Conflicts Lect 19

* 1. In re air crash disaster near Chicago (7th Cir)

not a class action

* 1. Airplane designed and built by McDonnell Douglas
  2. Operated by American
  3. Crashes out of O’Hare, bc engine falls off
  4. 118 wrongful death suits
     1. Filed in
        1. ill
        2. cal
        3. ny
        4. mich
        5. haw
        6. PR
     2. Ps are from
        1. cal
        2. CT
        3. Haw
        4. Ill
        5. Ind
        6. Mass
        7. Mich
        8. NJ
        9. NY
        10. VT
        11. PR
        12. Japan
        13. Neth
        14. Saudi Arabia
     3. D’s domicile
        1. McD Md is state of corp, PPB MO
        2. Am Del corp, PPB NY or maybe TX
     4. Place of wrong
        1. injury
           1. Ill
        2. wrongdoing
           1. McD (designing)

Cal

* + - * 1. Am (servicing)

OK

* 1. Cases are consolidated in ND Ill
     1. For pretrial motions
     2. Will be sent back for trial
  2. Question is punitive damages
     1. Allows pun dam
        1. MO
        2. TX
        3. OK
     2. Does not allow
        1. Ill
        2. CA
        3. NY
  3. Must use choice of law rules of all transferor states
     1. Van Dusen

so for Ill cases must use 2nd Rest –

for CA must use comp impairment

* for PR must use lex loci delicti
* for Hawaii must answer q of what it is – and
* NY must use NY’s Neumeier
* Mich must use interest analysis with forum preference

1. **Just to get guiding thread – Ct wants there to be A DECISION on the matter**
   1. **Same law (or at least same rule)**
   2. **Rules really get manipulated**

did 2nd Rest last time

1. Cases filed in Cal
   1. Comp impairment
      1. ct uses basically same argument as 2nd Rest
      2. is that so?
      3. they are different approaches
2. Cases filed in NY
   1. Claims Neumeier rules same as 2nd Rest
      1. NO!
      2. punitives are conduct regulating
      3. So wouldn’t place of wrongdoing or injury apply?
3. Michigan
   1. Interest analysis with a strong lex fori approach in a true conflict
      1. Would probably have applied Mich law for Mich Ps
         1. if Mich has punitives – Mich has interest
      2. BUT ct appealed to case where Mich SCt cited approvingly an intermediate case that resolved under 2nd Rest!
      3. so said decision would be the same
      4. This is grotesque
4. PR
   1. Lex loci
   2. easy – Ill law
5. Hawaii
   1. Don’t know its approach
   2. What should you do?
   3. Green – two possibilities

tradition - lex loci delicti

or the most common modern choice – 2nd Rest

* 1. BUT ct said forum law

that is not even a choice of law approach!

1. Agent Orange
   1. Class action
   2. Problem is the certification of the action – for nationwide case
2. Need to make sure that the interests of the class are adequately represented by the representative Ps
   * 1. Choice of law can be a problem
     2. If law used for repr P is different from law used for other Ps, then no adeq repr of interests
     3. Can scuttle a class and lead to separate suits
   1. 2 million potential Ps
      1. Transferred to EDNY
      2. Around 1000 consolidated as class
      3. But 400 opted out
      4. but they are consolidated for pretrial motions
   2. 1st ct claimed could be solved by body of fed common law
      1. may have thought Erie meant no fed common law
      2. no fed common law in diversity cases, but does exist if there is a sufficient federal interest
      3. is this an example

military connection suggests federal interest

* 1. 2nd Cir on appeal rejected fed common law approach
  2. So trial ct must make choice of law decisions of all states that had cases, like in transfer, to determine whether it can proceed as class action
     1. overwhelming too many states laws, and approaches
     2. So what does he do?
     3. Says under all approaches 2nd Rest, interest analysis, Leflar, 1st Rest
        1. all states would choose to apply “national consensus” law
        2. Idea that they all would come out the same is crazy
  3. What would 1st Rest be?
     1. Place where harm manifested itself
        1. idea that any would choose nat consensus law is insane
           1. none of them would
        2. this is just fed common law
     2. notice, knew he could be reversed upon appeal, but was not an appealable order (at time)
        1. except under mandamus
           1. 2nd cir upheld bc very light review
        2. then case settled (which was what ct wanted)
  4. Sometimes it is argued that class action justifies separate choice of law treatment
  5. Kramer thinks no: If choice of law is substantive (in the sense that it defines the parties' rights), then courts should not alter choice-of-law rules for complex cases. The reasoning is straightforward. We start with claims that everyone concedes would otherwise be adjudicated under different laws. We combine these claims, whether through transfer and consolidation or by certifying a class, on the ground that we can adjudicate the parties' rights more effectively and efficiently in one big proceeding. So far, so good. Then, having constructed this proceeding, we are told we must change the parties' rights to facilitate the consolidated adjudication. And that makes no sense. If the reason for consolidating is to make adjudication of the parties' rights more efficient and effective, then the fact of consolidation itself cannot justify changing those rights. To let it do so is truly to let the tail wag the dog.
     1. Green: BUT if choice of law is substantive, then choice of law rules of states whose law is chosen should apply

So – if forum law on choice of law can be used that suggests it is procedural

if so, then more likely that you can change choice of law approach in class action in line with procedural concerns

1. One thing to think about is whether it really is so hard to have subclasses on the basis of different states’ rules
   * 1. Usually not that many rules out there

note, often representative Ps, in the interest of certification of class, will consent to the law that is most generous to the D

call it an election of remedies? really like settlement

for Ps from states with law that is better for them, the states can’t really object – the states give Ps rights- not saying that they must enforce them

-- but Ds will resist anyway, claiming that unnamed Ps are being treated unfairly compared to other members of the P class

- they are really worried about themselves -

another solution is using defendant’s home law

1. if more protective of D then it is an election of remedies again
2. another problem
   1. Cyberspace
   2. Problem of effects on many different jurisdictions at same time
   3. And no clear idea of a place where things happen
   4. problems with PJ and choice of law
3. Are these problems so much greater that the old rules can’t apply?
   1. Notice does not matter that there is a virtual world
      1. All people really care about is effect in real world
      2. And causes in real world
      3. So argument has to be effects are too great, too dispersed
   2. BUT are they?
      1. Telephone
      2. Mass printing
      3. these already existed and choice of law accommodated it
   3. Three schools of thought concerning internet and choice of law
      1. Need to change choice of law analysis
      2. Need new substantive law
      3. No big deal (Green’s view)
   4. Choice of law clauses entered into on internet often solve problem