THE METASPLIT: THE LAW APPLIED AFTER TRANSFER IN FEDERAL QUESTION CASES

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Cases may be transferred from one federal district court to another under 28 U.S.C. § 1404 for convenience or under 28 U.S.C. § 1407 for coordinated or consolidated pretrial proceedings. In federal questions cases, such a transfer may result in the application of a different rule of law if there is a split of authority among the circuits. Should the court receiving the transferred case apply its own understanding of federal law or instead apply the law that would have been applied by the transferring court? The federal courts are split on this question of how to handle splits of authority, hence the term "metasplit." In diversity cases the law is well settled that the law does not change upon transfer under either of these provisions. The court receiving the transfer applies the same state law that would have been applied by the transferring court. In federal question cases, on the other hand, perhaps a majority of courts apply the law of the transferee court. This outcome is correct as to transfers under § 1404, although an exception for nonuniform federal law—when federal law borrows state law or is otherwise forum dependent—should be recognized. For transfers under § 1407, however, the law of the transferor court should apply because under § 1407 the case is to be remanded to the transferor court upon completion of pretrial proceedings.

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INTRODUCTION

The question of what law applies after a federal district court transfers a case to another federal district court is at once familiar and unsettled. The answer depends upon the context. The law is clear in diversity cases: if the plaintiff filed in a proper court, a transfer for convenience does not lead to a change in the state law that is to apply. The law is unsettled in the context of transfers in federal question cases when there is a split of authority on federal substantive law. There is conflicting authority on whether the court to which the case has been transferred should continue to apply the version of federal law that the transferring court would have applied. This is a split of authority about how to handles splits of authority—a metasplit.

Some unsettled legal issues are mere artifacts of poor reasoning or historical accident,[1] mere "derelicts on the waters of the law."[2] They need not be hard—they need not really even be a problem. In contrast, the problem of the law to be applied in federal question cases after transfer is difficult and nuanced. The issue of the law to be applied

1. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.").

2. *Ala. Pub. Serv. Comm'n v. S. Ry. Co.*, 341 U.S. 341, 357 (1951) (Frankfurter, J., concurring).

after transfer can arise in six different settings. Two variables account for the court's subject matter jurisdiction and three variables describe the type of transfer involved. As to subject matter jurisdiction, the case may arise under federal law or may be a diversity case,[3] where state law supplies the substantive rules. As to the type of transfer involved, three[4] statutes authorize transfer for three different reasons. First, even though the plaintiff has chosen a proper district under the statutes governing venue, the court may grant a transfer to a more convenient district under 28 U.S.C. § 1404.[5] Second, the plaintiff may have improperly chosen a venue, filing the case in a district not authorized by the venue statutes. In such cases, the transfer to a proper district is made under 28 U.S.C. § 1406.[6] Finally, the Judicial Panel on Multidistrict Litigation may transfer cases under 28 U.S.C. § 1407 for consolidated pretrial proceedings.[7] Transfers under §§ 1404 and 1407 share a common goal. Both of these transfers are based upon a concern for convenience and judicial efficiency,[8] which was thought by Congress to be sufficient to override plaintiff's choice of an otherwise proper venue.[9]

There are thus a total of six facets in this matrix of issues, comprised of two categories of subject matter jurisdiction, each category of which holds three types of transfers. The law is well settled in diversity cases. If the transfer is a convenience transfer under either § 1404 (plain convenience) or § 1407 (multidistrict litigation), the

3. 28 U.S.C. §§ 1331, 1332 (2012).

4. Actually, there are several additional transfer provisions. For example, 8 U.S.C. § 1252(b)(5)(B) (2012) provides for the transfer of deportation cases to the district where deportee resides. *See generally Leal Santos v. Gonzales*, 495 F. Supp. 2d 180 (D. Mass. 2007), *aff'd sub nom. Leal Santos v. Mukasey*, 516 F.3d 1 (1st Cir. 2008). But the vast majority of transfer cases fall under one of the three main statutory provisions discussed in the text.

5. 28 U.S.C. § 1404(a) (2012) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.").

6. § 1406 ("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.").

7. § 1407(a) ("When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.").

8. Transfers under 28 U.S.C. § 1404 are to be for "the convenience of parties and witnesses [and] in the interest of justice." § 1404(a). Transfers under § 1407 are to occur when the transfer will "be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." § 1407(a).

9. *Van Dusen v. Barrack*, 376 U.S. 612, 635–36 (1964).

transferee[10] court continues to apply to substantive issues the same state law that the transferor court would have applied.[11] *Van Dusen v. Barrack*[12] settled this for § 1404 and courts have uniformly extended the rule to transfers for consolidated pretrial proceedings under § 1407.[13] But when plaintiff chooses an impermissible forum and the transfer is under § 1406, the law that would have been applied in the transferor court does not follow along with the case upon transfer; instead the transferee court applies the state law that it would have applied had the case been initially filed there.[14]

The law is less clear when the case is brought under federal question jurisdiction and thus is based on federal substantive law. In the first place, the nature of the inquiry is somewhat different. In the diversity context there are multiple lawmakers (states) and multiple laws and thus there exists a choice of law problem in the traditional sense. If a diversity case is filed in a federal district court in Texas but transferred to one in Tennessee, does the transferee court apply Texas or Tennessee law?[15] However one answers that question, it is at least a choice of law between two lawmakers. But if the case is based substantively on federal law, there is not a choice of law issue in the

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10. I would prefer a different set of names for the courts involved in transfers. The customary terminology refers to the court granting the transfer as the "transferor" court and the court to which the case is transferred as the "transferee" court. This usage dates back over half a century. The Supreme Court used this terminology in 1960 in *Hoffman v. Blaski*, 363 U.S. 335, 341 (1960). I have found lower court opinions using it from 1951. *See, e.g.*, *Wilson v. Kan. City S. Ry. Co.*, 101 F. Supp. 56, 61 (W.D. Mo. 1951) ("transferor court"); *Mazinski v. Dight*, 99 F. Supp. 192, 194 (W.D. Pa. 1951) ("transferee court"). Given the longevity of this usage, I may be presumptuous in suggesting a change. But I have always found the "ee" and "or" suffixes in this context to require at least some thought to get it straight, perhaps because the occasions for using them are not frequent enough to cement the words within one's normal usable vocabulary (contrast the relatively more frequent use of terms such as "vendor" or "lessee"); instead they remain perpetual neologisms whose meaning must be worked out every time one speaks or hears them. It would be much simpler to call the transferring court the "sending" court or the "sender" and the court that receives the transfer the "receiving" court or the "recipient." Using this terminology, the issue considered here is whether to apply, after transfer, the law of the sender or the recipient court. But in the interest of not confusing the reader, I have chosen to adopt the traditional terminology in this article, awaiting the adoption of more descriptive terminology by a more authoritative source.

11. *See infra* notes 33–37 and accompanying text.

12. 376 U.S. 612 (1964).

13. *See infra* notes 42–44 and accompanying text.

14. *See infra* notes 50–60 and accompanying text.

15. More precisely, the question is whether the federal court in Tennessee applies the law that the Texas federal court would have applied. Under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), a federal court in diversity applies the choice of law rules of the state in which it sits. *See id.* at 496. Thus, the federal court in Texas might apply Texas law or might apply the law of some other state under the choice of law rules of Texas.

traditional sense.[16] Whether the case is pending in a district court within the Fifth Circuit (Texas) or the Sixth Circuit (Tennessee), the law applied is without dispute the law of the United States. But, of course, sometimes the *interpretation* of federal law is unsettled. Sometimes there is a split among the circuits. In such cases the rule of law applied by the Fifth Circuit is different from the rule of law applied by the Sixth Circuit. While this is not a choice of law problem in the traditional sense of choosing the law of a particular sovereign over the law of another distinct sovereign, it does require courts to choose between legal rules that reflect differing *versions* of federal law.

There is a split of authority about how to handle federal law splits of authority in transferred cases—a metasplit. The most common result found in the cases is that a transferee court applies the version of federal law subsisting in its own circuit, or, stated differently, the transferee court is not bound by the version of federal law existing in the transferor court.[17] This result obtains without exception when the case is transferred for improper venue under § 1406. There is no sense in which the plaintiff was ever entitled to the version of the law existing in the transferor court, since it was never a permissible forum.[18] But when the transfer is from a district that the plaintiff had a right to select (and the transfer is thus under § 1404 or § 1407) some transferee courts apply in some situations the "law" of the transferor court.[19] Other courts, perhaps a majority,[20] adhere to a flat rule of applying transferee "law." One may view the occasional reference to the law of the transferor as an exception to a general rule of applying transferee law or as a contradiction of it. Both views are found in the caselaw.[21] The matrix of issues thus looks like this (uncertainties are in italics)[22]:

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16. A traditional choice of law problem addresses "what effect is given to the fact that the case may have a significant relationship to *more than one state*." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 (AM. LAW INST. 1971) (emphasis added). A "state" is "a territorial unit with a distinct general body of law." *Id.* § 3. Although federal circuits are "territorial units," they do not have a "distinct general body of law." Thus, the Restatement considers "[i]ntrastate conflicts" beyond the scope of its rules. *See id.* § 2, cmt. c.

17. *See infra* Section II.B.1.

18. *See infra* notes 60–76 and accompanying text.

19. *See infra* Section II.B.2.

20. *See infra* notes 80–125 and accompanying text

21. *See infra* note 158–160 and accompanying text.

22. The Supreme Court added another tier to this cascade of issues in *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas*, 571 U.S. 49 (2013). The issue in *Atlantic Marine* was how to treat transfers made pursuant to a contractual forum selection clause. Is a case filed in violation of a valid forum selection clause liable to transfer under § 1406, the district chosen by the plaintiff being regarded as a "wrong" district under that statute by force of the forum selection clause? *See id.* at 55. The Court held otherwise. If the forum chosen by the plaintiff is proper under the venue statutes, the correct motion is a transfer under § 1404, for

	Basis of Transfer		
Type of Subject Matter Jurisdiction	28 U.S.C. § 1404 (Convenience)	28 U.S.C. § 1407 (Consolidated Pretrial Proceedings)	28 U.S.C. § 1406 (Improper Venue)
Diversity	Transferor law	Transferor law	Transferee law
Federal Question	*Transferee law?*	*Transferee law?*	Transferee law

Because the issue is settled for diversity cases, they are discussed only briefly (in Part II) to provide some helpful background. Part III examines the current caselaw on what version of divided federal law a transferee court should apply, setting forth both the general rule of applying the transferee court's interpretation of federal law and the exception to that rule that some cases recognize. Part IV evaluates this general rule in the separate contexts of § 1404 and § 1407 transfers.[23] My conclusions are as follows:

In a transfer under § 1404 based upon convenience, the transferee court should apply the law it normally would to a case initially filed in its own district—i.e., the binding law of that circuit. The reasons for applying the law of the transferor court are insufficiently strong to depart from the normal rules of stare decisis and precedent. An exception to this rule should exist when federal law is by design geographically non-uniform, such as occurs when Congress explicitly borrows a state statute of limitations. In such cases, the state law applied should be the law that would have been applied in the transferor court. Caselaw support exists for this approach. Other instances of the same rule (although not yet recognized in the caselaw) would occur when the federal courts have created an enclave of federal common law

convenience, with the issue of convenience being heavily influenced by the parties' ex ante choice of a particular district. *Id.* at 59. But, contrary to the normal practice of applying the law of the transferor court under *Van Dusen v. Barrack*, in cases like *Atlantic Marine*, the plaintiff does not get the benefit of the state law of the place improperly chosen as a forum. Instead, the law of the transferee court applies. *Id.* at 65. Plaintiff's choice of a forum at variance with that contractually agreed to disables him from asserting a "venue privilege." *See id.* at 63. Thus, in the context of enforcing forum selection clauses, the law that would have been applied by the transferor court does not carry forward and the transferee court applies whatever state law it would have applied had the case initially been filed there. *Atlantic Marine* was a diversity case. It remains to be seen how *Atlantic Marine* applies to the issue of the law applied when a forum selection clause is involved in a federal question case.

23. Because the law is well-settled for § 1406 (wrong venue) transfers, the focus is on transfers under § 1404 and § 1407.

and have chosen the content of the federal common law to be borrowed from state law.

Transfers for multidistrict litigation under § 1407 present a special case because the transfer is made under the anticipation of an eventual remand to the transferor court. If transferee law is applied in the transferee court, what happens when the case is remanded to the transferor court? Is it now to apply the law of its own circuit or must it apply the law of the transferee court? What if the case is transferred back to the transferor court and appealed to the Circuit Court of Appeals? Is that court (the initial transferor court) to apply another circuit's (the transferee's) law? For reasons explained below, I do think that can be right, and so since upon remand to the originating court that court will apply its own law the transferee court should too. Since the transferor court gets the last laugh, so to speak, the transferee court should stick to the script and apply transferor law.

I. THE LAW APPLIED AFTER TRANSFER IN DIVERSITY CASES

The law that applies after a transfer in a diversity case is well settled. For that reason, this section addresses this matter only briefly, setting out some basic principles that are also relevant to the law applied after transfers in federal question cases.

A. Transfers for Convenience Under 28 U.S.C. § 1404

Under 28 U.S.C. § 1404,[24] a party[25] may seek a transfer for "the convenience of parties and witnesses, [and] in the interest of justice."[26] Although the plaintiff has chosen a district that is proper under general venue provisions, § 1404 allows the initial choice to be overridden where in the particular case the chosen forum is inconvenient.[27] The provision is in general a codification of the common law doctrine of *forum non conveniens*, albeit a codification that grants the district court broader power to transfer.[28] The purpose of § 1404 is to "prevent the

24. 28 U.S.C. § 1404 (2012).

25. Transfers under § 1404 may be initiated by either the plaintiff or the defendant. *Ferens v. John Deere Co.*, 494 U.S. 516, 521 (1990) ("Section 1404(a) . . . says nothing about . . . affording plaintiffs different treatment from defendants.").

26. § 1404(a).

27. *See Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) ("Section 1404 (a) reflects an increased desire to have federal civil suits tried in the federal system at the place called for in the particular case by considerations of convenience and justice.").

28. On the relative scope of § 1404 and *forum non conveniens*, see *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955) (stating that "Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit

waste 'of time, energy and money' and 'to protect litigants, witnesses and the public against unnecessary inconvenience and expense.'"[29]

Prior to a transfer under 28 U.S.C. § 1404, a federal court in diversity applies the law that would have been applied by the state courts of the state in which it sits.[30] That is, in matters of substance[31] the court applies the law of its host state, but it applies that state's "whole"[32] law which includes its choice of law rules. It therefore may apply the substantive law of another state, provided that is what the host state's choice of law rules direct.

In *Van Dusen v. Barrack* the Supreme Court held that upon the transfer of a diversity case under § 1404 the transferee court is "obligated to apply the state law that would have been applied if there had been no change of venue. A change of venue under [§] 1404(a) generally should be, with respect to state law, but a change of courtrooms."[33] Thus, a plaintiff who has chosen a proper, albeit inconvenient, forum is entitled to "retain whatever advantages may flow from the state laws of the forum they have initially selected."[34] This result is supported by the *Erie*[35] doctrine, with its emphasis on cases having the same outcome whether filed in state or federal court: "[W]e should ensure that the 'accident' of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed."[36]

Van Dusen thus allows the plaintiff to retain the benefits of successful forum shopping. The Court concluded that § 1404 "was not

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courts to grant transfers upon a lesser showing of inconvenience" than under *forum non conveniens*).

29. *Van Dusen*, 376 U.S. at 616 (quoting *Cont'l Grain Co. v. Barge FBL–585*, 364 U.S. 19, 26–27 (1960)).

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

31. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 78–79 (1938).

32. Under standard choice of law principles, when a choice of law rule directs the application of the law of *X*, courts normally apply only the "internal" law of *X*. But when "the objective of the particular choice-of-law rule is that the forum reach the same result on the very facts involved as would the courts of another state, the forum will apply the choice-of-law rules of the other state." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8(2) (AM. LAW INST. 1971). This is referred to as the "whole law of the State." *See Richards v. United States*, 369 U.S. 1, 11 (1962). For a concise description of this basic choice of law issue (which goes under the heading of "renvoi"), see Erwin N. Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165, 1166–67 (1938).

33. *Van Dusen*, 376 U.S. at 639.

34. *Id*. at 633.

35. 304 U.S. 64 (1938).

36. 376 U.S. at 638.

designed to narrow the plaintiff's venue privilege or to defeat the state-law advantages that might accrue from the exercise of this venue privilege but rather the provision was simply to counteract the inconveniences that flowed from the venue statutes by permitting transfer to a convenient federal court."[37]

B. Transfers in Multidistrict Litigation Cases Under 28 U.S.C. § 1407

As with 28 U.S.C. § 1404, a transfer under 28 U.S.C. § 1407 provides a mechanism for transferring a case even though the plaintiff initially chose a proper venue. This statute provides that when cases in multiple districts "involv[e] one or more common questions of fact," the Judicial Panel on Multidistrict Litigation may transfer the cases "for coordinated or consolidated pretrial proceedings."[38] The predicate for such a transfer is that it will further "the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."[39] The "objective" underlying transfer and consolidation under § 1407 is "to eliminate duplication in discovery, avoid conflicting rulings and schedules, reduce litigation cost, and save the time and effort of the parties, the attorneys, the witnesses, and the courts."[40] The statute provides, however, that the transferred case "shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated."[41]

As to the law applied in diversity cases, transfers under § 1407 are indistinguishable from those under § 1404. In each, plaintiff has sued in a court with proper personal jurisdiction and venue and has perhaps thereby acquired certain substantive law advantages. A transfer is called for in each by the needs of the judicial system for efficiency. The logic *Van Dusen* applied in the context of § 1404 leads to a similar protection of this advantage upon transfer of diversity cases under § 1407. "The courts agree uniformly that *Van Dusen* applies to transfers under Section 1407(a) in diversity of citizenship cases. . . . [I]n diversity of citizenship cases, the MDL transferee court must apply the substantive

37. *Id.* at 635.

38. 28 U.S.C. § 1407(a) (2012).

39. *Id.*

40. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.131 (2004); *see also In re Plumbing Fixture Cases*, 298 F. Supp. 484, 491–93 (J.P.M.L. 1968) (stating that the purpose of multidistrict consolidation is "to eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts in multidistrict related civil actions" and to avoid "repetitious discovery").

41. *In re Plumbing Fixture Cases*, 298 F. Supp. at 488.

law . . . that would have been applied in the transferor forum."[42] Applying the same law as the transferor court would have applied serves to maintain the plaintiff's "venue privilege," an advantage that *Van Dusen* held to be deserving of protection.[43] It also serves the *Erie* policies that concerned the Court in *Van Dusen*.[44] A case filed in federal court because of diversity will get no different result due to a § 1407 transfer than an identical case in state court so long as one continues to apply the choice of law rules that the state court of origination would have applied.

Many legal commentators dislike this result.[45] Forcing the transferee court under § 1407 to apply the law that would have been applied by the transferor court makes consolidated pretrial proceedings more difficult. Discovery, for instance, may not be uniform across the cases consolidated in the transferee court because the scope of discovery—material relevant to the claims and defenses in the action[46]—may vary from consolidated case to consolidated case as the elements of the claims and defenses vary under the different substantive laws that must apply.[47] Indeed, the very process of analyzing each consolidated case under different choice of law methodologies (as is required by applying *Van Dusen* to § 1407 transfers) is itself time-consuming and burdensome, especially given the abstruse nature of much of modern choice of law doctrine.[48] The long and the short of it is that while the thrust of § 1407 is toward blending different cases into a homogenous whole for adjudication by mass production techniques, *Van Dusen*'s

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42. 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3867 (4th ed. 2013); *see also* Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 793 (2012) ("[A] case filed in a proper venue and transferred to the MDL carries with it the choice-of-law rules of the transferor court.").

43. *Van Dusen v. Barrack*, 376 U.S. 612, 635 (1964).

44. *See supra* note 36 and accompanying text.

45. *See, e.g.*, Mary Kay Kane, *Drafting Choice of Law Rules for Complex Litigation: Some Preliminary Thoughts*, 10 REV. LITIG. 309, 313–14 (1991) ("Under current law, consolidation across state lines into a single forum is impeded by the fact that transfer will not result in a change of the applicable law for the transferred cases; the transferee court must apply the choice of law rules that would have been applied in the transferor court. . . . The creation of multiple individual issues determined under varying state laws effectively makes a consolidated proceeding unmanageable.").

46. *See* FED. R. CIV. P. 26(b)(1).

47. *See* Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 553 (1996) ("[An] MDL court . . . must grapple with choice-of-law problems in ruling on motions to dismiss or for summary judgment as well as in resolving discovery disputes.").

48. *See* James A. R. Nafziger, *Choice of Law in Air Disaster Cases: Complex Litigation Rules and the Common Law*, 54 LA. L. REV. 1001, 1009 (1994) ("When a consolidation court is called upon to apply the choice-of-law rules or approaches of several different jurisdictions, the task is daunting.").

insistence on retaining the law of the transferor court after transfer preserves the individuality of the transferred cases. The round holes that the transferee court desires to use for its array of transferred-in cases are made useless by the relentlessly square pegs of the substantive law of the transferred cases.[49]

C. Transfers in Cases of Improper Venue Under 28 U.S.C. § 1406

28 U.S.C. § 1406 provides that a "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."[50] In contrast to § 1404 and § 1407, the plaintiff in such cases initially chose a forum to which he was not entitled. In this context, there is no sense in applying the rule of *Van Dusen* and allowing the plaintiff to port the law of the illicitly chosen forum along with the transferred case. Accordingly, "if a district court receives a case pursuant to a transfer under 28 U.S.C. § 1406(a), for improper venue . . . it logically applies the law of the state in which it sits, since the original venue, with its governing laws, was never a proper option."[51] To do otherwise would make a defendant "suffer the choice-of-law consequences of a plaintiff's mistake in choosing such a forum."[52] Moreover, it would "encourage procedural gamesmanship among plaintiffs," encouraging a "plaintiff to intentionally file a case in a forum with advantageous law (but without venue and/or personal jurisdiction), with the knowledge that he will receive the benefits of the law so long as he can convince the original district court to transfer the case rather than dismiss it outright."[53]

There appears to be no dissent in the caselaw from this rule. It also applies when a case is transferred for lack of personal jurisdiction. If a plaintiff chose a court that lacks personal jurisdiction, the court may order a transfer as an alternative to dismissal. Some courts put the authority for this under 28 U.S.C. § 1404.[54] Others use 28 U.S.C. § 1406.[55] Still others use 28 U.S.C. § 1631.[56] In any event, it is settled

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49. Paul S. Bird, *Mass Tort Litigation: A Statutory Solution to the Choice of Law Impasse*, 96 YALE L.J. 1077, 1085–86 (1987) ("[C]hoice of law problems derail the equity and efficiency advantages that collective adjudication otherwise promises.").

50. 28 U.S.C. § 1406 (2012).

51. *Gerena v. Korb*, 617 F.3d 197, 204 (2d Cir. 2010).

52. *Eggleton v. Plasser & Theurer Export Von Bahnbaumaschinen Gesellschaft, MBH*, 495 F.3d 582, 588 (8th Cir. 2007).

53. *Id*. at 588–89.

54. *See* 15 WRIGHT ET AL., *supra* note 42, § 3842.

55. *See id.*

that "the holding in *Van Dusen* . . . should not apply in Section 1406(a) transfers or when the transferor court lacked personal jurisdiction."[57] The "courts agree that *Van Dusen* does not apply if the transferor court was an improper venue or lacked personal jurisdiction."[58]

II. THE LAW APPLIED AFTER TRANSFER IN FEDERAL QUESTION CASES: CURRENT CASELAW

The law applied after a transfer in a case arising under federal law is, of course, federal law. Unlike diversity cases, in which it is possible for the governing law to change from that of Pennsylvania to that of Massachusetts (as was argued would happen in *Van Dusen* if transfer were allowed),[59] in federal question cases the transferor and transferee courts are both applying federal law. The choice of law question here is thus somewhat different. Should the transferee court apply its own (or its circuit's) understanding and interpretation of federal law or should it defer to the understanding and interpretation of the transferor district court (or the circuit of the transferor court)? There is a universally accepted rule that transferee law applies in cases transferred under § 1406. For cases transferred under either § 1404 or § 1407, the most commonly encountered rule is to apply the law of the transferee court. But there is a variant strain in this caselaw, which applies transferor law either as an exception to the general rule or as a contradiction of it. Finally, while many cases do not differentiate transfers under § 1404 from those under § 1407, the better view is that they present distinct problems.

A. Transfers in Cases of Improper Venue Under 28 U.S.C. § 1406

The cases agree that in transfers under 28 U.S.C. § 1406 the law applied in the transferee court is the interpretation of federal law the transferee court would normally apply. This mirrors the result for diversity cases under § 1406.[60] When a court transfers a case under § 1406, the plaintiff has chosen a court that lacks venue, lacks personal jurisdiction, or lacks both. In such a circumstance, even in diversity

56. The Supreme Court approved the use of § 1406 to transfer cases filed in a district that lacked personal jurisdiction in *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 465–67 (1962). For a discussion of the lower court cases and the choices among these three statutes, see 15 WRIGHT ET AL., *supra* note 42, § 3842 nn.29–30.

57. 15 WRIGHT ET AL., *supra* note 42, § 3846 n.29.

58. *Id*; *see also Muldoon v. Tropitone Furniture Co.*, 1 F.3d 964, 967 (9th Cir. 1993) (stating that if a case is "transferred under §§ 1404(a) or 1406(a) to cure a lack of personal jurisdiction . . . the law of the transferee district . . . is applicable").

59. *See Van Dusen v. Barrack*, 376 U.S. 612, 626 (1964).

60. *See supra* notes 51–58 and accompanying text.

cases (where a true choice of law problem exists and *Erie* policies are in play), there is no argument that plaintiff should be able to keep the fruit of his ill-gotten venue plunder. If the case arises under federal law, a plaintiff choosing an improper venue similarly lacks any entitlement to the "law"—or the local interpretation of the law—of the district in which he originally filed suit.

There are few cases discussing the question of the law to be applied in § 1406 transfers of federal question cases, probably for the joint reasons that (1) the law is very well settled for diversity cases transferred under § 1406 that the law that would have been applied in the transferor court does not carry forward with the transfer and (2) there is an even less compelling case for applying the transferor court's "law" when the matter is a federal question. Still, one can find supporting authority for applying the transferee court's version of federal law.[61] More important, perhaps, is the total absence of any authority for applying the interpretation of federal law subsisting in the transferor court after transfer to the transferee court.

Heinrich ex rel. Heinrich v. Sweet[62] fairly directly addresses the inapplicability of *Van Dusen*'s rule of applying the transferor court's law to § 1406 federal question transfers.[63] In that case the plaintiff brought both diversity and federal question claims.[64] As to the diversity claims, the court concluded that the law (the dispute was over the applicable statute of limitations) of the transferor court carried into the transferee court after transfer because the initial court "was a proper venue . . . [and the] transfer of the case . . . should be seen as having occurred under section 1404(a) rather than section 1406(a)."[65] But as to the federal law claims, "the district court need not be concerned with the dictates of *Erie* and *Klaxon*" and "the fact that this case was transferred from the District Court of New York does not enter into the analysis."[66] Accordingly, the transferee court applied the local (i.e.,

61. *See, e.g.*, *Flynn v. Greg Anthony Constr. Co.*, 95 F. App'x 726, 739 (6th Cir. 2003) (applying the receiving court's law of personal jurisdiction in an ERISA federal question case because "the law of the transferee forum applies when a case is transferred pursuant to § 1406(a)"); *Jennings v. Entre Comput. Ctrs., Inc.*, 660 F. Supp. 712, 714 (D. Me. 1987) (stating that, in a case based on federal question jurisdiction, stating that "when a 'transfer is under section 1406(a), the transferee court should apply whatever law it would have applied had the action been properly commenced there'") (quoting 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3827 n.7 (2d ed. 1986)).

62. 49 F. Supp. 2d 27 (D. Mass. 1999).

63. *Id.* at 36.

64. *See id*. at 31. Plaintiff brought, inter alia, negligence claims and a *Bivens* action. *Id. See generally Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing what is now known as a *Bivens* claim).

65. *Heinrich*, 49 F. Supp. at 36.

66. *Id.*

transferee) statute of limitations to federal claims regardless of the basis of transfer, not the one that would have been applied by the transferor court.[67]

Ali v. Carnegie Institute of Washington[68] also holds that transferee law applies in federal question transfers under § 1406.[69] In *Ali*, the plaintiff brought patent claims under federal law in the District of Oregon.[70] The court concluded that personal jurisdiction was lacking and that venue was improper and ordered a transfer.[71] In response to an argument that a non-party was "necessary and indispensable" to the litigation and to motions to dismiss on other grounds, the court "decline[d] to rule on this issue, which is governed by regional circuit law, due to the pending transfer."[72] The arguments were "denied as moot with leave to renew before the" transferee court.[73]

B. Transfers in Cases of Initially Proper Venue—28 U.S.C. § 1404 or § 1407

The situation is more nuanced when the plaintiff initially chose a proper forum. Although suing in a district with proper jurisdiction and venue, the plaintiff may be subject to a transfer to a more convenient forum (§ 1404) or be transferred pursuant to a consolidation of multidistrict litigation (§ 1407). Both of these transfer provisions are based on concerns for convenience and judicial efficiency. Those policies were thought by Congress to be sufficient to override the plaintiff's choice of an otherwise proper venue.[74] One may lump these

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67. The court explained:

> [W]hen a federal cause of action does not have an express federal statute of limitations period, state law may still be relevant because it provides a "borrowed" limitations period for the federal action. . . . Because the Court is now addressing federal question issues, the fact that this case was transferred from the District Court of New York does not enter into the analysis. Instead, the Court simply holds that the [local] Massachusetts' statute of limitations period for general or residual personal injury actions governs the *Bivens* claim and the civil responsibility for crimes against humanity claim.

Id. at 36.

68. 967 F. Supp. 2d 1367 (D. Or. 2013), *aff'd*, 684 Fed. App'x 985 (Fed. Cir. 2017).

69. *Id*. at 1391–92.

70. *Id*. at 1371.

71. *Id*. at 1391–92.

72. *Id*. at 1393.

73. *Id*.

74. As to §1404, see *Van Dusen v. Barrack*, 376 U.S. 612, 634 n.30 (1964) (stating that § 1404 "was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper") (quoting H.R. REP. NO. 80-308, at A127 (1947)). As for § 1407, see *In re*

transfers together as "efficiency transfers." The general choice of law rule for these efficiency transfers calls for the application by the transferee court of its own understanding of federal law. Other cases support a rule which may be viewed either as an exception or a divergence. Many of the cases do not differentiate between transfers under § 1404 or § 1407. Although I will eventually argue that § 1407 transfers should be treated differently, I will initially lay out the arguments for applying transferee law regardless of the context. This Article will then examine whether transfers under § 1407 should be treated differently.

1. THE GENERAL RULE: APPLY THE LAW OF THE TRANSFEREE COURT

Most courts hold that in transfers under either § 1404 or § 1407, the version of federal law prevailing in the transferee court applies. Perhaps the leading case on the subject is *In re Korean Air Lines Disaster of September 1, 1983*.[75] After discussing that case and its reasoning, the Article will explore additional rationales offered for the application of transferee law.

a. In re Korean Air Lines Disaster of September 1, 1983*:* *Distinguishing* Van Dusen

Korean Air Lines Disaster serves as a nice illustration of the problem and lays out some of the basic arguments, and so a close examination pays out a return. It is in many ways a remarkable case. The case arose from a notorious episode that occurred near the end of the Cold War—the Soviet Union's shooting down a civilian airliner over the Sea of Japan.[76] The majority opinion was written by future Supreme Court Justice Ruth Bader Ginsburg.[77] The other Ginsburg of the Court of Appeals for the District of Columbia Circuit, Douglas Ginsburg, concurred.[78] The opinion was handed down by the D.C. Circuit on September 25, 1987.[79] Just over a month later, on October 29, Douglas Ginsburg was nominated by Ronald Reagan to sit on the

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N.Y.C. Mun. Sec. Litig., 572 F.2d 49, 51–52 (2d Cir. 1978) (holding that "the need for . . . centralized management of pretrial proceedings in multidistrict litigation" under § 1407 overrides the general venue provisions in 12 U.S.C. § 12 applicable to National Banks).

75. 829 F.2d 1171 (D.C. Cir. 1987), *aff'd sub nom. Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989).

76. *See id.* at 1172.

77. *Id.*

78. *Id.*

79. *Id.* at 1171.

Supreme Court after Robert Bork was rejected by the Senate.[80] Numerous cases had been filed against the civilian air operator, Korean Air Lines.[81] "[T]he Judicial Panel on Multidistrict Litigation transferred these [cases] to the District Court for the District of Columbia . . . pursuant to 28 U.S.C. § 1407."[82] The plaintiffs in some of the cases had originally sued in the Southern and Eastern Districts of New York.[83]

The substantive issue was the operation of the Warsaw Convention and its amendment in the Montreal Agreement.[84] Pursuant to these agreements, international air passengers were limited to a recovery of $75,000.[85] The Montreal Agreement required that airline tickets notify passengers of this limitation and specified the required font. Plaintiffs argued that they were not bound by the limitation on liability because the font used on their tickets was smaller than that required by the Montreal Agreement.[86] The Second Circuit had previously ruled that such a typographical violation voided the limitation.[87] The transferee court, the District Court for the District of Columbia, ruled to the contrary that such an error of font size did not eliminate the limitation.[88] The issue then was whether the lower court "properly adhered to its own interpretation of the Warsaw Convention/Montreal Agreement in . . . actions . . . transferred from district courts within the Second Circuit," which had a conflicting interpretation of federal law.[89]

Writing for the majority, Judge Ruth Bader Ginsburg concluded that the transferee court under § 1407 was free to apply its own understanding of federal law.[90] She advanced several rationales.[91]

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80. *See On This Day: Senate Rejects Robert Bork for the Supreme Court*, NAT'L CONST. CENT. (Oct. 23, 2017), https://constitutioncenter.org/blog/on-this-day-senate-rejects-robert-bork-for-the-supreme-court [https://perma.cc/PS5N-W25Q]. Judge Ginsburg's nomination was withdrawn a short time later. *See* Steven V. Roberts, *Ginsburg Withdraws Name as Supreme Court Nominee, Citing Marijuana 'Clamor'*, N.Y. TIMES, Nov. 8, 1987, https://www.nytimes.com/1987/11/08/us/ginsburg-withdraws-name-as-supreme-court-nominee-citing-marijuana-clamor.html?pagewanted=all [https://perma.cc/Y228-WBX2].

81. *See Korean Air Lines Disaster*, 829 F.2d at 1172.

82. *Id.*

83. *See id.* at 1173.

84. *Id.* at 1172.

85. *Id.*

86. *See id.*

87. *See In re Air Crash Disaster at Warsaw, Pol., On March 14, 1980*, 705 F.2d 85, 90 (2d Cir. 1983), *abrogated by Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989) (holding that 10-point type is "necessary to provide sufficient notice").

88. *See Korean Air Lines Disaster*, 829 F.2d at 1172.

89. *Id.* at 1173.

90. *See id.* at 1176.

First, the chief caselaw support for applying transferor law is *Van Dusen v. Barrack*. Indeed, the court framed the issue as "whether the *Van Dusen* rule—that the law applicable in the transferor forum attends the transfer—should apply to transferred federal claims."[92] But, the court observed, *Van Dusen* was a diversity case and was driven by policies unique to the *Erie*-diversity context.[93] In diversity cases, there is no federal choice of law; instead, federal courts must apply state choice of law principles.[94] This generates a "venue privilege" for the plaintiff, entitling him to lock in the law that the federal court initially would have applied.[95] "'[Absent] federal choice-of-law principles that favor the application of the law of one state over the law of another,' the diversity plaintiff's opening move or 'venue privilege' ordinarily fills the gap—it 'prevails by default.'"[96] In short, *Van Dusen* was characterized as merely a necessary appendage of diversity and of the *Klaxon*[97] rule that a federal court in diversity is to apply local choice of law rules.

One may make several observations about this argument. First, although it is true under *Klaxon* that in diversity federal courts must apply state choice of law rules rather than inventing their own, that by itself does not, contrary to the court's reasoning, lead to a venue privilege *for the plaintiff*. One must still decide *which* state's choice of law rules to use. One could as easily craft a "venue privilege" rule that favors the transferring defendant by applying the state choice of law rules of the state to which the case is transferred. The "privilege" would be held, in effect, by whichever party won the venue battle—either the plaintiff if his initial choice is upheld and there is no transfer or the defendant in cases in which he succeeds in obtaining a transfer.

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91. Judge Ginsburg's opinion relied heavily on what was at the time the most influential scholarship on the issue. *See id.* at 1174 (citing Richard L. Marcus, *Conflict Among Circuits and Transfers Within the Federal Judicial System,* 93 YALE L.J. 677 (1984)).

92. *Id.*

93. *Id.* at 1173.

94. *See id.* at 1175. *See generally Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (holding federal courts in diversity apply the law that would be applied by a state court of the state in which it sits).

95. *See Van Dusen v. Barrack*, 376 U.S. 612, 633–34 (1964) ("[Retaining the law of the transferor allows] plaintiffs to retain whatever advantages may flow from the state laws of the forum they have initially selected. There is nothing, however, in the language or policy of § 1404(a) to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue.").

96. *See Korean Air Lines Disaster*, 829 F.2d at 1175 (quoting Marcus, *supra* note 91, at 700–01).

97. 313 U.S. 487 (1941); *see also supra* note 15.

The is no logical "default" to the law applicable in the initially chosen forum.

Second, there is a better argument under *Van Dusen* for using in diversity cases the law that would have been applied by the court chosen by the plaintiff, but *Korean Air Lines Disaster* did not articulate it, much less attempt to explain its inapplicability. In diversity cases, *Erie* seeks uniformity between federal and state adjudications.[98] And it is a particular kind of uniformity: the result in federal court should be the same as would be reached by the courts of the state in which the federal court sits. This is an "intrastate" uniformity as opposed to a uniformity that crosses state lines and is nationally uniform.[99] Thus, *Van Dusen* characterized *Erie* as "establish[ing] 'the principle of uniformity *within* a state,' . . . and declaring that federal courts in diversity of citizenship cases are to apply the laws 'of the states in which they sit.'"[100] *Van Dusen* based its decision that transferor law should apply in part upon that type of uniformity. A case filed in state court in, say, Pennsylvania, would be subject to the law that Pennsylvania choice of law rules indicate.[101] If the case is instead filed in diversity in a federal court in Pennsylvania or is removed from a Pennsylvania state court to a federal court, the result in the federal court should be the same as it would have been in the Pennsylvania state court.[102] And, finally, if a diversity case is filed in or removed to a federal court in Pennsylvania and then *transferred* under § 1404 to Massachusetts, the result there—in the Massachusetts federal court—should not differ from the result obtained in Pennsylvania state court. If the party obtaining the transfer could take advantage of the law indicated by Massachusetts choice of law, then he would receive a result in diversity not available in state court (in Pennsylvania, where the case began) since under Pennsylvania state procedure, no provision

98. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 75, 78 (1938).

99. *See* Jeffrey L. Rensberger, *Erie and Preemption: Killing One Bird with Two Stones*, 90 IND. L.J. 1591, 1633 (2015) ("*Swift* valued national or interstate uniformity; *Erie* rejected that in favor of intrastate uniformity. . . . Thus the federal court must achieve uniformity not nationally but with a state court in the state in which it sits . . . .").

100. *Van Dusen*, 376 U.S. 612, 637 (1964) (quoting *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (emphasis added); *Griffin v. McCoach*, 313 U.S. 498, 503 (1941)).

101. *See Klaxon*, 313 U.S. at, 496 (holding federal court in diversity applies the choice of law rules of the state in which it sits).

102. *See Van Dusen*, 376 U.S. at 638 (stating that, under *Erie*, "for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.") (quoting *Guar. Tr. Co. v. York*, 326 U.S. 99, 109 (1945)).

for transfer exits[103] and Massachusetts choice of law rules would never have come into play. The state case would have been filed, adjudicated, and decided in and under Pennsylvania law (including Pennsylvania choice of law) while the federal diversity case could, if transferor law did not carry along, be decided under the law indicated by Massachusetts choice of law. To avoid this disparate outcome, it is necessary in diversity cases to have the transferee court apply the law that would have been applied by the transferor court.

The concern for localized uniformity disappears in the context of transfers of federal question cases, such as *Korean Air Lines Disaster*. Since the case is decided under federal law, we do not require the federal court to mirror the courts of the state in which it sits. In the diversity context, *Erie* directs us to attend to local (intrastate) uniformity and we expect federal courts to reach different results from other federal courts, since each must follow local state law.[104] But these concerns are reversed in the federal question context. There is a unitary federal law, unitary in theory even if temporarily unclear and divided in the face of a circuit split. But circuit splits are the exception, not the

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103. This statement should be qualified. There is no state-to-state transfer mechanism, but the common law doctrine of *forum non conveniens* does allow a state court to decline to exercise jurisdiction on the ground that the courts of another state (or country) are more convenient. *See Cray v. Gen. Motors Corp.*, 207 N.W.2d 393, 398 (Mich. 1973) ("[S]tates do not have the advantage given to the federal courts whereby such cases can be transferred to other states as an administrative matter . . . [but] the doctrine of *forum non conveniens* should apply in Michigan."). One can find many examples of state-to-state *forum non conveniens* dismissals. *See, e.g.*, *Berbig v. Sears Roebuck & Co.*, 882 N.E.2d 601, 606 (Ill. App. Ct. 2007) (dismissing under *forum non conveniens* in favor of a Minnesota forum); *Ellis v. Outboard Marine Corp.*, 478 N.E.2d 14, 17 (Ill. App. Ct. 1985) (reversing trial court for denying *forum non conveniens* dismissal in favor of Ohio); *Jemaa v. MacGregor Athletic Prods.*, 390 N.W.2d 180, 183 (Mich. App. 1986) (affirming *forum non conveniens* dismissal in favor of an Ohio forum); *Carwell v. Copeland*, 631 S.W.2d 669, 671 (Mo. Ct. App. 1982) (affirming dismissal in favor of a Kansas forum).

As to the applicable law, in the context of *forum non conveniens* the opposite of the *Van Dusen* rule obtains: The assumption is that the court in which the case is refiled after dismissal may well apply its own law. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981). As the Court explained in *Piper Aircraft*, it is erroneous to assume that:

> plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum. The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.

Id. The Court explicitly distinguished *forum non conveniens* dismissals from those under § 1404. *See id.* at 253 (finding the "reasoning employed in *Van Dusen v. Barrack* is simply inapplicable to dismissals on grounds of *forum non conveniens*").

104. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 79 (1938) ("In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the state.").

norm, and we expect that in the vast majority of cases a federal court applying federal law in Pennsylvania will reach the same result as a federal court doing so in Massachusetts. And so there is no comparable need for a federal court receiving a transfer to mimic the federal court that sent the case there.

The third observation about the *Korean Air Lines Disaster* argument that *Van Dusen* is limited to the *Erie* context is that this is merely the negative case against applying *Van Dusen*. That is, it only refutes the applicability of an argument based on *Van Dusen*, but offers no independent reason for the result that transferee law should apply. It addresses why we give a "venue privilege" to diversity but not federal question plaintiffs, but it does not consider whether there might be arguments other than *Van Dusen* for applying the law of the transferor court. Other cases addressing the issue, however, do take up the broader question of whether transferor or transferee law should apply in federal question cases. It is to these cases that we now turn.

b. Other Rationales for Applying Transferee Law

Other cases that apply the law of the transferee in transfers under § 1404 or § 1407 rely on several other grounds. Prominent among them is the idea that in federal question cases a principle of federal court competence to decide federal law replaces *Van Dusen*'s diversity-based venue privilege. Under *Van Dusen*, in diversity cases the law of the transferor court continues to apply in the transferee court, which serves to lock in the plaintiff's "venue privilege."[105] But cases refusing to apply *Van Dusen* in the federal question context disregard the idea of a venue privilege; some go so far as to denigrate it.

Venue privilege is portrayed in these cases as a necessary evil of diversity jurisdiction. Under *Erie*, a federal court must apply *some* state law and that implies a choice of one law over another. But in a federal question case the "federal courts comprise a single system applying a single body of law."[106] Thus federal law is "unitary."[107] It is somewhat ironic that this analysis results in a transferee court applying a different rule of law than the transferor court in a federal question case—where

105. *See Van Dusen*, 376 U.S. at 634–35.

106. *See H.L. Green Co. v. MacMahon*, 312 F.2d 650, 652 (2d Cir. 1962). This statement from *MacMahon* has been relied on in many cases. *See, e.g.*, *Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir. 1993); *FMC Corp. v. EPA*, 557 F. Supp. 2d 105, 113 (D.D.C. 2008); *In re Ski Train Fire in Kaprun, Austria on November 11, 2000*, 343 F. Supp. 2d 208, 217 (S.D.N.Y. 2004).

107. *See Menowitz*, 991 F.2d at 40 ("[F]ederal law (unlike state law) is supposed to be unitary. Thus, the rule of *Van Dusen* does not apply by analogy where a case is transferred under § 1407 to a federal court that has a different construction of relevant federal law than the federal court in which the action was filed.").

the law is unitary—while in diversity cases, where the law is varied the transferee court applies the same law as the transferor court. But despite the irony, the argument for applying transferee law does indeed follow from the observation that federal law is unitary. There is simply no choice of law in federal question cases, in contrast to diversity cases where the applicable law might conceivably change from one federal district to another. In diversity cases, there is a sense of "vestedness."[108] The plaintiff has an entitlement to the favorable state law that would be applied by the state court in which he has chosen to sue. That entitlement cannot, or at least should not, be stripped by the "accident of diversity."[109] But there is no comparable sense of entitlement in federal question cases, it is argued, since it was never a case of choosing between the law of one sovereign over another.

Some courts in federal question transfer cases go so far as to denigrate the attempt to capture forum law, in contrast to its celebration as a virtuous venue privilege in diversity cases. Thus, in *Korean Air Lines Disaster*, the court argued that "there is no compelling reason to allow plaintiff to capture the most favorable interpretation of that law simply and solely by virtue of his or her right to choose the place to open the fray."[110] Forum shopping is thus seen as producing only unmerited advantages: "[N]o litigant has a right to have the interpretation of one federal court rather than that of another determine his case."[111] Indeed, forum shopping in this context is seen as a vice, not a virtue: "We have no sympathy with shopping around for forums."[112]

In place of the plaintiff's venue privilege as a basis for determining the applicable rule of law is a principle of *competence*. "[F]ederal courts have not only the power but the duty to decide [issues of federal law] correctly."[113] Rather than face a choice of law problem and

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108. *See* Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1245 (1987) ("[I]f the defining function of courts is to enforce legal rights that exist, in some sense, apart from their enforcement, any court committed to that view cannot hold that the analysis of substantive legal rights depends on . . . the forum in which an adjudication happens to be brought.").

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

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

111. *See MacMahon*, 312 F.2d at 652. Many cases cite *MacMahon* for this proposition. *See, e.g.*, *Menowitz*, 991 F.2d at 40; *FMC Corp.*, 557 F. Supp. 2d at 113; *In re Ski Train Fire in Kaprun*, 343 F. Supp. 2d at 217 n.8.

112. *Clayton v. Warlick*, 232 F.2d 699, 706 (4th Cir. 1956).

113. *Korean Air Lines Disaster*, 829 F.2d at 1175 (quoting Marcus, *supra* note 91, at 702); *see also* Marcus, *supra* note 91, at 679 ("*Van Dusen* . . . stressed the venue privilege because there is no federal principle by which to select the state law that should govern diversity cases. Where federal claims are transferred, however, the

resorting to a first-in-time venue privilege, federal courts are simply to decide, as they normally do, the correct content of federal law: "[U]ntil the Supreme Court speaks, the federal circuit courts are under duties to arrive at their own determinations of the merits of federal questions presented to them."[114] And all federal courts are "presumed to be as able and as well qualified to handle litigation as those in another."[115] Paving over circuit splits is the job of the Supreme Court, not the lower federal courts. The latter's job is to apply the normal rules of circuit-level stare decisis. Splits are "a matter for consideration by the Supreme Court on application for certiorari, not for consideration by a district judge on application for transfer."[116]

In sum, because federal law is unitary, not variegated, the principle of venue privilege is inapplicable. No litigant has a right to a particular interpretation of federal law, only to the correct interpretation of it. And so, since each court is competent for itself to decide the matter, the transferee is not only free to apply its own understanding of the federal law issue, it is duty bound to do so.[117]

The foregoing argument—competence to decide federal law and the irrelevance of venue privilege in federal question cases—is based on the inapplicability of certain *Erie*-based policies underlying *Van Dusen*. Less frequently stressed in the cases is the inapplicability of another *Erie* policy. Vertical federalism—the proper relation between the federal government and those of the states—is an important strand of *Erie*. The Court in *Erie* overruled *Swift v. Tyson*[118] in part to uphold the constitutional scheme that "recognizes and preserves the autonomy and

principle that the transferee federal court is competent to decide federal issues correctly indicates that the transferee's interpretation should apply.").

114. *See Menowitz*, 991 F.2d at 40; *see also Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 90 (2d Cir. 2006), *aff'd by an equally divided court sub nom. Warner-Lambert Co. v. Kent*, 552 U.S. 440 (2008) (stating that federal courts have "no obligation to defer to a foreign circuit's views on federal law: as to issues of federal law, we are permitted—indeed, required—to reach our own conclusions").

115. *Clayton*, 232 F.2d at 706 (quoting *Carbide & Carbon Chems. Corp. v. U.S. Indus. Chems.*, 140 F.2d 47, 49 (4th Cir. 1944)).

116. *Clayton*, 232 F.2d at 706; *see also MacMahon*, 312 F.2d at 652 (quoting *Clayton*, 232 F.2d at 706).

117. Other cases applying transferee law on federal questions include *Lanfear v. Home Depot, Inc.*, 536 F.3d 1217 (11th Cir. 2008) (§ 1404 transfer); *Desiano*, 467 F.3d at 87 (§ 1407 transfer); *In re Cardizem CD Antitrust Litigation*, 332 F.3d 896, 912 (6th Cir. 2003) (§ 1407 transfer); *McMasters v. United States*, 260 F.3d 814, 819–20 (7th Cir. 2001) (§ 1404 transfer); *Murphy v. FDIC*, 208 F.3d 959 (11th Cir. 2000) (§ 1404 transfer); *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1171 n.4 (8th Cir. 1998) (§ 1407 transfer); *Newton v. Thomason*, 22 F.3d 1455, 1460 (9th Cir. 1994) (§ 1404 transfer); *Menowitz*, 991 F.2d at 40 (§ 1407 transfer); *MacMahon*, 312 F.2d at 652 (§ 1404 transfer); *Clayton*, 232 F.2d at 706 (§ 1404 transfer).

118. *Swift v. Tyson*, 41 U.S. 1, 18–19 (1842), *overruled by Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

independence of the states" from federal intrusion.[119] State substantive law thus applies in diversity cases in order to protect this state autonomy.[120] But in the context of federal question cases, these concerns of protecting state autonomy are not involved. Under *Erie*, "federal courts . . . seek to ensure that the result would be the same in either [state or federal] court" in order to "protect[] the integrity of state policy."[121] But "[t]hese principles . . . do not apply to transfered cases involving federal claims" because "state policy considerations are not involved."[122]

2. DIVERGENCE FROM THE GENERAL RULE: EXCEPTION OR DISAGREEMENT

Not all transferred federal question cases apply the version of federal law obtaining in the transferor court. Some of these cases understand themselves as creating an exception for cases in which federal law is non-uniform. Others appear to be adopting a different rule under which as a general matter the law of the transferee court applies.

a. The Exception: Non-Uniform Federal Law

On occasion, Congress creates federal law that is not geographically uniform, as for example when it borrows a state statute of limitations for actions based on a federal cause of action. A number of courts hold that in this situation a transferee court under § 1404 should apply transferor law—i.e., the state statute of limitations that would have been applied in the transferor court.

Perhaps the leading case is *Eckstein v. Balcor Film Investors*.[123] The plaintiffs in that case brought a securities fraud action under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b–5.[124] Federal circuits had been split on the proper statute of limitations for actions under § 10(b). Some borrowed state law; some used by analogy the statute of limitations for actions under § 13 of the 1933 Securities Act.[125] The Supreme Court then held in *Lampf, Pleva, Lipkind, Prupis*

119. *See Erie R.R. Co.*, 304 U.S. at 78 (1938) (quoting *Baltimore & Ohio R.R. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

120. *See* Richard D. Freer, Erie*'s Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1091 (1989) (stating that *Erie* is "the gatekeeper of state law autonomy").

121. *Isaac v. Life Inv'rs Ins. Co. of Am.*, 749 F. Supp. 855, 863 (E.D. Tenn. 1990).

122. *Id.*

123. 8 F.3d 1121, 1127 (7th Cir. 1993).

124. *Id.* at 1123.

125. *See id.* at 1124.

& Petigrow v. Gilbertson[126] that the appropriate (and shorter)[127] limitations period was the one found in § 9 of the 1934 Act.[128] In response to *Lampf*, Congress enacted a new statute of limitations, § 27A of the 1934 Act, applicable to actions filed before the decision in *Lampf*. It provided that the period of limitations was that "provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991," the day before the *Lampf* decision.[129] The net effect was to place litigants who had filed before *Lampf* under the limitations period that was "applicable" in the "jurisdiction"—i.e., (presumably) the circuit—at the time they filed the suit. The lower court in *Eckstein* had before it two lawsuits, one originally filed in Wisconsin, within the Seventh Circuit, and another filed originally in California, in the Ninth Circuit, but transferred to the Wisconsin court under § 1407.[130] The Wisconsin action was time-barred under Seventh Circuit law at the time it was filed and so would be untimely under the newly enacted statute of limitations. But the transferred California action would have been timely where originally filed (although not in the Seventh Circuit where it had been transferred to). The District Court applied Seventh Circuit law to all the plaintiffs and dismissed the transferred plaintiffs' claims.[131] On appeal the question was whether a transferee court in a federal question case should apply transferee law or the law of the transferor court. The Seventh Circuit reversed the statute of limitations dismissal of the California action.

The court agreed with "*Korean Air Lines* that a transferee court normally should use its own best judgment about the meaning of federal law when evaluating a federal claim,"[132] but held that the new § 27A, which refers to the law in effect on a certain date "in the jurisdiction," requires a different result. The statute "codifies [the] fractured nature of federal law."[133] Since the federal law in question is "geographically

126. 501 U.S. 350 (1991).

127. *See Eckstein*, 8 F.3d at 1124 (stating that after *Lampf*, the statute of limitations "advantage of using § 10(b) disappeared").

128. *Lampf*, 501 U.S. at 360.

129. *See* 15 U.S.C. § 78aa-1 (2012) ("The limitation period for any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991 [the day before the *Lampf* decision], shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991."); *see also Eckstein*, 8 F.3d at 1124.

130. *See Eckstein*, 8 F.3d at 1124. After the § 1407 transfer, the transferee district court in Wisconsin executed a § 1404 transfer to itself, a practice common before being disallowed by the Supreme Court in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28 (1998).

131. *See Eckstein*, 8 F.3d at 1124.

132. *See id.* at 1126.

133. *See id.*

non-uniform"[134] the *Korean Air Lines Disaster* argument based on unitary federal law was inapposite. Federal courts are *not* in this context competent to decide what the content of federal law should be (at least not nationally). Instead, *Van Dusen* should "apply whenever different federal courts *properly* use different rules."[135] So, the controlling rationale was *Van Dusen*'s observation that "that a transfer under § 1404(a) accomplishes 'but a change of courtrooms.'"[136] Thus, according to *Eckstein*, *Van Dusen* is not a rule merely about diversity (although it was decided in the context of a diversity case); it is instead a case about the stability of the law upon a transfer when the law applied in the federal courts is intentionally and properly non-uniform. The law applied in federal courts in diversity is non-uniform (due to *Erie* and *Klaxon*), but diversity is not the only occasion for the law applied to be non-unitary, as *Eckstein* illustrates.

Other circuits have addressed the § 10(b) statute of limitations issue raised in *Eckstein*. A prior case, *Menowitz v. Brown*,[137] likewise dealt with cases originating in its circuit (the Second), which were time-barred under pre-*Lampf* law, and another which was originally filed in Florida but transferred under § 1407. The Florida plaintiffs' action was timely under the law of the Eleventh Circuit.[138] The Second Circuit in *Menowitz* rejected *Van Dusen* in the context of federal question cases, charactering federal law even here as being "unitary."[139] On the other hand, in *Olcott v. Delaware Flood Co.*,[140] the Tenth Circuit followed *Eckstein*. In *Olcott*, the plaintiff's case was transferred pursuant to § 1404.[141] The Tenth Circuit characterized § 27A's call for the application of the statute of limitations "in the jurisdiction" as reinstat[ing] the pre-*Lampf* circuit disharmony."[142] Congress directed that "'the geographical location of the events giving rise to the litigation,' should explicitly be taken into consideration."[143] In this situation, it "makes no sense for the applicable law to change simply as a result of a motion to transfer."[144]

The statute of limitations under § 27A is not unique in creating non-uniform federal law. The principle established in *Eckstein* would

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134. *See id.* at 1127.
135. *Id.* (emphasis added).
136. *Id.* (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964)).
137. 991 F.2d 36, 40 (2d Cir. 1993).
138. *See id.* at 39–40.
139. *See id.* at 40.
140. 76 F.3d 1538 (10th Cir. 1996).
141. *See id.* at 1542.
142. *Id.* at 1546.
143. *Id.* (quoting *Eckstein v. Balcor Film Inv'rs*, 8 F.3d 1121, 1126 (7th Cir. 1993)).
144. *See Olcott*, 76 F.3d at 1546.

have application elsewhere. *Eckstein* itself noted some of these: the statute of limitations for actions under 42 U.S.C. § 1983 is borrowed from local state law and hence is non-uniform.[145] The law of federal governmental contractual liens is federal but is borrowed from state law.[146] And the Ninth Circuit has applied the *Eckstein* rule to another statute of limitations problem. There is no statute of limitations in the qui tam provisions of the False Claims Act,[147] and so federal courts borrow state statute of limitations.[148] In *Hooper v. Lockheed Martin Corp.*,[149] a case filed timely under the local state statute of limitations was transferred under § 1404 to a district in a state with a shorter statute.[150] The Ninth Circuit held that:

> in a case arising under federal question jurisdiction, when a federal statute directs federal courts to borrow the most closely analogous state statute of limitations, a transferee district court must apply the state statute of limitations that the transferor district court would have applied had the case not been transferred . . . pursuant to 28 U.S.C. § 1404(a).[151]

The court reasoned that *Van Dusen*'s direction that transfers are to merely change the courtroom is applicable outside the diversity context and that applying transferee law "works a real injustice, because a motion to transfer a properly filed suit can become 'tantamount to a motion to dismiss.'"[152] Similarly, *Eckstein*'s rule of applying the statute of limitations of the transferor court has been applied to borrowed state statute of limitations for actions under § 301 of the Labor Management Relations Act[153] and ERISA.[154]

One could easily imagine other applications of the *Eckstein* principle to areas where federal law is not unitary: under Federal Rule of Evidence 501, "in a civil case, state law governs privilege regarding

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145. *See Eckstein*, 8 F.3d at 1127; 42 U.S.C. §§ 1983, 1988 (2012). *See generally Wilson v. Garcia*, 471 U.S. 261 (1985).

146. *See Eckstein*, 8 F.3d at 1127; *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 718 (1979).

147. *See* 31 U.S.C. § 3730 (2012).

148. *See Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 422 (2005) (stating that the "most closely analogous state statute of limitations . . . applies" to such actions).

149. 688 F.3d 1037 (9th Cir. 2012).

150. *See id.* at 1045.

151. *Id.* at 1046.

152. *Id.* at 1046 (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 630 (1964)).

153. *See In re United Mine Workers of Am. Emp. Ben. Plans Litig.*, 854 F. Supp. 914, 919 (D.D.C. 1994).

154. *See id.*

a claim or defense for which state law supplies the rule of decision."[155] Various federal procedural rules allow or require reference to local state law, making federal law nonuniform. Thus, Federal Rule of Civil Procedure 4 allows service to be made by "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made."[156] And while Federal Rule 15 does create a federal rule for relation back of amended pleadings, relation back will also allowed when "the law that provides the applicable statute of limitations allows relation back."[157] In a diversity case, this would refer to state law.

b. Divergence: Cases Applying Transferor Law as a Rule, Not as an Exception

Eckstein and *Olcott* are clear that they are stating an exception to and not a disagreement with the general rule that a transferee court in a federal question case should apply its own understanding of federal law. The court in *Eckstein* began its analysis with the observation that the "norm is that each court of appeals considers [questions of federal law] independently and . . . work[s] out the problem for itself rather than to guess how the circuit comprising the original district court would reason."[158] Likewise, *Olcott* noted that it was finding a "narrow"[159] exception and that "[n]othing in our decision should be read to imply *Van Dusen* and *Ferens* have any broad applicability to federal question jurisdiction cases generally."[160] But there are cases that apply transferor law and state this as the rule, not as an exception.

The first case espousing a rule that in transfers of federal question cases transferor law applies was in fact the work of the Judicial Panel on Multidistrict Litigation ("JPML"), the court that administers transfers under § 1407. In deciding whether to grant a multidistrict transfer in an antitrust case, the JPML in *In re Plumbing Fixtures Litigation* considered an argument that "the transferee court . . . [has] interpreted the requirements of Section 4 of the Clayton Act . . . less favorably to antitrust plaintiffs than to courts of the transferor district and circuit" and that "transfer [would] result in the dismissal of its claims . . . ."[161] The JPML rejected the premise of the argument, which was that transferee law would apply:

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155. *See* FED. R. EVID. 501.

156. *See* FED. R. CIV. P. 4.

157. *See* FED. R. CIV. P. 15.

158. *See Eckstein v. Balcor Film Inv'rs*, 8 F.3d 1121, 1126 (7th Cir. 1993).

159. *See Olcott v. Del. Flood Co.*, 76 F.3d 1538, 1546 (10th Cir. 1996).

160. *See id.* at 1546–47.

161. *In re Plumbing Fixtures Litig.*, 342 F. Supp. 756, 757–58 (J.P.M.L. 1972).

> [T]he sole basis for opposing transfer is . . . that the transferee court will not apply the laws of the circuit in which its action was filed . . . . In our view these fears are groundless. It is clear that the substantive law of the transferor forum will apply after transfer, [under] *Van Dusen v. Barrack* . . . .[162]

By itself, *Plumbing Fixtures* is scant authority for applying transferor law in § 1407 federal question cases. The court did not analyze whether *Van Dusen* applies to a federal question cases but instead assumed its application. Moreover, the JPML subsequently walked away from this language. In *In re General Motors Class E Stock Buyout Securities Litigation*,[163] the JPML said that the language from *Plumbing Fixtures* is "withdrawn,"[164] characterizing it as "dictum,"[165] and finding its reliance on *Van Dusen* in a federal question case to be "questionable."[166] This questioning of *Plumbing Fixtures* is justified, since the JPML in that case did not appear to give any serious consideration to an admittedly thorny issue. Other courts have declined to follow *Plumbing Fixtures*.[167]

But there are other cases that support the use of transferor law in the transferee court. In *Sargent v. Genesco, Inc.*,[168] a securities fraud case was filed in the Southern District of New York and transferred under § 1404 to the Middle District of Florida.[169] At this time (pre-*Lampf*), most federal courts borrowed the local state statute of limitations for § 10(b) actions. The action was timely under New York's borrowed statute of limitations and thus would not have been dismissed had the case stayed in the Middle District of New York. The court held that the transfer changed nothing:

> If there had been no transfer to Florida, the six year statute of limitations held applicable to New York forum 10b-5 suits would have applied [and the claims] would not be barred. . . . *Van Dusen v. Barrack* holds that when a case is transferred under Section 1404(a), such a transfer should be merely a

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162. *Id.* at 758.

163. 696 F. Supp. 1546 (J.P.M.L. 1988).

164. *See id.* at 1547.

165. *See id.*

166. *See id.*

167. *See In re Sulfuric Acid Antitrust Litig.*, 743 F. Supp. 2d 827, 853 (N.D. Ill. 2010) (stating that after "*Korean Air* . . . courts seem to have abandoned this position"); *In re Integrated Res. Real Est. Ltd. P'ships Sec. Litig.*, 815 F. Supp. 620, 636 (S.D.N.Y. 1993).

168. 492 F.2d 750 (5th Cir. 1974)

169. *See id.* at 758.

> "change of courtrooms," and the transferee forum must apply the state law which would have been applied by the transferor court. Under this principle, the case brought New York's six year statute to Florida.[170]

Notably, *Sargent* does not state that the law of the transferor court applies as an exception, but as the rule—it is a straightforward application of *Van Dusen*.[171]

Cases applying the law of the transferor can be found on a variety of other issues. Transferee courts have applied the materiality standards of the transferor circuit in a securities fraud case.[172] It has been applied on the question whether the defense of *in pari delicto* precludes the recipient of a purported insider tip from recovering against the "tipper" when the tip turns out to be false.[173] It has been applied to liability issues[174] under the Racketeer Influenced and Corrupt Organizations Act.[175]

Transferee courts have also applied the law of the transferor court to matters which could fairly be characterized as procedural. One might wonder whether a transferee court should apply its own interpretation of procedural rules even if substantive matters should be decided under transferor law. We will return to this question later.[176] But for present I will merely note that there are such cases. The interpretation of a statute that places venue where the defendant transacts business has been held to be properly decided under the law of the transferor

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170. *See id*. To the same effect as *Sargent* is *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402 (2d Cir. 1975). *Berry Petroleum* also dealt with the borrowed state statute of limitations in a § 10(b) action. After a transfer under § 1407, the court held that "the appropriate state law is the law of Texas (the *forum state where this suit was initiated*)." *Id.* at 406 (emphasis added).

171. For a case following *Sargent* and applying transferor law on the statute of limitations question, see *In re Rospatch Sec. Litig.*, 760 F. Supp. 1239, 1257 (W.D. Mich. 1991) ([T]his court will apply the law that the Florida district court, where these lawsuits originated, would have applied to the statute of limitations.").

172. *See Grimes v. Navigant Consulting, Inc.*, 185 F. Supp. 2d 906, 912 n.6 (N.D. Ill. 2002) ("In a transferred case, I apply the law of the transferor forum . . . if it differs from the law of the transferee forum . . . . *Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1137 (7th Cir. 1993) (Forum shopping is to be discouraged in transfer cases).").

173. *In re Haven Indus., Inc.*, 462 F. Supp. 172, 179 (S.D.N.Y. 1978). It should be noted that this case relied chiefly on the discredited *Plumbing Fixtures* opinion. *See id*; *see also supra* notes 160–166 and accompanying text.

174. *See In re Dow Co. Sarabond Prods. Liab. Litig.*, 666 F. Supp. 1466, 1468 (D. Colo. 1987) ("The transferee court is obliged to apply the law of the federal circuit which encompasses the transferor federal district court.").

175. *See* 18 U.S.C. § 1961 (2012).

176. *See infra* notes 353–354 and accompanying text.

court.[177] And the Fifth Circuit has held that a transferee court in the Seventh Circuit erroneously failed to give binding precedential effect to Fifth Circuit precedent that Mexico was an adequate alternative forum for purposes of forum *non conveniens*.[178] Finally, two cases have applied[179] or suggested[180] that they would apply the law of the transferor court in determining certification of a class action.

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177. *See Phila. Hous. Auth. v. Am. Radiator & Stand. Sanitary Corp.*, 309 F. Supp. 1053, 1055 (E.D. Pa. 1969) ("[T]he applicable law to be applied in Section 1407 transfers is the law of the transferor district. . . . With this in mind it is the opinion of this Court that District of Columbia law would hold that mere attendance at a trade association meeting in the District of Columbia does not constitute transacting business there.").

178. *See In re Ford Motor Co.*, 591 F.3d 406, 413 (5th Cir. 2009). The case began in the Western District of Texas, but was transferred to the Southern District of Indiana under § 1407. *See id.* at 408. The MDL court in the Southern District of Indiana denied a motion to dismiss for *forum non conveniens* on the ground that Mexico was an inadequate alternative forum. *See id.* at 409. After the case was remanded to the Western District of Texas, the defendant renewed the *forum non conveniens* motion. After it was denied, the defendant appealed to the Fifth Circuit. The court reversed, noting that its prior determinations in other cases that Mexico is an adequate alternative forum is "binding precedent of this court" until "this court en banc or the Supreme Court decides otherwise." *Id.* at 413. It then addressed the choice of law question and held that the transferee court in the Southern District of Indiana should have applied the law of the transferor circuit:

> Though the MDL court was not sitting in the Fifth Circuit, plaintiffs' cases all originated in the district courts of this circuit. Merely moving this case from the Western District of Texas to the Southern District of Indiana does not allow plaintiffs to circumvent our earlier binding precedent that Mexico is an available forum. Such a perverse result would allow a case to proceed improperly just because it happened to be before an MDL panel.

Id. at 413.

179. *See In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 241 F.R.D. 435, 440 (S.D.N.Y. 2007). There, the court stated:

> [C]lass certification requirements inherently enmeshed with considerations of the trial but under *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, the authority of the transferee court in multi-district proceedings ends once the pretrial proceedings are completed. *Lexecon* requires this Court to return each case to its original district for trial after the pretrial phase has been completed. It would be neither just nor efficient to apply the law of this Circuit in considering class certification, and then force the transferor court to try a class action that it might never have certified.

Id.

180. *See In re Wal-Mart Wage & Hour Emp. Practices Litig.*, No. 206-CV-00225-PMP-PAL, 2008 WL 3179315, at *5 (D. Nev. June 20, 2008). The court, which is under the Ninth Circuit's jurisdiction, had received § 1407 transferred cases from the Third, Eighth, and Ninth Circuits. Although the court found that "the law relating to class certification is fairly consistent within all three circuits," it suggested it would look to the transferor's law to "the extent the law of the Third and Eighth Circuits diverge" in part "[b]ecause these cases ultimately will be remanded for trial to the transferor districts and because class certification may be reviewed at any time before judgment." *Id.*

III. EVALUATION OF THE GENERAL RULE THAT A TRANSFEREE COURT APPLIES ITS OWN LAW IN FEDERAL QUESTION CASES

From the caselaw set out above, it appears there are three choices. It may be that upon examination the rule of applying transferee law (the *Korean Air Lines Disaster* rule) is absolutely correct. It is also possible that, as *Eckstein* suggests, *Korean Air Lines Disaster* states the general rule correctly but fails to account for an exception where federal law is not uniform. Third, it may be the case that *Korean Air Lines Disaster* is entirely wrong and that transferor law should apply in all cases, whether federal law is uniform or variegated. As to the last option, *Eckstein* characterized its rule as an exception to, not a contradiction of, the general rule,[181] but regardless of how a court characterizes its ruling, its rationale may not be capable of containment as an exception. The purported "exception," in other words, may actually be based on reasoning that fatally undermines the general rule.[182]

In addition, it is possible that the answer to the question of using transferor or transferee law depends upon the context. There is, in fact, a much stronger argument for using transferor law in § 1407 transfers than in those under § 1404. I shall first evaluate the rule of *Korean Air Lines Disaster* in the context of § 1404 and then examine it under § 1407.

A. The Law that Should be Applied in Federal Question Cases After a § 1404 Transfer

In evaluating whether to apply transferor or transferee law in a § 1404 case, one must begin with the fundamental question of why would a court ever apply a rule of decision[183] other than its own. Why do we have, in other words, choice of law at all? The directive to use transferee law is another, less direct, way of directing that the forum apply its own rule of decision. One would expect that a court would normally apply its own law.[184] But we know from choice of law

181. *See supra* note 158 and accompanying text.

182. *See* Mark A. Hill, *Opening the Door for Bias: The Problem of Applying Transferee Forum Law in Multidistrict Litigation*, 85 NOTRE DAME L. REV. 341, 353 (2009) (noting "a persistent strain of lower court holdings that view" *Korean Air Lines Disaster* and *Eckstein* "as somewhat incompatible").

183. I purposely use the term "rule of decision" in this discussion rather than "law" or "rule of law" to account for the fact that both transferee and transferor courts are applying the same "law." They have, however, different rules of decision.

184. *See* BRAINERD CURRIE, *Notes on Methods and Objectives in the Conflict of Laws*, *in* SELECTED ESSAYS ON THE CONFLICT OF LAWS 177, 183 (1963) ("Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.").

practice that sometimes courts do not. What are the policies that pull a court away from using its own view of the law and how do they apply to federal question cases transferred under § 1404?

First, it is helpful to explicate the norm of a court using its own rule of decision. At the merely mechanical level, rules of precedent force the application of forum law in many cases. District courts within a circuit are bound by circuit precedent,[185] and this is perforce their "forum law." Circuit courts in turn are bound by Supreme Court precedent.[186] Individual panels of a circuit are bound by prior circuit decisions.[187] But circuit courts are not bound by the decisions of other circuits,[188] and district courts are bound only by the decisions of their own circuit, not others.[189] Such are the basics of stare decisis.

But beyond stare decisis, if a court is faced with two conflicting rules of decision, we should expect, indeed we would hope, that it would apply the rule which it thinks reflects the correct understanding of the law. "In a domestic case, a court faced by conflicting rules properly chooses the better one. It is charged with developing its own . . . law, and any other choice would be perverse."[190] So if the transferee district court has no authority from its own circuit dictating the result and it is free to choose between what it believes the law should be and

185. *See Levin v. Madigan*, 41 F. Supp. 3d 701, 704 (N.D. Ill. 2014), *aff'd*, No. 14-2244, 2014 WL 6736999 (7th Cir. Sept. 30, 2014) ("In a hierarchical judicial system, it is for the court of appeals, not a lower trial court, to overrule a prior holding of the appellate court.").

186. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

187. *See Karns v. Shanahan*, 879 F.3d 504, 514 (3d Cir. 2018) ("We are therefore generally obligated to follow our precedent absent en banc reconsideration."); *Oracle USA, Inc. v. Rimini St., Inc.*, 879 F.3d 948, 966 (9th Cir. 2018) ("We are bound by our precedent unless the theory or reasoning of the decision is 'clearly irreconcilable' with a higher intervening authority . . . .") (quoting *Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc)).

188. *See, e.g.*, *Commodores Ent. Corp. v. McClary*, 879 F.3d 1114, 1133 (11th Cir. 2018) ("[W]e are not bound by the determinations of another circuit court . . . .").

189. *See Newsome v. Young Supply Co.*, 835 F. Supp. 2d 406, 414 (E.D. Mich. 2011) ("[T]his Court is not bound by the Tenth Circuit's decision . . . . To the contrary, the Court is required to 'independently decide [its] own cases . . . .'") (quoting *Nixon v. Kent County*, 76 F.3d 1381, 1388 (6th Cir. 1996) (en banc)).

190. *See* David F. Cavers, *The Value of Principled Preferences*, 49 TEX. L. REV. 211, 215 (1971); *see also* Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731, 755 (1990) ("[T]here is every reason for the forum to start with the presumption that conflicts cases, like domestic cases, should be decided in a way that promotes both justice and wise social policy, as the judges at the forum understand those values.").

what the transferor court (either at the district or circuit level) has decided it is, should we not expect the district court to choose the *right* answer, the *correct* version of the law?[191] It would be odd for it to select the worst of the two possible versions of the law when it is in fact free to choose. This is the principle of "competence" that the court relied upon in *Korean Air Lines Disaster*: federal courts are "competent to decide [issues of federal law]. [They] have not only the power but the duty to decide . . . correctly. There is no room in the federal system of review for rote acceptance of the decision of a court outside the chain of direct review."[192]

So there is appropriately a default preference for the rule of decision of the forum. But we do have choice of law. In the usual choice of law context a state court will sometimes apply the law of another state or nation and a federal court may apply the law of another nation.[193] There must be some fairly strong reason to justify a departure from local law, which is facially the better law of the two (else the court would not have adopted it). What are these reasons?

In broad strokes, there are two clusters of reasons for applying another law.[194] First, there are private interests. The parties to a case suffer negative effects when the law is indeterminate. One's rights should not change as the forum changes—especially if the competing fora are within a single sovereign court system.[195] Additionally, the

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191. In the choice of law realm, such arguments find voice in the "better law" method for solving choice of law problems. *See* Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1588 (1966) (stating that courts should "prefer rules of law which make good socio-economic sense for the time when the court speaks, whether they be its own or another state's rules"). *See generally Milkovich v. Saari*, 203 N.W.2d 408, 413 (Minn. 1973) (adopting the better law approach to choice of law). *But see* Mark Thomson, *Method or Madness?: The Leflar Approach to Choice of Law As Practiced in Five States*, 66 RUTGERS L. REV. 81, 127 (2013) (finding the better law factor is in practice "largely insignificant in Minnesota . . . [being used] almost exclusively as a tie-breaker").

192. *See In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171, 1175 (D.C. Cir. 1987), *aff'd sub nom. Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989) (quoting Marcus, *supra* note 91, at 702).

193. *See, e.g.*, *Lauritzen v. Larsen*, 345 U.S. 571, 592 (1953) (applying Danish law).

194. *See generally* Jeffrey L. Rensberger, *Jurisdiction, Choice of Law, and the Multistate Attorney*, 36 S. TEX. L. REV. 799, 803 (1995) ("First, a set of private concerns focuses on the effects such a situation has on individuals who find themselves caught between the wills of the two jurisdictions. Second, a political concern arises, which examines the allocation of law-making power assigned to the two jurisdictions.").

195. *See* Dane, *supra* note 108 ("[I]f the defining function of courts is to enforce legal rights that exist, in some sense, apart from their enforcement, any court committed to that view cannot hold that the analysis of substantive legal rights depends on the manner in which they are sought to be enforced or, more specifically, on the forum in which an adjudication happens to be brought."); Michael H. Gottesman,

parties' expectations may be upset by applying a rule of decision that was not within their contemplation at the time they acted or of the underlying transaction.[196] More generally, without the benefit of predictable choice of law, parties would be frustrated in their ability to predict legal outcomes and engage in planning. Thus, the Restatement (Second) of Conflict of Laws includes among the key choice of law principles the "the protection of justified expectations [and] certainty, predictability and uniformity of result."[197]

The second set of concerns that lie behind choice of law centers around the interests of the sovereigns involved. Choice of law "performs an essential function in our federal system, determining which sovereign authority will regulate conduct implicating several states' interests."[198] When a dispute touches more than one lawmaker—a U.S. state or a nation—one must decide, somehow, which one will be allowed to regulate it. In the language of interest analysis, a forum should apply its law only if it has an interest in the matter at hand,[199] which is usually found in a connection to one or more of the parties,[200] but may also exist when an event is local to the forum.[201] Or as the

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Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes, 80 GEO. L.J. 1, 13 (1991) ("[I]t is always disturbing when the law is indeterminate, but especially so when the legal regime that will judge the propriety of conduct will be the product of events (such as forum selection) that occur *ex post*.").

196. On the importance of expectations, see Willis L.M. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 329–30 (1972).

> To foster public confidence and respect, it is important that the law reach results appealing to common sense, and a person is likely to think that a result makes sense if it is one he would have anticipated had he thought about the question beforehand. . . . It is desirable, in other words, that a person's rights and duties should be determined under a law whose application he had reason to expect.

Id.

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

198. *See* Genevieve G. York-Erwin, *The Choice-of-Law Problem(s) in the Class Action Context*, 84 N.Y.U. L. REV. 1793, 1796 (2009); *see also* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 250 (1992) ("Choice-of-law questions are about the allocation of authority among the several states.").

199. *See* CURRIE, *supra* note 184 (stating that in deciding a choice of law issue, a court should "inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest").

200. *See* Patrick J. Borchers, *Foreword*, 49 CREIGHTON L. REV. 493 (2016) (stating that the "nub of [interest analysis] was that courts should reckon the interests of the party (usually meaning that a state had an interest in protecting its domiciliaries) and apply law accordingly").

201. *See* Robert A. Sedler, *Choice of Law in Conflicts Torts Cases: A Third Restatement or Rules of Choice of Law?*, 75 IND. L.J. 615, 626 (2000) ("[T]he state where the act or omission occurs has a real interest in applying its law in order to

Supreme Court has held, the Constitution allows a state to apply its own law if it has a "significant contact or significant aggregation of contacts, creating state interests."[202]

How do these two concerns play out in the context of transfers of federal question cases? The second choice of law goal, allocating authority between sovereigns, is easily dismissed. In federal question case there is no need to perform such an allocation since there is but one sovereign, the United States, involved.[203] Both transferor courts and transferee courts are applying the same law, albeit differing versions of it. So, in the federal question transfer context, we are not using choice of law to choose lawmakers, only to choose a rule of decision. This—choosing a rule of decision—is a judicial function similar to the task a court performs in a non-transfer case when there are competing precedents from which to choose. Imagine (in a case with no transfer involved) the Third Circuit ruling on a federal law issue as to which the First and Second Circuits have issued divided authority. We would expect the Third Circuit to exercise its "competence"[204] to decide the content of federal law on its own, not to adopt the rule of decision of a sister circuit. In the § 1404 federal question context, there is no reason to depart from this model.

Assessing the applicability of first choice of law function—protecting parties from uncertainty and avoiding the upsetting of expectations, is trickier. One might dismiss the concerns of party expectations and uncertainty in this context because the engine driving the problem is that federal law is unsettled. One could argue, that is, that parties cannot have legitimate expectations deserving of protection when the content of federal law is unsettled. The ability to plan in advance is not diminished by applying transferee law because the parties already lacked the ability to plan. But the argument for ignoring expectations and certainty in federal question cases is undermined by the fact that in the usual choice of law context (state-to-state or international conflicts) there is an identical uncertainty in the law but we nonetheless still do worry about uncertainty in those cases.[205] If the

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implement the conduct-regulating policy reflected in its law."); *see also* Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 954 (1994) ("But at other times, Currie explicitly recognized the importance of non-domiciliary interests.").

202. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981) (plurality opinion)).

203. *See supra* notes 15–16 and accompanying text.

204. *See supra* notes 113–116 and accompanying text.

205. A long time ago a young law professor wrote on treating domestic splits of authority as a choice of law problem. Some of the issues pursued in this paragraph are discussed in more detail in Jeffrey L. Rensberger, *Domestic Splits of Authority and Interstate Choice of Law*, 29 GONZ. L. REV. 521, 559–60 (1994).

unsettled nature of federal law prevents parties from having expectations worth protecting, then why is that not also true in intersovereign conflicts? The state law of Michigan and Illinois may differ and the interpretation of federal law by the Sixth and the Seventh Circuit may also differ. As to the former, our choice of law apparatus seeks to promote party expectations even though one could say that given the unsettled nature of state law the parties have no legitimate expectations. The only distinction between the two situations is that one involves a difference in the law of two lawmakers and the other involves only the indeterminate content of the law of a single lawmaker. Perhaps the answer to this underinclusiveness of choice of law is that it is desirable to seek uniform solutions to legal issues that touch two lawmakers (the traditional choice of law problem) because such cases will persist so long as we have commerce between persons in different states or nations and sufficiently broad rules of jurisdiction to allow for the possibility of litigation in either. But as to unsettled federal law, we need not use choice of law to solve the problem, since unification of the law through mutual coalescence of the circuits or through Supreme Court decision or through legislation is possible.[206] But in any event the distinction between unsettled intersovereign and unsettled intrasovereign law when it comes to the concerns of uncertainty and a lack of predictability is far from clear.

An additional problem with dismissing the use of transferor law in § 1404 federal question cases is the breadth of the rationales underlying *Van Dusen*.[207] *Van Dusen* was of course a diversity case, but the Court's reasoning depended not only on *Erie* principles but on the legislative history of § 1404. Transfer under § 1404 is available in cases where the "plaintiff has properly exercised his venue privilege,"[208] that is, in cases in which the plaintiff has sued in a proper forum. Congress was reacting to concerns of overly broad venue.[209] It considered and rejected narrowing the venue choices available to plaintiffs.[210] Section 1404 was an alternative, keeping the broad venue

206. *See* Mary Garvey Algero, *A Step in the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions*, 70 TENN. L. REV. 605, 616 (2003). In arguing that circuit court precedent should be given stare decisis effect in other circuits, Algero points out the debilitating effect on parties of circuit splits. "This lack of coherence and uniformity can be especially harmful to individuals, businesses, the government and its agencies as more and more activities and subsequent litigation relating to such activities occur across circuit lines." *Id.*

207. *See Van Dusen v. Barrack*, 376 U.S. 612, 635 (1964) (stating that § 1404 "was not designed to narrow the plaintiff's venue privilege").

208. *Id.* at 634.

209. *See id.* at 635 ("Congress was particularly aware of the need for provisions to mitigate abuses stemming from broad federal venue provisions.").

210. *See id.*

choices generally but allowing transfer to a more convenient forum on a case-by-case basis. Section 1404 was "not designed to narrow the plaintiff's venue privilege or to defeat the state-law advantages that might accrue from the exercise of this venue privilege but rather the provision was simply to counteract the inconveniences that flowed from the venue statutes by permitting transfer to a convenient federal court."[211] It was a "federal judicial housekeeping measure . . . intended . . . simply to authorize a change of courtrooms."[212] Thus, the legislative intent underlying § 1404 was to relocate a case from one district to another without changing the underlying rights of the parties. The "legislative history of § 1404(a) certainly does not justify the rather startling conclusion that one might 'get a change of law as a bonus for a change of venue.'"[213] There is no reason to limit the concerns expressed in this legislative history to diversity cases; it is equally applicable to federal question cases.[214]

The Supreme Court reiterated the idea of a plaintiff's venue privilege in it its 2013 decision in *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*.[215] In *Atlantic Marine* the Court held that a contractual forum selection clause was enforceable under § 1404 rather than § 1406.[216] A forum selection clause does not render another forum "wrong" for purposes of § 1406.[217] But it does render the contractually chosen clause more convenient, by the parties' stipulation, for purposes of § 1404.[218] The Court reaffirmed the existence of a venue privilege "[b]ecause plaintiffs are ordinarily allowed to select whatever forum they consider most advantageous."[219] But in the context of a forum selection clause, the "plaintiff has effectively exercised its 'venue privilege' before a dispute arises."[220] Thus forum selection clauses are enforced not as an exception to a plaintiff's venue privilege but as a fulfillment of it.

In *Ferens v. John Deere Co.*,[221] the Court (in holding that *Van Dusen* applies to transfers initiated by the plaintiff as well as to those

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211. *Id*.

212. *Id*. at 636–37.

213. *Id*. at 635–36 (quoting *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 522 (1953) (Jackson, J. dissenting)).

214. *See Eckstein v. Balcor Film Inv'rs*, 8 F.3d 1121, 1127 (7th Cir. 1993) ("Although [*Van Dusen* and *Ferens*] arose under the diversity jurisdiction, their references to *Erie* . . . do not imply a ruling limited to state law.").

215. 571 U.S. 49 (2013).

216. *See id.* at 52.

217. *See id.* at 55.

218. *See id.* at 63–64.

219. *See id.*

220. *Id.* at 63.

221. 494 U.S. 516 (1990).

initiated by the defendant),[222] characterized *Van Dusen* as resting on "three independent reasons:"

> First, § 1404(a) should not deprive parties of state-law advantages that exist absent diversity jurisdiction. Second, § 1404(a) should not create or multiply opportunities for forum shopping. Third, the decision to transfer venue under § 1404(a) should turn on considerations of convenience and the interest of justice rather than on the possible prejudice resulting from a change of law.[223]

While the first reason identified by *Ferens* is limited to the diversity context,[224] the second two reasons are clearly independent of any *Erie*-based policies.

The Court's second rationale, that § 1404 should not "create or multiply opportunities for forum shopping," is fully applicable to federal question cases. A defendant seeking a transfer under § 1404 in a federal question case may be only seeking a more convenient forum, but it is inconceivable that forum shopping (shopping for better law)[225] is not also a factor when circuit law is divided.[226] If the defendant

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222. *See id.* at 519.

223. *Id.* at 523.

224. *See id*. at 524 ("The policy that § 1404(a) should not deprive parties of state-law advantages, although perhaps discernible in the legislative history, has its real foundation in *Erie*.").

225. Most instances of forum shopping are about obtaining favorable substantive law. *See* Kermit Roosevelt III, *Choice of Law in Federal Courts: From* Erie *and* Klaxon *to CAFA and* Shady Grove, 106 NW. U. L. REV. 1, 6 (2012) ("[F]orum shopping is law shopping . . . .").

226. *See* David Charles Levy, *The Myth of A Uniform Federal Law and the Reality of CERCLA: Arguments For Application of the Law of the Transferor Court Following a Section 1404(a) Transfer of Venue*, 6 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 95, 95 (1999) ("Because of [the rule that a transferee court applies its own law], the most important strategy for a litigant may be to get a case transferred from a venue with unfavorable precedent to a more friendly arena.").

For an example of a strategic use of transfer to obtain favorable transferee law, see *In re Pan Am. Corp.*, 950 F.2d 839 (2d Cir. 1991). In that case, which involved the Lockerbie, Scotland bombing of a Pan Am flight, the Warsaw Convention might or might not have preempted state law claims. *See id.* at 841–42. A federal district court in Florida ruled state law claims survived preemption and remanded a removed case to state court. *Id.* at 842. The plaintiffs filed a second federal court action in the Florida federal district court brought under the Warsaw Convention in order to toll the statute of limitations in the event that the state law actions were later ruled to be preempted. *Id.* The JPML transferred the placeholder federal actions to the Eastern District of New York. *Id.*

Due to financial pressure, Pan Am filed a voluntary petition for reorganization under Chapter 11 in the United States Bankruptcy Court for the Southern District of New York. *See id.* Pan Am then moved under the bankruptcy code to transfer the *state actions* from Florida to the Southern District of New York. *See id; see also* 28 U.S.C.

knows that the interpretation of the law of Circuit *X* is favorable to its position, it would have a strong incentive to seek a transfer there under § 1404 if transferee law is going to apply. And it is impossible to believe that the defendant would seek a § 1404 transfer to a circuit with *less* favorable law merely for trial convenience.[227] The rule of applying transferee versions of federal law after a § 1404 transfer surely adds to the opportunities for forum shopping. Of course the plaintiff may well also have engaged in forum shopping in filing the suit where he did. But when he has sued in a district that has proper venue and personal jurisdiction, he has violated no norms. That is, he is entitled to shop under the law of venue and he is merely exercising a "venue privilege" that exists in a world that has divided rules of decision. Allowing a change of the content of federal law as a "bonus"[228] for a successful § 1404 transfer does not eliminate a plaintiff's forum shopping, it merely introduces a second round of forum shopping:

> An opportunity for forum shopping exists whenever a party has a choice of forums that will apply different laws. The *Van Dusen* policy against forum shopping simply requires [one] to interpret § 1404(a) in a way that does not create an

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§ 157(b)(5). Pan Am planned to then seek a transfer to the Eastern District of New York where the JPML had transferred earlier cases. Before any transfer decision was made, the Second Circuit ruled in another case that state law claims were indeed preempted by the Warsaw Convention. *See In re Air Disaster at Lockerbie*, 928 F.2d 1267 (2d Cir. 1991). The Second Circuit upheld that the transfer to the bankruptcy proceedings despite admitting that "Pan Am's persistent attempts to transfer these cases to Chief Judge Platt was no doubt influenced by his holding that punitive damages were not recoverable under the Warsaw Convention." *In re Pan Am. Corp.*, 950 F.2d at 843 n.5. Moreover, it held that on the federal law issue of preemption, the transferee court should apply its own understanding of federal law and not apply the finding of non-preemption previously made by the district court in Florida in the earlier case, rejecting the "argument that the district court should accept or at least defer to precedent in the Southern District of Florida (precedent that is contrary to our decision in *Lockerbie*)." *Id.* at 847. The court "agree[d] that a 'transferee court [should] be free to decide a federal claim in the manner it views as correct without deferring to the interpretation of the transferor circuit." *Id.* (quoting *In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171, 1174 (D.C. Cir. 1987)).

227. *See Ferens*, 494 U.S. at 526 (1990) (discussing the same issue on the context of plaintiff motions under § 1404).

> Some plaintiffs would prefer to litigate in an inconvenient forum with favorable law than to litigate in a convenient forum with unfavorable law or not to litigate at all. The [plaintiffs], no doubt, would have abided by their initial choice of the District Court in Mississippi had they known that the District Court in Pennsylvania would dismiss their action.

Id.

228. *Van Dusen v. Barrack*, 376 U.S. 612, 635–36 (quoting *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 522 (1953) (Jackson, J. dissenting)).

> opportunity for obtaining a more favorable law by selecting a forum through a transfer of venue.[229]

The third rationale, that transfer "should turn on considerations of convenience rather than on the possibility of prejudice resulting from a change in the applicable law,"[230] is also applicable in federal question cases. The prospect of a change in the federal rule of decision after a § 1404 transfer by the application of transferee law will surely discourage the court considering the transfer from granting it.[231] *Van Dusen* sought to keep decisions on transfer unentangled from choice of law.[232] Consider the question from the standpoint of the potential transferor court. It has its own view of the correct federal rule of decision. Or it has binding precedent from its circuit that instructs the district court as to the correct interpretation of federal law. Convenience factors in the case are compelling. Litigation in the transferee district would be much more convenient. But the transferee district would get the "wrong" result on the merits! The result would be a very efficient piece of litigation with an utterly wrong result, a classic case of the operation being a success despite the death of the patient. Courts have accepted the argument for using transferee law that transferee courts are competent to decide federal law and have a duty to do so.[233] If this is true of the transferee court, why is it not also true of the transferor court? If after transfer the deviant (from the standpoint of the transferor court) interpretation of the transferee will apply why on earth grant a transfer? Surely a mere interest in procedural efficiency cannot outweigh the importance of reaching a correct result of the merits.

The court in *Eckstein*, in choosing to apply transferor law, limited its rule to situations in which federal law was "non-uniform."[234] But it was not just any non-uniform presentation of federal law that triggers, according to *Eckstein*, the application of transferor law. *Eckstein* interpreted *Van Dusen* to "apply whenever different federal courts *properly* use different rules."[235] Transferor law is to be used only when

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229. *Ferens*, 494 U.S. at 527.

230. *Id.* at 528.

231. For an example of a court denying transfer because of a prejudicial change in the applicable legal rule following transfer, see *Ayers v. Arabian Am. Oil Co.*, 571 F. Supp. 707 (S.D.N.Y. 1983). The court denied a motion to transfer under § 1404 to a district "where plaintiffs might be time barred from prosecuting the claim" by a shorter statute of limitations. *See id.* at 710.

232. *See Van Dusen*, 376 U.S. at 636 ("[C]ourts would at least be reluctant to grant transfers, despite considerations of convenience, if to do so might conceivably prejudice the claim of a plaintiff who had initially selected a permissible forum.").

233. *See supra* notes 113–116 and accompanying text.

234. *Eckstein v. Balcor Film Inv'rs*, 8 F.3d 1121, 1127 (7th Cir. 1993).

235. *Id.* (emphasis added).

"the law of the United States is geographically non-uniform."[236] This would appear to limit the *Eckstein* rule to cases in which federal law borrows local statutes of limitations or other state law. But it is unclear that *Eckstein's* reasoning can be so contained. If Congress expressly directs that different districts are to use different law, then transferor law applies, but not, *Eckstein* says, if we have a mere circuit split. But is there really a difference between the two situations? In cases where a circuit split exists on the proper interpretation of a federal statute, Congress could solve the split by legislation. But it does not. Is choosing to suffer the split any different from affirmatively enacting a split? Congress has sometimes held to have legislated by inaction. In *Ankenbrandt v. Richards*,[237] the Supreme Court upheld the longstanding rule that there is a domestic relations exception to the grant of diversity jurisdiction.[238] There is no textual basis for this exclusion in § 1332 but the Court held that Congress had by doing nothing—by its silence[239]—"'adopt[ed] that interpretation' when it reenacted the diversity statute."[240] As the Court said in another context, Congress's "silence . . . and its inaction are . . . consistent with a desire to leave the problem fluid."[241] Or consider *Semtek International Inc. v. Lockheed Martin Corp*.[242] The question in *Semtek* was what law governs the claim preclusive effect of a judgment rendered in a federal diversity case.[243] The Court held that the matter was not governed by Federal Rule 41(b).[244] Instead, the matter is governed by federal common law.[245] But the Court held that the content of federal law is to be borrowed from state law, "the law that would be applied by state courts in the State in which the federal diversity court sits."[246] *Semtek* has geographically nonuniform federal law, a case in which *Eckstein* would require the application of transferor law. But this nonuniform law is not the result of explicit congressional mandate. In fact, it is the consequence of the failure of a congressionally authorized directive—Federal Rule 41(b)—to address the matter. Nonuniformity arises in *Semtek* from mere

236. *Id.*

237. 504 U.S. 689 (1992).

238. *Id.* at 700.

239. *See* Emily J. Sack, *The Domestic Relations Exception, Domestic Violence, and Equal Access to Federal Courts*, 84 WASH. U. L. REV. 1441, 1482 (2006) ("*Ankenbrandt* that turns congressional silence into intent.").

240. *Ankenbrandt*, 504 U.S. at 700–01 (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)).

241. *Girouard v. United States*, 328 U.S. 61, 70 (1946).

242. 531 U.S. 497 (2001).

243. *See id.* at 499.

244. *See id.* at 506.

245. *See id.* at 508.

246. *See id.*

inaction. Likewise, the Supreme Court can resolve a circuit split, but it may deny certiorari and let the split abide for a time.[247] Splits among the circuits are not natural disasters, hurricanes or earthquakes disrupting our otherwise orderly law. Splits are not alien to our legal system, they are a part of it.[248] Courts, we are told have the competence and duty to decide cases correctly. This prerogative to go a circuit's own way inevitably leads to splits. In what sense then are federal courts not "properly us[ing] different rules" in cases of circuit splits?

Although I find the question to be closer than it at first appears, I end up agreeing with the use of transferee law in § 1404 cases. The irreducible question is whether a party has a protectible "venue privilege" in federal question cases. In enacting venue statutes, I doubt that Congress intended to entitle parties to adjudication under a local version of federal law. In diversity cases, venue privilege is embedded in our federal system. Litigants should not lose in diversity cases whatever advantages they would have obtained in state court. That is the teaching of *Erie* and *Klaxon*. But venue privileges do not in the federal question context exist a priori. There is no federalism compulsion in this context, no rights vested or inchoate to have one's affairs decided under the law of a particular circuit. And there is no need to allocate lawmaking authority among multiple lawmakers. One is left only with the private party concerns. And as to these, whatever venue privilege might exist in federal question cases is granted by our legal system by voluntary design. And so we are free to choose. The bare existence of § 1404 undermines the idea of a venue privilege. It is hard to find that a plaintiff has a "right" to have his case adjudicated in

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247. *See Avis Rent A Car Sys., Inc. v. Aguilar*, 529 U.S. 1138, 1143 (2000) (Thomas, J., dissenting from denial of certiorari) ("My colleagues are perhaps dissuaded from granting certiorari by the paucity of lower court decisions addressing the First Amendment implications of workplace harassment law . . . ."); Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment,* 65 VAND. L. REV. 1137, 1155 (2012) (noting circuit splits that have persisted "for years, with eight splits dating back to the 1990s, and one to the 1980s"); Ruth Bader Ginsburg, *Workways of the Supreme Court*, 25 T. JEFFERSON L. REV. 517, 517 (2003) ("For the most part, the Supreme Court will consider for review only cases presenting what we call deep splits—questions on which other courts . . . have strongly disagreed.").

248. *See In re Dow Co. Sarabond Prods. Liab. Litig.*, 666 F. Supp. 1466, 1470 (D. Colo. 1987).

> [Courts] must recognize the reality of variation within the federal court system. . . . Although I perceive a great deal of sense in applying the law of a single forum to all § 1407 issues (whether state or federal) so that the advantages of multidistrict litigation may be pursued to their logical conclusions, a change in the law lies beyond the purview of my authority. I must accept the system as it currently operates, however diffidently it serves the stated objective.

Id.

Circuit X (where the general venue statute[249] would authorize suit), along with whatever procedural and substantive advantages inhere in that forum, when another statute, § 1404, authorizes transfer of the case elsewhere. Venue under the federal statues is insufficiently fixed to grant a privilege to have the law of the transferor court tag along. This calculus is indeed different in diversity cases, where the privilege protected is that which would have existed in state court had there been no diversity jurisdiction. Moreover, there are costs to a court applying some law other than its own. In addition to the court deviating from what it perceives to be the correct interpretation of the law, there is the inconvenience and dislocation of finding and researching another court's law. While these costs, particularly the cost of researching "foreign" federal law, may not be great, there is an insufficient need to offset even this modest weight. Party expectations are not high and there is absolutely no need to respect the lawmaking authority of another sovereign.

But the *Eckstein* exception for nonuniform federal law is also correct. In this context, there is no single, unitary, correct understanding of federal law. The duty to decide a case correctly therefore falls away. And since federal law is designed to be nonuniform, there is a greater sense of venue privilege for the plaintiff. The statute of limitations context, which is where *Eckstein* arose, provides a good illustration. The plaintiff has filed a case in a district with proper venue. And he has filed it in a timely manner under the statute of limitations that Congress has made applicable. Transferring a case for merely trial convenience to another district only to have it dismissed on statute of limitations grounds once there makes no sense. One could avoid that result by denying the transfer, but then we are stuck with inconvenient litigation. Given those choices, the most sensible solution is to transfer the case to serve convenience but to carry along the longer statute of limitations. This is essentially the reasoning of *Ferens*, which allowed transfer to a convenient forum while carrying along a longer statute of limitations.[250] And this reasoning applies generally to all cases based on designedly nonuniform federal law. The plaintiff should not lose his potentially meritorious case due to a convenience transfer, and we need not suffer inconvenient litigation when a transfer to a convenient forum is possible.

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249. *See* 28 U.S.C. § 1391 (2012).

250. *See Ferens v. John Deere Co.*, 494 U.S. 516, 525 (1990) (stating that "it [is] not the purpose" of § 1404 "to protect a party's ability to use inconvenience as a shield to discourage or hinder litigation otherwise proper").

B. The Special Case of § 1407: The Argument for Using Transferor Law

Whatever the result for transfers under § 1404, transferee courts should apply transferor law in cases transferred under § 1407. Applying transferee law is unfair to the plaintiff. It ignores the scheme of § 1407, which provides for the case to be remanded to the transferor district following pretrial proceedings. It also places the transferor court in an untenable position when the case is remanded back to it.

1. THE PECULIAR CHARACTER OF § 1407 TRANSFERS AND VENUE PRIVILEGE

Section 1407 provides for transfers of cases for "coordinated or consolidated pretrial proceedings" when "civil actions involving one or more common questions of fact are pending in different districts."[251] Its purpose is procedural convenience, to promote "the convenience of parties and witnesses."[252] While § 1404 looks to the "interest of justice" as well as the parochial concerns of the "parties and witnesses,"[253] § 1407 is inherently "collectivist."[254] Section 1407 seeks to promote the efficiency of the entire judicial system including the adjudication of other similar cases. Transfers are to be granted to "promote the just and efficient conduct" of "civil actions involving one or more common questions of fact,"[255] referring to the other pending cases. Commentators have observed that the JPML has come to value aggregate efficiency for related cases over the concerns of individual convenience.[256] The "remedial aim" of § 1407 "is to eliminate the potential for conflicting contemporaneous pretrial rulings [in] related civil actions."[257] Thus, judges overseeing multidistrict cases look for

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251. *See* § 1407(a).

252. *See id.*

253. *See* § 1404.

254. *See* Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 109–10 (2015).

255. *See* § 1407(a).

256. *See* Hill, *supra* note 182, at 350 n.64 (noting the criticism "that [the JPML] focuses almost exclusively on the efficiency of the proposed centralization to the detriment of the concerns of justice and convenience to the parties"); Benjamin W. Larson, Comment, Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*: Respecting the Plaintiff's Choice of Forum*, 74 NOTRE DAME L. REV. 1337, 1344 (1999) ("[R]ather than requiring that all the statutory criteria be established, the JPML has largely exceeded the discretion given to it by Congress and has placed efficiency as the paramount objective to be achieved.").

257. *See In re Plumbing Fixture Cases*, 298 F. Supp. 484, 491–92 (J.P.M.L. 1968).

lead counsel who have "the personality and character to play well in the sandbox," being able to "work cooperatively with others for the greater good of the entire class or MDL."[258]

In addition to the needs of the parties, transfer under § 1407 seeks "to eliminate duplication in discovery, avoid conflicting rulings and schedules, reduce litigation cost, and save the time and effort of the parties, the attorneys, the witnesses, *and the courts*."[259] And so the potential inconvenience to the individual parties is balanced against the greater efficiencies that will be obtained in litigating common issues: "While there may be some inconveniences and additional expenses caused by the transfer of this action . . . we believe that they will be greatly offset by the overall savings from and convenience of including this action in the coordinated or consolidated pretrial proceedings."[260] The JPML "has deleted [the convenience] requirement from its standards, and subsequently has rejected all motions to fight transfer that have been based on the convenience requirement."[261] Thus, § 1407 "advances judicial efficiency, but at the cost of partially compromising the right of litigants to individualized adjudication of their claims."[262] It is the "apogee of the judicial-management principle, in that party autonomy is subsumed to the convenience of all of the parties and of the judicial system as a whole."[263]

This makes transfers under § 1407 different from those under § 1404. In the latter, while the plaintiff has sued in a proper district under the venue statutes, there is another district which is preferable in terms of the convenience to the parties in adjudicating the particular case. Thus while a plaintiff does not normally[264] desire a transfer under §

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258. *See* Stanwood R. Duval, Jr., *Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases*, 74 LA. L. REV. 391, 392 (2014).

259. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.131 (2004) (emphasis added).

260. *See In re Sugar Indus. Antitrust Litig. (E. Coast)*, 471 F. Supp. 1089, 1094 (J.P.M.L. 1979). *See also In re Cygnus Telecomm. Tech., LLC, Pat. Litig.*, 177 F. Supp. 2d 1375, 1376 (J.P.M.L. 2001) (granting transfer to effectuate "an overall savings of cost and a minimum of inconvenience to all concerned").

261. *See* Richard A. Chesley & Kathleen Woods Kolodgy, *Mass Exposure Torts: An Efficient Solution to a Complex Problem*, 54 U. CIN. L. REV. 467, 519 (1985).

262. *See* Carter G. Phillips et al., *Rescuing Multidistrict Litigation from the Altar of Expediency*, 1997 B.Y.U. L. REV. 821, 823 (1997). *See also* Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 140 (2015) ("MDL plaintiffs in no sense meaningfully participate in, much less control, their day in court.").

263. *See* Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 177 (2000).

264. Normally the plaintiff has filed suit in the forum in which he wishes to litigate—else he would have filed the case in another district. The exception occurs

1404, he still may be seen as an involuntary beneficiary of it, given that it will be granted only upon a showing of greater convenience in the transferee forum.[265] Section 1404 should be understood as itself a venue statute that makes an exception to the more general venue statutes. Those latter statutes (principally 28 U.S.C. § 1391)[266] ostensibly authorize venue in the forum chosen by the plaintiff, but on the facts of the particular case, § 1404 overrides this choice. The basic venue statutes "work for convenience in the generality of cases" but need moderation to account for "the special circumstances of particular cases when the rigid venue rules are inappropriate."[267] Section 1404 was enacted to "allow for cases where the ordinary rules are found to work a great hardship."[268]

That § 1404 is primarily concerned with the parties' convenience and looks only secondarily to concerns of systemic judicial efficiency is made clear by *Atlantic Marine*. The Court established in that case that § 1404 is the proper basis for transferring venue pursuant to a forum selection clause[269] but also made clear the role of party convenience in § 1404 transfers. The existence of the forum selection clause decisively establishes the superior convenience to the parties of the selected forum.[270] The only remaining interests to consider are the "public-interest factors"—things such as judicial efficiency—but, the Court said, because these "factors will rarely defeat a transfer motion, the practical result is that forum-selection clauses should control except in unusual cases."[271] Thus, under § 1404 the private interests of the parties outweigh considerations of judicial efficiency "except in unusual cases." Later cases underscore this point. When some but not all parties in litigation have a forum selection clause, to uphold transfer as *Atlantic Marine* directs may require severance, transferring only a part of the case and creating duplicative litigation. The concerns of creating

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when the plaintiff sues in an inconvenient forum to take advantage of a long statute of limitations and then seeks a transfer to a more convenient forum. *Cf. Ferens v. John Deere Co.*, 494 U.S. 516, 523–27 (1990).

265. *See* 15 WRIGHT ET AL., *supra* note 42, § 3848 ("[A] motion to transfer under Section 1404(a) should not be granted lightly. After all, by definition, these are cases in which the plaintiff's choice of venue is proper under the applicable venue provisions.").

266. *See* 28 U.S.C. § 1391 (2012).

267. *See Hoffman v. Blaski*, 363 U.S. 335, 367 (1960).

268. *See id.* at 368.

269. *See Atl. Marine Constr. Co. v. U.S. Dist. Court. for W. Dist. of Tex.*, 571 U.S. 49, 59–60 (2013).

270. *See id.* at 64 ("[A] court evaluating a defendant's § 1404(a) motion to transfer based on a forum-selection clause should not consider arguments about the parties' private interests. When parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient.").

271. *Id.*

judicial inefficiencies such as this would be a factor in denying a transfer under public interest factors under § 1404, but lower federal courts have in fact ordered a severance and transfer. For example in *In re Rolls Royce Corp.*,[272] the plaintiff sued three defendants, only one of which had a forum selection clause in its contract with the plaintiff.[273] Since the other defendants were not subject to jurisdiction in the selected forum, transfer of the entire case was impossible.[274] This situation presented a stark choice between party convenience (transfer the case against the one defendant to the selected forum) and judicial efficiency (keep the claims against all defendants in one action). The court granted mandamus, reversing the district court for refusing to sever and transfer the case.[275] Thus, as *Atlantic Marine* directed, the "public-interest factors . . . will rarely defeat a transfer motion" based on a forum selection clause.[276]

But § 1407, on the other hand, is not based on the chosen venue being deficient in terms of convenience to the parties to the case. Transfer is for the entirely different reason of the existence of similar cases in other districts and the desire to achieve aggregate efficiencies in the adjudications of all the related cases. In considering whether to transfer under § 1407, "objections to the transfer itself based on asserted inconvenience typically are overruled" by the JPML.[277] It "generally takes the position that though some lawyers will be inconvenienced by having to travel to the MDL court, overall, consolidated treatment will result in savings of time and cost."[278] Thus the focus is on aggregate cost and convenience, not the convenience of the parties to the transferred case. The effort is to achieve an "overall savings of cost and a minimum of inconvenience to *all* concerned," i.e., the "parties and witnesses, their counsel and the judiciary."[279]

When the interpretation of federal law is not uniform, a plaintiff should not bear the burden of losing the advantage of favorable precedent just because he is caught up in the gears of the judicial efficiency machine.[280] It makes more sense to speak of a venue

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272. 775 F.3d 671 (5th Cir. 2014).

273. *Id.* at 674.

274. *See id.* at 674–75.

275. *See id.* at 683.

276. *See Atl. Marine*, 571 U.S. at 64.

277. 15 WRIGHT ET AL., *supra* note 42, § 3863.

278. *Id.*

279. *In re MLR, LLC, Pat. Litig.*, 269 F. Supp. 2d 1380, 1381 (J.P.M.L. 2003).

280. *See* Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 549 (1996) ("Because choice of law is part of the process of defining the parties' rights, it should not change simply because, as a matter of administrative convenience and efficiency, we have combined many claims in one proceeding.").

privilege in § 1407 cases because the plaintiff was in fact more entitled to the transferor venue. Moreover, that is the forum to which the case will be remanded following pretrial proceedings. The effect this has on the transferor court will be considered below, but the prospect of return to the transferor cements the plaintiff's connection to the forum.[281] The case was rightfully brought in the transferor district. It will end there if it survives pretrial proceedings.[282] The plaintiff would win under the law of that district. The case is only temporarily in the transferee district for pretrial administrative convenience. This cannot sensibly outweigh the plaintiff's legitimate interest in a win under the prevailing precedent in his properly chosen forum.

2. THE PUZZLE OF THE STATUS OF TRANSFEREE RULINGS AFTER REMAND

In addition to unfairness to the plaintiff, the rule of applying transferee law creates confusion and disorder for the courts. Transfers under § 1407 are only for pretrial proceedings. The case is to be remanded to the transferor court after pretrial proceedings are completed.[283] For many years, the Judicial Panel on Multidistrict Litigation supported the use of § 1404 by § 1407 transferee courts to re-transfer a transferred case to itself. Unlike a § 1407 transfer, the self-transfer under § 1404 was final; there was no remand to the original transferor court. This practice was put to a stop by the Supreme Court in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*.[284] The Court ruled that the "straightforward language" of § 1407 created a "responsibility to remand, which bars recognizing any self-assignment power in a transferee court."[285]

Notably, the leading cases establishing the rule that transferee law should be applied in federal question cases (such as *Korean Air Lines Disaster*) predate *Lexecon*. But *Lexecon* establishes a norm of remand.[286] The transferred case is to be subject to pretrial adjudication

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281. *See In re Dow Co. Sarabond Prods. Liab. Litig.*, 666 F. Supp. 1466, 1469 (D. Colo. 1987) ("[The transfer under § 1407] of plaintiff's claims from a variety of jurisdictions, subsequent dismissal of the RICO claims under the law of this jurisdiction, and final remand of the remnants of each case to its place of origination for trial without the RICO claims strikes me as . . . an anomaly . . . .").

282. *See infra* notes 284–285 and accompanying text.

283. *See* 28 U.S.C. § 1407(a) (2012) ("Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated.").

284. *See* 523 U.S. 26, 40 (1998).

285. *Id.*

286. On the effect of *Lexecon* on the issue considered here, see Larson, *supra* note 256, at 1363 ("*Lexecon* and its proscription of the self-transfer procedure in the

in the transferee court but then is to return to the transferor court for trial. If the transferee court applies its own version of federal law while the case is in that court, what happens upon remand to the transferor court? A hypothetical will help to illustrate: suppose that the plaintiff's complaint alleges two federal causes of action. The first is recognized as a valid cause of action in all circuits. But the second cause of action has been held to state a claim in the circuit where the case was filed (say the First Circuit), but not in the Second Circuit. Suppose this case is transferred under § 1407 to a district in the Second Circuit because other cases with common questions of fact are pending there. The defendant files a motion to dismiss the questionable cause of action. Under the prevailing view that a transferee district applies its own circuit's interpretation of federal law, the motion is granted. Pretrial proceedings are then completed and the case is remanded back to the district in the First Circuit for adjudication of the merits of plaintiff's remaining cause of action.[287] What are plaintiff's options at this point?

One might expect the plaintiff to attempt to resurrect his dismissed cause of action. He is, after all, litigating in a circuit which recognizes the cause of action. He may seek a rehearing of the motion to dismiss or simply amend his complaint to assert (reassert) the dismissed cause of action. What then does the district court do? Does it apply transferee law rather than the otherwise controlling law of its own circuit?

That the transferor district court in the First Circuit would apply the conflicting law of the Second Circuit would be surprising—and I think it would be wrong to do so. But what are the arguments for applying transferee law? The chief argument is the law of the case doctrine. Some of the transferee courts that choose to apply transferee law reason that the problem of remand examined here is not troubling since the transferor court after remand would be obliged to uphold the result reached by the transferee court under the law of the case doctrine. For example, in *Korean Air Lines Disaster*, the court said that if transferred cases "eventually return to transferor courts outside this circuit," its substantive ruling on the damage limitation[288] would be

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context of § 1407 transfers should go a long way toward impressing upon the courts the respect that should be accorded to the plaintiff's choice of the law that he will rely upon in vindication of his rights.").

287. The same scenario can occur when the plaintiff has a state law claim joined to a federal law claim about which there is a split. After a transferee court dismisses the federal cause of action, the case would be remanded for proceedings on the state law cause of action.

288. On the facts of *Korean Air Lines*, see *supra* notes 75–83 and accompanying text.

"binding" as the "law of the case."[289] This was necessary to avoid the "duplication and protraction" that § 1407 was to prevent.[290]

The law of the case doctrine is "amorphous."[291] Related doctrines, res judicata and the stare decisis effect of higher court rulings in lower courts, are firmer.[292] The law of the case doctrine in contrast is a matter of "discretion," and "does not limit the tribunal's power."[293] It "merely expresses the practice of courts generally to refuse to reopen what has been decided."[294] And the principle has exceptions: although a court has "power" to revisit its decision at any time, that power is generally limited to "extraordinary circumstances."[295] One such exception is when the "initial decision was 'clearly erroneous and would work a manifest injustice.'"[296] Another exception allows reexamination when controlling law has changed.[297] Finally, the law of the case doctrine has no application to bind an appellate court to the lower court's decision as the "law of the case."[298]

In the context of multidistrict litigation under § 1407, the law of the case doctrine has been used to require the transferee court to adhere to rulings before transfer by the transferor court[299] and likewise to require the transferor court after remand to adhere to rulings of the transferee court.[300] Frequently, the context for using the law of the case doctrine are procedural rulings, such as the formal sufficiency of pleadings, class certification, and discovery matters.[301] It has been on occasion applied to substantive rulings. For example, in *United States ex rel. Staley v. Columbia/HCA Healthcare Corp.*,[302] a qui tam action

289. *See In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171, 1176 (D.C. Cir. 1987), *aff'd sub nom. Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989).

290. *See id.*

291. *See Arizona v. California*, 460 U.S. 605, 618 (1983), *supplemented*, 466 U.S. 144 (1984).

292. *See id.* (referring to the "more precise requirements of res judicata").

293. *Id.*

294. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Messenger v. Anderson*, 225 U.S. 436, 444 (1912)).

295. *Id.*

296. *Id.* (quoting *Arizona*, 460 U.S. at 618).

297. *See* Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 600 (1987).

298. *See Christianson*, 486 U.S. at 817 ("[A] district court's adherence to law of the case cannot insulate an issue from appellate review . . . .").

299. *See* Steinman, *supra* note 297, at 672 ("The largest number of reported law of the case problems involve transferor court rulings challenged in the section 1407 transferee court.") (footnote omitted).

300. *See id.* at 702.

301. *See id.* at 674–81.

302. 587 F. Supp. 2d 757 (W.D. Va. 2008).

had been filed in the Western District of Virginia and transferred under § 1407 to the District of Columbia.[303] The transferee district dismissed two claims as barred by the public disclosure provision of the False Claims Act.[304] Following remand, the plaintiff moved the transferor court to reconsider the ruling,[305] arguing that the law of the Fourth Circuit on the public disclosure provision differed from that of the District of Columbia.[306] The transferor court rejected this argument, calling it "speculative" that the Fourth Circuit law was in fact different from the law of the transferee court and foreclosing reconsideration under the law of the case doctrine.[307] The court found the change in controlling authority exception to the law of the case doctrine inapplicable: "There is no authority for the proposition that a circuit split qualifies as a change in controlling law. Rather, 'federal law is presumed to be consistent.'"[308]

Use of the law of the case doctrine in this way—to bind the transferor court to rulings made by the transferee court before remand—opens the door to manipulation. The doctrine in this context, where two different district courts are involved, is a first-in-time rule: in *Staley*, the transferor court replicated the ruling of the transferee court for the simple reason that the transferee was first to rule.[309] But § 1407 cases do not begin in the transferee court, they begin in a transferor court. A party that anticipates a transfer under § 1407 to a district with law that is prejudicial to it can avoid losing under the law of the case doctrine by securing a ruling on the matter at hand from the transferor court before transfer. A defendant who might lose a defense by transfer should simply make a motion for partial summary judgment or for judgment on the pleadings as soon as possible. It would then be the ruling of the transferor court that becomes the law of the case and binds the transferee court. If the party aggrieved is the plaintiff—one who has a viable cause of action in the transferor district but not in the transferee district—the remedy similarly would be a motion that raises the legal issue before the court, again a partial summary judgment motion. The plaintiff would likely lose the motion because genuine issues of material fact exist, but he may succeed in getting a ruling on the legal issue. The foregoing demonstrates that the law of the case doctrine as applied between two courts makes no attempt to establish a

303. *Id.* at 758.
304. *Id.*
305. *Id.* at 759.
306. *Id.* at 761.
307. *Id.* at 761.
308. *Id.* at 762 (quoting *Bradley v. United States*, 161 F.3d 777, 782 n.4 (4th Cir. 1998)).
309. *Id.* at 759.

basis upon which to choose the court that should control the decision. Rather, it requires the second court that addresses the issue to replicate the determination of the first. And so, everything turns on which court is first to rule.

But the problems posed by the status of transferee court rulings after remand to the transferor court do not stop at the district court level. One can use the facts of *Staley* to illustrate the problem. Let us imagine what happens in *Staley* if the case is appealed. *Staley* began in a district within the Fourth Circuit, was transferred to the District of Columbia, and was remanded to the district within the Fourth Circuit.[310] In *Staley*, it was unclear that the law of the Fourth Circuit—the home circuit of the transferor court—actually differed from that the transferee, but let us assume it did, that there was clear and unequivocal Fourth Circuit precedent upholding the dismissed claims. The reasoning of *Staley* was that the transferee court is free to apply its own understanding of federal law and that after remand under the law of the case the transferor district court must uphold the ruling of the transferee court.[311] Can it be that the next step is that the Fourth Circuit on appeal from the transferor court's judgment must also apply the law of the District of Columbia? Such a result rebels against common sense. Fortunately, this is I believe one of those happy areas in which common sense and the law coincide. The law of the case doctrine would have no application to the Fourth Circuit. It never applies to bind an appellate court to the "law of the case" established by the district court.[312] The essence of the appeal, of course, is to review the lower court's rulings. So the Fourth Circuit would do what it normally does, apply its own law. This is of course the "competence" principle[313] applied to the transferor rather than the transferee court.

Now let us revisit what might have or should have happened in the proceedings after a remand but before any appeal. If it is true that the Fourth Circuit would apply Fourth Circuit law, what is to be gained by having the transferor district court within the Fourth Circuit apply the District of Columbia's version of federal law as the law of the case? Since the decisions of the transferor district court will be reviewed by its circuit court, it should follow those precedents.[314] The law of the

310. *Id.* at 758.

311. *Id.* at 761–62.

312. *See Christianson v. Colt. Indus. Operating Corp.*, 486 U.S. 800, 817 (1988).

313. *See supra* notes 113–115 and accompanying text.

314. *See* Austin V. Schwing, *Comity Versus Unitary Law: A Clash of Principles in Choice-of-Law Analysis for Class Certification Proceedings in Multidistrict Litigation*, 33 SEATTLE U. L. REV. 361, 379 (2010) ("[D]istrict courts 'owe obedience to the court of appeals in the circuit in which they sit. If the law in the transferor circuit differs from that in the transferee circuit where class certification was

case doctrine can be accommodated by treating this case as a change in the controlling law. The transferor court is operating under a different controlling law than was the transferee court and so is free of the strictures of the law of the case doctrine. And then if it is agreed that the district transferor court should apply the law of its own circuit, shouldn't the transferee court have in the first instance applied the law of the transferor as well? Because of *Lexecon*, cases surviving pretrial proceedings will return to the transferor court. The transferor court is decidedly the dog and the transferee court the tail. Given that, the transferee court should apply the law of the transferor.[315]

This reasoning finds support in the choice of law principle of renvoi. Renvoi directs a forum to apply not the substantive law but the choice of law rules of another jurisdiction.[316] Renvoi is used only when it is necessary "to decide the case in the same way as a court of the other state would have decided on the very facts involved."[317] It is applicable, for example, to cases involving real property, in which the court is directed to apply the choice of law rules of the situs of the real

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originally decided, the transferor court will invite reversal by upholding the law of the case.'") (quoting 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 134.21 [1] (3d ed. 1999)).

For a contrary view, see *Judicial Panel on Multidistrict Litig., Transferor Courts & Transferee Courts*, 78 F.R.D. 575, 577 (1978).

> However, it would be improper to permit a transferor judge to overturn orders of a transferee judge *even though error in the latter might result in reversal of the final judgment of the transferor court*. If transferor judges were permitted to upset rulings of transferee judges, the result would be an undermining of the purpose and usefulness of transfer under Section 1407 for coordinated or consolidated pretrial proceedings because those proceedings would then *lack the finality* (*at the trial court level*) requisite to the convenience of witnesses and parties and to efficient conduct of actions.

Id. (emphasis added).

The emphasized language is puzzling. Review of the ruling in question is to be had in the transferor circuit. It is unclear why the result needs to have finality only "at the trial court level." Building error into a decision in the trial court and awaiting its certain reversal does not achieve a goal of finality.

315. *See In re Dow Co. Sarabond Prods. Liab. Litig.*, 666 F. Supp. 1466, 1469 (D. Colo. 1987).

> The transferee court's goal of priming all cases for eventual trial in the transferor courts distinguishes § 1407 litigation from § 1404 cases. The latter-type cases are transferred for trial as well as for pretrial proceedings. In that situation, at least some authorities logically decline to apply the federal law of the transferor circuit. These authorities lose their persuasive value, however, where the cases face eventual remand to the transferor jurisdictions.

Id. (citation omitted).

316. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 (AM. LAW INST. 1971).

317. *Id.* § 8 cmt. d.

property.[318] One rationale for renvoi in this context is the "de facto power of the situs state to effectuate its policies,"[319] that is, any decree affecting the land must be enforced in the courts of the situs. The analogy here is that, since under *Lexecon* the case is to return to the transferor court, it has "de facto power" over the case; since any judgment of the transferor district court will be reviewed by its parent circuit, the transferee court should simply, by "legal acquiescence," apply the law of the transferor circuit.[320]

Applying the law of the transferor circuit because of the potential for remand also finds support in the longstanding practice of the Tax Court. In *Golsen v. Commissioner*,[321] the Tax Court was faced with an issue on which the "thrust"[322] of one its own prior decisions led in a different direction than a precedent of the Court of Appeals for the Circuit to which an appeal would be taken from its decision. The Tax Court concluded that "better judicial administration . . . requires us to follow a Court of Appeals decision which is squarely [on] point where appeal from our decision lies to that Court of Appeals."[323]

Applying transferor law within the transferee court under this reasoning is supported by *In re Ford Motor Co.*,[324] a case which did follow the actual journey suggested above, from transferor district court to transferee district court, to a remand back to the transferor district court, and finally an appeal to the circuit court of the transferor. The case was originally filed in the Western District of Texas and was transferred to the Southern District of Indiana under § 1407.[325] The transferee court denied a *forum non conveniens* motion to dismiss, concluding that Mexico was not an adequate alternative forum.[326] The case was remanded to the Western District of Texas, and the defendant again sought a *forum non conveniens* dismissal. The district court

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318. *Id.* § 223(1) ("Whether a conveyance transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs."); *see* James Y. Stern, *Property, Exclusivity, and Jurisdiction*, 100 VA. L. REV. 111, 119 (2014) (asserting that the forum court is to "imitate a situs court and reach whatever result they think a situs court would reach").

319. *Cf.* William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 15 (1963).

320. *See id.*

321. 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971) (footnote omitted).

322. *Id.* at 756–57.

323. *Id.* at 757. *Golsen* continues to reflect the practice of the Tax Court. *See, e.g.*, *Conner v. Comm'r*, 115 T.C.M. (CCH) 1013 n.6 (2018) (stating that the court will "follow the relevant precedent of the Court of Appeals to which an appeal would lie").

324. 591 F.3d 406 (5th Cir. 2009).

325. *Id.* at 408.

326. *Id.* at 409.

denied the motion on the ground that after a case "has been remanded . . . the pretrial rulings made by the transferee court should be reconsidered, if at all, under only the most extraordinary circumstances."[327] The Fifth Circuit reversed. It had, in prior cases, found Mexico to be an adequate forum and that determination was a "binding precedent of this court."[328] The error began, the Fifth Circuit concluded, in the transferee court, which had failed to follow Fifth Circuit (transferor) law:

> Though the MDL court was not sitting in the Fifth Circuit, plaintiffs' cases all originated in the district courts of this circuit. Merely moving this case from the Western District of Texas to the Southern District of Indiana does not allow plaintiffs to circumvent our earlier binding precedent that Mexico is an available forum. Such a perverse result would allow a case to proceed improperly just because it happened to be before an MDL panel.[329]

The court found that a law of the case doctrine exception was applicable: "[T]he transferee court's FNC decision is so clearly erroneous that it would work manifest injustice in this case."[330]

3. Re-Evaluating the Proposal to Use Transferor Law in the Transferee Court: Counterarguments and Limitations

The law of the case doctrine appears inadequate to solve the question of what law to apply in federal question cases after transfer. The foregoing suggests that the law of the transferor court should be applied because of the expectation of remand to the transferor court. But not all cases are remanded, and this fact complicates the analysis. One alternative would be to have the transferee district court apply the law of the circuit which will hear the appeal of the case. This serves to eliminate the problem noted above of a district court applying a different body of law than will the court that reviews its decisions. But upon evaluation, this approach too is inadequate. The following takes these matters up.

The argument for applying transferor law is clearest in cases in which there is an established precedent in the transferor circuit. The argument is less strong when there is no such authority or the law is murky. What should the transferee court do when its own view of

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327. *Id.* at 410.
328. *Id.* at 413.
329. *Id.*
330. *Id.* at 412.

federal law conflicts not with the transferor circuit but with its peer district courts in the transferor circuit? If the source of this version of federal law is a ruling in the very case made by the transferor judge before transfer, we would expect that it might be followed by the transferee court under the law of the case doctrine.[331] If there is no circuit level authority on the question from the transferee circuit, that would seem to be the correct result. But what if there is circuit authority in the transferee circuit? Does the transferee court apply transferor law under the law of the case doctrine or does it follow its own circuit level precedent? One possible solution is to apply transferor law in the transferee court but only if only if there are other viable claims to be remanded to the transferor court. If there is but one claim and it is a loser under the law of the transferee circuit, a final judgment will be rendered there and the case will in fact be appealed to the transferee circuit. [332] So, in such a case, the transferee district court should apply the same law that would be applied on any appeal—the law of its own circuit. This avoids the same problem noted above for cases remanded to the transferor court—a district ruling on a case under a body of law different from the one used by the court of appeals that will review its decision.[333]

But there are problems with a rule of applying the law of the circuit to hear the appeal. First, it fails to address the concern that in such a case the plaintiff has unfairly been deprived of a venue privilege.

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331. *Cf. Mechs. of Motion Practice Before the Judicial Panel on Multidistrict Litig.*, 175 F.R.D. 589, 601 (1998) ("[S]ometimes the Panel will, in the interests of comity and good will, wait for a transferor court to rule on a pending motion—such as a motion to dismiss—before ruling on the transfer motion since the outcome of a dispositive motion in the transferor court obviously has the potential of rendering Panel action moot.").

332. *See* Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 MICH. L. REV. 703, 755 (1995) ("If an MDL district court grants a dispositive motion dismissing an entire case, an appeal lies from the final judgment to the court of appeals that supervises the MDL court. If this circuit court affirms the dismissal, the case terminates in the MDL venue and is never remanded to the original forum.") (footnote omitted).

333. *See, e.g.*, *Satellite Fin. Planning Corp. v. First Nat'l Bank of Wilmington*, 633 F. Supp. 386, (D. Del.), *aff'd on reconsideration*, 643 F. Supp. 449 (D. Del. 1986). The *Satellite* case was transferred from a district in the Fourth Circuit to one in the Third Circuit under § 1404. *Id.* at 389–90. The transferee court rejected using of the interpretation of federal law prevailing in the Fourth Circuit in part because an appeal of its decision would go to the Third circuit:

> The Court chooses not to face the possibility of having to disregard the established law of this District, or the anomaly of the Court of Appeals for the Third Circuit having to disagree with its own precedent on appeal because it differs from that of the District of Maryland and the Fourth Circuit.

Id. at 393–94. Notably, however, *Satellite* was a § 1404 transfer and so there was no possibility of remand to the transferor court.

As argued above, in § 1407 cases a venue privilege can exist even in a federal question case since the plaintiff has filed the case in a perfectly unobjectionable forum. Under the proposed rule, a plaintiff with a single cause of action that is impeccable under the facts and under the law of the circuit where he has properly filed the case would lose if the case is transferred for *procedural convenience* to a circuit where his cause of action fails as a matter of law. As one court observed, "a motion to transfer a properly filed suit" should not be "tantamount to a motion to dismiss."[334] To be sure, this venue privilege is coherent only if there in fact is an advantage to the district chosen by the plaintiff. If the law of the transferor circuit is unclear, if it has no clearly defined difference from the law of other circuits, there is no realistic venue privilege. But if, on the other hand, the plaintiff would have had a clear advantage under the law of the circuit in which he filed the case, he should not be deprived of his venue privilege, even as to a single cause of action. In short, the clearer the break between transferor and transferee law, the more a transferee court should adhere to transferor law. The transferee court should apply transferor law when it clearly makes a difference.

A second problem with a rule that calls for the application of the law of the circuit that will hear the appeal is that it depends for its application the resolution of the choice of law issue under consideration. That is, an appeal will be in the transferee circuit if the transferee district court applies transferee law and in the transferor circuit of it applies transferor law. The rule gives an answer that depends upon the solution to the question it purports to answer. It is circular.

For these reasons a simple rule of applying the law of the circuit which will hear the appeal is untenable.[335] What is necessary is a true choice of law rule, not a mere first-in-time rule as the law of the case doctrine provides, nor a test for applying a law that is dependent on the identity of the forum that will decide the matter. Given the choices, it seems best to resort to a formal solution: since the case is subject to a mandatory remand, treat it as if it will be remanded and apply the law of the transferor circuit. What I mean by this formal approach will be clearer after discussing an additional argument against applying transferor law.

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334. *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1046 (9th Cir. 2012) (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 630 (1964)).

335. *But see* Ragazzo, *supra* note 332, at 746–47. Professor Ragazzo argues for an "appellate model" for deciding what law applies in transferred federal question cases. For § 1404 cases, the transferee court should apply its own circuit's law because that is where any appeal will be heard. *See id*. at 743. For cases transferred under § 1407, however, transferor law should apply "[b]ecause the MDL Act contemplates that cases will be remanded to their original fora for trial and appeal." *Id.* at 747.

Much of my argument for using transferor law is based upon *Lexecon's* establishing a norm of remand to the transferor court. This norm is indeed the legal rule of *Lexecon*: there is a "responsibility to remand" § 1407 cases.[336] But this legal rule remains more theoretical than practical. The vast majority of cases transferred under § 1407 never make it back to the transferee court. According to the Administrative Office of the United States Courts,[337] as of September 30, 2016, a total of 593,711 actions had been the subject of § 1407 proceedings. Of those, 260,156 were transferred from other districts (the remainder were originally filed in the transferee district). Of the 260,156 transferred cases, only 1622, or 6.24%, had been remanded.[338] The cases that do not make it back are settled or subject to a pretrial dismissal (such as a motion for summary judgment). Given the reality that the terminal destination of most § 1407 cases is in the transferee district, perhaps suggesting that transferor law applies puts the tail on the wrong end of the dog after all. But I believe that a formalist approach—basing a legal rule on what it is supposed to happen rather than the realist assessment of what in fact happens—is appropriate in this context.

First, the cases that settle should simply be ignored. If the parties settle, it does not matter whether transferor or transferee law applies. The settlement means that the parties have elected to govern their dispute by a private law that they have created by agreement.[339] Difficult liability and recoverable damages issues may abound under the prevailing law, but the parties find it in their interest to compromise, creating a sure liability where a doubtful one existed under the law. And this characterization of settlements as lawmaking is particularly apt in cases where the substantive law is unsettled. Whether transferor or

336. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998).

337. The data reported in the text is derived from *Table S-20. Cumulative Summary of Multidistrict Litigation*, USCOURTS.GOV, http://www.uscourts.gov/sites/default/files/data_tables/jb_s20_0930.2016.pdf [https://perma.cc/CK79-CR8P].

338. It is difficult to determine how many of the non-remanded cases were settled and how many were dismissed by a dispositive motion. *See* Catherine R. Borden et al., *Centripetal Forces: Multidistrict Litigation and Its Parts*, 75 LA. L. REV. 425, 443 (2014) (finding the data "does not indicate . . . whether the MDL cases were closed as the result of a global settlement, some other form of settlement, a ruling on a dispositive motion, a trial verdict, or simply based on a voluntary dismissal without settlement"). Even the cases that were remanded seldom ended with a trial. *See id.* at 448 ("[M]ore than eight in ten section 1407 remand cases terminate with a settlement in the transferor court.").

339. *See* Robert J. Rhee, *Toward Procedural Optionality: Private Ordering of Public Adjudication*, 84 N.Y.U. L. REV. 514, 516 (2009) ("Under private ordering, laws can be modified or ignored altogether, should both parties so agree.").

transferee law applies matters precisely in the cases that do not settle but which instead are adjudicated.

Second, a low remand rate may be driven in part by transferee courts applying their own law. The low remand rate should not be seen as a reason to uphold the rule of applying transferee law but instead as a manifestation of the problems with that rule. Both plaintiffs and defendants may seek to use § 1407 to forum shop.[340] If the general venue statutes permit it, a plaintiff would certainly file a case in a circuit which has an interpretation of federal law favorable to him. If there is a circuit in which the federal claim is not recognized or is limited, the defendant can use § 1407 to move all cases filed in any district to that defendant-favoring district. On the other hand, a plaintiff might also make use of § 1407. Suppose that there is a split but that the venue statutes force plaintiff to sue in a circuit under whose law he would lose. But other cases are pending in a multidistrict proceeding in another circuit in which the claim has been held to state a claim. In this situation, the plaintiff would file where he was required to and then seek a transfer to the more congenial circuit hosting the multidistrict litigation.[341]

The more cases that are dismissed under defendant-favoring transferee law or granted summary judgment to the plaintiff under plaintiff-favoring transferee law, the fewer there are to remand. It should be noted that the issue addressed here concerns a small subset of multidistrict cases. Many § 1407 cases are diversity cases not federal questions and of the federal questions, only a fraction involve a spilt between the circuits. But it may well be that in this subset there would be more remanded cases if transferee courts applied transferor law. Settlements are the product of litigation expectations. If the transferee court grants a partial summary judgment on the basis of transferee law, or simply indicates the likelihood that it will apply transferee law, a settlement is more likely and a remand is less likely.

Third, at the time the transferee court is ruling, it does not know if a remand is in fact going to occur. But it does know that *if* claims remain after pretrial proceedings, the case is supposed to be remanded. The decline of the civil trial rate is widely known,[342] but our procedural system, from pleadings to discovery to pretrial conferences, are geared

340. See *supra* note 226, for an example of forum shopping.

341. For a discussion of the forum shopping possibilities, see Hill, *supra* note 182, at 356 ("If a Michigan MDL plaintiff needs to obtain a state court fraud-on-the FDA finding to continue with a tort suit, his case will be dismissed if consolidated within Michigan, Ohio, Kentucky, or Tennessee, but will be allowed to go forward if transferred to New York, Connecticut, or Vermont.").

342. *See generally* Marc Galanter, *The Decline of Trials in a Legalizing Society*, 51 VAL. U. L. REV. 559, 565 (2017) (noting that "trials are just a bit more than one percent of civil cases" in federal courts).

toward preparing a case for trial—a hypothetical trial that will much more than likely never occur. We thus have abroad in our procedural system a formal set of rules that endure in order to support a system that largely does not exist. But district courts still consider trial convenience in considering joinder questions.[343] Discovery serves to "refine the case and to prepare it for trial."[344] Pleadings and related rules help to "elicit the particular facts underlying a claim or to narrow the issues for trial."[345] Indeed, the "central purpose" of § 1404 itself "to ensure that the trial is convenient."[346] The trial remains the ideal (precisely in the Platonic sense) around which we organize litigation. Whether or not a trial actually is to occur, having the anticipation of a trial gives necessary structure to our procedural rules, lending a true north for assessing procedural justice. And certainly it would be improper for a judge to make a pretrial ruling in any case based on a premise that a trial was never a possibility just because a trial is empirically unlikely.[347] That would lead to vastly different rulings on issues such as joinder and discovery than those dictated by the rules.

And so in the context of § 1407, a transferee judge should act as if a remand is to occur even if that is statistically unlikely. This means he should apply transferor law. This is admittedly a formalist argument, but given the difficult alternatives, I believe no better solution exits. Moreover, it would be a mistake to characterize the dispute as between a formal or realist solution. A chief argument for applying transferee law is that federal law is "unitary."[348] But this is surely a formalist's, not realist's, description of federal law when there is in fact a split of authority on the interpretation of federal law. Federal law is manifestly not unitary in this context, unless one is talking about an ideal. Moreover, it is beyond the scope of § 1407 to produce substantive uniformity when in fact none exists in the underlying law.[349] This is true for diversity cases filed originally in districts in different states. It is equally true for federal question cases when the law is unsettled. Section 1407 is merely to foster procedural convenience, not

343. *See Swan v. Ray*, 293 F.3d 1252, 1253 (11th Cir. 2002).

344. *See Life Plans, Inc. v. Sec. Life of Denver Ins. Co.*, 800 F.3d 343, 358 (7th Cir. 2015).

345. *Sparkman v. McFarlin*, 601 F.2d 261, 276 n.16 (7th Cir. 1979).

346. *See Qurio Holdings, Inc. v. Comcast Cable Commc'ns, LLC*, No. 14 C 7488, 2015 WL 535981, at *1 (N.D. Ill. Feb. 9, 2015).

347. *Cf. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (noting the fact that case will be settled does not obviate the need for complying with the requirements of Federal Rule 23); *see also* Larson, *supra* note 256, at 1363 (arguing the fact that most cases are not remanded "never was, nor could be, a valid justification for employing a potentially outcome-determinative choice of law analysis").

348. *See supra* note 107 and accompanying text.

349. *See supra* notes 45–49 and accompanying text.

substantive law reform. This situation—divergent law—calls for a choice of law rule. Applying transferor law does no violence to the interests of the lawmaker, since there is but one,[350] and serves to make the law turn on the propriety of the initial venue chosen by the plaintiff. Proper venue under the general venue statue requires a connection to the district selected by the plaintiff. Either the defendant must reside there or substantial part of the underlying event or transaction occurred there.[351] Under my proposal, since the law applied is that of the court initially chosen by the plaintiff, proper venue serves as a proxy for choice of law. The end result is that the federal law that will be applied is the law of a place where the defendant resides[352] or where the underlying events occurred. This is a more sensible way to choose law than to making applicable the law of the circuit to which a case is transferred for procedural convenience.

The duty to apply transferor law should not, however, extend to matters of procedure. Choice of law in general distinguishes between substance and procedure and allows a forum to apply its own procedural law even when the substantive law of another jurisdiction is to apply.[353] Given the purposes of multidistrict cases, it is necessary to allow the transferee court to control matters such as pleading and discovery. Otherwise, the very harm sought to be avoided by § 1407 would be realized. For that reason, a transferee court should apply its

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350. *See supra* note 203 and accompanying text.

351. *See* 28 U.S.C. § 1391(b) (2012).

352. Under 28 U.S.C. § 1391, an individual defendant resides where he is domiciled. *See* § 1391(c)(1). A corporation or other entity defendant resides in a district where it "is subject to the court's personal jurisdiction with respect to the civil action in question." § 1391(c)(2). Thus, a corporate defendant will be sued only where a substantial part of the events occurred or where it had sufficient contacts related to the case to establish personal jurisdiction. *See* 14D WRIGHT ET AL, *supra* note 42 § 3811.1 (4th ed. 2013) (stating that venue is proper "only if the entity defendant has minimal contacts with the forum to establish jurisdiction . . . under *International Shoe Company v. Washington* and its progeny"); *see also Leisure Concepts, Inc. v. Cal. Home Spas, Inc.*, No. 2:14-CV-388-RMP, 2015 WL 5567414, at *2 (E.D. Wash. Sept. 22, 2015) (finding venue proper because defendant was subject to personal jurisdiction because it "has sold its products and thrust them into the stream of commerce in a way that could reasonably be expected to place them in this district").

In addition to related contacts, the defendant resides in a district for venue purposes if it is subject to general jurisdiction in the district. *See Essex Energy, L.L.C. v. Willis*, No. CV 15-307-SDD-SCR, 2015 WL 8207468, at *5–6 (M.D. La. Dec. 7, 2015). This would occur if the defendant had a large number of unrelated contacts—so many that it was "at home" in the district. *See Daimler AG v. Bauman*, 571 U.S. 117 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

353. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (AM. LAW INST. 1971) ("A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.").

own view of federal procedure.[354] It is of course true that the line between substance and procedure can be difficult. What about the standards for class certification, for example? While joinder devices are technically procedural, the question of certifying a class has an enormous impact upon the course of the litigation. In a different context, this very question (whether class certification is procedural or substantive) fractured the Supreme Court badly in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co*.[355] In the present context—should transferee or transferor law be used in class certification of § 1407 cases—the lower courts are in fact split.[356] The better view is that transferor law on certification should be applied. If the transferee certifies a class that would not be certifiable under the law of the transferor circuit, it invites judicial confusion since the issue of certifiability persists through trial, which will occur in the transferor court.[357] Certification is "inherently enmeshed with the trial" and the law of the court that will try the case, the transferor, should apply.[358]

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354. *See In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 241 F.R.D. 435, 439 (S.D.N.Y. 2007) (quoting MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.131 (2004)).

> In the context of pre-trial issues such as motions to dismiss or discovery disputes, section 1407 requires the application of the law of the transferee circuit where the motions are being considered. For example, courts have held that the law of the transferee circuit controls pretrial issues such as whether the court has subject matter or personal jurisdiction over the action, or whether the cases should be remanded to state court because the cases were not properly removed. Likewise, the law of the transferee circuit controls discovery issues such as whether to compel a deposition or documents pursuant to a subpoena.
>
> The law of the transferee circuit applies in each of these situations because the "objective of transfer is to eliminate duplication in discovery, avoid conflicting rulings and schedules, reduce litigation costs, and save the time and effort of the parties, the attorneys, the witnesses, and the courts."

Id.; *see also In re Integrated Res. Real Est. Ltd. P'ships Sec. Litig.*, 815 F. Supp. 620, 636 (S.D.N.Y. 1993) ("[S]tatutes of limitations for federal securities claims [are] procedural, not substantive, matters, and they are, therefore, subject to the federal law of the transferee court.").

For an example of a transferee court applying its own interpretation of a purely procedural rule, see *McMasters v. United States*, 260 F.3d 814, 819–20 (7th Cir. 2001) (involving a method of service upon the United States).

355. 559 U.S. 393 (2010).

356. *See* Schwing, *supra* note 314, at 361 ("[D]istrict courts are divided into two camps . . . ."). Schwing has a very useful discussion of the certification choice of law problem.

357. *See In re Methyl Tertiary Butyl Ether*, 241 F.R.D. at 440 ("It would be neither just nor efficient to apply the law of this Circuit in considering class certification, and then force the transferor court to try a class action that it might never have certified.").

358. *See id.* at 441; *see also In re Wal-Mart Wage & Hour Emp. Practices Litig.*, No. 206-CV-00225-PMP-PAL, 2008 WL 3179315, at *5 (D. Nev. June 20,

And if the transferee court denies certification under its own law when the case was perfectly certifiable under the law of the transferor court, it has seriously violated plaintiff's venue privilege. The plaintiff, it will be recalled, has filed the action in a proper court and was subject to transfer not for his needs but for the greater good of judicial efficiency. A denial of certification is a potential death knell for the litigation.[359] It is a decision as to whether there will be any litigation, not a mere decision on the "form and mode"[360] of it.

CONCLUSION

In the context the § 1404 transfers, except where federal law by statute or by federal common law borrows local state law and thus varies across the federal courts, the arguments for applying transferor law are insufficiently strong to overcome the natural and proper impulse for a court to apply its own understanding of the law. Plaintiffs in such cases lack a sufficiently weighty interest in having transferor law follow their case. But in cases where federal law is not uniform because of the adoption of local state rules, the *Van Dusen* policies of protecting plaintiffs' initial venue choices and of avoiding encumbering decisions on transfer with possible prejudice from a prejudicial change of law become dominant because there is no proper basis for preferring forum law.

In the context of § 1407 transfers, the norm of remand to the transferor should be decisive in favor of applying transferor law. Since the final act of the litigation is to occur in the transferor district (and an appeal goes to its circuit) the transferee court should acquiesce to the reality of remand and apply the law that would be applied in the transferor court after remand.

2008) ("To the extent the law of the Third and Eighth Circuits diverge, the Court will consider it to determine whether any difference in the law of the respective transferor circuits would affect the outcome of the issue of class certification.").

359. *See Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1704 (2017) ("[A] denial of class certification would sometimes end a lawsuit for all practical purposes . . . .").

360. *See Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 536 (1958).