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Robin Effron
Brooklyn Law School, robin.effron@brooklaw.edu

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Disaster-Specific Mechanisms for Consolidation

Robin J. Effron*

Within the past decade, two large-scale catastrophes—the terrorist attacks of September 11, 2001, and Hurricane Katrina—have been the recent laboratories of new congressional provisions for the federalization and aggregation of mass tort claims. In the case of September 11th, the litigation has been shaped by the Air Transportation Safety and System Stabilization Act (ATSSSA), an aggregation device that Congress devised specifically to address that particular catastrophe. The Hurricane Katrina litigation has seen the use (and attempted use) of the Multiparty, Multiforum Trial Jurisdiction Act (MMTJA), an event jurisdiction device of general application that Congress established in 2002. This Article explores three aspects of postcatastrophe litigation where the consolidation of cases or the statutes that govern the consolidation of such cases raise issues about how to think about "disaster litigation" as a singular category. After providing a brief summary of the paths of In re September 11th Litigation *and* In re Katrina Canal Breaches Litigation, *this Article demonstrates that when the boundaries of federal jurisdiction are shaped by reference to events, this affects how cases may be consolidated, particularly with respect to Congress's degree of specificity in naming an event as the organizing principle of jurisdiction. These two federal statutes challenge courts to consider how closely, as a matter of law, federal jurisdiction based on the ATSSSA and the MMTJA and the consolidation of cases must be linked under these respective statutes. The Article then turns to a discussion of the role that courts of appeals play in determining the boundaries of federal jurisdiction and consolidation for disaster litigation. The Article ends with a discussion of the practical and administrative concerns of consolidated disaster litigation. I argue that the* September 11th *and* Canal Breaches *cases show that there can be a problem for judges and litigants of sorting common from uncommon issues in the context of a district-wide consolidation organized around an event.*

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* © 2008 Robin J. Effron. Assistant Professor, Brooklyn Law School. B.A. 2001, Columbia University; J.D. 2004, New York University School of Law. I am grateful to Jonathan Remy Nash, Jamelle Sharpe, and Edward Sherman for providing helpful comments on an earlier draft of this Article. I have also profited from discussions of this topic with Susan Bandes and Alexandra Lahav. From October 3, 2004, through September 30, 2005, I worked for the Honorable Alvin K. Hellerstein as the law clerk assigned to the *September 11th* cases consolidated before his court. All opinions expressed are solely mine and do not reflect Judge Hellerstein's position on any aspect of the litigation.

I. INTRODUCTION

The past decade has brought changes to the world of complex litigation. Congress has introduced several new tools to aid in the contouring of aggregated claims, such as the Class Action Fairness Act of 2005 (CAFA)[1] and the Multiparty, Multiforum Trial Jurisdiction Act (MMTJA).[2] In addition to the typical mass tort cases that populate the world of complex litigation,[3] two large-scale catastrophes—the terrorist attacks of September 11, 2001, and Hurricanes Katrina and Rita—have been the recent laboratories of these new provisions. In the case of September 11th, the litigation has been shaped by an aggregation device that Congress devised specifically to address that particular catastrophe. In the case of Hurricane Katrina, the litigation has been shaped by recent congressional innovations of aggregation devices that were intended for a more general application.

Disaster litigation is a multidistrict and interjurisdictional problem. This is because catastrophes can appear at once to be both intensely local and national in character, triggering questions of the jurisdiction of federal and state courts.[4] A disaster does not respect state or other jurisdictional boundaries, thus it implicates the law and enforcement mechanisms of multiple states. Finally, the damage and destruction that a disaster leaves in its wake predictably produces a large number of lawsuits. The question is, then, is there something about disaster litigation that makes it unique? In *In re September 11th Litigation* and *In re Katrina Canal Breaches Litigation*, these two disasters each have been used as the organizing principle for coordinating disparate tracks

1. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

2. Multiparty, Multiforum Trial Jurisdiction Act of 2002, Pub. L. No. 107-273, 116 Stat. 1826 (codified in scattered sections of 28 U.S.C.).

3. Typical mass tort cases include collective personal injury actions, mass financial injuries, products liability, and pharmaceutical liability cases. *See* Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 887-88 (2001) ("What distinguishes mass torts from ordinary high volume civil litigation is that they are pursued in a collective fashion—that is, as groups of cases rather than individually.").

4. *See* Linda S. Mullenix, *Mass Tort Litigation and the Dilemma of Federalization*, 44 DEPAUL L. REV. 755, 779-86 (1995) (discussing the problems of federalizing mass tort litigation, primarily in the context of products liability cases).

of litigants and claims before a single judge in a single judicial district. This ad hoc district-wide consolidation might be the future of multidistrict litigation for disasters.

Multidistrict litigation problems are not unique to disaster litigation. Lawsuits that are litigated as class actions or multidistrict litigations spring from sources beyond the world of catastrophic events. Cases that can be and are filed in both state and federal courts across several jurisdictions present organizational difficulties for litigants and judges alike. These issues appear in disaster litigation cases just as predictably as in other mass torts because the challenges of coordination are inherent in complex litigation. When federal courts have subject matter jurisdiction over a group of cases, it is possible for Congress to develop mechanisms for consolidating and coordinating individual actions. When federal and state courts have concurrent jurisdiction, complete consolidation is not possible and coordination is, at best, informal and ad hoc.

Subject matter jurisdiction thus seems to be the natural portal through which all plans for comprehensive coordination and consolidation must enter because there is no mechanism for joinder or consolidation of cases that are litigated in parallel court systems. When federal subject matter jurisdiction is broadened, particularly to grant a federal forum for the litigation of state law claims, this jurisdictional expansion raises a host of concerns about the scope of the role of federal courts in a system with multiple sovereigns.[5] The power to consolidate like cases is only one of these concerns. Consider the motivations for CAFA and the MMTJA, contemporaneous statutes that share the important feature of expanding federal jurisdiction by loosening the diversity requirement. The former emphasizes a concern that state court jurisdiction resulted in a *substantive* "unfairness" due to application of state law and procedure,[6] whereas the latter seems, at least initially, to have been born out of a *procedural* frustration with the inability to consolidate litigation in a single forum.[7] Both concerns have taken an increasingly prominent role in the debates over how Congress should shape the subject matter

5. For a review of the history and literature of this debate, see Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1217 n.12 (2004).

6. H.R. REP. NO. 107-14 (2001); *see* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. (forthcoming 2008).

7. *See* H.R. REP. NO. 107-685, at 199-202 (2002) (Conf. Rep.), *as reprinted in* 2002 U.S.C.C.A.N. 1120, 1151-53.

jurisdiction of the federal courts. The litigation arising out of September 11th and Hurricane Katrina illuminate how some of these concerns have been born out.

This Article catalogues the formal and informal mechanisms that have been deployed to coordinate or consolidate cases litigated in the aftermath of a disaster. I have selected three aspects of postcatastrophe litigation where the consolidation of cases, or the statutes that govern the consolidation of such cases, figure prominently in the category of "disaster litigation." These issues involve the tasks associated with consolidated cases before a single judge and the issues surrounding the interaction of that judge with other courts. Part II gives a brief introduction to the cases arising out of September 11th and Hurricane Katrina. When the boundaries of federal jurisdiction are shaped by reference to events, this affects how cases may be consolidated, particularly with respect to Congress's degree of specificity in naming an event as the organizing principle of jurisdiction. In Part III, I suggest that both the Air Transportation Safety and System Stabilization Act (ATSSSA)[8] and the MMTJA challenge courts to consider how closely, as a matter of law, federal jurisdiction based on the ATSSSA and the MMTJA and the consolidation of cases must be linked under these respective statutes. Part IV discusses the role that courts of appeals play in determining the boundaries of federal jurisdiction and consolidation for disaster litigation. Finally, Part V considers the problem of sorting common from uncommon issues in the context of a district-wide consolidation organized around an event.

II. USING FEDERAL STATUTES TO DEFINE THE SCOPE OF SUBJECT MATTER JURISDICTION

Congress appears to be increasingly willing to grant federal courts subject matter jurisdiction over claims arising out of a catastrophic event in which multiple parties suffer extensive harms. This grant of subject matter jurisdiction, which I have previously labeled "event jurisdiction,"[9] could be fashioned to cover a number of different types of events, but it is in the realm of postdisaster litigation that Congress has been the most proactive in utilizing this jurisdictional tool. Event jurisdiction denotes "Congress's choice to give the federal courts subject matter jurisdiction over an 'event' of

8. Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified at 49 U.S.C. § 40101 note (Supp. IV 2004)).

9. Robin J. Effron, *Event Jurisdiction and Protective Coordination: Lessons from the September 11th Litigation*, 81 S. CAL. L. REV. 199, 231-36 (2008).

perceived national importance, rather than locating subject matter jurisdiction over a certain class of cases or type of claim."[10] Two such event jurisdiction devices have been used in the *Canal Breaches* and *September 11th* cases, although consolidation of disaster-related claims probably does not *require* such a device. The September 11th litigation has been shaped by the use of the ATSSSA, an event jurisdiction statute that was created specifically to shape jurisdiction over September 11th claims. The consolidation of the *Canal Breaches* cases of the Hurricane Katrina litigation, on the other hand, was accomplished by administrative decisions of the judges in the United States District Court for the Eastern District of Louisiana.[11] Additionally, the *Canal Breaches* cases have seen the use (and attempted use) of the MMTJA, an event jurisdiction device of general application that Congress established in 2002.

Because the ATSSSA and the MMTJA provide a federal forum for cases, they also enable courts to consolidate cases for which there would not have been another basis for federal jurisdiction. In the case of the ATSSSA, Congress itself identified a distinct class of cases and litigants and has directed them to a specific forum.[12] I have called this phenomenon "protective coordination," and it is the strongest form of the methods that Congress employs for tying cases together for litigation purposes.[13] Although the MMTJA does not contain the mandatory jurisdictional features of the ATSSSA, it too is a form of protective coordination because "it demonstrates a congressional will to shape the course of certain litigation according to particular federal interests."[14]

The ATSSSA and the MMTJA represent two approaches to achieving protective coordination for disaster litigation through the federalization of forum. The ATSSSA singles out a specific event that has already occurred for federal jurisdiction.[15] The MMTJA describes the *type* of event that gives rise to federal jurisdiction, should the parties file in or remove to a federal forum.[16] As the examples of the September 11th and Hurricane Katrina litigations will show, a statute

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10. *Id.* at 202.
11. *See infra* note 58 and accompanying text.
12. ATSSSA § 400(b)(3), 115 Stat. at 241.
13. Effron, *supra* note 9, at 241-49. Congress has established several methods for tying cases together for litigation purposes. *See, e.g.*, 28 U.S.C. § 1407 (2000) (multidistrict litigation); *id.* §§ 1404, 1406 (transfer of venue); FED. R. CIV. P. 23 (class actions).
14. Effron, *supra* note 9, at 242.
15. ATSSSA § 408(b)(3), 115 Stat. at 240-41.
16. 28 U.S.C. § 1369(a) (Supp. V 2005).

of this sort is not necessary to achieve a district-wide consolidation of disaster cases. However, the application of such statutes can shape the scope of the cases that are available for litigation in a federal forum as well as the boundaries of the consolidation.

Judge Alvin K. Hellerstein of the United States District Court for the Southern District of New York and Judge Stanwood R. Duval, Jr. of the Eastern District of Louisiana are pioneering the practice of ad hoc district-wide consolidation of cases relating to a major disaster. The examples of these two litigations show the evolution of a litigation group consolidated for pretrial purposes without the involvement of the Judicial Panel on Multidistrict Litigation (JPML).[17] Both of these consolidations were achieved "internally" within the district. The *September 11th* cases were filed in or removed to the Southern District of New York pursuant to the ATSSSA and consolidated before Judge Hellerstein by operation of Federal Rule of Civil Procedure 42(a) and the local rules of the Southern District. The *Canal Breaches* cases were filed in or removed to federal court pursuant to several available avenues for subject matter jurisdiction. They were then consolidated before Judge Duval by a decision of the en banc Eastern District of Louisiana court or transferred to Judge Duval from another district using 28 U.S.C. § 1404, the transfer of venue statute.[18]

A brief summary of these two groupings shows the procedural prerequisites for placement of such cases in a federal forum, the mechanisms used to consolidate the cases before one judge, and the organizational techniques employed to manage disparate subgroups of cases within the consolidation.

A. The September 11th *Cases*

The cases arising out of the events of September 11th have been consolidated before Judge Hellerstein in the Southern District of New York. The terrorist attacks of September 11, 2001, resulted in 2973 deaths as well as personal injuries and extensive harm to property and the environment.[19] Aware that this sort of damage would result in a large number of high-profile lawsuits, Congress passed a statute eleven days after the attacks to address these litigation concerns.[20] The

17. For a description of the role of the JPML in consolidating multidistrict litigation, see Effron, *supra* note 9, at 236-40.

18. *See* note 58 and accompanying text.

19. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 311 (2005).

20. *See* ATSSSA Pub. L. No. 107-42, 115 Stat. 230.

ATSSSA was intended to provide swift compensation to September 11th victims while shielding the airline and other industries from potentially crippling lawsuits.[21] The statute established an administrative remedy and a federal cause of action. The administrative remedy, called the September 11th Victim Compensation Fund (VCF)[22] provided a source of no-fault compensation to the tragedy's victims and victims' families.[23] The federal cause of action allowed victims to elect to pursue the traditional litigation option instead by creating a federal cause of action "for damages arising out of the hijacking and subsequent crashes of American Airlines flights 11 and 77, and United Airlines flights 93 and 175, on September 11, 2001."[24] Section 408(b)(3) gave the Southern District of New York "original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11,

21. *See* Effron, *supra* note 9, at 201, 225.

22. ATSSSA §§ 401-409, 115 Stat. at 237-41.

23. For a more detailed account of the VCF, see generally Symposium, *After Disaster: The September 11th Compensation Fund and the Future of Civil Justice*, 53 DEPAUL L. REV. 205 (2003). For further discussion, analysis, and criticism of the VCF, see generally Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135 (2005); Elizabeth Berkowitz, *The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund*, 24 YALE L. & POL'Y REV. 1 (2006); Richard P. Campbell, *Implementing September 11 Victim Compensation Fund: Two Steps Forward, One Step Back*, 69 DEF. COUNS. J. 409 (2002); Martha Chamallas, *The September 11th Victim Compensation Fund: Rethinking the Damages Element in Injury Law*, 71 TENN. L. REV. 51 (2003); Wendy Floering, *The September 11th Victim Compensation Fund of 2001: A Better Alternative to Litigation?*, 22 J. NAT'L ASS'N ADMIN. L. JUDGES 195 (2002); Tracy Hresko, *Restoration and Relief: Procedural Justice and the September 11th Victim Compensation Fund*, 42 GONZ. L. REV. 95 (2006); Linda S. Mullenix, *The Future of Tort Reform: Possible Lessons from the World Trade Center Victim Compensation Fund*, 53 EMORY L.J. 1315 (2004); Jessica Ramirez, *The Victims Compensation Fund: A Model for Future Mass Casualty Situations*, 29 TRANSP. L.J. 283 (2002); George Rutherglen, *Distributing Justice: The September 11th Victim Compensation Fund and the Legacy of the Dalkon Shield Claimants Trust*, 12 VA. J. SOC. POL'Y & L. 673 (2005); Joe Ward, *The September 11th Victim Compensation Fund: The Answer to Victim Relief?*, 4 PEPP. DISP. RESOL. L.J. 161 (2003); James C. Harris, Comment, *Why the September 11th Victim Compensation Fund Proves the Case for a New Zealand-Style Comprehensive Social Insurance Plan in the United States*, 100 NW. U. L. REV. 1367 (2006); Erin G. Holt, Note, *The September 11 Victim Compensation Fund: Legislative Justice Sui Generis*, 59 N.Y.U. ANN. SURV. AM. L. 513 (2003); Jonathan D. Melber, Note, *An Act of Discretion: Rebutting Cantor Fitzgerald's Critique of the Victim Compensation Fund*, 78 N.Y.U. L. REV. 749 (2003).

24. ATSSSA § 408(b)(1), 115 Stat. at 240-41.

2001."[25] Finally, the statute implemented a liability cap by limiting recovery in all actions to the defendants' available liability insurance.[26]

The September 11th litigation is not a unitary group of cases. In a recent article, I documented how a group of cases that were initially believed to be a relatively coherent group of claims, *In re September 11th Litigation*,[27] in fact became the umbrella term for a two-part disaster litigation, a three-part mass tort litigation, and an insurance battle.[28]

Most cases filed in the immediate aftermath of September 11th were allegations of personal injury, wrongful death, or property damage suffered on September 11th itself. The first months of the litigation were spent coordinating the proceedings pending before Judge Hellerstein with the proceedings of the VCF. The remaining litigants included insurance companies that provided liability insurance for Silverstein Properties (the owners of the World Trade Center) and the Port Authority of New York and New Jersey (PANYNJ); litigants with claims of wrongful death and personal injury who had elected not to enter the VCF, including a number of personnel involved in the rescue and clean-up effort who had begun to file claims alleging respiratory injury; and property damage plaintiffs.[29] Each group of cases has presented issues that are unique to that group alone.

The respiratory injury cases have been among the most challenging for the court. These claims have been brought by workers who were employed in construction or clean-up efforts at Ground Zero and claim that the City of New York, along with private contractors,

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25. *Id.* § 408(b)(3), 115 Stat. at 241.

26. *Id.* § 408(a), 115 Stat. at 240. Although this statutory provision is not jurisdictional in the same sense as the establishment of the federal cause of action and the grant of original jurisdiction to the Southern District of New York, I have previously argued that the liability cap functioned as a jurisdictional feature because it effectively tied the cases together by means of a "fixed pot" of recovery. *See* Effron, *supra* note 9, at 249.

27. The cases were officially consolidated pursuant to FED. R. CIV. P. 42(a).

28. Because I have written a detailed account of the September 11th litigation elsewhere, *see* Effron, *supra* note 9, at 203-21, I will confine this discussion to a few key aspects of the litigation as it has developed from 2001-2007. One significant development has occurred since that article went to press: the judge had set a trial date for damages only in a select number of the personal injury/wrongful death cases. These cases have since settled, *see In re* September 11 Litig., No. 21 MC 97 (AKH) (S.D.N.Y. Nov. 1, 2007) (order regarding settlement), perhaps due to an evidentiary ruling that Judge Hellerstein made in limine that did not favor the plaintiffs. *See In re* September 11 Litig., No. 21 MC 97 (AKH) (S.D.N.Y. Oct. 16, 2007) (order regarding defendants' motion in limine).

29. Effron, *supra* note 9, at 206. A few miscellaneous cases also remained. *See, e.g.*, Grosshandels-und Lagerei-Berufsgenossenschaft v. World Trade Ctr. Props., LLC, 435 F.3d 136, 137-39 (2d Cir. 2006) (affirming the district court decision that German insurers cannot pursue state law tort claims on behalf of victims who have received VCF benefits).

were negligent in providing proper masks and equipment to protect the workers from hazardous dust at the site.[30] The issues of causation, the scope of discovery, and the identity of the defendants were sufficiently different from the personal injury/wrongful death cases; therefore, Judge Hellerstein created a separate master calendar number for them.[31] One of the major difficulties in this case is the question of federal jurisdiction over these claims under the ATSSSA, and how far it extends.[32]

The district court held that the ATSSSA grants a federal forum to the September 11th cases by creating a federal cause of action.[33] The boundary issues over the exact scope of the federal forum have been a defining feature of the litigation, particularly with respect to the respiratory injury cases. Workers alleging to have suffered respiratory injuries at the World Trade Center (WTC) site began filing their lawsuits in New York state court in early 2002,[34] but the bulk of these claims were not filed until 2004. The defendants removed the cases to the Southern District of New York claiming federal jurisdiction under the ATSSSA.[35] The plaintiffs then moved to remand, arguing that their injuries did not arise out of the events of September 11th within the meaning of the statute.[36]

The court held that "claims for respiratory injury based on exposures suffered at the World Trade Center site between September 11, 2001 and September 29, 2001 'arise out of,' 'result from,' and are 'related to' the attacks of September 11, 2001" because they involved the official search and rescue effort.[37] All other claims alleging injuries that occurred after this period were remanded to state court because by September 29, 2001, the task of searching for the living had "officially

30. *In re* World Trade Ctr. Disaster Site Litig., 270 F. Supp. 2d 357, 361 (S.D.N.Y. 2003), *aff'd in part*, 414 F.3d 352 (2d Cir. 2005).

31. *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (AKH) (S.D.N.Y. Feb. 13, 2003) (order establishing master docket).

32. Effron, *supra* note 9, at 210-12.

33. Pub. L. No. 107-42, § 408(b)(1), 115 Stat. 230, 240-41 (2001) (codified at 49 U.S.C. § 40101 note (Supp. IV 2004)).

34. Hickey v. City of New York, No. 02-CIV-8434 (S.D.N.Y. filed Oct. 22, 2002).

35. *In re World Trade Ctr. Disaster Site Litig.*, 270 F. Supp. 2d at 360.

36. *Id.* Judge Hellerstein had already ruled that ordinary workplace accidents that occurred after September 11, 2001, were not a sufficient basis of federal jurisdiction. *See* Graybill v. City of New York, 247 F. Supp. 2d 345, 347-52 (S.D.N.Y. 2002); Spagnuolo v. Port Auth., 245 F. Supp. 2d 521, 522-23 (S.D.N.Y. 2002); *see also* Effron, *supra* note 8, at 208-15 (discussing the respiratory distress cases).

37. *In re World Trade Ctr. Disaster Site Litig.*, 270 F. Supp. 2d at 361.

ended and workers' efforts were focused on . . . clean-up of the World Trade Center site."[38]

On appeal, the United States Court of Appeals for the Second Circuit disagreed, opining:

> As it requires no great stretch to view claims of injuries from inhalation of air rendered toxic by the fires, smoke, and pulverized debris caused by the terrorist-related aircraft crashes of September 11 as claims 'relating to' and 'arising out of' those crashes, we conclude that Congress intended ATSSSA's cause of action to be sufficiently expansive to cover claims of respiratory injuries by workers in sifting, removing, transporting, or disposing of that debris.[39]

The Second Circuit did not, however, define the exact boundaries of the statute. "No doubt there will be some claims whose relationship to the terrorist-related aircraft crashes of September 11, 2001, is 'too tenuous, remote, or peripheral' to warrant a finding that those claims 'relat[e] to' those crashes; *but we make no attempt to draw a definitive line here*."[40]

Following the Second Circuit opinion, Judge Hellerstein issued an order extending jurisdiction to all cases covered by the reasoning of the Second Circuit.[41] Since that time, the district court has begun to oversee the organization of claims and discovery, and has ruled on some motions by the defendants concerning sovereign immunity. The problems of the jurisdictional boundaries, however, remain unsolved.[42]

Workers from the buildings and areas surrounding Ground Zero and scattered throughout lower Manhattan have filed respiratory distress claims. As with the original "on-site" plaintiffs, the "off-site" claimants filed in state court and the defendants removed the cases to federal district court under the ATSSSA. Because a good deal of these plaintiffs alleged to have worked both on and off the WTC Site, Judge Hellerstein created two further master calendar docket numbers, one for the "off site" plaintiffs and one for the mixed or "straddler"

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38. *Id.* at 372.

39. *In re* WTC Disaster Site, 414 F.3d 352, 377 (2d Cir. 2005).

40. *Id.* at 380 (emphasis added) (quoting N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 661 (1995)).

41. *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (AKH) (S.D.N.Y. July 22, 2005) (order following appellate remand extending jurisdiction).

42. *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (AKH), 2005 U.S. Dist. LEXIS 14705, at *9 (S.D.N.Y. July 22, 2005) ("Should a time arise when subject matter jurisdiction again might challenged . . . there will be opportunity again to re-visit the issue . . . .").

plaintiffs who alleged having worked on and off the site.[43] The district court has not yet ruled on the boundaries of the subject matter jurisdiction of these claims. At present, the parties are proceeding as if subject matter jurisdiction exists and have drafted master complaints and case management orders similar to those used by the "on site" claimants.[44]

Plaintiffs alleging property damage comprise another track of cases in the September 11th litigation. Judge Hellerstein assigned these plaintiffs a separate master calendar number in March 2005 after realizing that issues of damages and the attendant differences in discovery meant that these cases would not mirror directly those of the personal injury/wrongful death plaintiffs.[45] Moreover, the property damage plaintiffs themselves defy a single categorization. Several claimants allege damages from the collapse of the building 7 World Trade Center (7WTC). This was the only building to have collapsed without being directly hit in the attacks.[46] This fact creates substantial differences in the arguments concerning causation and duty of care.[47] In a further layer of complexity, the City of New York maintained their Office of Emergency Management in 7WTC, prompting a round of motions and limited discovery concerning the issue of sovereign immunity.[48]

Another track of cases concerns a dispute among the liability insurers.[49] The court has had to determine the extent of liability insurance coverage based on "binders" and completed insurance contracts.[50] Judge Hellerstein decided that resolution of the insurance dispute was integral to administration of the underlying cases.[51]

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43. *See In re* Combined World Trade Ctr. & Lower Manhattan Disaster Site Litig., No. 21 MC 103 (AKH) (S.D.N.Y. Mar. 28, 2007) (case management order no. 1).

44. Effron, *supra* note 9, at 215.

45. *Id.* at 218.

46. *Id.*

47. *Id.* at 219.

48. *Id.* at 218-19.

49. Ordinary disputes between insureds and property insurers did not come to Judge Hellerstein because they were not brought pursuant to the ATSSSA. In fact, many of these cases were filed in and remained in state court. *Id.* at 216 n.81.

50. Shortly before September 11th, ownership of the WTC had changed hands. *See id.* at 216 n.82.

> As is typical in large real estate transactions, Silverstein (the new owner) sought insurance coverage for the property that was not finalized until after the deal had closed. The process of obtaining liability insurance was further delayed by the fact that the WTC had been owned and operated by the PANYNJ, an entity that enjoyed sovereign immunity due to its status as an intergovernmental agency. Therefore, the premises did not have a liability record and the insurance broker had difficulty

The diversity among the claimants, groups of claimants, and causes of action within the September 11th litigation came as a surprise to the judge and the litigants.[52] As I have previously argued, the situation is symptomatic of thinking about an *event* as the organizing principle for litigation.[53]

B. The Hurricane Katrina Canal Breaches *Cases*

I now turn to the *In re Katrina Canal Breaches Litigation* as another example of litigation consolidated in one district with an event as the organizing principle.[54] The *Canal Breaches* cases are one of the larger examples of an ad hoc district-wide litigation. Unlike the September 11th litigation, there was not a statute giving a specific district original jurisdiction, thereby effectuating consolidation. Consolidation occurred, instead, through a process of assignment by the en banc court of the Eastern District of Louisiana and § 1404 transfers of venue from other districts. Consolidation has not been the only method for aggregation of claims. Both federal and state class action law suits have been a major vehicle for the aggregation in the

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> obtaining bids from prospective insurers without this data. *In re* September 11 Liab. Ins. Coverage Cases, 458 F. Supp. 2d 104, 108-12 (S.D.N.Y. 2006). In such transactions, the insurers issue a "binder" to the insured that contains the typical and anticipated state-specific clauses for the property and risks to be insured. The parties then continue negotiations and the final policy is issued a few months later. Another feature of a large real estate transaction is the insurance "tower," that is, the entity is insured by one large primary policy, and then is insured for additional sums by layers of excess insurers. Silverstein secured a primary and secondary "umbrella" policy from Zurich American Group (Zurich) and eight layers of excess insurance involving as many as twenty insurers above that. The aggregate policies totaled $1 billion in coverage. The primary policy was a $2 million per occurrence, $4 million aggregate, and the Zurich umbrella covered $50 million per occurrence in excess of the primary policy.

Id. at 216 n.83 (citations omitted).

51. *See id.* at 217 ("[T]he [district] court realized that it would have to make several purely hypothetical findings about the extent of coverage in the absence of clear contours of the underlying litigation and sought to avoid making such speculative rulings. On the other hand, the ATSSSA had linked the resolution of the underlying litigation inextricably to the limits of the available liability insurance coverage. The course of the litigation and the possibility of reaching any sort of settlement will depend on knowledge of the available pool of insurance. These issues remain largely unresolved." (footnote omitted)).

52. *See id.* at 204-05.

53. *See id.* at 234-35.

54. The *Canal Breaches Litigation* is not the totality of the Hurricane Katrina litigation. Many individual cases are pending before judges in federal and state courts throughout Texas, Louisiana, and Mississippi. Moreover, other consolidations exist in this context, for example the Mississippi insurance cases before Judge L.T. Senter, Jr., in the United States District Court for the Southern District of Mississippi, and the oil spill cases before Judge Eldon E. Fallon, in the Eastern District of Louisiana.

Canal Breaches cases and for other lawsuits arising out of Hurricane Katrina.[55]

The *Canal Breaches* litigation began with suits filed in the Eastern District of Louisiana, or suits filed in state court and removed to the Eastern District of Louisiana, alleging that damage caused by the canal breaches was the result of negligence.[56] The *Canal Breaches* cases consist of both individual actions and class actions.[57]

After the first case was assigned to Judge Duval the en banc court of the Eastern District of Louisiana determined that "the proper approach would be to consolidate all such filings for purposes of pretrial discovery and motion practice."[58] Thus, other like cases were transferred to his docket from within the Eastern District as well as from other district courts.[59] Just as Judge Hellerstein and the September 11th litigants initially thought that a general "*In Re* September 11th" caption would be a sufficient description of the litigation, Judge Duval and the *Canal Breaches* litigants thought that the *Canal Breaches* litigation would function more or less as a unitary group under the heading "*In re* Katrina Consolidated Canal Breaches Litigation." In fact, in its earliest iteration, the consolidated cases were simply titled with the caption of the lead case *Berthelot v. Boh Brothers Construction*.[60]

In late March of 2006, Judge Duval proposed that the cases should be grouped by levee (17th Street Canal, London Avenue Canal, and the Industrial Canal),[61] and soon after that certain cases alleging damage from the Mississippi River Gulf Outlet (MRGO) should be

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55. The class actions themselves are an interesting group of cases from both a doctrinal and administrative perspective. These issues, however, are not central to the problems of event-based or disaster-based consolidation of cases.

56. Superseding Master Consolidated Class Action Complaint, *In re* Katrina Canal Breaches Consol. Litig., No. 05-4182 (E.D. La. Mar. 15, 2007).

57. No. 05-4182 (E.D. La. Mar. 1, 2007) (case management and scheduling order no. 4) (noting that the consolidated litigation includes "approximately 170 separately filed civil actions, including about four dozen putative class actions" as of March 2007).

58. *In re* Katrina Canal Breaches Consol. Litig., 466 F. Supp. 2d 729, 733 (E.D. La. 2006), *aff'd in part, vacated in part, In re* Katrina Canal Breaches Litig. 495 F.3d 191 (5th Cir. 2007), *cert. denied sub nom.* Xavier Univ. of La. v. Travelers Cas. Prop. Co. of Am., 128. S. Ct. 1230 (2008), *and* Chehardy v. Allstate Ins. Co., 128 S. Ct. 1231 (2008).

59. Chehardy v. Wooley, No. 05-1140-FJP-CN (M.D. La. Mar. 16, 2006) (order transferring cases).

60. *See* Berthelot v. Boh Bros. Constr. Co., No. 05-4182 (E.D. La. Apr. 11, 2006) (order consolidating the MRGO cases for pretrial purposes).

61. *In re* Katrina Canal Breaches Consol. Litig., No. 05-4182 (E.D. La. Mar. 24, 2006) (order grouping cases by levee).

consolidated as well.[62] Shortly thereafter, he directed the court and parties that "all Katrina Canal Breach cases are to be . . . consolidated pursuant to" that order.[63]

As the *Canal Breaches* cases accumulated before the court, it became clear that organizing the cases around the levee breaches was insufficient for organizational purposes, and he ordered that the cases be divided into four subcategories: (1) Levee cases, (2) Insurance cases, (3) MRGO cases, and (4) Responder cases, all falling under the general caption "*In re.* Katrina Canal Breaches Litigation."[64] He also appointed counsel to the Defendants' Preliminary Master Committee to represent the dredging interests in some of the MRGO cases,[65] foreshadowing a later decision to add a fifth category, dredging, as its own subcategory.[66] The court subsequently added three additional subcategories: (6) the St. Rita Nursing Home cases,[67] (7) barge cases,[68] and (8) Road Home cases.[69] Judge Duval also began to address the problems posed by class actions, putative class actions, and mass joinder cases by ordering that all plaintiffs file individually under the umbrella "Severed Mass Joinder Cases."[70]

Although the consolidation of a large number of Hurricane Katrina cases around the event of the canal breaches before one judge was an administrative decision of the Eastern District of Louisiana rather than a statutory mandate from Congress, the *Canal Breaches* litigation has also been affected by the MMTJA, a federal event jurisdiction statute. Congress enacted the MMTJA in 2002. Although the legislation had been proposed and debated for over three decades, it was finally passed as part of a growing sense of urgency that mass

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62. *In re* Katrina Canal Breaches Consol. Litig., No. 05-4182 (E.D. La. Apr. 11, 2006) (order noting limitation of the MRGO cases); *Berthelot*, No. 05-4182 (E.D. La. Apr. 11, 2006) (order consolidating the MRGO cases for pretrial purposes).

63. Sanchez v. Boh Bros. Constr. Co., No. 06-2287 (E.D. La. May 1, 2006) (order consolidating all Katrina Canal Breach Litigation cases).

64. Berthelot v. Boh Bros. Constr. Co., No. 05-4182 (E.D. La. July 19, 2006) (case management order no. 1).

65. Berthelot v. Boh Bros. Constr. Co., No. 05-4182 (E.D. La. June 15, 2006) (order appointing counsel to represent the Preliminary Master Committee at 3).

66. *In re* Katrina Canal Breaches Consol. Litig., No. 05-4182 (E.D. La. Oct. 20, 2006) (case management order no. 2).

67. *Id.*

68. *In re* Katrina Canal Breaches Consol. Litig., No. 05-4182 (E.D. La. Sept. 18, 2007) (case management and scheduling order no. 5).

69. Louisiana v. AAA Ins., No. 07-5528 (E.D. La. Sept. 18, 2007) (order consolidating the Road Home cases).

70. *In re* Katrina Canal Breaches Consol. Litig., No. 05-4182 (E.D. La. Mar. 27, 2007) (order requiring plaintiffs to file amended individual complaints).

catastrophe cases ought to be aggregated and given a federal forum.[71] The MMTJA expands federal jurisdiction over mass accidents by way of a minimal diversity requirement.

In ordinary cases filed in[72] or removed to[73] federal court, the rule governing diversity jurisdiction has been interpreted to require that each named plaintiff must be completely diverse from each defendant in the lawsuit.[74] The MMTJA takes advantage of the broader constitutional limits of Article III diversity jurisdiction by granting the district courts "original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location."[75] The MMTJA also amends the removal statute to allow defendants to remove actions that could have been brought under § 1369 originally[76] and if

> the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.[77]

The last major departure from the § 1332 diversity statute is that the MMTJA omits an amount in controversy requirement.

The MMTJA has been invoked as a basis for removal by numerous defendants in Hurricane Katrina actions. The district courts have been reluctant to interpret the statute in a way that would, essentially, "federalize" the event of Hurricane Katrina in the way that the ATSSSA federalized the events of September 11th.

District court judges interpreting the statute in the context of the Hurricane Katrina litigation have consistently held that Hurricane

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71. *See* 136 CONG. REC. 12,612 (1990) (statement of Rep. Kastenmeier); Mullenix, *supra* note 4, at 756 n.5; Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7, 9 (1986) ("The problem is the unavailability of any single forum in which to consolidate scattered, related litigation—a difficulty that is becoming more and more common given the increasing number of complex tort actions, such as those growing out of mass accidents and product liability claims.").

72. 28 U.S.C. § 1332 (2000 & Supp. V 2005).

73. *Id.* § 1441.

74. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267-68 (1806).

75. 28 U.S.C. § 1369(a) (Supp. V 2005).

76. *Id.* § 1441(e)(1)(A).

77. *Id.* § 1441(e)(1)(B).

Katrina is not an accident within the meaning of the statute.[78] Although the defendants who removed the cases have tried to argue that the storm was a "natural event culminating in an accident"[79] in which more than seventy-five natural persons died, the district courts have refused to categorize the Hurricane itself as the requisite accident. Judge Duval held that "Hurricane Katrina was the 'natural event' under § 1369 that culminated in many accidents,"[80] but "that it is anything but *clear* that Hurricane Katrina was an 'accident' within the meaning of the statute."[81] The same conclusion has been echoed by several other district court judges.[82]

The United States Court of Appeals for the Fifth Circuit has heard only one MMTJA case. *Wallace v. Louisiana Citizens Property Insurance Corp.* was a class action brought against property insurers in Louisiana state court.[83] The defendants removed the case to federal court on the basis of the MMTJA, arguing that the statute conferred federal jurisdiction because they were defendants in a case pending in federal court that arose out of the same accident.[84] The plaintiff's class moved to remand the case to state court and Judge Marcel Livaudais, Jr., of the Eastern District of Louisiana granted the motion.[85] The defendants appealed the decision.[86] The appellate courts do not usually have jurisdiction to hear appeals of district court decisions to remand cases to state court; however, the court used an exception to the relevant statute to find jurisdiction and rule on the issue.[87] In order to do so, it found that the district court had based its decision on

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78. *See* Fidelity Homestead Ass'n v. Hanover Ins. Co., 458 F. Supp. 2d 276, 282 (E.D. La. 2006) (noting that "[o]ther Judges in this district agree" with the conclusion that Hurricane Katrina itself was not an accident within the meaning of the MMTJA).

79. 28 U.S.C. § 1369(c)(4).

80. Flint v. La. Farm Bureau Mut. Ins. Co., No. 06-2546, 2006 WL 2375593, at *3 (E.D. La. Aug. 15, 2006).

81. Southall v. St. Paul Travelers Ins. Co., No. 06-3848, 2006 WL 2385365, at *5 (E.D. La. Aug. 16, 2006).

82. Johnson v. State Farm Fire & Cas. Ins., Co., No. 06-4256, 2006 WL 3627680, at *4 (E.D. La. Dec. 11, 2006); Trosclair v. Sec. Plan Life Ins. Co., No. 06-9220, 2006 U.S. Dist. LEXIS 84100, at *4 (E.D. La. Nov. 6, 2006); Fradella's Collision v. Lafayette Ins. Co., No. 06-7638, 2006 WL 3258332, at *1 (E.D. La. Oct. 30, 2006); Berry v. Allstate Ins. Co., No. 06-4922, 2006 WL 2710588, at *3 (E.D. La. Sept. 19, 2006); S. Athletic Club, LLC v. Hanover Ins. Co., No. 06-2605, 2006 WL 2583406, at *5 (E.D. La. Sept. 6, 2006); *Flint*, 2006 WL 2375593, at *3.

83. 444 F.3d 697, 698-99 (5th Cir. 2006).

84. Notice of Removal by Louisiana Farm Bureau Mutual Insurance Co. at 4, Chehardy v. La. Ins. Comm'r, No. 05-CV-1162 (M.D. La. Sept. 30, 2005).

85. *See Wallace*, 444 F.3d at 699-700.

86. *Id.* at 700.

87. *See infra* notes 141-146 and accompanying text.

principles of abstention rather than on a lack of jurisdiction.[88] The court held that the district court had misconstrued these principles because the statute permits abstention only under § 1369(a) of the MMTJA, and the defendants had removed the case to federal court pursuant to § 1369(b).[89] Therefore, the Fifth Circuit vacated the district court's remand to state court.[90] With federal jurisdiction upheld, the case was transferred to the Eastern District of Louisiana and consolidated with the *Canal Breaches* litigation. Following this decision, district court judges have continued to hold that the MMTJA did not apply in cases where defendants identified Hurricane Katrina as the accident nexus that triggered jurisdiction under the statute.[91] In order to distinguish their cases from *Wallace*, the judges usually note that the Fifth Circuit reached its decision based on an interpretation of the abstention provision and not based on a holding of the meaning of the term *accident* within the statute.[92]

When the argument that the Hurricane would be the triggering event for the MMTJA failed to gain traction in the district courts, litigants attempted to narrow the scope by pointing to the levee breaches as the requisite accident for federal jurisdiction. Following Judge Duval's dicta in *Flint v. Louisiana Farm Bureau Mutual Insurance Co.*, that "the levee break is the requisite accident that caused the death of at least 75 natural persons at a discrete location,"[93] there was reason to believe that the levee breaches would be the accident nexus upon which MMTJA jurisdiction would hang.

This, however, has also failed to form the basis of MMTJA jurisdiction. As the first to directly address the levee breach issue, Judge Ivan L.R. Lemelle held that "[a]lthough a levee breach may constitute an 'accident' consistent with § 1369, Defendant would be hard pressed to convince the Court that Plaintiffs' action arises out of

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88. *Wallace*, 444 F.3d at 700.

89. *Id.* at 702. The Fifth Circuit held that the part of the MMTJA found in the § 1441 removal statute allowed for supplemental jurisdiction in this situation and that the abstention principles in § 1369(b) were "not an independent bar to the exercise of jurisdiction over a case removed pursuant to § 1441(e)(1)(B), as it applies only to the exercise of original jurisdiction under § 1369(a)." *Id.*

90. *Id.* at 701-03.

91. Thompson v. Mixon, No. 06-11265, 2007 WL 1550948, at *3 (E.D. La. May 25, 2007); Maestri v. Lafayette Ins. Co., No. 06-4239, 2006 WL 2990120, at *2 (E.D. La. Oct. 16, 2006).

92. *See Thompson*, 2007 WL 1550948, at *3; *Maestri*, 2006 WL 2990120, at *2.

93. Flint v. La. Farm Bureau Mut. Ins. Co. No. 06-2546, 2006 WL 2375593, at *3 (E.D. La. Aug. 15, 2006) (distinguishing the Fifth Circuit opinion in *Wallace* from the facts in *Flint*, which did not allege any connection to a levee breach).

ONE levee breach" and because "[t]here were multiple breaches at several locations [it was] not [a] discrete" location.[94] When Judge Duval ruled on the applicability of the MMTJA to the levee breach cases, he held that "[b]ecause . . . [p]laintiffs . . . bring actions arising out of multiple levee breaches, this precludes the possibility that these actions arose out of the same 'single accident'" in the case in which the defendant was already a party.[95] He concluded that "[i]nterpreting the term 'single accident' so broadly as providing for multiple levee breaches does not coincide with the purposes of the MMTJA."[96] The result of these decisions is that the cases that fall along a spectrum of relatedness to the groups of the *Canal Breaches* litigation will continue to be litigated in state court.

III. THE LINK BETWEEN FEDERALIZATION OF FORUM AND CONSOLIDATION OF CASES

As Part II suggests, a coordination of cases arising out of an event is not a guarantee that the individual cases or groups of cases will be related in a legally significant way. The ATSSSA and the MMTJA are statutes that grant a federal forum for cases arising out of a certain type of event. The ATSSSA was drafted specifically to address problems that Congress perceived to arise out of disaster litigation.[97] The MMTJA, too, also targets disaster or catastrophe litigation.[98] In addition to the requirement that the litigation be related to a single accident, the MMTJA requires that seventy-five natural persons die as a result, not simply that some deaths or injuries occur.[99] As one of the bill's earlier sponsors emphasized, "the bill was targeted toward reducing duplicative litigation resulting from serious single accidents, not toxic torts or products liability claims."[100]

These statutes suggest Congress's interest in encouraging the sort of ad hoc district-wide consolidation of cases described in Part II for disaster litigation. This Part explains how Congress has chosen

94. Carroll v. Lafayette Ins. Co., No. Civ. A. 06-3955, 2006 WL 2663013, at *3 (E.D. La. Sept. 14, 2006).

95. Case v. ANPAC La. Ins. Co., 466 F. Supp. 2d 781, 794 (E.D. La. 2006).

96. *Id.*

97. *See* Effron, *supra* note 9, at 242, 244 (discussing legislative history and congressional intent of the ATSSSA).

98. H.R. REP. NO. 107-14 (2001).

99. 28 U.S.C. § 1369(a) (Supp. V 2005).

100. Laura Offenbacher, Note, *The Multiparty, Multiforum Trial Jurisdiction Act: Opening the Door to Class Action Reform*, 23 REV. LITIG. 177, 190 (2004) (citing 136 CONG. REC. 12,612 (1990) (statement of Rep. Kastenmeier)).

federalization of forum as the entryway to consolidation of cases and questions just how close the link between federalization of forum and consolidation of disaster litigation cases ought to be.[101]

Both the ATSSSA and the MMTJA were drafted with an eye toward consolidation, yet, nowhere in the plain language of either statute is consolidation *required*. Despite the absence of an explicit link between jurisdiction and consolidation, courts considering both statutes have taken the possibility of consolidation into account in their opinions granting or denying jurisdiction. This raises a two-part doctrinal question. The first is whether it is *permissible* to deny jurisdiction under either statute because the lawsuit in question would not be consolidated with other cases. The second, and perhaps stronger form of the question, is whether a judge who grants jurisdiction under either statute is required to transfer and consolidate the case with a larger group of related cases.

The MMTJA does not require an actual consolidation or coordination of cases once the Act has been applied to grant jurisdiction. The legislative history, however, consistently links the federalization of forum with consolidation.[102]

When defendants in the Katrina litigation have removed a case to federal court under the MMTJA, they have usually identified themselves as defendants in one of the *Canal Breaches* actions. The judges considering application of the statute have considered whether a case *actually* would be consolidated with this larger group when deciding whether to find federal jurisdiction under the statute. Judge Mary Ann Vital Lemmon, for example, referred to legislative history stating that the purpose of the statute was to "'streamline the process by which multidistrict litigation governing disasters are adjudicated'" to conclude that "[t]he narrow jurisdiction under the MMTJA is not intended to apply to a case where there are not many plaintiffs and many defendants."[103] Judge David Hittner reasoned that "a single case does not risk a lack of fairness, uniformity, efficiency, and

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101. It might be equally plausible to investigate the advantages of consolidation of cases on a state-wide level. However, because state governments have even less power than the federal government to acquire jurisdiction over cases pending in other states, I have bracketed that issue for the purposes of this Article.

102. H.R. REP. NO. 107-14, at 4-5 (2001); H.R. REP. NO. 106-276, at 7 (1999); 150 CONG. REC. H1378 (daily ed. Mar. 24, 2004) (statement of Rep. Smith).

103. S. Athletic Club, LLC v. Hanover Ins. Co., No. 06-2605, 2006 WL 2583406, at *5 (E.D. La. Sept. 6, 2006) (quoting H.R. REP. NO. 107-685, § 11020, *as reprinted in* 2002 U.S.C.C.A.N. 1120).

manageability as contemplated by the MMTJA."[104] Judge Carol J. Barbier was similarly unwilling to find jurisdiction under the MMTJA when the "[d]efendant does not suggest that this claim should be consolidated with . . . any other claims."[105] Judges also have used the fact of consolidation as one way to distinguish the *Wallace* case, where the Fifth Circuit overturned the remand of a case to state court.[106]

In each of these cases, the lawsuit was remanded to state court. The statements about a lack of consolidation, however, appear to be dicta because the holdings always stressed the fact that the allegedly related cases did not arise out of the same "single accident" within the meaning of the statute.[107] Therefore, it seems fair to conclude that when a district court considers a motion to remand a case removed to federal court under a statute like the ATSSSA or the MMTJA, it is permissible for that court to consider the possibility of consolidation as one factor favoring the grant of a federal forum.

The stronger form of this question is: Should jurisdiction under a statute like the ATSSSA or the MMTJA *require* consolidation? Given the current status of litigation in the *September 11th* and *Canal Breaches* cases, this question is, for now, purely hypothetical. No party litigating under either statute has made such a claim, and the event-based consolidation in each case has been organized by efforts of the judges and court personnel within each judicial district, not by pure application of the statute.

It is not inconceivable, however, that a district judge might find that a case satisfies the requirements of a statute such as the MMTJA for the purposes of federal jurisdiction but decline to transfer that case for consolidation with others. This is even more likely to occur when the statute is structured like the ATSSSA. There, a judge might find that a case is related to the specific jurisdictional event named in the statute, but that that case (or group of cases) is not sufficiently related to other cases (or groups of cases) to justify a transfer. For example, in the Hurricane Katrina cases, Judge Lemmon speculated that "the MMTJA *could* apply in an action by a single plaintiff against two defendants," but emphasized that this seemed to contradict the

104. Roby v. State Farm Fire & Cas. Co., 464 F. Supp. 2d 572, 577 (E.D. La. 2006).

105. Southall v. St. Paul Travelers Ins. Co., No. 06-3848, 2006 WL 2385365, at *6 (E.D. La. Aug. 16, 2006).

106. *See, e.g.*, *Roby*, 464 F. Supp. 2d at 577 ("Courts have subsequently distinguished the facts of *Wallace*, which involved class action plaintiffs and consolidation with other cases . . . .").

107. *See supra* notes 79-82 and accompanying text.

statutory purpose.[108] This attitude about the link between the statute and its purpose might be enough to keep the question as it applies to the MMTJA in the realm of the hypothetical.

I believe that interpreting the statute to mandate consolidation would be unwise. As the stories of the *September 11th* and *Canal Breaches* cases have shown, the results of an event-based consolidation of cases can result in an unexpectedly diverse group of claimants and causes of action. As I have argued previously, and as others at the Symposium have suggested,[109] it might not always be optimal to structure such a large scale consolidation around a single event. The best solution, then, would be a statutory scheme that *allows* for consolidation where judges and litigants believe that a consolidation would reduce process costs, but that would conserve the ability to break litigation apart if efficiency so demands.

Drawing broad conclusions about the relative value of statutes like the ATSSSA and the MMTJA from the anecdotal evidence of the *September 11th* and *Canal Breaches* cases, is at best imprecise. Aspects of the experiences of the two litigations, however, suggest that an event jurisdiction statute drafted like the MMTJA has some advantages over a statute drafted like the ATSSSA. The MMTJA defines "event" according to a few characteristics.[110] In contrast, the ATSSSA singles out a particular occurrence as the event upon which exclusive federal jurisdiction is predicated.[111] The flexibility of the MMTJA definition is preferable.[112] When Congress specifies an event like September 11th, the question of grouping cases together in federal court becomes a matter of statutory interpretation, rather than a functional analysis of which cases are actually related to each other.[113] The MMTJA, then, gives a standard for identifying an occurrence as an "event" whereas the ATSSSA gives a rigid rule.

When Congress names a particular event as the basis for federal event jurisdiction, it is making a judgment about which cases should be bundled together for litigation before any cases have even been

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108. *S. Athletic Club, LLC*, 2006 WL 2583406, at *5 (emphasis added).

109. *See, e.g.*, Alexandra Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2421 (2008).

110. 28 U.S.C. § 1369(a), (c) (Supp. V 2005).

111. Pub. L. No. 107-42, § 408(b)(3) 115 Stat. 230, 241 (2001) (codified at 49 U.S.C. § 40101 note (Supp. IV 2004)).

112. This should not be read as an endorsement of the *content* of the MMTJA definition of event. It is unclear, for example, that the requirement of the deaths of seventy-five natural persons represents anything more than a political compromise reached in Congress.

113. *See* Effron, *supra* note 9, at 235-36, 247-48.

filed.[114] A judge, on the other hand, has far better access to the realities of the litigation once cases have actually been filed.[115] Judges applying the MMTJA therefore can account for the relatedness of cases in identifying a particular occurrence as an "event" and defining the scope of that event within the meaning of the statute. As explained above, judges in the Hurricane Katrina cases who were asked to find jurisdiction under the MMTJA were reluctant to do so because the cases were unlikely to benefit from consolidation with other cases.[116] These are judgments based on the realities of existing cases rather than on an assumption that all litigation generated from an event is bound to contain sufficient commonalities to warrant consolidation.

Although the flexibility of the MMTJA may be advantageous, it may be that an identification of an "event" under the MMTJA would lead to the same problems of boundary drawing and of over- and under- inclusiveness that have plagued the *September 11th* litigation. Although judges making the determination of an "event" early on in the stages of a litigation will have more information than Congress had in drafting a statute like the ATSSSA, it still might be insufficient. For example, the judge and litigants in the *September 11th* litigation thought of the litigation as a unitary group of cases for the first few years of that litigation.[117] For this reason, I retain my earlier skepticism about the overall wisdom of event jurisdiction statutes.[118] As the *Canal Breaches* litigation shows, it is possible for judges and litigants to organize an event-based district-wide consolidation of cases pending in federal court without the help of any federal statute or directive. And as the *September 11th* cases show, federalizing cases arising out of an event for the purpose of consolidation may create more problems than it solves. Event jurisdictional statutes, then, are mechanisms to be deployed with caution. When they are used, they ought to be created with the maximum possible flexibility for application by judges and litigants.

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114. I have called this the "ex ante" approach and explained in further detail the problems with this method. *See* Effron, *supra* note 9, at 244-46.

115. This argument is about the relative institutional competence of Congress and the courts to determine issues of consolidation. *See* Effron, *supra* note 9, at 245.

116. *See supra* notes 103-105 and accompanying text.

117. *See* Effron, *supra* note 9, at 204 n.11.

118. *Id.*

IV. APPELLATE REVIEW OF THE COORDINATION BOUNDARIES

Judges who manage the aggregated claims involved in complex litigation have broad authority to manage and organize the cases before them.[119] Like any other type of litigation, however, they are responsible for implementing the orders of the court of appeals.

One way in which Congress could improve disaster litigation is to address the relationship between the district courts and the courts of appeals in determining the scope of the litigation. Congress has tried to streamline litigation by making available a federal forum in a broader number of cases. To that end, the district courts hearing disaster litigation cases have been called upon to tailor the scope of how many cases may be litigated together in federal court by ruling on motions to remand cases to state court for lack of subject matter jurisdiction. The circuit courts have struggled with appeals from remand orders, wanting to contribute some finality to the jurisdictional scope of complex litigation, but often lacking obvious appellate jurisdiction to do so. Although both the Second and Fifth Circuits have found creative solutions to the appellate jurisdiction problems, these tools may not always be available.

The federal removal statute, 28 U.S.C. 1447(d), plainly states that a district court's order of remand to state court is not reviewable by the appellate courts.[120] The statute's judicially recognized objective is a "'policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.'"[121]

Congress has carved out an exception to this rule in the class action context. Section 1453(c)(1) of CAFA states "that notwith-

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119. *See In re* Katrina Canal Litig. Breaches, 524 F.3d 700, 712 n.48 (5th Cir. 2008) ("'A district court is given broad discretion in controlling class actions because of the managerial difficulties which may develop . . . .'" (quoting Nix v. Grand Lodge of Int'l Ass'n of Mach. & Aerospace Workers, 479 F.2d 382, 385 (5th Cir. 1973))); *see also* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 391-413 (1982) (analyzing the managerial role of judges in the litigation process).

120. 28 U.S.C. § 1447(d) (2000) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise."); *see also* Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 127-28 (1995) ("As long as a district court's remand is based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction—the grounds for remand recognized by § 1447(c)—a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d).").

121. *In re* Lowe, 102 F.3d 731, 735 (4th Cir. 1996) (quoting United States v. Rice, 327 U.S. 742, 751 (1946)).

standing section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed."[122] To further streamline the process, the statute sets a date for filing an appeal,[123] and specifically mandates that "the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed."[124] CAFA's legislative history suggests Congress's belief that speedy appellate review of remand orders or denials would reduce the overall procedural costs associated with the adjudication of class actions.[125] The Senate Report, for example explained that the purpose of this mechanism "is to develop a body of appellate law interpreting the legislation without unduly delaying the litigation of class actions."[126]

These reasons for carving out an exception to § 1447(d) in CAFA apply to event jurisdiction statutes. As I have shown, event jurisdiction is likely to be tied to protective coordination, as in the case of the ATSSSA and the MMTJA where the consolidation of litigation relating to a certain event is at least one reason for federalization of forum. The boundaries of consolidation or potential consolidation are a key aspect of how the given statute will be applied. It is useful, then, to have direction from the appellate courts about the interpretation and application of the statute. Without a mechanism like the one built into CAFA, the availability of appellate review is spotty. The September 11th and Hurricane Katrina examples show, for example, that

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122. 28 U.S.C. § 1453(c)(1) (Supp. V 2005). Interestingly, the defendants in *Wallace* tried to rely on this section as a basis for appellate jurisdiction because it was, in fact, a class action that had been removed. Wallace v. Louisiana Citizens Prop. Ins. Co., 444 F.3d 697, 699-700 (5th Cir. 2006). The Fifth Circuit rejected this argument, however, because the basis for removal clearly had been the MMTJA and not CAFA. *Id.* at 700.

123. *See* 28 U.S.C. § 1453(c)(1). This period is the subject of the dispute among courts and commentators over the meaning of the statutes. By all indications, Congress meant to establish a seven-day deadline for filing the appeal. Instead, they drafted the statute to say "no less than seven days," thus effectively creating a waiting period instead of a deadline. Circuit courts have split over how to interpret and apply this provision.

124. *Id.* § 1453(c)(2). The court of appeals may extend this period by ten days if it feels that it is necessary "in the interests of justice," *id.* § 1453(c)(3)(B), or extend it indefinitely upon agreement of the parties, *id.* § 1453(c)(3)(A).

125. The legislative history of the interlocutory appeal provision of CAFA has been unusually well-documented by both courts and scholars because of the interpretive difficulty caused by the odd drafting error. *See, e.g.*, Adam N. Steinman, *"Less" Is "More"? Textualism, Intentionalism, and a Better Solution to the Class Action Fairness Act's Appellate Deadline Riddle*, 92 IOWA L. REV. 1183, 1195-1207 (2007) (discussing the various approaches in statutory interpretation emphasized by courts in interpreting CAFA's appellate provision).

126. S. REP. NO. 109-14, at 49 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 46.

determining the boundaries of subject matter jurisdiction can be integral to shaping the litigation when cases are to be consolidated or federalized using specialized event jurisdictional statutes, and that appellate review is important to that process.

The Second Circuit confronted the problem of appellate review in the context of the respiratory injury cases. Federal jurisdiction was based on the ATSSSA's requirement that the claims arise out of the events of September 11, 2001, but the fact that many of the claimed respiratory injuries were gradations of temporal and geographic distance from this event made the determination difficult.[127] The district court heard the plaintiffs' motion to remand, and struggled to find a principled basis for drawing a jurisdictional line.[128] The court held that "claims for respiratory injury based on exposures suffered at the World Trade Center site between September 11, 2001 and September 29, 2001 'arise out of,' 'result from,' and are 'related to' the attacks of September 11, 2001" because they involved the official search and rescue effort.[129] All other claims alleging injuries that occurred after this period were remanded to state court because "[b]y September 29, 2001, [search and rescue] officially ended and workers' efforts were focused on . . . clean-up of the World Trade Center site."[130] The effect was to deny in part and grant in part the motion to remand.[131]

Judge Hellerstein believed that the question of subject matter jurisdiction was so important to how the litigation would proceed that it called for a higher level of finality. Finding that "[t]he scope of federal jurisdiction in these cases involves a controlling question of law as to which there is a substantial ground for difference of opinion" and that an "immediate appeal also may materially advance the ultimate termination of the litigation," the district court certified the

127. *See supra* notes 29-40 and accompanying text. Judge Hellerstein had already determined the outer limits of ATSSSA jurisdiction by ruling that ordinary workplace accidents that occurred at the WTC demolition site were beyond the scope of federal jurisdiction. *See* Graybill v. City of New York, 247 F. Supp. 2d 345, 346 (S.D.N.Y. 2002) ("Congress did not intend to oust state court jurisdiction in cases such as this involving injuries common to construction and demolition sites generally, and *risks and duties not alleged to be particular to the special conditions caused by the terrorist-related aircraft crashes of September 11.*" (emphasis added)); Spagnuolo v. Port Auth., 245 F. Supp. 2d 521, 522-23 (S.D.N.Y. 2002) (denying a request for interlocutory appeal based on an order remanding a case to state court).

128. *In re* World Trade Ctr. Disaster Site Litig., 270 F. Supp. 2d 357, 368-80 (S.D.N.Y. 2003).

129. *Id.* at 361.

130. *Id.* at 372.

131. *See id.* at 380.

issue for interlocutory appeal.[132] Due to the requirements of 28 U.S.C. § 1447(d), Judge Hellerstein could only certify those cases for appeal for which he had denied the motions to remand.[133]

The Second Circuit agreed that it only had appellate jurisdiction over those cases in which the district court had denied the motion to remand, and rejected the argument that it had appellate jurisdiction based on general appellate review statutes.[134] In the end, this led the Second Circuit to the rather tortured conclusion that it was really only hearing the cases for which the district court had denied remand. In reality it was ruling on all of the cases. The Second Circuit held that the district court erred in remanding to state court the cases alleging injuries that occurred after September 29, 2001.[135] While holding that "[n]o doubt there will be some claims whose relationship to the terrorist-related aircraft crashes of September 11, 2001, is 'too tenuous, remote, or peripheral' to warrant a finding that those claims 'relat[e] to' those crashes," it did not identify exactly which cases were so unrelated to the events of September 11th that they did not belong in federal court.[136]

The district court responded by extending jurisdiction to all cases covered by the reasoning of the Second Circuit.[137] Since the circuit court's ruling, however, the district court has received more cases with more complex relationships to September 11th, both in terms of time and geography. To manage the organizational difficulties created by the uncertainties of subject matter jurisdiction, Judge Hellerstein created additional "tracks" of cases within the district-wide consolidation[138] and is proceeding as if subject matter jurisdiction

132. *Id.* at 381.

133. *Id.* at 380-81.

134. *In re* WTC Disaster Site, 414 F.3d 352, 363-71 (2d Cir. 2005); *see also* 28 U.S.C. § 1291(b) (2000) (providing for appellate review of final orders fitting within the collateral order doctrine); *id.* § 1292 (permitting some review of interlocutory appeals from nonfinal orders).

135. *In re WTC Disaster Site*, 414 F.3d at 381.

136. *Id.* at 380 (quoting N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 661 (1995)). The Second Circuit stated that it would "make no attempt to draw a definitive line" in this case. *Id.*

137. *See In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (AKH) (S.D.N.Y. July 22, 2005) (order following appellate remand extending jurisdiction); *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (AKH) (S.D.N.Y. July 22, 2005) (order amending previous order following appellate remand extending jurisdiction).

138. *See In re* Combined World Trade Ctr. & Lower Manhattan Disaster Site Litig., No. 21 MC 103 (AKH) (S.D.N.Y. Mar. 28, 2007) (case management order no. 1).

exists.[139] Should the district court ultimately decide to remand these cases to state court, the court of appeals would lack jurisdiction to review the order unless it was another "mixed" order to grant in part and deny in part.

The Fifth Circuit has also had to find a way around the barrier of § 1447(d) to assert appellate jurisdiction over the MMTJA aspects of the *Canal Breaches* litigation. As explained above in Part II.B, the MMTJA is an event jurisdiction statute that makes an enlarged number of cases available for litigation in a federal forum, specifically with an eye toward coordination or consolidation for pretrial purposes.

In *Wallace v. Louisiana Citizens Property Insurance Corp.*, the Fifth Circuit held that § 1447(d) was not a bar to appellate review of the remand order because the district court remand was based on abstention, not lack of subject matter jurisdiction.[140] Thus, the court of appeals had jurisdiction under the 28 U.S.C. § 1291 collateral order doctrine.[141] Noting that an "'abstention-based remand order does not fall into either category of remand order described in § 1447(c), as it is not based on lack of subject matter jurisdiction or defects in removal procedure,'"[142] the Fifth Circuit held that § 1369(b) of the MMTJA is an abstention provision that "assumes subject matter jurisdiction under § 1369(a), but abstains where the 'substantial majority' of the plaintiffs and the 'primary defendants' are citizens of the same state and the claims at issue are 'governed primarily by the laws of that State.'"[143] The court went on to explain that it was under these abstention principles that the district court had remanded the class action to state court.[144]

One consequence of this situation is that the appellate courts are able to insert themselves only haphazardly into the interpretations of definitions of the scope of these statutes when the underlying decision fortuitously lies outside of the boundaries of § 1447(d). For the MMTJA, this means that the court of appeals may have a hand in defining the proper interpretation of abstention based on a local controversy, but less so in the interpretation of what sort of event falls

139. *See In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (AKH) (S.D.N.Y. May 13, 2005) (case management order no. 4).

140. 444 F.3d 647, 700-01 (5th Cir. 2006).

141. *Id.* at 700.

142. *Id.* (quoting Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996)).

143. *Id.* at 701.

144. *Id.* at 701-02.

within the meaning of an "accident" within the statute.[145] For the ATSSSA (or an MMTJA situation in which the temporal and geographical boundaries of a single accident are unclear), this means that the district court will always need to deny, at least in part, a motion to remand, and stay the actual order of remand in order to obtain appellate review that would then apply to the original field of cases.

Given this experience of relative difficulty in obtaining appellate review of event jurisdictional statutes, it is worth considering whether Congress ought to amend Title 28 to provide for immediate appellate review of remand orders where subject matter jurisdiction is based on a statute such as the ATSSSA or the MMTJA. The § 1447(d) prohibition on most appellate review might, in the end, be causing more difficulty and delay than the savings of process costs that the rule is meant to achieve.

As the Senate Report for CAFA noted:

> [T]he current prohibition on remand order review was added to section 1447 after the federal diversity jurisdictional statutes and the related removal statutes had been subject to appellate review for many years and were the subject of considerable appellate level interpretive law. The Committee believes it is important to create a similar body of clear and consistent guidance for district courts that will be interpreting this legislation and would particularly encourage appellate courts to review cases that raise jurisdictional issues likely to arise in future cases.[146]

This logic applies with equal force to statutes like the MMTJA and the ATSSSA that stand at the intersection of federalization of forum and consolidation of cases.

V. THE ORGANIZATIONAL CHALLENGE OF SORTING THE COMMON FROM THE UNCOMMON

Complex litigation always entails special administrative and organizational challenges that stem from the difficulties of managing a multitude of plaintiffs, defendants, and claims. Disaster litigation, to the extent that it is a type of complex litigation, shares in these difficulties. There are, however, specific problems that occur in disaster litigation that is aggregated around a specific event. To

145. *Cf.* Stephen Aslett, Note, Wallace v. Louisiana Citizens Property Insurance Corp.: *The Fifth Circuit Expands Federal Jurisdiction over State Court Class Actions Arising Out of Hurricane Katrina*, 81 TUL. L. REV. 1331, 1342 (2007) (arguing that the Fifth Circuit failed to properly analyze the meaning of "accident" within the MMTJA).

146. S. REP. NO. 109-14, at 49 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 46.

understand this, it is useful to briefly review how cases may be aggregated in the first place.

Cases that share elements of fact or law do not always share the level of commonality required for a class action. Cases within one district may be consolidated by operation of local rules[147] or pursuant to Federal Rule of Civil Procedure 42(a).[148] Cases that are pending in multiple federal judicial districts may be aggregated pursuant to 28 U.S.C. § 1407 as a multidistrict litigation (MDL) for pretrial purposes.[149] These cases involving common questions of fact are referred by judges or upon motion of the parties to the JPML, which then decides whether or not to consolidate the cases for pretrial purposes.[150] Actions consolidated for pretrial purposes by the JPML are mostly consolidated according to the type of cause of action or a single occurrence and not arranged around a large event.[151]

One worry that has arisen in the *September 11th* litigation as well as in the *Canal Breaches* litigation is that individual cases will be swallowed up by issues of common liability or class certification issues.[152] The general concern is that the interests of individual litigants will be ignored or underrepresented by lawyers who represent a class as a whole,[153] or by leaders of plaintiffs' committees who represent only

147. *See, e.g.*, S.D.N.Y. R. 15(a) ("[A] civil case will be deemed related to one or more other civil cases and will be transferred for consolidation or coordinated pretrial proceedings when the interests of justice and efficiency will be served. In determining relatedness, a judge will consider whether (i) a substantial saving of judicial resources would result; or (ii) the just efficient and economical conduct of the litigations would be advanced; or (iii) the convenience of the parties or witnesses would be served.").

148. FED. R. CIV. P. 42(a) ("When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.").

149. 28 U.S.C. § 1407(a) (2000) ("When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.").

150. *Id.* § 1407.

151. *See* John F. Nangle, *From the Horse's Mouth: The Workings of the Judicial Panel on Multidistrict Litigation*, 66 DEF. COUNS. J. 341, 342 (1999) (explaining that the JPML has adopted the practice of classifying its dockets into eight general category areas: air and common disasters, antitrust, contract, employment practices, patent and trademark, products liability, securities law, and miscellaneous).

152. *In re* Katrina Breaches Consol. Litig., No. 05-4182 (E.D. La. Mar. 3, 2007) (case management and scheduling order no. 4 at 47-49).

153. John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 384 (2000); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 877 (1987); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 2 (1991).

a fraction of litigants involved in the case.[154] This concern is present in a unique way in disaster litigation cases.

When such cases have been consolidated for pretrial litigation purposes, it could be easy to succumb to a "more bang for the buck" mindset when structuring discovery, or setting a motion or trial schedule. A primary motivation for consolidating cases is to economize judicial resources. The temptation, then, might be to think of common issues of fact or law as "threshold" issues that can or should be resolved in advance of individual issues of fact or law. A few examples from the *September 11th* litigation and the *Canal Breaches* litigation demonstrate how a court presiding over postdisaster consolidated cases confronts and handles these issues.

Some common issues of law can be characterized as genuine threshold issues. These are primarily the jurisdictional and immunity issues asserted by the parties that would operate to either dismiss cases against some defendants altogether or end the litigation of some cases in the federal forum. Threshold issues, then, are especially appealing to single out for advanced resolution. In both litigations, definitions of the jurisdictional boundaries have been the subject of early, and sometimes extensive, motion practice.

Beyond the obvious threshold issues of immunity and jurisdiction lie the myriad issues that must be resolved and facts that must be discovered, any of which might be common to all, some, or just a few of the parties involved in the consolidated litigation. The problem is not so much that it is unfair to make parties wait to investigate or brief an issue that is individual to them while the court resolves issues that they share in common with others. It is, rather, that parties must wait while issues that have nothing at all to do with their case are investigated or resolved. Judge Duval noted this issue in addressing a discovery issue in the insurance subcategory of the *Canal Breaches* litigation.[155] Judge Duval had certified for interlocutory appeal the issue of his ruling as to the enforceability of insurance policies for wind and water damage. The Fifth Circuit granted review of the issue, and issued a stay of the proceedings in the district court while the case

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154. *See generally* Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 523-25 (discussing the need for procedural safeguards in class actions to protect absent class members).

155. For more information regarding Judge Duval's experience with this litigation, see DVD: The Problem of Multidistrict Litigation: Ad Hoc District-Wide MDLs/MMTJA (Tulane Law Review 2008) (statements by Judge Stanwood Duval) (on file with the Tulane University School of Law Library).

was under review. Some defendants asked the court for a broad interpretation of the stay, but the court construed the stay narrowly and insisted that discovery on substantive issues continue in the cases that did not involve insurance coverage questions, and that discovery on individual insurance claims that did *not* involve common liability would continue.[156] In other words, Judge Duval was mindful of this concern, while also recognizing the plaintiffs' interest in proceeding toward a swift resolution of the lawsuit. He denied the motion to bifurcate completely the issue of governmental immunity.[157] He instead sought a middle ground in which discovery would be directed toward that issue, but not completely limited so as not to forestall the case from proceeding in the event that he found against the defendants on the immunity issue.[158]

Judge Hellerstein has encountered similar issues in the *September 11th* litigation. While the court has ruled on several issues of liability that are common to all or some of the litigants, it has also pressed forward with resolution of individual claims. For example, some of the wrongful death cases were stalled due to peculiar discovery issues pertaining to sensitive government information.[159] The court, in an effort to move the cases forward but also to encourage settlement, bifurcated the liability and damages aspects of trial and prepared to try several cases for damages only in autumn of 2007.[160] In other words, the court and the parties decided that in that instance, it was useful to develop aspects of the individual claims regarding damages and for the defendants to prepare responses. The process involved both factual investigation into the individual damage allegations of each claimant as well as litigation on the admissibility of some of the evidence.[161] The cases settled shortly before the scheduled trial,[162] and this may have been a result of both the plaintiffs and

156. *In re* Katrina Canal Breaches Consol. Litig., No. 05-4182 (E.D. La. Mar. 16, 2007) (order and reasons clarifying the stay ordered by the Fifth Circuit at 3).

157. *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182 (E.D. La. Mar. 15, 2007) (*Robinson* case management order no. 1).

158. *See id.*

159. *See* Effron, *supra* note 9, at 221-22.

160. *In re* September 11 Litig., No. 21 MC 97 (AKH) (S.D.N.Y. July 2, 2007) (order bifurcating cases and proceeding and trial on damages).

161. The plaintiffs had wanted to admit the evidence of future earning as well as extrinsic evidence of the events of September 11th, including photos of the terrorists going through airport security and the cockpit data recorder. The district court granted the defendants motion to exclude this evidence from trial. *In re* September 11 Litig., No. 21 MC 97 (AKH) (S.D.N.Y. Oct. 17, 2007) (order regarding defendant's motion in limine).

162. *See* discussion *supra* note 28.

defendants seeing the reality of the outcome of the damages aspect of trial.[163]

Similar attention has been given to the individual aspects of the property damage and respiratory injury claimants. Although the Federal Rules of Civil Procedure do not require pleading with specificity,[164] Judge Hellerstein has used the creation and filing of master "check box" complaints to encourage some initial discovery and definition of plaintiff claims.[165] Like the bifurcation of liability and damages in the personal injury/wrongful death cases, this is meant to encourage the parties to look beyond some of the threshold issues that will affect the outcome of each claim.

In at least one instance, the ATSSSA itself was the source of conflict between the need to address issues common to several groups of plaintiffs and the needs of individual groups or subgroups. This arose out of the creation of a partial administrative remedy to claims arising out of September 11th. The property damage plaintiffs shared several issues of causation and discovery with the personal injury and wrongful death plaintiffs.[166] The personal injury and wrongful death claimants had access to the VCF, a remedy unavailable to the property damage plaintiffs. Although the court ruled on preliminary issues of duty of care and proximate cause on a Rule 12(b)(6) motion to dismiss standard, "the court and the parties understood that the 'real' work of moving the litigation forward could not begin until the VCF had closed and its attendant issues were settled."[167]

The *Canal Breaches* litigation and the *September 11th* litigation thus demonstrate how litigation that is consolidated based on a disaster or an event within a disaster can create a conflict between common and individual issues. I do not propose that there is an easy answer to

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163. *See* Lahav, *supra* note 109, at 2376-79.

164. *See* Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007).

165. *See* Effron, *supra* note 9, at 212.

166. *Id.* at 217-19. Recall, however, that the property damage plaintiffs were eventually split off into their own "track" because of a number of issues unique to them. *Id.* at 219.

167. Effron, *supra* note 9, at 218. The property damage and personal injury/wrongful death claimants also occasionally clashed because

> on several occasions, the property damage plaintiffs expressed concerns that a high-visibility trial featuring the wrongful death plaintiffs might result in extremely high jury verdicts, thus cutting deeply into the liability cap; or that some of the personal injury and wrongful death plaintiffs would act as unreasonable 'hold-outs,' thus preventing a reasonable global settlement plan.

Id. This worry is now moot given the recent settlement of the personal injury/wrongful death cases. *See* discussion *supra* note 28.

this problem, or that the conflict alone dooms a disaster litigation consolidation to failure. What these examples do show, however, is that judges and parties ought to be cognizant of these potential conflicts at two stages of litigation. The first is to be sure that there is a full accounting of *individual* issues as well as commonalities when deciding whether or not to consolidate cases. The second is to remain continually vigilant of these conflicts as the litigation proceeds and timelines for discovery, motion practice, and trials are set.

VI. CONCLUSION

Disaster litigation is not a new phenomenon. However, some of the tools employed to manage it are recent innovations. This is part of the recent trend toward federalization of forum and even federalization of some aspects of substantive tort law. It is not clear that postcatastrophe litigation, in and of itself, presents organizational or doctrinal problems that are unique to disasters. Rather, it is the use of event-based consolidation that has generated new administrative challenges and doctrinal puzzles for the courts. This Article has highlighted just a few of those issues, but the full scope of the advantages and disadvantages of event jurisdiction and event-based consolidation will only become clear after courts have had many more years to grapple with the issues—both expected and unexpected.

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