Multidistrict Litigation & Choice of Federal Law

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ABSTRACT

Multidistrict litigation (MDL) is a procedural mechanism that consolidates federal civil cases from around the country into one federal district for pre-trial proceedings. Congress enacted MDL by statute in 1968 in response to a substantial influx of cases, and MDL represents a large portion of the federal civil docket today. MDL creates tricky choice of law questions, however, because cases are often filed in one district and then transferred to another through consolidation. Should a judge handling an MDL apply the state and federal law that the original court would apply or should he apply the law of his own district? This Comment argues that the MDL court should apply the federal law of the original, transferor court because such a rule would protect plaintiff autonomy and limit inconsistencies once cases are remanded back to their original district for trial.

I. INTRODUCTION

Normally, in the course of civil litigation, there are certain procedural formalities and consistencies that parties can expect. This includes standards such as a proper and convenient forum as well as the application of a particular body of law. Not so in multidistrict litigation (MDL), where individual actions from around the country are consolidated into one district court in the name of efficiency only based on common questions of fact.¹ In that MDL court, the district court judge rules on all dispositive motions during pretrial proceedings until the action is remanded for trial. A plaintiff suing over a defective medical device in Idaho could suddenly have their case transferred to Louisiana with little to no input from the plaintiff’s attorney, all because other plaintiffs around the country filed their own complaints related to the same medical device.

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Today, MDL is an important judicial efficiency mechanism consolidating thousands of actions that may otherwise overwhelm an already overburdened federal civil docket, but it also creates procedural inconsistencies and limits plaintiff autonomy. One such inconsistency is the choice of law applied in an MDL. Since individual actions in an MDL are often filed in one district and then transferred to another district for consolidation, the law to be applied can often be vastly different between the transferor court and the transferee court. This in turn has a substantial effect on the plaintiff’s ability to choose and predict what law will govern their action, given that they originally chose a different forum.

A change in law can occur with both state and federal law, depending on the state and circuit of the district court when an action is transferred. Federal courts are left to grapple with which body of law to apply in these unique situations. When considering state law claims, it is well settled that the transferee MDL court must apply the state law of the original, transferor court. In this sense, the applicable law will not change after transfer—despite handling many consolidated cases in an MDL, the district court judge must still apply the state law of the original forum for each individual action. When it comes to issues of federal law, however, the current rule is that the circuit law of the transferee court will apply. This means that parties will face the law of the transferee MDL court’s circuit rather than the law of the original, transferor circuit during pretrial proceedings.

The application of the transferee court’s federal law to transferred MDL cases creates a situation in which one circuit’s law applies during pretrial proceedings while another circuit’s law applies during and after trial, creating substantial confusion for parties. This Comment will first discuss the text and history of the MDL statute as well as the Supreme Court’s jurisprudence concerning MDL. Both say little about choice of law directly but provide important context for how Congress and the Court have set up and interpreted MDL. Then, this Comment will discuss the current choice of law doctrine for transfers, both in MDL and non-MDL contexts. While the Supreme Court has not addressed choice of law in MDL, it has addressed choice of law for permanent transfers, finding on multiple occasions that the law of the transferor court

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3 See In re Temporomandibular Joint (TMJ) Implants Products Liab. Litig., 97 F.3d 1050, 1055 (8th Cir. 1996).

applies, rather than that of the transferee court. The Court’s holdings here provide further insight on how the Court considers transfers generally.

Lastly, this Comment will argue that MDL courts should apply the federal circuit law of the original, transferor court, and furthermore, that any appeals during pretrial proceedings should be appealed directly to the transferor court’s circuit. This rule would preserve the autonomy of plaintiffs to have their actions heard under the law of the jurisdiction they originally filed in, as well as allow circuits to review decisions based on their own interpretation of federal law. Before concluding, this Comment offers a brief case study applying these proposed rules.

II. HISTORY AND PROCEDURE OF MDL

MDL is a judicial efficiency mechanism that consolidates cases that contain one or more common question(s) of fact from federal district courts around the country into a MDL court.5 There is no precise qualitative or quantitative test for determining how many common questions of fact are sufficient, but the Judicial Panel on Multidistrict Litigation (JPML), the panel that handles MDL transfer decisions, has stated that these questions of fact should be “complex, numerous, unresolved, and unique.”6 While the number and nature of common questions of fact in MDL can vary, some common examples include price fixing antitrust violations by a large number of corporate defendants and mass products liability suits over the same medical device or drug.7

MDL was enacted by statute in 1968.8 This statute, 28 U.S.C. § 1407, allows a party in any civil action to file a motion for transfer to an MDL.9 Before an MDL exists, a party may petition for a group of cases to be consolidated into an MDL, or the JPML can consider consolidation on its own initiative.10 Once an action is transferred to an MDL,

6 Margaret S. Williams & Tracey E. George, Who Will Manage Complex Civil Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation, 10 J. OF EMPIRICAL LEGAL STUD. 3 424, 437 (2013).
7 See Calendar Year Statistics, U.S. JUD. PANEL ON MULTIDISTRICT LIT., https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2021.pdf [https://perma.cc/24RE-J5QN] (last visited May 10, 2023). While cases of diverse subject matters are filed into MDLs, antitrust and products liability predominate, making up almost 60% of MDLs. This figure, however, only considers the number of MDLs total, rather than the number of actions within each MDL. Products liability MDLs represent a significant portion of total actions in MDLs, with some containing thousands of individual actions.
10 Id.
the MDL judge will decide on all dispositive motions until trial, at which point the action will be remanded to its original transferor court. Parties may choose to litigate their action in the MDL court if they both agree, but the statute otherwise requires remand. It is typically more convenient for a plaintiff to conduct trial in the original, transferor forum because it requires less travel, and relevant evidence is often near that forum as well.

MDL was enacted in response to a large influx of mass tort and antitrust cases flooding the federal judiciary in the early 1960s. The most notable group of cases at the time was referred to as the “Electrical Equipment” cases, where more than a thousand antitrust allegations were filed against electrical equipment manufacturers across the country in 1962. Of the 2,079 antitrust cases filed in federal courts that year, all but 340 were Electrical Equipment cases. During discovery, the same specified pool of defendant officials were deposed, creating chaos for both district courts and defendants as the same individuals were deposed over and over again. MDL responds to this issue of mass litigation by consolidating cases for pretrial proceedings before remanding them back to their original court for trial.

Section 1407 established the JPML to handle potential transfers to MDL cases. This Panel is composed of seven federal district and appellate judges chosen by the Chief Justice of the United States. The JPML reviews potential transfers and decides whether the case will be transferred or remanded back to its original district court. A four-member majority is required to make any decision. The JPML also chooses the district and judge that will handle the MDL. It considers factors such as the judge’s previous experience with MDL, the proximity of the district to relevant evidence such as witnesses and the location where the events took place, and the condition of the transferee court’s docket. The operative question, however, is whether the transfer will

11 Id.
14 Id.
15 Id.
increase efficiency for parties and for the court. An MDL transfer can be initiated by a plaintiff, defendant, or the panel itself, and transfer can be to any district in the country. As of October 2022, there are 147 district judges handling MDL cases in forty-four transferee districts.

What started as a judicial efficiency mechanism designed to handle particular controversies with many individual actions, has turned into a centerpiece of the federal civil docket. As of 2018, multidistrict litigation constituted 51.9% of pending federal civil cases. As of 2018, there were 156,511 individual actions contained in 248 consolidated MDL cases. Although MDL represents a viable solution to the problems created by mass litigation overwhelming the federal judicial system, it presents unique questions of civil procedure considering the sheer number of actions and the way that MDL transfers occur. Complicated issues of personal jurisdiction and choice of law arise due to the change in district, with little guidance from the statute itself. One professor, David Noll, has argued that MDL is a practice of “public administration” that combines aspects of both litigation and the administrative state, rather than a simple extension of standard litigation.

Existing legal scholarship criticizes MDL in a variety of procedural contexts. One important consequence of the concentration of so many cases is the loss of agency for plaintiffs and their attorneys. Unlike a class action, participation in an MDL is mandatory if the JPML orders transfer. Moreover, every individual action in an MDL theoretically has a “positive value” claim, meaning it can stand on its own as an individual action, whereas not every member of a class action has to satisfy this condition. Therefore, a plaintiff who might have a substantial claim on his own may be consolidated with other plaintiffs and lose the ability to pursue his individual claim. Parties can object to transfer with the JPML, but this rarely succeeds. After an MDL is formed, some plaintiffs choose to file “tag-alongs,” which are cases filed with the

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20 Id.
21 Id.
23 See Wittenberg, supra note 2.
24 Id.
26 See Redish & Karaba, supra note 19, at 111.
27 See id.
28 See id.
29 Id.
intention of joining the MDL. Some of these tag-alongs may not possess a positive value claim on their own, but that does not change the reality that meritorious cases can be transferred to an MDL without the consent of the plaintiff.

Plaintiff autonomy is further eroded by the practice of plaintiff steering committees, where an MDL judge appoints the attorneys of specific plaintiffs to represent all plaintiffs in the MDL. MDL judges have considerable flexibility in choosing these attorneys and often resort to picking the same repeat players who may not adequately advocate for all plaintiffs. These plaintiffs’ attorneys often engage in self-enriching acts by obtaining large common-benefit fees from repeat defendants in exchange for favorable terms. Plaintiff steering committees and the mandatory transfer of positive value claims exacerbate the threats to plaintiff autonomy already presented by choice of law because attorneys not on these steering committees will have little say in the law applicable to their case changing without their consent.

III. CURRENT LAW ON MDL AND OTHER TRANSFERS

A. Section 1407: The MDL Statute

This section analyzes the text of the MDL statute, § 1407. The statute may not provide explicit guidance on choice of law, but it is discussed here to demonstrate the nature of MDL and the role of the MDL judge in proceedings. Section 1407(a) states that civil actions containing one or more common questions of fact “may be transferred to any district for coordinated or consolidated pretrial proceedings.” It adds that “each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred.” The statute makes clear that the purpose of MDL is to consolidate cases specifically for pretrial proceedings. Additionally, the fact that each action is then remanded back to its original district demonstrates the fundamental limits of MDL: the court that will ultimately try the case will be the district court in which the case

31 See id. Some tag-alongs are filed in the district they would have been filed in had the MDL not existed, while others are filed directly in the MDL itself, known as direct filing.
32 Some tag-alongs might not have a positive claim on their own because tag-along plaintiffs may not have filed without the existence of the MDL. This way, plaintiffs can take advantage of global settlements in the MDL that they would not have gotten otherwise.
34 See id. at 1449.
35 See id. at 1451.
37 Id.
MDL thus acts as a mechanism for judicial efficiency in the pretrial phase, rather than a mechanism for permanent transfer.

The text of the statute provides little guidance regarding choice of law. Most sections of the statute outline the mechanics and procedures of MDL, including the composition of the JPML as well as how transfer proceedings are handled. Section 1407(b), which discusses how an MDL district and judge are assigned, states that an assigned MDL judge “may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.” On its face, this section merely helps to facilitate the acquisition of evidence through depositions that may not occur in the MDL judge’s district, but it also demonstrates that a judge’s authority as an MDL judge is not limited to his home district. The only real relevance of an MDL judge’s physical district is the efficiency it creates, rather than the deliberate choice of a particular venue.

B. The Supreme Court’s MDL Jurisprudence

The Supreme Court has only addressed MDL in two cases, *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach* and *Gelboim v. Bank of America Corp.* *Lexecon* and *Gelboim* do not directly address issues pertaining to the choice of federal law in MDL, but they provide guidance into the nature of MDL and inform the statutory interpretation of § 1407. It is important to consider when and how the Supreme Court has addressed issues in MDL because not only is it the ultimate appellate court, it also is the ultimate determiner of the meaning of federal laws, such as § 1407. Although the Court’s lack of attention to choice of federal law in MDL leaves some ambiguity, its MDL jurisprudence nevertheless provides guidance.

The Supreme Court confirmed that MDL actions must be remanded back to their original district after pretrial proceedings in *Lexecon*. More specifically, the Court denied that the transferee court could reassign the case to itself for trial under § 1404(a), emphasizing that the obligation to remand could not be read out of the statute. Decided in 1998, thirty years after § 1407 was enacted, *Lexecon* was the

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38 See *id.*
39 Id.
41 See Redish & Karaba, *supra* note 19, at 120.
44 See *Lexecon*, 523 U.S. at 36.
45 See *id.*
first time the Supreme Court directly addressed MDL.\textsuperscript{46} This case reaffirms that the court which ultimately has jurisdiction over each action is the original district court in which it was filed.\textsuperscript{47} Some plaintiffs file their actions directly into an MDL, and for these plaintiffs the \textit{Lexecon} rule is irrelevant.\textsuperscript{48} Other plaintiffs, however, file in a district other than the MDL district where personal jurisdiction and venue are proper.\textsuperscript{49} For these plaintiffs, the \textit{Lexecon} rule has important implications. Transfer to an MDL may mean a plaintiff's case is whisked away to an unknown and inconvenient forum with potentially unknown law. Even if many MDL cases are settled before remand, the fact that the Supreme Court addressed this issue at all demonstrates that remand can be consequential to the outcome of the plaintiff's case. Moreover, one of the purposes of pretrial proceedings is to determine whether a case should proceed to trial, so the ultimate venue of trial is relevant when considering the nature of transferred MDL actions.

The other Supreme Court case involving an MDL issue is \textit{Gelboim}, in which the Court ruled that when all issues pertaining to an individual action in an MDL are resolved, that action becomes immediately appealable despite other actions remaining in the MDL court.\textsuperscript{50} The Court emphasized that "cases consolidated for MDL pretrial proceedings ordinarily retain their separate identities" and that "[s]ection 1407 refers to individual ‘actions’ which may be transferred to a single district court, not to any monolithic multidistrict ‘action’ created by transfer."\textsuperscript{51} This assertion clarifies that an action does not lose its identity as a separate, individual action when it is transferred to an MDL.\textsuperscript{52} This sentiment demonstrates that transfer does not alter the character of an action and thus that the jurisdiction of the action remains in the original district, not in the MDL court. The Court emphasized that transfer to an MDL district serves to "eliminate duplication in discovery, avoid conflicting rulings and schedules, reduce litigation cost, and save the time and effort of the parties," not to fundamentally alter the nature of the action itself.\textsuperscript{53}

\textsuperscript{46} Id.
\textsuperscript{47} See id.
\textsuperscript{48} See Bradt, supra note 30, at 795.
\textsuperscript{49} \textit{Lexecon}, 523 U.S. at 36.
\textsuperscript{51} Id. at 406.
\textsuperscript{52} See id.
\textsuperscript{53} Id. at 410 (citation omitted).
C. Choice of State Law and Transfer in Federal Courts

While the Supreme Court has not yet addressed choice of law in the MDL context, it has addressed choice of law in other transfer contexts. This section discusses two of the Court’s decisions regarding choice of law in permanent transfers, which provide insight into the Court’s thoughts regarding choice of law issues in transfers more broadly. In *Van Dusen v. Barrack*, the Court considered which state law to apply when a permanent transfer is made under § 1404(a). Section 1404 is a change of venue statute that allows a party to request a transfer “for the convenience of parties and witnesses.” Parties seeking transfer under this statute do so because the new forum is more convenient. As a result, transfers under § 1404 are permanent, as opposed to transfers to MDLs under § 1407. The Court in *Van Dusen* held that the law of the transferor district’s state applied to the case after permanent transfer initiated by a defendant, characterizing a change of venue under § 1404(a) as simply a “change in courtrooms.”

The opinion makes clear, however, that the *Van Dusen* holding was confined to diversity cases where transfer was sought by the defendant. This distinction demonstrates the difference between a request for a change in venue by a defendant and a plaintiff. The Court was concerned with defendants forum shopping for more favorable state law by requesting a transfer. When a defendant requests a transfer for reasons of efficiency and cost under § 1404, the plaintiff retains the right to have their case heard under the law of the state in which they brought their case without interference from the defendant. Where a plaintiff requests a transfer, however, this issue does not exist because they are voluntarily changing the forum in which their case is heard. The concern of defendant forum shopping espoused by the *Van Dusen* Court, however, can be seen again in the MDL context. A plaintiff may file their case in one district, only for the defendant to seek more favorable law in an MDL. Although the JPML ultimately decides where an MDL will be assigned, the Panel relies on the parties’ attorneys for

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55 See id. at 615.
57 *Van Dusen*, 376 U.S. at 636.
58 See id. at 640.
60 See id.
relevant information, providing ample opportunity for the defense attorneys to lobby for a particularly favorable forum.\textsuperscript{62}

The Supreme Court extended the \textit{Van Dusen} rule to permanent plaintiff transfers in the case \textit{Ferens v. John Deere Co.}.\textsuperscript{63} The Court in \textit{Ferens} considered whether the transferor court’s state law would apply after a permanent transfer under § 1404(a) was initiated by the plaintiff, rather than the defendant.\textsuperscript{64} The opinion discussed at length the purpose and limits of the rule in \textit{Van Dusen}, citing the prevention of forum shopping as an important concern for the rule.\textsuperscript{65} If defendants were allowed to change venue under § 1404(a) and obtain a more favorable choice of law, it would defeat the primary purpose of § 1404(a) as an efficiency mechanism.\textsuperscript{66} The Court argued that the same concern does not exist for plaintiffs; a plaintiff has already effectively forum shopped by choosing an appropriate venue with favorable law, so the same forum shopping concerns that a potential change in venue presents do not exist.\textsuperscript{67} As a result, the Court held that the state law of a transferor court will still apply after a plaintiff’s transfer under § 1404(a).\textsuperscript{68}

The problem with this extension of \textit{Van Dusen}, however, is that it provides plaintiffs with an additional opportunity to game the system. A plaintiff could file his case in a district with more favorable law only to transfer the case under § 1404(a) to a district where the location is more convenient, all while retaining the favorable law of the transferor district. As such, \textit{Ferens} ironically allows plaintiffs to forum shop not only for more favorable law, but also for a more convenient venue. Importantly, concerns with the \textit{Ferens} rule are not present when considering choice of federal circuit law in MDL. The problem with applying the transferee circuit’s law is that defendants, rather than the plaintiff, may try and forum shop for favorable law. As such, choice of circuit law in MDL is akin to \textit{Van Dusen}, where the defendant is seeking transfer.\textsuperscript{69}

\textsuperscript{62} See Redish & Karaba, \textit{supra} note 19, at 120.
\textsuperscript{63} 494 U.S. 516 (1990).
\textsuperscript{64} See \textit{id.} at 527.
\textsuperscript{65} See \textit{id.}.
\textsuperscript{66} See \textit{id.}.
\textsuperscript{67} See \textit{id.}.
\textsuperscript{68} See \textit{id.} at 528.
\textsuperscript{69} While it is true that transfer to an MDL is not solely requested by defendants, choice of law concerns are only present when defendants request transfer. As discussed previously, a plaintiff may file with the intention of joining a pre-existing MDL, but forum shopping for the transferee district’s law is not an issue here because that forum is pre-determined. Moreover, support and opposition of MDL are typically divided between defense counsel and plaintiffs’ counsel, respectively. Danielle Oakley, \textit{Note, Is Multidistrict Litigation a Just and Efficient Consolidation Technique? Using Diet Drug Litigation as a Model to Answer this Question}, 6 NEV. L.J. 494, 494 (2005-2006).
D. Current Choice of Law Rules in MDL

In the state law context, federal courts have routinely held that the transferor court’s state law will still be applied when an action is transferred to an MDL case.70 One of the most prominent examples of this rule is In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979,71 in which the Seventh Circuit, citing Van Dusen, stated that the state law to be applied in pre-trial proceedings was that of the district where the case was originally filed.72 The Eighth Circuit agreed in In re Temporomandibular Joint (TMJ) Implants Products Liability Litigation,73 noting that “the transferee court must apply the state law that would have applied to the individual cases had they not been transferred for consolidation.”74

The seminal case regarding choice of federal circuit law in MDL was the case In re Korean Air Lines Disaster of Sept. 1, 1983,75 where the D.C. Circuit considered which circuit’s law to apply to the individual actions in an MDL case consolidated in the District of D.C.76 The case involved several wrongful death actions filed in district courts around the country related to the destruction of a Korean Airlines plane over the Sea of Japan.77 A major issue in the case was whether to apply a $75,000 compensatory damages cap for each individual claim. If the district court had applied the precedent of other circuits, it would have found no cap in certain cases, but the D.C. district court ignored other circuits and decided on its own to apply the cap.78

In the appeal that followed, the D.C. Circuit concluded that the district court’s decision was a valid exercise of their interpretation of federal law, meaning it did not have to apply the law of the transferor circuit.79 Then Judge Ginsburg argued that a “transferee court [should] be free to decide a federal claim in the manner it views as correct without deferring to the interpretation of the transferor circuit.”80 This idea is known as the principle of competence, which posits that federal law, as

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70 In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 644 F.2d 594, 610 (7th Cir. 1981).
71 Id.
72 Id.
73 97 F.3d 1050 (8th Cir. 1996).
74 Id. at 1055.
75 829 F.2d 1171 (D.C. Cir. 1987).
76 Id. at 1175.
77 See id. at 1172.
78 See id. Although a damages cap determination may seem out of place for pre-trial proceedings, the plaintiffs had sought a determination regarding limitations on liability in the case.
79 See id. at 1174.
80 Id.
a unitary body of law, should be interpreted by a federal judge without reference to the transferor court. In reaching her conclusion, Judge Ginsburg considered whether to extend the rule in Van Dusen to federal law issues. She distinguished the two cases, arguing that concerns of federalism exist in the state law context, like in Van Dusen, that do not exist in the federal law context, given that federal law is assumed to be unitary.

Since its decision in 1987, Korean Airlines has been considered the accepted rule for choice of federal circuit law. Only half of the circuits have addressed choice of federal law, though. Moreover, several of these circuits have only dealt with this issue in the non-MDL transfer context. The only other circuits to affirm this rule specifically in the MDL context are the Eighth Circuit in In re Temporomandibular Joint Implants Products Liability Litigation and the Second Circuit in Menowitz v. Brown. This clarification is important because of MDL’s unique policy and choice of law concerns that are not present in other contexts. Although Judge Ginsburg’s opinion set forward several arguments, the other circuits have only cited her principle of competence, arguing that each federal judge is entitled to apply the law of their own circuit, rather than the circuit law of the transferor court.

E. Challenges to the Rule in Korean Air

Given that the choice of law rules for state law and federal law in MDL arrive at opposite conclusions, it is important to distinguish how state and federal law operate differently in an MDL. The key difference, as articulated in Korean Air, is that changing the applicable state law to a case would change which body of law applies entirely. On the other hand, federal law is a singular, unitary body of law. In practice, though, federal law often lacks one unitary meaning or interpretation. Circuit splits exist and can result in much different interpretations of

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81 See id. at 1174.
82 See id.
83 See id.
84 See Ragazzo, supra note 59, at 705
85 See AER Advisors, Inc. v. Fidelity Brokerage Services, LLC, 921 F.3d 282, 288 (1st Cir. 2019); Murphy v. F.D.I.C., 208 F.3d 959, 966 (11th Cir. 2000); Newton v. Thomason, 22 F.3d 1455, 1460 (9th Cir. 1994); Menowitz v. Brown, 991 F.2d 36, 40 (2nd Cir. 1993); See In re Temporomandibular Joint (TMJ) Implants Products Liability Litigation, 97 F.3d 1050, 1055 (8th Cir. 1996).
86 The First, Ninth, and Eleventh Circuits have only addressed choice of federal law in the § 1404(a) transfer context.
87 991 F.2d 36 (2nd Cir. 1993).
88 Id. at 40; In re Temporomandibular Joint Implants Products Liability Litigation, 97 F.3d at 1055.
federal law. As Professor Robert Ragazzo notes, the Circuit whose interpretation of federal law is applied can have practical implications on a case, so the depiction of federal law as unitary is an oversimplification of a much more complex system.\textsuperscript{90}

The most comprehensive argument against \textit{Korean Air} was written by Professor Ragazzo.\textsuperscript{91} Primarily relying on the argument that the federal circuit law to be applied is a matter of hierarchy, rather than that of competence,\textsuperscript{92} Professor Ragazzo argues that because the transferor circuit is the appellate court that will ultimately review the decisions made in a case after trial, the appellate model requires the application of the transferor circuit’s law.\textsuperscript{93} He also distinguishes between permanent transfers and MDL transfers, the latter of which will ultimately be remanded.\textsuperscript{94} Additionally, Professor Ragazzo argues that the inherently temporary nature of MDL necessitates the application of the transferor law.\textsuperscript{95} These arguments demonstrate that there may be a good reason to question the \textit{Korean Air} ruling.

\textbf{IV. ARGUMENTS AND RESPONSES TO COUNTERARGUMENTS}

This Comment advances two arguments: first, MDL courts should apply the circuit law of the transferor district, rather than that of the transferee MDL district. Although \textit{Korean Air}, the current law on this issue, says the opposite, there are several reasons why the law of the transferor circuit should be applied. First, applying the law of the transferor circuit protects the plaintiff’s autonomy in choosing where to litigate their case. Second, the law of the transferee circuit is not properly applied under the existing \textit{Korean Air} rule because the venue of the MDL court itself is irrelevant for the purposes of MDL transfers. Lastly, applying the transferor circuit’s law avoids confusing situations where a case is remanded back to the transferor court, yet that court is left with interpretations of federal law from the transferee circuit.

This Comment also asserts that appeals made during pretrial proceedings should be appealed directly to the transferor circuit, rather than the transferee circuit in which the MDL district sits. There are a couple reasons for this rule. First, because the law of the transferor circuit will be applied in the MDL district, the transferor circuit should apply and interpret its own law. Second, individual actions in an MDL

\textsuperscript{90} See Ragazzo, supra note 59, at 725.
\textsuperscript{91} See id. at 59.
\textsuperscript{92} See id. at 707.
\textsuperscript{93} See id.
\textsuperscript{94} See id.
\textsuperscript{95} See id.
maintain their original character and jurisdiction even when transferred.

A. MDL Courts Should Apply the Federal Law of the Transferor Court

A plaintiff’s autonomy in choosing a forum and a body of law is protected by the application of the transferor circuit’s law. A plaintiff, as the suing party, has a right to choose the forum in which their case is heard. As long as this forum is proper with regards to venue and personal jurisdiction, a case is generally heard in the venue that the plaintiff chooses—that is, until their case gets consolidated into an MDL.96 Many aspects of a plaintiff’s autonomy are already hindered by the MDL consolidation process; namely by plaintiff steering committees and global settlements that often involve little participation by attorneys not on these committees.97 It is important that some aspects of the plaintiff’s ability to control their own case should be maintained, including choice of law. Even if federal law is theoretically unitary, a plaintiff has settled expectations of the law they will face when they sue in a particular forum.

Moreover, the Van Dusen rule should be extended to choice of federal law in MDL proceedings because the same concerns of defendant forum shopping exist. As the Court in Van Dusen noted, the advantages accrued by a plaintiff who files in a “proper venue” should not be defeated by a defendant’s change in forum.98 In an MDL transfer, attorneys play a significant role in choosing the assigned MDL district and judge because they provide the JPML with information relevant to the proceeding.99 This role provides defense attorneys with ample opportunities to lobby for a circuit with a more favorable interpretation of federal law. This opportunity for defendant forum shopping illustrates one of the fundamental limitations of viewing federal law as unitary: allowing MDL districts to apply their own interpretation of federal law creates opportunities for forum shopping even if federal law is unitary in theory.

There are also distinct parallels between the Court’s analysis of § 1404(a) and the purpose of § 1407(a). In Van Dusen, the Court stated that Congress was primarily concerned with the inconvenience of the

96 The other exception to a case being heard in the venue the plaintiff chooses is transfer under 1404(a), as discussed previously. This type of transfer is more concerned with the convenience of two given forums, rather than the consolidation of cases as in MDL.
97 See Burch, supra note 33 at 1459.
99 See Redish & Karaba, supra note 19, at 120.
transferor forum, rather than its propriety as an appropriate forum.\textsuperscript{100} As such, the Court maintained that the law that applies to the case should not change.\textsuperscript{101} This argument applies to MDL as well: Congress was primarily concerned with consolidation for the purpose of efficiency, with no concern for whether the initial forum was proper.\textsuperscript{102} Therefore, the proper law to be applied is that of the initial forum, not that of the transferee district which the plaintiff did not choose.

The second part of this argument is directly tied to the first. The federal law of the transferee MDL court should not apply because the venue and location of that court is not chosen for the purpose of efficiency described by § 1407. Multidistrict litigation was intended to consolidate cases from around the country into one district, not because that district had any particular efficiency for litigants or special character, but because the consolidation itself was efficient. In this way, § 1407 is distinguished from § 1404, the latter of which allows for changes of venue specifically because the new venue is more efficient and convenient. Furthermore, an individual action’s status in the MDL court is always temporary since it will be remanded back to its original court for trial, so it would be more consistent to apply the transferor’s circuit law across the board.

Lastly, the application of the transferee’s federal law creates undesirable inconsistencies when the case is then remanded back to the transferor district court. Once the case is remanded for trial and ultimately appeal, the transferor court has no choice but to accept the MDL court’s previous interpretations of federal law because the trial court cannot go back and change decisions made before trial. While one might be able to logically separate the rulings and decisions made during the pre-trial phase and during trials, applying different circuit interpretations of the same federal law over the course of one case creates confusion and inconsistency for all involved. Imagine a situation where the transferor circuit’s law reaches the opposite conclusion of the transferee circuit’s law—parties would have no choice but to completely rework their arguments for trial.

Furthermore, if a case is ultimately appealed after trial, the transferor circuit is left in the difficult situation of potentially reviewing decisions made by the transferee’s appellate court. Under the law of the case doctrine, issues already decided by an appellate court may not be relitigated in a subsequent proceeding involving the same case.\textsuperscript{103} As a result, the transferor circuit may have to respect the ruling of the

\begin{footnotes}
\item[100] See Van Dusen, 376 U.S. at 633.
\item[101] See id. at 634.
\item[103] See In re Kor. Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1176 (D.C. Cir. 1987).
\end{footnotes}
transferee circuit, but they are still left with the job of interpreting that ruling and deciding to what extent their analysis will align with the reasoning of the transferee circuit, given that the two may be analyzing similar issues of law and fact from the case. Although it may be true that most MDL cases settle before they are remanded for trial, and that only a limited number of actions will even get this far, a rule that applies the transferor circuit’s law is more logically consistent on the whole because only one circuit’s law will be applied to any given action.

As mentioned previously, the rule in *Korean Air* that MDL judges should apply the federal law of their own circuit is the currently established rule.104 Only two other circuits, the Second and the Eighth, have affirmed the *Korean Air* rule in the MDL context, however.105 Choice of federal law in MDL has received little attention from the circuits and from the Supreme Court. This lack of attention may be because MDL operates primarily as a judicial efficiency mechanism, and acknowledgment of its procedural inconsistencies, such as issues with personal jurisdiction and choice of law that are created by involuntary transfer, would be detrimental to its mission of efficiency. Efficiency may be an important aspiration, especially when considering the mass-tort litigation that MDL often streamlines, but procedural rules cannot simply go out the window in the process.

Application of the transferor district’s circuit law would be less convenient for MDL judges, as they would have to apply different interpretations of federal law to different actions, but this lack of convenience merely demonstrates the fundamental limitations of MDL. Simply because a less convenient rule would hamper the primary purpose of MDL does not mean it can be ignored. Moreover, issues such as choice of law cannot be grounded in matters of convenience when accurate, predictable, and reliable rules are at stake. Efficiency and convenience are important to consider, but procedural rules primarily exist to make proceedings fair and ensure equal treatment of both parties. As this Comment argues, the choice of law rule from *Korean Air* is less fair and logically inconsistent because it hurts plaintiff autonomy and applies the law of a venue whose actual location is irrelevant for the purposes of MDL.

Because the argument of this Comment comes into direct disagreement with the rule in *Korean Air*, it is important to address the points made by Judge Ginsburg and demonstrate why they are not compelling. Her primary argument, as mentioned above, is that federal judges

104 See Ragazzo, supra note 59, at 705.
105 See Menowitz v. Brown, 991 F.2d 36, 40 (2nd Cir. 1993); See In re Temporomandibular Joint (TMJ) Implants Products Liab. Litig., 97 F.3d 1050, 1055 (8th Cir. 1996).
utilize their own “competence” when analyzing federal law because it is a unitary body of law, and thus an MDL judge should apply the law of their own circuit.106 The biggest issue with this argument is that it is true only in theory: in reality, different circuits can have vastly different interpretations of federal law unless the Supreme Court clarifies the issue. This difference in federal law can have important consequences for individual actions. A plaintiff may file his action in his home circuit, expecting one established interpretation of federal law, only to have his action transferred against his will to another circuit with a vastly different interpretation of federal law. A difference in interpretation of the Daubert standard,107 for example, could have a substantial effect on the admissibility of expert testimony.

Additionally, the notion that the MDL district court is “competent” enough to apply its own interpretation of federal law is misleading. A district judge may be interpreting federal law in some sense, but they are also directly applying the binding precedent of the circuit court above. Choice of federal law rules only come into play when there are tangible, pre-existing circuit splits on an issue. In this way, application of the transferor circuit’s law is not further entrenching different interpretations of federal law, but merely acknowledging that differences in interpretation already exist. Once a circuit split comes into play, a MDL judge is merely left with whose interpretation to apply. The resolution of circuit splits is a job for the Supreme Court, not the district judge.

Another concern discussed by Judge Ginsburg is that the application of different transferor law to each individual action would defeat the purpose of the pretrial consolidation and efficiency that § 1407 was designed to achieve.108 As mentioned earlier, efficiency should not be the ultimate determinant for issues that can have consequences for parties. Additionally, although choice of state and federal law are distinctly different issues, MDL judges are theoretically required to apply the state law of fifty different states.109 Arguments of efficiency are weakened by the already supposedly inefficient burden posed by the application of different state law.

106 See In re Kor. Air Lines Disaster of Sept. 1, 1983, 829 F.2d at 1175.
108 See In re Kor. Air Lines Disaster of Sept. 1, 1983, 829 F.2d at 1176.
109 The reality of MDL practice is that many consolidated cases end in global settlements that often give little regard to differences in state law. These differences can have tangible effects on cases, however, and the extension of the Van Dusen rule to the MDL context is an important recognition that differences in law warrant consideration by the MDL judge. See In re Temporomandibular Joint Implants Products Liability Litigation, 97 F.3d at 1055.
B. Decisions in an MDL Action Pre-Trial Should be Directly Appealable to the Transferor Circuit

If one accepts the argument that the MDL court should apply the transferor circuit’s interpretation of federal law, it follows that decisions made pretrial in the MDL court should be directly appealed to the transferor circuit, rather than the transferee circuit. First, as a matter of consistency, circuits should evaluate and review decisions based upon their own interpretation of federal law. It would only lead to inconsistency and confusion if the MDL court’s circuit had to make decisions based on the transferor circuit’s interpretation of federal law. The transferee circuit’s ability to apply their own reasoning and interpretation to a given appeal would be severely hampered because they would have to evaluate the MDL court’s decision based on the federal law of the transferor circuit rather than their own. This dilemma illuminates how the logic of choice of federal law issues breaks down once a case reaches the appellate level. It is the circuits themselves that create circuit splits and lead to choices between interpretations of federal law in the first place. Asking a circuit to then apply an interpretation other than their own is both burdensome and illogical.

At first glance, it may seem as if this dilemma weakens the argument presented here as a whole: why apply the transferor circuit’s law in the first place if it leads to logical inconsistencies? This dilemma is resolved, however, if actions are appealed to their original, transferor circuit. The transferee circuit would then never have the confusing task of evaluating appeals based on the transferor circuit’s law rather than their own. Moreover, this particular issue only exists at the appellate level. At the district level, a district judge must already apply a circuit’s binding precedent—it is simply a matter of which circuit’s interpretation to apply. Choice of federal law rules address the practical difficulties faced by MDL judges who are presented with individual actions from around the country and left with possibly many different interpretations of federal law.

Professor Ragazzo’s appellate model also provides a useful justification for why the transferor circuit should hear all appeals for a given action in an MDL.110 In this model, he posits that the federal law to be applied is that of the circuit with ultimate appellate jurisdiction over the action.111 In the context of permanent transfers, the transferee district court should apply its own circuit’s law because that circuit would eventually hear any appeals after a final judgment at trial.112 In MDL,
on the other hand, an individual action would ultimately be appealed to the transferor circuit after trial, so that circuit’s law should be applied. This model can be extended to the rule argued for here. Since an MDL court applies the law of the transferor circuit due to its ultimate appellate jurisdiction, that demonstrates that there is substantial merit to the idea that a circuit should review decisions based on their own interpretation of federal law. As such, the transferor circuit should also review decisions made by the MDL court pre-trial so that circuit can interpret its own law.

Another reason why all decisions in an MDL court should be directly appealed to the transferor circuit is that individual actions consolidated in an MDL never lose their independent character and jurisdiction. The Supreme Court’s jurisprudence on MDL provides useful guidance here. In *Lexecon*, the Court decided that an individual action in a MDL must be remanded back to the transferor district court at the end of pretrial proceedings. At the time *Lexecon* was decided, many MDL district courts were reassigning actions to themselves for trial. The Court explicitly rejected this practice, stating that “self-assignment is beyond the scope of the transferee court’s authority.” Furthermore, it dismissed the concern raised by the Ninth Circuit that the petitioner had not filed a motion to remand with the JPML, despite the statutory language of § 1407(a) that each action is remanded “by the panel.” This shows that the JPML is obligated to remand cases back to the transferor district court regardless of whether a party requests it. It is the nature of the MDL action itself that necessitates remand, not the actions of the parties.

The Court’s reasoning suggests that an action is still intrinsically tied to the venue from which it was transferred even while in the MDL court. This is demonstrated by the fact that the MDL judge and the parties play only a minimal role in facilitating remand. Moreover, the language in the statute regarding remand, as the *Lexecon* Court notes, is quite straightforward: “each action so transferred shall be remanded by the panel at or before the conclusion of . . . pretrial proceedings to the district from which it was transferred.” The Court interpreted

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113 See id.
115 See id. at 32.
116 *Id.* at 39.
117 *Id.* at 35.
118 See id.
this language literally, concluding that whether a MDL judge could reassign a case to the MDL court for trial was a decision for Congress.\textsuperscript{120}

As discussed earlier, the other relevant Supreme Court case involving MDL is \textit{Gelboim}, where the Court found that an individual action in an MDL could be appealed, even if other cases still remained in the MDL court.\textsuperscript{121} This holding is relevant because it further demonstrates that an action in an MDL maintains its individual character and is separable from the other actions in the MDL. Consolidation through MDL may bring together cases that have common issues of fact, but it does not morph them into one case. This decision enables the argument posed here because each individual action becomes immediately appealable to its own transferor circuit after a decision has been made rather than being stuck in the MDL court with all the other MDL actions.\textsuperscript{122}

Decisions in the MDL court should be directly appealed to the transferor circuit because the Supreme Court’s MDL jurisprudence demonstrates that each action in a MDL is still independent and inherently tied to its original, transferor court. If individual actions were completely absorbed into a MDL, this argument would not be possible, but the Court’s decisions in \textit{Lexecon} and \textit{Gelboim} have made clear that each action is separable and ultimately belongs in the original, transferor court.\textsuperscript{123} In one sense, \textit{Lexecon} illuminates that the MDL court’s role for any given action is narrow and clearly defined.\textsuperscript{124} The MDL judge makes decisions on an action for pre-trial proceedings, but the action is then wrested from the MDL judge’s hands and placed back in its original jurisdiction. Given that the MDL court possesses only this singular, narrow function, it is plausible to say that having the MDL court’s circuit review its decisions goes beyond that function, given that an individual action is separable and will ultimately end up back in the transferor court for trial. Moreover, as mentioned earlier, the physical location of the MDL court has only minimal relevance. Because an action is still tied to the transferor court, the transferee circuit has limited reasons to review the decisions of the MDL judge, other than a commonsense determination that appellate courts should review decisions made by district courts within their own circuit. As one can see, however, MDL makes complex issues like choice of law seem anything but common sense.

\begin{footnotes}
\item[120] See \textit{Lexecon}, 523 U.S. at 40.
\item[122] See \textit{id}.
\item[123] See \textit{id}.
\item[124] See \textit{Lexecon}, 523 U.S. at 36.
\end{footnotes}
V. MDL CHOICE OF FEDERAL LAW ISSUES IN PRACTICE

Given that this Comment is primarily dedicated to the theoretical implications of a federal choice of law rule, it is important to understand how the argument advanced here would work in practice. As such, this section is dedicated to the application of the rule argued for above to an actual case decided a few years ago, *In re Methyl Tertiary Butyl Ether Products Liability Litigation*.

This case concerned dozens of plaintiffs from all around the country whose claims were all consolidated into a MDL in the Southern District of New York. In 2003, cities and municipalities across the country individually sued large petroleum companies, alleging that these companies had contaminated their groundwater with a gasoline additive known as methyl tertiary butyl ether (MTBE). After consolidation, one large defendant, Lyondell Chemical Corporation (Lyondell), filed a motion to dismiss seven of the complaints against them under Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction.

Federal choice of law became a critical issue in this case as a result of a circuit split regarding the limits imposed by the Due Process Clause of the Fourteenth Amendment on exercises of personal jurisdiction. While the First, Fourth, and Eleventh Circuits have stricter due process limits on personal jurisdiction, the Fifth, Sixth, and Eighth Circuits have more lenient limits. This means that in the former circuits, Lyondell would have had a stronger argument for dismissal, whereas plaintiffs would have had the upper hand in the latter circuits. The District Court ultimately found that personal jurisdiction did exist over Lyondell for these seven actions under Second Circuit precedent, but

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126 See id.
127 See id. at 1.
128 See id.
129 See id. at 3.
130 See id. Having stricter limits on personal jurisdiction means that a higher burden must be met before a court can conclude it has the jurisdiction to enter judgment against a particular party. As this case discusses, the First, Fourth, and Eleventh Circuits would impose a higher burden (evaluated under a “stream of commerce plus” standard), whereas the Fifth, Sixth, and Eighth Circuits do not impose as high a burden.
131 See *In re Methyl Tertiary Butyl Ether Products Liability Litigation*, 379 F.Supp.2d 348 at 3.
the outcome could have been different had the personal jurisdiction standards of the transferor circuits been applied.\textsuperscript{132}

If the rule advanced in this Comment had been implemented in the above case, each plaintiff’s action would have risen and fallen on the personal jurisdiction standards of its own circuit. As a result, a plaintiff who filed in the First Circuit would have faced a stricter due process standard than the plaintiff who filed in the Fifth Circuit, and the former action may have been dismissed while the latter survived.\textsuperscript{133} Following the second argument presented in this Comment, the action originally filed in the First Circuit could have been appealed directly to the First Circuit, where judges much more familiar with their own law would be able to rule on an action that ultimately belonged in that circuit.\textsuperscript{134} This case illustrates how federal choice of law rules can dictate the ultimate fate of actions within an MDL, and as such, why federal choice of law rules cannot be swept under the rug by judges and practitioners in the name of efficiency.

VI. CONCLUSION

Choice of law questions can be incredibly complicated, but they reveal a great deal about the nature of judicial systems and have important implications for the system as a whole. With MDL making up such a large percentage of the civil docket today, it is important that ambiguities be clarified and that the correct law be applied in any given case. Moreover, many important procedural issues are overlooked in a system such as MDL where individual actions seem to get lost in massive, consolidated cases. What is often forgotten, however, is that these individual actions represent the claims of real people and plaintiffs whose voices are not always heard. A system that applies the federal law of the transferor circuit preserves some of the plaintiff’s limited autonomy and creates at least one element of predictability when a plaintiff’s case gets whisked away from its original district to a new forum with potentially very different law.

\textsuperscript{132} See id. at 10. The district court analyzed personal jurisdiction here under a five-prong reasonableness inquiry, which was the Second Circuit precedent.

\textsuperscript{133} See id. at 3.

\textsuperscript{134} See id.