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By Elizabeth J. Cabraser*

INTRODUCTION: THE PROBLEM

Mass-produced consumer goods and standardized financial services are marketed on a uniform basis to consumers across the country. Only rarely will the qualities or characteristics of these products differ significantly depending upon the state or region in which they are sold. The era of the localized manufacturer-seller-buyer relationship is long gone. The face-to-face transaction is no longer the norm in our society or in our economy, but the law persists in treating it as current reality. Jurisprudentially, we cling to the legal fictions, which have been demonstrably false during the whole of our own lifetimes, that bargaining occurs between individual merchants and customers, that goods are custom-made, that any of us know the identity of the makers of the products we use, or that we can effectively hold them to

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account based upon personal acquaintance, or local reputation.[1] We live, instead, in a faceless world of standardized products, mass marketing, and advertising pitched to the broadest common denominator.

Accordingly, if something goes wrong with a product sold to millions, when a mass-marketed prescription drug proves dangerous,[2] or when the purveyors of financial services, such as credit cards or mortgages, devise schemes to nickel-and-dime their customers, the consequences, to the individuals themselves (in the case of drug-caused personal injury or death), or in the aggregate (as the nickels and dimes of millions of cheated customers add up into millions or billions of dollars) registers at the societal level. The vindication of these transgressions becomes a matter of overarching social and economic importance. Certainly, the average citizen persists in believing that the law is, or at least aspires to be, effective at rectifying these breaches of the social contract. But courts have retreated from the effective enforcement of our laws by denying class certification to such claims in cases where significant common questions of law and fact exist, and no superior alternative adjudication methods are available.[3]

Often, the justification for rejection of the class mechanism is the court's refusal to conduct a complete conflicts of law analysis that: 1)begins with an inquiry into whether claimed variations among state laws rise to the level of true conflicts; 2)proceeds, in the event of such conflict, to compare the relative interests and

1. Indeed, at their inception, internet-based flea markets, auctions, and marketplaces such as ebay.com and craigslist were paradoxical reactions to, and revolts against, the anonymity of everyday commerce.

2. The emerging phenomenon of prescription drug mass marketing was recently described as follows: "To do business, the pharmaceutical company must convince prescribers to write prescriptions for its newly-patented drugs. To this end, the pharmaceutical industry uses an array of marketing devices, the most obvious being direct to consumer marketing, reflected in ubiquitous advertisements." IMS Health Corp. v. Rowe, 532 F. Supp. 2d 153, 159 (D. Me. 2007). The face-to-face aspect of prescription drug marketing survives in the form of "detailing," the deployment of "a small army" of drug company representatives (an estimated one detailer for every four or five U.S. physicians) who visit physicians. "The detailers regularly visit prescribers at their clinics and medical offices to persuade them to prescribe their products." Standardized sales materials and pitches, and free samples and gifts, are used. *Id.*

3. *See* FED. R. CIV. P. 23(b)(3).

contacts of the applicable jurisdictions as these pertain to the issues and claims raised by the case; and 3)culminates in a choice among the potentially applicable laws. In its stead, a number of courts have recently short-circuited such analysis, substituting a conclusory statement that all of the states in which the plaintiffs reside have an interest in seeing their own law applied, and that application of all such laws to the controversy in turn renders the class procedure unmanageable. Failure to choose the governing law bars access and thwarts the prospect of justice in claims that through sheer number and/or small individual value, cannot or should not be prosecuted on a piecemeal basis.

Unfortunately, many courts have thus regressed, rather than advanced, in their willingness to address the mass wrongs that define the dark side of our economy through the fairest, most efficient, and most cost-effective procedure available: the modern class action. The excuse for rejecting this well-established procedural mechanism is frequently that, because the claims of wronged consumers are state law-based, and because these laws vary in some particulars from state-to-state, it would be unfair not only to defendants, but to the consumers themselves, to allow them to band together in a single class for the unitary adjudication of their claims. Instead, the perfection of the purported due process right of each consumer to assert her claims under her home state's laws has been exploited to foreclose access of these same consumers to any feasible legal proceeding. The juggernaut of perfect home-state specificity has been deployed as the nemesis of the good of class adjudication under a single state's law.

There is no reason to require, or to allow, such a denial of access in the guise of due process. Over 20years ago, in *Phillips Petroleum Co.v. Shutts*,[4] the United States Supreme Court upheld the power of any single court to assert jurisdiction over, and adjudicate the claims of a nationwide class of plaintiffs, so long as certain hallmarks of due process are observed.[5] The *Shutts* court

4. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985) (hereinafter "*Shutts*").

5. The Supreme Court's landmark ruling in *Shutts* confirmed the authority of state courts to exercise jurisdiction over class actions and certify classes of nationwide scope. This preclusive adjudicatory power over multistate class claims was explicitly conditioned on the fulfillment of the

articulated reliable ground rules for the choice-of-law analysis that courts must conduct in the event of an actual conflict of law, before they apply the forum state's law (or any other's) to the claims of the entire class: the presence of "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[6] Choice of law decisions that follow such analyses are immune to constitutional challenge, and comport with due process.

VARIATIONS VERSUS TRUE CONFLICTS

The "variations" in state laws that often trigger judicial discomfort frequently do not rise to the level of "true conflicts" at the *Shutts* level; that is, they would not affect the disposition of claims based upon identical facts. Such variations do not require, as a matter of due process, either a departure from the forum law, or an application of all laws. In other words, "variations" do not disable a single-state law choice.[7] If deference to differences in state laws is nonetheless considered desirable, the Federal Rules of Civil Procedure provide a mechanism, Rule23(c)(5), under which subclasses can be formed, corresponding to variations in state laws where these could have a genuine impact on the outcome at trial.[8]

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basic due process requirements. The *Shutts* decision enacted the due process pillars of effective notice to and adequate representation of the class; the opportunity of class members to be heard; and at least with respect to claims for monetary damages certified under 23(b)(3) of the Federal Rules of Civil Procedure or its state analogs the ability of individuals to exclude themselves from class membership by exercising an "opt out" right. *Id.* at 811-12. The traditional corporate governance principles of "exit, voice, and loyalty" were thus secured for the protection of unnamed class members. *See* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation,* 100 COLUM. L. REV. 370, 377 (2000).

6. *Shutts*, 472 U.S. at 818.

7. *Id.* at 818 (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)); *see also* Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U.L. REV. 547 (1996).

8. Asserted differences in the laws of all states with respect to these claims may readily be managed with jury instructions and special verdict forms. Similarly, with respect to existing differences among the states' laws for consumer fraud and punitive damage claims, those few states which

It is a truism that there are variations in the laws of the several states. Such variations may relate to the specifics of remedies; the semantics in which the elements of a claim are expressed; or the level of proof that is required (*e.g.*, preponderance of the evidence vs. clear and convincing evidence) to prove a specific claim or issue. However, the essential elements of breach of contract, fraud, and negligence are (un)remarkably uniform across the nation.[9] We are, with few exceptions, a nation with a shared common law heritage. The basics of the law, as articulated by Blackstone and other commentators, were spread across the country as the law proceeded westward. The states have borrowed from each other, and Twentieth Century phenomena such as the American Law Institute's Restatements of the Law have both documented and reinforced such reciprocity, culminating in a high degree of uniformity. The concept of "failure to warn" is of constant significance in product liability mass tort litigation, as the states have adopted and described it at various times, in various terms. Yet the law in the area of "failure to warn" is essentially the same in all American jurisdictions.

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would not recognize plaintiffs' claims in a given case may be carved out through the special verdict form. Furthermore, should the need arise, subclasses can be created to account for variances pursuant to Rule 23(c)(4). *See, e.g., In re* Asbestos School Litig., 104 F.R.D. 422, 434 (E.D. Pa. 1984), *aff'd, In re* School Asbestos Litig., 789 F.2d 995 (3d Cir. 1986), *cert. denied*, 479 U.S. 852 (1986).

9. *See* Klay v. Humana, Inc., 382 F.3d 1241, 1263 (11th Cir. 2004), *cert. denied sub nom.* United Health Group, Inc. v. Klay, 543 U.S. 1081 (2005):

> The application of various state laws would not be a bar where, as here, the general policies underlying common law rules of contract interpretation tend to be uniform ... A breach is a breach is a breach, whether you are on the sunny shores of California or enjoying a sweet afternoon breeze in New Jersey.
>
> *Klay*, 382 F.3d at 1263.

Moreover, while the plaintiffs' breach of contract claims necessarily implicate the contract law of all fifty states (since members of the putative [physician] class practice in every jurisdiction in the country), the defendants fail to argue on appeal that there are any relevant differences in the applicable laws among these jurisdictions. *Id.*

The breach of contract claim in *Klay* failed to obtain class treatment because in that case "while this relatively simple issue of law is common to all the breach of contract claims, it is far outweighed by the individualized issues of fact pertinent to these claims." *Id.* Unlike their patients, doctors (at least in the view of the *Klay* court) still retain the power to bargain individually with health care providers.

Indeed, extraordinary similarities in this are highlighted by powerful overlaps among the predicate liability requirements common to the negligence, warranty and strict liability failure to warn claims commonly asserted in pharmaceutical and medical device mass torts:

> Warning claims . . . tend to be treated the same way by the courts, regardless of the underlying cause of action. Thus, with regard to different theories of recovery, and particularly strict liability and negligence, judges have opined that there is "no practical difference," "no doctrinal distinction;" no "rigid distinctions," a "strong resemblance" between the different products liability theories, or that any distinction is "illusory." Other courts have held that regardless of the underlying theory, warning claims are "equivalent," "indistinguishable," "virtually inextricable," "identical," "essentially the same," and are generally measured by the same standards.[10]

As Judge Spiegel concluded in the *Telectronics* medical device litigation: "[A]ll states use the same elements to define a cause of action in negligence."[11] Likewise, Judge Brimmer concluded after considering the same question in the *Copley* pharmaceutical litigation: "the standard for ordinary negligence does not significantly differ throughout the country, and the differences that do exist can be remedied through careful instructions to the jury."[12]

Whether the "variations" in the states' articulation of legal doctrines such as negligence are substantial, or whether more subtle "nuances" are meaningful in a specific case, is a matter of ongoing debate.[13] What is equally clear is that, at the level of due

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10. Louis R. Frumer & Melvin I. Friedman, 2 *Products Liability*, at 12-29 (1998).

11. *In re* Telectronics Pacing Systems, Inc., 172 F.R.D. 271, 291 (S.D. Ohio 1997).

12. *In re* Copley Pharmaceuticals, Inc., 158 F.R.D. 485, 491 (D. Wyo. 1994).

13. Compare the Eleventh Circuit's conclusion in *Klay*, based on "genius, general knowledge, and previous information," that as to the relevant elements of the legal claim of breach of contract, "[a] breach is a breach is a breach," 382 F.3d at 1263, with the Seventh Circuit's decision in *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995), reversing class certification on a novel negligence theory because, while the laws relevant to the claim arguably "differ among the states only in nuance ... [n]uance can be important, and its significance is suggested by a comparison of differing state

process, the choice of the forum state's law over another is proper, as long as the variations that are actually relevant to the issues in the case are not outcome-dispositive.[14] A comparative interest/contacts analysis, as between the forum state and the other states implicated, need occur only in the event of a "true conflict."[15] Otherwise, the forum law may be deployed without transgressing due process.[16] In the case of a true conflict, a choice must be made; however, regardless of who is disappointed, the choice itself will not violate either side's due process rights so long as it meets the constitutional choice of law criteria set forth in *Shutts*, as recently reaffirmed by *Franchise Tax Board of*

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pattern [jury] instructions on negligence and differing judicial formulations of the meaning of negligence and the subordinate concepts. The voices of the quasi-sovereigns that are the states of the United States sing negligence with a different pitch." *Id.* at 1301.

14. *See, e.g.,* Hanlon v. Chrysler Corp., 150 F.3d 1011, 1021 (9th Cir. 1998) (affirming the settlement of a nationwide consumer class action of consumers who sought the replacement of defective door latches on a variety of Chrysler minivans):

> [T]here is no structural conflict of interest based on variations in state law, ... and the differences in state remedies are not sufficiently substantial so as warrant the creation of subclasses. Representatives of other potential subclasses are included among the named representatives, including owners of every minivan model. However, even if the named representatives did not include a broad cross-section of claimants, the prospects for irreparable conflict of interest are minimal in this case because of the relatively small differences in damages and potential remedies.

Id. The *Hanlon* class claims were brought under state law warranty and consumer fraud theories. *Id.* at 1018.

15. If, and only if, a material or direct conflict on an outcome-dispositive issue is identified, must the relative significance of the relationships of various states to the claims at issue be analyzed, to assure that the choice among their laws is "neither arbitrary nor fundamentally unfair" only unless variations rise to the level of a "true conflict" – a difference that will decide the outcome. *See In re* Air Crash Disaster Near Chicago, 644 F.2d 594, 616 (7th Cir. 1981). At least one court has recently recollected a central lesson of *Shutts*: "A choice of law analysis is unnecessary where there is no actual conflict because 'there can be no injury' in applying a particular state's law absent a true conflict." French v. Eventually Yours Indus., 2008 U.S. Dist. LEXIS 54550 at *18 (class certification granted) (*citing Shutts*, 472 U.S. at 816).

Without a true (*e.g.*, dispositive) conflict of laws present, there is "no need for extended constitutional discussion." *Shutts*, 472 U.S. at 844 (citing Russell J. Weintraub, *Who's Afraid of Constitutional Limitations on Choice of Law*, 10 HOFSTRA L. REV. 17, 18-24 (1981)).

16. *Shutts*, 472 U.S. at 817-22.

California v. Hyatt.[17]

As with other good things, too much due process has proved to be bad for the very class members whose procedural rights the courts have undertaken to protect. For example, the Supreme Court's 1997 *Amchem* decision[18] was both a high- and low-water mark of due process protection for class members. *Amchem*, echoing *Shutts*, reaffirmed the "core" policy of the class action: to secure access to justice by enabling aggregation of small damage claims "into something worth someone's (usually an attorney's) labor.[19] *Amchem* also confirmed that the key to class certification of damages claims, satisfaction of the "predominance" requirement of Rule23(b)(3),[20] "is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws."[21] So far, so good. However, while acknowledging that "[E]ven mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement,"[22] the *Amchem* majority proceeded to affirm the rejection of a nationwide class settlement of asbestos injury and

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17. In *Franchise Tax Board v. Hyatt*, a unanimous Court upheld as constitutionally permissible the Nevada state court's determination to subject a California tax-collection agency to suit by a tax protestor (and former California resident) in Nevada, notwithstanding the immunity that the agency would have enjoyed under California law. 538 U.S. 488, 499 (2003). The Court noted that Nevada was not constitutionally required to apply California's immunity statute in the face of its own conflicting public policy with regard to immunity for its own counterpart agencies. *Id.* The *Hyatt* decision reaffirmed that courts that conduct a faithful *Shutts* choice-of-law analysis will be protected from constitutional "second-guessing" by the federal appellate system; that the Supreme Court itself will respect their choices of substantive law; and that the judgments implementing these choices will stand.

18. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

19. *Id.* at 617 (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (1997)); *see also Shutts*, 472 U.S. at 813 ("The plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually, nor would he affirmatively request inclusion in the class if such a request were required by the Constitution").

20. FED. R. CIV. P. 23(b)(3) requires that issues of law or fact common to all class members predominate over any questions involving only individual members. Rule 23 does not otherwise define, describe, or quantify the level or degree of commonality that constitutes "predominance". Predominance may thus be said to reside in the (presumably unjaundiced and farsighted) eye of the judicial beholder.

21. *Amchem*, 521 U.S. at 625.

22. *Id.*

death claims that would have distributed billions of dollars to claimants without the requirement of costly or protracted litigation, in part because of factual and legal differences among the dispersed class of victims. These differences, however, may have been manageable in the trial context, via subclassing, and need not have prevented the settlement of their claims.[23]

The *Amchem* majority, in applying the predominance factors, expressly distinguished between small claims, for which certification remains (as a matter of both practicability and due process) essential, and the presumably "high" individual damages claims in which certification has been traditionally disfavored, due to the supposedly "significant interest in individually controlling the prevailing claims", and "substantial stake in making individual decisions on whether and where to settle."[24] In protecting these autonomy interests, the *Amchem* majority elected to foreclose the opportunity of these same plaintiffs to participate in a valuable settlement. Having been rejected at the highest level, the settlement evaporated, and the class members whose rights to choose and control their litigation destinies the *Amchem* decision championed largely ended up as involuntary creditors in interminable asbestos manufacturer bankruptcies. The *Amchem* court destroyed the settlement in order to save it, and the perfect once again defeated the good.

The sincerity of the *Amchem* majority in protecting the idealized due process rights of class members cannot be questioned, but what that distinguished coalition may not have understood is that the bright line distinction it drew between "high" value and "paltry" claims has become meaningless in many mass torts, given the daunting cost of the experts necessary to mount any successful individual trial. Litigants with all but the most valuable claims are being priced out of individual adjudication. An injury claim with expected damages in the $75,000-$1million dollar range (if successful at trial and on appeal) meets the threshold for federal diversity jurisdiction in individual cases, and courts traditionally think of such claims as too valuable to require class treatment or other aggregation. Yet such cases cannot, these days, be presented cost-effectively,

23. *See id.* at 623.
24. *Id.* at 616-17.

because the exercise of expert witnesses, jury consultants, trial presentation aids, and pretrial discovery may easily exceed the highest reasonably likely verdict. Nor do such claims become feasible by factoring in punitive damages: the Supreme Court has mandated *de novo* appeals of punitive damages verdicts, and have drastically scaled back the size of punitive damages awards.[25] Even a wrongful death claim may be a "negative value" suit, which by definition costs more to win than the reasonably expected recovery, due to expert costs and the attrition tactics which courts have increasingly tolerated, in contravention of the administration of Federal Rule of Civil Procedure 1.[26] Even "high" value claims thus need the economies of scale of classwide adjudication, for example, through the class wide trial of common issues of law or fact under Rule23(c)(4).

A stark example is found in tobacco litigation, which has seen few individual trials and even fewer smokers' judgments.[27] Smokers' death claims were demonstrably and notoriously rendered cost ineffective by the tobacco industry's admitted attrition tactics, including stonewalling discovery.[28] As one

25. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 530 U.S. 408 (2003); Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001).

26. FED. R. CIV. P. 1 provides that the Federal Rules, which include the class action provisions of Rule 23, "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."

27. The few smokers' claims that have resulted in plaintiffs' verdicts have found themselves captive to repetitive appeal of punitive damages awards, as defendants, using the Supreme Court's very recently developed punitive damages limitation criteria, seek *de novo* review to reduce punitive damages below the threshold of feasibility. See, e.g., the odyssey of *Williams v. Philip Morris Inc.*, which originally resulted in a $79.5 million punitive award to the widow of a heavy cigarette smoker, and has long been mired in appeals to the Oregon Court of Appeal, the Oregon Supreme Court (which upheld the verdict), and the United States Supreme Court (which vacated it). On remand, the Oregon Supreme court again upheld the original verdict, and this term the U.S. Supreme Court again granted certiorari). *See* Philip Morris USA, Inc. v. Williams, 549 U.S. 346 (2007); Williams v. Philip Morris USA, Inc., 176 P.3d 1255 (Ore. 2008); Philip Morris USA, Inc. v. Williams, 128 S. Ct. 2904 (Or. 2008).

28. *See, e.g.*, Haines v. Liggett Group, Inc., 814 F. Supp. 414, 421 (D. N.J. 1993) ([T]he tobacco industry has taken the position that its members will never settle a lawsuit which invokes claims that tobacco has caused injuries to an individual. . . . the ability to outspend and over-litigate is . . . used to persuade those attorneys and their clients who were 'foolish' enough to file suit to voluntarily dismiss their claims.").

tobacco company's general counsel was quoted, "To paraphrase General Patton, the way we won these cases was not by spending all of [our] money, but by making that other son of a bitch spend his."[29] Although it ultimately paid millions to settle state governments' economic claims, the tobacco industry has never voluntarily paid for the release of individual smokers' claims. It is not irrational to suspect that other mass tort and consumer litigation defendants will be tempted by this long-successful example to emulate such attention tactics.

Only after the Florida Supreme Court, in *Engle v. Liggett Group, Inc.*,[30] granted, to the members of a decertified statewide smokers' class, the *res judicata* benefit of the product defect and liability findings made by the class trial jury (thereby requiring individuals to prove only medical causation in their own cases and nullifying the law of attrition) did individual tobacco death and injury suits become economically feasible in Florida. Over 7,000 are now pending, managed jointly by the federal and state courts, where fewer than 100 existed before. The trial time necessary for each case has been reduced from weeks or months to hours or days.

The *Engle* court, using a process it analogized to Federal Rule23(c)(4)'s "issues" certification procedure,[31] recognized the judicial economy interest in avoiding the prohibitively costly relitigation, via identical witnesses and documents, of the tobacco defendants' product, knowledge, conduct, and duty regarding smoking and disease. The *Engle PhaseI* trial special verdict form was held binding upon defendants in all class members' subsequent actions. While choice of law was not a distracting issue in *Engle* (the class was limited to Florida residents), *Engle* marks a rare judicial recognition of the economic reality, in the mass tort context, that limited judicial resources and high litigation costs have obliterated the theoretical autonomy that mass tort victims would otherwise enjoy in the absence of aggregation, and that unitary treatment of common questions is as essential to justice in the tort context as it is in "small" claim consumer litigation. Such a recognition is equally crucial to the

29. *Id.*
30. 945 So. 2d 1246 (Fla. 2006).
31. *Id.* at 1268-69.

judicial will to conduct a rigorous choice of law in the class-enabling manner approved in *Shutts* analyses, rather than default to an "all states" approach that all too often rejects aggregation as "unmanageable."

WHY ARE THE MEMBERS OF PROPOSED NATIONWIDE CLASSES REPEATEDLY DENIED DUE PROCESS AT THE CHOICE OF LAW STAGE?

While it is beyond peradventure after *Shutts* that a court may, in complete conformity with constitutional requirements, select a single state's law to govern the claims of a nationwide class, far more often than not courts considering class certification decline to do so.[32] Such decisions endorse and apply the syllogism that variations among the laws of states with any interest in the dispute foreclose a choice of law, and that proceeding under multiple laws instead is unmanageable.[33] That any effective

32. *See, e.g., In re* Paxil Litig., 218 F.R.D. 242, 250 (C.D. Cal. 2003); *In re* Baycol Prods. Litig., 218 F.R.D. 197, 209 (D. Minn. 2003); *In re* Propulsid Prods. Liab. Litig., 208 F.R.D. 133, 147 (E.D. La. 2002) (all denying class treatment under the superiority requirement of Fed. R. Civ. P. 23(b)(3) and holding variations in state laws render a nationwide class unmanageable without considering whether there were true or actual conflicts among the relevant provisions of such laws that precluded forum law application, and then by eschewing a true *Shutts* constitutionally permissible choice of law determination). *See also In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1016 (7th Cir. 2002) (reversing nationwide class certification order of district court under Indiana [forum] contact/interest analysis, applying instead the principle of *lex loci delicti* choice-of-law rule); *In re* Vioxx Prods. Liab. Litig., 239 F.R.D. 450, 458 (E.D. La. 2006) (concluding that law of each proposed class members' home jurisdiction applied to their respective claims).

33. The MDL transferor courts who rejected class certification in *Baycol*, *Paxil*, and *Vioxx* were jurists with considerable complex litigation experience, expertise, and energy. Their tasks were significantly complicated by gaps and paradoxes in the multidistrict litigation statute (28 U.S.C. § 1407) and rules, which contain no choice-of-law principle; rather, the choice-of-law rule(s) of the relevant transferor courts, as well as the forum state of the transferor court, must be considered, which adds a dimension of confusion (or at least tedium) to the choice of law analysis, unless class proponents take the initiative to simplify the process by selecting an existing action, already on file in the transferee court, as the vehicle for certification and trial of class claims. Some courts such as *Propulsid* have rejected the common MDL device of a "consolidated amended complaint" or "master complaint" as a mere "administrative" filing, rather than as a real action originally filed in the MDL forum. Other courts have urged the use of master complaints to

management of the thousands of underlying claims as individual cases was even *less* manageable is glossed over.

There are a number of incentives for the denial of class treatment where due process allows (or compels) it, and where the alternative of individual litigation (from a standpoint of cost, delay and inconsistency) is worse. For the past decade, the class certification decisions of the federal district courts have been instantly reviewable, pursuant to Federal Rule of Civil Procedure 23(f), at the insistence of the losing side. Prior to the enactment of Rule23(f), interlocutory review of class certification decisions was available only through the writ of mandate procedure, and the courts of appeal deferred to trial courts' class certification decisions far more than is the current practice. Although the class certification decision remains within the "broad discretion" of the district court, the district courts' discretion is now micromanaged by the Circuits. While "discretion" appears to be a neutral term, in reality it is far more likely that a court of appeal, granting a 23(f) review petition, will reverse class certification, or affirm the denial of class certification, than it will mandate the certification of a class the trial court has denied, or affirm a grant of class certification. There may thus be a persistent, albeit unintended or unacknowledged institutional disincentive to tempt reversal by certifying classes in cases in which the stakes are highest—the certification of a nationwide class.

Class actions involve case management challenges, and no class is more challenging, due to its sheer size, than a nationwide class. Ironically, the choice of a single state's law to govern the claims of such a class renders the trial of the case as simple as if a single statewide class were involved. If it is constitutionally

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solve the MDL choice of law conundrum. *See* "Unified and Consolidated Complaints in Multidistrict Litigation," 132 F.R.D. 598 (presentation by Hon. Diana E. Murphy on October 25, 1990 to the XXIII Meeting of Transferee Judges sponsored by the Judicial Panel on Multidistrict Litigation in Marcos Island, Florida). Judge Murphy suggested that the filing of the unified complaint in the transferee district supports the application of the choice-of-law doctrine (and thus potentially the substantive law), of the transferee court since, by filing any form of unified complaint, "all plaintiffs have, in effect, filed a new complaint in the transferee court." *Id.* at 608. Until this debate is resolved by statute, the precaution of utilizing (*e.g.*, by amendment) an existing MDL forum-filed complaint returns the choice-of-law process to the application of a single (forum) state's choice-of-law rule.

proper to do so, why do courts instead persist in shrinking from the available choice of any single state's law, claiming they must choose them all, and then throwing up their hands at the prospect of managing 50 statewide classes?[34] It may be the mistaken view that once an interest in each state's law is identified, that interest may not be constitutionally subordinated to an interest in uniformity or efficiency of, or access to, adjudication. Such is a mistake.

A. Disenfranchisement Begins at Home: The Defendant's Insistence on Application of Plaintiffs' Home State's Laws May Foreclose Access to Adjudication on the Merits

It is frequently assumed (or at least argued by the defendants as class action opponents) in class certification analysis, that the members of a proposed plaintiff class must expect and prefer to litigate their claims under their home state's laws. The average layperson is likely unaware that states' laws vary, or that her rights are defined by anything other than a common body of "American" law. The fact that enforcement of such "presumed" preference may cost class members the ability to have their claims litigated at all is not sufficiently considered. A number of courts

34. Courts declining to select a single state's law may instead elect, under Rule 23(b)(3)/(c)(4), to "group" the states' laws into a few discrete categories, and/or to select specific issues for class treatment, thereby preserving the benefits of classwide treatment of common issues. *See, e.g., In re* Teletronics Pacing Sys., Inc., 172 F.R.D. 271, 275-76 (S.D. Ohio 1997) (approving class action settlement and reporting on success of summary jury trial, as well as the utility of this approach). Several decisions have postulated the use of special verdicts corresponding to material differences. *See, e.g., In* School Asbestos Litig., 789 F.2d 995, 1010 (3d Cir. 1986). Such a technique has been accomplished, as well as proposed, in the conduct of actual trials, without undue complication. *See, e.g., Ex Parte* Masonite Corp., 681 So.2d 1068, 1087 (Ala. 1996) (upholding certification of nationwide homeowner class). In the *Naef v. Masonite* consumer class litigation, for example, certification of a nationwide homeowner class was followed by an initial trial phase at which the jury returned a special verdict on the defectiveness of the hardboard siding product at issue in the form of answers to a series of jury interrogatories, each corresponding to the controlling definition of "defect" of the various states. *See* Carrell v. Masonite Corp., 775 So.2d 121 (Ala. 2000) (describing the litigation). The Alabama forum's old school *lex locus* choice of law rule proscribed the court from applying one state's law to all claims. This disadvantage did not foreclose nationwide class treatment. Where there is a will, and sufficient judicial energy, there is a way.

have, in the not-too-distant past, thoughtfully considered this argument, concluding that it is preferable to certify a class under a single state's law, than to deny class treatment at all. Such decisions were typically made in the context of deciding whether or not to certify the "pendent" state law claims that accompanied a federal statutory claim, such as violations of the federal securities or antitrust laws.

In the securities fraud context, where federal statutory claims are accompanied by analogous state law claims (for fraud or negligence), the federal courts have understood and debunked the fallacy that the states' interests in the application of their own law, trumps these same states' interests in facilitating their citizens' access to adjudication through class certification, even if another state's law is applied to the claims. For example, in *In re Pizza Time Securities Litigation*, the court applied California law to the investors' state claims, utilizing the California forum's "comparative impairment" choice of law rule, and observing:

> Each of the interested jurisdictions shares the goal of deterring fraudulent conduct, protecting those wrongly accused of fraud, and providing a remedy for its residents who have been defrauded. . .. Each jurisdiction, including California, has laws prohibiting fraud that accommodate these sometimes competing concerns. It is evident that the similarities in these laws vastly outweigh any differences. *It is also apparent that each jurisdiction would rather have the injuries of its citizens litigated and compensated under another State's law than not litigated or compensated at all.*[35]

Because the class was already unified by claims under a single federal statute, the choice of a single state's law to certify the accompanying claims may have appeared more pragmatic, or proportional, than has the prospect of facing consumers from 50states who could, conceivably, assert their claims under as many state consumer statutes or bodies of common law. The absence of a federal statutory claim, however, should not change the choice of law analysis. Indeed, consumers who do not have federal substantive law to rely upon may be in far greater need of a nationwide class than those who do. There is no federal

35. *In re* Pizza Time Sec. Litig., 112 F.R.D. 15, 20 (N.D. Cal. 1986) (emphasis added).

statutory or common law proceeding for recovery by defrauded or injured consumers of most products or services. The unfettered ability of manufacturers to broadcast products across the country without accountability for the quality, safety, or reliability of their goods has been an unfortunate byproduct of the unwillingness of courts to select an appropriate state's law under which consumers may pursue their claims. The quintessential due process right of access to the tribunal may depend upon the court's choice of a single state's law. Thus, it may be the refusal to choose the law, rather than the recognition that all laws must be invoked, which works a true due process denial on consumers.

As Justice Holmes' repeated use of the term vividly illustrates, the late Nineteenth and early Twentieth Century viewed the states as "quasi-sovereigns."[36] The limited liability corporation was in its infancy, commerce was yet primarily intra-state, and the states were considered well able to police the doings of the manufacturing corporations who were then artificial creatures. But modern corporations have grown far beyond the ability of their state parents to control them, especially when their very jurisdiction over their unruly childrens' out-of-state transgressions is questioned. The alternative, simultaneous enforcement by all states of their own laws against the wrongdoing of foreign corporations, is at least as inconsistent and unpredictable.

If, to paraphrase a landmark California consumer class action decision, each state, like each consumer, "is left to assert [its] rights if and when [it] can, there will at best be at least a random and fragmentary enforcement, if there is any at all."[37]

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36. In his famous dissent in *Southern Pacific v. Jensen*, 244 U.S. 205, 222 (1917), Justice Holmes intoned: "the common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . . it is always the law of some State . . ." In *Georgia v. Tennessee Copper Co.*, Justice Holmes extolled "quasi-sovereign" Georgia's last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. 206 U.S. 230, 237 (1907). Holmes' statement was recently cited to confirm the states' standing to challenge federal EPA decisions in *Massachusetts v. EPA*. 127 S. Ct. 1438, 1454 (2007). If states are quasi-sovereign where their environments are concerned, what about their economies?

37. Vasquez v. Superior Court, 484 P.2d 964, 968 (Cal. 1971). *Vasquez* borrowed this theme, originated by Harry Kalven, Jr. and Maurice Rosenfield in their seminal article *Function of Class Suit*, 8 U. CHI. L. REV. 684, 689

As a practical matter, the notion that the states have equal interests in applying their own laws, whether the wrongdoer is incorporated or headquartered there or not, is itself unmanageable. There is no assurance that this co-equal interest will be invoked in every state, leaving gaps in enforcement. Moreover, the wholesale migration of state law class actions from state to federal courts pursuant to the enactment of the Class Action Fairness Act of 2005 ("CAFA") ensures that courts in all states will not invoke their respective laws in response to consumer complaints. Congress' stated intent to place claims arising from nationwide product distribution under the jurisdiction of the federal courts, despite a vacuum of federal substantive law, both assures a gap in state-by-state enforcement, and recognizes both the necessity and opportunity to choose one state's law to apply to recently federalized consumer claims. In the absence of a true conflict, the forum state's law will serve. In the presence of a true conflict, the law of the state of the defendant's (or its products) origin is frequently appropriate, comporting as it does with both interest- and contacts-based analysis.[38]

The initiative to federalize most class actions that was ultimately enacted as CAFA is rife with paradox and contradiction. CAFA's provisions proclaim exalted goals of consumer protection, fair and efficient compensation of class members, protection of interstate commerce, and marketplace

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(1941), and applied to the modern consumer conundrum.

38. A state's interest in ensuring that its resident manufacturers and distributors made products safe for public consumption is "not only a cognizable interest but also the paramount interest in its law being enforced." Butkera v. Hudson River Sloop "Clearwater", Inc., 93 A.2d 520, 522-23 (N.J. Super. Ct. App. Div. 1997); Gantes v. Kason Corp., 679 A.2d 106, 111-12 (N.J. 1996) (applying New Jersey law where malfunctioning machine made in New Jersey killed a Georgia resident in Georgia). Although each state has an interest in compensating its citizens and preventing unlawful business conduct within its jurisdiction, none may have a significantly greater interest than the state in which the defendant has formed, in which it has chosen to headquarter, or in which it designs or makes the products at issue. Ysbrand v. DaimlerChrysler Corp., 81 P.3d 618, 626 (Okla. 2003) (applying law of defendant's principal place of business to nationwide class alleging breach of warranty with regard to minivan airbags); *see also* Samuel Issacharoff, *Getting Beyond Kansas*, 74 UMKC L. REV. 613, 620 (2006).

innovation.[39] Once delivered to federal Court, "class members with legitimate claims" are promised "fair and prompt recoveries."[40] Moreover, CAFA does away with the $75,000 per plaintiff diversity jurisdiction threshold in all cases brought as class actions. CAFA's two new threshold requirements are simply that the class consist of a hundred or more claimants, and that the matter in controversy exceeds "the sum or value" of five million dollars.[41]

Yet CAFA contains no choice of law provisions to implement these ideals and assure fair and prompt adjudication of the claims of masses of consumers and tort victims statutorily catapulted into federal court. Indeed, in what has become "standard operating procedure" taught in seminars on defending class actions, defendants seek to eliminate class actions *altogether* in nationwide consumer fraud cases— where class actions are needed the most— with what has become a standard "Catch-22" strategy: (1) remove all state court actions to federal court (made

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39. Class Action Fairness Act of 2005, 28 U.S.C. § 1711 (2005). Section 2(b) states:

> (b) PURPOSES—The purposes of this Act are to—
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> (1) assure fair and prompt recoveries for class members with legitimate claims;
> (2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and
> (3) benefit society by encouraging innovation and lowering consumer prices.

40. *Id.* at §2(b)(1).

41. *See* 28 U.S.C. § 1332(d)(2).

> (2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—
>
> (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
>
> (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
>
> (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

easier by the enactment of the Class Action Fairness Act of 2005, which confers federal jurisdiction over nearly all class actions); (2) transfer all of the actions into a single MDL proceeding; (3) argue that the transferee court cannot apply the law of the defendant's principal place of business to residents of other states, and must instead apply the law of all 50 states (ostensibly to protect class members' interests in seeing their own state's law applied, which some courts have dubbed "the fox guarding the henhouse"); and (4) the "coup de grâce"— argue that because the court must apply the laws of all 50 states, class certification must be denied because common issues do not predominate and/or the case will be unmanageable for trial.[42] Choice of law has not been forgotten by Congress in enacting CAFA; it has been ignored. In 1994 for example, the American Law Institute's Complex Litigation Project issued a comprehensive proposal developed under the leading federal proceduralists Arthur Miller and Mary Kay Kane, who served as the Project's Reporters, to systemize and coordinate federal and state complex litigation.[43] Its choice-of-law chapter called for the adoption of a federal standard for choice-of-law and uniform choice of law rules to govern state-law-based mass torts and mass contract litigation.[44] The Project and its recommendations were met with Congressional indifference; federal choice-of-law appears to have been at least a decade ahead of its time. When CAFA was whisked through Congress early in 2005, its sponsors enforced a "no amendments" rule, which brushed aside a so-called "law professors' amendment," which was a *Shutts*-derived choice of law provision. It, along with efforts to correct typos and conflicting or nonsensical terminology, were casualties of expediency. As an ironic result of this Congressional rejection of a more class-specific rule, the *Shutts* formula remains the overarching rule for all cases, of all types, in all courts, including all CAFA class actions.

Some courts have not hesitated to certify a national class under a single state's law, such as New Jersey's Consumer Fraud Act, the ("NJCFA"), where a New Jersey "[d]efendant's alleged

42. *See, e.g., In re* Pharmaceutical Ind. Avg. Wholesale Price Litig., 252 F.R.D. 83, 92-93 (D. Mass. 2008) (hereinafter "AWP").

43. *See* AM. LAW INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS (1994).

44. *Id.* at 305-436.

misrepresentations and omissions concerning [health consequences] are alleged to be uniform" and disseminated "nationwide."[45] As the *Nafar* Court explained:

The NJCFA will apply to all class members because this particular law governs Defendant's behavior and uniform policies. New Jersey has a strong interest in this litigation because the case's outcome will likely affect Defendant's nationwide behavior. As stated in *Dal Ponte*,

Many states can claim members of the proposed class as residents, including New Jersey. These contacts are clearly relevant to the litigation, as each state has an interest in applying its consumer fraud laws to ensure that its citizens and domiciliaries are protected and compensated. It is equally apparent, however, that the interests of these states would not be frustrated by the application of the NJCFA.

Indeed, the NJCFA is one of this nation's strongest consumer protection laws and its application will not frustrate other states' consumer protection laws.[46]

Despite the CAFA kibosh, efforts (by law professors, no less) to formulate fair and predictable choice-of-law alternatives still persist. Foremost among these is the American Law Institute's choice of law approach, as featured in its ongoing Aggregate Litigation project:

> § 2.05 Choice of Law
>
> (a) To determine whether multiple claims involve common issues, the court must ascertain the substantive law governing those issues.
>
> (b) The court may authorize aggregate treatment of multiple claims, or of a common issue therein, when the court determines that
>
> > (1) a single body of law applies to all such claims or issues;

45. Nafar v. Hollywood Tanning Sys., Inc., 2008 WL 3821776, at *6 (D.N.J. Aug. 12, 2008).

46. *Id.* at *6 (citing Dal Ponte v. American Mortgage Express Corp., 2006 U.S. Dist. LEXIS 57675, at *18-20).

> (2) different claims or issues are subject to different bodies of law that are the same in functional content; or
>
> (3) different claims or issues are subject to different bodies of law that are not the same in functional content but do present a limited number of patterns that the court, for reasons articulated pursuant to §2.12, can manage by means of identified procedures at trial.[47]

As the Reporters explain:

> *e. Manageable patterns.* Subsection (b)(3) recognizes that choice-of-law considerations should not defeat aggregate treatment when the court determines that a manageable number of patterns exist in the relevant bodies of substantive law and explains their suitability for treatment on an aggregate basis as part of its trial plan under §2.12. That 50 different states' laws might apply to a set of claims does not necessarily mean that 50 radically different variations in functional content exist. Subsection (b)(3) recognizes that different states' laws can form manageable clusters or groupings, even when they are not entirely uniform. Common issues may exist within the respective clusters so as to make aggregate treatment permissible.[48]

Under §2.05's subsections (b)(1) and (b)(2), a single state's law is applied. This approach is, as the Reporters note, permitted by *Shutts*.[49] Subsection (b)(3) involves the identification of common

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47. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.05 (Tentative Draft No. 1, 2008). As Draft 1 notes, subsection (b) of this section does not seek to provide an "exhaustive typology of permissible approaches to choice of law in aggregate litigation. Subsection (b), instead, pursues the more limited goal of identifying three situations where a substantial consensus has emerged in existing law that choice-of-law considerations should pose no insurmountable barrier to aggregation." *Id.* at cmt. b.

48. *Id.* at cmt. e.

49. The Reporters invoke *Shutts*, 472 U.S. at 823 (noting that "a state court may be free to apply one of several choices of law" as long as the choice made is not arbitrary), and observe: "If anything, the Supreme Court's

patterns and the resulting grouping of claims.

How is such "grouping" accomplished? Very carefully. As the ALI Reporters advise:

> Subsection (b)(3) nonetheless counsels caution, requiring that the court not only identify the nature and number of variations in substantive law but also articulate a plan for how those variations can be handled on an aggregate basis while respecting their differences in content. In order to conduct such an inquiry, the court may need to accumulate and evaluate statutes, common-law decisions, and jury instructions from multiple jurisdictions. The court may reduce the burden on itself, however, by calling for submissions from the parties on these points. The court also might consider the appointment of an expert to assist the court in the choice-of-law analysis, with the parties bearing the expense associated with that appointment.[50]

Examples of the Subsection (b)(7) approach (the identification of a manageable number of patterns in substantive law) cited by the Reporters include *In re School Asbestos Litig.*; *In re Prudential Ins. Co. of America Sales Practices Litig.*; *Telectronics*; *AWP*; and *In re LILCO Sec. Litig.*[51] The determination of manageability is made by the court, which tests the assertions of manageability by class proponents.[52]

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decisions since *Shutts* underscore even further the latitude available to courts in the making of a nonarbitrary choice of law." *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 727 (1988) (recognizing that "it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another"). AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.05, reporter's cmt. b. (Tentative Draft No. 1, 2008).

50. *Id.* at cmt. e.

51. *In re* School Asbestos Litig., 789 F.2d 995, 1010 (3d Cir. 1986); *In re* Prudential Ins. Co. of America Sales Practices Litig., 148 F.3d 283, 315 (3d Cir. 1998); *In re* Telectronics Pacing Systems, Inc., 172 F.R.D. 271, 293-94 (S.D. Ohio 1997); *In re* LILCO Sec. Litig., 112 F.R.D. 663, 670 (E.D.N.Y. 1986); *AWP*, 252 F.R.D. at 92; *see also* MANUAL FOR COMPLEX LITIGATION, FOURTH § 22.317 (Federal Judicial Center 2004) (hereinafter "MCL").

52. Cole v. General Motors Corp., 484 F.3d 717, 725-726 (5th Cir. 2007). *See also In re* Welding Fume Prods. Liab. Litig., 245 F.R.D. 279, 294 (N.D. Ohio 2007) ("[A] court could manage the differences in medical monitoring law among the eight states chosen by the . . . plaintiffs by holding separate

The *Principles of the Law of Aggregate Litigation* draft is intended as a functional and practical document, and its choice-of-law alternatives (*lex loci*; single state selection; grouping of similar laws) are grounded in existing law. To assure that the choice from among these alternatives promotes a manageable and meaningful trial, or, as the Reporters term it, "judicial feasibility," the Project recommends that a "trial plan" be adopted, to translate aggregation theory into manageable practice:

> §2.12 Trial Plan for Aggregation
>
> (a) In ordering the aggregate treatment of a common issue or of related claims, the court should adopt a trial plan that explains
>
> > (1) the justification for aggregate treatment, as compared to the realistic procedural alternatives for treatment of the common issue;
> >
> > (2) the specific procedures to be used in the aggregate proceeding to determine the common issue, insofar as aggregate treatment is so confined; and
> >
> > (3) the anticipated effect that a determination of the common issue will have upon other proceedings on individual issues.
>
> (b) In developing the trial plan described in subsection (a), the court should resolve any pertinent disputes concerning the feasibility of aggregate treatment.[53]

Trial plans have become established fixtures of class certification briefing, and serve to enable claims of commonality, efficacy, and manageability to be judicially tested for practicability and fairness. While some courts have erected the "trial plan" as an additional barrier to class treatment, others, like *Copley* and *Telectronics* courts, have included or appended detailed trial plans

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trials for each state-wide subclass, or perhaps a combined trial for a few statewide subclasses, where the law in those states is similar enough to allow creation of jury instructions and a verdict form that is not too complex.").

53. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.12 (Tentative Draft No. 1, 2008).

to their class certification decisions, specifying the issues to be tried on a classwide basis, the groupings of applicable law, and the issues reserved for subsequent individual treatment.[54] Other courts, facing multistate consumer claims in the context of multidistrict litigation that also asserts federal RICO claims, have recognized pragmatically that the determination of this shared federal claim may moot the need to choose among the states. Such courts have elected to proceed with RICO classes and defer addressing state law claims.[55] Other courts have selected "exemplar states," adopting a "bellwether" approach to a significant state's classes.[56]

CONCLUSION

The determination of Fed. R. Civ. P. Rule23(b) "superiority," which depends upon the predominance of common issues of law or fact, and upon the manageability of the certified claims as a class action, is, as set forth in the Federal Rules themselves, an inherently relativistic, comparative exercise. All too often, courts do not treat it as such, instead insisting that the certification of a nationwide class be "superior" in absolute terms: that is, that it be

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54. *See, e.g.*, *Copley*, 161 F.R.D. 456, 467 (D. Wyo. 1995).

55. *See In re* Lupron Marketing and States Practices Litigation, 228 F.R.D. 75 (D. Mass. 2005); *In re* Zyprexa Products Liability Litigation, 253 F.R.D. 69 (E.D.N.Y 2008); *In re* Pharm. Indus. Average Wholesale Price Litig., 230 F.R.D. 61 (D. Mass. 2005) (court certified a Massachusetts standards class and deferred other state law claims).

56. Many MDL courts, in mass torts and purchase claims contexts, have adopted what is often called the "bellwether" trial approach to selecting exemplar individual plaintiffs, defendants, or classes for MDL trials to advance the litigation. *See, e.g., In re* MTBE Prod. Liab. Litig. (MDL No. 1358) 2007 U.S. Dist. LEXIS 45543 (S.D.N.Y. 2007) (describing the Rule 42(b)-based bellwether trial approach and finding it "warranted by the sheer size of this action, the need for expeditious resolution, judicial economy, and the convenience of the court, the jury, and the parties . . . ."); *In re* Pharm. Indus. Average Wholesale Price Litig. (MDL No. 1456), 233 F.R.D. 229 (D. Mass. 2006) (granting certification of three classes for trial against five "Fast Track" defendants). As the *Manual for Complex Litigation 4th*, § 20.132 advises: "Prior to recommending remand, the transferee court could conduct a bellwether trial of a centralized action or actions originally filed in the transferee district, the results of which (1) may, upon the consent of parties to constituent actions not filed in the transferee district, be binding on those parties and actions, or (2) may otherwise promote settlement in the remaining actions." *See* MCL, *supra* note 52, at § 20.132.

perfect, without management challenges, or other logistical drawbacks. To insist upon such perfection violates Rule23(b)(3) itself, which requires the comparison of the class action to other, existing, available procedures. Thus, a class action, whether it be statewide or nationwide, need not be perfect; instead, it must simply be better than other available alternatives to enable class members to adjudicate their claims, on the merits. In the non-class context, the Supreme Court has reiterated that choice of law in the case of conflict is neither an easy nor foolproof exercise, nor need it be "right" in the absolute sense (much less pleasing to both sides, one of whom is bound to be aggrieved) – in order to pass constitutional muster.[57] Class certification is a procedural exercise, without its own substantive law, and consumers' substantive rights must not be abridged because they are arrayed in class formation.

While the stakes may be raised when small claims are aggregated in a class action, this is no excuse to recoil from unitary determination. Indeed, it is the animating principle of class actions that relief, recovery, compensation, and deterrence shall be proportional to the misconduct, wrong, and harm.[58] To erect choice of law as a barrier to "fair and prompt" adjudication on the merits – to fail to choose – may work the cruelest due process deprivation of all.

57. Franchise Tax Board v. Hyatt, 538 U.S. 488, 499 (2003).

58. *See* Klay v. Humana, Inc., 382 F.3d 1241, 1274 (11th Cir. 2004) stating: "It would be unjust to allow corporations to engage in rampant and systematic wrongdoing and then allow them to avoid a class action because the consequences of being held accountable for their misdeeds would be financially ruinous. We are courts of justice, and can give the defendants only that which they deserve."