Rethinking Choice of Circuit Law in Multidistrict Litigation

by

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I.
Introduction

Since the D.C. Circuit's 1987 decision in the *Korean Airlines* case,[1] the dominant view in the federal courts has been that an MDL court should apply its own understanding of federal law, even if that understanding is inconsistent with the law of the circuit in which the transferor court sits. As a theoretical matter, *Korean Airlines* rests on the conclusion that a federal district court—including an MDL court—should apply the law of the circuit in which it sits. The two-judge concurrence in *Korean Airlines* defended that conclusion in the context of multidistrict litigation based in significant part on the practical fact that cases transferred to an MDL court are usually resolved in the MDL court rather than remanded to the transferor court for trial. But it is far from clear that choice of law under a statute that authorizes transfer to an MDL court *only* for pretrial proceedings should depend on that premise. Once the irrelevance of the premise is recognized, the stage is set for rethinking a crucial question: How should an MDL court determine what federal law requires when there is a circuit split between the circuits in which the MDL and transferor federal district courts sit?

In the last decade, at least one federal district Judge—Shira Scheindlin—has begun that rethinking by concluding that *Korean Airlines* should not be applied to class certification decisions.[2] Judge Scheindlin applied the law of the transferor circuit to that issue because class certification "inherently" is "enmeshed with considerations of the trial."[3] Her decision to apply the law of the circuit in which the transferor court sits is correct in my view, but application of that law should not be limited to class certification.

An MDL court has authority only over pretrial proceedings, and its decisions should not interfere with trial in the transferor court. For that reason, the law of the circuit in which the transferor court sits should apply to *all* matters that routinely may be adjudicated outside of pretrial proceedings. The law of the circuit in which the MDL court sits should apply to all other matters decided by an MDL court. The courts of appeals for the MDL and transferor circuits should also be bound by this

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[1] *In re* Korean Airlines Disaster of September 1, 1983, 829. F. 2d 1171 (D.C. Cir. 1987).

[2] *In re* Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation, 241 F.R.D. 435, 440 (S.D.N.Y. 2007). Another district judge left open the possibility that the law of the transferor court should apply to class certification, but concluded that any differences in the law of the relevant circuits (including the circuit in which the MDL court sat) were not outcome determinative. In re Wal-Mart Wage and Hour Employment Practices Litigation, 2008 WL 3179315156 (D. Nev. 2008). For an article discussing these two cases, 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 University L. Rev. 361 (2010).

[3] *In re MTBE Products Liability Litigation*, 241 F.R.D. at 440.

choice-of-law rule, thus ensuring that the MDL court and the parties to the litigation will know which circuit's law will govern review of an MDL court's decision *before* the MDL court renders its decision.

This proposed choice-of-law rule would require an MDL court to apply the law of the transferor circuit to many issues that may be adjudicated during pretrial proceedings, including some—like personal and subject-matter jurisdiction—that Judge Scheindlin insists should be governed by the law of the circuit in which the MDL court sits. But the rule would also require an MDL court to apply the law of the circuit in which it sits to important matters such as discovery that are at the heart of the authority that Section 1407 grants to an MDL court.

Part II of this brief paper outlines why the D.C. Circuit's reasoning in *Korean Airlines* should be rejected. Part III identifies the various choice-of-law rules that could be applied to the choice of circuit law in multidistrict litigation and briefly explains why the one suggested in this paper represents the best alternative. Part IV concludes.

II.
The Problem with *Korean Airlines*

The D.C. Circuit in *Korean Airlines* held that the MDL court should apply its own understanding of federal law, even if that understanding is inconsistent with the law of the circuit in which the transferor court sits. In her majority opinion, then-judge Ruth Bader Ginsburg argued that federal law is unitary—in other words, that there is only one correct understanding of federal law, even if that understanding has not yet been conclusively determined:

> [T]he federal courts have not only the power but the duty to decide [issues of federal law] 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. If a federal court simply accepts the interpretation of another circuit without [independently] addressing the merits, it is not doing its job.[4]

In rejecting the D.C. Circuit's conclusion, Robert Ragazzo—in a seminal critique[5]—correctly focused on the fact that Section 1407 authorizes only pretrial proceedings in the MDL court and requires a remand for trial. After remand, it is the court of appeals for the circuit in which the transferor court sits that reviews decisions made by the MDL court. For that reason, Judge Ginsburg's reasoning is insufficient to persuasively establish that an MDL court should apply the law of the circuit in which it sits.

The two-judge concurrence in *Korean Airlines* written by Judge Douglas Ginsburg[6] recognized that after remand the court of appeals for the circuit in which the transferor court sits would apply the law of its own circuit in reviewing a judgment rendered in a case that had been part of the MDL process. But he argued that the possibility of remand made no difference in the run of cases because remand is rare. Most cases would be resolved through settlement or otherwise while pending in the MDL court. For that reason, as a practical matter, it is the court of appeals for the circuit in which the

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[4] *Korean Airlines*, 829 F. 2d 1175 (brackets in the original) (quoting Richard Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 Yale L.J. 677, 702 (1987)).

[5] Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 Michigan L. Rev. 703 (1995).

[6] *Korean Airlines*, 829 F. 2d. at 1176 (D.H. Ginsburg, J., concurring). Judge Williams joined the concurrence.

MDL court sits that ordinarily will be in the chain of review. He further suggested that in the rare cases in which remand is a serious possibility, interlocutory review of outcome-determinative decisions could be sought in the court of appeals for the circuit in which the MDL court sits.

The concurrence's insistence that remand is rare is insufficient—even when coupled with the majority opinion's theoretical argument—to support the holding in *Korean Airlines*. The D.C. Circuit's conclusion that an MDL court should follow the law of the circuit in the "direct chain of review" rather than the MDL court's independent understanding of the law acknowledges that a federal court's competence to determine independently what federal law requires is not absolute. The principle of hierarchy requires an inferior court to subordinate itself to a superior court's determination of what federal law requires. And under this principle, an MDL court should conform its decision to the law of the circuit that will review its decision.[7]

But *Korean Airlines* makes that impossible. Consider, for example, how *Korean Airlines* would apply to a summary judgment motion brought by a defendant to resolve a federal claim. If the motion is granted and a final judgment is entered for the defendant, the law of the circuit in which the MDL court sits will govern. But if the motion instead is denied, in the absence of interlocutory review the legal question will be governed after remand by the law of the circuit in which the transferor court sits.[8] The law of the circuit that governs a dispositive motion simply should not depend on which side wins in the district court and whether interlocutory review is granted. To provide another illustration, whether Justice O'Connor's plurality opinion in *Asahi Metal*[9] or Justice Brennan's concurrence[10] governs the exercise of personal jurisdiction over a lawsuit should not be left to the happenstance of whether the court of appeals for the circuit in which the MDL court sits decides the question in favor

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[7] Ragazzo, note 5 *supra*, at 729 ("[C]hoice of circuit law at the district court level is more a matter of hierarchy within the federal system than of competence.").

[8] The transferor federal district court may well consider itself bound to apply the decision of the MDL district court under the law-of-the-case doctrine. But in the absence of interlocutory review, it is doubtful that the decisions of the MDL court should be protected by the law of the case. The principle that a federal district court is bound by the law of its circuit suggests the law of the case should not apply in such circumstances. *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, 643 (1987) (noting that a judge may have to subordinate the law-of-the-case doctrine "when reversal with all of its attendant inefficiencies would be probable if she failed to reconsider and perhaps to modify or 'reverse' the initial ruling in light of the interpretation of federal law controlling in her circuit."). *But see* Charles Alan Wright et al., 15 FED. PRAC. & PROC. § 3867 (4th ed., April 2015) ("Assuming the transferee applies its interpretation of federal law, what happens when the case is remanded to the transferor court? To avoid undoing [the] transferee court's work on the cases, it seems clear that the transferor, upon remand, should be required to defer to the transferee court's ruling as the law of the case.") (internal quotations omitted). Steinman, *supra* at 702 ("[T]here is widespread recognition that remand courts generally must adhere to the rulings of section 1407 courts so as not to undermine those courts' efforts to afford uniform handling or to impair the efficiencies derived from such handling."); Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, (1978) (insisting that "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" because doing so would "undermine . . . the purpose and usefulness of transfer under Section 1407"). I am skeptical that preserving the efficiencies obtained through consolidated pretrial proceedings authorizes transferor district courts to disregard their obligation to apply the law of their circuits. In any event, even if the transferor federal district court applies the law-of-the-case doctrine, the court of appeals for the circuit in which the transferor court sits should not do so, at least in the absence of interlocutory review in the circuit in which the MDL court sits.

[9] Asahi Metal Industry Co., Ltd. v. Superior Court, 482 U.S. 102, 105 (1987) (plurality opinion).

[10] *Id.* at 116 (Brennan, J., concurring).

of the defendant or whether the suit is remanded to a transferor court in a circuit with a different understanding of the law.

The concurrence is not blind to these concerns, but concludes that "the only solution is for Congress to amend section 1407(a) . . . to provide that rulings by a court in one circuit will not be reviewed under the case law of another circuit."[11] It is a mistake, however, to conclude that congressional action provides the "only solution." Although *Korean Airlines* rejected the possibility out of hand in the MDL context, the Federal Circuit has recognized that in appropriate circumstances a court of appeals may apply the law of another circuit.[12] The need to ensure that the MDL court and the parties can predict which circuit's law will govern *before* a decision is rendered provides ample justification for the courts of appeals in the transferor and MDL circuits to apply the law of the same circuit in reviewing decisions of the MDL court. Further legislation is not required.

III.
The Choice of Circuit Law

Once the need to select the law of one circuit to review a decision by the MDL court is recognized, there are essentially three possible approaches: (1) apply the law of the MDL circuit, (2) apply the law of the transferor circuit, or (3) apply the law of the MDL circuit to some determinations and the law of the transferor circuit to others. This Part first explains why the first two approaches are less desirable than the third and then identifies and explains a standard for sorting out which issues should be governed by the law of the transferor circuit and which should be governed by the law of the MDL circuit.

Applying the law of the MDL circuit to *any* decision made by the MDL court would be the most efficient choice-of-law rule. But this rule would have the effect of interfering with trial proceedings in the transferor federal district court. Assume, for example, that the MDL court—correctly applying the law of its circuit—denies summary judgment, concluding that the defendant's construction of a federal statute is unsound. The transferor federal district court under this choice-of-law rule would be required to apply the same construction of the statute in trial proceedings, even if the law of the circuit in which the transferor district court sits would construe the statute differently. Because Section 1407 gives the MDL federal district authority only over "pretrial proceedings," this would be problematic. The choice-of-law rule would give the MDL circuit ultimate authority over a matter subject to adjudication at trial.

Professor Ragazzo has suggested the contrary rule—that an MDL court should apply the law of the transferor circuit. That choice-of-law rule would avoid the possibility that decisions made by the MDL court would interfere with the transferor court's authority over trial proceedings. On the other hand, requiring the MDL court to apply the law of the transferor circuit undoubtedly would make it more difficult for the MDL court to conduct pretrial proceedings in the most efficient way

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[11] *Korean Airlines*, 929 F.2d at 1184-85 (D. Ginsburg, J., concurring).

[12] *See* Ragazzo, supra note 5, at 768 ("Just as the Federal Circuit has departed from the competence principle to achieve other goals of the federal system, the MDL context is sufficiently special to justify departure from this principle."). For a detailed discussion of the Federal Circuit's choice-of-law rules, see Sean M. McEldowney, *The Essential Relationship Spectrum: A Framework for Addressing Choice of Procedural Law in The Federal Circuit*, 153 U. Pa. 1639 (2005) (discussing the Federal Circuit's choice-of-law rules).

possible. Furthering the efficiency of pretrial proceedings does not justify subordinating the authority of the transferor court over the trial. But there are circumstances in which applying the law of the transferee circuit in pretrial proceedings will advance the litigation without interfering with the ability of the transferor circuit to exercise full authority over matters that could properly be raised at trial. For that reason, a choice-of-law rule that applies the law of the MDL circuit to some determinations and the law of the transferor circuit to others is preferable.

Judge Scheindlin's opinion in *Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*[13] points in the right direction. She recognizes that motions for class certification should be governed by the law of the transferor circuit because "whether to certify an action on behalf of a class under Rule 23 is not merely a pretrial issue."[14] Indeed, "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action"[15] and "with considerations of the trial."[16] By contrast, she concludes that discovery, subject-matter jurisdiction, and personal jurisdiction should be governed by the law of the circuit in which the MDL court sits.

Although the issue before Judge Scheindlin was class certification, her reasoning cannot sensibly be limited to that issue. As NEWBERG ON CLASS ACTIONS notes, her opinion suggests that the "MDL court will apply its own circuit's law to the resolution of many pretrial matters but that it may choose to apply the transferor circuit's (or circuits') law to issues like class certification that transcend the pretrial phase of the suit."[17] I agree with much of Judge Scheindlin's reasoning. But I think she is wrong to conclude that the law of the MDL circuit should govern matters like subject-matter and personal jurisdiction.

The law of the circuit in which the transferor court sits should apply to *all* matters that a court routinely may decide at trial. An easy example is a decision about what federal substantive law requires. That question might be decided pretrial on a motion to dismiss for failure to state a claim or a motion for summary judgment, *or* it might be decided through the jury instructions or on a motion for judgment as a matter of law. Whether class certification is warranted similarly should be governed by the law of the transferor circuit. Although class certification motions are decided pretrial, Rule 23 specifically authorizes a trial court to alter or amend a class certification order before final judgment.[18] The law of the circuit in which the transferor court sits likewise should apply to questions of personal and subject-matter jurisdiction because a court routinely may decide these issues at trial.

Consider, for example, personal jurisdiction. Even though the Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction is a pretrial motion, personal jurisdiction often will not definitively be established until trial. The court may deny the Rule 12(b)(2) motion if the plaintiff makes a *prima facie*

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[13] 241 F.R.D. 435 (2007).
[14] 241 F.R.D. at 439.
[15] *Id.* at 439-440.
[16] *Id.* at 440.
[17] William B. Rubenstein, 3 NEWBERG ON CLASS ACTIONS § 10:32 (5th ed. 2015).
[18] F.R. Civ. P. 23(c)(1)(C) ("*Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment."). *See also* Wright et. al, 7A FED. PRAC. & PROC. § 1785.4 ("[A]lthough the court's initial decision under Rule 23(c)(1) that an action is maintainable on a class basis in fact may be the final resolution of the question, it is not irreversible and may be altered or amended at a later date.").

case that personal jurisdiction exists.[19] But if the court denies the motion on that basis, the losing party "may proceed to trial on the merits without waiving the ability to renew the objection to the court's jurisdiction."[20] As the Fifth Circuit explains,"'[w]hatever degree of proof is required initially, a plaintiff must have proved by the end of trial the jurisdictional facts by a preponderance of the evidence.'"[21] A district court faced with a Rule 12(b)(2) motion to dismiss may choose instead to hold a pretrial evidentiary hearing to determine whether jurisdiction is proper. But to the extent the evidentiary hearing requires the plaintiff to prove by a preponderance of the evidence that jurisdiction exists, caution is required. As the First Circuit has noted: "[S]ince this method contemplates a binding adjudication, the court's factual determinations ordinarily will have preclusive effect, and, thus, at least in situations in which the facts pertinent to jurisdiction and the facts pertinent to the merits are identical, or nearly so, profligate use of the preponderance method can all too easily verge on a deprivation of the right to trial by jury."[22] For that reason and others, an evidentiary hearing on the personal jurisdiction defense may be postponed until trial.[23]

In short, there can be no question that personal jurisdiction routinely may be raised at trial. The same may be said of subject-matter jurisdiction. Although the existence of subject matter jurisdiction is often determined during pretrial proceedings, the question may be raised at any time.[24] Indeed, there is authority for the proposition that "even if the defense is overruled, stricken, or excluded by the district court, it may be reasserted at any time in the action."[25] For that reason, it would be problematic to conclude that subject matter jurisdiction is solely a pretrial matter.[26]

By contrast, other matters—at least in the absence of exceptional circumstances—will be addressed solely during pretrial proceedings. In the absence of exceptional circumstances, for example,

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[19] Wright et al. 5B FED. PRAC. & PROC. § 1351. The defendant bears the burden on some jurisdictional issues. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) ("[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable."). For the sake of simplicity, I do not address this complication.

[20] Wright et al. 5B FED. PRAC. & PROC. § 1351. For an alternative approach, *see* Kevin M. Clermont, *Jurisdictional Fact*, 93 Cornell L. Rev. 973 (2006).

[21] Mullins v. TestAmerica, 564 F.3d 386, 399 (5th Cir. 2009) (quoting decisions from the Fifth and Ninth Circuits).

[22] Foster-Miller, Inc. v. Babcox & Miller Canada, 46 F.3d 138, 146 (1st Cir. 1995). To avoid this problem, the First Circuit has indicated that courts may employ an "intermediate standard" focused on "probable outcomes as opposed to definitive findings of fact." *Id.* This approach "leaves to the time of trial a binding resolution of the factual disputes common to both the jurisdictional issue and the merits of the claim." *Id.*

[23] *See* F.R. Civ. P. 12(d) ("If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial."); Wright et al. 5B FED. PRAC. & PROC. § 1351("Under certain circumstances, the ruling also may await the trial on the merits with the fact issues being left to the jury for determination if the district judge believes that is desirable.") (citing cases).

[24] F.R. Civ. P. 12(h)(3) ("*Lack of Subject-Matter Jurisdiction.* If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

[25] Wright et al., 5B FED. PRAC. & PROC. § 1350 (citing cases).

[26] Federal courts have an unusually strong obligation to act only within their subject-matter jurisdiction. But that obligation does not relieve a district court of its obligation to apply controlling precedent on the question of subject-matter jurisdiction. The choice-of-law rule suggested in this paper simply identifies the controlling precedent by which the MDL court is bound. The court of appeals' duty to ensure that a district court does not exceed its jurisdiction should similarly be discharged by applying the subject-matter law of the transferor circuit.

discovery must be completed before trial.[27] By way of further illustration, consider summary judgment. Although a court may grant permission to file a summary judgment motion even during trial, summary judgment is quintessentially a pretrial motion, and such permission is almost never granted.[28] For that reason, in the absence of exceptional circumstances, matters unique to summary judgment practice—such as what a moving party without the burden of production at trial must do to satisfy its "initial responsibility"[29] on summary judgment—will almost always be addressed only during pretrial proceedings.

In short, the law of the transferor circuit should apply to all matters that a court routinely may decide at trial. By contrast, the law of the circuit in which the MDL court sits should govern all matters that—in the absence of exceptional circumstances—will be addressed only during pretrial proceedings conducted by the MDL court.

IV.
Conclusion

Korean Airlines is defensible only in a judicial system that understands the primary purpose of Section 1407 as providing a mechanism to force a global resolution of claims before individual actions are remanded for trial. That is because *Korean Airlines* makes it impossible for the MDL court and the parties to determine the law of which circuit will govern *before* the MDL court has rendered a decision. If one takes seriously the statute's directive that transfer is for pretrial proceedings only and that suits should be remanded for trial,[30] a choice-of-law rule that provides some measure of certainty is essential. This paper has suggested a choice-of-law rule designed to respect the Congressional objective of furthering efficiency through the coordination of pretrial proceedings under Section 1407 while avoiding interference with the right of the parties to a trial in a federal district authorized by statute.

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[27] *See, e.g.,* Greenwalt v. Sun City Fire District, 2006 WL 1688088 (D. Ariz. 2006) (sanctioning plaintiff because his untimely disclosure forced defendant to conduct discovery during trial).

[28] Edward J. Brunet, John T. Parry & Martin H. Redish, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 7.1 at 242 (stating that Rule 56 "no longer permits a motion filed after the commencement of trial without permission from the trial judge or in the local rules," and noting that even before the 2010 amendment to Rule 56 "courts had been understandably unsympathetic to such motions and rarely entertained them").

[29] Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) ("[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact.").

[30] *See* Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 Louisiana L. Rev. 399 (2014); *id.* at 402 (welcoming "evidence that a normative shift is underway").