

Proposed Amendments to Principles of Aggregate Litigation
§ 2.05 (Choice of Law)

I. Amendment to Comment *a* (No Bootstrapping).

Amend the third paragraph of comment *a* by inserting the italicized language:

Subsection (a) contemplates no change in what one might call the court's *usual* selection or determination of choice-of-law principles—that is, the court's identification of the body of choice-of-law principles to govern its selection of applicable substantive law. Thus, for example, under the legal principles now established, a federal court considering whether to afford aggregate treatment for claims arising under state law should apply the choice-of-law rules of the state in which that federal court sits. As for this Chapter generally, the objective is for aggregate treatment to operate seamlessly with substantive law—here, by leaving the decision whether to innovate in the area of choice-of-law principles to the institutions with the authority to set those principles themselves. *Because choice of law is part of the definition of parties' substantive rights, a decision to aggregate should not alter the law that would apply to any party's rights from the law that would be applied to adjudicate that party's rights in individual litigation.*

Suggested addition to Reporter's Note: "The rule that choice of law should not be affected by aggregation has been rejected in cases such as *Ferrell v. Allstate Insurance Co.*, 188 P.3d 1156, 1170-72 (N.M. 2008) (continuing to adhere to original Restatement rules for individual cases but directing application of Restatement (Second) to class actions). Those cases are contrary to the Principles stated here."

Discussion: The principle stated in the additional sentence is implicit in the existing draft and explicit in the Reporter's Note. But the Reporter's Note does not speak for the Institute, and the principle is too important to be left implicit. It has been argued that the principle is of constitutional stature, but the amendment takes no position on that issue. Even if a contrary rule is constitutionally permissible, the principle stated should be followed as part of the law of aggregate litigation and conflicts of laws.

II. Amendment to Comment *c* (Defendant's Principal Place of Business)

Amend comment *c* by adding the italicized language:

Subsection (b)(1) states what is, at first glance, an obvious point: that choice-of-law considerations should not defeat aggregate treatment, if other conditions for aggregation are met, when the application of choice-of-law principles points to a single body of substantive law as governing all claims. In accordance with Comments *a* and *b*, subsection (b)(1) leaves for development by appropriate institutions the choice-of-law principles to determine the situations, if any, in which a court may apply a single body of law—for example, the law of a common defendant's principal place of business—to a group of claims held by persons located in multiple states. At the present time, choice-of-law principles that point toward application of the law of the defendant's principal place of business remain quite rare across the various states. More typically, use of a single governing law based on the defendant's home state is a matter of underlying substantive law, rather than a question of conflicts of laws. For example, matters of corporate governance routinely are subject to the law of the corporation's state of incorporation, but that approach generally stems from the state's law concerning corporations, not from choice of law principles. *Most of the courts that have invoked choice of law rules to apply the law of a common defendant's principal place of business to multi-state groups of claimants appear to have done so as a special rule for aggregate litigation only, contrary to the principles stated in comment a.* Any such selection of a single body of law by state choice-of-law principles, moreover, remains subject to constitutional constraints of due process.

Discussion: The mention in the comment of the possibility of using the law of the defendant's principal place of business might be read by some as suggesting that the Institute regards that as a legitimate, if infrequently used, technique. Because most of the courts that have adopted such a rule have apparently done so only for aggregate litigation, the Institute should make it clear that it does not endorse that approach to using the law of the defendant's principal place of business.

III. Amendment to Comment *d* (When Content of a State’s Law Is Uncertain)

Amend comment *d* by adding the following paragraph at the end of the existing draft comment:

With respect to absent members of a putative class, different bodies of substantive law should not be treated as the same in functional content unless there is a reasonable basis for confident prediction as to the content of those laws. Of course, a court can ascertain the law of its own jurisdiction, subject to appellate correction. But it may not be able to readily ascertain the law of another jurisdiction that has not yet addressed the particular issue, unless existing law in that jurisdiction (viewed in light of the law elsewhere) permits confident prediction. Parties whose rights are governed by the laws of different jurisdictions have an interest in accurate determination of those laws in cases where the content of those laws is significantly uncertain. When an individual case requiring application of a law other than that of the forum is presented to a court, the court must resolve that case unless it concludes that the doctrine of *forum non conveniens* warrants dismissal. In such cases, irresolvable uncertainty as to the content of foreign law may be addressed by presuming similarity of that law to the law of the forum. Because only one or a few claims are at issue, this presumption has little impact on the interests of the other state and no impact on absent persons. But there is no similar obligation to adjudicate the rights of absent persons by defining a class to include them. Where the content of an applicable body of law cannot be confidently predicted, determination of the rights and obligations of absent persons under that law should be left to courts that can authoritatively determine that law.

Discussion: The issue addressed by this amendment came to the fore in the wake of Supreme Court’s decision in *Phillips Petroleum Co. v. Shutts*.¹ *Shutts* was an action on behalf of a worldwide class of owners of oil and gas royalty interests on which Phillips had suspended certain payments pending regulatory of price increases. The class members contended that they were entitled to interest on the amounts ultimately paid (“suspended royalties”) for the period of suspension. The suit was filed in Kansas, even though over 99% of the leases and over 97% of the class members “had no apparent connection to the State of Kansas except for this lawsuit.”² The Kansas courts chose to apply Kansas law to all claims of the class, and the Supreme Court held that unconstitutional.³ To apply its own law classwide, a forum “must have a ‘significant contact or significant aggregation of contacts’ to the claims asserted by *each member* of the

¹ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

² *Id.* at 815.

³ *Id.* at 818.

plaintiff class, contacts ‘creating state interests,’ in order to ensure that the choice of [the forum’s] law is not arbitrary or unfair.”⁴

While the Supreme Court had identified a number of apparent differences in the relevant state laws,⁵ the Kansas courts concluded on remand that all relevant states would reach the same conclusion as under Kansas law. The constitutional permissibility of that conclusion (with respect to the interest rate to be used in determining liability) came before the Supreme Court in *Sun Oil Co. v. Wortman*.⁶ The Court concluded that, “[t]o constitute a violation of the Full Faith and Credit Clause or the Due Process Clause, it is not enough that a state court misconstrue the law of another State. Rather, ... the misconstruction must contradict law of the other State that is clearly established”⁷ The Court then split over the application of that test. The majority concluded that Kansas had not violated that standard,⁸ but Justice O’Connor (joined by Chief Justice Rehnquist) concluded that it had.⁹

This weak constraint on possible distortion of other states’ laws creates substantial opportunities for effective extension of forum law to states whose law is not “clearly established.” (From the standpoint of plaintiffs, the key point will be whether the relevant state law is clearly contrary to whatever legal rule they wish to have applied by the forum, whether or not the forum has yet adopted that rule.) A case where that opportunity has been exploited is *Ferrell v. Allstate Insurance Co.*¹⁰ The issue there was whether an insurer could properly charge fully disclosed fees for the privilege of paying premiums in installments, without including those fees in the stated premium of the policy. New Mexico law ordinarily determined contractual questions based on the law of the place of contracting.¹¹ A multi-state class was certified. The certification of a New Mexico class was not challenged, but the inclusion of policyholders in 12 other states was challenged on interlocutory appeal. The New Mexico Court of Appeals reversed.¹² It concluded that, despite superficial similarities of the other states’ laws to the New Mexico statute, there was no definitive guidance as to the construction of those laws on the key point and substantial reason to think that different states might come to different conclusions.¹³ The court felt it improper to say that “different states’ laws [would] produce identical results ... when the result under those laws is uncertain.”¹⁴ As it read *Shutts*, “where the law of a jurisdiction is unclear, a court from another jurisdiction cannot simply ... assume that the law of the other jurisdiction is the same as forum law.”¹⁵ The New Mexico Supreme Court reversed, holding that, if “the party opposing certification fails to show that the laws of the relevant states actually conflict through clearly established, plainly contradictory law, then the district court

⁴ *Id.* at 821 (emphasis added).

⁵ *Id.* at 816-18.

⁶ *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988).

⁷ *Id.* at 730-31.

⁸ *Id.* at 731-34.

⁹ *Id.* at 743-49 (opinion dissenting in part).

¹⁰ *Ferrell v. Allstate Ins. Co.*, 188 P.3d 1156 (N.M. 2008).

¹¹ *Id.* at 1171.

¹² *Ferrell v. Allstate Ins. Co.*, 150 P.3d 1022 (N.M. Ct. App. 2007), *rev’d* 188 P.3d 1156 (N.M. 2008).

¹³ *Id.* at 1028-30.

¹⁴ *Id.* at 1029.

¹⁵ *Id.* at 1030.

cannot be faulted if it concludes that there is no *material* conflict between the laws of the relevant states.”¹⁶ Accordingly, a New Mexico court could apply New Mexico law classwide so long as none of the states whose law would otherwise be applicable had “clearly established” law “plainly contradictory” to existing or putative New Mexico law.

Ordinarily, where the content of foreign law cannot be determined, a court may decide in accordance with its own local law. It will do so because “in this way it can best do justice to the parties” before it.¹⁷ But it will not apply this rule where doing so “would not be in the interests of justice.”¹⁸

For the reasons stated in the language of the proposed amendment, it is not in the interests of justice to allow a forum state to usurp the function of developing and applying the (as yet undetermined) law of another state to absent class members. A rule that allows this effectively allows class actions to be brought on novel claims in favorable forums which will then determine, as a practical matter, nationwide law, simply because no other state has yet spoken definitively to the issue. For the same reasons, a class action applying forum law is not a superior means of adjudicating the claims or defenses of class members which are governed by the law of another jurisdiction whose content cannot confidently be predicted.

Application in a class-action context of a presumption that other-state law is identical to forum law is predictably biased in favor of plaintiffs. Plaintiffs almost always choose the forum state for class actions, though multi-state class actions will usually have to be litigated in a federal court. When seeking multi-state certification, they will select either a forum whose law is favorable to their claims or one whose courts are thought to be most likely to adopt law favorable to their claims.¹⁹ Thus, states whose undefined or ill-defined laws would be less favorable to those claims would be deprived of the opportunity to define and apply their own laws and defendants would be systematically deprived of an accurate adjudication.

Moreover, even federal courts trying their level best to predict the decisions of local state courts (rather than ignoring all but “clearly established” law) not infrequently guess incorrectly.²⁰ By diverting such issues to courts that cannot speak authoritatively, class actions predicting unclear law of nonforum states may “interrupt[] ... the orderly development and

¹⁶ 188 P.3d at 1169.

¹⁷ RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 136, cmt. *h* (1971).

¹⁸ *Id.*

¹⁹ Not surprisingly, the plaintiffs in *Shutts* appear to have done exactly that. See Stephen C. Yeazell, *Overhearing Part of a Conversation: Shutts as a Moment in a Long Dialogue*, 74 U.M.K.C. L. Rev. 779, 781 (2006) (observing that plaintiffs doubtless chose Kansas because of prior rulings in a similar, but smaller class action).

²⁰ See, e.g., Doris K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1678-79 & n. 52 (1992) (discussing a range of issues on which state courts rejected the “*Erie* guesses” of the Third Circuit and its district courts); John R. Brown, *Fifth Circuit: Certification--Federalism in Action*, 7 CUMBERLAND L. REV. 455, 455 & n.2 (1976-77) (citing examples of erroneous “*Erie* guesses” by the Fifth Circuit).

authoritative exposition of state law” in the state whose law is at issue and also subject litigants to an unnecessarily heightened risk of adjudication based on erroneous legal premises.²¹

When the content of the law of a state that should govern cannot be confidently determined, the class definition should simply exclude those whose claims or defenses would be governed by that law, thereby permitting an action in the courts that can authoritatively determine that law. (If the state in question will entertain certified questions of law, that is a possible avenue for confidently determining the content of that law.)

This principle does not preclude multi-state classes in situations where there is an adequate basis for confident prediction about the content of that law. That would usually be possible where there was a uniform statute that had been uniformly construed by many states. It could also be true on common-law issues dealing with subjects that have not produced variations in state law. Conversely, if the precise issue is one that had divided courts in the states that have addressed it, that would indicate that resolution of the issue by a state that has not addressed it is uncertain, absent specific data indicating how that state would likely come out.

If multi-state class actions are precluded, class member claims can still be presented in single state class actions brought in the state whose law is at issue, whose cost can be limited by efficient coordination by the counsel handling those cases.²²

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²¹ Doris K. Sloviter, *supra*, 78 VA. L. REV. at 1682.

²² Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions after Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 71-72 (1986).