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THE SHORTEST DISTANCE: DIRECT FILING AND  
CHOICE OF LAW IN MULTIDISTRICT  
LITIGATION

*Andrew D. Bradt\**

*The amount of multidistrict litigation (MDL) in the federal courts is skyrocketing, particularly in the areas of mass torts and products liability. One significant reason for the explosion of MDL has been the difficulty of maintaining nationwide or multistate class actions in these areas, due in large part to the choice-of-law problems created by operation of many different states' laws to plaintiffs' claims. One comparative benefit of MDL is that individual cases within the consolidated pretrial proceedings retain their "choice-of-law identity"—that is, that transfer of a case into a pending MDL does not change the choice-of-law rules that would otherwise apply to a plaintiff's case had it proceeded in its original home forum. In other words, the case carries the choice-of-law rules of the original forum state with it into the MDL. Because MDL is purportedly a consolidation only for pretrial proceedings, unlike a class action, the application of different choice-of-law rules to different plaintiffs' claims does not render the MDL proceeding itself infeasible. This framework, however, is in disarray due to the advent and increasing popularity of a practice called "direct filing." In direct filing, plaintiffs bypass the transfer process and file their cases directly into an MDL court. Amid the growing popularity of this practice, the question of what choice-of-law rules ought to apply to direct-filed cases has been left unaddressed. This*

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*paper seeks to expose and resolve the problem by permitting direct filing, but requiring plaintiffs to declare a proper home district whose choice-of-law rules would apply to their claims. Such an approach would both preserve the efficiency benefits of direct filing, and be consistent with the values of federalism and litigant autonomy underlying the choice-of-law framework in diversity cases.*

## INTRODUCTION

Aggregate litigation and choice of law are poor bedfellows. Aggregate litigation is driven by the need to resolve many cases efficiently in a single consolidated proceeding by emphasizing the commonalities of cases.<sup>1</sup> Choice of law demands attention to the uniqueness of individual cases, requiring analysis of potentially conflicting state policies and interests in light of the particular circumstances of cases.<sup>2</sup> Aggregation seeks sameness, while choice of law focuses on particularity. When aggregation of cases based on state law proceeds in a federal court under diversity jurisdiction, the complexity increases. Federal courts sitting in diversity must respect states' choice-of-law rules because those rules represent states' choices about the scope of their laws in cases in which they have regulatory interests,<sup>3</sup> and in order to ensure that diversity jurisdiction does not change the substantive law that would otherwise apply to a plaintiff's case.<sup>4</sup> As numerous commentators have observed, choice of law matters to the outcomes and values of cases, but it also represents differences in states' approaches to regulating disputes in which they have interests.<sup>5</sup> For aggregation and choice of law to coexist peacefully, and to avoid running afoul of these federalism considerations, the aggregation mechanism must accommodate the individual nature of cases within the collective. In other words, federal aggregation struc-

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1 See Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10 REV. LITIG. 231 (1991).

2 See Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731, 731-32 (1990).

3 See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); see also KERMIT ROOSEVELT, *CONFLICT OF LAWS* 156 (2009).

4 See *Van Dusen v. Barrack*, 376 U.S. 612 (1964); see also Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 576 (1996) (“[T]he mere existence of federal jurisdiction does not justify modifying the parties’ substantive rights”); Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2034 (2008) (“[A]ggregation should not distort the underlying substantive rights of the parties”).

5 See, e.g., Kramer, *supra* note 4, at 553-54; Patrick Woolley, *Choice of Law and the Protection of Class Members in Class Suits Certified Under Federal Rule of Civil Procedure 23(b)(3)*, 2004 MICH. ST. L. REV. 799, 833 (2004).

tures should seek choice-of-law neutrality for the cases within in the aggregate.

Given these issues, it should come as no surprise, then, that choice of law has presented a seemingly intractable problem for the nationwide, diversity-based, mass-tort class action.<sup>6</sup> Indeed, the federal courts, where most large class actions are now litigated due to the Class Action Fairness Act of 2005 (CAFA),<sup>7</sup> have come to a consensus that the operation of choice-of-law rules demands that different state laws apply to different plaintiffs within the class, and that those differences render the classes insufficiently cohesive for class certification.<sup>8</sup> Calls for federal choice-of-law rules that ensure that a single state's law can apply in a nationwide mass-tort case have fallen on deaf ears, in part because Congress has little interest in facilitating class actions,<sup>9</sup> but also because any such rule would raise serious potential federalism and due-process-related objections.<sup>10</sup> Further, in light of the Supreme Court's recognition in *Klaxon Co. v. Stentor Electric Manufacturing Co.* that a state's choice-of-law rules are part of its substantive law,<sup>11</sup> applying one set of choice-of-law rules to a nationwide set of cases raises similar federalism problems.<sup>12</sup>

Although the class-action structure seems increasingly untenable, the stresses on the system that create the need to aggregate have not disappeared. Given all this, it should also come as no surprise that multidistrict litigation, or "MDL," has stepped in to fill the void.<sup>13</sup>

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6 See Luke McCloud & David Rosenberg, *A Solution to the Choice of Law Problem of Differing State Laws in Class Actions: Average Law*, 79 GEO. WASH. L. REV. 374, 374 (2011); Genevieve G. York-Erwin, *The Choice-of-Law Problem(s) in the Class Action Context*, 84 N.Y.U. L. REV. 1793, 1794 (2009).

7 Pub. L. No. 109-2, 119 Stat. 4 (codified in relevant parts at 28 U.S.C. §§1332(d), 1453, 1711-15 (2006)).

8 See Elizabeth J. Cabraser, *Just Choose: The Jurisprudential Necessity to Select a Single Governing Law for Mass Claims Arising from Nationally Marketed Consumer Goods and Services*, 14 ROGER WILLIAMS U. L. REV. 29, 46-47 (2009) (describing the combination of CAFA and the choice-of-law problem as the "coup de grâce" for mass-tort class actions).

9 See Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1941-43 (2006).

10 See Mary Kay Kane, *Drafting Choice of Law Rules for Complex Litigation: Some Preliminary Thoughts*, 10 REV. LITIG. 309, 320 (1991); Silberman, *supra* note 4, at 2025.

11 See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); see also David F. Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 LAW & CONTEMP. PROBS. 732, 732 (1963).

12 Silberman, *supra* note 4, at 2025-26.

13 See Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245, 2292-95 (2008) (discussing choice-of-law concerns in the context of MDL); Thomas

The federal MDL statute allows for consolidation of tort cases individually filed around the country for pretrial proceedings in a single district court chosen by a panel of judges. Most cases are ultimately resolved by the MDL court, but, at least in theory, at the close of pretrial proceedings the individual cases are remanded to the district courts whence they came.<sup>14</sup> Although the MDL statute has been on the books for over four decades, it has never been as prominent as it is now. According to recent statistics by the Federal Judicial Center, a third of all pending federal civil cases are part of an MDL, and over ninety percent of those cases are products-liability cases—exactly the sorts of cases that might have been nationwide class actions had choice-of-law issues not emerged as such a central obstacle.<sup>15</sup>

Structurally, MDL is a much better fit with choice of law, because in MDL a high degree of aggregation can be achieved while allowing cases to retain their individual character. In other words, the MDL structure fosters aggregation without creating pressure to change the substantive law that would otherwise apply to cases.<sup>16</sup> Cases are filed around the country in proper venues and transferred into the MDL, carrying with them the law, and choice-of-law rules, that would have applied in the districts where the cases were filed.<sup>17</sup> Plaintiffs' substantive rights are formally unchanged due to the existence of a federal mass-tort proceeding, and states' interests in resolving disputes their laws might rationally regulate are vindicated.<sup>18</sup> As a result, MDL more comfortably accommodates the individualized nature of choice-of-law inquiries and the values those inquiries seek to enforce: the accommodation of interested states' policies in light of the relevant interests of the states and of the parties involved in the particular case.

Of course, every case in an MDL does not undergo a rigorous choice-of-law analysis. Although MDL structurally accommodates individualized choice-of-law analyses better than does the class action,

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E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 776 (2010) (discussing the substantial growth of aggregate tort litigation in MDL proceedings).

14 See Marcus, *supra* note 13, at 2265–66.

15 Emery G. Lee, Margaret Williams, Richard A. Nagareda, Joe S. Cecil, Thomas E. Willging, and Kevin M. Scott, *The Expanding Role of Multidistrict Litigation in Federal Civil Litigation: An Empirical Investigation* (2010) at 2 (draft on file with author).

16 See Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2205–06 (2008).

17 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3866 (3d ed. 2007).

18 Cf., e.g., Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 820–22 (1985) (arguing that certifying mass-tort proceedings as class actions can negatively affect a plaintiff's chance at recovery).

most MDLs eventually conclude with a global settlement.<sup>19</sup> That said, choice-of-law analyses still matter because MDL courts often apply state law when deciding dispositive motions and trying bellwether cases that push the litigation toward settlement.<sup>20</sup> Moreover, the applicable law matters significantly to the value of individual cases and the group as a whole, particularly in products-liability cases, where state laws differ significantly.<sup>21</sup> The growth of MDL in diversity-based mass-tort cases is a significant improvement when it comes to animating choice-of-law values in aggregate litigation.

But the growth of MDL is not a panacea for those concerned with choice of law—rather, it presents problems of its own. The more the MDL emphasizes the group nature of the litigation over the individual character of the component cases, the more the conflict between choice of law and efficiency will resurface. This paper examines in detail one example of this problem currently causing significant confusion in some of the largest MDLs in the country: the practice of direct filing. In direct filing, at courts' encouragement, defendants agree to allow plaintiffs to file their cases directly into the MDL court, skipping the steps of filing their cases in an otherwise proper venue and having the case transferred to the consolidated MDL proceeding. In most such cases, the MDL court, or the state in which it sits, would not otherwise be a proper venue for many of these cases, usually due to lack of jurisdiction over all defendants in all component cases. Courts encourage these stipulations and enshrine them in case-management orders applicable throughout the entire litigation. Ultimately, this procedure achieves significant efficiencies for all parties and the system: it reduces costs and delays, eliminates the administrative burdens of transfer on both the parties and the courts, and it provides the MDL court the ability to try to settle the cases without ever having the obligation to remand them to their home districts.<sup>22</sup>

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19 See Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 270 (2011) (noting MDL “creates the perfect conditions for an aggregate settlement”).

20 See Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1150 (2010) (noting bellwether trials' benefits in pricing claims and providing information to both sides).

21 See, e.g., 2 LOUIS I. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY §25.04 (rev. 2011) (“With the increasing differences from state to state . . . choice of law is becoming an ever more pertinent and significant aspect of products liability.”).

22 Absent direct filing an MDL court may not try a case transferred to it without consent of both parties. See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 34 (1998); see also Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2324 (2008) (discussing direct filing and bellwether trials).

Defendants prefer centralizing all of the cases, and plaintiffs prefer skipping the transfer step, while preserving their prerogative to return to a more convenient forum if and when pretrial proceedings conclude. In a sense, direct filing deeply embraces the notion of the MDL as a single aggregated litigation, as opposed to a temporarily consolidated collection of individual cases.

Despite these efficiencies, direct filing presents a knotty choice-of-law problem: what state's choice-of-law rules, and therefore substantive laws, apply to the direct-filed cases? The orders courts have adopted often say nothing about the choice-of-law implications of direct filing, and when they do, they usually say that direct filing will have "no effect" on the applicable law.<sup>23</sup> Such stipulations are meaningless because, without an antecedent choice of forum by the plaintiff, it is impossible to determine what choice-of-law rules would have applied absent direct filing. Direct filing without attention to choice of law replicates many of the federalism and litigant-autonomy-related problems of prioritizing efficiency over choice of law. The problem is both conceptual and currently causing confusion in some of the largest currently pending MDLs.

Most MDL courts have decided to apply the choice-of-law rules of their own state to direct-filed cases, applying the letter of the rule in *Klaxon*—that a federal court sitting in diversity must apply the choice-of-law rules of the state in which it sits.<sup>24</sup> This solution, however, is conceptually flawed in light of the justifications for *Klaxon*, namely, that choice-of-law rules reflect states' policies as to the scope of their *own* law when they have a regulatory interest, and that diversity should not change the law otherwise applicable in a plaintiff's case.<sup>25</sup> But recognizing that applying the *Klaxon* rule does not make sense does not solve the problem—it can and does create a vacuum, one which a court might be tempted to fill by selecting choice-of-law rules after the fact that are unconnected with the forum that might otherwise have been selected by an individual plaintiff at the outset of a case. Doing so is potentially prejudicial to a plaintiff who chose to file directly into the MDL thinking that doing so would have no effect on choice of law, as promised in most direct-filing orders.

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23 See *infra* Part III.B.

24 See, e.g., *In re Trasylol Prods. Liab. Litig.*, No. 1:08-MD-01928, 2011 WL 1033650, at \*3 (S.D. Fla. Jan. 18, 2011); *In re Vioxx Prods. Liab. Litig.*, 522 F. Supp. 2d 799, 806 (E.D. La. 2007).

25 See DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* 217–18 (1965); see also Brainerd Currie, *The Disinterested Third State*, 28 *LAW & CONTEMP. PROBS.* 754, 769–72 (1963) (highlighting the challenges facing a third-party court applying the *Klaxon* rule despite the lack of a state interest in the case).

Ultimately, this paper argues that the appropriate solution to the choice-of-law problems created by direct filing is for courts to require that direct-filed cases be governed by the choice-of-law rules of an otherwise proper forum that the plaintiff selects at the outset of her case.<sup>26</sup> Such a solution would ensure that the existence of the MDL proceeding, and the location of the MDL court, do not change the law that would otherwise apply to an individual plaintiff's case. This solution would also achieve the other underlying goal of *Klaxon*, to more often vindicate states' policy choices regarding the scope of their own laws in cases where they have a regulatory interest. By ensuring that an MDL continues to respect the individual character of the cases within it, the process can best avoid many of the ultimately insuperable choice-of-law obstacles that faced the class action.

In Part I of the paper, I briefly review the development of the Supreme Court's policy regarding choice-of-law and diversity jurisdiction. Although this Part does not canvass the entire array of the Court's choice-of-law cases, it examines in detail the Court's approach in *Klaxon* and *Van Dusen v. Barrack*,<sup>27</sup> two cases that still constitute the foundation of this jurisprudence. In Part II of the paper, I discuss the shift from class actions in diversity-based mass torts to the MDL and explain why the traditional MDL framework is a better fit with the policies underlying *Klaxon* and *Van Dusen* than the class action. In Part III, I focus in detail on direct filing as an example of how, when MDL strays from its traditional framework, choice-of-law problems resurface. In that section, I will explain why application of the letter of *Klaxon* in these cases conflicts with its policy underpinnings and examine how departing from *Klaxon* creates problems of its own. To do so I will discuss in detail the currently pending MDL involving the birth-control drug *Yaz*,<sup>28</sup> which has adopted a direct-filing stipulation, and in which nearly 9,000 of the almost 10,000 pending cases have been directly filed.<sup>29</sup> The problems in the *Yaz* litigation illustrate well the problems created by direct filing. In Part IV of the paper, I will sketch out a potential solution to the direct-filing dilemma that seeks

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26 *Cf.* 28 U.S.C. § 1407(a) (2006) (setting forth the process by which civil actions can be transferred to an MDL court, although remaining silent on direct file actions).

27 376 U.S. 612 (1964).

28 *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices and Prods. Liab. Litig.*, No. 3:09-md-02100-DRH-PMF. MDL No. 2100, 2011 WL 1375011 (S.D. Ill. Apr. 12, 2011).

29 Letter from Catlin Fischer, Managing Clerk, to author, *In re Yasmin*, MDL No. 2100 (Aug. 9, 2012) (on file with author); Letter from Catlin Fischer, Managing Clerk, to author, *In re Yasmin*, MDL No. 2100 (July 25, 2011) (on file with author).



to comply better with the policies underlying the Supreme Court's choice-of-law-federalism jurisprudence.

Examining the complications direct filing creates, and presenting a solution that seeks to preserve otherwise rational choice-of-law analysis in individual cases, aims to shed some light more broadly on the interaction of federalism, choice of law, and efficiency in aggregate litigation, and present an example of a solution that provides an appropriate balance of these often conflicting considerations.

## I. CHOICE-OF-LAW FEDERALISM IN THE SUPREME COURT

### A. *The Supreme Court's Choice-of-Law Jurisprudence Prior to Klaxon*

The years prior to the 1941 decision in *Klaxon* were ones of significant change with respect to the Court's approach to choice of law. In the early part of the twentieth century, the Court weighed in often on choice-of-law questions,<sup>30</sup> reviewing decisions by both federal and state courts under the Due Process and Full Faith and Credit Clauses.<sup>31</sup> The Court's view—that choices between conflicting states' laws were narrowly cabined by the Constitution—was consistent with the then-prevailing dogma. At the time, adherence to the territorially based “vested rights” view of choice of law, most often associated with Professor Joseph H. Beale and his First Restatement of Conflict of Laws, was near universal. The “vested rights” theory held that a plaintiff's legal rights “vested” at a particular moment under the law of a state in which a single connecting event occurred, such as the place of the injury in tort, or the place of the making of a contract.<sup>32</sup> Under this theory, departing from the law of the state where such a key event occurred implicated significant concerns about both the parties' due-process rights and the legislative jurisdiction of the state whose law seemingly undoubtedly applied to a particular dispute.<sup>33</sup> The key pur-

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30 See James Y. Stern, *Choice of Law, the Constitution, and Lochner*, 94 VA. L. REV. 1509, 1510 (2008).

31 See, e.g., *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930); *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149 (1914); see generally PETER HAY ET AL., *CONFLICT OF LAWS* §§ 3.21-3.24 (5th ed. 2010) (describing the evolution of the Court's conflicts jurisprudence as relating to due process and full faith and credit issues).

32 See generally Joseph H. Beale, *What Law Governs the Validity of a Contract*, 23 HARV. L. REV. 260, 271 (1910) (evaluating different theories of what law should govern contracts and concluding that the law of the place of the making of a contract provides the best option).

33 For a restatement of the vested-rights doctrine and its connection to the Court's choice-of-law jurisprudence, see RUSSELL J. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* § 9.1, at 654 (6th ed. 2010) (“[F]or a time the Supreme Court did

ported virtue of this framework was uniformity—under it, there was supposedly only one “correct” answer to every conflicts problem.<sup>34</sup>

But by the 1930s, according to the now-familiar story of the “choice-of-law revolution,” the territorial underpinnings of the vested-rights doctrine began to crumble.<sup>35</sup> Thanks to trenchant criticism by numerous academics, most forcefully Walter Wheeler Cook and David Cavers,<sup>36</sup> it became clear that the vested-rights approach had significant theoretical and practical problems. Strict application of the doctrine often led to arbitrary and unfair results,<sup>37</sup> and for that reason, courts regularly refused to apply it, instead using a variety of “escape devices,” such as the public-policy exception to applying foreign law, to avoid harsh application of the rules.<sup>38</sup> These critiques generated widespread dissatisfaction with traditional choice-of-law doctrine, and prompted rethinking. The so-called “revolution” had begun.<sup>39</sup> Although the new “modern” approaches to choice of law differed from one another in significant ways, they shared the position that several states’ laws could rationally apply to a multistate dispute. Choosing among possibly applicable laws required examination of the policies underlying those laws and the relation of those policies to the facts of individual cases.<sup>40</sup> Instead of there being one unassailable answer to every choice-of-law question, the prevailing view became, as Paul Freund described it, that “there are at least two possibly applica-

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attempt to translate rigid territorial choice-of-law dogmas into equally rigid constitutional dogmas.”).

34 Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2457 (1999) (noting that for Beale, “given his territorial understanding . . . laws cannot even come into contact with each other, much less conflict”).

35 See generally SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION* 11 (2d ed. 2006) (discussing the flaws in choice-of-law jurisprudence and the ensuing “revolution”).

36 See Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924); David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933).

37 See Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 30 (1989); Arthur Taylor von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 930 (1975).

38 See Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 208 (noting that commentators examined the exceptions to the traditional rule and “began to question . . . whether they indicated the need for an altogether different understanding of sovereignty”).

39 See Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631, 1631 (2005) (describing the “revolution”: “the old formalistic way of choosing law was dethroned, and has occupied a humble position on the sidelines ever since”).

40 See generally WEINTRAUB, *supra* note 33, § 1.5, at 7–15 (discussing the policy-based approaches that flourished during the choice-of-law revolution).

ble rules or systems of law in a multistate problem. Choice is inescapable and must be explicit.”<sup>41</sup> This shift reflected the realization that the purpose of choice of law was not to seek uniformity alone, but to “understand, harmonize, and weigh competing interests in multistate events.”<sup>42</sup>

By the late 1930s, the Court, too, was more often wavering from traditional conflicts doctrine.<sup>43</sup> In several opinions by Justice Stone, the Court turned away from the vested-rights approach in favor of the position that multiple laws might apply in a given case. Given that there were admittedly multiple plausible answers to most choice-of-law questions, the scope of the Supreme Court’s review of state courts’ choice-of-law decisions would be much more limited.<sup>44</sup> Perhaps most indicative of this shift was Justice Stone’s opinion for the Court in *Alaska Packers Association v. Industrial Accident Commission of California*.<sup>45</sup> In that case, rather than looking for a dispositive factual connection to a particular state, or the exclusive legislative jurisdiction of one state over torts or contracts occurring within its borders, the Court, strikingly, stated that “the conflict is to be resolved . . . by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight.”<sup>46</sup>

In short, the Court’s approach in *Alaska Packers* and other contemporaneous cases,<sup>47</sup> in Professor Freund’s words, established that, “[w]ithin limits, there is room for assertiveness as well as reticence in the family of our states. What those limits are must be determined by appraising the interests of the states.”<sup>48</sup> The Court’s more flexible approach to constitutional limits on choice of law therefore signaled two key developments: the acknowledgement that the strict rules of

41 Paul A. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1210 (1946).

42 *Id.* at 1235–36.

43 See ROOSEVELT III, *supra* note 34, at 116 (noting that by the 1930s the Court began to note “the tensions within the original system, which the erosion of territoriality threw into sharper relief”).

44 See Freund, *supra* note 41, at 1214 (noting that Justice Stone’s opinions began “renouncing a geographical test in favor of a teleological one in the choice of law. Not place but purpose was decisive.”).

45 294 U.S. 532 (1935).

46 *Id.* at 547.

47 See, e.g., *Pac. Emp’rs Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 500 (1939) (holding multiple laws may constitutionally apply to a multistate dispute).

48 Freund, *supra* note 41, at 1222. See also *id.* at 1225 (contending that *Alaska Packers* and *Pacific Employers* “have left great latitude to the states in choice of law”); Weinberg, *supra* note 39, at 1635 (stating that the “Court began to see that *both* states [in a conflicts case] might have constitutional power” as evidenced by *Alaska Packers*).

the vested-rights doctrine were not constitutionally mandated, and that the Supreme Court would not rigidly police states' choices with regard to the application of their own law in cases in which they had a regulatory interest.<sup>49</sup> As a result, the Court exhibited a high degree of tolerance for different decisions by state courts in choice of law, a move which made sense given the changes in the choice-of-law field generally.<sup>50</sup>

### B. *Erie* and *Klaxon*

Not to reverse the two in order of importance, but prior to *Klaxon* came *Erie Railroad Co. v. Tompkins*,<sup>51</sup> which, as Richard Marcus describes it, “looms over all federal adjudication.”<sup>52</sup> I will dispense with the familiar story of *Erie*, except to note two aspects of the case: that, first, *Erie* emphasizes the unfairness of different results in the federal and state courts of the same state based on the accident of diversity, and, second, that *Erie*, even on its most conservative reading, prohibits the federal courts from making law beyond the lawmaking power of the Congress.<sup>53</sup>

Prior to *Erie*, choice of law was considered a matter of federal common law in diversity cases.<sup>54</sup> After *Erie*, it was an open question whether federal courts sitting in diversity would be required to apply state choice-of-law rules.<sup>55</sup> Eventually, the circuits split,<sup>56</sup> and the

49 See Weinberg, *supra* note 39, at 1637 (discussing the “liberating insight” of the “innovative Supreme Court cases of the 1930s” that “in a two-state case in tort, the law chosen did not *have* to be the law of the place of injury . . . nor, indeed, [of] any other *single* place”).

50 The Court’s tolerance has not abated. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

51 304 U.S. 64 (1938).

52 Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 693 (1984).

53 See EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION (2000) (discussing *Erie* and its justifications).

54 See William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 27 (1963).

55 The Court could have addressed the issue contemporaneously with *Erie*, but it explicitly left the question open in an opinion released the same day. See *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 208 n.2 (1938).

56 In *Sampson v. Channell*, 110 F.2d 754, 761 (1st Cir. 1940), the First Circuit held that *Erie* required fidelity to state choice-of-law rules. In his iconic opinion, Judge Magruder opined that if a federal court could ignore state choice-of-law rules, “then the ghost of *Swift v. Tyson* still walks abroad, somewhat shrunken in size, yet capable of much mischief.” *Id.* (citation omitted).

Supreme Court took up the matter in 1941 in *Klaxon Co. v. Stentor Electric Manufacturing Co.*<sup>57</sup>

*Klaxon* was a breach-of-contract case brought in the District of Delaware. Stentor, a New York corporation, sued Klaxon, a Delaware corporation, on a contract made in New York. Stentor won at trial, and then moved for prejudgment interest.<sup>58</sup> Stentor had not, prior to that point, requested interest, nor had it asked the court to charge the jury on that question. Instead, Stentor argued that it was entitled to interest under a New York statute which made the addition of interest mandatory in breach-of-contract actions.<sup>59</sup> The district court agreed, holding that New York law governed the contract as a matter of federal conflicts law.<sup>60</sup> Klaxon appealed, arguing that the New York interest statute should not apply. Instead, Klaxon contended that *federal* law should apply to the question because the case was in federal court, and that as a matter of federal procedural law, Stentor was not entitled to interest because it had not moved for it before the case went to the jury.<sup>61</sup>

The Third Circuit affirmed, also apparently following federal common law of choice of law.<sup>62</sup> Citing only treatises, the court held that under “the better view of the law,” in a breach-of-contract case the availability of prejudgment interest should be decided according to the law of the place of a contract’s performance.<sup>63</sup> Applying that

57 313 U.S. 487 (1941).

58 *Id.* at 494–95.

59 *Id.* at 495 (citing N.Y. Civil Practice Act § 480 (1925 N.Y. Laws 173–74)).

60 *Stentor Elec. Mfg. Co. v. Klaxon Co.*, 30 F. Supp. 425, 432–35 (D. Del. 1939).

61 Klaxon based its position on a Second Circuit case authored by Judge Learned Hand, *Companhia de Navegacao Lloyd Brasileiro v. C.G. Blake Co.*, 34 F.2d 616 (2d Cir. 1929).

62 *Stentor Elec. Mfg. Co. v. Klaxon Co.*, 115 F.2d 268, 275–77 (3d Cir. 1940).

63 *Id.* at 275–76. There is reason to question whether this is the correct interpretation of the Third Circuit’s opinion. It is true that the Third Circuit never cited Delaware authority in deciding that New York law governed. But there is reason to believe that the Third Circuit thought it was following Delaware conflicts rules.

The writer of the opinion, Judge Goodrich, had authored a prominent conflicts treatise. He published a second edition of that treatise in 1938, after *Erie*, in which he opined that “today the federal courts have no independent rules of common law and therefore Conflict of Laws, but must follow the rules established in the state courts of their district.” HERBERT F. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS 24 (2d ed. 1938). Moreover, Judge Goodrich found this result “proper and desirable; it prevents a difference in decision depending on whether suit is brought in the state or federal courts, and one more possibility of divergence based upon the fortuitous event of the forum chosen has been abolished.” *Id.* The Supreme Court cited this passage in its *Klaxon* opinion. 313 U.S. at 496 n.2.

choice-of-law rule, the court decided that New York's interest statute applied to Stentor's claim.<sup>64</sup>

The Supreme Court unanimously reversed.<sup>65</sup> Although Klaxon continued to argue that the question of prejudgment interest was a matter of federal procedural law,<sup>66</sup> the Court framed the case exclusively as a choice between the Delaware and New York laws governing prejudgment interest. The Court found that the Third Circuit's decision, made "without regard to Delaware law," ran afoul of *Erie*.<sup>67</sup> Justice Reed, writing for the Court, stated that "the prohibition declared in *Erie*, against any such independent determinations by the federal courts, extends to the field of conflict of laws."<sup>68</sup> As a result, "[t]he

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Additionally, the other two judges on the *Stentor* Third Circuit panel, Judges Maris and Jones, decided a case only a month after *Stentor*, in which Jones wrote for a unanimous panel that in "effectuation of the policy of federal jurisprudence enunciated in *Erie*, it would seem proper for a federal court to follow the rule of the State of the forum on a question of conflict of laws." *Waggaman v. Gen. Fin. Co.*, 116 F.2d 254, 257 (3d Cir. 1940) (citation omitted). For this proposition, the *Waggaman* panel cited none other than their colleague Judge Goodrich and his treatise. *Id.*

Given all this, there is credence to an argument that the Third Circuit in *Stentor* was applying Delaware conflicts law. The opinion, though, is unclear. It first decides that prejudgment interest is a matter of substance and not procedure, citing the Restatement, and treatises by Goodrich and Beale. *Stentor*, 115 F.2d at 275–76. As a result, the law of the place of performance of the contract, New York, applied. In theory, if the court were applying federal common law, its work would be done. But then, oddly, the court went on to assess the "further difficult question whether the New York statute above referred to is a matter of substance to be included as a proper part of the reference to New York law in this case, or whether it is simply a regulation of procedure in the New York courts. This question the court at the forum must determine." *Id.* at 276. The court inserted a footnote to the Restatement, stating that "[t]he court at the forum determines according to its own Conflict of Laws rule whether a given question is one of substance or procedure." *Id.* n.6 (citing RESTATEMENT (FIRST) CONFLICT OF LAWS § 584 (1934)). The court then proceeded to state that, "[i]t seems to us that the statute, in the Conflict of Laws sense, at any rate, is substantive and that reference to it is rightfully included." *Stentor*, 115 F.2d at 276. Again, no mention of Delaware.

In any event, in light of the lack of clarity of the opinion and the necessity to address the conflicts issue after *Erie*, the questions surrounding the Third Circuit's conclusion are essentially academic, but it is ironic that Judge Goodrich, one of the earliest proponents of what would ultimately become the *Klaxon* rule, would be reversed in this manner.

64 *Stentor*, 115 F.2d at 276.

65 *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 498 (1941).

66 Petition for Writ of Certiorari, *Klaxon*, 313 U.S. 487 (No. 741), at 7 ("[I]t is essential that the federal courts have a uniform choice-of-law rule regarding interest.").

67 *Klaxon*, 313 U.S. at 496.

68 *Id.* (citation omitted).

conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts."<sup>69</sup> A different conclusion would "do violence to the principle of uniformity within a state, upon which the *Tompkins* decision is based."<sup>70</sup> If a federal court could craft its own choice-of-law rules, "the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side."<sup>71</sup>

Justice Reed also responded to the argument that requiring federal courts to abide by state choice-of-law rules would create intolerable disuniformity among federal courts:

Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws.<sup>72</sup>

As the Court ultimately concluded, "the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be."<sup>73</sup> Citing its recent choice-of-law opinions, the Court held that Delaware was free to decide that its choice-of-law rules mandated application of Delaware law to a Delaware corporate defendant if the New York law "would interfere with its local policy."<sup>74</sup> As a result, the Court reversed and remanded to the lower courts to decide what Delaware's choice-of-law rules would dictate.<sup>75</sup>

The Supreme Court's brief opinion in *Klaxon* has its flaws. For one thing, the Court ignored the first step of the analysis on which *Klaxon* had based its case: the "vertical" choice-of-law question of whether the issue of prejudgment interest is substantive or procedural as a matter of federal law, a question like those that would demand the court's attention soon thereafter in other *Erie*-progeny cases.<sup>76</sup> Second, the Court never made clear whether *Klaxon's* rule is constitu-

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.* at 497.

74 *Id.* at 498.

75 *Id.* Essentially, *Klaxon* "won" reversal based on Stentor's argument. The Court rejected *Klaxon's* position that federal choice-of-law rules should govern, and accepted Stentor's position that a federal court is compelled to follow the choice-of-law rules of the state in which it sits.

76 *See, e.g.,* *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

tionally based, statutorily based, or simply a rule of federal common law itself.<sup>77</sup>

Despite its flaws, however, the *Klaxon* opinion's holding and rationale were clear and consistent with both *Erie* and the Court's new choice-of-law jurisprudence. The Court promulgated a clear rule: a federal court sitting in diversity must follow the choice-of-law rules of the state in which it sits. And the justifications for this rule were also apparent. First, the Court recognized that choice-of-law rules significantly affect the results of the cases, and that it would be inconsistent with *Erie* for those rules to be different in federal and state court due to the "accident of diversity."<sup>78</sup> Second, in the new world where multiple states' laws could rationally govern in a single case, such questions were matters of state policy that federal courts were not to "thwart."<sup>79</sup> *Klaxon*, therefore, recognizes that states can and will differ on questions of choice of law as a matter of policy, and that federal courts must respect those differences. *Klaxon*'s policy goes beyond diver-

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77 Most commentators argue, and I tentatively agree, that the *Klaxon* rule is not constitutionally required because it is within Congress's power to make rules for cases involving multiple states. See Burbank, *supra* note 9, at 1938 ("There should be no question at all that, in the absence of such uniform federal statutory law, Congress has constitutional power to prescribe choice of law rules specifying the states whose laws shall govern [interstate] activities."); Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 402 (1964) ("[T]he constitutional basis of *Erie* does not apply to choice of law issues even when diversity is the sole basis of federal jurisdiction and *a fortiori* when it is not."). John Hart Ely thought that *Klaxon* was required by the Rules of Decision Act. See John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 714 n.125 (1974). Kermit Roosevelt contends that *Klaxon* is at least in a "limited sense . . . constitutionally grounded." ROOSEVELT, *supra* note 3, at 158.

What the Supreme Court thought was the "source" of the *Klaxon* rule remains unclear. Justice Reed famously concurred separately in *Erie*, rejecting Justice Brandeis's constitutional justification in favor of overruling *Swift v. Tyson* solely on the basis of the Rules of Decision Act. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 90–92 (1938) (Reed, J., concurring) (rejecting majority opinion "in so far as it relies upon the unconstitutionality" of *Swift*). In *Klaxon*, the portion of *Erie* that Reed cites is only the part of Brandeis's opinion discussing the "defects, political and social" of *Swift*, and not the constitutional justification for the opinion. *Klaxon*, 313 U.S. at 496 (citing *Erie*, 304 U.S. at 74–77). Edward Purcell's work reveals that Reed's hostility to *Erie*'s constitutional underpinning was based on his belief that the federal courts could constitutionally provide rules of decision, particularly in procedure. PURCELL, *supra* note 53, at 104–07. There is, then, at least some suggestion that the Court did not consider *Klaxon* of constitutional stature.

78 *Klaxon*, 313 U.S. at 496. This policy was better elaborated by Judge Magruder in *Sampson v. Channell*, 110 F.2d 754 (1940), which the Supreme Court cited approvingly in *Klaxon*. *Klaxon*, 313 U.S. at 496 n.2 (citing *Sampson*, 110 F.2d at 759–62).

79 *Klaxon*, 313 U.S. at 496.



sity—it suggests that state choices on conflicts in cases where its regulatory interests are implicated are to be respected as part of our federal system.

*Klaxon* has never been very popular. In fact, despite the unanimity of the Supreme Court, numerous prominent scholars have criticized the opinion, including the likes of Charles E. Clark and Henry Hart,<sup>80</sup> among others.<sup>81</sup> Criticism of the opinion has not abated since 1941,<sup>82</sup> but the Supreme Court has remained steadfast in its support for *Klaxon*.<sup>83</sup> And Congress has never overruled it by statute, despite numerous opportunities.<sup>84</sup> It is not my purpose here to relitigate *Klaxon*; that debate has been well-ventilated.<sup>85</sup> That said, I agree with the result. In particular, I am persuaded by the Court's conclusion that a state's choice-of-law rules are part of a state's substantive law and represent policy decisions as to the scope of that state's laws, and federal courts should not change those rules in diversity cases.<sup>86</sup> To do so would contravene the underlying policy of *Erie*.

In this regard, I find most persuasive David Cavers's work in response to Henry Hart, perhaps *Klaxon*'s harshest critic. As Edward

80 Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 285–87 (1946); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 514 n.86 (1954).

81 See, e.g., 5 WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 136 (1942) (criticizing the view adopted in *Klaxon*); Donald T. Trautman, *The Relation Between American Choice of Law and Federal Common Law*, 41 LAW & CONTEMP. PROBS. 105, 120 n.58 (1977) (criticizing *Klaxon* for reintroducing uncertainty into the choice of law determination); Baxter, *supra* note 54, at 31–33 (criticizing the *Klaxon* decision and noting that the holding did not even make a “cursory reference to the language, history, or purpose of the Rules of Decision Act.”).

82 See, e.g., Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 82 (1993) (describing *Klaxon* as “manifestly inconvenient” and noting its decreased ability to prevent forum-shopping over time); Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1 (1991).

83 See *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) (reaffirming *Klaxon*); see also Gene R. Shreve, *Conflicts Law—State or Federal?*, 68 IND. L.J. 907, 910 n.20 (1993) (noting the Supreme Court has “not wavered” in affirming the *Klaxon* rule).

84 See Edward H. Cooper, *Aggregation and Choice of Law*, 14 ROGER WILLIAMS U. L. REV. 12, 22 (2009) (“It does not seem likely that Congress will be interested in adopting a federal choice-of-law code . . .”); see also Silberman, *supra* note 4, at 2005–07 (discussing the uncertainty surrounding the application of *Klaxon* to CAFA).

85 For the terms of the *Klaxon* debate, see RICHARD H. FALLON ET AL., *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 564–69 (6th ed. 2009).

86 My views are similar to those of Professor Roosevelt in this regard. See ROOSEVELT, *supra* note 3, at 156.

Purcell has noted, Hart “despised *Klaxon*.”<sup>87</sup> In essence, Hart’s primary criticism was that the federal courts should be allowed to make choice-of-law rules in diversity cases because they “are in a peculiarly disinterested position to make a just determination as to which state’s laws ought to apply where this is disputed.”<sup>88</sup> Hart’s position was that federal common law of choice of law in diversity cases would eventually lead to uniform rules and would prevent interstate forum shopping, a problem he deemed worse than intrastate forum shopping because of plaintiffs’ ability to affect choice of law through the choice of forum.<sup>89</sup>

Cavers defended *Klaxon* primarily on the ground that a state’s choice-of-law rules were an expression of state policy about the reach and strength of its law, and the state’s conception of its relationship with other states.<sup>90</sup> The notion of needing the federal government as a disinterested umpire “places a low estimate on the importance of state autonomy in determining the reach of state law.”<sup>91</sup> In Cavers’s view, the federal-umpire approach granted federal courts under the diversity jurisdiction a “veto power over state assertions of interest in choice-of-law situations.”<sup>92</sup>

This defense of *Klaxon* was consistent with the choice-of-law revolution:

[I]f the basic task of the courts in a choice-of-law case is not to apply broad jurisdiction-selecting rules that ignore the content of the

87 PURCELL, *supra* note 53, at 251. Hart went so far as to deliver a speech before the Judicial Conference of the Third Circuit in 1958 called *Klaxon Delendum Est*.

88 Hart, *supra* note 80, at 515. Walter Wheeler Cook agreed with this view, though more tentatively. COOK, *supra* note 81, at 136 (“Very possibly national courts may take a broader, a less parochial, view of these matter than state courts.”).

89 PURCELL, *supra* note 53, at 249–53. These views were of a piece with Hart’s general views of *Erie* and *York*. See also Burbank, *supra* note 9, at 1940 (detailing complaints and defenses of *Klaxon* from several professors).

90 David F. Cavers, *Change in Choice-of-Law Thinking and Its Bearing on the Klaxon Problem*, Memorandum for the American Law Institute Study of Division of Jurisdiction Between State and Federal Courts, at 156 (Tentative Draft No. 1 April 30, 1963) (“A state choice-of-law rule, whether judge-made or statutory, is a determination of the reach of the state policy embodied in the state law chosen by the rule. Diversity jurisdiction should not be used by the federal courts as a means of curtailing or extending that reach.”). Hart and Cavers were on the Harvard Law School faculty, and there were “numerous occasions” when the two “shared classes to debate *Klaxon*.” Cavers, *supra* note 11, at 735 n.12.

91 CAVERS, *supra* note 25, at 217.

92 Cavers, *supra* note 11, at 736. Conversely, a federal court should not override when “the courts of the forum state might well have thought it wiser not to extend their own state’s law to an out-of-state event or transaction, even though there were sufficient connections with the forum state to justify its application.” *Id.* at 737.

state laws chosen but rather to identify state policies and to determine the significance for those policies of their application or non-application in interstate situations, then the most appropriate forum for the performance of this task is a court of a state whose policies are in issue.<sup>93</sup>

Ultimately, so long as a state's choices complied with the appropriately loose strictures of the Due Process and Full Faith and Credit Clauses, it was improper for the federal courts, under diversity jurisdiction, to override constitutional state decisions on such matters. Although states might differ as to the answer in a particular case, and such an answer might be parochial, Cavers concluded that these "chronic differences . . . reflect genuine differences in values. Moreover, I doubt that there is any supra-state hierarchy of values which would justify the federal courts exercising diversity jurisdiction in overriding one state's strongly-held values in favor of another's as long as constitutional limits on state power were respected."<sup>94</sup> A state's decision about the scope of its laws are as much a part of that state's substantive law as standards of liability or requirements of a valid contract, and a federal court, under *Erie*, may no more depart from one than the other.<sup>95</sup>

Besides his defense of state choice-of-law rules, Cavers opposed federal choice-of-law rules on their own merits. Pre-*Erie* history, when choice of law was a matter of common law in the federal courts, had demonstrated that uniformity had not developed, and such uniformity was even less likely to develop in the current climate of upheaval in choice of law and a likely lack of appetite on the Supreme Court's part to resolve choice-of-law circuit splits.<sup>96</sup> Moreover, Cavers feared that if Congress or the courts sought to establish choice-of-law rules, the desire to reduce uncertainty would lead them toward the "lowest common denominator," enshrining the traditional rules of the First

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93 Cavers, *supra* note 90, at 165; *see also id.* at 191 ("[R]ecognition of the fact that a state's choice-of-law rules may throw light on the reach and strength of its substantive policies").

94 Cavers, *supra* note 90, at 166.

95 *Id.*; *see also* Brainerd Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341, 345 (1960) ("[A] state court's construction of a state statute, determining how that statute is to be applied to cases having foreign aspects, is parcel of the statute, and is as much to be respected in federal courts as any other construction by the state courts."); Russell J. Weintraub, *The Erie Doctrine and State Conflict of Laws Rules*, 39 IND. L.J. 228, 242 (1963) ("[T]he choice-of-law rules of a state are important expressions of its domestic policy.").

96 CAVERS, *supra* note 25, at 221 n.40 (describing likely circuit splits and the unlikelihood that the Supreme Court would "clog its docket with private litigation involving choice-of-law questions").

Restatement, rather than the policy-based techniques of modern approaches.<sup>97</sup> And, unless any federal choice-of-law rules were binding on the states, separate choice systems in the federal and state courts would expand opportunities for forum shopping, and replicate the pre-*Erie* problem of courts across the street from one another reaching different results.<sup>98</sup> Indeed, Cavers, like the *Klaxon* Court, was willing to accept “ample freedom” for interstate forum shopping, but refused on *Erie* grounds to accept intra-state forum shopping.<sup>99</sup>

### C. Van Dusen v. Barrack

One dilemma for the *Klaxon* doctrine emerged in 1948 when Congress passed the federal transfer statute.<sup>100</sup> The statute, which effectively replaced the doctrine of *forum non conveniens* in the federal courts for domestic cases, allowed cases to be transferred to another district where the case might have been brought for the convenience of the parties and witnesses and in the interest of justice. *Klaxon*, of course, required that a federal court sitting in diversity must apply the choice-of-law rules of the state in which it sits. The passage of the transfer statute posed a problem: if a case is transferred from one federal district to another, what state’s choice-of-law rules should the transferee court follow?<sup>101</sup>

The facts of 1964’s *Van Dusen v. Barrack*<sup>102</sup> posed the problem starkly, and, importantly for this discussion, did so “against the backdrop of an alleged mass tort.”<sup>103</sup> *Van Dusen* involved the crash of an airplane which had taken off in Boston and was bound for Philadelphia, but landed in Boston Harbor. The crash spawned over 150 actions for personal injury and wrongful death.<sup>104</sup> Some 100 of these actions were brought in the District of Massachusetts, where the flight took off and crashed, while 45 others were brought in the Eastern

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97 *Id.* at 222 (“What the new freedom of the federal courts would bring would not be a new set of normative principles or a discriminating effort to narrow the issues in choice-of-law cases but a nostalgic search for a doctrinal lowest common denominator.”).

98 *Id.*; see also Cavers, *supra* note 90, at 158 (“If the sequel to the abolition of *Klaxon* were to be a long and possibly never-ending period in which federal choice-of-law rules would lack uniformity and certainty, a litigant’s opportunity to play for advantageous choice-of-law rules by the choice of a federal court instead of a state court within the same state would be greatly enhanced.”).

99 Cavers, *supra* note 11, at 740.

100 28 U.S.C. § 1404 (2006).

101 See Currie, *supra* note 95, at 348 (describing the problem as “insoluble”).

102 376 U.S. 612 (1964).

103 *Id.* at 613.

104 *Id.* Interestingly, the crash was caused by a “bird strike.”

District of Pennsylvania, where the flight was supposed to land.<sup>105</sup> Venue and jurisdiction were appropriate in Pennsylvania,<sup>106</sup> but the defendants sought to have the Pennsylvania wrongful-death cases transferred to the District of Massachusetts, where most of the other cases were pending and more of the witnesses and evidence were located.<sup>107</sup>

The problem was created by diverging state law and choice-of-law rules. Under Massachusetts law, these plaintiffs could not maintain their wrongful-death suits because they had not complied with Massachusetts law requiring that foreign wrongful-death plaintiffs acquire an appointment as a personal representative before filing suit. Pennsylvania law did not require such an appointment.<sup>108</sup> As the Court framed the problem, if Massachusetts law applied, these plaintiffs were out of court, but if Pennsylvania law applied, the cases could proceed.<sup>109</sup> Moreover, Massachusetts law sharply limited the damages available to plaintiffs in wrongful-death suits, compared to Pennsylvania laws.<sup>110</sup> Observing that changing the applicable law due to a transfer might render the transfer motion “tantamount to a motion to dismiss,” that Court found that “the potential prejudice to the plaintiffs is so substantial as to require review of the assumption that a change of state law would be a permissible result of transfer.”<sup>111</sup>

The Court, therefore, dealt squarely with the question whether, in a mass tort, the convenience of consolidating proceedings in a single federal court could work to deprive plaintiffs of the state-law benefits of their choice of forum. To this question, the Court answered, plainly, no: so long as plaintiffs’ original choice was a proper venue, the mechanics of aggregation could not work to defeat a plaintiff’s choice of forum.<sup>112</sup> So, the Court held, the transfer statute should be regarded as a “housekeeping measure,” resulting in a “change of courtrooms,” but not a change of law.<sup>113</sup>

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105 *Id.* at 614.

106 *Id.* at 617 n.6.

107 *Id.* at 614.

108 *Id.* at 616.

109 *Id.* at 625.

110 *Id.* at 626–28.

111 *Id.* at 630.

112 *Id.* at 633–34. The decision suggested it would “allow plaintiffs to retain whatever advantages may flow from the state laws of the forum they have initially selected. There is nothing, however, in the language or policy of § 1404(a) to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue.”

113 *Id.* at 636–37.

Importantly, the Court also recognized the tension between its decision in *Van Dusen* and the rule of *Klaxon*: under the *Van Dusen* rule, a transferee court would be applying the choice-of-law rules of the transferor court, not the transferee court's home state. In the Court's view, however, the policy underlying *Klaxon* and *Erie* warranted an exception from the letter of the *Klaxon* rule. Applying the *Klaxon* rule strictly to a transferee court would "enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed" and therefore change the result of the case based on the 'accident' of federal diversity jurisdiction."<sup>114</sup>

In sum, *Van Dusen* reaffirmed the *Klaxon* principle that state choice-of-law rules are to be respected, and also established that a plaintiff's inclusion in mass-tort litigation should not deprive that plaintiff of the benefits of his choice of a proper forum.<sup>115</sup> Although *Van Dusen* did not formally involve an aggregation tool, and the decision was several years before the passage of the MDL statute, the result of the transfers would have been to consolidate the litigation in a single federal district. *Van Dusen* suggests that mass-tort litigation does not warrant a change in state choice-of-law rules, particularly when doing so would prejudice the plaintiff—a view that prizes litigant autonomy at the expense of aggregation.<sup>116</sup> Indeed, *Van Dusen* anticipated the persuasive view of numerous modern scholars, most prominently Larry Kramer and Linda Silberman, who would argue the same thing, on the ground that choice-of-law rules define a plaintiff's right to recovery, and there is nothing about inclusion in a mass-tort pro-

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114 *Id.* at 638 (internal quotation marks omitted).

115 Currie ultimately agreed with *Van Dusen*, though he had originally taken the opposite view, arguing that in transfer cases, federal courts should develop a common law of choice of law. Currie abandoned that view because federal choice-of-law rules intruded improperly on state prerogatives. Currie, *supra* note 95, at 345–46.

The Court extended *Van Dusen* to situations where the *plaintiff* moves for transfer in *Ferens v. John Deere Co.*, 494 U.S. 516 (1990). Although fully entering the *Ferens* fray is beyond the scope of this paper, I believe it was wrongly decided. My view is that *Ferens*, by allowing plaintiffs to file in one far-flung forum and seek a transfer, allows a result unattainable in state courts—the ability to achieve both a nearby forum and a distant forum's choice-of-law rules. As a matter of *Klaxon* policy, *Ferens* is also questionable because it allows a state without legislative jurisdiction to have personal jurisdiction over a case, even though that state has no interest in applying its law. My critique of that phenomenon—more a critique of overbroad personal jurisdiction than *Ferens*—is also beyond the scope of this paper.

116 This view is echoed in the work of Roger H. Trangsrud. See, e.g., Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 821 (1985).

ceeding that ought to prejudice those underlying rights.<sup>117</sup> The ALI has also come around to this view in its recent *Principles of Aggregate Litigation*.<sup>118</sup>

In sum, *Klaxon* and *Van Dusen* together represent a coherent policy, that states' choice-of-law rules represent a state's substantive decision on the scope of its law, and diversity jurisdiction does not warrant departure from those rules. Moreover, the invocation of a state's choice-of-law rules is linked to a plaintiffs' selection of a proper venue. Transfer within the federal system—even in the case of a mass tort, where transfer would create increased efficiency—does not deprive a plaintiff of the benefits of that choice. With this backdrop in mind, I will turn to the complications that the *Klaxon/Van Dusen* policy represents for federal aggregate litigation.

## II. MASS TORT MULTIDISTRICT LITIGATION AND CHOICE OF LAW

In this section, I briefly describe how the policies underlying *Klaxon* and *Van Dusen* present a thorn in the side of aggregate litigation of mass torts. While aggregation seeks to make the claims of individual plaintiffs throughout the country more alike—so as to facilitate better litigating their cases as a group—the policies respecting differences in state laws and plaintiff's forum choices pull the other way, inhibiting aggregation by emphasizing the differences among plaintiffs' cases. Ultimately, one way to explain the problems choice of law has presented for class actions, leading to the resulting shift to multidistrict litigation, is to note that the class action overemphasized aggregation at the expense of federalism and litigant autonomy. MDL, for its part, still provides a high degree of aggregation—and some would argue too high—but also is more compatible with respecting differences in state law and litigant autonomy, at least with respect to choice of law.

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117 See Kramer, *supra* note 4, at 572 (“If the reason for consolidating is to make adjudication of the parties’ rights more efficient and effective, then the fact of consolidation itself cannot justify changing those rights. To let it do so is truly to let the tail wag the dog.”); Silberman, *supra* note 4, at 2034 (“The procedural tools of aggregation should not distort the underlying substantive rights of the parties. Courts should approach choice of law as they would in the paradigm individual case.”).

118 AM. LAW INST., PRINCIPLES OF AGGREGATE LITIGATION § 2.05 cmt. a (2010).

### A. The “Choice-of-Law Problem” in Class Actions

The so-called “choice-of-law problem” has become a silver bullet for nationwide class actions based on state-law claims.<sup>119</sup> In brief, this is the problem: in order to certify a damages class under Rule 23(b)(3) of the Federal Rules of Civil Procedure, the court must find (among a series of other prerequisites) that the questions of law and fact common to the class “predominate” over individualized questions.<sup>120</sup> *Klaxon* requires a federal court sitting in diversity to apply the choice-of-law rules of the state in which it sits.<sup>121</sup> Most such choice-of-law rules require application of different states’ substantive laws to different class members. As a result, the class claims are potentially governed by all fifty states’ laws. Courts have reached a near-consensus that this renders the class uncertifiable under Rule 23(b)(3) for two reasons: first, the fact that different groups of plaintiffs’ claims are governed by different laws means that the legal questions common to the class do not predominate over questions individual to each class member, and second, that the class is too difficult to manage through a trial, particularly when one considers the problem of instructing a jury.<sup>122</sup> Federal courts now generally agree that, unless a class is governed by a single state’s law, it cannot be certified under Rule 23.<sup>123</sup>

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119 See Silberman, *supra* note 4, at 2009 (describing choice-of-law problem as “a monumental barrier to class certification”); David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1282–83 (2007) (“Choice of law in multistate damages class actions is an extremely important hinge on which certification often turns.”).

120 FED. R. CIV. P. 23(b)(3).

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

122 See, e.g., *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 728 (5th Cir. 2007) (“[S]tate law variations are important, in part because they would require separate jury instructions.”); *Faherty v. CVS Pharmacy, Inc.*, No. 09-CV-12102, 2011 U.S. Dist. LEXIS 23547, at \*17 (D. Mass. Mar. 9, 2011) (noting that “the intricate nature of the task and the potential for juror confusion has persuaded most courts that it is unwise” to certify a class demanding application of many states’ laws).

123 See *York-Erwin*, *supra* note 6, at 1802–03 (“Federal courts increasingly refused to certify nationwide damages classes, finding predominance lacking on choice-of-law grounds.”); see, e.g., *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2002) (“No class action is proper unless all litigants are governed by the same legal rules.”); *Powers v. Lycoming Engines*, 272 F.R.D. 414, 427 (E.D. Pa. 2011) (“Given the difficult, if not, impossible burden of instructing the jury on the different laws of several states, a nationwide class action cannot pass the superiority test.”).

Although courts may use sub-grouping and issue classes to ease these administrative burdens, few courts have been willing to do so. See *In re Pharm. Indus. Average Wholesale Price Litig.*, 252 F.R.D. 83, 94 (D. Mass. 2008) (“While numerous courts



From the period when Rule 23 was amended in 1966 until the 1990s, choice of law was not considered such an insurmountable obstacle to class certification.<sup>124</sup> Although the Supreme Court held that a court could not go beyond the loose constitutional restrictions on legislative jurisdiction to apply an otherwise inapplicable single law to an entire class,<sup>125</sup> courts would sometimes discount or smooth out the differences in state law in order to ensure sufficient commonality of the legal questions to certify the class.<sup>126</sup> By the mid-1990s, however, tolerance for these tactics diminished. After influential opinions by numerous circuit courts decertifying classes based on the choice-of-law problem,<sup>127</sup> the Third, Fifth, and Seventh in particular,<sup>128</sup> a consensus emerged that classes requiring the application of multiple states' laws were not certifiable.<sup>129</sup> That consensus has only grown stronger, leading Linda Silberman to refer recently to the choice-of-law problem as a "monumental barrier to class certification."<sup>130</sup>

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have talked-the-talk that grouping of multiple state laws is lawful and possible, very few courts have walked the grouping walk.”).

124 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1780.1 (3d ed. 2005), at 202 (“[C]ourts have not always been unduly concerned about choice-of-law issues when certifying class actions under Rule 23(b)(3).”); *see also In re Digitek Prods. Liab. Litig.*, MDL No. 2:08-md-01968, 2010 U.S. Dist. LEXIS 53610, at \*126 (S.D. Va. May 25, 2010) (“Choice-of-law issues were treated superficially in early class-certification opinions involving state-law claims.” (internal quotation marks omitted)).

125 *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 815, 821 (1985) (holding a Kansas court could not apply Kansas law to a nationwide class when 99% of the claims had no connection with Kansas).

126 *See, e.g., Alexander v. Centrafarm Grp.*, 124 F.R.D. 178 (N.D. Ill. 1988); *Kleiner v. First Nat'l Bank*, 97 F.R.D. 683 (N.D. Ga. 1983). Judge Weinstein famously did this in the Agent Orange litigation. *In re Diamond Shamrock Chems. Co.*, 725 F.2d 858 (2d Cir. 1984).

127 *See, e.g., Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1184 (9th Cir. 2001); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1090 (6th Cir. 1996); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016–17, 1019 (D.C. Cir. 1986).

128 *See, e.g., Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627, 630 (3d Cir. 1996); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741–42 (5th Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1304 (7th Cir. 1995).

129 *See Silberman, supra* note 4, at 2002 (“But a sea change occurred with the growth of nationwide class action litigation where choice of law issues were central . . . . Choice of law analysis gained new prominence because attempts to structure nationwide classes involving state law claims . . . often turn on whether the law of a single state or multiple states is to be applied.”); *Marcus, supra* note 119, at 1285 (“[T]his trio of cases heralded a seismic shift in federal judicial attitudes toward the propriety of multistate classes.”).

130 *Silberman, supra* note 4, at 2009; *McCloud & Rosenberg, supra* note 6, at 374 (referring to the choice-of-law problem as posing a “virtually insuperable obstacle to certification”).

As this trend developed in the federal courts, plaintiffs' lawyers turned increasingly to some state courts that were friendlier to class actions and willing to apply their choice-of-law rules in such a way as to facilitate the application of a single state's law to every class member, thus avoiding the problem altogether.<sup>131</sup> Although plaintiffs' success in this enterprise was arguably overstated—particularly with respect to the notion that states were willing to change their choice-of-law rules to facilitate application of a single state's law<sup>132</sup>—Congress in large part overrode this strategy in 2005 when it passed the Class Action Fairness Act (CAFA), which has the effect of placing most class actions in federal court.<sup>133</sup>

Both before and after CAFA, some scholars have called for a federal choice-of-law rule that would allow a single state's law to apply to nationwide class actions, typically the law of the defendant's principal place of business.<sup>134</sup> But these proposals have not been enacted. The Supreme Court has shown no willingness to overrule *Klaxon*, and the Congress has declined to enact federal choice-of-law rules despite several opportunities. And neither Congress, nor the Court, has shown any desire to make class certification easier—indeed, for Congress to do so would fly in the face of the purpose of CAFA.<sup>135</sup>

Moreover, such a proposal presents significant other possible problems, such as the potential that it would create an incentive for defendants to relocate to states with the lowest liability standards, knowing they would likely apply to a nationwide class—particularly in light of the view that class-action plaintiffs would have to seek applica-

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131 See Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Perspective: A Preliminary View*, 156 U. PA. L. REV. 1439, 1505–07 (2008).

132 See Marcus, *supra* note 119, at 1294. In recent years, there has been little evidence that states have developed choice-of-law rules to facilitate class actions. Richard L. Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1815 (2008) (arguing that CAFA could hinder the development of state choice-of-law doctrine by moving on-point cases to federal courts); see also Linda J. Silberman, *Choice of Law in National Class Actions: Should CAFA Make a Difference?*, 14 ROGER WILLIAMS U. L. REV. 54, 61 (2009) (“Most state courts—at least the highest courts of the state—have refused to alter choice of law rules to favor or disfavor certification of a class.”).

133 28 U.S.C. § 1332(d) (2006); Cabraser, *supra* note 8, at 47 (describing CAFA and the choice-of-law problem as the “coup de grâce” for mass-tort class actions).

134 See, e.g., AM. LAW INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS § 6.01, at 322 (1994). See also generally, Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1842–43 (2006) (examining the effect that CAFA has had upon choice-of-law doctrine).

135 See Burbank, *supra* note 9, at 1942–43 (“The goal of CAFA’s proponents was to ensure that nationwide classes of the sort that some state courts had certified would not be certified at all.”).

tion of this state's law in order to achieve certification.<sup>136</sup> Moreover, as Larry Kramer and Robert Sedler have noted, applying a single state's law to plaintiffs dispersed nationwide is problematic as a matter of federalism because different states, with different tort policies, have regulatory interests in governing disputes with which they are connected.<sup>137</sup> Ultimately, then, the persistence of *Klaxon*, combined with CAFA, has presented a major practical obstacle to nationwide mass-tort class actions in federal court.

### B. *The Shift to Multidistrict Litigation*

As class actions have become harder to certify, plaintiffs have shifted in droves to multidistrict litigation as the next-best alternative.<sup>138</sup> The numbers are striking. Recent empirical work by the Federal Judicial Center reveals that one third of all civil cases in the federal courts right now are part of a pending MDL.<sup>139</sup> Moreover, as the troubles with the choice-of-law problem might indicate, ninety percent of these cases are products-liability cases.<sup>140</sup> And many of these MDLs are massive, comprising thousands of cases.<sup>141</sup> For exam-

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136 See Silberman, *supra* note 132, at 57 (“Plaintiffs press for a single law to apply—such as the principal place of business of the defendant—even if that law offers a lower standard of recovery than would be provided under the competing rules.”); Trangsrud, *supra* note 116, at 821 (“[I]f a class action is certified, the individual plaintiff may find that the state law applied by the forum court is not as favorable as the law which would have been applied had he been able to choose his own forum.”).

137 See, e.g., Kramer, *supra* note 4, at 578 (“[T]he more ‘national’ the case, the less appropriate it is for any single state’s law to govern”); Robert A. Sedler, *Interest Analysis, State Sovereignty, and Federally-Mandated Choice of Law in “Mass Tort” Cases*, 56 ALB. L. REV. 855, 861 (1993) (arguing that application of a single state’s law is “highly undesirable both from a choice-of-law perspective and from a state sovereignty perspective”).

138 See Fallon et al., *supra* note 22, at 2355 (“[W]ith the recent statutory and judicial discouragement of class actions, the federal court system has found itself turning to the MDL’s broad remedial powers more frequently than ever before.” (footnote omitted)); Willging & Lee, *supra* note 13, at 798 (“[T]he last few years have seen a massive increase in MDL aggregate litigation.”).

139 See Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1667 (2011) (“[B]y 2008, the 102,545 actions pending in MDLs constituted more than a third of all federal civil cases pending in that year . . .”).

140 Lee et al., *supra* note 15, at 2 (“[T]he overwhelming majority of MDL cases are products liability cases—90% of MDL cases.”).

141 See Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 115 (2010) (“The largest MDLs encompass thousands of cases filed by legions of attorneys.”); Willging & Lee, *supra* note 13, at 793 (referring to “mammoth MDL proceedings” as a “recent phenomenon”).

ple, the MDL involving the product-liability claims from use of the drug Vioxx included over 25,000 claimants.<sup>142</sup> It is no wonder, then, that one leading commentator and judge now refers to MDL as the “primary vehicle for the resolution of complex civil cases.”<sup>143</sup>

MDL was not always so prominent, particularly with respect to products-liability cases. Although the original supporters of the statute envisioned that products cases would be viable MDL candidates, there were few products-liability MDLs until the 1990s.<sup>144</sup> Now, however, products cases make up the vast majority of the MDL docket.<sup>145</sup> As a result of the difficulties of class certification, MDL should continue to be ascendant, and the attentions of civil-procedure scholars should shift accordingly.<sup>146</sup> Before turning to the choice-of-law implications of the shift to MDL, it makes sense to describe briefly the mechanics of the MDL process.

### 1. How MDL Works

Multidistrict litigation has been part of the federal procedural system for over four decades now. MDL’s roots extend to the early 1960s, when the federal courts were flooded with lawsuits alleging antitrust violations in the electrical-equipment industry.<sup>147</sup> This unprecedented state of affairs led the Judicial Conference to create the “Coordinating Committee for Multiple Litigation of the United States District Courts,” which consisted of nine federal judges who coordinated discovery and other pretrial matters in the electrical-

142 Silver & Miller, *supra* note 141, at 117.

143 Fallon et al., *supra* note 22, at 2324.

144 Deborah R. Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*, 26 REV. LITIG. 883, 907 (2007) (“[T]he number of motions for multi-districting filed in product liability cases increased dramatically in the 1990s, by comparison with the two previous decades. But the number filed in this decade has actually outpaced the number of MDL motions filed during the 1990s.”).

145 Lee et al., *supra* note 15, at 13 (“The products liability cases dominate this database, accounting for 92.5% of the cases. . . . The overwhelming majority of cases that are considered and transferred by the Panel involve such claims.”).

146 See Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers’ Powers*, 79 GEO. WASH. L. REV. 628, 657 (2011) (“[T]he MDL process helped to make plausible the bundling of mass torts.”).

147 See DAVID F. HERR, MULTIDISTRICT LITIGATION § 2.1–2.6 (1986); Judith Resnik, *From Cases to Litigation*, 54 LAW & CONTEMP. PROBS. 5, 29–32 (1991) (laying out the changing perception of mass torts and class action from the 1960s to the 1990s). See generally Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621, 622–25 (1964) (providing a background history on how the Judicial Conference addressed the increasing problem of electrical equipment antitrust cases).

equipment cases.<sup>148</sup> Although these efforts were effective at streamlining the electrical-equipment litigation, the Committee found the tools at its disposal inadequate and the Judicial Conference proposed a new federal procedural statute.<sup>149</sup> Rather than rely on voluntary participation by the various district judges handling individual cases, the new statute proposed “centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the ‘just and efficient conduct’ of such actions.”<sup>150</sup>

The statute passed in 1968 with little resistance and created the Judicial Panel on Multidistrict Litigation (JPML).<sup>151</sup> The JPML is authorized to transfer civil actions pending in multiple districts “involving one or more common questions of fact” to “any district for coordinated or consolidated pretrial proceedings.”<sup>152</sup> The “common questions of fact” requirement is lenient, and unlike in class actions, there is no requirement that such common questions predominate in order to achieve aggregation.<sup>153</sup> The panel must find only that transfer will “be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.”<sup>154</sup>

Unlike the general federal transfer statute, which provides that a case may be transferred only to a district court where it “might have been brought or to any district to which all parties have consented,”<sup>155</sup> the MDL statute provides no such restriction and the JPML can transfer a case to any district.<sup>156</sup> Indeed, most of the action in the briefing

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148 HERR, *supra* note 147, § 2.2.

149 See *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 498–504 (J.P.M.L. 1968) (reproducing an excerpt from The Report of the Co-Ordinating Committee on Multiple Litigation Recommending New Section 1407); see also Resnik, *supra* note 147, at 32–34.

150 H.R. REP. NO. 90-1130, at 2 (1968).

151 HERR, *supra* note 147, § 2.2–2.3; see also Resnik, *supra* note 147, at 32–33 (noting that the Department of Justice and American Bar Association supported the statute).

152 28 U.S.C. § 1407(a) (2006). The panel is composed of seven judges selected by the Chief Justice. *Id.* § 1407(d).

153 See Sherman, *supra* note 16, at 2208 (“In contrast to . . . class actions, MDL is a looser and more flexible structure allowing for transfer and consolidation based on pragmatic considerations.”); *Id.* at 2209; WRIGHT ET AL., *supra* note 17, § 3863, at 396–97 (“Section 1407 clearly does not require that there be strict identity of issues, a predominance of common questions, or that any common questions be central to or determinative of the controversy in order to justify transfer . . .”).

154 28 U.S.C. § 1407(a) (2006).

155 *Id.* § 1404(a).

156 See *In re Falstaff Brewing Corp. Antitrust Litig.*, 434 F. Supp. 1225, 1229 (J.P.M.L. 1977) (noting that the statute allows transfer to any district for pretrial proceedings). The JPML does not take into account personal jurisdiction of the MDL

and argument before the panel involves not whether the cases will be consolidated but where, as the parties vie for their preferred venue and even district judge.<sup>157</sup> The JPML considers a variety of factors in deciding where to consolidate a pending litigation, from the experience of the particular judge in prior MDLs, the location of the relevant evidence, and the willingness and motivation of the transferee judge.<sup>158</sup> The panel may, however, choose to establish the MDL in any federal district, regardless of any preexisting territorial connection to the already-pending cases.<sup>159</sup>

After the JPML has selected a transferee court and therefore established the MDL, future cases involving the same subject matter, called “tag-along[s],”<sup>160</sup> are filed in federal district courts where venue and personal jurisdiction are appropriate.<sup>161</sup> Requiring full-blown briefing and argument before the JPML for every tag-along case, of which there may be thousands,<sup>162</sup> would be extremely inefficient, so the JPML has adopted a streamlined procedure for transferring these cases to the MDL.<sup>163</sup> Unless the tag-along case clearly does not belong

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court when deciding where to transfer a case. *In re Highway Accident Near Rockville*, 388 F. Supp. 574, 576 (J.P.M.L. 1975) (“[T]he propriety of in personam jurisdiction in a proposed transferee district is not a criterion in considering transfer . . . under Section 1407.”).

157 Daniel A. Richards, *An Analysis of the Judicial Panel on Multidistrict Litigation’s Selection of Transferee District and Judge*, 78 *FORDHAM L. REV.* 311, 312 (2009) (arguing that, although the process could be more transparent, the JPML utilizes several factors in making transfer decisions that weigh more or less heavily depending on the context).

158 *Id.* at 325–26.

159 The JPML may choose to consolidate cases in a district where no related case is currently pending and that no party suggested. Richards, *supra* note 157, at 337–38 & n. 197 (describing *In re Silica Prods. Liab. Litig.*, 280 F. Supp. 2d 1381 (J.P.M.L. 2003)); see also *In re Cement & Concrete Antitrust Litig.*, 437 F. Supp. 750, 753 (J.P.M.L. 1977) (“In appropriate circumstances, [the panel may] order transfer of a group of actions to a district in which none of the constituent actions is pending.”).

160 See J.P.M.L. R. P. 1.1(h) (2010).

161 Cases may also, of course, be filed in state court and removed. 28 U.S.C. § 1448 (2006).

162 John G. Heyburn II, *A View From the Panel: Part of the Solution*, 82 *TUL. L. REV.* 2225, 2233 (2008) (noting that the JPML transfers thousands of tag-along cases each year).

163 WRIGHT ET AL., *supra* note 17, § 3865, at 490–91. A party seeking transfer—or a non-party involved in the MDL—must make the JPML aware of the existence of the case, and the JPML clerk will conditionally transfer the case unless a party objects. If no party objects within seven days, the case is transferred, but if there is an objection, the JPML will hear argument.

in the MDL, these cases are rather seamlessly transferred to the MDL court.<sup>164</sup>

Once a case is transferred, the control of the case is out of the JPML's hands and in the control of the transferee judge, to whom I will refer as the "MDL judge."<sup>165</sup> The MDL judge has the full measure of power over "pretrial proceedings" that the transferor court would have had if the transfer had not occurred.<sup>166</sup> The MDL court's powers are consequently quite broad, ranging from coordinating and resolving discovery-related matters,<sup>167</sup> to deciding evidentiary motions such as *Daubert* motions,<sup>168</sup> and ruling on motions for class certification,<sup>169</sup> motions to remand,<sup>170</sup> and dispositive motions.<sup>171</sup> Moreover, the MDL court has the power to govern settlement of cases before it, so long as they are reached prior to trial.<sup>172</sup> Shortly after the cases are

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164 *Id.* at 494 ("In the main . . . the later cases are consolidated and coordinated with the earlier cases.").

165 The JPML "has neither the power nor the inclination to dictate in any way the manner in which the coordinated or consolidated pretrial proceedings are to be conducted by the transferee judge." *In re Sundstrand Data Control, Inc. Patent Litig.*, 443 F. Supp. 1019, 1021 (J.P.M.L. 1978). Nor does the JPML review the actions of an MDL judge. *See In re Data Gen. Corp. Antitrust Litig.*, 510 F. Supp. 1220, 1226–27 (J.P.M.L. 1979).

166 WRIGHT ET AL., *supra* note 17 § 3866, at 510–11 ("[T]he transferee judge inherits the entire pretrial jurisdiction that the transferor judge would have exercised.").

167 *See, e.g.*, *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F. Supp. 2d 270, 279 (D.D.C. 2002) (ordering production of documents at deposition); *In re Air Crash at Charlotte, N.C. on July 2, 1994*, 982 F. Supp. 1052, 1056 (D.S.C. 1995) (motion to compel).

168 *See, e.g.*, *In re Trasylol Prods. Liab. Litig.*, 709 F. Supp. 2d 1323 (S.D. Fla. 2010) (resolving *Daubert* motion).

169 *See, e.g.*, *In re Monumental Life Ins. Co.*, 365 F.3d 408, 411 (5th Cir. 2004) (affirming MDL court's denial of class certification in transferred action); *In re Digitek Prods. Liab. Litig.*, 821 F. Supp. 2d 822 (S.D. W. Va. 2010); *see also* WRIGHT ET AL., *supra* note 17, § 3866 at 526–27 ("[C]lass action rulings are particularly suited for decision by the transferee court because that judge has an overall view of the litigation and it is important that there not be a conflict between or among the transferor courts . . .").

170 *See, e.g.*, *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 399 F. Supp. 2d 356 (S.D.N.Y. 2005) (motion to remand).

171 *See* MANUAL FOR COMPLEX LITIGATION § 22.36 (4th ed. 2010) (noting that a "transferee judge has authority to dispose of the case on the merits"); *see, e.g.*, *In re Pharm. Indus. Average Wholesale Price Litig.*, 252 F.R.D. 83 (D. Mass. 2008) (denying summary judgment).

172 *See, e.g.*, *In re Zyprexa Prods. Liab. Litig. II*, 467 F. Supp. 2d 256, 269 (E.D.N.Y. 2006) (creating fund governing attorney's fees in settled case); *In re Managed Care Litig.*, 246 F. Supp. 2d 1363, 1365 (J.P.M.L. 2003) ("[S]ettlement matters are appropriate pretrial proceedings subject to centralization . . .").

transferred, the MDL court will also appoint counsel on each side to leadership roles on committees to organize the litigation.<sup>173</sup>

The MDL court, therefore, possesses significant powers, but its jurisdiction is incomplete because it cannot try transferred actions without the parties' consent.<sup>174</sup> Nor can the MDL court transfer a case to itself on a permanent basis in order to try it. Until the Supreme Court's decision in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*,<sup>175</sup> MDL courts commonly transferred cases to themselves in order to try them.<sup>176</sup> The Supreme Court unanimously ended that practice, holding that, despite longstanding contrary practice, the plain language of § 1407(a) dictates that the JPML "shall" remand cases at the close of pretrial proceedings.<sup>177</sup> There have been numerous attempts to persuade Congress to reverse *Lexecon* by statute, but none have come to fruition.<sup>178</sup> As a result, an MDL court may not try a case transferred to it for pretrial proceedings unless the parties consent to trial.<sup>179</sup>

Despite *Lexecon*, the use of "bellwether trials," or test cases from the pool of component cases, has become an important part of MDL practice. Securing parties' consent for these trials is now an important aspect of the MDL courts' management of cases.<sup>180</sup> The idea is that if the court can try a representative sample of cases, it will yield important information to the participants about the strengths and weak-

173 MANUAL FOR COMPLEX LITIGATION § 22.36 (4th ed. 2010). For a critical assessment of this practice, see Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519 (2003).

174 *In re Showa Denko K.K. L-Tryptophan Prods. Liab. Litig.*, 953 F.2d 162, 165 (4th Cir. 1992) ("The authority for consolidating cases on the order of the judicial panel on multi-district litigation . . . is merely procedural and does not expand the jurisdiction of the district court to which the cases are transferred.").

175 523 U.S. 26, 35 (1998) (holding that the statute commanded this result "even if doing that will reverse the longstanding practice under the statute and the rule").

176 See also Courtney E. Silver, *Procedural Hassles in Multidistrict Litigation: A Call for Reform of 28 U.S.C. § 1407 and the Lexecon Result*, 70 OHIO ST. L.J. 455, 461 (2009) (recalling that during "the first thirty years of MDL practice, it was quite common" for an MDL to transfer cases to itself for trial).

177 *Lexecon*, 523 U.S. at 32.

178 Marcus, *supra* note 13, at 2291 ("[S]ince [*Lexecon*], bills to add authority to transfer for trial to the Panel's authority have been introduced but not passed."); Silver, *supra* note 176, at 475.

179 WRIGHT, MILLER & COOPER, *supra* note 17, § 3866.2 at 555 (noting that parties may consent to trial in the MDL court).

180 Lee et al., *supra* note 15, at 2 ("Bellwether trials have emerged as a primary mechanism for evaluating and resolving mass tort litigation in the multidistrict litigation context.").



nesses of the sides' respective cases.<sup>181</sup> Even though the results of these bellwether trials are not binding on parties who are not participants in the trials, they provide important data about the value of the claims, perhaps leading to settlement discussions.<sup>182</sup> The process has the advantage of working out the litigation using real cases before actual juries, making the process appealing to those who value the participatory aspects of jury trials.<sup>183</sup>

The traditional model for MDL, reflected in its legislative history<sup>184</sup> and the Supreme Court's reading of the MDL statute in *Lexecon*,<sup>185</sup> provides that pretrial proceedings will at some point conclude, and, on the recommendation of the MDL judge, the JPML will remand the cases to the districts whence they came.<sup>186</sup> The persistence of this vision notwithstanding, remand rarely happens.<sup>187</sup> Few cases are remanded,<sup>188</sup> and scholars and courts have recognized that

181 See Fallon et al., *supra* note 22, at 2325 (“[B]y injecting juries and factfinding into multidistrict litigation, bellwether trials assist in the maturation of disputes by providing an opportunity for coordinating counsel to *organize* the products of pretrial common discovery, *evaluate* the strengths and weaknesses of their arguments and evidence, and *understand* the risks and costs associated with the litigation.”); Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 827 (1992).

182 Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1485 (2005) (“A dramatic example of the effectiveness of the ‘summary jury trial’ device, for example, is the recent utilization of a one week mini-trial in the *Telectronics* certified class action that was not binding on defendants or the class, but provided both sides with sufficient information to enable them to negotiate a fair and reasonable classwide settlement.”); Nagareda, *supra* note 20, at 1150 (noting bellwether trials’ providing useful information to both sides); Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 78 (1989).

183 See Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 594 (2008); Saks & Blanck, *supra* note 181, at 839.

184 See H.R. REP. NO. 90-1130, 3–4 (1968) (“The proposed statute affects only the pretrial stages in multidistrict litigation.”).

185 *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 36–37 (1998) (“[T]he statute places an obligation on the Panel to remand no later than the conclusion of pretrial proceedings in the transferee court, and no exercise in rulemaking can read that obligation out of the statute.”).

186 28 U.S.C. § 1407(a) (2006); MANUAL FOR COMPLEX LITIGATION § 20.133 (4th ed. 2004) (“The Panel looks to the transferee court to suggest when it should order remand.”).

187 Marcus, *supra* note 13, at 2265–66 (noting “the great majority of cases that never came back” to home districts); Fallon et al., *supra* note 22, at 2329 (“[F]ew cases are remanded for trial; most multidistrict litigation is settled in the transferee court.”) (quoting *Delaventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147, 151 (D. Mass. 2006)));

188 See, e.g., Lee et al., *supra* note 15, at 17 (“9 in 10 cases that fully become part of an MDL proceeding, and that terminate, terminate in the transferee district. In other

MDL's primary feature is to provide an efficient means of consolidating the cases for an eventual global settlement. As Judge Fallon, who presided over the massive Vioxx MDL, has noted,

By virtue of the temporary national jurisdiction conferred upon it by the MDL Panel, the transferee court is uniquely situated to preside over global settlement negotiations. Indeed, the centralized forum created by the MDL Panel truly provides a "once-in-a-lifetime" opportunity for the resolution of mass disputes by bringing similarly situated litigants from around the country, and their lawyers, before one judge in one place at one time.<sup>189</sup>

## 2. Choice of Law in MDL

MDL's primary difference from the class action is that the cases within it retain their individual identities. In other words, instead of the case being formally litigated by a representative on behalf of a group of absentee plaintiffs, the cases in an MDL keep their individual character. That said, one must be careful not to overstate the difference. An MDL is still an aggregate proceeding. Once the MDL is established, the litigation is run in many ways by a relatively small number of counsel appointed to the case-management committees established by the court. And, as several scholars have noted, like the class action, the key virtue of the MDL is that it collects most parties in a single organized proceeding in order to facilitate a global settlement.<sup>190</sup> As a result, many authors have emphasized that the due process concerns of class actions are present in MDL, and may be even

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words, most cases that are transferred as part of an MDL do not return to the transferor court at the conclusion of the MDL proceeding.").

189 Fallon, et al., *supra* note 22, at 2340; *see also* Willging & Lee, *supra* note 13, at 804 ("[T]he availability of nonclass settlement procedures seems to provide opportunities, and perhaps incentives, for the parties to avoid the class action process while retaining the more-or-less global settlement benefits of aggregate federal litigation.").

190 Howard M. Erichson & Benjamin C. Zipursky, *Consent versus Closure*, 96 CORNELL L. REV. 265, 270 (2011) ("[MDL] creates the perfect conditions for an aggregate settlement."); Hensler, *supra* note 144, at 893 ("[A]lthough formally intended only to streamline the pretrial process, multi-districting usually leads to some sort of aggregative disposition."); Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 894 (2001) ("although formally intended only to streamline the pretrial process, multi-districting usually leads to some sort of aggregative disposition."). Willging & Lee, *supra* note 13, at 801 ("[T]he MDL process has supplemented and perhaps displaced the class action device as a procedural mechanism for large settlements.").

more pronounced since the MDL structure has fewer formal procedural protections than the class action.<sup>191</sup>

There is no doubt that the MDL structure presents many of the same concerns as the class action structure—such concerns are inherent in any massive aggregated litigation.<sup>192</sup> Numerous commentators have noted the almost “quasi-class action” nature of MDL.<sup>193</sup> And, as many scholars in favor of aggregate litigation have suggested, the costs of aggregate litigation also come with benefits.<sup>194</sup> Aggregate litigation offers important efficiencies and opportunities to pool resources that make it possible for plaintiffs to take on more powerful corporate defendants on a level playing field, and prevent the court system from being overwhelmed by massive controversies.<sup>195</sup>

All that understood, it is important to note the ways in which an MDL is *different* from a class action. Indeed, although MDL resembles

191 See Elizabeth Chamblee Burch, *Aggregation, Community, and the Line Between*, 58 U. KAN. L. REV. 889, 898 (2010) (“[MDLs] proceed in a procedural no man’s land—somewhere in between individual litigation and class action litigation, but without the [procedural] protections of either.”); Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979, 1019 (2010) (discussing global settlement in the *Vioxx* MDL and how it may have harmed clients and placed attorneys in an ethically untenable situation).

192 See William W. Schwarzer et al., *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 TEX. L. REV. 1529, 1531 (1995) (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. (footnote omitted)).

193 See, e.g., *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 554 (E.D. La. 2009) (“While an MDL is distinct from a class action, the substantial similarities between the two warrant the treatment of an MDL as a quasi-class action.”); *In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006); Erichson, *supra* note 173, at 539 (arguing non-class aggregation structures bear “powerful resemblance to class actions”); Silver & Miller, *supra* note 141, at 151.

Indeed, it has been a quarter century since Stephen Burbank observed that MDL was among “dubious packaging strategies that are supposedly provisional but that in substantive terms may be irremediable . . .” Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1471 (1987); see also *id.* at 1483 (“Individual dignity, effectuation, and participation compete with efficient administration at every turn. They also compete with judicial power.” (footnote omitted)).

194 Cooper, *supra* note 84, at 20 (“[T]here is no reason to suppose that procedural advantage will always outweigh procedural disadvantage.”); Marcus, *supra* note 119, at 1292 (explaining benefits accompanying consolidated litigation devices).

195 See Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1186 (2010) (arguing aggregation benefits plaintiffs and the alternative of mass individual litigation would be worse).

in important ways a representative suit, it is not quite the same, because the cases retain their individual character.<sup>196</sup> Unlike a class action, there are no absentee plaintiffs, and the cases are separately filed and prosecuted. And there will not be a single jury trial to decide the entirety of the case. As a result, the MDL has something of a hybrid character—not quite as aggregated as a class action, but consolidated to a significant degree.<sup>197</sup> Paramount among these differences is choice of law. Unlike a class action, which requires such a high degree of cohesion to warrant representative litigation, MDL allows for consolidation without the same degree of similarity. Because cases need not be grouped and tried together in all respects, differences among the cases are allowed to persist.

As a result, MDL accommodates well both the *Klaxon/Van Dusen* framework and its underlying policies. Indeed, courts have unanimously held that *Klaxon* and *Van Dusen* apply to cases transferred to MDLs. That is, a case filed in a proper venue and transferred to the MDL carries with it the choice-of-law rules of the transferor court.<sup>198</sup> If the MDL court handles a dispositive motion or tries a case by consent, it applies the choice-of-law rules of the transferor court. As a result, the policies of *Klaxon* and *Van Dusen* are not as threatened by the aggregation process: the choice-of-law rules of the state where the case was filed are vindicated, and the inclusion of the case in the federal mass-tort proceeding neither changes the choice-of-law rules, nor

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196 Howard M. Erichson, *Multidistrict Litigation and Aggregation Alternatives*, 31 SETON HALL L. REV. 877, 881 (2000) (“MDL, however, cannot be understood without reference to alternative or complementary aggregation procedures, especially the class action.”); Silver & Miller, *supra* note 141, at 113 (“MDLs are *not* class actions . . . . [They] simply aggregate individual lawsuits in a single court pursuant to 28 U.S.C. §1407 for the sake of convenience and efficiency.”).

197 See Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 215 (describing growing importance of “hybrids” of individual and aggregate litigation); Nagareda, *supra* note 20, at 1113–14 (“Hybridization [is] the combination of individual actions with some manner of centralizing technique or mechanism, just not always or inevitably the unity of litigation the class action device generates.”).

198 WRIGHT ET AL., *supra* note 17, § 3866 (“[I]n actions in which a federal court would be guided or governed by state law, the transferee court is bound to apply the law that the transferor court would follow.”); see, e.g., *Chang v. Baxter Healthcare Corp.*, 599 F.3d 728, 732 (7th Cir. 2010) (“When a diversity case is transferred by the multidistrict litigation panel, the law applied is that of the jurisdiction from which the case was transferred . . . .”); *In re Air Disaster at Ramstein Air Base, Germany*, on 8/29/90, 81 F.3d 570, 576 *opinion amended on denial of reh’g sub nom. Perez v. Lockheed Corp.*, 88 F.3d 340 (5th Cir. 1996).

the substantive law.<sup>199</sup> Moreover, aggregation can be achieved without crafting a choice-of-law rule that would require the application of a single state's law to a nationwide, dispersed tort, avoiding the due-process and federalism concerns associated with that strategy—even assuming such a rule were in the offing from a recalcitrant Congress. Although it is undoubtedly true that these choice-of-law determinations do not play out in each case, each case retains its choice-of-law identity, and plaintiffs are not faced with the choice of trading the law to which they would otherwise be entitled for the benefits of aggregation.<sup>200</sup>

### III. DIRECT FILING AND CHOICE OF LAW

Although the *Klaxon/Van Dusen* framework fits well with multidistrict litigation, one recent trend creates new tension. The practice is called direct filing, and it has been adopted often in MDLs over the last five years. I will discuss the mechanics in more detail below, but, essentially, the process allows plaintiffs in the potentially thousands of tag-along cases filed after the establishment of the MDL to bypass the transfer process and file their cases directly into the MDL court, as defendants waive any objections to personal jurisdiction or venue. Although defendants formally waive defenses to facilitate the practice, the process purports to achieve significant efficiencies for all parties, the courts, and the JPML. Direct filing allows the parties to bypass the administratively burdensome transfer process, and the court, in many cases, is allowed to retain complete jurisdiction over the cases to better facilitate a bellwether trial plan.

Although the process does create significant efficiencies—efficiencies that make the cases comprising the MDL look more like a coherent mass—it creates a knotty choice-of-law problem that cuts to the root of the federalism policies underlying *Klaxon* and *Van Dusen*: what law ought to apply to the direct-filed cases? Courts are currently struggling with that question, and no court has yet reached a satisfactory answer. In this section, I will highlight how direct filing works, the various approaches courts have taken, and discuss how no current solution to the problem is consistent with the policies underlying *Klaxon* and *Van Dusen*—policies which are better accommodated by the traditional MDL transfer system.

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199 Kramer, *supra* note 4, at 576–77 (“[T]he policy of preserving the parties’ substantive rights . . . was the driving force behind the decisions in both *Klaxon* and *Van Dusen*.”) (footnote omitted).

200 See Trangsrud, *supra* note 116, at 823–24.

In particular, I will examine the decision regarding choice of law and direct filing in the MDL involving the birth control drug, Yaz. The decision in this case, which is among the first to grapple with the problems created by direct filing, highlights the distortions the practice creates and the significance of the issue, as the MDL currently comprises over 9,000 individual cases and counting.

Whatever one thinks about the benefits or drawbacks of *Klaxon*, the growth of direct filing in MDL demonstrates that the current framework is being stretched to its limits. After examining courts' current approaches to the problem, I suggest a solution. In my view, there is no need for the advent of direct filing to threaten the federalism benefits of the MDL framework or create additional unpredictability for litigants. By requiring direct-filing plaintiffs to select a home district where venue and personal jurisdiction would be appropriate, we can preserve the choice-of-law-related benefits of the MDL while also retaining the efficiency benefits of direct filing. Ultimately, direct filing demonstrates how innovations in aggregate litigation that do not pay attention to choice of law create serious problems, and how such innovations may be maintained without undermining the benefits of the *Klaxon* choice-of-law regime.

#### A. *The Mechanics of Direct Filing*

Direct filing works a significant procedural change in the MDL process. As noted above, typically, after the JPML has established the MDL, future cases sharing a common question of fact with the MDL, called "tag-alongs," are filed in federal district courts where venue and personal jurisdiction are appropriate, and those courts maintain dockets for those cases.<sup>201</sup> Then, a party seeking transfer—or a non-party involved in the MDL—must make the JPML aware of the existence of the case, and the JPML clerk will conditionally transfer the case unless a party objects. If no party objects within seven days, the case is transferred. If there is an objection, the JPML will set a briefing schedule, but such objections rarely succeed.<sup>202</sup>

Illustrating the adage that the shortest distance between two points is a straight line, courts and parties have devised a way around this process: direct filing. Under a direct-filing regime, plaintiffs in tag-along cases filed after the establishment of the MDL can bypass transfer and file their cases directly into the MDL court, regardless of whether personal jurisdiction and venue would be appropriate in the

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201 See *supra* Part II.B.1.

202 See *supra* Part II.B.1.

MDL district.<sup>203</sup> As a result, no action is required on the part of the JPML, the parties avoid the hassle of the transfer process, and the MDL court has complete jurisdiction over the case and may try it.<sup>204</sup> The MDL court is also not bound by *Lexecon* to remand direct-filed cases at the close of pretrial proceedings (though some courts provide for remand to some to-be-agreed-upon venue if pretrial proceedings conclude), facilitating easier administration of the entire litigation, and, potentially, a global settlement.<sup>205</sup> In addition, the MDL court has a more representative pool from which it can draw bellwether cases for trial, both in terms of geographical connection and state substantive law.<sup>206</sup>

Ultimately, direct filing creates numerous efficiencies for all parties. The JPML is not burdened with transferring cases to and from home districts. Home district judges and clerks' offices need not undertake administrative burdens associated with cases destined for transfer and which will likely not return. The MDL court retains complete control over a greater portion of the overall pool of cases for trial and facilitation of global settlement, which is likely why MDL judges encourage the practice. These benefits extend to the parties as well, particularly defendants and firms representing a significant number of plaintiffs. Lodging all of the cases in a single court in the first instance more seamlessly aggregates the litigation.<sup>207</sup>

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203 Indeed, the direct filing stipulation is necessary because many cases might otherwise not be able to be filed in the district. Moreover, some direct-filing stipulations ensure that there is an appropriate district to which the MDL court might *transfer* the cases after pretrial proceedings have concluded. This paper argues that plaintiffs should make such choices explicit.

204 See Fallon et al., *supra* note 22, at 2355 (“With greater sources of litigation subject to MDL consideration and larger numbers of individual cases subject to MDL transfer, it has become increasingly more time-consuming and expensive for an individual case to find its way into a transferee court.”).

205 See MANUAL FOR COMPLEX LITIGATION § 20.132 (4th ed. 2004) (noting policy reasons for MDL judge to have complete jurisdiction, including the judge’s understanding of the issues and “a greater ability to facilitate a global settlement”); Fallon, et al., *supra* note 22, at 2341 (noting that the MDL court can’t control settlement of the cases once they disperse).

206 See Fallon et al., *supra* note 22, at 2356 (“A case filed directly into the MDL, whether by a citizen of the state in which the MDL sits or by a citizen of another jurisdiction, vests the transferee court with complete authority over every aspect of that case.”).

207 See *In re Vioxx Prods. Liab. Litig.*, 478 F. Supp. 2d 897, 904 (E.D. La. 2007) (“Direct filing into the MDL avoids the expense and delay associated with plaintiffs filing in local federal courts around the country after the creation of an MDL and waiting for the Panel to transfer these ‘tag-a-long’ actions to this district.”); Fallon, et al., *supra* note 22, at 2354–56.

Despite these efficiencies, direct filing is not automatically available because defendants must agree to the practice. The MDL statute, as interpreted by the Supreme Court in *Lexecon*, does not allow the MDL court to override personal-jurisdiction and venue requirements to achieve complete jurisdiction over a case.<sup>208</sup> As a result, the defendants must waive these defenses in order to allow for direct filing.<sup>209</sup> Moreover, MDL courts have been unwilling to allow plaintiffs to direct file when it is clear that other courts would be more convenient and appropriate forums, and the MDL forum has no connection to the underlying dispute.<sup>210</sup> Case-wide direct filing stipulations, therefore, are most often utilized in cases where the MDL is located in a jurisdiction without general personal jurisdiction over all of the defendants in the litigation, most likely a jurisdiction other than the primary defendants' places of incorporation or principal places of business.<sup>211</sup>

Such case-wide stipulations are necessary because obtaining defendants' permission to directly file tag-along-case-by-tag-along-case

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208 See *In re Vioxx*, 478 F. Supp. 2d at 904 (“[I]t is not clear whether defendants can be ‘properly subjected to suit’ in the MDL forum.” (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 638 (1964))). Courts have been unwilling to require defendants to agree to direct filing when they refuse to waive these defenses. See *In re NuvaRing Prods. Liab. Litig.*, No. 4:08-md-1964 RWS, 2009 WL 4825170, at \*1 (E.D. Mo. Dec. 11, 2009); *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, No. MDL 071873, 2008 WL 5423488, at \*1 (E.D. La. Dec. 29, 2008).

209 See also *In re Heartland Payment Sys., Inc. Customer Data Security Breach Litig.*, No. H-10-171, 2011 U.S. Dist. LEXIS 34953 at \*21 (S.D. Tex. Mar. 31, 2011) (“In some cases, a defendant facilitates direct filing through a stipulation waiving personal jurisdiction for the pretrial proceedings under § 1407.”).

210 In these cases, MDL courts are unwilling to allow direct filing because such filings contradict the file-and-transfer process in the MDL statute. See, e.g., *In re Prempro Prods. Liab. Litig.*, No. 4:03-cv-1507-WRW, 2004 U.S. Dist. LEXIS 29791 (E.D. Ark. Aug. 31, 2004); *In re Norplant Contraceptive Litig.*, 950 F. Supp. 779, 781 (E.D. Tex. 1996); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL 1014, 1995 WL 428683, at \*6–7 (E.D. Pa. July 17, 1995) (noting that although venue is typically waivable, courts may raise it sua sponte).

211 *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853–54 (2011) (describing the “paradigms” of general jurisdiction over a corporation as a place where the corporation is “fairly regarded as home,” such as place of incorporation or principal place of business). Even if general jurisdiction might be appropriate over the primary defendant in the MDL district, it might not be over other affiliates of the primary defendant, such as distributors or foreign parents, or other defendants, such as manufacturers of other products or component parts. Moreover, divergences in long-arm statutes and uncertainty over the scope of jurisdiction in products-liability cases after the Supreme Court’s June 2011 personal-jurisdiction decisions make it likely that MDL courts will avoid choppy jurisdictional waters more often through use of direct-filing stipulations.



is both inefficient and fraught with potential problems.<sup>212</sup> Moreover, as noted above, MDL courts have been hostile to the practice because it departs from the usual operation of the MDL statute.<sup>213</sup> As a result, for the last several years courts have begun experimenting with direct-filing stipulations in case management orders that apply to the MDL as a whole.<sup>214</sup> In essence, at the outset of the MDL, the court encourages the primary defendants to agree to allow future plaintiffs in all tag-along cases to file directly, regardless of potential personal-jurisdiction and venue problems. As a result, the MDL becomes more seamlessly integrated and amenable to global settlement. Judge Fallon of the Eastern District of Louisiana embraced this practice in the MDLs involving the drugs Vioxx and Propulsid. This procedure proved exceedingly effective in the *Vioxx* MDL, which included over 6,000 cases, 2,000 of which were direct-filed.<sup>215</sup>

### B. Direct Filing and Choice of Law

Since *Vioxx*, direct filing has proven increasingly popular, and courts have instituted similar orders in numerous large diversity-based MDLs.<sup>216</sup> But it is becoming clear that this procedure, which appears

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212 For instance, one can imagine defendants deciding which cases to allow for direct filing based on whether they would prefer that the MDL be able to use the case as a bellwether trial. Moreover, piecemeal direct filing creates potential problems should the cases ever be remanded. *In re Norplant Contraceptive Prods. Liab. Litig.*, 946 F. Supp. 3, 3–4 (E.D. Tex. 1996).

213 See *supra* note 210.

214 By “major” defendants, I mean those defendants who are named in every case, like the manufacturers of allegedly defective products, or component parts of those products.

215 *In re Vioxx Prods. Liab. Litig.*, 478 F. Supp. 2d 897, 904 (E.D. La. 2007); see also Sherman, *supra* note 1, at 235 (“[T]wo principal existing mechanisms for aggregation—consolidation and class action.”).

216 See, e.g., *In re Actos Prods. Liab. Litig.*, MDL No. 2299 (W.D. La. 2012); *In re Chantix*, MDL No. U.S. Dist. LEXIS (N.D. Ala. June 12, 2012); *In re Trasyolol Prods.* 709 F.Supp.2d 1323 (S.D. Fla. 2010); *In re Yasmin Prods.*, M.D.L. No. 2100; *In re FEMA Trailers Prods.* MDL No. 2100, 2011 WL 1375011 (S.D. Ill. Apr. 12, 2011); *In re Heparin Prods. Liab. Litig.*, 803 F. Supp. 2d 712 (N.D. Ohio 2011); *In re Digitek Prods. Liab. Litig.*, 264 F.R.D. 244 (S.D. W. Va. 2010); *In re Trasyolol*, 709 F.Supp.2d 1323 (S.D. Fla. 2010); *In re Oral Sodium Phosphate Prods.*, MDL No. 2066, 2009 WL 2601395 (N.D. Ohio, Aug. 24, 2009); *In re Bausch & Lomb Contact Lens Solution Prods. Liab. Litig.*, MDL No. 766000, 2009 WL 4893926 (N.Y. Sup. July 14, 2009); *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, MDL No. 1769 M07-1873, 2012 U.S. Dist. LEXIS 63099 (E.D. Fla. May 4, 2008); *In re Chantix Prods. Liab. Litig.*, 655 F. Supp. 2d 1346, (J.P.M.L. 2003).

so simple on its face, is fraught with potential problems.<sup>217</sup> Foremost among these issues is how to decide what substantive law should apply to direct-filed cases in an MDL, but courts have also been concerned about where cases ought to go if pretrial proceedings conclude.<sup>218</sup> These problems cut to the core of the MDL's hybrid character as an aggregated litigation that purports to respect, and not disturb, each individual case's identity, and recreates the tensions between aggregation and choice of law that plagued the class action.

To see how the problem plays out, it is necessary to look at the specifics of direct-filing stipulations. The stipulations crafted by the pioneering *Vioxx* and *Propulsid* courts, and nearly every court since, say nothing about the effect of direct filing on choice of law. Rather, the stipulations state only that defendants waive their venue and jurisdiction-related defenses to allow for direct filing, and that, if pretrial proceedings are ever concluded, the cases will be transferred to a proper venue. For instance, the *Vioxx* stipulation provided that:

In order to eliminate the delays associated with transfer of cases filed in or removed to other federal district courts to this Court, and to promote judicial efficiency, defendant Merck . . . has stipulated and agreed that it will not assert any objection of improper venue . . . as to any VIOXX(R)-related cases filed directly in the Eastern District of Louisiana that emanate from districts outside the Eastern District of Louisiana and that would appropriately be included in this multidistrict litigation proceeding. Accordingly, a plaintiff may now file any such complaint against Merck directly in the Eastern District of Louisiana, rather than in a federal district court affording proper venue.<sup>219</sup>

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217 *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, MDL No. 07-1873, 2012 U.S. Dist. LEXIS 63099, at \*6–7 (E.D. La. May 4, 2012) (“[D]irect filing could potentially affect [plaintiffs’] substantive rights.”); *Fin. Inst. Track Litig. v. Heartland Bank*, No. H-10-171, 2011 U.S. Dist. LEXIS 34953, at \*20 (S.D. Tex. Mar. 31, 2011) (“But direct filings may present jurisdictional, venue, or related issues.”).

218 See Fallon et al., *supra* note 22, at 2253; see also *Fin. Inst. Track*, 2011 U.S. Dist. LEXIS 34953 at \*21 n.5 (“Courts have expressed concern that selecting the forum by direct filing could present anomalous choice-of-law results.”).

219 *In re Vioxx*, 478 F. Supp. 2d at 903. The stipulation continued:

Merck’s stipulation and agreement in this regard is contingent on the understanding that upon the completion of all pretrial proceedings applicable to a case directly filed before this Court pursuant to this provision, this Court . . . will transfer that case to a federal district court of proper venue, as defined in 28 U.S.C. § 1391, based on the recommendations of the parties to that case. The Court intends to proceed consistent with that understanding.

*Id.* at 903–04. Thus far, it appears that no MDL including a direct-filing stipulation has ever followed through with this post hoc transfer process. The case that has come closest is *Seroquel*, in which the court recommended that cases be transferred and

Some courts issuing direct-filing stipulations have followed this basic template, which says nothing about how direct filing will affect choice of law, or simply proclaim that direct filing will have no effect on choice of law.<sup>220</sup> Nevertheless, several courts, including the *Vioxx* court, recognized that choice of law presented an issue early on.<sup>221</sup> In *Vioxx*, the court expressed uncertainty as to how to proceed, and ultimately decided that it was required to follow the letter of the *Klaxon* rule, and apply the choice-of-law rules of Louisiana, the state in which the MDL court sat, to all of the direct-filed cases, even though the court maintained that direct filing “was not intended to alter the substantive legal landscape.”<sup>222</sup> Other courts have followed suit and applied the choice-of-law rules of the state of the MDL court to direct-filed cases.<sup>223</sup> The near-consensus approach that has developed in

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remanded at the close of pretrial proceedings. That “threat” of remand apparently provoked the parties to settle the case.

220 None of the direct-filing stipulations referenced *supra* at note 216 explain the effects of the stipulation on choice of law. See, e.g., Case-Management Order No. 2, at 12, *In re Chantix Prods. Liab. Litig.*, MDL No. 2092 (N.D. Ala. Feb. 2, 2010) (“The fact that a case was filed directly in the MDL proceedings also shall have no impact on the choice of law to be applied.”).

221 See *In re Vioxx*, 478 F. Supp. 2d at 904 (“[T]his potential implication of direct filing is one that should be considered by other MDL courts.”); *In re Vioxx Prods. Liab. Litig.*, 522 F. Supp. 2d 799, 806 (E.D. La. 2007) (“The Court previously discussed the use of direct filing in this MDL and has concluded that Louisiana’s choice-of-law rules must be applied in such cases, unless, of course, the parties stipulate otherwise.”); see also *Skandro v. Bausch & Lomb, Inc.*, No. 2:06-MN-77777-DCN, 2007 U.S. Dist. LEXIS 76657, at \*8–9 (D.S.C. Oct. 11, 2007) (“A straightforward application of *Erie* would require this court to apply South Carolina law in those cases, yet it would be an odd result to subject plaintiffs to South Carolina law simply because they took advantage of the direct filing procedure—a procedure that provides benefits to all parties and preserves judicial resources.”).

222 *In re Vioxx*, 522 F. Supp. 2d at 805. The *Vioxx* court recognized the problem, but ultimately found that any distorting effects of the litigation were solved by Louisiana’s borrowing statute for statute of limitations, but the court did not grapple with the question of whether strict application of *Klaxon* was appropriate. See also *In re Vioxx*, 522 F. Supp. 2d at 805 n.10 (“Pretrial Order No. 11 is merely a procedural vehicle constructed to reduce costs and promote efficiency; it was not intended to alter the substantive legal landscape.”).

223 The MDL involving the drug *Trasylol*, centralized in the Southern District of Florida, embraced direct filing and applied Florida choice-of-law rules to all cases filed there, regardless of the home states of the parties. *In re Trasylol Prods. Liab. Litig.*, No. 1:08-MD-01928, 2011 U.S. Dist. LEXIS 38012, at \*139 (S.D. Fla. Jan. 18, 2011) (applying Florida choice-of-law rules to MDL case direct-filed in Florida even though the plaintiffs were domiciled and injured in Oklahoma); see also *Byers v. Lincoln Elec. Co.*, 607 F. Supp. 2d 840, 844 (N.D. Ohio 2009); *Lanigan v. Express Scripts, Inc.*, No. 4:05-MD-01672-SNL, 2008 U.S. Dist. LEXIS 26127, at \*18 (E.D. Mo. Mar. 6, 2008).

direct filing has been to apply the choice-of-law rules of the state of the MDL court to all direct-filed cases.

This result is inconsistent with the policy underpinnings of *Klaxon* and *Van Dusen*. As noted in Part I, these cases effectuate two central policies: first, that the accident of diversity should not change the choice-of-law rules that would otherwise apply to a case, and, second, that the federal government should not override a state's choice-of-law rules because those rules are part of a state's substantive law, in the sense that they define the reach and strength of those laws in a multistate dispute. Applying the choice-of-law rules of the state in which the MDL court sits to direct-filed cases undermines both of these policies.

With respect to the first policy, that diversity should not change the choice-of-law rules that would otherwise apply in a case, following the letter of *Klaxon* in direct-filed cases causes that very result. Direct-filing stipulations are usually necessary when the JPML centralizes an MDL in a federal court that would not otherwise be an appropriate venue in most cases filed by plaintiffs who are not residents of the MDL state. By waiving defenses of lack of personal jurisdiction or proper venue across the board in these cases, potentially thousands of cases will be filed directly into the MDL court—a court that would not otherwise have been the forum for many cases if the MDL had never existed.<sup>224</sup> Moreover, even if personal jurisdiction were appropriate over all defendants in the MDL forum, the location of the MDL combined with direct filing will act as a magnet for cases that would be filed there for no other reason. As a result, a different state's choice-of-law rules apply, potentially changing the results of cases, due solely to the existence of the MDL. Different results in individual cases are particularly likely when one considers the differences between states' products-liability laws—an issue I will turn to in earnest when discussing the *Yaz* MDL below.<sup>225</sup> *Klaxon* and *Van Dusen* were primarily concerned about a federal and state court in the same state reaching a different result.<sup>226</sup> As a practical matter, that occurs in direct-filing because that procedure facilitates cases—and the application of

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224 It is of course true that a defendant may waive defenses of lack of personal jurisdiction and improper venue in any case. But it is unlikely that a plaintiff from a faraway state would select the MDL forum, or that defendants would waive these defenses, absent the existence of the MDL. In dispersed mass torts, plaintiffs tend to sue near home. Direct filing creates a strong incentive for the plaintiff to choose the MDL court to avoid the transfer process.

225 See SYMENONIDES, *supra* note 35, at 271 (noting effects of differences in states' products-liability and choice-of-law rules).

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

choice-of-law rules—in federal court that could not otherwise be brought in the courts of the same state.<sup>227</sup>

With respect to the second *Klaxon/Van Dusen* policy, applying the letter of *Klaxon* rule is also an uneasy fit. *Klaxon* protects a state's policy with respect to the strength and reach of its own law through choice-of-law rules. In direct-filed cases, cases are more often filed into a federal court whose state has no interest in applying its own law to a dispute. For instance, in the *Trasylol* MDL, centralized in Florida, the defendant was a Pennsylvania corporation with its principal place of business in Indiana. In one representative direct-filed case, the plaintiffs were residents of Virginia who suffered injury in Virginia. The court held that Florida choice-of-law rules applied pursuant to *Klaxon*.<sup>228</sup> But such a result is odd in light of *Klaxon* policy because Florida tort law was not a plausible candidate to govern this case. Indeed, to apply Florida law in the case would probably have been unconstitutional, even under the Supreme Court's lax standards, because Florida had no connection to the underlying dispute, aside from being the forum state.<sup>229</sup> Applying Florida's choice-of-law rules to decide the reach of Virginia and Pennsylvania law, then, is an odd result.<sup>230</sup>

This problem was not lost on Cavers and Currie in the 1960s. Currie memorably referred to it as the problem of the “disinterested third state”: when the forum was placed in the position of deciding which of two (or more) *other* states' law should govern a particular case.<sup>231</sup> In other words, a neutral forum should not be deciding choice-of-law disputes because that forum would be defining the

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227 This is likely because personal jurisdiction over the defendant is questionable in forum based on the extent of forum contacts, or because even if a defendant might be amenable to personal jurisdiction in the state, a state court would dismiss the case on *forum non conveniens* grounds.

228 *Lewandoski v. Bayer Corp.*, No. 08-MD-01928, 2010 U.S. Dist. LEXIS 128951, at \*9 (S.D. Fla. Nov. 15, 2010).

229 See *Phillips Petroleum Co. v. Shutts*, 427 U.S. 797, 821 (1985).

230 The results are also odd if the MDL state has a different choice-of-law approach than both interested states. For example, consider a tort case in which either Maryland or Virginia law might apply, but the injury occurred in Virginia. Both states follow the First Restatement and would apply the law of the place of the injury. If the MDL court is located in a Second Restatement state that comparatively under-emphasizes the place of the injury, a law may wind up applying that neither interested state would apply. Although it is of course true that this is a potential problem in individual litigation, MDL increases its prevalence significantly. This paper does not seek to revise the rules of personal jurisdiction, but the increasing scope of the problem presented by nationwide mass-tort MDLs suggests it may be time to do so.

231 Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 764 (1963).

scope of other states' laws in a multistate dispute. Currie saw the intellectual problem, but noted that it was rarely observed in practice because plaintiffs typically sued in a forum which could apply its substantive law to the litigation.<sup>232</sup> Even so, Currie contended, "the problems presented by the phenomenon are so difficult that it ought to be avoided whenever that is reasonably possible."<sup>233</sup> The rise of direct filing suggests that if the problem was rare then, it is not rare now; rather, it is cropping up in some of our largest litigations.

Currie and Cavers understood the "disinterested third state" problem as implicating *Klaxon*: when a state court is disinterested, the justification for a federal court sitting in diversity to apply that state's choice-of-law rules is weakened—in *Erie* terms, the choice-of-law rules of the forum state start to look more "procedural" and less "substantive" when they are simply umpiring a dispute between other states. Cavers recognized this and conceded that in such a situation a federal court's departure from the forum state's choice-of-law rules "would not result in an inroad upon, or an undesired extension of, the forum state's own policies" and is therefore "not one that calls for the preservation of the *Klaxon* rule."<sup>234</sup> Currie agreed.<sup>235</sup>

Both Currie and Cavers acknowledged, however, that it is insufficient to note only the warrant for departing from *Klaxon*. The question of what choice-of-law rules ought to apply in such situations remains, particularly in the absence of Congressional legislation.<sup>236</sup> Recognizing the vacuum, neither Currie nor Cavers was prepared to abandon *Klaxon*, because the only plausible alternative was federal common law, which they each believed would increase confusion and lead to unprincipled and potentially retrograde choice-of-law rules.<sup>237</sup>

232 *Id.* at 765 (noting that the problem's "occurrence is extremely rare"); *see also id.* at 789 n.126 ("By hypothesis the disinterested forum is a rare phenomenon.").

233 *Id.* at 767.

234 Cavers, *supra* note 11, at 737.

235 Currie, *supra* note 231, at 786 ("[T]he basic principle underlying the *Klaxon* doctrine—that a state's power to determine the nature and scope of its domestic policy should not be impaired—must be deliberately limited.").

236 In a sense, the problem harkens back to the problem of interpleader—when the forum selected really may have no interest in the dispute. *See Griffin v. McCoach*, 313 U.S. 498 (1941).

237 *See supra* Part I. Both Currie and Cavers were willing to make an exception, however, for interpleader cases. *See Currie, supra* note 231, at 789.

With respect to a proposal by the ALI to bring into federal court multiple parties when all parties could not be brought within the jurisdiction of a state court, Cavers was prepared to depart from *Klaxon* and allow federal common law of choice-of-law, but only on the ground that "a federal court is exercising a jurisdiction that *no state court could exercise*. . . ." Cavers, *supra* note 11, at 746 (emphasis added). This is not

So long as *Klaxon* remains on the books—and there is no indication that the Supreme Court or Congress intends to overrule it—the notion that the federal courts would start making common law choice-of-law rules with respect to diversity cases seems farfetched. In any event, application of a federal common law for cases within an MDL would be a massive departure from *Klaxon* and *Van Dusen*—something courts should not do lightly.

That said, direct filing in MDL greatly increases the likelihood of disinterested-third-state problems by creating a disinterested magnet forum in the MDL court, whether or not the forum can exercise personal or legislative jurisdiction over the defendant in all cases. The problem also surfaced often in class actions. In class actions, personal jurisdiction over the defendant can be established through the claim of the representative plaintiff, even if that claim is based on specific jurisdiction.<sup>238</sup> This means that a single state's choice-of-law rules may wind up applying to a nationwide class of plaintiffs even though the state where the class action is filed would be “disinterested” in the vast majority of the claims.<sup>239</sup> Ultimately, although courts do not consider this to be the primary “choice-of-law problem” for nationwide, diversity-based class actions, it presents the complications of the disinterested-third-state problem and *Klaxon* on a large scale. One benefit of MDL is that it more often avoids the problem; direct filing replicates it.

But recognizing that the reasons for applying *Klaxon* are weak does not alone provide a solution, especially in light of the fact that federal common law is not in the offing. A ready example of the problems that can arise when a court departs from *Klaxon* without an alternative can be found in the first court willing to move away from the letter of the *Klaxon* rule for direct-filed cases: the court presiding over the massive MDL involving the birth-control drug, Yaz.

### C. *The Yaz Litigation*

The major products-liability MDL related to the sale and marketing of the oral contraceptive Yaz (and related brands)<sup>240</sup> squarely

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the case in an MDL—there are proper forums for every component case in the MDL and there is no need to depart from *Klaxon*.

238 See Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About “Class Action Fairness,”* 58 S.M.U. L. REV. 1313, 1331 (2005); Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597, 623 (1986).

239 The *Shutts* Court did not address this problem, but in so doing it arguably missed the key lesson of *Klaxon*.

240 The litigation involving Yaz involves a series of drugs with the same active ingredient, such as Natazia, Ocella, and Beyaz. I refer to them collectively as Yaz.

presents the federalism and choice-of-law problems posed by multidistrict litigation and direct filing.<sup>241</sup> In this massive MDL, which now includes nearly 10,000 cases and counting, the court wrote the first opinion rejecting the application of the letter of the *Klaxon* rule to the then-over 6200 direct-filed cases in the MDL. (Since the opinion, the number of direct-filed cases has ballooned to nearly 9000.) But, in so doing, the court revealed that rejecting the letter of the *Klaxon* rule can also undermine the policies underlying *Klaxon* and *Van Dusen*.

The Yaz family of drugs, developed by Bayer Pharmaceuticals, consists of oral contraceptives whose active ingredient is a synthetic version of the ovulation-blocking progestin hormone drospenirone, which was developed to mitigate the side effects associated with older forms of birth control.<sup>242</sup> During clinical trials, the drug also showed potential for additional benefits beyond contraception, and the FDA approved the drug both for birth control and to treat premenstrual dysphoric disorder (PMDD) (a severe form of premenstrual syndrome (PMS)) and moderate acne.<sup>243</sup>

Upon its release in 2006, Yaz was an immediate success. It quickly became America's top-selling birth-control pill and Bayer's best-selling drug, eventually bringing in \$1.62 billion in worldwide sales in 2010 alone.<sup>244</sup> Part of the drug's early success was due to a marketing strategy centered on the benefits of Yaz beyond contraception, including improving conditions as varied as "moodiness," "increased appetite," "bloating," "fatigue," and "acne."<sup>245</sup> While this marketing may have vaulted the drug to early success, it also caught the attention of the FDA, which proclaimed that Yaz's advertisements were "misleading because they broaden the drug's indication, overstate the efficacy of YAZ, and minimize serious risks associated with the use of the

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241 See *In re Yasmin and Yaz (Drospirenone) Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 3:09-md-02100-DRH-PMF, 2011 WL 1375011 (S.D. Ill. Apr. 12, 2011).

242 See Tammy Worth, *New Pills, New Issues: Yaz and Yasmin Spur Lawsuits*, L.A. TIMES, Apr., 19, 2010, at E3, available at <http://articles.latimes.com/2010/apr/19/health/la-he-yaz-20100419>.

243 See Warning Letter from Dep't of Health and Hum. Servs. to Reinhold Franzen, President and CEO of Bayer, (Oct. 3, 2008), available at <http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/WarningLettersandNoticeofViolationLettersstoPharmaceuticalCompanies/ucm053993.pdf>. [hereinafter "Warning Letter"].

244 Richard Knox, *With Birth Control Pills, New Isn't Always Better*, NAT'L PUB. RADIO (Aug. 23, 2010), <http://www.npr.org/templates/story/story.php?storyId=129258505>; *Bayer Supports Yaz and Yasmin, Despite Possible Increased Blood Clot Risk*, DRUG INDUSTRY DAILY (Apr. 25, 2011), <http://www.fdanews.com/newsletter/article?articleId=136221&issueId=14672>.

245 Knox, *supra* note 244.



drug.”<sup>246</sup> Ultimately, to avoid further regulatory action, Bayer took the rare step of airing corrective advertisements, but the ads did not dampen enthusiasm for Yaz, which continues to be a top seller.<sup>247</sup>

Yaz remains a best seller, but the drug’s potentially dangerous side effects persist. As the warning label states, in some women Yaz causes elevated potassium levels, which causes slower blood flow, leading to severe clotting and pulmonary embolisms, resulting in heart attacks, strokes, and other health problems.<sup>248</sup> Although Bayer contends that the drugs are safe and the risks are overstated, it voluntarily enhanced the safety warnings on Yaz labeling in March 2011.<sup>249</sup>

The extent of the risks is unclear, but, unsurprisingly, Yaz has spawned widespread litigation by those claiming to have been injured by the drug or deceived by Bayer’s advertising.<sup>250</sup> The JPML consolidated the federal diversity cases into an MDL in 2009 in the Southern District of Illinois, where several actions were pending, and which would “provide[ ] a geographically central forum for nationwide litigation in which actions are pending in various districts across the country.”<sup>251</sup> At the time of consolidation, some eighty four Yaz cases were pending in the federal courts.<sup>252</sup> Since then, that number has skyrocketed to nearly 10,000 cases and counting.<sup>253</sup> This enormous

246 Warning Letter, *supra* note 243, at 1.

247 See Natasha Singer, *A Pill That Promised Too Much*, N.Y. TIMES, Feb. 11, 2009, at B9 (describing Bayer’s \$20 million corrective ad campaign).

248 *Id.* Two studies released in April 2011 by the British Medical Journal found that use of drospirenone increased risks of blood clotting by two or three times over traditional birth control. Kirsten Hallam, *Birth-Control Pills With Drospirenone Raise Clot Risk in Study*, BLOOMBERG NEWS (Apr. 21, 2011), <http://www.bloomberg.com/news/2011-04-21/birth-control-pills-with-drospirenone-raise-clot-risk-in-study.html>.

249 See U.S. DEP’T OF HEALTH AND HUM. SERVS., U.S. FOOD AND DRUG ADMIN., *Safety Labeling Changes Approved by FDA Center for Drug Evaluation and Research – March 2011 and April 2012*, <http://www.fda.gov/Safety/MedWatch/SafetyInformation/ucm249859.htm> (last updated May 23, 2012).

250 See Sylvia Hsieh, *Birth Control Pills Give Rise to Mass Tort*, LAWYERS USA, July 17, 2009, available at <http://lawyersusaonline.com/blog/2009/07/17/birth-control-pills-give-rise-to-mass-tort/>; see also, e.g., Complaint, *Plaisance v. Bayer Corp.*, No. 3:09-cv-20108 (S.D. Ill. Nov. 5, 2009), ECF No. 1 (describing products-liability and fraud claims).

251 Transfer Order, *In re Yasmin and Yaz (Drospirenone) Mktg., Sales Practices, & Prods. Liab. Litig.*, MDL No. 2100, at 3 (S.D. Ill. Oct. 1, 2009). Bayer is not incorporated in Illinois, nor is its principal place of business there. As a result, general jurisdiction over Bayer, its foreign and domestic distributors and affiliates, in the district for every Yaz-related injury nationwide is at least questionable, hence the need for the stipulation. See HAY ET AL., *supra* note 31, § 6.9.

252 Transfer Order, *supra* note 251, at 1.

253 See *Multidistrict Litigation*, S. DIST. OF ILL., <http://www.ilsd.uscourts.gov/mdl/mdl2100.aspx> (last visited Nov. 27, 2012).

MDL is paradigmatic of how mass products-liability torts have come to be litigated. For one thing, the MDL court rejected a proposed nationwide class action, citing, primarily, the choice-of-law problem.<sup>254</sup> Having rejected a nationwide class action, the MDL court endorsed a bellwether-trial plan. Pursuant to this plan, the court will hold several representative trials in order to generate information for possible global settlement.<sup>255</sup>

The MDL court has also enthusiastically embraced direct filing, and so have the plaintiffs in the some 8,873 tag-along cases that have been directly filed into the MDL.<sup>256</sup> At the court's encouragement, the defendants agreed to a direct-filing case-management order soon after creation of the MDL.<sup>257</sup> By the terms of the order, any plaintiff whose case would be subject to transfer to the MDL may file directly in the Southern District of Illinois, and the defendants will not make any challenge to jurisdiction or venue "for purposes of pretrial proceedings."<sup>258</sup> With respect to choice-of-law, the stipulation proclaims only that:

The fact that a case was filed directly in the MDL Proceedings pursuant to this Order will have no impact on choice of law, including the statute of limitations that otherwise would apply to an individual case had it been filed in another district court and transferred to this Court pursuant to 28 U.S.C. § 1407.<sup>259</sup>

The complications such a proclamation creates are apparent: there is no way to determine whether direct filing has an "impact" on choice-of-law without knowing in what state the case would have been originally filed. It is obvious that the court's intention was to ensure that direct filing did not change the governing law of any individual plaintiff's claims, but this stipulation could not have that effect without providing some means for defining what that law would be absent direct filing.

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254 *Plaisance v. Bayer Corp.*, 275 F.R.D 270, 276 (S.D. Ill. 2011) (holding the class could not be certified "because governing choice of law principles require application of the substantive laws of the fifty states and the District of Columbia—laws which vary amongst the jurisdictions").

255 See Amended Case Management Order No. 24 Bellwether Trial Selection Plan, *In re Yasmin and Yaz Mktg., Sales Practices, and Prods. Liab. Litig.*, No. 3:09-md-02100-DRH-PMF, MDL No. 2100 (S.D. Ill. Oct. 13, 2010).

256 See Letter from Catlin Fischer to the author, Managing Clerk, *In re Yasmin*, MDL No. 2100 (Aug. 9, 2012) (on file with author).

257 Fourth Amended Case Management Order No. 9, *In re Yasmin and Yaz Mktg., Sales Practices, and Prods. Liab. Litig.*, No. 3:09-md-02100-DRH-PMF, MDL No. 2100, at 2 (S.D. Ill. March 19, 2012).

258 *Id.* at 2.

259 *Id.* at 2–3.

These problems became unavoidable as the case progressed and the court had to resolve choice-of-law issues related to attorney-client privilege. In particular, the court was called upon to decide choice-of-law problems related to documents both parties claimed were protected by attorney-client privilege.<sup>260</sup> Under Federal Rule of Evidence 501, when “[s]tate law supplies the rule of decision, the privilege . . . shall be determined in accordance with state law.”<sup>261</sup> The acknowledgement, however, that state law governs questions of privilege did not resolve the question of *which* state’s privilege law should govern in an individual case when “there are factual connections to more than one state.”<sup>262</sup> To answer that question, the court would have to “apply state choice of law rules to determine which state’s privilege law controls.”<sup>263</sup>

The court began by noting the *Klaxon/Van Dusen* rule, that a “transferee court applies the choice of law rules of the state in which the transferor court sits.”<sup>264</sup> Then the court recognized the problem created by direct filing: “There is no controlling authority . . . with regard to cases that (1) are directly filed in an MDL pursuant to a direct filing order and (2) originated outside of the MDL court’s judicial district.”<sup>265</sup> The court termed this category of cases “foreign direct filed cases.”<sup>266</sup>

Unlike other courts that have considered the question, the Yaz court rejected the position that *Klaxon* required that Illinois choice-of-law rules apply to these cases.<sup>267</sup> Instead, the court continued, “the governing choice of law rules will depend on each case’s *source of origin*” because the parties had agreed that direct filing would “not impact the choice of law that otherwise would apply to the direct filed actions.”<sup>268</sup> As a result, the court decided that:

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260 *In re Yasmin and Yaz Mktg., Sales Practices, and Prods. Liab. Litig.*, No. 3:90-md-02100-DRH-PMF, 2011 WL 1375011, at \*1 (S.D. Ill. Apr. 12, 2011).

261 FED. R. EVID. 501, 2011 WL 1375011 (S.D. Ill. Apr. 12, 2011) (repealed 2011). Regarding the history of the privilege rule, see Stephen B. Burbank, *Procedure, Politics, and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1710–11 (2004). Legislative history reveals that Rule 501 was a Congressional decision not required by *Erie*, and *Klaxon* does not necessarily control, though courts have applied the *Klaxon* rule. The Yaz court’s application of *Klaxon* illustrates well the choice-of-law problems created by direct filing.

262 *In re Yasmin and Yaz*, 2011 WL 1375011, at \*4.

263 *Id.*

264 *Id.*

265 *Id.*

266 *Id.* at \*5.

267 *See id.* at \*2.

268 *Id.* at \*5 (emphasis added).

[T]he better approach is to treat foreign direct filed cases as if they were transferred from a judicial district sitting in the state where the case originated. For purposes of this analysis, the Court considers the originating state to be the state where the plaintiff purchased and was prescribed the subject drug.”<sup>269</sup>

As a result, the court held that it must therefore “look to state choice of law principles . . . applicable in all fifty states, the District of Columbia, and Puerto Rico.”<sup>270</sup>

Given this holding, it is surprising, then, that the court concluded that “section 139 of the Restatement (Second) Conflict of Laws,” which typically applies the law of the state where a communication was made, “will apply to privilege matters governed by state law in this MDL.”<sup>271</sup> In other words, after deciding that it must apply the choice-of-law rules of every state, the court held that every state would adopt section 139 of the Second Restatement as its choice-of-law rule for attorney-client privilege. In support of this conclusion, the court noted that a majority of states that have done so have tended to adopt the Second Restatement approach. As for the courts that have not adopted the Second Restatement’s rule for privilege, many either had adopted the Second Restatement in other areas *or* “apply an interest based analysis that reflects the principles underlying section 139 of the Second Restatement.”<sup>272</sup> The court also concluded that the thirteen states that adhere to the First Restatement would adopt the Second Restatement for privilege conflicts.

These conclusions are likely incorrect. States following the First Restatement apply forum law with respect to privilege,<sup>273</sup> and they

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269 *Id.* at \*6. To illustrate, “for a foreign direct filed member action involving a plaintiff that purchased and was prescribed the subject drug in Tennessee, the Court will treat that plaintiff’s claims as if they were transferred to this MDL from a district court in Tennessee.” *Id.*

270 *Id.* at \*8.

271 *Id.*

272 *Id.*

273 The First Restatement denominates rules of evidence as procedural and therefore governed by forum law. JOSEPH H. BEALE, 3 A TREATISE ON THE CONFLICT OF LAWS § 597.1, at 1614 (1935) (“The rule that admissibility of evidence is to be governed by the law of the forum is . . . obviously necessary.”). *See also* Sun Oil Co. v. Wortman, 486 U.S. 717, 728 (1988) (including privileges among “a host of other matters generally treated as procedural under conflicts law”); Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 122 (2002) (“Courts adhering to . . . the First Restatement of Conflict of Laws tend to apply the privilege law of the forum state.”). The classic example is *Doll v. Equitable Life Assur. Soc.*, 138 Fed. 705, 710 (3d Cir. 1905) (applying forum law denying privilege even though the state where the communication was made would have protected the communication). For a more recent interpretation of choice-of-law rules relating to privilege in a First Restatement state, see

would be unlikely to depart from the First Restatement solely for privilege issues.<sup>274</sup> And the notion that all other “modern” states would adopt the Second Restatement rule is oversimplified because modern approaches differ from one another.<sup>275</sup> It is, moreover, odd that the court would say so much about the need to respect different states’ choice-of-law rules and then decide that those rules are the same for every state. Furthermore, it doesn’t appear that the court has much simplified its task—the court had already taken the time to discern each state’s choice-of-law rules, and it will still have to do a reasonably complicated Second Restatement choice-of-law analysis under the Restatement for every case. Finally, as a practical matter, this move will undoubtedly affect some results, excluding documents in some cases when they might otherwise be included, and vice versa, because privilege laws vary from state to state.<sup>276</sup>

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*Hatfill v. N.Y. Times Co.*, 459 F. Supp. 2d 462, 466 (E.D. Va. 2006) (“[T]he law of privilege, absent an applicable statute, is governed by procedural or *lex fori* rules.”). See also *Union Planters Nat’l Bank v. ABC Records, Inc.*, 82 F.R.D. 472, 473 (W.D. Tenn. 1979) (“Rule 501 requires a district court exercising diversity jurisdiction to apply the law of privilege which would be applied by the courts of the state in which it sits.”). This orthodoxy was challenged in the 1950s. See Jack B. Weinstein, *Recognition in the United States of the Privileges of Another Jurisdiction*, 56 COLUM. L. REV. 535, 541 (1956). Then-Professor Weinstein, though, professed no doubt that under the First Restatement the forum’s privilege law applied. *Id.* at 544, 549.

274 See ARTHUR TAYLOR VON MEHREN & DONALD THEODORE TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 208, 621–22 (1965) (discussing difference in approach to privilege between traditional and modern choice-of-law).

275 See, e.g., HAY ET AL., *supra* note 31, § 2.14, at 64 (“The [Second Restatement] test consists of multiple and diverse factors that, by themselves, will not enable a court to make a choice because they are not listed in any order of priority.” (footnote omitted)).

276 See Glynn, *supra* note 273, at 60 (“The law of privilege varies greatly from state to state, federal circuit to federal circuit, and context to context.”); see also Stewart E. Sterk, *Testimonial Privileges: An Analysis of Horizontal Choice of Law Problems*, 61 MINN. L. REV. 461, 461–62 (1977) (“The diversity of state rules regarding testimonial privileges has fostered several interesting and significant choice of law problems.”). For example, assume a plaintiff domiciled in Virginia who travels to Washington, D.C., where her doctor prescribes Yaz. That plaintiff purchases Yaz in a Washington pharmacy and travels home to Virginia, where she suffers a Yaz-related injury. Virginia follows traditional, First Restatement principles; Washington follows the Second Restatement. See generally SYMEONIDES, *supra* note 35, at 64 (charting the choice-of-law methodologies with respect to torts and contracts for all fifty states). If our plaintiff filed her case at home in Virginia, she would likely get the benefit of Virginia privilege law because the First Restatement considers privilege a procedural issue governed by forum law. See *Hatfill*, 459 F. Supp. 2d at 462. By directly filing her case in the Yaz MDL, pursuant to the court’s ruling, as a “foreign direct filed case,” the choice-of-law rules of the jurisdiction where she was prescribed the drug would apply—in this case, Washington, D.C. Washington, D.C. would apply the privilege law of the state with the most

Although much could be said about just the specific privilege issues involved here, what's most pertinent for this discussion is the court's conclusion that the direct-filing plaintiffs' cases will be subject to the choice-of-law rules of the state of purchase. The court admirably exposes and grapples with the problems of direct filing and choice of law, and by not reflexively applying the letter of *Klaxon*, the court takes an important first step toward preserving the choice-of-law advantages of multidistrict litigation. Moreover, in recognizing that direct filing creates a magnet forum for cases that would otherwise not be filed there, the court recognized that direct filing can potentially change the law governing individual cases. But departing from the *Klaxon* rule left a vacuum, and the court made two mistakes in filling it—first in choosing to apply the choice-of-law rules of the state of purchase, and second, with respect to privilege, assuming that every state's choice-of-law rules would be the same.

The court, therefore, asked the right questions, but came to problematic answers. The problems began with the direct-filing stipulation itself. The court intended, consistent with *Van Dusen*, to ensure that direct filing did not affect any party's substantive rights by changing

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significant relationship with the communication, because the Second Restatement tends to follow the privilege law of the state where the communication occurred. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §139 cmt. e (1986) (“The state which has the most significant relationship with a communication will usually be the state where the communication took place . . .”).

To keep things simple, let's assume that a Bayer employee, who works in its Pennsylvania home office, sends an email to one of its attorneys based in Philadelphia that could be construed as seeking business or legal advice—a borderline privilege call. Under the Second Restatement, Pennsylvania privilege law would determine whether the communication is privileged; if the case were filed in Virginia, Virginia privilege law would apply, pursuant to the First Restatement.

The difference matters. Pennsylvania's attorney-client privilege is significantly stronger than most other states because “Pennsylvania is one of the few jurisdictions in which the burden of proof is on the party challenging the assertion of the privilege.” *Agster v. Barmada*, 43 Pa. D. & C.4th 353, 370 n.8 (C.P. Allegheny Cnty. 1999). “Pennsylvania has a stronger attorney-client privilege than the privilege recognized in those jurisdictions that use a balancing approach.” *Id.* at 370. Virginia, on the other hand, places the burden of proof on the party seeking to assert the privilege. *Va. Elec. & Power Co. v. Westmoreland-LG & E Partners*, 526 S.E.2d 750, 755 (Va. 2000). The burden of persuasion matters to the results of privilege decisions, and one could imagine a document admitted under Virginia law that would be excluded under Pennsylvania law. See PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 11.9, at 976 (1993) (“In many instances this burden will be insurmountable”). As a result, the court's decision to ascribe choice-of-law rules of the state where the drug was prescribed could make a significant difference in the outcome.

the applicable choice-of-law rules in any case.<sup>277</sup> But there is no mechanism to determine what choice-of-law rules would have applied to each individual case but for direct filing. Here, without such an antecedent choice of forum by each plaintiff, the court was forced to substitute another set of choice-of-law rules: the state where the plaintiff “purchased and was prescribed the . . . drug.”<sup>278</sup> The court’s selection of the state of purchase seems somewhat arbitrary. The court could just as easily have chosen the state where the injury occurred, the plaintiff was domiciled, or ingested the drug. The court’s solution therefore fails in its goal of not changing the substantive rights of any party, is unconnected with the policy goals of *Klaxon* and *Van Dusen*, and creates a federal common law overlay on state choice-of-law rules. In sum, the court recognized the problem with its direct-filing stipulation, and attempted to solve it by imposing its own choice-of-law rules.<sup>279</sup>

Although the court’s specific privilege decision is noteworthy, the bigger impact of the court’s holding will likely be felt beyond privilege in the tort and products-liability laws applicable to each case. The court’s decision to apply the choice-of-law rules of the state where the drug was purchased could have far-reaching effects when the court decides dispositive motions or tries cases. The court’s decision was, in a sense, good rough justice: products-liability plaintiffs can always file cases where the product was purchased, and those states have an interest in applying their substantive law to the conduct. By the metric of the *Klaxon* policies, the *Yaz* ruling is therefore an improvement. But the ruling falls on the other horn of the choice-of-law problem: changing the law potentially applicable to the case due to the mass-tort proceeding. Whatever one might think about forum shopping, to change

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277 *In re Yasmin and Yaz Mktg., Sales Practices, and Prods. Liab. Litig.*, No. 3:09-md-02100-DRH-PMF, 2011 WL 1375011, at \*9 (S.D. Ill. Apr. 12, 2011).

278 *Id.* at \*6.

279 This approach is beginning to spread. For instance, in the massive MDL involving the drug Avandia, comprising over 4,500 cases, the judge recently held, following *Yaz*, that direct-filed cases “should be governed by the law of the states where [p]laintiffs received treatment and prescriptions for Avandia.” *In re Avandia Mktg., Sales Practices, and Prods. Liab. Litig.*, No. 07-MD-01871, 2012 WL 3205620, at \*2 (E.D. Pa. Aug. 7, 2012). Setting aside the potential problems of an order requiring that claims be governed by the laws of multiple states in which plaintiffs received prescriptions, the order replicates the problem of applying choice-of-law rules divorced from the plaintiffs’ choice of forum without prior notice. In this case, the court ruled that the statutes of limitations of the places where the plaintiffs were treated applied, barring claims under the laws of those states which might have been valid under the laws of other states where the plaintiffs might have chosen to file. *Id.*

the rules in the middle of the game is unfair—if a plaintiff files directly in an MDL, she at least ought to know what she is getting.<sup>280</sup>

For instance, any plaintiff who might have filed in a state following traditional choice-of-law rules could see a different tort law applied through a change of the choice-of-law rules to the state where the product was purchased. Consider this example: assume a plaintiff lives in Delaware, but near the Maryland border. She visits her Delaware doctor, who prescribes Yaz, and she fills the prescription at a Delaware pharmacy near her home. The plaintiff, however, works across the border in Maryland. While at work one day, she suffers a heart attack, which she alleges is due to her use of Yaz.

Maryland and Delaware have different choice-of-law rules and substantive tort laws, but jurisdiction and venue are appropriate in both states. With respect to choice of law, Maryland adheres strictly to the First Restatement and steadfastly applies the tort law of the state of the injury,<sup>281</sup> while Delaware subscribes to the more flexible Second Restatement, which considers the place of the injury as only one factor among several considerations in deciding what state's tort law to apply.<sup>282</sup> With respect to tort law, Maryland is significantly more plaintiff-friendly in the sense that it recognizes a claim for strict products liability.<sup>283</sup> Delaware, conversely, has rejected strict liability; plaintiffs are limited to claims in negligence and breach of warranty.<sup>284</sup>

Where the plaintiff sues makes a big difference. If she sues in Maryland, the court will apply Maryland law because the injury occurred there.<sup>285</sup> Under Maryland law, she can maintain a claim for

280 The Supreme Court has recognized that plaintiffs often select the forum for choice-of-law reasons. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250 (1981).

281 See *Erie Ins. Exch. v. Heffernan*, 925 A.2d 636, 648–49 (Md. 2007) (“Maryland law is clear that in a conflict of law situation . . . ‘where the events giving rise to a tort action occur in more than one State, we apply the law of the State where the injury[—]the last event required to constitute the tort[—]occurred.’” (quoting *Lab. Corp. of Am. v. Hood*, 911 A.2d 841, 845 (Md. 2006))). See also *Lab. Corp. of Am.*, 911 A.2d at 845 (“Maryland continues to adhere generally to the *lex loci delicti* principle in tort cases.”).

282 See *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 47 (Del. 1991).

283 See *Phipps v. Gen. Motors Corp.*, 363 A.2d 955, 963 (Md. 1976).

284 See *Cline v. Prowler Indus. of Md., Inc.*, 418 A.2d 968, 974 (Del. 1980). See also *Dilenno v. Libbey Glass Div., Owens-Illinois, Inc.*, 668 F. Supp. 373, 376 (D. Del. 1987) (“Delaware does not recognize the doctrine of strict products liability . . .”).

285 The court would deem the injury to have occurred in Maryland because, under First Restatement principles, the injury occurs at the “place where the injury was suffered, not where the wrongful act took place.” *Philip Morris, Inc. v. Angeletti*, 752 A.2d 200, 231 (Md. 2000) (internal quotations omitted). See also ROBERT A. LEFLAR, *AMERICAN CONFLICTS LAW* § 133, at 267 (3d ed. 1977) (“The orthodox rule . . . is that



strict liability.<sup>286</sup> But if the plaintiff were to sue in Delaware, the court would probably apply Delaware tort law, because, under the Second Restatement, the court would be unlikely to apply the law of the place of the injury when the plaintiff lived, consumed, bought, and was prescribed Yaz in another state.<sup>287</sup> The court would consider place of the injury a “fortuity.”<sup>288</sup> Assuming competent representation, the plaintiff would file her case in Maryland, where she could advance a strict-liability claim.

Now assume that our plaintiff direct-filed her case into the *Yaz* MDL pursuant to the direct-filing stipulation, which purported to have “no effect” on the applicable substantive law. Under the court’s decision, her case would be deemed a “foreign direct filed case,” which would be subject to the choice-of-law rules of the state where the drug was prescribed, in this case Delaware. By direct filing, she would unexpectedly be stuck with Delaware law, and no longer have the benefit of a strict-liability claim. Setting aside one’s views on the propriety of the plaintiff’s ability to select from otherwise proper forums and the “correct” choice-of-law analysis, it is clear that the court’s direct-filing ruling would change the substantive law applicable in certain cases in midstream.

The *Yaz* court’s decision, therefore, avoids the problem of inappropriate application of the *Klaxon* rule, but it runs afoul of the *Van Dusen* principle that mere inclusion in a mass-tort proceeding in federal court should not change the substantive law applicable to a plaintiff’s case. Moreover, in essentially adopting a federal choice-of-law rule with respect to privilege, the *Yaz* court ran afoul of the other

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when an act operates across a state line its legal character is determined by the law of the place where it first takes harmful effect or produces the result complained of.”).

286 See *Phipps*, 363 A.2d at 963.

287 See *Thompson v. Reinco, Inc.*, No. Civ.A. 01C-04-076JRJ, 2004 WL 1426971, at \*2 (Del. Super. Ct. June 15, 2004) (applying Delaware law rejecting strict-products-liability claim when plaintiff suffered injury while working in Maryland because “the place of injury was fortuitous, the relationship between all the parties is predominantly centered on the delivery and intended use in Delaware”). See also *McBride v. Whiting-Turner Contracting Co.*, No. C.A. 91C-01-179, 1993 WL 489487 (Del. Super. Ct. Oct. 21, 1993) *aff’d*, 645 A.2d 568 (Del. 1994) (reversing lower-court application of Maryland law when only the injury occurred there, but the plaintiff lived and worked in Delaware).

288 *Cervantes v. Bridgestone/Firestone N. Am. Tire Co.*, C.A. No. 07C-06-249 JRJ, 2010 WL 431788, at \*2 (Del. Super. Ct. Aug. 14, 2008) (“The place of injury is considered to be fortuitous when there is no other significant contact with the site other than the injury itself.”). See also *Rasmussen v. Uniroyal Goodrich Tire Co.*, No. 93C-04-058, 1995 WL 945556, at \*1 (Del. Super. Ct. Aug. 18, 1995) (“In deciding choice of law, Delaware courts apply the ‘most significant relationship’ test.”).

underlying *Klaxon* principle: that state choice-of-law rules are substantive law from which a federal court may not depart, at least while Congress has remained silent.

#### IV. A POSSIBLE SOLUTION

No current court's approach to direct filing and choice of law is satisfactory. This is understandable, both due to the inherent tension between mass-tort litigation and choice of law, and the underlying complexity and incoherence of federal personal-jurisdiction and choice-of-law doctrine. Following the letter of *Klaxon* and applying the choice-of-law rules of the MDL state to the potentially thousands of direct-filed cases is inconsistent with the policy underpinnings of both *Klaxon* and *Van Dusen*. But recognizing that following the *Klaxon* rule is problematic leaves a vacuum, one which the *Yaz* court filled by selecting choice-of-law rules without regard to the plaintiffs' choice of forum—a move also inconsistent with *Klaxon* and *Van Dusen*. This problem demonstrates how direct filing's attempts to consolidate more cases seamlessly in an MDL create complicated choice-of-law problems.

One solution to the dilemma might be to prohibit direct filing. This seems wrong, though, particularly when it would be preferable to preserve the efficiency benefits of direct filing to all parties and to reduce the pressures on the JPML as MDL becomes more prominent. As a procedural innovation, direct filing should be applauded, so long as any distorting downstream effects can be mitigated. Moreover, banning direct filing would be a rather extreme move, not only due to its popularity and efficacy, but also because personal jurisdiction and venue have long been deemed waivable defenses.<sup>289</sup> And, as the MDL process becomes more dominant, and transfer of tag-along cases into MDLs remains essentially a formality, there seems to be little reason not to streamline the procedure so long as the issues embedded in the choice-of-law problem can be ironed out.<sup>290</sup> Indeed, accommodating innovations like direct filing while also preserving competing litigation values ought to be a goal in developing hybrid aggregate-litigation schemes. Preserving direct filing as a practice, though, squarely presents the problems of what choice-of-law rules to apply to the direct-filed cases, and where to transfer the direct-filed cases should pretrial proceedings conclude.

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289 See *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704 (1982) (noting personal jurisdiction can be waived).

290 See Fallon, Grabill & Wynne, *supra* note 22, at 2357 n.16 (extolling some of the benefits of direct filing).

In my view, the best solution would be to require a direct-filing MDL plaintiff to declare in the complaint an appropriate “home venue” where the case could have otherwise been filed.<sup>291</sup> The MDL court should then apply the choice-of-law rules of the state where the case would otherwise have been filed, assuming that it is an appropriate venue. The benefit of this approach is that it would make direct filing neutral as to the choice-of-law rules that would otherwise apply—that is, do what the *Yaz* court was trying to do, but failed to accomplish. To do so would avoid replicating in MDL many of the complicated choice-of-law problems that plagued the class action. Ultimately, this solution would be straightforward in future cases, but could likely also be applied retroactively in currently pending MDLs by requiring plaintiffs to amend their complaints to include a proper home venue. Courts currently overseeing MDLs could enshrine choice-of-law neutrality as the rule in case-management orders.<sup>292</sup> Should defendants wish to challenge the plaintiff’s chosen “home venue” for lack of jurisdiction or improper venue, courts should establish a procedure that allows defendants to do so before answering the complaint, in a process akin to an objection under Rules 12(b)(2) or 12(b)(3).<sup>293</sup>

This approach is consistent with the structure of MDL, which proclaims to be an aggregation procedure that does not fundamentally

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291 One court has experimented with such a direct-filing order, but did not address the choice-of-law implications. In allowing direct filing, the court required the plaintiffs “to specify the proper venue of origin, as defined in 28 U.S.C. § 1391.” Pretrial Order No. 37, *In re* FEMA Trailer Formaldehyde Prods. Liab. Litig., MDL No. 07–1873, at 2 (E.D. La. Apr. 4, 2009). In other words, the court required the plaintiffs to specify the proper “venue of origin” to which the cases could be transferred at the close of pretrial proceedings. The order, however, says nothing about choice of law. When the problem eventually did arise, when the cases were set to be transferred to other districts, the court expressly refused to comment on the choice-of-law implications of direct filing, stating that “[t]he plaintiffs knew when they directly filed these claims in this [c]ourt that such direct filing could potentially affect their substantive rights[,]” but “the [c]ourt expressly makes no comment as to . . . the effect of such filing,” leaving the transferee court to sort it out. *In re* FEMA Trailer Formaldehyde Prods. Liab. Litig., MDL No. 07–1873, 2012 WL 1580761, at \*1 (E.D. La. May 4, 2012).

292 Defendants in these cases might challenge such an amendment, but courts will likely be within their power to effect the change because this is an issue of first impression in nearly all courts, and this approach is more consistent with the MDL statutory file-and-transfer scheme.

293 FED. R. CIV. P. 12(b)(2), (3). Although such objections might add a layer of process, MDL courts would be well equipped to issue decisions signaling the scope of jurisdiction to potential tag-along plaintiffs, similar to how MDL courts currently operate with respect to similar procedural issues, such as remand motions or fraudulent joinder.

change the character of the cases within it. Moreover, this solution is more consistent with the policies of *Klaxon* and *Van Dusen* than simply applying the letter of the *Klaxon* rule, and better avoids the problems associated with the “disinterested third state.”<sup>294</sup> First, the choice-of-law rules that apply would not be different from those that might apply were the MDL not to exist; rather the choice-of-law rules of a state where the action might have been brought individually will apply. This is consistent with *Klaxon* and *Erie* in that diversity jurisdiction will not change the choice-of-law rules otherwise applicable to a plaintiff’s case.

Second, a forum where personal jurisdiction and venue lie over the defendants is more likely to be sufficiently connected with the case to have an interest in applying its own law to the dispute. Unlike some nationwide class actions and MDLs where the lion’s share of cases are direct-filed,<sup>295</sup> the otherwise-proper individual forums where the cases are filed would be more likely to have constitutionally adequate contacts to assert legislative jurisdiction and apply their own laws to the case.<sup>296</sup> Whether that forum decides that its own law ought to apply to the case before it is a matter of state policy, as reflected in its choice-of-law rules—and it is this decision that is appropriately worthy of respect under *Klaxon*.<sup>297</sup> Taking this approach avoids replicating a problem common in nationwide class actions: leaving the decision of which law to apply to every plaintiff’s case with only one state, applying one set of choice-of-law rules.

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294 See *supra* Part III.A.

295 See Andrews, *supra* note 238, at 1331; Wood, *supra* note 238, at 623.

296 See Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 59–60 (1986) (explaining the impact of *Shutts* and the limits of a forum’s legislative jurisdiction in class actions).

297 See Cavers, *Changing Choice-of-Law Process*, *supra* note 11, at 736. The relationship between personal jurisdiction and legislative jurisdiction is complicated—they are almost certainly not co-extensive. Of course, it is possible that there might be personal jurisdiction, even though there is not legislative jurisdiction—that is, a state might be able to assert jurisdiction over the defendant but not be able to apply its own law. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981). MDL, however, exacerbates this problem—a result my solution seeks to prevent. Whether a state has legislative jurisdiction strikes me as a slightly different question from whether that state may apply its choice-of-law rules to a given dispute. Fully examining the implications of this distinction is beyond the scope of this paper, but it is an open question. One thing this paper seeks to accomplish is to begin a discussion of personal jurisdiction and choice of law in an era of MDL ascendancy. See Harold L. Korn, *Rethinking Personal Jurisdiction and Choice of Law in Multistate Mass Torts*, 97 COLUM. L. REV. 2183, 2184 (1997); Earl M. Maltz, *Visions of Fairness—The Relationship Between Jurisdiction and Choice-of-Law*, 30 ARIZ. L. REV. 751, 751 (1988).

Third, such an approach is consistent with *Van Dusen* in that the plaintiff's inclusion in a mass-tort proceeding within the federal system will neither change the law, nor deprive the plaintiff of the forum choice he otherwise would have made, knowing the choice-of-law implications.<sup>298</sup> Ultimately, a plaintiff's participation in an aggregated litigation should not alone change that plaintiff's substantive rights.<sup>299</sup> Although plaintiffs will still have a choice among forums—sometimes numerous forums—ensuring that there is not an additional possible set of choice-of-law rules available through direct filing means that any forum-shopping concerns linked to a plaintiff's venue privilege at least will not be exacerbated.<sup>300</sup> In other words, unlike creating a new set of choice-of-law rules for the federal courts, or offering a state forum that would otherwise be unavailable, this approach has no unique effect on forum shopping over a one-on-one litigation.

As a doctrinal matter, this approach is feasible, even though it would be an exception to the letter of the *Klaxon* rule. One might object that as long as *Klaxon* is on the books, MDL courts have no business departing from it, even if departing from the letter of the rule better preserves the policies underlying it.<sup>301</sup> This argument is powerful in light of Congress's persistent refusal to change the *Klaxon* rule in the context of mass torts and class actions.<sup>302</sup> But while it is true that the *Klaxon* rule remains solid in both the Supreme Court and Congress, direct filing is the appropriate situation for creating an

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298 See Trangsrud, *supra* note 182, at 86 (arguing that “[t]he evident purpose” of *Van Dusen* is “to avoid any impact on the likely outcome of the case due to the change of venue”).

299 See Kramer, *supra* note 4, at 578; Silberman, *supra* note 4, at 2034 (“The procedural tools of aggregation should not distort the underlying substantive rights of the parties. Courts should approach choice of law as they would in the paradigm individual case.”). My suggestion would also pair well with Congress revisiting the general transfer statute and *Ferens* to ensure that in cases where there is expansive personal jurisdiction, direct filing does not further entice plaintiffs to select the choice-of-law rules of the MDL forum and then seek to have the case transferred to a more convenient forum for trial. That said, my solution at least does not make the *Ferens* problem worse.

300 See Linda S. Mullenix, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 TEX. L. REV. 1623, 1646–47 (1992) (arguing that federal choice-of-law rules create an incentive for vertical forum shopping, in that “[f]ederalized choice-of-law standards, in the absence of federalized state choice-of-law, are a return to *Swift*—vintage forum-shopping opportunities” (footnote omitted)); Sedler, *supra* note 137, at 861.

301 Indeed, this is the argument many scholars make when rejecting federal common law choice-of-law rules in mass torts. See, e.g., Kramer, *supra* note 4, at 577 (“Congress should not overrule *Klaxon*.”).

302 See Silberman, *supra* note 4, at 2031 (“Congress has allowed the choice of law consequences to fall where they may.”).

exception by interpreting the MDL statute to require an antecedent choice of proper venue when direct filing.<sup>303</sup>

Indeed, such an exception to *Klaxon* pursuant to a federal procedural statute would not be unprecedented: *Van Dusen* was just such an exception. Strict application of the *Klaxon* rule in transfer cases would require the transferee court to apply the choice-of-law rules of the state in which it sits. *Van Dusen* interpreted the transfer statute to create an exception to the *Klaxon* rule on the ground that, assuming the original choice of forum was proper, a plaintiff's rights should not be affected by the use of a transfer device available only in the federal system.<sup>304</sup> A similar exception would be appropriate here, and consistent with *Van Dusen* and the MDL statute. Indeed, the MDL statute was designed to be a purely administrative device, not change the substantive law applicable to any component case. Ensuring that direct filing does not have that effect is consistent with the statute.

Support for my proposed framework may also be found in a similar exception courts have made to the *Van Dusen* rule when a case is originally filed in an improper venue and is transferred to a proper one under 28 U.S.C. §1406(a). In such a case, where the original venue is not one that would otherwise be authorized (because either venue or personal jurisdiction is inappropriate), the *Van Dusen* rule does not apply, and the transferee court is free to apply its own choice-of-law rules.<sup>305</sup> This line of cases confirms that an otherwise improper forum has no purchase on its choice-of-law rules applying to a given case.

The improper-venue analogy is not, however, a perfect one, because in direct filing the plaintiffs have agreed to file in the MDL court, and the defendants have, at least for purposes of pretrial proceedings, consented to jurisdiction there—in that sense, at least, the venue is proper. It is going too far, though, to say that consent to jurisdiction in the MDL court ought to be considered equivalent to consent to that state's choice-of-law rules, particularly in the current climate, where a rule has not yet been established and direct-filing

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303 Such a solution would also have the benefit of ensuring that the case had a proper venue to return should pretrial proceedings come to a close, or the plaintiff was not interested in agreeing to a negotiated global settlement.

304 *Van Dusen v. Barrack*, 376 U.S. 612, 637–39 (1964).

305 See *Gerena v. Korb*, 617 F.3d 197, 204 (2d Cir. 2010) (“If a district court receives a case pursuant to a transfer under 28 U.S.C. § 1406(a), for improper venue, or 28 U.S.C. § 1631, for want of jurisdiction, it logically applies the law of the state in which it sits, since the original venue, with its governing laws, was never a proper option.”); *Eggleton v. Plasser & Theurer Exp. Von Bahnbaumaschinen Gesellschaft, MBH*, 495 F.3d 582, 588–89 (8th Cir. 2007).

orders purport to have no effect of choice of law. At the very least, establishing a baseline rule would prevent unfair surprise to parties who, quite reasonably in cases like *Yaz*, expected that direct filing would not change their substantive rights. If nothing else, a plaintiff who is direct filing, and a defendant who agrees to the practice, ought to know what the effect will be. It is untenable for case-management orders to continue to state that direct filing will have no effect on choice of law when it is now clear that is not the case.

Also, courts could easily adopt the neutrality rule as part of a case-management order establishing direct filing. There is nothing in *Klaxon* that would bar an MDL court crafting a direct-filing stipulation to require that the choice-of-law rules of the state where the action would otherwise have been filed should apply. If nothing else, the *Yaz* case and the numerous other large current MDLs involving direct-filing stipulations demonstrate that the time has come for a baseline rule resolving the question of what state's choice-of-law rules apply to direct-filed cases. In *Yaz*, the lack of a defined rule led to a potential change in the governing law in many cases, despite the direct-filing stipulation's stated goal of having no effect on choice of law.<sup>306</sup> Going forward, there should be a rule that allows parties to decide effectively whether to take advantage of a direct-filing stipulation. If uncertainty persists, plaintiffs may forgo direct filing in order to ensure the application of their preferred set of choice-of-law rules, preventing the full benefit of the direct-filing process. One virtue of my proposed solution is that it delinks direct filing from choice of law—that is, direct filing does not have any choice-of-law impact. This approach is not only consistent with the view of MDL as a collection of otherwise independent actions but also consistent with *Klaxon* and *Van Dusen*.

Given, however, that direct filing is instituted by case-management orders to which defendants must stipulate, a reasonable next question might be whether MDL courts should allow parties to stipulate to different arrangements in direct-filing orders, or whether a different rule would be preferable. As a doctrinal matter, there is nothing that would currently prevent MDL courts from allowing such different arrangements.<sup>307</sup> Certainly, case-management orders that

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306 *In re Yasmin and Yaz Mktg., Sales Practices, and Prods. Liab. Litig.*, No. 3:90-md-02100-DRH-PMF, 2011 WL 1375011, at \*5 (S.D. Ill. Apr. 12, 2011).

307 Such an arrangement has been stipulated to in the MDL involving the Yamaha Rhino all-terrain vehicle. The parties included in the direct-filing stipulation that direct filed cases would be governed by the choice-of-law rules of the place of the injury or the place of plaintiff's domicile—at the election of the plaintiff. Case Management and Scheduling Order No. 2, *In re Yamaha Motor Corp. Rhino ATV Prods. Liab. Litig.*, MDL No. 2016, No. 3:09-MD-2016-JBC, at 1 (W.D. Ky. Jul. 27, 2009). In

specify the choice-of-law rules to be applied to direct-filed cases—whatever they might be—would be a significant improvement over orders that say nothing about choice of law, and therefore risk unfair surprise to plaintiffs, as in *Yaz*. If the applicable choice-of-law rules were specified, the plaintiff would know in advance the effects of direct filing and could choose not to do it.<sup>308</sup>

But there are reasons courts should be wary of establishing a direct-filing procedure that strays from choice-of-law neutrality. First, direct filing is a beneficial innovation for all parties and the courts in terms of administration of the MDL. Its availability should not depend on the particularities of a given case or the rules of the state in which the MDL is established. One could imagine defendants—who agree to institute the practice before the thousands of additional tag-along cases are filed—stipulating only to choice-of-law rules especially advantageous to them as part of direct filing. Moreover, one could imagine plaintiffs facing the decision of whether to exchange otherwise beneficial choice-of-law rules for the benefits of direct filing, a problem which persists in class actions, particularly when there is a possibility that lawyers would prefer administrative simplicity.<sup>309</sup> There is also the possibility that such a non-neutral agreement would

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general, courts would be better off preferring my proposed solution because it complies best with the *Van Dusen* policy of ensuring that inclusion in a mass tort litigation is choice-of-law neutral, and does not present a risk that plaintiffs will face a choice between administrative simplicity and beneficial law. In the *Rhino* litigation, in order for plaintiffs to get the benefit of direct filing they must give up the choice-of-law rules of other possible forums, such as the home state of the defendant. As a matter of disclosure, I was part of the team representing Yamaha in the *Rhino* litigation and first became interested in these issues then.

308 One could object that my proposed solution is not neutral as between a one-on-one litigation and an aggregated litigation because in a one-on-one litigation a disinterested forum to which the parties have consented will still apply its own choice-of-law rules. This is a potent objection, and it raises the complex problem of what rules a disinterested forum ought to apply. Indeed, this problem was so knotty that neither Currie nor Cavers developed a solution they deemed satisfactory. In their view, the problem was mostly theoretical and rarely came up in practice. See Cavers, *supra* note 11, at 737; Currie, *supra* note 25, at 785. Although this paper does not suggest an ultimate solution to the problem in one-on-one litigation, I believe that the appropriate solution, as a matter of choice of law, probably involves *renvoi*. That is, a disinterested third state should look to the choice-of-law rules of the interested states to decide if there is a conflict. See Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 982–83 (1991) (“To the extent that a foreign system defines the scope of the foreign state’s law, the court should accept the *renvoi*.”). Kermit Roosevelt sketches out a promising approach to the problem, grounded in *Klaxon* principles. See ROOSEVELT, *supra* note 3, at 160.

309 See Trangsrud, *supra* note 18, at 821 (“The individual plaintiff also runs the risk that the representative plaintiffs in a class action will elect to proceed on liability theo-



allow an additional set of choice-of-law rules to apply, which might unnecessarily create an additional forum-shopping opportunity, for both sides. In the end, the decision whether to agree to direct filing, or to choose to directly file a case should not be affected by choice-of-law considerations.

Beyond potential concerns about distortions, retaining a choice-of-law-neutral approach to direct filing avoids replicating the *Klaxon*-related federalism concerns inherent to applying a single set of federal choice-of-law rules to a potentially nationwide set of cases. It is one thing to say that parties may waive the advantages of an alternative forum by consenting to jurisdiction in an otherwise unavailable court, but another to say that parties, with courts' encouragement, should be able to override the choice-of-law rules of every other state with a regulatory interest in governing disputes.<sup>310</sup> As *Cavers* recognized, taking *Klaxon* seriously requires respect for states' policy choices when their laws are potentially implicated in a given dispute.<sup>311</sup> The rise of federal aggregate litigation demonstrates that the problem is not purely theoretical, but it need not be exacerbated if it can be avoided, particularly if the increased prevalence of the problem is created by the aggregation device itself. That is, the reason the parties are flooding disinterested forums is because of direct filing. Rather than create an unnecessary complication, all the better to accommodate the innovation by adopting a neutral and more coherent practice.

Moreover, this solution allows MDL courts to take advantage of the benefits of direct filing without causing increased choice-of-law confusion in the administration of cases. There is no doubt that the *Klaxon/Van Dusen* system causes a headache for MDL courts, a headache Congress repeatedly refuses to cure by enacting national choice-of-law rules.<sup>312</sup> Although different choice-of-law rules, or substantive laws for that matter, do not prevent aggregation in an MDL, as they have come to in the class action, they do present managerial problems for courts.<sup>313</sup> That said, these problems do not seem to have inhibited terribly the effective administration of MDLs—my proposed solution

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ries better suited for class treatment at the expense of theories especially favorable to the individual plaintiff.”); Silberman, *supra* note 4, at 2030.

310 See Kane, *supra* note 10 at 320 (“[I]dentifying a single governing law presents a direct collision between individual state interests and judicial system interests. . . . [That] may be challenged as inappropriately intrusive on historic federalism interests and the rights of states to establish and enforce their own policy decisions.”).

311 See *supra* Part I.B.

312 See Barbara Ann Atwood, *The Choice-of-Law Dilemma in Mass Tort Litigation: Kicking Around Erie, Klaxon, and Van Dusen*, 19 CONN. L. REV. 9, 19–20 & n.46 (1986).

313 See *id.* at 11; Kane, *supra* note 10, at 313.

does not reduce manageability and preserves the benefits of direct filing, and state autonomy in choice of law. It is certainly true that any solution which applies different choice-of-law rules to different cases requires a tradeoff in terms of manageability, but manageability must be weighed against other competing values.

Indeed, this solution would not have made the choice-of-law analysis in the *Yaz* case any more complicated. The *Yaz* court ultimately decided that it would have to follow the Second Restatement's flexible test with respect to every case in the MDL.<sup>314</sup> Assuming the court had followed this framework from the outset of the case, it would have been clear what state's choice-of-law rules applied to the component cases in the MDL. The solution I advocate would require only the additional step of determining the choice-of-law rules of the hypothetical state of filing and applying them.<sup>315</sup> In deciding matters with respect to individual cases, there would be no uncertainty. The specific question the *Yaz* court was dealing with, attorney-client privilege, creates a set of additional problems, but proper application of the law that would apply to individual cases leaves the defense no worse off due to consolidation.

There is also reason to believe that application of the *Klaxon/Van Dusen* system will not be a major impediment to the resolution of MDLs in the era of bellwether trials. In a system where MDL courts are trying a variety of cases in order to allow the parties to test their arguments to lay the foundation for global settlement, applications of choice-of-law rules will occur most in those individual cases. The *Klaxon/Van Dusen* framework is a strong fit for those analyses, because the inclusion of the cases in the MDL does not alter the substantive law that would otherwise apply.

This is not to say, of course, that choice-of-law rules are of little significance. Rather, choice-of-law rules not only affect the results of the bellwether trials, but also the settlement value of the rest of the cases in the MDL. Even in a globally settled case, parties ought to know what law applies to claims when deciding whether to accept the settlement, and to what forum the case will be transferred. And, as the *Yaz* case illustrates, there are still numerous occasions when broader applications of state law are necessary.

In the end, direct filing is a useful innovation that provides efficiencies to all parties and the federal litigation system and should be a

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314 *In re Yasmin and Yaz Mktg., Sales Practices, and Prods. Liab. Litig.*, No. 3:90-md-02100-DRH-PMF, 2011 WL 1375011, at \*8 (S.D. Ill. Apr. 12, 2011).

315 This is less of a substantial burden in the age of Westlaw and Dean Symeonides's fifty-state survey of choice-of-law rules. SYMEONIDES, *supra* note 35, at 64.

regularly available feature in MDL, especially as MDL becomes even more prominent. There is no reason to threaten the benefits of direct filing by entangling it with choice of law. Making direct filing choice-of-law neutral best preserves these benefits without overcomplicating MDL procedure or confronting unnecessary choice-of-law difficulties.

#### CONCLUSION

Multidistrict litigation has largely overtaken the class action as the primary vehicle for aggregating mass-tort cases in the federal courts. One significant reason for this shift is that the MDL process can achieve a high degree of aggregation without pressure to override the differences in individual cases. Unlike nationwide class actions, which federal courts have agreed must be governed under a single state's law in order to be sufficiently cohesive and manageable to be certified, MDL allows cases to retain their individual identities within a larger aggregate litigation. Moreover, MDL relieves the pressure to resolve every case within the aggregate under a single state's choice-of-law rules. This shift is an improvement as a matter of choice of law, federalism, and litigant autonomy, without creating an unbearable loss in efficiency. In sum, the fact that an MDL can be "choice-of-law-neutral" with respect to each individual plaintiff represents an advance, and demonstrates how hybrid approaches to aggregation like MDL can effectively accommodate competing litigation values.

As this paper has illustrated, however, this balance is tenuous—with overemphasis on efficiency comes potential increased confusion in choice of law. One example of this has been the uncertain choice-of-law implications of the increasingly prevalent practice of direct filing in MDL. This practice, which affects thousands of cases in some of the largest currently pending litigations in the country, presents troubling practical and conceptual choice-of-law problems. Courts have divided as to the appropriate solution, and no current approach is satisfactory. Ultimately, direct filing is an innovation beneficial to all parties and the MDL system. Courts ought to ensure the benefits of direct filing by delinking the practice from choice of law. To do this, courts should require direct-filing plaintiffs to declare an appropriate home forum in which the case would otherwise have been filed, and to which it would be transferred should pretrial proceedings conclude. The MDL court should apply the choice-of-law rules of this declared home forum to the plaintiff's case. This solution is both possible and workable and ought to be adopted by MDL courts in both pending and future litigations. By making direct filing choice-of-law neutral, MDL courts can prevent the distortions direct filing currently causes while preserving the benefits of this procedural innovation.