Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts

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Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts

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* The best is the enemy of the good. Voltaire

I. Introduction

Large-scale litigation—related cases involving numerous parties and spanning multiple forums—ranges from relatively simple multiparty accidents to vastly complex mass torts arising from exposure to harmful products or substances such as asbestos. Such litigation poses serious problems for the court system, the parties, and society at large. These problems are not susceptible to broad brush treatment; different categories of litigation create different kinds of problems calling for different solutions. For example, litigation brought about by a single accident, though it may give rise to numerous claims, calls for treatment different

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The views expressed by the authors are their own and do not necessarily reflect the position of the Federal Judicial Center or its Board.

from litigation involving claims based on exposure to a hazardous substance over a period of time. But the differences notwithstanding, all large-scale litigation has one common consequence: duplicative activity that wastes scarce resources, clogs court dockets, causes delays, and often produces divergent decisions on nearly identical claims, leading to frustration of victims' rights to compensation, excessive transaction costs, and unfairness and uncertainty.  

The scope and volume of large-scale litigation are enormous and continue to grow. Asbestos claims offer an illustration. The Judicial Panel on Multidistrict Litigation has transferred more than 40,000 asbestos actions for consolidation in the Eastern District of Pennsylvania. In addition, nearly 130,000 other asbestos cases were estimated to be pending in state courts as of 1992.  

Another dramatic illustration is the breast implant litigation. From June 25, 1992 through September 30, 1994, the Panel transferred roughly 9,600 federal cases to the Northern District of Alabama. Meanwhile, more than 15,000 cases were pending in state courts, and thousands more are anticipated.  

The asbestos and breast implant cases are examples of litigation involving a very large number of claims arising out of a common set of facts—a scenario that is occurring with increasing frequency. In the Agent Orange litigation, for example, the court certified a class of more than two million members. Claims such as those based on the effects of smoking, exposure to substances such as lead and L-Tryptophan, and exposure to

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2. See AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT 7 (1994) [hereinafter COMPLEX LITIGATION PROJECT] (criticizing large-scale litigation for its costs, delays, and unfair results); William W Schwarzer et al., Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts, 78 VA. L. REV. 1689, 1692 & nn.9-14 (1992) (discussing how duplicative proceedings cause additional expense and delay, limit the compensation eventually received by plaintiffs, and sometimes lead to inconsistent results).

3. The Panel is empowered to transfer federal court cases for coordinated pretrial proceedings when there are multiple cases with common questions of fact. 28 U.S.C. § 1407(a) (1988). See infra notes 29-30 and accompanying text.


5. Memorandum from Heidi Green, Senior Staff Associate, National Center for State Courts, to the Conference of Chief Justices Asbestos Litigation Committee 2 (June 25, 1992) (on file with the Texas Law Review).

6. MULTIDISTRICT LITIGATION ANALYSIS, supra note 4, at 14.

7. No record exists of the number of state court filings. The potential is enormous because 350,000 women received implants. It is believed that between 20,000 and 30,000 cases have been filed. See Minutes of Mass Tort Litigation Committee Meeting (Feb. 17, 1995) (on file with the Texas Law Review).

8. PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 45, 126 (1986).
electromagnetic radiation, the effect of which is often latent, are all likely to generate multiparty, multiforum litigation in the future. Yet torts of this kind are not the only types of claims that give rise to large-scale litigation. Securities, antitrust, contract, environmental, and patent cases have accounted for much of the Panel’s docket in recent years.

This phenomenon is not about to fade away. As the American Law Institute noted, “[H]uge multi-party, multiforum disputes have become a recurring feature of modern litigation.”

The problems caused by large-scale litigation have forced courts and litigants to search for ways to deal with the proliferation of cases. For litigation within the federal system, rudimentary rules exist to permit limited aggregation of claims. These rules authorize, in one form or another, joinder or consolidation of claims or cases for pretrial proceedings or for trial. But although aggregation can produce significant benefits by reducing duplicative activity, it raises concerns. Aggregation may compromise litigants’ rights to forum selection, impair litigants’ autonomy, diminish individualized resolution of claims, strain judges’ management capacity, and create a risk that procedural modifications will affect parties’ substantive rights.

The problems of large-scale litigation and the difficulties in resolving them are aggravated when, as is often the case, litigation spans the state and federal courts. No formal devices exist for aggregating, consolidating, or coordinating litigation that crosses the line between state and federal courts. State and federal judges have increasingly improvised ad hoc arrangements to coordinate related cases. In a number of cases they

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9. For a general discussion of recent trends in tort litigation, see DEBORAH HENSLER, TRENDS IN TORT LITIGATION 8-11 (1987).
10. See MULTIDISTRICT LITIGATION ANALYSIS, supra note 4.
11. COMPLEX LITIGATION PROJECT, supra note 2, at 12.
12. See infra notes 22-28 and accompanying text.
13. We use the term “aggregation” broadly to refer to devices that bring related cases onto the same docket. Where the cases are tried jointly, the term “consolidation” applies. Where the cases are managed jointly, we use the term “coordination.”
14. For discussions of these issues, see Judith Resnik, From “Cases” to “Litigation,” LAW & CONTEMP. PROBS., Summer 1991, at 5, 66, 64-68 (“But aggregation also comes with risks—of stunning concentrations of power in a very few people who . . . may become exceedingly powerful as gatekeepers . . . .”); Edward F. Sherman, Aggregate Disposition of Related Cases: The Policy Issues, 10 REV. LITIG. 231 (1991) (examining the trend toward aggregation and the various policies favoring and disfavoring such aggregation).
15. Sherman, supra note 14, at 234 (“[Current aggregation devices] are frequently powerless to insure the efficient aggregation of cases because jurisdictional barriers and federalism constraints prevent a comprehensive disposition of related cases in the same forum.”). Both federal class actions and bankruptcy proceedings have the potential to override state court jurisdiction of particular claims, but generally do not achieve intersystem aggregation. See infra notes 34-37 and accompanying text.
16. See generally Schwarzer et al., supra note 2, at 1700-32 (relating various examples of judges’ efforts to coordinate the proceedings in mass tort cases). That article, based on an extensive study of
have succeeded in coordinating pretrial scheduling, discovery, mediation, and settlement. But these arrangements can only achieve a limited degree of coordination, and their effectiveness declines as the number of judges engaged in related litigation in state and federal courts increases.

Is it feasible to move beyond these informal, ad hoc arrangements to a standardized, statute-based system of state and federal coordination? Some ambitious intersystem aggregation proposals have been advanced (and are discussed in this Paper); while they have made important contributions to the debate, major barriers stand in the way of their adoption. Considering that even the existing federal intrasystem devices are only rudimentary, the prospects for intersystem aggregation beyond voluntary or informal measures seem remote. A system that would lead to massive removals of actions from state court to a central federal court is certain to face major political resistance. Opponents of such a system can be expected to express concerns about the disruption of state court proceedings, the complexity of choice-of-law decisions and the possible subversion of state substantive law, the loss of litigant autonomy, and the potential impairment of due process. And while aggregation is intended to improve procedure, drastic procedural reform risks substantive impacts.

This Paper therefore offers a proposal intended to ameliorate the most serious problem associated with dispersed litigation while avoiding the difficulties inherent in more ambitious schemes. The most serious problem is the cost of duplicative and uncoordinated discovery. While most cases are ultimately terminated without trial, they suffer from the burdens of discovery. Therefore, eliminating duplication at the pretrial stage promises substantial benefits. The purpose of the instant proposal is to provide a procedure for coordination of discovery in cases dispersed in state and federal courts without implicating substantive law choices or delaying trials in state court. This minimalist approach should enjoy more favorable political prospects and may turn out to be a valuable first step toward more expansive aggregation.

coordination arrangements developed by state and federal judges in major litigation, reports on and analyzes those arrangements.

17. See id. at 1707-26.

18. Remarkable success has been achieved in coordination of federal and state breast implant litigation, but that success is due to a number of factors: an unusually able transferee judge, unusually competent and cooperative counsel, an experienced special master, the existence of a framework for the organization of state judges, and the availability of substantial resources. See Jack B. Weinstein, Ethical Dilemmas in Mass Tort Litigation, 88 NW. U. L. REV. 469, 479 (1994) (discussing Judge Sam Pointer's aggressive management of the breast implant litigation).

19. See generally Schwarzer et al., supra note 2, at 1743-49 (noting that intersystem coordination threatens litigant autonomy and poses choice-of-law problems).

20. See ROGER S. HAYDOCK ET AL., FUNDAMENTALS OF PRETRIAL LITIGATION 619 (3d ed. 1994) ("[S]omewhere between 90 and 97 percent of all civil litigation ends in settlement or dismissal before trial.").
The essence of the proposal is to amend the existing multidistrict litigation statute to provide for the following: (1) limited removal on a minimal diversity basis of state court cases related to federal multidistrict litigation to a multidistrict transferee court for coordinated discovery proceedings under the Federal Rules of Civil Procedure; (2) leaving all merits determinations (and hence any choice-of-law rulings) to be made in the state court; (3) making the results of coordinated discovery binding in all subsequent proceedings; and (4) requiring remand to state court when a case is ready to proceed to trial or summary judgment.

Part II of this Paper reviews the aggregation devices now available within the federal court system. This lays the groundwork for examining possible intersystem aggregation measures, which would presumably build upon existing aggregation devices. Part III considers the concerns implicated by intersystem aggregation and the manner in which pending proposals deal with these concerns. Part IV describes the proposal for discovery coordination of related cases in state and federal courts under the revised multidistrict statute.21

II. Aggregation in the Federal Courts Today

Current law provides several vehicles for aggregation within the federal system22 including: plaintiffs joining parties to transactionally related claims,23 prospective parties intervening in a pending action,24 and plaintiffs asserting claims on behalf of or against a class.25 These

21. The text of the proposed statute appears in the appendix and is hereinafter cited by the abbreviation “App.”

22. For a comprehensive review of intrasystem aggregation devices, see COMPLEX LITIGATION PROJECT, supra note 2, at 21-36. Aggregation devices are also available within some state judicial systems. Schwarzer et al., supra note 2, at 1694 n.18.

23. See FED. R. CIV. P. 20 (permitting joinder of parties in transactionally related cases with a common legal or factual issue); see also Mosley v. General Motors Corp., 497 F.2d 1330, 1333 (8th Cir. 1984) (allowing 10 employees to join racial discrimination claims against their employer because the events giving rise to the claims were “logically related”).

24. See FED. R. CIV. P. 24 (permitting intervention when the intervenor's claim or defense has a legal or factual issue in common with the main action); see also New Orleans Pub. Serv., Inc. v. United Gas Lines Co., 732 F.2d 452, 469-73 (5th Cir.) (disallowing intervention by city officials in a dispute between a local utility and a gas supplier because the city did not have a legally protectable interest at stake and its economic interests were adequately represented by the utility), cert. denied, 469 U.S. 1019 (1984).

25. See FED. R. CIV. P. 23 (authorizing certification of classes). Class actions achieve aggregation by providing for the common resolution of the claims of all persons who, because their claims share common questions, are members of the class. However, unless the class qualifies as mandatory, Rule 23(c)(2) permits potential claimants to opt out and pursue separate actions. FED. R. CIV. P. 23(c)(2). Cases qualifying for mandatory class treatment under Rule 23(b) are generally limited to common-fund or nonmonetary actions. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 733-34 (2d ed. 1993) (reporting that 23(b)(1) class actions often involve an attempted recovery from a limited common fund and that 23(b)(2) class actions may only request incidental monetary damages). Moreover, federal courts are reluctant to permit mandatory class treatment of mass tort litigation,
devices, however, are of limited reach because they must be initiated by one or both of the parties.\textsuperscript{26} A judge may consolidate cases with a common issue pending in that judge’s court,\textsuperscript{27} but lacks the authority to aggregate cases pending in other courts.\textsuperscript{28}

The only authority for systemwide, judicially imposed aggregation is provided by the multidistrict litigation process. The Judicial Panel on Multidistrict Litigation, on its own motion or that of a party, may transfer actions with a common question to a single district for coordinated or consolidated pretrial proceedings.\textsuperscript{29} Such transfers are limited to pretrial proceedings; cases must be returned to the transferor court for trial unless they qualify for a change of venue to the transferee district.\textsuperscript{30} In practice, especially where certification would interfere with state court cases. \textit{See, e.g.,} School Dist. v. Lake Asbestos (\textit{In re} School Asbestos Litig.), 789 F.2d 996, 1002 (3d Cir.) (concluding that certification of a mandatory class presents “serious questions of . . . intrusion into the autonomous operation of state judicial systems”), cert. denied, 479 U.S. 852, and cert. denied, 479 U.S. 915 (1986).

26. A partial exception can be found in 28 U.S.C. § 1404(a) (1988), which permits a transfer of a case on the court’s own motion for the convenience of parties or witnesses to any district where the case might have been brought. As a practical matter, however, because of the respect given to the parties’ choice of forum, it is highly unusual for a judge to transfer a case sua sponte. \textit{See, e.g.,} Lead Indus. Ass’n v. OSHA, 610 F.2d 70, 79 n.17 (2d Cir. 1979) (noting that there are surprisingly few cases addressing sua sponte transfers under § 1404(a).

27. \textit{See} FED. R. CIV. P. 42(a) (permitting consolidation of cases with a common question of law or fact); \textit{see also} Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357, 383 (E.D. Pa. 1982) ("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 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."). aff’d sub nom. Van Buskirk v. Carey Canadian Mines, Ltd., 760 F.2d 481 (3d Cir. 1985). But see \textit{In re} Repetitive Stress Injury Litig., 11 F.3d 368, 373-74 (2d Cir. 1993) (holding that consolidation of 44 suits against manufacturers of office equipment was an abuse of discretion justifying mandamus relief, when the plaintiffs were employed at different work sites in different occupations and reported different injuries), \textit{reh’g granted in part}, 35 F.3d 637 (1994); Malcolm v. National Gypsum Co., 995 F.2d 346, 350-52 (2d Cir. 1993) (holding that consolidation of 48 asbestos cases was error when the plaintiffs were involved in different occupations, had dissimilar exposure, alleged different injuries, and asserted claims against 25 direct defendants and numerous third- and fourth-party defendants).

28. Moreover, except for mandatory class actions and interpleader, no procedure exists for adjudicating the rights of injured persons who do not choose to become parties to the litigation. One commentator proposes amending Federal Rules of Civil Procedure 19 and 20 to empower courts to compel joinder of all plaintiffs and defendants "to avoid duplicative litigation . . . when doing so will create a manageable litigation package." Richard D. Freer, \textit{Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court’s Role in Defining the Litigative Unit}, 50 U. PITT. L. REV. 809, 833 (1989). He further suggests substantially broadening the provision in Rule 19 requiring parties to inform the court of prospective parties who might qualify for joinder and adding a sanction provision to Rule 19 for failure to comply. \textit{Id.} at 841-42.

29. 28 U.S.C. §§ 1407(a), (o)(f)-(ii) (1988). The Panel must first find that transfer serves the convenience of parties and witnesses and promotes the just and efficient conduct of the actions. \textit{Id.} § 1407(a).

30. Cases qualify if they could have been originally brought in the transferee district. 28 U.S.C. § 1404(a) (1988); \textit{see} George T. Conway III, \textit{The Consolidation of Multistate Litigation in State Courts}, 96 YALE L.J. 1099, 1102 n.23 (1987) ("Courts have consistently held that a § 1407 transferee court may transfer multidistrict litigation to itself for trial under 28 U.S.C. § 1404(a).")
not many cases return to the transferor court for trial; most cases are either settled while pending in the transferee court or are disposed of by summary judgment or other motion while there. Nevertheless, the statutory limitation to pretrial proceedings curtails the reach and effectiveness of the transferee court’s management power. Because consolidation of cases for trial is precluded (except by consent of all parties), the transferee court is barred from invoking an effective procedure—the early severance and consolidated trial of threshold and potentially dispositive issues common to the litigation.

The bankruptcy process also aggregates claims. Because a bankruptcy filing stays all litigation against the bankrupt, it permits a comprehensive resolution of all the claims, including those pending in state courts. But this opportunity becomes available only when a defendant (or its creditor) files for bankruptcy. Additionally, when the bankrupt is only one of several defendants, a bankruptcy proceeding involving only that defendant will not result in significant aggregation. The bankruptcy process, which was not intended to supersede conventional adjudication, has only limited utility for the comprehensive and orderly resolution of large-scale litigation.


32. See CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3862, at 503-04 (2d ed. 1986) (noting that although the plain language of § 1407(a) appears to require the transferee district to remand the transferred cases back to their original districts for trial, many of the transferee judges retain the consolidated cases for trial either through consent of the parties or under the general venue transfer statute).

33. See FED. R. CIV. P. 42(b) (allowing a district court to conduct separate trials of claims in order to further convenience or avoid prejudice); see also Moss v. Associated Transp., Inc., 344 F.2d 23, 26-27 (6th Cir. 1965) (affirming a district court’s order to hold separate trials on liability and damages issues in a complex, multiparty negligence case).


35. But see A.H. Robins Co. v. Piccinin, 788 F.2d 994 (4th Cir.) (affirming the district court’s holding that barred plaintiffs from severing their actions against a bankrupt defendant in order to proceed against codefendants), cert. denied, 479 U.S. 876 (1986); infra note 37 and accompanying text.

36. See Margaret I. Lyle, Note, Mass Tort Claims and the Corporate Tortfeasor: Bankruptcy Reorganization and Legislative Compensation Versus the Common-Law Tort System, 61 TEX. L. REV. 1297, 1304-07 (1983) (noting that the bankruptcy laws were designed to deal with contract claims, not tort claims).

37. The Dalkon Shield litigation, Piccinin, 788 F.2d 994, was a notable exception. There, A.H. Robins, the manufacturer of injurious birth control devices, filed for bankruptcy, staying thousands of suits against it in state and federal courts. Id. at 996. Several plaintiffs sought to sever their claims against Robins and proceed against other defendants. Id. The district court enjoined the plaintiffs from severing their claims and fixed venue for the trial of all the related claims in the district in which the bankruptcy court was sitting. Id. at 997-98. While remanding for a hearing about the wisdom and fairness of the venue transfer, the Fourth Circuit held that the district court had authority to grant injunctive relief. Id. at 1008. The eventual outcome was a class action settlement establishing a trust fund and a claims resolution facility. See In re A.H. Robins Co., 880 F.2d 709, 752 (4th Cir.)
Clearly, the aggregation mechanisms currently available within the federal system are limited in their scope and effect. Because Congress has not shown much disposition to enlarge them, it seems unlikely that it would support more drastic application of aggregation to litigation dispersed in state and federal courts. Nevertheless, the intersystem aggregation proposals that have been made are important, in part because they provide the frame of reference for consideration of the proposal made in this Paper. A discussion of those proposals follows.

III. Comprehensive Intersystem Aggregation—A Vision for the Future?

The specter of ever-expanding large-scale litigation engulfing state and federal judicial systems has driven a number of lawyers, judges, academics, and legislators to seek solutions. The principal proposals have come from the American Law Institute, the American Bar Association’s Mass Tort Commission, and the House of Representatives’ Judiciary Committee. The three proposals each adopt a different approach, and each is imaginative, incisively drawn, and worthy of serious consideration. Our purpose is not to describe these proposals but rather to identify the issues implicated in them and in any scheme for comprehensive intersystem aggregation. Analysis of these issues will lay the foundation for the
development of the alternative we propose here which, at least in the short term, may be more serviceable because it is more attainable.

A. Jurisdiction

Most intersystem aggregation schemes would encourage or require actions that currently end up in state court to be brought in or removed to federal court (although some would also permit "reverse removal" of cases from federal to state court). The threshold question confronting any such scheme is what basis exists for federal subject-matter jurisdiction.

Article III provides two relevant bases for subject-matter jurisdiction: an act of Congress or diverse citizenship of the parties. Because claims in large-scale litigation are predominantly based on state tort law and often involve nondiverse parties, intersystem aggregation faces a threshold jurisdictional obstacle: not all related cases can be aggregated in federal court if some lack federal jurisdiction. Some proposals seek to avoid this obstacle by relaxing the diversity requirement. Under current law, a state law case can be filed in or removed to federal court only if there is complete diversity of citizenship. These proposals would give federal courts jurisdiction over some mass tort cases based on minimal diversity. Minimal diversity would open the jurisdictional door much wider because

43. See, e.g., Multiparty, Multiforum Jurisdiction Act, H.R. 1100, 103d Cong., 1st Sess. § 2(a) (1993) (providing federal courts with original jurisdiction over cases involving minimal diversity that arise out of a single accident that injures at least 25 people and causes in excess of $50,000 damage per person); Subcommittee on the Fed. Courts and Their Relation to the States, Judicial Conference of the United States, Report of the Subcommittee on the Federal Courts and Their Relation to the States, in 1 FEDERAL COURTS STUDY COMMITTEE WORKING PAPERS AND SUBCOMMITTEE REPORTS 1, 523-31 (1991) (evaluating and rejecting arguments for allowing a defendant to remove to federal court when he has a federal defense); Rowe & Sibley, supra note 41, at 11, 10-11 (proposing that federal jurisdiction be expanded to cover cases in which "any defendant has a residence in a state other than one where a substantial part of the events or omissions giving rise to the claim occurred" (emphasis in original)).

44. See, e.g., COMPLEX LITIGATION PROJECT, supra note 2, app. A at 439 (proposing that, in some circumstances, state courts be designated as transferee forums).

45. U.S. CONST. art. III, § 2. In addition, federal jurisdiction extends to cases, rarely involved in large-scale litigation, in which the United States is a party, to maritime and admiralty cases, and to cases involving ambassadors, other public ministers, and consuls. Id.

46. See CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 36 (5th ed. 1994) (noting that in cases against multiple defendants, independent subject-matter jurisdiction for each defendant is required and noting that the rule is less clear when the case concerns multiple plaintiffs).

47. E.g., Multiparty, Multiforum Jurisdiction Act, H.R. 1100, 103d Cong., 1st Sess. § 2(a) (1993); FEDERAL COURTS STUDY COMMITTEE, supra note 41, at 44-45; see Rowe & Sibley, supra note 41, at 46-47 (suggesting that diversity jurisdiction should be replaced with or supplemented by a new multiparty, multiforum jurisdiction law).


49. Any expansion of diversity jurisdiction encounters the arguments against having federal courts determine state law. See Martin H. Redish, Reassessing the Allocation of Judicial Business Between

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few cases in mass litigation would not have at least one pair of diverse parties.50

Alternatively, Congress could create federal question jurisdiction (grounded in the "arising under" clause of Article III) by enacting federal substantive law covering claims that lead to large-scale litigation. In essence, Congress would be creating federal tort law.51 Congress might, for example, enact legislation creating a federal claim for injury caused by asbestos exposure.52 However, such legislation could cause substantial problems. First, by opening the door to many cases that could not otherwise be brought in or removed to federal court, it may significantly increase the federal caseload. Second, by intruding into the states' traditional role as laboratories for developing tort law, it would raise federalism concerns.53 States make their own policy choices, taking into account the needs and interests of their residents and industries.54 While federal legislation would not necessarily preclude states from pursuing their policies, it may give litigants the option of frustrating state policies by bringing a federal claim.55 And, unless Congress made the federal law the exclusive remedy, litigants could circumvent it by bringing state law

State and Federal Courts, 72 VA. L. REV. 1769, 1774 (1992) ("[I]t makes practical sense for a sovereign's courts to have primary responsibility for adjudication of that sovereign's law."); Dolores K. Sloviter, A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism, 78 VA. L. REV. 1671, 1671 (1992) (arguing that diversity jurisdiction "results in the inevitable erosion of the state courts' sovereign right and duty to develop state law as they deem appropriate").

50. Of course, even when diversity exists, aggregation may be defeated if plaintiffs instead choose to file in state court, and defendants choose not to remove. See 28 U.S.C. § 1441(a) (1988) (permitting defendants to remove an action brought in state court to a federal district court with proper original jurisdiction). In addition, technical requirements sometimes frustrate removal. See, e.g., 28 U.S.C. § 1446(b) (1988) (requiring a defendant to file for removal within 30 days of receiving notice of the suit). Diversity-based aggregation schemes could overcome these problems if they gave courts the power to order removal. See infra notes 79-80 and accompanying text. But see Mullenix, supra note 42, at 220-21 (criticizing diversity-based schemes for federal court jurisdiction over complex litigation).

51. U.S. CONST. art. III, § 2, cl. 1 (extending federal judicial power to all cases "arising under this Constitution, the Laws of the United States, and Treaties made . . . under their authority").

52. For the argument that Congress should go further and pass a law creating a federal substantive law of complex cases or mass torts generally, or that Congress should authorize the development of a federal common law of mass torts, see Mullenix, supra note 42, at 223-24. Traditionally, however, Congress has not created rights solely to facilitate aggregation (i.e., to create jurisdiction) in the federal courts; it generally creates causes of action only to further enforcement of regulatory statutes (e.g., the securities laws) or constitutional rights (e.g., the Fourteenth Amendment).

53. Cf. Mullenix, supra note 42, at 221-23 (arguing for a federal substantive law to govern complex litigation).


55. See id. at 21 ("[S]ubtle but important local differences cannot be captured by a single national law.").

56. Cf. Allan R. Stein, Erie and Court Access, 100 YALE L.J. 1935, 1951 (1991) ("[A] federal departure from a state 'procedural' rule may well frustrate the policy underlying the state rule.").
rather than federal law claims. The resulting bifurcated tort law—with some claims adjudicated under federal law and other similar claims under state law—would lead to inconsistent results and an appearance of arbitrariness.  

In any event, such legislation would not ensure that all related claims end up in federal court as long as plaintiffs remain free to assert state law (instead of federal law) claims in state court. Aggregation, therefore, would still be incomplete.

Even if Congress preempts all state law on the subject by creating an exclusive federal cause of action, state courts would still have jurisdiction over cases arising under federal law, unless the legislation specifically provides to the contrary. Therefore, to ensure the aggregation of claims, Congress would also have to bar actions in state court. Such an approach, however, would severely compromise state sovereignty as it would not only bar state legislatures from an area...
traditionally within their domain, but would also bar state courts from a role in the development of the law.\textsuperscript{61}

The proposals for intersystem aggregation made by the American Bar Association Commission on Mass Torts and the American Law Institute adopt an intermediate approach under which federal courts would have jurisdiction over certain categories of tort cases but would apply state substantive law.\textsuperscript{62} The ABA Commission’s proposal gives federal courts jurisdiction over litigation comprising 250 or more actions, each seeking more than $50,000 in damages and arising from either a single accident or the use of or exposure to a single substance or product.\textsuperscript{63} Under the ALI proposal, federal courts would have jurisdiction over cases in state court which are transactionally related to cases in federal court.\textsuperscript{64} State law would supply the governing law under each proposal.\textsuperscript{65}

The ABA Commission’s proposal enters a gray area in the law of federal jurisdiction. The proposal, while not creating substantive law, attempts to overcome this deficiency by incorporating choice-of-law and punitive damages standards, arguing that these provisions provide sufficient federal law to support federal jurisdiction.\textsuperscript{66} But it is doubtful that they would support “arising under” jurisdiction.\textsuperscript{67} Also, jurisdiction might arguably be found under some variation of the doctrine of “protective

\textsuperscript{61} Cf. Redish, supra note 49, at 1774 (“[I]t is not unreasonable to assume that courts of a sovereign will likely be more sensitive and sympathetic to the interests of that sovereign . . . .”).

\textsuperscript{62} While the Multiparty, Multiforum Jurisdiction Act would also lead to the application of state substantive law, it premises jurisdiction wholly on diversity. Multiparty, Multiforum Jurisdiction Act, H.R. 1100, 103d Cong., 1st Sess. § 2(a) (1993).

\textsuperscript{63} Comm’n on Mass Torts, Am. Bar Ass’n, Revised Final Report and Recommendation of the Commission on Mass Torts, in ABA REPORT, supra note 40, at 81 (hereinafter Revised Final Report). The statute creates a Judicial Panel for Mass Tort Litigation, which could declare actions to be “mass tort litigation” subject to the operation of the statute. \textit{Id}.

\textsuperscript{64} See infra notes 147-51 and accompanying text.

\textsuperscript{65} COMPLEX LITIGATION PROJECT, supra note 42, app. A at 449-50; Revised Final Report, supra note 63, at 83.

\textsuperscript{66} See Revised Final Report, supra note 63, at 46 n.77 (“We think the presence of such federal issues . . . is more than enough to satisfy Article III ‘arising under’ requirements.”). In Verlinden B.V. v. Central Bank of Nig., 461 U.S. 480 (1983), the Supreme Court held that the Foreign Sovereign Immunities Act authorized a foreign plaintiff to sue a foreign state in federal court on a nonfederal cause of action. \textit{Id} at 491 n.17. The Court in Verlinden upheld jurisdiction because the statute established a “comprehensive [regulatory] scheme” of which the “jurisdictional provisions . . . are simply one part.” \textit{Id} at 497. Whether a particular statute passes muster under Verlinden would seem to depend on what, if anything, the statute does in addition to conferring federal jurisdiction. Compare Thomas D. Rowe, Jr., Jurisdictional and Transfer Proposals for Complex Litigation, 10 REV. LITIG. 325, 350 (1991) (arguing that the choice-of-law and punitive damages provisions in the ABA Commission’s proposal provide sufficient “involvement of federal law” to establish “ample constitutional foundation for Congress to assert federal question jurisdiction”) with Epstein, supra note 54, at 47-48 (arguing that a statute must have a significant substantive law component to confer federal question jurisdiction).

\textsuperscript{67} See Mullenix, supra note 42, at 178-81 (asserting that choice-of-law and punitive damages standards do not create a federal interest sufficient to support Article III “arising under” jurisdiction).
jurisdiction,” which empowers Congress to give federal courts jurisdiction in areas where Congress could enact substantive laws, even if it has not done so. Because the Commerce Clause presumably empowers Congress to legislate on mass torts, Congress can confer jurisdiction on federal courts to hear mass tort litigation even if it has not enacted governing substantive law. However, because there is no explicit or implicit constitutional basis for protective jurisdiction, and it has not received the imprimatur of the Supreme Court, the doctrine provides a somewhat shaky basis for a major restructuring of mass tort litigation.

The ALI proposal takes a different (and somewhat speculative) approach to jurisdiction. Cases not otherwise subject to federal jurisdiction could be brought in or removed to federal court to be joined with transactionally related actions pending in that court. The proposal relies on a jurisdictional basis analogous to supplemental jurisdiction, but differs from its conventional form in that it would be applied not to a single case but to consolidated cases.

68. See, e.g., Local 25, Int’l Bhd. of Teamsters v. Mead, 230 F.2d 576, 580 (1st Cir.) (using protective jurisdiction to uphold the validity of § 301 of the Labor Management Relations Act, under which federal courts must refer to state substantive law for decision), cert. dismissed, 352 U.S. 802 (1956).

69. U.S. CONST. art. I, § 8, cl. 3.

70. This proposition is based on the manifest effect of mass torts on interstate commerce and the Court’s expansive interpretation of Congress’s Commerce Clause power. See Conway, supra note 30, at 1116 n.104 (asserting that it is “well-settled” that Congress may regulate any activity that affects interstate or foreign commerce in any way); Epstein, supra note 54, at 43 (explaining that the current expansive readings of the Commerce Clause make it clear that Congress has the power to regulate complex multistate litigation).

71. See Conway, supra note 30, at 1114 (noting that the theory of protective jurisdiction would allow “a purely jurisdictional statute providing a federal forum for the application of a state law in a field in which Congress could . . . enact preemptive substantive legislation”).


73. See generally Mullenix, supra note 42, at 178-81, 184-85, 201-07 (criticizing the use of protective jurisdiction).

74. COMPLEX LITIGATION PROJECT, supra note 2, at 220-44, 256-62.


76. See COMPLEX LITIGATION PROJECT, supra note 2, at 258-59 (“This is not to suggest that the jurisdiction proposed here is exactly coextensive with traditional ancillary and pendant jurisdiction caselaw because the jurisdiction asserted in those contexts has been in single cases, whereas supplemental jurisdiction under [this proposal] is being extended over consolidated cases.”). In addition, unlike the existing statute, the ALI proposal would extend supplemental jurisdiction to diversity-based claims and would therefore greatly enlarge diversity jurisdiction. See id. at 257-58 (“The grant of supplemental jurisdiction in [this proposal] includes . . . ancillary jurisdiction, which permits a court hearing a claim under federal question or diversity jurisdiction also to hear related claims brought by defendants or intervenors.” (emphasis added)).
B. Eligibility for Aggregation

1. Defining Eligibility: Precision versus Flexibility.—Unless aggregation is made available to all litigants, the aggregation procedure must make distinctions. Two broad alternatives are available: the eligible categories may be defined by statute, or the determination of eligibility may be left to the discretion of a court or judicial panel. The former alternative creates a risk of arbitrary line-drawing resulting in inequities, while the latter will result in unpredictability. The pending proposals take different approaches to this issue.

Both the Multiparty, Multiforum Jurisdiction Act introduced in Congress and the ABA Commission’s proposal precisely define the categories of cases eligible for aggregation. The former would permit filing in and removal to federal court of cases arising out of a single accident involving at least 25 persons, each with a claim of at least $50,000. As noted above, the ABA Commission’s proposal also specifies precisely what conditions must be met before cases qualify for aggregation: 250 or more actions, each seeking more than $50,000 in damages, arising from either a single accident or use of or exposure to a single substance or product. The ALI proposal takes a different path. It does not set numerical eligibility criteria for aggregation. Instead, it establishes a Complex Litigation Panel of federal judges with discretionary authority to order removal from state courts and consolidation in federal court (for pretrial and trial) of all transactionally related actions having a common issue. A number of factors enumerated in the statute, including the number and size of actions, the number of jurisdictions involved, special reasons for avoiding inconsistencies, unfairness to the parties due to a change in substantive law resulting from transfer, and potential disruption of state proceedings would guide the Panel’s exercise of discretion.

The ABA Commission’s proposal, by aiming only at large-scale litigation (250 actions or more), would not apply to other situations in which aggregation might also be beneficial, such as a crash or fire or other mass accident. The ALI proposal makes aggregation generally available

78. See supra note 63 and accompanying text.
79. The ALI proposal covers the consolidation of individual actions filed in federal court, and it has a complementary provision permitting removal of related state cases and consolidation with the already-consolidated federal cases. Complex Litigation Project, supra note 2, at 37, 220-21. Removal can be initiated by any party, the state court judge, or the Complex Litigation Panel sua sponte. Id. app. A at 440. The ALI proposal also authorizes reverse removal of cases from federal court to state court for the purposes of consolidation in the state court. See supra note 44 and accompanying text.
80. Complex Litigation Project, supra note 2, app. A at 438.
whenever the judicial panel, applying explicit but flexible statutory criteria, determines that litigation qualifies for and would benefit from aggregation. 81

2. Authority to Invoke the Procedure.—The corollary to the question of what cases are eligible for aggregation is the question of who may invoke the procedure. Again, two general alternatives are available: aggregation may be left to the parties (through their decisions to file, remove, or intervene) or it may depend on the order of a judge or judicial panel. As noted above, the ALI proposal gives a judicial panel authority to remove cases from state courts and consolidate them with related federal cases. 82 Likewise, the ABA Commission's proposal empowers a panel created by the statute to remove and consolidate related cases. 83 The Multiparty, Multiforum Jurisdiction Act takes a somewhat different approach, patterned on the existing multidistrict procedure. Unlike the procedures suggested by the ABA Commission and ALI, the judicial panel under the Multiparty, Multiforum Jurisdiction Act could order transfers to a single federal district court for consolidated proceedings 84 only of cases filed in or removed to federal court by the parties. 85

Leaving the choice of whether to invoke the aggregation procedure exclusively to the parties (as under the Multiparty, Multiforum Jurisdiction Act) means that aggregation may not occur. Whether to invoke the procedure is one of many tactical decisions litigants will make; aggregation is one dimension of forum selection which plays an important part in any litigation strategy. 86 Without judicial power to initiate and implement aggregation, aggregation will have limited utility. 87 However, the judicial

81. Id. at 38-39 (explaining that consolidation is appropriate when the parties and the judicial system would realize significant savings in time and resources that could also be achieved in a fair manner).

82. Removal may also be initiated by any party or the state court judge. See supra note 79 and accompanying text.

83. The ABA Commission's proposal differs from the ALI proposal in that it states objective numerical criteria that must be met before removal and consolidation are ordered. See supra notes 77-79 and accompanying text.

84. Those proceedings would be limited to liability and punitive damages, reserving determination of compensatory damages to the transferor court. Multiparty, Multiforum Jurisdiction Act, H.R. 1100, 103d Cong., 1st Sess. § 5 (1993).

85. Id. § 5.

86. Of course, if a significant proportion of the litigants can reach agreement on consolidation, or at least coordination, some of the benefits of aggregation can be realized through voluntary arrangements. See Paul D. Rheingold, The MER/29 Story—An Instance of Successful Mass Disaster Litigation, 56 CAL. L. REV. 116, 116 (1968) (discussing the successful voluntary consolidation of over 1500 MER drug-related injury claims between 1961 and 1967).

87. Such power could be given to a single federal judge assigned to large-scale litigation and authorized to order the transfer of transactionally related cases from the state court. However, giving such power to a single judge invites state-federal tension and, to the authors' knowledge, has not been
power, as the ALI recognizes, should be exercised with due regard for the parties' wishes. 88

C. Choice of Law

Under existing law, federal courts must apply the choice-of-law rules of the state in which they sit. 89 Because the transfer of a case 90 across state lines could affect the choice of substantive law and thereby affect the outcome of the case, a federal transference court (at least when sitting in diversity) must apply the choice-of-law rules of the transferor district if the action was properly filed there. 91 To subject aggregation of large-scale litigation to this rule would frustrate its purpose; little would be gained in efficiency and economy if a separate choice-of-law determination had to be made for the cases from each originating jurisdiction. Aggregation thus presents a dilemma: either it will create a multiplicity of applicable law with all of the complexities and burdens that will entail, or it will subject parties to unpredictable and uncontrollable changes in the governing substantive law. 92

The three proposals take different approaches to the choice-of-law question. The Multiparty, Multiforum Jurisdiction Act would mandate proposed. Placing intersystem aggregation power in a judicial panel, a device now familiar after more than 20 years of intrasystem experience under the multidistrict litigation procedure, 28 U.S.C. § 1407(d) (1988), seems preferable. But because even a federal panel's incursions across state-federal lines may not always be welcome, its discretion needs to be circumscribed and exercised with care and restraint.

88. See COMPLEX LITIGATION PROJECT, supra note 2, at 38 (including "wishes of the parties" among the factors relevant to a decision to transfer or consolidate).


90. Transfers among federal courts are normally ordered for the convenience of parties and witnesses. See 28 U.S.C. § 1404(a) (1988) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.").


92. Of course, whether reference to different states' choice-of-law rules will result in choices of different laws depends on the contents of those rules. See COMPLEX LITIGATION PROJECT, supra note 2, at 309 (observing that the transferee court handling pretrial proceedings in suits arising out of the disaster at the Union Carbide gas plant in Bhopal, India, applied the choice-of-law rules of 13 different jurisdictions and determined that all would apply the law of India).
application of the law of a single jurisdiction to all the consolidated cases except that "[i]f good cause is shown in exceptional cases . . . the court may allow the law of more than one State to be applied with respect to a party, claim, or other element of an action." The trial judge would have discretion to select which forum's law governs in light of five factors: place of injury, place of conduct causing injury, primary place of business or residence of the parties, danger of creating unnecessary incentives for forum shopping, and foreseeability to the parties of the application of a given state's law. The ALI proposal takes a similar but more fine-tuned approach to the choice-of-law question, expressing a preference for application of a single state's law, but permitting the transferee court to divide the action into subsidiary claims and issues and apply different states' laws to each. This proposal also guides the court's choice-of-law determination by enumerating factors for consideration such as those in the Multiparty, Multiforum Jurisdiction Act. It goes further, however, by also directing the court to consider "which State or States have a policy that would be furthered by the application of their laws," and laying down rules establishing which state's law should control when more than one such state has been identified. In contrast, the ABA Commission

94. Id. See generally Thomas M. Reavley & Jerome W. Weservich, 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, 40 (1992) ("By incorporating judicial discretion into the substantive choice-of-law standard, a federal rule would simply transfer the policy decision as to what constitutes a just choice from Congress to the courts."). But see P. John Kozyris, Interest Analysis Facing Its Critics—And Incidentally, What Should Be Done about Choice of Law for Products Liability?, 40 OHIO ST. L.J. 569, 570 (1985) (suggesting that advocates of discretion “merely invite the decision makers to fill the empty vessel by drawing from some value system,” but “fail to provide the system itself”).
95. See COMPLEX LITIGATION PROJECT, supra note 2, app. A at 449 (stating that a court should select the governing law “with the objective of applying, to the extent feasible, a single State’s law to all similar claims”). Cf. In re Rhone-Poulenc Rorer Inc., 63 U.S.L.W. 2579, 2580 (7th Cir. Mar. 16, 1995) (holding that the district court exceeded its authority by proposing to try claims from several jurisdictions according to a single legal standard).
96. COMPLEX LITIGATION PROJECT, supra note 2, app. A at 449.
97. Id. app. A at 449-52. A fair reading of this proposal suggests that, unlike in the Multiparty, Multiforum Jurisdiction Act, the court must take these factors into account. See infra note 99 and accompanying text.
98. COMPLEX LITIGATION PROJECT, supra note 2, app. A at 449.
99. The ALI proposal would guide the policy analysis by a series of rules and guidelines. See id. app. A at 149-53. It circumscribes discretion more than the Multiparty, Multiforum Jurisdiction Act because the latter says only that the court “may” consider the relevant factors, H.R. 1100, 103d Cong., 1st Sess. § 6(a) (1993), whereas the ALI proposal not only requires consideration of various factors, but requires the court to choose a particular state’s law if certain conditions are met.
100. COMPLEX LITIGATION PROJECT, supra note 2, app. A at 449-51. For example, the proposal says that if the court finds that only one State has a policy that would be furthered by the application of its law, that State’s law shall govern. . . . If the court finds that more than one State has a policy that would be furthered by the application of its law, the court shall apply the law of the State in which the common contracting party has its primary place

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proposal leaves it to the trial court to make its own determination “in the light of reason and experience.”

A case can be made that mass litigation presents a national problem calling for a national solution, one part of which should be a uniform rule of liability and damages. Congress has ample power under the Commerce Clause to adopt such a rule, thereby also conferring federal question jurisdiction over such claims. But, as previously discussed, such legislative action would create serious problems of its own. A more modest but still far-reaching solution would be the adoption of a federal choice-of-law rule for complex cases, but this too would intrude on states' interests.

In sum, choice-of-law concerns inhere in any aggregation scheme. Those concerns may be ameliorated but cannot be eliminated. Parties select a forum with expectations concerning the governing law, and states may have interests that are affected by changes in applicable law. Because interforum transfers resulting in changes of substantive law have significant costs, the question that must be asked is whether some of the benefits of aggregation may be realized at a lesser cost.

**D. Cost/Benefit Analysis**

Duplicative litigation undeniably produces adverse consequences that should be minimized to the extent possible. But, aggregation too has costs of business, unless the court finds that that law is in material conflict with the regulatory objectives of the State law in the place of performance . . . .

Id. app. A at 451.

100. See Revised Final Report, supra note 63, at 46.

101. See id. at 44-45 (“Because virtually every mass tort case involves or at least affects interstate commerce, it is clear that Congress has the power to enact federal products liability . . . law and to vest the federal courts with jurisdiction to hear and determine tort claims arising under such laws.”); Reavley & Weswick, supra note 94, at 37 (“Congress may point to the Commerce Clause as its authority to establish legal standards that govern all parties to cases arising from a single-accident mass tort . . . .”).

102. See supra notes 58-61 and accompanying text.

103. See Mary K. Kane, Drafting Choice of Law Rules for Complex Litigation, 10 REV. LITIG. 309, 313 (1991) (“[T]o introduce a single choice-of-law code applicable in all federal courts handling complex litigation should reduce the incentive to forum shop[,] . . . potentially help to reduce duplicative litigation[,] . . . and foster the consolidation of related litigation.”).

104. Id. at 311.

105. Although some aggregation proposals include a provision permitting the court to apply the rules in order to avoid unfair surprise and arbitrary results, see, e.g., COMPLEX LITIGATION PROJECT, supra note 2, at 323, aggregation achieved by these proposals would inevitably frustrate both the expectations of some parties as well as the interests of some states. The latter point implicates constitutional concerns. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (“[F]or a State's substantive law to be selected in a constitutionally permissible manner, the State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981))).
that need to be taken into account in the policymaking calculus.\textsuperscript{106} Some of those costs are discussed briefly below.

1. Loss of Individual Autonomy.—Aggregation tends to diminish plaintiffs' control over their claims.\textsuperscript{107} This is true, to a degree, in all multiparty litigation: individual control becomes attenuated as individual litigants either yield to the consensus of lead counsel or the group of claimants or risk being fenced in by the moves of others. Aggregation magnifies the loss of control as litigation expands in scope while being concentrated in a remote forum. Management of aggregated litigation generally gravitates to a relatively small group of lawyers as lead, liaison, or coordinating counsel, usually appointed by the court.\textsuperscript{108} These attorneys essentially represent groups of plaintiffs, negotiating for a group and distributing settlement proceeds among its members.\textsuperscript{109} As a practical matter, individual parties may become invisible as lawyers assume collective identities.\textsuperscript{110} In this situation, judges' responsibility for fairness to all parties increases, but their capacity to ensure it is attenuated.\textsuperscript{111}

2. Management Difficulties.—While aggregation reduces duplication, it increases the management responsibilities and burdens of the transferee judge. Aggregation concentrates activity in one court, including the paper

\textsuperscript{106} Extensive legal literature deals with cost/benefit analysis. For some prominent examples, see GUIDO CALABRESI, THE COSTS OF ACCIDENTS 29 (1970) (stating that the goal of accident law "must be to find the best combination of primary, secondary, and tertiary cost reduction taking into account what must be given up in order to achieve that reduction"); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 21 (1986) (arguing that "the common law is best... explained as a system for maximizing the wealth of society" taking into consideration the social costs and benefits of legal rules); STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 2-3 (1987) (undertaking an analysis of accident law by assuming that parties tend to behave in a utility-maximizing manner and examining whether legal rules minimize "the sum of accident losses and the costs of accident prevention" so as to maximize social utility). For the application of a cost/benefit analysis to the ALI proposal, see Epstein, supra note 54, at 5-20 (predicting negative effects of the ALI's proposal on the fairness and efficiency of mass tort litigation).

\textsuperscript{107} Resnik, supra note 14, at 50-52; see Roger H. Trangsrud, Mass Trials in Mass Tort Cases: A Dissent, 1989 U. ILL. L. REV. 69, 74, 74-76 (asserting that the consolidation of claims in mass tort cases threatens the historically important "tradition of individual claim autonomy").

\textsuperscript{108} See generally John C. Coffee, Jr., The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. CHI. L. REV. 877, 907-09 (1987) (asserting that there are fewer problems associated with court appointment of plaintiffs' lead counsel than with plaintiffs' counsel electing the lead counsel).


\textsuperscript{110} In one mass tort litigation, for example, nine lawyers or law firms represented over 10,000 claimants. Vairo, supra note 37, at 619.

\textsuperscript{111} See id. at 619-21 (questioning the ability of the courts to protect the individual interests of a large group of claimants in a mass tort claim when a small number of attorneys controls the collective representation).
flow generated by the litigation and the decisionmaking required to keep the litigation moving. The additional volume and complexity of work may exceed the capacity of the assigned judge. The judge must deal not only with the overall demands of the litigation, but also with discrete issues arising in particular cases and the demands of individual justice.\textsuperscript{112} Although aggregated cases share common issues, individual cases have unique features. The judge must balance the benefits of uniform treatment against the demands of substantive rules and procedural fairness in individual cases.\textsuperscript{113} Lawyers, who may be unenthusiastic about aggregation of their cases, compound the court’s management burden and confound its efforts to move the litigation toward expeditious resolution.\textsuperscript{114}

3. \textit{Common Issues Not Predominating}.—The fact that a group of cases has some common issues does not necessarily mean that aggregation will be efficient. If the common issues do not predominate, or if they are not susceptible to coordinated resolution, aggregation may bog down the litigation.\textsuperscript{115} Even limited aggregation for resolution of a specific issue runs that risk, although the centralized resolution of a controlling or potentially dispositive threshold issue can sometimes be beneficial when total consolidation would be unwise.\textsuperscript{116}


\textsuperscript{113} \textit{See Edward Brunet, The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies, 10 REV. LITIG. 273, 274 (1991)} (observing that “[c]ontemporary litigation policies involve a trade off between fairness and efficiency” and that aggregation tends to weight efficiency more heavily).

\textsuperscript{114} \textit{But see Schwarzer et al., supra note 2, at 1737-38} (discussing the positive role attorneys can play in facilitating coordinated treatment of related multiforum cases).

\textsuperscript{115} \textit{See Epstein, supra note 54, at 19} (arguing that consolidation of related claims would only complicate litigation).

\textsuperscript{116} \textit{See COMPLEX LITIGATION PROJECT, supra note 2, app. A at 438} (providing that “[i]n special circumstances, one or more common issues, rather than entire cases, may be transferred and consolidated”).
4. Sudden Death and Premature Disposition.—The obverse of the cost of excessively duplicative activity is the danger of a single dispositive decision operating as the death knell for the litigation, perhaps even for the defendants themselves, although it could later prove to have been decided wrongly. This risk is particularly high when a decision is made before the facts have been fully developed. In cases involving novel scientific issues, for example, it may take time to accumulate the empirical knowledge needed for an informed judgment. While aggregation helps to avoid inconsistent results, it can create the risk of concentrating too much decisionmaking power in the hands of a single judge and jury.

5. Miscellaneous Concerns.—Aggregation presents other potential problems. By raising the stakes in the litigation and mobilizing greater forces and resources, it could delay trial and settlements. For the same reasons, it might interfere with the effective use of alternative dispute resolution proceedings in transferor courts, and it might magnify scheduling difficulties because of the number of participants. It could impose disproportionate burdens on tangential defendants compelled to participate in extensive and costly proceedings. Moreover, if the litigation involves issues of individual causation and damages, assertion of the right to individual jury trials under the Seventh Amendment may limit the benefits of aggregation and encumber—or even overwhelm—consolidated proceedings.

117. See Epstein, supra note 54, at 9 ("The consolidation of all actions in a single court makes the [defendant] firm play 'you bet your company.'"). See also In re Rhone-Poulenc Rorer Inc., 63 U.S.L.W. 2579, 2580 (7th Cir. Mar. 16, 1995) (decertifying a class in a nationwide tort action because the risk of a single trial determining all negligence issues placed unfair pressure on defendants to settle).

118. See Lawrence Chesler, Repetitive Motion Injury and Cumulative Trauma Disorder, N.Y. ST. B.J., Dec. 1993, at 12, 52 (describing an "approaching wave of products liability litigation" based upon repetitive strain disorder and noting judicial skepticism of the theory and the need for plaintiffs to gather "the 'scientific data' that does not yet exist"). The repetitive strain disorder litigation is a good example of the benefits and dangers of aggregation: without aggregation, individual plaintiffs cannot afford to collect the scientific evidence necessary to prove their theory of liability, but with aggregation, they face the possibility of massive unfavorable verdicts resulting from resistance to their theory. See id. Defendants in turn face the risk of massive, possibly bankrupting, verdicts.

119. Some may consider the transfer of some 40,000 cases to a single judge illustrative of the problem. See supra note 4 and accompanying text.

120. See Epstein, supra note 54, at 15-17 (hypothesizing that aggregation of numerous parties leads to increased pretrial litigation).

121. See Thomas J. Stipanowich, Arbitration and the Multiparty Dispute: The Search for Workable Solutions, 72 IOWA L. REV. 473, 505 (1987) ("The involvement of additional parties will probably make arbitration more time-consuming and more costly than two-party proceedings.").

122. Id.

123. See Sherman, supra note 14, at 266, 264-66 (arguing that the Seventh Amendment would entitle defendants to a "jury determination of their responsibility in damages regarding each individual plaintiff," thereby preventing "the extrapolation of individual awards from the representative cases" in aggregate litigation).
None of this is to say that aggregation of large-scale litigation is not a worthy objective. Aggregation offers potential efficiencies and economies that may exceed its costs. Indeed, the growth of large-scale litigation may eventually leave no alternative to aggregation procedures if the courts' adjudicatory function is to survive. But any aggregation proposal must be carefully examined. That examination may be aided by experience gained under less drastic schemes, such as the proposal made in this Paper. Adoption of this proposal could stimulate thinking and discussion about aggregation and could provide an opportunity for experimentation and evaluation while reducing the risks of a future large-scale failure. Moreover, given the inevitable political realities, a modest scheme stands a better chance of adoption than blockbuster reforms. The present proposal, targeted at the most serious problem—duplicative and uncoordinated discovery—may generate substantial benefits at minimal cost.

IV. Limited Intersystem Discovery Coordination—One Small Step

A proposal for limited coordination should be guided by the following criteria: (1) It should be directed at the most significant and readily identified source of inefficiency in large-scale litigation; and (2) it should avoid to the greatest extent possible the jurisdictional, choice-of-law, and other procedural and management problems (and the associated political obstacles) of other aggregation proposals.

Undoubtedly the greatest source of inefficiency in multiparty, multi-forum litigation is duplicative and uncoordinated discovery. Many witnesses in transactionally related cases are identical, but will often be deposed separately in different cases (absent agreement of the parties). Similarly, interrogatory and document discovery may be repeated in separate cases, and uncoordinated scheduling of discovery activity causes expense, delay, and aggravation. The result is wasteful expenditure of private and public resources. This problem affects virtually all large-

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124. At least one commentator, while acknowledging other concerns implicated in aggregation, concludes that efficiency should be “the dominant policy value in contemporary complex litigation.” Brunet, supra note 113, at 277. If efficiency is the key value, claims resolution processes other than conventional adversarial litigation would obviously be preferable. See, e.g., JEFFREY O'CONNELL, THE LAWSUIT LOTTERY 157-205 (1979) (praising no-fault auto insurance and arguing for the extension of no-fault principles to all kinds of accidents).

125. Discovery is not only the most serious problem, but efforts to introduce coordination of discovery are also likely to be the least controversial. Schwarzer et al., supra note 2, at 1707 (arguing that “[v]irtually all judges and attorneys . . . agree that duplicative discovery . . . is enormously wasteful” and that streamlined discovery is the first goal of coordinated proceedings).

126. Id.

127. Id. at 1692 n.9.

128. See id. at 1692-93 (detailing the wasteful results of duplicative discovery in multiparty cases).
scale cases. Many are resolved without trial, but hardly any escape the discovery stage.

Intersystem coordination of discovery and related pretrial activity is therefore the obvious priority in the general area of aggregation. Considerable savings and efficiencies could be realized without consolidating cases for trial. By leaving all dispositions on the merits—both pretrial and trial—to the courts of the originating state, choice-of-law problems would be avoided.\textsuperscript{129} Such a scheme would also afford an opportunity to gain experience with intersystem consolidation and coordination which would inform any future moves toward more ambitious schemes.

Our proposal is to expand the multidistrict litigation process to include state cases by creating limited removal jurisdiction over state court claims transactionally related to federal cases previously or simultaneously consolidated for multidistrict litigation proceedings.\textsuperscript{130} The removal would be for the limited purpose of consolidating common discovery and related pretrial activity. Absent settlement, the state court actions would return to the state courts at the conclusion of the common discovery proceedings, or earlier if warranted. The federal transferee court would not have the authority to terminate or dispose of any claim or defense (such as by summary judgment) in the state cases.

Narrowly viewed, the proposal might seem to intrude on the domain of state courts. It enlarges federal removal power and could disrupt proceedings in state courts, although safeguards to minimize disruption are provided.\textsuperscript{131} But, on balance, the proposal advances economy and efficiency in both state and federal courts with due regard for the interests of each state. It is consistent with Chief Justice Rehnquist's recent reminder of the "need to view our [two] systems as one resource and use that resource as wisely and efficiently as we can."\textsuperscript{132}

\textsuperscript{129} This applies to the state court cases. The federal cases will continue to be treated as they are under the current multidistrict litigation statute, with transferee judges retaining the power to decide all pretrial motions, including motions for summary judgment. See 28 U.S.C. § 1407(a) (1988) (providing for consolidation of all pretrial proceedings for cases sharing common facts upon the recommendation of the Judicial Panel on Multidistrict Litigation); \textit{Complex Litigation Project, supra} note 2, at 22 (noting that under § 1407 "[t]he transferee judge decides all pretrial motions, including summary judgment motions, and supervises discovery").

\textsuperscript{130} For simplicity, the language of the proposal tracks as much as possible the language of existing 28 U.S.C. § 1407 (1988), the statute establishing the Judicial Panel on Multidistrict Litigation. The proposed statutory text appears in the Appendix.

\textsuperscript{131} App. § 1407(i)(1)(c) (requiring the Panel to determine, as a prerequisite to ordering removal, that the state court proceedings will not be unduly disrupted).

\textsuperscript{132} William H. Rehnquist, \textit{Welcoming Remarks: National Conference on State-Federal Judicial Relationships}, 78 VA. L. REV. 1657, 1658 (1992). The authors considered giving individual state judges veto power over removal of a case. Such a provision would, however, make the procedure too haphazard. The proposal does not preclude state judges from communicating their views to the Panel, which would take such views into account in considering whether removal would unduly disrupt state court proceedings.
The following sections describe the operation of the proposal.

A. Initiation of Proceedings

The present multidistrict litigation statute allows any party to a federal action in which consolidated pretrial proceedings may be appropriate to file a motion seeking consolidation with related actions in a single federal district court for coordinated pretrial proceedings. In addition, the Judicial Panel on Multidistrict Litigation may initiate transfer proceedings sua sponte.

This proposal goes beyond the present statute by allowing any party to a state court action to initiate removal by filing a motion to consolidate. Furthermore, borrowing from the ALI proposal, it authorizes any court in which an action is pending to move the Panel for consolidation. The timely identification of related actions is critical to the efficacy of the statute. Allowing both federal and state courts, as well as parties, to suggest pretrial coordination of cases will help the Panel become aware of litigation that may be appropriate for consolidation.

The proposal departs from traditional removal in two respects. First, it allows plaintiffs as well as defendants to initiate removal. Under current law, there is generally no reason to authorize plaintiffs to initiate removal; if federal subject-matter jurisdiction exists, based on either diversity of citizenship or federal law, they can file in federal court. But under this proposal, as discussed below, subject-matter jurisdiction for pretrial removal would be based on minimal diversity, which does not permit initial filing in federal court. As a result, plaintiffs unable to initiate an action in federal court could still take advantage of federal pretrial consolidation (after having properly initiated the action in state court).

134. Id. § 1407(i)(i).
136. Id. § 1407(i)(3)(a). The ALI proposal allows any court—state or federal—in which an action is pending to suggest a transfer for consolidation. COMPLEX LITIGATION PROJECT, supra note 2, at 440. It goes much further than the instant proposal, however, in that it contemplates consolidation for all purposes, including trial. See id. at 438 (allowing actions to be transferred “to any district for consolidated pretrial proceedings or trial”).
137. The proposal also requires any party filing a motion for consolidation to list the names and addresses of all known parties in transactionally related actions. App. § 1407(i)(3). Consideration should also be given to amending the Federal Rules of Civil Procedure to provide specifically that district judges may direct parties in actions before them to identify known parties in related state court actions. Federal Rule of Civil Procedure 16(c) might be amended to add the following to the list of topics appropriate for pretrial conferences: identification of and coordination with related state and federal court actions and parties.
138. See App. § 1407(i)(3)(b) (allowing “any party” to initiate removal).
140. App. § 1407(i)(5)(a).
Moreover, reasons for removal under this proposal may not arise until sometime after the filing of the action. Second, under current law, removal of a diversity case to federal court requires consent of all defendants.\textsuperscript{141} This proposal permits any defendant to move the Panel for pretrial consolidation even in the absence of agreement by other defendants.\textsuperscript{142}

B. \textit{Subject-Matter Jurisdiction}

Under the proposal, removal would not be self-executing; the Panel would have to make the requisite findings, including a finding that jurisdiction exists.\textsuperscript{143} Subject-matter jurisdiction under this proposal is based principally on minimal diversity,\textsuperscript{144} the constitutional validity of which has been upheld.\textsuperscript{145} Minimal diversity requires that any two adverse parties must be citizens of different states.\textsuperscript{146} Few cases will fail to qualify under minimal diversity because claims against a single non-diverse defendant will be rare in large-scale litigation.

In addition, the proposal authorizes the Panel to remove claims on the basis of supplemental jurisdiction.\textsuperscript{147} This authorization is needed because the existing supplemental jurisdiction statute does not permit removal of claims transactionally related to diversity actions, \textit{i.e.}, it is limited to claims related to federal question claims.\textsuperscript{148} The proposal would permit removal of claims lacking an independent basis of subject-matter jurisdiction so long as they are transactionally related to claims

\begin{footnotesize}
\begin{itemize}
\item 142. See App. § 1407(i)(3)(b) (allowing "any party" to make a pretrial consolidation motion to the Panel).
\item 143. Id. § 1407(i)(1)(a).
\item 144. The proposal does not cover federal question jurisdiction cases because (1) authority for their removal and consolidation already exists, 28 U.S.C. § 1441(a) (1988), and (2) minimal diversity together with supplemental jurisdiction will be adequate to enable removal of any case in large-scale litigation.
\item 145. See supra note 48 and accompanying text.
\item 146. 28 U.S.C. § 1332(a) (1988). Because the claims asserted in the kind of litigation within the scope of the proposal will almost certainly involve more than $50,000 each, there is no need to specify a jurisdictional amount.
\item 147. App. § 1407(i)(1)(a). This borrows from the ALI proposal, but differs in that the determination that supplemental jurisdiction exists is to be made by the Panel rather than the transferee judge. Compare \textit{Complex Litigation Project}, supra note 2, at 261 with App. § 1407(i)(1)(a) (allowing "a district court sitting as a transferee court" to exercise supplemental jurisdiction).
\item 148. The statute provides:
In any civil action of which the district courts have original jurisdiction founded solely on [diversity], the district courts shall not have supplemental jurisdiction . . . over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules
\item 149. 28 U.S.C. § 1367(b) (Supp. V 1993).
\end{itemize}
\end{footnotesize}
pending in federal court with which they would be consolidated. This would permit the Panel to sweep into the coordinated discovery federal question cases and cases lacking minimal diversity (though, as noted above, they would be rare). The transferee court would have discretion to remand such claims to the state court if the remand would be convenient for the parties and witnesses, would promote the just and efficient conduct of the action, or would avoid undue disruption of state court proceedings.

Because the transferee court's jurisdiction extends to limited pretrial proceedings only, a question might arise as to whether removal would bring an Article III "case" before the court. There is no record of any jurisdictional challenge to the exercise of judicial power under the existing multidistrict litigation statute, which authorizes transferee courts to conduct pretrial proceedings only. That statute might be distinguished because it contemplates that the case will be returned to an Article III court for adjudication at the conclusion of the pretrial proceedings. Under the present proposal, state cases will return to state court, and federal court authority over them will be limited to managing discovery. Precedent exists, however, for the exercise of such limited authority by the transferee court; it is similar, for example, to the authority which federal courts have long exercised to assist foreign courts with discovery in cases in which the foreign court has jurisdiction over the merits.

149. App. § 1407(i)(5)(b).
150. These would be federal question cases that the parties have chosen to litigate in the state court.
151. App. § 1407(i)(6).
152. Disagreement exists over whether under the Constitution "case" is distinguishable from "controversy," or whether a single, undifferentiated unit was intended. See, e.g., Robert J. Pushaw, Jr., Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts, 69 NOTRE DAME L. REV. 447 (1994) (suggesting that the history, language, and structure of Article III indicate that the Framers interpreted "case" and "controversy" to embody two distinct concepts—an approach different from the modern tendency to read the two terms as identical). This dispute, however, does not affect the proposal, and the terminology used in this Paper is not intended to take a position on this issue.
153. We make this assertion in light of a Westlaw search on May 26, 1995, in the "ALLFEDS" database using the following search query: "multidistrict litigation statute" /p "jurisdictional challenge" /p "pretrial."
155. App. § 1407(i)(1). While it is not uncommon for Congress to limit the scope of courts' authority with respect to certain claims by, for example, barring the award of punitive damages or injunctive relief, such restrictions are distinguishable because they do not bar the court from adjudicating the dispute on the merits and granting some relief.
156. See 28 U.S.C. § 1782(a) (1988) (authorizing courts to assist foreign courts with discovery). For other examples of the exercise of limited jurisdiction by district courts, see 28 U.S.C. § 1963 (Supp. V 1993) (allowing registration and enforcement of judgments in any district court); FED. R. CIV. P. 37(b)(1) (authorizing the court in which the deposition is taken to hold a witness in contempt for improper conduct); and FED. R. CIV. P. 45(a)(2) (stating that subpoenas for attendance at a deposition issue from the court in the district in which the deposition is to be taken).
The underlying rationale of the "case or controversy" requirement, which, as the Supreme Court has stated, "is built on a single basic idea—the idea of separation of powers," should allay any remaining concern about its effect on the proposed statute. The "case or controversy" requirement safeguards the separation of powers in two ways. First, it ensures that courts act only in a setting appropriate for their competence, that is, on disputes presented in an adversarial setting. The proposal would bring before courts only traditional adversarial proceedings, and managing discovery is an integral part of judicial work. Second, the "case or controversy" requirement prevents courts from encroaching on the other branches. The proposal in no way implicates this concern; management of pretrial activity is exclusively a function of the judicial branch.

Although the court managing the coordinated discovery will not adjudicate the underlying merits of the dispute, it does have a case before it—an adversarial dispute on course toward a judicial resolution. Article III states that the judicial power "shall extend to" certain cases and controversies; it does not say that in each case the power must be exercised to completely resolve that case.

C. Notice and Hearing

The proposal requires that notice be served on parties that may be affected by a Panel decision to consolidate, and it gives the parties an

158. See Evan H. Caminker, Comment, The Constitutionality of Qui Tam Statutes, 99 YALE L.J. 341, 380 (1989) (applying and discussing the twin safeguards that stem from the "case or controversy" requirement in the context of qui tam statutes).
159. See Flast v. Cohen, 392 U.S. 83, 95 (1968) (stating that the "case or controversy" requirement "limit[e] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process").
160. See Morrison v. Olson, 487 U.S. 654, 678 (1988) (arguing that the "case or controversy" requirement "ensure[s] the independence of the Judicial Branch and . . . prevent[s] the Judiciary from encroaching into areas reserved for the other branches").
161. It may be objected that United States v. Klein, 80 U.S. (13 Wall.) 128 (1871), requires that a federal court be able to rule in accord with all applicable law. In Klein, however, Congress tried to tilt an outcome by keeping some law—the effect of a pardon—outside judicial cognizance in cases otherwise properly before the courts. Id. at 143-44. The proposal, by contrast, would let courts do the part of the job they are given in accord with all applicable law. Moreover, it has neither the intent nor the effect of producing particular outcomes of cases.
163. Note that not everything courts do is directed at the adjudication of a dispute before them. The rendering of dicta is an example. As a judicial activity, it is less related to the exercise of the judicial power than would be the coordination of discovery under the proposal. Cf. Mistretta v. United States, 488 U.S. 361, 389-90 (1988) (upholding the rulemaking authority of the courts under the Sentencing Reform Act against the contention that it violated the "case or controversy" requirement); Morrison, 487 U.S. at 679 n.16 (upholding the vesting of power to appoint independent counsel in the judicial branch, while rejecting the contention that it violates the "case or controversy" requirement).
opportunity to participate in a hearing on the merits of consolidating or coordinating cases. The notice and hearing requirements not only satisfy due process, but also help inform the Panel's decision on whether to remove state cases transactionally related to federal cases.

There should be no issue of personal jurisdiction over the affected parties. Because the state courts will have already obtained personal jurisdiction over the parties in the state actions, the transferee court will have jurisdiction in the same fashion as any federal court to which an action has been removed.

D. Criteria for Consolidation

The criteria for pretrial consolidation of related state actions under the proposal would build upon the existing multidistrict litigation statute.

First, removal of state actions would be authorized only when the multidistrict litigation process has been previously or simultaneously invoked to consolidate related federal litigation. Thus, the federal courts will coordinate pretrial activity only in litigation that would be before them even without the intersystem procedure.

Second, the Panel may remove only state court actions involving questions of fact common to federal cases. The consolidation mechanism primarily attempts to avoid duplication in common factual investigations—depositions, interrogatories, and document discovery. It is not designed to resolve common questions of law (although they may be resolved in the federal actions).

In addition to the presence of a common question of fact in already (or simultaneously) consolidated federal litigation, three other conditions must be met before the Panel can order removal and consolidation of state cases. The following paragraphs describe these conditions.

164. App. § 1407(i)(3).
165. The fact that the cases may be removed to districts other than those where the state cases originated should have no impact on personal jurisdiction. Under ordinary removal based on complete diversity or federal question jurisdiction, the federal courts may subsequently order the action transferred to another district (as frequently happens, for example, under the present multidistrict litigation statute) without losing personal jurisdiction over the parties. See In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 163 (2d Cir. 1987) (noting that claims concerning personal jurisdiction do not affect the power of a transferee court which receives its power solely from the transferor court), cert. denied, 484 U.S. 1004 (1988); In re FMC Corp. Patent Litig., 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) (holding that the district court to which a removed case is transferred may exercise personal jurisdiction over the case). Nor should venue be a problem, particularly because the transferee court will make no decisions involving the application of substantive law to the merits.
166. App. § 1407(i)(1).
167. Id.
168. Id. § 1407(i)(1)(a)-(c).
1. Subject-Matter Jurisdiction.—The Panel must find the existence of subject-matter jurisdiction in the cases proposed to be removed. The proponent of removal would bear the burden of establishing jurisdiction, although when the proceedings are initiated on the Panel’s motion, it may call for submission by the parties of evidence that enables it to make the determination.

2. Convenient, Just, and Efficient.—The second criterion which must be satisfied under the proposal mirrors the main criterion for consolidation under the existing Section 1407(a): the Panel must find that removal is “for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.” By using the language of the existing statute, the proposal adopts existing precedent and practice. The standard is flexible, taking into account both the interests of the parties and witnesses and the management capabilities and limitations of the courts. State court actions, though related to federal mass litigation, will not necessarily be appropriate for pretrial intersystem consolidation. A significant number of the state cases, for example, may be nearing trial by the time they come before the Panel. Additionally, if most of the cases are concentrated in the courts of a single state, that state’s joinder, intervention, or consolidation devices may be adequate without need for federal consolidation. Consolidation may also be impractical because discovery activities will be dominated by the discrete issues in individual cases. A key consideration for the Panel will be whether consolidation will lead to significant economies and efficiencies for the parties and the courts. There is reason to expect that this will be true more often than not.

Geographic inconvenience is among the factors the Panel should consider in deciding whether and where to consolidate. Under existing

169. Id. § 1407(i)(1)(a). For a discussion of subject-matter jurisdiction, see supra notes 143-63 and accompanying text.
170. See McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936) (holding that the prerequisites to federal jurisdiction must be demonstrated by the party seeking federal jurisdiction).
171. Id. § 1407(i)(3).
173. Even when the procedure under the proposal is invoked, only some of the discovery in the litigation may be appropriate for national coordination, with local discovery left to be conducted after remand to the state court.
174. See Schwarzer et al., supra note 2, at 1700-06 (illustrating the wide range of intersystem litigation in which coordinated pretrial activity proved fruitful). The breast implant litigation is another illustration of litigation in which substantial efficiencies and economies have been achieved through informal coordination of discovery between the multidistrict litigation transferee judge and state judges handling related cases. See In re Silicone Gel Breast Implant Prods. Liab. Litig., 793 F. Supp. 1098, 1100 (J.P.M.L. 1992) (finding that centralization of discovery procedures would prevent inconsistent pretrial rulings and conserve judicial resources).
practice, if most of the cases originate in a particular geographic region, the Panel tends to locate the proceedings there.\textsuperscript{175} Consolidation creates a risk that litigation expense of individual state court parties may be increased by the additional travel required (although offsetting savings should be realized). The Panel needs to take this factor into account, but measures are available to minimize its impact—the transferee judge may hold hearings at different locations,\textsuperscript{176} and the appointment of lead counsel may reduce the number of persons that need to travel.

3. No Undue Disruption of State Court Proceedings.—Removal may be ordered only upon a finding that it will not unduly disrupt pending state court proceedings.\textsuperscript{177} This requirement expands on the second criterion, which permits consolidation to be ordered only when it would promote the efficient conduct of the actions. The separately stated “unduly disrupts” criterion is intended to stress the purpose of the proposal to further expeditious resolution of complex litigation. Consolidation would not be appropriate when state court proceedings are close to trial or when existing state consolidation or coordination arrangements adequately meet the needs of the litigation.

E. Review of Panel Decisions

The same procedure currently available for the review of decisions by the Panel would apply to its decisions regarding removal of state actions: review is by extraordinary writ to the court of appeals only, and no review is available of decisions not to remove.\textsuperscript{178} Such a restriction on review is necessary to deter attempts to derail the proceedings and generate lengthy delays. In addition, the proposal permits a party to seek remand at any time in the transferee court. Thus, the issue whether the prerequisites for removal have been satisfied, and in particular whether subject-matter jurisdiction exists, can be raised again in the transferee court.\textsuperscript{179}

\textsuperscript{175} Section 1407 authorizes the Panel to transfer pretrial proceedings to any district court in the nation. 28 U.S.C. § 1407(a) (1988); see, e.g., In re San Juan Dupont Plaza Hotel Fire Litig., 687 F. Supp. 716, 722 (D.P.R. 1988) (noting that one related case was transferred from the Central District of California to the District of Puerto Rico for consolidated pretrial proceedings).

\textsuperscript{176} This practice has been followed in the breast implant litigation in which joint pretrial conferences with state judges were held in various locations. See Order No. 5 (Revised Case Management Order) at 1, Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implants Prod. Liab. Litig.), No. CV 92-P-10000-S, Civ. A. No. CV94-P-11558-S (N.D. Ala. Sept. 15, 1992) [hereinafter Breast Implant Order No. 5] (on file with the Texas Law Review).

\textsuperscript{177} 28 U.S.C. § 1407(c) (1988); App. § 1407(i)(4).

\textsuperscript{178} See infra notes 191-92 and accompanying text.
F. Conduct of the Multidistrict Litigation Proceedings

The transferee court will conduct the consolidated pretrial proceedings in the same general manner as other multidistrict litigation proceedings with one major difference: the court will not be authorized to make dispositive rulings terminating or disposing of claims or defenses. Following the limited pretrial proceedings, the state cases would be remanded to the originating state courts for any remaining proceedings, including resolution of the merits by motion or trial.

By withholding from transferee courts authority to reach the merits in state cases, the proposal avoids the choice-of-law thicket. Discovery in federal court is regarded as procedural, governed by the federal rules, precluding the need for most choice-of-law determinations. The principal exception concerns rulings on claims of privilege—under the Federal Rules of Evidence, federal courts must look to state law to determine the law of privilege in cases in which state law

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180. One element unique to proceedings under this proposal will be the need to maintain some coordination or at least contact with the judges in the state courts from which the actions have been removed. In the breast implant litigation, for example, a common form of case management order was developed. See Breast Implant Order No. 5, supra note 176; Order No. 1 (Initial Case Management Order), Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implants Prods. Liab. Litig.), No. CV 92-P-10000-3, Civ. A. No. CV 94-P-11550-S (N.D. Ala. June 26, 1992) (on file with the Texas Law Review). The case management aspects of this proposal are beyond the scope of this Paper and must be largely left to the individual judges guided by the particular circumstances of each litigation.

181. App. § 1407(i)(2). While the transferee court would, as noted above, remand a case to state court if it finds a lack of subject-matter jurisdiction, such a remand would not constitute a dispositive ruling terminating or disposing of a claim or defense because it would not resolve the case. Under federal law, courts may dismiss an action or a claim as a sanction for the abuse of discovery. FED. R. CIV. P. 37(b)(2)(C). Under this proposal, courts could not exercise this authority in the state cases because the statute precludes dispositive rulings. Other available sanctions, such as awarding attorneys' fees or holding counsel or parties in contempt, should suffice to control abusive discovery practices.

182. App. § 1407(i)(6).

183. However, because the transferee court would have subject-matter jurisdiction, the parties could presumably stipulate to submitting rulings on the merits, such as motions for summary judgment.

184. See supra notes 93-100 and accompanying text (discussing the choice-of-law provisions in the Multiparty, Multiforum Jurisdiction Act, the ALI Proposal, and the ABA Commission proposal).

185. See Sibbach v. Wilson & Co., 312 U.S. 1 (1940) (rejecting the argument that Federal Rule of Civil Procedure 35, dealing with pretrial physical and mental examinations, and Rule 37, dealing with sanctions for abuse of discovery, are substantive and thus should not be applied by federal courts in cases governed by state substantive law).

186. Multidistrict litigation courts are, however, presently called on to make occasional choice-of-law determinations, even though § 1407 is limited to pretrial proceedings. See, e.g., In re Air Crash Disaster Near Chicago, Illinois, 644 F.2d 594, 610-16 (7th Cir.) (determining punitive damage claims under the law of the jurisdictions in which the transferred cases were originally filed), cert. denied, 454 U.S. 878 (1981). See generally RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION 206-08 (2d ed. 1992) (discussing instances in which multidistrict litigation courts may be required to make choice-of-law determinations). This occurs principally in connection with summary judgment motions. The proposal made in this Paper precludes the transferee judge from ruling on such motions in state cases. App. § 1407(i)(2).
supplies the rule of decision. However, this is not likely to prove to be a difficult choice-of-law problem—the court need only choose the most liberal rule applicable in any of the involved states.

Management of discovery will often require the transferee judge to rule on the scope of discovery. Such rulings will, under the proposal, control in all subsequent proceedings. Although the rulings may well implicate the merits of the case, they would not preclude the state judge on remand from making decisions on the merits outside of the discovery context. If the state judge were to determine that additional discovery were required to make a merits determination, the prior coordinated discovery proceedings would not stand in the way.

The process of managing consolidated discovery would not differ from current practice under Section 1407. Representation of the parties in the consolidated proceedings would be principally by lead counsel, as it is now, although attorneys for individual parties could obtain leave to appear. The large role played by lead counsel will place a responsibility on the transferee judge to ensure fair treatment of individual litigants.

The transferee judge could remand cases to state court whenever appropriate. Remand will normally occur when consolidated discovery is complete, but it may occur earlier. For example, the parties and the state court may be ready for trial, or the transferee judge may decide that consolidation will not be helpful in certain cases, perhaps because some cases need less discovery than others. The transferee judge could also issue a remand order for the limited purpose of permitting a motion for summary judgment to be decided in the state court, with the case returning to federal court if the motion is denied.

G. Settlement

One objective of the proposal is to facilitate the settlement of the entire litigation by consolidating all the cases before a single judge, albeit for

187. See FED. R. EVID. 501; see also Armour Int'l Co. v. Worldwide Cosmetics, Inc., 689 F.2d 134, 135 (7th Cir. 1982) (noting that state privilege law must be applied on issues governed by state law in diversity cases).

188. This would not seriously disadvantage anyone because even in the absence of consolidated discovery, parties can gain access to information gleaned from related cases in jurisdictions with more liberal discovery rules.

189. App. § 1407(i)(8).

190. See MANUAL FOR COMPLEX LITIGATION (THIRD) § 20.22 (Tentative Draft No. 1 1995) (recognizing that one or more attorneys generally act on behalf of the other counsel and the other parties in multiparty litigation).

191. App. § 1407(i)(6).

192. Although such a procedure may appear yo-yo-like, it is the least objectionable of all the alternatives, including having no coordination at all.
limited purposes. This may be one of its greatest attractions; experience under the multidistrict litigation process suggests that consolidating cases for pretrial purposes can lead to otherwise unattainable global settlements. That the transferee judge could not make merits determinations would not impair his or her effectiveness as a settlement judge. On the contrary, because of that limitation, the judge would be free of the ethical constraints that bind the trial judge.

Whether the judge could be involved in the approval of a settlement when such approval is required by law is not specifically addressed in the proposal. In some instances, the parties may stipulate to submission to the transferee judge. In other instances, in which local interests predominate, it may be appropriate to remand the case for approval and supervision by the originating state court. But it will often make sense to have approval proceedings in nationwide litigation centralized in one court; the prohibition against rulings terminating or disposing of any claim or defense should not preclude a transferee court from ruling on objections to class action or other settlements negotiated by the parties to the litigation.

H. Tag-Along Actions

The proposal would authorize the Panel to remove later-in-time (or "tag-along") state cases for consolidation, using the same criteria as the initial consolidation. The transferee judge is not given that authority, lest the decisionmaking responsibilities for removal be dispersed. The Panel will presumably develop expertise in evaluating and applying the criteria for consolidation, enabling it to deal efficiently with state tag-along cases (as it already does with federal tag-alongs).

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193. See In re Asbestos Prods. Liab. Litig., 771 F. Supp. 415, 421 (J.P.M.L. 1991) (transferring over 26,000 asbestos cases to a single district court and observing that transfer may facilitate exploration of the opportunities for global settlement).
194. App. § 1407(0)(1).
195. In federal multidistrict litigation, a presumption favors transferring tag-along actions, especially when such a transfer would eliminate the possibility of duplicative discovery and minimize undue hardship to the parties and witnesses. In re Air Crash Disaster Near Pellston, Mich., 357 F. Supp. 1286, 1287 (J.P.M.L. 1973). In the silicone gel breast implant litigation, the Judicial Panel on Multidistrict Litigation transferred 78 actions pending in 33 federal district courts and treated approximately 200 other related actions as potential tag-along actions, stating that the centralization of these actions under 28 U.S.C. § 1407 was necessary "in order to avoid duplication of discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary." In re Silicone Gel Breast Implants Prods. Liab. Litig., 793 F. Supp. 1098, 1100 (J.P.M.L. 1992). Additionally, if tag-along actions and actions consolidated in the transferee district share common defendants, the likelihood of a tag-along action being transferred is increased. In re Corrugated Container Antitrust Litig., 447 F. Supp. 468, 472 (J.P.M.L. 1978). Notwithstanding the benefits of transferring tag-along actions, such a transfer may cause problems for the federal courts. Initially, in the silicone gel breast implant litigation, it took roughly two months before a conditional transfer order for a tag-along action became final. Telephone conversation with Sam C. Pointer, Chief Judge of the Northern District of Alabama (Mar. 14, 1995). During this period, a number of district
I. Appellate Review of Transferee Judge Rulings

Appellate review of rulings by the transferee judge may be sought by extraordinary writ.\(^{196}\) Because those rulings will generally concern only discovery, and will not affect the merits of the case, such narrow review for abuse of discretion or patent errors of law seems adequate.\(^{197}\)

Collateral attack in state court on federal court rulings would be barred. Objections to the conduct of the consolidated discovery could and would have to be raised before the transferee judge, with review by writ to the federal court of appeals. The rulings would be final and binding in all later state court proceedings. This provision is necessary to ensure that the federal proceedings are given the same effect in all state court proceedings.\(^{198}\)

J. Remand to State Court

The state cases would be remanded to state court for trial upon conclusion of the consolidated discovery, or earlier by order of the transferee judge.\(^{199}\) Any case could be remanded upon a showing of good cause, such as a state court judge’s suggestion or a party’s motion that the case was ready to go to trial. As explained earlier, the proposal would also authorize a limited remand for the purpose of a state court determination on the merits, such as a summary judgment motion.\(^{200}\) If the motion were denied, the case would automatically return to the federal court for completion of discovery proceedings.

As noted earlier, the proposal provides that decisions by the federal courts shall be deemed controlling in all subsequent proceedings.\(^{201}\) This would not preclude a state court, on remand, from permitting additional judges had commenced implementing their own case management procedures, such as assigning cases to different tracks, unaware that some of these cases had been conditionally transferred to the federal multidistrict transferee court. \(\text{Id. See generally R.P.J.P.M.L. 12}\) (setting forth the procedures for conditional transfer orders of tag-along actions). Parties to an action have 15 days from the date of the entry of the conditional transfer order to file a notice of opposition. \(\text{Id. at 12(c).}\)

\(\text{If no opposition notice is filed, the Panel files the order with the clerk of the transferee district, thus making the transfer final. Id. at 12(a), (e).}\)

196. App. § 1407(h)(7).

197. See generally COMPLEX LITIGATION PROJECT, supra note 2, at 129-47 (proposing and explaining a rule that decisions regarding transfer and consolidation are reviewable only by extraordinary writ).


199. App. § 1407(h)(6). The experience of the multidistrict litigation courts, however, suggests that many cases will probably settle before the completion of the coordinated pretrial proceedings. \(\text{See supra note 31 and accompanying text.}\)

200. \(\text{See supra note 192 and accompanying text.}\)

201. \(\text{See supra note 189 and accompanying text.}\)
discovery, so long as it is consistent with the earlier coordinated multidistrict litigation discovery. A witness whose testimony is relevant only to the local case, for example, could be deposed. But discovery would not be permitted to resume against a national defendant named in numerous consolidated actions. Rulings on the scope of discovery would remain binding, and a state court could not bar the use of discovery because it had been taken in national rather than local proceedings.202

V. Conclusion

The proposal in this Paper is narrowly targeted to deal with one specific problem engendered by mass litigation: unnecessarily duplicative, costly, burdensome, and time-consuming discovery. Incidentally, it also aims to provide a forum to facilitate global settlements. Some may see the proposal as too modest and would go further in bringing about intersystem coordination. We recognize that this is not the only way in which to skin this cat. But we think it is a reasonable compromise of conflicting approaches, and one that is feasible now. And we recognize that the proposal will no doubt raise problems not specifically addressed in this Paper and not foreseeable at this time. But the apparent attractions of the proposed scheme seem to us to make the risk worth taking in the expectation that the courts will be able to solve attendant problems.

The proposed amendment of the multidistrict litigation statute has sufficient coercive force to achieve meaningful coordination; removal does not depend on the will of the parties. At the same time, because the proposal is limited to non-merits pretrial activity, it does not significantly compromise federalism or litigant autonomy. By providing for remand of state cases for trial, it protects states’ interests in administering their law because determinations of the merits in the state cases will be in state court under state law. Likewise, litigants in the state cases will have their claims heard and resolved on an individual basis.203 Parties’ preference for trial in a state court will be respected.204

The proposal also avoids or lessens various other potential problems, such as the risk of sudden death or premature disposition of some cases,

203. Although consolidated discovery may be seen by some litigants as inconvenient or strategically disadvantageous, it cannot be said to deprive them of an individualized decision on the merits of their claims. See Transcred, supra note 109, at 833 (“Although an individual plaintiff does have a legitimate interest in controlling discovery related to his own claim, this interest is comparatively less important than his interest in controlling the forum in which his claim is tried, the legal theories upon which he will proceed at trial, and the conduct of the trial itself.”).
204. The policy rationale for honoring plaintiffs’ choice of forum has considerably more force when applied to trial, when the substantive law of the jurisdiction plays a critical role, than to pretrial discovery, when the substantive law of the jurisdiction does not play a critical role.
the possible compromising of parties' right to jury trial, the risk that aggregated cases will overwhelm judges, and, perhaps most importantly, the choice-of-law problem. Although the proposal facilitates subject-matter jurisdiction, it is unlikely to add greatly to the work of the federal courts. First, removal could not occur without Panel approval; the Panel would have to make the requisite statutory findings. Second, the procedure would apply only where federal court litigation is consolidated under the existing intrasystem multidistrict litigation procedure and thus would add only cases related to pending multidistrict litigation. Third, consolidation would be for discovery and related pretrial proceedings only, not for merits determinations.

An incidental, but significant, consequence of the proposal is to create a setting conducive to comprehensive settlements of large-scale litigation. Bringing parties in the related state and federal cases into a single courthouse creates the opportunity for organized and effective approaches directed at bringing about global settlements. As resources decline while large-scale litigation proliferates, intersystem aggregation in some form may eventually become a necessity. The proposals that have been made for comprehensive aggregation are imaginative and deserve serious consideration, but they are probably ahead of their time. The proposal advanced in this Paper, although modest by comparison, offers substantial benefits at minimal costs—and the opportunity to learn to crawl before trying to run.

205. It is also conceivable that the availability of this procedure would encourage some parties who could have their claims tried in either state or federal court to opt for state court, knowing that they could realize the potential efficiencies of coordinated discovery while still remaining entitled to a trial in state court.
Appendix

§1407. Multidistrict Litigation

(a) - (h)206

(i) Removal of Related State Actions

(1) Civil actions involving one or more common questions of fact pending in different state courts may be removed to any federal district court for coordinated or consolidated limited pretrial proceedings. Such removal shall be ordered by the Judicial Panel on Multidistrict Litigation when consolidation has been previously or is simultaneously ordered in such court under the preceding provisions of this section and upon the Panel's determination that:

(a) minimal diversity, as defined in this section, exists between adverse parties, or that the conditions for supplemental jurisdiction, as defined in this section, are satisfied;
(b) removal of such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions; and
(c) removal will not unduly disrupt pending state court proceedings.

(2) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom other actions have been or will be assigned by the Judicial Panel on Multidistrict Litigation acting pursuant to subsections (a)-(f) of this section. The judges to whom such actions are assigned, the members of the Judicial Panel on Multidistrict Litigation, and other circuit and district judges designated by the Panel may exercise the powers of a district judge in any district for the purpose of conducting such consolidated or coordinated proceedings. No order terminating or disposing of any claim or defense shall be entered by any judge acting with respect to a case coordinated or consolidated under the provisions of this subsection.

(3) Proceedings for the removal of an action under this section may be initiated by:

(a) the Judicial Panel on Multidistrict Litigation upon its own initiative or the written suggestion of any state or federal judge to whom an action has been assigned; or

206. These sections of the current statute are not affected by the proposal of this Paper.
(b) motion filed with the Panel by any party in any action pending in a state court in which removal for coordinated or consolidated pretrial proceedings under this section may be appropriate.

Any such written suggestion or motion shall contain a short and plain statement of the jurisdictional basis and grounds for removal. Such a motion shall also include a copy of all process, pleadings, and orders in the action, and a list of the names and addresses of all known parties to the action and related actions.

The Panel shall give notice to the parties and the affected state judges in all actions which may be subject to removal for coordinated or consolidated proceedings, specifying the time and place of the hearing to determine whether such removal shall be ordered. Notice may be served at any place within the United States, or any place outside of the United States if not prohibited by law. Orders of the Panel to set a hearing and other orders of the Panel issued prior to the order either directing or denying removal shall be filed in the office of the clerk of the district court in which a removal hearing is to be or has been held. The Panel’s order of removal shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any state court and by any state judge who would be affected by the proceeding under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of removal and such other orders as the Panel shall make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the Panel’s order to the clerk of the state court from which the action is being removed. Once an order removing the case is filed in the transferee district court, the state court shall proceed no further unless the case, or any part of the case, is remanded to it. An order denying removal shall be transmitted to the clerk of the state court wherein a case is pending in which the motion for removal has been made.

(4) No proceeding for review of an order by the Panel to remove a case from state court may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an
extraordinary writ to review an order of the Panel to set a removal hearing and other orders of the Panel before the order either directing or denying removal shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to remove or orders after transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the Panel denying removal for consolidated or coordinated proceedings.

(5) The Judicial Panel on Multidistrict Litigation shall have subject-matter jurisdiction over all actions:

(a) in which minimal diversity, as defined in this subsection, exists; and
(b) over all claims arising from the same transaction, occurrence, or series of related transactions or occurrences as a claim otherwise consolidated under this subsection, subject to the limitations of subsection (i)(1). Minimal diversity exists between adverse parties if any party to the action 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 title 28, section 1603(a), United States Code.

(6) Each action so removed under this subsection shall be remanded by the Panel, or by the judge or judges to whom it has been assigned, at or before the conclusion of such limited pretrial proceedings to the state court from which it was removed, unless previously terminated; provided however, that the Panel, or judge or judges to whom the action has been assigned, may separate any claim, cross-claim, counterclaim, or third-party claim for remand before the remainder of the action is remanded.

The Panel, or the judge or judges to whom an action has been assigned, may remand the action or portions of the action before the conclusion of such limited pretrial proceedings on the grounds set forth in this subsection for determining removability of an action from state court. Such remand may be for the limited purpose of securing a ruling terminating or disposing of a claim or defense; if an action is not terminated following such a limited remand, it shall be returned to the federal transferee court.

Any action may be remanded to state court by the transferee judge before the conclusion of such pretrial
proceedings (a) on motion of a party for good cause shown, or (b) at the suggestion of the state court from which the action originated.

(7) No orders issued or actions taken by the judge or judges to whom such actions are assigned for limited pretrial proceedings under this subsection may be reviewed except by a writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for a writ to review any orders issued or action taken by a transferee judge shall be filed only in the court of appeals having jurisdiction over the transferee district.

(8) Any orders issued by the judge or judges to whom such actions are assigned for limited pretrial proceedings under this subsection, except if reversed or modified on review pursuant to subsection (7), shall be controlling in all subsequent proceedings.

§ 1441. Actions Removable Generally

(b) *** Any other such action, except a minimal diversity action as defined in section 1407(i) of this chapter, shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

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(f) Any civil action brought in a state court in which the parties meet the requirements of minimal diversity and criteria for removal as defined by section 1407(i) of this chapter shall be removable by an order of the Judicial Panel on Multidistrict Litigation.