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## Some Thoughts on Choice of Law, Judicial Discretion, and the ALI's Complex Litigation Project<sup>1</sup>

Donald T. Trautman\*\*

AMERICAN LAW INSTITUTE  
PROCEEDINGS OF THE 1993 ANNUAL MEETING<sup>1</sup>  
May 13, 1993, Washington D.C.

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*Professor Donald T. Trautman (Mass.):* I speak as perhaps the only remaining Adviser to the Second Restatement of Conflicts. In working through the Second Restatement, we did, I think, despite Professor Juenger's comments about it, achieve a great deal of flexibility, and we have achieved something that has been very useful to the courts in overcoming the woodenness and rigidity of the first Restatement.

The developments in choice of law are not legislative, by and large; they are judicial. Choice of law is a process in which judges participate. Although my student, Professor Symeonides, has done some marvelous work in Louisiana, by and large choice of law is not legislative. Austin Scott once told me what he thought of the New York efforts to legislate choice-of-law rules for trusts and estates. He thought they were abominable, and I think that, by and large, that is true. It is judges. We have, both at the state and federal level, for example, Fuld and Traynor, Chief Justice Kennison in New Hampshire, then a great many federal judges who have participated in the process: Goodrich and Hastie, Black, Magruder, Wyzanski, Harlan, and Jackson, I think. So it is not a great mistake, I think, to turn the problem of Section 6.01 over to judges.

Judges have done a fine job. Our history has been one in which judges have seen the way to choosing between the laws of different states, and of course a legislature naturally, in any event, has its own local territory as its object. It's only a judge in our system who is capable of taking a look—and especially a

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\* *Editor's Note:* In a letter to the editors of the Louisiana Law Review on July 20, 1993, Professor Trautman had committed to writing an article for inclusion in this issue of the Review. The article was to discuss the choice-of-law provisions of the ALI's Complex Litigation Project and to expand on the views expressed by the author in support of his written motion submitted during the Project's final discussion by the Institute's membership. Professor Trautman's untimely death prevented him from meeting this commitment. After consultation with his family and colleagues, the editors decided to dedicate this issue to the memory of Donald T. Trautman and to reproduce herein his remarks in support of his motion.

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1. The excerpts reproduced here are from an unedited draft of the Proceedings. The final version of these proceedings will be available from the American Law Institute in mid-1994. The editors sincerely thank the American Law Institute for granting permission to reproduce these excerpts.

federal judge—at the interests presented from different jurisdictions. And it's for that reason, and particularly because I think your rules do have a tendency to encourage defendant-favoring rules and to encourage the development of havens for defendants, I do appeal again for reconsideration of this question. What I have done is to go back to what the Institute did in 1969 in the Study of Division of Jurisdiction Between State and Federal Courts, where quite comparable provisions were involved—the multiparty/multistate diversity—and the Institute at that point adopted language saying we would overcome *Klaxon* by allowing the court to make its own determination as to which state rule of decision is applicable. It's that test that I urge on you because that was the Institute's stand at an appropriate time. The Institute's stand in the Second Restatement, I think, has been disregarded in what you do, and I think there's a serious problem of inconsistency as to what the Institute is producing.

I do strongly feel that the only appropriate thing to be done in Sections 6.01 and 6.03<sup>2</sup> is to adopt an open-ended approach. The four precise rules of Section 6.01 are so likely to miscarry and to create injustice. I agree that you do have loopholes, you do have escapes in Section 6.01(d), but I think they ought to be more open and more available to the judge than the formulation that you have adopted permits.

[The motion, which was submitted in writing, read as follows:

*MOTION:* In both §6.01(c) and §6.03(c), delete everything beginning with second sentence and substitute:

If more than one state has a policy that would be furthered by the application of its law, the court may make its own determination as to which state rule of decision is applicable.

#### REASONS FOR AMENDMENT

1. The text of the proposed amendment is taken from American Law Institute, Study of the Division of Jurisdiction between State and Federal Courts section 2374(c) (1969), which was widely approved when written.
2. As written, Sections 6.01(c) and 6.03(c) run counter to the basic developments in the field of choice of law in the United States over the past fifty years.
3. As written, Sections 6.01(c) and 6.03(c) are inconsistent in language and underlying theory with Restatement (Second) of Conflict of Laws.
4. By making the default rule in Section 6.01(c) the place of conduct and the default rule in Section 6.03(c) the common contracting party's primary place of business, the drafters have inadvertently adopted defendant-favoring rules, contrary to a policy of adopting rules that are neutral as between the parties.
5. For the above reasons, courts will refuse to follow the black letter. Although it will be enacted as a statute, there are escapes provided in Section

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2. Sections 6.01 and 6.03 are reproduced in an Appendix, *infra* 881, this issue. Ed.

6.01(d) and in Section 6.03(c) that will permit courts to depart from the apparent certainty of the black letter, just as they refused to follow the first Restatement of Conflict of Laws. The draft's hope for certainty will miscarry, with resulting confusion and uncertainty far greater than that resulting from adoption of the proposal amendment.

6. I believe that the guidance a court should have in making the determination of what state law to choose might best be along the following lines:

In making that determination, the court shall have regard for that rule which, in view of the basic policies underlying the particular field of law and of the parties' relations to particular States, best accommodates their justified expectations in the context of the laws of the several States. In particular, in assessing the basic policies underlying the particular field of law and the foreseeability of the rule chosen or possible unfair surprise or arbitrary results under such rule, the court may consider the extent to which one State's law is obsolescent in the context of the laws of the several States and not supported by significant interests in that State. In remaining cases of conflict, to give effect to parties' expectations drawn from their participation in multistate activity and from current substantive law norms, a court may give less effect to a State's law that is parochial or self-serving and greater effect to a State's law that is in line with such current norms.

This statement draws on my more extensive remarks in Donald T. Trautman, *Toward Federalizing Choice of Law*, 70 *Tex. L. Rev.* 1715 (1992).]

....

*Professor Louise Weinberg (Tex.):* I would like to say a few words in support of Professor Trautman's motion. In federal courts adjudicating mass torts, the one thing that was wrong with choice of law for mass torts we all agreed was *Van Dusen v. Barrack* and *Klaxon v. Stentor*. That was what was "broke"; that was what we needed to fix. To fix what was wrong, all we had to do was remove *Van Dusen* and allow the judges to choose law. That is what Professor Trautman's motion does. It really was never necessary to go beyond that to avoid the mess that *Van Dusen* had produced.

The case law that would develop under Professor Trautman's motion would not be unguided. He has incorporated a preliminary interest analysis. If you will look at his motion, in false conflicts only the interested state's law would apply. In true conflicts, he suggests furnishing informal indicia of wise choice.

The Reporters have previously argued against authorization of a federal common law of choice of law for mass torts. They fear giving judges too much discretion, but the Trautman proposal in fact would not do that, and the features of other chapters of this project are further assurance of that. Under this project, the plaintiff will not have been able to shop for the forum. This is a completely

different situation from the unguided choice of the interested parochial local forum doing its own selfish thing. Here, the judges are administering the law, looking over the broad mass of states, and are able to take into account the merits of the interests of the respective states. So it's a very different situation from the situation that would obtain prior to this project.

Under Professor Trautman's proposal, the forum may choose only the law of an interested contact state. Thus, the necessary constraints on choice, and protections from abuse, are already in place. For these reasons, I think Professor Trautman's proposal is a feasible and most desirable way of making a change that increasingly appears to be necessary, while avoiding the problems of discrimination and arbitrariness that plague the draft chapter.

*Mr. Bennett Boskey (D.C.):* I do not support Professor Trautman's motion, but I would like to say this. As the project has developed, I have been in support of the Reporters because we have been able to introduce what I thought was a reasonable degree of flexibility by the text of Subsection (d), which appears on page 397. Nevertheless, it seems to me that the expressions that have been voiced around the room at least suggest that we don't have quite enough flexibility, and I would like to inquire of the Reporters whether, in the first line of Subsection (d), where it says, "When necessary to avoid," they would be prepared to substitute, "When appropriate to avoid." It seems to me that would add a slightly greater degree of flexibility that would accommodate some of the views that have been expressed. I don't mean that it would satisfy fully the aspirations of the respective proponents of the three motions, but it seems to me it would be a better position to come out with.

*Professor Kane:* . . . I think if people are concerned that ["necessary"] doesn't allow enough discretion, "When appropriate" would be perfectly fine with me to adopt.

*Mr. Boskey:* I think that would help a good deal.

*Professor Kane:* I'd be happy to do that.

*President Perkins:* Then the Reporters are accepting the change in (d), is that correct?

*Professor Kane:* Yes.

*President Perkins:* The second word in (d) will become "appropriate," rather than "necessary."

*Professor Linda Silberman (N.Y.):* I speak against Professor Trautman's motion, and I wanted to respond to his description of choice-of-law rules as judge-made and that history. That, of course, is true, but I think if we look at the modern developments in choice of law, we have seen a concern of judges, as well, for the need for rules . . . . I always quote to my conflict-of-laws class the plea, if you will, of Judges Robson and Will in the DC10 crash in Chicago, saying, the famous language being, "The bottom line, it is crazy, it is crazy, but that's what conflict of laws is; somebody help us." (*Laughter*) And it seems to me that the Reporters and these choice-of-law principles are exactly in the right direction.

And as for the inconsistency with the Restatement of Conflicts, on that I agree with Professor Juenger. I think it's time for a new Restatement of Conflicts, and I hope that we will be able to move from at least the approach of these choice-of-law rules to adopt those or incorporate those in a new Restatement. I will say that I endorse the suggestion of the previous speaker because I do think that some flexibility for situations where those rules are deemed to be inappropriate would be desirable. Thank you.

....

*Professor Friedrich R. Juenger (Cal.):* I would like to speak in favor of Professor Trautman's motion. I think it has not completely sunk in—what he said and what Professor Silberman repeated—namely, that we're in effect, of course, overruling *pro tanto* the Second Restatement of Conflict of Laws, which took 16 years to make, as you have so helpfully reminded us. This is done sort of with a sleight of hand. At that time, people were talking about little accidents, one-car accidents somewhere on rural highways. Now, where it really matters, time—and presumably efficiency—are more important.

Let me also say something about the conflict of laws as it has developed elsewhere. As usual, in the work of The American Law Institute I have seen very few comparative law references. Unlike in the United States, of course, abroad the conflict of laws, specifically choice of law, has been a matter of very substantial true codifications, not a little rinky-dink rule here or there. Yet, the codifications of other countries have not been consulted. If they were to be consulted, one would find that the legislatures abroad are quite aware of the need for doing justice in tort cases, that they do have alternative reference rules, as have our judges *de facto*. I am very pleased to mention the New York Court of Appeals here. Of course *Schultz* is no longer the last case; the new Chief Justice has written a conflicts opinion which I thought was excellent, not so much for the opinion as for footnote number 2. (*Laughter*) Those of you who tend to read the footnotes, which is an art that is becoming rarer these days as people stop reading altogether, (*laughter*) if you were to read footnote number 2, Chief Judge Kaye was perfectly able to compare New York law with the law of other states, and she considered the law of New York backward in comparison. This is the *Mooney* case; I don't have the full citation on me.

And one final point. There is a certain split here evolving between plaintiffs' lawyers and defense lawyers. I think maybe we're a little bit too far aloft here in the esoteric realm of conflict of laws, but I picked this up in the *Wall Street Journal* of Monday—it is a beautiful line—by somebody here at Covington, Burling, who says, "One national dumb rule is better than 50 inconsistent rules of any kind." The person who should be given credit for that is Peter Hunt. I don't know if he is here. But I think that is a perceptive remark made from the defendant's side, so I don't know why you're so strongly against uniformity. There seems to be a certain amount of agreement between plaintiffs

and defendants that to have decent rules everybody could live with would not be a loss but rather a gain.

*Mr. Lawrence M. Johnson (Mass.):* My practice is about evenly divided between representing plaintiffs and defendants, and therefore I'm not really sensible of having any bias in the matter. I think that, as I read it, Professor Trautman's motion represents a more subtle approach to attempting to skin the same cat as Professor Juenger's motion. It leaves the black letter facially neutral, indeed providing no guidance at all, and relegates to a suggested addition to the commentary, language which I gather is primarily motivated by a desire to aim judges in the direction of avoiding defendant-oriented substantive law. I am not personally against that, but I think that this is the wrong way to go about it. I think that choice-of-law questions, if they're going to be enlightened at all, ought to consist of more than an exercise in determining which side, plaintiff or defendant, you think ought to win and then selecting the governing law which is best adapted to achieving that end. It does seem to me that, while there may very well be a number of jurisdictions in which there is undesirable substantive tort law, the cure for that is with the substantive tort law, not by attempting to cure it by making a bad choice-of-law rule in order to avoid bad substantive law.

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*Judge Dorothy Toth Beasley (Ga.):* I rise to speak against the motion, because in the first place there are not going to be many of these cases coming before any single judge, it's going to be an unusual situation, and if there are no guidelines, then we are going to have the possibility of arbitrary decision making and a whole cottage industry of what considerations will be given, which will find its way into the appellate courts and then create differences all over the country. It does not provide for an orderly consideration of the question, nor can the parties anticipate what the decision might be, because it will be totally up to the judge. So I would suggest that, with all due deference to and respect for Mr. Boskey, that Subsection (d), in order to take care of the possibility of too much rigidity with the proposed rules, read, "To avoid unfair surprise or arbitrary results, the transferee court may, in its discretion, choose the applicable law," and I think that would be enough of a safety valve. Thank you.

*President Perkins:* Is this a suggestion to the Reporters?

*Judge Beasley:* Yes, it is.

*Professor Kane:* I think your suggestion is in the same mindset as Mr. Boskey's, and I'll look at it in terms of getting a language that works out well. Thank you.

*President Perkins:* Thank you. I think, then, we're ready to close debate. Professor Trautman, you have the right to close and then the Reporter if she has any final comment.

*Professor Donald T. Trautman (Mass.):* Thank you. I only have one thought that was prompted by the last speaker. I am surprised and dismayed that there is so little trust of judges in this group. *(Laughter)* As I stated in my full

statement, I think judges have been the architects of choice of law in the last many years. I think if you were looking for guidance in federal law for some of the kinds of things that would be appropriate, it would actually be sufficient to refer to Justice Jackson's opinion in *Lauritzen v. Larsen*, which is one of the most splendid choice-of-law decisions. It's a FELA case, and Willis Reese always regarded FELA—or admiralty, I'm sorry—as apart from choice of law generally, but it is a great case. There are other examples: Judge Wyzanski, Judge Magruder. If you looked through federal opinions on choice of law, you would find a great deal of guidance, I think, in the right direction, not pointing to plaintiffs or defendants but pointing judges in the direction of achieving justice in the particular configuration of the case. Thank you.

....

*Professor Kane:* As has already been noted, basically Professor Trautman's motion is along the same lines as the previous motion with regard to trying to inject more discretion into the decision, and I won't repeat the reasons why we had decided to go down a different route. I do simply want to make a couple of statements, though, because Professor Trautman and others have referred to the fact that we are abandoning the Restatement, Second, or impliedly overruling it.

It is true that this is different than the Restatement, Second, because of its adoption of precise rules, and we have said that throughout the commentary. However, there is a reason for this difference, and I don't actually think—I was not trying to overrule the Second Restatement or suggest that I wanted to be involved in a Third Restatement. (*Laughter*)

....

But the major thing is that the Second Restatement was not formulated with the complex litigation problem in mind. That was not in the courts, it was not of a pressing nature, and so appropriately it was dealing with the world as it then existed in 1969 and for the 16 years subsequently, as it evolved over its life.

We believe that the complex litigation problem in particular, this class of cases, needs special predictability and special parity; that, while it might be an ideal in the single case, we are not trying to address that here. So there are special needs here to have special rules, and that's why we have adopted them at this time. It is also, I think, fair to say that in 1969, when the Institute in its Division of Jurisdiction Study decided to essentially authorize the development of federal common law, that was a particularly wise choice because the area of choice of law was in such foment, and there weren't enough decisions out there to have a sense of the kinds of choices that different states and different policy makers would feel comfortable with. That is not true today. While it's still in foment and there is not agreement as to what the right choices are, we have had, as I think the Reporter's Notes illustrate, a wealth of experience out there to at

least look at and to make some choices among, and that's what we've tried to do.

*President Perkins:* Thank you. We are ready for the vote. All those in favor of the Trautman motion, which is before you in writing, please say aye. *(There was a chorus of ayes.)* Opposed. *(There was a chorus of noes.)* The motion is clearly defeated.