

1987

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Recommended Citation

Truax, Sara Lloyd (1987) "United States Class Actions in Private International Law Decisions," *California Western Law Review*. Vol. 23 : No. 2 , Article 7.

Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol23/iss2/7>

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United States Class Actions in Private International Law Decisions

INTRODUCTION

When a case involving multiple state or international contacts is brought to trial in a United States federal court, that court must decide which state's or country's substantive laws should be applied.¹ Class actions, especially diversity class actions,² can involve a multitude of state or international contacts. As a result, choice of law decisions can become especially difficult.³

A number of different choice of law theories are used in the United States and still other methods of choice of law are used internationally. The Permanent Court of International Justice, in its discussion of which laws were applicable to a contract dispute between the United States and Mexico, stated:

Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country. The question as to which this law is

1. The need to assess which state's or country's laws are applicable to a case arises out of the concern for respecting state sovereignty and the concept that each state or country may enact and uphold laws which govern people and events which take place within, but not beyond, its boundaries. See discussion of the vested rights theory under the traditional approach, *infra* notes 55 to 73 and accompanying text. "The world is composed of territorial states having separate and differing systems of law. Events and transactions occur, and issues arise, that may have a significant relationship to more than one state, making necessary a special body of rules and methods for their ordering a resolution." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 1 (1971).

2. "Diversity of parties" refers generally to parties who are citizens of different states. 28 U.S.C. § 1332 (1982) describes diversity as existing in situations where the parties are

- (1) citizens of different states;
- (2) citizens of a State, and citizens and subjects of a foreign state;
- (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
- (4) a foreign state . . . as plaintiff and citizens of a State or of different States.

Class actions, a statutory device which allows one or more people to sue on behalf of a group of injured parties, see FED. R. CIV. P. 23, were designed to reduce the time and expense involved in numerous individual litigations of the same or substantially similar issues. See Comment, *Mass Tort Class Actions: A Step Toward Equity and Efficiency*, 47 ALA. L. REV. 1180 (1983), for a description of the process as it relates to this subject. See also FED. R. CIV. P. 23 Advisory Committee Note, 39 F.R.D. 98, 102-03 (1966).

3. For example, in *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 690 (S.D.N.Y. 1984), the class was composed of plaintiffs from virtually all of the fifty states, Puerto Rico and the District of Columbia as well as from a number of foreign countries. The court noted as significant to the choice of law problem the fact that the allegedly wrongful activities of the defendants had significant contacts with at least twelve different jurisdictions. *Id.* at 692, 706.

forms the subject of that branch of law which at the present day is usually described as private international law or the doctrine of the conflict of laws. The rules thereof may be common to several States and may even be established by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between States. But apart from this, it has to be considered that these rules form part of municipal law.⁴

Current theories of choice of law fail to provide adequate guidelines for the resolution of class actions. United States choice of law theories were developed prior to the current popularity of class actions and, therefore, made no provision for the numerous factors which would necessarily have to be weighed in the decision making process. Because of the deficiencies of current choice of law with regard to class actions, courts have failed to certify some class actions.⁵ In other cases, the courts have applied choice of law theories in unconstitutional⁶ or inadequately defined methods,⁷ leaving future courts little guidance for handling subsequent cases.

The United States remains a forum for international torts litigation. Much of this is due to the ever expanding role of international business and the ease of transportation provided by modern technology.⁸ Another reason for foreign plaintiffs to seek a United States forum is found in American liberal recovery and discovery laws.⁹ This Comment will briefly review both international and domestic approaches to the choice of law problem. Next, it will outline how choice of law theories fail to realize the policies they were designed to address when applied to class actions. This Comment then will propose a solution through the formulation of a rule based on domicile.

4. P.C.I.J. (ser. A) No. 20/21, at 41 (1929). Cf. *Illinois Central R.R. (United States v. Mexico)*, 1927 Opinions of the Commissioners 15.

5. See *Zandman v. Joseph*, 102 F.R.D. 924 (N.D. Ind. 1984), discussed *infra* notes 20-23 and accompanying text.

6. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), discussed *infra* notes 133-39 and accompanying text.

7. See "*Agent Orange*", 580 F. Supp. at 713, and *infra* notes 141-47 and accompanying text.

8. Baxter, *International Conflict of Laws and International Business*, 34 INT'L & COMP. L.Q. 538, 539-41 (1985).

9. For example, the court in *Tramontana v. S.A. Empresa de Viacao Aerea Rio Grandense*, 350 F.2d 468 (D.C. Cir. 1965), noted the difference in wrongful death limitations between Brazil, 100,000 cruzelros (approximately \$170.00 at the time), and the District of Columbia, an unlimited damages provision.

I. ANATOMY OF A CLASS ACTION CHOICE OF LAW QUESTION

In a class action, plaintiffs are allowed to sue on behalf of a group of individuals with similar claims.¹⁰ The ability to sue as a class was created by statute to reduce the time, effort and expense involved in the litigation of multiple suits arising out of the same set of facts.¹¹

Class actions originally evolved from English equity cases and were adopted in the United States under the old federal equity rules.¹² Although technically a joinder device,¹³ class actions vary significantly from joinder.¹⁴ Today, class actions are governed by Rule 23 of the Federal Rules of Civil Procedure¹⁵ which sets out a

10. FED. R. CIV. P. 23. See also Comment, *supra* note 2, for a description of the process as it relates to this subject, and Forde, *Punitive Damages in Mass Tort Cases: Recovery on Behalf of a Class*, 15 LOY. U. CHI. L.J. 397 (1983).

11. Comment, *supra* note 2, at 1181. See also text of Rule 23, *infra* note 15.

12. J. LANDERS & J. MARTIN, CIVIL PROCEDURE 510 (1981).

13. Joinder is a process of combining numerous claims of relief into one action. FED. R. CIV. P. 18(a).

14. In joinder, all parties to all causes of action remain before the court; in class actions, only the "representative plaintiffs" are actually before the court. See generally FED. R. CIV. P. 19, 20 & 23. The first rules that governed class actions were uncertain and contained procedural restrictions which made suing under them difficult. J. LANDERS & J. MARTIN, *supra* note 12, at 510.

15. FED. R. CIV. P. 23(a) & (b) provide:

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management

number of prerequisites such as numerosity, commonality of law or fact, typicality and adequacy of representation, all of which must be met before parties can be certified as a class.¹⁶

Rule 23(c)(2) gives class members the power to exclude themselves from the class.¹⁷ All members of the class are bound by the judgment, favorable or not, unless they have excluded themselves. The "opt out" aspect of the rule is significant in the choice of law question because it creates the right of potential class members to avoid the proposed rule by choosing not to participate in the class action. Of course, that means they lose the benefits of the class action as well.¹⁸

Some potential class actions meet their demise due to the choice of law problem while still in the certification process.¹⁹ Since plaintiffs are likely to be from numerous jurisdictions, all of whose substantive law may vary with consequent varying applicable laws, a court may find itself overwhelmed in choosing which substantive law to apply. Faced with this difficulty, some courts have simply denied certification. The inability to form a class requires plaintiffs to either sue individually or refrain from suing entirely. If, however, a court were able to determine which jurisdiction's law to apply, then only one lawsuit with the class as plaintiff could be pursued. Thus, the ability to determine what law to apply to a case can be critical to the maintenance of a class action suit.

In *Zandman v. Joseph*,²⁰ for example, plaintiffs sought to have a class certified to pursue a claim for damages arising out of the Securities Exchange Act²¹ and common law fraud. Plaintiffs, investors from a number of states, alleged that defendant made misrepresentations and omissions over an extended period of time.²² The court refused to certify the class because under Indiana's

of a class action.

16. There are a number of prerequisites to becoming a class, such as numerosity, commonality, typicality and adequacy of representation. Aside from these, there are also due process considerations and requirements of notice to possible class members, not to mention the jurisdictional and venue problems associated with mass litigation. A complete analysis of class actions is outside the scope of this Comment.

17. See Rule 23(c)(2), *infra* note 117. The right to "opt out" applies only to Rule 23(b)(3). This Comment addresses other forms of class actions as well, but arguments based on the "opt out" clause relate exclusively to Rule 23(b)(3) class actions.

18. The opting out clause may also affect the defendant's decision whether to settle. It is also important to note that not all class actions are governed by this clause. This factor may weigh against the presumption when a court attempts to determine if another state has a substantially greater interest. See *infra* notes 110-12 and accompanying text.

19. See, e.g., *Zandman v. Joseph*, 102 F.R.D. 924 (N.D. Ind. 1984)

20. *Id.*

21. 15 U.S.C. § 78j(b) (1982).

22. These misrepresentations were made in press releases published in the Wall Street Journal and regarded the progress, design, development, testing and marketability of the Downhole Steam Generator. *Zandman*, 102 F.R.D. at 926-27.

choice of law rule, the state fraud claims would have to be tried in accordance with the substantive law of the state of each class member.²³

The proposed plaintiff class was also denied certification in *Coca-Cola Bottling Co. v. Coca-Cola Co.*,²⁴ a suit which involved multiple alleged violations of numerous consent decrees.²⁵ The court stated that even though it was "more probable than not that individual questions of law will inevitably predominate . . . the court would be confronted with the necessity of applying as many as thirty-two different states' rules" to the cause of action.²⁶ The states involved in both *Coca-Cola Bottling* and *Zandman* used a choice of law theory which called for the application of the law of the state in which the last act necessary for a cause of action occurred. In these cases, the last act was the injury which occurred in each of the plaintiff's domicile.²⁷ Yet, in both cases, the plaintiff class and all of the relevant facts occurred entirely within the United States and the federal government had no particular interest in ensuring that the plaintiffs were successful in gaining recovery. When the acts in question occur outside the United States or the federal government has a stake in the outcome of the case,²⁸ the choice of law question becomes even more difficult.

Despite the difficulties class actions may pose, many class actions do proceed beyond the certification process. However, the choice of law question remains a substantial hurdle for courts to overcome. To illustrate thoroughly why current choice of law theories fail to meet the needs of class actions, a brief overview of current approaches to choice of law is necessary.

II. THEORIES OF CHOICE OF LAW

The body of choice of law is designed to answer the question of which state's laws are to be applied to a controversy in which the

23.

Indiana ordinarily follows the *lex loci delicti* choice-of-law rule for torts, and thus for a fraud claim uses the law of the place where the loss was suffered. That rule would require use of the law of the state where each class member suffered his or her pecuniary loss. Were the modern "most significant contacts" choice-of-law rule applied, the analysis would be even more complex but would lead in the case of most class members to application of the same law as under the *lex loci delicti* rule.

Id. at 930 (citations omitted).

24. 95 F.R.D. 168 (D. Del. 1982). On reconsideration, the class was again denied certification. *Coca-Cola Bottling Co. v. Coca-Cola Co.*, No. 81-48 (D. Del. Feb. 18, 1987).

25. *Id.* at 170.

26. *Id.* at 178.

27. *Zandman*, 102 F.R.D. at 930; *Coca-Cola*, 95 F.R.D. at 178.

28. See, e.g., "*Agent Orange*", 580 F. Supp. at 692, 706.

laws of more than one jurisdiction could apply.²⁹ To make the choice, a court will look at its own state's choice of law rules.³⁰ Federal courts, when presented with a class action based on diversity, apply the choice of law rule adopted by the state in which they sit.³¹ In the United States, choice of law rules are generally created by case law; statutes rarely play a role in such decisions.

Both domestic and international choice of law theories historically lack consistency. Moreover, the American choice of law theories have not been consistently applied and may require a court to make difficult policy assessments regarding another state's laws.³² These theories will be discussed more fully after a brief review of international choice of law concerns. International policies of choice of law may change from country to country, although there is a continuing attempt to unify this body of law.³³

A. Private International Law

Due to the liberal recovery laws found in the United States, this country remains a popular forum for international torts. The presence of international contacts makes the choice of law decision more difficult in international contexts, especially when questions of *forum non conveniens* arise.³⁴ In *Piper Aircraft Co. v. Reyno*,³⁵ the United States Supreme Court rejected the plaintiff's contention that her suit, which arose from a plane crash in Scotland, should not be dismissed on the grounds of *forum non conveniens*. The dismissal resulted in the application of Scottish law, which

29. See W. RICHMAN & W. REYNOLDS, UNDERSTANDING CONFLICTS OF LAWS 2-3, 109 (1984). "Conflict of Laws is that part of the law of each state which determines what effect is given to the fact that the case may have a significant relationship to more than one state." RESTATEMENT (SECOND), *supra* note 1, § 2.

30. To begin its analysis, a court will look to its own choice of law rules to determine what facts will be relevant in making the choice of law decision. In other words, only the substantive law of the other state is applied, not its choice of law doctrine.

The body of choice of law includes not only the choice of which law to use, but also questions of jurisdiction and enforcement of judgments. Questions of jurisdiction and enforcement of judgments are outside the scope of this Comment.

31. *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). The only time choice of law is predetermined is when parties to a contract specify which law is to apply to the contract. The proposal in this Comment is not designed to alter current law applicable to a party's specified choice. See W. RICHMOND & W. REYNOLD, *supra* note 29, at 216-17.

32. See discussion of interest analysis approach, *infra* notes 74-82 and subsequent discussion of U.S. choice of law theories.

33. See generally Reese, *The Hague Conference on Private International Law: Some Observations*, 19 INT'L L. 881 (1985).

34. *Forum non conveniens* "refers to discretionary power of court to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried in another forum." BLACK'S LAW DICTIONARY 589 (5th ed. 1979). See also *Johnson v. Spider Staging Corp.*, 87 Wash. 2d 577, 579, 555 P.2d 997, 999 (1976), *reh'g denied* 455 U.S. 928 (1982).

35. 454 U.S. 235 (1981).

the plaintiff argued was less favorable to her.³⁶

The effect of *forum non conveniens* on the choice of law decision, which the plaintiff in *Piper* complained of, does not arise in U.S. federal class actions as the transferor court can ensure a change of court within the United States which does not result in a change in the applicable choice of law rules.³⁷ However, when another country's courts are more convenient, a United States court cannot require the application of American laws.³⁸

As noted earlier, as world travel and trade becomes more frequent, disputes with international connections occur more often.³⁹ When international disputes arise, courts must make the difficult decision of which country's laws to apply. Municipal law concerning choice of law varies from country to country,⁴⁰ much as United States choice of law varies from state to state.

The Hague Conference on Private International Law was formed to attempt to unify rules of choice of law.⁴¹ To date, no agreement on how to handle the choice of law problem in class action suits has been reached. Currently, thirty-two States are members of the Hague Conference.⁴² When the Conference has prepared a convention, the member countries may choose to ratify, or not to ratify, a proposal presented to them.⁴³ In light of this flexibility, it seems unlikely that a uniform choice of law convention for class actions will be created, and universally accepted, any time in the near future. The proposal presented in this Comment may suggest a framework for such a convention. Until an attempt is made to create uniform conventions, this Comment's proposal may serve as a solution to problems encountered in United States class actions with international connections.

36. *Id.* at 238, 240.

37. 28 U.S.C. § 1404(a) (1982). *See* *Erie R. R. v. Tompkins*, 304 U.S. 64 (1938). A complete analysis of *forum non conveniens* is outside the scope of this Comment.

38. The proposal of this Comment is designed to fulfill the international choice of law question as well as the domestic question, although it is realized the application of the proposal in the international realm may not always be appropriate. For an explanation of the limitations, *see* discussion of fulfilling international concerns, *infra* notes 131-32 and accompanying text.

39. Baxter, *supra* note 8.

40. *See generally*, Morse, *Choice of Law in Tort: A Comparative Survey*, 32 AM. J. COMP. L. 51 (1984).

41. Reese, *supra* note 33.

42. The members of the Hague Conference are Argentina, Australia, Austria, Belgium, Canada, Cyprus, Czechoslovakia, Denmark, Federal Republic of Germany, Finland, France, Greece, Ireland, Israel, Italy, Japan, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Surinam, Sweden, Switzerland, Turkey, United Arab Republic, United Kingdom, United States, Uruguay, Venezuela and Yugoslavia.

43. Reese, *supra* note 33, at 881, 884.

B. *Domestic Choice of Law*

Four choice of law theories are primarily in use in the United States: 1) Traditional, 2) Interest Analysis, 3) Restatement (Second) and 4) Choice-Influencing Considerations (Better Law). The theories vary considerably in their approach; however, central basic purposes recur throughout choice of law approaches.⁴⁴ The basic objectives of choice of law rules are providing uniformity and protecting party expectations and territorial sovereignty. Another significant objective is discouraging forum shopping.

1. Forum Shopping

Commentators have argued that the most significant goal of choice of law rules is to discourage forum shopping.⁴⁵ Their position is based on the belief that substantive rights of the parties should not vary depending on where a suit is brought. Professor Cavers wrote in reference to a rule which would encourage forum shopping by applying forum law absent a compelling reason not to do so:

Not only is this denial of true justice, a denial of the purpose of the conflict of laws, but also it is a denial of law itself. It provides no opportunity for certainty in the law. It makes it difficult to plan transactions having interstate elements. Even after an injury of some sort has occurred, there is, under such a rule, no basis for advising a client as to his rights, or for settling or adjusting the dispute without litigation.⁴⁶

The need to discourage forum shopping is especially significant in class actions. Because diversity class actions often provide plaintiffs with a choice of several states within which to bring their suits, given multiple contacts of the defendant with those states, the potential arises for plaintiffs to affect the outcome of the suit merely by the choice of which forum to sue in, and consequently which choice of law doctrine and substantive law will be applied.⁴⁷ One of the only roadblocks plaintiffs may face is the inconsistency sometimes found in the application of choice of law rules.⁴⁸

44. W. RICHMAN & W. REYNOLDS, *supra* note 29, at 200-03.

45. *Id.*

46. D. CAVERS, *THE CHOICE OF LAW PROCESS* 23 (1965).

47. Courts apply the choice of law doctrine accepted by the state or country in which they sit. *Supra* note 30.

48. Personal jurisdictional questions may also arise. A full discussion of these potential problems are outside the scope of this Comment.

2. Inconsistency of Application

The problems with inconsistent application of choice of law are evident in many cases.⁴⁹ For example, under the traditional approach, a court is able to "characterize" a plane crash as either a tort or a contract issue to acquire the desired result.⁵⁰ Characterization of the accident as a tort will result in the application of the law of the state where the accident occurred. If characterized as a contract dispute, the court will apply the law of the state in which the contract was formed.⁵¹

Courts using other choice of law theories are able to mold their results to some extent by manipulating the characterization of a state's interest in a given case or by manipulating the legislative purpose of another state in enacting the statute in controversy.⁵² For example, the purpose of a guest statute could be characterized as assuring the priority of injured nonguests in the assets of a negligent host. The same statute could also be characterized as being designed to prevent fraudulent claims against local automobile owners.⁵³

To maintain the goal of discouraging forum shopping, this Comment suggests a uniform means of handling class actions so that the outcome of a suit would not rest on where the suit was brought. Because even a uniform rule can be applied inconsistently, the proposed domicile approach focuses on a simple inflexible standard. The proposal will also solve some of the problems associated with the fact that the major choice of law theories also vary in respect to one another.⁵⁴ To better understand the incon-

49. W. RICHMOND & W. REYNOLDS, *supra* note 29, at 207.

50. See discussion of the traditional approach, *infra* notes 55-73 and accompanying text.

51. W. RICHMOND & W. REYNOLDS, *supra* note 29, at 140. See generally R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS* 1-56, 75-91 (1981).

52. For example, the Court in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (Stevens, J. concurring), *reh'g denied* 450 U.S. 971 (1981), discussed Minnesota's interest in safeguarding the interests of its workers, but the worker whose interests were in question was deceased (only his insurance policies were in question—not employment concerns) and he had been a resident of Wisconsin. *Id.* at 314.

53. *Tooker v. Lopez*, 24 N.Y.2d 569, 575-76, 301 N.Y.S.2d 519, 523-24, 249 N.E.2d 394, 397 (1969).

54. The following is an example of inconsistent application of choice of law theories: In *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954), plaintiff sued her husband for child support under a New York separation agreement. The agreement provided in part that the wife was not to bring any action relating to their agreement in any court. A year after the couple signed the agreement and defendant had failed to make payments, plaintiff brought a separation agreement in England (the marital home of the couple). The suit in England was never brought to trial. Three years later in New York, defendant's new domicile, plaintiff brought this action. The lower court applied New York law to the case and upheld the defendant's defense that the wife's filing of the action in England repudiated the separation agreement. This holding was reversed on the theory that the parties must have

sistencies of these theories and how they relate to class actions, a review of each of the major theories currently in use follows.

C. Traditional Approach

The traditional approach to choice of law is a territorial/power-based approach founded on the vested rights theory.⁵⁵ According to Joseph Beale,⁵⁶ the vested rights theory evolved from the idea that when the event being sued on occurs in a state other than the forum, a right to litigate the issue is created, if at all, according to the laws of the state in which the last event necessary for recovery occurs.⁵⁷ Because laws are considered not to have extraterritorial effect,⁵⁸ the existence and scope of that right can only be determined by the laws of the state in which the right was created. The court's job is merely to give effect to the *right* which had vested in the other state.⁵⁹ The traditional approach, therefore, focuses on a single decisive event. Broad rules were developed to govern each major area of law. For example, in torts the state in which the last act necessary to form the cause of action has its law applied. In contract disputes, the state in which the contract was formed has its law applied.⁶⁰

The traditional theory focuses on which state's rules are to apply and not on the content of the rules themselves. If properly applied, the traditional approach takes no notice of the content of the foreign law until it has been chosen.⁶¹ However, in practice, judges are aware of the applicable foreign law and find that a blind application of the law of a state which has no interest at stake can result in decisions contrary to both common sense and equity.⁶² Judges have at times, therefore, considered local law and molded their characterization of an issue in order to reach what seems to be a more appropriate result.⁶³

expected that English law (under which the agreement was still valid) would be applied.

Seven years later, another case also involving child support was brought in New York, under similar circumstances. Although the same "theory" of choice of law was applied to both cases, in this second case New York law was not found to be applicable even though New York was the state, like England in *Auten*, where the mother was domiciled. *Haag v. Barnes*, 9 N.Y.2d 554, 216 N.Y.S.2d 65, 175 N.E.2d 441 (1961).

55. W. RICHMAN & W. REYNOLDS, *supra* note 29, at 132.

56. Beale was one of the main proponents of the vested rights theory in the United States. *Id.*

57. The right may also vest in the forum state depending on its state's laws.

58. Cheatham, *American Theories of Conflict of Laws and Their Role and Utility*, 58 HARV. L. REV. 361, 365 (1945).

59. W. RICHMAN & W. REYNOLDS, *supra* note 29, at 132.

60. *See supra* note 51.

61. W. RICHMAN & W. REYNOLDS, *supra* note 29, at 135.

62. *Id.*

63. *Id.*

The traditional approach to choice of law nevertheless has many aspects which are appealing as a rule for choice of law questions in class actions. It is simple to apply and discourages forum shopping because, if all states used the traditional approach, the same result would be reached regardless of the forum in which the suit was brought.⁶⁴ The problem with this approach, as applied to class actions, is determining what the one significant "contact" is. For example, in a class action products liability case, how is the court to choose one state's law if the last event needed to create the right is the injury and there are plaintiffs who have been injured across the United States and in numerous foreign countries? Applying numerous state and foreign laws to different plaintiffs does away with most of the benefits of class actions.⁶⁵

The application of a state's law when that state has no policy interest in having its laws applied is described as a false conflict. *Babcock v. Jackson*⁶⁶ is an illustration of this concept. In *Babcock*, the plaintiff and defendants, all New York domiciles, left New York for a weekend trip to Ontario. While in Ontario, Mr. Jackson's car was involved in an accident, injuring Mrs. Babcock. Ontario law would have denied recovery by means of a guest statute,⁶⁷ while New York law would have allowed recovery.⁶⁸ Under the traditional approach, the court, sitting in New York, would have been required to apply Ontario law since the last act necessary for Mrs. Babcock's injury—the accident—occurred in Ontario.⁶⁹

The New York court found that the purpose of the Ontario law was to protect Canadian insurers from collusive law suits.⁷⁰ The court further found the policy behind New York's relevant statute was to require "a tort-feasor to compensate his guest for injuries caused by his negligence"⁷¹ Since there was no Ontario defendant in the suit, the court saw no real conflict between the laws

64. This assumes of course the characterization problem does not arise. The problems associated with multiple defendant class actions are addressed *infra* notes 112-114 and accompanying text.

65. Although there would remain a single proceeding, that proceeding would in essence be numerous trials applying the same facts to different laws. The time and effort involved would not be much less than if separate trials were had. See *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 95 F.R.D. 168, 178 (D. Del. 1982).

66. 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963).

67. Highway Traffic Act of the Province of Ontario, ONT. REV. STAT. (1960), ch. 172, § 105, subd. (2).

68. *Babcock*, 12 N.Y.2d at 483, 240 N.Y.S.2d at 750, 191 N.E.2d at 284.

69. *Id.* at 478, 240 N.Y.S.2d at 746, 191 N.E.2d at 281.

70. *Id.* at 483, 240 N.Y.S.2d at 750, 191 N.E.2d at 284 (quoting *Survey of Canadian Legislation*, 1 U. TORONTO L.J. 358, 366).

71. *Babcock*, 12 N.Y.2d at 483, 240 N.Y.S.2d at 750, 191 N.E.2d at 284.

of the two jurisdictions.⁷² In applying New York law, the court noted that application of the "inflexible traditional rule" would "lead to unjust and anomalous results."⁷³

When the combined problems of determining where the last act occurred and the court's desire not to defeat the purposes behind states' laws, the traditional approach becomes a difficult solution for the class action choice of law problem. The desire to focus on another state's interest in a suit was developed in the interest analysis approach to choice of law.

D. Interest Analysis

In an interest analysis jurisdiction, the court first identifies the substantive laws of the respective jurisdictions which apply to the case.⁷⁴ Next, it looks at the policies behind those laws to see whether, in light of the factual situation present, application of those laws will further any state interest.⁷⁵ If application of a particular state's laws will further that state's policy, that state is considered to have an interest.⁷⁶

For example, in *Tooker v. Lopez*,⁷⁷ the court refused to apply the law of the state in which the accident occurred. The case arose from the crash, in Michigan, of a Japanese sports car. Both passengers were college coeds from New York who brought suit in New York. The defendant asserted the Michigan "guest statute" as a defense. The court characterized the purpose of the Michigan statute as preventing fraudulent claims against Michigan insurers and car owners.⁷⁸ Since the insurer involved as well as the car's owner were New York residents, no purpose of the Michigan statute could be fulfilled. As a result, the court refused to apply Michigan law. The court stated that application of Michigan law would defeat New York's interest in the case without serving a legitimate interest of Michigan.⁷⁹

One criticism of the interest analysis approach is that it is forum biased and thus leads to forum shopping.⁸⁰ In the event two

72. *Id.*

73. *Id.* at 484, 240 N.Y.S.2d at 751-52, 191 N.E.2d at 285.

74. *See* W. RICHMOND & W. REYNOLDS, *supra* note 29, at 175-76.

75. *Id.*

76. If more than one state has an interest, then the court applies the law of the forum. *Id.* at 182.

77. 24 N.Y.2d 569, 301 N.Y.S.2d 519, 29 N.E.2d 394 (1969).

78. *Id.* at 571, 301 N.Y.S.2d at 520, 249 N.E.2d at 395.

79. *Id.* at 576, 301 N.Y.S.2d at 525, 249 N.E.2d at 398.

80. *See supra* note 76. All a plaintiff needs to do is sue in the state which has the law most beneficial to his case and prove that another state also has an interest in the case. Of course, this will not be successful if there are jurisdictional problems or if the interest analysis is not followed in that jurisdiction.

states have equal interest in the litigation, forum law is applied to the case.⁸¹ Another problem concerns the court's ability to assess a foreign legislature's intent. A court could conceivably stretch the assessment of a state's intent to dictate a desired result as easily under the interest analysis approach as it does in the traditional approach by characterization.⁸² Further, the time, energy and complexity of such a task in a class action would be monumental. Other choice of law theories, although perhaps easier to apply than interest analysis in class actions, pose substantial problems as well.

E. Restatement (Second) Approach

The first step in the Restatement (Second) approach is to look to the forum's choice of law statute if there is one.⁸³ If no such statute exists, which is usually the case in the United States, a court next looks to a "presumptive rule." These presumptive rules are much like the "rules" of the traditional approach only narrower in scope. The purpose of the presumptive rules is to guide the court in finding the state which has the most significant relationship to the suit such that that state's laws may be applied. For example, the applicable law for a contract case is not governed by a single "where the contract was formed" rule as under the traditional approach, but will depend on the *type* of contract case.⁸⁴

81. See, e.g., *Lilienthal v. Kaufman*, 239 Or. 1, 16, 395 P.2d 543, 549 (1964): We have, then, two jurisdictions, each with several close connections with the transaction, and each with a substantial interest, which will be served or thwarted, depending upon which law is applied. The interests of neither jurisdiction are clearly more important than those of the other. We are of the opinion that in such a case the public policy of Oregon should prevail

See also *Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972); *Western Airlines v. Sobieski*, 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961).

82. See *supra* notes 62-63 and accompanying text.

83. See RESTATEMENT (SECOND), *supra* note 1, § 6(1): "A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."

84. A contract for services is governed by § 196 of the *Restatement (Second)* which provides:

The validity of a contract for the retention of services and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the contract requires that the services, or a major portion of the services, be rendered, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which the event the local law of the other state will be applied.

Section 145 provides:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to deter-

These "presumptive rules" are not conclusive. Under section 6 of the *Restatement (Second)*, if another state has a *more significant interest* than the one in which the action is brought, then the law of that state will be applied.⁸⁵ To determine whether a state has an interest, a court will look to the contacts the parties had with that state as they relate to the policies behind the state's laws.⁸⁶ The approach is designed "not merely to count contacts, but rather to consider which contacts are most significant and to determine where these contacts are found."⁸⁷

Section 6 of the *Restatement (Second)* lays out the factors relevant to determining how multiple state contacts are believed to affect the choice of law decision. The factors are

- (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.⁸⁸

An example of how the *Restatement (Second)* approach works is found in *Johnson v. Spider Staging Corp.*⁸⁹ In *Johnson*, the widow of a Kansas man who was killed in Kansas when the scaffold he was working on gave way brought a wrongful death action in Washington, where the defendant corporation was located and where the pertinent evidence rested. Kansas limited wrongful death awards to \$50,000; Washington had no limit. The appellate court reversed the trial court's conclusion that Kansas law applied, basing its decision on the *Restatement (Second)* approach.⁹⁰ After

mine the law applicable to an issue include:

- (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.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

W. RICHMOND & W. REYNOLDS, *supra* note 29, at 158.

85. See W. RICHMOND & W. REYNOLDS, *supra* note 29, at 158-59.

86. See, e.g., *Wood Bros. Homes, Inc. v. Walker Adjustment Bureau, Co.*, 198 Colo. 444, 601 P.2d 1369 (Colo. 1979); *Johnson v. Spider Staging Corp.*, 87 Wash. 2d 577, 555 P.2d 997 (1976).

87. *Johnson*, 87 Wash. 2d at 582, 555 P.2d at 1000 (citation omitted).

88. *RESTATEMENT (SECOND)*, *supra* note 1, § 6.

89. 87 Wash. 2d 577, 555 P.2d 997, (1976).

90. *Id.* at 580, 555 P.2d at 1000.

looking to section 145, which sets out the general principles which apply to torts, the court focused its attention on section 6.⁹¹

The Kansas statute was characterized as intending to protect defendants from excessive financial burdens, to eliminate speculative claims and to ease the difficulty of computing the appropriate compensation. Washington's lack of a wrongful death limit was characterized as intending to deter tortious conduct and to encourage the production of safer products. Because the application of the Kansas statute would further no Kansas policy, the court applied Washington's law. Washington's deterrent policy could be furthered by the application of its law because a Washington manufacturer was involved.

The Restatement (Second) approach seems to come closer than the traditional or interest analysis approach to being manageable in the class action suit. The problem with looking into every state's laws and its policies still exists, but under the proposal in this Comment, this can be mitigated in some respects if a court focuses on the criteria expressed in subdivisions (e), (f) and (g): party expectation, ease of application, and certainty, predictability and uniformity of result.⁹²

To make this approach viable for class actions, however, "presumptive rules" which apply to class actions need to be written. Because of the difficulty a court faces in applying the present presumptive rules to class actions, the Restatement (Second) approach is not a viable theory in the federal class action suits until newly tailored presumptive rules and guidelines for their application are developed.

F. Choice-Influencing Considerations

In a state which follows the choice-influencing considerations approach, also known as the "better law" approach, a court will determine choice of law questions by looking at the five basic "choice-influencing considerations" for each interested state.⁹³ These considerations were devised and explained by Professor Leflar and consist of "(A) Predictability of results; (B) Maintenance of interstate and international order; (C) Simplification of the judicial task; (D) Advancement of the forum's governmental interests; and (E) Application of the better rule of law."⁹⁴

91. *Id.* at 582, 553 P.3d at 1001.

92. See *supra* note 88 and accompanying text and *infra* notes 116-20 and accompanying text.

93. See generally LEFLAR, *AMERICAN CONFLICTS OF LAW* (3d ed. 1977).

94. Leflar, *Choice-Influencing Considerations in Conflicts of Law*, 41 N.Y.U.L. REV. 267, 269.

Milkovich v. Saari,⁹⁵ an automobile guest statute case, illustrates the application of this approach. In this case, a group of Ontario residents set out for a shopping trip to Minnesota. An accident occurred in Minnesota which had no guest statute. The court applied Minnesota law even though Ontario had a guest statute⁹⁶ because the court was "firmly convinced of the superiority of the common-law rule of liability to that of the Ontario guest statute."⁹⁷

Criticism of this approach rests primarily on the fact that its use "would result in the application of the law of the forum in each case because every forum thinks it has created the best rule of law"⁹⁸ Another commentator stated that an approach which bases its choice in terms of "the better rule of law" probably complicates the problem even further, unless general agreement exists on the standard by which superiority is judged.⁹⁹

Even if one is willing to overlook the subjectiveness of this approach, it still fails the essential purposes of class actions. There can be no judicial savings of time and energy if the court is required to assess what the laws of each interested state or nation require and then also look into the "quality" of those laws.

III. APPLICATION OF CHOICE OF LAW THEORIES TO CLASS ACTIONS

As has been discussed, none of the four theories of choice of law lend themselves well to international or domestic diversity class actions brought in the United States. The traditional approach may work in simple one accident mass tort cases,¹⁰⁰ but in complex cases, a court may have difficulty identifying the one significant contact a state may have to the accident. For example, in a case arising out of the defective manufacture of a drug that harms plaintiffs around the world, would a court use the place or places of manufacturing, the place or places of injury, or in a case of a delayed injury (via long term side effects of a drug), the place or places where the effect is first noticed?¹⁰¹

95. 295 Minn. 155, 203 N.W.2d 408 (1973).

96. *Id.* at 158, 203 N.W.2d at 410.

97. *Id.* at 171, 203 N.W.2d at 417.

98. *Tower v. Schwabe*, 284 Or. 105, 110, 585 P.2d 662, 664 (1978).

99. Von Mehrem, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 952-53 (1975).

100. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 314 (1981) (Stevens, J., concurring).

101. Questions regarding enforcement of U.S. judgments against foreign assets clearly may arise. In deciding whether or not to use the suggested approach when a foreign defendant is involved with a class action, a court will need to confront this problem and, indeed, other problems such as the ability to prove foreign law. Explanation of both of

The theories which require a court to look into a state's interest in light of factual contacts there, as well as the legislative intent behind relevant laws, create extensive choice problems for the judge in a class action suit. Discovering the content of interested states' laws is a time consuming task, and determining another state's legislative intent may be impossible to accomplish in an objective fashion.

Courts continue to struggle with these cases and the choice of law problems they pose. After laying out the proposal, this Comment will look at two class action cases and explain how the suggested approach would have minimized the choice of law dilemma.

IV. PROPOSAL

If class actions are to remain useful in diversity situations, some solution to the private international law question is necessary. It is unlikely that the solution will come from the Supreme Court, for the Court will only scrutinize the constitutionality of application of a choice of law under broad standards.¹⁰² Thus, Justice Stevens noted in his concurrence in *Allstate Ins. Co. v. Hague*¹⁰³ that

[i]t is not this Court's function to establish and impose upon state courts a federal choice-of-law rule, nor is it our function to ensure that state courts correctly apply whatever choice-of-law rules they have themselves adopted. Our authority may be exercised in the choice-of-law area only to prevent a violation of the Full Faith and Credit or the Due Process Clause.

Perhaps the most logical way of dealing with the confusion presented in class action suits involving multiple state interests is to look to a law based on domicile. A choice of law approach based on the defendant's domicile provides an easy solution to the choice of law question. The proposal can be applied to multiple defendant class actions with minor modifications. Further, because the domicile approach incorporates at least partially existing choice of law concerns (as expressed in the differing theories), application of a domicile rule should not offend states' current principles.

Domicile in American jurisprudence is a two prong inquiry which looks not only to where a person resides, but also to his intent to remain there. Domicile is "[t]hat place where a man has

these concerns is outside the scope of this Comment.

102. The state legislatures and Congress, having failed to draft conflict laws so far, are also unlikely candidates for solving the problems of choice of law in diversity class actions.

103. 449 U.S. 302, 332 (1981) (Stevens, J., concurring).

his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he had the intention of returning."¹⁰⁴ A corporation has its domicile in the state of its incorporation.¹⁰⁵

Domicile has traditionally played an active role in any choice of law determination not only in terms of jurisdiction, but also in its effect on the parties' intent or expectation of what law will be applied.¹⁰⁶ Domicile is also relevant in the determination of whether a given statute was contemplated to reach the parties.¹⁰⁷

For the purposes of this proposal, domicile is defined as that one state in which an individual resides with the present intent to remain indefinitely. With respect to corporations, domicile is that one state in which the corporation is incorporated without reference to state or states in which it is presently doing business. For purposes of the proposed solution to choice of law determinations, domicile is to be fixed as of the date the cause of action accrued.

This proposal starts with a rebuttable presumption that the law of the defendant's place of domicile should be applied to class action suits. The domicile approach would reduce forum shopping because the applicable law is fixed at the point the cause of action accrues.¹⁰⁸ It also allows a defendant to plan its activities as it can ascertain beforehand what laws will apply to it.¹⁰⁹

The state of the defendant's domicile may, in some cases, have an interest which is considerably less than another state's interest. Thus, the second prong to the approach directs the court to look into certain factors on which choice of law decisions currently are made. These factors are a) the nature of the relationship of the parties; b) the parties' expectations; c) substantial policies of another interested state or country; d) the nature of the field of law; and e) the difficulty presented in the application or assessment of the law.¹¹⁰ If a court finds that there are one or more states with a *substantially greater interest* in the case,¹¹¹ the presumption that the law of the defendant's domicile should apply gives way to the

104. BLACK'S LAW DICTIONARY 435 (5th ed. 1979).

105. Bergner & Englel Brewing Co. v. Dreyfus, 172 Mass. 154, 51 N.E. 531 (1898).

106. See W. RICHMOND & W. REYNOLDS, *supra* note 29, at 5.

107. See RESTATEMENT (SECOND), *supra* note 1, § 1, comment (a).

108. If all jurisdictions used this approach, the same law would be applied no matter where the suit was brought. Therefore, there would be no need to forum shop.

109. By knowing what law will govern any tort suits a corporation may be involved in, it can be sure to have adequate insurance or make any other necessary provisions regulated by the nature of its business.

110. See RESTATEMENT (SECOND), *supra* note 1, § 6.

111. The *Restatement (Second)* requires merely a "more significant" interest on the part of another state to defeat the presumptive rule. This approach requires a "substantially greater interest."

interested sovereign's laws.

This proposal closely mirrors the Restatement (Second) approach with the addition of a presumptive rule to govern class actions and a *greater* criterion to be met in order to negate the presumptive rule.¹¹² Due to the number of parties involved in class action suits, the number of interested states or countries could be monumental. It is with this possibility in mind that the more substantial degree of interest of a forum, other than the defendant's domicile, must be shown to rebut the presumptive rule. The party desiring to rebut the presumptive rule has the burden of proving that the other state has a substantially greater interest than the state of the defendant's domicile. Placing the burden on the party seeking to rebut the presumption will ease the court's task of examining the laws of numerous jurisdictions.

When a court is faced with more than one defendant in a class action suit, the court may choose to split the case in order for each defendant to be tried according to the laws of its respective domiciles. Although this may require plaintiffs to bring more than one suit, it is less burdensome to both plaintiffs and defendants than the bringing of numerous individual suits against numerous defendants.

In this regard, it is important to note that the number of suits will be limited by the number of defendants with dissimilar domiciles. For example, assume that a class is made up of 500 injured plaintiffs who have sued ten defendants. Assume further that four of the defendants are incorporated in Delaware and the other six are each incorporated in different states. If the presumptive rule is rebutted, in other words if it is clear that one state has the most substantial interest in the outcome of the suit, then that state's law will be applied to *all* of the defendants despite the fact that they are incorporated in different states. In such a situation, there would be only one suit which applies the law of that substantially interested state.

Presume, on the other hand, that the presumptive rule is not rebutted—that no one state has an interest which is substantially greater than the others. In that scenario, the action will be divided into seven different suits, one against the Delaware corporations and one against each of the other six corporations in their home states. Although there will be seven suits rather than one, that number remains a substantial savings to both the defendants, who still defend only one suit, and to the plaintiffs, who now collectively bring seven suits rather than the five hundred separate suits

112. Section 6 describes the considerations that the authors of the *Restatement (Second)* felt were significant in a choice of law decision. See *supra* notes 83-87.

which would be necessary if the plaintiffs were not certified as a class. In another situation it may be possible, depending on the nature of the case, for the finder of fact to make one finding applicable to all defendants if the liability laws of the defendants' domiciles are similar.¹¹³ After ruling on liability, the court could then apply the appropriate remedy as provided by the law of the defendants' domicile. If the laws of the multiple defendants' states are similar, a compromise of the applicable laws may be possible. For example, if stockholders of several companies (all from different states) sue the companies (incorporated in different states) for alleged improper withholding of stock dividends and win on the merits, a question may arise as to what interest is owed by the defendants on the improperly withheld dividends. Assume that one of the defendants is domiciled in a state allowing five percent interest, and another defendant is domiciled in a state which allows seven percent. The court may require the defendant from the state calling for five percent interest to pay its share of the judgment at five percent, and the defendant from the other state to pay seven percent. Alternatively, the court may require the judgment to be paid at six percent with the defendants being joint and severally liable.¹¹⁴ Lastly, the court may require that each defendant be sued separately or that the amount of liability be determined separately after a joint decision on the merits. Since this proposal is designed to be applicable to class actions brought in the federal court of any state, it should attempt, to the extent possible, to be acceptable to any of the choice of law theories now in use.

A. Fulfilling Domestic Concerns

1. Restatement (Second)

As previously discussed, the Restatement (Second) approach starts with a presumptive rule designed to fit the particular question being litigated. A court then looks to the factors set out in section 6 of the *Restatement (Second)* to see if there is another state which has a more significant interest than the state whose laws would be applied under the presumptive rule.

For the proposed domicile approach to satisfy the policies of states which follow the Restatement (Second) approach, the pro-

113. For example, personal injury law may be substantially the same in a number of jurisdictions allowing one court to apply one set of laws to all defendants although in different domiciles.

114. A discussion of joint and several liability is outside the scope of this Comment.

posal must itself meet section 6 criteria. The proposal satisfies these criteria. First, the rule will fill the goal of satisfying "the needs of the interstate and international systems"¹¹⁵ by providing a solution to the choice of law problems in diversity class actions.

The goals of predictability and uniformity of result are satisfied as well by having a law which is applied in a two step approach with a limited number of variables. (The number of variables is determined by the number of defendants with dissimilar domiciles.) In a class action, predictability of result is especially important as the majority of plaintiffs do not play an active role in the litigation.¹¹⁶ Their interests in effect are being represented by the named plaintiffs. To make an intelligent decision whether to opt out,¹¹⁷ unnamed plaintiffs must be afforded some certainty as to what law will be applied to the suit. A defendant's decision on whether to settle may also be colored by such knowledge.

The views of Erwin N. Griswold, quoted by D. Cavers, explained the need for uniformity in very simple terms:

We will not . . . fulfill the objectives of the conflict of laws, unless we can provide rules for cases under which the same cases will be decided the same way no matter where the suit is brought, to the extent that this is possible within the limits of human frailty. We will not always be successful in achieving uniformity, but we will surely have more success if we constantly hold up uniformity of result as a major objective, and recognize that there can be no true justice without it.¹¹⁸

The domicile approach fulfills the "justified expectations" of the

115. See *supra* note 88 and accompanying text.

116. It has been suggested that in tort cases, predictability of results is relatively unimportant.

Predictability of results can be overlooked since basically this test relates to consensual transactions where people should know in advance what law will govern their act. Obviously no one plans to have an accident, and, except for the remote possibility of forum shopping, this test is of little import. . . ."
Milkovich v. Saari, 295 Minn. 155, 161, 203 N.W.2d 408, 412 (1973).

This reasoning is not applicable to the class action suit, even in the case of a tort, in light of the need to grant possible class members the knowledge necessary to intelligently decide whether or not to "opt out" of the class.

117. There may be exceptions to the general opting out rules. Discussion of these exceptions are outside the scope of this Comment. See J. LANDERS & J. MARTIN, *supra* note 14, at 951. FED. R. CIV. P. 23(c)(2) provides:

In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

118. D. CAVERS, *THE CHOICE OF LAW PROCESS* 22-23 (1965).

parties (at least of the defendant¹¹⁹) by allowing them to know beforehand which law will be applied to their case. Take, for example, an airline. Certainly airline companies are aware of their potential liability to passengers and provide themselves with protection in the event one of their planes crashes. If the laws are reasonably certain, the airlines can take action to protect themselves in case of an accident, if they so choose. Under the proposed law, there would be nothing to block a defendant from moving or reincorporating in another state that has laws more beneficial to the type of activity in which it is engaged. It may be that the corporation would rather remain in its present state to take advantage of tax or other benefits,¹²⁰ but by having the option to choose its domicile, corporations cannot claim to be prejudiced by a domicile orientated law.

Although on the surface the approach may seem to give the potential defendants too much control or a motive to "forum shop," there are four factors which limit this possibility. First, corporations must decide where to incorporate based on many different legal consequences: labor costs; taxes; proximity to their principal place of business, etc. Therefore, potential liability in the event they are sued by a class may not be determinative of the decision of where to incorporate. Second, when large numbers of people are involved with each other in a contract setting, the parties are able to bargain for the choice of applicable law. Therefore, a company's choice of where to incorporate will not be determinative of what law will be applied. Third, states have an interest in protecting their noncorporate citizens as well. It is unlikely that states will alter their laws to encourage the immigration of large corporations without taking into consideration the welfare of individuals. Fourth, the proposal's second step of analysis is designed to meet this problem by allowing a court to sidestep the approach when and if it is shown, for example, that a corporation is domiciled in a particular state solely to defeat the rights of injured plaintiffs and there is another state which has a substantially greater interest in the proceedings.

The proposed domicile approach takes into consideration the goal of protecting "the relevant policies of other interested states"¹²¹ in the determination of the particular issue being litigated. Although a given state with an interest may not have its

119. Since torts are unplanned, plaintiffs in a tort case will not have an expectation of what law will apply.

120. The converse may also be true: For example, in 1980, Citicorp, a New York holding company, announced its intention to relocate in South Dakota to take advantage of higher rates allowed South Dakota law. N.Y. Times, Mar. 27, 1980, at D15, col. 1.

121. See *supra* note 88 and accompanying text.

"laws" applied, its interest is protected by ensuring that class actions remain a viable means for their residents to recover in mass tort cases.¹²² A domicile approach protects a state's interests as well by protecting its continued ability to regulate its corporations, even if its "laws" are not chosen to apply to the suit.

The domicile approach thus fills the criteria of section six of the *Restatement (Second)*. To a large degree, it also fulfills the goals of the other choice of law theories.

2. Traditional Approach

The traditional approach looks to the one decisive event which allows for recovery and applies the laws of the state where that event occurred. Certain aspects of the approach are appealing to the class action choice of law problem. The foremost is simplicity. Perhaps it is for this reason that the *Restatement (Second)* approach incorporates similar, but narrower, types of rules. The proposed domicile rule fits the policies of the traditional approach very well.

As discussed previously, under a traditional approach a tort will be tried according to the law where the injury takes place, and a contract where the place of contracting occurred. Because the results of these rules often are not logical, courts take the liberty of stretching their characterization of a case to reach a desired result. Once the characterization stretching trend began, the traditional approach's goal of creating uniformity was frustrated. The domicile approach solves some of these characterization problems.¹²³ Since most of the characterization problems arise in choosing between laws of different forums, it seems reasonable to expect that characterization problems will diminish under this proposal because in most cases only the law of the defendant's domicile will be available to the court. Thus, this use of choice of law is more likely to support the goal of uniformity.

The traditional approach's goal of discouraging forum shopping

122. This protection is much like the protection spoken of in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). In that case, Keeton brought suit against Hustler Magazine for libel. The main issue presented was one of jurisdiction, but the court spoke of the forum's interest in participating in a "law" which benefited the interest of all states:

New Hampshire also has a substantial interest in cooperating with other States, through the "single publication rule," to provide a forum for efficiently litigating all issues and damage claims arising out of a libel in a unitary proceeding. This rule reduces the potential serious drain of libel cases on judicial resources. It also serves to protect defendants from harassment resulting from multiple suits.

Id. at 777.

123. The characterization problem may still present itself under the proposed approach, but the variable will be more often than not the given laws within a state, as it is unlikely a court can manipulate the definition of domicile that this proposal adopts.

is also maintained by the domicile approach. The law of the defendant's domicile is applied regardless of where the suit is brought. Although the rule may be rebutted, this can only be done if the party seeking to impose another law maintains his burden of proving that there is another state with a substantially greater interest in the case than that of the defendant's domicile. The domicile approach, therefore, fulfills the choice of law policies of states using the traditional approach.

3. Interest Analysis

Courts which follow the interest analysis approach, with its strong forum bias,¹²⁴ will not be afforded the same protection of its policies under the domicile approach. The domicile approach focuses more on the defendant and its relationship to the suit than on state policies which may or may not be involved.

The state in which a defendant is incorporated will always have a significant interest in regulating the behavior of its corporations. These interests range from the economic impact the presence of numerous corporations may have on the state to the desire of states to encourage the safe manufacture of products. Since that state has an interest in the suit, the domicile approach and interest analysis approach may result in the application of the same state's laws.

Because the interest analysis approach is unrealistically difficult to use with respect to class actions, courts which follow it may be more willing to compromise on their policies than states which follow other theories. One feature of interest analysis which will need to be compromised is the requirement that the policies behind the laws be determined. To fulfill this policy would mean that the court would need to assess the law of any involved jurisdiction as well as the purposes behind those laws. As applied to class actions, this feature makes interest analysis unrealistic.

One major goal of interest analysis, however, is to have the court apply the substantive law of a state only if that state has an interest in the outcome of the suit. This goal is satisfied by the domicile approach. A state will always have considerable concern regarding litigation of issues relating to its corporations. States which follow the interest analysis approach may also have an interest in the availability and use of a rule which is uniformly applicable to class actions so as to protect its citizens should they be injured in a mass tort.

124. See *supra* notes 74-82 and accompanying text.

4. Choice-Influencing Considerations (Better Law)

The fourth major choice of law theory currently in use is the "better law" approach.¹²⁵ The major problem with this theory as it applies to class actions is its requirement that the court examine the laws of every interested state to pick which is "better."¹²⁶ Although some believe this approach is too subjective and uncertain to be valuable, the enormity of the judicial task is such that even if these problems were cured, the usefulness of the approach in class action suits is doubtful.

5. Summary

Admittedly, the proposal cannot fulfill the goals of every choice of law theory, but an attempt to do so may result in a law which is too inflexible to be of use.

Unfortunately, no single choice of law principal is intuitively correct. Nor does it seem likely that Congress will do a more adequate job in the choice of law field than have the states. Thus the drafting of a federal choice of law statute presents serious difficulties. If the text is highly precise, there is a risk that there will be insufficient flexibility to permit courts to produce sensible results. Conversely, legislation that provides the courts with significant discretion is likely to produce inconsistent results and offer little predictability.¹²⁷

The domicile approach comes close to fulfilling the important goals of each of the current choice of law theories, while still providing the courts with an easy to use means of handling the private international choice of law decision in diversity class actions. Moreover, the suggested approach meets the constitutional test for choice of law laid out in *Allstate Ins. Co. v. Hague*:¹²⁸ "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State 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."¹²⁹

The significance of the *Allstate* holding is that for the choice of

125. See *supra* notes 93-99 and accompanying text.

126. See *supra* note 93 and accompanying text.

127. Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions* After Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 79 (1986).

128. 449 U.S. 302 (1981) (Stevens, J., concurring).

129. *Id.* at 312-13. In *Allstate*, a resident was killed in a Wisconsin traffic accident. *Id.* at 305. After his death, but prior to bringing the suit, decedent's wife moved to Minnesota, the state of decedent's employment. *Id.* Minnesota law would have allowed the plaintiff to "stack" the decedent's insurance policies, but Wisconsin law would not. (The plaintiff sought to have the coverage of each of her husband's three insurance policies "stacked" to afford her three times the amount recoverable.) The Court upheld Minnesota's application of its own stacking law.

law decision to be constitutional, the law chosen must be that of a state which has *significant contacts, but not necessarily the most significant contacts*.¹³⁰ Under the domicile approach, the state of the defendant's domicile will have a significant interest in regulating the activities of its corporations or citizens. Thus, the domicile approach meets the constitutional standards for choice of law theories.

B. Fulfilling International Concerns

The domicile proposal should be viable internationally in most situations. As noted earlier, the application of the law of the defendant's domicile should give way when there is another state which has a substantially greater interest in the case. This type of situation is likely to arise in cases where the plaintiffs are United States citizens and the defendant is a foreign corporation. When the foreign law provides little or no recovery, a United States court may find it offensive to apply such a law. When this happens, the court can choose to apply another state's law.¹³¹

When the defendant is a domestic corporation, the domicile law should apply whether the cause of action arises within the United States or in a foreign country. For example, if, as a result of the Bhopal incident,¹³² a class action suit had proceeded in the United States, the laws of the state in which Union Carbide was incorporated would have been an appropriate state's law to apply. In such a case, the defendant would be familiar with the laws of that state and could purchase insurance to protect itself or take other appropriate actions such as lobbying for limitations on damage awards.

It is unlikely that a domicile based rule will be considered offensive to the principles of justice recognized by most developed legal

130. In a footnote in *Allstate*, Justice Brennan stated the "Court has since abandoned the weighing-of-interests requirement." *Id.* at 308 n.10 (citations omitted). Under this proposal, the concerns of each choice of law theory are merged to solve the choice of law problem. In this respect, the proposal is not unlike that "consensus" approach of *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp 690 (S.D.N.Y. 1984). In "*Agent Orange*," Judge Weinstein concluded it was "unnecessary to consider whether any state's conflict of law rule would deprive a litigant of due process, equal protection, or other constitutional right since each of the states whose conflict rule might apply has sufficient nexus with the matter through residence and the like." *Id.* at 694.

Given the domicile approach of the proposal, the constitutional problems are equally eliminated. As well, other states will have an interest in the continued application of the rule so that class actions can be maintained as an effective, cost efficient means of litigation.

131. For example, the court might turn to the law of the state in which the defendant is doing business in the U.S., or the law of the state in the U.S. in which the tort occurred, etc.

132. See generally Comment, *Parans Patriae Representation in Transnational Crises; The Bhopal Tragedy*, 17 CAL. W. INT'L L.J. 175 (1987).

systems. Therefore, its application in cases where the defendant is a foreign corporation is appropriate. However, there may be national policies or perhaps treaties which need to be assessed before the approach should be applied to a foreign defendant. Such an inquiry should not be burdensome on the court as this information is readily available.

In addition, there are international committees, such as the Hague Conference of Private International Law, which may in the future address international solutions to the problems of class actions. This proposal supplies them with the first step to achieve that goal and, in the interim, provides a solution that is both efficient and fair.

V. APPLICATION OF DOMICILE APPROACH TO CLASS ACTIONS: AN EXAMPLE

In *Phillips Petroleum Co. v. Shutts*,¹³³ the plaintiff class consisted of royalty owners from all fifty states and some foreign countries. The individuals possessed rights to leases from which the defendant Phillips produced gas.¹³⁴ The class sought to recover interest on royalty payments that had been delayed.¹³⁵ The states involved had varying limits on the amount of interest required to be paid on the withheld royalties.¹³⁶ Only a few of the plaintiffs were from Kansas, the state where the suit was brought.¹³⁷

The lower court's decision to apply Kansas law absent "compelling reasons" to apply a different state's law was deemed unconstitutional.¹³⁸ The Supreme Court determined that the defendant and royalty owners did not have a sufficient aggregation of significant contacts to make the application of Kansas law constitutional.¹³⁹

The effect of this holding requires that a trial court resolve the

133. 472 U.S. 797 (1985).

134. *Id.* at 799.

135. Payments were delayed while defendant sought approval of the Federal Energy Regulatory Commission for a price increase. *Id.* at 799-800.

136. *Id.* at 816-17.

137. The final class consisted of 28,100 members, but fewer than 1,000 of these were from Kansas. *Id.* at 815-16. Kansas law allowed fifteen percent interest to be paid on the withheld royalties. *Id.* The laws of other states varied. An Oklahoma statute—Oklahoma had 2,653 royalty owners (the second highest number)—if applied, would have excused defendant's liability because the royalty owners accepted payment of the "full principal without a claim for interest." *Id.* at 817 (citing OKLA. STAT., tit. 23, § 8 (1951)). Texas law, if applied, would have limited interest payments to 6%. *Phillips Petroleum*, 472 U.S. at 817 (citing TEX. CONST. art. 16, § 11; TEX. REV. CIV. STAT. ANN., art. 5069-1.03 (Vernon 1971)).

138. *Phillips Petroleum*, 472 U.S. at 823. The Supreme Court relied heavily on *All State Ins. Co. v. Hague*, 449 U.S. 302 (1981).

139. *Phillips Petroleum* 472 U.S. at 823.

choice of law issue, not simply avoid it. What is unclear from this decision is how a court is to resolve the issue. Present theories are of little help to the court in its decision. The domicile approach would solve the problem with little effort on the court's part. The court need only apply the law of the state in which Phillips Petroleum is incorporated, as that state has an important connection with the case and the defendant. It is also that state's laws which can best encourage fair dealings by its corporations, and it is that state which will suffer economically if unreasonable financial burdens are placed on its corporation.

If, on the other hand, the royalty owners can show the court that there is a state with a substantially greater interest than the state in which Phillips Petroleum is incorporated, then the court can choose to apply that state's laws. In this case, the showing of a state with a substantially greater interest is likely to be impossible as all states in which royalty owners reside will have only an interest in safeguarding the interest of their residents that is equal to the interest of Phillips Petroleum "home" state in regulating the activities of its corporations. Without the application of the domicile approach, one can only wonder if the holding in *Phillips v. Joesp*,¹⁴⁰ and simply failing to certify a class when the proposed class is likely to bring with it significant choice of law problems.

Even in cases where the choice of law decision was made, insufficient guidance was given to aid future courts. For example, in *In re "Agent Orange" Product Liability Litigation*,¹⁴¹ Vietnam War veterans and their families brought a class action suit against the manufacturers of Agent Orange to recover for injuries they sustained from exposure to the herbicide.¹⁴² In "*Agent Orange*," choice of law problems were intensified by the fact that state cases from a number of jurisdictions were merged into one. This necessitated the court's use of the choice of law rules that each of the original forums of the now merged cases would have applied. Suddenly, the court was faced with the need to somehow pull all the methods of choice of law used by the respective jurisdictions into a single rule. The court concluded that "there was no rational method by which a state court could choose the law of any one state to govern the issue"¹⁴³ and that "the relevant decisions of the various states indicated that they would look to federal or national

140. 102 F.R.D. 924 (N.D. Ind. 1984).

141. 580 F. Supp. 690 (S.D.N.Y. 1984).

142. *Id.* at 962, 693.

143. *Id.* at 692.

consensus law."¹⁴⁴ This law was not defined.¹⁴⁵

Even if the court in "*Agent Orange*" had spelled out the content of the national consensus law, that law would not be applicable to diversity class actions in general. This is because the decision to use federal law, or national consensus law, rested to a large degree on significant federal government interests in protecting its servicemen and the willingness of manufacturers to produce military supplies for the government.¹⁴⁶ These same dual sided governmental interests will not be found in most class actions.¹⁴⁷

If the "*Agent Orange*" court had applied the domicile approach, each of the eight defendants could have been held liable under the statutes of the states in which they were domiciled. It would have been irrelevant that the litigation was composed of several merged cases, as the states in which each of those cases were originally brought would have had an interest in following the approach to ensure a quick and equitable solution to the controversy. The domicile approach just may be the uniform law the "*Agent Orange*" court was striving for.

CONCLUSION

When a class action containing multiple state and international contacts is brought to trial, the court must determine what effect is to be given to these contacts. Current choice of law theories provide inadequate guidelines for the resolution of the choice of law issue. These deficiencies have resulted in the lack of certification of some class actions and have resulted in unconstitutional or open ended application of the choice of law doctrines in others.

Four choice of law theories are primarily used in the United States. These theories are not consistent in their goals, nor uniform in their application. Each of them possesses unique difficulties in its application to class actions. The traditional approach presents, among other difficulties, the need for a court to be able to determine what *one* of the multiple state contacts present constitutes the "last act" necessary to establish the right to litigate. Application of the interest analysis approach requires that the court assess the laws, and the policies behind those laws, of each state or country which has a connection with the case. When the number of states or countries involved is large, this can present an impossible task. The Restatement (Second) approach requires

144. *Id.* at 706.

145. *Id.* at 708.

146. *Id.* at 713. The case was later settled so that the question of what national consensus law is was never answered.

147. *Id.* at 706.

much the same assessment of a state's interest as the interest analysis theory but lacks presumptive rules which are applicable to class actions that involve anything more than a simple tort. The choice influencing consideration ("better law") approach, which again necessitates the investigation into concerned states' policies, results nearly always in the application of the forum law, and thus encourages forum shopping.

The domicile approach proposed by this Comment provides certainty to the parties by the application of a rule which cannot be rebutted unless a substantially greater interest of another state is shown to exist. Such a significant interest will be so obvious that the approach will leave parties able to settle or "opt out" intelligently. The proposal also provides uniformity in that it may be equally applicable across the United States and is viable internationally. Uniformity of results and certainty of application will allow parties to form protectable expectations of what laws will be applied to them in their dealing with others. Thus, the parties will be able to plan their activities accordingly.

Perhaps the most important result of the domicile approach is the protection of territorial sovereignty provided by the discouragement of forum shopping and by the assurance that states will be able to regulate their residents, or corporations, in actions which affect a multitude of people. Choice of law decisions are difficult in almost any setting, but they are intensely so in the area of class actions. There is a growing need for a simple, certain and fair means of determining which substantive law to use in federal diversity class actions. Not only is the need clear, but the solution is within reach. Of the major theories of conflict of law choices, not all agree on the importance of any one criteria, but most agree that in an analysis of the goals or purposes for choice of law, not one factor can be decisive. The weight of the criteria must necessarily vary according to the problem presented and, in some instances, one factor may have to give way completely to satisfy another.

Like most solutions, the domicile approach does not come without a price. State policies will need to give a little in accepting a rule which may not fit the exact mold of their current choice of law procedure, but the benefit to be gained is certain to outweigh the cost.

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* This article is dedicated to Dr. Elizabeth Truax for her considerable emotional and financial support during law school.