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**CHOICE OF LAW AND THE CERTIFICATION OF MASS TORT CLASS  
ACTIONS UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(b)(3)**

by

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**I.**

**Introduction**

Choice of law has not fared well in class actions. Courts certifying class suits have distorted choice-of-law rules in an effort to circumvent class certification requirements designed to protect absent class members,<sup>1</sup> or have misapplied certification requirements that would otherwise force them to grapple with material variations in substantive law.<sup>2</sup> Similarly, courts decertifying class suits have invoked choice of law in a way that creates an unjustifiable bias against class certification.<sup>3</sup> For those troubled by this sorry history, the Supreme Court's decisions in *Amchem* and *Ortiz* provide hope for a new day.<sup>4</sup>

*Amchem* and *Ortiz* hold that a settlement may be imposed on a class under Federal Rule of Civil Procedure 23 only if the suit can be certified under Rule 23(a) and (b),<sup>5</sup> thus

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<sup>1</sup> See Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U.L. Rev. 547 (1996) (arguing that courts in both consolidated and class actions have improperly manipulated choice-of-law rules for the purpose of applying the law of one state).

<sup>2</sup> See, e.g., *In re Asbestos Litigation*, 134 F.3d 668 (5th Cir. 1998) *reversed* *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831-32 (1999).

<sup>3</sup> See, e.g., *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.* 51 F.3d 1293 (7th Cir. 1995).

<sup>4</sup> *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

<sup>5</sup> *Ortiz*, 527 U.S. at 831-32; *Amchem*, 521 U.S. at 620-22. Rule 23(a) and (b) set forth the requirements for certification of a class. *Amchem* and *Ortiz* held that Rule 23 does not authorize imposition of a settlement on a class unless the class could be certified under Rule 23(a) and (b) and the settlement is approved as fair, reasonable, and adequate under Rule 23. I have elsewhere expressed skepticism that a class settlement may

making it more difficult to treat class suits certified for litigation more harshly than those certified for settlement.<sup>6</sup> The cases also make clear that variations in state law applicable to the claims of the class may affect whether certification is appropriate.<sup>7</sup> In this paper, I consider how variations in state law should affect the predominance and superiority requirements of Rule 23(b)(3)<sup>8</sup> and the adequate representation requirement of Rule 23(a)(4).<sup>9</sup> I argue that federal courts considering whether common issues predominate and whether a class suit would be the superior means of proceeding often have imposed too high a standard on proponents of certification, ignoring in the process the foundational

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be imposed on absent class members who seek to intervene in the litigation. See Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 Texas L. Rev. 571, 610-616 (1997).

<sup>6</sup> Compare *Castano*, 84 F.3d 734 (5th Cir. 1996) (decertifying a class suit certified for litigation) with *In re Asbestos Litigation*, 134 F.3d 668 (5th Cir. 1998) (approving certification of a class suit certified for settlement only). To his credit, Judge Jerry Smith, who authored the *Castano* decision, vigorously dissented in the *Asbestos Litigation*.

<sup>7</sup> See notes 66-75 and accompanying text, *infra*.

<sup>8</sup> See Rule 23(b) (“An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . . (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”). Rule 23(b)(1) does not include a predominance or superiority requirement. But *Ortiz* set such a high bar for certification of a “limited fund” class action, that few, if any, mass tort class suits may be eligible for certification under Rule 23(b)(1). I do not discuss Rule 23(b)(1) in this paper.

<sup>9</sup> See Rule 23(a) (“One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (4) the representative parties will fairly and adequately protect the interests of the class.”). Although Rule 23(a)(4) expressly refers to representative *parties*, Rule 23(a)(4) also requires adequate counsel. See *Amchem*, 521 U.S. at 626 n.20 (“The adequacy heading also factors in competency and conflicts of counsel.”). *Ortiz* emphasized the role of counsel with respect to adequate representation, 527 U.S. at 856 (requiring “separate representation to eliminate conflicting interests of counsel”), and properly so. See Cooper, *The (Cloudy) Future of Class Actions*, 40 Arizona L. Rev. 923, 927 (1998) (“Adequacy of representation is measured first and foremost by adequacy of counsel.”); Macey & Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 20 (1991) (“[T]he attorney . . . is not obliged to follow the unilateral wishes of any individual class member when those wishes deviate from the attorney’s sense of optimal litigation strategy.”). I follow suit in this paper and focus on class counsel rather than named plaintiffs. Although, *Amchem* and *Ortiz* focus exclusively on Rule 23 in their discussion of adequate representation, I agree with those who believe that the Court’s interpretation of Rule 23(a)(4) simply incorporates the requirements of the Due Process Clause. See, e.g. Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 Supreme Court Review 337, 352 (“The Court [in *Amchem* and *Ortiz*] redefines due process to focus centrally on the faithfulness of the agent that has litigated on behalf of the absent class members, what Rule 23 terms the ‘adequacy of representation’ . . .”).

choice-of-law rule in federal court—that federal courts should apply the choice-of-law rules of the state in which they sit.<sup>10</sup> By contrast, federal courts to date largely have overlooked the effect that variations in state law may have on the ability of class counsel to adequately represent the class.<sup>11</sup> I argue that substantial variations in state law that govern the claims of class members may create conflicts of interest during settlement negotiations that make it impossible for one attorney to adequately represent all members of the class.<sup>12</sup> Indeed, because a choice of forum may significantly affect the value of class claims, a decision by class counsel to seek certification in a particular forum may make him an inadequate representative with respect to some or all of the members of the class.<sup>13</sup> I acknowledge that recognizing that material variations in law may create conflicts of interest will require shrinking the size and scope of class actions, but argue that this will be a positive development.<sup>14</sup>

## **II. The Predominance and Superiority Requirement**

Rule 23 provides that certification of a (b)(3) class is appropriate only if “common questions of fact or law predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” This requirement insures that choice-of-law questions will often be litigated in mass tort class actions. Because choice-of-law

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<sup>10</sup> See Part II.A., *infra*.

<sup>11</sup> See Part III., *infra*.

<sup>12</sup> See notes 76-78 and accompanying text, *infra*.

<sup>13</sup> See Part III.B., *infra*.

<sup>14</sup> See Part III.A.2., *infra*.

rules determine which substantive law will apply to a mass tort claim,<sup>15</sup> the predominance of common issues and the superiority of the class device in any given case often cannot be established without engaging in a choice-of-law inquiry.

## **A. Choice-of-Law in Federal Class Actions**

### **1. Common Errors in Analysis**

Federal courts have made two significant errors in addressing choice of law in class actions, both of which make it harder for class proponents to satisfy the predominance and superiority requirements. First, they often have assumed that in a nationwide class suit, the law of all fifty states will necessarily apply, without considering the extent to which meaningful variations in the laws of the states exist. In one case, for example, a district court stated without further elaboration that “[b]ecause this is a diversity case, the plaintiffs’ claims will be governed by the legal standards of the various states in which their injuries occurred.”<sup>16</sup> The first step in any conflicts analysis, however, should be to determine whether the laws which are potentially applicable to the claims are identical or would lead to same result. As the Supreme Court recognized in

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<sup>15</sup> The simplest solution administratively would be to apply the law of the forum to all the claims brought in the forum, a particularly tempting solution in the context of a nationwide class suit. In *Phillips Petroleum Co. v. Shutts*, however, the Supreme Court made clear that a state may not apply its own law to all the claims in a nationwide class suit, just because it is the forum. 472 U.S. 797, 820-823 (1985) (rejecting the view that in a nationwide class action “the law of the forum should be applied unless compelling reasons exist for applying a different law.”). The Court emphasized that a state may apply its own law to a claim only if there are state interests creating a significant contact or significant aggregation of contacts such that application of its own law would not be arbitrary or unfair. *Id.* at 821 (“Kansas must have a ‘significant contact or significant aggregation of contacts’ to the claims asserted by each member of the plaintiff class, contacts ‘creating state interests,’ in order to ensure that the choice of Kansas law is not arbitrary or unfair.”). My colleague Russell Weintraub has noted that “courts utilizing interest and most-significant relationship analysis have sometimes facilitated certification of a national class action by applying to all claims the law of the state that was at the center of defendant’s wrongful conduct.” Weintraub, 2003 Supplement to COMMENTARY ON THE CONFLICT OF LAWS at 38-39 (collecting cases). To the extent that states choose to do so, certification problems resulting from material variations in state substantive law will disappear. Variations in choice-of-law rules may nonetheless lead to the conclusion that an attorneys’ choice of forum constitutes inadequate representation. See Part III.B., *infra*.

<sup>16</sup> *Fisher v. Bristol-Meyers Squibb Co.*, 181 F.R.D. 365, 368 (N.D. Ill. 1998).

*Phillips Petroleum Co. v. Shutts*, “there can be no injury in applying [a state’s] law, if it is not in conflict with that of any other jurisdiction connected to this suit.”<sup>17</sup> Larry Kramer, a noted conflicts scholar, has argued that the substantive law is far more uniform than courts often assume: “[W]hile in theory all fifty states could have different laws, in practice there are seldom more than two or three rules on any given question, each adopted by many states. Consequently, there will seldom be more than a few conflicts in any particular case . . .”<sup>18</sup> By assuming the contrary, courts needlessly complicate choice-of-law issues in class actions.<sup>19</sup>

The second choice-of-law mistake federal courts often make in class actions is to conclude that federal law requires the party seeking certification to bear the burden of identifying the substantive laws that will apply in the suit, although *Klaxon v. Stentor Electric Manufacturing Co.* in fact requires federal courts to apply the choice-of-law

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<sup>17</sup> *Shutts*, 472 U.S. at 816 (stating the rule with respect to constitutional choice-of-law issues); *see also* *Waters v. American Automobile Insurance Co.*, 363 F.2d 684, 686 (D.C. Cir. 1966) (holding that it was unnecessary to decide which law would apply since there was no conflict between the law of Missouri and the law of the District of Columbia); *Walton v. Arabian American Oil Co.* 233 F.2d 541, 545 n.14a (2d Cir. 1956) (“As the tort rules, pertinent here, of New York, Delaware, and Arkansas are doubtless substantially similar, there would be no need to choose one or the other.”); Leflar, McDougal & Felix, *AMERICAN CONFLICTS LAW* § 92 at 272 (1986) (“If the laws of both states relevant to the sets of fact are the same, or would produce the same decision in the lawsuit, there is no real conflict between them and the case ought to be decided under the law that is common to both.”); Westen, *False Conflicts*, 55 California L. Rev. 74, 106 (1967) (“Choice of law seems irrelevant in a situation where all choices are the same. In such a situation, disposition of the case is not meaningfully affected by choice of law considerations).

<sup>18</sup> Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 American J. Comp. L. 465, 475 (1991).

<sup>19</sup> Courts outside the class context have sometimes engaged in choice-of-law analysis in circumstances in which such analysis is unnecessary. *See* Westen, *False Conflicts*, 55 California L. Rev. at 105-07. The rule that a choice of law determination is unnecessary when the laws which are potentially applicable to the claims are identical or would lead to same result by definition is not “outcome-determinative.” For that reason, the rule of *Klaxon v. Stentor Electric Manufacturing Co.* is inapplicable. For discussion of *Klaxon*, *see infra* at notes 20-32 and accompanying text, *infra*.

rules of the state in which they sit.<sup>20</sup> In so doing, courts mistakenly conflate two separate inquiries: (1) whether the party who bears the burden with respect to choice of law has met its burden under the forum state’s choice-of-law principles, and (2) whether the party seeking certification has demonstrated, as required by federal law, that a certification of a class suit would be appropriate.<sup>21</sup> In *Walsh v. Ford Motor Co.*, for example, then-Judge Ruther Bader Ginsburg, wrote that

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<sup>20</sup> *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc.* 313 U.S. 487, 496 (1941) (“The conflict of law rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware’s state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side.”). If a class suit is transferred under 28 U.S.C. §1407, the court must apply the choice-of-law rules of the state from which the suit was transferred. *See Van Dusen v. Barrack*, 376 U.S. 612 (1964). Some court and commentators erroneously have assumed that a class suit comprised of plaintiffs whose suits have been transferred under Section 1407 should be viewed as an amalgam of transferred suits for choice-of-law purposes; thus, the claims of each class member would be governed by the choice-of-law rules of the state in which his or her suit originally had been filed. *See, e.g.*, *In re Agent Orange Product Liability Litigation*, 580 F. Supp. 690, 695 (E.D.N.Y. 1984) (“Certifying this as a class action with residents of different states as plaintiffs does not, we assume for present purposes, by analogy to *Van Dusen v. Barrack*, reduce all disputes within the litigation to one subject to . . . the conflict of law rules of New York); Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U.L. Rev. at 562 (endorsing Judge Weinstein’s assumptions, on the ground that “[b]ecause class certification does not affect the law applicable to any individual claim, the court had to follow *Klaxon* and *Van Dusen* and apply the choice-of-law rules of the transferor court.”) *Klaxon* and *Van Dusen*, however, apply to *actions*, not the individual claims in a class suit. A class action certified in an MDL proceeding, does not consolidate (or extinguish) other suits transferred under Section 1407, and may include individuals who have not filed suit at all or whose suits in state court are not subject to transfer under Section 1407. Thus, the choice-of-law rules of the state in which the particular class suit was brought should govern the class claims. *See, e.g.* *In re Bridgestone/Firestone Tires Product Liability Litigation*, 288 F.3d 1012 (7th Cir. 2002) (applying Indiana law when counsel for many of the MDL plaintiffs filed a new consolidated suit in Indiana and requested certification of the suit as a nationwide class action). To conclude otherwise would treat state and federal class actions differently with respect to choice of law, precisely what *Klaxon* and *Van Dusen* were intended to avoid. *See Kramer, Choice of Law in Complex Litigation*, 71 N.Y.U.L. Rev. at 575 (“The general practice [in state nationwide class suits] is for the court to use its own choice-of-law rules to determine the applicable law.”) (citing 3 Newberg & Conte § 13.29); *see, e.g.* *Washington Mutual Bank v. Superior Court*, 15 P.3d 1071 (Cal. 2001) (formulating choice-of-law rules applicable to class suits brought in California courts).

<sup>21</sup> *See, e.g.*, *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016-1017 (D.C. Cir. 1986); *Commander Properties Corp. v. Beech Aircraft Corp.*, 164 F.R.D. 529, 541 (D. Kansas 1995). Although in all the cases discussed in this section, the party seeking application of non-forum law was the defendant and the party seeking certification of the class was the plaintiff, that will not always be the case. In settlement class actions, for example, both the plaintiff and the defendant seek certification, sometimes against the opposition of objectors. Those objecting to certification often argue that non-forum law applies because doing so complicates the certification inquiry. As I argue below, however, representatives of a class have an obligation to adequately represent the class even in the course of certification hearings. *See notes 86-89 and accompanying text, infra.* For that reason, class

Appellees see the “which law” matter as academic. They see no variations in state warranty laws relevant to this case. A court cannot accept such an assertion “on faith.” Appellees as class action proponents must show that it is accurate. . . . [¶] As the Third Circuit observed, . . . to establish commonality of the applicable law nationwide, class movants must creditably demonstrate through an extensive analysis of state-law variances that class certification does not present insuperable obstacles.<sup>22</sup>

*Walsh*, in other words, imposed a burden on the class action proponent to demonstrate that there are “no variations in state warranty laws” that were relevant to the case. But in fact, Ford Motor Co.—rather than *Walsh*—may have been required to establish material variations in state warranty laws, if it wished to take advantage of such variations to argue against certification of a class. The *Erie* policy generally requires federal courts to follow state law when failure to do so would be “outcome determinative.”<sup>23</sup> And it has long been understood that rules governing choice-of-law or

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representatives may have an obligation to argue for application of more favorable non-forum law, even when doing so would complicate the certification analysis.

<sup>22</sup> The circuit court believed that the Third Circuit’s decision, *In re School Asbestos Litigation*, 789 F.2d 996, 1010 (3d Cir. 1986), supported its conclusions. But the Third Circuit’s decision—which *Walsh* quoted in relevant part—provides minimal support for the rule of *Walsh*. The Third Circuit did not hold that “class movants must creditably demonstrate through an extensive analysis of state-law variances “that class certification does not present insuperable obstacles,” but simply noted that the class proponents in *School Asbestos* had done so.

<sup>23</sup> *Hanna v. Plumer*, 380 U.S. at 460, 468 (1965) (“The outcome-determination test” . . . cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of the laws”); *Guaranty Trust Co. v. York*, 326 U.S.99, 109 (1945) (“The intent of [the *Erie*] decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of the litigation, as it would be if tried in a State court.”).

burdens of production and persuasion are outcome-determinative.”<sup>24</sup> Yet, the D.C. Circuit in *Walsh* failed to determine what would be required under the District of Columbia’s choice-of-law rules.<sup>25</sup>

The general rule across the country in fact requires a party which seeks application of non-forum law to bear the burden of demonstrating that forum law should not be applied.<sup>26</sup> As Judge Morris Arnold once explained, the general rule, when applicable, should be integrated into the certification inquiry under Rule 23:

[I]t is well settled that a court “should apply its own local law unless there is good reason for not doing so.” R. Leflar, L. McDougal III and R. Felix, *American Conflicts Law* § 102 at 288 (4th. Ed. 1986; *see also* 1A C.J.S. *Actions* § 19 at 345-46 (1985)). It follows from this that defendants must

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<sup>24</sup> *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943) (“The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases. . . must apply.”).

<sup>25</sup> District of Columbia choice-of-law rules apply to a diversity action filed in the District of Columbia. *See Lee v. Flintkote Co.*, 593 F.2d 1275, 1278-80 (D.C. Cir. 1979) (applying District of Columbia choice-of-law rules to a diversity action filed in the District of Columbia). Two cases which postdate *Walsh* suggest that the choice-of-law burden should have been placed on Ford. *See Joeckel v. Disabled American Veterans*, 793 A.2d 1279, 1282 n. 7 (D.C. App. 2002) (quoting *Rymer v. Poole*, 574 A.2d. 283 (D.C. App. 1990), and citing the Second Restatement for the proposition that “[w]hen parties do not raise the issue of the applicability of foreign law, the general rule is that a court is under no obligation to apply foreign law and may instead apply the law of the forum.”).

<sup>26</sup> Restatement (Second) of Conflicts § 136, comment h (“[W]here either no information, or else insufficient information has been obtained about the foreign law, the forum will usually apply its own local law except when to do so would not meet the needs of the case or would not be in the interests of justice.”). The constitutionality of this rule has been affirmed in the class context. As the Court explained in *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730-31 (1988): “[I]t is not enough that a state court misconstrue the law of another state. Rather, our cases make plain that the misconstruction must contradict law of the other State that is clearly established and has been brought to the court’s attention.” Professor Kramer has argued for a different rule. *See Kramer, Interest Analysis and the Presumption of Foreign Law*, 56 U. Chicago L. Rev. 1301, 1306 (1989) (criticizing the presumption of forum law under interest analysis on the ground that “[o]nce the applicable law becomes an issue, the ‘normal and natural practice’ [would be] to require the plaintiff to show that some law entitles him to recover.”). *Cf. Weintraub, COMMENTARY ON THE CONFLICT OF LAWS* at 112 (4th ed. 2001) (“If . . . the law and policies of some jurisdiction are known to the court and it is known that this law is functionally relevant to the case, the court would be free to apply this known law unless and until the court learned . . . that a different law exists elsewhere, that the policies of that law would also be advanced by application, and that, under all the circumstances, that law and those policies should be preferred over the others that are already known.”).

establish material differences between the laws of relevant states. As defendants have not made such a showing, the court will not deny class certification based on choice-of-law considerations.<sup>27</sup>

Rule 23 does not require otherwise. The text of Rule 23 is silent on the matter, and although federal courts often conflate the choice-of law burden with the class-certification burden, the burdens are distinct and need not be placed on the same party. A party seeking certification of a class can be required to prove predominance and superiority in light of the court's conclusions with respect to choice of law, as California state law, for example, requires in certain circumstances.

In the absence of a contractual choice-of-law provision, California law places much of the burden of demonstrating that foreign law applies on the proponent of foreign law.<sup>28</sup> Only if the proponent of foreign law makes a sufficient showing, must the class proponent “creditably demonstrate, through an extensive analysis of state law variances that class certification does not present insuperable obstacles.”<sup>29</sup> In other words, if a court

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<sup>27</sup> *Barker v. FSC Securities Corp.*, 133 F.R.D. 548, 555 (W.D. Ark. 1989).

<sup>28</sup> *See* *Washington Mutual Bank v. Superior Court*, 15 P.3d 1071 (Cal. 2001) (rejecting the argument that the claims of class members should presumptively be governed by the law of their residence “unless the proponent of class certification affirmatively demonstrates that California law is more properly applied.”). Because *Washington Mutual Bank* involved contractual choice-of-law provisions, the proponent of foreign law did not bear the burden of “affirmatively showing the existence of outcome-determinative differences among applicable state laws.” *Id.* at 1085. In the absence of a choice-of-law provision, the proponent of the class must demonstrate that “significant contacts to California exist.” *Id.* at 1081 (citing *Shutts*). If the class proponent meets this burden, the burden shifts to the proponent of foreign law to demonstrate that application of foreign law would be appropriate. *Id.* at 1080-81. Although the California Supreme Court apparently thought otherwise, the Constitution does not require the proponent of the class to demonstrate that significant contacts with California exist. *See Shutts*, 472 U.S. at 816 (“We must first determine whether Kansas law conflicts in any material way with any other law which could apply. There can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit.”); *Sun Oil*, 486 U.S. at 730-31 (placing the burden on the party seeking application of nonforum law).

<sup>29</sup> *Id.* at 923 (quoting *Walsh v. Ford Motor Co.*). The Court elaborated on the showing it expected from the class proponent in these circumstances:

concludes that the party seeking application of non-forum law has not made its case, then choice-of-law issues should not lead to the conclusion that certification is inappropriate. If, on the other hand, the party seeking application of non-forum law demonstrates its applicability, the party seeking certification of a class has an obligation to demonstrate that certification would be appropriate, notwithstanding the applicability of different substantive laws to the claims of the class. In short, the conclusion that Rule 23 imposes a burden on the class proponent to demonstrate that class certification would be appropriate does not require a conclusion that Rule 23 imposes the choice-of-law burden on the class proponent.

Because the two burdens are linked, it would not be unreasonable to read Rule 23 broadly enough to govern the choice-of-law burden. But doing so would fly in the face not only of the plain meaning of Rule 23, but also of the Court's current approach to interpreting the Federal Rules of Civil Procedure. In *Gasperini v. Center for Humanities*, the Court emphasized that federal courts should interpret the Federal Rules "with sensitivity to important state interests and regulatory policies,"<sup>30</sup> which I believe include outcome-determinative choice-of-law rules. The Court went even further in *Semtek v. Lockheed Martin Inc.*, a case in which the Court relied on a remarkably strained interpretation of Rule 41(b) to avoid a more reasonable interpretation that the Court

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[T]he presentation must be sufficient to permit the [superior] court, at the time of certification, to make a detailed assessment of how the difficulties posed by the variations in state law will be managed at trial. For example, certification may be appropriate if the class action proponent shows that state law variations can be effectively managed through the creation of a small number of subclasses grouping the states that have similar legal doctrines.

*Id.*

<sup>30</sup> *Gasperini v. Center for Humanities, Inc.* 518 U.S. 415, 427 n. 7 (1996).

feared would be inconsistent with the *Erie* policy.<sup>31</sup> If *Semtek* is properly read for the proposition that ambiguous federal rules should be read to avoid when possible clashes with the *Erie* policy, Rule 23 cannot properly be read to impose the choice-of-law burden on a class proponent in contravention of state law. The Court has long recognized that both choice of law and burdens of production and persuasion call for the application of state law.<sup>32</sup>

Quite apart from *Erie* concerns, placing the choice-of-law burden on the proponents of a class would lead to differential treatment of a critical issue—choice of law—based solely on the procedural device through which a claim was asserted. In individual litigation, allocation of the choice-of-law burden in federal diversity suits would be determined by state law, but in class suits, the allocation of the choice of law burden would be governed by federal law. Such a result should be avoided in the absence of strong countervailing reasons. None exists with respect to this issue. Given the burden of class litigation on the court and parties, it is reasonable to insist that choice-of-law issues be addressed at an earlier point than might be required in ordinary litigation. Indeed, federal courts have properly rejected the view that choice-of-law issues need not be addressed at the certification stage, citing the class proponent’s burden to demonstrate that the suit may be certified as a class action. But federal courts can insist that choice-of-law be addressed at the certification stage without ignoring choice-of-law rules that would apply in ordinary litigation.

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<sup>31</sup> *Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 501-504 (2001) (rejecting an interpretation of Rule 41(b) in part because that construction of Rule 41(b) “would in many cases violate the *federalism* principle of *Erie* by engendering ‘substantial variations [in outcome] between state and federal litigation’ which would ‘likely influence the choice of a forum.’”) (emphasis added).

<sup>32</sup> *Palmer v. Hoffman*, 318 U.S. 109, 117 (1942); *Klaxon v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 496 (1941).

## 2. *Rhone-Poulenc Rorer*: A Case Study in Error

The mistakes discussed above create an improper bias against certification of class suits, as demonstrated by the Seventh Circuit’s well-known opinion in *Rhone-Poulenc Rorer*.<sup>33</sup> In a fascinating opinion written by Judge Posner, the Seventh Circuit improperly relied on choice-of-law difficulties as one reason for decertification of a nationwide class suit. Application of the proper choice-of-law methodology, however, might well have led the court of appeals to conclude that there were no material variations in law that required decertification.

Hemophiliacs infected with HIV had brought state and federal suits against manufacturers of blood products contaminated with HIV, including *Wadleigh v. Rhone-Poulenc* which had been filed in the Northern District of Illinois.<sup>34</sup> Other federal suits were transferred to the Northern District of Illinois for pretrial proceedings before Judge Grady pursuant to the 28 U.S.C. § 1407.<sup>35</sup> In the course of those proceedings, Judge Grady partially certified *Wadleigh* as a nationwide class suit pursuant to Federal Rule of Civil Procedure 23(b)(3) and 23(c)(4)(A).<sup>36</sup>

In addressing the choice-of-law issues raised by the suit, Judge Grady rejected defendants’ arguments that class certification would be inappropriate because “the negligence law of each of fifty-one jurisdictions would have to be applied by the jury,

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<sup>33</sup> In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995).

<sup>34</sup> Telephone Interview with David Shrager, Esq., counsel for the plaintiffs, on May 7, 2003.

<sup>35</sup> *Id.*

<sup>36</sup> 157 F.R.D. 410 (N.D. Ill. 1994). Rule 23(c) (4) (A) authorizes a district to certify a class “with respect to particular issues.”

making a joint trial impossible.”<sup>37</sup> Judge Grady noted that the only difference with respect to duty and breach which defendants had identified was the distinction between ordinary negligence and a heightened professional standard of care.<sup>38</sup> Judge Grady was satisfied that Illinois law, which he had applied in an earlier case involving the same issues, should apply to the ordinary negligence issues in *Wadleigh*. He emphasized that defendant had failed to demonstrate that the law of other states with respect to ordinary negligence was materially different from Illinois law.<sup>39</sup>

The Seventh Circuit ignored Judge Grady’s analysis, asserting instead that [the district judge] proposes to have a jury determine the negligence of the defendants under a legal standard that does not actually exist anywhere in the world. One is put in mind of the concepts of general common law that prevailed in the era of *Swift v. Tyson*. That assumption is that the common law of the 50 states and the District of Columbia, at least so far as it bears

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<sup>37</sup> *Id.* at 418.

<sup>38</sup> Judge Grady wrote:

[Defendants] give no examples of differing definitions of ordinary negligence. It is this court's impression that the definition of ordinary negligence is substantially identical in all jurisdictions. . . . [¶] Defendants argue with particular vigor that the law concerning foreseeability of injury will differ among the various jurisdictions. . . . But the defendants have cited no case law from any state pertinent to the question of whether a defendant has a duty to guard against unknown but allegedly foreseeable risks.

*Id.* at 419-20. Judge Grady further concluded “that the fact that the defendants might be subject to different duties in different jurisdictions—customary or professional standard in some and ordinary care in others—does not create a multiplicity of issues” *Id.* at 420-21.

<sup>39</sup> *See id.* at 419 (“Counsel for the fractionater defendants in this case were trial counsel in *Poole* [the Illinois case previously heard by Judge Grady], and they have not made any attempt to show that the Illinois definition is materially different from that of any other state.”); *id.* at 420 (“If, in the time that has elapsed since the *Poole* trial, counsel for the fractionaters had found case law from any jurisdiction which conflicts with the sense of that instruction, they would have cited it. In the absence of such case authority, the court is satisfied that every jurisdiction would follow the . . . Restatement . . .”).

on a claim of negligence against drug companies is basically uniform and can be abstracted into a single instruction.<sup>40</sup>

While rhetorically powerful, Judge Posner’s opinion manifestly mischaracterized Judge Grady’s analysis and failed to comply with the required choice-of-law methodology. Without citing *Klaxon*, Judge Posner invoked *Erie* and the spectre of “general common law” to insist that the law of all fifty states must be applied to the claims asserted in *Wadleigh*. But as I argue above, *Klaxon* requires a federal court to apply the choice of law rules of the state in which it sits—in this case, Illinois’ choice-of-law rules.<sup>41</sup> Illinois follows the general rule that a party seeking application of nonforum law bears the burden of demonstrating that nonforum law applies.<sup>42</sup> Judge Posner, however, did not consider whether defendants had met their burden below, simply concluding that material variations in negligence law among the states required decertification. Had Judge Posner applied the proper methodology, he might well have come to the conclusion that choice-of-law difficulties did not provide a basis for decertification.<sup>43</sup>

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<sup>40</sup> *Rhone-Poulenc*, 51 F.3d at 1300.

<sup>41</sup> *Van Dusen* was inapplicable because *Wadleigh*—though a part of the MDL proceedings—had been filed in the Northern District of Illinois.

<sup>42</sup> See *Society of Mount Carmel v. National Ben Franklin Insurance Co.*, 643 N.E.2d 1280, 1293 n. 4 (Ill. App. 1994) (“While California law may be the more appropriate law to apply, we note that, under conflict of law principles, when the parties have failed to provide information as to the applicable foreign law, the forum will decide the case in accordance with its own local law.”) (citing Restatement). See also *International Administrators, Inc. v. Life Insurance Co.*, 753 F.2d 1373, 1377 n. 4 (7th Cir. 1985) (“Although we are not certain that Illinois law would apply to every issue, were the question properly argued, we are certain that it is not the job of the trial judge to do the parties’ work for them.”) (citing Restatement).

<sup>43</sup> Whether Judge Posner correctly concluded that *material* variations in negligence law existed among the states is beyond the scope of this paper and an issue on which I express no opinion. For a scathing critique of Judge Posner’s argument on this score, see Commentary, *Posner’s State Law Variations “Nuances” Unclothed*, 19 Class Action Reports 1 (1996).

Despite the influence of contrary precedent, I remain cautiously optimistic that the proper choice-of-law methodology ultimately will prevail in federal class actions. The cases conflating the choice-of-law and certification burdens have not considered the significant barrier that *Gasperini* and *Semtek* erected against a construction of Rule 23 that would preempt state choice-of-law rules. Indeed, both *Walsh* and *Rhone-Poulenc* were decided before *Gasperini* and *Semtek*.<sup>44</sup> It would be a mistake, however, to exaggerate the impact of applying the correct methodology: Whether or not courts apply the proper choice-of-law methodology, choice of law issues can and will seriously complicate efforts to pursue class litigation.

## **B. The Predominance and Superiority Requirements**

The party or parties seeking class certification must demonstrate that the predominance and superiority requirements of Rule 23(b)(3) have been satisfied notwithstanding differences in applicable law.<sup>45</sup> *Amchem* recognized that differences in state law may undermine class cohesion.<sup>46</sup> But when a court creates subclasses that address material variations in applicable substantive law, there should be little doubt that

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<sup>44</sup> The Fifth Circuit's decision in *Castano* also was decided before *Gasperini* and *Semtek*.

<sup>45</sup> The Seventh Circuit recently suggested (albeit in an ambivalent opinion) that *any* material variation in the law applicable to the class might render certification inappropriate. In re Bridgestone/Firestone, Inc. 288 F.3d 1012, 1015 (7th Cir. 2002) (“No class action is proper unless all litigants are governed by the same legal rules. Otherwise the class cannot satisfy the commonality and superiority requirements of Fed.R.Civ.P 23(a), (b) (3).”); *id.* (“[T]he district judge . . . recognized that uniform law would be essential to class certification.”); *but see id.* at 1018 (“Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable.”). But unless the Seventh Circuit’s isolated (and perhaps inadvertent) suggestion takes hold, once those seeking application of nonforum law meet their burden, class proponents are entitled to opportunity to prove that the proposed suit satisfies the predominance and superiority requirements.

<sup>46</sup> *See Amchem*, 521 U.S. at 624 (“The Third Circuit highlighted the disparate questions undermining class cohesion in this case: . . . Differences in state law, the Court of Appeals observed, compound these disparities.”).

variations in law cannot prevent satisfaction of the predominance requirement.<sup>47</sup> Rule 23(b) (3) requires that “common questions of law or fact predominate over any questions affecting *only individual members*.”<sup>48</sup> By definition, material variations in law which are addressed by forming subclasses do not affect only individual members, but rather *classes* of individuals who share the question in common.

Material variations in laws that govern claims, however, may prevent the conclusion in any given case that the requested certification of the proposed class action would be “superior to other available methods for the fair and efficient adjudication of the controversy.”<sup>49</sup> Rule 23 identifies two non-exclusive factors for consideration in the superiority analysis on which material variations in substantive law may bear. I discuss them below.

### **1. Manageability**

While courts have often relied on the “the difficulties likely to be encountered in the management of a class action”<sup>50</sup> to conclude that certification of a class would not be a superior means of proceeding, it is open to question whether courts may do so in the context of a settlement class action. *Amchem* held that a district court “[c]onfronted with a request for settlement-only class certification . . . need not inquire whether the case, if tried, would present intractable management problems, . . . for the proposal is that there

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<sup>48</sup> F.R. Civ. P. 23(b)(3) (emphasis added).

<sup>49</sup> F.R. Civ. P. 23(b)(3).

<sup>50</sup> F.R. Civ. P. 23(b)(3)(D).

be no trial.”<sup>51</sup> As Samuel Issacharoff has pointed out,<sup>52</sup> however, *Amchem*’s holding on this point is in tension with the Court’s recognition that

if a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting certification despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, and the court would face a bargain proffered for its approval without benefit of adversarial investigation.<sup>53</sup>

If trial of a class suit would be unmanageable, the suit cannot be certified for litigation, and class counsel cannot threaten to proceed with the suit to press for a better offer. Professor Issacharoff wisely has suggested that the tension is best resolved by requiring that class counsel have the ability to credibly threaten litigation against defendants, either through the class action or a series of actions which would pose an equivalent threat.<sup>54</sup> In other words, when class counsel would not have the ability to credibly threaten litigation against defendants in the absence of certification, the parties would be required to demonstrate that the class suit could be tried without undue difficulty.

Whatever the courts ultimately conclude about the relevance of manageability concerns to certification of a settlement class action, it is clear that proponents of class certification in other kinds of class suits will need to address manageability. Nor is there any doubt material variations in substantive law will complicate the management of a

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<sup>51</sup> *Amchem*, 521 U.S. at 620.

<sup>52</sup> Issacharoff, *Governance and Legitimacy*, 1999 Supreme Court Rev. at 348.

<sup>53</sup> *Id.* at 621.

<sup>54</sup> Issacharoff, *Governance and Legitimacy*, 1999 Supreme Court Rev. at 348-349.

class action. Professor Kramer has argued that no more than two or three materially different rules ordinarily exist on any given issue.<sup>55</sup> To the extent Professor Kramer's generalization is proven accurate in any given case,<sup>56</sup> the likelihood that variations in substantive law alone will render a class suit unmanageable will be diminished. Material variations in substantive law, however, may create serious manageability difficulties if, in any given case, Professor Kramer's generalization is incorrect or subclasses dealing with other issues must be doubled or tripled in number to address material variations in law. As John Coffee has noted, the number of required subclasses can add up rapidly:

Consider, for example, a hypothetical tort class action involving only three characteristic types of injury (small, medium, and large), but also involving the common law of multiple states (whose laws subdivide in turn into three categories: strict liability, negligence, and intentional misconduct), and extending over time periods that raise issues under each jurisdiction's statute of limitations. On this basis of three types of injury, three applicable legal rules, and two statutes of limitations categories, there would logically need to be eighteen distinct subclasses, each apparently with its own counsel under *Ortiz*.<sup>57</sup>

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<sup>55</sup> Kramer, *Choice of Law in the American Courts in 1990*, 39 American J. Comp. L. at 475.

<sup>56</sup> See Phair, Comment, *Resolving the Choice-of-Law Problem in Rule 23(b)(3) Nationwide Class Actions*, 67 U. Chi. L. Rev., 835, 854-855 (collecting cases in which courts have considered whether material variations in the laws of the states can be grouped in a few categories).

<sup>57</sup> Coffee, *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Columbia L. Rev. 370, 396 (2000); see also *id.* at 396 n. 67 (noting that in "In re Teletronics Pacing System, Inc., 172 F.R.D. 271 (S.D. Ohio 1997), the district court certified a nationwide class that included nine separate subclasses to address variations in state law"); Coffee, *Conflicts, Consent and Allocation After Amchem Products—Or Why Attorneys Still Need Consent to Give Away Their Client's Money*, 84 Virginia L. Rev. 1541, 1552-53 (1998) (arguing that as many as twelve subclasses might be required, even in a simple case).

It is clear that the creation of subclasses to account for material variations in law and other complications will at some point render litigation of a class suit frustratingly difficult. The key question, however, is not whether litigation of a class suit will be difficult, but whether proceeding with certification of the class suit would be “superior” to the alternatives. While the sheer number of the subclasses required may lead to the conclusion the class suit *as proposed* should not proceed, manageability concerns which stem from the number of required subclasses can and should be addressed by limiting the scope of the class suit. Additional class actions could then be filed in other jurisdictions to address the claims of excluded subclasses.

## **2. Forum Selection**

In addition to considering whether a class suit is manageable, the superiority requirement also requires courts to consider “the desirability or undesirability of concentrating the litigation of the claims in the particular forum[.]” Choice-of-law issues may play a role in deciding whether it would be desirable to concentrate litigation of claims in a particular forum. Although this factor has received much less attention in the cases than manageability, the authors of Federal Practice and Procedure state that an analysis “similar to that used in deciding a transfer of venue question under Section 1404(a) of Title 28” is required.<sup>58</sup> Whether the forum will be applying the law of the state in which it sits is a factor that has been considered under Section 1404(a):

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<sup>58</sup> 7A Wright et. al § 1780 at 573; *see also id.* at 572-73 (“The other consideration a district court must take account of under subdivision (b)(3)(C) is whether the forum chosen for the class action represents an appropriate place to settle the controversy, given the location of interested parties, the availability of witnesses and evidence, and the condition of the court’s calendar.”). *But see* 2 Newberg on Class Actions, § 4:31 at 266-69 (4th ed. 2002) (arguing that after the passage of 28 U.S.C. § 1407, this factor is of little relevance).

In diversity cases, in which state law provides the substantive rules, there is thought to be advantage in having it applied by federal judges who are familiar with the state law, and thus in trying the case in a district of the state whose law is to govern. This has been mentioned as a factor in some cases but it seems not to have been given great weight, particularly when the applicable state law appears clear.<sup>59</sup>

In other words, the need to apply the law of another state is a factor to be considered in deciding whether it would be desirable to concentrate class claims in a particular forum. I am skeptical that this factor should be given much weight in the superiority analysis, however. To begin with, courts which apply the general rule with respect to choice-of-law burdens will often conclude that *forum* law should be applied to novel issues of state law. To the extent that courts reach such a conclusion, there will be no need to apply foreign law to novel issues of state law.<sup>60</sup> Moreover, choice-of-law is only one of a number of issues that must be considered in deciding whether it would be desirable to concentrate class claims in the forum. Another factor which cuts in the opposite direction is “the desire to avoid multiplicity of litigation.”<sup>61</sup> And the desirability of concentrating class claims in the forum is only one of a nonexclusive list of factors to be considered in

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<sup>59</sup> 15 Wright et. al, § 3854 at 466-67. See also *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947) (“There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.”) (applying *forum non conveniens* analysis prior to passage of Section 1407).

<sup>60</sup> Take, for example, *Rhone-Poulenc*. The district court concluded that Illinois law applied, based in part on the defendants’ inability to demonstrate that other states would treat the novel issues raised by the litigation different from the way in which Illinois would do so. Had the district court’s finding not been overturned, the district court would not have been faced with the need to construe the law of other states, the basis for considering choice of law under Federal Rule of Civil Procedure 23(b)(3)(C).

<sup>61</sup> Wright et. al. § 3854 at 441; *id.* at 440-455 (discussing transfer under § 1404(a)).

the predominance and superiority analysis. In any event, the desire to have class claims heard in a federal court familiar with applicable state law should, at most, lead to certification of smaller class suits in fora whose substantive law would govern the claims.<sup>62</sup>

### **III. The Adequate Representation Requirement**

#### **A. Choice of Law Within the Forum**

Because the value of a claim is determined in part by the substantive law applicable to the claim, governing choice-of-law rules may create potential conflicts among members of a class whose claims might be governed by the substantive law of different states. Given the potential for conflicting interests, it is striking how little attention the relationship between adequate representation and choice of law has received.<sup>63</sup> This long-standing neglect is in part a function of how the choice-of-law issue

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<sup>62</sup> In re Bridgestone/Firestone, Inc. 288 F3d 1012 (7th Cir. 2002), is the only published case I have found that relies on the difficulties of applying nonforum law, but the court did so in the course of an extraordinarily broad attack on the use of class suits:

The district judge did not doubt that differences within the class would lead to difficulties in managing the litigation. But the judge thought it better to cope with these differences than to scatter the suits to the winds and require hundreds of judges to resolve thousands of claims under 50 or more bodies of law. Efficiency is a vital goal in any legal system—but the vision of “efficiency” underlying this class certification is the model of the central planner. . . . What *is* the law of Michigan, or Arkansas, or Guam as applied to this problem? Judges and lawyers will have to guess, because the central planning model keeps the litigation far away from state courts. . . . And if the law were clear how would the fact (and thus the damages per plaintiff) be ascertained? One suit is an all-or-none affair with a high risk . . . . Getting things right the first time would be an accident. . . . [¶] Our decision in *Rhone-Poulenc Rorer* made this point, and it is worth reiterating: only “a decentralized process of multiple trials, involving different juries and different standards of liability, in different jurisdictions” will yield the information needed for accurate evaluation of mass tort claims.

*Id.* at 1019-20.

<sup>63</sup> *But see* In re School Asbestos Litigation, 977 F.2d 764, 796 (3d Cir. 1992) (raising the possibility that counsel’s agreement to litigate a class suit under the least favorable law might constitute inadequate representation); *see also* *Washington Mutual Bank*, 15 P.3d 1071, 1086-87 (Cal. 2001), (“Determinations regarding the applicable law may affect issues other than predominance and manageability, such as . . .

has been framed by interested actors and of the underdevelopment of adequate-representation law before *Amchem* and *Ortiz*.

Courts and counsel interested in facilitating the certification of class suits notwithstanding choice-of-law difficulties had no incentive to complicate certification by looking at choice of law from the standpoint of adequate representation. Nor did defendants who argued against certification of class suits prior to *Amchem* and *Ortiz* ordinarily have any incentive to frame their choice-of-law arguments in terms of adequate representation. Adequate representation focuses on the best interests of absent class members; for obvious reasons, defendants seeking to block certification would prefer to invoke the predominance and superiority requirements of Federal Rule of Civil Procedure Rule 23(b)(3), requirements which instead focus courts' attention on the difficulties of class litigation.<sup>64</sup> And the class members most likely to complain about inadequate

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whether the representative plaintiffs can fairly and adequately protect the interests of the entire class.”). A few academics have also noted the issue. *See, e.g.,* Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 Texas L. Rev. at 435 (noting that the a choice of forum which results in an unfavorable choice of law may evidence inadequate representation); Brilmayer & Goldsmith, CONFLICT OF LAWS 382 (5<sup>th</sup> ed. 2002) (asking with respect to choice of law, “[d]oesn’t it pose formidable problems of adequacy of representation. . . to bring an absent plaintiff into a class action that is against her interest?”); Tidmarsh and Trangsrud, COMPLEX LITIGATION AND THE ADVERSARY SYSTEM 867 (1<sup>st</sup> ed. 1998) (recognizing the issue in discussing whether application of least favorable law is an acceptable method of addressing choice-of-law difficulties in a class action); Coffee, *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Columbia L. Rev. 370, 395 (2000) (“*Ortiz* tightened the conception of cohesion within the class, applying it not simply to gross differences in the nature of plaintiffs’ injuries, but also to differences in the legal and negotiating positions of class members.”); Coffee, *Conflicts, Consent and Allocation After Amchem Products—Or Why Attorneys Still Need Consent to Give Away Their Client’s Money*, 84 Virginia L. Rev. 1541, 1552 (1998) (“Residents of different states might need different counsel to the extent that different legal rules in their respective jurisdictions give them different claim strengths.”).

<sup>64</sup> Indeed, *In re School Asbestos Litigation* is the only federal case I have found in which a court adverted to an argument by defendants that class counsel’s decision with respect to choice of law constituted inadequate representation. Class counsel in that case had agreed to application of the law of the most restrictive jurisdiction. As the Third Circuit explained:

The defendants originally opposed class certification on the ground that because so many state laws would have to be applied[,] common issues could never predominate and the class action would be unmanageable. Counsel for the class plaintiffs repeatedly responded that the differences in state laws were not that great and that the plaintiffs were

representation with respect to choice of law often have a strong incentive to opt out of the litigation. Sophisticated class members with high value claims generally have preferred individual to class litigation.<sup>65</sup>

A principal reason that courts, class counsel, and defendants could ignore the intersection between choice of law and adequate representation was the appalling underdevelopment of adequate representation law prior to *Amchem* and *Ortiz*. *Amchem* and *Ortiz*, however, finally placed conflicts arising from claim strength front-and-center. Now that the Court has done so, the intersection between choice of law and adequate representation can no longer be ignored.

### **1. Conflicts and Choice of Law**

While *Amchem* and *Ortiz* leave crucial questions unanswered, the cases resolve important issues that make it impossible to ignore the relationship between choice of law and adequate representation. First, *Amchem* held that asking whether a settlement was “fair, adequate and reasonable” to the class as a whole is not the same as asking whether the adequate representation standard has been satisfied.<sup>66</sup> Quoting the Second Circuit, the Court in *Amchem* noted:

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willing to prove their case according to the law of the “strictest” jurisdiction. Relying in part on these two representations . . . the district court certified the class.

In re School Asbestos Litigation, 977 F.2d at 796. To the extent the court accepted this concession, defendants could not argue that the application of multiple substantive laws in the suit would create difficulty satisfying the predominance or superiority requirements of the class action rule.

<sup>65</sup> See Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 Texas L. Rev. 384, 441 (2000) (citing scholarly authority for the proposition that “it may be to the advantage of sophisticated claimants with high-value claims to opt out. . .”) (emphasis in original).

<sup>66</sup> *Ortiz*, 527 U.S. at 856 (“[I]t is obvious after *Amchem* that a class divided between holders of present and future claims . . . requires division into homogenous subclasses . . . with separate representation to eliminate conflicting interests of counsel.”); *Amchem*, 521 U.S. at 622 (“Federal courts . . . lack authority to substitute for Rule 23’s certification criteria a standard never adopted—that if a settlement is ‘fair’ then certification is proper.”).

The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given to those who understand that their role is to represent solely the members of their subgroup.<sup>67</sup>

The Court concluded that the lack of assurance . . . either in the terms of the settlement or in the structure of negotiations . . . that the named plaintiffs operated under a proper understanding of their representational responsibilities” was fatal to the settlement.<sup>68</sup> In short, *Amchem* emphasizes that there must be “structural assurance” of adequate representation.<sup>69</sup>

Second, in explicating the adequate representation standard, *Amchem* and *Ortiz* focused on the protecting the economic value of class members’ claims. The Court, for example, rejected the settlements in *Amchem* and *Ortiz* in part on the ground that the settlements reached in those cases did not protect the value of claims held by “exposure

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<sup>67</sup> 521 U.S. at 627 (quoting *In re Joint Eastern and Southern District Asbestos Litigation*, 982 F.2d 721, 742-743 (1982)).

<sup>68</sup> *Id.* at 627-28.

<sup>69</sup> The requirement that there be “structural assurance” of adequate representation in fact predates *Amchem*. In *Hansberry v. Lee*, 311 U.S. 32 (1940), for example, the Court insisted that both the representative and the Court be on notice of the representative’s role at the outset of the litigation:

The defendants in the first suit were not treated by the pleadings or decree as representing others or as foreclosing by their defense the right of others; and even though nominal defendants, it does not appear that their interest in defeating the contract outweighed their interest in establishing its validity. For a court in this situation to ascribe to either the plaintiffs or defendants the performance of such functions on behalf of the petitioners here, is to attribute to them a power it cannot be said that they had assumed to exercise, and a responsibility which, in view of their dual interests, it does not appear that they could rightly discharge.

*Id.* at 46. See also *Richards v. Jefferson County*, 517 U.S. 793, 801-02 (1996) (relying on a similar analysis).

only” plaintiffs.<sup>70</sup> The Court similarly held in *Ortiz* that the failure to provide separate representation for claims arising before 1959 from those arising after constituted inadequate representation because insurance policies rendered the pre-1959 claims more valuable.<sup>71</sup>

*Ortiz*, however, also limited the potential breadth of the protection against conflicts of interest provided by the adequate representation requirement. Specifically, the Court stated that “at some point there must be an end to reclassification with separate counsel.”<sup>72</sup> Similarly, at an earlier point in the opinion, the Court was critical that “[t]he district court took no steps at the outset to ensure that the potentially conflicting interests of easily identifiable categories of claimants be protected by provisional certification of subclasses under Rule 23(c)(4), relying instead on its *post hoc* findings at the fairness hearing that these subclasses in fact had been adequately represented.”<sup>73</sup> *Ortiz* suggests, in other words, that to the extent that variations in interest cannot be grouped into “easily identifiable categories of claimants,” they need not be considered in deciding whether an absent class member has been adequately represented. Of course, what constitutes an “easily identifiable categor[y] of claimants” is open to debate. It appears, however, that whether a category of claimants is easily identifiable should be measured against what an attorney involved in the case would be expected to know about the litigation at the time

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<sup>70</sup> *Ortiz*, 527 U.S. at 856-57; *Amchem*, 521 U.S. at 626.

<sup>71</sup> 527 U.S. at 857.

<sup>72</sup> 527 U.S. at 857.

<sup>73</sup> 527 U.S. at 831-32.

of the certification hearing.<sup>74</sup> After all, *Ortiz* concluded that pre- and post-1959 claims should be put in different categories because of differences in insurance coverage, a distinction which would certainly escape a casual observer.

Given the standards enunciated in *Amchem* and *Ortiz*, it seems clear that choice-of-law determinations have the potential to create conflicts of interest among members of a class that require separate representation. The content of the substantive law applied to a claim inevitably affects the value of a claim. Indeed, failure to argue for the best law available may constitute malpractice.<sup>75</sup> Moreover, sorting class members by “domicile” or “place of injury”—key considerations in determining applicable law—creates “easily identifiable categories of claimants.” Even an attorney with the most casual familiarity

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<sup>74</sup> In a thoughtful article written before *Ortiz* was decided, my colleagues Lynn Baker and Charles Silver noted that *Amchem*’s requirement of separate representation for “conflicts of interest” potentially had an enormously broad scope. Baker & Silver, *I Cut, You Choose: The Role of Plaintiff’s Counsel in Allocating Settlement Proceeds*, 84 Virginia L. Rev. 1465, 1491-1500 (1998). See also Rhode, *Class Conflicts in Class Actions*, 34 Stanford L. Rev. 1183, 1192 (1982) (“Among the primary questions left unaddressed [by the drafters of Rule 23] is whether interest ever means more than preference and, if so, when and what.”). Professors Baker and Silver noted, for example, that “[e]very litigation group contains plaintiffs with different attitudes toward risk.” 84 Virginia L. Rev. at 1492. Professor Coffee raised a similar concern even after *Ortiz*:

Imagine two similarly situated victims of the same mass tort injury. Both have equivalent injuries which in time will prove fatal. One has multiple dependents who require financial support, while the other does not. The latter plaintiff wants to win the largest possible recovery to vindicate his rights and punish the defendant; the former. . . desperately needs a settlement to support her children. . . . In overview, the latter plaintiff can be called a risk preferrer, while the former is risk averse. Neither has the same attitude toward litigation, nor approaches the settlement/trial decision from the same perspective.

Coffee, *Class Action Accountability*, 100 Columbia L. Rev. at 389-390. Professor Coffee asks whether these two victims may be included in the same class after *Ortiz*. *Id.* In my view, the answer is “yes.” The focus in *Ortiz* on “easily identifiable categories of claimants” suggests that a court may ignore these sorts of attitudinal differences. Of course, if a class member is dissatisfied with the representation available in a class suit, he or she should have the right to opt-out of or intervene in the litigation. See Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 Texas L. Rev. 571 (1997).

<sup>75</sup> See *Machado-Miller v. Mersereau & Shannon, LLP*, 43 P.3d 1207 (Or. App. 2002) (concluding that defense counsel’s failure to argue for application of more favorable California law in an Oregon action did not constitute malpractice because Oregon choice-of-law principles would have required application of Oregon law in any event); see also note 89 and accompanying text, *infra*.

with a case should understand, for example, that class members from different states may be in significantly different positions with respect to recovery. In short, material variations in the substantive law must be considered in deciding the extent to which subclassing is appropriate to address conflicts of interests among class members.

But it would be a mistake to assume that *Amchem* and *Ortiz* require that each category of claimants have separate representation. *Amchem* and *Ortiz* expressly require separate representation only if the proceedings or settlement discussions create disabling conflicts of interest. To this extent, I agree with Richard Nagareda who cautions in discussing settlement class actions that “[h]ow much cohesiveness one should insist upon for the class and what sorts of conflicts one should tolerate are questions that can be answered *only* by reference to what the class settlement seeks to achieve.”<sup>76</sup> In the case of adjudication—as opposed to settlement—differences among the class should rarely create a conflict of interest among class members that would disable class counsel from representing all class members in the adjudication of a class suit. Because a claim governed by the law of a more generous state can be adjudicated with a claim governed by law of a less generous state without affecting the value of either, adjudication of claims governed by different laws ordinarily will not create a conflict of interest among members of a class.<sup>77</sup> Similarly, not all settlement discussions will create disabling

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<sup>76</sup> Nagareda, *Autonomy, Peace & Put Options in the Mass Tort Class Action*, 115 Harvard L. Rev. 747, 784 (2000) (emphasis in original).

<sup>77</sup> Conflicts of interest, however, may arise in the course of adjudication, even with respect to choice-of-law rules. See Coffee, 100 Columbia L. Rev. at 387-88; Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 66-67 (1986) (recognizing that arguments over applicable law may create conflicts of interest). Assume, for example, that most of the class would be better off if the forum applied the *lex loci delicti* principle of the First Restatement of Conflicts, but a segment of the class would be better off if the forum applied the Second Restatement’s “most significant relationship” test. Class counsel could not properly decide that the First Restatement argument should be ignored because the majority of the class would benefit from application of the Second

conflicts of interest. When a defendant is willing to negotiate discrete settlements with subclasses, the same class attorney might be able to negotiate a series of settlements resolving the claims of individual subclasses. By “discrete settlement,” I mean that if the defendant were unable to reach an acceptable settlement with any particular subclass, the claims of that subclass could be litigated without nullifying settlements reached with other subclasses. Provided class counsel in these circumstances can maximize the recovery of each subclass without harming the interests of any, class counsel should be able to represent multiple subclasses without conflict. But to the extent that the contrary is true or that defendants seek to condition settlement on the resolution of the claims of all subclasses, settlement discussions would create a conflict of interest that disables class counsel from representing all of the subclasses.<sup>78</sup>

In short, whether disabling conflicts exist may depend upon the course of the litigation and settlement negotiations. I nonetheless agree with Professor Coffee that the logic of *Ortiz* (and *Amchem*) requires that every easily identifiable category of claimants be represented by separate counsel.<sup>79</sup> To do otherwise, would allow defendants to

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Restatement. If the issue were to be litigated, and plausible arguments could be made in support of both approaches, each segment of the class presumptively would be entitled to separate representation on *that* issue. Professor Coffee provides another example of a choice of law conflict that could arise outside of the settlement context. *See* Coffee, 100 Columbia L. Rev. 387-88. (“Some class members may reside in jurisdiction X (where the local substantive law is very favorable to them), while others may reside in jurisdiction Y (where the substantive law is essentially adverse.) Given this disparity, should class counsel seek to impose a federal or other uniform rule of liability for this multistate class action with the result that the damage awards will be averaged? Or, does such an attempt amount to a forbidden allocation which an individual lawyer cannot make under *Amchem*. . .”).

<sup>78</sup> This requirement effectively outlaws settlements that involve “large tradeoffs among class members in which certain valid legal claims are subordinated to other claims.” *See* Cramton, *Individualized Justice, Mass Torts, and “Settlement Class Actions”*: An Introduction, 80 Cornell L. Rev. 811, 827 (1995). Class representatives “who understand that their role is to represent solely the members of their subgroup” could not reach the sort of settlements struck down in *Amchem* and *Ortiz*.

<sup>79</sup> Coffee, *Class Action Accountability*, 100 Columbia L. Rev. at 397 (“*Ortiz* implies that each subclass must have its own counsel. . .”).

determine the structure of class representation by crafting their settlement proposals in specific ways. Defendants, for example, could force separate representation of subclasses by proposing a settlement that requires acceptance by every subclass. Because the compensation of class counsel will vary depending on whether counsel represents the class as a whole or a much smaller subclass, allowing defendants to control the structure of class representation would give defendants unacceptable financial leverage over class counsel. That clearly would not be in the interests of the class.<sup>80</sup>

## 2. Practical Issues

Professor Coffee has expressed concern that separate representation of multiple subclasses could render impracticable use of the class device. I agree with Professor Coffee that the requirements of *Amchem* and *Ortiz* should be interpreted with sensitivity to the realities of class litigation. Indeed, the Court’s focus in *Ortiz* on “*easily identifiable* categories of claimants” suggests that the Court itself was conscious of the realities of class litigation.<sup>81</sup> I see no reason to believe, for example, that the Court would

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<sup>80</sup> To require that class counsel not have an inventory of similar cases outside the class suit may impracticably narrow the pool of attorneys available to represent absent members of the class. *See Ortiz*, 527 U.S. at 878 (Breyer, J., dissenting) (“Of course, class counsel consisted of individual attorneys who represented other asbestos claimants. . . . Since Fibreboard had been settling cases contingent upon resolution of the insurance dispute for several years, any attorney who had been involved in previous litigation against Fibreboard was likely to suffer from a similar ‘conflict.’”); Nagareda, *Autonomy, Peace, and Put Options* 115 Harvard L. Rev. at 788-89 (arguing that at the “over-mature litigation stage . . . all firms with extensive hands-on experience in the litigation are likely to have droves of inventory cases.”). Counsel with inventory cases may be tempted to sell out the class in exchange for an advantageous settlement of her inventory cases. This potential conflict between the class and class counsel can be addressed in limited-fund cases by requiring that the rights of inventory plaintiffs be governed by the class settlement. The problem is significantly more difficult in Rule 23(b)(3) class actions, in which class members—including inventory plaintiffs within the class definition—have a right to opt-out of the class. *Amchem* did not address the problem, and it is beyond the scope of this paper, which focuses on conflicts created by differences among members of a class.

<sup>81</sup> The requirement that easily identifiable categories of claimants be separately represented will, of course, make it more difficult to achieve global settlements in class suits. But the proper metric for representation in litigation is not whether a suit can be easily settled, but how vigorously counsel pursues the interests of her clients. Defendants are free to settle with individual subclasses as well as the class as a whole. *Compare* F.R. Civ. P. 23(c)(4) (“When appropriate. . . (B) a class may be divided into subclasses, and *each*

insist on separate representation of “easily identifiable categories of claimants” in negative value suits. Such a requirement would be wasteful and would provide little benefit to claimants.<sup>82</sup> But, in other cases, segregating easily identifiable categories of claimants into subclasses should provide class members with high-value claims with protection against inadequate representation without rendering class litigation impracticable.

This protection, of course, comes at a cost. To the extent that class action law requires separate representation of “easily identifiable categories of claimants,” class counsel will have to accept diminished compensation, a result which may lead some attorneys to spurn class litigation.<sup>83</sup> But I see no reason to conclude that categories of high-value claimants will be unable to obtain effective counsel.<sup>84</sup> By definition, high-

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*subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.*”) (emphasis added), with F.R. Civ. P 23(e) (“A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class. . . .”). So long as defendants are not required by law to settle with the class as a whole or not at all, there is nothing unfair about requiring that decisions to settle be made by representatives who understand that their role is to represent solely the members of their subgroup.

<sup>82</sup> See *Reynolds v. Beneficial National Bank*, 288 F.3d 277, 282 (7th Cir. 2002) (Posner, J) (noting a conflict of interest within the class, but concluding that “in light of the modesty of the stakes even of class members who had multiple refund anticipation loans and the expense of subdividing the class (and how many subdivisions would be necessary to reflect the full range of damages?), we are not disposed to regard this particular defect in the settlement as fatal.”); Coffee, *Class Action Accountability*, 100 *Columbia L. Rev.* at 429-432 (discussing proper treatment of negative-value class actions).

<sup>83</sup> See Coffee, *Class Action Accountability*, 100 *Columbia L. Rev.* 397 (“If we assume that each [of six] subclass[es] requires separate counsel, the economic consequence is that our hypothetical plaintiffs’ firm must invite five other firms into the cases to share this expected fee award with it. The incentive to bring the action, or to search generally for meritorious actions is thereby weakened.”).

<sup>84</sup> The creation of subclasses with separate representation will be ineffective unless attorney compensation is properly regulated. See Coffee, *Class Action Accountability*, 100 *Columbia L. Review* at 398 (“[S]ubclassing as a remedy for class action collusion may accomplish little if plaintiffs’ attorneys for different subclasses could by pooling their fees effectively cancel the incentives that the law means to create for them to zealously represent their clients.”); *id.* at 404-06 (discussing the relevance of fee formulas to the adequate representation requirement); Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 *Supreme Court Review* at 387 (“Determining how attorneys are to be compensated, and under what circumstances, is an important first step in grounding the law of class actions in the quality of representation afforded absent class members.”). See also Silver, *Due Process and the Lodestar*

value claimants are those for whom the stakes are sufficiently high to warrant individual litigation. If individual claimants are able to obtain representation, categories of such claimants should have no difficulty in doing so. Litigation on behalf of a class has the potential to be more lucrative than litigation on behalf of an individual.

What *Amchem* and *Ortiz* may make impracticable are huge class actions that include a very broad range of claimants. But I believe the quality of justice in our courts will be better if the size and scope of class actions are reduced significantly. Moving away from nationwide class suits that aggregate a vast range of claims will provide more individualized treatment of class members' claims and will allow defendants to diversify the risks of litigation. The size of a class suit may have an effect on the resources class counsel is able to bring to bear, but there is evidence of informal pooling of resources among plaintiffs' attorneys that may counteract the strategic advantage in resources that defendants might otherwise enjoy in smaller class suits.<sup>85</sup>

## **B. Choice of Law and Choice of Forum**

In Part A, I argued that conflicts arising from differences in the substantive law governing the class in a forum may disable any attorney from representing all of the class. The differences to which I referred were created by the operation of the forum's choice-of-law rules. The impact of choice-of-law on the value of a claim, however,

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*Method: You Can't Get There From Here*, 74 Tulane L. Rev. 1809, 1810 (2000) (arguing that "[j]udges deny absent plaintiffs due process of law when they use the lodestar method to regulate fee awards from common funds in class actions."). Proposed amendments to Rule 23 that have been approved by the Supreme Court expressly allow a district court to address the question of counsel fees at the outset of class litigation. See Proposed Amendments to Rule 23, 23(g)(2)(C) ("The order appointing class counsel may include provisions about the award of attorney fees . . .").

<sup>85</sup> See Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Suits*, 50 Duke L.J. 381, 388-403 (1999); see also Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 Iowa L. Rev. 534-535 (citing authority with respect to defendants' strategic advantage in resources in the absence of collective action).

cannot be fully understood without looking beyond the forum. Because each state applies its own choice-of-law rules, the forum in which a suit is brought may have a major impact on the substantive law applied to a particular claim and, therefore, the value of the claim.<sup>86</sup> For that reason, class counsel cannot seek certification of a class in a particular forum without taking into account the consequences of her decision on applicable law, and the inclusion in a request for certification of an “easily identifiable category of claimants” that would be adversely affected by the choice of forum in itself may be evidence of inadequate representation.

A simplified hypothetical illustrates the point. Assume that a train departs from a station in State A and picks up additional passengers in State B before derailing in State C. State C’s tort law is more favorable to recovery than the law of State B, but less favorable than the law of State A. Assume, further that State A and State B each would apply the tort law of the State in which a passenger was domiciled under a “most significant relationship” approach to choice of law. State C, on the other hand, would apply the law of State C under a *lex loci delicti* approach. Under these circumstances, a decision by class counsel to request certification of a class suit (which includes residents of all three states) in State C would harm class members domiciled in State A. The law of State C is less favorable than the law of State A, and State A domiciliaries would have the benefit of State A law in either State A or B. By contrast, a decision to request certification of a class suit in State A or B would harm domiciliaries of State B. In State A and B, the courts would apply the law of State B law to determine the liability of the

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<sup>86</sup> In *Ferens v. John Deere*, 494 U.S. 516 (1990), for example, the plaintiff was able to preserve a tort suit by filing suit in Mississippi rather than in his home state of Pennsylvania. Similarly, in *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), the plaintiff was able to triple her recovery by filing suit in Minnesota rather than Wisconsin.

railroad to residents of State B. But that law is less favorable than the law residents of State B could have obtained in a class suit filed in State C. For these reasons, a request for certification in State C which includes domiciliaries of State A and a request for certification in States A or B which includes domiciliaries of State B would raise serious questions about adequate representation.

A choice of forum, however, involves not just the selection of choice-of-law principles, but other matters which may be of importance to class members.<sup>87</sup> Conflict-free counsel must be afforded latitude to exercise professional judgment in deciding where to request certification.<sup>88</sup> But putative class counsel cannot properly request certification of a class in a forum that would not at least arguably maximize the interests of “an easily identifiable category of claimants.” As Georgene Vairo has noted in a different context: “A plaintiff’s lawyer is guilty of malpractice if he or she does not consider what forum is the best for resolving a client’s dispute.”<sup>89</sup> Thus, class counsel

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<sup>87</sup> See, e.g., Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 Emory L.J. 85, 148 (“Anecdotal evidence suggests that juries in certain jurisdictions have reputations for awarding significantly higher amounts to tort plaintiffs than those in other jurisdictions.”).

<sup>88</sup> See Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 Texas L. Rev. 383, 435 n. 230 (2000) (arguing that reasonable determinations of class counsel with respect to choice of forum should be respected).

<sup>89</sup> National Law Journal, *Is Selecting Shopping?*, September 18, 2000 at A16 (col. 1). See also *Wojtonik v. Illinois Central Railroad*, 640 N.E.2d 355, 359 (Ill. App. 1994) (“Not only will you do your client a disservice by not filing where the recovery is apt to be greater. . . .but a strong case for legal malpractice could be made if you purposefully neglect to consider the economic advantages of filing in one forum as opposed to another.”). Remarkably, I have been unable to find any case in which a lawyer was found liable for malpractice based on his choice of forum, but a few cases appear to implicitly accept the proposition that an incompetent choice of forum may constitute legal malpractice. In *Raphael v. Clune, White & Nelson*, 607 N.Y.S.2d 734 (N.Y.A.D. 1994), for example, the New York Appellate Division considered whether the defendant law firm had committed malpractice by bringing suit in New York rather than Tennessee. The law firm had represented the plaintiff, a British national who had been injured at a Holiday Inn located in Bombay India. After the New York lawsuit against Holiday Inn was dismissed on grounds of *forum non conveniens*, the plaintiff filed suit in England against Holiday Inn and obtained a smaller settlement than would have been available in an American suit. Plaintiff later filed a malpractice suit against his American attorney, claiming that his attorney had a duty to file suit in Tennessee, the state in

should be deemed inadequate if a request for certification in the forum is not arguably in the best interests of the claimants whom she represents.

Inadequate counsel, of course, cannot bind the class members she represents with respect to settlement or any other matter. Thus, absent class members could not be bound by a settlement negotiated by an inadequate representative. But the fact that “an easily identifiable category of claimants” would prefer to have its claims tried in another forum does not disable a court from appointing adequate counsel and asserting jurisdiction over the claims. Class certification is appropriate so long as the proponent of certification meets his or her burden under Rule 23, and the law permits any party to the litigation who would benefit from class certification to seek it.<sup>90</sup> Thus, the consequences of finding class counsel inadequate will depend on whether the problem is discovered early enough to allow appointment of replacement counsel. But by creating a significant risk that seeking certification in a questionable forum will strip class counsel of representative authority, the adequate representation standard should have an important structural effect: It will discourage forum shopping by class counsel that is not arguably in the interests of class members she represents.

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which Holiday Inn International had its headquarters. The Appellate Division rejected the claim of malpractice on the ground that a suit in Tennessee would have been dismissed under Tennessee *forum non conveniens* law. See also *Woodruff v. Tomlin*, 616 F.2d 924, 931 (6th Cir. 1980) (rejecting claim of malpractice for failing to file suit in federal rather than state court in part because defendant’s testimony that “there was no perceptible pattern of higher verdicts for plaintiffs in the federal courts of West Tennessee than in the local courts of the region” was uncontradicted.).

<sup>90</sup> Indeed, defendant class actions have been certified at the request of plaintiffs. See Conte & Newberg, 2 NEWBERG ON CLASS ACTIONS, § 4:46 at 336 (“[R]ather than have a self-appointed champion of absent members of a plaintiff class to serve as a class representative, adequacy of representation must exist through an unwilling defendant class representative chosen by a litigation adversary.”). Counsel for those class members who were denied representation during the certification hearings could challenge findings made during the course of those hearings and insist that the certification decision be revisited. Because members of a subclass do not have a right to certification in the forum most favorable to their claims, the damage done by a disloyal representative may be irreparable, if the litigation has not terminated and the court orders litigation to proceed in the less favorable forum.

#### **IV. Conclusion**

It is time that we take seriously choice-of-law rules and their proper role in class certification decisions. Choice-of-law considerations should rarely—if ever—lead to the conclusion that the class device is an inappropriate means of resolving a controversy. But the need to create subclasses with separate representation to address material variations in both substantive and choice-of-law rules should lead to class suits that are smaller in size and scope than was the case before *Amchem* and *Ortiz*. While some may fear this result, I believe shrinking the size and scope of class actions will improve the quality of class justice.