THE ROLE OF CHOICE OF LAW IN NATIONAL CLASS ACTIONS

LINDA SILBERMAN[†]

INTRODUCTION

A number of the papers in this Symposium on the impact of the Class Action Fairness Act of 2005 (CAFA) have focused on the allocation of state and federal authority with respect to jurisdiction over nationwide class actions. This Article takes a different perspective by analyzing the role of choice of law in selecting a forum to hear a class action and the effect of choice of law on interstate forum shopping in nationwide class litigation. CAFA does not address the choice of law question, and thus interstate forum shopping is likely to continue as plaintiffs seek a forum with an approach to choice of law that will facilitate certification of a nationwide class. Because a federal court is

---

[†] © Linda Silberman, Martin Lipton Professor of Law, New York University School of Law. My thanks to Professors Steve Burbank and Tobias Wolff for putting together this terrific Symposium on the Class Action Fairness Act and for their helpful comments on my paper, both at the Symposium and at their Complex Litigation Seminar where I also presented; and to David Shapiro for our continuing dialogue on the effect of *Klaxon* on the federal courts' development of choice of law rules after CAFA. My research assistants at New York University, Jennifer Jones and Jacob Karabell, were of immense help in developing and finalizing this Article. The Filomen D'Agostino and Max E. Greenberg Research Fund has provided continuing financial support to me for this and other class action research projects.

obliged to apply state choice of law rules under *Klaxon Co. v. Stentor Electric Manufacturing Co.*,[1] a single state's parochial or pro-aggregation choice of law rule may be in tension with the "neutrality" in certification decisions that CAFA is seeking.

The first Part of this Article is an account of how courts tended to deal with choice of law issues in class actions prior to CAFA. The second Part addresses two normative questions: (1) whether aggregate litigation justifies a choice of law rule other than what would be called for if the case were proceeding as an individual litigation; and (2) whether CAFA calls for a departure from *Klaxon* and the development of an independent federal choice of law rule. This Article suggests that a federal choice of law rule, rather than strict adherence to *Klaxon,* will better achieve the objectives of CAFA, so long as the content of that federal choice rule is no different than the choice of law rule that would apply in an individual litigation.

I. THE DESCRIPTIVE STORY

A. *Choice of Law in Class Actions: Some Basic Background*

Choice of law issues have often taken a back seat to other important issues in civil litigation. But a sea change occurred with the growth of nationwide class action litigation where choice of law issues were central to the basic issue of certification of the class.[2] Choice of law analysis gained new prominence because attempts to structure nationwide classes involving state law claims—such as damage actions for consumer fraud or misrepresentation, overcharges in contract and insurance cases, personal injury and breach of warranty claims for defective products, punitive damage classes, and claims for medical monitoring—often turn on whether the law of a single state or multiple states is to be applied.

It should be obvious why choice of law has emerged as such a critical issue in the modern class action setting. The pre-1966 class action was limited in its use and confined to those with a tight community of

---

[1] 313 U.S. 487 (1941).

[2] *See In re* Simon II Litig., No. 00-5332, 2002 U.S. Dist. LEXIS 25632 (E.D.N.Y. Oct. 22, 2002), *modifying* 211 F.R.D. 86, 178 (E.D.N.Y. 2002) (illustrating the importance of choice of law in creating a national class), *vacated,* 407 F.3d 125 (2d Cir. 2005). For an earlier order and opinion on choice of law, see Simon v. Philip Morris, 124 F. Supp. 2d 46, 53-78 (E.D.N.Y. 2000). For a critique of Judge Weinstein's choice of law analysis, see Scott Fruehwald, *Individual Justice in Mass Tort Litigation: Judge Jack B. Weinstein on Choice of Law in Mass Tort Cases,* 31 HOFSTRA L. REV. 323, 348-59 (2002).

interest.[3] The rights in such cases were "joint, common, or secondary," and accordingly were unlikely to raise issues of the application of different laws to the members of the class. Even as to spurious classes, where absent class members could intervene after the judgment, it was unlikely that parties whose claims were based on a different applicable law could take advantage of the class judgment.[4]

With the emergence of the Federal Rule 23(b)(3) class and its state counterparts, a class action became appropriate when "questions of law or fact common to members of the class predominate[d]" over individual issues and the class action was the "superior" method of adjudication.[5] These requirements still serve to command a level of cohesiveness to ensure that aggregate litigation is the superior method of proceeding. To minimize the individual issues and the manageability concerns of class litigation that would likely flow from the application of multiple laws, class action plaintiffs often seek to establish either (1) that the law on a particular question is uniform throughout the various states of the United States; or (2) that under applicable choice of law principles a single law can govern the controversy. Defendants, for their parts, are anxious to show the differences among the various states' laws on numerous issues, such as negligence or comparative negligence, requirements for breach of warranty and fraud, and elements of consumer fraud statutes. Indeed, it is common on class action certification motions for defendants to offer elaborate surveys identifying differences among state laws with respect to various elements of the claims in question. When that strategy is successful—as it often is—defendants must still resist the attempt by lawyers for the class to show that a single law—such as that of the forum or that of the defendant's principal place of business—should apply. Similar issues have arisen in the context of Rule 23(b)(2)[6] class actions for declaratory and injunctive relief for the class as a whole where plaintiffs

---

[3] I have written elsewhere about the development of the modern class action. *See* Linda Silberman, *The Vicissitudes of the American Class Action—With a Comparative Eye*, 7 TUL. J. INT'L & COMP. L. 201 (1999).

[4] In general, nonmutual issue preclusion will not attach if the applicable law will be different. *See, e.g.*, Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 689 (N.Y. 1985).

[5] FED. R. CIV. P. 23(b)(3). There are, of course, general requirements for class certification that must be met under Federal Rule 23 and most state class action rules: numerosity, common questions of law or fact, typical claims or defenses by the representative parties, and fair and adequate representation by the named class representative. FED. R. CIV. P. 23(a).

[6] FED. R. CIV. P. 23(b)(2) (authorizing class certification where "the party opposing the class has acted or refused to act on grounds generally applicable to the class").

hope to avoid the express requirements, such as manageability, imposed on Rule 23(b)(3) actions.

Choice of law has also been a factor in aggregate litigation other than class actions. The desirability of having a single law to govern complex and/or mass litigation is a common thread as reformers seek to find ways to make this type of litigation more efficient. The search for a "single law" has generated different types of proposals: a federal products liability statute to be passed by Congress,[7] the development of federal common law in particular areas,[8] legislation for multiparty cases that included a federal choice of law rule,[9] and establishing choice of law criteria that could lead to the application of a single law in complex litigation.[10] None of these ideas reached fruition. When Congress in 2002 finally passed the Multiparty, Multiforum Trial Jurisdiction Act, providing for federal jurisdiction (on the basis of minimal diversity) over any civil action arising from a single accident in which at least seventy-five persons have died,[11] it did so without any provision on choice of law. Various bills leading up to this legislation contained proposals for federal choice of law provisions, but each time controversy sent the bill down to defeat. As enacted, 28 U.S.C. § 1369 provides for consolidation of individual suits and offers an alternative to the formal class action for the single-event mass accident. Choice of law is not addressed in the statute, but difficult questions about applicable law will also arise in these cases.[12] Perhaps because

---

[7] The Common Sense Product Liability Legal Reform Act of 1995, H.R. 956, 104th Cong. (1995).

[8] *See In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 690, 710 (E.D.N.Y. 1984) ("Given a failure of the legislature and the executive, the federal courts could be expected to step in by creating federal common law to cover a national problem."); Harold L. Korn, *Big Cases and Little Cases:* Babcock *in Perspective*, 56 ALB. L. REV. 933, 939 (1993) ("One way out of this morass would be to have federal statutory or common law govern such cases . . . .").

[9] *Multiparty, Multiforum Jurisdiction Act of 1989: Hearings on H.R. 3406 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the H. Comm. on the Judiciary*, 101st Cong. 1-2 (1989); *see also* Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 2 (1991).

[10] *See, e.g.*, ALI, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS § 6.01(a) (1994) [Mass Torts].

[11] 28 U.S.C. § 1369 (Supp. V 2005).

[12] *See, e.g., In re* Air Crash Disaster Near Chicago, Ill., 644 F.2d 594, 610-32 (7th Cir. 1981) (sorting out choice of law questions in a consolidated wrongful death suit where some possible fora allowed for punitive damages and others did not). In cases transferred to Illinois (the situs of the crash) from numerous states (California, New York, Michigan, Puerto Rico, and Hawaii), the Seventh Circuit found that application of the

of the experience with § 1369, none of the bills that resulted in CAFA even attempted to craft choice of law provisions for that legislation, although there was a flurry of activity on the part of some to try to address choice of law just as the proposed legislation reached the floor of Congress.[13] But no specific proposal emerged, and there is no choice of law provision in the legislation.

B. *The Impact of* Shutts *and* Klaxon

The failure of CAFA to address the choice of law questions leaves the role for choice of law in complex litigation and class actions post-CAFA where it has always been in these contexts: to be shaped and developed by judges and applied in common law fashion by the courts. Answers to two basic questions may help determine how those rules should be shaped. The first question is relevant not only to CAFA but to other class and nonclass aggregate litigation: does the fact of aggregation (in a class action or other consolidated action) call for a distinct choice of law rule that takes into account the needs presented by the multiple parties and events that characterize aggregate litigation? The second pertains specifically to federal cases brought under CAFA: are federal courts hearing nationwide class actions under CAFA bound by *Klaxon* to apply state choice of law rules, or can the federal courts depart from *Klaxon* and apply "federal" choice of law rules?

---

different choice of law rules of the states in which each action had been filed all pointed to using the law of Illinois, the place of injury.

[13] For example, Professors Arthur Miller and Samuel Issacharoff consulted on an amendment to require federal courts to apply the law of the state where the principal class action defendant resides. *See Legal Experts Enter Class Action Debate, Meet with Senate Staff To Discuss Bill*, 72 U.S.L.W. 2446, 2446 (Feb. 3, 2004). During the debate in the Senate on February 9, 2005, Senator John Bingaman stated that he had "prepared an amendment that would have reaffirmed the discretionary authority of a judge to select the law of one State" in order to permit "certification for large multistate consumer class actions," but instead of formally proposing its adoption, he would lend his support to a different amendment proposed by Senator Diane Feinstein. *See* 151 CONG. REC. S1157, S1167 (Daily ed. Feb. 9, 2005). Senator Feinstein's proposed floor amendment was entitled "Choice of State Law in Interstate Class Actions" and, among other things, would have instructed district courts: (1) not to deny class certification on the ground that the law of more than one state would be applied; (2) to use subclasses wherever possible; and (3) if subclasses were impracticable, to ensure that "plaintiffs' State laws" were applied. *See id.* at S1166. For further discussion of the amendment by the proponents and the responses to it, see David Marcus, Erie, *the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1308-10 (2007).

The pressure for, and subsequent resistance to, a single choice of law rule due solely to the aggregate nature of the litigation was presented to the Supreme Court of the United States in *Phillips Petroleum Co. v. Shutts*.[14] In *Shutts*, the Kansas Supreme Court had found that in a nationwide class action where procedural due process guarantees of notice and adequate representation were met, "the law of the forum should be applied unless compelling reasons exist for applying a different law."[15] The U.S. Supreme Court reversed, holding that it was unconstitutional for the Kansas courts to proceed in this fashion when Kansas had no basis for applying its law to the overwhelming majority of class members who resided outside of Kansas and had leases outside of Kansas.[16] In addition, the Supreme Court went even further to caution that a court's adjudication of a nationwide class action did not provide an "added weight in the scale when considering the permissible constitutional limits on choice of substantive law."[17] One may nonetheless remain skeptical about the impact of the Supreme Court's ruling in *Shutts*, since on remand the Kansas court determined that the law of the various states was in fact the same as Kansas law,[18] and in a related case, the Supreme Court refused to second-guess the state court's analysis of the substance of the sister state's law.[19] Still, as a formal matter, the choice of law resolution in *Shutts* has important consequences for class certification. Notwithstanding its recognition of constitutional limits on choice of law in *Shutts*, the Supreme Court did not dictate to either the state courts or the lower federal courts what choice of law principles should be adopted in class actions or in any other type of case.

Under *Klaxon*, of course, the federal courts have been bound to apply the choice of law rules of the state in which they sit. And al-

---

[14] 472 U.S. 797 (1985).

[15] Shutts v. Phillips Petroleum Co., 679 P.2d 1159, 1181 (Kan. 1984).

[16] *Shutts*, 472 U.S. at 822.

[17] *Id.* at 821.

[18] Shutts v. Phillips Petroleum Co., 732 P.2d 1286, 1292 (Kan. 1987).

[19] The argument that Kansas had unconstitutionally distorted the interpretation of other states' laws was presented to the Supreme Court in *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988), but the Court refused to review that aspect of the case, *id.* at 730-31. Justice O'Connor dissented on that point and observed that the result was the same as avoiding application of the law of a particular state. *Id.* at 744 (O'Connor, J., dissenting). She wrote that a court could "invent a legal theory so novel or strange that the other State has never had an opportunity to reject it; then, on the basis of nothing but unsupported speculation, 'predict' that the other State would adopt the theory if it had the chance." *Id.* at 749.

though recently a few states have enacted statutory choice of law codes,[20] state choice of law rules have generally evolved through case law development, and the choice of law revolution has come from the highest courts of the states. A survey of choice of law approaches reveals that a small minority of states still adhere to the traditional *Restatement*[21] choice of law rules,[22] while the remainder use some blend of contacts and interests as reflected in the *Restatement (Second) of Conflict of Laws*[23] and governmental-interest analysis.[24] In balancing contacts and interests, a few states express a strong presumption in favor of forum law,[25] whereas most look for a neutral principle of preference to resolve a "true conflict." Of course, state courts, in developing choice of law rules, are free, subject to the constitutional limits of *Shutts*, to adopt a choice of law methodology that would facilitate class certification in nationwide class actions. However, no state supreme court has explicitly done so, even when application of the general choice of law principles has led to the application of multiple laws for the nationwide class, which in turn has resulted in denials of class certification because of lack of commonality, predominance, or superiority.[26]

C. *The Approach of the Federal Courts (Pre-CAFA)*

Prior to CAFA, most federal courts were reluctant to reformulate choice of law rules in class actions in the absence of congressional legislation or Supreme Court modification of the *Klaxon* rule for complex cases. Indeed, even with *Klaxon*, the federal courts would be free to adopt an approach to the interpretation of the requirements of Federal Rule 23 that would put less weight on the choice of law aspects for certification purposes or to allocate burdens in a particular way to make resistance to class certification more difficult. But there has been no such movement by the federal courts; generally they have found that applicable law is an important element with respect to the decision whether or not to certify, and once variations in state laws are apparent, most federal courts have imposed the burden on the plain-

---

[20] *See, e.g.*, LA. CIV. CODE ANN. art. 3515–3556 (2007) (originally enacted in 1991, effective 1992).

[21] RESTATEMENT OF CONFLICT OF LAWS (1934).

[22] EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 84-98 (4th ed. 2004).

[23] RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1969).

[24] *See* SCOLES ET AL., *supra* note 22, at 98-105.

[25] *Id.* at 103-05.

[26] *See* discussion *infra* text accompanying notes 76-97.

tiff class to supply the relevant information to allow the court to make an appropriate choice of law determination on the various issues.[27] In a relatively early decision, *Walsh v. Ford Motor Co.*[28] (through a joint opinion written by Judge Harry Edwards and then-Judge, now-Justice, Ruth Ginsburg), the Court of Appeals for the District of Columbia Circuit focused upon potential variations in the underlying state laws to reverse the district court's initial certification of a nationwide class of car owners alleging various breach of warranty claims against a car manufacturer. Noting that "[t]he Uniform Commercial Code is not uniform,"[29] the court held that the burden was on the class action plaintiffs to demonstrate that the state law variances did "not present insuperable obstacles" to class certification.[30] Judge Posner's opinion in *In re Rhone-Poulenc Rorer Inc.*[31] pointed to a number of reasons why the Seventh Circuit, 2-1, found it necessary to overturn the district court's certification of a nationwide class of hemophiliacs on the issue of negligence for defects in a blood clotting product. On the choice of law issue, he indicated that the jury was being asked to determine negligence of the defendant "under a legal standard that does not actually exist anywhere in the world."[32] He wrote that "[t]he common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified. The voices of the quasi-sovereigns that are the states of the United States sing . . . with a different pitch."[33] Neither the *Walsh* nor the *Rhone-Poulenc* opinions discussed the choice of law rule they were applying. Those courts merely acknowledged that the application of the law of different states made satisfaction of the predominance of common

---

[27] *See* Spence v. Glock, 227 F.3d 308, 310-11 (5th Cir. 2000). Indeed, that approach has been criticized by some. *See, e.g.*, Patrick Woolley, Erie *and Choice of Law after the Class Action Fairness Act*, 80 TUL. L. REV. 1723, 1741 (2006) ("Federal courts sitting in diversity have . . . conflat[ed] the choice-of-law burden with the certification burden.").

[28] 807 F.2d 1000 (D.C. Cir. 1986). The suit was based on a federal statute, Magnuson-Moss, 15 U.S.C. § 2301–12, which incorporates state law on breach of warranty, so the court was in fact using a federal choice of law rule in determining that laws of different states were applicable to class members' claims. *Id.* at 1015-16.

[29] *Id.* at 1016 (quoting JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE (2d ed. 1980)).

[30] *Id.* at 1017 (quoting *In re* Asbestos School Litig., 789 F.2d 996, 1010 (3d Cir. 1986)).

[31] 51 F.3d 1293, 1298-1303 (7th Cir. 1995) (citing settlement pressures, choice of law, and bifurcation as reasons for denying certification).

[32] *Id.* at 1300.

[33] *Id.* at 1301 (citations and internal quotation marks omitted).

questions and manageability requirements of Rule 23(b)(3) impossible.

The later decision of the Seventh Circuit in *In re Bridgestone/Firestone, Inc.*[34] addressed the appropriate choice of law rule directly and the analysis of state laws that may be called for. In *Bridgestone/Firestone*, the district court certified two classes: one of owners of Ford Explorer SUVs with defective tires, and one of owners of certain models of Firestone tires, both seeking damages on breach of warranty theories. Apparently recognizing that uniform law was essential to class certification, the district judge determined that the applicable state choice of law rule—that of Indiana—would point to the headquarters of each of the two defendants; therefore the judge found the necessary coherence and manageability to permit certification of the class.[35] The Seventh Circuit reversed certification, first finding that the appropriate choice of law rule should be no different from the rule that would be applied in an individual case. Noting that the relevant choice of law rule in Indiana called for "the law of the place where the harm occurred" in all but "exceptional cases,"[36] the Court of Appeals determined that the laws of fifty different states would apply on various issues and that a single nationwide class was unmanageable.[37] The court acknowledged the temptation to "alter doctrine in order to facilitate class treatment" but admonished that "judges must resist so that all parties' legal rights may be respected."[38] The court also offered its views about the limits of efficiency when measured against accuracy in identifying the rights of the parties under particular laws. The court reiterated the point made in *Rhone-Poulenc* that a "'decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions' will yield the information needed for accurate evaluation of mass tort claims."[39]

After *Rhone-Poulenc* and *Bridgestone/Firestone*, a number of district courts accepted the premise that significant distinctions in state law present a monumental barrier to class certification because of the

---

[34] 288 F.3d 1012 (7th Cir. 2002).

[35] *In re* Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 205 F.R.D. 503, 511-13 (S.D. Ind. 2001).

[36] *In re* Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 288 F.3d at 1016 (7th Cir. 2002).

[37] *Id.* at 1018.

[38] *Id.* at 1020.

[39] *Id.* (citation omitted) (quoting *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir. 1995)).

Rule 23(b)(3) "predominance requirement."[40] In *Cole v. General Motors Corp.*,[41] where the district judge certified a nationwide class of Cadillac car owners alleging breach of express and implied warranties for alleged defects in the sensors that triggered the air-bag systems, the Fifth Circuit, on an interlocutory appeal, reversed. Both the district court and the appeals court agreed that the Louisiana conflicts rule pointed to application of the law of the state where the vehicle was used by its owner and where the contract of repair would be performed—the laws of all fifty-one jurisdictions.[42] But the appeals court rejected the view of the district court that the state laws were "virtually the same," pointing out several of the specific differences.[43] Although the district court had acknowledged that there might be some variations in the state laws, it thought that those differences "could be addressed through subclasses and the normal course of individual trials that take place in large litigations";[44] however, the Fifth Circuit dismissed such a cure, stating that "[t]his is hardly the type of extensive analysis of variations in law that is required prior to certification."[45]

Nor have courts been particularly sympathetic to allowing certification of "issues" under Rule 23(c)(4) to avoid "predominance" and "manageability" requirements.[46] More recently, in *In re General Motors Corp. Dex-Cool Products Liability Litigation*,[47] the district court expressly observed that

---

[40] *See, e.g.*, *In re* Gen. Motors Corp. Dex-Cool Prods. Liab. Litig., 241 F.R.D. 305, 315-24 (S.D. Ill. 2007) (determining that the application of the laws of forty-seven states defeats "predominance" and "manageability").

[41] 484 F.3d 717 (5th Cir. 2007).

[42] *Id.* at 724.

[43] *Id.* at 725-30 (quoting Cole v. Gen. Motors Corp., No. 01-0123, 2005 WL 1861960, at *8 (W.D. La. Aug. 4, 2005)).

[44] *Id.* at 728.

[45] *Id.* (internal quotation marks omitted).

[46] That point was made explicitly in a footnote in *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 n.21 (5th Cir. 1996):

> Reading [R]ule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of [R]ule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.

Note that the restyled Federal Rules address issue classes in a separate provision, Federal Rule 23(c)(4), whereas under the former rules the provision was Rule 23(c)(4)(A) with 23(c)(4)(B) covering subclasses (now 23(c)(5)).

[47] 241 F.R.D. 305, 314 (S.D. Ill. 2007).

> where class certification is sought as to issues under Rule 23(c)(4)(A), Rule 23(b)(3)'s requirements of predominance and manageability must be satisfied, and class certification must be denied where those requirements cannot be met by reason of, for example, the difficulties involved in attempting to apply the laws of numerous states to the questions as to which class certification is sought.

However, a recent Second Circuit decision, *In re Nassau County Strip Search Cases*,[48] took a different view, holding that a district court may certify a Rule 23(c)(4) issue class even when the entire class fails the Rule 23(b)(3) predominance requirement, because the language of the rule indicates that the issues should first be identified and *then* the requirements of the rule applied. The court found additional support in the Advisory Committee Notes.[49]

Even without resort to "issue classes," some federal courts have been willing to certify national class actions without too much regard for choice of law concerns. For example, Judge Jack Weinstein certified a nationwide punitive damages class in *In re Simon II Litigation*,[50] which was brought as a limited-fund class for punitive damages on behalf of smokers against cigarette manufacturers.[51] Judge Weinstein—ostensibly applying New York choice of law rules—found that, in a case such as this, New York substantive law should govern claims for punitive damages for all members of the class. Judge Weinstein expressed the view that, although the highest court in New York had "never specifically addressed how conflicts rules apply in a complex litigation setting like the present one,"[52] he ascertained a "[j]udicial preference for material justice in conflict cases."[53] He formulated this

---

[48] 461 F.3d 219 (2d Cir. 2006).

[49] *Id.* at 226. For more on the conflicting views with respect to "issue certification," compare Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567, 586-88 (2004), arguing that a class action must meet all of the 23(b)(3) requirements before it can be divided into issue classes, with Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1499 (2005), stating that "[I]ssue[s] proposed for class treatment [need only] be of 'central' importance to the disposition of the case." Attention to the "issue class" has also been a theme in the American Law Institute project on Principles of the Law of Aggregate Litigation. *See* ALI, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.02 (Tentative Draft No. 1, Apr. 7, 2008).

[50] *In re* Simon II Litig., No. 00-5332, 2002 U.S. Dist. LEXIS 25632, at *319 (E.D.N.Y. Oct. 22, 2002).

[51] Plaintiffs chose to bring a limited-fund class action for punitive damages and to forego an opt-out class action for compensatory damages. *See id.*, at *23-26; *see also In re* Simon II Litig., 211 F.R.D. 86, 99-101 (E.D.N.Y. 2002), *vacated*, 407 F.3d 125, 137-38 (2d Cir. 2005).

[52] *In re Simon II Litig.*, 2002 U.S. Dist. LEXIS 25632, at *235.

[53] *Id.* at *252.

preference as an approach that would lead to the application of a single law. Under these circumstances, he found that the facts that defendants' activities had "decisive connections" to New York and two of the defendants had their principal places of business there[54] justified application of New York law with respect to all of the plaintiffs' claims. Whatever the desirability of a single law in a case like *In re Simon II*, Judge Weinstein's prediction of how a New York court would apply the *Neumeier v. Kuehner* principles[55] in a setting such as this raised a number of eyebrows, and Judge Weinstein himself offered the Court of Appeals for the Second Circuit some suggestions in regards to manageability and subclassing, should it decide to reverse him.[56]

The possibility of subclassing has provided several courts a basis for justifying class certification notwithstanding decisions such as *Rhone-Poulenc* and *Bridgestone/Firestone*. For example, in *Southern States Police Benevolent Ass'n v. First Choice Armor & Equipment, Inc.*, involving a class action on behalf of law enforcement officers and organizations against manufacturers for the sale of defective armor to police departments around the country, the court concluded that the twelve jurisdictions in which warranty laws varied presented "no material conflicts" and that "any variations in state warranty laws can be managed and modified at a later stage, if necessary."[57] This approach seems to reinvigorate the seemingly moribund approach of "certify now and worry later"; on the other hand, the action was not *completely* nationwide and the variations in the state laws may have been relatively minor.[58] A more strategic approach to certification was undertaken by the plaintiffs' class action lawyers themselves in *Muehlbauer v.*

---

[54] *Id.* at *260-63.

[55] *See* Neumeier v. Kuehner, 286 N.E.2d 454, 457-58 (N.Y. 1972). The *Neumeier* rules are usually cited as reflecting the approach to choice of law taken by the New York Court of Appeals.

[56] *In re Simon II Litig.*, 2002 U.S. Dist. LEXIS 25632, at *258, *275-76. The Second Circuit did in fact overturn Judge Weinstein's certification of the class, but the Court of Appeals did not address the choice of law issue. The court held that the action could not be certified as a mandatory limited fund class because the plaintiffs did not demonstrate either the upper limit or insufficiency of the posited fund such that individual plaintiffs would be prejudiced if left to pursue separate actions. *In re* Simon II Litig., 407 F.3d 125, 138 (2d Cir. 2005).

[57] 241 F.R.D. 85, 91 (D. Mass. 2007).

[58] For an example of how subclassing may avoid choice of law difficulties in the context of a medical monitoring class for injunctive and declaratory relief under Federal Rule of Civil Procedure 23(b)(2), see In re Welding Fume Prods. Liab. Litig., 245 F.R.D. 279, 293-94 (N.D. Ohio 2007).

General Motors Corp.,[59] where the lawyers separated the nationwide class of purchasers and lessees of vehicles that contained defectively designed braking systems into several discrete subclasses prior to the defendant's motion to dismiss. In denying the defendant's motion to dismiss, the court addressed the future issue of certification. Because the complaint contained six counts and the class for each count was limited to purchases in states that had similar laws, the court observed that "[u]nder these groupings, plaintiffs do not present a single nationwide class, and there is a predominance of common legal issues in each subclass. Plaintiffs have made a sufficient showing at this early stage that the litigants, as grouped, are governed by the same legal rules."[60]

Some district courts have used the more direct approach of finding that the applicable choice of law rule points to a single law, and thereby eased certification of the class. One such case is *Powers v. Lycoming Engines*,[61] in which a nationwide class of prior and present owners of aircraft brought suit against a defendant manufacturer for allegedly selling defective engine crankshafts. With respect to the class claims for unjust enrichment and breach of implied warranty, the court applied the *Restatement (Second) of Conflict of Laws* and concluded that the "significant relationship" with the parties and the transaction was with Pennsylvania because the engines were manufactured there.[62]

---

[59] 431 F. Supp. 2d 847 (N.D. Ill. 2006).

[60] *Id.* at 872 (internal quotation marks omitted).

[61] 245 F.R.D. 226 (E.D. Pa. 2007). For another example, see Grove v. Principal Mutual Life Insurance Co., 14 F. Supp. 2d 1101, 1106-07 (S.D. Iowa 1998), which applied the law of the defendant's principal place of business to nationwide class claims for fraud and misrepresentation in marketing of life insurance policies.

[62] *Powers*, 245 F.R.D. at 232. The court explained its reasoning as follows:

> After weighing the factors . . . , the balance tilts in favor of applying Pennsylvania law. Pennsylvania has the most significant relationship to the transaction and the parties. It is the center of the activities that gave rise to the claims. Lycoming is a Pennsylvania manufacturer that has been sued here, where it manufactured the crankshafts and engines. Lycoming issued service bulletins and instructions, communicated orally and in writing about the crankshafts and sent press releases from its headquarters in Pennsylvania, and plans to replace crankshafts here.
>
> On the other hand, the contacts with the plaintiffs presumably took place in their home states where they purchased, operate, and moor their aircraft. Yet, considering the mobility of a plane, it could have been purchased and transported from a state other than a plaintiff's home state. Because Lycoming's engines are part of aircraft manufactured by others, it is unlikely that the plaintiffs purchased the aircraft in reliance on anything Lycoming may have

The case seems to be an outlier in terms of application of *Restatement (Second)* principles, although a few state courts have reached a similar conclusion.[63] A federal court in Minnesota, in *In re St. Jude Medical, Inc.*,[64] adopted similar reasoning, albeit under Minnesota's brand of interest analysis and "better-law" approach to choice of law issues. There, in a consumer class action filed against a Minnesota manufacturer of heart valves, the court applied Minnesota law to all class members because Minnesota had "a compelling interest in redressing wrongs committed within its borders" that was both a "moral interest in providing redress for those who are injured" and "an economic interest because when out-of-state persons are harmed by illegal actions of Minnesota businesses, the reputations of other Minnesota businesses are also tarnished."[65] The court reasoned that the eighteen states that had more stringent liability standards and offered greater protection to manufacturers than did Minnesota would not have an interest in preventing the application of a rule that would benefit their own citizens.[66] This analysis is a perverse understanding of the "interest analysis" approach to choice of law.[67]

---

represented. Consequently, the place where the false representations were received is not a factor.

Id.

[63] *See infra* notes 87-106 and accompanying text.

[64] MDL No. 01-1396, 2006 WL 2943154, at *2, *5-7 (D. Minn. Oct. 13, 2006). The district court's certification of the class followed a remand from the Eighth Circuit that reversed an earlier certification for failure to consider the extraterritorial application of Minnesota statutes to a nationwide class and to conduct a thorough conflict of laws analysis. *See In re* St. Jude Med., Inc., 425 F.3d 1116, 1119-21 (8th Cir. 2005). On remand, the district court conducted a more traditional conflicts analysis and found that Minnesota law should nonetheless apply. The Eighth Circuit reversed the certification a second time on the ground that the common issues did not predominate over individual issues. It did not address the district court's choice of law ruling. *See In re* St. Jude Med., Inc., No. 06-3860, 2008 WL 942274 (8th Cir. Apr. 9, 2008).

[65] *In re St. Jude Med., Inc.*, 2006 WL 2943154, at *6.

[66] *Id.* The court stated that the interests of those states were "furthered through the application of Minnesota law to their citizens because all consumer fraud laws in the nation are designed to protect consumers to some degree." *Id.* Interestingly, on appeal, the Eighth Circuit reversed the certification of the class because common issues did not predominate, but it did not address the district court's choice of law ruling. *See In re St. Jude Med., Inc.*, 2008 WL 942274.

[67] Missing from such an analysis is the fact that different state consumer fraud statutes offer different balances between the rights of consumers and protection for manufacturers. Properly understood, "interest analysis" does not mean that the applicable law is the foreign law because the foreign law benefits the residents of the state with the competing law. A court might properly find that the more protective rule does not apply because the defendant is not a local citizen or resident, and therefore the state has "no interest" in the application of its rule. Alternatively, however, such a

D. *State Choice of Law Rules in Class Actions*

As noted earlier, the federal courts in these class action choice of law cases felt bound under *Erie* and *Klaxon* to adopt the choice of law approach of the respective states in which they sat, and thus were limited as to how they might expressly shape choice of law to accommodate aggregate litigation. Of course, the interpretation of what the *state* choice of law rules are and how they apply to particular facts leaves the federal courts with substantial power in determining how choice of law will affect certification.[68] But the state courts ultimately have the more robust role because they are in a position to adapt their choice of law rules to facilitate class treatment if that is a desired goal. In some early cases, trial courts in certain states hearing class actions embraced precisely that philosophy, and, not surprisingly, class action lawyers quickly filed suits in those jurisdictions to take advantage of choice of law approaches that would facilitate nationwide class treatment.

Initially, the Texas state courts were one such place, but the decision of the Texas Supreme Court in *Henry Schein, Inc. v. Stromboe*[69] made Texas a less attractive forum. In *Schein*, the Texas Supreme Court decertified a nationwide class of purchasers of defective software products, asserting breach of contract, breach of express and implied warranties, and other claims against the dental groups that produced and marketed the software. The trial court determined that all of the claims could be governed by Texas law because the software was designed and manufactured in Texas and some of the software license agreements contained choice of law provisions calling for Texas law.[70] The Texas intermediate court agreed with the analysis of the trial court and held that Texas law should also apply to causes of action other than the contractual claims because they arose out of the parties' contractual relationships.[71] On appeal to the Texas Supreme Court, the court reversed the choice of law ruling with respect to class members who did not have choice of law clauses agreeing to be bound by Texas law.[72] Further, the Texas Supreme Court noted that class

---

protective interest could be furthered when a nonresident defendant conducts business in the state with the greater protection for that party.

[68] *See* David Marcus, *supra* note 13, at 1282-86 (discussing choice of law rulings by federal judges and noting that, as a consequence of adverse rulings, "plaintiffs' lawyers began to abandon federal courts for state fora").

[69] 102 S.W.3d 675 (Tex. 2002).

[70] *Id.* at 684.

[71] *Id.* at 687.

[72] *Id.* at 696-97.

members without choice of law clauses were not subject to Texas law merely because the defendant was located in Texas.[73] And with respect to the noncontractual claims of non-Texas plaintiffs, the Texas Supreme Court also found that the defendant's "presence in Texas [was] but one factor to be considered in determining the applicable law and does not, by itself, dictate that Texas law will govern the non-contract claims of class members in other states."[74]

A decision like *Schein* leads to interesting strategic choices for the use of choice of law clauses in consumer contracts as a means to block class litigation. Note that if the choice of law clause points to the law of a single state—such as the seller's principal place of business—class suits against the seller will be *easier* since the application of a single law may satisfy the commonality and predominance requirements necessary for class certification. On the other hand, a choice of law clause that might ostensibly seem more favorable to the consumer—e.g., the law of the state where the consumer resides—presents the difficulty of the application of multiple laws in class actions. Even when the law of a single state is chosen, certain claims, such as fraud, may not fall within the choice of law clause,[75] and for those claims certification may still be improper. Other courts, such as an Illinois appellate court in *Hall v. Sprint Spectrum Ltd. Partnership*,[76] have been more generous in interpreting the scope of a choice of law clause. In *Hall*, the court affirmed the certification of a nationwide class of cell phone users who brought both contract and fraud claims challenging Sprint's early termination fees; the court found that the provision in the contract stating that the agreement was "governed by the law of Kansas" applied to both the contract and fraud claims.[77]

Class action suits without the broad array of claims asserted in *Schein* may still find favor with Texas's or another state's supreme court. To that end, plaintiffs often attempt to limit the class claims to a particular theory of recovery where there is less likely to be variation among the state laws, or where the particular choice of law rule may tend to point to the application of a single law. Such was the strategy of the class plaintiffs in *Compaq Computer Corp. v. LaPray*,[78] where a na-

---

[73] *Id.*

[74] *Id.* at 697.

[75] *See* Lewis Tree Serv., Inc. v. Lucent Techs., Inc., No. 99-8556, 2002 WL 31619027, at *4 (S.D.N.Y. Nov. 20, 2002).

[76] 876 N.E.2d 1036 (Ill. App. Ct. 2007).

[77] *Id.* at 1041-44.

[78] 135 S.W.3d 657, 661 (Tex. 2004).

tionwide class of purchasers of personal computers alleged that the floppy disk controllers were defective and brought claims for breach of express warranty against the manufacturer. Both the trial and appellate court presumed that there was no real variation among the laws in the affected jurisdictions and ruled that the class could be certified, noting that it could await trial to consider whether there was a particular issue on which Texas law conflicted with that of another state.[79] The Texas Supreme Court reversed this approach of "certify now and worry later," holding that in ruling on motions for class certification, trial courts must conduct an extensive choice of law analysis before they can determine predominance, superiority, cohesiveness, and even manageability.[80]

Note, however, that so long as one state is prepared to apply a single law and thereby facilitate aggregation, the courts of that state will attract litigation on behalf of the nationwide class, whether or not it is the most appropriate forum for the litigation. This type of egregious forum shopping is illustrated by an unreported Oklahoma case, *Grider v. Compaq Computer Corp.*[81] *Grider*, which was a carbon copy (except for a different named plaintiff) of the nationwide class action brought by consumers complaining about defective floppy disk controllers in *LaPray*, was filed in Oklahoma while the "same" Texas class action against Compaq was on appeal. Although a nationwide class had already been certified in Texas, the class action lawyers were concerned about a reversal because of the earlier Texas Supreme Court decision in *Schein*, and so they filed the very same action in Oklahoma, where they hoped for a more favorable approach to choice of law.[82] Their concerns were justified when the Supreme Court of Texas reversed the certification of the class in the *LaPray* case, indicating that Texas law could not govern the claims of all class members and remanding for determination of the applicable law and the effect on certification of a national class.[83] Notwithstanding the Texas Supreme Court deci-

---

[79] *Id.* at 662.

[80] *Id.* at 663.

[81] No. 03-0969 (Okla. Dist. Ct. Oct. 26, 2004) (order declaring choice of law), *aff'd*, No. 102,693 (Okla. Civ. App. Oct. 13, 2006), *cert. denied*, No. 102,693 (Okla. Mar. 26, 2007). Rulings on the class-certification issue and subsequent appeals in the Oklahoma courts can be found in Compaq's Petition for a Writ of Certiorari in the Supreme Court of the United States (on file with author).

[82] That view was based on the recent Supreme Court of Oklahoma decision, *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618 (Okla. 2003), discussed *infra* note 89 and accompanying text.

[83] *See supra* note 80 and accompanying text.

sion that had been rendered by this time, the Oklahoma trial court ruled that, under Oklahoma choice of law rules, the laws of Texas, as the state of the principal place of business of the defendant, were applicable to the UCC warranty claims.[84] The Oklahoma Appeals Court affirmed the decision,[85] and the Oklahoma Supreme Court denied review. Whether *Grider* illustrates only a biased state court choice of law ruling in order to facilitate aggregation or a more serious breach of full faith and credit to the Texas judgment is left unanswered because the U.S. Supreme Court denied Compaq's certiorari petition.[86]

A strategy of narrowing claims to obtain application of a single law in a nationwide class action continues to have limited success in some contexts, both in Texas and elsewhere. In *Farmers Insurance Exchange v. Leonard*,[87] a Texas appellate court approved class certification in an action by agents against their insurance company for failure to pay certain bonuses. The court held that California, as the principal place of business of the defendant and the place where the bonus contracts were administered, had the most significant interest in the case, and thus California law could be applied to the entire class.[88] In *Ysbrand v. DaimlerChrysler Corp.*,[89] the Oklahoma Supreme Court affirmed the certification of a nationwide class of owners of minivans, limited to breach of warranty claims for defects in the front passenger seat airbags brought against the defendant manufacturer.[90] The Oklahoma Supreme Court held that the law of Michigan—as the principal place of business of the defendant—was applicable to plaintiffs' warranty claims, and therefore common questions of law predominated.[91]

---

[84] *Grider*, No. 03-0969 (Okla. Dist. Ct. Oct. 26, 2004).

[85] *Grider*, No. 102,693 (Okla. Civ. App. Oct. 13, 2006).

[86] Compaq Computer Corp. v. Grider, 169 L. Ed. 2d 261 (2007).

[87] 125 S.W.3d 55 (Tex. App. 2003).

[88] *Id.* at 61-65. *Farmers Exchange* may not be good law after *Compaq* and *Schein*. *See, e.g.*, Nat'l W. Life Ins. Co. v. Rowe, 164 S.W.3d 389, 392-93 (Tex. 2005) (per curiam) (reversing certification of a class where the lower court applied the law of insurance company's principal place of business rather than the law of the insured's domicile in an action brought by purchasers of life insurance policies alleging various claims for tort and breach of contract, and remanding for a detailed analysis of the relevant states' interests); Tracker Marine, L.P. v. Ogle, 108 S.W.3d 349, 356, 363 (Tex. App. 2003) (reversing certification of a nationwide class action brought on behalf of consumers for misrepresentations made by a Missouri manufacturer and indicating that states where the consumers reside have the "most significant interest" in the claims involving fraud and misrepresentation).

[89] 81 P.3d 618 (Okla. 2003).

[90] *Id.* at 629.

[91] *Id.* at 624-27.

However, as to claims for fraud and misrepresentation asserted by the class, the court held that where class members presumably received the representations in their home states, the applicable law was that of each class member's home state.[92] As a result, a nationwide class for fraud and misrepresentation was denied.[93] In a subsequent decision, *Harvell v. Goodyear Tire & Rubber Co.*,[94] the Oklahoma Supreme Court again ruled that the law of the principal place of business of the defendant was not applicable to contract and unjust enrichment claims by a nationwide class of consumers for illegal supply charges imposed upon them by defendants. The court noted that the appropriate law was that of the place where each class member had the service performed.[95]

Not all state courts have been quite so restrictive with respect to certification of nationwide classes for fraud and misrepresentation. In *International Union of Operating Engineers Local #68 Welfare Fund v. Merck & Co.*[96] a New Jersey appellate court upheld certification of a national class and approved the trial court's choice of law analysis applying the law of the defendant's principal place of business—New Jersey. The plaintiffs were a nationwide class of third-party payors who alleged that they had overpaid for the drug Vioxx because the defendant did not disclose the serious health risks associated with the drug. Applying its understanding of the conflict of laws principles in the *Restatement (Second) of Conflict of Laws* as interpreted in New Jersey, the appellate court found that New Jersey's Consumer Fraud Act was directed at deterrence and, as a result, New Jersey's contacts and interests were the "most significant."[97]

The approach to choice of law in *International Union* was inconsistent with the choice of law analyses of other New Jersey courts in both class and nonclass contexts;[98] a final resolution of the New Jersey ap-

---

[92] *Id.* at 626-27.

[93] *Id.* at 627.

[94] 164 P.3d 1028, 1033-36 (Okla. 2007).

[95] *Id.*

[96] 894 A.2d 1136, 1153-54 (N.J. Super. Ct. App. Div. 2006), *rev'd on other grounds*, 929 A.2d 1076 (N.J. 2007).

[97] *Id.* at 1147-48.

[98] *See, e.g.*, Rowe v. Hoffman-La Roche, Inc., 917 A.2d 767, 772-75 (N.J. 2007) (holding that Michigan's interest in promoting the availability of affordable prescription medication to its citizens outweighed New Jersey's interest in deterring New Jersey corporations from providing inadequate warnings); Deemer v. Silk City Textile Mach. Co., 475 A.2d 648, 651-53 (N.J. Super. Ct. App. Div. 1984) (holding that New Jersey's deterrent interests were outweighed by compensation structure in plaintiff's home

proach to choice of law in such cases seemed to rest with the New Jersey Supreme Court once the certification issue was appealed. And although the New Jersey Supreme Court ultimately reversed the class certification for lack of "predominance" and "superiority" under the New Jersey class action rule,[99] it expressly avoided the question of whether New Jersey's consumer fraud statute could be applied to all class members.[100]

It is noteworthy that the lower appellate court in *International Union*, in applying the New Jersey Consumer Fraud Act to all members of the nationwide class, did not formulate a specialized choice of law rule for aggregate litigation and purported to apply the same choice of law rule it applies in individual litigation. Most courts are unlikely to be transparent in this regard even though judges are undoubtedly influenced by the particular context that a case presents. Such "influence" may be difficult to detect, but a recent Supreme Court of Illinois case, *Barbara's Sales, Inc. v. Intel Corp.*,[101] identified just such an attempt to overcome a choice of law obstacle and expressly rejected the lower appellate court's attempt to mold choice of law rules to avoid the problems that application of different laws presents for aggregate litigation. The Illinois Appeals Court for the Fifth District had reversed a trial court's refusal to certify a nationwide class against a California manufacturer that had allegedly engaged in unfair business practices to conceal that its microprocessor did not perform as represented.[102] Plaintiffs had alleged that the California Consumer Legal Remedies Act and the California Unfair Competition Law applied to the claims of all plaintiffs since the substantial part of defendant's conduct had taken place in California. The trial court ruled that California law could not be applied to the nationwide class because California did not have the "most significant relationship" to the action. The appel-

---

state); Heindel v. Pfizer Inc., 381 F. Supp. 2d 364, 370-78 (D.N.J. 2004) (applying New Jersey choice of law and rejecting application of New Jersey law as the principal place of business of the defendant to the entire class).

[99] *Int'l Union*, 929 A.2d at 1085-89.

[100] In a footnote, the New Jersey Supreme Court stated that

> [a]lthough defendant advances strong arguments in support of its appeal from the Appellate Division's choice of law analysis, in light of our decision on predominance and superiority, we express no view on the Appellate Division's choice of law reasoning or the result it reached as to the applicability of our law to all members of a nationwide class.

Id. at 1086 n.3.

[101] 879 N.E.2d 910, 922 (Ill. 2007).

[102] Barbara's Sales, Inc. v. Intel Corp., 857 N.E.2d 717, 724 (Ill. App. Ct. 2006).

late court reversed, purporting to apply the principles of the *Restatement (Second) of Conflict of Laws* and concluding that California, the principal place of business of the defendant and the place where the conduct leading to the injury occurred, had the most significant relationship to the parties and the transaction.[103] A significant aspect of the appeals court's decision was its consideration of the litigation as a class action. Although the court did not expressly say that it was altering Illinois choice of law principles to facilitate aggregation of the claims in a class action, its language is revealing. Concluding that California, as the principal place of business of the defendant Intel, had the strongest interest in having its regulatory scheme applied to the conduct of Intel, the court stated,

> California is clearly the only state where conduct *relevant to all the potential class members occurred.* California law takes on added significance when the relevant factors stated in section 6 of the Restatement are considered. The needs of the interstate system and the basic policies of predictability and uniformity of result require *one forum with one result* rather than results in 51 jurisdictions with the distinct possibility of conflicting decisions.[104]

In reversing the Illinois appellate court on the choice of law point, the Illinois Supreme Court in *Barbara's Sales* criticized the lower court's concern for "one forum with one result," and noted that "[t]his declaration completely ignores the distinct interests of the differing states embodied in our federalist system and constitutional precedent."[105] As the Illinois Supreme Court further explained,

> The goals of the "needs of the interstate system" principle are "to make the interstate and international systems work well," to promote "harmonious relations," and "to facilitate commercial intercourse between them." The Restatement also directs courts to strive to adopt "the same choice of law" rules reflected in other states' precedent. The application of California law or Illinois law, as plaintiffs urge in this nationwide class, to a citizen of Washington state who purchased his computer in Washington state does nothing to improve the harmonious relations between the states. Thus, we are not persuaded that section 6 of the Restatement compels us to apply California law.[106]

---

[103] *Id.* at 722.

[104] *Id.* (emphases added).

[105] *Barbara's Sales*, 879 N.E.2d at 921.

[106] *Id.* at 922 (citations omitted).

II. THE RELATIONSHIP OF CLASS ACTIONS AND CHOICE OF LAW: THE NORMATIVE QUESTIONS

A. *Should There Be a Specialized Choice of Law Rule for Class Actions?*

Aggregate litigation presents the question as to whether this type of litigation justifies a specialized choice of law rule designed to facilitate the aggregation. The answer will depend on (1) how one perceives the role of choice of law in the legal system; and (2) how one understands the function of the class action in its relationship to individual litigation. As Professor (now Dean) Larry Kramer emphasized in his early article, *Choice of Law in Complex Litigation*, choice of law is part of the set of substantive rights that a party has when asserting a claim.[107] When one posits that the claims of individuals in a class action would, in the absence of the class context, be decided under different laws, it is not clear why aggregation should alter that result. Certainly as conceived by the 1966 amendments to Rule 23, the class action was not designed, nor could it have purported, to change the substantive rights of the parties. The reason for the class device is that a coherence of rights and claims *already exists* among potential class members, and it is the existence of those elements that makes the representative suit appropriate. To use the class action as the justification for altering choice of law rules would be to put the cart before the horse and to misunderstand the role of both class actions and choice of law.[108]

Judge Weinstein in the *Simon II* case presents a quite different view of both choice of law and class litigation. He sees the class action as something more than just the amalgam of individual claims and the

---

[107] Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 549 (1996) ("Because choice of law is part of the process of defining the parties' rights, it should not change simply because, as a matter of administrative convenience and efficiency, we have combined many claims in one proceeding . . . .").

[108] *See* Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1911 (2006) [hereinafter Nagareda, *Aggregation and Its Discontents*] (noting that a choice of law rule for aggregate litigation is problematic because it uses the aggregate nature of the action to alter substantive law); *see also* Richard A. Nagareda, *Bootstrapping in Choice of Law After the Class Action Fairness Act*, 74 UMKC L. REV. 661 (2006); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 189-98 (2003). *But cf.* Elizabeth J. Cabraser, *The Manageable Nationwide Class: A Choice-of-Law Legacy of* Phillips Petroleum Co. v. Shutts, 74 UMKC L. REV. 543, 567 (2006) ("It is particularly important, at this juncture, that the federal courts . . . recogniz[e] that the supposed 'precedents' of earlier decision [sic] denying such certification may be[,] as a matter of procedural justice, obsolete . . . .").

class as a necessary remedial device to respond to nationwide harms; accordingly, he believes that choice of law rules must be modified if necessary to achieve "justice" for the class. But justice is not an abstract principle: it is in the mind of the beholder. The communities in which the parties reside and act—the relevant state or nation—define the applicable principles of justice for that community. Conflicts arise because the lawmaking bodies of different states and different nations "see the world quite differently."[109] Choice of law rules—or rules of private international law in the transnational setting—offer a method for accommodating these principles when particular transactions and events bring them into conflict.[110]

Like Professor Kramer, I do not believe that courts should be in the business of altering the choice of law rules that have been developed for individual cases.[111] Certainly in the pre-CAFA era, in which Professor Kramer wrote, I do not believe that it was for the federal courts to restructure the federalism values inherent in *Erie* and *Klaxon* solely because Federal Rule 23 permitted the aggregation of state law claims in the service of efficient federal court management. And although state choice of law rules are largely judge made, it seems to me that a similar presumption holds for the state judiciaries as well: courts should not view consolidation as a reason to change the applicable law that would apply to the rights of the parties if the case or cases were proceeding as individual litigations.[112] The underlying principle is that aggregation mechanisms are procedural only and offer efficient procedures for adjudicating the individual rights of many.[113]

---

[109] Harold P. Southerland, *Sovereignty, Value Judgments, and Choice of Law*, 38 BRANDEIS L.J. 451, 455 (2000).

[110] I have written about these issues in a quite different context. *See* Linda Silberman & Karin Wolfe, *The Importance of Private International Law for Family Issues in an Era of Globalization: Two Case Studies—International Child Abduction and Same-Sex Unions*, 32 HOFSTRA L. REV. 233, 233 (2003); Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195, 2197 (2005).

[111] Professor Kramer directs his concerns largely to the federal courts, which are bound to apply state law, including choice of law. He emphasizes that the federal courts ought not to make independent choice of law rules or manipulate state choice of law. He also has some advice for the state courts—that is, that they should use the same choice of law rules in complex and ordinary cases, and not use consolidation to change the applicable law. *See* Kramer, *supra* note 107, at 549-50.

[112] There are certain nuanced aspects to this issue, such as whether the plaintiff or the defendant has the burden of demonstrating variations in the competing state laws. *See* Woolley, *supra* note 27, at 1739-41 & nn.92-103.

[113] That is also the view taken by the American Law Institute. *See* ALI, *supra* note 49, § 2.05 & Reporters' Notes cmt. a ("This Section as a whole proceeds on the premise that choice of law is a dimension of the larger inquiry into the constraints imposed by

A more difficult question is whether legislatures (for federal courts it would be Congress; for state courts it would be the respective state legislatures) should readjust the substance of choice of law rules for class actions and other types of aggregate litigation. The answer depends on one's underlying philosophy of class actions more generally. If one subscribes to an entity model of group litigation whereby individual interests are subordinated as a means to pursue collective action for the entity,[114] the argument for legislative reordering of choice of law might be enhanced. However, an entity model is best developed in an overall legislative scheme where specific tradeoffs and reassessments of regulatory rules would be part of any reconceptualized regime.[115] The imposition of a new regime of choice of law upon existing regulatory rules is—to borrow from a well-known metaphor in a different choice of law context—to "put together half a donkey and half a camel, and then ride to victory on the synthetic hybrid."[116] Moreover, if the inquiry is how *state legislatures* should view choice of law for *nationwide* class actions, perhaps the question is being put to the wrong decisionmaker. The choice of applicable law or laws in a national class action might be more well-suited to a federal solution by a national decision maker.[117] Such a national "decision maker" did emerge when Congress enacted CAFA, but, if anything, the legislative history of CAFA makes clear that there was no intention of diluting the role of applicable state substantive law in order to facilitate aggregation.

B. *The Impact of the Class Action Fairness Act on* Klaxon

Congress's recent attention to national class actions in the Class Action Fairness Act provides a particular focus for thinking about the role of choice of law in class litigation. Pursuant to that legislation, federal courts, rather than state courts, have been given decision-

---

substantive law upon aggregation, not a matter of procedural choice akin to the decision to aggregate itself.").

[114] *See* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 918-19 (1998).

[115] Silberman, *supra* note 3, at 211 (suggesting that the entity model only be used "within a particular contextual and substantive framework").

[116] DAVID F. CAVERS, THE CHOICE-OF-LAW PROCESS 39 (1965).

[117] Indeed, some might argue that choice of law rules as a whole should have been entrusted to the U.S. Supreme Court or Congress to fulfill the role of neutral umpire in competition among states for application of their particular rules. *See* Letter from James Madison to George Washington (Apr. 16, 1787), *reprinted in* JAMES MADISON, THE FORGING OF AMERICAN FEDERALISM 184-87 (S. Padover ed., 1953), *quoted in* ANDREAS F. LOWENFELD, CONFLICT OF LAWS 377 (2d ed. 2002).

making power over certification of most nationwide class actions. The legislation contains no provision on choice of law,[118] although efforts were made by some to that end.[119] Indeed, during the course of the floor debate, the Senate rejected an amendment providing that the federal courts should not deny class certification merely because the law of more than one state would be applied.[120]

The role for choice of law in national class actions under CAFA (and federal class actions more generally) raises numerous complexities in a system that rejects a "national law" for choice of law generally and for class actions specifically. A federal/national choice of law approach to *all* nationwide class actions—whether brought in state or federal court—would bring uniformity to applicable law in a variety of class action contexts and would avoid both interstate and intrastate forum shopping for favorable choice of law as a means of achieving class certification. But the imposition of federal law upon state courts in an area that has always been the province of state law presents almost insurmountable federalism objections.

A less controversial proposal might be to adopt a federal choice of law rule for nationwide class actions that have been brought in or removed to federal court under CAFA. If one views CAFA as designating specific types of class actions appropriate for "national treatment"—that is, in need of federal jurisdiction to ensure neutral and nonparochial assessment with respect to class viability—it could be argued that such cases are also deserving of "neutral" choice of law rules. Indeed, if state choice of law principles themselves reflect the kind of parochialism that CAFA was attempting to correct,[121] an anti-

---

[118] CAFA provides for original and removal jurisdiction in federal court for class claims based on state law whenever there is minimal diversity between any plaintiff class member and any defendant and the aggregate amount in controversy exceeds five million dollars. 28 U.S.C. § 1332(d)(2)(A) (Supp. V 2005). Class members are permitted to aggregate their claims. *Id.* § 1332(d)(2). Any defendant has the right to remove the action from state to federal court. *Id.* § 1453(b). However, the district court will not hear the action if a substantial majority of the proposed plaintiff class are citizens of the same state as all primary defendants. *Id.* § 1332(d)(4)(B). The district court also must decline jurisdiction if a substantial majority of the plaintiff class is from the same state as one primary defendant when the principal injuries occurred in that state. *Id.* § 1332(d)(4)(A).

[119] For a discussion of these various proposals, see *supra* note 13.

[120] 151 CONG. REC. S1166 (Daily ed. Feb. 9, 2005); *see also supra* note 13 (discussing various proposals).

[121] *See, e.g.*, S. REP. NO. 109-14, at 62 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 58 (concluding that federal courts will not "botch these critical choice-of-law issues" as

Klaxon rule would seem particularly appropriate. Such a rule would prevent forum shopping among the states to achieve favorable choice of law treatment for class actions, and because cases falling within CAFA will usually end up in federal and not state court, the "inequality" that a federal choice of law rule might create with respect to a similar action in state court does not occur in this context.[122]

The concept of a federal choice of law rule for cases under CAFA is attractive, but Congress's failure to include one underscores institutional concerns about whether it is proper for the courts to create one. A direction by Congress to the federal courts that they are not bound by state choice of law rules and should apply "federal" choice of law rules to a question of "applicable law" would be both appropriate and pragmatic.[123] The premise is that the framework for more neutral decision making created by federal court jurisdiction for nationwide class actions by CAFA should not be frustrated by parochial state choice of law rules. It is not so much that CAFA should be read as an implied repeal of *Klaxon*,[124] but rather that *Klaxon* need not be extended to situations where the federal courts will in effect have primary jurisdiction.[125]

---

some state courts have done); *see also* Woolley, *supra* note 27, at 1726-47 (questioning whether federal jurisdiction is appropriate to correct choice of law abuses).

[122] This may be a slight overstatement, since defendants might choose not to remove if a case falling within CAFA is brought in state court. Since absent class members do not have a right to remove under CAFA, there may be some cases that meet the requirements of CAFA that would not be removed. This would be particularly true in settlement class actions, but in such cases choice of law as a practical matter does not play a role. For further discussion of the impact of CAFA on absent class members, see Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035 (2008). Also, to the extent that some remands under CAFA are discretionary, certain nationwide class actions would be remanded back to state court. But in this situation, it could be argued that when a case does not warrant federal treatment under CAFA and is properly heard by the state court, the state choice of law rule is also proper.

[123] "Federal common law" on choice of law already does exist in a number of areas. *See, e.g.*, Eli Lilly Do Brasil, Ltda. v. Fed. Express Corp., 502 F.3d 78, 80-89 (2d Cir. 2007) (liability of air carriers); Lien Huynh v. Chase Manhattan Bank, 465 F.3d 992, 997 (9th Cir. 2006) (foreign banking transactions to which a U.S. corporation is a party).

[124] *See* Richard L. Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1815 (2008).

[125] *But see* Griffin v. McCoach, 313 U.S. 498, 503-04 (1941) (holding that a federal court is required to follow the state choice of law rule in a diversity action even though the federal court was exercising nationwide service of process under the Federal Interpleader Act and the state court would not have had a similar reach). However, *Griffin* is not a serious obstacle because a federal choice rule there would have made federal interpleader a device for interstate forum shopping. *See* RUSSELL J. WEINTRAUB, COM-

C. *The Appropriate "Federal" Choice Rule*

A proposal for a national choice of law rule for federal class actions—but with a quite different agenda than my own—has been made by Professor Samuel Issacharoff in two recent articles.[126] Professor Issacharoff argues that because nationwide class actions are the result of a national market for goods that ultimately cause national harm, the subject is one for attention by the national legislature—Congress.[127] To the extent that Issacharoff is correct, the most appropriate response to his concerns is creation at the federal level of a single national law on products liability or consumer fraud. With such a regime, interests of consumers and of manufacturers would be debated and reflected in the content of any such national law. But precisely because there has been no agreement or consensus through the democratic process about what the "national" law should look like, attempts to achieve national statutory solutions have failed.

In the absence of federal substantive law to address the liability of actors in the national market, a federal choice of law rule might fit the types of nationwide classes that already have been identified by CAFA as appropriate for federal court treatment. The *Klaxon* rule, which requires federal courts to follow state choice of law rules, is not an obstacle since it is not required either by the Constitution or by the Rules of Decision Act.[128] *Klaxon*'s rejection of a federal choice of law rule for federal diversity cases more generally was prompted by a preference for intrastate uniformity over interstate uniformity because intrastate forum shopping was perceived as the more serious and more likely evil. Even if that were true at the time *Klaxon* was decided, the world looks different today. The growth of national (and global) markets combined with the expansion of jurisdiction over corporate defendants gives plaintiffs a wide and almost unlimited choice as to

---

MENTARY ON THE CONFLICT OF LAWS 724-25 (5th ed. 2006). Moreover, *Griffin* has been extensively criticized. *See* ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 211-12, 402-03 (1969); Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267, 286-88 (1946).

[126] *See* Samuel Issacharoff, *Getting Beyond Kansas*, 74 UMKC L. REV. 613 (2006) [hereinafter Issacharoff, *Getting Beyond Kansas*]; Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839 (2006) [hereinafter Issacharoff, *Settled Expectations*].

[127] *See* Issacharoff, *Getting Beyond Kansas*, *supra* note 126, at 616-19; Issacharoff, *Settled Expectations*, *supra* note 126, at 1870-71.

[128] 28 U.S.C. § 1652 (2000). The Rules of Decision Act requires that the laws of the several states apply, but never says *which* state law.

the state in which they can bring a nationwide class action against a defendant. Moreover, as noted earlier, states have adopted various approaches to choice of law. This combination means that even a state with no connection to the particular transaction can use its choice of law approach to select the law or laws applicable to the transaction. A federal choice rule for federal nationwide class actions would have the advantage of eliminating forum shopping among the states for favorable choice of law rules. Because CAFA has already identified certain types of cases as justifying federal treatment—in this context, access to a federal court—those cases would seem to be precisely the right candidates for a federal choice of law rule.

One flaw in the above analysis is the potential overinclusiveness of the cases brought into federal court under CAFA. For example,[129] consider a class action in which *all* plaintiffs who reside in the forum state—for example, Texas—sue over conduct engaged in by a California defendant. The defendant is subject to jurisdiction in Texas, and the events in question and the plaintiffs all have strong connections with Texas. "This is a Texas lawsuit in every respect other than the formal citizenship of the defendant,"[130] but if the aggregate amount is met, the action comes within CAFA. The plaintiff may bring the suit in federal court in Texas, or if plaintiff sues in state court, the defendant is able to remove the case to federal court. Moreover, "neither the discretionary nor mandatory abstention provision of the Act applies" because the defendant is not a citizen of the forum state.[131] Thus, this is one example of a CAFA case that would not seem to call for a national choice of law rule.[132] Nonetheless, in most cases to which CAFA applies, a federal choice of law rule that would accommodate the competing interests of the various states would seem to be appropriate.

Unfortunately, most of the proposals calling for a national choice of law rule have no real interest in such federalism values. For example, Professor Issacharoff seeks a specific choice of law rule for nationwide class actions and argues that CAFA permits the federal courts to "craft a sensible choice of law rule that corresponds to the identi-

---

[129] This example is found in LINDA J. SILBERMAN, ALLAN R. STEIN & TOBIAS BARRINGTON WOLFF, CIVIL PROCEDURE: THEORY AND PRACTICE 1052-53 (2d ed. 2006).

[130] *Id.* at 1053.

[131] *Id.* (citing 28 U.S.C. § 1332(d)(3)–(4) (Supp. V 2005)).

[132] Of course, this is a case where Texas law would likely be selected as the applicable law regardless of whether a state or federal choice of law rule was used.

fied national scope of the underlying conduct."[133] But, as Professor Burbank points out, such authority is completely inconsistent with the legislative history and the effects CAFA was designed to bring about.[134] Moreover, Professor Issacharoff's proposed solution—of having the law of a single state control a nationwide class—is inconsistent with the purported emphasis on a *national* market. Application of the law of the state of the principal place of business allows one state's legislature or one state's development of a common law rule to dictate the substance of the applicable standard for the national market. In a regime where state law will govern the rights and liabilities of the parties, the federal choice rule should be one that continues to respect the different substantive judgments reflected in the laws of different states, and that considers the underlying purposes of the rules in question and the interests of the competing states.

Interestingly, when one looks to the original Rome Convention[135]—and now the proposed Rome I Regulation—that harmonizes choice of law rules concerned with the internal market within the European Community, one finds that in the case of consumer actions, it is the law of the habitual residence of the consumer and not the law of the principal place of business of the manufacturer that is the applicable law chosen. Concededly, these European rules have been developed for individual actions and not group litigation. But they shed some light on the kinds of choice of law rules that are developed for groups of states concerned with a national market. None of this is to reject the possibility that in a particular case—depending on the competing substantive rules in the various states—the law of the principal place of business of the defendant might apply. But many of those who propose application of a "single law" for class actions have little interest in the values of choice of law as such. The same can be said about many of the critics of the "single law" approach.

Consider the positions taken by each side—lawyers for the class representative and lawyers for the defendants—on these choice of law

---

[133] *See* Issacharoff, *Settled Expectations*, *supra* note 126, at 1870, 1861-71.

[134] Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1943 & n.129 (2006) ("[T]he Act does not change the application of the Erie Doctrine, which requires federal courts to apply the substantive law dictated by applicable choice of law principles in actions arising under diversity jurisdiction." (quoting S. REP. NO. 109-14, at 49 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 46)).

[135] European Economic Community, Convention on the Law Applicable to Contractual Obligations, *opened for signature* June 19, 1980, 1980 O.J. (L 266) 1.

questions in class actions.[136] Lawyers for the class dismiss concerns that the law where the defendants are headquartered may be substantially less favorable than the laws of other states where many—maybe even most—of the class members reside, or that such a rule will provide an incentive to defendants to locate in states with the most favorable rules to defendants. Certainly in individual litigation a choice of law rule like this would be strongly resisted by the plaintiff side who would object that such a choice of law rule creates a "race to the bottom" such that defendants would locate in such "low consumer protection" states. But lawyers for the class want to create the largest possible group of plaintiffs because their fees will be calculated on the basis of the class-wide relief; state-wide classes more narrowly defined and limited to claims applying similar law will be far less lucrative and command a much smaller settlement. And it is nationwide settlements that are the norm in this litigation—desired by plaintiffs, who want a large class, and also by defendants, who want nationwide peace. Of course, the position of defendants in the adversarial stages of the choice of law argument is also somewhat ironic—they argue that the law of the defendant's principal place of business ought not to be the applicable law because the law of the plaintiffs' home states often provides plaintiffs with greater opportunity to recover against the defendant.[137] One would be surprised to hear that argument from defendants in an individual litigation. Needless to say, defendants' interests are not really directed to concerns about more generous recoveries for plaintiffs, but are shaped by an appreciation that application of different laws to various groups of plaintiffs will make class certification less likely.

The proposals urging application of the principal place of business of the defendant have one objective: to ensure that nationwide class actions do not sound the death knell for consumer and other types of negative-value class actions. In effect, it is an attempt to craft a choice of law rule for class litigation so that a single law can apply to all plaintiffs' claims and satisfy the "predominance" and "superiority" requirements of class action rules. Such a position is ironic in light of

---

[136] *See supra* text accompanying notes 5-6.

[137] See, for example, Farmers Ins. Exch. v. Leonard, 125 S.W.3d 55 (Tex. App. 2003), where, in a breach-of-contract class action, the California-based defendant made the argument that California law would be unfair to plaintiffs. The court noted the irony of the defendant's position and found that the differences between the law of California and other states were minor. *Id.* at 64-65. The court then affirmed certification of the class. *Id.* at 71.

the fact that one of the main purposes behind CAFA was to prevent state courts from acting as magnet courts and deciding law for the rest of the country. If Congress should decide that consumer fraud and products liability claims present problems of national scope and should be governed by a single substantive standard, then Congress should enact federal substantive law that takes into account the national consensus about what the content of such a rule should be. Federal legislative solutions of this kind could also provide for aggregation of individual suits or offer an independent remedy, such as the type of public action that is the model for collective litigation in many countries in the European Union.[138]

In entrusting class action litigation to the federal courts without accompanying federal substantive law or federal choice of law principles, Congress has allowed the choice of law consequences to fall where they may. As suggested earlier, the applicable choice of law rule should not tilt in the direction of either enhancing or discouraging class certification. In other words, a statute concerned primarily with adjusting federal subject matter jurisdiction over class actions should allow the choice of law rules to play out neutrally in the class action context. At the same time, it may have been a mistake to neglect the repercussions of choice of law in the enactment of CAFA. The applicable choice of law will continue to be the rule that would be applied by the state court in which the federal court sits. If the states do in fact develop choice of law principles that favor aggregation or that further local interests at the expense of national ones,[139] it is not clear why a federal court in a *national* class action should be required to follow suit.[140] Under CAFA, the propriety of a nationwide

---

[138] *See, e.g.*, Harald Koch, *Non-Class Group Litigation Under EU and German Law*, 11 DUKE J. COMP. & INT'L L. 355, 357-58 (2001) (discussing two models of collective interest representation practiced in EU member states).

[139] *See, e.g.*, Barbara's Sales, Inc. v. Intel Corp., 857 N.E.2d 717, 722-23 (Ill. App. Ct. 2006) (holding that the law of the principal place of business of the defendant, California, should apply in order to facilitate certification of consumer class), *rev'd*, 879 N.E.2d 910 (Ill. 2007); Int'l Union of Operating Eng'rs Local #68 Welfare Fund v. Merck & Co., 894 A.2d 1136, 1148-51 (N.J. Super. Ct. App. Div. 2006) (applying the law of the forum state, New Jersey, because it was the principal place of business of the defendant and New Jersey's deterrent interests were more significant than the interests of the payors' home states), *rev'd on other grounds*, 929 A.2d 1076 (N.J. 2007).

[140] That point is developed by Professor Richard Nagareda in a recent article. Nagareda, *Aggregation and Its Discontents*, *supra* note 108, at 1918-22. Although, under *Klaxon*, a federal court would appear to be obliged to follow the state's law, Professor Nagareda notes that the Supreme Court, in *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958), allowed the *Erie* principle to be overcome in certain situations.

class is more appropriately determined and managed by a federal (rather than state) court. A federal choice rule that balances the competing policies underlying the state laws vying for application to the particular class members and the events in question is attractive. An independent federal choice rule would also have the advantage of eliminating forum shopping by lawyers for the class in search of a particular state in which to bring a class action in order to take advantage of a particular state's choice of law rules.

There are a number of possible models for developing the content of an independent federal choice of law rule. Carefully designed choice of law rules are presented in the ALI's 1994 Complex Litigation Study;[141] those rules do express a preference for application of a single state's law, but ultimately offer a methodology consistent with modern choice of law analysis. Moreover, rather than force a single law upon the case, related provisions contemplate division of the action into subgroups of claims, issues, or parties to assist in aggregating litigation where multiple laws may apply. Suggestions from other sources include the development of specialized rules for particular kinds of cases, such as consumer actions.[142] In any event, any choice of law rule that is adopted should be one that continues to respect the different substantive judgments reflected in the laws of different states and nations and that considers the underlying purposes of the substantive rules in question.

None of this is to say that the application of different laws to class actions and other kinds of aggregate litigation is necessarily dispositive of the certification issue. It may be possible in some cases to use sub-

---

With respect to CAFA, it is plausible that because CAFA "effectively shuts down the state court with regard to class certification," *Klaxon* should bow to Congress's notion that aggregation should not affect a substantive remedy. Nagareda, *Aggregation and Its Discontents*, *supra* note 108, at 1921. This principle, and not federal/state forum shopping, is arguably the problem that the Act aimed to remedy. *Id.* at 1918-22; *see also* Burbank, *supra* note 134, at 1950-51 ("[W]here state choice of law doctrine is materially influenced by state policy reflecting a bias in favor of aggregate litigation, CAFA's jurisdictional provisions—reflecting (most charitably) a policy to enable aggregation decisions unaffected by that bias—may plausibly be thought, in the words of the Rules of Decision Act, to require otherwise than that such state law applies.").

I do not think the suggestion offered by Professors Nagareda and Burbank is a workable one because it will always be unclear when the state choice of law rule reflects a "bias in favor of aggregate litigation." The application of a federal choice of law norm offers a more certain and clearer solution.

[141] ALI, *supra* note 10.

[142] *See, e.g.*, Phaedon John Kozyris, *Conflicts Theory for Dummies:* Après le Deluge, *Where Are We on Producers Liability?*, 60 LA. L. REV. 1161, 1173-81 (2000).

classes and accommodate variations in state laws. Applicable state laws may be grouped into manageable patterns such that complications from choice of law differences can be obviated.[143] In other cases, variations in state law may be too complex, and certification should be refused. But it is these management issues—and not choice of law—where attention and reform should be directed.[144]

One recent district court decision suggests that all the attention to choice of law may have been premature. *In re Pharmaceutical Industry Average Wholesale Price Litigation*[145] involved two putative classes of plaintiffs: one class of persons who made copayments for Medicare drugs manufactured by certain defendants, and a second class of third-party payors who made reimbursements for those drugs based on contracts using a particular pricing standard. Plaintiffs urged that since the inflated price was established at the respective defendants' principal places of business, the law of each of those states should govern the entire nationwide class. Defendants argued that the applicable law was that of the home states of the various class members, and, with respect to members of the Medicare class who were not reimbursed, the law of each state where the drug was purchased. Moreover, according to defendants, the consumer protection statutes in these various states had quite different legal standards. The district court judge applied Massachusetts choice of law rules to the entire consolidated action, which included cases transferred from other states.[146] Applying the *Restatement (Second) of Conflict of Laws*, the court held that "the home state of the consumer has a more significant relationship to the alleged fraud than the place of business of the defendant . . . since state consumer protection statutes are designed to pro-

---

[143] *See In re* The Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 450, 467-68 (D.N.J. 1997), *aff'd in part*, 148 F.3d 283 (3d Cir. 1998); *see also* Fruehwald, *supra* note 2, at 359-60 ("The use of subclasses may not be as difficult as some commentators and judges claim.").

[144] *See, e.g.*, ALI, *supra* note 49, § 2.12 (Trial Plan for Aggregation). Although the preliminary proposals have a definite pro-aggregation bias, they are directed to the management of class actions and not to a reformulation of choice of law rules for aggregate litigation.

[145] 230 F.R.D. 61 (D. Mass. 2005).

[146] *Id.* at 82. Because the Massachusetts court was sitting as an MDL forum, there was an open question as to whether the Massachusetts conflicts rules were appropriate for the transferred cases. The usual rule is that the choice of law rules of the transferor state should apply. *See* Grispino v. New Eng. Mut. Life Ins. Co., MDL No. 1105, 2003 U.S. Dist. LEXIS 25664, at *9-10 (D. Mass. May 20, 2003), *aff'd on other grounds*, 358 F.3d 16 (1st Cir. 2004).

tect consumers rather than to regulate corporate conduct."[147] However, unlike the usual case where a win on choice of law by defendants also leads to a denial of certification, the district court here offered a much more nuanced analysis. After examining the fifty-state survey offered by defendants to highlight the differences among state consumer laws, the district court investigated the issues in each of the proposed classes, permitted certification of a class of physician-administered drugs, and denied certification of a class that involved self-administered and specialty pharmacy drugs. The district judge's observations on this point were intriguing:

> [W]hile it is tempting to apply the consumer protection laws of the states where defendants have their principal places of business to promote uniform results and the ease of managing a class, under the Restatement, the laws of the home states of the consumers govern.
>
> Having smelled victory on the choice-of-law issue, defendants expect a knock-dead punch on their argument that the differences among the state consumer laws are so significant that they cause individual issues to predominate. Indeed, in a double-dare at oral argument, they waxed that no court in the nation has successfully certified a nationwide consumer class for litigation (as opposed to settlement) purposes.[148]

CONCLUSION

Choice of law has an important role to play in the certification of nationwide class actions. But courts should avoid manipulating choice of law principles to ensure aggregation. The procedural tools of aggregation should not distort the underlying substantive rights of the parties. Courts should approach choice of law as they would in the paradigm individual case. If that analysis produces application of multiple laws, courts should consider the management techniques they have under their class action rules and procedures and determine whether aggregation is appropriate given that different rules of law will apply. If choice of law is not viewed as the dispositive factor in certification, perhaps the genuine federalism concerns that should influence the substance of choice of law rules will once again become the focus of attention.

---

[147] *In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. at 83.

[148] *Id.*