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THE CASE IN SUPPORT OF LEGISLATION FACILITATING THE CONSOLIDATION OF MASS-ACCIDENT LITIGATION: A VIEW FROM THE LEGISLATURE

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In an article entitled *The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain*,¹ Professor Robert Sedler and Pro-

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We would like to thank David Beier, Steve Burbank, Linda Mullenix, Mike Remington, Judith Resnik, and Tom Rowe for their helpful suggestions on an earlier draft. The views expressed in this article are the authors', and do not represent the views of the Committee on the Judiciary, United States House of Representatives.

1. 73 MARQ. L. REV. 76 (1989). Professor Twerski was kind enough to supply us with an earlier draft of their fine reply to this article, which appears *infra*. We have opted against responding to their reply not because it is unworthy, but because it is, to our piece, as one ship passing another in the night.

Our article is a defense of H.R. 3406 and the process by which it was considered in the United States Congress. Their reply reargues the correctness of their position on the bill's choice of law section. While in the minority, Professor Sedler and Professor Twerski were not alone in the concerns they expressed with the choice of law section. By the time the bill passed the House, however, they *were* alone in their active opposition to the bill on those grounds. Now the fact that theirs was a lone view does not necessarily make it wrong. For that reason, the Subcommittee considered their concerns carefully before rejecting them (as discussed in Part III). In defense of the legislative process, it is enough to say that the position taken by Professor Sedler and Professor Twerski was thoroughly evaluated by the Subcommittee, was determined to be a decidedly minor-

fessor Aaron Twerski undertake an analysis of H.R. 3406, the Multiparty, Multiforum Jurisdiction Act of 1989.² Their article characterizes the legislation and the results it would achieve as "regressive and thoroughly discredited," "anomalous, unsound and self-defeating," a "rever[sion] back to the stone age," "irrational," "nonsensical," and "monstrously wrong." Suffice it to say, they do not think much of the bill.

The legislation that has so exercised Professor Sedler and Professor Twerski was sponsored by one of the authors of this article, former Congressman Robert W. Kastenmeier. It was referred to the House Committee on the Judiciary Subcommittee on Courts, Intellectual Property, and the Administration of Justice (Subcommittee on Courts), which Mr. Kastenmeier chaired and to which Mr. Geyh was counsel.³ The bill's modest objective was to facilitate the consolidation of duplicative litigation in a very limited class of cases: civil suits arising out of single accidents in which at least twenty-five people are killed or seriously injured—airplane crashes, hotel fires, bridge collapses, and similar events. Under the bill, consolidation of these cases would be facilitated by relaxing diversity jurisdiction requirements so as to permit all dispersed, related litigation to be filed in, or removed to, federal courts. For cases thus reaching the federal system, H.R. 3406 would authorize the Multidistrict Litigation Panel to transfer all related litigation to a single court for liability determinations, and, when appropriate, punitive damage assessments.

Similar to diversity cases generally, state law would govern liability and damage issues for litigation consolidated under the bill.⁴ Unlike diversity cases generally, however, in which the federal courts apply the choice of law rules of the states in which they sit, H.R. 3406 directed the court to which the cases are transferred (the "transferee court") to employ a mul-

ity view, and was rejected on the merits. Nothing more would be gained, for our purposes, by rehashing the substantive merits of their position on the choice of law section through an exegesis of the reply.

2. H.R. 3406, 101st Cong., 1st Sess., 135 CONG. REC. 3,275-76 (1989). The text of H.R. 3406, as it passed the House of Representatives in the 101st Congress, appears as an appendix to this article. H.R. 3406 was not acted upon by the Senate in the 101st Congress, and has been reintroduced in the 102nd Congress by Representative William Hughes, who succeeded Mr. Kastenmeier as Subcommittee Chairman. H.R. 2450, 102nd Cong., 1st Sess., 137 CONG. REC. 1, 923-24 (1991).

3. The subcommittee name has undergone three changes in as many congresses. Prior to the 101st Congress, the subcommittee was designated that of "Courts, Civil Liberties, and the Administration of Justice." In the 101st Congress, when H.R. 3406 was introduced, the name was changed to "Courts, Intellectual Property, and the Administration of Justice." In the 102nd Congress it was renamed again, this time "Intellectual Property and Judicial Administration."

4. In the relatively rare case, subject to federal question jurisdiction, but falling within the scope of a mass-accident covered by the bill, federal law could be designated as controlling.

tifactor choice of law analysis to determine which state's law to apply. Following resolution of liability and punitive damage issues pursuant to the applicable state law, the transferee court would normally return the cases to the state or federal courts where they were filed for compensatory damage assessments.

The argument that Professor Sedler and Professor Twerski make is basically this: The bill would usurp the traditional role of the state courts in adjudicating tort cases generally, and choice of law issues in particular, and would do so by means of a federal choice of law rule that would yield irrational and unfair results. Our piece may fairly be characterized as a reply to Professor Sedler and Professor Twerski; yet, it is both something less and something more. It is something less in that we do not attempt to refute Professor Sedler and Professor Twerski point-by-point in an acrimonious round of finger-pointing and belly-bumping, but to respond instead to the core, policy-level concerns that underlie the more specific objections they raise. At the same time, it is something more, in two respects. First, it is not just Professor Sedler and Professor Twerski to whom we respond. Some of the objections that they raise to mass-accident legislation are shared, to varying degrees, by others within and without academia. Indeed, their article was widely disseminated in manuscript form at the 1990 Convention of the American Bar Association, at which the ABA declined to support a resolution recommending adoption of legislation quite similar to H.R. 3406. Second, we do not confine ourselves to rebutting criticisms that have been directed at the bill, but take the opportunity to offer a legislative perspective on efforts to consolidate duplicative litigation, with a focus on H.R. 3406.

In Part I of this article, we will identify the threefold problem giving rise to the need for legislation such as H.R. 3406: 1) Under current law, a variety of impediments exists to consolidation of mass tort litigation that make duplicative litigation unavoidable; 2) the workload of our state and federal courts is rapidly reaching a crisis point, and duplicative civil litigation deserves a significant share of the blame; and 3) duplicative litigation creates opportunities for unfairness, inconsistency, and delay in the resolution of suits arising out of mass torts. In suggesting that the only "gain" to be had from legislation reducing duplicative litigation is that, like the fascist regime of Benito Mussolini, it would "help 'the trains run on time,'" Professor Sedler and Professor Twerski trivialize the severity of the problem confronting the judicial system, and understate the inconsistency and unfairness that the legislation seeks to alleviate.

In Part II, we will discuss the genesis and development of H.R. 3406 as a vehicle for addressing some of the problems identified in Part I. The bill

has undergone a number of changes over the course of the four congresses in which it has been introduced. Understanding what those changes are, and the reasons why they were made, provides a better understanding of what the bill has sought to do, and what the political, practical, and philosophical limitations are to pursuing more ambitious legislative proposals at this time.

In Part III, we will look at the arguments that have been made against facilitating consolidation of mass accident cases, including the choice of law problems raised in the Sedler/Twerski article. In our view, the choice of law concerns they raise are overstated. We agree that the choice of law provisions in H.R. 3406 would, in some instances, operate to limit the number of state laws that might otherwise be applied to consolidated litigation if conventional state choice of law rules were controlling. Indeed, that is intentional. We disagree, however, that such provisions constitute an unjustifiable intrusion upon state sovereignty, or are likely to yield untoward results. Contrary to the conclusion of Professor Sedler and Professor Twerski that the Multiparty, Multiforum Jurisdiction Act of 1989 offers only "sacrifice without gain," when the pros and cons of H.R. 3406 are objectively weighed the bill promises considerable gain with minimal sacrifice.

I. THE NEED FOR LEGISLATION

A. *Impediments to Consolidation of Mass Tort Cases*

Whenever a plane crashes, a hotel burns, or a nationally distributed product injures users, it has become relatively safe to anticipate that lawsuits will be filed seeking compensation for the victims' injuries. These suits are filed in whichever permissible venue is most convenient or opportune for the individual plaintiff, and are therefore often widely scattered throughout the state and federal courts. To varying degrees, all of the suits filed in connection with a particular crash, fire, or product present common issues of fact. Reserving until later the question of whether consolidating these common issues is desirable,⁵ there are a variety of impediments to doing so. These impediments have been thoughtfully, and thoroughly, explored in an excellent article by Professor Thomas Rowe and Mr. Kenneth Sibley.⁶ Because the obstacles to consolidation of duplicative litigation have

5. In §§ I.B. and I.C., *infra*, at 543-53, we discuss the need for consolidation and the harms associated with scattered, duplicative litigation. In Part III, *infra*, at 559-66, we respond to some of the criticisms that have been directed at H.R. 3406 and related efforts at consolidation.

6. Rowe & Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7, 14-22 (1986).

been chronicled elsewhere, and because there is no real dispute that such obstacles exist, we will simply summarize them here.

1. Impediments to Consolidation Within the State Court System

In the case of state court systems, the primary impediment to effective consolidation is constitutional in nature. The due process clause of the fourteenth amendment has been construed to require a minimum threshold of contact between a person and a state before the state may properly assert personal jurisdiction over the person in question.⁷ In complex cases involving manufacturers, distributors, retailers, contractors, subcontractors, pilots, engineers, drivers, and other miscellaneous persons arguably responsible in some measure for any given accident or product defect, it may often be the case that fewer than all of the defendants will have had sufficient contact with any single state to be properly sued there, making consolidation in the state courts impossible.⁸ Other nonconstitutional impediments to consolidation on the state level exist as well.⁹ Because the constitutional impediments alone often render the state forum incapable of facilitating consolidation of mass tort litigation, little is gained by a lengthy discussion of nonconstitutional impediments, which could be rectified by legislation.

7. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

8. In *World-Wide Volkswagen Corp.*, the New York passengers of a Volkswagen automobile brought suit in Oklahoma state court against the New York dealer who had sold them the car, and against the regional Volkswagen distributor, for injuries arising out of an accident in Oklahoma. The Supreme Court held that the two defendants lacked sufficient contacts with the state of Oklahoma to permit the state to compel them to appear and defend themselves. *Id.* at 299. Presumably, the plaintiffs could have sued the dealer and distributor in New York—ignoring for the moment the practical problems associated with litigating a suit in a place half a continent away from where all witnesses and records relevant to the accident at issue were located. Yet, as Rowe and Sibley point out, if the plaintiffs also sued the Oklahoma driver with whom they collided, they would have no better luck suing him in New York than they did suing the dealer and distributor in Oklahoma. Rowe & Sibley, *supra* note 6, at 18. In that case, no single state would have sufficient contacts with all relevant defendants to permit consolidation of all related litigation in a single state court.

9. One deserves particular mention. Even if all defendants can constitutionally be sued together in one or more states, there is no assurance that all plaintiffs will file their suits in only one state. If the plaintiffs file suits in different states, there is no existing means to consolidate those cases. As a partial solution, one commentator has recommended the formation of an interstate compact for the purpose of creating the equivalent of a multidistrict litigation panel on the state level, that would permit consolidation of related, multistate actions for pretrial proceedings. Schroeder, *Relitigation of Common Issues: The Failure of Non-Party Preclusion and an Alternative Proposal*, 67 IOWA L. REV. 917, 963-79 (1981-82). A similar solution is currently being considered by the Uniform Commissioners in the context of a proposed Uniform Transfer of Litigation Act.

2. Impediments to Consolidation Within the Federal Court System

Unlike the state courts, the federal courts can constitutionally exercise broader personal jurisdiction, and can therefore, if authorized, bring scattered parties together in one forum for a single resolution of common issues, when that is desirable. At present, though, several statutory impediments often make such consolidation impossible or impracticable.

a. Jurisdictional Barriers to Consolidation

First, and perhaps foremost, statutory limits on federal subject matter jurisdiction frequently prevent at least some litigation arising out of any given mass tort from entering the federal system. Diversity of citizenship between the parties is ordinarily the only jurisdictional basis upon which mass tort cases can be heard in the federal courts. Article III of the United States Constitution permits, but does not mandate, federal court jurisdiction based on "controversies between citizens of different states," and such jurisdiction was conferred on the district courts by the Judiciary Act of 1789.¹⁰ The Act, however, has been construed to require complete diversity between the parties—meaning that the jurisdiction is available only when no plaintiff is a citizen of the same state as any defendant.¹¹

The net effect of the complete diversity requirement is that the federal courts are often unavailable to many litigants in mass tort cases. The greater the number of parties, spread out over a range of states, the greater the likelihood that one or more of them will destroy complete diversity. As a consequence, those parties possessing the requisite diversity may proceed in federal courts, while others must litigate the identical issues in state courts. Rowe and Sibley note the resulting paradox: the more national the scope of the injury that the litigation seeks to redress, the less available the jurisdiction of the national courts will be.¹²

b. Non-Jurisdictional Barriers to Consolidation

Even to the extent that the diversity barrier is overcome, additional obstacles encourage duplicative litigation, or otherwise impede the consolidation of mass tort cases filed in, or removed to, the federal courts.

1) Multidistrict Litigation Panel—In the late 1960s, Congress responded to concerns raised with respect to duplicative litigation by author-

10. Codified, as amended, in pertinent part, at 28 U.S.C. § 1332(a) (1988).

11. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806); *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967).

12. *Rowe & Sibley*, *supra* note 6, at 20.

izing the creation of the Judicial Panel on Multidistrict Litigation.¹³ The Panel is authorized to consolidate actions involving one or more common questions of fact by transferring them to any district court.¹⁴ The statute limits the authority of the transferee court, however, to overseeing pretrial proceedings.¹⁵

Theoretically, cases with common issues to be resolved at trial must then be returned to the districts from which they were originally transferred for duplicative resolution.¹⁶ As a practical matter, judges to whom cases have been transferred by the Panel for pretrial proceedings have taken advantage of the change of venue statute so as to permit them to retain jurisdiction of the consolidated litigation trial. That option is available, however, only to the extent that venue properly lies with the transferee court.¹⁷

2) Choice of Law—Under existing state choice of law rules, which the district courts must apply in diversity cases, consolidated actions involving parties from a multitude of states may necessitate the application of a multitude of state laws, which can complicate, if not prevent, a consolidated trial of common issues.¹⁸ As the Department of Justice elaborated in a letter to the Subcommittee on Courts, discussing choice of law problems in mass-disaster litigation:

The current choice of law regime . . . creates severe practical problems. One federal district court judge has complained that "[t]he law on 'choice of law' in the various states and in the federal courts is a veritable jungle, which, if the law can be found out, leads not to a 'rule of action' but a reign of chaos dominated in each case by the judge's 'informed guess' as to what some *other* state than the

13. 28 U.S.C. § 1407 (1988).

14. *Id.* § 1407(a).

15. *Id.*

16. The statute provides that actions transferred "shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred." *Id.*

17. 28 U.S.C. § 1404(a) (1988) provides that "[f]or 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 may have been brought." See also, Rowe & Sibley, *supra* note 6, at 13; *Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Hearings H.R. 1046 and H.R. 2202 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice on H.R. 1046 and H.R. 2202*, 96th Cong., 1st Sess. 157, 161 (1979) [hereinafter *Diversity Hearings*] (Appendix to June 25, 1979, letter from Daniel Meador, Assistant Attorney General, to Robert W. Kastenmeier, submitting a Department of Justice legislative proposal concerning multiperson injuries) [hereinafter *DOJ Proposal*].

18. Sedler and Twerski make this point in a backhanded way, noting that a mass tort consolidation mechanism that did not restrict the range of choices to be applied would be "toothless" (at the same time arguing that one which does so restrict choice of laws would be "monstrously wrong"). Sedler and Twerski, *supra* note 1, at 77.

one in which he sits *would* hold *its* law to be." (citations omitted)(emphasis in original) An experienced practitioner has described the effort to identify the applicable state law as "like trying to tattoo soap bubbles" and has noted the call from the bench and bar for reform (citations omitted).¹⁹

3) Joinder Mechanisms—Consolidation of related claims within the federal courts can be facilitated to a considerable extent through a variety of additional means, including joinder pursuant to Fed. R. Civ. P. 18 through 20; class actions, pursuant to Fed. R. Civ. P. 23; and statutory interpleader. Because H.R. 3406 does not seek to facilitate consolidation of catastrophic accident litigation through reform of these mechanisms, a detailed discussion of such mechanisms is outside the scope of this article. Suffice it to say that each has proven inadequate to the task of avoiding duplicative litigation. The circumstances in which mandatory joinder can be obtained are limited, and the courts have been reluctant to permit wide-scale use of permissive joinder as a vehicle for comprehensive consolidation of related litigation.²⁰ Class actions have been rejected as a means to achieve consolidation in the mass tort context, although usually as a matter of rule construction, because the joinder would have been undesirable.²¹ In addition, federal statutory interpleader is limited to circumstances in which joinder is necessary to avoid multiple and inconsistent liability, rendering it unavailable in the standard mass tort case.²²

As a consequence of the various impediments to the consolidation of mass tort litigation in the federal courts, federal judges have struggled to minimize duplicative litigation, with only limited success.²³ While there have been success stories, those stories have, to a considerable extent, depended upon the cooperation of all relevant parties to the litigation.²⁴

19. *Multiparty, Multiform Jurisdiction Act: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Committee on the Judiciary*, 101st Cong., 1st Sess. 42 n.7 (1989) [hereinafter *Multiparty Hearing*] (Feb. 14, 1990 letter from Bruce Navarro, Acting Assistant Attorney General, to Robert W. Kastenmeier).

20. See Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809 (1989).

21. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039, 1041 n. 19 (1986).

22. Rowe & Sibley, *supra* note 6, at 22.

23. See Mullenix, *supra* note 21, at 1039-43 (describing unsuccessful efforts to certify mass tort cases as class actions); American Law Institute, *Complex Litigation Project Council Draft No. 1*, Nov. 23, 1988, at 16-21 [hereinafter *ALI Draft*] (chronicling the history of complex litigation and the problematic efforts at consolidation).

24. Rheingold, *The MER/29 Story—an Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116 (1968); *ALI Draft*, *supra* note 23, at 17 (characterizing the MER/29 litigation as the "exception that proves a rule—altogether extraordinary effort, trust and good faith were

B. Court Congestion

Accepting that there are impediments to consolidation of mass tort litigation, which often necessitate duplicative proceedings, the question becomes: What if any harms result? A full appreciation of the harms caused by duplicative litigation can only be understood in the larger context of the workload pressures currently confronting the courts.

1. The Federal Judiciary

Industrialization, urbanization, and increases in population in the middle to late 19th century gave rise to an increasing number and variety of disputes for the courts to resolve.²⁵ At the turn of the century, alarms began to sound over delays and inequities in the administration of justice occasioned by increases in judicial workload, and have crescendoed more or less steadily ever since.²⁶ Throughout this century-long series of warnings that the judiciary is on the brink of crisis, the courts have at least muddled through, and have usually performed admirably, prompting skepticism from some as to the severity of the problem.²⁷

necessary to prevent the disintegration of the litigation into a fight to the last ditch that could have generated immense legal fees at the expense of the tort victims").

25. As one of us has previously observed:

During the first one hundred years of the federal judiciary, there was not much concern about judicial administration. The work load was relatively low, and the numbers of judges and subordinates were well within manageable limits. In the latter part of the nineteenth century, with the development of the modern industrial state, however, new and largely unforeseen pressures were thrust on the courts and the legal profession. Social, technological and economic changes placed tremendous burdens on the legal system, whose job it was to direct and organize those changes.

Kastenmeier & Remington, *A Judicious Legislator's Lexicon to the Federal Judiciary* in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 61 (R. Katzmann ed. 1988).

26. A sampling of early writings addressing the issue of court congestion include: Shafroth, *Federal Courts Need More Judges*, J. AM. JUD. SOC'Y., June 1953; Cain, *Congested Dockets and Measures for Relief*, 9 NOTRE DAME L. REV. 117 (1934); Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 510 (1928); Dougherty, *Congested Dockets in the Courts: a Menace to Justice*, 7 MARQ. L. REV. 46 (1922); Smith, *Relief of the Supreme Court of the United States. Plan for Relief on the Overburdened Supreme Court*, 4 THE LAWYER & BANKER 128 (1911); Address by Dean Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice* (1906 Annual Meeting of the American Bar Association in Saint Paul, Minnesota), printed in 29 A.B.A. REP. 395 (1906), reprinted in 35 F.R.D. 241, 273-291 (1964).

27. Many observers are in agreement, for example, that before 1960, increases in federal district court case filings—a modest 1.8% annually between 1904 and 1959—were generally manageable. R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 59-62 (1985). In 1977, Ralph Nader testified before the Subcommittee on Courts that "in looking at the Federal judges around the country, I think one can say, show me an overburdened Federal judge and I will show you a whooping crane. That is how rare they are." *State of the Judiciary and Access to Justice: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 30 (1977) [hereinafter *Access Hearing*]. And while

Declarations of the caseload crisis, and the corresponding criticism that such declarations are premature, can to some extent be reconciled in light of the role that federal legislation has played in easing workload pressures and averting a number of crises that might otherwise have occurred. During the twenty years of Mr. Kastenmeier's subcommittee chairmanship, court congestion has been an issue with which the Committee on the Judiciary has struggled in literally every congress.²⁸ In the course of these two

district court case filings have increased an average of 5.6% annually between 1960 and 1983, persuading Judge Posner that the resulting "caseload explosion" has given rise to a state of crisis, Posner, *supra* at 64, Professor Marc Galanter, writing in 1983, concluded that there is "little support" for the notion that the dramatic increases in federal court filings "are linked with desperate congestion and crushing caseloads." Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 37 (1983) (arguing the increase in cases filed is offset by increases in court staffs and decreases in the average duration of cases litigated).

28. A partial list of Committee hearings held over the past two decades that touched upon congestion in the federal courts, includes: *Federal Courts and Judges: Hearings on S. 952 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969) (The opening statement of Committee Chairman Emanuel Celler discussing a bill to increase the number of federal judgeships as intended to improve "the present and future ability of the Federal Courts to cope with the burgeoning caseload and backlog."); *Commission on Revision of Judicial Circuits: Hearings on H.R. 7378 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 92nd Cong., 1st Sess. (1971) (The opening statement of Committee Chairman Emanuel Celler identifying "docket congestion" that "imposes severe pressures on the lawmaking function of the appellate process" as the basis for a bill authorizing the study of the circuit courts.); *Three-Judge Court and Six-Person Civil Jury: Hearings on S. 271 and H.R. 8205 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 93rd Cong., 2nd Sess. (1973) (The opening statement of Subcommittee Chairman Robert W. Kastenmeier describing bills limiting the use of three-judge courts and authorizing six-person civil juries as intended to "relax congestion and expedite the administration of justice in our Federal Courts."); *Additional Judgeships: Hearings on H.R. 4421, H.R. 4422, S. 286 and S. 287, Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 94th Cong., 2nd Sess. (1976) (The opening statement of Committee Chairman Rodino observing that "if congestion and delay and inadequate manpower are reducing the effectiveness of our U.S. district and circuit courts, then it is important for the Committee on the Judiciary to know the reasons."); *Access Hearings, supra* note 27 (The opening statement of Subcommittee Chairman Robert W. Kastenmeier observing that "[h]istorically, our courts have served our society well", but that "[t]oday . . . it must be recognized that they labor under extreme pressure."); *Civil Rights of Institutionalized Persons: Hearings on H.R. 10, Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 3 (1979) (The opening statement of Subcommittee Chairman Robert W. Kastenmeier describing a bill requiring state prisoners to exhaust administrative remedies before suing in federal court, as intended in part to "help the clogged federal dockets" by offering some "relief of prisoner litigation caseloads in the federal courts."); *Diversity of Citizenship Jurisdiction—1982: Hearings on H.R. 6691, Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 2nd Sess. 6 (1982) (The opening statement of Subcommittee Chairman Robert W. Kastenmeier supporting a bill to abolish diversity jurisdiction as necessary to "free up the Federal courts for the resolution of more important matters of Federal law."); *Supreme Court Workload: Hearings on H.R. 1968, Before the Subcomm. on Courts, Civil Liberties, and the Ad-*

decades, numerous pieces of legislation have been passed that were directed entirely, or in part, toward accommodating or relieving some of the burdens associated with mounting federal caseloads.²⁹

Notwithstanding the best efforts of Congress in the last five years, the federal court caseload has increased at an unmanageable rate. Arguments advanced as recently as the mid-1980s that the problem of federal court congestion is illusory, even if valid when made, are all but indefensible today. The single most important factor contributing to the recent surge in caseload is the dramatic increase in federal drug prosecutions. As stated in the April, 1990 Report of the Federal Courts Study Committee:

[T]he federal courts had, until about a year ago, managed to keep abreast of their dockets, though with some cost in the quality of

ministration of Justice of the House Comm. on the Judiciary, 98th Cong., 1st Sess. 1 (1983) (The opening statement of Subcommittee Chairman Robert W. Kastenmeier characterizing hearings on a bill to abolish the mandatory jurisdiction of the Supreme Court as addressing the Court's "workload crisis and . . . solutions to that crisis."); *Court-Annexed Arbitration and Experimentation: Hearing on H.R. 4341 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 2nd Sess. 1 (1986) (The opening statement of Subcommittee Chairman Robert W. Kastenmeier stating that "[a]rbitration is obviously not a panacea" for the problems of "caseloads, delays, and costs," but that "[i]t at least presents an alternative."); H.R. Rep. No. 889, 100th Cong., 2nd Sess., pt.1 22-23, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 5982, 5984. (Report of the House Committee on the Judiciary on H.R. 4807, the Court Reform and Access to Justice Act of 1988, characterizing the state of the Federal judiciary as "beset by problems" including "delay caused by rising caseloads . . . and unfair and inconsistent decision(s) caused by the pressures placed on judges who must cope with the torrent of litigation.").

29. Most obvious are the several enactments increasing the number of federal district and circuit court judges. R. Posner, *supra* note 27, at 353-57 (table listing increases in the size of the federal judiciary between 1789 and 1983). Others, originating with the Subcommittee on Courts, include: abolishing the mandatory jurisdiction of the Supreme Court, so as to permit the Supreme Court to better control its case inflow, Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662; expanding the jurisdiction of United States Magistrates, thereby facilitating the diversion of certain matters that would otherwise occupy district court time, Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643; splitting the Fifth Circuit into the Fifth and Eleventh Circuits as a means to relieve some of the burdens associated with the burgeoning number of appeals in the six states affected, Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994; facilitating alternative dispute resolution and court annexed arbitration, to encourage the resolution of litigation through means short of full blown trial, Dispute Resolution Act, Pub. L. No. 96-190, 94 Stat. 17 (1980); creating the Federal Circuit, thereby relieving caseload pressures within the regional circuits associated with hearing matters within the Federal Circuit's jurisdiction, Act of April 2, 1982, Pub. L. No. 97-164, 96 Stat. 25; increasing the threshold amount in controversy for diversity jurisdiction, thus eliminating from the federal dockets those cases that could have been filed under the lower threshold, Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 102, 120 Stat. 4642, 4646 (1988); and creating the Federal Courts Study Committee, which made numerous recommendations related to relieving docket congestion within the federal courts, Judicial Improvements and Access to Justice Act (Federal Courts Study Act), Pub. L. No. 100-702, § 102, 102 Stat. 4642, 4644 (1988). See also REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (Apr. 2, 1990) [hereinafter FCSC REPORT].

federal justice and with some slippage . . . evident in the increasing ratio of pending to terminated cases

The deterioration in the indices of federal judicial performance has been gradual, but the expanded federal effort to reduce drug trafficking has led to a recent surge in federal criminal trials that is preventing federal judges in major metropolitan areas from scheduling civil trials, especially civil jury trials, of which there is now a rapidly growing backlog. It appears that the long-expected crisis of the federal courts, caused by unabated rapid growth in case filings, is at last upon us.³⁰

2. The State Judiciary

Congress is concerned primarily with the federal courts, and generally leaves to state governments the task of overseeing state courts. Nevertheless, the health of the state courts is relevant to the health of the federal courts, inasmuch as the two are interdependent components of a single system providing the public with access to justice. Congress recognized as much in passing the State Justice Institute Act,³¹ which created a national institute to assist state court systems and to foster cooperation and exchanges of information between the state and federal judiciaries in areas of mutual concern, one of those areas being workload.³² A consideration of caseload congestion on the state level is particularly relevant here because the duplicative litigation that H.R. 3406 seeks to reduce plagues both the state and federal court systems. Thus, a full appreciation of the damage done by duplicative litigation necessitates that the problem be viewed against the backdrop of caseload pressures in the state, as well as the federal, courts.

The saga of docket congestion at the state level is in many ways the story of federal court congestion retold in epic proportion. Originally, nearly all court business was handled by the state courts, and even today

30. FCSC Report, *supra* note 29, at 5-6.

31. State Justice Institute Act of 1984, Pub. L. No. 98-620, 98 Stat. 3335, 3336.

32. As a representative of the Conference of Chief Justices testified before the Subcommittee on Courts:

[T]he State Justice Institute legislation is premised on the belief that improvement in the quality of justice administered by the states is not only a goal of fundamental importance in itself, but is essential to attainment of important national objectives including a reduced rate of growth in the caseload of the federal courts. . . . We believe, in short, that the futures of the state and federal judiciaries are inextricable.

State Justice Institute Act of 1983: Hearings on H.R. 3403 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 98th Cong., 1st Sess. 38 (1983).

over ninety percent of the cases filed continue to be in the state system.³³ As with the federal caseload issue, the first cries of state court docket congestion were heard early in the 20th century,³⁴ and just as some have argued that claims of a caseload crisis on the federal level have been overstated, similar arguments have been made in response to claims of state caseload crisis.³⁵ Recent surges in criminal, and to a lesser extent civil, case filings, however, have contributed to heightened workload concerns in the state court system.³⁶

3. Duplicative Litigation and Court Caseload

Duplicative litigation contributes to the general pressures of mounting caseloads in the state and federal court systems. Although the problem of duplicative civil litigation today is commonly associated with mass torts, it first came to the attention of the Congress as an antitrust issue. In the early 1960s, over eighteen hundred private antitrust actions were filed in thirty-three federal district courts against manufacturers of electrical equipment, which, in the words of a House Judiciary Committee Report, "threatened to engulf the courts."³⁷ Congress responded by creating the Judicial Panel on Multidistrict Litigation, as previously discussed.³⁸

33. FCSC Report, *supra* note 29, at 4.

34. See, e.g., Garrison, *Congestion in the Milwaukee Circuit Court*, 9 WIS. L. REV. 325 (1934).

35. M. FEELEY, *THE PROCESS IS THE PUNISHMENT* (1979) (seeking to dispel what is characterized as the "caseload myth" in a study of New Haven criminal courts); COURT STATISTICS AND INFORMATION MANAGEMENT PROJECT, NAT'L CENTER FOR STATE COURTS, *A PRELIMINARY EXAMINATION OF AVAILABLE CIVIL AND CRIMINAL TREND DATA IN STATE TRIAL COURTS FOR 1978, 1981 AND 1984* 1 (1986) (concluding that the "often cited litigation explosion . . . appears to be exaggerated with respect to the total number of civil filings during the period of 1981-84").

36. The National Center for State Courts, which as recently as 1986 concluded that claims of excessive state court caseloads were overstated, see *supra* note 35, tempered its view four years later, on the basis of 1988 caseload statistics. "Most statewide trial courts systems were unable to keep pace with the increasing volume of criminal cases," the Center concluded; moreover, "the large influx of new criminal cases during 1988, and increase at the general jurisdiction court level of 8.4 percent, is creating problems that warrant serious concern and corrective action." CONFERENCE OF STATE COURT ADMINISTRATORS, STATE JUSTICE INSTITUTES, AND THE NAT'L CENTER STATE COURT: COURT STATISTICS PROJECT, *STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1988* 13 (1990). On the civil side, the Report notes that while case clearance rates had improved, "[i]t remains the case that most courts at both levels failed to keep pace with the flow of new case filings. Most ended 1988 with a larger pending caseload than had been present at the start of the year." *Id.* at 10.

37. H. JUD. COMM. REP. NO. 1130 (1968).

38. Act of Apr. 29, 1968, Pub. L. No. 90-296, 82 Stat. 109 (codified at 28 U.S.C. § 1407 (1988)). See *supra* notes 13-17 and accompanying text.

During the more than twenty years that the Multidistrict Litigation Panel has been in operation, the eighteen hundred electrical industry anti-trust suits that prompted the Panel's creation have been dwarfed by three highly publicized spates of litigation in the toxic exposure/products liability context. One, concerning injuries from exposure of Vietnam veterans to the defoliant Agent Orange, is responsible for over 125,000 claims filed in state and federal courts.³⁹ A second, concerning injuries from the use of the Dalkon Shield intrauterine device, has resulted in 210,000 claims.⁴⁰ And the third, relating to allegations of injury from exposure to asbestos, included over 340,000 claims.⁴¹ In contrast, no other product or substance has generated more than two thousand claims.⁴²

This "virtual explosion in the frequency and number of lawsuits filed to redress injuries caused by a single product"⁴³ has contributed significantly to the caseload of the courts. The problem is made all the more acute by impediments to consolidation, necessitating duplicative litigation of common issues. As the Draft Report of the American Law Institute Complex Litigation Project explains, multiparty, multiforum litigation "presents one of the greatest problems our courts currently confront. Repeated relitigation of the common issues in a complex case wastes the resources of attorney and client, clogs already overcrowded dockets, delays recompense for those in need, and brings our legal system into general disrepute."⁴⁴

Because the asbestos, Dalkon Shield, and Agent Orange cases are, as compared to other examples of duplicative litigation, three five-hundred pound gorillas surrounded by so many spider monkeys, it has been argued that the problem begins and ends with the gorillas. Paul Rheingold, a member of the American Bar Association Commission on Mass Torts, wrote separately to criticize the Commission Report for recommending reforms in cases where as few as one hundred actions have been filed, arguing

39. A.B.A. COMM. ON MASS TORTS REP. TO HOUSE OF DELEGATES [hereinafter ABA DRAFT REPORT], Appendix E, at 14 (Separate Statement of Paul Rheingold) (1990).

40. *Id.*

41. *Id.*

42. *Id.* Bendectin and DES have each generated about 2000 claims.

43. In re N. Dist. of Calif. "Dalkon Shield" IUD Products Liability Litigation, 526 F. Supp. 887, 892 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982).

44. *ALI Draft*, *supra* note 23, at 13. Similarly, "A fundamental premise" of the Report of the American Bar Association Commission on Mass Torts, "is that separate adjudication of individual tort claims arising from a single accident or use or exposure to the same product or substance is inefficient and wasteful (and) seriously burdens both state and federal judicial systems." ABA DRAFT REPORT, *supra* note 39, at 12. And again, one leading scholar has referred to appellate court rejection of the class action mechanism as a vehicle for consolidating mass tort cases as giving rise to a "growing, nationwide mass-tort litigation crises." Mullenix, *supra* note 21, at 1043.

that such cases presented "no existing serious problem."⁴⁵ Referring to the example of a one hundred person airplane crash case, Mr. Rheingold asks: "Where are the statements from judges who have to try this type of fixed place disaster that existing procedures are inadequate for handling such cases? Or where do law review writers discuss such problems . . . ?"⁴⁶

Although Mr. Rheingold's questions are rhetorical, the answers are not necessarily what he assumes them to be. To the extent that impediments to consolidation necessitate duplicative trials in the state or federal courts, court workload is increased by the extent of the duplication, regardless of whether the cases are small or large.⁴⁷

Contrary to the implication of Mr. Rheingold's questions, numerous judges and scholars have recognized that the burden duplicative litigation places on the courts is not due solely to a very few, high profile toxic tort or products liability cases. It is also attributable to smaller cases as well, including cases arising out of single catastrophic events. Judge Spencer Williams refers to the "very real crisis" in which "state and federal trial judges are being inundated with mass filings of lawsuits . . . based on a *single catastrophe* or the mass production and sale by one defendant of a defective product."⁴⁸ Similarly, Judge Jack Weinstein submitted a written statement to the Subcommittee on Courts in 1988, in which he observed that "complex disaster litigations pose enormous difficulties for our judicial system," and expressed his support for proposed legislation to facilitate the consolidation of litigation arising out of single catastrophic events as "a laudable step towards resolving some of the difficulties that arise in the context of

45. ABA DRAFT REPORT, *supra* note 39, Appendix E, at 1-2. Mr. Rheingold's separate statement is relied upon by Professor Sedler and Professor Twerski, to the exclusion of all other sources of information, in support of their argument that there is nothing to be gained by legislation facilitating the consolidation of litigation arising out of single accidents. Sedler & Twerski, *supra* note 1, at 106. Given Mr. Rheingold's extensive experience with complex litigation, we take his remarks on the subject quite seriously, as reflected in the extent of our response to his concerns. Nevertheless, his views must be kept in perspective; they do, after all, constitute the lone dissent from the Report of a Commission composed of twelve members, each of whom has had considerable experience with complex litigation as practitioner, academic, judge, or litigant.

46. ABA DRAFT REPORT, *supra* note 39, Appendix E, at 2.

47. This point is made persuasively in a recent article by Professor Richard Freer, who argues that duplicative litigation unjustifiably wastes scarce judicial resources in small cases as well as large cases, and that consolidation is therefore appropriate across the board. Freer, *supra* note 20. See also Rowe & Sibley, *supra* note 6, at 52 (advocating application of multiparty, multiforum jurisdiction where as few as five people are injured, under circumstances in which duplicative litigation is otherwise inevitable).

48. Williams, *Mass Tort Class Actions: Going, Going Gone?*, 98 F.R.D. 323, 324 (1982) (emphasis added).

complex disaster litigations.”⁴⁹ Finally, the suggestion that judges perceive no problems with existing mechanisms for consolidation of disaster litigation is belied by the fact that in March 1988, the Judicial Conference of the United States went on record in support of legislation identical to H.R. 3406 as introduced. The conference characterized it as “a reasonable approach to dealing with problems associated with mass disasters by providing a means to consolidate multiple personal injury and property damage cases that would otherwise be scattered in various State and Federal Courts into a single forum.”⁵⁰

There has likewise been considerable law review commentary addressing the problems created by duplicative, single accident litigation.⁵¹ Although it cannot be pretended that the state and federal caseload burden created by duplicatives, single-accident litigation rivals that created by the “big three” toxic exposure/products liability cases, the burden is nonetheless significant. The Draft Report of the American Law Institute Complex Litigation Project explains:

Many complex cases . . . have arisen from single mass catastrophes. United States Circuit Judge Alvin Rubin provides a simple but moving catalog:

We all know of the Bhopal disaster in which, as a result of the release of noxious chemicals from a Union Carbide plant in Bho-

49. *Multiparty Hearing*, *supra* note 19, at 283 (Nov. 9, 1988 letter from the Honorable Jack B. Weinstein to Robert W. Kastenmeier). Judge Weinstein went on to criticize the legislation for its “rather limited scope” and urged that it be expanded to include consolidation of products liability and toxic torts cases as well.

50. *Court Reform and Access to Justice Act: Hearings on H.R. 3152 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st and 2nd Sess. 913 (1987-88) [hereinafter *Reform Hearings*]. In discussing the impact of duplicative, single accident litigation on court workload, we want to be careful not to overstate our case. Although Judge Williams, Judge Weinstein, and the Judicial Conference perceive the problem associated with duplicative, single accident litigation as sufficiently serious to warrant legislative intervention, they refer to the problem generically and do not focus on the extent to which the impact of duplicative litigation on workload animates their concern. There is ample evidence that duplicative, single accident litigation makes a meaningful contribution to the undeniably significant caseload burden created by duplicative mass tort litigation generally (*see infra* text accompanying notes 51-52). Nevertheless, we do not wish to be read as saying that the federal judiciary supports H.R. 3406 solely or even primarily because it will ease workload pressures for the federal courts. Our point is simply that the federal judiciary has gone on record in support of the proposition that the mechanisms now in place for the consolidation of single accident litigation are in need of reform, Mr. Rheingold’s suggestions to the contrary notwithstanding.

51. Rubin, *Mass Torts and Litigation Disasters*, 20 GA. L. REV. 429, 432 (1986); Note, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 HARV. L. REV. 1143 (1983); Note, *Air Crash Litigation and 28 U.S.C. § 1407: Experience Suggests A Solution*, 1981 U. ILL. L. REV. 927 (1981); Rowe & Sibley, *supra* note 6, at 14-22 (discussing the need for federal action-consolidating jurisdiction with reference to both products and mass accident cases).

pal, India, more that 1700 persons were killed and 200,000 were injured. When a Pan American Boeing 727 crashed into a residential area near the New Orleans airport on July 9, 1982, 179 people died. The collapse of a skywalk at the Hyatt Regency Hotel in Kansas City in 1981 resulted in 114 deaths and hundreds of injuries. In 1985, 500 people died in an airplane crash in Japan, 174 in a Delta Airlines crash at the Dallas airport, and 57 persons in a crash of a Midwestern Airlines plane (citation omitted).

Because catastrophes like these invariably raise complex issues of fact, they can have a much greater impact on the court systems than the small number of these cases suggests. It is not uncommon that cases may be dispersed in both the state and federal court systems.⁵²

In sum, duplicative litigation arising out of complex cases has significantly exacerbated an already serious workload problem in the state and federal courts. Mr. Rheingold is undeniably correct in saying that the asbestos, Dalkon Shield, and Agent Orange cases are at the core of the problem, but that does not mean that the impact of the single accident cases on court workload is inconsequential. Because scattered, duplicative litigation is a problem shared by the state and federal court systems, the benefits to be derived from an action-consolidating mechanism in the federal courts must be evaluated in light of the burdens that may thereby be alleviated in both those systems.

C. *Unfairness and Inconsistency of Results*

Apart from the burden that duplicative litigation creates for the courts, it also creates a danger of inconsistent and unfair results. Professor Sedler and Professor Twerski ably summarize the problem: "[A]s long as there can be multiple litigation in different states on the same underlying claim, there is also the possibility of 'inconsistent results' due to different dispositions. Juries in different states, operating under the same applicable law, may resolve questions of fact and liability differently."⁵³

Put in the context of a more concrete example: Two passengers sitting side by side in the same airplane are killed in the same crash, and their families file identical wrongful death suits against the airline in different courts. Under current law, it is possible that the airline could be found negligent in one suit, but not the other, entitling the family of one victim to receive complete compensation for its loss, while the family of the other victim receives a bill for court costs.

52. *ALI Draft*, *supra* note 23, at 18-19.

53. Sedler & Twerski, *supra* note 1, at 95.

Professor Sedler and Professor Twerski acknowledge that, in light of the inconsistent results that duplicative litigation permits, "it would be efficient to consolidate all of the actions in a single court and apply the law of a single state to determine liability."⁵⁴ "Efficiency," however, is not the issue here—fundamental fairness is. When the identical issues of law and fact arising out of the same accident are resolved one way in some cases and another way in others, due solely to the vagaries of the judges and juries, it is, in a word, unfair. Sedler and Twerski dismiss the unfairness that duplicative litigation can cause as "part of the price of our federal system;"⁵⁵ but that misses the point, just as it would miss the point for a government contractor to defend charging the Pentagon \$1000 for a socket wrench with the explanation that that was its price. In both cases the real question is whether the price is unjustifiably high. In our view, the answer is yes.

The unfairness that duplicative litigation may precipitate is not limited to inconsistent case outcomes, but includes multiple assessments of punitive damages against the same defendant for the same conduct. Just as it is appropriate for a criminal defendant to be punished only once for the same crime, so too, it is appropriate for a civil defendant to be assessed punitive damages only once for the same conduct. To the extent that separate, duplicative civil proceedings against the same defendant, or defendants, give rise to the possibility of duplicative punitive damage awards, the risk of unfair results is undeniable.⁵⁶

II. RESPONDING TO THE PROBLEM: THE DEVELOPMENT OF H.R. 3406

A. *The 1983 and 1986 Bills*

In the early 1970s, an ad hoc committee of judges, lawyers, plaintiffs, defendants, and academics, formed by Judge Pearson Hall, put together a legislative proposal to address the problem of multiple, scattered litigation in aviation accidents.⁵⁷ The resulting bill, introduced by Congressman Danielson, would have established federal question jurisdiction over actions arising out of airline accidents in which five or more people were killed. In addition, it would have created a uniform body of federal law to govern liability and damages in such actions.⁵⁸

54. *Id.*

55. *Id.* at 97 (quoting *Williams v. North Carolina*, 317 U.S. 287, 302 (1942)).

56. *Multiparty Hearing*, *supra* note 19, at 55-56 (statement of Barbara Wrubel).

57. *Diversity Hearings*, *supra* note 17, at 83.

58. H.R. 231, 96th Cong., 1st Sess. (1979).

Contemporaneously with Congressman Danielson's development of legislation targeted to address the narrow problem of airplane crash litigation, the Subcommittee on Courts initiated two extensive sets of hearings in 1977. The hearings concerned the performance of the federal courts in the wake of mounting caseload pressures, with a focus upon the continuing viability of diversity jurisdiction.⁵⁹ At those hearings, the merits of retaining diversity jurisdiction were questioned by judges, academics, practitioners, and representatives of the Administration. Nevertheless, even those favoring legislative restrictions upon diversity jurisdiction generally supported its retention in the limited context of statutory interpleader, which "serves a valuable contemporary purpose of ensuring a forum in situations where there are widely scattered claimants who could not otherwise be gathered in any one court."⁶⁰

A convergence of the Danielson legislation and the Subcommittee's ongoing evaluation of diversity jurisdiction occurred in a 1979 hearing before the Subcommittee on Courts regarding a bill to abolish diversity. At that hearing, Congressman Glickman, a member of the Subcommittee, expressed opposition to abolishing diversity, in part because "the machinery of our state court system is simply not adequate to reach across state lines to influence procedures in the ever-growing complex litigation regarding interstate operations."⁶¹

Professor Thomas Rowe, a witness testifying in support of abolishing diversity, acknowledged "the legitimate problem that Congressman Glickman raises," but noted that "diversity jurisdiction often doesn't respond to that problem at all well."⁶² Using the example of an airline accident, Professor Rowe explained how, as discussed in section I.A. above, the requirement of complete diversity can make "split litigation" unavoidable.⁶³ To facilitate the consolidation of complex, multiparty, multistate cases, Professor Rowe recommended the creation of a "special jurisdiction" to permit

59. *Diversity of Citizenship Jurisdiction/Magistrates Reform: Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977) [hereinafter *Citizenship Hearing*]. For a discussion of these hearings and their implications, see Kastenmeier & Remington, *Court Reform and Access to Justice: A Legislative Perspective*, 16 HARV. J. ON LEGIS. 301 (1979).

60. *Citizenship Hearings*, *supra* note 59, at 178, 95th Cong., 1st Sess. 178 (1977) (statement of Daniel Meador, Assistant Attorney General). See also Sept. 29, 1977 letter from Public Citizen Litigation Group to Robert W. Kastenmeier, *id.* at 297-98; Oct. 6, 1977 letter from Thomas Rowe to Robert W. Kastenmeier; *id.* at 276-77.

61. *Diversity Hearings*, *supra* note 17, at 67.

62. *Id.* at 82.

63. *Id.*

such cases to be heard in federal court.⁶⁴ Congressman Danielson, also a member of the Subcommittee, then raised the subject of his bill, to which Professor Rowe observed: "[I]t strikes me, that the aircraft situations are not necessarily the only ones to which [a special jurisdiction] would be applicable. This is the kind of situation for which we could use an action-consolidating device generally."⁶⁵

Following the hearing, the Subcommittee invited the Department of Justice to comment upon the suggestion that a multiperson injury exception to the diversity legislation be created. The Department responded with a proposal that formed the basis for legislation introduced by Congressman Kastenmeier in 1983 and 1986.⁶⁶

Jurisdiction: The 1983 and 1986 bills created federal jurisdiction over "any civil action arising out of a single event, transaction, occurrence, or course of conduct that results in personal injury or injury to property of twenty-five or more persons" for whom such injuries were alleged to exceed \$10,000 per person. Unlike the Danielson bill, which created federal question jurisdiction over the subject matter of the class of cases at issue, the Kastenmeier legislation was grounded upon an expansion of diversity jurisdiction. If any defendant and any plaintiff were citizens of different states, and two or more victims or two or more defendants were scattered among different states, federal jurisdiction would be available. An injured plaintiff who did not meet this jurisdictional threshold, and therefore could not file an original action in the district court (as would be the case with a plaintiff who was a citizen of the same state as the defendant or defendants), could intervene in any federal action that was properly commenced by another plaintiff. Similarly, a defendant could remove to federal court an action filed against it in state court, provided that a separate action against it had already been filed in the federal system, even if the state action could not have been filed in federal court originally. In this way, impediments to federal consolidation of complex litigation created by complete diversity of citizenship requirements could be avoided, and related cases arising out of mass torts could find their way into the federal courts, either by original filing, intervention, or removal.

Multidistrict Litigation: Multidistrict litigation procedures were amended for mass tort actions filed in federal court, pursuant to the first section of the bill, to permit the transferee court receiving the action for

64. *Id.*

65. *Id.* at 83.

66. See *DOJ Proposal*, *supra* note 17; H.R. 4315, 99th Cong., 2nd Sess. (1986); H.R. 3690, 98th Cong., 1st Sess. (1983).

pretrial purposes to retain jurisdiction for the determination of liability. Following the liability determination, the transferee court would ordinarily return the actions to the district courts from which they were transferred for determinations of damages. The net effect was that the bill relied on the existing Multidistrict Litigation Panel to consolidate mass tort actions filed in federal court, and would have explicitly authorized the transferee court to do what it is technically not now permitted to do—resolve common issues of liability. At the same time, the bill recognized that damage issues ordinarily present few common questions because such issues will usually turn on injuries, earning capacity, and related matters unique to individual plaintiffs. Given that little, if any, duplicative litigation could thus be avoided by consolidation of damage issues, the bill would spread the burden of resolving such issues among several federal courts.

Choice of Law: The 1983 and 1986 bills provided that “to ensure consistent results, the transferee court shall determine the source of the substantive law,” and that “[t]he same substantive law shall be applied to all cases.” The bill thus avoided the impediment to consolidated resolution of common issues created by the need to apply different state laws to different parties.

In deciding what substantive law to choose, the bill provided that “the transferee court shall not be bound by the choice of law rules which the transferor court or courts or the transferee court would otherwise apply in cases governed by State law.” In general, federal courts in state law cases are bound by the choice of law rules of the state in which they sit.⁶⁷ That rule, however, is extremely hard to defend for actions within the scope of the bill, in which a federal court would not be acting as a surrogate state court, but rather serving a nationwide function that often could not have been served by any state court. Given that the purpose of the jurisdiction was to use the federal courts to do what no state court might be able to do, the bill operated from the view that it made no sense to have a federal court bound by the conflicts laws of a single state.

B. The Court Reform and Access to Justice Act of 1987 and 1988

Although the 1983 and 1986 bills were referred to the Subcommittee on Courts, Mr. Kastenmeier did not schedule them for a hearing. With complicated and potentially controversial legislation such as this, simply introducing a bill is often an important preliminary means to elicit informed

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

commentary and to assess the viability of a given legislative proposal without expending scarce subcommittee resources on a hearing.

One important source of commentary on the 1983 and 1986 bills came from Professor Rowe in his previously cited article that he authored with Kenneth Sibley.⁶⁸ On the basis of suggestions from Professor Rowe, House Legislative Counsel, and others, the bill was revised, and reintroduced in the 100th Congress as Title IV of H.R. 3152, the Court Reform and Access to Justice Act of 1987.⁶⁹ The most significant changes⁷⁰ were:

Jurisdiction: The bill was revised to apply to actions "arising out of the same transaction, occurrence, or series of related transactions or occurrences." Thus, the bill reached the complete range of accident, toxic exposure, and products liability cases. Minimal diversity was retained as the jurisdictional cornerstone of the bill. However, the additional requirement of scattered victims, or scattered defendants, was jettisoned in favor of a requirement that some combination of defendants or events be scattered among two or more states. As Professor Rowe explained, it is where defendants, and/or events, are geographically dispersed that the risk of multiple, duplicative litigation is greatest.⁷¹ The damages threshold for the minimum of twenty-five victims was increased from \$10,000 to \$50,000, to make it consistent with the \$50,000 threshold being proposed elsewhere in the bill for diversity cases generally. Finally, removal procedures were made available to defendants even when no suit was pending in the district court, provided that the suit for which removal was sought could have been filed in federal court originally. Absent such a provision, defendants would have no choice but to litigate duplicative suits in different state courts as long as plaintiffs succeeded in keeping their cases out of the federal system.

Multidistrict Litigation: A "reverse removal" provision was added, enabling the transferee court to return cases originally filed in state courts to those courts (rather than to the district courts to which the actions were removed) upon resolution of liability issues. In the interests of comity, and reducing federal court workload, it was thought that damage issues should be resolved by whatever court received the action originally.

68. Rowe & Sibley, *supra* note 6.

69. H.R. 3152, 100th Cong., 1st Sess. (1987).

70. In discussing the most significant changes incorporated into the 1987 legislation, we have confined ourselves to those changes that contributed to the ultimate development of H.R. 3406 in the 101st Congress, and have excluded those changes that were inserted and then deleted during the 100th Congress.

71. Rowe & Sibley, *supra* note 6, at 25-26.

Choice of Law: In the interests of ensuring greater predictability, five factors were identified to guide the transferee courts in making their choice of law assessments.⁷² At the same time, to ensure greater flexibility, the transferee courts were authorized to determine the “source or sources” of applicable law.

At hearings on H.R. 3152, the Department of Justice testified that it would support the bill only if: 1) The scope of the bill was limited to actions arising out of single events or occurrences, because the inclusion of products liability and toxic exposure cases would threaten to overrun the federal courts; 2) the definition of “injury” sustained in actions within the scope of the bill was limited to the kind of injuries that arise in disaster cases: physical injury or death, and physical damage to tangible property; and 3) the transferee court was ordinarily limited to applying a single source of law to avoid “choice of law litigation of staggering complexity; delay in settlements resulting from uncertainty in the state of law to be applied; an impetus toward forum shopping; and a perceived unfairness when different bodies of law are applied to different parties in the same case.”⁷³

The recommended changes were adopted, although the Department’s suggestions with respect to choice of law were revised in light of its concession that more than one source of law would sometimes have to be applied⁷⁴ and by other comments received that were critical of an unyielding “single source” rule.⁷⁵ The resulting choice of law provisions added five additional factors for the transferee court to take into account in applying a single source of law, and permitted the transferee court to issue orders applying more than a single source of law to given actions.⁷⁶

72. Those factors included: (1) The states’ law that would ordinarily apply; (2) the states where claims might have been brought; (3) the need for uniformity; (4) whether changes in applicable law resulting from transfer or removal would be unfair; and (5) whether applying multiple state laws would induce unjustified forum shopping. H.R. 3152 § 405, 101st Cong., 1st Sess. (1987).

73. *Reform Hearings*, *supra* note 50, at 228.

74. *Id.* at 229 n.11.

75. See, e.g., *id.* at 983-86 (Oct. 27, 1987, letter from Thomas Rowe to Robert W. Kasstenmeier). It is somewhat puzzling that Professor Sedler and Professor Twerski criticize Professor Rowe for “indicat[ing] no awareness” of Supreme Court decisions that “limit the practical choices available to a federal court seeking to use a ‘single jurisdiction rule,’” Sedler & Twerski, *supra* note 1, at 99 n. 187, given that Professor Rowe nowhere advocates, and is in fact critical of, a single jurisdiction rule.

76. H.R. 4807, § 305, 100th Cong., 2nd Sess. (1988). These additional five factors are: (1) The location of the event or occurrence; (2) the place where the parties reside; (3) the interest of any jurisdiction in having its law apply; (4) the reasonable expectations of the parties; and (5) any agreement between the parties concerning applicable law.

The amended multiparty, multiform jurisdiction provisions were included as Title III, Subtitle A of H.R. 4807, the Court Reform and Access to Justice Act of 1988. The Subcommittee on Courts, and the full Committee on the Judiciary, reported the bill favorably by a voice vote, which was passed by the House on a voice vote. Title II, Subtitle A had no counterpart in the Senate court reform bill, however, and was ultimately deleted at the joint conference from the Judicial Improvements and Access to Justice Act, which became law.⁷⁷

C. The Multiparty, Multiform Jurisdiction Act of 1989 and 1990

In the 101st Congress, Title III, Subtitle A of H.R. 4807 was reintroduced as H.R. 3406, the Multiparty, Multiform Jurisdiction Act of 1989. The bill received the unqualified support of the Judicial Conference and the Department of Justice. It was, however, criticized in a written submission from Professor Sedler and Professor Twerski (which formed the basis of the article to which this piece responds), and in hearing testimony by a representative of the Lawyers for Civil Justice, who sponsored the Sedler/Twerski article.

Professor Sedler and Professor Twerski, together with the Lawyers for Civil Justice, raised a number of valid concerns that resulted in further amendments to the bill. As drafted, the bill's jurisdiction was triggered in part by a scattering of defendants or events, which was defined to occur when two or more defendants resided in different states or when any defendant resided in a state different from the state where the event or occurrence took place. Would either of these conditions be satisfied by corporate defendants having their principle place of business in, and therefore residing in, all those states?⁷⁸ The answer should be yes, given that whenever one or more defendants can be sued in different states scattered litigation is possible, and the bill was clarified accordingly.⁷⁹

77. Deletion occurred at the request of the Senate staff in informal meetings held to prepare a substitute amendment to the House-passed bill.

78. Professor Sedler and Professor Twerski argue that as drafted, the answer was obviously no, and that the bill was therefore "self-defeating." Sedler and Twerski, *supra* note 1, at 80. Their argument is overstated: to the extent that a defendant corporation resides in two or more states, one of which is where the accident occurred, the requirement that the defendant "reside in a State and . . . the event . . . t[akes] place in another State" is satisfied, even though the defendant may also reside in the state where the event took place. Nevertheless, the concern that the bill as originally drafted was unnecessarily ambiguous, is well taken.

79. As amended, the requisite scattering of defendants or events was deemed to occur if "a defendant resides in a State and a substantial part of the accident took place in another State, regardless of whether that defendant is also a resident of the State where a substantial part of the

Second, the bill was criticized for applying to cases of property damage alone, the example given being a retaining wall collapsing on a row of expensive parked automobiles.⁸⁰ The bill was therefore amended to require that the threshold twenty-five victims have sustained some physical injury. Finally, although the bill's application to a "single event or occurrence" was intended to reach only catastrophic accidents, it was argued that courts could conceivably conclude that a decision to design or label a product was a single event, and that long term exposure to a toxic substance was a "single occurrence."⁸¹ The bill was therefore clarified to apply to single accidents alone.

A final change, recommended by a member of the American Bar Association's Mass Torts Commission, who testified at the hearing on the Bill, was to authorize the transferee court to make punitive damages assessments as well as liability determinations.⁸² Given that multiple punitive damages awards are inappropriate and that the multiple proceedings giving rise to such awards are necessarily duplicative in nature, it made sense for the transferee court to resolve not only liability for but also the assessment of punitive damages.

These changes were incorporated into an amendment in the nature of a substitute that was presented to the Subcommittee on Courts at a mark-up session in February 1990. The amended bill was reported favorably by the Subcommittee to the Committee on the Judiciary, which in turn ordered the bill reported favorably to the House of Representatives in March.⁸³ The bill passed the House of Representatives on June 5, 1990.

The bill was then sent to the Senate, where it was referred to the Committee on the Judiciary. In the waning days of the 101st Congress, it was informally circulated in the Senate as part of a unanimous consent court reform package. The multiparty, multiforum provisions of the package were objected to by Senator Howell Heflin on the grounds that his Senate Judiciary Subcommittee of Courts and Administrative Practice had not had sufficient time to study them.⁸⁴ He did, however, commit to holding hearings on the bill early in the 102nd Congress.⁸⁵ Because Senator Heflin's

accident occurred," or if "any two defendants reside in different States, regardless of whether such defendants are also residents of the same State or States." H.R. 3406 § 2(a).

80. *Multiparty Hearing*, *supra* note 19, at 96 (statement of James Dixon).

81. *Id.* at 46 (questions and comments of Subcommittee member Rick Boucher).

82. *Id.* at 60 (statement of Barbara Wrubel).

83. H.R. REP. NO. 515, 101st Cong., 2nd Sess. (1990) (text appears in Appendix to this article).

84. Letter from Senator Howell Heflin to Robert W. Kastenmeier (Oct. 9, 1990) (on file with the Marq. L. Rev.).

85. *Id.*

objections would have destroyed the requisite unanimity, the package was passed with the multiparty, multiforum provisions removed.⁸⁶

III. OBJECTIONS TO H.R. 3406

Although support for H.R. 3406 has been considerable, a number of concerns have been raised that fall into three general categories: A) objections to the scope of consolidation authorized by the bill; B) objections to expanding the federal role in consolidating state law cases; and C) objections to the choice of law provisions.

A. Objections to the Scope of Consolidation Authorized by the Bill

Concerns raised with respect to the scope of the bill have fallen into two groups: one arguing that the bill permits too much consolidation, and the other arguing that the bill does not permit enough.

Some of the arguments that the bill permits too much consolidation correctly identify problems that concededly can occur when related cases are consolidated. First, the greater the number of plaintiffs consolidated in a single proceeding, the less control each will have over its case. Second, a single, consolidated resolution of related, but less than perfectly identical, actions can deprive individual parties of opportunities to call attention to the differences in their particular cases. And third, consolidation of numerous suits in a single forum can create case management problems for judges.

The restricted scope of H.R. 3406 makes it unlikely that these problems would become severe under the bill. Unlike products liability and toxic exposure cases, actions arising out of single accidents rarely exceed the hundreds in number. The difficulties that courts and parties may face when many thousands of cases are brought together in one courtroom are simply not as extreme when fewer cases are at issue.⁸⁷ Moreover, linking mass tort legislation with the problems that accompany consolidation creates the misleading impression that such problems do not already arise in actions that have been consolidated under current law. Given mounting caseload pressures, the trial courts have had every incentive to exploit existing consolidation mechanisms, and to overcome impediments to consolidation by whatever means the appellate courts are willing to tolerate. The result has been a patchwork of inconsistent, incomplete, and controversial approaches that has given rise to mass consolidation no less susceptible to the problems that critics associate with action-consolidating legislation. The principal

86. Pub. L. No. 101-650.

87. *Multiparty Hearing*, *supra* note 19, at 15, 21-23 (statement of William Schwarzer).

difference between consolidation in current practice and consolidation under H.R. 3406 is that the latter offers a degree of clarity, consistency, and comprehensiveness that is lacking in the present system.

Another argument that the bill goes too far relates to the twenty-five victim threshold. In their written statement to the Subcommittee, Professor Sedler and Professor Twerski argued that a threshold as low as twenty-five would significantly increase the number of actions for which a federal forum was available, thereby adding to the workload of the federal courts.⁸⁸ In support of their position, Professor Sedler and Professor Twerski provided a list of the many cases to which the bill would apply. They did not, however, identify how many of those cases would be in federal court anyway, at least in part, by virtue of satisfying complete diversity requirements. To the extent that the bill merely adds cases to related actions otherwise in the federal system for consolidation in a single trial, it adds little to court workload. Moreover, the bill would do more to consolidate cases already at least partly in the federal system, than to add totally new actions to it. It would also reduce the time expended on federal-state coordination of split litigation. Thus, the Judiciary, the Department of Justice, and the Congressional Budget Office reported that, if anything, the bill would decrease the federal court workload.

If meaningful experience is to be gained from legislation facilitating the consolidation of duplicative litigation, the legislation must reach a sufficient number of cases to make the effort worthwhile. By reaching litigation arising out of both medium and large accidents, H.R. 3406 strikes a balance between what many view as an overly ambitious undertaking to encourage consolidation of all mass torts, and an unduly narrow proposal that would reach only a handful of apocalyptic accidents. In so doing, the bill implicitly recognizes that duplicative litigation is undesirable, whether the duplication is modest or major in scope.

In contrast, others have argued that the bill does not consolidate enough—that the core problem in need of fixing is duplicative products liability and toxic exposure litigation, and that H.R. 3406 should be expanded to include such cases.⁸⁹ Politically, such a suggestion is unrealistic given the opposition that earlier, expanded versions of H.R. 3406 encountered.⁹⁰ Substantively, such a suggestion faces the legitimate objection that consoli-

88. *Id.* at 69-70, 86-92.

89. *See, e.g., id.* at 283 (Nov. 9, 1988 letter from the Honorable Jack B. Weinstein to Robert W. Kastenmeier). *See also id.* at 52-53 (statement of Robert Hanley).

90. The opposition of the Department of Justice, the Judicial Conference, and various segments of the bar and industry to earlier versions of the bill that did reach products liability and toxic exposure cases is illustrative. *See supra* notes 73, 80-81 and accompanying text.

dating those cases in the federal system might crush the already pressed federal courts. Should general diversity jurisdiction ultimately be abolished, the federal system could more efficiently accommodate the influx of cases that an expansion of H.R. 3406 could cause, and the desirability of amending the legislation to reach other mass tort cases might properly be revisited at that time. Assuming that diversity jurisdiction is retained, some other vehicles might be considered to improve consolidation procedures for products liability and toxic torts cases filed in, or removed to, federal court which, unlike H.R. 3406, would not expand federal jurisdiction. For the purposes of this article, however, it is enough to note that duplicative single accident litigation presents a serious problem in need of a solution that H.R. 3406 seeks to provide.

*B. Objections to Expanding the Federal Role in
Consolidating State Law Cases*

Professor Sedler and Professor Twerski argue that historically it has been "the primary responsibility of the state courts to adjudicate disputes between private persons," and that "[f]undamental federalism considerations strongly militate against a federally-required consolidation of 'mass tort' cases and especially against a federally-imposed 'single jurisdiction choice of law rule' and the resultant displacement of state conflicts law in such cases."⁹¹ As an initial matter, there is nothing "federally-required" about the consolidation that H.R. 3406 would facilitate. Parties wishing to litigate their accident cases in duplicative state actions may do so. H.R. 3406 simply offers the parties the alternative of a consolidated federal forum that becomes available only if one or more parties chooses to use it. As the Department of Justice commented in response to Sedler and Twerski's written statement to the Subcommittee: "It is obviously untrue to say that section 1658 would prevent the state courts from hearing and determining multiparty tort cases—the bill merely creates a federal forum which litigants in such cases may (or may not) prefer to state fora."⁹²

Indisputably, the states should bear primary responsibility for resolving state law disputes. For that reason, Mr. Kastenmeier has in the past introduced legislation to abolish diversity jurisdiction. The state courts are eminently qualified to accomplish the objective of resolving state law disputes

91. Sedler and Twerski, *supra* note 1, at 82-84.

92. *Multiparty Hearing*, *supra* note 19, at 40 (Feb. 14, 1990 letter from Bruce Navarro, Acting Assistant Attorney General to Robert W. Kastenmeier). Moreover, the bill adds the new "reverse removal" feature, permitting remand to state courts for compensatory damages determinations.

fairly and dispassionately, and, in the absence of a continuing need for federal intervention to accomplish that objective, principles of federalism counsel that the states be permitted to exercise their traditional role without federal interference. In the limited context of mass tort litigation, however, the objective at issue is to permit consolidation of related cases so as to avoid duplicative litigation. This is an objective that the state courts are constitutionally incapable of accomplishing. Where, as in H.R. 3406, the federal government undertakes to do what an individual state cannot do, it is hardly an indefensible usurpation of a traditional state function.

Professor Sedler and Professor Twerski change course mid-stream and agree: to the extent that Congress deems "the mass tort problem to be a matter of overarching federal concern," it may "conclude that national interests require displacement of state law" without doing violence to the principles of federalism. While couched in terms of an "affront to federalism," their ultimate argument has little to do with whether the bill federalizes what should be left to the states. Rather, they argue simply that it makes no sense to identify the mass tort problem as national in character, and only to direct that mass tort cases be resolved by state law that, by its nature, is not national in character.⁹³

Ironically enough, it is respect for federalism that justifies the vehicle the bill uses to facilitate consolidation of accident cases. The problem requiring federal intervention is that the states cannot constitutionally accomplish the desired objective of bringing related accident litigation together in a single forum. The problem is not that the substantive law applied by the states in resolving mass accident cases is deficient—to federalize substantive state law under these circumstances, when there is no good reason to do so, *would* interfere unnecessarily with state sovereignty. Accordingly, the bill respects the traditional role of state law in resolving issues of liability and damages in tort cases, and encroaches upon the states only to the extent it must to permit the desired consolidation.

Against this background, there is nothing illogical about having the federal courts apply state law to resolve mass accident cases. For over two hundred years, the federal courts have been authorized to resolve disputes arising under state law between citizens of different states. This grant of jurisdiction rests on the now antiquated premise that state courts may be biased against out-of-state litigants, and may thus be incapable of making fair and impartial decisions. With a more modern justification, H.R. 3406 would authorize federal courts to resolve state law disputes between citizens of different states, arising out of mass-accidents, on the salutary premise

93. Sedler & Twerski, *supra* note 1, at 86-87.

that the state courts are incapable of consolidating these cases the way the federal courts can.

C. Objections to the Choice of Law Provisions

Professor Sedler and Professor Twerski raise a number of objections to the choice of law section contained in H.R. 3406. Those objections go not only to the substance of the choice of law provisions in the bill, but also to the process by which those provisions were included. "We shall conclusively show that little consideration was given by the drafters to major constitutional choice of law cases," Sedler and Twerski contend. Rather, they conclude, "In their haste, [the drafters] simply failed to consider the practical effect of these cases on the discretion available to courts in choice of law situations."⁹⁴ In other words, it is not that Professor Sedler and Professor Twerski's concerns were considered and rejected, but that in a rush to pass legislation Congress never considered their concerns at all.

Such statements do a disservice to the legislative process. As reflected in Part II, the formulation and development of H.R. 3406 has been going on for over twelve years—hardly the unseemly race to legislate that Professor Sedler and Professor Twerski suggest. In that time, numerous revisions have been made to virtually all sections of the bill. The choice of law provisions have undergone three major alterations, and while no significant changes were made in the 101st Congress, they were nonetheless reviewed and reevaluated in light of comments received from the American Law Institute, individual academics, a consortium of state legislators, trade associations representing defense lawyers and corporate counsel, insurance companies, pharmaceutical companies, and other product manufacturers, individual plaintiffs' and defendants' lawyers, the Department of Justice, and a representative of the Judicial Conference. Indeed, Professor Sedler and Professor Twerski laid out all of their choice of law concerns in an extensive statement to the Subcommittee, which when revised and converted into article form inexplicably suggests that their choice of law concerns were never considered.

In fact, their objections were reviewed, circulated to a number of interested parties, and ultimately rejected in light of comments received, most notably from the Department of Justice. Professor Sedler and Professor Twerski's two basic objections were: First, that creating a federal choice of law standard usurps the traditional role of state law in supplying the choice of law rules that govern state law disputes; and second, that directing the

94. *Id.* at 77.

transferee court to prefer choice of a *single* governing law will lead to irrational and unfair results.

As to the first objection, we have previously explained the need for a federal choice of law.⁹⁵ The *Klaxon* rule directs district courts to apply the choice of law rules of the forum state in diversity actions. That makes sense when the federal court is acting as a surrogate state court. It makes no sense at all when a federal transferee court is performing a function that no state court can perform, and which may bear no unique relation to the state where the federal court happens to sit. There is thus a virtual unanimity of opinion among commentators advocating greater consolidation of mass tort cases that a federal choice of law rule is essential.⁹⁶

Professor Sedler and Professor Twerski do not argue otherwise. Rather, their position is simply that the need for legislation facilitating greater consolidation of mass tort litigation is insufficient to justify the resulting encroachment on state sovereignty that a federal choice of law provision would cause. We disagree. As outlined in Part I, the need for federal legislation—including a federal choice of law provision—is far greater than Professor Sedler and Professor Twerski would have us believe. As they concede, in the face of an overriding federal objective, state law is properly displaced.⁹⁷ Moreover, current law is hardly the embodiment of well-ordered federalism that Professor Sedler and Professor Twerski suggest. To the contrary, it is a system that is both chaotic and ripe with opportunities for manipulation and parochialism.⁹⁸

With respect to their second objection—that a single choice of law rule will yield arbitrary and unfair results—we do not pretend to possess Professor Sedler and Professor Twerski's choice of law expertise, and defer to their analysis on several points. First, we accept their analysis of how multiple jurisdictions' laws are applied in multistate cases under existing law. Second, we accept their conclusion that a single source of law rule will limit the multiple choices that could otherwise be made to the detriment of those parties that would have benefitted from the application of separate sources of law.

Nevertheless, the "unfairness" associated with depriving a party of the protection of state laws to which it might otherwise be entitled must be balanced against the unfairness associated with applying different sources of

95. See *supra* note 67 and accompanying text.

96. Rowe, *New Rules for Multistate Mass Torts*, LEGAL TIMES 30 (June 11, 1990).

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

98. See text accompanying note 19. See also, Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 558-59 (1989).

law to identically situated accident victims. In the view of the Department of Justice, the balance of equities tips in favor of treating similarly situated accident victims alike:

The gravamen of Sedler's and Twerski's complaint appears to be that where mass tort plaintiffs reside in different states, section 1658's "single jurisdiction" rule will either award recovery to plaintiffs who would be denied it by their own states' rules or (more likely) will deny recovery to plaintiffs who would be entitled to it by their own states' rules. . . . We do not find such a result at all troublesome. On the contrary, we think it highly desirable in such cases that plaintiffs with like claims should be treated similarly, whatever their state of domicile may happen to be. As the late Judge Henry Friendly pointed out, applying different state laws to different plaintiffs in mass crash cases produces the "seeming injustice that the estate of one passenger might recover without limit whereas that of the man sitting next to him could get only a small sum." [footnote omitted]. In our view, such results are far more anomalous and inequitable than the results to which Sedler and Twerski object.⁹⁹

There will be exceptions, where applying a single source of law to all parties would yield unjustifiably harsh results. One example may be derived from a case hypothesized by Sedler and Twerski, in which a Colorado resident passenger is injured in an Arizona bus accident: the passenger files suit in Colorado court, reasonably anticipating the protection of the Colorado statute of limitations, but has his suit dismissed after the action is removed, when Arizona law, which we will assume has a shorter statute of limitations, is designated as controlling. H.R. 3406, however, provides the flexibility needed to avoid such harsh results. Although the bill directs the transferee court to designate a single source of law, it explicitly authorizes the court to order the application of additional sources of law to different parties or claims, thus providing the court with the means necessary to avoid "monstrously wrong" choice of law determinations. The argument of Professor Sedler and Professor Twerski—that desire to achieve efficient results will impel transferee courts not to deviate from the single source of law rule—assumes that our judges will knowingly make "monstrously wrong" decisions for the sake of efficiency, an assumption that we do not share.

This is not to suggest that the bill's choice of law standard is infinitely malleable. The bill does direct the transferee court to designate a single source of law, flexible though that directive may be. Furthermore, while

99. *Multiparty Hearing*, *supra* note 19, at 42-43 (Feb. 14, 1990 letter from Bruce C. Navarro to Robert W. Kastenmeier).

the bill provides a multitude of factors for the court to consider in making its designation, Professor Sedler and Professor Twerski correctly note that the states whose contacts with all the parties are constitutionally sufficient to make them eligible for designation will be so few as to greatly limit the court's flexibility. Precisely for that reason, the bill meets a concern raised by others—that the multifactor analysis makes the choice of law designation insufficiently predictable. Ultimately, the bill tracks a middle ground. On the one side are those advocating the application of an optimally predictable choice of law rule, such as directing the transferee court to apply the law of the state where the accident or the tortious conduct occurred.¹⁰⁰ On the other side are those advocating an optimally flexible choice of law rule, that would impose no new constraints on the sources of law that the district court could designate in mass tort proceedings.¹⁰¹

As a final matter, the most significant problems associated with applying a single source of law to mass tort actions generally, are likely to be less troublesome in the limited context of mass-accident actions. In the average run of products liability cases, for example, plaintiffs buy, use, and are injured by the defendant's products in a series of separate events in separate states. The problems attendant to applying the law of a single state under these circumstances, where any number of states will have an arguably legitimate stake in resolving the dispute, are going to be less extreme under circumstances in which all plaintiffs are injured in the same place, at the same time, in the same event, and by the same "product" (i.e., the same airplane, bridge, or hotel).

IV. CONCLUSION

Our purpose here has been two-fold: first, to defend legislation facilitating the consolidation of mass-accident litigation against objections that have been raised. Second, to provide an illustration of how the legislative process can, and should, operate to address complex problems confronting the federal courts.

Consolidation is no panacea for the complicated woes of our courts. Indeed, consolidation has problems of its own, for whenever cases are re-

100. Such an approach has been advocated by the Department of Justice and the American Insurance Association.

101. Judge Schwarzer, for example, testifying on behalf of the Judicial Conference, suggested that the bill be amended to permit the transferee courts to designate the law of the applicable "jurisdiction or jurisdictions." *Multiparty Hearing*, *supra* note 19, at 19. Professor Sedler and Professor Twerski go even further, arguing that existing choice of law rules and procedures should not be tampered with, and because H.R. 3406 cannot accomplish its objectives without tampering with choice of law rules and procedures, the bill is a bad idea.

solved *en masse*, the advantages unique to individualized resolution are necessarily lost. Moreover, we have made it clear throughout this article that our defense of legislation facilitating the consolidation of mass-torts is limited to mass-accidents. Outside that context, i.e., in the context of products liability and toxic exposure cases, the desirability of an all-encompassing, action-consolidating mechanism in the federal courts is more debatable. Because the volume of cases relating to a given product failure or substance exposure can be considerably higher than for mass-accidents, the administrative difficulties for lawyers, judges, and the federal court system generally are likewise correspondingly higher. And because the multiple injuries caused by a product or substance arise out of separate events, in different locations, under circumstances that may differ in important ways, the number of issues requiring case-by-case resolution may be correspondingly greater. This is not to say that there are no ways to improve the procedures by which such cases are aggregated and resolved. It is merely to suggest that while H.R. 3406 is a satisfactory vehicle for consolidation and resolution of mass-accident litigation, the same may or may not be said of mass-tort litigation generally.

As far as mass-accident litigation is concerned, the comparative advantages and disadvantages of improving consolidation mechanisms must be examined in broader perspective. In a court system rapidly reaching a caseload crisis point, what advantages flow from individualized, duplicative litigation must increasingly be viewed as luxuries that the system simply can no longer accommodate. At the same time, duplicative litigation gives rise to a significant risk of inconsistent and unfair results that should not be overlooked.

In the end, the operative choice is not between complete consolidation or no consolidation. It is between consolidation pursuant to a patchwork of inconsistent and haphazard mechanisms under the existing law, or consolidation pursuant to a consistent and coherent framework—which includes a federal choice of law provision. There is no denying that the application of a federal choice of law standard in consolidated mass-accident cases will operate to the detriment of those litigants who would have received more favorable treatment had existing state choice of law standards been applied. In our view, however, that is a reasonable price to pay for a more consistent, coherent, efficient, and ultimately fair procedure for resolving mass-accident litigation.

101ST CONGRESS
2D SESSION

H. R. 3406

IN THE SENATE OF THE UNITED STATES

JUNE 11, 1990

Received; read twice and referred to the Committee on the Judiciary

AN ACT

To amend title 28, United States Code, to provide for Federal jurisdiction of certain multiparty, multiforum civil actions.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Multiparty, Multiforum
5 Jurisdiction Act of 1990”.

6 **SEC. 2. JURISDICTION OF DISTRICT COURTS.**

7 (a) **BASIS OF JURISDICTION.**—Chapter 85 of title 28,
8 United States Code, is amended by adding at the end the
9 following new section:

2

1 **"§ 1367. Multiparty, multiform jurisdiction**

2 “(a) The district courts shall have original jurisdiction of
3 any civil action involving minimal diversity between adverse
4 parties that arises from a single accident, where at least 25
5 natural persons have either died or incurred injury in the ac-
6 cident at a discrete location and, in the case of injury, the
7 injury has resulted in damages which exceed \$50,000 per
8 person, exclusive of interest and costs, if—

9 “(1) a defendant resides in a State and a substan-
10 tial part of the accident took place in another State or
11 other location, regardless of whether that defendant is
12 also a resident of the State where a substantial part of
13 the accident took place;

14 “(2) any two defendants reside in different States,
15 regardless of whether such defendants are also resi-
16 dents of the same State or States; or

17 “(3) substantial parts of the accident took place in
18 different States.

19 “(b) For purposes of this section—

20 “(1) minimal diversity exists between adverse par-
21 ties if any party is a citizen of a State and any adverse
22 party is a citizen of another State, a citizen or subject
23 of a foreign state, or a foreign state as defined in sec-
24 tion 1603(a) of this title;

25 “(2) a corporation is deemed to be a citizen of any
26 State, and a citizen or subject of any foreign state, in

3

1 which it is incorporated or has its principal place of
2 business, and is deemed to be a resident of any State
3 in which it is incorporated or licensed to do business or
4 is doing business;

5 “(3) the term ‘injury’ means—

6 “(A) physical harm to a natural person; and

7 “(B) physical damage to or destruction of
8 tangible property, but only if physical harm de-
9 scribed in subparagraph (A) exists;

10 “(4) the term ‘accident’ means a sudden accident,
11 or a natural event culminating in an accident, that re-
12 sults in death or injury incurred at a discrete location
13 by at least 25 natural persons; and

14 “(5) the term ‘State’ includes the District of Co-
15 lumbia, the Commonwealth of Puerto Rico, and the
16 territories of the United States.

17 “(c) In any action in a district court which is or could
18 have been brought, in whole or in part, under this section,
19 any person with a claim arising from the accident described
20 in subsection (a) shall be permitted to intervene as a party
21 plaintiff in the action, even if that person could not have
22 brought an action in a district court as an original matter.

23 “(d) A district court in which an action under this sec-
24 tion is pending shall promptly notify the judicial panel on
25 multidistrict litigation of the pendency of the action.”.

4

1 (b) A CONFORMING AMENDMENT.—The table of sec-
2 tions at the beginning of chapter 85 of title 28, United States
3 Code, is amended by adding at the end the following new
4 item:

“1367. Multiparty, multiforum jurisdiction.”.

5 SEC. 3. VENUE.

6 Section 1391 of title 28, United States Code, is amend-
7 ed by adding at the end the following:

8 “(g) A civil action in which jurisdiction of the district
9 court is based upon section 1367 of this title may be brought
10 in any district in which any defendant resides or in which a
11 substantial part of the accident giving rise to the action took
12 place.”.

13 SEC. 4. MULTIDISTRICT LITIGATION.

14 Section 1407 of title 28, United States Code, is amend-
15 ed by adding at the end the following:

16 “(i)(1) In actions transferred under this section when ju-
17 risdiction is or could have been based, in whole or in part, on
18 section 1367 of this title, the transferee district court may,
19 notwithstanding any other provision of this section, retain ac-
20 tions so transferred for the determination of liability and puni-
21 tive damages. An action retained for the determination of
22 liability shall be remanded to the district court from which
23 the action was transferred, or to the State court from which
24 the action was removed, for the determination of damages,
25 other than punitive damages, unless the court finds, for the

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1 convenience of parties and witnesses and in the interest of
2 justice, that the action should be retained for the determina-
3 tion of damages.

4 “(2) Any remand under paragraph (1) shall not be effec-
5 tive until 60 days after the transferee court has issued an
6 order determining liability and has certified its intention to
7 remand some or all of the transferred actions for the determi-
8 nation of damages. An appeal with respect to the liability
9 determination and the choice of law determination of the
10 transferee court may be taken during that 60-day period to
11 the court of appeals with appellate jurisdiction over the trans-
12 feree court. In the event a party files such an appeal, the
13 remand shall not be effective until the appeal has been finally
14 disposed of. Once the remand has become effective, the liabil-
15 ity determination and the choice of law determination shall
16 not be subject to further review by appeal or otherwise.

17 “(3) An appeal with respect to a determination of puni-
18 tive damages by the transferee court may be taken, during
19 the 60-day period beginning on the date the order making the
20 determination is issued, to the court of appeals with jurisdic-
21 tion over the transferee court.

22 “(4) Any decision under this subsection concerning
23 remand for the determination of damages shall not be re-
24 viewable by appeal or otherwise.

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1 “(5) Nothing in this subsection shall restrict the author-
2 ity of the transferee court to transfer or dismiss an action on
3 the ground of inconvenient forum.”.

4 **SEC. 5. REMOVAL OF ACTIONS.**

5 Section 1441 of title 28, United States Code,
6 is amended—

7 (1) in subsection (e) by striking out “(e) The court
8 to which such civil action is removed” and inserting in
9 lieu thereof “(f) The court to which a civil action is re-
10 moved under this section”; and

11 (2) by inserting after subsection (d) the following
12 new subsection:

13 “(e)(1) Notwithstanding the provisions of subsection (b)
14 of this section, a defendant in a civil action in a State court
15 may remove the action to the district court of the United
16 States for the district and division embracing the place where
17 the action is pending if—

18 “(A) the action could have been brought in a
19 United States district court under section 1367 of this
20 title, or

21 “(B) the defendant is a party to an action which
22 is or could have been brought, in whole or in part,
23 under section 1367 in a United States district court
24 arising from the same accident as the action in State

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1 court, even if the action to be removed could not have
2 been brought in a district court as an original matter.
3 The removal of an action under this subsection shall be made
4 in accordance with section 1446 of this title, except that a
5 notice of removal may also be filed before trial of the action
6 in State court within 30 days after the date on which the
7 defendant first becomes a party to an action under section
8 1367 in a United States district court arising from the same
9 accident, or at a later time with leave of the district court.

10 “(2) Whenever an action is removed under this subsec-
11 tion and the district court to which it was removed or trans-
12 ferred under section 1407(i) has made a liability determina-
13 tion requiring further proceedings as to damages, the district
14 court shall remand the action to the State court from which it
15 had been removed for the determination of damages, unless
16 the court finds that, for the convenience of parties and wit-
17 nesses and in the interest of justice, the action should be
18 retained for the determination of damages.

19 “(3) Any remand under paragraph (2) shall not be effec-
20 tive until 60 days after the district court has issued an order
21 determining liability and has certified its intention to remand
22 the removed action for the determination of damages. An
23 appeal with respect to the liability determination and the
24 choice of law determination of the district court may be taken
25 during that 60-day period to the court of appeals with appel-

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1 late jurisdiction over the district court. In the event a party
2 files such an appeal, the remand shall not be effective until
3 the appeal has been finally disposed of. Once the remand has
4 become effective, the liability determination and the choice of
5 law determination shall not be subject to further review by
6 appeal or otherwise.

7 “(4) Any decision under this subsection concerning
8 remand for the determination of damages shall not be re-
9 viewable by appeal or otherwise.

10 “(5) An action removed under this subsection shall be
11 deemed to be an action under section 1367 and an action in
12 which jurisdiction is based on section 1367 of this title for
13 purposes of this section and sections 1367, 1407, 1658,
14 1697, and 1785 of this title.

15 “(6) Nothing in this subsection shall restrict the author-
16 ity of the district court to transfer or dismiss an action on the
17 ground of inconvenient forum.”.

18 **SEC. 6. CHOICE OF LAW.**

19 (a) **DETERMINATION BY THE COURT.**—Chapter 111 of
20 title 28, United States Code, is amended by adding at the end
21 the following new section:

22 **“§ 1658. Choice of law in multiparty, multiforum actions**

23 “(a) In an action which is or could have been brought,
24 in whole or in part, under section 1367 of this title, the dis-
25 trict court in which the action is brought or to which it is

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1 removed shall determine the source of the applicable substan-
2 tive law, except that if an action is transferred to another
3 district court, the transferee court shall determine the source
4 of the applicable substantive law. In making this determina-
5 tion, a district court shall not be bound by the choice of law
6 rules of any State, and the factors that the court may con-
7 sider in choosing the applicable law include—

8 “(1) the law that might have governed if the juris-
9 diction created by section 1367 of this title did not
10 exist;

11 “(2) the forums in which the claims were or might
12 have been brought;

13 “(3) the location of the accident on which the
14 action is based and the location of related transactions
15 among the parties;

16 “(4) the place where the parties reside or do busi-
17 ness;

18 “(5) the desirability of applying uniform law to
19 some or all aspects of the action;

20 “(6) whether a change in applicable law in con-
21 nection with removal or transfer of the action would
22 cause unfairness;

23 “(7) the danger of creating unnecessary incentives
24 for forum shopping;

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1 “(8) the interest of any jurisdiction in having its
2 law apply;

3 “(9) any reasonable expectation of a party or par-
4 ties that the law of a particular jurisdiction would
5 apply or would not apply; and

6 “(10) any agreement or stipulation of the parties
7 concerning the applicable law.

8 “(b) The district court making the determination under
9 subsection (a) shall enter an order designating the single ju-
10 risdiction whose substantive law is to be applied in all other
11 actions under section 1367 arising from the same accident as
12 that giving rise to the action in which the determination is
13 made. The substantive law of the designated jurisdiction shall
14 be applied to the parties and claims in all such actions before
15 the court, and to all other elements of each action, except
16 where Federal law applies or the order specifically provides
17 for the application of the law of another jurisdiction with re-
18 spect to a party, claim, or other element of an action.

19 “(c) In an action remanded to another district court or a
20 State court under section 1407(i)(1) or 1441(e)(2) of this title,
21 the district court’s choice of law under subsection (b) shall
22 continue to apply.”.

23 (b) CONFORMING AMENDMENT.—The table of sections
24 at the beginning of chapter 111 of title 28, United States

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1 Code, is amended by adding at the end the following new
2 item:

"1658. Choice of law in multiparty, multiform actions."

3 **SEC. 7. SERVICE OF PROCESS.**

4 (a) **OTHER THAN SUBPOENAS.**—(1) Chapter 113 of
5 title 28, United States Code, is amended by adding at the end
6 the following new section:

7 **"§ 1697. Service in multiparty, multiform actions**

8 "When the jurisdiction of the district court is based in
9 whole or in part upon section 1367 of this title, process,
10 other than subpoenas, may be served at any place within the
11 United States, or anywhere outside the United States if oth-
12 erwise permitted by law."

13 (2) The table of sections at the beginning of chapter 113
14 of title 28, United States Code, is amended by adding at the
15 end the following new item:

"1697. Service in multiparty, multiform actions."

16 (b) **SERVICE OF SUBPOENAS.**—(1) Chapter 117 of title
17 28, United States Code, is amended by adding at the end the
18 following new section:

19 **"§ 1785. Subpoenas in multiparty, multiform actions**

20 "When the jurisdiction of the district court is based in
21 whole or in part upon section 1367 of this title, a subpoena
22 for attendance at a hearing or trial may, if authorized by the
23 court upon motion for good cause shown, and upon such
24 terms and conditions as the court may impose, be served at

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1 any place within the United States, or anywhere outside the
2 United States if otherwise permitted by law.”.

3 (2) The table of sections at the beginning of chapter 117
4 of title 28, United States Code, is amended by adding at the
5 end the following new item:

“1785. Subpoenas in multiparty, multiform actions.”.

6 **SEC. 8. EFFECTIVE DATE.**

7 The amendments made by this Act shall apply to a civil
8 action if the accident giving rise to the cause of action oc-
9 curred on or after the 90th day after the date of the enact-
10 ment of this Act.

Passed the House of Representatives June 5, 1990.

Attest: DONNALD K. ANDERSON,
Clerk.