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The Complex Litigation Project's Choice of Law Rules for Mass Torts and How to Escape Them

[I]dentifying and analyzing the issues in controversy and the debate that centers on those issues may be of more lasting importance than any particular solution; no choice of law solution will accommodate everyone's concerns. Only if we are able to organize the core issues that need to be addressed in any choice of law proposal will there be the possibility of slowly working toward a consensus on these matters.¹

I. INTRODUCTION

On May 13, 1993, the American Law Institute (ALI) adopted the Statutory Recommendations (the "Proposal") of the Complex Litigation Project² and recommended it for passage by Congress. The Complex Litigation Project (the "Project") contemplates large-scale consolidation of complex litigation in a single state or federal court. The types of cases that would be affected by the Proposal are those involving hundreds, thousands, and even millions of litigants who are seeking to litigate mass tort or contract issues in either the state or federal court system. Examples of tort cases likely to be consolidated under the Proposal are products liability litigation,³ securities litigation, air crashes, and other mass torts.⁴ The Project has been highly praised in some circles.⁵ It

1. Mary K. Kane, *Drafting Choice of Law Rules for Complex Litigation: Some Preliminary Thoughts*, 10 REV. LITIG. 309, 311 (1991).

2. AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS (1994), [hereinafter COMPLEX LITIGATION PROPOSAL]. The Proposal is the result of ten years of work on the Project, which was led by Professors Arthur R. Miller and Mary Kay Kane as Reporters.

3. See, e.g., *In re "Agent Orange" Prods. Liab. Litig.*, 580 F. Supp. 690, 713 (E.D.N.Y. 1984); see also P. John Kozyris, *The Conflicts Provisions of the ALI's Complex Litigation Project: A Glass Half Full?*, 54 LA. L. REV. 953, 968 (1994) (identifying product liability cases and single-event accident cases as the two major patterns of mass torts in the United States).

4. See, e.g., *In re Federal Skywalk Cases* (Hyatt Regency Hotel Disaster,

has also been roundly disparaged by its critics.⁶ One of the more debated parts of the Project has been its choice of law provisions, which are contained in Chapter 6 of the Proposal. This discussion of the Project's choice of law rules is confined to section 6.01, the proposed approach to mass tort choice of law. Choice of law questions present some of the most complicated issues in the American procedural system. And not surprisingly, the complexity of these issues increases exponentially in the case of mass tort litigation, as countless litigants engage in multiforum civil litigation. As a result, the Project's means of dealing with the significant choice of law questions posed by multiforum consolidation of litigation are of central importance in assessing the value of the proposed federal legislation.

The approach of the Project in the area of mass tort choice of law is to codify precise, mechanical, even rigid rules for determining which state's law will apply to consolidated litigation. Underlying the entire choice of law approach is the driving intention of the Project to *ensure that one state's law will apply* to common issues, notwithstanding the fact that the involved litigants may hail from all fifty states as well as foreign nations, and regardless of the fact that many litigants may have no contact at all with the state whose law would apply under the strictures of section 6.01. While such mechanical uniformity would likely lead to increased efficiency in the handling of complex litigation, the potential for unfair results is implicit in the approach chosen by the Project and recommended by subsections 6.01(a), (c), and (d).

An escape hatch from the "one-state's-law" rule is found in subsection 6.01(b), which allows for the division of litigants into

July 17, 1981), 97 F.R.D. 365 (W.D. Mo. 1982).

5. See, e.g., Symeon C. Symeonides, *The ALI's Complex Litigation Project: Commencing the National Debate*, 54 LA. L. REV. 843, 844 (1994) ("It is perhaps the most innovative, resourceful, and ambitious work ever undertaken in the United States on the subject of multistate complex litigation."); see also James A.R. Nafziger, *Choice of Law in Air Disaster Cases: Complex Litigation Rules and the Common Law*, 54 LA. L. REV. 1001, 1003 (1994) ("The ALI Project deserves great credit for citing and clearly summarizing leading scholarship about choice of law in mass tort cases. It is striking, however, that the cited literature and the Project itself seldom stray beyond a select few cases.").

6. See, e.g., Robert A. Sedler, *The Complex Litigation Project's Proposal for Federally-Mandated Choice of Law in Mass Torts Cases: Another Assault on State Sovereignty*, 54 LA. L. REV. 1085 (1994); David E. Seidelson, *Section 6.01 of the ALI's Complex Litigation Project: Function Follows Form*, 54 LA. L. REV. 1111, 1111 (1994) (deriding the Project's "jerry-built choice-of-law provision").

subgroups for the purpose of applying a different state's law to each.⁷ There is potential for this provision to diminish the harshness of the one-state rule and still preserve significant gains in efficiency. This thesis will be discussed below.

The present purpose of this article is to discuss the choice of law approach for mass torts contained in the Proposal in light of modern American choice of law theory. Part II of this paper includes a brief discussion of some of the theories that influence modern choice of law in the United States. The precise rules embodied in section 6.01 of the Proposal are set forth in Part III(A), while Part III(B) seeks to illuminate the theoretical underpinnings of the Drafters' chosen approach to choice of law. Part III(C) is an analysis of the debate that has taken place regarding the approach of section 6.01, while Part III(D) contains a suggestion on the proper use and scope of subsection 6.01(b).

Part IV concludes that the debate over section 6.01 generally will continue uninhibited, especially if Congress determines to consider some form of the Proposal's provisions for passage, and that subsection 6.01(b) should be used liberally to help preserve fair results and to comport with litigants' expectations as to applicable law. While such liberal application of the escape hatch might not have been contemplated by the Reporters to the Complex Litigation Project, it may be essential in order to make the proposal attractive federal legislation. Therefore, if Congress should take up the issue of passing some derivative of the Proposal, it should make clear its intent that subsection 6.01(b) be used liberally and regularly by the federal courts.

II. CURRENT STATE OF THE LAW

A. *Current State of Choice of Law Theory*

There are two prerequisites to establishing a choice of law question in a tort case. First, two or more states must be involved, since if all contacts with the tortious act involve only one state, no other state could reasonably seek to apply its law to the process of determining a remedy. This requirement would seem to be satisfied in the vast majority of cases contemplated by the Complex Litigation Project.⁸

7. Parallel provisions appear in § 6.02(b) and in § 6.03(b), allowing for subdivision of litigants in mass contract cases.

8. See COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 3.01(b). The Proposal

Second, the laws of the competing states must be in conflict with each other. In other words, the various states must have different methods of remedying the particular tortious conduct.⁹ Again, since the majority of mass torts that would qualify for consolidation under the legislation proposed by the Project would apparently involve litigants having contacts with multiple jurisdictions, this requirement would likely be satisfied in the vast majority of consolidated cases emerging from the Complex Litigation Panel. In short, the very nature of the mass tort cases sought to be affected by the Complex Litigation Project forecasts significant choice of law problems in consolidated cases, a fact that is compounded by the Reporters' interest in having "a single state's law [apply] to all similar tort claims being asserted against a defendant."¹⁰

1. First Restatement of Conflict of Laws: *lex loci delicti*

The traditional choice of law rule in torts cases originally adopted by each state is *lex loci delicti*:¹¹ the forum state applies the law of "the state where the last event necessary to make an actor liable for an alleged tort takes place."¹² The *First Restatement of Conflict of Laws* adopted the doctrine of *lex loci delicti*—the "place of injury" rule.¹³ The *First Restate-*

urges interdistrict consolidation when the number of parties and actions and the geographic dispersion of those actions are such that significant gains in efficiency can be attained. See *id.* Intuitively, these guidelines would seem to apply most frequently when the tortious conduct has had far-reaching effects to the extent that many states (and/or foreign sovereigns) would have contacts with the subject of the litigation. Specifically, the cases most frequently alluded to by the Reporters in § 6.01, the Proposal's Mass Torts choice of law section, are those involving products liability, airline crashes, and securities litigation. See generally *id.* Chapter 6, Introductory Note and comments to § 6.01. In short, it seems that if a particular set of cases is sufficiently complex and its litigants are sufficiently numerous and diverse for the proposed Complex Litigation Panel to order consolidation, the set of cases will normally have contact with a sufficient number of states and/or sovereigns for this first prerequisite to be satisfied.

9. See Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the "New Critics,"* 34 MERCER L. REV. 593, 597 (1983).

10. COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 6.01(a).

11. Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49, 51 (1989).

12. RESTATEMENT OF CONFLICT OF LAWS § 377 (1934).

13. See *id.* *Lex loci delicti* stems from the common-law "vested rights" doctrine, under which "each state conceptually had control over all incidents within its borders. Each state had jurisdiction to determine the effect of tortious acts committed within the state. Only the jurisdiction where the dispute arose was capable of giving the parties the right to a cause of action in court." Leigh Ann Miller,

ment formulation of the rule can best be described as a set of rigid conflicts rules, which dominated American conflicts law for decades.¹⁴ The benefits of the traditional rule "include its certainty, predictability, and uniformity of application."¹⁵ Indeed, the rule's mechanical application would seem to give potential litigants a rather clear indication of which state's law would apply to any dispute.

However, among the disadvantages of *lex loci delicti* is the fact that the state where the injury occurred may have no other contact with the litigation, a particularly important point in the context of the single-event mass disaster such as an airline crash. Further, application of the doctrine often results in harsh decisions and involves little balancing of interests or equities.¹⁶ Commentators argue that the few states still adhering to the doctrine do so because of the faults of other, more modern theories.¹⁷

Due to the rigidity of *lex loci delicti*, states began to recognize exceptions to the rule,¹⁸ applying the law of the forum to procedural issues,¹⁹ or applying the forum law "if the *lex loci* choice contradicted the forum's 'public policy.'"²⁰ Eventu-

Choice-of-Law Approaches in Tort Actions, 16 AM. J. TRIAL ADVOC. 859, 861 & nn.12-15 (1993). The principal American proponent of the vested rights doctrine was Joseph H. Beale, the reporter of the *First Restatement*, although the doctrine had European proponents, including Dicey. EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 2.5, at 13 (1992) [hereinafter SCOLES & HAY]. Dicey's formulation was that: "Any right which has been duly acquired under the law of any civilized country is recognized and, in general, enforced by English Courts, and no right which has not been duly acquired is enforced or, in general, recognized by English Courts." *Id.* (quoting DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS, 16-22 *passim* (1896)). Beale's formulation is analogous: "A right having been created by the appropriate law, the recognition of its existence should follow everywhere. Thus an act valid where done cannot be called in question anywhere." *Id.* (quoting J.H. BEALE, 3 CASES ON THE CONFLICT OF LAWS 517 (1901)).

14. SCOLES & HAY, *supra* note 13, § 2.5, at 15. "[M]any of the 'basic rules' of the *First Restatement* remain and continue to be retained" even today, although often only as one choice among several, as in the *Second Restatement*. *Id.* § 2.5, at 15-16.

15. Miller, *supra* note 13, at 861.

16. See *id.* at 864 & n.49. Scoles and Hay characterize *lex loci delicti* as "fixed and thus mechanical—but also predictable." SCOLES & HAY, *supra* note 13, § 2.6, at 16.

17. See Herma H. Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 583 (1983); Miller, *supra* note 13, at 864.

18. Miller, *supra* note 13, at 861.

19. See Solimine, *supra* note 11, at 51.

20. *Id.* at 52-53.

ally, the majority of American states came to reject *lex loci delicti*.²¹

Dissatisfaction with the fixed, mechanical *First Restatement* approach spawned numerous new suggestions and responses, resulting in what is considered a "revolution" in American conflicts law.²² In true revolutionary fashion, commentators proposed myriad alternatives to *lex loci delicti*.²³

2. Restatement (Second) of Conflict of Laws: the "most significant relationship" test

The approach of the *Second Restatement* may be fairly characterized as a formula for finding the "right line" between rigidity and flexibility in choice of law situations. Accordingly,

21. Only fifteen jurisdictions currently adhere to *lex loci delicti* in deciding choice-of-law questions. Miller, *supra* note 13, at 863 & n.32 (listing Alabama, Georgia, Kansas, Maryland, Montana, Nevada, New Mexico, North Carolina, South Carolina, South Dakota, Utah, Vermont, Virginia, West Virginia, and Wyoming as states that follow *lex loci delicti*).

22. Peter Hay & Robert B. Ellis, *Bridging the Gap Between Rules and Approaches in Tort Choice of Law in the United States: A Survey of Current Case Law*, 27 INT'L LAW 369, 370 (1993); see also SCOLES & HAY, *supra* note 13, § 2.6, at 16.

23. These theories include Currie's Governmental Interest Analysis, see BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 182 (1963) (advocating application of the forum law unless the foreign state has a legitimate policy interest in enforcing its laws and the forum state has no policy interest in the case); Ehrenzweig's *Lex Fori* Theory, see Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1050 (1987) (discussing Ehrenzweig's *lex fori* theory, which entails the nearly wholesale application of the forum state's law); the modern Interest-Balancing Theories of von Mehren, Trautman and Weintraub, set forth variously in A.T. VON MEHREN & DONALD T. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 341-75 (James Kasner ed., 1965); A.T. von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927 (1975); RUSSELL J. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 270, 345-46 (1980) (each stressing the importance of weighing competing jurisdictions' interests in having their respective laws applied to cases); Leflar's Choice-Influencing Considerations, set forth originally in Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966) (identifying five independent considerations—predictability, interstate order, simplicity, government interest, and application of the better rule—that courts should weigh in deciding which law to apply); the *Second Restatement's* "Most Significant Relationship" test, see discussion *infra*, part II.A.2; and, finally, court-elected Eclecticism, which is the judicial policy adopted by a small minority of states of selecting various hybrids of the above theories, see William A. Reppy, Jr., *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645 (1983) (criticizing eclectic choice of law as "methodless ad hoc decisionmaking." *Id.* at 651.); James E. Westbrook, *A Survey and Evaluation of Competing Choice-of-Law Methodologies: The Case for Eclecticism*, 40 MO. L. REV. 407, 412 (1975) (praising the versatility of Eclecticism). See generally SCOLES & HAY, *supra* note 13, §§ 2.6-8.

the *Second Restatement* "draws on much of the thought of the period during which it was drafted (1952-1971) and attempts to provide as much of 'the right line,' the balance [between rigid rules and flexible principles], as was possible in the light of the development of the law at that time."²⁴ Thus the *Second Restatement* represents what might be called the best thinking on choice of law since the *First Restatement's* adoption of *lex loci delicti*, and it is the approach selected by a plurality of states (22) to replace *lex loci delicti*.²⁵

The *Second Restatement* approach principally consists of three elements: the policy guidelines of section 6, the "most significant relationship" concept, and various lists of connecting factors. Section 6 provides that, absent a statutory directive on choice of law, a court will consider various factors relevant to the choice of law issue.²⁶ These factors include

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.²⁷

Since these factors are not listed in order of priority, they do not enable the court to choose any particular state's law over that of another state.

However, the factors become more significant in light of other sections of the *Second Restatement*, particularly section 145, which provides for application of the law of the state with the "most significant relationship" to the transaction or occurrence in tort cases.²⁸ Section 145 further provides the relevant

24. SCOLES & HAY, *supra* note 13, § 2.13, at 34-35.

25. Miller, *supra* note 13, at 872 & n.127 (listing Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Massachusetts, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, Oregon, Tennessee, Texas, and Washington).

26. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

27. *Id.* § 6(2).

28. *Id.* § 145(1). Section 146 of the *Second Restatement* applies to personal injuries:

"connecting factors" that will apply to individual choice of law issues:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.²⁹

The effect of the *Second Restatement* is thus to "soften the rigidity of the old [*First Restatement*] approach" by making the single connecting factor of the old system—place of injury—just one of several factors to be considered in the choice of law determination, and by providing the "most significant relationship" test as a "guiding principle."³⁰ The *Second Restatement* drew severe criticism, both during its preparation and after its adoption by the ALI.³¹ Notwithstanding its detractors, the *Second Restatement* also attracted glowing praise and a significant following.³² Included in that following was J.H.C. Morris, who praised the *Second Restatement* as "the most impressive, comprehensive and valuable work on the conflict of laws that has ever been produced in any country, in any language, at any time."³³

Critics of the *Second Restatement's* approach argue that it does not adequately emphasize the policies behind local law³⁴

In an action for personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Id. § 146. Thus, section 146 reserves the *lex loci delicti* preferences for the forum where the injury took place unless another state has a more significant interest in the litigation.

29. *Id.* § 145(2). Section 145 further provides that "[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue." *Id.*

30. SCOLES & HAY, *supra* note 13, § 2.14, at 37.

31. Not surprisingly, among the most vocal critics were Currie and Ehrenzweig. *Id.* at 38.

32. See *supra* note 24 and accompanying text.

33. SCOLES & HAY, *supra* note 13, § 2.14, at 38 (quoting J.H.C. Morris, *Law and Reason Triumphant or: How Not to Review a Restatement*, 21 AM. J. COMP. L. 322, 324 (1973)).

34. Willis L.M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501, 518 (1983).

and that its mechanical weighing of interests is often insufficient.³⁵ True enough, the approach of the *Second Restatement* is to weigh all values equally,³⁶ and when the court determines that two or more states have equal interests, some other method of decision—a tiebreaker—is called for.³⁷

III. THE COMPLEX LITIGATION PROJECT PROPOSAL

A. *The Mechanics of Section 6.01*

The legislation proposed by the ALI's Complex Litigation Project represents a major departure from modern choice of law theory and from modern federal practice. Section 6.01 of the Complex Litigation Proposal is composed of a series of fairly rigid rules, including a hierarchical list of different ways of determining which state's law will apply to complex litigation transferred pursuant to the Proposal's transfer sections, sections 3.01 and 5.01.³⁸

First, subsection (a) of section 6.01 identifies the driving force behind the Project's choice of law approach: the transferee court is to choose the applicable law with an eye single to "applying, to the extent feasible, *a single state's law* to all similar tort claims being asserted against a defendant."³⁹

Second, the Proposal outlines in subsection (c) the three factors a court must consider to determine which states have a policy that would be furthered by the application of their state law in a transferred proceeding: the place or places of injury, the place or places of conduct causing the injury, and the primary place of business or habitual residences of the plaintiffs and defendants.⁴⁰ The Proposal then deals with the false con-

35. Kay, *supra* note 17, at 559.

36. See Reese, *supra* note 34, at 515.

37. Kay, *supra* note 17, at 560.

38. See COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 6.01.

39. *Id.* § 6.01(a) (emphasis added). Subsection (a) reads in full:

(a) Except as provided in § 6.04 through § 6.06, in actions consolidated under § 3.01 or removed under § 5.01 in which the parties assert the application of laws that are in material conflict, *the transferee court shall choose the law governing the rights, liabilities, and defenses of the parties with respect to a tort claim by applying the criteria set forth in subsections (c)-(e) with the objective of applying, to the extent feasible, a single state's law to all similar tort claims being asserted against a defendant.*

Id. (emphasis added).

40. *Id.* § 6.01(c).

flict situation, charging the court, if only one state has a policy that would be furthered by the application of its law, to apply that state's law.⁴¹ More significantly, in the case of a true conflict, subsection (d) of section 6.01 provides the court a hierarchical list of rules to determine which state's law will apply:

(1) If the place of the injury and the place of the conduct causing the injury are in the same state, that state's law governs.

(2) If subsection (d)(1) does not apply, but all of the plaintiffs habitually reside or have their primary places of business in the same state, and a defendant has its primary place of business or habitually resides in that state, that state's law governs the claims with respect to that defendant. Plaintiffs shall be considered as sharing a common habitual residence or primary place of business if they are located in states whose laws are not in material conflict.

(3) If neither subsection (d)(1) nor (d)(2) applies, but all of the plaintiffs habitually reside or have their primary places of business in the same state, and that state also is the place of injury, then that state's law governs. Plaintiffs shall be considered as sharing a common habitual residence or primary place of business if they are located in states whose laws are not in material conflict.

(4) In all other cases, the law of the state where the conduct causing the injury occurred governs. When conduct occurred in more than one state, the court shall choose the law of the conduct state that has the most significant relationship to the occurrence.⁴²

The effect of subsection (d) is that subsection (4)—applying the rule of the state where the conduct causing the tort injury occurred—will determine the choice of law in the vast majority of section 6.01 cases, since the restrictive geographic rules on party residence found in subsections (d)(1)-(3), by their very terms, will rarely be satisfied in the dispersed-injury mass torts case.⁴³

Subsection (b) provides an escape hatch from the rigidity of subsections (a), (c), and (d): in the case that the court determines that the application of a single state's law would be

41. *Id.* § 6.01(d).

42. *Id.*

43. Linda S. Mullenix, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 TEX. L. REV. 1623, 1640-41 (1992).

inappropriate, it "may divide the actions into subgroups of claims, issues, or parties to foster consolidated treatment under section 3.01, and *allow more than one state's law to be applied.*"⁴⁴

Finally, subsection (e) provides that the transferee court may inject additional factors—factors not enumerated in subsection (c)—into the equation for determining the applicable law or may depart from the order of preferences in subsection (d) in order to "avoid unfair surprise or arbitrary results."⁴⁵

B. *The Theoretical Underpinnings of Section 6.01*

The Reporters' road map of the thought process behind the drafting of section 6.01 begins inauspiciously at best: "Certainly, the most direct way to attempt to solve the issues posed [by choice of law in the complex litigation context] would be to adopt national standards to govern the conduct of individuals or entities . . . who now are controlled by multiple, sometimes conflicting, state laws."⁴⁶ Having thus conceded that the Project's approach is no better than second-best,⁴⁷ the Reporters then proceed to outline the approach of Chapter 6. Again restating the global objectives of the Complex Litigation Project—to "foster[] the fair, just, and efficient resolution of the cases embraced by [the] Project"⁴⁸—the Reporters address two initial issues: first, whether sufficient justification exists to change the "current reliance on state choice of law rules,"⁴⁹ and second, whether a federal choice of law code should simply allow for the development of federal common law, whether it should give the federal courts discretion to evaluate policies and interests from an enumerated list, or whether it should

44. COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 6.01(b) (emphasis added).

45. COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 6.01(e). This subject thus offers a second escape hatch from the rigors of subsection (d).

46. *Id.* at 305. Noting the remote possibility of "reaching a political consensus on what the appropriate federal standard should be" and doubting the resolve of "Congress to intrude so directly into areas historically governed by state law," the Reporters consign their fate to proposing an admittedly less attractive, more indirect solution—the procedural approach of § 6.01. *Id.*

47. Even those who praise the Proposal make this observation. See, e.g., Kozyris, *supra* note 3, at 953.

48. COMPLEX LITIGATION PROPOSAL, *supra* note 2, at 305.

49. *Id.* This issue is germane since the adoption of a federal statutory choice of law code for complex litigation would necessarily intrude on an area long governed by state law. *Id.*

prescribe more precise, mechanical rules on how to select among competing state interests.⁵⁰

The Reporters elected the more precise, mechanical route. They apparently felt that this decision best served the goal of promoting efficiency in the handling of complex litigation and found that "reasonably precise" choice of law rules would provide sufficient predictability and avoid conflicting results.⁵¹ Despite what may be said in criticism of this approach, the Reporters must be credited for their honesty and forthrightness: having elected the precise, mechanical approach to federalizing choice of law, they confess that "[a]s will become clear when the details of the following sections are examined, *this choice of law approach is an imperfect solution at best* because it requires the use of a highly complex set of standards in order to accommodate the varying interests involved."⁵²

The Reporters justify the decision to adopt the rigid federal statutory approach by citing the need to discourage forum shopping and the need to simplify the "extremely complicated inquiry now needed" to select the applicable law in consolidated cases.⁵³ Thus, under the Project's approach, litigants would purportedly have no incentive to forum shop for the most favorable law, since the applicable law will be selected regardless of the plaintiff's choice of forum and likely without regard for the interests and expectations of many litigants.

As to the complicated inquiry required of courts under current choice of law theory, the Reporters' criticisms appear plausible: "Even if one presumes that courts can divine unsettled state law with some degree of accuracy, there is sufficient leeway in any analysis of governing law questions so that the choice of law decision may be very ad hoc."⁵⁴ Further complicating the matter in the context of complex litigation is the fact that, under current choice of law analysis, "more than one choice of law rule may have to be applied, creating burdensome individual issues that may be incompatible with consolidated treatment."⁵⁵ Thus, allowing the transferee court to select and apply a single choice of law rule, reason the Reporters, elimi-

50. *Id.*

51. *Id.* at 305-06.

52. *Id.* at 306 (emphasis added).

53. *Id.*

54. *Id.* at 307.

55. *Id.*

nates this complication, provides for more predictability, and allows "the development of a coherent body of law applying the federal standard."⁵⁶ The intended result would be increased judicial efficiency and fairness.⁵⁷

It is clear from the commentary accompanying the Proposal that the compelling purpose of the choice of law section is to achieve the "highly desirable" result of applying a single state's law to each particular issue that is common to all claims and parties in the litigation.⁵⁸ The Project concedes, however, that the division of consolidated cases into issues may be necessary in order to ensure that only truly common issues are treated "in the aggregate."⁵⁹ Once the purely common issues have been separated from the noncommon issues, the Project's interest in efficiency calls for application of one state's law to the common issues.⁶⁰ The Project even contemplates application of the federal choice of law standard upon remand, unless "justice requires otherwise,"⁶¹ so that the efficiency achieved by applying a single state's law to common claims is achieved in the state courts as well.

The Project nonetheless recognizes the fact that "[i]n some circumstances it may not be possible or desirable to have a single state's law control."⁶² In such circumstances it may be that consolidation should be avoided or aborted, or else limited to certain kinds of claims and/or issues.⁶³ Another, and perhaps more attractive, option would be to subdivide the litigation pursuant to subsection 6.01(b) "when it appears preferable that multiple state laws apply."⁶⁴

C. *The Preceding and Ensuing Debate*

The rules adopted by the ALI in the Proposal are clearly the result of a major groundswell of debate in the area of mass torts choice of law. Among the issues central to this debate are the propriety of adopting a federal choice of law code in the

56. *Id.*

57. *Id.*

58. *Id.* at 316.

59. *Id.*

60. *Id.*

61. *Id.* at 318.

62. *Id.* at 316.

63. *Id.*

64. *Id.*

first place and the proper approach of any such codification effort.

1. *The propriety of a federal choice of law code*

There seems to have been general agreement that seeking the passage of a federal choice of law code would be a worthy and worthwhile pursuit, notwithstanding the realization that a more direct solution would be to adopt federal substantive standards for liability.⁶⁵ Professor Kozyris, for one, was a strong advocate for a federal choice of law code, since the likely alternative would be the conferral of federal common law-making authority on the federal courts, a prospect he finds distasteful.⁶⁶ He thus regards the Proposal's simplified, mechanical rules as indicia of a desire to avoid "finessing" choice of law problems by "dumping the problem on the lap of the federal courts called upon to create new types of common law."⁶⁷

Professor Weintraub has agreed that a uniform choice of law code would simplify litigation of mass tort cases:

Federal courts, when dealing with claims consolidated from many different forums, would not face the task of applying several choice-of-law approaches in the same opinion. Moreover, a legislated rule would relieve the judge of making de novo the many difficult policy choices encountered in functional choice-of-law analysis.⁶⁸

Other commentators echo the call for a uniform choice of law code, each with different insights on and criticisms of the Project's chosen methods.⁶⁹

2. *The proper approach of the federal choice of law code*

Although there has been general agreement that drafting a federal choice of law code would be desirable, the scholarship divides quite sharply over the Project's approach, with particu-

65. See *id.* at 305; see also *supra* note 52 and accompanying text (discussing the Project's settling for "second-best").

66. This is an option likewise considered, and rejected by the Drafters of the Proposal. See COMPLEX LITIGATION PROPOSAL, *supra* note 2, at 305.

67. Kozyris, *supra* note 3, at 955.

68. Russell J. Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 U. ILL. L. REV. 129, 145.

69. See, e.g., Larry Kramer, *On the Need for a Uniform Choice of Law Code*, 89 MICH. L. REV. 2134 (1991).

lar debate over the proper role of interest-analysis in the mass torts context.

a. *Point:* On one hand, supporters of the Project seem to advocate any theory but the modern interest-balancing approach.⁷⁰ Indeed, some writings, particularly those of Professor Kozyris, evidence delight that the Proposal rejects the modern, interest-balancing approach in favor of mechanical rules, heralding the decision as "[a]voiding the wrong turns of interest analysis."⁷¹

Professor Nafziger has echoed these sentiments, opining that the Proposal's prioritization of connecting factors is a "welcome departure from the . . . troublesome Hydra of 'pure' government interest analysis."⁷² According to Nafziger, the result of interest analysis is that objective analysis, "like the three-headed Hydra, . . . becomes the stuff of mythology" because courts are able to manipulate interest analysis "to justify almost any result they want."⁷³ However, even Nafziger is not completely satisfied with the Proposal: "The ALI Project deserves great credit for citing and clearly summarizing leading scholarship about choice of law in mass tort cases. It is striking, however, that the cited literature and the Project itself seldom stray beyond a select few cases."⁷⁴

Kozyris's criticisms of interest-balancing center around the belief that interest analysis involves ad hoc attempts to determine the law of the controlling jurisdiction, which in turn includes analysis of legislative intent that is "virtually nonexistent"; further, Kozyris has argued that the dogmatic "interests" involved in interest analysis are not only elusive, but also "malignant."⁷⁵ Not dissimilarly, Professor Juenger argues that "interest analysis has lost cohesion and coherence."⁷⁶

70. See, e.g., Kozyris, *supra* note 3, at 955.

71. *Id.* at 962. Kozyris argues that "but for the brilliance of Brainerd Currie and the favorable climate at the time for iconoclastic attacks on the traditional doctrine, [interest analysis] would have attracted much less attention." *Id.* Further, he trumpets the Project's approach as "a welcome decision to transcend the vague, subjective, and convoluted ad hoc methods advocated by the 'modern' conflicts theories and to generate choice-of-law legal norms to cover most situations in principled, predictable, efficient, and intelligible ways." *Id.* at 975.

72. Nafziger, *supra* note 5, at 1002.

73. *Id.* at 1003.

74. *Id.*

75. Kozyris, *supra* note 3, at 963.

76. Friedrich K. Juenger, *Symposium on Interest Analysis in Conflict of Laws: An Inquiry into Fundamentals with a Side Glance at Products Liability: What Now?*, 46 OHIO ST. L.J. 509, 510 (1985).

Thus, supporters of the Proposal have lauded it for its rejection of interest analysis and its fixation on efficiency. Kozyris notes that the Project's choice of law rules will help free consolidated proceedings of "unnecessary complexities," namely complicated choice of law analysis.⁷⁷ Thus, he views the adoption of the Proposal as the beginning of a much needed "catharsis, if not purgation," in the area of conflicts.⁷⁸ He describes the Project's reliance on mechanical rules as a "total rejection" of interest analysis, which he asserts to be an analysis fraught with "intrinsic indeterminacy."⁷⁹ Instead, the Project adopts "precise, reciprocal, comprehensive conflicts rules which will lead to predictable outcomes in most instances," according to its champions.⁸⁰ Nonetheless, many would object to the mechanical nature of the Project's choice of law rules, calling for a more flexible approach, to which Kozyris would likely quote Judge Posner, who wrote, "The opponents of mechanical rules . . . may have given too little weight to the virtues of simplicity."⁸¹

b. Counterpoint: On the other hand, Professor Weintraub acknowledges that any federal choice of law code *should* be an easy rule to administer, one that would effect "a reasonable ac-

77. See Kozyris, *supra* note 3, at 954-55. Kozyris begins his analysis of the Proposal "with ample praise for the fixation on conflicts efficiency." *Id.* at 956. He does, however, identify a potential irrationality in extending the Proposal's new-found efficiency only to "consolidated" cases in the federal courts, a distinction he regards as "questionable." *Id.* at 954.

78. *Id.* at 975. Notwithstanding his praise of the Proposal, Kozyris still describes it as "a glass half full": first, § 6.01 is clearly not perfect in that it is "good for torts in general, but not custom-made enough to fit the typical mass torts in consolidated cases"; second, the key connectors of § 6.01(d) are "not adequately highlighted, while certain peripheral factors are included in an excessively eclectic environment." *Id.* at 967-68. In this respect, Kozyris's criticism of interest analysis is analogous to Professor Juenger's criticism of conflicts academicians generally when he said:

Their predilection for theoretical speculations has trapped conflicts scholars in a time warp. Preoccupied with stale issues, they fail to come to grips with the more pressing problems of our days. Such neglect is regrettable. Counsel and judges who must wrestle with these problems surely would welcome guidance from the experts. As for conflicts theory, a study of mass disaster cases could bring new insights to a discipline that is currently viewed as mired in sophistry and obfuscation.

Friedrich K. Juenger, *Mass Disasters and the Conflict of Laws*, 1989 U. ILL. L. REV. 105, 108, *quoted in* Mullenix, *supra* note 43, at 1625.

79. Kozyris, *supra* note 3, at 965-66.

80. *Id.* at 965.

81. *Kaczmarek v. Allied Chem. Corp.*, 836 F.2d 1055, 1057 (7th Cir. 1987), *quoted in* Weintraub, *supra* note 68, at 131-32.

commodation of the policies underlying conflicting liability laws."⁸² Weintraub also opines that the code should embrace a certain amount of flexibility, "some play in the joints" rather than rigid rules, "so that the rule does not compel a bad result in an unusual or unforeseen circumstance."⁸³

Weintraub is steadfast in his belief that the *First Restatement* approach has outlived its usefulness and thus should not have been incorporated into the Proposal. As he puts it, "Alas, it is probably too late to turn the choice-of-law clock back. Mechanical conflicts rules, like mechanical rules in any field of law, cause covert resistance."⁸⁴

Professor Seidelson likewise remains a proponent of interest analysis and criticizes section 6.01 as a "jerry-built choice-of-law provision," as it consists of a "little bit of interest analysis," too much of the *Second Restatement*, and several "seemingly slapdash subsections having no apparent legitimate antecedents" in conflict of laws.⁸⁵ In one article, Professor Seidelson explores the practical function of subsections 6.01(d)(1)-(4), concluding that interest analysis is, after all, the preferable mode of analysis for mass tort choice of law.⁸⁶

Professor Mullenix likewise discounts the rules of the Complex Litigation Project Proposal, arguing that they do little to assist in determining the applicable law in "truly dispersed" mass tort litigation.⁸⁷ As she says, "For the hard cases, the [Drafters] have proposed virtually useless rules."⁸⁸ According to Mullenix, who acknowledges that the Proposal's "provisions and commentary sound perfectly plausible and reasoned (albeit reflecting the proposers' own conflicts preferences)," the rules of section 6.01 will not function adequately in the case of "truly massive" tort litigation.⁸⁹

D. Escaping from Section 6.01

As has been stated previously, the rules of section 6.01 have been widely described as mechanical, certainty-assuring

82. Weintraub, *supra* note 68, at 145.

83. *Id.* Weintraub would have preferred a choice of law approach that applied the law of the plaintiff's habitual residence. *Id.* at 156.

84. *Id.* at 133.

85. Seidelson, *supra* note 6, at 1111.

86. *Id.* at 1137.

87. Mullenix, *supra* note 43, at 1630.

88. *Id.* See *supra* notes 42-43 and accompanying text.

89. *Id.* at 1630-31.

approaches to choice of law. Critics of the rule deride the mechanics of the section as "rigid" constraints, while supporters prefer to use the term "precise."⁹⁰ Notwithstanding the section's intended precision or rigidity, it is clear the Drafters intended to inject some flexibility and reasonableness into the law-choosing process when they drafted and adopted subsection 6.01(b), the "escape hatch." Just like the exception to the mechanical rules in subsection 6.01(e), subsection 6.01(b) should be used liberally, "when appropriate,"⁹¹ to deal fairly with mass tort cases.

Not surprisingly, the strength of the Drafters' commitment in section 6.01(a) to the application of one state's law has spawned one of Project's more significant debates. Professor Symeonides is quick to point out that the Project's aim of applying a single law to all similar claims against a defendant is only "[o]ne of the purposes of Chapter 6."⁹² After all, the single-law objective is not unqualified in the text of Chapter 6 since the Drafters provide courts with several "escape hatches." First, subsection 6.01(b) authorizes subdivision into subgroups of "claims, issues, or parties" and allows more than one state's law to apply if applying a single law would be inappropriate in the court's opinion.⁹³ Second, the same subsection authorizes the court to sever and remand to the transferor courts claims or issues that "should [not] be governed by the law chosen by the application of the rules [of Chapter 6]."⁹⁴ The Drafters clearly contemplated the subsection's use on some scale, and it seems that a liberal construction of subsection 6.01(b) is within the realm of reason.

Third, subsection 6.01(e), which is to be employed in order to "avoid[] unfair surprise or arbitrary results," has been interpreted to be a mechanism to vindicate concerns of the parties rather than those of the state.⁹⁵ Thus, subsection 6.01(e) allows the court to inject additional connectors into its choice analysis when proper.

90. See COMPLEX LITIGATION PROPOSAL, *supra* note 2, at 305-06.

91. See *id.* § 6.01(b).

92. Symeonides, *supra* note 5, at 859.

93. *Id.*

94. *Id.* at 860 (quoting COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 6.01(b)).

95. See Kozyris, *supra* note 3, at 965. Kozyris regards the "unfair surprise" escape hatch of subsection 6.01(e) as a means for introducing better-fitted connectors to courts' analysis in the consolidated context. *Id.* at 975.

An even more liberal construction of both subsections (b) and (e) is warranted, especially considering the heated debate over the propriety of subsection 6.01(d)'s rigid formulations.

As has been discussed elsewhere,⁹⁶ subsection 6.01(c) enumerates the factors or contacts the court should consider when determining which states have "legitimate interests" in having their state tort policies applied to the case.⁹⁷ These criteria are the place of injury, conduct, business, or habitual residences of the plaintiffs and defendants.⁹⁸ The function of subsection 6.01(d) is to prioritize the interests of the states identified by subsection 6.01(c) if more than one state has an interest that would be furthered by the application of its law to the case.⁹⁹ In the case of a widely dispersed mass tort (e.g., Agent Orange, Dalkon Shield, Bendectin-DES, and asbestos) subsections 6.01(d)(1)-(3) will almost never apply to the case, since all three of those subsections are premised upon common residency. For example, (d)(1) provides that if the place of the injury *and* the place of the conduct causing the injury are the same state, that state's law applies.¹⁰⁰ Also, (d)(2) would call for application of the law of the state where all of the plaintiffs habitually reside or have their place of business *and* the defendant also has its principal place of business.¹⁰¹ Finally, (d)(3) is the third tie-breaking rule: the law of the state of all the plaintiffs' habitual residences or principal places of business will apply *if* that state is also the place of injury. It should be clear that these three tests will almost never be met in the case of even moderately dispersed torts, although they may match up nicely with certain single-site events or mass-accident cases.¹⁰²

Therefore, in dispersed tort litigation, subsection 6.01(d)(4) will almost always apply since it is the catch-all preference rule of section 6.01: "In all other cases, the law of the state where the conduct causing the injury occurred governs. When conduct occurred in more than one state, the court shall choose the law of the conduct state that has the most significant relationship

96. See *supra* text accompanying note 40.

97. COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 6.01(c).

98. *Id.*

99. *Id.* § 6.01(c).

100. *Id.* § 6.01(d)(1).

101. *Id.* § 6.01(d)(2).

102. Mullenix, *supra* note 43, at 1641 (citing as examples Love Canal and a hypothetical Southwestern Airlines plane crash in Texas).

to the occurrence."¹⁰³ The possibility for prodefendant bias is inherent in subsection 6.01(d)(4)'s preference for the law of the state where the conduct causing the injury took place, which in the case of dispersed torts is most likely to be the defendant's "home state." Therefore, to combat this potential bias as well as the significant potential for general unfairness, surprise, and irrationality created by the rigid, mechanical approaches of all of subsection 6.01(d), the "escape hatches" of subsections 6.01(b) and (e) would best be used frequently, especially in the dispersed tort case.¹⁰⁴

IV. CONCLUSION

A liberal construction and application of subsection 6.01(b) must be considered by Congress and by courts that may be called upon to interpret the Proposal's provisions even if they never become law.¹⁰⁵ Liberal construction of subsection 6.01(b) is mandated by the effect of the other rules of section 6.01, which will not likely function adequately in the case of a dispersed mass tort.¹⁰⁶

Given the potential for surprising and unfair results in mass disaster cases, Congress and the courts would be well-advised to rethink the Project's choice of law strictures throughout, but given the potential for beneficial results under other sections of the proposed federal legislation, decisionmakers may be more likely to accept minor adjustments in the Project's approach rather than wholesale rejection or revision. A significant area for improvement of the Proposal is subsection 6.01(b), whose frequent and liberal application in mass torts cases should be welcomed by policy makers and scholars alike.

While use of the escape hatch will not allow the complete simplification of choice of law analysis in the average consolidated case, many of the gains in efficiency, simplicity, and consistency can still be retained. Subdivision of litigants and claims and application of different states' laws to each subgroup will guarantee significant gains in efficiency, especially

103. COMPLEX LITIGATION PROPOSAL *supra* note 2, § 6.01(d)(4).

104. *See generally supra* notes 87-89 and accompanying text.

105. The very existence of the Proposal will undoubtedly make it an extremely influential source, like the various Restatements, for judges managing mass tort cases, even if the Proposal never sees the light of day in Congress.

106. *See Mullenix, supra* note 43, at 1640.

when thousands of litigants are involved. While subsection 6.01(b) may sacrifice, in the name of fairness, some of the efficiency gains envisioned by the Drafters, those sacrifices will not outweigh the gains in fairness. In summary, subsection 6.01(b)'s liberal construction would have a procompetitive effect in that similar groups of litigants would be treated similarly, and the courts' task in choice of law analysis will still be significantly simplified and expedited.

The history of American choice of law analysis is a storied one, the only constant being debate and disagreement over the propriety of certain approaches. The circumstances surrounding the drafting and adoption of the Complex Litigation Project Proposal have been no different. The Proposal is the product of more than eight years of work by some of the brightest conflict of laws scholars in the land; its provisions will not be ignored. But they may yet be improved by increasing the potential fairness of the Project's choice of law procedures.

Fred I. Williams