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Choice of Law in National Class Actions: Should CAFA Make A Difference?

Linda J. Silberman*

Choice of law issues often have taken a back seat to other important issues in civil litigation. But new attention to choice of law has emerged in the context of class action litigation where applicable law often becomes central to the critical question of certification of a class.[1] In particular, choice of law analysis has gained new prominence because attempts to structure nationwide classes involving state law claims, such as damage actions for consumer fraud or misrepresentation, overcharges in contract and insurance cases, personal injury and breach of warranty claims for defective products, punitive damages classes, and claims for medical monitoring often turn on whether a single law or multiple laws are to be applied.

Prior to the enactment of the Class Action Fairness Act (CAFA) in 2005, both the state and federal courts dealt with the question of applicable law as a matter of *state* conflicts law, the federal courts being required to do so under the *Klaxon* rule.[2] Thus, the development of choice of law rules for class actions was

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1. For an extensive discussion of these developments, see Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2007-21 (2008).

2. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). The Supreme Court held in *Klaxon* that a federal court must apply the choice of law rules of the state in which it sits.

in the hands of the states. Favorable choice of law approaches as well as more liberal certification practices in certain states led to interstate forum shopping as a means to achieve certification of a nationwide class.[3] CAFA was enacted to put an end to such blatant forum shopping, and thus requests for certification of nationwide classes most likely will now be heard by federal courts. How restrictive the federal courts will be on certification is unclear, and whether choice of law will have a significant impact on their decisions is still an open question. In this Comment, I suggest that state choice of law rules need not be followed in actions covered by CAFA and that a federal choice of law rule is appropriate. However, the substance of the applicable choice of law rule or rules under CAFA should be the same as that which would be applied to the claims of the various class members had they brought their own individual actions. In short, aggregation should not change the underlying substantive rights of the parties. In developing these points, I first explain why interstate forum shopping for choice of law has been so important in the class action context. I then turn to the normative question as to whether special choice of law rules should be developed for aggregate litigation—in particular, class actions. Finally, I consider whether the recent enactment of CAFA calls for development of an independent federal choice of law rule, and if so, what that rule should be.

A. THE PROBLEM OF INTERSTATE FORUM SHOPPING

Interstate forum-shopping in class action litigation has occurred for various reasons—most notably a group of "magnet" state courts that became attractive to plaintiffs' lawyers because of the ease of obtaining certification of a nationwide class.[4] It was

3. For more detail on these issues, see my paper on the role of choice of law in national class actions published in the recent University of Pennsylvania Law Review Symposium on the Class Action Fairness Act, Silberman, *supra* note 1, at 2001. *See also* 151 CONG. REC. S1228 (daily ed. Feb. 10, 2005) (statement of Sen. Hatch) ("Other times, these duplicative actions are the product of forum shopping by the original lawyers who file similar actions in different State courts around the country, perhaps with the sole purpose of finding a friendly judge willing to certify the class.").

4. *See* S. REP. NO. 109-14, at 22 (2005) ("A fourth type of class action

in part for that reason that Congress enacted CAFA, authorizing certain nationwide class actions to be brought in and/or removed to federal court.[5] In brief, the jurisdictional provisions of CAFA provide for both original and removal jurisdiction in federal court for class claims based on state law whenever there is minimal diversity between any plaintiff class member and any defendant.[6] Class members are permitted to aggregate their claims to reach the jurisdictional amount of more than five million dollars,[7] and any defendant has the right to remove the action from state to federal court.[8] However, the district court must decline to hear the action if (a) greater than two-thirds of the members of the proposed plaintiff class are citizens of the same state as one significant defendant when the action is filed in that state and the principal injuries occur there;[9] or (b) greater than two-thirds of the putative class and the primary defendants are all citizens of the State in which the action was filed.[10] There is also discretion to decline jurisdiction in other limited circumstances.[11]

The premise underlying CAFA is that the federal courts will be less biased and parochial than the state courts have been with

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abuse that is prevalent in state courts in some localities is the 'I never met a class action I didn't like' approach to class certification."). Indeed, there was some perception that "cozy relationships" existed between judges and the plaintiffs' bar where judges are elected, given that the judges are dependent upon financial support for their re-election. *See, e.g.*, 151 CONG. REC. S1180 (daily ed. Feb. 9, 2005) (statement of Sen. Hatch) (citing notorious plaintiff lawyer Dickie Scruggs's discussion of "magic jurisdictions").

5. For recent discussions of the Act, see Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439 (2008); Richard L. Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765 (2008).

6. 28 U.S.C. §§ 1332(d)(2), 1453(b) (2006).

7. 28 U.S.C. § 1332(d)(2), (d)(6).

8. 28 U.S.C. § 1453(b).

9. 28 U.S.C. § 1332(d)(4)(A).

10. 28 U.S.C. § 1332(d)(4)(B).

11. *See* 28 U.S.C. § 1332(d)(3). A court may decline to exercise jurisdiction in which greater than one-third but less than two-thirds of all proposed plaintiff class members in the aggregate and the primary defendants are citizens of the state in which the action was filed based on such considerations including whether the claims involve matters of national interest, whether the class will be governed by the law of the forum, whether the pleading has been strategic to avoid federal jurisdiction, whether there is a nexus with the forum, the citizenship of members of the plaintiff class, and whether other class actions asserting similar claims have been filed.

respect to the certification of "nationwide" classes. However, on the question of the law to be applied to the class claims, CAFA is silent. That is curious because choice of law had become increasingly relevant to certification of nationwide classes prior to CAFA. Plaintiffs who seek to have a nationwide class certified under Federal Rule 23(b)(3) (or its state counterpart) must minimize individual issues in order to satisfy the "predominance" and "superiority" requirements for class certification[12] and to counter problems of manageability that can come with the application of multiple laws.[13] Plaintiffs therefore try to establish either that (1) the law on a particular question is uniform throughout the states of the United States—thereby showing that common issues of law predominate—or that the applicable choice of law rule leads to the application of a single law. Defendants, for their part, strive to establish that there are substantial differences among various state laws on particular issues, such as breach of warranty, fraud, consumer fraud statutes, and the like—and that the appropriate choice of law rule in the forum state results in the application of the laws of many states. Unlike an individual litigation, where plaintiff usually will argue for the law that offers the greatest recovery and defendant will urge application of the more restrictive rule, in class action litigation, the substance of the applicable rule means little to either side. Plaintiffs press for a single law to apply—such as the principal place of business of the defendant—even if that law offers a lower standard of recovery than would be provided under the competing rules. Ordinarily, this proposition would lead to objections that such a

12. In addition to the general requirements for class actions under Federal Rule 23(a) -- numerosity, commonality, typicality, and adequacy of representation -- class actions falling within Rule 23(b)(3) must meet additional criteria. Those requirements are that common questions predominate over individual issues and that a class action is "superior" to other methods of adjudication.

13. One of the important factors in making the "superiority" determination is the difficulty likely to be encountered in the management of a class action. See FED. R. CIV. P. 23(b)(3)(D). In many instances, courts faced with the application of multiple laws have found a class action to be "unmanageable." *See, e.g., In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1018 (7th Cir. 2002) (holding that where claims are to be adjudicated under the laws of the fifty states and multiple territories, "a single nationwide class is not manageable").

choice of law rule leads to a "race to the bottom" such that defendants would locate in "low consumer protection" states, but in this context the main objective for plaintiffs is to have a single law apply to defeat predominance and manageability concerns. Defendants, on the other hand, press for more generous liability rules that may exist in the home states of some members of the plaintiff class—all in the service of having multiple laws apply and subsequently arguing that the class cannot be certified.

Prior to CAFA, when the certification issue often came before state courts, choice of law became an important element of the decision of whether or not to certify a class. Federal courts under *Klaxon* were obligated to apply the choice of law rules of the state in which they sat, which significantly affected the federal court's decision as to whether to certify. Under both state and federal class action practice, in many instances certification only could result if the court reached a "favorable" choice of law outcome—i.e., that a single law was to be applied. Because there is no uniformity with respect to choice of law approaches, plaintiffs would seek a forum for a nationwide class action that had a choice of law approach likely to lead to the application of a single law. Although *Phillips Petroleum Co. v. Shutts* held a forum state's interest in "adjudicating a nationwide class action" did not alleviate the constitutional requirement that in order for a forum state to apply its own law it must have a substantial connection with the parties or the transaction other than the fact that it is the forum, [14] *Shutts* did not offer much more direction about choice of law in class actions.[15]

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14. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 820-21 (1985).

15. Professor Richard Nagareda reads more into the *Shutts* decision and suggests that the Supreme Court's concern with "bootstrapping" -- using the existence of a nationwide class "as an added weight in the scale when considering the permissible constitutional limits on choice of substantive" law -- has broader repercussions. He argues that a fundamental principle of *Shutts* -- even outside its constitutional context -- is that "choice of law in the absence of bootstrapping results in the same choice being made for purposes of a class action as would be made in an individual action brought in the forum state." See Richard Nagareda, *Bootstrapping in Choice of Law After the Class Action Fairness Act*, 74 UMKC L. REV. 661, 665-66 (2006). That broad reading of *Shutts* is criticized by Professor Stephen B. Burbank in *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1945 (2006) ("The notion, for instance, that the Court in *Shutts* was doing anything other than commenting on the reasoning

Perhaps the most egregious example of the kind of forum-shopping I have alluded to is illustrated by an unreported Oklahoma case, *Grider v. Compaq Computer Corp.*[16] In *Grider*, the Oklahoma courts used their choice of law interpretation of the Restatement (Second) of Conflict of Laws to determine that the warranty and consumer laws of Texas, which was the principal place of business of the defendant, should be applied to an entire nationwide class of consumers complaining about alleged defects in floppy disk controllers. The Oklahoma court certified the class even after the Supreme Court of Texas, in an earlier case involving the same allegations but a different named plaintiff, held that a nationwide class was inappropriate and that *Texas law could not govern the claims of all class members.*[17]

Another example of "forum-shopping" for both a pro-certification attitude and favorable choice of law is a recent Illinois case in which a number of conflict of laws professors, including myself, had a role. The case is *Barbara's Sales, Inc. v. Intel Corp.*[18] Professors Peter Hay and John Cross filed an amicus brief on behalf of themselves in the intermediate appellate court, and then Professor Hay was joined by Professors Gene Scoles and Russell Weintraub in an amicus brief on their behalf in the Illinois Supreme Court. I was asked by defendant's counsel to respond to the amicus brief in the intermediate Illinois court, and Professors Tobias Wolff and I were retained by the Chamber of Commerce to file such a brief. The case was a nationwide class brought in Illinois state court against a California manufacturer that had allegedly engaged in unfair business practices to conceal that its microprocessors did not perform as represented. The trial court certified a class on behalf of Illinois consumers, but not a nationwide class, under Illinois law. On appeal, the intermediate

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of the Kansas court -- that what the Kansas court did there would have violated due process if the law selected to facilitate class treatment had been that of Oklahoma (Phillips's principal place of business) -- seems to me far-fetched.")

16. No. 03-0969 (Okla. Dist. Ct., Oct. 26, 2004) (order declaring choice of law), aff'd, No. 102, 693 (Okla. Civ. App., Oct. 13, 2006), cert. denied, No. 102, 693 (Okla. Mar. 26, 2007). Certiorari was denied by the Supreme Court of the United States in Compaq Computer Corp. v. Grider, 128 S.Ct. 378 (2007).

17. Compaq Computer Corp. v. Lapray, 135 S.W.3d 657, 681 (Tex. 2004). I filed an expert report on choice of law in the trial court in this case.

18. Barbara's Sales, Inc. v. Intel Corp., 879 N.E.2d 910 (Ill. 2007).

court applied the Restatement (Second) and determined that the law of California—the state where defendant had its principal place of business—could apply to all members of the class. The court therefore held that it could certify a nationwide class of consumers under *California* law, finding that California as the principal place of business of the defendant had the most significant relationship to the case. The effect was that the intermediate Illinois court applied the California consumer fraud statute to a nationwide class without any signal from the California legislature, or the judiciary, that its statute had such an "extraterritorial" reach. The language of the intermediate appellate court's opinion stressed the need to find application of a single law in order to facilitate a single aggregate action, thus suggesting that "aggregation" was a factor that should tilt towards finding a single applicable law. The case was appealed to the Illinois Supreme Court, which reversed the intermediate court. The Illinois Supreme Court criticized the intermediate court for its orientation to "one forum with one result," stating that this view "completely ignores the distinct interests of the differing states embodied in our federalist system and constitutional precedent." Additionally, the Illinois Supreme Court observed that the needs of the interstate system and harmonious relations among states are not furthered by "one forum with one result" and pointed out that the application of California law or Illinois law to a citizen of Washington state who purchased his computer in Washington "does nothing to improve the harmonious relations between the states." Moreover, the scope of the California consumer protection statute was more appropriately determined by California, which had a similar case pending in its state courts.

B. A SPECIAL CHOICE OF LAW RULE FOR AGGREGATE LITIGATION?

As those familiar with choice of law are all aware, and the survey of Professor Symeon Symeonides reminds every year,[19] there continue to be different approaches to choice of law in the various states. However, most states—whether they do so under the rubric of "interest analysis" or the Restatement (Second)—now

19. *See, e.g.*, Symeon C. Symeonides, *Choice of Law in the American Courts in 2007: Twenty-First Annual Survey*, 56 AM. J. COMP. L. 243 (2008).

look to the policies of the competing laws as applied to the particular facts to determine which law ultimately should prevail. And those principles, at least in an individual action, often point to the law of plaintiff's domicile in a consumer fraud or breach of warranty case—typical causes of action in a small-claim, nationwide class suit.[20] And in a nationwide class action, that will mean the application of multiple laws.[21]

One question courts face when confronting a choice of law issue in a class action case is whether aggregation itself justifies development of a specifically designed choice of law rule that might make class certification easier. *Shutts* hinted that it did not, but that was a situation where the law urged upon the court lacked constitutional justification altogether. Most state courts—at least the highest courts of the state—have refused to alter choice of law rules to favor or disfavor certification of a class.[22]

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20. *See, e.g.*, Dassault Falcon Jet Corp. v. Oberflex, Inc., 909 F. Supp. 345, 353 (M.D.N.C. 1995) (noting that, in dispute over warranties covering goods, the place where the goods were used and where the injury was suffered is the state with the "most significant contacts"); *In re* Estate of Rhymer, 969 S.W.2d 126, 129 (Tex. App. 1998) (applying California rather than Texas solicitation statute to determine whether California resident had right to rescind contract because home solicitation laws are designed to protect residents who are solicited in their states).

21. *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., 239 F.R.D. 450, 458 (E.D. La. 2006) (holding that law of each proposed class member's home state applies to product liability claims); *In re* Relafen Antitrust Litig., 221 F.R.D. 260, 277-78 (D. Mass. 2004) (determining that, in class action brought by indirect purchasers against defendant pharmaceutical company, state law claims were governed by law of state where consumers resided); Lyon v. Caterpillar, Inc., 194 F.R.D. 206, 214 (E.D. Pa. 2000) (finding that, in class action for consumer fraud, the applicable law is that of the state where each purchaser resides)..

22. *See, e.g.*, Barbara's Sales, Inc. v. Intel Corp., 879 N.E.2d 910, 922 (Ill. 2007) (rejecting an intermediate appellate court's view that a class action mandated "one forum with one result" and applying the general Illinois choice of law rule leading to the law of the state where each plaintiff purchased the product); Schein, Inc. v. Stromboe, 102 S.W.3d 675, 696-97 (Tex. 2002) (applying its normal conflicts rule -- the Restatement (Second) of Conflicts -- to class members' claims and noting that the defendant's "presence in Texas [was] but one fact to be considered in determining the applicable law and does not, by itself, dictate that Texas law will govern the non-contract claims of class members in other states"). *But see* Ferrell v. Allstate Ins. Co., 188 P.3d 1156, 1172-73 (N.M. 2008) (reversing intermediate appellate court's decertification of a class of insurance policy holders from thirteen states where intermediate court held that the applicable law was

They apply the choice of law rules as they would in an individual action and let the chips fall where they may.

I believe that this approach is the appropriate one in which to view choice of law in the context of class actions. Class action rules were not designed to change the substantive rights of the parties. The traditional justification for aggregation has been that the parties have a coherence of rights, and it is the existence of that coherence that makes the class suit appropriate in the first place. Because it is the pre-existence of these rights that is the first step in creating the class, to use the class action itself as a justification for altering choice of law rules is to put the cart before the horse.[23]

Others have disagreed, some because they see the class action as something quite different than the aggregation of a large number of individual claimants. For example, Professor David Shapiro views the class action as an "entity," in which individual interests are subordinated as a means to pursue collective action on behalf of the entity.[24] Although Professor Shapiro does not directly address the choice of law point, he might have some sympathy with Professor Edward Cooper, who, in his contribution to this panel,[25] tentatively suggests that the benefits of efficiency might be sufficient to "sacrifice" rights that parties might otherwise have in an individual action and alter choice of law in order to accommodate aggregation.[26] However, Professor Cooper misses the mark when he takes aim at choice of law. An entity

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that of the states where each policy holder resided and thus a class action would be unmanageable; the New Mexico Supreme Court opined in dicta that "for the benefit of our class action jurisprudence" if New Mexican courts were to follow their usual choice of law rule – the Restatement (First) – the result usually would lead to application of the law of different states, making class actions unlikely, and therefore New Mexico would adopt the approach of Restatement (Second) for "multi-state contract class actions").

23. My view is shared by others. *See, e.g.*, Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924 (2006); Richard A Nagareda, *Bootstrapping in Choice of Law After the Class Action Fairness Act*, 74 UMKC L. REV. 661 (2006).

24. *See* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 924–25 (1998) (considering the "small claim" class action the strongest case for the "entity" model).

25. *See* Edward H. Cooper, *Aggregation and Choice of Law*, 14 ROGER WILLIAMS U. L. REV. 12 (forthcoming 2009).

26. *Id.* at 19-21.

model of group litigation whereby individual interests are subordinated as a means to pursue collective action for the entity may make sense in an overall legislative scheme where specific tradeoffs and reassessments of regulatory rules are part of any reconceptualized regime.[27] In such situations, a federal substantive law solution might also be possible. But using aggregation to alter choice of law usually has but one purpose and that is to find a single law such that a class action can be certified. It ignores the question of what rights the parties have in the first place and it undermines the underlying structure of federalism in the United States where the individual states set the appropriate standards of responsibility and compensation in a particular area. The laws in the different states reflect different values, and choice of law offers a method for accommodating these differences when interstate behavior brings those competing rules into conflict.[28] Finally, it is universally acknowledged that certification of a class is often the catalyst for settlement. The manipulation of choice of law in the service of certification does, of course, increase efficiency to the extent that settlements are encouraged. But the underlying question remains whether the parties really have meritorious claims under the applicable law or whether certification (or possible certification) of a nationwide class with its enormous liability risks forces defendants into settlements of questionable claims.[29] And it was concerns such as these that motivated the CAFA in the first place.

Most courts, including the highest state courts, have refused to alter choice of law in order to facilitate aggregation,[30]

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27. *See* Linda Silberman, *The Vicissitudes of the American Class Action -- With a Comparative Eye*, 7 TUL. J. INT'L & COMP. L. 201, 211 (1999).

28. Harold P. Southerland, *Sovereignty, Value Judgments, and Choice of Law*, 38 BRANDEIS L.J. 451, 455, 482 (2000).

29. *See* the comments of Judge Richard Posner in *In re Rhone Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995): "[Certification of a class action forces] defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability . . .. [Defendants] may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle." For further discussion about class settlement pressure, *see* Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1921 (2006).

30. See cases cited *supra* note 22.

but there are some counter-examples. In *In re Simon II*,[31] Judge Jack Weinstein applied a single law to a nationwide class action in order to avoid manageability problems arising from the application of multiple laws; however, he was reversed on other grounds.[32] The American Law Institute's 1993 Complex Litigation Project recommended that choice of law rules identify, if possible, a single state law to govern in "complex litigation,"[33] but that ALI effort was directed as much to consolidated and transferred litigation and a change of the rule in *Van Dusen v. Barrack*[34] that the transferee forum must apply the choice of law rules of the transferor forum. Moreover, although the ALI in that proposal took the position that choice of law rules should tilt to favor application of a single law, the proposal (never taken up by Congress) included various other recommendations consistent with modern choice of law analysis as well as related provisions that would assist in aggregating litigation even where multiple laws did apply.

The New Mexico Supreme Court, in its recent decision, *Ferrell v. Allstate Insurance Co.*, expressed frustration that its usual choice of law approach—that of the First Restatement[35] —often would lead to application of different laws thereby rendering "multi-state class actions a virtual nullity."[36] Although the court already had determined that there was no "actual conflict" among the competing laws[37] and thus a class of insurance policy-holders

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31. *In re* Simon II Litig., 211 F.R.D. 86 (E.D.N.Y. 2002).

32. Simon II Litig. v. Philip Morris USA Inc. (*In re* Simon II Litig.), 407 F.3d 125 (2d Cir. 2005). The Second Circuit did not address the choice of law issue.

33. *See* AM. LAW INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS & ANALYSIS §6.01(a) (1994).

34. 376 U.S. 612 (1964).

35. In tort cases, the First Restatement advocated the *lex loci delicti* rule --"[t]he law of the place of wrong determines whether a person has sustained a legal injury." RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 378 (1934). Because the place of wrong is defined as "the state where the last event necessary to make an actor liable for an alleged tort takes place," *id.* at § 377, the law of the place of purchase would apply to each plaintiff's fraud claim.

36. Ferrell v. Allstate Ins., 188 P.3d 1156, 1171 (N.M. 2008).

37. *Id.* The court's resolution of this point itself might be subject to criticism. The court acknowledged the proposition that the party proposing class certification carries the burden of persuading the district court that there are no significant variations among the laws of the states connected to the dispute. But to the extent there is ambiguity with respect to differences

from thirteen states could be certified, the court went further to address the appropriate choice of law rule "for the benefit of our class action jurisprudence." The court found the Restatement (First) "particularly ill-suited for the complexities present in multi-state class actions" in part because it does not allow a court "to consider the competing policies of the states implicated by the suit." Therefore, the court concluded that "the Restatement (Second) is a more appropriate approach for multi-state contract class actions." The court did not proceed to identify what law would apply under the Restatement (Second), but the implication is that it might well be a "single law" that would apply to the class. The New Mexico Supreme Court may be correct in its critique of the First Restatement, but its adoption of the Restatement (Second) only for multi-state class actions means that it has altered the rights of the parties merely because there is an aggregate litigation.

The present American Law Institute Project on Aggregate Litigation also has a pro-aggregation tilt, but it identifies various options for dealing with choice of law and has not yet taken a firm position on the effect that aggregation should have on choice of law.[38] Section 2.05 provides that the court must "ascertain the substantive law" to determine whether the class claims involve common issues, and then authorizes aggregate treatment in various situations (1) when a single law applies, (2) different laws apply but are the same in functional content, and (3) different laws apply and, even though not the same in functional content, present a limited number of patterns that can be managed by various trial procedures. But Comment *a* to 2.05 states that this section "leav[es] the decision whether to innovate in the area of choice of law principles to the institutions with the authority to set those principles themselves."[39] And there is an affirmative

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among the state laws, the New Mexico Supreme Court assigns the burden to the party opposing certification and requires that the party opposing certification "show that the laws of the relevant states actually conflict through clearly established, plainly contradictory law." *Id.* at 1169 . Notwithstanding the court's protestations to the contrary, this approach also appears tilted to favor certification of a class.

38. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.05 (Council Draft No. 2, Nov. 18, 2008).

39. *Id.* § 2.05 cmt. a.

suggestion that "appropriate institutions" might want to develop choice of law principles to determine situations where a court may apply the single law such as the principal place of business of the defendant to a group of claims held by persons located in multiple states. That particular proposal seems inconsistent with specific concerns behind CAFA. Identifying certain class action abuses in state courts, the Senate Report on CAFA noted the "trend toward 'nationwide' class actions, which invite one state court to dictate to 49 others what their laws should be on a particular issue, thereby undermining basic federalism principles."[40]

C. CHOICE OF LAW, *KLAXON*, AND CAFA

State cases such as *Grider* and *Intel* offer some context for thinking about what the choice of law regime should be for class actions brought into federal court under CAFA. Must a federal court continue to abide by *Klaxon* and apply the choice of law rules adopted by the state—even if those choice of law approaches have the kind of parochial bent that led Congress to enact CAFA in order to move these cases into federal court?

Among conflict of laws cognoscenti, there has always been some general anti-*Klaxon* sentiment. One argument against *Klaxon*—even in its most traditional application—is that a federal choice of law rule is an appropriate way to mediate among competing substantive state laws vying for application in an interstate case. Indeed, some have argued for a federal common law rule that would be the complete reverse of *Klaxon*—that is, using a federal choice of law rule where a case was brought in *state or federal court.* Although the argument has not been advanced recently, it has a certain appeal in the context of nationwide class actions because it would reduce forum-shopping by plaintiffs *among state courts* as they seek a forum with favorable choice of law rules pointing to application of a single law and facilitating certification of a nationwide class. This would mean that in a case like *Grider* or *Intel* there would be a "federal choice" rule for nationwide class actions—even when brought in state court—that could alleviate any "bias" or parochialism in

40. S. REP. 109-14, at 24 (2005).

state choice of law rules.

But a more limited and less controversial proposal that does not carry quite the same usurpation of state choice of law as the previous suggestion would be to adopt a federal choice of law rule for those class actions that have been brought in or removed to federal court under CAFA. If one views CAFA as designating specific types of class actions appropriate for "national treatment"—that is, in need of federal jurisdiction to ensure neutral and non-parochial assessments with respect to class viability—it follows that such cases are also deserving of independent "federal" choice of law rules. Indeed, if state choice of law principles reflect the very parochialism that CAFA was attempting to correct, an anti-*Klaxon* rule would seem particularly appropriate here. And because cases falling within CAFA will usually end up in federal rather than state court, the "inequality" that a federal choice of law rule might create with respect to a similar action in state court is unlikely to occur in this context.

Late in the hearings and debate on CAFA, a number of proposals were made to address the choice of law question.[41] Professors Arthur Miller and Samuel Issacharoff consulted on a proposal to require federal courts to apply the law of the state where the principal class action defendant resides.[42] They argued that a federal choice of law rule was appropriate as part of CAFA and urged Congress to include as part of CAFA a federal-choice rule that would ultimately point to the law of the principal place of business of the defendant. But the objective of that proposal—to identify a single law in order to make class certification easier—moves in a direction that completely undermines the objectives of CAFA itself. One of those objectives was to prevent one state from issuing "nationwide rulings that actually contradict the laws of

41. *See* David Marcus, Erie, *the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1308-10 (2007).

42. *See Legal Experts Enter Class Action Debate, Meet with Senate Staff To Discuss Bill*, 72 U.S.L.W. (BNA) 2446 (Feb. 3, 2004). Professor Issacharoff has pressed this argument in a couple of recent articles. *See* Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839 (2006); Samuel Issacharoff, *Getting Beyond Kansas*, 74 UMKC L. REV. 613 (2006).

other states"[43] and to eliminate the false federalism by which one court applies the law of a "single state to transactions that occurred in all 50 states"—thereby overriding "whatever policy determinations another state's legislature or courts may have made . . . ." [44] A choice of law rule that points to the law of defendant's principal place of business for all transactions is exactly the kind of rule that CAFA was designed to prevent.

Professor Issacharoff has argued in two recent articles that because nationwide class actions are the result of a national market for undifferentiated goods that ultimately cause national harm, a federal choice of law rule is appropriate and that rule should invoke the law of the defendant's principal place of business.[45] But that rule has little to do with federalism values and much to do with facilitating aggregation. And the existence of a national market actually undercuts Issacharoff's position. Having a single uniform law of products liability or consumer fraud to apply to goods in the national market does make sense, but only if such a rule is developed as a matter of consensus by the national government as national law. If such a federal substantive law were passed, it would reflect the interests of consumers and businesses because it would have been debated in Congress—the national forum—and would represent a national consensus. But the idea of choosing the law of "*one state*" to represent the national consensus, when the states disagree both about what the "substance" of rules relating to consumer fraud or breach of warranty should be and about which state's law should be chosen, is a serious breach of federalism.

That is not to say that a federal or national choice of law rule could not be the subject of consensus that emerged in a serious debate in Congress. Indeed, a federal choice rule developed in a national forum could be an important mechanism for furthering the objectives of CAFA, and it is unfortunate that choice of law did not become a piece of the legislation. Late floor amendments dealing tangentially with choice of law were introduced, but they were merely attempts to inject pro-aggregation elements into

43. S. REP. 109-14, at 24 (2005).
44. *Id.* at 25.
45. *See* Issacharoff, *supra* note 2.

legislation targeted in exactly the opposite direction.[46] Whether consensus of any kind on choice of law could emerge in a thoughtful and serious debate is unclear, but it is almost certain that the law of a "single" state, such as the principal place of business, would not be the outcome.

Choice of law rules were debated in Congress in connection with the Multiparty, Multi-forum Trial Jurisdiction Act,[47] but the statute was passed only after various provisions on choice of law (that changed over the period of years that earlier iterations of the bill languished in Congress) were eliminated. One analogy that comes to mind in considering the impact of a "national market" on choice of law is the European initiative taken in the Rome I and Rome II Regulations[48] on choice of law that create "national choice of law rules" for the European market. Admittedly, those rules—that generally point to the law of the habitual residence of the plaintiff or consumer—are developed in the context of individual litigation. But they underscore the point that one state's legislature or one state's development of a common law rule should not dictate the substance of the applicable standard in a national market when multiple states, in which plaintiffs reside, have reached different solutions with respect to issues of loss-allocation. Moreover, CAFA was passed in reaction to concerns about parochialism by some states purporting to decide law for the rest of the country. A federal choice of law rule that is manipulated to impose a single state's law without consideration of other states' interests turns that legislation on its head.

But what about a different and more nuanced federal choice of law rule developed by the federal courts for CAFA cases? So far the federal courts hearing CAFA cases have not considered a

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46. *See* 151 CONG. REC. S1167 (daily ed. Feb. 9, 2005) (statement of Sen. Bingaman) (discussing his original CAFA amendment affirming a judge's authority to select the law of one state to govern a nationwide class, along with Senator Feinstein's revised amendment to prevent the application of multiple state laws from thwarting class certification).

47. Multiparty, Multiforum Trial Jurisdiction Act, 28 U.S.C. § 1369 (2006).

48. Regulation 864/2007, On the Law Applicable to Non-Contractual Obligations (Rome II), recital 39, 2007 O.J. (L 199); Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I), art. 9, 2005/0261/COD (Mar. 31, 2008) (adopted June 6, 2008).

federal choice of law rule and have mechanically cited *Klaxon* without analyzing whether the rule should extend to national market class actions.[49] In one case, *Thompson v. Jiffy Lube International, Inc.*,[50] plaintiffs did argue that a single state's law should apply to all class members and relied upon CAFA as support for this view, arguing that "Congress passed CAFA in order to create efficiencies in the judicial system." The Kansas district court made short shrift of this argument, pointing out that "[w]hatever the policy merits of such an approach, the argument lacks any support whatsoever in the language of the Act. Nowhere does the Act purport to dictate the substantive law to be applied to claims of purported class members."[51]

Ideally, Congress—if it ever returns to CAFA in order to remedy some of its problems—could direct the federal courts to apply "federal choice of law principles" in these cases. And Congress might well take such action if states enact or develop choice of law principles that favor aggregation or further local interests at the expense of national ones. One would think that Congress would not want CAFA undermined by state choice of law rules imposed upon federal class actions, and certainly a federal court adjudicating a national class action should not have to bow to any such state parochialism. In the absence of congressional action, however, the federal courts have the power to reject *Klaxon* for cases brought under CAFA and might well be advised to do so. There is a body of "federal choice of law" to apply — federal choice of law has generally embraced some version of the Restatement (Second) of Conflict of Laws with an emphasis on "contacts" and "interests"[52]—and it is unlikely to yield the kind of choice of law parochialism seen in a number of states. Moreover, a firm

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49. *See, e.g.*, Green v. Charter One Bank, N.A., No. 08C1684, 2009 WL 483892, at *4 n.6 (N.D. Ill. Feb. 25, 2009); Shaw v. Marriott Int'l, Inc., 570 F. Supp. 2d 78, 86 (D.D.C. 2008); *In re* Grand Theft Auto Video Game Consumer Litig., 251 F.R.D. 139, 146 (S.D.N.Y. 2008); Thompson v. Jiffy Lube Int'l, Inc., 250 F.R.D. 607, 625 (D. Kan. 2008); In re Welding Fume Prods. Liab. Litig. 245 F.R.D. 279, 295 n. 90 (N.D. Ohio 2007).

50. 250 F.R.D. 607 (D. Kan. 2008).

51. *Id.* at 628.

52. *See, e.g.*, Eli Lilly Do Brasil, Ltda. v. Fed. Express Corp., 502 F.3d 78, 81 (2d Cir. 2007) ("In general, '[t]he federal common law choice-of-law rule is to apply the law of the jurisdiction having the greatest interest in the litigation.'").

"reversal" of *Klaxon* in CAFA cases will help develop appropriate choice of law rules for these cases and is a much clearer and cleaner approach to the problem than proposals such as those of Professors Richard Nagareda[53] and Stephen Burbank,[54] who suggest that the federal courts have the power to reject state choice of law rules when particular rules are found to be biased in favor of aggregate litigation.

Without direction from Congress, however, it may be that the federal courts will continue to apply *Klaxon* to CAFA cases as the early decisions under the Act indicate. But if the federal courts can begin to view the "choice of law issue" separately from the "certification" decision, perhaps both choice of law and aggregate litigation can be served. That is, application of different laws to class and other kinds of aggregate litigation should not necessarily be dispositive of the certification issue. It may be possible in some cases to use subclasses and accommodate variations in state laws.[55] Applicable state laws may be grouped into manageable patterns such that complications from choice of law differences can be obviated.[56] In other cases variations in state law may be too complex, and certification should be refused. But courts should focus their attention on these myriad factors that determine whether a class should be certified, including how a case might be managed if different laws are to be applied. That would leave choice of law to be decided in the context of the

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53. Nagareda, *supra* note 29, at 1921.

54. Burbank, *supra*, note 15, at 1950-51.

55. *See, e.g., In re* Pharm. Indus. Average Wholesale Price Litig., 230 F.R.D. 61 (D. Mass. 2005) (applying, in class action brought by third-party payors against drug manufacturers for establishing an inflated wholesale price, the laws of the home states of the consumers pursuant to the Restatement (Second) but nonetheless certifying a class of physician-administered drugs while denying a class of self-administered drugs and drugs distributed through a specialty pharmacy).

56. Elizabeth Cabraser has described a nationwide consumer class action of homeowners claiming that hardboard siding used in homes was defective. After the class was certified, see *Ex Parte* Masonite, 681 So.2d 1068 (Ala. 1995), there was an initial trial phase where the jury returned a special verdict on the "defectiveness" of the product in the form of answers to a series of jury interrogatories, each corresponding to the controlling definition of "defect" in the various states. *See* Elizabeth J. Cabraser, *Just Choose: The Jurisprudential Necessity To Select a Single Governing Law for Mass Claims Arising from Nationally Marketed Consumer Goods and Services*, 14 ROGER WILLIAMS U. L. REV. 29 (forthcoming 2009).

genuine federalism concerns that are its province.