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**Preliminary Issues Regarding Forum Selection,  
Jurisdiction, and Choice of Law in Class Actions**

by

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## TABLE OF CONTENTS

	<u>Page</u>
I. FILING IN STATE VERSUS FEDERAL COURTS .....	1
II. STANDING TO ASSERT NON-RESIDENT CLASS MEMBERS' CLAIMS IN NATIONWIDE CLASSES .....	3
III. DIVERSITY JURISDICTION AND AGGREGATION OF MONETARY CLAIMS — GETTING INTO FEDERAL COURT .....	5
A. Jurisdictional Requirements .....	6
B. General Rule: Aggregation of Class Claims .....	7
C. Aggregation of Attorneys Fees .....	8
D. Aggregation of Punitive Damages .....	12
E. Supplemental Jurisdiction Pursuant to 28 U.S.C. § 1367 .....	16
IV. REMOVAL CONCERNS AND STRATEGIES TO AVOID – STAYING OUT OF FEDERAL COURT .....	21
A. Some General Rules and Principles .....	22
B. Plaintiff's Strategies .....	22
1. Filing Against a Defendant in That Defendant's Home State .....	22
2. Amount in Controversy .....	22
3. Non-Diverse Defendants .....	25
V. CHOICE OF LAW CONSIDERATIONS .....	27
VI. ARBITRATION OF CLASS CLAIMS .....	36
VII. TOLLING THE STATUTE OF LIMITATIONS .....	45

## **I. FILING IN STATE VERSUS FEDERAL COURTS**

Choice of forum can mean joyous victory or depressing defeat. A wrong selection and it's enemy territory: a jurisdiction where the prevailing law, available remedies, courtroom procedures, and juror attitudes are inimical to your client. A correct choice and, as Don Corleone once said, "They will fear you."

Gita F. Rothschild, "Forum Shopping," 24 *Litigation* 40 (ABS Section of Litigation, Spring 1998).

For at least 100 years, America's state courts have handled representative and class actions involving local or statewide matters and issues of state substantive law. State court class action activity predated the 1966 amendments to Federal Rule 23, that in turn precipitated the rise of class action activity in the federal courts. When an action involves issues of substantive state law (versus federal statutory or common law) and the controversy is between the citizens of a single state, state courts remain the only available filing forum. Cases involving non-diverse parties and state law issues will likely remain in state court, once filed, and are generally not subject to removal to the federal courts.

There are other reasons, besides necessity, for favoring a state court forum. Plaintiffs' counsel may wish to proceed to trial more quickly, and may perceive the state court as a more favorable arena in terms of procedural rules, jury pool, etc. Almost every state follows the same class certification criteria and procedure as do the federal courts, since most state courts have adopted their own versions of Federal Rule 23, or follow codal provisions buttressed by state court jurisprudence that has borrowed substantially from the Federal Rules and procedure.

Nonetheless, there is concern, among some defendants, that the state courts present a less favorable forum to them on issues of class certification and class trial.

Additionally, it is commonly perceived, and frequently the case, that the federal courts possess superior judicial resources, in terms of experienced judges with more extensive research and staff support, that are more capable of effectively managing the complexities of large-scale class actions than their state court counterparts. Accordingly, there has recently been legislative activity in Congress, over the last two terms, to “federalize” class actions by revising the current diversity rule. Under such statutes (none of which has yet been enacted into law), “diversity” for federal jurisdictional purposes will be satisfied if at least one member of the class and one defendant are of different domicile. The present doctrine holds that, for federal diversity purposes, only the citizenship of the main parties (class representatives and defendants) may be examined. Additionally, in actions without a federal question and hence without federal subject matter jurisdiction, the federal diversity jurisdictional threshold of \$75,000 must generally be satisfied for each member of the class.

The following sections address, in greater detail, the jurisdiction of state courts over out-of-state residents in the context of class certification; the binding effect of state court judgments; aggregation of claims to meet the federal diversity minimum for purposes of original filing in, or removal to, the federal court; choice of law to facilitate the management and trial of multi-state class actions; and the entitlement of state court class action judgments to full faith and credit.

## **II. STANDING TO ASSERT NON-RESIDENT CLASS MEMBERS' CLAIMS IN NATIONWIDE CLASSES**

Whether a plaintiff has standing to assert the claims of non-resident class members in nationwide or multistate class actions, or, stated alternatively, whether a state court has the power to certify and the jurisdiction to bind multistate or national classes, involves both federal constitutional issues and state jurisdictional and procedural questions.

In Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), the Supreme Court decided that the due process rights of nonresident class members are satisfied, and hence that a state court has authority to adjudicate the claims of non-resident class members, if the named plaintiff adequately represents the interests of the absent class members and reasonable notice and an opportunity to opt out of the class are provided. Shutts, supra, at 811-812. Prior to the decision in Shutts, there had been considerable controversy among commentators and in state court decisions over the standing and jurisdictional issues involved in nationwide or multistate class actions. See, Newberg on Class Actions, 3d ed., §§ 13.25-13.27. Since Shutts, at least with respect to opt out class actions, there has been little controversy over the issues. However, the issues are far from clear with respect to non-opt out, or mandatory class actions.

In Shutts, the Supreme Court expressly limited its holding to “class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments” and reserved with respect to “other types of class actions, such as those seeking equitable relief.” Supra at 812, n.3.

In the wake of Phillips v. Shutts, a number of federal and state courts determined that its holdings on due process were limited to Rule 23(b)(3) opt-out classes and that the certification of nationwide “mandatory” classes under 23(b)(1) or 23(b)(2) was

consonant with due process. See Nottingham Partners v. Dana, 564 A.2d 1089, 1097-1101 (Del. 1989); In re Jackson Lockdown/MCO Cases, 107 F.R.D. 703, 713-714 (E.D. Mich. 1985); discussion in Bell v. American Title Ins. Co., 226 Cal. App. 3d 1589, 277 Cal. Rptr. 583, 594-596 (Cal. App. 1 Dist. 1991). The Supreme Court itself has not had occasion to address these issues further since that decision. However, recently in Ortiz v. Fiberboard Corp., \_\_\_ U.S. \_\_\_, 119 S.Ct. 2295 (1999), the court suggested that it considers the issue to be an open one in a footnote in which the court pointedly expressed no opinion regarding whether notice of the mandatory class certification in that case was required. Supra, at n.19. Hence, whether a state court may, consistent with federal due process, certify a nationwide or multistate mandatory class, whether for monetary or equitable relief, and if so, under what circumstances, remain open questions.

### **III. DIVERSITY JURISDICTION AND AGGREGATION OF MONETARY CLAIMS — GETTING INTO FEDERAL COURT**

28 U.S.C. § 1332 permits a federal court to exercise jurisdiction over cases involving diverse parties where the amount in controversy exceeds \$75,000. In the context of a class action, a critical issue is whether, and to what extent, claims of multiple plaintiffs particularly those for attorneys' fees and punitive damages, may be aggregated to satisfy the amount in controversy requirements of 28 U.S.C. § 1332. The traditional rule stated by the Supreme Court in Zahn v. International Paper Co., 414 U.S. 291 (1978), is that the separate and distinct claims of class members may not be aggregated to satisfy the amount in controversy requirement of the statute, though courts may aggregate the claims of putative class plaintiffs where such claims involve an interest in a single title or right which is common and undivided. With regard to plaintiffs' claims for attorneys' fees and punitive damages, courts nearly always follow the dichotomy utilized in Zahn, yet they often reach seemingly contradictory results.

Although there are conflicting decisions among the courts addressing these issues, a review of the key decisions suggests the following general guidelines apply:

(1) attorneys' fees may not be aggregated except in jurisdictions where there is a state statute that directs an award of attorneys' fees to the prevailing plaintiff and allocates those fees to the representatives of the putative class; and (2) punitive damages may not be aggregated except in jurisdictions where under applicable state law demonstrates such damages are fundamentally collective.

Finally, a related, though slightly different issue arises in those instances where a federal court aggregates claims of the class, and the result of such aggregation is that one or more of the class member's claims exceed the jurisdictional amount. Some courts have held

in such cases that a federal court may, pursuant to 18 U.S.C. § 1667, exercise supplemental jurisdiction over the claims of all putative class members, even those whose individual claims do not exceed the jurisdictional minimum, and thereby obtain jurisdiction of the entire case.

**A. Jurisdictional Requirements.**

Where federal court jurisdiction of a class action is based on diversity of the parties, the requirements of 28 U.S.C. § 1332 must be met. Section 1332(a) provides that “the district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different states.” 28 U.S.C. § 1332 (1999). The case must involve citizens who are diverse. In a class action, of course, there is diversity of citizenship if each named plaintiff is of diverse citizenship as to each defendant. Snyder v. Harris, 394 U.S. 332, 340 (1969).

The rules concerning proof of the amount in controversy are well established. Where there is a dispute concerning the sufficiency of the amount in controversy, the party asserting federal jurisdiction bears the burden of proof. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936); Gilman v. BHC Securities, Inc., 104 F.3d 1418, 1421 (2nd Cir. 1997). The amount in controversy is determined as of the time of filing, and for purposes of calculating the amount in controversy, “the sum claimed by the plaintiff controls if the claim is apparently made in good faith.” St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288 (1938); Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 353 (1961). However, “if from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed,” dismissal may be justified. St. Paul Mercury Indem., 303 U.S. at 289.

**B. General Rule: Aggregation of Class Claims.**

The traditional rule against aggregation of class claims is set forth in the Supreme Court’s decisions in Zahn v. International Paper Co., *supra*, and Snyder v. Harris, 394 U.S. 332, 338 (1969). The rule proscribing aggregation developed from the Court’s long-standing interpretation of the language in Section 1332 regarding “matter in controversy.” Snyder v. Harris, 394 U.S. at 336-37 (“The doctrine that separate and distinct claims could never be aggregated . . . is based . . . upon this Court’s interpretation of the statutory phrase ‘matter in controversy.’” Zahn, 414 U.S. at 299. In Zahn, the Court noted the “classic statement of the dichotomy that developed in construing and applying” Section 1332:

When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and individual interest, it is enough if their interests collectively equal the jurisdictional amount.

Zahn, 414 U.S. at 294 [citation omitted]; Snyder, 394 U.S. at 335.

The rule against aggregation “plainly mandates not only that there may be no aggregation and that the entire case must be dismissed where none of the plaintiffs claims more than \$10,000 [currently \$75,000] but also requires that any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims.” Zahn, 414 U.S. at 300. Therefore, where federal jurisdiction over a class action is based on diversity of the parties, and the plaintiffs allege “separate and distinct” claims, the general rule is that the amount in controversy requirement cannot be satisfied by aggregation of the claims of putative class members. Zahn, 414 U.S. at 294-300; Snyder, 394 U.S. at 338.

**C. Aggregation of Attorneys Fees.**

With regard to attorneys' fees, courts are split on whether a potential attorney fee award may be aggregated for purposes of satisfying the amount in controversy requirements for diversity jurisdiction in a class action. As a general matter, in an individual action attorneys' fees are not used to calculate the amount in controversy because the successful party typically does not collect attorneys' fees from the opponent in addition to, or as part of, the judgment. 15 James Wm. Moore, et al., Moore's Federal Practice, §102.106[6][a] (3d ed. 1999). However, a court may consider attorneys' fees as part of the amount in controversy where the recovery of fees are provided for in a state statute or contract, so long as the amount of attorneys' fees is reasonable. Goldberg v. CPC Int'l Inc., 678 F.2d 1365, 1367 (9th Cir. 1982) cert. denied 459 U.S. 945 (1982); In Re: Abbott Laboratories, 51 F.3d 524, 525 (5th Cir. 1995), reh'g denied en banc, 65 F.3d 33 (1995); Traponotto v. Aetna Life Insurance Co. Inc., 1996 U.S. Dist. LEXIS 10458 at 28 (S.D. N.Y. 1996).

Most courts hold that a potential recovery of attorney fees on behalf of a class may not be aggregated and, instead, the amount of any potential attorney fee award must be allocated pro rata among class members. Goldberg, 678 F.2d at 1366.<sup>1/</sup> In Goldberg, the

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<sup>1/</sup>Many district court decisions have followed Goldberg and refused to aggregate attorneys fees. See, e.g., Kline v. Avis Rent A Car System, Inc., 1999 U.S. Dist. LEXIS 14683 at \*7 (S.D. Ala. 1999); Greenburg v. Trace Int'l Holdings, Inc., 1999 U.S. Dist. Lexis 11985 at \*8 (S.D. N.Y. 1999) (refusing to aggregate potential recovery of attorney fees allowed by statute because of inability to predict plaintiffs likelihood of prevailing or the amount of fees to which they might be entitled); McNamara v. Phillip Morris Co., 1999 U.S. Dist. LEXIS 10855 at \*7 (E.D. Pa. 1999); Colson v. Rent-A-Center Inc., 13 F.Supp.2d 553, 560 (S.D.N.Y. 1998); Copeland v. MBNA Am., N. A., 820 F. Supp. 537, 541-42 (D. Colo. 1993); Mayo v. Key Fin. Servs. Inc., 812 F. Supp. 277, 278 n.3 (D. Mass. 1993); Czechowski v. Tandy Corp., 731 F. Supp. 406, 410 (N.D. Cal. 1990); National Org. for Women v. Mutual of Omaha Ins. Co., 612 F. Supp. 100, 109 (continued...)

defendant removed a class action case from state court to federal court based on diversity of citizenship and argued that the case satisfied the amount in controversy requirement “despite the small individual claims of class members” because “plaintiffs’ potential attorneys fees would exceed the jurisdictional amount.” Id. Specifically, defendant argued that “the potential attorneys’ fees should be attributed to the named plaintiffs only, rather than pro rata to each class member, or, in the alternative, that the potential fees should be attributed to the class as a whole and treated as a common fund.” Id. On appeal, the Ninth Circuit Court of Appeals rejected these arguments, holding that a potential award of attorney fees could not be aggregated as a common fund, nor could they be attributed solely to the named plaintiffs. The court explained that acceptance of either of defendant’s theories of aggregated attorneys’ fees “would conflict with the policy of Zahn . . . in which the Supreme Court reaffirmed that the ‘matter in controversy’ requirement must be satisfied by each member of the plaintiff class.” Id. at 1367.

Similarly, the Eleventh Circuit in Davis v. Carl Cannon Chev. Inc., 182 F.3d 792, 796-97 (11th Cir. 1999), refused to aggregate a potential award of attorney fees measured as a percentage of the common fund of damages sought by the putative class which Alabama state law authorized plaintiffs to seek, on equitable grounds. Id. at 797. In Davis, the court considered the “narrow question” of “whether a fee to be deducted from a common fund may, if it exceeds \$75,000, satisfy the amount in controversy requirement.” Id. at 795. Acknowledging that Zahn permitted aggregation of claims only if the “plaintiffs [have] united to enforce a single title or right in which they have a common and undivided interest,” the

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<sup>1/</sup>(...continued)  
(D.D.C. 1985).

court examined the potential common fund attorneys' fees "in the two ways it [could] be reasonably characterized." First, the court considered the attorneys' fees (which would be a percentage of the class common fund pursuant to Alabama law) as "a component of compensatory damages." Id. Viewing the attorneys' fees as part of the compensatory damage award, the court explained that "the attorneys' fee must be treated as 'transparent,' and its treatment for jurisdiction for diversity-jurisdiction purposes must be identical to that of damages." Id. at 796. Accordingly, the court concluded that where "the damages claimed are purely compensatory, the attorneys' fees are no more aggregable than the compensatory damages would be." Id. Because the underlying compensatory damages in Davis could not be aggregated without violating Zahn, the common fund attorneys' fees could not be aggregated either. Alternatively, viewing the attorneys' fees "as a lump sum collectively benefitting the plaintiff class," the court concluded, "the common fund fee does not represent a 'right' of the plaintiffs. . . [because] the fees directly compensate the lawyers who have acted independently as 'private attorneys general.'" Id. at 797.

The Fifth Circuit has taken a very different view of attorneys' fees than that set forth in the Goldberg and Davis decisions, holding that aggregation of attorneys fees to determine the amount in controversy is appropriate where there is a specific state statute that creates a fund and allocates attorneys fees to the named class representatives. In In re Abbott Laboratories, 51 F.3d 524, 525 (5th Cir. 1995), reh'g denied en banc, 65 F.3d 33 (1995), a class action case initially filed in Louisiana state court in which the plaintiffs alleged violations of Louisiana's antitrust statutes, the court held that attorney fees should be aggregated and attributed to the class representatives when determining whether the plaintiffs satisfied the requisite amount in controversy. Id. at 527. Expressly relying on two "key"

attorney fees provisions – Article 595 of the Louisiana Code of Civil Procedure, which provides that a court “may allow the representative parties” an award attorney fees in a class action case, and Section 51:137 of the Louisiana Revised Statutes, which provides a court “shall” award attorney fees in an action under Louisiana antitrust laws – the court found that “under Louisiana law the class representatives were entitled to fees,” and therefore that the individual claims of the named class representatives satisfied amount in controversy requirement. Id.

Subsequent decisions have construed Abbott to permit aggregation of attorney fees where there is a state statute which mandates an award of attorneys’ fee to class representatives. See, e.g., Johnson v. Cytec Industries, U.S. Dist. LEXIS 4897 (E.D. La. 1999). The treatment of Abbott in federal courts located in Louisiana, where the courts have repeatedly interpreted the decision, is instructive. These courts, focusing on the fact that Abbott deemed the attorney fee provision at issue “key” to its decision, have limited application of Abbott to cases where there is a state statute that contains a mandatory award of attorney fees. See, Johnson, U.S. Dist. LEXIS 4879 at \*7 (distinguishing Abbott because statutory attorney fee provisions at issue did not “mandate the award of fees”); Harrison v. Union Carbide Corp., 1995 U.S. Dist. LEXIS 13907 at \*3 (E.D.La.1995) (refusing to aggregate attorneys’ fees because plaintiffs filed under Louisiana’s negligence law which does not provide for an award of attorneys’ fees); Cappel v. Quick & Reilly, Inc., 1996 U.S. Dist. LEXIS at \*3 (E.D.La.1996) (holding that absent a statute that compels the award of attorney’s fees over and above the amount of damages awarded to plaintiffs, attorney’s fees should not be used in the calculation of amount in controversy); Thomas v. Fidelity Brokerage Services, Inc., 977 F. Supp. 791, 794 (W.D. La. 1997) (concluding that because Louisiana has no

provision for recovery of attorney fees where a party prevails on a claim alleging breach of fiduciary duty, attorney fees for such a claim may not be considered when determining whether the amount in controversy requirement is met). Where the statute permitting recovery of attorneys' fees is discretionary, courts have held that Abbott is distinguishable. See, e.g., Traponatto v. Aetna Life Ins. Co., U.S. Dist. LEXIS 10458 at 25 (S.D.N.Y. 1996).

Accordingly, where aggregation of attorney fees is a possibility, it is important to ascertain the basis of the award of attorneys' fees under applicable state law, particularly whether any recovery of attorneys' fees is mandatory, whether it is allocated to the class representatives or whether it is allocated as part of a common fund of damages. See, e.g., McNamara v. Philip Morris Co., Inc., U.S. Dist. LEXIS 10855 (E.D. Pa. 1999) ("Because Pennsylvania law does not allocate attorneys' fees to class representatives, the [Abbott] case is neither controlling nor persuasive.").

**D. Aggregation of Punitive Damages.**

Courts have split on whether punitive damages may be aggregated to determine whether amount in controversy requirements are satisfied. The analysis concerning the aggregation of punitive damages is somewhat analogous to the analysis of attorney fees described above. In other words, while some courts do not allow aggregation of a potential punitive damages award, other courts may allow aggregation of such an award, although the result in each instance will depend upon the characterization of punitive damages under applicable state law.

The Second Circuit has refused to aggregate damages where the underlying cause of action asserted on behalf of the putative class does not involve a single title or right in which class members hold a common, undivided interest. In Gilman v. BHC Securities,

Inc., 104 F.3d 1418, 1431 (2nd Cir. 1997), the defendant removed a state class action case to federal court, arguing that jurisdiction existed because of diversity of the parties and because the amount in controversy requirement was satisfied as the defendant believed the plaintiffs would seek punitive damages and that such damages, when aggregated, satisfied the amount in controversy requirement. Defendant argued that punitive damages are “by their nature” collective, and recovery of punitive damages results in a common fund in which the class shares an interest. Rejecting Defendant’s argument, the court focused on the underlying claims – the basis on which damages are sought and observed that “the putative class members may indeed share an interest in receiving damages, but that has nothing to do with whether – prior to litigation – they jointly held a single title or right in which each possessed a common interest.” Id. at 1429.

Like Gilman, other courts have concluded that punitive damages may not be aggregated to satisfy the amount in controversy requirement. In Ard v. Transcontinental Gas Pipe Line Corp., 138 F.3d 596 (5th Cir. 1998), hundreds of plaintiffs filed suit against the defendant in Louisiana state court and sought compensatory and punitive damages. The defendant removed the case to federal court, arguing that the plaintiffs’ punitive damages could be aggregated to satisfy the amount in controversy requirement. The district court denied plaintiffs’ motion for remand, and the plaintiffs appealed.

The Fifth Circuit reversed, but had to reconcile two previous opinions out of the Fifth Circuit reaching opposite results concerning aggregation of punitive damages. The first decision, Lindsey v. Alabama Telephone Co., 576 F.2d 593 (5th Cir. 1978), acknowledged the Supreme Court’s ruling in Snyder prohibiting aggregation of separate and distinct claims, and concluded that the defendant had failed to demonstrate “each plaintiff”

would satisfy the jurisdictional amount assuming the plaintiff class recovered punitive damages. The second decision, Allen v. R&H Oil & Gas Co., 63 F.3d 1326 (5th Cir. 1995), held that the nature of punitive damages under Mississippi state law required that the punitive damage claim should be aggregated and the entire amount allocated to each plaintiff to determine the jurisdictional amount.

The Ard court reconciled these opinions by reading the Lindsey decision to support the general rule that “ordinarily the punitive damage claims of multiple plaintiffs may not be aggregated for purposes of determining jurisdictional amount.” Ard, 138 F.3d at 602. On the other hand, the court read the Allen case as an exception to Lindsey based on “the peculiar nature of Mississippi law.” Id. The court concluded that “[i]t is unclear to us what Mississippi law regarding punitive damages drove the Allen panel to depart from Lindsey’s rule, but we find no principle in Louisiana law regarding the nature of punitive damages that permits us to depart from Lindsey. We therefore hold that in this case, the punitive damage claims of multiple plaintiffs should not be aggregated. . . .” Id. See also In Re: Core States Trust. Fee, 39 F.3d 61 (3d Cir. 1994) (finding that plaintiff could not aggregate punitive damages because state law did not allow recovery of such damages on plaintiffs’ claims).

Relying on the Allen decision, the Eleventh Circuit has held that aggregation of punitive damages is permissible, though the court emphasized that the outcome of the case depended specifically on the characterization of punitive damages under the applicable state law. See Tapscott v. MS Dealer Service Corp., 77 F.3d 1353, 1359 (11th Cir. 1996). In Tapscott, the defendant removed a state class action to federal court arguing that the plaintiffs’ claim for punitive damages, if aggregated, exceeded the amount in controversy requirement. Following the Allen court’s analysis, the Eleventh Circuit analyzed the nature of punitive

damages under Alabama law and concluded that “[t]he punitive damages sought in this case are a single collective right in which the putative class has a common and undivided interest; the failure of one plaintiff’s claim will increase the share of successful plaintiffs.” Id. at 1359. However, while holding that punitive damages could be aggregated based on the facts before it, the court cautioned that “our holding in this case is not to be taken to establish a bright line rule that any class action claim for punitive damages may be aggregated to meet the amount in controversy requirement. While the facts of this case result in an aggregation of punitive damages, other factual situations may dictate that punitive damages are non-aggregable.” Id. See Allen v. R.H. Oil and Gas Co., 63 F.3d 1326 (5th Cir. 1995) (allowing aggregation of punitive damages based on the peculiar nature of punitive damages under Mississippi law).

Following the analyses utilized in Tapscott and Allen, district courts in the Fifth and Eleventh Circuits, in many instances scrutinize applicable state law relating to the claims for punitive damages at issue and have allowed aggregation for purposes of satisfying the jurisdictional amount. See Cohen v. Office Depot, 184 F.3d 1292, 1296 (11th Cir. 1999) (analyzing Florida law); Turpeau v. Fidelity Financial Services, 936 F. Supp. 975, 979 (N.D. Ga. 1996), aff’d, 112 F.3d 1173 (11th Cir. 1997) (analyzing Georgia law); In re Norplant Contraceptive Prods., 907 F. Supp. 244, 246 (E.D. Tex. 1995) (analyzing Texas law); Gilmer v. Walt Disney Co., 915 F. Supp. 1001, 1013-14 (W.D. Ark. 1996) (analyzing Arkansas law); Brooks v. Georgia Gulf Corp., 924 F. Supp. 739, 741 (M.D. La. 1996) (analyzing Louisiana law); but see Harrison v. Union Carbide Corp., 1995 U.S. Dist. LEXIS 18608 (E.D. Pa. 1995) (distinguishing Allen and concluding that Louisiana law does not justify aggregation of punitive damages).

**E. Supplemental Jurisdiction Pursuant to 28 U.S.C. § 1367.**

Several recent decisions have held that where the claim of one member of a putative class action case exceeds the jurisdictional amount in controversy requirement, a federal court may, pursuant to 28 U.S.C. § 1367, assert supplemental jurisdiction over all other putative class members even if the claims of the other class members do not satisfy the jurisdictional amount under Section 1332. In re Brand Name Prescription Drugs, 123 F.3d 599, 607 (7th Cir. 1997); In re Abbott Laboratories, 51 F.3d 524, 527-529 (5th Cir. 1995); Stromberg Metal Works, Inc. v. Press Mechanical Inc., 77 F.3d 928, 930-33 (7th Cir. 1996). These decisions conclude that Section 1367, which was enacted by Congress in 1990 as the Judicial Improvements Act of 1990, effectively overruled the Zahn rule against aggregation of separate and distinct claims.

The leading decision holding that Section 1367 overrules Zahn and allows a court to exercise supplemental jurisdiction over class members whose claims do not satisfy the jurisdictional amount, is the Fifth Circuit's decision in Abbott, discussed above in connection with aggregation of attorneys' fees. In Abbott, the court held that a court may aggregate attorneys' fees in a class action filed under Louisiana law because under state law the "class representatives were entitled to attorneys' fees." Abbott, 51 F.3d at 527. Once the court in Abbott determined that the potential award of attorneys could be aggregated and allocated solely among the class representatives, the court found that the claims of the class representatives satisfied the amount in controversy requirement of Section 1332 and that the court could exercise jurisdiction over the named class representatives.

With regard to the remaining members of the proposed class whose claims did not satisfy the jurisdictional minimum, the Abbott court concluded that pursuant to Section

1367 the court could exercise supplemental jurisdiction over other members of the class regardless of whether each individual's claim satisfied the amount in controversy requirement of Section 1332. The court based its conclusion on the plain language of Section 1367. Section 1367(a)<sup>2/</sup> extends supplemental jurisdiction to the limits of Article III of the Constitution, subject only to the limitations of Section 1367(b). Section 1367(b)<sup>3/</sup> precludes the exercise of supplemental jurisdiction in diversity cases when joinder is accomplished pursuant to Rules of Federal Procedure 14 (third-party practice), 19 (mandatory joinder), 20 (permissive joinder) or 24 (intervention), but does not specify Rule 23 (class action). Reviewing the language of Section 1367, the Abbott court concluded that the statute was “clear and unambiguous,” and therefore refused to review the legislative history for congressional intent. Abbott, 51 F.3d at 528. Instead, the court reasoned that “[t]he statute’s first section vests federal courts with the power to hear supplemental claims generally, subject to limited exceptions set forth in the statute’s second section. Class actions are not among the enumerated exceptions. Omitting the class action from the exception may have been a clerical error. But the statute is the sole repository of congressional intent where the statute is clear and does not demand an absurd result.” Abbott, 51 F.3d at 528-29. The court concluded that

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<sup>2/</sup>Section 1367(a) provides as follows: “[I]n any civil action of which the courts have original jurisdiction, the courts shall have supplemental jurisdiction over all other claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.” 28 U.S.C. 1367(a).

<sup>3/</sup>Section 1367(b) reads as follows: "In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

because Section 1367 is clear and does not produce an absurd result “a district court can exercise supplemental jurisdiction over members of a class, although they did not meet the amount-in-controversy requirement, as did the class representatives.”<sup>4/</sup> Id.

Subsequent decisions have refused to follow Abbott. See Leonhardt v. Western Sugar Co., 160 F.3d 631, 639 (10th Cir. 1998); Meritcare Inc. v. St. Paul Mercury Ins., 166 F.3d 214 (3d Cir. 1999).<sup>5/</sup> In Leonhardt, plaintiffs filed a class action in federal court alleging a federal cause of action and various state law claims. After the court dismissed the federal claim, plaintiffs argued that federal jurisdiction existed based on diversity of the parties because one of the class members satisfied the jurisdictional amount, the court could exercise supplemental jurisdiction pursuant to Section 1367 over the claims of other putative class members whose claims did not exceed the jurisdictional minimum. Leonhardt, 160 F.3d at 632. The district court rejected plaintiffs’ argument, and the Tenth Circuit affirmed.

In Leonhardt, the court relied on two main arguments to conclude that Section 1367 did not allow a court to exercise supplemental jurisdiction over claims of class members who did not satisfy the amount in controversy. First, like the court in Abbott, the Tenth Circuit looked to the plain language of Section 1367; however, in contrast to Abbott, the court

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<sup>4/</sup>The Seventh Circuit has adopted the reasoning of Abbott. See In re Brand Name Prescription Drugs, 123 F.3d 599, 607 (7th Cir. 1997); Stromberg Metal Works v. Press Mechanical, Inc., 77 F.3d 928, 930 (7th Cir. 1996).

<sup>5/</sup>Numerous district courts have criticized the Abbott decision, principally on the ground that the Fifth Circuit made an erroneous determination that the statute was clear and unambiguous on its face and that it was therefore unnecessary to consider the legislative history. Daniels v. Phillip Morris Co. Inc., 18 F. Supp. 2d 1110, 1113 (S.D. Ca. 1998) (noting legislative history “supports construction of Section 1367 which is consistent with the survival of Zahn”); Borgeson v. Archer Daniels Midland Co., 909 F. Supp. 709, 716 (C.D. Ca. 1995); Allendale Mutual Ins. Co. v. Excess Ins. Co., 62 F. Supp. 2d 1116 (S.D. N.Y. 1999); Colon v. Rent A Car Center Inc., 13 F. Supp. 2d 553, 562 (S.D.N.Y. 1998).

in Leonhardt reached precisely the opposite result, noting that “a literal and textually faithful reading of § 1367(a) leads to the opposite conclusion from that of the Fifth and Seventh Circuits.” Id. at 640. According to the Court in Leonhardt, the Abbott court erred by focusing its analysis on the wrong issue:

In determining that nothing in the language of Section 1367 limited the broad grant of authority conferred by Section 1367(a) so as to preserve the historical aggregation rules for class actions under Section 1332, the Fifth and Seventh Circuits focused only on the absence of Rule 23 from exceptions enumerated in Section 1367(b). [citation omitted]. Those exceptions, however, concern only the exercise of supplemental jurisdiction over claims against defendants who are made parties to a diversity action under certain rules and claims by plaintiffs who seek to be added to an on-going diversity action. . . . We are concerned however, with whether Congress intended to change the rules about when a plaintiff can bring an initial diversity-based class action under Rule 23, where the court's original jurisdiction is based upon Section 1332. The omission of Rule 23 from Section 1367(b) has no bearing on that question.

Id. at 639. Central to the court’s conclusion in Leonhardt was the fact that “[s]ection 1367(a) specifically addresses ‘any civil action of which the district courts have original jurisdiction.’”

Id. The court explained that Section 1332 is the provision that confers original jurisdiction, and it is the “amount in controversy” language in Section 1332 that prohibits aggregation of claims as a basis for conferring diversity jurisdiction. Furthermore, the enactment of Section 1367 did not alter the language of Section 1332, nor did it alter prior judicial interpretations of Section 1332, specifically Zahn, which defined amount in controversy language. To the contrary, according to the court in Leonhardt, “Congress in § 1367(a) expressly excepted claims brought under § 1332 and its well-understood definition of matter in controversy.” Id. at 640.

The Leonhardt court also concluded that the legislative history of Section 1367 supported its holding since it demonstrates that Congress, in enacting Section 1367, did not intend to alter the traditional rules against aggregation of separate and distinct claims.

Specifically, the court noted that the House Report that accompanied the Judicial Improvements Act, and which was approved by the Senate Judiciary Committee, “expressly states that Section 1367 ‘is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to [Finley v. United States, 490 U.S. 545 (1989)].’” Id. at 640. Zahn is specifically cited as an example of the interpretation of the jurisdictional requirements of § 1332 that is not to be disturbed. Id. The court concluded that “the legislative history indicates that Congress did not intend to overrule the historical rules prohibiting aggregation of claims, including Zahn’s prohibition of such aggregation in diversity class actions.” Id.

Following the essentially the same analysis of legislative intent used in Leonhardt, the Third Circuit in Meritcare Inc. v. St. Paul Mercury Ins., 166 F.3d 214 (3d Cir. 1999), reached the same conclusion concerning Section 1367, concluding that “review of the text, legislative history, and origins of Section 1367 leads us to hold that it preserves the prohibition against aggregation outlined in Zahn . . . and thus maintains the traditional rules governing diversity of citizenship and the amount in controversy under 28 U.S.C. § 1332.” Id. at 222.

Just this week the United States Supreme Court has agreed to hear the appeal in Free v. Abbott Laboratories, 99-391, the Fifth Circuit’s decision in In re Abbott Laboratories, supra, to resolve the division among the Circuits.

#### **IV. REMOVAL CONCERNS AND STRATEGIES TO AVOID – STAYING OUT OF FEDERAL COURT**

A recent study has found that plaintiffs are far less likely to win in cases which are removed to federal court at the instance of the defendants than when the plaintiffs choose to bring their cases in federal court in the first place. See Clermont & Eisenberg, Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction, 83 Cornell L. Rev. 581 (1998). If plaintiffs' counsel, for whatever reasons, concludes that state court is the place to be, defendant's counsel is likely to want to be in federal court. The battleground over which this contest is most often fought is federal removal.

Removal has been described as the "judicial curiosity" that allows defendants to remove an action properly brought in a state court to a federal district court. Tinney v. McClain, 76 F. Supp. 694, 698 (N.D. Tex. 1948). Removal of state court cases to federal court is governed generally by 28 U.S.C. §§ 1441, et seq.:

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a). If the original jurisdiction is based upon a federal question, the case may be removed without regard to the citizenship or residency of the parties. Otherwise, the requirements for diversity jurisdiction must exist. 28 U.S.C. § 1441(b). In an effort to control forum selection, plaintiffs in class actions have employed a number of strategies.

**A. Some General Rules and Principles.**

The parties who invoke the federal court's removal jurisdiction have the burden of establishing federal jurisdiction. Emrich v. Touche-Ross & Co., 846 F.2d 1190, 1195 (9th Cir. 1998). The removal statute is strictly construed against removal jurisdiction and doubt is resolved in favor of remand. Livhart v. Santa Monica Dairy Co., 592 F.2d 1062, 1064 (9th Cir. 1979). The existence of federal jurisdiction on removal is normally determined on the face of the plaintiff's complaint. Louisville & Nashville RR. v. Mottley, 211 U.S. 149 (1909).

**B. Plaintiff's Strategies.**

**1. Filing Against a Defendant in That Defendant's Home State.**

Section 1441(b) explicitly provides, and the cases uniformly hold, that removal to federal court based upon diversity of citizenship is available only if none of the defendants is a citizen of the state in which the action is filed. Caterpillar, Inc. v. Lewis, 519 U.S. 61 (1996); Korea Exchange Bank v. Trackwise, 66 F.3d 46 (3rd Cir. 1995). This limitation applies even though the federal court would have had original subject matter jurisdiction had the suit been filed in the federal court in the first instance. Thus, one way of preventing removal is to name as a defendant a party who for diversity law purposes is a citizen of the state in which the action is filed. It does not matter that the other defendants reside elsewhere, so long as at least one of the defendants is a citizen of the forum state.

**2. Amount in Controversy.**

Federal law currently requires that the matter in controversy exceed the sum of \$75,000, exclusive of interest and costs, for federal diversity jurisdiction. 28 U.S.C. § 1332. In St. Paul's Indemnity Corp. v. Red Cab Co., 303 U.S. 283 (1938), the Supreme Court held

that a plaintiff who does not “desire to try his case in federal court . . . may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove.” St. Paul’s Indemnity Corp., *supra*, at 294.

In a number of instances, class plaintiffs seeking to remain in state court have anticipated removal by pleading damages in amounts below the jurisdictional minimum, by explicitly asserting that the claims of the class fall below the jurisdictional amount or even by proposing to stipulate on behalf of the entire class that no amount greater than the jurisdictional amount will be sought or accepted. Although generally this tactic has proved successful, it has raised a number of issues.

May a plaintiff control the forum merely by praying for damages below the jurisdictional amount? In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599 (7th Cir. 1997), a proposed state court antitrust class action of indirect purchasers was removed to the federal court. The court of appeals acknowledged that class plaintiffs had the right to plead damages below the jurisdictional limit in order to defeat removal even if actual damages were greater. However, in De Aguilar v. Boeing Co., 47 F.3d 1404 (5th Cir. 1995), plaintiffs in a multi-plaintiff action (though not a class action) arising from an air crash averred that they were seeking no recovery in excess of the jurisdictional limit of \$50,000. Reasoning that under modern practice in many states plaintiffs are not necessarily limited by damage prayers, the court held that a defendant may defeat remand by showing the amount in controversy actually exceeds the jurisdictional amount. If the defendant can make this showing, the plaintiff, to avoid federal court, must then demonstrate that, as a matter of law, it is certain that he will not be able to receive more than the damages for which he has prayed.

What burden must a defendant meet to establish the jurisdictional sufficiency of the amount in controversy for diversity purposes? Numerous different standards have been employed to assess the adequacy of defendant's showing that the jurisdictional amount is satisfied. See, for example, Sanchez v. Monumental Life Insurance Co., 102 F.3d 398 (9th Cir. 1996). These run the gamut from a "legal certainty" that the amount exceeds the limit, to a "preponderance of the evidence," to "some reasonable probability," to that it does not appear to a legal certainty that the amount falls below the jurisdictional limit. See generally 14C Wright & Miller, Federal Practice & Procedure, § 3725, nn.25-31.

A question which has received relatively little attention is whether a class representative or his counsel have authority to unilaterally limit damage claims on behalf of an entire class in order to avoid federal jurisdiction. In Hall v. ITT Financial Services, 891 F. Supp. 580 (M.D. Ala. 1994), the court questioned the adequacy of a class representative who unilaterally proposed to restrict the damages on behalf of the proposed class, but declined to reach the issue in deciding to remand the case. In Parham v. Stouffer Foods Corp., 880 F. Supp. 1018 (M.D. Ala. 1995), the court acknowledged the issue, but then failed to address it. In Corley v. Southern Bell Telephone Co., 924 F. Supp. 782 (E.D. Tex. 1996), although not explicitly so holding, the court suggested that a stipulation by a class representative to damages below the jurisdictional amount may not be binding on all potential class members.

A variant of this situation arises from different interpretations of the 1990 amendment of the supplemental jurisdiction statute. As is discussed earlier in this presentation, some circuits have held that the 1990 Amendment to 28 U.S.C. § 1367(a) implicitly overruled the Supreme Court's decision in Zahn v. International Paper Co., supra, and that it is no longer necessary for each class member to separately satisfy the jurisdictional

minimum. It is enough under this view, some defendants have argued, that any single class member meets the threshold, because a federal court may exercise supplemental jurisdiction over the claims of all other class members.

However, because those courts which have found implied repeal of Zahn still require the named plaintiff to meet the jurisdictional amount (In re Brand Name Prescription Drugs Antitrust Litig., *supra*, at 600; Tortola Restaurants v. Kimberly-Clark Corp., 987 F. Supp. 1186 (N.D. Cal. 1997); In re High Fructose Corn Syrup Antitrust Litig., 936 F. Supp. 530, 532 (C.D. Ill. 1996)), an effective technique to deal with this situation has been devised: naming as representative plaintiffs claimants whose damages in fact fall below the jurisdictional limit. Even if some of the claims of some of the absent class members exceed the jurisdictional minimum, federal courts have held that diversity jurisdiction cannot be satisfied where none of the named plaintiffs' claims exceed the required amount. See Tortola Restaurants, *supra*.

### **3. Non-Diverse Defendants.**

Another technique to deal with removal, and one not at all peculiar to class actions, is naming at least one defendant whose citizenship is common with at least one named plaintiff. In determining diversity in class actions, only the citizenship of the named class representative is considered; the citizenship of the unnamed class members is irrelevant. Snyder v. Harris, 394 U.S. 332, 340 (1969); In re Agent Orange Product Liability Litig., 818 F.2d 145, 162 (2d Cir. 1987). Hence, subject to questions of fraudulent joinder, by selecting as a class representative a class member whose citizenship coincides with at least one defendant, diversity jurisdiction is destroyed.

An additional point to be kept in mind in this regard is that under section 1446(b), an action may not be removed on the basis of diversity jurisdiction more than one year after commencement of the action. See, e.g., In re Uniroyal Goodrich Tire Co., 104 F.3d 322, 324 (11th Cir. 1997); Howell v. St. Paul Fire & Marine Ins. Co., 955 F. Supp. 660, 661-663 (M.D. La. 1997). In some circumstances, plaintiffs may take advantage of this restriction by naming a non-diverse defendant who is potentially liable, with the intention of dropping that defendant after the passage of one year.

## V. CHOICE OF LAW CONSIDERATIONS

Another major consideration determining the limits of a class action suit, and where a suit is filed – in federal or state court and in what state or jurisdiction – is choice-of-law. The choice of a correct jurisdiction for choice-of-law can sometimes make or break class certification. The issue comes up in any multi-state class action which involves state-created rights, and sometimes arises in cases under federal question jurisdiction where there is a split between various circuits.

Choice-of-law is an issue because of a pair of United States Supreme Court cases and Rule 23 itself. The first important Supreme Court case is Klaxon Co. v. Stentor Mfg. Co., 113 U.S. 847 (1941), where the United States Supreme Court rejected the idea that there was a federal choice-of-law doctrine and required that “a federal court sitting in diversity must apply forum state conflict-of-law rules in determining what law to apply.” As a result, choice-of-law rules vary state-by-state, and there is no uniform body of federal precedent. The second case is Philips Petroleum v. Shutts, 472 U.S. 747 (1985), where the United States Supreme Court reviewed the application of the law of the forum state, Kansas, to a multistate class by a Kansas court. The Supreme Court held that the forum state could apply its own laws consistent with due process when there were shown to be “true conflicts” only if the forum had a “significant contact or significant aggregation of contacts” to the claims asserted by the class members so that those connections created state interests “which made application of that forum state’s laws neither arbitrary or unfair.” Finding that the Kansas courts had incorrectly applied Kansas law to claims which were unconnected to Kansas, the Supreme Court reversed and remanded.

The further progress of the underlying case in Philips Petroleum is, however, instructive. After remand, the trial court considered the various state laws at issue and made findings of fact that none presented true conflicts, and therefore it once again applied Kansas law to all claims as there were no “true conflicts” requiring that another state’s laws be applied. The Supreme Court of Kansas again affirmed, and the case returned to the United States Supreme Court for the second time, this time styled as Sun Oil Co. v. Wortman, 486 U.S. 717 (1988). On the substantive choice-of-law issue, the Supreme Court affirmed the decision of the Kansas Supreme Court that all other states’ pertinent substantive legal rules were consistent with those of Kansas and therefore allowed application of Kansas law to all of the claims from other states.

Read together, Klaxon, Shutts and Wortman require, in a multi-state case, (1) a determination whether there is a “true conflict” in laws between any relevant jurisdictions, and if true conflicts are shown, (2) a determination of which law or laws the forum state’s choice-of-law rules require be applied; and (3) a final determination if the resulting choice-of-law decision is violative of due process.

The choice-of-law issue frequently arises in a class action under the requirement of Rule 23(b)(3) – which is mirrored in most jurisdictions’ class action rules – that common questions of law or fact must “predominate” and that a class action must be “superior” for a class to be certified. This results in the familiar arguments that – to quote the well-known case of Castano v. American Tobacco – 84 F.3d 734, 741 (5th Cir. 1995), “variations in state law may swamp any common issues and defeat predominance,” and that variations in law between jurisdictions make the case “unmanageable” and therefore class treatment is not “superior” if the choice-of-law decision requires application of multiple

states' laws. Nor, given recent decisions, can choice-of-law issues be evaded through the use of injunctive relief classes or settlement classes. Although the Supreme Court noted in Amchem that there is no "predominance" requirement in securing injunctive relief under Rule 23 (117 S. Ct. at 2250, n.19), the claimed difficulties of applying multiple states' laws may be raised as an issue of the "typicality" or "commonality" of claims. Amchem also made clear that all of the requirements of Rule 23 including superiority and predominance must be met in a settlement context. (117 S. Ct. at 2248.)

A careful consideration of choice-of-law rules of various jurisdictions is useful prior to filing suit and may dictate a choice of state or federal court or one particular jurisdiction over another. In essence, there are three questions that must be answered under a state's choice-of-law rules, and the answers to these questions will dictate the particular strategies that both defense counsel and plaintiffs' counsel can adopt.

If there are in fact no conflicts between various state laws, then choice-of-law is not an issue in the certification of a suit. One question to ask about any particular jurisdiction is if there are specific burdens or presumptions that apply. Many, if not most, states have case law which state there is a presumption that home state law applies, and that it is the burden of defendant to show relevant "true" conflicts. Defendants will usually challenge the application of these presumptions in a class action, suggesting that to apply these presumptions switches the burden of proof under Rule 23 impermissibly, and that plaintiffs must affirmatively demonstrate that there are no true "conflicts" so that the action is manageable under Rule 23. Because cases are split both as to the existence of presumptions, and if those presumptions apply into a class action context, the knowledge of the choice-of-law rules of various jurisdictions is useful at a pre-filing stage.

Regardless of the presumptions, though, many courts now require the presentation of complex multi-state analysis of variations in law. How case law in any jurisdiction or circuit has treated these analyses, and the variations in them, is very important in deciding whether to file in federal or state court, or in various possible venues. For example, in In re Rhone-Poulenc Rohrer, Chief Judge Posner, writing for the Seventh Circuit, suggested that there is no uniform law of negligence and that the slight nuances in laws mattered and could prohibit class certification. 51 F.3d 1293, 1300 (7th Cir. 1995). Other courts, most recently the Third Circuit in In re Prudential Securities Lit., 148 F.3d 208 (3d Cir. 1998), found that claimed variations in law were minor and did not raise issues preventing class certification. See also In re Diamond Shamrock Chem. Co., 725 F.2d 858, 861 (2d Cir. 1994) (upholding certification of a nationwide class by Judge Weinstein, who found any divergence in product liability rules nationwide to be “insignificant.”).

Another key determination is the rules which any single jurisdiction has adopted. The traditional choice-of-law approaches is *lex loci delicti* and *lex loci contractus*. Both require the automatic application of the law of the place where an injury occurred or a contract had been signed. These place-based doctrines, which are still operative in 15 jurisdictions in one form or another, present immediate choice-of-law issues as they appear to require the use of multiple states’ laws when a true conflict is shown. Similar problems are encountered in federal multi-district litigation proceedings where, under Ferens v. John Deere Co., 494 U.S. 516 (1990), a transferee court must apply the choice-of-law rules of the transferor court requiring the court to apply numerous states’ choice-of-law rules.

The alternative choice-of-law approaches adopted in many jurisdictions allows more room for creative lawyering on the part of plaintiff and defense attorneys. This

approach, which has been adopted in one form by the Restatement, is generally referred to as “interest analysis” and requires a court to consider the interests of the various jurisdictions which have an interest in the lawsuit, or particular sections of the lawsuit, in deciding which state’s law, or which of several states’ laws, must be applied to the class. Although defendants frequently argue that the law of 51 jurisdictions must be automatically applied in a nationwide class, such an argument in effect seeks to apply a rule of *lex loci delicti* and *lex loci contractus*, an approach which has been rejected by states which have adopted the interest analysis. See generally Kuehn v. Children’s Hosp., 119 F.3d 1296, 1301 (7th Cir. 1997) (Posner, C.J.) (noting that defendant was arguing in effect for *lex loci delicti* and that place of injury does not control in Wisconsin).

Many states add another level of complexity by requiring the court to make a choice-of-law determination as to each important issue in the case separately. This concept called *dé/peçage*, helps to identify the major issues at stake in any case but complicates the analysis.

Faced with interest analysis the approach of most defense counsel is to look for ways to argue for the application of multiple states’ laws in an effort to defeat certification. The goal is to defeat certification by arguing the case will be unmanageable. A counter tactic frequently employed by plaintiffs is to argue that a particular state’s choice-of-law rules can be applied either because there is no true conflict, or that a particular state, usually the defendant’s state of incorporation or principle place of business, has sufficient interest so that its laws can be applied to a nationwide class.

Both federal and state courts have recognized the propriety of applying a defendant’s home state’s, or state of principle place of businesses’ laws to a nationwide class.

One leading case to do so is Martin v. Heinhold Commodities, Inc., 117 Ill. 2d 67 (1987) which applied the Illinois Consumer Fraud Act to a nationwide class which had allegedly been defrauded by an Illinois-based corporation. As the Supreme Court of Illinois held:

There can be no doubt that the claims of each member of the plaintiff class implicate the legitimate interests of Illinois in applying its law to adjudicate a dispute involving a business principally situated in its jurisdiction.

Other courts have similarly applied the law of a defendant's principle place of business to conduct occurring nationwide. For example, in W.R. Grace & Co. v. Continental Cas. Co., 896 F.2d 865, 872 (5th Cir. 1990) the court recognized "the strong and overriding interest" of the state of principle place of business in misconduct occurring in that state. Similarly, in In re Benedictin Lit., 858 F.2d 290, 305 (6th Cir. 1986) the Sixth Circuit applied the law of the defendants' principle place of business to all class members.

However, application of defendants' home state laws is not the only approach under the interest analysis which can result in the application of the laws of one or several jurisdictions. Numerous cases have recognized that a careful consideration of the interest of various jurisdictions does not require those states to apply their own laws, but rather to apply the law of a jurisdiction which will allow the suit to be adjudicated and a remedy provided to injured class members. As the court in Randle v. Spectrian, 129 F.R.D. 386, 394 (D. Mass. 1988) noted the interest of any state in having "the injuries of its citizens litigated and compensated outweigh any interest in applying its own law."

A similar approach was adopted by the court in In re Pizza Time Theaters Security Litigation, 112 F.R.D. 15 (N.D. Cal. 1986) where the court analyzed the choice-of-law issues both under California choice-of-law principles and Philips Petroleum and noted that no state had articulated an interest in protecting the defendants from liability for

wrongdoing, or would insist on having its own law applied to the dispute if the result was that the class action mechanism could not be utilized and that the plaintiffs would be barred from court. As the court noted

Each jurisdiction, including California, has laws prohibiting fraud that accommodate these somewhat competing concerns. It is evident that the similarities in these laws vastly outweigh any differences. It is also apparent that each jurisdiction would rather have the injuries of its citizens litigated and compensated under another state's laws than not litigate it or compensate it at all.

112 F.R.D. at 20. The approach though is controversial and is currently before the California Supreme Court in a case testing the scope of Business & Professions Code § 17200.

Under interest analysis there are several areas where application of forum state law or one state's law is, however, less controversial. For example, the statute of limitations of the forum state is almost always applied, and according to Sun Oil Co. v. Wortman regardless of the state interests involved as application of forum statutes of limitation is historically accepted. Similarly, numerous courts have found that with regard to punitive damages the court should seek to apply one state's laws to a dispute, given the overriding interests of certain jurisdictions in preventing certain types of conduct. A good example of the choice-of-law analysis in the punitive damages context is found in In re Air Crash Near Chicago, 644 F.2d 594 (7th Cir. 1981). A final option under interest analysis is to argue that if the law of one particular jurisdiction cannot be applied to all claims, then perhaps that state's choice-of-law rules rather than requiring the application of 51 states' laws as if it were a *lex loci* jurisdiction, in fact requires the application of one or several states' laws, which presents far fewer manageability concerns.

Once it has been determined that there are in fact true conflicts of law and that the forum state will apply its law, or the law of a single jurisdiction to a nationwide class, the constitutional issues raised in Shutts as to whether the state whose law is to be applied to the nationwide dispute has sufficient contacts with the litigation so as to create state interest which allow it to apply its law must be answered. However, the analysis utilized in Philips Petroleum Co. v. Shutts is for all practical purposes nearly identical to the interest analysis used by many states and some courts simply conflate the two and treat them as one. For example, in Martin v. Heinhold Commodities, the Supreme Court of Illinois analyzed application of the Illinois Consumer Fraud Act under the Shutts test and concluded that Illinois – is the state in which the defendant was headquartered and incorporated and the state from which the conduct at issue had emanated – had sufficient contacts to apply its law to a nationwide class. Other courts have agreed with this result. See e.g. In re Kirschner Med. Corp. Sec. Litig., 139 F.R.D. 74, 84 (D. Md. 1991), Clothesrigger, Inc. v. GTE Corp., 236 Cal. Rptr. 605 (Cal. App. 1987).

Defendants frequently seek to counter cases such as Martin v. Heinhold Commodities – and the ability of courts to apply the law of the jurisdiction of the corporation’s principal place of business or incorporation to a national class – by citing to the Supreme Court’s recent decision in BMW of North America v. Gore, 517 U.S. 559 (1996).<sup>6/</sup> Citing to BMW, and several other cases decided under the dormant commerce clause,

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<sup>6/</sup>BMW was not itself a class action, but an individual claim by an Alabama resident. Punitive damages calculated by reference to the defendant’s nationwide activities were held excessive by the Supreme Court. In a class action, where the members of a nationwide class are before the court and the nationwide activities of the defendant are relevant to their claims, there is no issue of judicial overreach, as there might be in attempting to match the activities of defendant in all states with the claims and damages of a single plaintiff in one state.

defendants contend that application of one state's laws to a nationwide class interferes with the policy choices of other states and is therefore a violation of state sovereignty. The counter-argument is that the interest of a home jurisdiction is shown by its choice-of-law rules, decisions of its court, legislative statements, and contacts between the litigation, the parties, and the forum and that these interests are such that under Shutts that the choice-of-law determination does not interfere with any policy decisions of other states under BMW v. Gore to raise to the level of a constitutional violation.

Put simply – in most circumstances – if a state's choice-of-law rules involve interest analysis, and a sufficient showing has been made of the interest in the jurisdiction whose law is to be applied – the constitutional “limitation” presents no real difficulties.

The final, and last resort if a court chooses to apply the law of multiple states to a nationwide class is to show that such an application of multiple state laws is manageable. This approach is perhaps best exemplified by the opinion of Judge Arthur Spiegel in In re Teletronics Prod. Liab. Litig., 172 F.R.D. 271 (S.D. Ohio 1997). Teletronics was an MDL case where the court arguably had to apply multiple states' laws. As a result, the plaintiffs' attorneys presented the court with comprehensive surveys categorizing the various “true” conflicts-in-laws, and then developed a trial plan which explained how the various subclasses created to reflect variations in law could be presented to a jury at trial. This however is not an easy course, and one which helps to explain why choice-of-law issues are best considered in the pre-filing phase.

## VI. ARBITRATION OF CLASS CLAIMS

The propriety of classwide arbitration has recently been vigorously litigated and can be expected to continue to be debated in courts across the country. The trend has been for providers of goods and services to include in their standardized, non-negotiable contracts with consumers, and other parties to their contracts, mandatory arbitration provisions. Hence, the courts have increasingly been called upon to determine whether the existence of these arbitration provisions can effectively prohibit plaintiffs from resolving their common claims in a single comprehensive proceeding, or whether the same issue must be repeatedly arbitrated in separate proceedings before different tribunals, potentially resulting in duplication of effort, inconsistent and unpredictable decisions and the distinct possibility that the plaintiffs' claims will never be asserted. Because the damages of class members are typically small in relation to the costs of individual arbitration, class members may be unable or unlikely to assert their claims against defendants with vastly superior resources.

Generally, in both state and federal courts, arbitration agreements, like other contracts, will be enforced according to their terms. However, where the written agreement fails to specify the law or rules under which the arbitration is to be conducted *and* the contract relates to a transaction involving interstate commerce, the Federal Arbitration Act, 9 U.S.C. § 2 (the "FAA"), governs the agreement to arbitrate. See 9 U.S.C. § 2; Volt Info. Sciences v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U. S. 468, 477-79 (1989). If, on the other hand, the agreement to arbitrate specifies that state law or that other rules, for example, the Commercial Rules of Arbitration of the American Arbitration Association, are to govern the conduct of the arbitration, the FAA mandates that the arbitration shall be governed under the rules or law so specified, irrespective of whether the contract involves interstate commerce.

9 U.S.C. § 4 (party to an arbitration may “petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.”); Volt at 477-78. The FAA was “. . . designed ‘to overrule the judiciary’s long-standing refusal to enforce agreements to arbitrate’” according to their terms, but does not preempt the application of other law or rules when the agreement to arbitrate so provides. Volt at 474, 477-78 (citing Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-220).

Neither the Supreme Court nor most federal appellate courts have yet precisely determined whether there is a right to classwide arbitration under agreements governed by the FAA. The Seventh Circuit and most federal trial courts, however, have concluded that there is no right to classwide arbitration under the FAA unless the agreement to arbitrate specifically provides for it. See, e.g., Champ v. Siegel Trading Co., Inc., 55 F.3d 269, 275 (7th Cir. 1995) (absent a provision in the parties’ arbitration agreement providing for class treatment of disputes, a district court has no authority to certify class arbitration); Randolph v. Green Tree Financial Corp., 991 F. Supp. 1410, 1424 (M.D. Ala. 1998)<sup>2/</sup>; McCarthy v. Providential Corp., 1994 U.S. Dist. LEXIS 10122 at \*23 (N.D. Cal 1994), cert. denied, 119 S. Ct. 275 (1998) (concluding that court cannot compel class arbitration under the FAA where the agreement does not specifically provide for it); Gammaro v. Thorp Consumer Discount Co., 828 F. Supp. 673, 674 (D. Minn. 1993) (the court “. . . is without power to order this matter to proceed to arbitration as a class action” because it was constrained by the four corners of the parties’

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<sup>2/</sup>While the court in Randolph found that classwide arbitration was not permitted because the parties’ agreement did not provide for it, the court was careful to note that it did not lack the authority to order it in appropriate cases. See also Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A., 527 F. 2d 966, 975 (2nd Cir. 1975), cert. denied, 426 U.S. 936 (1976) (holding that a district court could order consolidated arbitration pursuant to Federal Rules of Civil Procedure 42(a) and 81(a)(3)).

agreement.<sup>8/</sup> Similarly, several federal circuits, namely the Second, Fifth, Sixth, Eighth, Ninth and Eleventh, have concluded that consolidation of arbitration proceedings is permitted under the FAA only if the arbitration agreement at issue provides for it. See Government of United Kingdom v. Boeing Co., 998 F.2d 68, 73-74 (2nd Cir. 1993); American Centennial Ins. v. National Casualty Co., 951 F.2d 107 (6th Cir. 1991); Baesler v. Continental Grain Co., 900 F.2d 1193, 1195 (8th Cir. 1990); Protective Life Ins. Corp. v. Lincoln Nat'l. Life Ins. Corp., 873 F.2d 281, 282 (11th Cir. 1989) (*per curiam*); Del E. Webb Const. v. Richardson Hospital Authority, 823 F.2d 145, 150 (5th Cir. 1987); Weyerhaeuser Co. v. Western Seas Shipping Co., 743 F.2d 635, 637 (9th Cir. 1984).<sup>9/</sup>

Under state law the propriety of classwide arbitration has been litigated with less frequency, except in California. Only Pennsylvania and California courts have expressly decided that classwide arbitration is permitted under state law, notwithstanding that the arbitration agreement does not specifically provide for it. See Dickler v. Shearson Lehman Hutton, Inc., 408 Pa. Super. 286, 596 A.2d 860 (Pa. 1991); Keating v. Superior Court, 31 Cal. 3d 584 (1982). At least one state court has held that class allegations must *give way* to arbitration provisions in the parties' agreement, however, the court in that case was not presented with, and did not address, the propriety of classwide arbitration as a possible alternative. See Harris v. Shearson Hayden Stone, Inc., 82 A.D.2d 87, 95, 441 N.Y.S. 2d 70, 76 (N.Y. Sup. Ct. 1981).

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<sup>8/</sup>See also Med Center Cars, Inc. v. Smith, 727 So.2d 9 (Ala. 1998) (concluding that the arbitration agreement at issue was governed by the FAA and that there was no right to classwide arbitration thereunder).

<sup>9/</sup> But see In re Knepp, 229 B. R. 821, 841-42 (N.D. Ala 1999), concluding that the fact that the arbitration provision in an adhesion contract would operate to bar classwide proceedings was one of several reasons that the agreement to arbitrate was deemed unenforceable.

California has the most well-developed jurisprudence on the issue. Under that law, claims may be arbitrated on a classwide basis in appropriate cases. See Keating v. Superior Court, 31 Cal.3d 584, 609 (1982), rev. on other grounds sub. nom. Southland Corp. v. Keating, 104 S.Ct. 882 (1984). Because parties opposing classwide arbitration have found a safe haven in the FAA, California defendants typically argue that the agreement to arbitrate is governed by the FAA in an attempt to avoid the application of California law. See, e.g., Burbank Podiatry Associates Group, APC v. Blue Cross of California, Case No. 994846, [Re-issued] Order and Statement of Decision, dated July 23, 1999.

More than a decade ago the California Supreme Court in Keating v. Superior Court, 31 Cal.3d 584 (1982), recognized the propriety of classwide arbitration in appropriate cases.<sup>10/</sup> In Keating, the defendant, a franchisor, contended that the dispute between it and the plaintiffs, franchisees, should be submitted to arbitration on an individual (i.e., franchisee by franchisee) basis pursuant to an arbitration provision included in the parties' franchise agreements. The franchisees, on the other hand, contended that if the dispute was to be submitted to arbitration it should proceed on behalf of a class of similarly-situated franchisees. Id. at 591.

Accepting the franchisees' characterization of the agreements as contracts of adhesion, that is ". . . 'a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to

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<sup>10/</sup> An appellate court in California has concluded that claims asserted under the California Consumer Legal Remedies Act, Civ. Code §§ 1750, et seq., which specifically authorizes class actions for its violation, are not subject to mandatory arbitration. The California Supreme Court has agreed to hear the issue. See Broughton v. Cigna Healthplans of California, 65 Cal App. 4th 314 (1998), rev. granted, depublished, 964 P. 2d 439, 1998 Cal. LEXIS 6380 (Cal. 1998).

the contract or reject it" (citing Graham v. Scissor-Tail, Inc., 28 Cal.3d 807, 817 (1981), quoting Neal v. State Farm Ins. Cos., 188 Cal. App. 2d 690, 694 (1961)),<sup>11/</sup> the Supreme Court observed that the contention that the arbitration should not proceed on a classwide basis required it “. . . to examine the special problems of unfair advantage which may appear in an adhesion setting when individual arbitration agreements are invoked to block an otherwise appropriate class action.” Id. at 609 (footnote omitted). The Court looked to California Code of Civil Procedure § 1281.3, which authorizes consolidation of arbitration proceedings,<sup>12/</sup> and the law of other states, and concluded that the statute permitting consolidation of arbitrations could be extended to permit classwide arbitration, observing:

[t]he members of a class subject to classwide arbitration would all be parties to an agreement with the party against whom their claim is asserted; each of those agreements would contain substantially the same arbitration provision; and if any of the members of the class were dissatisfied with the class representative, or with the choice of arbitrator, or for any other reason would prefer to arbitrate on their own, they would be free to opt out and do so. Moreover, the interests of justice that would

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<sup>11/</sup>Although adhesion contracts are not per se objectionable, they are subject to greater judicial scrutiny than other types of contracts. Arbitration agreements have frequently been challenged on the ground that they are part of a contract of adhesion, and are therefore not binding. See In re Knepp, 229 B.R. 841-42 (N.D. Ala. 1999); Madden v. Kaiser Foundation Hospital, 17 Cal. 3d 699 (1976); Spence v. Omnibus Industries, 44 Cal. App. 3d 970 (1975).

<sup>12/</sup>California Code of Civil Procedure § 1281.3, provides in pertinent part:

A party to an arbitration agreement may petition the court to consolidate separate arbitration proceedings, and the court may order consolidation of separate proceedings when: (1) Separate arbitration agreements or proceedings exist between the same parties; or one party is a party to a separate arbitration agreement or proceeding with a third party; and (2) The disputes arise from the same transactions or series of related transactions; and (3) There is common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators.

be served by ordering classwide arbitration are likely to be even more substantial in some cases than the interests that are thought to justify consolidation. It is unlikely that the state Legislature in adopting the amendment to the Arbitration Act [Code Civ. Proc. §§ 1280, et seq.,] authorizing consolidation of arbitration proceedings, intended to preclude a court from ordering classwide arbitration in an appropriate case. We conclude that a court is not without authority to do so.

Keating at 612-13. See also Izzy v. Mesquite Country Club, 186 Cal. App. 3d 1309, 1323 (1986) (the court rejected the plaintiff's argument that the contract was one of adhesion, but nonetheless held that classwide arbitration determining the rights of the parties to a sale of real property was permissible); Lewis v. Prudential Bache Securities, Inc., 179 Cal. App. 3d 935, 946 (1986) (determining that class certification of claims that the defendant fraudulently charged its customers excessive interest would not render arbitration unworkable: "The alternative to class arbitration here is to force each Prudential customer to individually arbitrate claims, most of which probably cannot justify the time and money required to prove. This case appears to offer no great difficulty in adapting arbitration to fit the class action mold, with adequate judicial supervision over the class aspects.")

The California Court of Appeal recently confirmed the propriety of classwide arbitration on similar facts, rejecting the defendant's attempt to avoid the application of Keating and its progeny. In Blue Cross of California v. Superior Court (Farquhar), 67 Cal. App. 4th 42 (1998), rev. denied, 1999 Cal. LEXIS 245 (Jan. 13, 1999) ("Farquhar"), the plaintiff insureds brought a class action against Blue Cross alleging that certain exclusions in its health plans violated California law. The plaintiffs' health plans provided that any disputes arising thereunder were to be arbitrated according to the Commercial Rules of Arbitration of the American Arbitration Association. In Farquhar, the parties stipulated that the contracts were governed by the FAA. Nonetheless, the Court of Appeal held that there was no bar to classwide

arbitration, concluding that "when the arbitration agreement between the parties is silent as to classwide arbitration and state law specifically authorizes it in appropriate cases, an order compelling classwide arbitration neither contradicts the contractual terms nor contravenes the policy behind the Federal Arbitration Act." Farquhar at 60 (emphasis added).<sup>13/</sup>

Most recently, in the health care context California trial courts have granted petitions to compel classwide arbitration, soundly rejecting attempts to avoid the application of California law. In each case, the court concluded that California law permits classwide arbitration of disputes arising between Blue Cross and physicians participating in its Prudent Buyer [Health] Plan. See Mullens v. Blue Cross of California, Case No. 997504, Order dated October 15, 1999 (attached as Exh. B); Burbank Podiatry Associates Group, APC v. Blue Cross of California, Case No. 994846, [Re-issued] Order and Statement of Decision, dated July 23, 1999; Anesthesia Care Assoc. Medical Group v. Blue Cross of California, Case No. 986677 DAG, Statement of Decision, dated July 14, 1998.

In each of these recent actions, plaintiffs, physicians participating in Blue Cross' Prudent Buyer Plan, alleged that in contravention of their agreements Blue Cross failed to pay for fees and costs the physicians incurred in providing medical services to Blue Cross insureds. The agreements provided, among other things, that they were to be governed by California law and that the arbitrations thereunder were to be conducted under California's Arbitration Act, Cal. Civ. Proc. Code §§ 1280, et seq.

The trial courts rejected Blue Cross' assertion in each action that the FAA governed the agreements and that only individual arbitration was appropriate, holding that

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<sup>13/</sup>The Farquhar court also rejected the argument advanced by Blue Cross that classwide arbitration was not permitted by the Rules of the American Arbitration Association.

California law on the issue was not preempted by the FAA and that, under California law, classwide arbitration of the contractual dispute between Blue Cross and the plaintiff physicians was permissible. In keeping with the California Supreme Court's opinion in Keating, under the California trial courts' recent orders, the arbitrators will determine the merits of the underlying dispute and the courts will retain jurisdiction to oversee class certification, class notice, and to ensure both that the rights of absent class members are protected and that the arbitrators' ruling will be applied on a classwide basis. See Exhs. B, C.

These new cases underscore the propriety in California of resolving arbitrable claims on a classwide basis. California courts have repeatedly emphasized the importance of the class action device as a method of obtaining redress for claims which would otherwise be economically unviable. See Richmond v. Dart Industries, Inc., 29 Cal.3d 462, 469 (1981). Sound public policy favors using the class action device to resolve common claims in arbitration. As one court astutely observed, "in cases in which the class action and arbitration devices would both appear to be appropriate and useful, recognition of a combined 'classwide arbitration' mechanism, if properly administered and judiciously applied, might possibly preserve the essential values of both devices." Izzy, 186 Cal. App. 3d at 1321.

There is no question that a judicially ordered classwide arbitration will entail a greater degree of judicial involvement than is normally associated with arbitration. "The court would have to make initial determinations regarding certification and notice to the class, and if classwide arbitration proceeds it may be called upon to exercise a measure of external supervision in order to safeguard the rights of absent class members to adequate representation

and in the event of dismissal or settlement.” Keating, 31 Cal. 3d at 613. <sup>14/</sup> In making the determination as to whether an action is appropriate for classwide arbitration, in California, the court will ultimately be called upon to consider the factors normally relevant to class certification, as well as the special characteristics of arbitration, including the following factors: (1) the degree of intrusion or “impact” upon an arbitration proceeding of whatever court supervision might be required; (2) availability of consolidation as an alternative means for assuring fairness; (3) whether classwide proceedings would prejudice the legitimate interests of the party which drafted the adhesion agreement; and (4) whether the party who drafted the adhesion agreement given the option of remaining in court rather than submitting to classwide arbitration, elects arbitration. Id.<sup>15/</sup>

Hence, in California and at least in the short term, the inclusion of arbitration provisions will not cut off the right to a class proceeding. See Keating at 609. And, it appears likely that the propriety of classwide arbitration will be litigated with increasing frequency. Economic realities dictate that these relatively small disputes proceed on a classwide basis, or not at all. Whether other courts will permit defendants to immunize themselves from classwide liability by including arbitration provisions in their standardized, non-negotiable contracts remains to be determined.

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<sup>14/</sup>See also Izzy at 1322 (“If the [trial] court deems the classwide arbitration practicable, it may stay its order compelling arbitration pending its determination of the class action issues, including certification of the class, provision of notice and any discovery problems involved therein. Alternatively, if the court deems it preferable, it may order arbitration and reserve jurisdiction over these matters.” (Footnote omitted.))

<sup>15/</sup>A Pennsylvania appellate court, in Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, adopted the California Supreme Court’s reasoning in Keating, holding that a properly certified class may proceed through arbitration under Pennsylvania law. See Dickler at 864-65.

## VII. TOLLING THE STATUTE OF LIMITATIONS

Publicity surrounding the filing of a class action and formal notices relating to the class action have a natural tendency to comfort members of the class that no independent action by them is required in order for their rights to be protected. One area of some controversy in this regard has to do with whether the filing of a class action tolls the statute of limitations for the members of the proposed class. This issue arises both with respect to class members who elect to exclude themselves from certified class actions and with respect to claims in which class certification is denied.

Generally, under federal law, the filing of a class action complaint tolls the statute of limitations for all defined class members. American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974). The tolling rule applies even if certification is denied and even if the case was never certifiable in the first instance. Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983); Tosti v. City of Los Angeles, 754 F.2d 1485 (9th Cir. 1985). However, the statute of limitations recommences upon denial of class certification. Id. Also, generally the tolling only protects individual class members and may not apply to subsequently filed class actions. See, e.g., Smith v. Flagsby, 36 F.E.P. Cas. (BNA) 1682 (N.D. Tex. 1985).

The class action equitable tolling doctrine enunciated in American Pipe and Crown, Cork & Seal has been uniformly applied in the federal courts in a variety of cases including antitrust, employment discrimination, race discrimination, contract (Kornsby v. Carnival Cruise Lines, 741 F.2d 1332 (11th Cir. 1984)), civil rights, and torts (Stoddard v. Ling-Temco-Bought, Inc., 513 F. Supp. 314, 332-35 (C.D. Cal. 1981)).

Most state courts that have considered the issue have likewise held that the pendency of a putative class action tolls the statute of limitations. See Staub v. Eastman Kodak

Co., 320 N.J. Super. 34; 726 A.2d 955 (1999) (cases collected at 49). However, the California Supreme Court has taken a markedly different approach, stating in dicta in a personal injury case that because personal injury mass tort class action claims rarely meet the required element of commonality, such claims may be presumptively incapable of apprising defendants of the substantive claims being brought against them and therefore preclude tolling. Id. at 1125. A handful of other courts have reached similar conclusions. See Portwood v. Ford Motor Co., 183 Ill.2d 459, 701 N.E.2d 1102 (Ill. 1998) (declining to toll a state statute of limitations on the basis of a federal class action in an action by automobile owners against manufacturers for breach of contract); Bell v. Showa Denko K.K., 899 S.W.2d 749, 757 (Tex. Ct. App. 1995) (declining to toll a state statute of limitations in an L-tryptophan case). But see, In re Norplant Contraceptive Products Liability Litig., 961 F. Supp. 163, 166-67 (E.D. Tex. 1997) (distinguishing Bell and holding that in a diversity case governed by Texas law, the Texas statute of limitations was tolled between the filing and the denial of class certification in a class action); Burton v. American Home Products Corp., 173 F.R.D. 185 (E.D. Tex. 1997) (declining to vacate the order in In re Norplant Contraceptive Products Liability Litig., supra).

Subsequent California appellate court decisions, however, have applied American Pipe tolling outside of the personal injury context. See Becker v. McMillin Construction Co., 226 Cal. App. 3d 1493 (1991) (distinguishing Jolly and applying American Pipe to property damage claims arising from construction defects where class certification was denied for lack of commonality); San Francisco Unified School District v. W.R. Grayson Co., 37 Cal. App. 4th 1318, 1336-1342 (1995) (Jolly distinguished and American Pipe followed in property damage asbestos removal case where plaintiff opted out of federally certified class

action). New Jersey has recently embraced American Pipe in a personal injury case and rejected the California Supreme Court's decision in Jolly. Staub v. Eastman Kodak Co., supra.