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PANEL DISCUSSION II

PROFESSOR MEADOR: I will make just two or three quick observations. Unlike the appellate process we discussed previously, in this area there is a great deal that the judges and the courts can do themselves. Much more can be accomplished through rule making power, imaginative actions by judges, and the suggestions of which Judge Motley spoke.[1]

In diversity of citizenship jurisdiction, we have an immense untapped potential for dealing with a lot of the problems that Dean Cooper talked about. Congress can expand that potential enormously by permitting nationwide service of process and the joining of claims and parties that cannot be brought together today in any one forum. The present configuration of diversity jurisdiction is, in my view, dysfunctional. It brings a lot of cases into the federal courts that ought not be there, but does not permit many that could usefully be litigated there to come in. In 1968 the American Law Institute Study (ALI Study) moved in that direction,[2] but I think we could move much further. I hope that the new ALI study on complex litigation[3] might accomplish that and come up with some good proposals, while at the same time getting rid of a lot of the diversity jurisdiction that should not be in the federal courts.

Another approach that would do much good, I think, is to think imaginatively about the use of multidistrict panels. The jurisdictional statutes ought to be amended to allow transfer and consolidation for all purposes, not simply for pretrial purposes. I think you can have a national "switching station" in the multidistrict panel through which litigation from throughout the country arising out of a common transaction can be brought together. I think we ought to move in that direction. Judge Keeton's imaginative thrust into the future at the end of his re-

1. *See* Motley, *supra* pp. 546-49.

2. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969) (completed in 1968) [hereinafter ALI STUDY].

3. AMERICAN LAW INSTITUTE, PRELIMINARY STUDY OF COMPLEX LITIGATION: REPORT (Feb. 19, 1987).

marks[4] brings up another problem that we must think about, and that is whether many of these mass matters ought to be taken out of the courts altogether because they simply are unfit for judicial resolution. I think we will get to that situation with the Agent Orange type of case. These enormous and sprawling matters simply do not lend themselves very readily to adjudication, at least in the sense we have always thought of it, and I expect we will be moving out of this situation.

Along a similar vein, it seems to me that personal injury matters have eventually got to be taken out of the court. There is, in my view, very little that can be said in defense of the present system of compensating persons who are injured. I think we will see movement along that line, but it may be slow and long in coming. These are some of the mixtures of prophecy and wishful thinking I offer on the subject.

PROFESSOR WRIGHT: The American Law Institute is making at least tentative steps in two directions of the sort that Professor Meador talked about. There is one project that has been approved, although it has not yet been funded, with Professor Richard Stewart of the Harvard Law School as Reporter, to study the substantive aspects of compensation for tort. A separate project, only in the preliminary stages, is a study to see if a full-scale project on complex litigation seems worthwhile, with Professor Arthur Miller as Reporter and Dean Cooper as one of the advisers. Professor Cooper, could you tell us what that project is?

DEAN COOPER: The Advisory Committee is meeting with the purpose of discussing a draft proposal for a study across a wide variety of topics. The topics that are currently under discussion divide things in much the way I did in my paper. The problems of complex litigation in terms of case management, discovery, pretrial management, and actual trial have been put aside, at least for the moment. The focus is much more on questions of choice of law, jurisdiction, and devices for consolidation in what we would think of today as a transjurisdictional sense. My guess is that since the draft proposals are very well done, they will decide to go further.

Let me discuss an area touched upon in many places in my

4. *See* Keeton, *supra* pp. 540-43.

paper. This area is not completely outside my competence, but certainly is outside any area in which I have thought very much for very long. This is the choice of law question. It has been an accepted doctrine for more than forty-five years that, in diversity cases, a federal court is bound by the choice of law rules applied by the courts of the state in which that federal court is sitting. This doctrine has proliferated to the rule that when a case is transferred from one federal district court to a federal district court in another state, the transferee court must take with the case the choice of law rules applied by the court of the state in which the action was filed. Many of the questions that arise from mass litigation suggest that federal courts should be cut loose from that doctrine. Whether diversity jurisdiction is the mechanism for bringing more mass litigation into federal courts, whether we develop an interpleader model, class action model, or whatever, I have never been able to understand the rule in *Klaxon v. Stentor*.[5] It seems clear that there is much to be said for abolishing the *Klaxon* rule in the simple lawsuit, but the case becomes almost overwhelming in the complex lawsuit. I would like someone to explain to me why that is not so.

JUDGE KEETON: I will attempt an answer of why it is not an operable rule. At least fifteen to twenty percent of the cases on my docket plainly have choice of law issues in them. But it is a very, very rare case in which I have to decide one of those issues. When I say to the lawyers, "If you want me to think about the choice of law question, I will ask you to tell me first why it makes any difference," the lawyers usually tell me, "Well, on this issue, there is no decision in either of those jurisdictions on this question." Thus, to make the choice of law question relevant, what I have to do is first predict that the two courts that have not yet decided this issue will decide it differently. Now, why should I do that? As a practical matter among trial lawyers and trial judges, we usually find some way of dealing with the controversy without addressing that question. Therefore, although I have not really answered your question, Dean Cooper, I think that choice of law rules generally may be the classic illustration of the rule so refined that we come to think about the rule in an abstract sense without thinking about its application

5. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

in particular cases. It becomes a practically inoperable rule that trial judges and trial lawyers generally do not use and, of course, that appellate courts seldom use because they only get the tip of the iceberg of the problems that the trial judges and trial lawyers think about anyway.

The whole choice of law situation does raise for me many, many more of what John Frank once referred to as "decision points" in the case. Thus, they make the whole problem so complex that it is not worth the game for anybody involved in the litigation in most instances.

PROFESSOR WRIGHT: I would like to add to that. I agree with Judge Keeton that the choice of law question is much more a theoretical problem than a real one. I think it may cast a shadow over attempts to do something sensible in the mass litigation that we have been talking about today. The conclusion of the American Law Institute Reporters was that the rule of *Klaxon v. Stentor* makes sense in typical litigation, but in the special category of multiparty, multistate litigation, in which they propose to make imaginative use of the diversity clause in article III, section 2,[6] they would have had Congress provide by statute for independent choice by the federal court of what law would apply, rather than being bound by the rule of *Klaxon.*[7] I think that especially since *Phillips Petroleum Co. v. Shutts*,[8] if you have a class action with claimant members of the class from all over the country, one can no longer comfortably rely, as I tried to persuade the Ninth Circuit it could rely two years ago in the Dalkon Shield case, on the assumption that a California court would apply California law to absolutely every issue no matter where an injured person comes from. *Phillips* said the state court cannot do that and, therefore, a federal court would have to say, "Well, constitutionally, the state court cannot do that," and that might persuade a federal court. This, however, is simply too complex. We are going to have to apply fifty different sets of substantive rules. I really think that legislative change is necessary, and everyone agrees that Congress has the power to change the rule of *Klaxon.*

I also think that, at least in these mass litigations, if we are

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6. U.S. CONST. art. III, § 2.
7. *See* ALI STUDY, *supra* note 2, § 2374(c), at 73, 402-04.
8. 472 U.S. 797 (1985).

going to do anything sensible here, we need Congress to amend the Anti-Injunction Act.[9] A couple of years ago, the Eighth Circuit held, in a divided opinion, that it was wrong for the district court judge to certify a mandatory class action in a suit for punitive damages in claims arising out of the collapse of the skywalk of the Hyatt Regency Hotel.[10] The basis for the decision was that because certifying the class action amounts to an injunction against state proceedings, the Anti-Injunction Act bars that. I do not think that is an inevitable result by any means, but it is the only appellate decision on point.

All of the Corrugated Container cases were transferred by the multidistrict panel to Judge Singleton in Houston for pretrial and then back for settlement. Plaintiffs, both in South Carolina and in California, tried to bring their own actions rather than be caught up in the mass action that was going on in Texas. The Fifth Circuit held that Judge Singleton could properly enjoin prosecution of the action in South Carolina.[11] The Ninth Circuit reached the opposite result on the same factual setting and held that a federal district court in the Ninth Circuit was barred by the Anti-Injunction Act from enjoining independent state court action that should have been in the action in Houston.[12] These are the kinds of things that make me think that, as Professor Meador says, a lot can be done by the courts themselves. However, we are going to need statutes, even on the procedural side. I think Judge Motley quite appropriately emphasizes that the real solution for many of these things will come from changes in substantive law.[13]

JUDGE KEETON: May I follow that with this question: If we open our minds to legislation on this subject, what policy arguments for the legislation can we marshal for having a national choice of law rule that would not also argue for having a national substantive law rule? Once we start thinking about that, I think we would come to the conclusion that the better legislation

9. 28 U.S.C. § 2283 (1982).

10. *In re* Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982). On remand a voluntary class action was certified under FED. R. CIV. P. 23(b)(3). *See In re* Federal Skywalk Cases, 95 F.R.D. 483 (W.D. Mo. 1982).

11. Three J. Farms, Inc. v. Plaintiff's Steering Comm., 659 F.2d 1332 (5th Cir. 1981), *cert. denied*, 456 U.S. 936 (1982).

12. Alton Box Bd. Co. v. Esprit de Corp., 682 F.2d 1267 (9th Cir. 1982).

13. *See* Motley, *supra* p. 545.

would not be just a national choice of law rule, but whatever pressures are sufficient to make that worth thinking about seriously probably also are sufficient to overcome the interests in local autonomy with respect to the substantive rule.

PROFESSOR WECHSLER: On the point of attempting to interest Congress in a statute which would authorize the federal courts to make their own choice of law rules, one bit of experience may be relevant. After the ALI Study of diversity jurisdiction to which Professor Wright referred was produced, Senator Burdick of North Dakota, a member of the Senate Judiciary Committee, developed a strong interest in the whole subject. Under his aegis a bill was drafted that really undertook to incorporate as much of the conclusions of the ALI Study as Senator Burdick was willing to sponsor. He went along with ninety percent or more of the ALI recommendations, but when it came to working to preserve a piece of diversity jurisdiction for multiparty cases—as I recall, this was a requirement that no state court would be competent to render full justice—Senator Burdick balked. The theory behind this requirement was that full justice could not be served by state courts. Senator Burdick took one look at that and thought that the burden of having to explain that provision in the committee, apart from having to explain it on the Senate floor, was such that it rather impaired any prospect that the whole piece of legislation might have had. I think, therefore, that much of these problems are legislative problems. A great tragedy of our present situation is that we have no adequate national organ for making national law to solve these national problems. I think you have to keep in mind that Congress is not going to salivate to attempt to understand the problem, no less to resolve it. So the question really is whether the judicially determined position in *Klaxon* will be reconsidered by the Court. Every effort to obtain reconsideration is failing, however. I do not mean to be simply a voice of gloom on these matters, but I think the prospect of Supreme Court reconsideration is very slim, and the prospect of legislative solution slimmer.

This gives force to Judge Keeton's suggestion that one is driven to the conclusion that if this problem is to be dealt with, it should be dealt with within the context of the substantive law

that will govern the resolution of the action.[14] While I do not see great enthusiasm in Congress for a national products liability statute, for example, strong as the argument for utilizing congressional power to provide uniform rules within that area may be, if constructive work is to be done to try to produce this solution, it seems to me that the larger issue is whether there ought to be a national rule of liability.

I would say only one other word about the subject of mass litigation. I am not prepared to accept the proposition that the prospect of mass and repetitive litigation alone justifies a federal forum. Dean Cooper raised that question.[15] I do not know if he expressed his own view on that subject, but it seems to me that so long as a state forum is available, and recent decisions indicate that it is if only state law is involved, it seems to me that the case for leaving that matter to the state court is as strong as it is in the simple diversity case. This I think is the clearest and most obvious step that can be taken to produce elbow room, very substantial elbow room, in both the district courts and the circuit courts.

I am devoted to John Frank of Phoenix. I regard him as one of my closest friends. I think that I gave him the first job that he had in law after he graduated from the University of Wisconsin. Nevertheless, I consider him practically Public Enemy Number One because it was he who, almost single-handedly after the House passed the diversity of citizenship bill in 1978, prevented that bill from being considered in the United States Senate. It was one of the most remarkable pieces of lobbying that I know of, and all for a dreadful cause.

DEAN GRISWOLD: I have a technical and law school type of question to ask Professor Weschler, or anyone else, in connection with his recent remark. Why is *Phillips Petroleum* not inconsistent with *Klaxon*? It may be that the due process clause, because it is applicable to the federal courts, requires that the federal courts use an appropriate standard in choice of law; therefore the due process clause requires that Kansas cannot apply its law to all these states. We have been looking for an answer to *Klaxon* for forty years. I wonder if it is not right under our noses.

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14. *See* Keeton, *supra* pp. 555-56.
15. *See* Cooper, *supra* pp. 496-99.

PROFESSOR WECHSLER: Well, I think that is an interesting proposition. I do not react adversely to your view at the moment. Do you?

PROFESSOR BATOR: No, I do not.

JUDGE KEETON: Well, is not *Phillips Petroleum* only a slight qualification rather than a displacement of the *Klaxon* rule? The due process standard is a constitutional standard that would only cut a little way into the *Klaxon* rule. It would give the courts another decision point to use in trying to figure out when *Klaxon* does and does not apply.

PROFESSOR BATOR: Maybe the answer is this: In principle the *Klaxon* rule was always limited by the fact that it is only constitutional state choice of law rules that the federal courts under *Klaxon* have to adopt. Insofar as these constitutional due process constraints on the states expand and limit the state's power to decide what the choice of law should be, there is a dissolving of the *Klaxon* rule. The greater the extent of the due process constraint, the less bite *Klaxon* has as an independent principle.

DEAN GRISWOLD: I have a broader philosophical or moral question that I cannot possibly answer myself: Is not part of the problem in mass tort litigation that we have gone too far in expanding and developing tort law? After all, virtually all products liability law is court created. We have developed the idea, which seems to permeate everything, that anybody who has suffered a loss for any purpose ought to be paid for it. It really is considerably inconsistent with any general, old-fashioned, Judeo-Christian notions of individual responsibility and of the importance of people taking care of themselves. I think particularly in this respect of the asbestos litigation, in which, to the best of my knowledge, my firm does not have any connection with any asbestos case and, therefore, I have just an academic bias. Here is a situation in which a lot of businessmen provided something that everybody wanted. I am not now thinking about the mine workers who, of course, are entitled to workers' compensation. The idea that because asbestos was put around the pipes in my heating system and thirty years later, without any foreknowledge on the part of anyone at Johns Manville or whoever provided the asbestos, asbestosis develops, that Johns Manville or whoever should have to pay for it seems to me to be: (a) completely a court creation and (b) one remedy that ought to

be reconsidered. If we did not reach out and feel that everyone who suffered a loss anywhere ought to be paid for it, we could eliminate a lot of these mass tort problems. This would also apply to a considerable extent in the Dalkon Shield area. So, this really seems to me to be a court-created problem, and maybe it is time the courts began to think a little about it and qualify it.

PROFESSOR WRIGHT: I see people both in the audience and on the platform who would like to respond to Dean Griswold, but I think that the schedule says we must move onto another subject. In fact, if we are going to get into whether section 402A of the Restatement of Torts was or was not a wise piece of legislation for the ALI to adopt, I know I will not get back to Houston in time for the World Series. So I am going to have to cut off that topic and turn to the . . .

DEAN GRISWOLD: You get down to the fundamental question and then you will not talk about it.

PROFESSOR WRIGHT: No, I think there is so much to be said about that, Dean Griswold, that it will have to be the topic for next year's seminar at the University of South Carolina School of Law.

END OF PANEL DISCUSSION