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# Appendix: American Law Institute Complex Litigation Project

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# APPENDIX

AMERICAN LAW INSTITUTE  
COMPLEX LITIGATION PROJECT  
Proposed Final Draft<sup>1</sup>  
(April 5, 1993)

## CHAPTER 3. FEDERAL INTRASYSTEM CONSOLIDATION

### § 3.01. *Standard For Consolidation*

(a) Actions<sup>2</sup> commenced in two or more United States District Courts may be transferred and consolidated if:

- (1) they involve one or more common questions of fact, and
- (2) transfer and consolidation will promote the just, efficient, and fair conduct of the actions.

(b) Factors to be considered in deciding whether the standard set forth in subsection (a) is met include

(1) the extent to which transfer and consolidation will reduce duplicative litigation, the relative costs of individual and consolidated litigation, the likelihood of inconsistent adjudications, and the comparative burdens on the judiciary, and

(2) whether transfer and consolidation can be accomplished in a way that is fair to the parties and does not result in undue inconvenience to them and the witnesses.

In considering those factors, account may be taken of matters such as

- a. the number of parties and actions involved;<sup>3</sup>

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1. Copyright 1993 by the American Law Institute ("ALI"). Reproduced with permission of the ALI. This Draft, which is the subject of all the contributions to this Symposium, was discussed by the ALI membership at its Annual Meeting on May 13, 1993, in Washington D.C. The Draft was approved and its publication was authorized subject to changes agreed to in the course of discussion and final editorial revisions by the Reporters. Revisions proposed for the official text are noted in the footnotes hereafter. The information for these footnotes is taken from 16 A.L.I. Rep. No. 1, 11-12 (1993) and from an unedited draft of the Proceedings of the May 13 meeting. For further information, see Symeon C. Symeonides, *The ALI's Complex Litigation Project: Commencing the National Debate*, *supra* this issue. The final version of the Project will be available from the American Law Institute in mid-1994. What is reproduced here is only the "black letter" from the 1993 Proposed Final Draft, without the accompanying, and very enlightening, Comments and Notes written by the Reporters.

2. In response to a suggestion that the words "potentially involving many parties" be added after the word "Actions" it was decided instead that the preamble to the Complex Litigation Statute to be submitted to Congress should be revised to emphasize that the statute's normal expected operation would be limited to mass torts and similar situations. See Symeonides, *supra* note 1, text accompanying note 20.

3. A proposal to confine the Project's scope to "mega-mass cases" and to define them in terms of a minimum number of parties and amounts in dispute was not adopted by the Institute's membership. See *supra* note 2.

- b. the geographic dispersion of the actions;
- c. the existence and significance of local concerns;
- d. the subject matter of the dispute;
- e. the amount in controversy;
- f. the significance and number of common issues involved, including whether multiple laws will have to be applied to those issues;
- g. the likelihood of additional related actions being commenced in the future;
- h. the wishes of the parties; and
- i. the stages to which the actions already commenced have progressed.

(c) When the United States is exempted by Act of Congress from participating in consolidated proceedings in actions under the antitrust or securities laws, it shall have the right to be exempted from transfer and consolidation under this section.

(d) Transfer and consolidation need not be denied simply because one or more of the issues are not common so that consolidated treatment of all parts of the dispersed actions cannot be achieved. The interests of particular individual litigants can be considered when determining whether they have shown cause to be excluded from the consolidated proceeding, as provided in § 3.05(a).

### § 3.02. *The Complex Litigation Panel*

A special Complex Litigation Panel of federal judges shall be established and have responsibility for deciding whether separate actions should be transferred for consolidation under the criteria set forth in § 3.01 and, if so, determining to what district court they should be transferred and consolidated in accordance with the standard set forth in § 3.04.

### § 3.03. *Timing of Transfer and Consolidation*

(a) Motions for transfer and consolidation and the decision by the Complex Litigation Panel whether to do so should be made as soon as possible in order to give parties and counsel the earliest practicable notice and to prevent duplication of effort.

(b) The timeliness of a motion for transfer and consolidation should be determined by the Complex Litigation Panel on a case by case basis.

(c) In order to avoid unnecessary delay of the underlying proceedings or of the decision whether to transfer and consolidate,

(1) the transferor court ordinarily should not stay any of its proceedings until the transfer and consolidation decision has been made; and

(2) the Panel ordinarily should not either postpone its transfer and consolidation decision pending the resolution of motions in the transferor courts or stay any of the proceedings in the transferor courts until the transfer and consolidation decision has been made.

**§ 3.04. Standard For Determining Where To Transfer Consolidated Actions**

(a) Cases may be transferred to and consolidated in any district court in which the just and efficient resolution of the actions will be promoted and fairness to the individual litigants can be facilitated.

(b) When the just, efficient, and fair resolution of the actions will be promoted, the Complex Litigation Panel may designate more than one transferee court. The Panel should give great weight to the convenience to the litigants in assigning individual actions among multiple transferee courts.

**§ 3.05. Panel Procedure**

(a) The question whether any action or group of actions should be transferred for consolidation may be brought before the Complex Litigation Panel on motion of any party to any potentially affected action, at the suggestion of the court to which any such action is assigned, or on the Panel's own initiative. Parties shall be permitted to show cause why their action or claims should be excluded from transfer for consolidation.

(b) A motion before the Complex Litigation Panel shall be considered by a subpanel of the Panel, unless one of the members of the subpanel refers the matter to the full Panel. Any party may petition the full Panel to rehear a subpanel order granting transfer and consolidation. Any action taken by a subpanel shall be considered the action of the Panel.

(c) When the Complex Litigation Panel determines that transfer and consolidation is justified under § 3.01, it shall order that it take place in the most appropriate district or districts as provided in § 3.04. In an appropriate case, transfer and consolidation may be ordered only for pretrial purposes or only with regard to certain issues.

(d) Counsel in any case that is the subject of a transfer and consolidation motion before the Complex Litigation Panel, or that already has been transferred and consolidated, are under an obligation to notify the other parties and the court of any case known to them involving an issue of fact or law common to their case. A lawsuit not identified or commenced at the time of the Complex Litigation Panel's original decision may be joined with those that have been transferred and consolidated pursuant to a tag-along procedure comparable to that under 28 U.S.C. § 1407.

**§ 3.06. Powers of the Transferee Court**

(a) Unless the Complex Litigation Panel otherwise provides, transfer and consolidation shall be for all purposes, and the transferee judge shall have the full power to manage and organize the consolidated proceeding so as to promote its just, efficient, and fair resolution. Among the things that the transferee court may consider are the organization of the parties into groups with like interests and the structuring of the litigation by separating the issues into those common questions

that should be treated on a consolidated basis and those individual questions that should not. The transferee court also may certify classes either encompassing the entire litigation or for particular issues. Discovery and trial preparation on issues not consolidated by the transferee court may be stayed until the close of the consolidated proceeding.

(b) The transferee court shall prepare a preliminary plan and order for the disposition of the litigation. The plan shall specify whether the entire action or only specified issues shall be determined in the transferee district and also shall provide for the disposition of the issues not to be determined in the transferee court. This plan is conditional and may be altered or amended should it be appropriate to do so.

(c) When the transferee court severs issues, it shall have broad discretion to order the separated issues to be transferred for consolidated treatment in one or more transferee districts; to return individual issues to the districts in which they originated; to retain those issues for trial; or to order any other appropriate resolution. The transferee court may order the immediate transfer of those issues not to be determined by it, or it may postpone transfer until a later stage of the proceedings. When damage issues are severed, the discretion of the transferee court includes the transfer of those issues either prior to or after the trial of liability for a consolidated damages trial in one or more transferee districts.

### § 3.07. *Review*

(a) Any decision regarding transfer and consolidation by the Complex Litigation Panel, whether made by a subpanel or the full Panel, as provided in § 3.05(b), will not be subject to review by any court, except by extraordinary writ. There shall be no review by appeal or otherwise of an order of the Panel denying transfer for consolidated proceedings.

(b) Review of the transferee court's decision under § 3.06(b) concerning whether to transfer subsequent stages of the proceedings shall be within the exclusive jurisdiction of the Complex Litigation Panel. Any party may petition the Panel to review that determination but the Panel shall have no obligation to do so. If review is undertaken,

(1) it may be by a subpanel or by the full Panel and

(2) the Panel shall have discretion to affirm the transferee court's decision or to reverse it and specify how and in what district or districts the subsequent stages of the litigation will proceed. The Panel shall have discretion to order any disposition on the transfer question it finds serves the objectives of justice, efficiency, and fairness.

(c) When the question of liability has been separately adjudicated and finally determined in the transferee court as to all the claims and parties, review of that determination may be sought immediately. When review is sought by a defendant, the appellate court may grant review if it determines that doing so is likely (i) to avoid harm to the party seeking review and (ii) to promote the efficient and economical resolution of the litigation. When a final determination of liability has been made as to less than all the claims or parties, review may be sought if, in

addition to satisfying the preceding requirements, the transferee court certifies that determination for review by finding that there is no just reason for delay.

(d) Other than as provided in subsection (b) or as otherwise provided by law, all appeals in proceedings transferred and consolidated under § 3.01 shall be heard in the court of appeals of the circuit in which the transferee court initially designated by the Complex Litigation Panel is located.

*§ 3.08. Personal Jurisdiction in the Transferee Court*

(a) Once actions have been transferred and consolidated by the Complex Litigation Panel, the transferee court may exercise jurisdiction over any parties to those actions or any parties later joined to the consolidated proceeding to the full extent of the power conferrable on a federal court under the United States Constitution.

(b) Once actions have been transferred and consolidated by the Complex Litigation Panel, a subpoena for attendance at a hearing or trial, if authorized by the transferee court upon motion for good cause shown and upon such terms and conditions as the court may impose, may be served at any place within the jurisdiction of the United States or anywhere outside the United States if not otherwise prohibited by law.

CHAPTER 4. CONSOLIDATION IN STATE COURTS

*§ 4.01. Designating a State Court as a Transferee Forum for Federal Actions*

(a) Subject to the exceptions in subsection (c), when determining under § 3.04 where to transfer and consolidate actions, the Complex Litigation Panel may designate a state court as the transferee court if the Panel determines

(1) that the events giving rise to the controversy are centered in a single state and a significant portion of the existing litigation is lodged in the courts of that state;

(2) that fairness to the parties and the interests of justice will be materially advanced by transfer and consolidation of the federal actions with other suits pending in the state court; and

(3) that the state court is superior<sup>4</sup> to other possible transferee courts.

The Complex Litigation Panel may designate a state court as the transferee court solely for pretrial proceedings, including discovery and motion practice, or for the full or partial adjudication of controversy. The consent of the appropriate judicial authority in the state in which the designated transferee court is located must be obtained.<sup>5</sup> Once transfer is approved, a state transferee court shall have the

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4. Consideration will be given to substituting the words "superior to" with "more appropriate than" or "more suitable than."

5. A motion to permit transfer to state courts only upon consent of the parties was defeated.

same powers and responsibilities as a federal transferee court under §§ 3.06(c), 3.08, 5.03, and 5.04

(b) When determining whether the requirements in subsection (a) are met, the Complex Litigation Panel should consider factors such as

(1) the number of the individual cases that initially were filed or are pending in state courts relative to the number of actions pending in federal courts;

(2) the number of states in which the state and federal cases are located;

(3) whether the procedures or law to be applied in the state transferee court differ from that which would have been applied by a federal transferee court to a sufficient degree that designation of the state transferee court creates a risk of prejudice to some of the parties to be transferred there; and

(4) any other factor indicating the need to accommodate a particular state or federal interest.

(c) The Complex Litigation Panel shall not transfer to a state court any action that is within the exclusive jurisdiction of the federal courts, or any action that has been removed to a federal court under the provisions of 28 U.S.C. § 1441(d), 28 U.S.C. § 1442, or 28 U.S.C. § 1443, or brought in federal court under the provisions of 42 U.S.C. § 1983. In any action brought by the United States under 28 U.S.C. § 1345, or removed by it under 28 U.S.C. § 1444, the government shall have the right to be exempted from transfer to a state court.

(d) Other than as provided in § 3.07(b), appellate review in federal actions transferred for consolidation to a state court pursuant to this section shall be in the appellate courts of the state in which the transferee court sits.

#### *§ 4.02. Formulation of an Interstate Complex Litigation Compact or a Uniform Complex Litigation Act*

In order to facilitate the transfer and consolidation of related litigation pending in the courts of different states and to promote the just, efficient, and economical resolution<sup>6</sup> thereof, consideration should be given to the formulation of an Interstate Complex Litigation Compact or a Uniform Complex Litigation Act.

### CHAPTER 5. FEDERAL-STATE INTERSYSTEM CONSOLIDATION

#### *§ 5.01. Removal Jurisdiction*

(a) Except as otherwise provided by Act of Congress, the Complex Litigation Panel may order the removal to federal court and consolidation of one or more civil actions pending in one or more state courts, if the removed actions

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6. The phrase "just, efficient, and economical" will be harmonized with the phrases "just, efficient, and fair" in Chapter 3 and "just, speedy, and inexpensive" in Rule 1 of the Federal Rules of Civil Procedure.

arise from the same transaction, occurrence, or series of transactions or occurrences as an action pending in the federal court, and share a common question of fact with that action. The Complex Litigation Panel shall evaluate whether to order removal and consolidation by reference to (1) the criteria set forth in § 3.01 to determine whether the transfer and consolidation of the cases is warranted and (2) consideration of whether removal will unduly disrupt or impinge upon state court or regulatory proceedings or impose an undue burden on the federal courts. When making its determination under subsections (a)(1) and (a)(2), the Complex Litigation Panel should consider factors such as

- a. the amount in controversy for the claims to be removed;
- b. the number and size of the actions involved;
- c. the number of jurisdictions in which the state cases are lodged;
- d. any special reasons to avoid inconsistency;
- e. the presence of any special local community or state regulatory interests;
- f. whether removal and consolidation will result in a change in the applicable law that will cause undue unfairness to the parties; and
- g. the possibility of facilitating informal cooperation or coordination with the state courts in which the cases are lodged.

If the standard is met, the Panel may order the cases removed, consolidated, and transferred pursuant to § 3.04.

(b) If all of the parties as well as the appropriate state judge object to removal of a particular action, that action shall not be removed, although the remaining cases may be removed and consolidated.

(c) In exercising its discretion under subsection (a), the Complex Litigation Panel shall have the authority to remove common issues, related claims, or entire actions.

(d) Claims to which any state is a party may not be removed under subsection (a) unless the state itself requests or consents to removal.

(e) Removal under subsection (a) may be initiated upon

- (1) the requests of any party to any one of the state action; or
- (2) the certification of any state judge presiding over one or more of the actions.

#### *§ 5.02. Removal Procedure*

(a) A party desiring to remove a civil action pursuant to § 5.01 shall file with the Complex Litigation Panel a notice of removal signed in accordance with Rule 11 and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders in the action, and a list of the names and addresses of known parties to the action and to any related actions.

(b) A state judge may recommend that the Complex Litigation Panel consider removal of a civil action pursuant to § 5.01 by certifying that there is a substantial basis for considering whether the action should be removed. The



certification shall contain a short and plain statement of the grounds for removal and a list of the names and addresses of known parties to the action and to any related actions.

(c) A notice of removal under subsection (a) shall be filed: (1) within ninety days from the commencement of an action in the state court, within thirty days from the time the party seeking removal was joined to the action, or within thirty days of the interposition of a claim removable under § 5.01; (2) at any time if a timely removal notice has been filed with the Complex Litigation Panel by any party to a related action and is pending before the Panel; or (3) within thirty days of an order consolidating related actions under § 3.01 or under § 5.01. A certification under subsection (b) may be filed at any time.

(d) A party or judge shall give prompt written notice of a filing under subsection (a) or (b) to all parties to that action and shall file a copy of the removal notice or certification with the clerk of the state court.

(e) After making its decision under § 5.01, the Complex Litigation Panel shall enter an order either refusing to remove the action or removing and transferring all or part of it to a federal court and that order shall be filed with the clerk of the state court. Once an order removing the case is filed, the state court shall proceed no further unless the case, or any part of it, is remanded to it.

### § 5.03. *Supplemental Jurisdiction*

(a) A transferee court shall have subject-matter jurisdiction over any claim by or against any person that

(1) arises from the same transaction, occurrence, or series of related transactions or occurrences as a claim that has been transferred to it pursuant to § 3.01, or removed pursuant to § 5.01, or

(2) involves indemnification related to the same transaction, occurrence, or series of related transactions or occurrences as a claim that has been transferred or consolidated pursuant to<sup>7</sup> § 3.01 or removed pursuant to § 5.01.

(b) The district court in its discretion may decline jurisdiction over any claim brought under subsection (a). In exercising its discretion, the court may consider factors such as:

(1) whether the subsection (a) claim would substantially predominate in terms of proof, the scope of the issues raised, or the comprehensiveness of the remedy;

(2) the degree to which the efficient and fair resolution of all the claims will be facilitated or impaired by the presence of the additional party or claim;

(3) the likelihood of jury confusion and the degree to which potential confusion can be alleviated by any of the claim coordinating procedures of § 3.06; and

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7. The text of the original is as follows: "transferred pursuant or consolidated to § 3.01."

(4) the degree to which accepting jurisdiction over the additional claim or party may intrude upon state interests or impose an undue burden on the federal court.

(c) Any claim brought under subsection (a) shall be treated in the same manner as a claim consolidated pursuant to § 3.01, and provisions such as nationwide service of process under § 3.08 and choice of law under §§ 6.01-6.08 shall be applicable.

*§ 5.04. Antisuit Injunctions*

(a) When actions are transferred and consolidated pursuant to § 3.01 or § 5.01, the transferee court may enjoin transactionally related proceedings, or portions thereof, pending in any state or federal court whenever it determines that the continuation of those actions substantially impairs or interferes with the consolidated actions and that an injunction would promote the just, efficient, and fair resolution of the actions before it.

(b) Factors to be considered in deciding whether an injunction should issue under subsection (a) include

- (1) how far the actions to be enjoined have progressed;
- (2) the degree to which the actions to be enjoined share common questions with and are duplicative of the consolidated actions;
- (3) the extent to which the actions to be enjoined involve issues or claims of federal law; and
- (4) whether parties to the action to be enjoined were permitted to exclude themselves from the consolidated proceeding under § 3.05(a) or § 5.01(b).

*§ 5.05. Court-ordered Notice of Intervention and Preclusion*

(a) If, at the request of a party or on its own initiative, a transferee court in a complex action consolidated pursuant to § 3.01, determines that:

(1) an existing claim or claims of nonparties involve one or more questions of fact in common with the actions pending before the transferee court and arise out of the same transaction, occurrence, or series of transactions or occurrences;

(2) intervention will advance the efficient, consistent, and final resolution of both the parties and nonparties claims; and

(3) intervention will not impose upon either the nonparties or parties undue prejudice, burden, or inconvenience,

it may enter an order informing the nonparties who are within the court's jurisdiction under § 3.08 that they may intervene in the action and in any event will be bound by the determinations made to the same extent as a party, unless otherwise provided by law.

(b) An order under subsection (a) shall provide both the parties and the affected nonparties with notice setting forth:

(1) the existence, status, and substance of the claims and issues to be resolved in the transferee court;

(2) the nonparties' right to intervene in the consolidated action and the time period during which intervention must be accomplished;

(3) the fact that, whether or not the nonparties exercise the opportunity to intervene, they may benefit from determinations made and will be precluded from relitigating issues adjudicated in the transferee court proceedings described in the notice; and

(4) the parties' and the nonparties' right to petition the court to show why the standards in subsection (a) have not been satisfied.

(c) Upon receipt of the notice prescribed in subsection (b), any party or nonparty may file with the transferee court within twenty days a petition setting forth reasons why the requirements of subsection (a) are not satisfied. The transferee court shall conduct a hearing at which parties and nonparties may participate and upon completion of which the transferee court shall transmit notice of its ruling either confirming, modifying, or vacating the order under subsection (a) to all parties and nonparties notified under subsection (b). That notice shall identify specifically those nonparties who may intervene and who will be bound by the determinations made in the consolidated action.

(d) The transferee court's decision under this section will not be subject to immediate review unless it otherwise qualifies under one of the existing interlocutory appeal statutes.

## CHAPTER 6. CHOICE OF LAW

### § 6.01. *Mass Torts*<sup>8</sup>

(a) Except as provided in § 6.04 through § 6.06, in actions consolidated under § 3.01 or removed under § 5.01 in which the parties assert the application of laws that are in material conflict, the transferee court shall choose the law governing the rights, liabilities, and defenses of the parties with respect to a tort claim by applying the criteria set forth in the following subsections with the objective of applying, to the extent feasible, a single state's law to all similar tort claims being asserted against a defendant.<sup>9</sup>

(b) In determining the governing law under subsection (a), the court shall consider the following factors for purposes of identifying each state having a policy that would be furthered by the application of its laws:

(1) the place or places of injury;

(2) the place or places of the conduct causing the injury; and

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8. For the various unsuccessful motions to amend this section, see Symeonides, *supra* note 1, text accompanying notes 141-44.

9. Consideration will be given to adding a sentence at the end of this subsection stating that, if the court determines that a single state's law cannot be applied, then subsection (c) becomes applicable.

(3) the primary places of business or habitual residences of the plaintiffs and defendants.

(c) If, in analyzing the factors set forth in subsection (b), the court finds that only one state has a policy that would be furthered by the application of its law, that state's law shall govern. If more than one state has a policy that would be furthered by the application of its law, the court shall choose the applicable law from among the laws of the interested states under the following rules:

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

(2) If subsection (c)(1) does not apply, but all<sup>10</sup> of the plaintiffs habitually reside or have their primary places of business in the same state, and a defendant has its primary place of business or habitually resides in that state, that state's law governs the claims with respect to that defendant. Plaintiffs shall be considered as sharing a common habitual residence or primary place of business if they are located in states whose laws are not in material conflict.

(3) If neither subsection (c)(1) nor (c)(2) applies, but all<sup>11</sup> of the plaintiffs habitually reside or have their primary places of business in the same state, and that state also is the place of injury, then that state's law governs. Plaintiffs shall be considered as sharing a common habitual residence or primary place of business if they are located in states whose laws are not in material conflict.

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

(d) When necessary<sup>12</sup> to avoid unfair surprise or arbitrary results, the transferee court may choose the applicable law on the basis of additional factors that reflect the regulatory policies and legitimate interests of a particular state not otherwise identified under subsection (b), or it may depart from the order of preferences for selecting the governing law prescribed by subsection (c).

(e) If the court determines that the application of a single state's law to all elements of the claims pending against a defendant would be inappropriate, it may divide the actions into subgroups of claims, issues, or parties to foster

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10. It was suggested that some qualifying language, such as the word "substantially" be added before "all."

11. It was suggested that some qualifying language, such as the word "substantially" be added before "all."

12. During the final discussion of this Draft by the Institute's membership on May 13, 1993, it was proposed and the Reporter agreed to replace the word "necessary" with the word "appropriate." Later on, it was proposed that the entire subsection (d) be replaced with the following language: "(d) To avoid unfair surprise or arbitrary results, the transferee court may, in its discretion choose the applicable law." The Reporter agreed to consider this language. See Symeonides, *supra* note 1, text accompanying notes 157-161.

consolidated treatment under § 3.01, and allow more than one state's law to be applied. The court also may determine that only certain claims or issues involving one or more of the parties should be governed by the law chosen by the application of the rules in subsection (c), and that other claims or parties should be remanded to the transferor courts for individual treatment under the laws normally applicable in those courts. In either instance, the court may exercise its authority under § 3.06(c) to sever, transfer, or remand issues or claims for treatment consistent with its determination.

§ 6.02. *Mass Contracts: Law Chosen by the Parties*

(a) In actions consolidated under § 3.01 or removed under § 5.01, in which the parties assert the application of laws that are in material conflict, the rights, liabilities, and defenses of the parties with respect to a contract claim shall be governed by the law designated by the parties in the contract, unless the court finds either

(1) that the clause is invalid for reasons of misrepresentation, duress, undue influence or mistake,<sup>13</sup> as defined under the state law that otherwise would be applicable under § 6.03, or

(2) that the law chosen by the parties is in material conflict with fundamental regulatory objectives of the state law that otherwise would be applicable under § 6.03.

(b) In appropriate cases, the transferee court may determine that the actions should be divided into subgroups of claims<sup>14</sup> or parties, allowing more than one state's law to be applied. The court may determine that only some of the claims involving some of the parties should be governed by the law chosen by the parties to apply to their respective contracts and that other claims or parties should be governed by different laws selected under § 6.03. In that event, the transferee court may retain all the claims treating them under the appropriately designated laws, or it may exercise its authority under § 3.06(c) to sever, transfer, or remand the claims to the transferor courts for individual treatment consistent with its determination.

§ 6.03. *Mass Contracts: Law Governing in the Absence of Effective Party Choice*

(a) Except as provided in § 6.02, in actions consolidated under § 3.01 or removed under § 5.01, in which the parties assert the application of laws that are in material conflict, the transferee court shall choose the law governing the rights, liabilities, and defenses of the parties with respect to a contract claim by applying the criteria set forth in the following subsections with the objective of

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13. Consideration will be given to adding the word "unconscionability."

14. The word "issues" will be inserted after "claims."

applying a single state's law to every claim being asserted under the same or similar contracts with a common party.

(b) In determining the governing law under subsection (a), the court shall consider the following factors for purposes of identifying each state having a policy that would be furthered by the application of its law:

- (1) the place or places of contracting;
- (2) the place or places of performance;
- (3) the location of the subject matter of the contract; and
- (4) the primary places of business or habitual residences of the plaintiffs and defendants.

(c) If, in analyzing the factors set forth in subsection (b), the court finds that only one state has a policy that would be furthered by the application of its law, that state's law shall govern. If more than one state has a policy that would be furthered by the application of its law, the court shall apply the law of the state in which the common contracting party has its primary place of business, unless the court finds that that law is in material conflict with the regulatory objectives of the state law in the place of performance or where the other contracting parties habitually reside. In that event, the court shall apply those state laws to the contracts legitimately within their scope.

(d) If the court determines that the application of a single state's law to all the claims being asserted under similar contracts with a common party would be inappropriate, it may divide the actions into subgroups of claims, issues, or parties to foster consolidated treatment under § 3.01, and allow more than one state's law to be applied. The court also may determine that only certain claims involving one or more of the parties should be governed by the law chosen by the application of the rules in subsection (c), and that other claims or parties should be remanded to the transferor courts for individual treatment under the laws normally applicable there. In either instance, the transferee court may retain all the claims, treating them under the appropriately designated laws, or it may exercise its authority under § 3.06(c) to sever, transfer, or remand the claims to the transferor courts for individual treatment there consistent with its determination.

#### § 6.04. *Statutes of Limitations*

In actions consolidated under § 3.01 or removed under § 5.01 and based on state law, the transferee court shall apply the limitations law of the state whose law is chosen to govern the claims under §§ 6.01-6.03, except that any claim that was timely where filed but is not under the law chosen pursuant to this section will be deemed timely by the transferee court and remanded to the transferor court.<sup>15</sup>

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15. Consideration will be given to modifying this section to provide that a claim will be remanded only upon the application of a party.

§ 6.05. *Monetary Relief Generally*

(a) Except for damages covered by § 6.06, the measure of monetary relief in actions consolidated under § 3.01 or removed under § 5.01 shall be determined in accordance with the law or laws selected under §§ 6.01-6.03.

(b) If the court determines that the monetary relief issues involve policies different from those underlying the liability issues and that the application of the law or laws selected under §§ 6.01-6.03 to those issues would ignore the interests of states whose policies regarding the measure of relief would be furthered by the application of their laws, it may sever the relief issues for treatment under the laws of the states whose regulatory policies would be furthered thereby.

§ 6.06. *Punitive Damages*

(a) In actions consolidated under § 3.01 or removed under § 5.01 in which punitive damages are sought and in which the parties assert the application of laws that are in material conflict, the transferee court shall choose the law governing the award of punitive damages by applying the criteria set forth in the following subsections with the objective of applying a single state's law to all punitive damage claims asserted against a defendant.

(b) In determining the governing law under subsection (a), the court shall consider the following factors for purposes of identifying each state having a policy on punitive damages that would be furthered by the application of its laws:

- (1) the place or places of injury;
- (2) the place or places of the conduct causing the injury; and
- (3) the primary places of business or habitual residences of the defendants.

(c) If, in analyzing the factors set forth in subsection (b), the court finds that only one state has a policy that would be furthered by the application of its law, that state's law shall govern. If more than one state has a policy that would be furthered by the application of its punitive damages law, those damages may be awarded if the laws of the states where any two of the factors listed in subsection (b) are located authorize their recovery and the court finds that the possible imposition of punitive damages reasonably was foreseeable to the defendants. If multiple places of injury are involved and they differ as to the availability of punitive damages, the law of the state where the conduct causing the injury occurred governs.<sup>16</sup> When conduct occurred in more than one state, the court will choose the law of the conduct state that has the most significant relationship to the occurrence.

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16. The Reporter agreed to clarify that this sentence applies only if the law of the place of conduct and that of the primary places of business of the defendant are in disagreement on the punitive damages issue. See Symeonides, *supra* note 1, text accompanying notes 183-84.

(d) If the court determines that punitive damages are authorized under subsection (c), but the state laws identified in subsection (b) differ with respect to the standard of conduct giving rise to the availability of punitive damages, the standard of proof required, the method of calculation, limitations on the amount of punitive damages, or other matters, the order of preference for the governing law on those issues, among the states authorizing punitive damages, is the place of conduct, the primary place of business or habitual residence of the defendant, and the place of injury.

#### *§ 6.07. Procedure*

(a) When the transferee court prepares its preliminary plan and order for the disposition of the litigation under § 3.06(b), it should include a designation of the law or laws governing the dispute under the rules set out in §§ 6.01-6.06.

(b) Review of the transferee court's decision regarding the governing state law or laws may be had immediately with leave of the court of appeals upon certification by the transferee court that the issue is ripe for review and that an immediate appeal from the order may advance materially the ultimate termination of the litigation.

(c) Review of the decisions of federal transferee courts shall be in the court of appeals for the circuit in which the transferee court is located.

#### *§ 6.08. Intercircuit Conflicts*

In actions consolidated under § 3.01 or removed under § 5.01, the transferee court shall not be bound by the federal law as interpreted in the circuits in which the actions were filed, but may determine for itself the federal law to be applied to the federal claims and defenses in the litigation.