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Complexity and Aggregation in Choice of Law:

An Introduction to the Landscape

Louise Ellen Teitz*

Many of us who have taught Civil Procedure lecture our students about the “building blocks” of putting lawsuits together, emphasizing the stated goal¹ of efficiency through joinder of claims and parties. Yet we generally fail to mention to the already bewildered first year student that the resulting complex² structure will likely have an impact on the substantive law that will be applied.³ We extol the virtues of consolidation of claims and parties, the zenith of which is the class action, even while courts continue to refuse to certify classes because of the fear of confusion and lack of manageability. It is only when these same students return to us as third year students in Conflict of Laws

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1. FED. R. CIV. P. 1 (“Scope and Purpose. These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”).

2. As used in the Complex Litigation Project, “complex litigation” refers exclusively to multiparty, multiform litigation; it is characterized by related claims dispersed in several forums and often involving events that occurred over long periods of time.” AM. LAW INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS, 7 (1994).

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

that we reveal the complete picture, that joining parties and claims may, and usually does, affect the underlying substantive law, either directly⁴ or indirectly through the choice of law rules employed.⁵ While startling to our students, this admission is neither new nor surprising to scholars, practitioners, and judges who have grappled with the issue for decades.

Indeed, there have been attempts on many fronts— in the courts, in Congress, and among scholars— to resolve the tension between aggregation and choice of law. Many of these attempts have arisen from the structural side, focusing on choice of law only as it creates a barrier to procedural joinder. Thus the goal has been to simplify choice of law so that aggregation, especially class actions, can occur. Yet one is tempted to suggest that we may be asking the wrong question, that our starting point needs redefining. Should we have choice of law rules for substantive claims which can be applied easily,⁶ even when we have multiple parties? And can we agree on underlying assumptions, such as that one person injured by a product or involved in a mass tort or taken in by a ponzi scheme should get the same result as another? Or as another from the same state or country? Even here, we do not all begin with the same notion of what is conflicts “equality,” although we generally may share a common precept that procedure should not control substance.

Because choice of law is part of the process of defining the parties’ rights, it should not change simply because, as a matter of administrative convenience and efficiency, we have combined many claims in one proceeding; whatever choice-of-law rules we use to define substantive rights should be the same for ordinary

4. See, e.g., *In re “Agent Orange” Prod. Liab. Litig.*, 506 F. Supp. 762 (E.D.N.Y. 1980)(Weinstein creates common law tort liability).

5. See, e.g., *In re Simon II Litig.*, 211 F.R.D. 86 (E.D.N.Y. 2002), *rev’d*, 407 F.3d 125 (2d Cir. 2005).

6. Dean Symeon Symeonides has attempted to formulate choice of law rules through extensive study of the existing cases for product liability, an area of substantive law that underlies a significant portion of aggregate and complex litigation. See Symeon Symeonides, *THE AMERICAN CHOICE-OF-LAW REVOLUTION IN THE COURTS: TODAY AND TOMORROW*, 298 RECUEIL DES COURS 1 (Hague Academy of International Law 2003). His study largely excluded class actions. Thus it is not at all clear that these rules would be viable in mass torts and aggregate litigation without some adjustments. See *id.* at 279, n. 1081.

and complex cases.⁷

While most of us as Conflicts scholars would agree with the basic proposition, how we reach that result is subject to considerable disagreement.

This Symposium volume grows out of the 2008 Annual Program of the Conflict of Laws Section of the Association of American Law Schools.⁸ Since much of the recent attention on the Class Action Fairness Act⁹ and aggregate litigation has focused on the procedural and structural problems first, and on choice of law, if at all, second, the panel was charged with examining the problems of choice of law in aggregate, complex, and mass tort litigation. The presenters were to consider the issues raised for choice of law and the recent attempts to resolve these in legislation, in ALI projects, and in court cases. To this end, the panel included a proceduralist and rule drafter, a practitioner, a Conflicts scholar, and a sitting federal District Court Judge.¹⁰

As mentioned above, much of the recent scholarship and attention by practitioners has centered on the procedural aspect of aggregation, for example the impact on the class action procedure of claims that involve diverse and multiple substantive laws. From the plaintiff's vantage, is there a way to circumvent this problem and still manage to be certified, usually as a (b)(3) class action?¹¹ Can subclasses be used? Courts have been grappling

7. Larry Kramer, *Choice of Law in Complex Litigation*, 71 N. Y. U. L. REV. 547, 547 (1996).

8. The program, *Choice of Law in Aggregate, Complex, and Mass Tort Litigation: Accommodating Policy, Procedure, and Practicality*, was presented in Washington, DC while I was serving as Chair of the Section.

9. Class Action Fairness Act, 28 U.S.C. § 1711 (2005).

10. The original panel included Judge Shira Scheindlin of the United States District Court for the Southern District of New York who added the essential viewpoint from the bench of the practical difficulties and realities that the trial judge must face in these cases. I am indebted to her for her major contribution to the panel and regret that this element is not included in this Symposium. Professor Nancy J. Moore was not a participant on the panel but graciously agreed to contribute to the Symposium volume, providing the perspective of a scholar and expert on professional responsibility, raising the largely overlooked issues of choice of law in professional responsibility. Professor Moore was the Chief Reporter for the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000"), the major ABA revision of the Model Rules of Professional Conduct.

11. FED. R. CIV. P. 23(b)(3).

with these issues, some more successfully than others,¹² certainly since Rule 23 was amended in 1966, if not before.

There have been numerous attempts since 1938 to consolidate and aggregate cases where possible, to make litigation more efficient and less costly to the participants and the system. Examples are legion. Rule 23, as revised in 1966, provided for three categories of class actions, the most problematic in terms of multiple underlying substantive laws, being the (b)(3) or damage class. The potential for large damage class actions was not necessarily foreseen, especially in the mass accident tort context; the Advisory Committee notes even suggested that mass torts might not be appropriate for class treatment.¹³ However, one would not expect necessarily to see any discussion of choice of law in keeping with the concept that Federal Rules make procedural changes but can't modify substantive rights.¹⁴ Also of significance in aggregating cases is the multidistrict transfer statute, Section 1407¹⁵, added in 1968, which provides a process for consolidation

12. Linda J. Silberman, *Choice of Law in National Class Actions: Should CAFA Make a Difference?*, 14 ROGER WILLIAMS U. L. REV. 54 (2009); 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 (2009).

13. See FED. R. CIV. P. 23 advisory committee's note. A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

14. 28 U.S.C. § 2072 (1990) provides: "Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

15. 28 U.S.C. § 1407 (1976) provides:
(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, that the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

within the federal courts of cases “involving common questions of fact” into one district for pretrial purposes only.¹⁶ Unlike the class action procedure and subsequent revisions to it, only pretrial issues are resolved in theory,¹⁷ although often the parties agree to litigate the merits at the same place, or more frequently, the cases settle before trial.

Another recent statutory enactment is the Mutiparty, Multiforum Jurisdiction Act¹⁸ which was added as Section 1369 to expand federal court jurisdiction to allow consolidation of actions involving certain mass torts into one lawsuit in one district, without concern with the difficulties of current federal diversity of citizenship interpretations requiring complete diversity and disallowing aggregation of claims for monetary jurisdictional purposes. The statute, enacted in 2002, vests federal district courts with original jurisdiction for litigation arising from a single accident where at least 75 persons die. An earlier version of the statute, as introduced in the House of Representatives in 1999 as H.R. 2112,¹⁹ actually attempted to add a choice of law rule for the court,²⁰ listing factors such as place of injury, place of conduct,

16. *Id.*

17. *Lexecon Inc. v. Milberg Weiss*, 523 U.S. 26 (1998).

18. 28 U.S.C. § 1369 (2002).

19. H.R. 2112, 106th Cong. (1st Sess. 1999).

20. H.R. 2112 provided:

e) CHOICE OF LAW- (1) DETERMINATION BY THE COURT- Chapter 111 of title 28, United States Code, is amended by adding at the end the following new section:

Sec. 1660. Choice of law in multiparty, multiforum actions

(a) FACTORS- In an action which is or could have been brought, in whole or in part, under section 1369 of this title, the district court in which the action is brought or to which it is removed shall determine the source of the applicable substantive law, except that if an action is transferred to another district court, the transferee court shall determine the source of the applicable substantive law. In making this determination, a district court shall not be bound by the choice of law rules of any State, and the factors that the court may consider in choosing the applicable law include--

- (1) the place of the injury;
- (2) the place of the conduct causing the injury;
- (3) the principal places of business or domiciles of the parties;
- (4) the danger of creating unnecessary incentives for forum

domicile of the parties— factors also found in an earlier ALI Complex Litigation Project²¹— but adding concerns with forum shopping and foreseeability. These provisions, which were to be Section 1660, did not make it to the final mass tort statute of 2002.

Another statutory effort to aggregate cases can be seen in the recently enacted Class Action Fairness Act of 2005, CAFA, which provides federal court jurisdiction, both original and removal, for nationwide class actions with only minimal diversity where the total amount in controversy exceeds \$5,000,000.²² While there was an attempt to include choice of law rules²³, the final legislation removed these rules, like Section 1369, and created more aggregation in federal courts, without resolving the conflict of laws issue. Thus, while the federal courts have been faced with complex and aggregated cases, through procedural mechanisms that are increasingly moving these lawsuits from state to federal court, they have been provided little assistance on how to resolve the continual choice of law problems that loom in every issue. Many will argue that Congress missed the opportunity to create order from chaos in the most recent legislation in the area, CAFA.²⁴ The burden continues to fall on trial court judges, who make valiant efforts to create some workable rule, often only to be reversed by appellate courts removed from the practical battles.²⁵

The judges are not alone in grappling with the issue of choice of law in these complex cases. The American Law Institute has undertaken twice to address complex litigation. The first project,

shopping; and

(5) whether the choice of law would be reasonably foreseeable to the parties.

21. AM. LAW INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS § 6.01 (1994).

22. For a thorough discussion of CAFA, see Silberman, *supra* note 13, at 55-58.

23. See Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001 (2008).

24. Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law after the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1867-71 (2006).

25. A well-known example is Judge Barker's particularly detailed analysis of choice of law in the multistate context, reversed by the Seventh Circuit. *In re Bridgestone/Firestone, Inc., Tire Prod. Liab. Litig.*, 205 F.R.D. 503 (S.D. Ind. 2001); *rev'd* 288 F.3d 1012 (7th Cir. Ind. 2002).

The Complex Litigation Project, begun in 1986 and finished in 1993, was designed “to develop an understanding of the phenomenon of multiparty, multiform lawsuits” and provide options for “mitigating the problems these cases pose.”²⁶ That plan interestingly sought to be consistent with three overriding concerns: respecting federalism, not adding to the federal court docket, and not compromising the litigants’ fundamental procedural rights.²⁷ Chapter 6 actually addressed choice of law, developing a set of rules for mass tort and mass contract, statutes of limitations, and monetary and punitive damages. “This Chapter proposes the enactment of a coherent and uniform federal choice of law code for these cases.”²⁸ The Reporters continue: “This Chapter is premised on the conclusions that a federal statutory choice of law code is necessary to foster the fair and efficient handling of complex litigation and that, in order to provide sufficient predictability and avoid conflicting results, it would be preferable to devise reasonably precise choice of law rules to be applied in these cases.”²⁹ Thus the rules sought to allow federal courts to reduce the choice of law inquiry at least in tort into a federal rule which would apply the law of only one state, “to the extent feasible.” The choice of law chapter was perhaps the most controversial part of the Complex Litigation Project, with proponents of rules lining up against those who would accept a more ad hoc approach. In the end, there is the proposal for rules—rules that federal courts will use to determine the underlying substantive law, rules whose goal is to apply only one choice of law rule.

The second and current ALI project to tackle choice of law in the complex litigation area

is the Principles of the Law of Aggregate Litigation.³⁰ The Principles encompass a broader scope than the earlier project, reaching proceedings “that combine claims or defenses held by many persons for unified resolution, which may be trial or

26. AM. LAW INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS, Introduction and Scope 3 (1994).

27. *Id.* at 7.

28. *Id.* at Chapter 6, Choice of Law Introductory Note 305.

29. *Id.* at 305-06.

30. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (Council Draft No. 2, November 18, 2008).

settlement.”³¹ Unlike the earlier ALI project, at least equal focus is devoted to settlement as to adjudication. Nor is there any suggestion of incorporating a national choice of law standard for aggregate cases; the Principles instead are based on maintaining the status quo.³² Section 2.05 on Choice of Law seeks largely to incorporate existing choice of law through approval of aggregate treatment in three current situations: when one law applies to all claims; when different laws are “the same in functional content;” or when there are a limited number of patterns.³³

The history of the statutory provisions for aggregation and of Rule 23 reflect efforts to create efficient and fair solutions for increasingly complex litigation which routinely crosses state borders and more and more often country boundaries. As the structures for aggregation increase, problems of choice of law rise proportionally. What efforts that have made to adopt federal choice of law rules have failed. The courts have been left to handle the resulting morass, with more or less success, often ending in noncertification of a class and dismissal or if not, subsequent reversal of the class certification. District court judges have labored long on choice of law decisions, studying various state laws, trying to determine an appropriate choice of law rule, often struggling with multiple subclasses. In the end, the questions raised involve not only efficiency but whether the choice

31. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 at cmt. a (Council Draft No. 2, November 18, 2008).

32. *Id.* “Subsection (a) contemplates no change in what one might call the court’s selection or determination of choice-of-law principles -- that is the court’s identification of the body of choice-of-law principles to govern its selection of applicable substantive law.”

33. *Id.* at § 2.05. 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.

Am. Law Inst., Principles of the Law of Aggregate Litigation § 2.05 at cmt. e (Tentative Draft No. 1, 2008).

of law for an individual case would lead to a different outcome.

The four articles in this Symposium volume address choice of law in complex and aggregate litigation from different perspectives. Edward Cooper provides the perspective of a proceduralist who also serves as the Reporter for the United States Judicial Conference Advisory Commission on the Federal Rules of Civil Procedure. In addition, he served as the Reporter on the Uniform Transfer of Litigation Act (UTLA)³⁴ which invests the appropriate court (normally the trial level court) with the dual authority, first, to transfer litigation to a court in another state (or a federal court) and, second, to receive litigation transferred to it from a court in another state (or a federal court). Edward Cooper's article serves as an introduction to the two essential issues: whether aggregation should change choice of law and whether there are choice of law principles that could facilitate "procedurally desirable aggregation." In his article, he explores the interests that are involved in shaping choice of law in aggregated cases. The choice of law problem impedes procedural advantages that might come with aggregation. But even small-scale aggregation may have inescapable effects on choice of law which may not be as justified as in large-scale aggregation. After exploring these problems, Cooper reviews the possible legislative solutions to choice of law problems, including the creation of choice of law rules for class actions by Congress. In the end he emphasizes that the benefits of large-scale aggregation from a procedural standpoint could justify substantive accommodation that subordinates individual interests.

Elizabeth Cabraser, one of the top class action litigators in the country, usually representing plaintiffs, provides the view of the practitioner who has to deal with these choice of law problems in her cases, especially those involving goods and services, which make up a significant category of complex litigation nationally. Cabraser reviews the all too frequent tendency of many courts to choose among applicable law, resulting in eventual denial of class certification because the procedure is too unmanageable. She

34. This Act was adopted by the National Conference of Commissioners of Uniform State Laws (NCCUSL) in 1991 but has not been adopted in any state. The Act is available at <http://www.nccusl.org> (last visited Mar. 4, 2009).

argues that many courts label variations in state laws as “conflicts” when that is not necessary; even when the variation is significant, subclassing can be used. Courts, instead, are often persuaded by defendants that the law of all plaintiffs must be applied, amounting to 50 different laws and thus lack of commonality or manageability. Cabraser implores courts to select a single governing law for choice of law which may not be perfect but may be the best, relatively speaking.

Linda Silberman offers the view of an expert in choice of law (as well as in civil procedure) about class actions, the prototypical complex case. Silberman examines national class actions, especially in the context of the Class Action Fairness Act (CAFA). After reviewing the importance of forum shopping for choice of law, Silberman addresses the issue of whether there should be special choice of law rules for aggregate litigation and suggests that choice of law should not be subordinated to procedural needs for certification. Silberman develops the argument supporting a federal choice of law rule for those class actions brought in or removed to federal court under CAFA.

Nancy Moore, an expert in professional responsibility and who was not a participant in the original Conflicts Section program, provides a view of an often overlooked part of choice of law—that of professional responsibility. The aggregation of cases has implications for the ethical responsibilities and duties of lawyers in these multistate cases. In the past, ethical rules may have been the same in most jurisdictions, but as the ethical landscape has become more divergent, the need for making choices is more significant. Moore highlights the scope of professional responsibility issues that provide choice of law concerns and she focuses on the additional complexities arising from aggregate litigation, both class and nonclass cases. These issues range from conflicts of interests to contingent fees and appear both pre-litigation and during the litigation process. Moore makes a plea for more conscious recognition of the ethical issues raised and the resulting choice of law problems posed.

In the end, our authors and their varied perspectives serve to remind us that choice of law is a crucial element in the creation of procedural devices that aggregate litigation. All too often it is swept under the carpet by litigants and legislators, or manipulated by courts to resolve procedural issues, either

allowing aggregation or denying it. To many choice of law is the stumbling block to aggregation, especially in the context of nationwide class actions, the barrier to procedural efficiency. The AALS panel and this Symposium volume are designed to reverse that presumption and to force us to think about what rules choice of law should use to provide fair and uniform application of law and what interests we must include in the balance.

This Symposium volume would not be possible without the support and participation of many. I am indebted first to the AALS Conflict of Laws Section for allowing me to plan the program for January 2008; and to the panel participants, colleagues and friends, who agreed not only to speak but also agreed to produce an article from their talk. Professor Moore deserves special mention since she did not even speak and yet agreed to the venture over lunch between friends.

The program became a Symposium volume only through the generous support of Roger Williams University School of Law and specifically, of Dean David Logan, and through the hard work of the Law Review, especially Jillian Taylor, the Executive Articles Editor.

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