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STATE CHOICE OF LAW IN MASS TORT CASES: A RESPONSE TO "A VIEW FROM THE LEGISLATURE"

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In an article entitled *The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain*,¹ we voiced our objections to proposed legislation which would empower federal courts to consolidate the litigation of "mass torts" in a single federal court and require that court to apply the substantive law of a "single designated jurisdiction." The proposed legislation toward which our objections were directed included the Multiparty, Multiforum Jurisdiction Act of 1989,² which was sponsored by Congressman Robert W. Kastenmeier of Wisconsin.³ On the pages of this law review, Mr. Kastenmeier and Charles Gardner Geyh, Counsel of the House Judiciary "Subcommittee on Courts," responded to our article.⁴

Anyone possessing even passing familiarity with the subject of judicial administration knows that Congressman Kastenmeier has brought to the House Judiciary Committee the rare combination of extraordinary intelligence and personal dedication to the improvement of the American judicial system. When we undertook an analysis of H.R. 3406, we did so because we believed, notwithstanding the best intentions of the bill's authors, that such legislation would do more harm than good. The Kastenmeier and

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1. Sedler & Twerski, *The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain*, 73 MARQ. L. REV. 76 (1989).

2. H.R. 3406, 101st Cong., 1st Sess., 135 CONG. REC. 3,275-76 (1989).

3. Representative Robert W. Kastenmeier, a Democrat from Wisconsin, was first elected to the U.S. House of Representatives in 1958 and held the 2d Congressional District seat until 1990.

The Kastenmeier bill, Multiparty Multiforum Jurisdiction Act, H.R. 3406, was *not* included in the bill that passed the Senate in the closing days of the 101st Congress. The Kastenmeier bill passed the House and was on the Senate consent calendar but was later dropped due to Senator Howell T. Heflin's (D-Ala.) objections. Senator Heflin objected because he had not held a hearing to consider the bill's consolidation procedure for cases arising from single event mass disasters. Congressman Kastenmeier was expected to reintroduce his bill in the 102d Congress and Senator Heflin has agreed to hold a hearing on the bill. Exactly what impact Kastenmeier's failure to be reelected will have on this bill is unknown.

4. Kastenmeier & Geyh, *The Case in Support of Legislation Facilitating the Consolidation of Mass-Accident Litigation: A View from the Legislature*, 73 MARQ. L. REV. 535 (1989).

Geyh response is, as one would expect, very good. We are delighted that they have joined issue with us. It is a tribute to the American political process that the authors took the time and care to draft such a thoughtful and insightful response to appear in an academic forum. Nonetheless, the clarity of their response has revealed issues that convince us that we were quite right in our original opposition to the bill — more right than we first imagined.

I. OUR CORE CONCERN: THE APPLICABILITY OF STATE CHOICE OF LAW IN “MASS TORT” CASES

Congressman Kastenmeier and Mr. Geyh note that their work is “both something less and something more” than a reply.⁵ As they state, it is “something less” in the sense that they are trying to respond “to the core, policy-level concerns that underlie the more specific objections [we] raise,” and it is “something more” in the sense that they “do not confine [themselves] to rebutting criticisms that have been directed at the bill, but take the opportunity to offer a legislative perspective on efforts to consolidate duplicative litigation, with a focus on H.R. 3406.”⁶

In the same spirit, our reply will be something less in that we will focus only on our strongest objection to H.R. 3406: that it would require the displacement of state choice of law in mass tort cases by a federally-imposed “law of a designated single jurisdiction” rule. We submit that, totally apart from whether consolidation of mass tort cases is necessary or desirable, if consolidation ever does occur it should be accomplished without displacement of state choice of law. Where the mass tort cases have been consolidated, the federal court should be required to follow state choice of law and reach the same choice of law result that would be reached by the court of the state from which the case was transferred.⁷

This approach to the applicability of state choice of law in transferred mass tort cases is the same as is now followed in diversity cases when there is a venue transfer from one federal court to another.⁸ The transferee court must apply the law that would have been applied by the court of origination

5. *Id.* at 537.

6. *Id.*

7. Under H.R. 3406, mass tort cases could be brought in or transferred to the federal courts on the basis of minimal diversity and consolidated for hearing and trial before a single federal court. Sedler & Twerski, *supra* note 1, at 79-81.

8. 28 U.S.C. § 1404(a) (1988).

regardless of whether the transfer of venue was initiated by the defendant⁹ or by the plaintiff.¹⁰

Our objections to the displacement of state choice of law by a federally imposed "law of a designated single jurisdiction" rule are fully set out in the original article and will only be summarized here. First, the requirement that the "law of a single designated jurisdiction" governs all claims arising out of the same mass tort would improperly intrude on state sovereignty. Such an intrusion would deny states the power to determine what substantive law applies to the resolution of these cases, and in many instances would require the sacrifice of valid state interests.¹¹ Second, in practice, because of constitutional constraints on what state's law can be selected to apply in a conflicts case, a federally imposed "law of a designated single jurisdiction" rule for mass torts would run counter to progressive trends in choice of law and would impose a choice of law straightjacket in mass tort cases. In the vast majority of cases, the court would be forced to choose either the totally discredited "law of the place of the wrong" rule of the First Restatement,¹² or an equally rigid rule of "law of the place of conduct." In some cases, the court will simply run out of law, in that there will be no single designated jurisdiction whose law could constitutionally be applied to govern all the claims in the particular mass tort case.¹³

Congressman Kastenmeier and Mr. Geyh expended a great deal of effort on demonstrating a need for consolidation of mass tort cases. To the extent that they set out to respond to our core policy level concerns for the displacement of state choice of law in mass tort cases, they say that these concerns are overstated and that such displacement would not "constitute an unjustifiable intrusion upon state sovereignty, or [be] likely to yield untoward results."¹⁴ But they devote surprisingly little discussion to these issues and do not respond directly to our core policy concerns. Rather, their approach tries to demonstrate the necessity for consolidation and to justify the displacement of state choice of law as an appropriate cost to achieve the benefits of consolidation.

In contending that displacement of state law would not constitute an unjustifiable intrusion on state sovereignty, they do little more than bootstrap the appropriate cost rationale. They recognize that under *Erie Rail-*

9. Van Dusen v. Barrack, 376 U.S. 612 (1964).

10. Ferens v. John Deere Co., 110 S. Ct. 1274, 1284 (1990).

11. Sedler & Twerski, *supra* note 1, at 86-98.

12. RESTATEMENT (FIRST) OF CONFLICTS OF LAW § 377 (1934).

13. Sedler & Twerski, *supra* note 1, at 98-107.

14. Kastenmeier & Geyh, *supra* note 4, at 538.

*road Co. v. Tompkins*¹⁵ and *Klaxon Co. v. Stentor Electric Manufacturing Co.*¹⁶ a federal court hearing a diversity case must apply the substantive law of the state in which it sits, including that state's conflicts law. But they then say, "[t]hat rule, however, is extremely hard to defend for actions within the scope of the bill, in which a federal court would not be acting as a surrogate state court, but rather serving a nationwide function that often could not have been served by any state court," so that in such a circumstance, it "made no sense to have a federal court bound by the conflicts laws of a single state."¹⁷

What this argument fails to consider is that the bill's basis for federal jurisdiction in mass tort cases is still diversity of citizenship, and that regardless of any nationwide function that is being served by federal court consolidation in mass tort cases, the federal court is still applying state law. In another part of the article, the authors strongly make this point, saying that the bill "respects the traditional role of state law in resolving issues of liability and damages in tort cases, and encroaches upon the states only to the extent it must to permit the desired consolidation."¹⁸ Since the basis of federal jurisdiction in mass tort cases is still diversity and since state substantive law is being applied, the federal court, even if serving a nationwide function, is still a surrogate state court for *Erie* purposes.

II. IDENTIFYING THE STAKES: VITAL STATE INTERESTS AND STATE-FEDERAL UNIFORMITY OF RESULT

There can be little question that a major underlying premise of H.R. 3406 is that the efficiencies sought to be effected by the bill can only be accomplished by enacting a single choice of law rule to govern the claims of all the litigants in a mass tort case. Kastenmeier and Geyh do not argue otherwise.¹⁹ They indicate that if courts will be required to fragment the litigation to account for differing state laws, there is little to be gained by enacting the proposed legislation. The statutory "out," which permits a court to apply the laws of differing states to various issues or parties, is clearly to be used only in the rarest of circumstances.²⁰ Nor does there

15. 304 U.S. 64 (1938).

16. 313 U.S. 487 (1941).

17. Kastenmeier & Geyh, *supra* note 4, at 555.

18. *Id.* at 563.

19. *Id.* at 555.

20. In their reply, the authors fall back on the possibility of the court's departing from the "designated single jurisdiction" rule and looking to additional sources of law in order to avoid "monstrously wrong" choice of law determinations. *Id.* at 566. This possibility, of course, undercuts all the justifications that have been advanced for the "single designated jurisdiction" rule in

seem to be much argument that the choice of law examples, which we set forth in the original article, would play out in the way explained. Significant state interests would have to be sacrificed. What may not be fully appreciated is just how many issues are subject to interstate conflict and how serious the intrusions will be.

A decade ago it appeared that the choice of law in tort cases would be a matter of rarefied academic interest. Tort law appeared to be taking on a national character. Differences between one state law and another were vanishing or being reduced to matters of inconsequential significance.²¹ The onset of the insurance crisis in the early eighties and the product liability crisis in the late eighties spawned a legislative reform movement of unprecedented scope. Over forty state legislatures have enacted some form of tort reform legislation and further legislative initiatives are pending in a host of states.²² The differences from one state to another are not mere matters of detail, but affect basic issues of duty, standard of care, causation, affirmative defenses, and recoverable damages. Today, when a state argues that it wishes its tort law to apply in a choice of law setting, it expresses a high order policy decision. No one need go searching under rocks to dis-

the first place. As we pointed out in the original article, either "[d]ifferent law will apply to different parties and different issues" or "[i]n order to avoid fractionalization, a court will be compelled to opt for the law of a single jurisdiction." Sedler & Twerski, *supra* note 1, at 105.

21. Issues that dominated choice-of-law cases in the era in which the interest analysis revolution took place have simply faded from the scene. Host-guest immunities, which provided much of the early action, have for the most part disappeared from the American landscape. See *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); see also W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 34 (5th ed. 1984 & Supp. 1985). Similarly, interspousal immunity, which was the topic of considerable choice of law litigation, is now the law in only a small minority of jurisdictions. See, e.g., *Haumschild v. Continental Casualty Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1957); EPSTEIN, *CASES AND MATERIALS ON TORTS* 848-49 (1990). Wrongful death limitations provided the substance for many important choice-of-law cases. See, e.g., *Kilberg v. Northeast Airlines*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); *Griffith v. United Air Lines*, 416 Pa. 1, 203 A.2d 796 (1964). Court opinions have also gone into oblivion. See W. PROSSER & W. KEETON, *supra* § 127.

22. A compilation of state tort reform statutes that affect product liability claims can be found in the CCH Products Liability Reporter. See also KEETON, OWEN, MONTGOMERY & GREEN, *PRODUCTS LIABILITY AND SAFETY*, ch. 11 (2d ed. 1989). Many law review symposia have dealt with the general subject of state statutory tort law reform. See Twerski, *The Baby Swallowed the Bathwater*, 22 U.C. DAVIS L. REV. 1161 (1989); Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS L. REV. 1141 (1988); *Symposium on Developments in Tort Law and Tort Law Reform*, 18 ST. MARY'S L.J. 669 (1987); *Symposium: Issues in Tort Reform*, 48 OHIO ST. L.J. 317 (1987); *Symposium on Tort Reform*, 10 HAMLINE L. REV. 345 (1987); *Symposium, Tort and Reform: Will It Advance Justice in the Civil System?* 32 VILL. L. REV. 1211 (1987); *Tort Reform Symposium*, 24 SAN DIEGO L. REV. 795 (1987). For a recent state court decision detailing the striking difference of opinion between state courts on market share liability, see *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 560 N.E.2d 324 (1990).

cover what state interests are at stake. They are written in large bold type in ink that has hardly dried on the pages of state statute books.

We do not mean to intimate that all mass tort cases will be loaded down with dozens of choice of law issues. The real world does not reflect law school examination hypotheticals. But of this we are certain: when the conflicts cases arise, they will be significant and will seriously affect the rights of the parties involved.

In the context of displacement of state choice of law in mass tort cases, the importance of protecting legitimate state interests interacts with the uniformity of result objective of *Erie* and *Klaxon*. The uniformity of result objective is itself sufficient to preclude displacement of state choice of law in such cases. The harm to basic principles of federalism that would be brought about by the abandonment of this objective is even more severe when displacement of state choice of law also brings about the sacrifice of vital state interests.²³

Let us now turn to the uniformity of result objective. The underlying premise of *Erie* and *Klaxon* is uniformity of result between federal and state courts in diversity cases. As the Supreme Court has stated:

In essence, the intent of [the *Erie*] decision was to insure that in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.²⁴

Because choice of law is obviously outcome-determinative, *Klaxon* requires that a federal court apply the choice of law rules of the state in which it sits. Likewise, in order to implement the policy of uniformity of result between state and federal courts in diversity litigation when there is a transfer of venue from one federal court to another, the transferee court must apply the law that would have been applied by the transferring court had the case remained there.

23. For early scholarly recognition that *Klaxon* gives voice to significant state interests and is logically mandated if interest analysis is the governing conflicts methodology, see Currie, *Change of Venue and the Conflict of Law: A Retraction*, 27 U. CHI. L. REV. 341 (1960), and Cavers, *Change in Choice-of-law Thinking and Its Bearing on the Klaxon Problem*, ALI Study of the Division of Jurisdiction Between State and Federal Courts, 154, 161 (Tent. Draft No.1 1963).

24. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

The Supreme Court recently had occasion to reaffirm the latter principle in *Ferens v. John Deere Co.*,²⁵ where it held that the principle was applicable even when it was the plaintiff who initiated the transfer. The Court emphasized that the convenience objectives advanced by a transfer of venue should not "deprive parties of state law advantages that exist absent diversity jurisdiction," and that such transfer "does not change the law applicable to a diversity case."²⁶ Nor should it matter that it was the plaintiff who initiated the transfer, since the defendant does not lose any advantage thereby; the same law applies as would apply if the plaintiff had not initiated the transfer.²⁷ Finally, the Court noted that a contrary result would "undermine the *Erie* rule in a serious way" because it would have the effect of "chang[ing] the state law applicable to a diversity case."²⁸

As we pointed out in the original article, this is exactly what happens under the "single designated jurisdiction" approach to choice of law. In a mass tort case, a party that wants a different choice of law result than would be obtained under the conflicts law of the state where the suit was brought may "change the state law applicable to a diversity case" by moving to transfer the case to a federal court under H.R. 3406.²⁹

This change of law is illustrated by the airplane crash case we discussed in the original article.³⁰ There, California passengers boarded the plane in California, Michigan passengers boarded it in Michigan, and it crashed on take-off from the Detroit airport killing all aboard. The plane was designed and manufactured in New York, and the allegation is that the crash was due to a defect in the landing gear. California law favors plaintiffs, while Michigan and New York law favors manufacturers. Under a single designated jurisdiction rule, California law could not constitutionally be applied to determine the claims of the survivors of the Michigan residents. Thus, the only law of a designated single jurisdiction that could be applied would be the law of Michigan or New York, both of which favor manufacturers.³¹ If the survivors of the California residents sue in California, California will

25. 110 S. Ct. 1274 (1990).

26. *Id.* at 1280.

27. *Id.*

28. *Id.* at 1281.

29. It is completely disingenuous to suggest, as Kastenmeier and Geyh do, that "[p]arties wishing to litigate their accident cases in duplicative state actions may do so," and that all the bill does is offer the parties "the alternative of a consolidated federal forum that becomes available only if one or more parties chooses to use it." Kastenmeier & Geyh, *supra* note 4, at 562. Under the bill, removal of the case to the federal court is not "consensual." The defendant has the power to remove the case to federal court and thereby to change the law applicable to a diversity case.

30. Sedler & Twerski, *supra* note 1, at 101-02.

31. *Id.*

undoubtedly apply its plaintiff-favoring rule. To avoid this result, under H.R. 3406, the manufacturer may have the case transferred to a federal court, which is compelled to apply the New York or Michigan manufacturer-favoring rule.

What *Erie* and *Klaxon* were designed to prevent, therefore, would come to pass. There would be a "change of state law in a diversity case" because the manufacturer would be able to remove the case to a federal court that is "not bound by the choice of law rules of any state." Furthermore, as the above example indicates, such a result prevents California from implementing the plaintiff-favoring policy reflected in its law in a case where it has a very strong interest in doing so. To say the least, such a result sacrifices vital state interests on the altar of efficiency and strongly intrudes upon state sovereignty in an area traditionally reserved to the states in our constitutional system. For this reason, it can hardly be called an "appropriate cost" of consolidation.

III. THE SPURIOUS JUSTIFICATIONS

The authors next advance a series of justifications for the "law of a single designated jurisdiction" rule.³² These justifications, originally set forth by the Department of Justice, are that the "law of a single designated jurisdiction" rule is necessary to avoid the purported evils of (1) "choice of law litigation of staggering complexity," (2) "delay in settlements resulting from uncertainty in the choice of law to be applied," (3) "impetus toward forum shopping," and (4) "a perceived unfairness when different bodies of law are applied to different parties in the same case."³³ We will consider each of these justifications separately and demonstrate that they are completely spurious.

A. "Choice of Law Litigation of Staggering Complexity"

The authors simply state that the "law of a single designated jurisdiction" rule is necessary to avoid "choice of law litigation of staggering complexity."³⁴ But there is no further explanation of what this means. Presumably it refers both to the purported difficulty of deciding any choice of law issue and to the purported number of choice of law issues that will arise in a mass tort case. Neither concern is supportable. In practice,

32. Kastenmeier & Geyh, *supra* note 4, at 557.

33. *Id.* (quoting *Court Reform and Access to Justice Act: Hearings on H.R. 3152 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st and 2nd Sess. 228 (1987-88)).

34. *Id.*

choice of law issues in tort cases are not at all difficult to resolve. Choice of law issues in tort cases tend to fall into certain fact-law patterns, and courts that have abandoned the traditional "place of the wrong" rule tend to reach predictable results in these cases.³⁵ These results depend primarily on a consideration of the policies reflected in the laws of the involved states and the interest of each state in applying its law in order to implement that policy.³⁶ In practice, then, conflicts tort 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 California-Michigan-New York airplane crash. Since Michigan and New York have the same negligence 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 survivors. This loss of efficiency seems a small price to pay for adherence to the principle of uniformity of result in diversity cases and respect for implementation of the important interests of California. 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,³⁷ and the conflict of laws issues resolved with respect to each subgroup of parties.³⁸

35. See generally Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975, 979-83 (1977).

36. See Sedler, *The Governmental Interest Analysis Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181, 227-33 (1977).

37. FED. R. CIV. P. 23(c)(4).

38. 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 law issues in the 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.

We have demonstrated, therefore, that even with consolidation it is not necessary to have all of the cases determined under the substantive law of a "single designated jurisdiction" in order to avoid "choice of law litigation of staggering complexity." The cases can be grouped into fact-law patterns, and by following the approach as it is followed with respect to transfer of venue under 28 U.S.C. § 1404(a), 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. This will result in a limited number of party groupings for trial. 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. While this approach imposes greater efficiency costs than a "law of a single designated jurisdiction" rule, it implements very important federalism policies and to us seems worth the cost.

B. "Delay in Settlements" and "Forum Shopping"

Likewise, once the choice of law decisions are made there will be no "delay in settlements resulting from uncertainty in the choice of law to be applied."³⁹ The substantive law applicable to the resolution of each plaintiff's claim against each defendant will be known and to that extent will facilitate settlement.

Regarding so-called "forum shopping," as we have pointed out above, the "law of a single designated jurisdiction" rule encourages forum shopping by defendants: the defendant can remove the case from a state where the choice of law result is plaintiff-favoring in hopes of getting a different choice of law result under the "law of a single designated jurisdiction" rule that must be followed by the federal court to which the case has been removed. As the Supreme Court has recently noted: "An opportunity for forum shopping exists whenever a party has a choice of forums that will apply different law."⁴⁰ In this sense, the plaintiff in a mass tort case has engaged in forum shopping when making the initial decision where to bring the suit. All the law of a single designated jurisdiction rule does is to compound forum shopping by giving the defendant a chance to forum shop also. Consequently, to justify the "law of a single designated jurisdiction" rule in terms of "avoiding an impetus toward forum shopping" is patent nonsense; the rule will have exactly the opposite effect.

39. Kastenmeier & Geyh, *supra* note 4, at 557.

40. *Ferens v. John Deere Co.*, 110 S. Ct. 1274, 1282 (1990).

C. *“Perceived Unfairness”: Horizontal Versus Vertical Inequality*

Finally, we come to the matter of “perceived unfairness when different bodies of law are applied to different parties in the same case.”⁴¹ Here the authors state that “the ‘unfairness’ associated with depriving a party of the protection of state laws to which it might otherwise be entitled must be balanced against the unfairness associated with applying different sources of law to identically situated accident victims.”⁴² They raise the following specter:

Two passengers sitting side by side in the same airplane are killed in the same crash, and their families file identical wrongful death suits against the airline in different courts. Under current law, it is possible that the airline could be found negligent in one suit, but not the other, entitling the family of one victim to receive complete compensation for its loss, while the family of the other victim receives a bill for court costs.⁴³

They argue that a single choice of law rule would promote equality of result.⁴⁴ What they fail to perceive is that they have bartered vertical equality for horizontal equality — and they have made a very bad trade.

Consider the plane crash described above and imagine one hundred plaintiffs from California and fifty plaintiffs from Illinois, all killed when the plane crashes on take-off in Illinois. Assume that California law applies to allow recovery for California plaintiffs, but that Illinois law would deny recovery for the Illinois plaintiffs under less favorable Illinois law. If asked to explain the result to the Illinois plaintiff, we could point to the fact that the state which has the most significant interest with their well-being has denied recovery in such cases. They are, in fact, treated as Illinois 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 respective residents.

Now let us look at the same case under H.R. 3406. If the “law of a designated single jurisdiction” rule is to apply, either all parties will be allowed recovery or denied recovery. Assume that the court chooses the choice of law rule that denies recovery. Now the disappointed California plaintiffs ask, “Why did we lose?” The answer has to be “Because you were involved in an accident that involved more than twenty-five people. We sacrificed you to efficiency.” We submit that the answer has no explanatory

41. Kastenmeier & Geyh, *supra* note 4, at 557.

42. *Id.* at 565-66.

43. *Id.* at 551.

44. *Id.* at 552.

power whatsoever. It would be quite different if the source of law chosen to govern mass torts were federal substantive tort law especially tailored to deal with mass tort litigation. The answer would be that the law that governs his or her litigation was designed to respond to the unique problems of mass torts. But H.R. 3406 does not create such a body of federal law. Parties are relegated to state tort law. The decision as to which body of law will govern will be determined by the number of victims in the tragedy. When more than twenty-five victims are involved, one body of law governs; when less than twenty-five are involved, another body of law governs. Thus, we strongly disagree with Kastenmeier and Geyh. They have given up consistency for a single transaction and have bartered both substantive fairness to the parties and inequality between similarly situated parties but for the fact that one was injured in an accident that had more people involved in it.

Ultimately, the inherent fallacy in the Kastenmeier and Geyh position is the assumption that accident victims are "similarly situated," *simply because they have been involved in the same accident*. Neither the authors nor the Department of Justice explain what makes victims of the same accident similarly situated. The question that immediately comes to mind: "With respect to what are they similarly situated?" They are similarly situated only in the sense that they have been involved in the same accident. But 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 policy reflected in those laws.

IV. THE PRACTICAL FALLOUT

Finally, we urge Kastenmeier and Geyh to take a realistic look at litigation the way it would look the day after H.R. 3406 would become law. What law would litigants expect to govern their cases? It has taken twenty-five years of turmoil since the onset of the choice of law revolution to bring some predictability and stability to the field. In any given state, if one examines the choice of law cases, one can predict with fair accuracy what law that state would apply to a choice of law issue presented in a particular case.⁴⁵ Under H.R. 3406 that process would have to begin anew. Each

45. There is now a well-developed body of case law in every jurisdiction that indicates which particular brand of interest analysis the state follows and how the theory plays out in practice. See, e.g., *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973); *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985); *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972); *Erwin v. Thomas*, 264 Or. 454, 506 P.2d 494 (1973). Though there is substantial controversy among different states on how to resolve choice-of-law problems, within a given state results are highly predictable. For a thorough and

federal court of appeals would have to decide for itself which "brand of interest analysis" it would follow and how it would balance various interests.⁴⁶ Another quarter century of chaos awaits us. Any expectation that the United States Supreme Court would step in and provide guidance is likely to be unrealistic.⁴⁷ And one almost shudders to think of what the results would be if the Supreme Court did get involved.⁴⁸ By almost all accounts, the work product of the Court in the areas of choice of law and jurisdiction has been quixotic. In short, for the foreseeable future mass tort cases will not be resolvable quickly through litigation or settlement because we will have to wait for the courts to create this new body of "federal choice of law principles."

enlightening discussion of the various choice-of-law approaches adopted by the various states, see R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 6.16 - .32 (3d ed. 1986).

46. Not only would a federal court face the difficult task of deciding which of the various choice-of-law methodologies it would have to adopt, it would face the problem of choice in a most difficult setting. A federal court sitting in a diversity case with total freedom to choose law as it sees fit is a disinterested state. In normal interstate conflict cases when a state decides that a true conflict between the parties of two interested jurisdictions exists, the forum will usually opt to apply its own law. See Sedler, *supra* note 35. It is a rare conflicts case in which the forum is a disinterested state. There is little guidance in state choice-of-law methodology on how to treat the true conflict case in this setting. Thus, a federal court seeking to find its way would have to face the "true conflict" case in a setting for which there is little guidance from state decisional law. For an early exploration of this problem, see CAVERS, THE CHOICE OF LAW PROCESS 216-24 (1965).

47. If the Court's decisions in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), and *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988), are any barometer, the Court appears unwilling to strike down even highly imprudent, if not outrageous, state choice-of-law decisions. Perhaps, given the mandate to create federal choice-of-law principles, the Court might attempt to work out conflicts between differing views of the various circuit courts. It is likely, however, that there will be a long period of gestation before the Court would be prepared to act decisively.

48. The work of the Court in the area of personam jurisdiction has left even the most knowledgeable observers befuddled. See, e.g., *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). For critical commentary, see, e.g., Cox, *The Interrelationship of Personal Jurisdiction and Choice of Law: Forging New Theory Through Asahi Metal Industry Co. v. Superior Court*, 49 U. PITT. L. REV. 189 (1987); Dessen, *Personal Jurisdiction after Asahi: The Other (International) Shoe Drops*, 55 TENN. L. REV. (1987); Seidelson, *A Supreme Court Conclusion and The Rationales That Defy Comprehension: Asahi Metal Industries Ltd. v. Superior Court of California*, 53 BROOKLYN L. REV. 563 (1987); Stewart, *A New Litany of Personal Jurisdiction*, 60 COLO. L. REV. 5 (1989); Weintraub, *Asahi Sends Personal Jurisdiction Down the Tubes*, 23 TEXAS INT'L L.J. 55 (1988); and *Symposium, Asahi Metal Industry Co. v. Superior Court and The Future of Personal Jurisdiction*, 39 S.C.L. REV. 815 (1988).

The Court continues to be fascinated by the subject of jurisdiction and now appears poised to do even further damage to well-settled doctrine. See *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3209 (U.S. Oct. 1, 1990) (No. 89-1647).

V. CONCLUSION

We remain convinced that H.R. 3406 is not a good bill. It sacrifices state interests, fosters unexplainable inequality, and creates an atmosphere of unpredictability that will cause a significant increase in litigation because no one will know what the "new choice of law rules" are. And all this for what? As Kastenmeier and Geyh admit, the true "gorilla problems"⁴⁹ fostered by the mega-cases (e.g., Agent Orange, asbestos, Dalkon Shield) will not be resolved by enacting the pending bill. What they call the "spider monkey" problems,⁵⁰ *i.e.*, the run of the mill mass tort problems, are simply not of such significance to warrant the enactment of legislation which brings about all the ills we have identified. The burden of proof for change rests on the proponents. In our opinion, they have failed by a wide mark to make their case.

49. Kastenmeier & Geyh, *supra* note 4, at 548.

50. *Id.*