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It's Not over 'Til It's over: Mandating Federal Pretrial Jurisdiction and Oversight in Mass Torts

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It's Not Over 'Til It's Over: Mandating Federal Pretrial Jurisdiction and Oversight in Mass Torts

Tanya Pierce*

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I. INTRODUCTION

Nearly twenty years ago, speaking of the difficulties inherent in managing mass tort cases, Chief Justice William Rehnquist predicted that without coordinated state and federal mechanisms, lawyers would “seek to pursue duplicative and exhaustive litigation.”¹ And some courts, “operating under a parochial view of the situation,” would allow them to do so.² He warned that the result would be “expense, delay, resulting crowding of dockets, divergent decisions on identical factual questions, and sometimes the insolvency of the defendants who are being sued.”³ Despite this and similar warnings,⁴ expensive and exhaustive litigation is exactly what has happened in many cases.

Because of concurrent jurisdiction in mass tort litigation,⁵ lawyers often file tens of thousands of separate but related lawsuits in federal and state courts all over the country.⁶ No existing procedural mechanism requires co-

1. William H. Rehnquist, *Welcoming Remarks: National Mass Tort Conference*, 73 TEX. L. REV. 1523, 1524 (1995).

2. *Id.*

3. *Id.*

4. See, e.g., JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 5.39 (8th ed. 2011) (quoting *Report of U.S. Judicial Conf. Ad Hoc Committee on Asbestos Litigation*, 2-3 (March 1991)) (“Dockets in both federal and state courts both continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims’ recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.”).

5. This Article uses the term “mass tort litigation” as defined in RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT xii-xiii (2007) (explaining that mass tort litigation shares features found in mass accidents and toxic torts, including numerosity, geographic dispersion, temporal dispersion, and diverse factual patterns that compound the difficulties involved in trying to resolve these claims).

6. See, e.g., *In re Motor Fuel Temperature Sales Practices*, Litig., 711 F.3d 1050, 1053 (9th Cir. 2013) (recognizing that “our hard-working district judges are severely overburdened and could benefit from a substantial reduction in workload,” but rejecting multidistrict litigation judge’s offer to be visiting judge in the district from which some of the multidistrict litigation cases had been transferred and to which they would return); Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. REV. 67, 67; Symposium, *The American Law Institute’s New Principles of Aggregate Litigation*, 8 J.L. ECON. & POL’Y 183, 193-94 (2011) (comments of Francis McGovern); James C. Duff, Director, *Judicial Business of the United States Court: Annual Report of the Director*, U.S. CTS., 50 (2011), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinesspdfversion.pdf> (during the twelve-month periods from 2006 to 2010, the total filings per year in the United States District Courts increased from 259,541 to 282,895); *Id.* at 19-20 (417 newly filed civil cases per judge in 2010); see also, e.g., *MDL Statistics Report – Distribution of Pending MDL Dockets*, U.S. JUD. PANEL ON

ordination of all of these related cases. Therefore, this type of litigation threatens inconsistent awards or even the bankruptcy of defendants⁷ such that no resources would be available to pay injured plaintiffs who file suit later but who may be just as entitled to compensation.⁸ In addition, even when courts and parties engage in massive, voluntary coordination efforts and are able to negotiate settlements, holdover parallel litigation may threaten those efforts.⁹ If those threats are not effectively controlled, courts may become unable to manage future litigation and facilitate other settlements.

The prohibition against anti-suit injunctions contained in the Anti-Injunction Act is central to the problems of overlapping state and federal suits.¹⁰ Enacted in 1793¹¹ and last amended in 1948, the Anti-Injunction Act provides, "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."¹² Unless one of these three enumerated exceptions applies,

MULTIDISTRICT LITIG., 1 (last updated Aug. 15, 2013, 7:32 AM), http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL-Dockets_By_District-August-15-2013.pdf (showing, for example, 1531 actions currently pending related to Chantix, 2917 actions currently pending related to Prempro, 9868 actions currently pending related to Yasmin and Yaz, 2854 actions currently pending related to the "Deepwater Horizon" spill, 2514 actions currently pending related to the Actos Products liability litigation, 1843 actions currently pending related to Levaquin, 1279 actions currently pending related to NuvaRing, 1083 actions currently pending related to Fosamax, 3531 actions currently pending related to Asbestos, 3411 actions currently pending related to Avandia, 1390 actions currently pending related to Kugel Mesh Hernia Patch, and over 25,900 actions currently pending related to various pelvic repair products). In another example, currently, as part of a consolidated federal Multidistrict Litigation, over 13,100 actions related to alleged faulty hip implant products are pending, and that number does not include lawsuits filed in state courts. *Id.*; Barry Meier, *J.&J. Loses First Case over Faulty Hip Implant*, N.Y. TIMES (Mar. 8, 2013), <http://www.nytimes.com/2013/03/09/business/johnson-johnson-must-pay-in-first-hip-implant-case.html> (reporting a jury award of more than \$8.3 million in damages in the first of "more than 10,000 lawsuits pending against the medical products maker in connection with a now-recalled artificial hip").

7. See, e.g., Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 781 (1985) (predicting that costs of individual trials of mass tort cases would be hundreds of millions of dollars); George T. Conway III, Note, *The Consolidation of Multistate Litigation in State Courts*, 96 YALE L.J. 1099, 1099 (1987) (citing David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 851-52 (1984)).

8. See MCLAUGHLIN, *supra* note 4, at § 5:39.

9. See, e.g., *In re Vioxx Prods. Liab. Litig.*, 869 F. Supp. 2d 719, 722 (E.D. La. 2012).

10. 28 U.S.C. § 2283 (2012).

11. Judiciary Act of 1793, ch. 23, § 5, 1 Stat. 333-35 (1793); see also *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 282 (1970).

12. 28 U.S.C. § 2283.

the Anti-Injunction Act precludes a federal court from enjoining duplicative, parallel state litigation.¹³

According to the Supreme Court of the United States in its 1970 decision *Atlantic Coastline Railroad Co. v. Brotherhood of Locomotive Engineers*¹⁴ – the seminal case interpreting the “necessary-in-aid-of-jurisdiction” exception to the Anti-Injunction Act – the need for the Anti-Injunction Act grew out of a compromise reached by the Framers of the Constitution.¹⁵ The Framers disagreed about the need for separate federal and state court systems.¹⁶ Some argued that separate federal courts were not needed because the state courts could be trusted to protect both state and federal rights.¹⁷ But others cautioned that the Constitution itself should provide for a complete system of federal courts to decide federal legal problems.¹⁸ This disagreement resulted in a compromise: the Constitution itself created the Supreme Court, and rather than the Constitution itself creating the lower federal courts, the Constitution gave Congress that authority.¹⁹ Congress exercised that authority in the Judiciary Act of 1789.²⁰

As a result of that compromise, almost from the beginning this country has had “two essentially separate legal systems” that operate independently of each other.²¹ Among federal courts, only the Supreme Court has the power to review state court decisions.²² Nevertheless, this dual court system sometimes leads to conflict because litigants often choose their system based on

13. Scholars have disagreed about the scope of the Anti-Injunction Act and its exceptions in general. See, e.g., James E. Pfander & Nassim Nazemi, *The Anti-Injunction Act and the Problem of Federal-State Jurisdictional Overlap*, 92 TEX. L. REV. 1, 6-7 (2013) (discussing the dominant account of the statute, as reflected most recently in the Supreme Court’s 2011 decision in *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2375 (2011), the view of some scholars that the AIA is a “much more modest affair,” and their own view that interprets the text of the original statute “against the backdrop of equity practice in the eighteenth century”). This Article accepts what Professors Pfander and Nazemi characterize as the dominant account of the Anti-Injunction Act. See *id.* at 4-5. The dominant account is consistent with the traditional views of the Supreme Court’s interpretations of the Act as discussed *infra* Part VII.

14. *Atl. Coast Line R.R. Co.*, 398 U.S. at 284-85.

15. *Id.* at 285; See generally Wythe Holt, “To Establish Justice”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421 (1989) (analyzing the controversies surrounding the creation of the federal court system).

16. *Atl. Coastline R.R. Co.*, 398 U.S. at 285.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 286.

22. *Id.*

which one they perceive to favor them more.²³ The Framers had the foresight to recognize that the “dual system could not function if state and federal courts were free to fight each other for control of a particular case.”²⁴ As such, the Anti-Injunction Act²⁵ serves to “work out lines of demarcation between the two systems.”²⁶

In the multidistrict litigation context, however, the practice of some federal courts has become more complicated. These courts have invoked the All Writs Act,²⁷ another of the country’s oldest statutes, in combination with the “necessary-in-aid-of-jurisdiction” exception²⁸ to the Anti-Injunction Act to

23. See, e.g., *id.* (predicting litigants would try to invoke the power of the court they predict will treat them more favorably).

24. *Id.*

25. As first enacted in 1793, the language of the Anti-Injunction Act provided no exceptions. Judiciary Act of 1793, ch. 23, § 5, 1 Stat. 333-35 (1793). *But see* Pfander & Nazemi, *supra* note 13, at 1 (arguing that the Anti-Injunction Act was not intended to ban federal courts from issuing anti-suit injunctions against concurrent state actions, and rather it was drafted to “restrict ‘original’ federal equitable interference in ongoing state court proceedings but to leave the federal courts free to grant ‘ancillary’ relief in the nature of an injunction to protect federal jurisdiction and to effectuate federal decrees”).

26. *Atl. Coast Line R.R. Co.*, 398 U.S. at 286 (citing *Ok. Packing Co. v. Ok. Gas & Elec. Co.*, 309 U.S. 4, 9 (1940)). Despite the background provided in the *Atlantic Coastline* case, which illuminates important policy considerations behind the act, the detailed history behind the original enactment of the Anti-Injunction Act is not fully known. See *Toucey v. N.Y. Life Ins. Co.*, 314 U.S. at 129-32 (1941) (discussing various influences that shaped the enactment of the original version of the AIA and concluding that its purpose was “manifest from its terms: proceedings in the state courts should be free from interference by federal injunction”). For background on decisions interpreting the Anti-Injunction Act from 1793 until the 1948 amendments, see Martin H. Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717, 719-22 (1977). The act has been described as “enigmatic.” *Honey v. Goodman*, 432 F.2d 333, 340 (6th Cir. 1970). In fact, the reasons underlying its enactment remain the subject of scholarly interest even today. See, e.g., Pfander & Nazemi, *supra* note 13, at 20 (tracing history of early Anti-Injunction Act exceptions beginning with the *Diggs & Keith v. Wolcott*, 8 U.S. 179 (1807), case, which appears to be the first case in which the Supreme Court ruled that the AIA barred “federal courts from asserting jurisdiction over actions seeking an original writ of injunction to stay proceedings in state court”).

27. 28 U.S.C. § 1651 (2012).

28. Historically, the “necessary-in-aid-of-jurisdiction” exception to the Anti-Injunction Act was invoked to allow federal courts to enjoin parallel state court actions *in rem* where the state court action threatened to interfere with a *res* over which the federal court had acquired jurisdiction. *Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1101 (9th Cir. 2008) (citing *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 641-42 (1977)). But the exception did not authorize a federal court to interfere with a state court action that was *in personam*, even if that state action threatened to undermine the proceedings before the federal court. *Id.*

justify limited injunctions of state court proceedings in appropriate cases.²⁹ The All Writs Act states that federal courts may “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”³⁰ As interpreted by the Supreme Court, the All Writs Act supplies federal courts “with the instruments needed to perform their duty, as prescribed by the Congress and the Constitution, provided only that such instruments are ‘agreeable’ to the usages and principles of law.”³¹

Although some courts have conflated the “necessary or appropriate in aid of . . . jurisdiction” language in the All Writs Act with the “necessary in aid of jurisdiction” language in the Anti-Injunction Act to justify injunctions in complex multidistrict litigation, the Supreme Court has never addressed whether this combined interpretation of the Acts is proper. The resulting confusion exacerbates the problems already inherent in duplicative mass tort litigation.³² In light of the explosion of this kind of litigation and the enormous challenges courts face as a result, commentators have long urged interpretations of the Anti-Injunction Act that would permit anti-suit injunctions in multidistrict litigation. Such interpretations have gained traction over the last twenty years.³³

Recognizing that effective docket management by multidistrict litigation courts is crucial to the ability to resolve complex mass torts where class action treatment is not available,³⁴ this Article argues that it is more important than ever to facilitate pretrial consolidation of inter-state litigation. The recent litigation surrounding the drug Vioxx³⁵ highlights the ways in which duplicative, parallel state court litigation can threaten the ability of federal courts to effectively manage mass tort litigation, even when massive voluntary coordination efforts are involved. This Article proposes the adoption of amendments to the federal Multidistrict Litigation Statute to allow pretrial consolidation of related cases that are filed in state courts as well as in federal courts. This change could be accomplished by incorporating a minimal di-

29. See, e.g., *In re Diet Drugs Prods. Liab. Litig.*, 369 F.3d 293, 305 (3d Cir. 2004) (citing *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 143 (3d Cir. 1998); *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 204 (3d Cir. 1993)); *In re Vioxx Prods. Liab. Litig.*, 869 F. Supp. 2d 719, 725 (E.D. La. 2012).

30. 28 U.S.C. § 1651.

31. *Harris v. Nelson*, 394 U.S. 286, 299-300 (1969) (citing *Price v. Johnston*, 334 U.S. 266, 293 (1948) (holding district court had power under the All Writs Act to require that interrogatories propounded by a petitioner in a habeas corpus proceeding be answered)).

32. See discussion *infra* Part IV.

33. See discussion *infra* Parts IV-V.

34. See Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2223 (2008) [hereinafter *The MDL Model for Resolving Complex Litigation*].

35. See discussion *infra* Part V.B.2.

versity jurisdiction requirement into the statute. Additionally, this Article recommends that the Multidistrict Litigation Statute be changed to require courts to provide oversight during the settlement process and over the settlements themselves, similar to the judicial oversight of settlements in federal class actions.

These proposed changes would benefit the litigants, the courts, and the public, which has an interest in courts resolving cases as timely and as efficiently as possible. Bringing all of the parties together under one tent would increase the likelihood of reaching truly global settlements accompanied by finality of all the related litigation. The changes would allow defendants to more accurately assess the value of global peace, taking into account the diminished threat of holdover parallel state court litigation. They would also benefit plaintiffs by ensuring all plaintiffs have a seat at the bargaining table, rather than allowing some to sit out, hoping for a better deal, only to later learn that their rights were affected by a process in which they took no part. Under these proposals all current plaintiffs would be included in the bargaining process, and few potential plaintiffs would be left to possibly undermine the settlement process. Requiring judicial oversight would give settlements of multidistrict consolidated cases at least the minimal judicial protections given in class action settlements.

Part II of this Article explores recent developments in mass tort litigation and the resulting enactment of the Multidistrict Litigation Statute.³⁶ Part III explains how the Supreme Court's decisions limiting the availability of federal class certifications has restrained recent attempts to combat duplicative litigation in mass tort cases³⁷ and resulted in increased reliance on the Multidistrict Litigation Statute as the preferred aggregation device. In light of these developments, Part IV reconsiders prior calls for changes to allow courts to more effectively manage duplicative litigation. Parts V and VI use the historical underpinnings of the Anti-Injunction Act and criticisms of interpretations of the Act to analyze the trend of recognizing certain multidistrict litigation contexts as permitting injunctions against parallel state action. Part VII examines Supreme Court precedent that consistently favors strict statutory interpretation and federalism over innovative statutory interpretations aimed at increasing judicial efficiency. It concludes that the Supreme Court would not uphold the current trend of allowing injunctions against parallel state actions in multidistrict litigation cases. Finally, Part VIII proposes solutions aimed at increasing efficiency, predictability, and fairness in the management and resolution of mass tort litigation.

36. 28 U.S.C. § 1407 (2012).

37. See discussion *infra* Part III regarding Congress's passage of the Class Action Fairness Act in 2005.

II. MULTIDISTRICT CONSOLIDATION

The multidistrict litigation process – codified in the Multidistrict Litigation Act, 28 U.S.C. section 1407 – serves an increasingly important role in the management and resolution of mass tort litigation.³⁸ Compared with the All Writs Act³⁹ and the Anti-Injunction Act,⁴⁰ the phenomena of mass tort litigation and the enactment of the federal Multidistrict Litigation Statute⁴¹ are relatively recent developments.⁴² Nevertheless, one of the greatest challenges courts face is determining how to efficiently administer the crush of lawsuits that comprise mass tort litigation.⁴³

In the nearly forty-four years since its inception, the United States Judicial Panel on Multidistrict Litigation (Multidistrict Litigation Panel) has

38. See Nancy J. Moore, *Ethical Issues in Mass Tort Plaintiffs' Representation: Beyond the Aggregate Settlement Rule*, 81 FORDHAM L. REV. 3233, 3234 (2013) (observing that litigation of mass tort personal injury claims has undergone a shift post *Amchem* and *Ortiz* from class actions to non-class group litigation, including both formal and informal aggregations of individual claims); Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 794, 798-99 (2010) (citing Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal* at 3 for the proposition that the “preferred way of handling mass tort lawsuits in the federal courts has been for the [judicial panel on multi-district litigation] to transfer and consolidate the cases in a single district” and later discussing the consolidation of asbestos cases by the Multidistrict Litigation Panel).

39. 28 U.S.C. § 1651 (2012).

40. 28 U.S.C. § 2283.

41. 28 U.S.C. § 1407.

42. See, e.g., *In re N. D. of Cal. “Dalkon Shield” IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 892 (N.D. Cal. 1981) (“The latter half of the twentieth century has witnessed a virtual explosion in the frequency and number of lawsuits filed to redress injuries caused by a single product manufactured for use on a national level.”), *rev'd*, 693 F.2d 847 (9th Cir. 1982); Edward F. Sherman, *Introduction to the Symposium, Complex Litigation: Plagued by Concerns over Federalism, Jurisdiction and Fairness*, 37 AKRON L. REV. 589, 590 (2004) (“Complex litigation as a distinct field is only about a half century old.”); Edward F. Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25 REV. LITIG. 691, 692 (2006) [hereinafter Sherman, *Segmenting Aggregate Litigation*] (discussing the “avalanche” of federal suits against the electrical equipment industry in the 1960s that preceded the passage of the Multidistrict Litigation Statute, 28 U.S.C. § 1407); see also Karen A. Geduldig, Note, *Casey at the Bat: Judicial Treatment of Mass Tort Litigation*, 29 HOFSTRA L. REV. 309, 314-21 (2000) (describing the evolution of mass tort litigation).

43. See, e.g., MCLAUGHLIN, *supra* note 4, at § 5:39 (quoting Report of the U.S. Judicial Conf. Ad Hoc Comm. on Asbestos Litig., 2-3 (March 1991)) (offering that the “sobering litany of problems associated with asbestos litigation” is equally valid today and compounded by other mass tort litigation).

considered motions for transfer involving nearly 400,000 cases.⁴⁴ This statistic demonstrates the overwhelming need for the passage of the federal Multidistrict Litigation Statute and illustrates the large volume of cases alleged to be eligible for consolidated treatment under the statute. And the number of motions for multidistrict litigation consolidation has increased greatly over time.⁴⁵ As a result, cases consolidated under the statute make up an increasingly significant portion of the dockets of federal courts.⁴⁶ As of 2010, about fifteen percent of the federal civil docket consisted of multidistrict litigation cases.⁴⁷ And in the twelve-month period from October 1, 2010 to September 30, 2011, the Multidistrict Litigation Panel acted on 43,769 civil actions – averaging over 3,600 actions a month – under the Multidistrict Litigation Statute.⁴⁸

Foreshadowing the current scope and volume of multidistrict litigation, beginning in the 1960s there was an “avalanche” of federal court antitrust suits against the electrical equipment industry.⁴⁹ To help manage those cases, Congress passed the Multidistrict Litigation Statute in 1968.⁵⁰ The statute created the Multidistrict Litigation Panel.⁵¹ For pretrial purposes, the Multidistrict Litigation Panel is authorized to transfer cases that are pending in different federal districts to a centralized single district called the transferee district.⁵² Multidistrict litigation treatment thus consolidates cases with common factual and legal issues to a single federal multidistrict court, allow-

44. *Overview of Panel*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., <http://www.jpml.uscourts.gov/panel-info/overview-panel> (last visited Apr. 2, 2014).

45. *Panel Promotes Just and Efficient Conduct of Litigation*, THE THIRD BRANCH (U.S. Judicial Panel on Multidistrict Litigation), Feb. 2010, at 1, available at <http://www.jpml.uscourts.gov/sites/jpml/files/The%20Third%20Branch%20-%20February-2010-Heyburn%20Interview.pdf> (interview of Judge G. Heyburn (W.D. Ky), chair of the Judicial Panel on Multidistrict Litigation).

46. *Id.* at 2.

47. *Id.* at 3.

48. *Annual Statistics of the United States Judicial Panel on Multidistrict Litigation: January Through December 2011*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., available at, http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Annual_Statistics_CY_2011-Revised.pdf (last visited Apr. 2, 2014). Of those, the panel transferred 5,593 cases that were originally filed in 91 various federal district courts to be included in coordinated or consolidated pretrial proceedings with 38,176 cases initiated in the transferee districts. *Id.*

49. Sherman, *Segmenting Aggregate Litigation*, *supra* note 42, at 717-18 (citing 28 U.S.C. § 1407 (2012)) (examining seven devices that have been used to segment litigation into manageable parts and concluding that the use of these various procedural devices is in transition).

50. 28 U.S.C. § 1407; Sherman, *Segmenting Aggregate Litigation*, *supra* note 42, at 697; Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621 (1964).

51. See sources cited *supra* note 50.

52. 28 U.S.C. § 1407.

ing one federal multidistrict litigation judge to rule on all discovery disputes and other pretrial matters involved in all of the related consolidated cases.

With the passage of the Multidistrict Litigation Statute, Congress sought to “avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve the resources of the parties, their counsel and the judiciary.”⁵³ Thus the primary goal of the Multidistrict Litigation Statute was “to promote judicial economy and to minimize [opportunities] for conflict and duplication” in the discovery phases of related cases.⁵⁴ Consolidated treatment under the Multidistrict Litigation Statute has many advantages. Primarily, it significantly alleviates the strain on courts, freeing them to hear other cases.⁵⁵ It also benefits the litigants in multidistrict litigation actions because consolidated treatment prevents duplicative discovery, discourages multiple motions on the same issues, and minimizes the possibility of inconsistent rulings – all of which reduces the time and expense of the litigation.⁵⁶

The standard to qualify for consolidated pretrial proceedings under the federal Multidistrict Litigation Statute is much looser than the requirements to qualify for federal class action treatment under Federal Rule of Civil Procedure 23.⁵⁷ To qualify for consolidated pretrial treatment under the statute, the cases need only involve similar issues, be sufficiently complicated, and trigger the need for efficiency more than cases that do not qualify for consolidated treatment under the statute.⁵⁸

53. *Overview of Panel*, *supra* note 44.

54. Conway III, *supra* note 7, at 1102 (citing H.R. Rep. No. 1130, 90th Cong., 2d Sess. 2, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 1898, 1899-1900).

55. See *Panel Promotes Just and Efficient Conduct of Litigation*, *supra* note 45, at 2.

56. *Id.* Of course, some lawyers whose cases are consolidated under the Multidistrict Litigation process have protested the loss of control that results. For example, one lawyer whose case was transferred and consolidated with cases that had earlier been transferred and consolidated lamented

... the [Multidistrict Litigation] Panel can seize control of your case, thrust you into someone else’s litigation halfway across the country, and relegate you to “100th chair” status in an already over-lawyered mass litigation where coveted “lead counsel,” “liaison counsel” and “executive committee” court-appointed case management and litigation leadership positions have already been divvied up.

DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL, PRACTICE BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION 71 (2006) (citing Earle F. Kyle, IV, *The Mechanics of Motion Practice before the Judicial Panel of Multidistrict Litigation*, 174 F.R.D. 589, 590-91 (1998)).

57. Compare 28 U.S.C. § 1407 (2012), with Fed. R. Civ. P. 23.

58. HERR, *supra* note 56, at 64 (citing *In re Willingham Patent*, 322 F. Supp. 1019, 1020 n.1 (J.P.M.L. 1971) (explaining that the Multidistrict Litigation Panel’s concern when deciding requests is “with the question of whether this common legal issue involves common fact questions sufficiently complex to require the use of 28 U.S.C. Section 1407”).

Nevertheless, the Multidistrict Litigation Statute has serious limitations that frustrate the goals of promoting judicial economy and minimizing inconsistencies. Chief among them is that state courts are beyond the reach of the statute's centralization power.⁵⁹ Although some state cases may be removed under the authority granted in the general removal statute,⁶⁰ no independent removal authority is contained in the Multidistrict Litigation Statute itself.⁶¹ To be removed to federal court, therefore, each related case to be included in the consolidated multidistrict litigation must either involve complete diversity of citizenship or a federal question.⁶² Otherwise, federal courts would lack jurisdiction to hear the case, and the state-filed case or cases would thus not be transferrable to a federal multidistrict litigation court under the Multidistrict Litigation Statute.

In addition, although some states have analogous consolidation statutes that operate within those particular states,⁶³ many do not. Furthermore, no inter-state centralization system exists to coordinate cases filed in the courts of different states. Thus, the federal Multidistrict Litigation Statute and similar state consolidation statutes do not include a way for all related cases to be brought before one court. The lack of independent authority in the Multidis-

59. See William W. Schwarzer, Alan Hirsch & Edward Sussman, *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 TEX. L. REV. 1529, 1531 (1995).

60. 28 U.S.C. § 1441 (2012).

61. See 28 U.S.C. § 1407. In addition, the Supreme Court in the *Syngenta* case specifically rejected attempts to rely on the All Writs Act as a source of authority to remove to federal courts state cases that were not otherwise eligible for removal to federal courts. *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 34 (2002).

62. See *infra* Part III (discussing the difference in removal standards for class actions).

63. Elizabeth J. Cabraser, *In Rem, Quasi in Rem, and Virtual in Rem Jurisdiction Over Discovery*, 10 SEDONA CONF. J. 253, 256 n.13 (2009) (citing as examples, CAL. CODE CIV. PROC. § 404, et seq. & CAL. RULES OF COURT, RULES 3:520, et seq.); Sherman, *The MDL Model for Resolving Complex Litigation*, *supra* note 34, at 2209 (“[The MDL] model has recently spread to state courts with some sixteen states creating statewide MDLs or ‘coordinated proceedings’ for transfer of all cases related to a particular kind of litigation to a single judge.”). States have also experimented with MDL-type consolidations and other pragmatic approaches to bridge the federal-state court jurisdictional divide, which can reduce the need to rely on consolidation in a federal MDL or lessen the need for a federal court to enjoin a parallel state action because of the resulting coordinated nature of the state court actions. One example of a state’s response to the challenge mass related litigation poses is Texas’s approach to asbestos litigation filed in its courts. See *Judge Mark Davidson*, HARRIS CNTY. DIST. CTS., <http://www.justex.net/courts/Civil/CourtSection.aspx?crt=62&sid=245> (last visited Apr. 3, 2014). There, former Chief Justice Wallace Jefferson and the Texas Multidistrict Litigation Panel named Judge Mark Davidson to act as the Multidistrict Litigation Judge for all asbestos litigation cases filed in the state. *Id.* In that role, Judge Davidson oversees 85,000 asbestos cases. *Id.*

strict Litigation Statute to remove and consolidate cases filed in state courts into multidistrict litigation courts undermines the statute's goals of promoting judicial economy and minimizing the risk of inconsistent rulings. Indeed, rather than minimizing opportunities for conflict and duplication, this gap in statutory authority increases those opportunities. Therefore, while consolidation for pretrial proceedings under the Multidistrict Litigation Statute is more readily available than class action treatment, unless all of the cases are present in federal court or all of the cases can be removed to federal court, this option has serious limitations.

III. CLASS TREATMENT UNDER CAFA

Against this backdrop, Congress meant to improve efficiencies by federalizing most of the nation's largest class action suits when it passed the Class Action Fairness Act (CAFA) in 2005.⁶⁴ To facilitate this efficiency, CAFA greatly expanded federal courts' jurisdiction in class action lawsuits.⁶⁵ In order to accomplish this goal, Congress adopted a minimal diversity requirement so that if "any member of a class of plaintiffs is a citizen of a State different than any defendant" and the amount in controversy and number of parties are large enough, all of the purported class actions would be removable to federal court.⁶⁶ In this way, theoretically one court would oversee all related large-scale litigation, which would facilitate finality – either through trials or, more realistically, through global settlements.

Even though Congress attempted to resolve the problems of duplicative litigation and thus greatly expanded federal court jurisdiction over class action cases in CAFA, the class action tool for consolidation has limited effectiveness in many mass tort situations. Thus, the problems inherent in large-

64. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. § 1332 (2012) (significantly expanding federal jurisdiction in class action litigation)); see also Elizabeth Chamblee Burch, *CAFA's Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. 2517, 2525-26 (2008). Interestingly, the class action device was originally intended to be a tool for civil rights litigants seeking injunctions against discrimination. See S. Rep. No. 420, S. REP. 106-420, at *11 (2000). According to John P. Frank, one of the members of the 1966 Advisory Committee on Civil Rules, the drafters of rule 23 thought it would hardly ever apply in mass tort situations. *Id.* Then, in the 1980s, a group of "plaintiffs' lawyers successfully persuaded" courts to allow class actions to be used in the area of mass torts. *Id.* Because courts "feared that the sheer volume of mass tort cases could slow or [even] stop the judicial system," they "began to expand the types of claims they were willing to certify as class actions." *Id.*

65. See 28 U.S.C. § 1332(d) (2012); Willging & Lee III, *supra* note 38, at 779.

66. 28 U.S.C. § 1332(d)(2). Federal courts have jurisdiction of class actions under CAFA if "minimal diversity" exists; the amount in controversy, which may be aggregated, exceeds \$5,000,000; and there are at least 100 members in the class. *Id.* Minimal diversity exists when "any member of a class of plaintiffs is a citizen of a State different from any defendant." *Id.* § 1332(d)(2)(A).

scale duplicative litigation persist. Indeed, an empirical study published in 2010 concluded that despite the statute's expansion of federal court jurisdiction over class actions, post-CAFA the number of personal-injury class actions filed in federal court does not appear to have increased but has merely remained steady.⁶⁷ Some experts have even concluded that CAFA has exacerbated the problems related to duplicative litigation and resulted in a "blow to the centrality of the class action for resolving mass complex litigation."⁶⁸ That blow resulted in large part because class certification in federal courts has become more difficult to achieve in the aftermath of the Supreme Court's landmark class certification decisions in *Amchem Products, Inc. v. Windsor*⁶⁹ in 1997, *Ortiz v. Fibreboard Corp.*⁷⁰ in 1999, and *Wal-Mart Stores, Inc. v. Dukes*⁷¹ in 2011.

In addition, as a practical matter, the minimal diversity requirement in CAFA can itself result in unexpected inefficiency. For example, a purported nationwide mass tort litigation class may be removed to federal court under CAFA's minimal diversity requirement. However, given the Supreme Court's class certification decisions in *Amchem*,⁷² *Ortiz*,⁷³ and *Dukes*,⁷⁴ a federal court would very likely deny class certification.⁷⁵ Nevertheless, some minimal discovery would likely be needed to prove that the requisites

67. Willging & Lee III, *supra* note 38, at 780 (citing Linda S. Mullenix, *Nine Lives: The Punitive Damage Class*, 58 U. KAN. L. REV. 845 (2010)). *But see* Steven S. Gensler, *The Other Side of the CAFA Effect: An Empirical Analysis of Class Action Activity in the Oklahoma State Courts*, 58 U. Kan. L. Rev. 809, 816 (2010) ("Taken together, the data suggest that CAFA may have shifted class actions from state courts to federal courts generally, but not evenly, as plaintiffs bringing these new federal filings targeted what they perceived to be the more favorable federal districts and circuits.").

68. *See, e.g.*, Sherman, *The MDL Model for Resolving Complex Litigation*, *supra* note 34, at 2207.

69. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622-25 (1997) (rejecting attempt to certify proposed class of present and future asbestos claimants under Federal Rule of Civil Procedure 23(b)(3)).

70. *Ortiz v. Fibreboard, Corp.*, 527 U.S. 815, 864-65 (1999) (rejecting proposed limited fund asbestos settlement class action under rule 23(b)(1)(B)).

71. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553-57 (2011) (rejecting class certification under the commonality requirement of FRCP 23(a)(2) where proposed class members did not demonstrate that they had "suffered the same injury" and also holding "claims for back pay were improperly certified" under FRCP 23(b)(2)).

72. *See Amchem*, 521 U.S. at 622-25.

73. *See Ortiz*, 527 U.S. at 864-65.

74. *See Dukes*, 131 S. Ct. at 2556-57.

75. In light of lawyers' ethical duties not to pursue frivolous litigation, one can argue that class counsel should not seek to certify class actions in mass tort situations. If advantageous to their clients, however, zealous advocates will continue to attempt to distinguish these cases and invoke jurisdiction of federal courts as provided by CAFA.

of class treatment did not exist. If the federal court's sole basis for jurisdiction were CAFA's minimum diversity, upon denial of a class certification motion the purported class action would be dismissed for lack of subject matter jurisdiction (assuming there is no federal question and there is not the complete diversity required for traditional removal to federal court).⁷⁶ But that dismissal would very likely not end the litigation, even if a significant amount of time had passed, because the statute of limitations for the individual claims would toll during the pendency of the purported class action, and individual plaintiffs would therefore be afforded a window within which to file individual claims.⁷⁷ Furthermore, a federal court's denial of a class certification request does not by itself preclude plaintiffs from seeking certification of the class in state courts that interpret the standard for class certification differently than federal courts interpret the standard set by Federal Rule of Civil Procedure 23.⁷⁸

Despite CAFA's broad removal power, one expert writing in 2008 predicted that coupled with the federal courts' aversion to certifying class actions, CAFA could result in the certification of fewer federal class actions.⁷⁹ That prediction appears to have come true.⁸⁰ Plaintiffs' lawyers are able to avoid federal court by filing state-only class actions that do not qualify for CAFA removal.⁸¹ They can also avoid class actions by filing individual state lawsuits.⁸² Even if the lawyers are not actively trying to avoid federal court, class certification treatment is rarely available in mass tort cases.⁸³ Finally, it has been observed that CAFA's passage has actually "increase[d] the likeli-

76. See, e.g., *In re Motions to Certify Classes Against Court Reporting Firms for Charges Relating to Word Indices*, 715 F. Supp. 2d 1265, 1274, 1284 (S.D. Fla. 2010).

77. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974). The question of whether state class actions could be filed is less clear; see, e.g., *Phipps v. Wal-Mart Stores, Inc.*, 925 F. Supp. 2d 875, 905 (M.D. Tenn. 2013). It is nevertheless beyond the scope of this Article. Resolving this complicated issue, however, could create yet another potential source of protracted litigation in mass tort cases.

78. See *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011).

79. See Sherman, *The MDL Model for Resolving Complex Litigation*, *supra* note 34, at 2207.

80. Willging & Lee III, *supra* note 38, at 782-85 (citing Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 286, 290 tbl.1 (2008)) (analyzing factors other than "*Amchem-Ortiz*" on the class certification decision, focusing on the impact of addition of section (f) to Fed. R. Civ. P. 23, which authorizes permissive interlocutory appeals to review decisions granting or denying class certification). *But see* Mullenix, *supra* note 67, at 855-56 (discussing the survival of class actions despite adverse federal law that renders certifying class actions in federal court quite difficult).

81. See Sherman, *The MDL Model for Resolving Complex Litigation*, *supra* note 34, at 2207-08.

82. *Id.*

83. *See id.*

hood of disparate litigation in multiple courts and overlapping class actions, making global settlement more difficult” than it was before.⁸⁴ Thus, while Congress intended to increase the courts’ ability to efficiently handle the nation’s largest lawsuits, CAFA’s efficacy is limited in mass tort cases, and, in fact, CAFA is often not a viable option for bringing all related mass tort litigation under the authority of a single court.

IV. RESPONSES TO DUPLICATIVE LITIGATION

Of course, Chief Justice Rehnquist was not alone in recognizing the growing challenge of managing mass tort litigation. In fact, many constituencies have tried to identify procedures to limit duplicative litigation in adjudicating these types of cases. Among the more notable developments, the Federal Judiciary Center published the Fourth Edition of the Manual for Complex Litigation in 2004 (Manual for Complex Litigation), with changes that largely reflected the growth in mass tort cases.⁸⁵ The manual’s authors recognized that trial judges often must embark on “sparsely charted terrain with little guidance on how to respond to pressing needs for effective management.”⁸⁶ Thus, they encouraged those judges to be “innovative” in meeting those needs, while at the same time cautioning them to remain “mindful of the bounds of existing laws.”⁸⁷

Trial judges, faced with over-crowded dockets, have responded to these calls by developing creative and pragmatic approaches to managing caseloads in the mass tort litigation area.⁸⁸ For example, judges have used special masters to control discovery and administer settlements.⁸⁹ They have also appointed plaintiffs’ committees, consisting of attorneys, to coordinate discovery in both state and federal cases.⁹⁰ In these and other ways, trial judges have encouraged consolidated mass settlements through cooperative agreements, even when the efficiencies of class action treatment were not available.⁹¹

84. *Id.* at 2208.

85. MANUAL FOR COMPLEX LITIGATION (Fourth) § 1 (2004).

86. *Id.* at 2.

87. *Id.*

88. See Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867, 1868-69 (2000).

89. See, e.g., *In re Zyprexa Prods. Liab. Litig.*, 238 F.R.D. 539, 540 (E.D.N.Y. 2006) (citing *In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 262-65 (E.D.N.Y. 2006)).

90. *Id.*

91. *Id.* at 540-41 (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997); *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001)).

Scholars have also examined ways to more effectively manage complex aggregate litigation.⁹² For example, one scholar proposed that institutional cooperation be instituted at the state judiciary-to-federal judiciary level, as opposed to merely at the judge-to-judge level.⁹³ While recognizing the benefits of cooperation among judges, this proposal argued that the adverse implications for federalism and due process that resulted when cooperation between judges failed could be diluted by a cooperative institutional strategy that promoted national settlements.⁹⁴ Another commentator proposed the creation of an Article III class action court.⁹⁵ Under that proposal, the class action court would have exclusive jurisdiction over federal class actions and an exclusive right to interpret and enforce the preclusive effect of its class-action instruments over non-parties who raise preclusion claims.⁹⁶ Further, that right would exist whether those claims originally arose in federal or state courts.⁹⁷

Notably, twice in the past twenty years the American Law Institute (ALI) has brought together many of the country's experts in yet more efforts to promote efficient and effective procedures for handling aggregate lawsuits. Of particular note, in 1993, the ALI proposed ambitious statutory recommendations that would have, among other things, allowed for inter-state transfer and consolidation.⁹⁸ This report, entitled *Complex Litigation: Statutory Recommendations and Analysis with Reporter's Study* (Complex Litigation Report), responded to the prior lack of statutory authority for inter-state centralization of complex concurrent state and federal claims.⁹⁹ In addition to ex-

92. See, e.g., Roger H. Trangsrud, *Aggregate Litigation Reconsidered*, 79 GEO. WASH. L. REV. 293 (2011); Sherman, *Segmenting Aggregate Litigation*, *supra* note 42, at 717; McGovern, *supra* note 88; Geduldig, *supra* note 42; Paul W. Werner, Comment, *Antisuit Injunctions Under the Complex Litigation Proposal: Harmonizing the Sirens' Song of Efficiency and Fairness with the Hymn of Judicial Federalism and Comity*, 1995 BYU L. REV. 1041 (1995); John Daniel Reaves & David S. Golden, *The Federal Anti-Injunction Statute in the Aftermath of Atlantic Coast Line Railroad*, 5 GA. L. REV. 294 (1971); Redish, *supra* note 26, at 760; William T. Mayton, *Ersatz Federalism Under the Anti-Injunction Statute*, 78 COLUM. L. REV. 330 (1978).

93. McGovern, *supra* note 88, at 1871.

94. *Id.* at 1896.

95. Christopher D. Bayne, Comment, *From Anti-Injunction to Radical Reform: Proposing a Unifying Approach to Class-Action Adjudication*, 31 U. HAW. L. REV. 155 (2008).

96. *Id.* at 183-91.

97. *Id.*

98. See AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS WITH REPORTER'S STUDY: A MODEL FOR STATE-TO-STATE TRANSFER AND CONSOLIDATION §§ 3.01-.08 (1993) [hereinafter COMPLEX LITIGATION REPORT].

99. *Id.* In 2010, the ALI published its second report and recommendations, the *Principles of the Law of Aggregate Litigation*, with recommendations

panding the provisions for removing cases to federal courts under the federal removal statutes,¹⁰⁰ the Complex Litigation Report's recommendations would have allowed multidistrict litigation courts to exercise broad powers to issue injunctions, including enjoining parallel state court action, whenever such an injunction would "foster the overall objectives of the proposal."¹⁰¹

In 1995, certain experts predicted that "[a]s resources decline while large-scale litigation proliferates, intersystem aggregation in some form may eventually become a necessity."¹⁰² Consistent with the Complex Litigation Report's recommendations, these experts argued for coordination of interstate discovery in large-scale multi-district litigation.¹⁰³ Both recommendations would have prevented the problem faced by the court nearly twenty years

to help judges, legislators, and others make aggregation decisions correctly, and to improve the management of cases in which aggregation is allowed. In addition to formal aggregation in litigated settings, such as with class actions, the work addresses a broader array of cases that are bundled together and settled or tried to test the value of related claims.

AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010) [hereinafter PRINCIPLES OF AGGREGATE LITIGATION].

100. COMPLEX LITIGATION REPORT, *supra* note 98, §§ 5.01-.02, at 219-20 ("Under current law the only opportunity for achieving intersystem consolidation is when certain defendants are permitted to remove state court cases to federal court under the general removal statute, 28 U.S.C. § 1441, or one of the special removal statutes."). *But see* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. § 1332 (2012)) (listing additional grounds for removal to federal court if minimal diversity exists and if other requirements of CAFA removal are met).

101. COMPLEX LITIGATION REPORT, *supra* note 98, § 5.04 proposed the following:

Antisuit Injunctions

(a) When actions are transferred and consolidated pursuant to § 3.01 or § 5.01, the transferee court may enjoin transactionally related proceedings, or portions thereof, pending in any state or federal court whenever it determines that the continuation of those actions substantially impairs or interferes with the consolidated actions and that an injunction would promote the just, efficient, and fair resolution of the actions before it.

(b) Factors to be considered in deciding whether an injunction should issue under subsection (a) include

- (1) how far the actions to be enjoined have progressed;
- (2) the degree to which the actions to be enjoined share common questions with and are duplicative of the consolidated actions;
- (3) the extent to which the actions to be enjoined involve issue or claims of federal law; and
- (4) whether the parties to the action to be enjoined were permitted to exclude themselves from the consolidated proceeding under § 3.05(a) or § 5.01(b).

AMERICAN LAW INSTITUTE, COMPLEX LITIGATION REPORT, *supra* note 98, § 5.04.

102. Schwarzer, Hirsch & Sussman, *supra* note 59, at 1564 ("As resources decline while large-scale litigation proliferates, intersystem aggregation in some form may eventually become a necessity.").

103. *See id.* at 1532.

later in the *Vioxx* litigation, but neither was followed.¹⁰⁴ Meanwhile, in the twenty years since the recommendations were first made, the situation has worsened. It is time for Congress to act.

V. ANTI-INJUNCTION ACT LIMITS TO COURTS' MANAGEMENT AUTHORITY

Despite the efforts of various constituencies, the Anti-Injunction Act¹⁰⁵ continues to provide a major impediment to effectively managing complex aggregate litigation. As mentioned above, when parallel federal and state actions are litigated concurrently, the Anti-Injunction Act prohibits federal courts from enjoining state court action unless one of the following three statutory exceptions applies.¹⁰⁶

A. Exceptions to the Anti-Injunction Act

Under the Act, an injunction must be (1) “expressly authorized,” (2) “necessary in aid of its jurisdiction,” or (3) necessary to prevent relitigation.¹⁰⁷ As the Anti-Injunction Act was historically understood, none of its exceptions would have applied to parallel federal and state mass tort litigation.¹⁰⁸ Before examining the trend to rely on the “necessary-in-aid-of-jurisdiction” exception to allow limited injunctions in multidistrict litigation cases, it is helpful to consider the three statutory exceptions in turn.

1. “Expressly Authorized” Exception

The “expressly authorized” exception, which would be more appropriately called the “implicitly authorized”¹⁰⁹ exception, does not allow federal courts to enjoin parallel state court actions in mass tort litigation largely because the Multidistrict Litigation Statute does not contemplate the power to enjoin other courts.¹¹⁰ Furthermore, the Multidistrict Litigation Statute is not

104. See *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450 (E.D. La. 2006).

105. 28 U.S.C. § 2283 (2012).

106. *Id.*

107. *Id.*

108. See *Negrete v. Allianz Life Ins. Co.*, 523 F.3d 1091, 1101 (9th Cir. 2008) (“[T]he necessary-in-aid-of-jurisdiction exception applies to in rem proceedings where the federal court has jurisdiction over the res and the state court proceedings might interfere with that.”) (citing *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 641-42 (1977)).

109. Diane P. Wood, *Fine-Tuning Judicial Federalism: A Proposal for Reform of the Anti-Injunction Act*, 1990 BYU L. REV. 289, 297 (1990).

110. 28 U.S.C. § 1407 (2012); Wood, *supra* note 109, at 297-98.

jurisdictional in nature.¹¹¹ The language and policy of the statute¹¹² do not, therefore, support issuing injunctions against parallel state proceedings under the expressly authorized exception.¹¹³

One option to solve the confusion regarding the legitimacy of interpreting the “necessary-in-aid-of-jurisdiction” exception as allowing injunctions in multidistrict litigation would be to amend the Multidistrict Litigation Statute to expressly allow such injunctions. Indeed, as one scholar noted, while the “necessary-in-aid-of-jurisdiction” exception is the one that “has often been construed with the greatest nineteenth century rigor the courts can muster,”¹¹⁴ courts have not been so strict when interpreting whether an injunction is “expressly authorized.”¹¹⁵ Thus, one way to solve the confusion regarding the application of the Anti-Injunction Act in the context of multidistrict litigation would be to amend the Multidistrict Litigation Statute. While an amendment to the statute to “expressly authorize” injunctions would eliminate the confusion about whether such injunctions violate the Anti-Injunction Act, it would be just a small step in the right direction. It would ostensibly do away with litigation over whether such injunctions could ever issue without violating the Anti-Injunction Act, but the litigated issue would shift to whether the particular injunction was appropriate in the given situation.

Such a modest proposal would answer the first question that should be asked when considering the propriety of any federal injunction of a state court proceeding: whether the injunction falls within an exception to the Anti-Injunction Act. It would not address the equally important question of whether the injunction should be granted consistent with the principles of equity, comity, and federalism that restrain a federal court whenever it considers enjoining a state court’s parallel proceedings, even if that injunction would not violate the Anti-Injunction Act.¹¹⁶ Thus, even if the Multidistrict

111. In *Mitchum v. Foster*, the Supreme Court considered whether state court proceedings that allegedly violated the Civil Rights Act could be enjoined as “expressly authorized” under the Civil Rights Act. 407 U.S. 225, 226 (1972). Rejecting the requirement that the text of a statute must “expressly authorize an injunction of a state court proceedings in order to qualify as an exception,” the court stated the proper inquiry was “whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity could be given its intended scope *only* by the stay of a state court proceeding.” *Id.* at 238 (emphasis added).

112. 28 U.S.C. § 1407.

113. *See id.*

114. Wood, *supra* note 109, at 301.

115. *See Mitchum*, 407 U.S. at 226 (holding injunction was appropriate under the “expressly authorized” exception because in the Civil Rights Act, even though the text contained no language explicitly stating that federal courts could enjoin state courts, the Act created a federal right that would be enforceable only if federal courts had the power to stay contrary court proceedings).

116. *See, e.g., Mitchum*, 407 U.S. at 244 (Burger, J. concurring) (discussing concepts of “Our Federalism” as outlined in *Younger v. Harris*, 401 U.S. 37 (1971),

Litigation Statute were to “expressly authorize” the use of federal injunctions against state actions in limited situations, it would not necessarily follow that the injunction should issue. Rather, the federal multidistrict litigation court would consider in each case whether the injunction should be granted consistent with the principles of federalism embodied in the dual system of courts.

Given the enormous number of cases that flow from mass tort litigation, this proposal is too modest. It would resolve the confusion surrounding the effect of the Anti-Injunction Act in multidistrict litigation cases, which would be an improvement over the current state of affairs. It would not, however, enable all overlapping federal and state court cases to be brought under the auspices of one court that could manage and facilitate a truly global settlement, nor would it address the problem of settlements that are reached without sufficient court oversight to ensure fairness of at least process, if not outcome.

2. “Necessary-in-Aid-of-Jurisdiction” Exception

Before analyzing the recent trend in which courts have chosen the first option and expanded the “necessary-in-aid-of-jurisdiction” exception to allow anti-suit injunctions, it is helpful to recall the historical interpretation of this exception. The Supreme Court has applied the “necessary-in-aid-of-jurisdiction” exception in its opinions only to cases that are *in rem*.¹¹⁷ In fact, in its earliest decision interpreting this exception, the Court warned, “a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing”¹¹⁸ Thus, the Court explained that an action brought to enforce a personal liability “does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending.”¹¹⁹ Rather, the Court made clear that, unless the action were *in rem*, “[e]ach court is free to proceed

which allowed an injunction in a criminal proceeding without explicitly discussing whether the injunction was allowed by an exception to the Anti-Injunction Act).

117. See Redish, *supra* note 26 (citing *Kline v. Burk Const. Co.*, 260 U.S. 226 (1922) (Although *Kline* was decided before the 1948 Amendments to the AIA, its reasoning still applies. The Reviser’s notes to the 1948 Amendments stated that the intent of the amendments was to restore the AIA to its pre-*Toucey* meaning)). *But see* CHARLES ALAN WRIGHT ET AL., 17A FED. PRAC. & PROC. Ch. 12, n.10 (citing *In re Diet Drugs*, 282 F.3d 220 (3d Cir. 2002); *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196 (7th Cir. 1996); *Battle v. Liberty Nat’l Life Ins. Co.*, 877 F.2d 877, 879 (11th Cir. 1989); *In re Baldwin-United Corp.*, 770 F.2d 327, 337 (2d Cir. 1985); *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332, 1334-35 (5th Cir. 1981)).

118. *Kline*, 260 U.S. at 230.

119. *Id.*

in its own way and in its own time, without reference to the proceedings in the other court.”¹²⁰

The justification for injunctions in cases *in rem* is straightforward: when federal courts have jurisdiction over a *res*, the “exercise by the state court of jurisdiction over the same *res* necessarily impairs, and may defeat, the jurisdiction of the federal court already attached.”¹²¹ As early as 1922, the Supreme Court declared that the existence of a parallel lawsuit *in personam* in state court that seeks to adjudicate the same cause of action does not qualify as an exception that is “necessary-in-aid-of-jurisdiction.”¹²²

Nearly a century and a half later, the Supreme Court, in the *Atlantic Coastline* case, reaffirmed its interpretation of the in-aid-of-jurisdiction exception requiring litigation to be *in rem*.¹²³ There, relying on the Anti-Injunction Act, the Supreme Court vacated a federal court injunction that had dissolved a state court order.¹²⁴ Even though the federal court dissolved the state order because the order was inconsistent with a Supreme Court opinion interpreting applicable federal law, the Court reasoned that the injunction was invalid and reiterated that lower federal courts do not have the power to review state court decisions.¹²⁵ Rejecting the arguments that the injunction was proper under the relitigation exception or was “necessary-in-aid-of” the federal court’s jurisdiction, the Supreme Court held that the federal injunction violated the Anti-Injunction Act.¹²⁶

3. “Relitigation” Exception

The “relitigation” exception allows federal courts to enjoin state court actions when necessary to “protect or effectuate [a court’s] judgments.”¹²⁷ This exception does not apply to ongoing parallel actions until one of the actions has been completed or a discrete issue has been decided.¹²⁸ Even when one of the actions has been completed or an issue has been decided, to successfully invoke this exception the traditional requirements for *res judicata* or issue preclusion must be met.¹²⁹ In its most recent opinion interpreting the Anti-Injunction Act, the Court noted that under the “relitigation excep-

120. *Id.*

121. *Id.* at 229.

122. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977) (declaring seven years after the *Atlantic Coastline* case, “[w]e have never viewed parallel *in personam* actions as interfering with the jurisdiction of either court . . .”).

123. *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng’rs*, 398 U.S. 281, 295 (1970).

124. *Id.* at 297.

125. *Id.* at 284-85.

126. *Id.*

127. 28 U.S.C. § 2283 (2012).

128. *Kline v. Burke Const. Co.*, 260 U.S. 226 (1922).

129. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2376-79 (2011).

tion,” an injunction could only issue if preclusion were “clear beyond peradventure.”¹³⁰ The problems of duplicative, parallel litigation rarely involve the exact same parties relitigating identical issues but instead involve thousands of similarly situated parties relitigating similar, but not identical issues. Thus, the “relitigation” exception is unlikely to exempt a requested injunction from the broad prohibition against injunctions in the Anti-Injunction Act.¹³¹

B. “Necessary-in-Aid-of-Jurisdiction” in Multidistrict Litigation

Although the Supreme Court in *Atlantic Coastline* reiterated its interpretation of the “in-aid-of-jurisdiction” exception requiring litigation *in rem*, in *dicta* the Court left open the possibility that the exception might apply in a case posing a sufficiently serious threat to the federal court’s jurisdiction.¹³² Specifically, of the language in the “necessary-in-aid-of-jurisdiction” exception, the Court stated, “[W]hile this language is admittedly broad, we conclude that it implies something similar to the concept of injunctions to ‘protect or effectuate’ judgments.”¹³³ According to the Court, both of these exceptions to the Anti-Injunction Act “imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court’s consideration or disposition of a case as to seriously impair the federal court’s flexibility and authority to decide that case.”¹³⁴ Relying on this *dicta*, scholars have urged a broader interpretation of the “necessary-in-aid-of-jurisdiction” exception in complex litigation, even for non-*in rem* cases.¹³⁵ Indeed two experts recently observed that “[p]erhaps the greatest pressure for some expansion in the antisuit capacity of the federal courts comes in connection with modern complex litigation”¹³⁶ The idea of reading the excep-

130. *Id.* at 2375-76.

131. *See id.*; *see also* discussion *infra* Part VI.

132. *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng’rs*, 398 U.S. 281, 294-95 (1970).

133. *Id.* at 295.

134. *Id.*

135. *See, e.g.,* WRIGHT ET AL., *supra* note 117; Redish, *supra* note 26; Wood, *supra* note 109; Joshua J. Wes, VI, *The Anti-Injunction & All Writs Acts in Complex Litigation*, 37 LOY. L.A. L. REV. 1603 (2004). *But see* Pfander & Nazemi, *supra* note 13 (arguing that the AIA was not intended to ban federal courts from issuing anti-suit injunctions against concurrent state actions, but rather was drafted to “restrict ‘original’ federal equitable interference in ongoing state court proceedings but to leave the federal courts free to grant ‘ancillary’ relief in the nature of an injunction to protect federal jurisdiction and to effectuate federal decrees”).

136. Pfander & Nazemi, *supra* note 13, at 53; *see also* Bryan J. Schillinger, *Preventing Duplicative Mass Tort Litigation Through the Limited Resources Doctrine*, 14 REV. LITIG. 465, 489-91 (1995) (arguing that in light of the reality of mass tort litigation, the historic view of the Anti-Injunction Act that so strongly favors federalism over efficiency must undergo a shift).

tions more broadly has been around for some time¹³⁷ however, and its acceptance has only grown.

1. Interpretations of the “Necessary-in-Aid-of-Jurisdiction” Exception in Multidistrict Litigation

In this era of innovation and pragmatism,¹³⁸ strict adherence to the historical interpretation of the Anti-Injunction Act may indeed be at odds with the goals of effectively managing mass tort litigation that threatens to overwhelm the courts. Thus, it is not surprising that some courts have adopted the broader interpretation of the “necessary-in-aid-of-jurisdiction” exception in multidistrict litigation cases. According to this interpretation, the All Writs Act and the “necessary-in-aid-of-jurisdiction” exception allow federal courts to enjoin parallel state actions in “consolidated multidistrict litigation, where a parallel state court action threatens to frustrate proceedings and disrupt the orderly resolution of the federal litigation.”¹³⁹ The two acts are seen to complement each other: if an injunction is not prohibited by the Anti-Injunction Act, the All Writs Act gives federal courts the authority to issue injunctions that affect state court proceedings. Thus, in extraordinary circumstances, this interpretation holds that multidistrict litigation courts may enjoin concurrent *in personam* state court proceedings without violating the prohibition against injunctions contained in the Anti-Injunction Act.¹⁴⁰

Those who favor the more innovative interpretation of the “necessary-in-aid-of-jurisdiction” exception generally argue that in the context of multidistrict litigation, the Supreme Court’s distinction between an *in rem* and an *in personam* proceeding “is not so delineated.”¹⁴¹ As a practical matter, cir-

137. See, e.g., Redish, *supra* note 26 (arguing that the in-aid-of-jurisdiction exception be interpreted more broadly); Wood, *supra* note 109, at 303-04 (arguing for a liberalized approach that would allow federal courts to use a “first in time” rule for concurrent state court litigation just as they do in concurrent federal court litigation).

138. See discussion *infra* Part IV.

139. See, e.g., *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 365 (3d Cir. 2001) (citing *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202 (7th Cir. 1996)); *WRIGHT ET AL.*, *supra* note 117; see also *In re Diet Drugs*, 282 F.3d 220, 239 (3d Cir. 2002); *Carlough v. Amchem Prods. Inc.*, 10 F.3d 189, 197, 202-04 (3d Cir. 1993); *James v. Bellotti*, 733 F.2d 989, 993-94 (1st Cir. 1984); *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332, 1334-35 (5th Cir. 1981), *cert. denied*, 456 U.S. 936 (1982).

140. *In re Vioxx Prods. Liab. Litig.*, 869 F. Supp. 2d 719, 725-26 (E.D. La. 2012) (citing *In re Diet Drugs I*, 282 F.3d 220 (3d Cir. 2002); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998); *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196 (7th Cir. 1996); *Battle v. Liberty Nat’l Life Ins. Co.*, 877 F.2d 877 (11th Cir. 1989); *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985); and *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332 (5th Cir. 1981)).

141. See, e.g., *In re Vioxx Prods. Liab. Litig.*, 869 F. Supp. 2d at 725.

cuit courts have been most willing to interpret the “in-aid-of-jurisdiction” exception as allowing an injunction in complex multidistrict litigation if two factors are present: first, settlement must be complete or “imminent” in the federal action; and second, a preliminary or final class certification must have been granted.¹⁴² In these situations, the argument goes, the settlement or near-settlement becomes a *res* or a quasi-*res*, which justifies the federal court’s injunction as “necessary-in-aid-of-jurisdiction.”¹⁴³

Often, the requested state court action threatens to undermine a settlement of the federal action.¹⁴⁴ For example, in one of the earliest cases to allow a multidistrict litigation court to issue an injunction against parallel state court action, the Second Circuit in *In re Baldwin-United Corp.* upheld a district court’s injunction of a related state court proceeding where settlements with some defendants had been tentatively approved and settlements with the rest were close to being reached.¹⁴⁵ Similarly, in the cases of *In re Diet Drugs*,¹⁴⁶ *In re Prudential Insurance Co. of America Sales Practice Litigation*,¹⁴⁷ and *Carlough v. Amchem Products*,¹⁴⁸ the Third Circuit held that the federal courts had all properly enjoined state court proceedings where the settlements had been reached or were imminent, and where the state court proceedings would have seriously undermined the courts’ approvals of the settlements that had been reached or the parties’ ability to reach a final settlement.¹⁴⁹ In certain cases, injunctions have also been allowed when a state court action has threatened to contradict a federal court’s orders in the parallel federal action. For example, in *Winkler v. Eli Lilly & Co.* the Seventh Circuit upheld a federal multidistrict litigation court’s injunction against state court proceedings that threatened to circumvent a multidistrict litigation court’s discovery order.¹⁵⁰

142. *Id.* at 726.

143. *Id.*; see also Cabraser, *supra* note 63, at 258.

144. Sherman, *The MDL Model for Resolving Complex Litigation*, *supra* note 34, at 2219.

145. 770 F.2d 328, 333, 342 (2d Cir. 1985).

146. 282 F.3d 220, 239 (3d Cir. 2002) (holding that the federal court properly enjoined the implementation of a state court order purporting to opt out members of a state court class from the federal class action after settlement class had been conditionally certified and the settlement had been provisionally approved).

147. 261 F.3d 355, 369-70 (3d Cir. 2001) (permitting federal court injunction where state court action would have undermined federal court’s approval of federal class settlement).

148. 10 F.3d 189, 203-04 (3d Cir. 1993) (permitting an injunction of a state court action where a federal class action settlement was imminent and the state court proceeding was perceived as a “preemptive strike” against the federal court).

149. *Id.* at 203.

150. 101 F.3d 1196, 1205-06 (7th Cir. 1996).

2. The *Vioxx* Case

More recently, in the 2012 *Vioxx* case, a federal multidistrict litigation court was again faced with a dilemma about what to do when parallel state litigation threatened the finality of supposed “global settlements” in which both federal and state courts and the parties had already invested enormous resources.¹⁵¹ The *Vioxx* case aptly illustrates the challenge presented by the multidistrict litigation court’s statutory inability to consolidate all related cases and, more specifically, the challenge presented by the Anti-Injunction Act’s prohibition against interfering with parallel state court actions.¹⁵²

The *Vioxx* litigation also illustrates how innovative approaches, like those suggested in the Principles of Aggregate Litigation and in the Manual for Complex Litigation, combined with the multidistrict consolidation of federal cases and voluntary cooperation from state courts can result in unprecedented settlements.¹⁵³ The success of those settlements is even more remarkable because the cooperation achieved is not mandated by statute and the federal multidistrict litigation court does not even have jurisdiction over the state court cases that are not removable to federal court.¹⁵⁴

Before Merck voluntarily recalled *Vioxx* in 2004,¹⁵⁵ *Vioxx* lawsuits had been filed all over the country, in both federal and state courts.¹⁵⁶ While the federal cases were consolidated under the Multidistrict Litigation Statute, only a few states – including California, New Jersey, and Texas – had similar consolidation mechanisms.¹⁵⁷ Most of the federal and state courts in which the *Vioxx* lawsuits had been filed, therefore, relied on extensive, voluntary coordination to facilitate case management and the eventual settlements.¹⁵⁸ Between 2005 and 2007, the federal multidistrict litigation court oversaw rapid but substantial discovery, including the production of “[m]illions of documents,” “[t]housands of depositions,” and “at least 1,000 discovery motions.”¹⁵⁹ The court then assisted the parties in selecting and preparing six personal injury bellwether trials.¹⁶⁰ During this period, the cooperating state courts also oversaw about thirteen bellwether trials.¹⁶¹ With the information

151. *In re Vioxx Prods. Liab. Litig.*, 869 F. Supp. 2d 719, 720-24 (E.D. La. 2012).

152. *See id.*

153. *See id.*

154. *See id.*

155. *Id.* at 720; Snigdha Prakash & Vikki Valentine, *Timeline: The Rise and Fall of Vioxx*, NPR (Nov. 10, 2007, 2:40 PM), <http://www.npr.org/templates/story/story.php?storyId=5470430>.

156. *In re Vioxx Prods. Liab. Litig.*, 869 F. Supp. 2d at 721.

157. *Id.*

158. *See id.*

159. *Id.*

160. *Id.*

161. *Id.*

gained in discovery and the bellwether trials, the parties were encouraged to engage in settlement discussions.¹⁶²

To facilitate settlement discussions, the multidistrict litigation court pragmatically appointed plaintiffs' counsel to engage with Merck.¹⁶³ For about a year, those lawyers negotiated – including meeting more than fifty times, holding several hundred telephone conferences, and keeping the multidistrict litigation and state courts informed about their progress.¹⁶⁴ This massive effort resulted in unprecedented settlements. At the end of the negotiations, nearly 50,000 pending individual lawsuits and roughly 265 purported class action lawsuits were included in the settlements.¹⁶⁵ These settlements were even more extraordinary because the efficiencies and related safeguards of class action treatment were not available.¹⁶⁶

Then, in early 2012, despite this incredible expenditure of resources to achieve “global settlements,” the *Vioxx* settlements found themselves on a “collision” course with a parallel class action suit that had been pending for years in Missouri state court.¹⁶⁷ As there was no mechanism to bring all of the related *Vioxx* claims before the federal multidistrict litigation court, some state court claims proceeded independently from the cases included in the “global settlement” discussions facilitated by the multidistrict litigation court. One such case, the *Plubell* class action, which sought economic rather than personal injury damages, was pending in Missouri state court and was scheduled for trial in May of 2012.¹⁶⁸ Arguing that the *Plubell* plaintiffs sought what would amount to a double-recovery of awards included in the global settlements, Merck moved for the federal multidistrict court to enjoin the plaintiffs and prohibit them from seeking recovery in the state court action for those sums that were covered in the global settlements.¹⁶⁹

The question that confronted the federal multidistrict litigation court – whether it had the power to enjoin the state action that threatened the global settlements – is an example of the tenuous position federal courts find themselves in because of the ineffectiveness of CAFA, the lack of broader federal removal power in the Multidistrict Litigation Statute, and the confusion surrounding the Anti-Injunction Act's “necessary-in-aid-of-jurisdiction” exception.¹⁷⁰ Recognizing that finality is a “crucial motivating factor for defendants to enter global settlements in multidistrict litigation,” the

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 720-22 (discussing the voluntary coordination that culminated in global settlements being reached).

166. *See id.*

167. *Id.* at 720.

168. *Id.*

169. *Id.*

170. *Id.*

federal multidistrict litigation court invoked the All Writs Act and ordered a limited injunction.¹⁷¹

Thus, the multidistrict litigation court sided with the courts that have interpreted the “necessary-in-aid-of-jurisdiction” exception broadly in complex multidistrict litigation. As the court warned, allowing parallel state lawsuits like *Plubell* to proceed unchecked would very likely result in a chilling effect on future settlements.¹⁷² This potential effect provides a strong argument in support of the use of anti-suit injunctions in this kind of case.

But not all courts agree. As the Anti-Injunction Act was historically understood, none of its exceptions would have applied to parallel federal and state mass tort litigation.¹⁷³ Consistent with the traditional interpretation of the Anti-Injunction Act, some courts reject attempts to invoke the All Writs Act and the “necessary-in-aid-of-jurisdiction” exception to allow injunctions against *in personam* litigation.¹⁷⁴ Furthermore, even if courts agree with a broader interpretation of the “necessary-in-aid-of-jurisdiction” exception in the context of multidistrict litigation, the circumstances under which injunctions may be allowed are far from clear.

VI. CRITICISM AND CONFUSION SURROUNDING THE ANTI-INJUNCTION ACT

Just as confusion currently exists concerning the propriety of allowing injunctions in mass tort litigation as “necessary-in-aid-of-jurisdiction,” from the beginning, considerable confusion has existed surrounding the application of the Anti-Injunction Act in general. In part, the confusion regarding the Act’s application relates to its dual purposes.¹⁷⁵ On the one hand, the prohibition against anti-suit injunctions exists to respect the autonomy of state courts.¹⁷⁶ On the other hand, the exceptions to the Act’s broad prohibition against injunctions are meant to protect federal courts’ interests when those interests outweigh the state courts’ autonomy concerns.¹⁷⁷ In the context of mass tort litigation where a parallel state court proceeding threatens to

171. *Id.* at 728, 730.

172. *Id.* at 728.

173. See *Negrete v. Allianz Life Ins. Co.*, 523 F.3d 1091, 1011 (9th Cir. 2008) (“[T]he necessary-in-aid-of-jurisdiction exception applies to *in rem* proceedings where the federal court has jurisdiction over the *res* and the state court proceedings might interfere with that.”) (citing *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 641-42 (1977)).

174. *In re Vioxx Prods. Liab. Litig.*, 869 F. Supp. 2d at 725-26 (citing *In re Life Investors Ins. Co. of Am.*, 589 F.3d 319 (6th Cir. 2009); *Negrete*, 523 F.3d 1091; *Standard Microsystems Corp. v. Texas Instruments Inc.*, 916 F.2d 58 (2d Cir. 1990); *In re General Motors Corp.*, 134 F.3d 133 (3d Cir. 1998)).

175. See Wood, *supra* note 109, at 290.

176. *Id.*

177. *Id.*

frustrate a federal court's ability to manage litigation, including facilitating global settlements, the competing interests of federalism and efficiency are invoked most acutely.¹⁷⁸ Perhaps not surprisingly, as these competing interests come into play, courts struggle to interpret the Act in a coherent and consistent manner.

Some of the blame for the confusion lies in the language of the 1948 revisions to the Act and in the lack of guidance provided in the legislative history.¹⁷⁹ In 1977, Professor Martin Redish observed that both the statutory language of the revisions and the Reviser's Notes were unclear regarding the scope or the intent of the changes to the Act.¹⁸⁰ In fact, some have lamented that the revisions raised more questions than they answered.¹⁸¹ Writing more than a decade later, in 1990 Professor Diane Wood assessed that the Anti-Injunction Act is "badly in need of attention . . . [because it] still suffers from 'dense clouds of ambiguity,' and still might fairly be called the 'most obscure of jurisdictional statutes.'"¹⁸² She described the Act as "an unsatisfactory 'thing of threads and patches,' whether measured by the volume of litigation involving the Act, the consistency of results, or the clarity and achievement of its purposes."¹⁸³ As courts struggled to interpret the Act, the law surrounding the exceptions had matured into what Professor Wood described as an "unattractive mess."¹⁸⁴ Scholars are not the only ones who have lamented the confusion surrounding the application of the Anti-Injunction Act. As early as 1970, Sixth Circuit Judge Anthony Celebrezze complained,

While protesting that the Act does not establish "only a principle of comity," the [Supreme] Court [has] proceeded to define the Act's purpose in the same language that has traditionally

178. Wes, *supra* note 135, at 1607-08.

179. Redish, *supra* note 26.

180. *Id.*

181. *Id.* at 722 (quoting Comment, *Federal Injunctions Against Proceedings in State Courts*, 35 CALIF. L. REV. 545, 563 (1947)).

182. Wood, *supra* note 109, at 320 (citing David P. Currie, *The Federal Courts and the American Law Institute, Part II*, 36 U. CHI. L. REV. 268, 322 (1969)). Some cases, however, have held that the AIA is not jurisdictional in nature. Wood, *supra* note 109, at 294. Rather, it merely applies a prohibition that absent exception prohibits courts that otherwise already have jurisdiction over a cause of action from enjoining action in a parallel state proceeding. *Id.* at 295-96.

183. *Id.* at 290 (citing Tefford Taylor & Everett I. Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 YALE L.J. 1169, 1172 (1933)).

184. Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2047 (2008); *see also, e.g.*, *Honey v. Goodman*, 432 F.2d 333, 340-43 (6th Cir. 1970) (discussing in-depth three cases – *Amalgamated Clothing Workers of Am. v. Richman Bros. Co.*, 348 U.S. 511 (1955); *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957); *Atlantic Coast Line R.R. Co. v. Bhd. of Locomotive Engr's*, 398 U.S. 281 (1970) – to illustrate the continuing uncertainty in the AIA's application following the 1948 revisions).

been used to define the judicial doctrines of comity and abstention . . . to prevent needless friction between state and federal courts.¹⁸⁵

As Professor Wood suggested, one can take a cynical view and conclude that “courts have continued to treat the [Act’s] statutory language like silly putty, stretching and squashing it in an effort to use anti-suit injunctions against state court proceedings when circumstances seemed to justify them.”¹⁸⁶ While the Anti-Injunction Act was meant to prevent friction between state and federal courts, including discouraging litigation over forum selection, conflicting interpretations of the exceptions to the Anti-Injunction Act have done the opposite: “rewarding litigation over choice of forum, and when applicable they enable the federal courts to forcibly control the state courts’ exercise of power.”¹⁸⁷

VII. SUPREME COURT DECISIONS FAVORING FEDERALISM AND STRICT STATUTORY CONSTRUCTION OVER EFFICIENCY

Thus far, the Supreme Court has not answered whether federal multidistrict litigation courts may legitimately rely on the All Writs Act and the Anti-Injunction Act to issue injunctions as “necessary-in-aid-of-jurisdiction” in mass tort litigation. Moreover, as the criticism surrounding the Anti-Injunction Act suggests, the Supreme Court’s decisions have resulted in as much confusion as they have guidance. It is far from clear that the Supreme Court would agree with the trend to interpret the “necessary-in-aid-of-jurisdiction” exception to allow injunctions against parallel state actions in complex, multidistrict litigation cases. An examination of the Supreme Court’s jurisprudence, including its most recent opinion concerning the Anti-Injunction Act and its prior opinions considering innovations aimed at increasing efficiency in aggregate litigation, however, suggests that it would not. Indeed, when presented with conflicting options, the Supreme Court consistently favors federalism and strict statutory construction over judicial innovations calculated to improve efficiency.

185. *Honey*, 432 F.2d at 342 (quoting *Atlantic Coast Line*, 398 U.S. at 286) (comparing *Atlantic Coast Line* with *Harrison v. NAACP*, 360 U.S. 167, 176 (1959) (considering abstention and stating, “avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns . . .”) and *Darr v. Burford*, 339 U.S. 200, 204 (1950) (considering comity and “potential conflict between state and federal courts”).

186. Wood, *supra* note 109, at 289-90.

187. *Id.* at 291; accord Roger Trangsrud, *Federalism and Mass Tort Litigation*, 148 U. PA. L. REV. 2263, 2272-73 (2000) (pointing out the reality that if certain courts are backlogged or are perceived as hostile to certain types of cases, plaintiffs’ counsel will file in more “friendly” courts).

From its earliest Anti-Injunction Act decisions, the Supreme Court has warned against interpretations that would enlarge exceptions to the Act and has resisted attempts to do so.¹⁸⁸ Nevertheless, during the first 150 years after the Anti-Injunction Act was first passed, many common law exceptions arose.¹⁸⁹ Over time, the exceptions that developed to the original Anti-Injunction Act became “well defined and . . . far-reaching.”¹⁹⁰ Then, in 1941, the Supreme Court in *Toucey v. New York Life Insurance Co.* drew the line against judicially created exceptions to the Act.¹⁹¹ There, the Court considered whether, in consolidated cases, a federal court had the power to stay a proceeding in state court if the claim had previously been adjudicated in the federal court.¹⁹² In other words, the Court considered whether the federal courts could rely on the doctrine of *res judicata* to enjoin a state court case if a federal court had already decided the case. Writing for the Court, Justice Frankfurter answered, unequivocally, “No.”¹⁹³

In its decision, the majority considered the various exceptions to the Anti-Injunction Act that had been created and declared “that apart from Congressional authorization, only one ‘exception’ has been imbedded in [the Anti-Injunction Act] by judicial construction, to wit, the *res* cases.”¹⁹⁴ The majority, therefore, refused to recognize a “relitigation” exception, even though federal courts had enjoined state courts in such situations in the past, and in *Toucey*, the consolidated cases in fact were fully litigated in the federal courts before being brought in the state courts.¹⁹⁵ Nevertheless, Justice Frankfurter warned, “Loose language and a sporadic, ill-considered decision cannot be held to have imbedded in our law a doctrine which so patently violates the expressed prohibition of Congress.”¹⁹⁶ In interpreting the Anti-Injunction Act strictly, the Supreme Court declared, “We must be scrupulous in our regard

188. See, e.g., *Kline v. Burke Const. Co.*, 260 U.S. 226, 232-34 (1922).

189. See Redish, *supra* note 26 (discussing in-depth various exceptions that had arisen). Among the exceptions were federal court injunctions to prevent the enforcement of fraudulently obtained state court judgments and federal court injunctions against *in rem* state proceedings that would interfere with property that was already in the custody of the federal courts. See *Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118, 132-39 (1941) (cataloging various exceptions that had been recognized prior to its decision to reject the relitigation exception urged in the consolidated cases before it), *superseded by statute*, Anti-Injunction Act of 1948, Ch. 646, 64 Stat. 968, *as recognized in* *Parsons Steel, Inc. v. First Al. Bank*, 474 U.S. 518, 524 (1986).

190. Redish, *supra* note 26, at 720.

191. *Toucey*, 314 U.S. at 139.

192. *Id.* at 126.

193. *Id.* at 141.

194. *Id.* at 139. This early reference to the “res” cases in *Toucey* is an early recognition of the “in-aid-of-jurisdiction” exception to the Anti-Injunction Act. See *supra* Part V.A.2.

195. *Toucey*, 314 U.S. at 139.

196. *Id.*

for the limits within which Congress has confined the authority of the courts of its own creation.”¹⁹⁷

In 1948, responding to the Supreme Court’s holding in the *Toucey* decision, Congress revised the Anti-Injunction Act,¹⁹⁸ not only codifying the “re-litigation” exception that the majority in *Toucey* rejected, but also codifying the two other previously acknowledged exceptions: the “expressly authorized” exception and the “necessary-in-aid-of-jurisdiction” exception.¹⁹⁹ The revised Anti-Injunction Act, which has not since been amended, states, “A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”²⁰⁰

Despite Congress’s apparent rebuke in revising the Act to overrule the Supreme Court’s decision in *Toucey*, the Court has remained largely steadfast in its declarations that it refuses to embrace “loose” interpretations of the statute and its continued message that courts must maintain a “scrupulous” regard for the Anti-Injunction Act’s limits on the authority of the federal courts.²⁰¹ Indeed, the language favored by the Supreme Court in dealing with the Anti-Injunction Act has been so deferential at times that the Act has been characterized by one commentator as occupying “a post of near-constitutional dignity.”²⁰²

197. *Id.* at 141.

198. 28 U.S.C. § 2283 (2012) (Historical and Revision Notes).

199. *Id.* In adopting the relitigation exception, Congress found persuasive Justice Reed’s dissent in *Toucey*, which examined cases decided before the 1911 revision the Anti-Injunction Act. *Id.*; *Toucey*, 314 U.S. at 143-51 (Reed, J., dissenting). Justice Reed had argued that before the *Toucey* decision, it was commonly accepted that federal courts had the power to protect their judgments, and the 1911 revision to the Anti-Injunction Act did not intend to take away that power. *Toucey*, 314 U.S. at 151 (Reed, J., dissenting).

200. 28 U.S.C. § 2283 (2012). The Revisers’ Notes make clear that although the bankruptcy exception was eliminated, the more general “expressly authorized by Act of Congress” language was meant to cover all statutorily authorized injunctions. § 2283 (Historical and Revision Notes).

201. *See, e.g.,* *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2375 (2011) (citing *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988)); *see also* *Atlantic Coast Line R.R. Co. v. Bhd. of Locomotive Engr’s*, 398 U.S. 281, 286-87 (1970). *But see* Wood, *supra* note 109, at 297 (noting that “[m]any commentators have noted (with glee or despair) that the words ‘expressly authorized’ actually mean ‘implicitly’ authorized.”); Redish, *supra* note 26, at 733-39. Wood also notes, however, that the “in-aid-of-jurisdiction” exception is the one that “has often been construed with the greatest nineteenth century rigor the courts can muster.” Wood, *supra* note 109, at 301.

202. William C. Bryson, Note, *Federal Courts Injunctions – the Civil Rights Act of 1871 Constitutes an Express Statutory Exception to the Anti-Injunction Statute*, 50 TEX. L. REV. 170, 171-72 (1971). Despite the Court’s language about strict interpretation, however, at least as to the first exception, the Court’s interpretation has not rested on strict application. Indeed, in *Mitchum v. Foster*, the Court went beyond the

In its decisions the Court has stated that it “expressly rejected [t]he view that” the Anti-Injunction Act “merely states a flexible doctrine of comity”²⁰³ Rather, the Supreme Court has declared that “the Act is an absolute prohibition against any injunction of any state-court proceedings, unless the injunction falls within one of the three specifically defined exceptions in the Act.”²⁰⁴ In its language, the Supreme Court consistently reiterates that it interprets the Anti-Injunction Act “strictly” and repeatedly warns against interpretations that would enlarge those statutory exceptions.²⁰⁵ Its decisions frequently invoke the principle that the Anti-Injunction Act represents “Congress’[s] considered judgment as to how to balance the tensions inherent in [a dual] system [of courts],”²⁰⁶ and its purpose protects state courts from unauthorized interference by federal courts.²⁰⁷ With this principle and purpose in mind, the Court declared in the 2011 case *Smith v. Bayer Corporation*, “[C]lose cases have easy answers: The federal court should not issue an injunction.”²⁰⁸ Rather, any “doubts as to the propriety of a federal

“expressly authorized” language in the first exception to the Anti-Injunction Act and instead stated two practical tests: (1) “an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding”; and “[t]he test . . . is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding.” 407 U.S. 225, 237-38 (1972). *Mitchum*, however, was unique in that the question it presented was whether a federal court could enjoin state court proceedings that allegedly violated the Civil Rights Act, the text of which did not include any explicit authority to issue such an injunction that the Anti-Injunction Act would otherwise have barred. *Id.* at 226. The trend of allowing anti-suit injunctions in certain mass tort, multidistrict litigation situations, however, has not relied on the Court’s arguably looser interpretation of the expressly authorized exception. Rather, the trend focuses on the second exception – the “in-aid-of-jurisdiction” exception, which, as the Court recently did in its interpretation of the relitigation exception, the Court has consistently interpreted strictly against allowing injunctions.

203. *Mitchum*, 407 U.S. at 228.

204. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630 (1977).

205. *See id.* at 643.

206. *Chick Kam Choo*, 486 U.S. at 146.

207. *Mitchum*, 407 U.S. at 232-33 (dealing with the “expressly authorized” exception) (citing *Okla. Packing Co. v. Okla. Gas & Elec. Co.*, 309 U.S. 4, 9 (1940)).

208. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011). In the first footnote to the *Smith* case, the Court stated that the case preceded the passage of CAFA because the case had been going on for over six years before the class certification decision. *Id.* at 2373 n.1. If the state court action had been filed after 2005, the defendant in the state court case could have removed it to the federal court under the minimal diversity provision in CAFA, which would have prevented this situation that presented a risk of inconsistent federal and state court judgments. *Id.* (citing 28 U.S.C. §§ 1332(d), 1453(b) (2012)). In light of the passage of CAFA, the effect of the Supreme Court’s decision in this case is limited, which the Court itself recognized. *See id.* at 2382.

injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed”²⁰⁹

Thus, although many of the Court’s earlier decisions interpreting the Anti-Injunction Act predated the problems inherent in modern mass tort litigation, just two years ago the Court reiterated that the “Act’s core message is one of respect for state courts.”²¹⁰ “The [Anti-Injunction] Act broadly commands that those tribunals ‘shall remain free from interference by federal courts.’”²¹¹

Smith v. Bayer Corporation dealt with nearly identical, related-but-separate claims against Bayer arising out of an allegedly defective drug called Baycol.²¹² In August of 2001, George McCollins filed a lawsuit related to Baycol against Bayer in West Virginia state court, seeking to certify a class of West Virginia residents.²¹³ One month later, Keith Smith and Shirley Sperlazza (together “Smith”) filed a separate but substantially identical lawsuit, also in West Virginia state court and also seeking to certify a class of West Virginia residents.²¹⁴ The purported class sought by Smith was identical to the purported class sought by McCollins.²¹⁵ Although Bayer removed the *McCollins* action to federal court on federal diversity jurisdiction grounds, it was not able to remove the *Smith* action because complete diversity between the parties was not present.²¹⁶

After the *McCollins* action was removed to federal court, it was consolidated under the Multidistrict Litigation Statute with related federal cases and transferred to a federal multidistrict litigation court in Minnesota.²¹⁷ The *McCollins* and *Smith* cases then proceeded on parallel paths, one in federal court and one in state court.²¹⁸ In both cases, the plaintiffs sought class certification; however, the federal court decided the class certification question before the state court did.²¹⁹ The federal court determined that the class pro-

209. *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng’rs*, 398 U.S. 281, 297 (1970).

210. *Smith*, 131 S. Ct. at 2375 (citing *Atl. Coast Line R.R. Co.*, 389 U.S. at 282).

211. *Id.*

212. *Id.* at 2373.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 2373-74. As the Court pointed out in a footnote, CAFA’s minimal diversity jurisdiction did not allow the *Smith* case to be removed to federal court because the *Smith* case was filed before 2005, when CAFA was enacted. *See id.* at 2373 n.1. If the *Smith* case had been filed after CAFA’s passage, the *Smith* action could have been removed to federal court. *See id.* If that had happened, it would have been transferred to the federal multidistrict litigation court in Minnesota along with *McCollins* and the other consolidated federal cases. *See id.* at 2373.

217. *Id.*

218. *Id.* at 2374.

219. *Id.*

posed in the *McCollins* case failed to meet the requirement for class certification under Federal Rule of Civil Procedure 23 because individual issues predominated, rendering the cases ineligible for class action treatment.²²⁰

After receiving this favorable ruling in the *McCollins* federal multidistrict litigation action, Bayer moved the federal district court to enjoin the state court in the *Smith* case from certifying the identical class of putative plaintiffs in that case.²²¹ Relying on the relitigation exception in the Anti-Injunction Act, which permits a federal court to enjoin parallel state court proceedings when necessary “to protect or effectuate [the federal court’s] judgment[,],” the district court granted the injunction.²²² On appeal, the Eighth Circuit affirmed.²²³

However, in keeping with its decisions that interpret exceptions to the Anti-Injunction Act strictly, the Supreme Court reversed.²²⁴ The Court noted that under the “relitigation exception,” an injunction could only issue if preclusion were “clear beyond peradventure.”²²⁵ Thus, the issue was “whether the federal court’s rejection of *McCollins*’ proposed class precluded a later adjudication in state court of *Smith*’s certification motion.”²²⁶ For such preclusion to apply, the issue decided by the federal court had to be the same as the issue presented to the state court.²²⁷ In addition, preclusion could only apply to the *Smith* action if the *Smith* plaintiffs were parties to the *McCollins* action or if the *Smith* plaintiffs were subject to one of the narrow exceptions against binding nonparties.²²⁸

Although the Eighth Circuit relied heavily on the “near-identity of the two Rules’ texts,” the Supreme Court criticized that approach.²²⁹ It reasoned that federal and state courts “can and do apply identically worded procedural

220. *Id.*

221. *Id.*

222. *Id.* at 2374; 28 U.S.C. § 2283 (2012).

223. *Smith*, 131 S. Ct. at 2374.

224. *Id.* at 2376.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* The Court discussion of preclusion in *Smith* appropriately focused on the relitigation exception to the Anti-Injunction Act. *Id.* at 2375-76. But its analysis also raises serious questions about the preclusive effect that results when federal courts enjoin parallel state litigation under the “in-aid-of-jurisdiction” exception to the Anti-Injunction Act as well. Although that exception, unlike the relitigation exception, is not grounded in the concepts of claim and issue preclusion, injunctions against state court actions that affect persons who are not parties to the federal suit may well violate the prohibition against nonparty claim preclusion if they do not qualify for an exception to this prohibition. *See, e.g., Taylor v. Sturgell*, 553 U.S. 880, 882-83 (2008) (rejecting the argument that the public law nature of Freedom of Information Act requests supported the adoption of a “virtual representation” exception to the rule against nonparty claim preclusion).

229. *Smith*, 131 S. Ct. at 2377.

provisions in widely varying ways.”²³⁰ The Court cited a West Virginia case that denounced the idea that the analysis of class certification questions under the West Virginia rule would merely, as the West Virginia court put it, “amount to nothing more than Pavlovian responses to federal decisional law.”²³¹ Because the West Virginia Supreme Court had disapproved the predominance approach to Federal Rule of Civil Procedure 23(b)(3), which was mandated by federal law and applied by the federal multidistrict court, the Supreme Court held that the federal multidistrict court’s injunction violated the Anti-Injunction Act because the issues presented in the state and federal courts were not identical.²³² In *dicta*, the Supreme Court went on to suggest that even if it did not know whether a West Virginia court would adopt the same approach as the federal court in the *McCollins* case, the Supreme Court would view that very uncertainty as precluding a federal court injunction from issuing under the Anti-Injunction Act.²³³

The Court further reasoned that the relitigation exception did not apply because party status or an applicable exception is a prerequisite for preclusion.²³⁴ The Court, however, found that Smith was not a party to the *McCollins* action.²³⁵ It stated that, while a putative class member becomes a party to a lawsuit after certification of a class in that lawsuit, they are not a party to that lawsuit before class certification.²³⁶ Moreover, a putative class member can never be considered a party after a request for class certification is denied.²³⁷

In discussing its holding, the Supreme Court opined that Bayer’s strongest argument in support of allowing the injunction to stand related to efficiency concerns surrounding the use of the class action device.²³⁸ The Court acknowledged that its approach would theoretically allow class counsel to repeatedly attempt to certify the same class by changing the named plaintiff, resulting in a “world of ‘serial relitigation of class certification,’” which would force defendants “in effect to buy litigation peace by settling.”²³⁹

230. *Id.*

231. *Id.* at 2378 (quoting *In re W. Va. Rezulin Litig.*, 214 W. Va. 52, 61 (2003)).

232. *Id.* at 2378-79.

233. *Id.* at 2377-78.

234. *Id.* at 2379.

235. *Id.*

236. *Id.* at 2380-81 (citing *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008)).

237. *Id.* at 2380.

238. *Id.* at 2381.

239. *Id.* (citing Brief for Respondent at 47-48, 2, 12, *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (No. 09-1205); *In re Bridgestone/Firestone, Inc., Tires, Prods. Liab. Litig.*, 333 F.3d 763, 767 (7th Cir. 2003) (“objecting to an ‘an asymmetric system in which class counsel can win but never lose’ because of their ability to relitigate the issue of certification”)).

Nevertheless, the Court was not persuaded to alter its decision despite these policy arguments that the Court itself characterized as “compelling.”²⁴⁰

The Court reasoned that it confronted a similar policy concern in its 2008 opinion in *Taylor v. Sturgell*.²⁴¹ That case involved litigation brought under the Freedom of Information Act (FOIA).²⁴² After prevailing in resisting a FOIA request, the government sought to bind nonparties from seeking identical requests in the future under a theory of “virtual” representation.²⁴³ The government argued that, unless the Court agreed to bind nonparties, a “‘potentially limitless’” number of plaintiffs could “mount a series of repetitive lawsuits” demanding the selfsame documents.²⁴⁴ But the Court unanimously rejected that argument, explaining that recognizing the government’s proposed theory of “virtual representation” would create, in effect, “a common-law kind of class action”²⁴⁵ In refusing to expand preclusion to non-parties in *Sturgell*, the *Smith* Court acknowledged that the “payoff in a single successful FOIA suit – disclosure of documents to the public – could ‘trum[p]’ or ‘subsum[e]’ all prior losses, just as a single successful class certification motion could do.”²⁴⁶

Alleviating these concerns, however, the Court stated that the U.S. legal system’s reliance on “principles of *stare decisis* and comity among courts [would] mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs.”²⁴⁷ The Court also opined that although CAFA did not apply to this case because the purported class action in *Smith* was filed before Congress enacted CAFA, to the extent that future class actions raised special problems related to relitigation, CAFA’s minimal diversity jurisdiction requirement would enable future defendants to remove large class actions to federal court.²⁴⁸ Thus, according to the Supreme Court, CAFA removal would solve the relitigation issue without needing to depart from the accepted rules governing preclusion.²⁴⁹ But as discussed in Part III of this Article, CAFA’s efficacy is limited in mass tort litigation where class certification is rarely a viable option.

As recognized in the Court’s opinion itself, *Smith* was not the first time the Court considered and rejected efficiency arguments in favor of protecting strict statutory construction and federalism.²⁵⁰ Indeed, more than twenty-five years earlier, the Court explicitly acknowledged that duplicative litigation is

240. *Id.*

241. *Id.* at 2379-80 (citing *Taylor v. Sturgell*, 553 U.S. 880 (2008)).

242. *Taylor*, 553 U.S. at 885.

243. *Id.* at 888.

244. *Id.* at 903.

245. *Id.* at 882.

246. *Smith*, 131 S. Ct. at 2381.

247. *Id.*

248. *Id.* at 2382.

249. *Id.* at 2381-82.

250. *Id.* at 2382.

merely “one of the costs of our dual court system” when it rejected a federal court’s attempt to enjoin parallel state litigation.²⁵¹ Likewise, in the *Sturgell* case, the Court was not sufficiently moved by efficiency concerns to bind non-parties, despite recognizing the argument that a limitless number of plaintiffs could mount repetitive lawsuits hoping to subsume all prior losses with one successful suit.²⁵² Similarly, ten years before *Sturgell*, the Court disapproved an actual practice that had developed in multidistrict litigation cases to improve judicial efficiency.²⁵³ As context, under the language in the Multidistrict Litigation Statute, cases may be consolidated for pretrial proceedings.²⁵⁴ Some multidistrict litigation courts, which had developed expertise in actions that were consolidated before them for pretrial, began to transfer those consolidated cases to themselves for trial purposes as well.²⁵⁵ The rationale was that because those multidistrict litigation courts managed the pretrial proceedings of the consolidated cases, they had developed a level of expertise regarding the cases.²⁵⁶ Thus, retaining the cases for trial would be more efficient than transferring them back to the courts from which they originated.²⁵⁷ In *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, however, the Supreme Court held that the Multidistrict Litigation Statute does not allow transferee courts to assign transferred cases to themselves for trial, despite the gains in efficiency that would result from such transfers.²⁵⁸

The risk that the Supreme Court will interpret the Anti-Injunction Act “strictly” and rule against the trend that enlarges the statutory “necessary-in-aid-of-jurisdiction” exception in the context of mass tort litigation, therefore, is real. Even acknowledging the confusion surrounding the Court’s interpretation of the Anti-Injunction Act, the trend to interpret the “necessary-in-aid-of-jurisdiction” exception more broadly is at odds with the Supreme Court’s historical preference for strict statutory construction and federalism over efficiency when faced with these choices.

Though this broad reading of the “necessary-in-aid-of-jurisdiction” exception in multidistrict litigation actions is meant to increase efficiency by allowing federal courts to block duplicative state litigation, that purpose is undermined by the uncertainty the trend has created. Defendants are encouraged to seek federal injunctions against duplicative state actions because certain courts have embraced that approach. Plaintiffs, on the other hand, have

251. *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 525 (1986) (holding a federal court injunction “not justified under ‘relitigation exception’ of the Anti-Injunction Act”).

252. *Taylor v. Sturgell*, 553 U.S. 880, 903-04 (2008).

253. *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 27 (1998).

254. 28 U.S.C. § 1407 (2012).

255. *See, e.g., Lexecon*, 523 U.S. at 33.

256. *See id.* at 32.

257. *Id.*

258. *Id.* at 40.

sound arguments that the approach violates the Anti-Injunction Act. Thus, in addition to litigating their substantive cases, parties now also litigate whether federal injunctions against parallel state mass tort litigation are ever allowed under the Anti-Injunction Act.

The result – “expense, delay, resulting crowding of dockets, divergent decisions on identical factual questions, and sometimes the insolvency of the defendants who are being sued” – is just what Chief Justice Rehnquist warned against when he cautioned courts not to operate under a “parochial view,” which he characterized as one that would allow duplicative and exhaustive litigation.²⁵⁹ Unfortunately, the “parochial” view that Chief Justice Rehnquist lamented appears to be the right one in this instance; indeed, it is certainly the safer one.

VIII. EXPANDING FEDERAL PRETRIAL JURISDICTION AND OVERSIGHT OF RESULTING SETTLEMENTS

Because effective docket management by multidistrict litigation courts is crucial to the courts’ ability to resolve complex mass tort litigation where class action treatment is not available,²⁶⁰ it is imperative that Congress act to facilitate pretrial consolidation of related cases. That consolidation should be available for all related cases that are filed in courts around the country, even when those cases are filed in the courts of various states, and even when those cases are not independently eligible for removal to federal court. Although a more modest solution to the confusion surrounding the Anti-Injunction Act could be had by “expressly authorizing” injunctions in the Multidistrict Litigation Statute, that solution does not sufficiently address the other problems discussed in this Article.²⁶¹

Instead, an amendment to the federal Multidistrict Litigation Statute to allow pretrial consolidation of related cases that are filed in state courts as well as federal courts would facilitate the kinds of truly global settlements that would result in finality. Doing so would free courts to handle the other cases that crowd their dockets. While voluntary coordination of the kind advocated by the Manual for Complex Litigation and the ALI’s Principles of Aggregate Litigation has been quite successful in situations like the *Vioxx* case, the lack of statutory authority to bring all of the claims under the jurisdiction of one tribunal continues to leave open the possibility that parallel state cases that are not included in the coordinated efforts may undermine the gains reached through such coordination.²⁶²

259. Rehnquist, *supra* note 1, at 1524.

260. See Sherman, *The MDL Model for Resolving Complex Litigation*, *supra* note 34, at 2223.

261. See *supra* Part IV.

262. See Sherman, *The MDL Model for Resolving Complex Litigation*, *supra* note 34, at 2208.

This potential threat could be drastically reduced by incorporating a minimal diversity jurisdiction requirement into the Multidistrict Litigation Statute, similar to the requirement imposed by Congress in 2005 as part of CAFA.²⁶³ Federal courts have jurisdiction over class actions under CAFA if certain requirements are met: minimal diversity exists; the amount in controversy, which may be aggregated, exceeds \$5,000,000; and there are at least 100 members in the class.²⁶⁴ Under CAFA, minimal diversity exists when “any member of a class of plaintiffs is a citizen of a State different from any defendant.”²⁶⁵

In passing CAFA, Congress ostensibly showed a relatively recent willingness to address the problem of duplicative litigation in large-scale litigation, which is promising. CAFA was the first time Congress had “enacted a generally applicable legislative policy pertaining to aggregate representative litigation”²⁶⁶ But as illustrated earlier, despite Congress’s attempt to address duplicative federal and state litigation by adopting a minimal diversity requirement in CAFA, more work needs to be done.²⁶⁷ Because most mass tort litigation does not qualify for class treatment in federal courts, federal courts still confront situations in which they must determine whether injunctive relief is authorized against overlapping state court proceedings pursuant to the Anti-Injunction Act.²⁶⁸ Adding minimal diversity jurisdiction to the Multidistrict Litigation Statute would drastically alleviate this problem and be consistent with Congress’s intent in passing CAFA.

The Multidistrict Litigation Statute should also be amended, however, to require courts to provide oversight during the settlement process and to the settlements themselves. Strong arguments exist to support the proposition that cases consolidated under the Multidistrict Litigation Statute are different from individual cases, even when the consolidated multidistrict litigation cases do not qualify for class action treatment.²⁶⁹ Although the consolidated

263. See 28 U.S.C. § 1332(d) (2012). Of course, this requirement would not cover all related cases, as at least minimal diversity would still be required. Thus, for example, Merck & Co., Inc. is headquartered in New Jersey. MERCK, <http://www.merck.com/contact/home.html> (last visited Apr. 9, 2014). Thus, litigation by Texas residents against Merck would be removable to federal court under minimal diversity jurisdiction. Litigation by New Jersey residents against Merck, on the other hand, would not be removable unless diverse parties were also joined in the litigation. This solution, therefore, does not purport to completely solve the problems inherent in duplicative state and federal litigation, but it would be a significant improvement over the current situation.

264. 28 U.S.C. § 1332(d)(2).

265. 28 U.S.C. § 1332(d)(2)(A).

266. Wolff, *supra* note 184, at 2036.

267. See *supra* Parts I-III.

268. See Sherman, *The MDL Model for Resolving Complex Litigation*, *supra* note 34, at 2206.

269. See, e.g., *In re Diet Drugs*, 582 F.3d 524, 547 (3d Cir. 2009).

cases are still individual claims – indeed, if remanded for trial they would return as separate cases to the separate courts from which they were transferred – “the number and cumulative size” of mass tort cases can create a “penumbra of class-type interest on the part of all [the] litigants and of public interest on the part of the court and the world at large.”²⁷⁰ The power of the courts should be viewed in this “semi-public context.”²⁷¹

In the context of class actions, various circuits have adopted formal tests for the approval of class action settlements.²⁷² In multidistrict litigation where settlement classes are neither sought nor certified, however, settlements are not necessarily subject to these formal tests. Of course, multidistrict litigation courts often exercise supervisory authority over non-class settlements on the grounds that such actions are “quasi class actions” because the actions are litigated like class actions with “thousands of lawsuits being litigated on a common basis under close judicial management”²⁷³

Multidistrict litigation courts, however, are not required to approve aggregate settlements, unless special circumstances exist, such as where minors are involved.²⁷⁴ Indeed the ALI’s most recent related report, the Principles of Aggregate Litigation, has been characterized as indirectly approving “the common practice of mass tort lawyers treating individual clients as if they were members of a class action”²⁷⁵ Despite the “semi-public context” of mass tort litigation, some courts approve aggregate settlements without necessarily conducting an independent review of the terms of the settlement or the process that led to the settlement.²⁷⁶ However, the increasing reliance on the Multidistrict Litigation Statute to manage complex mass tort litigation where class action treatment is not available weighs in favor of requiring court oversight of settlements made possible by this kind of aggregation.²⁷⁷ There is no compelling reason to distinguish the requirement of such over-

270. *Id.* (citing *In re Air Crash Disaster at Fla. Everglades* on Dec. 29, 1972, 549 F.2d 1006, 1012 (5th Cir. 1977)).

271. *Id.*

272. Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165, 3174 (2013) (citing *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 317 (3d Cir. 1998); *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974)).

273. Moore, *supra* note 38, at 3267 (quoting *In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d 184, 196 (S.D.N.Y. 2011)).

274. *Id.*

275. *Id.* at 3275 (citing Nancy J. Moore, *The Absence of Legal Ethics in the ALI’s Principles of the Law of Aggregate Litigation: A Missed Opportunity – and More*, 79 GEO. WASH. L. REV. 717, 728-29 (2011) (lamenting the failure to afford clients even the minimal “judicial protections given to actual class members”).

276. *Id.* at 3267 (citing Willging & Lee III, *supra* note 38, at 802).

277. *See id.* at 3268-69.

sight in the class action context from the lack of any such requirement in the multidistrict litigation context.

The changes advocated in this Article would benefit all parties, as well as the courts that have to manage the crush of lawsuits that comprise mass tort litigation. Bringing everyone together before one court would increase the possibility of reaching truly global settlements that more accurately assess the value of the consolidated claims and that take into account the diminished threat of holdover parallel state court litigation. Although the changes would force some reluctant plaintiffs to the bargaining table in federal rather than state courts, it would ensure all plaintiffs a place in the negotiations. Arguably, that participation would be preferable to plaintiffs choosing to sit out in hopes of achieving a more favorable deal, and later learning that their rights were affected by a process in which they had no part. Under these proposals all current plaintiffs would be included in the bargaining process, and no – or very few – potential plaintiffs would be left to threaten the settlement process.²⁷⁸ Requiring judicial oversight would further afford parties at least the minimal judicial protections given in settlements of class actions to settlements of multidistrict consolidated cases.

IX. CONCLUSION

As is clear from the enactment of the Multidistrict Litigation Statute in the 1960s and the enactment of CAFA nearly forty years later, the problems related to duplicative litigation have persisted for decades. Despite numerous calls for reform, however, the problem continues to vex courts and lawyers alike. Depending on one's point of view, the Anti-Injunction Act may present the greatest challenge to effectively managing mass tort litigation, or it

278. This proposal does not attempt to bind future plaintiffs whose injuries are not yet apparent. Nevertheless, given the time it would likely take to conduct sufficient discovery to determine whether settlements are warranted or to sufficiently prepare for trial to be remanded to the various courts from which the litigation was transferred, it is likely that statutes of limitation would require plaintiffs without latent injuries to file suit and be included in the consolidated proceedings. Unlike in the class actions, which involve representative litigation, consolidations under the federal Multidistrict Litigation Statute and similar state statutes do not result in representative litigation as such. Rather, the individual nature of the lawsuits is retained. Thus, in class actions, the tolling of statutes of limitations facilitates efficiency by discouraging individual lawsuits while representative litigation is pursued. *See Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983); *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 545-46 (1974). Without the protection offered by tolling, individual class members would have to file lawsuits prophylactically to preserve their claims where class certification decisions were not reached before the limitations periods expired. In contrast, efficiency in the multidistrict litigation context would be discouraged by tolling.

may provide the greatest safeguard to effectively managing federal and state court relationships.²⁷⁹ Thus, confusion reigns.

This Article concludes that the trend to recognize a mass tort, multidistrict litigation exception to the Anti-Injunction Act is unlikely to survive a Supreme Court challenge. As historically understood, none of the Anti-Injunction Act's exceptions apply to parallel federal and state mass tort litigation. In addition, the Court's historical tendency to protect federalism over efficiency concerns and its most recent opinion interpreting the Anti-Injunction Act suggest that the trend would not survive a Supreme Court challenge.

Nevertheless, serious concerns about judicial efficiency and effective docket management have led commentators and courts alike to rely on the "necessary or appropriate" language in the All Writs Act and the "necessary-in-aid-of-jurisdiction" language in the second exception to the Anti-Injunction Act to conclude that injunctions may issue in certain multidistrict litigation cases. In addition, because no procedural mechanism allows for inter-state consolidation of large-scale litigation, federal and state courts have been left to informally coordinate proceedings to maximize efficiency without offending the principles of federalism. When voluntary coordination has not worked, or even when it has worked, parallel state action can nevertheless threaten the effective management of multidistrict litigation. Multidistrict litigation courts, therefore, face the uncomfortable task of deciding whether to issue an injunction against parallel state action, in light of the broad historical prohibition against injunctions in the Anti-Injunction Act.

This Article proposes an amendment to the federal Multidistrict Litigation Statute to facilitate the transfer of the vast majority of related cases that are filed in state courts as well as federal courts before the multidistrict litigation court during the pretrial phase of such litigation. In addition, it proposes that the Multidistrict Litigation Statute be amended to require courts to provide oversight of any settlement negotiations and agreements to furnish at least the level of protection provided in the context of class actions.

279. See Wood, *supra* note 109, at 290.