OPENING THE DOOR FOR BIAS: THE PROBLEM OF APPLYING TRANSFEREE FORUM LAW IN MULTIDISTRICT LITIGATION

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INTRODUCTION

Quick, what part of the federal court system is appointed exclusively by the Chief Justice of the United States Supreme Court,[1] allows parties as little as one minute to make their case,[2] and acts upon approximately 36,000 civil actions a year[3] from every corner of the country? If you answered the Judicial Panel on Multidistrict Litigation (JPML) then you probably either work in complex litigation or were tipped off by the Note's title. In truth multidistrict litigation (MDL), over which the Panel presides, is one of the legal world's best kept secrets.[4]

MDL sidesteps traditional rules of procedure to efficiently consolidate large numbers of similar cases for pretrial proceedings. In order to achieve these massive efficiency gains, the JPML is vested with rather extraordinary power to consolidate and transfer litigation. The

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1 *See infra* note 16 and accompanying text.

2 *See* John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2235 n.53 (2008).

3 *See* U.S. Judicial Panel on Multidistrict Litig., Annual Statistics of the Judicial Panel on Multidistrict Litigation 3 (2008), *available at* http://www.jpml.uscourts.gov/General_Info/Statistics/JPML_Annual_Statistics-CY_2008.pdf.

4 *See* Gregory Hansel, *Extreme Litigation: An Interview with Judge Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation,* ME. B.J., Winter 2004, at 18 ("[The Panel] is a little known secret, frankly."); *An Interview with Judge John F. Nangle,* THIRD BRANCH (Admin. Office of the U.S. Courts, Washington, D.C.), Dec. 1995, *available at* http://www.uscourts.gov/ttb/decttb/nangle.htm (noting that even district judges often know very little about the panel and its purpose).

potential for abuse of this power justifies close scrutiny of the Panel's decisions, especially when the location of consolidation could have an adverse effect on a group of litigants. Exactly one such case arises out of a simple choice of law rule, which mandates that a court receiving an MDL docket should apply its own circuit's law to decide federal questions. When there is a circuit split on a dispositive pretrial issue, this rather innocuous-sounding rule effectively allows the Panel to decide MDL cases based solely on the location of consolidation. While there is no evidence that the Panel has been abusing its power, this choice of law rule opens the door for bias to enter into an increasingly important part of the federal judicial system, and it thus deserves attention.

Part I of this Note provides an overview of the MDL process, while Part II details how federal choice of law issues provide an opening for bias. Finally, Part III reviews various prophylactic measures and concludes that mandating the use of transferor court law in the MDL context is the easiest and most effective means to prevent JPML bias.

I. THE MDL PROCESS

A. The Genesis and Purpose of Modern Multidistrict Litigation

Over the latter sixty years of the twentieth century, a variety of factors contributed to a vast expansion of federal litigation.[5] As courts' dockets began to fill, some judges noted the growing issue of dispersed and duplicative litigation. In 1941, within the context of a district court's refusal to enjoin a patent infringement action already decided by another district court, Judge Maris of the Third Circuit noted:

> The economic waste involved in duplicating litigation is obvious. Equally important is its adverse effect upon the prompt and efficient administration of justice. In view of the constant increase in judicial business in the federal courts . . . public policy requires us to seek actively to avoid the waste of judicial time and energy. Courts . . . should therefore not be called upon to duplicate each other's work in cases involving the same issues and the same parties.[6]

Judge Maris understood that the federal court system was beginning to face a crisis of resources, and his concern foreshadowed the creation of a procedural solution to growing dockets and duplicative actions: multidistrict litigation. The roots of modern MDL stem from

5 *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 28–54 (6th ed. 2009).

6 Crosley Corp. v. Hazeltine Corp., 122 F.2d 925, 930 (3d Cir. 1941).

the early 1960s, when Chief Justice Warren—responding to over 1800 civil actions related to conspiracy allegations spread across thirty-three districts—created the Coordinating Committee for Multiple Litigation of the United States District Courts.[7] Through voluntary agreement, the committee coordinated and consolidated discovery, established a casewide document clearinghouse, and utilized national depositions.[8] Due in large part to these measures, the cases were "disposed of by 1968, far earlier than had been anticipated."[9] Following this success, the Committee drafted and recommended to Congress the passage of a formal mechanism for case consolidation, centered upon a standing judicial panel.[10] This legislation,[11] which was to become the multidistrict litigation statute,[12] was meant to "provide centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the 'just and efficient conduct' of such actions" and to minimize the "possibility for conflict and duplication in discovery and other pretrial procedures in related cases."[13] Put simply, in instituting MDL, Congress sought to promote a convenient and efficient process which avoided potentially conflicting contemporaneous court rulings[14] and instituted a speedy and inexpensive mechanism for determination.[15]

The legislation, codified at 28 U.S.C. § 1407, authorized the creation of the Judicial Panel on Multidistrict Litigation, which consisted of seven circuit and district judges each from different judicial circuits, appointed by the Chief Justice of the United States Supreme Court.[16] While there is no statutory term limit, the modern practice

7 *See* Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621, 622 tbl.3 (1964); Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47, 48–49 (2007).

8 *See* H.R. REP. NO. 90-1130, at 2 (1968); *see also* Ostolaza & Hartmann, *supra* note 7, at 48–50 (noting that the committee coordinated scheduling of pretrial discovery proceedings, national depositions, and a central depository of over one million documents).

9 Ostolaza & Hartmann, *supra* note 7, at 49.

10 H.R. REP. NO. 90-1130, at 2.

11 Act of Apr. 29, 1968, Pub. L. No. 90-296, 82 Stat. 109.

12 28 U.S.C. § 1407 (2006).

13 H.R. REP. NO. 90-1130, at 2–3.

14 *See* Utah v. Am. Pipe & Constr. Co., 316 F. Supp. 837, 839 (C.D. Cal. 1970).

15 *See In re* Nat'l Student Mktg. Litig., 368 F. Supp. 1311, 1316 (J.P.M.L. 1973).

16 28 U.S.C. § 1407(d).

instituted in 2000 by Chief Justice Rehnquist is to appoint members of the Panel to staggered seven-year terms.[17]

B. The Mechanisms of MDL

Section 1407 empowers the JPML to determine whether a group of cases should be "coordinated or consolidated" for "pretrial proceedings" and where such cases should be transferred.[18] The Panel can initiate a proceeding to transfer the action either sua sponte or upon motion by a party in the case.[19] Additionally, it evaluates three express statutory considerations in determining whether an action should be transferred. Section 1407 mandates that potential transfers (1) be actions "pending in different districts" and involving "one or more common questions of fact," such that transfer of the actions will (2) "be for the convenience of parties and witnesses" and (3) "promote the just and efficient conduct of such actions."[20] The JPML translates the statutory mandates of convenience, efficiency, and justice into a rough balance of factors based on the context of the particular motion.[21] In general, the Panel favors transfer when it will eliminate duplicate discovery,[22] avoid conflicting rules and schedules,[23] or reduce litigation costs.[24]

In deciding whether to consolidate pretrial proceedings, efficiency considerations are prominent. Thus, for the Panel, "[t]he

17 *See Judicial Panel on Multidistrict Litigation Reorganized*, THIRD BRANCH (Admin. Office of the U.S. Courts, Washington, D.C.), June 2000, at 3, *available at* http://www.uscourts.gov/ttb/june00ttb/jreorg.html; Heyburn, *supra* note 2, at 2227 (2008).

18 *See* 28 U.S.C. § 1407(a); Mark A. Chavez, *The MDL Process*, *in* 13TH ANNUAL CONSUMER FINANCIAL SERVICES LITIGATION INSTITUTE 2008, at 123 (PLI Corporate Law & Practice, Course Handbook Series No. B-1656, 2008).

19 *See* 28 U.S.C. § 1407(c). The court most often acts sua sponte on tag-along actions, which are actions that are factually related to cases previously transferred and consolidated. *See* Chavez, *supra* note 18, at 125.

20 28 U.S.C. § 1407(a).

21 *See* Heyburn, *supra* note 2, at 2237–42.

22 *See In re* Royal Ahold N.V. Sec. & "ERISA" Litig., 269 F. Supp. 2d 1362, 1363 (J.P.M.L. 2003); *In re* Cal. Retail Natural Gas & Elec. Antitrust Litig., 150 F. Supp. 2d 1383, 1384 (J.P.M.L. 2001).

23 *See In re* Mosaid Techs., Inc., Patent Litig., 283 F. Supp. 2d 1359, 1360 (J.P.M.L. 2003); *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 269 F. Supp. 2d 1372, 1373 (J.P.M.L. 2003).

24 *See In re* Seroquel Prods. Liab. Litig., 447 F. Supp. 2d 1376, 1378 (J.P.M.L. 2006); *In re* Cobra Tax Shelters Litig., 408 F. Supp. 2d 1348, 1349 (J.P.M.L. 2005); *see also* Heyburn, *supra* note 2, at 2236 ("As a general rule, the Panel considers that eliminating duplicate discovery in similar cases, avoiding conflicting judicial rulings, and conserving valuable judicial resources are sound reasons for centralizing pretrial proceedings . . . .").

greater the factual commonality of the cases, the more likely it is that centralization will benefit the involved parties and the system as a whole."[25] Similarly, the greater the number of actions and the earlier those actions are in pretrial proceedings, the more likely it is that economies of scale will produce efficient litigation.[26]

Choosing where to consolidate an MDL docket is a difficult question. Three of the most important factors are geographical convenience, the ability of a judge, and the availability of that judge.[27] Thus, in a given docket, if there is a geographical concentration of claims or witnesses, the Panel is more likely to consolidate the claims in that area,[28] and if there is no geographical nexus of claims, the Panel is more likely to consider questions of judicial competence.[29] Additionally, "[t]he willingness and motivation of a particular judge to handle an MDL docket" is a chief consideration when determining where to consolidate because "[t]he Panel has neither the power nor the desire to force an MDL docket upon a district judge."[30] Thus, out of necessity, the members of the Panel must speak directly to a potential transferee judge before any final decision is made on where to consolidate an MDL docket.[31]

One factor that is not considered in determining whether to consolidate a group of cases, though, is a party's concerns about potential adverse rulings by the transferee court.[32] In fact, the JPML has stated in clear terms that "[w]hen determining whether to transfer an action under Section 1407, . . . it is not the business of the Panel to consider what law the transferee court might apply."[33] Thus, the Panel will judge many factors when deciding where to place an MDL docket, but

25 *See* Heyburn, *supra* note 2, at 2237.

26 *See id.* at 2238.

27 *See id.* at 2239–41.

28 *See, e.g.*, *In re* Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig., 469 F. Supp. 2d 1348, 1350 (J.P.M.L. 2006) (consolidating docket in the District of Columbia because "most, if not all, discovery will likely come from the federal Government and documents and witnesses are likely to be in or near the District of Columbia").

29 *See, e.g.*, *In re* Motor Fuel Temperature Sales Practices Litig., 493 F. Supp. 2d 1365, 1367 (J.P.M.L. 2007) ("Given the geographic dispersal of constituent actions . . . no district stands out as the geographic focal point for this nationwide docket. Thus, we have searched for a transferee judge with the time and experience to steer this litigation on a prudent course and sitting in a district with the capacity to handle this litigation.").

30 Heyburn, *supra* note 2, at 2240–42.

31 *See id.* at 2242.

32 *See* DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL § 5:41 (2009); *see also id.* § 5:41 n.1 (citing cases where the JPML has refused to consider such concerns) .

33 *In re* Gen. Motors Class E Stock Buyout Sec. Litig., 696 F. Supp. 1546, 1547 (J.P.M.L. 1988).

will not officially consider any effect a potential transfer may have on the outcome of the litigation.

The numbers clearly demonstrate that the Panel generally favors consolidation and "[m]ore often than not" orders centralization.[34] Since 2000, the annual approval rate of an MDL docket request ranges from sixty-seven percent to eighty-seven percent.[35] Recently that number is even higher, with eighty-six percent of MDL docket requests being approved for consolidation in 2006 and seventy-two percent being approved in 2007.[36] While these numbers seem to suggest that the JPML has an overwhelming preference for consolidation, Judge Heyburn, the Panel's chair, argues instead that the high rate of transfer approval is more likely due to the Panel's promulgation and consistent application of clear standards.[37] Practitioners, he argues, are therefore more likely to "refrain from bringing unfounded motions that do not satisfy the prerequisites of § 1407."[38] While this argument surely has some merit, the incredibly broad standards of § 1407 also favor consolidation. Whatever the cause, the Panel has "considerable and largely unfettered discretion" within its locus of power[39] and has declined to strictly construe the vague statutory requirements.[40]

Given the Panel's broad discretion, it is important that there are some clear limits circumscribing its powers. Of course, like all other federal courts, the JPML's jurisdiction is limited by Article III of the United States Constitution. Thus, it cannot act upon state court cases, including cases that have been remanded from federal to state court.[41] Additionally, the Panel cannot transfer a case unless the transferor court has subject-matter jurisdiction over it,[42] and, though it is usually a formality, the chief judge of the transferee district must

34 *See* Heyburn, *supra* note 2, at 2229.

35 *Id.*

36 *See id.*

37 *See id.*

38 *Id.*

39 *Id.* at 2228.

40 *See* Stanley J. Levy, *Complex Multidistrict Litigation and the Federal Courts*, 40 FORDHAM L. REV. 41, 47 (1971) (contending that the JPML allocates too great a significance to efficiency to the detriment of the other requirements); Richard A. Chesley & Kathleen Woods Kolodgy, Note, *Mass Exposure Torts: An Efficient Solution to a Complex Problem*, 54 U. CIN. L. REV. 467, 520 (1985) ("[F]ew cases are denied MDL status for their failure to promote just and efficient proceedings due to the Panel's favoring of transfer.").

41 *See In re* Celotex Corp. "Technifoam" Prods. Liab. Litig., 68 F.R.D. 502, 503–04 (J.P.M.L. 1975).

42 *See* BancOhio Corp. v. Fox, 516 F.2d 29, 32 (6th Cir. 1975).

also personally approve each of the MDL dockets transferred to his or her district.[43] More importantly, transferee courts are limited to pretrial rulings, and the Panel is required to remand the actions back to the transferor court when pretrial procedures are concluded.[44] While limiting transferee courts to pretrial rulings usually prevents them from hearing trials in cases, the transferee judge is still allowed to make determinative rulings on motions for summary judgment and dismissal.[45] Thus, these basic limitations on the JPML provide at least some restrictions upon its transfer power, while still allowing a transferee court to efficiently adjudicate litigation.

While the JPML's power is limited to the specific area of transferring federal multidistrict cases, it has exceptionally broad power to carry out this permissible function. Strikingly, a Panel ruling denying a motion to transfer is unappealable,[46] and a grant of transfer is only appealable via petitions of extraordinary writ to the appropriate circuit court.[47] In fact, Judge Heyburn notes that an "appeal from a Panel ruling seldom occurs."[48] Furthermore, given that courts have interpreted § 1407 as granting nationwide jurisdiction,[49] the Panel's

43 *See* 28 U.S.C. § 1407(b) (2006) (noting that an action may only be transferred "[w]ith the consent of the transferee district court").

44 *See* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 32–34 (1998). There has been a continuing dispute over the wisdom and effectiveness of requiring remand of an MDL action back to the transferor court for trial. *See* Heyburn, *supra* note 2, at 2233 n.47. While *Lexecon* put a formal stop to the widespread practice of a transferee court transferring the litigation to itself in order to hear trial, many informal methods have developed to circumvent the ruling's requirements. *See id.* For a critical view of attempts to bypass *Lexecon* from the perspective of a transferor court judge seeking to have a case returned, see generally Delaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 148–57 (D. Mass. 2006).

45 *Cf. Lexecon*, 523 U.S. at 37 (commenting that the Panel "is not meant to issue ceremonial orders in cases already concluded by summary judgment, say, or dismissal").

46 *See* 28 U.S.C. § 1407(e) ("There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.").

47 *See id.* § 1407(e) ("No proceedings for review of any order of the panel 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 transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer 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 transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district.").

48 Heyburn, *supra* note 2, at 2228.

49 *See, e.g.*, *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 163 (2d Cir. 1987) ("Congress may, consistent with the due process clause, enact legislation

consolidation efforts are not burdened by many of the usual procedural limits to its authority.[50] In fact, neither the transferor court[51] nor the transferee court[52] needs to have personal jurisdiction over the defendant to effectuate a transfer, nor is the transfer burdened by the usual requirements and limitations of venue.[53] When added to the already broad reading of the statute, these special considerations endow the Panel with expansive authority over transfer of litigation.[54] In sum, given the generality of § 1407, the paucity of appellate review, and the JPML's special jurisdictional status, the JPML possesses significant discretion when judging the merits of a proposed transfer, and it has used this power to appreciably favor consolidation of cases within an MDL docket.

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authorizing the federal courts to exercise nationwide personal jurisdiction. One such piece of legislation is 28 U.S.C. § 1407 (1982), the multidistrict litigation statute." (citation omitted)).

50 *See* 32A AM. JUR. 2D *Federal Courts* § 1510 (2008).

51 *See In re* Library Editions of Children's Books, 299 F. Supp. 1139, 1142 (J.P.M.L. 1969) (holding that although defendants must eventually receive service of process, "the power of the Panel and the courts to effectuate a transfer under § 1407 is not vitiated by the transferor court's lack of personal jurisdiction over a defendant").

52 *See In re* FMC Corp. Patent Litig., 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) ("Transfers under Section 1407 are simply not encumbered by considerations of in personam jurisdiction and venue. A transfer under Section 1407 is, in essence, a change of venue for pretrial purposes. Following a transfer, the transferee judge has all the jurisdiction and powers over pretrial proceedings in the actions transferred to him that the transferor judge would have had in the absence of transfer." (citations omitted)).

53 *See In re* Helicopter Crash Near Wendle Creek, B.C., on Aug. 8, 2002, 542 F. Supp. 2d 1362, 1363 (J.P.M.L. 2008) ("In considering transfer under Section 1407, the Panel is not encumbered by considerations of in personam jurisdiction and venue."); *In re* Peanut Crop Ins. Litig., 342 F. Supp. 2d 1353, 1354 (J.P.M.L. 2004) ("[I]n considering transfer under Section 1407, the Panel is not encumbered by considerations of venue. An opposite conclusion would frustrate the essential purpose of Congress in enacting Section 1407 and providing for transfer of civil actions to 'any district' by the Panel, namely, to permit centralization in one district of all pretrial proceedings when civil actions involving one or more common questions of fact are pending in different districts." (citation omitted)).

54 *See* Heyburn, *supra* note 2, at 2228; *see also* Benjamin W. Larson, Comment, Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*: Respecting the Plaintiff's Choice of Forum*, 74 NOTRE DAME L. REV. 1337, 1344 (1999) ("[R]ather than requiring that all the statutory criteria be established, the JPML has largely exceeded the discretion given to it by Congress and has placed efficiency as the paramount objective to be achieved.").

C. *Success of MDL*

The Panel has been incredibly successful in achieving efficient resolution of mass litigation. In fact, if treated individually, it is quite possible that this mass litigation would have simply overwhelmed the federal court system. Since its creation in 1968, "the Panel has considered motions for centralization in over 1950 dockets involving more than 250,000 cases and literally millions of claims therein."[55] While much of the Panel's work comprises mass tort litigation,[56] the range of litigation categories is exceptionally diverse. As Judge Heyburn notes,[57] recent cases have involved single transportation accidents, mass torts and product liability issues, patent infringement, antitrust litigation, securities fraud, employment practice litigation, and consumer credit litigation.[58] MDL has been generally successful and has largely accomplished its goals.[59] David Herr, author of the *Multidistrict Litigation Manual*, contends that "[t]he Panel continues to be one of the most effective means of making it possible for federal courts to manage cases and accomplish the just and efficient resolution of civil actions,"[60] and indeed, its success has spawned similar regimes in at least fifteen states.[61]

II. Choice of Law Issues as an Opening For Bias

A. *Applicable Law in Federal Question Cases*

Given MDL's general success, which has allowed the federal judicial system to withstand—without other major structural reforms—the

55 Heyburn, *supra* note 2, at 2229.

56 *See* James M. Wood, *The Judicial Coordination of Drug and Device Litigation: A Review and Critique*, 54 Food & Drug L.J. 325, 337 (1999) (noting that MDL is "used to manage mass torts").

57 *See* Heyburn, *supra* note 2, at 2229–30.

58 For examples of cases from each of these categories, see *id.* at 2229–30 & nn.20–26.

59 *See, e.g.*, Ostolaza & Hartmann, *supra* note 7, at 75 (noting the basic success of the MDL regime and commenting that it has "proven to be a useful procedural tool for consolidating thousands of related cases pending in federal courts and has led to substantial judicial and party savings").

60 *See* Herr, *supra* note 32, § 1:1, at 5.

61 *See* Ostolaza & Hartmann, *supra* note 7, at 69–75. Ostolaza and Hartmann note mechanisms for statewide consolidation in California, Colorado, Connecticut, Illinois, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Texas, Virginia, and West Virginia. *See id.* Most statutes have established formal mechanisms for consolidation through statute or rules. *See id.* Oklahoma, though, has recognized its supreme court's inherent supervisory power to consolidate all state cases on a common topic. *See id.* at 72–73.

vast increase in litigation since the late sixties, any substantial reforms must arise out of legitimate and serious defects within its process. MDL litigation balances a plaintiff's traditional right to choose his or her forum with the interests of justice, convenience, and efficient adjudication of cases.[62] The interests of efficiency and economy, though important, are not paramount. As § 1407 notes, transfers should serve to promote *both* "just" and "efficient" adjudication of actions.[63] Thus, justice to all parties involved should be an interest on par with the efficient resolution of cases.[64] While defining a general, Platonic form of justice is beyond the scope of this Note, within any judicial system, a cornerstone of justice and due process must be access to an impartial judge to adjudicate one's claims.[65] Indeed, any serious risk of biased adjudication created by the MDL process clearly merits ameliorative reform.

The root of potential bias within the MDL system comes from a simple procedural choice of law decision adopted by most courts in the 1990s: *In re Korean Air Lines Disaster of September 1, 1983* ("*Korean Air Lines*").[66] There, then–D.C. Circuit Judge Ruth Bader Ginsburg expounded what has become the majority rule in federal question cases transferred under the auspices of the JPML.[67] In a short five-page opinion, Ginsburg held that in multidistrict litigation actions arising under federal question jurisdiction, the transferee court has a duty to utilize its own interpretation of federal law.[68] Ginsburg distinguished *Van Dusen v. Barrack*[69] where the Supreme Court—largely on *Erie* grounds—held that transfer of suits arising under diversity jurisdiction mandated that *transferor law* must be utilized by the transferee court.[70] She noted that "the *Erie* policies served by the *Van Dusen* decision do not figure in the calculus when the law to be applied is federal, not state."[71] Ginsburg continued, asserting that while "federal courts spread across the country owe respect to each other's efforts

62 *See* 28 U.S.C. § 1407 (2006); Larson, *supra* note 46, at 1343–45.

63 *Id.* § 1407(a).

64 One of the few concrete criticisms of the JPML is that it focuses almost exclusively on the efficiency of the proposed centralization to the detriment of the concerns of justice and convenience to the parties. *See* Larson, *supra* note 46, at 1343–45.

65 *See, e.g.*, *In re* Murchison, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases.").

66 829 F.2d 1171 (D.C. Cir. 1987).

67 *See infra* notes 83–89 and accompanying text.

68 *See Korean Air Lines*, 829 F.2d at 1174–76.

69 376 U.S. 612 (1964).

70 *See id.* at 639.

71 *Korean Air Lines*, 829 F.2d at 1174.

and should strive to avoid conflicts, . . . each has an obligation to engage independently in reasoned analysis."[72] She gave two main reasons for preferring the use of the transferee court's law: efficiency and uniformity. First, she asserted that applying up to thirteen divergent interpretations of federal law would diminish the economy achievable through consolidation of claims.[73] Additionally, she contended that "because there is ultimately a single proper interpretation of federal law, the attempt to ascertain and apply diverse circuit interpretations simultaneously is inherently self-contradictory."[74] Indeed, Ginsburg, found it "logically inconsistent" to require one judge to simultaneously apply different and conflicting interpretations of "a unitary federal law."[75] Moreover, if one circuit simply applied the work of another circuit, it would be shirking its primary duty of interpreting federal law.[76] Further, she noted, the parties could always seek Supreme Court review for an authoritative interpretation of the law.[77]

The rule of *Korean Air Lines*, though widely applied, has been limited by the Seventh Circuit. In *Eckstein v. Balcor Film Investors*,[78] the Seventh Circuit considered whether to apply the transferee or transferor court's statute of limitations to a claim arising the Securities Exchange Act of 1934.[79] Judge Easterbrook, writing for the court, held that "[w]hen the law of the United States is geographically nonuniform, a transferee court should use the rule of the transferor forum in order to implement the central conclusion of *Van Dusen* and *Ferens*: that a transfer under §1404(a) accomplishes 'but a change of

72 *Id.* at 1176. The Supreme Court has not spoken directly to federal question transfer cases. In the context of diversity actions, though, the Supreme Court has affirmatively ruled that actions transferred by either the defendant or the plaintiff under the general transfer statute—28 U.S.C. §1404(a)—must utilize transferor court's law. *See* Ferens v. John Deere Co., 494 U.S. 516, 530–31 (1990) (applying transfereror court law to plaintiff-intiated transfer); *Van Dusen*, 376 U.S. at 614 (applying the same to defendant-initiated transfer). These rulings have been widely analogized and applied in multidistrict litigation cases. *See, e.g.*, *In re* Gen. Am. Life Ins. Co. Sales Practices Litig., 391 F.3d 907, 911 (8th Cir. 2004); *In re* Parmalat Sec. Litig., 412 F. Supp. 2d 392, 399 (S.D.N.Y. 2006); *In re* Managed Care Litig., 298 F. Supp. 2d 1259, 1296 (S.D. Fla. 2003); *In re* StarLink Corn Prods. Liab. Litig., 211 F. Supp. 2d 1060, 1063 (N.D. Ill. 2002); McCord v. Minn. Mut. Life Ins. Co., 138 F. Supp. 2d 1180, 1186–87 (D. Minn. 2001).

73 *See Korean Air Lines*, 829 F.2d at 1175.

74 *Id.* at 1175–76.

75 *Id.*

76 *See id.* at 1175.

77 *See id.* at 1176.

78 8 F.3d 1121 (7th Cir. 1993).

79 *See id.* at 1123–24.

courtrooms.'"[80] The Seventh Circuit thus rejected the D.C. Circuit's assertion that because *Van Dusen* rested largely on *Erie* grounds, it must only apply to diversity cases. Easterbrook noted that "*Erie* is itself part of national law, interpreting the Rules of Decision Act . . . [and] *Van Dusen* and *Ferens* accordingly apply whenever different federal courts properly use different rules."[81]

The scope of *Eckstein*'s split with—or exception to—*Korean Air Lines* is unclear. The opinion, in accordance with Seventh Circuit rules,[82] notes a circuit split with the Second Circuit, which shortly after the ruling applied the law of the transferee forum to a case factually indistinguishable from *Eckstein*.[83] However, though *Eckstein* and *Korean Air Lines* are not easily reconciled, Judge Easterbrook seems to have intended the former as an exception to the latter that is applicable solely when a federal statute mandates nonuniform application of federal law. He notes, "We agree with *Korean Air Lines* that a transferee court normally should use its own best judgment about the meaning of federal law when evaluating a federal claim, but § 27A instructs us to act differently."[84] Though most courts, including the Seventh Circuit, have subsequently ascribed to this reconciliation of

80 *Id.* at 1127 (citing *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1963)). I can find no case which distinguishes the MDL transfer statute—28 U.S.C. § 1407—from the general transfer statute—28 U.S.C. § 1404(a)—in the choice of law context. *See, e.g.*, McMasters v. United States, 260 F.3d 814, 819 (7th Cir. 2001) (citing both § 1404 and § 1407 choice of law precedents in a § 1404 case).

81 *Eckstein*, 8 F.3d at 1127.

82 Seventh Circuit rules require that any opinion which creates a circuit court split be circulated to all judges in active service to vote on whether the issue should be heard en banc. *See* 7TH CIR. R. 40(e) ("A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted.").

83 *Compare Eckstein*, 8 F.3d at 1123 (applying transferor law to a complaint alleging that fraudulent misrepresentations and omissions in a prospectus induced the purchase of interests in a limited liability partnership), *with* Menowitz v. Brown, 991 F.2d 36, 38 (2d Cir. 1993) (applying transferee law to a complaint alleging that fraudulent misrepresentation in a prospectus and other SEC mandated disclosure statements induced purchase of debentures).

84 *Eckstein*, 8 F.3d at 1126.

the two opinions,[85] there is a persistent strain of lower court holdings that view the two cases as somewhat incompatible.[86]

B. Divergence on the Consequences of Federal Question Circuit Splits

When circuits split, different residents of the United States are assured different constitutional and statutory rights based upon their location within an ad hoc system of twelve geographic subdivisions. This is a troubling, but probably unavoidable, outcome of a sizable federal judiciary dealing with difficult questions of law. This inevitable problem, though, is magnified and heightened within the context of MDL. Following *Korean Air Lines*, the Second,[87] Fourth,[88] Seventh,[89] Eighth,[90] Ninth,[91] and Eleventh Circuits[92] as well as various

85 *See, e.g.*, *McMasters*, 260 F.3d at 819 (holding that application of transferee law is the norm in federal question cases and that *Eckstein* applies "[o]nly where the law of the United States is specifically intended to be geographically non-uniform"); Olcott v. Del. Flood Co., 76 F.3d 1538, 1546 (10th Cir. 1996) (agreeing with *Eckstein* that transferor law should be applied because the Securities and Exchange Act mandates nonuniform law).

86 *See, e.g.*, Undertow Software v. Advanced Tracking Techs., Inc., No. 02-C-8065, 2002 WL 31890062 (N.D. Ill. Dec. 30, 2002) (noting that *Eckstein* requires application of transferor forum law in a federal question case); *In re* United Mine Workers Employee Benefit Plans Litig., 854 F. Supp. 914, 919 n.8 (D.D.C. 1994) (adopting the *Eckstein* rule and recognizing "the tension between its holding and some of the language in the *In re Korean Air Lines* decision," but noting that "the Court is satisfied that until higher authorities indicate otherwise, this Court's holding is consistent with this Circuit's ruling *In re Korean Air Lines*"). Given the incongruity between *Eckstein* and *Korean Air Lines* and the clear circuit split as to the validity of *Eckstein* in general, confusion at the district court level is probably inevitable until the Supreme Court hears the issue. Thus, whether one calls *Eckstein* an exception to or a split with the majority rule of *Korean Air Lines*, there is clearly a divergence of opinion as to what extent a court should use transferor court law or transferee court law when there is a circuit split on a federal question action.

87 *See Menowitz*, 991 F.2d at 40 ("[T]he federal circuit courts are under duties to arrive at their own determinations of the merits of federal questions presented to them . . . ."); *In re* Pan Am. Corp., 950 F.2d 839, 847 (2d Cir. 1991) ("'[F]ederal courts comprise a single system applying a single body of law, and no litigant has a right to have the interpretation of one federal court rather than that of another determine his case.'" (quoting H.L. Green Co. v. MacMahon, 312 F.2d 650, 652 (2d Cir. 1962))).

88 *See* Bradley v. United States, 161 F.3d 777, 782 n.4 (4th Cir. 1998) (citing *Korean Air Lines*, 829 F.2d at 1175–76) ("But, unlike state law, federal law is presumed to be consistent and any inconsistency is to be resolved by the Supreme Court. We, of course, apply the law of the Fourth Circuit, not the Fifth Circuit." (citations omitted)).

89 *See McMasters*, 260 F.3d at 819.

district courts in other circuits[93] have determined that in general under federal question jurisdiction, a transferee court is to apply the substantive law of its own jurisdiction when adjudicating MDL pretrial issues. Only the Sixth Circuit has expressed substantial doubt—albeit in dicta—as to the wisdom of a transferee court applying its own circuits law in the MDL context.[94]

Thus, though most courts have followed *Korean Airlines*, there is still some divergence of opinion on the proper law to be applied to federal question claims that are transferred under § 1407. But what makes this disagreement more alarming than normal divergence among the circuits is the potential for abuse of the transfer power vested in the JPML. Under the dominant *Korean Air Lines* rule, the transferee court utilizes its own law to rule on a determinative pretrial issue, and therefore, the Panel is effectively positioned to determine the fate of whole groups of cases based solely on geographical or judicial assignment. While it is an unintended consequence of an otherwise effective process, this risk of potential bias within and abuse of MDL is deeply troubling.

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90 *See In re* Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig., 97 F.3d 1050, 1055 (8th Cir. 1996) ("When analyzing questions of federal law, the transferee court should apply the law of the circuit in which it is located.").

91 *See* Newton v. Thomason, 22 F.3d 1455, 1460 (9th Cir. 1994) ("There, in resolving an identical question under 28 U.S.C. § 1407, the D.C. Circuit correctly pointed out that '[b]inding precedent for all [courts] is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit [in the absence of Supreme Court authority].' We therefore hold that, when reviewing federal claims, a transferee court in this circuit is bound only by our circuit's precedent." (quoting *In re* Korean Air Lines Disaster, 829 F.2d 1171, 1176 (D.C. Cir. 1987)) (citations omitted) (alterations in original)).

92 *See* Murphy v. FDIC, 208 F.3d 959, 966 (11th Cir. 2000) ("We find the reasoning of the D.C., Second, Eighth, and Ninth Circuits persuasive. Since the federal courts are all interpreting the same federal law, uniformity does not require that transferee courts defer to the law of the transferor circuit. Therefore, we conclude that the law of the Eleventh Circuit, rather than the law of the D.C. Circuit . . . was properly applied in this case.").

93 *See In re* Pharm. Indus. Average Wholesale Price Litig., 431 F. Supp. 2d 109, 116 (D. Mass. 2006); *In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 644 n.128 (S.D. Tex. 2005); *In re* Ikon Office Solutions, Inc. Sec. Litig., 86 F. Supp. 2d 481, 484 (E.D. Pa. 2000).

94 *See In re* Cardizem CD Antitrust Litig., 332 F.3d 896, 911 n.17 (6th Cir. 2003) ("[I]t is not clear that precedent 'unique' to a particular circuit and arguably divergent from the predominant interpretation of a federal law, such as the Sixth Circuit's 'necessary predicate' gloss on the antitrust injury doctrine, should be applied to state antitrust laws or federal antitrust claims that originated in other circuits.").

C. Potential Areas of Bias

This bias could potentially take many forms. It could be as overt as assigning the case to a judge that was known to be more or less favorable toward a certain type of claim. Alternatively, the bias could be subtler and woven into a particular circuit split on a determinative pretrial issue. For example, favorable regulatory decisions by the FDA have long been utilized by the healthcare industry as a defense to state tort claims.[95] In response, some plaintiffs attempted to bypass this defense by asserting that the particular company only received approval of its drug or device by making "fraudulent representations to the Food and Drug Administration."[96] However, in *Buckman Co. v. Plaintiffs' Legal Committee*,[97] the Supreme Court unanimously held that these "state-law fraud-on-the-FDA claims conflict with, and are therefore impliedly pre-empted by, federal law."[98] In addition, various states around the country have laws that provide statutory immunity from tort suits for drug manufacturers whose products have been approved by the FDA, unless it can be proven that the manufacturer withheld information from the FDA and, as a consequence, the drug was approved.[99] While these laws share obvious similarities with the now null fraud-on-the-FDA claims, they do not create a specific cause of action, but instead provide immunity to drug companies unless the plaintiff can prove that fraud led to the drug's approval.[100]

Because these state statutes are so close to the invalidated fraud-on-the-FDA claims, the natural question was whether, as a matter of federal law, they were also implicitly preempted by federal regulation.

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95 *See, e.g.*, Feldman v. Lederle Labs., 479 A.2d 374, 390 (1984) ("Defendant also argues that the plaintiff's cause of action for personal injury due to mislabeling is barred because Congress has preempted the field by enacting the Act pursuant to its power under the commerce clause.").

96 *See* Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 343 (2001) ("Plaintiffs further claim that . . . [h]ad the [fraudulent] representations not been made, the FDA would not have approved the devices, and plaintiffs would not have been injured.").

97 531 U.S. 341 (2001).

98 *Id.* at 348.

99 *See, e.g.*, MICH. COMP. LAWS § 600.2946(5) (West 2000) ("In a product liability action against a manufacturer or seller, a product that is a drug is not defective or unreasonably dangerous, and the manufacturer or seller is not liable, if the drug was approved for safety and efficacy by the United States food and drug administration, and the drug and its labeling were in compliance with the United States food and drug administration's approval at the time the drug left the control of the manufacturer or seller.").

100 *See* Garcia v. Wyeth-Ayerst Labs., 385 F.3d 961, 965–66 (6th Cir. 2004).

In *Garcia v. Wyeth-Ayerst Laboratories*,[101] the Sixth Circuit held that *Buckman* preemption does indeed invalidate any state attempts to codify a fraud-on-the-FDA exception to immunity.[102] As a consequence, a Michigan law containing a fraud-on-the-FDA exception to immunity was declared unconstitutional.[103] Two years later—in *Desiano v. Warner-Lambert & Co.*[104]—the Second Circuit addressed the same issue and held that *Buckman* preemption, for various reasons, did not apply to the exact same Michigan law.[105] Attempting to resolve this split, the Supreme Court granted certiorari, but due to a recusal by Chief Justice Roberts, the Court divided evenly, affirming the Second Circuit by default.[106] For the purposes of MDL, the outcome is a mess.[107] The split has effectively endowed the JPML with the ability to decide whether a case goes forward or is dismissed based exclusively on where the case is consolidated. If a Michigan MDL plaintiff needs to obtain a state court fraud-on-the FDA finding to continue with a tort suit, his case will be dismissed if consolidated within Michigan, Ohio, Kentucky, or Tennessee, but will be allowed to go forward if transferred to New York, Connecticut, or Vermont. Thus, there is significant potential for abuse of the system, given that four members of the JPML could greatly strengthen or completely shut down a large num-

101 *Id.*

102 *See id.* at 966 ("[I]t makes abundant sense to allow a State that chooses to incorporate a federal standard into its law of torts to allow that standard to apply when the federal agency itself determines that fraud marred the regulatory-approval process. In the final analysis, the exemptions are invalid as applied in some settings (*e.g.*, when a plaintiff asks a state court to find bribery or fraud on the FDA) but not in others (*e.g.* claims based on federal findings of bribery or fraud on the FDA).").

103 *See id.*

104 467 F.3d 85 (2d Cir. 2006).

105 *See id.* at 98 ("In the presence of this presumption, because Michigan law does not in fact implicate the concerns that animated the Supreme Court's decision in *Buckman*, and because Appellants' lawsuits depend primarily on traditional and pre-existing tort sources, not at all on a 'fraud-on-the-FDA' cause of action created by state law, and only incidentally on evidence of such fraud, we conclude that the Michigan immunity exception is not prohibited through preemption. It follows that common law liability is not foreclosed by federal law, and Appellants' claims should not have been dismissed.").

106 *See* Warner-Lambert Co. v. Kent, 128 S. Ct. 1168 (2008).

107 While the Supreme Court's recent decision in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), has provided some guidance by limiting the circumstances in which the Court will find implied preemption in state law failure to warn cases, the ruling's effect on *Buckman* preemption is unclear. *See id.* at 1193 n.3 (differentiating *Buckman* as applying only to "state-law fraud-on-the-agency claims").

ber of cases depending on where they decide to consolidate the MDL docket.[108]

The JPML's ability to dictate the course of a transferred docket is particularly troubling given that (1) it generally favors centralization,[109] (2) its transfer orders are either unappealable or receive substantial deference on appeal,[110] (3) it maintains broad and virtually unilateral authority over consolidation and placement of a significant number of cases,[111] and (4) its membership selection is at the full discretion of the Chief Justice of the Supreme Court.[112]

As noted above, the JPML favors centralization and maintains almost unfettered discretion to administer an enormous docket. Additionally, without a standard appeals process, litigants who believe they have been subjected to a biased MDL transfer have significantly less opportunity than the average litigant to appeal the Panel's ruling. Even if such a litigant were fortunate enough to have his extraordinary writ accepted by the circuit court, that court is unlikely to reverse a panel that has extraordinarily broad discretion to decide transfer orders based on a combination of malleable factors.[113] In short, it is hard to imagine a litigant having access to any evidence of bias that would not also arguably fit into any number of permissible factors considered by the Panel.[114] Furthermore, in addition to special appellate treatment, potential bias within the JPML is exacerbated by its

108 This example stems from the analysis of Jim Beck and Mark Herrmann. *See* Drug and Device Law, There Ought To Be a Law (An Odd Implication of *Kent*), http://druganddevicelaw.blogspot.com/2008/03/there-oughta-be-law-odd-implication-of.html (Mar. 5, 2008 7:42 EST).

109 *See supra* notes 34–40 and accompanying text.

110 *See supra* notes 46–48 and accompanying text.

111 *See supra* note 39–40, 48–54 and accompanying text.

112 *See supra* notes 16–17 and accompanying text.

113 Extensive searching has produced no case in which a circuit court has negated a Panel consolidation order. Other sources provide no such cases either. *See, e.g.*, HERR, *supra* note 32, § 11:1 (2009) (citing all "reported decisions reviewing actions of the Panel"); Heyburn, *supra* note 2, at 2229 n.17 (listing appeals from Panel rulings, none of which were successful). For an example of a typical rejection of such an appeal see *In re* Collins, 233 F.3d. 809, 812 (3d Cir. 2000).

114 *See supra* notes 34 & 46 and accompanying text. Absent an extraordinary circumstance, no litigant will have evidence of bias or collusion among panel members. If a litigant appealed claiming that the Panel prejudicially transferred his case, the circuit court would be unlikely to hear the appeal and, in the event that it did, the Panel would be able to rely on broad considerations of efficiency, convenience, geography, fairness, and justice as a means to explain its actions. Short of the Panel stating that it took into account an impermissible consideration, it seems unlikely that any litigant could receive relief from a detrimental § 1407 transfer order.

nontransparent appointment mechanism, which is controlled exclusively by one individual.[115]

Little is known about any Chief Justice's criteria for appointment to the Panel. An analysis of the historical composition of the MDL Panel—as displayed in the Appendix—reveals that only one of the four Chief Justices' appointments to the Panel contains a noticeable disparity in favor of the political party of the president who appointed that Chief Justice.[116] Chief Justice Warren—who was nominated to the Court by Republican Dwight Eisenhower[117]—appointed the original seven members of the Panel, selecting five judges who were nominated by Democrats and only two who were nominated by Republicans.[118] Similarly, Chief Justice Burger, nominated by Republican Richard Nixon,[119] appointed seven judges nominated by Democrats and only four judges nominated by Republicans.[120] Conversely, Chief Justice Rehnquist—who was nominated by Republican presidents for both his Associate and Chief Justice seats[121]—selected fifteen judges nominated by Republicans and only three judges nominated by Democrats.[122] Finally, Chief Justice Roberts, who was nominated by Republican George W. Bush,[123] has appointed three judges nominated by a Democrat and two judges nominated by Republicans.[124]

The cause of Rehnquist's partisan disparity could be ideological bias. It could also stem from a more subtle, subconscious partisan networking effect. Put simply, a Chief Justice may be more likely to personally know and respect, judges with whom he agrees frequently. Pure ideological bias is unlikely because until the mid-1990s—when widespread adoption of *Korean Air Lines* made clear that transferee law would apply in most federal question cases transferred by the JPML—there was significantly less at stake in panel appointments.

One might argue that it was precisely at this time, around the adoption of *Korean Air Lines*, that Chief Justice Rehnquist shifted from appointing judges nominated by Democrats (three of his first four

115 *See* 28 U.S.C. § 1407(d) (2006).

116 *See infra* Appendix.

117 *See* Federal Judicial Center., History of the Federal Judiciary, http:// http://www.fjc.gov/history/home.nsf [hereinafter Federal Judiciary History] (last visited October 26, 2009).

118 *See infra* Appendix.

119 *See* Federal Judiciary History, *supra* note 117.

120 *See infra* Appendix.

121 *See* Federal Judiciary History, *supra* note 117.

122 *See infra* Appendix.

123 *See* Federal Judiciary History, *supra* note 117.

124 *See infra* Appendix.

appointments) to appointing exclusively judges nominated by Republicans (his last fourteen nominations).[125] While it is certainly conceivable that ideology motivated Rehnquist, had it been his chief motivating factor, it is unlikely that he would have reformed the Panel selection process by mandating staggered seven year terms. One who was motivated principally by ideology would more likely have packed the Panel and kept appointees on it as long as possible.

A better explanation for the partisan patterns seen in the Rehnquist appointments is simple timing. Spots on the JPML are considered an honor by most judges and are often given to those who have proved themselves through experience.[126] Thus, when one party dominated the presidential office and was able to appoint more judges to the bench, those judges were more likely to gain the experience necessary to be appointed to the JPML and, thus, skew the pool of potential JPML judges in favor of one party or another's nominees. During the late 1960s, when Chief Justice Warren was appointing members to the Panel, judges were much more likely to have been appointed by a Democrat simply because they had won seven of the previous nine presidential elections.[127] Analogously, in the early nineties when one begins to notice a rightward shift in Rehnquist's appointments to the JPML, Republicans had won five of the previous six presidential elections.[128]

Thus, a historical review of JPML appointments reveals no clear indications of an ideologically biased process. Three out of the four Chief Justices show no partisan disparity in favor of the party that appointed them to the bench, and the partisan disparity of Rehnquist is perhaps best explained by timing and not ideological bias.

III. Possible Prophylactic Measures

Truly, those interested in the integrity of the judicial system should find some relief that there appears to be no evidence of serious ideological bias within the JPML. Nevertheless, the potential threat of misusing the MDL system calls for substantive prophylactic measures to lessen the danger of potential abuse. While it might be tempting to dismiss the problem, the federal judicial system should

125 *See infra* Appendix.

126 In fact, members of the JPML are often on senior status within their respective district or circuit. *See An Interview with Judge John F. Nangle, supra* note 4.

127 *See* The White House, The Presidents, http://www.whitehouse.gov/about/presidents/ (last visited Oct. 26, 2009).

128 *Id.*

not wait to act until after the flaws in the system have allowed injustice to occur.

The cleanest reform measure would be to have Congress amend the MDL statute to include a provision which mandates that, when deciding federal questions, a transferee court would be required to apply the law of the transferor court. In essence, this would codify the notion of a geographical nonuniformity of federal law based on differing rulings of the various circuits. If politically palpable, this approach has the benefit of being a quick and uniform solution to the MDL transferee law problem. Nevertheless, galvanizing political support for a measure that overrides the chosen rule of many circuits might be difficult and may require a high profile case of JPML bias.

Another remedial action would be judicial repudiation of *Korean Air Lines*. For example, a prudential rule requiring application of transferor law only in the MDL context would ameliorate any potential concerns of JPML bias. The Supreme Court, though, is unlikely to even hear a case which would allow it the opportunity to consider *Korean Air Lines*. The Court, after all, accepts only a small number of cases. Additionally, when choosing between an appeal of a decision regarding a clean circuit split on an issue and an one merely applying *Korean Air Lines*, the Court is likely to hear and resolve the former before scrutinizing the latter nearly universally adopted rule.

Still other judicial remedial measures might also be employed. Transferee courts, faced with particular instances of plaintiffs or defendants being unfairly prejudiced by an MDL transfer, could rule that the particular issue (such as whether *Buckman* preemption applies) is one too intertwined with the potential trial to be properly considered a pretrial issue.[129] While the court would still have to decide the issue during the pretrial phase, it could use the distinction to justify a reliance on transferor law for that particular issue without running afoul of precedents that have adopted the *Korean Air Lines* rule.

In addition, the JPML could provide a remedy by reversing its holding in *In re General Motors Class E Stock Buyout Securities Litiga-*

129 One court has ruled that a quintessentially pretrial issue, class certification under Federal Rule of Civil Procedure 23, was so intertwined with the trial as to warrant application of the transferor court's law, so as to not prejudice either party based merely on an MDL transfer. *See In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 241 F.R.D. 185, 191–193 (S.D.N.Y. 2007). While this case expressly distinguished other pretrial motions such as motions for summary judgment and dismissal, *see id.* at 191, its approach provides a possible means for a district court to utilize transferor law when justice requires.

tion,[130] which expressly disavowed any willingness to consider the effect a potential transfer may have on the outcome of the litigation.[131] While this approach would substantially complicate the Panel's already difficult inquiry into the propriety of an MDL transfer, the task would be made easier by advocates for both parties who would actively expose possible prejudicial circuit splits.

Another reform option, promoted by Alexandra Lahav, would create an MDL transferee court within each circuit in cases where MDL centralization and transfer present possible prejudice to one side or the other.[132] This proposal thus circumvents the problem of applying transferee law in federal question MDL cases by ensuring that each MDL transferee court is dealing solely with its own circuit's law. Lahav's proposal has the added benefit of developing circuit law in all circuits on various issues and framing any splits clearly for the Supreme Court. However, the approach is probably not advisable as creating thirteen geographically diffuse centers of substantially similar litigation would effectively eviscerate most, if not all, of the efficiency gains inherent in the MDL process. After all, while efficiency is not the only consideration, it is certainly a substantial one.[133]

Finally, if Congress or the judiciary is unwilling to change the *Korean Air Lines* rule, it is possible to substantially reduce the risk of bias in MDL by reforming the JPML appointment process. Subject to separation-of-powers concerns, Congress could modify § 1407 to give itself more oversight in the appointment process. For example, the statute could be modified to allow Congress or members of the Supreme Court to exercise a veto over a Chief Justice's appointments to the JPML. In addition, Congress could shift the appointment power from the Chief Justice to the members of the various circuit courts. The judges in a circuit could then vote to choose their representative. The result would be a more transparent appointment process where diffuse rather than concentrated power would make bias less likely. Even in the absence of congressional action, the Chief Justice could institute his own simple reforms to make the process more transparent.

Rather than creating a multicentered MDL or simply offering more transparency in the appointment process, the federal system would be better served by striking a balance between efficiency and

130 696 F. Supp 1546 (J.P.M.L. 1988).

131 *See id.* at 1547.

132 *See* Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2418 (2008).

133 *See supra* notes 18–26 and accompanying text.

justice through a blanket rule that, in the MDL context, transferor jurisdiction law will govern. Critics would likely argue that adopting transferor law in the MDL context compromises both the process's efficiency and each circuit's duty to expound its view of an inherently uniform federal law. However, as noted above, efficiency was not Congress's only consideration in creating MDL.[134] Section 1407 expressly balances the twin goals of efficiency and justice,[135] and justice mandates that we do not allow the Panel, in the name of efficiency, to have the power to prejudicially influence the outcome of litigation. Additionally, there seems to be no reason why potentially applying the law of thirteen separate federal circuits would somehow impermissibly burden the efficiency of the MDL process, when applying the law of up to fifty states in diversity actions does not.

While stronger than the efficiency arguments, the uniformity arguments for requiring utilization of transferee court law also suffer from serious flaws. First, contrary to Justice Ginsburg's contention,[136] an application of divergent views of an inherently uniform federal law is not a logical contradiction. It is, in fact, perfectly consistent with the concept of uniformity to apply *uniformly a principle of nonuniformity.* Thus, while such a system might be theoretically less homogeneous, it certainly does not somehow destroy its ultimate uniformity to allow for nonuniform rules of decision, if they are consistently applied. Furthermore, as Judge Easterbrook noted in *Eckstein*, federal courts apply disparate norms in other instances such as applying state law to determine the proper federal statute of limitations or the federal law of preclusion.[137] Regardless, abstract and theoretical concerns should not be allowed to justify a rule that creates a real risk of bias in one of the most vital areas of the federal judicial system.

CONCLUSION

Since its inception, MDL has been largely successful at achieving its goals of efficiency and fair adjudication. One might even argue that without MDL the federal judicial system could have collapsed under the weight of a rising tide of litigation. The effect of utilizing a transferee court's law in federal question MDL cases, though, creates an unintended opportunity for bias to creep into the federal courts. While a historical review reveals no significant ideological bias in the

134 *See supra* notes 60–62 and accompanying text.

135 *See supra* note 61 and accompanying text.

136 *See In re* Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1175–76 (D.C. Cir. 1987).

137 *See* Eckstein v. Balcor Film Investors, 8 F.3d 1121, 1127 (7th Cir. 1993).

JPML appointment process and though there is no evidence that the Panel has ever engaged in ideologically biased decisionmaking, our law should not, in the interest of efficiency and uniformity, leave the door open for such bias. The utilization of transferee court law in MDL federal question cases has—albeit unintentionally—provided a mechanism for four individuals to unduly influence the nation's courts of justice. Indeed, this threat to the integrity of the federal judicial system justifies a departure from the usual rule that each federal court considers federal law independently. Instead, within the MDL process, a transferee court should apply the transferor court's law, thereby assuring the litigants that a transfer effectuates merely a change of courtrooms.

APPENDIX

Judicial Panel Membership[138]

Judge	Court	Date Appointed to JPML	End Date	Date Appointed as Chairman	President Nominating to Bench	C.J. Appointing to JPML
Alfred P. Murrah	10th Cir.	05/29/1968	10/30/1975	05/29/1968	FDR	Warren
John Minor Wisdom	5th Cir.	05/29/1968	11/15/1978	11/06/1975	Eisenhower	Warren
Edwin A. Robson	N.D. Ill.	05/29/1968	07/01/1979	–	Eisenhower	Warren
William H. Becker	W.D. Mo.	05/29/1968	02/01/1977	–	JFK	Warren
Edward Weinfeld	S.D.N.Y.	05/29/1968	11/15/1978	–	Truman	Warren
Joseph S. Lord III	E.D. Pa.	05/29/1968	07/17/1978	–	JFK	Warren
Stanley A. Weigel	N.D. Cal.	05/29/1968	07/01/1979	–	JFK	Warren
Andrew A. Caffrey	D. Mass.	11/06/1975	06/01/1990	02/20/1980	Eisenhower	Burger
Roy W. Harper	E.D. Mo.	02/01/1977	09/30/1983	–	Truman	Burger
Charles R. Weiner	E.D. Pa.	10/25/1978	09/30/1983	–	LBJ	Burger
Murray J. Gurfein	2d Cir.	11/15/1978	12/16/1979	11/15/1978	Nixon	Burger
Robert H. Schnacke	N.D. Cal.	07/01/1979	11/19/1990	–	Nixon	Burger
Edward S. Northrop	D. Md.	06/06/1979	09/30/1983	–	JFK	Burger
Fred Daugherty	E.D. Okla.	03/01/1980	11/19/1990	–	JFK	Burger
Sam C. Pointer	N.D. Ala.	03/01/1980	12/07/1987	–	Nixon	Burger
Milton Pollack	S.D.N.Y.	10/01/1983	11/30/1994	–	LBJ	Burger
Hugh S. Dillin	S.D. Ind.	10/01/1983	10/26/1992	–	JFK	Burger

138 This table reflects information gleaned from the JPML and the Federal Judicial Center. Information on the judges who have served on the JPML and their courts, tenures, and service as JPML Chairman may be found at U.S. Judicial Panel on Multidistrict Litig., Roster of Current and Former Judges, http://www.jpml.uscourts.gov/General_Info/Judges/Panel_Judges_Roster-10-7-2009.pdf (last visited Oct. 24, 2009). The President who nominated each JPML member to the Judiciary is listed at Federal Judiciary History, *supra* note 117. The Chief Justice who selected each Panel member was then deduced from the information provided by these sources.

Louis H. Pollak	E.D. Pa.	10/01/1983	10/26/1992	–	Carter	Burger
Halbert O. Woodward	N.D. Tex.	03/08/1989	06/23/1992	–	LBJ	Rehnquist
John F. Nangle	S.D. Ga. (formerly E.D. Mo.)	06/01/1990	12/01/2000	06/01/1990	Nixon	Rehnquist
Robert R. Merhige, Jr.	E.D. Va.	11/19/1990	06/08/1998	–	LBJ	Rehnquist
Barefoot Sanders	N.D. Tex.	10/26/1992	06/01/2000	–	Carter	Rehnquist
Clarence A. Brimmer	D. Wyo.	10/26/1992	06/01/2000	–	Ford	Rehnquist
John F. Grady	N.D. Ill.	10/26/1992	06/01/2000	–	Ford	Rehnquist
Louis C. Bechtle	E.D. Pa.	12/06/1994	06/29/2001	–	Nixon	Rehnquist
John F. Keenan	S.D.N.Y.	06/08/1998	06/01/2006	–	Reagan	Rehnquist
William B. Enright	S.D. Cal.	11/19/1990	06/01/2000	–	Nixon	Rehnquist
Wm. Terrell Hodges	M.D. Fla.	06/01/2000	06/13/2007	12/01/2000	Nixon	Rehnquist
Bruce M. Selya	1st Cir.	06/01/2000	06/01/2004	–	Reagan	Rehnquist
Morey L. Sear	E.D. La.	06/01/2000	12/31/2002	–	Ford	Rehnquist
Julia Smith Gibbons	6th Cir. (formerly W.D. Tenn.)	06/01/2000	12/30/2003	–	Reagan	Rehnquist
D. Lowell Jensen	N.D. Cal.	12/01/2000	06/01/2008	–	Reagan	Rehnquist
J. Frederick Motz	D. Md.	07/13/2001	06/01/2009	–	Reagan	Rehnquist
Robert L. Miller, Jr.	N.D. Ind.	01/01/2003	–	–	Reagan	Rehnquist
Kathryn H. Vratil	KS	02/02/2004	–	–	H. W. Bush	Rehnquist
David R. Hansen	8th Circuit	07/09/2004	–	–	Reagan	Rehnquist
Anthony J. Scirica	3d Cir.	06/01/2006	06/15/2008	–	Reagan	Roberts
John G. Heyburn II	W.D. Ky.	06/14/2007	–	06/14/2007	H.W. Bush	Roberts
W. Royal Furgeson, Jr.	N.D. Tex.	09/22/2008	–	–	Clinton	Roberts
Frank C. Damrell, Jr.	E.D. Cal.	12/09/2008	–	–	Clinton	Roberts
David G. Trager	E.D.N.Y.	10/07/2009	–	–	Clinton	Roberts