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# "United We Stand": Managing Choice-of- Law Problems in September-11-Based Toxic Torts Through Federal Substantive Mass- Tort Law

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# **“United We Stand”: Managing Choice-of-Law Problems in September-11-Based Toxic Torts Through Federal Substantive Mass-Tort Law**

KENNETH G. KUBES\*

I am more concerned about the long-term physical . . . problems we face. My two sons spent the night of September 11th in the lobby of a downtown hotel. I am extremely worried about the exposure they got to harmful substances in the air. They got additional exposure when the mayor of New York city [sic] had us move back home on 09/23/01, a date many now consider to have been to [sic] early. As a parent, I will have to worry about this each day of my life.

Once we have attended the needs of the dead, we hope that you watch out for the needs of the living victims with long-term issues yet to surface.<sup>1</sup>

## INTRODUCTION

On September 11, 2001, horrific acts of terror claimed the lives of nearly 3000 innocent victims. Countless other victims sustained nonlethal physical injuries. Just days after the attacks, Congress passed legislation that sought to compensate these victims and their families for their injuries and losses.<sup>2</sup> In the process, however, Congress failed to recognize another legitimate—if less identifiable—group of victims.

As the introductory comment suggests, Congress failed to consider that the release of toxic substances from the World Trade Center collapse may have substantially increased the risk that tens of thousands of people who lived, worked, or visited Lower Manhattan may now contract future illnesses. These forgotten victims may not realize the full extent of their injuries for months or years to come; when they do, they will likely turn to the courts to seek compensation for their injuries. Because the toxic fallout from the World Trade Center may have affected tens of thousands of people, the ensuing mass-tort<sup>3</sup> litigation will present difficulties that the current judicial system

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\* J.D. Candidate, 2002, Indiana University School of Law—Bloomington; B.A., 1999, Northwestern University. I would like to thank Professors John Applegate and Gene Shreve for their helpful comments and suggestions during my work on this Note. I would also like to thank my parents, Ken and Rita, for their unwavering love and support. I would like to extend a special thank you to Mindy Finnigan, Ben Brimeyer, and Tom Goodwin, who collectively taught me the true meaning of patience. I dedicate this Note to the innocent victims who tragically lost their lives on September 11, 2001—we will never forget.

1. Anonymous Public Comment (Nov. 8, 2001) (Submitted in Response to the Department of Justice’s Nov. 5, 2001, Notice of Inquiry and Advance Notice of Rulemaking Regarding the September 11 Victim Compensation Fund of 2001), *available at* <http://www.usdoj.gov/victimcompensation/W000248.html>.

2. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001).

3. There are two types of mass-tort litigation: the single disaster case and the multi-exposure case:

is not equipped to handle.

As a general rule, mass-tort litigation imposes unique burdens on the judicial system, many of which stem from the complicated analysis that judges must make to determine which forum's<sup>4</sup> substantive tort law will govern the various claims.<sup>5</sup> Current Supreme Court case law makes this analysis, often referred to as a court's choice-of-law inquiry,<sup>6</sup> needlessly complex, thereby creating inefficient and inequitable outcomes.<sup>7</sup> Scholars and judges have responded to this problem by suggesting that the federal government intervene by creating a body of substantive tort law to simplify mass-tort litigation.<sup>8</sup> Unfortunately, however, many scholars have lamented that enactment of substantive mass-tort law—for example, enactment of products liability standards for asbestos litigation—has generally been politically unrealistic.<sup>9</sup>

Regardless, the need for federal intervention is no more apparent than in the mass toxic-tort litigation that will inevitably ensue from the environmental fallout from the collapse of the World Trade Center. Indeed, given the dangerous environmental situation that existed in Lower Manhattan, tens of thousands of people may now risk

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In the single-disaster case, a large number of persons residing in different states are killed or injured in a single disaster, such as an airplane crash. [In the case of an airline crash, typically] the victims or their beneficiaries will bring a negligence claim against the airline and a products liability claim against the manufacturer of the airplane and sometimes against the manufacturer of the component part as well . . . . The multi-exposure case involves claims of a large number of persons exposed to a product that has caused an illness or condition, such as asbestos, Agent Orange, Dalkon Shield, and DES litigation. The problems in these cases are complicated by the fact that a number of different manufacturers may have manufactured the product so that it is not always possible to identify the individual manufacturer whose product caused the injury to the particular victim. The problems are further complicated because the injuries may not appear for a number of years . . . .

Robert A. Sedler, *The Complex Litigation Project's Proposal for Federally-Mandated Choice of Law in Mass Torts Cases: Another Assault on State Sovereignty*, 54 LA. L. REV. 1085, 1085 n.1 (1994).

Both types of mass-tort litigation produce the complex choice-of-law problems that are addressed in this Note. Although the unique characteristics of the particular mass-tort litigation will produce variances in the nature and degree of the specific choice-of-law problems plaguing the litigation, the fundamental issues and dilemmas are the same. As a result, this Note builds on literature that has discussed *either* type of mass-tort litigation.

4. "Forum" usually means a particular state, although in international contexts, it can mean a particular country.

5. See, e.g., Barbara Ann Atwood, *The Choice-of-Law Dilemma in Mass Tort Litigation: Kicking Around Erie, Klaxon, and Van Dusen*, 19 CONN. L. REV. 9, 18 (1986).

6. The term "choice of law" is often used interchangeably with the term "conflict of laws." Therefore, I use both of these terms throughout this Note.

7. See, e.g., Atwood, *supra* note 5, at 18.

8. See, e.g., Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 2-3 (1991).

9. See, e.g., Linda S. Mullenix, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 TEX. L. REV. 1623, 1631-32 (1992).

developing illnesses from exposure to toxic substances, including asbestos.<sup>10</sup> The current judicial system is ill-equipped to manage the enormity of this eventual litigation and the staggeringly complex choice-of-law problems that will result. Although recent legislation will somewhat reduce the burden of the "choice-of-law problem" that will plague this litigation, choice-of-law issues will still threaten to make the future litigation unmanageable, inefficient, and unfair.<sup>11</sup> Congress should solve this problem by enacting a uniform body of federal substantive tort law that will cover the issues likely to arise in September-11-based toxic-tort<sup>12</sup> litigation (for example, applicable standards of conduct and issues of liability, proof, and causation). Arguably, congressional enactment of substantive mass-tort law is no longer politically unrealistic. In light of post-September 11 political realities and Congress's recent willingness to enact incremental tort reform laws, incremental substantive mass-tort legislation is a viable and necessary solution.

After introducing the concept of choice of law in Part I.A, this Note describes in Part I.B the unique problems afflicting mass-tort litigation due to choice-of-law issues. Part II.A chronicles the environmental dangers that existed in Lower Manhattan on and after September 11, and Part II.B explains the choice-of-law issues that will plague the mass toxic-tort litigation that will inevitably ensue. Then, Part III.A discusses one proposed solution to the choice-of-law problem in mass torts: enactment of federal substantive tort law. Finally, in Part III.B this Note concludes that the nature of future September-11-based mass-tort litigation justifies and requires congressional enactment of substantive tort law to manage this litigation.

#### I. THE CHOICE-OF-LAW PROBLEM IN MASS TORTS

When a lawsuit has factual connections to multiple states or to a foreign nation, a state court will use the choice-of-law doctrine of the state in which it sits to determine which state's substantive law will govern the case.<sup>13</sup> Federal district courts sitting in diversity,<sup>14</sup> which are the courts that handle the vast majority of mass-tort litigation,<sup>15</sup> must also conduct a choice-of-law analysis to determine the governing substantive law.<sup>16</sup> In mass-tort litigation, a federal court's choice-of-law analysis can be extraordinarily time consuming and complex because of the burdens that current law places on federal courts.<sup>17</sup> These burdens often make the litigation's proceedings

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10. See *infra* Part II.A.

11. See *infra* Part II.B.

12. Black's Law Dictionary defines "toxic tort" quite simply as "[a] civil wrong arising from exposure to a toxic substance . . ." BLACK'S LAW DICTIONARY 1497 (7th ed. 1999).

13. LEE S. KREINDLER ET AL., NEW YORK LAW OF TORTS § 18.32 (West N.Y. Practice Series NO. 16, 1997).

14. Federal courts have diversity jurisdiction over all civil actions between citizens of different states when "the matter in controversy" is more than \$75,000. 28 U.S.C. § 1332(a) (2000).

15. Linda S. Mullenix, *Mass Tort Litigation and the Dilemma of Federalization*, 44 DEPAUL L. REV. 755, 786 (1995).

16. See *infra* Part I.B.1.

17. See, e.g., Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed*

exceedingly inefficient because the federal judge must expend substantial time and energy to resolve choice-of-law issues.<sup>18</sup> In addition, these burdens often lead to inequitable results because the current law tends to produce duplicative litigation that increases the risk that plaintiffs with substantially similar claims will experience disparate legal outcomes.<sup>19</sup>

This Part begins by establishing why choice-of-law doctrines are a necessary and important component of American law. Then, this Part discusses the particular issues and problems that choice of law presents in the context of mass-tort litigation.

#### *A. The Need for Choice-of-Law Doctrine Generally*

In any given lawsuit, the relevant legal dispute will have numerous factual elements, or contacts, that have connections to various geographic locations. In a tort case, for example, these contacts might include the place of injury, the place of the tortious conduct,<sup>20</sup> the parties' domicile,<sup>21</sup> place of the parties' incorporation, or the parties' principal place of business.<sup>22</sup> If all of the tort lawsuit's contacts arose from the same state, then the case would implicate *only* that state's law.<sup>23</sup> In such a case, personal jurisdiction requirements would likely permit the plaintiff to maintain the lawsuit only in a court of that state.<sup>24</sup> In the end, the state court would apply its own

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*Federal Procedure Act*, 64 TEX. L. REV. 1039, 1076 (1986).

18. *Id.*

19. *See, e.g.*, Alvin B. Rubin, *Mass Torts and Litigation Disasters*, 20 GA. L. REV. 429, 436 (1986).

20. In a relatively simple tort case, such as one involving an automobile accident caused by a driver's negligence, the place of injury will be in the same state as the place of the tort. In some tort cases, however, the injury and the tort will occur in different states because a tortfeasor's conduct in one state can cause injuries to parties in other states. This divergence often occurs in tort cases involving products liability claims or claims against airlines. *See, e.g.*, KRIENDLER ET AL., *supra* note 13, § 18.37 (discussing the relevance of this divergence under New York choice-of-law rules). Because September-11-based torts will likely involve claims against airlines *and* products manufacturers, it is likely that for many claims, the tort and the resulting injury will have occurred in different states.

21. Although the terms "residence" and "domicile" are often used interchangeably by courts, legislatures, and commentators, EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* § 4.13, at 240-41 (3d ed. 2000), this Note uses the terms "domicile" and "domiciliary" because New York courts, recognizing a distinction between "residence" and "domicile," use the concept of "domicile" for purposes of choice-of-law analysis. *Antone v. Gen. Motors Corp.*, 473 N.E.2d 742, 745-46 (N.Y. 1984). Under New York law, domicile "requires a physical presence in the State and an intention to make the State a permanent home." *Id.* at 745.

22. SCOLES ET AL., *supra* note 21, § 1.1, at 1.

23. *See id.*

24. Personal jurisdiction is a court's power and authority to bring a person into its adjudicative process and make a decision that binds the parties as to any matter that is properly brought before it. BLACK'S LAW DICTIONARY 856-57 (7th ed. 1999). The Supreme Court has interpreted the Due Process Clause of the Fourteenth Amendment to require that a defendant have certain minimum contacts with the state before the state's courts may exercise personal

state's substantive tort law to determine the rights and liabilities of the parties. In this simple scenario, no choice-of-law issue would exist.

However, if all of the tort lawsuit's contacts did *not* arise from the same state, then the case would potentially implicate the laws of more than one state.<sup>25</sup> For example, if the parties hailed from different states or if the plaintiff had been injured outside her home state, then the source of applicable substantive tort law might be unclear.<sup>26</sup> The facts of one famous case, *Neumeier v. Kuehner*,<sup>27</sup> illustrate this point. Kuehner, a New York domiciliary, drove his car across the border from New York to Ontario to pick up Neumeier, an Ontario domiciliary.<sup>28</sup> While driving in Ontario, Kuehner and his passenger Neumeier were killed when a train struck their car.<sup>29</sup> Under an Ontario guest statute, Kuehner's estate would be liable for Neumeier's wrongful death only upon proof of Kuehner's gross negligence.<sup>30</sup> Under New York law, however, Kuehner's estate would be liable upon proof of ordinary negligence.<sup>31</sup> In this case, because the plaintiff and defendant were domiciled in Ontario and New York, respectively,<sup>32</sup> the lawsuit implicated the laws of both forums, thereby leaving the source of applicable law uncertain. In addition, because Ontario and New York imposed different standards of care in the driver/passenger relationship,<sup>33</sup> the decision regarding applicable tort law had material ramifications. Indeed, the outcome of the case likely hinged on the question of applicable law. In cases like this, a critical choice-of-law issue exists.

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jurisdiction over the defendant. GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 24-25 (2d ed. 1994). Federal courts sitting in diversity are indirectly subject to the same limitations. *Id.* at 26 (noting that Federal Rule of Civil Procedure 4 requires that federal courts may only exercise personal jurisdiction over a defendant "who could be subjected to the jurisdiction of a court . . . in the state in which the [federal] court is located"). A court may exercise personal jurisdiction over the defendant in one of four ways: 1) if the defendant is domiciled in the state (or, if the defendant is a corporation, if the corporation is incorporated or has its principal place of operations there); 2) if the defendant consents to personal jurisdiction; 3) if the defendant can be found and served within the state; or, if these three situations do not apply, 4) if the defendant has "certain minimum contacts" with the state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 30-37, 71 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

In practice, therefore, the number of states in which a plaintiff can maintain a lawsuit might be limited by personal jurisdiction requirements. This Note will assume, however, that the particular court may constitutionally exercise personal jurisdiction over the defendant.

25. SHREVE & RAVEN-HANSEN, *supra* note 24, at 174.

26. *Id.*

27. 286 N.E.2d 454 (N.Y. 1972).

28. *Id.* at 455.

29. *Id.*

30. *Id.*

31. *Id.* at 458.

32. The plaintiff and defendant in this case were the widows of Neumeier and Kuehner, respectively. *Id.* at 454-55.

33. *Id.* at 455, 458.

When, as in *Neumeier*, a court reasonably has more than one state's law from which to choose the applicable substantive law, a court resolves the problem by turning to the common-law-based<sup>34</sup> choice-of-law doctrine of the state in which the court sits.<sup>35</sup> Choice-of-law doctrine is the body of jurisprudence that helps courts to determine which state's law should govern a dispute having contacts with two or more states, the substantive laws of which conflict.<sup>36</sup> Each state's choice-of-law doctrine consists of a set of rules<sup>37</sup> or a method of analysis<sup>38</sup> that guides the court to the substantive law that should govern the case. When a plaintiff files a suit in a particular state's court, the court will apply its own state's choice-of-law principles to determine the

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34. With only one exception, Louisiana, state legislatures have declined to codify choice-of-law rules. See Symeon C. Symeonides, *The ALI's Complex Litigation Project: Commencing the National Debate*, 54 LA. L. REV. 843, 845 (1994).

35. KREINDLER ET AL., *supra* note 13, § 18.32. "A forum court . . . applies its own choice of law rules to *substantive* law issues in a litigation which involves multi-state contacts." *Id.* (emphasis added). When dealing with issues of *procedural* law, the court will always apply its own state's law. *Id.* Unfortunately, the border between substance and procedure is notoriously blurry and therefore subject to judicial manipulation. See SCOLES ET AL., *supra* note 21, § 3.8-3.12, at 124-34. Nevertheless, New York courts have offered the following general distinction: procedural law concerns the mechanics of bringing a lawsuit, while substantive law places an impediment on a right or remedy. *Barnett v. Johnson*, 839 F. Supp. 236, 242 (S.D.N.Y. 1993).

36. BLACK'S LAW DICTIONARY 295 (7th ed. 1999). Note that the determination of governing state law is an academic exercise when the substantive laws of the involved states do not actually differ with respect to the legal issue in question. This situation is known as a "false conflict." *Id.*

37. For example, a number of states espouse "hard-and-fast" choice-of-law rules that direct courts to apply the law of the state in which a particular event took place. See GENE R. SHREVE, A CONFLICT-OF-LAWS ANTHOLOGY 38-39, 215-24 (1997). These relatively strict rules are predominantly based on the American Law Institute's original Restatement of the Law of Conflict of Laws. *Id.* at 38-39. For tort causes of action, for example, the relevant rule states that "[t]he law of the place of the wrong determines whether a person has sustained a legal injury." RESTATEMENT OF CONFLICT OF LAWS § 378 (1934).

38. On the other hand, the vast majority of states adhere to any one of a number of methodologies that attempt to weigh a variety of factors to determine which state's law will govern the controversy. See SHREVE, *supra* note 37, at 215-24. Currently, the dominant methodology is that of the American Law Institute's Second Restatement of the Law of Conflict of Laws. *Id.* Among the factors that these kinds of approaches consider are the domiciles of the parties, the states in which the injury and conduct occurred, and the relative strength of each state's interest in having its law applied. See *id.* As discussed in Part II.B, *infra*, New York espouses a "government interest analysis" methodology that seeks to determine "which of two [or more] competing jurisdictions has the great[est] interest in having its law applied in the litigation. The great[est] interest is determined by an evaluation of the 'facts or contacts which . . . relate to the purpose of the particular law in conflict.'" *Padula v. Lilard Properties Corp.*, 644 N.E.2d 1001, 1002 (N.Y. 1994) (quoting *Schultz v. Boy Scouts of America, Inc.*, 480 N.E.2d 679, 684 (N.Y. 1985)). For an extended discussion of the New York choice-of-law approach, see *infra* Part II.B.

applicable state law.<sup>39</sup> Because each state has its own choice-of-law doctrine, the same set of facts can produce a different legal outcome depending on the state's particular choice-of-law principles and, by extension, on the state in which the plaintiff filed the suit. A hypothetical scenario based on the *Neumeier* facts provides such an example.

Assume that Ontario choice-of-law doctrine dictates that in tort cases with multistate contacts, the law of the place of injury will govern the case.<sup>40</sup> Further assume that New York choice-of-law doctrine dictates that New York law should *always* apply absent a contrary directive from the legislature or settled judicial precedent (assume that none exists).<sup>41</sup> If *Neumeier's* widow filed her wrongful death action in a New York court, the court would employ New York choice-of-law doctrine and apply New York law, which permits recovery upon proof of ordinary negligence.<sup>42</sup> However, if she filed in an Ontario court, the court would employ Ontario choice-of-law doctrine and apply Ontario law, which only permits recovery upon proof of gross negligence.<sup>43</sup> In this example, because Ontario and New York employ dissimilar methods to resolve the same choice-of-law issue, a different burden of proof would govern Mrs. *Neumeier's* case depending on whether she filed it in Ontario or New York. If Mrs. *Neumeier* researched the choice-of-law doctrines of Ontario and New York, she could likely anticipate how each court would resolve the choice-of-law issue and thereby predict which substantive law would govern the case.

Indeed, in a case like *Neumeier* that potentially implicates the laws of more than one state, a plaintiff can often file suit, subject to personal jurisdiction limitations, in more than one jurisdiction.<sup>44</sup> As a result, by selecting the jurisdiction in which to file the suit, the plaintiff effectively has the power to select the choice-of-law principles that the court will use to determine the applicable substantive law.<sup>45</sup> From there, it is up to the court to interpret, in light of the facts of the case, its state's choice-of-law rules to determine which state's substantive law will actually govern the case.<sup>46</sup>

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39. KREINDLER ET AL., *supra* note 13, § 18.32; *see also* Gottesman, *supra* note 8, at 3.

40. This "hard-and-fast" rule, which is still used in eleven states, *see* SCOLES ET AL., *supra* note 21, § 2.16, at 68-74, is known as the *lex loci delicti* rule, which literally translates as "the law of the place of the wrong," *see id.* § 17.2-17.7, at 688-97.

41. This rule is known as the *lex fori* approach, which literally translates as "the law of the forum." *See id.* § 2.10, at 38-43. In reality, no state currently espouses this approach. *Id.*

42. *Neumeier v. Kuehner*, 286 N.E.2d 454, 458 (N.Y. 1972).

43. *Id.* at 455. Note that, depending on the facts of the case and the state's choice-of-law doctrine, a state court may be directed to apply *another* state's law to the controversy. In other words, state courts do not invariably apply their own state's substantive law to each and every case. Indeed, the ultimate outcome of *Neumeier* demonstrates this. In *Neumeier*, the New York court applied Ontario law after engaging in an analysis of the governmental interests of Ontario and New York. *Id.* at 456-59.

44. *See supra* note 24 and accompanying text.

45. The power of the plaintiff to choose the jurisdiction in which to file the lawsuit can lead to the phenomenon known as "forum shopping," a process by which a plaintiff searches for the forum that will apply the substantive law most favorable to her position. *See infra* notes 91-94 and accompanying text.

46. Essentially, determination of the applicable substantive law is a two-step process. First, the plaintiff chooses the state in which to file the suit, thereby establishing the choice-of-



Because many lawsuits have connections with more than one state, it is crucial that a court turn to its state's choice-of-law doctrine to resolve the issue by employing a set of rules or a method of analysis rather than by leaving the decision up to the personal feelings of the parties or the judge.<sup>47</sup> The importance of choice-of-law doctrine is no more obvious than in mass-tort litigation.

### *B. Choice-of-Law Issues in Mass-Tort Litigation*

Because federal diversity-jurisdiction courts manage the bulk of mass-tort litigation, understanding the choice-of-law process in these courts is crucial. From there, the problems that federal courts face in solving choice-of-law issues can be understood.

#### 1. Choice of Law in Federal Diversity Courts

Since the late 1970s, federal courts have been the "forums of choice for mass tort litigants."<sup>48</sup> Although Congress has demonstrated over the last decade an increased willingness to federalize various aspects of tort law,<sup>49</sup> the vast majority of tort law still derives from state law.<sup>50</sup> As a result, mass-tort litigation in federal courts will almost invariably be based on diversity-of-citizenship jurisdiction.<sup>51</sup> When sitting in diversity, the *Erie* doctrine requires federal courts to apply to the controversy the law of the state in which the federal court sits.<sup>52</sup> In addition, *Klaxon Co. v. Stentor Electric Manufacturing*<sup>53</sup> requires federal diversity courts to apply the *choice-of-law* rules of

law principle that the court will use to determine which state's law will govern. Second, the court selects the governing law based on the preselected choice-of-law principle and the facts of the particular case.

47. Unfortunately, choice-of-law analyses are notoriously prone to results-oriented manipulation by the courts. See, e.g., Larry Kramer, *Class Actions and Jurisdictional Boundaries: Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 552-60 (1996).

48. Mullenix, *supra* note 15, at 786 ("[Mass tort] litigants have voted with their feet and marched overwhelmingly into federal court."); see also Atwood, *supra* note 5, at 9.

49. See *infra* notes 356-60 and accompanying text.

50. See Atwood, *supra* note 5, at 15. Congress has historically shown deference to states' substantive tort law by opting to "intrude[] on state substantive tort law as little as possible." Thomas M. Reavley & Jerome W. Wesevich, *An Old Rule for New Reasons: Place of Injury as a Federal Solution to Choice of Law in Single-Accident Mass-Tort Cases*, 71 TEX. L. REV. 1, 21, 35 (1992). For example, even in legislation such as the Federal Tort Claims Act, Congress has chosen to defer to state tort law for determination of party rights and standards of conduct. 28 U.S.C. §§ 1346(c), 2671-80 (1994) (subjecting the federal government to liability for the tortious acts of its agents *under the law of the state in which the act occurred*). As a result, tort claims—including toxic-tort claims—will almost exclusively be based on state law, regardless of whether the claim is brought in state or federal court.

51. Atwood, *supra* note 5, at 11 n.3; see also *supra* note 14.

52. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); see also SHREVE & RAVEN-HANSEN, *supra* note 24, at 157-59.

53. 313 U.S. 487 (1941).

the state in which the court sits.<sup>54</sup> If a case is transferred to<sup>55</sup> or consolidated in<sup>56</sup> a federal diversity court, *Van Dusen v. Barrack*<sup>57</sup> requires the court to apply the state law that would have been applied had there been no change of venue.<sup>58</sup>

Unfortunately, these rules of law hinder a federal court's ability to manage complex litigation effectively. Indeed, if the federal litigation arose from controversies in a number of different states, then the federal court handling the multijurisdiction litigation must identify and apply the distinct choice-of-law rules of numerous states.<sup>59</sup> Ultimately, the court will often need to apply a variety of different substantive laws to otherwise similarly situated parties merely because they do not share the same domicile.<sup>60</sup> As Professor Atwood states, "[t]he multi-layered process of identifying a state's choice-of-law methodology, applying it to given facts, and then ascertaining the applicable substantive law can be difficult even in a single-claimant case."<sup>61</sup> In complex litigation, a court's task becomes even more daunting because of the manageability problems involved in identifying and applying the laws of numerous states.<sup>62</sup> Adherence to the rules of *Erie*, *Klaxon*, and *Van Dusen* forces federal diversity courts handling complex litigation to engage in "labyrinthian choice-of-law analyses"<sup>63</sup> that "impede[] federal judges in their efforts to manage complex multi-party cases"<sup>64</sup> and "push an already cumbersome action toward procedural unmanageability."<sup>65</sup>

In the class action context, the Supreme Court compounded the problem further in *Phillips Petroleum Co. v. Shutts*.<sup>66</sup> In *Shutts*, the Court held that a state court may not constitutionally apply its own state's law to nonresident plaintiff class members who do not have "significant" choice-of-law contacts with the state.<sup>67</sup> As a result, a court presiding over a class action must confirm that *each member of the class* has sufficient contacts with the court's state before it may constitutionally apply the state's law to

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54. *Id.* at 496; see also SHREVE & RAVEN-HANSEN, *supra* note 24, at 174-77.

55. Under the federal change-of-venue statute, 28 U.S.C. § 1404(a) (1994), a federal court may transfer a case to another district in which the case might have been brought "[f]or the convenience of parties and witnesses, in the interest of justice." *Id.*

56. Under 28 U.S.C. § 1407, civil actions involving common questions of fact "may be transferred to any district for . . . consolidated pretrial proceedings." 28 U.S.C. § 1407 (1994).

57. 376 U.S. 612 (1964).

58. *Id.* at 639.

59. Paul S. Bird, *Mass Tort Litigation: A Statutory Solution to the Choice of Law Impasse*, 96 YALE L.J. 1077, 1078 (1987).

60. *Id.* Professor Atwood comments, "federal judges overseeing mass tort lawsuits have . . . to apply the often ambiguous law of distant states to both choice of law and substantive questions." Atwood, *supra* note 5, at 11.

61. Atwood, *supra* note 5, at 11 n.7.

62. *Id.*

63. *Id.* at 11-12.

64. *Id.* at 12.

65. *Id.* at 11.

66. 472 U.S. 797 (1985).

67. *Id.* at 821-22; see also William D. Torchiana, *Choice of Law and the Multistate Class: Forum Interests in Matters Distant*, 134 U. PA. L. REV. 913, 913 (1986).

the entire class.<sup>68</sup> Prior to *Shutts*, courts handling mass-tort class actions often tried to relieve the burden created by *Erie*, *Klaxon*, and *Van Dusen* by applying the substantive law of a single state to the entire controversy.<sup>69</sup> After *Shutts*, however, these courts are now unable to fashion “innovative state law solutions to procedural manageability and choice-of-law problems.”<sup>70</sup> In a case involving a geographically diverse class of plaintiffs, courts may not “cavalierly apply a single law to a case” but rather must potentially apply the substantive laws of numerous states.<sup>71</sup>

## 2. Problems Inherent in Choice of Law in Federal Courts <sup>72</sup>

Scholars have strongly criticized the current choice-of-law system because it places a heavy burden on federal diversity courts in mass-tort litigation.<sup>73</sup> By creating “severe practical problems,”<sup>74</sup> the current choice-of-law regime “derails” the efficiency and

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68. See *Shutts*, 472 U.S. at 821-22.

69. See Atwood, *supra* note 5, at 12.

70. *Id.*

71. Torchiana, *supra* note 67, at 915 (quoting Steven Greenhouse, *Class Actions: A Key Ruling*, N.Y. TIMES, Sept. 24, 1985, at D2).

72. Choice-of-law problems are not the only difficulties that plague mass-tort litigation. Indeed, Kastenmeier and Geyh identified numerous failures in mass-tort litigation procedural mechanisms. Robert W. Kastenmeier & Charles G. Geyh, *The Case in Support of Legislation Facilitating the Consolidation of Mass-Accident Litigation: A View from the Legislature*, 73 MARQ. L. REV. 535, 538-43 (1990). More recently, a 1999 report to Chief Justice Rehnquist listed twenty-three “phenomena”—only one of which was choice-of-law—“that have been viewed as problems by a significant number of experienced mass tort participants and observers.” REPORT TO THE ADVISORY COMM. ON CIVIL RULES AND THE WORKING GROUP ON MASS TORTS TO THE CHIEF JUSTICE OF THE UNITED STATES AND TO THE JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT ON MASS TORT LITIGATION, reprinted in 187 F.R.D. 293, 307-15 (1999) [hereinafter REPORT ON MASS TORT LITIGATION]. However, a discussion of these other problems is beyond the scope of this paper.

73. See Atwood, *supra* note 5, at 18 (noting that the present law imposes “immense practical difficulties . . . in such multidistrict cases”); see also Friedrich K. Juenger, *Mass Disasters and the Conflict of Laws*, 1989 U. ILL. L. REV. 105, 108-10; Kastenmeier & Geyh, *supra* note 72, at 549 (noting that one federal judge observed that mass tort litigation “pose[s] enormous difficulties for our judicial system”).

Professor Atwood offered a colorful description of the problem: “The process of determining applicable law under the doctrines of *Klaxon* and *Van Dusen* has been characterized as an entry into ‘the wilderness in which courts sometimes find themselves when searching for solutions to problems arising under the judicial nightmare known as Conflict of Laws.’” Atwood, *supra* note 5, at 27 (quoting *Forsyth v. Cessna Aircraft Co.*, 520 F.2d 608, 609 (9th Cir. 1975)).

74. Kastenmeier & Geyh, *supra* note 72, at 541 (quoting *Multiparty, Multiforum Jurisdiction Act: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Committee on the Judiciary*, 101st Cong., 1st Sess. 42 (1989) (Feb. 14, 1990 letter from Bruce Navarro, Acting Assistant Attorney General, to Robert W. Kastenmeier)).

equity advantages that the collective adjudication of mass torts should ideally offer.<sup>75</sup>

i. Efficiency

Critics have suggested that the present system is inefficient for two reasons: the resolution of choice-of-law issues is a lengthy and expensive process,<sup>76</sup> and the current system produces wastefully duplicative adjudication of claims.<sup>77</sup> First, choice-of-law issues “increase the complexity, expense, and duration of mass-tort litigation.”<sup>78</sup> At the outset of the litigation, for example, courts must apply “substantial judicial resources” to determine which substantive law will govern the lawsuit.<sup>79</sup> As discussed above, a federal court handling complex tort litigation “must apply the choice-of-law rules of the state in which *each plaintiff* originally filed suit to *every choice of law issue* that arises involving that plaintiff.”<sup>80</sup> Put simply, “[t]his is an extraordinarily arduous task.”<sup>81</sup> Because a significant portion of a court’s time and energy must be used to sort out the morass of choice-of-law issues involved in mass-tort litigation, a court’s time—and the attorneys’ time, for that matter—is diverted from considering the case on its merits,<sup>82</sup> thereby delaying the litigation<sup>83</sup> and making it more expensive.<sup>84</sup> In the “most egregious” cases, federal courts may have to wait years

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75. Bird, *supra* note 59, at 1085-86.

76. Mullenix, *supra* note 17, at 1076.

77. See Bird, *supra* note 59, at 1085; see also Mary Kay Kane, *Drafting Choice of Law Rules for Complex Litigation: Some Preliminary Thoughts*, 10 REV. LITIG. 309, 310 (1991).

78. Mullenix, *supra* note 17, at 1076.

79. *Id.* at 1076; see also Atwood, *supra* note 5, at 27-29; Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 63-67 (1986) (discussing the difficulty in managing choice-of-law issues in widely dispersed mass tort litigation).

80. Reavley & Wesevich, *supra* note 50, at 4 (emphasis added); see also *supra* notes 48-58 and accompanying text.

81. Reavley & Wesevich, *supra* note 50, at 4.

82. In the actual opinion of a mass-tort case, one federal judge urged Congress to help solve the problem because “[u]ncertainty on the choice of law question requires a considerable expenditure of time, money and other resources.” *Ford v. Continental Airlines Corp.*, 720 F. Supp. 1445, 1455 (D. Colo. 1988).

83. Judge Alvin Rubin noted that “despite able judicial management,” seven hundred asbestos cases were pending in the Eastern District of Texas in 1986; these cases rarely settled or went to trial in fewer than two years. Rubin, *supra* note 19, at 434. More recently, mass-tort suits filed shortly after the 1993 World Trade Center bombing “have yet to go to trial.” Michael Freedman, *Waiting in the Wings*, FORBES, Oct. 29, 2001, at 62.

84. In one somewhat dated study, the Rand Institute determined that “[a]sbestos litigation has resulted in far more expense than in recovery of damages for injured persons.” Rubin, *supra* note 19, at 430 (citing JOHN KAKALIK ET AL., *VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES* xviii-xix (1984)). The Institute estimated that “injured persons receive less than thirty-seven percent of the total amount spent on litigation” and that “[a]lmost two-thirds of the total expenditures are for attorneys’ fees and other litigation expenses.” *Id.*

while questions certified to state courts are resolved.<sup>85</sup> Even if the case never reaches the merits at trial, the uncertainty stemming from the choice-of-law questions can thwart the settlement process.<sup>86</sup> Indeed, delays in determining governing law can wreak havoc on settlement negotiations as parties struggle to assess the strength of their positions in light of this legal ambiguity.<sup>87</sup>

Second, the current system is inefficient because it tends to produce separate, duplicative adjudication of similar claims.<sup>88</sup> Ideally, an efficient system would facilitate the collective adjudication of mass-tort claims so as to minimize courts' use of resources and avoid concurrent or sequential resolutions of individual claims that are based on the same factual dispute.<sup>89</sup> However, the current system often undermines these efficiency gains<sup>90</sup> by producing duplicative litigation<sup>91</sup> in a variety of ways.

For example, because a federal court must apply the choice-of-law rules of the state in which they sit,<sup>92</sup> plaintiffs have the incentive to "forum shop" to find the law that is most favorable to their position.<sup>93</sup> Each plaintiff, by taking into account the facts of her case and the choice-of-law rules of the various states in which she can file and permissibly maintain her suit, will individually determine which state's choice-of-law rule will lead to application of the substantive law most favorable to her position. Because plaintiffs in mass-tort litigation will have different contacts with different states, these plaintiffs will likely file lawsuits in numerous states even though the plaintiffs' claims are based on the same mass tort. This leads to wasteful, duplicative litigation of common issues of law.<sup>94</sup> Even if the dispersed lawsuits were consolidated

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85. Mullenix, *supra* note 17, at 1076. Professor Mullenix opines that "[i]ronically, the *Erie* doctrine has engendered an evil in the mass-tort context that the decision [of *Erie*] itself was intended to eliminate. The *Erie* doctrine has repeatedly proven to be a major impediment to the fair adjudication of mass-tort claims . . ." *Id.*

86. Kastenmeier & Geyh, *supra* note 72, at 557; *see also* Mullenix, *supra* note 17, at 1076. For example, defendants are sometimes "pressed to settle even relatively weak claims rather than face the enormous risks posed by the aggregation of numerous claims" and the uncertain resolution of choice-of-law issues. REPORT ON MASS TORT LITIGATION, *supra* note 72, at 298.

87. Mullenix, *supra* note 17, at 1076.

88. *See* Bird, *supra* note 59, at 1085; *see also* Kane, *supra* note 77, at 310.

89. Bird, *supra* note 59, at 1084-85.

90. As Bird noted, "pre-trial choice of law rulings quickly dissipate the efficiency gains collective adjudication is intended to achieve." *Id.* at 1086.

91. The evils of duplicative litigation are apparent: "Repeated relitigation of the common issues in a complex case unduly expends the resources of attorney and client, [and] burdens already overcrowded dockets . . ." COMPLEX LITIGATION PROJECT 9 (Proposed Final Draft 1993) (estimating the enormity of the costs of duplicative lawsuits in complex litigation).

92. *See supra* notes 52-54 and accompanying text.

93. *See* Gottesman, *supra* note 8, at 31-32; *see also* Reavley & Wesevich, *supra* note 50, at 3-4. As one scholar noted, "reliance on state choice of law rules, which vary considerably among states, has produced an enormous incentive to forum shop among federal courts in different states, and this has contributed to the dispersion of essentially similar litigation in multiple courts." Kane, *supra* note 77, at 313.

94. *See* Kane, *supra* note 77, at 313.

in a single federal district, the district court, under *Van Dusen*, would still have to expend significant resources applying the choice-of-law rules of the states from which the cases were transferred.<sup>95</sup>

In addition, because choice-of-law problems tend to frustrate the procedural mechanisms that enable courts to adjudicate mass-tort lawsuits collectively, the current system fosters duplicative litigation. *Van Dusen*'s holding produces "two serious barriers to effective consolidation" of mass-tort lawsuits.<sup>96</sup> "The first stems simply from the fact that the chaotic state of the choice of law field requires the federal courts to engage in an extremely complicated inquiry in order to ascertain the various state choice of law rules that might be applied."<sup>97</sup> The second arises if the court concludes, after its choice-of-law analysis, that it must apply multiple state laws to the underlying claims of the collective proceeding.<sup>98</sup> If the mass-tort litigation consists of hundreds or thousands of individual claims that must be resolved under varying state laws, the consolidated proceeding will become unmanageable and may have to be broken up.<sup>99</sup>

In the realm of class actions, choice-of-law issues may prevent the mass-tort action from going forward,<sup>100</sup> or may even prevent a federal judge from certifying the class altogether.<sup>101</sup> This is because the rule governing class actions, Federal Rule of Civil Procedure 23, states that a class action can only be maintained if 1) questions of law or fact are common to the class,<sup>102</sup> 2) these common questions of law or fact predominate over any questions affecting only individual members of the class,<sup>103</sup> and 3) the class action is manageable.<sup>104</sup>

In attempting to meet these class action requirements, a court has the incentive to try to apply its own state's law to the claims of all of the class members.<sup>105</sup> This technique would eliminate not only the need to make complex choice-of-law inquiries,

95. See *supra* text accompanying notes 55-65.

96. Kane, *supra* note 77, at 313-14.

97. *Id.* at 313. Professor Kane provides an example from the realm of mass toxic torts:

[I]n the litigation following the plant disaster in Bhopal, India, suits originally filed in federal courts in California, Connecticut, the District of Columbia, Florida, Illinois, Louisiana, Maryland, New Jersey, New York, Pennsylvania, Tennessee, Texas, and West Virginia were transferred to the Southern District of New York. After examining each of those state's conflicts laws, the [Southern District] determined that choice of law questions would be resolved under three different approaches . . . . The court then analyzed the issues posed under each of these approaches, ultimately concluding that all the states would apply Indian law.

*Id.* at 313-14.

98. *Id.* at 314.

99. *Id.*

100. See Torchiana, *supra* note 67, at 915.

101. *Id.* at 925-36.

102. FED. R. CIV. P. 23(a)(2).

103. FED. R. CIV. P. 23(b)(3).

104. FED. R. CIV. P. 23(b)(3)(D).

105. Torchiana, *supra* note 67, at 915.

but also the need to apply numerous states' substantive laws to the class action.<sup>106</sup> However, the Court's holding in *Shutts* will often prevent a court from constitutionally doing so.<sup>107</sup> In many cases, *Shutts* will effectively destroy the viability of the class action device in mass-tort litigation by requiring a federal court overseeing a class action to "embark on a complex choice-of-law analysis."<sup>108</sup> For example, because the choice-of-law analysis in a class action is itself a logistically daunting task,<sup>109</sup> the class action may become unmanageable at the outset and thereby fail Rule 23's requirements.<sup>110</sup> Additionally, if the court's choice-of-law analysis directs it to apply the substantive law of numerous states, then the requirements of commonality and predominance will likely not be met.<sup>111</sup>

If issues of fact are not common to the class, and the forum must apply multiple laws [as a result of its choice-of-law analysis], then neither questions of fact nor questions of law will be common to the class and the action will not satisfy even the threshold commonality requirement. If questions of fact are common, but multiple questions of law exist, then the common questions of fact will not "predominate" over the individual questions of law, and the action will fail the predominance test.<sup>112</sup>

In these situations, federal courts will often be forced to deny class certification and dismiss the action,<sup>113</sup> to divide the class into subclasses, or to dismiss the claims of the plaintiffs who destroy commonality and predominance.<sup>114</sup> Regardless of the court's action, choice-of-law problems impede effective collective litigation of similar claims, thereby producing wasteful and duplicative litigation.

Although the vast majority of commentators agree that the present system is

106. *Id.*

107. *See supra* notes 66-71 and accompanying text.

108. Torchiana, *supra* note 67, at 919. As Torchiana explains:

First, [the court] must decide, based on the choice-of-law rules of the forum, what law will apply to plaintiffs not covered by forum law. The court must then examine the foreign law or laws so selected and compare them to the laws of the forum. If the foreign law is the same as the law of the forum there is no conflict. . . . In the case of a "true" conflict, in which forum and foreign law actually differ, the court must apply foreign law to the plaintiff class members' claims.

*Id.* at 919-20.

109. *See supra* note 60 and accompanying text.

110. FED. R. CIV. P. 23(b)(3)(D) (requiring class actions to be manageable).

111. Torchiana, *supra* note 67, at 926. "Specifically, questions of law will not be 'common' to a class and common questions will not 'predominate,' and after *Shutts* a court may not satisfy these requirements simply by deciding to apply forum law uniformly to all claims." *Id.*

112. *Id.* at 926 (citing 3 H. NEWBERG, NEWBERG ON CLASS ACTIONS §§ 4.25-.26 (2d ed. 1985)).

113. *Id.* at 929-30.

114. *Id.* at 932-36.

inefficient,<sup>115</sup> a few scholars challenge this view.<sup>116</sup> This vocal minority argues that choice-of-law issues in mass-tort litigation are not, from a practical standpoint, so problematic as the majority suggests.<sup>117</sup> Criticizing the majority for treating the efficiency problems as self-evident,<sup>118</sup> the minority scholars argue that the literature fails to provide concrete evidence that the present system of mass-tort litigation produces the efficiency problems to which the majority points.<sup>119</sup> The minority ignores the cries of numerous federal judges<sup>120</sup>—a group that regularly deals *first-hand* with mass-tort litigation and that is probably most familiar with the practical problems that choice-of-law inquiries cause. Professors Robert Sedler and Aaron Twerski bluntly state that “[i]n practice, choice of law issues in tort cases are not at all difficult to

115. See Atwood, *supra* note 5, at 27-29; see also Bird, *supra* note 59, at 1085; Kane, *supra* note 77, at 310; Miller & Crump, *supra* note 79, at 63-67; Mullenix, *supra* note 17, at 1076.

116. See generally Kramer, *supra* note 47; Robert A. Sedler & Aaron D. Twerski, *State Choice of Law in Mass Tort Cases: A Response to “A View from the Legislature”*, 73 MARQ. L. REV. 625 (1990) [hereinafter Sedler & Twerski, *State Choice of Law*]; Robert A. Sedler & Aaron D. Twerski, *The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain*, 73 MARQ. L. REV. 76 (1989) [hereinafter Sedler & Twerski, *Sacrifice Without Gain*].

117. According to Professors Sedler and Twerski, “only three mass tort cases have presented serious management problems to the American court system: asbestos, Agent Orange and Dalkon Shield.” Sedler & Twerski, *Sacrifice Without Gain*, *supra* note 116, at 106.

118. Kramer, *supra* note 47, at 568; see also Sedler & Twerski, *Sacrifice Without Gain*, *supra* note 116, at 91 (arguing that scholars “simply assume[] that all of these alleged harmful effects result from [choice-of-law difficulties]”).

119. Sedler & Twerski, *Sacrifice Without Gain*, *supra* note 116, at 91.

120. Judge Finesilver has stated: “The choice of law problems inherent in [mass-tort] litigation cry out for federal statutory resolution. We urge Congress to [act] . . . in the context of . . . mass torts . . . . Uncertainty on the choice of law question requires a considerable expenditure of time, money and other resources . . . .” Symeonides, *supra* note 34, at 854 (quoting *Ford v. Continental Airlines Corp.*, 720 F. Supp. 1445, 1454-55 (D. Colo. 1988)). Judge Rubin stated that “[t]he present system is slow, inefficient, costly, and potentially unjust both to injured parties and defendants,” Rubin, *supra* note 19, at 433, and suggested that “we eliminate the roulette-wheel characteristics of our present mode of adjudication,” *id.* at 450. Judge Weinstein stated that “[p]roblems in efficiently resolving the total [mass-tort] dispute in one court are created, unnecessarily, by our federalism . . . and by the reluctance of Congress and the courts to recognize that a new world economic and technological order requires some rethinking of our . . . choice-of-law shibboleths.” Jack B. Weinstein, *Mass Tort Jurisdiction and Choice of Law in a Multinational World Communicating by Extraterrestrial Satellites*, 37 WILLAMETTE L. REV. 145, 146 (2001). Finally, Judge Hall stated that “[t]he law on ‘choice of law’ . . . is a veritable jungle” that leads to “a reign of chaos.” Kastenmeier & Geyh, *supra* note 72, at 541 (alteration in original) (quoting *In re Paris Air Crash*, 399 F. Supp. 732, 739 (C.D. Cal. 1975)). For continued rantings from both the bench and bar, see *Multiparty, Multiforum Jurisdiction Act: Hearing Before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the House Committee on the Judiciary*, 101st Cong., 1st Sess. 42 (1989).



resolve" and "are not at all complex."<sup>121</sup> In fact, one scholar even suggests that the judges' complaints stem not from legitimate concerns about the state of the current system, but rather from the judges' desire to avoid tedious work.<sup>122</sup> While the minority rightly notes that most choice-of-law issues can be resolved before trial,<sup>123</sup> they nonetheless ignore not only the effect that choice-of-law uncertainty has on settlement negotiations,<sup>124</sup> but also the obvious fact that the vast majority of cases *never* go to trial.<sup>125</sup> In addition, they argue that a federal judge's task is made easier by the fact that most choice-of-law issues "tend to fall into certain fact-law patterns,"<sup>126</sup> but ignore the fact that in order to be able to separate claims into these fact-law patterns, the judge must still undergo a lengthy choice-of-law analysis to determine into which pattern each claim falls.

The scholars who espouse the majority view have offered rebuttal to the minority attacks. Congressman Robert Kastenmeier and Professor Charles Geyh challenge the minority's assertion that only three mass-tort cases—*asbestos*, *Agent Orange*, and *Dalkon Shield* litigation—have presented serious management problems.<sup>127</sup> Kastenmeier and Geyh correctly note that the current system's tendency to produce duplicative adjudication increases courts' workload and creates inefficiency

121. Sedler & Twerski, *State Choice of Law*, *supra* note 116, at 632-33.

122. Kramer, *supra* note 47, at 582 n.130. Professor Kramer irreverently opines:

[T]he view among judges [seems to be that it is impossibly difficult to resolve so many choice-of-law questions], though I suspect they may be influenced by another factor: Doing multiple choice-of-law analyses in the same case is boring and tedious, and a desire to avoid this work (conscious or not) undoubtedly makes the arguments for applying a single law look more attractive. . . . In any event, while experience grading exams gives me a certain sympathy for the feeling, it is obviously inappropriate.

*Id.*

123. *See, e.g., id.* at 633.

124. *See supra* notes 86-87 and accompanying text. Professors Sedler and Twerski naively state that "once the choice of law decisions are made there will be no 'delay in settlements resulting from uncertainty in the choice of law to be applied.'" Sedler & Twerski, *State Choice of Law*, *supra* note 116, at 634 (quoting Kastenmeier & Geyh, *supra* note 72, at 557). They fail to recognize that in complex cases, sorting out choice-of-law issues is a time-consuming task that can delay pretrial proceedings for months.

125. Indeed, the fact that a court is capable of resolving choice-of-law issues *before* trial does nothing to negate the majority scholars' assertion that *pretrial* resolution of choice-of-law issues in mass-tort litigation increases the complexity, cost, and duration of the proceedings as a whole. *See supra* notes 71-81 and accompanying text. Whether complex choice-of-law issues are resolved before trial or during trial, they must be resolved *at some point* in the proceeding. The process is inefficient no matter when it occurs.

126. Sedler & Twerski, *State Choice of Law*, *supra* note 116, at 633. According to Professor Kramer, because states tend to copy one another's laws, there will be a limited number of different choice-of-law rules, thereby reducing the number of conflicts "to a relatively manageable number." Kramer, *supra* note 47, at 582-83.

127. Kastenmeier & Geyh, *supra* note 72, at 548-49; *see also supra* note 117.

"regardless of whether the cases are small or large."<sup>128</sup> "[N]umerous judges and scholars have recognized that the burden duplicative litigation places on the courts is not due solely to a very few, high profile toxic tort or products liability cases. *It is also attributable to smaller cases as well . . .*"<sup>129</sup>

## ii. Equity

Critics have also suggested that the present choice-of-law regime is unjust for a number of reasons.<sup>130</sup> First, the present system tends to produce duplicative litigation that can lead to inconsistent and unfair legal results.<sup>131</sup> Choice-of-law problems often force mass-tort plaintiffs to litigate their claims apart from other similarly situated parties.<sup>132</sup> As a result, individual plaintiffs with otherwise identical claims may not achieve the same legal result because two different factfinders may interpret the facts or law differently.<sup>133</sup> This can cause "striking disparities" in the recoveries of similarly situated victims, with the plaintiffs' fates depending "less on the justice of their causes than on their selection of an initial forum."<sup>134</sup> Most scholars and judges agree that equity requires that cases involving identical or substantially similar facts must be treated equally under the law,<sup>135</sup> and some scholars even go so far as to argue that

128. Kastenmeier & Geyh, *supra* note 72, at 549 (emphasis added).

129. *Id.* (emphasis added).

130. *See, e.g., id.* at 551-52; Reavley & Wesevich, *supra* note 50, at 24; Rubin, *supra* note 19, at 436.

131. *See* Rubin, *supra* note 19, at 436 ("A just legal system would allot the benefits and costs of [mass] tort litigation rationally and equitably."); *see also* Kastenmeier & Geyh, *supra* note 72, at 551.

132. *See supra* text accompanying notes 66-91.

133. Kastenmeier & Geyh, *supra* note 72, at 551. Kastenmeier & Geyh offer an example from a mass tort based on an airline disaster, although the situation can easily be analogized to apply to other mass torts:

Two passengers sitting side by side in the same airplane are killed in the same crash, and their families file identical wrongful death suits against the airline in different courts. Under current law, it is possible that the airline could be found negligent in one suit, but not in the other, entitling the family of one victim to receive complete compensation for its loss, while the family of the other victim receives a bill for court costs. . . . [However, w]hen the identical issues of law and fact arising out of the same accident are resolved one way in some cases and another way in others, due solely to the vagaries of the judges and juries, it is, in a word, unfair.

*Id.* at 551-52.

134. Juenger, *supra* note 73, at 109 (noting that this situation also "increases the likelihood of discrimination among different classes of victims").

135. Reavley & Wesevich, *supra* note 50, at 24 ("Judges, legislators, and academics all echo our condemnation of this disparate legal treatment as unfair."); *see also* Bird, *supra* note 59, at 1087 n.50 (noting that *Erie* was designed "to ensure that litigants with the same kind of case would have their rights measured by the same legal standards of liability") (quoting *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 410 (1953)).

equal treatment of similar claims is a "fundamental principle of American law."<sup>136</sup>

Second, scholars note that the current system's inequity affects mass-tort defendants as well.<sup>137</sup> Indeed, because many mass-tort cases potentially implicate the laws of numerous states, a court's interpretation of its own state's choice-of-law doctrine may result in the application of a substantive legal standard that the defendants could not have foreseen.<sup>138</sup> To the extent that choice-of-law jurisprudence attempts to protect the reasonable and justified expectations of the parties to a lawsuit,<sup>139</sup> this outcome is unjust.

Finally, the current system tends to thwart one of the primary goals of the tort system—to compensate injured victims fairly and adequately.<sup>140</sup> As noted above, the current system tends to frustrate the procedural mechanisms that enable courts to adjudicate mass-tort lawsuits collectively, thereby fostering duplicative litigation.<sup>141</sup> By forcing certain plaintiffs to litigate their claims individually, the present regime prevents plaintiffs from taking advantage of the gain in bargaining power—relative to the defendants—that a group of plaintiffs enjoys by litigating their claims collectively.<sup>142</sup> Also, collective adjudication of a mass tort tends to lower the risk that

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136. Bird, *supra* note 59, at 1087.

137. Briggs L. Tobin, *The 'Limited Generosity' Class Action and a Uniform Choice of Law Rule: An Approach to Fair and Effective Mass-Tort Punitive Damage Adjudication in the Federal Courts*, 38 EMORY L.J. 457, 483 (1989). As Kastenmeier and Geyh note:

The unfairness that duplicative litigation may precipitate . . . includes multiple assessments of punitive damages against the same defendant for the same conduct. Just as it is appropriate for a criminal defendant to be punished only once for the same crime, so too, it is appropriate for a civil defendant to be assessed punitive damages only once for the same conduct. To the extent that separate, duplicative civil proceedings against the same defendant, or defendants, give rise to the possibility of duplicative punitive damage awards, the risk of unfair results is undeniable.

Kastenmeier & Geyh, *supra* note 72, at 552.

138. Tobin, *supra* note 137, at 483.

139. The most widely used choice-of-law approach, that of the Second Restatement of the Law of Conflict of Laws, SCOLES ET AL., *supra* note 21, §2.23, at 96-101, specifically lists the goal of protecting justified party expectations as a factor that courts should consider in determining the applicable law. REST. 2d CONFLICT OF LAWS § 6(2)(d) (1969).

140. See, e.g., REST. 2d CONFLICT OF LAWS § 145 cmt. b (1969).

141. See *supra* notes 88-115 and accompanying text.

142. Bird, *supra* note 59, at 1085. Undoubtedly, a group of one thousand injured plaintiffs has more bargaining power against a potentially liable defendant—often a large corporation in mass toxic tort cases—than a single plaintiff would have. Additionally, in some situations it may be the case that,

without consolidation [of dispersed lawsuits] many claimants will be unable to test their claims at all. The stakes could be too small to justify independent litigation, or—more likely in the mass tort context—the cost of litigating each claim separately could exhaust the defendants' assets before a judgment is obtained. If so, consolidation may be necessary to prevent [unfairness].

Kramer, *supra* note 47, at 581.

plaintiffs who sue early on will deplete the available pool of compensation funds before other equally deserving—but tardier—plaintiffs can also obtain recovery.<sup>143</sup> To the extent that the current system frustrates collective adjudication, it also exacerbates this inequity problem.

While the majority of scholars believes that the present system is inequitable,<sup>144</sup> there is once again a vocal minority that challenges this view.<sup>145</sup> The minority challenges the consensus view that it is unfair for similarly situated mass-tort plaintiffs to be subjected to potentially inconsistent and disparate legal outcomes when they sue in different states.<sup>146</sup> Professor Larry Kramer argues that

there is nothing “unfair” if victims of the same mass tort are compensated differently—at least, not if they are from or were injured in different states. Such differences in outcome reflect the fact that different states with legitimate interests have made different judgments about how to handle tort problems. Different outcomes are thus both expected and acceptable.<sup>147</sup>

These minority scholars argue that the “inherent fallacy” in the consensus view is “the assumption that accident victims are ‘similarly situated,’ simply because they have been involved in the same accident.”<sup>148</sup> The minority would argue that if domiciliaries of different states were simultaneously injured side-by-side in the same mass tort, they would nevertheless *not* necessarily be “similarly situated” because the domiciliaries’ respective states might establish varying rights and liabilities based on the same set of facts.<sup>149</sup>

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143. Bird, *supra* note 59, at 1079, 1085 (“[F]rom society’s point of view, equity requires that victims of mass torts receive prompt, adequate, and effective compensation for their injuries.”).

144. See, e.g., Kastenmeier & Geyh, *supra* note 72, at 551-52; Reavley & Wesevich, *supra* note 50, at 24; Rubin, *supra* note 19, at 436.

145. See generally Kramer, *supra* note 47; Sedler & Twerski, *Sacrifice Without Gain*, *supra* note 116; Sedler & Twerski, *State Choice of Law*, *supra* note 116.

146. See *supra* text accompanying notes 130-36.

147. Kramer, *supra* note 47, at 579. Professors Sedler and Twerski argue that, “[i]nconsistency of result” in the “mass toxic tort” situation . . . exists because different states, in the exercise of their traditional sovereignty, have adopted different substantive rules in the products liability area. Different results reached by courts in determining the legal rights of private persons in litigation is, as the Supreme Court has observed, “part of the price of our federal system.”

Sedler & Twerski, *Sacrifice Without Gain*, *supra* note 116, at 96-97 (quoting *Williams v. North Carolina*, 317 U.S. 287, 302 (1942)). “The ‘inefficiencies’ in multiple litigation of the same underlying claim in different courts are ‘built-into’ our federal system.” *Id.* at 95.

148. Sedler & Twerski, *State Choice of Law*, *supra* note 116, at 636.

149. *Id.*

They are similarly situated only in the sense that they have been involved in the same accident. But they are not similarly situated with respect to the policies embodied in the laws of the involved states nor the interests of the involved states in having their laws applied in order to implement the policy reflected in those

Scholars who espouse the majority view have offered rebuttal. One scholar urged that “society’s interest and the interests of individual victims in the integrity of mass tort adjudication require that the principles of equity [in preventing inconsistent, disparate legal outcomes] . . . override competing values of federalism in mass tort litigation.”<sup>150</sup> Others add that the minority “ignores states’ interests in [securing] equal treatment for their citizens,”<sup>151</sup> and that “[i]n cases arising from accidents that injure people from several states, a state’s interest in obtaining equal treatment for its citizens could . . . outweigh its interest in perpetuating the policy expressed in its tort and choice-of-law rules.”<sup>152</sup>

To be fair, it should be noted that the minority scholars do not completely deny that *mass-tort litigation itself* imposes burdens on the courts.<sup>153</sup> While admitting that legitimate problems *do* actually exist, they challenge the majority’s characterization of the current *choice-of-law regime* as an evil that must be rectified.<sup>154</sup> Instead, they *embrace* mass-tort choice-of-law problems (and the disparate and inconsistent legal outcomes that result therefrom), and favorably refer to the problems alternatively as merely “what a federal system is all about”<sup>155</sup> and “something to be embraced and affirmatively valued.”<sup>156</sup> In other words, they believe—primarily because of their strong valuation of federalism and the “states as a laboratory” concept<sup>157</sup>—that the “problems” the current choice-of-law regime creates are not problems at all. According to Professor Sedler, mass-tort litigation does raise “legitimate concern for efficiency and the avoidance of duplicative litigation”,<sup>158</sup> however, “[t]hese concerns can properly be addressed by consolidating mass tort cases for trial before a single court” *without* changing the current choice-of-law regime.<sup>159</sup> Professor Kramer notes: “I do not mean to minimize the seriousness of the problem posed by complex litigation . . . . [However], there are ways to consolidate and adjudicate without rewriting the parties’ rights” by changing the current choice-of-law regime.<sup>160</sup> As a result, these scholars urge that if mass-tort litigation were to be reformed, the reforms

laws.

*Id.* “Reasonable people can understand that different legal systems provide different rights to their respective residents.” *Id.* at 635.

150. Bird, *supra* note 59, at 1088.

151. Reavley & Wesevich, *supra* note 50, at 26.

152. *Id.* at 25.

153. See Kramer, *supra* note 47, at 581; Sedler, *supra* note 3, at 1110.

154. See Kramer, *supra* note 47, at 581; Sedler, *supra* note 3, at 1110.

155. Kramer, *supra* note 47, at 579.

156. *Id.*

157. See Justice Brandeis’s ode to scientific-method federalism in his dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis J., dissenting).

158. Sedler, *supra* note 3, at 1110.

159. *Id.*

160. Kramer, *supra* note 47, at 581. Professor Kramer argues that choice-of-law rules are by their nature substantive, not procedural, because they effectively define a party’s rights in a lawsuit by determining which state’s substantive tort law will govern the case. *Id.* at 572-73. To this extent, changing the current choice-of-law regime will, in his opinion, inappropriately change the substantive rights of the parties. *Id.*

should not change the present choice-of-law regime.<sup>161</sup>

In sum, it appears clear that despite the vocal minority's belief that mass-tort litigation is in practice quite manageable, the experience of judges and practitioners demonstrates otherwise.<sup>162</sup> The current system is indeed inefficient. The current system is probably also inequitable, but this determination may hinge on one's personal belief in what is "fair." Even if the minority's equity argument is persuasive, in all probability the inefficiency of the current system by itself may provide sufficient justification to consider reforming the system.

## II. "GROUND ZERO"<sup>163</sup> TOXIC TORTS: THE INEVITABLE PROBLEM

In the weeks and months following the destruction of the World Trade Center on September 11, 2001, concern developed about the potentially dangerous environmental situation around Ground Zero.<sup>164</sup> Indeed, numerous environmental tests and studies suggested that the collapse of the towers and the subsequent fires that burned at the site had unleashed toxic substances, including asbestos, into Lower Manhattan.<sup>165</sup> As the weeks passed, countless people living and working around the site began to experience adverse health effects.<sup>166</sup> As a result, it is probably reasonable to surmise that of the hundreds of thousands of workers, residents, and visitors who were in Lower Manhattan on or after September 11, thousands of these people may have been exposed to toxins capable of causing serious short-term and long-term health effects.<sup>167</sup> Because thousands of people were potentially exposed, mass toxic-tort litigation will likely erupt as ailing plaintiffs, arguably sickened by exposure to toxins near Ground Zero, bring forth their claims.

This Part begins by discussing the environmental dangers created by the World Trade Center's destruction. Then, this Part explores the debilitating effect that choice-of-law issues would have on any future mass toxic-tort litigation.

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161. Kramer, *supra* note 47, at 581; *see also* Sedler, *supra* note 3, at 1110.

162. *See supra* note 120.

163. Shortly after the attacks, the media began colloquially referring to the area surrounding the site where the World Trade Center once stood as "Ground Zero." Richard P. Campbell, *The View from the Chair: Tort-Model Compensation*, BRIEF, Winter 2002, at 4 (American Bar Association Tort & Insurance Practice Section).

164. *See, e.g.*, Margaret Ramirez, *Airing Their Health Concerns*, NEWSDAY, Nov. 27, 2001, at A6.

165. *See* Juan Gonzalez, *A Toxic Nightmare at Disaster Site: Air, Water, Soil Contaminated*, N.Y. DAILY NEWS, Oct. 26, 2001, at 2; *see also* Christine Haughney, *In N.Y., Taking a Breath of Fear; Illnesses Bring New Doubts About Toxic Exposure Near Ground Zero*, WASH. POST, Jan. 8, 2002, at A1.

166. *See* Pete Donohue & Frank Lombardi, *Downtown Air's Risky, M.D. Warns*, N.Y. DAILY NEWS, Nov. 9, 2001, at 8; *see also* Delthia Ricks, *Lung Ailments Emerge; MDs: Ground Zero Workers Affected*, NEWSDAY, Jan. 20, 2002, at A7.

167. *See infra* text accompanying notes 207-10.

*A. The Environmental Danger at Ground Zero*

The twin towers of the World Trade Center were built between 1968 and 1972.<sup>168</sup> During construction, builders sprayed an asbestos/cement slurry mixture onto the towers' steel lattice to insulate it from fire.<sup>169</sup> New York City banned this practice in 1971, but not before builders had already applied hundreds of tons of the mixture.<sup>170</sup> At least forty stories of the north tower reportedly still contained this mixture when the towers collapsed,<sup>171</sup> and the towers contained untold quantities of asbestos-containing products in the towers' floors, ceilings, and walls.<sup>172</sup> In addition, the World Trade Center complex housed a chemical bulk storage facility, numerous entities that generated hazardous waste, and several storage tanks for petroleum products,<sup>173</sup> including two electrical substations containing 109,000 gallons of oil.<sup>174</sup> A mind-boggling array of materials, some of them capable of causing serious long-term health effects, were undoubtedly incinerated, pulverized, and aerosolized because of the attacks.<sup>175</sup> For more than three months after the attack, fires consumed the Ground Zero rubble and unleashed an unknown "chemical soup" of smoke and fumes.<sup>176</sup>

As the towers collapsed, a massive dust cloud containing millions of tons of airborne particles enveloped much of Lower Manhattan and its hundreds of thousands of workers and residents.<sup>177</sup> Although the exact composition of the dust cloud is unknown, one scientist, after analyzing Ground Zero debris, determined that the cloud likely contained a variety of chemical compounds and carcinogens, including asbestos, in addition to pulverized concrete and fiberglass.<sup>178</sup> The potential health effect of this "single burst, heavy dose" exposure is uncertain, but some research suggests that a massive singular dose of a carcinogen like asbestos could be enough to cause lethal

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168. Michael B. Gerrard, *World Trade Center: Response, Recovery and Reconstruction*, N.Y.L.J., Oct. 4, 2001, at 3.

169. *Id.*

170. *Id.* One source reported that construction workers had sprayed over 5000 tons of asbestos before the practice was banned. *Asbestos, Lead, PCB Exposure Potential Risk of Environmental Aftermath from WTC Collapse*, INTERNET WIRE, at 2001 WL 29913960.

171. Kimberley A. Strassel, *The EPA Comes Clean on Asbestos*, WALL ST. J., Oct. 19, 2001, at A14.

172. Andrew Schneider, *Asbestos at Ground Zero: The Dust Settles at Ground Zero*, ST. LOUIS POST-DISPATCH, Jan. 13, 2002, at A1; see also Traci Watson, *Uncertainty Surrounds Asbestos*, USA TODAY, Feb. 7, 2002, at A6.

173. Gerrard, *supra* note 168.

174. Sharon L. Crenson, *Release of Poison Feared at Center; Transformers Held Toxins*, SOUTH FLORIDA SUN-SENTINEL, Jan. 20, 2002, at 13A.

175. Mark Maremont & Jared Sandberg, *Weighing Risks: Tests Say Air Is Safe, But Some People Feel Ill Near Ground Zero*, WALL ST. J., Dec. 26, 2001, at A1.

176. *Id.* As one observer stated, "[y]ou had 210 [sic] floors of carpets, wallboard, furniture and computers burning. We have no idea what this will do." Susan Q. Stranahan, *Track Their Health Now, to Protect Others Later*, WASH. POST, Jan. 20, 2002, at B2.

177. Jon Laor, *Rutgers Lecture Addresses Health Risks, Pollutants at Ground Zero*, DAILY TARGUM, Feb. 18, 2002, 2002 WL 12486838.

178. Maremont & Sandberg, *supra* note 175.

disease.<sup>179</sup>

Shortly after the attack, the Environmental Protection Agency ("EPA") began taking samples to test outdoor air quality.<sup>180</sup> The EPA reported that although initial asbestos levels in Lower Manhattan had exceeded federal standards,<sup>181</sup> subsequent EPA tests indicated no excessive levels of toxic substances except directly around Ground Zero.<sup>182</sup> A week after the attack, EPA Administrator Christie Todd Whitman declared New York's air and water to be safe.<sup>183</sup> However, as workers and residents tried to return to their normal lives amidst reports of their neighbors' respiratory problems, headaches, and nausea,<sup>184</sup> doubts about the accuracy of the EPA's assurances soon began to surface.<sup>185</sup> Responding to an environmental group's Freedom of Information Act<sup>186</sup> request in late October, the EPA released previously undisclosed data indicating that the release of toxic chemicals from Ground Zero may have been far more extensive than initially believed.<sup>187</sup> Indeed, the data revealed that from mid-September to mid-October, the EPA had detected dioxins, PCBs, benzene, lead, chromium, copper, and sulfur dioxide—sometimes at levels far exceeding federal standards—in the air and soil around Ground Zero and in the Hudson River.<sup>188</sup>

Despite continued reassurances from the EPA that the air was safe,<sup>189</sup> many New Yorkers distrusted the government's findings<sup>190</sup> and began to mobilize to ensure the

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179. Schneider, *supra* note 172. In any event, one scientist noted that "people were breathing in stuff that was far in excess of what anybody would normally be exposed to in their lifetime." Maremont & Sandberg, *supra* note 175; see also Maia Davis, *Dust From WTC Contained Witches' Brew of Pollutants—Researcher Urges Health Effects Study*, RECORD, Feb. 16, 2002, at A17, 2002 WL 4646495.

180. Margaret Ramirez, *America's Ordeal/Whitman: City Air No Threat to Health*, NEWSDAY, Oct. 13, 2001, at A17, 2001 WL 9255628.

181. *Id.*

182. *Id.*

183. Haughney, *supra* note 165.

184. See, e.g., *Breathing Problems Reported at School*, MILWAUKEE J. SENTINEL, Oct. 19, 2001, at 14A (reporting that about eighty teachers and students from a high school near Ground Zero complained of medical problems after returning to the school on October 9).

185. See, e.g., *id.*

186. 5 U.S.C. § 552 (2000).

187. See Judy Fahys, *Utah Company Sniffs Out Hazards at World Trade Center Site*, SALT LAKE TRIB., Oct. 23, 2001 (describing Ground Zero as "basically a hazardous-waste site" and noting that when workers around the site breathe, "they risk inhaling a toxic brew of dangerous particles"); see also Gonzalez, *supra* note 165; *Toxin Levels Elevated at Trade Center Site*, CHI. TRIB., Oct. 28, 2001, at 10.

188. Gonzalez, *supra* note 165. For example, one EPA test on October 11, 2001, found levels of benzene, a chemical that can cause leukemia, that were fifty-eight times higher than Occupational Safety and Health Administration ("OSHA") limits. Haughney, *supra* note 165. In an EPA test on September 26, 2001, three samples close to Ground Zero showed elevated lead readings. *Id.*

189. Heather Won Tesoriero, *Double Agony*, TIME, Oct. 29, 2001, at F5.

190. Wondering why the EPA did not voluntarily disclose worrisome test results for nearly a month, some residents and commentators questioned the EPA's honesty. See, e.g.,



safety of their neighborhoods.<sup>191</sup> Local tenant groups, unions, and political leaders hired civilian scientists and doctors to conduct private tests and studies.<sup>192</sup> The results were disturbing for a number of reasons. First, these private experts concluded that asbestos levels in reality may have been substantially higher than EPA test results had indicated because of the asbestos particles' unusually small size.<sup>193</sup> They argued that the force of the towers' collapse may have pulverized the asbestos materials into minute particles too small for EPA instruments to detect.<sup>194</sup> Second, numerous studies found that *indoor* asbestos levels in Lower Manhattan residences and businesses had been dangerously high.<sup>195</sup> One study found that the air in four buildings near Ground Zero, two of which were residential and two of which were commercial, had had asbestos levels exceeding the federal safety standards.<sup>196</sup> Subsequent tests found similar results,<sup>197</sup> including one study that found a Lower Manhattan apartment to have asbestos-laden dust 555 times greater than acceptable levels.<sup>198</sup> Finally, two independent studies released in February 2002 highlighted the severity of the pollution.<sup>199</sup> One study found that during the first six weeks after the attack, levels of

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Josh Getlin, *N.Y. Air's Purity a Matter of Dispute*, L.A. TIMES, Jan. 18, 2002, at A1. Perhaps responding to these concerns, the EPA's ombudsman ordered an investigation into charges that the agency concealed evidence of hazardous conditions in Lower Manhattan. Russ Buettner, *Battle Over EPA Denials of Dangers Downtown*, N.Y. DAILY NEWS, Jan. 12, 2002, at 6, available at 2002 WL 3163569. In February 2002, a congressional hearing was held to investigate the propriety of the EPA's actions. See Jared Sandberg, *Risk of Air Near Ground Zero Still Unclear*, WALL ST. J., Feb. 12, 2002, at B4B.

191. See, e.g., Ramirez, *supra* note 164 (reporting that city and state officials called for the establishment of an agency to oversee environmental testing in Lower Manhattan); Elizabeth Hays, *Parents Call Excavation Barge a Health Threat*, N.Y. DAILY NEWS, Nov. 1, 2001, at 10, available at 2001 WL 27986132 (reporting that local parents demanded that a barge carrying wreckage be moved from its berth in the Hudson River because of air quality concerns).

192. Schneider, *supra* note 172.

193. Haughney, *supra* note 165; see also Getlin, *supra* note 190.

194. Haughney, *supra* note 165; see also Getlin, *supra* note 190.

195. See, e.g., Josh Benson, *The Air Downtown: Tests Call It Clean, But Coughs Abound*, N.Y. OBSERVER, Jan. 7, 2002, available at 2002 WL 5164325.

196. Juan Gonzalez, *Feds, City Ignore Asbestos Cleanup Rules, Says EPA Vet*, N.Y. DAILY NEWS, Nov. 20, 2001, at 8, available at 2001 WL 27987983.

197. One study found that three randomly selected apartments near Ground Zero contained carpets and curtains that were "inundated with dust that was laden with copious amounts of asbestos" and other hazardous materials. Benson, *supra* note 195. Another study found "dangerously high levels of asbestos" coating a nearby playground. *Id.* Yet another study found several indoor samples to be contaminated with asbestos in excess of four times the federal safety guideline. Getlin, *supra* note 190.

198. Haughney, *supra* note 165.

199. Andrew Bridges, *9-11 Air Pollution Unmatched: Fine Particles Seen as Factor in Illnesses*, SAN ANTONIO EXPRESS-NEWS, Feb. 12, 2002, at 3A; see also Andrew Schneider, *Public Was Never Told That Dust From Ruins Is Caustic: Scientists Found Residue as Corrosive as Drain Cleaner*, ST. LOUIS POST-DISPATCH, Feb. 10, 2002, at A1.

certain pollutants had been the *highest ever recorded*, “trumping those measured in Kuwait after Iraqi invaders *torched oil wells* during the Gulf War.”<sup>200</sup> Another study found that the World Trade Center dust had been as caustic as ammonia or even liquid drain cleaner.<sup>201</sup>

As mounting evidence continued to call into question the safety of indoor conditions, a wave of concern arose among the owners, managers, and residents of corporate and residential buildings around Ground Zero.<sup>202</sup> Specifically, they feared that hazardous dust had seeped into their buildings—some of which had already been reoccupied—and that this dust was being recirculated by the buildings’ ventilation systems.<sup>203</sup> Indeed, as one observer soberly stated:

I spoke to one of the people who works in a building nearby, and her office was brought back a week or 10 days after the collapse of the Trade Towers. Everyone there was complaining about scratchy throats and watery eyes and coughing. And a memo came down [from their company’s chief health officer] saying, “You know, it’s like going to a campfire, you’re going to cough, you’re going to have burning eyes.” But these people have been going down there . . . five days a week for the last month, month and a half, ingesting this stuff.<sup>204</sup>

Further exacerbating the problem was the fact many nearby buildings had been cleaned in a haphazard manner that failed to eliminate the health risks presented by the dust.<sup>205</sup> In fact, these slapdash attempts to remove the dust may have only served to increase the danger to the public.<sup>206</sup>

Because of these environmental dangers, one must frighteningly conclude that tens of thousands of people may have been put at risk from exposure to toxic substances.

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200. Bridges, *supra* note 199, at 3A.

201. Schneider, *supra* note 199, at A1.

202. Mark Riley, *Asbestos: The New Danger*, THE AGE, Oct. 31, 2001, at 13, available at 2001 WL 28698816.

203. *Id.*

204. *The O’Reilly Factor* (Fox News broadcast, Oct. 29, 2001), 2001 WL 5081851, (quoting an interview with Newsweek Senior Editor David France).

205. Benson, *supra* note 195; see also Jared Sandberg, *Cleaning Dust Improperly Can Create New Hazards*, WALL. ST. J., Dec. 26, 2001, at A4. *The New York Daily News* reported that a veteran EPA scientist recently wrote a “scathing” internal memo accusing the EPA of handling the situation in Lower Manhattan irresponsibly. Gonzalez, *supra* note 196. The scientist stated that the EPA erred by recommending that residents and commercial building managers around Ground Zero follow the “extremely lenient (and arguably illegal) asbestos guidelines of the New York City Department of Health.” *Id.* Noting that “EPA regulations do not allow anyone to oversee and perform . . . asbestos removal, such as a resident in an apartment building or a building owner,” she criticized the EPA for offering “ludicrous” advice such as, “[i]f curtains need to be taken down, take them down slowly to keep dust from circulating.” *Id.*

206. Benson, *supra* note 195; see also Sandberg, *supra* note 205.

Indeed, many people have already experienced adverse health effects.<sup>207</sup> With over 100,000 workers and 10,000 residents returning to Lower Manhattan in the weeks and months after the attack<sup>208</sup>—not to mention the thousands of rescue workers who toiled at the site<sup>209</sup>—doctors have encountered an unanticipated volume of serious respiratory ailments among people who lived or worked around Ground Zero.<sup>210</sup>

With thousands of people claiming symptoms of what has been dubbed “World Trade Center syndrome,”<sup>211</sup> insurance companies and lawyers for New York City have expressed concern about the potential legal consequences.<sup>212</sup> Expecting the city to be “hit with suits over the cleanup,”<sup>213</sup> New York City successfully lobbied Congress to cap the city’s liability to potential injured plaintiffs.<sup>214</sup> Insurance companies, perhaps heeding doctors’ warnings of an upcoming potential outbreak of illness that could “rival the Gulf War and Agent Orange syndromes in its medical and legal implications,”<sup>215</sup> tried to assess the risks.<sup>216</sup> As *Money* reported:

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207. See, e.g., Ricks, *supra* note 166.

208. “On Sept. 18, just one week after the World Trade Center collapse, tens of thousands of office workers . . . were given the go-ahead by federal and local safety officials to return to their jobs.” Juan Gonzalez, *Castling a Dark Cloud Over City*, *EPA*, N.Y. DAILY NEWS, Feb. 12, 2002, at 26, 2002 WL 3166409; see also Asbestos & Lead Abatement Report, Dec. 1, 2001, available at 2001 WL 14957926; Mei Fong, *Landlords Entice Tenants Back to Ground Zero*, WALL ST. J., Feb. 22, 2002, at B1 (reporting that about 9000 people lived in nearby Battery Park City before the attack); *The O’Reilly Factor* (Fox News broadcast, Oct. 29, 2001), 2001 WL 5081851, (quoting an interview with Newsweek Senior Editor David France).

209. *Breath of Life*, COLUMBUS DISPATCH, Jan. 14, 2002, at 6A.

210. Donohue & Lombardi, *supra* note 166. This news article reported that the medical director of occupational and environmental diseases at New York’s Mount Sinai Medical Center “strongly disputed assurances by government officials . . . that air in the neighborhood poses no long-term health risks, except at Ground Zero.” *Id.* The doctor stated that his “clinical experience tells us something quite different,” for his hospital had been seeing more instances of “airway dysfunction” problems among patients “who work in office buildings [that are] two, three, and four blocks from Ground Zero.” *Id.*

211. Beth Daley, *Health Fallout Remains Up in the Air*, BOSTON GLOBE, Nov. 9, 2001, at A17.

212. Walter Updegrave, *How Strong Is the Safety Net? Here’s a Look at How Insurers Will Shoulder the Burden for the Largest Disaster the Industry Has Ever Faced*, MONEY, Nov. 1, 2001, at 130; see also James Brewer, *Insurers Must Fill Asbestos War Chests*, LLOYD’S LIST INT’L, Dec. 19, 2001, available 2001 WL 31407265.

213. *N.Y. Official Fears City Will Face Suits Pertaining to Cleanup*, L.A. TIMES, Oct. 27, 2001, at A13. The *Los Angeles Times* quotes New York’s corporation counsel as saying: “The single biggest issue that we’re dealing with now is liability . . . and in maybe 10 to 15 years from now, with people saying they got asthma or asbestos or lung injury.” *Id.*

214. See Aviation and Transportation Security Act, Pub. L. No. 107-71, § 102, 115 Stat. 597 (2001).

215. Riley, *supra* note 202 (noting that both the Gulf War and Agent Orange syndromes “led to successful class-action lawsuits”).

216. Updegrave, *supra* note 212; see also Brewer, *supra* note 212.

One major issue [is] possible asbestos contamination in the wake of the buildings' collapse. "That's a huge liability that could come into play," says Matthew Mosher, group vice president of property/casualty ratings at A.M. Best. "All this new exposure could have an impact in terms of cost that will take years to figure out." Any calculation of the cost of these claims is obviously iffy at best, which is why analysts' estimates range from \$8 billion to \$20 billion.<sup>217</sup>

In sum, although there is a great deal of uncertainty, a growing body of clinical and scientific evidence suggests that thousands of people who lived in, worked in, or visited Lower Manhattan may now be at risk of suffering adverse health effects because of the dangerous environmental situation that existed around Ground Zero. As a result, the possibility that ailing plaintiffs will turn to the courts for relief is a looming prospect.

*B. The Choice-of-Law Problem in September-11-Based Mass Toxic Torts*

The environmentally dangerous situation that existed in Lower Manhattan suggests the possibility that over the next ten to twenty years, thousands of plaintiffs experiencing health problems may file claims alleging that their injuries were caused by exposure to toxic substances around Ground Zero in the weeks and months after September 11, 2001. Judge Jack Weinstein, an expert in mass-tort litigation, stated that there could be "potentially thousands and thousands" of September-11-based cases that will be "scattered all over, with different judges burdened by the same essential facts in the law."<sup>218</sup> Agreeing with Judge Weinstein's sentiment, some practitioners have anticipated that the number of cases and types of claims could be "beyond imagination."<sup>219</sup>

To be sure, early indications suggest that some of this anticipated litigation may already be on the horizon.<sup>220</sup> Over thirteen hundred people, many of whom were rescue workers at Ground Zero, have already notified New York City that they may sue for a total of \$7.18 billion for damages stemming from the attack.<sup>221</sup> These notices reserve the individuals' right to allege that they had been exposed to "dangerous levels" of toxins due to the city's "negligence, carelessness, and recklessness" in not providing them with proper protective gear during their work at the site.<sup>222</sup> In addition, more than one hundred people have already notified the Port Authority of New York and New Jersey, which was the owner of the World Trade Center, about their possible

217. Updegrave, *supra* note 212 (emphasis added).

218. Sarah Sparks & Milo Geyelin, *New York's Recovery: Experts Offer Ways to Manage Terror Lawsuits*, WALL ST. J., Sept. 25, 2001, at A10.

219. Freedman, *supra* note 83, at 62 (stating that plaintiffs' lawyers anticipate "thousands upon thousands of claims").

220. *See, e.g.*, John J. Goldman, *Response to Terror: N.Y. Rescue Workers Move to Sue Over Respiratory Damage*, L.A. TIMES, Feb. 12, 2002, at A10.

221. *Id.*; *see also* Michael Weissenstein, *1,300 Take Steps to Sue New York City*, STATE, Feb. 8, 2002, at A11, available at 2002 WL 4529794.

222. Goldman, *supra* note 220.

intent to sue.<sup>223</sup> Finally, in February 2002, a group of Lower Manhattan tenants filed what is arguably the first “World Trade Center syndrome” lawsuit.<sup>224</sup> The tenants in the case, which included testimony by an indoor air quality specialist whom the court recognized as “an expert in World Trade Center dust contamination,” sought to require their landlord to rid their apartments of World Trade Center dust.<sup>225</sup>

If and when widescale litigation ensues, the plaintiffs will most likely be geographically widespread for a number of reasons. First, New York City has an extraordinarily cosmopolitan population.<sup>226</sup> For example, because of Lower Manhattan’s status as the undisputed center of American—if not *world*—finance,<sup>227</sup> countless thousands of residents of different states and foreign countries undoubtedly worked or lived in Lower Manhattan on or after September 11. Indeed, residents of more than *fifty* foreign countries, not to mention *numerous* states, were killed when the towers collapsed.<sup>228</sup> It is probably reasonable to assume that similarly diverse populations inhabited or visited neighboring buildings, including those on Wall Street and in the World Financial Center, during or after the attacks. In addition, Lower Manhattan is home to a number of major universities, including New York University,<sup>229</sup> that undoubtedly have students and faculty from across the nation and world. Finally, because New York City welcomes hundreds of thousands of tourists and visitors each year, it is likely that many thousands of these people passed through Lower Manhattan on or after September 11.

Second, the potential environmental effects of September 11 have literally spanned the globe. For example, thousands of people from across the country rushed to New York to aid in the rescue and recovery operations.<sup>230</sup> Four hundred fifty rescue workers came from California alone.<sup>231</sup> Since returning to their home states, many of

223. Weissenstein, *supra* note 221.

224. Graham Rayman, *Tenants vs. Landlord in WTC Cleanup Case*, NEWSDAY, Feb. 15, 2002, at A06, available at 2002 WL 2728252.

225. *Id.* The expert testified that “nearly five months after the attacks, he found the telltale black and gray dust in several apartments, in the stairwell and on or near fans, air conditioners and other ventilation areas.” *Id.*

226. Organizations that plan to study the health effects of the situation in Lower Manhattan have themselves noted that “[t]he studies are expected to be ‘intensely complicated’ due to demographics of the area”—a “mix of workers, commuters and tourists.” *WTC: Studies Look for Health Risk From Exposure to Debris*, AMERICAN POLITICAL NETWORK AMERICAN HEALTH LINE, Jan. 11, 2002, at 17, available at WL APN-HE 17.

227. Stevenson Swanson, *Sense of Peril Slows Revival of Manhattan: Despite Progress, Some Businesses, Residents Leaving*, CHI. TRIB., Oct. 29, 2001, at 3.

228. Stanley Crouch, *Killers’ Only ‘Cause’ Was Killing*, N.Y. DAILY NEWS, Sept. 20, 2001, at 57.

229. See Jesse Logan, *NYU to Test for Toxic Air in Downtown Dorms*, WASH. SQUARE NEWS, Mar. 7, 2002, available at 2002 WL 14816173.

230. See, e.g., Jessie Seyfer, *Rescue-Team Coughs Worse Than After Oklahoma City Blast*, SEATTLE TIMES, Jan. 9, 2002, at A3, available at 2002 WL 3886953; Matthew B. Stannard, *Cough Lingered in State Firefighters Who Helped in N.Y.*, S.F. CHRON., Dec. 25, 2001, at A1, available at 2001 WL 3423433.

231. Seyfer, *supra* note 230.

these workers have experienced adverse health effects.<sup>232</sup> In addition, over a thousand Southern Baptists from around the country and over 600 immigrants, many of whom were undocumented, came to Lower Manhattan to help clean the asbestos-laden homes and offices of displaced residents and workers.<sup>233</sup> Subsequent medical examinations found that more than 400 of these laborers had exhibited symptoms of respiratory distress arguably caused by their exposure to World Trade Center dust and debris.<sup>234</sup> Finally, the World Trade Center pollution itself may have crossed state and international borders. One study suggested that airborne toxins emanating from Ground Zero may have crossed the Hudson River into New Jersey.<sup>235</sup> Halfway around the globe, environmental activists in India have expressed concern that Indian salvage companies may have received contaminated scrap metal from Ground Zero.<sup>236</sup>

Third, potential plaintiffs may have changed their domicile by the time they bring their claims, thereby increasing the number of states that have a connection to the lawsuit for purposes of choice-of-law analysis.<sup>237</sup> For example, if a potential plaintiff had been exposed to toxic dust while living in New York, but subsequently sued after having moved to another state, each of those states might have an interest in having its substantive law applied because of its respective connection to the case. Such a situation would undoubtedly make the court's choice-of-law inquiry more complex.<sup>238</sup> Unfortunately, because of the latency period of the health problems from which potential plaintiffs might suffer,<sup>239</sup> it may take these plaintiffs years to discover their

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232. Gonzalez, *supra* note 208 (reporting that half of the rescue workers from an Ohio contingent had become ill since returning home); *see also* David Perlman, *Toxic Clouds Billowed Above Twin Tower Site: Expert Says Particles Were Worst Ever Measured*, S.F. CHRON., Feb. 12, 2002, at A1, *available at* 2002 WL 4012576 (reporting that seventy percent of the rescue workers from a Menlo Park contingent had reported being sick upon their return to California); Seyfer, *supra* note 230; Brad Smith, *Ground Zero Workers Breathless After Ordeal*, TAMPA TRIB., Feb. 23, 2002, at 1, *available at* 2002 WL 6541733; Stannard, *supra* note 230.

233. Alison Leigh Cowan, *God's Cleaning Squad: Southern Baptists Help Apartment Dwellers Return*, SOUTH FLORIDA SUN-SENTINEL, Dec. 9, 2001, at 3A, *available at* 2001 WL 29960362; John Moreno Gonzalez, *Immigrants Risk Health for Wages*, NEWSDAY, Jan. 13, 2002, at A08, *available at* 2002 WL 2722752.

234. Margaret Ramirez, *Breathing Problems Detected at WTC: 400 Workers Display Similar Symptoms*, NEWSDAY, Mar. 2, 2002, at A06, *available at* 2002 WL 2730840.

235. Laor, *supra* note 177.

236. *WTC Scrap Is Hazardous, Activists Say: Greenpeace Complains That the Metal Is Contaminated and Endangering Recyclers in India*, L.A. TIMES, Feb. 18, 2002, at A8. A director of Greenpeace India stated that "[t]here is every possibility that high levels of toxins are in the debris that would pose serious health and environmental risks to uninformed recycling workers in India." *Id.*

237. *See supra* Part I.A.

238. *See supra* Part I.A.

239. Some medical conditions caused by exposure to toxic substances do not develop until many years after the exposure. *See, e.g.*, GERALD W. BOSTON & M. STUART MADDEN, *LAW OF ENVIRONMENTAL AND TOXIC TORTS* 5 (2d ed. 2001). For example, mesothelioma, a rare form of lung cancer caused by exposure to asbestos, may not develop until decades after the exposure. *See* Lawrence Martin, *Asbestos Lung Disease—A Primer for Patients, Physicians*

injuries.<sup>240</sup> As a result, for example, many plaintiffs who used to live in New York may have subsequently established new domiciles.<sup>241</sup>

Unfortunately, the vast number and large geographical dispersal of potential plaintiffs would likely cause an immense choice-of-law conundrum if the claims were to be consolidated and adjudicated collectively. Barring federal intervention modifying the current choice-of-law system, the situation would look like this. Forum-shopping incentives,<sup>242</sup> coupled with plaintiffs' post-injury relocations, would lead the plaintiffs to bring suit in countless different states and countries. When these dispersed cases were consolidated in a federal court—as they probably would be<sup>243</sup>—the judge would have to make complicated and difficult choice-of-law analyses. Under *Klaxon* and *Van Dusen*,<sup>244</sup> in order to determine which substantive tort law would apply to various claims, the judge would have to apply—for each and every individual suit—the choice-of-law rules of the state or foreign country from which the individual suits originated.<sup>245</sup> With potentially thousands of plaintiffs and lawsuits originating from across the nation and the world, the federal court would be crippled by this choice-of-law analysis.

Congress, although probably not explicitly intending to address this choice-of-law problem, partially simplified the problem when it passed the Air Transportation Safety and System Stabilization Act<sup>246</sup> (the "Act"). The Act not only requires that "all actions brought for any claim . . . resulting from or relating to" the attacks be brought in a single federal district court,<sup>247</sup> but also directs the federal court to apply New York state choice-of-law doctrine to all the claims.<sup>248</sup> As discussed below, however, the Act does not go far enough in eliminating the massive choice-of-law problems that may erupt.

The Act, signed into law just eleven days after the attacks, was passed to keep September-11-based litigation from getting out of control by limiting the liability of the airlines<sup>249</sup> and by establishing a federal fund (the "Fund") from which the

and Lawyers, at <http://www.mtsinai.org/pulmonary/Asbestos/asbestos-questions.htm> (revised January 2002).

240. Bryan Virasami, *Cleanup Worries: Residents, Doctors See WTC Health Risks*, NEWSDAY, Nov. 9, 2001, at A27, available at 2001 WL 9260605.

241. In fact, some residents have already moved: "Many parents with young children who lived in Tribeca and Battery Park, the residential areas closest to the site, have moved away." Philip Delves Broughton, *Asbestos Alert at Ground Zero*, DAILY TELEGRAPH, Jan. 9, 2002, at P15, available at 2002 WL 3273082.

242. Forum-shopping incentives, discussed *supra* text accompanying notes 92-94, will exist so long as the *Erie/Klaxon/Van Dusen* trilogy of cases is still good law when the plaintiffs bring these suits.

243. See *supra* text accompanying notes 48-58.

244. See *supra* text accompanying notes 32-58.

245. See *supra* text accompanying note 55-58.

246. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 408, 115 Stat. 230 (2001).

247. *Id.* § 408(b)(3) (emphasis added)

248. *Id.* § 408(b)(2).

249. *Id.* § 408(a). On November 19, the act was amended to extend liability caps to a

government could promptly compensate victims of the attacks.<sup>250</sup> However, the Fund, which was designed to dissuade victims and their families from filing traditional mass-tort lawsuits,<sup>251</sup> is not available to the vast majority of people who may experience subsequent health problems because of the pollution around Ground Zero.<sup>252</sup> Indeed, the Act limits the availability of the fund to those who were “present at the World Trade Center . . . at the time, or in the immediate aftermath” of the crashes<sup>253</sup> and who filed their claims with the Fund within two years.<sup>254</sup> In promulgating regulations to implement the Act and the Fund, the Justice Department<sup>255</sup> interpreted the Act’s language to require, for Fund eligibility: 1) that Fund claimants have been, during the *first twelve hours* after the attack,<sup>256</sup> *in the World Trade Center or in the immediate vicinity* such that there had been a “demonstrable risk of physical harm” from fires, explosions, or falling debris,<sup>257</sup> and 2) that Fund claimants have experienced a physical injury that had been treated by a doctor within twenty-four hours, or within seventy-two hours if the claimant had either been unable to realize immediately the extent of their injuries or had been unable to receive medical treatment on September 11.<sup>258</sup> The physical injury must have either 1) required hospitalization for at least twenty-four hours, or 2) caused “physical disability, incapacity, or disfigurement.”<sup>259</sup>

The Justice Department received numerous comments requesting that the Fund be available to people who may develop illnesses in the future because of exposure to toxins that emanated from Ground Zero.<sup>260</sup> Nevertheless, the Department decided to exclude this group from the Fund, stating that “Congress did not intend for this Fund

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variety of other potential defendants, including the airports from which the doomed flights originated, the manufacturer of the planes and the planes’ engines, the owner and leaseholder of the World Trade Center, and the City of New York. Aviation and Transportation Security Act, Pub. L. No. 107-71, § 210, 115 Stat. 697 (2001).

250. Air Transportation Safety and System Stabilization Act §§ 401-07.

251. September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274, 66,274 (Dec. 21, 2001) (to be codified at 28 C.F.R. pt. 104) [hereinafter Interim Rule].

252. See Interim Rule, *supra* note 251, at 66,276; see also September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233, 11,234, 11,242 (Mar. 13, 2002) (to be codified at 28 C.F.R. pt. 104) [hereinafter Final Rule].

253. Air Transportation Safety and System Stabilization Act § 405(c)(2)(A)(i).

254. *Id.* § 405(a)(3). The two-year period begins on the date on which the Justice Department promulgates the statute’s regulations. *Id.* The Justice Department’s regulations went into effect on December 21, 2001. *Id.* § 407.

255. The statute charges the Justice Department with the task of promulgating regulations to implement the Act. *Id.* § 407.

256. Interim Rule, *supra* note 251, at 66,282 (to be codified at 28 C.F.R. § 104.2(b)).

257. *Id.* (to be codified at 28 C.F.R. § 104.2(e)).

258. *Id.* (to be codified at 28 C.F.R. § 104.2(c)); Final Rule, *supra* note 252, at 11,245 (to be codified at 28 C.F.R. § 104.2(c)). In addition, the administrator of the Fund has discretion to modify the time period for “rescue personnel who did not or could not obtain treatment by a medical professional within 72 hours.” Final Rule, *supra* note 252, at 11,245.

259. Interim Rule, *supra* note 251, at 66,282 (to be codified at 28 C.F.R. § 104.2(c)).

260. See, e.g., Letter Regarding Victim Compensation Fund, to Kenneth Zwick, DOJ, at <http://www.usdoj.gov/victimcompensation/interim/nfeb11/N002586.html>.



to cover those who face only a risk of future injury (i.e. latent harm that does not fully manifest itself within the statutory time period for this Fund).<sup>261</sup> According to the Justice Department, “[w]hile Congress might later consider whether an administrative program for latent harm caused by [the attack] may be appropriate, the language of the statute that created this Fund does not contemplate awards for that purpose.”<sup>262</sup> As a result, the Act forces *almost all September-11-based toxic-tort plaintiffs* to file in federal court rather than with the Fund.

For injured parties who cannot file a claim with the Fund, the Act provides an *exclusive* federal cause of action for “damages arising out of the . . . crashes.”<sup>263</sup> The U.S. District Court for the Southern District of New York will have “original and exclusive jurisdiction over *all actions brought for any claim . . . resulting from or relating to*” the crashes,<sup>264</sup> and the governing substantive law for the claims is to “be derived from the law, *including choice of law principles*, of [New York] unless such law is inconsistent with or preempted by Federal law.”<sup>265</sup> Although it is not entirely certain, it is likely safe to assume that *any* personal injury claim—including any toxic tort—that has a *reasonable causal connection* with the attacks will come under the Southern District’s jurisdictional umbrella.

As a result, the mass toxic-tort claims that will likely arise will probably be consolidated promptly, and the federal judge will apply the *choice-of-law rules of New York* to determine which state’s substantive law will govern the issues involved in each claim. Because the court will need to employ only one state’s *choice-of-law doctrine*, this procedure would undoubtedly make the judge’s choice-of-law inquiry somewhat simpler, thereby easing some of the efficiency problems that would otherwise plague the mass-tort litigation.<sup>266</sup> Nevertheless, the court’s choice-of-law inquiry will still be extraordinarily complex for two reasons:

First, although the Act eliminates the need for the court to identify and apply numerous states’ *choice-of-law doctrines*, the Act does *not* eliminate the need for the court to make a *choice-of-law inquiry in itself* for each and every claim. Thus, in order to determine which states’ substantive laws will govern the lawsuits, the court must still resolve the choice-of-law issues that would inevitably arise in potential September-11-based mass-tort litigation. Because of the Supreme Court’s decision in *Phillips Petroleum v. Shutts*, the trial court *may not* indiscriminately apply the substantive law of a single state—presumably New York—to all the claims;<sup>267</sup> instead, the court *must* make a choice-of-law inquiry for each claim.<sup>268</sup> In sum, even though the Act partially eases the court’s choice-of-law task, the court’s resolution of these choice-of-law issues, as discussed above, would *still* be a very arduous, time-

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261. Interim Rule, *supra* note 251, at 66,276.

262. *Id.*

263. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 408(b)(1), 115 Stat. 230 (2001).

264. *Id.* § 408(b)(3) (emphasis added).

265. *Id.* § 408(b)(2) (emphasis added).

266. For a discussion of these inefficiencies, see *supra* Part I.B.2.i.

267. See *supra* text accompanying notes 66-71.

268. See *supra* text accompanying notes 66-71.

consuming task.<sup>269</sup>

Second, New York's choice-of-law doctrine is a particularly complex doctrine to apply. New York espouses a choice-of-law methodology known as governmental "interest analysis."<sup>270</sup> This governmental interest analysis test mandates that a New York court apply to a particular issue in a controversy the law of the state with the greatest interest in fostering its domestic policies on a given issue.<sup>271</sup> The court must consider the interests of any state having a significant interest in the particular issue, including the states of the parties' domiciles and the states in which the conduct and injury occurred.<sup>272</sup> The court determines which state has the greatest interest by evaluating the facts or contacts of the controversy that relate to the purposes behind the particular laws in conflict.<sup>273</sup> New York courts determine the applicable law on an issue-by-issue basis; that is, a court must determine what law governs as to *each substantive law issue* in the case.<sup>274</sup> Quite obviously, this issue-by-issue inquiry greatly increases the complexity of the choice-of-law process. As one treatise explains, this issue-by-issue resolution of conflicting laws leads to

the potential result that different law[s] on different issues can apply in the same case. Thus, where the parties have a common domicile of New Jersey, that law may apply on damages, but if the tort occurred in New York, New York law could apply on conduct regulating issues (e.g., breach of standard of care).<sup>275</sup>

Other aspects of New York choice-of-law doctrine complicate courts' choice-of-law inquiries even further. For example, some courts will apply a more concrete set of choice-of-law rules to determine the applicable law in certain tort cases.<sup>276</sup> These rules tend to infuse in the government interest analysis doctrine a presumption in certain instances that the law of the place of the tort or injury should apply.<sup>277</sup> However, the use of these rules is not mandatory, as the rules are intended as "guideposts" for the courts in resolving choice-of-law issues,<sup>278</sup> the rules are intended to supplement, but not supplant,<sup>279</sup> the state's governmental interest analysis choice-of-law doctrine.<sup>280</sup> Unfortunately, the New York Court of Appeals has not clarified precisely *when* courts are supposed to use these rules in their choice-of-law

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269. See *supra* text accompanying notes 79-88.

270. *Schultz v. Boy Scouts of America, Inc.*, 480 N.E.2d 679, 684 (N.Y. 1985).

271. *Id.* at 684.

272. *Id.*

273. *Id.*

274. KREINDLER ET AL., *supra* note 13, § 18.32.

275. *Id.* § 18.36 n.4.

276. *Id.* §§ 18.35-.36.

277. *Id.* § 18.36.

278. *Id.* §§ 18.36, 18.40.

279. *Id.* § 18.34.

280. *Id.* § 18.36.

analyses.<sup>281</sup> Indeed, while some courts have applied these rules rigidly,<sup>282</sup> others have ignored them in favor of a pure governmental interest analysis.<sup>283</sup>

Hence, the Act's requirement that the federal court apply New York's choice-of-law doctrine tends to exacerbate the choice-of-law problem that will likely arise in future September-11-based mass-tort litigation. Indeed, New York's choice-of-law doctrine will require the federal court 1) to identify each state that may be interested in having its law govern the particular legal issue, 2) to identify the conflicting laws and their underlying purposes and public policies, 3) to identify the facts and contacts of the case that make each state interested in having its law applied, and then, taking all this into account, 4) to determine which state has the greatest interest in having its law applied to the particular issue in the case.<sup>284</sup> The court must potentially engage in this elaborate process not only for *each plaintiff*, but also for *each issue* in each plaintiff's case that presents a conflict between the laws of two or more interested states.<sup>285</sup> In addition, the current uncertainty regarding the applicability of more concrete choice-of-law rules in tort cases makes the problem even worse.

In the end, with respect to future September-11-based mass-tort litigation, the choice-of-law process that the Act effectively establishes falls short for three reasons: efficiency concerns, equity concerns, and federalism concerns.

First, the choice-of-law process that the Act establishes is inefficient. As discussed above, the Southern District of New York will not have to identify and apply the *choice-of-law* provisions of numerous jurisdictions; rather, it will only need to apply *New York* choice-of-law doctrine.<sup>286</sup> Nevertheless, the court may still need to make individual choice-of-law inquiries for *thousands of plaintiffs* to determine which states' substantive laws will govern the various issues involved in each plaintiff's claim. Because New York's choice-of-law doctrine is particularly complex,<sup>287</sup> the court's inquiries will be even more difficult. As a result, while the court's choice-of-law task is certainly lessened, the court must still expend substantial resources to determine the substantive law to which the New York choice-of-law doctrine points with respect to *each issue* in *each plaintiff's* case. With the court potentially forced to make these determinations for tens of thousands of plaintiffs from all over the nation and the world, the process will inevitably be extremely inefficient.<sup>288</sup> This would undoubtedly increase the cost and duration of the litigation.<sup>289</sup> In addition, delays in determining the applicable substantive law could interfere with effective settlement negotiations.<sup>290</sup>

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281. *Id.*

282. *Id.*; *see, e.g., Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957, 962-63 (2d Cir. 1991).

283. KREINDLER ET AL., *supra* note 13, § 18.36; *see, e.g., Curley v. American Airlines*, 846 F. Supp. 280, 284 (S.D.N.Y. 1994).

284. *See supra* text accompanying notes 271-75.

285. KREINDLER ET AL., *supra* note 13, § 18.32.

286. *See supra* text accompanying notes 266-69.

287. *See supra* text accompanying notes 270-83.

288. *See supra* Part I.B.2.i.

289. Mullenix, *supra* note 17, at 1076.

290. *Id.*

Second, the choice-of-law process may lead to unfair results. If the court's choice-of-law inquiry requires that different substantive laws be applied to different plaintiffs' claims, the court may be unable to adjudicate similar cases collectively. For example, if a group of plaintiffs wished to file claims together as a class, the class might not meet Rule 23's requirements of commonality, predominance, and manageability<sup>291</sup> if the court, after conducting a choice-of-law inquiry for each member of the class, were required to apply numerous states' substantive laws.<sup>292</sup> To the extent that these choice-of-law problems impair collective adjudication of similar claims, this fosters duplicative litigation and creates the risk that similarly situated plaintiffs who are forced to litigate separately might experience unfairly disparate legal outcomes or recoveries.<sup>293</sup> To be sure, Congress and the Justice Department were concerned about minimizing these disparities with respect to the Fund,<sup>294</sup> so it is likely that they were also concerned about minimizing these disparities in *any* September-11-based litigation under the Act. As the Justice Department stated in announcing the Act's regulations, the Department wanted to create a program that would "treat similarly situated claimants alike."<sup>295</sup> Finally, the choice-of-law process may unfairly impose on the defendants legal standards that they could not have foreseen, thereby frustrating party expectations.<sup>296</sup>

Third, the choice-of-law process created by the Act seems to be ideologically inconsistent with the spirit of the Act itself. It is curious that Congress, although presumably motivated to pass the Act because of the uniquely *national* nature of the terrorist attacks,<sup>297</sup> chose to respond by directing federal courts to apply *state* tort law. Commenting on this exact type of situation, Professor Kramer noted that it is ironic to establish a "choice-of-law rule that selects the [substantive] law of a single state on the ground that . . . litigation is national in character. I would have thought that the more 'national' the case, the *less* appropriate it is for any single state's standard to govern."<sup>298</sup> Professor Friedrich Juenger drives the point home: "In situations . . . that so clearly *transcend state and even national boundaries*, there are *no good reasons* for leaving the parties' rights and obligations to the vagaries of state laws."<sup>299</sup> The reality of the aftermath of September 11 is a *national* issue of the foremost degree. The litigation that will likely ensue from the consequences of the terrorist attacks, including any toxic-tort litigation, will be so "national in character" and will "so clearly transcend state and international boundaries" that application of *state* law is

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291. FED. R. CIV. P. 23; *see also supra* text accompanying notes 102-14.

292. Torchiana, *supra* note 67, at 915.

293. *See supra* Part I.B.2.ii.

294. Interim Rule, *supra* note 251, at 66,275.

295. *Id.*

296. *See supra* notes 137-39 and accompanying text.

297. The Justice Department commented that the Fund "is an attempt by the American people [through Congress] to demonstrate their solidarity with, and generosity for, those injured by the terrible September 11 attack on our country." Interim Rule, *supra* note 251, at 66,275.

298. Kramer, *supra* note 47, at 578 (emphasis in original).

299. Friedrich K. Juenger, *The Complex Litigation Project's Tort Choice-of-Law Rules*, 54 LA. L. REV. 907, 922-23 (1994) (emphasis added).

inappropriate. Indeed, the litigation requires a truly national solution—federal substantive law.

In summary, the choice-of-law inquiries that the federal court would need to make in any future September-11-based mass toxic torts would be complex and time-consuming due to 1) the extraordinary number and geographical dispersal of the potential plaintiffs, and 2) the complexity of New York's choice-of-law doctrine. Because the court's resolution of choice-of-law issues would be such a complicated task, the process will likely be inefficient and inequitable. In addition, the fact that the court must apply *state* substantive law to such *national* issues is perplexing.

### III. REFORMING CHOICE OF LAW IN SEPTEMBER-11-BASED MASS TOXIC TORTS THROUGH FEDERAL SUBSTANTIVE TORT LAW

As discussed above, the choice-of-law process that the Act creates for handling potential mass-tort litigation is problematic for a number of reasons.<sup>300</sup> To solve the choice-of-law problems inherent in this type of litigation, scholars have suggested a variety of reforms. One such reform would entirely eliminate the choice-of-law problem through congressional creation of a body of federal substantive tort law.<sup>301</sup> Although some scholars have dismissed the creation of federal substantive tort law as being politically infeasible or inappropriate,<sup>302</sup> recent events have made it both feasible *and* appropriate for the federal government to establish a limited body of substantive tort law to help manage potential September-11-based mass toxic-tort litigation. This Part begins by discussing in general terms the reformation of the mass-tort choice-of-law process through federal substantive tort law. Then, this Part discusses this reform as applied to September-11-based mass toxic-tort litigation. Finally, this Part concludes that Congress should strongly consider enacting incremental substantive tort law to manage September-11-based mass toxic torts.

#### *A. Using Federal Substantive Tort Law to Reform Mass-Tort Choice of Law Generally*

Because of the myriad difficulties that choice-of-law issues present in mass-tort litigation,<sup>303</sup> many scholars have suggested that the federal government intervene<sup>304</sup> to help bring order to the "chaos"<sup>305</sup> and "drain the dismal swamp" of the choice-of-law realm.<sup>306</sup> Commentators who advocate for greater and more effective consolidation of mass-tort litigation are virtually unanimous in arguing that federal intervention is

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300. See *supra* Part II.B.

301. See, e.g., Juenger, *supra* note 299, at 921.

302. See *infra* text accompanying notes 342-50.

303. See *supra* Part I.B.2.

304. See, e.g., Gottesman, *supra* note 8; Reavley & Wesevich, *supra* note 50.

305. Kastenmeier & Geyh, *supra* note 72, at 541.

306. See Gottesman, *supra* note 8, at 1 (playing off of William Prosser's colorful description of the "realm of the conflicts of laws [as] a dismal swamp," William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953)).

necessary.<sup>307</sup> As noted previously, federal diversity courts have become the “forums of choice” for mass-tort litigants.<sup>308</sup> To a great extent, therefore, because mass-tort litigation has become “de facto federalized,” the relevant question is no longer, “Should mass-tort litigation be federalized?” but rather, “How should current and future federal cases be resolved more effectively?”<sup>309</sup> Even the most vocal critics of the majority view<sup>310</sup> admit that in some circumstances, federal intervention would be helpful and appropriate.<sup>311</sup> Although much of the literature has focused on the need for a uniform federal *choice-of-law* rule for mass torts, there has been support for the creation of federal *substantive mass-tort law*.<sup>312</sup> Because Part III.B of this Note argues that adoption of a limited body of federal substantive tort law is necessary, feasible, and appropriate to help manage September-11-based mass toxic torts, this Note focuses on substantive tort law as a reform option.<sup>313</sup>

Scholars have offered numerous justifications for the federalization of mass-tort

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307. Kastenmeier & Geyh, *supra* note 72, at 565. Interestingly, Professor Michael Gottesman noted that “many of the prominent architects of the ‘modern’ [choice-of-law] theories now predominating under state law believed that there should be a uniform federal rule applied throughout the nation to determine choice of law disputes.” Gottesman, *supra* note 8, at 19.

308. Mullenix, *supra* note 15, at 786; *see also* Bird, *supra* note 59, at 1093 (footnote omitted) (“[T]he usefulness and availability of procedural devices created by federal law have led litigants to rely almost exclusively upon federal courts for the adjudication of mass tort claims.”).

309. Mullenix, *supra* note 15, at 786-87.

310. *See supra* text accompanying notes 116, 145.

311. *See* Sedler & Twerski, *Sacrifice Without Gain*, *supra* note 116, at 106-07 (stating that in the truly unmanageable mass torts—for example, asbestos and Agent Orange litigation—only direct federalization of the cause of action itself would address the problem).

312. Most of the scholars who advocate for a federal choice-of-law rule for mass torts admit that creation of federal *substantive* law covering mass torts (for example, airplane crashes, toxic exposure cases, and so on) would ideally be the best solution. *See, e.g.*, Juenger, *supra* note 299, at 921. Indeed, federalizing the *cause of action itself* would eliminate the need for choice-of-law analyses altogether. *Id.*

313. Another reform option that some scholars have suggested relies on the federal judiciary to create substantive tort law. *See, e.g.*, Georgene M. Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?*, 54 *FORDHAM L. REV.* 167, 182-200 (1985). These scholars have argued that federal courts, *on their own* (that is, without substantive federal legislation), possess the authority to create a body of federal mass-tort law via federal common law. *See id.*; *see also* Jonathan R. Macey & Geoffrey P. Miller, *A Market Approach to Tort Reform Via Rule 23*, 80 *CORNELL L. REV.* 909, 910-11 (1995); Aaron D. Twerski, *With Liberty and Justice for All: An Essay on Agent Orange and Choice of Law*, 52 *BROOK. L. REV.* 341, 366-67 (1986). Twerski stated:

The only way [to decide the *Agent Orange* case appropriately] was to create a national rule . . . based . . . on what the court believed to be the preferable national solution to the problem . . . . In short, the only way to resolve the conflicts problems in this case was to create a federal common law.

*Id.*

law either through choice-of-law or substantive rules.<sup>314</sup> First, establishing a uniform rule would eliminate many of the efficiency problems discussed in Part I.B.2.i and would thereby reduce the cost, complexity, and duration of the litigation. For example, a federal rule would be more efficient because it would undoubtedly be easier to apply than the present system, which requires courts to employ states' choice-of-law doctrines to determine the applicable substantive law.<sup>315</sup> Indeed, a federal substantive rule would eliminate the need to make choice-of-law inquiries altogether; instead of looking to state law for the applicable substantive rules, the court would merely apply the *federal* substantive rule to the entire litigation. Courts would no longer need to expend substantial resources resolving preliminary choice-of-law issues, but rather would be able to concentrate immediately on the merits of the case. In addition, because the court would no longer have to deal with choice-of-law problems that create uncertainty regarding the applicable substantive law, the parties to the litigation could more promptly and effectively negotiate settlements.<sup>316</sup>

A federal substantive rule would also relieve court congestion by significantly reducing wastefully duplicative litigation of claims<sup>317</sup> arising from the same mass tort.<sup>318</sup> For example, because courts across the nation would uniformly apply the same federal substantive rule, the current incentive for plaintiffs to forum-shop<sup>319</sup> would be reduced or eliminated. Additionally, a uniform rule would permit more effective consolidation of these cases<sup>320</sup> because the current procedural barriers to maintaining mass-tort class actions<sup>321</sup> would no longer inhibit the collective adjudication of mass-tort claims. Indeed, because the same substantive law would apply to all claims stemming from a particular mass tort, the three requirements of Federal Rule of Civil Procedure 23—commonality of questions of law or fact, predominance of these common questions, and manageability of the class action<sup>322</sup>—would usually be met.

Second, a federal rule would arguably be more equitable. For example, a federal substantive rule would reduce the inequity of the current system by eliminating the risk of inconsistent and disparate legal outcomes inherent in the independent litigation of substantially similar claims.<sup>323</sup> Because a federal rule would ensure that the same legal standards would be applied to all similar claims—regardless of where the

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314. See, e.g., Kane, *supra* note 77, at 313-14.

315. Reavley & Wesevich, *supra* note 50, at 30. Professor Kane notes that under a uniform rule, federal courts could more effectively manage complex litigation because they would no longer have to "engage in an extremely complicated [choice-of-law] inquiry." Kane, *supra* note 77, at 313-14.

316. See *supra* text accompanying notes 86-87.

317. See Kane, *supra* note 77, at 313-14.

318. See Kastenmeier & Geyh, *supra* note 72, at 543-51.

319. See *supra* text accompanying notes 93-95.

320. Reavley & Wesevich, *supra* note 50, at 31.

321. See *supra* text accompanying notes 100-115.

322. See *supra* text accompanying notes 102-104.

323. See, e.g., Reavley & Wesevich, *supra* note 50, at 22-30 (arguing that a federal rule would promote fairness by ensuring uniformity of legal outcomes, by establishing neutrality through a reduction in the incentive to forum-shop, and by creating determinacy in the interpretation of choice-of-law rules).

plaintiffs brought them—the federal rule would improve the overall consistency of legal outcomes. In addition, a federal substantive rule would be more equitable to mass-tort defendants because they could depend on the consistent application of a uniform standard of conduct.<sup>324</sup>

Third, establishing a federal rule would further the *federal* interests implicated in mass-tort actions.<sup>325</sup> Mass-tort litigation has significant interstate effects, not only because of the number and geographical diversity of the people affected by the tort, but also because of the interstate activity of typical mass-tort defendants.<sup>326</sup> Scholars have argued that a uniform federal rule is necessary because products liability and toxic-tort cases frequently have “multistate implications.”<sup>327</sup> Congress’s decision to regulate a variety of products and substances that are the frequent subjects of products liability and toxic-tort litigation reinforces this argument: “a conflict among the interests of numerous states concerning the [toxic] product or substance presents an intrinsically federal problem . . . .”<sup>328</sup> Additionally, one scholar bluntly opines that in situations like mass toxic torts “that so clearly transcend state . . . boundaries, there are no good reasons for leaving the parties’ rights and obligations to the vagaries of state law.”<sup>329</sup> Therefore, “parochial, self-serving” state doctrines are unacceptable<sup>330</sup> given that the federal interest involved in a mass tort “certainly outweighs the interest of any individual state.”<sup>331</sup>

Nevertheless, some scholars, while recognizing the potential benefits of establishing a uniform federal rule, urge restraint. To begin with, they note that before Congress may establish federal mass-tort rules, it should, as a threshold matter, confirm that it has the authority and institutional competence to federalize the law.<sup>332</sup> In most mass-tort situations, however, this threshold concern is a nonissue as a practical matter. Indeed, because the vast majority of mass-tort litigation has an undeniable effect on interstate commerce, Congress, as the elected representatives of the American people, undoubtedly has the power and competence to displace state law

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324. See *supra* text accompanying notes 137-40.

325. As Professor Weinberg notes, there is a national interest not only in ensuring “effective administration of mass [tort] litigation,” but also in the mass torts themselves. Louise Weinberg, *Mass Torts at the Neutral Forum: A Critical Analysis of the ALI’s Proposed Choice Rule*, 56 ALB. L. REV. 807, 817-18 (1993).

326. Atwood, *supra* note 5, at 15; see also Bird, *supra* note 59, at 1093 (“[M]ost mass torts arise from interstate economic activity and directly affect citizens from many states.”); Reavley & Wesevich, *supra* note 50, at 22 (“[T]he number of parties, combined with the amount of money at stake in . . . mass-tort cases gives these cases a uniquely national dimension.”).

327. Gottesman, *supra* note 8, at 16.

328. Vairo, *supra* note 313, at 198. “The myriad federal statutes regulating various hazardous products and substances . . . provide authority for a federal court to create a federal rule when competing state interests and identifiable federal interests are presented.” *Id.* at 203.

329. Juenger, *supra* note 299, at 922-23.

330. Donald T. Trautman, *Toward Federalizing Choice of Law*, 70 TEX. L. REV. 1715, 1734 (1992).

331. Tobin, *supra* note 137, at 482.

332. See, e.g., Sedler & Twerski, *Sacrifice Without Gain*, *supra* note 116, at 83-90.



by legislating substantive mass-tort law.<sup>333</sup>

In urging restraint, these scholars also stress federalism concerns by noting that state governments arguably have legitimate interests in having their substantive tort law applied in mass-tort litigation.<sup>334</sup> According to these scholars, the federal government should displace state law only in limited circumstances in which Congress concludes that a case “with interstate or international ramifications [will] impose an ‘*undue burden*’ on interstate commerce.”<sup>335</sup> Professor Sedler has commented that creation of a federal substantive rule would encroach on states’ sovereignty in two ways.<sup>336</sup> First, a federal rule would deprive states of their power to establish substantive rules regulating disputes between parties in mass-tort litigation.<sup>337</sup> Second, a federal rule would “require that the states sacrifice the strong policies underlying their substantive tort laws by denying the application of a state’s law in cases where the state would have a real interest in implementing its policy.”<sup>338</sup>

333. *Id.* at 83; see also Juenger, *supra* note 299, at 921 (“That the Congress has the power to adopt such rules is of course beyond cavil . . .”).

334. Robert A. Sedler, *Interest Analysis, State Sovereignty, and Federally-Mandated Choice of Law in “Mass Tort” Cases*, 56 ALB. L. REV. 855, 870-79 (1993).

335. Sedler & Twerski, *Sacrifice Without Gain*, *supra* note 116, at 86 (emphasis added). Professor Sedler notes:

While Congress has the power to override or displace state law, as a matter of federal supremacy, Congress has recognized that any exercise of federal power should be undertaken with due regard for the traditional sovereignty of the states and their role in the federal system . . . Congress has long recognized this fundamental principle of our federal system . . . Congress has been unwilling to use its power over interstate commerce to enact federal substantive law, such as national products liability law, that would displace state law applicable to the resolution of disputes between private persons, even though these disputes may significantly affect interstate commerce . . . Congress then has been extremely solicitous of the primary responsibility of the states in our federal system which is to promulgate the law applicable to disputes between private persons and to adjudicate such disputes in their courts.

Sedler, *supra* note 334, at 874-75.

336. Sedler, *supra* note 334, at 873.

337. *Id.*

338. *Id.* Other scholars counter this argument from a number of different fronts. Professor Kane argues: “The judicial efficiency to be gained by allowing the application of a single . . . standard in a consolidation court, as well as the ability to promote similar results for similar cases, seem to outweigh the intrusion into a sphere traditionally dominated by the states.” Kane, *supra* note 77, at 314. Reavley and Wesevich state:

[T]hese critics grossly overstate the states’ interests in perpetuating the present system. . . First, as a practical matter in all multistate cases, the plaintiffs and the states share control over which state’s law governs the controversy [because the plaintiff is able to forum-shop]. . . Second, states’ inattention to choice-of-law issues [as indicated by the almost universal failure of state legislatures to enact choice-of-law statutes] reflects their lack of practical

Conceivably, these federalism concerns may help explain why Congress has generally chosen not to tackle choice-of-law issues in mass-tort litigation. Without a doubt, Congress could solve the choice-of-law problem "in one fell swoop" by simply enacting federal substantive mass-tort law.<sup>339</sup> However, despite a handful of ill-fated attempts to address the mass-tort problem, Congress has failed to intervene.<sup>340</sup> In addition, with a few notable exceptions,<sup>341</sup> scholars and legal reform organizations, though praising the potential benefits of federal substantive mass-tort law,<sup>342</sup> generally consider it an unrealistic reform solution.<sup>343</sup>

Scholars note that congressional enactment of substantive law is ordinarily an unrealistic option because of Congress's traditional respect for state sovereignty.<sup>344</sup> Indeed, Congress has shown great deference to the states in the area of tort law.<sup>345</sup> One scholar argues that it would be an "extraordinary departure" from this historic deference for Congress to solve choice-of-law problems by enacting substantive tort law.<sup>346</sup> "[T]hat Congress has the power to federalize does not mean that its power *should* be exercised. . . . This is a matter of policy choice . . . . [Some scholars] strongly oppose such a choice."<sup>347</sup> For example, Professors Sedler and Twerski argue that because of this respect for state sovereignty, Congress should only consider adopting substantive tort law when it can "demonstrate an overriding necessity" for

ability to affect choice-of-law decisions. . . . Finally, there is even ample precedent for federal preemption of areas of state law in which states' interest are appropriately characterized as traditional, active, and significant.

Reavley & Wesevich, *supra* note 50, at 19-21.

339. Mullenix, *supra* note 9, at 1631-32; *see also* Juenger, *supra* note 299, at 920-21 ("[I]t can hardly be denied that equal justice in mass [tort] cases would be considerably enhanced by a uniform body of federal law.").

340. *See* Mullenix, *supra* note 9, at 1628; *see also* Mullenix, *supra* note 17, at 1078 n.203. Professor Kramer muses: "Congress has declined to legislate—whether from lack of political will, the urge to toady to palm-greasing lobbyists, or wisdom in recognizing the benefits of leaving states a role." Kramer, *supra* note 47, at 550.

341. *See* Pamela M. Madas, *To Settlement Classes and Beyond: A Primer on Proposed Methods for Federalizing Mass Tort Litigation*, 28 SETON HALL L. REV. 540, 562-68 (1997) (proposing that substantive mass-tort law could be established either through the judiciary or through an act of Congress"); *see also* Mullenix, *supra* note 15, at 779-91.

342. *See, e.g.*, Russell J. Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 U. ILL. L. REV. 129, 141 nn.72-73.

343. *See* Madas, *supra* note 341, at 567; *see also* Mullenix, *supra* note 9, at 1632. ("[N]one of the major institutional law reform organizations . . . have ever seriously even mentioned the possibility of substantive mass-tort legislation."); Symeonides, *supra* note 34, at 855 (noting that reform via substantive tort law is generally regarded as "utopian").

344. *See* Sedler, *supra* note 3, at 1088.

345. Gottesman, *supra* note 8, at 30 (describing tort law as an area that has "traditionally been left to state control").

346. *Id.*

347. Symeonides, *supra* note 34, at 852 (emphasis in original); *see also* Sedler & Twerski, *Sacrifice Without Gain*, *supra* note 116, at 83 ("[T]he measure of Congress' constitutional power is not the measure of a *proper* exercise of that power.") (emphasis in original).

a federal solution to justify “such a radical subversion of state sovereignty.”<sup>348</sup> As a general rule, scholars like Sedler and Twerski believe that the problems inherent in “garden-variety” mass-tort litigation do *not* warrant federal substantive tort law.<sup>349</sup>

Many scholars disagree with this assessment. For example, although Professor Linda Mullenix admits that mass-tort litigation may not present a compelling case for federalization by some traditional analyses, she nevertheless argues that the unique characteristics and problems of mass-tort cases justify enactment of substantive mass-tort law legislation, presumably regardless of state sovereignty issues.<sup>350</sup> She argues that mass-tort litigation is a “peculiar litigation phenomenon which transforms the simple state tort into something conceptually different. This difference supports the need for federalization.”<sup>351</sup> Indeed, even Professors Sedler and Twerski admit that enactment of federal substantive tort law will occasionally be justified:

We do not argue that it is improper in all circumstances for Congress to modify state law applicable to [mass-tort cases]. In certain limited circumstances, Congress may conclude that national interests require displacement of state law, and that diverse or cumulative imposition of liability *in cases with interstate or international ramifications impose an “undue burden” on interstate commerce.* . . . Where Congress legislates by creating substantive law to resolve a problem of national significance, it presumably has done so after having weighed the merits of the issue, and chosen a national solution to it . . . [In] *the true mega-mass disaster cases* . . . *there is no alternative to directly federalizing the cause of action* and fashioning special rules that will address both the procedural and substantive law problems which are indigenous to them.<sup>352</sup>

Most scholars concede that in the immediate future, Congress is not likely to enact substantive tort law that would cover the *full gamut* of mass-tort litigation, or even a

348. Sedler & Twerski, *Sacrifice Without Gain*, *supra* note 116, at 85. Reavley and Wesevich state that Congress, if it decides to act at all, will generally opt for the action that intrudes the least on state sovereignty and tort law. Reavley & Wesevich, *supra* note 50, at 35 (“[A]lthough federal substantive law could facilitate fairness and efficiency in the resolution of . . . mass-tort cases, Congress will not reach this option as long as it recognizes others that are less intrusive and easier to implement.”).

349. *See* Sedler & Twerski, *Sacrifice Without Gain*, *supra* note 116, at 85-86.

350. Mullenix, *supra* note 15, at 763-72 (noting that mass-tort litigation seems to be an “uncompelling candidate for federalization” when viewed through the lens of the Federal Judicial Center’s framework to decide whether an area of the law should be federalized).

351. *Id.* at 782 (pointing to difficulties with procedural consolidation and complex issues in ascertaining applicable substantive law as two reasons for this “transformation”). Professor Mullenix then offers several alternative justifications for federalization. First, mass-tort litigation has already been de facto federalized. *Id.* at 786-87; *see also* text accompanying notes 40, 307-08. Second, “existing procedural rules and doctrine have proved significantly ineffective to resolve aggregate mass tort litigation.” Mullenix, *supra* note 15, at 787-88.

352. Sedler & Twerski, *Sacrifice Without Gain*, *supra* note 116, at 86-87, 106-07 (emphasis added).

significant portion thereof.<sup>353</sup> However, some scholars believe that *incremental* federalization of certain key “problem areas” such as products liability litigation is currently politically feasible.<sup>354</sup> For example, Congress has arguably “already taken steps toward nationalizing products liability law,” and at least one scholar urges Congress to “continue these steps and develop a workable solution to mass tort litigation.”<sup>355</sup> In fact, Congress has enacted nearly a dozen incremental federal tort reform laws over the past several years.<sup>356</sup> Although not dealing directly with mass-tort issues, these laws demonstrate that Congress is becoming “more and more accustomed” to enacting incremental tort reform legislation that preempts state tort law.<sup>357</sup> Arguably, the incremental tort reform trend is gaining steam, for “the proponents of . . . incremental tort reforms are able to hold them up as examples to help get the next [tort reform passed], or to save one that might be challenged in court.”<sup>358</sup> In light of this trend, the possibility of Congress enacting incremental substantive mass-tort reforms no longer seems unrealistic and politically infeasible.

Some scholars have suggested another mode of congressional intervention. In theory, Congress could federalize a particular mass-tort cause of action *without* explicitly defining the substantive standards to be applied by the courts, thereby leaving it up to the federal judiciary to flesh out the substantive law<sup>359</sup> via creation of

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353. See, e.g., Madas, *supra* note 341, at 567.

354. See, e.g., *id.* at 562-68; Trautman, *supra* note 330, at 1730-41.

355. Madas, *supra* note 341, at 567.

356. Terry Carter, *Piecemeal Tort Reform*, A.B.A. J., Dec. 2001, at 50, 53; see, e.g., Aviation Disaster Family Assistance Act of 1996, Pub. L. No. 104-264, § 702, 110 Stat. 3213, 3265 (codified at 49 U.S.C. § 1136 (Supp. V 1999)) (preventing lawyers and insurance companies from contacting airplane crash survivors or families of crash victims for thirty days); Bill Emerson Good Samaritan Food Donation Act of 1996, Pub. L. No. 104-210, 110 Stat. 3011 (codified at 42 U.S.C. § 1791 (Supp. V 1999)) (limiting liability for lawsuits and criminal prosecutions of people and corporations donating food to the needy); Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, § 161, 111 Stat. 2570, 2577 (codified at 49 U.S.C. § 28,103 (Supp. V 1999)) (setting a \$200 million limit for damages in a single rail accident and requiring evidence of flagrant indifference to the safety of injured parties in order to recover punitive damages); Biomaterials Access Assurance Act of 1998, Pub. L. No. 105-230, 112 Stat. 1519 (codified at 21 U.S.C. § 1604 (Supp. V 1999)) (relieving suppliers of raw materials or components for medical devices from liability unless they failed to meet product specifications); Year 2000 Information and Readiness Disclosure Act of 1998, Pub. L. No. 105-271, 112 Stat. 2386 (codified at 15 U.S.C. § 6612 (Supp. V 1999)) (limiting liability in civil suits stemming from Year 2000 computer failures).

357. Carter, *supra* note 356, at 52.

358. *Id.*

359. See, e.g., Atwood, *supra* note 5, at 25 (“Congress on rare occasion has provided federal jurisdiction over a type of controversy without establishing substantive standards to be applied by the courts.”); see also Juenger, *supra* note 299, at 921 (stating that it is within the power of Congress to enact a statute empowering federal courts to create substantive rules on their own); P. John Kozyris, *The Conflicts Provisions of the ALI’s Complex Litigation Project: A Glass Half Full?*, 54 LA. L. REV. 953, 955 (1994) (stating that Congress could solve the “choice-of-law dilemma by dumping the problem on the lap of the federal courts called upon

federal common law.<sup>360</sup> While a few scholars have viewed this possible approach favorably,<sup>361</sup> most scholars criticize it for two reasons. First, the choices that the courts would have to make to develop the substantive law “are so complex and laden with policy choices” that the process is “ideally suited for the legislative process.”<sup>362</sup> Second, a “long period of uncertainty” would result while the federal courts struggled to define the substantive law on a circuit-by-circuit basis, waiting for Supreme Court guidance that might never arrive.<sup>363</sup> As a result, if Congress decides to enact substantive mass-tort legislation, it should probably include *explicit* substantive standards for the courts to apply and interpret. It should not put the fundamental lawmaking process in the hands of the judiciary.

### *B. Applying the Reform to September-11-Based Mass Toxic Torts*

It is likely that the American public will not tolerate September-11-based litigation that deteriorates into the type of contentious and drawn-out debacle that often occurs in high-profile mass-tort litigation. Unfortunately, however, the current system is not likely to prevent this from happening. As discussed in Part II.B., the choice-of-law

to create new types of common law”); Rubin, *supra* note 19, at 444 (“Congress . . . has the power to give the courts a mandate to develop . . . a uniform [substantive] rule.”).

360. Federal common law is the body of decisional law developed by the federal judiciary that derives its authority from the federal courts’ judgments and decrees. BLACK’S LAW DICTIONARY 60 (6th ed. 1990). “The application of this body of common law is limited by the *Erie* doctrine and by the Rules of Decision Act, which provides that except for cases governed by the *Constitution*, the treaties of the United States, or *acts of Congress*, federal courts are to apply *state law*.” *Id.* (emphasis added). As a result, when a federal court has jurisdiction over a case solely based on diversity of citizenship—a situation that includes, as discussed above, the vast majority of mass toxic-tort cases, *see supra* text accompanying notes 14-15—the federal court must apply and interpret the *state law* as it thinks the highest state court would do. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

361. *See Juenger, supra* note 299, at 921-22 (stating that it would be sensible to entrust the task of formulating substantive rules to the federal courts—as opposed to Congress—because federal judges “can rely on a fully formed body of case law, including . . . products liability rules”); *see also* Rubin, *supra* note 19, at 444 (arguing that federal courts, “[i]f given the duty and the power to apply a uniform product liability law,” could apply, for example, the principles embodied in the Restatement (Second) of Torts).

362. Kozryis, *supra* note 359, at 955.

363. *Id.* As the Fifth Circuit explained in the context of asbestos litigation:

First, any decision by this court to displace state law would be effective only within our geographical jurisdiction. While it is of course possible that other circuits would in time follow our lead, [this is not guaranteed.] Unless and until the Supreme Court imposes a similar federal common law on the country as a whole, any federal substantive rules fashioned by us would exacerbate the alleged inequities among claimants . . . . Such a result, in turn, would encourage a massive effort at forum-shopping . . . .

Mullenix, *supra* note 17, at 1079 n.204 (quoting *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1326 (5th Cir. 1985)).

procedures that the Act establishes for handling eventual September-11-based mass-tort litigation will arguably be inefficient, unfair, and inappropriate.<sup>364</sup> Not only will the legitimate interests of potentially injured parties be put at risk by the inefficiency and inequity of the Act's procedures, but the Act's procedures will also tend to ignore the *national* interests likely to be involved in the eventual litigation. Indeed, it is difficult to imagine litigation that would implicate national interests more than September-11-based mass torts, because these cases will stem from the consequences of terrorist acts that were intended to be attacks *on our nation as a whole*. Perhaps recognizing this, Congress and the Justice Department highlighted these important national interests in the Act and its regulations.<sup>365</sup>

To help remedy the Act's choice-of-law problems, Congress should streamline and simplify the eventual toxic-tort litigation as much as possible. To date, Congress has already taken helpful steps to make the litigation more manageable.<sup>366</sup> However, Congress should finish the task by enacting legislation that establishes substantive tort law standards to deal with the major legal and factual issues destined to arise in the upcoming toxic-tort litigation. Indeed, establishing a limited body of substantive tort law would likely rectify efficiency and equity problems, preserve the strong national interests likely to be involved in the future litigation, and help prevent a public-opinion backlash against those whom the public perceives to be profiting from a national tragedy.

First, establishing substantive tort law standards would make the litigation more efficient and fair. For example, if Congress were to adopt substantive standards, the Southern District of New York would then have a singular body of tort law with which to decide cases, thereby eliminating the need for time-consuming choice-of-law inquiries.<sup>367</sup> In addition, a uniform standard would promote equity by ensuring that the *same* conduct and liability standards would apply to *all* similarly situated plaintiffs. Currently, the Act fails to ensure fair results because it directs the Southern District to apply New York choice-of-law rules and, by extension, a variety of different substantive tort laws. If Congress were to include legislative measures to ensure that damage awards were distributed meritoriously and promptly, it could promote equity even further.

Second, substantive standards would protect the unique national interests involved in the litigation. Congress passed the Act for at least two reasons: to minimize damage to the national economy due to business failures caused by crushing liability, and to ensure that victims would receive fair and prompt compensation. Effectively, Congress determined that the national interest required the nation to accept collective responsibility for compensating victims and protecting business sectors vital to the nation's economy. As the Justice Department stated, the Act and the Fund are "an

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364. See *supra* Part II.B.

365. See Interim Rule, *supra* note 251, at 66,275.

366. For example, as noted earlier, the Act ensures consolidation of lawsuits in the Southern District of New York. See *supra* text accompanying notes 264-65.

367. Of course, a body of substantive tort law covering toxic exposure claims would help simplify litigation beyond merely eliminating choice-of-law problems. For example, Congress could address other toxic-tort "problem areas" such as causation and indeterminate defendant issues.

attempt by the American people to demonstrate their solidarity with, and generosity for, those injured by the . . . attack on our country.”<sup>368</sup> In light of this, it is perplexing that Congress would declare the matter to be of such paramount national importance that the nation must take collective financial responsibility for it, yet declare that undoubtedly myopic state law—in the sense that it does not consider *national* concerns—will serve as the applicable substantive law. It is likely that the eventual toxic-tort litigation—or any September 11-based litigation, for that matter—will probably produce an impact on interstate commerce and the national economy *that no other litigation in our nation’s history has produced*. Indeed, the estimated potential liability for *asbestos contamination alone* is \$8 billion to \$20 billion.<sup>369</sup> To leave such crucial and weighty national matters to the arguable “vagaries of state law” is potentially unwise. Congress can, and should, protect these national interests by enacting substantive law that reflects these concerns and takes *state* substantive tort law out of the picture.

Third, uniform substantive standards that simplify and streamline the litigation process would help contain the outrage that many Americans would feel if and when the litigation balloons out of control. Despite the fact that the Act’s Fund will funnel a certain number of claims away from litigation and into the Fund, there will likely still be an extraordinary amount of litigation. Indeed, as discussed previously, the vast majority of potential plaintiffs claiming injury due to exposure to toxic substances will not be eligible for the Fund and will therefore need to litigate to recover at all.<sup>370</sup> This morass of litigation will undoubtedly fare poorly in the court of public opinion once the litigation deteriorates into a shoving match with attorneys elbowing each other to dig into the defendants’ deep pockets.

In arguing that Congress should enact substantive tort law to simplify September-11-based litigation, it is useful to evaluate the argument through the lens of scholars’ commentary on the viability and propriety of enacting federal substantive tort law. While some scholars urge restraint in the use of federal substantive tort law due to federalism concerns, practically all agree that *certain circumstances* warrant its development.<sup>371</sup> However, most scholars feel that development of substantive tort law is, as a general matter, politically unrealistic.<sup>372</sup>

Professors Sedler and Twerski, the foremost opponents of federalizing substantive tort law, themselves admit that Congress may appropriately adopt substantive tort law when it can “demonstrate an overriding necessity” for a federal solution.<sup>373</sup>

In certain limited circumstances, *Congress may conclude that national interests require displacement of state law, and that diverse or cumulative imposition of liability in cases with interstate or international ramifications impose an “undue burden” on interstate commerce. . . .* Where Congress legislates by creating substantive law to resolve a *problem of national*

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368. Interim Rule, *supra* note 251, at 66,275.

369. Updegrave, *supra* note 212.

370. *See supra* text accompanying notes 260-63.

371. *See supra* Part III.A.

372. *See supra* Part III.A.

373. *See supra* text accompanying note 348.

*significance*, it presumably has done so after having weighed the merits of the issue, and chosen a national solution to it . . . . [In] *the true mega-mass disaster cases . . . there is no alternative to directly federalizing the cause of action and fashioning special rules that will address both the procedural and substantive law problems which are indigenous to them.*<sup>374</sup>

September-11-based mass-tort litigation appears to be one of these “limited circumstances.” If even the harshest critics of federal substantive tort law concede that its development would be appropriate to deal with September-11-based mass-tort litigation, then the only remaining question is whether its development is politically feasible.

Scholars have argued that *incremental* federalization of substantive mass-tort law is currently a realistic option, and Congress has recently demonstrated a willingness to preempt state tort law via incremental substantive tort reforms.<sup>375</sup> If Congress were to enact substantive tort law to cover certain aspects of September-11-based litigation—for example, subsequent toxic torts—this would indeed be incremental in nature, thereby making the option more politically feasible. In addition, the political climate has undoubtedly changed in Congress since September 11, and it is reasonable to assume that Congress would be *even more willing* to preempt state tort law in a time of crisis. Indeed, Congress has *already enacted substantive tort law* with respect to September-11-based claims by not only declaring that the Fund “shall not consider negligence or any other theory of liability”<sup>376</sup> in evaluating claims, but also by charging the Justice Department with the task of promulgating substantive and procedural regulations to implement the Fund.<sup>377</sup> Indeed, it can no longer be said that congressional federalization—especially incremental federalization—of substantive tort law is unrealistic and politically infeasible.

Thus, Congress should implement one of two options: 1) Congress should enact substantive tort law that would cover the future September-11-based toxic-tort litigation *or*, perhaps ideally, 2) Congress should amend the Act to bring future toxic-tort plaintiffs under the control of the Fund *and* direct the Justice Department to promulgate regulations creating substantive and procedural standards by which to evaluate and administratively adjudicate the toxic-tort claims. As the Justice Department stated, “Congress might later consider whether an administrative program for latent harm caused by the September 11, 2001, terrorist-related aircraft crashes may be appropriate.”<sup>378</sup> Congress should strongly consider doing so.

In sum, although the Act partially reduces the burden of the choice-of-law issues that will plague the seemingly inevitable September-11-based mass toxic-tort litigation, choice-of-law issues still threaten to make the future litigation unmanageable, inefficient, and unfair. Congress should solve these

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374. Sedler & Twerski, *Sacrifice Without Gain*, *supra* note 116, at 86-87, 106-07 (emphasis added).

375. *See supra* text accompanying notes 354-59.

376. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 405(b)(2), 115 Stat. 230 (2001).

377. *Id.* § 407.

378. Interim Rule, *supra* note 251, at 66,276.



problems—problems that are inherent in mass-tort litigation generally—by enacting a uniform body of federal substantive tort law that would cover the issues likely to arise in the September-11-based toxic-tort litigation. The issues likely to arise include the applicable standards of conduct and issues of liability, proof, and causation. Although Congress has historically balked at preempting state tort law, in recent years it has shown a willingness to undertake incremental federalization of substantive tort law. This new political climate, combined with the uniquely national interests that will be involved in September-11-inspired litigation, make incremental federalization of substantive tort law covering future toxic-tort litigation a viable and necessary option.

#### CONCLUSION

To solve the choice-of-law problems that will likely result from future September-11-based mass toxic-tort litigation, Congress should establish a body of federal substantive mass-tort law to handle this litigation. Specifically, Congress should either 1) enact substantive tort law that would cover the future toxic-tort litigation, or 2) amend the Air Transportation Safety and System Stabilization Act to bring future toxic-tort plaintiffs under the control of the Fund and direct the Justice Department to promulgate regulations creating substantive and procedural standards by which to evaluate and administratively adjudicate the toxic-tort claims.