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Drafting Choice of Law Rules for Complex Litigation: Some Preliminary Thoughts

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I. Introduction

One of the major themes that appears when addressing the complex litigation phenomenon is the tension between individuals’ rights to control their own lawsuits and the judicial system’s need to process these cases in a way that is both more efficient and more fair. That tension is heightened by the fact that, under current law, each state decides for itself not only what law will govern the rights and duties of the parties, but also, in cases crossing state lines, what choice of law standards will be applied to determine which state’s law will govern. In addition, the federal courts are

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1. The definition of complex litigation used in this piece is the same as that adopted by the American Law Institute in its Complex Litig. Project (Tent. Draft No. 1, 1989). “[C]omplex litigation refers exclusively to multiparty, multiforum litigation: it is characterized by related claims dispersed in several forums and often over long periods of time . . . .” Id. at Ch. 2(a).
not free to develop their own rules in these interstate cases. Rather, under the direction of *Erie Railroad Co. v. Tompkins*\(^2\) and *Klaxon Co. v. Stentor Electric Manufacturing Co.*,\(^1\) they are required to adhere to the state choice of law rules of the state in which they sit. What this means is that in the circumstances most likely to generate complex litigation—that is, when a hazardous or defective product has been distributed nationwide, when nationwide business practices have been conducted fraudulently harming numerous consumers, or when a single event involving numerous corporate and individual defendants has resulted in a disaster that has harmed hundreds or thousands of victims—plaintiffs frequently have the opportunity, as well as the incentive, to forum shop in order to have their cases determined under the law most favorable to them. This very opportunity thus helps to contribute to the litigation dispersion that has been described as threatening to overwhelm the courts.\(^4\)

Whether multiple or duplicative lawsuits are viewed as simply inevitable and necessary in our highly developed and litigious society—in effect, a price of individual freedom—and thus requiring additional resources rather than a rethinking of what the delivery of justice should mean in these times, or they are seen as intolerable, demanding some readjustment of the traditional adjudicatory model, could be debated without end. Agreement that it may be appropriate in certain designated circumstances to prefer collective, over individual, adjudication necessarily narrows the range of opportunities for individuals to maximize their litigation advantages by controlling the selection of the forum in which their disputes will be resolved. However, even if there is a willingness to accept that outcome, additional constraints stemming from our commitment to federalism create enormous difficulties in achieving a consensus on the appropriate solution.\(^5\) Nowhere is this more evident than when addressing the question of how to develop

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2. 304 U.S. 64, 78 (1938).
3. 313 U.S. 487, 496 (1941).
4. *See generally Complex Litig. Project. supra* note 1, at Ch. 2.
choice of law rules for complex cases that are transferred or otherwise aggregated for consolidated treatment in a single court.

My purpose here is briefly to discuss the process of arriving at a choice of law approach for consolidated complex litigation, not to present a specific choice of law proposal for handling these cases. In truth, recent experience in the American Law Institute (ALI) Complex Litigation Project suggests that identifying 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, as well as of understanding the differences among the various proposals that are being put forward.

II. The Justification for a Federal Choice of Law Code

The first issue to be addressed is whether sufficient justification exists to change the current reliance on state choice of law rules by adopting a federal choice of law code for complex cases, recognizing that the introduction of federal standards necessarily intrudes into what previously has been a state arena. Not only would the use of a federal choice of law code allow federal courts to abandon state choice of law rules, but it is to be expected that at least in some, if not most, cases, the application of that code may result in the designation of a particular state’s law as governing when the use of state choice of law rules would identify a different state’s law as controlling. Thus, a federal choice of law code would intrude both generally and specifically on state interests.

The sensitivity to this intrusion is heightened when it is recognized that complex litigation involving state claims occurs most frequently in the tort field—an area in which major differences persist among the states and in which the state courts and legislatures traditionally have been left to develop their own laws. Thus, notions of federalism and states’ rights are particularly acute, and it may be legitimate to impose a heavy burden of proof on those who would alter the current balance of power.
Note, however, that the question is one of policy, not of constitutionality. *Erie Railroad* and *Klaxon* merely restrict the capacity of the federal courts to use their common law powers to create federal choice of law rules; they do not address the power of Congress to do so. Three separate constitutional sources support federal legislation in this area. The first is the Commerce Clause. Given a definition of complex litigation as embracing cases dispersed in multiple forums across state lines and involving underlying activity or conduct that either is multistate in character or has multistate effects, there should be no question that a federal choice of law code authorizing federal courts to choose which of several conflicting state laws ought to be applied to these cases is rationally related to congressional authority to regulate interstate commerce. An even more direct constitutional source for federal choice of law legislation is the Full Faith and Credit Clause, which explicitly authorizes Congress to make the laws necessary to determine how to resolve conflicts between differing, but arguably applicable, laws from two or more states. Third, and finally, the Judicial Power Clause itself, coupled with the implementing authority of the Necessary and Proper Clause, supports the development of a congressional choice of law code in order to fully effectuate the federal courts’ jurisdiction to resolve these disputes.

6. 304 U.S. at 78.
7. 313 U.S. at 496.
9. See generally Complex Litig. Project, *supra* note 1, at Ch. 2.
10. The rational-basis standard for testing the constitutionality of legislation under the Commerce Clause is found in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).
11. U.S. Const. art. IV, § 1.
14. The argument that a choice of law code for complex cases is necessary to effectuate the federal courts’ jurisdiction is enhanced further if such legislation is part of a package that includes specific jurisdictional proposals for multiparty, multiforum cases. However, the grant of diversity jurisdiction alone may suffice to support the adoption of federal choice of law rules. See American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts*, Commentary—Memorandum C, 443-48 (Official Draft 1969). See also P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart and Wechsler’s The Federal Courts and the Federal System* 794-95 (3d ed. 1988).
So what is the policy justification for altering current federal practice regarding choice of law? As noted earlier, reliance on state choice of law rules, which vary considerably among states, has produced an enormous incentive to forum shop among federal courts in different states, and this has contributed to the dispersion of essentially similar litigation in multiple courts. Consequently, to introduce a single choice of law code applicable in all federal courts handling complex litigation should reduce the incentive to forum shop and, in that sense, potentially help to reduce duplicative litigation. More important, however, allowing the federal courts to apply a single choice of law rule will foster the consolidation of related litigation. If it is accepted as a premise that the consolidation or aggregation of related lawsuits under some appropriate standard will achieve a more efficient, just, and fair resolution of these disputes—a premise underlying the ALI's proposals on complex litigation, but challenged by some—then the need for a federal choice of law standard becomes clear.

Under current law, consolidation across state lines into a single forum is impeded by the fact that transfer will not result in a change of the applicable law for the transferred cases; the transferee court must apply the choice of law rules that would have been applied in the transferor court. This produces two serious barriers to effective consolidation. The first stems simply from the fact that the chaotic state of the choice of law field requires the federal courts to engage in an extremely complicated inquiry in order to ascertain the various state choice of law rules that might be applied. To give but one example, in the litigation following the plant disaster in Bhopal, India, suits originally filed in federal courts in California, Connecticut, the District of Columbia, Florida, Illinois, Louisiana, Maryland, New Jersey, New York,

15. See Complex Litig. Project, supra note 1, at Ch. 2, comment d.


19. For another example, see In re Air Crash Disaster at Sioux City, Iowa, 734 F. Supp. 1425 (N.D. Ill. 1990).
Pennsylvania, Tennessee, Texas, and West Virginia were transferred to the Southern District of New York. After examining each of those state’s conflicts laws, the federal transferee court determined that choice of law questions would be resolved under three different approaches: (1) the most-significant-relationship standard, (2) governmental-interest analysis, and (3) lex loci delicti. The court then analyzed the issues posed under each of these approaches, ultimately concluding that all the states would apply Indian law.\textsuperscript{20} In addition to requiring such an extended and complicated inquiry, numerous cases reveal that because the choice of law field is in a state of flux, there is no assurance that the district court’s conclusions about choice of law—no matter how carefully researched, analyzed, and deliberated—will be upheld on appeal.\textsuperscript{21}

The second impediment arises if the application of the different state choice of law rules leads to the conclusion that multiple state laws must be applied to the underlying claims in the proceeding. The creation of multiple individual issues determined under varying state laws effectively makes a consolidated proceeding unmanageable.\textsuperscript{22} Although in some instances that may be the appropriate result in light of the interests involved, nothing in the current scheme of things allows the court to consider the desire to achieve the uniform treatment of these claims. For these reasons, the need to develop federal choice of law standards to be applied in consolidated complex litigation appears clearly justified as a matter of policy.

The judicial efficiency to be gained by allowing the application of a single choice of law standard in a consolidation court, as well as the ability to promote similar results for similar cases, seem to outweigh the intrusion into a sphere traditionally dominated by the states. Although plaintiffs may believe that they

\textsuperscript{20} In re Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842, 866 (S.D.N.Y. 1986), aff’d, 809 F.2d 195 (2d Cir. 1987).


\textsuperscript{22} Class certification has been denied on grounds of unmanageability resulting from the need to apply multiple state laws to pendent state law fraud claims in a federal securities class action. See, e.g., Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 725 (11th Cir. 1987), cert. denied, 485 U.S. 959 (1988); Zandman v. Joseph, 102 F.R.D. 924, 929 (N.D. Ind. 1984); In re United States Fin. Sec. Litig., 64 F.R.D. 443, 454-55 (S.D. Cal. 1974).
have good reason for dispersing their litigation to obtain the most favorable results in their cases, allowing them that privilege creates confused and conflicting rulings and imposes enormous transaction costs both on defendants who must defend essentially the same dispute in multiple forums and on the federal judicial system itself. 23

III. Selecting a Choice of Law Approach

Despite this somewhat lengthy explanation of why a federal choice of law code is necessary for complex litigation, the decision to develop a separate federal scheme actually is easy compared to the task of achieving consensus on what choice of law approach to adopt. Indeed, after examining the arguments surrounding the various approaches that might be taken, many may suggest a return to the basic inquiry whether it is wise (or feasible) to attempt the task at all.

The general objectives of, as well as the constitutional restraints on, any proposal are simple to identify. The key concern, as a matter of constitutional law, is that the standard chosen should not result in the application of the law of a state with which the parties or transaction have no significant contacts, because to do so would violate due process. 24 More broadly, it is important to achieve a set of rules that will be even-handed and fair in their application. The very nature of the choice of law process requires that at some point a particular state is deemed to have a controlling interest in having its law applied. Necessarily that state’s interest will be favored over other states whose laws are not applied. That result is tolerable only if it is achieved not arbitrarily, but on the basis of neutral and fair criteria. But these general guidelines may support any number of approaches, and it is necessary to refine

23. One adverse effect of developing a federal choice of law code for complex litigation, as defined in note 1, supra, is that it creates a disparity in how state law cases are treated simply as a result of the phenomenon of multiple victims. Consequently, one may argue that this different treatment is not justified. However, the nationwide impact of these cases merits some special attention, and the decision to limit a choice of law code to complex cases and not to have it apply more generally in all federal court diversity litigation reflects a desire not to intrude on state interests more than is necessary to address the problem presented.

further the kinds of drafting choices that are possible and the premises that should underlie the approach selected.

The first question to be answered is what level of detailed guidance should be given the courts concerning how to select among competing state laws. At one end of the spectrum would be a statute simply authorizing the courts to apply and develop federal common law choice of law standards for these cases.\textsuperscript{25} This essentially was the approach taken by the ABA Mass Torts Commission in its 1989 Report. It avoids the need to achieve consensus about how to resolve these cases, and thus may be the most politically viable. Resorting to federal common law as a means of resolving choice of law questions in complex litigation also would aid the consolidated handling of these cases by relieving the court from the need to investigate multiple state conflicts rules, which are not always easily ascertainable. Nonetheless, this approach has several distinct disadvantages. Not only will uncertainty and a lack of uniformity remain, at least until the federal courts determine what the standards should be, but also there is no assurance that a single federal standard will ever evolve. Rather, just as the states have had difficulty in reaching agreement in various substantive contexts as to which choice of law standard seems most appropriate,\textsuperscript{26} variations will likely develop among the federal circuits, with little expectation that the Supreme Court will resolve those conflicts by reviewing two or three cases a year in order to develop a uniform federal standard.

Similar criticisms may be made of approaches that consist of a listing of the factors to be considered in making the choice of law decision, but that fail to suggest how those factors should be weighed or evaluated, particularly if the guidelines do not all point in the same direction as to the appropriate governing law. This essentially was the approach taken in the Multiparty, Multiforum Jurisdiction Act of 1990, which passed the House but not the Senate.\textsuperscript{27} That bill, which despite its broad title applied only to

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26. \textit{See}, \textit{e.g.}, E. \textsc{Scoles} & P. \textsc{Hay}, \textit{supra} note 18, at 656-70 (contracts) and 552-603 (torts).
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civil actions arising from a single accident, authorized the federal courts in cases under the statute's jurisdiction to determine for themselves the sources of applicable substantive law, and it included a list of ten factors that the courts could (but were not required to) consider in making that determination. 28 Those ten elements were as follows:

(1) the law that might have governed if the jurisdiction created by section 1367 of this title did not exist; (2) the forums in which the claims were or might have been brought; (3) the location of the accident on which the action is based and the location of related transactions among the parties; (4) the place where the parties reside or do business; (5) the desirability of applying uniform law to some or all aspects of the action; (6) whether a change in applicable law in connection with removal or transfer of the action would cause unfairness; (7) the danger of creating unnecessary incentives for forum shopping; (8) the interest of any jurisdiction in having its law apply; (9) any reasonable expectation of a party or parties that the law of a particular jurisdiction would apply or would not apply; and (10) any agreement or stipulation of the parties concerning the applicable law. 29

Even a cursory look at that listing reveals that, although each of the factors arguably is relevant, without further guidance little predictability or uniformity could be expected under such a scheme. 30

It is clearly appropriate and desirable that the federal consolidation court makes its choice of law decision based on an analysis of the policies to be fostered by the application of a given state's law—in other words, that the court evaluate which states may assert a legitimate governmental interest in the dispute. However, the intrinsic indeterminacy of a policy analysis, without more, also raises fears about the lack of predictability and the possibility of inconsistent treatment. This, in turn, will result in undue emphasis on the selection of a particular consolidation court

28. Multiparty, Multiforum Jurisdiction Act, supra note 27, § 6(a).
29. Id.
30. Given the bill's restriction to single-event torts, identifying the appropriate governing law in light of the 10 factors actually would not be as difficult to predict as it might seem at first glance, because in most instances several factors would be irrelevant or would coalesce around the same state. However, the use of such a broad and diverse list for dispersed torts would be chaotic.
(or judge) because that selection may be potentially dispositive in determining the governing law.

The use of more refined choice of law rules drafted in light of the policies involved, or, as in the Restatement (Second) of Conflict of Laws, a set of presumptions to be considered in conjunction with a policy analysis,\(^{31}\) offers the potential that a uniform body of law for these cases will develop. Further, openly including in any legislative package some policy judgments as to how to select among competing state interests, although surely politically more difficult, allows these important decisions to be exposed to (and perhaps shaped to some degree by) public debate. This seems preferable to leaving matters, which involve the duties and entitlements of so many citizens, in the exclusive hands of the judiciary who, regardless of their enormous competence, are unelected officials. For these reasons, it seems desirable to reach some consensus about a more refined code, rather than leaving the federal courts to develop their own choice of law approach to these cases or simply allowing the courts to apply a general policy analysis to determine which state's law should govern.

Once it is agreed that a detailed choice of law methodology should be developed for complex litigation, a series of additional questions become apparent. The first is how narrowly crafted the rules should be—that is, should they address how to select the governing state law for the claims that are involved or should they speak in terms of the issues that are presented? The latter seems preferable for numerous reasons. To begin with, by focusing on the various issues that comprise a claim, state interests may be revealed that might be obscured if only whole claims were evaluated. A choice of law process that failed to recognize those distinctions or nuances might be needlessly intrusive on state interests. Thus, for example, in mass-products-liability litigation, it seems wisest to consider separately what law should govern on

\(^{31}\) Restatement (Second) of Conflict of Laws § 6 (1971) sets out the general policy analysis required for all choice of law decisions. However, subsequent sections contain presumptive rules that apply if certain factors are located in a single state, unless some other state overcomes the presumption by having a more significant relationship with the events or the parties. See, e.g., id. § 146 (presumption for place of injury in personal injury suits); § 148 (presumption for state in which plaintiff took action in reliance on misrepresentations made there in fraud actions); and § 150(2) (presumption for state of plaintiff's domicile in multistate defamation action).
tort-liability questions, on statute-of-limitations questions, on procedural questions, and on the availability of punitive damages. Notably, a separate choice of law analysis for each of these questions will not mean that different states' laws necessarily will apply to each one. Rather, it merely assures that in appropriate cases in which there is some reason to treat a particular issue under a state law different from the law applied to the liability question that will occur.

The application of choice of law rules to issues, not cases as a whole, is consistent with the approach taken in the Restatement (Second) of Conflict of Laws. In addition, in the consolidation context this approach is particularly important because it provides the needed flexibility for the court to organize the litigation around the issues that truly are common and can appropriately be treated in aggregate fashion. Its only danger is that such a division creates a potential for the lawsuit to be decided on the basis not of any existing law, but an amalgam of laws, which, when applied together, represent no state’s entire interests. In other words, effectively, federal common law will be applied in these cases. However, that danger does not suggest that focusing on the issues to determine the governing law is inappropriate. Instead, it simply means that in drafting the choice of law rules that are to be applied, it is important to include protection against anomalous results. For example, after making its choice of law analysis, the consolidation court should be required to consider whether the conclusions reached there, taken as a whole, present a fair, not anomalous, approach. Further, the court must be given the authority to sever and remand parties, claims, or issues that it ultimately determines should be treated individually, rather than collectively.

One important element of any consolidation scheme, therefore, is the court’s power to reorganize the litigation to allow for the

32. See Restatement (Second) of Conflict of Laws §§ 198-207 (1971).
33. The ALI's approach to complex litigation rests on the notion that after the cases have been transferred and consolidated, the transferee court will reorganize the litigation into issues, some to be treated in a consolidated fashion and some individually. See Complex Litig. Project, supra note 1, § 3.06. Thus, once the court divides the litigation into issues around which parties are grouped, the most appropriate result may be for the parties and issues to be subclassed, with different laws applied to different parties on similar issues.
common adjudication of appropriate issues. Given that fact, the next question in developing a choice of law code may seem somewhat counterintuitive: should one of the stated objectives of the choice of law analysis be to allow a single state’s law to be applied to an issue designated as common to all claims and parties in the litigation? The answer to this question is very important because reference to a single state’s law to govern a common issue will help to maximize the efficient handling of the litigation and encourage uniform, or at least consistent, results. 34 On the other hand, the conclusion that it is not possible or desirable for a single state’s law to control may indicate that consolidation is unworkable. Thus, the court must be given authority to subdivide complex litigation into appropriate subclasses formed around common issues, using as one measuring rod in doing that the objective of treating the issues so grouped under a single legal framework.

The objective of identifying a single governing law presents a direct collision between individual state interests and judicial system interests. 35 This is particularly true to the extent that the differences among the state laws are significant and represent fundamental policy decisions, such as the retention in some states of the contributory negligence rule and the experimentation in other states with a rule of market share liability for generic products. A choice of law rule that, while recognizing these differences, would suggest that the court try to identify a single governing law in order to allow for the consolidated treatment of issues having factual similarity may be challenged as inappropriately intrusive on historic federalism interests and the rights of states to establish and enforce their own policy decisions. However, the balance between state and federal spheres of power is not in equipoise, and it should be borne in mind that an appropriate recognition of legitimate state interests will be an integral part of the initial analysis identifying which state’s law will control. Thus, although

34. See id. § 3.06, comment c.
35. The objective of seeking a single state whose law may be applied to cases filed in numerous states and involving multistate parties necessarily must be evaluated in light of the constitutional limits imposed generally on the application of choice of law rules. In other words, the state selected “must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981)).
in some circumstances it may not be desirable to have a single state’s law control a particular issue, that decision should be made in the context of each litigation. To argue that each state has an unconditional right to control these questions and that it is impermissible to consider favoring one state’s interest over another is to ignore the fact that the states, although sovereign in their own spheres, are bound together under the Full Faith and Credit Clause.\textsuperscript{36}

The final question that must be addressed when considering the general principles that should underlie a choice of law code for complex litigation is whether the rules should be drafted so as to be neutral in their application (insofar as that is possible) or whether they should openly reflect some substantive policy preferences. To take a relatively simple example, consider statutes of limitations—an area in which state laws may differ markedly. One choice of law approach to claims filed in multiple courts and later consolidated would be to provide that whichever state’s law was deemed to control the underlying claim for which the limitations issues were pertinent also should govern the limitations questions. This approach would treat limitations as essentially substantive,\textsuperscript{37} but in itself would not represent a preference for either party in the litigation. A different approach would be to provide that claims timely where filed should be sustained. This rule may be viewed as a plaintiff-favoring rule because under current law a court may apply the statute of limitations of the state in which it is sitting, regardless of the contacts of the parties or transaction with that state.\textsuperscript{38} This encourages plaintiffs to forum shop to take advantage of the law in those states having the longest or most generous statutory periods.\textsuperscript{39} Thus, although a rule sustaining claims timely where filed would protect the parties’ expectations and would respect the interests of all the states in which

\textsuperscript{36} U.S. Const., art. IV, § 1. See Complex Litig. Project, supra note 1, § 3.09 comment d.

\textsuperscript{37} The decision to link limitations to liability is made in the Uniform Conflict of Laws—Limitations Act § 2(a), 12 U.L.A. 57 (Supp. 1990).


\textsuperscript{39} For an extreme example of forum shopping for limitations periods that recently was upheld by the Supreme Court, see Ferens v. John Deere Co., 110 S. Ct. 1274 (1990).
claims were initially filed, it ignores the fact that limitations issues have meaning only insofar as they relate to other issues in the case and it does so at the expense of encouraging multiple filings—to the detriment of judicial economy.

The mere articulation of these competing choices reveals the difficulty of answering the neutrality question. To draft rules that openly reflect party preferences, even those preferences based on the generally accepted trend in the law, is necessarily fraught with difficulty. Those litigants not favored may claim a bias and, in the context of a federal choice of law scheme, that bias may result in the substitution of a federal preference for a different state preference, thereby emphasizing the intrusion on a traditional state sphere. At the same time, if one recognizes that the application of any choice of law code often will necessitate a choice between two legitimately interested states as to whose preferences will be honored, then to assume that whatever rule is used to reach a result can be entirely neutral may appear disingenuous. Indeed, it may be argued that a choice of law system that fails to openly vindicate shared concerns about matters such as the safety of products on the national market, for example, will be manipulated in any event by the judiciary to respond to those concerns.

IV. Conclusion

Numerous additional issues could be presented to illustrate the kinds of problems that must be confronted when drafting a detailed choice of law code for complex litigation. However, without some consensus about each of the broad preliminary questions I have raised, there is little hope of agreeing upon solutions for those situations in which legitimately interested states have reached substantive but truly conflicting policy determinations. Conversely, the difficulty of the entire drafting enterprise in this area may raise a serious question whether the goals to be achieved—the efficient, fair, and just determination of complex litigation through consolidation—are outweighed by the intrusion caused.

Personally, I believe that the current crisis in the courts caused by these cases merits a serious attempt to achieve a choice of law

solution despite these difficulties. And I have reached that conclusion even though I recognize that little, if any, likelihood exists of Congress actually enacting an omnibus measure in this field in the foreseeable future. Certainly, for civil proceduralists, there should be no doubt but that the examination of the problem itself is worth the effort as it presents one of the more fascinating and real dilemmas in the civil litigation field today.