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LEXECON INC. v. MILBERG WEISS BERSHAD HYNES
& LERACH: RESPECTING THE PLAINTIFF'S
CHOICE OF FORUM

I. INTRODUCTION

In March 1998, a unanimous Supreme Court handed down a decision that ended what had been a common judicial practice in the federal courts for nearly thirty years. That decision, *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*,¹ will have an immediate and profound impact on the consolidation and adjudication of federal civil claims that fall under the rubric of multidistrict litigation. In short, the Court held that district judges who are designated under the multidistrict litigation statute, 28 U.S.C. § 1407, to conduct the consolidated *pretrial* proceedings of civil actions involving common questions of fact, have no authority under the federal change-of-venue statute, 28 U.S.C. § 1404,² to transfer those cases to themselves for *trial*.³ The federal judiciary had long ago created and approved this practice by which a judge unilaterally transfers cases to himself for trial, commonly known as “self-transfer.” The purpose of the self-transfer was to enable greater efficiency and expediency in the adjudication of multidistrict litigation.⁴ However, this exercise in judicial “ingenuity” contravened the straightforward language of 28 U.S.C. § 1407 (§ 1407) which, as the Supreme Court held, requires the remand of all transferred cases to their originating district courts for trial.⁵

1 118 S. Ct. 956 (1998).

2 28 U.S.C. § 1404(a) (1994). Section 1404 provides: “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” *Id.*

3 See *Lexecon*, 118 S. Ct. at 964.

4 See *In re Multidistrict Civil Actions Involving the Air Crash Disaster Near Hanover, N.H.*, 342 F. Supp. 907, 908 (D.N.H. 1971) (stating that self-transfer would be in the interest of the “orderly and expeditious administration of justice”).

5 28 U.S.C. § 1407(a) (1994). Section 1407(a) provides:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall

Lexecon marks a victory for the right of the plaintiff, whose cause of action is transferred for consolidated pretrial proceedings under § 1407, to have his case tried in the forum of his choice following the conclusion of those pretrial proceedings. This presumptive right of plaintiffs⁶ had, in many respects, been subordinated to countervailing concerns of efficiency expressed by federal judges encumbered with the demands of multidistrict litigation. These judges began to make a routine practice of self-transfer shortly after the enactment of § 1407 in 1968.⁷ The judges cited their power under 28 U.S.C. § 1404(a) (§ 1404(a)), which is often invoked during pretrial proceedings as a means by which to effectuate the self-transfer.⁸ Yet they overlooked the fact that a consolidated trial is specifically precluded by the language of § 1407. *Lexecon* conclusively settled any existing interpretive tension between the statutes—a tension that Congress, when it passed § 1407, never anticipated given its clearly expressed intent concerning the limited purpose of § 1407 transfers.⁹ Nevertheless, the practice of self-transfer went unchecked for nearly three decades at the expense of plaintiffs whose rights were subjugated to prevailing concerns of efficiency and judicial economy.

Admittedly, the federal courts face an imposing, and sometimes overwhelming, number of cases arising from events involving many parties, such as mass torts or mass disasters.¹⁰ Yet it is imperative that

be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred *shall be remanded by the panel* at or before the conclusion of such pretrial proceedings *to the district from which it was transferred* unless it shall have been previously terminated

.....

Id. (emphasis added).

6 See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (stating that “the plaintiff’s choice of forum should rarely be disturbed”).

7 The seminal decision articulating the basic rationale for the ad hoc self-transfer of § 1407 cases was *Pfizer, Inc. v. Lord*, 447 F.2d 122 (2d Cir. 1971).

8 See *id.* at 124.

9 There have been many commentaries over the years concerning the incompatibility of § 1404(a) self-transfers with the remand mandate of § 1407. See generally Stanley J. Levy, *Complex Multidistrict Litigation and the Federal Courts*, 40 *FORDHAM L. REV.* 41 (1971); Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 *CORNELL L. REV.* 779 (1985); Blake M. Rhodes, Comment, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 *U. PA. L. REV.* 711 (1991).

10 One author noted that more than 350,000 asbestos lawsuits alone had been filed as of 1993, and that approximately 100,000 were on state and federal dockets at the time. See Valle Simms Dutcher, Comment, *The Asbestos Dragon: The Ramifications of Creative Judicial Management of Asbestos Cases*, 10 *PACE ENVTL. L. REV.* 955, 955 (1993).

a plaintiff's choice of forum be given the deference it deserves. The legislative history of § 1407 clearly indicates that the drafters of the statute recognized the need for efficiency and economy in the context of multidistrict litigation, but not at the expense of the plaintiff's right to trial in the forum of his choice. Congress agreed with the drafters and enacted a statute which is an effective tool both for mitigating the costs inherent in multidistrict litigation and for preserving this traditional right of plaintiffs. The federal judiciary's ad hoc expansion of the scope of § 1407, while conceived with the good intention of easing the burden of multidistrict litigation, was an ill-advised decision to do that which Congress, after reasoned contemplation, wisely chose not to do.

This Comment will first analyze § 1407, including the catalyst for its drafting, and the legislative history of the statute which clearly outlines Congress' intent. As a practical matter, *Lexecon* ends the debate concerning the question of remand under § 1407. However, the legislative history is especially relevant because it underscores the significance that Congress ascribed to plaintiffs' rights at the very time in which it adopted legislation for the purpose of alleviating the burdens placed on the federal courts by multidistrict litigation. In keeping with its concern both for plaintiffs' rights and for judicial economy, Congress set out four requirements that had to be fulfilled before cases could be transferred for coordinated or consolidated pretrial proceedings.¹¹ Congress created and authorized the Judicial Panel on Multidistrict Litigation (JPML)¹² to make these transfer determinations. However, over time the JPML conflated the statutory guidelines in a manner that elevated efficiency to a position of paramount consideration. Consequently, the JPML eventually sanctioned the use of § 1404 self-transfers by transferee judges.¹³ Part I will conclude with a review of the flawed rationale adopted by the federal judiciary to justify the self-transfer procedure. Part II will examine *Lexecon*, including its background and the lower court opinions leading to the Supreme Court's decision in March 1998. Part III will discuss the significance of the plaintiff's right to trial in his choice of forum. This right should

11 See 28 U.S.C. § 1407(a) (1994).

12 See *id.* The JPML consists of seven federal circuit and district judges, of whom no two may be from the same circuit. These judges are designated "from time to time" by the Chief Justice of the United States. The JPML requires the concurrence of four judges to take any action. See 28 U.S.C. § 1407(d) (1994).

13 The district to which actions are transferred for coordinated or consolidated pretrial proceedings is the "transferee" court and is presided over by the "transferee" judge. The "transferor" court is the court in which a transferred action is originally filed and to which it must be remanded.

be upheld both for the plaintiff engaging in simple litigation as well as for the plaintiff whose case is one of many related multidistrict claims. In its present state, § 1407 already imposes several actual and potential hardships upon plaintiffs whose cases are transferred for consolidated pretrial proceedings. The federal judiciary's assumption of self-transfer authority only served to exacerbate these hardships. Finally, Part IV will address why *Lexecon* was correct and why Congress should not amend § 1407 to allow the JPML to transfer cases for consolidated trial. Although there is a strong public interest in efficiency and conservation of scarce judicial resources, the virtues that are inherent within the respect that we have always accorded to a plaintiff's choice of forum must not be discarded in our haste to achieve efficiency.

II. ANALYSIS OF 28 U.S.C. § 1407

A. *The Legislative History*

The catalyst for the creation and passage of § 1407 was the electrical equipment antitrust cases that flooded the federal district courts during the early 1960s. These cases, some believed, threatened to retard the progress of the courts for years by creating onerous backlog problems.¹⁴ Following the criminal indictments of various manufacturers of electrical equipment, nearly 2,000 civil cases involving more than 25,000 separate claims were filed in thirty-five federal districts.¹⁵ Faced with this unprecedented number of cases, the federal judiciary realized that, unless extraordinary procedures were adopted, judicial effort would be needlessly duplicated and delays would be rampant as the parties all sought the same discoverable information.¹⁶ In 1961, the Judicial Conference of the United States voted to create what came to be known as the Co-ordinating Committee for Multiple Litigation of the United States District Courts. The Committee was tasked with "considering discovery problems arising in multiple litigation with common witnesses and exhibits."¹⁷ It thereafter resolved to "suggest ways and means of handling the electrical antitrust cases, from discovery through pretrial . . ."¹⁸ The Committee's efforts

14 See H.R. REP. NO. 90-1130 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1899; S. REP. NO. 90-454, at 3 (1967).

15 See S. REP. NO. 90-454, at 3 (1967).

16 For a comprehensive discussion of the electrical equipment antitrust cases and the actions taken in response to them, see Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621 (1964).

17 *Id.* at 623 (citing a January 26, 1962, letter of Chief Justice Warren to Judge Edwin A. Robson, the vice chairman of the Co-ordinating Committee).

18 *Id.* (citing a resolution adopted by the Co-ordinating Committee).

culminated in a national discovery program which substantially aided in bringing all of the cases to conclusion by 1967. This discovery program included the use of national pretrial hearings and orders, national depositions of key witnesses, and national document production by means of central document depositories.¹⁹

Based upon its experience and success in managing the electrical equipment antitrust cases,²⁰ the Co-ordinating Committee was prompted by the Judicial Conference to draft the legislation that became § 1407.²¹ The objective of the legislation, as understood and agreed on by Congress, was to "provide centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the 'just and efficient conduct' of such actions."²² The idea was that centralized management would minimize the "possibility for conflict and duplication in discovery and other pretrial procedures in related cases"²³ Congress emphasized that § 1407 would affect "only the pretrial stages in multidistrict litigation" and "would not affect the place of trial in any case."²⁴ It clearly demarcated "pretrial proceedings" to be "the practice and procedure which precede the trial of an action" and which "generally involve deposition and discovery"²⁵ In its analysis of the features of the bill, Congress specifically noted that the legislation "requires that transferred cases be remanded to the originating district at the close of coordinated pretrial proceedings."²⁶ Without a doubt, the bill drafted by the Co-ordinating Committee and adopted by Congress contemplated only the pretrial portion of factually related cases. This was due, in part, to the fact that the experience of the Co-ordinating Committee with the electrical equipment cases was "limited to pretrial matters," and the Committee had not wished to exceed the "confines of that experience."²⁷

19 See *id.* at 624–26.

20 Chief Justice Warren observed that the electrical equipment cases were terminated in just over six years, a period of time "which would not be regarded as an unusual length of time for the processing of a single complex antitrust case." Wilson W. Herndon & Ernest R. Higginbotham, *Complex Multidistrict Litigation—An Overview of 28 U.S.C.A. § 1407*, 31 BAYLOR L. REV. 33, 37 (1979) (quoting Chief Justice Warren's address to the American Law Institute on May 16, 1967).

21 See H.R. REP. NO. 90-1130 (1968), reprinted in 1968 U.S.C.A.N. 1898, 1899.

22 *Id.* at 1899.

23 *Id.* at 1899–1900.

24 *Id.* at 1900.

25 *Id.*

26 *Id.* at 1901.

27 *Id.*

Yet the breadth of the Committee's experience was not the only reason for limiting the scope of § 1407 to pretrial proceedings.²⁸ The Committee was keenly aware of the need to preserve the "benefits of local trials in the appropriate districts."²⁹ In its comment recommending the proposed legislation, the Committee noted that the bill was designed to "maximize the litigant's traditional privileges of selecting where, when and how to enforce his substantive rights or assert his defenses while minimizing possible undue complexity from multi-party jury trials."³⁰ Congress unequivocally agreed with the Committee that it was best for all involved to have cases remanded to the originating districts at the conclusion of coordinated pretrial proceedings. It too believed that "trial in the originating district is generally preferable from the standpoint of the parties and witnesses"³¹ Additionally, it noted that "from the standpoint of the courts it would be *impracticable* to have all cases in mass litigation tried in one district."³²

As envisioned by Congress, § 1407 was designed simply to assemble cases sharing common questions of fact so that discovery and depositions could occur at one time rather than in repetitious succession that would waste judicial resources and increase the likelihood of conflicting discovery. Once the pretrial proceedings were completed, remand to the transferor districts was necessary so that local discovery proceedings could take place and trial could finally get underway.³³ Congress explicitly recognized that most cases would have additional issues that could only be tried in the originating districts where necessary witnesses and evidence would be located.³⁴ Moreover, it deemed

28 See Report of the Co-ordinating Committee on Multiple Litigation Recommending New Section 1407, Title 28 (Mar. 2, 1965), reprinted in *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 498-502 (J.P.M.L. 1968) [hereinafter Co-ordinating Committee Report].

29 *Id.* at 499.

30 *Id.* The Committee asserted that the "major innovation" of § 1407 was the fact that transfer would be "solely for pre-trial purposes." *Id.* It further emphasized this innovation by drawing attention to the fact that because § 1407 was limited to pretrial proceedings, it was not limited in terms of the district to which the cases could be transferred. Hence, transfer could be made to the "most desirable forum" unlike other venue statutes, specifically 28 U.S.C. §§ 1404(a) and 1406(a), which limit transfer to districts where the action could have been brought. *Id.* at 499-500.

31 S. REP. NO. 90-454, at 5 (1967).

32 *Id.* (emphasis added).

33 See *id.*

34 Hence its comment that "trial in the originating district is generally preferable from the standpoint of the parties and witnesses." *Id.*

a consolidated trial by the transferee judge to be "impracticable."³⁵ This does not mean, however, that Congress believed consolidated trial to be impossible. Rather, Congress recognized that the adjudication of all the cases in one district in a mass litigation could not be achieved in a manner that would be fair to all involved and preserve the rights to which plaintiffs are entitled. To be sure, Congress considered consolidated trial, but retreated from the idea noting: "If proposed section 1407 should be enacted and future experience justifies extending it to include consolidation and coordination for trial purposes as well, only minor amendments to the present language of the bill will be necessary."³⁶ Congress wisely chose to limit § 1407 to pretrial proceedings believing, as did the Co-ordinating Committee, in the "benefits of local trials in the appropriate districts."³⁷ Judicial economy and efficiency would thus be realized within a practicable framework that would necessarily inconvenience plaintiffs to some extent—by requiring them to engage in pretrial proceedings in the transferee forum—but would ultimately preserve their indispensable rights.

B. The Judicial Panel on Multidistrict Litigation and the Federal Judiciary

As noted above, Congress created the Judicial Panel on Multidistrict Litigation and empowered it to transfer cases for coordinated or consolidated pretrial proceedings.³⁸ Under § 1407, transfer of civil actions was made contingent upon the establishment of four requirements.³⁹ Congress did not provide any real guidance for the JPML with regard to the more subjective requirements—that transfer be "for the convenience of parties and witnesses" and for the promotion of the "just and efficient conduct" of the actions.⁴⁰ Consequently, in

35 *Id.*

36 H.R. REP. NO. 90-1130 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1902.

37 Co-ordinating Committee Report, *supra* note 28, at 449. The Committee also noted in this report that one of the advantages of § 1407 "over alternative techniques, such as the class action, is that each action remains as an individual suit with the litigants retaining control over their separate interests." *Id.*

38 *See* 28 U.S.C. § 1407(a) (1994).

39 *See id.* The following four requirements must be established: (1) the civil actions in question must involve one or more common questions of fact; (2) they must be pending in different districts; (3) the JPML must determine that transfer will be for the convenience of parties and witnesses; and (4) the JPML must determine that transfer will promote the "just and efficient" conduct of the actions. *Id.*

40 Congress instead intended to rely on "the informed discretion of the judiciary" as the "best method for resolving questions as to when and where cases should be transferred for pretrial." H.R. REP. NO. 90-1130 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1901.

the years since its inception, the JPML has transferred some cases in situations where transfer did not appear to be justifiable.⁴¹ Both critics and supporters of the JPML have acknowledged this fact.⁴² As one supporter noted, "few cases are denied MDL status for their failure to promote just and efficient proceedings due to the Panel's favoring of transfer."⁴³ Thus, rather than requiring that all the statutory criteria be established, the JPML has largely exceeded the discretion given to it by Congress and has placed efficiency as the paramount objective to be achieved.⁴⁴ In so doing, the Panel laid the foundation for the proliferation of § 1404 self-transfers by the federal judiciary.⁴⁵

Taking their cue from the JPML, transferee judges hastened to create a way to "improve" the functioning of § 1407. In *Pfizer v. Lord*,⁴⁶ a two-judge panel of the Second Circuit Court of Appeals heard a petition for a writ of mandamus. The writ was sought after a transferee judge ordered transfer under § 1404(a) of all transferred cases from the eleven districts in which they were filed to one district for consolidated trial.⁴⁷ Although the transfer under scrutiny in *Pfizer* was not a "self-transfer," the Second Circuit paved the way for the

41 See Levy, *supra* note 9, at 46-47 (criticizing the JPML for allocating greater significance to the "just and efficient" criterion while virtually ignoring the other requirements).

42 See, e.g., *id.* at 47 ("The Panel has assumed that transfer and consolidation will promote judicial efficiency which will result in convenience to the parties and witnesses."); Herndon & Higginbotham, *supra* note 20, at 43 (stating that, with regard to the requirement that transfer be for the convenience of parties and witnesses, "the Panel has largely eliminated this guideline as a determinative standard"); Richard A. Chesley & Kathleen Woods Kolodgy, Note, *Mass Exposure Torts: An Efficient Solution to a Complex Problem*, 54 U. CIN. L. REV. 467, 519 (1985) (noting with regard to the convenience requirement that the JPML has "deleted this requirement from its standards").

43 Chesley & Kolodgy, *supra* note 42, at 520.

44 One of the first judges to sit on the JPML, Judge Stanley A. Weigel, discussed extensively the process that the Panel should undergo in determining whether to order transfer. His concurrence in the case of *In re "East of the Rockies" Concrete Pipe Antitrust Cases*, 302 F. Supp. 244, 253-56 (J.P.M.L. 1969), noted that in some cases, including those that the Panel was then considering for transfer, "coordination and consolidation may impair, not further, convenience, justice and efficiency." *Id.* at 254 (Weigel, J., concurring).

45 Typically, the JPML would suggest that its discount of the convenience requirement was justified since transfer was for pretrial purposes only and thus did not require the parties and witnesses to travel to the transferee district. See *In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415, 422 (J.P.M.L. 1991); *In re Air Crash Disaster Near Chicago, Ill.*, 476 F. Supp. 445, 448 (J.P.M.L. 1979); *In re Hawaii Hotel Room Rate Antitrust Litig.*, 438 F. Supp. 935, 936-37 (J.P.M.L. 1977).

46 447 F.2d 122 (2d Cir. 1971).

47 See *id.* at 123.

practice by side-stepping § 1407's clear remand mandate and holding that the transferee judge's authority to transfer cases for trial under § 1404(a) was not limited by § 1407.⁴⁸ Similarly, in a case decided just two weeks prior to *Pfizer*, a transferee judge ordered a § 1404(a) self-transfer, rationalizing that a consolidated trial would save time and money and foster overall judicial economy.⁴⁹

It is worth noting that the practice of self-transfer developed with the full acquiescence of the JPML. In 1970, the Panel adopted Rule 15(d) of its Rules of Procedure⁵⁰ which recognized the authority of a transferee judge to rule on a § 1404(a) motion—a tacit ratification of self-transfers. Later, in 1993, the JPML substituted Rule 15(d) with Rule 14(b) which *explicitly* endorsed self-transfers pursuant to § 1404(a).⁵¹

Notwithstanding the consensus of the JPML and the federal judiciary, the practice of self-transfer was a judicial invention.⁵² The legislative history of § 1407 clearly demonstrated that Congress never intended for transferee judges to rule on § 1404(a) motions, let alone

48 See *id.* at 124. Specifically, the court said that § 1407 only limited the power of the JPML which could not transfer cases for trial under § 1404(a). Conversely, the transferee judge retained the same authority as he would have in any other case pursuant to 28 U.S.C. § 296. See *id.* The court said that its conclusion “would clearly seem to comport with the essential purpose of section 1407 to ‘promote the just and efficient conduct’ of complex multidistrict litigation.” *Id.* at 125 (quoting 28 U.S.C. § 1407(a) (1994)). The court's paramount goal was clearly efficiency, irrespective of the other costs involved—specifically those costs to the parties.

49 See *In re Multidistrict Civil Actions Involving the Air Crash Disaster Near Hanover, N.H.*, 342 F. Supp. 907, 908 (D.N.H. 1971). District Judge Bownes cited his active involvement in the supervision of the pretrial proceedings, his familiarity with the facts, issues, and problems involved in the case, and his duty to the expeditious administration of justice as reasons to transfer the cases to himself for trial. See *id.* He also recognized that § 1407's clear language did not allow him to order a self-transfer. Nevertheless, he concluded that such a transfer for consolidated trial was a “judicial interpretation” that was developed “to meet the problems imposed upon the federal courts by complex and multidistrict cases.” *Id.* at 909.

50 The JPML is authorized under 28 U.S.C. § 1407(f) to promulgate rules for the conduct of its business, provided they are not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

51 Rule 14(b), Rules of Procedure of the J.P.M.L., provides in part: “Each transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial, *unless ordered transferred* by the transferee judge *to the transferee* or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406.” Rule 14(b), R.P.J.P.M.L. following 28 U.S.C. § 1407 (1994) (emphasis added).

52 See *Air Crash Disaster Near Hanover*, 342 F. Supp. at 910 (commending the development of the self-transfer mechanism as “an excellent illustration of how the administration of justice can be advanced by an intelligent and imaginative judge”).

transfer cases to themselves for trial.⁵³ Such transfers stemmed from the JPML's liberality with regard to transfer decisions coupled with the prevailing belief of transferee judges that "the essential purpose of section 1407 [was] to 'promote the just and efficient conduct' of complex multidistrict litigation."⁵⁴ Both the Panel and the judges were convinced that § 1407 and § 1404(a) "should be used in concert to effect the most expeditious disposition of multidistrict litigation."⁵⁵ Yet in their firm adherence to this belief, they overlooked the key component of § 1407—the remand mandate—and the underlying importance of that component. Without a doubt, the judges were correct in their argument that § 1407 was intended to enhance the efficiency of multidistrict litigation by eliminating repetitious procedures in related cases. But the statute was also concerned with achieving results that were both just and practicable, in short, results that preserved the traditional rights of plaintiffs.⁵⁶ Congress had wisely rejected the option to authorize transfer for consolidated trial because it valued both the rights of plaintiffs and the importance of just outcomes as much as, if not more than, the virtues of efficiency. As one group of observers noted, "When Congress enacted the [multidistrict litigation] statute, it exercised its prerogative to make difficult policy choices and struck a specific balance between concerns of judicial efficiency and the rights of litigants."⁵⁷ The federal judiciary, having overlooked the primary concern of § 1407, supplanted the will of Congress and struck its own flawed balance—one heavily tilted in favor of an efficiency which might be wholly illusory.⁵⁸ In so doing, they compelled plaintiffs to litigate in forums not of their choosing as partici-

53 Congress did not preclude the use of § 1404(a) altogether. Rather, it concluded its discussion of the remand mandate with the observation that § 1404(a) "is available in those instances where transfer of a case for all purposes is desirable." H.R. REP. NO. 90-1130 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1902. Congress, of course, was referring to a § 1404(a) transfer ordered by the transferor, not the transferee judge. The Co-ordinating Committee made this clear in its Report where it noted that § 1407 "would not affect the place of trial in any case or exclude transfer under other statutes (e.g., 28 U.S.C. §§ 1404(a) and 1406(a)) prior to or at the conclusion of pretrial proceedings." Co-ordinating Committee Report, *supra* note 28, at 499 (emphasis added).

54 *Pfizer, Inc. v. Lord*, 447 F.2d 122, 125 (2d Cir. 1971) (quoting 28 U.S.C. § 1407(a) (1994)).

55 *In re Koratron*, 302 F. Supp. 239, 242 (J.P.M.L. 1969).

56 *See supra* text accompanying notes 28–37.

57 Carter G. Phillips et al., *Rescuing Multidistrict Litigation from the Altar of Expediency*, 1997 BYU L. REV. 821, 822.

58 For an excellent discussion of the inconsistency of § 1404(a) transfers with § 1407, see Trangsrud, *supra* note 9, at 804–09. *See also* Noreen Dever Arralde, Comment, *A Catalyst for Reforming Self-Transfer in Multidistrict Litigation: Lexecon, Inc. v.*

pants in consolidated trials over which they could exercise little control and self-determination. As a result, plaintiffs were more likely to suffer unfair treatment and outcome-changing consequences, both of which would almost certainly have been obviated if they had received their substantive right to remand pursuant to § 1407.

III. THE *LEXECON* DECISION

A. Background

Lexecon emerged from the multidistrict securities litigation that followed the collapse of Charles Keating's Lincoln Savings & Loan in 1989. In the vast class action brought on behalf of the purchasers of securities issued by the failed thrift, counsel for the plaintiff class, Milberg Weiss Bershad Hynes & Lerach (Milberg Weiss), named Lexecon Inc. as a defendant.⁵⁹ Lexecon, an economic consulting firm based in Chicago, was alleged to have violated federal and state securities and racketeering laws by knowingly misrepresenting to banking regulators facts concerning the financial stability of Lincoln.⁶⁰ Due to the volume of litigation initiated by investors, the JPML transferred all of the cases to the District of Arizona for consolidated pretrial proceedings pursuant to § 1407.⁶¹ On June 22, 1992, Lexecon agreed to a "resolution" with the class attorneys whereby it was dismissed from the litigation in exchange for the professional fees that Lincoln Savings had paid to Lexecon.⁶²

Subsequent to its dismissal, Lexecon initiated a suit against Milberg Weiss and other plaintiffs' attorneys for defamation and malicious prosecution.⁶³ Lexecon filed its action on November 25, 1992, in the Northern District of Illinois. It alleged that Milberg Weiss had sought to "destroy" Lexecon by involving it in the Lincoln Savings & Loan litigation.⁶⁴ In June 1993, Milberg Weiss petitioned the JPML to transfer the case under § 1407 to the District of Arizona for pretrial

Milberg Weiss, 72 ST. JOHN'S L. REV. 623 (1998) (arguing that the factors relevant to a § 1404(a) transfer are unworkable within the multidistrict litigation context).

59 See *In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424 (D. Ariz. 1992).

60 See *id.* at 1448-49.

61 See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956, 959 (1998).

62 See *In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, 102 F.3d 1524, 1529 (9th Cir. 1996). Lexecon wished the agreement to be termed a "resolution" rather than a settlement in order to protect its professional reputation. *Id.*

63 See *id.*

64 See *In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, 845 F. Supp. 1377, 1382 (D. Ariz. 1993).

consolidation with the remaining Lincoln Savings cases.⁶⁵ The JPML ordered transfer of the case to Arizona even though the judge who originally presided over the consolidated Lincoln Savings litigation and who was intimately familiar with Lexecon's dismissal from that litigation had then recused himself.⁶⁶ Following final settlement of the last of the Lincoln Savings cases in March 1994, Lexecon unsuccessfully moved for remand of its case back to Illinois.⁶⁷ Lexecon renewed this motion in November 1994 after the completion of discovery.⁶⁸ In April 1995, prior to ruling on the remand motion, the judge dismissed all but one of Lexecon's claims.⁶⁹ Then, upon the motion of Milberg Weiss, the judge self-transferred Lexecon's one surviving claim to himself for trial under § 1404(a).⁷⁰ Lexecon's petition to the Ninth Circuit Court of Appeals for a writ of mandamus directing the transferee judge to remand the case to Illinois in accordance with § 1407's remand mandate was denied.⁷¹ Thereafter, a jury trial on the remaining defamation claim resulted in a verdict for Milberg Weiss.⁷² Lexecon appealed to the Ninth Circuit, which in December 1996 affirmed, two-to-one, the district judge's self-transfer and the verdict in the case.⁷³

65 See *In re American Continental Corp.*, 102 F.3d at 1529.

66 See *id.* The judge recused himself because, upon hearing of Lexecon's lawsuit against Milberg Weiss, he "arranged a telephonic hearing held on December 7, 1992, and therein charged Lexecon with what he viewed as its incorrect portrayal of the resolution of its role as a defendant in [the Lincoln Savings litigation]." *Id.* The judge then placed an order in the record of that litigation which undermined the validity of Lexecon's complaint against Milberg Weiss. See *id.* The JPML's transfer of the case to Arizona subsequent to the judge's recusal is especially curious because one of the chief factors cited as a justification for transfer—judicial economy—could not be realized. The judge familiar with the litigation was no longer involved. Furthermore, the case was transferred at a very late point in the multidistrict proceeding, in fact, very near to its completion. Consequently, the *Lexecon* story is quite ironic given the fact that, had the case not been transferred to Arizona by the JPML and then self-transferred by the transferee judge, it surely would not have culminated in a Supreme Court decision that finally ended the practice of self-transfer under § 1407. Simply put, no one could have prognosticated that such a radical result would come from such an unlikely candidate.

67 See *id.* at 1531.

68 See *id.*

69 See *In re American Continental/Lincoln Sav. & Loan Sec. Litig.*, 884 F. Supp. 1388 (D. Ariz. 1995).

70 See *In re American Continental Corp.*, 102 F.3d at 1531.

71 See *Lexecon Inc. v. United States Dist. Court for the Dist. of Ariz.*, No. 95-70380, 1995 WL 432395 (9th Cir. July 21, 1995).

72 See *In re American Continental Corp.*, 102 F.3d at 1531.

73 See *id.* at 1534-39.

B. The Ninth Circuit's Affirmance and Judge Kozinski's Dissent

In its appeal to the Ninth Circuit, Lexecon stressed the remand mandate of § 1407 which precludes a transferee judge from self-transferring a case for trial.⁷⁴ The court rejected this argument citing, among other things, the frequency with which self-transfers occur, the efficiency gains of self-transfer, and the JPML's Rule 14(b) authorizing self-transfers.⁷⁵ Judge Kozinski, who had dissented from the court's prior decision denying Lexecon's petition for mandamus, wrote a scathing dissent condemning the self-transfer procedure.⁷⁶ He argued that the infrequency with which transferred cases were remanded to their originating districts denoted "a remarkable power grab by federal judges" who had created a "mechanism for systematically denying plaintiffs the right to trial in their forum of choice."⁷⁷ Judge Kozinski noted the clear language of § 1407 and the legislative history indicating Congress's decision to limit the scope of transfer to pretrial proceedings.⁷⁸ He attacked the federal judiciary's manipulation of § 1404(a), a statute which had been designed to protect a plaintiff's choice of forum, as a means to effect self-transfers.⁷⁹ Finally, Judge Kozinski observed that the Rules of Procedure of the JPML are promulgated without rigorous congressional oversight and, being limited to the business of the Panel, can in no wise be invoked to "broaden the transferee court's authority to act under section 1404(a)."⁸⁰ In short, Judge Kozinski's dissent was a strongly intoned message directed to the Supreme Court, which received it and granted certiorari.

C. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach

The only question before the Supreme Court was whether § 1407 permitted a transferee judge to transfer a case to himself for trial under § 1404(a).⁸¹ The Court began by examining the language of

74 See *id.* at 1533.

75 See *id.* at 1532-33.

76 See *id.* at 1540 (Kozinski, J., dissenting).

77 *Id.* Judge Kozinski cited the 1995 Report of the Director of the Administrative Office of the United States Courts. This report documented that the JPML had transferred 92,562 cases since 1968, and only 3,508 of these had been remanded for trial. He did, however, note the transferee courts' ability to rule on dispositive motions which might make trial, and hence remand, unnecessary. See *id.* at 1544-45.

78 See *id.*

79 See *id.* at 1546-48

80 *Id.* at 1549.

81 See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956, 960-61 (1998). The Court ultimately did not rule on the question of whether

§ 1407. Focusing on the requirement that “each action so transferred shall be remanded by the panel,” the Court observed that “the mandatory ‘shall’ . . . normally creates an obligation impervious to judicial discretion.”⁸² Despite the “longstanding practice” of the federal judiciary, this “plain command” could not be ignored.⁸³ The Court also recognized that Congress had clearly distinguished the fact that § 1407 applied only to pretrial proceedings.⁸⁴ Hence, no amount of judicial creativity or legal argument could contort § 1407 into an instrument allowing self-transfer for consolidated trial.⁸⁵ Transfer for trial under § 1404(a) was not precluded, but it could only occur “after remand of the case to the originating district court.”⁸⁶

Justice Souter wrote the opinion of the Court which was unanimous except as to the brief discussion of the legislative history of § 1407 from which Justice Scalia refrained.⁸⁷ On the whole, the decision was rather unremarkable as the Court simply engaged in a straightforward textual analysis of § 1407. It did not address policy concerns of efficiency, judicial economy, or fairness to plaintiffs. The nearest the Court came to even mentioning these issues was in the following glib, conclusory statement: “Milberg may or may not be correct that permitting transferee courts to make self-assignments would be more desirable than preserving a plaintiff’s choice of venue (to the degree that § 1407(a) does so), but the proper venue for resolving that issue remains the floor of Congress.”⁸⁸ The Court’s opinion was short and seemingly detached from the thirty years’ worth of debate over the proper use of § 1407. What may in fact be remarkable about

§ 1404(a) permits self-transfer because it found that § 1407 requires remand of all cases. *See id.* at 964 n.4.

82 *Id.* at 962 (quoting 28 U.S.C. § 1407(a) (1994)).

83 *Id.* at 962. The Court also noted that § 1407 could not be parsed, as the *Pfizer* court had done, so as to apply only certain provisions to the JPML, and certain provisions to the transferee courts. Rather the “central tenet of interpretation” holds that “a statute is to be considered in all its parts when construing any one of them.” *Id.*

84 *See id.* at 963.

85 *See id.*

86 *Id.* at 964. Given the straightforward language of § 1407, the Court declared the invalidity of the JPML’s Rule 14(b). *See id.*

87 *See id.* at 958.

88 *Id.* at 964. I should here note that the Court did, in analyzing the remedy to which Lexecon was entitled, make brief mention of the interests that parties have in choosing their own forum. *See id.* at 965. The Court made its comments in response to Milberg Weiss’s argument that the denial of Lexecon’s right to remand constituted harmless error and thus did not require remedy. Yet in rejecting this argument, the Court focused more on the need to remedy statutory violations than it did on the relevance of the issue of a plaintiff’s choice of forum. *See id.*

the *Lexecon* decision is the unremarkable way in which it effected such a significant change in the landscape of multidistrict litigation.

IV. THE PRESUMPTIVE RIGHT OF PLAINTIFFS

A. Introduction

Unlike Judge Kozinski, the Supreme Court in *Lexecon* did not discuss in any depth the right of a plaintiff to a trial in his choice of forum. However, the Court did order reversal of the verdict for Milberg Weiss because *Lexecon* had been denied its substantially significant right to remand under § 1407.⁸⁹ The Court's order was necessary because, without it, § 1407's remand mandate would be meaningless.⁹⁰ Yet the order also underscores the considerable significance and respect that our justice system has always accorded to the plaintiff's choice of forum. Section 1407 embodied this respect and manifested it in its remand mandate. In the judgment of Congress, there could be no discretion on the part of either the JPML or the transferee judges with respect to the remand decision because the right of the plaintiff to trial in his forum of choice was entitled to substantial deference.⁹¹ Congress did, of course, leave itself open to the possibility that transfer for consolidated trial under § 1407 might one day become desirable.⁹² Yet in the thirty years subsequent to the passage of § 1407, in light of the extensive societal changes and the increased caseloads of the federal courts, Congress never saw fit to amend the statute. Nor should it do so now.

The reasons for attaching significance to the plaintiff's choice of forum are as valid today as they have always been and should not be discarded in favor of countervailing concerns of efficiency—an efficiency which may be actual or, in many respects, illusory. This is especially so with regard to the plaintiff engaged in multidistrict litigation whose case is transferred under § 1407 for coordinated or consolidated pretrial proceedings. Such a plaintiff is confronted by a number of variables that can temporarily wrest control of his case from him. The exigencies of multidistrict litigation make this nearly inevitable. Yet if the plaintiff's case is then transferred for consolidated trial, as was common prior to *Lexecon*, a number of factors arise that can jeopardize the plaintiff's right to a fair adjudication of his claim as an individual. Rather than having his claim adjudicated ac-

89 See *id.* at 965.

90 See *id.* at 966.

91 See *id.* at 965.

92 See *supra* text accompanying note 36.

ording to the law of his chosen forum, a skewed choice of law analysis may effect an entirely inappropriate outcome favoring the defendant, who initially moved for consolidation. Furthermore, contrary to being treated as an individual, the plaintiff is more likely to experience indiscriminate treatment from judges seeking to achieve uniform rather than disparate results. For the meritorious plaintiff, the consequences of this uniform treatment can be wholly inequitable and frustrating. Due to the aggregation of claims, a plaintiff may find a jury trial to be unduly prejudicial in its treatment of his case. In sum, there are a number of potential outcome-determinative effects that are likely to be adverse to the plaintiff who is subject to a consolidated trial. These adverse effects make the remand mandate all the more crucial to the plaintiff's substantive rights.

B. *The Significance of the Plaintiff's Choice*

America's adversarial system of dispute resolution has long respected the right of the individual litigant to oversee the management of his claim and the pursuit of his remedy.⁹³ This respect stems from the notion that "litigation is a personal and individual enterprise."⁹⁴ In short, every citizen has a right to go to court for redress of wrongs and, in so doing, to actively participate in the pursuit of his remedy.⁹⁵ In accordance with these precepts of individual control, American courts have consistently acknowledged an established principle—the forum chosen by the plaintiff is entitled to significant deference.⁹⁶ The Supreme Court reaffirmed this inveterate principle in the case of *Gulf Oil Corp. v. Gilbert*.⁹⁷ There the Court stated that, although a plaintiff may not be permitted to select an inconvenient forum simply to oppress the defendant, in general "the plaintiff's

93 See *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("Of course, the party who brings a suit is master to decide what law he will rely upon . . ."); see also *Trangsrud*, *supra* note 9, at 816–19 (discussing the historical notion of individual control in the context of personal injury litigation).

94 *Trangsrud*, *supra* note 9, at 817.

95 See *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (referencing America's "deep-rooted historic tradition that everyone should have his own day in court") (quoting 18 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4449, at 417 (1981)).

96 See *Healy v. Sea Gull Specialty Co.*, 237 U.S. 479, 480 (1915) ("the plaintiff is absolute master of what jurisdiction he will appeal to"). Although *Healy* involved plaintiff's choice of jurisdiction—state or federal—the principle it articulated is no less applicable to the plaintiff's choice of forum within the jurisdiction he has brought his claim. Any doubts as to this fact are resolved by the Supreme Court's comments in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

97 330 U.S. 501 (1947).

choice of forum should rarely be disturbed."⁹⁸ The presumption in favor of the plaintiff's choice can only be overcome if the balance weighs heavily in favor of the defendant.⁹⁹ Absent an inappropriate motive on the part of the plaintiff, courts have traditionally gone to great lengths to ensure the plaintiff's right to seek relief in the forum of his choice.¹⁰⁰

In addition to the individual's control over his legal strategy, the adversary system grants certain rights to litigants, such as the plaintiff's right to his choice of forum, with offsetting protections for the opposing party. The plaintiff is the "master of the complaint" and as such maintains a considerable degree of control over the structure and prosecution of his complaint.¹⁰¹ In some respects, the American civil justice system complements these managerial rights of plaintiffs, while at the same time protecting defendants from abusive tactics. For example, the venue statutes have been "drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy."¹⁰² The plaintiff, as a rational individual, may exercise this venue privilege to his advantage and has the right to do so in pursuit of the most favorable adjudication of his claim. At the same time, however, the plaintiff is limited in terms of the venues in which he may bring his

98 *Id.* at 508. Although the issue in *Gilbert* concerned the applicability of the principle of forum non conveniens to the case at bar, nevertheless the Court's comments are general in nature and relevant in all cases where the plaintiff's choice of forum is contested. Moreover, the Court's opinion alludes to the notion that even where a forum is inconvenient for a defendant, it should be upheld if it is "necessary to [the plaintiff's] own right to pursue his remedy." *Id.*

99 *See id.*; *see also* *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970) ("It is black letter law that a plaintiff's choice of a proper forum is a paramount consideration in any determination of a transfer request, and that choice . . . 'should not be lightly disturbed.'") (quoting *Ungrund v. Cunningham Bros.*, 300 F. Supp. 270, 272 (S.D. Ill. 1969)); *Franklin v. Blaylock*, 218 F. Supp. 261, 262 (S.D.N.Y. 1963) (holding that, in ruling on a § 1404(a) motion, the plaintiff's choice of forum is "entitled to great weight" and "will not be disturbed unless the balance of convenience weighs heavily in favor of defendant").

100 *See Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986) ("Jurisdiction may not be sustained on a theory that the plaintiff has not advanced."); *see also* David E. Steinberg, *The Motion To Transfer and the Interests of Justice*, 66 NOTRE DAME L. REV. 443, 463 (1990) ("Where a plaintiff has made a reasonable choice of forum, a transfer motion is unlikely to succeed and only will impose an unnecessary burden on both the plaintiff's counsel and the federal courts.").

101 *See* JAY TIDMARSH & ROGER H. TRANGSRUD, *COMPLEX LITIGATION AND THE ADVERSARY SYSTEM* 87 (1998).

102 *Gilbert*, 330 U.S. at 507.

action against the defendant.¹⁰³ He is also limited by the requirement that his chosen venue have personal jurisdiction over the defendant.¹⁰⁴ Given these controls placed on plaintiffs and the concomitant protections afforded to defendants, if the plaintiff's choice of forum is proper, that choice should be respected. Provided the plaintiff is not motivated by a desire to oppress the defendant, the plaintiff certainly need not seek to aid his opponent who, in turn, will rationally work to undermine the plaintiff's choice.¹⁰⁵ Inconvenience to the defendant is nearly unavoidable when the forum is not of his choosing.

There are some practical reasons as well for respecting the plaintiff's choice of forum that are frequently mentioned, but should not be hastily dismissed. Congress alluded to these reasons when it considered the enactment of § 1407 while noting the benefits to be realized through local trials brought in the appropriate districts.¹⁰⁶ For example, when a plaintiff chooses to litigate in his home forum, discovery may be conducted with greater ease and less expense as the parties will presumably have ready access to both evidence and witnesses.¹⁰⁷ A trial in a distant forum that is not related to the case, however, will likely be more costly and entail greater difficulty in the procurement of necessary witnesses.¹⁰⁸ Moreover, there is a public interest in the adjudication of local controversies within the locality of their occurrence.¹⁰⁹ The community whose laws are violated has a

103 See *Leroy v. Great W. United Corp.*, 443 U.S. 173, 183-84 (1979) ("In most instances, the purpose of statutorily specified venue is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial.").

104 See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (noting that the requirement of minimum contacts performs two functions, one of which is to "protect [] the defendant against the burdens of litigating in a distant or inconvenient forum").

105 See *TIDMARSH & TRANGSRUD*, *supra* note 101, at 87 (noting that one party will often seek to thwart the other party's choices); see also Steinberg, *supra* note 100, at 464 (noting that "defendants appear likely to file a [§ 1404(a)] transfer motion almost as a matter of course when some colorable argument exists that an alternative forum could prove more convenient").

106 See *supra* text accompanying notes 28-37.

107 See *Gilbert*, 330 U.S. at 508; see also *General Foam Plastics Corp. v. Kraemer Export Corp.*, 806 F. Supp. 88, 89-90 (E.D. Va. 1992) (noting that plaintiff's choice of forum is accorded substantial weight, especially where it is plaintiff's home forum, the cause of action has a strong connection to the forum, and plaintiff's witnesses and documents are present in that forum).

108 See Steinberg, *supra* note 100, at 480 (noting that a plaintiff may not be able to afford the travel expenses of witnesses, and may not be able to compel hostile witnesses to attend a trial lying beyond a subpoena's reach).

109 See *Gilbert*, 330 U.S. at 509 ("There is a local interest in having localized controversies decided at home.").

duty to seek the vindication of those laws and to impose the appropriate judgment on the violator. Members of the community will also be in a better position to ascertain the loss suffered by one of their own citizens and to remedy that loss accordingly.¹¹⁰ The forthcoming pages of this Comment seek to expound on the ideas briefly mentioned here, as well as others, to emphasize the significance that we should continue to attach to the plaintiff's choice of forum.

C. *The Individual Plaintiff in the Realm of Multidistrict Litigation*

The individual plaintiff who brings a simple cause of action in the forum of his choice has certain expectations about the manner in which his claim should proceed. These expectations are derived, in large part, from the rational decisionmaking process that the plaintiff employs when selecting the forum in which to bring his action. He will often consider such things as "the substantive law of the possible forums, the choice of law considerations involved in selecting the governing law, the quality of the judges, jurors and opposing counsel, the status of court dockets, the expense of having to litigate in a distant forum, and the need to have local counsel and how that affects control of the case."¹¹¹ Having considered some or all of these factors in making his decision, the plaintiff logically expects his case to proceed with a relative degree of predictability.

Yet the plaintiff has other expectations regarding his case that are not rooted in these factors. Rather, they originate in the fact that the plaintiff has suffered some personal wrong and is now entitled to redress of that wrong. Simply put, a plaintiff is an individual with his own story of what happened in the world that resulted in the necessity to file a cause of action and to seek a remedy to which he believes he is entitled. He rightfully expects to be able to tell his story, present the issues, and receive an adjudication based upon the facts that are relevant to him personally.

110 See *id.* at 510 (noting that a jury composed of local residents would be quite capable of ascertaining the value of the goods lost by the plaintiff and the value of the business lost by the plaintiff).

111 Levy, *supra* note 9, at 43. See also Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 395-96 (1992) (noting that among the "main rationales at work in forum selection" are the pace and cost of litigation, the desire to inconvenience one's opponent, and factors related to attorney convenience). Although this study focuses on the reasons attorneys remove cases from state to federal court, its findings are instructive as to the strategic calculus in which plaintiffs' and defendants' attorneys generally engage when selecting a forum.

These expectations are radically altered when the plaintiff becomes embroiled in the "vortex" of multidistrict litigation.¹¹² A transfer under § 1407 for consolidated pretrial proceedings will markedly curtail the amount of individual control that a plaintiff, and often his attorney, has over his case. Moreover, it will increase the number of conflicts he encounters. For example, it is not uncommon for a transferee judge—in an attempt to organize the pretrial proceedings—to require the plaintiffs as a whole to file a consolidated complaint.¹¹³ This can be a recipe for conflict and delay if there is dissension among the plaintiffs as to whether such a unified complaint should be filed.¹¹⁴ Moreover, with the filing of a consolidated complaint generally comes the appointment of lead counsel¹¹⁵ or committees of counsel¹¹⁶ "who, as a practical matter, oust the attorneys chosen by parties," thus resulting in an alteration of "the procedural 'right' of civil litigants to select their own counsel."¹¹⁷ Although his appointment may be a managerial necessity, the unfortunate reality is that the lead counsel will usually have "very little familiarity with individual . . . clients and their particularized claims."¹¹⁸ As a result, the indi-

112 This was the term used by Judge Kozinski in *In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, 102 F.3d 1524, 1547 (9th Cir. 1996) (Kozinski, J., dissenting).

113 See Diana E. Murphy, *Unified and Consolidated Complaints in Multidistrict Litigation*, 132 F.R.D. 597, 598–600 (1991). Written by a federal judge with experience as a transferee judge, this article provides insight into the factors considered by judges in determining how best to manage cases transferred under § 1407(a), and how to deal with the conflicts inherent in consolidation. The author advocates the use of a consolidated complaint.

114 See *id.* at 599–600, 602.

115 The lead counsel typically acts for all of the plaintiffs in "initiating and organizing discovery requests and responses, conducting the principal examination of deponents, employing experts, arranging for support services, and seeing that schedules are met." MANUAL FOR COMPLEX LITIGATION § 20.221 (3d ed. 1995).

116 Committees of counsel "may be assigned tasks by the court or lead counsel, such as preparing briefs or conducting portions of the discovery program." *Id.* Appointment of such committees can lead to "substantially increased costs" as well. *Id.*

117 Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be Part II: Non-Jurisdictional Matters*, 42 UCLA L. REV. 967, 975 (1995). The author notes that courts have generally not been concerned by the fact that their appointment of lead counsel overturns litigants' choice of counsel and "transform[s] the attorney-client relationship in potentially deleterious ways." *Id.* at 977.

118 Mike Roberts, *Multidistrict Litigation and the Judicial Panel, Transfer and Tag-Along Orders Prior to a Determination of Remand: Procedural and Substantive Problem or Effective Judicial Public Policy?*, 23 MEMPHIS ST. U. L. REV. 841, 863 n.171 (1993). The author questions the ability of a lead counsel to represent adequately all plaintiffs in the transferee forum. See *id.* at 863.

vidual plaintiff and his lawyer may have very little say about the objectives and strategies that they would like to see employed in the management of the pretrial proceedings which will bear on the development of the plaintiff's case.¹¹⁹ The "internal constraints" of case management may "mak[e] it inevitable that the interests of individual plaintiffs will be ignored or submerged in decisions concerning tactics and discovery affecting the entire plaintiff group."¹²⁰

Even if the plaintiff is not encumbered with the difficulties that accompany the filing of a consolidated complaint and appointment of lead counsel, the simple fact that he is in a forum not of his choosing can seriously affect his case. For instance, "certain districts have different attitudes toward discovery problems."¹²¹ Given the variety of discovery regimes that exist in individual districts, the plaintiff's case could be significantly undermined or disadvantaged.¹²² Moreover, there is the crucial choice of law question which will be addressed *infra*. There is also the factor of limited resources. As one observer noted, "For a small player in a large litigation drama, consolidation can raise costs drastically."¹²³ All of these issues are relevant in the context of multidistrict litigation, and they can affect the plaintiff's case in crucial ways.

The sole consolation for the individual plaintiff is the remand mandate of § 1407 which allows the plaintiff to retain some measure of control over "the selection of the forum, the legal theories pursued at trial, and the lawyer who actually represents him."¹²⁴ Prior to *Lexecon*, however, matters could become far worse for the plaintiff if the transferee judge self-transferred all of the cases for trial. Consolida-

119 See Murphy, *supra* note 113, at 602. The author refers to the case of *In re Wirebound Boxes*, 128 F.R.D. 262, 263 (D. Minn. 1989), in which she served as the transferee judge and had to deal with plaintiffs warring over the management of the case. She notes that one group of plaintiffs favored consolidated pleadings arguing that it would simplify management, while the opposing group questioned the surrender of claims or rights and future difficulties after remand back to the transferor districts. See *id.* at 602.

120 Trangsrud, *supra* note 9, at 823.

121 Levy, *supra* note 9, at 43 n.15.

122 Donna Stienstra, *Local Discovery Practices*, in 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE vii-viii (Supp. 1998). This useful resource provides the Federal Judicial Center's catalog of each federal district court's procedures for discovery under FED. R. CIV. P. 26.

123 David Lauter, *Mastering MDL*, NAT'L L.J., Nov. 21, 1983, at 24 ("Sometimes it's a disaster to be consolidated. You may have a fairly simple situation and get tied up with a very complex case and be stuck for years in discovery.") (quoting attorney Laurence Greenwald of Stroock & Stroock & Lavan).

124 Trangsrud, *supra* note 9, at 823.

tion for trial contrary to § 1407 would only exacerbate the hardships detailed above. The plaintiff's traditional control over "the venue, the lawyers representing him, the legal theories relied upon, and the strategy and tactics employed" would be rendered nugatory.¹²⁵ In short, a self-transfer decision could itself be outcome-determinative.¹²⁶ Congress, seeking to obviate such unwanted effects, included the remand mandate in § 1407 to preserve the plaintiff's rights and to avoid depersonalizing the plaintiff's case. In the pursuit of efficiency and judicial economy, Congress struck a clear balance, choosing to compel plaintiffs to surrender only some, not absolute, control. Unquestionably, *Lexecon* was essential for the restitution of the rights of plaintiffs engaged in multidistrict litigation.

D. *Choice of Law and Illusory Efficiency in Multidistrict Litigation*

In *Piper Aircraft Co. v. Reyno*,¹²⁷ the Supreme Court ruled on the appropriate forum for a wrongful death action involving one party governed by Pennsylvania law and another governed by Scottish law. The Court found that the Pennsylvania District Court had made a reasonable assessment of the problems inherent in such a case that warranted trial in Scotland; namely, the potential for confusing a jury with two sets of law and the district court's own lack of familiarity with Scottish law.¹²⁸ Although *Piper* had nothing to do with multidistrict litigation, the problems faced by the Pennsylvania District Court are illustrative of the very same problems created by the self-transfer procedure. These problems emanate from the choice of law analysis, which, when coupled with cases consolidated for trial in the context of multidistrict litigation, becomes a quagmire of inefficiency.

Under the rule of *Van Dusen v. Barrack*¹²⁹ a claim that is transferred from another district court under § 1404(a) requires the trans-

125 *Id.* at 824.

126 I should here note that self-transfer decisions often were outcome-determinative in that many would result in settlement. See Mark Herrmann, *To MDL Or Not To MDL? A Defense Perspective*, LITIGATION, Summer 1998, at 43, 47 (noting that a multidistrict litigation proceeding can foster settlement simply by bringing all of the parties together into one place). While settlement is desirable, I will discuss *infra* the ways in which settlement may be unfair when a meritorious plaintiff is forced to share in a settlement with meritless plaintiffs.

127 454 U.S. 235 (1981).

128 See *id.* at 259-60. The Pennsylvania District Court also noted that it "would be unfair to burden citizens with jury duty when the Middle District of Pennsylvania has little connection with the controversy" *Id.* at 243-44.

129 376 U.S. 612 (1964).

feree court to apply the choice of law rules of the transferor court.¹³⁰ Hence, a transferee judge who self-transfers a number of cases to himself for trial must conduct a choice of law analysis for each of those cases. To add to this complexity, "once the transferee court determines the applicable choice of law rules, it must apply the rules to each precise legal issue involved in the litigation."¹³¹ This means that "the substantive law from several different states may govern the liability, compensatory damages and punitive damages."¹³² As is evident from this brief summary, self-transfer for consolidated trial can open a veritable Pandora's box of complex problems that have the potential to hopelessly confuse both transferee judges and, especially, juries trying to sort out the issues and the applicable law.¹³³ The inevitable result is prejudice to plaintiffs whose cases should have been remanded in the first place in accordance with § 1407.¹³⁴ Furthermore, any hopes that the transferee judge has for "orderly and expeditious

130 See *id.* at 639. The Court concluded that in cases "where the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue. A change of venue under section 1404(a) generally should be, with respect to state law, but a change of courtrooms." *Id.* at 639. In *Ferens v. John Deere Co.*, 494 U.S. 516, 529 (1990), the Supreme Court held that the *Van Dusen* rule is also applicable where the *plaintiff* moves for a § 1404(a) transfer.

131 Desmond T. Barry, Jr., *A Practical Guide to the Ins and Outs of Multidistrict Litigation*, 64 DEF. COUNS. J. 58, 65-66 (1997).

132 *Id.* at 66.

133 Even if the judge is a managerial genius who writes incredibly articulate jury instructions, the risk of jury confusion remains high and makes consolidated trial impracticable. Judge Posner addressed the acuity of this obstacle that is faced by the standard six-person federal jury which must reach a verdict while juggling a multitude of laws. In *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995), a class action suit, he noted that such a jury "will receive a kind of Esperanto instruction, merging the negligence standards of the 50 states and the District of Columbia." Judge Posner concluded that in a high-stakes case with the fate of an industry in the balance, the more favorable alternative is the submission of the issue "to multiple juries constituting in the aggregate a much larger and more diverse sample of decision-makers." *Id.* at 1300. Another observer noted that in the trial of mass tort cases where the liability issues present noncommon questions, "[j]oint trial of the entire liability question is then not practical" because "[j]ury confusion will inevitably result if the court allows scores of individual plaintiffs to introduce evidence concerning their particular experience." Trangsrud, *supra* note 9, at 826. Cf. Phillips et al., *supra* note 57, at 836 (observing that consolidated trials of complex cases pose the serious risk of "jury overload" and hence "unfair prejudice" to the parties).

134 See *supra* text accompanying note 30. The Co-ordinating Committee on Multiple Litigation had foreseen this exact problem of jury confusion arising from multi-party trials and had thus included the remand mandate in § 1407 which, if obeyed, would obviate the problem entirely.

administration of justice"¹³⁵ may be effectively terminated by the need to hold "a series of 'mini-trials'" on the relevant legal issues.¹³⁶ The efficiency to be realized by self-transfer for consolidated trial can thus be illusory and may create more problems than it solves.

Given the complexities of the choice of law problem, some transferee judges who, prior to *Lexecon*, self-transferred cases for consolidated trial would often find a way to apply a single law to all of the transferred claims or to each issue.¹³⁷ One conflicts of law scholar has examined a number of examples,¹³⁸ nearly all of them in the context of multidistrict litigation, where the transferee judges manipulated the choice of law analysis in order to select that law—usually the law of the state in which the court presided—which would be most convenient for them.¹³⁹ This critic observed that choice of law analysis is crucially significant because the decision to apply one law rather than another can affect the outcome of a case.¹⁴⁰ In short, under the regime of self-transfer, a plaintiff would be denied not only his choice of forum but also, quite possibly, adjudication of his case under the appropriate law. Furthermore, knowing that cases consolidated under § 1407 were rarely remanded, defense attorneys could petition the JPML to transfer all cases to a forum favoring the defense.¹⁴¹ Likewise, they could file a consolidation motion in order to escape an un-

135 *In re Multidistrict Civil Actions Involving the Air Crash Disaster Near Hanover, N.H.*, 342 F. Supp. 907, 908 (D.N.H. 1971).

136 Dutcher, *supra* note 10, at 975-76.

137 See Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. Rev. 547, 552-53 (1996) (noting that, with regard to cases in multidistrict litigation that have been self-transferred for trial, "in practically every case, the court has found the same law applicable under all the relevant choice-of-law approaches").

138 See *id.* at 553 n.16.

139 See *id.* at 552-61. The author notes that the case of *In re Air Crash Disaster Near Chicago, Illinois*, 644 F.2d 594 (7th Cir. 1981), serves as "a virtual 'how-to' manual of ways to manipulate choice-of-law analysis." Kramer, *supra* note 137, at 554-55.

140 See *id.* at 554.

141 Technically, the Panel's stated position is that it is blind to the choice of law issue. See *In re General Motors Class E Stock Buyout Sec. Litig.*, 696 F. Supp. 1546, 1547 (J.P.M.L. 1988) ("When determining whether to transfer an action under Section 1407, however, it is not the business of the Panel to consider what law the transferee court might apply.") (footnote omitted). Nevertheless, a petition to the JPML for transfer of one's case can be very strategic, and it certainly is highly relevant to how the parties will manage their case. See Lauter, *supra* note 123, at 25 (noting the candid comments of lawyers appearing before the JPML seeking consolidation of cases in district courts with favorable appellate benches, and concluding that "[f]orum shopping is an 'unspoken reason' behind many consolidation motions"); cf. Miller, *supra* note 111, at 437-38 (reporting that over one half of the defense attorneys in its study said that "the likelihood of more favorable appellate rulings in federal court was a factor in case removal").

favorable judge or jurisdiction, being confident that they would not return for trial.¹⁴² The proliferation of self-transfers thus created the potential for forum shopping in the guise of efficiency. *Lexecon*, because it precluded self-transfer for consolidated trial in conjunction with § 1407, preserved the plaintiffs' rights, and the integrity of the system as a whole.

Brief mention must be made of the choice of law problem as it relates to multidistrict cases arising under questions of federal law that are transferred pursuant to § 1407 for coordinated and consolidated pretrial proceedings. As discussed above, self-transfers for consolidated trial produced numerous difficulties for transferee courts because of their duty to apply the choice of law rules of the various transferor courts in accordance with the *Van Dusen* rule. These problems were as daunting for transferee courts presiding over cases governed by federal questions as for transferee courts presiding over diversity cases, with just as troublesome consequences for plaintiffs. With regard to the former, the debate over whether a transferor court's interpretation of federal law should govern a transferee court came to a head in *In re Korean Air Lines Disaster of September 1, 1983*.¹⁴³ The Circuit Court of Appeals for the District of Columbia ruled that, because a transferee court was competent to decide federal issues correctly, its interpretation of federal law should be applied rather than the differing interpretation of the transferor court.¹⁴⁴ The D.C. Circuit in large part rested its decision on its finding that the policies advanced by the *Van Dusen* decision "do not figure in the calculus when the law to be applied is federal, not state."¹⁴⁵ The court realized

142 See Lauter, *supra* note 123, at 24 (noting that the motivations for filing consolidation motions with the JPML include "searching for the most favorable federal circuit in which to hear a case . . . and avoiding district judges with a reputation for being unfavorably disposed toward a certain type of case").

143 829 F.2d 1171 (D.C. Cir. 1987).

144 See *id.* at 1175. The plaintiffs in *Korean Air Lines* had made a motion for partial summary judgment in which they sought a declaration that the defendant airline would be liable without fault for compensatory damages without any limitation on the amount of damages allowable per person under the Warsaw Convention treaty which governed international air disasters. See *id.* at 1172. The transferee court had denied this motion despite the fact that the precedent of the Second Circuit—the jurisdiction in which the majority of the plaintiffs had filed their claims—favored the position advanced by the plaintiffs. See *id.* On interlocutory appeal, the D.C. Circuit upheld the transferee court's ruling and affirmed its interpretation of the Warsaw Convention which differed from that of the Second Circuit. See *id.* at 1173.

145 *Id.* at 1174. The court noted that *Van Dusen* was based on the principles advanced in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), which sought to "ensure that the 'accident' of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the

that, in so holding, it was effectively denying "to [the] plaintiff with a federal claim, the 'venue privilege' [that the] diversity claimant enjoys."¹⁴⁶ Nevertheless, the court reasoned, "there is ultimately a single proper interpretation of federal law," and because this is so, "the attempt to ascertain and apply diverse circuit interpretations simultaneously is inherently self-contradictory."¹⁴⁷

In reaching its decision in *Korean Air Lines*, the D.C. Circuit made a logically compelling argument. Furthermore, its goals were consistent with the goals of § 1407—to eliminate repetitive judicial effort. Recognizing that on remand the transferor court would perhaps reverse its decision, the court suggested that the decision should be binding as "law of the case," lest the efficiency goals of the § 1407 transfer process be for naught.¹⁴⁸ Yet, despite the apparent soundness of the court's reasoning, the fact remains that the decision was at odds both with the legislative history of § 1407¹⁴⁹ and with the great weight of the case law applying transferor law to federal question cases transferred under § 1407.¹⁵⁰ The D.C. Circuit also supported its decision by finding that most decisions transferred under § 1407 are not re-

courts of the State where the action was filed." *Korean Air Lines*, 829 F.2d at 1174 (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 638 (1964)).

146 *Korean Air Lines*, 829 F.2d at 1175. The court was also well aware that the plaintiffs in the case would fare much better if the Second Circuit's interpretation of federal law was applied rather than the D.C. Circuit's interpretation. *See id.*

147 *Id.* The court further noted that "[o]ur system contemplates differences between different states' laws But it is logically inconsistent to require one judge to apply simultaneously different and conflicting interpretations of what is supposed to be a unitary federal law." *Id.* at 1175-76.

148 *See id.* at 1176.

149 *See* Ross Daryl Cooper, *The Korean Air Disaster: Choice of Law in Federal Multidistrict Litigation*, 57 GEO. WASH. L. REV. 1145, 1155-59 (1989). The author analyzes the legislative history of § 1407 noting primarily that Congress intended for transferee courts to apply the *Van Dusen* principle to both state and federal law issues. In rebuttal to the argument that "*Van Dusen* was limited to state law issues in diversity cases," the author points out that:

Section 1407 was passed . . . in response to the complexities of the electrical equipment cases, which were complex federal antitrust cases. Because all of the witnesses testifying before the subcommittee knew of this underlying purpose, it is illogical to assume that they were confining their comments [concerning the general application of *Van Dusen*] to state law issues associated with Section 1407 transfers.

Id. at 1158. (footnote omitted).

150 In his concurrence in *Korean Air Lines*, Judge Douglas Ginsburg acknowledged a number of cases in which transferee courts applied the transferor court's interpretation of federal law pursuant to *Van Dusen*. *See Korean Air Lines*, 829 F.2d at 1177 n.2. Judge Ginsburg criticized these decisions for their lack of adequate analysis concerning the state law-federal law difference.

manded to their transferor courts at the conclusion of consolidated pretrial proceedings.¹⁵¹ Of course this never was, nor could be, a valid justification for employing a potentially outcome-determinative choice of law analysis. Although the D.C. Circuit raised a significant point with regard to the need for uniformity in the interpretation of federal law, “[m]any of the factors that entered into the calculus of the court’s decision . . . were misconstrued and misapplied.”¹⁵² There are, no doubt, instances in which one interpretation of federal law must be applied. Obviously, this is so where the Supreme Court has ruled on the proper interpretation.¹⁵³ Yet to give a transferee court freedom to disregard the law of the transferor courts simply because it is presiding over cases involving federal questions seems to open the door to the same abuses and inequities previously discussed in the context of transferred diversity cases.¹⁵⁴ *Lexecon* and its proscription of the self-transfer procedure in the context of § 1407 transfers should go a long way toward impressing upon the courts the respect that should be accorded to the plaintiff’s choice of the law that he will rely upon in vindication of his rights. This is contingent, of course, upon § 1407’s continued existence in its presently effective and equitable state.

V. *LEXECON*: A VINDICATION OF CONGRESSIONAL FORESIGHT

A. *Maintenance of § 1407(a) in Its Present State*

Despite the calls for Congress to amend § 1407 to allow transfer for consolidated trial,¹⁵⁵ the statute should remain unchanged. In its present state, § 1407 is an effective tool for eliminating repetitive effort and reducing costs in multidistrict litigation.¹⁵⁶ Those who call for amendment of the statute often overlook this existing effective-

151 See *id.* at 1176 n.9.

152 Cooper, *supra* note 149, at 1166. The author concludes that the D.C. Circuit’s “dismissal of prior case law, its neglect of Congress’ manifest intent for *Van Dusen* to apply, and its reliance on the improper practice of courts using Section 1404 transfers to retain cases that were transferred to them under Section 1407 all serve to undermine the propriety of the court’s balancing as well as its ultimate conclusion.” *Id.*

153 The Supreme Court granted certiorari to the *Korean Air Lines* decision and affirmed the D.C. Circuit’s decision in *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989). However, the Court only resolved the proper interpretation of the Warsaw Convention. It did not address the choice of law issue.

154 See *supra* text accompanying notes 127–142.

155 See generally Rhodes, *supra* note 9, at 749–52; Arralde, *supra* note 58, at 649–52.

156 This fact is borne out by the example of the electrical equipment antitrust cases, the successful management of which provided the framework for § 1407. See *supra* text accompanying notes 14–27.

ness, and argue that consolidation for trial will streamline cases and provide faster resolutions.¹⁵⁷ In fact, the initiation of a multidistrict litigation proceeding under § 1407 will inevitably consume a great deal of time and is often a delaying tactic used by defendants.¹⁵⁸ Additionally, the critics make efficiency arguments citing the "epidemic" backlogs in the federal courts.¹⁵⁹ In fact, many of these arguments concerning the efficiency gains of consolidated trial are not supported by reality.¹⁶⁰

Critics of the present § 1407 make many of the above assumptions in their elevation of efficiency as a paramount good. Transferee judges made these same assumptions. However, in the haste to achieve efficiency by means of consolidated trial, more harm than good is often effected as plaintiffs are indiscriminately lumped together, judges overreach, and juries are overwhelmed by the mass litigation. In many respects then, any perceived efficiency beyond that which is already achieved by the statute is illusory. In short, Congress was correct when it said that transfer for consolidated trial would be "impracticable."¹⁶¹ It wisely struck a balance between efficiency and plaintiffs' rights because it recognized the limits of the former and the significance of the latter. Unlike transferee judges who self-transferred cases for trial, Congress was not willing to subordinate the rights and interests of plaintiffs to an efficiency beyond that which was

157 See Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 814 (1989). Interestingly, the author of this article makes the argument for speedy trials, but concedes that consolidation can also create management problems and hostility, both of which will only retard the progress of cases. See *id.* at 814.

158 See Herrmann, *supra* note 126, at 43 ("Creating an MDL proceeding will take time. Five or six months can easily pass between the filing of a motion for coordination and the MDL Panel's decision whether to create a coordinated proceeding Thus, by invoking Section 1407, a client initiates a time-consuming process."); see also Miller, *supra* note 111, at 403 (noting the tactic of "opponent inconvenience" used by attorneys as a means to "erode the opposing party's willingness to continue litigation").

159 See Freer, *supra* note 157, at 810. In fact, § 1407 provides more than adequate efficiency. The Supreme Court noted in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956, 961 (1998), that out of 39,228 cases transferred under § 1407 and terminated as of September 30, 1995, only 3,787 ultimately required trial. The vast majority then are terminated in the transferee courts either by settlement or by means of dispositive motions.

160 See Levy, *supra* note 9, at 50 (noting that, with respect to aviation accident cases, transfers simply for consolidated pretrial proceedings have often been surprisingly inefficient).

161 S. REP. NO. 90-454, at 5 (1967).

practicable and reasonable. *Lexecon* restored the realistic and equitable parameters that had prudently been set by Congress.

B. *The Individuality of the Plaintiff*

Lexecon is of primary importance as a reaffirmation of the individuality that characterizes each plaintiff, especially the one who engages in multidistrict litigation. Prior to the Supreme Court's decision, this notion had been swept aside in an effort to dispense of complex multidistrict cases in what was deemed to be the best means possible. Among other things, efficiency was equated with uniformity of outcome.¹⁶² The result was the inability of transferee judges to render the justice due to each plaintiff. Yet uniformity of outcome is not coterminous with efficiency and it is far from being equivalent with fairness, even when plaintiffs appear to have suffered similar injuries.¹⁶³ The Second Circuit Court of Appeals cautioned in *Johnson v. Celotex Corp.*¹⁶⁴ that "[c]onsiderations of convenience and economy must yield to a paramount concern for a fair and impartial trial."¹⁶⁵ Transferee judges exercising the self-transfer procedure lost sight of this principle, choosing instead to view all plaintiffs similarly and then using this as a rationale for hanging on to cases so that they could dispose of them more quickly or compel resolution.¹⁶⁶ *Lexecon* restored the right of the multidistrict plaintiff to trial in the forum of his choice where he can be given the individual treatment to which Congress believed he is entitled.

162 See *In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, 102 F.3d 1524, 1532 (9th Cir. 1996) ("[P]ermitt[ing] the transferee court to transfer a case to itself upon completion of its pretrial work often promotes efficiency in the disposition of the case or cases. The time required for a new judge to become acquainted with the litigation is eliminated, as is the possibility of conflicting or duplicative rulings and proceedings.")

163 See *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373-74 (2d Cir. 1993) (noting that although the plaintiffs had similar injuries and consolidation might increase judicial efficiency, the plaintiffs had different occupations, they reported different ailments, and there were different questions of causation).

164 899 F.2d 1281 (2d Cir. 1990).

165 *Id.* at 1285.

166 See *In re Asbestos Prods. Liab. Litig. (No. VI)*, No. CIV. A. MDL 875, 1996 WL 539589 (E.D. Pa. Sept. 16, 1996). In this motion for remand made by a group of plaintiffs under § 1407, the plaintiffs stated that they had been at an impasse in settlement negotiations for over three and one half years and did not anticipate settlement. See *id.* at *2. The transferee judge denied the motion and rebuked the plaintiffs for not cooperating enough so as to foster a settlement. See *id.* at *3. This case was still not settled in 1997 when it appeared before the Supreme Court as *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

In the opinion of the Co-ordinating Committee for Multiple Litigation, the major innovation of § 1407 was the fact that transfer of multidistrict cases would be for pretrial purposes alone.¹⁶⁷ This would preserve the "benefits of local trials in the appropriate districts."¹⁶⁸ Among these benefits is the individual treatment of a plaintiff who receives an adjudication of his case based upon the facts relevant to him personally in the forum of his choice before a jury composed of members of his community.¹⁶⁹ At some point in time, transferee judges came to the conclusion that uniform outcomes were just outcomes. Because they believed that this was so, their goal was to ensure uniform treatment of plaintiffs. Hence, this became part of the rationale for self-transfers. Yet the transferee judges overlooked the fact that plaintiffs are often entitled to different outcomes.

One justification for different outcomes is the fact that our system is federal, and "[i]t is in the nature of a federal system that different states will apply different rules of law, based on their individual perceptions of what is in the best interests of their citizens."¹⁷⁰ It may seem counter-intuitive to apply different legal standards to plaintiffs who have virtually identical injuries, or who were injured in the same accident. However, in a federal system, "differences in where [plaintiffs] are from or where they were injured are relevant grounds for distinguishing on matters still governed by state law."¹⁷¹ Consequently, remand to the transferor districts following the conclusion of pretrial proceedings is necessary because the plaintiff is entitled to adjudication of his individual case according to the law of his chosen forum.

Plaintiffs may also be entitled to different outcomes due to the nature and exigencies of multidistrict litigation itself. As one observer notes, once the JPML has decided to transfer cases for consolidated pretrial proceedings, "plaintiffs will inevitably file many new complaints."¹⁷² These additional plaintiffs may have far from meritorious claims. In fact, "It has become almost axiomatic among plaintiffs' counsel to put the good cases in state court and put the 'dogs' in the MDL."¹⁷³ The results of this phenomenon can be mixed especially

167 See *supra* text accompanying notes 24–32.

168 See *supra* text accompanying note 29.

169 A jury of fellow community members, that is, assuming that the plaintiff has chosen to litigate in his home forum.

170 *In re* "Agent Orange" Prod. Liab. Litig., 635 F.2d 987, 994 (2d Cir. 1980) (concluding that "uniformity is not prized for its own sake").

171 Kramer, *supra* note 137, at 580.

172 Herrmann, *supra* note 126, at 45.

173 *Id.*

when the cases are adjudicated in a single aggregated trial. A meritorious plaintiff can potentially suffer as a result of the claims of other plaintiffs which may be wholly specious.¹⁷⁴ He may be forced to share in a settlement with claimants who have far weaker cases than his own.¹⁷⁵ Conversely, he may be pulled down by the very presence of these weaker cases and thereby receive nothing.¹⁷⁶ As a result of this unfortunate reality, it is all the more imperative that a plaintiff—especially the plaintiff with an especially strong case—receive remand to the transferor district where his claim can be adjudicated individually on its merits rather than in an aggregate with claims that are weaker, or perhaps even meritless.¹⁷⁷ The plaintiff with the meritorious claim who is precluded from bringing his action in state court may thus suffer additional injustice if his case is self-transferred for trial. Adherence to the remand mandate of § 1407 obviates problems such as these and ensures the plaintiff of the individual treatment to which he is entitled.¹⁷⁸ In short, it ensures the preservation of fairness in a complex atmosphere where obfuscation of facts and issues can be prevalent. Congress prudently foresaw the wisdom of remand and was thus unequivocal in its requirement. *Lexecon* has vindicated this foresight.

174 See Irwin A. Horowitz & Kenneth S. Bordens, *The Effects of Outlier Presence, Plaintiff Population Size, and Aggregation of Plaintiffs on Simulated Civil Jury Decisions*, 12 LAW & HUM. BEHAV. 209 (1988). The authors conducted an experiment "to determine the effects of the size of the plaintiff population, the presence or absence of an outlier, defined as a plaintiff whose injuries were significantly more severe than other plaintiffs, and whether plaintiffs were tried individually or were aggregated in a group." *Id.* The authors found that when plaintiffs are aggregated, "a plaintiff with a relatively weak case is definitely helped by aggregation; conversely, a plaintiff with a quite strong case appears to be better served by being disaggregated, particularly with reference to punitive damages." *Id.* at 226.

175 See *id.* at 225 (finding that juries used their judgment of the outlier plaintiff as a kind of threshold test whereby if liability was found, all of the plaintiffs benefited).

176 See *id.* ("In some juries the very severity of the outlier's injuries appeared to raise a question of fault, in that doubt may have been cast on whether the [defendant] could be so venal as to cause such injuries in pursuit of profit. Indeed, juries that did not find the [defendant] liable discussed the possibility that injuries as serious as those described could not have been foreseeable.").

177 See Herrmann, *supra* note 126, at 45 (observing that if the transferee judge "does not effectively fence out the dogs, the MDL proceeding threatens to become a howling disaster").

178 See Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 82 ("The plaintiffs [in mass tort trials] are no less deserving of and entitled to full jury consideration of their case than are the victims of isolated torts.").

C. *Final Thoughts on the Plaintiff As an Individual*

I have endeavored to demonstrate that there are both equitable and practical concerns which, in addition to traditional notions concerning the individuality of litigation, justify our continued respect for the rights of plaintiffs, especially plaintiffs engaged in multidistrict litigation. The argument is particularly difficult given the litigiousness of our times. There is no denying that the federal courts are stretched thin, and as a result, efficiency should be sought where it can be achieved practicably. I have struggled with the fact that the majority of the federal judiciary gave assent to the practice of self-transfer which severely curtailed the rights of plaintiffs, not only to their choice of forum, but sometimes even to their substantive rights. These judges apparently believed that the practice did not result in a serious abridgment of rights. In all deference to their experience, I disagree. The rights of plaintiffs are interwoven with issues of fairness, and fairness should be of paramount concern in the American system of justice.

America holds itself out to the world as an example of the system of government to which all nations should aspire. We believe that government by democracy, that is, "rule by the people,"¹⁷⁹ creates that cohesive social structure within which a citizenry is enabled to realize its most fruitful, equitable, and beneficial potential. The ideas of democracy form the cornerstone of our foreign policy, and we ambitiously seek to export its tenets and foster its growth worldwide. Furthermore, America's espousment of democracy has permitted it to stand on a higher moral ground in the international arena. In light of the foregoing, we ourselves must not lose sight of those fundamental components of democracy, without which our system is an empty shell. The two components about which I am concerned here are fairness and participation.

Simply put, a democracy cannot function effectively if disparate treatment is the norm and participation is rare; in many respects, the former directly results in the latter. First, with regard to fairness, all participants must be possessed of the same rights and must be accorded equal treatment; there is no "first among equals."¹⁸⁰ Rather,

179 From the Greek noun δῆμος (*demos*) "the people," and the verb κρᾶτέω (*krateo*) "to rule." See HENRY GEORGE LIDDELL & ROBERT SCOTT, A GREEK-ENGLISH LEXICON 386, 991 (Henry Stuart Jones rev. 1968).

180 *Primus inter pares* accurately describes the position of authority held by Cæsar Augustus at the inception of the Roman Empire. Augustus himself described his authority in his RES GESTAE DIVI AUGUSTI ¶34 in VELLEIUS PATERCULUS (Loeb Classical Library, 1924) ("Post id tempus auctoritate omnibus praestiti; potestatis autem nihilo

the rule of law prevails and—in theory—guarantees equality under the law. Second, it is necessary for the citizenry to take an active part in the democratic system of government lest its virtue be relegated to meaninglessness. A democracy that suffers from a lack of participation is a democracy in name only.¹⁸¹ In contemporary American society, however, we see ever decreasing levels of participation which, I believe, are largely the result of cynicism. This cynicism, in turn, is a direct result of the erosion of fairness, or at least an erosion of the belief that all are held to the same level of accountability under the law. The end result is apathy and an overwhelming feeling of powerlessness, both of which are anathema to an effective democracy.

I do not wish to sound trite or to broad brush this point by making outlandish assertions about a panacea that revolves solely around the plaintiff having his day in court. Admittedly, the courts are often abused by plaintiffs who have no business being in a courtroom, and we want courts to be responsive to this abuse by screening out such spurious claims. Yet likewise, it would be foolish to allow the system to degenerate into a faceless, mass-adjudication machine that views all plaintiffs the same and disregards the individual. To do so would further alienate a populace that already sees little need to involve itself in a seemingly detached system of government. The courts are a public resource and are accountable to the people who have “a right to insist that their services not be squandered.”¹⁸² But the courts are also accountable to the people who have a right to insist that they serve as a vehicle for justice and for the righting of wrongs. Individual treatment of the individual plaintiff will, I believe, go a long way toward enhancing faith in a system in which people will wish to participate. This is a virtue that should not be lightly dismissed. Again, I do not intend to make blanket statements concerning the fate of our democ-

amplius habui quam ceteri qui mihi quoque in magistratu conlegae fuerunt.” (“After that time (i.e., 27 B.C.) I surpassed all men in influence; but I held no greater power [that is, legally constituted power] than those others who were my colleagues in each magistracy.”) (my translation).

181 Interestingly, our word “idiot” comes from the Greek noun ἰδιώτης (*idiotes*) meaning “a private person.” See LIDDELL & SCOTT, *supra* note 179, at 819. This word could be used to describe not only an ignorant and ill-informed man, but more importantly, a citizen who was so blind as to put his private interests above those of the public, i.e., the citizenry. Simply put, a man whose self-interest eclipsed any regard for the public good. Hence, the characterization could be not only unflattering, but disparaging. For additional information concerning the etymology of the word, see PIERRE CHANTRAINE, 1–2 DICTIONNAIRE ETYMOLOGIQUE DE LA LANGUE GRECQUE, 455 (1968). On this point, I thank Professor F.E. Romer, a classicist at the University of Arizona, who discussed this question with me *per litteras*.

182 Freer, *supra* note 157, at 832.

racy and the plaintiff's choice of forum. My intent is only to suggest some issues for consideration with regard to the potential amendment of § 1407.

VI. CONCLUSION

Amendment of § 1407 to allow for the transfer of multidistrict cases for consolidated trial would be a mistake. The lessons of the past thirty years sufficiently affirm the wisdom that prevailed among the Co-ordinating Committee for Multiple Litigation and Congress when § 1407 was drafted and approved. The Court's decision in *Lexecon* was a long overdue wake-up call to the federal transferee judges who had subordinated the rights of plaintiffs to a perceived efficiency that was both illusory and wholly impracticable. When it enacted § 1407, Congress was well aware of the limits of efficiency, and it recognized the dangers of exceeding these limits at the expense of plaintiffs' rights. It therefore struck a balance that would both achieve efficiency and expediency in the context of multidistrict litigation, and would retain the rights of plaintiffs which are necessary to fairness and justice. The wisdom that characterized the decision of Congress in 1968 is as valid today as it was then. Section 1407 should remain as it is written for the benefit of all involved in multidistrict litigation.

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* Candidate for Juris Doctor, Notre Dame Law School 2000; B.A. University of Arizona 1995. I give all glory to God who enables me by His grace. I would like to thank Professor Jay Tidmarsh for his invaluable assistance and guidance during the preparation of this Comment. Additionally, I wish to express my sincere gratitude to my family and friends for their prayers and encouragement.