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# The ALI's Complex Litigation Project: Commencing the National Debate

Symeon C. Symeonides

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# The ALI's Complex Litigation Project: Commencing the National Debate

Symeon C. Symeonides\*

## TABLE OF CONTENTS

I. Introduction .....	844
II. The Project: An Overview .....	845
A. Procedural Aspects—Chapters 3-5 .....	848
1. Intra-Federal Transfer and Consolidation .....	848
2. State-to-Federal Removal and Consolidation .....	849
3. Federal-to-State Transfer and Consolidation .....	849
4. State-to-State Transfer and Consolidation .....	851
B. Choice of Law—Chapter 6 .....	851
1. Preliminary Considerations .....	852
a. Federalizing the Law of Choice of Law: The Power .....	852
b. Its Exercise: The <i>Van Dusen</i> Burden .....	852
c. Federal Intervention in Complex Litigation .....	855
d. Intervention Through Choice-of-Law Rules .....	856
2. The Choice-of-Law Approach of Chapter 6 .....	857
3. The Desideratum of Applying a Single Law .....	859
a. The Objective .....	859
b. The Exceptions .....	859
4. Dépeçage .....	860
5. Structure: Steps of Analysis, Rules and Escape Clauses .....	861
a. First Step: Preliminary Analysis .....	861
b. Second Step: False Conflicts .....	861
c. Third Step: Resolving Non-False Conflicts Through Rules .....	862
d. Fourth Step: Escapes .....	862
6. Rules for Mass Torts .....	863
a. Rules 1-4 .....	863
b. The Escape of Subsection (d) .....	866
7. Damages .....	867
a. Compensatory damages .....	867

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b.	Punitive damages . . . . .	868
i.	The Basic Rule . . . . .	868
ii.	Multiple Places of Conduct . . . . .	869
iii.	Multiple Places of Injury . . . . .	870
8.	Mass Contracts . . . . .	871
a.	Law Applicable in the Absence of Party- Choice-of-Law . . . . .	871
b.	Party Autonomy and its Limits . . . . .	873
i.	Preliminary Questions . . . . .	873
ii.	Existence and Validity of the Choice-of-Law Clause . . . . .	874
iii.	Limits to Party Autonomy . . . . .	875
9.	Statutes of Limitations . . . . .	875
a.	The Choices . . . . .	875
b.	The Rule . . . . .	877
c.	The Savings Clause . . . . .	878
III.	In Lieu of Conclusions . . . . .	878

### I. INTRODUCTION

On May 13, 1993, the American Law Institute approved the Proposed Final Draft of the Complex Litigation Project,<sup>1</sup> and proposed it to the United States Congress for enactment. The Proposed Final Draft is the culmination of eight years of work<sup>2</sup> under the able stewardship of Professors Arthur R. Miller<sup>3</sup> and Mary Kay Kane<sup>4</sup> as Reporter and Associate Reporter, respectively. It is perhaps the most innovative, resourceful, and ambitious work ever undertaken in the United States on the subject of multistate complex litigation. It establishes new mechanisms and standards for the intra-federal, state-to-federal, federal-to-state, and state-to-state transfer and consolidation of related, yet geographically dispersed, actions, and provides a set of choice-of-law rules for actions that are transferred to a federal court.

This Symposium is intended to begin the national debate that should precede and inform Congress' consideration of the Proposed Final Draft. Even if Congress does not enact it, the Proposed Final Draft will undoubtedly influence

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1. American Law Institute, Complex Litigation Project, Proposed Final Draft (May 13, 1993), [hereinafter Proposed Final Draft]. The Proposed Final Draft is reproduced in an Appendix, *infra*.

2. Preliminary work began in 1985 with a Preliminary Study on Complex Litigation by Professor Arthur R. Miller, which was discussed by the Institute's Council and membership in 1986 and 1987, respectively. The Reporters and the Advisory Committee were appointed in 1988. The First Tentative Draft was discussed by the Institute's membership in May 1989, the Second Tentative Draft in 1990, the Third Tentative Draft in 1992, and the Proposed Final Draft in 1993.

3. Professor Miller is the Bruce Bromley Professor of Law at the Harvard Law School.

4. Professor Kane is the Dean and Professor of Law at the University of California, Hastings College of Law. She was primarily responsible for Chapter 6 of the Proposed Final Draft dealing with choice of law.

judicial opinion for many years to come. It is hoped that this debate will be helpful to the judicial application of the Proposed Final Draft.

For reasons that may not be readily apparent to the non-Louisiana reader, Louisiana is the appropriate place for this debate to begin. As the only state of the United States that has a long tradition of codified law, including a recent codification of conflicts law,<sup>5</sup> Louisiana seems a logical forum for debating the need for—or form and content of—legislative intervention in the judicial handling of multistate complex litigation. By recommending this project to Congress, the American Law Institute subscribes to the premise that, although commendable and perhaps heroic, judicial efforts to tackle the increasingly nightmarish problems of multistate complex litigation are in urgent need of legislative assistance or other guidance in the form of pre-formulated rules. A casual survey of judicial decisions in mass disaster cases offers ample evidence to sustain this premise; indeed, courts routinely invite legislative intervention.<sup>6</sup> Although some critics question this premise, most disagreements center on the extent or form of legislative intervention. This Symposium offers samples of both types of critiques and offers perspectives, not only from the academic world, but also from the bench and the bar.

## II. THE PROJECT: AN OVERVIEW

One of the duties of a symposium host is to provide appropriate background and offer a balanced perspective of the symposium's subject. This usually means that the host's contribution must be descriptive and neutral. This contribution promises to be both, and no more. Because the articles of this Symposium focus on only certain parts of the Proposed Final Draft, a brief description of the entire Proposed Final Draft might be useful to readers not familiar with it. Obviously, such a description is not a substitute for a reading of the Proposed Final Draft's text<sup>7</sup> and, especially, of the exceptionally erudite explanatory Comments and Notes written by the two Reporters.

The Proposed Final Draft consists of six chapters. The first two chapters define complex litigation and the need for and scope of the project. Complex litigation is defined as "multiparty, multiforum litigation . . . characterized by

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5. The new codification went into effect on January 1, 1992, adding a fourth book to the Louisiana Civil Code of 1870. This codification is discussed, *inter alia*, in Symeon C. Symeonides, *Private International Law Codification in a Mixed Jurisdiction: The Louisiana Experience*, 57 *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 460 (1993); Symeon C. Symeonides, *Les grands problèmes de droit international privé et la nouvelle codification de Louisiane*, 81 *Revue critique du droit international privé* 223, 233-81 (1992); Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 *Tul. L. Rev.* 677 (1992) [hereinafter cited as Symeonides, *Exegesis*]; Symeon C. Symeonides, *La Nuova Normativa della Louisiana sul Diritto Internazionale Privato in Tema di Responsabilità Extracontrattuale*, 29 *Rivista di Diritto Internazionale Privato e Processuale* 43 (1993).

6. See *infra* at text accompanying note 73.

7. See *infra*, Appendix.

related claims dispersed in several forums and often involving events that occurred over long periods of time."<sup>8</sup> Examples given range from single mass disasters that give rise to multiple individual claims accruing at the same time,<sup>9</sup> to multiple-event disasters<sup>10</sup> in which myriad claims, latent for generations, mature at different times.<sup>11</sup> These cases share two basic characteristics: "they all involve the potential for relitigation of identical or nearly identical issues, and consequently, they all involve the enormous expenditure of resources."<sup>12</sup> The

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8. Proposed Final Draft, *supra* note 1, Ch. 2, cmt. a, at 9.

9. For instance, an airplane crash or the collapse of a Hyatt Hotel skywalk are single mass disasters. In addition to the authorities cited in the Reporter's Comments and Notes, in-depth discussions of the problems encountered in mass-disaster cases can be found in the following recent articles: Friedrich K. Juenger, *Mass Disasters and the Conflict of Laws*, 1989 U. Ill. L. Rev. 105 (1989); Robert W. Kastenmeier & Charles G. Geyh, *The Case in Support of Legislation Facilitating the Consolidation of Mass-Accident Litigation: A View from the Legislature*, 73 Marq. L. Rev. 535 (1990); Ralph I. Lancaster & Catherine R. Connors, *Creation of a National Disaster Court: A Response to "Judicial Federalism in Action"*, 78 Va. L. Rev. 1753 (1992); Andreas F. Lowenfeld, *Mass Torts and the Conflict of Laws: The Airline Disaster*, 1989 U. Ill. L. Rev. 157 (1989); Linda S. Mullenix, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 Tex. L. Rev. 1623 (1992); Scott R. Paulsen, *Choice of The Punitive Damage Law in Airline Accidents: The Chicago Rule Comes Crashing Down*, 15 J. Corp. L. 803 (1990); Thomas M. Reavley & Jerome W. Wesevich, *An Old Rule for New Reasons: Place of Injury as a Federal Solution to Choice of Law in Single-Accident Mass-Tort Cases*, 71 Tex. L. Rev. 1 (1992); David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. Rev. 695 (1989); Robert A. Sedler & Aaron D. Twerski, *The Case Against All-Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain*, 73 Marq. L. Rev. 76 (1989); Louise Weinberg, *Mass Torts at the Neutral Forum: A Critical Analysis of the ALI's Proposed Choice Rule*, 56 Alb. L. Rev. 807 (1993); Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. Ill. L. Rev. 269 (1991); Russell J. Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 U. Ill. L. Rev. 129 (1989).

10. For instance, the DES products liability cases or cases involving asbestos, agent orange, or other toxic substances are multiple-event disasters. In addition to the authorities cited in the Reporter's Comments, the following recent articles contain extensive discussions of these cases: Arthur R. Miller & Price Ainsworth, *Resolving the Asbestos Personal-Injury Litigation Crisis*, 10 Rev. Litig. 419 (1991); Troyen A. Brennan, *Environmental Torts*, 46 Vand. L. Rev. 1 (1993); Valle Simms Dutcher, *The Asbestos Dragon: The Ramifications of Creative Judicial Management of Asbestos Cases*, 10 Pace Env'tl. L. Rev. 955 (1993); Jeffrey M. Eilender, *Forum Non Conveniens and Comprehensive Hazardous Waste Coverage Suits*, 90 Colum. L. Rev. 1066 (1990); Linda S. Mullenix, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, 32 Wm. & Mary L. Rev. 475 (1991); Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Pol'y 541 (1992); Jack B. Weinstein, *Procedural and Substantive Problems in Complex Litigation Arising from Disasters*, 5 Touro L. Rev. 1 (1988).

11. Proposed Final Draft, *supra* note 1, Ch. 2, cmt. a, at 9.

12. *Id.* For pertinent discussion and authorities, see *id.* For recent discussions of the procedural problems of complex litigations, see Edward Brunet, *The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies*, 10 Rev. Litig. 273 (1991); Mary Kay Kane, *Dispute Resolution in the United States: Concerns and Opportunities in an Era of Globalization of Securities Markets*, 14 Hastings Int'l & Comp. L. Rev. 405 (1991); Mary Kay Kane, *Drafting Choice of Law Rules for Complex Litigation: Some Preliminary Thoughts*, 10 Rev. Litig. 309 (1991) [hereinafter *Drafting Choice of Law Rules*]; Linda S. Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 Fordham L. Rev. 169 (1990); Chief Justice William H. Rehnquist, *Seen*

scope of the Proposed Final Draft is expressly limited to "judicial dispute resolution and matters of procedure"<sup>13</sup> and does not extend to matters of substantive law, case-management problems, jurisdiction, and the right to trial by jury.<sup>14</sup>

The Proposed Final Draft deliberately refrains from defining in quantitative terms the cases that fall within its intended scope.<sup>15</sup> Rather, the decision of which cases will be subject to consolidated treatment under the Proposed Final Draft is relegated to the Complex Litigation Panel, a panel of federal judges that will replace the existing Multidistrict Litigation Panel, and will be guided by criteria provided by the Proposed Final Draft,<sup>16</sup> as well as by the experience accumulated by its predecessor panel. A proposal to confine the Proposed Final Draft's scope to "mega-mass cases" and to define them in terms of a minimum number of parties and amounts in dispute<sup>17</sup> was not adopted by the Institute's membership.<sup>18</sup> It was agreed, however, that appropriate language be inserted

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*in a Glass Darkly: The Future of the Federal Courts*, 1993 Wis. L. Rev. 1 (1993); Judith Resnik, *From "Cases" to "Litigation,"* 54 Law & Contemp. Probs. 5 (1991); Thomas D. Rowe, Jr., *Jurisdictional and Transfer Proposals for Complex Litigation*, 10 Rev. Litig. 325 (1991); Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. Pa. L. Rev. 7 (1986); William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 Va. L. Rev. 1689 (1992); Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issue*, 10 Rev. Litig. 231 (1991); Linda J. Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. Pa. L. Rev. 2131 (1989); Marjorie A. Silver, *Giving Notice: An Argument for Notification of Putative Plaintiffs in Complex Litigation*, 66 Wash. L. Rev. 775 (1991); Michael E. Solimine, *Removal, Remands, and Reforming Federal Appellate Review*, 58 Mo. L. Rev. 287 (1993); Louise E. Teitz, *Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings*, 26 Int'l Law. 21 (1992); Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 Geo. Wash. L. Rev. 1683 (1992); Spencer W. Waller, *A Unified Theory of Transnational Procedure*, 26 Cornell Int'l L.J. 101 (1993); Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. Pa. L. Rev. 1901 (1989).

13. Proposed Final Draft, *supra* note 1, Ch. 1, cmt. b, at 3.

14. *Id.* at 3-7. For a discussion of these and other subjects excluded from the Proposed Final Draft's scope, see Linda S. Mullenix, *Unfinished Symphony: The Complex Litigation Project Rests*, 54 La. L. Rev. 977 (1994).

15. See Proposed Final Draft, *supra* note 1, § 3.01, cmt. d, at 66 ("The use of exact dimensional criteria has been rejected . . . because consolidation may be desirable even when relatively few cases are involved."). See also Professor Miller's statements on this subject in American Law Institute, Proceedings of the 1993 Annual Meeting, May 13, 1993, Washington D.C., Afternoon Session 9-10, 11-12 [hereinafter referred to as Proceedings]. This is an unedited version of the Proceedings made available to the *Review*. All references to pages are references to this unedited version.

16. See Proposed Final Draft, *supra* note 1, § 3.01, described *infra*.

17. This proposal was made by Judge Jack B. Weinstein during the final discussion of the Project by the membership of the American Law Institute on May 13, 1993. By way of illustration, Judge Weinstein suggested a minimum of 5,000 parties and an amount in controversy exceeding \$100 million. See Proceedings, *supra* note 15, at 9.

18. See *id.*

in the preamble of the bill to be submitted to Congress, "emphasizing that [the Proposed Final Draft's] normal expected operation would be limited to mass tort and similar situations."<sup>19</sup>

A. *Procedural Aspects—Chapters 3-5*

1. *Intra-Federal Transfer and Consolidation*

Chapter 3 of the Proposed Final Draft establishes criteria and mechanisms for intra-federal transfer and consolidation of cases. The chapter builds on the existing multidistrict litigation statute<sup>20</sup> and the practices that have evolved under it. The existing Multidistrict Litigation Panel is to be replaced with a similar panel, the Complex Litigation Panel,<sup>21</sup> which will decide whether cases should be consolidated for trial<sup>22</sup> and where they should be tried.<sup>23</sup>

Actions are candidates for transfer and consolidation if they involve one or more common questions of fact,<sup>24</sup> and if, in the panel's judgment, consolidation will "promote the just, efficient, and fair conduct of the actions."<sup>25</sup> In reaching its decision, the panel is instructed to consider two groups of factors, both of which must be satisfied. The first group encompasses considerations of systemic efficiency: the extent to which transfer and consolidation will reduce duplicative litigation, the likelihood of inconsistent adjudications if consolidation is not ordered, the relative cost of litigation in individual versus consolidated treatment, and the relative burden on the judicial system.<sup>26</sup> The second group encompasses factors of fairness and convenience: whether the transfer and consolidation can be accomplished in a way that is fair to the parties and does not result in undue inconvenience to them or the witnesses.<sup>27</sup> In considering these factors, the panel is instructed to consider a number of "matters," such as: the number of parties and actions involved, the geographic dispersion of the actions, the subject matter and amount in dispute, the existence and significance of local concerns, the significance and number of common issues, and the wishes of the parties.<sup>28</sup>

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19. *Id.* at 12.

20. 28 U.S.C. § 1407 (1988).

21. See Proposed Final Draft, *supra* note 1, § 3.02.

22. See *id.* § 3.01.

23. See *id.* § 3.04 (providing that cases may be transferred to "any district court in which the just and efficient resolution of the actions will be promoted and fairness to the individual litigants can be facilitated").

24. This test of "minimal commonality" is a much lower standard than the one required for consolidation under present law. See *id.* § 3.01, cmt. c, at 53.

25. *Id.* § 3.01(a).

26. *Id.* § 3.01(b)(1).

27. *Id.* § 3.01(b)(2).

28. *Id.* § 3.01(b)(2), a-i.

Once the cases are transferred, the transferee court is empowered to organize them, using recognized bifurcation techniques, to order the trial of common and individual issues, or to retain some of them and remand the rest to the transferor court.<sup>29</sup> Finally, Section 3.08 contemplates the enactment of a federal statute that would authorize the transferee court to exercise nationwide jurisdiction over all parties to the transferred actions "to the full extent of the power conferrable on a federal court under the United States Constitution."<sup>30</sup>

## 2. State-to-Federal Removal and Consolidation

Chapter 5 establishes standards and mechanisms for the removal of actions filed in state courts to a designated federal court for consolidated treatment with actions already filed in that court and other federal courts. State actions are candidates for removal if they (1) arise from the same transaction, occurrence, or series of transactions or occurrences as an action pending in the federal court and (2) share a common question of fact with that action.<sup>31</sup> In deciding whether to order removal, the Complex Litigation Panel is instructed to evaluate the same factors as those provided by Section 3.01 for intra-federal transfers, and, in addition, to consider "whether removal [from the state court] will unduly disrupt or impinge upon state court or regulatory proceedings."<sup>32</sup> Furthermore, unlike federal-to-federal and federal-to-state transfers, the state-to-federal removals may be blocked by the objection of all parties to the state actions and the appropriate state judge.<sup>33</sup>

## 3. Federal-to-State Transfer and Consolidation

Chapter 4 completes the circle by providing for federal-to-state and state-to-state transfer and consolidation of actions originally filed in diverse federal and state courts, respectively. Obviously, this is nothing short of revolutionary.

Section 4.01 provides that, in certain circumstances narrowly defined therein, actions filed in federal court<sup>34</sup> may be transferred to a designated state court for consolidated treatment with other cases pending there. The transfer will be ordered by the Complex Litigation Panel, that is, the same panel of federal judges that decides intra-federal transfers or removals. The transfer will be

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29. See *id.* § 3.06.

30. *Id.* § 3.08(a).

31. See *id.* § 5.01(a). In addition, § 5.03, which builds on the existing law of supplemental and pendent jurisdiction, grants the transferee court the power to assert subject matter jurisdiction over claims that may lack independent subject matter jurisdiction but are logically related to claims removed or transferred to that court under § 5.01 or § 3.01, respectively.

32. *Id.* § 5.01(a).

33. See *id.* § 5.01(b).

34. Certain actions, such as actions that are within the exclusive jurisdiction of the federal courts, are exempted from this transfer. See *id.* § 4.01(c).



ordered (1) if the events giving rise to the controversy are "centered in a single state and a significant portion of the existing litigation is lodged in the courts of that state"<sup>35</sup> and (2) the panel determines that "fairness to the parties and the interest of justice will be materially advanced"<sup>36</sup> by the transfer and that the transferee court is "superior to other possible transferee courts."<sup>37</sup> In reaching its decision, the panel is instructed to consider the same factors used to evaluate intra-federal transfers and, in addition, to compare the relative number of cases pending in state and federal courts and the number of states in which the state and federal cases are located.<sup>38</sup>

The panel is also instructed to consider "whether the . . . law to be applied in the state transferee court differ[s] from that which would have been applied by a federal transferee court, to a sufficient degree"<sup>39</sup> so that the transfer would risk prejudicing the parties transferred. This consideration is necessary because these transfers, unlike intra-federal or state-to-federal transfers, will not be governed by the choice-of-law rules provided for federal courts in Section 6 of the Proposed Final Draft.<sup>40</sup> Instead, the choice-of-law rules of the transferee state court will control.<sup>41</sup>

Unlike intra-federal transfers or cases removed from state to federal court under Section 5.01, the federal-to-state transfers are subject to a veto by the judicial authorities of the transferee state.<sup>42</sup> Such consent is necessary to accommodate basic federalism concerns. However, unlike state-to-federal removals which can be blocked by a unanimous objection of the parties, the federal-to-state transfers do not depend on the parties' wishes. A proposal to make such transfers dependent on party consent was rejected by the Institute membership.<sup>43</sup>

Once the transfer is approved, the transferee state court will have the same case-management powers as a federal transferee court under Section 3.06, including the nationwide jurisdictional and subpoena powers conferred by Section

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35. *Id.* § 4.01(a)(1).

36. *Id.* § 4.01(a)(2).

37. *Id.* § 4.01(a)(3). During the final discussion of the Proposed Final Draft, it was suggested that the word "superior" in the last-quoted phrase be replaced with the words "more appropriate" or "more suitable." Proceedings, *supra* note 15, at 17. Earlier, Professor James B. Lewis suggested that the whole phrase be replaced with language such as "that the interest of justice would be better served by this designation rather than by an alternative one." *Id.* at 13. These suggestions were accepted by the Reporters.

38. Proposed Final Draft, *supra* note 1, § 4.01(b)(1)-(2).

39. *Id.* § 4.01(b)(3).

40. See *id.* §§ 6.01-6.06. All provisions of Chapter 6 apply to "actions consolidated under § 3.01" (i.e., intra-federal transfers) or actions "removed under § 5.01" (i.e., state-to-federal transfers).

41. See Proceedings, *supra* note 15, at 13-15. The third option of applying the choice-of-law rules of the state of the transferor court, as is presently done in intra-federal transfers under *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020 (1941) and *Van Dusen v. Barrack*, 376 U.S. 612, 84 S. Ct. 805 (1964), is apparently out of the question.

42. See Proposed Final Draft, *supra* note 1, § 4.01(a).

43. See Proceedings, *supra* note 15, at 12.

3.08.<sup>44</sup> However, appeals from its decisions will be heard by the appellate courts of the transferee state.<sup>45</sup>

#### 4. *State-to-State Transfer and Consolidation*

Although the proposed mechanisms of Chapter 4 are quite innovative, the futuristic, albeit hortatory, Section 4.02 envisions an even more revolutionary regime. Under Section 4.02, actions pending in the courts of different states could be transferred and consolidated from one state court to another. Such a regime can come into existence only through an interstate compact or a uniform act, both of which require the consent of participating or adopting states. A model for such a compact or uniform act is contained in a "Reporter's Study" which is appended to the Proposed Final Draft.<sup>46</sup> In an article published in this Symposium, Justice Herbert D. Wilkins of the Massachusetts Supreme Court discusses transfers to and from state courts from the perspective of a state judge.<sup>47</sup>

In the meantime, the National Conference of Commissioners on Uniform State Laws has approved and recommended for enactment by all states a similar, but less ambitious, model dealing with complex and non-complex cases, the Uniform Transfer of Litigation Act.<sup>48</sup> This Act is discussed and compared with the ALI project by Dean Edward H. Cooper, the Reporter for the Uniform Act, in an article published in this issue.<sup>49</sup>

#### B. *Choice of Law—Chapter 6*

Finally, Chapter 6 of the Proposed Final Draft provides a uniform set of choice-of-law rules to be applied by the transferee court in intra-federal or state-to-federal transfer cases.<sup>50</sup> Since most of the contributions to this Symposium

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44. Proposed Final Draft, *supra* note 1, § 4.01(a).

45. *Id.* § 4.01(d).

46. *See id.* Appendix B.

47. *See* Herbert D. Wilkins, *The American Law Institute's Complex Litigation Project: A State Judge's View*, 54 La. L. Rev. 1155 (1994) ("As a state judge, I have no problem with the fact that the operation of the proposed system will result in cases being taken away from state court jurisdiction on a standard of freer mobility than that applied in traditional removal cases. . . . Similarly, I have no difficulty in accepting into the state judicial system those cases which meet the standard for the panel's transfer of federal and state cases to a state court. These cases in large measure are cases that could have been commenced in the courts of the transferee state, and the legal issues are ones to be decided under the law of the transferee state.").

48. This Act is reproduced in Appendix C of the Proposed Final Draft, at 675-16.

49. *See* Edward H. Cooper, *Interstate Consolidation: A Comparison of the ALI Project with the Uniform Transfer of Litigation Act*, 54 La. L. Rev. 897 (1994).

50. All provisions of Chapter 6 apply to "actions consolidated under § 3.01" (i.e., intra-federal transfers) or actions "removed under § 5.01" (i.e., state-to-federal transfers). *See* Proposed Final Draft, *supra* note 1, §§ 6.01(a), 6.02(a), 6.03(a), 6.04(a), 6.05(a), 6.06(a).

focus on this chapter,<sup>51</sup> and most of them are disapproving, a more detailed description of this chapter may be needed to provide a more balanced perspective for the reader.

### 1. Preliminary Considerations

#### a. Federalizing the Law of Choice of Law: The Power

The existence of a constitutional power to federalize the law of choice of law should not be doubted,<sup>52</sup> although it has been rarely exercised.<sup>53</sup> This power can be derived from several federal constitutional clauses, such as the Full Faith and Credit Clause,<sup>54</sup> the Commerce Clause,<sup>55</sup> and, at least for federal courts, the Judicial Power Clause<sup>56</sup> in combination with the Necessary and Proper Clause.<sup>57</sup> It is only because Congress has not exercised this power that choice of law remains a matter of state law under *Erie*<sup>58</sup> and *Klaxon*.<sup>59</sup> To be sure, that Congress has the power to federalize does not mean that its power *should* be exercised or that Congress *should* enact comprehensive federal *statutory* choice-of-law rules. This is a matter of policy choice. At least two of the contributors to this Symposium strongly oppose such a choice.<sup>60</sup>

#### b. Its Exercise: The Van Dusen Burden

At least in the area of complex litigation, the need for some form of federal intervention can be readily ascertained by a casual perusal of consolidated cases

51. See Friedrich K. Juenger, *The Complex Litigation Project's Tort Choice-of-Law Rules*, 54 La. L. Rev. 907 (1994); P. John Kozyris, *The Conflicts Provisions of the ALI's Complex Litigation Project: A Glass Half Full?* 54 La. L. Rev. 953 (1994); James R. Nafziger, *Choice of Law in Air Disaster Cases: Complex Litigation Rules and the Common Law*, 54 La. L. Rev. 1001 (1994); Robert A. Sedler, *The Complex Litigation Project's Proposal for Federally Mandated Choice of Law in Mass Torts Cases: Another Assault on State Sovereignty*, 54 La. L. Rev. 1085 (1994); David E. Seidelson, *Section 6.01 of the ALI's Complex Litigation Project: Function Follows Form*, 54 La. L. Rev. 1111 (1994); Gene R. Shreve, *Reform Aspirations of the Complex Litigation Project*, 54 La. L. Rev. 1139 (1994). For previous discussions, see Kane, *Drafting Choice of Law Rules*, *supra* note 12; Mullenix, *supra* note 9; Donald T. Trautman, *Toward Federalizing Choice of Law*, 70 Tex. L. Rev. 1715, 1737-41 (1992); Weinberg, *supra* note 9.

52. For a contrary view, see Seidelson, *supra* note 51, at n.2.

53. See, e.g., 28 U.S.C. § 1738(A) (Supp. 1993) (Federal Parental Kidnapping Prevention Act of 1980); 42 U.S.C. § 11601 (1993) (Federal International Child Abduction Remedies Act).

54. U.S. Const. art. IV, § 1.

55. U.S. Const. art. I, § 8, cl. 3. In fact, the Commerce Clause can also be the basis for federal substantive legislation for certain mass tort and mass contract cases. See *infra* note 74.

56. U.S. Const. art. III, § 2, cl. 1. For a discussion of these clauses, see Proposed Final Draft, *supra* note 1, Ch. 6, Intro. Note, cmt. b, at 382-86.

57. U.S. Const. art. I, § 8, cl. 18.

58. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938).

59. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020 (1941).

60. See Seidelson, *supra* note 51; Sedler, *supra* note 51.

decided by federal courts under the present multidistrict litigation statute. Even in relatively simple cases, such as those involving airplane accidents, the existing system seems to be very near the crashing point under the combined weight of *Erie*, *Klaxon*, *Van Dusen*,<sup>61</sup> and *Ferens*,<sup>62</sup> which require a transferee federal court to apply the choice-of-law rules of the state in which the transferor federal court is sitting. This problem has been described in detail elsewhere,<sup>63</sup> but the gravity of this weight can best be measured by the judges who are forced to bear it. In *In Re Paris Air Crash of March 3, 1974*,<sup>64</sup> Judge Hall was faced with the unenviable task of having to decide 203 consolidated lawsuits arising from the death of over three hundred passengers of a Turkish airplane. Describing the burden of *Van Dusen* he wrote:

The law on "choice of law" in the various states and in the federal courts is a veritable jungle, which, if the law can be found out, leads not to a "rule of action" but a reign of chaos dominated in each case by the judge's "informed guess" as to what some other state than the one in which he sits would hold its law to be. . . . Most of the cases are involved with such a "guess" as to the law of one other state or perhaps as many as three. Here . . . this Court would have to "guess" what the courts in 24 foreign and 12 domestic jurisdictions would hold on the facts in this case, including their "choice-of-law" rules, and who knows what laws of what country or state that would lead to.<sup>65</sup>

In a similar case, *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo., on Nov. 15, 1987*,<sup>66</sup> the parties did their best to relieve the court of some of the choice-of-law burden by stipulating to the application of the law of each plaintiff's domicile to the issue of compensatory damages and of the law of the forum to all other issues. Predictably, the parties could not agree on the law applicable to punitive damages. Utilizing the most common way of reducing the *Van Dusen* burden, the court decided to blur the differences between the choice-of-law methodologies followed by the transferor courts in New Jersey (interest analysis) and Idaho and Colorado (Restatement Second) by characterizing the Restatement approach as merely "a more formalized approach to the interests considered in [interest analysis]".<sup>67</sup>

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61. *Van Dusen v. Barrack*, 376 U.S. 612, 84 S. Ct. 805 (1964).

62. *Ferens v. John Deere Co.*, 494 U.S. 516, 110 S. Ct. 1274 (1990).

63. See, e.g., authorities cited *supra* in notes 9-12; Nafziger, *supra* note 51; P. John Kozyris & Symeon C. Symeonides, *Choice of Law in the American Courts in 1989: An Overview*, 38 Am. J. Comp. L. 601, 607-14 (1990).

64. 399 F. Supp. 732 (C.D. Cal. 1975).

65. *Id.* at 739-40.

66. 720 F. Supp. 1433 (D. Colo. 1988).

67. *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo., on Nov. 15, 1987*, 720 F. Supp. 1445, 1448 (D. Colo. 1988).

In *In re Air Crash Disaster at Sioux City, Iowa, on July 19, 1989*,<sup>68</sup> the judge's *Van Dusen* burden could not be lightened as easily. More than one hundred lawsuits were filed by plaintiffs from thirty states and two foreign countries, in eight different states, that were then transferred to the federal district of Illinois. Of these eight states, only three, Colorado, Iowa, and Illinois, could be grouped under one choice-of-law methodology, the Restatement Second.<sup>69</sup> The court added New York to this group without any explanation, even though such a grouping is questionable at best. Even more questionable was the court's classification of Georgia as a Restatement Second state with the explanation/guess that, although "[t]he Supreme Court of Georgia has never decided whether the Restatement should be applied in air crash cases, . . . Georgia would adopt the Restatement if the question were raised."<sup>70</sup> This was too optimistic a guess since, as late as 1984, the Georgia Supreme Court had expressly denounced the center of gravity approach for contract conflicts,<sup>71</sup> and has been routinely upholding lower court decisions adhering to the *lex loci delicti* in tort conflicts. Georgia continues to adhere to the same position to date.<sup>72</sup>

That able and conscientious judges find it necessary to take such liberties indicates that the *Van Dusen* burden is simply unbearable in consolidated multidistrict mass-disaster litigation. This is further evidenced by the recurring plea of federal judges for federal conflicts, or substantive, legislation for mass-disaster cases. Judge Finesilver's plea in the *Stapleton* case is the latest voice from the trenches:

"The choice of law problems inherent in air crash and mass disaster litigation cry out for federal statutory resolution. We urge Congress to pursue enactment of uniform federal tort law to apply to liability and damages in the context of commercial airline disasters and other mass torts. . . . Uncertainty on the choice of law question requires a considerable expenditure of time, money and other resources . . . by litigants and counsel. Federal law would eliminate costly uncertainty and create uniformity. This approach would lead to a quick and efficient resolution of mass disaster cases."<sup>73</sup>

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68. 734 F. Supp. 1425 (N.D. Ill. 1990).

69. Nevertheless, the court lumped together the cases transferred from the District of Columbia, a jurisdiction following pure interest analysis, with the cases transferred from Pennsylvania, a state that has shown particular preference for Professor Cavers' "principles of preference." See Symeon C. Symeonides, *Choice of Law in the American Courts in 1993*, 42 Am. J. Comp. L. (forthcoming 1994).

70. *Air Crash Disaster at Sioux City*, 734 F. Supp. at 1434.

71. See *General Tel. Co. v. Trimm*, 311 S.E.2d 460, 462 (Ga. 1984).

72. See Symeonides, *supra* note 69.

73. *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo.*, on Nov. 15, 1987, 720 F. Supp. 1445, 1454-55 (D. Colo. 1988).

Chapter 6 of the Proposed Final Draft is the American Law Institute's response to these pleas.

*c. Federal Intervention in Complex Litigation*

Federal intervention in the area of complex litigation could take three different forms: (a) enactment of federal substantive legislation for mass torts and mass contracts cases under the Commerce Clause;<sup>74</sup> (b) enactment of federal choice-of-law rules under the Full Faith and Credit Clause; or (c) a mere overruling of *Klaxon-Van Dusen* and an express authorization to the federal courts to develop their own body of federal common law of choice of law.<sup>75</sup>

The first option is generally regarded as utopian, at least for the foreseeable future.<sup>76</sup> The third option has many supporters, including several members of the American Law Institute.<sup>77</sup> However, their efforts to steer the Institute in this direction have been unsuccessful.<sup>78</sup> The Institute has chosen the second option of boldly stepping into the "dismal swamp"<sup>79</sup> of conflicts law and

74. For citations of authority, see Proposed Final Draft, *supra* note 1, Ch. 6, Intro. Note, cmt. b, at 382-85. As Professor Juenger notes,

[T]he perceived need for a uniform national law is no less pressing in aerial as in aquatic disasters. Lacking the necessary foresight, the Founding Fathers only provided for admiralty jurisdiction. One may surmise, however, that . . . they would not have been adverse to including other forms of interstate and international transportation. But even in the absence of a specific constitutional provision akin to the admiralty clause, it can hardly be denied that justice in mass disaster cases would be considerably enhanced by a uniform body of federal law. . . . [T]o leave the outcome of complex litigation to the vagaries of state . . . law . . . is but a second-best solution.

Juenger, *supra* note 51, at 920. See also Shreve, *supra* note 51, at 1139; Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 Geo. L. J. 1 (1991); Trautman, *supra* note 51, at 1731. Georgene M. Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Federal Common Law?*, 54 Fordham L. Rev., 167 (1985).

75. Several attempts to accomplish such a result through an act of Congress have so far been unsuccessful. The last two attempts are the Multiparty, Multiforum Jurisdiction Act of 1989, H.R. 3406, 101st Cong., 1st Sess. (1989), introduced by former Representative Robert W. Kastenmeier, and the Multiforum Jurisdiction Act of 1991, H.R. 2450, 102d Cong., 1st Sess. (1991). Both bills passed the House but not the Senate. These efforts are detailed in Sedler, *supra* note 51. See also Kastenmeier & Geyh, *supra* note 9; Charles G. Geyh, *Complex-Litigation and the Legislative Process*, 10 Rev. Litig. 401 (1991).

76. See Proposed Final Draft, *supra* note 1, Ch. 6, Intro. Note, at 375. For an opposing view, see Juenger, *supra* note 51.

77. See, e.g., Juenger, *supra* note 51; Donald T. Trautman, *Some Thoughts on Choice of Law, Judicial Discretion, and the ALI's Complex Litigation Project*, 54 La. L. Rev. 835 (1994); Trautman, *supra* note 51.

78. See the discussion of the Trautman motion, Trautman, *supra* note 77. For the Juenger motion, see Juenger, *supra* note 51.

79. Since it was used by Dean Prosser more than forty years ago (see William Prosser, *Interstate Publication*, 51 Mich. L. Rev. 959, 971 (1953)), the term "dismal swamp" has become the universally accepted shorthand for describing the complexity and incoherence of American conflicts law. In 1987, in an article entitled *Exploring the "Dismal Swamp": The Revision of Louisiana's*

proposing a comprehensive set of choice-of-law rules to be cast in statutory form. Chapter 6 of the Proposed Final Draft is premised on the conclusion that "a federal statutory choice of law code is necessary to foster the fair and efficient handling of complex litigation"<sup>80</sup> and that, to "provide sufficient predictability and avoid conflicting results,"<sup>81</sup> to "decrease forum shopping[,] and to reduce the extremely complicated inquiry now needed to ascertain and apply the numerous state choice of law rules,"<sup>82</sup> a set of "reasonably precise choice of law rules"<sup>83</sup> should be devised for these cases.

*d. Intervention Through Choice-of-Law Rules*

The above conclusion is bound to encounter significant opposition in a country that lacks any tradition of codification; especially in the field of conflicts law, which is particularly hostile to legislative interventions and inhospitable to almost any process of rule making.<sup>84</sup> For too long, American conflicts thinking has been mesmerized by the teachings of Brainerd Currie who proclaimed that all rules are necessarily evil.

In attempting to use the rules we encounter difficulties that stem not from the fact that the particular rules are bad, . . . but rather from the fact that we have such rules at all. . . . We would be better off without choice-of-law rules.<sup>85</sup>

This agnosticism was a natural but naive overreaction<sup>86</sup> to the theology of Joseph Beale and the theocracy of his first Restatement of Conflicts.<sup>87</sup> It has been the great misfortune of American conflicts that the only rule system it ever had was a spectacularly bad one. The rules of the first Restatement were too rigid and mechanical, leaving no room for evolution. This rigidity led to the overuse of the few available escape devices: characterization, *ordre public*, the substance versus procedure dichotomy, and, occasionally, *renvoi*. Gradually, the

*Conflicts Law on Successions*, 47 La. L. Rev. 1029 (1987), this author described Louisiana's first attempt to codify its conflicts law and expressed the hope that others might follow. In 1990, Professor Gottesman used the same terminology in arguing for federal conflicts legislation. See Gottesman, *supra* note 74.

80. Proposed Final Draft, *supra* note 1, Ch. 6, Intro. Note, at 376.

81. *Id.*

82. *Id.*

83. *Id.*

84. The reasons for this climate have been discussed elsewhere. See Symeon C. Symeonides, *Exception Clauses in American Conflicts Law*, 42 Am. J. Comp. L. 601, 604-08 (1994) [hereinafter *Exception Clauses*]; Symeon C. Symeonides, *Revolution and Counter-Revolution in American Conflicts Law: Is There a Middle Ground?*, 46 Ohio St. L. J. 549, 550-52 (1985) [hereinafter *Revolution*].

85. Brainerd Currie, *Selected Essays on the Conflict of Laws*, 180, 183 (1963).

86. See Symeonides, *Revolution*, *supra* note 84, at 550-52.

87. American Law Institute, *Restatement of Conflict of Laws* (1934).

Restatement came to be honored more in these exceptions than in its rules. Because of the wide and frequent utilization of these escape devices, the Restatement was perceived as incapable of producing the legal certainty and predictability that its drafters had promised. In turn, this failure encouraged and nourished an open revolution in the early 1960's, at least in the area of tort and contract conflicts. As with many revolutions, the established system was demolished rather than repaired. The obvious deficiencies of the Restatement's rules, coupled with the influence of American Legal Realism, the philosophical school of choice of most conflicts revolutionaries,<sup>88</sup> provoked an overreaction against *any* rules. This prejudice against *a priori* rules continues to dominate the conflicts literature.

After thirty years of revolution and a few years of counter-revolution, after so many years of *impressionism juridique* and experimentation with various ad hoc approaches, including the one advanced by Currie, American conflicts law looks like "a tale of a thousand-and-one-cases"<sup>89</sup> in which "each case is decided as if it were unique and of first impression."<sup>90</sup> The "dismal swamp" described by Dean Prosser in 1951<sup>91</sup> became a "veritable jungle" in the eyes of Judge Hall in 1975.<sup>92</sup> In 1994, it can best be described as a *toxic swamp*. Plaintiffs' attorneys, defendants' attorneys, and conflicts teachers alike can make a living out of this uncertainty as they do with toxic waste cases. But the judges who handle mass tort cases tell us that the toxic swamp of conflicts law is threatening to contaminate precious judicial resources urgently needed elsewhere in the federal system. A set of choice-of-law rules, applicable at least to mass tort and contract cases, can help conserve these resources and provide a modicum of certainty for plaintiffs and defendants alike. Obviously, certainty, efficiency, and predictability should not be the only goals of a choice-of-law system. They must be balanced against the need for equity, flexibility, and the protection of justified party expectations.<sup>93</sup> Through an elaborate combination of rules and escape mechanisms, Chapter 6 of the Proposed Final Draft is capable of producing this balance.

## 2. *The Choice-of-Law Approach of Chapter 6*

In evaluating a proposed statutory enactment, it is customary for commentators to pigeonhole its choice-of-law approach into one or another of the existing

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88. For the influence of American legal realism on the American conflicts revolution, see Symeon C. Symeonides, *An Outsider's View of the American Approach to Choice of Law* 212-25, 229-34 (1980).

89. P. John Kozyris, *Interest Analysis Facing its Critics—And, Incidentally, What Should Be Done About Choice of Law for Products Liability?*, 46 Ohio St. L. J. 569, 578 (1985).

90. *Id.* at 580.

91. *See supra* note 79.

92. *See supra* text accompanying note 65.

93. *See* Symeonides, *supra* note 88, at 112-30.



methodological camps and then to praise or attack the proposal accordingly.<sup>94</sup> In the case of Chapter 6 of the Proposed Final Draft, it is tempting to characterize the approach followed by it as "interest analysis." After all, the chapter speaks of "interested"<sup>95</sup> states, or states whose policies "would be furthered by the application of [their] law[s]."<sup>96</sup> Similarly, the chapter's reliance on factual contacts or factors listed in a non-hierarchical, non-exclusive fashion,<sup>97</sup> bears some resemblance to the Restatement Second. Finally, that Chapter 6 contains rules that permit, or lead to, the application of the law of a state solely because of its territorial connections to the case<sup>98</sup> evokes comparisons with even the first conflicts Restatement and gives rise to accusations of "Bealism."<sup>99</sup>

Such characterizations are plausible but not necessarily accurate or helpful. For example, while elements of interest analysis are undeniably present in the chapter, what is completely lacking, and is in fact expressly rejected, is the forum-favoritism and pro-recovery bias that characterized Currie's version of interest analysis and many of its judicial applications.<sup>100</sup> Similarly, although the resemblance to the Second Restatement is equally undeniable, the critical difference is that Chapter 6 contains explicit choice-of-law rules that go beyond the mere presumptions of the Second Restatement. Finally, the best response to the "Bealism" accusation is that, unlike the rules of the First Restatement, every single one of the rules of Chapter 6 is subject to some exception.<sup>101</sup>

Thus, it would be more constructive to accept that Chapter 6 has forged its own individual approach and to evaluate it on its own merits. This approach draws from, but also builds on, the considerable pool of American academic doctrine and its judicial applications, but it is sufficiently different from any of the existing approaches to deserve a separate evaluation without the baggage carried by any one of them.

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94. For a similar experience with the Louisiana codification which is labelled by some as having adopted the "comparative impairment" approach, see Symeonides, *Exegesis*, *supra* note 5, at 689-92.

95. Proposed Final Draft, *supra* note 1, §§ 6.01(c), 6.05(b).

96. *Id.* §§ 6.01(c), 6.03(c), 6.05(b), 6.06(c).

97. *See id.* §§ 6.01(b), 6.03(b), 6.06(b).

98. *See id.* §§ 6.01(c)(4) (place of conduct); 6.03(c) (primary place of business of common contracting party); 6.06(c) (state that has two of the territorial contacts listed therein).

99. *See Juenger's critique*, *supra* note 51. *See also Seidelson*, *supra* note 51 (proclaiming that Chapter 6 "consists of a little bit of interest analysis, too much of the Restatement (Second) of Conflicts, and several seemingly slapdash subsections having no apparent legitimate antecedents"). Given the Reporter's explicit rejection of result-selectivism, the only one of the contemporary American approaches that the Proposed Final Draft cannot be accused of—or praised for—adopting is the "better-law" approach. *See Proposed Final Draft*, *supra* note 1, § 6.01, Reporter's Note 16 to cmt. c, at 426-27; Ch. 6, Intro. Note, cmt. c, at 387 (stating that "federal choice of law rules should not be designed with the objective of promoting substantive preferences for one party rather than the other").

100. *See Symeonides, Revolution*, *supra* note 84, at 566-67.

101. *See infra* Section II(B)(3)(b).

### 3. *The Desideratum of Applying a Single Law*

#### a. *The Objective*

One of the purposes of Chapter 6 is to facilitate and promote the application of a single law to all "similar"<sup>102</sup> claims "being asserted against a defendant"<sup>103</sup> in a mass tort or mass contract case. This desideratum is explicitly stated in Subsection (a) of Sections 6.01 for torts, and 6.02 and 6.03 for contracts.<sup>104</sup> It should be noted that, first, this statement applies to each defendant rather than to the entire litigation.<sup>105</sup> Secondly, this statement should not be viewed as a proscription of *dépeçage*, that is, the application of different laws to different issues in the same claim.<sup>106</sup> Instead, it should be viewed as an effort to ensure that, "to the extent feasible,"<sup>107</sup> all similar tort claims against the same defendant and all claims "under the same or similar contracts with a common party"<sup>108</sup> should be treated equally. Since the defendant is the common target of all claimants in mass tort or mass contract cases, the defendant becomes the central focus of Chapter 6. This is evident not only in the fact that the single-law objective is built around the defendant, but also in the fact that many of the specific rules are constructed around factual contacts associated with the defendant.

#### b. *The Exceptions*

In any event, the statement of the single-law objective is not an unqualified one. Recognizing that in some cases this objective may be non-feasible<sup>109</sup> or inappropriate,<sup>110</sup> the drafters provide the court with at least two escapes. Subsection (e) of Section 6.01, Subsection (b) of Section 6.02, and Subsection (d) of Section 6.03 authorize the court to divide the actions into subgroups of "claims, issues, or parties"<sup>111</sup> and allow more than one state's law to be applied if the court determines that the application of a single state's law to all elements of the claims pending against a defendant would be inappropriate.

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102. Proposed Final Draft, *supra* note 1, § 6.01(a) ("similar tort claims"); § 6.03(a) and (d) ("similar contracts with a common party"). The word "similar" implies that Chapter 6 permits the application of the law of different states to dissimilar claims against the same defendant.

103. *Id.* § 6.01(a). See also *id.* § 6.03(a) which speaks of "the objective of applying a single state's law to every claim being asserted under the same or similar contracts with a common party."

104. For a critique of this notion, see Sedler, *supra* note 51.

105. See Proposed Final Draft, *supra* note 1, Ch. 6, Intro. Note, cmt. c, at 388.

106. See *infra* Section II(B)(4).

107. Proposed Final Draft, *supra* note 1, § 6.01(a).

108. *Id.* § 6.03(a).

109. *Id.* Section 6.01(a) states the single-law objective is to be pursued "to the extent feasible." This phrase is not repeated in any of the other sections of Chapter 6.

110. *Id.* §§ 6.01(e), 6.03(d).

111. *Id.* §§ 6.01(e), 6.02(b), 6.03(d).

The same provisions provide another partial escape from the choice-of-law rules of Chapter 6 by authorizing the court to sever and remand to the transferor courts certain "claims or issues"<sup>112</sup> that, in the court's opinion, "should [not] be governed by the law chosen by the application of the rules [of Chapter 6]."<sup>113</sup> Since the transferor courts will not be bound by the rules of Chapter 6, but rather by "the laws normally applicable in those courts,"<sup>114</sup> these claims or issues may ultimately be governed by a different substantive law.<sup>115</sup>

#### 4. *Dépeçage*

The repeated reference to "issues" in the two exceptions quoted above is clear evidence that an issue-by-issue analysis, which is an integral feature of all modern American choice-of-law methodologies, will also play a role in the application of Chapter 6.<sup>116</sup> Unlike all other methodologies, however, this issue-by-issue consideration is authorized—not in the first—but in a later step of the court's analysis.<sup>117</sup> The same will be true for cases that fall within another escape clause, the one found in Subsection (d) of Section 6.01.<sup>118</sup> In all these cases, the issue-by-issue analysis may well lead to *dépeçage*, that is the application of the law of different states to different issues in the same claim.

A more direct route to *dépeçage* may be provided by Sections 6.05 and 6.06. Section 6.05, applicable to issues of monetary relief in tort and contract cases, begins with the notion that these issues should, in principle, be governed by the same law that governs the other tort or contract issues under Section 6.01 or 6.02-03, respectively, but then permits the application of a different law in some circumstances.<sup>119</sup> Section 6.06, applicable to punitive damages in tort cases, may also lead to the application of a different law to the issue of punitive

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112. *Id.* §§ 6.01(e), 6.03(d).

113. *Id.* Section 6.01(e) refers to "the law chosen by the application of the rules in subsection (c)." During the final discussion of the Proposed Final Draft, it was suggested that the phrase "rules in subsection (c)" be changed to "previous rules" (i.e., all rules of § 6.01). The Reporter agreed to consider this suggestion. See Proceedings, *supra* note 15, at 54. Sections 6.02(b) and 6.03(d), applicable to contracts, contain similar language.

114. Proposed Final Draft, *supra* note 1, § 6.01(e).

115. *But see id.*, Ch. 6, Intro. Note, cmt. c, at 390-91 (differentiating between cases in which whole claims are remanded from cases in which only issues are remanded, and suggesting that in the latter cases the rules of Chapter 6 should be followed, at least in spirit, by the transferor courts).

116. *Id.* at 388.

117. It seems, however, that an issue-by-issue consideration is also possible at an earlier point in the court's analysis—that is the step that precedes the application of the choice-of-law rules of Sections 6.01 and 6.03. In this step, the court weeds out false conflicts by examining whether, of the involved states, there is "one state [that] has a policy that would be furthered by the application of its law." *Id.* § 6.01(c). See *infra* text accompanying notes 122-124.

118. See *infra* text accompanying notes 155-160.

119. See *infra* text accompanying notes 161-166.

damages than the law applicable to the other tort issues under Section 6.01 or 6.05.<sup>120</sup>

### 5. *Structure: Steps of Analysis, Rules, and Escape Clauses*

#### a. *First Step: Preliminary Analysis*

From a structural perspective, the approach of Chapter 6 can be divided into four successive steps. In the first step, the transferee court conducts a preliminary analysis for determining whether the case presents a conflict of laws. Indeed, all sections of Chapter 6 become applicable only if "the parties assert the application of laws that are in material conflict."<sup>121</sup> *A contrario*, if the parties fail to raise the conflicts question or if the court determines that the asserted laws are not in "material conflict," then the transferee court would not be bound by the provisions of Chapter 6. The possibility that none of the parties to a multistate mass tort or mass contract dispute will raise the conflicts question is indeed remote, but it does raise the intriguing question of which law should be applied in such a case. Under current state practice, courts routinely decide such cases under the law of the forum state as the residual law. The same is true for diversity cases under *Erie-Klaxon* and in transfer cases under *Van Dusen*. However, if *Klaxon* and *Van Dusen* are overruled, as contemplated by the Proposed Final Draft, the transferee court will have no "forum law" to apply. The resulting gap can be filled by a partial resurrection of either *Klaxon* or *Van Dusen* or both, or by granting the transferee court the autonomy to choose the applicable law. The latter option seems much more in tune with the Proposed Final Draft's spirit. Arguably, the same gap and the same solutions are present when the court determines that the asserted laws are not "in material conflict." If this determination is accurate, then a decision by the transferee court to apply any one of the asserted laws would be both sensible and totally non-controversial and would not need to be grounded on a specific constitutional or legislative basis.

#### b. *Second Step: False Conflicts*

In the second step of the analysis, the court is instructed to weed out false conflicts by determining whether, from among the contact states<sup>122</sup> whose law

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120. See *infra* text accompanying notes 167-184.

121. See Proposed Final Draft, *supra* note 1, §§ 6.01(a), 6.02(a), 6.03(a), 6.06(a). Sections 6.04 and 6.05 also incorporate by reference the phrase quoted in the text through a cross-reference to Sections 6.01-6.03.

122. In all cases, the contact states include the primary places of business or habitual residences of the plaintiffs and defendants. In tort cases and those involving punitive damages, the relevant contacts are the places of conduct and the resulting injury. In contract cases, the relevant contacts are the places of contracting, performance, and location of subject matter of the contract. See *id.* §§

has been asserted by the parties and found by the court to be in material conflict,<sup>123</sup> there is "one state [that] has a policy that would be furthered by the application of its law."<sup>124</sup> If only one state is "interested" in applying its law, the court is instructed to apply the law of that state.

*c. Third Step: Resolving Non-False Conflicts Through Rules*

In the third step, the court is left with cases in which "more than one state has a policy that would be furthered by the application of its law."<sup>125</sup> In interest-analysis terminology, these cases would include true conflicts, apparent conflicts, and even some "unprovided-for" or no-interest cases.<sup>126</sup> Here the court is provided with definite rules for resolving the conflict.<sup>127</sup> These rules are discussed in Section II(B)(6) of this article.

*d. Fourth Step: Escapes*

Almost all of these rules, however, are subject to escapes which, when applicable, authorize the application of a law other than that dictated by a strict application of the rule. For example, the two escapes discussed earlier in connection with the single-law objective<sup>128</sup> apply to Sections 6.01 for torts, and 6.02 and 6.03 for contracts. Section 6.01 contains an additional and much more prominent escape in Subsection (d).<sup>129</sup> Section 6.05(b), applicable to issues of monetary relief, also contains a different escape that may lead to *dépeçage*.<sup>130</sup> A less flexible escape is contained in Section 6.04, applicable to statutes of

6.01(b), 6.03(b), 6.06(b).

123. This qualification flows from the cross-reference to Subsection (a) that is contained in Subsection (b) of Sections 6.01, 6.03, and 6.06. *Id.*

124. *Id.* §§ 6.01(c), 6.03(c), 6.06(c). The analysis whereby this determination is made is described in Proposed Final Draft, *supra* note 1, Ch. 6, Intro. Note, cmt. c, at 392-93, and is identical to that followed in the first step of interest analysis or, for that matter, any other modern functional analysis.

125. *Id.* §§ 6.01(c), 6.03(c).

126. The possibility that, in mass tort or mass contract cases, *none* of the involved states "has a policy that would be furthered by the application of its law" is remote. This may be the reason for which this possibility is not expressly addressed by the Proposed Final Draft. If such a situation does arise, one must assume, as in the cases where the involved laws are not "in material conflict," that the transferee court should have the power to independently choose the applicable law guided only by the general principles of the Proposed Final Draft. *See supra* text following note 121. On the other hand, at least in tort cases, the Proposed Final Draft does expressly address cases in which some of the involved states have a policy that would be furthered while other states do not have such a policy. In such cases the Proposed Final Draft instructs the court to choose "from among the laws of the *interested* states." Proposed Final Draft, *supra* note 1, § 6.01(c) (emphasis added).

127. *See id.* §§ 6.01(c)(1)-(4), 6.03(b)(1)-(4), 6.06(c).

128. *See supra* Section II(B)(3)(b).

129. This escape is discussed *infra* at text accompanying notes 155-160.

130. *See supra* Section II(B)(4) and *infra* Section II(B)(7)(a).

limitation.<sup>131</sup> Thus, the only section that does not contain an open escape is Section 6.06, applicable to punitive damages.<sup>132</sup>

## 6. Rules for Mass Torts

### a. Rules 1-4

For mass torts, Section 6.01(c) provides four choice-of-law rules to be employed in the third step of the analysis described above. These rules, are to be applied in the order in which they are listed so that, if the case falls within the scope of the first rule, that rule governs to the exclusion of the second rule, and so forth. These rules call for the application of the law of:

[Rule 1] the state of conduct, if the injury is also in that state;<sup>133</sup>

[Rule 2] the state where all<sup>134</sup> plaintiffs and a defendant habitually reside or have their primary place of business,<sup>135</sup> with regard to claims against that defendant;<sup>136</sup>

[Rule 3] the state where all<sup>137</sup> plaintiffs habitually reside or have their primary places of business,<sup>138</sup> if that state is also the place of injury;<sup>139</sup> and

[Rule 4] the state where the injury-causing conduct occurred.<sup>140</sup>

Section 6.01, in general, and the above four rules, in particular, were the focus of discussion at both the 1992 and the 1993 meetings of the Institute

131. See *infra* text accompanying notes 206-221.

132. See *infra* text accompanying notes 167-184.

133. Proposed Final Draft, *supra* note 1, § 6.01(c)(1).

134. During the final discussion of the Draft on May 13, 1993, it was suggested that some qualifying language, such as the word "substantially" be added before "all." The Reporter agreed to consider this suggestion. See Proceedings, *supra* note 15, at 56.

135. Section 6.01(c)(2) also provides that plaintiffs located in states whose laws "are not in material conflict" shall be treated as if residing or having their primary place of business in the same state. For an analogous provision, see Louisiana Civil Code article 3544(1), applicable only to "loss distribution" issues, which provides that "persons domiciled in states whose law on the particular issue is substantially identical shall be treated as if domiciled in the same state." For a discussion of the rationale of this provision as an easy way of disposing of some false conflicts, see Symeonides, *Exegesis*, *supra* note 5, at 723-25. An identical provision is contained in the Project for the Codification of Puerto Rican Private International Law, Article 47 (Academy Draft, 1991, Symeon C. Symeonides & Arthur T. von Mehren, Reporters).

136. Proposed Final Draft, *supra* note 1, § 6.01(c)(2).

137. See *supra* note 134 regarding the possible addition of qualifying language.

138. Proposed Final Draft, *supra* note 1, § 6.01(c)(3), also provides that "[p]laintiffs shall be considered as sharing a common habitual residence or primary place of business if they are located in states whose laws are not in material conflict."

139. *Id.* § 6.01(c)(3).

140. *Id.* § 6.01(c)(4). When the conduct occurred in more than one state, the court is directed to choose "the conduct state that has the most significant relationship to the occurrence." *Id.*

membership. During the 1992 meeting, this section was criticized, *inter alia*, by prominent conflicts teachers such as Professors Russell Weintraub and Louise Weinberg. Their motions to amend the section, however, were unsuccessful. Weintraub's and Weinberg's views on the matter have been published elsewhere.<sup>141</sup> During the 1993 debate, the opposition was joined by two other distinguished conflicts scholars, Professors Donald Trautman and Friedrich Juenger. Their views are reproduced in this Symposium.<sup>142</sup> Most of the other contributions to this Symposium also focus on Section 6.01.<sup>143</sup>

In light of this plethora of critiques, as well as this author's duty of neutrality as a symposium host, it is neither necessary nor appropriate to engage in an extensive discussion of these rules here. Besides, after drafting choice-of-law rules for two different jurisdictions,<sup>144</sup> there is no easy way for this author to avoid the appearance of having a narcissistic preference for his own rules.<sup>145</sup>

Be that as it may, it is this author's opinion that: Rule 1 makes perfect sense *if* the issue in question is one of conduct regulation, as opposed to one of loss-distribution;<sup>146</sup> Rule 2 makes perfect sense *if* the issue in question is one of loss distribution;<sup>147</sup> Rule 3 makes perfect sense *if* the plaintiffs' state

141. See Russell J. Weintraub, *An Approach to Choice of Law that Focuses on Consequences*, 56 Alb. L. Rev. 701 (1993); Weinberg, *supra* note 9; Louise Weinberg, *Choosing Law: The Limitations Debates*, 1991 U. Ill. L. Rev. 683, 710-11, 716-17 (1991). Professor Weinberg also participated in the 1993 meeting. Her motion to amend § 6.01, which was supported by this author, was narrowly defeated. See Proceedings, *supra* note 15, at 41-52.

142. For Professor Trautman, see Trautman, *supra* note 77. For Professor Juenger, see Juenger, *supra* note 51 and Juenger, *supra* note 9.

143. See Kozyris, *supra* note 51; Nafziger, *supra* note 51; Sedler *supra* note 51; Seidelson, *supra* note 51; Shreve, *supra* note 51.

144. See *supra* note 5 for the Louisiana codification, and *supra* note 135 for the Puerto Rico codification.

145. This author does not admit to a general bias in favor of his own rules. Indeed, he recognizes that drafting state choice-of-law rules, designed primarily for regular torts, is a much easier undertaking than drafting rules for mass torts.

146. For the meaning, origin, and rationale of this distinction, see Symeon C. Symeonides, *Problems and Dilemmas in Codifying Choice of Law for Torts: The Louisiana Experience in Comparative Perspective*, 38 Am. J. Comp. L. 431, 441-44 (1990). The Proposed Final Draft does not directly subscribe to this distinction. *But see* Proposed Final Draft, *supra* note 1, § 6.05 discussed *infra* at text accompanying notes 161-166. Louisiana Civil Code article 3543 contains a rule which is similar to Rule 1 of § 6.01(c)(1) but which, unlike Rule 1, is confined to "[i]ssues pertaining to standards of conduct and safety." For the rationale and operation of this rule, see Symeonides, *Exegesis*, *supra* note 5, at 705-08. Moreover, Louisiana Civil Code article 3543 authorizes the application of the law of the state of conduct even if the injury occurred in another state, if the law of the latter state provides for a standard that is the same as, or lower than, that of the state of conduct. This sub-rule is another quick way of identifying and disposing of false conflicts. See Symeonides, *Exegesis*, *supra* note 5, at 705-08. On the other hand, Article 3544, which applies only to "[i]ssues pertaining to loss distribution," authorizes the application of the law of the state of conduct and injury but only if that state is also the domicile of either the tortfeasor or the victim.

147. Louisiana Civil Code article 3544(1), applicable to issues of loss distribution, calls for the application of the law of the common domicile of the tortfeasor and the victim. For the rationale of

provides for a higher standard than that of either the defendant's state or the conduct state;<sup>148</sup> and Rule 4 makes perfect sense *if* the issue in question is one of regulation of conduct *and* the state of conduct imposes a higher standard of conduct than that of the other involved states.<sup>149</sup>

The above qualifications may appear incompatible with the letter of Section 6.01, especially because the four rules provided in Subsection (c): (1) are not phrased in terms of particular issues; (2) do not adopt the distinction between conduct regulation and loss distribution; and (3) do not make the selection of the applicable law dependent on its content.<sup>150</sup> Nevertheless, on closer analysis, a different picture emerges. For example, as stated earlier, although the four choice-of-law rules of Section 6.01 are not phrased in terms of issues, an issue-by-issue analysis is called for by other provisions of Section 6.01 whose application either precedes<sup>151</sup> or follows the application of these rules.<sup>152</sup> Similarly, although the above rules do not adopt the distinction between issues of conduct regulation and issues of loss distribution, such a distinction is possible under other provisions of Section 6.01 whose application precedes or follows the application of these rules.<sup>153</sup> More importantly, this distinction is almost explicit given that Chapter 6 provides separate rules for compensatory damages (Section 6.05) and punitive damages (Section 6.06).<sup>154</sup> Moreover, although the above rules do not expressly authorize consideration of the content of, and standards provided by, the competing

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this rule, see Symeonides, *Exegesis*, *supra* note 5, at 715-25.

148. These cases present true conflicts. The higher standard of the state of injury reflects an interest in protecting victims domiciled therein. The lower standard of the defendant's state or the conduct state reflects an interest in protecting defendants domiciled in or acting within its borders. Although reasonable people may disagree as to how these conflicts should be resolved, the application of the law of the place of injury is justified if the defendant should have foreseen that the injury would occur in the plaintiff's domicile. This is the solution adopted by the Louisiana Civil Code. See Louisiana Civil Code article 3543 for issues of conduct regulation and Article 3544(2)(b) for issues of loss distribution. For the rationale of these rules, see Symeonides, *Exegesis*, *supra* note 5, at 710-12, 729-31. On the other hand, when the state of injury provides for a lower standard, that state has no real interest in applying its law to benefit the foreign defendant at the expense of its own domiciliaries. At least when the issue in question is one of conduct regulation, the state where the defendant acted or had his domicile would have an interest in applying its law to regulate conduct by its own or foreign domiciliaries acting within its borders. See La. Civ. Code art. 3543 and Symeonides, *Exegesis*, *supra* note 5, at 709-10.

149. See *supra* note 148. Without this qualification, Rule 4 has the potential of providing a haven for major mass tortfeasors. For a critique on this point, see Juenger, *supra* note 51, at 919; Weinberg, *supra* note 9, at 846-51; Weintraub, *supra* note 141, at 723.

150. One of the major premises of Chapter 6 is that "federal choice of law rules should not be designed with the objective of promoting substantive preferences for one party rather than the other." Proposed Final Draft, *supra* note 1, Ch. 6, Intro. Note, cmt. c, at 387.

151. For the issue-by-issue analysis permitted by the first section of Subsection (c) of § 6.01, see *supra* note 117.

152. See discussion of Subsection (e) of § 6.01, *supra* at text accompanying notes 110-115 and Subsection (d) of § 6.01, *infra* at text accompanying notes 155-160.

153. See *supra* notes 151-152.

154. See discussion of § 6.05(b), *infra* at text accompanying notes 164-165.



state laws, such consideration is implicitly authorized by other provisions of Section 6.01, whose application either precedes or follows the application of these rules.<sup>155</sup> In conclusion, therefore, it might be said that most of the objections to the above four rules of Section 6.01 are capable of being addressed through devices made available by other provisions of Chapter 6, not the least of which is the escape clause of Section 6.01(d).

*b. The Escape of Subsection (d)*

Subsection (d) of Section 6.01 provides a broad, open-ended escape from any and all of the above four rules of Section 6.01. As evidenced by this clause's extensive history, the Institute strove to attain an appropriate balance between the competing goals of certainty and flexibility.<sup>156</sup> In Tentative Draft No. 3, the opening phrase of Subsection (d) provided that "to ensure that the results obtained by the application of the rules set out in the preceding subsections are in the interests of justice and not arbitrary, the transferee court may . . ."<sup>157</sup> During the discussion of that draft in May 1992, the Institute decided that this clause had the potential of seriously undermining the Project's goal of certainty and predictability by giving too much discretion to the transferee court. The opening clause of Subsection (d) was therefore rephrased to provide:

(d) When *necessary* to avoid unfair surprise or arbitrary results, the transferee court may choose the applicable law on the basis of additional factors that reflect the regulatory policies and legitimate interests of a particular state not otherwise identified under subsection (b), or it may depart from the order of preferences for selecting the governing law prescribed by subsection (c).<sup>158</sup>

During the final consideration of the Proposed Final Draft by the Institute's membership on May 13, 1993, Subsection (d) was again the object of specific

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155. See *supra* notes 151-152.

156. For the perpetual tension between certainty and flexibility in American conflicts law, see Symeonides, *Exception Clauses*, *supra* note 84.

157. American Law Institute, Complex Litigation Project, Tentative Draft No. 3 (March 31, 1992) [hereinafter Tentative Draft No. 3]. The balance of Subsection (d) was the same as in the Proposed Final Draft. See *infra* at text accompanying note 158.

158. Proposed Final Draft, *supra* note 1, § 6.01(d) (emphasis added). For a similar story, see Louisiana Civil Code article 3547, which provides in part that "[t]he law applicable under Articles 3543-46 shall not apply if, from the totality of the circumstances of an *exceptional* case, it is *clearly* evident under the principles of Article 3542, that the policies of another state would be more seriously impaired if its law were not applied to the particular issue" (emphasis added). The italicized words were added by the Council of the Louisiana State Law Institute in order to restrain the applicability of this exception. For the history and meaning of this exception, see Symeonides, *Exegesis*, *supra* note 5, at 763-66. For a critique, see Russell J. Weintraub, *The Contributions of Symeonides and Kozyris to Making Choice of Law Predictable and Just: An Appreciation and Critique*, 38 Am. J. Comp. L. 511 (1990).

discussion; however, this time most members favored granting the transferee court more discretion. Expressing this sentiment, Mr. Bennet Boskey proposed, and the Reporter agreed, to replace the italicized word "necessary" with the word "appropriate."<sup>159</sup> Later, Judge Beasley proposed that the entire Subsection (d) be replaced with the following language: "(d) To avoid unfair surprise or arbitrary results, the transferee court may, in its discretion choose the applicable law."<sup>160</sup> The Reporter agreed to consider this language.<sup>161</sup> Since the Final Draft is not yet available, it is not known how the final version of Subsection (d) will read. Consequently, any specific discussion of it would be premature.

## 7. Damages

### a. Compensatory Damages

Section 6.05 provides that issues of "monetary relief,"<sup>162</sup> other than punitive damages, in both tort and contract cases are to be determined in accordance with the same law or laws that govern the tort or contract under Sections 6.01-6.03 of the Proposed Final Draft. This rule is in keeping with the otherwise laudable single-law objective which underlies the entire Project. The drafters recognize, however, that in some instances, this objective may be unattainable or undesirable. For example, the drafters observe:

[I]n some instances decisions regarding what damages are recoverable may reflect policy determinations involving how to allocate losses between parties, rather than the conduct-regulating policies that underlie the liability rules being applied. In that event, simply to apply the same choice of law rules to both issues inappropriately may ignore these distinctions.<sup>163</sup>

This is an express recognition of the distinction between issues of conduct regulation and loss distribution which is drawn from the American conflicts experience and which also forms the basis of the 1992 Louisiana conflicts codification.<sup>164</sup> The drafters of Chapter 6 put this experience to good use. Subsection (b) of Section 6.05 authorizes the court to sever issues of monetary relief, if it determines that these issues "involve policies different from those underlying the liability issues and that the application of the law or laws selected under §§ 6.01-6.03 to those issues would ignore the interests of states whose policies regarding the measure of relief would be furthered by the application of

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159. See Proceedings, *supra* note 15, at 36; also reprinted in Trautman, *supra* note 77, at 835.

160. See Proceedings, *supra* note 15, at 39.

161. *Id.* For objections by Professor Roger Cramton, see *id.* at 56. See also *id.* at 58.

162. This term is designed to ensure that Section 6.05 applies to restitutionary, as well as damage, remedies. See Proposed Final Draft, *supra* note 1, § 6.05, cmt. b, at 494.

163. *Id.* at 495.

164. See *supra* note 135 and text accompanying notes 146-155.

their laws." In such a case, the court is authorized to apply the law of the latter states.<sup>165</sup> Thus, issue-by-issue analysis and *dépeçage* are eventually brought in through the side door and become available as tools for correcting the potential rigidity of the rules found in Section 6.01.

*b. Punitive damages*

Section 6.06 applies to punitive damages in tort cases. Like the corresponding article of the Louisiana Civil Code,<sup>166</sup> this section revolves around three factual contacts: the place or places of the injury; the conduct that caused the injury; and the primary places of business or habitual residences of the defendants.<sup>167</sup> Conspicuously, and appropriately, absent from the list is the victims' residence.<sup>168</sup> The court's choice is confined to these three states.<sup>169</sup> Clause one of Subsection (c) of Section 6.06 addresses false-conflict cases. It provides that, if the court finds that only one of the three states has a policy that would be furthered by the application of its law, that law applies, regardless of whether it allows punitive damages.<sup>170</sup>

*i. The Basic Rule*

Clause two of Subsection (c) enunciates the basic rule for non-false conflicts, that is, cases in which more than one of the above states "[have] polic[ies] that would be furthered by the application of [their] law."<sup>171</sup> The rule authorizes the court to award punitive damages "if the laws of the states where any two of the [above] factors . . . are located authorize their recovery."<sup>172</sup> This phrasing is unnecessarily, and perhaps inadvertently, confining. Taken literally, this phrasing means that for punitive damages to be awarded under this rule, the state under whose law they are awarded must have *two* of the above listed factual

165. Proposed Final Draft, *supra* note 1, § 6.05, cmt. b, at 495.

166. See La. Civ. Code art. 3546. For discussion, see Symeonides, *Exegesis*, *supra* note 5, at 735-49.

167. Proposed Final Draft, *supra* note 1, § 6.06(b).

168. Since punitive damages are designed to regulate conduct rather than compensate victims, the domicile of the victim is irrelevant. See *id.* § 6.06, cmt. a, at 501; Symeonides, *Exegesis*, *supra* note 5, at 736-37.

169. See Proposed Final Draft, *supra* note 1, § 6.06, cmt. b, at 510 ("If it is determined that only one of those states has a policy that would be furthered . . ." (emphasis added)).

170. *Id.* § 6.06(c), first clause.

171. *Id.* § 6.06(c), second clause.

172. *Id.* § 6.06(c), second sentence. This rule is conditioned on a finding that "the possible imposition of punitive damages reasonably was foreseeable to the defendants." *Id.* Section 6.06(d) provides that, in the event that these states differ with respect to the standard of conduct for which punitive damages may be awarded, the standard of proof required, or the amount or method of calculation of such damages, "the order of preference for the governing law on those issues, among the states authorizing punitive damages, is the place of conduct, the primary place of business or habitual residence of the defendant, and the place of injury."

contacts; that is, it must be the state of *both* (a) the conduct *and* the injury; or (b) the conduct *and* the defendant's primary place of business or residence; or (c) the injury *and* the defendant's primary place of business or residence. Under this literal reading, punitive damages would not be available if, for example, the conduct, the injury, and the defendant's primary place of business are in *different* states, even if all three of those states impose punitive damages. To disallow punitive damages in such a manifest false conflict would clearly be incompatible with the spirit of Section 6.01. This is why such a literal reading should be avoided. Thus, the basic rule of clause two of Section 6.06(c) should be read as authorizing the award of punitive damages when such damages are available either under the law of a state that has at least two of the above contacts, *or under the laws of two different states each of which has at least one of the above contacts.*<sup>173</sup>

The above rule is followed by two clauses addressing situations in which the conduct or the injury occurred in more than one state.<sup>174</sup> A third possibility, if the defendant's business is located in more than one state, is very sensibly addressed by the comments: "[T]he determination of [such a defendant's] primary place of business will depend on locating the place of business that is most closely related to the conduct for which punitive damages are sought."<sup>175</sup> This determination is properly left to the court and is to be made on an ad hoc basis.

#### *ii. Multiple Places of Conduct*

Clause four of Section 6.06(c) addresses situations in which the conduct occurred in more than one state and instructs the court to "*choose the law of the conduct state that has the most significant relationship to the occurrence.*"<sup>176</sup> The italicized words may cause some confusion. If read literally, they may lead to the conclusion that, when the conduct occurred in more than one state, the court must *apply* the law of the conduct state that has the most significant relationship to the occurrence, regardless of whether the other two contact states (the state of injury and the defendant's state) allow such damages.

Such a reading should be avoided. Instead, clause four should be read, not as an independent choice-of-law rule, but rather as an interpretative sub-rule for aiding the court in applying the choice-of-law rule of clause two, or for identifying false conflicts under clause one of Subsection (c). This means that: (1) in cases in which punitive damages are otherwise available under the rule of

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173. This reading is supported by the Reporter's comment. *See id.* § 6.06, cmt. b, at 510 ("If any two of the states identified under subsection (b) authorize punitive damages . . ." (emphasis added)). This is also the rule provided by Louisiana Civil Code article 3546. *See, Symeonides, Exegesis, supra* note 5, at 737-41.

174. Proposed Final Draft, *supra* note 1, § 6.06(c), fourth and third sentences, respectively.

175. *Id.* § 6.06, cmt. b, at 509-10.

176. *Id.* § 6.06(c), fourth sentence (emphasis added).

clause two without regard to the law of the state of conduct (e.g., when such damages are provided by the law of the state of injury and the defendant's state), then clause four will be inoperative; (2) when, under the rule of clause two, the award of punitive damages depends in part on whether such damages are available under the law of the state of conduct (e.g., because one of the other two contact states does not allow punitive damages), then the interpretative clause four is applicable. In such a case, the clause should be interpreted as meaning that, if the conduct is in more than one state, the court must identify or determine the conduct *state* that has the most significant relationship to the occurrence. As in the case when the defendant has multiple places of business,<sup>177</sup> this determination will not necessarily mean that the law of this state will *apply*. It simply means that this state will serve as "the conduct state" for purposes of applying the choice-of-law rule of clause two. If this state allows punitive damages and it is also the state in which either the injury occurred or the defendant's primary place of business or habitual residence is located, then punitive damages will be available under the rule of clause two.<sup>178</sup>

### iii. Multiple Places of Injury

Clause three of Subsection (c) is more problematic. It provides that "[i]f multiple places of injury are involved and they differ as to the availability of punitive damages, the law of the state where the conduct causing the injury occurred governs."<sup>179</sup> Read literally, this clause may defeat or authorize the award of punitive damages in certain cases in which it should not.

In a multistate products liability action, for example, if the states where all but one of the victims suffered their injury impose punitive damages and one such state does not, then the above quoted clause applies and requires the application of the law of the place of conduct. If that state does not allow punitive damages, such damages will be denied these plaintiffs, even though such damages are authorized by the defendant's state and by most of the states of injury.<sup>180</sup> Conversely, when all but one of the states where the victims suffered

177. See *supra* text accompanying note 175.

178. The same should be true if the places of primary conduct, injury, or defendant's business or residence are in different states, but two of those states allow punitive damages. See *supra* text accompanying notes 171-175.

179. Proposed Final Draft, *supra* note 1, § 6.06(c), third sentence.

180. This reading is confirmed by the following Reporter's comment:

If there is more than one place of injury . . . and those states differ as to whether punitive damages can be awarded, they will be authorized under subsection (c) if the place of conduct and the defendant's primary place of business or habitual residence authorize punitive damages . . . . However, if the law of the place of defendant's conduct conflicts with the law of the defendant's primary place of business, then, given the absence of a single place of injury, no two factors under § 6.06(b) are alike in their treatment of punitive recoveries. Under those circumstances, the law of the place of the injury-causing conduct will determine the availability of punitive damages.

their injury deny punitive damages but one such state allows them, the prescription that "the law of the state where the conduct causing the injury occurred governs"<sup>181</sup> would allow the award of punitive damages if the conduct state allows them, regardless of whether such damages are also authorized by the law of the defendant's domicile. Fortunately, this inference is negated by a statement in the comments,<sup>182</sup> and this sentence will probably be redrafted so as to make clear that the quoted clause will become applicable only when the law of the state of conduct and the defendant's state disagree on the availability of punitive damages.<sup>183</sup> However, the problem identified earlier of denying punitive damages in the converse case will probably remain unresolved.

#### 8. *Mass Contracts*

Sections 6.02 and 6.03 provide rules for mass contracts cases. Examples mentioned by the comments include contract actions by consumers against the manufacturer of a defective product distributed nationwide and disputes between product manufacturers or polluters and their insurers.<sup>184</sup> In their contribution to this Symposium, Messrs. Kalis, Sergendahl, and Waldron provide an in-depth discussion of these sections, especially with regard to mass insurance contracts covering environmental pollution. Significantly, these two sections apply to mass contract cases "even if the underlying lawsuit is premised on tortious rather than contractual, activity."<sup>185</sup>

##### a. *Law Applicable in the Absence of Party-Choice-of-Law*

Section 6.03 provides rules for selecting the law applicable to contracts that do not contain a choice-of-law clause and for determining certain aspects of the validity and effectiveness of such a clause. After ferreting out false conflicts,<sup>186</sup> the court applies a single choice-of-law rule to resolve non-false conflicts. The court is instructed to apply "the law of the state in which the

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*Id.* § 6.06, cmt. b, at 510.

181. *Id.* § 6.06(c), third sentence.

182. *See id.* § 6.06, cmt. b, quoted *supra* note 180.

183. *See Proceedings, supra* note 15, at 2-3.

184. Proposed Final Draft, *supra* note 1, § 6.02, cmt. a, at 444. *See* Peter J. Kalis et al., *The Choice-of-Law Dispute in Comprehensive Environmental Coverage Litigation: Has Help Arrived from the American Law Complex Litigation Project?*, 54 *La. L. Rev.* 925 (1994).

185. Proposed Final Draft, *supra* note 1, at xxxvii (Reporters' Memorandum, Feb. 19, 1993).

186. *See supra* text accompanying notes 121-124. After the preliminary step of determining whether the asserted state laws are "in material conflict," Proposed Final Draft, *supra* note 1, § 6.03(a), the court is instructed to consider the law of the place or places of contracting, performance, location of the subject matter of the contract, and the primary places of business or habitual residences of the plaintiffs and defendants. *Id.* § 6.03(b). If the court finds that only one of the above states is interested in having its law applied, the court is instructed to apply that law. *Id.* § 6.03(c).

common contracting party has its primary place of business."<sup>187</sup> The Reporter justifies this bold and almost unprecedented<sup>188</sup> rule by referring to the single-law objective underlying the entire Chapter 6 and to the distinct probability that the other three connecting factors employed by Section 6.03, the places of contracting, performance and location of the subject matter of the contract will be "distributed across many states."<sup>189</sup> The Reporter also addresses the potential rigidity of this rule, though not its manipulability, by restating that the determination of the primary place of business is left to the court—that it is to be made on a case-by-case, contract-to-contract basis through an evaluation focused on the particular activities that underlie the contracts in dispute, and "will not necessarily result in an automatic reference to corporate headquarters."<sup>190</sup>

However, the best assurance that this rule will not become a euphemism for applying the law favoring the common contracting party is the exception clause that accompanies the rule. The exception authorizes the court to not apply the law of the common contracting party if the court finds that this law "is in material conflict with the regulatory objectives of the state law in the place of performance *or* where the other contracting parties habitually reside."<sup>191</sup> Examples mentioned include consumer protective legislation in force at either or both the place of performance or the consumers' residence.

Thus, despite the appearance of some rigidity, Section 6.03 vests the court with considerable discretion in determining the law applicable to mass contracts.

187. *Id.* § 6.03(c).

188. The Reporter cites Article 4 of the EEC Convention on the Law Applicable to Contractual Obligations (1980) [hereinafter EEC Convention] as a precedent for such a rule. See Proposed Final Draft, *supra* note 1, § 6.03, Reporter's Note to cmt. a, at 465. Indeed, Article 4 calls for the application of the law of the country with which the contract is "most closely connected." EEC Convention, art. 4(1). This country is "presumed" to be one in which "the party who is to effect the performance which is characteristic of the contract has, at the time of the conclusion of the contract, his habitual residence, or, . . . its central administration . . . [or with regard to contracts] entered into in the course of that party's trade or profession, . . . the country in which the principal place of business is situated . . ." *Id.* art. 4(2). However, as the Reporter recognizes, the quoted language is a mere presumption rather than a rule. Furthermore, the presumption is explicitly made inapplicable to certain contracts, such as contracts for the carriage of goods (*id.* art. 4(4)), contracts involving immovables (*id.* art. 4(3)), *consumer contracts* (*id.* art. 5) (emphasis added), and employment contracts (*id.* art. 6) or to certain issues such as capacity (*id.* art. 11) and consent (*id.* art. 8). Furthermore, even when the presumption does apply, it will not always lead to the law of the primary place of business of the *common* contracting party. In that regard, the pertinent statutes of Hungary and the former East Germany would more likely lead to this result. See The Statutes of the Hungarian People's Republic, Law-Decree No. 13 of 1979 on Private International Law § 24 and Rechtsanwendungsgesetz [RAG] [Act concerning the law applicable to International, Private, Family and Labor Law relationships as well as to international contracts] § 12, 1975 Gesetzblatt der DDR, Teil I [GB1,I] 748 (G.D.R.), translated in Friedrich K. Juenger, *The Conflicts Statute of the German Democratic Republic: An Introduction and Translation*, 25 *Am. J. Comp. L.* 332, 354-63 (1977).

189. Proposed Final Draft, *supra* note 1, § 6.03, cmt. a, at 461.

190. *Id.*

191. *Id.* § 6.03(c) (emphasis added).

The court begins with a choice between the laws of the four contact states listed in Subsection (b) and may dispose of some contract conflicts at this stage if it determines that only one of those states has a policy that would be furthered by the application of its law. For the remaining conflicts, the court may apply the law of the common contracting party, unless the opposing parties demonstrate to the court's satisfaction that the application of that law would impair the "regulatory objectives" of either the state of performance or the state where the other contracting parties reside. In such a case, the court "shall apply those state laws to the contracts legitimately within their scope."<sup>192</sup> Thus, under the rule and its exception, it is conceivable that the law of the common contracting party may apply to some contracts, the law of the residence of the other parties to other contracts, and the law of the place of performance to other contracts.<sup>193</sup>

*b. Party Autonomy and its Limits*

*i. Preliminary Questions*

When the parties have chosen the applicable law, Section 6.02 defines the validity and limits of the parties' choice. Choice-of-law clauses are in principle recognized in all western legal systems and have become common practice in most multistate and international contracts.<sup>194</sup> The systems differ only on the question of how to decide the validity of such clauses and how to delineate the limits to party autonomy.

Section 6.02 provides that, in cases where the laws of more than one state are in material conflict, "the rights, liabilities, and defenses of the parties with respect to a contract claim shall be governed by the law designated by the parties in the contract . . ."<sup>195</sup> Although the comments do not address questions such as the scope, form, and timing of the parties' choice, most of these questions can be answered through inferences from the quoted text. For example, the word "designated" implies that the Proposed Final Draft recognizes only express choice-of-law clauses, as opposed to implied or, especially, imputed or hypothetical ones. The words "in the contract" may mean that the choice-of-law clause must be contained in the contract, rather than be derived from the conduct of the parties.

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192. *Id.*

193. A fourth possibility is the application of the law of the state of the location of the subject matter of the contract, with regard to a contract for which the court determines that only that state "has a policy that would be furthered by the application of its law." *Id.* § 6.03(c), first sentence. All these possibilities exist with regard to cases kept by the transferee court. Additional possibilities exist if the court exercises the power accorded by Section 6.03(d) of subdividing the actions "into subgroups of claims, issues, or parties" and either keeping all of them or remanding some of them to the transferor courts.

194. For recent American interstate practice, see Kozyris & Symeonides, *supra* note 63, at 618-21; Symeon C. Symeonides, *Choice of Law in the American Courts in 1988*, 37 *Am. J. Comp. L.* 457, 478-80 (1989).

195. Proposed Final Draft, *supra* note 1, § 6.02(a).



The words "a contract claim" suggests that the scope of a choice-of-law clause is confined to contract claims and does not, for example, extend to tort claims.

*ii. Existence and Validity of the Choice-of-Law Clause*

Which law determines the existence and validity of the choice-of-law clause is a preliminary question confronted by all codifiers. The three options are: the law chosen by the parties;<sup>196</sup> the law that would apply in the absence of choice of law by the parties;<sup>197</sup> and, for some issues, the law of the forum *qua* forum.<sup>198</sup> Since the last choice is unavailable to transferee federal courts under the Project, its drafters had to choose between the first two options. Referring these questions to the chosen law would create some obvious problems of "bootstrapping" if, for example, the chosen law gives the parties powers not granted them by the otherwise applicable law. Referring these question to the otherwise applicable law avoids these problems but undercuts much of the efficiency and convenience that make choice-of-law clauses attractive to courts and litigants.

Section 6.02 strikes a middle, or perhaps mid-right, course by expressly assigning certain "serious" questions of the clause's validity to the otherwise applicable law and impliedly relegating the rest to the chosen law. Paragraph (1) of Subsection (a) of Section 6.02 authorizes the court not to apply the chosen law, if the court finds that the choice-of-law clause is invalid "for reasons of misrepresentation, duress, undue influence or mistake, as defined under the state law that otherwise would be applicable under § 6.03 . . . ."<sup>199</sup> On the other hand, by clear implication, other questions of validity of the choice-of-law clause, such as questions of incapacity or lack of proper form, and all questions pertaining to the existence of the clause (i.e., offer and acceptance, meeting of the minds, etc.) are relegated to the chosen law.<sup>200</sup> The "bootstrapping" problems resulting from such relegation can be controlled through Paragraph (2) of the same subsection which defines the limits to party autonomy.

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196. See, e.g., Swiss Federal Statute on Private International Law of December 18, 1987, art. 116(2), translated by Jean-Claude Cornu et al., in Symeon C. Symeonides, *Swiss Federal Statute on Private International Law*, 37 Am. J. Comp. L. 187, 193-246 (1989) which provides in part that "the choice of law is governed by the chosen law."

197. See, e.g., La Civ. Code arts. 3537-3540 and Reporter's comments thereunder; EEC Convention, *supra* note 188, art. 3(4).

198. See, e.g., Project for the Codification of Puerto Rican Private International Law, arts. 34-35, *supra* note 135, and Reporter's comments thereunder. These articles provide that, in contracts other than consumer, employment, or insurance contracts, the law chosen by the parties is to be applied unless its application exceeds the limits imposed on party autonomy by *both* the law of the forum and the otherwise applicable law.

199. Proposed Final Draft, *supra* note 1, § 6.02(a)(1). During the final discussion of the draft, the Reporter agreed to consider whether "unconscionability" should be added to the list of grounds for invalidating a choice-of-law clause. See Proceedings, *supra* note 15, at 60-61. This factor was included in earlier drafts.

200. This implication is confirmed by the Reporter's Notes. See Proposed Final Draft, *supra* note 1, § 6.02, Reporter's Note 8 to cmt. b, at 452.

### iii. Limits to Party Autonomy

The limits of party autonomy are also defined by reference to the otherwise applicable law and are deliberately set at a rather high threshold. Section 6.02(a)(2) provides that the law chosen by the parties shall not apply if it is found to be "in material conflict with the *fundamental* regulatory objectives of the state law that otherwise would be applicable under § 6.03."<sup>201</sup> This language, especially the word "fundamental," parallels the corresponding language of Section 187(2)(b) of the Restatement Second and is intended to have the same general meaning,<sup>202</sup> despite the fact that, unlike Section 6.02, the Restatement seems to pose a double hurdle before invalidating a choice-of-law clause. The two hurdles are, first, a showing that the chosen law is "contrary to a fundamental policy"<sup>203</sup> of the state of the otherwise applicable law, and, second, a showing that the former state has a "materially greater interest than the chosen state in the determination of the particular issue."<sup>204</sup> However, it is questionable whether this difference in verbiage will produce a difference in results. Indeed, perhaps because the Project's scope is confined to mass contracts, the Proposed Final Draft seems to adopt a more deferential position towards party autonomy than the Restatement. For example, under the Restatement, a choice-of-law clause may be disregarded, even when it does not contravene the fundamental policy of the otherwise applicable law, if the chosen state "has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice . . . ."<sup>205</sup> The Project imposes no such limitation.

## 9. Statutes of Limitations

### a. The Choices

Under current practice,<sup>206</sup> a state court confronted with a limitations conflict can choose from among three distinct approaches: (1) the traditional common-law approach, also adopted by the original Restatement, which characterizes limitations questions as procedural and assigns them to the

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201. *Id.* § 6.02(a)(2) (emphasis added).

202. *See id.* § 6.02, cmt. b, at 450.

203. Restatement (Second) of Conflict of Laws § 187(2)(b) (1971).

204. *Id.*

205. *Id.* § 187(2)(a). This provision applies only with regard to issues "which the parties could not have resolved by an explicit provision." *Id.* § 187(2). Regarding issues that are within the contractual power of the parties, the Restatement imposes no limitations whatsoever. The Proposed Final Draft does not make such a differentiation.

206. For recent discussions of past and present American practice, see Eugene Scoles & Peter Hay, *Conflict of Laws* 58-67 (2d ed. 1992); Russell J. Weintraub, *Commentary on the Conflict of Laws* 56-66 (3d ed. 1986); Margaret R. Grossman, *Statutes of Limitations and the Conflict of Laws: Modern Analysis*, 1980 *Ariz. St. L.J.* 1; Kozyris & Symeonides, *supra* note 63, at 630-36; Symeonides, *supra* note 194, at 474-78 (1989); Weinberg, *supra* note 141.

exclusive domain of the law of the forum;<sup>207</sup> (2) the approach of the 1982 Uniform Conflict of Laws—Limitations Act,<sup>208</sup> which characterizes limitations as substantive and, subject to some exceptions, refers them to the same law as the one that governs the merits of the action;<sup>209</sup> or (3) the modern or direct approach, adopted by a minority of recent cases, which rejects both *a priori* characterizations and calls for an independent analysis of the limitations issue.<sup>210</sup> Several combinations are also possible. For example, Section 142 of the Restatement Second as revised in 1988<sup>211</sup> and Article 8 of the Puerto Rican Draft Code<sup>212</sup> follow a combination of the third and first approaches, while Article 3549 of the Louisiana Civil Code follows a combination of the second and first approaches.<sup>213</sup> On the other hand, under *Klaxon* and *Guaranty*,<sup>214</sup> a federal court sitting in diversity does not have any of the above choices but is rather bound to follow the approach adopted by the courts of the forum state. In transfer cases, that choice is also binding on the transferee court under *Ferens*.<sup>215</sup>

The first dilemma of the Proposed Final Draft's drafters was whether to maintain the status quo by binding the transferee court to the limitations

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207. See, e.g., Restatement of Conflict of Laws §§ 585, 603 (1934). For statutory and judicial exceptions see Symeon C. Symeonides, *Louisiana Conflicts Law: Two "Surprises,"* 54 La. L. Rev. 497, 532 (1994) and authorities cited therein.

208. See Uniform Conflict of Laws—Limitations Act, 12 U.L.A. 63 (1982). This Act has been adopted by Arkansas, Colorado, Montana, North Dakota, Oregon, and Washington. For an authoritative discussion, see Robert A. Leflar, *The New Conflicts-Limitations Act*, 35 Mercer L. Rev. 461 (1984).

209. Uniform Conflict of Laws—Limitations Act section 2, 12 U.L.A. 63 (1982), authorizes the application of the limitations law of the state on whose law is "substantively based." However, if that law "is substantially different from the limitation period of [the forum] state and has not afforded a fair opportunity to sue upon, or imposes an unfair burden in defending against the claim," Section 4 authorizes the application of the limitations law of the forum state. *Id.* § 4, at 64. Although not directly influenced by the civil law, the new Act accidentally reflects the civilian approach which considers prescription as merely a mode of extinguishing the obligation and subjects it to the same law as the one applicable to the merits of the obligation or action. See Symeonides, *supra* note 207, at n.157.

210. See *Heavner v. Uniroyal, Inc.*, 305 A.2d 412 (N.J. 1973). See also *Nelson v. International Paint Co.*, 716 F.2d 640 (9th Cir. 1983); *Tomlin v. Boeing Co.*, 650 F.2d 1065 (9th Cir. 1981); *Schum v. Bailey*, 578 F.2d 493 (3d Cir. 1978); *Air Prods. & Chems., Inc. v. Fairbanks Morse, Inc.*, 206 N.W.2d 414 (Wis. 1973).

211. New § 142 of the Restatement (Second) of Conflict of Laws (1988) instructs the court to select the law applicable to limitations through the flexible and nuanced formula provided by Section 6 of the Restatement. This formula is detached from any *a priori* preference for either the *lex fori* or the *lex causae*. However, this formula is implemented through presumptive rules that are based on the *lex fori* as the basic rule. For discussion, see Symeonides, *supra* note 207, at 536; Weinberg, *supra* note 141, at 705-710.

212. See Symeon C. Symeonides, *Revising Puerto Rico's Conflicts Law: A Preview*, 28 Colum. J. Transnat'l L. 413, 433-47 (1990).

213. Louisiana Civil Code article 3549 is discussed in Symeonides, *supra* note 207, at 539-49.

214. *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S. Ct. 1464 (1945).

215. *Ferens v. John Deere Co.*, 494 U.S. 516, 110 S. Ct. 1274 (1990).

approach followed by the state of the transferor court or to liberate the transferee court by providing an independent approach. In Tentative Draft Number 3, the drafters proposed to maintain the status quo. Section 6.04 of that Draft instructed the transferee court to "apply the limitations law that would be applied by the court in which the claim was filed."<sup>216</sup> During the November 1992 meeting of the Consultative Group it was decided that the transferee court should be freed from the shackles of the transferor court and be allowed to choose independently the applicable limitations law by employing either the second or the third approach described above. The Consultative Group recognized that although conceptually appealing, this solution might be politically unwise; it could deprive plaintiffs of the advantage currently enjoyed under *Klaxon-Ferens* of shopping for the most favorable limitations law. A compromise was therefore thought necessary. Section 6.04 of the Proposed Final Draft reflects that compromise.

*b. The Rule*

Section 6.04 adopts the substantive law approach to limitations conflicts by authorizing the application of the limitations law of the state whose law is applicable to the merits of the tort or contract action under Sections 6.01-6.03 of the Proposed Final Draft. This rule is entirely consistent with the Project's single-law objective and its general disfavor of *dépeçage*. Also, there is something inherently attractive, at least from a conceptual perspective, to the idea, which has always been followed in civil law systems, that the law that determines whether an obligation has come into existence should also determine how long such an obligation will live.

In practice, however, the inexorable application of that law to both issues may lead to undesirable results in cases in which the law that governs the obligation is chosen on the basis of grounds that do not allow consideration of the special policies underlying the conflicting limitations laws. For example, Section 6.01(c)(4) requires the application of the law of the place of conduct to the liability issue without regard to any factors affiliated with the plaintiff. The Reporter recognizes that in such a case, the law of the plaintiff's state may have a better claim to apply its limitations law, at least with regard to issues such as the discovery rule or other tollings of the statute of limitations.<sup>217</sup> To enable the court to address such potential problems, the Reporter points out two helpful mechanisms: (1) the savings clause of Section 6.04 which allows the court to remand to the transferor court claims that were timely there but untimely under the law applicable through Section 6.04; and (2) Section 6.01(e) which allows the transferee court to "divide the actions into subgroups of claims, issues or

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216. Tentative Draft No. 3, *supra* note 157, § 6.04.

217. See Proposed Final Draft, *supra* note 1, § 6.04, cmt. b, at 485.

parties . . . and allow more than one state's law to be applied."<sup>218</sup> In that event, says the Reporter, "the transferee court appropriately may decide that limitations questions should be separated from liability and be governed by the law of the plaintiffs' domiciles."<sup>219</sup> In reaching this decision, the court will not be directly bound by any of the rules of either Section 6.01 or Section 6.04. Instead the court should conduct an independent analysis of the limitations issue, an analysis that would not be different from the one prescribed by Section 142 of the Restatement Second.

*c. The Savings Clause*

The rule of Section 6.04 is accompanied by an exception or savings clause that authorizes the transferee court to remand to the transferor court "any claim that was timely where filed" but is barred by the limitations law selected through the rule of Section 6.04.<sup>220</sup> The combined effect of the rule and the exception is that the plaintiff cannot lose on the issue of limitations. If her action is timely under the law applicable through the rule, the action will be allowed to go forward. If the action is not timely under that law, then the action will be remanded to the transferor court. However, as the Reporter explains, there are some very good reasons for this result, not the least of which is the need to avoid unfair surprise to plaintiffs who may be drawn into the consolidated proceeding in a remote forum against their wishes or contrary to their expectations.<sup>221</sup> Insofar as defendants, as a class, can expect more benefits—some of them deserved and others unintentional—from the application of the Proposed Final Draft than plaintiffs, this concession to plaintiffs may provide a certain degree of balance and even-handedness. Even with this concession, however, plaintiffs will enjoy fewer advantages than under present law, which allows plaintiffs both the advantage of the favorable limitations law of the transferor court and the convenience of litigating in a transferee forum closer to home.<sup>222</sup>

### III. IN LIEU OF CONCLUSIONS

In 1991, while she was embarking on this arduous Project, Dean Mary Kay Kane, the Reporter for Chapter 6, said the following to a conference of teachers of conflicts and civil procedure:

[I]dentifying and analyzing the issues in controversy and the debate that centers on those issues may be of more lasting importance than any

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218. *Id.* § 6.01(e).

219. *Id.* § 6.04, cmt. b, at 485.

220. *Id.* § 6.04.

221. *See id.* § 6.04, cmt. a, at 473.

222. *See Van Dusen v. Barrack*, 376 U.S. 612, 84 S. Ct. 805 (1964); *Ferens v. John Deere Co.*, 494 U.S. 516, 110 S. Ct. 1274 (1990).

particular solution; no choice of law solution will accommodate everyone's concerns. Only if we are able to organize the core issues that need to be addressed in any choice of law proposal will there be the possibility of slowly working toward a consensus on these matters . . . .<sup>223</sup>

As the contributions to this Symposium demonstrate, the now-completed Proposed Final Draft does not accommodate everyone's concerns. Indeed, it would be suspect if it did. However, the Project as a whole has done more than promote an understanding of the issues addressed by it; it has dared to shake the stagnant waters with thoughtful, bold, and imaginative proposals that are bound to generate a lively debate. Consensus may be late in coming, but at least the debate will now be focused and is more likely to be productive. Congress would do well to give this Project a most serious consideration. Regardless of whether it is adopted by Congress, in whole or in part, the Project is bound to have a lasting and clearly beneficial influence on the handling of multistate complex litigation.

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223. Kane, *Drafting Choice of Law Rules*, *supra* note 12, at 311.