

Applying State Contingency Fee Caps in Multidistrict Litigation (MDL) Settlements*

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I. Introduction

An attorney signs a retainer agreement to represent a Connecticut resident allegedly harmed by taking a new prescription drug manufactured by a New York drug company. The attorney will charge a 40% contingency fee according to the agreement. The attorney decides to bring the case in federal court in the Southern District of New York on the basis of diversity jurisdiction and files suit under New York state tort law. Given that the defendant's headquarters are in New York, the plaintiff works full-time in

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New York, and the plaintiff's injury—a heart attack—happened in New York, the attorney believes New York law will apply to all substantive legal issues under New York choice-of-law rules.

Just weeks later, upon the defendant's motion in this case and in 500 other cases filed nationwide involving the same drug, the Judicial Panel on Multidistrict Litigation approves the transfer of all 501 cases to the federal district court in Connecticut for consolidated multidistrict litigation (MDL) proceedings. In a matter of months, the defendant settles almost all of its pending claims with the MDL plaintiffs in a single settlement, while the case is still pending before the MDL transferee court.¹ The original Connecticut plaintiff settles for \$800,000, and the attorney keeps 40% (\$320,000) as her contingency fee. But the Connecticut plaintiff wants the benefit of New York state law, which caps contingency fees for this size settlement at 25%,² or \$200,000 in this case. Can the Connecticut plaintiff enforce the state contingency fee caps?

Stated differently, the question posed by this hypothetical is whether state laws capping contingency fees apply to settlements of federal diversity cases pending before MDL transferee courts. Because several state laws broadly cap contingency fee awards, this question will continue to arise in cases consolidated through the MDL process. This question also raises a plethora of interesting legal issues, including the application of state law in federal courts, the possibility of forum shopping between state and federal forums, and the equities among plaintiffs and their counsel, all consolidated in the same MDL court.

This Note ultimately argues that state contingency fee caps should apply to settlements of federal diversity cases pending before MDL courts. Part II of this Note begins by giving background on state contingency fee caps and the MDL consolidation process. Part III then moves to the Note's core analysis: it argues that state fee caps should apply to MDL settlements for three important reasons. Next, Part IV addresses two policy concerns that critics have advanced against the analysis in Part III. After resolving these policy concerns, the Note briefly concludes in Part V.

1. The term "MDL transferee court" refers to the federal district court where multiple cases are consolidated for pretrial proceedings pursuant to the MDL consolidation statute. *See* 28 U.S.C. § 1407 (2006) (setting forth the procedure for consolidating multiple cases). An "MDL transferor court," on the other hand, refers to the federal district court where an MDL plaintiff originally brought suit, and from which the suit is transferred for pretrial proceedings. *Id.*

2. N.Y. SUP. CT. APP. DIV. 1ST DEPT. R. 603.7(e); N.Y. SUP. CT. APP. DIV. 2D DEPT. R. 691.20(e); N.Y. SUP. CT. APP. DIV. 3D DEPT. R. 806.13; N.Y. SUP. CT. APP. DIV. 4TH DEPT. R. 1022.31.

II. Background on State Contingency Fee Caps and MDL Consolidation

A. *State Contingency Fee Caps*

Several state laws broadly cap contingency fees in most kinds of tort suits.³ For example, New Jersey's rule caps contingency fees in all tort cases, "including products liability claims . . . but excluding statutorily based discrimination and employment claims."⁴ Other state laws cap contingency fees in more narrow contexts, like medical malpractice or worker's compensation suits.⁵ For the purposes of this Note, the state contingency fee caps that apply broadly are most relevant, since many MDL settlements arise outside of the narrower contexts like medical malpractice.⁶ This Note addresses three states' broad contingency fee caps—those of New Jersey, New York, and Florida—as examples of the kinds of state caps at issue. What follows is a brief description of each of these states' fee caps.

New Jersey's fee caps are found in a rule entitled "Contingent Fees" within the New Jersey Rules of Court.⁷ As mentioned, the New Jersey caps apply "[i]n any matter where a client's claim for damages is based upon the alleged tortious conduct of another" with the exception of statute-based discrimination and employment claims.⁸ The rule creates a four-tiered fee

3. See CONN. GEN. STAT. ANN. § 52-251c(a) (West 2005) (capping contingency fees in cases involving "personal injury, wrongful death or damage to property"); R. REGULATING FLA. BAR 4-1.5(f)(4)(B) (capping contingency fees "in an action or claim for personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortious conduct of another, including products liability claims"); MICH. CT. R. 8.121(A) (capping contingency fees "[i]n any claim or action for personal injury or wrongful death based upon the alleged conduct of another or for no-fault benefits"); N.J. CT. R. 1:21-7(c) (capping contingency fees "[i]n any matter where a client's claim for damages is based upon the alleged tortious conduct of another, including products liability claims and claims among family members . . . but excluding statutorily based discrimination and employment claims"); N.Y. SUP. CT. APP. DIV. 1ST DEPT. R. 603.7(e) (capping contingency fees in "any claim or action for personal injury or wrongful death, other than one alleging medical, dental or podiatric malpractice"); OKLA. STAT. ANN. tit. 5, § 7 (West 2011) (capping contingency fees in all cases at 50%).

4. N.J. CT. R. 1:21-7(c).

5. E.g., CAL. BUS. & PROF. CODE § 6146 (West Supp. 2012) (medical malpractice); DEL. CODE ANN. tit. 18, § 6865 (1999) (medical malpractice); FLA. STAT. ANN. § 73.092 (West 2004) (eminent domain proceedings); FLA. STAT. ANN. § 768.28(8) (West Supp. 2012) (actions brought against the state of Florida); HAW. REV. STAT. ANN. § 662-12 (LexisNexis 2012) (actions brought against the state of Hawaii); KAN. STAT. ANN. § 44-536 (Supp. 2011) (worker's compensation); N.Y. JUD. LAW § 474-a (McKinney Supp. 2012) (medical, dental, and podiatric malpractice); TENN. CODE ANN. § 29-26-120 (2000) (medical malpractice); TEX. LAB. CODE ANN. § 408.221 (West Supp. 2012) (requiring commissioner or court approval of fees in worker's compensation cases); WIS. STAT. ANN. § 102.26(2) (West 2010) (worker's compensation); WIS. STAT. ANN. § 655.013 (West 2004) (medical malpractice).

6. E.g., *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 556 (E.D. La. 2009) (reviewing MDL settlement of product liability tort claims); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 3896006, at *5-8 (D. Minn. Aug. 21, 2008) (same); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491-94 (E.D.N.Y. 2006) (same).

7. N.J. CT. R. 1:21-7(c).

8. *Id.*

cap schedule, where the contingency fee allowed decreases as the amount of the claimant's recovery increases. Specifically, the rule provides:

an attorney shall not contract for, charge, or collect a contingent fee in excess of the following limits:

- (1) 33 1/3 % on the first \$500,000 recovered;
- (2) 30% on the next \$500,000 recovered;
- (3) 25% on the next \$500,000 recovered;
- (4) 20% on the next \$500,000 recovered; and
- (5) on all amounts recovered in excess of the above by application for reasonable fee in accordance with the provisions of paragraph (f) hereof⁹

If an attorney thinks the fee permitted by the fee schedule is inadequate, she can apply for a hearing to determine reasonable fees, as long as she provides written notice to the client.¹⁰ Interestingly, the New Jersey federal district court has incorporated the state cap into its local rules, but only with respect to lawyers admitted *pro hac vice*.¹¹ Local Rule 101.1(c)(4) states, “[a] lawyer admitted *pro hac vice* [to the federal district court] is deemed to have agreed to take no fee in any tort case in excess of New Jersey Court Rule 1:21-7 governing contingent fees.”¹²

Like the New Jersey caps, the New York caps can be found in the state court rules. In New York, however, each of the intermediate appellate courts, which are called the Appellate Divisions of the Supreme Court, adopted the fee caps.¹³ Because there are four appellate divisions, there are four separate fee cap rules, but they share very similar language. The fee caps apply to “any claim or action for personal injury or wrongful death, other than one alleging medical, dental or podiatric malpractice.”¹⁴ All of the New York rules provide that a contingency fee will be “deemed to be fair and reasonable” if it satisfies one of two schedules.¹⁵

9. *Id.*

10. N.J. CT. R. 1:21-7(f).

11. D.N.J. CIV. R. 101.1(c)(4).

12. *Id.*

13. N.Y. SUP. CT. APP. DIV. 1ST DEPT. R. 603.7(e); N.Y. SUP. CT. APP. DIV. 2D DEPT. R. 691.20(e); N.Y. SUP. CT. APP. DIV. 3D DEPT. R. 806.13; N.Y. SUP. CT. APP. DIV. 4TH DEPT. R. 1022.31.

14. *E.g.*, N.Y. SUP. CT. APP. DIV. 1ST DEPT. R. 603.7(e). The only New York rule whose language differs slightly is the Second Department's rule. It provides that the caps apply “[i]n any claim or action for personal injury or wrongful death, or loss of services resulting from personal injury or for property or money damages resulting from negligence or any type of malpractice, other than one alleging medical, dental or podiatric malpractice.” N.Y. SUP. CT. APP. DIV. 2D DEPT. R. 691.20(e) (emphasis added). Although this language may expand the Second Department's rule, all of the Departments' rules still apply broadly to personal injury and wrongful death cases.

15. *E.g.*, N.Y. SUP. CT. APP. DIV. 1ST DEPT. R. 603.7(e). For reference, the specific language of the fee schedule for the First Department, which is functionally identical to the fee schedules of the other Departments, is as follows:

One schedule, Schedule B, applies if the original agreement set a contingency fee “not exceeding 33 $\frac{1}{3}$ percent of the sum recovered.”¹⁶ So, if the parties originally agreed to a flat one-third fee, it will be deemed reasonable under Schedule B. The other schedule, Schedule A, applies when there is no contract providing for a flat fee less than or equal to one-third.¹⁷ Schedule A requires a contingency fee to be less than or equal to the following tiered standard: “(i) 50 percent on the first \$1,000 of the sum recovered, (ii) 40 percent on the next \$2,000 of the sum recovered, (iii) 35 percent on the next \$22,000 of the sum recovered, (iv) 25 percent on any amount over \$25,000 of the sum recovered.”¹⁸ Contingency fees that meet neither of these two schedules “constitute the exaction of unreasonable and unconscionable compensation.”¹⁹ Like the New Jersey rule, all of the New York rules also allow the attorney to apply for higher fees.²⁰ But in New York, attorneys can only seek higher fees in “extraordinary circumstances.”²¹ Notably, an attorney cannot claim extraordinary circumstances if she originally agreed to a flat fee equal to or less than one-third.²²

Finally, the Florida rule is part of the Florida Bar Rules.²³ The rule is again found in a provision entitled “Contingent Fees” and applies broadly to suits “for personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortious conduct of another, including products liability claims.”²⁴ The rule provides that fees in excess of the listed schedules are “presumed, unless rebutted, to be clearly excessive.”²⁵ It then sets out three fee schedules, each with different allowable fees depending on whether an answer is filed, and whether the

Schedule A

- (i) 50 percent on the first \$1,000 of the sum recovered,
- (ii) 40 percent on the next \$2,000 of the sum recovered,
- (iii) 35 percent on the next \$22,000 of the sum recovered,
- (iv) 25 percent on any amount over \$25,000 of the sum recovered; or,

Schedule B

A percentage not exceeding 33 $\frac{1}{3}$ percent of the sum recovered, if the initial contractual arrangement between the client and the attorney so provides, in which event the procedure hereinafter provided for making application for additional compensation because of extraordinary circumstances shall not apply.

Id.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. R. REGULATING FLA. BAR 4-1.5(f)(4). The Florida Supreme Court recently released an opinion that made certain amendments to the Florida Bar Rules, but the opinion did not affect any of the fee cap provisions that are discussed here. *In re Amendments to the Rules Regulating the Fla. Bar*, No. SC10-1967, 2012 WL 1207226 (Fla. Apr. 12, 2012).

24. R. REGULATING FLA. BAR. 4-1.5(f)(4).

25. R. REGULATING FLA. BAR. 4-1.5(f)(4)(B)(i).

defendants admit liability when filing their answer and request a trial on damages only.²⁶ The fee caps ultimately range from 15% to 40% of the client's recovery.²⁷ Notably, the rule allows the client to petition the court to allow higher fees, but it does not appear the attorney can independently do so.²⁸

These three state fee caps are similar in that they deem contingency fees above a certain percentage of the client's recovery unreasonable or excessive. Although the exact fee caps vary, all three rules regulate an attorney's ability to charge fees in excess of the schedules provided. Next is a brief description of the MDL consolidation process.

B. MDL Consolidation

The MDL consolidation procedures under 28 U.S.C. § 1407 serve as an important alternative to the class action method of consolidating mass litigation.²⁹ Since 1968, "over one thousand" MDLs have been litigated through this procedure.³⁰ Each MDL consolidation, in turn, can involve hundreds or even thousands of claimants.³¹ As class certification becomes increasingly more difficult, and as the Judicial Panel on Multidistrict Litigation is increasingly more willing to consolidate product liability cases, the importance of MDL consolidation is growing.³²

The MDL statute allows "civil actions involving one or more common questions of fact [that] are pending in different districts" to be temporarily transferred to one federal district court for pretrial proceedings.³³ To achieve transfer, the party seeking transfer must show: (1) that there are common factual questions among the cases, and (2) that transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."³⁴ The Panel, a group of seven federal circuit and

26. *Id.*

27. *Id.* Also, if any post-judgment action is required for recovery—such as an appeal—the rule allows the attorney to collect an extra 5% contingency fee. *Id.*

28. R. REGULATING FLA. BAR. 4-1.5(f)(4)(B)(ii).

29. 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) ("The MDL model, applied creatively, can be an effective alternative in certain situations to class treatment for accomplishing an aggregate or global settlement."). But see 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 (2010) ("MDL aggregation is not *exactly* an alternative to class action aggregation of claims. Cases consolidated in an MDL proceeding may, and often do, raise class allegations, and an MDL proceeding can very well result in a class settlement . . .").

30. Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 107–08, 114 (2010).

31. See *id.* at 108 n.2 (referencing recent MDLs involving thousands of claimants).

32. Willging & Lee, *supra* note 29, at 787, 793–94.

33. 28 U.S.C. § 1407(a) (2006).

34. *Id.*

district judges, decides whether cases meet these criteria.³⁵ The Panel has jurisdiction only over cases filed in federal court; however, if a plaintiff could have originally filed the case in federal court, she can first remove the case to federal court, then request transfer to the MDL.³⁶

MDL consolidation is designed for pretrial purposes only. According to the statute, a transferred case “shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated.”³⁷ In practice, many cases transferred to an MDL are not transferred back to the original district court, often because they settle while pending before the MDL transferee court.³⁸ Because so many cases settle at this point, attorneys must consider what law applies to these MDL settlements.

III. State Fee Caps Should Apply to MDL Settlements

With this background in mind, this Note turns to the core analysis of whether state fee caps should apply to MDL settlements. The analysis proceeds in three parts, considering (1) whether state fee caps are “state law” for choice-of-law purposes, (2) which law and choice-of-law rules an MDL transferee court applies in a diversity case, and (3) whether state fee caps are substantive for choice-of-law purposes. All three parts of this analysis suggest that fee caps should apply to MDL settlements.

This analysis makes three important assumptions. First, it assumes that an MDL transferee court has the power to review a settlement reached while the case is pending before it, according to the law it would be bound to follow. In other words, this Note assumes that a settlement reached while a case is pending before an MDL transferee court is subject to the law the transferee court would follow. Given that federal transferee courts often

35. *Id.* § 1407(a), (d).

36. Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47, 65 n.78 (2007); *see also* Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation 1.1 [hereinafter MDL R. P.] (defining “[t]ransferor district” as “the federal district court where an action was pending prior to its transfer pursuant to Section 1407, for inclusion in an MDL”); *In re Celotex Corp. “Technifoam” Prods. Liab. Litig.*, 68 F.R.D. 502, 503 n.2 (J.P.M.L. 1975) (“The Panel, of course, does not have the power under Section 1407 to consider the propriety of coordinated or consolidated pretrial proceedings in state court actions.”).

37. 28 U.S.C. § 1407(a); *see also* *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28, 34–36 (1998) (holding that a district court handling MDL pretrial proceedings may not invoke 28 U.S.C. § 1404 to transfer venue of one of the consolidated cases to itself and reaffirming that MDL cases must be remanded back to the original transferor court for trial).

38. *See* Lori J. Parker, *Causes of Action Involving Claim Transferred to Multidistrict Litigation*, in 23 CAUSES OF ACTION § 13 (2d ed. 2013) (“Only about 20% of cases transferred to MDL’s eventually find their way back to the local district court.”); *id.* § 24 (“MDL’s often serve as forums for negotiation of settlements between defendants and multiple plaintiffs.”).

conclude they have power to review these settlements,³⁹ this assumption is not that heroic.

Second, this analysis assumes that the cases at issue are filed in or removed to federal court based on diversity jurisdiction, rather than federal question jurisdiction. This is done simply to limit the scope of this Note. The *Erie* doctrine, which is discussed in subpart III(C), applies in both federal diversity cases and federal question cases.⁴⁰ Yet courts and scholars discuss the *Erie* doctrine more often in the context of federal diversity cases.⁴¹ Thus, the doctrine's application in the context of federal diversity cases is, at the very least, more established.⁴² By limiting the discussion to federal diversity cases, this Note does not address the additional considerations involved in applying *Erie* in federal question cases.

Third and finally, this Note assumes that the cases at issue are filed against nongovernmental defendants, such as companies selling pharmaceuticals, medical devices, tobacco, or consumer products.⁴³ This

39. *E.g.*, *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 558–62 (E.D. La. 2009); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 3896006, at *5–6 (D. Minn. Aug. 21, 2008); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491–94 (E.D.N.Y. 2006). In the class action context, Federal Rule of Civil Procedure 23(h) gives courts authority to award reasonable attorney's fees. FED. R. CIV. P. 23(h). This means that courts have more explicit authority to review attorney's fees in the class action context than in the MDL context. It also means there is the potential for a direct collision between the state contingency fee caps and Rule 23 in class actions. See Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2077–79 (2010) (discussing the possibility that Rule 23 directly collides with state contingency fee caps). However, a discussion of the application of state contingency fee caps in class actions is beyond the scope of this Note.

40. See 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4520, at 635 (2d ed. 1996) (“The *Erie* case and the Supreme Court decisions following it apply in federal question cases as well.”).

41. See *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring) (“It is unquestionably true that up to now *Erie* and the cases following it have not succeeded in articulating a workable doctrine governing choice of law in diversity actions.”); Donald Earl Childress III, *When Erie Goes International*, 105 NW. U. L. REV. 1531, 1554–55 (2011) (“[I]t is beyond doubt that the *Erie* doctrine requires a federal court sitting in diversity to apply the law of the state in which it sits.”). The focus on *Erie*'s application in diversity cases may be partly because *Erie* and two of the seminal opinions that followed it were all diversity cases. See *Hanna*, 380 U.S. at 461, 463–64 (considering service of process in a diversity case and holding that service shall be made in a manner prescribed by federal law); *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945) (considering the statute of limitations in a diversity case and determining that a court should apply state law if applying federal law would “significantly affect the result of a litigation”); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (determining that, in diversity cases, the court must apply state substantive law).

42. Secondary sources recognize that there is confusion about whether *Erie* applies in federal question cases. *E.g.*, 19 WRIGHT ET AL., *supra* note 40, § 4520, at 635 (“It frequently is said that the doctrine of *Erie Railroad Company v. Tompkins* applies only in diversity of citizenship cases; this statement simply is wrong.” (footnote omitted)).

43. For a sense of the types of defendants involved in MDL cases, see generally U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., MULTIDISTRICT LITIGATION TERMINATED THROUGH SEPTEMBER 30, 2012 (2012), available at http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Terminated_Litigations-2012.pdf. This data suggests that the typical MDL consolidation is brought against a nongovernmental entity, though suits against governments are represented in the data.

assumption, again, is to narrow the scope of the analysis. In tort suits against the federal government under the Federal Tort Claims Act, federal law caps attorney's fees.⁴⁴ This sort of federal fee cap—applicable in tort suits against the federal government—would alter the *Erie* analysis that follows, since such federal fee caps might conflict with the state fee caps at issue here.⁴⁵ Thus, to narrow the scope of the analysis, this Part focuses on cases where businesses and other nongovernmental entities are defendants, as in the hypothetical presented at the beginning of the Note. In these cases, federal law does not provide a fee cap like the one provided in suits against the federal government.

A. State Fee Caps Are State Law for Choice-of-Law Purposes

The first consideration in determining whether the state fee caps apply to MDL settlements is whether the state fee caps are treated as “state law” for choice-of-law purposes. In federal diversity cases, federal courts are required to apply state law in certain circumstances,⁴⁶ which are discussed in more detail in subpart III(C). As a result, before reaching a choice-of-law analysis, one must determine whether the state fee caps are even considered state law for choice-of-law purposes. As discussed in subpart II(A), the New Jersey and New York fee caps are part of the states' Rules of Court, and the Florida fee caps are part of the Florida Bar Rules.⁴⁷ The question is thus whether these rules, which are adopted by judges rather than by legislatures,⁴⁸ qualify as state law.

The answer is that the fee caps are state law for choice-of-law purposes. In the landmark decision *Erie Railroad Co. v. Tompkins*,⁴⁹ the Supreme Court held that when federal courts are to apply state law, they must apply it whether it is “declared by its Legislature in a statute or by its highest court in a decision.”⁵⁰ Subsequent cases have clarified that in applying state law,

44. See Federal Torts Claim Act, 28 U.S.C. § 2678 (2006) (capping attorney's fees in cases brought against the United States under the Act). State laws may also cap attorney's fees in tort suits against the state itself. *E.g.*, FLA. STAT. ANN. § 768.28 (West 2012) (providing that, in a tort action against the state of Florida, “[n]o attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any judgment or settlement”). The assumption that the defendants are not governments also eliminates the problem of a possible conflict between the state fee caps at issue and state fee caps that apply only in tort suits against the state government.

45. For a full discussion of federal laws that could potentially conflict with the state fee caps, see section III(C)(2).

46. *Hanna*, 380 U.S. at 471 (“[B]oth the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state ‘substantive’ law and federal ‘procedural’ law . . .”).

47. See *supra* subpart II(A).

48. See Fla. Bar re Amendment to the Code Prof'l Responsibility (Contingent Fees), 494 So. 2d 960, 961–62 (Fla. 1986) (adopting the Florida fee cap); *Am. Trial Lawyers Ass'n v. N.J. Supreme Court*, 330 A.2d 350, 351 (N.J. 1974) (noting that the New Jersey Supreme Court had adopted the fee cap rule a few years earlier); *Gair v. Peck*, 160 N.E.2d 43, 53 (N.Y. 1959) (noting that the judges of the New York Appellate Division's First Department adopted that Division's fee cap).

49. 304 U.S. 64 (1938).

50. *Id.* at 78.

federal courts must look to how the state high court has applied the law or how the federal court believes the state high court would apply the law.⁵¹ Federal judges should not apply state law according to their own independent view of it.⁵²

Here, in determining whether the state fee caps apply, a federal court must ask whether the state's highest court would apply the caps. In the three states considered here, the state high court either adopted the fee caps, held them to be valid, or both. First, the New Jersey Supreme Court itself adopted the fee cap rule in 1971.⁵³ Several years later, the same court also affirmed a decision of an intermediate state court that the fee caps were "constitutionally unassailable, [and] clearly came within the ambit of this Court's responsibility to regulate relationships between Bar and public."⁵⁴

New York's highest court has also upheld the New York contingency fee caps, although the New York intermediate courts were responsible for adopting them. In *Gair v. Peck*,⁵⁵ the New York high court held that the Appellate Division's First Department had the power to pass the original version of its fee cap.⁵⁶ Finally, the Florida Supreme Court adopted its fee caps in *Florida Bar re Amendment to the Code of Professional Responsibility (Contingent Fees)*.⁵⁷ In the opinion, the court adopted a proposal by the Florida Bar to amend its rules to provide fee caps.⁵⁸ In short, all three of the states' highest courts expressed early approval of the fee caps by adopting them, upholding them, or both.

Given that all three state high courts have approved the state fee caps—and in New Jersey and Florida, even adopted them—a federal court should consider them state law for choice-of-law purposes. This is because there is little doubt that each of these high courts would enforce their respective fee caps. Indeed, at least in New Jersey and Florida, the high courts have had the opportunity to enforce the fee cap rules since their original decisions adopting or upholding the caps. In *McMullen v. Conforti & Eisele Inc.*,⁵⁹ the New Jersey Supreme Court applied its state fee cap to a settlement reached after the fee cap was adopted into state law, even though the parties'

51. See, e.g., *Schlein v. Mills (In re Schlein)*, 8 F.3d 745, 754–55 (11th Cir. 1993) (looking to state court decisions to determine how to apply a Florida wage exemption statute); *J.C. Wyckoff & Assocs., Inc. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1485 (6th Cir. 1991) ("[W]e are bound by what we believe Michigan courts would do, rather than what we may think personally would be the result most harmonious with the state statute." (quoting *Diggs v. Pepsi-Cola Metro. Bottling Co., Inc.*, 861 F.2d 914, 927 (6th Cir. 1988)) (internal quotations omitted)).

52. *J.C. Wyckoff*, 936 F.2d at 1485.

53. See *Am. Trial Lawyers Ass'n*, 330 A.2d at 351 (noting that it had adopted the fee cap a few years earlier in 1971).

54. *Id.* at 352.

55. 160 N.E.2d 43 (N.Y. 1959).

56. *Id.* at 53.

57. 494 So. 2d 960 (Fla. 1986).

58. *Id.* at 961–62.

59. 341 A.2d 334 (N.J. 1975).

contingency fee agreement was signed before the fee cap was adopted.⁶⁰ More recently, in *Florida Bar v. Pellegrini*,⁶¹ the Florida Supreme Court approved a referee's recommended discipline for an attorney who violated the state fee caps.⁶² Thus, the New Jersey and Florida high courts have since applied the fees caps, further suggesting that a federal court applying state law on this issue would apply the relevant fee caps. Although the New York high court has not addressed the New York fee caps since *Gair v. Peck*, New York's intermediate courts continue to enforce the fee caps.⁶³ Given that *Gair v. Peck* is still good law, there is little doubt that the New York high court would enforce the New York fee caps.

To summarize, the state high courts of New Jersey, New York, and Florida have recognized—by adopting, upholding, and applying—their respective state fee caps. This means a federal court applying state law in this context would apply the fee caps. The fee caps are therefore state law for choice-of-law purposes.

B. An MDL Court Applies the Law of the Transferor Court

Now that it is clear that state fee caps are state law for choice-of-law purposes, the next question is what law an MDL transferee court applies. Because this Note analyzes settlements reached while cases are pending in the MDL transferee court, and because it assumes the MDL transferee court has power to review settlements under the law that binds it, an important question is precisely what law is binding in the MDL transferee court.

The answer to this question depends on whether the original transferor court was to apply state or federal law. On the one hand, if the original case was a federal diversity case and the transferor court was bound to apply state law, the transferee MDL court is bound to follow the law that the original transferor court would have followed.⁶⁴ In other words, the “transferee district court must apply the state law, including its choice-of-law rules, that would have been applied had there been no change of venue.”⁶⁵ On the other hand, if the original case was brought under federal question jurisdiction and the original federal district court was to apply federal law, the transferee MDL court applies the federal law as it exists in its own circuit.⁶⁶ Some

60. *Id.* at 335–36.

61. 714 So. 2d 448 (Fla. 1998).

62. *Id.* at 450, 452–53.

63. *See, e.g.*, *Connors v. Wildstein*, 706 N.Y.S.2d 189, 190 (N.Y. App. Div. 2000) (holding an agreement invalid because it violated the Second Department's fee caps).

64. *In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 97 F.3d 1050, 1055 (8th Cir. 1996) (“When considering questions of state law, however, the transferee court must apply the state law that would have applied to the individual cases had they not been transferred for consolidation.”).

65. *Parker*, *supra* note 38, § 12.5.

66. *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 391 F.3d 907, 911 (8th Cir. 2004) (“When a transferee court receives a case from the MDL Panel, the transferee court applies the law

courts have added that the interpretation of federal law by the circuit of the original federal district court “merits close consideration, but does not have stare decisis effect in a transferee forum situated in another circuit.”⁶⁷

For this Note, what is most important is that in federal diversity cases, the transferee MDL court is bound to apply the state law that the transferor court would have applied. This means that state law—and thereby state fee caps—will apply in federal diversity cases pending before MDL courts.

C. *Fee Caps Are Substantive Under a Choice-of-Law Analysis*

1. *The Erie Analysis and Substantive Versus Procedural State Law.*—So far, the analysis points to applying the state fee caps to settlements of cases pending before an MDL transferee court. This part of the analysis further shows why this conclusion is correct under a choice-of-law analysis. State fee caps, which are considered state law, will apply in federal diversity cases if they are considered “substantive” rather than “procedural” for choice-of-law purposes.⁶⁸ To understand the meaning of this distinction, a brief summary of *Erie Railroad Co. v. Tompkins*⁶⁹ and subsequent precedent is necessary. In the seminal *Erie* case, the Supreme Court

held that federal courts sitting in diversity cases, when deciding questions of “substantive” law, are bound by state court decisions as well as state statutes. The broad command of *Erie* was therefore identical to that of the [Rules] Enabling Act: federal courts are to apply state substantive law and federal procedural law.⁷⁰

Since *Erie*, federal courts have grappled with the question of whether specific state laws are substantive, and must be applied by federal courts, or whether they are procedural, and do not bind federal courts. Two subsequent Supreme Court decisions are of particular importance: *Guaranty Trust Co. v. York*⁷¹ and *Hanna v. Plumer*.⁷²

In *York*, the Court held that if the difference between federal and state law would be “outcome-determinative,” the state law is substantive; otherwise, it is procedural.⁷³ The question that federal courts after *York* were to ask is whether the outcome of the litigation would be significantly affected

of the circuit in which it is located to issues of federal law.”); In re *TMJ*, 97 F.3d at 1055 (“When analyzing questions of federal law, the transferee court should apply the law of the circuit in which it is located.”).

67. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1176 (D.C. Cir. 1987).

68. *See Hanna v. Plumer*, 380 U.S. 460, 465 (1965) (“[F]ederal courts are to apply state substantive law and federal procedural law.”).

69. 304 U.S. 64 (1938).

70. *Hanna*, 380 U.S. at 465 (discussing *Erie*).

71. 326 U.S. 99 (1945).

72. 380 U.S. 460 (1965).

73. *York*, 326 U.S. at 109.

by ignoring the relevant state law.⁷⁴ This question—rather than “any traditional or common-sense substance-procedure distinction”—was conclusive.⁷⁵ Although the *York* test was seemingly broad, the Court reaffirmed the *Erie* policy that, in federal diversity cases, “the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.”⁷⁶

Next, in *Hanna v. Plumer*, the Supreme Court, building on *York*, established the choice-of-law analytical framework as it generally exists today.⁷⁷ Under *Hanna*, the first question to ask is whether there is a “direct collision” between a federal text (the Constitution, a federal statute, or a federal rule) and the state law at issue.⁷⁸ If there is a direct collision—in other words, if the federal text covers the point or addresses the issue at hand—then federal courts are to apply the federal text without engaging in an *Erie* analysis.⁷⁹ If there is no direct collision, then courts are to apply an *Erie* analysis.⁸⁰

Hanna further clarified what an “*Erie* analysis” involves. An *Erie* analysis after *Hanna* asks two questions. The first is whether applying state law over federal law is outcome-determinative in the *York* sense, in that it would significantly alter the outcome of the litigation.⁸¹ The second question, which was designed to limit the breadth of the *York* test standing alone, is whether the choice between federal and state law would lead to either (1) “forum-shopping” or (2) “inequitable administration of the laws.”⁸² These considerations are “the twin aims of the *Erie* rule” and are crucial in determining whether the difference between state and federal law is more than “trivial.”⁸³ To recap, if the choice between state and federal law is outcome-determinative in the *York* sense, and the choice would lead to either forum shopping or inequitable administration of the laws, the state law is deemed substantive and should apply. If the choice between state and federal law would lead to neither, even if it is outcome-determinative in the *York* sense, then the state law is deemed procedural and federal law applies.

74. *Id.*

75. *Hanna*, 380 U.S. at 466 (describing *York*, 326 U.S. at 109).

76. *York*, 326 U.S. at 109.

77. 19 WRIGHT ET AL., *supra* note 40, § 4508, at 244 (“Then, in *Hanna v. Plumer*, decided in 1965, the Court provided the next (and to date, the latest) reconceptualization of the *Erie* doctrine.”).

78. *Hanna*, 380 U.S. at 471–74.

79. *Id.* at 473–74. In *Hanna*, there was a direct collision between Massachusetts law and Federal Rule of Civil Procedure 4(d)(1), both regarding service of process. *Id.* at 470. Because the Court concluded the Federal Rule was valid, the Court applied it, rather than state law. *Id.* at 474.

80. *Id.* at 469–71.

81. *Id.* at 467–68.

82. *Id.* at 468.

83. *Id.*

2. *Fee Caps Are Substantive Under a Direct Application of Hanna.*— Under a direct application of the *Hanna* analysis just described, state laws capping fees are substantive rather than procedural for a few reasons. First, under *Hanna*, there is no direct collision between the state fee caps and federal law on this issue. As mentioned, federal law does regulate attorney’s fees in certain specific contexts. For example, federal law caps attorney’s fees in tort suits brought against the United States under the Federal Tort Claims Act.⁸⁴ Several federal fee-shifting laws also allow prevailing parties to recover attorney’s fees in certain types of cases, such as civil rights actions.⁸⁵ There is, however, no federal law broadly capping contingency fees in tort cases against nongovernmental defendants.⁸⁶ Thus, assuming the defendants are not governments, there is no direct collision between the state fee caps at issue and federal law, and an *Erie* analysis is necessary to determine whether federal courts must apply the state fee caps.

Under the *Erie* analysis as outlined by *Hanna*, the first question is whether the choice of state law over federal law is outcome-determinative in the *York* sense.⁸⁷ The fee caps here are outcome-determinative because they significantly alter the outcome of the litigation if applied. As seen in the hypothetical at the beginning of this Note, whether the 25% fee cap applied or the 40% fee could be charged made a difference of thousands of dollars for the plaintiff. If the caps applied, the outcome of the litigation for the plaintiff would have been significantly different. Although the caps do not affect the funds exchanged between the two parties, they seriously impact the total dollar amount that a party to a contingency fee contract takes home.

Hanna also requires that the choice between state and federal law lead to forum shopping or inequitable administration of the laws.⁸⁸ Undeniably, the fee caps here would lead to forum shopping. If the attorney is deciding where to file suit, she will much prefer a forum without laws capping

84. 28 U.S.C. § 2678 (2006).

85. *See* 42 U.S.C. § 1988(b) (2006) (providing that a court may, in its discretion, award reasonable attorney’s fees to a prevailing party in a civil rights action brought under various civil rights statutes).

86. One federal law does cap fees in a narrow set of circumstances. A Local Rule of the Federal District Court of New Jersey provides that “[a] lawyer admitted *pro hac vice* [to the federal court] is deemed to have agreed to take no fee in any tort case in excess of New Jersey Court Rule 1:21-7 governing contingent fees.” D.N.J. CIV. R. 101.1(c)(4). This local rule simply applies the New Jersey state fee caps to lawyers admitted *pro hac vice* to New Jersey federal district court. This means that, in MDL cases consolidated in New Jersey federal district court and handled by lawyers admitted *pro hac vice*, state and federal law capping contingency fees would be identical, so an *Erie* analysis would not be necessary. But, in all other cases, the analysis that follows is essential to determining whether the state fee caps apply to settlements of cases filed and consolidated in federal court.

87. *Hanna*, 380 U.S. at 467–68.

88. *Id.* at 468.

contingency fees, assuming all other things equal.⁸⁹ An attorney would surely file in a federal forum to avoid a fee cap as stringent as 15% or 20%.⁹⁰ Forum shopping, then, would be a real threat if federal courts did not enforce state fee caps and the states with fee caps continued to do so. Interestingly, if the client is deciding where to file suit, she will prefer a forum with laws capping contingency fees.⁹¹ This means that the choice of forum will depend on who decides where to file suit. Yet, regardless of who makes the decision, forum shopping remains a threat in the context of state fee caps. The risk of forum shopping and the fact that the choice between state and federal law is outcome-determinative in the *York* sense means that state fee caps are substantive and must apply in federal diversity cases under *Hanna*.

Worth noting is that a handful of courts have reached this conclusion regarding state fee caps, but they often do so without a detailed *Erie* analysis. For instance, in *Eagan by Keith v. Jackson*,⁹² the Pennsylvania federal district court held that the New Jersey fee cap rule applied, rather than Pennsylvania law, in a settlement of a diversity case.⁹³ The court did not go through an extensive *Erie* analysis to explain why the states' laws regarding fees were substantive and would apply over federal law. It instead summarily concluded that "[r]ules regulating attorneys' fees are considered substantive" to justify its application of state law.⁹⁴ Other federal diversity cases applying state fee caps have similarly assumed that the state caps applied without mentioning *Erie* concerns.⁹⁵ Although they lack this reasoning, these decisions are still consistent with the *Hanna* analysis mandating that such caps apply.

3. Cases Holding that State Fee Caps Are Procedural Are Analytically Unsound.—Cases holding that state fee caps are procedural are poorly reasoned and depart from established choice-of-law precedent. One such case is *Mitzel v. Westinghouse Electric Corp.*,⁹⁶ where the Third Circuit held

89. See Lynn A. Baker & Charles Silver, *Fiduciaries and Fees: Preliminary Thoughts*, 79 *FORDHAM L. REV.* 1833, 1857 (2011) ("Given the substantial sums at stake, especially in high value cases, one would expect contingent-fee attorneys strongly to prefer to file cases in jurisdictions without fee caps, other things being equal.").

90. See R. REGULATING FLA. BAR 4-1.5(f)(4)(B)(i)(c) (capping fees at as low as 15% or 20% on damages over \$1 million when "all defendants admit liability at the time of filing their answers and request a trial only on damages").

91. See Baker & Silver, *supra* note 89, at 1858 ("Other things being equal, the client can be presumed to prefer . . . to prosecute his claim in the fee cap jurisdiction" (footnote omitted)).

92. 855 F. Supp. 765 (E.D. Pa. 1994).

93. *Id.* at 778.

94. *Id.* at 778 n.18.

95. See, e.g., *Estate of McMahon v. Turner Corp.*, No. 05-4389, 2007 WL 2688557, at *2-3 (D.N.J. Sept. 7, 2007) (determining that New Jersey fee cap rules applied to settlement of diversity case with no *Erie* analysis); *Newcomb v. Daniels, Saltz, Mongeluzzi & Barrett Ltd.*, 847 F. Supp. 1244, 1250-51 (D.N.J. 1994) (concluding that New Jersey fee caps, rather than Pennsylvania law, applied but not providing an *Erie* analysis of why state law rather than federal law applied).

96. 72 F.3d 414 (3d Cir. 1995).

that the New Jersey fee caps were procedural, not substantive.⁹⁷ The court recognized that “[g]enerally, the right of a party or an attorney to recover attorney’s fees from another party in a diversity action is a matter of substantive state law.”⁹⁸ Yet in the next sentence, the court added, “contingency fee agreements have been treated differently.”⁹⁹

According to the Third Circuit, statutes capping contingency fees are fundamentally different than statutes shifting fees between plaintiffs and defendants. Whereas contingency fees “apportion resources between plaintiffs and their counsel,” statutes giving a prevailing party a right to recover fees apportion resources between plaintiffs and defendants.¹⁰⁰ In this way, contingency fee caps “are collateral to the substantive merits of lawsuits in a way that awards of attorney’s fees between parties are not.”¹⁰¹ The court thus held that the state fee caps were procedural and therefore did not apply.¹⁰²

In reaching this conclusion, the Third Circuit misapplied core *Erie* principles. First, a correct *Erie* analysis is not based on “any traditional or common-sense substance-procedure distinction.”¹⁰³ Instead, the first question under *Hanna* is whether the state fee caps significantly alter the outcome of the litigation.¹⁰⁴ The Third Circuit ignored the fact that the fee caps affect the plaintiff’s ultimate recovery, even if they do not affect the check that one party writes to the other. The Third Circuit also did not carefully consider one of “the twin aims of the *Erie* rule”—to prevent forum shopping.¹⁰⁵ The court failed to recognize the incentives to forum shop when the state forum enforces the caps and the federal forum does not.¹⁰⁶ Overall, the Third Circuit focused on its own notions of the substance–procedure distinction, rather than the distinction as developed by *Hanna*.

Another older Third Circuit opinion reaching the same conclusion is similarly flawed. In *Elder v. Metropolitan Freight Carriers, Inc.*,¹⁰⁷ the Third Circuit reasoned that “[r]ules regulating contingent fees pertain to conduct of members of the bar, not to substantive law which determines the existence or parameters of a cause of action.”¹⁰⁸ This statement is incorrect. Contingency fee caps do, in fact, determine the existence of a cause of

97. *Id.* at 417.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Hanna v. Plumer*, 380 U.S. 460, 466 (1965).

104. *See id.* at 466–68 (explaining that the first step in a substance–procedure analysis is whether applying the federal or state rule would affect the outcome of the case).

105. *Id.* at 468.

106. *See supra* note 89 and accompanying text.

107. 543 F.2d 513 (3d Cir. 1976).

108. *Id.* at 519.

action: whether an attorney can sue a client for nonpayment of the full contractual fee. Indeed, fee caps would preclude an action to recover the full contractual fee if that fee exceeded the cap. Like the *Mitzel* court, the *Elder* court also ignored the fact that fee caps alter parties' recoveries and can lead to forum shopping if not enforced by federal courts.¹⁰⁹ Again, the court's conclusion that fee caps are procedural is not analytically sound under *Hanna*. This Note now turns to one final reason why fee caps are substantive for choice-of-law purposes.

4. *Fee Caps Are No Different than State Fee-Shifting Laws.*—State fee caps should be treated the same way as state fee-shifting laws, which are considered substantive for choice-of-law purposes. State fee-shifting laws force the losing party to reimburse the attorney's fees of the prevailing party under certain circumstances.¹¹⁰ Federal courts have concluded that these fee-shifting laws are substantive rather than procedural. For instance, the Third Circuit, citing other Third Circuit cases, recognized:

Where there is a statutory provision shifting attorneys' fees and costs in a state statute creating the plaintiff's cause of action, a federal court exercising diversity or supplemental jurisdiction over that claim should, under [*Erie*.] apply the state provision shifting fees and costs in the absence of a controlling federal statute, rule, or policy.¹¹¹

Cases adopting this analysis often cite as support dicta in the Supreme Court case *Alyeska Pipeline Services Co. v. Wilderness Society*.¹¹² In *Alyeska*, the Court stated,

[I]n an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed.¹¹³

The *Alyeska* Court explained that a pre-*Erie* opinion of its own decided that a state law requiring an attorney's fee award applied in a case removed to federal court.¹¹⁴ Citing *Hanna*, the Court in *Alyeska* concluded, "nothing after *Erie* require[d] a departure" from the result in that pre-*Erie* decision.¹¹⁵

109. See *supra* note 89 and accompanying text.

110. *E.g.*, N.J. STAT. ANN. § 10:5-27.1 (West Supp. 2012) (allowing the prevailing party to recover fees in civil rights actions).

111. *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1223 (3d Cir. 1995).

112. 421 U.S. 240 (1975).

113. *Id.* at 259 n.31 (quoting 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 54.77 (2d ed. 1974)).

114. *Id.* (discussing *People of Sioux Cnty. v. Nat'l Surety Co.*, 276 U.S. 238 (1928)).

115. *Id.*

The Court therefore recognized in dicta that state laws giving or denying the right to attorney's fees are substantive under *Hanna*.¹¹⁶

For choice-of-law purposes, state laws capping contingency fees are not distinguishable from the substantive fee-shifting laws just discussed. Both types of laws are outcome-determinative under *York*,¹¹⁷ since they both affect the ultimate dollar amount one or both parties will receive. Both types of laws also involve forum-shopping considerations.¹¹⁸ In the context of fee-shifting statutes, there is a concern that confident plaintiffs would strongly prefer to file claims in a state forum that allowed fee shifting for prevailing parties, rather than a federal one that did not.¹¹⁹ Similarly, plaintiffs would prefer to file claims in a state court if it exclusively enforced its fee caps.¹²⁰ The only difference between the two types of laws is that fee caps allocate funds between one party and her counsel, and fee-shifting laws allocate funds between plaintiffs and defendants. Yet this difference is not material under *Hanna* since the caps still influence ultimate recoveries and implicate forum-shopping considerations. In short, state fee caps are substantive in the same ways that state fee-shifting laws are, so the caps must apply in diversity cases.

IV. Policy Considerations Support, Rather than Undermine, This Analysis

The analysis in Part III shows why state laws capping contingency fees must apply to settlements reached in federal diversity cases pending before MDL transferee courts. Policy considerations support, rather than undermine, this analysis. To show this is the case, this Part briefly addresses two policy arguments that are advanced against the conclusion just reached.

A. *Applying State Fee Caps Will Not Seriously Threaten Judicial Resources*

Applying state fee caps in this context will not seriously threaten judicial resources, as some have argued. Commentators say that applying each state's law "could pose serious administrative difficulties in MDLs, which often draw cases from many states."¹²¹ Courts adopting blanket fee caps in MDL settlements voice similar concerns. They believe that looking

116. *Id.*

117. *See* Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) (holding that state laws are substantive if they "significantly affect the result of a litigation"); *see also supra* note 87 and accompanying text.

118. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (discussing the importance of forum-shopping considerations in the *Erie* analysis); *see also supra* notes 88–91 and accompanying text.

119. *See* Ashland Chem. Inc. v. Barco Inc., 123 F.3d 261, 265 n.3 (5th Cir. 1997) ("Undoubtedly, the possibility of receiving or paying attorneys' fees will be a consideration when plaintiffs decide where to file a diversity action and when defendants decide whether to remove such an action to federal court.").

120. *See supra* note 91 and accompanying text.

121. Silver & Miller, *supra* note 30, at 120 n.43.

to each state's attorney's fees laws and "[c]onducting fifty independent analyses of reasonableness [of the fees] would drain judicial resources and would eliminate the efficiency the MDL was designed to create."¹²²

In important ways, these concerns are unfounded. First, only six states have broad fee caps.¹²³ In addition, courts reviewing fees in MDL settlements have had no problem identifying these state laws, in addition to state laws with narrower fee caps.¹²⁴ Thus, judicial resources would not be expended in identifying the relevant fee caps.

It is also not clear that a court reviewing a large MDL settlement would have to do a case-by-case determination of whether such caps applied. The court would simply have to order the following: if the law of a state that has contingency fee caps would have otherwise governed the case, such caps govern the fees on that case. This is similar to what the court did in *In re Zyprexa Products Liability Litigation*.¹²⁵ The court there ordered that if, in any specific case, state law would have capped fees below the 35% cap it set, the state cap could be enforced in that particular case.¹²⁶ Such a blanket order would probably be sufficient, outside the occasional dispute between an attorney and client about which state's law would have actually governed the dispute had it not settled.

Even if case-by-case determinations were necessary, transferee MDL courts were designed to handle the complexities that arise in consolidating cases in a single forum.¹²⁷ These courts already make important choice-of-law decisions on pretrial motions.¹²⁸ If anything, they are particularly well equipped to undertake such complex choice-of-law analyses. In sum, judicial resources would not be seriously threatened by enforcing state fee caps in MDL settlements; even if case-by-case determinations were necessary, MDL courts were designed to handle and do handle such complex questions.

122. *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 563 (E.D. La. 2009).

123. CONN. GEN. STAT. ANN. § 52-251c(b) (West 2005 & Supp. 2012); R. REGULATING FLA. BAR 4-1.5(f); MICH. CT. R. 8.121; N.J. CT. R. 1:21-7; N.Y. SUP. CT. APP. DIV. 1ST DEPT. R. 603.7(e); OKLA. STAT. ANN. tit. 5, § 7 (West 2011).

124. *E.g.*, *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 494-96 (E.D.N.Y. 2006).

125. *Id.*

126. *Id.* at 496-97.

127. See 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3861, at 356 (3d ed. 2007) (explaining that the Manual on Complex and Multidistrict Litigation and the modern MDL consolidation process were prompted by the increasing "number of cases requiring special treatment because of their size, complexity, or multidistrict character").

128. *E.g.*, *In re TMJ Implants Prods. Liab. Litig.*, 872 F. Supp. 1019 (D. Minn. 1995), *aff'd*, 97 F.3d 1050 (1996) (conducting a choice-of-law analysis in ruling on a motion for summary judgment in a consolidated MDL proceeding).

B. *The Uniform Treatment of All Plaintiffs and Attorneys in a Single MDL Should Not Trump the Erie Policy or Federalism Concerns*

Ignoring state fee caps would provide more uniform treatment of MDL plaintiffs and attorneys, but the desire for uniformity cannot override the *Erie* policy or federalism concerns. Some courts and commentators argue that uniformity is paramount in the MDL setting. Attorney Jeremy Grabill believes that “plaintiffs from around the country brought together in mass tort litigation [should] pay the same percentage contingency fee to their attorneys when all of their claims are resolved in a centralized forum.”¹²⁹ Likewise, in applying a universal fee cap, the district court in *In re Vioxx Products Liability Litigation*¹³⁰ similarly reasoned, “the claimants’ attorneys were all tasked with navigating their clients through an identical settlement matrix and in accomplishing this they all faced similar challenges, regardless of in which state their fee arrangement was consummated.”¹³¹ The court further noted, “the MDL statute’s mandate of fairness requires a uniform, consistent result for all attorneys and their clients.”¹³²

These arguments ignore the limited purpose and power of MDL consolidation. In designing the MDL consolidation procedure, Congress’s intent was “to provide judicial machinery to transfer, for coordinated or consolidated pretrial proceedings, civil actions, having one or more common questions of fact, pending in different judicial districts.”¹³³ The legislative history of the MDL statute does not evidence an intent to diminish the application of state law. Instead, MDL consolidation is “merely a procedural

129. Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 177 (2012).

130. 650 F. Supp. 2d 549 (E.D. La. 2009).

131. *Id.* at 563.

132. *Id.*

133. H.R. REP. NO. 90-1130, at 1 (1968); *see also* S. REP. NO. 90-454, at 1 (1967) (stating that the main purpose of the MDL statute was “to provide for the temporary transfer to a single district for coordinated or consolidated pretrial proceedings of civil actions pending in different districts which involve one or more common questions of fact”). The MDL statute was a response to hundreds of damages actions filed in various federal courts “[f]ollowing the successful Government prosecution of electrical equipment manufacturers for antitrust law violations” in the 1960s. H.R. REP. NO. 90-1130, at 2. A Coordinating Committee of nine judges was established to help consolidate the pretrial proceedings in the damages actions. S. REP. NO. 90-454, at 3. The Committee assisted in setting a pretrial discovery schedule, and the parties and presiding judges consented to consolidating discovery for all of the cases. H.R. REP. NO. 90-1130, at 2; S. REP. NO. 90-454, at 3. Because of the success of the consolidated proceedings in the electrical equipment cases, Congress wanted to create a statutory procedure for consolidation that would not depend on the parties’ and judges’ consent to consolidation. H.R. REP. NO. 90-1130, at 2. Congress “believe[d] that the possibility for conflict and duplication in discovery and other [pretrial] procedures in related cases [could] be avoided or minimized by such centralized management.” *Id.*

device designed to promote judicial economy.”¹³⁴ The Ninth Circuit has explained,

Within the context of MDL proceedings, individual cases that are consolidated or coordinated for pretrial purposes remain fundamentally separate actions, intended to resume their independent status once the pretrial stage of litigation is over.¹³⁵

In short, there is no evidence that Congress intended the MDL statute for anything as radical as abolishing the application of state law in federal courts. Federal MDL transferee courts in diversity cases must respect state law on the substantive legal issues before them,¹³⁶ and this practice should be no different for the substantive state law of contingency fee caps.

Moreover, federal MDL courts should not strip away the ability of state courts to regulate the important substantive area of attorney’s fees. By ignoring New Jersey fee caps, an MDL court would inhibit New Jersey’s ability to regulate fees it could have otherwise regulated if the case were brought in state court. The Supreme Court has even recognized the value of federal courts applying state laws regulating attorney’s fees. In *People of Sioux County v. National Surety Co.*,¹³⁷ the Court addressed a state law allowing insurance policy beneficiaries to recover attorney’s fees in certain suits, noting: “It would be at least anomalous if this [attorney’s fees] policy could be thwarted and the right so plainly given destroyed by removal of the cause to the federal courts.”¹³⁸ The state’s serious interest in having its attorney’s fees laws applied in federal cases did not escape the Court. This further shows that a desire for uniformity of outcomes across plaintiffs and their attorneys cannot trump the longstanding *Erie* policy, nor can it violate basic federalism concerns.

V. Conclusion

The analysis in this Note shows that state laws capping contingency fees should apply to settlements of diversity cases pending before MDL transferee courts. This analysis is particularly relevant since MDL transferee courts are increasingly ignoring state law by broadly capping contingency fees in MDL settlements.¹³⁹ These courts have overlooked the important choice-of-law considerations involved in their decisions. This Note urges MDL transferee courts tasked with reviewing settlements to pay close attention to state laws

134. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 489 F. Supp. 2d 932, 936 (D. Minn. 2007).

135. *In re Korean Air Lines Co., Antitrust Litig.*, 642 F.3d 685, 700 (9th Cir. 2011).

136. *See supra* subpart III(B).

137. 276 U.S. 238 (1928).

138. *Id.* at 243. The validity of this case’s reasoning was confirmed in the post-*Erie* case of *Alyeska Pipeline Servs. Co. v. Wilderness Soc’y*, 421 U.S. 240, 259 n.31 (1975).

139. *E.g., In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 564–65 (E.D. La. 2009) (stating that state fee caps are “relevant” but effectively ignoring them by capping all fees at 32%).

capping attorney's fees. Ignoring them to achieve efficiency or uniformity goals ignores the *Erie* doctrine and threatens important state policies. Like any other state substantive law, state fee caps should apply in MDL settlements.

—*Monica Hughes*