The Complex Litigation Project's Proposal for Federally Mandated Choice of Law in Mass Torts Cases: Another Assault on State Sovereignty

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I. INTRODUCTION

The underlying premise of the Complex Litigation Project's proposal for federally-mandated choice of law in mass torts cases is that "a federal statutory choice of law code is necessary to foster the fair and efficient handling of complex litigation and that, in order to provide sufficient predictability and avoid conflicting results, it would be preferable to devise reasonably precise choice of law rules to be applied in these cases." Federally-mandated choice-of-law rules are said to be necessary to "achieve greater parity in the treatment of persons who are similarly harmed by the same course of conduct." This is because, in the absence of federally-mandated choice of law rules, there is the "incentive to forum shop among courts that, applying distinct state choice of law rules, may reach different conclusions about which substantive law should be applied to the underlying facts.
of a case." The objectives of "parity of treatment" and "avoidance of forum shopping and conflicting results" are sought to be achieved by, to the extent feasible, having all claims being asserted against a defendant determined by a single state's law.

The Complex Litigation Project's proposal (Proposed Final Draft) for federally-mandated choice of law in mass torts cases is the latest version of the "great quest" for "uniform choice of law" in mass torts cases. Along with Professor Aaron Twerski of Brooklyn Law School, I have responded to the various previous versions of this "great quest" in law journals and in Congressional testimony. Professor Twerski and I contend the concept of federally-mandated choice-of-law rules for mass torts should be rejected because first, it is inconsistent with the principles of state sovereignty that lie at the heart of our federal system, and second, in practice, it will produce functionally unsound choice-of-law results. Thus, we maintain that if it is considered desirable that all mass torts cases should be consolidated for trial before a single court, this should be accomplished without federally-mandated choice of law. That is, as is now done with federal court cases transferred by the Judicial Panel on Multidistrict Litigation, the court to which the cases have been transferred for trial should apply the conflict-of-laws rules of each of the states from which the case has been transferred. As I will point out subsequently, this can be accomplished efficiently by dividing the parties and claims into subclasses for choice-of-law purposes, and deciding the choice-of-law issue for each subclass in accordance with the conflicts law of the state or states where the suits were filed by the members of the subclass.

In the present article, I will first review the response that Professor Twerski and I have made to prior proposals for federally-mandated choice of law in "mass torts" cases. I will then discuss in detail the Proposed Final Draft's proposal in terms of its effect on principles of state sovereignty and on functionally sound choice-of-law results in mass torts cases. My conclusion will be that while in some respects, the Draft's proposal is an improvement over prior "law of a single jurisdiction" proposals, it still represents an unwarranted assault on state sovereignty by requiring the sacrifice of important state interests in the quest for a specious

4. Id. at 376. The proposal also notes that even where cases are consolidated for trial before a single federal court by the Judicial Panel on Multidistrict Litigation, there is no change of applicable law for the transferred cases. This is because the transferee court is required to apply the conflict-of-laws rules of the state from which the case has been transferred. Van Dusen v. Barrack, 376 U.S. 612, 84 S. Ct. 805 (1964). This rule applies regardless of which party initiated the transfer. Ferens v. John Deere Co., 494 U.S. 516, 110 S. Ct. 1274 (1990).

5. Proposed Final Draft, supra note 2, § 601(a), at 376.

6. This article borrows copiously from the articles that Professor Twerski and I co-authored, as did my previous article on the subject, Robert A. Sedler, Interest Analysis, State Sovereignty, and Federally-Mandated Choice of Law in "Mass Tort" Cases, 56 Alb. L. Rev. 855 (1993) [hereinafter Interest Analysis]. These articles reflect our joint view in opposition to a federally-imposed "law of a single jurisdiction" rule in mass tort cases. Although this joint view is reflected in the present article, the analysis and criticisms of the Complex Litigation Project's specific proposal that is the subject of the present article are entirely my own.
"parity of treatment" between accident victims of mass torts, and so should be rejected.

II. THE "LAW OF A SINGLE JURISDICTION" RULE: AN ASSAULT ON STATE SOVEREIGNTY AND A RETURN TO THE "LAW OF THE PLACE OF THE WRONG"

The prior proposals for federally-mandated choice of law in mass torts cases sought to have all the claims between all of the parties in the cases and all the issues arising in the case determined by a designated "law of a single jurisdiction." In all of these proposals, the "law of a single jurisdiction" rule would displace state choice of law in mass tort cases, although the proposals differed somewhat on how the transferee court was to determine what state's law should be designated as the "law of a single jurisdiction." All of these proposals have been rejected, and are not likely to be revived in the foreseeable future.7

7. The "great quest" for "uniform choice of law" in "mass torts" cases begins with the "Kastenmeier bill," more specifically, the Multiparty, Multiforum Jurisdiction Act of 1989, sponsored by former Representative Robert W. Kastenmeier of Wisconsin. H.R. 3406, 101st Cong., 1st Sess. (1989), 135 Cong. Rec. E3275 (daily ed. Oct. 4, 1989) (statement of Robert W. Kastenmeier). Under this bill, which applied only to single-disaster mass torts, all such cases would be transferred to a federal court on the basis of "minimal diversity," and the court was directed to apply the "law of a single designated jurisdiction" to all of the claims. The law specified some eleven factors that the court was to take into account in determining the "law of the single designated jurisdiction." See the discussion of the provisions of the bill in Robert A. Sedler and Aaron D. Twerski, The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain, 73 Marq. L. Rev. 76, 79-82 (1989) [hereinafter Sacrifice Without Gain]. In the same year, the American Bar Association Commission on Mass Torts submitted a report to the House of Delegates, in which it proposed a draft Federal Mass Tort Jurisdiction Reform Act. ABA Comm. on Mass Torts, Report to the House of Delegates (1989). The ABA Commission proposal covered both single disaster and multi-exposure mass torts and would consolidate those cases for trial before a single federal court. Like the Kastenmeier bill, the ABA proposal sought to achieve the application of the law of a single state to govern all of the mass tort claims but would do so by having the federal courts develop their own choice-of-law rules for mass torts cases.

Professor Twerski and I presented written testimony before the House Judiciary Subcommittee on Courts, Intellectual Property and the Administration of Justice in opposition to the Kastenmeier bill, 101st Cong., 1st Sess. (Nov. 15, 1989) (House Comm. on the Judiciary), and prepared a law review article concurrently with our testimony. Sacrifice Without Gain, supra. Representative Kastenmeier and Charles G. Geyh, Counsel to the House Subcommittee on Courts, Intellectual Property and the Administration of Justice, responded to our article, see Robert W. Kastenmeier & Charles G. Geyh, The Case in Support of Legislation Facilitating the Consolidation of Mass-Accident Litigation: A View from the Legislature, 73 Marq. L. Rev. 535 (1990), to which Professor Twerski and I responded in turn. Robert A. Sedler & Aaron D. Twerski, State Choice of Law in Mass Tort Cases: A Response to "A View from the Legislature," 73 Marq. L. Rev. 625 (1990) [hereinafter Response]. In our testimony and law review articles, we set forth our basic objections to a federally-mandated "law of a single jurisdiction" rule, which will be discussed in this section of the article.

The Multiparty, Multiforum Jurisdiction Act of 1989 passed the House in 1990, but failed to pass the Senate. A proposal to accept the Report of the ABA Commission on Mass Torts was defeated by the House of Delegates in February, 1990, ABA, Summary of Action Taken by the House of Delegates of the American Bar Association 4 (1990), and the issue does not appear to be currently
I will now discuss the basic objections that Professor Twerski and I have advanced to a federally-mandated "law of a single jurisdiction" rule in mass tort cases. The first objection is that it represents an "assault on state sovereignty" because it would displace state choice of law in favor of a federally-imposed solution in mass tort cases, and by so doing, would require the sacrificing of state interests in such cases.

The significance of state sovereignty in the American constitutional system has been discussed at length elsewhere and need not be repeated here. Suffice it to say that an essential element of state sovereignty in the American constitutional system is the states' power to develop legal rules governing disputes between private persons and to adjudicate such disputes in their courts. Congress has recognized the primacy of state law in disputes between private persons by requiring the application of state law in diversity cases under the Rules of Decision Act, and the Supreme Court's expansive interpretation of what is "substantive" for Erie purposes reinforces Congressional recognition of the primacy of state law in governing disputes between private persons. Congressional respect for state sovereignty in this area is also reflected in the Court's extreme reluctance to find federal preemption of the state's power to promulgate legal rules governing the disputes between private persons, even in areas where federal preemption is otherwise likely to be found.

Any proposal for federally-mandated choice of law in mass torts cases, whether the "law of a single jurisdiction" rule of prior proposals, or the purportedly more "flexible" approach of the Proposed Final Draft, seriously undercuts this
fundamental element of state sovereignty by displacing state choice of law in favor
of a federally-imposed solution. It is indeed true, as the proposal states, that "courts
that, applying distinct state choice of law rules, may reach different conclusions
about which substantive law should be applied to the underlying facts of a case." What the proposal discounts, however, is that the matter of "reaching different conclusions about which substantive law should be applied to the underlying facts of a case" is a necessary concomitant of a constitutional system that is premised on respect for state sovereignty.

The importance of state sovereignty in determining the applicable law in disputes between private persons is even more cogent today because interest analysis has become the operative approach to choice of law in complex torts cases. Interest analysis means that the states can advance their own policies and interests in conflicts torts cases, and that a state court can, and most likely will, apply its own law when it has a real interest in doing so in order to implement the policy reflected in that law. A federally-mandated choice-of-law rule for mass torts cases necessarily and designedly impairs the ability of the involved states to advance their own policies and interests in such cases.

Among the examples that Professor Twerski and I have used to illustrate the sacrificing of state interests under a federally-mandated "law of a single jurisdiction" rule is the following. Twenty members of the Elks Club in Denver, Colorado, charter a bus for a trip to Arizona for an Elks Convention. The bus company, Colorado Coaches, Inc., is a Colorado corporation doing business mostly within the state. In Phoenix, thirty Arizona Elks members board the bus for a local sightseeing trip. Due to the negligence of the bus driver, the bus hits a culvert, causing the bus to overturn. All the passengers suffer serious and debilitating injuries. A Colorado statute adopted in 1987 limits recovery for non-economic loss to $250,000 for each plaintiff.

It is our submission that in these cases a functionally sound result is for the Arizona plaintiffs to obtain unlimited recovery under Arizona law, but for the Colorado plaintiffs to be limited to the $250,000 limitation on non-economic loss. In an interstate accident situation, the primarily interested states are the parties' home states, where the consequences of the accident and of allowing or denying recovery will be felt by the parties. The Arizona policy of allowing unlimited recovery will always be advanced when the victims are residents of Arizona. The application of Arizona law to determine liability in the claim of the Arizona

13. See the discussion in Sedler, Interest Analysis, supra note 6, at 855-56.
plaintiffs against Colorado Coaches, Inc., is fully fair to the defendant, since the accident occurred in Arizona on a local sightseeing trip. There is no doubt that the Arizona plaintiffs will be able to obtain unlimited recovery in this case. They will bring suit against Colorado Coaches, Inc. in Arizona, where the defendant is subject to jurisdiction under the Arizona “long-arm” act, and Arizona will apply its own law, thus allowing unlimited recovery.\(^{16}\)

In the suit between the Colorado plaintiffs and the Colorado defendant, Colorado law, limiting recovery to $250,000 for non-economic loss, should likewise apply to determine the rights of the Colorado parties. The Colorado legislature has made this determination as to the proper measure of recovery for non-economic loss. Since the social and economic consequences of the accident and of imposing liability will be felt by the parties in Colorado, Colorado is the only state that has a real interest in having its law applied to this issue. Thus, Colorado will apply its own law in the event that suit is brought there, and it is likely that if suit were brought in Arizona, its courts would apply Colorado law in this case as well.\(^{17}\)

The result in this case, with the Arizona plaintiffs obtaining unlimited recovery in accordance with Arizona law and the Colorado plaintiffs being limited to the recovery permitted by Colorado law, advances the interests of both Arizona and Colorado and is functionally sound and fair to the parties. It is irrelevant that the parties were victims in the same “mass tort.” The “mass” nature of the tort has nothing to do with the consequences of the tort for the individual victim or with the interest of the victims’ home states in applying their law to determine the rights of the victims. The consequences of this “mass tort” will be felt by the victims in their home states, and it is the law of the respective home states that should determine the amount of damages they each will recover for this “mass tort.” In this sense, there is no “discrimination” or “lack of parity” in the “treatment of persons who are similarly harmed by the same course of conduct.”\(^{18}\)

The Arizona plaintiffs and the Colorado plaintiffs are both treated equally: each group of plaintiffs receives the protection—or lack of it—afforded by the law of their home state. To put it another way, in our federal system, people are not similarly situated simply because they have been “harmed by the same course of conduct.” Since they come from different states, and since the consequences of the accident and of imposing or denying liability will be felt by the parties in their home states, they are not similarly situated with respect to the policies embodied in the laws of involved states nor the interests of the involved states in having their laws applied in order to implement the policies reflected in those laws.\(^{19}\)

\(^{16}\) See the further discussion and review of cases in Sedler & Twerski, Sacrifice Without Gain, supra note 7, at 87-88.

\(^{17}\) See the discussion and further review of cases, id. at 88-89.

\(^{18}\) Proposed Final Draft, supra note 2, at 376.

\(^{19}\) See the further discussion of “horizontal versus vertical inequality” in Sedler & Twerski, Response, supra note 7, at 635-36.
The intrusion of a federally-imposed "law of a single jurisdiction" rule in this case would require that either the interests of Arizona or the interests of Colorado be sacrificed in the name of "uniformity." This sacrifice of state interests, we submit, is clearly inconsistent with the significance of state sovereignty in the American federal system.\(^2\)

Our second basic objection to imposing a federally-mandated "law of a single jurisdiction" rule in mass torts cases is that it would run counter to progressive trends in choice of law, which include, of course, the resolution of choice-of-law issues with reference to the policies and interests of the involved states,\(^2\) and would impose a "choice of law straightjacket" in mass tort cases. In this area, we have demonstrated that because of constitutional constraints on what state's law can be applied in a conflicts case, a court's choice of what would be the "law of a single jurisdiction" is very limited. As a practical matter, the court would either be required to apply the discredited "law of the place of the wrong" rule of the First Restatement or an equally rigid rule of "law of the place of conduct."

The matter of constitutional constraints on choice of law interacting with the "law of a single jurisdiction" rule has been discussed at length elsewhere, and need not be repeated here.\(^2\) It is sufficient at this point to observe that while constitutional constraints ordinarily will not prevent a state court from making a decision to apply its own law or the law of another state in a particular case, these limits do become restrictive when an effort is made to apply the substantive law of the "law of a single jurisdiction." This is especially so when multiple plaintiffs reside in a number of different states, and where the conduct in question occurs in more than one state. These constitutional constraints then inject extreme rigidity into any effort to impose a "law of a single jurisdiction" requirement.\(^2\)

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20. See the further discussion and examples in Sedler & Twerski, Sacrifice Without Gain, supra note 7, at 90-98.
21. See the discussion in Sedler, Interest Analysis, supra note 6, at 861-62, 869-70.
22. See Sedler & Twerski, Sacrifice Without Gain, supra note 7, at 99-105; Sedler, Interest Analysis, supra note 6, at 863-66.
23. For example, the Multiparty, Multiforum Jurisdiction Act of 1991 substituted three factual contacts and two general considerations for the eleven factors that were to be considered under the predecessor bill. The three factual contacts were "the place of injury," "the place of the conduct causing the injury," and "the principal places of business or domiciles of the parties." H.R. 2450, 102d Cong., 1st Sess. § 6 (1991). It may be noted that these are the identical factual contacts in § 6.01 of the Proposed Final Draft. This is not surprising, since these are the factual contacts that are relevant in conflicts torts cases and those that give rise to what I have referred to as the fact-law patterns that arise in these cases. See the discussion of fact-law patterns in Robert A. Sedler, Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases, 44 Tenn. L. Rev. 975, 980-81 (1977) [hereinafter Rules of Choice of Law]. The two general considerations were "the danger of creating unnecessary incentives for forum-shopping," and "whether the choice of law would be reasonably foreseeable to the parties." H.R. 2450, 102d Cong., 1st Sess. § 6 (1991).

At first glance, the choice-of-law provision of the 1991 Act appears to be a combination of the primary factors used to determine the state with the most significant relationship in tort cases under
One of the examples that we have used to illustrate the "choice of law straightjacket" resulting from the interaction of constitutional constraints on choice of law with the "law of a single jurisdiction" rule is the following. One hundred and fifty California residents leave Los Angeles on a flight to New York, with a stopover in Detroit, Michigan. In Detroit, another twenty-five passengers, all from Michigan, embark for the last leg of the flight to New York. The plane crashes on takeoff from the Detroit airport, killing all on board. The allegation is that the crash was due to a design defect in the landing gear. The aircraft was designed and manufactured by Gruman Aircraft in New York. California law imposes a "risk utility" burden on manufacturers in design defect claims, which is widely acknowledged to effectively create strict liability for design defects. Under Michigan law and New York law, the manufacturer can rely on a "state of the art" defense and so, for practical purposes, can be held liable only for negligence.

California law could constitutionally be applied in this situation to determine the California victims' claims against Gruman. California has an interest in applying its law to determine the claims of the California survivors, and the application of California law on this issue is not unfair to Gruman, which has a large number of airplanes flying in California, including the airplane involved in the fatal crash. For the same reason, Michigan law could be applied to determine the claims of the survivors of the Michigan passengers. In addition, Michigan law could be applied to determine the claims of all the survivors against Gruman, since the accident occurred there. Similarly, New York law could be applied to determine all these claims, since the airplane was designed and manufactured in New York.

California law, however, could not be applied to determine the claims of the survivors of the Michigan passengers. Since the Michigan victims were not residents of California, California has no interest in applying its law to determine the claims of their survivors, and since the Michigan victims did not board the plane in California, California law cannot be applied to determine these claims on the basis of factual contacts with the underlying transaction. Thus, the mere presence of a single non-California victim who boarded the plane outside of

§ 145 of the Second Restatement, with the addition of some of the general choice-of-law considerations set out in § 6 of the Second Restatement. See Restatement (Second) of Conflict of Laws §§ 6, 145 (1971). If this were so, it would seem that the court ultimately would have broad discretion in selecting the "law of a single jurisdiction" in the particular mass tort case. In point of fact, however, because of constitutional constraints on choice of law in the mass tort situation, the court's choice of the "law of a single jurisdiction" would be severely restricted. In most mass tort cases, the only state's law that a court would be able to constitutionally apply to determine all the issues and claims of the different parties would be the law of the state in which the injury occurred or the law of the state in which the allegedly tortious act took place. Ordinarily these will be the only two possible states with which all the parties and the underlying transaction have constitutionally sufficient contacts. See the discussion and review of cases in Sedler, Interest Analysis, supra note 6, at 863-66.

California would preclude the application of California law to determine the claims of the California survivors in this case. This amounts to a "single-plaintiff veto" on an otherwise functionally sound choice-of-law result that doubtless would have obtained if the suit had remained in California—the application of the law of the victim's home state to determine the liability of the manufacturer for an accident arising out of a flight that originated in the victim's home state—and defeats the strong interest of California in applying its victim-favoring rule in design defect cases for the benefit of the survivors of the California victims who boarded the plane in California.

Under the "law of a single jurisdiction" rule, the only applicable law in this case could be the law of Michigan, where the accident occurred, or the law of New York, where the product was designed and manufactured, both of which are the same and favor the manufacturer. The law of California, the state where most of the victims resided, where the manufacturer did substantial business, and where the trip originated, cannot be applied in this case because that law could not constitutionally be applied to determine the claims of the Michigan survivors. 26

Our second example applies the "law of a single jurisdiction" rule to a multi-exposure case and demonstrates that the only state's law that could constitutionally be applied in such a case is the "law of the place of acting." We have simplified things by having a single manufacturer that manufactured the product in its home state, New York, and instead of having plaintiffs in all fifty states, as is typical in multi-exposure cases, we will have one group of plaintiffs in California and another group of plaintiffs in Michigan. All the plaintiffs suffered the injuries in their home states. The issue is the standard of liability for design defect claims, as in our previous New York-California-Michigan example involving the airplane crash. Recall that California imposes strict liability for design defect claims, while New York and Michigan impose liability only on the basis of negligence. There is a conflict between California law and


26. The claims of the Michigan survivors are appropriately determined under Michigan law, which does not differ from New York law. The application of Michigan law to determine the claims of the Michigan survivors and of California law to determine the claims of the California survivors produces a functionally sound result that would be recognized under most modern approaches to choice of law. This result is necessarily precluded under the "law of a single jurisdiction" rule.

If, on the other hand, the crash had occurred when the plane took off in California, California law could constitutionally be applied to determine the claims of all the survivors against Gruman and against Northwest Airlines. In this case, under the "law of a single jurisdiction" rule, the court could choose either the place of harm or the place of conduct. But suppose that the carrier was a regional airline that did not fly to New York and that the crash occurred on a flight from California to Arizona. In that circumstance, the court would be limited to selecting California law, as the law of the place of harm, since New York law could not constitutionally be selected to govern the survivors' claims against the airline.
New York law on the point in issue here, and there is no doubt that if the California victims brought suit against the New York manufacturer in California, California would apply its own law.27

However, the law of California could not constitutionally be applied to determine the claims of the Michigan victims, since California would have no interest in applying its law for the benefit of Michigan victims injured in their home state. Here then, the only state's law that could be constitutionally selected to govern the claims of all the victims is the law of the state of manufacture, New York, since New York is the only state having factual contacts with respect to the claims of all the victims. Thus, in the multi-exposure case, the "law of a single jurisdiction" rule will invariably mandate the application of the "law of the place of acting" to govern the claims of all the victims, who will be residing in different states and who will have suffered the harm in their respective home states.

We see then that in both the single disaster case and the multi-exposure case, the "law of a single jurisdiction" rule turns out to be nothing more than a slightly modified "place of the wrong" rule, with the "place of the wrong" sometimes being the place of harm and sometimes the place of acting. The law of the states where the parties reside or have their principal place of business can never be selected independently on the basis of the parties' residence in that state as the "law of a single jurisdiction" to be applied in mass tort cases.28

27. See, e.g., Kasel v. Remington Arms Co., 24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (1972) (where California victim purchased product manufactured by out-of-state manufacturer in California and was injured while using the product in Mexico, California products liability law applied in victim's suit against the manufacturer). Cf. Bernhard v. Harrah's Club, 546 P.2d 719, cert. denied, 429 U.S. 859, 97 S. Ct. 159 (1976) (where California victim was injured in California by California driver who became intoxicated at defendant's gambling establishment located across the state line in Nevada, California law imposing liability against liquor establishment for harm caused by intoxicated patron applied).

28. In some cases, there would be no "single designated jurisdiction" whose law could constitutionally be applied to govern all the claims in a mass torts case. This will occur in the multi-exposure case in which different manufacturers, operating in different states, are sought to be held liable to groups of victims residing in different states on the same underlying claim. We will assume here that the point in issue relates to determining liability on the basis of "market share," which some states recognize and others do not. To simplify matters, we will have one group of victims residing in State A and another group of victims residing in State B. One company manufactured the product in State C, and another manufactured the product in State D. Both manufacturers do business nationwide. The laws of State A and State C recognize "market share" liability, while the laws of State B and State D do not.

The law of State A could be constitutionally selected to govern the claims of the State A victims against both manufacturers, but the law of State A could not be constitutionally selected to govern the claims of the State B victims against the manufacturers, and vice-versa. The law of State C could constitutionally be selected to govern the claims of both the State A and the State B victims against the State C manufacturer but could not be constitutionally selected to govern their claims against the State D manufacturer. Nor could the law of State D be selected to govern their claims against the State C manufacturer. In this case, because of constitutional constraints on choice of law, we have "run out of law." There is no "single jurisdiction" whose law could constitutionally be selected to
I submit that Professor Twerski and I have demonstrated very cogently why Congress should not impose a federally-mandated “law of a single jurisdiction” rule in mass torts cases. First, we have demonstrated, as proponents of federally-mandated choice-of-law rules in mass torts cases cannot seriously dispute, that this would seriously intrude upon state sovereignty. It would displace state choice of law in mass tort cases, and require the sacrifice of state interests by preventing states from applying their own law in circumstances in which the state had a real interest in applying its law in order to implement the policy reflected in that law. Second, we have demonstrated that a “law of a single jurisdiction” rule would lead to functionally unsound choice-of-law results in many cases, because constitutional constraints on choice of law, interacting with the “law of a single jurisdiction” rule, would usually require the court to apply a “law of the place of the wrong” rule, subject only to the possibility that in some cases the “place of the wrong” could be the “place of acting” rather than the “place of harm.” This result runs completely counter to progressive trends in choice of law and requires states to sacrifice the advancement of their own policies and interests in the name of “efficiency and consistency.”

Professor Twerski and I have also addressed the matter of “parity in the treatment of persons who are similarly harmed by the same course of conduct.” As I have discussed in the present article in connection with the Arizona-Colorado Elks Club members example, there is no “lack of parity” in the treatment of the Arizona and Colorado victims of the same accident by holding that their rights should be determined by the differing laws of their respective home states. Since they come from different states, they are not similarly situated with respect to the policies embodied in the laws of the involved states nor the interests of the involved states in having their laws applied in order to implement the policies reflected in those laws. There is no “lack of parity” in providing each group of plaintiffs with the protection—or lack of it—afforded by the law of their home state.

Requiring that the claims of each group of plaintiffs be determined by the same law achieves horizontal equality, but it does so at the expense of vertical equality. If the “law of a single jurisdiction” rule is to apply, both groups of governing the claims of all the victims residing in different states against the two manufacturers who manufactured the product in different states.

The problem of “running out of law” would not occur under the Draft’s proposal, since the “law of a single state” rule only applies to claims against a particular defendant. Where more than one defendant is involved, the law of a different “single state” would be selected as to that defendant. As we will see, however, under the Draft’s proposal, in the multi-exposure case, the applicable law will be the law of the state where each defendant acted.

29. The result will be that choice of law in conflicts torts cases will have become bifurcated. In the ordinary conflicts tort case, the court will follow progressive trends in choice of law, but in mass torts cases, there will have been an effective return to the “place of the wrong” rule. As to the development of progressive trends in choice of law in conflicts torts cases, see Sedler, Interest Analysis, supra note 6, at 855-58.

plaintiffs will either be allowed or denied recovery. Assume that the court chooses the choice-of-law rule that denies recovery. The disappointed Arizona plaintiffs ask, "Why did we lose?" The answer has to be, "Because you were involved in an accident that involved people from Colorado. We had to have the same rule, governing both of your claims in order to achieve 'parity and efficiency,' and we sacrificed you (and the interests of Arizona) to 'parity and efficiency.'" This hardly seems a very satisfactory answer. On the other hand, if we hold that the Arizona plaintiffs obtain full recovery under Arizona law, but that the Colorado plaintiffs are limited to the amount of recovery permitted under Colorado law, we can explain the result to the disappointed Colorado plaintiffs in a much more satisfactory and reasonable way. We can point to the fact that Colorado, the state that has the most significant interest in their well-being, has limited the amount of their recovery in this case. They are, in fact, treated as Colorado treats its residents in a domestic injury case. The horizontal inequality is present, but it is explainable. Reasonable people can understand that different legal systems provide different rights to their residents. In other words, horizontal inequality can be explained in a satisfactory and reasonable way, while vertical inequality cannot. Thus, the "parity of treatment" objective of the "law of a single jurisdiction" rule, as well as of the American Law Institute's proposal for choice-of-law rules in mass tort cases, turns out to fall of its own weight.

Finally, Professor Twerski and I have demonstrated that even if mass tort cases are to be consolidated for trial before a single court, it is not necessary to have all the cases determined under the "law of a single state." The cases can be grouped into fact-law patterns, and by following the approach that is followed with respect to cases that are consolidated for trial by the Judicial Panel on Multidistrict Litigation, the court would apply to each fact-law pattern the relevant choice-of-law rules of each of the states from which the case has been transferred.

Choice-of-law issues in tort cases tend to fall into certain fact-law patterns,31 and the courts that have abandoned the traditional approach, as the overwhelming number of them have done, tend to reach fairly uniform results in the different fact-law patterns presented in these cases, regardless of which "modern" approach to choice of law they purport to follow.32 These results depend primarily on a consideration of the policies reflected in the laws of the

31. See the discussion of fact-law patterns in conflicts torts cases in Sedler, Rules of Choice of Law, supra note 23, at 980-81.
32. See the discussion in Sedler, Rules of Choice of Law, supra note 23, at 1032-41; Sedler, Across State Lines, supra note 14, at 50-58. See also Patrick J. Borchers, The Choice-of-Law Revolution: An Empirical Study, 49 Wash. & Lee L. Rev. 357 (1992), analyzing the results in conflicts torts cases in terms of forum law, recovery law, and local favoring law. Professor Borchers concludes: "Courts do not take the new approaches seriously. Because all of the competitors of the First Restatement start from different analytical premises, if courts were faithful to their tenets they would inevitably generate different result patterns. Yet in practice the outcomes are largely indistinguishable." Id. at 379.
involved states and the interest of each state in applying its law in order to implement that policy. In practice then, conflicts torts cases are not at all complex.

Likewise, the number of choice-of-law issues that will arise in any mass tort case is limited, and most of these issues can be resolved prior to trial. Even when a case is connected with more than one state or with a number of states, the laws of the involved states will not differ on most of the issues in the case. Where there is a difference, it can be pinpointed. Consider again the earlier example of the California-Michigan-New York airplane crash. Since Michigan and New York have the same rule for design defect claims, no conflict of laws is presented with respect to the claims of the survivors of the Michigan residents against the New York manufacturer. A conflict of laws is presented with respect to the claims of the survivors of the California residents against the New York manufacturer, which the California courts would resolve in favor of the application of California law. Under consolidation, there could be common discovery and pre-trial proceedings for both sets of claims, but trial before different juries on the claims of the California survivors and the claims of the New York/Michigan survivors. And even when the plaintiffs come from a large number of states, and there is more than one defendant, the case can be broken down into subgroups of parties, much in the manner of subclasses in a class action, and the conflict-of-laws issues resolved with respect to each subgroup of parties.

33. In the "false conflict" situation, where only one state has a real interest in having its law applied in order to implement the policy reflected in that law, the courts have invariably applied the law of the only interested state. In the "true conflict" situation, where both of the involved states have a real interest in having their laws applied in order to implement the conflicting policies reflected in those laws, the forum will usually apply its own law in order to implement its own policy and interest. See the discussion and review of cases in Sedler, New Critics, supra note 14, at 635-43 (1983). For a further discussion of the application of interest analysis by the courts in practice, see Robert A. Sedler, Professor Jueger's Challenge to the Interest Analysis Approach to Choice-of-Law: An Appreciation and a Response, 23 U.C. Davis L. Rev. 865, 891-94 (1990). It may also be noted that the policies and interests reflected in the laws of the involved states are a relevant, if not controlling, consideration in virtually all of the other modern approaches to choice of law.


35. The subgroups would typically consist of the following: (1) plaintiffs from states with a plaintiff-favoring rule, (2) plaintiffs from states with a defendant-favoring rule, (3) defendants from states with a defendant-favoring rule, and (4) defendants from states with a plaintiff-favoring rule. There would be no conflict of laws issues in cases involving plaintiffs from states with a plaintiff-favoring rule and defendants from states with a plaintiff-favoring rule, or in the cases involving plaintiffs from states with a defendant-favoring rule and defendants from states with a defendant-favoring rule.

The ability of a judge to resolve choice-of-law issues under the different conflicts law of a number of states in a "mass torts" case is illustrated by the disposition of the choice-of-law issues by Chief Judge Julian Abele Cook, Jr. of the United States District Court for the Eastern District of Michigan in In re Disaster at Detroit Metropolitan Airport on August 16, 1987, 750 F. Supp. 793 (E.D. Mich. 1989). That case resulted from the crash on takeoff from Detroit Metropolitan Airport of a Northwest Airlines DC-9, designed and manufactured by McDonnell-Douglas Corporation on a flight from
Thus, even with consolidation, it is not necessary to have all of the cases determined under the "law of a single jurisdiction." The cases can be grouped into fact-law patterns, and the court would apply to each fact-law pattern the relevant choice-of-law rules of each of the states from which the case has been transferred. All that is then required is the empaneling of separate juries, which can hear the evidence in common and decide the case under separate instructions.

Detroit to Phoenix, Arizona. All on board were killed except a four year old child, and other persons were killed or injured on the ground. One hundred and fifty-seven claims were filed in federal courts in Michigan, Arizona, California, and Florida. For the most part, the plaintiffs were residents of the state where they filed their claims. The plaintiffs asserted a negligence claim against Northwest and a design defect claim against McDonnell-Douglas and sought compensatory and punitive damages against both defendants.

When the case was consolidated for trial before the United States District Court for the Eastern District of Michigan, Judge Cook resolved the choice-of-law issues by: (1) identifying the substantive law questions on which the laws of the involved states differed, and (2) deciding what state's law the courts of each of the four states where separate federal suits had been filed would apply on each substantive law question. The two substantive law questions on which the laws of the involved states differed related to the standard of liability in design defect cases and the availability of punitive damages.

The issue of the standard of liability in design defect cases and the recovery of punitive damages against McDonnell-Douglas presented a "false conflict." California, the state of manufacture, had a real interest in applying its law to implement the "producer regulatory" policy reflected in that law, and none of the other involved states, such as Michigan, whose law on this issue required a showing of negligence, would have any interest in applying the manufacturer-protecting policy reflected in that law for the benefit of the California manufacturer. Thus, Judge Cook predicted that all of the four states would apply California law on this issue.

On the issue of recovery of punitive damages against Northwest, Michigan had a real interest in applying its law disallowing recovery of punitive damages in order to protect Northwest, which uses Detroit Metropolitan Airport as a "hub," from such liability in an accident arising out of Northwest's business activity in Michigan. Judge Cook also predicted that California, following the "comparative impairment" approach, and Arizona and Florida, following the state of the most significant relationship approach, would apply Michigan law on this issue. This prediction is clearly correct. It is questionable whether the victim's home state can assert a legitimate interest in applying its law allowing punitive damages to conduct of a defendant occurring in another state, and it is likewise questionable whether the application of the law of the victim's home state in this circumstance would be constitutionally permissible.

As it turned out then, despite the fact that the cases were filed in four different federal courts, under the conflicts laws of the four different states, the choice-of-law results would be the same in this case. All states would apply California law with respect to the issue of design defect liability and punitive damages in the claims against McDonnell-Douglas, and all the states would apply Michigan law with respect to the punitive damages claims against Northwest. Perhaps because of the guidance furnished by Judge Cook's choice-of-law decisions, all of the wrongful death and personal injury claims against both defendants were settled without trial.

The resolution of choice-of-law issues with reference to the conflicts law of the states from which the cases have been transferred is also facilitated by the fact that, as we have said, the courts have tended to reach fairly uniform results in the different fact-law patterns that are presented in conflicts torts cases. Therefore, it is not surprising that Judge Cook found that Michigan, California, Arizona and Florida would all reach the same result with respect to the choice-of-law issues presented in that case.
In summary, I submit that Professor Twerski and I have made a compelling—I would go so far as to say irrefutable—argument against the adoption of a federally-mandated “law of a single jurisdiction” rule in mass torts cases. However Congress may decide to address the problem of mass torts litigation in the United States, it should categorically reject the proposition that all of the issues in a mass torts case must be determined by a federally-mandated “law of a single jurisdiction” rule.

III. THE COMPLEX LITIGATION PROJECT'S PROPOSAL

I now turn to a consideration of the Complex Litigation Project’s proposal for federally-mandated choice of law in mass tort cases. In many respects this proposal appears more “moderate and reasonable” than the “law of the single jurisdiction” proposals that we have discussed previously. First, the approach taken by the proposal does not attempt “to identify at the outset a single law to be applied to the entire litigation.” Rather, the approach clearly recognizes that, where multiple defendants are involved, a different law may have to be applied to the claims against different defendants, and seeks only to have the same law applied to all the claims asserted against the same defendant. In addition, the transferee court has the authority to divide claims and to apply the laws of different states on different issues. Second, the approach emphasizes “flexibility” rather than “rigidity,” directing the transferee court to apply the choice-of-law criteria “with the objective of applying, to the extent feasible, a single state’s law to all similar tort claims being asserted against a defendant.” The choice-of-law criteria are asserted to be “neutral and fair,” and to lead to the application of the law of the state that “has a controlling interest in having its law applied,” so that its law is “deemed the appropriate rule to govern a particular dispute.” Third, the approach recognizes that “[i]n some circumstances it may not be possible or desirable to have a single state’s law control.” So, to “protect against arbitrary results and to accommodate varying state interests,” the transferee court is authorized when appropriate to sever issues as well as claims, and to allow the same issue to be governed by different state laws. Specifically, if the transferee court determines that the application of a single state’s law to all the elements of the claim against the same defendant

37. Id.
38. Id.
39. Id. § 6.01(a) (emphasis added).
40. Id. at 384.
41. The proposal recognizes that there are constitutional constraints on choice of law in mass tort cases, and states that, “whatever choice of law standard is applied, it [may] not result in the application of the law of a state with which the parties have no contacts.” Id.
42. Id. at 389.
43. Id. at 391.
would be inappropriate, the court "may divide the actions into subgroups of claims, issues, or parties ... and allow more than one state's law to be applied."\(^4\)

The choice-of-law criteria of this approach specifically make use of interest analysis in order to identify "false conflicts" and "true conflicts."\(^5\) Section 6.01(b) begins by indicating the states that may have legitimate interests in having their laws applied in torts cases: "(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 plaintiffs and defendants."\(^6\) Looking to the laws of each of these states and the policies reflected in those laws, the transferee court is directed to consider whether only one of these states "has a policy that would be furthered by the application of its law."\(^7\) If this is so, the case presents a false conflict, and the law of the only interested state is to be applied.\(^8\) This would occur in a mass torts case involving a products liability claim, for example, where the law of the manufacturer's home state reflected a strong regulatory policy, such as imposing strict liability and allowing recovery of punitive damages. The manufacturer's home state would be interested in applying its law to all products manufactured there. Since the states where the victims reside would have no interest in applying their law imposing a lesser standard of liability for the benefit of the out-of-state manufacturer, the case presents a false conflict, and the law of the manufacturer's home state imposing liability would be applied to all of the claims.\(^9\) Obviously, this is a functionally sound choice, since it results in the application of the law of the only interested state.\(^10\)

Up to this point, the basic objections that Professor Twerski and I have advanced to a federally-mandated "law of a single jurisdiction" rule are not applicable to the proposal's approach. Thus far, the application of the "law of a single state" rule has not undercut state sovereignty or produced an unsound choice-of-law result. All the claims of the parties against the defendant are

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44. *Id.* § 6.01(e). Under this provision, the transferee court may also determine that only certain claims or issues involving one or more of the parties should be governed by a single law and that the other claims of parties should be remanded to the transferor courts for individual treatment under the laws normally applicable in those courts.

45. *Id.* § 6.01(b).

46. *Id.* § 6.01(c).

47. *Id.*

48. *Id.*

49. The same approach is taken under § 6.06(c), dealing with the law governing the imposition of punitive damages.

determined by the law of the only state that has a real interest in having its law applied in order to implement the policy reflected in that law.

The problem comes once we get beyond the false conflict. And here, the proposal's approach, whenever it results in the application of the "law of a single state" to govern all of the plaintiffs' claims against the same defendant, will in most of its applications, require the sacrifice of state interests and produce unsound choice-of-law results in substantially the same manner as the "law of a single jurisdiction" rule that we have mentioned above.

Under the proposal's approach, where the court finds that "more than one state has a policy that would be furthered by the application of its law," the court must look to Section 6.01(c), which sets forth "tie breakers" that are to be used in arriving at the objective of having all the claims against the same defendant governed by the "law of a single state." This means that where the case presents a true conflict as to some of the parties in the case, Section 6.01(c)'s "tie breakers" are to be used, even though the case presents a false conflict as to other of the parties. Coming back to our example of the Arizona and Colorado Elks members injured by a Colorado defendant on a sightseeing trip in Arizona, we said that the case presents a true conflict with respect to the claims of the Arizona plaintiffs against the Colorado defendant, but a false conflict with respect to the claims of the Colorado plaintiffs against the Colorado defendant. Thus, our view of a functionally sound result in this case is that the Arizona plaintiffs receive unlimited recovery against the Colorado defendant under Arizona law, but that the Colorado plaintiffs be limited to the amount of recovery permitted under Colorado law.

But since the case presents a true conflict with respect to the claims of the Arizona plaintiffs against the Colorado defendant, the proposal's objective of having all the claims against the Colorado defendant governed by the "law of a single state" requires that the court make use of the Section 6.01(c) "tie breakers." This case would be resolved by the first "tie breaker": where the place of injury and the place of the conduct causing the injury are in the same state, that state's law applies. In effect, the "tie breaker" here turns out to be the old standby, the "place of the wrong" rule. Because the accident occurred in Arizona, Arizona law must govern the claims of both the Arizona plaintiffs and the Colorado plaintiffs against the Colorado defendant.

Perhaps, however, the "tie breaker" may not apply in this particular case. This is because the "flexibility" embodied in Section 6.01(d) gives the transferee court the authority to consider factors other than those set out in Subsection (b), and to depart from the order of preferences for selecting the governing law. Likewise, the flexibility of Subsection (e) gives the court the authority to divide the case into subgroups of claims, issues, or parties and "allow more than one state's law to be applied." Is this one of those cases in which the "tie breaker" may not apply, and in which the court may "allow more than one state's law to be applied?" Let us see what guidance the proposal itself provides on this question.
The proposal says that the "preference rules" of Subsection (c) "reflect, in large measure, the conclusion that most of the tort rules that will be at issue are directed toward conduct regulation rather than loss allocation, and thus that certain contacts or factors have more significance than others given that objective." The proposal goes on to say:

Although that general assumption seems appropriate, some issues involved in tort cases clearly may be decided differently by the states because of differences in their views on how to allocate losses, rather than how to regulate conduct. The most obvious of these may involve decisions regarding what types of damages are available for certain losses.

And in specifically discussing the matter of "allow[ing] more than one state's law to be applied," the proposal uses the example of severing liability issues from damages issues. Since the point on which the laws of the involved states in the Arizona-Colorado Elks members example differ is the amount of damages recoverable for non-economic loss, this case would seem to be a good candidate for the invocation of Subsection (e), under which Arizona law would apply to the claims of the Arizona plaintiffs while Colorado law would apply to the claims of the Colorado plaintiffs.

On the other hand, if this result does obtain in this case, it would defeat the purported underlying objective of having federally-mandated choice-of-law rules in the first place to "achieve greater parity in the treatment of persons who are similarly harmed by the same course of conduct." Thus, a particular transferee court judge could invoke the underlying objective of Section 6.01, and under Subsection (c)(1), apply Arizona law to determine the claims of both the Arizona plaintiffs and the Colorado plaintiffs. Or, the judge could invoke Subsection (e) and the comments quoted above and "allow more than one state's law to be applied" on the issue of damages recoverable. As this example indicates, the proposal does indeed emphasize "flexibility," which means that here the transferee court judge can either come down on the side of "parity of treatment" and apply Arizona law to determine the claims of both sets of plaintiffs, or come down on the side of recognition of the legitimate interests of the involved states and apply Arizona law to the claims of the Arizona plaintiffs and Colorado law to the claims of the Colorado plaintiffs.

As this example also indicates, the "flexibility" afforded under the proposal also undercuts the proposal's purported objective of "provid[ing] sufficient predictability" in mass torts cases. "Flexibility" is, at least to a degree,
inconsistent with "predictability," and the proposal's effort to overcome the charge of "rigidity" by providing "flexibility" has in this example undercut the "predictability" objective. In this example, the choice-of-law result is not "predictable" at all, but depends entirely on whether the particular transferee court judge emphasizes "parity of treatment" or recognition of the legitimate interests of the involved states.

Let us now compare the process of deciding on the applicable law that the transferee court employs when cases are consolidated for trial by the Judicial Panel on Multidistrict Litigation. The transferee court looks to the conflicts laws of the different states from which the cases have transferred. In the Arizona-Colorado Elks members example, we said that all the Arizona plaintiffs and very likely all the Colorado plaintiffs would file in Arizona. So, there would not be any need for transfer in that situation. If some of the Colorado plaintiffs had filed in Colorado, however, and the cases had been consolidated by the Panel, the federal court to which the cases had been transferred would most assuredly predict, as we have done, that the Colorado courts would apply Colorado law to the claims of the Colorado plaintiffs against the Colorado defendant. The court would likewise predict that the Arizona courts would apply Arizona law to the claims of the Arizona plaintiff against the Colorado defendant. In this example then, by having the transferee court look to the conflicts law of the different states from which the cases have been transferred, we achieve a high degree of predictability and a functionally sound result. We permit Arizona to advance its own policies and interests in the case of the Arizona plaintiffs and Colorado to advance its own policies and interests in the case of the Colorado plaintiffs. Under the proposal's approach, however, the "built-in flexibility" impairs the predictability objective and, depending on what the transferee court judge wants to emphasize, the "parity of treatment" objective may require defeating the legitimate interest of Colorado in having its law applied to determine the claims of Colorado plaintiffs against a Colorado defendant.

Where the place of injury and the place of the conduct causing the injury are in different states in the true conflict situation, Subsection (c)(2)-(4) set out three other "tie breakers." Under Subsection (c)(2), where all the plaintiffs and defendants reside or have their principal places of business in the same state or in states whose laws are not in conflict on the point in issue, the law of the parties' home state applies. As the proposal points out, this situation is highly unlikely in most mass tort cases except where the laws of the involved states are not in conflict.\textsuperscript{56} I would note that where the laws of the involved states are not in conflict, there is simply no choice-of-law issue for the court to resolve, and the matter should end there. While it is possible to posit a rare mass tort case presenting a true conflict where all of the parties are from the same state or

\textsuperscript{56} Id. at 403.
from states whose laws are not in conflict on the point in issue, precisely because this situation is so rare, there is no need to comment further on it.

In the typical mass tort case, of course, all the plaintiffs and all the defendants will not reside in or have their principal places of business in the same state. It is also not very likely in most mass tort cases that all the plaintiffs will reside in the same state or in states whose laws are not in conflict on the point in issue. But where this does occur, and where, as is usual, all the plaintiffs have been injured in their home states, under Subsection (c)(3) the law of the plaintiffs’ home state and the state of injury applies. So, if the manufacturer manufactured the product in State X, a negligence state, and the product injures victims only in State Y and State Z, which are both strict liability states, the claims of the State Y plaintiffs and State Z plaintiffs against the State X manufacturer will be determined under a strict liability standard. In this situation, the plaintiffs’ home state is able to advance its own policy and interest notwithstanding that a mass tort is involved. And the result accords with the result that would obtain in practice, since the plaintiffs in these cases would sue in their respective home states, and those states would apply their own plaintiff-favoring rules. But again, such cases will be relatively rare.

In the overwhelming number of mass tort cases, particularly in the multi-exposure cases, the plaintiffs will reside in different states, and the laws of these states will differ on the point in issue. Here, under Subsection (c)(4), the law of the state where the conduct causing the injury occurred governs. It may be

57. Suppose that a manufacturer has its principal place of business in State X, but manufactures the product in question in State Y. The product is distributed in other states, causing injuries to victims in State X and State Z. Under the laws of State X and State Z, liability is imposed on the basis of negligence. State Y imposes strict liability. It is arguable that in this case State Y has a real interest in applying its strict liability rule to implement the regulatory policy reflected in that rule, although the victims are from states whose laws impose liability only on the basis of negligence. Since State X is interested in applying its law to protect the State X manufacturer, a true conflict is presented with respect to the claims of the State X victims and State Z victims against the State X manufacturer. Under Subsection (c)(2), State Y law would not apply, and the claims of the State X victims and the State Z victims would be determined under a negligence standard.

58. When the conduct occurred in more than one state, the court shall choose the law of the state that has the "most significant relationship to the occurrence."

The project deals separately with the award of punitive damages in § 6.06. In effect, where the defendant has acted in one state, causing harm in another state, this section adopts a "law of the place of acting" rule. If the law of the state where the defendant acted imposes liability for punitive damages, the case in effect presents a false conflict. That state has a real interest in applying its law to implement the regulatory/admonitory policy reflected in that law, while the state where the injury occurred would have no interest in applying its law to protect the out-of-state actor from liability for punitive damages. In this false conflict situation, under § 6.06(c), the law of the state of acting, which imposes liability for punitive damages, applies.

When the state where the defendant acted does not impose liability for punitive damages, that state has a real interest in applying its defendant-protecting rule when the defendant's action produces harm in another state. However, where the state of injury imposes liability for punitive damages, that state likewise has a real interest in applying its law in order to implement that regulatory policy, and will do so in the absence of "foreseeability" or "fairness" problems. Thus, in the typical products...
noted that if the claims of all the plaintiffs are to be determined under the "law of a single state," it is only the law of the state where the conduct causing the injury occurred that can constitutionally be selected to govern the claims of all the plaintiffs. We have explained this point earlier in our discussion of the "law of a single jurisdiction" rule as applied to a single-disaster case, the California-Michigan-New York airplane crash, and to a multi-exposure case, which we had simplified to involve only California and Michigan victims and a New York manufacturer. We will return to these cases now to explain why the "place of conduct tie breaker" of Subsection (c)(4) is constitutionally required and to show how its application will require the sacrifice of important state interests.

In the California-Michigan-New York airplane crash, 150 California residents left Los Angeles on a flight to New York, with a stopover in Detroit, Michigan. In Detroit, twenty-five Michigan residents embarked on the plane for the last leg of the flight to New York. The plane crashed on takeoff from the Detroit airport, killing all on board. The allegation is that the crash was due to a design defect in the landing gear. The aircraft was designed and manufactured by Gruman Aircraft in New York. California law imposes a "risk utility" burden on manufacturers in design defect claims, which effectively creates strict liability. Under Michigan law and New York law, the manufacturer can be held liable only for negligence.

The claims of the survivors of the Michigan passengers against Gruman present a "no conflict" case, and so, without regard to the "mass tort" nature of the claim, will be determined in accordance with the negligence standard of both Michigan and New York law. The claims of the California passengers against Gruman present a true conflict situation: California has a real interest in applying its plaintiff-protecting rule (and since the airplane took off from California, its conduct-regulating rule as well) for the benefit of the survivors of the California victims, while New York has the same interest in applying its manufacturer-protecting rule for the benefit of Gruman. The application of California law on this issue is not in any way unfair to Gruman, which has a large number of airplanes flying in California, including the airplane involved in the fatal crash.

There is no doubt that if this case presenting the true conflict had been brought in California by the California survivors, as it doubtless would be, the

liability case, where the out-of-state manufacturer whose state does not impose liability for punitive damages has sent the product into the victim's home state, which allows the recovery of punitive damages, the victim will sue in the home state, and that state will apply its law imposing liability for punitive damages. See the discussion and review of cases in Sedler, Across State Lines, supra note 14, at 63-65. In this situation, under § 6.06(c)-(d), essentially paralleling § 6.01(c)(4) in this regard, the law of the place where the conduct occurred, here the defendant's home state, governs.

Section 6.06 sets forth rules governing the award of punitive damages in other situations, such as where the defendant has its principal place of business in the state of injury, but the act occurred in another state. These situations are not presented in the typical products liability case, discussed above, where the defendant's conduct in one state causes the injury in another state.
California court would have applied California law on this issue. And if all of
the cases of both the California survivors, which have been brought in California,
and of the Michigan survivors, which we will assume would have been brought
in Michigan, had been transferred for trial before a single court by the Judicial
Panel on Multidistrict Litigation, the choice-of-law decision for the transferee
court would not have been at all difficult, nor would the resulting trial. Since
there is no conflict of laws between New York and Michigan law on the point
in issue, the Michigan plaintiffs would have been put into a subclass, and their
claims against Gruman would have been tried under a negligence standard.
Likewise, the court would have determined that the California court would have
applied California law to determine the claims of the California survivors, and
so would have put the California plaintiffs into another subclass, with their
claims against Gruman being tried under a strict liability standard. This result
advances the legitimate interests of California in applying its plaintiff-favoring
rule (and since the aircraft took off from California, its conduct-regulating rule
as well) for the benefit of the survivors of the California passengers, while
imposing only minimal "efficiency" costs on the trial of the case, namely the
empaneling of two juries to try the separate claims.

This result, of course, could not obtain under the "tie breakers" of
Subsection (c). Since California law and Michigan law differ on the standard of
liability and all the passengers do not reside in the same state for purposes of
Subsection (c)(3), Subsection (c)(4) applies. This means that the claims of both
the survivors of the Michigan passengers and survivors of the California
passengers against Gruman must be determined by the manufacturer-protecting
New York law as the law of the place of conduct. As we have pointed out
previously, if only one state's law is going to be applied in this case, it must be
New York law, since only New York has contacts with the transaction giving
rise to the claims of both the California and Michigan victims. California law
cannot constitutionally be applied to determine the claims of the Michigan
victims, since California has neither an interest in applying its law for their
benefit nor any factual contacts with either the airplane crash or the manufacture
of the airplane. And so, under Subsection (c)(4), it cannot be applied to
determine the claims of the California victims either.

The application of New York law to determine liability in this single disaster
mass tort is of no moment as regards the claims of the survivors of the Michigan
passengers, since there is no conflict between Michigan law and New York law
on the point in issue. But in order to achieve "parity of treatment" between the
survivors of the California passengers and the survivors of the Michigan
passengers in their claims against Gruman, Subsection (c)(4) requires that the

59. If the survivors of the Michigan passengers had sued Gruman in California, as we have
pointed out previously, the California court could not have constitutionally applied California law to
determine their claims, since California has neither an interest in applying its law for their benefit
nor any factual contacts with the underlying transaction.
survivors of the California passengers be denied the benefit of California's plaintiff-protecting rule. Under the application of the "place of conduct tie breaker" of Subsection (c)(4), then, just as under a rigid "law of a single jurisdiction" rule, California's real interests must be sacrificed in the name of "parity of treatment," and it cannot apply its law to determine the claims of the survivors of the California passengers against Gruman.

The same result and the sacrifice of California's interests is likewise required under the "place of conduct tie breaker" in the multi-exposure case we have discussed earlier, which also involved, for the sake of simplicity, a New York manufacturer and only California and Michigan victims. (If the victims resided in all fifty states, they could be put in two subgroups consisting of plaintiffs residing in states with plaintiff-favoring rules, and plaintiffs residing in states with defendant-favoring rules.) Again, as in the airplane crash example, there is no conflict between Michigan and New York law on the issue of standard of liability. But again, as in the airplane crash example, there is a true conflict between California law and New York law on this issue, so the California plaintiffs would sue in California, and the California court would apply its plaintiff-favoring rule for their benefit. And again, under Subsection (c)(4)'s "place of conduct tie breaker," New York law would and constitutionally must apply to determine both the claims of the Michigan victims and the California victims against the New York manufacturer. Thus, as in the airplane crash example, California's policy and interest must be sacrificed on the altar of "parity of treatment." 60

The proposal justifies the application of the "place of conduct tie breaker" in the true conflict situation presented in both of these example cases, when that state has indeed sought to effectuate these interests in its tort policies and when multiple contacts do not coincide in any single state because it refers to a state: (1) that has more than a fortuitous connection with the events; (2) that in many instances may be identified readily; and (3) that leads to the application of a single law (unlike reference to the plaintiffs' residence states or, in product liability actions, to the place where the product was distributed or marketed, or the place of injury in all but single event disasters). In sum, although each of the other factors in Subsection (b) may identify other states with regulatory interests in the controversy, relying on the place of conduct appears fair and consistent with the objectives of achieving the uniform

60. It should also be noted that where, as here, the matter in issue presents a true conflict between the policies and interests of the victim's home state and the policies and interests of the manufacturer's home state, there would seem to be no basis for invoking the "allowing more than one state's law to be applied" exception of Subsection (e) to apply New York law to determine the claims of the Michigan plaintiffs (and the other plaintiffs from a defendant-protecting state) and to apply California law to determine the claims of the California plaintiffs (and the other plaintiffs from a plaintiff-protecting state). So, this "escape hatch" would not be available to prevent the sacrificing of California's policy and interest in this case.
and consistent treatment of claimants harmed by the defendant's conduct.61

Applying the above justification to our example cases, it would seem that the proposal recognizes that, as in any true conflict situation, California has exactly the same interest in applying its plaintiff-favoring rule for the benefit of the California victims as New York does in applying its manufacturer-protecting rule for the benefit of the New York manufacturer. The proposal chooses the "place of conduct tie breaker" because it best advances the "parity of treatment" objective that is the underlying justification for the proposal's "law of a single state" approach to choice of law in mass torts. The law of the "place of conduct" is also the only law that can constitutionally be applied to determine the claims of victims residing in different states against the same manufacturer.

We see then that, despite the proposal's purported flexibility and consideration of the policies and interests of the involved states, "in the crunch," that is, in the true conflict presented in the typical products liability mass tort case, the proposal comes out the same way as did the prior "law of a single jurisdiction" proposals. And as a constitutional matter, it could not come out in any different way. We are back to a "place of conduct" rule that requires the sacrifice of the policy and interest of the victims' home states in applying their plaintiff-protecting rules for the benefit of their resident victims. Indeed, to the extent that manufacturers take products liability law considerations into account in deciding where to locate their principal place of business, a manufacturer seeking to market a highly risky product on a nationwide basis would be well-advised, in light of Subsection (c)(4)'s "place of conduct tie breaker," to locate in a state whose substantive products liability law is manufacturer-protecting.

Finally, as we have pointed out previously, if our example cases were consolidated for trial before a single court, as are cases consolidated by the Judicial Panel on Multidistrict Litigation, the court would have no difficulty in dividing the plaintiffs into subgroups and resolving the choice-of-law issue for each subgroup with reference to the conflicts law of the state from which the case had been transferred. The claims of the California plaintiffs (and the claims of plaintiffs from other states with a plaintiff-favoring strict liability rule) would be tried before one jury under a strict liability standard, and the claims of the Michigan plaintiffs (and the claims of plaintiffs from other states with a defendant-favoring negligence rule) would be tried before another jury under a negligence standard.

It turns out then that the principal justification for the "law of a single state" objective of the proposal cannot be one of "efficiency." In regard to "efficiency," there is no more than marginal utility at best in having all the consolidated cases tried under the "law of a single state" rather than having the plaintiffs

61. Proposed Final Draft, supra note 2, at 405-06.
divided into subgroups and the claims of each set of plaintiffs determined under the law of the state from which the case has been transferred.

The principal justification for the "law of a single state" objective of the proposal then must be that of "parity of treatment" between the victims who are asserting claims against the same defendant. Under the "law of a single state" objective, in these example cases and in any other case governed by Subsection (c)(4), the policies and interests of the states with plaintiff-favoring substantive rules must be sacrificed so that these plaintiffs will be treated equally with plaintiffs from states with defendant-favoring rules. This is accomplished by using the "place of conduct tie breaker" to require that the claims of all the plaintiffs be governed by the defendant-favoring rule of the "place of conduct." In the final analysis then, the proposal must stand or fall on the "parity of treatment" justification.

We have demonstrated that the "parity of treatment" justification for a "law of a single state" rule to govern all the claims against a defendant in a mass torts case is quite specious. Where the victims come from different states, they are not similarly situated with respect to the policies embodied in the laws of the involved states nor the interests of the involved states in having their laws applied in order to implement the policies reflected in those laws. There is no "lack of parity" in providing each group of victims with the protection—or lack of it—afforded by the differing laws of their different home states.

IV. CONCLUSION

In some respects the proposal is an improvement over the previous "law of a single jurisdiction" proposals. The proposal is more "moderate and reasonable" than the previous proposals in the sense that its objective is to have a "single state's law" apply to all the claims against a particular defendant in a mass torts case rather than to identify the "law of a single jurisdiction" to govern all the claims of all the plaintiffs against all of the defendants. Likewise, the proposal contains some flexibility in recognizing that, in some limited circumstances, the laws of different states may be applied to determine the claims of different parties or different issues involving the same defendant. Finally, the criteria of the proposal's choice-of-law rules specifically make use of interest analysis. In the false conflict situation, they provide for the application of the law of the only interested state. In the true conflict situation, in the very rare case where the parties are from the same state, and in the only slightly less rare case where all the plaintiffs come from states with plaintiff-favoring rules, they provide for the application of the law of the plaintiffs' home state.

Most mass torts, however, involve parties from different states with laws that differ on the point in issue, and so will present a true conflict, at least with respect to some of the parties. Here, both as a matter of choice and because of constitutional constraints on choice of law, the proposal's "tie breakers" bring us back to a "place of the wrong" rule, with the "place of the wrong" sometimes being the place where the accident occurred and sometimes the place where the
conduct occurred. Thus, in the typical mass torts case, the proposal's "tie breakers" suffer from the same rigidity as the previous "law of a single jurisdiction" rule. And likewise, they require the sacrifice of important state interests in the quest for a specious "parity of treatment" between accident victims who reside in different states, where the consequences of the accident and of allowing or denying recovery will be felt merely because they are asserting claims against the same defendant.

State sovereignty is a fundamental element of the American constitutional system. The ability of each state to apply its own law in private litigation where it has a real interest in doing so in order to implement the policy reflected in that law is an important attribute of state sovereignty. The regard for state sovereignty, that is so fundamental in our constitutional system and that has been so long recognized by Congress, strongly argues against denying the states the power to apply their own law to advance their own policies and interests, notwithstanding that a mass tort is involved.

Mass tort cases do raise a legitimate concern for efficiency and the avoidance of duplicative litigation. These concerns can properly be addressed by consolidating mass tort cases for trial before a single court, as is now done in cases transferred by the Judicial Panel on Multidistrict Litigation. However, as is now done by the courts before which those cases have been transferred for trial, the transferee court should be required to apply the conflicts law of the state from which the case has been transferred. Any proposal to have these cases governed by the "law of a single state," whether under the rigid "law of a single jurisdiction" rule of prior proposals, or under the "more moderate and reasonable" "law of a single state" objective of the proposal, unjustifiably intrudes upon that state sovereignty which is so fundamental in the American constitutional system, and thus must be rejected. However we decide to address the problem of mass torts litigation in the United States, we should categorically reject any proposition that seeks to have all claims determined by the "law of a single state." In the final analysis, therefore, whatever may be the merits of the proposal for consolidation of mass torts for trial before a single court, that consolidation must be accomplished without the imposition of a federally-mandated "law of a single state" rule for mass torts.