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Transfer and Choice of Federal Law: The Appellate Model

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TRANSFER AND CHOICE OF FEDERAL LAW: THE APPELLATE MODEL

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Choice of law questions are among the most complicated in the American procedural system. In cases in which state law supplies the rule of decision, the laws of fifty sovereigns are potentially applicable to every dispute. State courts employ choice of law rules to determine which state's law governs a particular controversy.[1] Federal district courts exercising diversity jurisdiction employ the same choice of law rules as the courts of the state in which they are located.[2]

The choice of law problem is complicated by transfers of cases from one district court to another within the federal system.[3] In *Van Dusen v. Barrack*,[4] the United States Supreme Court held that after the transfer of a diversity case on the defendant's motion from a court that had the power to entertain the action, the transferee court should apply the same law that the transferor court would have applied.[5] This article considers whether and to what extent the *Van Dusen* rule should apply to transferred cases containing federal issues.

For illustrative purposes, assume that a plaintiff brings an action pursuant to section 14(a) of the Securities Exchange Act of 1934,[6] and Rule 14a-9 promulgated thereunder,[7] and alleges that the de-

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1. *See infra* section III.A.

2. *See infra* text accompanying notes 165-67.

3. The difficulty of determining the proper effect of transfer upon choice of law is eloquently demonstrated by the change of views of one eminent commentator within a five-year period. *Compare* Brainerd Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 501-03 (1955) [hereinafter Currie, *Change of Venue*] (supporting the application of federal choice of law principles in transferred state law cases) *with* Brainerd Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341, 348 (1960) (arguing that transferor state law should apply).

4. 376 U.S. 612 (1964).

5. *See infra* section I.B.1.

6. 15 U.S.C. § 78n(a) (1988).

7. 17 C.F.R. § 240.14a-9 (1994).

fendant negligently committed fraud in connection with a proxy solicitation. The plaintiff files a lawsuit in the United States District Court for the Southern District of New York. The plaintiff chooses this court because it lies within the Second Circuit, which permits negligence actions under section 14(a).[8] In light of the broad jurisdictional and venue rules that apply to securities fraud actions, the Southern District of New York is a proper forum.[9] The court then transfers the case to the United States District Court for the Northern District of Ohio, which lies within the Sixth Circuit. The Sixth Circuit has held that section 14(a) requires proof of scienter.[10] Should the Northern District of Ohio apply the law of the Second or the Sixth Circuit? The plaintiff's ability to proceed with the case depends on the answer to this question.

Among the early cases, two lines of authority developed. Prior to *Van Dusen,* federal courts considered whether to transfer cases containing federal issues to circuits that interpreted federal law less favorably from the plaintiff's perspective. These courts generally assumed that transferee federal law would apply and held that an unfavorable change of law from the plaintiff's perspective did not prevent a transfer.[11] After *Van Dusen,* federal courts continued to take the view that transferee federal law applies after a permanent transfer pursuant to 28 U.S.C. § 1404(a).[12]

Four years after *Van Dusen,* Congress passed the Multidistrict Litigation Act (MDL Act).[13] The MDL Act allowed the Judicial Panel on Multidistrict Litigation (JPML) to consolidate cases for

8. *See* Wilson v. Great Am. Indus., 855 F.2d 987, 995 (2d Cir. 1988); Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1298-1301 (2d Cir. 1973).

9. *See* 15 U.S.C. § 78aa (1988); Busch v. Buchman, Buchman & O'Brien, 11 F.3d 1255, 1256-58 (5th Cir. 1994) (noting that under the Securities Exchange Act, service of process is nationwide); Conover v. Dean Witter Reynolds, Inc., 794 F.2d 520, 527 (9th Cir. 1986) (noting that under the Securities Exchange Act, venue lies in any district where any portion of the defendant's illegal conduct occurred), *vacated on other grounds,* 482 U.S. 923 (1987).

10. *See* Adams v. Standard Knitting Mills, Inc., 623 F.2d 422, 428-31 (6th Cir.), *cert. denied,* 449 U.S. 1067 (1980).

11. *See infra* section II.A.1.

12. 28 U.S.C. § 1404(a) (1988); *see infra* note 149 and accompanying text. Section 1404(a) transfers are premised on the propriety of the original venue. If the original venue is improper, transfer is accomplished pursuant to 28 U.S.C. § 1406(a) (1988). Section 1406 transfers pose no choice of law problems. If the original venue is improper, the plaintiff's act of filing cannot establish a choice of law baseline for subsequent proceedings. It is well accepted that transferee law applies after § 1406 transfers. *See, e.g.,* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 243 & n.8 (1981); Nelson v. International Paint Co., 716 F.2d 640, 643-44 (9th Cir. 1983); Ellis v. Great S.W. Corp., 646 F.2d 1099, 1109-11 (5th Cir. 1981). Consequently, references in this article to permanent transfers are to § 1404(a) transfers.

13. Pub. L. No. 90-296, § 1, 82 Stat. 109 (1968) (codified as amended at 28 U.S.C. § 1407 (1988)).

pretrial proceedings.[14] The MDL Act contemplated that transferred cases would be remanded to their original fora after the completion of pretrial proceedings.[15] MDL transferee courts, relying on *Van Dusen* with little analysis, applied transferor law on federal issues. These courts neglected to consider whether the *Van Dusen* rule should apply to federal issues and what difference, if any, the MDL posture of the case made.[16]

Thus, in the early 1980s it was well established that transferee federal law applies after permanent transfers and transferor federal law applies after MDL transfers. Then, in 1984, Professor Richard Marcus wrote a seminal article on transfer and choice of federal law.[17] Marcus viewed *Van Dusen* as based on federalism considerations that were irrelevant in the federal issue context.[18] He argued that every federal judge has the ability and the duty to determine the content of federal law independently, without regard to the positions judges in other federal circuits have taken. Marcus called this conclusion the principle of competence.[19] Based on this principle, Marcus argued that a district court should apply the law of its own circuit after both MDL and permanent transfers.[20]

In *In re Korean Air Lines Disaster of September 1, 1983*,[21] which involved an MDL transfer, the United States Court of Appeals for the District of Columbia Circuit became the first court to consider in depth the effect of transfer on choice of federal law. Relying heavily on Marcus's analysis and his principle of competence, the court held that transferee federal law should apply. The court considered whether there was any reason to distinguish MDL transfers from permanent transfers and held, as Marcus had suggested, that there was not.[22] *Korean Air Lines* changed the legal landscape. Although *Korean Air Lines* confirmed the view that transferee federal law applies after permanent transfers, it repudiated the view that transferor law applies after MDL transfers. Other courts have

14. *See* 28 U.S.C. § 1407(a) (1988).

15. *See* 28 U.S.C. § 1407(a) (1988).

16. *See infra* section II.A.2.

17. *See* Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677 (1984).

18. *See id.* at 693-701; *see also infra* text accompanying notes 160-68.

19. *See* Marcus, *supra* note 17, at 702-09; *see also infra* text accompanying notes 169-70.

20. *See* Marcus, *supra* note 17, at 709-19; *see also infra* text accompanying note 171.

21. 829 F.2d 1171 (D.C. Cir. 1987), *affd. sub nom.* Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989).

22. 829 F.2d at 1174-76; *see also infra* section II.C.

uniformly followed *Korean Air Lines* in both contexts.[23] As a consequence, the federal courts are approaching a new consensus that transferee federal law applies regardless of the type of transfer.

Recent commentators have challenged Marcus's views and the *Korean Air Lines* case and have urged that transferor law should govern federal issues after both MDL[24] and permanent[25] transfers. The Marcus article and the *Korean Air Lines* decision have also been undercut to some extent by the Supreme Court's decision in *Ferens v. John Deere Co.*,[26] which held that after the transfer of a diversity case on the plaintiff's motion, transferor law continues to apply on state law issues. The Court viewed *Van Dusen* as protecting more than federalism concerns. It believed that *Van Dusen* was also based on the desirability of divorcing transfer decisions from choice of law considerations and preserving whatever advantages are entailed in the plaintiff's right to pick the forum.[27]

In light of recent developments, a reexamination of the position that transferee federal law applies regardless of the context is in order. This article argues that the consensus that existed prior to the Marcus article and the *Korean Air Lines* case, although not based upon the most thorough analysis, comprises the better view: transferee federal law should apply after permanent but not MDL transfers.

Part I of this article examines the Supreme Court's precedents in the analogous forum non conveniens and diversity transfer contexts. Part II examines relevant legal developments with regard to the transfer of cases containing federal issues. Part III considers which law should apply after the permanent transfer of a case containing federal issues and concludes, consistent with the weight of authority, that transferee federal law should apply. Part III, however, supplies a different rationale for this result than the currently prevailing view. In the absence of controlling Supreme Court authority, when a case containing federal issues is commenced in federal court, a district court does not ask which circuit deserves to have its law applied or utilize any choice of law principle. A district court applies the law of its circuit because its circuit court is the

23. *See infra* section II.D.

24. *See, e.g.*, Ross Daryl Cooper, *The D.C. Circuit Review, September 1987 - August 1988, The Korean Air Disaster: Choice of Law in Federal Multidistrict Litigation*, 57 GEO. WASH. L. REV. 1145 (1989).

25. *See, e.g.*, Tom M. Fini, Note, *The Scope of the* Van Dusen *Rule in Federal-Question Transfers*, 1992/1993 ANN. SURV. AM. L. 49.

26. 494 U.S. 516 (1990).

27. 494 U.S. at 524-30; *see also infra* section I.B.3.

next-higher court in the federal hierarchy — the court that will review its decisions. After a permanent transfer, a transferee district court should continue to apply the law of its circuit on federal issues because its circuit, rather than the transferor circuit, has appellate jurisdiction over the case. I call this view the "appellate model." Part III also concludes that *Van Dusen* and *Ferens* do not require a departure from the appellate model.

Although the appellate model reaches the same result as the prevailing weight of authority in the permanent transfer context, it reaches a different result in the MDL context. Part IV argues that after an MDL transfer the transferee court should continue to apply transferor federal law. The MDL scheme contemplates that at the conclusion of pretrial proceedings, cases will be remanded to their original fora for trial. As a consequence, any appeal after remand, trial, and final judgment will be to the transferor court of appeals, and the MDL district court should apply that circuit's law.

I. Analogous Supreme Court Authority

At present, the Supreme Court has not addressed the effect of transfer on the law applicable to federal issues. Any relevant Supreme Court learning must be derived from the Court's decisions in the forum non conveniens and diversity transfer contexts. These cases suggest that the plaintiff has a privilege in the forum selection process that includes the right to influence choice of law. This choice of law advantage is viewed as a vested right that should not be disturbed by transfer. Part I examines the plaintiff's venue and choice of law privileges and their potential application to the federal issue context.

A. *The Plaintiff's Venue Privilege*

The Supreme Court explicitly endorsed a plaintiff's venue privilege in *Gulf Oil Corp. v. Gilbert*.[28] Prior to 1948, transfers within the federal system were impossible. In *Gulf Oil*, the Supreme Court affirmed the dismissal of a case pursuant to the common law doctrine of forum non conveniens so that a lawsuit legitimately brought in one federal district could be tried in another.[29] As a

28. 330 U.S. 501, 507-08 (1947).

29. *See* 330 U.S. at 505-12. The *Gulf Oil* decision has been questioned on the ground that forum non conveniens dismissals are inappropriate if the plaintiff has chosen a legitimate forum. *Cf.* Currie, *Change of Venue, supra* note 3, at 420-34 (arguing that forum non conveniens dismissals are inappropriate, even in the absence of transfer provisions, when the alternate forum lies within the federal system); Allan R. Stein, *Forum Non Conveniens and*

consequence, for a short time the forum non conveniens doctrine served as a proxy for transfer.[30]

The *Gulf Oil* Court identified two categories of factors that are relevant in ruling on forum non conveniens motions. First, the district court must consider private interest factors, which include access to sources of proof, availability and cost of securing the attendance of witnesses, potential for viewing premises, ability to enforce any judgment, relative obstacles and advantages to a fair trial, and "all other practical problems that make trial of a case easy, expeditious and inexpensive."[31] Second, the district court must consider public interest factors, such as preventing docket congestion, limiting the burden of jury duty to communities with a relation to the litigation, making it possible for citizens to view proceedings with an impact on their communities, and holding the trial of a diversity case before a judge conversant with local law.[32]

In applying this multifactor balancing test, the Court noted that the plaintiff's choice of forum is entitled to great respect: "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[33] Because forum non conveniens and transfer decisions are analogous, the *Gulf Oil* factors apply in the transfer context. However, because transfer involves less significant consequences to the plaintiff than a forum non conveniens dismissal, a lesser showing of inconvenience is re-

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the Redundancy of Court-Access Doctrine, 133 U. PA. L. REV. 781, 841-46 (1985) (arguing that forum non conveniens should be replaced by more stringent standards for jurisdiction).

30. In 1948, in response to the problems posed by *Gulf Oil,* Congress passed the first statute allowing transfer from one legitimate federal forum to another "[f]or the convenience of parties and witnesses" and "in the interest of justice." Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 937 (codified as amended at 28 U.S.C. § 1404(a) (1988)). Federal courts now employ the forum non conveniens doctrine only when the alternative venue lies beyond the federal system. *See, e.g.,* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

31. 330 U.S. at 508.

32. 330 U.S. at 508-09. One commentator has suggested that the *Gulf Oil* factors are often disregarded. *See* Peter G. McAllen, *Deference to the Plaintiff in Forum Non Conveniens,* 13 S. ILL. U. L.J. 191, 239-42 (1989).

33. 330 U.S. at 508. On the specific facts before it, the Court held that the district court did not err in finding that *Gulf Oil* was "one of those rather rare cases where the [forum non conveniens] doctrine should be applied." 330 U.S. at 509. Respect for the plaintiff's original choice of venue may have decreased over time. *See* Edmund W. Kitch, *Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice,* 40 IND. L.J. 99, 101 (1965) (observing that district courts "have granted transfer on a steadily decreasing showing of inconvenience"); McAllen, *supra* note 32, at 240 (identifying a " 'liberal trend' in *forum non conveniens*" according to which "courts are becoming more likely to grant a dismissal on the basis of a particular showing of inconvenience than they would have been in years past"); Stein, *supra* note 29, at 831 (noting a "dramatic increase in the use of forum non conveniens" between 1965 and 1985).

quired to obtain transfer.[34] As a result, the plaintiff's venue privilege continues to be recognized in the transfer context but has less weight than in the forum non conveniens context.[35]

One may fairly question why the plaintiff should have a right superior to the defendant to influence venue. Although some commentators have tried to justify this right based on characteristics that distinguish plaintiffs from defendants,[36] the plaintiff's venue privilege is best explained as an efficiency mechanism.[37] The legislature creates rules of subject matter jurisdiction, personal jurisdiction, and venue that limit potential fora but often identify more than one forum as proper. Some actor must decide which of these

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34. *See, e.g.,* Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955) (finding that Congress intended the phrase "[f]or the convenience of parties and witnesses, in the interest of justice" in § 1404(a) to allow courts to grant transfers upon a lesser showing of inconvenience than traditionally required under a forum non conveniens analysis).

35. *See, e.g.,* 349 U.S. at 32; Club Assistance Program, Inc. v. Zukerman, 598 F. Supp. 734, 736 (N.D. Ill. 1984) ("[P]laintiff's forum selection is significantly less weighty under Section 1404(a) than under forum non conveniens."); Air Express Intl. Corp. v. Consolidated Freightways, Inc., 586 F. Supp. 889, 891 (D. Conn. 1984) (stating that under § 1404(a) plaintiff's choice of forum is controlling absent a showing of inconvenience); Cheeseman v. Carey, 485 F. Supp. 203, 215 (S.D.N.Y.) ("[P]laintiff's choice of forum is entitled to respect . . . ."), *affd. on other grounds,* 623 F.2d 1387 (2d Cir. 1980); *see also* Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court,* 40 UCLA L. REV. 423, 512 (1992) (arguing that in enacting § 1404(a), Congress intended that courts give substantial deference to the plaintiff's initial choice of forum). Given the flexible nature of the *Gulf Oil* analysis, it is not surprising that there is a large variance in how much deference particular courts give to the plaintiff's choice of forum. *See* David E. Steinberg, *The Motion to Transfer and the Interests of Justice,* 66 NOTRE DAME L. REV. 443, 488-94 (1990).

36. *See, e.g.,* David E. Seidelson, *Jurisdiction of Federal Courts Hearing Federal Cases: An Examination of the Propriety of the Limitations Imposed by Venue Restrictions,* 37 GEO. WASH. L. REV. 82, 85 (1968) (arguing that the plaintiff's venue privilege flows from the presumption that the plaintiff has been wronged by the defendant); Fini, *supra* note 25, at 53 (attempting to justify the plaintiff's venue privilege on the grounds that the plaintiff is the party who has allegedly been wronged and defendants have more resources to litigate in inconvenient fora than plaintiffs); Stowell R.R. Kelner, Note, *"Adrift on an Uncharted Sea": A Survey of Section 1404(a) Transfer in the Federal System,* 67 N.Y.U. L. REV. 612, 639-40 (1992) (supporting a plaintiff's venue privilege because "for any adjudicatory system to work . . . it must . . . attract potential plaintiffs"); *see also* Louise Weinberg, *Choice of Law and Minimal Scrutiny,* 49 U. CHI. L. REV. 440, 464 (1982) (arguing that the pro-plaintiff bias of the venue and choice of law system flows from an attempt "to regulate a great common market and to rationalize a stubborn federalism").

37. Professor McAllen argues persuasively:

> The only identifiable characteristic that plaintiffs all share is that they chose to institute litigation. Some are wealthier than the defendants they sue, some are poorer. Some seek affirmative relief, others seek declaratory relief. Some claim to be victims, others claim not to have victimized. Some are individuals, some are corporations, some are governments or government agencies. It makes no more sense to confer a substantive law advantage on all plaintiffs than it would to confer a similar advantage on all who happened to wear blue last Tuesday.

McAllen, *supra* note 32, at 237 n.222; *see also* Kelner, *supra* note 36, at 618-22 (summarizing case law and pointing out that the courts have not thought this problem through clearly).

proper fora will hear the lawsuit.[38] Allowing the parties to select the venue rather than the judge saves systemic resources.[39] Allowing the plaintiff to select the venue rather than the defendant is more efficient because it involves fewer steps and does not require communication between the parties prior to the filing of a lawsuit.[40] The presumption in favor of the plaintiff's initial choice of venue prevents reconsideration except in extreme cases. Any other rule would eliminate the efficiency gains inherent in removing the judicial system from the initial forum selection process.[41]

Thus, the plaintiff's venue privilege is well founded.[42] One advantage this privilege confers on plaintiffs is the ability to influence the choice of state law.[43] Whether the plaintiff should retain this choice of law advantage if the venue changes is the subject of the next section.

B. *The Plaintiff's Choice of Law Privilege*

1. Van Dusen v. Barrack

In *Van Dusen v. Barrack,*[44] the Supreme Court broadened the plaintiff's venue privilege to include a choice of law privilege.[45] In *Van Dusen,* the Court held that transferor state law applies after the permanent transfer of a diversity case on the defendant's motion.[46] Two distinct strands of reasoning support this holding. The Supreme Court viewed the plaintiff as having a privilege to pick the initial forum — a privilege that confers certain vested rights upon the plaintiff, including the ability to influence the choice of state law. The Court believed that transfer should not disturb this privi-

38. *See* McAllen, *supra* note 32, at 242-51 (considering the models of judicial choice, plaintiff's choice, and defendant's choice).

39. *See id.* at 247.

40. *See id.* at 248-49 & n.264 (noting that the defendant's choice model would require procedures intervening between the plaintiff's decision to sue and the defendant's choice of forum).

41. *See id.* at 244-51; *see also* Earl M. Maltz, *Choice of Forum and Choice of Law in the Federal Courts: A Reconsideration of* Erie *Principles,* 79 Ky. L.J. 231, 249 (1990-91) ("If the presumption in favor of the plaintiff's choice is strong, the *forum non conveniens* inquiry will consume relatively few resources . . . .").

42. *But see* Stein, *supra* note 29, at 816-17, 844-46 (arguing that the plaintiff's venue privilege is a vestige of a time when rules of personal jurisdiction sharply limited the plaintiff's choice of fora and that this privilege should be eliminated in light of modern jurisdictional theory).

43. *See infra* text accompanying notes 203-07.

44. 376 U.S. 612 (1964).

45. *See also* Fini, *supra* note 25, at 53 (arguing that the plaintiff's venue privilege often includes a choice of law privilege).

46. *See* 376 U.S. at 626-40.

lege. The Court also rested its holding on federalism grounds and on the policies underlying *Erie Railroad v. Tompkins.*[47] Both strands of analysis are considered below.

The *Van Dusen* Court advanced two rationales for its holding that are premised on the notion that the plaintiff's venue privilege includes a choice of law privilege. First, the Supreme Court evinced concern that allowing transfer to change the applicable law would prejudice the plaintiff.[48] The Court was disturbed that in some cases the transferee forum would refuse to entertain claims that would have been actionable in the transferor forum.[49] In such circumstances, a transfer motion would be the functional equivalent of a motion to dismiss. The Court noted that transfers, like forum non conveniens dismissals,[50] had previously been granted with conditions that allowed the action to proceed in the transferee forum.[51] Applying transferor law removes any concern that changing the applicable law will prejudice the plaintiff and dispenses with the need for conditional transfers.[52]

In this regard, the Supreme Court examined "the history and purposes of § 1404(a)" and found that the transfer statute "should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorize a change of courtrooms."[53] In the Court's view, the transfer statute "was not designed to narrow the plaintiff's venue privilege or to defeat the state-law advantages that might accrue from the exercise of this venue privilege."[54]

Second, the Court noted that applying transferor law allows district courts to decide transfer questions based on efficiency considerations unhindered by concerns regarding a change in the

47. 304 U.S. 64 (1938).

48. *See* 376 U.S. at 628-30.

49. *See* 376 U.S. at 629-30.

50. *See, e.g.,* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 242 (1981) (noting that in making a forum non conveniens motion, defendants agreed to submit to the jurisdiction of the alternative forum and waive any statute of limitations defense); Hoffman v. Blaski, 363 U.S. 335, 364 (1960) (Frankfurter, J., dissenting) (noting that to obtain forum non conveniens dismissals, defendants often agree to waive jurisdictional objections); McAllen, *supra* note 32, at 205 (noting that courts have conditioned forum non conveniens dismissal on the defendant's promise to waive objections to personal jurisdiction, venue, or timeliness, to permit discovery to proceed under the rules of the original forum, and to pay any judgment).

51. *See* 376 U.S. at 630-31 & n.27.

52. 376 U.S. at 630-31.

53. 376 U.S. at 636-37.

54. 376 U.S. at 635.

applicable law.[55] Section 1404(a) requires district courts to consider "the convenience of parties and witnesses" and "the interest of justice" in deciding transfer motions.[56] Were a change of venue to result in a change in law, district courts would have to consider whether prejudice to the plaintiff requires a denial of transfer based on the interest of justice in some cases in which convenience factors weighed in favor of transfer. The *Van Dusen* rule obviates the need for this inquiry.[57]

Although the Supreme Court did not explicitly endorse a plaintiff's choice of law privilege, each of the above rationales implies such a privilege. Each rationale makes sense only if the plaintiff, through the initial choice of forum, has the right to establish a choice of law baseline that is entitled to respect from the courts. Prejudice implies more than detrimental change. Prejudice implies the loss of vested rights. If the plaintiff lacks a choice of law privilege, a transfer would not be prejudicial even if the transferee forum would not recognize, or would apply less favorable law to, the plaintiff's claim.[58] The plaintiff is prejudiced only if the initial choice of venue results in an entitlement to lock in the law applicable to the claim regardless of transfer.

The *Van Dusen* Court's notion that courts should base transfer decisions solely on efficiency considerations also implies the existence of a plaintiff's choice of law privilege. Applying transferor law is one way to accomplish this result. The Court could as easily have held, however, that transferee law applies but that a change in law is entitled to no weight in the transfer calculus.[59] Using the former approach to protect the core concerns of section 1404(a) can only be justified by an independent principle valuing the plaintiff's right to influence applicable law.

The legitimacy of the Supreme Court's assumption that the plaintiff is entitled to a greater opportunity than the defendant to influence choice of law is questionable. Such a right is not inherent in the plaintiff's venue privilege. That privilege rests on grounds that are systemic and value neutral. The plaintiff is granted the venue privilege for efficiency reasons, not because the plaintiff is

55. 376 U.S. at 636.

56. 28 U.S.C. § 1404(a) (1988).

57. *See* 376 U.S. at 636.

58. The cases applying transferee federal law have proceeded in part on this theory. *See infra* text accompanying notes 136-45.

59. The Supreme Court in the forum non conveniens context, *see infra* text accompanying notes 92-97, and the lower federal courts in the federal issue transfer context, *see infra* text accompanying notes 146-48, have adopted this approach.

more deserving than the defendant with respect to venue considerations. Despite these efficiency concerns, the plaintiff's right to choose the forum is not absolute. Given the right circumstances, defendants may remove state cases to federal court,[60] transfer cases within the federal system,[61] and have cases dismissed on forum non conveniens grounds.[62] If the defendant succeeds in vetoing the plaintiff's choice of forum, there is no venue-related reason why any choice of law advantage the plaintiff might otherwise have had should be retained.

Certain plaintiff advantages tied to forum selection evaporate if the defendant is successful in changing the forum. A plaintiff may file in state court to impose more limited discovery on the defendant than the Federal Rules of Civil Procedure would allow. If the defendant succeeds in removing the case, however, the Federal Rules, with their broad discovery provisions, will apply and the plaintiff will lose any discovery advantage.[63] The plaintiff may file in federal court in one region of the country in an attempt to influence the values of the judge or jury. Yet, if the defendant succeeds in having the case transferred to a federal court in another region of the country, the plaintiff will lose any regional advantage.[64] A forum non conveniens dismissal always has the effect of relegating the plaintiff to the law of another forum.[65] The interesting question is what, if anything, distinguishes choice of law in the transfer context from other advantages the plaintiff loses upon change of forum.[66]

60. *See* 28 U.S.C. § 1441(a) (1988) (allowing defendants to remove cases that are within the district court's original jurisdiction).

61. *See supra* note 30.

62. *See supra* text accompanying notes 31-35.

63. *See* Satellite Fin. Planning Corp. v. First Natl. Bank, 633 F. Supp. 386, 394 & n.9 (D. Del. 1986). The broad federal discovery provisions, *see* FED. R. CIV. P. 26-37, are often a significant factor in causing parties to choose federal over state court. *See, e.g.,* Jerry Goldman & Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry,* 9 J. LEGAL STUD. 93, 98 (1980) (finding that 57% of attorneys surveyed cited the superior rules of discovery as a reason for choosing federal court). Once a party removes the case to federal district court, applicable federal rules will displace any conflicting state procedural rules. *See* Hanna v. Plumer, 380 U.S. 460, 467-74 (1965).

64. For example, in *Gulf Oil* the plaintiff filed in federal court in New York, rather than in Virginia where all events relevant to the litigation occurred, because the plaintiff believed that a New York jury would be more comfortable in awarding the $400,000 sought by the plaintiff. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 510 (1947). After the Supreme Court affirmed a forum non conveniens dismissal to force the plaintiff to proceed in the Virginia forum, the potential advantage of trying the case in front of a metropolitan jury was irretrievably lost. *See also* Henderson v. American Airlines, Inc., 91 F. Supp. 191 (S.D.N.Y. 1950) (transferring a case challenging the provision of racially separate facilities in a Kentucky airport to the Eastern District of Kentucky).

65. *See infra* text accompanying notes 96-97.

66. *See Satellite,* 633 F. Supp. at 394 (analogizing the elimination of the plaintiff's choice of law privilege on transfer to the tactical advantages the defendant gains on removal).

Two strong arguments suggest that any choice of law advantage accruing to the plaintiff should not survive once the defendant successfully challenges the initial venue choice. Because of the presumption in favor of the plaintiff's venue choice, the defendant will be able to justify a transfer only in extreme cases. The fact that the plaintiff has picked a forum that is so inconvenient that transfer is justified suggests that the plaintiff has engaged in manipulative or vexatious behavior that the system should not tolerate. It is hard to justify encouraging such behavior by granting the plaintiff a choice of law privilege that survives transfer.[67]

There is, moreover, some overlap between venue and choice of law considerations. To some extent, both depend on the center of gravity of events. Thus, if the original forum is inappropriate, it is likely that transferor law is also inappropriate. The *Gulf Oil* factors are heavily based on the location of events.[68] Traditional choice of law principles favor applying the law of the place where the last act necessary to confer a claim on the plaintiff occurred.[69] Modern choice of law principles favor applying the law of the jurisdiction with the most significant relationship to the litigation.[70] As a consequence, in the majority of transferred cases, transferee law will be preferable to transferor law based on choice of law considerations and thus is the appropriate per se position to adopt if the system prefers a per se to an ad hoc rule.[71]

Because the arguments in support of a plaintiff's choice of law privilege are weak, other factors supporting the result in *Van Dusen* assume increased prominence. *Van Dusen* may be justified on the basis of efficiency concerns similar to those that underlie the plaintiff's venue privilege. To prevent expenditure of systemic resources through reconsideration of venue in a large number of cases, the plaintiff's venue choice is entitled to substantial respect. The *Van Dusen* Court noted that applying transferee law would give the defendant an incentive to engage in gamesmanship and forum shopping and to make transfer motions for reasons unrelated to the core values underlying section 1404(a): efficiency and convenience.[72] In part to prevent forum shopping by defendants, the Court rejected

67. *But see* Van Dusen v. Barrack, 376 U.S. 612, 637 n.36 (1964) (rejecting this argument to prevent transfer decisions from having outcome-determinative effects).

68. *See supra* text accompanying notes 31-32.

69. *See infra* text accompanying notes 197-200.

70. *See infra* text accompanying note 201.

71. *See* Marcus, *supra* note 17, at 698 ("[A]ny connection between the convenience of the forum and the choice of law would point to preferring the law of the transferee [forum].").

72. Van Dusen v. Barrack, 376 U.S. 612, 636 (1964).

"the rather startling conclusion that one might 'get a change of law as a bonus for a change of venue.' "[73]

The marginal efficiency benefit of the *Van Dusen* rule is unclear. The plaintiff's venue privilege already contains a substantial disincentive to filing ill-founded transfer motions. A transfer motion will not be granted unless there is a large inequity in the balance of convenience. This rule should discourage most groundless transfer motions.[74] On the other hand, courts make transfer decisions according to an inherently uncertain multifactor balancing test.[75] As a consequence, the defendant will usually have colorable grounds to argue in favor of a transfer if presented with the prospect of a favorable change in law.[76] Thus, *Van Dusen* increases to some extent the marginal efficiency of the venue system.

Federalism concerns provide the strongest support for the *Van Dusen* holding. The Court noted that its holding was "supported by the policy underlying *Erie R. Co. v. Tompkins.*"[77] *Erie* rested in large part on respect for state sovereignty[78] and a concern that the existence of federal diversity jurisdiction should not change the results in state law cases.[79] Were transferee state law to apply, the

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73. 376 U.S. at 636 (quoting Wells v. Simonds Abrasive Co., 345 U.S. 514, 522 (1953) (Jackson, J., dissenting)).

74. *See* Comment, *Choice of Law After Transfer of Venue,* 75 YALE L.J. 90, 97 (1965) (arguing that defendants have little ability to forum shop because "there [is] rarely . . . more than one most convenient forum, and it [is] dictated by objective factors over which the defendant has no control").

75. *See supra* text accompanying notes 31-32.

76. *See* Kelner, *supra* note 36, at 616 ("[L]ack of defined standards allows parties to utilize statutory transfer for purely strategic purposes, such as . . . manipulating the applicable law.").

77. *Van Dusen,* 376 U.S. at 637. For an interesting view on the relationship between *Erie* and *Van Dusen,* see Maltz, *supra* note 41. Professor Maltz argues that federal diversity jurisdiction and *Erie* are based on a " 'limited impact theory' — the principle that federal instrumentalities should have only a limited impact on the overall process of governing the nation." *Id.* at 239-40. He supports *Van Dusen* as a correct application of the limited impact theory because "by holding that a transfer [on] defendant's motion will not change the applicable law, *Van Dusen* ensures that such a transfer will have no other effects." *Id.* at 257.

78. Justice Brandeis suggested that federal courts lacked the constitutional power to promulgate federal common law in diversity cases. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78-80 (1938).

79. *See* 304 U.S. at 74-75 (objecting to the creation of federal common law in diversity cases, which "introduced grave discrimination by non-citizens against citizens" and "rendered impossible equal protection of the law"); *see also* Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) ("The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result."). As a consequence of the desire to achieve uniformity between federal and state courts in the same location, the Supreme Court has held that a large number of seemingly procedural matters are substantive for *Erie* purposes. *See, e.g.,* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555-56 (1949) (holding that requirements for shareholder derivative litigation are substantive); Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949) (holding that a door-

existence of federal diversity jurisdiction would change the result that would have occurred in the courts of the transferor state because, assuming state courts in the transferor jurisdiction would not have dismissed on forum non conveniens grounds,[80] transfers between state courts are impossible.[81] Were transferee state law to apply in the federal system, plaintiffs would have an incentive to file in state court to attempt to insulate their cases against transfer and change of law.[82] Defendants would have an incentive to remove cases to federal court in an attempt to procure transfer and change of law. Discouraging parties from choosing between federal and state courts in the same location in an attempt to obtain more favorable law is central to *Erie*.[83] Thus, the *Van Dusen* Court held that "[a] change of venue under § 1404 (a) generally should be, with respect to state law, but a change of courtrooms."[84]

Because the *Van Dusen* Court's *Erie* analysis is the most satisfying ground for its decision, there is a temptation to dismiss the other grounds. The grounds predicated upon the plaintiff's venue and choice of law privileges, however, provide independent support for the result in *Van Dusen* and appear to have primacy over the *Erie* ground. The Court discussed *Erie* only at the conclusion of its analysis of the effect of venue change on choice of law,[85] after it had already decided that the plaintiff's venue and choice of law privileges required the application of transferor law.[86] The *Van Dusen* Court noted that *Erie* applied only by analogy because *Van Dusen* itself dealt with "a congressional statute apportioning the business

closing statute is substantive); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 532-34 (1949) (holding that the tolling of a statute of limitations is substantive); *Guaranty Trust*, 326 U.S. at 108-10 (holding that the length of a limitations period is substantive); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (holding that choice of law rules are substantive).

80. *Van Dusen* reserved decision in cases in which the state where the transferor district court is located would have dismissed the case on forum non conveniens grounds. *See* 376 U.S. at 640.

81. As a consequence, *Van Dusen* held that "the critical identity to be maintained is between the federal district court which decides the case and the courts of the State in which the action was filed." 376 U.S. at 639.

82. Presumably the plaintiff would also attempt to defeat diversity and prevent removal by joining marginal nondiverse parties as defendants. Although fraudulent joinder to destroy diversity will be disregarded by the federal courts, *see, e.g.*, Poulos v. Naas Foods, Inc., 959 F.2d 69, 72-74 (7th Cir. 1992), eliminating incentives for this kind of gamesmanship was a core *Erie* concern. *See infra* note 83 and accompanying text.

83. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 73-74 (1938) (noting the widespread criticism of permitting reincorporation for the purpose of creating diversity jurisdiction and gaining access to federal court and federal common law).

84. 376 U.S. at 639.

85. *See* 376 U.S. at 637-39.

86. *See* 376 U.S. at 626-37.

of the federal courts."[87] The *Van Dusen* Court appears to have conceived of its mission more as an exercise in interpreting section 1404(a) than in applying *Erie.*

2. Piper Aircraft Co. v. Reyno

The Supreme Court's decision in *Piper Aircraft Co. v. Reyno*[88] may appear to have undercut the existence of a plaintiff's venue and choice of law privileges. Upon closer analysis, however, *Piper* does little to contradict *Gulf Oil* or *Van Dusen.* In *Piper,* the legal representative of the estates of five Scottish passengers who died in the crash of a small commercial aircraft in Scotland brought suit in a California state court against the manufacturers of the propeller and the plane — both American corporations.[89] The plaintiff admitted that she chose an American forum to take advantage of domestic law regarding liability, capacity to sue, and damages.[90] The defendants removed the action and had it transferred to the United States District Court for the Middle District of Pennsylvania. After transfer, the defendants, presumably motivated at least in part by the desire to obtain better law, moved to dismiss on forum non conveniens grounds so that the case might be tried in Scotland.[91]

In affirming the district court's decision to dismiss,[92] the Supreme Court noted that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry."[93] The Court relied on systemic factors in arriving at this conclusion. Because "[j]urisdiction and venue requirements are often easily satisfied," a wide choice of fora is usually available to the plaintiff.[94] Presumably, the plaintiff will bring the action in the forum that will apply the most favorable legal rules. Were an unfavorable change in law from the plaintiff's perspective to preclude application of the forum non conveniens doctrine, the doctrine would seldom apply, even

87. 376 U.S. at 637.

88. 454 U.S. 235 (1981).

89. *See* 454 U.S. at 238-40. Gaynell Reyno, the plaintiff, was a legal secretary to the attorney that filed the suit. She was appointed by a California court to represent the estates of the deceased passengers. 454 U.S. at 239.

90. *See* 454 U.S. at 240. Scottish law does not recognize strict liability in tort, permits only relatives to bring wrongful death actions, and limits recovery in wrongful death actions to compensation for loss of support and society. 454 U.S. at 240.

91. *See* 454 U.S. at 240-42.

92. *See* 454 U.S. at 247-61.

93. 454 U.S. at 247.

94. 454 U.S. at 250.

when the *Gulf Oil* factors pointed heavily in favor of an alternative forum.[95]

Piper went to some pains to distinguish rather than contradict *Van Dusen*. *Piper* emphasized that *Van Dusen* involved an intrasystem transfer rather than a forum non conveniens dismissal.[96] As a consequence, the *Van Dusen* Court had available a mechanism that the *Piper* Court did not: the ability to protect the plaintiff's choice of law privilege and allow venue decisions to proceed uninhibited by potential changes in the law.[97] In the forum non conveniens context, the only way to protect the plaintiff's choice of law privilege is to deny dismissal, which in some cases requires the trial to proceed in an inconvenient forum. Thus, *Piper* may be viewed as confined to the forum non conveniens context and may not disturb any choice of law privilege that *Van Dusen* recognized in the transfer context.

Moreover, despite some harsh and categorical language,[98] *Piper* lends support to the existence of a plaintiff's choice of law privilege even in the forum non conveniens context. The Court noted that "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice."[99] The Court gave as an example the case in which "the alternative forum does not permit litigation of the subject matter of the dispute."[100] Thus, the *Piper* Court agreed with *Van Dusen* that change of venue should not be the functional equivalent of dismissal on the merits. Unless the plaintiff's original choice of forum creates a vested right to the law this forum would have applied, it is hard to understand why elimination of the plaintiff's claims through change of venue causes any unfairness.

The *Piper* Court was also careful to limit its holding to the specific facts before it. The Court noted that an unfavorable change in the law should not preclude a forum non conveniens dismissal "[a]t

95. *See* 454 U.S. at 247-51. The Court also relied on the desire to avoid burdening the forum non conveniens inquiry with difficult choice of law questions. *See* 454 U.S. at 251; *see also supra* notes 31-32 and accompanying text (discussing *Gulf Oil* factors).

96. *See* 454 U.S. at 253.

97. *See* 454 U.S. at 253 n.20 (noting that *Van Dusen* cited decisions that "frequently rested on the assumption that a change in law would have been unavoidable under common law *forum non conveniens,* but could be avoided under § 1404(a)").

98. *See supra* text accompanying note 93.

99. 454 U.S. at 254.

100. 454 U.S. at 254 n.22.

least where [a] foreign plaintiff named an American manufacturer as defendant."[101] A contrary result would make American fora inordinately attractive to foreign plaintiffs and increase the congestion of the American court system.[102] The Court further acknowledged that under *Gulf Oil* "a plaintiff's choice of forum should rarely be disturbed."[103] It believed, however, that the presumption in favor of the plaintiff's choice of forum "applies with less force when the plaintiff or real parties in interest are foreign."[104] As a consequence, *Piper* holds only that an unfavorable change in law should not be a significant forum non conveniens factor when the plaintiff is foreign.[105] It does not necessarily undercut an American plaintiff's venue and choice of law privileges.

3. Ferens v. John Deere Co.

In *Ferens v. John Deere Co.*,[106] the Supreme Court returned to an issue that it had reserved in *Van Dusen*[107] and held that transferor state law applies in diversity cases even when the plaintiff requests the transfer.[108] In so doing, the Court confirmed the existence of a plaintiff's venue and choice of law privileges in strong terms. The *Ferens* Court viewed *Van Dusen* as resting on three independent considerations:

> First, § 1404(a) should not deprive parties of state-law advantages that exist absent diversity jurisdiction. Second, § 1404(a) should not create or multiply opportunities for forum shopping. Third, the decision to transfer venue under § 1404(a) should turn on considerations of convenience and the interest of justice rather than on the possible prejudice resulting from a change of law.[109]

The Court held that these considerations require the application of transferor state law without regard to which party requested the transfer.[110]

With regard to the first *Van Dusen* factor, the *Ferens* Court believed that the plaintiff has a venue privilege that includes a choice

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101. 454 U.S. at 251.

102. 454 U.S. at 252.

103. 454 U.S. at 241.

104. 454 U.S. at 255.

105. *See* McAllen, *supra* note 32, at 238 n.231 (arguing that *Piper* discusses "the question of deference to the plaintiff's choice of forum, but only in the context of explaining why there should be less deference when the plaintiff is a foreigner").

106. 494 U.S. 516 (1990).

107. *See* Van Dusen v. Barrack, 376 U.S. 612, 640 (1964).

108. *See* 494 U.S. at 519.

109. 494 U.S. at 523.

110. *See* 494 U.S. at 523.

of law privilege,[111] and that it would be wrong to eliminate the plaintiff's choice of law advantage even when the plaintiff requests the transfer.[112] This vision constitutes an extreme view of the plaintiff's choice of law privilege, because if the plaintiff requests the transfer, the transferee forum might fairly be viewed as the plaintiff's chosen venue.[113] The plaintiff is allowed to control both venue and choice of law even after, at the plaintiff's request, the two cease to be linked.[114]

The *Ferens* Court viewed the second *Van Dusen* factor — discouraging forum shopping by defendants — as largely inapplicable to plaintiff-initiated transfers.[115] Plaintiff forum shopping did not trouble the Court because, in the Court's view, the venue and choice of law privileges give the plaintiff the right to forum shop.[116] The Court's rule, however, encourages strategic conduct by plaintiffs. After *Ferens,* plaintiffs are well advised to file in fora that provide the best plaintiffs' law without regard to convenience and then seek a transfer to a more convenient venue when necessary.[117] The Court failed to explain why the plaintiff should be allowed to engage in double forum shopping — once to pick the law and once to pick the venue — or why the system should tolerate the inefficiencies attendant to such conduct.[118] Such a result might fairly be viewed as multiplying the opportunities for forum shopping, a result at odds even with *Ferens*'s view of *Van Dusen.*[119]

Applying the third *Van Dusen* factor, the *Ferens* Court believed that application of transferor law is desirable to divorce transfer

111. *See* 494 U.S at 524 (citing "[t]he policy that § 1404(a) should not deprive parties of state-law advantages").

112. *See* 494 U.S. at 524-27.

113. *See* 494 U.S. at 535 (Scalia, J., dissenting).

114. *See* 494 U.S. at 537 (Scalia, J., dissenting) (arguing that the plaintiff should not be allowed "to have his cake and eat it too — to litigate in the more convenient forum that he desires, but with the law of the distant forum that he desires").

115. *See* 494 U.S. at 527-28.

116. *See* 494 U.S. at 527 ("[E]ven without § 1404(a), a plaintiff already has the option of shopping for a forum with the most favorable law."). For a reversal of the usual view and an argument that courts should worry less about defendant forum shopping, see Stein, *supra* note 29, at 826 n.199 ("The 'evil' of forum shopping is not that it is motivated by a desire to manipulate the applicable law. Rather, it is that there is a disproportionate advantage bestowed on the plaintiff . . . .").

117. *See* 494 U.S. at 538 (Scalia, J., dissenting) (criticizing the "file-and-transfer ploy" sanctioned by the *Ferens* majority).

118. *Cf.* Ursula Marie Henninger, Note, *The Plaintiff's Forum Shopping Gold Card: Choice of Law in Federal Courts After Transfer of Venue Under Section 1404(a)* — Ferens v. John Deere Co., 26 WAKE FOREST L. REV. 809, 826-27 (1991) (arguing that plaintiffs should not be able to shop for the most favorable law *and* the most convenient court).

119. *See supra* text accompanying note 109.

considerations from choice of law.[120] The Court asserted that "*Van Dusen* also made clear that the decision to transfer venue under § 1404(a) should turn on considerations of convenience rather than on the possibility of prejudice resulting from a change in the applicable law."[121] It is hard to understand, however, how the plaintiff can ever be prejudiced by a change in law pursuant to a transfer the plaintiff requests or why the court should take such prejudice into account.[122] The Court's real concern in this area seems to be that a contrary rule might burden the system with trials in inconvenient fora — imposing unnecessary burdens on witnesses, jurors, and the court[123] — and violate the principle that " '[t]here is a local interest in having localized controversies decided at home.' "[124] Were transferee law to apply, plaintiffs would have an incentive to file in inconvenient fora that provided the best law and decline to request transfer.[125] Although the defendant might request a transfer,[126] or the court might order one sua sponte,[127] the other actors in the process might decline to seek transfer to force the plaintiff to live with the consequences of the filing decision. In these cases, the judicial system would be burdened with trying cases in inconvenient fora.[128] However, the cases in which both the defendant and the court would concur in allowing the trial to proceed in an inconvenient forum would seem to be minimal.

Noticeably absent from the Court's list of *Van Dusen* factors is any reference to *Erie*. The *Ferens* Court viewed *Erie* as providing support for the first *Van Dusen* factor — that transfer should not deprive the plaintiff of vested state law advantages[129] — but did not

120. *See* 494 U.S. at 528-29; *see also supra* text accompanying note 59 (explaining how the concern about divorcing choice of law and transfer decisions presumes a plaintiff's choice of law privilege).

121. 494 U.S. at 528.

122. *See* 494 U.S. at 536 (Scalia, J., dissenting) (arguing that "the principle of *volenti non fit injuria* suffices to allay" any concern that the plaintiff is prejudiced).

123. *See* 494 U.S. at 529.

124. 494 U.S. at 530 (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947)).

125. *See* 494 U.S. at 529.

126. *See* John D. Currivan, Note, *Choice of Law in Federal Court After Transfer of Venue*, 63 CORNELL L. REV. 149, 156 (1977) (concluding that a plaintiff who files in an inconvenient forum can usually count on the defendant to make a transfer motion).

127. *See* 494 U.S. at 537 (Scalia, J., dissenting); I-T-E Circuit Breaker Co. v. Becker, 343 F.2d 361, 363 (8th Cir. 1965) (noting that the district court has the power to effect § 1404(a) transfers sua sponte); Kirby v. Mercury Sav. & Loan Assn., 755 F. Supp. 445, 448 (D.D.C. 1990) (same).

128. *See* 494 U.S. at 530 ("The desire to take a punitive view of the plaintiff's actions should not obscure the systemic costs of litigating in an inconvenient place.").

129. *See* 494 U.S. at 524.

view *Erie* policies as independently significant. Moreover, the result in *Ferens* seems squarely at odds with *Erie,* as Justice Scalia argued in a vigorous dissent joined by three other Justices. The *Ferens* rule allows plaintiffs to use the federal courts to obtain advantages they could not obtain in state court.[130] In selecting state fora, plaintiffs must choose between venue and choice of law advantages when these advantages reside in different states.[131] *Ferens* allows the plaintiff simultaneously to reap both sets of advantages. As a consequence, the existence of federal diversity jurisdiction has the potential to change outcomes in cases governed by state law and gives the plaintiff an incentive to file in federal rather than state court in a given location.[132] Preventing this kind of forum shopping was a central concern of *Erie.*[133]

C. *Conclusion*

In *Gulf Oil* and *Van Dusen,* the Supreme Court implied that the plaintiff has venue and choice of law privileges that should not be disturbed by transfer. These privileges survived *Piper* and were strengthened by *Ferens.* The *Ferens* Court's relegation of *Erie* principles to secondary status demonstrates that it is incorrect to view *Van Dusen* as based purely on *Erie* concerns. As a consequence, the plaintiff's venue and choice of law privileges, as well as the other *Van Dusen* factors emphasized by the *Ferens* Court, must be taken seriously in the federal issue context.

II. The History of Federal Question Transfers

When courts have permanently transferred cases containing federal issues within the federal system, they have uniformly applied transferee federal law. In this context, the courts have relied on the theoretical uniformity of federal law and taken the view that *Van Dusen* is inapplicable. By contrast, after MDL transfers, the federal courts initially applied transferor federal law based on *Van Dusen,* with little explanation. *In re Korean Air Lines Disaster of Septem-*

130. *See* 494 U.S. at 533-36 (Scalia, J., dissenting); Maltz, *supra* note 41, at 257 (arguing that *Ferens* is inconsistent with *Erie* because it gives "the plaintiff an option that he would not have had in the absence of federal diversity jurisdiction"); Henninger, *supra* note 118, at 826 (accusing the *Ferens* majority of "apparently forg[etting] the policies which supported the *Erie* decision").

131. *See* 494 U.S. at 536 (Scalia, J., dissenting).

132. *See* 494 U.S. at 536 (Scalia, J., dissenting) (arguing that "[t]he significant federal judicial policy" in favor of uniformity between federal and state courts in the same location "is reduced to a laughingstock if it can so readily be evaded through filing-and-transfer").

133. *See supra* text accompanying notes 77-83.

ber 1, 1983[134] held that transferee federal law also applies after an MDL transfer.[135] Since that decision, a consensus has developed that transferee federal law applies after both permanent and MDL transfers. This Part examines the history of federal question transfers.

A. *The Early Cases*

1. *Permanent Transfers*

The first significant case to consider the effect of permanent transfer on choice of federal law was *Clayton v. Warlick*.[136] In this case, the plaintiff brought a federal patent infringement action in the United States District Court for the Western District of North Carolina. The defendant moved to transfer to the Northern District of Illinois. The plaintiff candidly admitted that he chose to proceed in North Carolina because the Fourth Circuit's law on an important patent issue was more favorable to him than the Seventh Circuit's.[137] The district court granted the transfer motion,[138] and the Fourth Circuit held that mandamus was not available to review the district court's decision.[139]

The court also noted on the merits of the mandamus question that the district court had not abused its discretion in transferring the case.[140] The Fourth Circuit assumed that the Northern District of Illinois would apply Seventh Circuit law to the case and believed that this result presented no impediment to transfer. The court viewed federal law as theoretically uniform and, therefore, believed that any difference between the views of the Fourth and Seventh Circuits was irrelevant to the transfer decision:

> [T]he same law, the federal patent law, will be applied wherever [the case] is tried. We are not impressed by the argument that such transfer should be denied because of an alleged conflict of decision between this Circuit and the Seventh on an important question of law involved in the case. If there be such conflict, this presents a matter for consideration by the Supreme Court on application for certiorari, not for consideration by a district judge on application for transfer

134. 829 F.2d 1171 (D.C. Cir. 1987), *affd. sub nom.* Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989).

135. 829 F.2d at 1176.

136. 232 F.2d 699 (4th Cir. 1956).

137. 232 F.2d at 700-01.

138. Clayton v. Swift & Co., 137 F. Supp. 219 (W.D.N.C. 1956), *mandamus denied,* 232 F.2d 699.

139. *See* 232 F.2d at 706.

140. 232 F.2d at 706.

> under 28 U.S.C. § 1404(a). We have no sympathy with shopping around for forums.... "[T]he courts of one District or Circuit must be presumed to be as able and as well qualified to handle litigation as those in another."[141]

The Second Circuit's decision in *H.L. Green Co. v. MacMahon*[142] followed the result and reasoning of *Clayton*.[143] In *Green*, the Second Circuit refused to grant a writ of mandamus against a district judge who had transferred a federal securities action from a federal court in New York to one in Alabama.[144] The court squarely rejected the argument that a detrimental change in law from the plaintiff's perspective was a factor to consider in connection with a transfer motion. Like the Fourth Circuit, the Second Circuit relied on the theoretical uniformity of federal law:

> A plaintiff may not resist the transfer of his action to another district court on the ground that the transferee court will or may interpret federal law in a manner less favorable to him.... The federal courts comprise a single system applying a single body of law, and no litigant has a right to have the interpretation of one federal court rather than that of another determine his case.[145]

Neither *Clayton* nor *Green* dealt squarely with the choice of law question. Both courts assumed that transferee federal law would apply and held that a detrimental change in law from the plaintiff's perspective was not a factor in the transfer calculus.[146] In this regard, *Clayton* and *Green* prefigured *Piper* rather than *Van Dusen*.[147] They divorced choice of law from the efficiency considerations that should otherwise govern transfer decisions by holding that a change in the law was not a relevant transfer factor. It presumably fell to

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141. 232 F.2d at 706 (quoting Carbide & Carbon Chems. Corp. v. United States Indus. Chems., Inc., 140 F.2d 47, 49 (4th Cir. 1944)).

142. 312 F.2d 650 (2d Cir. 1962), *cert. denied*, 372 U.S. 928 (1963).

143. The Second Circuit's seminal decision in *Green* was prefigured in the lesser-known case of Ackert v. van Pelt Bryan, 299 F.2d 65 (2d Cir. 1962), in which the court, over a strong dissent by Judge Friendly, *see* 299 F.2d at 71-72, allowed the permanent transfer of a case to a circuit that would probably dismiss the plaintiff's federal claim. The court assumed that the transferee court would apply the law of its own circuit after the transfer. *See* 299 F.2d at 69. To the contrary is Ruskay v. Reed, 225 F. Supp. 581 (S.D.N.Y. 1963), in which the district court exercised its discretion in refusing to transfer a case to a circuit that would not recognize the plaintiff's claim. *See* 225 F. Supp. at 583.

144. *See* 312 F.2d at 654.

145. 312 F.2d at 652.

146. One court has interpreted a plaintiff's desire to avoid the less favorable law of another circuit as a factor affirmatively supporting the defendant's transfer motion. *See* Cheeseman v. Carey, 485 F. Supp. 203, 215 (S.D.N.Y.), *affd. on other grounds*, 623 F.2d 1387 (2d Cir. 1980); *see also* Ziegler v. Dart Indus., Inc., 383 F. Supp. 362, 364-65 (D. Del. 1974) (assuming that transferee federal law applies after a permanent transfer and denying the plaintiff's motion for transfer to a circuit with more favorable law).

147. *See supra* text accompanying notes 55-57, 93-95.

the transferee courts themselves to determine which circuit's law to apply in these cases.[148] In later cases that postdate *Van Dusen,* transferee courts applied the federal law of their own circuits in accordance with *Clayton* and *Green;* they argued, with little analysis, that *Van Dusen* was limited to the state law context and that the theoretical uniformity of federal law required the application of transferee circuit precedent.[149]

Clayton, Green, and their progeny rest on a questionable premise. While *Clayton* and *Green* insist that federal law is theoretically uniform, both cases demonstrate that federal law is not uniform in practice and that this lack of practical uniformity has significant consequences for the parties. The plaintiffs in *Clayton* and *Green*

148. *See* Club Assistance Program, Inc. v. Zukerman, 598 F. Supp. 734, 738 (N.D. Ill. 1984) (leaving the choice of which circuit's law to apply in federal question cases to the transferee court); *see also* Air Express Intl. Corp. v. Consolidated Freightways, Inc., 586 F. Supp. 889, 893 (D. Conn. 1984).

149. *See, e.g., In re* Pittsburgh & L.E.R.R. Co. Sec. & Antitrust Litig., 543 F.2d 1058, 1065 n.19 (3d Cir. 1976); Satellite Fin. Planning Corp. v. First Natl. Bank, 633 F. Supp. 386, 393-94 (D. Del. 1986); Roth v. Bank of the Commonwealth, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,267, at 91,712 & n.13 (W.D.N.Y. Aug. 17, 1981); *see also* Henry J. Friendly, *The "Law of the Circuit" and All That,* 46 ST. JOHN'S L. REV. 406, 412 (1972) (viewing *Van Dusen* as "limited to choices of *state* law"). After *Van Dusen,* potential transferor courts continued to assume, as *Clayton* and *Green* had, that transferee federal law would apply after a transfer. *See Ziegler,* 383 F. Supp. at 364-65; Scheinbart v. Certain-Teed Prods. Corp., 367 F. Supp. 707, 710-11 (S.D.N.Y. 1973); *cf.* United States v. Barrientos, 485 F. Supp. 789, 791-93 (E.D. Pa. 1980) (suggesting that transferee federal law applies after the transfer of a criminal case). *But see* Oldfield v. Alston, 77 F.R.D. 735, 743 & n.2 (N.D. Ga. 1978) (applying transferor federal law after a permanent transfer).

The American Law Institute (ALI), in the context of recommending the application of transferee federal law after the permanent consolidation of mass tort cases, *see infra* text accompanying notes 285-87, has recently suggested that there is a split of authority on the federal law applicable to a permanently transferred case. *See* ALI, COMPLEX LITIGATION PROJECT § 6.08 cmt. b, note 4 (Proposed Final Draft, Apr. 5, 1993) [hereinafter CLP]. However, all the permanent transfer cases cited by the ALI to demonstrate such a split are cases in which federal statutes incorporated state limitations periods and the transferee court applied the same limitations period that the transferor court would have applied. *See* Sargent v. Genesco, Inc., 492 F.2d 750, 758 (5th Cir. 1974); Thorn v. New York City Dept. of Social Servs., 523 F. Supp. 1193, 1197-98 (S.D.N.Y. 1981); Campbell v. Upjohn Co., 498 F. Supp. 722, 726 (W.D. Mich. 1980), *affd.,* 676 F.2d 1122 (6th Cir. 1982); Brick v. Dominion Mortgage & Realty Trust, 442 F. Supp. 283, 299 (W.D.N.Y. 1977); Corey v. Bache & Co., 355 F. Supp. 1123, 1125 (S.D. W. Va. 1973); *see also* Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 406 (2d Cir. 1975) (§ 1407 transfer); Railing v. United Mine Workers, 429 F.2d 780, 781 (4th Cir. 1970), *revg.* 276 F. Supp. 238, 241 (N.D. W. Va. 1967) (§ 1404(a) transfer), *vacated,* 401 U.S. 486 (1971); *In re* Clinton Oil Co. Sec. Litig., [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,015, at 91,566-67 (D. Kan. Mar. 18, 1977) (§ 1407 transfer). At the time they were decided, these cases involved a straightforward application of *Van Dusen* to state law issues. As a result, they cannot properly stand for the proposition that transferor federal law applies after a permanent transfer. *See infra* note 191 (describing the modern view). Thus, in *Green,* one of the landmark cases supporting the application of transferee federal law, the Second Circuit assumed that transferor state law would govern the limitations period applicable to a federal securities claim just as transferor law would govern any other state issue. *See* 312 F.2d at 652-53. The ALI's suggestion that there is a conflict on the federal law applicable to permanently transferred cases is simply incorrect.

chose the initial fora, and the defendants moved to transfer, in large part due to the differences in federal law across the country. Moreover, the refusal of the more recent cases to give substantial consideration to the application of *Van Dusen* in the federal issue context is cause for concern. Nevertheless, as Part III demonstrates, *Clayton* and *Green* reached the correct result for the correct reason.

2. *MDL Transfers*

The MDL Act allows the JPML to consolidate cases involving common questions of fact for pretrial purposes.[150] The first MDL court to consider the impact of transfer on choice of federal law was *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*[151] This case involved civil antitrust actions that had been commenced in the United States District Court for the District of Columbia and transferred to the Eastern District of Pennsylvania. The defendants moved to dismiss for lack of venue. In deciding this motion, the MDL court applied the law of the D.C. Circuit.[152] The court cited *Van Dusen* without discussion and provided no justification for its choice of transferor federal law. The result may have seemed obvious to the court because both parties agreed that the *Van Dusen* rule applied.[153]

This result, however, is far from obvious. There are at least two factors that potentially distinguish *Van Dusen* from *Philadelphia Housing Authority: Van Dusen* involved state law issues and a permanent transfer pursuant to section 1404(a), and *Philadelphia Housing Authority* involved federal issues and a pretrial transfer pursuant to section 1407. The court in *Philadelphia Housing Authority* made no attempt to determine what difference, if any, these potential distinguishing factors made. It did not consider whether the line of authority established by *Clayton* and *Green,* which supported the application of transferee federal law in the permanent transfer context, applied in the MDL context and survived *Van Dusen.* Nevertheless, in *In re Plumbing Fixtures Litigation,*[154] the JPML agreed with *Philadelphia Housing Authority* and asserted, without analysis, that transferor federal law applies after section 1407 transfers.[155] Prior to *In re Korean Air Lines Disaster of Sep-*

150. *See* 28 U.S.C. § 1407(a) (1988).
151. 309 F. Supp. 1053 (E.D. Pa. 1969).
152. *See* 309 F. Supp. at 1054-55.
153. *See* 309 F. Supp. at 1055.
154. 342 F. Supp. 756 (J.P.M.L. 1972).
155. *See* 342 F. Supp. at 758.

tember 1, 1983,[156] these cases were uniformly followed with little discussion or analysis.[157]

B. *The Marcus Article*

A 1984 law review article by Professor Richard Marcus represents the first in-depth examination of the effect of transfer on the law applicable to federal issues.[158] Marcus took the view that transferee federal law should apply in all circumstances, without regard to whether the transfer was permanent or for pretrial purposes pursuant to the MDL Act.[159] He based this conclusion on the fundamental differences between diversity and federal question cases. Marcus argued that *Van Dusen* principally protects two *Erie* policies in the diversity context: achieving uniformity of result between federal and state courts in the same location and preserving the integrity of state law.[160] These policies are irrelevant in the federal question context.[161]

Marcus acknowledged that *Van Dusen* also proceeds on a venue privilege theory that is potentially applicable to federal issues.[162] Relying on *Piper,* he discounted the general existence of this privilege and argued that it applied only in diversity cases.[163] In Marcus's view, a plaintiff in a diversity case receives a choice of law privilege as a corollary to a venue privilege as a matter of necessity. Although Congress has the power to adopt choice of law rules in diversity cases, it has chosen not to. Moreover, although many have argued that the federal courts should fashion common law rules to

156. 829 F.2d 1171 (D.C. Cir. 1987), *affd. sub nom.* Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989).

157. *See, e.g.,* Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 408 n.7 (2d Cir. 1975); *In re* Dow Co. "Sarabond" Prods. Liab. Litig., 666 F. Supp. 1466, 1468-70 (D. Colo. 1987); Sentner v. Amtrak, 540 F. Supp. 557, 559 n.5 (D.N.J. 1982); *In re* Haven Indus. Inc. Sec. Litig., 462 F. Supp. 172, 179 (S.D.N.Y. 1978); *In re* Clinton Oil Co. Sec. Litig., [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,015, at 91,568 (D. Kan. Mar. 18, 1977); *In re* Air Crash Disaster at Boston, Mass., 399 F. Supp. 1106, 1108 (D. Mass. 1975); Stirling v. Chemical Bank, 382 F. Supp. 1146, 1150 n.5 (S.D.N.Y. 1974), *appeal dismissed,* 511 F.2d 1030 (2d Cir. 1975); *In re* Four Seasons Sec. Laws Litig., 370 F. Supp. 219, 228 (W.D. Okla. 1974).

158. *See* Marcus, *supra* note 17.

159. *See id.* at 708-12 (discussing § 1404(a) transfers); *id.* at 716-19 (discussing § 1407 transfers).

160. *See id.* at 693-96.

161. *Id.* at 696.

162. *See id.* at 696-97.

163. *See id.* at 698-700; *see also* Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts,* 64 N.Y.U. L. REV. 1, 38-39 n.220 (1989) (arguing that the concept of a plaintiff's choice of law privilege "was shattered" in *Piper*).

determine the applicable state law in diversity cases,[164] the Supreme Court held in *Klaxon Co. v. Stentor Electric Manufacturing Co.*,[165] and reaffirmed in *Day & Zimmermann, Inc. v. Challoner*,[166] that in such cases a federal district court must apply the choice of law rules of the state in which the district court is located.[167] Because federal courts are incompetent to fashion independent choice of law rules in diversity cases, Marcus argued that they had no option but to allow venue to determine choice of state law by default.[168]

Believing that *Van Dusen* had no application in the federal question context, Marcus searched for federal principles that would determine the effect of a transfer on choice of federal law. Marcus identified the principle of competence.[169] Federal courts lack the power to determine the substantive rules that will govern diversity cases. By contrast, in the federal question context "the federal courts have not only the power but the duty to decide [cases] correctly. . . . If a federal court simply accepts the interpretation of another circuit without addressing the merits, it is not doing its job."[170] Because Marcus believed that every federal court of appeals has the duty, in the absence of controlling Supreme Court authority, to apply its best view of federal law, he argued that transferee circuit law should apply after both permanent and MDL transfers.[171]

Although Marcus's view has received nearly universal acceptance by the courts, certain aspects of his analysis deserve reconsideration. As discussed in Part I, *Van Dusen* and its progeny are not based solely or primarily on *Erie* concerns.[172] Thus, Marcus's dismissal of *Van Dusen* as a state law case is questionable. Because *Piper* seems limited to cases involving foreign plaintiffs, Marcus's

164. *See, e.g.*, Currie, *Change of Venue*, *supra* note 3, at 459-64, 502-03 (arguing for the application of federal choice of law principles on state law questions in the transfer context and noting that this solution would probably undermine Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941)); Seidelson, *supra* note 36, at 90-92 (arguing that federal choice of law principles, rather than *Klaxon*, should apply to pendent state claims); Comment, *supra* note 74, at 130-34 (supporting the application of federal interest analysis in choosing state law in the transfer context and the overruling of *Klaxon*).

165. 313 U.S. 487 (1941).

166. 423 U.S. 3 (1975).

167. The *Klaxon* rule has been heavily criticized. *See, e.g.*, Henninger, *supra* note 118, at 818 n.86 (collecting authorities).

168. *See* Marcus, *supra* note 17, at 700-01.

169. *See id.* at 702-09.

170. *Id.* at 702.

171. *See id.* at 705-19.

172. *See generally supra* section I.B.

use of *Piper* to undercut support for a plaintiff's choice of law privilege is also questionable. Although I agree with Marcus that, in the absence of controlling authority, every court generally has the capacity and the duty to apply its best view of federal law, I do not believe that this principle requires the application of transferee federal law in all cases. As I argue below,[173] choice of circuit law at the district court level is more a matter of hierarchy within the federal system than of competence. I agree with Marcus that transferee federal law should apply after permanent transfers because the transferee circuit will hear any appeal and, as Marcus argues, will and should apply its own precedents.[174] I also believe that these concerns outweigh any contrary policy arguments advanced in *Van Dusen* and *Ferens*.[175] In the MDL context, however, any appeal after a trial will be to the transferor court of appeals. As a consequence, I contest Marcus's conclusion that transferee federal law should apply after an MDL transfer.[176]

C. Korean Air Lines

The first case to consider in depth the effect of a transfer on applicable federal law was the D.C. Circuit's decision in *In re Korean Air Lines Disaster of September 1, 1983*.[177] In this case, plaintiffs brought multiple lawsuits relating to a Korean Air Lines flight that was destroyed by a Soviet aircraft before it could complete its journey from New York to South Korea. These lawsuits were consolidated for pretrial purposes pursuant to the MDL Act in the United States District Court for the District of Columbia. A central issue in the case involved the application of the damage limitation provisions of an international treaty — the Warsaw Convention — as modified by an accord among airlines known as the Montreal Agreement.[178] The Montreal Agreement imposes a per-passenger damage limitation of $75,000, provided that this limitation appears on passenger tickets in ten-point type.[179] The Korean Air Lines tickets in question contained the limitation in eight-point type.[180]

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173. *See infra* section III.B.

174. *See infra* section III.C.

175. *See infra* text accompanying notes 259-64.

176. *See infra* section IV.A.

177. 829 F.2d 1171 (D.C. Cir. 1987), *affd. sub nom.* Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989).

178. *See* Liability Limitations of Warsaw Convention and Hague Protocol: Order Approving Agreement, 31 Fed. Reg. 7302 (1966).

179. *See id.*

180. *See* 829 F.2d at 1172.

Certain of the MDL cases had been transferred from district courts in the Second Circuit, which had held that failure to follow the typeface conventions of the Montreal Agreement prevents airlines from relying on the damage limitation provisions.[181] The MDL judge believed he was not bound by Second Circuit precedent in the cases transferred from that circuit and, because the D.C. Circuit had not yet considered the question, was free to make his own determination in all the MDL cases. The district court held that Korean Air Lines' use of eight-point type did not preclude application of the damage limitation provisions of the Warsaw Convention and Montreal Agreement.[182] The D.C. Circuit and the Supreme Court affirmed the lower court decision on the merits.[183]

In addressing the choice of law question, the D.C. Circuit, in an opinion by then-Judge Ruth Bader Ginsburg, agreed with Professor Marcus that *Van Dusen* rested principally on *Erie* concerns that were irrelevant in the federal question context.[184] The court adopted Marcus's competence principle as affirmative support for its decision that transferee federal law should apply.[185] The court also believed that a contrary rule would unnecessarily complicate MDL cases because it would require the MDL judge to apply different federal law to cases that had been transferred from different circuits, and that the law of the case principle would insulate its substantive decision from reversal in the Second Circuit following remand and trial.[186]

Korean Air Lines is questionable for all the reasons that Marcus's theories, on which the court heavily relied, are questionable. In addition, as Part IV demonstrates,[187] the court's reliance on the need to create efficient MDL procedures does not justify its application of transferee federal law in the MDL context. Moreover, as

181. *See* 829 F.2d at 1172; *see also In re* Air Crash Disaster at Warsaw, Pol., on Mar. 14, 1980, 705 F.2d 85 (2d Cir.), *cert. denied,* 464 U.S. 845 (1983).

182. *See In re* Korean Airlines Disaster of Sept. 1, 1983, 664 F. Supp. 1463 (D.D.C. 1985), *affd.,* 829 F.2d 1171 (D.C. Cir. 1987), *affd. sub nom.* Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989).

183. *See* 829 F.2d at 1173 (adopting the district court's opinion), *affd. sub nom.* Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989). The Supreme Court opinion did not consider the choice of law question.

184. *See* 829 F.2d at 1174-75.

185. *See* 829 F.2d at 1175 (relying on a passage from Marcus's article).

186. *See* 829 F.2d at 1175-76; *infra* section IV.B.2 (explaining and applying the law of the case principle).

187. *See infra* section IV.C.3.

Part IV also demonstrates,[188] Judge Ginsburg's reliance on the law of the case principle is unsound.

D. *Conclusion*

In the aftermath of *Korean Air Lines,* a consensus is developing that transferee federal law applies after both permanent[189] and MDL[190] transfers. My research has disclosed no case decided after *Korean Air Lines* that takes a contrary view.[191] Indeed, bowing to the new consensus, the JPML recently overruled its opinion in the

188. *See infra* section IV.B.2.

189. *See* Newton v. Thomason, 22 F.3d 1455, 1460 (9th Cir. 1994); Tel-Phonic Servs., Inc. v. TBS Intl., Inc., 975 F.2d 1134, 1138 (5th Cir. 1992); Novodzelsky v. Astor, Weiss & Newman, No. CIV.A.94-2407, 1994 WL 527281, at *3 (E.D. Pa. Sept. 22, 1994); *In re* College Bound Consol. Litig., No. 93 Civ. 2348 (MBM), 1994 WL 236163, at *6 n.1 (S.D.N.Y. May 31, 1994); Center Cadillac, Inc. v. Bank Leumi Trust Co., 808 F. Supp. 213, 222-24 (S.D.N.Y. 1992); Wegbreit v. Marley Orchards Corp., 793 F. Supp. 965, 968-69 (E.D. Wash. 1992); TBG Inc. v. Bendis, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,623, at 92,921-23 (D. Kan. Mar. 5, 1992); *In re* Air Crash at Detroit Metro. Airport, Detroit, Mich. on Aug. 16, 1987, 791 F. Supp. 1204, 1212-13 (E.D. Mich. 1992); Isaac v. Life Investors Ins. Co. of Am., 749 F. Supp. 855, 863 (E.D. Tenn. 1990); Greyhound Fin. Corp. v. Willyard, No. 87-C-0911B, 1989 WL 201094, at *13-*14 (D. Utah Dec. 26, 1989); *cf. In re* Pan Am. Corp., 950 F.2d 839, 847-48 (2d Cir. 1991) (applying *Korean Air Lines* after a transfer pursuant to the Bankruptcy Act); Fossett Corp. v. Gearhart, 694 F. Supp. 1325, 1328 (N.D. Ill. 1988) (granting a transfer and dismissing the idea that a transferee court must apply transferor law).

190. *See* Menowitz v. Brown, 991 F.2d 36, 39-41 (2d Cir. 1993); *In re* TMJ Implants Prods. Liab. Litig., No. 94-MD-1001, 1995 WL 16766, at *4 (D. Minn. Jan. 17, 1995); *In re* Air Disaster, 819 F. Supp. 1352, 1369-71 (E.D. Mich. 1993); *In re* Integrated Resources Real Estate Ltd. Partnerships Sec. Litig., 815 F. Supp. 620, 635-37 (S.D.N.Y. 1993); *In re* Taxable Mun. Bond Sec. Litig., 796 F. Supp. 954, 962-63 (E.D. La. 1992); *In re* Donald J. Trump Casino Sec. Litig., 793 F. Supp. 543, 547-48 (D.N.J. 1992), *affd.,* 7 F.3d 357, 368 n.8 (3d Cir. 1993) (declining to review the choice of law question because neither party challenged it on appeal), *cert. denied,* 114 S. Ct. 1219 (1994); *In re* Air Crash Disaster at Stapleton Intl. Airport, 720 F. Supp. 1493, 1496 (D. Colo. 1989).

191. Potentially inconsistent with *Korean Air Lines* are cases in which federal statutes incorporated state limitations periods and the transferee court applied the same limitations period that the transferor court would have applied. *See* Eckstein v. Balcor Film Investors, 8 F.3d 1121, 1126-27 (7th Cir. 1993) (§ 1404(a) transfer), *cert. denied,* 114 S. Ct. 883 (1994); *In re* United Mine Workers, 854 F. Supp. 914, 916-22 (D.D.C. 1994) (§ 1407 transfer); *In re* Rospatch Sec. Litig., 760 F. Supp. 1239, 1256-58 (W.D. Mich. 1991) (§ 1404(a) transfer). Prior to 1983, this result was thought to involve a straightforward application of *Van Dusen* on state law issues. *See supra* note 149. It is now settled that the limitations question is federal in nature. *See* DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 159 n.13 (1983) ("[T]he choice of a limitations period for a federal cause of action is itself a question of federal law."). As a consequence, most recent cases have applied transferee law in accordance with *Korean Air Lines* after both pretrial, *see Menowitz,* 991 F.2d at 39-41; *Integrated Resources,* 815 F. Supp. at 635-37; *Taxable Mun. Bond,* 796 F. Supp. at 962-63; *cf. In re* Litig. Involving Alleged Loss of Cargo, 772 F. Supp. 707, 710-11 (D.P.R. 1991) (applying transferee law to determine which state's marine insurance contract law to adopt in an admiralty case), and permanent transfers, *see Wegbreit,* 793 F. Supp. at 968-69; *TBG,* [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 92,921-23; *cf.* Duke v. Touche Ross & Co., 765 F. Supp. 69, 73 (S.D.N.Y. 1991) (applying transferee law to a borrowed statute of limitations question because the issue is procedural). However, the borrowed statute of limitations cases involve federal law in an area where federal law is concededly not uniform. *See Eckstein,* 8 F.3d at 1126-27. As a consequence, the cases applying transferor law are not inconsistent with *Korean Air Lines. See Eckstein,* 8 F.3d at 1126 (accepting the rule that transferee federal law

Plumbing Fixtures case,[192] which was the foundation for the application of transferor law in the MDL context.[193] The reasoning of *Korean Air Lines,* however, is suspect and leads to the wrong result in the MDL context. Part III examines the choice of law question in the context of permanent transfers and concludes, as *Korean Air Lines* did, that transferee federal law should apply. Part IV examines the question in the MDL context and concludes, contrary to *Korean Air Lines,* that transferor federal law should apply.

III. Choice of Federal Law After Permanent Transfers

As discussed in Part I, *Van Dusen* rests on two sets of rationales: the desire to preserve the plaintiff's venue and choice of law privileges and the desire to be faithful to *Erie.* The attempt to dismiss *Van Dusen* as based exclusively on *Erie* concerns is not profitable. *Van Dusen,* as viewed through the lens of *Ferens,* expresses three concerns that are potentially applicable to transfers in cases with federal issues. Transfers should not (i) disturb preexisting choice of law advantages accruing to the plaintiff, (ii) give the defendant an incentive to seek transfer for the purpose of obtaining more favorable law, or (iii) introduce choice of law considerations into transfer decisions.[194]

Nevertheless, this Part argues in accordance with the prevailing view that the theoretical uniformity of federal law requires the application of transferee federal law in the permanent transfer context. This Part compares the role that choice of law principles play in the state and federal systems. In the state system, choice of law plays a significant role. There is, however, no analogous federal concept because federal law is theoretically uniform. On federal issues, the venue of appeal determines choice of law by default. This result serves substantial efficiency interests. Because there is no reason to distinguish transferred cases from other cases, transferee federal law should apply after permanent transfers. *Van Dusen* and *Ferens* do not require a contrary result.

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should normally apply). Indeed, *United Mine Workers* was decided by a district court that was required to follow *Korean Air Lines.*

192. *See In re* General Motors Class E Stock Buyout Sec. Litig., 696 F. Supp. 1546, 1547 & n.1 (J.P.M.L. 1988) (noting that "[w]hen determining whether to transfer an action under Section 1407 . . . it is not the business of the Panel to consider what law the transferee court might apply" and that "[a]ny suggestion to the contrary in *[Plumbing Fixtures]* is withdrawn" (citation omitted)).

193. *See supra* text accompanying notes 154-57.

194. *See supra* text accompanying note 109; Fini, *supra* note 25, at 63-79 (arguing that the policies articulated in *Van Dusen* and *Ferens* are equally applicable in the federal issue context).

A. *Choice of State Law*

When a plaintiff selects a state forum in a state law case, the plaintiff's choice of venue influences but is not determinative of choice of law. Rules of personal jurisdiction and venue limit the available fora. The doctrine of forum non conveniens allows states to dismiss cases that are otherwise brought in legitimate fora.[195] Even when the plaintiff's choice of forum is the place of trial, the forum does not necessarily apply its own law to the substance of the controversy. One of the forum's first actions will be to apply choice of law rules that identify the applicable substantive law.[196]

Conflicts principles in the early twentieth century were based on the vested rights theory and made choice of law dependent on the location of one legally relevant event.[197] In tort, the First Conflicts Restatement applied the law of the place where the injury occurred.[198] In contract, the First Restatement applied the law of the place of contracting to resolve contract validity questions[199] and the law of the place of performance to resolve questions regarding breach.[200] The First Restatement's chief virtue was predictability. Its chief drawback was the inability to make individualized determinations in particular cases.

Modern choice of law theory has departed from vested rights theory and the single-factor analyses of the First Restatement. Modern choice of law is based on multifactor interest analyses that focus on the interests of the parties and the relevant sovereigns in having the laws of particular jurisdictions applied. Thus, the Second Conflicts Restatement supports application of the law of the state with the most significant relationship to the litigation.[201] Although the Second Restatement's approach allows for individualized choice of law determinations, it is inherently uncertain and unpredictable. In light of the mixed costs and benefits of both the

195. *See supra* text accompanying notes 132-33.

196. *See* EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS §§ 3.1-.2 (2d ed. 1990); *cf.* Ferens v. John Deere Co., 494 U.S. 516, 532 (1990) ("To a large extent . . . state conflicts-of-law rules . . . ensure that appropriate laws will apply to diversity cases.").

197. *See* SCOLES & HAY, *supra* note 196, § 17.2.

198. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934); Kyle Brackin, *Salvaging the Wreckage: Multidistrict Litigation and Aviation*, 57 J. AIR L. & COM. 655, 673 n.81 (1992).

199. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 332 (1934).

200. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 358 (1934).

201. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145 (1969).

First and Second Restatement approaches, it should not be surprising that both have their adherents among the states.[202]

In sum, in the state court system, choice of law principles restrict but do not eliminate the plaintiff's ability to choose the substantive law applicable to the case. Because the forum usually applies its own choice of law rules, the plaintiff has the ability to select a choice of law rule, as well as a particular state's interpretation of that rule, when choosing a venue.[203] In cases with interstate elements that potentially identify more than one applicable law, this system gives the plaintiff some advantage, but the advantage is not absolute.

The plaintiff's biggest choice of law advantage in state law cases is the ability to pick the procedural rules that will apply to the case. Although state courts employ choice of law rules to identify the applicable substantive law, they usually employ domestic law on questions of procedure. The United States Constitution places some limits, albeit not very restrictive ones, on a state's ability to apply its own law to the substance of a controversy.[204] There is, however, no constitutional limit on a state's ability to apply its own law to procedural questions.[205] Most significantly, state courts usually apply their own law on limitations questions without regard to which state's substantive law applies.[206] It is, therefore, not surpris-

202. In 1983, Professor Herma Hill Kay surveyed the choice of law approaches of all fifty states. *See* Herma Hill Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 591-92 (1983). Her conclusions are enlightening: Kentucky and Michigan apply the forum law approach, *see id.* at 579-81; twenty-one states and the District of Columbia follow the traditional approach of the First Restatement, *see id.* at 582-84; fourteen states follow the Second Restatement's most significant relationship test, *see id.* at 552-62; New York and North Dakota apply the center of gravity approach, *see id.* at 525-38; California and New Jersey use the governmental interest approach, *see id.* at 538-52; Minnesota, New Hampshire, and Wisconsin apply Leflar's "better law" method, *see id.* at 562-72; and six states combine a number of modern methods, *see id.* at 572-78. One Supreme Court Justice described this choice of law landscape as "kaleidoscopic." *See* Ferens v. John Deere Co., 494 U.S. 516, 538 (1990) (Scalia, J., dissenting).

203. Under the doctrine of renvoi, the forum can choose to defer to the choice of law rules of the jurisdiction that the forum's choice of law rules initially identified. *See* SCOLES & HAY, *supra* note 196, § 3.13. American courts, however, employ renvoi only in limited circumstances. *Id.* at 67 & n.2.

204. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-22 (1985) (holding that for a state to apply its own substantive law it must have a " 'significant contact or significant aggregation of contacts' " to the litigation (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981) (plurality opinion))).

205. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 722-29 (1988). For a thoughtful critique of *Sun Oil*, see Louise Weinberg, *Choosing Law: The Limitations Debate*, 1991 U. ILL. L. REV. 683, 712-23 (arguing that interest analysis should apply to limitations questions).

206. *See Sun Oil*, 486 U.S. at 722-29. Limitations questions are substantive for *Erie* purposes. *See* Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 532-34 (1949) (holding that the tolling of a statute of limitations is substantive); Guaranty Trust Co. v. York, 326 U.S. 99, 108-10 (1945) (holding that the length of a limitations period is substantive).

ing that an inordinate number of transfer cases have involved limitations issues.[207]

Thus, choice of law in the state law context represents a carefully calibrated system that balances the plaintiff's privileges against the rights of the defendant and the needs of the judicial system. To the extent that a plaintiff has any residual leverage over choice of law after application of the rules of jurisdiction and venue, it is a fair inference that the system intends this leverage. The state law regime consciously confers on the plaintiff what can fairly be described as a qualified choice of law privilege. Because federal courts exercising diversity jurisdiction seek to respect state sovereignty and to achieve uniformity of result between federal and state courts in the same location, it is understandable that federal courts apply the choice of law rules of the local state courts and protect the plaintiff's choice of law privilege.[208]

B. *Choice of Federal Law*

The process by which federal district courts determine which circuit's law to apply is entirely different. For illustrative purposes, let us return to the hypothetical posed at the outset of this article.[209] Suppose a plaintiff files a claim pursuant to section 14(a) of the Securities Exchange Act in a federal court in New York and the case is never transferred. In determining the degree of fault necessary to establish liability, the district court does not ask where the injury occurred or which circuit has the most significant relationship to the litigation. Indeed, the district court does not apply any choice of law rule. The district court applies the Second Circuit's precedents because the Second Circuit is the court that will hear any appeal of the case.[210]

Traditionally, however, the states have treated these questions as procedural. *See Sun Oil,* 486 U.S. at 722-29; *see also* Duke v. Touche Ross & Co. 765 F. Supp. 69, 73 (S.D.N.Y. 1991) (applying transferee law to a federal limitations issue because the issue was one of procedure). In an attempt to prevent litigants from choosing a local forum with no relation to the litigation to take advantage of the forum's limitations law, some states have adopted borrowing statutes, which preclude claims that are barred under the law of the jurisdiction that governs the substance of the controversy. *See* SCOLES & HAY, *supra* note 196, § 3.11.

207. *See, e.g.,* Ferens v. John Deere Co., 494 U.S. 516, 519-21 (1990); *see generally* Currie, *Change of Venue, supra* note 3, at 470-82 (discussing the effect of transfer on applicable state limitations law); *supra* notes 149, 191.

208. *See supra* text accompanying notes 165-67.

209. *See supra* text accompanying notes 6-10.

210. *See, e.g.,* Hasbrouck v. Texaco, Inc., 663 F.2d 930, 933 (9th Cir. 1981) (holding that a district court is required to obey the circuit court that reviews its decisions), *cert. denied,* 459 U.S. 828 (1982); United States v. Barrientos, 485 F. Supp. 789, 792-93 (E.D. Pa. 1980) ("I follow [the law of the Third Circuit] . . . not because I subscribe to it but because, sitting in Philadelphia, I am required to do so, just as a district judge sitting in Miami must follow the

In the absence of controlling Supreme Court authority, a federal district court applies its best view of federal law in light of its circuit's precedents. On federal issues, the venue of appeal determines choice of law by default. This default rule obtains because federal law is the creation of a single sovereign and is, therefore, uniform in theory.[211] Asking a choice of law question with respect to federal issues is a logical nonsequitur.

The uniformity of federal law is, of course, a myth.[212] As Professor Marcus's competence principle suggests, the thirteen federal courts of appeals are not required to defer to each other.[213] Until the Supreme Court intervenes, each circuit court remains free to apply its best view of federal law. Although the Supreme Court exists in part to resolve differences among the circuits,[214] the Supreme Court is able to hear only a tiny fraction of the cases in which certiorari is sought.[215] The Supreme Court cannot guarantee the uniformity of federal law on any but the most significant federal

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Fifth Circuit . . . ."); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction,* 65 B.U. L. REV. 205, 258 n.170 (1985) (arguing that "[c]urrent rules of precedent" are governed "by the mechanisms of review that Congress provides for"); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?,* 46 STAN. L. REV. 817, 824-25 (1994) (noting that in the federal system "[a] court must follow the precedents established by the court(s) directly above it" but may "ignore precedents established by other courts so long as they lack revisory jurisdiction over it").

211. *See, e.g.,* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies,* 98 YALE L.J. 679, 726-27 (1989).

212. *See, e.g.,* Marcus, *supra* note 17, at 686 (noting that the federal "system is not ideal; historical development and current necessity make conflicts among the circuits inevitable"); *id.* at 691 (collecting cases that demonstrate circuit conflicts in securities cases); Burt Neuborne, *The Binding Quality of Supreme Court Precedent,* 61 TUL. L. REV. 991, 997 (1987) (calling the uniformity theory "hopelessly naive"). *But see* Seidelson, *supra* note 36, at 89 (arguing that disparities in federal law are temporary).

213. *See* Marcus, *supra* note 17, at 702; *supra* notes 160-71 and accompanying text; *see also, e.g.,* Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System,* 138 U. PA. L. REV. 1111, 1155 (1990). The current structure of the federal court system derives from the Evarts Act of 1891, which established the modern courts of appeals. *See* Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

214. *See* SUP. CT. R. 10.1(a) (citing the existence of a circuit conflict as a ground for granting certiorari); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 168-73 (7th ed. 1993).

215. *See The Supreme Court, 1992 Term — Leading Cases,* 107 HARV. L. REV. 144, 376 (1993) (showing that during the 1992 Term the Supreme Court disposed of 119 cases by written opinion and 107 cases by memorandum decision out of the 6336 cases in which review was sought).

questions.[216] Even where the Supreme Court is able to resolve intercircuit conflicts, the delay is often substantial.[217]

Attempts to unify federal law without the intervention of the Supreme Court have also been unavailing. The drive to establish a new federal appeals court to resolve differences among the circuits[218] has been unsuccessful.[219] It has been suggested, by analogy to intracircuit practice, that every federal appeals court should defer to the first appeals court that decides any question.[220] However, no circuit currently holds the view that precedents of other circuits should be treated as binding authority.[221] The federal circuits have adopted this position because the benefits of intercircuit dialogue are thought to outweigh the costs of fragmentation of federal law

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216. *See* Beaulieu v. United States, 497 U.S. 1038 (1990) (White, J., dissenting) (arguing that certiorari should be granted in a case that presents a circuit conflict, and noting that 55 other conflicts among the state and federal courts were not resolved by the Court during the 1989 Term); Byron R. White, *A Salute to the Circuits,* 28 LOY. L. REV. 669, 670 (1982) ("[T]he courts of appeals these days are in large part — and necessarily so — finally responsible for the interpretation and enforcement, and hence for the condition, of the federal law."); *see also* Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law,* 82 HARV. L. REV. 542, 580 (1969) ("The 'law of the circuit' has emerged as a response to the Supreme Court's incapacity to resolve intracircuit conflicts."). *But see* GERHARD CASPER & RICHARD A. POSNER, THE WORKLOAD OF THE SUPREME COURT 89-90 (1976) (arguing that the Supreme Court is able to resolve all but a small percentage of genuine circuit conflicts).

217. *See* Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz,* 99 YALE L.J. 801, 811 (1990); Marcus, *supra* note 17, at 688 & n.74.

218. *See* Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study,* 59 N.Y.U. L. REV. 681, 684-96, 813-22 (1984); Marcus, *supra* note 17, at 689 n.82 (describing bills that would have created a temporary Intercircuit Tribunal of the U.S. Courts of Appeals); Daniel J. Meador, *The Federal Judiciary — Inflation, Malfunction, and a Proposed Course of Action,* 1981 B.Y.U. L. REV. 617, 625-37 (discussing various proposals for a national court of appeals); Sanford Caust-Ellenbogen, Note, *Using Choice of Law Rules to Make Intercircuit Conflicts Tolerable,* 59 N.Y.U. L. REV. 1078, 1085-86 (1984).

219. *See, e.g.,* Dreyfuss, *supra* note 163, at 6 (noting that Congress, in enacting the Federal Courts Improvements Act of 1982, rejected the recommendation of the Hruska Commission to create a new appellate court to handle cases referred by the Supreme Court).

220. *See* William J. Brennan, Jr., *Some thoughts on the Supreme Court's workload,* 66 JUDICATURE 230, 232, 235 (1983) (noting that Justice White has endorsed this proposal); Walter V. Schaefer, *Reducing Circuit Conflicts,* 69 A.B.A. J. 452, 455 (1983); Caust-Ellenbogen, *supra* note 218, at 1090; Note, *Securing Uniformity in National Law: A Proposal for National Stare Decisis in the Courts of Appeals,* 87 YALE L.J. 1219, 1240-46 (1978).

221. *See* Estreicher & Revesz, *supra* note 211, at 736 & n.275. I do not mean to suggest that the federal circuits disregard the decisions of their sister circuits. The creation of an intercircuit conflict is a factor suggesting the need for en banc review. *See, e.g.,* Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990,* 59 GEO. WASH. L. REV. 1008, 1024-25 (1991) (describing the D.C. Circuit's practice and noting that this rule obtains in part because "[a] conflict between circuits is an embarrassment to a system of national law"); *see also* Samuel Estreicher & Richard L. Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence: A Reply,* 99 YALE L.J. 831, 834 & n.18 (1990) (collecting cases in which circuit courts recognized an obligation to accommodate the law of other circuits in the interests of national uniformity).

among the circuits.[222] Permitting the courts of appeals to depart from the rulings of other circuits allows the law to develop.[223] If courts of appeals continue to disagree over time, this fact signals the Supreme Court that an issue is ripe for review and aids the Supreme Court in resolving the issue.[224] As a consequence, federal law is uniform within but not among circuits.[225]

The absence of federal choice of law rules demonstrates that the federal courts are required to accept the myth of a uniform federal law. To return to our hypothetical, a district court in New York will apply the law of the Second Circuit in a federal securities case even if all the parties reside in Ohio and all relevant events occurred in Ohio. By any choice of law criteria, this result is absurd. However, the district court is not permitted to undertake a choice of law analysis. Even though federal law is not uniform in practice, the district court is required to pretend that it is.[226]

To summarize, a federal district court in New York applies the law of the Second Circuit for only one reason: any appeal will lie to the Second Circuit. Although district judges have occasionally ignored binding appellate precedent[227] and recent commentators have questioned the duty of district courts to apply the law of reviewing appellate courts,[228] there is hardly a more well-accepted

222. *See* Estreicher & Revesz, *supra* note 211, at 736. *But see* Schaefer, *supra* note 220, at 454.

223. *See* Estreicher & Revesz, *supra* note 211, at 736-37.

224. *See id.*

225. *See, e.g.*, Caminker, *supra* note 210, at 855; Diller & Morawetz, *supra* note 217, at 805.

226. *See In re* Pittsburgh & L.E.R.R. Co. Sec. & Antitrust Litig., 543 F.2d 1058, 1065 n.19 (3d Cir. 1976) ("[F]ederal law . . . is assumed to be nationally uniform, whether or not it is in fact."); United States v. Barrientos, 485 F. Supp. 789, 792 (E.D. Pa. 1980) (arguing that " 'a conflict of law between the Circuits' is a misnomer" even when a "conflict of *interpretations*" exists).

227. One Alabama district judge has refused to follow the Supreme Court's Establishment Clause jurisprudence. *See* Jaffree v. Board of Sch. Commrs., 554 F. Supp. 1104, 1128 (S.D. Ala.), *modified sub nom.* Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984), *aff'd.*, 472 U.S. 38 (1985). District Judge William Cox was often unwilling to follow Fifth Circuit precedent in voting rights cases. *See* FRANK T. READ & LUCY S. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH 293-303 (1978). State courts have occasionally refused to follow Supreme Court rulings. *See* State v. Phillips, 540 P.2d 936, 938 (Utah 1975) (refusing to accept the incorporation doctrine as applied to the First Amendment), *overruled by* State v. Taylor, 664 P.2d 439, 448 n.4 (Utah 1983).

228. *See* Paul L. Colby, *Two Views on the Legitimacy of Nonacquiescence in Judicial Opinions*, 61 TUL. L. REV. 1041, 1058 (1987) (noting that the duty of lower courts to follow the precedents of higher courts is "not compulsory but suasive"); Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's* Justice Accused, 7 J.L. & RELIGION 33, 85 (1989); *see also* Caminker, *supra* note 210, at 856-65 (exploring the question but concluding, after a review of the relevant literature, that district courts generally apply the law of reviewing appellate courts).

procedural rule. A trial court's duty to follow the precedents of a court with appellate jurisdiction flows from substantial efficiency concerns.[229] This practice saves resources at both the trial and appellate levels.[230] The district court does not have to reconsider any questions decided by the appellate court. Following precedent obviates the need for appeals. It also allows the parties to obtain the result that the appellate court would require at the earliest possible time.[231] A contrary rule would have a substantial differential impact on poor parties.[232] Whereas rich parties would have the ability to get errant district court decisions reversed, poorer parties might lack the financial resources for an appeal they know they could win.

The rule that the venue of appeal determines the applicable federal law obtains in fora other than the district courts. The United States Tax Court hears cases in which a taxpayer wishes to challenge a ruling of the Internal Revenue Service prior to paying the tax.[233] An appeal from the Tax Court lies to the court of appeals where the taxpayer resides.[234] For many years, the Tax Court took the position that, unlike the district courts, it had a nationwide mandate to apply the tax laws uniformly and was, therefore, not required to defer to the precedents of any court of appeals.[235] This

229. For an argument that the duty to follow Supreme Court precedent flows directly from the requirements of Article III, see Caminker, *supra* note 210, at 828-34. *See also id.* at 838-39 (rejecting the argument that the duty to follow the precedents of courts with appellate jurisdiction flows directly from the statutes creating such jurisdiction). Although Caminker questions the strength of a number of rationales, he ultimately concludes that courts should follow the precedents of courts with appellate jurisdiction in most cases. *See id.* at 839-43, 865-67.

230. *See id.* at 839-40.

231. *See id.* at 843-45. In Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989), the Supreme Court noted that the inferior federal courts must follow existing Supreme Court precedent even when they believe that the Supreme Court would overrule such precedent. *See* 490 U.S. at 484. The Supreme Court issued this rebuke in *Shearson* even as it overruled a prior case, as the Fifth Circuit had predicted it would. *See* 490 U.S. at 479-84. *Shearson* should not be taken as a contradiction of the policy that trial courts should strive to mirror the results that are most likely to prevail on appeal. The *Shearson* Court may simply have believed that the costs of inaccurate predictions that prior precedents would be overruled outweighed the benefits of accurate predictions. Because the Supreme Court usually declines to overrule its prior cases, *see, e.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2808-16 (1992) (discussing the doctrine of stare decisis), the safer practice is to require obedience to all higher authority until such time as it is the pleasure of the superior court to reconsider.

232. *Cf.* Diller & Morawetz, *supra* note 217, at 812 (discussing this principle in the context of agency nonacquiescence); Estreicher & Revesz, *supra* note 211, at 749-50 (same).

233. *See* 26 U.S.C. § 6213(a) (1988). A taxpayer who is willing to pay any required tax prior to filing suit may seek a refund in either district court or the U.S. Claims Court. *See* 28 U.S.C. § 1346(a)(1) (1988).

234. *See* 26 U.S.C. § 7482(b)(1)(A) (1988).

235. *See* Lawrence v. Commissioner, 27 T.C. 713, 716-17 (1957), *revd.*, 258 F.2d 562 (9th Cir. 1958).

position was sharply criticized by the circuit courts.[236] In *Golsen v. Commissioner*,[237] the Tax Court changed course and agreed to follow the precedents of the circuit court with appellate jurisdiction.[238] It did so for the same efficiency reasons that district courts obey circuit courts with appellate jurisdiction.[239]

The rule that the venue of appeal determines applicable federal law also obtains in the administrative agency context. Many agencies have national jurisdiction to administer legislative schemes that includes a quasi-judicial function. Congress often provides for judicial review of such determinations. In some circumstances the venue of judicial appeal is definite, and in others it is not.[240] When the venue of appeal is definite, the common agency practice is to apply the law of the appellate forum.[241]

Prior to 1985, the Social Security Administration (SSA) refused in its adjudicatory proceedings to apply the law of the judicial forum with appellate jurisdiction. Claimants who are denied social security benefits have the right to appeal to the federal district court where they reside.[242] Nevertheless, the SSA took the view that it was not bound by the precedents of the federal circuit in which the claimant resided and that as the administrator of a na-

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236. *See, e.g.*, Stacey Mfg. v. Commissioner, 237 F.2d 605, 606 (6th Cir. 1956) ("[T]he Tax Court of the United States is not lawfully privileged to disregard and refuse to follow . . . the settled law of [this] circuit . . . .").

237. 54 T.C. 742 (1970), *affd.*, 445 F.2d 985 (10th Cir.), *cert. denied*, 404 U.S. 940 (1971).

238. *See Golsen*, 54 T.C. at 757. The Tax Court may still have greater leeway than a district court to depart from the precedents of the circuit court with appellate jurisdiction. The Tax Court is only required to follow relevant circuit decisions that are squarely on point. *See* Sirbo Holdings, Inc. v. Commissioner, 476 F.2d 981, 989 (2d Cir. 1973); *Golsen*, 54 T.C. at 757. In Lardas v. Commissioner, 99 T.C. 490 (1992), the Tax Court recently took a very narrow view of when circuit precedents are squarely on point. *Lardas*, 99 T.C. at 494-95. For a critique of the *Lardas* case and its implications for forum shopping, see Donald B. Tobin, Note, *The Tax Court Revisits the* Golsen *Rule:* Lardas v. Commissioner, 47 TAX LAW. 559 (1994).

239. *See Golsen*, 54 T.C. at 757 (adopting the new rule in the interest of "efficient and harmonious judicial administration").

240. *See* Estreicher & Revesz, *supra* note 211, at 687.

241. *See In re* Anselmo, Interim Decision 3105 (Bureau of Immigration Appeals May 11, 1989), *reprinted in* 66 INTERPRETER RELEASES 598 (1989) (rejecting the nonacquiescence policy in deportation proceedings); Davis Metal Stamping, Inc., 12 O.S.H. Cas. (BNA) 1259, 1261 (Occupational Safety and Health Rev. Commn. Apr. 15, 1985) (applying the law of the circuit to which the party said it would appeal), *affd.*, 800 F.2d 1351 (5th Cir. 1986); Diller & Morawetz, *supra* note 217, at 801 n.1 (noting that most agencies "that are certain which circuit will review their decisions generally practice intracircuit acquiescence"); Estreicher & Revesz, *supra* note 211, at 716 (noting that when review of agency action is vested in a single court of appeals, most agencies will apply the law of that court).

242. *See* 42 U.S.C. § 405(g) (1988). A claimant may also appeal in the district in which its principal place of business is located. *See* 42 U.S.C. § 405(g) (1988). The overwhelming majority of cases, however, are appealed in the district of the claimant's residence. *See* Estreicher & Revesz, *supra* note 211, at 694.

tional scheme, it was entitled to apply its best view of federal law in light of Supreme Court authority.[243]

The SSA's position — that it would not defer to the precedents of the judicial fora to which its cases would be appealed — is usually referred to as nonacquiescence.[244] The SSA's policy caused a national uproar. It was condemned by the courts[245] and commentators.[246] Two United States Attorneys refused to represent the Government in SSA nonacquiescence cases. The strength of the reaction to the nonacquiescence view demonstrates the substantial importance of the efficiency concerns that require adherence to the precedents of a court with appellate jurisdiction.[247] The SSA, unlike the federal district courts and the Tax Court, is not part of the

243. *See* Estreicher & Revesz, *supra* note 211, at 694-97. Since 1985, the SSA has softened its nonacquiescence policy. *See id.* at 697-99.

244. *See* Diller & Morawetz, *supra* note 217, at 801. The Internal Revenue Service, Federal Labor Relations Authority, Federal Trade Commission, and Merit Systems Protection Board also have policies that permit a certain amount of nonacquiescence. *See* Estreicher & Revesz, *supra* note 211, at 713-14, 718. To be distinguished from the policies of these agencies is that of the National Labor Relations Board (NLRB), which supervises a scheme in which the venue of judicial appeal is uncertain. *See id.* at 709. In this circumstance, although it has also been criticized by the courts, *see id.* at 710-12, the NLRB would seem justified in refusing to apply the precedents of the inferior federal courts. *See* Diller & Morawetz, *supra* note 217, at 802 n.8; Estreicher & Revesz, *supra* note 211, at 735-43. Congress would do well, however, to change the statutory scheme to provide for a definite appellate venue so that the agency could know where judicial appeals would lie and apply the rules of that circuit. *See id.* at 764-70.

245. *See* Schisler v. Heckler, 787 F.2d 76, 84-85 (2d Cir. 1986) (noting that the SSA represented that it was currently following Second Circuit law and enjoining the SSA to follow Second Circuit law with respect to claimants residing in the Second Circuit on that basis); Lopez v. Heckler, 725 F.2d 1489 (9th Cir.) (affirming a preliminary injunction against the SSA's nonacquiescence policy), *vacated and remanded on other grounds*, 469 U.S. 1082 (1984); Stieberger v. Heckler, 615 F. Supp. 1315 (S.D.N.Y. 1985) (granting a preliminary injunction against the SSA's nonacquiescence policy), *vacated sub nom.* Stieberger v. Bowen, 801 F.2d 29 (2d Cir. 1986) (vacating the injunction based on *Schisler*); Thomas v. Heckler, 598 F. Supp. 492 (M.D. Ala. 1984) (enjoining the SSA's nonacquiescence policy); Holden v. Heckler, 584 F. Supp. 463 (N.D. Ohio 1984) (same); *see also* Diller & Morawetz, *supra* note 217, at 801 n.2 (collecting cases condemning agency nonacquiescence). In Hyatt v. Heckler, 579 F. Supp. 985 (D.N.C. 1984), the district court's injunction against the SSA's nonacquiescence policy was vacated by the court of appeals, 757 F.2d 1455 (4th Cir. 1985), whose judgment was in turn vacated by the Supreme Court, Hyatt v. Bowen, 476 U.S. 1167 (1986). Although the Fourth Circuit did not reinstate the injunction on remand, it strongly disapproved of the SSA's nonacquiescence policy. *See* Hyatt v. Heckler, 807 F.2d 376, 379 (4th Cir. 1986), *cert. denied*, 484 U.S. 820 (1987).

246. *See* Diller & Morawetz, *supra* note 217; Estreicher & Revesz, *supra* note 211, at 681 n.8 (collecting authorities). Even those commentators who oppose a per se ban on agency nonacquiescence suggest that agencies may refuse to follow the precedents of judicial fora with appellate jurisdiction only in very limited circumstances. *See id.* at 683, 743-53 (arguing that an agency may engage in intracircuit nonacquiescence only when it has a reasonable prospect of obtaining a change in the law).

247. *See* Diller & Morawetz, *supra* note 217, at 812-17. Constitutional arguments have also been advanced to support the same result. *See* Estreicher & Revesz, *supra* note 211, at 718-35 (collecting constitutional arguments and arguing that such concerns do not justify a per se ban on agency nonacquiescence).

federal judicial system.[248] Arguably, the SSA, as the administrator of a national program, has a much greater procedural and substantive interest in the uniformity of the federal law it administers than the federal district courts.[249] Perhaps the SSA should have been permitted to apply whatever scheme comported with its best view of federal law, subject only to the perils of being reversed in a court that Congress endowed with appellate jurisdiction. Nevertheless, the SSA's nonacquiescence program elicited strong passions and has been widely viewed as beyond the pale.

The rule that the venue of appeal determines applicable federal law also obtains within the state court system.[250] State courts are often required to determine federal questions. They usually have concurrent jurisdiction over federal question cases,[251] some of which are not removable.[252] Absent diversity of citizenship, state courts have exclusive original jurisdiction over federal issues in cases in which the plaintiff's well-pleaded complaint raises only state law questions.[253] When a state court decides federal issues, it owes no fealty to the inferior federal courts in its region, including the local court of appeals.[254] State trial courts owe obedience on federal issues only to the higher state courts and the Supreme Court of the United States. This result obtains because the inferior federal courts do not lie in the path of appellate review.[255]

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248. *See* Estreicher & Revesz, *supra* note 221, at 839-40 (rejecting the "analogy between administrative agencies and district courts").

249. *See id.* at 840.

250. *See* Caminker, *supra* note 210, at 825.

251. There is a strong presumption in favor of such state court jurisdiction. *See, e.g.*, Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-78 (1981); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507-08 (1962).

252. *See, e.g.*, 15 U.S.C. § 77v(a) (1988) (denying the removal of Securities Act claims); 28 U.S.C. § 1445 (1988) (denying the removal of certain labor cases).

253. The federal district courts do not have original jurisdiction over cases where federal issues are introduced only by way of defense. *See, e.g.*, Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9-12 (1983); Gully v. First Natl. Bank, 299 U.S. 109, 113 (1936); Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152-54 (1908).

254. *See, e.g.*, Freeman v. Lane, 962 F.2d 1252, 1258 (7th Cir. 1992); Bromley v. Crisp, 561 F.2d 1351, 1354 (10th Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); United States *ex rel.* Lawrence v. Woods, 432 F.2d 1072, 1075-76 (7th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971); Owsley v. Peyton, 352 F.2d 804, 805 (4th Cir. 1965); Alicia T. v. County of L.A., 271 Cal. Rptr. 513, 517 (Ct. App. 1990); Bradshaw v. State, 286 So. 2d 4, 6 (Fla. 1973), *cert. denied*, 417 U.S. 919 (1974); State v. Coleman, 214 A.2d 393, 402-04 (N.J. 1965), *cert. denied*, 383 U.S. 950 (1966); Penrod Drilling Corp. v. Williams, 868 S.W.2d 294, 296 (Tex. 1993).

255. In criminal matters, Congress has provided for habeas corpus review of federal issues in the inferior federal courts. *See* 28 U.S.C. § 2254(a) (1988). As a consequence, in this context it makes eminent good sense for the state courts to follow the local federal court of appeals. *See* Commonwealth v. Negri, 213 A.2d 670, 672 (Pa. 1965). One court recently suggested that the Supremacy Clause requires state courts to follow the precedents of the federal court of appeals with habeas review power. *See* Fretwell v. Lockhart, 946 F.2d 571,

In sum, the venue of appeal determines choice of law on federal issues. Although Marcus's competence principle is an element of the analysis, it provides only a partial explanation for the result. The core idea is that in the absence of federal choice of law rules, efficiency concerns require the application of the law of the court with appellate jurisdiction. I call this view the "appellate model." As demonstrated below, the appellate model confirms the well-accepted view that transferee federal law should apply after permanent transfers. As Part IV demonstrates, however, the appellate model requires a different result in the context of MDL transfers.

C. *The Effect of Permanent Transfer*

Now suppose, in accordance with our hypothetical, that a federal court in New York decides, pursuant to 28 U.S.C. § 1404(a), to transfer a case brought under section 14(a) of the Securities Exchange Act to a federal court in Ohio. Should the transferee court apply the law of the Second Circuit, which allows the plaintiff to prevail on a showing of negligence, or the Sixth Circuit, which requires proof of scienter?

The law of the Sixth Circuit should apply, and the district court should hold that proof of scienter is required. If the complaint alleges only negligence, the district court should dismiss the complaint.[256] The determining factor in choice of federal law is the site of appellate jurisdiction. Because any appeal will be heard by the Sixth Circuit, the district court in Ohio should apply the Sixth Circuit's view of federal law, just as it would for cases originally commenced in its court.[257] Allowing the plaintiff to proceed on a negligence theory would potentially waste substantial resources. Because the Sixth Circuit is not required to follow the Second, applying the Second Circuit's view on this question would invite certain reversal if the plaintiff wins.[258]

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577 (8th Cir. 1991), *revd. on other grounds,* 113 S. Ct. 838 (1993). This assertion, however, seems questionable. *See* Lockhart v. Fretwell, 113 S. Ct. 838, 846 (1993) (Thomas, J., concurring).

256. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 190 & n.5 (1976) (requiring proof of scienter in connection with Rule 10b-5 claims and affirming the dismissal of a complaint alleging only negligence).

257. *See* Greyhound Fin. Corp. v. Willyard, No. 87-C-0911B, 1989 WL 201094, at *14 (D. Utah Dec. 26, 1989) (applying transferee federal law after a permanent transfer because the transferee court of appeals would be the appellate forum); Satellite Fin. Planning Corp. v. First Nat'l. Bank, 633 F. Supp. 386, 393-94 (D. Del. 1986) (applying transferee federal law after a permanent transfer to avoid the anomaly of the transferee circuit having to disregard its established precedents).

258. *See* Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation,* 135 U. PA. L. REV. 595, 641-48 (1987) (arguing

The concerns of *Van Dusen* and *Ferens* do not require a different result. By contrast to the state law context, the plaintiff has no choice of law privilege with respect to federal law. Unlike the state system, the plaintiff's residual ability to influence applicable federal law is not the result of a carefully calibrated system. The plaintiff's choice of venue usually determines choice of law by default, not because the plaintiff has any entitlement to this result. The plaintiff had access to the Second Circuit's law only because of the broad venue provisions of the Securities Exchange Act.[259] However, Congress also created section 1404(a) as a limitation on these venue provisions. As a consequence, the plaintiff has no legitimate cause for complaint if transfer changes applicable federal law.

The rule that transferee federal law should apply does not violate the concern of *Van Dusen* and *Ferens* that transfer decisions should be determined by efficiency rather than choice of law considerations. Because the uniformity of federal law is accepted as a given, applicable federal law is deemed to remain unchanged after transfer. As a consequence, any detriment to the plaintiff receives no weight in the transfer calculus because, by hypothesis, no detriment exists.[260]

Nor is this result unfair. The absence of choice of law rules with respect to federal issues gives the plaintiff a significant litigation advantage. The plaintiff is often presented with a wide range of venue options, and the plaintiff's initial choice of forum is entitled to respect. The defendant has the burden of overcoming the presumption in favor of the plaintiff's choice of venue.[261] Because the plaintiff is the first actor in the venue process, the plaintiff has a greater ability than the defendant to influence venue and, as a consequence, choice of law.[262] Any detriment to plaintiffs in transferred cases would seem at least offset by the plaintiff's ability to choose the applicable federal law in cases that are not transferred.

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that transferee federal law should apply to prevent reversal in the transferee court of appeals). We might, of course, depart from the principle of competence and require the Sixth Circuit to apply the Second Circuit's law on the standard of fault required in § 14(a) actions. This rule, however, would have all the costs that a similar rule would have in the MDL context and none of the compensating benefits. *See infra* section IV.C. Unlike in the MDL context, the Second Circuit would have no ability to review the case to determine if the courts in the Sixth Circuit applied its law correctly. *See infra* text accompanying note 340.

259. *See supra* note 9.

260. *See supra* text accompanying notes 136-45.

261. *See supra* note 33 and accompanying text.

262. Thus, although Marcus argued that venue established choice of law by default in diversity cases, *see supra* text accompanying notes 162-68, venue actually plays a greater role in establishing choice of law with respect to federal issues.

The last of the *Van Dusen-Ferens* concerns presents a greater obstacle to the application of transferee federal law. Applying transferee federal law presents defendants with the prospect of obtaining a better law in some cases as a result of transfer. As a consequence, defendants will have an incentive to seek transfer for reasons not related to trial efficiencies.[263] Although the trial court has the power to deny transfer motions that are not founded on efficiency considerations, the system wastes resources in disposing of transfer motions that originate from choice of law concerns.

Nevertheless, the fundamental assumptions of the federal system require the application of transferee federal law. There is no choice of law with respect to federal law because federal law is theoretically uniform. Although this result does not obtain in practice, the lack of practical uniformity is a fact that federal courts are not permitted to consider. Were they allowed to admit the existence of variations in federal law, the creation of federal choice of law rules would be a necessity. Just as the theoretical uniformity of federal law outweighs choice of law considerations, it outweighs any efficiency concern related to forum shopping by defendants.

Perhaps the better practice would be to recognize the lack of uniformity of federal law with all its attendant implications. Federal courts might then create choice of law rules to determine applicable circuit law.[264] The plaintiff might receive a choice of law privilege that courts should protect in the transfer process, and federal choice of law rules might discourage defendants from forum shopping. Until the fundamental assumptions of the system change, however, courts should treat transfers in accordance with the same assumptions that govern cases that are not transferred, including the assumptions that a single federal law governs all federal issues and that the venue of appeal determines which circuit's law applies in district court. It is not so much that *Van Dusen*'s policies are inapplicable in the federal issue context as that the federal courts are disabled from considering them.

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263. *See* Friendly, *supra* note 149, at 412 (noting that the application of transferee federal law encourages forum shopping by defendants). Although forum shopping usually has pejorative overtones, *see* Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies,* 1991 WIS. L. REV. 11, 14, we should not forget that an attorney's job is to give the client the greatest possible chance of winning, which includes selecting the forum that will apply the best law from the client's perspective. *See* Cheeseman v. Carey, 485 F. Supp. 203, 215 (S.D.N.Y.), *affd. on other grounds,* 623 F.2d 1387 (2d Cir. 1980); Purcell, *supra* note 35, at 449-51.

264. *See* Caust-Ellenbogen, *supra* note 218, at 1091-98 (arguing for the application of choice of federal law rules based on the defendant's residence or principal place of business).

D. *Conclusion*

In sum, as *Clayton* and *Green* suggest, transferee federal law should apply in the permanent transfer context as a consequence of the theoretical uniformity of federal law and the allocation of appellate jurisdiction within the federal court system.[265] The progeny of *Clayton* and *Green* were correct to discount the significance of *Van Dusen.* The next Part examines the choice of law question in the MDL context and concludes that the special circumstances of MDL litigation require a different result.

IV. Choice of Federal Law After MDL Transfers

This Part considers the choice of law question in the context of MDL transfers and concludes, contrary to the emerging consensus view, that MDL courts should apply the law of the transferor circuit on federal questions. This result flows from the structure and purposes of the MDL Act. The MDL Act contemplates a remand to the transferor court after the conclusion of pretrial proceedings. As a consequence, the transferor circuit is the ultimate appellate forum, and its law should apply during all phases of the case. Moreover, although there is little direct legislative history, the limited purposes of MDL transfers suggest that Congress did not desire MDL transfers to have outcome-determinative effects.

A. *The MDL Context*

1. *Applying the Appellate Model*

The MDL Act allows the JPML to consolidate cases involving common questions of fact for pretrial purposes. The MDL venue need not be one in which the actions could have been brought as an original matter. The MDL court has exclusive jurisdiction over the transferred cases during the pretrial phase.[266] At the conclusion of pretrial proceedings, pending cases are remanded to their original

265. Because a permanent transfer has the effect of changing the federal law applicable to the case, district courts should make transfer decisions as early in the proceedings as practicable. *See* 1B James Wm. Moore et al., Moore's Federal Practice ¶ 0.404[4.-2] (2d ed. 1994).

266. *See In re* Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1178 (D.C. Cir. 1987) (D.H. Ginsburg, J., concurring), *affd. sub nom.* Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989); Astarte Shipping Co. v. Allied Steel & Export Serv., 767 F.2d 86, 87 (5th Cir. 1985); Eckstein v. Balcor Film Investors, 740 F. Supp. 572, 574-75 (E.D. Wis. 1990). Because the MDL Act evinces Congress's desire for coordinated pretrial proceedings in the MDL court, the MDL judge has the power to rescind previous rulings made by the transferor district judge. *See, e.g., Astarte,* 767 F.2d at 87; *In re* Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig., 664 F.2d 114, 118-20 (6th Cir. 1981).

fora for trial.[267] After remand, any appeal from the final judgment lies in the circuit in which the trial court is located.

Because the MDL Act contemplates that cases will be remanded to their original fora for trial and appeal, the MDL judge should apply transferor circuit law to all federal issues because the transferor circuit will have ultimate jurisdiction over any appeal of the case.[268] This result is consistent with the rule that, due to the absence of federal choice of law principles, the venue of appeal determines applicable circuit law. The application of transferor federal law in MDL cases is justified by the same efficiency considerations that require district courts to apply the precedents of their own circuits in cases that are not transferred and in cases that are permanently transferred under section 1404(a). Were an MDL court in Ohio to hold, in accordance with the Sixth Circuit's law, that section 14(a) of the Securities Exchange Act requires proof of scienter, the Second Circuit would overturn this result on ultimate appeal. As a consequence, after remand the federal district court in New York would probably vacate the MDL judge's ruling to save the Second Circuit the trouble and allow the trial to proceed in accordance with Second Circuit law.[269]

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267. *See* 28 U.S.C. § 1407(a) (1988).

268. Although there have been suggestions that one circuit court may not examine rulings made by a district court in another circuit, *see* Steinman, *supra* note 258, at 644 n.159 (collecting cases), it would seem that, because all interlocutory rulings may be reconsidered prior to final judgment, *see* FED. R. CIV. P. 54(b), the district court that enters final judgment in any case is deemed to endorse any previous rulings made in the case and the court of appeals that supervises the district court entering judgment is entitled to revise any errors on which the judgment rests. *See* Tel-Phonic Servs., Inc. v. TBS Intl., Inc., 975 F.2d 1134, 1138 (5th Cir. 1992) (holding that the transferee court of appeals has jurisdiction to review pretransfer rulings by a district court in another circuit that were not reconsidered by the transferee district court after transfer); Steinman, *supra* note 258, at 646-47. As a consequence, after the remand of an MDL case, jurisdiction is exclusively in the remand court, final judgment will be entered by the remand court, and the court of appeals that supervises the remand court is entitled to inquire into all aspects of the case. *See* Allegheny Airlines, Inc. v. LeMay, 448 F.2d 1341, 1345 (7th Cir.) (noting that errors made by the MDL judge "will be subject to review . . . at the time of the entry of judgment on the complaints in the suits in the ultimate trial forum" and that "[t]he transferor court . . . takes the case with all of its errors, if any, that may have fastened on the carcase theretofore"), *cert. denied,* 404 U.S. 1001 (1971).

269. Departing from earlier decisions to avoid appellate reversal is a well-accepted exception to the law of the case doctrine. *See, e.g.,* Peterson v. Lindner, 765 F.2d 698, 704 (7th Cir. 1985); Loumar, Inc. v. Smith, 698 F.2d 759, 763 (5th Cir. 1983); Holzsager v. Valley Hosp., 482 F. Supp. 629, 633 (S.D.N.Y. 1979) (refusing to accept the rulings of a transferor court in another circuit on a subject matter jurisdiction question because the law of the case doctrine "should not prevent the discharge of a judge's obligation to present an appellate court with the judgment he believes ought to be rendered in the case" (quoting Rodriguez v. Olaf Pedersen's Rederi A/S, 387 F. Supp. 754, 757 (E.D.N.Y. 1974), *affd.,* 527 F.2d 1282 (2d Cir. 1975))); 1B MOORE ET AL., *supra* note 265, ¶ 0.404[4.-2] (arguing that district courts should be hesitant to effect permanent transfers after substantial proceedings have occurred because of the potential for reexamination in the transferee court); Steinman, *supra* note 258, at 641-43 (arguing that a district court should reexamine federal decisions made by a district

2. *Congressional Intent*

The application of transferor federal law in MDL cases is also consistent with the will of Congress.[270] The MDL Act was passed in 1968[271] in response to the thousands of electrical equipment price-fixing cases filed in the early 1960s under the federal antitrust laws. In these cases discovery proceedings were coordinated by the judiciary under a special procedure developed to avoid duplication of effort in the various federal districts involved.[272] Sparse legislative history suggests that Congress gave little consideration to the choice of law problem but may have assumed that transferor law would apply.[273] Professor Marcus has argued that this history is irrelevant in the federal issue context because the authors of these comments had diversity cases, the actual context in which *Van Dusen* was decided, in mind.[274] As a more recent view contends, however, Congress passed the MDL Act with federal antitrust cases in mind, so there is no reason to believe that it assumed that transferor law would apply only to diversity cases.[275]

Moreover, the actual legislation passed by Congress provides insight into Congress's position on choice of law. The MDL scheme approved by Congress is quite limited. The MDL court has jurisdiction only over pretrial proceedings. Any subsequent proceedings must be conducted in the transferor court after remand. Because of the limited scope of MDL proceedings, Congress allowed MDL transfers to courts that would not have been legitimate original fora and, therefore, would not qualify as permanent trans-

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court in another circuit to prevent reversal on appeal); *id.* at 704-05 (applying this principle after remand in MDL proceedings).

270. By contrast, there is no indication that Congress directly considered this issue in 1948 when it enacted § 1404(a).

271. *See* Multidistrict Litigation Act of 1968, Pub. L. No. 90-296, 82 Stat. 109 (codified as amended at 28 U.S.C. § 1407 (1988)).

272. *See* Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration,* 50 A.B.A. J. 621, 623-24 (1964); Lawrence J. Fleming, Note, *The Problem of Venue in Multiple District Litigation,* 41 NOTRE DAME LAW. 507, 518-19 (1966); *see also* Brackin, *supra* note 198, at 664; Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts,* 78 F.R.D. 575, 581 (1978).

273. In connection with the hearings on the MDL Act, two witnesses with experience in the handling of the electrical equipment price-fixing cases testified that the *Van Dusen* rule would apply in MDL cases. *See Multidistrict Litigation: Hearings on S. 3815 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,* 89th Cong., 2d Sess. 13 (1966) (testimony of Dean Phil Neal); *id.* at 25 (testimony of Judge William Becker).

274. *See* Marcus, *supra* note 17, at 710-11.

275. *See* Cooper, *supra* note 24, at 1157-58.

feree courts.[276] Congress explicitly considered and rejected the possibility of consolidating MDL cases for trial.[277] It is hard to imagine that Congress contemplated that pretrial transfers to fora that lacked the ability to conduct trials would have outcome-determinative effects.[278]

To be contrasted with the scheme Congress enacted are MDL schemes that give the MDL court greater powers. The Multiforum, Multiparty Jurisdiction Act of 1989 (MMJ Act),[279] which has never become law, provides for permanent transfers to MDL fora to maximize the efficiencies inherent in consolidating mass tort cases.[280] As part of this scheme, the MMJ Act provides that a single law should apply to all state law issues and lists factors for courts to consider in selecting the applicable law.[281] Thus, in state law cases, the MMJ Act would overrule *Klaxon* and provide the first federal choice of law principles.[282] Federal issues are exempted from the

276. Section 1404(a) permits a permanent transfer to any district "where [the case] might have been brought." 28 U.S.C. § 1404(a) (1988). The Supreme Court has interpreted this language to refer to fora that can exercise personal jurisdiction and venue without the defendant's consent. *See* Hoffman v. Blaski, 363 U.S. 335 (1960).

277. Congress declined to order permanent consolidation for four reasons: (i) the experience of the electrical equipment price-fixing cases, on which the MDL Act was based, had been limited to coordinated pretrial proceedings; (ii) it might be impracticable to litigate all MDL cases in a single district; (iii) a trial in the original district would probably be more convenient for the parties and witnesses; and (iv) discovery proceedings in the original forum might be needed to supplement the MDL proceedings. *See* H.R. REP. No. 1130, 90th Cong., 2d Sess. 4 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1901-02; George T. Conway III, Note, *The Consolidation of Multistate Litigation in State Courts,* 96 YALE L.J. 1099, 1108 n.45 (1987).

278. *See In re* Dow Co. "Sarabond" Prods. Liab. Litig., 666 F. Supp. 1466, 1469 (D. Colo. 1987) (noting that "[a]pplication of the federal law of the transferor forum is supported by the very purpose of multidistrict litigation" because "the ultimate aim of the transferee court is to return each case to its transferor jurisdiction in a state of readiness for trial").

279. H.R. 3406, 101st Cong., 1st Sess., *reprinted in* 135 CONG. REC. 23,302 (1989). The MMJ Act has been revised and reintroduced in each succeeding Congress. *See* Linda S. Mullenix, *Unfinished Symphony: The Complex Litigation Project Rests,* 54 LA. L. REV. 977, 977 n.5 (1994) (collecting bills).

280. *See* H.R. 3406, *supra* note 279, § 4, *reprinted in* 135 CONG. REC. at 23,302; *see also* John F. Cooney, Note, *The Experience of Transferee Courts Under the Multidistrict Litigation Act,* 39 U. CHI. L. REV. 588, 611 (1972) (arguing that Congress should amend the MDL Act to allow for consolidated trials); Blake M. Rhodes, Comment, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking,* 140 U. PA. L. REV. 711, 745-49 (1991) (arguing that Congress should amend the MDL Act to give the JPML the power to consolidate cases for trial).

281. *See* H.R. 3406, *supra* note 279, § 6(a), *reprinted in* 135 CONG. REC. at 23,303.

282. Courts and commentators have often expressed a preference for federal choice of law rules in consolidated cases. *See, e.g.,* Kohr v. Allegheny Airlines, Inc., 504 F.2d 400, 403 (7th Cir. 1974), *cert. denied,* 421 U.S. 978 (1975); Mary Kay Kane, *Drafting Choice of Law Rules for Complex Litigation: Some Preliminary Thoughts,* 10 REV. LITIG. 309 (1991). *But see* Robert A. Sedler & Aaron D. Twerski, *The Case Against All Encompassing Federal Mass Tort Litigation: Sacrifice Without Gain,* 73 MARQ. L. REV. 76 (1989) (arguing in favor of the *Klaxon* rule in mass tort cases).

choice of law provisions,[283] presumably because transferee federal law would apply after the permanent transfers contemplated by the Act without reference to any choice of law rules.[284] This result would be consistent with the weight of authority as well as sound theory.

The American Law Institute's (ALI) Complex Litigation Project similarly recommends altering the current MDL procedure to allow permanent consolidation of cases involving common questions of fact.[285] Like the MMJ Act, the ALI proposes federal choice of law principles to govern state law issues.[286] Unlike the MMJ Act, the ALI's proposal directly addresses the problem of intercircuit conflicts on federal issues and adopts the position that transferee circuit law should apply.[287]

Thus, broader MDL schemes allow for the permanent transfer and consolidation of related cases.[288] Such schemes also have sig-

283. *See* H.R. 3406, *supra* note 279, § 6(a), *reprinted in* 135 CONG. REC. at 23,303.

284. The MMJ Act still has the potential to create some choice of law difficulties on federal issues. The MMJ Act consolidates cases in the MDL court for the purpose of ascertaining liability. At the conclusion of this phase of the case, the Act gives the MDL judge the power to proceed to the damages phase of the case or to remand the cases to their original fora for the ascertainment of damages. *See* H.R. 3406, *supra* note 279, § 4, *reprinted in* 135 CONG. REC. at 23,302. In state law cases, the Act provides that the law identified as applicable by the MDL judge pursuant to the Act's choice of law provisions will continue to apply after remand. *See* H.R. 3406, *supra* note 279, § 6(c), *reprinted in* 135 CONG. REC. at 23,303. On federal issues, however, the MMJ Act creates a dilemma similar to that now faced in MDL cases. After remand, should the original forum apply the law of its own circuit or the MDL circuit in fixing damages? If the MMJ Act becomes law, the better approach would seem to be to apply MDL circuit law after remand, because this circuit's law will apply on liability questions and a single circuit's law should apply to all issues in MDL cases.

285. *See* CLP, *supra* note 149, § 3.06. The ALI's proposal includes the possibility that cases originally filed in federal court could be transferred to state court, which would then be the forum in which consolidated proceedings were ultimately conducted. *See id.* § 4.01; *see also* Conway, *supra* note 277, at 1107-12 (proposing that Congress amend the MDL Act to allow the consolidation of related cases for trial in state court and arguing that the transferee state court should be free to apply its own law). This reverse removal procedure was recently criticized in Joan Steinman, *Reverse Removal,* 78 IOWA L. REV. 1029 (1993).

286. *See* CLP, *supra* note 149, § 6.01. The *Louisiana Law Review* recently dedicated a symposium issue to the Complex Litigation Project. Commentators supporting the ALI's choice of law scheme were P. John Kozyris, *The Conflicts Provisions of the ALI's Complex Litigation Project: A Glass Half Full?,* 54 LA. L. REV. 953 (1994), and James A.R. Nafziger, *Choice of Law in Air Disaster Cases: Complex Litigation Rules and the Common Law,* 54 LA. L. REV. 1001 (1994). In opposition were Friedrich K. Juenger, *The Complex Litigation Project's Tort Choice-of-Law Rules,* 54 LA. L. REV. 907 (1994); Robert A. Sedler, *The Complex Litigation Project's Proposal for Federally-Mandated Choice of Law in Mass Tort Cases: Another Assault on State Sovereignty,* 54 LA. L. REV. 1085 (1994); and David E. Seidelson, *Section 6.01 of the ALI's Complex Litigation Project: Function Follows Form,* 54 LA. L. REV. 1111 (1994).

287. *See* CLP, *supra* note 149, § 6.08.

288. In addition to the MDL schemes described in the text, there have been proposals to exercise federal subject matter jurisdiction in aviation cases, *see* Brackin, *supra* note 198, at 702-09, and in cases in which any defendant has a residence in a state other than the one where a substantial part of the events or omissions giving rise to the claim occurred, *see*

nificant choice of law implications. The MMJ Act and the ALI both propose federal choice of law rules to identify applicable state law to enhance the efficiency of the MDL procedures. The MMJ Act implies, and the ALI's Complex Litigation Project states, that transferee federal law would apply in consolidated cases. The application of transferee federal law in these schemes is a natural result of the allowance of permanent transfers. Such transfers always have the potential to change results with respect to federal issues, and MDL cases should be no different. Unless and until Congress sees fit to adopt a scheme providing for permanent MDL transfers, however, the MDL Act should be seen as preserving the traditional choice of law framework with as little impact as possible on the results in transferred cases. The discomfort that MDL courts have in applying the law of their own circuits is demonstrated by the fact that such courts continue to give some respect, although less than dispositive significance, to the law of the transferor circuit court.[289]

One might question the above analysis based on the substantive powers given to MDL courts prior to remand. Some have argued that the MDL court lacks the power to effect permanent transfers pursuant to section 1404(a)[290] or make substantive rulings because the MDL Act was principally designed to allow consolidation of discovery proceedings.[291] The courts have soundly rejected this position.[292] It is contrary to the language of the MDL Act, which

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Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction,* 135 U. PA. L. REV. 7, 23-28 (1986). The authors of these proposals do not consider the effect of their plans on choice of federal law, but they advocate altering the *Klaxon* rule with respect to state law litigation. *See* Brackin, *supra* note 198, at 707; Rowe & Sibley, *supra,* at 37-41.

289. *See In re* Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1176 (D.C. Cir. 1987) (suggesting that the law of the transferor circuit warrants "close consideration"), *affd. sub nom.* Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989); *In re* Donald J. Trump Casino Sec. Litig., 793 F. Supp. 543, 548 (D.N.J. 1992), *affd.,* 7 F.3d 357 (3d Cir. 1993), *cert. denied,* 114 S. Ct. 1219 (1994); Isaac v. Life Investors Ins. Co. of Am., 749 F. Supp. 855, 863 (E.D. Tenn. 1990).

290. *See* Cooper, *supra* note 24, at 1159-64 (arguing that the language and legislative history of § 1407 preclude transfer decisions by the MDL court); Cooney, *supra* note 280, at 606 (arguing that MDL courts lack the power to effect permanent transfers because the MDL Act requires a remand of all cases that are not terminated during pretrial proceedings); Rhodes, *supra* note 280, at 734-42 (arguing that the language and legislative history of § 1407 preclude transfer decisions by the MDL court).

291. *See* Cooney, *supra* note 280, at 596, 601-02 (arguing that MDL courts have the power to make substantive rulings only as an adjunct to the discovery process and do not have the power to make summary judgment rulings after the completion of discovery).

292. It is now well established that the MDL court has the power to effect permanent transfers. *See, e.g.,* Eckstein v. Balcor Film Investors, 8 F.3d 1121, 1124 (7th Cir. 1993), *cert. denied,* 114 S. Ct. 883 (1994); Kohr v. Allegheny Airlines, Inc., 504 F.2d 400, 402 (7th Cir. 1974), *cert. denied,* 421 U.S. 978 (1975); Pfizer, Inc. v. Lord, 447 F.2d 122, 124-25 (2d Cir. 1971); *In re* Air Crash at Detroit Metro. Airport, Detroit, Mich. on Aug. 16, 1987, 791 F. Supp. 1204, 1209 (E.D. Mich. 1992); *In re* Bristol Bay Salmon Fishery, Alaska, Antitrust

gives the MDL court the power to conduct coordinated "pretrial" proceedings, not merely discovery proceedings.[293] MDL courts should have the power to effect permanent transfers because, as Part III demonstrates, such transfers change the federal law applicable to the case. Therefore, transfer decisions should be made as early in the case as practicable and should not be postponed until the case is remanded.

MDL judges should have the power to rule on substantive motions because there is an inherent connection between discovery rulings and other pretrial rulings. For example, when jurisdictional questions are at issue, courts often limit discovery to such issues and allow broader discovery to proceed only after they determine that jurisdiction exists.[294] Rule 12(b)(6) motions must be determined at the outset of cases so that the parties will know with regard to what claims their discovery is relevant.[295] Prohibiting the MDL court from dealing with such pretrial matters would substantially limit the efficacy of consolidated discovery proceedings.

The MDL judge's power to decide dispositive substantive issues, however, does not imply that Congress intended MDL transfers to have outcome-determinative effects. As long as the MDL court applies the law of the ultimate trial forum to all pretrial matters, there are no outcome-determinative effects. Because it is possible to allow MDL judges substantive powers without affecting outcomes, the choice of law problem must be resolved on the basis of independent considerations.[296] As demonstrated above, these con-

Litig., 424 F. Supp. 504, 507 (J.P.M.L. 1976). MDL courts also have the power to entertain substantive motions. *See, e.g., Eckstein,* 8 F.3d at 1124 (motion to dismiss); *In re* Donald J. Trump Casino Sec. Litig., 7 F.3d 357, 364 (3d Cir. 1993) (same), *cert. denied,* 114 S. Ct. 1219 (1994); *Korean Air Lines,* 829 F.2d at 1172 (motion for partial summary judgment); Zinser v. Continental Grain Co., 660 F.2d 754, 757 (10th Cir. 1981) (motion to dismiss), *cert. denied,* 455 U.S. 941 (1982); Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 406 n.5 (2d Cir. 1975) (same); Humphreys v. Tann, 487 F.2d 666, 668 (6th Cir. 1973) (summary judgment motion), *cert. denied,* 416 U.S. 956 (1974); Reidinger v. Trans World Airlines, Inc., 463 F.2d 1017, 1018 n.2 (6th Cir. 1972) (same); Sentner v. Amtrak, 540 F. Supp. 557, 558 & n.2 (D.N.J. 1982) (motion to amend pleadings to add a punitive damages claim). The JPML is empowered to promulgate rules governing MDL cases as long as these rules are "not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure." 28 U.S.C. § 1407(f) (1988). Rule 14 of the MDL Rules, which governs remand of MDL cases, expressly contemplates that the MDL judge has the power to grant permanent transfers and dismiss claims on the merits, including the power to dismiss claims on summary judgment. *See* R.P. JUD. PANEL MULTIDISTRICT LITIG. 14(a)-(b), *reprinted in* 28 U.S.C. § 1407 note (1988).

293. 28 U.S.C. § 1407(a) (1988).

294. *See* Cooney, *supra* note 280, at 602 (arguing that MDL courts have the power to decide threshold legal questions to narrow the scope of discovery).

295. *See* Rhodes, *supra* note 280, at 725 (arguing that MDL judges should decide dismissal motions before "forg[ing] ahead with discovery").

296. The fact that there is no inconsistency between the broad pretrial powers granted to MDL judges and the application of transferee federal law is demonstrated by Judge Weigel's

siderations support the application of transferor federal law in MDL cases.

B. *Attempts to Reduce the Efficiency Costs of Applying Transferee Law*

The proponents of the rule that transferee federal law should apply in the MDL context recognize that such a rule has the potential to waste substantial judicial resources if the decisions of the MDL court are reexamined after remand. They argue that this efficiency cost is not high for two reasons. First, most cases terminate in the MDL forum and are never remanded to the original forum. Second, if a remand is required, the law of the case doctrine will protect the rulings made during the MDL stage of the case. As demonstrated below, these arguments do not justify departing from the view that transferor federal law should apply in MDL cases.

1. *Likelihood of Remand*

The MDL Act does not require a remand to the original forum if the case terminates in the MDL court or is permanently transferred during pretrial proceedings.[297] As a practical matter, over seventy percent of all MDL cases never return to their original fora for trial.[298] Thus, the potential waste of judicial resources seems confined to about one-quarter of the cases transferred by the JPML.[299] Consequently, the proponents of the *Korean Air Lines*

support of both propositions. *See* Weigel, *supra* note 272, at 581-83 (arguing that MDL judges have the power to effect permanent transfers and to decide dispositive pretrial motions, including "motions for judgment approving a settlement, for dismissal, for judgment on the pleadings, for summary judgment, for involuntary dismissal under Rule 41(b) . . . and to quash service of process" (footnotes omitted)); *id.* at 584 & n.70 ("[T]he transferee court must consider the impact of its decisions if and when the transferred cases are returned to the originating courts for trial. And the transferee court must apply the substantive law of the transferor forum . . . ." (footnote omitted)). Among the cases cited by Judge Weigel on the choice of law issue are the *Plumbing Fixtures* and *Philadelphia Housing Authority* cases that initially established the rule that transferor federal law applies in MDL cases. *See id.* at n.70; *supra* section II.A.2.

297. *See, e.g.*, Zinser v. Continental Grain Co., 660 F.2d 754, 762 (10th Cir. 1981) (holding that the district court did not err in refusing to remand cases that were dismissed on the merits), *cert. denied*, 455 U.S. 941 (1982); *see also* Cooney, *supra* note 280, at 607-08 ("[T]ransferee courts have usually attempted to decide all substantive issues in the litigation.").

298. *See In re* Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1176 n.9 (D.C. Cir. 1987) (citing authority showing that as of June 1986 about 73% of MDL cases had terminated in the MDL court), *affd. sub nom.* Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989); Diana E. Murphy, *Unified and Consolidated Complaints in Multidistrict Litigation*, 132 F.R.D. 597, 603 & n.3 (1991) (noting that as of June 1990 about 20% of MDL cases had been remanded); Steinman, *supra* note 258, at 700 & n.411 (noting that as of June 1985 about 22% of MDL cases had been remanded).

299. *See Korean Air Lines*, 829 F.2d at 1176 n.9; Marcus, *supra* note 17, at 681.

result argue that transferee federal law should apply in MDL proceedings because the application of transferor federal law has efficiency costs of its own.[300]

This analysis is flawed for four reasons. First, the empirical results demonstrate that a substantial number of cases are remanded.[301] In the approximately twenty-five percent of MDL cases that are remanded, the potential waste of judicial resources is large.[302] As demonstrated below, the costs of applying transferor federal law in the MDL context, though not negligible, are small by comparison. As a result, there is no reason to tolerate the costs associated with the need to reexamine previously decided questions, even in the one-quarter of MDL cases that are remanded.

Second, the proponents of the *Korean Air Lines* rule have underestimated the relative efficiency cost in remanded cases because they have examined the wrong universe of cases in arguing that the cost of the rule is limited to about twenty-five percent of MDL cases. The total universe of cases against which the remanded cases are compared should exclude cases that are permanently transferred to the MDL court pursuant to section 1404(a). If a case is permanently transferred to the MDL court, MDL choice of law rules are irrelevant. As demonstrated in Part III, the law of the MDL circuit should then apply because this circuit is the ultimate appellate venue. MDL choice of law rules are relevant only in cases that have the potential to return to their original venue or are permanently transferred to a third venue outside the MDL circuit.[303] In comparing efficiency gains and losses from the competing choice of law rules, we must examine the universe of cases in which the selection of a choice of law rule has relevance, not the universe of all MDL cases.

Third, the total universe of cases against which the percentage of remanded cases should be compared should also exclude cases that terminated prior to any significant legal proceedings in the MDL court.[304] For example, many cases can be expected to termi-

300. *See infra* section IV.C.

301. *See* Cooper, *supra* note 24, at 1159.

302. *Id.; see supra* text accompanying notes 229-32, 268-69.

303. To the extent that cases are permanently transferred during coordinated pretrial proceedings to a circuit other than that in which the cases arose or in which the MDL court sits, the law of the ultimate transferee forum should apply during the MDL proceedings, as demonstrated in Part III.

304. One commentator suggests that we should eliminate from the universe of total MDL cases all cases that are terminated by voluntary dismissal, settlement, and procedural irregularities. *See* Cooper, *supra* note 24, at 1159. Although this commentator assumes that no substantive rulings are made in such cases, *see id.* at 1159 n.124, this conclusion is inaccurate.

nate in the MDL court as a result of voluntary settlement.[305] To the extent that these settlements occurred before the onset of significant legal proceedings, the relative efficiency costs of the competing choice of law rules have no relevance, and these cases should be eliminated from the analysis.[306]

Fourth, the *Korean Air Lines* rule affects more than the twenty-five percent of cases that are ultimately remanded. If transferee federal law applies in the MDL context, some cases will be dismissed that would not have been dismissed in the original forum. Thus, applying transferee law will affect settlement value. Because the MDL scheme adopted by Congress suggests that Congress did not intend MDL transfers to have outcome-determinative effects, the *Korean Air Lines* rule is subject to challenge on more than just efficiency grounds.

The fact that termination in the MDL court precludes a remand represents a glitch in the statutory scheme. If an MDL district court grants a dispositive motion dismissing an entire case, an appeal lies from the final judgment to the court of appeals that supervises the MDL court.[307] If this circuit court affirms the dismissal, the case terminates in the MDL venue and is never remanded to the original forum. This result poses a number of problems for the position that MDL courts should apply transferor federal law.

For example, any number of rulings can be made prior to settlement. To the extent that these rulings are made pursuant to transferee federal law in the MDL court, the efficiency costs associated with the application of transferor federal law are avoided and there are no costs associated with the application of transferee federal law. The only cases that should be eliminated from the analysis are those that are in fact terminated prior to any substantive proceedings.

305. *See* Pfizer, Inc. v. Lord, 447 F.2d 122, 123 (2d Cir. 1971); *In re* Four Seasons Sec. Laws Litig., 370 F. Supp. 219, 227 n.12 (W.D. Okla. 1974); Donald J. McLachlan, *The Multidistrict Litigation Act: The Demise of Venue*, 49 CHI. B. REC. 367, 369 (1968) (noting that out of the hundreds of consolidated price-fixing cases that inspired the MDL Act, "only a handful resulted in trial and only five went to judgment").

306. One might also eliminate from the total universe of MDL cases those cases in which no conflict exists between the MDL and transferor circuits. In this circumstance, the competing choice of law rules are also irrelevant. Were we to take this approach, however, we would also have to eliminate remanded cases in which no circuit conflict existed. Because there is no reason to believe that cases without a federal law conflict terminate or survive termination disproportionately in the MDL court, this factor can probably be ignored.

307. *See In re* Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1180 (D.C. Cir. 1987) (D.H. Ginsburg, J., concurring), *affd. sub nom.* Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989); Glasstech, Inc. v. AB Kyro OY, 769 F.2d 1574, 1576-78 (Fed. Cir. 1985); Astarte Shipping Co. v. Allied Steel & Export Serv., 767 F.2d 86, 87 (5th Cir. 1985); *In re* Corrugated Container Antitrust Litig., 662 F.2d 875, 880 (D.C. Cir. 1981); Eckstein v. Balcor Film Investors, 740 F. Supp. 572, 574-75 (E.D. Wis. 1990); *In re* Exterior Siding & Aluminum Coil Litig., 538 F. Supp. 45, 48 (D. Minn.), *mandamus denied*, 705 F.2d 980 (8th Cir.), *cert. denied*, 464 U.S. 866 (1983); Marcus, *supra* note 17, at 682; Cooney, *supra* note 280, at 591.

Because the case is not remanded, there are no efficiency costs attendant to the MDL district and circuit courts' applying their own law. By contrast, the efficiency concerns inherent in the application of transferor federal law, though small, remain.[308] Especially significant is the lack of any opportunity to have the transferor circuit pass on the content of its own law. Moreover, the appellate model suggests that the ultimate venue of appeal determines the applicable federal law. In this class of cases, the final appellate venue at the circuit court level lies in the MDL circuit.

However, applying transferee circuit law in this context poses its own problems. Determining the final appellate venue depends on the substantive result in the MDL circuit court. If the MDL circuit court affirms the judgment of dismissal, it is the ultimate appellate venue and the case is never remanded. But if the MDL circuit court reverses the judgment and holds that the MDL district court erred in dismissing the complaint, the case will be remanded to the original forum for trial and an appeal to the transferor circuit. Choice of federal law cannot be made to depend on the substantive result in the transferee circuit court.

Applying transferee law also distinguishes irrationally between final and interlocutory judgments. In our hypothetical, if the plaintiff asserts a section 14(a) claim based solely on allegations of negligence, MDL courts applying the Sixth Circuit's scienter requirement would dismiss this claim, and no remand would be required. If the complaint alleges both negligence and scienter, however, dismissing the negligence count does not prevent the case from being remanded for trial, with any appeal following trial occurring in the Second Circuit.[309]

Applying transferee federal law when the MDL circuit court is the final appellate venue also unfairly favors defendants. If the defendant succeeds in getting an entire complaint dismissed in the courts of the MDL circuit, this result is final and not subject to reexamination. If the MDL courts permit the plaintiff to proceed, however, the defendant gets a second bite at the apple after remand. Thus, the defendant wins if the courts in either circuit are convinced to dismiss the case. The plaintiff must win in both circuits to be allowed to try the case.

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308. *See infra* section IV.C.

309. A judgment is not final and appealable unless it disposes of all the claims between all the parties to the litigation. *See* FED. R. CIV. P. 54(b); *see also infra* note 314 and accompanying text.

Consistency with the rest of the MDL scheme requires that the MDL district and circuit courts apply transferor federal law even in cases that will not be remanded. Congress would do well to remedy this glitch in the legislative scheme. To solve this problem, Congress should amend the MDL Act to provide that after the conclusion of pretrial proceedings, courts shall remand all cases to their original fora unless they have been permanently transferred as part of the MDL proceedings.

2. *Law of the Case*

Because the argument based on the possibility that cases will not be remanded is weak, the proponents of the application of transferee federal law in the MDL context rely on the law of the case doctrine to protect decisions in the MDL circuit from reexamination and reversal. According to the law of the case doctrine, previous decisions in the same case should generally not be reexamined.[310] Applying transferee federal law in MDL cases involves reduced efficiency costs if the ultimate trial forum and its appellate court are required to defer to MDL rulings.

The law of the case doctrine is insufficient to make the *Korean Air Lines* result acceptable from an efficiency standpoint. Initially, the law of the case doctrine applies only between courts of coordinate rank.[311] In the context of our hypothetical, unappealed rulings by an MDL district court in the Sixth Circuit would be entitled to no deference by the Second Circuit after remand. Any other rule would insulate the unappealed rulings of the MDL district court from any appellate review, a result the federal system cannot tolerate.[312] A trial judge in the Second Circuit would be unlikely to defer to MDL district court rulings that make appellate reversal likely. In this context, the law of the case doctrine does nothing to mitigate the efficiency losses flowing from the application of MDL circuit law.

Recognizing this last conclusion, Judge Douglas H. Ginsburg argued in a concurring opinion in the *Korean Air Lines* case that interlocutory appeals should be allowed as a matter of course to the MDL circuit court on outcome-determinative federal issues.[313]

310. For a discussion of the law of the case doctrine, see Steinman, *supra* note 258, at 597-613.

311. *See* Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988).

312. *See* 486 U.S. at 817 ("[A] district court's adherence to law of the case cannot insulate an issue from appellate review . . . .").

313. *See In re* Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1180 (D.C. Cir. 1987) (D.H. Ginsburg, J., concurring), *affd. sub nom.* Chan v. Korean Airlines, Ltd., 490 U.S.

This practice is open to a number of objections. It violates the final judgment rule that is the cornerstone of federal appellate jurisdiction.[314] Interlocutory appeals are generally allowed only in exceptional circumstances.[315] In the MDL context, the most important exception to the final judgment rule involves the district court's ability to certify a nonfinal disposition for interlocutory appeal, which the court of appeals has the discretion to accept or deny.[316] Federal appellate courts have allowed discretionary interlocutory appeals only sparingly.[317]

The final judgment rule reflects a congressional desire to prevent the delays inherent in piecemeal appellate litigation.[318] It reduces the number of appellate issues because the winning party has no need to appeal[319] and, after the conclusion of a lengthy trial process, only the most significant errors are worthy of appeal and reversal.[320] Nothing in the MDL Act suggests that Congress in-

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122 (1989). Interlocutory appeals from decisions of the MDL court are to its own court of appeals. *See, e.g.*, Glasstech, Inc. v. AB Kyro OY, 769 F.2d 1574, 1576-78 (Fed. Cir. 1985); Astarte Shipping Co. v. Allied Steel & Export Serv., 767 F.2d 86, 87 (5th Cir. 1985); *In re* Corrugated Container Antitrust Litig., 662 F.2d 875, 880 (D.C. Cir. 1981); Eckstein v. Balcor Film Investors, 740 F. Supp. 572, 574-75 (E.D. Wis. 1990); *In re* Exterior Siding & Aluminum Coil Litig., 538 F. Supp. 45, 48 (D. Minn.), *mandamus denied*, 705 F.2d 980 (8th Cir.), *cert. denied*, 464 U.S. 866 (1983). This rule is consistent with the notion that after a § 1407 transfer the MDL court has exclusive jurisdiction over the case. *See Eckstein*, 740 F. Supp. at 575. One commentator has recently supported an expanded use of the interlocutory appeals mechanism in mass tort cases. *See* Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1205-09 (1990).

314. *See* 28 U.S.C. § 1291 (1988). A judgment is final if it ends the litigation on the merits and leaves nothing but execution to be completed. Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 497 (1989). A judgment is final only if it disposes of all claims between all parties to a litigation. *See* FED. R. CIV. P. 54(b). The district court has the power to deem final a separate judgment that disposes of one or more but less than all of the claims between the parties. *See* FED. R. CIV. P. 54(b). There have occasionally been proposals to eliminate appeals as of right even from final judgments in civil cases. *See, e.g.*, Carleton M. Crick, *The Final Judgment Rule as a Basis for Appeal*, 41 YALE L.J. 539 (1932) (arguing that appeals should be allowed only in the discretion of the appellate court); *cf.* Irving Wilner, *Civil Appeals: Are They Useful in the Administration of Justice?*, 56 GEO. L.J. 417 (1968) (questioning the value of appellate review).

315. *See* Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 729-47 (1993) (examining the exceptions to the final judgment rule).

316. *See* 28 U.S.C. § 1292(b) (1988).

317. *See* Milbert v. Bison Lab., Inc., 260 F.2d 431, 433 (3d Cir. 1958) (supporting the limitation of interlocutory appeals to "exceptional cases"); Martineau, *supra* note 315, at 733-34 (discussing how courts have restricted interlocutory appeals to "big, exceptional" cases); Solimine, *supra* note 313, at 1193-99 (same).

318. *See, e.g.*, Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981); Solimine, *supra* note 313, at 1168 ("Powerful efficiency arguments support limiting appeals to final judgments.").

319. *See* Solimine, *supra* note 313, at 1168.

320. It is worth noting that to some extent the final judgment rule values the time of appellate courts more than the time of trial courts. The final judgment rule requires the trial

tended to alter the normal rules of appellate jurisdiction in the MDL context.[321] Moreover, although Judge Ginsburg assumes that outcome-determinative issues will be small in number, this result is hardly obvious.[322]

Judge Ginsburg's interlocutory appeals solution is also incomplete. Because he recognizes that interlocutory appeals cannot be provided on all issues decided by the MDL district court, Judge Ginsburg restricts the category of issues entitled to such appeals to outcome-determinative issues. As a consequence, on many issues the decisions of the MDL district court must be subject to reexamination and reversal after remand. The incomplete nature of Judge Ginsburg's scheme leads to the anomalous result that the law of different circuits will apply to different issues in the same case: MDL circuit law will apply to outcome-determinative issues — assuming that after remand the transferor circuit court accords law of the case status to decisions of the MDL circuit court — and transferor circuit law will apply after remand on issues that were not deserving of an interlocutory appeal. Nothing in the MDL Act or common sense sanctions such a schizophrenic result.[323]

Judge Ginsburg's interlocutory appeals solution might also be difficult to apply. In some guises, the standard of fault applicable to a section 14(a) claim would be outcome determinative. For example, if the plaintiff alleges negligence alone, the entire case turns on the standard of fault issue. On the other hand, if the plaintiff also

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court to hold trials that may turn out after an appeal to have been unnecessary or to retry cases that the appellate court later finds were tainted with significant error. A contrary rule is neither unthinkable nor obviously inefficient. For example, New York allows an appeal as of right from all interlocutory judgments and most interlocutory orders. *See* N.Y. CIV. PRAC. L. & R. § 5701(a)(1)-(2) (McKinney 1978). New York does so because it values the time of trial courts more than the time of appellate courts. *See also* Solimine, *supra* note 313, at 1178-80 (supporting an increase in the number of federal interlocutory appeals to conserve the trial court's resources).

321. *See, e.g.*, Allegheny Airlines, Inc. v. LeMay, 448 F.2d 1341, 1343-45 (7th Cir.) (refusing to entertain an interlocutory appeal in an MDL case because the appropriate venue for appeal is in the transferor circuit after final judgment), *cert. denied*, 404 U.S. 1001 (1971).

322. *See In re* Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1180 (D.C. Cir. 1987) (D.H. Ginsburg, J., concurring) (arguing that interlocutory appeals are available in MDL cases to resolve "those few outcome-determinative rulings of the transferee district court"), *affd. sub nom.* Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989). Judge Ginsburg's assumption is especially questionable because he means to allow interlocutory appeals on all federal issues with a substantial impact on the outcome rather than merely dispositive issues. *See infra* text accompanying note 324.

323. Although courts often use depeçage to designate different state law to govern different issues in the same case, *see* Brackin, *supra* note 198, at 674 & n.87, this result arises from the need to accommodate the competing interests of a number of sovereigns, which may vary depending on the issue. *See id.* at 674. Because such sovereignty concerns are irrelevant in the federal system, the federal courts have no reason to utilize such a confusing procedure with respect to federal issues.

alleges scienter, the decision is not necessarily outcome determinative. In this regard, it is worth noting that *Korean Air Lines* itself did not involve a dispositive issue. Whether Korean Air Lines was entitled to avail itself of the damage limitation provisions of an international treaty governed the scope of its potential exposure but did not definitively resolve any pending claims. Because Judge Ginsburg supported an interlocutory appeal on this issue, one must assume that he also means to allow interlocutory appeals on significant nondispositive issues.[324]

Perhaps significant nondispositive issues will seldom need to be decided in the MDL court. The core job of the MDL court, however, is presiding over consolidated discovery. Discovery in federal court is confined to relevant evidence or evidence that is likely to lead to relevant evidence.[325] Relevance is determined according to what the substantive law defines as the elements of the plaintiff's claims and the defendant's defenses. Even if discovery is relevant, a discovery judge has the power to grant protective orders.[326] Many of these discovery decisions cannot be made without addressing central substantive issues in the case.

The law of the case solution to the efficiency concerns attendant to applying MDL circuit law is also problematic because the law of the case doctrine is far from absolute. All interlocutory decisions are subject to reexamination prior to final judgment.[327] Although the law of the case doctrine provides a fully sufficient reason for refusing to reexamine decisions made at an earlier stage in the case, it does not always prohibit such reexamination.[328] Among the well-recognized exceptions to the law of the case doctrine are rulings viewed as clearly erroneous.[329] Decisions that are clearly contrary to the precedents of the ultimate appellate forum would qualify as manifestly erroneous and justify departure from law of the case principles.[330] In our hypothetical, if a plaintiff brought a section

324. *See Korean Air Lines*, 829 F.2d at 1180 (D.H. Ginsburg, J., concurring).

325. *See* FED. R. CIV. P. 26(b)(1).

326. *See* FED. R. CIV. P. 26(c).

327. *See* FED. R. CIV. P. 54(b).

328. *See* Arizona v. California, 460 U.S. 605, 618 (1983) ("Law of the case directs a court's discretion, it does not limit the tribunal's power.").

329. *See, e.g., Arizona*, 460 U.S. at 618 n.8; Robinson v. Parrish, 720 F.2d 1548, 1550 n.* (11th Cir. 1983); Hill v. BASF Wyandotte Corp., 696 F.2d 287, 290 n.3 (4th Cir. 1982); Crane Co. v. American Standard, Inc., 603 F.2d 244, 248 (2d Cir. 1979).

330. *See* Steinman, *supra* note 258, at 704 (noting that to the extent MDL transferor courts have jurisdiction to reexamine decisions in the MDL circuit and apply their own law on remand, such courts are permitted to depart from law of the case principles with respect to decisions that are contrary to transferor circuit law).

14(a) claim founded on both negligence and scienter and an MDL court in Ohio dismissed the negligence counts, the Sixth Circuit would affirm on interlocutory appeal. Because the scienter counts remain, however, the case would be remanded to a district court in New York for trial. On appeal from the final judgment, the Second Circuit would probably refuse to defer to the Sixth Circuit with regard to the dismissal of the negligence claim because, based on existing Second Circuit precedent, this decision is manifestly an error.

Finally, it bears noting that at the circuit court level the law of the case doctrine is often honored more in the breach than in the observance. To take but one stark example, the Supreme Court has twice been faced with conflicting appellate decisions in the transfer context. In both cases, an appellate court in the original forum provided for the transfer of a case to another circuit. In both cases, the transferee appellate court transferred the case back to its original venue. The first time the Supreme Court faced the issue of federal appellate courts playing this elaborate game of procedural ping pong, it suggested that the discretionary aspects of the law of the case doctrine permitted this result.[331] The second time it faced the issue, the Supreme Court suggested that the second appellate court should ordinarily defer to the first in the interest of procedural harmony.[332] The latter Supreme Court decision surely expresses the better view. But if federal circuit courts are uncomfortable in accepting transfer results from other circuit courts, which present the strongest case for deference, one should be sanguine regarding the likelihood of deference on other issues when the ultimate appellate court has the ability to have the last word at the circuit court level.[333]

Although I do not believe that the law of the case doctrine satisfactorily resolves the efficiency concerns inherent in applying transferee federal law in MDL cases, I do not mean to suggest that the

331. *See* Hoffman v. Blaski, 363 U.S. 335, 340 n.9 (1960).

332. *See* Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818-19 (1988).

333. The difficulty with assuming that the law of the case doctrine will insulate MDL circuit rulings after remand is demonstrated by the fact that Judge Ginsburg, who made this assumption, *see In re* Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1180-81 (D.C. Cir. 1987) (D.H. Ginsburg, J., concurring), *affd. sub nom.* Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989), also believes that for the MDL scheme to work properly, Congress should amend the statute "to provide that rulings by a court in one circuit will not be reviewed under the case law of another circuit," 829 F.2d at 1184-85. As suggested above, the preferable way to resolve potential appellate conflicts would be to require the MDL courts to apply transferor law and provide that all MDL cases shall be remanded so that the transferor circuit always has ultimate appellate jurisdiction. *See supra* text accompanying notes 307-09. According to this approach, interlocutory appeals would be rare, and conflicts between appellate courts would be kept to a minimum.

law of the case doctrine has no role to play in such cases. As long as the MDL judge makes an honest effort to apply the law of the transferor court of appeals, after remand the trial judge has no more cause to reexamine these interlocutory decisions than if they had been made by another judge on his court. If the MDL circuit decides an interlocutory appeal in accordance with the transferor circuit's law, after remand the transferor circuit should accord this decision substantial deference just as it would an interlocutory decision by a different panel of its own court. This process is faithful to the MDL Act's assumption that transfers do not change applicable federal law as well as the efficiency concerns that motivate the law of the case doctrine.[334]

Moreover, discovery decisions by the MDL trial and appellate courts should be treated with substantial deference after remand. Conducting consolidated discovery is at the core of the MDL function and involves substantial discretion. Discretionary decisions present a strong claim for application of the law of the case doctrine.[335] Parties challenging discovery rulings on an interlocutory basis have had some success in surmounting the final judgment rule.[336] The courts are somewhat more likely to allow interlocutory appeals on discovery questions because the harm of an erroneous ruling is often irremediable. When an MDL circuit hears an interlocutory appeal on discovery issues that cannot wait until the conclusion of the case to be resolved, the transferor circuit should rarely revisit such issues. But to preserve the sense of the MDL scheme, and in the interest of applying a uniform law to the entire case, the MDL courts should also apply transferor circuit law to discovery questions.

C. *The Costs of Applying Transferor Law*

Proponents of the *Korean Air Lines* result argue that applying transferor federal law to MDL cases has substantial costs and is contrary to fundamental assumptions of the federal system. The following sections examine these arguments and find them to be without substantial merit.

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334. *See* Sentner v. Amtrak, 540 F. Supp. 557, 558 n.3, 559 n.5 (D.N.J. 1982) (recognizing simultaneously that an MDL court is required to follow transferor federal law and that its decisions are entitled to law of the case deference on remand).

335. *See* Steinman, *supra* note 258, at 601 ("[S]ome issues, most notably questions of fact and matters of discretion, are particularly unsuited for reconsideration . . . .").

336. *See* RICHARD H. FIELD ET AL., MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 590-92 (6th ed. 1990).

1. *Applying the Law of Another Circuit*

Proponents of the *Korean Air Lines* rule argue that a contrary rule imposes unacceptable costs on the MDL district and appellate courts in attempting to divine the law of the transferor appellate circuit.[337] Should the courts adopt the position that transferor federal law applies in MDL cases, the MDL court would be required to predict the law that the transferor circuit court would apply. This predictive task is notoriously difficult in the analogous *Erie* context, where federal courts are required to predict the law that the relevant state's highest court would apply.[338] Although such practical difficulties are inherent in the *Erie* scheme, they are avoidable in the MDL context with respect to federal issues. Applying transferee federal law in the MDL context would eliminate such difficulties.

There are, however, two features that distinguish the MDL federal issue context from the *Erie* context. First, a federal MDL court is in a far better position to apply transferor circuit law than state law.[339] Although in some sense both are "foreign law" — that is, law the judge does not deal with on a daily basis — MDL judges should at least be familiar with the general structure of federal law even if they do not know the particular answers provided by the transferor circuit. Moreover, an MDL judge would divine the law of the transferor circuit just as the transferor district court would have: by researching that circuit's relevant precedents. The facility of federal judges with the law of other circuits is demonstrated by the fact that federal judges often sit by designation on courts of appeals outside their home circuits.[340]

Second, unlike *Erie,* the MDL scheme usually provides a method to ensure that the MDL judge correctly predicts the law that the transferor circuit would apply. After remand and trial, the transferor circuit will itself get to pronounce on the correctness of

337. *See Korean Air Lines,* 829 F.2d 1182-83 (D.H. Ginsburg, J., concurring) (arguing that it is more difficult for a district judge to apply the law of another circuit than state law); Marcus, *supra* note 17, at 713-14.

338. *See* Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir. 1960) (Friendly, J.) (complaining that "[o]ur principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought"), *vacated per curiam on other grounds,* 365 U.S. 293 (1961).

339. *See* Fossett Corp. v. Gearhart, 694 F. Supp. 1325, 1328 (N.D. Ill. 1988) (concluding that it would be easier "for the U.S. District Court for the Northern District of Texas to apply Seventh Circuit precedent than it would be for this court to apply Texas law").

340. *See* 28 U.S.C. §§ 291(a), 292(d) (1988) (giving the Chief Justice of the United States the power to designate circuit and district judges for service on courts of appeals outside their home circuits).

the decisions of the MDL judge. In the *Erie* context, it is possible to ascertain the position of the relevant state's highest court on disputed issues only in exceptional circumstances.[341] As a consequence, the efficiency costs of applying transferor federal law in the MDL context are much smaller than the analogous costs in the *Erie* context.

2. *Distinguishing Substance from Procedure*

Requiring the MDL court to apply transferor law presents a second problem that has *Erie* analogies. Courts apply their own law on issues of "procedure" based on their inherent duty to regulate housekeeping matters in their own courtrooms.[342] In the *Erie* context, distinguishing substance from procedure has been particularly vexing.[343] The proponents of the *Korean Air Lines* result argue that this problem should not be introduced into federal question transfer cases.[344]

The substance versus procedure problem in the federal issue context is not of the same magnitude as in the *Erie* context because all federal courts are required to follow the Federal Rules of Civil Procedure. Nevertheless, the problem is not insignificant because there is still substantial room for disagreement among the circuits on procedural matters. Different circuits have different interpreta-

341. *See, e.g.*, Bethpage Lutheran Serv. v. Weiker, 965 F.2d 1239, 1246 (2d Cir. 1992) (noting that certification procedures should be used infrequently).

342. *See* Steinman, *supra* note 258, at 630 (noting that the *Erie* analogy suggests that "federal courts having federal question jurisdiction over transferred cases also may use their own procedural rules").

343. The law in this area seems to have come to an uneasy resting place based on a three-pronged test that represents a compromise among competing values. Federal law controls any issue that lies within the domain of a valid federal statute or rule. *See* Hanna v. Plumer, 380 U.S. 460 (1965). If no valid federal statute or rule applies, and an important federal policy interest is at stake, the interests of the federal government are balanced against the interests of the relevant state government in determining which law to apply. *See* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958). If no federal statute or rule is applicable and no significant federal policy interest is involved, state law applies on all issues that are likely to have a significant impact on the outcome of the case. *See* Guaranty Trust Co. v. York, 326 U.S. 99 (1945). This uneasy compromise has arisen, in large part, because the Supreme Court desired to give greater scope to federal law in diversity cases than *Guaranty Trust* allowed but was unwilling to overrule *Guaranty Trust* or its progeny. In *Hanna,* the Court created the three-pronged structure that currently reigns to avoid overruling its prior cases. Subsequent to *Hanna,* the Court has continued to refuse to overrule cases from the *Guaranty Trust* era. *See* Walker v. Armco Steel Corp., 446 U.S. 740 (1980) (refusing to overrule Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949)); Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3 (1975) (refusing to overrule Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941)). Avoiding such complexities in federal question cases is a consummation devoutly to be wished.

344. *See* Marcus, *supra* note 17, at 714-16.

tions of the Federal Rules,[345] and each district court is allowed to promulgate additional procedural rules to the extent that such rules are not inconsistent with the Federal Rules.[346] There is, however, no guarantee that district courts will promulgate rules that are consistent with each other. Moreover, the circuits have often differed on doctrines that flow from sources other than the Federal Rules but can be viewed as procedural.[347]

In the *Erie* context, the need to distinguish substance from procedure arises from the claims of competing sovereigns. The *Erie* decision rests in part on the desire to protect state sovereignty from encroachment by a federal government that is supposed to have limited powers.[348] Later decisions gave federal courts broader scope to apply their own law in diversity cases to implement the Constitution's enabling clauses and the Supremacy Clause, which serve to restrict state sovereignty.[349] Because there are no similar federalism concerns in the MDL context, there is no need to distinguish substance from procedure.[350] In the interest of simplicity, a single circuit's law should apply to all issues, whether substantive or procedural.[351] Because efficiency considerations and congressional intent suggest that transferor circuit law should apply on substantive questions, there is no reason not to extend this result to the procedural context.[352] This result eliminates any costs attendant to procedure-substance differentiation.

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345. *See id.* at 715 & n.225 (describing conflicting views on the requirements for class action certification under rule 23 and protective orders under rule 26(c)).

346. *See* FED. R. CIV. P. 83.

347. *See, e.g.,* Marcus, *supra* note 17, at 716 (discussing injunction standards and the doctrine of fraudulent concealment in the limitations context).

348. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78-80 (1938).

349. *See supra* note 343.

350. *See* Dreyfuss, *supra* note 163, at 38 n.220 (arguing that the "principle of equivalency between circuits and states is specious"); Estreicher & Revesz, *supra* note 221, at 833 ("[I]t cannot be plausibly maintained that the courts of appeals have the status of independent courts representing an authority sovereign over their geographic territories."); Schaefer, *supra* note 220, at 454 ("There is no element of sovereignty in a federal judicial circuit."); *cf.* Laurie R. Wallach, Note, *Intercircuit Conflicts and the Enforcement of Extracircuit Judgments,* 95 YALE L.J. 1500, 1501 (1986) (noting "[t]he unique status of circuits — something 'less' sovereign than states but 'more' than mere coordinate courts").

351. For example, although statute of limitations questions can be viewed as either procedural or substantive, *see supra* note 206, federal courts deciding which circuit's law to apply on such questions in the transfer context have generally ignored the procedure-substance distinction, *see supra* note 191. *But see* Duke v. Touche Ross & Co., 765 F. Supp. 69, 73 (S.D.N.Y. 1991) (treating limitations questions as procedural and applying law of the forum).

352. The MDL court would, of necessity, retain the power to apply its own rules on purely housekeeping matters — for example, the typeface conventions for briefs. Thus, even under the regime proposed in the text, the MDL judge would still be required to distinguish between procedural matters of a purely housekeeping nature and other procedural matters.

3. *Reducing the Benefits of Consolidation*

Proponents of the *Korean Air Lines* result argue that applying transferor federal law in MDL cases reduces the benefits of consolidation because the MDL court might have to apply conflicting federal rules to cases that originated in different circuits.[353] There is little question that applying transferor law in the MDL circuit does reduce the benefits of consolidation. Nevertheless, applying the law of several circuits to a single issue does not entirely eliminate the benefits of consolidation. It is more efficient for a single court to analyze a single problem and then research the answer according to the precedents of a number of circuits than for numerous district judges to analyze the problem separately under their own circuits' laws.

Moreover, the efficiency of conducting consolidated proceedings has seldom been a paramount goal of the procedural system. A number of other rules limit the facility of collective litigation to accomplish more significant procedural objectives. The rules of subject matter jurisdiction prevent diversity plaintiffs from aggregating their claims to reach the jurisdictional limit.[354] Rules of personal jurisdiction often prevent the consolidation of related cases.[355] In state law cases, constitutional limitations on state choice of law rules inhibit the facility of the class action mechanism.[356]

Congress's approach to the MDL problem also suggests that preserving the law of the transferor forum is a more significant con-

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This fact eloquently testifies to the inherent impossibility of eliminating entirely the procedure-substance dichotomy.

353. *See* Marcus, *supra* note 17, at 716-19; Murphy, *supra* note 298, at 608 ("Application of the law of the transferor court can be a very complicated process . . . in cases where there are transfers from a number of different courts and jurisdictions.").

354. *See* Zahn v. International Paper Co., 414 U.S. 291 (1973). The lower courts are divided on whether the new supplemental jurisdiction statute, 28 U.S.C. § 1367 (1988 & Supp. II 1990), has supplanted *Zahn*. *Compare, e.g.*, Patterson Enters., Inc. v. Bridgestone/Firestone, Inc., 812 F. Supp. 1152, 1154 (D. Kan. 1993) (holding that § 1367 overrules *Zahn*) *with* Averdick v. Republic Fin. Servs., Inc., 803 F. Supp. 37, 45-46 (E.D. Ky. 1992) (holding that *Zahn* survives § 1367).

355. Prior to the enactment of the federal interpleader statute, 28 U.S.C. § 1335 (1988) (originally enacted as Act of June 25, 1948, ch. 646, § 1335, 62 Stat. 869, 931), obligors were often unable to join competing claimants in a single action. *See, e.g.*, New York Life Ins. Co. v. Dunlevy, 241 U.S. 518, 521-22 (1916).

356. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-22 (1985) (holding that a state court could not apply its own law to thousands of related cases in the class action context because it lacked a " 'significant contact or significant aggregation of contacts' " to some of the cases (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981) (plurality opinion))). For an analysis of *Phillips*'s impact on class actions, see Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law after* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 57-67 (1986).

cern than preserving inviolate the benefits of MDL consolidation. By providing for a return of cases to their original fora for trial, Congress indicated that achieving uniformity of results was not among its most important goals. As demonstrated above, the MDL Act involved consolidation for limited purposes principally related to discovery and was not intended to have outcome-determinative effects. Indeed, on state law issues, the *Van Dusen* rule often precludes the application of a single law to MDL cases.[357] I see no reason to distinguish the federal law MDL context from others in which the efficiency concerns inherent in consolidated litigation are secondary to more significant procedural concerns.[358]

4. *Departing from the Principle of Competence*

Perhaps the most significant charge against the application of transferor federal law in the MDL context is theoretical rather than practical. Whereas the appellate model incorporates Marcus's competence principle in the permanent transfer context, it is in conflict with this principle in the MDL context. The appellate model precludes the MDL court, and its circuit court, from applying their best views of federal law in light of the pronouncements of Congress and the Supreme Court. The appellate model requires the MDL courts to defer to the views of the transferor circuit.

The competence principle contains two elements: the ability and the duty of federal judges to determine federal law correctly. The first element is essentially a tautology. By definition, all American courts, including state courts, have the ability to determine federal law correctly. The second element is arguable.[359] In cases that are not transferred, according to the currently prevailing view, the

357. *See, e.g., In re* San Juan Dupont Plaza Hotel Fire Litig., 745 F. Supp. 79, 81 (D.P.R. 1990) (noting that in mass tort litigation, "the application of choice of law standards turns into a colossal struggle for the transferee court"); *In re* Paris Air Crash of Mar. 3, 1974, 399 F. Supp. 732, 740 (C.D. Cal. 1975) (commenting on the " '*judicial nightmare* known as Conflicts of Laws' " in an MDL mass tort proceeding (quoting Forsyth v. Cessna Aircraft Co., 520 F.2d 608, 609 (9th Cir. 1975) (emphasis added))); Symeon C. Symeonides, *The ALI's Complex Litigation Project: Commencing the National Debate,* 54 LA. L. REV. 843, 853 (1994) ("[T]he existing system seems to be very near the crashing point under the combined weight of *Erie, Klaxon, Van Dusen,* and *Ferens.*" (footnotes omitted)); Weinberg, *supra* note 205, at 710 & n.156 (arguing that "*Van Dusen,* for consolidated cases in federal court . . . ha[s] produced what writers today quite rightly call 'mass litigation disaster,' " and collecting authorities).

358. *See In re* Dow Co. "Sarabond" Prods. Liab. Litig., 666 F. Supp. 1466, 1470 (D. Colo. 1987) (perceiving "a great deal of sense in applying the law of a single forum to all § 1407 issues (whether state or federal) so that the advantages of multidistrict litigation may be pursued to their logical conclusions," but applying transferor federal law based on the current MDL scheme).

359. *See* Fini, *supra* note 25, at 80 (noting that the "competence principle is not helpful because *Van Dusen* does not speak to competence; rather, it speaks to appropriateness").

benefits of intercircuit dialogue justify the competence principle at the circuit court level. For cases that are permanently transferred, there is no reason to depart from the competence principle and, as Part III demonstrates, substantial reason to support it.

Moreover, the competence principle is not absolute within the federal system. In 1982, Congress created the United States Court of Appeals for the Federal Circuit.[360] This court primarily[361] has jurisdiction over appeals when the jurisdiction of a federal district court is founded in whole or in part on 28 U.S.C. § 1338, which provides for original subject matter jurisdiction over patent cases.[362] The Federal Circuit has held that it also has appellate jurisdiction over nonpatent issues in cases that are otherwise within its appellate jurisdiction.[363] On federal nonpatent issues, however, the Federal Circuit applies the federal law of the regional circuit within which the district court sits.[364] This practice enables the Federal Circuit to create the national patent law that Congress envisioned,[365] avoid piecemeal appeals in patent cases, and avoid changing the results on nonpatent issues that would never have come before the Federal Circuit had there been no patent questions in the case.

Just as the Federal Circuit has departed from the competence principle to achieve other goals of the federal system, the MDL context is sufficiently special to justify departure from this principle. Applying transferor federal law in the MDL context furthers sub-

360. *See* Federal Courts Improvements Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (combining the Court of Customs and Patent Appeals and the Court of Claims to create the Court of Appeals for the Federal Circuit).

361. Although the Court of Appeals for the Federal Circuit's primary significance lies in the area of patent appeals, it also hears appeals in a number of other areas. *See* Dreyfuss, *supra* note 163, at 4.

362. *See* 28 U.S.C. § 1295(a)(1) (1988). In Christianson v. Colt Industries Operating Corp., 486 U.S. 800 (1988), the Supreme Court held that the Court of Appeals for the Federal Circuit has appellate jurisdiction in patent cases only when a federal patent issue appears on the face of a well-pleaded complaint. *See* 486 U.S. at 807-10.

363. *See, e.g.*, Loctite Corp. v. Ultraseal Ltd., 781 F.2d 861, 875-78 (Fed. Cir. 1985) (entertaining an antitrust claim); Bandag, Inc. v. Al Bolser's Tire Stores, Inc., 750 F.2d 903, 907-09 (Fed. Cir. 1984) (entertaining a trademark claim); Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1571-72 (Fed. Cir. 1984) (entertaining a disqualification of counsel claim). The Federal Circuit also hears appeals within the scope of its appellate jurisdiction in cases where no patent issues remain in the case. *See* Gemveto Jewelry Co. v. Jeff Cooper Inc., 800 F.2d 256, 258 n.2 (Fed. Cir. 1986) (entertaining an appeal when the patent issues in the case had been dismissed); Atari, Inc. v. JS & A Group, Inc., 747 F.2d 1422 (Fed. Cir. 1984) (entertaining an appeal when the patent issues in the case had been severed).

364. *See Atari*, 747 F.2d at 1439-40 (applying the rule to substantive issues); *Panduit*, 744 F.2d at 1574-75 (applying the rule to procedural issues). This deference has been criticized. *See* Dreyfuss, *supra* note 163, at 37-46.

365. *See* Revesz, *supra* note 213, at 1167.

stantial efficiency concerns and is faithful to Congress's purpose in creating the MDL scheme. Moreover, departing from the competence principle in the MDL context does little injury to the policy goal that animates it. The chief purpose of the competence principle at the appellate level is to encourage intercircuit dialogue.[366] Such dialogue will proceed uninhibited in all but MDL cases and accomplish most or all of its objectives.

It should also be noted that in the MDL context either choice of law approach involves some compromise of the competence principle. The *Korean Air Lines* approach is premised in part on the ultimate appellate court's willingness to accord law of the case status to interlocutory appellate rulings in the MDL circuit. This approach precludes the ultimate appellate court from applying its best view of federal law. The approach suggested by the appellate model would require the MDL court, and its circuit, to apply transferor federal law. Because some compromise of the competence principle is required, the appellate model's approach is preferable because it furthers efficiency goals as well as congressional intent.

D. *Conclusion*

In sum, the appellate model, which posits that the ultimate venue of appeal identifies applicable federal law, should apply in MDL cases and require the application of transferor federal law. This choice of law approach is consistent with the MDL scheme, which contemplates the return of cases to their original fora for trial and furthers substantial efficiency goals by reducing the number of MDL rulings that will have to be reexamined after any remand. Attempts to reduce the efficiency costs of a contrary rule are unavailing. The fact that most MDL cases are not remanded is, by itself, of little significance. The law of the case doctrine does not eliminate the efficiency costs of applying transferee federal law because it does not apply to MDL district court rulings, requires interlocutory appeals to the MDL circuit, and does not ensure that the rulings of the MDL circuit court will be respected after remand. Finally, although the appellate model's approach presents some efficiency costs of its own, these costs are small in comparison to the efficiency costs of the *Korean Air Lines* rule.

366. *See supra* text accompanying notes 220-25.

V. CONCLUSION

In conclusion, Professor Marcus, *Korean Air Lines,* and their progeny have arrived at a conclusion that is only half right. The current consensus view, that transferee federal law should apply after all transfers of cases containing federal issues, is right in the context of permanent transfers but wrong in the context of MDL transfers. With respect to federal issues, the venue of appeal determines choice of law by default. Neither the permanent transfer nor MDL context presents any reason to depart from this principle. As a consequence, transferee federal law should apply after permanent transfers, and transferor federal law should apply after MDL transfers. These conclusions reflect the pre-*Korean Air Lines* consensus of the federal courts, to which a return would be welcome.

The effect of transfer on choice of federal law will probably continue to be a difficult question for the foreseeable future. Although resolution of the choice of law issue is within the Supreme Court's province, this issue is peculiarly insulated from Supreme Court review. As *Korean Air Lines* itself demonstrates, whenever the Supreme Court grants certiorari to resolve a conflict among the circuits, it usually renders the choice of law question moot.[367] Once the Supreme Court addresses the conflict on the merits, federal law becomes uniform.

Perhaps the Court will exercise its role as supervisor of the lower federal courts and provide some advice on the choice of law question. For example, in *Christianson v. Colt Industries Operating Corp.*,[368] the Supreme Court granted certiorari to resolve a conflict relating to the appellate jurisdiction of the Federal Circuit.[369] In the course of its opinion, the Supreme Court resolved the question on the merits.[370] It also gave advice to the inferior federal courts on the handling of transfer decisions and strongly suggested that federal appellate courts should accord law of the case status to transfer decisions emanating from other circuits.[371] There is no reason the Court could not give similar guidance the next time it resolves a circuit conflict in the transfer context.

Given the difficulties surrounding Supreme Court action, Congress is in the best position to resolve the choice of law dilemma.

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367. *See supra* note 183.

368. 486 U.S. 800 (1988).

369. *See* 486 U.S. at 806-07.

370. *See* 486 U.S. at 807-18.

371. *See* 486 U.S. at 818-19.

The Rules of Decision Act[372] is the font of choice of law in the *Erie* context.[373] There is no reason that Congress could not legislate the federal law applicable to transferred cases. Congress would do well to resolve this issue so that cases can proceed based on the express, rather than the divined, intent of Congress. At the very least, Congress should amend the MDL Act to provide for a remand of all MDL cases at the conclusion of pretrial proceedings, including cases that have been terminated on the merits.[374] This procedure would greatly increase the consistency of the current MDL scheme.

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372. 28 U.S.C. § 1652 (1988).

373. *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938); *see also* Boggs v. Blue Diamond Coal Co., 497 F. Supp. 1105, 1109-13 (E.D. Ky. 1980) (discussing the interplay between *Erie* and the Rules of Decision Act).

374. Cases that have permanently transferred to the MDL court should be exempt from this rule. Cases that have been permanently transferred to other districts pending the completion of MDL proceedings should be transferred to those districts at the conclusion of the pretrial phase.