

1-1-1974

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Recommended Citation

John T. McDermott, *The Transferee Judge--The Unsung Hero of MultiDistrict Litigation*, 35 Mont. L. Rev. (1974).
Available at: <https://scholarship.law.umt.edu/mlr/vol35/iss1/2>

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THE TRANSFEEE JUDGE — THE UNSUNG HERO OF MULTIDISTRICT LITIGATION

John T. McDermott*

The creation in 1968¹ of the Judicial Panel on Multidistrict Litigation marked the beginning of a new approach to the control and management of federal multi-party multidistrict litigation.² For the past five years nearly all complex federal litigation has been coordinated by the Panel.³ Unlike its predecessor, the Coordinating Committee for Multiple Litigation,⁴ the Panel does not direct the processing of multidistrict litigation; it simply "collects" the related cases for transfer to a single federal district court and assignment to a single federal judge—the transferee judge.⁵ Although the transferee judge may receive assistance from the Panel staff⁶ or from depositions judges appointed by the Panel, he is solely responsible for processing all cases from the

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¹The Judicial Panel on Multidistrict Litigation was established in June, 1968, following the enactment of the Multidistrict Litigation Act, now 28 U.S.C. § 1407 (1970). The Panel is composed of seven federal circuit and district judges who meet at least once a month to review multidistrict litigation and to hear arguments in pending matters. The Panel's permanent staff is located in Washington, D.C. For a further discussion of the establishment and organization of the Panel, see Peterson and McDermott, *Multidistrict Litigation: New Forms of Judicial Administration*, 56 A.B.A.J. 737 (1970). For a short primer on practices before the Panel, see, McDermott, *The Judicial Panel on Multidistrict Litigation*, 57 F.R.D. 215 (1973).

²The Panel has jurisdiction over litigation where "civil actions involving one or more common questions of fact are pending in different districts." 28 U.S.C. § 1407(a) (1970).

³During the 1968-72 period nearly 2,400 cases were transferred by the Panel under 28 U.S.C. § 1407(a) (1970). While this is less than 1 percent of the civil actions filed in federal district courts during the same period, it includes nearly half of the private treble damage actions filed during the period and a very substantial percentage of the other types of typically complex federal litigation: common disaster (air crash), stock fraud, and patent infringement cases.

⁴The Coordinating Committee for Multiple Litigation of the United States District Courts was established by Chief Justice Earl Warren in January, 1962, in response to the nearly 2,000 separate private treble damage antitrust suits filed against the electrical equipment manufacturers in the early 1960's. For a brief review of the work of the Coordinating Committee, see Neal and Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A.J. 621 (1964). For a comprehensive analysis of this litigation, see Bane, *The Electrical Equipment Conspiracies: The Treble Damage Actions* (Federal Legal Publications 1973).

⁵The jurisdiction of the Panel is principally limited to the transfer of related cases to a single district "for coordinated or consolidated pretrial proceedings", their assignment to a single district judge, the appointment of deposition judges to assist the transferee judge, and finally the remand of the transferred cases "at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." 28 U.S.C. § 1407(a),(b) (1970). The Panel does hold regular conferences for transferee judges at which matters of mutual interest are discussed, but neither the Panel nor its staff attempts to direct the actual progress of a group of cases transferred under § 1407.

⁶The Panel does encourage transferee judges to avail themselves of the clerical and legal services offered by the Panel's small staff.

time they are assigned to him until they are remanded or reassigned by the Panel.⁷

Many of the problems encountered by transferee judges are neither new nor unique to multidistrict litigation, but may be magnified because of the number of parties involved.⁸ Transferee judges have had to resolve such diverse legal questions as the validity of service of process under a typical state long arm statute⁹ and the right of a foreign government to maintain a suit for treble damages under the federal anti-trust laws.¹⁰ There are also several kinds of problems unique to multidistrict litigation and others which although not unique to multidistrict litigation are rather common in such cases.¹¹ This article attempts to identify some of these relatively unique problems and to discuss the solutions developed by the transferee judges themselves.

LIAISON COUNSEL

The *Manual for Complex Litigation*¹² strongly recommends that liaison counsel be appointed in all complex multiparty litigation¹³ and most transferee judges have found it desirable to appoint one or more liaison counsel for their cases. Appointment and compensation of liaison counsel can create serious problems.

The duties of liaison counsel, as distinct from lead counsel, involve such primarily administrative functions as the reproduction and distribution of court orders and notices. When his duties are limited to ministerial tasks of this sort, selecting liaison counsel is relatively easy although compensation or reimbursement may present a problem. Even where his duties are strictly administrative however, the appointment of a local attorney as liaison counsel by a transferee judge sometimes causes bad feelings among out-of-state attorneys who may feel that the transferee judge would prefer to deal with the local bar rather than

⁷On two occasions—both at the request of the transferee judges—the Panel has reassigned all or part of the cases to another judge. See, for example, *In re Antibiotic Drug Cases*, 320 F. Supp. 586 (J.P.M.L. 1970).

⁸One group of multidistrict litigation may include hundreds of actual plaintiffs and ten or more major defendants. If class actions are involved, the parties may number in the millions.

⁹*Miller v. Trans World Airlines, Inc.*, 302 F. Supp. 174 (E.D. Ky. 1969); *In re Puerto Rico Air Disaster Litigation*, 340 F. Supp. 492 (D. P.R. 1972). Some unique "venue" problems have also arisen. For example, a third party defendant in a transferred case must be served in the transferee district; service in the transferor district is ineffective. *Allegheny Airlines, Inc. v. LeMay*, 448 F.2d 1341 (7th Cir. 1971).

¹⁰*In re Antibiotic Drug Antitrust Litigation*, 333 F. Supp. 315 (S.D.N.Y. 1971).

¹¹Although transfer under 28 U.S.C. § 1407 (1970) usually eliminates the need for federal judges to coordinate related cases, it is still sometimes necessary for the transferee judge to informally coordinate federal proceedings with those occurring in related state court actions. See *In re Texas Gulf Sulphur Securities Litigation*, 344 F. Supp. 1398 (J.P.M.L. 1972) and *In re Hendersonville Air Disaster Litigation*, 297 F. Supp. 1039 (J.P.M.L. 1969).

¹²Formerly *The Manual for Complex and Multidistrict Litigation* [hereinafter referred to as the *Manual*].

with them.¹⁴ At least one transferee judge¹⁵ has attempted to dispel this atmosphere of partiality by appointing co-liaison counsel, one from Boston and the other from New York City where most of the transferred cases originated. Another appointed a committee of 3 attorneys (the "Troika") selected by counsel for all plaintiffs to expedite discovery.¹⁶

However, a more difficult problem results because many liaison counsel end up serving as lead counsel. Since liaison counsel frequently is responsible for coordinating the filing of pleadings and other papers for his liaison group, he may take it upon himself to prepare the preliminary draft of all pleadings, answers, responses, and discovery requests for his group. In some multidistrict litigation all counsel collaborate to prepare pleadings, motions, etc., but where there are a large number of attorneys involved, committees may be established to handle the different aspects of pretrial. When all counsel participate more or less equally in the pretrial process and each accepts his proportionate share of the work, there is seldom any problem with compensation of liaison counsel. He may be reimbursed, on a pro-rata share, but will not be entitled to legal fees for he will have done no more legal work than the other attorneys in his group. However, many times the liaison counsel actually does all the legal work for his group either with or without the approval or consent of the court or the attorneys within the liaison group.

The transformation from liaison counsel to lead counsel may occur because the attorney actively attempts to dominate the litigation, but more often it happens because the other attorneys are willing to sit back and let liaison counsel do all the work. This situation would probably not create any problems for the transferee court¹⁷ except that liaison counsel, quite naturally, will expect to be compensated for the legal work he has done for the entire group.¹⁸

¹⁴Although most local federal court rules require the appearance of local counsel in all cases, the rule is generally waived in multidistrict litigation being processed under 28 U.S.C. § 1407 (1970).

¹⁵Chief Judge Andrew A. Caffrey of the District of Massachusetts in the Revenue Properties Litigation.

¹⁶Judge Charles Metzner of the Southern District of New York in the Protection Device Cases. *City of Detroit v. Grinnell Corp.*, 356 F. Supp. 1380, 1385 (S.D.N.Y. 1972).

¹⁷Actually, such a development usually makes it easier for the transferee judge to schedule and conduct pretrial conferences because fewer lawyers attend and participate.

¹⁸This type of transformation occurred in the Cincinnati, Ohio, Air Disaster Litigation (TWA). Judge MacSwainford of the Eastern District of Kentucky held a pretrial conference to discuss the matter of fees for liaison counsel and, following the hearing, made the following findings: "Liaison counsel advised in open court that they have done more than merely perform the administrative duties enumerated in Pretrial Order No. 1. They allege, for example, that they have prepared, initially for circulation to all plaintiffs' counsel, but eventually for service on the defendants, extensive interrogatories, motions for production of documents, and request for admissions. These documents are part of the record in this multidistrict litigation as are the objections to them filed by the defendants. The greatest part of the recent pretrial conference was devoted to these motions and objections."

The reimbursement of liaison counsel for out-of-pocket expenses (such as costs of reproducing and mailing notices, etc.) and for legal services (such as the preparation of papers, motions, etc.) became a serious problem in several groups of multidistrict litigation. Transferee judges have sometimes mistakenly assumed that the attorneys would work out this problem among themselves and that judicial supervision would not be necessary. Such an approach can lead to a serious problem at the close of the litigation when, due to settlements and dismissals, the court no longer has all parties before it and liaison counsel is seeking reimbursement from all counsel in the group he represents. Several unfortunate instances of this type have convinced some transferee judges that specific arrangements for the compensation of liaison counsel must be made when counsel is first appointed.

Transferee judges have developed their own methods for handling these problems. For example, Judge Swinford of the Eastern District of Kentucky, the transferee judge in two groups of air crash cases¹⁹ merely provided that no settled case would be dismissed unless the settlement order was approved by liaison counsel thereby insuring that a satisfactory arrangement for his compensation had been made between him and plaintiff's counsel. This procedure worked quite satisfactorily; at no time did counsel have to come before the court to settle disagreements about fair compensation for liaison counsel's services. A problem did arise when counsel for certain plaintiffs sought dismissal from the transferor court²⁰ without receiving the consent of liaison counsel. This problem was resolved by having the transferor judge vacate his dismissal order and insist that counsel follow the procedures established by the transferee judge.

Judge Hubert Will, the transferee judge in the *Butterfield Patent Cases*, took a different approach and required liaison counsel to submit a statement of their expenses and charges periodically to the court. A hearing was then held to determine the fairness of these charges

"While liaison counsel's efforts in this regard are clearly beyond those required by this Court in its initial pretrial order, they are neither improper nor unexpected. Someone must take the lead in coordinating plaintiffs' discovery, and it is logical that this responsibility should be assumed by court-designated liaison counsel.

"All these services of liaison counsel were and are valuable to all plaintiffs. All these services were accepted by all plaintiffs. They were rendered and accepted with either the express or implied approval of all plaintiffs.

"The Court is convinced that these efforts benefit all plaintiffs regardless of whether or not their action eventually goes to trial and the results of the discovery actually used. All plaintiffs accepting these services are obligated to pay the reasonable value thereof, including a fair share of expenses paid or incurred in rendering said services."

¹⁹In re Air Crash Disaster at the Greater Cincinnati Airport (American Airlines Crash), 295 F. Supp. 51 (J.P.M.L. 1968); In re Air Crash Disaster at the Greater Cincinnati Airport, (TWA Crash), 298 F. Supp. 358 (J.P.M.L. 1968).

²⁰It is clear that transferor courts have no authority to enter any orders or take any action in transferred cases until they have been remanded by the Panel. In re *Planting Fixture Cases*, 298 F. Supp. 484, 496 (J.P.M.L. 1968).

and if approved, the court directed the parties within the liaison group to reimburse the liaison counsel for their share of the costs. The advantage of Judge Will's procedure is that it permits a contemporaneous review of liaison counsel's work and charges. Postponing reimbursement of liaison counsel until the cases are settled may result in objections to the fees when little if anything can be done to reduce the expenses.

CLASS ACTIONS

Although class actions are not unique to multidistrict litigation and not all multidistrict litigation includes class actions, it seems that class actions have become an almost commonplace aspect of multidistrict litigation.²¹ Class actions have been filed in virtually every type of multidistrict litigation²² and even where class actions status has been denied, some courts have proceeded in a quasi-class action style.²³ Since multidistrict litigation necessarily involves multiple parties and common questions of law, the basic criteria of Rule 23 (numerosity and common questions of law or fact) are usually present and the establishment of class actions in multidistrict litigation is not usually on these grounds.

There have been several major problems which have challenged the ingenuity and resourcefulness of many transferee judges with regard to the management of class actions: (1) competing class action claims, (2) notice, and (3) attorney fees. Transferee judges have made significant contributions to the resolution of these problems.²⁴

A. COMPETING CLASS ACTIONS

Class actions "compete" when similarly situated parties have filed actions purporting to represent the same, similar, or overlapping classes.

²¹One student commentator has pointed out that almost half (22 or 53) of all transferred multidistrict litigation involves class action claims. Comment, *The Experience of Transferee Courts Under the Multidistrict Litigation Act*, 39 U. CHI. L. REV. 588 (1972). Indeed, the existence of conflicting class action claims may be a compelling reason for transfer under 28 U.S.C. § 1407 (1970). See, for example, *In re Texas Gulf Sulphur Securities Litigation*, *supra* note 11.

²²*In re Ampicillin Antitrust Litigation*, 55 F.R.D. 269 (D.D.C. 1972) [state-wide consumer classes and national hospital and drug store classes established]; *In re Penn Central Securities Litigation*, 347 F. Supp. 1327, 1343-1345 (E.D.Pa. 1972) [several stockholder classes established]; *Petition of Gabel*, 350 F. Supp. 624 (C.D.Cal. 1972) [plaintiffs' class established in air crash litigation].

²³Although establishment of a plaintiffs' class was initially denied in the Hanover, New Hampshire, Air Disaster Litigation, *Hobbs v. Northeast Airlines, Inc.*, 50 F.R.D. 76 (E.D.Pa. 1970), the transferee judge planned to try the issue of liability "in the same manner as a class action." *In re Hanover, New Hampshire, Air Crash Litigation*, 342 F. Supp. 907 (D.N.H. 1971).

²⁴While limiting this discussion to the contributions of transferee judges in multidistrict class action litigation, it goes almost without saying that other judges have made equally valuable contributions in these areas. See, for example, *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253 (S.D.N.Y. 1971), *rev'd* 479 F.2d 1005 (2d Cir. 1973) [class "notice" and "floating class recovery"]; *Rothman v. Gould*, 52 F.R.D. 494 (S.D.N.Y. 1971) and *LaSala v. American Savings & Loan Assn.*, 489 P.2d 113 (Calif. 1971) [protection of absent class]; *TWA v. Hughes*, 312 F. Supp. 478 (S.D.N.Y. 1970), *aff'd* 449 F.2d 51 (2d Cir. 1971), *rev'd* on other grounds, 93 S.Ct. 647 (1973) [attorney fees and costs].

There are three basic solutions to this problem: 1) one of the potential class action representatives can be selected to represent the entire class and those not selected may either choose to be included in the class or to opt out and maintain their *individual* actions; 2) the competing cases can be consolidated and all potential class action representatives named joint representative parties with their attorneys serving as a committee of counsel for the class; and 3) the class can be subdivided so that each potential class action representative (and his attorney) represents a portion of the entire class.

All three techniques have been successfully used by transferee judges. In the *Revenue Properties Litigation* Judge Caffrey subdivided the class by types of claims. Most of the plaintiffs who originally filed class actions were selected to represent one of the subclasses.²⁵ In the *Antibiotic Drug Litigation* Judge Inzer B. Wyatt of the Southern District of New York used consolidated classes in the wholesaler-retailer cases and in the hospital cases, and appointed a committee of counsel to represent the absent class members composed of all counsel who had brought class actions. In the "litigating" *Antibiotic Drug Cases* Judge Miles Lord of the District of Minnesota chose one of several potential class representatives to represent several "farm classes" of antibiotic users, but all attorneys were permitted to become members of a "committee of counsel" which was to assist the attorney for the class representatives.

Each of the three approaches has advantages and limitations. Where the class can rationally be subdivided into subclasses which have conflicting or potentially antagonistic interests, it is not only feasible, but desirable, to divide the class into subclasses and to select different representatives and attorneys for each subclass. As in the *Revenue Properties Litigation*, *supra*, this procedure protects the separate interests of each of the subclasses. However, where the potential conflict between class members is more illusory than real, the establishment of subclasses may be suggested anyway to accommodate the potential representative plaintiffs and their attorneys; establishing subclasses with separate representation under such circumstances is generally undesirable for it increases costs²⁶ and attorney fees,²⁷ both of which reduce the actual recovery.

²⁵The subclasses were not established *artificially* as is evidenced by the fact that different settlements were made with different classes. In approving each of the settlements, Judge MacCaffrey pointed out that the attorneys for the various classes "conferred at very great length and have produced an agreement which initially evaluates the probability of success among the various classes . . . [and] worked out by mutual agreement a formula which provides for distribution to the various classes of claimants in proportion to their likelihood of success on the merits." *In re Revenue Properties Co., Ltd.* (D-Mass. 1972).

²⁶For example, separate notices will generally be required for each subclass thereby increasing publication and/or mailing costs.

²⁷If a "sliding scale" approach is used in fixing attorney fees, the total award will be less if one attorney represents the entire class than if several attorneys represent various subclasses.

Consolidating the cases and appointing a committee of counsel to represent the class avoids the troublesome problem of attempting to select one or more class representatives from a group of equally qualified representatives, each with eminently qualified counsel. If the cases are eventually settled, the only drawback to the "consolidated class" approach is that each member of the "committee of counsel" will probably expect a generous award of attorney fees, thereby reducing the ultimate recovery by the absent class members. If the cases are litigated, however, consolidation can cause problems for it will be difficult, if not impossible, to conduct a trial by committee unless the committee has a strong chairman who can serve as lead counsel.

Where some of the potential class actions have been transferred *under* § 1407 an even more serious problem can occur if the cases actually go to trial. Since each transferred case will at least theoretically be returned to the transferor court at the completion of pretrial proceedings, a consolidated class action will have to be dismantled prior to remand or multiple class actions will have to be tried. As judge Myron L. Gordon of the Eastern District of Wisconsin pointed out:

the avoidance of inconsistent adjudication with respect to class action claims must necessarily involve choosing among competing representatives or structuring complementary classes so as to avoid overlapping as much as possible.²⁸

Since the main reason for transferring related cases to a single district under § 1407 "is to conserve judicial resources and avoid duplication of effort,"²⁹ consolidation of class actions should not be permitted unless settlement is certain or all consolidated cases were originally filed in the transferee court or transferred there for trial pursuant to 28 U.S.C. §§ 1404(a) or 1406(a).

In an attempt to allow all potential class representatives and their attorneys to participate in the class action without reducing the effectiveness of the class action technique or the benefits or transfer under § 1407, Judge Miles Lord selected one of the "farm cases" as *the* farm class action and the attorney for the plaintiff as *the* attorney for the class. However, all attorneys representing members of the class were allowed to become members of a "committee of counsel" to assist the counsel for the representative plaintiff.

Such a committee of counsel may serve a very worthwhile purpose. With attorney fees averaging between ten and twenty per cent in large consumer class actions, attorney fees will often be orders of magnitude greater than any class member's final recovery. Thus it may be very difficult for the attorney to view an offer of settlement objectively; the committee of counsel, each of whom has a substantially smaller pecuniary interest in the litigation, may provide more objectivity in

²⁸In re Career Academy Antitrust Litigation, 57 F.R.D. 569, 571 (E.D. Wisc. 1972).

assessing settlement offers. Such counsel will also be quick to discover a conflict of interest within the designated class if one develops during litigation or settlement negotiations. In this way a committee of counsel may serve as an important "check and balance" in large consumer class actions.

B. NOTICE IN CLASS ACTIONS

The methods for giving notice to absent members of the class has also troubled many transferee judges, particularly in large consumer class actions. The rules provide that in "(b)(3) classes" "*the court shall direct to the members of the class the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort.*"³⁰ Virtually all courts have interpreted this provision to mean that the court must prepare or at least approve the notice and control its distribution. Even if the rules do not make the court primarily responsible for giving notice in class actions, its broad supervisory control over class actions and its duty to protect the interests of the absent members of the class gives it not only the authority, but the responsibility to insure that the class action notice fairly and adequately describes the litigation and gives absent class members a free and meaningful choice in determining whether or not to opt out of the class. For this reason transferee judges generally insist that they review and approve the notice before it is given to the class.³¹

Many transferee judges have concluded that an official notice from the court should be used rather than one emanating from the class representative's attorney. As a result, class action notices are either prepared by the judge himself or prepared by counsel for the judge's signature.³² Some judges have permitted notices to be mailed in envelopes carrying a return address of the attorney for the class, and have permitted inquiries concerning the suit to be made directly to the attorney for the representative plaintiff. Most judges insist that the class action notice be as neutral as possible and contain no reference to counsel for either side. These judges generally require inquiries to be made to the judge or to the clerk rather than to counsel. They also require that responses to class action notices, either in the form of opt-out notices or "proof of claims," be sent to the clerk of court rather than to the attorney for the representative plaintiff.³³

³⁰FED. R. CIVIC P. 23(c)(2).

³¹The *Manual* and the local rules of many federal district courts prohibit any communications with absent class members without prior authorization from the court. See, *Local 734 Bakery Drivers' Pension Fund Trust v. Continental Illinois National Bank*, 57 F.R.D. 1 (N.D. Ill. 1972).

³²Some judges prefer that the notice be signed by the clerk of court.

³³In many cases, due to lack of sufficient personnel, the clerk's office does not become actually involved in either notice distribution or notice processing. In some cases, the representative party has been required to obtain, at his expense, a post office box;

More significantly the judge must determine whether the method of notice suggested by the parties is "the best notice practicable under the circumstances," the rule requires. A serious problem can occur if the court determines that individual notice can and must be given to class members by mail but the representative party is unable to bear the costs of a large mailing.³⁴

Several transferee judges have concluded that the court should initially bear the costs of mailing class action notices.³⁵ This conclusion is derived from the language of Rule 23 which provides that the court, rather than the representative party or his attorney, must "direct" notice to absent class members. Many courts have authorized the use of penalty envelopes for mailing of class action notices. The practice has been ignored in small classes by those interested in court economics, even where it was necessary for the clerk of court to obtain extra envelopes in order to make the required mailing. However, where the notice was given to several million members—at a very great expense to the federal government³⁶—the propriety of using penalty-free envelopes was challenged by the Administrative Office of the United States Courts³⁷ and by at least one congressman.³⁸

and returns from the class action notices are sent to the clerk at the special post office box rather than to the clerk's office. The "class attorney" is responsible for processing responses to class action notices under the general supervision of the court.

³⁴This problem generally does not arise in a settlement situation for there is a fund out of which expenses for class action notices can be taken. Of course, where classes are established soon after the actions are filed, there will be no settlement fund; and someone—the representative party, the defendants, or the court—will have to pay for the notice. Perhaps courts should inquire prior to establishment of a class whether the representative party is financially able to pay for the expenses of an extensive notice program. The ability to bear such a financial burden might be an appropriate consideration in determining which of several competing class action representatives should represent the class or whether it may be necessary to consolidate the "competing" class actions so that the various class representatives can share the costs of an extensive notice program.

³⁵It is generally assumed that such costs could later be "taxed" to the losing party. However, if the plaintiffs lose and the representative party cannot pay such costs, it is doubtful that they could actually be collected from the class members.

³⁶The cost of mailing class action notices in the nonsettling *Antibiotic Drug Cases* was approximately \$800,000, which is more than the annual Administrative Office postage budget.

³⁷The Administrative Office has recently prohibited federal judges from using penalty envelopes for notices in class actions. While it is true that the language of FED. R. CIVIC P. 23 concerning the court's responsibility for class action notices is far from clear, it would seem that the interpretation of this rule, like the other Rules of Civil Procedure, should be made by federal judges and not by administrative personnel. If sufficient funds are not available, it would seem to be the responsibility of the Administrative Office to try and get them. Of course, Congress undoubtedly has the final authority and could prohibit the use of penalty envelopes for class action notices. It is somewhat doubtful that the Administrative Office has similar authority.

The unavailability of penalty envelopes for class action notices has forced at least one transferee court to postpone the giving of notice to members of the class. In *re Ampicillen Antitrust Litigation*, *supra* note 20 at 280. A substantial delay in notifying the class might seriously jeopardize the class action. See *Scott v. Danaher*, 343 F. Supp. 1272, 1278 (N.D. Ill. 1972) [three-judge court].

³⁸Representative H. R. Gross of Iowa—ranking minority member of the House Post Office & Civil Service Committee.

Where individual notice cannot be given to class members by mail, most courts have resorted to notice by publication, either in newspapers of general circulation or in trade journals or sometimes both.³⁹ The class action notice given in the settling *Antibiotic Drug Cases* was published in every newspaper of general circulation in each of the 42 settling states at a cost of approximately \$130,000.⁴⁰ It is unfortunate that no attempt was ever made to determine how many members of the class received and understood the published notice, even though a challenge to the settlement on related grounds was rejected.⁴¹ The exact size of the consumer classes in the settling *Antibiotic Drug Cases* is not known, but it must have approached 100,000,000 members. However, only 37,000 class members filed notices of claims—approximately 0.05% of the class.⁴² Before notice by publication is used exclusively in other consumer classes, it would seem that the parties should present the court with some indication as to the effectiveness of such a notice.⁴³

A different procedure was used in the "litigating" *Antibiotic Drug Cases*. Direct mail notice—supplemented by newspaper and television publicity—was given to approximately 20,000,000 members of the class. Unfortunately, it is not possible to compare the impact of the two types of notice, for the litigating class notice did not offer a double option, but only the choice of opting out of the class or, by silence, becoming

³⁹The Second Circuit in *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973) disapproved of the initial assessment of the cost of publishing class action notices to the defendants even though the lower court had held a preliminary hearing, as one would be held prior to entering a temporary injunction, and found a high probability of success that the class would prevail on the merits of the controversy. *Eisen v. Carlisle & Jacquelin*, 54 F.R.D. 565, 573 (S.D.N.Y. 1972). This decision coupled with the Administrative Office ruling that penalty envelopes may not be used for class action notices may eventually destroy the "class action"—at least as a device to protect consumer rights.

⁴⁰State of West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710, 724-725 (S.D.N.Y. 1970). In The Protection Device Cases, actual notice was sent to 89,000 customers of the defendants; and, in addition, a notice was published for three consecutive weeks in both the Wall Street Journal and the New York Times. *City of Detroit v. Grinnell Corp.*, *supra* note 16 at 1384.

⁴¹In re Antibiotic Antitrust Action, 333 F. Supp. 296 (S.D.N.Y. 1971).

⁴²The notice in the consumer cases gave the absent class member a double option. He could opt out of the class, or by silence, consent to be included in the class. In addition, he could file a notice of claim setting forth the amount of his claim; or he could, again by silence, assign his claim to the attorney general of his state. Of course, there is no way of knowing how many class members actually read and understood the notice and then decided to, in effect, assign their claims to the state attorney general.

⁴³If the dissemination of class action notices is determined to be a proper court function, then it may be that the court will have to have additional personnel, computer services, mailing services, and other facilities for handling notices in large class actions. It might be desirable to establish within either the Judicial Panel on Multidistrict Litigation or the Administrative Office of the United States Courts a class action notice section, staffed by sufficient personnel and with adequate equipment to provide for giving, receiving, processing, and collating notices in class actions regardless of their magnitude.

If the court is responsible for giving notice by mail, as many courts have held, it would seem that the court would also be responsible for giving notice by publication or by any other method. Thus, funds will have to be made available for procuring advertisements in newspapers and trade magazines.

a member of the class. In both groups of cases, very few people opted out.

A variety of techniques were used for mailing notices in the litigating case, ranging from a computer derived printout from the State of North Carolina (which included everyone who was a voter or a tax payer or had registered a motor vehicle with the State of North Carolina) to an "occupant" mailing used in the State of California. A press release, approved by the parties and the court, was released on the day the notices were delivered. The primary purpose of this publicity was to alert the public that they would be receiving an important notice in the mail, that they were to read it carefully and seek competent professional advice if necessary.

It is possible that the "best notice practicable" in a large consumer class might be delivered by way of spot television announcements videotaped by the judge himself. Television is, without doubt, one of the most important ways of reaching the American public; it should be used to a greater extent for giving notices in class actions.

C. SETTLEMENT AND ATTORNEY FEES

Another difficult problem presently confronting transferee judges is approving settlements and the awards of attorney fees in large class actions.⁴⁴ During the past three years several very large settlements were approved.⁴⁵ Although the procedures employed by various transferee judges may have differed from one another to some degree they all reflected a careful assessment of the settlement. The Court's function in approving settlements is:

"to determine whether the agreement reached between the parties is fair and reasonable in light of the nature of the claims presented, the defenses offered thereto, and the difficulty of proving the respective allegations of the parties, the complexity of the issues raised, and the parties' likelihood of success or failure in pressing their respective claims or defenses. Another important consideration is whether the defendants will be able to satisfy any judgment rendered against them in the event of a full trial terminating favorably to the plaintiff."⁴⁶

Although Rule 23 does not specifically give the trial judge the authority to set or approve attorney fees in connection with class

⁴⁴The importance of settlement of complex litigation transferred under 28 U.S.C. § 1407 (1970) was underscored by Judge Metzner who estimated that it would have taken 2,300 trial days—about 11 years—to try only damages in one group of the Protection Device cases. *City of Detroit v. Grinnell Corp.*, *supra* note 16 at 1388-1389.

⁴⁵Well over half of the *Antibiotic Drug Cases* have been settled. *State of West Virginia v. Chas. Pfizer & Co.*, *supra* Note 36 *aff'd* 440 F.2d 1079 (2d Cir. 1971); *Hartford Hospital v. Chas. Pfizer & Co.*, 52 R.F.D. 131 (S.D.N.Y. 1971). So have most of the *Plumbing Fixture Cases*. *Philadelphia Housing Authority v. American Rad. & Sanitary Corp.*, 322 F. Supp. 834, 323 F. Supp. 364 (E.D. Pa. 1970), *aff'd* 453 F.2d 30 (3d Cir. 1971) and the *Children's Book Cases*. *State of Illinois v. Harper & Row Publishers, Inc.*, 55 F.R.D. 221 (N.D. Ill. 1972).

⁴⁶*In re Revenue Properties Co. Ltd.*, *supra* note 23.

action settlements, there is little doubt the power exists.⁴⁷ Transferee judges have generally rejected the "automatic" 25% contingent fee, often suggested by plaintiff's attorneys as a standard,⁴⁸ and have based fees on factors peculiar to the specific litigation. That each class action must be viewed on its own merits is probably best exemplified by the *Plumbing Fixtures Case* which involved different settlements for different class of plaintiffs. Judge Alexander Harvey of the District of Maryland, used different percentages for setting attorney fees depending, in part, on the difficulty that the class action representatives had in reaching settlement with the defendants.⁴⁹

Courts which have rejected the contingent fee formula have considered the following factors in fixing the amount to be awarded in class action litigation: the novelty and difficulty of the questions involved; the professional standing, reputation and experience of the attorneys; the time spent on the case; the diligence and skill exhibited, and the actual benefits conferred upon members of the class. In the *Childdren's Book Cases*, Judge Bernard M. Decker of the Northern District of Illinois noted that the attorneys representing a class of 3,000 public school and public libraries—none of which had sufficient purchases to justify litigation—had obtained "excellent financial results for the class members" by aggressively prosecuting their cases and convincing the defendants—one by one—that there would most certainly be a trial if adequate settlements were not made.⁵⁰ Settlement was made with the various defendants in two phases. The first took from October, 1968, to March, 1971, and resulted in a settlement fund of \$3,461,628 plus interest. The attorneys requested and received a 20% fee which totaled \$662,000. The second phase took another year and produced a settlement fund of \$3,213,287 plus interest. Again the class attorney requested a 20% fee (\$665,000) but the court, after considering all of the factors mentioned above,⁵¹ approved a fee of \$475,000 for services rendered in achieving the second settlement.⁵² The total fee of slightly over \$1,000,000 may seem large, but this litigation resulted

⁴⁷FED. R. CIVIL P. 23(e) provides that a class action "shall not be dismissed or compromised without the approval of the court." This power necessarily includes the power to approve attorney fees and costs, at least where they affect the amount of the settlement which will eventually be actually distributed to the class.

⁴⁸Judge Metzner called the 25% formula "nonexistent" in his opinion. *City of Detroit v. Grinnell Corp.*, *supra* note 16 at 1390.

⁴⁹*See* *Lindy Bros. Builders, Inc., v. Am. Rad. & Std. Sanitary Corp.*, 341 F. Supp. 1077 (E.D. Pa. 1972). For example, a fee of 15% of the \$1,000,000 wholesaler class was allowed while a 25% fee in the \$2,000,000 plumbing contractor settlement was authorized for distribution among the 16 plaintiffs' attorneys who contributed to the creation of the settlement fund.

⁵⁰One defendant refused to settle before trial but capitulated on the second day of trial, increasing its settlement from \$115,000 to \$525,000.

⁵¹Of particular significance was the fact that the attorneys spent a total of 8,633 hours on the first settlement and only 3,975 hours on the second settlement.

⁵²*In re Children's Books*, 55 F.R.D. 221 (N.D. Ill. 1972).

in a *net* recovery to the plaintiffs of more than five and one-half million dollars.⁵³

Although the "small" settlements in the *Plumbing Fixture Cases* produced relatively few problems with regard to attorney fees and costs,⁵⁴ the \$26,000,000 settlement⁵⁵ of the owner-builder class created a variety of problems for the transferee judge. Judge Harvey approved expenses of the settlement committee of more than \$220,000 and expenses of various other attorneys totaling approximately \$100,000. The real problem concerned the award of attorney fees. The two "class attorneys" sought a \$3,000,000 fee while twelve other attorneys sought an aggregate fee of more than \$1,000,000. Since all twelve attorneys had contingent fee contracts with some members of the "owner-builder" class (or other parties in this litigation) and since all were reimbursed for their out-of-pocket expenses,⁵⁶ the court declined to award any of them an additional fee to be deducted from the settlement fund.

To establish a proper fee for the attorneys for the owner-builder class, the class was subdivided into four categories:

1. The claims of class members personally represented by the attorneys for the class (18.2% of the entire class);
2. The claims of class members personally represented by other attorneys who allegedly contributed to the creation of the settlement fund. (37.6% of the entire class);
3. The claims of class members personally represented by still other attorneys who allegedly *did not* contribute to the creation of the settlement fund. (17.4% of the entire class); and
4. The claims of the "absent" class members. (26.8% of the entire class).

The class attorneys sought no award of fees from category 1⁵⁷ and category 2 claimants. They requested 16 $\frac{2}{3}$ % of the amounts to be distributed to category 3 claimants⁵⁸ and 33 $\frac{1}{3}$ % of the amounts to be distributed to the category 4 claimants. However, Judge Harvey refused to authorize the assessment of additional attorney fees to category 3 claimants holding that "those claimants who undertook to incur the risk of litigation should not be penalized by being required to pay for

⁵³A \$1,500,000 fee was awarded in three Protection Device national class actions which were settled for \$10,000,000. *City of Detroit v. Grinnell Corp.*, *supra* note 16 at 1392.

⁵⁴See note 43, *supra*.

⁵⁵The fund consists of \$21,500,000 from the "full line" settling defendants, \$1,400,000 from the "short line" settling defendants and interest in excess of \$3,000,000.

⁵⁶Only one attorney was given less than he requested.

⁵⁷Pursuant to their private contingent fee arrangements, generally 33 $\frac{1}{3}$ %, the class attorneys will receive fees of more than \$800,000 from their own clients.

⁵⁸Category 3 claimants are obligated to pay fees of 2 to 33 $\frac{1}{3}$ % (or more) to their individual retained counsel.

larger attorneys fees than any other claimant⁵⁹ merely because their attorneys may not have, in the opinion of counsel for the Class Representatives, contributed as much to the creation of the settlement fund as did others."⁶⁰

Several "absent" class members objected to the allowance of any fees to the class attorneys from the settlement fund because these attorneys would be adequately compensated by their own (category 1) clients. The court rejected the contention: "the non-litigating (category 4) claimants, in accepting their share of the benefits produced, should likewise assume a share of the burden."⁶¹ Recognizing that the class attorneys were "entitled to fair and adequate compensation for their skillful efforts in producing the sizable fund for the benefit of this large class,⁶² the court awarded a fee of 20% of the nearly seven million dollars distributable to category 4 claimants. This fee, approximately \$1,375,000 was in addition to the \$800,000 received by those attorneys from their own clients.⁶³ The court rejected counsel's argument that an assessment of less than 33 $\frac{1}{3}$ % unfairly discriminated against the litigating claimants (categories 1, 2 and 3) and favored the non-litigating (category 4) claimants. Judge Harvey observed that the only way he could equalize the portion of the fee assessable to the absent class members without allowing the total fee to become excessive would be to reduce the contingent fees payable under the agreements between counsel and their clients, the "litigating" members of the class. Judge Harvey doubted that he had the power to consider the reasonableness of private agreements between a client and his attorney, particularly in view of the fact that none of the clients had requested the court to review the reasonableness of the contingent fees. He emphasized: "the test for determining what is a proper contingent fee to be charged a private client is entirely different from the test for determining what is a reasonable fee for class representation in a class action settlement."⁶⁴

It is now generally agreed that before an award of attorney fees or costs is made in class action litigation, the court should insist:

1. That the attorneys for the class file a detailed statement fully setting forth the nature and complexity of the litigation, the results achieved, the services performed by each attorney involved and

⁵⁹Some category 3 class members would have had to turn over half of their recovery to attorneys—33 $\frac{1}{3}$ % to their retained attorneys and 16 $\frac{2}{3}$ % to the attorneys for the class.

⁶⁰Lindy Bros. Builders, Inc., v. Am. Rad. & Std. Sanitary Corp., *supra* note 43 at 1086.

⁶¹*Id.* at 1087.

⁶²*Id.* at 1089.

⁶³The court noted that a higher percentage would produce an hourly rate for the more than 6,000 hours spent by the two attorneys on this litigation which "in spite of the excellent result achieved and the undisputed competence of counsel . . . would be excessive." *Id.* at 1090.

the number of hours expended by all attorneys and the work actually performed by each;

2. That all participating attorneys disclose any fee arrangement they have made with any other attorney. If any other attorney is to receive any part of the fee, the reason therefor should be fully detailed and the services actually performed by other counsel should be explained in full;⁶⁵

3. That any attorney seeking a fee for representing the class who has entered into a contingent fee arrangement with his client should disclose the details of the arrangement to the court;

4. That the attorneys submit a full and *detailed* itemization of all expenses and costs which are to be reimbursed from the settlement fund.

Within the organized bar opposition has recently grown to the increased use of class actions, particularly in consumer cases. The critics contend that class actions are being used to primarily benefit the attorneys for the class and not class members themselves. Transferee judges, however, have taken great pains to insure that the settlements⁶⁶ themselves and any attorneys' fees awarded are fair.⁶⁷

Discovery

Discovery has undoubtedly become the most crucial problem facing transferee judges in multidistrict litigation. Judge Phillip Neville of the District of Minnesota has reported some rather revealing statistics concerning the extent of discovery in the IBM litigation. The attorneys for IBM had looked at more than 80 million documents taken from

⁶⁵See generally, *Setting Attorney Fees*, by Judge Alexander Harvey, District of Maryland, Remarks delivered at Fourth Transferee Judge Meeting, Chandler, Arizona, December 6, 1971.

⁶⁶The attorney for a group of plaintiffs in the *Antibiotic Drug Cases* requested court approval of a \$2,000,000 fee, payable by the defendants, for his role in negotiating the eventual settlement of a major part of this litigation. Judge Wyatt observed that a procedure which permits an attorney to negotiate an agreement by which defendants would pay his fee while at the same time negotiating a settlement between the defendants and the class he represented seemed "wrong in principle and ought to be discouraged." The court decided not to nullify the fee arrangement primarily because there was no secrecy (a full disclosure had been made to the court and to other counsel) and because payment by defendants would not diminish any recovery by members of the class. The court reviewed counsel's participation in the litigation and determined that a fair and reasonable value of his services was \$600,000. However, the court pointed out that a payment of \$600,000 by the defendants, in addition to the \$361,000 already paid by his clients would be excessive, but Judge Wyatt permitted the attorney to resolve this dilemma himself. Judge Wyatt also criticized the procedure of *intervening* individual class members as named parties, apparently for the purpose of establishing a contingent fee arrangement between the individual class members and their attorneys—an arrangement which may not be subject to court approval. *City of Philadelphia v. Chas. Pfizer & Co., Inc.*, 345 F. Supp. 454 (S.D.N.Y. 1972).

⁶⁷See, *In re Auto Pollution Antitrust Litigation*, 52 F.R.D. 398 (C.D. Cal. 1970); *City of Detroit v. Grinnell Corp.*, *supra* note 16; *Hartford Hospital v. Chas. Pfizer & Co.*, *supra* note 66; *City of Detroit v. Crane Co.*, 453 F.2d 30 (3d Cir. 1971).

the files of Control Data Corporation. Not to be out done, Control Data and other plaintiffs sent 61 attorneys to suburban New York City to look over documents and records at the IBM headquarters there. At one point counsel for IBM announced that they want to take at least 2,700 depositions—one for each of the 2,700 companies in the computer field.⁶⁸ Overly expensive and unnecessarily time-consuming discovery has been reported by judges in almost every type of litigation being processed and transferred under § 1407.⁶⁹ One has no way of knowing if the new liberal rules of discovery encourage massive discovery programs or if the attorneys involved in these types of cases are attempting to wear down their opponents and seek favorable settlements through the use of massive discovery. Sometimes it seems that they are merely searching, perhaps in vain, for the one document which will establish their claim or seriously weaken their opponent's. Whatever the cause, there seems to be a growing concern that discovery in complex litigation is getting out of hand.

Several transferee judges have attempted to limit the discovery being conducted in their cases. Perhaps the best way to avoid unwarranted discovery is for the transferee judge to exercise firm control over discovery and to rule promptly on all objections so that the filing of unnecessary discovery motions or frivolous objections cannot be used as a delaying tactic. Another effective approach is to set a firm but realistic trial date which will permit the parties to conduct a reasonable amount of discovery but which will require them to limit the discovery to the essentials. Of course, the judge must make sure that the date is reasonable and must continually assist the parties and their attorneys to be sure they will be ready when the trial date arrives. There is always a risk that by setting a firm date and refusing to depart from it, the Court may unnecessarily and improperly limit discovery thereby committing reversible error. However, one court has recently stressed that "reversible error arising from curtailment of discover procedures must be premised on a demonstration that the *Court's* action made it impossible to obtain crucial evidence, and implicit in such a showing is proof that more diligent discovery was impossible."⁷⁰

⁶⁸One way of injecting the advisorial process into the approval of attorney fees and costs would be to prohibit the deduction of attorney fees and costs from the proposed settlement fund. The court would simply refuse to approve settlements unless they clearly established the amount of distributable directly to the class. Attorney fees and costs would then be an additional "price" to be paid for settling the cases. The defendants would then have an interest in minimizing attorney fees and costs and would turn hearings on the approval of attorney fees, now in essence an *ex parte* proceeding, into an advisorial one. The judge would no longer be the sole protector of the absent class.

^{69a}In another group of antitrust cases, one deposition took 3,000 pages for its answer. The documents produced by the defendants filled some 260 filing drawers and open shelves. *City of Detroit v. Grinnell Corp.*, *supra* not 16 at 1386.

⁷⁰One transferee judge, in observing the breadth of discovery being conducted in his group of air disaster cases, commented that the parties would undoubtedly have taken the depositions of Orville and Wilbur Wright if they were still alive.

Another possible approach is to punish a party or its attorney for unnecessary discovery by imposing sanctions under the federal rules.⁷¹ Since this can only be done when the trial has been completed, its effect is at best indirect.⁷² However, greater use of sanctions by transferee judges in appropriate situations would undoubtedly curtail some of the unnecessary discovery presently being conducted.

Independent or "Neutral" Experts

The *Manual for Complex Litigation* suggests that under certain circumstances a trial court should consider the employment of its own experts.⁷³ Two transferee judges have made extensive use of court-appointed experts in two entirely different ways.

In the *Kaehni Patent Litigation*, Chief Judge Northrup of the District of Maryland appointed a technical expert to assist him. The technical nature of this patent infringement litigation led Judge Northrup to suggest and the parties to agree that a neutral Court-appointed expert witness be retained with the losing party paying the expense.⁷⁴ The procedure employed by Judge Northrup required agreement by all parties in the selection of the expert to insure his neutrality. The expert was to be present during the entire trial, but was permitted to conduct out-of-court experiments if he thought they were necessary. He testified at the end of trial and was subject to examination by the parties and by the court. Judge Northrup stressed that he did not consult with his Court-appointed expert off the record at any time and did not consider himself bound by the expert's opinion. The judge concluded that in view of the complex nature of the litigation, which like most patent infringement litigation was a "battle between experts", the use of an independent or neutral technical expert was very beneficial.

While Judge Northrup's expert was appointed as an expert *witness*, the experts utilized by Judge Miles Lord of the District of Minnesota in

⁷¹FED. R. CIVIL P. 37.

⁷²Following trial in the *Kaehni Patent Infringement Litigation*, Chief Judge Northrup entertained defendants' motion for costs and attorney fees under 35 U.S.C. § 285 (1970). After carefully reviewing the entire course of the litigation, Judge Northrup concluded that "plaintiffs' conduct throughout the entire history of this case [could] only be characterized as vexatious and wholly unjustified in light of their lack of candor [in answering interrogatories and requests for admissions] and failure to conduct tests and discover the absence of infringement." The court granted defendant's motion and held that the defendant was entitled to reimbursement for all of its reasonable costs and attorney fees. The court also held, alternatively, that attorney fees and costs could be assessed under FED. R. CIVIL P. 37(c) because of plaintiff's "irresponsible and inexcusable" failure to admit the matters contained in defendants' second request for admission. *Kaehni v. The Diffraction Co., Inc.*, (D. Md. memorandum and order of April 28, 1972).

⁷³*Manual*, § 2.60(g). See also FED. R. CIVIL P. 83.

⁷⁴This procedure was first employed two decades ago in patent litigation involving complex technical questions by the late Judge William C. Coleman of the District of Maryland. Judge Coleman's technique was published in 21 F.R.D. 548 (1958) and was incorporated into the "Handbook of Recommended Procedures for the Trial of Patented Cases," 25 F.R.D. 351 at 427 (1960).

the *Antibiotic Drug Cases* were to serve as court advisors and it was not originally anticipated that they would testify at trial. In his order appointing an economist and a statistician, Judge Lord pointed out that the parties had presented divergent positions with respect to the economic theories and statistical methods which were used in analyzing and evaluating damages. These two experts were authorized "to consult with the court, its representatives and, subject to objection by the parties, the employees, representatives and experts of the plaintiff and defendants as they shall deem necessary."⁷⁵

These Court-appointed experts reviewed the technical material submitted by the parties and assisted the transferee judge in much the same way a law clerk would. They also acted as the court's representative in off-the-record meetings among the experts representing all of the parties. The purpose of these informal meetings was to make all parties aware of the economic evidence which would be offered by each side and to permit objections to such evidence to be made early enough so that the parties could reconcile their technical differences. Judge Lord felt that the use of these experts was of great value and assisted the court in reaching a better understanding of the technical issues involved.

Judge Lord also found it necessary to appoint special masters to assist him in the review of hundreds of documents for which the defendants claimed privilege. These masters were "impartial attorneys of high esteem in the community,"⁷⁶ who conducted an exhaustive review of the documents. They eventually made findings which were accepted by the trial court.⁷⁷

The use of special masters, expert witness, and technical advisors is not only desirable in some complex multidistrict litigation, but absolutely essential if the judge is to properly discharge his responsibility under § 1407. Many of the parties have almost unlimited resources at their disposal and may employ teams of "experts" to assist them. It is unrealistic to expect a single federal judge to efficiently process such complex litigation without qualified assistance.

Resolution of Common Issues

Although both the language⁷⁸ and the legislative history⁷⁹ of § 1407 clearly contemplate that all cases, except those which are terminated

⁷⁵In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions (S.D.N.Y. Administrative Order No. 71-2).

⁷⁶In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions (S.D.N.Y. Administrative Order No. 71-13).

⁷⁷Although certain of these findings were found to be erroneous by the Eighth Circuit Court of Appeals, that Court did not criticize the appointment or use of the masters. *Chas. Pfizer & Co., Inc., v. Lord*, 456 F.2d 545 (8th Cir. 1972).

⁷⁸" . . . 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. . . ." 28 U.S.C. § 1407(a) (1970).

⁷⁹Subsection (a) requires that transferred cases be remanded to the originating

during pretrial, are to be remanded to the transferor courts at the close of pretrial proceedings, few cases have been remanded for trial. Most multidistrict litigation, like other federal civil litigation, ends in a settlement. But even where no settlement has been reached, remand to the transferor courts, except for determination of individual issues such as damages, has been exceedingly rare. Most transferee judges have concluded that common issues should be resolved by *them* prior to remand and they have employed various techniques to accomplish this.⁸⁰

One way of avoiding remand for trial is to dispose of some or all of the major issues by summary judgment. If extensive discovery has taken place and a complete pretrial record has been prepared, the transferee court may be able to settle liability of some if not all of the defendants by entertaining motions for partial summary judgment prior to remand. Such a procedure is consistent with § 1407 as the legislative history makes it clear that the transferee court has the power to rule on motions for summary judgment.⁸¹ This procedure was employed by Judge Mac Swinford of the Eastern District of Kentucky in the *Cincinnati (TWA) Air Disaster Cases*.⁸²

Following completion of an extensive three-year discovery program, the parties were invited to file motions for partial summary judgment on the issue of liability. Motions were filed by three of the four defendants and by the passenger plaintiffs. The court absolved three of the defendants from liability for the accident and held that the passenger plaintiffs were entitled to a judgment against the carrier.⁸³ The court pointed out that three years of discovery had failed to produce any direct evidence to support the carrier's contention that the crash was

district at the close of coordinated pretrial proceedings. The Bill (S. 159, 90th Cong., 1st Sess. (1967)) does not, therefore, include the trial of cases in the consolidated proceedings. The experience of the Coordinating Committee was limited to pretrial matters, and the [House Judiciary] Committee consequently considers it desirable to keep this legislative proposal within the confines of that experience. Additionally, trial in the originating district is generally preferable from the standpoint of the parties and witnesses, and from the standpoint of the courts it may be impracticable to have all cases in mass litigation tried in one district."

⁸⁰H. R. REP. No. 1130, 90th Cong., 2d Sess. 4 (1968) which accompanied S. 159, 90th Cong., 1st Sess. (1967).

For a criticism of some of these techniques, see Comment, *The Experience of Transferee Courts under the Multidistrict Litigation Act*, 39 U. CHI. L. REV. 588, 607-611 (1972).

⁸¹H. R. Rep. No. 1130, 90th Cong., 2d Sess. 3 (1968).

⁸²Reidinger v. Trans World Airlines, 329 F. Supp. 487 (E.D. Ky. 1971).

⁸³The stipulated facts were that the TWA Flight No. 128 was cleared to land at the Greater Cincinnati Airport; that the crew attempted to make a visual approach; that the required "minimum level altitude" call-out was not made by the first officer; and that Flight No. 128 descended below its minimum level altitude well in advance of a visual sighting of the runway and contacted small trees at an elevation of 875 feet, almost two miles short of the runway. The court posed the "fundamental issue" as whether the crew knew or should have known their altitude, speed, and rate of descent prior to the crash or whether the crew, because of instrument failure or dereliction of duty by tower controllers, had reason to believe that they were executing their landing from a safe approach altitude and at a safe speed.

"proximately" caused by an instrument malfunction.⁸⁴ After exonerating the other defendants, the Court concluded that the undisputed facts established that the flight crew was negligent in the performance of their duties; the carrier was held liable for the accident.⁸⁵

Although recognizing "the great contribution made by Swinford in these complex cases," the Court of Appeals reversed. It concluded that the grant of summary judgment had occasioned "the denial of the opportunity afforded by our adversary system to put opposing factual contentions against each other to determine truth."⁸⁶ What the Court of Appeals overlooked was that all discovery regarding liability had been completed and that Judge Swinford reviewed all of the depositions and documentary evidence which had been produced during three years of discovery. Based on his review of these materials Judge Swinford concluded that there was absolutely *no evidence* to support TWA's contentions. TWA had a "theory" as to the cause of the crash, but in three years it had produced no *facts* to support its theory.⁸⁷ In spite of the appellate court's decision in this case, it seems reasonably certain that liability can be resolved by summary judgment in appropriate cases.⁸⁸

A test case may also be used for resolving common issues prior to remand. The transferee judge, with the assistance of counsel, selects one or more of the cases originally filed in his district (or transferred there for all purposes under § 1404(a)) and conducts a bifurcated trial on the issue of liability. He may also invite the parties in other cases to enter into a joint stipulation agreeing to be bound by his decision and by the decision on appeal.⁸⁹ Even in the absence of such a stipulation, a decision on the merits will likely have a profound influence on the remaining cases, often resulting in a quick settlement.⁹⁰ Addi-

⁸⁴TWA theorized that the amount of precipitation in the air and the icing propensities of the precipitation at the aircraft's altitude might have resulted in the ingestion and freezing of moisture in the pitot and static pressure tubes of the aircraft which, in turn, *might* have caused the altimeters to malfunction. The court characterized this contention as "totally hypothetical" since it was based on double and triple inferences. It was stipulated that at the time of the crash, the altimeter readings corresponding almost exactly with the plane's altitude at the time it first hit the trees.

⁸⁵The crew's negligence was traced to their failure to perform two fundamental and highly important functions: the first officer's failure to make the necessary call-outs of the aircraft's rate of descent, airspeed, and, most importantly, altitude and the crew's failure to execute a missed approach when they reached the minimum altitude without being able to see the runway.

⁸⁶Reidinger v. Trans World Airlines, Inc., 463 F.2d 1017, 1921 (6th Cir. 1972).

⁸⁷If Judge Swinford had entered an order precluding the introduction of any evidence which had not been made part of the record during the three-year discovery period, it might have been shown that there was and could be no evidence to support TWA's contention.

⁸⁸See, for example, Dolgow v. Anderson, 464 F.2d 437 (2d Cir. 1972).

⁸⁹This was done in the *Contact Lens Patent Litigation*. There, 98 patent infringement actions originally filed in 42 different districts were transferred to the Northern District of Illinois and assigned to Judge Hubert Will. The common plaintiffs and almost half of the defendants entered into such a stipulation. *Butterfield v. Oculus Contact Lens Co.*, 332 F. Supp. 750 (N.D. Ill. 1971).

⁹⁰*In re Air Crash Disaster, Dayton, Ohio*, 350 F. Supp. 757, 760 (S.D. Ohio 1972).

tionally, unless “mutuality” is required, a common party may be bound by an unfavorable decision under the doctrines of *res judicata* or collateral estoppel.⁹¹

Perhaps the most innovative and controversial method of disposing of common issues without remand is by transfer under § 1404(a). Consolidation for trial through transfer under § 1404(a) predates the passage of the Multidistrict Litigation Act; air disaster cases, for example, were often consolidated in a single court by the independent action of the judges before whom the cases were originally filed. The Panel has emphasized that §§ 1407 and 1404(a) are not mutually exclusive and that the same group of cases might involve both types of transfers.⁹² Transfer under § 1404(a) can either precede or follow transfer under § 1407. Although it has been urged “that only the transferor court can rule on a § 1404(a) transfer motion,”⁹³ every court considering this question has held that the power to transfer resides with the *transferee* court. The defendants in the *Antibiotic Drug Cases* challenged the authority of a transferee judge to make further transfers under § 1404(a), but Judge Miles Lord concluded that he had the power to make the proposed transfer. After he transferred one group of cases from the Southern District of New York to the District of Minnesota for trial,⁹⁴ the defendants sought review by writ of mandamus on the ground that the transferee judge lacked the power to make a further transfer under § 1404(a). The Court of Appeals denied the motion, upholding the power of the transferee court to make the order and finding no abuse of discretion. The court recognized that “while the Multidistrict Litigation Panel would have no power to transfer these cases for trial under § 1404(a), the judge to whom the cases have been assigned has such power here as he would in any other case.”⁹⁵

A variation to this theme occurred in the *Hanover, New Hampshire*

⁹¹Chief Judge Carl Weinman of the Southern District of Ohio applied federal rather than state law to determine the preclusive effect to be given a federal court judgment in diversity actions upon another federal action involving the same issues. Chief Judge Weinman then concluded that even parties who did not participate in the trial of the initial case would be bound by the doctrine of collateral estoppel. This decision, which may be said to have developed the “Humphrey’s correlary” to the well-known Bernhard Doctrine (*Bernhard v. Bank of America*, 19 Cal.2d 807, 122 P.2d 892 (1942)), means that the sword of the Bernhard Doctrine cuts both ways. It may be used to grant summary judgment in favor of a nonparticipating plaintiff against a common defendant who has litigated the issue of liability and lost as well as to grant summary judgment against a nonparticipating plaintiff and in favor of a common defendant who has litigated the issue of liability and won. In re Air Crash Disaster, Dayton, Ohio, *supra* note 90 at 767.

⁹²In the *Air Crash Disaster at Aramore, Okla.*, 295 F. Supp. 45 (J.P.M.L. 1968), seven cases were transferred to the Eastern District of Oklahoma by the Judicial Panel while nine actions were transferred from four different districts under 28 U.S.C. § 1404 (1964).

⁹³Levy, *Complex Multidistrict Litigation in the Federal Courts*, 38 *FORDHAM L. REV.* 786 (1970).

⁹⁴In re Antibiotic Antitrust Actions, 333 F. Supp. 299 (S.D.N.Y. 1971).

⁹⁵*Pfizer v. Lord*, 447 F.2d 122 (2d Cir. 1971), *accord*, *Greyhound Computer Corp. v. I.B.M.*, 342 F. Supp. 1143 (D. Minn. 1972).

Air Disaster Litigation which had been transferred under § 1407 to the District of New Hampshire and assigned to Judge Hugh H. Bownes.⁹⁶ The parties in those cases did not seriously question the transferee judge's authority to make a further transfer under § 1404(a) but disagreed about whether the transfer should be for a trial limited to liability or for trial of both liability and damages.⁹⁷ The court decided that the best way to proceed was to determine the issue of liability first in a consolidated trial and then to have separate trials on damages. Judge Bownes felt that the judge who supervised the pretrial discovery was better prepared to preside at the liability trial than a transferor judge would be but that the convenience of the plaintiffs would be best served by having the damage portion of the trial conducted where they brought suit, since the witnesses who would testify on the issue of damages were different from the witnesses who would testify on the issue of liability. While he had no doubt that a New Hampshire jury would be quite competent to determine liability in all cases, he was concerned that the difference in their backgrounds as compared to jurors in New York City, Philadelphia or Ohio might have the effect of depriving the plaintiffs of their constitutionally-guaranteed right to a trial by jury of *their peers*. Thus, the court transferred all cases to the District of New Hampshire for a consolidated trial on the issue of liability but provided that they would all be remanded or retransferred to the respective transferor courts for separate trials on the damage issue.⁹⁸ Other transferee judges in aviation litigation have made § 1404(a) transfers for trial on all issues, damages as well as liability.⁹⁹

These transferee judges, faced with the possibility of remanding large groups of cases to various districts for multiple determinations of common questions of law, each employed different techniques to insure that a single decision on the common issue would be made fairly and expeditiously.

CONCLUSION

Much has been written about the Judicial Panel on Multidistrict Litigation and its immense contribution to the orderly processing of complex federal litigation. Were it not for the Panel, 43 federal district judges might have been involved in the processing of the Butterfield Patent Litigation, 39 more in the Antibiotic Drug Litigation and another

⁹⁶In re Air Crash Disaster near Hanover, N.H., 314 F. Supp. 62 (J.P.M.L. 1970).

⁹⁷The defendants objected to the transfer for trial on issue of liability *alone*, but strongly supported transfer of all cases for trial as to liability *and* damages. Most plaintiffs, on the other hand, did not object to a transfer for trial on the issue of liability, although some objected to a transfer for all purposes.

⁹⁸In re Hanover, New Hampshire, Air Crash Litigation, *supra* note 21. The cases were never tried, however; all remaining cases were settled at the commencement of the consolidated trial.

⁹⁹In re Air Crash near Duarte, Calif., 357 F. Supp. 1013 (C.D. Calif. 1973), and cases cited therein.

38 in the Plumbing Fixture Litigation. Under the aegis of the Panel these cases were assigned to five federal judges leaving 115 other judges free to handle the other equally important business of the federal courts. But it was these five men—and the other federal judges who have assumed the responsibility of other major multidistrict litigation, who have made the system work. They have borne the burdens of this massive and complex litigation—and borne it exceedingly well.