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REDRAFTING REVERSE REMOVAL: FOUR RECOMMENDATIONS TO IMPROVE THE AMERICAN LAW INSTITUTE'S *COMPLEX LITIGATION PROJECT*

Abstract

Many commentators have recommended the enactment of federal complex litigation legislation which would allow certain cases filed in federal court to be "removed" to state court for consolidated trial with other similar cases. The American Law Institute has recently drafted a provision that would allow this "reverse removal" and is recommending that Congress turn it into legislation. After discussing the procedural issues at stake in the American Law Institute's proposal, the author recommends that the provision state that the state court's jurisdiction over the transferred defendants be measured by weighing the defendant's hardship in pursuing the case against the interests of the other parties to proceed collectively, while the court's jurisdiction over the transferred plaintiffs be presumptively valid. Finally, the author recommends that, prior to transfer, the federal court must obtain consent to the transfer from the state's highest court and that the parties should participate in the consent process.

I. INTRODUCTION

This Note analyzes a recent recommendation to Congress from the American Law Institute (ALI) that would allow certain complex litigation cases[1] to be removed from the federal court system and

1. For purposes of this Note, the term "complex litigation" is contrasted with the term "simple litigation" and is understood to mean multiparty, multiforum litigation characterized by related claims dispersed throughout several fora. This is the definition used by the ALI in its *Complex Litigation Project*. *See* COMPLEX LITIGATION PROJECT 9 (Proposed Final Draft 1993). For a brief explanation of this definition, see *infra* text accompanying notes 65-71.

The terms "complex" and "simple" litigation do not have commonly recognized defi-

consolidated with factually similar state court cases.[2] Removal

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nitions. Often "complex litigation" can mean litigation which presents difficult problems for adjudication. However, after the 1950s antitrust prosecution of a large number of electrical equipment manufacturers, see CHARLES A. BANE, THE ELECTRICAL EQUIPMENT CONSPIRACIES: THE TREBLE DAMAGE ACTIONS (1973), the term "complex litigation" has taken on more specific overtones for proceduralists and trial lawyers. *See generally* MANUAL FOR COMPLEX LITIGATION ii (5th ed. 1982) [hereinafter MANUAL] (describing antitrust cases as impetus for the original drafting of the Manual). Consequently, "complex litigation" has come to refer to claims arising out of specific societal and procedural contexts. Judge Williams' statement, in *In re* Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig., 526 F. Supp. 887 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983), highlights this point by comparing "traditional" litigation with class actions as follows:

> In a complex society such as ours, the phenomenon of numerous persons suffering the same or similar injuries as a result of a single pattern of misconduct on the part of a defendant is becoming increasingly frequent.
>
> The judicial system's response to such repetitive litigation has often been blind adherence to the common law's traditional notion of civil litigation as necessarily private dispute resolution (footnote omitted). In situations where this traditional mode of litigation threatens to leave large numbers of people without a speedy and practical means of redress and simultaneously threatens to expose defendants to continuing punishment for the same wrongful acts, the class action device is a powerful tool to accomplish its proclaimed goals of judicial economy and fairness.

Id. at 892 (footnote omitted).

Other authors have described complex litigation in a myriad of ways, ways which do not even agree upon the important factors to be considered. *E.g.*, MANUAL, *supra*, §§ 0.20-0.22 (describing "potentially complex cases" by focusing on the type of claim or the procedural characteristics of the case); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-84 (1976) (describing complex litigation by contrasting private, bipolar, self-contained, and party-initiated cases with "sprawling and amorphous" public cases "intermixed with negotiating and mediating processes at every point."); Linda S. Mullenix, *Problems in Complex Litigation*, 10 REV. LITIG. 213, 215 (1991) (describing judicial development of "the complex litigation phenomenon"); Judith Resnik, *From "Cases" to "Litigation"*, 54 LAW & CONTEMP. PROBS. 5, 22-24 (1991) (defining complex litigation in terms of types of procedural aggregation); Thomas D. Rowe & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7, 9 (1986) (limiting complex litigation to scattered, related litigation); Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 270 (defining complex tort litigation as "characterized by thousands . . . of actual or potential plaintiffs residing in many different jurisdictions" where the defendant's liability is "of an unprecedented magnitude that frequently threatens [it] with bankruptcy"). *Cf.* Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 U. ILL. L. REV. 43, 44 (rejecting a description of "collective litigation" as "any lawsuit with more than one person on either side of the 'v'" because, *inter alia*, that definition makes collective litigation "'so commonplace as to warrant no discussion'"). *See generally* RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE 1-3 (1985) (providing overview of history of complex litigation).

2. *See* COMPLEX LITIGATION PROJECT, *supra* note 1, § 4.01.

from federal to state court, or "reverse removal,"[3] is a recent innovation in the area of complex litigation and one that raises new questions about the limits of federalism and the extent of the procedural due process rights of federal litigants. This Note analyzes the ALI's treatment of these issues and makes specific revisions of the ALI's reverse removal provision. The recommendations in this Note are intended to refine the ALI's reverse removal provision in a manner consistent with existing constitutional notions of due process and federalism while simultaneously satisfying the ultimate rationale behind the ALI's proposal.[4]

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3. "Reverse removal" has become the generally accepted idiom for the transfer of federal cases to state courts similar to federal removal found at 28 U.S.C. § 1441 (1988). There is currently no known procedure which raises concerns corresponding to those raised by reverse removal and one must stretch far to find remotely similar mechanisms. *See Thursday Morning Sessions*, 69 A.L.I. PROC. 183 (1992) [hereinafter *Sessions*]. Arthur R. Miller commenting that "[t]he current law on federal-to-state transfer is, to put it mildly, nonexistent . . . . The analogues, the analogies, you can find are distant."). *See also id.* at 188 (Herbert M. Watchtell stating "this is a concept that is previously unknown in American law, and I think it should stay that way."). The judicially created doctrine of abstention, which permits a federal court to withdraw its jurisdictional power over a case, has been used to explain the constitutionality of reverse removal. For a more detailed discussion of abstention, see *infra* note 108.

4. This Note recognizes that the American Law Institute's COMPLEX LITIGATION PROJECT has been developed in the context of a growing area of attention for legal scholars and the organized bar.

Among the academic literature on complex litigation and mass tort litigation, representative examples include PETER H. SHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (1986); Kenneth S. Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 VA. L. REV. 845 (1987); Paul S. Bird, *Mass Tort Litigation: A Statutory Solution to the Choice of Law Impasse*, 96 YALE L.J. 1077 (1987); Irwin A. Horowitz & Kenneth S. Bordens, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 JUDICATURE 22 (1989); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV 669 (1986); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987); Andreas F. Lowenfeld, *Mass Torts and the Conflict of Laws: The Airline Disaster*, 1989 U. ILL. L. REV 157; Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440 (1986); Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989) [hereinafter *Mature Mass Tort*]; Linda S. Mullenix, *Class Resolution of the Mass Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039 (1986); Thomas D. Rowe & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7 (1986); Alvin B. Rubin, *Mass Torts and Litigation Disasters*, 20 GA. L. REV. 429 (1986); Roger H. Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779 (1985); Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69 [hereinafter *Dissent*].

Additionally, the American Bar Association, see ABA Commission on Mass Torts, *Report Number 126 to the ABA House of Delegates* (1989), and the Congress, see Multi-

An example highlighting the need for a reverse removal procedure occurred in 1982 when the sudden collapse of the suspended walkways at the Hyatt Regency Hotel in Kansas City resulted in litigation dispersed between the state courts and the federal district court.[5] The overwhelming majority of cases arising out of the hotel accident were filed in Missouri state courts.[6] However, the residency of the parties kept the state and federal cases from being tried together. The complete diversity rule[7] prevented the Missouri citizens from suing the owner of the hotel, a Missouri corporation, in federal court. Likewise, the federal removal statute barred most of the defendants from removing the state actions to federal court because of their citizenship in the forum state.[8] The tiny group of federal plaintiffs sought to include the state plaintiffs in a class action.[9] The federal plaintiffs' strategies ultimately led to a stay of the state court proceedings.[10] Thus, the presence of a small number of federal plaintiffs separated from the bulk of the state litigation stalled the state court proceedings and created conflicts among

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party, Multiforum Jurisdiction Act of 1990, H.R. 3406, 101st Cong., 2d Sess., 136 CONG. REC. H3116-19 (daily ed. June 5, 1990), have contributed to the field by making recommendations for reform of current procedural mechanisms for adjudicating complex disputes. *See infra* notes 47-60 and accompanying text.

5. The state courts of Missouri heard the litigation of 120 cases resulting from the Hyatt Regency disaster. *In re* Federal Skywalk Cases, 680 F.2d 1175, 1177 n.5 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982). On two occasions, twenty-four additional plaintiffs unsuccessfully attempted to certify a mandatory class action in the federal district court of Missouri. *See id.* at 1183 (denying first attempt at class certification); *In re* Federal Skywalk Cases, 95 F.R.D. 479, 482 (W.D. Mo. 1982) (denying second attempt at class certification). While the federal actions arrested the progress of the state proceedings and caused friction between both litigants and judicial systems, the eventual settlement at the state level provided the basic structure for a second settlement of the twenty-four related claims filed in federal district court. *See* David R. Morris & Andrew See, *The Hyatt Skywalks Litigation: The Plaintiff's Perspective*, 52 UMKC L. REV. 246, 270 (1984). Similarly, both the state and the federal courts have handled large-scale, related asbestos claims in tandem. For example, at the time of its bankruptcy filing in 1984, nearly two thirds of the 17,120 asbestos cases filed against Johns-Manville were filed in state courts. *See* Martha M. Parrish, *Asbestos Litigation—Dimensions of the Problem*, STATE CT. J., Winter 1984, at 4, 5 & n.2 (citing June 1, 1983 letter from senior attorney for Manville Corporation to the National Center for State Courts indicating that the total pending cases against Manville was 11,143 in state courts and 5,977 in federal courts).

6. *In re* Federal Skywalk Cases, 680 F.2d at 1177 n.5.

7. *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806) (denying diversity jurisdiction if any plaintiff is a citizen of the state of any defendant).

8. *See* 28 U.S.C. § 1441(b) (1988) (denying removal to federal court by a defendant who "is a citizen of the State in which [the] action is brought").

9. *In re Federal Skywalk Cases*, 680 F.2d at 1178-79.

10. *Id.* at 1180.

the plaintiffs.[11]

On the other hand, bringing all the state actions to a single federal court leaves much to be desired. Even if the federal rules allowed the state cases to be brought to the federal court for trial with the federal cases, the federal district court in Missouri would have been required to manage over 200 related cases involving questions of Missouri law.

Consequently, the availability of a device for reverse removal of complex federal cases has become an attractive option for proceduralists and trial lawyers. Commentators on complex litigation reform increasingly suggest that reverse removal would be a useful weapon in the arsenal of procedures designed to further the efficiency of handling dispersed actions. Such a device would have the added benefit of reducing the workload within the nation's judicial systems.

However, the possible benefits to be achieved by a reverse removal procedure may be overshadowed by the serious problems that reverse removal could create. Any recommendation that Congress enact a reverse removal statute must contend with justifying the removal of cases from the federal courts to a state court system without encroaching upon the constitutionally granted sovereignty of the state whose court would receive the action? Moreover, what safeguards exist to prevent the removal of the federal case from infringing upon the litigants' procedural due process rights to, among other things, choose the forum for their litigation?

In the discussion surrounding reverse removal, these issues have not gone unnoticed. However, a thorough explanation of how a reverse removal statute could be drafted to accommodate them has yet to be undertaken. Judge Jack B. Weinstein of the United States District Court for the Eastern District of New York recommended that Congress legislate a reverse removal provision requiring all related cases to be sent to a single, interested state court, but he did not elaborate on this suggestion.[12] Fifth Circuit judge

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11. *See* Judith Whittaker, *Skywalk Wars*, 52 UMKC L. REV. 296, 296 (1984) ("The real story of the Hyatt litigation was not a contest between plaintiffs and defendants . . . . The dramatic contest of this litigation was a fight between two groups of *plaintiffs* . . . .").

12. Judge Weinstein writes:

> In some instances it might be more sensible to send all the cases to the court system of the state with the predominant interest. In part this can be accomplished through federal stays, applications of *forum non conveniens* concepts and deferential refusals to accept jurisdiction. A more direct and compre-

Alvin Rubin also alluded to reverse removal in his recommendation that such a procedure would overcome the jurisdictional difficulties encountered in multiparty litigation.[13] Rubin, acknowledging that reverse removal would raise constitutional and practical questions, concluded without analysis that "these questions seem to be answerable."[14] Another commentator persuasively highlighted the benefits to be gained by allowing the federal Judicial Panel on Multidistrict Litigation[15] to transfer some of their cases to state court. He also suggested the possible constitutional bases for limiting federal court jurisdiction in these cases, but failed to address concerns dealing with fairness to the litigants and the federalism limitations that would govern federal and state court interaction in the reverse removal context.[16]

The American Law Institute provided a detailed proposal for reverse removal in Section 4.01 of its *Complex Litigation Project*.[17] Section 4.01 would allow cases with one or more common questions of fact or law to be transferred and consolidated in a single state trial court if the number of cases pending in the federal system is minimal compared to the number of cases pending in the state systems and the state trial court would be the best court to

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> hensive approach probably could be provided by Congress, ... Under such a scheme, federal and state cases would be transferred to a single state forum, provided perhaps—as a matter of comity—that the state court involved consented.

Jack B. Weinstein, *Preliminary Reflections on the Law's Reaction to Disasters*, 11 COLUM. J. ENV. L. 1, 23-24 (1986). Weinstein offers no detail as to how this legislation would operate other than merely asserting that Congress' Commerce Clause and Supremacy Clause powers, in addition to its authority to regulate the business of the federal courts, would permit reverse removal legislation in the complex litigation area. While this may be correct, reverse removal legislation would be ineffective without guidelines as to the limits of the federal courts' ability to transfer complex cases to state court. For a discussion of those congressional powers, see *infra* note 111.

13. Rubin, *supra* note 4, at 449 ("Conflicting state and federal jurisdiction might be eliminated by providing for removal of mass tort cases pending in state courts or by 'reverse removal' of federal cases to a state court so that all cases could be tried in one forum.").

14. *Id.*

15. The Judicial Panel on Multidistrict Litigation consists of seven federal circuit and district judges and was created by Congress to administer the transfer of actions to be consolidated under the federal multidistrict litigation statute. 28 U.S.C. § 1407 (1988). *See* Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1002-09 (1974).

16. *See* George T. Conway III, Note, *The Consolidation of Multistate Litigation in State Courts*, 96 YALE L.J. 1099, 1110, 1112 (1987).

17. COMPLEX LITIGATION PROJECT, *supra* note 1, § 4.01.

maintain efficiency and fairness to the parties.[18] Under Section 4.01, a centralized federal tribunal would use a multiple factor analysis to determine which state court would be preferable as a locus for the consolidation of the federal cases.[19] However, before the transfer can occur, the state must consent to receiving the action.[20]

The ALI is aware that Section 4.01 leaves certain federalism and due process questions largely unanswered.[21] To the extent that these questions persist, certain formal aspects of the reverse removal procedure remain unclarified. In an attempt to refine those unclarified formal aspects of Section 4.01, this Note will explain and answer those questions.

Part II of the Note describes the background against which Section 4.01 must be analyzed. Specifically, part II begins by briefly describing the existing federal rules affecting complex litigation. It then describes how other complex litigation proposals, designed without a reverse removal provision, compare with the *Complex Litigation Project.* This is followed by a more detailed explanation of the purposes of the *Complex Litigation Project* and the first two transfer procedures proposed by the ALI. Finally, part II concludes with an examination and illustration of the reverse removal provision in Section 4.01.

Part III of the Note briefly discusses the four problems which are left unanswered by Section 4.01. Each point in part III begins with a recommended revision to the section, followed by a summary of the reasons for that recommendation. The four recommendations answer the following questions:

> 1) What constitutional standard will be used to determine whether personal jurisdiction over the federal litigants can be maintained by the state court to which the federal litigants will be removed?
> 2) What difference, if any, should be made when determining whether the state court which receives the action

18. *Id.* § 4.01(a).

19. *See id.* § 4.01(b)(1)-(4).

20. *Id.* § 4.01(a).

21. *See Sessions, supra* note 3, at 183-84 (introductory remarks by COMPLEX LITIGATION PROJECT Reporter, Arthur R. Miller) ("[Section 4.01] raises federalism concerns and it raises fairness concerns . . . . We view this as sort of a toe in the water. We are not asking people to jump head first without even knowing whether the pool is filled or not.").

has jurisdiction over the federal plaintiff?
3) Who in the state system should be given the authority to consent to the transfer of the federal action to that state?
4) What legal restrictions can be put in place to ensure that the state's consent is meaningful?

In part IV, each of the above problems is separately analyzed and its corresponding recommendation is explained. Ultimately, the Note recommends:

1) The jurisdiction of the state transferee court should be determined by weighing the individual litigants' hardship in pursuing their cases in the chosen state court against the combined interests of both the judiciary and all other involved litigants in adjudicating the matter collectively.
2) Personal jurisdiction of the state court over plaintiffs should be presumed to exist unless plaintiffs can show serious hardship in pursuing their cases in the state transferee court.
3) Before the federal action can be transferred to the state court, the highest court of the state receiving the action must consent to the transfer.
4) In order for consent to be meaningful, the parties must obtain consent or must actively participate in the consent process with the federal court transferring the action.

II. BACKGROUND

A. Existing Laws Governing Consolidated Adjudication

The current state of federal law impedes lawyers' attempts to transfer and consolidate many related cases dispersed among different fora. Litigation may be combined for more efficient adjudication through the rules of joinder, intervention, class action, interpleader, and consolidation. However, these rules are limited in their effectiveness. They are often unworkable or wholly inapplicable in the context of the large-scale cases that pose the greatest predicament in complex litigation. Their jurisdictional requirements may pose insurmountable obstacles, and they are often construed too narrowly to assist in combining large numbers of cases dispersed throughout various courts. A brief description of these rules and their limitations is in order.

Compulsory joinder, under Rule 19, would join parties to an

action whose presence is needed for a "just adjudication" if the joinder is "feasible."[22] An absent person will be considered necessary for a just adjudication if either that person or any party before the court will be prejudiced by that person's absence, or if the person's absence will prevent complete relief.[23] These requirements prevent application of Rule 19 in the mass tort context because most courts hold that joint tortfeasors or injured parties are not necessary for a just adjudication.[24]

Permissive joinder, under Rule 20, allows claims or defenses that arise out of the same transaction or occurrence to be combined in order to reduce duplicative litigation.[25] However, Rule 20 joinder requires that each joined party satisfy personal jurisdiction and venue requirements.[26] Thus, in a federal diversity action, the joinder of non-diverse parties is prohibited, thereby limiting the applicability of joinder in federal complex litigation. Also, because permissive joinder must be invoked by the individual litigant,[27] the combination of all parties in large-scale cases may be prevented by litigants who, for tactical reasons, pursue their claims separately.

Intervention under Rule 24 may be helpful to bring small cases together because it allows parties outside the main action to make themselves a part of it. However, intervention is largely inappropriate for combining widely dispersed actions. Rule 24(a) grants intervention as a right where the outsider has an interest in the property or transaction that is the subject of the main action and the outsider's interests would be impaired by the action.[28] However,

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22. *See* FED. R. CIV. P. 19(a).

23. *See* Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968).

24. *See, e.g.*, Lynch v. Johns-Manville Sales Corp., 710 F.2d 1194, 1198 (6th Cir. 1983) ("It is beyond peradventure that joint tortfeasors are not indispensable parties in the federal forum.").

25. *See* FED. R. CIV. P. 20(a). The object of Rule 20 "is to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits." 7 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1652 (2d ed. 1982) (citations omitted). The rule thus authorizes joinder in more cases than was possible prior to the enactment of the Federal Rules. *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 6.4 (1985).

26. *See, e.g.*, Sherrell v. Mitchell Aero, Inc., 340 F. Supp. 219, 221 (E.D. Wis. 1971) (explaining that pendant jurisdiction applies to diversity actions only where a federal question also exists).

27. *See* FED. R. CIV. P. 20(a) ("[P]ersons may join in one action . . . *if they assert* any right to relief jointly, severally, or . . . arising out of the same transaction, occurrence, or series of transactions or occurrences . . . .") (emphasis added).

28. *See* FED. R. CIV. P. 24(a). Applicants for intervention must be able to show that the main action carries a possible detriment to them, thereby entitling them with a right to influence the litigation. *See* Diamond v. Charles, 476 U.S. 54, 68 (1986) (applicant

Rule 24(a) is often read too narrowly to apply to large-scale actions, requiring more substantial involvement with the main action by the intervenor.[29]

Rule 24(b) combines related litigation by allowing an outsider who asserts a claim or defense with a question of fact or law common to the main action to proceed in conjunction with the main action at the trial judge's discretion where doing so increases judicial economy.[30] While more successful in combining certain larger cases,[31] Rule 24(b) may hinder aggregation because of its requirement that all parties independently satisfy jurisdictional requirements.[32] Thus, parties who reside in different states may be precluded from intervening even though they were all injured in the same event or by the same transaction.

The federal class action rule,[33] widely debated in the complex litigation arena,[34] is often unavailable in mass tort cases as well as

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need only have a "significantly protectable interest" (quoting Donaldson v. United States, 400 U.S. 517, 531 (1971))). They must also demonstrate that none of the existing parties to the action will adequately represent their interests. *See* Delaware Valley Citizens' Council for Clean Air v. Pennsylvania, 674 F.2d 970, 973 (3d Cir. 1982) (suggesting that existing party must be in collusion with opposing party, be hostile to intervenor, or fail to be diligent in order to be an inadequate representative). Finally, intervention must be timely. *Cf.* Arizona v. California, 460 U.S. 605, 615 (1983) (explaining that even if an application to intervene is timely, "permission to intervene does not carry with it the right to relitigate matters already determined in the case").

29. *See* Florida Power & Light Co. v. Belcher Oil Co., 82 F.R.D. 78, 81 (S.D. Fla. 1979) (holding that consumers of electric utility service could not intervene as a matter of right in lawsuit against oil company because their interests were adequately represented by the utility).

30. *See* FED R. CIV. P. 24(b) ("In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.").

31. *See* Kendrick v. Jim Walter Homes, Inc., 545 F. Supp. 538 (S.D. Ind. 1980) (allowing six plaintiffs to intervene in consumer credit action originally consisting of 42 plaintiffs); Moscarelli v. Stamm, 288 F. Supp. 453 (E.D.N.Y. 1968) (stating that intervention is preferable to class action in securities fraud action brought by 25 plaintiffs); New York City Transit Auth. v. U.S. Steel Corp., 40 F.R.D. 333 (S.D.N.Y. 1966) (allowing a city and an interstate railway to intervene in antitrust suit against four major steel companies).

Such success may have as much to do with the language of the rule as it does with the particular judge whose discretion is being exercised. *See* Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 380 (1987) ("Particularly in a complex case . . . , a district judge's decision on how best to balance the rights of the parties against the need to keep the litigation from becoming unmanageable is entitled to great deference.").

32. *See* Harris v. Amoco Prod. Co., 768 F.2d 669, 675 (5th Cir. 1985) ("[A] party must have 'independent jurisdictional grounds' to intervene permissively under Rule 24(b)."), *cert. denied*, 475 U.S. 1011 (1986).

33. FED. R. CIV. P. 23.

34. *See, e.g.*, STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE

product liability, consumer, securities, and antitrust actions. Generally, Rule 23 allows the adjudication of claims or defenses in a single lawsuit by a class of similarly situated parties.[35] However, the prerequisites to class certification[36] have been restrictively construed by the federal courts.[37] Thus strictly construed, the requirement that a class share common questions of law or fact has prevented many multiparty tort actions from being certified as a class because individual issues of damages, liability, and defenses would affect the class members differently.[38] Additionally, the form of class action best suited for large, multiparty actions, class certification under Rule 23(b)(3),[39] contains a provision allowing each class member to "opt out"[40] of the class and proceed individually,

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MODERN CLASS ACTION 238-66 (1987) (overview of the issues in modern class actions); ARTHUR MILLER, AN OVERVIEW OF FEDERAL CLASS ACTIONS: PAST, PRESENT AND FUTURE 45 (1977) (explaining how Rule 23(b)(1) operates and its consequent problems); Note, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 HARV. L. REV. 1143 (1983).

35. *See* FED. R. CIV. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all . . . .").

36. In general a class must meet the requirements of commonality of facts, typicality among claims, adequacy of representativeness of the entire class, and numerosity. FED. R. CIV. P. 23.

37. *See, e.g.*, Rex v. Owens, 585 F.2d 432, 435-36 (10th Cir. 1978) (mandating strict burden of proof for potential class action plaintiffs).

38. *See In re* Northern Dist. of Ca. Dalkon Shield IUD Prod. Liab. Litig., 693 F.2d 847, 852 (9th Cir. 1982) (holding that the requirements of commonality, typicality, and representativeness were not met in punitive damage class action brought by women claiming liability on various theories), *cert. denied*, 459 U.S. 1171 (1983); La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 467 (9th Cir. 1973) (denying class certification for independent tort claims unless separate actions will "inescapably . . . alter the substance of the rights of others having similar claims"). *But see* Jenkins v. Raymark Indus. Inc., 782 F.2d 468, (5th Cir. 1986) (certifying class of 753 plaintiffs in asbestos case); *In re* School Asbestos Litig., 104 F.R.D. 422, 424 (E.D. Pa. 1984), *amended in*, 107 F.R.D. 215 (E.D. Pa. 1985), *vacated in part, aff'd in part*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986) (granting conditional certification of class consisting of "essentially all public school districts and private schools in the nation").

39. Rule 23(b)(3) requires that common questions of law or fact predominate over all the claims presented by the individual class members and that a class action is the superior method for achieving a fair and efficient adjudication of the controversy. *See* FED. R. CIV. P. 23(b)(3). Rule 23(b)(3) is considered best suited for large, complex actions because it does not require evidence of a limited fund, as does Rule 23(b)(1)(B), see Jenkins v. Raymark Indus. Inc., 109 F.R.D. 269, 277 (E.D. Tex. 1985) (denying certification of a Rule 23(b)(1)(B) class due to a lack of limited fund evidence), *aff'd*, 782 F.2d 468 (5th Cir. 1986), and because it is not limited to declaratory or injunctive relief, as is Rule 23(b)(2), *see* FED. R. CIV. P. 23(b)(2) (allowing class action where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole").

40. *See* FED. R. CIV. P. 23(c)(2) ("In any class action maintained under [23](b)(3), the

thereby frustrating any attempts to ensure that all claims are litigated together.

Interpleader, under either Rule 22[41] or the Federal Interpleader Act,[42] allows a party to combine cases in which the party's property is subject to two or more inconsistent claims. However, it is not generally helpful in the complex litigation context because the plain language of the rule requires a single party to join all others with conflicting claims to the same property and to concede to the others' right to such property. For instance, multiple tort claims, readily in need of aggregation, may be brought against defendants who do not concede the claimants' right to the property or who have sufficient money to settle the liability to all the claimants.[43]

Finally, 28 U.S.C. § 1407 allows the Judicial Panel on Multidistrict Litigation to transfer cases pending in various federal district courts to a single federal court for pre-trial proceedings if those cases involve one or more common questions of fact.[44] Unfortunately, the statute is limited to transfer and consolidation only during pretrial proceedings,[45] does not allow for consolidation of federal and state cases, and does not offer adequate provisions for the efficient handling of cases arising after the initial transfer.[46]

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court shall direct to the members of the class the best notice . . . [advising] each member that . . . the court will exclude the member from the class if the member so requests."). For a description of the procedure and effect of opting out, see 3 HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 16.14 (2d ed. 1985).

41. *See* FED. R. CIV. P. 22(1). Interpleader is a "procedural device which enables a person holding money or property, in the typical case conceded to belong in whole or in part to another, to join in a single suit two or more persons asserting mutually exclusive claims to the fund." 3A JAMES MOORE ET AL., MOORE'S FEDERAL PRACTICE § 22.02[1] (2d ed. 1993).

42. *See* 28 U.S.C. § 1335(a)(1) (1988). Section 1335 requires only minimal diversity (*see* CHARLES A. WRIGHT, FEDERAL COURTS § 74 (4th ed. 1983)) which requires only that two of the rival claimants be of diverse citizenship. *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530-31 (1967).

43. *See* Paula J. McDermott, Comment, *Can Statutory Interpleader Be Used as a Remedy by the Tortfeasor in Mass Tort Litigation?*, 90 DICK. L. REV. 439 (1985) (noting that courts have refused to allow mass tort defendants to use statutory interpleader).

44. *See* 28 U.S.C. § 1407(a) (1988).

45. *See id.* ("When civil actions . . . are pending in different districts, such actions may be transferred to any district for coordinated or consolidated *pretrial proceedings.*") (emphasis added).

46. The Judicial Panel on Multidistrict Litigation defines tag-along actions as "civil action[s] . . . involving common questions of fact with actions previously transferred under Section 1407." The Judicial Panel presumes that new cases arising after the transfer of an action should be transferred for consolidation with the earlier transferred cases. It has been noted that:

B. *Comparison to Other Complex Litigation Reform Proposals*

Comparing the *Complex Litigation Project* in light of Section 4.01 to other complex litigation proposals that do *not* contain a reverse removal provision highlights the issues of fairness and federalism that are raised by that section. One such proposal, H.R. 3406,[47] although adhering to a stringent notion of fairness to litigants, lacks the flexibility of Section 4.01 of the *Complex Litigation Project* Section 4.01 and is consequently not as sensitive to the docket pressures of state and federal courts. The American Bar Association's proposal,[48] while responsive to the risk of federal intrusion on state judicial processes, puts more pressure on federal courts than the ALI *Complex Litigation Project*'s Section 4.01.

H.R. 3406, the proposal that has come the closest to being enacted into legislation,[49] would funnel certain complex cases into

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> It is more difficult to prevent transfer of a tag-along action than to prevent initial transfer. The Panel tends to resolve all doubts in favor of transfer and is inclined to defer to the transferee judge to sort out any unique problems associated with the tag-along action.

Wilson W. Herndon & Ernest R. Higginbotham, *Complex Multidistrict Litigation—An Overview of 28 U.S.C.A. § 1407*, 31 BAYLOR L. REV. 33 (1979).

However, this presumption in favor of transfer is insensitive to the issues raised by such later, "tag-along" actions. For instance, while it may be desirable to encourage litigants with timely claims to bring their complaints before a court, forcing the litigants to raise their claims may be questionable. As one commentator notes:

> Ignoring such claims could undermine the effort to deal as fully as possible with large multiparty, multiclaim cases. Yet smoking out matured claims unfiled but not time-barred is a sensitive matter on all sides, perhaps stirring up unnecessary litigation and liability but also raising significant problems of fairness to the potential claimants if they could lose their claims and have not yet undertaken to defend their interests.

Thomas D. Rowe, Jr., *Jurisdictional and Transfer Proposals for Complex Litigation*, 10 REV. LITIG. 325, 344 (1991).

By comparison, the ALI COMPLEX LITIGATION PROJECT proposed another rule for tag-along actions. The ALI would require notice to all potential parties of the transferred action and a court-ordered opportunity for intervention. *See Complex Litigation Project, supra* note 1, § 5.05. All parties who would receive notice and do not file their actions would later be subject to issue (but not claim) preclusion. *See id.* Though more sensitive to the issues raised by tag-along actions, section 5.05 is not without controversy. *Compare* Rowe, *supra*, at 345 (commending section 5.05 as offering a solution to existing preclusion problems) *with* Richard A. Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal* 10 J.L. & COM. 1, 59-60 (1990) (recommending that parties should be able to elect whether to be benefitted or burdened by preclusion).

47. Multiforum, Multiparty Jurisdiction Act of 1990, H.R. 3406, 101st Cong., 2d Sess. § 2(a) (1990).

48. ABA Comm. on Mass Torts, *Report to the House of Delegates* (Nov. 1989).

49. On June 5, 1990, the House of Representatives passed H.R. 3406 with no objec-

the federal court system where twenty-five or more persons have died or been injured in an accident resulting in damages for $50,000 or more per plaintiff and where any plaintiff is the citizen of a state different from any defendant.[50] This method of consolidating complex cases would not be of help to long-term exposure cases such as product and drug liability cases or asbestos cases because the proposal limits the applicability of consolidation to single-event accidents. Also, the proposal effectively erodes state court participation in a limited class of complex cases by giving district courts original jurisdiction over these cases. This can have dangerous consequences when the federal district court is forced to choose which state law applies to the case at bar. To account for this danger, H.R. 3406 authorized federal courts to create common law for choice of law, an arguably dangerous authorization,[51] by supplying the courts with ten factors to consider in choosing the law.[52]

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tion. 136 CONG. REC. H3116-19 (daily ed. June 5, 1990). However, the bill's enactment was held up by the Chair of the Senate Judiciary Subcommittee. *See* Charles G. Geyh, *Complex-Litigation Reform and the Legislative Process*, 10 REV. LITIG. 401, 415-18 (explaining that time constraints and the complexity of the House Bill may have been responsible for the Senate's reluctance to approve H.R. 3406 without more thorough review).

50. The language of the bill states:

> The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 25 natural persons have either died or incurred injury in the accident at a discrete location and, in the case of injury, the injury has resulted in damages which exceed $50,000 per person, exclusive of interest and costs . . . .

H.R. 3406, 101st Cong., 2d Sess. § 2(a) (1990).

51. In the landmark case of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), the Supreme Court held that the existence of a federal common law is unconstitutional as an invasion of the independence of the states.

52. These ten factors are:

1) The law that might have governed the jurisdiction created by 28 U.S.C. § 1367 did not exist;
2) The fora in which the claims were or could have been brought;
3) The location of the accident and related transactions;
4) The parties' residence or place of business;
5) The desirability of using uniform law for some or all of the litigation;
6) Whether a change in law because of removal or transfer will result in unfairness;
7) Avoiding forum shopping;
8) The jurisdiction's interest in applying its own law;
9) The parties' reasonable expectations as to which law will apply;
10) Any agreement by the parties as to which law to apply.

H.R. 3406, 101st Cong., 2nd Sess., § 6(a) (1990).

The advocates of H.R. 3406 point to the relative advantages of creating minimal diversity jurisdiction for single-accident, multiparty, multiforum cases over the adoption of reverse removal jurisdiction.[53] One of the House bill's strongest points is its recognition of party initiative at some point in the consolidation process. Because H.R. 3406 grants original jurisdiction to the district courts, those plaintiffs that satisfy the conditions of the legislation would have to trigger the jurisdiction in their complaints by alleging the statutory requirements. Additionally, advocates of H.R. 3406 may be able to argue that the House bill would not risk unfairly restricting federal district court jurisdiction to the disadvantage of federal plaintiffs who have chosen to bring their actions in federal court. The proposed legislation evades the problems likely to be encountered by Section 4.01 because it relies on minimal diversity to bring would-be state cases into the federal courts for consolidation and adjudication.[54] Consequently, the federal court's authority to adjudicate the dispute is not in question, unlike the state court's authority to receive, as the transferee court, cases from the federal system.

Where H.R. 3406 succeeds in consolidating cases by slightly expanding federal court jurisdiction through enactment of a minimal diversity statute, it fails in comparison to relative scope and flexibility of Section 4.01 and raises serious constitutional questions in its authorization of the creation of federal common law. The ALI's reverse removal provision does not limit the benefits of complex litigation reform to a limited class of plaintiffs because it is not restricted to certain tort cases. Likewise, it is responsive to burgeoning federal and state court dockets by allowing federal cases to be transferred to state courts and by reserving state control over the transfer through Section 4.01(a)'s consent requirement.

The American Bar Association's Commission on Mass Torts

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53. *See, e.g.*, Rowe, *supra* note 46, at 346-47 (recommending that H.R. 3406 be adopted "as a limited, experimental first step toward expanding the federal judiciary's role in dealing with mass-tort cases" before the "more comprehensive, visionary, and ambitious structure of the ALI proposal"); Rowe & Sibley, *supra* note 4, at 11 ("While it would be unorthodox to frame federal court subject matter jurisdiction in terms of any defendant's residence in a state other than the locus of some events giving rise to the claim . . . , this criterion nonetheless would provide a practical, workable basis for the jurisdiction.").

54. Statutory interpleader, 28 U.S.C. § 1335 (1988), provides precedent for minimal diversity. In State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530-31 (1967), the Supreme Court held that this minimal diversity requirement is constitutional under Article III. *See also* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373 n.13 (1978) ("It is settled that complete diversity is not a constitutional requirement.").

has proposed a third vehicle for consolidation of multiparty, multiforum cases. This proposal would allow the consolidation of cases pending in federal district courts and state trial courts through the creation of a judicial panel that would be responsible for the management and transfer of cases.[55] The Commission's recommendation would limit the application of its consolidation measure to civil tort claims resulting in 100 or more claimants and arising from a single accident or exposure to a product or substance that causes more than $50,000 in personal injury, property, or wrongful death damages.[56] State cases would be moved to federal court under innovative legislation that would federalize the choice of law question in such cases, thereby granting original jurisdiction to the federal district courts for these cases as actions "arising under" the Constitution and laws of the United States.[57]

The Commission recommended the limits on the class of cases subject to its proposal, resisting broader application of consolidation, because of concern over federal court intrusion with state jurisdiction.[58] A belief that wide ranging consolidation would interfere with the attorney-client relationship also supports higher standards for treatment under the Commission's recommendation.[59] Finally, the Commission felt that there was insufficient need to consolidate cases with less than 100 plaintiffs.[60]

The effectiveness of the ABA proposal would be significantly less than the ALI's *Complex Litigation Project* largely because of the narrow class of cases to which the Commission's recommendations would apply. Also, although the ABA went further than H.R. 3406 by including mass exposure cases, its proposal does not reach as broad as the ALI's proposal, which applies to single accident torts, mass exposure torts, and non-tort claims as well by virtue of its transaction-based consolidation mechanism. The ALI's proposals would apply to such things as securities actions, while the ABA's could not because of its "single accident" requirement. The high number of claimants required for consolidated treatment under the ABA Report would also severely limit the number of cases that

55. ABA Comm. on Mass Torts, *Report to the House of Delegates*, Recommendation 2(a)(1) (November 1989).

56. *Id.*

57. *Id.* at Recommendation 3.

58. *See id.* at 24.

59. *See id.* at 20.

60. *See id.*

would benefit from aggregation.

C. *The Aims of the Complex Litigation Project*

In 1985, the American Law Institute began a project which studied the current problems of complex litigation.[61] The *Complex Litigation Project* examined elements of the contemporary occurrences of multiparty, multiforum lawsuits.[62] Recognizing the ambiguity of the term "complex litigation,"[63] the *Project* limited its focus to the conflicts generated by multiparty, multiforum litigation.[64] According to the ALI, "Multiparty, multiforum litigation . . . is characterized by related claims dispersed in several forums and often over long periods of time ."[65] Such litigation too frequently results in taxing the resources of attorneys and their clients,[66] adding duplicative cases to already overburdened court dockets,[67] delaying the resolution of disputes,[68] and reducing the

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61. Instructive detailed discussion of the COMPLEX LITIGATION PROJECT can be found in Epstein, *supra* note 46; Linda S. Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 FORDHAM L. REV. 169, 181-91 (1990); Resnik, *supra* note 1, at 40-43; Rowe, *supra* note 46, at 330-37, 341-47.

62. *See* COMPLEX LITIGATION PROJECT, *supra* note 1, at ch. 1, cmt. a.

63. *See supra* note 1.

64. *See* COMPLEX LITIGATION PROJECT, *supra* note 1, at ch. 2, cmt. a.

65. *Id.*

66. *See In re* Agent Orange Prod. Liab. Litig., 611 F. Supp. 1452, 1463-64 (E.D.N.Y. 1985) (discussing effects of fee arrangements on adequacy of representation and the possibility of inappropriate settlements in class actions), *rev'd on other grounds*, 818 F.2d 216 (2d Cir. 1987); McGovern, *Mature Mass Tort*, *supra* note 4, at 659, 675-79 (describing A.H. Robins Company's bankruptcy filing and subsequent disputes between judges, lawyers, and defendants as a result of approximately 16,000 personal injury claims filed against Robins); Charles Silver, *Comparing Class Actions and Consolidations*, 10 REV. LITIG. 495, 511 (1991) (stating that "flawed fee arrangements . . . can cause underrepresentation in consolidated suits"); *see also* Mary K. Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 TEX. L. REV. 385, 386 (1987) (identifying the problem of conflicts of interest inherent in class litigation).

67. *See In re* Federal Skywalk Cases, 680 F.2d 1175, 1179 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982) (recognizing the duplication of litigation of common issues in state and federal court); Note, *Air Crash Litigation and 28 U.S.C. Section 1407: Experience Suggests a Solution*, 1981 U. ILL. L. REV. 927, 927-28 ("The multiple parties . . . which usually accompany air disasters produce massive litigation efforts in numerous federal and state courts. Individual plaintiffs . . . may file separate actions arising from the same crash in several federal districts simply to obtain personal jurisdiction over each defendant. Defendants complicate the process by cross-claiming among each other." (footnotes omitted)).

68. *See* Lindsey Gruson, *Ex-Love Canal Families Get Payments*, N.Y. TIMES, Feb. 20, 1985, at B1 (reporting that plaintiffs in Love Canal environmental litigation received settlement seven years after filing); Andrew Wolfson, *After 8 Years, A Complex Case Comes to an End*, NAT'L L.J., Aug. 19, 1985, at 6 (noting the settlement of cases eight years after the Beverly Hills Supper Club fire).

public's opinion of the legal system as a whole.[69] The *Complex Litigation Project*'s purpose was to provide an "analysis of potentially fruitful options for mitigating the problems these cases pose"[70] and has resulted in what may now be the most thorough and radical revision of the existing rules governing multiparty, multiforum actions.[71]

D. Transfer Mechanisms and Transfer Authority Proposed by the Complex Litigation Project

The ALI proposes a series of interrelated provisions designed to consolidate actions scattered throughout various judicial systems for trial in a single state trial court.[72] The general authority to transfer is contained in Section 3.01.[73] Under Section 3.01, cases subject to the *Complex Litigation Project*'s broad transfer provisions include separate actions involving "one or more common questions of fact"[74] where "transfer and consolidation will promote the just, efficient, and fair conduct of the actions."[75] Cases to be transferred should satisfy a series of criteria designed to ensure that significant efficiency gains will be achieved by both the parties and

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69. *See* Warren E. Burger, Foreword, *American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation*, 1989 DUKE L.J. 808, 808 (asserting that the "public has a right to look to [lawyers] for . . . answers" concerning the "critical condition" of the "machinery of justice"); Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1644 (1985) ("Whether we have too many cases or too few, or even, miraculously, precisely the right number, there can be little doubt that the system is not working very well."); *see also* Weinstein, *supra* note 12, at 3 n.5 (stating that federal district and appellate courts expended an estimated $10.1 million on asbestos-related claims in 1984); *cf.* Rubin, *supra* note 4, at 434 (defending complex litigation attorneys against charges of degeneracy for "making diligent efforts to protect those whom they are hired to represent.").

70. COMPLEX LITIGATION PROJECT, *supra* note 1, at ch. 1, cmt. b.

71. *See* AMERICAN LAW INSTITUTE, REPORT: PRELIMINARY STUDY OF COMPLEX LITIGATION 238-41 (1987) (identifying six broad areas of focus within the *Complex Litigation Project* which "will require extremely bold steps" to obtain the "achievement of greater efficiency," *cited in* Resnik, *supra* note 1, at 40); Rowe, *supra* note 46, at 341 (describing the ALI *Project* as "the most ambitious complex litigation effort now under way"); *cf.* Epstein, *supra* note 46, at 2-3 (criticizing the COMPLEX LITIGATION PROJECT as an "elaborate network of interlocking provisions" that result in "coerced consolidation" and dangerous reliance on the discretion of federal judges).

72. *Cf.* COMPLEX LITIGATION PROJECT, *supra* note 1, at ch. 2, cmt. d ("Even a cursory examination of the problems caused by complex litigation leads to the conclusion that both state and federal courts should develop new procedures to consolidate the units of a complex dispute.").

73. *See id.* § 3.01.

74. *Id.* § 3.01(a)(1).

75. *Id.* § 3.01(a)(2).

the court system and that all litigants involved will be treated fairly.[76] Factors to be considered include: the number of parties and actions, the geographic dispersion of the actions, any significance of local concern in the litigation, the subject matter of the litigation, the amount in controversy, the number of common issues shared by the actions, the likelihood that future related claims will arise, the wishes of the parties, and the progress of already existing claims.[77] The ALI proposed this balancing approach to allow fine-tuning and to permit transfer of cases which are not neatly categorized, but which may benefit from consolidation even though they may not satisfy narrowly specified criteria.[78]

Besides Section 4.01's transfer of federal actions to state trial courts,[79] two other types of transfer are authorized. The *Complex Litigation Project* would allow the transfer of actions from one federal district court to another[80] and removal of state actions to a federal district court.[81] Section 3.01 authorizes the transfer of actions from one federal district court to another.[82] This federal intrasystem transfer follows the approach mapped out by the rules governing multidistrict litigation under Section 1407.[83] Section 3.01 differs from the multidistrict litigation statute in that the transferee court receiving the transferred action under the *Complex Litigation Project* is granted more authority to completely adjudicate the disputes than are transferee courts under Section 1407.[84]

The transfer of actions from state courts to a federal district court applies to state cases which meet the criteria of Section 3.01(a) and (b) and which arise from "the same transaction, occurrence, or series of transactions or occurrences" as the pending federal court action with which they will be consolidated.[85] Additionally, state-to-federal removal may not "unduly disrupt or impinge upon state court or regulatory proceedings or impose an undue burden on the federal courts."[86] Unlike the currently avail-

76. *See id.* § 3.01 cmt. c.
77. *Id.* § 3.01(b)(2) a-h.
78. *See id.* § 3.01 cmt. b.
79. For a description of section 4.01, see *infra* notes 96-98 and accompanying text.
80. *See* COMPLEX LITIGATION PROJECT, *supra* note 1, § 3.01(a).
81. *See id.* § 5.01.
82. *Id.* § 3.01(a).
83. *Id.* at ch. 3, cmt. b.
84. *Id.*; *compare* 28 U.S.C. § 1407 (1988) (allowing the transfer at cases for pretrial proceedings only) *with* COMPLEX LITIGATION PROJECT, *supra* note 1, § 3.06 (empowering the transferee court with full power to manage and try the consolidated proceedings).
85. COMPLEX LITIGATION PROJECT, *supra* note 1, § 5.01(a).
86. *Id.* State-to-federal intersystem removal also turns on the application of a discre-

able removal procedure, Section 5.01 does not restrict removal to federal district courts which have independent jurisdiction over the cases[87] and allows state cases to be considered for removal upon the motion of any party to the state action or the certification of a judge presiding over the action.[88]

A federal Complex Litigation Panel would decide how these cases are transferred.[89] Ideally, the Panel would be composed of nine federal judges serving for a fixed term of years.[90] The Panel's purpose is to provide one central body whose specialized experience would expedite the decisionmaking process and allow careful monitoring of the national complex litigation landscape.[91] Like the currently existing Judicial Panel on Multidistrict Litigation, the Complex Litigation Panel would provide a single, experienced decision-making body to implement the transfer of cases for consolidation without being swayed by the pressures of its own docket.[92] In fact, the Panel would "absorb the existing panel, its functions, and much of its jurisprudence."[93] At its most basic lev-

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tionary balancing test including the following factors: the amount in controversy of the state case; the number and size of actions involved; the number of jurisdictions in which state cases are located; the avoidance of inconsistency of result; the presence of local concern; the possibility of developing cooperation or coordination with the state transferor courts; and the change in the applicable law. *Id.*

87. *See id.* § 5.01 cmt. a. ("Removal [under section 5.01] avoids duplicative or overlapping litigation that otherwise might occur when some of the claims or parties meet the general standards for asserting federal jurisdiction and others do not."). *Cf.* 28 U.S.C. § 1441(a) (1988) ("[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . .").

88. *See* COMPLEX LITIGATION PROJECT, *supra* note 1, § 5.01(e). *Cf.* 28 U.S.C. § 1441(a) (1988).

89. *See* COMPLEX LITIGATION PROJECT, *supra* note 1, § 3.02.

90. *See id.* § 3.02 cmt. d. At the time § 3.02 was drafted by the ALI, the Institute had not completed its work on the reverse removal provision. Therefore, recommendations on the Panel's composition address only the federal intrasystem transfer decisions of the Panel. *See id.* § 3.02 cmt. d ("Because . . . this Chapter calls for the Complex Litigation Panel to handle cases under the subject matter jurisdiction of the federal courts, it should continue to be composed of Article III judges. Whether any additional special qualifications are required deserves further consideration."). It is unclear to what extent federalism limitations may require or prohibit the alteration of the Institute's initial outlines of the composition of the Panel. *Compare Sessions, supra* note 3, at 187 (COMPLEX LITIGATION PROJECT Reporter, Arthur R. Miller, acknowledging the "relationship" that exists between state transferee courts under section 4.01 and the Panel and stating that when the ALI "put[s] all these chapters together . . . [the] linkages . . . and the applications across the aggregation devices will be made clearer.") *with id.* at 189 (Miller stating that "we rely in this draft on the Complex Litigation Panel—a group of federal judges").

91. *See* COMPLEX LITIGATION PROJECT, *supra* note 1, § 3.02 cmt. a.

92. *See id.* § 3.02 cmt. a; *see also* Note, *supra* note 15, at 1040.

93. COMPLEX LITIGATION PROJECT, *supra* note 1, § 3.02 cmt. c.

el, the Panel's work is a two step process. First, it must determine whether an action meets Section 3.01's factor analysis and should therefore be considered for transfer.[94] Once a case is considered appropriate for transfer, the Panel is responsible for applying Section 3.04's factor analysis to determine which forum, if any, is the best possible transferee court.[95]

E. Reverse Removal Under Section 4.01

Although not explicitly recognized in Section 3.04, the ALI's *Complex Litigation Project* authorizes a third form of transfer. Broadly stated, the Panel could transfer certain federal actions to state courts, a reversal of the typical notion of removal. This "reverse removal" provision, proposed in Section 4.01, would allow the transfer of federal cases to state courts "if the Panel determines that fairness to the parties and the interests of justice will be materially advanced by transfer and subsequent consolidation of the federal actions with other suits pending in the state court and that the state court is superior to other possible transferee courts."[96] Section 4.01 specifies four factors for determining whether a state court should receive the federal action.[97] These factors are the

94. *See id.* § 3.02.

95. *Id.*

96. *Id.* § 4.01(a). The entire text of this section currently reads:

> Subject to the exceptions in subsection (c), when determining under § 3.04 where to transfer and consolidate actions, the Complex Litigation Panel may designate a state court as the transferee court if the Panel determines that the fairness to the parties and the interests of justice will be materially advanced by transfer and consolidation of the federal actions with other suits pending in the state court and that the state court is superior to other possible transferee courts. Transfer under this section normally should not be ordered when the federal actions are widely dispersed or they require a substantial degree of individualized treatment. The Complex Litigation Panel may designate a state court as the transferee court solely for pretrial proceedings, including discovery and motion practice, or for the adjudication or common questions, or both. The consent of the appropriate judicial authority in the state in which the designated transferee court is located must be obtained. Once transfer is approved, a state transferee court shall have the same powers and responsibilities as a federal transferee court under § 3.06, and any assertion of authority by the state transferee court that is beyond the scope of its state power shall be exercised under the general supervision of the Complex Litigation Panel.

Id.

The general factors influencing the choice of a transferee court are provided by Section 3.04 and require that the transferee court be capable of promoting the "just and efficient" disposition of transferred cases as well as assuring "fairness" to the individual litigants. *Id.* § 3.04. Additionally, the Panel, in making that decision, is directed to give great weight to considerations of convenience to the litigants. *Id.*

97. *Id.* § 4.01(b). It should be noted that it is unclear whether the factors listed in

proportion of cases dispersed among the two separate systems, the number of states whose trial courts and federal district courts have such actions pending, the state whose law is likely to govern, and "any other factors indicating the need to accommodate a particular state or federal interest."[98]

The ALI explains that Section 4.01 is designed to "increase the ability to promote efficient aggregated proceedings in the absence of a formal legislative solution custom-tailored for the resolution of disputes arising out of a particular set of circumstances."[99] Reverse removal is designed to allow many cases which are spread throughout the court systems to be consolidated even where the factual circumstances of the cases do not allow consolidation under other procedural statutes.[100] Reverse removal is an attempt to add flexibility to the *Complex Litigation Project* by increasing the likelihood that multiparty, multiforum actions will be consolidated in "the most rational and efficient forum possible."[101] By adding Section 4.01 to the *Complex Litigation Project*, the ALI diverged sharply from other complex litigation reform packages, which have made single federal cases the magnet for consolidating large numbers of state actions in a single federal court. Smooth adjudication of large cases under these other proposals may become hobbled by a diseconomy in which the federal courts shoulder the entire burden of large numbers of state cases.[102] In complex actions resulting from a single disastrous event, claims resting largely on substantive state law could be brought into the federal courts via diversity jurisdiction. Redirecting those claims to the state court for consolidated trials preserves the adjudication of state issues in the state courts and ensures that the states will continue their participation in the national complex litigation process despite the adoption of a federal complex litigation reform package.[103]

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section 4.01(b) are to be used to determine whether to transfer to a state court at all, which state court should be designated as the transferee court, or both.

98. *Id.*

99. *Id.* § 4.01.

100. Several statutes do permit the consolidation of fact specific cases. *See* I.R.C. foll. § 7453, Rule 141 (West Supp. 1993) (providing for consideration of tax cases); Bankruptcy Rule 1015 (West Supp. 1993) (providing for consolidation of bankruptcy cases); 29 C.F.R. § 2200.9 (1987) (providing for consolidation of cases before the Occupational Safety and Health Review Commission).

101. COMPLEX LITIGATION PROJECT, *supra* note 1, ch. 4 Intro. Note cmt. d.

102. *See id.* ch. 4, Intro. Note cmt. b.

103. *See id.* § 4.01 cmt. a.

Thus, where a large number of actions are dispersed in the state courts and are highly concentrated in a single state, while a small number of claims have been filed in the federal courts, the adjudication of those claims by a single state court would proceed more quickly and with less cost to all judicial systems than if the actions were consolidated separately within each system. The ALI uses the Hyatt Skywalk litigation[104] as an example of the benefits of section 4.01.[105] By removing the federal claims to the Missouri state court in which most of the claims were pending, section 4.01 would have consolidated these related cases in recognition that most of the litigation was already taking place within that state system.[106]

Though reverse removal in any form is a procedure wholly unknown in American law,[107] the ALI advances three constitutional arguments to support Congressional enactment of section 4.01. The ALI reasoned that federal jurisdiction can be restricted by Congress' Article III powers to allocate judicial business among the lower federal courts and state courts.[108] The ALI argues that

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104. *See supra* notes 5-11 and accompanying text.

105. *See* COMPLEX LITIGATION PROJECT, *supra* note 1.

106. *See id.*

107. *See Sessions*, *supra* note 3, at 188.

108. COMPLEX LITIGATION PROJECT, *supra* note 1, § 4.01 cmt. c. Article III states that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

As an aside, it should be noted that an argument has also been made that the judicial doctrine of abstention supports the constitutionality of section 4.01. *See* COMPLEX LITIGATION PROJECT, *supra* note 1, § 4.01 cmt a, illus. 2 (quoting Weinstein, *supra* note 12, at 24). Broadly speaking, the abstention doctrine allows federal courts in certain cases to withdraw their jurisdictional power over the case. *E.g.*, Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976). The ALI relies on United States District Court Judge Jack B. Weinstein's management of asbestos cases, *see In re* Eastern & Southern Dist. Asbestos Litig., 772 F. Supp. 1380 (E.D.N.Y. 1991), and earlier writings on mass disaster litigation, *see* Weinstein, *supra* note 12, at 23-24 (explaining ways for the federal court to send cases to state courts); Jack B. Weinstein, *Coordination of State and Federal Judicial Systems*, 57 ST. JOHN'S L. REV. 1, 12-13 (1982) (explaining transfer of litigation between state and federal systems), as support for the removal of federal cases to state court.

Judge Weinstein argues that large disaster claims in the state courts do not benefit from the progressive consolidation procedures offered by the currently existing Judicial Panel on Multidistrict Litigation. Weinstein concludes that these cases should be afforded more liberal use of, among other things, deferential abstention by the federal court from exercising its jurisdiction. *See* Weinstein, *supra* note 12, at 23-24.

Weinstein avers to the ability of a federal court to abstain from hearing a case, particularly as expressed by the Supreme Court in *Colorado River*. He argues that this form of abstention could support the involuntary removal of federal cases to state courts.

Congress could use this power to authorize the Complex Litigation Panel to transfer certain federal cases to state courts.[109] Concomitantly, the state court's capacity to hear the transferred matter[110] is supported by Congress' Supremacy Clause.[111] Conscious of the

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In *Colorado River*, the Court recognized that there are circumstances in which it may be wise for a federal court to refuse jurisdiction over an otherwise properly filed cause of action. 424 U.S. at 814-17. Weinstein, and ultimately the ALI's COMPLEX LITIGATION PROJECT, opts for a "'more direct and comprehensive approach.'" COMPLEX LITIGATION PROJECT, *supra* note 1, § 4.01 cmt. a, illus. 2. (quoting Weinstein, *supra* note 12, at 24). By relying on the abstention doctrine, the ALI advises that Congress use its Commerce Clause and Supremacy Clause powers to enact regulatory provisions effecting the transfer of single cases from various systems and jurisdictions into the court with the most interest in the matter. *Id.*

This approach would have the effect of codifying the doctrine of abstention in circumstances that could have little to do with the purpose for its judicial creation. According to the Court in *Colorado River*, "the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention." 424 U.S. at 818.

Colorado River turned largely upon the traditional notion that piecemeal litigation is to be avoided in disputes over property rights. *Id.* at 819-21. However, the class of cases to which the ALI and Weinstein would apply involuntary removal do not generally implicate as strong a need to avoid piecemeal litigation as that found in property cases. The involuntary removal of federal cases to state court under Section 4.01 of the COMPLEX LITIGATION PROJECT would apply to any type of action where the majority of related cases are found in a state's courts. In particular, both the ALI and Weinstein would have transferred the federal claims in *Skywalk Litigation* and in certain asbestos actions to a state court. In *Colorado River*, the dispersion of cases throughout the federal and state systems involved the same property rights, 424 U.S. at 806, while the *Skywalk Litigation* action, for instance, merely involved different tort claims against the same defendants, *see In re* Federal Skywalk Cases, 680 F.2d 1175, 1177 n.5 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982). Additionally, the abstention doctrine is quite different from the reverse removal context because it assumes both parties are already litigating or have access to state adjudication. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 657-74 (1989) (describing how federal courts use abstention to avoid duplicative litigation).

109. *See* COMPLEX LITIGATION PROJECT, *supra* note 1, § 4.01 cmt. a.

110. *See id.*

111. Although the most recent version of Section 4.01 has abandoned the argument, an earlier ALI draft relied on the Commerce Clause to support congressional enactment of Section 4.01. *See* COMPLEX LITIGATION PROJECT § 5.08 (Preliminary Draft No. 2, 1989). While some commentators have suggested that there is insufficient support in the proposal to trigger Congress's commerce clause powers, their arguments are conclusory and do not recognize that the adjudication of complex suits affects more than the parties to the litigation.

For instance, Linda S. Mullenix, in *Complex Litigation Reform and Article III Jurisdiction*, 59 FORDHAM L. REV. 169, 187-89 (1990), questioned whether the commerce clause can support Section 4.01. However, she provides no support or analysis of her argument, merely stating that the ALI's analysis of reverse removal begs the question whether Congress "has the constitutional authority to regulate federal court jurisdiction . . . by restricting it through involuntary inter-system transfers." *Id.* at 188-89.

Congress's commerce clause power clearly supports Section 4.01's reverse removal.

possibility that reverse removal may infringe on state sovereignty,[112] the *Complex Litigation Project* requires that the "appropriate judicial authority" of the state consent to the transfer.[113]

Because the state transferee court may be required to hear the claims of plaintiffs who are citizens of other states, the ALI expands the jurisdictional reach of the state court to the limits of the Due Process Clause of the Fifth Amendment.[114] Rather than relying on the minimum-contacts requirement for personal jurisdiction found in the Supreme Court's interpretation of the Fourteenth Amendment,[115] the ALI recommends that state transferee courts be granted broader jurisdictional powers limited by a national con-

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In order for Congress's commerce clause power to apply, the regulated activity must affect the operation of interstate commerce. *See* Wickard v. Filburn, 317 U.S. 111 (1942) (upholding federal statute setting limit on intrastate wheat production); United States v. Darby, 312 U.S. 100 (1941) (upholding federal statute imposing minimum wage and maximum hours on manufacturers of goods shipped interstate). In the case of complex litigation, both courts and commentators have recognized that developments in complex litigation have national commercial and economic effect. *See, e.g., In re* Asbestos Litig., 829 F.2d 1233, 1235 (1987) ("More than 30,000 asbestos personal injury claims were filed nationwide by 1986, and an additional 180,000 claims are projected to be on court dockets by the year 2010."), *cert. denied*, 485 U.S. 1029 (1988). The alarming number of asbestos personal injury cases, *see id.*, and the courts' struggle over the Agent Orange litigation, *see* SHUCK, *supra* note 4, at 431 (estimated size of Agent Orange class action was between 600,000 and 1.2 million persons; final settlement totalled $180,000,000), to cite two examples, indicate that the private resolution of injuries has begun to spill over into areas of national economic concern.

Concededly, these monstrous cases are not the norm. The more difficult cases for justifying Congressional enactment of Section 4.01 on commerce clause grounds are the smaller claims that would fall under the COMPLEX LITIGATION PROJECT's scope. However, Congress's commerce powers are broad enough to cover activities that appear remote from interstate commerce. *See* Wickard v. Filburn, 317 U.S. 111 (1942) (intrastate wheat production subject to federal statute under the commerce clause where national market in wheat is dependent upon local wheat production). Additionally, given the ALI's proscription against employing Section 4.01 in all but the most necessary cases, see COMPLEX LITIGATION PROJECT, *supra* note 1, ch. 4, Intro. Note cmt. d. ("[T]he Complex Litigation Panel will not order transfer and consolidation to a state's court unless it is quite convinced that doing so would provide a superior means of handling the controversy."), it is unlikely that federal cases will be removed to state courts without a large number of actions already pending in the state court system. *Cf. id.* § 4.01 cmt. e ("Indeed, transfer of federal cases to state court should not be ordered unless state cases predominate.").

112. *See* COMPLEX LITIGATION PROJECT, *supra* note 1, § 4.01 cmt. b (stating that transfer will be "perceived as an encroachment on the authority of the state courts.").

113. *See id.*

114. *See id.* § 3.08 cmt. d.

115. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (allowing jurisdiction over a non-resident party because it had minimum contacts with the forum state).

tacts test.[116] Although the ALI articulates no precise formula for determining whether particular litigants have sufficient contacts with the United States to justify extending a transferee court's jurisdiction over them, the *Complex Litigation Project* outlines an analysis of the litigants' aggregation of contacts with the United States and the fairness of requiring the parties to litigate in and subject themselves to the judgment of a distant forum.[117] According to the ALI, the test would be applied equally to both plaintiffs and defendants because there is no reason to distinguish between the relative burdens carried by the transferee plaintiff and the transferee defendant.[118] "Both may oppose being moved to the magnet forum and being compelled to participate in the consolidated proceeding; both are subject to the discovery and subpoena power of the magnet court; both are 'present' in the litigation."[119]

Noticeably absent from section 4.01 is a general grant of supervisory power to the Panel over the state transferee court. The earlier draft of section 4.01 endowed the Panel general supervisory[120] or superintendency power[121] over the state matter. This power was intended to enable the state court to perform extraterritorial functions like discovery and subpoena beyond the state boundaries.[122] This power also had the implicit effect of preserving for the federal litigants the federal status of their case. Although the state court would not, by virtue of the transfer, be changed into a federal court,[123] the superintendency of the Panel was to have supported the proceeding of the state trial court as a proceeding by a body "acting as a national tribunal for the handling of complex cases."[124] In its proposed final draft to the entire Institute, the *Complex Litigation Project* drafters did not grant this authority to the federal courts.

III. PROPOSED REVISIONS TO SECTION 4.01

The following section highlights four recommended revisions to

116. *See* COMPLEX LITIGATION PROJECT, *supra* note 1, § 3.08 cmt. d.
117. *See id.* § 3.08 cmt. f.
118. *See id.* § 3.08 cmt. a, illus. 1.
119. *Id.*
120. *See* COMPLEX LITIGATION PROJECT § 4.01(a) (Tentative Draft No. 3, 1992) [hereinafter TENTATIVE DRAFT NO. 3].
121. *See id.* § 4.01 cmt. f.
122. *See id.*
123. *See id.*
124. *See id.*

Section 4.01 of the *Complex Litigation Project.* Each recommendation is followed by a brief explanation and illustration. The recommendations will be further evaluated and justified in part IV.

A. *Determining the Transferee Court's Jurisdiction over the Transferred Litigants*

Section 4.01 should include an explicit articulation of the limits of the state transferee court's personal jurisdiction over federal litigants whose cases are removed to that court. The limits on the state transferee court's personal jurisdiction should be measured by weighing the hardship to the litigants in pursuing their cases in the transferee court against the interests of the judiciary and the other litigants in adjudicating the matter collectively.[125]

This recommendation would fill in the personal jurisdiction gap left by the ALI. Because reverse removal merely transfers the case for consolidated trial in the state judiciary, it does not vitiate the federal status of the case. The jurisdiction of the state court must, therefore, be measured by federal standards. The *Complex Litigation Project* proposes only that the state transferee court's personal jurisdiction cover all parties with nationwide contacts for whom transfer would not be unfair.[126] This proposal and the existing case law on the matter are, however, unclear as to how fairness is to be evaluated when determining federal court personal jurisdiction.[127] Certain federal court cases abandon, or seem to abandon, the traditional minimum contacts analysis employed in determining state court jurisdiction over a defendant.[128] Other federal courts employ a modification of the traditional state court personal jurisdiction test.[129] The result is that personal jurisdiction issues with similar facts are decided inconsistently by the courts.

This result is unsatisfactory in the context of a national project for complex litigation reform. The above recommendation is suggested because a uniform standard has not been forthcoming from

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125. *See infra* notes 164-69 and accompanying text.

126. *See* COMPLEX LITIGATION PROJECT, *supra* note 1, § 3.08 & cmt. f. For a discussion of this requirement see *supra* notes 111-14 and *infra* notes 138-41.

127. *See infra* notes 142-48 and accompanying text.

128. *See, e.g.*, Trans-Asiatic Oil Ltd. S.A. v. Apex Oil Co., 743 F.2d 956, 959 (1st Cir. 1984) (holding that the Fourteenth Amendment fairness analysis is not applicable to federal *in personam* jurisdiction). *See also infra* note 148 and accompanying text.

129. *See, e.g.*, Handley v. Indiana & Michigan Electric Co., 732 F.2d 1265, 1271 (6th Cir. 1984) (holding that federal district court jurisdiction requires a determination of unfair burden to defendant). *See also infra* note 148 and accompanying text.

the federal bench and has not been supplied by the ALI's *Complex Litigation Project.*

B. Personal Jurisdiction Analysis Specific to Federal Plaintiffs Transferred to State Court

Reverse removal under Section 4.01 would remove the entire case to the state transferee court. Therefore, personal jurisdiction of the transferee court must extend to the plaintiff as well as the defendant. Section 4.01 should be modified to include a presumption that the state court's personal jurisdiction over the federal plaintiff will be satisfied by the plaintiff's minimum contacts with the United States unless the plaintiff can show serious hardship in pursuing the litigation in the transferee forum.[130]

This recommendation runs contrary to the proposed version of Section 4.01. There, the ALI recommends that the standard for determining personal jurisdiction of the transferee court over the plaintiff be applied equally to defendants as well as plaintiffs.[131]

The presence of the typical plaintiff in suits subject to the *Complex Litigation Project*, however, differs significantly in its impact on the litigation than does the presence of the typical defendant. Plaintiffs in consolidated actions benefit from protective devices designed to facilitate collective litigation in distant fora. Likewise, there is a growing understanding that a litigant's control over his or her case is increasingly reduced as the case affects other parties. Finally, limiting the transferee court's personal jurisdiction over the plaintiff to the same restrictions as those used for the defendant would likely create several fragmented trials rather than a single consolidated trial.[132] For this reason, the ALI should treat defendants and plaintiffs differently for personal jurisdiction purposes.

C. The Appropriate Judicial Authority as the Source of Consent for the Transfer

Section 4.01 should require that, before the federal Panel transfers the federal case to the state court, the highest court of the transferee state must consent to the reverse removal.

The ALI has included in its blackletter portion of Section 4.01

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130. *See infra* notes 171-72 and accompanying text.

131. *See* COMPLEX LITIGATION PROJECT, *supra* note 1, § 3.08 cmt. f.

132. For a discussion of these justifications, see *infra* notes 173-91 and accompanying text.

a requirement that the Complex Litigation Panel receive consent of the appropriate judicial authority in the state prior to effecting the transfer of federal actions to that state.[133] The ALI, however, does not specify which judicial authority is "appropriate" for granting consent.

There appear to be three possible sources from which the Panel could obtain consent: the state legislature, the state trial court, and the state's court of last resort. The comments to Section 4.01 suggest that the Panel should seek consent from the state trial court which is likely to receive the reverse removed action. However, this option should be rejected. The state's highest court is recommended as the better source of consent because of its pivotal role in the adjudicative branch of the state government. Likewise, because the state legislature may be quite removed from judicial matters existing within its boundaries, this alternative is also rejected.[134]

D. Ensuring Meaningful State Consent

Section 4.01 does not include a provision which would guarantee that the state's consent to the reverse removal would be meaningful. The ALI should, therefore, modify the consent provision to read: "The consent of the appropriate judicial authority in the state in which the designated transferee court is located must be obtained by the parties or by the Panel with active participation of the parties."[135]

The ALI is justified in recommending that the Panel be permitted to condition its transfer of the federal actions on the state court's adoption of certain federal procedures.[136] For instance, the Panel may refuse to remove the federal case to the state trial court if the state does not agree to follow certain federal discovery rules notwithstanding the state's consent. Additionally, local and judicial pressures specific to a given case may unduly influence the state to grant consent to the transfer where it otherwise would not.[137] For these reasons, adequate safeguards are necessary to prevent disregard for the litigants' interests. As it stands now, Section 4.01 does

133. *See* COMPLEX LITIGATION PROJECT, *supra* note 1, § 4.01(a). For discussion of this requirement, see *supra* notes 109-10 and *infra* notes 194-96 and accompanying text.

134. *See infra* notes 203-06 and accompanying text.

135. *See infra* notes 209-15 and accompanying text.

136. *See infra* note 212 and accompanying text.

137. *See infra* notes 209-12 and accompanying text.

not provide any such safeguards. By including the litigants in the consent process, the above recommendation is intended to guarantee that the state's consent is meaningful for all parties involved.

IV. EVALUATION—JUSTIFICATIONS FOR PROPOSED REVISIONS TO SECTION 4.01

A. Due Process Rights of Federal Plaintiffs in Transfer Proceedings under Section 4.01

The following sections attempt to articulate the scope of personal jurisdiction in the transferee court and the relative applicability of that limit over plaintiffs and defendants. Although the process given to a party prior to the transfer withstands Fifth Amendment criticism while best meeting the goals of the *Complex Litigation Project*, the ALI's requirement of personal jurisdiction in the transferee court should be clarified to address the current confusion in the federal courts over the Fifth Amendment due process limitations on personal jurisdiction. Likewise, the standards for determining personal jurisdiction of the transferee court over plaintiffs should not be as demanding as that used for determining personal jurisdiction over a defendant.

1. Jurisdictional Reach of the State Transferee Court

In order to exercise power over litigants beyond the traditional reach of state courts,[138] the ALI *Complex Litigation Project* proposes legislation that extends a state court's personal jurisdiction to the limits of the Fifth Amendment due process clause for actions transferred to it under the proposed federal statute.[139] The per-

138. The traditional reach of state court personal jurisdiction is generally articulated in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (requiring defendants in state court to have minimum contacts "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'") (*citing* Milliken v. Meyer, 311 U.S. 457, 463 (1940)). For a discussion of the application of *International Shoe*'s minimum contacts test in the context of state long-arm statutes, see generally Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77.

139. *See* COMPLEX LITIGATION PROJECT, *supra* note 1, § 4.01 cmt. f. Referring to Section 3.01's national contacts test for personal jurisdiction, comment f states that "[n]ationwide service of process for complex litigation would be under the command of a federal statute and not simply an assertion of state power. Thus, it would not be limited by the Due Process Clause of the Fourteenth Amendment, but would be controlled by the Fifth Amendment." That Congress can expand the jurisdiction of the state courts in complex cases is not seriously in dispute. *See supra* note 108.

sonal jurisdiction of state transferee courts would reach parties who have minimum contacts with the United States and for whom transfer to the state court would not be unfair as provided in Section 3.08 of the *Complex Litigation Project*.[140] This jurisdictional standard is based on the personal jurisdiction of federal courts.[141]

Although the jurisdictional standard proposed in the *Complex Litigation Project* is consistent with Fifth Amendment due process standards, the ALI should explicitly articulate the standard in the proposal's black letter statement because neither the Supreme Court nor the lower federal courts have been able to settle on a precise definition of Fifth Amendment due process requirements for federal court personal jurisdiction.[142] Section 3.08 does not specifically define the proposed national contacts test and the comments following Section 3.08, while helpful, are, in some instances, too general, and in others, wholly unclear as to how the fairness requirement should be applied. Moreover, the ALI *Complex Litigation Project*, like the lower federal courts, seems unable to distinguish clearly between the personal jurisdiction test proposed for the complex litigation context and that enunciated by the Supreme Court in cases disputing state court jurisdiction.[143]

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140. *See* COMPLEX LITIGATION PROJECT, *supra* note 1, § 3.08 & cmt. f.

141. *See id.* § 4.01 cmt. f. "Because complex litigation is, by definition, a national phenomenon, state transferee courts can be effective partners in handling it only if they are able to exert the same nationwide jurisdiction as do their federal counterparts." *Id.*

142. This standard is recommended for use when transferring litigants to a state court. The specific application of this standard to certain plaintiffs will be treated later. *See infra* notes 146-49 and accompanying text.

143. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945). The *Complex Litigation Project* goes so far as to analogize the fairness requirement in the nationwide contacts test with that required to establish state court jurisdiction over a defendant without indicating their points of difference. *See Complex Litigation Project*, *supra* note 1, § 3.08 cmt. e ("Thus, just as an analysis of state contacts and fairness are pertinent to the decision of whether a particular assertion of jurisdiction violates the Fourteenth Amendment, reference to national contacts and fairness appears to be proper for determining whether Fifth Amendment constraints are satisfied."). For an analysis of the arguments distinguishing between *in personam* jurisdiction in the state and federal courts, see Robert Haskell Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1, 33 (1982) (arguing that federal court personal jurisdiction be reduced to a strict national contacts test), Maryellen Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 NW. U. L. REV. 1, 85 (1984) (arguing that federal court personal jurisdiction requires regional contacts and fairness based on inconvenience, anticipation, and national interest) and David S. Welkowitz, *Beyond Burger King: The Federal Interest in Personal Jurisdiction*, 56 FORDHAM L. REV. 1, 25-26 (1987) (proposing a threshold test for national interest before overriding a defendant's interest in resisting jurisdiction, coupled with a balancing test to determine whether the defendant's interest outweighs that of the government).

A detailed analysis of Section 3.08 justifies the recommended revision of the *Complex Litigation Project*'s jurisdiction analysis when the language of that section is read in the context of the courts' and commentators' dispute over personal jurisdiction in the federal courts. Section 3.08 states that "the transferee court may exercise jurisdiction over any parties to those actions [transferred and consolidated by the Complex Litigation Panel] . . . to the full extent of the power conferrable on a federal court by the United States Constitution."[144] Thus, the *Complex Litigation Project* would provide a federal statute for nationwide personal jurisdiction similar to many existing federal statutes.[145] The Supreme Court has not yet determined the jurisdictional reach of the federal district courts. When faced with the issue, the Court, in *Stafford v. Briggs*,[146] decided the case on other grounds. However, Justice Stewart's dissent analyzed the Fifth Amendment issue, and argued that the jurisdiction of the federal courts under the Fifth Amendment is to be determined solely on the basis of the defendant's contacts with the United States. Stewart wrote:

The issue is not whether it is unfair to require a defendant

The ALI recognizes that a nationwide contacts test coupled with a determination of fairness in the transfer of a litigant "enlarge[s] the existing personal jurisdiction power of the federal courts." COMPLEX LITIGATION PROJECT, *supra* note 1, § 3.08 cmt. f. As a general rule, the federal courts' in personam jurisdiction is limited by the long-arm statutes of the states in which they sit. FED. R. CIV. P. 4(e) (allowing process to be served under the circumstances and in the manner prescribed by state law). Both the Judicial Code and some state statutes, however, allow nationwide service of process. *See, e.g.*, 28 U.S.C. §§ 1655, 2361 (1988); CAL. CIV. PROC. CODE § 415.40 (West 1973).

144. COMPLEX LITIGATION PROJECT, *supra* note 1, § 3.08.

145. Certain federal statutes either provide for nationwide personal jurisdiction or provide for nationwide service of process which is then interpreted by the courts to intend nationwide personal jurisdiction. *See, e.g.*, United Power Ass'n v. L.K. Comstock & Co., No. 3-89 CIV 766, 1992 U.S. Dist. LEXIS 18874, at *7 (D. Minn. Oct. 27, 1992) (construing nationwide service of process provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1965(a), as providing for nationwide personal jurisdiction); Central States Southeast & Southwest Areas Pension Fund v. Central Distrib. Carriers, Inc., No. 92 C 2411, 1992 U.S. Dist. LEXIS 11974, at *1 (N.D. Ill. Aug. 3, 1992) (construing nationwide service of process provisions of Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(e)(2), as authorizing nationwide personal jurisdiction); Collier v. Stuart-James Co. No. 89 Civ. 5805, 1990 U.S. Dist. LEXIS 4896, at *7 (S.D.N.Y., April 26, 1990) (construing nationwide service of process provisions in the Securities Act of 1933, 15 U.S.C. § 77(v), as authorizing for nationwide personal jurisdiction). *But see* Abrams, *supra* note 143, at 9 ("[N]umerous provisions in the Judicial Code . . . are used to claim power over a defendant with minimal contact with the forum district, . . . [such an] assertion of federal personal jurisdiction is not self-evidently correct.").

146. 444 U.S. 527 (1980).

> to assume the burden of litigating in an inconvenient forum, but rather whether the court of a particular sovereign has power to exercise personal jurisdiction over a named defendant. The cases before us involve suits against residents of the United States in the courts of the United States. No due process problem exists.[147]

Without any controlling authority on the matter, the lower federal courts have been divided in their analyses of personal jurisdiction over cases brought to them under a federal statute. The federal circuits are in conflict as to whether or not the Fifth Amendment requires a court to determine the fairness of exercising personal jurisdiction over a defendant.[148] Federal courts that do apply a fairness analysis look to different relations between the defendant and the forum than those required when state courts exercise personal jurisdiction.[149]

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147. *Id.* at 554 (Stewart, J., dissenting).

148. *Compare* Trans-Asiatic Oil Ltd. S.A. v. Apex Oil Co., 743 F.2d 956, 959 (1st Cir. 1984) (finding that defendant came within the court's jurisdiction and holding that Fourteenth Amendment fairness analysis is not applicable to federal in personam jurisdiction; defendant need only have sufficient contacts with the United States) *with* Handley v. Indiana & Michigan Elec. Co., 732 F.2d 1265, 1271 (6th Cir. 1984) (holding that federal district court jurisdiction requires determination of unfair burden to defendant and finding that defendant is not unfairly burdened) *and* Horne v. Adolph Coors Co., 684 F.2d 255, 259 (3d Cir. 1982) (holding that the Fifth Amendment requires a fairness determination such that defendant that was aware of product placed by third parties in forum state could anticipate that it would be sued in forum state and finding that extension of court's jurisdiction over defendant would not be unfair).

However, current cases suggest that the federal courts, at least where the underlying statute provides nationwide service of process, view minimum contacts with the United States as sufficient determination of fairness under the fifth amendment. *See, e.g., United Power*, at *4-5 (holding that R.I.C.O. statute 18 U.S.C. § 1965(b) creates nationwide jurisdiction and that jurisdiction is proper where party has minimum contacts with the United States), *Central States*, at *1 (holding that minimum contacts with the United States is adequate for nationwide jurisdiction under E.R.I.S.A., 29 U.S.C. § 1132(e)(2)); Hazel v. Curtiss-Wright Corp., No. IP 86-909-C, 1990 U.S. Dist. LEXIS 8416 at *9 (S.D. Ind. May 15, 1990) (finding that Fifth Amendment Due Process concerns arising in E.R.I.S.A. claims are satisfied by minimum contacts with the United States); *Collier*, at *2 (holding that minimum contacts with the United States are sufficient for personal jurisdiction in federal securities claims and R.I.C.O. actions). *But see* First Federal Savings & Loan Ass'n of Pittsburgh, v. Oppenheim, Appel, Dixon & Co., 634 F. Supp. 1341, 1345 (S.D.N.Y. 1986) (rejecting the notion that nationwide service of process requires a subsequent constitutional analysis of jurisdiction and requiring only reasonable notice to satisfy service of process requirement).

149. In *Handley*, for instance, the Sixth Circuit stated in dicta that a Fifth Amendment due process analysis "is different from one undertaken under the Fourteenth Amendment" to the extent that the minimum contacts analysis under the Fourteenth Amendment "'acts to ensure that the States, through their courts, do not reach out beyond the limits imposed

Notwithstanding this confusion, the comments following the blackletter prescription of Section 3.08 provide no more than general outlines as to when a party falls within the personal jurisdiction of the transferee court. Where the litigant whose case is to be transferred is not a resident of the United States, the ALI recommends that the Panel consider the litigant's aggregate contacts with the United States and the interests of the judicial system, the transferee court, and the claimants in transferring the party to the state court.[150] Under this analysis, a foreign plaintiff could be brought under the jurisdictional power of the state court notwithstanding the fact that the litigant may not be subject to the reach of the Fourteenth Amendment jurisdictional analysis. To do otherwise, the ALI argues, would leave claims against that party with no proper forum for adjudication.[151] Where the litigant is a resident of the United States (whose contacts with the United States are not in question), the *Complex Litigation Project* merely suggests that determining the fairness of transferring that litigant to a distant state forum involves consideration of the facts and circumstances of the litigation and the distance between the litigant and the transferee forum.[152] Under this analysis, actual hardship to the litigant is recommended as the controlling factor.[153]

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on them by their status as coequal sovereigns in a federal system.'" 732 F.2d at 1271 (quoting World-Wide Volkswagen v. Woodson, 444 U.S. 286, 291-92 (1980)). The court held, however, that, like the Fourteenth Amendment, the due process clause of the Fifth Amendment concerns whether or not "the district court's assertion of jurisdiction unfairly burden[s]" the defendant. *Id.* Thus, where the defendant was a non-resident corporation carrying on "substantial and more or less continuous" business with the forum state, the defendant is subject to the personal jurisdiction of the federal court. *Id.* at 1272. The defendant's contacts with the forum state primarily involved passing through Kentucky waters while travelling on the Ohio River. After holding that jurisdiction was properly extended over the defendant, the Sixth Circuit added that "[t]o hold otherwise would be to diminish the effectiveness of legislation having national scope." *Id.* Because the jurisdictional significance of the contacts in this case were questionable, this quote may indicate that the Sixth Circuit is merely relaxing the fairness standard applied under a Fourteenth Amendment in state court personal jurisdiction case.

The Third Circuit, in *Horne*, applied a Fifth Amendment due process test that parallels the fairness test of the Fourteenth Amendment more closely than that in *Handley*. There, the court refers to "traditional notions of fairness" to conclude that a manufacturer is subject to the personal jurisdiction of a distant federal court where a known bootleg market placed its products in the forum state and those products violated a valid patent. *Horne*, 684 F.2d at 260.

150. *See* COMPLEX LITIGATION PROJECT, *supra* note 1, § 3.08 cmt. f.

151. *See id.*

152. *See id.*

153. *See id.*

Courts may find it difficult to apply these standards to complex cases. Imagine, for instance, that the parties whose circumstances gave rise to *World-Wide Volkswagen Corp. v. Woodson*[154] were in litigation not for a two-car crash, but for a collision between the Robinsons, the drivers of a car purchased in from the defendants in New York, and a charter bus carrying sixty Oklahoma elementary school children. Imagine that the defective tank which caused the fire in *Woodson*, also injured the children on the charter bus. All the plaintiffs, the Robinsons, and the children's parents filed actions against all four defendants in the Oklahoma state court. The defendants were the automobile manufacturer, Audi; the importer, Volkswagen of America, Inc.; the regional distributor, World-Wide Volkswagen; and its retail dealer, Seaway. Before the Oklahoma court can consolidate all the actions, the regional distributor and the retail dealer file special appearances challenging the Oklahoma state court's assertion of personal jurisdiction over them on the grounds that they had no contacts with the Oklahoma except for the presence of the Robinson's car.

Under *Woodson*, these two defendants would prevail, thereby forcing the plaintiffs to file suit in federal court, using diversity jurisdiction. However, the federal court in diversity is prohibited from extending its personal jurisdiction over parties that could not be served in the manner provided by the state in which it sits.[155] Plaintiffs would then be required to bring their actions in a federal diversity court sitting in a state with which World-Wide Volkswag-

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154. 444 U.S. 286 (1980). *Woodson* involved a collision between an Audi, purchased from the defendants by Harry and Kay Robinson in New York, and another automobile. The accident caused a fire which severely burned Ms. Robinson and her two children. The Robinsons alleged that the defective design and placement of the gas tank and fuel system caused the explosion. *See id.* at 288.

155. Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963), was the pivotal case on the issue of personal jurisdiction of federal courts sitting in diversity. In that case, Judge Friendly stated, "a federal district court will not assert jurisdiction over a foreign corporation in an ordinary diversity case unless that would be done by the state court under constitutionally valid state legislation in the state where the court sits . . . ." *Id.* at 222. For more recent cases dealing with this issue, see Mariner v. Hyatt Corp., Civ. No. 90-464 ACK, 1990 U.S. Dist. LEXIS 16570, at *2-4 (D. Haw. Oct. 10, 1990) (holding that acts of defendant including national advertising and operation of world-wide toll-free reservation system are sufficient to satisfy minimum contacts requirement); Tropea v. Rogers-Tropea Inc., No. 89-0275B, 1990 U.S. Dist. LEXIS 12697, at *7-8 (D.R.I. Sept. 10, 1990) (holding that merely advertising in national magazines does not establish minimum contacts with the forum); *see also* FED. R. CIV. P. 4(e) (requiring federal court to adopt the long-arm statute of the state in which it sits where the cases before it presents no federal statute providing a rule for service of process).

en and Seaway have sufficient minimum contacts.

Under the *Complex Litigation Project*'s Section 4.01, the plaintiffs could petition to reverse this federal diversity action to an Oklahoma state trial court for consolidated treatment because nationwide personal jurisdiction of the state courts is authorized under Section 3.08. Given the defendants' business contacts, the federal diversity action would be located somewhere near New York or New Jersey. However, the Complex Litigation Panel could transfer the action to an Oklahoma trial court if the Fifth Amendment test for an Oklahoma federal court's personal jurisdiction extends to defendants in New York.

Notwithstanding this odd twist, the standards recommended by the ALI for determination of jurisdiction may lead to inconsistent results. Discrepancies between cases could turn on the breadth with which the Panel could measure the federal interest in consolidating the action and how closely the Panel parallels its analysis to that used under the Fourteenth Amendment. Using an analysis similar to that in Handley v. Indiana & Michigan Electric Co.,[156] the federal interest in consolidating the action by lightening federal docket pressures by eliminating cases which may duplicate cases taking place in the Oklahoma court could convince the court to exercise jurisdiction over the New York defendants. In *Handley*, the contacts of the defendant with the federal court's state were at best insubstantial and not specific to the litigation.[157] The Sixth Circuit, however, upheld the fairness of exercising federal court jurisdiction largely because "[t]o hold otherwise would be to diminish the effectiveness of legislation having national scope."[158] Likewise, the convenience to the plaintiffs and the federal interest in efficiency may outweigh whatever burden the New York defendants would face by being required to travel to Oklahoma to litigate their cases. Considering the relevant facts and circumstances of the litigation, as the ALI recommends, leads to the conclusion that the federal case should be reverse removed to an Oklahoman trial court. The judicial system and the majority of the parties to the complex action would be more burdened by requiring more than sixty plaintiffs to raise their cases in a distant forum. If the cases were con-

156. 732 F.2d 1265 (6th Cir. 1984).

157. *See id.* at 1271. The relevant contacts of the defendant with the forum state involved travelling through the forum state's waters on the Ohio River and stopping from time to time at ports in the forum state to take on "fuel and stores." *Id.*

158. *Id.* at 1272.

solidated in Oklahoma, only two defendants would be required to travel to litigate their cases. Moreover, the two judicial systems would not be deciding duplicative cases if the actions were consolidated in a single court.

On the other hand, applying the Section 3.08 standards under the Third Circuit's definition of fairness in *De James v. Magnificence Carriers, Inc.*[159] would result in an opposite conclusion. In that case, the defendant, a ship repair company located in Japan, was held not subject to the district court's in personam jurisdiction because its only contact with the forum state was the ship it repaired on which the plaintiff's accident took place.[160] The Third Circuit emphasized that the contacts with the forum state were not such that the defendant had in any way benefitted from the laws of that state.[161] Application of the district court's jurisdiction to the defendant would therefore, the court reasoned, be unfair.[162] The *De James* court clearly applied a fairness standard to assertions of personal jurisdiction in federal courts that matches the standards applied under the Fourteenth Amendment. Although the admiralty nature of the suit would have given the court an opportunity to assert the presence of a national interest, the court opted in favor of a narrower application of Fourteenth Amendment standards.[163] Under this reasoning, then, the plaintiffs in the modified-*Woodson* hypothetical would be unable to bring the New York defendants within the jurisdiction of the Oklahoma transferee court.

It is clear from this comparison that the existing confusion over the Fifth Amendment due process standard to be applied in federal court personal jurisdiction cases would result in confusion over whether a state transferee court could extend jurisdiction over a party under the ALI's expression of the Fifth Amendment jurisdiction standard. A more specific articulation of the standards for fairness that determine jurisdiction under Section 3.08 is necessary if the ALI's reverse removal provision can be exercised constitutionally. The *Complex Litigation Project* should require, when inquiring into the facts and circumstances surrounding litigation, a

159. 654 F.2d 280 (3d Cir.), *cert. denied* 454 U.S. 1085 (1981).

160. *See id.* at 286.

161. *See id.* at 285.

162. *See id.* at 286.

163. *See id. But see id.* at 292 (Gibbons, J., dissenting) ("[T]he applicable constitutional due process provision should not be the fourteenth amendment, but the fifth amendment . . . , [which] requires only that the forum be a fair and reasonable place at which to compel defendant's appearance.").

determination of how the actual hardship to the litigant measures up against the interest of the judiciary and other litigants in processing the claims separately.

Weighing the interests of adjudication against the convenience of the litigant is not a revolutionary technique for determining the due process limitations of personal jurisdiction. The Supreme Court in *Phillips Petroleum Co. v. Shutts* reminds us that the limit of due process protection for personal jurisdiction depends upon the "'quality and nature of the [litigant's] activity [in the forum state] *in relation to* the fair and orderly administration of the laws.'"[164]

Determining fairness by comparing the hardship of the transfer to the litigant to the overall judicial interest in conveniently and efficiently adjudicating the dispute fits naturally into current practice. It is interesting to note that the currently existing Judicial Panel on Multidistrict Litigation does not inquire into the personal jurisdiction of the transferee court.[165] The inquiry, once common issues of fact and law are established, concerns convenience to all parties and witnesses, and the purposes of just and efficient adjudication.[166] Prior to coining the oft-quoted admission that this bare-bones interpretation of Section 1407 is the result of a "worm's eye view of Section 1407," Judge Wisdom wrote:

> Of course it is to the interest of each plaintiff to have all of the proceedings in *his* suit handled in *his* district. But the Panel must weigh the interests of all the plaintiffs and all the defendants, and must consider multiple litigation as a whole in the light of the purposes of the law.[167]

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164. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 806 (1985) (quoting International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)) (emphasis added). The reiteration of this relational inquiry is used by the Court to explain the foundation of a litigant's liberty interest in legitimately challenging litigation in a distant forum. *See id.*

165. In Freedman v. Amalgamated Sugar Co., 399 F. Supp. 1397 (J.P.M.L. 1975), the defendant challenged the transfer as a violation of its fifth amendment due process rights because the defendant had insufficient contacts for exercise of personal jurisdiction. In response, the Panel stated, "We have considered this constitutional argument and find it without merit." *Id.* at 1400.

166. This inquiry is a result of the plain language of the multidistrict litigation statute. *See* 28 U.S.C. § 1407 (1988); *see also* DAVID F. HERR, MULTIDISTRICT LITIGATION, § 5.2 (1988) (discussing convenience of parties and efficient conduct as statutory criteria for transfers).

167. *In re* Multidistrict Private Civil Treble Damage Litig. Involving Library Editions of Children's Books, 297 F. Supp. 385, 386 (J.P.M.L. 1968). This statement was the court's response to plaintiffs' argument that their limited means should persuade the Panel from authorizing the transfer. *Id.*

Along a more specific line of reasoning, Chief Justice Rehnquist in his opening remarks to the 1992 Proceedings of the ALI, stated:

> Particularly in areas such as bankruptcy or some kinds of mass tort litigation, when transactional costs are, economically speaking, directly subtracted from the gross amount available to compensate litigants who establish their claims, entry into the judicial system, choice of forum within that system, and exit from the system will probably have to be regulated in ways largely unknown and perhaps unacceptable, at least in the past and perhaps at the present time.[168]

Finally, as Professor David S. Welkowitz argued, "the interests of the state in asserting its authority to force the defendant to litigate in the state substitute for the 'contacts' analysis" used in Supreme Court decisions determining a state court's personal jurisdiction over a foreign defendant.[169] By examining the hardship of the transfer to the litigant in terms of the competing interests in adjudicating the dispute collectively, the Complex Litigation Panel can adopt a more consistent due process analysis than that already used by the federal courts.

2. Determining Jurisdiction over the Plaintiff

According to Section 3.08 of the ALI *Complex Litigation Project*, the due process standard used to determine whether the transferee court has jurisdiction over the plaintiff is the same as that used for transfer of a defendant: nationwide minimum contacts plus the requirement that transfer would be fair to the party under the facts and circumstances of the litigation.[170] The application of the same due process standard for plaintiffs as for defendants, however, is not constitutionally necessary and may, in certain circum-

168. *Tuesday Morning Session*, 69 A.L.I. PROC. 5 (1992) (remarks of Chief Justice Rehnquist).

169. Welkowitz, *supra* note 143, at 26. *But cf.* Harold S. Lewis, Jr., *The "Forum State Interest" Factor in Personal Jurisdiction Adjudication: Home-Court Horses Hauling Constitutional Carts*, 33 MERCER L. REV. 769 (1982) (arguing that fairness to parties rather than forum state interest is benchmark of jurisdiction analysis). Welkowitz uses this argument to support the conclusion that federal court personal jurisdiction should include a threshold determination of federal governmental interest prior to inquiring into the fairness of exercising power over a defendant.

170. *See* COMPLEX LITIGATION PROJECT, *supra* note 1, § 3.08 cmt. a, illus. 1. For a discussion of this standard, see *supra* note 115-16 and accompanying text.

stances, prevent the transfer of cases where transfer is most needed to ensure efficiency. The ALI should adopt a less rigid standard of due process to determine whether jurisdiction of the transferee court applies to plaintiffs. Where plaintiffs from across the country are involved in the litigation, different burdens are placed on each of them. A complex case involving these plaintiffs may create the possibility that, rather than consolidate the case, intersystem transfer would result in the creation of smaller actions located at several centralized fora.[171] A less rigid application of the fairness determination would ensure that efficiency gains will be realized where they are most needed.

To this end, the ALI's blackletter statement should include a provision that jurisdiction of the state transferee court over the federal plaintiff will be satisfied by virtue of the national interest in transfer *unless* the plaintiff can show serious hardship in pursuing the litigation at the site of the transferee forum. This standard is ultimately based on the growing assumption that society as a whole may have greater interest in an individual's case than has been traditionally recognized. This is to say civil litigation between private parties may no longer be seen in terms of the private enforcement of personal rights. Such cases have an impact beyond the individual litigant and may therefore contain certain societal interests.[172]

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171. The analogous transfer power currently existing, that of the Judicial Panel on Multidistrict Litigation under 28 U.S.C. § 1407 (1988), has been functioning without clear limits on the transferred plaintiffs' due process rights. *See* HERR, *supra* note 166, § 3.5. *Cf.* Freedman v. Amalgamated Sugar Co., 399 F. Supp. 1397, 1400 (J.P.M.L. 1975) (quoting the Judicial Panel's articulation of the jurisdictional limits on its transfer authority).

172. The Supreme Court, in Martin v. Wilks, 490 U.S. 755 (1989), after acknowledging that the judgment of a court does not generally apply to "strangers" to the action, "recognized," in a footnote, "an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party." *Id.* at 762 n.2. According to the Court, this exception permits "legal proceedings [to] terminate preexisting rights if the scheme is otherwise consistent with due process." *Id.* The Court, however, declined to give examples that would be "consistent with due process."

Along a similar vein, Judith Resnik writes:

> By phrases such as the "asbestos litigation" and the "Savings and Loan litigation," we link individuals and their interests with the image that courts and lawyers could and should interact with such a "litigation" as an interrelated whole. The primacy of the individual in relation to her or his own case has declined.

Resnik, *supra* note 1, at 51-52; *see also* Deborah R. Hensler, *Conflict of Laws and Complex Litigation Issues in Mass Tort Litigation: Resolving Mass Torts: Myths and Realities,*

The ALI reaches its conclusion that plaintiffs should be subject to the same jurisdictional standards as defendants through a narrow reading of *Phillips Petroleum Co. v. Shutts*.[173] In its only analysis of the issue, the *Complex Litigation Project* determined that plaintiffs in complex litigation are sufficiently distinct from those in class actions to merit due process protection equal to that of defendants:

> The crux of the Court's analysis was a comparison of the relative burdens of litigation imposed upon the parties. Applying the same general analysis to complex litigation, there is no reason to distinguish between transferee defendants and transferee plaintiffs. Both may oppose being moved to the magnet forum and being compelled to participate in the consolidated proceeding; both are subject to the discovery and subpoena power of the magnet court; both are "present" in the litigation. The inevitable conclusion seems to be that the transferee court should apply the same personal jurisdiction analysis to unwilling plaintiffs and defendants alike.[174]

The ALI may have overlooked the fact that more often than not there are more plaintiffs in these cases than there are defendants, and that the plaintiffs may be spread throughout the nation.[175] Likewise, the ALI failed to recognize that where there are large numbers of plaintiffs in consolidated cases, the plaintiffs are not subject to the same burdens as the defendant. The Court in *Shutts* examined, more closely than the ALI, the relative burdens that place plaintiffs and defendants in class actions on different footing

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1989 U. ILL L. REV. 89, 89-90 ("[A] consensus has now emerged calling for substantial modifications in traditional court processes to improve the efficiency and equity of the mass claims resolution process."); Yeazell, *supra* note 1, at 45 (stating that in collective litigation "[t]he lawsuit is no longer tailor-made to the litigant's (or to the lawyer's conception of the litigant's) interest; it represents instead an amalgamation of the litigant's interest with that of others"). *But cf.* Transgrud, *Dissent*, *supra* note 4, at 76 ("Large numbers of plaintiffs and defendants often create a matrix of cross-claims, a web of choice-of-law issues, and a host of peripheral and satellite litigation that would never exist if the claims had been tried separately.").

173. 472 U.S. 797 (1985).

174. COMPLEX LITIGATION PROJECT, *supra* note 1, § 3.08 cmt. a, illus. 1.

175. *See, e.g.*, *In re* Federal Skywalk Cases, 93 F.R.D. 415, 419 (W.D. Mo. 1982) (noting over 150 plaintiffs); *In re* Northern District of California Dalkon Shield I.U.D. Products Liab. Litig., 526 F. Supp. 887, 893 (N.D. Cal. 1981) (over 1,500 claims filed nationwide against single manufacturer).

for due process purposes.[176] Then-Justice Rehnquist, writing for the Court in *Shutts*, considered eight, roughly distinct characteristics of the circumstances of absent plaintiffs in a class action: that the absent plaintiffs' claims are pooled, that the absent plaintiffs are not required to hire a lawyer, that the structure of the lawsuit affords protection of the absent plaintiffs' interests, that the absent plaintiffs are not "haled" into a forum "upon pain of a default judgment," and that the absent plaintiffs are not likely to be involved in counterclaims or cross-claims, will not be liable for fees or court costs, and are not subject to coercive or punitive remedies of the court.[177] The Court then contrasted these circumstances with the burdens carried by the defendant. The defendant must hire a lawyer, will be required to travel, will suffer default judgment if no appearance is made, and is subject to discovery orders, damages, and other remedies issued by the presiding judge.[178] The common thread of the Court's analysis was the measure of the protection afforded to absent plaintiffs by the representative structure of class actions. The result of the Court's analysis was that absent plaintiffs in class actions need not satisfy the minimum contacts test for personal jurisdiction of the trial court, but can be bound by a court's rulings where they have notice, an opportunity to be heard and participate in the litigation, and an opportunity to "opt out" of the litigation.[179]

The distinctions between plaintiff and defendant in the *Shutts* analysis hinge on the representative nature of class action suits and are equally applicable to the opportunities available to plaintiffs transferred under the *Complex Litigation Project*. The *Complex Litigation Project*, drafted to "follow the general approach" used in transfers by the Judicial Panel on Multidistrict Litigation,[180] is more comparable to class action as analyzed in *Shutts* than it is to adjudication of single party disputes. The procedures used in complex cases transferred by the Judicial Panel on Multidistrict Litigation are similar to those that protect absent plaintiffs in class action suits. The *Manual for Complex Litigation* authorizes transferee courts to encourage parties with similar interests to select counsel to act as liaison between the court and the lawyers for the individ-

176. *See Shutts*, 472 U.S. at 807-11.
177. *See id.*
178. *See id.*
179. *See id.* at 812.
180. COMPLEX LITIGATION PROJECT, *supra* note 1, ch. 3, Intro. Note cmt. b.

ual parties in the consolidated action.[181] The *Manual* also authorizes the judge to encourage parties with similar interests to select lead counsel to handle pre-trial motion practice on behalf of a group of parties with common interests.[182] Although not free of the burden of hiring a lawyer or fending for themselves, plaintiffs consolidated according to the approaches used in federal, multidistrict litigation enjoy more protection of their interests than do the plaintiffs in single party lawsuits.

Plaintiffs in consolidated cases are also similar to absent plaintiffs in class actions because both courts presiding over consolidated cases and courts presiding over class actions emphasize the individual plaintiffs' common interests and follow rules that create incentives for the plaintiffs' attorneys to work together. In order for plaintiffs to consolidate actions under the *Complex Litigation Project*, their cases must share common issues of fact.[183] Likewise, in current practice, multidistrict litigation has assured that transfer and consolidation will take place where individual issues do not predominate.[184] As in a class action suit, the consolidation of cases occurs in the context of structural devices designed to encourage attorneys for one side of an action to work toward the common

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181. *See* MANUAL, *supra* note 1, § 1.90. *See also* Rando v. Luckenbach SS. Co., 25 F.R.D. 483, 484 (E.D.N.Y. 1960) (holding that it is proper for the court to appoint liaison counsel to supervise discovery in action involving approximately 500 plaintiffs and 200 attorneys).

182. *See* MANUAL, *supra* note 1, § 1.92 (5th ed. 1982) ("Such counsel brief and argue motions, file opposing briefs in pretrial proceedings initiated by other parties, prepare proposed written interrogatories, initiate and conduct proceedings and motions for production and inspection of documents, and conduct the examination of witnesses in depositions on oral interrogatories, ..."); *see also In re* Air Crash Disaster at Florida Everglades, 549 F.2d 1006, 1014 (5th Cir. 1977) (stating that judges have power to appoint and rely on lead counsel to handle pre-trial activity in complex litigation where interests of co-parties coincide).

183. *See* COMPLEX LITIGATION PROJECT, *supra* note 1, § 3.01. The ALI did not adopt the standard used in class actions, which requires a predominance of common issues, because this standard is more restrictive and "[n]oncommon questions may be severed and remanded to the transferor courts for individual treatment when appropriate." *Id.* § 3.01 cmt. c.

184. *See* Henderson v. National R.R. Passenger Corp., 118 F.R.D. 440, 441 (N.D. Ill. 1987) (denying motion to consolidate civil rights cases on the ground that individual issues predominated); Hasman v. G.D. Searle & Co., 106 F.R.D. 459, 461 (E.D. Mich. 1985) (refusing to consolidate tort cases where individual issues would make joint trial confusing and unmanageable). Although the federal cases on consolidation are interpretations of Rule 42 of the Federal Rules of Civil Procedure, the same concern for manageability and reduction in duplicative litigation is present in the comments to the ALI's standard for consolidation. *See* COMPLEX LITIGATION PROJECT, *supra* note 1, § 3.01 cmt. a.

goal of furthering the interests of that side in addition to the interests of their individual clients.[185] As Rehnquist observed of absent plaintiffs in class actions, the parties to consolidated litigation are protected by the "undoubted power and inescapable duty" of the trial judge to control the procedures of the complex case so that its outcome will be reached efficiently and fairly.[186] Current approaches to consolidation under the Judicial Panel on Multidistrict Litigation parallel all the significant features of class action, with the exception that individual litigants remain separate and separately represented.[187] In contrast, these protective devices are not given to the single plaintiff in instances of simple litigation.

It is conceded that plaintiffs transferred under the ALI *Complex Litigation Project* are not as distinct from defendants as are the absent class plaintiffs in *Shutts*. Like the *Shutts* defendants, complex litigation plaintiffs have to hire lawyers, be required to travel, and will suffer default judgment if they fail to appear.[188] However, plaintiffs in consolidated actions are distinct from defendants in other respects. In most of the cases falling under Section 4.01, plaintiffs will not be expected to pay damages to either the defendant or to other plaintiffs. Most of the actions would involve large accident cases where the majority of individuals file in state court and the issues before the court are liability in tort. Plaintiffs will, therefore, not be likely to subject each other to cross-claims and will not likely be subject to counterclaims by the defendant.

However, plaintiffs may argue that regardless of the protective devices given to them and overall benefits received by everyone

185. It has been argued that federal consolidation under Rule 42 is superior to class action for ensuring cooperation because of the contract based nature of the relationship between the lead counsel, individual clients' attorneys, and the client themselves. *See* Silver, *supra* note 66, at 505 ("[T]he need to define adequate representation and the prospect of underrepresentation disappear because consolidations are not representational suits . . . . Second, the likelihood of agency failures falls because . . . [parties] use contracts and the threat of discharge to create institutional structures that govern their individual suits.").

186. *See* MANUAL, *supra* note 1, § 1.10.

187. *See* Silver, *supra* note 66, at 497 ("Because a consolidation is a set of independent lawsuits, it cannot properly be characterized as a representational suit in which a lead party stands on behalf of everyone else."); *Cf.*, Resnik, *supra* note 1, at 47 (arguing that consolidation under the Judicial Panel on Multidistrict Litigation does not convey the appearance of enabling litigants to litigate like class action); *Compare* 28 U.S.C. § 1407 (1988) ("[A]ctions may be transferred to any district for coordinated or consolidated pretrial proceedings.") *with* FED. R. CIV. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all . . . .").

188. *See Shutts*, 472 U.S., at 812.

involved in the litigation, the transfer burdens them as equally as it burdens the defendant, and that they should therefore, be afforded the same due process rights in determining personal jurisdiction. Plaintiffs can point to the cost in having to litigate in a distant forum as support for this conclusion. Their cost would, theoretically, be the same as that of a defendant residing in the same location. Plaintiffs can also argue that they should not be penalized by suffering a lower due process standard for properly seeking enforcement of their legal rights.

This challenge merely underscores the conclusion that plaintiffs transferred and consolidated under Section 4.01 should not be treated with the same due process standard as that of absent members of a plaintiff class. It does not, however, lead to the conclusion that plaintiffs, in a Section 4.01 transfer, require the same level of due process as defendants.

The challenge, however, does go to the heart of the issue of a litigant's control over his or her case. Procedural practice today suggests that, in the context of collective litigation, the litigant's autonomy may have to be subordinated to other, overarching issues.[189] Ultimately, the fact that a plaintiff's interests are initially harmed by the same transaction or occurrence that caused harm to others minimizes the amount of control that a plaintiff may have in seeking a remedy for that harm. The societal need to reach a common resolution for all the injuries caused by the defendant mandates that the claims of the multiple plaintiffs be heard together.[190] Where the due process rights of plaintiffs prevent transfer for consolidated trial, these procedural rights frustrate the overriding societal need to achieve a common resolution of claims based on the same transaction or occurrence.

Under the *Complex Litigation Project*, adjudicating plaintiffs cannot be characterized as mere plaintiffs in the traditional sense,

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189. *See supra* notes 167-69 and accompanying text.

190. *See* Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10 REV. LITIG. 231, 248-51 (1991) (discussing tailoring class actions to allow individual attorneys to perform functions for consolidated litigation). *See also* David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851, 859 (1984) (arguing that aggregative methods of adjudication are supported by the interests of substantive tort law). Rosenberg's argument that fact-finders will undervalue a plaintiff's claim when heard individually as opposed to the value of common claims heard collectively adds force to the argument that a plaintiff's convenience in litigating where he or she chooses is legitimately outweighed by interests of justice.

but must be seen in terms of their relationship to other plaintiffs in related actions, the judicial systems in which they bring their disputes, and any litigants with claims not yet filed. As Edward F. Sherman writes, "[t]oday, litigant autonomy has to be viewed in light of the fact that individual control of litigation is unavoidably affected by the existence of related cases."[191] Though the ALI *Complex Litigation Project* does not create a class action *per se*, it does propose legislation that would establish a litigative unit with interests greater than that of individual parties themselves. While not as protected as those in class actions, a plaintiff in a multidistrict consolidated proceeding carries less burden than that of the single plaintiff and should therefore be subject to less protection from the due process jurisdictional analysis.

B. Effective and Meaningful Interaction Between State Trial Courts and the Federal Panel

At the outset of its third draft of the *Complex Litigation Project*, the ALI recognized that "the limitations of the present system are so severe that, as a practical matter, they can be overcome only by negotiations between lawyers in which a large part of the exchange is mutual forbearance from exploiting those limitations."[192] The broader purpose of Section 4.01 is to enact legislation that would avoid this "bargaining in the shadow of no law."[193]

The following Section seeks to contribute to this purpose by articulating rules and guidelines which may be necessary for effective cooperation between the Panel and the state transferee court, but have been unclearly drafted or overlooked by the ALI in their description of how the Complex Litigation Panel should follow when removing a federal case to a state trial court. Specifically, these sections add safeguards to the provision in Section 4.01 requiring state consent to the transfer and the provision in Section 4.01 granting the Complex Litigation Panel with supervisory powers over the state court proceeding.

1. Selecting the Appropriate Judicial Authority

Section 4.01 of the *Complex Litigation Project* should be revised to specify that the state's highest court consent to the transfer

191. Sherman, *supra* note 190, at 249.
192. TENTATIVE DRAFT NO. 3, *supra* note 120, at xv.
193. *Id.*

of the federal action to that state's trial courts. The current version of section 4.01 requires that, before a federal action may be transferred to a state court for consolidation and trial, "[t]he consent of the appropriate judicial authority in the state in which the designated transferee court is located must be obtained."[194] Consent of the state's appropriate judicial authority is necessary because a system of mandatory transfer would be impractical and may threaten the state's autonomy. Mandatory acceptance of cases from the federal Panel would also impose an undesirable coercion of state courts, forcing them to accept cases they may not wish to adjudicate.[195]

However, the ALI did not clarify which judicial authority is the "appropriate judicial authority" to accept the transfer. The states' highest courts are the most appropriate source because of their pivotal role in the state judiciary. If, for whatever reason, consent of the state's high court is impossible or impractical, the Panel should then seek the consent of any other legislatively or judicially empowered, statewide judicial body, such as a state conference of judges, and, as a final alternative, the trial court to which the action would be transferred.

The state's highest court is the most appropriate source of authority for consent to the transfer. The other possible sources of consent include the state trial court that would receive the action and the state legislature or a legislatively authorized committee. These two alternatives lack the insight into state judicial processes that the high court would have and also may impose obstacles and general procedural inefficiencies that the state high court would not.

In discussing the consent provision of Section 4.01, the ALI

194. COMPLEX LITIGATION PROJECT, *supra* note 1, § 4.01(a). If the Panel does not obtain consent from the appropriate judicial authority, the COMPLEX LITIGATION PROJECT provides other options for the transfer. The Panel may transfer the action to another state which it deems appropriate and which does grant consent. The Panel may alternatively transfer the matters back to their original courts. *Id.* § 4.01 cmt. b. If the state to which the Panel seeks to transfer the federal action is part of an interstate complex litigation compact such as the one proposed by the National Conference of Commissioners on Uniform State Laws, *see* UNIF. TRANSFER OF LITIG. ACT (1992), *reprinted in* COMPLEX LITIGATION PROJECT, *supra* note 1, at app. C, and encouraged by the COMPLEX LITIGATION PROJECT, *see id. supra* note 1, § 4.02, the Panel must seek approval of any interstate complex litigation panel established by the compact. *See id.* § 4.01 cmt. b.

195. The ALI recognized the indefiniteness of their reference to an "appropriate judicial authority" and the difficulty in determining presently who that authority may be. COMPLEX LITIGATION PROJECT, *supra* note 1, § 4.01. The COMPLEX LITIGATION PROJECT, however, fails to provide guidelines that would assist the Panel in determining where to seek consent.

implies that the panel seek consent of the state trial judge.[196] It argues that requiring consent would help foster contact and develop a close working relationship between the Panel and the state trial judge.[197] The ALI invokes concern for sensitivity to pending cases on the transferee court's docket as well as the propriety of adjudicating legal issues that may or may not be central to state law. The initial conclusion compelled by these issues is that the trial court would be responsible for consenting to the transfer. The conclusion is driven further by the ALI's statement that "[t]here is also a sense that judges know best what they should or should not adjudicate in their own courts."[198]

Seeking the consent of the trial court which would receive the action, however, overlooks the larger impact that federal-to-state consolidation may have on the state's law and on the state judiciary's appellate process. As the ad hoc experience of state and federal judges has shown, intersystem cooperation risks compromising the development of state law and affecting the substantive rights of the state parties.[199] For example, Judge Carl B. Rubin recognized, during his coordination of the litigation over the Beverly Hills Supper Club Fire,[200] that a state judge may be concerned that the federal court would "[run] roughshod over the whole thing."[201] Finally, the *Complex Litigation Project* requires that, for the purposes of maintaining efficiency and consistency, appeal of the decision on the transferred action be made through the state appellate process.[202] For this reason, the power to decide whether a state's appellate judiciary can and should handle the federal cases should not lie with a lower state trial court but should be given to the court of last resort.

The other alternative, placing the power to consent solely in the hands of the state legislature, would be a needless interruption of the state's central governmental body. At first blush, the obvious authority to approve transfer of federal actions to state trial courts would lie with the state legislature because it is theoretically cast as the safeguard against federal encroachment of state powers,[203]

196. *See* COMPLEX LITIGATION PROJECT, *supra* note 1, § 4.01.

197. *See id.*

198. *Id.*

199. *See* William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1743 (1992).

200. *See In re* Beverly Hills Fire Litig., 639 F. Supp. 915, 916 (E.D. Ky. 1986).

201. Schwarzer et al., *supra* note 199, at 1734.

202. *See* COMPLEX LITIGATION PROJECT, *supra* note 1, § 4.01(d) & cmt. h.

203. In describing the states' governmental structure, the Constitution mandates only that

and because the state legislatures, by explicit authority of their state constitutions or by constitutional amendment, empower their respective judicial systems.[204] However, unless the state slated to receive the federal action had a legislatively empowered committee set aside to grant or withhold consent to the Panel's Section 4.01 transfers,[205] the approval of the transfer by the state legislatures would frustrate the need to transfer the action without undue delay and would redirect the attention of the legislators to matters that may or may not be of vital concern to them. Alternatively, requiring that each state legislature establish such a body to consider transfer motions of the Panel would be an uncompromising encroachment on states' legislative functions.[206]

Of the available sources of consent, the state's high court, on the other hand, is in the best position assess the overall, statewide benefits and burdens of receiving cases from the federal courts for consolidation with their own state cases. Unlike the trial court that could receive the action, the state's highest court is more capable

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the states shall have republican forms of government. U.S. CONST. art. IV, § 4. However, James Madison argued that it is the state legislatures that are integral to an effective federalist system. THE FEDERALIST No. 45 (James Madison). *See also* Gregory v. Ashcroft, 501 U.S. 452, 455-57 (1991) (concurrent federal and state government assures increased citizen involvement in democratic process); EEOC v. Wyoming, 460 U.S. 226, 271-73 (1983) (Powell, J., dissenting) (citing examples of state legislative assertions of individual state autonomy).

204. *See, e.g.*, ARIZ. CONST. art. VI, § 1 (judicial power is vested in the courts as provided by law); *accord* ARK. CONST. art. VII, § 1; CAL. CONST. art. VI, § 1; DEL. CONST. art. IV, § 1; ILL. CONST. art. VI, §§ 6-9; N.Y. CONST. art. VI, § 1; N.C. CONST. art. IV, §§ 7-10; PA. CONST. art. V, §§ 2(c), 3-8; R.I. CONST. art. 10, § 1; TEX. CONST. art. V, §§ 1, 8; VA. CONST. art. IV, § 14; WASH. CONST. art. IV, § 11; *see also* People v. Walker, 519 N.E.2d 890, 893 (Ill. 1988) (recognizing that the legislature is "clearly empowered to promulgate procedural rules to facilitate the exercise of judicial power"); Street v. Roberts, 529 S.W.2d 343, 348 (Ark. 1975) (Fogelman, J., dissenting) ("The legislature may regulate the exercise of, but cannot abridge the express or necessarily implied powers, [sic] granted to this court by the constitution."). The state legislatures' authority to regulate their state courts' criminal adjudication is well recognized. *See* State v. Rodriguez, 429 A.2d 919 (Conn. 1980) (legislatively imposed juror qualifications); State v. Vasquez, 609 A.2d 29 (N.J. 1992) (mandatory sentencing guidelines).

205. The ALI's comments which discuss the indefiniteness of referring the Panel to the "appropriate judicial authority" hold this option out as the ideal. *See* COMPLEX LITIGATION PROJECT, *supra* note 1, § 4.01 cmt. b.

206. *See* New York v. United States, 112 S. Ct. 2408, 2428 (1992) (states that Congress may not simply "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program" (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)); *see also* Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 761-62 (1982) ("[T]his Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations . . . .").

of weighing the burdens on the trial court docket, the docket of the appellate courts, and the influence that a federal presence may have on state adjudication. Any information on the case load of the trial court could be received by the high court from the trial judges themselves. Because contact between the Panel and the trial judge is important to maintaining a fruitful cooperation between the two judicial systems,[207] the ALI can require, or the Panel in its discretion can adopt, the practice of discussing transfer with the proposed transferee judge prior to transfer. However, the decision of this judge should not be relied upon to impose the kinds of burdens that reverse removal under Section 4.01 would impose.

The procedure for obtaining consent of the state's high court should work analogously to a federal court's certification of a question of state law to the state's high court.[208] The difference being, of course, that the availability of such certification procedures are prescribed by the state legislature while Section 4.01's consent provision would operate without interaction of the state legislature. The states' highest court, whose daily business concerns adjudicative matters across the state, is better equipped to respond to the Panel's request to transfer quickly and with efficient use of available resources. If the state legislators are fearful of having their courts burdened by federal matters, the state could enact appropriate legislation to allay those fears.

2. Safeguards to Ensure Meaningful Consent

Section 4.01 of the *Complex Litigation Project* does not provide adequate safeguards against overlooking the interests of the litigants in the time period during which a transferee state is considering whether or not to consent to the removal of federal actions to their trial courts. The ALI should modify the consent provision of Section 4.01(a) to read: "The consent of the appropriate judicial authority in the state in which the designated transferee court is located must be obtained by the parties or by the panel with active participation of the parties." Because the efficiency and consistency of the state court proceedings would be adversely affected by the retention of cases in federal court, there is a strong incentive for the states to consent to receive the federal action from the Panel. This incentive should not go unchecked by blackletter language

207. *See* Schwarzer, *supra* note 199, at 1733-37.

208. For a description of this process, see 17A WRIGHT ET AL., *supra* note 25, § 4248.

which fails to recognize litigant participation in the consent process.

As it now stands, the blackletter prescription of Section 4.01 reads: "The consent of the appropriate judicial authority in the state in which the designated transferee court is located must be obtained."[209] At least one commentator, however, has argued forcefully that Section 4.01 does not realistically address the consequences of state and federal court interaction on the matter of the state's consent to receive the removed federal court action.[210] The argument recognizes that Section 4.01 may lead to inappropriate bargaining between the state and federal courts because of the federal Panel's ability to condition transfer on the acceptance of federally recommended procedural rules and because of the strong incentive that may compel the state court to consent in order to have its own law applied by its own judges. This bargaining, the argument continues, would be inconsistent with current notions of federalism and ordinary principles of due process.[211] With regard to a different but related issue, another commentator reminded the reporter that current procedures before the Judicial Panel on Multidistrict Litigation often allow counsel only a few minutes to present their arguments.[212] The incentives for states to readily consent to transfer and the small degree of participation of counsel under the current system of multidistrict transfer, if effectuated by the language of Section 4.01, would result in no more than the congressional mandate of conduct resembling the ad hoc conduct that the ALI seeks to avoid. "[T]he effect of [Section 4.01] is that the location where cases are tried and even the law applied in them is not a function of any predetermined jurisdiction or process . . . . What we have here is a tremendous distortion of both

209. COMPLEX LITIGATION PROJECT, *supra* note 1, § 4.01(a).

210. *See Sessions*, *supra* note 3, at 190 (comments of Mr. George W. Liebmann) ("[T]he effect of [the consent provision] is that the location where cases are tried . . . is not a function of any predetermined jurisdiction or process. It is a function of a bargaining process between the multidistrict panel and its state court counterparts.").

211. *See id.* The argument increases in force when one recognizes, as Mr. Liebmann has, that the state may feel threatened by the broad powers of the Panel under Section 5.01 to remove, on its own motion, state matters to the federal courts for consolidated treatment with related federal matters. However, whether the powers of the Panel under Section 5.01 are broad enough to remove large numbers of state cases for consolidation with a relatively small number of federal cases, as would be the case should Section 4.01's consent provision be at issue, is not within the scope of this Note.

212. *See Sessions*, *supra* note 3, at 187-89 (comments of Herbert M. Watchell criticizing the effectiveness of Section 4.01(b) factor analysis in protecting litigants' interests).

the federal system and ordinary principles of due process . . . ."[213] This distortion would "corrupt the judicial system while relieving Congress and the state legislatures of any impetus toward real reform of the handling of these kinds of litigation."[214]

Ironically, Reporter Arthur R. Miller points to the "numerous ad hoc instances" of intersystem collaboration between federal and state judges who have litigated large, multiforum actions as support for his argument that the consent provision of Section 4.01 will not be corrupted.[215] These ad hoc cases, Miller argues, operate in an environment where federal and state judges exercise "reasonable good faith."[216] Miller is "willing to assume"[217] that federal judges acting under Section 4.01 will exercise the same good faith in obtaining consent from the state court.

However, the two scenarios are not analogous. State and federal judges collaborating on an ad hoc basis have done so under private agreements between themselves and the litigants in the case. Both federal and state judges seek to benefit individually from good faith participation in the coordinated proceedings. Section 4.01, however, would be a congressionally mandated procedure under which the Panel, like the Judicial Panel on Multidistrict Litigation, can, in an ideal situation, free itself completely of a matter once it has been transferred to the state court. At worst, the degree to which the Panel would be involved in collaboration with the state court would be relatively small compared to those cases to which Miller referred.[218] Thus, the Panel is more likely than its ad hoc counterparts to dispose of federal matters pending before it in a hasty manner. This encouragement risks causing a careless search for state consent to the reverse removal.

Such carelessness on the part of the Panel could result in unnecessary and prejudicial consequences to the litigants. As the experience of the Judicial Panel on Multidistrict Litigation has shown, even judges acting in good faith can make mistakes that result in needless expense or reduction in options to the parties to the action. In one case, the Judicial Panel ordered the transfer of a claim against a defendant who argued that the transferred cases

213. *Id.* at 190 (comments of George W. Liebmann).
214. *Id.*
215. *Id.* at 191 (comments of Arthur R. Miller).
216. *Id.*
217. *Id.*
218. However, Section 4.01 does not establish definite limits on this involvement.

involved substantially different facts.[219] The result was that the defendant's claims were remanded back to the transferor court by the Judicial Panel[220] after eighteen months, four out-of-state trips and over 200 lawyer-hours.[221] In another case,[222] the Judicial Panel transferred a defendant who had limited involvement with the common issues and whose financial resources prevented it from participating in the transfer.[223] Unable to continue in the litigation, the defendant's only option was to settle.

By incorporating a statement that requires active participation by the parties in the consent process, Section 4.01 would be able to guarantee that this kind of judicial economy would not compromise the litigants' valid interests in the litigation. Litigants would not suffer from the arbitrary decisions arising out of ad hoc judicial conduct and would be ensured that judicial management of their cases would not result without their involvement. Ultimately, party participation in the consent process requires that the Panel's collaboration with the state, good faith notwithstanding, does occur without attending to the litigants' interests.

V. CONCLUSION

As the case loads of state and federal court dockets increase, the need for procedural rules designed to streamline the litigation process becomes more compelling. The reverse removal device, as formulated in the ALI's *Complex Litigation Project*, would contribute to the efficiency of both the state and federal judicial system

219. *See In re* King Resources Co. Sec. Litig., 342 F. Supp. 1179, 1183 (J.P.M.L. 1972).

220. *See also In re* King Resources Co. Sec. Litig., 352 F. Supp. 975, 976 (J.P.M.L. 1972) (advising transferee court to remand cases involving substantially different facts).

221. *See* Note, *supra* note 15, at 1015 n.69 (citing Letter from Leigh D. Stephenson, Esq., of Portland, Oregon, to the Harvard Law Review, Feb. 28, 1974) (recommending that the Judicial Panel give more careful attention to the burdens of transferring litigants).

222. *See In re* Aviation Prods. Liab. Litig., 347 F. Supp. 1401 (J.P.M.L. 1972).

223. *See* Note, *supra* note 15, at 1016 n.75 (citing Brief for Defendant Airwork Serv. Div. of Pac. Airmotive Corp. at 2-3, *In re* Aviation Prods. Liab. Litig., 347 F. Supp. 1401 (J.P.M.L. 1972)). The Judicial Panel's decision did not address the defendant's individual problems.

and thereby improve the effectiveness of adjudication in both fora. By adopting the recommendations suggested above, the ALI would be closer to providing a workable system of reverse removal that meets the goals of efficiency and satisfies the constitutional demands of federalism and due process.

RUSSELL J. WOOD