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SALVAGING THE WRECKAGE: MULTIDISTRICT LITIGATION AND AVIATION

Kyle Brackin

I. INTRODUCTION

On December 23, 1987, television cameras graphically captured the spine chilling screams and sobs of a mother who had just learned of her child's death aboard Pan Am Flight 103. But the American media cannot as easily recreate the silent screams and headaches caused by the complex legal process which confronts airline accident victims and their families who attempt to gain compensation for their loss. The mother's hysterical reaction to an airplane crash is understandable; the sudden and unexpected nature of airline accidents and the high percentage of fatalities provoke tremendous pain, grief, and sorrow. The aggravation that the legal system adds to

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1 CBS Evening News (CBS television broadcast, Dec. 23, 1988); Dennis Hevesi, Thirty-six Students at Syracuse Among the Passengers, N.Y. TIMES, Dec. 22, 1988, at A16 (woman screaming at JFK Airport in New York on notification of daughter's death aboard Pan Am flight 103).

2 Trials and appeals of airline accident litigation consume years of court time. For example, appeals were still before the courts as late as 1991 in the Delta crash at Dallas/Fort Worth International Airport which occurred August 2, 1985. In Re Air Crash at D/FW Airport, 919 F.2d 1079 (5th Cir. 1988), cert. denied sub nom., Connors v. United States, 112 S. Ct. 622 (1991). See also In Re Air Crash in Bali, Indonesia, 684 F.2d 1301 (9th Cir. 1982) (multiple passenger appeals still in dispute eight years after crash). Of course, these particular cases do not represent all of the suits brought by victims of these accidents. The litigation process might be longer or shorter depending on compensation sought by the victim and his/her willingness to settle.

3 Airline accidents are statistically uncommon occurrences. Decline in Aviation Accidents, SAN FRANCISCO CHRON., Jan. 19, 1991, at A19. Unfortunately, when an airline accident does happen the percentage of passengers killed is great and the degree of injury to those who survive is severe. But the danger of airline accidents
the airline accident victim's trauma is unconscionable. When a plane falls from the sky, the passengers are not at fault; they or their families deserve full and swift compensation for their injuries. Unfortunately, the legal system seemingly aggravates their trauma.

The present aviation tort system creates inflated transaction costs and strains judicial resources. The system alienates the public trust when airline accident victims must wait for years for the courts to finally award damages. The overall unpredictability and wide range of compensation available for victims further erodes any expectation the public might retain that justice, though slow, eventually will be served. The high price of litigation also contributes to the already tight margins of the

must be kept in perspective. Each year car accidents kill thousands on the highways. See Branch, Fry & Lebeck, Litigating Hazardous Highway Claims, vii (1990) (Federal Highway Administration reported 46,056 fatalities and 3.4 million injuries on United States roads in 1986). In 1981, motor vehicle crashes were the leading cause of death for people under age 50. Joan Claybrook, Vehicle Safety Research: Alive and Well, TRIAL, Jan. 1981, at 35. The vast majority of those involved in auto accidents, though, do not die and, generally, car accidents do not kill hundreds of persons in one accident.

Inflated transaction costs of the current aviation accident litigation scheme squeeze both plaintiffs and defendants. Airlines pay from $3500 to $17,000 per victim in legal fees. Contingency fees paid to attorneys significantly reduce compensation paid to victims or their families as well. Randal R. Craft, Jr., Factors Influencing Settlement of Personal Injury and Death Claims in Aircraft Accident Litigation, 46 J. AIR L. & COM. 895, 897 n.4 (1981).


Georgia Sargeant, ABA Rejects First Proposed Mass Tort Consolidated Plan: Second Plan Withdrawn, TRIAL, Apr. 1990, at 14, 16 (citing Robert Hanley, Chairman of the ABA Commission on Mass Torts, "[p]eople won't stand for having to wait five years to get to trial.").

Wide ranges exist in compensation given to individual plaintiffs depending on the law applied to the individual claim by the court and the jury verdict. See infra notes 77-93 and accompanying text. See also Robert W. Kastenmeier & Charles G.
airline industry.\textsuperscript{7} Judges\textsuperscript{8} and commentators\textsuperscript{9} universally agree that the current mass aviation tort litigation process must change.

This article examines the problems which exist within the mass aviation torts arena, and it searches for potential solutions. A short foray into the overall problems of mass tort litigation challenging the American legal system sets the stage for the discussion. Next follows an in-depth look at the adaption of multidistrict litigation in the federal courts to cope with mass aviation accidents. This investigation exposes particular friction areas in that relationship. Using the knowledge gained from that per-


spective, a plan for revising aviation disaster litigation will be proposed.

A. The Evolution of the Current System

The hopelessly tangled legal wreckage of mass aviation torts reflects a larger problem within American tort law: the inability of our court system to effectively resolve large scale, complex lawsuits. Mass torts resulting from mass disasters, asbestos cases, and toxic torts overwhelm the capacity of the courts to handle their caseloads adequately or efficiently. As American society in the nineties emerges wrapped in fiber optic wires, a tortfeasor's ability to injure has grown astronomically in terms of the

\[10\] See generally, In re Juan Dupont Plaza Hotel Fire Litig., 907 F.2d 4 (1st Cir. 1990) (four years after fire, multidistrict litigation continues); Hydro-Air Equipment, Inc. v. Hyatt Corp., 852 F.2d 403 (9th Cir. 1988) (eight years after the fire in Las Vegas' MGM Grand Hotel, in one of the most "efficiently handled multidistrict litigation cases ever," litigation continues); In re Beverly Hills Fire Litig., 695 F.2d 207 (7th Cir. 1982), cert. denied sub nom., Bryant Elec. Co. v. Kiser, 461 U.S. 929 (1983) (fast-spreading fire in Louisville, Kentucky supper club injuring hundreds, litigation continues three years afterward); In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.), cert. denied sub nom., Stover v. Rau, 459 U.S. 988 (1982) (a year after Kansas City Hyatt Regency Hotel ramp collapsed killing 114 and injuring hundreds more, preliminary trial court rulings certifying class action for victims was struck down, sending cases back to trial court for individual adjudication).

\[11\] See generally In re Fibreboard Corp., 893 F.2d 706, 707, 712 (5th Cir. 1990) (court recognizes significance of and need for innovation in dealing with the asbestos caseload within the circuit); Cimino v. Raymark Indus. Inc., 751 F. Supp. 649, 650-52 (E.D. Tex. 1990) (opinion includes history of one district court's grappling with an enormous number of asbestos cases).


Claims against asbestos manufacturers have already resulted in the filing of more than 30,000 suits, cases are being filed at the rate of about 500 a month, and this is merely the tip of the asbestos iceberg. Since 1940, approximately twenty-one million workers have been exposed in the United States to significant amounts of asbestos.

Id. (footnotes omitted).

number of persons affected and the degree of possible harm. Common law traditions such as the two-party, adversarial dispute resolution mechanism inhibit any multiparty, global resolution of mass tort cases.

Through the years, the American legal system has responded to problems created by mass torts. The response, however, has not been adequate in terms of speed or forcefulness. In 1938, the Federal Rules of Civil Procedure (FRCP) provided the courts with the first important tool for simplification of complex disputes. The FRCP provided federal courts with a limited ability to dispose of related cases simultaneously. The Supreme Court's decision in *Erie Railroad v. Tompkins*, also in 1938, mandated that a federal court must apply the law of the state in which it is located to cases arising out of diversity jurisdiction. Thirty years later, in 1968, the Multidistrict Litigation Act (MLA) allowed federal courts to combine cases.

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1. See supra notes 10-12 and accompanying text.


   The adversarial system, reinforced by an entrepreneurial professional ethos, by doctrines of due process, by the significant role of market capitalism in the economy, by a political ideology of individual rights, and by almost a millennium of acculturation to individualist litigation practices has created a strongly individualistic system of litigation.

   Id.


   The [Supreme] [C]ourt may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both . . . Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session.

   Id.

4. 304 U.S. 64, 78 (1938). The *Erie* doctrine, as the body of law arising out of this case is known, held that federal courts must apply the law of the jurisdiction in which it is located to diversity cases. *Id.* The decision overturned *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842), which held that federal diversity courts were not bound to apply the case law of their state, but were free to exercise independent judgment as to what the common law should be. *Erie*, 304 U.S. at 77-8. Specifically, the *Swift* court ruled that the word "laws" as defined in the Rules of Decision
arising out of common questions of fact or law into one
district court for discovery purposes.17 These desperately
needed substantive and procedural adjustments to Ameri-
can law define the present framework for mass disaster lit-
igation within the federal courts.

The substantive and procedural adjustments, consid-
ered radical at the time, faded into the stasis now frustrat-
ing the federal courts in the 1990s. The federal court
system cries out for new procedural devices to effectively
manage a huge docket including mass torts. The substan-
tive superstructure of the law must adapt as well. Substan-
tive changes in the law devised with new implementation
schemes would greatly improve the courts' ability to func-
tion. The courts and Congress should examine the pres-
ent procedural and substantive underpinnings of mass
torts and take action to address these issues. Scholars and
students should bring new ideas and concepts to the at-
tention of the judiciary and the legislature as well.

When a tort harms a large number of persons, the com-
mon law model envisions each victim filing an individual
action against the tortfeasor(s) allegedly responsible.18
Hundreds of civil claims could potentially arise out of the

U.S. at 18.

From the time the Supreme Court handed down the Erie
decision, federal
courts were bound to apply the law of the states as the state supreme court would
interpret it. Ultimately, as the federal courts fleshed out the Erie doctrine, they
came to rely on state law for choice of law methods and many other important
487, 496 (1941) (state choice of law rules must be applied by federal diversity
courts).


18 See supra note 12; see also Abram Chayes, The Role of the Judge in Public Law

In our received tradition the lawsuit is a vehicle for settling disputes
between private parties about private rights. The defining features
of this conception of civil adjudication are: (1) the lawsuit is bipolar,
(2) litigation is retrospective, (3) right and remedy are interdepen-
dent, (4) the lawsuit is a self-contained episode, (5) the process is
party-initiated and party-controlled.

Id.
same set of circumstances. Since the Rules encourage cross-claims, counterclaims and interventions in civil suits, the number of individual claims could soar even higher. The sheer number of claims and the limited judicial resources available dictate that individual adjudication of each claimant's suit in a mass tort case is impossible and undesirable. Furthermore, even if separate trials were plausible, each individual case would be repetitive. In mass tort suits, the identical witnesses, evidence, testimony and pleadings form the backbone of most related cases.

The FRCP remedy this situation slightly. Rules 19, 20 and 24 allow joinder and intervention of parties with related interests in civil suits upon a showing of a right or at the discretion of the judge. FRCP 42 allows cases filed in the same federal district court to be consolidated for

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19 MARCUS & SHERMAN, COMPLEX LITIGATION 6 (1985).
20 Lowrie, supra note 9, at 927.
Modern commercial aircraft carry hundreds of individuals, and each person on board represents a potential plaintiff if an accident occurs. Moreover, an aviation disaster commonly involves numerous defendants. Plaintiffs almost always name the airline as defendant, citing pilot error or faulty maintenance, and plaintiffs typically sue the plane's manufacturer regarding the aircraft design. These two defendants, in turn, frequently join the manufacturers of myriad component parts, such as altimeters, warning devices, landing gear, or engine bolts, any of which might contribute to a particular crash. Other potential defendants include airports and the United States government.

Id.

21 Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 651-52 (E.D. Tex 1990). “Four hundred and forty-eight [victims] have died waiting for their (asbestos) cases to be heard. . . . If the Court could somehow close thirty cases a month, it would take six and one-half years to try these cases and there would be pending over 5000 untouched cases at the present rate of filing.” Id.

22 See Marcus & Sherman, supra note 19, at 6; In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo., 720 F. Supp. 1455, 1459 (D. Colo. 1988) [hereinafter Denver II]. The court noted specifically that liability phases of individual trials would involve identical evidence and standards of conduct in the airplane crash cases on its docket. For that reason, the court conducted an exemplar consolidated trial. The results of the exemplar trial would bind all cases consolidated in the District of Colorado at that time by the JPML. Denver II, 720 F. Supp. at 1459.

23 FED. R. CIV. P. 19. Parties who are necessary and/or indispensable to a just adjudication of the issues before the court are to be joined by the court or the
pretrial proceedings or for trial.\textsuperscript{24} FRCP 13 mandates that parties with related or other claims against another party must or may raise these claims in the same forum.\textsuperscript{25} FRCP 14 permits parties to implead third parties into cases for efficiency purposes as well as other reasons.\textsuperscript{26} Overall, the range, and thus the usefulness, of the gathering mechanisms of the FRCP is limited to suits filed in the same federal district court.

Certain transfer provisions in the United States Code, which Congress enacted shortly after the FRCP became effective, also aided the federal courts' ability to consolidate cases. Section 1404(a) allows federal judges to trans-

\textsuperscript{24} FED. R. CIV. P. 13. If a party possesses related claims which could or should have been adjudicated with an original suit, federal courts may bar later suits on those claims. Id. This federal court policy is especially rigid if the parties against whom the related claims are brought were under the court's jurisdiction in the initial proceedings.

\textsuperscript{25} FED. R. CIV. P. 14. This rule is aimed at allowing defendants the right to bring in all parties who may have been joint tortfeasors or have indemnity obligations into court. Plaintiffs receive coextensive rights to bring in third parties. Id. at (b). The main limitation on third parties being brought into court in this manner is the complete diversity jurisdictional requirement. 28 U.S.C. § 1332(a)(1) (1988). \textit{See} Strawbridge v. Curtiss, 7 U.S. (3 Cranch.) 267 (1806) (Supreme Court's judicial gloss on diversity statute mandates that every plaintiff must be completely diverse from every defendant). If a plaintiff brings in a third party, thereby destroying complete diversity, the court must dismiss the case for lack of subject matter jurisdiction, if no other basis for jurisdiction exists. \textit{See}, e.g., Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978) (widow cross-claimed against third party defendant unwittingly destroying diversity).
fer a civil action to any other federal district court or division in which the suit originally could have been brought.27 A section 1401(a) transfer requires a judge to find that the transfer serves either the convenience of the parties and witnesses or the interest of justice.28 Section 1406 provides federal courts with the ability to transfer cases lacking venue into a district or division with proper venue.29

From an institutional perspective, these statutes authorize the federal courts to transfer cases to a more logical forum. Unfortunately, Congress conferred this ability on the judiciary without any accompanying power of coercion or coordination.30 For instance, even if the Northern District of Texas appeared to provide the most logical and convenient forum for litigation surrounding an airplane crash at D/FW Airport, federal judges overseeing cases filed in their respective districts would retain complete discretion over any transfer decision. The likelihood of numerous judges from diverse districts individually deciding on the same district as the best place for adjudication of a case is extremely slim. The system clearly required further refinement beyond the FRCP to make the transfer mechanism more useful and efficient.

In 1968, Congress ratified the MLA and conferred upon the federal judiciary the coordinating body and requisite authority for effective transfer and consolidation.31 The

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27 The statute reads, "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1988).

28 Id.

29 The statute reads, "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1406 (1988).

30 See 114 Cong. Rec. 9435 (1968); Lowrie, supra note 9, at 945-46; Veldenz, supra note 9, at 187-88.


(a) [W]hen civil action involving one or more common questions of fact are pending in different districts, such actions may be trans-
plethora of antitrust actions filed against the electrical equipment industry in the early 1960s prodded Congress to finally address the reality of mass, complex litigation.\textsuperscript{32} The electric equipment litigation, along with other cases, focused attention on the federal judicial system's inability to draw related cases to a single forum. The MLA therefore sired the Judicial Panel on Multidistrict Litigation (JPML).\textsuperscript{33}

Congress granted to this new body the power to transfer civil actions filed in different districts, and having one or more common questions of fact, to any federal district court for coordinated or consolidated pretrial proceedings. In the twenty-two years since the MLA became law, the JPML has utilized its multidistrict transfer capacity in such areas as antitrust,\textsuperscript{34} products liability,\textsuperscript{35} and mass disasters.\textsuperscript{36} Multidistrict litigation is particularly well-suited for the needs of airline crash litigation. Because of its

\begin{verbatim}
ferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or from which it was transferred unless it shall have been previously terminated. \textit{Provided, however,} That the panel may separate any claim, cross-claim, counterclaim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(emphasis in original) \textit{Id.}
\end{verbatim}

\textsuperscript{32} See Marcus & Sherman, \textit{supra} note 19, at 211; Stanley A. Weigel, \textit{The Judicial Panel on Multidistrict Litigation: Transferor Courts and Transferee Courts}, 78 F.R.D. 575, 581 (1977); Kastenmeier & Geyh, \textit{supra} note 6, at 547.

\textsuperscript{33} 28 U.S.C. \S 1407(d) (1988).

The panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

\textit{Id.}


\textsuperscript{35} See \textit{supra} note 12 and accompanying text.

\textsuperscript{36} See \textit{supra} note 10 and accompanying text.
widespread use in airline crash litigation, the specific provisions of the MLA and its practical application merit close examination.

B. The Multidistrict Litigation Statute

Any party of the JPML may initiate the transfer of an action under the MLA. The JPML bases its transfer decisions upon a record of a hearing at which any party may present material evidence. The transfer decision must be supported by findings of fact and conclusions of law arrived at by the JPML from the record of the hearing. The sole possibility for review of a JPML transfer decision is a party’s submission of an extraordinary writ petition, pursuant to the All Writs Act, to the circuit court of appeals exercising jurisdiction over the court in which the transfer hearing is to be or has been held.

Once the transfer ruling has been made, the JPML may designate a judge or judges to preside over the pretrial proceedings in the case. The JPML may request the Chief Justice of the United States or the chief judge of the circuit to appoint a district judge to serve in the transferee district court to conduct the consolidated pretrial proceedings. The JPML more commonly assigns, with the

38 Section 1407(c) reads in pertinent part:
[T]he panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record . . . .
39 Id.
41 Id.
44 Id.
permission of the transferee court, the transferred cases for pretrial proceedings to a judge of the transferee court. The JPML's power includes the authority to transfer or sever all or any part of a civil case from the transfer order. Furthermore, the statute commands that all cases transferred for pretrial proceedings shall be remanded back to the transferor court after the close of the pretrial proceedings. The only exception to that rule is the action's termination in the transferee court. Finally, the statute empowers the JPML to prescribe rules that govern the conduct of its deliberations.

The Rules, adopted in 1988, provide detailed guidance to parties whose cases come before the JPML. While many of the Rules contain technical information about filing motions and papers with the panel, certain Rules can significantly affect the substantive outcome of a case. These important directives require careful review.

The time necessary for completion of a JPML transfer action can be extremely short. Rule 11 states that when the JPML considers transfer of a case on its own initiative, the JPML will enter an order with the clerk of the JPML directing the parties to show cause why the action should not be transferred. The parties' discretionary response to this show cause order must be filed within twenty days, otherwise the JPML assumes a party's acquiescence to the transfer. Rule 11(a) also requires that parties shall notify the clerk of the JPML of any other existing federal district court actions related to the litigation at issue before the JPML. This duty to report includes all related federal

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44 Id.
45 See supra note 31 and accompanying text.
46 Id.
49 Id. Rules 2-10 provide general guidelines for the JPML.
51 Id. at 11(b).
actions which a party may file in the future. Rule 13 mandates that counsel to any party in a transferred case must notify the JPML of any other related action or tag-along action in which his client appears or in which he serves as counsel. Rule 1 defines a tag-along action as "a civil action pending in a district court and involving common questions of fact with actions previously transferred under 1407." The clerk of the JPML, pursuant to Rule 12, can enter an order conditionally transferring any potential tag-along actions to the previous transferee district on the basis of prior decisions of the JPML. After notification of the parties, the clerk will transmit the transfer order for the tag-along action if a notice of opposition to the conditional transfer order has not been filed within fifteen days. A party opposing the transfer must then file a motion to vacate the conditional transfer order and a brief in support thereof with the JPML clerk. Recognizing the court's general power regarding consolidation, Rule 13 allows consolidation of tag-along actions filed in the transferee district with even less process and no action of the JPML. A party's request for consolidation of these tag-along actions should be made according to the local rules of the transferee district court. The federal procedural mechanics codified by the Rules for multidistrict litigation both transfer and consolidate related actions speedily with or without the assent of the litigants.

Rule 14 governs the termination and remand of cases that have been transferred under the MLA to a transferee court after pretrial proceedings end. Actions which the
transferee court disposes of by summary judgment, judgment of dismissal with prejudice, or upon stipulation of the parties after settlement obviously do not require remand.\textsuperscript{61} In fact, most of the cases transferred by the JPML terminate this way.\textsuperscript{62} Remand from the transferee court back to the transferor court occurs only rarely.\textsuperscript{63}

Perhaps the most striking facet of the Rules appears in Rule 14(b). This rule states that the JPML will remand actions not terminated in the transferee district court back to the transferor court.\textsuperscript{64} But the JPML will not remand the action to its originating district if the transferee judge has transferred the case pursuant to sections 1404(a) or 1406 of the United States Code to his own or another district.\textsuperscript{65} The Rules contemplate that if the transferee judge has transferred the case to another district other than the transferor district, no further action of the JPML is required.

Rule 14(b) appears to contradict the spirit, if not the letter, of its enabling statute, the MLA. The MLA mandates that the transferee court will remand the action to the transferor court after pretrial proceedings are terminated.\textsuperscript{66} Although the later subsections of Rule 14 outline

\textsuperscript{61} Id.

\textsuperscript{62} Marc Galanter, \textit{Reading The Landscape Of Disputes: What We Know And Don't Know (And Think We Know) About Our Allegedly Contentious Society}, 31 U.C.L.A. L. REV. 5, 27-30 (1983). The author lists the reasons that set apart the minority who do not settle from the majority who do settle. \textit{Id.} Selected reasons include: (1) the case is so complex or the outcome so indeterminate that it is too unwieldy or costly to arrange a settlement; (2) even if the particular bargain is acceptable, the settlement might have detrimental effects on future transactions; (3) the settlement "value" is insufficient. \textit{Id.}

\textsuperscript{63} Wiegel, \textit{supra} note 32, at 583. Slightly less than five percent of the actions transferred by the JPML had been remanded to the district courts in which they had been filed up to 1977. \textit{Id.} Most are terminated in the transferee court by settlement or transferred to the transferee district court pursuant to 28 U.S.C. §§ 1404(a), 1406. \textit{Id.} See also Kastenmeier & Geyh, \textit{supra} note 6, at 541 ("As a practical matter, judges to whom cases have been transferred by the Panel for pretrial proceedings have taken advantage of [the] venue statute so as to permit them to retain jurisdiction of the consolidated litigation trial.").

\textsuperscript{64} Rule 14, \textit{supra} note 60, at (b).

\textsuperscript{65} Id.

procedures under which parties may oppose or support remand, the rule still creates a presumption against remand by the JPML without the suggestion of the transferee court.\textsuperscript{67} Realistically, then, a transferee court will remand a case for trial to the transferor court only at the discretion of a judge of the transferee court who has already invested substantial time and resources into the case. The low remand percentage should not be surprising.

The structural framework of the multidistrict litigation system is sound. The federal courts may gather similar types of civil cases into one forum for discovery purposes quickly and efficiently.\textsuperscript{68} The MLA and the intricate and exhaustive Rules of the JPML hasten and improve the discovery process in mass tort litigation. The MLA’s final product, although an efficient discovery process, leaves many loose ends. A satisfactory discovery process without a comparable satisfactory trial process still arrests effective disposition of these cases. The final objective should be a comprehensive, efficient mechanism for global resolution of the legal and factual issues arising out of tortious conduct affecting numerous victims. Simultaneously, this ideal mass tort adjudication process would eliminate repetitious individual lawsuits in state and federal courts.

Since Congress ignores this problem, the courts forge ahead on their own. Innovative federal judges stretch the law and the procedures available to them, but tortured expansion of rules and statutes beyond their intended uses spawns other difficulties, delays, and tensions for litigants.\textsuperscript{69} The issues and nuances unique to mass tort liti-

\textsuperscript{67} See Rule 14, supra note 60, at (d). Rule 14(d) in pertinent part reads, “The Panel is reluctant to order remand absent a suggestion of remand from the transferee district court . . . .” Id.

\textsuperscript{68} See Weigel, supra note 32, at 585.

\textsuperscript{69} Many federal judges have attempted to utilize the class action mechanism of FRCP 23 in order to get around the limitations of the current federal procedural system. The present system simply cannot cope with such large scale problems as asbestos with the old tools. See In re Fibreboard Corp., 893 F.2d 706, 712 (5th Cir. 1990). See also Rein & Kirby, supra note 11, at 22 (detailing efforts by Judges
igation require new mechanisms and rules tailored for them. Each segment of the law affiliated with mass torts should undergo scrutiny to determine if change can streamline the overall structure. The focus today dissects the aviation law segment.

II. Specific Problems of Multidistrict Litigation in Aviation Cases

A. Choice of Law

One of the ostensible purposes of multidistrict litigation is consolidation of cases with common issues of law and fact before one judge. In the ideal multidistrict scenario the judge uses the vantage point over all of the cases to give perspective and consistency to pretrial decisions. If the judge oversees all of the individual cases, the process also leads to equality or at least consistency of compensation for all the victims in the multidistrict forum. The present multidistrict litigation process does not even approach that ideal.

In aviation crash cases, the transferee judge initially determines which jurisdiction's law will govern the issues in the case. The choice of law rulings take immediate precedence because of the outcome-determinative effect this decision yields; once the law governing the issues is chosen, settlements can be evaluated realistically. The law

Parker, Lambros and Weinstein in grappling with their tremendous caseloads with innovative procedures.}

70 See Weigel, supra note 32, at 579, 583.

71 In re Aircrash Disaster at Sioux City, Iowa, 734 F. Supp. 1425, 1429 (N.D. Ill. 1990) [hereinafter Sioux City]. "The choice of law question . . . should be resolved as early as possible. First and foremost, this determination may facilitate settlement negotiations and thus enable victims of the crash to be compensated expeditiously." Id.

72 See Airline Disaster Litig. Report, 127 F.R.D., 405, 407, 414, 416 (N.D. Ill. 1979) [hereinafter Report]. The multidistrict transferee court filed the Report after the conclusion of the litigation involving the Chicago crash. The court noted that choice of law issues were especially important to the resolution of the actions and decided the issue early on. Id. at 414. After its decision, the court certified its finding for interlocutory review by the Seventh Circuit, again noting the importance of the choice of law decision to settlements. Id. at 416.
chosen by the transferee court to govern the issues in dispute at the pretrial stage invariably will be the law applied to these issues at trial because of the doctrine of law of the case. The only practical way that the transferee court’s choice of law decision could be disturbed is if an appellate court overturned the decision. As an interlocutory decision, however, little chance exists for appellate review except through interlocutory appeal to the court of appeals of the circuit of the transferee court.\textsuperscript{73}

Congress provides no national policy directive from which a multidistrict court could infer the proper method of choosing the law which should govern the issues in aviation conflicts of law decisions. The only guidance available to the transferee district court in this decision is unhelpful and overinclusive. In \textit{Van Dusen v. Barrack},\textsuperscript{74} the Supreme Court held that a transferee court must apply the law that the transferor court would apply to cases transferred to its docket.\textsuperscript{75} The \textit{Erie} doctrine mandates

\textsuperscript{73} Weigel, \textit{supra} note 32, at 578 (Only the court of appeals for the transferee district reviews the transferee court pretrial decisions. The JPML does not). For text of All Writs Act, 28 U.S.C. § 1651, see \textit{supra} note 40.

\textsuperscript{74} 376 U.S. 612 (1964). The Supreme Court ruled that, for diversity cases, if a defendant moved for transfer under 28 U.S.C. § 1404(a), and the transfer was accomplished, the transferee court was bound to apply the law that the transferor court would have applied to the case. \textit{Id}.

\textsuperscript{75} \textit{Id}. In \textit{Ferens v. John Deere Co.}, 494 U.S. 516 (1990), the Supreme Court extended the \textit{Van Dusen} rule that transferee courts must apply the law of the transferor forum in cases in which the plaintiff moved under 28 U.S.C. § 1404(a) for transfer. \textit{Id}.

\textit{Ferens} involved a Pennsylvania farmer injured by farm equipment manufactured by the defendant. The two-year Pennsylvania statute of limitations for tort actions time-barred the plaintiff from receiving a tort remedy in Pennsylvania federal district court. Therefore, plaintiff filed suit in Mississippi whose six-year statute of limitations had not yet run. Plaintiff then moved to transfer his case to the Pennsylvania federal court and sought application of the Mississippi statute of limitations in the case. The Pennsylvania federal court balked at this request and dismissed the action. 639 F. Supp. 1484 (W.D. Pa. 1986). The court of appeals affirmed. 819 F.2d 423 (3d Cir. 1987).

The Supreme Court reversed the lower courts and permitted plaintiff to go forward using the Mississippi statute of limitations in the Pennsylvania federal court. The Court noted the forum shopping opportunities presented by its decision, but stated that convenience governed transfer of venue under section 1404, rather than prejudice to a party resulting from change of an applicable law. 494 U.S. at 528, 531-32.
that the federal district courts, in diversity cases, must act as a state court of the jurisdiction in which it sits.\textsuperscript{76} Therefore, in multidistrict litigation, the transferee court makes choice of law decisions on individual bases for each plaintiff or group of plaintiffs according to the choice of law method of the jurisdiction in which the suit was originally filed.\textsuperscript{77}

The present choice of law methodology for multidistrict litigation virtually assures forum shopping as well as wide disparity in the compensation awards of airplane crash victims. Assuming that the tortfeasor has sufficient contacts to be sued within a jurisdiction, courts do not require the victim to be a citizen of that jurisdiction to apply that jurisdiction's choice of law method to his case.\textsuperscript{78} Therefore, hypothetically, two New York plaintiffs with identical injuries seated next to one another on the same plane who file suits in New York and in New Jersey could receive drastically different compensation awards from the same tortfeasor. The sole legal basis for the dichotomy lies within the different choice of law methods of New York and New Jersey.

An outline of the specific choice of law methodology for multidistrict courts faced with parties who file suit in several different states follows. The first step taken by the transferee court is the determination of the choice of law methods utilized by each state in which a suit has been

\textsuperscript{76} For a discussion of the \textit{Erie-Klaxon} doctrine, see \textit{supra} note 16.

\textsuperscript{77} \textit{Chicago}, 644 F.2d at 605; \textit{D.C.}, 559 F. Supp. at 840; \textit{Detroit}, 750 F. Supp. at 796, 797.

\textsuperscript{78} A plaintiff can generally file suit against a tortfeasor in any jurisdiction in which the tortfeasor does business. The Supreme Court's recent discussion of forum shopping in \textit{Ferens} emphasized that opportunities for forum shopping which exist within the present system are not necessarily to be condemned, but should be minimized. See \textit{supra} note 75. Therefore, a plaintiff can take advantage of the opportunities within the system if they benefit his case. For instance, if a plane crashes in State A and State A's choice of law method provides that the law of the place of injury governs tort disputes, plaintiffs from other jurisdictions will gain advantage from filing suit in State A. The transferee courts have no mandate or authority to prevent this. The district court must apply the choice of law method of the state in which it exercises jurisdiction. \textit{Detroit}, 750 F. Supp. at 813.
filed and subsequently transferred to its docket.\textsuperscript{79} This initial inquiry may be difficult to satisfy. Choice of law methods vary distinctly from state to state, and courts are extremely unpredictable in their application to identical fact situations even within their own states.\textsuperscript{80} The states' choice of law methods run the gamut from anachronistic "lex loci delictus" rules to the "modern" Restatement of Conflicts interest analysis.\textsuperscript{81} Many states complicate the matter further since their state court of last resort has not given its imprimatur to a particular choice of law method.

\textsuperscript{79} \textit{Chicago}, 644 F.2d at 611, 621, 628. The Seventh Circuit's first step in each choice of law determination was to identify each state's choice of law method. For example, the court found that Illinois used the Restatement of Conflicts "most significant relationship" test, California used the comparative impairment method, and New York used a functional equivalent of the "most significant relationship" test. See \textit{Restatement (Second) of Conflicts} (1971).

\textsuperscript{80} See Joseph A. Zirkman, Note, New Choice of Law Quagmire Revisited: O'Rourke v. Eastern Air Lines, Inc., 51 Brook. L. Rev. 579, 614-15 (1985) (describing the Second Circuit's attempt to decide the correct New York choice of law methodology from inconsistent case law). New York courts have had an exceptionally difficult time consistently applying a choice of law method to an issue. The progression of cases involving automobile guest passengers and New York hosts serves as a good example of the variance which can occur in application of choice of law methods. For further discussion of the New York guest-host choice of law problems and difficulty with consistent application of choice of law methods, see Herma Hill Kay, \textit{Theory Into Practice: Choice of Law in the Courts}, 34 Mercer L. Rev. 521, 529-35 (1983).

\textsuperscript{81} Lex loci delictus established the common law basis for the initial Restatement of Conflicts choice of law method. \textit{Restatement of Conflicts} (1938). This method codified the common law idea that the law of the place of injury governed issues of law arising out of any occurrence. See \textit{D.C.}, 559 F. Supp. at 341. The Second Restatement method generally notes that the law of the state with the "most significant relationship" to the transaction/occurrence governs the legal issues. \textit{Restatement (Second) of Conflicts} § 6 (1971). Modern courts use many variants of the choice of law methods to analyze the various interests and policy choices of the interested jurisdiction in making choice of law determinations. These methods include: the comparative impairment method used in California, Bernhard v. Harrah's Club, 546 P.2d 719, 720-21 (Cal.), \textit{cert. denied}, 429 U.S. 859 (1976); the Leflar better law method employed in Minnesota, Milkovich v. Saari, 203 N.W.2d 408, 413 (Minn. 1973); the government interest test utilized by the District of Columbia, \textit{D.C.}, 559 F. Supp. 333, 341-42; and the center of gravity method pioneered by New York, \textit{see supra} note 80. See also Kay, \textit{ supra} note 80, at 591-92 (chart disclosing the choice of law methods for every American jurisdiction). Kay's article focuses on a determination of whether American jurisdictions are correctly applying their chosen choice of law methods. \textit{Id.} at 524. She concluded that they were not. \textit{Id.} at 586.
method.82

At this stage, the court's choice of law inquiry may end. If a state in which a plaintiff filed suit continues to utilize the place of injury test as indicative of the law which should govern the dispute, the court applies the law of the place where the tort occurred to all issues in that case.83 If the state in which a suit filed uses a modern choice of law method, the next task of the transferee court is to undertake a choice of law analysis for each specific issue in the suit. This choice of law process is known as depecage.84

Initially, using modern choice of law methods, the court analyzes the law of all states with important contacts or interests in having its law apply to an issue. The court next determines whether the laws of the interested states conflict.85 If they do not conflict, the law of either state can be applied to the issue. If the laws do conflict, the court determines which state possesses the greatest interest in having its law applied through a choice of law analysis.86 Using depecage, the court designates the law of a specific state to govern each of the separate issues of the case: liability, compensatory and punitive damages, joint and several liability, and prejudgment interest.87

82 D.C., 559 F. Supp. at 359, 361. The court held that the federal district court must apply the law as it believes that the state supreme court of the jurisdiction would apply the law. Because Georgia and Maryland respectively still apply lex loci delictus, a federal district court might hold that the state supreme court would apply a modern choice of law method to these cases. Id. In Chicago, the court discussed the quandary which occurred because the choice of law method of Hawaii had not been clearly defined by that state's supreme court. 644 F.2d at 630. In the situation where the choice of law method could not be discerned, the Seventh Circuit held that the forum should apply the choice of law method of the state in which the multidistrict court is located. Id. at 631.

83 D.C., 559 F. Supp. at 361. The D.C. court found that Georgia had not abandoned lex loci delictus. As the site of the crash, D.C. law would govern every issue, except the apportionment issue, because the D.C. and Georgia laws conflicted. Georgia courts will not apply the law of a state with which its own state laws conflict. Id.

84 Chicago, 644 F.2d at 610-11; Sioux City, 734 F. Supp. at 1429.
85 Detroit, 750 F. Supp. at 796.
86 Id.
87 In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo, 720 F. Supp.
The list of interested states varies for different issues depending on the group of plaintiffs involved. An example places this process in context. If four groups of plaintiffs filed suits in Michigan, Arizona, Florida and California, such as in In re Disaster at Detroit Metropolitan Airport (Detroit), the court will analyze each issue with regard to each group of plaintiffs. In Detroit, for example, the issues of products liability and punitive damages underwent choice of law analysis. The defendants in that case were McDonnell Douglas (MDC) and Northwest Airlines.

For the products liability claims of the Arizona plaintiffs against MDC, the Detroit court examined the products liability laws of Michigan (the place of injury), California (where the allegedly defective parts were produced), Missouri (MDC’s principal place of business), and Arizona (the plaintiffs’ domicile). Arizona’s choice of law methodology requires use of the Restatement (Second) of Conflicts’ “most significant relationship” test. This test posits that the law of the place of injury should govern tort issues unless another state has a more significant relationship to the issues. The Restatement (Second) lists factors for courts to consider in making this decision, but

1505 (D. Colo. 1989) [hereinafter Denver III]. The Denver case illustrates this phenomenon. The Denver case arose out of the crash of a Continental Airlines DC-9 at Denver’s Stapleton Airport. Denver I, 720 F. Supp. at 1447. The plane crashed as it attempted a takeoff in a snowstorm, killing 28 people and injuring 54 people. Id. The court held an exemplar trial. The exemplar trial plaintiff filed suit in Idaho. Denver II, 720 F. Supp. at 1455, 1457. The court applied Texas law to her punitive damages and Texas Deceptive Trade Practices Act claims. Denver III, 720 F. Supp. at 1505, 1528. Colorado law applied to the negligence and prejudgment interest issues. Id. Idaho law applied to the exemplar plaintiff’s compensatory damages award, and the law of the state in which their suits were filed would apply to the other consolidated plaintiffs’ compensatory damages claims. Id.

750 F. Supp. at 796. This case arose out of the crash of a Northwest Airlines DC-9 which occurred shortly after takeoff and killed 156 persons. One hundred fifty-seven cases had been filed as of the date of the opinion. Id.

Id.

Id.

Id. at 802-04.

Id. at 803.

See supra note 81. See also Detroit, 750 F. Supp. at 798, 803 for a discussion of the Restatement (Second) of Conflicts of Law’s choice of law method.
it does not furnish a hierarchy or scale indicating the appropriate weight each factor should receive.94

The *Detroit* court struggled to determine which state's relationship to the products liability issue was the most significant. The inquiry boiled down to the judge's decision about which state had the most significant relationship to an allegedly defective product manufactured in California by a Missouri corporation which injured an Arizona plaintiff in Michigan. The intricacy of this explanation demonstrates the subjectiveness that engulfs multidistrict courts when they make conflicts of law decisions for mass torts.

The *Detroit* court selected California law to govern the products liability claims of the Arizona plaintiffs against MDC.95 The court then conducted the choice of law process eight more times on the issue of the availability of punitive damages: four times for punitive damage claims against MDC and Northwest respectively.96 At the end of its opinion, the *Detroit* court required that the parties brief the choice of law issue with regard to compensatory damage claims, foreshadowing another four trips through the choice of law process.97

As the *Detroit* case illustrates, the multidistrict transferee court applies the law of no existing jurisdiction to the cases; a collage of law governs because of depecage.98 The judge's tremendous discretionary powers in making choice of law decisions flow from the open ended modern choice of law decisionmaking process. Depecage increases the trial judge's power because it allows the judge to craft his choice of law decisions in any rational way that he sees fit to do so.99 Of course, certain due process con-

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94 Id. at 802.
95 Id. at 804.
96 Id. at 804-12.
97 Id. at 813.
98 See supra note 84, at 796.
99 See Reese, supra note 9, at 1304-05.

The [modern cases dealing with airplane accidents] make for dreary reading, but, worse still, they do not state the real reasons which led
stitutional boundaries limit the judge, but the choice of law process still leaves room for manipulation and pretextual justifications. The Supreme Court understated its characterization of modern choice of law methods as "malleable." Depecage exacerbates disuniformity and unpredictability in conflicts of law decisions.

Nevertheless, in important choice of law decisions regarding the issues of liability and compensatory and punitive damages in mass aviation disaster cases, disturbing trends have formed. In multidistrict litigation cases involving aviation negligence and products liability claims, the place of injury has provided the law governing disposition of issues through court rulings or party stipulation. This result occurred even though most states have abandoned the lex loci delictus approach for modern choice of law methods. Most plaintiffs receive compensatory damages according to the law of their home states. Finally, once a judge decides that a particular jurisdiction...
tion's law governs an issue, for instance, products liability claims against a certain defendant, the judge applies that law generally to govern all products liability claims against that defendant. The federal courts should develop a more principled and efficient choice of law mechanism.

B. Punitive Damages

Punitive damages penalize the tortfeasor for his tortious conduct and seek to deter him from engaging in that conduct in the future. The availability of punitive damages is a hotly contested issue in every air disaster multidistrict proceeding. The availability of punitive damages affects both the amount of settlement offers and the willingness of parties to go to trial. Transferee courts dispense with choice of law decisions early in the adjudication process precisely because of the punitive damage issue in many air accident cases.

The current system leaves open the possibility of punitive damages in every aviation crash case since the choice of law decision in aviation accidents can turn out many different ways. No incentive exists for parties to settle their cases immediately after an accident. Plaintiffs and their attorneys hope for large punitive damage awards. They are reluctant to sign releases for all of their potential claims if the chance for an astronomically larger award exists. Airlines will litigate the punitive damages issue to trial rather than provide huge settlements to plaintiffs.

103 City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-67 (1981); W. Page Keeton, et al., PROSSOR AND KEETON ON THE LAW OF TORTS § 2, at 9 (5th ed. 1984). “Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.” RESTATEMENT (SECOND) OF TORTS § 908 (1979).

104 Chicago, 644 F.2d at 604; D.C., 559 F. Supp. at 352; Denver I, 720 F. Supp. at 1449; Sioux City, 734 F. Supp. at 1429-30; Detroit, 750 F. Supp. at 795. In each of these airline accident multidistrict litigation cases, the courts above delivered lengthy early opinions regarding the issue of punitive damages availability.


106 Craft, supra note 4, at 912. “[N]othing de-stabilizes settlement discussions more than the hope of recovering punitive damages.” Id.
whose expectation of punitive damages toughens their settlement negotiating positions. In contrast, airlines will readily admit liability in return for plaintiff’s release of punitive claims. Because of these realities, the punitive damages issue inflates transaction costs and lengthens the litigation process.

The previous discussion of choice of law in multidistrict proceedings demonstrated the way in which the availability of punitive damages is decided by the transferee courts. The previous discussion also highlighted that, in many cases, multidistrict transferee courts now serve as the trial court for their transferred cases. If the transferee court rules that the law of a state that allows punitive damages governs the issue of punitive damages, the plaintiff earns the right to go to the jury on that question. If several groups of plaintiffs with punitive claims governed by the law of different jurisdictions present their case to the jury, special problems for the multidistrict transferee court arise.

Attempting to apply different standards of punitive liability in a case in which a jury must evaluate the defendant’s conduct presents enormous problems of complexity. The process of explaining incompatible standards of punitive liability will require immense amounts of attorney time, court patience, and jury com-

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107 Chicago, 644 F.2d at 635. In Chicago, the parties stipulated that in turn for the plaintiff’s waiver of punitive damages, the defendant would waive the right to contest liability for compensatory damages. Id. The case went to trial on the issue of prejudgment interest. Id. The defendants in the Chicago case offered this arrangement to all victims. Report, supra note 68 at 407-08. The parties in the Tenerife crash agreed that plaintiffs would not claim punitive damages and defendants would not contest compensatory damage liability. Craft, supra note 4, at 905.

108 See supra notes 70-102 and accompanying text.

109 See supra note 63.

110 Jim Fieweder, Note, The Need For Reform Of Punitive Damages In Mass Tort Litigation: Juzwin v. Amtorg Trading Corp., 39 DePaul L. Rev. 775, 796 (1990). "Characteristics of decentralization innately associated with current litigation procedures, such as multiplicity of juries hearing the cases and the variety of standards used in jurisdictions, produce difficulties in awarding punitive damages in mass tort cases." Id.
prehension. The procedural obstacles will certainly lengthen the trial, and they may also distract the jury from more crucial issues. Jury confusion will inevitably result.

The jury in *In re Air Crash Disaster at Stapleton International Airport, Denver, Colorado, (Denver)*\(^{111}\) confronted this situation. Their answers illustrate the problems inherent in asking a group of laymen to come to a coherent conclusion in an area of the law that taxes the understanding of even experienced attorneys. The jury found that the defendant's conduct had been willful or reckless with regard to the Idaho plaintiffs.\(^{112}\) This finding entitled the victims to a recovery beyond Idaho's $400,000 limit for non-economic damages.\(^{113}\) The jury also found that the defendant had not acted grossly negligent and should not be held liable for punitive damages under Texas law.\(^{114}\) From the perspective that the jury allowed substantial recovery to Idaho plaintiffs, while refusing to penalize the defendant for punitive damages, the jury may have known exactly what it was doing. That conclusion, however, does not rationally explain the difference between grossly negligent and willful or reckless conduct in an intellectually sound fashion. Judge Finesilver's effort to reconcile the Denver jury's verdict with the law demonstrates how this complex process strains judicial integrity.\(^{115}\)

The punitive damages issue also tries the patience of many transferee courts. A large number of courts appear to avoid the complication of the issue entirely by choosing the law of a state that forbids punitive damages to govern the issue.\(^{116}\) This action quickly ends a court's immediate problem, but it only postpones tough decisions. It may


\(^{112}\) *Denver IV*, 720 F. Supp. at 1474.

\(^{113}\) Id.

\(^{114}\) Id.

\(^{115}\) Id. at 1474-78.

\(^{116}\) Craft, *supra* note 4, at 910-11.
ultimately result in bad case law for future deserving plaintiffs. A quick decision may not be the correct one. In Chicago, the court chose Illinois law, the law of the place of injury, to govern the punitive damages issue against defendants McDonnell Douglas Corporation (MDC) and American Airlines.\textsuperscript{117} Illinois law does not permit punitive damages.\textsuperscript{118} In Detroit, the law of Michigan, the place of injury, forbids punitive damages.\textsuperscript{119} Michigan law governed such claims against MDC and Northwest Airlines.\textsuperscript{120} In Sioux City, Illinois law governed punitive claims against United Airlines.\textsuperscript{121} Ohio law governed punitive damage claims against General Electric, and California law governed claims against MDC.\textsuperscript{122} The laws of Ohio and California, coincidentally, prevent punitive damages claims.\textsuperscript{123}

In the cases discussed above, the law governing punitive damages chosen by modern choice of law methods was either the place of injury or the home state of the corporation involved. Although lex loci delictus has been abandoned for many years, it appeared to be a factor in the decisions. The designation of the home state law of a corporation to govern its punitive damage liability increases the potential for manipulation by the corporation.\textsuperscript{124} In making these choice of law decisions, courts note that the home state of a corporation has an interest in that corporation’s conduct.\textsuperscript{125} Neither the place of injury nor the home state of a corporation should be guiding forces when determining the availability of punitive damages for multidistrict courts. In the attempt to fill the void, most courts retreat to familiar, yet anachronistic concepts.

\textsuperscript{117} Chicago, 644 F.2d at 604.
\textsuperscript{118} Detroit, 750 F. Supp. at 805-06.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at 813.
\textsuperscript{121} Sioux City, 734 F. Supp. at 1434.
\textsuperscript{122} Id.
\textsuperscript{123} Id. at 1431, 1433.
\textsuperscript{124} Detroit, 750 F. Supp. at 805. As the Detroit court noted, states have an interest in protecting their home state corporations. Id.
\textsuperscript{125} Id.
The wide spectrum available for punitive damages from state to state, coupled with the unpredictability of courts' choice of law decisions, promotes both forum shopping and a lack of uniformity of damage awards for similarly suited victims. Punitive damage awards further promote wide disparity in compensation awards for victims depending on where their case has been filed. Even if the state law governing a case allows punitives, disparity between victim awards can occur when one plaintiff can prove to a jury that the tortfeasor's actions justify punitive damages and other plaintiffs cannot so sway a jury within the same jurisdiction. Such divergent results should not occur when the same tortfeasor conduct is at issue.

The changing liability standards caused by the availability of punitive damages from state to state and the tangled choice of law rules unfavorably affect airlines. In aviation multidistrict cases, because of varying standards among the states where plaintiffs file suit, an airline could be subject to multiple punitive damage awards for the same conduct. A jury could award punitive damages to plaintiffs from various states which allow punitive claims. In Detroit, for example, the Florida, California, Arizona and Michigan plaintiffs could each receive separate punitive awards if those states allowed punitive damages.

Unfortunately, the previous description is only the tip

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126 Id. at 814.
127 See Detroit, 750 F. Supp. at 795. The laws of Michigan and California govern the punitive damages issue with respect to MDC. Id. If, for instance, California law allowed punitive damages (though it does not), the victims of this crash could receive compensation at drastically different levels since California plaintiffs could potentially share in a punitive damage award unavailable to the other plaintiffs as a matter of law.
128 Detroit, 750 F. Supp. at 796. The plaintiffs in the Detroit case were from the named states. Id. See also 1 Linda L. Schleuter & Kenneth R. Redden, Punitive Damages § 4.4(A)(5)(b)(2) (2d ed. 1989) (discussing the disparity among verdicts in the MER/29 cases); Rand Corporation, Asbestos in the Courts 42 (1985). The Rand Corporation noted that "[s]ick people and people who died a terrible death from asbestos are being turned away from the courts, while people with minimal injuries who may never suffer severe asbestos disease are being awarded hundreds of thousands of dollars, and even in excess of a million dollars." Rand Corporation at 42.
of the iceberg. In the hypothetical, one jury could make the multiple punitive awards according to the law of different states, making up one total punitive award against the airline. In reality, numerous jury awards of punitive damages can occur around the country. Since the JPML does not have the power to pull related state cases into the federal courts, airlines can be repeatedly penalized for the same conduct. Many tortfeasors argue that multiple, successive punitive damage liability is violative of their due process rights.\textsuperscript{129} Though the Supreme Court denies the problem, the intuitive injustice of multiple successive punitive damage liability remains apparent.\textsuperscript{130}

Despite these disadvantages, evidence that punitive damage awards have any deterrent effect on airlines does not exist. Uniform federal regulations cover every aspect of the airline industry.\textsuperscript{131} Airlines retain little independent control over safety standards. Federal agencies monitor airline conduct closely and impose fines and penalties for deviation from their detailed guidelines.\textsuperscript{132} Since victims receive huge full compensation awards, airlines suffer significant economic hardship from compensatory damage awards arising from airline accidents and the accompanying negative publicity.\textsuperscript{133} Finally, insurance costs

\textsuperscript{129} Sioux City, 734 F. Supp. at 1427. The defendants argued that the due process clause of the 14th Amendment prevented punitive damages in their case. \textit{Id.} The Sioux City court noted in ruling against defendants that twice in recent years the Supreme Court declined to validate such arguments. \textit{See} Browing-Ferris Indust. v. Kelco Disposal, Inc., 492 U.S. 257 (1989); Banker’s Life & Casualty v. Crenshaw, 486 U.S. 71 (1988).

\textit{See also} Chicago, 644 F.2d at 608. Defendants argued that punitives violate the equal protection clause of the 14th Amendment, because New York allows punitives in personal injury but not in wrongful death actions. \textit{Id.} at 609. The Seventh Circuit affirmed the lower court’s ruling that punitives did not violate the Constitution because the New York limitations were not irrational and were legislative determinations. \textit{Id.} at 610.

\textsuperscript{130} Sioux City, 734 F. Supp. at 1427 (Supreme Court denied certiorari in other cases raising due process objections to punitive damages).


\textsuperscript{133} \textit{See} Terry Maxon, \textit{Final Approach - Plaskett Says ‘Landing Pan Am deal was in-
climb steeply after an airline accident. In an era in which airline bankruptcies are commonplace and federal safety standards dominate the industry, punitive awards do not make sense.

Certainly defendants should answer for their actions to all persons affected by their conduct. If the jurisdiction mandates punitive damage awards, the defendant should be penalized to the extent that his conduct reaches the requisite level of blameworthiness. Today's punitive damage awards, though, occur haphazardly without any national consensus. The judicial system should not punish defendants repeatedly, oblivious to previous punitive awards. Moreover, the defendant should not suffer repetitious punishment because the system does not provide a procedure wherein a defendant may answer for its conduct before a central forum to all plaintiffs on this issue.

Overall, the current system for awarding punitive damages needlessly complicates the multidistrict litigation process for aviation disasters. Punitive damages inflate transaction costs, strain judicial resources, discourage set-


An even bigger factor afflicting Pam Am: the December 1988 terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland, Mr. Plaskett said. The incident killed all 259 people aboard the Boeing 747, and falling wreckage claimed 11 others on the ground.

Suddenly nobody wanted to fly Pan Am. In the months after the Lockerbie bombing, Pan Am's first class and business class traffic declined 40 to 50 percent, and some of it never returned to Pan Am, he said.

'Lockerbie was devastating. There is no other word to describe it, both in human terms and in economic terms. Lockerbie cost us, on a cash basis, probably in the range of $400 million to $450 million cash,' he said.

Id. at 90.

Airlines must carry huge insurance coverage for all flights. See Laurence Barron, Aircraft Accident Investigation - Whose Interest Prevails?, IX AIR L. 87, 90 (1984). "It is no longer unusual to find airlines carrying per accident cover up to 500 million dollars, and in one transaction I have seen a contractual requirement for the airline concerned to carry cover up to 1 billion dollars." Id. at 90. See also Asra Q. Nomani & Susan Pulliam, USAir Group Cuts Insurance On Its Aircraft, WALL ST. J., Feb. 15, 1991, at A3. Immediately after the recent LAX accident USAir was forced to cut its insurance coverage because of rising rates. Id.
tlement, and confuse juries. Punitive damages should be abolished or Congress should install a system to centralize punitive awards in one court for each tortfeasor to be penalized with one verdict. In that way, the tortfeasor could be penalized and the victims could share equally in the punitive damage award.

C. Case Consolidation and Transfer Effects

The most significant outgrowth of the MLA over the past two decades has been the trial of consolidated cases from many districts in one forum. The MLA presented for the first time a device to consolidate related cases filed in different federal district courts into one district for pretrial proceedings. Once the system gathered the cases into one forum for discovery, the natural progression was to a trial of common issues by the forum which supervised discovery of the consolidated cases. Unfortunately, the MLA nowhere expressly authorizes the concept.

The MLA refers exclusively to pretrial proceedings. Yet federal courts improvise with the tools provided in 28 U.S.C. §§ 1404(a) and 1406 to transfer the cases consolidated for pretrial proceedings from the district which handled the multidistrict pretrial proceedings to the same district for trial of common issues. Rule 14 of the Rules of the JPML explicitly recognizes this method of action.136 Because the MLA never envisioned such a trial, no statutory provision details the effects such a trial will have on related cases.

The preclusive effect of a judgment or jury verdict is relatively predictable and easy to understand when two parties or individuals litigate an issue.137 But in a consolidated trial of multidistrict litigation, the effects on future claimants or even on all consolidated parties is not so easily defined. The legal doctrine of res judicata bars reliti-

136 See supra notes 64-66 and accompanying text.
137 Petromanagement Corp. v. Acme-Thomas Joint Venture, 835 F.2d 1329, 1332-33 (10th Cir. 1988). Federal law controls the preclusive effects of successive diversity suits insofar as the res judicata issue is not clearly substantive. Id.
gation of adjudicated claims between the same parties.\textsuperscript{158} Collateral estoppel operates as an equitable doctrine to preclude relitigation of an issue in certain circumstances if one of the parties to a later action participated as a party in the first action.\textsuperscript{159} Formerly, use of collateral estoppel assumed that if the doctrine barred relitigation of an issue, both parties should be able to assert the doctrine; this concept is called mutuality.\textsuperscript{140} The Supreme Court abandoned mutuality of estoppel for litigation between two parties in certain situations.\textsuperscript{141} The application of collateral estoppel or res judicata to the multidistrict arena remains a largely unsettled area of the law.

A consolidated trial in multidistrict proceedings occurred in the \textit{Denver} case.\textsuperscript{142} The JPML transferred the plaintiffs' suits filed in various districts against the defendant, Continental Airlines, to a Colorado federal court for pretrial proceedings.\textsuperscript{143} The judge then formally transferred the consolidated cases already on his docket to his court for trial pursuant to 28 U.S.C. § 1404(a).\textsuperscript{144} The judge made these motions with the concurrence of all parties.\textsuperscript{145}

\textsuperscript{141} Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329 (1979). The procedural posture in \textit{Parklane} arose from a securities fraud charge filed by the Securities Exchange Commission against the defendant. \textit{Id.} In the initial case the court found in favor of the SEC. The parties in the case at bar then wished to use offensive non-mutual collateral estoppel in order to prevent the defendant from relitigating certain issues which had already been litigated in the first suit and found adverse to defendant. \textit{Id.} The Supreme Court ruled that despite the lack of mutuality, the defendant could not relitigate the issues again. \textit{Id.}
\textsuperscript{142} Denver III, 720 F. Supp. at 1511. See also In re Air Crash at Detroit Metropolitan Airport, Detroit, Michigan on Aug. 16, 1987, 776 F. Supp. 316, 318-19 (another consolidated trial similar to that conducted in the Denver case).
\textsuperscript{143} Denver III, 720 F. Supp. at 1510.
\textsuperscript{144} \textit{Id.}
\textsuperscript{145} \textit{Id.}
Counsel also agreed that the court would conduct an exemplar trial to resolve specific issues common to all cases pending at that time: liability and punitive and compensatory damages.146 Two plaintiffs' cases, one of defendant's and one of the plaintiff's choice, would be tried before the court.147 These cases would serve as the exemplar trial for these issues in all cases consolidated in the District of Colorado.148 An exemplar trial tremendously expedites the adjudication process since only one jury will decide verdicts for all the consolidated cases. This process prevents repetitious presentation of the identical factual circumstances of the crash for each victim's suit.

To facilitate this arrangement, the court first consolidated the cases for trial pursuant to FRCP 42(a) and then bifurcated the trial pursuant to FRCP 42(b).149 All parties and the court approved the trial plan.150 This plan mandated that after liability was determined, each case would be returned to the district in which it was filed for individualized compensatory damage awards.151 The plan also specified that if the exemplar trial jury found that defendant's conduct warranted punitive damages, this award would be distributed among all the plaintiffs on a pro rata basis.152 The parties stipulated that Colorado law governed the issue of Continental's negligence liability.153 The court had previously ruled that Texas law governed any potential punitive damage liability of Continental.154 The case proceeded to trial on the claims of the two chosen plaintiffs and lasted twenty-two days.155

Since the trial represented adjudication of the claims of numerous parties, the court afforded plaintiffs wide lati-
tude in presenting evidence to the jury. The exemplar trial jury heard evidence in three categories: a) conduct of Continental personnel during the long period between de-icing and takeoff, b) the effect of impact on the plane’s interior and the subsequent panic, and c) emergency efforts following the crash. Ordinarily, only the first category would be relevant to these two plaintiffs’ cases. The only evidence excluded by the trial court was the testimony of individual witnesses’ lasting emotional or physical trauma. The excluded testimony graphically and clearly detailed the impact of the crash on a planeload of passengers.

The jury found Continental's conduct negligent according to Colorado law but undeserving of punitive damage punishment under Texas law. The jury awarded full compensatory damages to the exemplary plaintiffs. The effect of this jury finding on all of the related consolidated cases in the District of Colorado became the subject of extensive litigation. Ten tag-along plaintiffs were caught up in this controversy. They filed their cases against Continental during the course of the exemplar trial. The court's decision to bind or exclude these plaintiffs from the verdict of the exemplar trial would exert important practical consequences in gauging the value of the exemplar trial to both plaintiffs and defendants.

In its examination of the issue the court found that non-mutual collateral estoppel could not be used as a defense by Continental against plaintiffs who were not joined in the exemplar trial. To bind these plaintiffs, the court searched for privity or some control relationship connecting these ten tag-along plaintiffs to the exemplar trial.

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156 Denver IV, 720 F. Supp. at 1480.
157 Id.
158 Id.
159 Id. at 1474.
161 Id. at 1521.
162 Id.
plaintiffs. Unless such a relationship existed, Continental's assertion of collateral estoppel against these later plaintiffs would violate the due process rights of the tag-along plaintiffs. The court ruled that eight of the ten plaintiffs whose cases were filed during the trial lacked the mutuality necessary for the defendant to estop relitigation of the claims tried in the exemplar trial.

The court also found that two of the tag-along cases did manifest characteristics which gave their cases mutuality of estoppel. These two plaintiffs filed their cases three days before the exemplar trial. Their counsel served as a member of the Plaintiffs' Steering Committee and as lead trial counsel during the exemplar trial. The pleadings of each case exhibited language showing that these plaintiffs intended to participate in the exemplar trial. Thus, the court bound these two plaintiffs to the exemplar jury's verdict.

Though the trial expedited the court's disposition of these crash cases, this exemplar trial did not bind all of the suits in this multidistrict litigation. Many other related suits occupied the attention of the court. The court could potentially have to preside over future trials arising out of the Denver crash. The workings of JPML, though relatively quick, delayed transfer sufficiently so that cases filed in districts other than that of the transferee court were not consolidated with the other cases in time to bind them to the exemplar jury verdict. The JPML should not be faulted here, however, because it does not possess the power to compel plaintiffs to file suit.

Federal courts wielding the power of the MLA do not

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163 Id.
164 Id.
165 Id.
166 Id. at 1523.
167 Id. at 1522.
168 Id.
169 Id.
170 Id. at 1523.
171 Id. at 1534-35.
172 Id.
have the capacity to adequately address the problem of multiple actions arising from an identical fact pattern causing injury to a large number of plaintiffs whose injuries are not discovered until many years later. Neither the JPML nor the MLA provide any authority to set a deadline or limitation period beyond which plaintiffs may not seek compensation in the federal system for mass torts. Though the MLA facilitates a global resolution of airline crash litigation, nothing currently prevents another plaintiff from filing a later related suit in a federal forum. Fifty state laws provide limitation periods applicable to the federal system for aviation cases based on diversity jurisdiction.\textsuperscript{173}

Because many plaintiffs may file suit in state court, federal courts cannot attain jurisdiction over related state actions for a comprehensive adjudication of all litigation relating to an airline accident. The court in \textit{Denver} experienced this problem. In its final memorandum addressing the collateral estoppel issue, the court discussed two plaintiff crew members' motion for a voluntary non-suit.\textsuperscript{174} The injuries suffered by these plaintiffs arose out of the identical conduct that injured the other plaintiffs.\textsuperscript{175} The exemplar jury rendered a verdict on their employer's liability for that conduct.\textsuperscript{176} Yet because the plaintiffs wished to sue in state court, the multidistrict court had to grant their motion.\textsuperscript{177}

These plaintiffs, like hundreds of similarly situated persons, would choose to litigate their claims in state court.\textsuperscript{178} The \textit{Denver} plaintiffs' claims alluded to here did


\textsuperscript{174} \textit{Denver III}, 720 F. Supp. at 1525. These crew member plaintiffs sought a voluntary non-suit according to FRCP 41(a)(2). \textit{Id.} See \textit{Fed. R. Civ. P. 41(a)(2)}. The voluntary dismissal is a dismissal by the court without prejudice unless the court specifies differently. \textit{Id.} A court must deem the dismissal proper using its discretion. \textit{Id.}

\textsuperscript{175} \textit{Denver III}, 720 F. Supp. at 1524.

\textsuperscript{176} \textit{Id.}

\textsuperscript{177} \textit{Id.} at 1525.

\textsuperscript{178} See Report, 127 F.R.D. at 406. In the \textit{Chicago} case, plaintiffs filed seventy cases in the Superior Court of Los Angeles County; these cases could not be dis-
contain substantial state statutory legal questions which necessitated state court review. Nevertheless, these cases still duplicated the liability findings of the multidistrict court. State courts which repeat actions of the federal courts are wasteful and inefficient; unfortunately, such a result is unavoidable under the present system.

The subsequent effect of multidistrict trials on related cases remains uncharted. No policy or statutory directive guides the courts regarding these proceedings. Though the multidistrict trials greatly expedite the federal system's disposition of mass tort litigation, much inefficiency lingers. With concerted effort and principled consideration, great strides could be made to improve the case consolidation and transfer ability of the federal courts. If the Congress or the courts choose to act, the system could evolve into an extremely useful tool to handle the mass aviation tort litigation problem and perhaps other substantive areas of law.

III. PRACTICAL SOLUTIONS

The American legal system desperately needs new procedures and substantive law to effectively handle mass tort litigation. Several alternatives for legislative and judicial action contain viable options for management of a growing mass tort caseload. Many of these options alter current mechanisms to provide greater usefulness and application. Recent proposals for reform shed light on areas that critics target for restructuring. These changes, along with considerations unique to mass torts in the airline litigation context, will form the basis of a proposal to maximize the efficiency and responsiveness of the legal system to mass airline accidents.

posed of by the multidistrict court which the JPML set up to deal with these cases. Id. The federal court system could not obtain jurisdiction over these cases for lack of diversity, and the defendants could not remove the cases to federal court for the same reason. Id.

179 Denver III, 720 F. Supp. at 1525.
180 Id.
The United States House of Representatives recently passed the Multiparty, Multiforum Jurisdiction Act of 1989 (Bill).\(^{182}\) This Bill paralleled the Court Reform and Access to Justice Act\(^{183}\) which contained a similar scheme to revamp federal court procedure and likewise passed the House but failed to achieve Senate approval. The Bill proposes interesting modes of dealing with the mass tort problems discussed previously in the context of airplane crash disasters. It serves as a useful starting point in fashioning a constructive solution.

The first substantive section of the Bill, section 2, begins by expanding federal court subject matter jurisdiction. It allows parties with minimal diversity to gain access to federal courts if their injuries arise from a single event in which twenty-five or more persons are injured simultaneously, and the plaintiff claims $50,000 in damages.\(^{184}\) The statute envisions three scenarios involving minimal diversity: 1) a defendant resides in one state and a substantial part of the event sued upon occurred in another state, 2) any two defendants reside in different states, and 3) substantial parts of the event sued upon took place in different states.\(^{185}\) This section of the bill also permits a party to intervene as a matter of right in any action arising out of the major tortious event.\(^{186}\) This section confers the right of intervention even if that party could not ordinarily file suit in an action in federal district court.\(^{187}\)

Section 3 amends the venue provision of 28 U.S.C.

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\(^{184}\) H.R. 3406, supra note 182, § 2(a).

\(^{185}\) Id.

\(^{186}\) Id.

\(^{187}\) Id.
§ 1391 by designating venue to be proper in any district in which defendant resides or in which a substantial part of the event sued upon occurred.\textsuperscript{188} Section 4 amends 28 U.S.C. § 1407 by authorizing courts that have presided over consolidated cases for pretrial proceedings to keep those cases for trials on liability as well.\textsuperscript{189} After a trial on liability the Bill contemplates that the multidistrict court that held the trial will return the case to the district court in which the case had been filed for the damage award proceedings.\textsuperscript{190} The multidistrict court, however, would retain an option to keep a case for a damage award upon a finding that retention of the case for that purpose would serve the interest of justice or the convenience of parties or witnesses.\textsuperscript{191} This section also authorizes interlocutory appeal of the multidistrict court's choice of law and liability rulings during a sixty day period.\textsuperscript{192} After this time, the multidistrict court may certify its liability findings and intention to remand or keep the case for damage award purposes.\textsuperscript{193}

Section 5 amends 28 U.S.C. § 1441 by granting defendants the ability to remove an action filed in state court to federal court.\textsuperscript{194} Section 5 envisions removal if the action could have been brought under section 2 of the Bill, or if defendant is a party to a case already pending under proposed U.S.C. § 1467 and the case arises out of the same transaction or occurrence.\textsuperscript{195} After removal of the case to federal court for pretrial proceedings and liability determinations, this section calls for return of the case to the state court in which it was filed for a damage award.\textsuperscript{196} The same flexible finding as in section 4 of the Bill, "in the interest of justice or for the convenience of parties

\textsuperscript{188} H.R. 3406, supra note 182, § 3.
\textsuperscript{189} Id. § 4.
\textsuperscript{190} Id.
\textsuperscript{191} Id.
\textsuperscript{192} Id.
\textsuperscript{193} Id.
\textsuperscript{194} Id. § 5.
\textsuperscript{195} Id.
\textsuperscript{196} Id.
and witnesses," must accompany the return of the case to state court.\textsuperscript{197}

Section 6 would add 28 U.S.C. § 1650 to guide federal courts in their choice of law decisions for multiparty, multiform actions.\textsuperscript{198} This section promulgates eleven factors for federal multidistrict courts to consider in deciding which jurisdiction's law to apply in conflicts of law holdings.\textsuperscript{199} These factors share many characteristics utilized in modern choice of law methods in section 6 of the Restatement (Second) of Conflicts: location of conduct causing injury, interest of jurisdictions, domiciles of parties, and fairness.\textsuperscript{200} This section eliminates the \textit{Erie-Klaxon} doctrine's mandate that a federal court in a diversity action must apply the choice of law rules of the state in which it sits.\textsuperscript{201} The choice of law section further allows the multidistrict court to enter an order designating a single jurisdiction's law to govern all cases which have been consolidated for adjudication by that court.\textsuperscript{202} The section provides that one jurisdiction's law would govern all issues, unless the multidistrict trial court specifically finds otherwise in its choice of law order.\textsuperscript{203}

The Bill ends with section 7, which revises service of process for multidistrict litigation to ensure nationwide service of process for actions brought under the revised § 1407.\textsuperscript{204} The Bill establishes the ability to subpoena persons anywhere within the United States to appear for the consolidated multidistrict cases.\textsuperscript{205} These practical aspects of the legislation guarantee that the multidistrict

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\textsuperscript{197} Id.

\textsuperscript{198} Id. § 6.

\textsuperscript{199} Id.

\textsuperscript{200} Restatement (Second) of Conflicts, § 6 (2) (1971). The \textit{Detroit} case discusses application of the Restatement (Second) factors to its facts. 750 F. Supp. at 798. See supra note 93 for a discussion of the Restatement (Second) application to choice of law problems.

\textsuperscript{201} See supra note 16 and accompanying text for a discussion of the \textit{Erie-Klaxon} doctrine.

\textsuperscript{202} H.R. 3406, supra note 182, § 6.

\textsuperscript{203} Id.

\textsuperscript{204} Id. § 7.

\textsuperscript{205} Id.
courts will not have to formulate their orders on cold, impersonal records.

The ambition of the Bill is evident. At a minimum, it is evidence that at least a few Congressmen are aware of the judicial branch's mass tort dilemma. The Bill examines the available options and purports to make some policy choices. Unfortunately, the Bill's flaws factored into its failure to become law. These flaws deserve analysis.

The Bill's minimal diversity threshold of a single event or occurrence which injures twenty-five people or more is questionable. First, the twenty-five person threshold figure seems to be both arbitrary and problematic. Many accidents occur almost daily involving twenty-five people or more.\(^{206}\) Federal courts need not be concerned with each of these situations. Even if an accident injures twenty-five or more people, their individual suits do not necessarily represent an overwhelming caseload for the courts. Problems arise when the number of suits, not the number of individuals bringing the cases, is high.\(^{207}\)

The Bill permits intervention as a right in a multidistrict consolidated case if a party's claim arises out of the same transaction or occurrence.\(^{208}\) Intervention can occur even if that person ordinarily could not have brought the action in federal court.\(^{209}\) This expansion of pendent jurisdiction could enable a party to intervene in the action of any other party with a claim arising out of the mass tort event.\(^{210}\) This section potentially interferes in a prejudicial way with the rights of parties to the consolidated cases. Such permissive intervention may be interpreted to permit claimants with only tangential relationship to the


\(^{207}\) Id.

\(^{208}\) See supra note 187.

\(^{209}\) Id.

\(^{210}\) See Hearings, supra note 206, at 6.
cases in which they intervene to proceed to adjudication together. Giving the claimants the choice to intervene, instead of giving aggregation authority to a coordinating authority such as the JPML, may not reach the desired efficiency goals. The intervention provision also seems superfluous since FRCP 24 and the related rule of joinder ordinarily allow interested parties to intervene or to be joined if necessary or desirable.\textsuperscript{211}

The Bill's definitions merit close scrutiny. The definition of "a substantial part of the event or occurrence" is important in many subsections of the Bill, but this definition provides no indication of the drafters' intent as to the language's meaning or as to how a court should attempt to interpret it.\textsuperscript{212} The definition of "injury" includes only physical harm or damage to persons or property.\textsuperscript{213} On its face the statute lacks authority for multidistrict court to hear emotional or psychological damage claims of injured persons, despite the fact that a defendant's identical actions caused physical harm to one person and psychological damage only to persons seated in adjacent airplane seats. The efficiency justifications of the Bill seem to indicate that both of these types of claims should be considered by the court which is familiar with the totality of the accident.

The multidistrict litigation section of the Bill codifies the current reality that the transferee court conducting the multidistrict pretrial proceedings should also retain these cases for liability determinations on common issues.\textsuperscript{214} The flexible provision through which these multidistrict courts may also keep cases for damage awards would promote uniformity and consistency. The interlocutory appeal of the choice of law and liability decisions of the multidistrict court before it disposes of the cases for damages awards would prevent waste of judicial re-

\textsuperscript{211} See Fed. R. Civ. P. 24, supra note 23.
\textsuperscript{212} H.R. 3406, supra note 182, § 2.
\textsuperscript{213} Id.
\textsuperscript{214} 28 U.S.C. § 1404(a).
sources. If errors of law have been made at the trial court level, these mistakes can be corrected before more proceedings based on incorrect holdings take place.\textsuperscript{215}

The Bill's removal section would function as an efficient mechanism to remove cases to federal courts for nationwide adjudication of mass tort accident litigation.\textsuperscript{216} If defendants, who generally desire one convenient forum, can gather all cases into one forum using minimal diversity, the system will have taken a massive step toward eliminating the problem of repetitive individual lawsuits. Defendants usually are relatively small in number. Their ties to the many cases might be the functional link needed to reel in the web of the many state court cases. At the same time, though, the advantages of removal hinge directly on the defendant's cooperation with federal courts in centering the litigation into one forum. In some scenarios, however, defendants favor that their opponents be dispersed.\textsuperscript{217}

The Bill's choice of law factors break no new ground in aiding the federal courts in cases with multistate parties and implications. The Bill conveys no indication of the weight to be given any factor; therefore it effectively gives no rule of decision.\textsuperscript{218} This section, however, abrogates the federal courts' \textit{Erie-Klaxon} duty to apply the choice of law method of the state in which it sits to diversity cases.\textsuperscript{219} The action profits no one unless it includes a uniform, predictable rule for federal courts' choice of law determinations.\textsuperscript{220} The Bill's general presumption against depeccage will also make choice of law rules more predictable, but the multidistrict courts may still adopt

\textsuperscript{215} See Report, 127 F.R.D., at 416.

\textsuperscript{216} H.R. 3406, \textit{supra} note 182, \S 5.


\textsuperscript{218} H.R. 3406, \textit{supra} note 182, \S 6.

\textsuperscript{219} See \textit{supra} note 201 and accompanying text.

that principle if desired.\textsuperscript{221}

The Bill's final section specifically codifies the \textit{Van Dusen v. Barrack} rule for multidistrict courts.\textsuperscript{222} This section impacts multidistrict litigation when a case is transferred back to a jurisdiction in which it was originally filed.\textsuperscript{223} Nationwide service of process and subpoena capability possess obvious practical value for the proper and expeditious resolution of the issues in dispute.\textsuperscript{224}

B. \textit{American Bar Association Commission on Mass Torts Report}

The American Bar Association (ABA) Commission on Mass Torts (Commission) in August of 1989 reported to the larger body of the ABA.\textsuperscript{225} In their report, the Commission suggested radical change for mass tort litigation. The Commission synthesized its proposals into a draft Federal Mass Tort Jurisdiction Reform Act (Act).\textsuperscript{226} In the summer of 1990 the full body of the ABA rejected recommending the Act for congressional action.\textsuperscript{227}

The essential provisions of the Act are as follow. First, the Act establishes a federal judicial panel for mass torts.\textsuperscript{228} This body may act when at least 100 federal or state civil tort actions alleging damages greater than $50,000 arise from a single occurrence or series of occurrences.\textsuperscript{229} At that juncture, this new panel can transfer some or all of the actions to a single federal district court for resolution and trial of all issues.\textsuperscript{230} The panel's powers would remain discretionary in much the same way as

\begin{itemize}
\item \textsuperscript{221} Id.
\item \textsuperscript{222} H.R. 3406, supra notes 182. See supra notes 74-87 and accompanying text for a discussion of the \textit{Van Dusen v. Barrack} choice of law rule and its application in the multidistrict setting.
\item \textsuperscript{223} H.R. 3406, supra note 182, § 4.
\item \textsuperscript{224} Id. § 7.
\item \textsuperscript{225} See Sedler & Twerski, supra note 220, at 77.
\item \textsuperscript{226} Id. See also Sargeant, supra note 217, at 16.
\item \textsuperscript{227} Sargeant, supra note 217, at 16.
\item \textsuperscript{228} H.R. 3406, supra note 182, § 2.
\item \textsuperscript{229} Id.
\item \textsuperscript{230} Id.
\end{itemize}
The JPML currently functions. The transferee court would then retain the right to decide which issues should be consolidated for trial or remanded for individualized resolution.

The Commission established the new federal judicial panel for mass torts through the interstate commerce clause of the Constitution, which gives Congress the power to regulate commerce between the states. The Commission believed that Congress has the power to pass a bill creating a judiciary panel with the ability to remove state civil actions into federal court. The Act envisions that federal courts will develop their own choice of law rules for mass tort cases. The Act seeks application of one state's law to govern all issues before the transferee court. The federal courts would be free to formulate their own choice of law rules to decide which state's law will govern the issues in a case. Though the proposal mentions depecage, the Act does not seem to seriously contemplate utilization of the doctrine for the process to achieve the desired results of uniformity.

Other provisions allow federal courts to appoint impartial experts to survey the events giving rise to the mass tort litigation. These experts can provide perspective on the panorama before the court in an objective way. The Act also mandates unitary assessment of a punitive damage award, from which each plaintiff would receive a share of a global punitive award. Only one court or jury will penalize defendants for gross or willful negligence with punitive damages.

The Act achieves laudable results. The federal judicial

\[\text{281} \text{ See supra notes 37-69 and accompanying text for a discussion of how the JPML operates.}\
\[\text{282} \text{ U.S. Const. art. I, § 8, cl. 3. Article I of the Constitution grants Congress the power to regulate commerce with foreign nations and among the several states. Id.}\
\[\text{283} \text{ Sedler & Twerski, supra note 220, at 78.}\
\[\text{284} \text{ H.R. 3406, supra note 182, § 6.}\
\[\text{285} \text{ Id.}\
\[\text{286} \text{ Id.}\
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panel for mass torts with the power to gather and transfer related mass tort cases from federal and state courts for complete adjudication will make great strides toward the goals of uniformity and consistency. The new panel idea emanates from the success of the current JPML. Expansion of the powers of the JPML allows many problems to be solved. The discretion of this panel can be relied on to facilitate mass tort litigation.

The Act’s sections initiating unitary assessment of punitive damages also sharply improves upon the present system. For the first time, a multidistrict court with cases consolidated from federal and state courts can punish egregious tortfeasor conduct. This consolidated court can act with the knowledge that its penalty will be the only punitive damage award which can be gained against the tortfeasor. The victims can be assured that the punitive award will benefit each victim equally. The increase in uniformity and predictability of damage awards will reduce the pressure for parties to hold out for better settlements.

The Act’s provision for appointment of experts by the consolidated court to assist the court in the assessment of tortfeasor conduct will aid the speedy and complete resolution of all claims. The overburdened court will have expert assistance in making sense of very technical issues. A disinterested party can objectively evaluate the facts and testimony of the many concerned parties much as a special master could. Since the plaintiff and defendant each retain experts to help attorneys sift through their cases, it seems only fair that a judge faced with hundreds of cases should have the ability to retain experts of his own.

C. A Proposed Solution

Before embarking on an analysis of a proposed solution

297 FED. R. CIV. P. 53. Rule 53 defines a master as a “referee, auditor, examiner [or] assessor.” Id. § 2. Only in exceptional circumstances will federal courts allow masters. Id. § 3.
to simplify mass aviation tort litigation it is necessary to keep the objectives clearly in mind. First, any changes which would encourage quick settlements or early meaningful settlement negotiations between the parties should be a top priority. Most cases of this type should settle and therefore prevent the need for any court action. Also, an added benefit from early settlement will be reduced transaction costs, which in turn translates into a greater percentage of the damage awards actually reaching the victims.

Second, predictability in compensatory and punitive damage awards is desperately needed. The uncertainty in this area slows the settlement process immensely. In many suits the wide range in potential defendant liability prevents early settlements from both defendant and plaintiff points of view. Third, uniformity in damage awards should also be achieved. The home state of a victim or defendant should not be determinative of a victim’s compensation or a defendant’s liability. Finally, changes should be made to promote the airline industry. Air travel has become the most important mode of national transportation. This situation demands that the industry receive legal recognition appropriate to its status.

It is difficult to plot the proper course that the American legal system should follow regarding mass tort litigation. Since no comprehensive scheme currently exists, a change of courts will upset nothing. Careful consideration must be given to understanding the needs of the aviation industry, the American public, and the legal system. From that starting point, revision of the law regarding aviation torts can only improve.

This proposal consists of substantive and procedural planks. Substantively, Congress should enact a statute giving the federal courts jurisdiction over all aviation industry litigation, much like admiralty and maritime law. Procedurally, federal courts must be given the ability to gather cases into federal fora for global resolution of issues arising out of mass torts in general. These two pro-
posals need not be integrated or implemented together; either proposal alone would aid the federal judiciary's capacity to handle mass tort litigation. Operating in tandem, however, these proposals would significantly reduce the obstacles facing the federal courts in dealing with these issues.

1. **Substantive Proposal**

Aviation deserves the same legal framework that the maritime industry enjoys. Congress vests the federal district courts with original jurisdiction over admiralty and maritime claims. Federal statutes and regulations govern all facets of the shipping and maritime industry. The jurisdictional authority of the courts, in combination with the federal statutes regulating the shipping industry, guarantees the application of uniform rules of decision to maritime disputes. Congressional expansion of aviation law into an admiralty-like federal jurisdiction for aviation-related disputes would expedite and streamline aviation industry conflict resolution.

In the 1960s, Senator Tydings of Maryland introduced several bills designed to create exclusive aviation jurisdiction for the federal courts. His idea should be resurrected. The tremendous problems in aviation litigation and predictions of trouble in the future which pressured Senator Tydings to formulate his legislation have arrived. Congress should pattern a new bill creating aviation jurisdiction for the federal courts on the admiralty law. A comparison between aviation law and admiralty law shows the desirability of this course of action.

Admiralty owes its position in American legal history to

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the Constitution. The framers of the Constitution gave their only significant transportation system special legal recognition. Unfortunately, there is little record of the framers’ intent to confer admiralty jurisdiction on the federal judiciary because the Constitutional Congress’ deliberations were secret and no contemporary records of the proceedings exist. Historical research concludes, however, that the framers placed federal maritime jurisdiction in the Constitution to correct a flaw of the Articles of Confederation: disuniformity in admiralty law.

American courts put the framers’ intention of uniformity into motion:

The [framers’]... purpose was... to place the entire subject — its substantive as well as its procedural features — under national control because of its intimate relation to navigation and to interstate and foreign commerce. In pursuance of that purpose, the constitutional provision was framed and adopted. Although containing no express grant of legislative power over the substantive law, the provision was regarded from the beginning as implicitly investing such power in the United States. Commentators took that view; Congress acted on it, and... this Court, gave effect, to it. Practically, therefore the situation is as if that view were written into the provision. After the Constitution went into effect, the substantive law theretofore in force was not regarded as superseded or as being only the law of the several [s]tates, but as having become the

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242 U.S. CONST. art. III, § 2, cl. 3. The “judicial power of the United States” extends to “all cases of admiralty and maritime jurisdiction.” Id. §§ 1-2.


244 DAVID W. ROBERTSON, ADMIRALTY AND FEDERALISM 7-8 (1970).

245 Id. at 15. The Articles of Confederation left admiralty jurisdiction to the states. The plan for the Constitution submitted by Pinckney of South Carolina corrected that flaw. Id. The Committee of Detail which wrote the draft copy that was submitted to the Constitutional Convention worked the Pinckney plan into their proposal. Id. at 10-14. The idea of federal maritime jurisdiction did not originate solely in the Committee of Detail therefore, but that Committee was responsible for the final language of the admiralty clause put into the Constitution. Id. The Framers believed that their transportation industry deserved national attention.
law of the United States, subject to power in Congress to alter, qualify or supplement it as experience or changing conditions might require.246

Further, in The Lottawanna, the Supreme Court declared, "The Constitution must have referred to a system of [admiralty] law coextensive with, and operating uniformly in, the whole country."247 Later Supreme Court decisions such as Southern Pacific Co. v. Jensen clarified that state statutes could not affect the uniformity of admiralty law even in areas on the fringe of admiralty where the federal government remained dormant.248

In 1789, aviation did not exist. If it had, almost assuredly, the framers of the Constitution would have deemed aviation as a subject which deserved national, instead of state, supervision. Aviation arguably has more interstate and national contacts than admiralty since even a landlocked state can be served by plane. Also, admiralty and aviation share other similarities in technical and practical operations. The captain of a plane or ship possesses extraordinary control of his craft. Each captain navigates using nautical miles. Although aviation lacks an evolution of traditions from the medieval era, aviation still has international rules, respected and observed the world over.249 In fact, much of aviation's commercial and navigational traditions are derived from admiralty law. At present aviation offers the most important and effective long distance transportation system in the United States.

247 88 U.S. 558, 575 (1874).
248 244 U.S. 204, 215-16 (1917). In this case, the Supreme Court held that a New York Workmen's Compensation Board could not award damages to a widow whose husband was killed working on a ship at the Port of New York. Id. at 218. The Court reasoned that the Constitution gave exclusive jurisdiction of admiralty to the federal government, and if New York could subject all ships coming into her ports to Workmen's Compensation liability, the uniformity sought by the Constitution would be disrupted. Id. at 214-15, 217. The Court ruled that a state program such as Workmen's Compensation disrupted uniformity even in areas on the fringe of admiralty where Congress had not yet acted. Id. at 217-18.
The federal government preempted the field of aviation regulation long ago. Justice Jackson described the federal preeminence in aviation more eloquently than could be done here in *Northwest Airlines, Inc. v. Minnesota*:

Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time.

Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.250

Congress reinforced the exclusive federal interest in aviation with the Federal Aviation Act of 1954.251 Today, federal statutes and regulations set standards which govern even the smallest aspects of aviation.252 The Federal Aviation Administration (FAA) and the National Transportation Safety Board (NTSB) were created to ensure that American aviation standards remain the world’s safest.

Furthermore, like admiralty, aviation’s commercial transactions are heavily regulated by the federal government. The federal government monitors the financing of

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250 322 U.S. 292, 303 (1944) (citations omitted).
airplanes as well as ships. International treaties of which the United States is a signatory cover shipment of goods by water and by air. Finally, federal statutory law already governs personal injury or wrongful death actions which occur over the water in airplanes. An international treaty details the causes of action for injuries aboard international airline flights. The postures of aviation and admiralty in federal law mirror one another in all but one respect: federal courts decide admiralty claims with regard to federal law while the same courts decide aviation cases under diversity jurisdiction's mosaic of law, depecage.

A constitutional amendment for exclusive federal jurisdiction for aviation law is unlikely. But nothing as radical as a constitutional amendment is required to put this plan into effect; Congress holds the power to act in this area. The Supreme Court expressly recognized that this power belongs to Congress pursuant to the Constitution's commerce clause in *Executive Jet Aviation, Inc. v. City of Cleveland.* Congress exercised its power to regulate interstate commerce through passage of the Federal Aviation Act and its many provisions. Thus, Congress maintains the power to place aviation concerns within the exclusive province of the federal courts.

The exact structure of federal legislation imposing fed-

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256 See *Warsaw Convention,* supra note 254, at arts. 4-16, 18-26 (limitation of liability for goods in air transport).
257 See *supra* note 84-87 and accompanying text for a discussion of depecage.
259 See Veldenz, *supra* note 9, at 205.
eral jurisdictional stature for aviation is beyond the scope of this article. The jurisdictional lines which define admiralty jurisdiction, “on navigable water” geographically and “admiralty-related” conceptually, could be analogized into workable formulations for use within aviation.260 Any final draft of legislation must work out the necessary compromises and accommodations with state laws over the parameters of the new aviation jurisdiction. Congress must specifically define which federal laws would be preempted by this new law as well.261 Just as admiralty law has the savings clause of the Judiciary Act, the new uniform aviation act legislation should make specific provision for any concurrent jurisdiction and retain the right to trial inviolate where it would be so at common law.262 The bill should also create a federal cause of action for aviation torts along with the aviation jurisdiction so that reference to state law will be unnecessary.263 The courts could then fill in the interstices of a federal aviation common law which are not clearly defined by statute from the wealth of persuasive case law within admiralty.

A federal forum for the aviation industry would provide several benefits. Perhaps one of the most important improvements would be the eradication of conflicts of law decisions in all domestic mass aviation litigation. Aviation-related litigation, from products liability to personal injury, would be governed by one uniform law; federal law. A uniform law would drastically increase predictability. If Congress decides not to create a federal common law in this area, at the least it could specify how federal courts should choose the state whose law will govern the case.264 The entire aviation industry and consumers

260 Executive Jet, 409 U.S. at 249, 261.
261 See supra notes 254-56.
262 See 28 U.S.C. § 1333 (1988). The statute states, “The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.” Id.
263 See Veldenz, supra note 9, at 205.
264 Kastenmeier & Geyh, supra note 6, at 562-67.
would benefit from the reduction of insurance and litigation costs. \(^{265}\) With federal jurisdiction over aviation, the JPML can function efficiently to bring cases together for global resolution. A corollary result would be the unitary assessment of punitive damages. Finally, if Congress allows aviation to borrow another admiralty concept, for many disputes, a judge alone without a jury, would be the trier of fact.\(^{266}\) Such a procedure would greatly expedite aviation cases.

Of course this new federal power deprives states, in the abstract, of certain powers.\(^{267}\) The advocates who defend states' rights to govern tortious conduct within their states will oppose this proposal vigorously.\(^{268}\) Congress should ignore their obstructionist clamor. States under the present system of exclusive federal regulation of aviation control not one iota of airline or airplane or airport regulation. Their sole interest is in the welfare of their citizens. In the final analysis, their citizens would benefit far more from uniform federal law in aviation than from an abstract state's rights notion of federalism. The status quo in which states "protect" their citizens' interest causes immediate problems in those citizens' receipt of compensation for tortious injury. In short, the policy benefits far outweigh theoretical, conceptual problems of loss of state rights in an area in which states' interests

\(^{265}\) See Velden, supra note 9, at 204 n.209.

\(^{266}\) See Fed. R. Civ. P. 38(e). The Rule reads "(e) Admiralty and Maritime Claims. These rules shall not be construed to create a right to trial by jury of the issues in admiralty or maritime claim within the meaning of Rule 9(h)." Id. See also Fed. R. Civ. P. 9(h) Advisory Committee Notes on 1966 Amendment to Rules. "One of the important procedural consequences is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute." Id.

\(^{267}\) See U.S. Const. amend. X. "All powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Id. Students of American Constitutional law recognize that this is merely a truism. "The amendment states but a truism that all is retained which has not been surrendered." United States v. Darby, 312 U.S. 100, 123-24 (1941).

were preempted decades ago.  

An alternative substantive proposal for the new federal aviation tort legislation is in order. Overall, a scheme in which the airlines and aircraft operators concede to strict liability for accidents in the process of air transport seems appropriate. Many commentators suggest such a scheme. As noted previously many airlines propose this sort of deal in settlement negotiations.

While this change appears radical, in reality, it is not. Common carriers such as airlines currently are held to strict highest care negligence standards of safe passage of customers under current law. In return for this concession, airline passengers could relinquish claims for punitive damages. This compromise would exponentially improve incentives to negotiate for both victims and the airlines. Victims and their families would be assured of full, complete and speedy compensation. Airlines would be free from the uncertainty and unpredictability of sometimes multiple punitive damage awards. The airline industry would feel adequate pressure to maintain high safety standards, and accident investigations could proceed unhampered by the need for liability determinations. Victims and defendants would benefit from reductions in transaction costs.

269 Compare Kastenmeier & Geyh, supra note 6, at 564-68 with Sedler & Twerksi, supra note 268, at 632-38. The author obviously sides with Kastenmeier & Geyh in this debate.


271 See supra note 107.


273 See generally, Kennelly & Bosco, The National Transportation Safety Board - The Right of Accident Victims to Participate in Investigations, 33 TRIAL LAW. GUIDE 473, 532 (1989) (the fact that NTSB investigations determine liability in many cases distracts the agency from doing the best investigation possible - plaintiffs and defendants fight for input into the results).
2. Procedure

At this time, the main procedural innovations to be implemented in mass torts should be mechanisms to gather related mass tort cases into federal court. The plank of the ABA Bill, which proposed creation of a new improved mass tort panel much like the current JPML, should be put into motion. The JPML's current success indicates that with improved powers its abilities could help the system efficiently process mass tort litigation. The JPML's power should be extended specifically to allow it to consolidate related mass tort state cases into a federal forum at its discretion. Congress could invoke its power under the Commerce Clause or its power to establish inferior courts to make the new JPML a reality.\(^{274}\)

Another gathering pathway might consist of judicial action. The Anti-Injunction Act (A-I Act)\(^{275}\) prevents federal courts from enjoining state courts for federalism reasons. Nevertheless judicially-created exceptions already mitigate this A-I Act's exceptions to permit the transferee courts to enjoin state courts from proceedings in related mass tort actions. This interpretation would force the state plaintiffs to come to the federal system to get relief and subject themselves to the JPML power to consolidate cases. If plaintiffs have state claims closely linked to their federal mass tort suits, the new pendent jurisdiction legislation passed by Congress in January 1991 assures that these closely related state claims can be heard in federal court if necessary.\(^{276}\)

\(^{274}\) See Sedler & Twerski, supra note 220, at 78.

\(^{275}\) 28 U.S.C. 2283 (1988). The statute reads in pertinent part, "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Id.

Once the cases can be consolidated in a useful fashion, the transferee court should possess authority to meaningfully and carefully consider the issues on its mass torts docket. The ABA Bill's proposal for experts to assist the judge in surveying the cases seems appropriate. Specifically with regard to aviation, the current exclusion of NTSB reports on airline crashes should be discontinued. These federal agency conclusions in reports should be fully admissible at trial to assist the judge. This information is the best available. Fault determinations by federal agencies carry tremendous weight with juries. At the least, though, the agency personnel should be available to brief the judge at his request. The agency reports or personnel could serve much like a special master under FRCP 51.

On an even more radical level of revision, the Congress could create, under its Article I constitutional powers a quasi-judicial arm of the FAA or NTSB. This board or panel would determine fault or negligence in airline accidents. From that decision, the board would make compensation awards to the victims of the accident. After all,

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277 See supra note 236 and accompanying text.


279 See FED. R. CIV. P. 53, supra note 238.

280 This board could make fault determinations and provide damage awards much like either Workmen's Compensation Boards currently operate or the National Labor Relations Board currently operate. These boards fulfill administrative functions but make fully binding decisions on the parties before them. The FAA or NTSB could make fault determinations following basically the same procedures already in place. See supra note 270. The NTSB could then make compensation findings for the victims. This process would tremendously speed up the process of and lower the cost of compensation for victims. Administrative proposals to deal with mass torts problems are not wholly unusual. Recently such a compensation board was proposed as a Congressional bill. Congress Approves Agent Orange Bill, DALLAS MORNING NEWS, Jan. 31, 1991, at A4.
the multidistrict court in aviation crash proceedings already functions much as an administrative body.

Whether punitive damages are available under federal common law or not, unitary assessment of punitive damages should be imposed immediately. With the ability of gathering mechanisms to get all related cases into one forum for the first time procedurally, the tortfeasor can be punished once and for all time in a punitive way. Airlines benefit from this proposal because they are not subject to multiple awards. Their benefit is tempered, though, since the publicity nightmare of a huge punitive award arising out of global resolution of a plane crash will be lasting. The victims share in any punitive award on an equal basis.

The effect of consolidated trials and tag-along cases could be addressed. A comprehensive plan to detail the consequences of a consolidated trial on later cases should be formulated by Congress or detailed by the Supreme Court. Such a scheme could include some sort of limitations period beyond which claims for airline torts cannot be filed. In cases where a transfer court schedules consolidated cases for exemplary trial with effects on all cases, a procedure is needed whereby the trial court can set a date beyond which if cases are not yet filed arising out of the same accident or occurrence, the future cases are bound to the effects of the consolidated trial’s verdicts. In the peculiar circumstances of mass aviation tort litigation all parties who are victims of a specific crash could be notified quickly and easily to avoid due process challenges. Premium court efficiency could then exist at a consolidated trial.

Lastly, if federal common law is not adopted, federal choice of law rules should be formulated for the federal courts.281 Some meaningful guidance must exist to make these choice of law determinations. A Congressional debate designating the site of the crash or the home state or the victim or defendant corporation’s place of incorpora-

281 See supra note 264.
tion as the state’s law which should govern a mass tort would be helpful. Another proposal is to let the law of the jurisdiction in which the JPML’s consolidated court sits govern the issues before that court. This makes as much sense as the current case law. From a judicial perspective, it also makes sense since an objective body, the JPML, can make a decision on objective criteria — the convenience and efficiency needs of a certain case. The decision of which forum in which to consolidate the cases would also carry the effect of determining that the law of that state will be the law which will govern all issues of the mass tort cases. Less characterization and self-interested manipulation is possible since different judges make the decision of which law another judge will apply. An added advantage will be that the transferee judge will be familiar with the law to be applied. A settled choice of law method such as this will greatly reduce uncertainty. The early choice of law decision will also improve settlement incentives.

IV. Conclusion

The field of mass torts in America is in turmoil. The judicial system rapidly feels itself overwhelmed by the tasks society imposes upon it. While the current system possesses valuable and durable qualities to deal with the mass tort problem, the system is also shackled in many respects. Congress and the courts must address that situation. This article attempts to propose concrete solutions to the field of mass torts, with mass aviation torts at the forefront. Aviation accidents provide a useful template on which to begin to revise the entire mass tort litigation process. Ideas and concepts unique to the aviation industry and its needs can be adapted quickly and effectively to handle other problems. Perhaps every field within mass torts can be handled in this individualistic way; certainly, each field must receive the serious contemplation which aviation mass torts garnered here.

282 See Hill & Baker, supra note 4, at 76-77.
Because of its high profile nature and great economic impact on this country and its economy, the law of aviation should be revised so that it can operate at an optimum level. The industry is in the midst of a troubled era. The industry is rapidly becoming an oligopoly.\textsuperscript{288} The proposals above would improve the aviation industry's ability to conduct litigation. With these changes the industry will be able to quickly rid itself of decades-long litigation and concentrate on safety and service.

This revision of the law of mass aviation torts is only a small step toward revision of the entire mass torts arena. But it is a beginning. Though progress may be piecemeal, it must happen step by step. On the seashore where appropriately the land and sea and sky come together a short story demonstrates the importance of continually trying to effect change appropriate for the legal system. A man and his grandson were walking along the beach. Each time the little boy saw a starfish washed up on the shore, he picked it up and tossed it back into the ocean. When the grandfather inquired as to why, the boy replied, "If I don't pick them up and throw them back they will dry up and die. I'm saving their lives." The grandfather harumphed, "What are you doing? There are thousands of starfish ahead and many miles of beaches. What you are doing won't make any difference." The boy picked up another starfish as they continued to walk and gently threw it into the sea. "Yes, that's true," he said, "but it makes a difference to this one."

Indeed, if a seemingly insurmountable problem is regarded as too large to solve, that is the way it will remain. Though the mass torts dilemma facing the nation's courts poses difficult challenges, many different angles should be examined in an attempt to solve the problem. Each victim or party who benefits from the revision of the mass aviation tort system will appreciate the difference.