108TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
108–416

MULTIDISTRICT LITIGATION RESTORATION ACT OF 2003

FEBRUARY 10, 2004.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 1768]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1768) to amend title 28, United States Code, to allow a judge to whom a case is transferred to retain jurisdiction over certain multidistrict litigation cases for trial, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

CONTENTS

THE AMENDMENT

The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Multidistrict Litigation Restoration Act of 2004".

SEC. 2. MULTIDISTRICT LITIGATION.

Section 1407 of title 28, United States Code, is amended—

(1) in the third sentence of subsection (a), by inserting "or ordered transferred to the transferee or other district under subsection (i)" after "terminated"; and

(2) by adding at the end the following new subsection:

"(i)(1) Subject to paragraph (2) and except as provided in subsection (j), any action transferred under this section by the panel may be transferred for trial purposes, by the judge or judges of the transferee district to whom the action was assigned, to the transferee or other district in the interest of justice and for the convenience of the parties and witnesses.

"(2) Any action transferred for trial purposes under paragraph (1) shall be remanded by the panel for the determination of compensatory damages to the district court from which it was transferred, unless the court to which the action has been transferred for trial purposes also finds, for the convenience of the parties and witnesses and in the interests of justice, that the action should be retained for the determination of compensatory damages.".

SEC. 3. TECHNICAL AMENDMENT TO MULTIPARTY, MULTIFORM TRIAL JURISDICTION ACT OF 2002.

Section 1407 of title 28, United States Code, as amended by section 2 of this Act, is further amended by adding at the end the following:

"(j)(1) In actions transferred under this section when jurisdiction is or could have been based, in whole or in part, on section 1369 of this title, the transferee district court may, notwithstanding any other provision of this section, retain actions so transferred for the determination of liability and punitive damages. An action retained for the determination of liability shall be remanded to the district court from which the action was transferred, or to the State court from which the action was removed, for the determination of damages, other than punitive damages, unless the court finds, for the convenience of parties and witnesses and in the interest of justice, that the action should be retained for the determination of damages.

"(2) Any remand under paragraph (1) shall not be effective until 60 days after the transferee court has issued an order determining liability and has certified its intention to remand some or all of the transferred actions for the determination of damages. An appeal with respect to the liability determination and the choice of law determination of the transferee court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the transferee court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination and the choice of law determination shall not be subject to further review by appeal or otherwise.

"(3) An appeal with respect to determination of punitive damages by the transferee court may be taken, during the 60-day period beginning on the date the order making the determination is issued, to the court of appeals with jurisdiction over the transferee court.

"(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

"(5) Nothing in this subsection shall restrict the authority of the transferee court to transfer or dismiss an action on the ground of inconvenient forum.".

SEC. 4. EFFECTIVE DATE.

(a) SECTION 2.— The amendments made by section 2 shall apply to any civil action pending on or brought on or after the date of the enactment of this Act.

(b) SECTION 3.—The amendment made by section 3 shall be effective as if enacted in section 11020(b) of the Multiparty, Multiforum Trial Jurisdiction Act of 2002 (Public Law 107–273; 116 Stat. 1826 et seq.).

PURPOSE AND SUMMARY

H.R. 1768 would allow a designated U.S. district court (a so-called "transferee" court) under the multidistrict litigation statute [1] to retain jurisdiction over referred cases arising from the same fact scenario for purposes of determining liability and punitive dam-

[1] 28 U.S.C. § 1407.

ages, or to send them back to the respective courts from which they were transferred. It also would function as a technical fix to a recently-enacted "disaster" litigation statute from the 107th Congress. The bill would save litigants time and money, but would not interfere with jury verdicts or compensation rates for attorneys.

BACKGROUND AND NEED FOR THE LEGISLATION

SECTION 2: MULTIDISTRICT LITIGATION/THE *LEXECON* DECISION

H.R. 1768 would reverse the effects of a Supreme Court interpretation of 28 U.S.C. § 1407, the Federal multidistrict litigation statute. The case in question is commonly referred to as *"Lexecon"* [2]

Under § 1407, a Multidistrict Litigation Panel ("MDLP")—a select group of seven Federal judges picked by the Chief Justice—helps to consolidate lawsuits which share common questions of fact filed in more than one judicial district nationwide. Typically, these suits involve mass torts—a plane crash, for example—in which the plaintiffs are from many different states. All things considered, the panel attempts to identify the one U.S. district court nationwide which is best positioned to adjudicate pretrial matters. The panel then remands individual cases back to the districts where they were originally filed for trial unless they have been previously terminated.

For approximately 30 years, however, the district court selected by the panel to hear pretrial matters (the "transferee court") often invoked § 1404(a) of title 28 to retain jurisdiction for trial over all of the suits. This general venue statute allows a district court to transfer a civil action to any other district or division where it may have been brought; in effect, the court selected by the panel simply transferred all of the cases to itself. According to the Administrative Office of the U.S. Courts and the MDLP, this process has worked well since the transferee court was versed in the facts and law of the consolidated litigation. This is also the one court that could compel all parties to settle when appropriate.

The *Lexecon* decision altered the § 1407 landscape. Lexecon was a defamation case brought by a consulting entity (Lexecon) against a law firm that had represented a plaintiff class in the Lincoln Savings and Loan litigation in Arizona. Lexecon had been joined as a defendant to the class action in the original case, which the MDLP transferred to the District of Arizona. Before the pretrial proceedings were concluded, Lexecon reached a resolution with the plaintiffs in the original action, and the claims against it were dismissed.

Lexecon then brought a defamation suit against the law firm in the Northern District for Illinois. The law firm moved under § 1407 that the MDLP empower the Arizona court which adjudicated the original S&L litigation to preside over the defamation suit. The panel agreed, and the Arizona transferee court subsequently invoked its jurisdiction pursuant to § 1404 to preside over a trial that the law firm eventually won. Lexecon appealed, but the Ninth Circuit affirmed the lower court decision.[3]

---

[2] *Lexecon* v. *Milberg Weiss Bershad Hynes & Lerach, et. al.,* 523 U.S.26 (1998).
[3] 102 F. 3rd 1524 (9th Cir. 1996).

The Supreme Court reversed, however, holding that section 1407 *explicitly* requires a transferee court to remand all cases for trial back to the respective jurisdictions from which they were originally referred. In his opinion, Justice Souter observed that "the floor of Congress" was the proper venue to determine whether the practice of self-assignment under these conditions should continue.

Section 2 of the bill responds to Justice Souter's admonition. In the absence of a *Lexecon* "fix," the MDLP will be forced to remand cases back to their transferor districts, and then have each original district court decide whether to transfer each case back to the transferee district for trial purposes under § 1404. This alternative, to invoke the Chairman of the MDLP, would be "cumbersome, repetitive, costly, potentially inconsistent, time consuming, inefficient, and a wasteful utilization of judicial and litigant resources."[4]

Since *Lexecon*, significant problems have arisen that have hindered the sensible conduct of multidistrict litigation. Transferee judges throughout the United States have voiced their concern to the MDLP about the urgent need to clarify their authority to retain cases for trial. Indeed, transferee judges have been unable to order self-transfer for trial, even though all parties to constituent cases have agreed on the wisdom of self-transfer for trial.[5] Instead, complex multidistrict cases should be streamlined as much as possible by providing the transferee judge as many options as possible to expedite trial when the transferee judge, with full input from the parties, deems appropriate. In other words, there is a pressing need to recreate the multidistrict litigation environment that existed before *Lexecon*.

The change advocated by the MDLP and other multidistrict practitioners makes sense in light of judicial practice under the multidistrict litigation statute for the past 30 years. It promotes judicial administrative efficiency and will encourage parties to settle complex Federal litigation.

SECTION 3: TECHNICAL AMENDMENTS TO MULTIPARTY, MULTIFORUM JURISDICTION OF DISTRICT COURTS/"DISASTER" LITIGATION

The legislative history of section 3 of H.R. 1768 is intertwined with that of section 3 of H.R. 860 from the 107th Congress.

As passed by the House on March 14, 2001, H.R. 860, the "Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001," contained the following core provisions:

(1) Section 2 (Lexecon). Section 2 of the bill would have enacted a "straight" *Lexecon* fix identical to that of H.R. 1768.

(2) Section 3 ("disaster" litigation). Section 3 of H.R. 860 conferred original jurisdiction on U.S. district courts to adjudicate any civil action arising out of a single accident in which at least 25 persons are either killed or injured. Damages for each person must exceed $150,000, and minimal diversity rules apply (i.e., jurisdiction will lie if any one plaintiff and any one defendant are from different states), with one exception: the "substantial majority" of all plaintiffs and the "primary" defendants are citizens of the same

[4] *Hearing on H.R. 2112 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary,* 106th Cong., 1st Sess. (June 16, 1999) (statement of the Honorable John F. Nangle, Chairman, Judicial Panel on Multidistrict Litigation, at 5).

[5] *See, e.g.,* MDL–1125—*In re Air Crash Near Cali, Columbia, on 12/20/95,* S.D. Fla. (Judge Highsmith).

state, and the claims will be "primarily" governed by the laws of that state (i.e., state courts would hear these "exception" cases). If the base requirements of Section 3 are otherwise satisfied, the court may determine liability and punitive damages, but would remand to state courts for determination of compensatory damages.[6]

The Senate Committee on the Judiciary took no action on H.R. 860, but the matter was resurrected during House-Senate conference deliberations on what became the "21st Century Department of Justice Appropriations Authorization Act."[7] Pursuant to negotiations, the conferees agreed to take "half" of H.R. 860—section 3, or the "disaster" litigation portion. It is codified as section 11020 of the Department of Justice authorization statute. In addition, one of the threshold criteria triggering its application was changed in conference. Specifically, and in addition to the other criteria, a U.S. district court may only retain jurisdiction over such cases if at least 75 persons (not 25) have been killed or injured.

The Committee believes that a straight *Lexecon* fix is meritorious in its own right, promoting as it does judicial efficiency. But there is another problem in light of the legislative history of H.R. 860.

The disaster litigation portion of H.R. 860 now set forth in the Department of Justice authorization statute contemplates that the *Lexecon* problem is solved. In other words, the new disaster litigation law only creates original jurisdiction for a U.S. district court to accept these cases and qualify as a transferee court under the multidistrict litigation statute. But the transferee court still cannot retain the consolidated cases for determination of liability and punitive damages, which effectively guts the statute. In this sense, then, the *Lexecon* fix—its freestanding merits aside—also functions as a technical correction to the recently-enacted disaster litigation measure.

HEARINGS

There were no hearings on H.R. 1768 in the Committee on the Judiciary.

COMMITTEE CONSIDERATION

On July 22, 2003, the Subcommittee on Courts, the Internet, and Intellectual Property met in open session and ordered favorably reported the bill H.R. 1768 by voice vote, a quorum being present. On January 28, 2004, the Committee met in open session and ordered favorably reported the bill H.R. 1768 with an amendment by voice vote, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of Rule XIII of the Rules of the House of Representatives, the Committee notes that there were no recorded votes during consideration of H.R. 1768.

---

[6] *See* H. Rept. No. 106–276, 106th Cong., 1st Sess. (1999) and H. Rept. No. 107–14, 107th Cong., 1st Sess. (2001) for a detailed explanation of why "disaster" litigation redress was needed.

[7] H.R. 2215, Pub. L. No. 107–273.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of Rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of Rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of Rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of Rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1768, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 9, 2004.

Hon. F. JAMES SENSENBRENNER, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1768, the "Multidistrict Litigation Restoration Act of 2003."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Lanette J. Walker, who can be reached at 226–2860.

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 1768—Multidistrict Litigation Restoration Act of 2003.

CBO estimates that implementing H.R. 1768 would have no significant impact on the Federal budget and would not affect direct spending or receipts. H.R. 1768 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would have no significant effects on the budgets of State, local, or tribal governments.

Enacting H.R. 1768 would remove existing impediments to the consolidation of certain lawsuits within the Federal judicial system. The bill would permit a Federal judge to consolidate such cases for trial on the common issues of liability and punitive damages if those cases were consolidated for pretrial proceedings. The bill also would allow Federal judges to determine compensatory damages in such consolidated cases under certain conditions. Under current law, cases related by one or more common questions of fact that

are pending in multiple Federal judicial districts may be consolidated before a single Federal judge only for pretrial proceedings. At the end of those proceedings, each case must now be remanded for trial back to the judicial district where it originated.

CBO expects that enacting this bill would result in a more efficient use of Federal judicial resources. Any savings realized by the Federal court system would be negligible, CBO estimates, and might be offset by increased court costs that could arise from additional cases being moved from State court to Federal court under the bill. Thus, CBO estimates that implementing H.R. 1768 would result in no significant impact on the Federal budget.

The CBO staff contact for this estimate is Lanette J. Walker, who can be reached at 226–2860. This estimate was approved by Robert A. Sunshine, Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

H.R. 1768 does not authorize funding. Therefore, clause 3(c)(4) of Rule XIII of the Rules of the House of Representatives is inapplicable.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of Rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8 and article III, section 1, of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 1. Short Title. The Act may be cited as the "Multidistrict Litigation Restoration Act of 2003." The Committee adopted a technical amendment changing the date to 2004.

Section 2. Multidistrict Litigation. Section 2 affirms the authority of a transferee court to retain jurisdiction under the general multidistrict litigation statute over district and state actions initially referred to it for trial purposes, "in the interest of justice and for the convenience of the parties and witnesses." Similarly, Section 2 also specifies that a transferee court which retains jurisdiction over referred actions for trial may only make determinations regarding compensatory damages if it is convenient to the parties and witnesses and promotes the interest of justice.

Section 3. Technical Amendments to Multiparty, Multiforum Trial Jurisdiction Act of 2002. Section 3 clarifies that transferred actions brought under the disaster litigation statute (enacted as part of the "21st Century Department of Justice Appropriations Authorization Act") may be retained by the transferee court for determinations of liability and punitive damages. The determination of non-punitive (i.e., compensatory) damages may be retained by the transferee court only if it is convenient to the parties and witnesses and promotes the interest of justice.

At the Committee's markup, Chairman Sensenbrenner offered a perfecting amendment. H.R. 1768 as originally drafted changed one of the threshold criteria for the now-codified disaster litigation provision to take effect. Under current law, at least 75 persons must be killed in an accident to trigger the statute's application. H.R. 1768, as introduced, lowered the number to 25.

The Sensenbrenner amendment, which passed by voice vote, simply makes the disaster litigation references in section 3 of H.R. 1768 compatible with the statute. The threshold will be at least 75 persons—not 25.

Section 3 also prescribes the terms by which a determination governing liability, choice of law, and punitive damages may be appealed.

Section 4. Effective Date. H.R. 1768 applies two effective dates to different provisions of the bill.

The provisions of Section 2 will apply to any civil action pending on or brought on or after the date of the enactment of H.R. 1768.

Section 3 applies to "disaster" cases that are addressed by section 11020 of the Department of Justice authorization statute from the 107th Congress. The provision is therefore deemed to take effect as though it were a part of section 11020. This means that Section 3 of the bill applies to any relevant civil action if the accident giving rise to the cause of action occurred on or after the 90th day after the date of the enactment of the "21st Century Department of Justice Appropriations Authorization Act," which was November 2, 2002.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

SECTION 1407 OF TITLE 28, UNITED STATES CODE

§ 1407. Multidistrict litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated *or ordered transferred to the transferee or other district under subsection (i): Provided, however*, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

* * * * * * *

(i)(1) Subject to paragraph (2) and except as provided in subsection (j), any action transferred under this section by the panel may be transferred for trial purposes, by the judge or judges of the transferee district to whom the action was assigned, to the trans-

feree or other district in the interest of justice and for the convenience of the parties and witnesses.

(2) Any action transferred for trial purposes under paragraph (1) shall be remanded by the panel for the determination of compensatory damages to the district court from which it was transferred, unless the court to which the action has been transferred for trial purposes also finds, for the convenience of the parties and witnesses and in the interests of justice, that the action should be retained for the determination of compensatory damages.

(j)(1) In actions transferred under this section when jurisdiction is or could have been based, in whole or in part, on section 1369 of this title, the transferee district court may, notwithstanding any other provision of this section, retain actions so transferred for the determination of liability and punitive damages. An action retained for the determination of liability shall be remanded to the district court from which the action was transferred, or to the State court from which the action was removed, for the determination of damages, other than punitive damages, unless the court finds, for the convenience of parties and witnesses and in the interest of justice, that the action should be retained for the determination of damages.

(2) Any remand under paragraph (1) shall not be effective until 60 days after the transferee court has issued an order determining liability and has certified its intention to remand some or all of the transferred actions for the determination of damages. An appeal with respect to the liability determination and the choice of law determination of the transferee court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the transferee court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination and the choice of law determination shall not be subject to further review by appeal or otherwise.

(3) An appeal with respect to determination of punitive damages by the transferee court may be taken, during the 60-day period beginning on the date the order making the determination is issued, to the court of appeals with jurisdiction over the transferee court.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) Nothing in this subsection shall restrict the authority of the transferee court to transfer or dismiss an action on the ground of inconvenient forum.

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, JANUARY 28, 2004

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:04 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

[Intervening business.]

Chairman SENSENBRENNER. The next item on the agenda is the adoption of H.R. 1768, the "Multi-District Litigation Restoration Act of 2003." The Chair recognizes the gentleman from Texas, Mr. Smith, the Chairman of the Subcommittee on Courts, the Internet, and Intellectual Property.

Mr. SMITH. Thank you, Mr. Chairman. The Subcommittee on Courts, the Internet, and Intellectual Property reports favorably the bill H.R. 1768, and moves its favorable recommendation to the full House.

Chairman SENSENBRENNER. Without objection, the bill will be considered as read, and open for amendment at any point. The Chair recognizes himself to explain the bill.

[The bill, H.R. 1768, follows:]

I

108TH CONGRESS
1ST SESSION

H. R. 1768

To amend title 28, United States Code, to allow a judge to whom a case is transferred to retain jurisdiction over certain multidistrict litigation cases for trial, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 11, 2003

Mr. SENSENBRENNER (for himself, Mr. SMITH of Texas, and Mr. COBLE) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 28, United States Code, to allow a judge to whom a case is transferred to retain jurisdiction over certain multidistrict litigation cases for trial, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Multidistrict Litigation Restoration Act of 2003''.

SEC. 2. MULTIDISTRICT LITIGATION.

Section 1407 of title 28, United States Code, is amended—

(1) in the third sentence of subsection (a), by inserting ''or ordered transferred to the transferee or other district under subsection (i)'' after ''terminated''; and

(2) by adding at the end the following new subsection:

''(i)(1) Subject to paragraph (2) and except as provided in subsection (j), any action transferred under this section by the panel may be transferred for trial purposes, by the judge or judges of the transferee district to whom the action was assigned, to the transferee or other district in the interest of justice and for the convenience of the parties and witnesses.

''(2) Any action transferred for trial purposes under paragraph (1) shall be remanded by the panel for the determination of compensatory damages to the district court from which it was transferred, unless the court to which the action has been transferred for trial purposes also finds, for the convenience of the parties and witnesses and in the interests of justice, that the action should be retained for the determination of compensatory damages.''.

SEC. 3. TECHNICAL AMENDMENTS TO MULTIPARTY, MULTIFORM TRIAL JURISDICTION ACT OF 2002.

(a) MULTIDISTRICT LITIGATION.—Section 1407 of title 28, United States Code, as amended by section 2 of

this Act, is further amended by adding at the end the following:

''(j)(1) In actions transferred under this section when jurisdiction is or could have been based, in whole or in part, on section 1369 of this title, the transferee district court may, notwithstanding any other provision of this section, retain actions so transferred for the determination of liability and punitive damages. An action retained for the determination of liability shall be remanded to the district court from which the action was transferred, or to the State court from which the action was removed, for the determination of damages, other than punitive damages, unless the court finds, for the convenience of parties and witnesses and in the interest of justice, that the action should be retained for the determination of damages.

''(2) Any remand under paragraph (1) shall not be effective until 60 days after the transferee court has issued an order determining liability and has certified its intention to remand some or all of the transferred actions for the determination of damages. An appeal with respect to the liability determination and the choice of law determination of the transferee court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the transferee court. In the event a party files such an appeal, the remand shall not be effective until the

appeal has been finally disposed of. Once the remand has become effective, the liability determination and the choice of law determination shall not be subject to further review by appeal or otherwise.

''(3) An appeal with respect to determination of punitive damages by the transferee court may be taken, during the 60-day period beginning on the date the order making the determination is issued, to the court of appeals with jurisdiction over the transferee court.

''(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

''(5) Nothing in this subsection shall restrict the authority of the transferee court to transfer or dismiss an action on the ground of inconvenient forum.''.

(b) BASIS OF JURISDICTION.—Section 1369 of title 28, United States Code, is amended in subsections (a) and (c)(4), by striking ''75'' and inserting ''25''.

SEC. 4. EFFECTIVE DATE.

(a) SECTIONS 2 AND 3(b).— The amendments made by section 2 and section 3(b) shall apply to any civil action pending on or brought on or after the date of the enactment of this Act.

(b) SECTION 3(a).—The amendments made by section 3(a) shall be effective as if enacted in section

11020(b) of the Multiparty, Multiforum Trial Jurisdiction Act of 2002 (Public Law 107–273; 116 Stat. 1826 et seq.).

○

Chairman SENSENBRENNER. This bill reverses the effect of a 1998 Supreme Court case, commonly referred to as *Lexecon* that has hampered the Federal court system from adjudicating complex multi-district cases that are related by a common-fact situation. And the bill also functions as a technical correction to a related disaster litigation provision that was incorporated in the DOJ Authorization Act late last year.

A little background is in order. In the last Congress, I authored legislation to address this issue and disaster litigation problems. This bill was passed by the House under suspension, and its operative part relating to this bill would reversed the effect of the *Lexecon* case. And pursuant to the *Lexecon* decision, the transferee court can retain Federal and State cases for pretrial matters but not the actual trials themselves. The second part of the bill that passed in the last Congress was the common disaster provision, and that was taken care of in a modified version in the DOJ authorization bill. But the DOJ authorization bill did not deal with the *Lexecon* decision at all.

What this bill does is it enacts a straight *Lexecon* fix before us. The gentleman from California, Mr. Berman, has correctly noted that, as introduced, this bill did not raise the threshold for the invocation of the disaster litigation statute from 25 to 75 victims. When we get to the point for amendments, I will offer an amendment, which Mr. Berman has agreed to, to make this fix in order.

Before recognizing the gentleman from California, Mr. Berman, I would like to ask unanimous consent to include in the record a letter from the judicial conference of the United States supporting this legislation. And without objection, the letter is included. And the gentleman from California, Mr. Berman, is recognized.

[The material referred to follows:]

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

January 20, 2004

Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

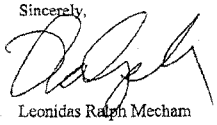
The Judicial Conference of the United States strongly supports the enactment of H.R. 1768, the "Multidistrict Litigation Restoration Act of 2003."

Current law authorizes the Judicial Panel on Multidistrict Litigation to transfer related cases pending in federal judicial districts to a single district for coordinated or consolidated pretrial proceedings. The 107th Congress passed and the President signed the "Multiparty, Multiforum Trial Jurisdiction Act" into law. That law authorizes, in certain circumstances, related cases from federal and state court to be consolidated.

However, the Supreme Court in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26 (1998) decided that the wording of Section 1407 of title 28, United States Code was such that after pretrial proceedings were complete, all consolidated cases must be returned to the districts of origin. This ended the 30-year practice of transferee judges to retain jurisdiction over consolidated cases to facilitate settlement or to try the cases.

The decision of the Court in the *Lexecon* case significantly interferes with the intent of Congress in creating the Judicial Panel on Multidistrict Litigation. Allowing transferee judges to be able to retain jurisdiction over consolidated cases throughout their pendency furthers the interest of justice, allows for efficient judicial administration, and takes into full account the convenience of the parties and witnesses. H.R. 1768 will reinstate these benefits to the federal civil justice system.

Sincerely,



Leonidas Ralph Mecham
Secretary

cc: Honorable John Conyers, Jr.
Honorable Lamar S. Smith
Honorable Howard L. Berman

I am going to speak about H.R. 1768 in the context of the amendment that I understand and you have indicated that you will offer. And if your amendment is adopted, I intend to support the bill, and ask for my colleagues to do the same.

As you mentioned, this Committee has approved legislation containing the provisions of H.R. 1768 in each of the last two Congresses, both times, I believe, by voice vote. We have had to keep passing legislation like H.R. 1768 because the Senate keeps killing it. Some of our colleagues in the other House appear to have strong reservations about this legislation. While it will not guarantee Senate adoption, I think we can increase the chances for enactment this time around by adopting the amendment the Chairman will offer. As part of the DOJ reauthorization legislation enacted in 2002, Congress created minimal diversity jurisdiction in Federal court for certain actions involving large-scale single accidents. Among other things, that legislation, which had been part of the predecessor to H.R. 1768, created Federal diversity jurisdiction for such accidents only where at least 75 people had been killed or injured. The agreement between the House and the Senate conferees to set the bar at 75 people represented a significant departure from the House-passed legislation which only required a 25-person threshold.

As introduced, H.R. 1768 would, among other things, upset that by instituting a 25-person threshold. Since the Senate had insisted on a 75-person threshold as the price for supporting enactment of the single accident provisions, there is every reason to believe it will object to lowering this threshold. I understand that some Members of this Committee would also register strong objections to lowering the 75 percent threshold.

So I applaud the Chairman's decision to offer an amendment that will leave that threshold in place. As so amended, I believe this legislation will be unobjectionable and reasonable. It will have the very narrow purpose and effect; it would simply overturn the 1998 *Lexecon* decision of the Supreme Court, which held that a multi-district litigation transferred to a Federal court for pretrial proceedings cannot be retained by that court for trial purposes. In so doing, the *Lexecon* decision upsets decades of practice by the multi-district litigation panel and Federal district courts. The *Lexecon* decision also increases the cost and complexity of such multi-district litigations by requiring courts other than the transferee court, which has overseen discovery and other pretrial proceedings to conduct the trial.

This bill overturns the *Lexecon* decision in a carefully calibrated manner. While the bill allows a transferee court to retain a case for trial on liability issues and, when appropriate, on punitive damages, it creates a presumption that the trial of compensatory damages will be transferred—will be remanded to the transferor court.

In so doing, the bill is careful to overturn the *Lexecon* decision without expanding the power previously exercised by transferee courts. More importantly, the presumption regarding the trial of compensatory damages ensures that plaintiffs will not be unduly burdened in pursuit of their claims. The bill's narrow breadth should be contrasted with broader and, in my mind, more troubling legislation to expand Federal court jurisdiction such as the alleged class-action reform. I just want to make sure everybody under-

stands that support for H.R. 1768 does not imply by many of us support for any of the various class-action bills. Because the bills are so vastly different in scope and effect, my support for this bill shouldn't be read as support for a class-action bill. And I ask my colleagues to vote for the Chairman's amendment to H.R. 1768 and then for the bill as amended. I yield back.

Chairman SENSENBRENNER. Without objection, all Members may insert opening statements into the record at this point. Are there amendments? And the Chair has an amendment at the desk.

The CLERK. Amendment to H.R. 1768 offer by Chairman Sensenbrenner.

[The amendment follows:]

AMENDMENT TO H.R. 1768

OFFERED BY MR. SENSENBRENNER

Page 2, line 22, strike "**AMENDMENTS**" and insert "**AMENDMENT**".

Page 2, line 24, strike "(a) MULTIDISTRICT LITIGATION.—".

Page 4, strike lines 16 through 18.

Page 4, line 20, strike "SECTIONS 2 AND 3(b)" and insert "SECTION 2".

Page 4, line 21, strike "and section 3(b)".

Page 4, lines 24 and 25, strike "(a) SECTION 3(a).—The amendments made by section 3(a)" and insert "(a) SECTION 3.—The amendment made by section 3".

Chairman SENSENBRENNER. I ask unanimous consent that the amendment be considered as read, and recognize myself briefly.

This is the amendment that was referred to both in my opening remarks and that of the gentleman from California which keeps the threshold at 75, and I urge the adoption of the amendment. The question is on the adoption of the amendment. Those in favor say aye. Those opposed no. The ayes appear to have it. The ayes have it. The amendment is agreed to.

Are there further amendments? If there are no further amendments, the Chair notes that a reporting quorum is not present.

Without objection, the previous question is ordered on the motion to report the bill as amended favorably.

* * * * * * *

A reporting quorum being present, the question now is on the motion to report favorably the bill H.R. 1768 as amended. Those in favor will say aye. Opposed, no. The ayes appear to have it. The ayes have it. And the motion to report favorably as amended is agreed to. Without objection, the short title will be amended by striking the number 2003 and including 2004. Without objection, this bill will be reported at the House in the form of a single amendment in the nature of a substitute incorporating the amendment adopted here today.

Without objection, the Chair is authorized to move to go to conference pursuant to House rules. Without objection, the staff is directed to make any technical and conforming changes. And all Members will be given 2 days as provided by House rules in which to submit additional, supplemental, dissenting or minority views.

○