

# MULTIDISTRICT LITIGATION RESTORATION ACT OF 2005

MARCH 17, 2005.—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

together with

## DISSENTING VIEWS

[To accompany H.R. 1038]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1038) 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, report favorably thereon without amendment and recommend that the bill do pass.

## CONTENTS

	Page
Purpose and Summary .....	2
Background and Need for the Legislation .....	2
Hearings .....	4
Committee Consideration .....	4
Vote of the Committee .....	5
Committee Oversight Findings .....	5
New Budget Authority and Tax Expenditures .....	5
Congressional Budget Office Cost Estimate .....	5
Performance Goals and Objectives .....	6
Constitutional Authority Statement .....	6
Section-by-Section Analysis and Discussion .....	6
Changes in Existing Law Made by the Bill, as Reported .....	7
Markup Transcript .....	8
Dissenting Views .....	17

## PURPOSE AND SUMMARY

H.R. 1038 would allow a designated U.S. district court (a so-called “transferee” court) under the multidistrict litigation statute<sup>1</sup> to retain jurisdiction over referred cases arising from the same fact scenario for purposes of determining liability and punitive damages, or to send them back to the respective courts from which they were transferred. The legislation also provides a technical fix to a “disaster” litigation statute enacted during the 107th Congress. The bill will save litigants time and money, but does 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. 1038 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*.”<sup>2</sup>

Under § 1407, a Multidistrict Litigation Panel (MDLP)—a select group of seven Federal judges selected by the Chief Justice of the United States—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. After weighing relevant circumstance, the panel attempts to identify the one U.S. district court nationwide which is best suited 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 provision is a general venue statute that 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. The case pertained to a 1998 defamation case brought by a consulting entity (*Lexecon*) against a law firm that had represented a plaintiff class in the Lincoln Savings and Loan (S&L) litigation in Arizona. Lexecon had been joined as a defendant to the class action, which the MDLP transferred to the District of Arizona. Before the pretrial proceedings were concluded, Lexecon reached a “resolution” with the plaintiffs, and the claims against the consulting entity were dismissed.

Lexecon then brought a defamation suit against the law firm in the Northern District for Illinois. The law firm filed a motion under § 1407 requesting the MDLP to empower the Arizona court which adjudicated the original S&L litigation to preside over the defama-

<sup>1</sup>28 U.S.C. § 1407.

<sup>2</sup>*Lexecon v. Milberg Weiss Bershad Hynes & Lerach, et. al.*, 118 S. Ct. 956 (1998).

tion 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.<sup>3</sup>

The Supreme Court reversed, holding that § 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.<sup>4</sup>

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 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.”<sup>5</sup>

In the wake of the *Lexecon*, decision significant problems have arisen that have hindered the sensible disposition 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.<sup>6</sup> Instead, complex multidistrict cases should be streamlined as much as possible by providing the transferee judge as much discretion as possible to expedite trial when the transferee judge, with full input from the parties, deems this to be appropriate. In other words, there is a pressing need to recreate the multidistrict litigation environment that existed before the *Lexecon* decision.

The change advocated by the MDLP and other multidistrict practitioners is well-justified 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 complex Federal litigation to settle.

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

The legislative history of § 3 of H.R. 1038 is intertwined with that of § 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. 1038.

(2) *Section 3 (“disaster” litigation)*. Section 3 of H.R. 860 conferred original jurisdiction on U.S. district courts to adjudicate any

<sup>3</sup> 102 F.3rd 1524 (9th Cir. 1996).

<sup>4</sup> *Lexecon* at 964.

<sup>5</sup> *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).

<sup>6</sup> See, e.g., MDL-1125—*In re Air Crash Near Cali, Columbia*, on 12/20/95, S.D. Fla. (Judge Highsmith).

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 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.<sup>7</sup>

The Senate Committee on the Judiciary took no action on H.R. 860, but the matter was revived during House-Senate conference deliberations on what became the “21st Century Department of Justice Appropriations Authorization Act.”<sup>8</sup> 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 criterion triggering its application was changed in conference. Specifically, and in addition to the other criterion, 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 the legislation remedies 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 nullifies the statute. In this sense, the *Lexecon* fix—its freestanding merits aside—also functions as a technical correction to the recently-enacted disaster litigation measure.

#### HEARINGS

No hearings were held on H.R. 1038.

#### COMMITTEE CONSIDERATION

On March 3, 2005, the Subcommittee on Courts, the Internet, and Intellectual Property met in open session and ordered favorably reported the bill H.R.1038 by voice vote, a quorum being present. On March 9, 2005, the Committee met in open session and ordered favorably reported the bill H.R. 1038 by voice vote, a quorum being present.

<sup>7</sup> See H.R. Rept. No. 106–276, 106th Cong., 1st Sess. (1999) and H.R. Rept. No. 107–14, 107th Cong., 1st Sess. (2001) for a detailed explanation of why “disaster” litigation redress was needed.

<sup>8</sup> H.R. 2215, Pub. L. No. 107–273.

## 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. 1038.

## 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. 1038, 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, March 11, 2005.*

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. 1038, the "Multidistrict Litigation Restoration Act of 2005."

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

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure

cc: Honorable John Conyers, Jr.  
Ranking Member

*H.R. 1038—Multidistrict Litigation Restoration Act of 2005.*

CBO estimates that implementing H.R. 1038 would have no significant impact on the Federal budget and would not affect direct spending or receipts. H.R. 1038 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of State, local, or tribal governments.

Enacting H.R. 1038 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 small, 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. 1038 would result in no significant net impact on the Federal budget.

The CBO staff contact for this estimate is Gregory Waring, who can be reached at 226–2860. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

#### PERFORMANCE GOALS AND OBJECTIVES

H.R. 1038 does not authorize funding. Therefore, clause 3(c)(4) of Rule XIII of the Rules of the House of Representatives is inapplicable. H.R. 1038 would allow a designated U.S. district court under the multidistrict litigation statute to retain jurisdiction over referred cases arising from the same fact scenario for purposes of determining liability and punitive damages, or to send them back to the respective courts from which they were transferred.

#### CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to Rule XI, clause 2(1)(4) of the Rules of the House of Representatives, the Committee finds the authority for this legislation in 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 2005.”

*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, § 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.

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. 1038 applies two effective dates to different provisions of the bill. The provisions of § 2 will apply to any civil action pending on or brought on or after the date of enactment of H.R. 1038.

Section 3 applies to “disaster” cases that are addressed by § 1020 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 § 11020. This means that § 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 enactment of the “21st Century Department of Justice Appropriations Authorization Act,” which was November 2, 2002.

In conclusion, the Committee notes that the text of H.R. 1038 is identical to that of H.R. 1768 from the 108th Congress, which the House passed under suspension of the Rules by a rollcall vote of 418–0 on March 24, 2004.

#### 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, MARCH 9, 2005**

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

The Committee met, pursuant to notice, at 10:00 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

Chairman SENSENBRENNER. The Committee will be in order. A working quorum is present comprised entirely of Members of the majority party. So rather than doing a ratification of minority Committee assignments, since there is no one here to make a motion to do that, we will now go to the next item on the agenda which is the adoption of S. 167, the "Family Entertainment and Copyright Act of 2005," and the Chair recognizes the gentlemen from Texas, Mr. Smith, the Chairman of the Subcommittee on Courts, the Internet, and Intellectual Property for a motion.

Mr. SMITH. Mr. Chairman, I ask unanimous consent that we consider the following bills en bloc: S. 167, H.R. 683, H.R. 1036, H.R. 1037, H.R. 1038.

Chairman SENSENBRENNER. How about House Concurrent Resolution—

Mr. SMITH. It's my understanding, Chairman, that needs to be considered separately.

Chairman SENSENBRENNER. Okay. Without objection, the 5 bills mentioned by the gentleman from Texas will be considered en bloc, and the Chair recognizes the gentleman from Texas to explain them.

Mr. SMITH. I'll try to be brief, Mr. Chairman. The first bill, S. 167 really consists of three previous bills that this Committee has approved and that passed the House last year. The first one is the Family Movie Act, and I think Members will recall that that simply gives parents the right to determine what their children see when they rent or buy a movie video.

The second part of this particular bill is the Art Act which creates new penalties for those who camcord movies in public theaters and who willfully infringe copyright law by distributing copies of prereleased works, movies or otherwise.

The Trademark Dilution Revision Act of 2005 simply, basically protects trademarks in a better way and also makes sure that people cannot infringe trademarks as easily as they do now. It also does a good job of trying to keep us out of court to determine some of the ambiguities of that particular subject.

The two technical correction bills are just that, technical corrections of the Satellite Viewer, Home Viewer Movie Act, and the technical corrections, in addition to the satellite corrections are technical corrections of the CARP bill, which we approved last year and which passed the House.

The last bill in the en bloc package, Mr. Chairman, is your bill, the Multidistrict Litigation Restoration Act of 2005, and I will yield to you to make any comments on that.

And that would be the quick summary of the five bills en bloc. [The bill, H.R. 1038, follows:]

109TH CONGRESS  
1ST SESSION

# H. R. 1038

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

MARCH 2, 2005

Mr. SENSENBRENNER 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.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Multidistrict Litigation  
5 Restoration Act of 2005”.

6 **SEC. 2. MULTIDISTRICT LITIGATION.**

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

1           (1) in the third sentence of subsection (a), by  
2       inserting “or ordered transferred to the transferee  
3       or other district under subsection (i)” after “termi-  
4       nated”; and

5           (2) by adding at the end the following new sub-  
6       section:

7       “(i)(1) Subject to paragraph (2) and except as pro-  
8       vided in subsection (j), any action transferred under this  
9       section by the panel may be transferred for trial purposes,  
10      by the judge or judges of the transferee district to whom  
11      the action was assigned, to the transferee or other district  
12      in the interest of justice and for the convenience of the  
13      parties and witnesses.

14       “(2) Any action transferred for trial purposes under  
15      paragraph (1) shall be remanded by the panel for the de-  
16      termination of compensatory damages to the district court  
17      from which it was transferred, unless the court to which  
18      the action has been transferred for trial purposes also  
19      finds, for the convenience of the parties and witnesses and  
20      in the interests of justice, that the action should be re-  
21      tained for the determination of compensatory damages.”.

1 **SEC. 3. TECHNICAL AMENDMENT TO MULTIPARTY, MULTI-**  
2 **FORM TRIAL JURISDICTION ACT OF 2002.**

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

6 “(j)(1) In actions transferred under this section when  
7 jurisdiction is or could have been based, in whole or in  
8 part, on section 1369 of this title, the transferee district  
9 court may, notwithstanding any other provision of this  
10 section, retain actions so transferred for the determination  
11 of liability and punitive damages. An action retained for  
12 the determination of liability shall be remanded to the dis-  
13 trict court from which the action was transferred, or to  
14 the State court from which the action was removed, for  
15 the determination of damages, other than punitive dam-  
16 ages, unless the court finds, for the convenience of parties  
17 and witnesses and in the interest of justice, that the action  
18 should be retained for the determination of damages.

19 “(2) Any remand under paragraph (1) shall not be  
20 effective until 60 days after the transferee court has  
21 issued an order determining liability and has certified its  
22 intention to remand some or all of the transferred actions  
23 for the determination of damages. An appeal with respect  
24 to the liability determination and the choice of law deter-  
25 mination of the transferee court may be taken during that  
26 60-day period to the court of appeals with appellate juris-

1 diction over the transferee court. In the event a party files  
2 such an appeal, the remand shall not be effective until the  
3 appeal has been finally disposed of. Once the remand has  
4 become effective, the liability determination and the choice  
5 of law determination shall not be subject to further review  
6 by appeal or otherwise.

7 “(3) An appeal with respect to determination of puni-  
8 tive damages by the transferee court may be taken, during  
9 the 60-day period beginning on the date the order making  
10 the determination is issued, to the court of appeals with  
11 jurisdiction over the transferee court.

12 “(4) Any decision under this subsection concerning  
13 remand for the determination of damages shall not be re-  
14 viewable by appeal or otherwise.

15 “(5) Nothing in this subsection shall restrict the au-  
16 thority of the transferee court to transfer or dismiss an  
17 action on the ground of inconvenient forum.”.

18 **SEC. 4. EFFECTIVE DATE.**

19 (a) SECTION 2.—The amendments made by section  
20 2 shall apply to any civil action pending on or brought  
21 on or after the date of the enactment of this Act.

22 (b) SECTION 3.—The amendment made by section 3  
23 shall be effective as if enacted in section 11020(b) of the

14

5

1 Multiparty, Multiform Trial Jurisdiction Act of 2002

2 (Public Law 107–273; 116 Stat. 1826 et seq.).

○

Chairman SENSENBRENNER. The Chair passes on this.

Without objection, all Members may place opening statements in the record on each of the bills being considered en bloc at this time. Hearing no objection, so ordered.

[The prepared statement of Mr. Berman follows:]

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND RANKING MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

Mr. Chairman,

I intend to support H.R. 1038, The Multidistrict Litigation Restoration Act of 2005, and would ask my colleagues to do the same.

This Committee has approved legislation containing the provisions of H.R. 1038 in each of the past three Congresses. In the 106th Congress, the House passed the bill by voice vote on suspension. In the 107th Congress, the House passed identical legislation by unanimous consent, and last year the exact same bill passed the House 418–0. Each time, the legislation has died in the Senate.

This bill has a very narrow purpose and effect—it would simply overturn the 1998 *Lexecon* decision of the Supreme Court.

The *Lexecon* decision held that a multidistrict litigation transferred to a federal court for pretrial proceedings cannot be retained by that court for trial purposes. In so holding, the *Lexecon* decision upset decades of practice by the Multidistrict Litigation Panel and federal district courts. The *Lexecon* decision also increases the cost and complexity of such multidistrict 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 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.

This bill's narrow breadth should be contrasted with broader, and more troubling legislation to expand federal court jurisdiction, such as so called class action reform.

I ask my colleagues to vote for H.R. 1038, and then for the bill as amended.

I yield back the balance of my time.

Chairman SENSENBRENNER. Are there any amendments to any of the bills?

[No response.]

Chairman SENSENBRENNER. There being no amendments, without objection, the previous question is ordered on reporting the bills favorably and the vote on reporting these bills favorably will be taken when a reporting quorum is present.

Without objection the order for the previous question is vitiated. There is a Subcommittee amendment on H.R. 683, the Dilution Bill. Without objection, the Subcommittee amendment is agreed to. Hearing none, so ordered.

And now without objection, the previous question is ordered on reporting the bills favorably with H.R. 683 being reported favorably as amended. And the vote will be taken at the time that a reporting quorum appears.

[Intervening business.]

Chairman SENSENBRENNER. If there are no further amendments, without objection, the previous question is ordered favorably reporting Senate 167.

We are still one short of a reporting quorum. I would ask the Members present to be patient, and as soon as we round up—here we go. They have been rounded up. [Laughter.]

The previous question has been ordered on reporting favorably the following bills: Senate 167, H.R. 683, H.R. 1036, H.R. 1037 and H.R. 1038. So many as are in favor of reporting these bills favorably will say aye.

Opposed, no?

The ayes appear to have it. The ayes have it, and the bills are reported favorably.

Without objection, those bills which were amended here, meaning H.R. 683, will be reported favorably to the House in the form of a single amendment in the nature of a substitute, incorporating the amendments adopted here today. That unanimous consent request also includes Senate 167 as amended.

Is there any objection?

[Intervening business.]

Chairman SENSENBRENNER. With the next unanimous consent request, the gentleman will be given the right to file dissenting views on that bill. There will be separate Committee reports that will be filed on each of the bills considered en bloc. Does the gentleman withdraw his reservation?

Mr. WATT. Yes.

Chairman SENSENBRENNER. Okay. Without objection, all Members will be given 2 days as provided by House rules, in which to submit additional dissenting supplemental or minority views, and without objection the staff is directed to make any technical and conforming changes.

[Intervening business.]

Chairman SENSENBRENNER. There being no further business to come before the Committee, the Committee stands adjourned.

[Whereupon, at 10:17 a.m., the Committee was adjourned.]

## DISSENTING VIEWS

I opposed reporting H.R. 1038, the “Multidistrict Litigation Restoration Act of 2005,” to the full House at the March 9, 2005 Judiciary Committee markup because I object to the process under which the bill was considered and because I object to certain substantive provisions of the bill.

I object to the process because the Subcommittee on Courts, the Internet, and Intellectual Property did not conduct a hearing on H.R. 1038. The Subcommittee reported the bill by voice vote on March 3, 2005 and the full Committee markup was held less than one week later. Those who support H.R. 1038 contend that the bill did not warrant a hearing in light of other hearings and markups on identical or related bills from previous Congresses. The last hearing on a prior version of this bill was in the 106th Congress. However, subsequent versions of the bill have undergone substantial changes worthy of examination. At the hearing on this bill during the 106th Congress the Subcommittee heard testimony from a witness who expressed serious concerns about the bill’s expansion of Federal jurisdiction.<sup>1</sup> These concerns have never been addressed. I believe a hearing should have been held in this Congress to evaluate the revised bill and to determine whether the revisions remedied the serious federalism issues raised by the prior iteration of this bill or made them worse.

In addition to my concerns about process, I also object to certain substantive provisions of H.R. 1038. A prior version of this bill, H.R. 860 was partially passed into law in the “21st Century Department of Justice Appropriation Authorization Act,”<sup>2</sup> codified as § 11020 of the DoJ bill. Despite some adjustments<sup>3</sup>, I believe § 11020 inappropriately expands the jurisdiction of the Federal courts by infringing on the traditional jurisdiction of the state courts which are better equipped to handle personal-injury and wrongful death cases. H.R. 1038 compounds that problem by insuring that the transferee court can retain the consolidated cases for determination of liability and punitive damages. Expanding Federal jurisdiction will add an additional burden to the Federal courts at a time when our Federal courts are already overcrowded and backlogged. Moreover, in light of passage (also without the benefit of a timely hearing) of S. 5, the “Class Action Fairness Act of 2005,”<sup>4</sup> which steers most class actions and mass tort cases into

<sup>1</sup>See *Hearing on H.R. 2112 Before the House Subcommittee on Courts and Intellectual Property*, 106th Cong. (1999) (statement of Brian Wolfman, Staff Attorney, Public Citizen).

<sup>2</sup>Pub. L. No. 107-273.

<sup>3</sup>For example, § 11020 creates Federal jurisdiction for civil actions arising out of a single accident that results in the death or injury of 75 or more persons when specified conditions are met. Under the original version of this bill Federal district courts were authorized to adjudicate cases arising out of a single accident where at least 25 persons were killed or injured.

<sup>4</sup>The Class Action Fairness Act was signed into law on February 18, 2005. See Pub. L. No. 109-2

Federal court, I believe H.R. 1038 will exacerbate the strain already imposed on the Federal courts. While the bill's proponents maintain that the bill will increase judicial efficiency for the Federal courts, a proposition with which I disagree, it would do so by encroaching on the jurisdiction of state courts and states' rights and would do so at the expense of accident victims. I think we have lost sight of the fact that the courts are for the convenience of litigants, not judges and administrators.

While some may characterize this bill as a "non-controversial" piece of legislation that should be quickly moved through the legislative process, I believe that the landscape has changed with the passage of the Class Action Fairness Act. Accordingly, I believe that we failed to properly exercise our responsibility as Members of the Judiciary Committee by not conducting a *more extensive review* of this bill. Consequently, while I favor some of the provisions of the bill, I oppose reporting H.R. 1038 to the full House.

MELVIN L. WATT.

