SUPREME COURT NO. S240245

IN THE SUPREME COURT OF CALIFORNIA

HAIRU CHEN, et al.,

Plaintiffs and Appellants,

v.

L.A. TRUCK CENTERS, LLC,

Defendant and Respondent.

REPLY BRIEF ON THE MERITS

From the Opinion of the Court of Appeal of the State of California,
Second Appellate District, Division Eight, Case No. B265304
on Appeal from The Superior Court of California,
County of Los Angeles, Case No. BC469935
(Hon. J. Stephen Czuleger and Hon. Holly E. Kendig)

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TABLE OF CONTENTS

Page

I. INTRODUCTION 7

II. RESPONSE TO PLAINTIFFS' STATEMENTS OF FACTS AND OF THE CASE 12

III. CHOICE OF LAW SHOULD BE BASED ON THE UNDERLYING FACTS OF THE DISPUTE, NOT ON PARTIES' STRATEGIC LITIGATION DECISIONS 15

IV. THE COURT SHOULD REJECT PLAINTIFFS' ATTACK ON THE TRIAL COURT'S CHOICE-OF-LAW RULING. 21

A. Plaintiffs Overstate Any California Deterrent Interest, Which Was Protected By Application Of Indiana Law. 21

B. Indiana's Adherence To *Lex Loci Delicti* Says Nothing About Its Interest In Application Of Its Substantive Law. 27

V. ANY ERROR BY THE TRIAL COURT WAS NOT PREJUDICIAL. 33

VI. CONCLUSION 35

TABLE OF AUTHORITIES

Page(s)

CASES

Baltimore & O.S.W. Ry. Co. v. Read
(Ind. 1902) 62 N.E. 488 28

Barker v. Lull Engineering Co.
(1978) 20 Cal.3d 413 22

Barrett v. Superior Court
(1990) 222 Cal.App.3d 1176 24

Bernhard v. Harrah's Club
(1976) 16 Cal.3d 313 ..... 25, 31, 33

Bernkrant v. Fowler
(1961) 55 Cal.2d 588 16

Beron v. Kramer-Trenton Co.
(E.D. Pa. 1975) 402 F.Supp. 1268 ..... 22, 23

Brown v. Superior Court
(1988) 44 Cal.3d 1049 ..... 23, 24

Burgess v. Superior Court
(1992) 2 Cal.4th 1064 ..... 23, 24

Burns v. Grand Rapids & I.R. Co.
(Ind. 1888) 15 N.E. 230 28

Comments on Reich v. Purcell
(1968) 8

Cronin v. J.B.E. Olson Corp.
(1972) 8 Cal.3d 121 22

Danziger v. Ford Motor Co.
(D.D.C. 2005) 402 F.Supp.2d 236 ..... 30, 31

First State Ins. Co. v. Superior Court
(2000) 79 Cal.App.4th 324 19

Forsyth v. Cessna Aircraft Co.
(9th Cir. 1975) 520 F.2d 608 ..... 30, 31

Greenman v. Yuba Power Products, Inc.
(1963) 59 Cal.2d 57 ..... 23, 24

Hernandez v. Burger
(1980) 102 Cal.App.3d 795 ..... 24, 25

Howard v. Omni Hotels Management Corp.
(2012) 203 Cal.App.4th 403 35

Howe v. Diversified Builders, Inc.
(1968) 262 Cal.App.2d 741 25

Hurtado v. Superior Court
(1974) 11 Cal.3d 574 ..... 22, 23, 24, 25

Ketchum v. Hyundai Motor Co.
(1996) 49 Cal.App.4th 1672 24

Kim v. Toyota Motor Corp.
(2016) 243 Cal.App.4th 1366, review granted April 13, 2016 (No. 5232754) 35

Kunec v. Brea Redevelopment Agency
(1997) 55 Cal.App.4th 511 34

Levin v. Dalva Brothers, Inc.
(1st Cir. 2006) 459 F.3d 68 19

Mancuso v. Southern Cal. Edison Co.
(1991) 232 Cal.App.3d 88 24

McCabe v. American Honda Motor Co.
(2002) 100 Cal.App.4th 1111 34

McCann v. Foster Wheeler LLC
(2010) 48 Cal.4th 68 26

Myers v. Cessna Aircraft Corp.
(Ore. 1976) 553 P.2d 355 31

NL Industries, Inc. v. Commercial Union Ins. Co.
(3d Cir. 1995) 65 F.3d 314 19

O'Neill v. Novartis Consumer Health, Inc.
(2007) 147 Cal.App.4th 1388 35

Paxton v. Washington Center Corp.
(D.D.C. 2013) 991 F.Supp.2d 29 ..... 30, 31

People v. One 1953 Ford Victoria
(1957) 48 Cal.2d 595 16

Pfau v. Trent Aluminum Co.
(N.J. 1970) 263 A.2d 129 28

Phillips v. General Motors Corp.
(Mont. 2000) 995 P.2d 1002 ..... 30, 32

Reich v. Purcell
(1967) 67 Cal.2d 551 ..... *passim*

Robert McMullan & Son, Inc. v. United States Fid. & Guar. Co.
(1980) 103 Cal.App.3d 198 ..... 29, 30

Soule v. General Motors Corp.
(1994) 8 Cal.4th 548 34

State Farm Mutual Automobile Ins. Co. v. Superior Court
(2004) 121 Cal.App.4th 490 ..... 18, 19

Sutherland v. Kennington Truck Service, Ltd.
(Mich. 1997) 562 N.W.2d 466 ..... 30, 32

Tramontana v. S.A. Empresa De Viacao Aerea Rior Grandense
(D.C. Cir. 1965) 350 F.2d 468 ..... 30, 32

Umbarger v. Bolby
(Ind. Ct. App. 1986) 496 N.E.2d 128 28

Vandermark v. Ford Motor Co.
(1964) 61 Cal.2d 256 ..... 23, 24

Wimberly v. Derby Cycle Corp.
(1997) 56 Cal.App.4th 618 24

OTHER AUTHORITIES

CACI No. 1204 35

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REPLY BRIEF ON THE MERITS

I. INTRODUCTION

Plaintiffs argue choice of law should be treated as a routine motion in limine subject to reconsideration until – and perhaps through – trial as parties are added or dismissed and new facts discovered. They contend that once the Indiana-based manufacturer, Starcraft, settled and was dismissed, any interest of Indiana in application of its law evaporated and the trial court should have reconsidered its choice-of-law determination and chosen California law.

Plaintiffs virtually ignore *Reich v. Purcell* (1967) 67 Cal.2d 551, 555 (*Reich*). Their discussion of *Reich* is limited to footnotes in which they assert *Reich's* reference to the residences of the parties should be consigned to a category of historical facts unrelated to events in the litigation and that *Reich* never explicitly addressed the doctrine of *renvoi*. (Ans. Br. 46, fn. 5, and 61, fn. 8.) Instead, they advance three principal arguments in support of their position that choice of law should remain fluid and be revisited as parties are added or dropped from a case.

First, plaintiffs argue a distinction should be made between historical and litigation facts, with only the former tied to the date of the accident. (Ans. Br. 12-13, 44-46 & fn. 5.) Second, they contend application of *Reich's* time-of-accident rule to issues beyond the residences of the parties would result in "inalterable" choice-of-law decisions that are "frozen in time," would require trial courts to wear "blinders," and would lead to "absurd and arbitrary results." (Ans. Br.

12, 13, 46-47, 49-50.)

Finally, plaintiffs discount the possibility that recalculation of choice of law during the progress of a case to trial will permit it to be shaped by the parties' tactical decisions rather than the underlying facts of the dispute. They assert a plaintiff will rarely have sufficient information to make a calculated choice to settle with a defendant in order to obtain a more favorable choice-of-law ruling. (Ans. Br. 49-50.)

Each of these arguments is rebutted by the record in this case and is contrary to sound choice-of-law policy. Plaintiffs' attempt to avoid *Reich* and open choice of law to post-accident manipulation should be rejected for the following reasons:

- Resolution of choice-of-law questions should be based on the underlying facts of the dispute, not the parties' strategic choices during the litigation, such as a decision to settle with one of multiple defendants. (Symposium, *Comments on Reich v. Purcell* (1968) 15 UCLA L.Rev. 551, 588 (hereafter "UCLA Symposium") [comment by Professor Herma Hill Kay: "[N]ormally the forum's interest in applying its law should be assessed at the time of the transaction or events on which the rights of the parties depend."]. The relevant state interests arise from the underlying facts of the dispute, not the parties' tactical litigation decisions.

- Sanctioning serial choice-of-law rulings based on decisions whether to add, dismiss, or settle with selected parties ignores the essential role played by pretrial rulings on choice of law in influencing litigation decisions (e.g., whether to seek summary judgment) and enabling parties to value their claims and defenses for

purposes of settlement. It also creates the risk that similarly situated defendants will be treated differently under different substantive laws.

- Plaintiffs offer no support for their proposed distinction between historical and litigation facts. Why, for example, should a decision to change residence after an accident be treated differently from a decision to settle? As explained by Professor Clyde Spillenger in his March 8, 2017 letter to the Court supporting review (hereafter "Spillenger ltr."): "It is difficult to see whether the result in the present case should be any different simply because Starcraft's post-transaction change consisted of settling the claims against it rather than moving its operations to California." (Spillenger ltr. at pp. 3-4, fn. 2.)

- The argument that a plaintiff will rarely have sufficient information to make a calculated decision to settle with a defendant in order to obtain a more favorable choice-of-law ruling is belied by the facts of this case, which reveal a close link between settlement and a requested change in choice of law. Plaintiffs settled with Starcraft on August 6, 2014, shortly before the case was set for trial. (RA 3:23, 26.) A few weeks later, at the hearing on Starcraft's good-faith settlement motion, plaintiffs requested the trial court change its choice-of-law decision and apply California law. (RA 4:61-62.)

- Plaintiffs contend Buswest seeks a rule that would result in premature choice-of-law decisions that will be immutable. This misreads Buswest's position. Motions to determine choice of law – whether construed as motions in limine or otherwise – should not be made until the facts are developed through discovery and perhaps, in some cases, not until the applicable statute of limitations has run. But

once made, they should be subject to modification only on a showing of the discovery of significant new facts. Even then, the determination of choice of law should be based on the underlying facts of the dispute, not on later events such as a decision to change residence or settle. Here, there were no missing persons and plaintiffs made no claim that the trial court's choice-of-law ruling was premature.

Plaintiffs' brief is focused on an effort to reargue the merits of the underlying choice-of-law question. They repeatedly invoke "California" (seven times in their opening paragraph at Ans. Br. 11) and give singular emphasis to California's purported deterrent interest in application of its law. The record demonstrates, however, that this case arose from a bus designed, manufactured, and sold in Indiana that was involved in a rollover accident in Arizona while taking Chinese residents from Las Vegas to the Grand Canyon. And application of California or Indiana law was not an all-or-nothing choice in responding to either state's deterrent interest.

To the extent California may have a deterrent interest, it was – as the trial court held in its initial ruling – subordinate to that of Indiana. (2 AA 10:462.) And application of Indiana law, which plaintiffs on multiple occasions argued was reasonably identical to California product liability law, amply vindicated any deterrent interest California may have had despite the non-California locus of the underlying facts. Indiana law did not give Buswest a free pass. Its potential sting motivated Starcraft to settle for $3.25 million. (RA 3:26, 5:81.)

Plaintiffs also emphasize Indiana's *lex loci delicti* choice-of-law rule, which they contend demonstrates Indiana never had an interest in application of its law. (Ans. Br. 56-60.) They do not dispute that application of Ohio's then *lex loci delicti* rule would have changed the Court's decision to apply Ohio law in *Reich* or that governmental interest scholars have consistently rejected application of *renvoi*, at least where the other jurisdiction applies the rule of *lex loci delicti*. Although *renvoi* may make sense where the other state applies the governmental interest approach to choice of law, it is alien to the governmental interest analysis where – as here – the other state is a *lex loci delicti* jurisdiction. (See, e.g., Weintraub, *The Conflict of Laws Rejoins the Mainstream of Legal Reasoning* (1986) 65 Tex. L.Rev. 215, 228 [where the other state selects choice of law based "on a territorial rule that sticks a pin in a map without regard to state purposes . . . no functional information can be gleaned from [it] and it should not be read as a disclaimer of interest in the outcome."].)

Under plaintiffs' (and the Court of Appeal's) view of choice of law, a plaintiff may reshape the choice-of-law calculus through a pretrial settlement with one of multiple defendants who are residents of different states. But the settlement with Starcraft should not be viewed as extinguishing any interest of Indiana in application of its law any more than an earlier settlement with Buswest should have been viewed as removing any potential interest of California in application of its law. Choice of law should not turn on the parties' strategic decisions whether, when, and with whom to settle. It should be based on the underlying facts of the dispute.

The Court should affirm that *Reich* reaches beyond the issue of the parties' residences. The governmental interest analysis in determining choice of law in a personal injury or wrongful death case should be based on the parties' relationships to the interested states on the date of the accident or injury. Post-accident transactions such as settlement with one of multiple defendants, should not be part of the analysis. Choice of law should be anchored to the underlying facts of the dispute.

II. RESPONSE TO PLAINTIFFS' STATEMENTS OF FACTS AND OF THE CASE

In their effort to emphasize a California connection with this litigation, plaintiffs state that the day before the accident they were driven in the bus from Los Angeles to Las Vegas. (Ans. Br. 20.) This is not correct. Several plaintiffs testified that they flew to Las Vegas the evening before the accident. (6 RT 2707; 8 RT 3370.) This was confirmed by plaintiffs' counsel in his opening statement to the jury in which he explained that the plaintiffs flew from San Francisco to Las Vegas and were taken directly from the McCarran Airport to their hotel, where they were picked up the next morning by the bus for their trip to the Grand Canyon. (5 RT 2117, 2118.)

Plaintiffs assert the bus operated out of TBE's headquarters in California for use on California roads and highways. (Ans. Br. 17-18, 42-43.) Although there is no dispute that TBE was located in California and the bus had California apportioned license plates, there is no evidence in the record indicating the bus was used primarily to carry passengers in California and there is no disagreement that TBE

submitted a statement to the California Board of Equalization under penalty of perjury that the vehicle was being purchased for use outside California. (2 AA 7:342.) This statement contained a "Notice to Purchaser" advising TBE to maintain records documenting that the bus was used outside California. (*Ibid.*) Although it was headquartered in California, TBE maintained an apartment for its drivers in Las Vegas. (5 RT 2414, 2446.)

Plaintiffs ask why the California-resident owner and the driver of the bus, TBE and Mr. Lu, should not also be considered in the choice-of-law analysis despite the fact they settled early in the case. (Ans. Br. 47.) Plaintiffs omit that TBE and Lu were sued only under a theory of negligence. Plaintiffs' product liability claim, which was the focus of the choice-of-law motion and determination, was brought only against Starcraft and Buswest. (1 AA 1:8-54.) And no party contended that California and Indiana negligence law differ.

Plaintiffs emphasize the testimony of their experts regarding positions taken by the National Highway Transportation Safety Administration (NHTSA) and National Transportation Safety Board (NTSB) on whether seatbelts should be required in buses. But they overlook several important points. Plaintiffs' central theme throughout the trial was that two-point lap seatbelts could – and should – have been installed in the tour bus at a cost of only $12 per belt, for a total additional cost of $168. (5 RT 2110; 10 RT 3984; 12 RT 4555, 5125, 5142.) Plaintiffs' expert Carly Ward acknowledged, however, that use of lap belts could be "catastrophic" in frontal collisions, which are the most common type of bus accident. (6 RT 2812-2813.) Plaintiffs' expert William Broadhead also agreed that lap

belts create a significant risk of jackknifing and he is afraid to advise people to wear lap belts because of the risk of frontal collisions. (10 RT 4005-4007.)

Mr. Broadhead conceded the NHTSA's decision not to require passenger belts for this type of bus was due to concerns over low expected use of seatbelts by bus passengers and retrofit problems, and that it was interested in exploring other protection systems that would be more effective, less costly, and more likely to be accepted by the public. (10 RT 3992-3993.)

Plaintiffs emphasize that the trial court's first choice-of-law ruling by the Hon. Holly E. Kendig was based on its conclusion that California has no interest in applying its law in this case. (Ans. Br. 28, 31.) The trial court actually found that California's deterrent interest in controlling the design and manufacture of the bus in Indiana was "subordinate" and that, "[a]s between California and Indiana, Indiana has a greater interest in deterring the conduct at issue here." (2 AA 10:462.) It concluded, "Indiana has a greater interest than California in applying its law here." (2 AA 10:463.)

In denying plaintiffs' motion in limine seeking application of California law in light of the settlement with Starcraft, the trial court (the Hon. J. Stephen Czuleger) commented that there is no California interest in applying its law. (2 RT 603.) It appears, however, the trial court's decision to deny plaintiffs' motion was based primarily on its view that the settlement with Starcraft should not justify a change in the prior choice-of-law decision. (2 RT 604.)

III. CHOICE OF LAW SHOULD BE BASED ON THE UNDERLYING FACTS OF THE DISPUTE, NOT ON PARTIES' STRATEGIC LITIGATION DECISIONS.

There is no dispute that choice of law plays an essential role in important pretrial rulings and enables parties to value their claims and defenses for purposes of settlement. Motions for summary judgment, identification of issues that must be addressed by experts, selection of experts, and preparation of motions in limine and jury instructions, all turn on the applicable substantive law. The issue here is whether choice of law should be based on the underlying facts of the dispute or whether – as argued by plaintiffs – it should be subject to change based, for example, on a party's strategic decision whether to join, settle with, or dismiss selected defendants or cross-defendants. Should the choice-of-law determination be tethered to the date of the underlying accident or, as held by the Court of Appeal, should it be subject to reconsideration based on changes in the parties or their status as a case proceeds to or through trial?

Reich dealt with the issue of whether the plaintiffs' change in residence from Ohio to California prior to filing suit in California should be considered in the choice-of-law analysis. Addressing choice of a law in a wrongful death case arising from a vehicular accident, the Court held it would be inappropriate if "choice of law were made to turn on events happening after the accident." (*Reich, supra*, 67 Cal.2d at p. 555.) Although plaintiffs and the Court of Appeal attempt to limit *Reich* to the narrow issue of the parties' residences, choice-of-law scholars recognize that *Reich* reaches beyond the historical facts of the parties' residences and holds that

choice of law should be based on the underlying facts of the dispute, not strategic choices made by the parties while litigating the case.

Professor Herma Hill Kay observed that a rule tethering the parties' relationships with the potentially interested states to the date of the underlying accident or transaction "is to be preferred as the one carrying the least risk of unsettled expectations" and is consistent with Professor Brainerd Currie's view that "normally the forum's interest in applying its law should be assessed at the time of the transaction or events on which the rights of the parties depend." (UCLA Symposium, *supra*, 15 UCLA L.Rev. at pp. 588-589.) This position is echoed in the amicus letters by Professors Andrew D. Bradt and Clyde Spillenger to the Court in support of review in this case. (Bradt, March 4, 2017 letter to the Court supporting review at pp. 2-4 (hereafter "Bradt ltr."); Spillenger ltr. at pp. 2-4.) As noted by Professor Kay, *Reich* is consistent with prior decisions by the Court, as well as the views of the acknowledged architect of the governmental interest analysis, Professor Currie. (UCLA Symposium, *supra*, 15 UCLA L.Rev. at pp. 588-589 & fn. 30 [citing *Bernkrant v. Fowler* (1961) 55 Cal.2d 588, 595; *People v. One 1953 Ford Victoria* (1957) 48 Cal.2d 595, 598-599; and Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress* (1964) Sup.Ct.Rev. 89, 92-99].)

Plaintiffs ignore this authority and attempt to distinguish *Reich* on the ground it "was about historic facts, not litigation facts." (Ans. Br. 46, fn. 5.) Plaintiffs do not fully describe the distinction between historic and litigation facts, but it appears historic facts are consigned to the situation prior to the initiation of a lawsuit. Litigation facts are

apparently based on conduct after a lawsuit is filed. Plaintiffs cite no authority that has made or endorsed this distinction and they offer no reason why the significance of an event (e.g., a decision to settle with one of multiple defendants) should be considered in the choice-of-law analysis if it happens after a lawsuit is filed, but not if it occurs before.

Plaintiffs claim that tying choice of law to the date of an accident or transaction would require a court to wear "blinders" and lead to "absurd and arbitrary" results. (Ans. Br. 13, 47.) They argue it makes "no sense to hold that the choice-of-law determination must be frozen in time based on the status of the pleadings at the time of an original complaint." (Ans. Br. 47.) They dismiss as speculation the possibility that, under the Court of Appeal's decision, choice of law would be subject to manipulation and potential gamesmanship and argue "the mere possibility that a settlement with one defendant might affect a choice-of-law ruling as to others" would be a "risky gamble," that would rarely be taken by a plaintiff. (Ans. Br. 50.) None of these objections supports discarding the rule of *Reich* in favor of the approach adopted by the Court of Appeal.

First, connecting the choice-of-law analysis to the underlying facts of the dispute, rather than the parties' tactical decisions during litigation, does not make a choice-of-law ruling immutable or frozen in time. It does not require a trial court to wear blinders in assessing choice of law. There is no dispute that a choice-of-law ruling is premature until the parties have engaged in discovery and have had an opportunity to identify all potential parties and tortfeasors. In some cases, this may require the parties to wait for expiration of the statute of limitations. But this is an issue of the appropriate time for making

a choice-of-law ruling. This is distinct from whether the analysis should focus on the underlying facts of the dispute at the date of the accident or transaction in issue or be shaped by post-accident or post-transaction events such as settlements with selected defendants.

Plaintiffs' argument that a plaintiff will rarely have sufficient information to gamble on a pre-trial settlement with a selected defendant in order to reshape a choice-of-law determination is unmasked by the facts of this case. Shortly before the then-set trial date, plaintiffs settled with Starcraft. (RA 3:23, 26.) They then promptly sought reconsideration of the Court's prior choice-of-law ruling at the hearing on Starcraft's Motion for a Judicial Determination of Good Faith Settlement. (RA 4:61-62.) The connection between plaintiffs' decision to settle with Starcraft and their attempt to change the trial court's choice-of-law ruling is transparent.

Plaintiffs echo the Court of Appeal's conclusion that a motion to determine applicable law should be treated as an in limine motion, which is not binding and should be subject to reconsideration "upon full information at trial." (Ans. Br. 45.) This is arguably a matter of form rather than substance. But regardless of the nomenclature used to describe a motion to determine applicable law, a ruling on such a motion should not be subject to change based on the parties' tactical litigation decisions. It should be premised on the discovery of new facts related to the underlying dispute or a change in the law.

Plaintiffs and the Court of Appeal rely on *State Farm Mutual Automobile Ins. Co. v. Superior Court* (2004) 121 Cal.App.4th 490, 502 (*State Farm*), to support their position that choice of law should

be addressed through a motion in limine that is subject to change through trial. (Opn. p. 13; Ans. Br. 45.) But, as explained by Professor Spillenger, the court in *State Farm* analogized a motion to determine applicable law to a motion in limine in an effort to distinguish it from dispositive motions in the context of a post-reversal peremptory challenge to the trial judge. (Spillenger ltr. at p. 5; see also Bradt ltr. at p. 3 ["[B]y characterizing the trial court's decision on choice of law to be a mere motion in limine, the Court of Appeals gave short shrift to the importance of that decision to the conduct of the litigation."].) If anything, *State Farm* supports the position that a ruling on choice of law is an important decision that needs to be made before dispositive motions can be filed. (*State Farm, supra*, 121 Cal.App.4th at p. 502 [citing *First State Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 324, 327, for the position that choice of law must be determined before a court is able to rule on dispositive motions].)

Plaintiffs cite *Levin v. Dalva Brothers, Inc.* (1st Cir. 2006) 459 F.3d 68 (*Levin*), as an example of a change in choice of law recognized on the first day of trial. (Ans. Br. 49.) But this was the first time the issue of choice of law had been raised in that case (*Levin, supra*, 459 F.3d at pp. 72-73.) Nothing in *Levin* suggests the determination of choice of law should be shaped by post-accident or post-transaction events such as a settlement with one of multiple defendants. Plaintiffs cite *NL Industries, Inc. v. Commercial Union Ins. Co.* (3d Cir. 1995) 65 F.3d 314, 324, fn. 8, for the position a choice-of-law decision should be subject to reconsideration when there is a change in controlling law. (Ans. Br. 45.) But this says

nothing about whether choice of law should be shaped by the parties' tactical litigation decisions.

Plaintiffs attempt to downplay the risk of manipulation or gamesmanship that will result from the Court of Appeal's conclusion that choice of law should be fluid and subject to change through trial based on a defendant's settlement and dismissal. (Ans. Br. 49-50.) But here, for example, what would be the impact if Buswest had settled before trial rather than Starcraft? Would the payment of substantial money to plaintiffs as part of such a settlement satisfy any California deterrent interest? Would California have retained any interest in application of its law? At a minimum, this hypothetical situation underscores the risk of manipulation and gamesmanship posed by the Court of Appeal's decision. As emphasized by Professor Bradt, the underlying policies at issue in weighing the potential governmental interests should not be affected by events that occur after the litigation has begun. (Bradt ltr. at p. 3 ["The extent to which any of the involved states' policies will be advanced has nothing to do with whether one of the defendants has settled. To put it slightly differently, a state's interest in having its law applied to one defendant does not change because a different defendant has exited the litigation."].)

The Court should reaffirm the rule of *Reich*. The governmental interest analysis should be based on the relationships between the parties and the potentially interested states on the date of the underlying accident or transaction. It should not be shaped by the parties' tactical litigation decisions.

IV. THE COURT SHOULD REJECT PLAINTIFFS' ATTACK ON THE TRIAL COURT'S CHOICE-OF-LAW RULING.

Plaintiffs challenge the trial court's initial choice-of-law ruling on two principal grounds. First, they contend the facts of this case are centered in California and this state has a compelling deterrent interest in application of its law that was substantially impaired by application of Indiana products liability law. (Ans. Br. 39-44.) Second, they argue Indiana's *lex loci delicti* rule means it has no interest in application of its law in this case, which arises from an accident in Arizona. (Ans. Br. 2-64.) Plaintiffs assert this is consistent with the "more modern use" of *renvoi* as part of the governmental interest analysis. (Ans. Br. 61, 62-64.) As demonstrated below, these arguments should fail.

A. Plaintiffs Overstate Any California Deterrent Interest, Which Was Protected By Application Of Indiana Law.

Plaintiffs overstate any California deterrent interest. The accident did not occur in California and did not cause injury to a Californian. The bus was designed, manufactured, and sold in Indiana. Although plaintiffs contend the accident "could just as easily happened in California" (Ans. Br. 42), they presented no evidence the bus had substantial operations in California and, in fact, concede that TBE submitted a signed statement to the California Board of Equalization that the bus was being purchased for use outside California (Ans. Br. 19).