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Articles

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INTRODUCTION

This is more a conversational gambit than an article. I address a question at the intersection of procedure and choice of law, speaking as a proceduralist rather than a choice-of-law scholar. The question — which may be two questions — addresses the potential interdependence of procedural aggregation devices and choice of law. One part of the question is whether aggregation can justifiably change the choice of law made for some part of an aggregated proceeding. The other part is whether choice-of-law principles can be adapted to facilitate procedurally desirable aggregation. Answers may be sought either in abstract theory or in theory informed by some attention to practical concerns. Either way, it seems likely that resistance to interdependent adjustments will come from the choice-of-law perspective more than the procedural perspective.

It is important to define aggregation as used in this question before summarizing the conclusion. Aggregation means any expansion of a lawsuit beyond a single claim by one plaintiff against one defendant. If "claim" is taken in the meaning adopted

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for res judicata claim preclusion, indeed, even a single claim may involve aggregation in a meaningful sense when it includes separate theories — including theories derived from different sources of law — and distinctive facts relevant to one theory but not another. Class actions have provoked the most extensive discussion of the interaction between aggregation and choice of law. Because they have received so much attention, as exemplified by Professor Silberman's paper,[1] they will receive only incidental attention here.

In the end, my answers are not only tentative. They are also ambivalent. There is a strong claim that large-scale aggregations of parties justify choices of law that would not be made if each element in the aggregation were the subject of a separate action. The justifications run in both directions — the choice facilitates the procedural advantages of aggregation, and aggregation facilitates a choice of law that yields overall more satisfactory results than those that would be achieved by separate actions. Smaller-scale aggregation presents more difficult questions. It seems likely that choice of law should seldom be affected by joinder of a relatively modest number of parties, although voluntary joinder may at times justify a different choice.

The suggestion that aggregation and choice of law may affect each other rests on a belief that the choice process should move beyond consideration of the conflicting rules and the policies and interests specifically associated with those rules. Events that entangle two or more law-giving jurisdictions invoke additional interests often referred to in the choice-of-law process. There are shared interests in uniformity of outcome, interests that are associated with equal treatment of actors caught up in indistinguishable events. The interest in uniformity and quality is bolstered by the interest in mutual accommodation, the recognition that subordination of event-specific interests of any particular jurisdiction for that set of events will be repaid by subordination of others' interests when another set of events comes to be litigated. In addition, there is an interest in the efficient and consistent application of whatever set of rules is

1. Linda Silberman, *Choice of Law in National Class Actions: Should CAFA Make A Difference?*, 14 ROGER WILLIAMS U. L. REV. 54 (forthcoming Apr. 2009).

chosen. This interest is better served by aggregation than by repeated litigation in multiple forums.

INCIDENTAL AND INESCAPABLE EFFECTS

The least interesting observation is that the fact of aggregation affects choice because it is simpler to choose a single law. The greater the proliferation of claims and parties, the greater the prospect that a court will choose for some combination of issues and parties a different law than it would have chosen had that particular combination been presented in a stand-alone dispute. Whether or not this seems undesirable, it does not seem likely that courts will avoid all traces of this effect. It can be recognized and fought against by arguing for sound choices, but it is likely to endure.

Beyond the ease of avoiding hard choices lie inescapable effects of aggregation on choice of law that become more interesting as they come to seem more nearly avoidable. Examples are noted simply to illustrate the point. A defendant faced with a compulsory counterclaim rule is forced to submit a claim to a court that may make a different choice of law than would be made by the court the defendant would choose for an independent action. The defendant might argue that the court, having compelled assertion of the counterclaim, cannot properly apply its own choice rules but must instead adopt the choice rules that would be used by the court the defendant asserts as the preferred court. That argument does not seem likely to succeed.

A plaintiff required by claim preclusion to advance both federal and state theories in support of a single claim may be driven to select the court preferred for one theory, bypassing another court that would be preferred — and might make a different choice of law — for the other theory. Although it seems less likely, it might also be that claim preclusion could require joining, as parts of a single claim, demands for relief that might better be governed by the laws of different states. An example may be provided by *White Plains Coat & Apron Co. v. Cintas*, described below.[2] Again, the forum is not likely to surrender its own choice principles, even when they are forced on a federal court

2. 460 F.3d 281 (2d Cir. 2006).

by the obligation to adopt local rules.[3]

More subtle examples may occur. The availability of an alternative forum that can compel broad party joinder is one factor that influences Civil Rule 19(b)[4] determinations to dismiss for nonjoinder of a Rule 19(a) party. Suppose a desirable party is subject to personal jurisdiction only in another state whose courts would make a different choice of law for all parties. Here there is room to account for the different choices in ruling on aggregation. But how far should the initial court take account of the different choice in determining whether, "in equity and good conscience," it should proceed without the absent party? Does it make a difference whether it prefers its own choice, or whether it would prefer the choice likely to be made by an alternative court free to operate under different choice principles? *Klaxon* submission to forum-state choice rules could easily lead a federal court to prefer the choice rules of an alternative forum.[5] It cannot achieve that result by a § 1404 transfer,[6] but it can by dismissing for inability to join a Rule 19(b) party.

Finally, the effects of personal jurisdiction on choice of law should be noted among the incidental effects of aggregation. Aggregation of parties and claims can readily justify an assertion of personal jurisdiction as to a party or claim that would not be made if that party or claim were the subject of an independent action in the same court. This expansion is easily accepted in federal courts; 28 U.S.C. § 1697,[7] supporting the single-event mass-disaster jurisdiction established by § 1369,[8] is an obvious

3. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941).

4. FED. R. CIV. P. 19(b)(4) advisory committee's note ("The fourth factor, looking to the practical effects of a dismissal, indicates that the court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible").

5. *See Klaxon*, 313 U.S. 487.

6. 28 U.S.C. § 1404 (2000); Van Dusen v. Barrack, 376 U.S. 612 (1964) (In *Van Dusen*, the Supreme Court held that the substantive law that would be chosen by the transferor state should apply when a defendant requests a transfer of a state law claim).

7. 28 U.S.C. § 1697 (Supp. V 2005) ("When the jurisdiction of the district court is based in whole or in part upon section 1369 of this title, process, other than subpoenas, may be served at any place within the United States, or anywhere outside the United States if otherwise permitted by law").

8. 28 U.S.C. § 1369 (Supp. V 2005) ("The district courts shall have original jurisdiction of any civil action involving minimal diversity between

example. The Uniform Transfer of Litigation Act[9] — which, if adopted, could be used to aggregate litigation among courts in different states — offers two illustrations that would expand state-court jurisdiction. Section 103 authorizes a court that lacks personal jurisdiction of a party to assert sufficient authority over the party to transfer the action to a court that does have personal jurisdiction. Choosing the receiving court could easily affect the choice of law made in deciding the action. Section 203 authorizes a receiving court to exercise personal jurisdiction over a party that was within the personal jurisdiction of the transferring court even though the receiving court would not independently have personal jurisdiction. Here too transfer could affect the choice of law. The Act should be adopted everywhere, but has not yet been adopted anywhere. But more routine expansions of state-court personal jurisdiction to reflect the needs and opportunities of multiparty litigation can have similar choice-of-law effects.

PERMISSIVE EFFECTS

A. Choice Without Aggregation

The interesting question beyond these incidental or inescapable effects is whether a court may properly take account of aggregation by choosing for some part of an aggregated litigation a law that it would not choose for that same part if it were presented in isolation as the sole subject of an independent action. The question is interesting only on a more or less relaxed view of choice principles. In theory it may not seem to be a question, much less an interesting question, if you believe that there is, in the nature of law, a single correct choice to govern each issue as between a single two-party pair. So confident an approach to choice of law could parallel the little-lamented "vested rights" view, asserting that it is unjust or even unlawful to make any but the single correct choice among the laws of two or more law-giving jurisdictions touched by a litigated event. But that

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adverse parties that arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location").

9. *See* Edward H. Cooper, *Interstate Consolidation: A Comparison of the ALI Project With the Uniform Transfer of Litigation Act*, 54 LA. L. REV. 897 (1994).

position can be defended only by also answering the very question being put — whether the "correct" choice should be influenced by the opportunities of aggregate litigation.

The question might be made somewhat more interesting by noting that even if there is a single correct choice for every issue and party pair, courts and commentators commonly fail to agree on what that answer is. If the single correct answer will often be missed, it might be argued that courts might as well choose the law that furthers the advantages of aggregation when faced with an uncertain choice between competing alternatives. At best, that is an argument by default that will not please many true believers.

The next step toward the aggregation questions does not involve any regard for the shape of litigation. It can arise in a single action between two parties stemming from a common course of conduct that touches more than one state. The proposition to be tested is that the multistate character of events generates interests beyond those implicit in the competing rules, the policies that underlie those rules, and the interests that arise from the competing rules and policies considered alone. Among those interests are mutual accommodation and equality of treatment. Ease of disposition also may count for something. An illustration is provided by *White Plains Coat & Apron Co.* The defendant persuaded 35 of the plaintiff's linens customers to switch to the defendant. Twenty-eight of the customers were located in, and served from, New York; four were located in, and served from, Connecticut; and three were located in, and served from, New Jersey. After noting that the plaintiff's contracts chose New York law, the court found it more important that "the alleged tort substantially occurred in New York," and the vast majority of the harm occurred in New York because the plaintiff was a New York company headquartered there. Thus "New York has the greatest interest in regulating the conduct in question" and New York law applies. Does this result frustrate the interests of Connecticut and New Jersey? Or may it further the interests of all three states in reaching a uniform result as to a single course of conduct inflicting an essentially common injury? Reflect that the benefit to New York of vindicating its substantive policy preferences in this case may be repaid by vindicating the substantive policy preferences of Connecticut or New Jersey when

the balance of events is different.

If the Second Circuit was right, the reason is that multiple lawgivers share interests that transcend the interests specific to particular substantive rules. When the question arises from more than a single transaction or event, the choice of law may be different than it would have been for some of the underlying components, even if they are closely related.

B. Aggregation Effects

(1) Large-Scale Aggregation

And so the stage is set for the real question. The effects of aggregation on choice of law are not addressed by the proposition that the multiplication of related claims shapes the interests affected by the choice. Should aggregation affect the choice of law in such multistate events? If aggregation is accomplished for purposes of efficient litigation, can the cause of efficiency justify a simplified choice of law? Or, more daringly, may aggregation be used for the purpose of changing the choices that would be made in separate actions?

The case for shaping choice rules to recognize the needs and opportunities of aggregation is most readily made in circumstances that involve large numbers of parties in many states. An illustration can be built out of one of the nonclass proceedings involved in the diet drug litigation. *In re Brisco*[10] involved "intermediate opt-outs" from the class settlement. 450 plaintiffs filed 127 separate suits in Texas courts, naming as defendants both the drug manufacturer, Wyeth, and treating physicians. The manufacturer removed to federal court; the cases were transferred to the Eastern District of Pennsylvania for § 1407 consolidated pretrial proceedings. The court in Pennsylvania decided the diversity-destroying physicians were "fraudulently joined" because Texas limitations law clearly barred the claims against them. So far there is no choice problem, only a risk the court may be wrong in its understanding of Texas limitations law. But suppose like numbers of opt-out individual actions were brought in several other states, removed, and consolidated. Under

10. 448 F.3d 201 (3d Cir. 2006).

present approaches, § 1407 consolidation is only for pretrial purposes.[11] As Elizabeth Cabraser's paper illustrates, the choice-of-law rules of the transferring courts carry into the consolidated proceedings.[12] It is not yet possible to seize the opportunity of consolidation to establish uniform substantive rules that apply equally to all plaintiffs and the defendant as well. And the need to account for multiple substantive rules impedes the procedural advantages that might be gained by consolidation.

There is something disconcerting about the common assumption that there is no help for it — that when people in 50 different states and still other jurisdictions are affected alike by a uniform course of conduct, it is necessary to deny recovery to some and to allow different measures of recovery to others by making choices among different laws. To be sure, patterns of similarity are likely to emerge, paring the choice down to far fewer than 50 different laws for each issue. But a diligent issue-by-issue approach is likely to yield a substantial number of different rules sets for different party pairs. We accept that outcome readily enough when it is actually a series of outcomes of numerous individual actions, or of actions that involve small-scale party aggregations. Acceptance, however, can be seen as a result of necessity. We have no system for coordinating the choices made by many different courts even — and perhaps especially — in large numbers of individual actions. Why should we not work toward means of aggregation that make it possible to treat alike all of those who become involved in the same series of events? Like treatment can be both substantive and procedural, and the like procedural treatment can be achieved at lower cost than we pay for repeated litigation and repeated settlements. Although there may be some value in deferring the aggregation until there has been some experience with individual litigation — until, in the common phrase, the dispute has "matured" by developing the best

11. 28 U.S.C. § 1407(a) (2000) ("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") (*emphasis added*).

12. Elizabeth 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 Feb. 2009).

available common fact basis for decision — there comes a point when aggregation and common treatment are highly attractive.

The value of achieving equality is most pressing in extreme cases that involve a few outliers, or even just one, in the general run of the law. One state bars product-liability claims against drug manufacturers for injuries caused by a drug approved by the FDA so long as the approval process was not tainted by fraud. Forty-nine states allow claims arising from use of a particular FDA-approved drug: if claimants from the one no-liability state can be aggregated into a single action with claimants from the other 49 states, should they be denied recovery?

The price of homogenizing substantive law by the choices made to govern consolidated proceedings is apparent. The choice is likely to confer benefits on some participants as compared to the law that would be chosen for them in individual proceedings, while imposing comparable costs on others, both claimants and defendants. These advantages may be offset to some extent by the procedural advantages of aggregation, but there is no reason to suppose that procedural advantage will always outweigh procedural disadvantage.

Current approaches implicitly weigh the competing concerns and opt to apply to aggregations, even the largest aggregations, the same choice principles as apply to individual two-party actions. The question is whether these current approaches should be reconsidered, either for multidistrict consolidation of cases in the federal courts or more generally. Can the case be made, not merely in procedural terms but also in grander choice-of-law terms for adopting different choice principles for large-scale aggregations? And if the case can be made, are there means to accomplish the result?

There is enough experience to suggest large-scale aggregation will be necessary to achieve any general change. Asking many different courts to achieve a consensus choice of law in repeated actions, working to follow the first persuasive leader, is asking the improbable. Aggregation seems the only likely means. It is common to think of the federal courts as the more likely host for the aggregation, in part because they are national in scope and in part because it is far easier to contemplate a single act of federal legislation than to contemplate coordination of state courts by such means as uniform legislation or interstate compact.

But state courts should not be counted out of the possible options.

The means of moving from procedural aggregation to aggregation-influenced choice of law remain to be explored. Many alternatives are possible. All of them will be difficult to implement.

One thoughtful approach to aggregation for the purpose of uniformity is provided by the American Law Institute's Complex Litigation: Statutory Recommendations (1994). The project recommends statutory provisions for transfer and consolidation both within the federal court system and between federal and state systems. Chapter 6 sets out choice-of-law rules for mass torts and mass contracts.[13] The general rules are fleshed out by more specific rules for limitations, monetary relief, and punitive damages. The premise is that federal choice rules should be adopted to "foster[] the fair, just, and efficient resolution" of cases consolidated for the disposition of common claims. Establishing binding federal law will reduce the incentives for forum shopping and "reduce the extremely complicated inquiry now needed to ascertain and apply the numerous state choice of law rules that may be relevant in a consolidated action." Simply leaving matters to authorizing development of a federal common law was put aside for fear that federal courts might be little more able to achieve consistent results than state courts have been, and in recognizing that such uniformity as might emerge would be long in coming.

The ALI rules set an objective of applying a single state's law to all similar tort or contract claims, but recognize that the consolidated actions may be divided into subgroups of claims, issues, or parties that "allow more than one state's law to be applied." The possibility of subgrouping — "subclassing" in a class-action context — is not troubling in itself. It might be modified, however, to go a step further, to pick different sources of law to govern closely related issues in patterns that would not be adopted by any single law-giver. The opportunity to mix and match laws from different sources offends many observers who view the prospect as creating an amalgam that, being independently recognized nowhere, is not "law" at all. And indeed care must be taken to ensure that focus on the policies that

13. *See* ALI COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS §§ 6.01-6.03 (1994).

underlie seemingly different substantive rules does not obscure a deeper interdependence among the different substantive rules of any single law giver. But separation may be plausible.

To illustrate the mix-and-match question, suppose a product manufactured in a state that does not require proof of a commercially feasible alternative design to establish design defect and establishes a 50% bar for comparative responsibility. The product injures consumers in many states, including some that adhere to contributory negligence, others that impose a 50% bar or a 51% bar, and a few that recognize pure comparative responsibility. It may be appropriate to look to the manufacturing state for the law of design defect as to all whom it injures; the choice could be defended independently of aggregation, although it is (much?) more likely to be the uniform choice with aggregation. At the same time, it may be appropriate to adopt the law of one or more of the injury states for comparative responsibility rules. The most interesting possibility would be to look to the manufacturer's state law by applying a 50% bar not only to all those affected in the manufacturer's state and in other 50%-bar states, but also to those affected in contributory negligence states. At the same time, those affected in 51% bar or pure comparative responsibility states might properly be afforded the greater protection of their own laws.

The ALI recommendations have not been taken up by Congress. It does not seem likely that Congress will be interested in adopting a federal choice-of-law code, either as part of an aggregation system or otherwise. Choice-of-law provisions were included in the early bills that led to the single-event mass disaster jurisdiction provisions of § 1369, but did not make it to the final act.[14] The failed attempt to include choice-of-law provisions in the Class Action Fairness Act (CAFA) is a more recent illustration.[15] Neither does it seem likely that Congress will be interested in legislatively overruling *Klaxon*, leaving federal courts free to develop their own choice principles for matters *Erie*-governed by state law. That prediction is particularly unfortunate for § 1369 and CAFA, where federal

14. *See* H.R. 967, 106th Cong. (1999); H.R. 1852, 106th Cong. (1999).

15. *See* S. 2083, 105th Cong. (1998); S.1712, 107th Cong.(as introduced); S. 12, 108th Cong. (as introduced); S 1751, 108th Cong. (as introduced).

courts are deliberately used to do things state courts cannot do, or that Congress does not want them to do.

It does not seem much more practicable to hope that the Federal Rules of Civil Procedure might be called to serve this purpose by adopting explicit choice-of-law provisions. The Rules Enabling Act authorizes adoption of "general rules of practice and procedure," and for good measure decrees that "such rules shall not abridge, enlarge or modify any substantive right."[16] It might be urged that authority to adopt rules for aggregating parties and claims carries with it authority to facilitate the goals of aggregation — and on a fair view, the goals of diversity jurisdiction — by providing for independent federal choice principles. The Supreme Court could do that by overruling *Klaxon*. The Court also can adopt Enabling Act rules that dramatically affect and even transform "substantive right[s]." The class-action provisions of Civil Rule 23 have had such transformative effects that no small number of observers argue that significant amendments would have such substantive effects as to be prohibited by the very Enabling Act that supported creation of Rule 23 in the first place. The Civil Rules can, in the pursuit of procedural ends, have dramatic, at times fatal, consequences for substantive rights. Authorizing independent court-developed approaches to choose among the sources of substantive rights, for the purpose of advancing efficient procedure, either Rule 23 class-action procedure or less dramatic joinder rules, might well fall within the range of substantive effects that do not count as abridging, enlarging, or modifying the substantive rules that are affected. The aim would be to facilitate development of good choice rules that would better implement substantive rights — a worthy procedural goal — than could be accomplished by the displaced choice rules.

But any attempt to adopt an Enabling Act rule that, in the name of facilitating effective procedural aggregations, authorizes an independent federal choice between competing state substantive laws would be met with vigorous challenges that would be reasonably founded, even if not ultimately convincing. It is a peculiar characteristic of the Enabling Act process that it is not always available to support Supreme Court adoption of a rule

16. 28 U.S.C. § 2072 (2000).

to accomplish results that the Court could accomplish by decision. The rules committees, moreover, may understandably find it better to leave a matter so fraught with state sensitivities to rise or fall in the legislative process. The prospect of a Civil Rule overruling *Klaxon* as a support for one or more of the Civil Rules joinder provisions is vanishingly dim.

State legislation might be considered as an alternative to federal statute or rule. Widespread state enactment would enable aggregation-sensitive choices not only in state courts but also in a federal court sitting in a state with the liberating legislation. An illustration is provided by the Uniform Transfer Act. Section 105 authorizes the transferring court to state "terms of the transfer." Section 208 authorizes the receiving court to depart from the terms "for good cause." These provisions could be used to achieve consolidation across state lines, addressing choice of law by terms on the transfer; a receiving court might accede to the terms even though it would not independently make the same choice. But the problems of coordinating legislation among the states are formidable. The Transfer Act has failed of adoption, most likely for fear of even the simpler uses that would enable state courts to supplement forum non conveniens dismissals with a more flexible transfer device similar to § 1404(a) transfer between federal courts.[17]

So long as legislation fails, some procedural devices might be developed to address a few situations. One device would approach an opt-in class without awaiting adoption of an opt-in class-action rule. A court could establish terms for the litigation, including choice-of-law terms, and invite intervention by anyone who wishes to join on those terms. If the defendant's consent were obtained there would be little ground for objection, and a defendant might well consent to a reasonable choice of law in return for the benefits of what might turn out to be relatively comprehensive aggregation. Even if the choice were forced on the defendant, the achievements in uniformity and efficiency might well justify the effort.

"Aggregation" also may be accomplished by extra-procedural means. A single lawyer or firm, or — more dramatically — cooperating groups of lawyers and firms, may

17. 28 U.S.C. § 1404 (2000).

represent hundreds or even thousands of clients with similar claims. These large inventories of claims commonly are resolved by the same means as most claims are resolved — settlement. Settlements may include many claims that have not yet been filed as court actions. Rules of professional responsibility create real but surmountable difficulties.[18] Another American Law Institute Project, Principles of Aggregate Litigation,[19] is addressing these problems. For the moment, it suffices to observe that one great virtue of settlement is to elide choice-of-law issues. Some account may be made in the settlement terms for different values arising from different laws. But the exquisite inquiries a court might feel compelled to make under general choice analysis are not likely to stand in the way of generally fair settlement terms.

The most obvious alternative remains. Class actions could readily justify creation of choice principles developed to seize the special capacity of class actions to achieve uniformity and efficiency. But obstacles remain. It is commonplace to reflect that Civil Rule 23 has grown far beyond anything contemplated by those who developed the 1966 amendments. The growth has come through the cooperation of lawyers and judges in adapting the new tool to myriad expansive uses. The same essentially common-law process might be used to add independent choice-of-law rules as a matter of fulfilling the inherent character and purposes of class actions. But any such development would run directly counter to more than four decades of resolute adherence to traditional choice rules, including the *Klaxon* mandate to follow state choice rules in diversity actions. It is beyond late in the day to reconsider the possible implications of the present rule; the strong arguments that would be made against any attempt to add explicit choice-of-law provisions to Rule 23 become fully persuasive when addressed to reconstruction of Rule 23 without further rulemaking. Nor is it persuasive to argue that CAFA should be interpreted to supersede *Klaxon's* reference to state law because it was motivated in part by the bizarre overreaching choices made by a small number of state courts. And even if

18. *See* Nancy Moore, *Choice of Law for Professional Responsibility Issues in Aggregate Litigation*, 14 ROGER WILLIAMS U. L. REV. 73 (forthcoming Feb. 2009); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.8 (1983).

19. *See* ALI PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §§ 3.01-3.19 (Tentative Draft No. 1, 2008).

CAFA were bent to this worthy purpose, it could not reasonably be extended to class actions that do not rest on CAFA jurisdiction. State courts might fare better in attempting to generate new choice rules for class actions, but the risk persists that a few states might prove too willing to project local rules beyond reasonable application to distant events. Although the cause is just, and the hope for action feeble, it seems better to leave such sensitive developments to legislation, most likely in Congress.

(2) Small-Scale Aggregation

It may seem paradoxical, but smaller-scale aggregation presents greater challenges in making a case for shaping a choice of law to facilitate aggregation, or for shaping aggregation to support a preferred choice of law.

A simple example shows the difficulties. Passenger and Driver from a joint-and-several-liability state are involved in an accident in a several-liability state. Passenger sues Driver in their home state. The court believes that in light of the many local interests it should hold Driver jointly and severally liable for all of Passenger's injuries. Driver then impleads the other driver's employer, a citizen of the several-liability state where the accident occurred, the defendant driver and the employer add claims against each other for their own injuries, and the plaintiff passenger claims against the several-liability state employer. Choice of several liability makes obvious sense for the drivers' claims against each other. But what of the impleader for contribution and the passenger's claim against the employer? Application of joint-and-several liability to the local driver, without opportunity for contribution, would confound the principles of both states. Why not use impleader to enable the forum to apply its own law? The result should be a wash if both drivers are collectible — the impleaded driver ends up paying only the liability that would be apportioned as several liability. This result serves efficiency, and also ensures that collecting full damages from the local driver does not leave the local driver liable for an entire liability that neither state would impose. But suppose the forum driver is not collectible: can the forum properly expand application of its joint-and-several liability rule to impose a greater share on the other defendant? There might be some thought that the difference between several liability and joint-

and-several liability is a mere matter of "loss allocation," justifying use of the forum rule. But if that does not persuade — and the distinction between loss-allocating and conduct-regulating rules is slippery if it is a distinction at all — should aggregation by impleader make a difference? My intuition is that the aggregation should make no difference. If the passenger plaintiff would be limited to several liability against the employer in a two-party action, aggregation on this scale does not justify special choice principles.

Another example may look the other way. A defendant in State A makes discharges into a stream that runs into State B. Ten riparian owners in A and two in B claim to be affected by what they call pollution. If the two B plaintiffs brought a separate action in B, application of B law could be easily justified. If the two B plaintiffs brought a separate action in A, the choice might reasonably go either way, depending on the full context of events and competing laws. But what if the two B plaintiffs join in a single action in A with the ten A plainitffs? Joinder itself might imply consent to A's choice of A law to govern pollution liability as to all plaintiffs, even though the court still would choose B law to determine ownership in B. The two B plaintiffs might join in the aggregated action because of the costs of suing alone, or because of uncertainty as to the substance of either A law or B law. This result could hold whether A law is more demanding than B law or less.

CONCLUSION

These questions have been framed by asking whether the "interests" that count for choice of law include a shared interest of the several states (or nations) in achieving the benefits of aggregated litigation. The procedural advantages of large-scale aggregation seem to support a clear affirmative answer. The procedural advantages, moreover, intertwine with the special mutual interests of all states when large-scale events affect people in many states. Subordination of purely local policies to the shared interest in common treatment of all reflects a central, if confusing, aspect of our federalism. The answer to the question "Is this one country or what?" is many shades of "what." The values that force respect for state autonomy in purely local matters and that inform attempts to reconcile competing

autonomies for discrete events may diminish as events become increasingly regional or national in scope. On this perspective, there indeed is a difference between large- and small-scale aggregation. The only trick is in making appropriate distinctions.

The voluntary aspect of aggregation on a smaller scale might seem to count in drawing the distinctions. But joinder, voluntary as to some parties, may not be welcomed by an adversary who prefers proceedings that are not aggregated, for reasons of either procedure or choice of law. A temporizing answer might be that something depends on the indeterminacy of the choices — the advantages of aggregation can tip the balance when the court is quite uncertain what law it would choose for a particular two-party single claim issue. But there is something disquieting about an approach that advances procedural values by discounting the ability to make a cogent, much less correct, choice of law.

Some help may be found in an analogy. There should be, and often is, a wise two-way accommodation between procedural capacities and substantive law. It is easy enough to adapt procedure to the needs of specific substantive law. Those who develop substantive law likewise should take account of the institutions and procedures available for enforcement — elegant theory may properly yield to the realistic limits of litigation. The same may be true of the accommodation between procedure and choice of law.