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IN REM, QUASI IN REM, AND VIRTUAL *IN REM* JURISDICTION OVER DISCOVERY

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I. INTRODUCTION

According to *Black's Law Dictionary*, *in rem* [Latin for "against a thing"] is jurisdiction "involving or determining the status of the thing, and therefore the rights of persons generally with respect to that thing." Accordingly,

> "An action *in rem* is one in which the judgment of the court determines the title to property, and the rights of the parties, not merely as between themselves, but also as against all persons at any time dealing with them or with the property upon which the court had adjudicated."[1]

A small step removed is *quasi in rem* jurisdiction [again, Latin for "as if against a thing"] which is jurisdiction "involving or determining the rights of a person having an interest in property located within the court's jurisdiction."[2]

The concepts of *in rem* and *quasi in rem* jurisdiction include not only the court's power to adjudicate the rights to a given item of property, but "the power to seize and hold it."[3] *Quasi in rem* jurisdiction is, technically, jurisdiction over a person, rather than an item of property, but jurisdiction based upon that person's interest in the property located within the court's territory.

Back in the day of documents on paper, the establishment of *in rem* and *quasi in rem* jurisdiction, by a specific court, over a specific body of documentary evidence, was established by the straightforward mechanism of creating a "document depository," located with the court's jurisdictional territory. Indeed, in the early years of determining appropriate transferee venues under the multidistrict litigation statute, 28 U.S.C. Section 1407, the location of documents was an important consideration, since the effort and expense in relocating large bodies of documents was substantial.[4] The physical location of documents was, accordingly, a convenient basis upon which to determine the location of the federal multidistrict litigation involving it.[5] While the resulting *in rem* or *quasi in rem* jurisdiction of the MDL transferee court over the body of documents with evidentiary significance to the litigation was not frequently remarked, that is perhaps because it did not need to be: it was beyond peradventure and literally went without saying.

We are now well into the era of virtual documentation, in which documentary evidence consists significantly, if not primarily, of electronically created, transmitted, and stored data, which may or may not have a paper back-up, in a specific place. Document depositories, in the traditional

1 R.H. Graveson, *Conflicts of Laws*, 98 (7th. ed. 1974).
2 *Black's Law Dictionary*, (7th Ed.).
3 *Id.*
4 *See, e.g.*, reference to the "massive document depository" as a factor supporting transfer of related actions to the District of Arizona under 28 U.S.C. Section 1407 in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 30 (1998).
5 The location of documents (typically at a defendant's headquarters) was a major consideration in the Judicial Panel's early transfer decisions. *See, e.g., In re 1980 Decennial Census Adjustment Litigation*, 506 F. Supp. 648 (Jud. Pan. Mult. Lit. 1981); *In re Upjohn Co. Antibiotic "Cleocin" Prod. Liab. Litig.*, 450 F. Supp. 1168 (Jud. Pan. Mult. Lit. 1978); *In re Sundstrand Data Control, Inc., Patent Litigation*, 443 F. Supp. 1019 (Jud. Pan. Mult. Lit. 1978). Recent transfer orders of the Panel, such as those on the Panel's website, www.jpml.uscourts.gov, are notable for their frequent omission of this factor.

sense, are no longer pre-existing: they must be created, and more and more courts are dispensing with this step as costly and unnecessary. The result is, at least theoretically, a savings of time and costs, because documentary evidence may be produced, as well as stored, electronically, and the days of branch library-sized paper document depositories, located within the MDL transferee court's jurisdictional territory, may be a thing of the past. However, this evolution may have given rise to a problem which simply did not previously exist: determining which court has jurisdiction to determine the status of documentary evidence (as relevant or irrelevant; privileged or non-privileged) and of the rights of persons (the requesting and producing parties and their counsel) with respect thereto.

To the extent that determinations of privilege and potential relevance are discretionary, qualitative and/or subjective in nature, and given the often inescapable fact that litigation involving the same evidence is pending in multiple jurisdictions (which may or may not be formally or informally coordinated), the question of which court is or should be the sole or primary adjudicator of evidentiary disputes is a live one. The new Rule 502(d) "clawback" provisions,[6] which protect the privilege of inadvertently produced documents, and hence potentially promote production, facilitate cost-effective discovery, and reduce disputes, can work optimally only if the parties and their counsel may have a reasonable degree of confidence that disputes over such discovery will be adjudicated once, with binding effect. The old-fashioned concepts of *in rem* and *quasi in rem* jurisdiction may merit revival to address this emerging and predictably recurring problem.

II. *IN REM* AND *QUASI IN REM*: A PRIMER

The federal courts, as tribunals of limited jurisdiction, have had a particular interest in defining the nature, and delineating the bounds, of *in rem* and *quasi in rem* jurisdiction.

While the vast majority of federal cases are actions *in personam*, there is no constitutional or statutory limitation on the power of a federal court to entertain actions *in rem* or, under certain circumstances, actions *quasi in rem*. *See* 14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, Section 3631, at 3 (2d ed. 1985). Jurisdiction predicated on the presence of property or assets within a federal court's geographical domain has a long history. *See Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878). *In rem* and *quasi in rem* jurisdiction arising from a court's territorial power over the property is typically invoked when persons with claims to the property are nonresidents and securing personal jurisdiction difficult or impossible. 4 C. Wright & A. Miller, *Federal Practice and Procedure*, Section 1070, at 417 (2d ed. 1987).

Much debate still surrounds the use of *quasi in rem* jurisdiction, clouded in part by varying definitions of two jurisdictional concepts. Technically, *in rem* jurisdiction relates to the determination of title to, or the status of, property located within the court's territorial limits. *Federal Practice and Procedure*, Section 1070, at 422. A court's authority stems directly from adjudicating the ownership or other rights with respect to the property and the judgment is effective against all persons with an interest in the property.[7]

A *quasi in rem* action does not directly relate to the property, although it may represent the asset that will be used to satisfy a subsequent judgment, should plaintiff prevail. *Federal Practice and Procedure*, Section 1070, at 422. Most courts and commentators support continued reliance on *in rem*

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6 The Federal Rules of Evidence now include Rule 502, which addresses "Attorney-client privilege and work product; limitations on waiver." The Rule protects against inadvertent disclosures as follows:

(b) Inadvertent disclosure. When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:
(1) the disclosure is inadvertent;
(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
(3) the holder promptly took reasonable steps to reasonable steps to rectify the error, including (if applicable) following *Federal Rules of Civil Procedure 26(b)(5)(B).*

(d) Controlling effect of a court order. A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding.

7 *See, e.g.,* 28 U.S.C. Section 1655 (1988) (granting federal court jurisdiction to hear cases involving title, liens, claims or encumbrances as to real or personal property).

and *quasi in rem* jurisdictional bases where the property is the subject matter of the litigation or at least a significant ingredient in it, while questioning its use in the absence of minimum contacts.[8]

The same principles of minimum contacts that govern personal jurisdiction are relevant in determining the proper assertion of *quasi in rem* jurisdiction. The location of the property remains a significant factor, however, as it "may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977).[9]

The federal courts often have an adequate basis to exercise both *in rem* and *quasi in rem* jurisdiction in class action proceedings. The assets of a settlement trust or common fund resulting from a court-approved settlement may constitute the *res*. Each absent class member has some contact with the jurisdiction, since each seeks to recover monies from the *res* and hence expects to benefit from the forum's protection of the settlement assets.[10]

III. IS DISCOVERY A THING?

The Latin word "res," literally "thing," has been applied to a broad array of items and matters in Anglo-American law: real and personal property, items of physical evidence, and indeed, disputes themselves. We speak of a controversy finally adjudicated as "*res judicata*." In tort law, we say of a self-evident injury, or the instrumentality that must have caused it: "*res ipso loquitur*." Indeed, a metaphysical inquiry yields no material distinction between the piece of paper upon which words are written, printed, or typed, and email that documents the same thought, intention, agreement, or occurrence. Indeed, all evidence involving words, onscreen, on paper, or digitally encoded, involves the visible and lasting artifact of an invisible, and perhaps ephemeral, thought, that became a word, and it relates to a deed (of commission, omission, or concealment) that is potentially relevant to a statutory or tort claim or defense.

When persons fall within the jurisdiction of the court, the evidence of their intentions and conduct likewise, and logically, falls under that jurisdiction: *quasi in rem*. Persons may simultaneously come within the jurisdiction of multiple courts, as a result of claims derived from the same course of conduct or event. Thus, persons and the evidence relating to their intent and conduct, may be metaphysically divided among multiple jurisdictions, all of which are empowered to adjudicate the rights and disputes related thereto. As a result, we have inconsistent, and potentially contradictory, rulings involving the admissibility, privilege, and production of documentary evidence. It is because such inconsistent or contradictory results are possible (often times within the allowable range of judicial discretion) that we have costly and time-consuming discovery disputes.

Theoretically, if one court were empowered by exercise of *in rem* or *quasi in rem* jurisdiction, over a body of documentary evidence, and the rights and interests relating thereto, the costs, expense and delay of discovery disputation would markedly decrease, and predictability and consistency would be enhanced. Opportunities for gamesmanship would decline, and it is pleasant to think that potentially relevant and non-privileged evidence would more likely be produced, and available for an ultimate determination of claims and defenses on their merits.

Assuming such an exclusive exercise of *in rem* or *quasi in rem* jurisdiction is possible, by whom is it most appropriate? The first court before whom the dispute is filed, and in which the

8 *See Cargill, Inc v. Sabine Trading & Shipping Co.*, 756 F. 2d 224, 227-8 & n.2 (2d Cir. 1985); *Spungin v. Chinetti Int'l Motors*, 515 F. Supp. 31 (E.D.N.Y. 1981); *Drexel Burnham Lambert Inc. v. D'Angelo*, 453 F. Supp. 1294, 1296-97 (S.D.N.Y. 1978); *In re: Joint Eastern and Southern District Asbestos Litigation*, 129 B.R. 710, **232237 (1991).

9 In *Shafer*, the Supreme Court held that securing personal jurisdiction over a nonresident defendant through the seizure of property located within the state, but unrelated to the action, violated due process. *Id.* at 207. The plaintiff had seized defendant's shares in a Delaware corporation to obtain jurisdiction to resolve a dispute unrelated to any acts within the state. *Id.* Without additional contacts, the Court found that jurisdiction offended traditional notions of fair play and substantial justice. *Id.* Thus, for *quasi in rem* actions, due process requires the court to look beyond the mere physical existence of the property within the forum. The *Shaffer* decision has inspired considerable controversy. *See, e.g.*, Silberman, *Shaffer v. Heitner*" "The End of an Era," 53 N.Y.U. L. Rev. 33 (1978); Kalo, "Jurisdiction as an Evolutionary Process: The Development of *Quasi In Rem* and *In Personam*, Principles," 1978 Duke L.J. 1147.

10 *Joint E. & S. Dist. Asbestos Litigation*, *id.* at 800 ("Constructive possession of the [settlement] Trust and the preservation of its assets suffices to warrant the exercise of jurisdiction.").

disputing parties appear? The first such *federal court*? MDL transferee court to which numerous related federal actions are sent for coordinated discovery and other pre-trial proceedings? Or simply the court(s) within which the documentary evidence happens to be situated?

The last alternative, *in locus*/*in rem* jurisdiction, is the most traditional, but probably the least useful in the e-discovery context. It is easy to determine the location of original written documents and physical evidence. But copies of documents are portable, and virtual documents are (or easily can be) everywhere. With respect to electronic discovery, ubiquity is a given.[11]

Within the federal system, documents and discovery originating in, located in, or sent to a number of federal courts may be retrieved and collected in a single federal jurisdiction through the statutory multidistrict litigation process. In MDL parlance, pretrial proceedings (including discovery) are said to be "centralized" within a single transferee district in order "to eliminate duplicative discovery, prevent inconsistent rulings, and conserve the resources of the parties, their counsel and the judiciary."[12] Thus, within the federal system, out of many potential discovery fora, one is created, and that one may exercise essentially plenary jurisdiction (at least during pretrial proceedings) over the processes and products of discovery. This is the ideal scenario under which new Rule 502 potentially operates to speed the pace, maximize the scope, and minimize the disputes surrounding the protection of potentially relevant documents (including e-discovery).

State courts are beyond the mandate of Section 1407 centralization. While many states that have analogous coordination statutes which operate within state boundaries,[13] other states do not, and there is no inter-state centralization system. Coordination among state courts, and between federal and state courts is often implemented, and has become a recommended "best practice" within the diffuse institution of complex litigation.[14]

If an MDL transferee court is designated early enough in related multijurisdictional proceedings, that court may have the opportunity to exercise protective jurisdiction over discovery such that production flows freely with Rule 502 protections against inadvertent disclosure in place. If, however, as is often the case, state court proceedings are running ahead of the federal litigation, and discovery is underway, the parties may revert to traditional over-withholding of documents as a precaution against waiver, unless and until a court that implements and honors Rule 502 procedures emerges as a recognized "center of gravity" for the litigation such that it may exercise *in rem*, *quasi in rem*, or its virtual equivalent, to operate as a sanctuary in which the free flow of discovery information may safely occur.[15]

IV. THE (COMPLEX) LITIGATION'S THE THING

Class action and other complex litigation[16] often, but not always, culminates in the judicial review and approval of a settlement that, in turn, requires ongoing jurisdiction and administration of a settlement trust or common fund, or the enforcement of injunctive or equitable relief. This is the classic arena of *in rem*/*quasi in rem* jurisdiction. The dual nature of our federal/state court system has led to attempted end-runs around traditionally "limited" federal jurisdiction by litigants (often

11 The venerable maxim, "Wherever you go, there you are," (attributed to, *inter alia*, Thomas á Kempis, P.J. O'Rourke, Art Linkletter, and Buckaroo Banzai.) applies with particular force to e-discovery.
12 *See, e.g.*, *In re Bausch & Lomb, Inc. Contact Lens Solution Prod. Liab. Litig.*, 444 F. Supp. 2d 1336, 1338 (J.P.M.L. 2006).
13 *See, e.g.,* California Code of Civil Procedure, Sections 404, *et seq.*; California Rules of Court, Rules 3.520, *et seq.*
14 *See, e.g., Manual For Complex Litigation Fourth* (Federal Judicial Center 2004) Sections 20.3-20.313.
15 The Judicial Panel on Multidistrict Litigation frequently uses the term "center of gravity" to connote a confluence of circumstances (including but not limited to the location of documents, witnesses, evidence, related proceedings, parties, or some combination of the foregoing) that justifies the transfer and centralization of cases from across the country in that district. *See, e.g.*, *In re Municipal Derivatives Antitrust Litigation (MDL No. 1950)*, 560 F. Supp. 2d 1386, 1387 (JPML 2008).
16 The class action court's jurisdiction over absent class members, and its broad supervisory power over all aspects of a formal Rule 23 class action, have long been recognized. This is quintessential equity jurisdiction. Many mass torts and other complex litigation scenarios are not brought as class actions, and in others class certification may be denied. Neither circumstance has prevented courts from characterizing the cases before them as "*quasi*-class" actions, subjecting the parties to the courts' "broad equitable powers,' including the power to cap and limit attorney fees. *In re Vioxx Prod. Liab. Litig.* (MDL No. 1657), 574 F. Supp. 2d 606, 611 (E.D. La. 2008), *citing In re Zyprexa Prod. Liab. Litig.* (MDL No. 1596), 424 F. Supp. 2d 488, 492 (E.D.N.Y. 2006) ("The judiciary has well-established authority to exercise ethical supervision of the bar in both individual and mass actions")' and *In re Guidant Corp. Prod. Liab. Litig.* (MDL No. 1708), 2008 U.S. Dist. LEXIS 17535 (D. Minn. 2008). Judge Wersten has further expanded the concept of the non-class mass tort action as a "*quasi*-class action" to the situation of a "*quasi*-aggregate" action, extending the judicial power to review and modify private contingent fee agreements in single-plaintiff trials that were preceded by common issues adjudications. *See McMillan v. City of New York*, 2008 U.S. Dist. LEXIS 78711 (E.D.N.Y. 2008).

opting-out or objecting class members) who seek to ignore or evade the settlement terms, or attempt to obtain damages from a settling defendant in addition to the settlement fund. In such instances, federal courts have explored the consistencies and tensions between the All Writs Act and the Anti-Injunction Act, often finding in the former the injunctive mechanism to protect their ongoing jurisdiction from interference, invoking the concept of *in rem* jurisdiction to justify the halt of parallel or related state court proceedings.[17] It is illuminating to summarize this analysis, as it has, and may constructively continue, to be adopted outside the context of a settlement fund or trust as the foundational "*res*."

Federal district and appellate courts have analyzed both multidistrict ("MDL") and large class actions to *in rem* actions.[18] The analogy is based, in part, on the institutional demands of such litigation on the supervising court, as well as on the limited resources of a defendant in a large mass tort, securities, or antitrust case (*e.g.*, the rigors of class or mass litigation may jeopardize the viability of corporate defendants and their ability to satisfy a mass or class judgment or fund a global settlement), as well as the court's interest in the equitable treatment of plaintiffs who may be competing for a fair share of dwindling resources.[19]

The Second Circuit, upholding an All Writs Act injunction against state court proceedings in *In re BaldwinUnited Corp*., 770 F.2d 328, 337 (2d Cir. 1985), was both categorical and succinct:

> "the need to enjoin conflicting state proceedings arises because the jurisdiction of a multidistrict court is analogous to that of a court in an *in rem* action or in a school desegregation case, where it is intolerable to have conflicting orders from different courts." 17 C. Wright & A. Miller & E. Cooper, *supra*, Section 4225 at 105 n.8 (Supp. 1985).
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> the district court had before it a class action proceeding so far advanced that it was the virtual equivalent of a *res* over which the district judge required full control. Similar authority for the injunction comes from the court's power to protect and effectuate its order provisionally approving [the 18 settlements]."

Other courts have solidified and expanded upon this concept. As noted in *In re: School Asbestos Litigation*:

> In class action contexts, such as *In re Baldwin-United*, courts have noted the similarity of complex litigation to *in rem* actions. Where a complex proceeding is "so far advanced that it was the virtual equivalent of a *res* over which the district court judge required full control," *In re Baldwin-United*, 770 F.2d at 337, the "in aid of jurisdiction" exception authorizes the stay of state court proceedings when "the state court proceeding may effectively deprive the federal court of the opportunity to adjudicate as to the *res* …." *Mitchum v. Foster*, 407 U.S. 225, 2357 (1972).
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> In a multi-defendant class action, the labeling of the class action as a "*res*" over which the district judge should be permitted to exercise full control, including

17 A court may enjoin state court proceedings "where necessary in aid of its jurisdiction." 28 U.S.C. Sections 1651; 2283. It is well-settled that "if an action is *in rem* or *quasi in rem*, the court first obtaining jurisdiction over the *res* could enjoin suits in other courts involving the same *res*." Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure Section 4221 (2d Ed. 2005); *Vendo Co. v. LektroVend Corp.*, 433 U.S. 623, 641 (1977); *Mitchum v. Foster*, 407 U.S. 225, 235-37, 32 L. Ed. 2d 705, 92 S. Ct. 2151 (1972); *Standard Microsystems Corp. v. Texas Instruments, Inc.*, 916 F.2d 58, 60 (2d Cir. 1990); *In re VisaCheck/MasterMoney Antitrust Litig.*, 2005 U.S. Dist. LEXIS 18693, *8 (E.D.N.Y. 2005).

18 *See, e.g., In re Baldwin-United Corp.*, 770 F.2d 328, 337 (2d Cir. 1985) (securities class action was "so far advanced that it was the virtual equivalent of a *res* over which the district judge required full control."). *In re Diet Drugs Prods. Liab. Litig.*, 369 F.3d 293, 306 (3d Cir. 2004); *In re Diet Drugs*, 282 F.3d 220, 235 n.12 (3d Cir. 2002); *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 882 (11th Cir. 1989); *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332, 133435 (5th Cir. 1981).

19 *See In re Diet Drugs*, 369 F.3d at 296-97; *In re Joint Eastern and Southern Dist. Asbestos Litig.*, 134 F.R.D. 32, 37-38 (E.D.N.Y. & S.D.N.Y. 1990); *VisaCheck*, 2005 U.S. Dist. LEXIS 18693 at *9.

> the stay of parallel state proceedings, is especially appropriate where a settlement has been reached with many of the defendants and the judge seeks to supervise the administration of the settlement. *See In re Corrugated Contained Antitrust Litigation*, 659 F.2d 1332 (5th Cir. 1981).[20]

In one of its reviews of procedural attacks upon the massive and complex class action settlement in the "*Diet Drugs*" MDL litigation, the Third Circuit thoroughly explored the concept, and statutory and jurisprudential support, for the powerful complex litigation-*in rem* analogy. Writing to affirm the district court's All Writs Act injunction of a purported "mass opt out" by a Texas-court-certified subclass from the federal court-approved class settlement in *In re: Diet Drugs Prod. Liab. Litig.*, 282 F.3d 220 (3d Cir. 2002), Judge Scirica conducted a comparative and harmonizing analysis of the apparently contradictory powers of the All Writs and Anti-Injunction Acts.[21] The Court recognized that the Anti-Injunction Act might trump the All Writs Act in ordinary *in personam* actions:

> In ordinary actions *in personam*, each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principle of *res adjudicata* by the court in which the action is still pending …. *Kline v. Burke Constr. Co.*, 260 U.S. 226, 230, 67 L. Ed. 226, 43 S. Ct. 79 (1922). Therefore, it may not be sufficient that state actions risk some measure of inconvenience or duplicative litigation. *In re Baldwin-United Corp.*, 770 F.2d 328, 337 (2d Cir. 1985). An injunction may issue, however, "where the state court action threatens to frustrate proceedings and disrupt the orderly resolution of the federal litigation. *Winkler v. Eli Lilly & Co.*, 161 F.3d 1196, 1202 (7th Cir. 1996). In other words, the state action must not simply threaten to reach judgment, it must interfere with the federal court's own path to judgment." *Diet Drugs*, 282 F.3d at 234.

The All Writs Act's injunctive powers may, however, be invoked where the federal court's jurisdiction is *in rem*:

> While, as noted the "necessary in aid of jurisdiction" exception does not ordinarily permit injunctions merely to prevent duplicative actions *in personam*, federal courts are permitted to stay later-initiated state court proceedings over the same *res* in actions *in rem*, because "the exercise by the state court of jurisdiction over the same *res* necessarily impairs, and may defeat, the jurisdiction of the federal court already attached."
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> We have recognized another category of federal cases for which state court actions present a special threat to the jurisdiction of the federal court. Under an appropriate set of facts, a federal court entertaining complex litigation, especially when it involves a substantial class of persons from multiple states, or represents a consolidation of cases from multiple districts, may appropriately enjoin state court proceedings in order to protect its jurisdiction. *Carlough v. Amchem Prods.,*

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20 *In re Asbestos School Litigation*, 1991 U.S. Dist. LEXIS 5142, *6 (E.D. Pa. 1991).

21 The All Writs Act provides "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. 28 U.S.C. Section 1651. The power granted by the All Writs Act is limited by the Anti-Injunction Act, 28 U.S.C. Section 2283, which prohibits, with certain specified objections, injunctions by federal courts that have the effect of staying a state court proceeding.… The Anti-Injunction Act prohibits most injunctions "to stay proceedings in a State court." 28 U.S.C. Section 2283.

The Anti-Injunction Act does "not preclude injunctions against the institution of state court proceedings, but only bars stays of suit already instituted. *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965). However, the Anti-Injunction Act allows such injunctions "as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. 28 U.S.C. Section 2283.

> *Inc.*, 10 F.3d 189, 202-04 (3d Cir. 1993). *Carlough* involved a nationwide class of plaintiffs and several defendants – primarily manufacturers of asbestos-related products – and third-party defendants – primarily insurance providers. We found the complexity of the case to be a substantial factor in justifying the injunction imposed. 10 F.3d at 202-03. *Diet Drugs*. *Id.*

Implicit in the *Carlough-Diet Drugs* analysis is the recognition that preserving and protecting "the federal court's flexibility and authority to decide[22] complex nationwide cases (whether MDLs or class actions) makes special demands on the court [implicitly, the challenge of fulfilling Fed. R. Civ. P. 1's overarching "just, speedy, and inexpensive determination of every action and proceeding" directive that may justify an injunction otherwise prohibited by the Anti-Injunction Act. The *Diet Drugs* decision mustered an impressive array of authority (or at least anecdotes) in support of this thesis.[23]

Likewise, *Diet Drugs* collects specific instances in which the "courts have analogized complex litigation cases to actions *in rem* …. The *in rem* analogy may help to bring into focus what makes these cases stand apart … where complex cases are sufficiently developed, mere exercise of parallel jurisdiction by the state court may present enough of a threat to the jurisdiction of the federal court to justify the issuance of an injunction."[24] The insight of *Diet Drugs* is that, for both the traditional *in rem* action and the modern complex case, is that "in both kinds of cases state actions over the same subject matter have the potential to 'so interfere with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide the case.'"[25]

Much of the jurisprudence gathered by *Diet Drugs* concerned the propriety of injunctions issued by federal courts in the context of impending global settlements.[26] The need for consistency and predictability of discovery ruling – and thus the potential attraction of applying an *in rem* or *quasi in rem* analogy to discovery and documents – arises much earlier in the proceedings. It is thus significant that *Diet Drugs* acknowledges and cites two instances of federal courts using the analogy to protect their discovery rulings: *Winkler v. Eli Lilly*[27]and *Harris v. Wells*.[28]

V. DOES THE COMPLEX LITIGATION – *IN REM* ANALOGY APPLY TO DISCOVERY?

In *Harris v. Wells*, a (non-class, non-MDL) corporate dispute involving officers, directors, and shareholders of AroChem International, the district court issued an All Writs Act injunction against Delaware Chancery Court discovery requests that "mirror previous discovery requests" made in the federal court, to enable it to "retain control over discovery matters."[29]

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22 *Diet Drugs*, 282 F.3d at 235.

23 *See, e.g., Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998); *Winkler*, 101 F.3d at 1203 ("The Anti-Injunction Act does not bar courts with jurisdiction over complex multidistrict litigation from issuing injunctions to protect the integrity of their rulings."); *Welsch v. Folsom*, 6 F.3d 1465, 1470 (11th Cir. 1993); *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 882 (11th Cir. 1989); *Baldwin-United*, 770 F.2d at 337-38; *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332, 1334-35 (5th Cir. Unit A 1981) (approving injunction in a "complicated antitrust action[that] has required a great deal of the district court's time and has necessitated that it maintain a flexible approach in resolving the various claims of the many parties."); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 93 F. Supp. 2d 876 (M.D. Tenn. 2000); *In re Lease Oil Antitrust Litig. (No. II)*, 48 F. Supp. 2d 699, 704 (S.D. Tex. 1998); *Harris v. Wells*, 764 F. Supp. 743 (D. Conn. 1991); *In re Asbestos Sch. Litig.*, 1991 U.S. Dist. LEXIS 5142, No. 83-0268, 1991 WL 61156 (E.D. Pa. Apr. 16, 1991), *aff'd mem.*, 950 F.2d 723 (3d Cir. 1991); *In re Joint E. & S. Dist Asbestos Litig.*, 134 F.R.D. 32 (E.D.N.Y. & S.D.N.Y. 1990). As one court reasoned, "the district court had before it a class action proceeding so far advanced that it was the virtual equivalent of a *res* over which the district judge required full control. *Baldwin-United*, 770 F.2d at 337; *see also Wesch*, 6 F.3d at 1470; *Battle*, 877 F.2d at 882 ("It makes sense to consider this case, involving years of litigation and mountains of paperwork, as similar to a *res* to be administered.").

24 *Diet Drugs*, *id.* at 235.

25 *Id.*, 282 F.3d at 235; *Coast Line R.R. Co. v. Bhd of Locomotive Eng'rs.*, 398 U.S. 281, 295 (1970).

26 "The threat to the federal court's jurisdiction posed by parallel state actions is particularly significant where there are conditional class certifications and impending settlements in federal actions. Many – though not all – of the cases permitting injunctions in the complex litigation cases involve injunctions issued as the parties approached settlement.… Complex cases in the later stages – where, for instance, settlement negotiations are underway – embody an enormous amount of time and expenditure of resources. It is in the nature of complex litigation that the parties often seek complicated, comprehensive settlements to resolve as many claims as possible in one proceeding. These cases are especially vulnerable to parallel state actions that may 'frustrate the district court's efforts to craft a settlement in the multi-district litigation before it,' *Carlough*, 10 F.3d at 203 (quoting *BaldwinUnited*, 770 F.2d at 337), thereby destroying the ability to achieve the benefits of consolidation." *Diet Drugs*, 282 F.3d at 236.

27 101 F.3d 1196, 1202 (7th Cir. 1996).

28 764 F. Supp. 743, 745-46 (D. Conn. 1991).

29 764 F. Supp. at 746.

In *Winkler v. Eli Lilly & Co.*, on appeal arising out of the *Prozac* MDL proceedings, the Seventh Circuit faced the issue of "whether a federal court has the authority to protect the integrity of a discovery order" in the Anti-Injunction Act/All Writs Act context.[30] The *Winkler* court noted the "strong and long established policy against forum shopping," which balance the Anti-Injunction Act "principles of federalism and comity," and acknowledged that the "district courts' power to control multidistrict litigation is established by statute, 28 U.S.C. Section 1407, and … with that power comes the duty to exercise it as efficiently as possible… an important aspect of that control is to prevent predatory discovery, especially of sensitive documents, ensuring that litigants use discovery properly as an evidence gathering tool, and not as a weapon. … Indeed, an express purpose of consolidating multidistrict litigation for discovery is to conserve judicial resources by avoiding duplicative rulings. Where a litigant's success in a parallel state court actions would make a nullity of the district court's ruling, and render ineffective its efforts, especially to manage the complex litigation at hand, injunctive relief is proper."[31]

Adding to this observation the district court's express powers of the All Writs Act to issue "such commands as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in the exercise of jurisdiction otherwise obtained," and the court's established parallel construction of the "aid of jurisdiction" language of both the Anti-Injunction and All Writs Acts, the *Winkler* court concluded: "Consequently, we believe the two statutes in concert permit a district court, under certain circumstances, to issue an injunction to safeguard a pre-trial ruling like the discovery order at issue here."[32]

The specific injunction in *Winkler* was overturned, not as an improper injunction, *per se*, but on an abuse of jurisdiction standard, as unnecessarily broad, because it went beyond "those persons (and their counsel) whose cases are presently part of federal multidistrict litigation, or who were properly part of such multidistrict litigation at the time the ruling in question was made.[33] Where the defendant's documents are involved, this limitation presents no problem: a federal court can issue an order to protect such from inconsistent (or even duplicative) discovery forays. A defendant named in federal multidistrict litigation may find a haven there from "predatory discovery" proceedings in state courts.

Those courts entrusted with MDL and other complex proceedings are currently investing thousands of judicial hours grappling with the challenges of electronic discovery, including an increase in the sheer volume of data that is subject to discovery requests. Privilege logs, for example, may now include thousands rather than scores of documents, and the trial preparation process that the courts are called upon to manage can bog down in a privilege backlog. A privilege log, and the documents to which it refers (whether they are tangible or virtual) is arguably a *res*, and the division of its contents into privileged and non-privileged categories, once accomplished via the investment of substantial sweat equity, ought to be *res* judicata.

The recent experience of the *Vioxx* MDL court is illustrative. In *In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d 789 (E.D.La. 2007), the court describes a situation in which it was faced with privilege disputes involving over 30,000 documents. After the Fifth Circuit had vested the transferee court's own privilege determination (based upon a document-by-document review), a court-appointed special master reviewed and made recommendations on a representative sample of the documents. The parties shared the considerable costs of this process, which resulted in a determination that the bulk of the documents were non-privileged and subject to production. This investment of judicial and litigant resources in the determination of the discoverability of, and the resulting sweat equity in "documents" which were mostly "print-outs of electronic communications, primarily internal company e-mails and attachments gives renewed currency to the *in rem* analogy "at the dawn of the age of electronic discovery." 501 F. Supp. at 790.

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30 101 F.3d at 1202.
31 *Id.*, *citing Marrese v. Am. Academy of Ortho. Surgeons*, 726 F.2d 1150, 1161 (7th Cir. 1989), *rev'd on other grounds*, 470 U.S. 375 (1989), and *Matter of Orthopedic Bone Screw Prod. Liab. Litig.*, 79 F.3d 46, 48 (7th Cir. 1995).
32 101 F.3d at 1203.
33 *Id.*

VI. CONCLUSION

In the age of paper discovery, courts designated to preside over complex litigation had literal *in rem* jurisdiction over the physical depositories of documentary evidence, located within the their territory, and entrusted to administration by court-appointed counsel.[34] This jurisdiction was taken for granted, unremarkable (and unremarked upon), and the transition to d-discovery (and virtual depositories) was heralded as an opportunity for substantial court savings and increased convenience: documents could be everywhere at once.[35] Only now are we coming to grips with the collateral challenge of jurisdiction and enforcement occasioned by documents more mobile than the persons who authored them. The need for orderly and consistent adjudication of disputes over the relevance or privileged status of virtual documents may call for the exercise of virtual *in rem* jurisdiction.

The federal courts' development of the *in rem* analogy to embrace complex litigation itself as "the virtual equivalent of a *res*"[36] was based in part on the quantity of documentary evidence and discovery itself (including depositions) that featured in the judicial case management of complex litigation, whether class actions, mass torts, or MDLs. Now that e-discovery untethered to a particular place, and occupying only virtual space, has become the norm, this complex task has literally taken on an additional dimension. This in turn arguably heightens the necessity, and hence the force, of the virtual *in rem* jurisdiction concept.

The "complex litigation as *res*" analogy, which enabled courts, considering All Writs Act injunctions to preserve the integrity of their rulings against contradictory or inconsistent decisions in parallel proceedings, to ground such extreme judicial acts on a traditional *in rem* foundation, did not spawn an avalanche of injunctive writs. Despite, or because of, its power, the All Writs Act has been used sparingly over the years, only after efforts at informal coordination and inter-court accommodation failed.

Applying the *in rem* analogy to discovery would be equally unlikely to touch off an injunction tsunami, especially as the federal courts have increasingly recognized the great advantages of active federal/state court coordination, particularly in multi-jurisdictional mass torts.[37]

What recognition and revival of the virtual *in rem* analogy has the potential to accomplish, if applied to the discovery context, is a reduction in the cost, waste, delay and gamesmanship of discovery disputation, as litigants recognize that the new protections of the federal discovery provisions will be applied consistently and enforced centrally, by a single court taking charge of the discovery process and product as recognized components of a complex litigation *res*.

34 *See, e.g.*, *Manual for Complex Litigation, Third* (Federal Judicial Center 1995), Section 21.444 Document Depositories. The latest edition of the *Manual* replaces much of the discussion of physical depositories with the observation that "techniques such as CD-ROM and the Internet reduce the need for physical storage facilities, inspection, and copying." *Manual for Complex Litigation*, Fourth (Federal Judicial Center 2004) Section 11.444 at p. 77.
35 *Id.* At p. 28.
36 *Diet Drugs*, 282 F.3d at 235; *Baldwin-United*, 770 F.2d at 337.
37 *See, e.g., In re: Vioxx Prod. Liab. Litig.* (MDL No. 1657), 2008 U.S. Dist. LEXIS 95097, *7 (E.D. La. 2008); *Manual For Complex Litigation, Fourth*, Sections 20.3; 22.4.