

Comments

DON'T MAKE A FEDERAL CASE OUT OF IT: AN ARGUMENT WHY THE CLAIMS OF PLAINTIFFS AFFECTED BY A NATIONWIDE FRAUD SHOULD NOT BE CERTIFIED AS A CLASS ACTION UNDER RULE 23(B)(3)

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This comment argues that many nationwide fraud class actions asserting state law claims should not be certified under Federal Rule of Civil Procedure 23(b)(3). The Supreme Court has made it clear that the Constitution requires the claims and defenses available to a plaintiff and a defendant to remain constant regardless of whether a plaintiff chooses to pursue her claims individually or in a class action.¹ Under the laws of thirty-five US states,² when a domiciliary is defrauded in her home state by a defendant acting in that state, that state's laws should determine the parties' rights.³ Therefore, assuming that a defendant is domiciled in one of those thirty-five states and that a given nationwide class action includes at least one plaintiff from every one of those thirty-five states who is defrauded in her home state,⁴ any court adjudicating the action would be

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1. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822 (1985) (holding that even in the context of a nationwide class action, the Kansas Supreme Court could not "abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them" (quoting Home Ins. Co. v. Dick, 281 U.S. 397, 410 (1930))).

2. This comment only examines the laws of thirty-five states because the question of which state's laws determine the rights of parties is answered by a choice of law analysis, and only thirty-five states have adopted one of the three choice of law rules that have received significant scholarly discussion and practical application.

3. Throughout this comment, plaintiffs are referred to as "her," and defendants are referred to as "him." The term "right" is used to refer to claims and defenses collectively.

4. In Section IV below, this comment suggests that these assumptions hold in two recent district court cases.

required to “apply” the laws of thirty-five different states.

Although a court could constitutionally adjudicate in such a manner it would be extremely inefficient, and would not be an option for class actions certified under Federal Rule of Civil Procedure 23(b)(3). A class action may be maintained under 23(b)(3) only if “the questions of law or fact common to class members predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”⁵ Although it is possible that common questions of fact could predominate over individual ones in a nationwide fraud, this comment suggests that multiple statewide class actions would more fairly and efficiently adjudicate the rights of parties involved in a nationwide fraud than would a nationwide class action. Thus, this comment argues that when a defendant defrauds a nationwide class of plaintiffs in their home states, the claims of those plaintiffs should not be certified as a nationwide class action under Rule 23(b)(3). If this argument is persuasive, it will suggest that two recent district court cases, certifying nationwide fraud class actions,⁶ were incorrectly decided.

The remainder of this comment proceeds in five sections. Section I explains why the rights of a plaintiff and a defendant remain constant regardless of whether a plaintiff chooses to pursue her claims individually or in a class action. Section II is divided into three subsections which discuss how parties’ rights are determined under: (A) the territorial approach; (B) interest analysis; and (C) the Second Restatement of Conflict of Laws, respectively. Section II concludes that any state that has adopted one of those three approaches to choice of law ought to determine that when a defendant defrauds a plaintiff in her home state, the laws of the plaintiff’s home state should determine her rights, as well as those of the defendant. Moreover, since the rights of a plaintiff and a defendant remain constant regardless of whether a plaintiff chooses to pursue her claims individually or in a class action, any court that determines parties’ rights using the territorial approach, interest analysis, or the Second Restatement ought to come to the following conclusion: When a defendant defrauds a class of plaintiffs in their home states, the laws of a particular plaintiff’s home state should determine her rights, and the laws of that state should also determine the rights of the defendant with regard to his actions

5. FED. R. CIV. P. 23(b)(3).

6. *See In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46 (D.N.J. 2009) (maintaining a class comprised of plaintiffs from all fifty states under Rule 23(b)(3), and using New Jersey’s law of consumer fraud to determine the rights of all plaintiffs and the defendant, a Delaware limited liability company); *Kelley v. Microsoft*, 251 F.R.D. 544 (W.D. Wash. 2008) (maintaining a nationwide consumer fraud class action under Rule 23(b)(3), and using Washington law to determine the rights of all plaintiffs and the defendant, a Washington corporation with its headquarters in Washington).

affecting that particular plaintiff.

Section III discusses how the rights available to parties under the territorial approach, interest analysis, and the Second Restatement ought to affect the Rule 23(b)(3) certification process. Section III concludes that because the rights of a plaintiff and a defendant ought to be determined by the laws of a particular plaintiff's home state even when that plaintiff aggregates her claims with the claims of others, multiple statewide class actions would more fairly and efficiently adjudicate the rights of parties involved in a nationwide fraud than would a nationwide class action. Thus, when a defendant defrauds a nationwide class of plaintiffs in their home states, those plaintiffs will not be able to meet the superiority requirement of Rule 23(b)(3).

Section IV discusses two recent district court decisions that reached the opposite conclusion. Each decision certified the claims of a nationwide class of plaintiffs who were defrauded in their home states. Section IV suggests that those decisions were erroneous because of a flawed choice of law analysis. If the courts rendering those decisions had performed a correct choice of law analysis, each court should have determined that the class of plaintiffs before it could not meet the superiority requirement of Rule 23(b)(3). Finally, Section V offers some concluding remarks.

I. THE CONSTITUTION REQUIRES THE RIGHTS OF A PLAINTIFF AND A DEFENDANT TO REMAIN CONSTANT

The Supreme Court has determined that the Constitution requires the claims and defenses available to a plaintiff and a defendant to remain constant regardless of whether a plaintiff chooses to pursue her claims individually or in a class action.⁷ The reason for the Supreme Court's pronouncement can be explained as follows. When a person is harmed, one or more laws may grant her one or more claims, and under certain circumstances she may be permitted to pursue her claims jointly with others who have similar claims.⁸ By pursuing her claim jointly with others, however, a plaintiff does not gain additional claims. Similarly, a defendant is not stripped of any defenses to a given claim simply because that claim has been joined with others. In short, the fact that plaintiffs have chosen to utilize a procedural advantage does not alter either their substantive rights or those of the defendant.⁹

7. *Phillips Petroleum Co.*, 472 U.S. at 822.

8. *See, e.g.*, FED. R. CIV. P. 20 & 23 (providing mechanisms by which plaintiffs can pursue claims jointly).

9. *See* Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 572 (1996) (making a similar argument: "We start with claims that everyone concedes would otherwise be adjudicated under different laws. We combine these claims, whether

II. THE RIGHTS OF A PLAINTIFF AND A DEFENDANT

When a plaintiff alleges that she has been defrauded, her rights and those of the defendant are delineated by state law.¹⁰ State legislatures, however, typically do not include, within a particular law, an exhaustive list of all the situations in which that law grants rights. Courts usually assume that legislatures intend for their laws to reach wholly intrastate matters, and that legislatures do not intend for their laws to reach matters that have no contacts with their state. But does a state legislature intend for a law to grant rights to one of its domiciliaries when that domiciliary is defrauded in another state? In order to answer such questions, courts have traditionally looked to choice of law rules.

Currently, thirty-five states have adopted either the territorial approach, interest analysis, or the Second Restatement as their choice of law rule for purposes of frauds.¹¹ Thus, by examining those three approaches to choice of law it can be determined whether the states that have adopted one of those three approaches would grant parties rights in a given situation.

The remainder of this Section is divided into three subsections which discuss: (A) the territorial approach; (B) interest analysis; and (C) the Second Restatement, respectively. Subsection A concludes that any state adhering to the territorial approach would determine that when a defendant defrauds a plaintiff in her home state, the laws of that state should determine the plaintiff's rights, as well as those of the defendant. Subsection B concludes that any state adhering to interest analysis and using comparative impairment as its rule of priority ought to make the same determination. Finally, Subsection C concludes that any state adhering to the Second Restatement would also determine that when a plaintiff is defrauded in her home state, that state's laws should determine her rights and those of the defendant.

through transfer and consolidation or by certifying a class, on the ground that we can adjudicate the parties' rights more effectively and efficiently in one big proceeding. So far, so good. Then, having constructed this proceeding, we are told we must change the parties' rights to facilitate the consolidated adjudication. And that makes no sense.”).

10. See Shawn S. Ledingham, Jr., Note, *Aggregate Reliance and Overcharges: Removing Hurdles to Class Certification for Victims of Mass Fraud*, 85 N.Y.U. L. REV. 289, 295 (2010) (explaining that whether a plaintiff has a fraud claim will turn on state law because “there is no national fraud law” (quoting *In re Simon II Litig.*, 211 F.R.D. 86, 141 (E.D.N.Y. 2002))).

11. Ten states adhere to the territorial approach, California uses interest analysis, and twenty-four states follow the Second Restatement. Symeon C. Symeonides, *Choice of Law in the American Courts in 2008: Twenty-Second Annual Survey*, 57 AM. J. COMP. L. 269, 279–80 (2009). Professor Symeonides' survey discusses torts generally, but a fraud is typically considered a tort. See, e.g., *Brown v. U.S.*, 105 F.3d 621, 623 (Fed. Cir. 1997) (stating that “fraud as a cause of action lies in tort”).

A. *The Territorial Approach*

States that have adopted the territorial approach as their choice of law approach for frauds use the rule of *lex loci delicti* to determine if their law grants any rights to a given set of parties.¹² Under *lex loci delicti*, the law of “the place of wrong” determines the rights of the parties.¹³ The “place of the wrong” is the place where the last act necessary to create a claim occurred.¹⁴ States that have adopted the territorial approach do not use it to select a particular law but, rather, to determine whether they have the authority to regulate the conduct at issue.¹⁵ If the last act necessary to create a claim occurs in a state that has adopted the territorial approach, then that state will view itself, and only itself, as having the legitimate ability to determine the rights of the person injured as well as the person who injured her.

A state that has adopted the territorial approach has determined that only its laws are effective within its borders. Such a state views itself as having “complete and unchallengeable authority over matters within its sphere of sovereignty . . . [such] that no [other] state may meddle” in conduct occurring within its territory.¹⁶ As a corollary, states adopting the territorial approach expressly disclaim the ability to have their laws determine the rights of parties whose conduct occurs outside of their state’s borders. In other words, “[t]he territorial principle is a rule of scope, which sets the reach of state laws equal to their geographic boundaries.”¹⁷ Therefore, the only question a state that has adopted the territorial approach needs to ask is: Where did the tort occur?

Treating that one question as dispositive, however, has led to some decisions that strike many as intuitively incorrect. One infamous example

12. Alabama, Georgia, Kansas, Maryland, New Mexico, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming currently adhere to the territorial approach in the torts context. Symeonides, *supra* note 11, at 279–80.

13. See RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 384 (1934) (applying the territorial approach and stating: “If a cause of action in tort is created at the place of wrong, a cause of action will be recognized in other states . . . [, but i]f no cause of action is created at the place of wrong, no recovery in tort can be had in any other state.”).

14. *Id.* at § 377 (“The place of the wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.”).

15. See, e.g., Jeffrey L. Rensberger, *Who Was Dick? Constitutional Limitations on State Choice of Law*, 1998 UTAH L. REV. 37, 41 (1998) (“Under the territorial approach, choice of law rules gave effect to rights that vested when a particular event occurred; the law that applied was that of the place where the event occurred because only that state had legitimate authority to deal with the matter.” (citing *Slater v. Mexican Nat’l R.R. Co.*, 194 U.S. 120, 126 (1904))).

16. LEA BRILMAYER, CONFLICT OF LAWS 22 (1995).

17. KERMIT ROOSEVELT, CONFLICT OF LAWS 5 (2009).

is *Alabama Great Southern Railroad Co. v. Carroll*.¹⁸ The plaintiff in *Carroll* was a citizen of Alabama, the defendant was an Alabama corporation, and they entered into an employment contract in Alabama where almost all of the work was to be performed.¹⁹ Moreover, the plaintiff was injured when a train car was uncoupled, and if the defendant's employees had not been negligent in Alabama by failing to properly inspect the train's couplings, the plaintiff would not have been injured.²⁰

An Alabama court, however, determined that all of those facts were irrelevant because the plaintiff was injured in Mississippi: "Up to the time this train passed out of Alabama no injury had resulted The fact which created the right to sue,—the injury,—without which confessedly no action would lie anywhere, transpired in the state of Mississippi."²¹ Thus, the *Carroll* court determined that the plaintiff could only recover, if at all, under the laws of Mississippi.²²

When *Carroll* was decided, Mississippi, Alabama, and most likely every other state adhered to the territorial approach,²³ so the court was probably correct that Mississippi law governed the rights of the parties. The problem was that Mississippi law refused to permit employees to recover from their employer for the negligence of fellow employees, while Alabama law allowed such recoveries.²⁴ Thus, the plaintiff in *Carroll* was denied a claim he would have been granted had his injury occurred in Alabama.²⁵ This result strikes many as intuitively incorrect given that the plaintiff and defendant were both from Alabama, the plaintiff contracted to work for the defendant in Alabama, and most of the work that the plaintiff performed for the defendant was performed in Alabama.

To avoid outcomes like that in *Carroll*, courts have developed several methods, referred to as "escape devices."²⁶ A comprehensive discussion of escape devices is beyond the scope of this comment. What is important to note, however, is that escape devices are inconsistent with the territorial approach. States that adhere to the territorial approach have determined

18. 11 So. 803 (Ala. 1892).

19. *Id.* at 803-04.

20. *Id.* at 804.

21. *Id.* at 806.

22. *Id.* at 804-05.

23. See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 5 (5th ed. 2006) (explaining that until the 1960's choice of law analysis in the US was based on the territorial approach).

24. *Alabama Great S. R.R. Co.*, 11 So. at 805 ("It is, however, further contended that the plaintiff, if his evidence be believed, has made out a case for the recovery sought under the employers' liability act of Alabama, it being clearly shown that there is no such or similar law of force in the state of Mississippi.")

25. *Id.*

26. See CURRIE ET AL., CONFLICT OF LAWS 39-84 (7th ed. 2006) (providing a comprehensive discussion of the various escape devices employed by courts).

that their laws only grant rights when an injury occurs in their state. Thus, if a court uses an escape device to permit the laws of a territorialist state to determine the rights of a plaintiff injured outside the state, the court is not properly applying the territorial approach. Nevertheless, escape devices can make some intuitive sense. For example, there would be something to recommend an escape device that would have permitted the *Carroll* court to decide that Alabama law could determine the rights of the parties in that case. It would make no intuitive sense, however, for a court to determine that a state adhering to the territorial approach should determine the rights of parties if the injury occurs outside that state and a majority of other factors also point outside that state. Nor would it make any intuitive sense for a court to determine that a state adhering to the territorial approach should not determine the rights of parties if the injury occurs in that state and a majority of other factors also point to that state.

The foregoing discussion, concerning the mechanics of the territorial approach and how escape devices can affect that approach, speaks to nationwide fraud class actions in four important ways. First, if a class action includes plaintiffs whose home states adhere to the territorial approach and those plaintiffs are defrauded in their respective home states, then the scope of those states' laws will reach the conduct harming their domiciliary plaintiffs. Second, if the home state of a class action defendant adheres to the territorial approach and that defendant defrauds plaintiffs in their home states, then the laws of that defendant's home state cannot properly reach the conduct causing the plaintiffs' injury. In other words, the laws of the defendant's home state cannot properly determine the rights of the plaintiffs and the defendant. Third, the laws of any other state that adheres to the territorial approach would not reach conduct by a non-domiciliary defendant that injures non-domiciliary plaintiffs in those plaintiffs' home states. Fourth, these outcomes seem correct. It would make no intuitive sense for a court to use an escape device to try to avoid them.

The first point is relatively obvious. When a fraud occurs within the borders of a state that has adopted the territorial approach, then that state views only itself as having a legitimate ability to determine the rights of the people injured, as well as the person who injured them. The second point is that if the defendant's home state adheres to the territorial approach and the defendant defrauds plaintiffs in their home states, then the laws of the defendant's home state will not reach those injuries because they will have occurred outside the borders of the defendant's home state. The third point is similar to the second point. Any state, other than the plaintiffs' home states or the defendant's home state, that adopts the territorial approach, will not reach conduct that injures the plaintiffs in their home states because those injuries will have occurred outside that state's borders. The

fourth point is that the first three points seem correct. When a defendant injures a class of plaintiffs in their home states, it makes sense that a given plaintiff's home state would determine her rights as well as the rights of the defendant vis-à-vis that particular plaintiff.

B. Interest Analysis

Although at one point all U.S. states adhered to the territorial approach and ten states continue to do so, the territorial approach does have its share of drawbacks. As shown in *Carroll*, for example, the territorial approach can lead to outcomes that appear intuitively incorrect. The reason cases like *Carroll* offend our intuitions is that the territorial approach only takes one factor—where an injury occurred—into consideration. Thus, factors such as each party's domicile do not enter the calculus at all. The territorial approach has been criticized for not considering any factor except the “place of the wrong” at least since the time of the *Carroll* decision, but it was not until Brainerd Currie developed the theory of “governmental interest analysis” in the 1960's that a comprehensive alternative to the territorial approach was proposed.²⁷

Interest analysis applies general rules of statutory interpretation, well known in the intrastate context, to the interstate context. In the intrastate context, courts first look to the text of a given statute to see if the text makes it clear that the statute was meant to reach the underlying factual scenario at issue. If the statutory language shows that the statute clearly speaks to that factual scenario, then a court merely applies the statute to that scenario.²⁸ If the text of a given statute does not provide a clear answer as to whether it is meant to reach a certain scenario, then a court will look to the underlying purposes of the statute to see if those purposes would be furthered by permitting the statute to reach the scenario at issue.²⁹

In the interstate context, courts are typically unable to look to the text

27. BRILMAYER, *supra* note 16, at 47.

28. See *Cordray v. Planned Parenthood Cincinnati Region*, 122 Ohio St. 3d 361, 2009-Ohio-2972, 911 N.E.2d 871, at ¶ 26 (determining that if the statutory text in one of Ohio's laws is unambiguous, then courts give the statute its unambiguous meaning); *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis. 2d 663, 681 N.W.2d 110 (determining that when a Wisconsin statute “yields a plain, clear statutory meaning, then there is no ambiguity, and [Wisconsin courts will apply the statute] according to this ascertainment of its meaning” (citing *Bruno v. Milwaukee Cty.*, 2003 WI 28, ¶ 20, 260 Wis. 2d 633, 660 N.W.2d 656)).

29. See *Bell Atlantic Nynex Mobile, Inc. v. Comm'r of Revenue Servs.*, 869 A.2d 611, 622 (Conn. 2005) (interpreting a statute that was ambiguous on its face in a way that furthered the legislature's purpose in enacting the statute); *State v. Keyes*, 2007 WI App 163, ¶ 16, 304 Wis. 2d 372, 736 N.W.2d 904 (stating that when two or more interpretations of a Wisconsin statute are reasonable, Wisconsin courts “look to case law examining the statute's legislative history and underlying purpose and policies to resolve the ambiguity”).

of a given law to see if the text makes it clear that the statute was meant to reach a given factual scenario. Legislatures almost never include clauses relating to scope in the statutes they promulgate.³⁰ Therefore, interest analysis suggests, in analogy to intrastate statutory interpretation, that when it is unclear whether a law is meant to apply in a given interstate scenario, a court should look to the underlying purposes of that law to see if those purposes would be furthered by permitting the law to reach the scenario at issue.³¹ If the purposes underlying a given law would be furthered by permitting it to reach the factual scenario at issue, then a court using interest analysis would say that that state is “interested” in having its laws determine the outcome of the factual scenario at issue. But how does a court determine when the purposes underlying a state’s laws would be furthered by permitting them to reach a given scenario? In other words, when is a state “interested”?

Currie assumed that the answer to this question was that states would act selfishly and claim an interest in having their laws determine the outcome of a matter when it would benefit one of their domiciliaries.³² Currie used this assumption to simplify his analysis, and he expressly stated that he was not suggesting that states could actually adopt this position.³³

If a state actually adopted Currie’s selfish state position, the state would probably violate the Privileges and Immunities Clause of the Constitution.³⁴ The selfish state position would, at least sometimes, lead a court to deny non-domiciliaries legal privileges on the basis that they were non-domiciliaries.³⁵ Thus, interest analysis as originally devised by Currie was incomplete—it did not specify which interests would be constitutionally sufficient to permit a state to assert that its laws reached a given factual scenario.

In *Allstate Insurance Co. v. Hague*, the U.S. Supreme Court held that “for a State’s substantive law to be selected in a constitutionally

30. See ROOSEVELT, *supra* note 17, at 35 (suggesting that legislatures do not tend to think about “[h]ow their statutes are supposed to operate in multistate cases . . .”).

31. See Patrick J. Borchers, *Punitive Damages, Forum Shopping, and the Conflict of Laws*, 70 LA. L. REV. 529, 543 (2010) (noting that interest analysis suggests courts “should look to the underlying purposes behind the competing legal rules”).

32. CURRIE ET AL., *supra* note 26, at 128 (citing Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958)).

33. See *id.* (“The question is not, for the moment, whether such an attitude would be shocking, or unwise, or unjust, or unconstitutional. The question is whether it would be rational; and the answer is that it would.”).

34. The Privileges and Immunities Clause provides: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” U.S. CONST. amend. XIV, § 1, cl. 2.

35. See ROOSEVELT, *supra* note 17, at 133 (arguing that “[r]estricting the benefits of local law to locals is generally unconstitutional, at least within a state’s borders”).

permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”³⁶ Thus, after *Allstate*, a state may constitutionally assert that its laws reach a given scenario when that scenario involves the state’s interest in (a) regulating conduct within its borders, (b) protecting and compensating its citizens, or (c) regulating the conduct of its citizens.³⁷ *Allstate*, however, only suggests what interests a state may constitutionally assert;³⁸ it sets boundaries. *Allstate* does not suggest what interests any given state will actually assert.³⁹

Only one state, California, currently adheres to interest analysis as its choice of law approach for frauds. California has asserted interests in many different scenarios, and an exhaustive analysis of those scenarios is beyond the scope of this comment. As a general matter, however, California frequently claims an interest in having its laws determine the rights of parties in scenarios where one of its domiciliaries is a party.⁴⁰

Therefore, if a nationwide class action includes plaintiffs domiciled in California who are defrauded in California, then the scope of California’s laws would almost certainly reach the portion of the defendant’s conduct that defrauded Californians in California.⁴¹ Moreover, if the defendant in a nationwide class action is domiciled in California, then California might also reach the defendant’s conduct that defrauded the plaintiff class.⁴²

In the latter situation, however, California will be vying with other states for the ability to determine the rights of some plaintiffs. For example, when a defendant injures a nationwide class of plaintiffs in their home states, the home states of plaintiffs adhering to the territorial approach will also reach the conduct causing the plaintiff’s injury.⁴³ Thus, the scope of two or more states’ laws will overlap. A court adjudicating the rights of the parties in such a class action would have to determine, in each instance of overlap, whether to give priority to the laws of the defendant’s

36. 449 U.S. 302, 312-13 (1981).

37. See ROOSEVELT, *supra* note 17, at 121 (stating interests that states may constitutionally assert).

38. 449 U.S. at 312-13.

39. *Id.*

40. See, e.g., *Offshore Rental Co. v. Cont’l Oil Co.*, 583 P.2d 721, 725 (Cal. 1978) (determining that California has “an interest in protecting California employers from economic harm because of negligent injury to a key employee,” even when the injury occurs in Louisiana).

41. See, e.g., *Wyatt v. Union Mortg. Co.*, 598 P.2d 45, 55 (Cal. 1979) (using California’s laws to determine the rights of a Californian who was defrauded in California).

42. See, e.g., *Wershba v. Apple Computer, Inc.*, 110 Cal. Rptr. 2d 145, 160 (Cal. Ct. App. 2001) (holding that California statutes grant causes of action to “non-California members of a nationwide class where the defendant is a California corporation and some or all of the challenged conduct emanates from California”).

43. See *supra* Subsection A.

home state or a given plaintiff's home state.⁴⁴

Questions of priority did not arise in the discussion of the territorial approach above because states that adopt the territorial approach do not have any need for such rules. A "territorialist" state does not believe that the laws of another state can reach a fraud occurring within its borders. Nor does a "territorialist" state believe that its laws can reach a fraud occurring outside its borders. Therefore, when all states adhered to the territorial approach, there was no need for rules of priority.⁴⁵

In contrast, the analytical framework of interest analysis shows that the laws of multiple states can reach a given scenario. Once some states began adhering to interest analysis, it became possible for the laws of those states to reach conduct occurring wholly within the territorial boundaries of states continuing to adhere to the territorial approach. Thus, states adhering to interest analysis adopt rules of priority stating the circumstances under which their laws receive priority over the laws of other states.

As stated above, only California currently adheres to interest analysis as its choice of law approach for frauds. And California's rule of priority is comparative impairment.⁴⁶ In order to use comparative impairment a court must "determine 'the relative commitment of the respective states to the laws involved' and consider 'the history and current status of the states' laws' and 'the function and purpose of those laws.'"⁴⁷

Comparative impairment was actually created by Professor William Baxter.⁴⁸ In Professor Baxter's words, comparative impairment is the idea "that a court can and should determine which state's internal objective will be least impaired by subordination in cases like the one before it."⁴⁹ Professor Baxter explicitly distinguishes comparative impairment from balancing the interests of states.⁵⁰ Therefore, comparative impairment does not merely compare how important State A's policy is to State A in relation to how important State B's policy is to State B. Rather, comparative

44. The distinction between scope and priority was developed by Professor Roosevelt. See ROOSEVELT, *supra* note 17, at 1-2 (outlining the general principles of scope and priority in choice of law analysis).

45. Even when all states adhered to the territorial approach, however, rules of priority could at times be necessary if the states defined causes of action differently. For example, if New York had adopted the mailbox rule, but New Jersey had not, then New York would view a contract as formed within its borders when acceptance was mailed from New York to New Jersey, while New Jersey would view a contract as formed within its borders when acceptance was received in New Jersey.

46. Washington Mut. Bank, FA v. Superior Court, 15 P.3d 1071, 1081 (Cal. 2001) (quoting Offshore Rental Co. v. Cont'l Oil Co., 583 P.2d 721, 727 (Cal. 1978)).

47. *Id.*

48. See William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 18 (1963) (establishing comparative impairment as a rule of priority).

49. *Id.*

50. *Id.*

impairment examines how much the “internal objectives” (policies) of State A will be impaired if State B’s law is allowed to determine the rights of parties in a given matter, as compared to how much the policies of State B will be impaired if State A law is allowed to determine the parties’ rights in that same matter.

Theoretically, comparative impairment would maximize overall state utility in a given matter and would be an unbiased rule of priority. The problem is that no one can actually do it. It is impossible to know the extent to which State A’s policies will be impaired if State B’s laws are used to determine the rights of parties in a given matter. Thus, comparative impairment is unpredictable, and invites manipulation.⁵¹

Despite these problems, California does not seem to be trying to manipulate comparative impairment calculations in order to favor the laws of California.⁵² Therefore, if the California Supreme Court was faced with a California-domiciled defendant who injured a plaintiff in her home state and that state wanted its rules to determine the parties’ rights, it is quite possible that the California Supreme Court would determine that the laws of California should yield to the laws of the plaintiff’s home state. By contrast, if the California Supreme Court were faced with a California-domiciled plaintiff who was injured by a defendant acting in California, presumably California would prefer that its laws have priority.

Although it is not clear that the California Supreme Court would come to these decisions, they do seem to be the correct decisions. Comparative impairment is not really possible, but it does seem that the interests of State A could be impaired if the laws of State B were permitted to determine the rights of a State A plaintiff who is defrauded in State A. On the other hand, it seems unlikely that interests of State B would be impaired if the laws of State A were permitted to determine rights in that situation.

Thus, if a defendant’s home state adheres to interest analysis and that defendant injures a plaintiff in her home state, the laws of the defendant’s home state can properly reach the conduct causing the plaintiff’s injury.

51. *See, e.g.*, ROOSEVELT, *supra* note 17, at 68 (suggesting that although “[c]omparative impairment is a nice idea” it will be problematic in practice because “judges tend to ignore or misunderstand even quite basic features of most choice-of-law approaches, and the difference between comparative impairment and balancing is likely to escape them entirely”).

52. *See, e.g.*, Washington Mut. Bank, FA v. Superior Court, 15 P.3d 1071, 1086 (Cal. 2001) (determining that California laws could not be used as the rules of decision in a nationwide class action unless the trial court had considered the interest of the various plaintiffs’ home states in having their laws serve as the rules of decision); Offshore Rental Co. v. Cont’l Oil Co., 583 P.2d 721, 728 (Cal. 1978) (holding that the trial judge “correctly applied Louisiana, rather than California, law, since California’s interest in the application of its unusual and outmoded statute is comparatively less strong than Louisiana’s corollary interest, so lately expressed, in its ‘prevalent and progressive’ law”).

But if the defendant's home state adopts comparative impairment as its rule of priority, the defendant's home state ought to give priority to the laws of the plaintiff's home state. Moreover, since the rights of a plaintiff and a defendant remain constant, regardless of whether a plaintiff chooses to pursue her claims individually or in a class action,⁵³ the following can be stated: If the home state of a class action defendant adheres to interest analysis and has adopted comparative impairment as its rule of priority and the defendant defrauds a plaintiff in her home state, then the laws of the defendant's home state ought to defer to the laws of the plaintiff's home state, and let those laws determine the parties' rights.

In summary, a state that has adopted interest analysis as its choice of law approach and comparative impairment as its rule of priority would almost certainly view its laws as reaching a situation where one of its domiciliaries is defrauded by a non-domiciliary within its borders. And in that situation that state ought to determine that its laws have priority. A state that has adopted interest analysis as its choice of law approach and comparative impairment as its rule of priority might also determine that its laws reach a situation where a domiciliary defendant defrauds non-domiciliaries in their home states. In that situation, however, the defendant's home state should not give its laws priority. Rather, it should defer to the laws of the state where a given plaintiff was both injured and domiciled.

C. *The Second Restatement*

Although interest analysis is important because our largest state, California, still adheres to it, the importance of interest analysis (as prescribed by Currie) is waning. By contrast, twenty-four states currently adhere to the approach outlined in the Second Restatement of Conflict of Laws.⁵⁴ And like interest analysis, the Second Restatement has an analytical structure that comprehends the idea that the laws of more than one state can reach a given fraud.

With regard to the tort of misrepresentation, the Second Restatement provides:

When the plaintiff has suffered pecuniary harm on account of his reliance on the defendant's false representations and when the plaintiff's action in reliance took place in the state where the false

53. *See Phillips Petroleum Co.*, 472 U.S. at 820 (holding that even in a nationwide class action, a court cannot abrogate parties' rights).

54. Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Iowa, Maine, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Vermont, and Washington currently adhere to the Second Restatement in the torts context. Symeonides, *supra* note 11, at 279.

representations were made and received, the local law of this state determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.⁵⁵

Thus, when a defendant makes misrepresentations to the plaintiff in her home state, a state adhering to the Second Restatement would presume that the territorial approach is correct—the laws of the state where the fraud occurred should determine the rights of the parties.⁵⁶ But the Second Restatement provides that that territorial presumption can be overcome if “some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties.”⁵⁷ Therefore, it seems that the territorial presumption will have an effect only if: (1) no state is interested in having its laws serve as the rules of decision in a given matter;⁵⁸ (2) the only interested state is the one where the fraud occurred; or (3) the interests of the state where the fraud occurred and the interests of the other interested state(s) are perfectly equal.⁵⁹

If a court is using the laws of a state that adheres to the Second Restatement to determine parties’ rights and more than one state is interested in having its laws determine the rights of the parties, then that court must determine if a state other than the one where the injury occurred has a “more significant relationship . . . to the occurrence and the parties.”⁶⁰ And whether another state has a more significant relationship depends on “the principles of § 6 in light of relevant contacts identified by [§ 148].”⁶¹

Section 6(2) states:

[T]he factors relevant to the choice of the applicable rule of law include

- (a) the needs of the interstate and international systems,

55. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 148(1) (1971).

56. *Id.*

57. *Id.*

58. If no state is interested in having its laws serve as the rules of decision, then a court using the laws of a state adhering to the Second Restatement to determine parties’ rights ought to determine that those parties do not have any rights. See Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2522 (1999) (“[A] determination that no state is interested means that no state’s law grants any rights. The plaintiff loses; he fails to state a claim on which relief may be granted.” (citing Larry Kramer, *The Myth of the “Unprovided-for” Case*, 75 VA. L. REV. 1045, 1062-63 (1989))).

59. In this case, the state(s) where the injury did not occur, but which is nonetheless interested, would not have a “more significant relationship.” It would only have an equally significant relationship.

60. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 148(1) (1971).

61. CURRIE ET AL., *supra* note 26, at 208.

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- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.⁶²

Therefore, whether a state other than the one where the injury occurred has a “more significant relationship” will be determined by considering those § 6 principles, in light of the following § 148 contacts:

(2) . . . [T]he forum will consider such of the following contacts, among others, as may be present in the particular case in determining the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties:

- (a) the place, or places, where the plaintiff acted in reliance upon the defendant’s representations,
- (b) the place where the plaintiff received the representations,
- (c) the place where the defendant made the representations,
- (d) the domicile, residence, nationality, place of incorporation and place of business of the parties,
- (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and
- (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representation of the defendant.⁶³

As illustrated above, the Second Restatement suggests that courts take several different factors into account in determining whether a particular state has the “most significant relationship.” This makes the Second Restatement somewhat unpredictable because it is often difficult to anticipate in advance which factors a court will treat as dispositive in a given case.⁶⁴ Despite the unpredictability of the Second Restatement, if a

62. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971).

63. *Id.* at § 148(2).

64. *See, e.g.*, Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 MICH. L. REV. 703, 733 (1995) (“Although the Second Restatement’s approach allows for individualized choice of law determinations, it is inherently uncertain and unpredictable.”); Jeffrey M. Shaman, *The Vicissitudes of Choice of Law: The Restatement (First, Second) and Interest Analysis*, 45 BUFF. L. REV. 329, 361-64 (1997) (discussing how some courts consider § 6 without regard to the Second Restatement’s presumptive rules, while other courts stress the policies behind the Second Restatement, or turn the Second Restatement into simple balancing).

court uses it properly, the court will determine that, under the Second Restatement, when a domiciliary is defrauded in her home state by a defendant acting in that state, that state's laws should determine the parties' rights.

Any analysis of fraud under the Second Restatement begins with § 148(1), which presumes that the laws of the state where the fraud occurred will determine the rights of the parties. Thus, for states adhering to the Second Restatement, there is a presumption that when a plaintiff is defrauded in her home state, the laws of that state should determine her rights. Moreover, that presumption should only be rebutted when, in light of the contacts laid out in § 148, "some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties."⁶⁵

Under § 6(2)(b) courts are explicitly instructed to consider "the relevant policies of the forum." So, if a plaintiff sues a defendant in his home state, then that state's policies may be considered in light of the § 148 contacts. The fact that a plaintiff sues a defendant in his home state would also seem to implicate § 6(2)(g) because a court of the defendant's home state is presumably most familiar with its own state's laws.⁶⁶ Moreover, even if a plaintiff chooses not to sue the defendant in his home state, but his home state is nonetheless interested in the matter, the policies of the defendant's home state would still be considered under § 6(2)(c).⁶⁷ Section 6(2)(d) seems to be inapplicable to the type of matters considered in this comment because it is a principle that speaks primarily to issues of contract.⁶⁸ And §§ 6(2)(a), (e) & (f) seem so broad and malleable that they can be shaped to favor the choice of any state's laws.

Thus, depending on where a plaintiff sues a defendant, the laws of the defendant's home state could potentially be implicated by the policies espoused in either §§ 6(2)(b) & (g), or § 6(2)(c). The Second Restatement, however, does not instruct courts to consider those policies in the abstract but, "in light of relevant contacts identified by . . . [§ 148]."⁶⁹ And no §

65. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 148(1) (1971).

66. Section 6(2)(g) instructs courts to consider "ease in the determination and application of the law to be applied." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(g) (1971).

67. Section 6(2)(c) instructs courts to consider "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue." *Id.* at § 6(2)(c).

68. Section 6(2)(d) involves "the protection of justified expectations" which are usually not at issue in tort. *Id.* at § 6(2)(d). *See also* ROOSEVELT, *supra* note 17, at 82 (suggesting that § 6(2)(d) is not usually applicable to torts because it "is one of the factors underlying the relatively broad freedom the Second Restatement gives contracting parties to choose the governing law").

69. CURRIE ET AL., *supra* note 26, at 208.

148 contacts appear to favor permitting the laws of the defendant's home state to determine the parties' rights when the defendant defrauds a plaintiff in her home state. Rather, the § 148 contacts favor permitting the laws of the plaintiff's home state to determine the parties' rights.

Sections 148(2)(a), (b) and (c) would all seem to weigh in favor of using the laws of a plaintiff's home state when she is defrauded there. Section 148(2)(d) allows a court to consider the domicile of both parties, and thus, favors neither the plaintiff's nor the defendant's home state. Section 148(2)(e) refers to the "tangible thing" which is at issue. Therefore, if § 148(2)(e) is applicable, it would also seem to weigh in favor of a plaintiff's home state when she is defrauded there. Finally, § 148(2)(f) refers to the place where performance will be rendered under a contract that the plaintiff was fraudulently induced to enter. Section 148(2)(f) is highly case specific, and will not as a general matter favor any state except a plaintiff's home state. Plaintiffs typically perform contracts in their home states.⁷⁰ Thus, some § 148 contacts will always weigh in favor of permitting the laws of a plaintiff's home state to determine the parties' rights, and usually no § 148 contacts will weigh in favor of permitting the laws of any other state to determine the parties' rights.

When the § 148 contacts only weigh in favor of the laws of a plaintiff's home state, no other state can have a more "significant relationship to the occurrence and the parties,"⁷¹ and the territorial presumption of § 148(1) cannot be rebutted. Therefore, any state adhering to the Second Restatement ought to determine that when a defendant defrauds a plaintiff in her home state, the laws of the plaintiff's home state should determine her rights as well as those of the defendant. Moreover, since the rights of a plaintiff and a defendant remain constant regardless of whether a plaintiff chooses to pursue her claims individually or in a class action,⁷² the following can be asserted: any court using the laws of a Second Restatement state to determine parties' rights ought to decide that when a defendant defrauds a class of plaintiffs in their home states, the laws of a particular plaintiff's home state should determine her rights, and the laws of that state should also determine the rights of the defendant with regard to his actions affecting that particular plaintiff.

III. RULE 23(B)(3) ANALYSIS

The three subsections immediately above suggest that any state

70. *See, e.g.*, In re Mercedes-Benz Tele Aid Contract Litigation, 257 F.R.D. 46, 67 (D.N.J. 2009) (presuming that consumers would perform contracts in their home states).

71. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 148(1) (1971).

72. *See Phillips Petroleum Co.*, 472 U.S. at 820 (holding that even in a nationwide class action, a court cannot abrogate parties' rights).

adhering to (A) the territorial approach, (B) interest analysis, or (C) the Second Restatement ought to decide that when a defendant defrauds a plaintiff in her home state, the laws of the plaintiff's home state should determine her rights, as well as those of the defendant. Therefore, since thirty-five states currently adhere to one of those three approaches to choice of law, the laws of at least thirty-five different states will usually have to be considered to determine the various rights of a nationwide plaintiff class. This section assumes that this is true, and considers its effect on a plaintiff class seeking to certify a nationwide fraud class action under Rule 23(b)(3). This section concludes that when a defendant defrauds a nationwide class of plaintiffs in their home states and those plaintiffs seek to aggregate their claims in a 23(b)(3) class action, the predominance requirement of Rule 23(b)(3) can be met, but the superiority requirement of Rule 23(b)(3) cannot be met.

Rule 23 governs when class actions can be brought in federal court, and to be certified under Rule 23, a class action must be maintainable under one of Rule 23(b)'s three subsections. Most cases do not meet the requirements of Rule 23(b)(1) or (2), and therefore, if a case is maintainable as a class action in federal court it usually needs to satisfy Rule 23(b)(3).⁷³ In order for Rule 23(b)(3) to be satisfied, the court deciding whether to certify a given class action must find "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."⁷⁴ Moreover, Rule 23(b)(3) states that the matters pertinent to predominance and superiority include:

- (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (D) the likely difficulties in managing a class action.⁷⁵

Thus, Rule 23(b)(3) instructs a court to consider the four factors listed immediately above when it is determining whether a plaintiff class meets the predominance and superiority requirements.

The relation of Rule 23(b)(3)(A) to the predominance requirement seems relatively straightforward. In some instances, it might be in a plaintiff's best interest to pursue her claims individually instead of in a

73. John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1432 (2003).

74. FED. R. CIV. P. 23(b)(3).

75. *Id.*

class action. For example, a plaintiff may be able to increase her personal recovery if she pursues her claim individually.⁷⁶ Rule 23(b)(3)(A) simply instructs courts, when deciding whether to certify a class action, to consider what is in the best interests of individual plaintiffs.

Rule 23(b)(3)(B), like Rule 23(b)(3)(A), is relatively straightforward. It instructs courts to consider whether certifying a given class action will lead to duplicative litigation or coordination problems.⁷⁷

The relation of Rule 23(b)(3)(C) to the predominance inquiry is less straightforward. On its face, Rule 23(b)(3)(C) seems to suggest that there might be a particular forum that would be preferable for a given class action. In terms of predominance, if everyone is injured in one state (fact), or if the laws of one state would govern all the parties' rights (law), Rule 23(b)(3)(C) seems to suggest it might make sense to have the litigation in that state.

The aim of the rules advising committee in authoring Rule 23(b)(3)(C), however, seems to have been the prevention of premature class actions.⁷⁸ The rule makers were seeking to prevent courts from certifying large classes of mass tort victims when issues critical to the class's case, such as medical causation, were unsettled.⁷⁹ The rule makers' fear seems to have been that if a mass tort class action was brought while key issues related to the tort were unsettled, an entire class of plaintiffs might be denied recovery because their case was brought prematurely.⁸⁰

Finally, Rule 23(b)(3)(D) seems to suggest that if a class action involves lots of plaintiffs alleging divergent facts that give rise to claims, which will be governed by different laws, it will be difficult to manage. By contrast, if a class action involves plaintiffs all alleging the same facts giving rise to the same claims, which will be governed by the same laws, then that class action will not be much more difficult to manage than a traditional lawsuit involving two parties.

The key question for the purposes of this comment is: Can a court considering the Rule 23(b)(3) factors determine that a nationwide fraud

76. See Linda S. Mullenix, *Should Mississippi Adopt a Class-Action Rule – Balancing the Equities: Ten Considerations that Mississippi Rulemakers Ought to Take Into Account in Evaluating Whether to Adopt a State Class-Action Rule*, 24 MISS. C. L. REV. 217, 235 (2005) (stating that “the aggregation of claims within a class action may effectively dilute the value of individual claims” (citing FED. R. CIV. P. 23(b)(3)(A))).

77. See Allan Erbsen, *From “Predominance” to “Resolvability”: A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1055 n.114 (2005) (explaining that “a federal court could conclude under Rule 23(b)(3)(B) that the pendency of related state court actions may pose coordination problems that would diminish the utility of a federal class action”).

78. John K. Rabiej, *The Making of Class Action Rule 23 – What Were We Thinking?*, 24 MISS. C. L. REV. 323, 354 (2005).

79. *Id.*

80. *Id.*

class action meets the predominance requirement? The answer is that, in at least some instances, the predominance requirement can be met when a defendant defrauds a nationwide class of plaintiffs in their home states.

The predominance requirement only requires predominance as to law *or* fact.⁸¹ Thus, if a given fraud was allegedly perpetrated against each plaintiff in the same way, fact issues involving the perpetration of that fraud would seem to be common to all class members. Moreover, the fact that all the frauds were perpetrated in the same fashion might make the class relatively easy to manage, which would seem to imply that Rule 23(b)(3)(D) might point in favor of certification. A plain reading of Rule 23(b)(3)(C) might also point in favor of certifying a class action brought in the defendant's home state if the defendant acted in a similar way (a fact question) toward all potential plaintiffs. In that case, much of the factual information relating to how the defendant acted might be in his home state. Considering Rule 23(b)(3)(C) in light of its purpose of preventing premature mass tort class actions, however, undermines that reasoning to some extent. But even if Rule 23(b)(3)(C) does not point in favor of predominance, there will almost certainly be instances when it is neutral and the other Rule 23(b)(3) factors do point in favor of predominance. Therefore, in at least some instances, it does seem that a nationwide fraud class action can meet the predominance requirement.

In order for a plaintiff class to be certified under Rule 23(b)(3), however, a court must find that the class meets both the predominance requirement and the superiority requirement. And the remainder of this section suggests that when a defendant defrauds a class of plaintiffs in their home states, the superiority requirement cannot be met.

As stated above, if one court adjudicates the rights of parties in a nationwide fraud class action, that court will have to review the laws of at least thirty-five different states to determine the rights of various class members. The laws of all the states are not likely to be identical, and even if most of them are, it will be difficult for one court to determine what the law in thirty-five different states is. Thus, there will be a manageability problem under Rule 23(b)(3)(D). Moreover, Rule 23(b)(3)(C) will not favor certification because a single forum will have to consult the laws of thirty-five different states to dispose of a single class action. There is no reason to think that the courts in a particular forum would be better at determining the laws of thirty-five different states than the courts in any other forum. It is also important to remember that superiority is a comparative analysis. Determining superiority involves a comparison between certifying the class at issue and permitting the plaintiffs to bring their claims in another manner. One way plaintiffs could bring their claims

81. FED R. CIV. P. 23(b)(3).

would be through statewide class actions. The plaintiffs in a nationwide class action could be forced to split up and bring their claims with other plaintiffs from their own state.

The issue is whether multiple statewide class actions, as compared to a nationwide class action, would more “fairly and efficiently” adjudicate the parties’ rights.⁸² Statewide class actions would definitely seem to be fairer. In each statewide class action, a court of the state whose laws would actually determine the parties’ rights would be adjudicating those rights. And if a party felt that the court’s decision was erroneous, she would at least have the possibility of being able to appeal that decision to the state’s highest court—the ultimate expositor of the state’s laws.

Efficiency is a closer question. Although a nationwide class action would allow all the parties’ claims to be adjudicated in a single proceeding, that proceeding would involve the laws of at least thirty-five different states. Statewide class actions would increase the number of proceedings, but each proceeding would be much simpler. The laws of one state, the state in which the court sits, would be at issue. Professor Brunet has shown that giving one court control over multiple claims in a single proceeding is only efficient up to a point.⁸³ At some point, there is too much information, and the quality of the judicial output goes down.⁸⁴ Requiring one court to consult the laws of at least thirty-five different states seems likely to surpass the point of too much information.

Moreover, when nationwide fraud class actions have been adjudicated in federal court, the court has sometimes punted on the issue of what law should determine the rights of the parties.⁸⁵ Thus, even if a single proceeding might be more efficient, some courts have refused to actually do the choice of law analysis. This almost certainly prejudices at least some parties, and is not efficient. Efficiency should be about getting the right outcome quickly with the least resources. It should not be about getting any outcome regardless of whether it is correct.

Multiple statewide class actions would more fairly adjudicate the rights of a nationwide class of plaintiffs when a defendant defrauds each member of the plaintiff class in her home state. It also seems likely that several statewide class actions would more efficiently adjudicate the parties’ rights. Thus, when a defendant defrauds a nationwide class of

82. FED R. CIV. P. 23(b)(3).

83. Edward J. Brunet, *A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria*, 12 GA. L. REV. 701, 710-20 (1978).

84. *Id.* at 716-17. Professor Brunet spoke with regard to joinder, but his general thesis is that at some point giving a court more information when it already has a lot of information will be inefficient.

85. *See, e.g., In re Agent “Orange” Product Liability Litig.*, 580 F. Supp. 690, 708 (1984) (determining that regardless of where plaintiffs were from, their rights, and those of the defendant, would be governed by a “national consensus law”).

plaintiffs in their home states, multiple statewide class actions would be superior to a nationwide class action.

IV. ERRONEOUS DISTRICT COURT OPINIONS

The previous section suggests that a court should not certify the claims of a nationwide class of plaintiffs under Rule 23(b)(3) when those plaintiffs are defrauded in their home states. This section discusses two recent district court opinions that reached the opposite conclusion, and it suggests that each of those cases was erroneously decided because of a flawed choice of law analysis.

A. *In re Mercedes-Benz Tele Aid Contract Litigation*

In *In re Mercedes-Benz Tele Aid Contract Litigation*,⁸⁶ a nationwide class of plaintiffs sought recovery from Mercedes under the New Jersey Consumer Fraud Act (“NJCFCA”). The plaintiffs asserted that Mercedes violated the NJCFCA by making “statements or omissions of material facts that it knew or should have known were false or misleading when promoting vehicles purchased by Plaintiffs that were equipped with ‘Tele Aid.’”⁸⁷ Tele Aid is “an emergency response system which links subscribers to road-side assistance operators by using a combination of global positioning and cellular technology.”⁸⁸ The Tele Aid systems that were installed in all Mercedes vehicles during 2002-2004 and in some 2005 and 2006 models, used an analog signal provided by AT&T.⁸⁹ In August 2002, however, the Federal Communications Commission (“FCC”) adopted a rule that wireless communication companies, including AT&T, did not have to provide analog service after February 2008.⁹⁰

In light of the 2002 FCC rule, the plaintiffs in *In re Mercedes-Benz* alleged that “Mercedes knew or should have known as early as August 8, 2002 that analog Tele Aid systems would become obsolete in 2008, but continued to market those systems without disclosing their future obsolescence.”⁹¹ The plaintiffs argued that Mercedes’ failure to disclose the future obsolescence of analog Tele Aid systems violated the NJCFCA and that every person who bought a Mercedes with an analog Tele Aid system after Mercedes knew of the future system’s obsolescence was

86. 257 F.R.D. 46 (D.N.J. 2009).

87. *Id.* at 48.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

entitled to recover under the NJCFA.⁹² Therefore, the plaintiffs moved to certify a nationwide class under Rule 23(b)(3) of all people who bought or leased a Mercedes with an analog Tele Aid system from August 2002 onward.⁹³ Such a class would include plaintiffs from all fifty states.⁹⁴

Mercedes opposed the plaintiffs' motion on the ground that "each Plaintiff's claim is governed by the law of his or her home state, and the differences between those laws would render class treatment inappropriate."⁹⁵ The court rejected Mercedes' argument,⁹⁶ and granted the plaintiffs' motion for class certification.⁹⁷

In re Mercedes-Benz was a multi-district litigation. Thus, the *In re Mercedes-Benz* court was required to look to the conflict of laws rules of the states where cases were originally filed to determine which state's laws should determine certain parties' rights.⁹⁸ Several cases were originally filed in states that adhered to the Second Restatement as their choice of law approach for frauds. Therefore, the *In re Mercedes-Benz* court was required to use § 148 of the Second Restatement.

The court correctly laid out § 148 but misapplied it. Recall that under § 148(1) there is a presumption that "when the plaintiff's action in reliance took place in the state where the false representations were made and received, the local law of this state determines the rights and liabilities of the parties."⁹⁹ The *In re Mercedes-Benz* court presumed that the plaintiffs "received and relied on Mercedes' alleged misrepresentations in their home states."¹⁰⁰ Thus, if the false representations were also made in the plaintiffs' home states, then the *In re Mercedes-Benz* court should have presumed that the laws of a particular plaintiff's home state would determine her rights, and that the laws of that particular plaintiff's home state would also determine the rights of the defendant with regard to his actions affecting that plaintiff.

In explaining how the plaintiffs felt they had been defrauded by Mercedes' omissions, the court cited advertisements for Tele Aid that touted Tele Aid's benefits while failing to mention that the system would be obsolete in a few years.¹⁰¹ If the plaintiffs actually heard these advertisements and relied on them to their detriment, then presumably the ads were *made* in the plaintiffs' home states. A California plaintiff is not

92. *Id.* at 53.

93. *Id.*

94. *Id.* at 67.

95. *Id.* at 53.

96. *Id.* at 54.

97. *Id.* at 75.

98. *Id.* at 55 (citing *Ferens v. John Deere Co.*, 494 U.S. 516, 532 (1990)).

99. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 148(1) (1971).

100. *In re Mercedes-Benz*, 257 F.R.D. at 66.

101. *Id.* at 50.

likely to be defrauded by a statement made in New Jersey.

The *In re Mercedes-Benz* court, however, determined that “[t]he alleged misrepresentations which form the basis of Plaintiffs’ claim took place in New Jersey.”¹⁰² The court reached this determination by relying on the plaintiffs’ contentions that:

[A]ll of Mercedes’s actions relating to Tele Aid were planned and implemented by a “Telematics team” based in Montvale, New Jersey. That team oversaw the marketing and promotion of Tele Aid, coordinated with AT&T in anticipation of the discontinuation of analog service, and was responsible for deciding that Tele Aid subscribers would be charged approximately \$1,000 to upgrade to digital equipment.¹⁰³

Even if those contentions are correct, however, they do not show that Mercedes’ misrepresentations were made in New Jersey. There is no such thing as fraud in the air.¹⁰⁴ The fraud that may have been planned in New Jersey occurred in the states where the ads containing misrepresentations were distributed. Thus, the *In re Mercedes-Benz* court erred in determining that Mercedes’ misrepresentations were made in New Jersey. The court should have determined that those misrepresentations occurred in the plaintiffs’ home states. Moreover, if the *In re Mercedes-Benz* court had made that determination, then it would have further determined that the presumption of Section 148(1) was applicable to the case, and that it would not have been rebutted.¹⁰⁵

Even if the *In re Mercedes-Benz* court is correct that Mercedes’ misrepresentations were not made in the plaintiffs’ home states, the court’s analysis still seems erroneous. After determining that § 148(1) was inapplicable to the case before it, the *In re Mercedes-Benz* court looked to the factors listed in § 148(2) to determine which state had “the most significant relationship to the occurrence and the parties.”¹⁰⁶

The court acknowledged that “four of the six considerations articulated by Restatement § 148(2) weigh in favor of applying the law of each class member’s home state,”¹⁰⁷ yet the court treated § 148(2)(c)—the place where the defendant made the representations—as dispositive.¹⁰⁸ Thus, plaintiffs whose home states allowed a more generous recovery than

102. *Id.* at 66.

103. *Id.* (internal citation omitted).

104. *See, e.g.,* *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 101 (N.Y. 1928) (explaining that a tort has not occurred unless a right has been violated).

105. As explained in Section III above, the presumption of § 148(1) will not be rebutted when a defendant defrauds a class of plaintiffs in their home states. *See supra* pp. 511-515.

106. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 148(2) (1971).

107. *In re Mercedes-Benz*, 257 F.R.D. at 67. The court stated that §§ 148(2)(a), (b), (e) & (f) weighed in favor of each plaintiff’s home state. *Id.*

108. *Id.* at 68.

New Jersey were denied the chance to receive that recovery because even though those plaintiffs performed their obligations under the Tele Aid agreement in their home states, used their Tele Aids in their home states, and received and relied upon Mercedes' misrepresentations in their home states, Mercedes made representations in New Jersey. Although the Second Restatement is unpredictable,¹⁰⁹ it does not seem possible to say that New Jersey had the most significant relationship to every fraud at issue in *In re Mercedes-Benz*. Thus, the *In re Mercedes-Benz* court performed a flawed choice of law analysis.

If the court had performed a correct choice of law analysis, it would have determined that when a defendant defrauds a class of plaintiffs in their home states, the laws of a particular plaintiff's home state should determine her rights, as well as the rights of the defendant vis-à-vis that particular plaintiff. Moreover, if the *In re Mercedes-Benz* court had made that determination, its 23(b)(3) analysis should have been analogous to the 23(b)(3) analysis in Section III above. The *In re Mercedes-Benz* court should have determined that the plaintiffs before it could not meet the superiority requirement of Rule 23(b)(3).

B. *Kelley v. Microsoft Corp.*

In *Kelley v. Microsoft*,¹¹⁰ as in *In re Mercedes-Benz*, a nationwide class of plaintiffs was seeking recovery under a state consumer fraud act. Specifically, the plaintiffs in *Kelley* asserted that Microsoft violated the Washington Consumer Protection Act ("WCPA") by engaging in "deceptive practices to boost holiday sales of personal computers."¹¹¹

The plaintiff's argument proceeded as follows. Microsoft delayed the release of its Vista operating system from March 2006 until early 2007.¹¹² Microsoft and personal computer manufacturers were worried that this delay would cause consumers to put off buying new computers until after the holiday season.¹¹³ Therefore, a few months before the 2006 holiday season, Microsoft began certifying certain computers as "Windows Vista Capable," and placed stickers on those computers that it certified.¹¹⁴ When Vista was eventually released, however, it came in several editions—a basic edition and several premium editions—and only the premium editions could run the new "Aero" interface, which the plaintiffs asserted was the

109. See *supra* note 64 and accompanying text.

110. 251 F.R.D. 544 (W.D. Wash. 2008).

111. *Id.* at 548.

112. *Id.*

113. *Id.*

114. *Id.*

essence of the Vista operating system.¹¹⁵ Therefore, the plaintiffs argued that anyone who bought a stickered computer that could only run the basic version of Vista had been deceived by Microsoft in violation of the WCPA.¹¹⁶ The plaintiffs moved to certify a nationwide class under Rule 23(b)(3) of all people who purchased a computer with a “Windows Vista Capable” sticker, which could only run the basic edition of Vista.¹¹⁷

The *Kelley* court granted the plaintiffs’ motion for certification.¹¹⁸ The court explained that the parties’ agreed that the Second Restatement should be used to determine which state’s laws govern the parties’ rights.¹¹⁹ But the *Kelley* court, like the *In re Mercedes-Benz* court, misapplied § 148 of the Second Restatement.

In explaining how the plaintiffs felt they had been defrauded, the *Kelley* court stated that the plaintiffs were confused when they saw the “Windows Vista Capable” sticker on computers. For example, the court explained that one class member “ordered his particular computer because ‘it would handle Vista,’ and that he was relieved when it arrived and had a ‘Windows Vista Capable’ sticker affixed to it.”¹²⁰ The same class member stated that he remembered “seeing the Windows Vista marketing materials” and thought he was supposed “to look for the sticker that said ‘Vista.’”¹²¹ If other class members were deceived as this member was, then those class members would seem to have been deceived by statements made in their home states. Presumably class members would see promotional materials in their home state, and have a computer they purchased sent to their home state. Moreover, it seems that the plaintiffs received and relied on Microsoft’s deceptive statements in their home states.¹²² Therefore, under § 148(1) of the Second Restatement, there would be a presumption that the laws of a particular plaintiff’s home state should determine her rights, and that the laws of that particular plaintiff’s home state should determine the rights of the defendant with regard to his actions affecting that particular plaintiff. Moreover, that presumption would not be rebuttable under the facts of *Kelley*.¹²³

The *Kelley* court, however, reached a different conclusion. It determined that the laws of Washington should govern all the parties’ rights because the “[d]efendant originated the allegedly deceptive scheme

115. *Id.* at 548-49.

116. *Id.* at 548.

117. *Id.* at 549.

118. *Id.* at 560.

119. *Id.* at 551.

120. *Id.* at 549.

121. *Id.*

122. *Id.* at 551-52.

123. *See supra* note 105 and accompanying text.

in Washington.”¹²⁴ It is not clear that the place where a deceptive scheme is originated is a contact that § 148 instructs courts to consider, and it was certainly erroneous for the *Kelley* court to determine the rights of an entire class on the basis of that factor.

If the *Kelley* court had conducted a correct choice of law analysis, it would have determined that when a defendant defrauds a class of plaintiffs in their home states, the laws of a particular plaintiff’s home state should determine her rights, as well as the rights of the defendant vis-à-vis that particular plaintiff. And if the court had made that determination, its Rule 23(b)(3) analysis should have been analogous to the Rule 23(b)(3) analysis in Section III above.

The *In re Mercedes-Benz* court and the *Kelley* court each certified the claims of a nationwide class of plaintiffs who were defrauded in their home states. Each of those decisions was erroneous because of a flawed choice of law analysis. If the *In re Mercedes-Benz* court and the *Kelley* court had performed correct choice of law analyses, each court would have determined that the class of plaintiffs before it could not meet the superiority requirement of Rule 23(b)(3).

V. CONCLUSION

The rights of a defrauded plaintiff, and the rights of the defendant who defrauded her, are delineated by state law. The Constitution requires those rights to remain constant regardless of whether a plaintiff chooses to pursue her claims individually or in a class action. Under the laws of thirty-five US states, those rights should be determined by a plaintiff’s home state when she is defrauded in her home state by a defendant acting there. Thus, if a nationwide class action is certified against a defendant who is domiciled in one of those thirty-five states, any court adjudicating that action would have to consult the laws of thirty-five different states to determine the rights of various plaintiffs.

Consulting the laws of thirty-five states is very time consuming, and a single court is unlikely to be familiar with the laws of thirty-five different states, meaning that such a court is likely to make mistakes. Given these issues, it seems that multiple statewide class actions would more fairly and efficiently adjudicate the rights of parties involved in a nationwide fraud than would a nationwide class action. Therefore, the claims of plaintiffs affected by a nationwide fraud should not be certified as a nationwide class action under Rule 23(b)(3).

124. *Kelley*, 251 F.R.D. at 552.