A Federal Tête-à-Tête? The Multiparty, Multiforum Trial Jurisdiction Act and Hurricane Katrina: Past, Present, and Future Considerations

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A Federal Tête-à-Tête? The Multiparty, Multiforum Trial Jurisdiction Act and Hurricane Katrina: Past, Present, and Future Considerations

Tête-à-Tête:
1. Together without the presence of a third person; face to face. Or
2. A private conversation between two persons.¹

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I. INTRODUCTION

The story of Hurricane Katrina is well-immersed in the collective experience of most Americans, especially citizens in the states directly affected by the storm’s rampage. Almost every aspect of this story has been analyzed and re-analyzed. The short- and long-term consequences of the storm have been the subject of seemingly endless prognostication. The failure of government at all levels to prepare for and to respond to the storm’s tragedy has been replayed by analysts for over two years. The response of the judicial branch, however, has been a neglected aspect of this story. The courts are today bearing the brunt of the storm’s lasting impact, and their response is of enormous consequence not only for the parties to pending suits, but for wider efforts at rebuilding. The judicial response also provides a bellwether for recent congressional efforts to use federal court jurisdiction as a remedy for long-standing problems with so-called “complex litigation” involving multiple lawsuits filed in multiple courts following an event.

A host of lawsuits were filed in various courts across Louisiana following the storm. Defendants, mostly insurance companies, began to invoke federal jurisdiction under a statute Congress passed in 2002 called the Multiparty, Multiforum Trial Jurisdiction Act (“MMTJA”).\(^2\) The statute was the fruition of almost three decades of attempts to remedy a particular set of problems with situations like that of the multitude of suits filed after Hurricane Katrina, an increasing phenomenon called “complex litigation.” This term is a shorthand reference for multiple lawsuits being filed after the same event in various state and federal courts.\(^3\) The application of the statute in the context of Katrina litigation appears commonsensical since the MMTJA was passed with the purpose of remedying situations like that following Hurricane Katrina. Yet, counterintuitively, the Eastern District of Louisiana,

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3. H.R. REP. No. 107-685, at 199 (2002) (Conf. Rep.). For a fuller explanation of the problems the MMTJA addresses, and the cause of these problems, see *infra* Part II.B.
the federal district court in which most of the suits involving the MMTJA are pending, has uniformly remanded most of the removed cases back to state court, in effect blunting the application of the MMTJA.⁴

This Comment summarizes and analyzes the jurisprudential trend emerging from the Eastern District’s remand decisions in an effort to forecast its impact on the hurricane litigation and on the MMTJA itself. The Comment provides a detailed examination of the provisions of the MMTJA in Part II, and discusses the problematic scenario that led to the enactment of the MMTJA. In Part III, the Comment analyzes the impact of the MMTJA in the litigation resulting from Hurricane Katrina, summarizing the Eastern District jurisprudence. Part III also focuses on the policy goals of the MMTJA, which provide a measuring stick with which to assess that jurisprudence. This assessment leads to the conclusion that the federal court’s interpretation has blunted the MMTJA’s effectiveness.

The Eastern District has narrowly interpreted the essential term in the MMTJA, “accident,” to conclude that Hurricane Katrina itself is not an accident.⁵ This ruling serves to limit the exercise of jurisdiction over most of the cases filed as a result of the storm. The court has also developed an analysis of the particular nature of the case and the number of parties to the suit in order to trim back what the court sees as over-expansive removal provisions in the statute.⁶ This jurisprudential trend has been shaped by the Eastern District’s justified fear that, should it read the MMTJA in an expansive manner, a flood of cases will swamp its already crowded docket.⁷ The Eastern District’s fear may be enhanced by the U.S. Fifth Circuit’s holding that effectively prevented the only statutory limitation on jurisdiction in the MMTJA from being applied to most of the Katrina litigation.⁸ This suggests that the Fifth Circuit’s reading of the MMTJA is considerably more expansive

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4. See discussion infra, Part III.A.
7. See discussion infra Part III.C.3.
than the Eastern District’s. Nonetheless, the Eastern District’s interpretation may make the MMTJA another of Katrina’s many victims.

II. BACKGROUND: SETTING THE STAGE

The Eastern District’s interpretation of the MMTJA statute results in part from the novelty of the statute’s provisions, which are unlike any other jurisdictional statute ever passed. Part II of the Comment summarizes those provisions of the statute which have been at issue in the Katrina litigation. This part also discusses the particular problems with complex litigation and the frustration with the previous inadequate remedies. It concludes by discussing the proposed solution to these frustrations: a procedural mechanism for consolidating these actions into one forum.

A. What Is the MMTJA? What Does It Do?

The MMTJA gives federal jurisdiction over a certain species of cases arising from a common accident. The statute creates both original jurisdiction[9] and a kind of supplemental jurisdiction in order to facilitate efficient management of the large number of suits filed following an event[10]. The supplemental jurisdiction empowers defendants named in actions in federal court under § 1369(a) to remove to federal court another action to which they are a party, related to the same accident, brought in state court.[11]

9. To that end, other provisions of the statute that have not been the subject of litigation are not explored. The reader should be on notice that the description of the provisions in the following subsection is not an exhaustive analysis of all of the MMTJA. The MMTJA’s provisions attempt to remedy the problems at all the stages of complex litigation, some of which are detailed in this Comment. Some of the other provisions not analyzed in this Comment include the right of a party to intervene in an action in a district court, 28 U.S.C. § 1369(d) (2006), and the inability to appeal the decision of a federal court to remand an action for a determination of damages, 28 U.S.C. § 1441(e)(4) (2006). General provisions for appealing a remand order, 28 U.S.C. § 1453 (2006), are also relevant but are actually a part of the Class Action Fairness Act of 2005.

10. § 1369(a).
11. § 1441(e)(1).
12. Id.
These main procedural provisions intend to facilitate the aggregation in a federal forum of multiple suits filed in multiple courts following the same event.\textsuperscript{13}

1. § 1369(a): The Basic Provision

The MMTJA is codified, in part, at 28 U.S.C. § 1369. Subsection (a) contains the basic statement of jurisdiction. The statute gives the federal district courts “original jurisdiction” over “civil action[s] involving minimal diversity between adverse parties that arise[] from a single accident, where at least 75 natural persons have died in the accident . . . .”\textsuperscript{14} Minimal diversity exists when “any party is a citizen of a State and any adverse party is a citizen of another State, a citizen or subject of a foreign state, or a foreign state as defined in section 1603(a) of this title . . . .”\textsuperscript{15} This first provision manifests the MMTJA’s novelty.

a. Minimal Diversity

In the MMTJA, it is clear that Congress intentionally departed from the “complete diversity” rule, first enunciated in \textit{Strawbridge v. Curtis}.\textsuperscript{16} This rule requires that all adverse parties be citizens of different states for there to be diversity jurisdiction under 28 U.S.C. § 1332.\textsuperscript{17} The \textit{Strawbridge} rule has been criticized in recent years because it has frustrated efforts to streamline

\begin{itemize}
  \item[14.] § 1369(a):
    \begin{itemize}
      \item[(a)] In general.—The district courts shall have 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, if—
      \begin{enumerate}
        \item[(1)] a defendant resides in a State and a substantial part of the accident took place in another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place;
        \item[(2)] any two defendants reside in different States, regardless of whether such defendants are also residents of the same State or States; or
        \item[(3)] substantial parts of the accident took place in different States.
      \end{enumerate}
    \end{itemize}
  \item[15.] § 1369(c)(1).
  \item[16.] 7 U.S. (3 Cranch) 267 (1806).
  \item[17.] \textit{Id}.
\end{itemize}
adjudicating in a single forum the multitude of suits filed following accidents or disasters.\textsuperscript{18} By adopting minimal diversity, Congress intends to remove the \textit{Strawbridge} rule as an obstacle. It would also seem that Congress has attempted to tailor the application of the MMTJA to certain kinds of parties, such as corporate defendants, who were previously prevented from removing cases in which they were named to a single forum for efficient adjudication. Oftentimes the complete diversity rule induced parties to employ various strategies in order to prevent federal diversity jurisdiction from being invoked.\textsuperscript{19} As will be seen in the later provisions, the move to expand jurisdiction, yet narrowly tailor the application of the statute’s provisions to particular cases or parties, is a prominent feature in the MMTJA.\textsuperscript{20}

\textit{b. Single Accident}

Federal jurisdiction under the MMTJA is premised on “a single accident, where at least 75 natural persons have died in the accident at a discrete location.”\textsuperscript{21} This is a curious foundation for federal jurisdiction, which has traditionally turned on the nature of

\begin{footnotes}
\item[18] See discussion \textit{infra} Part II.B.2.
\item[19] An example of the sorts of strategies parties have utilized is detailed in \textsc{Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts to the Chief Justice of the United States and to the Judicial Conference of the United States} 33, 34 (1999) [hereinafter \textsc{Report}].
\item[20] The move to minimal diversity in the MMTJA has not gone without criticism. See, for example, C. Douglas Floyd, \textit{The Limits of Minimal Diversity}, 55 \textsc{Hastings L.J.} 613 (2004), and JoEllen Lind, “\textit{Procedural Swift}”: Complex Litigation Reform, State Tort Law, and Democratic Values, 37 \textsc{Akron L. Rev.} 717 (2004), in which both authors criticize what they view as attempts to affect substantive law via amendments to procedural rules, removing the possibility of genuine democratic debate. The debate must be seen against the larger backdrop of recent scholarly concerns over the continued viability of diversity jurisdiction. Many criticize diversity jurisdiction for wasting scarce judicial resources on cases of relative unimportance involving matters of state law. See, for example, Richard A. Posner, \textit{The Federal Courts: Crisis and Reform} 139 (1985), and Larry Kramer, \textit{Diversity Jurisdiction}, 1990 \textsc{Byu L. Rev.} 97 (1990), in which both authors criticize diversity jurisdiction for adding to the overcrowded dockets of the federal courts, which prevents efficient adjudication of claims.
\end{footnotes}
the cause of action (federal question) or the citizenship of the parties to the lawsuit (diversity), coupled in some instances with a specific monetary amount in dispute. Why is jurisdiction under the MMTJA premised on the occurrence of an event with certain characteristics? Again, Congress is attempting to address a particular set of cases that often arise after an accident or disaster and cause significant judicial inefficiency. The progenitors of the current MMTJA pointed out that the problems associated with complex litigation result from situations where there is one cause of injury, but the damages occur in a variety of places. The requirement that cases result from a single accident intends to tailor the scope of this jurisdiction and at the same time provide a forum to aggregate cases that would otherwise be filed in various locations.

As with the shift to minimal diversity, the MMTJA at once expands federal jurisdiction but targets that expansion to particular situations. By attempting to limit this jurisdiction to very particular circumstances, Congress remains true to the basic intent of the founders that the federal courts be of "limited" jurisdiction and has targeted the statute's application to a particular situation to resolve the problems of judicial inefficiency, inconsistent results, and increased litigation costs.

Airplane crashes exemplify the troublesome scenario Congress has in mind. While the actual event, the crash itself, occurs at one distinct location, the damages which will form the basis of any lawsuits occur in various places. The plane’s passengers are likely to be citizens of any number of places and are likely to file suit in their state of citizenship, resulting in multiple suits filed in various places against the same defendants. These suits are likely to

revolve around the same issue of liability, to require discovery of the same evidence, and will mirror the other suits in many respects, save that of damages. Moreover, if the plaintiffs attempt to aggregate their claims, the likelihood of complete diversity decreases. This situation obviously wastes judicial resources and increases the costs of litigation. Congress has attempted to provide a remedy in the MMTJA by expanding federal jurisdiction over these suits.\(^\text{26}\)

2. Tailoring the Basic Provision’s Reach

Congress further tailored the jurisdictional reach of the federal courts under the MMTJA by adding three “qualifications” intended to address situations where dispersed litigation following the same event is most likely to occur.\(^\text{27}\) For jurisdiction to be proper any one of these three situations must also exist.\(^\text{28}\)

First, federal jurisdiction is proper if “a defendant resides in a State and a substantial part of the accident took place in another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place . . . .”\(^\text{29}\) The statute defines a corporation to be a resident of any state “in which it is incorporated or licensed to do business or is doing business . . . .”\(^\text{30}\) It retains the traditional dual citizenship of corporations, that of the state of incorporation and the state of its principal place of business.\(^\text{31}\)

26. A third distinctive feature is the statute’s requirement that the single accident result in the death of “at least 75 natural persons.” § 1369(a). This requirement caused some initial confusion among practitioners because it suggested the statute was only applicable in suits seeking damages for the deaths of those (at least) seventy-five persons, when in fact the number of deaths is relevant only to the nature of the accident, not the type of claim arising out of it. For a brief discussion dispelling this confusion, see Peter Adomeit, The Station Nightclub Fire and Federal Jurisdictional Reach: The Multidistrict, Multiparty, Multiforum Jurisdiction Act of 2002, 25 W. NEW ENG. L. REV. 243, 249 (2003).

27. § 1369(a)(1)–(3).
28. Id.
29. § 1369(a)(1).
30. § 1369(c)(2).
31. Id.
The second possible situation in which federal courts have original jurisdiction exists when "any two defendants reside in different States, regardless of whether such defendants are also residents of the same State or States . . . "32

Finally, if "substantial parts of the accident took place in different States," a federal district court has original jurisdiction.33 The purpose of these additional requirements is to limit and target the jurisdictional reach of federal courts, and to quell congressional fears about the breadth of this jurisdictional grant.34

3. Abstaining from Jurisdiction: § 1369(b)

Congressional qualms over the scope of this jurisdiction were caused by the possibility of cases that are really and truly "intrastate" being swept into federal court.35 The statute attempts to address these concerns, not only through the limiting qualifications (§ 1369(a)(1)–(3)), but also by the inclusion of an "abstention" provision in § 1369(b).36 The abstention provision, like the three qualifications set out in § 1369(a), is intended to limit the reach of the federal courts and attempts to make clear what kind of case a federal court should not hear. The abstention provision requires that a federal district court not hear a case "described in subsection (a) in which—(1) the substantial majority

32. § 1369(a)(2).
33. § 1369(a)(3).
35. Id. at 192. The House report accompanying the statute notes that the fear of such expansive change to federal jurisdiction was a primary factor preventing earlier versions of the Act from being passed. H.R. REP. NO. 107-685, at 199 (2002) (Conf. Rep.).
36. The abstention provision reads:
   (b) Limitation of jurisdiction of district courts.—The district court shall abstain from hearing any civil action described in subsection (a) in which—
   (1) the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens; and
   (2) the claims asserted will be governed primarily by the laws of that State.
§ 1369(b).
of all plaintiffs are citizens of a single State of which the primary
defendants are also citizens; and (2) the claims asserted will be
governed primarily by the laws of that State." Federal courts
should not exercise federal jurisdiction over cases that are
essentially local controversies between local parties.

4. Removing Cases to Federal Court: § 1441(e)

In 28 U.S.C. § 1441, the final provision of the MMTJA
relevant for the purposes of this Comment, a significant change is
wrought to general removal procedures. In § 1441(e)(1), a
defendant in a civil action brought in state court can "remove that
action to the district court of the United States for the district and
division embracing the place where the action is pending" in two
circumstances delineated in § 1441(e)(1)(A) and (B). Subsection
(A) allows the defendant to remove a case pending in state court to
federal court if the action presently in state court "could have been
brought in a United States district court under section 1369 of this
title." More significantly, subsection (B) allows a defendant to
remove a pending state action to federal court 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

37. Id. The abstention provision has caused substantial interpretive
problems and has drawn the most criticism for its use of inherently vague terms
such as "substantial majority" of plaintiffs, or "primary defendants." The nature
of § 1369(b) has also been the subject of litigation. The earliest case to interpret
the MMTJA, Passa v. Derderian, involved the question of whether § 1369(b) is
an abstention provision, which requires a court to refrain from hearing a case it
otherwise has jurisdiction over, or whether it is a denial or exclusion of federal
jurisdiction over cases to which the section applies. 308 F. Supp. 2d 43 (D.R.I.
2004). The court held that the provision is an abstention concept, not a denial of
jurisdiction. Id. at 51.
(e)(1) Notwithstanding the provisions of subsection (b) of this section,
a defendant in a civil action in a State court may remove the action to
the district court of the United States for the district and division
embracing the place where the action is pending if—
(A) the action could have been brought in a United States district court
under section 1369 of this title; or
The second provision allows a federal court to exercise supplemental jurisdiction in a case over which it otherwise would not properly have jurisdiction under § 1369(a).

B. Where Did the MMTJA Come From?

This section of the Comment traces the development of the MMTJA, focusing on the problems that caused scholars to suggest the MMTJA as a solution. Both the problems and the proposed solution reveal Congress' purpose in passing the MMTJA. Understanding this purpose, in turn, serves as a measuring stick to ascertain the effectiveness of the MMTJA in present Katrina litigation.

1. The Problem of Complex Litigation

The key to comprehending the purpose of the MMTJA is in understanding how litigation has changed since the complete diversity rule was first enunciated in Strawbridge v. Curtis. A significant development in litigation in recent decades has been the appearance of so-called "complex litigation." Pinning down exactly what the phrase "complex litigation" refers to is as tricky as finding solutions to the problems it poses, but scholars have isolated some of the recurring features of this type of litigation.

(B) 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.

39. § 1441(e)(1)(B).
41. 7 U.S. (3 Cranch) 267 (1806). See discussion supra Part II.A.1.a.
42. For a general empirical analysis of the increase in complex litigation and its impact on the judicial process, see Deborah R. Hensler, The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation, 31 SETON HALL L. REV. 883 (2001) (surveying the dockets of courts to determine the increase in cases filed).
The first feature of complex litigation is numerosity. Disasters lead to the filing of a multitude of suits in various places against the same defendants, which require the resolution of similar basic legal issues.43 Typical examples of these sorts of events are exposure to asbestos and airplane crashes.44

The second defining feature of complex litigation is collective pursuit of the claims, as lawyers coordinate litigating a high number of cases.45 Coordination has significant advantages. If each claim were individually pursued, the low value of the particular claim would generally serve to prevent the claim from being brought.46 However, consolidating the individual claims increases their economic worth, making the cases more enticing to pursue because more is at stake financially. It is the classic example of the old adage, "The whole is greater than its individual parts." By pursuing these claims collectively, significant economic interests are brought to bear, raising the stakes in the litigation.47 Pursuing a large number of individual claims in a collective fashion against a few defendants also provides lawyers with significant leverage in negotiating settlements.48

Despite efforts at coordination, large numbers of claims raise the potential for "relitigation of identical or nearly identical issues," with the concomitant risks of such litigation.49 Because a single incident or exposure to a single product results in the filing

43. REPORT, supra note 19, at 14 (noting that claimants may number in the millions).


45. Hensler, supra note 42, at 888.

46. Id.

47. Id.

48. Id. at 889. The features of collectivity are not appealing solely to plaintiff lawyers. The benefits of collectivization to defendants are two-fold. First, strategic advantages are gained from consolidating an otherwise untold number of individual claims into a single suit. Id. Consolidation cuts down significantly on overall litigation costs, for one thing. Secondly, there is significant economic advantage to settling a large action once and for all rather than risking multiple litigation, and the potential exposure to large judgments. Id.

49. Baker, supra note 44, at 768.
of a high number of claims, if each is pursued individually, the same basic legal issues would be re-litigated in each case. The problems with such recurrent litigation are obvious. Litigation costs are increased as more lawyers fight over the same pieces of evidence and litigate the same issues of liability. The re-litigation wastes judicial resources, which will be spent resolving substantially the same issue again and again. Finally, the defendant may be subject to the possibility of inconsistent judgments.50

Over time, dissatisfaction grew over the inability to remedy the problems with complex litigation. This criticism gradually centered on the complete diversity rule, which prevented total aggregation of the cases in a federal forum.51 Complete diversity requires all adverse parties to be citizens of different states.52 Because of the large number of plaintiffs who bring suits after disasters, and the definition of corporate citizenship in 28 U.S.C. § 1332, the probability was very high that complete diversity would not exist between the parties, and the federal forum would be consequently foreclosed.

2. The Remedy: Aggregation in Federal Court

A number of solutions to the problems outlined above were suggested prior to the 2002 passage of the MMTJA. In 1986, Thomas Rowe and Kenneth Sibley made a significant proposal in a seminal law review article entitled Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction.53 The article noted the need for expanded federal jurisdiction in order to redress the "unavailability of any single forum in which to consolidate scattered, related litigation," a situation they also noted was occurring with almost daily regularity because of the nature of litigation in the (then) latter part of the twentieth century.54 However, their proposal was novel for its insistence that this new "multiparty, multiforum" jurisdiction be based on the residence of

50. Rowe & Sibley, supra note 23, at 15.
51. Id. at 20.
52. Strawbridge v. Curtis, 7 U.S. (3 Cranch) 267 (1806).
54. Id. at 9.
a defendant, and in particular whether "any defendant has a residence in a state other than one where a substantial part of the events . . . giving rise to the claim occurred."55 It is not a mere coincidence that this proposal appears almost verbatim in the current statute.

U.S. Supreme Court rulings that imposed constitutional limits on state court in personam jurisdiction precipitated the turn to federal jurisdiction as the adequate remedy.56 Because of these limitations, Rowe and Sibley argued, "the states alone cannot resolve the problem of scattered litigation resulting from multiparty, multiforum disputes."57 At the same time, federal diversity jurisdiction, especially the Strawbridge complete diversity rule, offered a blunted resolution of the problem.58 The solution they presented required federal action to remove barriers and to embrace an expansion of jurisdiction based not on citizenship, but on the defendant's residence. Basing this proposed jurisdiction on whether a defendant sued in a case arising out of a single injury-causing event was a resident of a state where a part of the event did not occur was necessary, according to Rowe and Sibley, to tailor the jurisdiction to the precise situation it was attempting to remedy. They wrote: "The focus on dispersions of events and defendants should be the core of the definition of a federal action-consolidating jurisdiction, for such a definition includes only those cases in which scattered litigation is possible."59 The solution, again, was to turn to federal court, particularly diversity jurisdiction, and allow cases that involved

55. Id. at 11.
56. See, e.g., World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). In World-Wide, the plaintiffs were citizens of New York but were injured in a car accident in Oklahoma. Id. at 288. They brought suit in Oklahoma state court against the manufacturer of the car, a foreign corporation, the importer, a regional distributor, and the retailer who sold them the car, also a citizen of New York. Id. The regional distributor and retailer objected to the suit in Oklahoma, arguing the court did not have in personam jurisdiction over them. Id. at 288–89. The Supreme Court upheld their objection, finding that they lacked sufficient contacts with the forum to justify suit there. Id. at 291.
57. Rowe & Sibley, supra note 23, at 18–19.
58. Id. at 19–22 (surveying various other federal procedural remedies and their shortcomings to solve the dispersed litigation problem).
59. Id. at 28.
minimally diverse parties and defendants who were residents of a state where a "substantial" part of the events did not occur to be brought in or removed to federal court. This solution circumvented both the constitutional limitations on state court jurisdiction and the requirement of complete diversity that had prevented the federal courts from providing a single forum for consolidation.

III. ANALYSIS: KATRINA MEETS THE MMTJA

Redundant, repetitive litigation resulting from a single event threatens the judicial process with increased costs and inconsistent judgments against the same defendants and wastes scarce judicial resources. Hurricane Katrina heightened the threat of these problems as a high number of lawsuits were filed in its wake. It is natural to assume that the MMTJA should affect the resolution of these suits. A mere two weeks after the storm’s end, defendants began to invoke the MMTJA to remove cases filed in state court to federal court. The following section addresses the impact the MMTJA is having in the Katrina litigation. Examining these decisions conclusively shows that the statute is having a muted impact, a counterintuitive result given the policy issues at stake in the original passage of the MMTJA and the Katrina litigation.

Part III describes the overall jurisprudential trend resulting from the removal and remand motions filed by parties and assesses this trend by weighing the results against the policies at stake in the Katrina litigation. Part III concludes by attempting to forecast what this trend means for the post-Katrina litigation context and

60. Chehardy v. La. Ins. Comm’r, No. 05-1140 (M.D. La. filed March 16, 2006). Chehardy was removed to the Middle District of Louisiana from the 19th Judicial District in East Baton Rouge Parish and later transferred to the Eastern District of Louisiana. In the Eastern District of Louisiana it was consolidated with other cases resulting from the levee breaches, and heard by the Fifth Circuit Court of Appeals. See In re Katrina Canal Breaches Consol. Litig., 495 F.3d 191 (5th Cir. 2007). For a complete review of Chehardy’s procedural travails, see Petition for Writ of Mandamus Under 28 U.S.C. § 1651, or Alternatively Appeal Under 28 U.S.C. § 1291 of Collateral Order at 1–3, In Re La. Farm Bureau Mutual Ins. Co. & La. Farm Bureau Casualty Ins. Co., No. 06-0114 (5th Cir. June 16, 2006) [hereinafter Petition].
for future application of the MMTJA itself outside of the Katrina context.

A. The Jurisprudential Trend

From a relatively few number of cases, it is difficult to distill a pattern for analysis and critique. First, the reported cases are still pending in both federal and state court and, secondly, there are likely to be some pending cases that have not produced written opinions. Furthermore, no single model of litigation in the Katrina context has yet emerged; there is no ideal case to analyze. Nonetheless, a common thread does emerge because the cases discussed have all arisen as a result of Hurricane Katrina and have all sought to utilize the MMTJA.

The reported decisions indicate that the participants in this litigation, particularly the judges interpreting the statute, are being confronted for the first time with a relatively new situation. To this end, the judges and lawyers are literally "thinking on their feet" when it comes to the MMTJA. The federal judges of Louisiana's Eastern District face the unenviable task of sorting through what Congress has done in the MMTJA in an incredibly difficult context. Close analysis of the cases suggests the beginning of a jurisprudential trend. Briefly, it can be summarized in three essential elements.

First, the judges of the Eastern District of Louisiana appear to have concluded that for purposes of MMTJA jurisdiction, Hurricane Katrina itself does not suffice as the required "single

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61. It is also important to remember that in many instances a judge may not issue written reasons for denying a motion to remand. Such decisions are usually not appealable until the conclusion of the case.

62. Some cases, for example, have been pursued individually, while in others the plaintiffs have petitioned for class certification. For an example of the former, see Flint v. Louisiana Farm Bureau Mutual Insurance Co., No. 06-2546, 2006 WL 2375593, at *3 (E.D. La. Aug. 15, 2006). Chehardy is an example of the latter type of case. See supra note 60.

63. Moreover, the context of the litigation itself and the intensely emotional and politically charged atmosphere surrounding these suits increases the difficulties being faced by the judges. People have lost their homes, their property, and their possessions.
Second, the removal provisions in § 1441(e)(1) dominate this litigation because only a few cases have invoked original jurisdiction under § 1369(a). However, the broad removal provisions give the Eastern District the nightmare of a flood of cases being swept into an already crowded system. This nightmare has led the court to look to policy considerations in an effort to trim back the removal provision. The judges look to the original purpose of the MMTJA to determine if a case seeking removal to federal court measures up to the kind of case that Congress would have clearly wanted to be in federal court. In the opinion of the judges of the Eastern District, while the plain language of § 1441(e)(1)(B) would allow many cases to be removed, the policy implications in the MMTJA cut against the exercise of federal jurisdiction. Finally, the cases decided thus far center on remand for lack of subject matter jurisdiction, because the U.S. Fifth Circuit has correctly held that the abstention provision in § 1369(b) does not apply to cases removed under § 1441(e)(1)(B).65

B. Assessing the Trend: The Measuring Stick

Understanding the significant policy implications at stake in the Katrina litigation provides a guidepost for critically appraising the jurisprudential trend described above. The policy considerations in the post-Katrina litigation are those traditionally present in all litigation—judicial efficiency and fairness.66 Congress, the courts, and the parties to litigation want efficient resolution to claims brought in court. Long dockets mean that lawsuits take longer to resolve, grievances go unaddressed, and self-resolution of issues appears as a more salient method of problem-solving. Parties to litigation must also feel as though their case was fairly decided and that, win or lose, no bias on the part of the court influenced the outcome. The perception of fixed or biased judicial outcomes could be detrimental to a judicial system that in large part relies upon the power of the pen to enforce its

64. Flint, 2006 WL 2375593, at *3.
66. See generally FINK ET AL., supra note 24.
judgments. In the context of the Katrina litigation, it is vital that claimants who have suffered significant property damage achieve fair results in as efficient a manner as possible. At the same time, fairness requires that insurance companies have access to courts and a fair opportunity to defend suits against them by policyholders.

Congress passed the MMTJA for the purpose of providing the federal courts with the needed tools to achieve efficient and fair adjudication of complex litigation. The House report accompanying the statute states that its primary purpose is to "streamline the process by which multidistrict litigation governing disasters [is] adjudicated."67 The House report also delineates what Congress saw as the "need" for the statute. Numerous lawsuits are filed in several states, in both the federal and state systems, involving lots of lawyers and several defendants, and the same basic issue is re-litigated. Having to litigate this basic issue over and over causes significant problems: waste of scarce judicial resources and higher costs to litigants. Furthermore, then-current federal statutes unintentionally inhibited consolidation of these cases in a single forum.68 The policy implications in the MMTJA match those traditionally present in litigation and are heightened by the circumstances of Hurricane Katrina: efficient and fair adjudication of claims.

C. Analyzing the Individual Components

These pressing policy considerations provide an adequate measuring stick to assess the particular components of the emerging jurisprudential trend.

1. Katrina as a "Single Accident"

The first component of the jurisprudential trend is the Eastern District's conclusion in Flint v. Farm Bureau Mutual Insurance Co. that Hurricane Katrina itself is not a "single accident."69 Flint was a suit between individual policyholders and their insurance

68. Id. at 200.
company for damages following Farm Bureau’s denial of certain claims related to landscaping. The plaintiff filed suit in state court in St. Tammany Parish, and the defendant removed the case to the Eastern District, relying on § 1441(e)(1)(B) because it was also a named party in a case already pending in the Eastern District, *Craddock v. Safeco Insurance Co.* The plaintiff then filed a motion to remand the case to state court, which was granted. The issue for Judge Duval was whether *Craddock* was properly brought under § 1369(a), which turned on whether Hurricane Katrina itself was a “single accident.” Judge Duval concluded that for purposes of § 1369(a), Hurricane Katrina was not a “single accident,” and that the basis for jurisdiction upon which the defendant relied (*Craddock*) was therefore improper. Judge Duval determined that while the hurricane was a necessary antecedent, the hurricane itself was the not the accident, nor did it cause a “single” accident at the heart of either *Craddock* or *Flint*.

What assessment can be made of this restriction of the term accident? In reaching his conclusion in *Flint*, Judge Duval appeared to be relying on the plain language of the statute. As already mentioned, § 1369(c)(4) defines “accident” as “a sudden accident, or a natural event culminating in an accident . . . .” Judge Duval read this provision and concluded from the construction of the second phrase that Hurricane Katrina itself could not be considered the “accident.” He wrote, “[H]urricane Katrina was the natural event under § 1369 that culminated in many accidents.” Thus, for Duval, the second phrase draws a

70. *Id.* at *1.
73. *Id.*
74. *Id.*
75. While finding that no previous opinion had ever defined Katrina as the single accident for purposes of the MMTJA, he stated in his opinion that the levee breach caused by Hurricane Katrina would qualify as a single accident. *Id.* at *3. Thus he drew a somewhat subtle distinction between cases resulting from the levee breaks, such as *Chehardy*, and those which appear to be more “run of the mill” damages caused by a hurricane. See, e.g., *id.*
76. 28 U.S.C. § 1369(c)(4) (emphasis added).
distinction between a natural event and an accident, precluding the natural event from being an accident. Furthermore, he concluded that "Hurricane Katrina was the natural event that culminated [sic] in the levee break that caused at least 75 deaths at a discrete location. Therefore, the levee break, not Hurricane Katrina, was the § 1369 accident." Because the second phrase expressly distinguishes between a "natural event" and a "sudden accident" triggering jurisdiction under § 1369, Judge Duval concluded that Hurricane Katrina, obviously a natural event, could not itself qualify as the "accident." 79

Judge Duval’s conclusion appears reasonable given his construction of the unusual definition of "accident" in the statute. No commentator had previously given much thought to the question of what Congress meant in using the word "accident." The only consideration of the term prior to Hurricane Katrina appeared in the context of a discussion about the role of "intent" in determining if an event was an accident for purposes of § 1369(a). 80 The commentary raised the question of whether events such as criminal acts or terrorism, which involve human participants acting with full intent to cause harm, could be considered accidents under § 1369. Policy considerations, it was suggested, might dictate against a narrow interpretation of "accident." 81 The author argued that the "accident characteristics likely to affect subsequent litigation" should determine the meaning of the term. 82 The fact that a particular event, whatever its nature, results in "duplicative, redundant litigation" should be the controlling factor in drawing conclusions about what events are and are not accidents. 83

One could argue that any distinction between natural events and accidents should fail because of the same argument—that of the policy reasons underlying the statute. Although Judge Duval’s conclusion in Flint is based on a thoughtful, considered interpretation of the plain language of the statute, the § 1369(c)(4)

78. Id.
79. Id.
80. Rafoth, supra note 40.
81. Id. at 263.
82. Id.
83. Id.
definition of accident is anything but "plain." The meaning of the term is not self-evident from the language of the statute, and in order to determine its meaning, a judge should look to the purpose of the statute being interpreted. Whatever meaning is ascribed to "accident" should be such that it accords with and effectuates the MMTJA's purpose. The fact that a natural event, like a hurricane, causes redundant, duplicative litigation over the same basic issues should control the meaning ascribed to "accident." The clear policy of the MMTJA is to redress situations like that in Hurricane Katrina and to efficiently coordinate the aggregation of claims in a single forum to avoid the concomitant problems when complex litigation proceeds absent such efforts. Judge Duval's reading is plausible, no doubt, based on the unusual definition of accident in § 1369(c)(4), but it serves to prevent the implementation of the MMTJA's aggregative policy. The Flint holding excludes the majority of cases that resulted from the hurricane from being aggregated with other claims on the basis of a rather fine distinction drawn by the definition between a natural event and a sudden accident.

Judge Richard Posner of the Seventh Circuit Court of Appeals suggests an interpretive approach which bolsters the argument against a narrow interpretation of the term "accident." This approach is ripe for consideration in the context of Hurricane Katrina because Judge Posner suggests this interpretive technique in his book detailing the challenges facing the federal courts, not the least of which are overcrowded dockets. His proposal is two-fold. First, the judge should take the advice of Atticus Finch and put himself in another's skin. The judge's primary consideration

84. There are plain language counter-arguments to Judge Duval's reading of the statute. It could be argued that his disjunctive reading of the second phrase ("or a natural event that culminating in a sudden accident") is misplaced. See supra text accompanying note 75. As mentioned, he read this phrase as implicitly distinguishing the "natural event" from the "sudden accident." An alternative reading of the phrase leads to the conclusion that the phrase refers to the natural event leading to the accident. This alternative reading sees the accident and natural event as a whole as one simultaneous event. Hurricane Katrina qualifies as an accident under this reading of the statute.

85. POSNER, supra note 20, at 261.

in interpreting a statute should be to consider how the legislators who enacted the statute would have wanted the statute to be applied in the particular case. Posner calls this "the method of imaginative reconstruction." His second interpretive approach can be utilized when the first method is inapplicable. The judge should decide in such a way that will yield the most reasonable result in the case at hand. There is, of course, an inherent vagueness in Posner's second interpretive consideration. Despite this vagueness, however, Judge Posner's approach has the appeal of a commonsensical solution. It avoids significant debate over plain language or the role of legislative history in the interpretation of any statute, and goes to the heart of the matter: what result does the legislature want?

Before applying Judge Posner's interpretative technique to the interpretation of Hurricane Katrina as an "accident," a brief historical note shows that Judge Posner's approach is far from novel. The Posnerian technique is actually of venerable lineage within the common law, stemming from Sir Edward Coke's articulation of this technique in the celebrated *Heydon's Case.*

The issue before the court was whether copyhold interests, a method of property seizure omitted from a statute aimed at increasing the power of the king to seize church property, was therefore regulated by the statute. In deciding the case, Coke articulated the general canon that the judge should consider the common law, the "mischief" the common law did not solve, and

87. *POSNER, supra* note 20, at 287.
88. *Id.*
89. Some scholars and jurists assert the so-called "plain language" argument to counter Judge Posner's interpretive suggestions. Members of this interpretive school question the turn to congressional purpose or intent altogether. They charge that a divination of purpose from a piece of legislation is impossible because each legislator brings his or her own subjective purpose to bear when voting for or against legislation. For more on this counter-argument, see Max Radin, *Statutory Interpretation,* 43 HARV. L. REV. 863, 870 (1929). While an interesting conversation, entertaining it detracts from the primary purpose of this article, which tells the story of the MMTJA and its impact in the Katrina litigation.
the remedy devised by the legislature. After this, the judge should give the statute such "construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief. . . ." In this statement lies the very essence of Judge Posner's suggested technique some 600 years later. Focus on the wrong, focus on the remedy, and interpret the statute to achieve the remedy.

Utilizing Judge Posner's interpretive approach leads to the conclusion that "accident" should be interpreted to include Hurricane Katrina. After all, re-imagining what Congress wants from the statute is not difficult: aggregation in a single forum of cases resulting from the same triggering event. This much should be clear from the express statements in the House Report, as well as the significant commentary leading up to and following the statute's passage, as detailed above. Clearly, like a fire or an airplane crash, Hurricane Katrina has resulted in a mass of litigation which will require re-litigation of the same basic legal issues. The Katrina litigation presents the same nightmare scenario that concerned Congress in passing the MMTJA of multiple suits filed in various fora involving some of the same defendants. It likewise threatens to waste judicial resources, increase litigation costs, and potentially yield inconsistent judgments. There is no plausible ground, then, for any distinction between a natural event and an accident given the policy implications in the Katrina litigation.

Applying Judge Posner's second approach, the most reasonable result in this situation is aggregation of the cases in a single forum. Absent aggregation, the largest insurance companies operating in Louisiana are likely to be subject to untold numbers of lawsuits,

92. Heydon's Case, 76 ENG. REP. at 638.
93. Id.
95. The use of Judge Posner's suggestion is intended to assist in framing an alternative meaning of "accident." Judge Duval, however, concludes that the plain language of the statute precludes Hurricane Katrina from being the "single accident." In other words, according to the traditional rules of statutory interpretation, there is no need to go beyond the plain text.
costing hundreds of thousands of dollars to litigate, potentially subjecting the insurance companies to inconsistent judgments and wasting the resources of state courts. At the same time, plaintiffs could benefit from aggregation by the pooling of resources, time, and talent, which could significantly increase their tactical position. The politically disadvantageous appearance of ensuring insurance companies a fair opportunity to defend claims also strengthens the case for the federal forum. High numbers of uncoordinated suits may ultimately result in increasing insurance costs above their already elevated state, threatening the economic viability of this important industry. The state forum, with elected judges, is particularly susceptible of being swayed by the political winds currently blowing in Louisiana and makes the federal forum, more removed from these winds, appropriate.

The Eastern District’s definition remains counterintuitive given the fact that the precise situation that concerned Congress has occurred following Hurricane Katrina. The problem, no doubt the federal judges themselves will agree, is the statute itself. The § 1369(c)(4) definition of accident is unhelpful. The statute’s odd definition of its essential term, “accident,” unfortunately invites the court, concerned as it appears to be with the possibility of being swamped with cases, to define the term in a restrictive manner. To rectify this situation, Congress should amend the statute in order to broaden the definition beyond fires, airplane crashes, and levee breaches in order to achieve the policy which underlies it.

2. Getting into the Dance: Removal Under § 1441(e)(1)

Judge Duval’s holding in Flint results not only from the construction of the definition of accident in § 1369(c)(4), but in part because Flint was a suit that relied upon § 1441(e)(1)(B) for jurisdiction. This provision is probably what has shaped the Eastern District’s reading of the statute more than any other consideration. While no judge has explicitly stated this, such a conclusion is not hard to discern between the lines. The expansive removal provisions are getting pushed to the limits by the attempts to remove cases to federal court, and the court is seeking ways, extra-textually, to “trim” them. Restricting the meaning of accident is a part of the judicial attempt to rein in a very broad
removal provision that threatens to flood the federal system with cases that might more properly belong in state court. Seen another way, while the MMTJA attempts to rectify the impossibility of aggregation, the removal provisions threaten another danger: over-aggregation.

The possibility of over-aggregation was not a concern in the early analysis of the statute. Over-aggregation implicates similar problems to under-aggregation. It threatens to waste scarce judicial resources, making adjudication of claims inefficient. This conclusion obviously follows from having more cases but the same number of judges to handle them, increasing the amount of time required to handle cases. The court’s concern with the broadness of § 1441(e)(1)(B) is well founded. The MMTJA may threaten more problems than solutions on this front and may weaken the statute’s attempt to achieve efficient results in complex litigation.

The court has focused on two extra-textual considerations: (1) the nature of the cause of action at the basis of the suit; and (2) the connection between the state action a defendant is attempting to remove and the “parent” case the defendant is piggybacking on. The court has applied a sort of Posnerian “imaginative reconstruction” by asking, “Is this really the kind of case Congress would have wanted to be removed to federal court?” The Eastern District’s express reliance on policy to trim the removal provisions appears counterintuitive to its holding defining accident, which threatens to circumvent the policy of the MMTJA.

The Eastern District’s second extra-textual consideration focuses on the nature of the cause of action potentially removable under § 1441 and its relationship with the § 1369(a) cause of action on which the former case is attempting to piggyback into federal court. A near-identical claim must exist in both instances in order

96. For a discussion of the constitutional problems which might be implicated by the MMTJA’s broad removal provisions, see Rafoth, supra note 40, at 271–77.

97. As of yet, no case has appeared in the litigation that mirrors the “ideal form” the court concludes Congress intends to be removed to federal court under § 1441(e)(1). It would be interesting to speculate on the availability of other procedural mechanisms that could be utilized to aggregate a larger number of claimants together, and therefore add up (literally) to the assumed requisite number of parties in order to properly appear in federal court.
for the § 1441 case to be removed to federal court. Two of the earliest cases to be filed following Hurricane Katrina provide the clearest example of this required connection.

*Chehardy v. State Farm Fire and Casualty Co.* was filed in the Nineteenth Judicial District on September 15, 2005 and included a petition for class certification. The plaintiffs brought suit against the Louisiana Commissioner of Insurance and fifteen foreign and domestic insurers seeking declaratory relief that insurance policies that contained flood exclusion provisions not be enforced in Louisiana. The plaintiffs suffered property damage in Orleans and Jefferson Parishes, which they claimed resulted from Hurricane Katrina and the levee breaks that followed throughout the city. The defendant insurers removed the case to the Middle District of Louisiana, basing federal jurisdiction in part on § 1369(a). The plaintiffs then filed a motion to remand the case, which Judge Polozola denied. He then transferred the case to the Eastern District and it was subsequently consolidated with other “levee breach” cases currently pending in the Eastern District.

*Chehardy* is a pivotal case, and not only because it may have been one of the first cases to be filed following Katrina and to invoke jurisdiction under the MMTJA. Until other cases were filed later in federal court, it became the case on which other cases filed in state court have attempted to piggyback their way into federal court under § 1441(e)(1)(B). In this regard, perhaps the most significant case is *Wallace v. Louisiana Citizens Property Insurance Corp.* The case has the distinction of being the only case thus far to result in a reported decision on the MMTJA by any federal court of appeal. The case was originally filed on December 98. No. 05-1140 (M.D. La. filed Mar. 16, 2006).

98. No. 05-1140 (M.D. La. filed Mar. 16, 2006).
99. Petition, supra note 60, at 1–3.
100. Petition for Class Certification, at 2–3, Chehardy, No. 05-1140 (M.D. La. filed Mar. 16, 2006).
101. Chehardy v. Wooley, No. 05-1140, slip op. at 2 (M.D. La. Mar. 16, 2006). In the oral reasons for his ruling, Judge Polozola simply stated that the court “has jurisdiction over this matter pursuant to . . . 28 U.S.C. 1369.” Id. This brief statement plays a pivotal part in subsequent litigation.
102. Id.
12, 2005 in Louisiana state court (Plaquemines Parish). The plaintiffs sued under the Louisiana Valued Policy Law, asserting that defendants should pay the full amount of the policy if any part of the total property loss occurred because of a covered peril. Again, the defendant insurers removed the case to the Eastern District, basing jurisdiction on § 1441(e)(1)(B). The defendants claimed that the court had federal jurisdiction under § 1441(e)(1)(B) since they were also defendants in the Chehardy action, at the time still pending before Judge Polozola for his ruling on the motion to remand. The defendants argued that since the Wallace case also arose from the same accident, Hurricane Katrina, or from the levee breaks caused by the hurricane, as in Wallace, jurisdiction was proper.

Judge Livaudais granted the plaintiff's motion to remand the case to state court. Although he observed that jurisdiction might not be proper because the Wallace case could not have been brought under § 1369, citing a lack of minimal diversity, Judge Livaudais actually granted the remand motion on the basis that the pending action fell under the abstention provisions of § 1369(b). He held that the case "fits squarely into the 'exception' to jurisdiction under 28 U.S.C. 1369, Subsection (b)." The defendants appealed this ruling to the United States Fifth Circuit, which after finding that it had appellate jurisdiction, reversed Judge Livaudais. In its opinion, the United States Fifth Circuit held that "[t]he district court misapplied the mandatory §1369(b) abstention to the exercise of supplemental jurisdiction established by §1441(e)(1)(B). Section 1369(a) applies only to original jurisdiction under § 1369(a)." The case was remanded to the Eastern District, at which time the plaintiffs filed a second motion.

105. Petition, supra note 60, at 1–3.
106. Id. at 3.
107. Id.
109. Id.
111. Id. at 702.
for remand, this time arguing that federal jurisdiction under § 1441(e)(1)(B) was improper because the *Wallace* case did not arise from the same "accident" as the *Chehardy* case. Judge Livaudais, with very little discussion, held that because the cause of action in the *Wallace* case was essentially a dispute over the extent of coverage guaranteed by the contract, it did not arise from the same accident as the *Chehardy* action, which sought declaratory relief over damages caused by the breach of the levees. Judge Livaudais apparently saw a distinction between the two causes of action, which led him to conclude that the *Wallace* case was not appropriately in federal court under the MMTJA and should be remanded. The Eastern District has followed the trend established by *Chehardy* and *Wallace* to conclude that when an insufficient connection exists between the two causes of action, the § 1441(e)(1)(B) case will be remanded to state court.

The Eastern District's consideration of the nature of the case the defendant attempts to remove to federal court and its connection to the case properly in federal court under § 1369 is intended to provide a basis to restrict the application of the broad removal provisions. The court is turning to the MMTJA's policy of aggregation to limit removal because of the fear that a plain interpretation of the statute would justify the removal of any and all cases that follow the storm, thus flooding the already crowded dockets. The Eastern District's fear is enhanced following the U.S. Fifth Circuit's holding in *Wallace*, discussed further below, because there is no apparent limitation in the statute on the application of the removal provisions. Read faithfully to their plain language, they threaten to allow a flood of cases into the federal system. The court has developed the two considerations discussed above, based on the policy of aggregation in the MMTJA, in order to prevent this flood. The Eastern District has

113. See, e.g., Berry v. Allstate Ins. Co., No. 06-4922, 2006 WL 2710588, at *3 (E.D. La. Sept. 19, 2006) (noting that the "instant case" made no allegations about levee breaches involved in the *Chehardy* case). It should be noted that this inserts into § 1441(e)(1)(B) a limitation that is not present in the statute. The statute does not require "connexity" between the two causes of action. It simply says they must "arise from" the same accident.
concluded that cases with only a few parties, essentially involving insurance contract limits or claims, unconnected in any substantial way to the § 1369(a) case on which the defendant is attempting to piggyback into federal court, should be remanded to state court because they do not fit the general purpose of the statute.

The interpretive considerations suggested by Judge Posner split both ways in assessing this component of the jurisprudential trend. The only conclusion a judge can reach imagining what Congress would have wanted is that the cases should be removed to federal court if they meet the plain text of § 1441(e)(1)(B). This "imaginative reconstruction" broadly accords with the aggregative policy underlying the MMTJA. Therefore, those cases remanded to state court should probably have been retained by the federal court when the defendants were also parties to actions under § 1369(a). No outside consideration should have been given to the nature of the claim or the number of parties or the connection between the two claims. The plain text simply provides federal jurisdiction over all cases resulting from the same accident.

On the other hand, the most reasonable result approach might justify remanding these actions to state court. A reasonable result would be to prevent over-aggregation of cases in the federal system, particularly cases involving relatively insignificant claims over insurance contracts. Again, given the shortcomings in the statute, it is defensible that the federal courts, ever protective of the limits of jurisdiction, would turn to these considerations as a limitation on the application of the plain language of the statute. By not trimming the removal provisions, the policy underlying the MMTJA is significantly hampered by the real possibility of over-aggregation.

Because the policy of aggregation splits both ways, the jurisprudential treatment of § 1441(e)(1)(B) remains the most troubling aspect of the trend emerging in the Eastern District. As noted, the plain language of the MMTJA requires that cases that fit within the statute be removed, no matter how "insignificant" they may appear. At the same time, the plain language of the statute threatens the potentially dire result of over-aggregation. Once again, the MMTJA's own provisions provide the pretext for the problems the Eastern District is having with this statute. This flaw was exacerbated by the Fifth Circuit's *Wallace* holding that the
abstention provision does not apply to § 1441(e). The Comment now turns to this final aspect of the jurisprudential trend.

3. Who's NOT Coming to Dinner: § 1369(b)

The final component of the jurisprudential trend is the counterintuitive effect of the abstention provision in the Katrina litigation. The abstention provision has not factored into the Eastern District's remand decisions. However, the absence of the abstention provision in the case law has significantly impacted this litigation; it has been the necessary antecedent to the battles over the scope of the removal provisions. The Wallace case was the only case where the abstention provision was applied. 114 In Wallace, after Judge Livaudais granted the plaintiff's motion to remand, the Fifth Circuit reversed, finding that the application of the abstention provision in § 1369(b) to a removed case was inappropriate. 115 The court relied on the language of § 1369(b) which states that "[t]he district court shall abstain from hearing any civil action described in subsection (a) . . . " 116 The Fifth Circuit read this language literally to apply only to cases which were brought under the original jurisdiction of the federal courts given in § 1369(a). This ruling is significant for a number of reasons.

First, the lack of limitation provided by § 1369(b) invites the court to develop extra-textual considerations in order to limit its jurisdiction. Read literally, the removal provision added by the MMTJA is all-encompassing, and threatens to throw open the floodgates to cases which otherwise would properly be in state court. If the abstention provisions were held applicable to removed cases, the jurisprudential trend in the Eastern District may very well have taken on a different shape. If the abstention provision had been held to be applicable to cases removed to federal court, this would have provided a textual limitation to the exercise of jurisdiction. This might have allowed the court to trim the removal provisions without resorting to extra-textual considerations.

114. For a review of the facts of Wallace, see the discussion supra Part III.C.2.
115. Id.
Secondly, the U.S. Fifth Circuit’s holding suggests that its reading of the MMTJA and its underlying policy is more expansive than the Eastern District’s own reading. The issue is similar to that discussed above in defining the scope of the term “accident.” Which trumps: literal readings of a statute, or broader policies? The Fifth Circuit expressly invoked the MMTJA’s policy of aggregation in reversing Judge Livaudais’ application of the abstention provision.\(^{117}\) They read the underlying policy as requiring that the removal provisions not be encumbered by the abstention provision. Judge Garza wrote in his opinion for the panel that “the MMTJA was designed to ameliorate the restrictions on the exercise of federal jurisdiction that ultimately forced parties in multiple suits arising from the same disaster to litigate in several fora. To hamstring the removal statute by misapplying the abstention provisions would undercut the MMTJA’s ultimate goal of consolidation.”\(^{118}\) A narrower reading of the MMTJA, according to Judge Garza, would impede the policy of total aggregation.\(^{119}\) This reading of the MMTJA strongly suggests that the Fifth Circuit may have a very different understanding of the statute, and might alter the Eastern District’s jurisprudence.\(^{120}\)

Finally, the Fifth Circuit’s *Wallace* holding raises the significant possibility that the Eastern District is incorrectly narrowing the removal provisions. As already mentioned, the Fifth Circuit’s reading of the policy of the MMTJA would appear to require that meeting the plain language of the removal provision is sufficient to allow removal of the case. This means that the Eastern District’s extra-textual considerations are misplaced. According to the Fifth Circuit, the determination that a case should be removed under § 1441(e)(1) is wholly independent from any other consideration. Again, Judge Garza explained that when the requirements of § 1441(e)(1)(B) are met, defendants need not

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118. *Id.*
119. *Id.*
120. It may be very difficult for the Fifth Circuit to re-shape the jurisprudential trend, however, as its own *Wallace* opinion makes clear the difficulty with appealing remand orders under 28 U.S.C. § 1447(d). *Id.* at 700–01.
establish the existence of independent subject matter jurisdiction under any other provision, including under § 1369(a), because supplemental jurisdiction has been established.\textsuperscript{121} This reading, the court goes on to note, is consonant with the MMTJA’s purpose, and contrary considerations would serve to “undercut the MMTJA’s ultimate goal.”\textsuperscript{122} This opinion clearly shows the divergent readings of the policy implications between the Eastern District and the Fifth Circuit. It also leaves open the possibility that the Eastern District’s policy considerations themselves will be trimmed by the Fifth Circuit, giving the removal provisions full effect.\textsuperscript{123}

IV. CONCLUSION—FORECASTING THE FUTURE?

Tentative insights into the future of both the litigation arising from Hurricane Katrina and the MMTJA itself can be drawn from understanding the current jurisprudential trend. A necessary subtext is the adequacy of this judicial interpretation. The Eastern District’s interpretation of the statute has been closely tied to an analysis of its text and purpose, the ordinary tools for interpretation, in light of the particular context of Hurricane Katrina. Lamentably, this interpretation has blunted the MMTJA’s impact on the hurricane litigation and has foreclosed a single forum for the aggregation of these cases that could effectively ensure their fair and efficient adjudication. Given the significant

\textsuperscript{121} Id.
\textsuperscript{122} Id. at 702.
\textsuperscript{123} There is a counter-argument to the Fifth Circuit’s holding, however, from the language of the statute itself. The court apparently entertained this argument, and dismissed it in footnote 6 of its opinion. Section 1441(e)(5) states that “[a]n action removed under this [§ 1441(e)(1)] shall be deemed an action under section 1369 . . . .” This raises the possible argument that the court, rather than expansively reading the statute, is actually too narrowly reading the statute’s provisions which will result in the dreaded scenario of over-aggregation in the Eastern District. It is plausible to argue that because cases removed under § 1441(e)(1) must result from the same accident as the § 1369(a) case, it does in some sense fall under § 1369. The court dismissed this argument, however, by stating in footnote 6 that § 1441(e)(5) applies only to “certain procedural requirements.” \textit{Wallace}, 444 F.3d at 702 n.6. However, this statement fails to take the argument seriously.
problems inherent in the MMTJA’s provisions, however, the Eastern District’s interpretation reflects a common sense concern with over-aggregation of cases and the resultant problems of inefficiency and unfairness. Given the significant interpretive problems with the statute, the fault for the MMTJA’s ineffectiveness lies mostly with the statute itself.

What does the future look like in the light of this present jurisprudence? For the continued hurricane litigation, the trend has broken in favor of limited application of the MMTJA and this appears unlikely to change in the near future. This conclusion means that the vast majority of suits are likely to be pursued individually and in state court, unless complete diversity is pursued or the Class Action Fairness Act applies. The ability of the state district courts, especially in those areas most affected by the storm and where these suits are most likely to be filed, remains unclear. The procedural devices available under state law have arguably not faced any situation remotely similar to the Katrina litigation. The MMTJA itself is perhaps the greatest victim in this litigation. The statute is a cumbersome, awkward piece of legislative machinery. This litigation and its interpretation heretofore have revealed significant problems inherent in the language of the statute itself. The terms of the statute lack the definiteness apparently intended by Congress, as the tortured interpretation of “accident” crystallizes.

The significant problems for the MMTJA, which its application to hurricane litigation has exposed, most likely require congressional action to remedy. If Congress’ attempted remedy to the problems of complex litigation in the MMTJA is to be successful, the drafting ambiguities in the Act will need to be amended. The definition of accident in subsection (c) will need to be broadened in order to encompass an event of whatever nature that triggers the filing of multiple suits against few defendants in multiple state and federal courts. As this Comment has argued, the distinction in the definition of accident between an “accident” and

124. For a comprehensive overview of the various procedural mechanisms available under the state rules of procedure, see Charles S. McCowan, Jr. & Calvin C. Fayard, Jr., Louisiana Complex Litigation, 80 Tul. L. Rev. 1905 (2006).
a "natural event" appears to make no sense given the policies at stake. Congress must also act to provide some limitation on the removal of cases under § 1441(e)(1)(B). These two actions would serve to patch the significant weaknesses the Katrina litigation has exposed in the MMTJA.

Fixing the significant problems in the statute exposed by the Eastern District's interpretation of it will assist the courts in achieving the significant policy goals of fair and efficient adjudication of claims, particularly in the context of events such as Hurricane Katrina where those policy goals are significantly heightened. That the MMTJA fails to achieve these goals because of its inherent flaws, which the Eastern District has exposed, means that the long-sought solution to complex litigation may still be in the making.

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