

CHOICE OF LAW UNDER THE MULTIPARTY, MULTIFORUM TRIAL JURISDICTION ACT OF 2002

I. INTRODUCTION

“A single transportation or building catastrophe can generate a thousand lawsuits.”¹ Consider for a moment the complexity of consolidating a thousand lawsuits in a single court. When a catastrophe occurs that takes the lives of hundreds of people, the legal result is hundreds of plaintiffs filing lawsuits against multiple defendants based on various causes of action. Traditionally, in such cases, lawsuits were filed in every jurisdiction connected to the catastrophe or any of the parties involved. The same issues were litigated over and over in federal and state courts. Often, many of the cases could be consolidated in federal court; others could not because of the requirement of complete diversity for federal diversity jurisdiction.² Of the cases that were amenable to consolidation, one can only imagine the choice of law labyrinth that the consolidation of hundreds of suits can foster. In a case resulting from an airline crash in Chicago that killed a total of 273 people, the court summed up the confounding choice of law dilemma in this way:

The crash and consequent deaths occurred in Illinois. Plaintiffs and their decedents were and are residents of California, Connecticut, Hawaii, Illinois, Indiana, Massachusetts, Michigan, New Jersey, New York, Puerto Rico, and Vermont, as well as Japan, the Netherlands and Saudi Arabia. At the time of the crash, American Airlines, Inc. . . . a Delaware corporation, had its principal place of business in New York. . . . American [recently] moved its principal place of business to Texas. At the time of the crash, American's operations base was in Texas, and its maintenance department was headquartered in Oklahoma. Defendant McDonnell Douglas Corporation . . . a Maryland corporation, had its principal place of business in Missouri. The DC-10 aircraft was designed and built by MDC in California. Defendant MDC argues that this Court should apply the law of Illinois, the place of the injury, to all actions. . . . Defendant American argues that the law of Illinois should be applied to actions originally filed in Illinois and Michigan, and that of New York should be applied to actions originally

¹ 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, 2 (1992).

² 28 U.S.C. § 1332(a) (2000); 28 U.S.C. § 1407(a) (2000); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

filed in New York and California. . . . The plaintiffs take various [other] positions.³

Congress began considering ideas for federal consolidation of multiform, mass-tort litigation in the late 1970s. From the beginning, the proposed bills included some attempt at a federal solution to the choice of law quandary that necessarily attends such cases. It seemed natural that, if federal courts were given original jurisdiction over all cases resulting from a mass-disaster, there should be some mechanism in place for the court to decide what substantive law would apply in the litigation.

In November 2002, Congress passed the Multiparty, Multiform Trial Jurisdiction Act of 2002 ("MMTJA"). The MMTJA gives federal district courts original jurisdiction over any case arising from a single-accident catastrophe that takes the lives of at least seventy-five people, so long as there is minimal diversity between the opposing parties.⁴ Additionally, it expands defendants' right to remove cases arising out of such single-accident catastrophes to federal court, and also the right of plaintiffs to intervene in such cases.

The MMTJA, surprisingly, is completely silent on the issue of how the single federal court is to determine what substantive tort law applies to the cases. This fact is astounding considering the vigorous debate that raged for almost two decades both in Congress and in academia specifically over the best way to deal with the choice of law dilemma in this legislation.

Although the MMTJA allows for consolidation of multiple cases arising from single-accident catastrophes, the court will have to apply different conflict of laws rules to the various cases depending on where they originated. Various choice of law provisions were proposed in earlier versions of the MMTJA, most of which directed the federal court to select the law of a single jurisdiction to apply to all the consolidated cases. These approaches were in keeping with the legislation's goals of increased efficiency and consistency. A new choice of law statute for MMTJA litigation should be enacted requiring the court to apply a single substantive standard to the entire litigation. In keeping with the way federal courts have handled choice of law issues for decades, the rule should direct the MMTJA court to apply the substantive law of the state in which it sits.

This Note will analyze the jurisdictional, removal, and intervention provisions of the MMTJA, and how the choice of law issue is and should be determined under the statute. Part II will discuss the relevant parts

³ *In re Air Crash Disaster Near Chicago, Ill.*, on May 25, 1979, 500 F. Supp. 1044, 1047 (N.D. Ill. 1980).

⁴ 28 U.S.C.A. § 1369(a) (Supp. 2004).

of the MMTJA and the statute's legislative history. Part III will examine choice of law under the MMTJA, with a review of past proposals for a choice of law provision. The Note concludes with a recommendation that Congress enact a choice of law statute which would require the court in MMTJA litigation to apply a single legal standard to all of the parties.

II. THE MULTIPARTY, MULTIFORUM TRIAL JURISDICTION ACT OF 2002

A. *The General Jurisdictional Rule*

28 U.S.C. § 1369(a), the general jurisdictional rule of the MMTJA, reads:

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.⁵

The general rule, then, consists of five requirements that must be met for the federal court to have original jurisdiction over the case. The first four requirements are conjunctive: there must be (1) minimal diversity between the adverse parties in litigation arising from (2) a single accident that (3) claimed the lives of at least seventy-five people (4) at a discrete location.⁶ The final element is disjunctive requiring the parties to satisfy at least one of three requirements: (1) the defendant must be a resident of a state other than the one in which the accident took place, (2) any two of the defendants must be residents of different states, or (3) "substantial parts" of the accident must have taken place in different states.⁷

First, there must be "minimal diversity between adverse parties."⁸ This requirement is in contrast to the requirement of complete or total diversity in cases under 28 U.S.C. § 1332.⁹ The term "minimal diversity" is defined in the statute itself: "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

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ 28 U.S.C. § 1332(a) (2000); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

foreign state as defined in section 1603(a) of this title”¹⁰ “Citizenship” suggests the section 1332 requirement of domicile.¹¹ Under section 1369, so long as at least one plaintiff is the domiciliary of a state within the United States, and at least one defendant is the domiciliary of a different state or is not a United States citizen at all, or vice versa, then the minimal diversity requirement is met.¹²

Second, the litigation must have “arise[n] from a single accident.”¹³ According to the statute itself, “the term ‘accident’ means a sudden accident, or a natural event culminating in an accident.”¹⁴ The scope of section 1369 is limited to cases arising from single catastrophic events

¹⁰ 28 U.S.C.A. § 1369(c)(1).

¹¹ 28 U.S.C. § 1332(a) (setting out the citizenship requirements for diversity jurisdiction); 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3611 (2d ed. 1984) (explaining the construction of “citizen” in § 1332 as “domicile”). Given that this statute is addressing a form of diversity jurisdiction, and the term “citizen” in the federal diversity jurisdiction statute has long been construed as requiring domicile, the term “citizen,” as used in this statute, should be construed as requiring domicile. Domicile is simply “that place where [a] person has a true, fixed, and permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom.” CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 26 (6th ed. 2002).

¹² Section 1369 requires, for minimal diversity, either diversity of domicile of states, or diversity between a domiciliary of one state and a “citizen or subject of a foreign state, or a foreign state as defined in section 1603(a) of [Title 28].” 28 U.S.C.A. § 1369(c)(1). The language “citizen or subject of a foreign state,” as used in 28 U.S.C. § 1332, has been universally construed as requiring merely that the person “is accorded that status by the laws or government of [the foreign] country.” WRIGHT ET AL., *supra* note 11. The phrase “citizen or subject of a foreign state” should not be construed any differently in section 1369.

Section 1603(a)-(b) reads as follows:

(a) A “foreign state”, except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An “agency or instrumentality of a foreign state” means any entity-

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(a)-(b) (2000).

In contrast to 28 U.S.C. § 1332, and earlier proposed versions of the MMTJA, section 1369 contains no amount in controversy requirement. Peter Adomeit, *The Station Nightclub Fire and Federal Jurisdictional Reach: The Multidistrict, Multiparty, Multiforum Jurisdiction Act of 2002*, 25 W. NEW ENG. L. REV. 243, 249 (2003); H.R. REP. NO. 107-14, at 8 (2001).

¹³ 28 U.S.C.A. § 1369(a).

¹⁴ 28 U.S.C.A. § 1369(c)(4).

and does not include progressive or multiple tort cases such as asbestos litigation.¹⁵

Third, “at least 75 natural persons [must] have died in the accident.”¹⁶ The language of this element is unambiguous. The restriction of this requirement to seventy-five “natural persons” is obviously meant to avoid misuse of the statute in cases of the death of a corporate entity or artificial person. The requirement that the seventy-five, or more, deaths take place “in the accident,”¹⁷ is explored below. The clear requirement of the third element, then, is that a minimum of seventy-five human beings must have died as an immediate result of the accident.

Fourth, at least seventy-five deaths must have taken place “at a discrete location.”¹⁸ “Discrete location” clearly refers to an individual geographic site. The only possible ambiguity is the question of what must have occurred at the discrete location. The structure of the sentence indicates that the seventy-five, or more, deaths must have occurred at an individual location. The accident, by contrast, is not restricted to a discrete location.¹⁹

The fifth requirement to meet the general rule consists of three disjunctive elements; if any one of these three elements is met, then the fifth requirement is satisfied. The first element is that “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”²⁰ A single defendant need only be a resident of a state other

¹⁵ An “accident” is “[a]n unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated.” BLACK’S LAW DICTIONARY 15 (8th ed. 2004). As defined, the second requirement, that the litigation be the result of a single accident, drastically limits the reach of the Act. Most mass-tort litigation is excluded by this requirement.

¹⁶ 28 U.S.C.A. § 1369(a).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ The first two requirements described in subsection (a) are divided from the third and fourth by a comma. After the elements of (1) minimal diversity and (2) single accident, there is a comma, and the rule then continues “where at least 75 natural persons have died in the accident at a discrete location.” *Id.* An accident could conceivably occur in more than one location and still fall within the scope of section 1369. For example, an airplane could sustain an explosion over one state, then fall to the ground in another, killing all on board.

This would seem to indicate that the deaths must be immediate, or almost immediate, in conjunction with the accident. Consequently, if fewer than seventy-five persons died in the accident, but the total number of deaths that resulted from the accident equaled seventy-five or more, the cases would not fall within section 1369. However, if at least seventy-five died in the accident, plaintiffs who died at some later time as a result of the accident would still have their claims included in the section 1369 litigation. 28 U.S.C.A. § 1369(d).

²⁰ 28 U.S.C.A. § 1369(a)(1).

than that in which a “substantial part” of the accident occurred. The statute requires that a “substantial part of the accident” occur in a state different than one in which a defendant is a resident.²¹ It apparently requires, then, that some significant aspect of the accident occur in a state other than one that is the sole residence of every defendant. In this vein, if the accident substantially occurs in a state in which all defendants reside, this element is met if one defendant also resides in another state.

The second element of the disjunctive fifth requirement is that “any two defendants reside in different States, regardless of whether such defendants are also residents of the same State or States.”²² This is the simplest of diversity schemes; it requires merely a difference in state residence between any two parties on one side of the litigation—the defense.

The final element of the disjunctive fifth requirement is that “substantial parts of the accident took place in different States.”²³ If the accident occurs to a large extent in more than one state, this element is met. One example might be: two airplanes collide in mid-air above Virginia, one of which is carrying seventy-five passengers; the passenger plane then crashes to the ground in North Carolina, killing all on board. In this instance, a “substantial part” of the accident, the collision between the airplanes, occurred in one state, while a second “substantial part,” the collision between the plane and the earth, occurred in a second state. In such a case, this third element of the disjunctive fifth requirement would be met.²⁴

It is also noteworthy that the venue provision of the MMTJA describes the acceptable location for an MMTJA court. “A civil action in which jurisdiction of the district court is based upon section 1369 of this title may be brought in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place.”²⁵

B. The Jurisdictional Exception

The exception to the general rule of section 1369 reads as follows: “[T]he 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

²¹ *Id.* The language “substantial part” in the statute is another indication that the entire accident need not have taken place at a single discrete location.

²² 28 U.S.C.A. § 1369(a)(2).

²³ 28 U.S.C.A. § 1369(a)(3).

²⁴ Again, the accident need not have occurred at a discrete location, but rather the deaths that resulted from the accident. 28 U.S.C.A. § 1369(a).

²⁵ 28 U.S.C.A. § 1391(g) (Supp. 2004).

citizens; and (2) the claims asserted will be governed primarily by the laws of that State.”²⁶ In stark contrast to the precise, limiting language of the general rule, the exception is extremely ambiguous. The reason for this difference is that the wording of the general rule was debated and refined over a span of twenty years, while the exception was a hastily drafted addition to the statute that was inserted in an effort to make an earlier bill satisfactory to concerned members of the Senate Judiciary Committee.²⁷

The exception provides that a district court must “abstain from hearing” a case otherwise within the purview of section 1369 if two very indefinite elements are met.²⁸ The first element, that the “substantial majority” of plaintiffs and the “primary defendants” be citizens of the same state, has two possible points of contention.²⁹ There is no indication in the statute itself, or the legislative history, of how the court is to quantify a “substantial majority” of the plaintiffs. Similarly, it is unclear how the court is to determine who the “primary defendants” are.

The second element is that the claims in the case are “governed primarily by the laws of” the state that the “substantial majority” of plaintiffs and “primary defendants” are citizens of.³⁰ The concern in the Senate that led to the addition of the exception was likely that the minimal diversity requirement was too broad and needed softening. Federalism concerns may also have led to the addition of this provision. The exception, then, is probably aimed at ensuring that cases that are not of an interstate character are not automatically brought into federal court. Because of the ambiguous wording of the exception, one commentator “wonders how much litigation will result over how a ‘substantial majority’ of plaintiffs would be quantified, or who the ‘primary defendant’ is.”³¹

Section 1369 is generally aimed at single-accident, mass-disaster litigation that was previously comprised of many lawsuits filed all over the country. Thus, the most conservative reading of the statute is that the exception generally encompasses cases that do not present these problems: cases that are clearly intrastate. But, as a result of its clumsy wording, and its mandatory requirement that the federal court “abstain

²⁶ 28 U.S.C.A. § 1369(b).

²⁷ H.R. REP. NO. 107-14, at 8 (2001). “[The exception] was one of three changes proffered to the Senate in an effort to develop greater support for H.R. 2112 in the waning days of the 106th Congress.” *Id.*

²⁸ 28 U.S.C.A. § 1369(b).

²⁹ 28 U.S.C.A. § 1369(b)(1).

³⁰ 28 U.S.C.A. § 1369(b)(2).

³¹ Georgene Vairo, *An Important Act with Two Antecedents More Controversial than the Original*, NAT’L L.J., Dec. 16, 2002, at B7.

from hearing” the case, the exception could easily lend itself to complicated collateral litigation.

The first example of such litigation is *Passa v. Derderian*,³² a consolidation of five cases arising from the 2003 nightclub fire in Rhode Island that claimed the lives of 100 people and injured over 200 more.³³ “In the wake of this tragedy, numerous lawsuits have been filed throughout southern New England in both state and federal courts.”³⁴ *Passa* dealt with five of those cases, two of which were filed in the United States District Court for the District of Rhode Island, and three more that were removed from Rhode Island state court. Two of the defendants filed motions to dismiss for lack of jurisdiction with regard to the two cases originally filed in federal court, and motions to remand the other three to state court.³⁵ The *Passa* court was the first to construe the MMTJA’s jurisdictional exception.

After determining that the facts of the cases brought them within section 1369’s jurisdictional parameters and reviewing the MMTJA’s legislative history, the court addressed whether the cases fell within the statute’s exception. The court determined that subsection 1369(b) is a “mandatory abstention clause;”³⁶ if a case falls within the exception, the district court does not have jurisdiction to hear it. The court turned its attention to the first requirement of the exception, that “the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens.”³⁷ The court held that “all plaintiffs” refers to all potential plaintiffs, that is, all the parties that suffered death or injury as a result of the single-accident catastrophe (in this case, the nightclub fire), rather than just those plaintiffs before the court. This reading, the court argued, “is consistent with Congress’ desire to consolidate all cases arising from one major disaster in one federal court.”³⁸

The court determined that, of all those killed or injured in the fire, 44 percent were residents of Rhode Island, while the remaining victims were from various other states. Thus, the court concluded, “[w]hile it is true that Rhode Islanders make up the largest group of potential plaintiffs, it cannot be said that they constitute a ‘substantial majority of all plaintiffs.’”³⁹

³² *Passa v. Derderian*, 308 F. Supp. 2d 43 (D.R.I. 2004).

³³ *Id.* at 46.

³⁴ *Id.*

³⁵ *Id.* at 48.

³⁶ *Id.* at 56.

³⁷ 28 U.S.C.A. § 1369(b)(1).

³⁸ *Passa*, 308 F. Supp. 2d at 60.

³⁹ *Id.* at 61.

The court also held that “primary defendants” refers to “all defendants sued directly in a cause of action,” as opposed to “those parties sued under theories of vicarious liability, or joined for purposes of indemnification or contribution.”⁴⁰ The court determined that some of the defendants sued directly in three of the cases, the band members alleged to have caused the fire and their tour manager, were not residents of Rhode Island. Another defendant sued directly in two of the cases, Anheiser-Busch, was likewise a resident of another state. Thus, “the substantial majority of all plaintiffs” were not “citizens of a single State of which the primary defendants are also citizens.”⁴¹ Because the first requirement of the jurisdictional exception was not met, the court concluded that it had jurisdiction over the cases under the MMTJA.

C. Removal

The removal provision of the MMTJA reads:

(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court 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.⁴²

⁴⁰ *Id.* at 62.

⁴¹ *See* 28 U.S.C.A. § 1369(b)(1).

⁴² 28 U.S.C.A. § 1441(e) (Supp. 2004). Subsection 1441(e) also includes several other provisions on removal:

(1) The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection 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.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the

There are two ways a case may be removed to the MMTJA federal court under this statute. First, a plaintiff who meets the requirements of subsection 1369(a) might have chosen to file her claim in state court. Under subsection 1441(e)(1)(A), the defendant has the right to remove the case to the federal district court when it could have been filed in that court originally under section 1369.

The second way that section 1441(e) enables a defendant to remove to the MMTJA court expands the statute's reach even beyond the requirements of section 1369. Under subsection 1441(e), a defendant can remove a state case to the MMTJA federal court even when the case could not have been brought in that court originally. If the defendant is already party to an MMTJA suit, or one that could have been brought in federal court under the MMTJA, and is also party to a state court case arising from the same single-accident catastrophe, the defendant can remove the state case to the MMTJA court.

The removal provision of the MMTJA, then, allows consolidation of cases arising from the single-accident catastrophe that do not meet the requirements of section 1369. In this way, "the claims for relief subject to the [MMTJA] do not all themselves have to be claims for death, but can encompass claims for personal injury and property damage."⁴³ Furthermore, cases that do not even meet the minimal diversity requirement can be removed to federal court.

D. Intervention

The intervention provision of the MMTJA states:

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

determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

Id.

⁴³ JoEllen Lind, "Procedural Swift": *Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 742 (2004).

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.⁴⁴

Federal Rule of Civil Procedure 24(a)(1) allows any plaintiff “to intervene in an action . . . when a statute of the United States confers an unconditional right to intervene.” Subsection 1369(d) clearly confers a right to intervene. This provision of the MMTJA is another mechanism to allow for consolidation of all cases arising from a single-accident catastrophe in a single federal court, even actions that do not fit within the elements of the general jurisdictional rule.⁴⁵

E. Legislative History

The legislative history of Section 1369 spans over two decades. Legislation seeking to bring all cases stemming from mass torts into federal court was repeatedly proposed and defeated in Congress. Ten years before the passage of the MMTJA, its legislative predecessors were described as having “a phoenix-rising-from-the-ashes quality.”⁴⁶ But, with each reincarnation of multiparty, multiforum legislation, the scope of the legislation differed slightly until the MMTJA was finally passed. The choice of law issue was the most hotly debated aspect of the bills that were proposed in Congress throughout the 1980s and 1990s.⁴⁷

⁴⁴ 28 U.S.C.A. § 1369(d).

⁴⁵ At least one commentator views this liberal allowance of intervention as a possible drawback to the MMTJA:

Although it may be true that intervention is necessary to include all claims arising from the same accident in the same case, the splinter claims could make some lawsuits so complex and unwieldy that they would be unmanageable and ultimately could make courts very inefficient. In these situations, the intervening-parties provision operates as a catch-22, burdening the federal courts with one complex case in much the same way as separate actions in state and federal courts burden the entire judicial system.

Laura Offenbacher, *The Multiparty, Multiforum Trial Jurisdiction Act: Opening the Door to Class Action Reform*, 23 REV. LITIG. 177, 197 (2004).

⁴⁶ Linda S. Mullenix, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 TEX. L. REV. 1623, 1661 (1992).

⁴⁷ See, e.g., *Multiparty, Multiforum Jurisdiction Act of 1989: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong. 35-45, 65-85 (1989) (statement of the United States Department of Justice and joint statement of Robert A. Sedler and Aaron D. Twerski). Professors Sedler and Twerski continued their debate with Rep. Robert W. Kastenmeier over the choice of law proposals even after Rep. Kastenmeier left Congress. While Rep. Kastenmeier was Chairman of the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the House Committee on the Judiciary during the 1980s, he consistently championed the cause of multiparty, multiforum legislation and was the sponsor of most of the proposals during the 1980s. For their part, Professors Sedler and Twerski fought tirelessly against any choice of law provision in Rep. Kastenmeier's bills. See Robert A. Sedler & Aaron D. Twerski, *The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain*, 73 MARQ. L. REV. 76 (1989); Robert W. Kastenmeier &

"In the early 1970s, an ad hoc committee of judges, lawyers, professors, plaintiffs, defendants, and academics, formed by Judge Pearson Hall," worked specifically on legislation to give federal courts original jurisdiction in airplane accident cases.⁴⁸ The result of this group's work was a bill introduced in the 96th Congress that would have given federal courts original jurisdiction over cases arising from airplane crashes that take the lives of five or more people.⁴⁹ This bill represented an early attempt at solving the problem of multiparty, multiforum litigation resulting from single-accident, mass-disasters. At the same time, the idea of completely eliminating federal diversity jurisdiction had gained a great deal of support in Congress.⁵⁰ This movement spawned other proposals for federalizing mass-tort litigation.

In 1978, in Senate hearings during the 95th Congress, the Public Citizen Litigation Group urged the Senate Judiciary Committee to create an exception to its planned abolition of diversity jurisdiction.⁵¹ The proposal was rather simple; its notable requirements were that at least twenty-five people suffer injury as a result of a "single event, transaction, occurrence or course of conduct," that the injuries be valued at at least \$1,000 each, and that minimal diversity between the adverse parties exist.⁵² It is noteworthy that the events covered by the bill included more than mass-disaster accidents; a "single event, transaction, occurrence or course of conduct"⁵³ could include forms of mass-tort litigation beyond merely single-accident catastrophes.

The 96th Congress again considered legislation to eliminate federal diversity jurisdiction.⁵⁴ In hearings on the proposed legislation in 1979, the Justice Department recommended an exception for multi-person

Charles Gardner Geyh, *The Case in Support of Legislation Facilitating the Consolidation of Mass-Accident Litigation: A View from the Legislature*, 73 MARQ. L. REV. 535, 552 (1990).

⁴⁸ Kastenmeier & Geyh, *supra* note 47, at 552 (citing *Diversity of Citizenship Jurisdiction / Magistrates Reform—1979: Hearings on H.R. 1046 and H.R. 2202 Before the House Subcomm. on Courts, Civil Liberties, and the Admin. of Justice*, 96th Cong. 83 (1979) (statement of Rep. Danielson)).

⁴⁹ H.R. 231, 96th Cong. (1979); Kastenmeier & Geyh, *supra* note 47, at 552.

⁵⁰ See *Federal Diversity of Citizenship Jurisdiction: Hearings on S. 2094, S. 2389, and H.R. 9622 Before the Senate Subcomm. on Improvements in Judicial Mach. of the Comm. on the Judiciary*, 95th Cong. 179-80 (1978); see also Robert W. Kastenmeier & Michael J. Remington, *Court Reform and Access to Justice: A Legislative Perspective*, 16 HARV. J. ON LEGIS. 301, 314-16 (1979).

⁵¹ *Federal Diversity of Citizenship Jurisdiction: Hearings on S. 2094, S. 2389, and H.R. 9622 Before the Senate Subcomm. on Improvements in Judicial Mach. of the Comm. on the Judiciary*, 95th Cong. 180-82 (1978) (testimony of Alan B. Morrison, Director, Public Citizen Litigation Group).

⁵² *Id.* at 181-82.

⁵³ *Id.* at 181.

⁵⁴ H.R. 2202, 96th Cong. (1979); H.R. 1046, 96th Cong. (1979).

injury cases.⁵⁵ The statute proposed by the Justice Department was largely the same as that propounded by the Public Citizen Litigation Group a year earlier. The proposal applied to injuries to twenty-five people which were valued at a minimum of \$10,000 each; it was broadly worded so as to include all forms of mass-tort litigation.⁵⁶

In 1983, in the 98th Congress, the House tried again to eliminate federal diversity jurisdiction⁵⁷ by introducing legislation that was based largely on the 1979 Justice Department proposal.⁵⁸ The next proposed legislation of this nature came three years later, in the 99th Congress, and for the first time, the idea of multiparty consolidation was introduced separate from a congressional attack on federal diversity jurisdiction.⁵⁹ The 1983 and 1986 bills were essentially the same; they prescribed original jurisdiction in federal court for “any civil action arising out of a single event, transaction, occurrence, or course of conduct that results in personal injury or injury to property of twenty-five or more persons.”⁶⁰ Additionally, the bills required only minimal diversity between the adverse parties and that injuries be valued at more than \$10,000 per plaintiff.⁶¹

In 1987, the 100th Congress proposed a revised version of the 1983 and 1986 bills.⁶² Compared to the 1983 and 1986 proposals, this bill actually broadened the reach of the federal courts’ jurisdiction. Whereas the earlier bills, based in large part on the 1979 Justice Department proposal, would have given the court jurisdiction over cases “arising out of a single event, transaction, occurrence, or course of conduct,”⁶³ the 1987 bill prescribed federal original jurisdiction in cases “arising out of the same transaction, occurrence, or series of related transactions or occurrences.”⁶⁴ In this regard, the 1987 bill reverted to the 1979 Public

⁵⁵ *Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Hearings on H.R. 1046 and H.R. 2202 Before the House Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the Comm. on the Judiciary*, 96th Cong. 157-62 (1979) (statement of Daniel J. Meador, Assistant Attorney General). “Although [the Justice Dept.] support[s] abolition of the general diversity jurisdiction . . . [w]e have come to conclude that the so-called multi-person injury case should . . . be guaranteed a federal forum.” *Id.* at 158.

⁵⁶ *Id.*

⁵⁷ H.R. 3690, 98th Cong. (1983).

⁵⁸ Kastenmeier & Geyh, *supra* note 47, at 554; see H.R. 3690, 98th Cong. (1983).

⁵⁹ Kastenmeier & Geyh, *supra* note 47, at 554; see H.R. 4315, 99th Cong. (1986).

⁶⁰ Kastenmeier & Geyh, *supra* note 47, at 554.

⁶¹ *Id.*

⁶² *Id.* at 556; *Court Reform and Access to Justice Act: Hearings on H.R. 3152 Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary*, 100th Cong. 913 (1987-88). The multiparty, multiforum provision was Title IV of the bill, which was a broad bill called the Court Reform and Access to Justice Act of 1987.

⁶³ Kastenmeier & Geyh, *supra* note 47, at 554.

⁶⁴ *Id.* at 556.

Citizen proposal in that it applied to virtually all mass-tort litigation, rather than being limited to that arising out of a single accident. In hearings on the bill, the Justice Department expressed its concern over the breadth of the bill's reach and stated its position that legislation of this kind should be limited to single-accident litigation.⁶⁵ The framers of the bill deferred to the Justice Department's wishes and a second version of the bill in the 100th Congress was so limited.⁶⁶ The revised 1987 bill again required twenty-five plaintiffs with minimal diversity existing between the adverse parties, but the amount in controversy per plaintiff was increased to \$50,000.⁶⁷

In 1989, in the 101st Congress, the 1987 bill was recycled verbatim as the Multiparty, Multiforum Jurisdiction Act of 1989.⁶⁸ Although the 1989 bill "received the unqualified support of the Judicial Conference and the Department of Justice,"⁶⁹ it was heavily criticized by several commentators.⁷⁰ Criticism of the bill was primarily aimed at the choice of law provision, which is discussed in Part III. Commentators also criticized the bill's breadth by claiming that it applied to property damage and torts that are not single-accident mass-disasters.⁷¹ In response to these concerns, the desired changes were made and the bill was passed in the House; the Senate rejected it, however, claiming that it did not have enough time left in the session to fully study the implications of the bill.⁷²

In 1991, a bill identical to the 1989 bill⁷³ was introduced in the 102nd Congress.⁷⁴ The House again passed the bill and sent it to the Senate. This time, the Senate held subcommittee hearings on the bill, but let it die without bringing it to a vote.⁷⁵ The text of the 1991 bill was reintroduced in the House in 1993 in the 103rd Congress,⁷⁶ but never emerged from the subcommittee. In the 105th Congress, the same legislation was reintroduced in the House and passed as part of the

⁶⁵ *Id.* at 557.

⁶⁶ *Id.*

⁶⁷ *Id.* at 556.

⁶⁸ *Id.* at 558; H.R. 3406, 101st Cong. (1989).

⁶⁹ Kastenmeier & Geyh, *supra* note 47, at 558.

⁷⁰ *Multiparty, Multiforum Jurisdiction Act of 1989: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong. 65-85 (1989); *see also* Sedler & Twerski, *supra* note 47.

⁷¹ Kastenmeier & Geyh, *supra* note 47, at 559.

⁷² *Id.*

⁷³ H.R. 2450, 102d Cong. (1991).

⁷⁴ H.R. REP. NO. 102-373, at 5 (1991).

⁷⁵ Robert J. Witte, . . . *Or Would You Rather Have What's Behind Door Number Two? Uniform Choice of Law Proposals: Big Deal of the Day or Just Another Zonk?*, 59 J. AIR L. & COM. 617, 647 (1994).

⁷⁶ H.R. 1100, 103d Cong. (1993).

Judicial Reform Act of 1998.⁷⁷ But, this bill too was allowed to die in Senate subcommittee.

In the 106th Congress in 1999, the legislation that had previously been proposed in the 102nd, 103rd, and 105th Congresses, was introduced in the House as part of a bill⁷⁸ with another purpose—reversal of the Supreme Court’s decision in *Lexecon, Inc. v. Milberg Weiss*.⁷⁹ In *Lexecon*, the Court held that that transferee courts acting under 28 U.S.C. § 1407, the multidistrict-litigation transfer statute, may not transfer multidistrict cases to themselves based on § 1404(a).⁸⁰ Since federal courts had been doing this for decades, thereby consolidating multiparty, multiforum cases, Congress sought to codify that action for multidistrict cases generally.⁸¹ Additionally, it again tried to enact legislation that would give the courts original jurisdiction over single-accident, mass-disaster cases.⁸² Again, though, the Senate was not completely satisfied with the bill, so the House made three important concessions in an effort to get the Senate to pass it.⁸³ First, an exception to the minimal diversity provision was added:⁸⁴ the federal court would refrain from hearing cases in which a “substantial majority” of the plaintiffs and the “primary defendants” are citizens of the same state and the case is “primarily” governed by state law.⁸⁵ This language is the same as the exception in section 1369. Second, the amount in controversy requirement was raised from \$75,000 to \$150,000.⁸⁶ The reason for these two changes was that they made “it more difficult to file or remove to Federal court.”⁸⁷

The third change was crucial: the House completely removed from the bill the choice of law provision.⁸⁸ The only rationale for this change on record is that “[t]he choice of law section was thought to confer too much discretionary authority on district judges to select the relevant law that would apply in a given case.”⁸⁹ Every version of this legislation since the late 1970s had contained a choice of law provision, and the choice of law standard had been the most hotly debated aspect of the various bills

⁷⁷ H.R. REP. NO. 106-276, at 7 (1999).

⁷⁸ H.R. 2112, 106th Cong. (1999).

⁷⁹ *Lexecon, Inc. v. Milberg Weiss*, 523 U.S. 26 (1998).

⁸⁰ *See Vairo, supra* note 31.

⁸¹ H.R. 2112, 106th Cong. § 2 (1999).

⁸² H.R. 2112, 106th Cong § 3 (1999).

⁸³ H.R. REP. NO. 107-14, at 8 (2001).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

in the hearings and in the academic literature. But, “in an effort to develop greater [Senate] support for H.R. 2112 in the waning days of the 106th Congress,” the House simply eliminated the choice of law provision completely.⁹⁰ The changes apparently had no effect, however, as the bill still did not pass.

The 1999 bill was recycled once again in the 107th Congress as the Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001.⁹¹ The House passed the 2001 bill, although it was apparently still not satisfactory to the Senate as it died in committee. Before the end of the 107th Congress, however, language substantially similar to the 2001 bill was added to the 21st Century Department of Justice Appropriations Authorization Act.⁹² The language of the 2001 bill was trimmed even more, completely dropping the amount in controversy provision.⁹³ Furthermore, the number of persons requirement, which had remained twenty-five for a number of years, was increased to seventy-five.⁹⁴ In its newer form, the bill was made one section of the much larger Appropriations Act and was passed “with virtually no opposition” to become the new section 1369.⁹⁵

III. CHOICE OF LAW UNDER THE MMTJA

Because the MMTJA does not address the question of which state’s substantive law applies to the cases brought into the single federal court, the court must apply the traditional federal choice of law approach.

A. *Conflict of Laws in Federal Court*

When a federal court is faced with a case in which its jurisdiction is based on diversity of citizenship, the case often presents a thorny issue for the court as to which state’s substantive law applies to the conflict. The states have their own rules for deciding whose law applies.⁹⁶ In federal diversity cases, the court must apply the choice of law rule of the state in which the federal court sits.⁹⁷ In cases transferred from one federal court to another, however, the transferee court must apply the conflicts of law rule of the transferor court, the court in which the case

⁹⁰ *Id.*

⁹¹ H.R. 860, 107th Cong. (2001).

⁹² H.R. 2215, 107th Cong. § 11020 (2002).

⁹³ Compare H.R. 860, 107th Cong. (2001), with 28 U.S.C.A. § 1369.

⁹⁴ 28 U.S.C.A. § 1369.

⁹⁵ Vairo, *supra* note 31.

⁹⁶ GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE § 7.05 (3d ed. 2002).

⁹⁷ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

was originally brought.⁹⁸ The purpose of these rules is to limit, as much as possible, forum shopping. The goal of the Supreme Court's conflict of law jurisprudence is to ensure that a plaintiff is judged by the same substantive tort law regardless of whether she files in state or federal court.⁹⁹

The states employ a variety of conflict of laws rules. Furthermore, individual state courts often use a mix of theories, and the exact mix is often inconsistent throughout the case law in the same jurisdiction.¹⁰⁰ As a result, simply determining what a state's conflict of laws rule is, and how it works, can be a difficult task for a federal court.

It is important to keep in mind the nature of MMTJA litigation. Section 1369 is limited to litigation resulting from single-accident catastrophes like airplane crashes or building collapses.¹⁰¹ A catastrophic event within the purview of the MMTJA will almost certainly result in lawsuits by hundreds of plaintiffs against a handful of defendants. By applying all the implicated state choice of law rules, the court will have to determine what state's substantive law each choice of law rule points to, and apply that substantive law to that particular plaintiff's case against the common defendants. This analysis must be done with regard to each state where a complaint was filed, and the state where the federal court sits for the plaintiffs who originally filed in the MMTJA court. The choice of law determination must also be made individually with regard to each issue in the case.

B. Choice of Law under the MMTJA

Throughout its legislative history, the main goals of the MMTJA were to increase efficiency in single-accident catastrophe cases by eliminating duplicative liability determinations in various state and federal courts, and to increase fairness through consistency of results. The repeated attempts to include a federal choice of law rule in the

⁹⁸ *Ferens v. John Deere Co.*, 494 U.S. 516, 532 (1990); *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964).

⁹⁹ *Guar. Trust Co. v. York*, 326 U.S. 99, 109 (1945).

[I]n all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.

Id.

¹⁰⁰ WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *UNDERSTANDING CONFLICT OF LAWS* 270 (3d ed. 2002). "Four or five theories are in vogue among the various states, with many decisions using – openly or covertly – more than one theory. Inconsistency between the theoretical underpinnings of decisions in the same jurisdiction is also common" *Id.*

¹⁰¹ The statute requires that the litigation be the result of a single accident in a single location that took the lives of at least seventy-five people. 28 U.S.C.A. § 1369(a).

MMTJA were in keeping with these goals. The choice of law problems that can attend consolidated mass-tort cases are well-documented. In its current form, the MMTJA's usefulness in achieving its goals of efficiency and fairness is tempered by the unresolved complexity of the choice of law issue.

The MMTJA has been likened to "a vacuum cleaner" that "can suck up all of the cases arising out of" a single-accident catastrophe "regardless of where filed" and deposit them in a single federal court.¹⁰² The cases that wind up in a single federal court under section 1369 get there in one of four ways. First, a case may be filed in the MMTJA court based on the statute's grant of original jurisdiction over cases that meet its requirements.¹⁰³ Second, a case may be removed to the MMTJA court from state court under the statute's liberal removal provision.¹⁰⁴ Third, a party may intervene in an already existing case under the MMTJA's intervention provision.¹⁰⁵ Fourth, a case may be transferred from the federal court in which it was originally filed to the MMTJA court under 28 U.S.C. § 1404(a) or § 1407.¹⁰⁶

In a case that is in federal court based on the court's diversity jurisdiction, the court is required to apply the choice of law rule of the state in which it sits, the forum state.¹⁰⁷ Presumably, this rule applies in cases originally filed in federal court based on section 1369's requirement of "minimal diversity."¹⁰⁸ The drafters assumed that this requirement of minimal diversity was sufficient to invoke the federal courts' diversity jurisdiction.

In cases that are removed to federal court, the *Klaxon* rule generally requires the court to apply the choice of law rule of the forum state.¹⁰⁹ Removal under the MMTJA is unlike conventional removal from state to federal court, however. Under the traditional rules of removal, a defendant cannot remove a case to federal court based on diversity jurisdiction if the plaintiff chose to file in state court in the defendant's

¹⁰² Adomeit, *supra* note 12, at 247; see also Lind, *supra* note 43, at 742 (discussing how the removal provision enables the MMTJA to "function as a kind of vacuum cleaner").

¹⁰³ 28 U.S.C.A. § 1369(a).

¹⁰⁴ 28 U.S.C. § 1441(e).

¹⁰⁵ 28 U.S.C.A. § 1369(d).

¹⁰⁶ 28 U.S.C. § 1404(a) (2000). Under 28 U.S.C. § 1369(e), a district court in which an MMTJA action is pending must notify the multidistrict litigation panel, which has the power to transfer cases to a multidistrict litigation court under 28 U.S.C. § 1407.

¹⁰⁷ *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3 (1975); *Klaxon Co. v. Stentor Elec. Mfg.*, 313 U.S. 487, 496 (1941).

¹⁰⁸ 28 U.S.C.A. § 1369(a).

¹⁰⁹ *WRIGHT ET AL.*, *supra* note 11, at § 3723; see also *Vestar Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 960 (9th Cir. 2001) (applying California law to a case removed from a California state court to a U.S. district court in California).

home state.¹¹⁰ The reason usually given for this limitation is that removal exists to make federal court as available to the defendant as it is the plaintiff. In this way, the defendant can escape local bias if the plaintiff decides to sue in her own home state court. When the plaintiff brings the suit in state court in the defendant's home state, the defendant has no need to seek a more neutral forum.¹¹¹ There is no such limitation in the MMTJA removal provision. Subsection 1441(e) allows a defendant to remove cases to federal court even when the plaintiff filed in the defendant's home state court.¹¹² Beyond that, there is really no need for even minimal diversity between the adverse parties at all because the MMTJA enables a defendant to remove even cases that could not have been brought under the MMTJA originally.¹¹³ Cases removed under the MMTJA are removed to "the district court . . . for the district and division embracing the place where the action is pending."¹¹⁴ If that court keeps the case under the MMTJA, it must apply the choice of law rule of the forum state. If, however, the case is transferred under 28 U.S.C. § 1404 or § 1407, the court to which it is transferred must apply the choice of law rule of the transferor state.¹¹⁵

In cases in which a plaintiff intervenes, the choice of law rule by which the court is bound depends on how the case originally ended up in federal court. The court is bound by the choice of law rule of the forum state in diversity cases, and by that of the transferor forum in transferred cases. Like the removal provision, the MMTJA's intervention provision allows for cases in federal court in which there is not even

¹¹⁰ 28 U.S.C. § 1441(b).

¹¹¹ WRIGHT ET AL., *supra* note 11, at § 3723.

¹¹² 28 U.S.C.A. § 1441(e)(1)(A) (allowing removal of any action that "could have been brought in a United States district court under section 1369").

¹¹³ 28 U.S.C.A. § 1441(e)(1)(B) allows removal if:

the defendant is a party to an action which is or could have been brought . . . 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.

¹¹⁴ 28 U.S.C.A. § 1441(e)(1).

¹¹⁵ *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964) (holding that, in cases transferred under 28 U.S.C. § 1404(a), the court must apply the choice of law rule of the transferor forum); *see also* *Ferens v. John Deere Co.*, 494 U.S. 516 (1990). 28 U.S.C. § 1407 empowers the multidistrict litigation panel to transfer cases from one federal court to another for consolidation. Federal courts have held that when this occurs, the rule of *Van Dusen* applies, requiring the transferee court to apply the choice of law rule of the transferor forum. *See, e.g., In re Air Crash Disaster at Boston, Mass.* on July 31, 1973, 399 F. Supp. 1106, 1119-21 (D. Mass. 1975); *Stirling v. Chem. Bank*, 382 F. Supp. 1146, 1150 n.5 (S.D.N.Y. 1974); Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 552 (1996).

minimal diversity between the adverse parties.¹¹⁶ Thus, even if the plaintiff has no connection to the forum, if she has a claim arising from the single-accident catastrophe that fostered the suit, she can intervene and will be subject to the substantive law as determined by the choice of law rule of the forum or transferor state.

Finally, as was noted previously, when a case is transferred to a federal court, the court must apply the choice of law rule of the transferor forum. Subsection 1369(e) requires an MMTJA court to “promptly notify the judicial panel on multidistrict litigation.”¹¹⁷ This requirement is apparently designed “to facilitate the transformation of an [MMTJA] matter into an MDL matter under 28 U.S.C. § 1407.”¹¹⁸ Under section 1407, the multidistrict litigation panel has the power to transfer various cases arising from the same facts to a single federal court for consolidation.¹¹⁹ This transfer can be initiated by the panel or upon motion by one of the parties in the case to be transferred.¹²⁰ Thus, when a federal court has jurisdiction over a case based on the MMTJA, it must notify the multidistrict litigation panel, which could presumably transfer other federal cases that arose from the same single-accident catastrophe to the MMTJA court. The cases transferred to the MMTJA court under section 1407, or 1404(a), would be governed by the substantive law selected by the choice of law rule of the transferor forum.

C. The Need for a Single Source of Law

Two of the MMTJA’s stated goals are hampered by the lack of a choice of law provision—“fairness and judicial efficiency.”¹²¹ A number of commentators have explained why a single choice of law rule is uniquely necessary for the MMTJA to improve fairness and efficiency in single-accident catastrophe cases.

The problem of fairness arises because all of the litigants in a MMTJA case were, by definition, involved in the same single-accident catastrophe. Their cases have been statutorily consolidated for a single determination of liability, yet that determination can lead to varying

¹¹⁶ 28 U.S.C.A. § 1369(d) (allowing for intervention by “any person with a claim arising from the accident . . . even if that person could not have brought an action in a district court as an original matter”).

¹¹⁷ 28 U.S.C.A. § 1369(e).

¹¹⁸ Lind, *supra* note 43, at 743.

¹¹⁹ 28 U.S.C. § 1407(a).

¹²⁰ 28 U.S.C. § 1407(c).

¹²¹ H.R. REP. NO. 107-14, at 28 (2001) (statement of Rep. Sensenbrenner, author of the language of section 1369); *see also* H.R. REP. No. 101-515, at 4 (1990) (explaining that the purpose for the 1989 bill was to “improve[] the fairness and efficiency of the process by which [complex, multidistrict] cases are resolved”).

substantive results for the individual litigants. Throughout the legislative history of the MMTJA, commentators and judges pointed out the unfairness of disparate substantive results for identically situated litigants.¹²² The current choice of law system can lead to such a result in non-MMTJA litigation, but MMTJA plaintiffs are in a unique situation that warrants “unified recovery standards.”¹²³ Plaintiffs in MMTJA litigation always share a factual commonality not necessarily present in other types of litigation.¹²⁴ Also, fairness calls for a single choice of law rule in MMTJA litigation because of the inherent interstate character of this type of litigation.¹²⁵ Throughout the legislative history of the MMTJA, there were various proposals for a single choice of law rule in MMTJA litigation to ensure that the determinations of liability lead to the same substantive result for each litigant.

In addition to ensuring fairness of result, another major reason for the enactment of the MMTJA was to create a more efficient system for the litigation of single-accident catastrophe cases.¹²⁶ The MMTJA does solve the problem of duplicative “trial[s] of the same liability issues in both state and federal court.”¹²⁷ But, absent a choice of law provision, courts will become bogged down by trying to determine the conflict of laws rule of each jurisdiction implicated.¹²⁸ All of the time and money spent on choice of law litigation that is necessarily attenuated from the

¹²² Kastenmeier & Geyh, *supra* note 47, at 565-66; Reavley & Wesevich, *supra* note 1, at 23; Paul S. Bird, *Mass Tort Litigation: A Statutory Solution to the Choice of Law Impasse*, 96 YALE L.J. 1077, 1087-88 (1986-1987). *But see* Robert A. Sedler & Aaron D. Twerski, *State Choice of Law in Mass Tort Cases: A Response to “A View from the Legislature,”* 73 MARQ. L. REV. 625, 635-36 (1990); Kramer, *supra* note 115.

¹²³ Bird, *supra* note 122, at 1088.

¹²⁴ *Id.* at 1087.

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.

Id.

¹²⁵ Reavley & Wesevich, *supra* note 1, at 22. “[T]he number of parties, combined with the amount of money at stake, in single-accident mass-tort cases gives these cases a uniquely national dimension.” *Id.*

¹²⁶ H.R. REP. NO. 107-14, at 28 (2001).

¹²⁷ *Multidistrict, Multiparty, Multiforum Jurisdiction Act of 1999 and Federal Courts Improvement Act of 1999: Hearing Before the House Subcomm. on Courts and Intellectual Prop. of the Comm. on the Judiciary*, 106th Cong. at 138 (2000) (statement of John F. Nangle, Chairman, Judicial Panel on Multidistrict Litigation and United States District Judge, Southern District for Georgia).

¹²⁸ Kastenmeier & Geyh, *supra* note 47, at 541-42.

merits of the case would be saved if Congress enacted a single choice of law rule for federal courts in MMTJA litigation.¹²⁹

Because the MMTJA was enacted without a choice of law provision, the debate over such a provision should resume and result in enactment of a choice of law statute to supplement it. It is thus necessary to consider the various single choice of law provisions that were proposed throughout the legislative history of the MMTJA.

D. Proposed Single Source of Law Provisions

Throughout the MMTJA's legislative history, there were a number of choice of law provisions proposed in the legislation and in the academic literature. Some of the proposals would have enabled the court to select more than one source of law to apply to different parties.¹³⁰ But multiple sources of substantive law would cut against the MMTJA's goals of fairness and efficiency. Thus, a choice of law provision should direct the court to apply a single source of substantive law to all of the parties. In fact, the idea of a single choice of law rule enjoyed widespread support throughout the MMTJA's legislative history.¹³¹ However, there was disagreement among commentators and lawmakers on how the court should select the source of law.

Several proposals simply directed the court to choose a single source of law, without giving any guidance on how the selection should be made. Other proposals offered the court a list of factors to consider in selecting the single source of law. And, several proposals directed the court as to which implicated jurisdiction's law to apply to the cases.

¹²⁹ *But see* Kramer, *supra* note 115, at 567-69 (admitting that the present system "makes consolidated litigation more expensive" but arguing that the choice of law determination is itself substantive, rather than merely "a matter of procedure," and therefore the added cost is acceptable).

¹³⁰ The 1987 bill included a choice of law provision giving the MMTJA court the power to choose the "source or sources" of substantive law, and including a list of ten factors to aid in the determination. Kastenmeier & Geyh, *supra* note 47, at 592 nn.72, 76. The 1991 bill contained a choice of law provision that allowed the court to apply the law of more than one jurisdiction to different cases and parties "[i]f good cause is shown in exceptional cases." H.R. REP. 102-373, at § 6, 102d Cong. (1991). The provision also included a list of five factors to aid in the choice of law determination. *Id.* This choice of law provision remained in the 1993 bill, H.R. 1100, 103d Cong. (1993), the 1998 bill, H.R. 1252, 105th Cong. (1998), and the 1999 bill, H.R. 2112, 106th Cong. (1999). It was stricken from the 1999 bill and no choice of law provision was included in later versions of the MMTJA.

¹³¹ Kramer, *supra* note 115, at 547 (1996). "Consensus is increasingly rare in today's legal world. . . . Yet consensus there is—consensus, at least, that ordinary choice-of-law practices should yield in suits consolidating large numbers of claims and that courts should apply a single law in such cases." *Id.*

1. Source of Law Selected at the Court's Discretion

The 1979 Justice Department proposal included a choice of law provision:

[I]n order to ensure consistent results, the transferee court shall determine the source of the substantive law. The same substantive law shall be applied to all cases . . . in the transferee court, and . . . the transferee court shall not be bound by the choice of law rules which . . . would otherwise apply in cases governed by state law.¹³²

The provision would also have enabled the district court to ignore the choice of law rule of the state in which it sits, contrary to normal diversity jurisdiction practice.¹³³ But, it should be remembered that this bill as a whole would have completely eliminated federal diversity jurisdiction.¹³⁴

The Justice Department explained its inclusion of this provision as a means of guarding against the possibility of the federal court applying different rules of law to different parties involved in the litigation.¹³⁵ As for the fact that the provision would have given the court no guidance on how to select the source of law, the Justice Department explained, “[i]t is expected that the transferee court shall make this choice based upon all the facts and circumstances available to it.”¹³⁶

The 1983 and 1986 bills included identical choice of law provisions, which provided that “the transferee court shall determine the source of the substantive law,” and “[t]he same substantive law shall be applied to all cases.”¹³⁷ The bills completely freed the federal court from the choice of law rules of any one state.¹³⁸ They would have given the court complete authority to decide which state’s law would apply, with the only limit being that it had to choose one source of substantive law to be applied to every case.

¹³² *Diversity of Citizenship Jurisdiction / Magistrates Reform – 1979: Hearings before the Subcomm. On Courts, Civil Liberties and the Admin. of Justice on H.R. 1046 and H.R. 2202, 96th Cong. 159 (1979).*

¹³³ *Id.* Also in the 96th Congress, the Senate Judiciary Committee considered legislation to eliminate federal diversity jurisdiction. S. 679, 96th Cong. (1979). In committee hearings on the bill, an exception for multi-person injury cases was proposed; however, the proposal contained no choice of law provision. *Jurisdictional Amendments Act of 1979, S. 679: Hearings on S. 679 Before the Senate Comm. on the Judiciary, 96th Cong. 179 (1979).*

¹³⁴ See *supra* text accompanying notes 51-56.

¹³⁵ *Diversity of Citizenship Jurisdiction / Magistrates Reform – 1979: Hearings before the Subcomm. On Courts, Civil Liberties and the Admin. of Justice on H.R. 1046 and H.R. 2202, 96th Cong. 161 (1979).*

¹³⁶ *Id.*

¹³⁷ Kastenmeier & Geyh, *supra* note 47, at 555.

¹³⁸ *Id.*

Although these approaches would ensure that all parties are governed by the same substantive law, they would not necessarily increase judicial efficiency. Given the enormous discretion they give to the MMTJA court, the various federal circuits would undoubtedly develop their own approaches to the selection problem. These different approaches would likely have varying degrees of increased efficiency in comparison to the current system.

2. Statutory Guidance on Selecting the Source of Law

The 1989 bill, as introduced, included a choice of law provision that would have enabled the court to select multiple sources of substantive law to be applied to different parties.¹³⁹ In subcommittee hearings on the bill, however, there was contentious debate over the merits of the choice of law provision.¹⁴⁰ The result of the hearing was an amended bill with a new choice of law provision that required the district court to determine a single source of substantive law to be applied to all cases in the litigation.¹⁴¹ The bill provided that the court would “not be bound by the choice of law rules of any State,”¹⁴² and it included a list of eleven factors for the court to consider in selecting the source of substantive law:

- (1) the law that might have governed if the [new federal jurisdiction] did not exist;
- (2) the forums in which the claims were or might have been brought;
- (3) the location of the accident on which the action is based and the location of related transactions among the parties;
- (4) the place where the parties reside or do business;
- (5) the desirability of applying uniform law to some or all aspects of the action;
- (6) whether a change in applicable law in connection with removal or transfer of the action would cause unfairness;
- (7) the danger of creating unnecessary incentives for forum shopping;
- (8) the interest of any jurisdiction in having its law apply;
- (9) any reasonable expectation of a party or parties that the law of a particular jurisdiction would apply or would not apply;
- (10) any agreement or stipulation of the parties concerning the applicable law; and

¹³⁹ *Multiparty, Multiforum Jurisdiction Act of 1989: Hearing Before the House Subcomm. on Courts, Intellectual Prop., and the Admin. of Justice of the Comm. on the Judiciary*, 101st Cong. 35-45, 65-85 (1989) (statement of the U.S. Department of Justice and Joint Statement of Robert A. Sedler and Aaron D. Twerski).

¹⁴⁰ *Id.*

¹⁴¹ H.R. 3406, § 6, 101st Cong. (1989).

¹⁴² *Id.*

(11) whether a change in applicable law in connection with removal or transfer of the action would cause unfairness.¹⁴³

The federal court would not have been required to apply the eleven factors. The purpose of the factors was not to “attempt to legislate a single governing law or methodology” for how to select the source of substantive law.¹⁴⁴ Rather, the factors were included to show the court the issues that “may be relevant in [its] choice of law determinations,” while at the same time “leaving this complex matter to judicial development.”¹⁴⁵

In hearings on the 1989 bill, this choice of law approach was vehemently attacked by professors Robert Sedler and Aaron Twerski.¹⁴⁶ Sedler and Twerski were primarily concerned by the fact that the provision directed the court to select a single source of substantive law, which they opposed on federalism grounds.¹⁴⁷ They further argued that, due to the constitutional requirement that a jurisdiction must have sufficient contacts with the litigation for its law to be applied, this choice of law provision would almost always lead the court to select the law of the jurisdiction in which the accident occurred or the jurisdiction in which the defendant is alleged to have committed the tortious act.¹⁴⁸ They found these options unacceptable because such a rule could result in a plaintiff who would have recovered under her state conflict of laws rule not recovering (or recovering less) under the law applied by the place of the injury or place of the wrong.

According to the 1989 bill’s sponsor, “the ‘unfairness’ associated with depriving a party of the protection of state laws to which it might otherwise be entitled must be balanced against the unfairness associated with applying different sources of law to identically situated accident victims.”¹⁴⁹ The Justice Department took the position that allowing one plaintiff to recover, while denying recovery to another, is a “far more anomalous and inequitable [result]” than the one mandated by the 1989 bill’s choice of law provision.¹⁵⁰ Further, the Justice Department argued that, even if the court was limited to the law of the place of the injury or place of the wrong, “the accompanying gains in clarity, certainty and

¹⁴³ H.R. 3406, § 6(a), 101st Cong. (1989).

¹⁴⁴ H.R. REP. NO. 101-515, at 13 (1990).

¹⁴⁵ *Id.*

¹⁴⁶ *Multiparty, Multiforum Jurisdiction Act of 1989*, 101st Cong. 65 (1989) (joint statement of Robert A. Sedler and Aaron D. Twerski).

¹⁴⁷ *Id.* at 75-78.

¹⁴⁸ *Id.* at 78-85.

¹⁴⁹ Kastenmeier & Geyh, *supra* note 47, at 565-66.

¹⁵⁰ *Multiparty, Multiforum Jurisdiction Act of 1989*, 101st Cong. 43 (1989) (letter from Bruce C. Navarro, Acting Assistant Attorney General to Rep. Robert W. Kastenmeier, sponsor of the 1989 bill).

predictability would far outweigh the disadvantages.”¹⁵¹ Thus, in the Justice Department’s view, the choice of law provision in the 1989 bill would further the policy objective of ensuring fairness among the parties and greatly increase judicial efficiency in single-accident catastrophe cases.

3. Statutorily Mandated Source of Law

In the hearings on the 1989 bill, the Justice Department conceded that that choice of law provision, due to constitutional constraints, would often reduce the court’s options for the source of substantive law to the place of the injury or place of the wrong.¹⁵² In addition to defending the 1989 bill’s choice of law provision, the Justice Department proposed that Congress simply codify the place of the injury rule or place of the wrong rule for single-accident catastrophe litigation.

In the early 1990s, Judge Thomas M. Reavley lobbied for the place of the injury choice of law rule in single-accident catastrophe litigation.¹⁵³ Judge Reavley’s proposed rule read: “Actions that are, or could have been brought, in whole or in part, under section [1369] of this title are governed by the substantive law of the State where the greatest number of natural persons [have died] from an ‘accident’ as defined in section [1369(c)(4)].”¹⁵⁴ Since the entire MMTJA litigation is the result of a single accident, the substantive law of the state in which the accident occurred is the law that would be applied to all cases.

A place of the wrong rule, on the other hand, might require that multiple sources of law be applied in MMTJA litigation because there will virtually always be multiple defendants. Under this rule, each defendant would be judged by the substantive law of the state in which it is alleged to have committed the tort. For example, if an airplane crashes in Virginia, any action against the airline for the negligence of the pilot would be governed by Virginia tort law because that is the state where the pilot was allegedly negligent. But actions against the manufacturer of a defective part that contributed to the crash would be governed by the law of the state where the part was manufactured.

In the hearings on the 1989 bill, the Justice Department argued that there are several advantages to a rule that mandates the source of

¹⁵¹ *Id.* at 42.

¹⁵² *Id.* at 41.

¹⁵³ Reavley & Wesevich, *supra* note 1; *The Multiparty, Multiforum Jurisdiction Act of 1991: Hearing Before the House Subcomm. on Courts and Admin. Practice of the Comm. on the Judiciary*, 102d Cong. 174 (statement of Judge Reavley).

¹⁵⁴ *The Multiparty, Multiforum Jurisdiction Act of 1991: Hearing Before the House Subcomm. on Courts and Admin. Practice of the Comm. on the Judiciary*, 102d Cong., at 177 (statement of Judge Reavley).

substantive law—fairness and increased efficiency.¹⁵⁵ It argued that fairness demands a single choice of law rule because “such a rule would produce equal treatment of identical claims.”¹⁵⁶ Also, because single-accident catastrophe litigation is inherently interstate in character, the choice of substantive law should not be dictated by the domicile of each individual plaintiff.¹⁵⁷ And a place of the injury or place of the wrong rule would be more efficient than the current choice of law system because it would produce “greater certainty, predictability and ease of application,” thus enabling plaintiffs to “receive prompt compensation for their injuries, with a minimum of litigating costs.”¹⁵⁸

Besides place of the injury and place of the wrong, there was one other notable proposal for a mandatory choice of law rule in single-accident catastrophe litigation. Robert S. Bird proposed the following rule:

[T]he court shall: i) consider the laws of only those states with contacts to the mass tort such that a defendant could reasonably have foreseen it would be subject to those laws; ii) select from among the laws available the one most favorable to the plaintiffs; and iii) apply the same law to the claims of similarly situated parties.¹⁵⁹

This rule would be fair in that a single standard would be applied to all parties. But it is unclear whether such a rule would increase efficiency because the court would still be required to address the conflict of laws rule of each state implicated in the litigation.

IV. CONCLUSION

One of the stated goals of the MMTJA was to create a system for single-accident catastrophe litigation that is fairer than the previous system of fractured litigation. Another goal of the MMTJA was to increase efficiency in single-accident catastrophe litigation. The MMTJA solves the problem of duplicative “trial[s] of the same liability issues in both state and federal court.”¹⁶⁰ But once the various cases arising out of the single-accident catastrophe are brought together in a single federal court, the court must still apply different substantive legal standards to

¹⁵⁵ *Multiparty, Multiforum Jurisdiction Act of 1989*, 101st Cong. 43-45 (1989) (letter from Bruce C. Navarro, Acting Assistant Attorney General to Rep. Robert W. Kastenmeier, sponsor of the 1989 bill).

¹⁵⁶ *Id.* at 43.

¹⁵⁷ *Id.* at 43-44.

¹⁵⁸ *Id.* at 44.

¹⁵⁹ Bird, *supra* note 122, at 1094.

¹⁶⁰ *Multidistrict, Multiparty, Multiforum Jurisdiction Act of 1999 and Federal Courts Improvement Act of 1999: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 106th Cong. 138 (2000) (statement of John F. Nangle, Chairman, Judicial Panel on Multidistrict Litigation and United States District Judge, Southern District of Georgia).

the various parties' cases. Even though the liability issue is determined in one federal court, the legal results might be entirely different for different parties injured in the same accident.

Congress should enact a choice of law statute that requires the court in MMTJA litigation to apply a single legal standard to all parties in the litigation. Such a rule would ensure fairness as all parties would receive the same result and increase efficiency as the court would not be forced to discover and apply the conflict of laws rules of all implicated jurisdictions. As to how the rule should require the court to select the single source of law, a good place to start is to reconsider the various choice of law provisions that were proposed throughout the MMTJA's legislative history.

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