Procedural Hassles in Multidistrict Litigation: A Call for Reform of 28 U.S.C. § 1407 and the *Lexecon* Result

COURTNEY E. SILVER*

I. INTRODUCTION

Imagine thousands of plaintiffs sue a single defendant or a small number of defendants. Imagine further that these plaintiffs all request thousands of documents. They interpose thousands of interrogatories. The thousands of plaintiffs all want to take the depositions of the same few individuals. Fortunately, the federal judicial system has a mechanism to coordinate the pretrial process in order to conserve the time and resources of the parties involved and of the judiciary.

But when the pretrial process is complete, these thousands of actions remain. Does it then make sense to cut off the coordinated process that had been so logical? Is it wise to remove the actions from the judge that has become most familiar with the case throughout discovery? When parties want to continue the litigation in that district, should they then have to undertake costly procedural steps to return the case to the transferee district, rather than simply remaining there after discovery? This is the frustrating result currently in place in the federal court system. This is the result that needs to be amended.

The first multidistrict litigation (MDL) statute, 28 U.S.C. § 1407, was passed in 1968 in response to the growing need for consolidating pretrial proceedings in mass tort cases.[1] In cases involving actions for mass disasters like airplane crashes and products liability, where thousands of plaintiffs sue a single defendant or a small number of defendants, efficiency and the interest of justice favor the consolidation of cases for discovery proceedings. The Judicial Panel on Multidistrict Litigation (the "Panel") was formed to oversee the transfer and remand of cases to a transferee district.[2]

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* J.D. Candidate, expected 2009, The Ohio State University Moritz College of Law; B.S. *summa cum laude*, 2006, Cornell University.

[1] 15 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3861 (3d ed. 2007) [hereinafter WRIGHT, MILLER & COOPER, FEDERAL PRACTICE]. The goal of § 1407 is to provide centralized management of pretrial proceedings to avoid conflict and duplication in discovery and other pretrial procedures in related cases. *Id.*

[2] *See* 28 U.S.C. § 1407 (2008). The Panel consists of seven circuit and district judges designated by the Chief Justice of the United States. § 1407(d). A concurrence of four members of the Panel is necessary for any action to be taken by the Panel. *Id.*

Section 1407 provides for the transfer of an action to any district for coordinated or consolidated pretrial proceedings when actions with one or more common questions of fact are pending in different districts.[3] Transfer is appropriate for the convenience of the parties and witnesses and in order to promote the just and efficient conduct of the actions.[4] Each transferred action is to be remanded to its originating district by the Panel at or before the conclusion of pretrial proceedings unless it is previously terminated.[5]

For the first thirty years after it was passed, § 1407 enabled cases to be transferred to the "transferee district" for consolidated pretrial proceedings.[6] The Panel then, as directed by § 1407, remanded the cases to the originating district for trial.[7] However, transferee judges frequently followed a more efficient course of action, such as granting a motion to dismiss or a motion to transfer the case permanently to the transferee district.[8] During this period,

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[3] The statute provides:

> (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: *Provided, however*, [t]hat 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.
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> . . .
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> (c) Proceedings for the transfer of an action under this section may be initiated by--
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> (i) the judicial panel on multidistrict litigation upon its own initiative, or
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> (ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending . . . .

28 U.S.C. § 1407 (2006).

[4] *Id.* § 1407(a).

[5] *Id.*

[6] *See* WRIGHT, MILLER & COOPER, FEDERAL PRACTICE, *supra* note 1, § 3866.2.

[7] *See id.*

[8] *Id.*; *see Pfizer, Inc. v. Lord*, 447 F.2d 122, 124–25 (2d Cir. 1971) (recognizing that § 1407, in dictating only the powers of the Panel, did not prevent transferee judges from controlling the path of transferred cases). The practice of self-transfer was sanctioned by the Rules set forth by the Panel. "Each transferred action that has not been terminated in the transferee court shall be remanded by the Panel to the transferor district for trial,

this practice of "self-transfer" under § 1404(a) by the transferee judge was quite common.[9]

In 1998, the Supreme Court prohibited this procedure of self-transfer in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*.[10] The Court interpreted the word "shall" in § 1407 as mandating the remand of the transferred cases by the Panel to the originating districts after the completion of pretrial proceedings.[11] Transferee judges no longer had the power to transfer cases to the transferee district or other districts of the parties' choice.[12]

As a result of the *Lexecon* bar to self-transfer, current practice often leads to judicial inefficiency and complicates the procedural course of the action after discovery. One effect of *Lexecon* has been to vastly increase the number of actions that are remanded.[13] Now, several thousands of actions, rather than the hundred or so prior to *Lexecon*, are remanded each year for trial.[14] The rigidity of the mandatory remand system defeats the efficiency goals of multidistrict litigation by preventing simple permanent transfers and thereby encouraging litigants to engage in time-consuming procedural hassles so that the case may be heard by the appropriate judge.

Part II will begin with an overview of the purpose of multidistrict litigation and § 1407. Part III will discuss the routine use of self-transfer for the first three decades of MDL practice, followed by a review of the *Lexecon* case and how it has negatively impacted the judicial process. Part IV of this Note will analyze the many procedural hurdles that litigants go through in

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unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406." J.P.M.L. RULE OF PROCEDURE 14(b), 28 U.S.C. § 1407 (1976), *amended by* 28 U.S.C. § 1407 (Supp. 1981). The rule expressly stated that an order of remand would not be necessary if the transferee judge granted a § 1404(a) or 1406 motion.

This rule was later overturned, in part, to prevent the transferee judge from granting self-transfer or transfer to another district. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998); J.P.M.L. RULE OF PROCEDURE 7.6(b), 28 U.S.C. § 1407 (1998), *amended by* 28 U.S.C. § 1407 (2001).

[9] *In re* Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1176 n.9 (D.C. Cir. 1987) (recognizing that in practice, as of June 30, 1986, over two-thirds of the 15,026 actions that had been transferred pursuant to § 1407 were terminated by the transferee district without remand).

[10] 523 U.S. 26 (1998).

[11] *Id.* at 35 (citing Anderson v. Yungkau, 329 U.S. 482, 485 (1947)).

[12] *Id.* at 40.

[13] *In re* Methyl Tertiary Butyl Ether Prods. Liab. Litig., 241 F.R.D. 185, 191 (S.D.N.Y. 2007) (citing *In re* Methyl Tertiary Butyl Ether Prods. Liab. Litig., No. 1:00-1898, MDL 1358, 2005 WL 106936, at *4 (S.D.N.Y. Jan. 18, 2005)).

[14] *Id.*

order to achieve the desired forum, among other things, for the adjudication of their cases. Congress has been active in proposing legislation over the last decade to reverse the effect of *Lexecon* to eliminate the need for such hassles, but no such change has been enacted to date, as will be discussed in Part V. This Note will then argue in Part VI the merits of a new proposal for legislative reform that would improve the multidistrict litigation process to achieve litigants' desired result.

II. PURPOSE OF MULTIDISTRICT LITIGATION

When many cases of the same type involving a similar claim are filed throughout the country, they can be transferred to a single district to coordinate discovery.[15] This transfer "prevent[s] duplication of discovery and eliminates the possibility of conflicting pretrial rulings."[16] The Judicial Panel on Multidistrict Litigation, established by 28 U.S.C. § 1407, is an inter-district body that reviews the cases and orders the transfers.[17]

Section 1407 proceedings for the transfer of an action to a transferee court may be initiated by the Panel itself or upon a motion filed with the Panel by a party desiring this transfer.[18] An action transferred under this section "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 . . . ."[19]

Remand usually occurs upon the recommendation of the transferee court, though the transferee court itself does not have independent discretion under § 1407 to remand an action.[20] In accordance with the overall purpose of § 1407 of ensuring judicial economy, a main factor in determining when remand is appropriate is "when remand will best serve the expeditious disposition of the litigation."[21] After remand, the transferor court regains exclusive jurisdiction over the action.[22]

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[15] *See* 28 U.S.C. § 1407(a) (2008).

[16] *In re* Liquid Carbonic Truck Drivers Chem. Poisoning Litig., 423 F. Supp. 937, 939 (J.P.M.L. 1976) (citing *In re* Radiation Incident at Washington, D.C. on Apr. 5, 1974, 400 F. Supp. 1404, 1406 (J.P.M.L. 1975)) (granting the transfer of several actions involving common issues of fact regarding the causation of the plaintiffs' injuries and the liability of the defendants).

[17] 28 U.S.C. § 1407(d) (2008).

[18] *Id.* § 1407(c).

[19] *Id.* § 1407(a).

[20] MANUAL FOR COMPLEX LITIGATION § 20.133 (4th ed. 2004).

[21] *Id.*

[22] Following remand, the transferor court oversees further pretrial proceedings as needed and presides over the remainder of the adjudication process. *Id.*

The purpose of § 1407, however, is more about efficiency and fairness than remand. The "clear language, corroborated by the legislative history, . . . and by testimony before Congress of its authors, makes it clear that [§ 1407's] remedial aim is to eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts in multidistrict related civil actions."[23] Section 1407 and multidistrict proceedings are important for achieving a balance between the competing interests of efficiency and fairness.[24] One significant feature of multidistrict proceedings is that they "bring before a single judge all of the federal cases, parties, and counsel comprising the litigation. They therefore afford a unique opportunity for the negotiation of a global settlement."[25] The types of cases where § 1407 transfer is usually appropriate are "antitrust, securities, air disaster, other common disaster, patent, copyright, trademark and products liability."[26] Hundreds or thousands of actions relating to the same incident may be brought, and multidistrict proceedings offer a means by which these cases may proceed efficiently and in fairness to all involved. Duplicative discovery is avoided, time and money are saved, and the possibility of a global settlement is increased.

The need for consolidated pretrial proceedings in multidistrict litigation became apparent in 1961 when more than 2,000 antitrust actions were filed in thirty-five federal districts against manufacturers of electrical equipment.[27] These actions presented previously-unseen issues of coordination and maximizing judicial efficiency.[28] The Judicial Conference of the United States created a subcommittee of judges to oversee the pretrial proceedings of these actions, and this laid the foundation for Judicial Panel on Multidistrict Litigation, created in 1968.[29]

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[23] *In re* Plumbing Fixture Cases, 298 F. Supp. 484, 490–92 (J.P.M.L. 1968). "[T]o qualify for transfer, civil actions must meet three criteria: [F]irst, they must involve one or more common questions of fact; second, they must be pending in more than one district, and third, pretrial consolidation must promote the 'just and efficient conduct' of such actions and be for 'the convenience of parties and witnesses.'" *In re* Ivy, 901 F.2d 7, 9 (2d Cir. 1990) (citing H.R. REP. NO. 90-1130 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900).

[24] *See* WRIGHT, MILLER & COOPER, FEDERAL PRACTICE, *supra* note 1, § 3868.

[25] MANUAL FOR COMPLEX LITIGATION, *supra* note 20, § 20.132.

[26] Robert A. Cahn, *A Look at the Judicial Panel on Multidistrict Litigation*, 72 F.R.D. 211, 214 (1977).

[27] James M. Wood, *The Judicial Coordination of Drug and Device Litigation: A Review and Critique*, 54 FOOD & DRUG L.J. 325, 326 (1999).

[28] *Id.*

[29] *Id.*

Since its creation in 1968, the Panel has acted upon 265,268 civil actions pursuant to § 1407, as of September 30, 2007.[30] The following table provides a cumulative summary of multidistrict litigation from 1968 through September 30, 2007.[31]

	Cumulative Totals as of September 30, 2007
Total Actions Subjected to Section 1407 Proceedings	265,268
Actions Transferred	202,601
Actions Originally Filed in Transferee Districts	62,667
Total Terminations	188,408
Actions Terminated by Transferee Courts	176,405
Actions Reassigned to Transferor Judges Within Transferee Courts	393
Actions Remanded by the Panel	11,610
Total Actions Presently Pending and Subjected to Section 1407 Proceedings	76,860

That multidistrict litigation has had a tremendous impact on the federal judicial system is clear from the hundreds of thousands of actions that have been affected. Repeatedly, courts and the Panel have recognized the benefits of transfer to the MDL, including judicial economy and overall efficiency.[32] While the importance of § 1407 is widely accepted, the remand procedure is not. The next section discusses MDL practice since its creation in 1968 and the varying levels of acceptance of the remand procedure over the last forty years.

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[30] James C. Duff, *Judicial Business of the United States Courts, 2007 Annual Report of the Director, Table S-20, available at* http://www.uscourts.gov/judbususc/judbus.html.

[31] *Id.*

[32] *See id.* The sheer volume of transfers pursuant to § 1407 reflects the awareness of courts and the Panel of the benefits to be gained by transfer to the MDL.

III. FORTY YEARS OF MULTIDISTRICT LITIGATION IN PRACTICE

This section reviews the history of multidistrict litigation in action. For the first thirty years of MDL practice, it was quite common for the transferee judge to grant §§ 1404(a) and 1406 motions.[33] In 1998, however, the Supreme Court's decision in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach* stripped the transferee courts of the ability to grant these transfers and held that § 1407 mandates remand by the Panel to the transferee court.[34] Since 1998, courts have generally applied the *Lexecon* result and have explored the limits of its holding.

A. *Self-Transfer from 1968-1998*

For the thirty year period between 1968 and 1998, the Panel directed thousands of cases to transferee districts in multidistrict litigation.[35] It was common during that time for many cases transferred under § 1407 to remain in the transferee district for trial. Transferee judges frequently entered orders for permanent transfer of these cases under 28 U.S.C. § 1404(a) or 1406.[36] This practice, though not entirely consistent with the language of § 1407, was endorsed by the Panel. The Panel enacted its own procedural rules that provided for self-transfer.[37] Judicial Panel on Multidistrict Litigation Rule of Procedure 14(b) provided for each transferred action to be remanded by the Panel to the transferor district for trial, *unless* the transferee judge ordered self-transfer to the transferee district or transfer to another district under

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[33] *See supra* notes 8 & 9.

[34] 523 U.S. 26, 40 (1998).

[35] Leonidas Ralph Mecham, *Judicial Business of the United States Courts, 1998 Annual Report of the Director, Table S-22, available at* http://www.uscourts.gov/judbususc/judbus.html (last visited Apr. 9, 2009). As of September 30, 1998, 140,867 actions had been subjected to § 1407 proceedings. *Id.*

[36] *Lexecon*, 523 U.S. at 32–33 (recognizing the popularity of the "self-transfer" practice in conjunction with § 1407).

Transfer of venue motions under §§ 1404(a) and 1406 allow for permanent transfer of an action with no need to remand. "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (2008); "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1406(a) (2008).

[37] The Panel is authorized to prescribe rules for conducting its business so long as those rules are not inconsistent with the Acts of Congress or the Federal Rules of Civil Procedure. 28 U.S.C. § 1407(f) (2008).

§ 1404(a) or 1406.[38] With that sanction in the Rule itself, it was more common that the action remain in the transferee district than be remanded to its originating district: "[H]istory has indicated that once the limited transfer has occurred, the transferor district is not likely to see the case again."[39] Thus, with a discrepancy between § 1407 and the Rule promulgated under the statute, courts often followed the procedure sanctioned by the Rule.

During pretrial proceedings under § 1407, the transferee district judge possessed control over all aspects of discovery.[40] Such powers included scheduling discovery on a variety of issues, staying discovery on a particular issue until remand, ruling on the sufficiency of pleadings, and making results of completed discovery available to other parties in related actions.[41]

Granting motions for change of venue was also a routine aspect within a transferee judge's power in multidistrict litigation.[42] Using 28 U.S.C. § 1404(a) or 1406, a transferee judge could permanently transfer the action to the transferee court or to another court.[43] With these statutes, the transferee judge's power is limited by venue considerations in that venue must be proper in the district to which the action is sent.[44] The Second Circuit's opinion in *Pfizer, Inc. v. Lord* was a noteworthy opinion approving the use of a § 1404(a) motion in transferee courts.[45] With the support of many courts

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[38] J.P.M.L. RULE OF PROCEDURE 14(b), 28 U.S.C. § 1407 (1993) (current version at 28 U.S.C. § 1407 (2001)) (invalidated by Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998)). Rule 14(b) was adopted in 1993 as a substitute for former Rule 15(d), which also recognized the authority of the transferee judge to rule on a § 1404(a) motion. The Panel has thus supported the validity of self-transfer since 1970, when Rule 15(d) was promulgated. *See* Benjamin W. Larson, Comment, Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach: *Respecting the Plaintiff's Choice of Forum*, 74 NOTRE DAME L. REV. 1337, 1345 (1999).

[39] *In re* New York City Mun. Sec. Litig., 572 F.2d 49, 51 (2d Cir. 1978).

[40] *See* Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 579 (1978).

[41] *Id.* at 579–80.

[42] "The power of a transferee judge to order transfer of those actions for all purposes pursuant to 28 U.S.C. § 1404(a) or § 1406 is an accepted procedure in multidistrict practice." *Id.* at 581.

[43] *See* 28 U.S.C. §§ 1404 and 1406 (2008).

[44] *See id.* The action may only be transferred under these statutes to any district where it might have been brought. *Id.*

[45] 447 F.2d 122 (2d Cir. 1971). The court held that a transferee judge, to whom cases are transferred by the Panel under § 1407, has the power to issue transfer orders under § 1404(a). *Id.* at 125. The court stated that § 1407 applies to the powers of the Panel, not to the powers of the transferee judge. *Id.* at 124. While § 1407 restricts the Panel from granting a § 1404 or 1406 motion, this restriction does not apply to the transferee judge. *Id.*

and the Panel itself, during this first thirty year period, "[m]ost actions [were] terminated either in the transferee district, (often by settlement) or [were] transferred by the transferee judge to the transferee district or to another district for trial pursuant to Sections 1404(a) or 1406."[46] It was clear that this practice best supported judicial economy, in accord with the purpose of § 1407.

Strong policy considerations support the pre-1998 practice.[47] First, the transferee judge gained a solid understanding of the case throughout the extensive discovery process.[48] It made sense for trial to be conducted by the judge with the greatest understanding of the case. Second, the transferee judge would often try the constituent centralized actions, and it was sometimes more efficient to adjudicate related actions in one trial.[49] Lastly, the transferee judge, when empowered to try the centralized actions, had a greater ability to facilitate a global settlement.[50]

The pivotal Supreme Court ruling in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach* eliminated the possibility of the transferee court

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The Panel itself has noted that "[s]ections 1404(a), 1406(a), and 1407 are not mutually exclusive and, when appropriate, should be used in concert to effect the most expeditious disposition of multidistrict litigation." *In re* Koratron, 302 F. Supp. 239, 242 (J.P.M.L. 1969).

In *Pfizer*, Judge Miles Lord ordered a § 1404 transfer to his district of all remaining cases in the MDL over which he was presiding. The Second Circuit affirmed this self-transfer, noting that allowing transferee judges to grant §§ 1404 and 1406 motions "would clearly seem to comport with the esential [sic] purpose of section 1407 to 'promote the just and efficient conduct' of complex multidistrict litigation." *Pfizer*, 447 F.2d at 125. The court reasoned that the transferor court has no authority to grant a § 1404 motion while the case is subject to the § 1407 transfer for coordinated pretrial proceedings, and to prevent the transferee court from granting such motions would be to delay these transfer motions during the entire pretrial period. *See id.* "The inevitable result would be further extensive delay in litigation which already is among the most time consuming to appear on the federal dockets. We see no reason to sanction such a result." *Id.*

[46] Weigel, *supra* note 40, at 583. In the first ten years after § 1407 was enacted, less than five percent of the actions transferred by the Panel were remanded. *Id.* This figure suggests how common and useful settlement and self-transfer were in managing the court docket by eliminating the need for remand to the originating district and efficiently disposing of and transferring cases.

[47] MANUAL FOR COMPLEX LITIGATION, *supra* note 20, § 20.132.

[48] *Id.* "After spending weeks, or even months, governing pretrial stages of a matter, a judge acquires an unparalleled familiarity with the litigation. This familiarity can enhance the smooth and speedy processing of cases through trial." Blake M. Rhodes, Comment, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. PA. L. REV. 711, 731 (1991).

[49] MANUAL FOR COMPLEX LITIGATION, *supra* note 20, § 20.132.

[50] *Id.*

directing the transfer of cases upon completion of discovery.[51] The Court held that a transferee court under § 1407 must return each case to the Panel, and the Panel will remand the case to its originating district for disposition after the coordinated pretrial phase is complete.[52] "[T]he Supreme Court overturned three decades of uniform case law that allowed transferee courts to retain cases for trials through the practice of a 'self-transfer' under section 1404 . . . ."[53] While the policy concerns for the pre-1998 practice remain, the *Lexecon* ruling invalidated the previously common practices.

B. *The* Lexecon *Case in 1998 and a Reversal of Thirty Years of Practice*

In *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*,[54] the Supreme Court finally addressed the discrepancy between § 1407, which mandates the remand of cases to the transferor district, and Multidistrict Litigation Rule 14(b), which allowed the transferee judge to transfer cases to itself or to any other district.[55] In that case, Lexecon, Inc., a law and economics consulting firm, brought claims of malicious prosecution, abuse of process, tortious interference, commercial disparagement, and defamation against the law firms of Milberg Weiss Bershad Hynes & Lerach (Milberg) and Cotchett Illston & Pitre (Cotchett).[56] This action stemmed from the law firms' conduct as counsel in a prior class action for violations of securities and racketeering laws.[57] Lexecon was a defendant, and the case had been transferred under § 1407(a) for pretrial proceedings to the District of Arizona with the consolidated cases known as the Lincoln Savings litigation.[58]

Lexecon was ultimately dismissed in that suit, and brought its action against Milberg and Cotchett in the Northern District of Illinois.[59] Milberg and Cotchett filed a motion under § 1407(a) with the Panel for transfer to the

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[51] Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 40 (1998).

[52] *Id.*

[53] *In re* Methyl Tertiary Butyl Ether Prods. Liab. Litig., No. 1:00-1898, MDL 1358, 2005 WL 106936, at *4 (S.D.N.Y. Jan. 18, 2005).

[54] Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998).

[55] Rule 14(b) enabled transferee judges to grant § 1404 or 1406 motions, and when these actions were transferred, the Panel was no longer involved in authorizing further proceedings. *In re* Carbon Dioxide Indus. Antitrust Litig., 229 F.3d 1321, 1323 n.4 (11th Cir. 2000).

[56] *Lexecon*, 523 U.S. at 28–29.

[57] *Id.* at 29.

[58] *Id.*

[59] *Id.*

District of Arizona for consolidation with the Lincoln Savings litigation.[60] The motion was granted.[61] As discovery progressed, Lexecon moved the court for the District of Arizona to recommend to the Panel that the case be remanded to the Northern District of Illinois.[62] The defendants filed a countermotion under § 1404(a) requesting that the District of Arizona "transfer" the case to itself for the duration of discovery and trial.[63] Ultimately, the law firms' § 1404(a) motion was granted.[64] The remaining issues of the case were tried in the District of Arizona and judgment was entered for Milberg and Cotchett.[65] Lexecon then appealed to the Ninth Circuit. The circuit court affirmed on the ground that permitting a transferee court to assign a case to itself was consistent with statutory language and also conducive to efficiency.[66] The Supreme Court reversed and held that a transferee court has no authority to assign a transferred case to itself for trial under § 1404(a).[67]

The Court determined that § 1407 obligates the Panel to remand any pending case to its originating court.[68] The requirement that the Panel remand to that court is mandatory, as emphasized by the use of the word "shall" in the statute:[69] "Each action so transferred *shall* be remanded by the panel . . . ."[70] The Court added that "[i]f we do our job of reading the statute whole, we have to give effect to this plain command, even if doing that will reverse the longstanding practice under the statute and [Panel Rule 14(b)]."[71] None of the arguments raised by Milberg and Cotchett could "unsettle the straightforward language imposing the Panel's responsibility to remand, which bars recognizing any self-assignment power in a transferee court and consequently entails the invalidity of the Panel's Rule 14(b)."[72]

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[60] *Id.*

[61] *Id.* at 30.

[62] *Lexecon*, 523 U.S. at 30.

[63] *Id.*

[64] *Id.* at 31.

[65] *Id.* at 32.

[66] *Id.*

[67] *Id.* at 38–40.

[68] *Lexecon*, 523 U.S. at 40.

[69] *Id.* at 35.

[70] 28 U.S.C. § 1407(a) (2008) (emphasis added).

[71] *Lexecon*, 523 U.S. at 35 (internal citations omitted).

[72] *Id.* at 40.

C. *The Effect of* Lexecon *on Multidistrict Litigation Practice and Procedure*

The Judicial Panel on Multidistrict Litigation Rules of Procedure were revised to match the *Lexecon* holding prohibiting transfer by the transferee judge. Former Rule 14(b), which was invalidated in *Lexecon*, was removed. Rule 7.6(b) was amended to reflect the ruling in *Lexecon* and provides that "[e]ach action transferred only for coordinated or consolidated pretrial proceedings that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial."[73] Unlike former Rule 14(b), no language permits the transferee judge to transfer a case under § 1404 or 1406.[74] This language is now consistent with § 1407.

While the *Lexecon* case specifically involved only self-transfer by a § 1407 transferee court, the Supreme Court suggested that the language of § 1407 would also bar a transferee court from granting a § 1404(a) motion to transfer a case to any court.[75] Based on the "Supreme Court's interpretation of the mandatory remand language, there is no apparent reason that the *Lexecon* ruling would not bar a § 1404 transfer to a court *other than* the transferee court. Under the Supreme Court's analysis, either type of transfer would run afoul of the mandatory remand language."[76]

Subsequent cases have upheld *Lexecon*. In *In re Roberts*, the court addressed the question of whether the authority to remand a transferred case can lie with the transferee district judge.[77] The court held that "§ 1407(a) and *Lexecon* indicate that the power to remand a transferred case to the transferor court lies with the Panel, not the transferee district judge."[78] Though not all courts agree that mandatory remand is proper, they recognize that the *Lexecon* holding that the Panel's obligation to remand at the completion of pretrial proceedings is "impervious to judicial discretion."[79] The Panel does

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[73] J.P.M.L. RULE OF PROCEDURE 7.6, 28 U.S.C. § 1407 (effective 1998).

[74] *See supra* Part III.A.

[75] *See Lexecon*, 523 U.S. at 41 n.4.

[76] *In re* Commercial Money Ctr., Inc., Equip. Lease Litig., No. 1:02-CV-16001-KMO, at *36 (N.D. Ohio Mar. 1, 2007) (order denying Sky Bank's motion to dismiss for lack of personal jurisdiction).

[77] *In re* Roberts, 178 F.3d 181, 181 (3d Cir. 1999).

[78] *Id.* at 184. Section 1407 places on the Panel the mandatory obligation to remand a transferred case to the transferor court. *Id.* (citing *Lexecon*, 523 U.S. at 34). While the power to remand lies with the Panel, "[Panel Rule 14(c)] clearly states that the Panel must consider remand on the suggestion of the transferee district judge." *Id.*

[79] *See, e.g., In re* Wilson, 451 F.3d 161, 172 (3d Cir. 2006) (quoting *Lexecon*, 523 U.S. at 35) (acknowledging that remand is mandatory at the conclusion of pretrial proceedings but denying to comment on the soundness of the mandatory remand

have discretion, however, to determine whether remand is appropriate prior to the conclusion of the coordinated or consolidated pretrial proceedings.[80] The Third Circuit recognized that the *Lexecon* Court "concluded that a § 1404 transfer order was outside the scope of the transferee court's authority because a 'necessary consequence of self-assignment by a transferee court [is that] it conclusively thwarts the Panel's capacity to obey the unconditional command of § 1407(a).'"[81] That court held, however, that conducting settlement conferences in the transferee court does not "conclusively thwart" the Panel's ability to remand and is therefore within the transferee court's power.[82] The transferee court does have the authority to decide the entire case summarily at the pretrial stage.[83]

The courts and litigants have come to accept that *Lexecon* prohibits transferee judges from granting §§ 1404(a) and 1406 transfer motions outright. This does not mean, however, that they are satisfied with the result. Litigants have devised several procedural mechanisms by which they can get around the undesired result of remand to the transferor court or make the best of the remand situation.

IV. PROCEDURAL ATTEMPTS TO AVOID *LEXECON*

The *Lexecon* ruling has produced some inefficient consequences, but in some cases, parties have found ways to circumvent those consequences. The *Lexecon* mandate, in essence, can be subverted as litigants attempt to steer the course of the action. Various practices and procedures exist, such that a particular case, for example, may go to trial in the transferee court or be

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procedure); *In re* Methyl Tertiary Butyl Ether Prods. Liab. Litig., No. 1:00-1898, MDL 1358, 2005 WL 106936, at *4 (S.D.N.Y. Jan. 18, 2005) (acknowledging but criticizing the *Lexecon* mandatory remand procedure).

[80] *In re Wilson*, 451 F.3d at 172–73 (expressing frustration with the remand procedure in that the court was bound by the Panel's reluctance to suggest remand prior to the conclusion of pretrial proceedings, which "continue[d] to limit [the court's] ability and inclination to decide otherwise at this time").

[81] *In re* Patenaude, 210 F.3d 135, 146 (3d Cir. 2000) (quoting *Lexecon*, 523 U.S. at 36).

[82] *Id.*

[83] *In re* African-American Slave Descendants Litig., 471 F.3d 754, 757 (7th Cir. 2006). The transferee court is responsible for overseeing the coordinated and consolidated pretrial proceedings, and in order to do so effectively, the court must rule on a variety of pretrial motions, including those that may be dispositive.

However, *African-American Slave Descendants* is to be read "narrowly as authorizing a transferee court . . . to decide *only* motions to dismiss and other potentially dispositive *pretrial* motions, and not to preside over the trial itself." Armstrong v. La Salle Bank, No. 01 C 2963, MDL 1417, 2007 WL 704531, at *3 (N.D. Ill. March 2, 2007).

bound by the outcome of other cases in the coordinated pretrial proceedings. While these procedures do enable litigants to have their case heard in the district they choose, these options may be appropriate only in limited circumstances. Therefore, these alternatives are insufficient for alleviating the burdens established by *Lexecon* and § 1407, and greater reform is necessary so that litigants do not need to undergo these procedural hassles. This section reviews these procedures.

A. *Transfer Under 28 U.S.C. § 1404 as an Alternative to § 1407 Transfer to the Desired Transferee District*

A civil action pending in a district court and involving common questions of fact with actions previously transferred under § 1407 is a "tag-along action."[84] Before discovery, if a case may be a tag-along, the parties are advised to notify the Panel, who will consider formal designation of the case as a tag-along and transfer it pursuant to § 1407.[85]

As an alternative, the parties to such a case may move the district court itself to transfer the case under 28 U.S.C. § 1404(a) to the transferee district.[86] Then, the case will be in that district permanently and need not be remanded to the transferor district.[87] For this transfer to be appropriate, however, the moving parties must show that the transfer is for the convenience of the parties and witnesses and in the interest of justice.[88] Venue must also be proper.[89]

Some courts have found § 1404 transfers of related actions to be appropriate.[90] With this type of transfer, the related cases from the transferee

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[84] J.P.M.L. RULE OF PROCEDURE 1.1, 28 U.S.C. § 1407 (2008). When an action is similar to cases currently pending in multidistrict litigation, the action may be transferred to the existing MDL under § 1407. 28 U.S.C. § 1407(a) (2008).

[85] *See* J.P.M.L. RULES OF PROCEDURE 7.4, 7.5, 28 U.S.C. § 1407 (2008).

[86] "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (2008).

[87] Section 1404(a) provides for permanent transfer of the action. The Panel has no control over an action transferred through § 1404; a § 1404 transfer "makes it impossible for the Panel to remand even though the action has not been terminated . . . ." *In re* Patenaude, 210 F.3d 135, 146 (3d Cir. 2000).

[88] 28 U.S.C. § 1404(a) (2008). In addition to reasons of the convenience of parties and the interest of justice, some courts also grant a transfer to avoid inconsistent results. *See, e.g.*, Schecher v. Purdue Pharma, 317 F. Supp. 2d 1253, 1262 (D. Kan. 2004).

[89] *See* 28 U.S.C. § 1404(a) (2008).

[90] *See, e.g.*, LeMaster v. Purdue Pharma Co., No. Civ.A. 04-147-DLB, 2004 WL 1398213, at *1 (E.D. Ky. June 18, 2004) (citing *In re* Oxycontin Antitrust Litig., 314 F. Supp. 2d 1388 (J.P.M.L. 2004)). By way of background, in *In re Oxycontin Antitrust*

district and the case transferred under § 1404(a) are pending in the same district, but are not consolidated and not necessarily before the same judge, which is a downside of § 1404(a) transfer when done only to avoid § 1407.[91] When the number of related actions grows too large, however, courts and the Panel deny § 1404(a) motions in favor of consolidating the cases with the transferee district under § 1407.[92] The Panel has stated that transfer under § 1407 is more appropriate because it has the "salutary effect of placing all actions in this docket before a single judge who can formulate a pretrial program that ensures that pretrial proceedings will be conducted in a manner leading to the just and expeditious resolution of all actions to the overall benefit of the parties."[93]

Though a § 1404 transfer allows litigants to circumvent the *Lexecon* remand requirement, this procedure is not always available. For example, when the number of actions to be transferred is large, the Panel may decide that consolidation on the docket of a single judge is better than transferring all of the actions just to a particular district under § 1404, where any judge could receive the case.[94] In such instances, the parties may be bound by the mandatory remand. Aside from this potential obstacle, § 1404(a) also specifies particular requirements for transfer, and these conditions are not always met. First, § 1404 can only be invoked if transfer is for the convenience of parties and witnesses and in the interest of justice.[95] Second, transfers are also inappropriate when the transferee district is an improper

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Litigation, forty-one tag-alongs related to the *LeMaster v. Purdue Pharma* action were transferred to the Southern District of New York by the Panel pursuant to § 1407. *In re Oxycontin Antitrust Litig.*, 314 F. Supp. 2d at 1390. In *In re Oxycontin Antitrust Litigation*, the Panel decided that § 1407 transfer was preferable to § 1404(a) transfer because under § 1407, all of the transferred actions would be placed in front of a single judge who could best coordinate pretrial proceedings. *Id.*

Defendants in *LeMaster*, the moving party for the § 1404(a) transfer, had already notified the Panel of this action as a tag-along, but decided that rather than wait for the Panel to determine that this case too was a tag-along, the district court itself could grant a § 1404(a) motion more immediately. *LeMaster*, 2004 WL 1398213 at *1. The Eastern District of Kentucky went through the traditional § 1404(a) analysis and concluded that § 1404 transfer was appropriate. *Id.*

[91] *See* 28 U.S.C. § 1404(a) (2008).

[92] *See, e.g., In re* Oxycontin Antitrust Litig., 314 F. Supp. 2d 1388 (J.P.M.L. 2004).

[93] *Id.* at 1390. It is likely that the *LeMaster* district court (discussed *supra* note 90) decided that transfer under § 1404 was adequate because the court was considering a single case. With the forty-one cases in *In re Oxycontin Antitrust Litigation*, the Panel decided that § 1407 transfer was best "[g]iven that the number of related actions continues to grow, along with the potential need for additional motions to transfer venue." *Id.*

[94] *See* discussion *supra* note 93.

[95] 28 U.S.C. § 1404(a) (2008).

venue.[96] If the related action could not have been brought in the transferee district due to the venue requirements of 28 U.S.C. § 1391,[97] the litigants may be unable to achieve permanent transfer and instead may have to face § 1407 and mandatory remand.

When successful, § 1404 transfers to the transferee district allow the case to remain in that court, whereas cases transferred only temporarily pursuant to § 1407 must be remanded by the Panel at a greater expense to the parties and witnesses. Though § 1404(a) transfers provide parties with an option for a permanent way to remain in the transferee district for trial, this mechanism is not always available and is not always successfully invoked. Parties may be denied § 1404(a) transfer when venue is inappropriate or the number of cases to be transferred is too great. As such, the § 1404 transfer mechanism is insufficient to alleviate the burden of the mandatory remand procedure in multidistrict litigation.

B. *Consent to Venue or Consent to Trial in the Transferee District*

Parties may stipulate that venue is proper in the transferee district or consent to hold the trial in the transferee court.[98] This mechanism eliminates the need for remand and re-transfer to the transferee district.[99] The Panel recognized that the *Lexecon* Court "did not foreclose all possibility that a transferee judge could try an action that had been transferred to him or her under section 1407 so long as the parties waived their entitlement to remand under section 1407."[100] The *Lexecon* decision does not inhibit parties' ability to waive the venue requirements of 28 U.S.C. § 1391. Instead, "[i]t is clear from the Court's opinion in *Lexecon* that section 1407 is not a jurisdictional limitation, but rather 'a venue statute that . . . categorically limits the authority of courts (and special panels) to override a plaintiff's choice [of

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[96] Transfer may only be "to any other district or division where [the action] might have been brought." *Id.*

[97] For general venue provisions, see 28 U.S.C. § 1391 (2008).

[98] Solis v. Lincoln Elec. Co., No. 1:04-CV-17363, 2006 WL 266530, at *3 (N.D. Ohio, Feb. 1, 2006) (citing Catz v. Chalker, 142 F.3d 279, 284–85 (6th Cir. 1998)), *amended*, 243 F.3d 234 (6th Cir. 2001) (noting that because § 1407 is a venue statute, which is "critical because 'venue is personal and waivable[,]' . . . a plaintiff may decide not to raise an otherwise-valid objection to venue and 'consent to remain in the transferee district for trial'").

[99] William J. Martin, *Reducing Delays in Hatch-Waxman Multidistrict Litigation*, 71 U. CHI. L. REV. 1173, 1192 (2004).

[100] *In re* Brand-Name Prescription Drugs Antitrust Litig., 264 F. Supp. 2d 1372, 1377 n.4 (J.P.M.L. 2003); *see also In re* Carbon Dioxide Indus. Antitrust Litig., 229 F.3d 1321, 1326 (11th Cir. 2000) (allowing parties to stipulate to trial in the transferee court when their actions had been transferred pursuant to § 1407).

forum].'"[101] However, as the pretrial process carries on, parties may realize that remaining in the transferee district for trial better suits their situation, and stipulating that venue is proper achieves the parties' interests while still respecting the plaintiff's choice of forum.

Though a viable option, this mechanism has not gained the favor of many jurisdictions.[102] It has been suggested that this method is improper and courts may deny parties the ability to stipulate to venue.[103] At the very least, even if courts do not allow parties to consent to trial in the transferee district, and the case is remanded, parties can still stipulate that venue is proper in the transferee district in hopes of facilitating a § 1404 or 1406 transfer back to that district after remand. Again, though, these procedural hassles imposed by *Lexecon* burden parties by adding to the time and expense of the litigation.

C. *Stipulation to be Bound by the Outcome in "Bellwether" Cases*

Another mechanism for the retention of transferred cases is by agreement to be bound by "bellwether" trials of a centralized action originally filed in

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[101] *In re Carbon Dioxide Indus. Antitrust Litig.*, 229 F.3d at 1326. During the early 1990s, the Panel transferred consolidated cases to the United States District Court for the Middle District of Florida under § 1407. *Id.* at 1322. Upon the conclusion of pretrial proceedings, the parties agreed that the cases would remain in the Middle District of Florida for trial. *Id.* After the transferee court held for the defendants (and after the *Lexecon* opinion was issued), the plaintiffs requested relief from judgment on the grounds that the cases should have been remanded to their original districts pursuant to § 1407. *Id.* at 1325. The issue in the case was whether the *Lexecon* decision invalidated the stipulation that venue was proper and the parties' request that the transferee district try their cases. *Id.* at 1324. The Eleventh Circuit affirmed the district court's decision on the grounds that these cases were distinguishable from *Lexecon* in that the parties in the *Carbon Dioxide* cases failed to raise the issue of remand until the day of jury selection and had stipulated that venue was proper. *Id.* at 1326. In contrast, Lexecon requested remand early in the case and continuously objected that the remand procedure had not been followed. *Id.* (citing Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 43 (1998)).

[102] "The scarcity of jurisdictions to condone this tactic suggests that it has not yet entered the judicial mainstream." Martin, *supra* note 99, at 1192. Additionally, the Eleventh Circuit suggested that this stipulation practice may not always be successful; though the court permitted stipulation to venue in this case based on the parties' actions throughout pretrial proceedings, the court also recognized that it may have been error for the transferee court to refuse to suggest remand to the Panel. *In re Carbon Dioxide Indus. Antitrust Litig.*, 229 F.3d at 1326.

[103] Martin, *supra* note 99, at 1192.

the transferee district.[104] Under current practice, cases transferred pursuant to § 1407 are remanded to their originating districts following coordinated pretrial proceedings. Attorneys in the remanded cases can then stipulate that they will be bound by the result in bellwether trials pending before the transferee judge.[105] Under this method, randomly selected representative actions, the bellwethers, are adjudicated in the transferee district.[106] The related actions that had been remanded are then bound by the outcome in those cases. Trials are still held for those remaining actions, but issues such as causation and liability, which were determined in the bellwether trial, are already decided and binding.

This method carries several advantages. First, the parties who wanted to remain in the transferee district for trial essentially benefit from the adjudication process in the transferee district, in that the outcome of the case in the transferee district controls the outcome in the remanded cases. The costs of subsequent trials in the transferor district are thus conserved greatly as many of the main issues are already determined and need not be re-tried. The results of the bellwether trial are beneficial in providing information about the value of the cases as determined by a jury verdict.[107] This information aids both sides to an action in achieving fair and favorable settlements. Thus, the trial in the originating districts often are less likely to occur because the parties can come to more intelligible settlements. This stipulation provides an expeditious way of determining some or all of the major common issues of the coordinated cases in a relatively small number of trials.[108]

Despite these advantages, the remanded cases must still go through the procedural hassles of remand and then wait for the outcome in the bellwether cases. Those pending remanded cases must then have their own trials. This

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[104] "The term bellwether is derived from the ancient practice of [placing a bell around the neck of] a wether (a male sheep) . . . to lead [the] flock. The ultimate success of the wether selected to wear the bell was determined by whether the flock had confidence that the wether would not lead them astray, and so it is in the mass tort context." *In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997).

[105] *See In re* Welding Fume Prod. Liab. Litig., Nos. 1:03-CV-17000, MDL 1535, 2006 WL 2869548, at *1 (N.D. Ohio, Oct. 5, 2006); WRIGHT, MILLER & COOPER, FEDERAL PRACTICE, *supra* note 1, § 3866.2.

[106] *In re Chevron*, 109 F.3d at 1019. The key to a bellwether trial is that the selected cases that are tried must be representative of all the actions. In order to achieve its goals of determining causation and liability, as well as the value of the case, in a way that is meaningful to "the universe of claimants," "the sample must be a randomly selected one of sufficient size so as to achieve statistical significance to the desired level of confidence in the result obtained." *Id.*

[107] *Id.*

[108] *See* WRIGHT, MILLER & COOPER, FEDERAL PRACTICE, *supra* note 1, § 3866.2.

process can be greatly minimized by allowing all cases to remain in the transferee district for trial. Additionally, the method of selecting the appropriate cases for the bellwether trials may unduly increase the role of the courts in justly and efficiently processing cases. A trial court may only use the results from bellwether trials when the court finds that the tried cases were representative of the larger group of cases from which they were selected.[109] In order to make this determination, the court must find "competent, scientific, statistical evidence that identifies the variables involved and that provides a sample of sufficient size so as to permit a finding that there is a sufficient level of confidence that the results obtained reflect results that would be obtained from trials of the whole."[110] Of course this requirement is logical because it insulates the cases from due process and fundamental fairness concerns, but this extra work imposed upon the trial court can be avoided if the cases were simply permitted to remain in the transferee district for trial.

D. *Dismiss and Refile in the Transferee District*

A self-explanatory option for getting the action to the district of choice is that the plaintiff can dismiss the case and refile the action in the transferee district. Though this method is relatively simple, it does not come without challenges.[111] It imposes the added expenses of time and money that could be avoided if self-transfer to the transferee district was permitted. Additionally, venue must be proper in the transferee district. The defendant may also need to agree to this option in order to waive venue if it is improper in the new district or if the statute of limitations has run.[112]

E. *Transferor Court Transfers Action Back to Transferee Court After Panel Remands*

After the Panel remands the action to the originating district following pretrial proceedings, the parties may move the originating district to transfer the action under 28 U.S.C. § 1404 or 1406 to the transferee district.[113] The transferee court can facilitate this transfer by recommending it when it

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[109] *In re Chevron*, 109 F.3d at 1020.

[110] *Id.*

[111] *See* John F. Nangle, *From the Horse's Mouth: The Workings of the Judicial Panel on Multidistrict Litigation*, 66 DEF. COUNS. J. 341, 345 (1999).

[112] *Id.*

[113] Thomas J. McLaughlin & Adam N. Steinman, *The Multiparty, Multiforum Trial Jurisdiction Act's Impact on Major Accident Litigation*, 34 FALL BRIEF 16, 21 (2004).

suggests remand to the Panel.[114] At this point, the transferor court will go through its standard § 1404(a) analysis of ensuring that (1) venue is proper in the transferee district, (2) transfer is for the convenience of the parties and witnesses, and (3) transfer is in the interest of justice.[115] If the motion is granted, the moving party is then in the district of choice for trial, whether it be the transferee district or another district altogether.

Though this method is also relatively simple and complies with *Lexecon*, it creates such a hassle for litigants that an easier, more direct route to the transferee court should be established. This "compulsory and mechanical series of transfers impairs the statute's underlying purpose of enhancing judicial economy."[116] Instead of going through these procedural hoops to ultimately return the case to the transferee court, the action should be able to remain in the transferee court instead of being remanded by the Panel.

F. *Intercircuit or Intracircuit Assignment of Transferee Judge to Preside Over Trial in Originating District*

The transferee judge could request an intercircuit or intracircuit transfer under 28 U.S.C. § 292 or 294 in order to preside over the trial of a remanded action in its originating district.[117] The chief judge of the district or circuit to which the transferee judge would be transferred must certify the need for transfer to the Chief Justice of the United States.[118] The Chief Justice would then order the transfer.

This procedure has the benefit of allowing the transferee judge to hear the actions that he has become familiar with throughout the course of pretrial proceedings. Intercircuit and intracircuit transfer, however, is a "cumbersome and inefficient procedure."[119] This process is much more complicated and time-consuming than simply transferring the cases directly to the transferee judge's trial docket.

These procedural hassles are a necessary evil in order for litigants to achieve their goals of the litigation, but the current system conflicts with the purpose of multidistrict litigation of enhancing judicial economy. With numerous methods available by which litigants technically abide by

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[114] Nangle, *supra* note 111, at 345.

[115] Altamont Pharm., Inc. v. Abbott Labs., No. 94 C 6282, 2002 WL 69495, at *2 (N.D. Ill. Jan. 18, 2002) (holding that an originating district may grant a § 1404(a) motion following remand by the Panel).

[116] WRIGHT, MILLER & COOPER, FEDERAL PRACTICE, *supra* note 1, § 3866.2.

[117] Nangle, *supra* note 111, at 345.

[118] 28 U.S.C. § 292(d) (2008).

[119] Martin, *supra* note 99, at 1193.

Lexecon's mandatory remand yet work around the remand to land the case in the forum or before the judge of their choice, it is perplexing that this absurdity has been allowed to continue for ten years without reform of § 1407. Congress has long recognized the need for a *Lexecon* reform, but to date, no such reform has been enacted.

V. CONGRESSIONAL ACTION AND INACTION

In *Lexecon*, the Supreme Court recognized that the procedure for remand established in that case may be undesirable or inefficient.[120] Justice Souter, writing for the Court, noted, however, that "the proper venue for resolving that issue remains the floor of Congress."[121] With this suggestion from the Court, Congress has been active in writing legislation to reverse the mandatory remand result of *Lexecon*, but legislation to that effect has not yet been passed into law.

After the *Lexecon* decision in 1998, the Judicial Conference of the United States, the policymaking arm of the federal judiciary, requested that Congress amend § 1407 to remove the mandatory remand requirement and permit transferee judges to retain cases for trial.[122] In response to these requests, among others, the Senate Judiciary Subcommittee on Administrative Oversight and the Courts investigated the MDL situation.[123] Members of the Judicial Panel on Multidistrict Litigation itself have also spoken out that reform of the *Lexecon* result is necessary. United States District Judge John F. Nangle, former Chairman of the Panel, testified before the House Subcommittee on Courts and Intellectual Property Committee on the Judiciary that the mandatory remand procedure is "a cumbersome, repetitive, costly, potentially inconsistent, time consuming, inefficient and wasteful utilization of judicial and litigants' resources."[124] In support of this position, he wrote that based on his experience as Chairman of the Panel over several years, he has come to know that both plaintiff and defense counsel have agreed for the most part that self-transfer is a useful practice in handling

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[120] Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 40 (1998). "Milberg may or may not be correct that permitting transferee courts to make self-assignments would be more desirable than preserving a plaintiff's choice of venue (to the degree that § 1407(a) does so)." *Id.*

[121] *Id.*

[122] Marcia Coyle, *Bill to Fix* 'Lexecon' *Sought in Congress, Issue is Handling of Multidistrict Cases*, NAT'L L.J., Jul. 19, 2006, at 1, 18.

[123] *Id.*

[124] *Hearing on H.R. 2112 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 106th Cong. 56 (1999) (statement of the Honorable John F. Nangle, Chairman, Judicial Panel on Multidistrict Litigation).

MDL dockets.[125] United States District Judge William Terrell Hodges, another former Chairman of the Panel, told the Senate Judiciary Subcommittee that amendment to § 1407 is "vital" for three reasons: first, to facilitate settlements; second, to reduce waste of judicial resources due to litigating these cases in multiple jurisdictions; and third, to curb the uncertainties, delays, and expense that parties have experienced due to unnecessary duplication of litigation or inconsistent results in similar cases from different jurisdictions.[126] Hodges also presented to the subcommittee the statements of twenty-seven transferee judges who were dissatisfied with the effect of *Lexecon* on their multidistrict litigation docket.[127]

Bills to amend § 1407 have been considered in various forms since the 101st Congress in the early 1990s. The House of Representatives has been more active in drafting legislation to serve as a *Lexecon* "fix." Representative James F. Sensenbrenner (R-WI), then Chairman of the Committee on the Judiciary, introduced the Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999 to amend § 1407 to authorize a judge to whom a case is transferred in multidistrict litigation to retain jurisdiction for trial.[128] The House recognized that *Lexecon* has created significant problems that "have hindered the sensible conduct of multidistrict litigation" and drafted this legislation with the objective of improving the *Lexecon* result.[129] The bill was passed in the House in September 1999. A month later, Senator Orrin Hatch (R-UT) introduced the Multidistrict Jurisdiction Act of 1999 (the Senate's name for the Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999) as S. 1748 into the Senate.[130] This bill was read twice and referred to the Committee on the Judiciary, where it passed with an amendment in the nature of a substitute.[131] The Senate's amendment to the House bill struck most provisions not relating to overturning *Lexecon*, and the House disagreed with this action.[132] The House, however, agreed to go to conference on the proposed legislation and appointed conferees, but the

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[125] Nangle, *supra* note 111, at 346.

[126] Coyle, *supra* note 122, at 18.

[127] *Id.*

[128] Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999, H.R. 2112, 106th Cong. (1999).

[129] H.R. REP. NO. 106-276, at § 2 (1999).

[130] Multidistrict Jurisdiction Act of 1999, S. 1748, 106th Cong. (1999).

[131] *Id.*

[132] Stephen R. Stegich & David P. Yates, *MDL Consolidation of Aviation Disaster Cases Before and After* Lexecon, 67 DEF. COUNS. J. 226, 234 (2000).

Senate did not agree to a conference.[133] As such, this would-be *Lexecon* fix was never passed by both houses.[134]

Rep. Sensenbrenner later authored H.R. 860 during the 107th Congress to undo *Lexecon*.[135] This legislation would also have had the effect of codifying the pre-*Lexecon* procedure of allowing the transferee court to preside over transferred actions for trial.[136] This bill passed in the House but died in the Senate Committee on the Judiciary.[137] The House of Representatives has upon multiple occasions passed its version of the "Multidistrict Litigation Restoration Act," which would allow a judge, to whom a case is transferred for pretrial proceedings in multidistrict litigation, to retain jurisdiction over the case for trial.[138] Both the 2003 and 2005 versions of the Act also specify 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.[139]

These bills were designed in response to Justice Souter's admonition to reverse the effects of the Supreme Court's interpretation of § 1407 in *Lexecon*. This bill would "function as a technical fix to a recently-enacted 'disaster' litigation statute from the 107th Congress. The bill would save

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[133] *Id.*

[134] Ultimately, Congress did pass a version of the Multidistrict, Multiparty, Multiform Trial Jurisdiction Act in 2002, but this version did not include any provision to amend § 1407. Multiparty, Multiforum Trial Jurisdiction Act of 2002, Pub. L. No. 107-273, § 11,020, 116 Stat. 1758, 1826-29 (codified as 28 U.S.C. §§ 1369, 1391, 1441, 1697, 1785 (Supp. 2003)). The removal of the *Lexecon*-related material may have been an intentional result of negotiations between the House and the Senate, but this removal is also somewhat mysterious. Angela J. Rafoth, *Congress and the Multiparty, Multiforum Trial Jurisdiction Act of 2002: Meaningful Reform or a Comedy of Errors?*, 54 DUKE L.J. 255, 279 n.106 (2004). The effect of the removal of the § 1407 amendment has reduced the effectiveness of the Multiparty, Multiforum Trial Jurisdiction Act in that the transferee court still cannot retain the consolidated cases for trial.

[135] *See* 151 CONG. REC. H2120 (daily ed. Apr. 19, 2005) (discussing the history of Rep. Sensenbrenner's proposal to reverse the *Lexecon* ruling). Rep. Sensenbrenner made several attempts to pass such legislation, the first being during the 105th Congress.

[136] *Id.*

[137] On a side note, the "disaster litigation" portion of H.R. 860 was resurrected and passed during House-Senate conference deliberations on the Department of Justice Authorization Act in 2002 and is now codified as 28 U.S.C. § 1369. *See* 151 CONG. REC. H2120 (daily ed. Apr. 19, 2005) (statement of Rep. Sensenbrenner).

[138] Multidistrict Litigation Restoration Act of 2003, H.R. 1768, 108th Cong. (2004); Multidistrict Litigation Restoration Act of 2005, H.R. 1038, 109th Cong. (2005).

[139] *Id.* Ordinarily, a case tried in the transferee district would be remanded to the transferor district for the determination of compensatory damages.

litigants time and money . . . ."[140] Rep. Sensenbrenner submitted the House Report that states that "since *Lexecon*, significant problems have arisen that have hindered the sensible conduct of multidistrict litigation. Transferee judges throughout the United States have voiced their concern to the [Panel] about the urgent need to clarify their authority to retain cases for trial."[141] The Report went on to point out that actions in multidistrict litigation "should be streamlined . . . by providing the transferee judge as many options as possible to expedite trial when the transferee judge, with full input from the parties, deems appropriate. In other words, there is a pressing need to recreate the multidistrict litigation environment that existed before *Lexecon*."[142] The 2003 version was passed by the House during the 108th Congress by a rollcall vote of 418–0.[143] On March 25, 2004, the bill was referred to the Senate and died in the Senate Judiciary Committee.[144]

The Multidistrict Litigation Restoration Act of 2005 was identical to the 2003 version. The House again reported that for approximately thirty years before *Lexecon*, the transferee district courts often invoked § 1404 to retain jurisdiction for trial, and this process had worked well since the transferee court was well-versed in the facts and law of that litigation.[145] The bill stated that "there is a pressing need to recreate the multidistrict litigation environment that existed before the *Lexecon* decision."[146] The bill passed in the House on April 19, 2005. The next day, the bill was referred to the Senate and directed to the Senate Committee on the Judiciary.[147] Again, the bill died at the adjournment of Congress at the end of the session.

While the House was considering passage of the Multidistrict Litigation Restoration Act and similar legislation multiple times consistently over the years, the Senate's attempts to amend *Lexecon* were more sporadic. Finally, in 2006, Senator Hatch introduced the Multidistrict Litigation Restoration Act of 2006 in the Senate.[148] Senator Hatch recognized the problems with the *Lexecon* result that had long been acknowledged by the House of Representatives and practitioners, judges, and commentators. Like the House version, S. 3734 would allow the transferee judge to transfer the case for

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[140] H.R. REP. NO. 108–416, at 3 (2004).

[141] *Id.*

[142] *Id.*

[143] 151 CONG. REC. H2121 (daily ed. Apr. 19, 2005).

[144] Multidistrict Litigation Restoration Act of 2003, H.R. 1768, 108th Cong. (2004).

[145] Multidistrict Litigation Restoration Act of 2005, H.R. 1038, 109th Cong. § 2 (2005).

[146] *Id.*

[147] *Id.*

[148] 152 CONG. REC. S8272 (daily ed. July 26, 2006).

trial. Senator Hatch stated this amendment to current law would "return the law to what was in effect for almost three decades prior to the *Lexecon* decision. It will provide the MDL Panel with the most efficient option for resolving complex issues, the best means to encourage universal settlements, and the most consistent approach for rendering decisions."[149]

After proposal of this bill, it was read twice and referred to the Senate Committee on the Judiciary.[150] No further action was taken on this bill. As of the writing of this Note, no legislation to amend multidistrict litigation procedure and § 1407 is pending in Congress.

Now that a decade has passed since the *Lexecon* decision reversed the standard that had operated successfully over the thirty year period, real reform is necessary. Congress has been toying with the idea of reform for far too long. Perhaps what Congress needs is a fresh proposal, one that is simple yet directly implements the desired reform while still respecting plaintiffs' choice of forum, the convenience of the parties, and the interest of justice.

VI. A CALL FOR REFORM

Members of the legal community, including Congressmen, judges, Panel members, practitioners, and scholars, have also identified the need to amend § 1407. This section begins with a recognition of statements and appeals of such individuals of the importance of a change of the *Lexecon* result. Then this Note advances a new proposal for reform of the *Lexecon* decision that would create a system similar to the pre-*Lexecon* status quo yet account for concerns with unbridled transfer under §§ 1404(a) and 1406.

A. *Urgings for Amendment from Others*

Practitioners, judges (including those on the Panel), and Congressmen have identified and called for an amendment of the mandatory remand procedure established by § 1407 and *Lexecon*. A "*Lexecon* fix . . . is needed and would be welcomed by counsel who litigate these complex and multiparty cases."[151]

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[149] *Id.* at S8273.

[150] Multidistrict Litigation Restoration Act of 2005, S. 3734, 109th Cong. (2006) (stating that the latest major action occurred on July 26, 2006, where it was read twice and referred to the Senate committee).

[151] Stegich & Yates, *supra* note 132, at 236. In the aviation litigation context, after *Lexecon*, MDL courts provide "effective case management, overseeing discovery, ruling on jurisdictional and remand issues, facilitating settlement negotiations, and making rulings on the applicability of law." *Id.* at 232. Defendants commonly use tag-along procedures to achieve consolidation, but also move simultaneously in the originating court for permanent transfer to the MDL district under § 1404(a). *Id.* Litigants would

Former Chairmen of the Judicial Panel for Multidistrict Litigation William Terrell Hodges and John F. Nangle testified before Congress as to the necessity for reform of § 1407 to remove the mandatory remand requirement.[152] Judge Robert W. Sweet of the Southern District of New York stated that "*Lexecon* has substantially eviscerated the practical purposes of the MDL assignments. After all, pretrial discovery and related proceedings simply set the stage for ultimate resolution."[153] The benefits of consolidation could best be achieved if "the assigned judge [had] the ability to conduct a consolidated trial on liability. Such a power would greatly enhance the possibility of settlement, and, most importantly, eliminate the threat of inconsistent determinations throughout the country."[154] Senior Judge James B. Moran of the Northern District of Illinois has considered remand to be a "meaningless exercise" and recognized that allowing actions to remain in the transferee district, where the judge has become so familiar with the case, is best.[155]

Even the writers of the Manual for Complex Litigation, members of the Federal Judicial Center, have recognized that the policy reasons for the pre-1998 practice remain.[156] The Federal Judicial Center "has long considered it '[a] major deficiency in MDL procedure . . . that the [P]anel does not have statutory authority to transfer cases for trial.'"[157]

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prefer, however, a reform of *Lexecon* rather than relying on the not-always-available § 1404(a) transfer.

[152] *See supra* Part V.

[153] Stegich & Yates, *supra* note 132, at 236 (reciting a letter written by Judge Sweet and quoted by Judge Nangle).

[154] *Id.*

[155] Armstrong v. La Salle Bank, No. 01 C 2963, MDL 1417, 2007 WL 704531, at *5 (N.D. Ill. Mar. 2, 2007). Senior Judge Moran acknowledged that remand in this case would be worthless and would merely frustrate judicial economy since the parties would reconsolidate the cases in the originating district after remand and then move to transfer them back to the Northern District of Illinois pursuant to § 1404(a) for trial. *Id.* This case certified two questions for immediate interlocutory appeal to the United States Court of Appeals for the Seventh Circuit, one of which was to determine "[w]hether the filing of an amended complaint agreeing to venue and jurisdiction in the transferee court, . . . constitutes consent to trial in the transferee court sufficient to overcome the right to seek remand under 28 U.S.C. § 1407(a) and the Supreme Court's decision in *Lexecon* . . ." *Id.* at *6. The Seventh Circuit has not yet issued an opinion regarding this question.

[156] MANUAL FOR COMPLEX LITIGATION, *supra* note 20, § 20.132; *supra* Part III-A.

[157] Delaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 152 (D. Mass. 2006) (first alteration in original) (quoting THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER, TRENDS IN ASBESTOS LITIGATION (1987)). The *Delaventura* court concluded that current multidistrict litigation practice is "seriously flawed" because it proceeds in a manner that favors defendants. *Id.* at 159.

To date, however, no such amendment has been passed. With the requests for amendment stretching almost a decade, it is time for reform.

B. *A Fresh Proposal*

There are several reasons why Congress must amend § 1407 to reverse *Lexecon*. First, it is odd that the transferee judge, who has so much power during pretrial proceedings, is then rendered powerless after the pretrial period. Under current procedure, the transferee judge can *recommend* to the Panel that an action be taken, but beyond that, the transferee court—which has all of the experience with the case and is so familiar with it—cannot do anything.[158] This anomalous situation does not make sense.

Second, in many cases, the parties go through procedural hurdles after remand by the Panel to get around *Lexecon*.[159] For instance, parties often move for a § 1404(a) transfer from the originating district to the transferee district after the Panel has remanded the case.[160] The result of the motion is that the case ends up in the transferee district once again and the trial can be conducted in that district. This is a waste of time and effort; the ultimate result is the same as if the Panel did not require remand. This extended process is more complicated and judicially inefficient.

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[158] J.P.M.L. RULE OF PROCEDURE 7.6(d), 28 U.S.C. § 1407 (2006). According to the Panel's Rules, the Panel considers the remand of any transferred action upon the motion of a party, upon the suggestion of the transferee district court, or upon the Panel's own initiative. However, "the Panel is reluctant to order remand absent a suggestion of remand from the transferee district court." *Id.* Thus, the transferee court's only power in controlling the case following the pretrial proceedings is recommending to the Panel an appropriate time for remand.

In applying these rules, the Panel has noted that the "transferee judge is charged with the day-to-day supervision of centralized pretrial proceedings and, accordingly, has special insight into the question of whether further coordinated or consolidated proceedings are likely to be useful." *In re* Brand-Name Prescription Drugs Antitrust Litig., 264 F. Supp. 2d 1372, 1376 (J.P.M.L. 2003). Because the transferee judge is so deeply involved in these proceedings, he or she is in a unique position to determine when coordinated pretrial proceedings are no longer necessary. For this reason, the Panel relies on the suggestion of remand of the transferee judge. However, remand ignores the observation that the transferee judge is in this unique position to fully understand the case. Remand deprives the transferee judge of his or her experience in the case and removes this judge from the remainder of the action. It is inefficient to remove an experienced judge and throw in a new judge (from the originating district) who is completely unfamiliar with the case and must start from scratch.

[159] *See supra* Part IV.

[160] *See, e.g.* Altamont Pharm., Inc. v. Abbott Labs., 2002 WL 69495, at *2 (N.D. Ill. Jan. 18, 2002).

Lastly, judges, practitioners, and Congress have recognized that the current system requires amendment, as many articles have been published pointing out the flaws and many bills have passed in the House of Representatives that would amend § 1407. A fresh approach to amending the statute is necessary, however, and this Note proposes a new idea for consideration that would encourage reform in a more effective manner.

In amending § 1407 there are certainly competing interests that must be considered, including judicial efficiency versus the plaintiff's choice of forum and the power of the transferee judge versus the power of the Panel. It is both odd and wasteful, however, that transferee judges have so much power during the pretrial proceedings and that parties may go through several procedural steps to get around the mandatory remand procedure established by *Lexecon*. The rule should be changed back to the pre-*Lexecon* way that had worked well for thirty years, where it was common for the transferee judge to grant motions for self-transfer.

In particular, this Note proposes that Congress amend § 1407 to create a default procedure where actions transferred by the Panel to a transferee district for pretrial proceedings are then remanded by the Panel to the transferor court, similar to the procedure currently in place. The parties and the transferee court, however, should have the option to allow the transferee judge to transfer the case under § 1404 or 1406 to either the transferee court or another court of the parties' choice. This mutual consent on behalf of all parties involved and the transferee court ensures that the parties are willing to remain in that district (or be transferred to another district altogether) and can avoid the procedural hassles to return to that district. It also guarantees that the transferee court deems it appropriate for that particular action to go to trial in that court and that the court is capable of adding the case to its permanent docket.

If the parties wish that the case remain in the transferee district or be transferred elsewhere, such requests should be accommodated to promote judicial economy. The parties can stipulate that venue is proper in the district to where they desire the case be transferred. This mechanism would ensure that all parties to the action want to be in the transferee or other district and that the transferee judge deems the transfer to be appropriate in the interests of efficiency and convenience. If venue is improper in the transferee district, requiring all parties to stipulate that venue is proper and requiring consent to trial in that district serve to protect the plaintiff's choice of forum. It is certainly conceivable that throughout the weeks, months, or years of discovery in the MDL, a plaintiff may come to realize that the transferee district, or a district other than the transferor district, is most appropriate for trial. This amendment would facilitate the achievement of the parties' desire to transfer venue while also respecting the notions of judicial economy and preservation of resources.

Another suggestion for reform of § 1407 is to create legislation that solely concerns *Lexecon* and amendment of § 1407. Many of the bills discussed in Part V, among others suggesting reform of the *Lexecon* result, were combined with other legislation that likely received more attention in the Houses of Congress. As a result, the § 1407 amendment provisions were not always at the forefront of the bill, and it is certainly plausible that these provisions were easily removed from the bills in committee in attempts to compromise over other portions of the bills unrelated to *Lexecon.* Streamlining the *Lexecon* amendment into a single bill where it is the sole issue within that bill may force Congress to address *Lexecon* directly instead of bypassing the *Lexecon* concerns in favor of other provisions within the bills.

As fundamental as reform is, there have been criticisms and concerns in amending § 1407.[161] Some of these worries do not even arise under the proposal contained in this Note, and others are offset by counterbalancing benefits of remaining in the transferee district for trial. Because this proposal calms fears about reform, the merits of the proposal are highlighted in that doubts about reform are removed.

One potential concern with allowing all cases to remain in the MDL district instead of being remanded by the Panel is that this practice could be inefficient. With a massive inundation of thousands of cases from the MDL pretrial proceedings suddenly being added to the permanent docket of the transferee district, the transferee judges may be unable to give each case its due attention.[162] The transferee district judge will have such a lengthy docket that it will take more time to move each case through the litigation process.[163] Because the judge is so busy, so the concern goes, he may also be unable or unwilling to focus on the merits of each case, and motions for summary judgment will be granted less frequently.[164] As such, even more cases will have to go to trial and further lengthen the list of cases pending for trial. This concern need not exist if the statute were amended based on the proposal in this Note. Under this version of amendment, the transferee district would have to consent to the case remaining in that district for trial.

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[161] *See, e.g.,* Mark Herrmann, Geoffrey J. Ritts & Brian Ray, *Creating Mini MDL-Statutes*, 32 LITIGATION 39, 41–42 (2005); Larson, *supra* note 38, at 1363–67.

[162] Herrmann, Ritts & Ray, *supra* note 161, at 41. This article addresses the state versions of § 1407 and important concerns in creating state "mini-MDL statutes." The article points to many areas in which the state and federal versions are similar and many in which they are different. The authors provide guidance in drafting mini-MDL procedures and point out area of concern with MDL practice.

[163] *Id.*

[164] *Id.*

This requirement of consent would prevent the transferee court from becoming overly burdened with cases staying in that district for trial.

Another worry about reform is that settlement prospects may not improve if the cases remain coordinated for trial. Throughout the pretrial process, the transferee judge has at his or her disposal means by which reform is encouraged, such as controlling the procedures and pace of discovery and by refusing to suggest to the Panel to remand a case until the parties have taken advantage of all settlement opportunities.[165] It has been argued that the new judge in the originating district, upon remand, has a fresh perspective of the case and can bring about new suggestions for settlement.[166] That the transferor judge may find new ways to encourage settlement is certainly a realistic argument, but the transferee judge still knows the case best and is in a fortunate position to be able to review the history of the settlement negotiations in order to determine what course of action for achieving settlement is most plausible based on past efforts.

A third concern is the potential for abuse of the plaintiff's choice of forum that may arise when the parties remain in the transferee district rather than returning to the transferor district where the plaintiff chose to file the action.[167] This proposal in this Note, however, addresses concerns about the plaintiff's choice of forum by requiring the plaintiff's consent to remain in the transferee district rather than being remanded to the transferor district.[168]

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[165] *Id.*

[166] *Id.*

[167] Larson, *supra* note 38, at 1351–52. Potential fears about disrespecting the plaintiff's choice of forum include choice of law issues, discriminatory treatment from judges, and undue prejudice from a jury. *Id.* at 1352. In one such scenario, plaintiff may have carefully chosen the district of choice to file the action, and defendant then moved to consolidate the action under § 1407. If the case were heard in the transferee district, the court may apply a different law that would lead to "an entirely inappropriate outcome favoring the defendant, who initially moved for consolidation." *Id.* Additionally, according to this author, judges may seek to achieve uniform rather than disparate results, and in effect disregard the individual circumstances of the plaintiff's case. *Id.* This author argues that "there are a number of potential outcome-determinative effects that are likely to be adverse to the plaintiff who is subject to a consolidated trial. These adverse effects make the remand mandate all the more crucial to the plaintiff's substantive rights." *Id.* These fears, however, are unwarranted under the current proposal, which seeks to preserve plaintiffs' rights, choices, and interests by ensuring that the plaintiffs would consent to trial in the transferee district.

[168] In addition to plaintiffs' interests being protected by this proposal, it is also true that "many plaintiffs would not feel the effects of a *Lexecon* 'fix' since transferee courts dispose of almost seventy-five percent of all multidistrict litigation cases before trial through settlement." L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 203

After months or years of coordinated or consolidated pretrial proceedings, the plaintiff may come to realize that trial in the transferee district is best. The plaintiff may become more comfortable in that district or develop a rapport with the MDL judge, or perhaps the plaintiff may decide that district is more convenient than originally thought. Choice of law may not be a major issue in a particular case, and thus a plaintiff may likely choose to remain in that forum. The vast number of procedures that plaintiffs have participated in to avoid the *Lexecon* result suggests that plaintiffs do sometimes change their minds about the most appropriate forum for trial. When they do not decide to transfer venue permanently, they are not bound to such transfer, because they must consent under the proposed amendment to § 1407. Thus, this proposal respects the plaintiff's choice of forum while recognizing that a plaintiff's interests may change over the course of litigation and remaining in the MDL district for trial may become the option in the best interests of both parties.

While there are reasons for concern based on the thought of reform in general, these concerns subside in light of the merits of the proposal. The concerns are counteracted by the benefits of remaining in the MDL district for trial. This proposal takes account of prior concerns and assures that these concerns need not be of worry. The current proposal, whereby remand is the default procedure but parties have the option to consent, with the permission of the transferee court, to remain in the transferee district for trial, acknowledges these concerns and promotes means which do not pose a threat to party autonomy or the continued efficiency of the judicial system.

Ultimately, under the current system, the parties can most often achieve the goal of having the case heard in the district that they desire or by the judge that they prefer. The process of getting to that point, however, is absurd and results in a tremendous waste of time and resources. Because the parties are eventually able to sidestep the procedural hurdles of *Lexecon*, it makes sense simply to remove the obstacles and allow the parties to achieve their goals more efficiently. Since the overarching purpose of § 1407 and multidistrict litigation is to promote judicial efficiency and the interests and convenience of the parties, this amendment will further achieve this purpose in a logical fashion. With complex cases, the interests of judicial efficiency make it highly desirable that the transferee judge, who was involved in pretrial proceedings and is most familiar with the case, hears the trial. This amendment would satisfy this interest.

(2004). Thus, abuse of plaintiffs would be protected against both under this proposal and through the common occurrence of disposal of the case before remand anyway.

VII. CONCLUSION

Multidistrict litigation was designed to create a more efficient procedural system in mass litigation cases, where hundreds or thousands of actions involving one or more common questions of fact pending in different districts can be transferred to a single district for coordinated or consolidated pretrial proceedings, in the convenience of the parties and witnesses and while promoting the just and efficient conduct of these actions.[169] For the first thirty years of practice in multidistrict proceedings, transferee courts frequently granted "self-transfer" motions allowing the cases that were transferred by the Judicial Panel on Multidistrict Litigation to remain in the transferee district for trial. This procedure was well-accepted and commonly employed.

The Supreme Court's decision in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach* pointed to the plain language of § 1407 and its legislative history in holding that this self-transfer was not authorized by the statute, and any case that had been transferred by the Panel pursuant to § 1407 must be remanded by the Panel to the transferor court.[170] After this decision, parties immediately began devising techniques to avoid the mandatory remand procedure, and while these tactics are often effective in carrying out the parties' intent of reaching the proper forum for trial, they are an undue expense and waste of litigants' and judicial resources. Congress, with the urgings of many courts and members of the Panel, attempted to pass legislation that would amend the *Lexecon* result, but no amendment has been successfully passed in the ten years since *Lexecon*.

It is time for reform. To promote judicial efficiency and end this waste of time and money, Congress should amend § 1407 to create a system where the default procedure would be for the transferee court to recommend to the Panel to remand the case to the originating district, but allow litigants the options to move the transferee court for permanent transfer under § 1404 or 1406. With ten years having passed since the *Lexecon* decision and each successive Congress considering but not enacting an amendment, enough is enough. The 110th Congress should act to mark the end of an era of time- and resource-consuming tactics to avoid the mandatory remand, and directly and expressly permit the ultimate result in many multidistrict litigation actions by allowing the transferee court to decide §§ 1404 and 1406 motions.

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[169] 28 U.S.C. § 1407 (2006).

[170] Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998).