

## MULTISTATE CLASS ACTIONS AND CHOICE OF LAW

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### *I. Introduction*

Multistate class actions are those implicating the substantive law of multiple jurisdictions. In a typical multistate class action, the named plaintiff purports to bring state law claims on behalf of non-forum-state residents. For example, a plaintiff might sue an automobile manufacturer for breaches of express and implied warranties (governed by state law), purporting to represent a class of all vehicle owners in the United States.<sup>1</sup> As another example, an insurance policyholder, on behalf of a class of all similar policyholders nationwide, might sue an insurance company for violations of the federal securities laws and state common law.<sup>2</sup> The plaintiff may allege that one state's laws should apply to the entire class,<sup>3</sup> or may instead allege that any variations in state substantive law do not preclude class certification.<sup>4</sup> As courts of appeals have recognized, certification of a multistate or, especially, a nationwide class increases the stakes of litigation and can create significant settlement pressure for defendants.<sup>5</sup> Not surprisingly, certification decisions in multistate class actions are intensely litigated.

The U.S. Constitution, Rule 23 of the Federal Rules of Civil Procedure, and the Rules Enabling Act require a choice of law analysis to be conducted, at some stage, in every multistate class action, and each of these limits the power of federal

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1. See *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 720 (5th Cir. 2007).

2. See *In re Prudential Ins. Co. of Am. Sales Litig.*, 148 F.3d 283 (3d Cir. 1998).

3. See, e.g., *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2002).

4. See, e.g., *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1188–90 (9th Cir. 2001).

5. See, e.g., *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

courts to certify class actions that would require the application of laws from multiple states.<sup>6</sup>

First, under the Constitution, *Erie Railroad Co. v. Tompkins*,<sup>7</sup> *Klaxon Co. v. Stentor Electric Manufacturing Co.*,<sup>8</sup> and *Phillips Petroleum Co. v. Shutts*<sup>9</sup> establish the following three principles, respectively: (1) federal courts sitting in diversity must apply the substantive law of the forum state in which they sit; (2) state choice of law rules are substantive law; and (3) states ordinarily may not apply their laws to conduct and transactions that occur outside their borders.

Second, the Rules Enabling Act provides that the Federal Rules “shall not abridge, enlarge or modify any substantive right.”<sup>10</sup> The Rules Enabling Act confirms that a class action is a procedural device that should not deprive litigants (including absent class members) of the right to have the appropriate substantive law govern the disposition of their claims and defenses, even if there otherwise would be procedural efficiencies to adjudicating the claims on an aggregated basis.<sup>11</sup>

Third, several subsections of Rule 23—including section (a)(2)’s commonality requirement, section (b)(3)’s predominance requirement, section (b)(3)’s superiority requirement, and section (b)(3)(D)’s manageability factor—require courts to conduct a choice of law analysis, and to ascertain whether variations in state law make the action unsuitable for class treatment, at some point in the proceedings.

This chapter explains the doctrines governing choice of law analysis in multi-state class actions.

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## II. Choice of Law Analysis Under the Constitution and the Rules Enabling Act

### A. THE CONSTITUTION: *SHUTTS*

The starting point for analyzing constitutional limits on choice of law rules in class actions is the U.S. Supreme Court’s decision in *Phillips Petroleum Co. v. Shutts*.<sup>12</sup> In

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6. See, e.g., Chapter 30, “Other Due Process Challenges to the Class Device.”

7. 304 U.S. 64 (1938).

8. 313 U.S. 487 (1941).

9. 472 U.S. 797, 823 (1985).

10. 28 U.S.C. § 2072(b).

11. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (“Rule 23’s requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act.”); *id.* at 628–29 (“The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. And Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load [plaintiffs] and the District Court heaped upon it.”).

12. 472 U.S. 797.

*Shutts*, the Court considered the claims of a nationwide class of plaintiffs who brought suit in Kansas state court against Phillips Petroleum, an out-of-state corporation. Plaintiffs had sued to recover interest on allegedly delayed royalty payments on oil and gas leases, the majority of which related to oil and gas deposits outside of Kansas. The state courts agreed with plaintiffs that Kansas law should govern the claims of the entire class, citing the plaintiffs' choice of Kansas as the forum and that state's preference for applying its own law in its own courts absent exceptional circumstances.

The Supreme Court reversed, holding that Kansas could not constitutionally apply its own law to the claims of the entire class in light of the commands of the due process clause and full faith and credit clause of the federal Constitution. Even though Kansas had personal jurisdiction over the defendant (through its conduct of business in that state) and the plaintiff class members, these contacts were insufficient to justify applying Kansas law to the dispute.<sup>13</sup> Moreover, because there was a material conflict between the substantive law of Kansas and that of Texas and Oklahoma (the other possible sources of law), the due process rights of the parties were violated by imposing Kansas law upon them.<sup>14</sup> According to the Court, the state whose law is applied "must have a significant contact or aggregation of contacts to the claims asserted by *each member of the plaintiff class*, contacts creating state interests, in order to ensure that the choice of that law is not arbitrary or unfair."<sup>15</sup>

In *Shutts*, the Supreme Court also held that choice of law analysis cannot be relaxed or excused simply to give effect to the class action as a favored forum of adjudication. The Constitution's restrictions on a state's power to apply its law beyond its borders are not "altered by the fact that it may be more difficult or more burdensome to comply . . . because of the large number of transactions which the States proposes to adjudicate in a single action."<sup>16</sup>

*Shutts* arose out of the Supreme Court of Kansas and therefore was not an interpretation of Federal Rule of Civil Procedure 23. Rather, *Shutts* establishes constitutional limitations on the power of a state to apply its law to conduct that occurs beyond its borders and shows that those limitations are not relaxed or suspended in a class action.

The Supreme Court has echoed many of the same concerns expressed in *Shutts* in a line of cases imposing due process limitations on punitive damage awards. The most recent and strongest articulation of the principle is in *State Farm Mutual Automobile Insurance Co. v. Campbell*.<sup>17</sup> There, the Court invalidated the Utah Supreme

13. *Id.* at 819–20.

14. *See id.* at 817–18.

15. *Id.* (emphasis added).

16. *Id.* at 821 (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981)).

17. 538 U.S. 408, 421–22 (2003).

Court's imposition of a \$145 million punitive damages judgment, in part because the record demonstrated that the jury had relied on the defendant's out-of-state conduct when awarding punitive damages. The Court observed that states "cannot punish . . . conduct that may have been lawful where it occurred," and cited *Shutts* for the proposition that "[a]ny proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion [in the case], and, to those parties, the Utah courts, in the usual case, *would need to apply the laws of their relevant jurisdiction*."<sup>18</sup> *State Farm* confirms the presumption, reflected in *Shutts*, that states cannot apply their law to conduct and transactions that occur outside their borders.

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### III. *The Rules Enabling Act*

Under the Rules Enabling Act, no Federal Rule of Civil Procedure, including Rule 23, may "abridge, enlarge or modify any substantive right."<sup>19</sup> In *Amchem Products, Inc. v. Windsor*,<sup>20</sup> the Supreme Court observed that the Act places important constraints on the interpretation and application of Rule 23. Even when a nationwide class action might be "the most secure, fair, and efficient means of compensating victims," class treatment is impermissible where "bold aggregation techniques" would violate the Act by abridging, enlarging, or modifying substantive rights.<sup>21</sup> The Rules Enabling Act precludes courts from using the class action device in ways that either negate or make it impossible for one or more of the parties to assert otherwise available claims and defenses or to do so under the state law that would apply outside the class action context.

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### IV. *Choice of Law Analysis Under Rule 23*

Separate and apart from constitutional and statutory requirements, Rule 23 requires courts to engage in a choice of law analysis. Rule 23(a) requires the claims of the named plaintiffs to be "typical" of and "common" with the members of the putative class; and, in damages class actions under Rule 23(b)(3), a putative class representative must show that individualized issues do not "predominate" over common issues in the proposed litigation, and that the proposed class action is both "manageable" and "superior" to other forms of adjudication.

The courts have construed each of these requirements—commonality, typicality, predominance, manageability, and superiority—as imposing a limit on their

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18. *Id.* (emphasis added).

19. 28 U.S.C. § 2072(b).

20. 521 U.S. 591.

21. *Id.* at 628–29.

authority to certify classes that would involve the application of laws from many different states. Different courts have identified different elements of Rule 23 as the source of that constraint, as these representative statements from the federal appellate courts demonstrate:

No class action is proper unless all litigants are governed by the same legal rules. Otherwise the class cannot satisfy the commonality and superiority requirements of Fed. R. Civ. P. 23(a), (b)(3). . . . Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable.<sup>22</sup>

Given the multiplicity of individualized factual and legal issues, magnified by choice of law considerations, we can by no means conclude “that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members.”<sup>23</sup>

[A] district court must consider how variations in state law affect predominance and superiority. . . . In a multi-state class action, variations in state law may swamp any common issues and defeat predominance.<sup>24</sup>

[T]he law on predominance requires the district court to consider variations in state law when a class action involves multiple jurisdictions.<sup>25</sup>

Separately and in combination, these provisions of Rule 23 impose two types of constraints upon the certification of multistate class actions. One constraint is procedural: Rule 23 requires a choice of law analysis to be conducted at some stage in class proceedings. The second constraint is substantive: beyond a certain point, the need to apply the laws of different jurisdictions renders an action unsuitable for class treatment under the Rule.

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## V. Procedural Requirement: A Choice of Law Analysis Must Be Conducted

In most jurisdictions, a district court must analyze choice of law issues before certifying a class.<sup>26</sup> Several district courts have stated that failing to conduct a choice

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22. *In re Bridgestone/Firestone*, 288 F.3d at 1015, 1018.

23. *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 630 (3d Cir. 1996), *aff'd sub nom.*, *Amchem*, 521 U.S. 591.

24. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996).

25. *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 728 (9th Cir. 2007).

26. See *In re LifeUSA Holding Inc.*, 242 F.3d 136, 147 (3d Cir. 2001); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 370 (4th Cir. 2004); *Castano*, 84 F.3d at 740–41; *In re Am. Med. Sys.*, 75 F.3d 1069, 1085 (6th Cir. 1996); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674 (7th Cir. 2001); *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1121 (8th Cir. 2005); *Lozano*, 504 F.3d at 728; *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1024 (11th Cir. 1996); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016–17 (D.C. Cir. 1986).

of law analysis before certification violates due process.<sup>27</sup> As the Seventh Circuit has explained, “[n]o class action is proper unless all litigants are governed by the same legal rules”—and therefore the choice of law analysis must be conducted at the certification stage.<sup>28</sup> A failure to conduct this analysis (or postponing it) can be grounds for reversal of the certification order.<sup>29</sup>

The requirement to conduct the choice of law analysis before a class is certified flows from two sources. First, several courts have explained that the timing is based on the need to “find,” rather than presume, that all of the Rule 23 standards have been met: “In order to make the findings required to certify a class action under Rule 23(b)(3) . . . one must initially identify the substantive law issues which will control the outcome of the litigation.”<sup>30</sup>

Second, the need to conduct a choice of law analysis at the certification stage may also derive from the need to provide meaningful notice to class members, which is mandatory upon certification under (b)(3) and discretionary under (b)(1) and (b)(2).<sup>31</sup> The class notice must “concisely and clearly state . . . the class claims, issues or defenses.”<sup>32</sup> Unless the applicable substantive state law has been identified, class members may not have sufficient information to make an informed choice about whether to opt out of the class (or to intervene in a (b)(1) or (b)(2) proceeding).

In some jurisdictions, the courts have been less precise about whether a district court must conduct a choice of law analysis before class certification.<sup>33</sup> These

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27. See *Yadlosky v. Grant Thornton, L.L.P.*, 197 F.R.D. 292, 300 (E.D. Mich. 2000) (“Due process requires individual consideration of the choice of law issues raised by each class member’s case before certification.”); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 457 (D.N.J. 1998) (same); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 348 (D.N.J. 1997) (same).

28. *In re Bridgestone/Firestone*, 288 F.3d at 1015.

29. See, e.g., *Castano*, 84 F.3d at 739, 741–43:

The [district] court noted that any determination of how state law variations affect predominance was premature, as the court had yet to make a choice of law determination. . . . A thorough review of the record demonstrates that, in this case, the district court did not properly consider how variations in state law affect predominance. The court acknowledged as much in its order granting class certification, for, in declining to make a choice of law determination, it noted that “[t]he parties have only briefly addressed the conflict of laws issue in this matter.”

30. *Id.* at 741 (quoting *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 316 (5th Cir. 1978)); see *Gariety*, 368 F.3d at 365, 370.

31. See FED. R. CIV. P. 23(c)(2)(B).

32. *Id.*

33. See *Maywalt v. Parker & Parsley Petroleum Co.*, 147 F.R.D. 51, 58 (S.D.N.Y. 1993); *In re LILCO Sec. Litig.*, 111 F.R.D. 663, 670 (E.D.N.Y. 1986); *Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 71 (D. Mass. 1999); *In re United Telecomms., Inc. Sec. Litig.*, No. 90-2251, 1992 WL 309884, at \*4 (D. Kan. Sept. 15, 1992).



courts generally reason that choice of law questions will be clarified as the litigation proceeds, and that any state law complexities can be addressed at a later juncture—even after certification. The certification decision in *In re LILCO Securities Litigation* is representative of this line of cases: “In the event that there are material variations in the law of the fifty states, the Court may employ subclasses or decertify those state law subclasses whose adjudication becomes unmanageable.”<sup>34</sup>

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## VI. Procedural Requirement: The Plaintiff Bears the Burden of Proof

Most courts of appeals have held that plaintiffs bear the burden of proof in establishing that all of Rule 23’s requirements are met before a class can be certified.<sup>35</sup> This point has been disputed in the past,<sup>36</sup> but the debate was largely put to an end by the Supreme Court’s decision in *Amchem*, which stated that “[i]n addition to satisfying Rule 23(a)’s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3).”<sup>37</sup>

Because the plaintiff bears the burden of demonstrating that Rule 23’s requirements are satisfied,<sup>38</sup> class action plaintiffs generally must provide the district court with a choice of law analysis.<sup>39</sup> In the words of the Fourth Circuit, “[t]he plaintiffs have the burden of showing that common questions of law predominate, and they cannot meet this burden when the various laws have not been identified and compared.”<sup>40</sup>

Some courts have shifted the burden to class action defendants to prove that the forum state’s law should *not* be applied on a classwide basis, on the ground that “the proponent of foreign law” bears the burden under the state’s choice of law

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34. 111 F.R.D. at 670.

35. See, e.g., *Cole*, 484 F.3d at 724; *In re Am. Med. Sys.*, 75 F.3d at 1086.

36. See 1 HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS: A MANUAL FOR GROUP LITIGATION AT FEDERAL AND STATE LEVELS § 2076 (1st ed. 1977) (“Burden of proof concepts . . . are not appropriate in dealing with a determination respecting whether [an action brought under Rule 23] should be permitted to be maintained.”).

37. *Amchem*, 521 U.S. at 614 (emphasis added); see also *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 315–16 (3d Cir. 2008) (“[I]t is clear that the party seeking certification must convince the district court that the requirements of Rule 23 are met.”); *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 30 (2d Cir. 2006).

38. See, e.g., *Cole*, 484 F.3d at 724; see *Amchem*, 521 U.S. at 614 (“In addition to satisfying Rule 23(a)’s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3).”).

39. See, e.g., *Cole*, 484 F.3d at 725.

40. *Gariety*, 368 F.3d at 370.

principles.<sup>41</sup> A few academic commentators advocate this burden shift.<sup>42</sup> When the plaintiff does not provide a choice of law analysis, district courts might conduct one *sua sponte*,<sup>43</sup> but there do not appear to be any cases in which a district court has certified a multistate class when the plaintiff failed to identify and compare the relevant states' laws.

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## VII. *Procedural Requirement: What the Choice of Law Analysis Must Show*

The first step in the choice of law analysis is to ascertain whether meaningful differences exist in the laws of the potentially relevant states.<sup>44</sup> The plaintiff's analysis on this point must be comprehensive, not cursory. As the Third Circuit has held, putative class members must conduct an "extensive analysis" of state law variations.<sup>45</sup>

The plaintiff must demonstrate that the potentially applicable state laws do not vary in meaningful ways.<sup>46</sup> Where there are no differences, the application of the laws from multiple states generally will not preclude class certification. In practice, this has prompted parties to file significant "state law appendices" to their class

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41. See *Mazza v. Am. Honda Motor Co.*, 254 F.R.D. 610, 620 (C.D. Cal. 2008) (holding that "the foreign law proponent must identify the applicable rule of law in each potentially concerned state and must show it materially differs from the law in California"); *Payne v. Goodyear Tire & Rubber Co.*, 216 F.R.D. 21, 27–28 (D. Mass. 2003) (same); but see *S. States Police Benevolent Ass'n, Inc. v. First Choice Armor & Equip., Inc.*, 241 F.R.D. 85 (D. Mass. 2007) (disagreeing with *Payne* and holding that a defendant does not carry a burden at the choice of law stage). Following class certification in *Mazza*, the Ninth Circuit granted defendant's Rule 23(f) petition, and the appeal (9th Cir. Case No. 09-55376) is pending at the time of this writing.

42. See Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PENN. L. REV. 1439, 1507 n.264 (2008):

Class counsel may also be aware of . . . [an] interesting argument that choice of law and class certification burdens are analytically discrete and that, by conflating them, some federal courts have erroneously placed both burdens on the party seeking class certification. See Patrick Wooley, *Erie and Choice of Law after the Class Action Fairness Act*, 80 TUL. L. REV. 1723, 1739–43 (2006). On this view, state courts so inclined can blunt some of the force of *Shutts* and of recent federal and state case law emphasizing the plaintiff's burden of demonstrating compliance with Rule 23 (or its state equivalent). Thus, they can insist that the choice of law question be addressed first, invoke a presumption that forum law is applicable, and place on the party seeking to displace that law the burden of demonstrating that some other law is applicable.

43. See, e.g., *In re Panacryl Sutures Prods. Liab. Cases*, 263 F.R.D. 312, 318 (E.D.N.C. 2009) (explaining that the plaintiffs had not "identified and compared the laws of all interested states and ha[d] thus failed to carry [the Rule 23] burden," but then conducting a full choice of law analysis apparently *sua sponte*).

44. *Shutts*, 472 U.S. at 816 ("We must first determine whether Kansas law conflicts in any material way with any other law which could apply. There can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit.").

45. See *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986).

46. See *Walsh*, 807 F.2d at 1016.



certification briefing.<sup>47</sup> As a general matter, some legal claims or doctrines have been considered to be materially identical across the states, while others have been deemed to vary greatly. (Note that some doctrines appear in both of the following lists.) Legal claims that have been thought to be sufficiently similar across jurisdictions include breach of contract,<sup>48</sup> fraud,<sup>49</sup> breach of fiduciary duty,<sup>50</sup> limitations periods,<sup>51</sup> securities fraud,<sup>52</sup> and implied warranties.<sup>53</sup> Claims or doctrines that have been considered to vary materially from state to state include breach of contract,<sup>54</sup> limitations periods,<sup>55</sup> breach of fiduciary duty,<sup>56</sup> negligence,<sup>57</sup> fraud,<sup>58</sup> the duty of disclosure,<sup>59</sup> products liability law,<sup>60</sup> medical monitoring doctrines,<sup>61</sup> the assumption of the risk defense,<sup>62</sup> negligent infliction of emotional distress,<sup>63</sup> consumer protection laws,<sup>64</sup> warranty doctrines (including reliance, notice of breach, and privity requirements),<sup>65</sup> securities fraud, including the fraud-on-the-market presumption,<sup>66</sup> unjust enrichment,<sup>67</sup> implied covenants to market in oil and gas leases,<sup>68</sup> gaming laws,<sup>69</sup> and provisions of the Uniform Commercial Code.<sup>70</sup>

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47. See, e.g., *Cole*, 484 F.3d at 725 (“[P]laintiffs have provided the district court with an extensive catalog of the statutory text of the warranty and redhibition laws of the fifty-one jurisdictions implicated in this suit . . . [Defendant] provided the district court with extensive charts of authority concerning express and implied warranty actions from the fifty-one jurisdictions showing, *inter alia*, variations among the states in regard to reliance, notice of breach, vertical privity, and presumptions of merchantability.”).

48. See *Klay v. Humana, Inc.*, 382 F.3d 1241, 1263 (11th Cir. 2004); *Steinberg v. Nationwide Mut. Ins. Co.*, 224 F.R.D. 67, 76–78 (E.D.N.Y. 2004).

49. See *Bresson v. Thomson McKinnon Sec. Inc.*, 118 F.R.D. 339, 343 (S.D.N.Y. 1988).

50. *Id.* at 343.

51. See *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000).

52. See *Amchem*, 521 U.S. at 625.

53. See *Walsh*, 807 F.2d at 1003.

54. See *Agostino v. Quest Diagnostics, Inc.*, 256 F.R.D. 437, 460 (D.N.J. 2009).

55. See *Doll v. Chicago Title Ins. Co.*, 246 F.R.D. 683, 688–89 (D. Kan. 2007).

56. See *id.* at 690–91.

57. See *In re Rhone-Poulenc*, 51 F.3d at 1300 (“The law of negligence, including subsidiary concepts such as duty of care, foreseeability, and proximate cause, may . . . differ among the states only in nuance[.] . . . [b]ut nuance can be important.”); *Zinser*, 253 F.3d at 1188; *Bresson*, 118 F.R.D. at 344.

58. See *Castano*, 84 F.3d at 743 n.15.

59. See *id.*

60. See *id.*; *Zinser*, 253 F.3d at 1188.

61. See *Zinser*, 253 F.3d at 1188.

62. See *id.*

63. See *id.*

64. See *In re St. Jude*, 425 F.3d at 1120; *In re Bridgestone/Firestone*, 288 F.3d at 1018.

65. See *Cole*, 484 F.3d at 726–28.

66. See *Gariety*, 368 F.3d at 370.

67. See *Steinberg*, 224 F.R.D. at 67.

68. See *Stirman v. Exxon Corp.*, 280 F.3d 554, 564–65 (5th Cir. 2002).

69. See *Andrews*, 95 F.3d at 1024.

70. See *Walsh*, 807 F.2d at 1016.

If the laws of the potentially relevant jurisdictions differ, the district court must apply the forum state's choice of law rules to determine which state's substantive law will apply to each class member's claim.<sup>71</sup> In consolidated multidistrict litigation, the court applies the choice of law rules of the state in which each action was originally filed.<sup>72</sup>

### VIII. *Substantive Requirement: Classes Cannot Be Certified Where the Laws of Several States Must Be Applied and Those Laws Are Materially Different*

Where the state laws applicable to the claims of class members differ, courts generally will decline to certify the class on the ground that variations in state law defeat the commonality requirement under section (a)(2), the predominance, superiority, and manageability standards of section (b)(3), or some combination. In *In re Bridgestone/Firestone*, for example, the Seventh Circuit, after conducting a choice of law analysis and determining that all 50 states' laws should be applied to the claims of a putative class, held that "a single nationwide class is not manageable."<sup>73</sup>

There is no clear quantitative limit of the number of distinct state laws beyond which a class cannot be certified. The Fifth Circuit has suggested that no variations are permissible: "In order for common issues to predominate, each of the states whose law is at issue must recognize an implied covenant to market, which is the heart of this class action. . . . The relevant state laws must be uniform in other necessary aspects as well."<sup>74</sup> In *In re American Medical Systems*, the Sixth Circuit characterized a permissible limit as "a few" variations: "If more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law."<sup>75</sup> In *Klay v. Humana, Inc.*, the Eleventh Circuit stated:

It goes without saying that class certification is impossible where the fifty states truly establish a *large number* of different legal standards governing a particular claim.

71. States generally follow one of three general choice of law approaches: the "*lex loci*" test, the "most significant relationship" test, or the "government interest" test. See generally *Thompson v. Jiffy Lube Int'l, Inc.*, 250 F.R.D. 607, 627 (D. Kan. 2008) (explaining the *lex loci* approach); RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) §§ 6, 145 (explaining the "most significant relationship" test); and *In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 55 (D.N.J. 2009) (explaining the "government interest" test).

72. See *Ferens v. John Deere Co.*, 494 U.S. 516, 532 (1990).

73. 288 F.3d at 1018; see also *Andrews*, 95 F.3d at 1024 (holding that variations in state laws rendered a proposed class action unmanageable).

74. *Stirman*, 280 F.3d at 564–55 & n.9.

75. 75 F.3d at 1085.

Similarly, if the applicable state laws can be sorted into a *small number* of groups, each containing materially identical legal standards, then certification of subclasses embracing each of the dominant legal standards can be appropriate.<sup>76</sup>

Even in courts that might tolerate some variation in the law applicable to the claims of class members, only a very small number of different state law doctrines appear to be permissible. In *In re School Asbestos Litigation*, the Third Circuit affirmed the district court's certification of a nationwide class when the plaintiffs had grouped relevant state law into four categories.<sup>77</sup> The court expressed some doubts about the manageability of four legal regimes, but based on the plaintiffs' "extensive analysis" that "satisfied the district court," the court affirmed the certification. In *In re Teletronics Pacing Systems, Inc.*, the district court certified two negligence subclasses and four strict liability subclasses.<sup>78</sup>

If varying state laws are applicable to the claims of class members, the plaintiff must submit a plan for managing the different laws through subclasses, separate trials, or special jury instructions.<sup>79</sup> In reversing a class certification order, for example, the Fifth Circuit held, "By not providing the district court with a sufficient basis for a proper choice of law analysis or a workable sub-class plan, the plaintiffs failed to meet their burden of demonstrating that common questions of law predominate."<sup>80</sup> Courts have found class certification inappropriate where plaintiffs have failed to submit detailed, workable plans that address the need to apply multiple states' substantive laws.<sup>81</sup>

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## IX. Special Issues

### A. SUBCLASSES

Rule 23(c)(5) provides that "[w]here appropriate, a class may be divided into subclasses that are each treated as a class under this rule." Some courts have relied

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76. 382 F.3d at 1261 (emphasis added).

77. See 789 F.2d at 1010.

78. 172 F.R.D. 271, 291 (S.D. Ohio 1997).

79. See *Zinser*, 253 F.3d at 1189.

80. *Spence v. Glock*, 227 F.3d 308, 316 (5th Cir. 2000).

81. See, e.g., *id.* at 313 ("Nor did the plaintiffs provide the court with a sub-class plan in case the court disagreed that Georgia law controlled."); *Agostino*, 256 F.R.D. at 466–67 ("In cases where numerous state laws are potentially applicable to a proposed class, the plaintiffs bear the burden to 'creditably demonstrate, through an extensive analysis of state law variances, that class certification does not present insuperable obstacles.' . . . Plaintiffs have not suggested how the many permutations in state consumer protection law can be managed by the Court. . . . The Court concludes that the Plaintiffs have not met their burden of proving that the legal variations among state consumer fraud statutes and the factual variations among the Class members can be managed in a practical manner in this litigation." (quoting *Walsh*, 807 F.2d at 1017)).

upon this provision to address the problems of multistate class actions by creating subclasses in which the laws of one state (or of all states with similar laws) would apply. As the Eleventh Circuit explained in *Klay*, “if the applicable state laws can be sorted into a small number of groups, each containing materially identical legal standards, then certification of subclasses embracing each of the dominant legal standards can be appropriate.”<sup>82</sup>

But the mere availability of subclassing is, in and of itself, not sufficient to overcome the problems created by the need to apply the law of multiple states. In affirming a denial of class certification, the Ninth Circuit in *Zinser v. Accufix Research Institute* made clear that a plaintiff must conduct a rigorous analysis and show what the subclasses are and that each subclass meets Rule 23's requirements.<sup>83</sup> As one district court recently noted, “[w]hile numerous courts have talked-the-talk that grouping of multiple state laws is useful and possible, very few courts have walked the grouping walk” by appropriately analyzing whether variations within the proposed subclass are meaningful or not.<sup>84</sup>

Similarly, any effort to bypass subclassing by instructing the jury on a “compromise” set of legal standards would likely violate the *Erie* doctrine. As the Seventh Circuit held in *In re Rhone-Poulenc Rorer*, district courts may not make new substantive law in the service of facilitating aggregated litigation.<sup>85</sup> In that case, the district court certified a nationwide negligence class, intending to apply a single “Esperanto”-like jury instruction covering the laws of all 50 states, despite not being the “actual law of any jurisdiction.” Using such a hybrid jury instruction, the Seventh Circuit held, was flatly prohibited: “The diversity jurisdiction of the federal courts is, after *Erie*, designed merely to provide an alternative forum for the litigation of state law claims, not an alternative system of substantive law for diversity cases.”<sup>86</sup>

## B. SETTLEMENT-ONLY CLASSES

Under Rule 23(e), class action settlements require court approval, and settlements also present choice of law dilemmas. In *Amchem*, the Supreme Court expressly held that “[s]ettlement is relevant to class certification” because “confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial.”<sup>87</sup> But the Court went on to state that “the *other* specifications of the Rule—those designed to protect absentees by blocking unwar-

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82. 382 F.3d at 1262.

83. 253 F.3d at 1190.

84. *In re Pharm. Indus. Average Wholesale Price Litig.*, 252 F.R.D. 83, 94 (D. Mass. 2008).

85. 51 F.3d at 1300.

86. *Id.*

87. 521 U.S. at 619.

ranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context.”<sup>88</sup> Indeed, the Court ultimately affirmed an order decertifying a class because, among other reasons, “[d]ifferences in state law . . . compound[ed] the[ ] disparities” among class members’ claims.<sup>89</sup>

Relatively few courts of appeals have addressed the extent to which choice of law problems should receive less weight in a settlement class than in a litigation class and whether settlement is relevant solely to the manageability prong of Rule 23(b)(3) or also to the “predominance” requirement. As a practical matter, most courts reviewing settlements provide broader latitude to settling parties on choice of law issues than they do when class proceedings are contested. For example, in *In re Warfarin Sodium Antitrust Litigation*, the Third Circuit held that divergent state laws did not preclude certification of a settlement class.<sup>90</sup> While the court stated that “there may be situations where variations in state laws are so significant so as to defeat commonality and predominance even in a settlement class certification,” any variations in state consumer fraud and antitrust laws for the claims in *Warfarin* “were insufficient to defeat the requirements of Rule 23.”<sup>91</sup> Similarly, in *In re Mexico Money Transfer Litigation*, the Seventh Circuit held that where federal and state law claims have been brought together, and where federal law is the principal theory of recovery, variations in state law theories were not sufficient to preclude the settlement.<sup>92</sup>

This is not to say that the general trend toward court approval of class settlements involving multistate claims can be cleanly reconciled with *Amchem*’s injunction that the requirements of Rule 23(a) and of Rule 23(b) *other than* manageability retain all of their force. In *Hanlon v. Chrysler Corp.*, for example, the Ninth Circuit approved a settlement class relating to an automobile defect that involved varying state laws of products liability, breaches of express and implied warranties, and “lemon laws.”<sup>93</sup> The court believed the common factual questions, particularly the defendant’s prior knowledge of the design defect, overrode any variations in state law. This decision could be in tension with the “extensive analysis” of state law variations that must take place in contested class proceedings.<sup>94</sup> It may well be that—for the practical purpose of promoting settlement—the predominance requirement of Rule 23(b)(3) is applied with less force at the settlement stage than

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88. *Id.* at 620.

89. *Id.* at 624.

90. 391 F.3d 516, 529 (3d Cir. 2004).

91. *Id.* at 530.

92. 267 F.3d 743, 746–47 (7th Cir. 2001).

93. 150 F.3d 1011, 1022–23 (9th Cir. 1998).

94. *E.g., Cole*, 484 F.3d at 724.

when the propriety of class certification is disputed. At least one court of appeals has so stated.<sup>95</sup>

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## X. Trends and Open Issues

In recent years, the federal courts have become increasingly reluctant to certify multistate or nationwide class actions on the ground that variations in state law render the action unsuitable for class treatment.<sup>96</sup> To avoid this outcome, the proponents of class certification have contended, with increasing frequency, that under the forum state's choice of law analysis, the law of a single state—often the state of the defendant's headquarters or principal place of business—should govern all claims.<sup>97</sup> In *Bridgestone/Firestone*, the Seventh Circuit cast doubt on whether such a choice of law rule existed for products liability claims: “Neither Indiana nor any other state has applied a uniform place-of-the-defendant's-headquarters rule to products-liability cases.”<sup>98</sup> Yet some district court decisions come close to approving such a “place of the defendant's headquarters” rule, and have concluded—under conflicts of law analysis—that the law of a single state is appropriately applied to the claims of all class members. In *Simon v. Philip Morris, Inc.*,<sup>99</sup> for example, the court held that it could apply New York law to a nationwide class of cigarette smokers because:

- The defendants' principal places of business and headquarters were in New York;
- Much of the alleged conduct, including the agreement initiating a conspiracy and the development of a public relations plan, took place in New York;
- Corporate entities in furtherance of the alleged conspiracy were incorporated in New York; and
- Defendants had business investors and lawyers based in New York.

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95. See *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 440 (4th Cir. 2003) (explaining that “settlement is relevant to class certification” under *Amchem* and that “Rule 23(e) affects a court's evaluation of predominance.”).

96. See, e.g., *Powers v. Lycoming Engines*, 328 F. App'x 121 (3d Cir. 2009); *Cole*, 484 F.3d 717; *In re St. Jude*, 425 F.3d 1116; *Gariety*, 368 F.3d 356; *Zinser*, 253 F.3d 1180; *In re Bridgestone/Firestone*, 288 F.3d 1012; *Andrews*, 95 F.3d 1014; *In re Panacryl Sutures Prods. Liab. Cases*, 2009 WL 3874347, at \*2 (E.D.N.C. Nov. 13, 2009); *Doll*, 246 F.R.D. 683.

97. See, e.g., *In re Mercedes-Benz*, 257 F.R.D. 46 (certifying nationwide class under New Jersey law based on New Jersey choice of law principles); *Mazza*, 254 F.R.D. at 620 (certifying nationwide class under California law); *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618 (Okla. 2003) (certifying nationwide class under Michigan law); *Daniel v. AON Corp.*, Nos. 1-06-0240 et al., 2008 Ill. App. LEXIS 1147 (Ill. App. Ct. Nov. 10, 2008) (unreported) (order denying rehearing regarding certification of nationwide class under Illinois law).

98. 288 F.3d at 1016.

99. 124 F. Supp. 2d 46, 53 (E.D.N.Y. 2000).



Similarly, in *In re Mercedes-Benz Tele Aid Contract Litigation*, the district court certified a nationwide class action under New Jersey's consumer protection statute on the ground that, under New Jersey choice of law rules, New Jersey law should govern because the defendant's principal place of business was in New Jersey, the major decisions involved in the litigation were made in New Jersey, and New Jersey had a strong interest in regulating the conduct of corporations headquartered within the state.<sup>100</sup>

In a reversal of the customary litigation positions, in a New Jersey state court case, *Meng v. Novartis Pharmaceuticals Corp.*, the defendants argued in favor of a "headquarters test" for the punitive damages portion of the claim.<sup>101</sup> (The parties had agreed that the law of each plaintiff's state of residence would govern compensatory damages claims.) In this case, the defendant sought the protection of New Jersey's statutory cap on punitive damages. The court agreed with the defendants: "Defendant should reasonably expect to be governed by the punitive damages law of the state in which it maintains its principal place of business and be punished by New Jersey's punitive damages law for any wrongdoing it may have committed at its corporate headquarters."<sup>102</sup>

These decisions have brought the multistate issues full circle. In *Shutts*, the Supreme Court made clear that choice of law issues must be examined carefully in class actions. Following *Shutts*, the federal courts of appeals became largely unresponsive to multistate class suits that would require the application of more than one state's law. In turn, the proponents of multistate class actions have turned to choice of law theories that resemble but can arguably be distinguished from the theories that the *Shutts* Court held insufficient to justify the application of Kansas law to a nationwide class. In *Shutts*, for example, the defendant was not headquartered and did not have its principal place of business in-state, and the Supreme Court concluded that it would not have been foreseeable to the defendant or to its contractual partners from other states that Kansas law would apply to their claims. The application of a so-called "headquarters test" or "principal place of business test" would appear to be in significant tension with *Shutts* and *State Farm*, and most federal appellate courts to have considered such a test have rejected it because

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100. 257 F.R.D. at 48–60.

101. Nos. L-7670-07MT, L-6027-08MT, 278, 2009 WL 4623715 (N.J. Super. Ct. Law Div. Nov. 23, 2009).

102. *Id.*; cf. *Aguirre Cruz v. Ford Motor Co.*, 435 F. Supp. 2d 701 (W.D. Tenn. 2006) (granting defendant's motion to dismiss non-class punitive damages claims because, even if Tennessee law governed compensatory claims, Michigan law would govern punitive damages claims under relevant choice of law principles, and Michigan law prohibited punitive damages).

of a failure to conduct a proper choice of law analysis.<sup>103</sup> But whether these new rationales will be sufficient to justify the application of a single state's law to the claims of a multistate or nationwide class will no doubt be a key front in the battleground of future class certification wars.

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103. See *In re St. Jude*, 425 F.3d at 1120 (reversing the district court's certification of a nationwide class on a headquarters theory because the court had failed to "analyze the contacts between Minnesota and each plaintiff class member's claims," but stating "we suspect Minnesota lacks sufficient contacts with all the parties' claims, and the different states have material variances between their consumer protection laws and Minnesota's," citing *Shutts*); *Zinser*, 253 F.3d at 1188; *Agostino*, 256 F.R.D. at 460–65 (rejecting a "headquarters test" approach for a multistate class, under New Jersey choice of law principles, for consumer fraud and breach of contract claims); see generally Richard A. Nagareda, *Bootstrapping in Choice of Law after the Class Action Fairness Act*, 74 U. MO. KAN. CITY L. REV. 661 (2006).