IN THE SUPREME COURT OF TEXAS

NO. 03-0505

CITIZENS INSURANCE COMPANY OF AMERICA, ET. AL., PETITIONERS,

v.

FERNANDO HAKIM DACCACH, ET. AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

Argued October 21, 2004

CHIEF JUSTICE JEFFERSON, joined by JUSTICE BRISTER and JUSTICE MEDINA, concurring.

I

We generally resolve choice-of-law issues by following the Restatement approach. *Hughes Wood Prods., Inc. v. Wagner*, 18 S.W.3d 202, 205 (Tex. 2000). Section 6(1) of the Restatement (Second) of Conflict of Laws provides that a court will follow "a statutory directive of its own state on choice of law." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (1971). Absent such a directive, however, courts must examine the seven factors outlined in section 6(2). *Id*. § 6(2). Today, the Court does otherwise, distilling its choice-of-law determination in a single sentence: "Because the class lawsuit only alleges Citizens' failure to register with the Texas Securities Board before allegedly offering and selling securities from Texas, Section 12 governs under any conflict-of-law principles that might apply." __ S.W.3d at ___.

If that is indeed the case, then only rarely will courts analyze choice-of-law issues by examining section 6(2)'s relevant factors[1]—factors critical to a thorough and correct choice-of-law analysis. In cases like this, which will adjudicate the rights of thousands of people in dozens of countries, the problems that will arise from failing to examine those factors will be magnified. As a recent law review article noted:

> While statutory interpretation in the choice of law context may not be the most pressing legal question of our day, the combination of a choice of law question and a vaguely worded statute presents a real opportunity for mischief. Three factors suggest that the potential for mischief may be quite prevalent and consequential: (i) the high incidence of vaguely worded state statutes, (ii) the enormous incentives for plaintiffs to forum shop, and (iii) the multiplying effect of the class action.

Lindsay Traylor Braunig, *Note, Statutory Interpretation in a Choice of Law Context*, 80 N.Y.U.L. REV. 1050, 1054 (2005).

By concluding that because the plaintiffs allege only a violation of Texas law, then Texas law applies, the Court in effect permits the plaintiffs to choose the law that governs the proceeding. But as the United States Supreme Court noted, in a case in which class plaintiffs advocated Kansas law, the law rather than the litigants determines what law is controlling:

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[1] Those factors, applicable "[w]hen there is no [statutory] directive," include:

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

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6.

> We . . . give little credence to the idea that Kansas law should apply to all claims because the plaintiffs, by failing to opt out, evinced their desire to be bound by Kansas law. Even if one could say that the plaintiffs "consented" to the application of Kansas law by not opting out, plaintiff's desire for forum law is rarely, if ever controlling. In most cases the plaintiff shows his obvious wish for forum law by filing there. "If a plaintiff could choose the substantive rules to be applied to an action . . . the invitation to forum shopping would be irresistible." Even if a plaintiff evidences his desire for forum law by moving to the forum, we have generally accorded such a move little or no significance. . . . Thus the plaintiffs' desire for Kansas law, manifested by their participation in this Kansas lawsuit, bears little relevance.

Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 820 (1985) (citation omitted).

"In a multistate class suit involving nonresidents, a court must be particularly diligent not to commit error by bootstrapping a choice of law determination on a finding of requisite jurisdiction over the parties involved." 4 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 13.37 (4th ed. 2002); *see also Shutts*, 472 U.S. at 821 (noting that personal jurisdiction may not be used as an "added weight in the scale when considering the permissible constitutional limits on choice of substantive law," as "this is something of a 'bootstrap' argument"). Moreover, "[t]he simple institution of a multistate class suit in one forum cannot provide the foundation for applying that forum's law to nonresidents, without creating a substantial threat to our constitutional system of cooperative federalism." 4 NEWBERG ON CLASS ACTIONS § 13.37. Additionally, the complexity of the choice-of-law analysis here is magnified by the fact that this is not an interstate, but an international class action.

> [C]lass actions present added difficulties when they include an international element. The problems of jurisdiction and choice of law when the dispute only involves American parties is compounded when international parties are added. Within the United States, we have a fairly uniform legal system, attitude, and history from state to state, and each state is constitutionally required to give full faith and credit to the

> decisions of another state. This common history and constitutionally mandated acceptance is absent across international lines.

Jack B. Weinstein, *Compensating Large Numbers of People for Inflicted Harms*, 11 DUKE J. COMP. & INT'L L. 165, 175-76 (2001). As another commentator notes:

> Nationwide class actions have presented issues concerning pre-existing cases, manageability, choice of law, and personal jurisdiction. Extending the reach of a class action judgment beyond U.S. borders adds a new dimension to each determination in class litigation. A transnational class action requires an examination of potential international law and treaty obligations, *a careful evaluation of the laws of the countries involved*, and an examination of the potential cultural, linguistic, and logistical implications.

Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 FORDHAM L. REV. 41, 43-44 (2003) (emphasis added).

In *Compaq Computer Corp. v. Lapray*, we held that "when ruling on motions for class certifications, trial courts must conduct an extensive choice of law analysis before they can determine predominance, superiority, cohesiveness, and even manageability." *Compaq*, 135 S.W.3d 657, 672 (Tex. 2004). In this case, both the trial court's certification order and the court of appeals' opinion predate our decision in *Compaq*. Not surprisingly, therefore, neither court engaged in the sort of extensive analysis we required in *Compaq*.

In *Compaq*, the putative class members alleged that Compaq breached its express warranty provided in conjunction with certain Compaq computers—a statutory claim under Texas law. *Compaq*, 135 S.W.3d at 662; *see, e.g.,* TEX. BUS. & COM. CODE §§ 2.313, 2.607, 2.714. The trial court certified a class, stating that it "believe[d] it c[ould] properly apply Texas law to all claims covered by this nationwide class action" but concluded that it would revisit the issue if Compaq

sought to litigate an issue on which Texas law differed from other jurisdictions. *Compaq*, 135 S.W.3d at 672. We rejected this approach, holding:

> The lower courts erred by failing to conduct a state-by-state analysis of the questions of law presented. Those courts never assessed the substance of other states' laws but instead concluded that the theory was sound under Texas law. A proper review would have analyzed the relevant law of each state and the variations among states.

Id. at 673; *see also Spence v. Glock*, 227 F.3d 308, 312 (5th Cir. 2000) (reversing trial court's class certification order which determined that Georgia law would govern class claims, as "one must compare Georgia's contacts and the state policies those contacts implicate with those of the 50 other interested jurisdictions" and "*[t]he central problem with the district court's opinion is its failure to make this comparison*") (emphasis added).

Today, the Court commits a similar error: rather than assess the substance of other nations' laws, it merely concludes that the plaintiffs' theory is sound under Texas law. A proper choice-of-law analysis in this case would require an analysis of section 6(2)'s relevant factors, as well as those of other pertinent Restatement sections. For example, we recently held that a trial court failed to rigorously analyze class certification requirements, in part because it failed to conduct an adequate choice-of-law analysis. *Nat'l W. Life Ins. Co. v. Rowe*, 164 S.W.3d 389, 391-92 (Tex. 2005). In so holding, we recognized that, in claims involving life insurance policies, the Restatement provides that "[t]he validity of a life insurance contract . . . and the rights created thereby are determined . . . by the local law of the state where the insured was domiciled at the time the policy was applied for, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which even the local law of the other

state will be applied." *Id*. (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 192). As the comment notes:

> There are several reasons why such importance is attributed to the state where the insured was domiciled at the time the policy was applied for. Life insurance is a matter of intense public concern, as is evidenced by the fact that it has been subjected to extensive statutory regulation by the great majority of states. Issues arising under a life insurance policy should be determined by the local law of the state which has the dominant interest in the insured with respect to these issues, and this state will usually be that where the insured was domiciled at the time the policy was applied for. Likewise, a major purpose of life insurance legislation is to protect the individual insured and his beneficiaries, and the courts have sought to assist in the achievement of this purpose by means of their choice-of-law rules. They have done so by requiring that, at least as a general rule, the insured should receive the protection accorded him by the local law of his domicil.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 192, cmt. c. Here, the parties agree that Citizens sells life insurance policies; a proper choice-of-law analysis would therefore take into account the section 192 factors as well. Who is to say that Colombia, for example, does not have a greater interest in protecting Colombian citizens who purchase life insurance policies in Colombia to provide death benefits to their (presumably Colombian) beneficiaries, than Texas, whose only connection to the case is that the insurer is located here?

The Restatement provides that:

> In determining a question of choice of law, the forum should give consideration not only to its own relevant policies (see Comment e) but also to the relevant policies of all other interested states. The forum should seek to reach a result that will achieve the best possible accommodation of these policies. The forum should also appraise the relative interests of the states involved in the determination of the particular issue. In general, it is fitting that the state whose interests are most deeply affected should have its local law applied. Which is the state of dominant interest may depend upon the issue involved.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, cmt. f.

In this case, the class members presented no evidence of the laws of the class members' countries of residence. Indeed, other than stating that the 25,000 class members hale from "approximately" fifty foreign countries, the record does not even reflect which countries those are.[2] We know little other than that the named plaintiffs are Colombian. According to Citizens, each of the fifty foreign jurisdictions, save one (Belize), operates its own licensed security trading exchange. Citizens argues that, given the presence of such an exchange, courts may infer that each of those jurisdictions possesses a significant body of securities law and regulations, and thus a significant interest in providing redress to its citizens concerning the sale of allegedly unregistered securities within its borders. But it is not our job to infer what the other countries' laws are; plaintiffs, as class action proponents, must present an extensive analysis of those laws. *Compaq*, 135 S.W.3d at 672-73.

Perhaps, after a thorough choice-of-law analysis, it will turn out that Texas law governs the class claims. But just because a statute *may* apply does not mean that it *must* apply; that is, a statute's permissible application does not dispense with the need to examine the section 6(2) factors and application of another state's law. By holding that the Texas Securities Act governs this international class action, the Court leapfrogs over any substantive choice-of-law analysis and, in doing so, risks making Texas a magnet forum for national and international class actions.[3] *See*

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[2] Citizens alleges only that the "fifty foreign countries" are in "every continent of the globe."

[3] Indeed, Congress passed the Class Action Fairness Act of 2005 in part because of "state and local courts . . . making judgments that impose their view of the law on other States and bind the rights of residents of those States." Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4 (2005) (codified at 28 U.S.C.A. § 1711, historical and statutory notes (2006)).

Arthur R. Miller and David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 58-59 (1986); *cf.* Allison M. Gruenwald, *Rethinking Place of Business as Choice of Law in Class Action Lawsuits*, 58 VAND. L. REV. 1925, 1941-42 (2005). If, contrary to what we held in *Compaq*, class plaintiffs need only allege a violation of a Texas statute to ensure that Texas law will govern the proceedings, the Supreme Court's dictate in *Shutts* that plaintiffs may not choose which law governs will be thwarted.

II

I add a brief response to JUSTICE WAINWRIGHT's concurrence. JUSTICE WAINWRIGHT would hold that, based on the history and purpose of blue sky laws, the TSA was intended to have extraterritorial effect if a transaction occurs "in this state," and therefore the TSA contains a statutory directive on choice of law, rendering unnecessary an examination of factors otherwise relevant to a choice-of-law determination.

I disagree. Some statutes clearly contain an explicit "directive . . . on choice of law." *See, e.g.*, TEX. BUS. & COM. CODE § 35.531 (c) ("A contract to which this section applies is governed by the law of this state . . . ."); TEX. BUS. & COM. CODE § 1.301(a) ("[T]his title applies to transactions bearing an appropriate relation to this state."); TEX. FAM. CODE § 1.103 ("The law of this state applies to persons married elsewhere who are domiciled in this state."); TEX. FAM. CODE § 159.604 (entitled "Choice of Law" and stating that "the law of the issuing state governs" various situations involving child support); TEX. OCC. CODE § 2301.478 (in proceeding against motor vehicle dealer, "the law of this state applies to the action or proceeding"); TEX. INS. CODE, art. 21.42 (entitled "Texas Laws Govern Policies" and providing that "[a]ny contract of insurance payable to any citizen

or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance, and governed thereby"); *see also Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 353 (5th Cir. 1989) (noting that Texas statute specifically controlled the choice-of-law issue, as it directed that "[t]he internal affairs of a foreign corporation . . . shall be governed solely by the laws of its jurisdiction of incorporation") (quoting TEX. BUS. CORP. ACT art. 8.02). But this is not one of those statutes.

The sections of the TSA at issue here provide only that liability will attach if a person "offers or sells a security in violation of" section 12, which prohibits the offer or sale "of any security in this state unless the person is registered."[4] TEX. REV. CIV. STATS. arts. 581-12(A), 581-33(A)(1). Such vague language is not a "directive on choice of law." The comment to Restatement section 6(1) indicates that it is aimed at those statutes that explicitly provide which state's law governs a particular dispute:

> *Statutes directed to choice of law*. A court, subject to constitutional limitations, must follow the directions of its legislature. The court must apply a local statutory provision directed to choice of law provided that it would be constitutional to do so. An example of a statute directed to choice of law is the Uniform Commercial Code which provides in certain instances for the application of the law chosen by the parties (§ 1-105(1))[5] and in other instances for the application of the

[4] It is noteworthy that, in enacting the TSA, Texas did *not* adopt the Uniform Securities Act's choice-of-law provision. *See* UNIF. SEC. ACT § 414 (1956), 7C U.L.A. 940-41 (2006).

[5] Prior to its repeal, this UCC section, as adopted verbatim in Texas, provided that "when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law of either this state or of such other state or nation shall govern their rights and duties. Failing such agreement this title applies to transactions bearing an appropriate relation to this state." Uniform Commercial Code, 60th Leg., R.S., ch. 785, § 1.105, 1967 Tex. Gen. Laws 2343, 2346-47 (current version at TEX. BUS. & COM. CODE § 1.301(a)). The Restatement has not yet been updated to reflect this UCC provision's repeal.

> law of a particular state (§§ 2-402, 4-102, 6-102, 8-106, 9-103).[6] Another example is the Model Execution of Wills Act which provides that a written will subscribed by the testator shall be valid as to matters of form if it complies with the local requirements of any one of a number of enumerated states. Statutes that are expressly directed to choice of law, that is to say, statutes which provide for the application of the local law of one state, rather than the local law of another state, are comparatively few in number.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, cmt. a (footnotes added). If the registration mandates of the TSA are a "statutory directive on choice of law" because they contain the words "in this state," it is difficult to imagine a claim based on *any* Texas statute that would not be viewed as a statutory directive on choice of law.

In support of his writing, Justice Wainwright relies on language in *Marmon v. Mustang Aviation, Inc.*, a case we decided a year before the Restatement (Second) of Conflict of Laws was approved for publication. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Introduction (1971); *Marmon v. Mustang Aviation, Inc*., 430 S.W.2d 182 (Tex. 1968). But the second Restatement embodied a major shift in conflict-of-law analysis, abandoning "dogma" in favor the most significant relationship test and the factors relevant thereto outlined in section 6(2). *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Introduction. The Restatement makes clear that these factors form the basis for courts' choice-of-law determinations, "absent a binding statutory mandate." *Id*. The TSA "in this state" language is a far cry from a binding statutory mandate that Texas law governs to the exclusion of the laws of the fifty nations from which the class members hale.

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[6] For example section 4-102 of the UCC provides that "[i]n the case of action or non-action by or at a branch or separate office of a bank, its liability is governed by the law of the place where the branch or separate office is located." U.C.C. § 4-102 (1977).

III
Conclusion

I would remand the case for a proper choice-of-law analysis. Because I disagree with the Court's treatment of that issue, I respectfully concur in the Court's judgment but not in section IV of its opinion.

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Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: March 2, 2007