

No Looking Back: The Effect of Transfer on the Choice of Law Rules Applicable to Directly Filed Multidistrict Litigation Cases

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I. INTRODUCTION

Marye Wahl, a Tennessee resident, suffers from a rare, but potentially serious, disease known as nephrogenic systemic fibrosis (“NSF”) for which there is no cure.¹ The only known cause of NSF is the use of gadolinium-based contrast agents (“GBCAs”) during MRI procedures.² General Electric, a company with its principal place of business in New Jersey, sells and markets a GBCA called Omniscan.³ In May and November 2006, Wahl’s physicians administered MRIs on Wahl in Tennessee using Omniscan as a contrast agent.⁴ In May 2007, Wahl began experiencing symptoms associated with NSF, and doctors diagnosed her with the disease in October 2010.⁵

Many individuals, like Wahl, developed NSF after treatment with GBCAs.⁶ As a result, related lawsuits were consolidated for pre-trial proceedings in a Multidistrict Litigation court (“MDL court”) in the Northern District of Ohio.⁷ The MDL court issued a Case Management Order permitting direct filing into the court, regardless of whether jurisdiction and venue were otherwise proper.⁸ In May 2011, Wahl filed her suit directly into the MDL court.⁹ Although most of the suits in the MDL court settle, Wahl’s case was not settled.¹⁰

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1. Wahl v. Gen. Elec. Co., 786 F.3d 491, 493–94 (6th Cir. 2015); Brief of Plaintiff-Appellant Marye Wahl at 6, Wahl v. Gen. Elec. Co., 786 F.3d 491 (6th Cir. 2015) (No. 13-6622), 2014 WL 897565.

2. Wahl, 786 F.3d at 492–93.

3. *Id.* at 492, 500.

4. *Id.* at 493.

5. Brief of Plaintiff-Appellant, *supra* note 1, at 6–7.

6. *See Wahl*, 786 F.3d at 493.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

The parties, pursuant to 28 U.S.C. § 1404(a), agreed to transfer the case to the Middle District of Tennessee.¹¹ Following the transfer, General Electric moved for summary judgment, arguing that the Tennessee products liability statute of repose barred Wahl's suit.¹² Wahl responded, arguing that application of Ohio's choice-of-law rules was appropriate and would require application of New Jersey's statute of limitations, which would not bar her suit.¹³ Although Wahl lives in Tennessee and the injury giving rise to the cause of action occurred in Tennessee, she argued that, as the transferor court, the choice-of-law rules of Ohio, not Tennessee, should apply.¹⁴

MDL courts and the ability to file directly into them provide a great deal of judicial efficiency to a flooded federal court system, but they also create a loophole for forum-shopping plaintiffs. The federal Multidistrict Litigation statute allows for the consolidation of tort cases for pretrial proceedings in a single district court chosen by the Judicial Panel on Multidistrict Litigation.¹⁵ Most of the cases are settled or are disposed of during pretrial proceedings, and any cases that survive are usually remanded back to the district courts from which they were transferred.¹⁶ To promote judicial efficiency, however, plaintiffs may file their case directly into the MDL court, even if it does not have personal jurisdiction over the parties.¹⁷ If one of these directly filed cases

11. *Id.*; see 28 U.S.C. § 1404(a) (2013) ("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 or to any district or division to which all parties have consented.").

12. *Wahl*, 786 F.3d at 493.

13. *Id.* at 494.

14. *Id.*

15. 28 U.S.C. § 1407 (2013).

16. See U.S. PANEL ON MULTIDISTRICT LITIGATION, STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION FISCAL YEAR 2014 (2014), http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical%20Analysis%20of%20Multidistrict%20Litigation_2014.pdf (indicating that over seventy percent of Multidistrict Litigation actions were terminated by the MDL courts between 1968 and 2014).

17. Direct filing is permissible when the judge presiding over the MDL court issues a Case Management Order allowing cases to be directly filed into the MDL court rather than filed in another district and transferred to the MDL court. See, e.g., Case Management Order No. 2, *In re DePuy Orthopaedics, Inc.*

survives the MDL court, it is transferred to a district court with proper jurisdiction. Plaintiffs may argue that the more preferable choice-of-law rules of the state in which the MDL court sits apply, citing a line of cases that, if followed, would support the notion that the choice-of-law rules of the transferor court always apply.¹⁸ However, there is no choice of law theory that supports the conclusion that the transferee district court should apply the choice-of-law rules from the state in which the transferor district court sits if that state does not have a significant contact or a significant aggregation of contacts.¹⁹ Furthermore, mechanical application of the analysis presented in *Van Dusen* and *Ferens* would generate inconsistent results. Namely, federal courts would apply different choice-of-law rules for plaintiffs who directly file into an MDL court and plaintiffs who initially file in one venue and their case is transferred to the MDL court, even though those actions would actually be litigated in the same state. This inconsistency of result is also at odds with the *Erie* doctrine.²⁰ Finally, the Supreme Court's recent decision in *Atlantic Marine*²¹ would reject such a mechanical application in so far as it departs from *Van Dusen* and *Ferens*.²²

ASR Hip Implant Products, No. 1:10-md-2197 (N.D. Ohio Jan. 7, 2011) (“In order to eliminate delays associated with transfer of cases in or removed to other federal district courts to this Court, and to promote judicial efficiency, any plaintiff whose case would be subject to transfer to [this Court] may file his or her case directly . . .”).

18. See *Ferens v. John Deere Co.*, 494 U.S. 516, 520 (1990); *Van Dusen v. Barrack*, 376 U.S. 612, 646 (1964).

19. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (AM. LAW INST. 1971) (requiring the law of the state with the “most significant relationship” to be applied); RESTATEMENT OF CONFLICT OF LAWS § 377 (AM. LAW INST. 1934) (requiring the law of the place of the harm to be applied); BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 69 (1963) (requiring forum law to be applied as long as the forum has a legitimate interest in its law being applied).

20. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.”).

21. *Atlantic Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568 (2013).

22. See *Ferens*, 494 U.S. at 531; *Van Dusen*, 376 U.S. at 616.

Closure of the forum-shopping loophole created by direct filing requires a two-step response. First, every Case Management Order issued by an MDL court that allows direct filing should contain a mandatory provision requiring the plaintiff to declare a “home forum” upon filing.²³ Second, Congress should amend 28 U.S.C. § 1407 to add a provision requiring that if a directly filed case is transferred following pretrial proceedings, the choice-of-law rules of the state in which the transferee court sits are applicable, unless the plaintiff declared the MDL court as the home forum and the case could have originally been filed in the MDL court absent the Multidistrict Litigation.

Part II of the Note examines the development of choice of law theories in the United States and the application of these theories in federal courts. Part III focuses on the history of Multidistrict Litigation and the newly adopted direct filing process. Part IV seeks to prove that the direct filing process leaves open a loophole for plaintiffs to challenge the choice-of-law rules of a transferee court. Part V analyzes and comments upon the need for a provision in Multidistrict Litigation Case Management Orders requiring that direct filing plaintiffs declare a home forum as well as a Congressional amendment to 28 U.S.C. § 1407. Part VI, the Conclusion, offers brief closing remarks.

II. CHOICE OF LAW DEVELOPMENT

A choice of law analysis is employed by courts when it is unclear which jurisdiction’s law should be applied to a case because the law of more than one jurisdiction could potentially be applied.²⁴ Although the analysis of which laws should be applied in a case seems like a simple procedural system that would be uni-

23. See Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 759–60 (2012) (suggesting that the solution to which choice-of-law rules for pretrial proceedings of directly filed cases in the MDL court are applicable is resolved by “requiring plaintiffs to declare a proper home district whose choice-of-law rules would apply to their claims” in the MDL court).

24. See KERMIT ROOSEVELT, III, CONFLICT OF LAWS 1–2 (2010) (describing a two-step process through which courts first analyze whether the case is within the scope of each jurisdiction’s law and then which jurisdiction has priority in the claims asserted).

form throughout U.S. jurisdictions to ensure predictable results, the methods of analysis vary from state to state.²⁵ The application of one state's laws over another can be the difference between a victory for the plaintiff and their case being dismissed.²⁶ The substantial impact on a case that can result from the implementation of one choice of law analysis over another has incited some plaintiffs to forum-shop.²⁷ To discourage such practices and provide a greater uniformity of results, the Supreme Court has rendered decisions that assist in closing forum-shopping loopholes.²⁸

A. Development of Choice of Law Theories

The Full Faith and Credit Clause of the Constitution requires that each state give full faith and credit to the "public [a]cts" of its sister states.²⁹ Additionally, the Due Process Clause of the Fourteenth Amendment guarantees due process of law.³⁰ The Supreme Court thus ruled that a forum's application of its own law is unconstitutional if the forum's connection to the case is insignifi-

25. See Symeon C. Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 59 AM. J. COMP. L. 303, 331 (2011) (providing a table evidencing the various methods of choice of law analysis used by each state).

26. This problem often arises when the competing jurisdictions have different length statute of limitations and the case is brought after one has expired. See *Wahl v. Gen. Elec. Co.*, 983 F. Supp. 2d 937, 952 (M.D. Tenn. 2013) (dismissing the case after applying Tennessee's statute of repose). Choice of law can also affect damages awarded to the plaintiff if one jurisdiction has statutory limitation on damages or does not allow insurance policies to be stacked. See *Allstate Ins. v. Hague*, 449 U.S. 302, 306 (1981) (holding that insurance policies issued in Wisconsin could be stacked following an accident in Minnesota).

27. See *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 530–31 (1928) (evidencing plaintiffs who filed in federal court rather than state court to exploit the federal court's advantageous choice of law analysis).

28. See *Klaxon Co. v. Stentor Elec. Mfg.*, 313 U.S. 487, 496 (1941) (holding that a federal court sitting in diversity must apply the choice-of-law rules of the state in which it sits).

29. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

30. U.S. CONST. amend. XIV § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

cant.³¹ Accordingly, a choice of law analysis is necessary whenever more than one state's laws could be applied. A forum may apply its own law, however, when it has a "legitimate" interest in its law being applied.³² Therefore, if the choice of law analysis leads to the forum law being applied, the court may implement any choice of law analysis it wishes as long as the court can show that the forum had a legitimate interest in its law being applied.³³ The choice of law theory utilized by a court may change depending upon the type of claim being asserted.³⁴ This Note focuses on the choice of law theories utilized in tort claims.

1. First Restatement

The (First) Restatement of Conflict of Laws ("First Restatement") implemented the vested rights theory,³⁵ which relies upon territoriality.³⁶ According to this theory, the law of the forum

31. *Allstate*, 449 U.S. at 310–11 ("[I]f a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional.").

32. *Id.* at 323 (Stevens, J., concurring) ("[T]he [Full Faith and Credit] Clause should not invalidate a state court's choice of forum law unless that choice threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State.").

33. *Id.* at 336 (Powell, J., dissenting) ("A contact, or a pattern of contacts, satisfies the Constitution when it protects the litigants from being unfairly surprised if the forum State applies its own law, and when the application of the forum's law reasonably can be understood to further a legitimate public policy of the forum State.").

34. For example, Tennessee courts employ the Second Restatement in the choice of law analysis for tort claims but rely upon the First Restatement for contract claims. *See* Symeonides, *supra* note 25, at 331.

35. RESTATEMENT OF CONFLICT OF LAWS (AM. LAW INST. 1934).

36. *See* Kermit Roosevelt, III, *Brainerd Currie's Contribution to Choice of Law: Looking Back, Looking Forward*, 65 MERCER L. REV. 501, 503 (2014); Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 778 (1983) ("Most of these rules are, in the language of the new learning, 'jurisdiction selecting.' They identify the state whose law governs solely on the basis of these couplings of substantive category and determinative contact, looking to the substantive tenor and policies of the conflicting local laws only insofar as is necessary to determine in which substantive category the rules belong."); James Y. Stern, Note, *Choice of Law, the Constitution, and Lochner*, 94 VA. L.

in which a wrong occurred is the applicable law in deciding any claim that arose from such wrong.³⁷ The moment a wrong occurs, it creates a right in the injured individual. This right then vests, and once vested, is enforceable in all states.³⁸ The Supreme Court utilized this theory in numerous cases during the first quarter of the Twentieth Century.³⁹ Courts cited the Full Faith and Credit Clause and the Due Process Clause as reasons to force a forum to apply the law of a foreign jurisdiction.⁴⁰

Although this approach simplifies the choice of law process, it can provide unfair results.⁴¹ For example, in the case of *Alabama Great Southern Railroad Co. v. Carroll*, an Alabama employee was injured in Mississippi by the negligence of his Alabama employer and, through the use of the First Restatement, the

REV. 1509, 1521 (2008); *see also* RESTATEMENT OF CONFLICT OF LAWS § 379 (AM. LAW INST. 1934).

37. *See* William M. Richman & David Riley, *The First Restatement of Conflict of Laws on the Twenty-Fifth Anniversary of Its Successor: Contemporary Practice in Traditional Courts*, 56 MD. L. REV. 1196, 1197 (1997) (“When an event (a tort, for example) occurred in the foreign territory, a right was created; the content of that right, of course, could be determined only by reference to the foreign law. The role of the forum court in the choice-of-law process was merely to enforce the right that had vested in the foreign territory according to the foreign law.”); Korn, *supra* note 36, at 803 (“Since under the vested rights theory the exclusive power of such a state embraced the creation and definition of the entire right of action, that state’s law was held to govern all substantive issues in tort actions and, in contract actions, at least all those going to the ‘validity and effect’ of the agreement.”).

38. *See* ROBERT L. FELIX & RALPH U. WHITTEN, *AMERICAN CONFLICTS LAW: CASES AND MATERIALS* 18 (5th ed. 2010).

39. *See* *W. Union Tel. Co. v. Brown*, 234 U.S. 542, 547 (1914) (holding that the law of the place where a tort is committed follows the defendant); *Old Dominion S.S. Co. v. Gilmore*, 207 U.S. 398, 406 (1907) (holding that the law of the place of the wrong vests with the right to sue); *see also* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1225–26 (1992).

40. *See* Brilmayer & Norchi, *supra* note 39, at 1227; Stern, *supra* note 36, at 1526.

41. *See* Korn, *supra* note 36, at 806 (“[A] forum asked to enforce a right ‘vested’ elsewhere was stripped of any discretion with respect to the legal rules governing its response—it had an obligation to apply the law of the one state having territorially-based ‘legislative jurisdiction’ from which the only escapes were through manipulatory techniques or an ill-defined ‘public policy’ exception.”).

law of Mississippi was held to be applicable.⁴² The Alabama employer and Alabama employee made their contract in Alabama and the injury arose from a negligent act that occurred in Alabama.⁴³ The only relationship the state of Mississippi had to the lawsuit was that the injury happened to occur within the state's borders.⁴⁴ The plaintiff was able to recover under Mississippi law but was unable to do so under Alabama law.⁴⁵ The Alabama Supreme Court created a bright line rule, stating "there can be no recovery in one state for injuries to the person sustained in another, unless the infliction of the injuries is actionable under the law of the state in which they were received."⁴⁶ Although such a rule allows for a greater predictability of results, it also allows the law of a state with no interest in the case to be applied.

Many legal theorists criticized the First Restatement. Walter Wheeler Cook, for one, did not believe that a state's sovereignty stopped immediately at its borders.⁴⁷ David Cavers criticized the First Restatement for being an instrument for jurisdiction selection, not choice of law selection.⁴⁸ Rejecting the per se rule espoused by the First Restatement, legal theorists sought a system rooted less in territoriality.⁴⁹ In the 1950s and early 1960s, Brainerd Currie developed the Governmental Interest Analysis approach to choice of law issues.⁵⁰

42. 11 So. 803, 803–09 (Ala. 1892).

43. *Id.* at 803–04.

44. *Id.* at 804.

45. *Id.* at 805.

46. *Id.*

47. WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 41 (1942) ("[L]aw' is not a material phenomenon which spreads out like a light wave until it reaches the territorial boundary and then stops.").

48. David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 178 (1933) ("Both the territorial and the 'vested rights' theories sanctioned its disregard. So long as deduction from territorial postulates could indicate only one jurisdiction as a source of law in a given case, the content of that law would be logically irrelevant.").

49. See Korn, *supra* note 36, at 807–09 (describing attempts by legal scholars to move away from the use of territoriality in choice of law analysis).

50. See generally CURRIE, *supra* note 19, at 188–89.

2. Governmental Interest Analysis

Through Currie's governmental interest analysis, the forum applies its own law whenever it has a legitimate interest in doing so.⁵¹ Currie's theory rejects the First Restatement's choice of law analysis that favors the law of the state where the harm occurred above all else.⁵² Courts welcomed interest analysis insofar as it gave credence to the application of the law of the jurisdiction with the strongest interest in the claim.⁵³ Despite its improvements over the approach of the First Restatement, this analysis has been criticized for favoring forum law and being easily manipulated.⁵⁴ Notwithstanding any criticism it may receive, this analysis raises the important distinction between a true conflict and a false conflict, while shedding light on the "unprovided-for" cases.⁵⁵

First, a court must determine whether the case presents a true conflict.⁵⁶ If application of another state's choice-of-law rules would create the same result as the application of the forum's own choice-of-law rules, there is a false conflict and the court applies forum law.⁵⁷ Courts have also held that a false conflict exists if the

51. See *id.* at 152–57; Alfred Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585, 1590 (1985) (“The laws of a state should be deemed to regulate only the affairs of residents of the state, absent reason for concluding otherwise.”).

52. See Maurice Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 COLUM. L. REV. 946, 951 (1981).

53. *Babcock v. Jackson*, 191 N.E.2d 279, 285 (N.Y. 1963) (“Where the issue involves standards of conduct, it is more than likely that it is the law of the place of the tort which will be controlling but the disposition of other issues must turn, as does the issue of the standard of conduct itself, on the law of the jurisdiction which has the strongest interest in the resolution of the particular issue presented.”).

54. See Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1048 (1987); Korn, *supra* note 36, at 815–16.

55. A true conflict arises when application of the forum's law would have a different result from the application of an eligible foreign jurisdiction's law. See Smith, *supra* note 54, at 1047–48.

56. See Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 311 (1990) (“A multistate conflict of laws exists only when contacts are distributed such that more than one state wants to regulate the case.”).

57. See CURRIE, *supra* note 19, at 107 (explaining that a false conflict arises when only one forum has a legitimate interest in its law being applied).

foreign jurisdiction has no interest in its law being applied.⁵⁸ In *O'Connor v. O'Connor*, both plaintiff and defendant were domiciled in Connecticut, but the injury that gave rise to the suit occurred in Quebec.⁵⁹ Although Quebec would not have allowed recovery and Connecticut would have, creating different results, the Connecticut court deemed this case to be a false conflict because Quebec had no interest in applying its law; therefore, the court applied Connecticut law.⁶⁰

A true conflict arises when the application of forum law would cause a different result than application of the law of another interested jurisdiction. Interest analysis requires that when a true conflict arises, the law of the forum will be applied.⁶¹ For example, in *Lilienthal v. Kaufman*, the parties, one domiciled in Oregon, the other in California, made, entered into, and performed a contract in California.⁶² Despite the deep-rooted connection of the claim to California, the court applied the law of Oregon, reasoning that in a case where “[t]he interests of neither jurisdiction are clearly more important than those of the other[,]” the law of the forum must be applied.⁶³

In addition to false conflicts and true conflicts, there is a third category into which cases may fall—“unprovided-for” cases.⁶⁴ This occurs when no state, including the forum, has an interest in its law being advanced.⁶⁵ Accordingly, the court must next

58. See, e.g., *O'Connor v. O'Connor*, 519 A.2d 13, 25 (Conn. 1986).

59. *Id.* at 14.

60. *Id.* at 24–25.

61. See Damon C. Andrews & John M. Newman, *Personal Jurisdiction and Choice of Law in the Cloud*, 73 MD. L. REV. 313, 345 (2013) (explaining that in the event of a true conflict, interest analysis required the forum to apply its own law); see also Gene R. Shreve, *Currie's Governmental Interest Analysis—Has It Become A Paper Tiger?*, 46 OHIO ST. L.J. 541, 542 (1985).

62. *Lilienthal v. Kaufman*, 395 P.2d 543, 544 (Or. 1964) (en banc).

63. *Id.* at 549.

64. See Jeffrey M. Shaman, *The Vicissitudes of Choice of Law: The Restatement (First, Second) and Interest Analysis*, 45 BUFF. L. REV. 329, 347 (1997); see also John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 200–01 (1981) (describing “unprovided-for cases” as a “criss-cross” configuration where the law of the state in which each party is domiciled is in opposition to that party's interests).

65. Larry Kramer, *The Myth of the “Unprovided-for” Case*, 75 VA. L. REV. 1045, 1045–46 (1989) (“[S]uppose that a plaintiff from state A has an

determine whether the forum has a legitimate interest in its law being applied.⁶⁶ In the event that an “unprovided-for” case arises, under interest analysis, the forum would apply the forum’s law.⁶⁷

Currie’s governmental interest analysis has been praised for incorporating the purpose of the law of competing states in determining the proper choice of law.⁶⁸ However, the approach has also been criticized for forum favoritism and being easily manipulated by courts.⁶⁹ Accordingly, Currie’s approach has been widely abandoned in favor of choice of law approaches that consider the totality of circumstances.⁷⁰

3. Second Restatement

In 1971, the American Law Institute published the Restatement (Second) of Conflicts (“Second Restatement”), an attempt to reach a middle ground between conflicting choice of law approaches.⁷¹ The Second Restatement provides the “most significant relationship” test to determine which jurisdiction’s law should be applied when a conflict arises in torts claims.⁷² Section 6 of the Second Restatement enumerates the factors the court should consider in determining which jurisdiction has the most significant

accident with a defendant from state B. If the policy underlying state A’s law protects defendants and the policy underlying state B’s law protects plaintiffs, neither state would have an interest in applying its law.”).

66. See Kramer, *supra* note 56, at 326–27 (explaining scholarly preference for a forum’s law to be applied if there is a legitimate interest).

67. See CURRIE, *supra* note 19, at 152–56.

68. See Shreve, *supra* note 61, at 542 (“By whatever name, all modern choice of law approaches include in their design some mechanism for probing the interests of the forum and other jurisdictions by investigating the extent to which policies accounting for substantive rules will be advanced through their application in the particular case.”).

69. See Symeonides, *supra* note 25, at 328; see also Shreve, *supra* note 61, at 542.

70. See Shaman, *supra* note 64, at 354 (explaining that only four states still use interest analysis and some scholars dispute that there are even four).

71. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (AM. LAW INST. 1971); see Shaman, *supra* note 64, at 330 (citing Herma H. Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 552–53 (1983)).

72. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (AM. LAW INST. 1971).

relationship with the parties and the issues before the court.⁷³ To determine which state has the most significant relationship, courts consider the following contacts: (1) the place of the injury; (2) the place where the conduct causing the injury occurred; (3) the domicile and place of business of the parties; and (4) the place where the parties' relationship was centered, if any.⁷⁴

In *Townsend v. Sears, Roebuck and Co.*, a Michigan boy was injured at his home when he was run over by a lawn mower purchased from the defendant, a New York corporation with its principal place of business in Illinois.⁷⁵ Plaintiffs, mother and son, filed suit against the defendant in Illinois and requested that forum law apply.⁷⁶ The Supreme Court of Illinois denied this request, explaining that the application of the Second Restatement requires that the law of the state where the injury occurred must be applied, unless there is a state with a more significant relationship.⁷⁷ In *Townsend*, Michigan was the state in which the injury occurred, the home of the plaintiffs, and, therefore, the state with the most significant relationship to the cause of action.⁷⁸

The Second Restatement is the most widely used choice of law approach, primarily due to its flexibility.⁷⁹ This approach is

73. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. LAW INST. 1971) (“(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law. (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.”).

74. *Montgomery v. Wyeth*, 580 F.3d 455, 459–60 (6th Cir. 2009) (citing *Hataway v. McKinley*, 830 S.W.2d 53, 59 (Tenn. 1992) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (AM. LAW INST. 1971))).

75. 879 N.E.2d 893, 896 (Ill. 2007).

76. *Id.*

77. *Id.* at 902–05.

78. *Id.* at 905–06.

79. See *Phillips v. Gen. Motors Corp.*, 995 P.2d 1002, 1007 (Mont. 2000) (citing *In re Air Crash Disaster at Boston, Mass.* on July 31, 1973, 399 F. Supp. 1106, 1110 (D. Mass. 1975)) (explaining the advantages of adopting the Second Restatement approach to choice of law analysis); Smith, *supra* note 54, at 1046

criticized, however, for its lack of predictability due to the significant amount of judicial discretion allowed under the approach.⁸⁰ Scholars have complained that by not defining “significant” and giving discretion to judges to assign weight to the various factors employed in determining the significant relationship, the Second Restatement almost encourages dissimilarity in results across courts.⁸¹

B. Federal Courts and Choice of Law

The ability of courts to choose their own choice of law analysis creates a disparity in results from jurisdiction to jurisdiction.⁸² This lack of uniformity was further frustrated when a case’s result turned not only on within which state a plaintiff brought their claims, but whether they brought their claims to state or federal court.⁸³ Following the Supreme Court’s decision in *Swift v. Tyson*, confusion reigned supreme.⁸⁴

1. *Erie* and *Klaxon*

The Supreme Court, through its decisions in *Erie* and *Klaxon*, narrowed the ability of federal courts to create law. The Supreme Court held in *Swift v. Tyson* that a federal court sitting in

(describing the Second Restatement as a flexible mixture of choice of law theories); see also Symeonides, *supra* note 25, at 331.

80. See Korn, *supra* note 36, at 818; Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1246 (1997) (“The eclectic mix of territorial and personal connecting factors allows a court to claim that almost any result is consistent with the Second Restatement.”); see also Hill, *supra* note 51, at 1636 (explaining that although the Second Restatement provides guidance, a judge still has a substantial amount of judicial discretion).

81. See Korn, *supra* note 36, at 818–19 (listing numerous defects of the Second Restatement).

82. See Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 962 (1994) (noting that scholars track closely jurisdictions’ adoptions of different choice of law approaches).

83. See, e.g., *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 529–31 (1928).

84. See Adam N. Steinman, *What Is the Erie Doctrine? (and What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 256–57 (2008) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 75 (1938)).

diversity must only apply the statutory law of the state in which it sits and may disregard the common law of such state.⁸⁵ The *Swift* decision created an inconsistency in the courts that enabled plaintiffs to forum-shop between state and federal courts.⁸⁶ Accordingly, an individual's substantive rights varied depending on whether their case was heard in federal or state court.⁸⁷ A notable example of the inconsistency created by *Swift v. Tyson* is of the taxicab company that reincorporated in a different state to create diversity jurisdiction so their case could be heard in federal court, avoiding the common law of Kentucky.⁸⁸

Swift v. Tyson stood untouched for almost a century until the Supreme Court held in *Erie* that a federal court sitting in diversity must apply the law of the state in which it sits.⁸⁹ The cause of action in *Erie* arose from a train accident, when a train in Pennsylvania hit a Pennsylvania resident and the Pennsylvania resident filed suit in New York.⁹⁰ The plaintiff argued that federal common law should determine the applicable standard of care, while the defendant railroad argued that Pennsylvania law should be applied.⁹¹ The Supreme Court held that a federal court sitting in diversity must apply the substantive law of the state in which it sits.⁹² *Erie* firmly established that “[t]here is no federal general common law.”⁹³ The goal of this opinion was to create a greater uniformity amongst courts that had become disconnected following *Swift*.⁹⁴

85. 41 U.S. 1, 19 (1842).

86. See Donald Earl Childress, III, *When Erie Goes International*, 105 NW. U. L. REV. 1531, 1540 (2011).

87. *Erie*, 304 U.S. at 74–75.

88. *Black & White Taxicab & Transfer Co.*, 276 U.S. at 522–23.

89. *Erie*, 304 U.S. at 78.

90. *Id.* at 69.

91. *Id.* at 70–71.

92. *Id.* at 79–80.

93. *Id.* at 78.

94. See *id.* at 74 (“Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.”); see also Allan Ides, *The Supreme Court and the Law to Be Applied in Diversity Cases: A Critical Guide to the Development and Application of the Erie Doctrine and Related Problems*, 163 FED. RULES DECISIONS 19, 20 (1995) (providing a detailed analysis of *Erie* and how it will impact decisions in the future).

Following *Erie*, the Supreme Court held in *Klaxon* that a federal court sitting in diversity must apply the choice-of-law rules of the state in which it sits.⁹⁵ The cause of action that gave rise to *Klaxon* was the breach of a contract.⁹⁶ The defendant, a Delaware corporation, and the plaintiff, a New York corporation, executed the contract in New York.⁹⁷ Although the plaintiff filed suit in Delaware, the federal district court applied New York law.⁹⁸ The Court held that a federal court sitting in diversity may not fashion its own choice of law methodology, effectively making a state's choice-of-law rules substantive law.⁹⁹ Combined, *Erie* and *Klaxon* require that the choice-of-law rules governing a case filed in federal court must be the same as though the case were filed in a state court.¹⁰⁰

When *Klaxon* was decided, courts routinely followed the First Restatement of Conflicts of Laws.¹⁰¹ As noted above, the First Restatement simply requires the law of the place of the harm or contract formation be applied.¹⁰² Accordingly, no matter within which state the federal court was seated, the applicable law would be the place of the harm or contract formation.¹⁰³ Such predictable and uniform outcomes are not possible, however, when each state has its own choice-of-law rules.¹⁰⁴ Today, the choice-of-law rules

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

96. *Id.* at 494.

97. *Id.*

98. *Id.* at 495.

99. *See id.* at 498.

100. *See Ides, supra* note 94, at 34 (“In a diversity case, a federal district court sitting in New York will not necessarily apply New York substantive law to the controversy; rather, the court will apply the substantive law a New York state court would apply.”).

101. *See Earl M. Maltz, Choice of Forum and Choice of Law in the Federal Courts: A Reconsideration of Erie Principles*, 79 KY. L.J. 231, 253 (1991) (“At the time the *Klaxon* rule was established, it fit both the limited impact theory and the principle of equality well. American courts uniformly followed the approach of the Restatement (First) of Conflict of Laws in deciding choice of law questions.”).

102. *See supra* Part II.A.1.

103. *See W. Union Tel. Co. v. Brown*, 234 U.S. 542, 547 (1914).

104. *See Symeonides, supra* note 25, at 331 (providing a survey of the theories employed by each state in torts and contracts cases).

implemented by states give courts great discretion to apply forum law.¹⁰⁵

2. Post-Transfer Choice of Law

In 1948, Congress passed the federal transfer statute.¹⁰⁶ The statute, while providing convenience to parties, left open the question of which state's laws applied after a case was transferred. The Supreme Court held in *Van Dusen* and *Ferens* that the policies underlying the holdings of *Erie* and *Klaxon* mandated that the law, including the choice-of-law rules, of the transferor court, rather than those of the transferee court, must be applied to a case that has been transferred pursuant to 28 U.S.C. § 1404(a).¹⁰⁷

The claims asserted in *Van Dusen* arose from a plane crash when a plane traveling from Boston to Philadelphia crashed into the Boston Harbor.¹⁰⁸ Plaintiffs filed personal injury and wrongful death suits in Pennsylvania, but the district court then granted the request of the defendants to transfer the case to Massachusetts.¹⁰⁹ The request was granted because the case could have been brought in the District of Massachusetts at the onset.¹¹⁰ However, the Court held that the law of Pennsylvania, not Massachusetts applied.¹¹¹ The Court explained that 28 U.S.C. § 1404(a) is available to prevent a waste of time and money, not to change the applicable law in the case.¹¹²

The Supreme Court strengthened the precedent set by *Van Dusen* in *Ferens*. In *Ferens*, a John Deere combine injured a Pennsylvania farmer in Pennsylvania.¹¹³ The farmer filed suit against John Deere in a Mississippi state court, then requested the case be transferred to a Mississippi federal court.¹¹⁴ Finally, after

105. See Childress, III, *supra* note 86, at 1544 (citing PETER HAY ET AL., CONFLICT OF LAWS § 1.10 tbl. 3 (5th ed. 2010)).

106. 28 U.S.C. § 1404 (2012).

107. *Ferens v. John Deere Co.*, 494 U.S. 516, 532 (1990); *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964).

108. *Van Dusen*, 376 U.S. at 613.

109. *Id.* at 613–14.

110. *Id.* at 614.

111. *Id.* at 639.

112. *Id.* at 616.

113. *Ferens v. John Deere Co.*, 494 U.S. 516, 519 (1990).

114. *Id.* at 520.

realizing that the statute of limitations in Pennsylvania was more advantageous, the farmer sought for his case to be transferred to the Western District of Pennsylvania.¹¹⁵ The Supreme Court held that the transferee court must apply the law of the transferor court, regardless of which party initiated the transfer.¹¹⁶ When read with *Klaxon*, these cases require that courts employ the choice-of-law rules of the transferor court.¹¹⁷

In *Atlantic Marine*, the Supreme Court departed from this general rule in deciding that the laws of the state in which the transferee court sits should apply when the transfer is based on the parties' valid, contractual choice of law provision.¹¹⁸ The cause of action arose from an alleged breach of contract.¹¹⁹ The contract included a forum selection clause, which required that any action arising from the contract must be filed in the Eastern District of Virginia.¹²⁰ However, when the plaintiff believed the defendant had breached the contract, the plaintiff brought suit in the Western District of Texas.¹²¹ The defendant filed a mandamus action to force the district court to transfer the case to the Eastern District of Virginia.¹²² The Supreme Court held that not only should the case be transferred to the Eastern District of Virginia, but the law of the transferee court should also apply.¹²³ In departing from the bright line rule created by *Van Dusen* and *Ferens*, the Supreme Court

115. *Id.*

116. *Id.* at 531.

117. *See Klaxon Co. v. Stentor Elec. Mfg.*, 313 U.S. 487, 497–98 (1941); *see also Bradt, supra* note 23, at 780 (“[T]he invocation of a state’s choice-of-law rules is linked to a plaintiffs’ selection of a proper venue. Transfer within the federal system—even in the case of a mass tort, where transfer would create increased efficiency—does not deprive a plaintiff of the benefits of that choice.”).

118. *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 582–83 (2013).

119. *Id.* at 575.

120. *Id.*

121. *Id.* at 576.

122. *Id.*

123. *Id.* at 582 (“[W]hen a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue’s choice-of-law rules—a factor that in some circumstances may affect public-interest considerations.”).

relied upon the policy behind the holdings of these cases.¹²⁴ Justice Alito reasoned, “[b]ecause ‘§ 1404(a) should not create or multiply opportunities for forum shopping,’ . . . we will not apply the *Van Dusen* rule when a transfer stems from enforcement of a forum-selection clause. . . .”¹²⁵ It should be inferred then that the choice-of-law rules of the transferor court should not be applied if doing so would encourage the “gamesmanship” described by Justice Alito.¹²⁶

Over the past century, the loopholes that allow forum-shopping have narrowed significantly.¹²⁷ Rather than focusing on an isolated incident, courts have begun to look at the totality of the circumstances in determining which jurisdiction’s laws apply to any given case.¹²⁸ Rather than awarding a better outcome to a plaintiff who brings his case in federal court, federal courts apply the same choice of law rules to federal diversity cases as though the case were brought in state court.¹²⁹ Rather than allowing parties to transfer their case for a different result, the Supreme Court has required that the original forum’s law apply post-transfer.¹³⁰ Taken as a whole, courts and scholars have made it clear that forum-shopping should be stopped.¹³¹

III. MULTIDISTRICT LITIGATION

Multidistrict Litigation is a statutory tool used to promote efficiency and judicial economy.¹³² It allows for cases with similar causes of action to be consolidated into one district court for pre-trial proceedings.¹³³ In 2008, one-third of all federal civil litigation

124. *Id.* at 583 (citing *Ferens v. John Deere Co.*, 494 U.S. 516, 523 (1990)).

125. *Id.*

126. *Id.* at 583.

127. *See supra* Part II.

128. *See Smith, supra* note 54, at 1046–47; Symeonides, *supra* note 25, at 331.

129. *See Ides, supra* note 94, at 34.

130. *See Ferens v. John Deere Co.*, 494 U.S. 516, 531 (1990).

131. *See infra* Section V.A.1.

132. 28 U.S.C. § 1407 (2012).

133. *Id.*

cases are Multidistrict Litigation cases.¹³⁴ An added efficiency of Multidistrict Litigation that is not statutorily defined is direct filing, which allows plaintiffs to file their claims directly into the district court where similar cases have been consolidated.¹³⁵

A. History

The prologue to Multidistrict Litigation formed out of necessity in the early 1960s when, following a batch of highly publicized antitrust litigation, hundreds of cases were filed alleging conspiracies among electrical equipment managers.¹³⁶ Chief Justice Warren established the Coordinating Committee for Multiple Litigation of the United States District Courts and charged the Committee with consolidating the pretrial proceedings of the conspiracy cases.¹³⁷ Following the success of the Committee and upon the Committee's recommendation, in 1968, Congress enacted 28 U.S.C. § 1407, creating Multidistrict Litigation, in an effort to consolidate the pretrial proceedings of cases with similar claims and defendants, which would otherwise span courts across the country and waste valuable time and resources.¹³⁸

The purpose of enacting the statute was to promote efficiency and encourage uniformity by avoiding inconsistent pretrial proceedings in different district courts.¹³⁹ The Multidistrict Litigation statute contemplates that cases with similar claims and defendants are transferred to a designated district court for pretrial proceedings.¹⁴⁰ Then, following the pretrial proceedings, the cases

134. See Bradt, *supra* note 23, at 784 (citing Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 *FORDHAM L. REV.* 1643, 1667 (2011)).

135. Although direct filing is not contained within § 1407, it has been widely used by MDL courts over the past decade to promote judicial economy. See Bradt, *supra* note 23, at 764–65.

136. See Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 *REV. LITIG.* 47, 48–49 (2007).

137. See Mark A. Hill, *Opening the Door for Bias: The Problem of Applying Transferee Forum Law in Multidistrict Litigation*, 85 *NOTRE DAME L. REV.* 341, 342–43 (2009).

138. 28 U.S.C. § 1407 (2012); see Hill, *supra* note 137, at 343.

139. See Hill, *supra* note 137, at 343.

140. 28 U.S.C. § 1407; see Hill, *supra* note 137, at 346–47.

that have not been disposed of are remanded to their originating court.¹⁴¹

The Multidistrict Litigation statute also created the Judiciary Panel on Multidistrict Litigation (“JPML”). The JPML consists of seven circuit and district court judges who are appointed, without oversight, by the Chief Justice of the Supreme Court.¹⁴² The JPML identifies causes of action to be consolidated by Multidistrict Litigation and selects a singular district court to conduct the pretrial proceedings.¹⁴³ The JPML may initiate proceedings for the consolidation of pretrial proceedings or may act upon a motion filed by a party involved in an action.¹⁴⁴ The only three requirements necessary for pretrial proceeding consolidation to occur are: (1) the cases for consolidation involve “one or more common questions of fact”; (2) the consolidation must be for the “convenience of parties and witnesses”; and (3) the consolidation of the pretrial proceedings must promote justice and efficiency.¹⁴⁵

Once the JPML has decided to consolidate pretrial proceedings for a particular cause of action, the JPML, again without oversight, will designate a district court wherein the Multidistrict Litigation pretrial proceedings for the particular cause of action will be heard.¹⁴⁶ Following notice from the JPML, filed cases arising from the particular cause of action are then transferred to the designated district court.¹⁴⁷ Once the cases have been transferred, the Multidistrict Litigation judge treats the cases as though they originated in the MDL court, but only for pretrial proceedings.¹⁴⁸ The cases are then settled, dismissed, or transferred back to the court of origin for trial.¹⁴⁹

141. See Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 MICH. L. REV. 703, 705 (1995).

142. 28 U.S.C. § 1407(d).

143. *Id.* § 1407(a); see Daniel A. Richards, Note, *An Analysis of the Judicial Panel on Multidistrict Litigation’s Selection of Transferee District and Judge*, 78 FORDHAM L. REV. 311, 312 (2009).

144. 28 U.S.C. § 1407(c).

145. *Id.* § 1407(a); Ostolaza & Hartmann, *supra* note 136, at 62.

146. 28 U.S.C. § 1407(b).

147. *Id.* § 1407(c).

148. See Bradt, *supra* note 23, at 788.

149. UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION FISCAL YEAR 2014, *su-*

B. Direct Filing

Within the past decade, the JPML has created a device to further increase the efficiency of Multidistrict Litigation—direct filing.¹⁵⁰ Between October 1, 2013 and September 30, 2014, more than eighty five percent of cases presided over by the MDL courts were filed directly into the MDL court.¹⁵¹ Following the JPML’s designation of an MDL court and transfer of already filed cases to that court, the MDL court will issue a Case Management Order, permitting plaintiffs whose cases share the same cause of action as the already transferred cases to file directly into the MDL court,¹⁵² regardless of whether the MDL court has personal jurisdiction over the case.¹⁵³ Direct filing effectively allows plaintiffs to circumvent filing into a district court only to have their case transferred to the MDL court. If the case is not settled or dismissed, the case is then transferred to a court with proper jurisdiction.¹⁵⁴

IV. FORUM-SHOPPING LOOPHOLE

Although the efficiency of Multidistrict Litigation and direct filing seems without fault, a closer look reveals a much larger problem—forum-shopping.¹⁵⁵ Plaintiffs can potentially engage in

pra note 16 (indicating that over seventy percent of Multidistrict Litigation actions were terminated by the MDL court between 1968 and 2014).

150. See Bradt, *supra* note 23, at 794.

151. UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION FISCAL YEAR 2014, *supra* note 16 (revealing that in the one year period 46,983 cases were directly filed into the MDL courts and 6,120 were transferred to the MDL courts).

152. See *supra* note 17 and accompanying text.

153. See Bradt, *supra* note 23, at 795–96 (“[P]laintiffs in tag-along cases filed after the establishment of the MDL can bypass transfer and file their cases directly into the MDL court, regardless of whether personal jurisdiction and venue would be appropriate in the MDL district.”).

154. 28 U.S.C. § 1407(a) (2012).

155. See Korn, *supra* note 36, at 782–83 (“The problem of forum-shopping arises when four conditions exist. First, the combination of federal and state law governing judicial jurisdiction allows the courts of more than one state to act in a single case. Second, the federal law governing legislative jurisdiction allows application of the law of any of two or more states having conflicting local rules to a potentially determinative issue in that case. Third, under the choice-of-law doctrine of the states having judicial jurisdiction, the courts of two

forum-shopping by choosing to directly file into MDL courts instead of first filing in a more natural jurisdiction. If the state in which the MDL court sits has laws more favorable to a party than any jurisdiction with actual jurisdiction over the case, that party could argue that the laws of the state in which the MDL court sits should be applied to their case.¹⁵⁶ The reasoning to support such an argument is that the *per se* rule espoused in *Van Dusen* and *Ferens* requires that the law of the transferor court prevail over the law of the transferee court.¹⁵⁷

For example, the court in *In re Express Scripts* mechanically applied *Van Dusen* and held that the law of the state in which the MDL court sits should be applied to directly filed cases during pretrial proceedings.¹⁵⁸ Similarly, the court in *In re Welding Fume* followed a related analysis and arrived at the same result.¹⁵⁹ Both courts relied upon the same district court opinion, which, in dicta, acknowledged that it might be permissible to apply the law of the MDL court but declined to do so.¹⁶⁰ In neither case was there any evidence that, but for the Multidistrict Litigation, the plaintiff would have filed their case in that particular district court. Accordingly, where there is no evidence that, but for the Multidistrict Lit-

or more of them could reach different conclusions as to which of the conflicting local rules should be applied. Fourth, the probable conclusion of one or more of the permissible forums regarding the law to be applied is predictable at the time that the plaintiff commences suit.”).

156. See Brief of Plaintiff-Appellant at 8, *Wahl v. Gen. Elec. Co.*, 786 F.3d 491 (6th Cir. 2015) (No. 13-6622) (citing *Ferens v. John Deere Co.*, 494 U.S. 516, 530 (1990)) (arguing that there is a *per se* rule that requires that the choice-of-law rules of the state in which the transferor court sits must be applied by the transferee court).

157. *Id.*

158. *In re Express Scripts, Inc., PBM Litig.*, No. 4:05-CV-00862 SNL, 2007 WL 4333380, at *2 (E.D. Mo. Dec. 7, 2007).

159. *In re Welding Fume Prods. Liab. Litig.*, 245 F.R.D. 279, 295 (N.D. Ohio 2007) (“To make this determination, the Court would have to apply the choice-of-law rules of California, because that is where the *Steele* complaint was originally filed.”).

160. *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 454 (E.D. La. 2006) (“In the present case, the proposed class representatives originally filed their class action complaint in the United States District Court for the District of New Jersey; however, the PSC also subsequently filed a Master Complaint in this Court. Therefore, the Court could conceivably apply the choice-of-law rules of either New Jersey or Louisiana.”).

igation, the plaintiff would have filed in the district in which the MDL court sits, application of the choice-of-law rules of the MDL court after a directly filed case has been transferred frustrates the intent of *Ferens*.¹⁶¹

V. CLOSING THE LOOPHOLE

It is imperative that the potential loophole, created by direct filing that allows plaintiffs to claim that the choice-of-law rules of the state in which the MDL court sits should apply when that state has no significant contact or significant aggregation of contacts after their case has been transferred, be closed. Allowing the loophole to remain open encourages gamesmanship and could lead to constitutionally impermissible results.¹⁶²

Courts that apply the choice-of-law rules of the state in which the transferee court sits rely upon the argument that direct filing is not meant to change the applicable choice-of-law rules in a case, but a procedural device to save time and money.¹⁶³ In *Wahl v. G.E.*, the Sixth Circuit held that when a directly filed Multidistrict Litigation case is transferred to a court of proper jurisdiction, the law of the transferee court should apply.¹⁶⁴ Many courts have followed this line of analysis, reasoning that but for the MDL court permitting direct filing, the case would have originally been filed with the now transferee court.¹⁶⁵ Utilization of the most significant

161. *Ferens*, 494 U.S. at 527 (“The *Van Dusen* policy against forum shopping simply requires us to interpret § 1404(a) in a way that does not create an opportunity for obtaining a more favorable law by selecting a forum through a transfer of venue.”) (citing *Van Dusen v. Barrack*, 376 U.S. 612, 636 (1964)).

162. *See supra* Part IV.

163. *Wahl v. Gen. Elec. Co.*, 786 F.3d 491, 498 (6th Cir. 2015) (holding that the transferee court’s choice-of-law rules are applicable).

164. *Id.*

165. *Wahl v. Gen. Elec. Co.*, 983 F. Supp. 2d 937, 943 n.11 (M.D. Tenn. 2013).

[T]he better approach is to treat foreign direct filed cases as if they were transferred from a judicial district sitting in the state where the case originated,” which is “the state where the plaintiff purchased and was prescribed the subject drug. Thus, for a foreign direct filed member action involving a plaintiff that purchases and was prescribed the subject drug in Tennessee, the Court will treat that plaintiff’s claims as if they were

relationship test of the Second Restatement results in the application of the transferee court's law over the law of the MDL court. The Second Restatement directs courts to apply the place of the injury, unless another state has a more significant relationship.¹⁶⁶ The court considers the following contacts: (1) the place of the injury, (2) the place where the conduct causing the injury occurred,

transferred to this Multidistrict Litigation from a district court in Tennessee.

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

The Court has concluded, as have other MDL courts, that such cases should be governed by the law of the states where Plaintiffs received treatment and prescriptions for Avandia. This ruling will promote uniform treatment between those Plaintiffs whose cases were transferred into the Multidistrict Litigation from their home states and those Plaintiffs who filed directly in the Multidistrict Litigation.

Id. (quoting *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, No. 07-MD-01871, 2012 WL 3205620, at *2 (E.D. Pa. Aug. 7, 2010)).

[U]nlike the usual case filed in this district, the present case has no connection with Illinois other than the fortuity that the JPML authorized an Multidistrict Litigation proceeding to take place here, supervised by the undersigned judge. Illinois is essentially an artificial forum created for purposes of convenience and efficiency. That is doubly true for the present case, which was filed here only by virtue of a court-approved direct-filing procedure whose sole purpose was to maximize convenience and save the parties' and judicial resources. Given the circumstances, it would not make a great deal of a sense to apply Illinois law in this case, or even Illinois' choice-of-law rules. Indeed, the prevailing rule in this situation is that in a case that was directly filed in the Multidistrict Litigation transferee court but that originated elsewhere, the law (including the choice-of-law rules) that applies is the law of the state where the case originated.

Id. (quoting *In re Watson Fentanyl Patch Prods. Liab. Litig.*, 977 F.Supp.2d 885, 888, 2013 WL 4564927, at *2 (N.D. Ill. Aug. 27, 2013)). "[I]t would be an odd result to subject plaintiffs to [the law of the Multidistrict Litigation forum] simply because they took advantage of the direct filing procedure—a procedure that provides benefits to all parties and preserves judicial resources." *Id.* (quoting *In re Bausch & Lomb Inc. Contacts Lens Solution Prods. Liab. Litig.*, Multidistrict Litigation No. 1785, 2007 WL 3046682, at *3 (D.S.C. Oct. 11, 2007)).

166. *Montgomery v. Wyeth*, 580 F.3d 455, 459 (6th Cir. 2009) (quoting *Hataway v. McKinley*, 830 S.W.3d 53, 59 (Tenn. 1992)).

(3) the domicile and place of business of the parties, and (4) the place where the parties' relationship was centered if any.¹⁶⁷ This is a default rule "whereby trial courts can apply the law of the place where the injury occurred when each state has an almost equal relationship to the litigation."¹⁶⁸ Accordingly, unless these contacts occurred in the state in which the MDL court sits, it is unlikely that the law of the state in which the MDL court sits will be applied.

A. Necessity for Loophole Closure

1. Forum-Shopping

Forum-shopping is "[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard."¹⁶⁹ Although forum-shopping operates on a continuum ranging from a plaintiff simply choosing whether to file in state or federal court to "manufactured diversity" to gain the ability to file in federal court,¹⁷⁰ the practice holds a negative connotation due to its association with gamesmanship.¹⁷¹ Furthermore, the Supreme Court declared the discouragement of forum-shopping to be one of the twin aims of the *Erie* doctrine.¹⁷² There are numerous reasons that forum-shopping should be discouraged,¹⁷³ but the most notable ar-

167. *Id.* at 459–60.

168. *Id.* at 459.

169. *Forum-shopping*, BLACK'S LAW DICTIONARY (10th ed. 2014).

170. *See Note, Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1679–80 (1990) ("'[M]anufactured diversity' [is] the improper or collusive creation of diversity of citizenship for the sole purpose of obtaining federal court jurisdiction.").

171. *See* Patrick J. Borchers, *The Real Risk of Forum Shopping: A Dissent from Shady Grove*, 44 CREIGHTON L. REV. 29, 30 (2010) ("Gamesmanship, not justice, is the prevalent consideration if litigants can control the results of cases by choosing between courthouses as little as a block apart.").

172. *See* *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

173. *See Forum Shopping Reconsidered*, *supra* note 170, at 1684 ("Three reasons are generally given for policies against forum shopping: first, that forum shopping undermines the authority of substantive state law; second, that forum shopping overburdens certain courts and creates unnecessary expenses as litigants pursue the most favorable, rather than the simplest or closest, forum; and, third, that forum shopping may create a negative popular perception about the equity of the legal system.").

gument against forum-shopping is the inconsistent and unpredictable results that stem from attempts at gamesmanship.¹⁷⁴

2. Intent of *Van Dusen* and *Ferens*

The Supreme Court, in *Van Dusen*, held that the law of the transferor court was applicable in a case where venue and jurisdiction was proper in both the transferor court and the transferee court.¹⁷⁵ Direct filing, on the other hand, at its core is an artifice. But for the Multidistrict Litigation proceedings, the MDL court would not have jurisdiction over the directly filed cases. In *Ferens*, the Supreme Court made clear that policy required 28 U.S.C. § 1404(a) to be interpreted in a way that would not give parties an advantage from transferring a case, standing staunchly against forum-shopping.¹⁷⁶ Therefore, *Van Dusen* and *Ferens* are inapplicable in cases when a directly filed case has been transferred to a court of proper jurisdiction where the transferor court, the MDL court, is not a court with proper venue and jurisdiction.¹⁷⁷ Accordingly, it would go against the policy rationale of *Van Dusen* and *Ferens* to apply the cases in a way that would promote forum-shopping.

3. Effect of *Atlantic Marine*

The Supreme Court's decision in *Atlantic Marine* substantially undermines the attempt by courts to mechanically apply *Van Dusen* and *Ferens*. Mechanical application of these cases would cause the law of the state of the transferor court to apply in every transferred case. However, *Atlantic Marine* asserts that there is no

174. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74–75 (1938) (explaining that forum-shopping may make equal protection of the law impossible).

175. *Van Dusen v. Barrack*, 376 U.S. 612, 621 (1964) (“It must be noted that the instant case . . . involves a motion to transfer to a district in which both venue and jurisdiction are proper.”).

176. *See supra* text accompanying note 161.

177. *See* Brief of Appellees at 13, *Wahl v. Gen. Elec. Co.*, 786 F.3d 491 (6th Cir. 2015) (No. 13-6622) (citing *Ferens v. John Deere Co.*, 494 U.S. 516, 530 (1990)) (arguing that application of the choice-of-law rules of the state in which the MDL court sits would defeat the policy of *Ferens*).

such steadfast requirement.¹⁷⁸ The Supreme Court reiterates in *Atlantic Marine* that a § 1404(a) transfer may not be used for forum-shopping or to create inequities.¹⁷⁹ Furthermore, directly filed cases resemble the special circumstances at play in *Atlantic Marine* because the Multidistrict Litigation direct filing case management order is essentially the inverse of a contractual choice of law provision.¹⁸⁰

4. Choice of Law Theories

There is no choice of law theory that would support the conclusion that the law of a state with no interest in the case and where no events that gave rise to the cause of action occurred should be applied simply because the case was originally filed in that state. The First Restatement maintains that the law of the forum in which a wrong occurred is the applicable law in a case that arises from the harm.¹⁸¹ Unless the cause of action of the Multidistrict Litigation occurred in the same state as the MDL court, a transferee court employing the First Restatement to determine the applicable choice of law would not apply the law of the MDL court. Currie's Governmental Interest Analysis requires that a forum apply its own choice-of-law rules as long as it has a legitimate interest in doing so.¹⁸² Even if the state in which the MDL court sits has a legitimate interest in its laws being applied to the case,

178. *Atlantic Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568, 582 (2013) (holding that 28 U.S.C. § 1404(a) does not carry with it the choice-of-law rules of the transferor court when the parties are contractually obligated to a forum-selection clause).

179. 28 U.S.C. § 1404(a) (2012); *see Atlantic Marine*, 134 S. Ct. at 583 (“Not only would it be inequitable to allow the plaintiff to fasten its choice of substantive law to the venue transfer, but it would also encourage gamesmanship. Because ‘§ 1404(a) should not create or multiply opportunities for forum shopping.’”) (quoting *Ferens*, 494 U.S. at 523).

180. A plaintiff should not enjoy the “privilege” of preserving the MDL court’s choice-of-law rules because, but for direct filing, filing into the MDL court would be improper. *See Atlantic Marine*, 134 S. Ct. at 582–83 (citing *Van Dusen*, 376 U.S. at 635) (explaining that the “privilege” of preserving the transferor court’s choice-of-law rules should not be enjoyed by a plaintiff who filed their case in the transferor court in violation of a forum-selection clause).

181. *See* RESTATEMENT OF CONFLICT OF LAWS (AM. LAW INST. 1934).

182. *See* CURRIE, *supra* note 19, at 152–57.

the law of the transferee court would prevail.¹⁸³ Application of the Second Restatement's choice of law approach also would not result in application of the law of the state in which the MDL court sits. The Second Restatement requires several factors to be weighed to determine which state has the most significant relationship to parties and issues before the court.¹⁸⁴ Again, because the MDL court's relationship to the case is a mere legal fiction, unless the cause of action or the parties were substantially linked to the state in which the MDL court sits, it is unlikely that state would have the most significant relationship to the case. If there is no choice of law theory that supports the application of the law in which the MDL court sits, it is clear that the only purpose in applying that law would be forum-shopping. Accordingly, courts should reject such application.

5. Due Process and Full Faith and Credit Clauses

A mechanical application of the choice-of-law rules of the state in which the MDL court sits after a directly filed case has been transferred to a court with proper venue and personal jurisdiction would violate both the Due Process and the Full Faith and Credit clauses if the state in which the MDL court sits does not have a "significant contact or aggregation of contacts" to the claim.¹⁸⁵ In cases where more than one jurisdiction may have an interest in a claim, the Due Process clause and Full Faith and Credit clause balance one another. The Due Process clause ensures that one jurisdiction's laws are not applied arbitrarily while the Full Faith and Credit clause allows a forum to apply its own law as long as it has a legitimate interest in doing so.¹⁸⁶

183. See Shreve, *supra* note 61, at 542.

184. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. LAW INST. 1971).

185. Allstate Ins. v. Hague, 449 U.S. 302, 312–13 (1981) (“[F]or a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”); see U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”); U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .”).

186. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 819 (1985).

The exception to this rule appears in *Sun Oil v. Wortman*.¹⁸⁷ The Supreme Court held that application of the forum's procedural rules does not violate the Full Faith and Credit clause even if the forum does not have a significant contact to the claim.¹⁸⁸ Therefore, a forum with no connection to the case other than the case being filed within its jurisdiction could apply its own statute of limitations.¹⁸⁹ However, this does not extend to the issue before us now. Choice-of-law rules are substantive law.¹⁹⁰ Accordingly, it is necessary that a jurisdiction must have a significant contact or aggregation of contacts for the choice-of-law rules of that jurisdiction to be applied.

Multidistrict litigation is a statutory device that allows a court that would not normally have jurisdiction over a case to oversee the case for the sake of judicial efficiency.¹⁹¹ If the state in which the MDL court sits does not have significant contacts or an aggregation of significant contacts to the claim, then, when pretrial proceedings cease and the case is transferred to a court with proper forum and jurisdiction, application of the choice-of-law rules of the state in which the MDL court sits would violate both the Due Process clause and the Full Faith and Credit Clause.

B. Method of Closure

Closure of the forum-shopping loophole created by direct filing requires a two-step response. First, every Case Management Order issued by an MDL court that allows direct filing would contain a mandatory provision requiring the plaintiff to declare a "home forum" upon filing. Second, Congress must amend 28 U.S.C. § 1407, adding a provision that, if a directly filed case is transferred following pretrial proceedings, the choice-of-law rules of the state in which the transferee court sits are applicable, unless the plaintiff declared the MDL court as the home forum and the case could have originally been filed in the MDL court absent the Multidistrict Litigation.

187. See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730–34 (1988).

188. *Id.* at 722–23.

189. *Id.*

190. Kermit Roosevelt, III, *Choice of Law in Federal Courts: From Erie and Klaxon to Cafa and Shady Grove*, 106 NW. U. L. REV. 1, 17 (2012) (citing *Klaxon Co. v. Stentor Elec. Mfg.*, 313 U.S. 487, 496 (1941)).

191. See *supra* Part III.

1. Required Case Management Order Provision

Direct filing into an MDL court is a legal fiction created to promote judicial efficiency. Such a fiction does not give the state in which the MDL court sits a governmental interest in the directly filed case.¹⁹² Thus, when the case is thereafter transferred to a court with proper jurisdiction, any argument that the law of the state in which the MDL court sits should apply is a false conflict. As evidenced above, some courts are willing to mechanically apply *Van Dusen* and *Ferens*, creating an anomalous result.¹⁹³ It is therefore necessary to close the loophole created by Multidistrict Litigation direct filing to prevent forum-shopping abuse. All Case Management Orders filed by a designated MDL court that allow cases to be directly filed into the MDL court should include: (1) a requirement that plaintiffs who file directly into the MDL court must declare a “home forum,” a district court with personal jurisdiction over the parties, where the case would be transferred should it not be disposed of in the MDL court; and (2) a provision explaining the fact that the case was directly filed in the MDL court will have no impact on the choice of law to be applied should the case be transferred to the “home forum.”

It is possible that the choice-of-law rules of the state in which the MDL court sits would apply when a directly filed case has been transferred following pretrial proceedings.¹⁹⁴ However, for these choice-of-law rules to apply, it would be necessary that: (1) filing the case in that district would be otherwise proper, notwithstanding the Multidistrict Litigation and (2) upon directly filing, the plaintiff declared the district in which the MDL court sits to be the home forum.¹⁹⁵ The home forum is, according to the plaintiff’s complaint, where the plaintiff would have filed the case but for the Multidistrict Litigation. These two requirements deter gamesmanship after a case has been directly filed. The first requirement follows the Supreme Court’s requirement in *Van Dusen*

192. See *supra* Section V.A.4.

193. See *supra* Part IV.

194. See *In re Fresenius Granuflo/NaturaLyte Dialysate Prods. Liab. Litig.*, 76 F. Supp. 3d 294, 303 (D. Mass. 2015).

195. See *id.* at 304 (“The home forum designation of the direct filing plaintiffs is the best evidence I have of what these plaintiffs would have done absent direct filing.”).

that, for law of the transferor court to be applied, jurisdiction and forum must be proper in both the transferor and transferee courts.¹⁹⁶ The second requirement follows the Supreme Court's decision in *Ferens*, holding that the purpose of transfer should not be to confer an advantage upon the transferring party.¹⁹⁷

For example, in the Multidistrict Litigation case of *In re Fresenius Granuflo*, the Case Management Order permitting direct filing required that all plaintiffs filing directly into the MDL court submit a short complaint in which they were to indicate their home forum for purposes of pretrial proceedings.¹⁹⁸ The court conceded that the applicable choice of law analysis to be applied to a case in the MDL court is not necessarily the choice-of-law rules of the state in which the MDL court sits.¹⁹⁹ The court held that the choice-of-law rules of the home forum stipulated on the short complaint of the plaintiff were applicable to each case for purposes of pretrial litigation.²⁰⁰ Accordingly, if the case were thereafter transferred to a different district court following pretrial proceedings, the application of choice-of-law rules applied by the MDL court would be consistent with *Van Dusen* and *Ferens*.²⁰¹

2. Amendment to 28 U.S.C. § 1407

The most obvious solution would be to amend the MDL statute to close the forum-shopping loophole at its source. Congress should amend 28 U.S.C. § 1407 to include a clause requiring that, if a case is directly filed into a Multidistrict Litigation court and the case is thereafter transferred to a district court with subject matter jurisdiction, the “transferee” court will apply the choice-of-law rules of the state in which it sits.²⁰² Such an amendment would

196. See *Van Dusen v. Barrack*, 376 U.S. 612, 621 (1964).

197. See *Ferens v. John Deere Co.*, 494 U.S. 516, 527 (1990).

198. *In re Fresenius Granuflo/NaturaLyte Dialysate Prods. Liab. Litig.*, 76 F. Supp. 3d at 298–99.

199. *Id.* at 300; see *Bradt*, *supra* note 23, at 800–01 (describing the inconsistency that arises when courts mechanically apply the choice-of-law rules of the state in which the MDL court sits).

200. *In re Fresenius Granuflo/NaturaLyte Dialysate Prods. Liab. Litig.*, 76 F. Supp. 3d at 302.

201. *Ferens*, 494 U.S. at 527; *Van Dusen*, 376 U.S. at 621.

202. 28 U.S.C. § 1407 (2012).

prevent the application of the laws of a state with no relationship to the cause of action and close the loophole for forum-shopping.

VI. CONCLUSION

Forum-shopping allows plaintiffs to choose a forum that will render a favorable decision to the plaintiffs. Although the practice of forum-shopping should be discouraged, direct filing allows plaintiffs to choose not only between forums of proper jurisdiction in which to file, but to also consider the law of the MDL court, the transferor court, as well.²⁰³ The Supreme Court held in *Van Dusen* and *Ferens* that the policies underlying the *Erie* doctrine mandate applying the transferor court's choice-of-law rules, rather than those of the transferee court, after a transfer of venue pursuant to 28 U.S.C. § 1404(a).²⁰⁴ However, as illustrated in *Atlantic Marine*, this general rule is not without exceptions.²⁰⁵ The ability to consolidate pretrial proceedings into one MDL court was created to promote federal court efficiency, and the direct filing process was added to increase such efficiency. Direct filing should not be so unrestrained that it is easy for plaintiffs to gain a more favorable judgment.

It was not the intention of Congress to allow the laws of a forum with no relationship to the cause of action to be the deciding factor in a case.²⁰⁶ Furthermore, no choice of law theory would support such an outcome.²⁰⁷ Therefore, attempts by plaintiffs who directly file Multidistrict Litigation cases and later transfer those cases to forums with proper jurisdiction to use the law of the forum

203. *Wahl v. Gen. Elec. Co.*, 786 F.3d 491, 498 (6th Cir. 2015).

204. *Ferens*, 494 U.S. at 821; *Van Dusen*, 376 U.S. 612.

205. *Atlantic Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568, 577 (2013).

206. 114 CONG. REC. 4, 4925 (1968) (explaining that the purpose of the Multidistrict Litigation legislation was to ensure "just and efficient conduct" of consolidated actions).

207. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (AM. LAW INST. 1971) (requiring the law of the state with the most significant relationship to be applied); RESTATEMENT OF CONFLICT OF LAWS § 377 (AM. LAW INST. 1934) (requiring the law of the place of the harm to be applied); CURRIE, *supra* note 19, at 69 (requiring forum law to be applied as long as the forum has a legitimate interest in its law being applied).

of the MDL court to gain a more favorable outcome should be thwarted.