

CONGRESS AND THE MULTIPARTY, MULTIFORUM TRIAL JURISDICTION ACT OF 2002: MEANINGFUL REFORM OR A COMEDY OF ERRORS?

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INTRODUCTION

On February 20, 2003 a fast-moving inferno tore through the Station, a nightclub in West Warwick, Rhode Island, killing one hundred people.¹ Considered one of the worst fires at a social assembly in United States history,² the accident has led to substantial litigation.³ Private litigation arising from mass tragedies is not a new phenomenon and often involves many suits filed in different jurisdictions by different plaintiffs or sets of plaintiffs. Multiple lawsuits are particularly problematic in the context of a mass accident because, although mass accident cases usually are not appropriate for class action treatment, mass accident suits by individual plaintiffs often involve similar or identical questions of liability, generally against the same set of defendants. Traditionally, consolidation of individual claims for joint treatment has been frequently impractical or impossible because only some potential plaintiffs have been eligible to bring their cases in federal court—under statutory diversity

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1. See Thomas Farragher & Douglas Belkin, *Death Toll Reaches 96 in Fire at R.I. Nightclub*, BOSTON GLOBE, Feb. 22, 2003, at A1; Stephen Smith, *10 Weeks After R.I. Fire, 100th Victim Dies*, BOSTON GLOBE, May 6, 2003, at B1.

2. NAT'L FIRE PROT. ASS'N, FIRE SAFETY IN ASSEMBLY OCCUPANCIES: NFPA ADDRESSES NIGHTCLUB TRAGEDIES, at <http://www.nfpa.org/Research/FireInvestigation/RislandFire/RIFire.asp> (last visited Oct. 26, 2004) (on file with the *Duke Law Journal*); see also Peter Adoneit, *The Station Nightclub Fire and Federal Jurisdictional Reach: The Multidistrict, Multiparty, Multiforum Jurisdiction Act of 2002*, 25 W. NEW ENG. L. REV. 243, 243 (2003) (dubbing the Station fire the fourth-worst nightclub fire in American history).

3. In anticipation of multiple complex suits related to the accident, the Rhode Island Superior Court designated a single judge to handle all pretrial proceedings related to the fire. Assignment of Justice for Multi-Case Management, Admin. Order No. 2003-4 (R.I. Super. Ct., Mar. 4, 2003).

jurisdiction⁴—whereas other plaintiffs have had recourse only to state courts. Such split litigation results in substantial time and cost inefficiencies for parties and courts and also can generate inconsistent outcomes based on substantially similar facts.

In this environment of mass accident litigation, the Station fire is particularly important, because it represents the first accident to qualify for federal jurisdiction and consolidation under the Multiparty, Multiform Trial Jurisdiction Act of 2002 (MPMF 2002)⁵ and will become a test case for the ability of federal courts to handle complex mass accident litigation under this statute.⁶ MPMF 2002 permits victims of accidents such as the Station fire to file suit in federal court based on only minimal diversity,⁷ enabling them to take advantage of significant procedural benefits such as nationwide service of process and intervention in existing, related suits.⁸ MPMF 2002 is also intended to benefit mass accident defendants by allowing them the option, under certain circumstances, of removing and consolidating separate actions relating to the same qualifying accident.⁹

Congress considered some form of multiparty, multiform jurisdiction on several occasions, and MPMF 2002 consists largely of elements taken from those prior attempts.¹⁰ MPMF 2002 aims to address the long-recognized inefficiencies and inconsistencies of

4. See 28 U.S.C. § 1332 (2000) (listing the criteria for diversity jurisdiction).

5. Pub. L. No. 107-273, § 11,020, 116 Stat. 1758, 1826–29 (codified at 28 U.S.C. §§ 1369, 1391, 1441, 1697, 1785 (Supp. 2003)). MPMF 2002 became effective for accidents occurring on or after January 31, 2003. See *id.* § 11,020(c), 116 Stat. at 1829 (stating that the Act's provisions would cover qualifying accidents occurring on or after the ninetieth day following enactment, meaning on or after January 31, 2003).

6. The first court to “bite the proverbial bullet” and interpret MPMF 2002 was the Federal District Court for the District of Rhode Island, which found that it had jurisdiction over five cases—two of which were filed there originally, and three of which were originally filed in Rhode Island state court. *Passa v. Derderian*, 308 F. Supp. 2d 43, 48–49 (D.R.I. 2004); see Elizabeth Mehren, *New Law Used to File Federal Suit in Rhode Island Club Fire*, L.A. TIMES, Apr. 23, 2003, at A13. See generally Adoneit, *supra* note 2 (addressing the potential application of MPMF 2002 to litigation arising out of the Rhode Island fire).

7. 28 U.S.C. § 1369(a), (c)(1) (Supp. 2003).

8. See *id.* § 1697 (allowing nationwide service of process); *id.* § 1369(d) (permitting intervention).

9. See *id.* § 1441(e) (describing the conditions under which defendants may remove and consolidate actions); see also *infra* Part II.A.

10. Compare, e.g., Multiparty, Multiform Trial Jurisdiction Act of 2002, 116 Stat. at 1826–29, with The Judicial Reform Act of 1998, H.R. 1252, 105th Cong. § 7 (1998) (version referred to Senate Judiciary Committee on Apr. 24, 1998 after being received from House of Representatives).

duplicate litigation arising from a single mass tort, such as the Station fire.¹¹ Prior to MPMF 2002—as remains true today, with respect to categories of complex litigation not covered by that statute—jurisdictional and procedural constraints prevented joining all parties in a single state forum for consolidated litigation, requiring plaintiffs to file duplicate suits arising from the same accident.¹² MPMF 2002 provides limited federal jurisdiction so that, in a single accident resulting in at least seventy-five fatalities, a federal forum is available for consolidating all related litigation.¹³ Facilitating joint adjudication of such common claims can eliminate redundant litigation expenses and use of judicial resources, promote just resolution of claims, and prevent conflicting or inconsistent judgments. This Note analyzes the effectiveness of MPMF 2002 in achieving these benefits while balancing the interests of litigants against those of the federal and state judicial systems.

This analysis of MPMF 2002 proceeds by examining four characteristics of the statutory scheme. Each of these four elements—

11. See H.R. REP. NO. 106-276, at 6–7 (1999):

The waste of judicial resources—and the costs to both plaintiffs and defendants—of litigating the same liability question several times over in separate lawsuits can be extreme.

Different expert consultants and witnesses may be retained by the different plaintiffs' lawyers handling each case. The court in each lawsuit can issue its own subpoenas for records and for depositions of witnesses, potentially conflicting with the discovery scheduled in other lawsuits. Critical witnesses may be deposed for one suit and then redeposed by a different set of lawyers in a separate lawsuit. Identical questions of evidence and other points of law can arise in each of the separate suits, meaning that the parties in each case may have to brief and argue—and each court may have to resolve—the same issues that are being briefed, argued, and resolved in other cases, sometimes with results that conflict.

12. *Id.*, at 7:

Current efforts to consolidate all state and federal cases related to a common disaster are incomplete because current federal statutes restrict the ways in which consolidation can occur—apparently without any intention to limit consolidation. For example, plaintiffs who reside in the same state as any one of the defendants cannot file their cases in federal court because of a lack of complete diversity of citizenship, even if all parties to the lawsuit want the case consolidated. For those cases that cannot be brought into the federal system, no legal mechanism exists by which they can be consolidated, as state courts cannot transfer cases across state lines. In sum, full consolidation cannot occur in the absence of federal legislative redress.

See Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7, 9 (1986) (“The problem is the unavailability of any single forum in which to consolidate scattered, related litigation—a difficulty that is becoming more and more common given the increasing number of complex tort actions, such as those growing out of mass accidents and product liability claims.”).

13. 28 U.S.C. § 1369; *Passa v. Derderian*, 308 F. Supp. 2d 43, 50 (D.R.I. 2004) (applying the statute for the first time and concluding that the Rhode Island nightclub fire falls within its scope).

original federal jurisdiction, intersystem consolidation, intrasystem consolidation, and procedural enablement—is necessary to consolidate effectively the related actions in a single forum. MPMF 2002’s employment of each characteristic of consolidation determines the extent to which the Act will achieve its goal of making a single federal forum available for joint adjudication of claims arising from mass accidents. Only when all four of these components work effectively will mass accident plaintiffs, such as the victims of the Station nightclub fire, be able to consolidate their claims with those of plaintiffs already in federal court and achieve the efficiencies and forum choice intended by MPMF 2002.

Part I of this Note examines the scope of MPMF 2002’s grant of original federal jurisdiction, including issues that are likely to arise in interpreting and applying the statutory text. Part II then looks at the mechanisms of intersystem consolidation (consolidation of cases pending in state and federal courts). Part II also examines drafting problems in the removal provision that may undermine its effectiveness, and the Part proposes statutory and common law workarounds. Part III proceeds by analyzing the capacity of MPMF 2002 to affect intrasystem consolidation (consolidation of cases pending in different federal districts). Because the statutory provision authorizing consolidation for trial was omitted from the final version of the MPMF 2002 package, Part III focuses on the extent to which MPMF 2002 can accomplish its goals using existing transfer and consolidation mechanisms. Finally, Part IV examines the procedural features necessary for joint adjudication. This Part describes the impact of auxiliary mechanisms included in MPMF 2002, such as nationwide service of process, but it focuses particularly on the potential impact of the omission of a uniform choice-of-law provision.

This Note’s conclusion is that, although MPMF 2002 marks an important step toward just and efficient adjudication of litigation arising from severe mass accidents, the imprecision with which Congress drafted the statute will make it necessary for Congress to enact modifications, or for courts to develop common law workarounds, to allow the intended consolidation and thereby achieve the statute’s policy goals.

I. MPMF 2002 ORIGINAL JURISDICTION

The core of MPMF 2002 is a grant of original federal minimal diversity jurisdiction over a narrowly defined class of complex mass

tort litigation.¹⁴ This initial grant of jurisdiction expands the number of cases that can be brought in federal court, creating the potential for single-forum adjudication of common issues in cases arising from a single mass accident.¹⁵ MPMF 2002's jurisdiction has the narrow goal

14. For reference throughout this discussion, the full text of section 1369 is as follows:

(a) In general.—The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location, if—

- (1) a defendant resides in a State and a substantial part of the accident took place in another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place;
- (2) any two defendants reside in different States, regardless of whether such defendants are also residents of the same State or States; or
- (3) substantial parts of the accident took place in different States.

(b) Limitation of jurisdiction of district courts.—The district court shall abstain from hearing any civil action described in subsection (a) in which—

- (1) the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens; and
- (2) the claims asserted will be governed primarily by the laws of that State.

(c) Special rules and definitions. —For purposes of this section—

- (1) minimal diversity exists between adverse parties if any party is a citizen of a State and any adverse party is a citizen of another State, a citizen or subject of a foreign state, or a foreign state as defined in section 1603(a) of this title;
- (2) a corporation is deemed to be a citizen of any State, and a citizen or subject of any foreign state, in which it is incorporated or has its principal place of business, and is deemed to be a resident of any State in which it is incorporated or licensed to do business or is doing business;
- (3) the term “injury” means—
 - (A) physical harm to a natural person; and
 - (B) physical damage to or destruction of tangible property, but only if physical harm described in subparagraph (A) exists;
- (4) the term “accident” means a sudden accident, or a natural event culminating in an accident, that results in death incurred at a discrete location by at least 75 natural persons; and
- (5) the term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(d) Intervening parties.—In any action in a district court which is or could have been brought, in whole or in part, under this section, any person with a claim arising from the accident described in subsection (a) shall be permitted to intervene as a party plaintiff in the action, even if that person could not have brought an action in a district court as an original matter.

(e) Notification of judicial panel on multidistrict litigation.—A district court in which an action under this section is pending shall promptly notify the judicial panel on multidistrict litigation of the pendency of the action.

28 U.S.C. § 1369.

15. The definition of what would constitute a mass accident for this purpose proved difficult for Congress to agree on. One earlier version, for example, included a threshold of twenty-five fatalities or injuries resulting in at least \$150,000 in damages per person. *See* Multidistrict, Multiforum, Multiparty Trial Jurisdiction Act of 2001, H.R. 860, 107th Cong. § 3

of facilitating joint adjudication of those mass accident claims facing the greatest risk of scattered and redundant litigation.¹⁶ Therefore, the statute is crafted to avoid infringing the rights of individual states to manage and adjudicate claims under state law when the claims arise from accidents with effects primarily limited to the individual states.¹⁷ This Part analyzes the scope of MPMF 2002's grant of original jurisdiction, including its exception for primarily local controversies.

A. Getting into Federal Court: General Multiparty, Multiforum Jurisdiction

The basic jurisdictional grant in MPMF 2002 covers "any civil action involving minimal diversity between adverse parties that arises from a single accident[,] where at least 75 natural persons have died in the accident at a discrete location."¹⁸ The minimal diversity requirement is necessary to keep the statute within Article III of the Constitution, and MPMF 2002 extends the authority of federal courts to that outer limit.¹⁹ This opens the federal courts to all plaintiffs when at least one plaintiff is a citizen of a different state than at least one defendant. This diversity rule is substantially more permissive

(2001) (version referred to Senate Judiciary Committee on Mar. 15, 2001 after being received from House of Representatives). This version was rejected by the Senate before ultimately being reincarnated as MPMF 2002 with the seventy-five-fatality threshold. Although the enacted threshold of seventy-five fatalities severely limits the number of accidents likely to qualify for MPMF 2002 jurisdiction, it appears unlikely that Congress will lower the threshold. A change of the threshold to twenty-five was proposed as a technical amendment to MPMF 2002 but was quickly deleted from the proposed legislation. *Compare* Multidistrict Litigation Restoration Act of 2003, H.R. 1768, 108th Cong. § 3(b) (2003) (version introduced in House of Representatives on Apr. 11, 2003), *with* Multidistrict Litigation Restoration Act of 2004, H.R. 1768, 108th Cong. § 3 (2004) (version passed by House of Representatives on Mar. 24, 2004).

16. *See* H.R. REP. NO. 107-14, at 5 (2001) ("The [MPMF legislation] should reduce litigation costs as well as the likelihood of forum-shopping in airline accident cases; and an effective one-time determination of punitive damages would eliminate multiple or inconsistent awards arising from multiforum litigation.").

17. *See id.* at 4 (reporting that Senate concerns over federal usurpation of control over predominantly local disputes best left to the states led Congress to include the abstention provision in MPMF 2002); *see also* AM. LAW INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS ch. 5, introductory cmt. at 219 (1994) (analyzing a conceptually similar proposal and concluding that "[a]bsent a means for compelling consolidation in a state court, a decision that it would be preferable to adjudicate the actions or claims in state court means that the federal courts should decline jurisdiction").

18. 28 U.S.C. § 1369(a).

19. Congress has authorized jurisdiction predicated on minimal diversity in one other limited situation, federal statutory interpleader. *See* 28 U.S.C. § 1335 (2000) (giving district courts original jurisdiction if, *inter alia*, two or more adverse claimants of diverse citizenship are involved in the controversy).

than the general statutory diversity rule requiring all plaintiffs to have citizenship diverse from that of all defendants (complete diversity).²⁰ Thus, in the example of litigation resulting from the Station fire, a Rhode Island plaintiff suing Rhode Island and California defendants could file suit in federal court under MPMF 2002 but otherwise would be limited to a state court action.

Section 1369(a), which codifies MPMF 2002 jurisdiction, adopts additional criteria designed to target only those situations most prone to scattered litigation. Under these restrictions, a qualifying action must have either at least one defendant who resides in a state other than the state in which the accident occurred,²¹ at least two defendants who reside in different states,²² or multiple states in which substantial parts of the accident took place.²³ MPMF 2002's drafters adapted

20. The constitutional provision defining federal diversity jurisdiction, U.S. CONST. art. III, § 2, cl. 1, has been consistently interpreted as requiring only minimal diversity, should Congress choose to authorize jurisdiction to that extent. *E.g.*, *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967). It is the statutory authorization for general diversity jurisdiction, 28 U.S.C. § 1332, that restricts jurisdiction to cases satisfying complete diversity. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806) (holding that jurisdiction cannot be supported unless each plaintiff and defendant is capable of obtaining jurisdiction in federal court).

21. 28 U.S.C. § 1369(a)(1) (Supp. 2003). Note that a defendant can have residency in multiple states, and section 1369(a)(1) does not exclude situations in which the defendant is also a resident of the state in which the accident occurred. This is likely to be significant in the case of a corporate defendant, who is “deemed to be a resident of any State in which it is incorporated or licensed to do business or is doing business,” *id.* § 1369(c)(2), because its concurrent residence in the state of the accident site would not thereby exclude the corporation from the coverage of this provision.

22. *Id.* § 1369(a)(2). Although this provision also includes cases in which defendants are residents of the same state so long as one is also a resident of another state, it does indicate that single-defendant actions would have to qualify under either section 1369(a)(1) or (3).

23. *Id.* § 1369(a)(3). The Rowe and Sibley proposal from which these criteria were adopted was much broader in scope than the single mass accident jurisdiction implemented and included other types of actions, such as product liability suits. *See Rowe & Sibley, supra* note 12, at 49 (referring to “civil actions arising out of the same transaction, occurrence, or *series of related transactions or occurrences*” (emphasis added) in the proposed statute). As a result, this criterion appears to have very little application in the present context, because there are very few situations in which an accident could occur both at a discrete location and with substantial parts in two states. Accidents that take place in interstate waterways and tunnels are examples of this limited set. There is some indication, however, that this category was included to capture all qualifying accidents involving interstate travel. *See Laura Offenbacher, Note, The Multiparty, Multiforum Trial Jurisdiction Act: Opening the Door to Class Action Reform*, 23 REV. LITIG. 177, 192–93 (2004):

The language referring to a “substantial part” of the accident is designed to include cases in which an accident occurred in more than one judicial district, but it is not intended to expand the scope of the definition of “accident.” This qualifier could apply in accidents involving interstate travel, such as airplane crashes and train wrecks.

these additional criteria from suggestions of scholars who had originally proposed a form of multiparty, multiforum jurisdiction.²⁴ Although in most instances these restrictions will probably not be material, they help confine the scope of the expanded jurisdiction.

Section 1369's jurisdictional grant presents two initial questions about scope that the statutory text does not directly answer and that, therefore, will be for judicial interpretation. The first question is how broadly "accident" should be construed given the statute's startlingly unhelpful definition. The second question is whether jurisdiction under section 1369 is limited to personal injury and wrongful death suits only.

Section 1369 jurisdiction is triggered by "a sudden accident, or a natural event culminating in an accident."²⁵ This definition, however, provides little guidance in defining the scope of section 1369. One question of particular interest is whether this definition captures criminal or terrorist acts, clearly sudden and unforeseen to victims but not so to perpetrators. Neither the text nor the legislative history of MPMF 2002 indicates whether Congress intended terrorist acts to trigger section 1369 jurisdiction. Standard and legal usage of the term "accident" disagree as to the relevance of intent.²⁶ However, the way that the term is used in federal regulations defining aircraft accidents—a type of catastrophe that Congress clearly contemplated as within the scope of section 1369²⁷—would capture qualifying events even when caused by criminal acts.²⁸

(footnote omitted).

24. See Rowe & Sibley, *supra* note 12, at 49 (proposing a draft statute, portions of which were adopted by the drafters of MPMF 2002).

25. 28 U.S.C. § 1369(c)(4).

26. Whether the term "accident" excludes intentional acts may differ according to the context in which it appears. Compare BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 13 (2d ed. 1995) (noting that, as contrasted with mistake, "an accident occurs without the willful purpose of the person who causes it"), with AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 10 (4th ed. 2000) (defining an accident as "[a]n unexpected and undesirable event, especially one resulting in damage or harm").

27. See H.R. REP. NO. 107-14, at 28 (2001) ("[MPMF 2002] addresses a particular species of complex litigation, the so-called disaster cases, such as those involving airline accidents." (quoting statement of Rep. Sensenbrenner, Chairman, House Comm. on the Judiciary)).

28. See Notification and Reporting of Aircraft Accidents or Incidents and Overdue Aircraft, and Preservation of Aircraft Wreckage, Mail, Cargo, and Records, 49 C.F.R. § 830.2 (2003) (explaining that, in the context of federal transportation regulations regarding aircraft, "accident means an occurrence associated with the operation of an aircraft . . . in which any person suffers death or serious injury, or in which the aircraft receives substantial damage").

Furthermore, from a policy perspective, the distinction between events caused “accidentally” and those resulting from criminal planning has no apparent relevance to the goals and objectives behind the creation of MPMF jurisdiction. All other circumstances being equal, it seems illogical that victims of an airplane crash resulting from negligent maintenance should have a federal forum whereas victims of a similarly devastating crash resulting from inadequate security measures that permitted third-party action should lack access to a federal court. Both types of cases have identical tendencies toward duplicative, redundant litigation. Additionally, the explicit inclusion of accidents resulting from natural disasters²⁹ indicates that Congress was more concerned with accident characteristics likely to affect subsequent litigation than with the nature of the causes behind covered accidents. However, the ambiguity as to the definition of “accident,” particularly as it relates to potential terrorist attacks, will likely persist until courts confront the issue.

Although the definition of “accident” could preclude application of section 1369 jurisdiction to some cases falling under the policy objectives of consolidation and joint adjudication, the openness of section 1369’s jurisdictional grant to “any civil action”³⁰ could have the opposite effect, creating federal jurisdiction in some cases outside such objectives. The statutory use of the seventy-five-fatality threshold comprises only part of the definition of qualifying accidents—it does not mean that only suits by the estates of people killed can qualify.³¹ This construction of “any civil action” is consistent with the desire to consolidate all common-issue suits; common liability issues could arise from claims of personal injury or property damage, as well as from claims relating to fatalities. Inclusion of a subject matter restriction, such as limiting jurisdiction to claims of personal injury or property damage, was a policy choice that some earlier proposals suggested.³² However, Congress adopted

29. 28 U.S.C. § 1369(c)(4).

30. *Id.* § 1369(a).

31. *See id.* (qualifying “any civil action” with the phrase “where at least 75 natural persons have died in the accident at a discrete location”); *see also* Offenbacher, *supra* note 23, at 193–94 (“[T]he statute allows injured parties and people who suffered property damage to file suit as an original matter as long as they have minimal diversity and their injuries arise from the requisite accident.”).

32. *See* Rowe & Sibley, *supra* note 12, at 51 (offering suggestions as to when subject matter limitations (such as those included in a 1979 Department of Justice study, *Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Hearing Before the Subcomm. on Courts,*

no such restriction in the text of section 1369. For this reason, section 1369 potentially applies in cases arising out of a qualifying accident but involving neither a risk of duplicate litigation nor good opportunities for consolidated adjudication. For example, a contract suit against or between insurers regarding coverage related to a qualifying accident could come into federal court under section 1369 even absent the kinds of common issues that arise when multiple victims bring separate suits. Such cases, although technically qualifying for federal jurisdiction under section 1369, would not present the dangers of multiple litigation that Congress intended MPMF 2002 to address.

B. Going Back to State Court: The Local Controversy Exception

The questions underlying the relatively well-drafted provisions of section 1369(a)'s jurisdictional grant pale in comparison to the difficulties that courts seem likely to face when interpreting section 1369(b). Section 1369(b) demands that courts abstain from hearing cases authorized by section 1369(a) when such cases meet certain criteria indicating that the controversies in question relate primarily to a single state.³³ This "local exception" threatens to raise at least two major problems in implementation, one practical and the other normative. First, the provision is drafted so vaguely that concern about its language was among the first topics of commentary on MPMF 2002.³⁴ Additionally, interpretation of section 1369(b) was the issue before the Federal District Court for the District of Rhode Island when it became the first court called upon to apply MPMF 2002.³⁵ The provision's sole guidance as to the boundaries of its

Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong. 158–62 (1979)) would fit into the proposed statute).

33. See *infra* text accompanying note 42.

34. See Georgene Vairo, Editorial, *An Important Act with Two Antecedents: More Controversial Than the Original*, NAT'L L.J., Dec. 16, 2002, at B7 ("[O]ne wonders how much litigation will result over how a 'substantial majority' of plaintiffs would be quantified, or who the 'primary defendant' is . . ."); see also Offenbacher, *supra* note 23, at 199 (pointing out the inherent subjectivity of the statutory language and noting several publications that discuss this problem).

35. In *Passa v. Derderian*, 308 F. Supp. 2d 43 (D.R.I. 2004), the court decided a motion to dismiss based on application of the local exception. The cases before the court arose out of the Station nightclub fire and required the court to make several interpretive decisions relating to section 1369(b). As an initial matter the court determined that the local exception operates as a statutory mandatory abstention provision limiting the *exercise* of the federal jurisdiction granted by section 1369(a) rather than as a condition on the grant of jurisdiction itself. *Id.* at 56–57.

application comes in ambiguous terms such as “substantial majority of all plaintiffs,”³⁶ “primary defendants,”³⁷ and “primarily” governing law³⁸—terms that courts seem bound to have difficulty interpreting.³⁹ Any outcome appears possible, from the exception’s complete uselessness to its complete swallowing of MPMF 2002’s entire original jurisdictional authority. Second, application of the local exception, however broadly courts interpret it, threatens once again to split suits between federal and state proceedings, creating duplicate litigation.⁴⁰ Thus, applying the local exception in some cases qualifying for federal consolidated treatment under section 1369(a) would exacerbate the very result that Congress enacted MPMF 2002 to correct.

Although the local exception does not involve the exercise of judicial discretion,⁴¹ its criteria leave a lot of room for flexibility. Section 1369(b) mandates that a district court authorized to hear a case under section 1369(a) must nonetheless abstain from doing so if “(1) the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens; and (2) the claims asserted will be governed primarily by the laws of that State.”⁴² The statute provides no further guidance as to what constitutes the “substantial majority of all plaintiffs” or the similarly vague concepts

Although that distinction has a variety of potential practical consequences, *id.* at 56, it does not have any significance for the analysis in this Note. Therefore, throughout this discussion the local exception is referred to interchangeably as a jurisdiction limitation or an abstention requirement.

36. 28 U.S.C. § 1369(b)(1).

37. *Id.*

38. *Id.* § 1369(b)(2).

39. A dispute over the meaning of a “substantial majority” of plaintiffs and “primary defendants” was the center of the court’s jurisdictional inquiry in *Passa v. Derderian*, 308 F. Supp. 2d at 58–63. The *Passa* court concluded that the “substantial majority” of plaintiffs is determined by “whether the number of potential plaintiffs from a single state makes up a substantial majority of all potential plaintiffs with claims arising from the same disaster.” *Id.* at 60; *see infra* notes 45–46 and accompanying text. Although the estimated 44.18% of potential Station plaintiffs from Rhode Island is larger than any other group, it could not be said to constitute a substantial majority of the total. *Id.* at 60–61. The court interpreted the “primary defendants” to include “all defendants facing direct liability, and excluding all defendants joined as secondary or third-party defendants for purposes of vicarious liability, indemnification or contribution.” *Id.* at 62. Based on that definition, it was simple for the court to conclude that not all of the primary defendants in the cases were Rhode Island residents. *Id.* at 63.

40. Plaintiffs otherwise qualifying for diversity jurisdiction could still bring suit in federal court. *See infra* notes 48–49 and accompanying text.

41. *See* 28 U.S.C. § 1369(b) (“The district court *shall* abstain from hearing any civil action” (emphasis added)).

42. *Id.*

of “primary defendants” and “primarily” governing law.⁴³ The District of Rhode Island considered these phrases in the first of the Station nightclub fire cases, *Passa v. Derderian*,⁴⁴ and that court’s analysis is likely to shape the discussion of these issues in subsequent cases. The *Passa* court’s interpretation of the section 1369(b) test may prove particularly important, because judicial interpretation of these terms will have a large impact both on the state interests that section 1369(b) aims to protect and on MPMF 2002’s ability to alleviate the problem of split and duplicate litigation.

For example, inquiry into what constitutes a “substantial majority of all plaintiffs” would be complicated by the inclusion of accident victims yet to have filed suit. The *Passa* court was particularly concerned about the results of limiting the definition of “all plaintiffs” for this purpose. The court based its analysis of this factor on an estimation of the number of “all potential plaintiffs, meaning all those who have died or suffered injury as a result of the tragedy at issue.”⁴⁵ Strictly limiting the interpretation of “all plaintiffs” to those actually involved in the cases under consideration, the court understood, “would frustrate Congress’ desire for consolidation.”⁴⁶ If courts applied the local exception strictly as drafted—i.e., relative to actual plaintiffs only and before consolidation of related suits—a few individual cases might be excluded from federal jurisdiction under section 1369(b), even though they actually form part of a larger national series. This result would occur in cases in which plaintiffs were citizens of the same state as at least one defendant and in which that state’s law was likely to apply. Under such circumstances, individual suits arising from the same accident could have disparate access to federal courts—the very situation that MPMF 2002 seeks to eliminate.

Analogous ambiguity exists as to whether “all plaintiffs” includes plaintiffs who have already settled their claims.⁴⁷ If such plaintiffs are

43. For an analysis of the appropriate construction of section 1369(b) drawing on legislative history and similar language in class action statutes, see Offenbacher, *supra* note 23, at 198–205.

44. 308 F. Supp. 2d at 58.

45. *Id.* at 60. Because the exact number of potential plaintiffs was, and will remain for some period of time, incalculable, the *Passa* court founded its conclusion that a “substantial majority” were not all citizens of the same state on a statistical extrapolation from the citizenship information of the known victims. *Id.* at 60–61.

46. *Id.* at 59.

47. Offenbacher, *supra* note 23, at 201.

excluded from the “substantial majority,” the result could be distortion in favor of either federal treatment of what was in reality a primarily local controversy or federal rejection of a controversy that was truly national in scope. However, tracking individuals who have settled seems both unnecessarily costly in a jurisdictional inquiry and, perhaps, insensitive to the actual needs and preferences of plaintiffs who remain in a case.

Application of the section 1369(b) local exception may lead to split litigation in another way. Even if section 1369(b) functions as intended, it does not exclude plaintiffs who have another basis on which to assert federal jurisdiction. Thus, individual plaintiffs may still file their suits in federal court if they meet the requirements of regular diversity jurisdiction,⁴⁸ but those plaintiffs who are nondiverse or minimally diverse will be relegated to a separate state court action, a result contrary to the stated objectives of MPMF 2002.⁴⁹

II. INTERSYSTEM CONSOLIDATION UNDER MPMF 2002

MPMF 2002 also encourages joint adjudication through mechanisms designed to join additional related claims to claims already pending in federal court under section 1369 jurisdiction. By providing for intersystem consolidation mechanisms—intervention and removal⁵⁰—MPMF 2002 attempts to further reduce duplicative litigation and increase efficiency by providing joint federal adjudication of state law claims that could not have come into federal court as original matters, even under section 1369.⁵¹ This Part analyzes

48. See 28 U.S.C. § 1332 (2000) (granting federal jurisdiction when there is complete diversity between all plaintiffs and all defendants, as well as an amount in controversy exceeding \$75,000 per plaintiff).

49. In the Station fire situation, for example, three cases (in addition to those at issue in *Passa*) have been transferred to the District of Rhode Island from Massachusetts and Connecticut. See *Passa*, 308 F. Supp. 2d at 59. The *Passa* court used one of these cases, in which jurisdiction was based on the general diversity statute, to illustrate that a “case-by-case” determination of the substantial majority of all plaintiffs “would foster the possibility for inconsistent discovery rulings and even verdicts on liability.” *Id.* at 59–60.

50. Although intervention is not technically a consolidation mechanism because it does not combine two existing actions, this Note treats it as such because, absent the authority under section 1369(d) to join claims to an existing federal action, intervening plaintiffs would have no choice but to file a separate action, probably in state court.

51. See *Rowe & Sibley*, *supra* note 12, at 24 (“When such scattered litigation occurs, a federal action-consolidating jurisdiction could achieve the economies sought by the permissive joinder rules, reduce the danger of inconsistent outcomes, and counteract the case-splitting effects of the complete diversity rule.”).

the effectiveness of intersystem consolidation mechanisms in maximizing the number of suits related to section 1369(a) accidents that can be consolidated in the federal system and then examines how the drafting of MPMF 2002's removal provision may present both constitutional and practical obstacles to the realization of the consolidation objective.

A. Joining an Existing Action: Intervention and Removal

MPMF 2002's intervention and removal provisions are roughly analogous mechanisms. Intervention is available to plaintiffs wanting to join an existing federal action rather than initiate a separate state court suit;⁵² removal is a possibility for defendants wishing to consolidate related state and federal actions to which they are party rather than defend duplicative matters in separate court systems.⁵³ Because joint adjudication of common issues can strategically benefit either or both parties, MPMF 2002 is fair in providing roughly parallel opportunities for both plaintiffs and defendants.

Section 1369(d) provides that, in any action authorized by section 1369(a), "any person with a claim arising from the accident . . . shall be permitted to intervene as a party plaintiff . . . even if that person could not have brought an action in a district court as an original matter."⁵⁴ This provision allows plaintiffs who otherwise would have to initiate separate state suits to join existing federal actions pertaining to the same accident.

Also, this intervention provision could be used as a workaround to the first instance of split litigation arising from the section 1369(b) exception.⁵⁵ Early plaintiffs who would be excluded on the basis of section 1369(b) even though their cases involved a national controversy could wait to join a federal action when filed if they strongly preferred a federal forum.

52. See 28 U.S.C. § 1369(d) (Supp. 2003) ("[U]nder this section, any person with a claim arising from the accident . . . shall be permitted to intervene as a party plaintiff in the action" (emphasis added)). Generally, intervention is available for plaintiffs under Federal Rule of Civil Procedure 24, but the statutory authorization allows intervention as of right under circumstances that would only allow intervention at the judge's discretion under Rule 24.

53. See *id.* § 1441(e) (allowing removal by MPMF defendants even if the state suit could not have been brought as an original matter in federal court).

54. *Id.* § 1369(d).

55. See *supra* text accompanying note 45–46.

Allowing intervention under section 1369(d) is an effective use of the permissiveness of a minimal diversity rule to maximize joint adjudication of common-issue claims, because joining a nondiverse plaintiff will never destroy minimal diversity in suits in which it already exists. Intervention is particularly efficient in MPMF 2002 cases because it allows later-joining plaintiffs to receive adjudication of common issues without duplication of pretrial effort, particularly discovery, completed before they joined a case.

Just as intervention gives potential plaintiffs the option of combining their claims with an existing one, MPMF 2002's removal provision, section 1441(e), provides an analogous option for defendants. Through section 1441(e) removal, defendants can join cases initiated in state court with related federal suits to which they are also party.⁵⁶ This feature provides an additional means of consolidating litigation efficiently resolvable jointly and gives defendants some degree of control over their exposure to multiple, related suits and potentially inconsistent judgments. Section 1441(e) provides for removal by any defendant⁵⁷ in a state court action when either "the action could have been brought . . . under section 1369"⁵⁸ or

the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 . . . and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.⁵⁹

Section 1441(e) removal is thus intended to further promote joint adjudication when it makes sense for defendants as well as plaintiffs.

State actions removed under section 1441(e)(1)(B) by a common defendant to a pending federal action need not themselves qualify for original federal jurisdiction.⁶⁰ This category of cases includes not only nondiverse state court actions outside the scope of section 1369(a), but also some actions within section 1369(a) but subject to the section

56. 28 U.S.C. § 1441(e).

57. Section 1441(e) removes the standard limitation for diversity cases that an action cannot be removed when a defendant is a citizen of the state in whose courts the action is pending. *Id.* § 1441(b), (e).

58. *Id.* § 1441(e)(1)(A).

59. *Id.* § 1441(e)(1)(B).

60. *Id.*

1369(b) local exception.⁶¹ Section 1441(e), however, cannot prevent split litigation from arising when the section 1369(b) exception is applicable to all suits arising from a given accident. In such cases, common defendants cannot remove their suits to federal court because any pending federal action would necessarily have been brought under section 1332 diversity jurisdiction and so could not serve as the predicate action for section 1441(e) removal.

Section 1441(e) also contains a unique “reverse removal” provision mandating that actions invoking its removal authority ordinarily be remanded to the originating state court for individual damage proceedings after completion of the consolidated federal liability phase.⁶² Plaintiffs thus retain their forum choice when the policy interest in providing a single forum is weakest, in the determination of damages.⁶³ Damages issues often do not lend themselves to consolidated treatment because of necessary factual determinations relating to individual injury. But when a federal court

61. Whether any actions excluded under section 1369(b) would be eligible for section 1441(e) removal probably depends in large part on how “substantial majority of all plaintiffs” is interpreted for purposes of section 1369(b). *See supra* Part I.B. If the “substantial majority” determination is based only on the plaintiffs in the action before the court, it is conceivable that a subsequent action based on the same accident could come under section 1369(a) and not be similarly excluded under section 1369(b). In such a case, a common defendant could then remove the first case back to federal court to join the subsequent action under section 1441(e)(1)(B).

62. *See* 28 U.S.C. § 1441(e)(2):

Whenever an action is removed under [section 1441(e)] and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

Note that this provision only applies to the court to which the action is removed; the reference to “transfer” under section 1407(j) is a meaningless drafting error because that provision, proposed in earlier versions of MPMF 2002, was not included in the final package that Congress enacted. *See infra* Part III (discussing the implications of the failure to amend section 1407 in the final version of MPMF 2002).

63. Determination of damages generally involves individual questions of fact that make consolidated determinations both impractical and undesirable. The prevalence of individual questions in the determination of damages in mass accident cases is among the reasons that such cases have never been considered good candidates for class treatment. *See* Jeffrey W. Stempel, *Contracting Access to the Courts: Myth or Reality? Boon or Bane?*, 40 ARIZ. L. REV. 965, 983 n.71 (1998) (describing a general relaxation of judicial hostility toward mass tort class actions, but noting that mass accidents, as opposed to products liability cases, “such as a bus, airplane, or train crash may have more individual questions of causation and damage predominating over the common questions of duty and negligence”).

finds that “for the convenience of parties . . . and in the interest of justice” an action should be retained for the determination of damages, the court has the discretion to do so.⁶⁴ Such discretion could be exercised, for example, to facilitate consolidated determination of punitive damages, thereby preventing multiple, competing state awards.⁶⁵

B. Bringing Too Much to Federal Court: Potentially Unconstitutional Removals

MPMF 2002 maximizes its jurisdictional reach by including a removal provision that captures some state court cases that could not have been brought in federal courts as original matters.⁶⁶ Although joining nondiverse state claims with related federal actions is not itself constitutionally problematic in the context of minimal diversity jurisdiction, the specific drafting of section 1441(e), which requires that a state case be removed by the federal court “embracing the place where the [state] action is pending,”⁶⁷ may present some Article III hurdles to implementation.

State court cases removed under section 1441(e)(1)(B) over which federal courts lacked original jurisdiction do not independently qualify for federal jurisdiction under section 1369 or any other statute. Because section 1441(e)(1)(B) requires that these actions involve a mass accident satisfying the requirements of section 1369(a),⁶⁸ state cases falling into this category are limited to actions in which the parties are completely nondiverse and the claims are based entirely on state law.⁶⁹ Thus, this subset of actions is barred from

64. 28 U.S.C. § 1441(e)(2).

65. Consolidating punitive damages determinations was a stated congressional objective for creating MPMF jurisdiction. See H.R. REP. NO. 107-14, at 5 (2001) (“[A]n effective one-time determination of punitive damages would eliminate multiple or inconsistent awards arising from multiforum litigation.”). A specific provision for consolidated determination of both liability and punitive damages would have been codified in a related amendment to the multidistrict litigation statute, 28 U.S.C. § 1407 (2000), proposed by the House but rejected in the final version of MPMF 2002. See *infra* notes 90–104 and accompanying text.

66. 28 U.S.C. § 1441(e)(1)(B) (Supp. 2003); see *supra* note 54 and accompanying text.

67. 28 U.S.C. § 1441(e)(1).

68. The existing federal action must “[arise] from the same accident as the action in State court,” *id.* § 1441(e)(1)(B), and must have been raisable under section 1369. In other words, the common accident must meet the threshold fatality requirement of section 1369(a) for the federal action to constitute the basis for removing the state action.

69. Two exceptions to this generalization are possible but unlikely. First, a minimally diverse action in this context would fail to qualify for original jurisdiction under section 1369(a)

independent jurisdiction in federal courts not only by the limits of statutory authorization, but by the constitutional limits of federal jurisdiction.⁷⁰

Because minimal diversity is maintained, the joinder of these claims with the federal actions on which their eligibility for removal is predicated⁷¹ creates a constitutionally permissible consolidated action. Such consolidated actions are also permissible under section 1369, because joining removed claims would not affect the application of any of that section's requirements. Thus, to the extent that section 1441(e) removal of nondiverse state law actions results in their consolidation with existing federal cases, such removal is analogous to the exercise of supplemental jurisdiction.⁷² Application of section 1441(e) in that context reflects an exercise of congressional authority that is both allowable and reasonable to achieve judicial efficiency in adjudicating mass accident litigation.⁷³

The text of section 1441(e)(1)(B), however, does not demand consolidation of removed state cases with existing federal cases in situations when the plaintiffs could not have brought their state cases in federal court originally. Instead, section 1441(e) mandates that a state case be removed to the federal district court embracing the court in which the state action is currently pending,⁷⁴ regardless of where the existing federal case is pending.

if none of the defendants had a residence outside the state in which the accident occurred. *See* 28 U.S.C. § 1369(a)(1)–(3); *supra* notes 21–24 and accompanying text. Second, disqualification of an action under section 1369(b), the exception for predominantly local controversies, would render it ineligible for original federal jurisdiction (if it did not qualify on another basis, such as section 1332 complete diversity). In that situation, the application of section 1369(b), which mandates that a “district court *shall abstain* from hearing” those actions, *id.* § 1369(b) (emphasis added), may preempt a defendant’s right to remove the action after it is refiled in state court, even if the defendant is subject to another suit in federal court.

70. Claims based exclusively on state substantive law must be at least minimally diverse for a federal court to hear them constitutionally. *See supra* text accompanying note 19.

71. *See* 28 U.S.C. § 1441(e)(1)(B) (establishing that section 1369 claims are eligible for removal when “the defendant is a party to an action which . . . arises from the same accident as the action in state court”).

72. *See* 28 U.S.C. § 1367 (2000) (allowing federal courts to hear supplemental state law claims when the claims form part of the same “case or controversy” as a claim properly within the court’s original jurisdiction).

73. *See* AM. LAW INST., *supra* note 17, § 5.01 cmt. d at 234 (“The presence of a proper federal action to which the state suit will be attached and the requirement that the state actions be transactionally related to the federal one means that the assertion of jurisdiction over those actions is analogous to the court’s supplemental jurisdiction powers.”).

74. 28 U.S.C. § 1441(e) (Supp. 2003).

Unfortunately, this section 1441(e) venue provision, together with the omission of a consolidation requirement, makes it likely that the removal provision is constitutionally defective as drafted. The venue provision is consistent with the standard employed in ordinary removal cases⁷⁵ to minimize disruption of the plaintiff's choice of forum, but the provision makes it possible, even probable, that a state case removed under section 1441(e)(1)(B) will not find itself in the court hearing the pending federal matter based on the same accident. In such a situation, removal under section 1441(e)(1)(B) would present a district court with a nondiverse state law case that it would have no constitutional authority to hear.⁷⁶

It is generally agreed that a district court lacking subject matter jurisdiction over a case also lacks authority to transfer the case under the general transfer provision, section 1404(a).⁷⁷ This restriction precludes the use of transfer under section 1404(a) to consolidate state and federal claims relevant to a section 1441(e)(1)(B) removal when the state claims lack independent jurisdiction in the district court to which they are initially removed. However, in such circumstances, it may be possible for courts to transfer cases under section 1631, which permits transfer to cure want of jurisdiction for some civil actions.⁷⁸ To transfer a case under section 1631, a district

75. See 28 U.S.C. § 1441(a) (2000) (establishing for standard removal cases that “[e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a state court of which the district courts . . . have original jurisdiction, may be removed by the defendant . . . to the district court . . . for the district and division embracing the place where such action is pending”).

76. This applies only to cases that do not have another independent basis for federal jurisdiction. If, for example, a removed case was completely diverse and only filed in state court as a matter of the plaintiff's choice of forum, there would be no problem with the removal court's assertion of jurisdiction.

77. See, e.g., *Grimsley v. United Eng'rs & Constructors, Inc.*, 818 F. Supp. 147, 148 (D.S.C. 1993) (“When the court lacks subject matter jurisdiction, it does not have the power to transfer pursuant to § 1404(a).”); see also 17 MOORE'S FEDERAL PRACTICE § 111.14, at 111-115 (3d ed. 2004) (“A district court's power to transfer an action under Section 1404(a) . . . depends on the existence of subject matter jurisdiction (diversity, federal question, or some other basis for federal subject matter jurisdiction) over the action.”); 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3844, at 322 (2d ed. 1986) (“Transfer under § 1404(a) is possible only if venue is proper in the original forum and federal jurisdiction existed there. If subject matter jurisdiction is lacking, there is no power to do anything with the case except dismiss.”). But see *Dornbusch v. Comm'r*, 860 F.2d 611, 613 (5th Cir. 1988) (“There are cases in which the transferor court lacked jurisdiction in the technical sense. Here the circuits appear to have been split.”).

78. See 28 U.S.C. § 1631:

court must determine “(1) if there is another court in which the action could have been brought at the time it was originally filed, and (2) whether a transfer is in the interests of justice.”⁷⁹ Although the text of section 1631 theoretically allows such transfers, as of yet it has been used only in suits originally filed in federal court and has not been tested in the removal context.

Congressional intent to allow these state claims into federal court suggests that it is in the interest of justice that such claims be transferred to the court hearing the related federal claim for consolidation. Therefore, satisfying the second requirement for section 1631 transfer should not be controversial in most cases.

The first requirement for section 1631 transfer, that there be another federal court in which the suit could have been brought, is more problematic. Whether the intended transferee court, the one hearing the existing federal case, meets this standard will depend entirely on whether courts in this context choose to analyze the issue by considering the state claim standing alone or as part of the consolidated action.⁸⁰ Given that neither section 1441(e)(1)(B) nor section 1631 mandates that a state action be consolidated with a related federal action once transferred to the court hearing the

Whenever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed

This statute was intended for use, and has in fact been almost exclusively used, in cases filed in an ordinary federal district court that properly belong in one of the specialized federal courts:

Ordinarily, a district court must dismiss an action if it lacks subject matter jurisdiction If, however, the district court lacks subject matter jurisdiction over particular categories of actions or appeals because a federal statute vests exclusive subject matter jurisdiction in a specified court, the district court may transfer the action to that court under Section 1631.

17 MOORE'S FEDERAL PRACTICE, *supra* note 77, § 111.51[1] at 111-185. Of course, when general federal subject matter jurisdiction, either diversity or federal question, is involved, the inquiry into subject matter jurisdiction almost always pertains to the entire federal system rather than to a specific federal district. In such cases, transfer to a different district would not cure any defect. The situation contemplated here—that transfer could enable jurisdiction by combining actions pending in different districts—is unique and has not yet been considered with respect to section 1631's understanding of a jurisdictional defect.

79. *Grimsley*, 818 F. Supp. at 148.

80. If the transferee court considers the removed case independently, the court will not have jurisdiction, because the case will remain in the same situation as before transfer—it will remain a completely nondiverse state law action. If, however, the transferee court bases the jurisdiction determination on the entire consolidated action, the defect is cured and a section 1631 transfer is proper.

section 1369 action, such consolidation is purely discretionary.⁸¹ A transferee court, therefore, would not be required to consider related cases together when making jurisdictional determinations.⁸² Thus, although a section 1631 transfer offers some promise as a practical workaround to the drafting error in section 1441(e), it does not eliminate the facial constitutionality problem and may be inapplicable in the absence of a requirement that the related actions be consolidated after removal and transfer.

The section 1441(e) drafting problem, which creates statutory authorization for possibly unconstitutional removals,⁸³ is one that Congress could remedy relatively easily. At least as to actions removed under section 1441(e)(1)(B),⁸⁴ Congress should amend section 1441(e) to require removal, not to the district court “embracing the place where the action is pending,”⁸⁵ but instead directly to the district court in which the predicate federal action is pending. Although this change would depart from traditional respect for the plaintiff’s choice of forum, in this context that policy interest is less compelling than it is in the context of the traditional removal of a single, independent suit. The ultimate intention behind allowing

81. See FED. R. CIV. P. 42(a):

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

82. When a court is not obligated to consolidate two related cases, it seem illogical that it would be compelled to consider them as a unit for the jurisdiction determination because, ultimately, they could be heard as independent controversies.

83. For the removal to be unconstitutional in practice, the state case would have to be completely nondiverse. Suits based on accidents of sufficient scope (seventy-five fatalities) to invoke the provision, even if brought by a single plaintiff, generally involve multiple corporate defendants. Such defendants often have two states of citizenship, and the citizenship of the plaintiff has minimal logical correlation with the defendants’ citizenship. In such circumstances minimal diversity seems a low-threshold requirement. However, this would be important for cases in which individual plaintiffs selected defendants to avoid federal diversity jurisdiction. See note 69, *supra*, for discussion of other situations in which removal of a state law claim would be impermissible. Also, in the event that the federal district court to which a case lacking original jurisdiction is removed happened to be hearing the related federal case—eliminating the need for a venue transfer—it would probably be constitutional for that court to exercise its authority to consolidate the cases.

84. 28 U.S.C. § 1441(e)(1)(B) (Supp. 2003). The other category of actions authorized for removal by section 1441(e) is those that could have been brought originally under section 1369. See *id.* § 1441(e)(1)(A). In such cases, there is no requirement that a federal action related to the same accident already be pending, so the current provision for removal to the district embracing the current venue is both constitutional and sensible.

85. *Id.* § 1441(e)(1).

removal of section 1369-related actions is the consolidation of related proceedings for joint adjudication of common issues.⁸⁶ That objective is impossible to accomplish without displacing the claims of some, or even most, plaintiffs from the locality in which the plaintiffs filed their claims initially. The plaintiff's choice of forum in these actions, although important, should not be enough to prevent removal to a district court not embracing the state action.⁸⁷ In fact, amending section 1441(e) as suggested here would simply accomplish in one step what under the current version requires two—removal followed by transfer for consolidation.

Once it becomes established that a federal district court may constitutionally hear a state claim, the propriety of removing the state claim directly to a district other than that embracing the state court in which the state claim was pending seems consistent with the principles of transfer for consolidation within the federal system.⁸⁸ Therefore, the solution that this Note proposes not only provides a constitutional means of asserting jurisdiction over the state claim, but also furthers the efficiency goals of the MPMF 2002 scheme by consolidating in a single step cases removed from state court for that purpose.

III. INTRASYSTEM CONSOLIDATION UNDER MPMF 2002

Getting related claims into federal district courts, whether through section 1369 original jurisdiction or via intersystem consolidation, does not alone accomplish the goals of an MPMF scheme; once the claims are in federal courts, they must be consolidated into a single forum. To accomplish this goal, there must be statutory authority to transfer all the cases to a single court, which can then consolidate them, as appropriate, for joint determination of common legal and factual issues.⁸⁹

86. See generally AM. LAW INST., *supra* note 17, ch. 5, introductory cmt. at 218 (discussing a proposal, with similar consolidation objectives, by which a central body similar to the current Judicial Panel on Multidistrict Litigation would remove cases and would decide both questions of appropriate consolidation and what district court should receive the cases).

87. See *id.* § 5.01, cmt. d, at 234 (“Other than certain aspects of convenience, none of the reasons that a plaintiff chooses a state court creates a vested, let alone a constitutional, right to remain there.”).

88. For analysis of consolidation of cases under MPMF 2002 once they are in the federal system, see Part III, *infra*.

89. FED. R. CIV. P. 42(a).

Early versions of MPMF statutes and related proposals clearly assume the existence of intrasystem consolidation authority through the combined use of section 1407 for pretrial proceedings⁹⁰ and section 1404 to retain the consolidated cases for trial in the transferee court. This was a reasonable assumption because, before 1998, federal courts regularly employed the section 1407-section 1404 statutory combination to effectuate intrasystem consolidation for trial.⁹¹ This solution was occasionally cumbersome because the statutes involved were not originally intended to operate in tandem,⁹² but courts used it successfully for thirty years to promote efficiency by keeping cases before judges already familiar with the cases' facts, issues, and parties.⁹³

In 1998, however, the Supreme Court foreclosed future use of section 1404 to retain and try actions originally transferred under section 1407. In *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*⁹⁴ the Court held that, as a matter of statutory interpretation, the remand language of section 1407(a) “bars recognizing any self-assignment power in a transferee court”⁹⁵ and therefore “precludes a

90. Section 1407 provides for transfer and consolidation of related claims for pretrial proceedings only:

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 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 . . .

28 U.S.C. § 1407(a) (2000).

91. H.R. REP. NO. 108-416, at 3 (2004); see AM. LAW INST., *supra* note 17, ch. 3, introductory cmt. at 22 (noting that, after the Judicial Panel on Multidistrict Litigation transfers a case for pretrial proceedings under section 1407, “the transferee judge frequently retains the actions for trial . . . either because the parties consent or pursuant to a change of venue under Section 1404” (citations omitted)); DAVID F. HERR, MULTIDISTRICT LITIGATION § 3.2, at 21 (1986) (“[T]he transferee court can consider a motion to transfer venue under 28 U.S.C. § 1404(a). . . [especially when] the [Judicial Panel on Multidistrict Litigation] transfers a number of actions filed in various districts around the country to a transferee district that happens to be the most convenient for trial.” (footnote omitted)).

92. See AM. LAW INST., *supra* note 17, ch. 3, introductory cmt. at 22 (“The procedures under [section 1407 and] section 1404 . . . were developed separately and were not designed to be used together. Thus, the combination often is clumsy . . .”).

93. H.R. REP. NO. 107-14, at 2 (2001).

94. 523 U.S. 26 (1998).

95. *Id.* at 40.

transferee court from granting any section 1404(a) motion.”⁹⁶ The Court recognized that consolidation for trial may, in fact, be advantageous in the resolution of these cases, but left the issue for Congress to resolve.⁹⁷

After *Lexecon*, any statutory mechanism for consolidating complex cases for trial, such as MPMF 2002, must include either a general amendment to section 1407 overruling or modifying the *Lexecon* rule,⁹⁸ or a specific exception to section 1407 providing for consolidation for trial in the subset of cases that the legislation covers.⁹⁹ Because consolidation for trial is very important for achieving the efficiencies sought in multiforum cases,¹⁰⁰ versions of MPMF jurisdiction proposed in Congress after *Lexecon*, as well as at least one version before the decision, included explicit language amending section 1407 for this purpose.¹⁰¹

Despite Congress’s awareness of the need to reform section 1407,¹⁰² it passed MPMF 2002 without any provision to amend that section.¹⁰³ The House of Representatives’ version of MPMF 2002 included both a general *Lexecon* fix and a specific provision dealing with cases that were or could have been brought under the new section 1369 jurisdiction. However, neither of those provisions survived in the version of the statute that emerged from the Senate

96. *Id.* at 41 n.4.

97. *Id.* at 40.

98. An example of this approach, which appeared in many attempts to pass some form of MPMF jurisdiction before success in 2002, is the Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999, H.R. 2112, 106th Cong. § 2 (1999). Such a “*Lexecon* fix” has been advocated in Congress because of the benefits that it would confer in its own right, even apart from its particular importance in the MPMF context. *See* H.R. REP. NO. 108-416, at 4 (2004) (“[T]here is a pressing need to recreate the multidistrict litigation environment that existed before *Lexecon*.”).

99. This approach would be analogous to the provision for trial consolidation already provided for actions brought under section 4C of the Clayton Act. *See* 28 U.S.C. § 1407(h) (2000) (allowing the consolidation of both pretrial and trial proceedings for actions brought under section 4C of the Clayton Act).

100. *See* H.R. REP. NO. 108-416, at 5 (“The disaster litigation portion of H.R. 860 [MPMF 2002] . . . contemplates that the *Lexecon* problem is solved.”).

101. *See, e.g.*, Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001, H.R. 860, 107th Cong. §§ 2, 3(c) (2001) (version passed by House of Representatives on Mar. 14, 2001); Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999, H.R. 2112, 106th Cong. § 2 (1999); Multiparty, Multiforum Jurisdiction Act of 1990, H.R. 3406, 101st Cong. § 4 (1990) (version passed by House of Representatives on June 5, 1990).

102. *See* H.R. REP. NO. 107-14, at 2–3 (2001) (describing the background and need for a *Lexecon* fix).

103. *See* H.R. 2215, 107th Cong. § 11,020 (2002) (enacted as MPMF 2002).

Judiciary Committee and was eventually enacted, meaning that the implementation of MPMF 2002 left section 1407 unchanged.¹⁰⁴ Ironically, the drafters who changed the House of Representatives' version of the statute failed to remove from the adopted text of section 1441(e) a reference to section 1407(j), which would have been created by the House version's amendment to section 1407 but is otherwise nonexistent.¹⁰⁵ The result, whether intentional or by accidental omission,¹⁰⁶ is that MPMF 2002 jurisdiction now operates with only previously existing consolidation mechanisms. Unfortunately, these existing mechanisms do not specifically provide for joint adjudication of liability or punitive damages, the key objectives of MPMF 2002.¹⁰⁷

Even in its present form, however, MPMF 2002 can achieve some benefits of intrasystem consolidation. Cases in the federal system through section 1369 or section 1441(e) can be consolidated for pretrial proceedings under current section 1407.¹⁰⁸ Consolidation at

104. Compare H.R. 860, §§ 2, 3(c) (version referred to the Senate Judiciary Committee on Mar. 15, 2001 after being received from House of Representatives), *with* Multiparty, Multiforum Trial Jurisdiction Act of 2002, Pub. L. No. 107-273, § 11,020, 116 Stat. 1758, 1826–29 (codified at 28 U.S.C. §§ 1369, 1391, 1441, 1697, 1785 (Supp. 2003)), *and* Multiparty, Multiforum Trial Jurisdiction Act of 2002, S. 3050, 107th Cong. (2002) (version introduced in Senate on Oct. 3, 2002).

105. 28 U.S.C. § 1441(e)(2) (Supp. 2003); *see supra* note 62 (quoting section 1441(e)(2) and discussing the drafting error).

106. It appears likely that the deletion of the general *Lexecon* fix was an intentional result of negotiations between the House of Representatives and the Senate. *See* H.R. REP. NO. 108-416, at 5 (2004) (“Pursuant to negotiations, the conferees agreed to take ‘half’ of H.R. 860—section 3, or the ‘disaster’ litigation portion.”). The omission of the section 1407 amendment specifically applicable to MPMF 2002 cases, however, is more mysterious, given that it had been included in the bill as part of the disaster litigation package rather than as part of the *Lexecon* fix. *See* H.R. 860, § 3(c) (version referred to Senate Judiciary Committee on Mar. 15, 2001 after being received from House of Representatives). Congress’s failure to enact that provision, at least, has unanticipated consequences for the effectiveness of MPMF 2002. *See* H.R. REP. NO. 108-416, at 5 (“[T]he transferee court still cannot retain the consolidated cases for determination of liability and punitive damages, which effectively guts the statute.”).

The Senate made the same change with respect to the Senate version of the 1988 MPMF bill that passed the House of Representatives. AM. LAW INST., *supra* note 17, ch. 3, introductory cmt. at 24 (referring to the Court Reform and Access to Justice Act of 1988, H.R. 4807, 100th Cong. § 303 (1988)). Of course, in that pre-*Lexecon* era, the only impact of the omission was the loss of complete clarity as to the transferee court’s authority, because the practice of self-transfer under section 1404 to accomplish the same ends was still alive and well.

107. *See* H.R. REP. NO. 107-14, at 5 (“The revisions should reduce litigation costs as well as the likelihood of forum-shopping in airline accident cases; and an effective one-time determination of punitive damages would eliminate multiple or inconsistent awards arising from multiforum litigation.”).

108. 28 U.S.C. § 1407 (2000).

this stage facilitates discovery and witness efficiencies.¹⁰⁹ Pretrial consolidation can also promote settlement, because defendants can deal with all or most of the potential claims at one time, instead of contending with the uncertainty of large numbers of separate, potentially inconsistent, liability determinations. Also, as a purely practical matter, pretrial consolidation covers most cases in their entirety; “[i]n reality . . . cases gathered under Section 1407 hardly ever reach trial or return to their districts of initiation because most often they are settled in the transferee court.”¹¹⁰

Additionally, the possibility of trial consolidation still exists when the individual transferor judges to whom actions are remanded choose to use section 1404(a) to transfer the actions back to the transferee court.¹¹¹ This solution is “cumbersome, repetitive, costly, potentially inconsistent, time consuming, inefficient, and a wasteful utilization of judicial and litigant resources,”¹¹² and it does not guarantee reconsolidation of all or even most of the previously joined cases. Nevertheless, it provides an opportunity for judges to work cooperatively to facilitate an efficient solution when separate trials are clearly against the interests of both litigants and the judicial system.

109. See Earle F. Kyle, IV, *The Mechanics of Motion Practice Before the Judicial Panel on Multidistrict Litigation*, 175 F.R.D. 589, 590 (1998) (“Consolidated or coordinated pretrial proceedings resulting from Panel transfer orders can provide tremendous benefits. Parties can save time and expense by avoiding duplicative discovery and minimizing the burden on non-parties who may be compelled to testify or produce documents in similar actions scattered around the country.”).

110. AM. LAW INST., *supra* note 17, ch. 3, introductory cmt. at 22. In the post-*Lexecon* years 1999–2002, only 10 percent of the terminated multidistrict cases resulted in remand to the transferor court for trial. The remainder were terminated in the transferee court. From September 1998 to September 2002, 51,639 cases that had been subjected to section 1407 proceedings were terminated, and of those 5,110 were terminated through remand. See ADMIN. OFFICE OF THE UNITED STATES COURTS, 2002 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 67 tbl.S-20 (2003) (collecting and presenting section 1407 actions from 1999 through 2002), available at <http://www.uscourts.gov/judbus2002/tables/s20sep02.pdf>; *id.* 78 tbl.S-21 (2003) (collecting and presenting section 1407 actions from 1997 through 1999), available at <http://www.uscourts.gov/judbus1999/s21sep99.pdf>. There is no apparent reason that cases entering section 1407 proceedings as a result of the availability of MPMF jurisdiction should differ substantially in the proportion of actions that go to trial from the complex cases for which that mechanism has already been in use, but as yet there has been no opportunity for empirical validation of that assumption.

111. H.R. REP. NO. 107-14, at 3.

112. *Id.* (quoting *Hearing on H.R. 2112 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 106th Cong. 5 (June 16, 1999) (statement of the Honorable John F. Nangle, Chairman, Judicial Panel on Multidistrict Litigation)).

Section 1404(a) transfer requires (1) that the transfer be “in the interest of justice” and (2) that the suit could have been originally brought in the transferee court.¹¹³ In the context of remanded section 1407 proceedings, satisfaction of the first prong of the test appears relatively obvious, because all parties and many witnesses have already been subject to pretrial proceedings relating to the same case in the transferee court. The transferor judge also faces “a significant ‘learning curve’ regarding the merits, discovery issues, and other matters associated with the case in order to be prepared” to try a remanded case.¹¹⁴ The further risk of inconsistent judgments may make it in the interest of justice to cooperate in transfer for reconsolidation. All of these factors, although not conclusive, lead toward a conclusion that further adjudication of common issues, such as liability, in a single proceeding in the transferee court is desirable for all parties.

However, problems arise regarding the second transfer requirement of section 1404, that the transferee district be one in which the suit originally “might have been brought.”¹¹⁵ Unlike the section 1407 transfer for pretrial proceedings, a section 1404 transfer for reconsolidation requires that the transferee court meet all personal jurisdiction and venue requirements.¹¹⁶ The MPMF 2002 cases that would face the greatest difficulty qualifying for section 1404 transfer would be those cases removed under section 1441(e) that do not qualify for independent Article III jurisdiction in any federal court. Although it is unclear how courts would deal with such cases once removed,¹¹⁷ if they treated them as independent actions, the cases could not qualify for section 1404(a) transfer because they could not have been brought in the transferee court originally.¹¹⁸ If,

113. 28 U.S.C. § 1404(a).

114. Kyle, *supra* note 109, at 605.

115. 28 U.S.C. § 1404(a).

116. See Kyle, *supra* note 109, at 606 (“Unlike § 1407 Panel transfers . . . §§ 1404 and 1406 authorize transfer *only* if personal jurisdiction and venue lie in the transferee court.”). Note that these requirements also applied to section 1404 self-transfers to a transferee court for trial in the pre-*Lexecon* era as well, so these issues are not new except in cases brought under MPMF jurisdiction, which did not exist before *Lexecon*. This just presents an additional set of advantages to enacting a statutory transfer provision applicable to the situation.

117. See *supra* notes 68–77 and accompanying text.

118. The only district in which a federal court could have original jurisdiction over such cases would be the district in which they were joined with the federal case upon which removal jurisdiction was predicated. See *supra* text accompanying notes 71–73. This would be the transferor, not the transferee, court.

however, courts considered the removed claims in this category as part of the controversy that they formed when consolidated with the predicate federal claim, section 1404(a) transfer would be a viable option for the transferor judge.¹¹⁹

Section 1404 transfers by transferor judges for the purpose of reconsolidation for trial are probably more readily available in MPMF cases than in section 1407 cases based on general diversity jurisdiction, because of the more generous personal jurisdiction¹²⁰ and venue provisions available under MPMF 2002.¹²¹ This approach, however, still relies on the coordination and initiative of multiple transferor judges to be an effective or efficient option.

The benefits of a statutory provision allowing section 1407 consolidation for trial in the wake of *Lexecon* may become more obvious as courts attempt to deal with suits brought under section 1369 absent such a provision. In fact, Congress appears to have realized the scope of this difficulty in implementing MPMF 2002, and legislation is pending to reinstate the section 1407 amendments omitted from the original enactment.¹²² It seems clear that, in section 1369 cases, the omission of what would have been sections 1407(i)–(j)—creating a general self-transfer for trial provision and a provision specifically authorizing consolidation for trial, with a presumption toward remand for determination of individual damage issues¹²³—prevents realization of the full benefits that MPMF 2002 jurisdiction could have achieved for both litigants and the judicial system. Even absent such a provision, however, the availability of pretrial

119. For discussion of this issue with respect to section 1631, see *supra* notes 78–82 and accompanying text.

120. The existence of nationwide service of process, 28 U.S.C. § 1697 (Supp. 2003), indicates that Congress intended a national contacts standard for personal jurisdiction, a standard that is appropriate in section 1369 cases. See AM. LAW INST., *supra* note 17, § 3.08, at 157:

Complex diversity litigation has all of the characteristics that currently justify the national-contacts standard: (1) the need to provide a forum for litigation to correct and control severe problems in the national economy that are likely to involve parties across the country acting in a similar fashion or being injured by similar conduct; (2) the need to provide a forum where all parties can be subjected to jurisdiction, when no single state has that power; and (3) the need to provide a convenient forum for litigation to marshal and conserve the assets of an insolvent party.

121. See *infra* Part IV.A.

122. Multidistrict Litigation Restoration Act of 2004, H.R. 1768, 108th Cong. § 2 (2004) (version passed by House of Representatives on Mar. 24, 2004); H.R. REP. NO. 108-416, at 4–5 (2004).

123. Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001, H.R. 860, 107th Cong. §§ 2, 3(c) (2001) (version passed by House of Representatives on Mar. 14, 2001).

consolidation under section 1407 and the potential use of section 1404(a) by transferor judges to reconsolidate should still provide efficiency gains in adjudicating cases admitted to the federal system through section 1369 or section 1441(e).

IV. PROCEDURAL FACILITATION OF MPMF 2002

In addition to the core jurisdiction and consolidation mechanisms already discussed, other procedural provisions are important, even necessary, to the effective implementation of a joint adjudication scheme such as MPMF 2002.¹²⁴ These provisions, such as nationwide service of process and choice of law, are the nuts and bolts of constructing effective consolidated actions. This Part briefly outlines the relevant provisions included in the MPMF 2002 package and then examines the impact of the omission of a statutory choice-of-law provision.

A. *What's In: Nationwide Service of Process and Venue*

To facilitate the functioning of MPMF 2002's core jurisdiction and consolidation provisions, the statute includes enabling features related to service of process, subpoena authority, and venue. These provisions exert the authority of the federal system to solve the problem to which MPMF 2002 responds: redundant litigation resulting from the inability of a single state forum to gather all of the parties and claims together for efficient resolution.¹²⁵

Section 1697 provides for nationwide service of process.¹²⁶ Although common in federal question cases, nationwide service in diversity-based actions is more unusual¹²⁷ and indicates that, for the

124. See Rowe & Sibley, *supra* note 12, at 28 (“[R]efinement and supplementation [of the jurisdiction] by other features such as process, removal, transfer, and choice of law are also necessary.”).

125. See Rowe & Sibley, *supra* note 12, at 9 (“The problem is the unavailability of any single forum in which to consolidate scattered, related litigation—a difficulty that is becoming more and more common given the increasing number of complex tort actions, such as those growing out of mass accidents and product liability claims.”).

126. 28 U.S.C. § 1697 (Supp. 2003).

127. The present situation is analogous to federal statutory interpleader, 28 U.S.C. § 1335 (2000), which uses jurisdiction based on minimal diversity to provide a single forum for bringing together parties who might not all be joined in a single state court action, and includes a provision for nationwide service of process, *id.* § 2361. As with federal interpleader, courts handling consolidated cases brought into federal court under MPMF 2002 operate on behalf of the national judicial system, rather than on behalf of the judicial system of the states in which they happen to sit.

purposes of MPMF 2002-defined cases, the federal courts are operating in a national capacity rather than more or less as courts of the states in which they sit.¹²⁸ Nationwide subpoena authority is also available for these cases.¹²⁹

The federal venue statute was amended by MPMF 2002 to provide venue rules specific to actions brought under section 1369.¹³⁰ Under section 1391(g), MPMF 2002 suits can be brought in any district in which a defendant resides or in the district in which the accident occurred.¹³¹ This provision is generally analogous to the provision applicable in general diversity cases, but it omits reference to districts in which a defendant is subject to personal jurisdiction.¹³² This distinction, like the provision for nationwide service of process, may constitute evidence that Congress intended MPMF 2002 to operate on a national contacts basis. In that case, defendants subject to personal jurisdiction anywhere in the U.S. would be subject to jurisdiction in all federal districts, making personal jurisdiction inapplicable as a restriction on venue in section 1369 cases.

B. *What's Out: Statutory Choice of Law*

MPMF 2002's jurisdictional authority is a subset of the federal courts' constitutional diversity jurisdiction.¹³³ Under *Klaxon Co. v. Stentor Electronic Manufacturing Co.*,¹³⁴ federal courts sitting in diversity have long been required to apply the choice-of-law principles of the forum state.¹³⁵ The related principle that transferee courts must apply the choice-of-law rules that would have applied in

128. For the same reason, defendants in MPMF 2002 cases in federal court are subject to a Fifth Amendment due process standard of personal jurisdiction (minimum national contacts), rather than to the Fourteenth Amendment standard (minimum state contacts) applicable to state courts. See AM. LAW INST., *supra* note 17, § 3.08, at 156 (“[J]ust as an analysis of state contacts and fairness [is] pertinent to the decision of whether a particular assertion of jurisdiction violates the Fourteenth Amendment, reference to national contacts and fairness appears to be proper for determining whether Fifth Amendment constraints are satisfied.”).

129. 28 U.S.C. § 1785 (Supp. 2003).

130. *Id.* § 1391(g); see Multiparty, Multiforum Trial Jurisdiction Act of 2002, Pub. L. No. 107-273, § 11,020(b)(2), 116 Stat. 1758, 1827 (amending 28 U.S.C. § 1391).

131. 28 U.S.C. § 1391(g).

132. Compare *id.* (applicable in MPMF 2002 cases), with *id.* § 1391(a) (applicable in general diversity cases).

133. See *supra* notes 19–20 and accompanying text.

134. 313 U.S. 487 (1941).

135. *Id.* at 496.

the transferor jurisdiction was established in *Van Dusen v. Barrack*¹³⁶ to avoid a change in the applicable law when a case is transferred within the federal system.¹³⁷ Thus, absent any constitutionally permissible mandate from Congress, a court presiding over a consolidated MPMF 2002 case is left to determine choice of law under the guidance of state principles inherited from each transferor jurisdiction. This situation poses extremely problematic consequences for effective consolidation,¹³⁸ because it forces the transferee court to make an individual determination of the applicable law for each transferred action and potentially apply several different states' substantive law to the consolidated issue.¹³⁹ These determinations

136. 376 U.S. 612 (1964).

137. *See id.* at 639 (requiring a transferee court to apply the law of the original jurisdiction for transfers under 28 U.S.C. section 1404(a)); 19 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 4506, at 115 (2d ed. 1996) (noting that this rule also applies for section 1407 transfers).

138. The anticipated choice-of-law complexity in MPMF 2002 actions arises not from the presence of each individual action in federal court, but from their consolidated treatment for trial. Thus, without the *Lexecon* fix, *see supra* notes 98–107 and accompanying text, choice of law will be no more a problem in these cases than under other section 1407 consolidations of pretrial proceedings. In fact, when the national interest lies in joint adjudication of similar claims, the need and justification for federal choice-of-law principles is particularly strong. *See AM. LAW INST., supra* note 17, ch. 6, introductory cmt. at 317 (“The decision to apply federal choice of law criteria in multiparty, multiforum cases is tied to those situations in which Congress determines that there is a need for uniform rules of decision. That need seems clearest when it is for the purpose of fostering consolidation.” (citation omitted)).

139. Commentators disagree as to whether the consolidation of related claims alone justifies changing choice-of-law principles that would have applied to each case if tried separately. Compare Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 549 (1996):

Because choice of law is part of the process of defining the parties' rights, it should not change simply because, as a matter of administrative convenience and efficiency, we have combined many claims in one proceeding; whatever choice-of-law rules we use to define substantive rights should be the same for ordinary and complex cases.

with Paul S. Bird, Note, *Mass Tort Litigation: A Statutory Solution to the Choice of Law Impasse*, 96 YALE L.J. 1077, 1087 (1987):

It is one thing to contemplate the disparate ways different state laws may resolve a given dispute; it is quite another to accept such disparities in the context of a mass tort suit consolidated in a single forum adjudicating, for example, the identical claims of passengers sitting side by side aboard an airplane.

Of course, simply applying the choice-of-law principles of the forum state to all of the consolidated actions, the straight *Klaxon* result, is not a logical alternative either because it would result in the arbitrary application of one state's policy-driven choice rules to all claims, even when some of the claims could not originally have been filed in the courts of that state. *See Rowe & Sibley, supra* note 12, at 38:

In [federal interpleader or MPMF] situations, the *Klaxon* rule . . . creat[es] the possibility of applying to some litigants a substantive state law regime that could not, but for the federal jurisdiction, have governed them It makes little sense to

significantly reduce the efficiencies gained from consolidated treatment and add a layer of complexity threatening to overwhelm proceedings.¹⁴⁰ Although in many cases, both before and after *Lexecon*, courts handling consolidated actions under section 1407 have efficiently managed the intricacies created by the principle of *Van Dusen*, some courts have called for legislative action to establish uniform rules.¹⁴¹

The lack of choice-of-law guidance in MPMF 2002 could present the largest implementation problem for courts hearing cases under the statute.¹⁴² When MPMF cases are consolidated, these concerns become magnified because the transferee court faces the ironic result that it is required to apply multiple sets of choice-of-law rules to cases brought into federal court primarily to facilitate their efficient and uniform treatment.¹⁴³ Until the federal courts have an opportunity to consider some of these cases, how large of a hurdle the application of

oblige the federal court to follow the conflicts law of a state in whose courts it might not even have been possible to bring the case.

140. See AM. LAW INST., *supra* note 17, ch. 6, introductory cmt. at 306 (“The rationale for developing federal choice of law standards for complex litigation is to decrease forum shopping and to reduce the extremely complicated inquiry now needed to ascertain and apply the numerous state choice of law rules that may be relevant in a consolidated action.”); Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039, 1076 (1986):

Choice-of-law problems significantly increase the complexity, expense, and duration of mass-tort litigation. . . . [S]ubstantial judicial resources must be applied to determine the applicable law. After the applicable law is determined, the lawsuit can grind to a halt while the court determines whether to apply state or federal rules to a particular legal question.

(footnotes omitted).

141. See Stephen R. Stegich & Donald P. Yates, *MDL Consolidation of Aviation Disaster Cases Before and After Lexecon*, 67 DEF. COUNS. J. 226, 230 (2000) (“Section 1407 does not simplify choice of law issues, and some courts have called for legislative action to establish uniform choice of law rules. Courts themselves have managed to simplify these issues, for example, through effective use of conflict analysis to ascertain a state law that governs all cases.” (footnotes omitted)).

142. See AM. LAW INST., *supra* note 17, ch. 6, introductory cmt. at 309 (“A significant difficulty for a transferee court under the current choice of law regime is that it is required to consult the state choice of law rules of each of the transferor jurisdictions.”).

143. See James A. R. Nafziger, *Choice of Law in Air Disaster Cases: Complex Litigation Rules and the Common Law*, 54 LA. L. REV. 1001, 1012 (1994):

Klaxon's application of state rules in federal diversity cases seems ill-equipped for cases whose complicated scope and multi-party character engage the national interest. In complex litigation, at least, there is little justification for applying state choice-of-law rules rather than a special multi-jurisdictional or national rule that would take account of the broad, national complexion of most air disaster claims and the national interest in their fair and consistent disposition by the courts.

(footnotes omitted).

the *Klaxon* and *Van Dusen* principles will be to the joint adjudication of mass accident liability issues will remain largely unknown. It is possible that, in the narrow category of major disasters, state choice-of-law principles and even substantive liability standards will vary insubstantially, making determinations of applicable law in consolidated proceedings less cumbersome than anticipated.¹⁴⁴ However, given the potential for substantial inefficiencies, Congress should act to forestall unnecessary wrangling by prescribing federal choice-of-law principles for uniform application in section 1369 cases.

Amending MPMF 2002 to include a federal approach to choice of law for these mass accident trials would conform with the federal policy of uniform treatment without impinging on the sphere of state authority, because these cases represent situations that could not have been brought in a single state court. Congress could prevent much uncertainty inherent in federal application of state choice-of-law principles¹⁴⁵ by specifying a uniform, predictable standard for such cases in the federal system. Additionally, establishing federal choice of law rules would give claimants notice of the applicable principles and the contexts in which courts would apply them, avoiding the unfairness in the tendency of courts to fudge existing choice-of-law principles to simplify matters in consolidated actions.¹⁴⁶

Establishing uniform federal rules would certainly provide notice to plaintiffs filing suit in federal court under section 1369. However,

144. See Kramer, *supra* note 139, at 584:

[B]ecause variation in the legal rules is not great, once the state-by-state survey is completed, judges will find a relatively small number of conflicts and an equally small number of approaches to choice of law. At that point, claims can be grouped and the task of resolving the conflicts completed in a fairly efficient manner. It may not be fun, but it is far from impossible.

145. It is always unclear whether a federal judge will interpret state conflicts law correctly, let alone consistently with other federal courts, making even application of a given state's law an uncertain matter. See *In re Paris Air Crash of Mar. 3, 1974*, 399 F. Supp. 732, 739 (C.D. Cal. 1975) (noting that choice of law in litigation over an aircraft accident "is a veritable jungle, which, if the law can be found out, leads not to a 'rule of action' but a reign of chaos dominated in each case by the judge's 'informed guess' as to what some *other* state than the one in which he sits *would* hold *its* law to be").

146. See Kramer, *supra* note 139, at 554:

[J]udges in complex cases have managed to suppress these differences [among approaches to conflicts of law]. Some say that the various tests, while different, all share the same basic objective Other judges collapse approaches together, asserting that they use different words to describe what are really identical inquiries. Still other judges purport faithfully to apply the assorted tests only to find . . . that all happen to mandate the same result in the particular case.

(footnotes omitted).

there would inevitably be some disruption of plaintiffs' choice-of-law expectations when they originally filed their suits in state court and became subject to federal choice-of-law principles only after subsequent removal and consolidation.¹⁴⁷ Concern for this class of plaintiffs, who are suffering removal from their preferred court, or even state, is legitimate and should be balanced against the inefficiencies created by the application of multiple states' choice-of-law principles. In light of the national interest in efficient and fair adjudication of such claims, it may be possible to accommodate the interests of displaced plaintiffs sufficiently within the choice-of-law principles selected for consistent application, rather than to abandon the claims to the case-by-case application of *Klaxon* and *Van Dusen*.

Scholars have proposed three general approaches for implementing federal choice-of-law rules: (1) Congress could authorize the courts to develop a federal common law approach,¹⁴⁸ (2) Congress could specify factors for consideration in a court's choice-of-law determination,¹⁴⁹ or (3) Congress could provide specific choice-of-law rules for application in these situations.¹⁵⁰

The development of federal common law principles would eliminate the need for courts to apply multiple sets of choice-of-law principles in consolidated cases.¹⁵¹ The primary advantage of a common law approach is its flexibility to deal with the different

147. There is no constitutional right to the application of a particular law to the facts of a case, *see Allstate Ins. Co. v. Hague*, 449 U.S. 302, 315–16 (1981) (rejecting the defendant insurance company's argument that the Constitution mandated the application of the laws of the state in which the insured resided), and there is no reason to believe that fair and predictable federal choice-of-law rules would implicate a plaintiff's due process rights, *see id.* at 312–13 (articulating the constitutional standard for choice-of-law rules that they be “neither arbitrary nor fundamentally unfair” and result in the application of the substantive law of a state having an interest arising from significant contact with the subject matter). However, plaintiffs traditionally control the decision as to where to bring their suits and, by extension, over what substantive law will decide their claims.

148. This is the default rule when courts have the authority to make choice-of-law determinations but lack guidance.

149. *See, e.g., Rowe & Sibley, supra* note 12, at 57 (considering factors including which law would have applied in the absence of federal jurisdiction and the potential change in applicable law as a result of transfer or consolidation).

150. *See, e.g., AM. LAW INST., supra* note 17, § 6.01, at 321–23 (drafting model rules with the stated objective of choosing a state law that could be applied to all similar tort claims against a given defendant).

151. Of course, federal common law could develop to mandate the application of state choice-of-law principles of either transferee or transferor courts, which would raise anew the above-discussed concerns touching the application of current doctrine under *Klaxon* and *Van Dusen*. *See supra* notes 138–44 and accompanying text.

circumstances of each case or set of cases, because judges can adapt the rules that develop as necessary. MPMF 2002 jurisdiction is already limited to a very specific subset of cases (mass-fatality, single-occurrence accidents), however, so the inherent adaptability of the common law is unlikely to provide significant benefits in this context. This approach would not solve the problems of uncertainty and nonuniformity now plaguing the system of applying state rules.¹⁵² Instead, the common law approach could exacerbate the existing uncertainty problem by making the choice of law dependent on consolidated litigation's random assignment to a particular court, because principles might never be harmonized across the federal system.

Prior versions of MPMF legislation took the approach of specifying factors for courts to consider in making its choice-of-law determinations,¹⁵³ but Congress dropped this approach from MPMF 2002 to accommodate Senate concerns that the provision gave the district courts too much discretion.¹⁵⁴ Congress has thus manifested a willingness to include a federal choice-of-law clause in an MPMF package, but it has yet to find a political solution to enable itself to do so. Factor-based determinations have the advantage of being flexible yet targeted toward promoting the policies deemed most important. However, such determinations do not guarantee that different courts will balance the factors consistently. Therefore, they are not ideal for achieving uniform federal treatment of similar cases.

Statutory definition of specific choice-of-law principles for courts to apply has the ultimate advantage of consistency and uniformity. However, the policy consensus required to draft and pass such a provision may be unattainable. Drafting specific rules would be particularly desirable in MPMF 2002 cases because such cases stem from shared mass accidents. It seems fundamentally illogical that a single defendant facing multiple suits in a consolidated action faces

152. See AM. LAW INST., *supra* note 17, ch. 6, introductory cmt. at 314 (“[T]he federal common law approach has several distinct disadvantages. Not only will uncertainty and a lack of uniformity continue, at least until the courts determine what the standards should be, but also there is no assurance that a single federal standard ever will evolve.”).

153. See, e.g., Multidistrict, Multiforum, Multiparty Trial Jurisdiction Act of 1999, H.R. 2112, 106th Cong. § 3(e) (1999) (version referred to Senate Judiciary Committee on Sept. 14, 1999 after being received from House of Representatives); Multiparty, Multiforum Jurisdiction Act of 1990, H.R. 3406, 101st Cong. § 6 (1990) (version reported in House of Representatives Jun 1, 1990).

154. H.R. REP. NO. 107-14, at 8 (2001).

different choice rules (and, potentially, different substantive law) regarding a common liability issue involving a discrete accident. Because all injuries in a set of related MPMF 2002 cases will have occurred in a discrete event at a discrete location, competing state interests relate to all of the injuries in the particular set of cases in the same way. Given that these interests interact similarly for each claim relating to a particular accident, the balancing of these interests would ideally result in the same choice-of-law decision (although not necessarily in the application of a single state's law) for all of the cases. To get this result predictably, however, this balancing of relative state interests should be accomplished in advance through the drafting of a set of standard federal choice-of-law rules to govern these instances, not after the fact through a common law determination in each individual case.¹⁵⁵

The precise content of such standard rules represents a policy determination. In making its policy choices, Congress should focus on the federal policies resulting in federal jurisdiction over these cases—judicial economy and fairness to parties—rather than on any substantive regulatory agenda. This approach would minimize intrusion upon states' interests in the application of their relevant substantive laws.¹⁵⁶ By definition, choice of law ultimately involves the elevation of one state's interest in a dispute over the interests of other states; federal courts should make such choices only pursuant to legitimate federal interests, thereby avoiding choices among competing state substantive policies. Proposals for choice principles in mass accident cases vary greatly, from choosing the most plaintiff-

155. The earlier congressional proposal may have been overly simplistic, however, in suggesting that courts create a rebuttable assumption that a single state's substantive law should apply to all issues and parties in cases arising out of the same accident. See H.R. 2112, § 3(e)(1)(b) (version referred to Senate Judiciary Committee on Sept. 14, 1999 after being received from House of Representatives):

The district court making the [choice-of-law] determination . . . shall enter an order designating the single jurisdiction whose substantive law is to be applied in all other actions under section 1369 arising from the same accident as that giving rise to the action in which the determination is made. The substantive law of the designated jurisdiction shall be applied to the parties and claims in all such actions before the court, and to all other elements of each action, except where Federal law applies or the order specifically provides for the application of the law of another jurisdiction with respect to a party, claim, or other element of an action.

156. See AM. LAW INST., *supra* note 17, ch. 6, introductory cmt. at 315 (“[A] distinction should be drawn between state policies that reflect substantive, regulatory rules, and the federal policies underlying the proposed choice of law rules, which are limited to resolving conflicting substantive state policies.”).

friendly substantive law related to an accident,¹⁵⁷ to simply applying the substantive law of the state in which the accident occurred.¹⁵⁸

The lack of any federal choice-of-law rule stands to frustrate the goals of MPMF 2002. Although courts hearing consolidated actions may find ways to construe state choice rules so as to minimize variation in the applicable rules and substantive law, such flexibility does not exist in individual MPMF 2002 actions that, for one reason or another, are not consolidated.¹⁵⁹ In both situations, the similar treatment of similarly situated parties that MPMF 2002 intends to foster will not be realized if the courts are compelled to follow *Klaxon* and *Van Dusen*.

CONCLUSION

MPMF 2002 is a valiant attempt to solve a long-recognized problem that had historically evaded political consensus. The statute, however, bears marks of hasty drafting and political compromise that severely limit the effectiveness with which it can accomplish its goals of promoting the fair and efficient resolution of litigation arising from mass disasters such as the Station fire. Drafting problems affect both the intersystem and intrasystem aspects of consolidation under MPMF 2002, such that the statute as enacted provides opportunities for joint adjudication of common issues only marginally greater than the opportunities available under standard removal¹⁶⁰ and multidistrict litigation¹⁶¹ statutes. Because MPMF 2002 is limited in

157. See Bird, *supra* note 139, at 1095 (“Insofar as two primary policy objectives of modern tort law are deterrence and compensation, a rule requiring selection of the law most favorable to the victims of mass torts is consistent with this well-established norm.” (footnotes omitted)).

158. See Thomas M. Reavley & Jerome W. Wesevich, *An Old Rule for New Reasons: Place of Injury as a Federal Solution to Choice of Law in Single-Accident Mass-Tort Cases*, 71 TEX. L. REV. 1, 1 (1992) (arguing, in the context of an earlier version of MPMF proposed in Congress in 1991, that adoption of the substantive law of the place of injury in mass accident cases best accomplishes both fairness and efficiency).

159. A primary reason that MPMF cases would not be consolidated is the omission of consolidation for trial authority. See *supra* notes 102–07.

160. See 28 U.S.C. § 1441 (2000) for the general removal statute before the enactment of MPMF 2002. MPMF 2002 added section 1441(e), which deals specifically with cases under the jurisdiction added by that Act. See also AM. LAW INST., *supra* note 17, ch. 5, introductory cmt. at 219–20 (“Under current law the only opportunity for achieving intersystem consolidation is when certain defendants are permitted to remove state court cases to federal court under the general removal statute, 28 U.S.C. § 1441, or one of the special removal statutes.”).

161. See 28 U.S.C. § 1407 (providing for transfer of related actions for consolidated pretrial proceedings by order of the Judicial Panel on Multidistrict Litigation). Section 1407 was not amended by MPMF 2002. See *supra* notes 102–03 and accompanying text.

scope,¹⁶² however, it seems possible that the statute and the courts' ability to work around its weaknesses can be tested in a limited number of cases, allowing Congress to fix the most grievous problems relating to consolidation before too many suits are initiated under the statute.

Faced with the many difficulties that complex litigation poses both for parties and for the judicial system, MPMF 2002 succeeds in providing equal access to federal courts in at least some circumstances. The imperfections of MPMF 2002, a version of legislation that has been floating around Congress for two decades, reflect problems inherent in the legislative process. Although the statute may not succeed in meeting all of its intended objectives, it represents a step toward improved handling of cases that have frustrated state and federal judicial systems alike as the frequency and complexity of mass tort litigation has exploded.

162. For example, between January 1, 1998 and December 31, 2004, only two aircraft accidents in U.S. airspace would have satisfied the seventy-five-person fatality threshold: (1) on November 12, 2001, an American Airlines flight crashed in Belle Harbor, NY, resulting in 265 fatalities, and (2) on January 31, 2000, an Alaska Airlines flight crashed off Port Hueneme, CA, killing eighty-eight. NATIONAL TRANSPORTATION SAFETY BOARD, AVIATION ACCIDENT DATABASE & SYNOPSES, *available at* <http://www.nts.gov/ntsb/query.asp>. That number excludes the four aircraft that crashed on September 11, 2001, three of which would have met the seventy-five-person fatality threshold, because of uncertainty as to whether terrorist acts could be classified as "accidents" for purposes of MPMF jurisdiction. *See supra* notes 26–28 and accompanying text.