

Shielding Local Law and Those it Protects from Adhesive Choice of Law Clauses

William J. Woodward Jr has posted “**Constraining Opt-Outs: Shielding Local Law and Those it Protects from Adhesive Choice of Law Clauses**” on SSRN (originally published in the *Loyola of Los Angeles Law Review*, Vol. 40, No. 1, 2006). Here’s the abstract:

Fifty years ago, the idea that parties could “choose” the law governing their contract was alien to the way most courts viewed their roles. Applicable law depended on complicated conflict of laws rules, administered by judges who would apply the law, not on party choice. Contemporary contracts, by contrast, nearly always specify the law that will govern them. Choice of law clauses reduce uncertainty, contribute to economic welfare and, in most instances, are no longer controversial. But when we move from negotiated contracts to adhesion and mass market contracts, choice of law clauses can become less than benign. A drafter will, of course, choose law that best suits its needs. But the law that best suits the drafter may well be less than ideal for the customer. Not surprisingly, recent cases reveal that mass market drafters often choose the law of a state that offers very limited protection for customers in their dealings with the drafter. Cases show, for example, that drafters choose the law of a state that recognizes adhesive class action waivers over the law of a state that does not. If such a choice of law provision is effective against customers whose law ordinarily protects them from such waivers, the drafter has effectively replaced the law their state crafted to protect its residents with the less-beneficial law the drafter chose. This, of course, raises policy questions and both courts and state legislatures have begun to address them. How can a state “protect” the law it has developed to benefit its residents without jeopardizing the commercial certainty that choice of law provisions provide? After providing an analytic framework for considering the complex issues raised by this amalgam of conflicts and contract law, we proceed to consider solutions both at the state and federal level.

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