Comity Versus Unitary Law: A Clash of Principles in Choice-of-Law Analysis for Class Certification Proceedings in Multidistrict Litigation

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I. INTRODUCTION

When the Judicial Panel on Multidistrict Litigation (Panel) transfers class action cases to a transferee court for pretrial purposes, a fundamental and potentially case-dispositive question arises: Which circuit's law will the transferee court apply to the class certification determination? As described below, district courts are divided into two camps on this issue. One camp, following the principle of comity, applies the transferor courts' law. The other camp, following the principle of unitary law, applies its own circuit's law. This Article describes the clash of principles underlying these two approaches, explains why neither approach produces satisfactory results under the current multidistrict litigation system, and presents a solution to end the division on this important choiceof-law issue.

Under the multidistrict litigation (MDL) procedure, the Panel assigns multiple federal lawsuits to a single district court (transferee court) for pretrial proceedings.¹ The MDL assignment is technically for pretrial proceedings only, and unless the transferred cases are resolved during pretrial proceedings, the Panel must remand the cases back to the courts from which they were transferred (transferor courts) for trial.² The choice-of-law issue for class certification is of paramount importance because there are several significant conflicts between the circuits' case law. Examples include critical issues such as the rigor with which courts

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^{1.} See 28 U.S.C. § 1407 (1976).

^{2.} See id.; see also infra Part II.B.

examine experts' opinions in connection with class certification,³ the availability of pursuing monetary relief under a Federal Rule of Civil Procedure 23(b)(2) injunctive relief class,⁴ the possibility of using fluid recovery,⁵ and other issues that can make or break class certification. Thus, on a practical level, the law that applies to the class certification decision is a pivotal issue that can mean the difference between a multi-million-dollar class action and an insignificant individual lawsuit worth as little as a few dollars.

In the last few years, the transferee courts that have grappled with the choice-of-law question for class certification have resolved the issue differently; some courts applied the law of the transferor courts and some applied their own circuit's law. On a philosophical level, this divide represents a clash of fundamental legal principles: comity versus unitary law. The principle of comity is the belief that courts should, under the proper circumstances, voluntarily defer to another jurisdiction's laws.⁶ The principle of unitary law is the belief that courts should adhere to a single, uniform law to foster consistency and efficiency.⁷ In the MDL class certification context, the principle of comity suggests that the transferee court should apply the law of the transferor courts because the transferee court is merely handling the cases during the pretrial phase of the litigation and the cases must be remanded to the transferor courts for trial. In contrast, the principle of unitary law suggests that the transferee court should apply its own law because there can be only one proper interpretation of federal law and the transferee court is bound to follow its own circuit's precedent.

Under the current MDL procedure, which requires cases to be remanded for trial, both the comity approach and the unitary law approach have major intractable flaws. As described below, strict adherence to the

^{3.} Compare In re Monosodium Glutamate Antitrust Litig., No. Civ. 00-MDL-1328 (PAM), 2003 WL 244729, at *1 (D. Minn. Jan. 29, 2003), and In re Pressure Sensitive Labelstock Antitrust Litig., No. 3:03-MDL-1556, 2007 WL 4150666, at *6 (M.D. Pa. Nov. 19, 2007) ("[Rule 23] does not require—or authorize—the Court to credit Plaintiffs' evidence over Defendants' or vice versa."), with In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 323 (3d Cir. 2008) (holding that weighing conflicting expert opinion evidence and examining the persuasive value of such evidence is central to the class certification analysis under Rule 23).

^{4.} See In re Wal-Mart Wage & Hour Employment Practices Litig., No. 2:06-CV-00225-PMP-PAL, 2008 WL 3179315, at *5, *16 (D. Nev. June 20, 2008) (describing circuit split on this issue).

^{5.} *Compare* McLaughlin v. American Tobacco Co., 522 F.3d 215, 231–32 (2d Cir. 2008) (holding fluid recovery is unconstitutional in the class action context), *with* Simer v. Rios, 661 F.2d 655, 676 (7th Cir. 1981) (holding fluid recovery is appropriate under some circumstances).

^{6.} See infra Part IV.A.

^{7.} See infra Part IV.B.

comity approach is inefficient, can produce inconsistent results, and can require a district court to ignore its own circuit's controlling precedent, even to the point of violating the Constitution of the United States. Strict adherence to the unitary law approach, on the other hand, can significantly impact the parties' rights and, under certain circumstances, lead to inefficiency.

This Article explores the choice-of-law quandary and its important role in MDL class action litigation, explains why the current approaches to the choice-of-law issue are ineffective, and offers a possible legislative solution. Specifically, Part II describes the MDL process generally to provide a basis for discussion. Part III describes the general choice-oflaw rules in MDL proceedings. Part IV describes the case law addressing choice-of-law issues in MDL class certification proceedings. Part V describes the major flaws that exist when applying the comity approach or the unitary law approach to the class certification decision. Part VI offers a solution: Congress should change the MDL rules to eliminate the requirement of remand to the transferor courts, which will further consistency in class action MDL cases, increase judicial efficiency, and eliminate most of the problems district courts currently face in examining choice-of-law issues in MDL class action cases. Part VII provides concluding remarks.

II. THE MULTIDISTRICT LITIGATION PROCESS GENERALLY

When civil actions involving one or more common questions of fact are pending in different districts, the Panel may transfer those actions to a single district for coordinated or consolidated pretrial proceedings under the MDL process.⁸ This Part describes the circumstances under which the Panel will transfer cases filed in multiple districts to one district for pretrial proceedings and explains the remand requirement for trial.

^{8. 28} U.S.C. § 1407(a) (1976) provides:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. 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 unless it shall have been previously terminated: *Provided, however*, [t]hat the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

A. The MDL Transfer

The district court to which the Panel transfers the actions is typically called the "transferee court," and the district courts from which the cases are transferred are typically called the "transferor courts." The Panel will transfer the cases when it will serve the "convenience of parties and witnesses and will promote the just and efficient conduct of such actions."⁹ The MDL procedure aims to eliminate duplicative discovery, avoid conflicting rulings and schedules, reduce litigation costs, and conserve the time and effort of the parties, attorneys, witnesses, and courts.¹⁰

The Panel determines where to transfer the actions. Unrestricted by venue considerations, the Panel may transfer the actions to any federal district court.¹¹ The Panel may consider a number of factors when determining the transferee court, including whether (1) the parties prefer a particular district;¹² (2) a particular district is geographically convenient and accessible to the litigants;¹³ (3) cases are already pending in a particular district;¹⁴ (4) a particular district court judge has already invested significant time in developing familiarity with the issues likely to arise in the actions;¹⁵ (5) a particular action was filed early or has advanced procedurally;¹⁶ (6) the evidence, parties, and witnesses are located in a particular district;¹⁷ (7) a potential transferee court has room on its docket;¹⁸

^{9.} Id.

^{10.} See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.131 (2004).

^{11. 28} U.S.C. § 1407(a); *In re* New York City Mun. Sec. Litig., 572 F.2d 49, 51 (2d Cir. 1978). 12. *See, e.g., In re* Rivastigamine Patent Litig., 360 F. Supp. 2d 1361, 1362 (J.P.M.L. 2005)

⁽choosing transferee district based on the agreement of the parties).

^{13.} See, e.g., *In re* Intel Corp. Microprocessor Antitrust Litig., 403 F. Supp. 2d 1356, 1357 (J.P.M.L. 2005) (consolidating ten California actions and four Delaware actions in the District of Delaware because, among other reasons, Delaware was a geographically convenient location for the litigants).

^{14.} See, e.g., In re Teflon Prods. Liab. Litig., 416 F. Supp. 2d 1364, 1365 (J.P.M.L. 2006) (transferring cases to district court because, among other reasons, one of fourteen cases to be consolidated was already pending there).

^{15.} See, e.g., In re American Invs. Life Ins. Co. Annuity Mktg. & Sales Practices Litig., 398 F. Supp. 2d 1361, 1362 (J.P.M.L. 2005) (transferring cases to judge who had "already developed familiarity with the issues present in this docket as a result of presiding over motion practice and other pretrial proceedings in the actions pending before her for the past year").

^{16.} *See, e.g., In re* JP Morgan Chase & Co. Sec. Litig., 452 F. Supp. 2d 1350, 1351 (J.P.M.L. 2006) (transferring to district where earlier filed and most procedurally advanced action was pending).

^{17.} See, e.g., In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig., MDL-1798, 2006 U.S. Dist. LEXIS 94117, at *4 (J.P.M.L. Dec. 28, 2006) (transferring to District of Columbia where witnesses and documents were likely to be in or near the district).

^{18.} See, e.g., In re Educ. Testing Serv. PLT 7-12 Test Scoring Litig., 350 F. Supp. 2d 1363, 1365 (J.P.M.L. 2004) (transferring to district with "favorable caseload conditions").

and (8) a district has a judge experienced in handling multidistrict litigation.¹⁹ As described below, however, this transfer is for pretrial purposes only.

B. The MDL Remand Requirement

Transferee courts make only pretrial decisions; the Panel must remand the cases back to the transferor courts for trial. The controlling authority on this issue is *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach.*²⁰ In that case, the Supreme Court held that a district court conducting "pretrial proceedings" could not invoke the venue transfer statute²¹ to assign a case to itself for trial.²² The Court interpreted 28 U.S.C. § 1407's use of the words "shall be remanded by the panel"²³ as mandating the remand of the transferred cases back to the transferor courts for trial.²⁴ *Lexecon* made clear that the Panel was obligated to remand any transferred case to its originating court when pretrial proceedings had concluded.²⁵

Lexecon is highly significant because it changed the landscape of MDL proceedings. Prior to *Lexecon*, the vast majority of cases that entered into the MDL process were transferred to the transferee court for all purposes, including trial.²⁶ Transferee courts frequently transferred the cases to themselves under the Rules of Procedure set forth by the Panel.²⁷ That practice ground to a halt when the Supreme Court prohibited self-transfer in *Lexecon*.²⁸

^{19.} See, e.g., In re Human Tissue Prods. Liab. Litig., 435 F. Supp. 2d 1352, 1354 (J.P.M.L. 2006) (transferring cases to "a jurist who has the experience necessary to steer this litigation on a prudent course").

^{20.} Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998).

^{21. 28} U.S.C. § 1404(a) (1996) (The venue transfer statute, provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.").

^{22.} Lexecon, 523 U.S. at 40-41.

^{23. 28} U.S.C. § 1407(a) (1976). See supra note 8 and accompanying text.

^{24.} Lexecon, 523 U.S. at 35 (citing Anderson v. Yungkau, 329 U.S. 482, 485 (1947)).

^{25.} Id.

^{26.} *In re* Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1176 n.9 (D.C. Cir. 1987) (noting that prior to *Lexecon*, over two-thirds of the actions transferred pursuant to the MDL procedure were not remanded to the transferor courts).

^{27.} At the time of *Lexecon*, J.P.M.L. Rule of Procedure 14(b) provided: "Each transferred action that has not been terminated in the transferee court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406." J.P.M.L. R. of Proc. 14(b) (1998).

^{28.} See In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 241 F.R.D. 185, 191 (S.D.N.Y. 2007) (citing In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., No. 1:00-1898, MDL 1358 (SAS), M21-88, 2005 WL 106936, at *4 (S.D.N.Y. Jan. 18, 2005)) (noting that Lexecon has in-

Interestingly, the Court did not pass judgment on the wisdom of § 1407's remand requirement.²⁹ Indeed, the Court noted that it "may or may not be correct that permitting transferee courts to make self-assignments would be more desirable than preserving a plaintiff's choice of venue," but found that a strict reading of § 1407 required the Panel to remand transferred actions back to the transferor courts for trial.³⁰ Ultimately, the Court concluded, if § 1407's remand requirement was to be eliminated, "the proper venue for resolving that issue remains the floor of Congress."³¹

Notwithstanding *Lexecon*, most cases do not go to trial, and therefore the practical impact of MDL consolidation is that the transferee court usually decides the fate of the cases.³² For example, the transferee court may decide whether to strike a fatal blow to the cases through a motion to dismiss, summary judgment, or class certification determination. Alternatively, the transferee court may allow the cases to survive pretrial proceedings. Given the magnitude of most cases consolidated under the MDL procedure, a transferee court's decision on class certification can mean the difference between a certified class action with potentially millions, if not billions, of dollars at issue and an individual lawsuit worth an insignificant amount.³³

III. CHOICE-OF-LAW RULES IN MULTIDISTRICT LITIGATION PROCEEDINGS GENERALLY

This Part examines the general choice-of-law issues in MDL proceedings. Generally speaking, the choice-of-law case law breaks up nicely between state substantive law on the one hand and federal substantive and procedural law on the other. As described below, this division reflects a balance between respect for state law pluralism, in which our legal system embraces differences, and a desire for a unitary federal

creased the number of remanded actions each year from several hundred to several thousand) [herei-nafter *MTBE II*].

^{29.} Id. at 40.

^{30.} Id.

^{31.} Id.

^{32.} James C. Duff, 2008 Annual Report of the Director, Judicial Business of the United States Courts, Table S-20, available at http://www.uscourts.gov/judbususc/judbus.html. As of September 30, 2008, out of the 301,255 total actions subjected to the MDL procedure, only 11,665 actions were remanded by the Panel. *Id.*

^{33.} *See, e.g., In re* AOL Time Warner, Inc. Sec. and ERISA Litig., 381 F. Supp. 2d 192, 220 (S.D.N.Y. 2004); *In re* Silicone Breast Implant Prods. Liab. Litig. (MDL No. 926); *and In re* Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789 (E.D. La. 2007). All three of these cases were class actions that settled for more than a billion dollars.

law, in which our legal system rejects inconsistencies and loss of efficiency.

A. Choice-of-Law for State Law Claims

A district court examining state law issues must use the choice-oflaw rules of the state in which the district court sits.³⁴ In *Van Dusen v. Barrack* and *Ferens v. John Deere Co.*, the United States Supreme Court held that when a case involving state law claims transfers from one district court to another pursuant to 28 U.S.C. § 1404,³⁵ the transferee court must still follow the choice-of-law rules of the state in which the transferor court sits.³⁶ In other words, the transfer does not alter the choice-oflaw analysis. In *Van Dusen*, the Court explained that "[a]lthough as a matter of federal policy a case may be transferred to a more convenient part of the system . . . [t]he case should remain as it was in all respects but location."³⁷ A "change of venue . . . generally should be, with respect to state law, but a change of courtrooms."³⁸

Courts have consistently applied this holding to transfers taking place under the MDL procedure.³⁹ Thus, when analyzing issues of state law in MDL proceedings, the transferee court must apply the choice-of-law rules of the state or states in which the transferor courts sit (for example, the District of Kansas would apply California choice-of-law rules in analyzing a negligence claim for a case transferred from the Northern District of California). The result of this rule can be a complicated examination of multiple states' choice-of-law rules, because each action that originated in a different state will require a unique choice-of-law analysis. In one MDL action, for example, a transferee court applied the choice-of-law rules of the District of Columbia, Georgia, Illinois, Maryland, Massachusetts, Pennsylvania, Texas, and Virginia.⁴⁰

^{34.} Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97 (1941).

^{35.} See *supra* note 21, and text accompanying the footnote.

^{36.} Van Dusen v. Barrack, 376 U.S. 612, 639 (1964); *see also* Ferens v. John Deere Co., 494 U.S. 516, 531 (1990).

^{37.} Van Dusen, 376 U.S. at 633.

^{38.} Id. at 639.

^{39.} See, e.g., In re United States Office Prods. Co. Sec. Litig., 251 F. Supp. 2d 58, 68 (D.D.C. 2003); In re Ski Train Fire in Kaprun, Austria, 257 F. Supp. 2d 717, 723 (S.D.N.Y. 2003); In re ConAgra Peanut Butter Prods. Liab. Litig., 251 F.R.D. 689, 693 (N.D. Ga. 2003); McCord v. Minn. Mut. Life Ins. Co., 138 F. Supp. 2d 1180, 1186–87 (D. Minn. 2001).

^{40.} In re Air Crash Disaster at Washington, 559 F. Supp. 333, 340-41 (D.D.C. 1983).

B. Choice-of-Law for Federal Legal Issues

The choice-of-law analysis is different for federal legal issues in cases that are transferred from one district court to another. Generally, the circuit courts have held that the law of the transferee court's circuit applies to federal legal claims.⁴¹ The seminal case on this issue is *In re* Korean Air Lines Disaster of September 1, 1983, which was decided in the District of Columbia Circuit.⁴² In that case, the court addressed the question of whether the law of the transferee or the transferor forum applied to the interpretation of the federal Warsaw Convention/Montreal Agreement.⁴³ The court refused to extend the rationale of *Van Dusen v*. Barrack to federal law, holding instead that the law of the transferee forum governs the determination of federal claims.⁴⁴ Accordingly, the transferee court is under no obligation to defer to the interpretation of the transferor circuit when dealing with federal law issues.⁴⁵ In reaching the conclusion that the transferee court's law applied, then-Circuit Court Judge Ruth Bader Ginsburg cited the dual goals of uniformity in federal law and judicial efficiency:

Application of *Van Dusen* in the matter before us, we emphasize, would not produce uniformity. There would be one interpretation of federal law for the cases initially filed in districts within the Second Circuit, and an opposing interpretation for cases filed elsewhere. Applying divergent interpretations of the governing federal law to plaintiffs, depending solely upon where they initially filed suit, would surely reduce the efficiencies achievable through con-

^{41.} This view has been embodied by the decisions of the District of Columbia, Second, Fourth, Seventh, Eighth, Ninth, and Eleventh Circuits. Murphy v. FDIC, 208 F.3d 959, 966 (11th Cir. 2000); Bradley v. United States, 161 F.3d 777, 782 n.4 (4th Cir. 1998); *In re* Temporomandibular Joint Implants Prods. Liab. Litig., 97 F.3d 1050, 1055 (8th Cir. 1996); Newton v. Thomason, 22 F.3d 1455, 1460 (9th Cir. 1994); Menowitz v. Brown, 991 F.2d 36, 40 (2d Cir. 1993); Eckstein v. Balcor Film Investors, 8 F.3d 1121, 1126 (7th Cir. 1993), *cert. denied*, 510 U.S. 1073 (1994); *In re* Korean Air Lines Disaster of September 1, 1983, 829 F.2d 1171, 1174 (D.C. Cir. 1987), *aff d on other grounds sub nom.* Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989). It should be noted that there is a circuit split on the issue of whether the transferor or transfere choice-of-law rules should apply when a case has been transferred and Congress has expressed its intention that the federal rules should not be interpreted in a geographically uniform fashion. *Compare Menowitz*, 991 F.2d at 40 (holding that *Van Dusen* and *Ferens* apply only in diversity cases), *with Eckstein*, 8 F.3d at 1127 ("[W]hen the law of the United States is geographically non-uniform, a transferee court should use the rule of the transferor forum in order to implement the central conclusion of *Van Dusen* and *Ferens*: that a transfer under § 1404(a) accomplishes 'but a change of courtrooms."").

^{42.} In re Korean Air Lines Disaster of September 1, 1983, 829 F.2d 1171 (D.C. Cir. 1987).

^{43.} Id. at 1172, 1174.

^{44.} Id. at 1175-76.

^{45.} Id. at 1172, 1174.

solidated preparatory proceedings. Indeed, because there is ultimately a single proper interpretation of federal law, the attempt to ascertain and apply diverse circuit interpretations simultaneously is inherently self-contradictory.⁴⁶

In contrast to analyzing issues of state law, which is anticipated to present and require the application of laws that may differ from state to state, "the federal courts comprise a single system [in which each court endeavors to apply] a single body of law."⁴⁷ Therefore, the *Korean Air Lines* court reasoned, "it is logically inconsistent to require one judge to apply simultaneously different and conflicting interpretations of what is supposed to be a unitary federal law."⁴⁸

In sum, the Supreme Court has held that the choice-of-law rules of the state in which the case was originally filed govern the choice-of-law analysis for state law substantive law issues even if the case is transferred to another district. This is because, for state law purposes, a transfer is but a change of courtrooms that should not impact the substantive law at issue.⁴⁹ This reasoning reflects deference to legal pluralism in state law issues and an acknowledgement that one party should not benefit over another because of a change in venue to another district.⁵⁰ In contrast, courts that examine federal choice-of-law issues in the MDL context have applied the law of the transferee circuit because federal law is supposed to be unitary and consistent, not pluralistic.⁵¹ The federal courts that consider federal choice-of-law issues do not seem troubled by the fact that application of the transferee courts' precedent to a federal legal issue may benefit one party over another simply because of a change in venue.

IV. CHOICE-OF-LAW RULES FOR CLASS CERTIFICATION PROCEEDINGS IN MULTIDISTRICT LITIGATION

The choice-of-law issues discussed in Part III above divide neatly along state and federal law lines, with the former requiring the state law

^{46.} *Id.* at 1175 (interpreting Van Dusen v. Barrack, 376 U.S. 612 (1964)). While the court noted that the law of the transferor forum "merits close consideration," it determined that the transferor forum's law "does not have *stare decisis* effect in a transferee forum situated in another circuit." *Id.* at 1176.

^{47.} Id. (quoting H.L. Green Co. v. MacMahon, 312 F.2d 650, 652 (2d Cir. 1962), cert denied, 372 U.S. 928 (1963)).

^{48.} Id. at 1175-76.

^{49.} Van Dusen, 376 U.S. at 639.

^{50.} Id.

^{51.} See discussion, supra note 41.

of the transferor jurisdiction and the latter requiring the federal law of the transferee jurisdiction. One might intuitively think that federal class action certification determinations would necessarily follow the transferee jurisdiction's law. After all, class certification is governed by Rule 23,⁵² which is a federal procedural law. The case law, however, is split on this issue.

As described below in Part IV.A, one camp has applied the law of the transferor courts. Courts falling into this camp reason that *Korean Air Lines* and its progeny, which use the transferee court's law for federal issues, do not apply to class certification because class certification is an issue that impacts both pretrial and trial proceedings. Because the

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

^{52.} FED. R. CIV. P. 23. Federal Rule of Civil Procedure 23(a) and (b) provide: (a) Prerequisites.

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

⁽¹⁾ the class is so numerous that joinder of all members is impracticable,

⁽²⁾ there are questions of law or fact common to the class,

⁽³⁾ the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

⁽⁴⁾ the representative parties will fairly and adequately protect the interests of the class.

⁽b) Types of Class Actions.

A class action may be maintained if Rule 23(a) is satisfied and if:

⁽¹⁾ prosecuting separate actions by or against individual class members would create a risk of:

⁽B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

⁽²⁾ the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

⁽³⁾ the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

⁽A) the class members' interests in individually controlling the prosecution or defense of separate actions;

⁽B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

⁽C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

⁽D) the likely difficulties in managing a class action.

cases will be transferred to the transferor courts for trial as required by *Lexecon*, courts that follow the principle of comity reason that the transferor courts' precedent must apply to the class certification decision.

Another camp has applied the law of the transferee court, reasoning that *Korean Air Lines* and its progeny *do apply* to class certification. As described in Part IV.B below, these courts, influenced by the principle of unitary law, reason that there is only one proper interpretation of federal law, and therefore each district court must interpret Rule 23 consistent with the precedent of its own circuit. These cases also stress that applying one circuit's law to the class certification determination is efficient because a district court need not use multiple circuits' precedent in making class certification determinations.⁵³ The discussion below describes the division between these two competing camps and the clash of principles these cases reflect.

A. The Comity Approach

"Comity" is an informal practice where a court gives "mutual recognition" to another court's judicial acts.⁵⁴ Ulrich Huber, a Dutch jurist from the 17th Century, is generally regarded as the father of the principle of comity in the legal context.⁵⁵ In his work, *De Conflictu Legum*, Huber explained that ""[c]omity calls on states to recognize and enforce rights created by other states, provided that such recognition does not prejudice the state or its subjects."⁵⁶

The U.S. legal system has embraced this principle and it can arise in many contexts.⁵⁷ For example, in the international law context, the

^{53.} This does not mean, however, that the district court need only use one state's substantive law. An MDL action may involve numerous state law claims, each of which must be analyzed under the choice-of-law rules of each state at issue. *See Van Dusen*, 376 U.S. at 639. The only efficiency achieved with the unitary law approach is derived from using one circuit's precedent on Rule 23.

^{54.} See BLACK'S LAW DICTIONARY 285 (8th ed. 2004).

^{55.} Ulrich Huber's work *De Conflictu Legum* was a landmark in the development of choice-oflaw theory. GARY BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY & MATERIALS 547 (3d ed. 1996); D.J. Llewelyn Davies, *The Influence of Huber's Conflictu Legum on English Private International Law*, 18 BRIT. Y. B. INT'L L. 49 (1937); Arthur Nussbaum, *Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws*, 42 COLUM. L. REV. 189 (1942); Hessel R. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9 (1966).

^{56.} Ulrich Huber, *De Conflictu Legum*, Praelectiones Juris Romani et Hodierni (1689). For an English translation, see Ernest G. Lorenzen, *Huber's De Conflictu Legum*, *in* SELECTED ARTICLES ON THE CONFLICT OF LAWS 136 (1947).

^{57.} Justice Story has been credited as the most important factor in injecting Huber's conception of comity into United States jurisprudence. *See* BORN, *supra* note 55; Ernest G. Lorenzen, *Story's Commentaries on the Conflict of Laws—One Hundred After*, 48 HARV. L. REV. 15 (1934); Kurt H.

United States may give legal effect to a foreign nation's legal decision.⁵⁸ Comity may also arise when federal courts abstain from deciding a state legal issue that has not yet been addressed by a state court on the theory that the states should have the ability to govern their affairs without unnecessary federal intrusion.⁵⁹

Within the MDL context, comity arises in connection with choiceof-law analysis for class certification. The case that best embodies the impact of this principle is *In re Methyl Tertiary Butyl Ether Products Liability Litigation* ("*MTBE I*").⁶⁰ In *MTBE I*, plaintiff residents and property owners brought state law claims (e.g., nuisance, trespass, negligence, and strict liability) in state courts against oil and pipeline companies for damages arising from gasoline release.⁶¹ The cases were removed to federal district courts, and the Panel transferred the cases to the Southern District of New York under the MDL procedure.⁶² In addressing class certification, the *MTBE I* court considered whether the law of the transferor court (Seventh Circuit) or the law of its own circuit

59. Brockett v. Spokane Arcade, Inc., 472 U.S. 491, 508 (1985). The Supreme Court has long recognized that concerns for comity and federalism may require federal courts to abstain from deciding federal constitutional issues that are entwined with the interpretation of state law.... [W]here uncertain questions of state law must be resolved before a federal constitutional question can be decided, federal courts should abstain [from reaching a decision on federal issues] until a state court has addressed the state questions.

Id. Similarly, based on the underlying principle of comity, the Supreme Court has generally refused to allow federal courts to intervene in pending cases in state courts. See Younger v. Harris, 401 U.S. 37 (1971), noting that "comity" requires

Nadelmann, Joseph Story's Contribution to American Conflicts Law: A Comment, 5 AM. J. LEGAL HIST. 230 (1961).

^{58.} Hilton v. Guyot, 159 U.S. 113, 163 (1895) (laying the framework for comity considerations in international law cases); *see also* Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 713–16 (1987).

[[]A] proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps, for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism."

^{60.} See In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 241 F.R.D. 435 (S.D.N.Y. 2007) [hereinafter *MTBE I*].

^{61.} Id. at 437-38.

^{62. 28} U.S.C. § 1407 (1976).

(Second Circuit) applied to the Rule 23 analysis.⁶³ The court found that the transferor court's law applied.⁶⁴

The MTBE I decision largely turned on the distinction between pretrial and trial proceedings, the nature of class certification, and the Supreme Court's Lexecon⁶⁵ decision, which, as discussed above, held that the Panel is obligated to remand any transferred cases back to the transferor courts for trial. The court explained that class certification is not only a pre-trial issue: class certification requirements are "inherently enmeshed" with trial considerations because the trial court will need to examine the facts and law raised by the class claims.⁶⁶ Further, under Supreme Court precedent, "courts must determine whether Rule 23 is satisfied for purposes of trial before granting certification."⁶⁷ Given Lexecon's holding that § 1407 requires cases to remand to the transferor courts for trial, the transferee court's authority ends once the pretrial proceedings are completed.⁶⁸ Accordingly, the *MTBE I* court reasoned, "[i]t would be neither just nor efficient to apply the law of this Circuit in considering class certification, and then force the transferor court to try a class action that it might never have certified."⁶⁹ Thus, the court applied the law of the transferor court in examining class certification.⁷⁰

69. Id.

^{63.} *MTBE I*, 241 F.R.D. at 439–41.

^{64.} Id.

^{65.} Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28 (1998); see infra Part I.B.

^{66.} *MTBE I*, 241 F.R.D. 435, 440–41 (S.D.N.Y. 2007). The court, in holding that class certification was not only a pre-trial issue, stated that the requirements of class certification were "inherently enmeshed" with considerations of the trial in requiring analysis of "the factual and legal issues comprising the plaintiff's cause of action." *Id.* (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978)). In a subsequent decision, the same court addressed this choice-of-law issue once again and decided that the transferor court's law applies to class certification in MDL actions. *See MTBE II*, 241 F.R.D. 185, 191–93 (S.D.N.Y. 2007). Because this decision is consistent with *MTBE I* and does not offer any additional material insights into the choice-of-law decision, this Article focuses on the *MTBE I* decision.

^{67.} *MTBE I*, 241 F.R.D. at 440 (citing Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625–28 (1997)).

^{68.} Id. (citing Lexecon, 523 U.S. at 40).

^{70.} The *MTBE I* decision noted that another reason to apply the transferor court's law to the class certification decision was that the plaintiffs had initially filed their state law tort claims in state court and later had the claims removed to federal court. *Id.* at 440–41. The court reasoned that "[n]either party should be prejudiced in preparing for trial because the case was removed and transferred to another district in a different circuit." *Id.* at 441. The court's focus on the fact that the cases involved removed state law claims makes little sense. While it is true that the district court may need to examine the elements of state substantive law in conducting its class certification analysis under Rule 23, it does not follow that the class certification analysis is an issue of state substantive law. The class certification determination under Federal Rule of Civil Procedure 23 is a federal

More recently, the District of Nevada also concluded that the law of the transferor courts governs class certification in MDL proceedings.⁷¹ In re Wal-Mart Wage and Hour Employment Practices Litigation was an MDL action involving approximately thirty-four wage-and-hour class actions brought against Wal-Mart in federal courts throughout the United States.⁷² The plaintiffs filed a motion to certify state-wide classes encompassing state law claims in four of the thirty-four cases involving three different federal circuits (the Third, Eighth, and Ninth Circuits).⁷³ In analyzing class certification, the Wal-Mart court acknowledged that potential choice-of-law issues and conflicts existed.⁷⁴ The court generally applied the transferee circuit's law, noting that "the law relating to class certification is fairly consistent within all three circuits."⁷⁵ "To the extent the law[s] of the Third and Eighth Circuits diverge," however, the court stated that it would "consider [the divergence] to determine whether any difference in the law of the respective transferor circuits would affect the outcome of the issue of class certification."⁷⁶ The court then analyzed the divergent standards regarding whether injunctive relief predominates for Rule 23(b)(2) purposes, because "[t]his [was] one area where the law of the Circuits at issue may diverge."⁷⁷ The court ulti-

procedural issue. Under the Rules Enabling Act, the Federal Rules of Civil Procedure may not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (1990). If it were true that a court must apply the transferor courts' laws whenever it would need to examine state substantive law as part of carrying out its analyses under the Federal Rules of Civil Procedure, then the court would need to apply the transferor courts' laws for any motion to dismiss under Rule 12 or summary judgment under Rule 56 for state law claims. But such a result would not only be inconsistent with the Korean Air Lines line of cases, supra Part III.B., but it would also be at odds with the MTBE cases because the court had previously decided that it was bound by the law of the transferee court in deciding a motion to dismiss plaintiffs' state tort claims. In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., No. 1:00-1898, MDL 1358 (SAS), M21-88, 2005 WL 106936, at *5 (S.D.N.Y. Jan. 18, 2005). Moreover, this division of state-versus-federal claims would make little sense in a case that raised both state and federal claims because the court would have to apply the transferor court's Rule 23 precedent to some claims and the transferee court's Rule 23 precedent to other claims, which would be an absurd result. Thus, it is clear that the lynchpin of the MTBE I decision is not that state law claims were at issue, but rather that § 1407(a), per Lexecon, requires the Panel to remand the cases to the transferor courts for trial, and the fact that class certification is a pre-trial and a trial issue. MTBE I. 241 F.R.D. at 440-41.

^{71.} *In re* Wal-Mart Wage & Hour Employment Practices Litig., No. 2:06-CV-00225-PMP-PAL, 2008 WL 3179315 (D. Nev. June 20, 2008).

^{72.} Id.

^{73.} Id. at *5.

^{74.} Id.

^{75.} *Id.* The court largely applied Ninth Circuit law, which was both the transferee circuit's law and one of the transferor circuit's law.

^{76.} Id.

^{77.} See id. at *16.

mately concluded that plaintiffs failed to meet their burden "[u]nder any Circuit's test."⁷⁸

In sum, the principle of comity influenced these courts to defer to the laws of the transferor courts in examining class certification. *MTBE I*, in particular, focused on the fact that the transferee court is merely handling the cases for pretrial proceedings and the Panel will remand the cases back to the transferor courts for trial. As explained below, this comity approach has been criticized and rejected by other courts that hold the principle of unitary law in higher esteem.

B. The Unitary Law Approach

The concept of unitary law in the federal law context is straightforward; the principle provides that there is only one body of federal law and "there is ultimately a single proper interpretation of federal law."⁷⁹ Within the transfer context, the *Korean Air Lines* case best embodies the principle of unitary law.⁸⁰ Unlike the state law system, in which differences are accepted as an embodiment of our valuable federalism, inconsistent interpretations of federal law among the federal courts is cause for concern⁸¹ and may lead the United States Supreme Court to grant certiorari to eliminate incongruity.⁸² At its core, the principle of unitary law has considerations of consistency and efficiency in mind.⁸³

The principle of unitary law has motivated some courts to apply the law of the transferee court in class certification determinations in MDL cases. Currently, the most important case on this topic is the Central

^{78.} *Id.* The court did not explain why it needed to examine the precedent of the transferor courts, though it presumably did so because it was persuaded by Wal-Mart's class certification briefing, which, largely based on the *MTBE I* case, argued that the transferee court should defer to the transferor courts' laws for the class certification analysis.

^{79.} In re Korean Air Lines Disaster of September 1, 1983, 829 F.2d 1171, 1175 (D.C. Cir. 1987).

^{80.} Id. at 1174-76. See also discussion supra Part III.B.

^{81.} *Id.* at 1175 ("Our system contemplates differences between different states' laws; thus a multidistrict judge asked to apply divergent state positions on a point of law would face a coherent, if sometimes difficult, task. But it is logically inconsistent to require one judge to apply simultaneously different and conflicting interpretations of what is supposed to be a unitary federal law.").

^{82.} SUP. CT. R. 10 provides, in pertinent part:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter....

^{83.} Korean Air Lines, 829 F.2d at 1175.

District of California's decision in *In re Live Concert Antitrust Litigation.*⁸⁴ The court in *Live Concert* held that the transferee court's law applies to class certification determinations in the MDL context.⁸⁵ The *Live Concert* court noted that "circuit and district courts, including the Ninth Circuit, have uniformly applied the law of the transferee circuit in MDL proceedings involving federal law."⁸⁶ In particular, the court focused on the reasoning in *Korean Air Lines*, and decided that it would give transferor circuit precedent "close consideration,"⁸⁷ but was bound to follow only the precedent of its own circuit and the Supreme Court.⁸⁸

The court determined that there were many reasons to apply the law of the transferee court, including the "reduction in efficiency of forcing a court to apply divergent interpretations of governing federal law and the logical inconsistency of requiring one judge to apply simultaneously different and conflicting interpretations of what is supposed to be a unitary federal law."⁸⁹ The *Live Concert* court also found support for its decision in the law-of-the-case doctrine. Quoting *Korean Air Lines*, the *Live Concert* court reasoned that its interpretation of federal law would have binding force upon the cases' return to the transferor courts, "for if it did not, transfers under 28 U.S.C. § 1407 could be counterproductive, i.e., capable of generating rather than reducing the duplication and protraction Congress sought to check."⁹⁰ Thus, according to the *Live Concert* court, the transferor courts would effectively be precluded from relitigating this issue upon remand by the law-of-the-case doctrine.⁹¹

Similarly, the District of New Jersey's decision in *In re Managerial, Professional & Technical Employees* supports the conclusion that the

^{84.} In re Live Concert Antitrust Litigation, 247 F.R.D. 98 (C.D. Cal. 2007).

^{85.} Id. at 104-05.

^{86.} The court cited to numerous cases addressing choice-of-law issues. Id. at 105 n.8.

^{87.} *Id.* at 105. The *Live Concert* court's statement that it would give "close consideration" to the transferor court's law is both significant and puzzling. It is significant because it is an express acknowledgement of the desire for comity, otherwise there would be no reason to even consider what a transferor jurisdiction might do when considering class certification. However, the statement is also puzzling because it is not clear why the court would need to consider the transferor court's law if it will be trumped by the transfere court's law in any event. The court's statement is further puzzling because it did not engage in any analysis of the transferor court's law.

^{88.} Id. at 104.

^{89.} *Id.* (citing *In re* Korean Air Lines Disaster of September 1, 1983, 829 F.2d 1171, 1173– 1176 (D.C. Cir. 1987)). This reasoning is contrary to *MTBE I. Live Concert* explicitly rejected the *MTBE I* court's reasoning that "it would be neither just nor efficient to apply the law of this Circuit in considering class certification, and then force the transferor court to try a class action that it might never have certified." *Id.* at 105 n.8 (quoting *MTBE I*, 241 F.R.D. at 193).

^{90.} Id. at 105 n.8 (quoting Korean Air Lines, 829 F.2d at 1176).

^{91.} Id.

transferee court's law governs Rule 23 determinations in MDL cases.⁹² In that MDL proceeding, employees of major U.S. oil companies alleged that the companies violated the Sherman Act by exchanging detailed salary information which slowed the rate of salary increases.⁹³ The lawsuits were filed in federal courts in New York, Texas, and New Jersev and were consolidated before the District of New Jersey under the MDL procedure. In analyzing class certification, the court noted that it "must first determine whether to apply the law of the Third Circuit or, if different, the law of the circuit from which each of the consolidated cases originated. Where the claim arises under federal law, as is the case here, the appropriate course is to apply the law of the transferee court."94 The court noted that applying the transferor court's law had some appeal because "the pretrial nature of multidistrict transfers suggests that the law of the origin circuit should apply," but ultimately relied on the principle of unitary law espoused in Korean Air Lines and decided that "the 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."95

In sum, there is a sharp division between the courts that apply the transferor court's law and the courts that apply the transferee court's law in class certification determinations in MDL actions. The former follows

^{92.} In re Managerial, Professional & Technical Employees, No. 02-CV-2924 (GEB), 2006 WL 38937, at *1 (D.N.J. Jan. 5, 2006).

^{93.} Id.

^{94.} Id. at *2.

^{95.} Id. (quoting Korean Air Lines, 829 F.2d 1171, 1174-76 and Richard L. Marcus, Conflict Among Circuits and Transfers Within the Federal Judicial System, 93 YALE L.J. 677, 721 (1984)). Other courts have supported the conclusion that class certification should be decided under the transferee court's laws. The Western District of Oklahoma, in In re General Motors Corporation "Piston Slap" Products Liability Litigation, addressed the application of transferee versus transferor circuit law in determining the propriety of class certification under Rule 23. MDL No. 04-1600, 2006 U.S. Dist. LEXIS 26603, at *2 n.6 (W.D. Okla. Apr. 19, 2006). This case only briefly touched upon the issue, but the court's preference for the law of the transferee circuit was clear: "Although this proceeding involves multiple cases transferred to this Court under the MDL procedure, in analyzing questions of federal law a transferee court applies the law of the circuit in which it is located." Id. Accordingly, the court applied the precedent of the circuit in which it was located in interpreting the standard for class certification under Rule 23. See id. Similarly, in In re Farmers Insurance Exchange Claims Representatives' Overtime Pay Litigation, 300 F. Supp. 2d 1020, 1031 at n.12 (D. Or. 2003), the District of Oregon noted the preference for applying the law of the transferee circuit in a federal MDL proceeding, relying upon its own Ninth Circuit precedent to interpret the scope of the administrative exemption under the Fair Labor Standards Act (FLSA). Though the Court did not explicitly address the application of transferor versus transferee circuit law in certifying the seven state law classes under FLSA, it exclusively applied transferee Ninth Circuit precedent in interpreting and applying the standard for Rule 23 class certification. Id.

the principle of comity and voluntarily defers to the transferor courts, which is where the cases will be returned for trial. The latter follows the principle of unitary law and takes encouragement from the fact that applying the law of one jurisdiction is efficient.

V. BOTH THE UNITARY LAW APPROACH AND THE COMITY APPROACH HAVE MAJOR FLAWS

Both the comity and unitary law approaches to the class certification choice-of-law question suffer from intractable flaws. This Part discusses how neither of these approaches adequately address the choice-oflaw question for class certification in MDL proceedings.

A. The Unitary Law Approach's Flaws

Transferee courts that interpret class certification under their own circuits' laws have justified doing so under the principle of unitary law because it fosters consistency and efficiency. However, in some cases, the unitary law approach may produce inefficient or arguably unfair results. Specifically, the unitary law approach has two major flaws: (1) there are limits to the law-of-the-case doctrine that the unitary law approach relies on, especially when constitutional concerns arise, and those limitations may lead transferor courts to reverse the transferee court's class certification decision upon remand; and (2) the change of forum may have a significant impact on the parties' rights and the outcome of the litigation.

1. Limits of the Law-of-the-Case Doctrine

The unitary law approach's primary failure is that it does not take into account the limits of the law-of-the-case doctrine. Critical of the unitary law approach, the *MTBE I* court noted that the transferor court will regain control of the case at trial and it "would be neither just nor efficient" to apply the law of the transferee circuit "in considering class certification, and then force the transferor court to try a class action that it might never have certified."⁹⁶ Following the principle of unitary law, the *Live Concert* case attempted to counter this argument by pointing out that the principle of the "law of the case" would cure that problem—for example, it does not matter if the transferor court might not have certi-

^{96.} MTBE I, 241 F.R.D. 435, 439 (S.D.N.Y. 2007).

fied the class because the transferor court is bound by the transferee court's decision when the cases are remanded for trial.⁹⁷

This unitary law counter argument only goes so far, however. The law-of-the-case doctrine—the doctrine limiting re-litigation of a decision in the same case—is *discretionary* in nature.⁹⁸ In other words, the law-of-the-case doctrine does not strictly limit a court's power to revisit an issue. Indeed,

[w]hen a court applies the law of the case doctrine to its own prior decisions (or those of a coordinate or equal court), the traditional formulations of the doctrine must be conceived as rules of thumb and not as straightjackets on the informed discretion and sound practical judgment of the judge.⁹⁹

The law-of-the-case doctrine is also limited in that district courts "owe obedience to the court of appeals in the circuit in which they sit. If the law in the transferor circuit differs from that in the transferee circuit where class certification was originally decided, the transferor court will invite reversal by upholding the law of the case."¹⁰⁰ Importantly, the law-of-the-case doctrine has no effect on the court of appeals, which can review issues arising in the district court without any restrictions.¹⁰¹ Thus, a transferor district court to which a case is remanded for trial may be loathe to abide by the law of the case for fear that it will waste its time

^{97.} In re Live Concert Antitrust Litig., 247 F.R.D. 98, 105 n.8 (C.D. Cal. 2007).

^{98.} See, e.g., Perillo v. Johnson, 205 F.3d 775, 780 (5th Cir. 2000); First Union Bank v. Pictet Overseas Trust Corp., 477 F.3d 616, 620 (8th Cir. 2007).

^{99. 18} JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 134.21[1] (3d ed. 1999) (citing Prisco v. A & D Carting Corp., 168 F.3d 593, 607 (2d Cir. 1999)); United States v. Dunbar, 357 F.3d 582, 592–93 (6th Cir. 2004); Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 817 (1998).

^{100.} MOORE'S at ¶ 134.21[1].

^{101.} Christianson, 486 U.S. at 816; McMasters v. United States, 260 F.3d 814, 818 (7th Cir. 2001). In *McMasters*, the Central District of California ruled that service of process on the United States was effective even though no attempt had been made to serve the United States Attorney. The case was then transferred to the Northern District of Illinois under a § 1404(a) transfer. The transferee court then dismissed the action for insufficient service of process. The Seventh Circuit held that the law-of-the-case doctrine generally requires a court after transfer to refrain from reopening rulings made before transfer, but allows reconsideration to correct clear error. On appeal, moreover, the law-of-the-case constraints that apply between trial courts evaporate: the question for the appellate court is to identify the correct rule of law. Even if the Ninth Circuit would hold the service effective, the Seventh Circuit indicated that it must nonetheless apply its own view of the correct answer to a question of federal law because the Federal Rules of Civil Procedure are not intended to be geographically non-uniform. *Id.*

with a trial only to have its circuit court reverse the class certification decision.¹⁰²

The unitary law approach, which relies on the law-of-the-case doctrine, is also ill-equipped to deal with constitutional law dilemmas that may arise upon remand. Class certification issues are sometimes inextricably tied to fundamental principles of due process, the right to a trial by a jury, and the Rules Enabling Act,¹⁰³ which makes adherence to the law of the case in the class action context more problematic than in some other areas of the law that do not implicate such fundamental issues. For example, there is currently a split in authority regarding whether the doctrine of fluid recovery may be applied to alleviate individualized questions of causation, injury-in-fact, and damages.¹⁰⁴ Some circuits, including the Second Circuit, have flatly rejected the doctrine of fluid recovery as a violation of due process and the Rules Enabling Act.¹⁰⁵ Other courts, such as the Seventh Circuit, have indicated that fluid recovery might be appropriate when "the use of such a mechanism is consistent with the policy or policies reflected by the statute violated."¹⁰⁶ This circuit split highlights a potential dilemma for a transferor court.

To bring this dilemma into perspective, consider a theoretical case filed in the District of Vermont (in the Second Circuit) that is transferred via the MDL procedure to the Southern District of Illinois (in the Seventh Circuit). If the transferee court applies the law of its own circuit, it might certify a class action after determining that a fluid recovery would be appropriate under the circumstances of the case. If the case is then remanded back to the District of Vermont, that court will be faced with a choice: follow the law of the case, which would render an unconstitutional result under Second Circuit law, or follow its own circuit's law

^{102.} See, e.g., In re Baseball Bat Antitrust Litig., 112 F. Supp. 2d 1175, 1177 (J.P.M.L. 2000) (the circuit court with jurisdiction over the district court of origin has the "power and authority to review any and all rulings made in the case, without regard to whether those rulings were made by the transferee court or the transferor court"); In re Briscoe, 448 F.3d 201, 213–14 (3d Cir. 2006) (A transferee court's "previously unreviewed rulings are properly raised in the court of appeals for the transferor district should the case reach a final judgment there.").

^{103.} The Rules Enabling Act provides that federal rules of procedure, such as Rule 23, cannot be used to "abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072(b) (2008).

^{104.} Under the doctrine of fluid recovery, "the jury determines the aggregate damage to the class without deciding how much each individual class member is to receive. Allocation of the award is made later, administratively, upon the submission of claims, and often according to formula." *In re* Neurontin Mktg. & Sale Practices Litig., 244 F.R.D. 89, 112 (D. Mass. 2007) (quoting *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 235 F.R.D. 127, 143 (D. Me. 2006)).

^{105.} McLaughlin v. American Tobacco Co., 522 F.3d 215, 231-32 (2d Cir. 2008).

^{106.} Simer v. Rios, 661 F.2d 655, 676 (7th Cir. 1981).

and decertify the class. Presumably, the transferor court would opt for the latter approach and uphold its oath to "support and defend the Constitution of the United States."¹⁰⁷ Thus, the unitary law approach is flawed because it relies on the potentially incorrect assumption that the transferor court will abide by the transferee court's class certification decision under the law-of-the-case doctrine. To the extent that the transferor court does not abide by the transferee court's previous decision and instead applies its own law to decertify the class, then the unitary law approach would, in that circumstance, work less efficiently than the comity approach.

Within the class certification context, Rule 23's text appears to invite a court to revisit class certification decisions and thus further weakens the law-of-the-case doctrine. Specifically, Federal Rule of Civil Procedure 23(c)(1)(C) provides that "[a]n order that grants or denies class certification may be altered or amended before final judgment." In other words, the rule itself provides the trial court flexibility to change its mind or alter its certification order at any time prior to judgment. Therefore, after a court remands a case for trial, it is inconsistent with Rule 23(c)(1)(C) to require the transferee court to blindly abide by the class certification ruling of the transferee court could have freely altered the order at any time if the case had not been transferred.¹⁰⁸

2. A Venue Change May Impact the Litigation's Outcome

At least with respect to issues of state law, it is well established that when a case transfers from one district court to another, the transfer is but a change of forum and should not impact the rights of the parties.¹⁰⁹ However, when the law of the transferee court governs the class certification decision, a court operating under the unitary law approach will

^{107. 5} U.S.C. § 3331 (2009).

^{108.} In *In re* Exterior Siding & Aluminum Coil Antitrust Litig., 696 F.2d 613, 616–18 (8th Cir. 1982), after a district judge in the District of Minnesota three times denied a motion to certify an antitrust plaintiff class, courts transferred two other actions filed in other districts to the District of Minnesota under the MDL procedure for consolidated pretrial proceedings. A district judge from Pennsylvania was designated to conduct the proceedings, and granted certification of the class. The Eighth Circuit Court of Appeals initially issued mandamus to set aside the class certification. It noted that a judge ordinarily should not set aside prior rulings by another judge in the same case without good cause and concluded that class certification should require some showing of changed law or facts. *Id.* Thereafter, however, the court of appeals voted en banc to deny the petition for mandamus, without opinion. *In re* Exterior Siding & Aluminum Coil Antitrust Litig., 705 F.2d 980 (8th Cir. 1983).

^{109.} Van Dusen v. Barrack, 376 U.S. 612, 632 (1964). See also supra Part III.A.

apply its own circuit's class certification law. Thus, the transfer from one district court to another may significantly impact whether the court certifies a class.

Thus far, the Panel has not addressed this important topic. In a similar context, however, the Panel expressly refused to address the choiceof-law issue. In *In re General Motors Class E Stock Buyout Securities Litigation*, a plaintiff had been conditionally transferred to another district for multidistrict proceedings. The plaintiff argued unsuccessfully to the Panel that a transfer could expose its case to dismissal because the transferee court would apply the statute of limitations law of the transferee circuit rather than the transferor circuit.¹¹⁰ Rejecting the argument, the Panel stated, "[W]hen determining whether to transfer an action under Section 1407 . . . it is not the business of the Panel to consider what law the transferee court might apply."¹¹¹ The fact remains, however, that transferring a case to a district that intends to apply its own circuit's law to the Rule 23 inquiry can dramatically affect the outcome of the case depending on how "plaintiff friendly" the circuit is on class certification issues.¹¹²

B. The Comity Approach's Flaws

Although there are significant flaws associated with applying the unitary law approach, the comity approach, which applies the laws of the transferor circuit or circuits, suffers from major problems as well. The chief problems with the comity approach are that it requires district courts to shun their own circuit's precedent, invites potentially inconsistent decisions within the same case, and leads to inefficiency.

1. Rejecting Controlling Precedent

One of the comity approach's biggest problems is that it offends the fundamental premise that a court should not make a decision that it believes is wrong. It is one thing for a district court to abide by controlling precedent with which it disagrees under the doctrine of stare decisis, because that principle serves as an invaluable stabilizing feature of our judicial system. However, it is wholly different for a district court to shun the law of its own circuit in deference to a circuit court to which it

^{110.} In re General Motors Class E Stock Buyout Sec. Litig., 696 F. Supp. 1546, 1547 (J.P.M.L. 1988).

^{111.} Id.

^{112.} The discussion above provides a ready example with respect to the circuit split on the doctrine of fluid recovery. *See supra* Part V.A.1.

owes no obedience. Ultimately, as aptly stated by the court in *Korean Air Lines*, it would be "inherently self-contradictory" and "logically inconsistent to require one judge to apply simultaneously different and conflicting interpretations of what is supposed to be a unitary federal law."¹¹³

In the same vein, there are significant limitations to a transferee court's deference to the transferor courts, many of which mirror the limitations of the law-of-the-case doctrine described above. For example, what if a transferee court determines that the transferor court's circuit would apply a construction of Rule 23 deemed unconstitutional under its own circuit's law? Should the transferee court nevertheless apply that unconstitutional law because it believes the transferor court will do so upon remand? A district court should not play accomplice to a constitutional violation. A court faced with such a dilemma should apply its own law and uphold the constitution as interpreted by its circuit.¹¹⁴ Efficiency must yield to constitutional concerns.

2. An Invitation to Inconsistent Decisions

Another significant flaw of the comity approach is that it invites inconsistent rulings in the same case. If the transferee court must apply different circuits' precedent to the Rule 23 decision, inconsistent rulings may result. The *Wal-Mart* case described above provides a helpful example.¹¹⁵ In that case, the district court, following the comity approach, noted that there is a circuit split regarding which test to apply to determine the appropriateness of a Rule 23(b)(2) class.¹¹⁶ The *Wal-Mart* court ultimately concluded that under the specific facts at issue, a Rule 23(b)(2) class would not be appropriate under any circuit's test.¹¹⁷ If the facts had been different, however, the court may have decided that it needed to certify a Rule 23(b)(2) class in some of the cases, but not others, simply because it was using inconsistent tests under different circuits' precedent. As noted in *Korean Air Lines*, this conflicting result

^{113.} *In re* Korean Air Lines Disaster of September 1, 1983, 829 F.2d 1171, 1175–76 (D.C. Cir. 1987).

^{114.} See discussion of *MTBE I*, supra note 60, and accompanying text. The court in *MTBE I* did not have occasion to address whether deference to the transferor courts has limitations, but presumably the transferee district court would have misgivings about playing accomplice to a constitutional violation.

^{115.} In re Wal-Mart Wage & Hour Employment Practices Litig., No. 2:06-CV-00225-PMP-PAL, 2008 WL 3179315, at *1 (D. Nev. June 20, 2008). See discussion supra Part IV.A.

^{116.} *Id*.

^{117.} Id. at *16.

would be "logically inconsistent."¹¹⁸ It would also be "difficult to explain the rationality of such divergences to the lay persons served by the federal judicial system."¹¹⁹

3. The Comity Approach's Inefficiency

The final problem with applying the transferor court's law is a practical one: it reduces the efficiency of the MDL process. A transferee court already faces extreme difficulty applying the substantive laws of all of the underlying states in a multi-state MDL proceeding. If the court must also apply varying interpretations of Rule 23 based on the original location of the cases, the class certification process could bog down tremendously. Not uncommonly, the transferee district court would have to consider the laws of half a dozen or more circuits because MDL proceedings often include cases pending across the United States. The MDL procedure's goals of increasing efficiency and eliminating confusion¹²⁰ might be significantly impaired if the district court must navigate through a maze of potentially conflicting class certification rules. Requiring a transferee court to apply the laws of all the transferor circuits also increases the likelihood that the transferee court might improperly interpret the law, both because the transferee court has less familiarity with other circuits' laws and because there are simply too many cases and wrinkles in the law between circuits for the district court to capture every nuance.

The judiciary's desire for efficiency, perhaps more than any other factor, will motivate many district courts to find a justification for applying one circuit's law, and preferably its own. As one commentator put it:

The transfer provisions would, however, be impaired substantially by insisting upon adherence to transferor interpretation. Transferee judges would be burdened with the difficult task of divining the attitude of the transferor circuit; such adherence would present new problems in distinguishing between "substantive" matters, which are governed by transferor interpretation, and "procedural" matters, which are not; and consolidated treatment of transferred cases would become more difficult or perhaps impossible. In this day of escalating caseloads it is foolish to weaken the transfer devices, which attempt to utilize the unified federal judicial system to relieve

^{118.} Korean Air Lines, 829 F.2d at 1175-76.

^{119.} Id. at 1176 n.8.

^{120.} The MDL transfer rules are designed to eliminate "delay, confusion, conflict, inordinate expense and inefficiency" during the pretrial period. *In re* Plumbing Fixture Cases, 298 F. Supp. 484, 495 (J.P.M.L. 1968) (discussing legislative history of statute).

part of the burden on the courts. The courts should therefore recognize that the transferee court must be free to decide a federal claim in the manner it views as correct without deferring to the interpretation of the transferor circuit.¹²¹

In summary, the current MDL remand procedure leads to two highly flawed approaches to the choice-of-law issue. Neither the comity approach nor the unitary law approach supplies an adequate answer to the choice-of-law question: either the transferee district court abides by its own circuit's law and runs the risk that the transferor district court or circuit will overturn the decision, or it makes a determination that may be incorrect under its own circuit's precedent to avoid a problem upon remand.

VI. A THIRD OPTION: CONGRESSIONAL ACTION

So which path is best? The above analysis of these two flawed approaches ultimately shows that neither presents a viable solution. A third option, however, offers a solution to nearly all of the shortcomings presented by the comity and unitary law approaches: Congress should simply enact legislation that allows transferee courts under the MDL process to keep the transferred cases for trial. Indeed, as described below, both the House of Representatives and the Senate repeatedly examined the problems of *Lexecon* and its remand obligation, but ultimately failed to pass the necessary legislation. This Part describes a solution to remedy the choice-of-law dilemma for class certification in MDL cases and the necessary congressional action.

A. The Solution

The best available option to solve nearly all of the problems associated with the comity and unitary law approaches is to eliminate the remand requirement mandated by § 1407. If the transferee court can keep the cases for trial, then the law-of-the-case problems described above disappear because the transferor courts will not regain control of the cases, and therefore will not need to examine the class certification decisions. Nor will the transferee court need to worry that a transferor court may later reverse the class certification decision because the transferor court will never have occasion to consider the appropriateness of the certification decision.

^{121.} Marcus, supra note 95, at 721.

Allowing the transferee court to keep the cases for trial would also increase efficiency. Prior to *Lexecon*, transferee courts would routinely transfer the cases to themselves for trial purposes.¹²² This procedure allowed the transferee courts to efficiently handle not only pre-trial proceedings, but also trials of multiple cases presenting similar issues. As the *Manual for Complex Litigation* explains, self-transfer to the transferee court has several efficiencies:

(1) during the often protracted time of the section 1407 assignment, the transferee judge gains a solid understanding of the case, and it makes sense for trial to be conducted by the judge with the greatest understanding of the litigation; (2) the transferee judge may already be trying the constituent centralized action(s), and there may be efficiencies in adjudicating related actions or portions thereof in one trial; and (3) the transferee judge, if empowered to try the centralized actions, may have a greater ability to facilitate a global settlement.¹²³

One can add to this list the efficiency gained by allowing the transferee court to apply a single circuit's law in deciding class certification.

Eliminating § 1407's remand requirement would also ensure consistent results within the same MDL action. As described above, a transferee court that applies the comity approach may need to consider conflicting Rule 23 precedent of multiple circuit courts, which may cause it to grant class certification to some of the cases, but not others. This would produce a counterproductive result given that the MDL procedure is designed to eliminate conflict, not facilitate it.¹²⁴ If, however, the transferee court keeps the cases for trial, the transferee court can safely apply its own circuit's law and achieve a consistent decision on class certification.

One potential drawback under the current system remains uncured by eliminating the remand procedure: a transfer from one jurisdiction to another may alter the outcome of the litigation. A transfer from one district court to another with controlling case law that is more beneficial to one party creates the possibility that the transfer may be case determinative. Of course, as described in Part III.B., that issue already exists in MDL cases in connection with pretrial proceedings, such as motions to dismiss and summary judgment, because the transferee courts apply their

^{122.} MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132 (2009).

^{123.} Id.

^{124.} *Plumbing Fixture Cases*, 298 F. Supp. at 491–92 (explaining that elimination of conflict is one of the main goals of the MDL procedure).

own circuits' law. Indeed, even the *MTBE I* court, which championed the comity approach described above, applied the law of the transferee court in examining a motion to dismiss.¹²⁵ Thus, the current system already tolerates the reality that transfer under the MDL procedure may cause a change in applicable federal precedent that may impact the result of the litigation.

Further, the principle that the plaintiff should be able to choose its forum only goes so far in federal court. Even under the current MDL procedure, a transferor court can transfer a case to the transferee court for all purposes under 28 U.S.C. § 1404(a).¹²⁶ Moreover, as noted by the *Korean Air Lines* court, "[t]he point has been cogently made that venue provisions are designed with geographical convenience in mind, and not to 'guarantee that the plaintiff will be able to select the law that will govern the case."¹²⁷ The *Korean Air Lines* court added that

[t]he federal courts comprise a single system [in which each tribunal endeavors to apply] a single body of law; there is no compelling reason to allow plaintiff to capture the most favorable interpretation of that law simply and solely by virtue of his or her right to choose the place to open the fray.¹²⁸

As long as the Panel does not consider choice-of-law issues in deciding where to transfer cases, it is difficult to maintain that the Panel favors either party through the MDL process. Indeed, the plaintiff may even benefit by the MDL transfer if the transferee court uses its own circuit's law in making the class certification decision. The transferee circuit's law may be more "plaintiff friendly" than the transferor circuit's law. In fact, the plaintiff may have preferred to file the complaint in the transferee court in the first instance if he had not been precluded from doing so by venue considerations. Thus, although a real concern exists that the MDL transfer may impact the outcome of the litigation, it is an

^{125.} MTBE I, 241 F.R.D. 435, 441 (S.D.N.Y. 2007).

^{126.} LeMaster v. Purdue Pharma Co., No. Civ.A. 04-147-DLB, 2004 WL 1398213, at *1 (E.D. Ky. June 18, 2004) (citing *In re* Oxycontin Antitrust Litig., 314 F. Supp. 2d 1388 (J.P.M.L 2004)). Similarly, cases may be removed from state court to federal court even though the plaintiff may prefer to remain in state court, which will have a significant impact on the procedural rules to be applied in the case to the extent the state rules differ from the federal rules. 28 U.S.C. § 1441 (2008).

^{127.} *In re* Korean Air Lines Disaster of September 1, 1983, 829 F.2d 1171, 1175 (D.C. Cir. 1987) (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 n.24 (1981)).

^{128.} Id. (quoting H.L. Green Co. v. MacMahon, 312 F.2d 650, 652 (2d Cir. 1962), cert. denied, 372 U.S. 928 (1963)).

acceptable cost because the Panel can remain impartial on this issue,¹²⁹ and the risk is fairly evenly distributed to both sides in the lawsuit.

B. Congressional Action

As the Supreme Court recognized in Lexecon, "the proper venue for resolving [the MDL remand procedure] remains the floor of Congress."130 Shortly after the Court issued the Lexecon decision, the Judicial Conference of the United States requested that Congress eliminate § 1407's remand requirement to allow the transferee courts to selftransfer cases.¹³¹ United States District Court Judge John F. Nangle, former Chairman of the Panel, testified before the House Subcommittee on Courts and Intellectual Property Committee on the Judiciary and called the MDL remand requirement "a cumbersome, repetitive, costly, potentially inconsistent, time consuming, inefficient and wasteful utilization of judicial and litigants' resources."¹³² Similarly, United States District Judge William T. Hodges, another former Chairman of the Panel, told the Senate Judiciary Subcommittee that eliminating § 1407's remand requirement is imperative to facilitate settlements, reduce waste of judicial resources, and reduce the uncertainties, delay, and expense that parties may experience due to unnecessary duplication of litigation or inconsistent results in different jurisdictions.¹³³

Both Houses of Congress considered eliminating *Lexecon's* remand requirement. Senator Orrin Hatch (R-Utah), for example, suggested that eliminating § 1407's remand requirement would "provide the MDL Panel with the most efficient option for resolving complex issues, the best means to encourage universal settlements, and the most consistent approach for rendering decisions."¹³⁴ The House¹³⁵ and the Senate¹³⁶ pro-

^{129.} *In re* General Motors Class E Stock Buyout Sec. Litig., 696 F. Supp. 1546, 1547 (J.P.M.L. 1988) (noting that the Panel will not consider choice-of-law issues in determining to which district to transfer cases).

^{130.} Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 40 (1998).

^{131.} Marcia Coyle, Bill to Fix 'Lexecon' Sought in Congress, Issue is Handling of Multidistrict Cases, NAT'L L.J., Jul. 10, 2006, at 1, 18.

^{132.} Federal Courts Improvement Act of 1999: Hearing on H.R. 1752 Before the Subcomm. on Courts and Intellectual Property, 108th Cong. 56 (1999) (statement of Judge John F. Nangle, Chairman, Judicial Panel on Multidistrict Litigation); Multidistrict, Multiparty, Multiforum Jurisdiction Act of 1999: Before the Comm. on the Judiciary, 108th Cong. 56 (1999) (statement of Judge John F. Nangle, Chairman, Judicial Panel on Multidistrict Litigation).

^{133.} Coyle, supra note 131, at 18.

^{134. 152} CONG. REC. S8272-73 (daily ed. July 26, 2006).

^{135.} The Judicial Reform Act of 1998, H.R. 1252, 105th Cong. (1998), was passed in the House and would have eliminated the § 1407 remand requirement, but it died in the Senate Judiciary Committee. *See* H.R. 1252, 105th Cong. (1998), *in* 144 CONG. REC. S3585 (daily ed. Apr. 24,

posed legislation multiple times that would amend § 1407 to allow transferee courts to retain the cases for trial. Ultimately, however, the legislation repeatedly languished in committees and died.¹³⁷ On the available record, it is difficult to know whether the legislation failed because Congress lacks interest in this issue or if lobbying efforts successfully thwarted the legislation's enactment. The sheer number of times proposed legislation has been introduced on this issue makes the former explanation unlikely. The record, however, does not reflect lobbying, and we are left to speculate why Congress cannot synchronize its efforts to enact the necessary legislation. Until it does, courts will be required to weigh the principles of comity and unitary law in their choice-of-law analysis for class certification decisions in MDL cases, and the result of that weighing process will produce flawed results.

VII. CONCLUSION

The current MDL remand procedure creates a choice-of-law battle for class certification that pits the principle of comity against the principle of unitary federal law. Because these are principles central to the United States' judicial system, it comes as no surprise that courts have struggled with and disagreed on which principle prevails when the two conflict. But this philosophical battle is a needless war that can be easily ended by changing the MDL rules to allow the transferee court to retain the transferred cases for trial. The courts, however, cannot spontaneously decide to implement a change; instead, Congress needs to act to eliminate the MDL remand procedure. Until Congress changes the law, courts examining choice-of-law for class certification in MDL cases will

^{1998).} In 1999, the House and the Senate passed the Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999, H.R. 2112, 106th Cong. (1999), but it died in conference committee. In the 107th Congress, the House passed H.R. 860, but the bill again languished in the Senate Judiciary Committee until Congress adjourned. *See also* H.R. 860, 107th Cong, (2001), *in* 147 CONG. REC. H1377 (daily ed. Mar. 14, 2001); Multidistrict Litigation Restoration Act of 2003, H.R. 1768, 108th Cong. (2004) (described in 151 CONG. REC. H2121 (daily ed. Apr. 19, 2005) as passing in the House by a roll call vote of 418–0, but later dying in the Senate Judiciary Committee); Multidistrict Litigation Restoration Act of 2005, H.R. 1038, 109th Cong. (2005) (passing in the House and dying in the Senate Judiciary Committee at the adjournment of Congress at the end of the session).

^{136.} The Senate has been less active than the House in trying to devise a *Lexecon* "fix," but in 2006, Senator Hatch introduced the Multidistrict Litigation Restoration Act of 2006, which would have eliminated § 1407's remand requirement. Multidistrict Litigation Restoration Act of 2005, S. 3734, 109th Cong. (2006) (stating that the latest major action occurred on July 26, 2006, where it was read twice and referred to the Senate Judiciary Committee). Ultimately, the legislation died in the Senate Judiciary Committee.

^{137.} See supra notes 135 and 136.

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find themselves in a difficult position with no satisfactory approach in sight.