

# Fordham Law Review

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Volume 40 | Issue 1

Article 2

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1971

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### Recommended Citation

Stanley J. Levy, *Complex Multidistrict Litigation and the Federal Courts*, 40 Fordham L. Rev. 41 (1971).  
Available at: <https://ir.lawnet.fordham.edu/flr/vol40/iss1/2>

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## Complex Multidistrict Litigation and the Federal Courts

### Cover Page Footnote

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# COMPLEX MULTIDISTRICT LITIGATION AND THE FEDERAL COURTS

STANLEY J. LEVY\*

## I. INTRODUCTION

WITH ever increasing frequency, litigation resulting from the same factual events is commenced in more than one federal court or judicial district. Although complex multidistrict litigation may involve any area of the law, it arises primarily in antitrust, patent infringement, security fraud and airplane accident cases. Congress and the federal courts have been faced with the problem of establishing an effective method of administering multidistrict litigation efficiently while still preserving the rights of all the parties.

In the early 1960s, the federal courts attempted to handle multidistrict litigation on an ad hoc basis, often transferring cases or assigning judges between districts. However, the "Electrical Equipment Antitrust Cases,"<sup>1</sup> unprecedented in their size and impact on the courts, demonstrated that existing procedures were inadequate for that type of massive litigation. Before it was concluded, 2,000 private actions, involving over 25,000 claims, had been commenced in thirty-five separate federal district courts.<sup>2</sup> Had some procedures not been developed to enable the courts to handle this massive litigation efficiently, these cases could have become so overburdening as to jeopardize the effective administration of the entire federal court system.

In order to overcome the threat of impending disaster, the Judicial Conference of the United States<sup>3</sup> established a Coordinating Committee to examine the difficulties involved in the pretrial stages of multidistrict

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1. In the Electrical Equipment Antitrust Cases, 29 manufacturers of electrical equipment were convicted of conspiring to fix prices and allocate business in violation of the Sherman Anti-Trust Act, 15 U.S.C. § 1 (1970). Neal & Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A.J. 621 (1964); see Comment, *The Judicial Panel on Multidistrict Litigation: Embryonic Guidelines for the Consolidation of Pretrial Proceedings*, 38 Fordham L. Rev. 786, 787 (1970) [hereinafter cited as *The Judicial Panel on Multidistrict Litigation*].

2. S. Rep. No. 454, 90th Cong., 1st Sess. 3 (1967) [hereinafter cited as *S. Rep. No. 454*]. The private actions were brought by aggrieved purchasers under section 4 of the Clayton Act, 15 U.S.C. § 15 (1970). *The Judicial Panel on Multidistrict Litigation* 787.

3. 28 U.S.C. § 331 (1964).

litigation.<sup>4</sup> Through the cooperation and coordination of the district judges, consolidated pretrial proceedings were successfully achieved in the Electrical Equipment Cases. The Coordinating Committee held frequent conferences with the responsible judges and recommended a national discovery program to replace independent discovery in the individual districts.<sup>5</sup> While this informal coordination enabled the courts to process the litigation,<sup>6</sup> it also demonstrated that such informal coordination between judges did not provide an effective and efficient method for administering massive, complex multidistrict litigation. A more formal statutory procedure was clearly needed.

Upon the recommendation of the Coordinating Committee, legislation was sought to reduce court congestion, conserve judicial manpower, save time and expense of the parties and witnesses, and resolve conflicting discovery demands while still fully protecting the rights of the parties. The search for greater judicial flexibility led to the enactment of section 1407<sup>7</sup> to title 28 of the United States Code, which permitted consolidation of multidistrict litigation for pretrial proceedings.<sup>8</sup> More than three years have elapsed since the enactment of section 1407; it is now appropriate to analyze how it has worked in practice, and whether it has been an effective method of handling multidistrict litigation.

## II. PROCEDURAL DEVICES AVAILABLE PRIOR TO SECTION 1407

### A. Section 292

Prior to the enactment of section 1407, there were few statutory tools available to handle multidistrict litigation. One such device was the intra and interdistrict assignment of judges under section 292 of title 28 of the United States Code. Under this section the chief judge of a circuit could temporarily assign one of the district judges within the circuit to sit in any other district within that circuit.<sup>9</sup> For example, in *In re Concrete Pipe*,<sup>10</sup> Judge Pence of the District Court of Hawaii was designated to sit in all the districts within the Ninth Judicial Circuit where concrete pipe cases were pending. Similarly, under this section, in order to ease congestion problems in certain districts, the Chief Justice of the United States

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4. S. Rep. No. 454 at 3.

5. *Id.*

6. *Id.* at 4.

7. Act of April 29, 1968, Pub. L. No. 90-296, § 1, 82 Stat. 109 (codified at 28 U.S.C. § 1407 (Supp. V, 1970)).

8. Hearings on S. 915 & H.R. 6111 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 322, 326 (1967); H.R. Rep. No. 1130, 90th Cong., 2d Sess., in 2 U.S. Code Cong. & Ad. News 1889, 1898-1900 (1968).

9. 28 U.S.C. § 292(b) (1964).

10. 302 F. Supp. 244, 246 n.1 (JPML 1969).

could designate a district judge in one circuit to serve in another circuit if he or the chief judge of the circuit filed a certificate of necessity.<sup>11</sup> Neither of these procedures, however, provided an effective method of administering multidistrict litigation.

### B. *Sections 1404 and 1406*

Under certain circumstances it is possible to combine cases brought in different districts by transferring them to a single district and assigning them to a single judge. Under section 1406, if an action is commenced in a district where venue was improper, it can be transferred "to any district . . . in which it could have been brought."<sup>12</sup> More important, section 1404 provides that, even if a case is properly commenced in one district, it can be transferred "to any other district or division where it might have been brought" if the district court where the action is pending finds that such transfer will be "[f]or the convenience of the parties and witnesses, [and] in the interest of justice . . . ."<sup>13</sup> A case transferred pursuant to either section is transferred for all purposes.<sup>14</sup>

In a case involving alternative jurisdictions in which to bring suit, the choice of forum involves careful analysis by the parties of factors such as the substantive law of the possible forums,<sup>15</sup> the choice of law considerations involved in selecting the governing law, the quality of the judges, jurors and opposing counsel, the status of court dockets, the expense of having to litigate in a distant forum, and the need to have local counsel and how that affects control of the case. Deciding where to sue may be the most critical decision in the entire case and it is an established principle that the plaintiff's choice of forum should not be disturbed lightly.<sup>16</sup> For that reason, counsel often vigorously oppose any efforts to

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11. 28 U.S.C. § 292(c) (1964).

12. *Id.* § 1406(a).

13. *Id.* § 1404(a).

14. While there are no cases in point, it would seem appropriate and reasonable for a court which receives a case pursuant to a 1404(a) transfer to return it to the originating district under section 1404(a) if the relevant factors in determining the "convenience of the parties and witnesses" change. For example, where a personal injury suit which was transferred to the site of the accident for the convenience of the liability witnesses has been tried on the issue of liability, it would seem more "convenient" to the parties and remaining witnesses to retransfer the case to the originating district where the plaintiff and the damage witnesses reside.

15. Even though the Supreme Court in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), held that the transferee court must apply the substantive law that the transferor court would apply, the forum still may critically affect the case. For example, certain districts have different attitudes toward discovery problems; in other districts there are differences in admissibility of evidence and, of course, an Asheville, North Carolina jury may evaluate personal injury and death claims quite differently than would a New York, Los Angeles, or Chicago jury.

16. *North Branch Prods., Inc. v. Fisher*, 284 F.2d 611 (D.C. Cir. 1960), cert. denied, 365 U.S. 827 (1961).

transfer. Since no single judge rules on all 1404 transfer motions it is possible that the results will not be consistent. Some cases arising out of the same facts may not be transferred and, even if transfers are ordered, the cases may not be sent to the same district.

It was made apparent by the Electrical Equipment Cases that, because of these deficiencies, the existing statutes did not provide a consistently reliable method of administering massive multidistrict litigation.

### III. THE OPERATION OF SECTION 1407

Section 1407 is a limited purpose statute which provides a means of transferring all factually related cases to a single district for pretrial proceedings only.<sup>17</sup> To this end it created a Judicial Panel on Multidistrict Litigation composed of seven federal circuit and district court judges appointed by the Chief Justice of the United States, with the restriction that no two judges may be from the same circuit.<sup>18</sup> The Panel was given the power to transfer, on its own initiative or on motion by one of the parties, any civil actions which are pending in different districts and involve "one or more common questions of fact . . . to any district for coordinated or consolidated pretrial proceedings [if it] . . . will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."<sup>19</sup>

The greater flexibility in transferring cases under section 1407 rather than under section 1404 is obvious. In addition to establishing different and more liberal standards for transfer, section 1407 makes available a broader geographical area for transfer. Whereas section 1404 permitted a transfer only to a district "where it might have been brought,"<sup>20</sup> section 1407 provides that a transfer may be "to any district."<sup>21</sup> Furthermore, section 1407 does not even require that there be an action pending in the transferee district or that such district have any relationship to the litigation. While the Panel recognizes its apparent power to transfer to a disinterested district, it has not as yet done so.

The major difference between these two transfer provisions is the limited nature of a 1407 transfer. A 1404 transfer is a transfer for all purposes,<sup>22</sup> theoretically to the court best suited to try the case, whereas

17. Thus leaving to the parties the choice of forum for the trial. See S. Rep. No. 454 at 5.

18. 28 U.S.C. § 1407(d) (Supp. V, 1970).

19. Id. § 1407(a). There is no mention of a requirement of common questions of law.

20. Id. § 1404(a) (1964).

21. Id. § 1407(a) (Supp. V, 1970).

22. However, there has been one recent attempt to affect a limited transfer for liability only under section 1404(a). Judge Bownes of the District of New Hampshire ordered that all cases assigned to him pursuant to section 1407 for pretrial proceedings be transferred to the District of New Hampshire under section 1404(a) "for trial on the issue of liability alone." In re Air Crash Disaster Near Hanover, N.H., No. 43, at 3 (D.N.H., June 3, 1971). The

a transfer under section 1407 is limited to pretrial proceedings only.<sup>23</sup> At the conclusion of the consolidated pretrial proceedings, the case must be remanded "to the district from which it was transferred."<sup>24</sup> As stated in the Senate Judiciary Report:

The bill does not, therefore, include the trial of cases in the consolidated proceedings. . . . 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 would be impracticable to have all cases in mass litigation tried in one district. Finally, the committee recognizes that in most cases there will be a need for local discovery proceedings to supplement coordinated discovery proceedings, and that consequently remand to the originating district for this purpose will be desirable.<sup>25</sup>

If a transfer is made, the Panel is authorized to assign the consolidated cases to a particular judge who is empowered to act in any district.<sup>26</sup> Where possible, a judge of the transferee district will be designated to handle the litigation if the chief judge of the district consents and a willing judge can be found. Frequently, however, the Panel will, with the approval of the chief judge of the transferee district, designate a judge from another district to handle the litigation. For example, in *In re San Juan, Puerto Rico Air Crash Disaster*,<sup>27</sup> the Panel transferred the cases to the District of Puerto Rico but designated Judge Weinfeld of the Southern District of New York to serve there when the two local judges disqualified themselves due to a possible conflict of interest. Similarly, the Panel has recently separated the cases in *In re Antibiotic Drugs*<sup>28</sup> into two classifications, assigning one group of cases to Judge Lord of the

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opinion contains no reported authority on the precise issue, and the author has been advised that petitions for review will be filed.

23. 28 U.S.C. § 1407(a) (Supp. V, 1970).

24. *Id.*

25. S. Rep. No. 454 at 5.

26. 28 U.S.C. § 1407(b) (Supp. V, 1970). Because of the importance of early identification of cases for a section 1407 transfer, the Panel has recommended, and most district courts have adopted, procedures to enable the Panel to promptly identify cases for section 1407 treatment. When such a case is identified, the Panel issues an order to show cause why the cases should not be transferred. The parties may file affidavits and briefs, and a hearing may be held.

The Panel, as authorized by section 1407(e), has issued for the conduct of its business Rules of Procedure which deal with filing requirements, time for motions, size of paper, date and place of hearings, and related matters. Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 2 Trade Reg. Rep. ¶ 9400 (Sept. 1, 1971). The Rules and the Manual for Complex and Multidistrict Litigation, prepared by the Coordinating Committee, should be studied by anyone involved in multidistrict litigation. The manual has been published by Commerce Clearing House, Inc. and West Publishing Co. It also appears in 1 J. Moore, Federal Practice pt. 2 (2d ed. 1970).

27. 316 F. Supp. 981 (JPML 1970). See also *In re Brown Co. Sec. Litigation*, 325 F. Supp. 307 (JPML 1971); *In re Seeburg-Commonwealth United Merger*, 312 F. Supp. 909 (JPML 1970).

28. 320 F. Supp. 586 (JPML 1970).

District of Minnesota, who was designated to sit in the transferee Southern District of New York. Thus, as a result of the flexibility achieved under section 1407, the Panel has been able to utilize available judicial manpower more efficiently.

Under section 1407 there is a very limited right of review. No appeal is permitted if the Panel denies transfer.<sup>29</sup> However, there may be an appeal to the court of appeals of the transferee district from the Panel's order of transfer or an order subsequent to transfer.<sup>30</sup> To date, no order of the Panel has been appealed.

#### IV. PREREQUISITES TO TRANSFER

According to section 1407, a case may be transferred if there are common issues of fact and the Panel finds that transfer will further the "convenience of parties and witnesses and will promote the just and efficient conduct" of the action.<sup>31</sup> This standard has been criticized as being too vague and broad;<sup>32</sup> indeed, the Panel has frequently transferred cases where it did not appear that the standards had been met.<sup>33</sup> The statute does not require that the "common issues of fact" predominate or even that they be significant to the litigation. For this reason, some cases with only limited commonality have been subjected to transfer.<sup>34</sup> Moreover, while the statute requires that all criteria be met—common questions of fact, convenience of witnesses and parties, and the promotion of just and

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29. 28 U.S.C. § 1407(e) (Supp. V, 1970).

30. *Id.* A review by the court of appeals may be obtained only by extraordinary writ pursuant to 28 U.S.C. § 1651 (1964).

31. 28 U.S.C. § 1407(a) (Supp. V, 1970). Between April 29, 1969 and March 31, 1971, the Panel denied transfer in only 15 of the 58 matters (dockets) ruled on. Between April 29, 1969 and October 31, 1970, 67 matters were docketed. They may be categorized as follows: Antitrust—20; Aviation—15; Patent and Trademarks—11; Securities—7; Torts—2; Labor—2; Product Liability—1; Bankruptcy—1; all others—8. By transfer orders entered prior to December 31, 1970, the Panel transferred 869 cases to 29 separate transferee judges who, in addition, were administering 509 cases which were already pending in the transferee district. The Panel had entered orders in 16 additional dockets between December 31, 1970 and March 31, 1971, but figures as to the number of cases transferred are not yet available. Report of the Judicial Panel on Multidistrict Litigation (Oct. 1970).

32. See, e.g., Committee on Federal Legislation of the Ass'n of the Bar of the City of New York, Proposed Legislation for the Transfer of Multiple Suits to a Single District for Pretrial Proceedings, 6 Reports of Committees of the Ass'n of the Bar Concerned with Federal Legislation 61, 64-65 (1967).

33. See, e.g., *In re Air Crash Disaster At the Greater Cincinnati Airport*, 298 F. Supp. 353 (JPML 1968) (transfer of defendant General Dynamics Corporation). See also dissenting opinions of Judge Weigel in *Embryo Patent Infringement Litigation*, No. 57 (JPML, March 5, 1971); *In re Willingham Patent Litigation*, 322 F. Supp. 1019 (JPML 1971); *In re Carrom Trademark Litigation*, 322 F. Supp. 1016 (JPML 1971).

34. See, e.g., *In re Willingham Patent Litigation*, 322 F. Supp. 1019 (JPML 1971). See also *In re Air Fare Litigation*, 322 F. Supp. 1013 (JPML 1971); *In re Fourth Class Postage Regulations*, 298 F. Supp. 1326 (JPML 1969).

efficient conduct of the cases—the Panel has transferred where it found that only the “just and efficient” criterion was met, often with little regard given to the convenience of the parties.<sup>35</sup> The Panel has assumed that transfer and consolidation will promote judicial efficiency which will result in convenience to the parties and witnesses. However, actual experience in many cases transferred under section 1407 raises serious doubts as to the validity of this assumption.

Thus, only by an examination of the cases transferred is one able to fully comprehend the factors considered to be determinative by the Panel. According to Judge Weigel:<sup>36</sup> “The basic question before the Panel in each proceeding looking to coordinated or consolidated pretrial is, then, whether the objectives of the statute are sufficiently served to justify the necessary inconveniences of transfer and remand.”<sup>37</sup> He went on to point out that many factors are relevant in determining whether transfer is dictated in a particular case, and that the importance of each factor may vary from case to case.<sup>38</sup>

#### A. *Common Questions of Fact*

The Panel has held that, in order to obtain a transfer, the initial prerequisite is the existence of one or more common questions of fact.<sup>39</sup> In some types of cases, such as aviation accident, security fraud, and patent infringement litigation, the common questions of fact are significant and obvious. It is often not clear whether the common issues of fact found by the Panel are so important or significant to the litigation as to justify disruptive transfer. However, the Panel is quick to find that there are common facts sufficient to order transfer, despite the frequent dissent of Judge Weigel who recently stated: “As in [two recent cases<sup>40</sup>], it seems to me that there are insufficient common questions of fact to justify [a section] 1407 transfer in the light of the troubles and inconveniences occasioned thereby.”<sup>41</sup>

Although the existence of common questions of law is not a ground

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35. See, e.g., *In re Butterfield Patent Infringement*, No. 29 (JPML, Feb. 2, 1970); *In re Concrete Pipe Litigation*, 303 F. Supp. 507 (JPML 1969); *In re Antibiotic Drugs*, 295 F. Supp. 1402 (JPML 1968).

36. Judge of the Northern District of California and member of the Panel.

37. *In re Concrete Pipe*, 302 F. Supp. 244, 255 (JPML 1969). Judge Weigel's opinion contains the most detailed and explicit listing of factors which may be deemed significant by the Panel in deciding whether to transfer.

38. *Id.*

39. E.g., *In re Air Crash Disaster At the Greater Cincinnati Airport*, 298 F. Supp. 353, 354 (JPML 1968).

40. *In re Willingham Patent Litigation*, 322 F. Supp. 1019 (JPML 1971); *In re Carrom Trademark Litigation*, 322 F. Supp. 1016 (JPML 1971).

41. *In re Embro Patent Infringement Litigation*, No. 57, at 6 (JPML, March 5, 1971) (dissenting opinion).

for a 1407 transfer, the Panel has transferred cases where the common legal question was the prime issue. Where it has done this, it has rationalized its decision by saying that it was necessary to discover the underlying or surrounding facts. Thus, in *In re Fourth Class Postage Regulations*,<sup>42</sup> the Panel chose to consider as relevant factors justifying transfer such "common facts" as the historical development of postal sorting, the presence or absence of studies supporting the legislation, and the public policy implications of applying the regulations to certain materials. More recently, this issue was raised in *In re Air Fare Litigation*<sup>43</sup> which involved seven class action claims for the refund of fare overcharges. The Panel found that, although the primary issue was a question of law, there were common fact questions concerning the total damages to the class. Hence, the cases suggest that if the Panel feels the matter should be consolidated under section 1407, common questions of fact will be found to exist in order to justify the transfer.

While the statute applies if there are cases pending in at least two different districts,<sup>44</sup> it was originally held that, where only a few cases were involved, transfer would be ordered only upon a showing that the common questions of fact were rather complex. Accordingly, transfer was denied in *In re Scotch Whiskey*,<sup>45</sup> where two cases were pending in two districts. On the other hand, transfers were ordered in *In re IBM*,<sup>46</sup> where four cases were pending in only two districts, since the Panel found that the cases were exceptional and involved "complex questions of fact."<sup>47</sup> More recently, however, the Panel has ordered transfers where four cases were pending in three districts,<sup>48</sup> and where three cases were pending in two districts,<sup>49</sup> even though in both cases "the factual complexity [was] not so great as *In re IBM Antitrust Litigation* . . ."<sup>50</sup> Furthermore, the Panel has even gone to the extreme, in *In re CBS Licensing Antitrust Litigation*,<sup>51</sup> of ordering transfer where only two cases were pending in two districts, apparently feeling that judicial efficiency would be enhanced since in one of the cases the judge had already dismissed several causes of action. Thus, it is suggested by these cases that the Panel is abandoning its initially expressed reluctance against ordering transfer where only a few cases are involved.

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42. 298 F. Supp. 1326 (JPML 1969).

43. 322 F. Supp. 1013 (JPML 1971).

44. 28 U.S.C. § 1407(a) (Supp. V, 1970).

45. 299 F. Supp. 543 (JPML 1969).

46. 302 F. Supp. 796 (JPML 1969).

47. *Id.* at 799.

48. *In re Carrom Trademark Litigation*, 322 F. Supp. 1016 (JPML 1971).

49. *In re Willingham Patent Litigation*, 322 F. Supp. 1019 (JPML 1971).

50. *Id.* at 1020.

51. 5 Trade Reg. Rep. (1971 Trade Cas.) ¶ 73,447 (JPML, Jan. 20, 1971).

### B. *Just and Efficient Proceedings*

The cases discussed immediately above<sup>52</sup> are a further indication that the statutory requirement that judicial efficiency result from transfer plays the greatest role in the Panel's consideration of transfer motions. Indeed, when section 1407 was originally proposed the Coordinating Committee on Multiple Litigation said that this requirement "limits the applicability of the proposed statute to litigation in which significant economy and efficiency in judicial administration may be obtained."<sup>53</sup> However, in order to prevent the total sacrifice of the interests of the parties in achieving the goal of judicial efficiency, section 1407 provides that the transfer must result in "just" as well as "efficient" conduct of the actions.<sup>54</sup>

The Panel is apparently of the view that transfer and coordination invariably mean overall economy and efficiency and will avoid conflicting pretrial rulings,<sup>55</sup> duplication of discovery<sup>56</sup> and multiplicity of appeals.<sup>57</sup> The Panel has effectively used section 1407 to consolidate and administer massive civil antitrust cases which have been filed with increasing frequency. Had it not transferred and consolidated these cases there would have been serious inefficiency, the possibility of inconsistent and conflicting results, and an adverse impact on the entire judicial structure. However, aside from antitrust cases, the Panel's view that efficiency and economy always follow a transfer is subject to serious doubt as a result of the experience of handling aviation disaster litigation.

Prior to the enactment of section 1407, cases arising out of commercial aviation accidents were frequently brought in many different districts. They were generally handled efficiently and quickly, and in very few instances was it necessary to have more than one case tried as a result of any one accident.<sup>58</sup> Discovery frequently was completed within two years

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52. Cases discussed at notes 48, 49 & 51 supra and accompanying text.

53. *In re Plumbing Fixtures Cases*, 298 F. Supp. 483, 499 (JPML 1968).

54. 28 U.S.C. § 1407(a) (Supp. V, 1970); see *The Judicial Panel on Multidistrict Litigation* 795.

55. *In re Fourth Class Postage Regulations*, 298 F. Supp. 1326 (JPML 1969).

56. *In re Gypsum Wallboard*, 297 F. Supp. 1350 (JPML 1969). The Panel has ordered transfer to avoid duplication of discovery despite a history of voluntary cooperation among counsel. E.g., *In re Air Crash Disaster Near Dayton, Ohio*, 310 F. Supp. 798 (JPML 1970).

57. Where discovery has reached an advanced stage, transfer offers little advantage. Transfer was denied in *In re Grain Shipments*, 300 F. Supp. 1402 (JPML 1969), and *In re Air Crash Disaster At Falls City, Neb.*, 298 F. Supp. 1323 (JPML 1969), where two cases well along in discovery proceedings were not transferred and consolidated with thirty other cases. But see *In re Ampicillin Antitrust Litigation*, 315 F. Supp. 317 (JPML 1970).

58. The most notable exception was the litigation arising out of the crash of an Eastern Air Lines Electra at Logan Airport, Massachusetts, in October 1960. Cases against five defendants were brought primarily in Pennsylvania and Massachusetts. Because of the Massachusetts wrongful death limitations, the Pennsylvania plaintiffs opposed a motion to transfer

of the date of the accident, fully prepared cases seldom required more than 3,000 pages of depositions, and defendants' employees were rarely examined more than once regardless of the number of cases pending or the number of different districts involved. In contrast, efficiency and economy have been the exception rather than the rule in aviation cases transferred and consolidated by the Panel under section 1407.<sup>59</sup> For example, in the litigation arising out of the two air crashes at the Cincinnati Airport in 1965<sup>60</sup> and 1967,<sup>61</sup> the commencement of depositions was delayed more than two years and were not concluded until long after most of the cases which were started contemporaneously in the state courts had been resolved. In the consolidated litigation arising out of the Piedmont air collision in July 1967, near Hendersonville, North Carolina,<sup>62</sup> depositions ran for well over one year with the taking of more than 15,000 pages of testimony. Far from fostering economy and efficiency, consolidation has caused delay, expense and injustice. When all the cases are consolidated and all the parties are gathered together, individual settlements become rare because of the fear that, in the fishbowl atmosphere which usually prevails, the terms will become general knowledge and set a pattern. Moreover, all settlements are delayed for excessive periods of time while a "package" settlement is devised.

### C. *Convenience of Parties and Witnesses*

The final statutory prerequisite is that the transfer must be for the convenience of the parties and the witnesses.<sup>63</sup> Judge Weigel has recognized that "there are a number of inherent inconveniences" in 1407 transfers and has characterized some of them as follows:

Some plaintiffs are temporarily deprived of their choices of forum and some defendants may be forced to litigate in districts where they could not have been sued. Considerable time and trouble are involved in the sheer mechanics of transferring and remanding. After transfer, the process of segregating the pretrial matters which should be remanded for handling by the transferor courts may be time-consuming as well as subject to reasonable disagreement. Since remand must be by order of the Panel, the Panel may have to hold further hearings to resolve disagreements among the parties.<sup>64</sup>

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the cases to Massachusetts and that issue finally had to be resolved by the Supreme Court in *Van Dusen v. Barrack*, 376 U.S. 612 (1964). See note 15 *supra*.

59. Except for *In re Air Crash Disaster At Falls City, Neb.*, 298 F. Supp. 1323 (JPML 1969), which involved cases which were at an advanced stage in the proceedings at the time the matter was considered by it, the Panel has transferred and consolidated every commercial aircraft disaster case which has been brought before it.

60. *In re Air Crash Disaster At the Greater Cincinnati Airport*, 295 F. Supp. 51 (JPML 1968).

61. *In re Air Crash Disaster At the Greater Cincinnati Airport*, 298 F. Supp. 353 (JPML 1968).

62. *In re Mid-Air Collision Near Hendersonville, N.C.*, 297 F. Supp. 1039 (JPML 1969).

63. 28 U.S.C. § 1407(a) (Supp. V, 1970).

64. *In re Concrete Pipe*, 302 F. Supp. 244, 254-55 (JPML 1969) (footnote omitted).

Despite the expressed "inherent inconveniences," the Panel has assumed that coordination will, nevertheless, further the convenience of most of the parties. It has generally rejected claims of inconvenience made by the parties as being "parochial" and "self-interested."<sup>65</sup> When counsel have claimed that transfer to distant forums will create great inconvenience and impose unjustifiable financial expenses of transportation, of retaining local counsel, and of out of town living, the Panel has stated: "We are satisfied that any additional burden will be offset by the savings from and convenience of coordinated or consolidated pretrial proceedings directed by the transferee judge."<sup>66</sup>

Similarly, in *In re Butterfield Patent Infringement*,<sup>67</sup> the Panel said: "[I]t is not only expedient, but less expensive for each individual defendant to join in the selection of lead counsel to handle the consolidated discovery depositions."<sup>68</sup> In response to counsels' argument that they will lose control of their cases, the Panel has said that their fears are irrelevant since they can rely on other counsel and "receive the benefit of the consolidated depositions without the necessity of engaging individual local counsel in the transferee court and without the necessity of extensive travel by their own local counsel."<sup>69</sup> One effect of the Panel's approach, innocent and well motivated as it may be, is to force some lawyers into a position where they must accept the benefit of another lawyer's work whether they want to or not. Conversely, certain lawyers are compelled to provide their work product for the benefit of other lawyers without compensation. As a result, the interest and convenience of the parties may well be sacrificed for an assumed, but unproven, judicial convenience and economy.

On the other hand, the Panel has acted promptly and with ample justification in consolidating cases which involved competing class action claims.<sup>70</sup> As stated in the *Manual for Complex and Multidistrict Litigation*:<sup>71</sup> "If two courts enter parallel orders determining that an action in each court shall proceed as a class action for all plaintiffs similarly situated, without regard to geographical areas or district boundaries, a real

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65. See, e.g., *In re IBM*, 302 F. Supp. 796 (JPML 1969).

66. *In re Concrete Pipe*, 303 F. Supp. 507, 509 (JPML 1969); accord, *In re Antibiotic Drugs*, 295 F. Supp. 1402, 1404 (JPML 1968).

67. No. 29 (JPML, Feb. 2, 1970).

68. *Id.* at 3.

69. *Id.* The Panel has also rejected the suggestion that it should establish in national cases two or more regional transferee courts in order to ease the burden on small parties. The Panel has always selected a single transferee court despite the probable savings to the parties. *In re Antibiotic Drugs*, 295 F. Supp. 1402 (JPML 1968).

70. E.g., *In re Antibiotic Drugs*, 303 F. Supp. 1056 (JPML 1969); *In re Plumbing Fixture Cases*, 298 F. Supp. 484 (JPML 1968); *In re Protection Devices & Equip.*, 295 F. Supp. 39 (JPML 1968).

71. 1 J. Moore, *Federal Practice* pt. 2 (2d ed. 1970). See note 26 *supra*.

conflict between the courts exists."<sup>72</sup> Thus, if the Panel had not acted to consolidate them, competing class actions could proceed independently in the different districts with the very real possibility of chaos and confusion.<sup>73</sup>

An analysis of the Panel's decisions indicates that it is quick to find common issues of fact and prone to transfer cases where there are some common issues, often with little regard to the significance of them to the litigation. An analysis also reveals that the Panel has assumed, despite practical experience demonstrating that consolidation has a deleterious effect in certain cases, that coordination will lead to efficiency and economy and result in greater convenience to the majority of the litigants, without giving serious consideration to the claims of inconvenience, cost and prejudice frequently asserted.

#### V. TIME OF TRANSFER

There has been considerable discussion<sup>74</sup> concerning the appropriate time to transfer cases which are subject to section 1407. The timing of transfer may have a significant effect on the entire course of the litigation; it may affect not only which court will rule on early motions, but it may also affect the method and exercise of control of the litigation by the parties. The Panel has asserted that early consolidation furthers section 1407's goals of centralized pretrial management which includes the "reduction of court congestion, conservation of judicial energy, saving of time and trouble for parties and witnesses, resolution of conflicting discovery demands, acceleration of solutions of major controversies, and fostering sound results on the merits."<sup>75</sup> Given this belief it is only natural that the Panel would attempt to identify possible section 1407 cases and effect early transfers, preferably before any significant independent discovery has been conducted. To this end the Panel has taken steps,<sup>76</sup> in cooperation with the various district courts and the Administrative Office of the United States Courts, to identify "appropriate" cases and has consistently rejected attempts to delay transfers.

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72. 1 J. Moore, *supra* note 71, at § 5.5, at 99.

73. The Panel has said that "[i]t is in the field of class action determinations in related multidistrict civil actions that the potential for conflicting, disorderly, chaotic judicial action is the greatest." *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 493 (JPML 1968).

74. E.g., *In re Library Editions of Children's Books*, 297 F. Supp. 385 (JPML 1968).

75. *In re Library Editions of Children's Books*, 299 F. Supp. 1139, 1142 (JPML 1969). However, the Panel has also made it clear that discovery proceedings commenced in the transferee district are not stayed unless modified by the transferee judge after the initial pre-trial conference. *In re Master Key*, 320 F. Supp. 1404, 1407 (JPML 1971).

76. See 1 J. Moore, *supra* note 71, at §§ 0.2-.23, at 9-10.

In *In re Library Editions of Children's Books*,<sup>77</sup> and *In re Gypsum Wallboard*,<sup>78</sup> the Panel ordered transfer even though the defendants had not been served with process. Moreover, in the former case, transfer was ordered notwithstanding the fact that the defendants did not have notice of the proposed transfer. Rejecting counsel's argument that failure to give an unserved defendant notice of the proposed transfer prevents the transfer, the Panel stated that cases had been transferred under section 1404<sup>79</sup> and section 1406<sup>80</sup> even though defendants had not been served, and that "lack of personal jurisdiction over a defendant does not necessarily bar a transfer as a matter of constitutional law."<sup>81</sup> It pointed out that the defendants still had to be served "pursuant to the rules of the transferor court" and that they could raise any motions, such as motions to quash or dismiss for want of jurisdiction.<sup>82</sup> Furthermore, while section 1407 required the Panel to give notice to "parties," the Panel defined "parties" so as to exclude anyone who had not as yet been served. Finally, the Panel justified its decision by stating that the effectiveness of 1407 "would be severely impeded" if the power to transfer was contingent upon all named parties being served.<sup>83</sup>

One problem resulting from early transfer is the effect of transfer on motions which have been made in the originating court and which are *sub judice* at the time the question of transfer is before the Panel. It is generally assumed that transfer divests the transferor court of jurisdiction.<sup>84</sup> Assuming this is so, some have argued that the Panel should defer action until all pending motions have been resolved. In *In re Plumbing*

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77. 299 F. Supp. 1139 (JPML 1969).

78. 302 F. Supp. 794 (JPML 1969).

79. 28 U.S.C. § 1404(a) (1964).

80. *Id.* § 1406(a).

81. 299 F. Supp. at 1141.

82. *Id.* at 1142. The Panel specifically did not pass upon "the question of whether such motions should be raised in the transferor or the transferee court." *Id.* n.l. However, by the time of its decision in *In re Gypsum Wallboard*, 302 F. Supp. 794 (JPML 1969), only three and one half months later, the Panel said that such motions were "being routinely considered by courts to which multidistrict litigation has previously been transferred" and suggested that the defendant could pursue its remedy there. *Id.* On September 1, 1971, the Panel's newly adopted rules became effective. Rule 12(f) provides that the failure to serve the complaint or a copy of the transfer order on the defendant did not preclude transfer or render the transfer void although the absence of such service would constitute a basis for opposing transfer or seeking remand. In effect, the Panel has codified its decisions in *In re Library Editions of Children's Books*, 299 F. Supp. 1139 (JPML 1969), and *In re Gypsum Wallboard*, *supra*, by promulgation of this rule.

83. 299 F. Supp. at 1142.

84. *In re Plumbing Fixture Cases*, 298 F. Supp. 484 (JPML 1968).

*Fixture Cases*,<sup>85</sup> one of the parties urged that the Panel delay action until it could obtain a ruling on a motion for a class action determination. The Panel rejected the plea for delay and took the opportunity to restate its inclination for early transfers and to make clear that it would give due regard to the rights of the transferor court. Recognizing that transfer motions might come before it while important motions, possibly involving summary judgment or dismissal of claims, were pending in the transferor court, the Panel stated:

On principles of comity, where appropriate, the Panel has in the past timed its actions and constructed its orders in a manner which will permit the transferor courts (and Courts of Appeals if any are involved) to reach timely decisions on particular issues without abrupt, disconcerting, untimely or inappropriate orders of transfer by the Panel. This policy of comity has been followed in the past and will be followed in the future by the Panel.<sup>86</sup>

This flexible approach has led the Panel to transfer cases pending in one district despite the fact that a 1404 transfer motion was *sub judice* before the district judge while, in the same case, denying transfer of cases pending in another district where the plaintiffs intended to seek appellate review of a decision ordering a 1404 transfer.<sup>87</sup> It was the Panel's opinion that transfer of the cases to be appealed would disrupt the proceeding in process, whereas transfer of the undecided motion could easily be deferred.<sup>88</sup>

The problem of divestiture of jurisdiction over pending motions could have been a source of dissension between the Panel and the district judges who had motions pending before them. While the Panel assumes that its transfer order divests the transferor court of all jurisdiction, there are no cases yet decided, other than by the Panel itself, which support the assertion that a judge can be divested of jurisdiction over a motion submitted to him. Moreover, at least one member of the Panel, Judge Weinfeld,<sup>89</sup> has asserted that there is no such divestiture of jurisdiction.<sup>90</sup> However, both the Panel and the district judges have approached the matter in a

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85. 298 F. Supp. 484 (JPML 1968).

86. *Id.* at 496. This case is also significant because the Panel rejected the idea that it could partition issues in a single claim for relief and assign certain portions to one court and other portions to another court. The Panel reviewed the legislative history and ruled that a claim for relief is "unitary" and an irreducible unit. While such a claim can be transferred, it cannot be divided, and two courts cannot exercise "contemporaneous dual control" over a single claim for relief. *Id.* at 495.

87. *In re Mid-Air Collision Near Hendersonville, N.C.*, 297 F. Supp. 1039 (JPML 1969).

88. *Id. Contra*, *In re Deering Milliken Patent Litigation*, No. 49 (JPML, Aug. 21, 1970), where the Panel denied transfer in order to give the originating courts an opportunity to rule on pending motions.

89. Judge of the Southern District of New York.

90. *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 497 (JPML 1968) (dissenting opinion).

spirit of comity and reasonableness, with the courts following Judge Weinfeld's advice to "decline to exercise jurisdiction and defer to the transferee court."<sup>91</sup>

While the Panel's policy of early transfer is sound, it does raise certain problems, the primary one being the "tag along" case. As defined in the Panel's Rules of Procedure,<sup>92</sup> the "tag along" case is "a civil action apparently sharing common questions of fact with actions previously transferred under Section 1407 and which was filed or came to the attention of the Panel after the initial hearing before it."<sup>93</sup> The magnitude of the "tag along" problem is highlighted by the fact that nearly two-thirds of the 502 cases transferred by the Panel between July 1, 1969 and June 30, 1970, were "tag along" cases.<sup>94</sup>

The first problem the "tag along" faces is that if he is opposed to transfer or has reason to desire transfer to a particular district, his arguments may not be heard by the Panel at the initial hearing and he is then confronted with a *fait accompli*.<sup>95</sup> Although the Panel has set up a procedure which gives a "tag along" the right to be heard,<sup>96</sup> his voice is given little weight since the Panel has already acted. Indeed, even though in several rare instances<sup>97</sup> the Panel has refused to transfer a "tag along," many parties who oppose transfer simply do not object because of the apparent futility of achieving any success.

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91. *Id.*

92. Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 2 Trade Reg. Rep. ¶ 9400 (Sept. 1, 1971) [hereinafter cited as Panel R.].

93. Panel R. 1, at 15,767.

94. Reports of the Judicial Panel on Multidistrict Litigation (March & Oct. 1970).

95. There has been at least one case where prospective plaintiffs have sought leave to appear at a hearing on transfer of the matter in which the plaintiffs were involved, but where the actions had not yet been commenced. In *re* Mid-Air Collision Near Fairland, Ind., 309 F. Supp. 621 (JPML 1970). The Panel denied the prospective party the right to appear or file papers without giving any reason for the refusal. Letter from John T. McDermott, Administrative Attorney, JPML, to Stanley J. Levy, Esq., Jan. 8, 1970.

96. When the clerk of the Panel learns of the existence of a "tag along" case he enters a transfer order pursuant to Panel R. 12(a). However, the clerk withholds transmitting the transfer order to the clerk of the transferee court, thus staying execution for fifteen days to give the parties a chance to file a "Notice of Opposition." *Id.* The "conditional transfer order" is an administrative device to expedite transfer where there is no opposition; it is not a decision by the Panel which must be reversed to be vacated. In *re* Grain Shipments, 319 F. Supp. 533, 534 (JPML 1970). When the clerk receives the notice of opposition he further extends the stay until the Panel acts. The party opposing must file a motion with supporting brief to vacate the transfer order within fifteen days of the filing of the notice of opposition, and must notify the Panel if a hearing is requested. Failure to file is deemed a withdrawal of opposition. Panel R. 12(c), at 15,769-70.

97. In *re* Western Liquid Asphalt, 309 F. Supp. 157 (JPML 1970); In *re* Concrete Pipe, 297 F. Supp. 1125 (JPML 1968).

When the "tag along" plaintiff reaches the transferee court his presence may cause problems for him, for the cases already pending there, and for the court. Discovery may already have begun and he may find himself at a substantial disadvantage in the proceedings. On the other hand, to assure that his rights are not prejudiced and to minimize any request for supplemental discovery, the court will probably insist that he be given full access to and the benefit of the production and depositions already conducted. Frequently, this is done without the court also insisting that he bear a fair share of the expenses already incurred. Additionally, he may find that agreements and stipulations have been reached which he is not permitted to challenge. More significantly, he may find that matters of importance to him, such as determination of class action questions, selection of lead counsel, summary judgment motions and the like, have already been litigated and decided, and are binding on him even though he did not participate in those proceedings. However, to enjoin discovery in order to assure that all possible cases have been commenced and consolidated would be unfair to the diligent plaintiff.

There is no easy solution to the problem. If the consolidated discovery has substantially progressed it would be a reasonable ground for denying transfer.<sup>98</sup> Perhaps the only feasible approach is to leave it to the transferee court's discretion to minimize any injustice or prejudice. To this end the transferee court has substantial latitude.<sup>99</sup>

## VI. SELECTION OF THE TRANSFEEE FORUM

After the Panel has decided to transfer a matter it must select the transferee forum. Obviously the parties are vitally interested in this decision and the Panel's rulings indicate that the choice of the appropriate forum is more frequently argued than whether the case should be transferred.

Section 1407 offers no guidance. It simply states that the Panel may transfer "to any district" for pretrial proceedings.<sup>100</sup> While the Panel has asserted power to transfer the cases to a district in which there are no cases pending and no interest in the litigation, it has generally gone through a balancing procedure in selecting an appropriate forum for the pretrial proceedings. The ideal transferee court, according to the Panel, would be a district where many of the common facts occurred, where a number of the cases are already pending, where some discovery has taken place, where a single judge is already familiar with the litigation, and

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98. *In re Air Crash Disaster At Falls City, Neb.*, 298 F. Supp. 1323 (JPML 1969).

99. *In re Concrete Pipe*, 303 F. Supp. 507 (JPML 1969).

100. 28 U.S.C. § 1407(a) (Supp. V, 1970). Although the statute itself provides no guidance, its legislative history states that several factors such as the state of the transferee district's docket, the availability of counsel, and sufficient courtroom facilities, should be considered. S. Rep. No. 454 at 5.

where the judges and the court are not burdened by calendar problems.<sup>101</sup>

Unfortunately, however, the ideal is rarely obtained; therefore, the Panel must select between competing considerations. Certain administrative factors considered are: Whether or not there is a judge in the suggested transferee district who is familiar with the case; whether or not he is willing to accept responsibility for the litigation; whether or not his workload is such as will permit him to handle the case, and if not, whether or not a judge from another district can be assigned;<sup>102</sup> and, whether or not the chief judge of the district will consent to the transfer of additional cases into his district. Unless all of these questions are answered affirmatively the suggested court may not be "appropriate." Moreover, the Panel will frequently examine the relative condition of calendars in competing districts.<sup>103</sup>

The Panel gives some consideration to which district has the most cases already pending, but this is not the single determinative factor.<sup>104</sup> It gives great weight to decisions transferring related cases to a particular district under section 1404.<sup>105</sup> In cases which are national in scope the

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101. See *In re IBM*, 302 F. Supp. 796 (JPML 1969); *In re Plumbing Fixture Cases*, 295 F. Supp. 33 (JPML 1968).

102. The Panel has been quite willing to transfer a case to the district which seemed most appropriate and then assign an out of district judge to handle it. *In re AlSCO-Harvard Fraud Litigation*, 325 F. Supp. 315 (JPML 1971); *In re Brown Co. Sec. Litigation*, 325 F. Supp. 307 (JPML 1971); *In re Antibiotic Drugs*, 320 F. Supp. 586 (JPML 1970).

103. E.g., *In re Library Editions of Children's Books*, 297 F. Supp. 385, 387 (JPML 1968). It is likely that calendar congestion may be a greater factor than the opinions suggest. The Panel, in its reports, has noted that most commercial cases have been transferred to urban districts such as the Southern District of New York (3 cases), the Central (3 cases) and Northern District of California (5 cases), and the Eastern District of Pennsylvania (2 cases). These districts have not been deluged by the cases transferred under section 1407 only because the tort cases have generally been transferred to more rural districts. Thus, the Southern District of New York has had a net loss of 17 cases, the Northern District of California has had a loss of 32 cases, and the Central District of California has had a loss of 13 cases. Only the Eastern District of Pennsylvania, which was the transferee court for *In re Plumbing Fixture Cases* and *In re Concrete Pipe* has shown a substantial gain of 268 cases. Report of the Judicial Panel on Multidistrict Litigation, App. B (Oct. 1970).

104. *In re Koratron*, 302 F. Supp. 239 (JPML 1969); *In re Gypsum Wallboard*, 297 F. Supp. 1350 (JPML 1969); *In re Protection Devices & Equip.*, 295 F. Supp. 39 (JPML 1968). But see *In re Butterfield Patent Infringement*, No. 29 (JPML, Feb. 2, 1970) (the Panel transferred the cases to the Northern District of Illinois where four cases were pending, despite plaintiffs' request to transfer either to New York where eleven cases were pending, or to San Francisco where nine cases were pending); *In re IBM*, 302 F. Supp. 796 (JPML 1969) (the Panel transferred the cases to the District of Minnesota where only one case was pending). It is also clear that neither the plaintiffs' nor the defendants' choice of forum is accorded much weight. *In re Butterfield Patent Infringement*, *supra*; *In re Library Editions of Children's Books*, 297 F. Supp. 385 (JPML 1968).

105. *In re Master Key*, 320 F. Supp. 1404 (JPML 1971); *In re Frost Patent*, 316 F. Supp. 977 (JPML 1970); *In re Mid-Air Collision Near Hendersonville, N.C.*, 297 F. Supp. 1039 (JPML 1969).

Panel tries to minimize the expense and inconvenience to the parties by selecting a centrally located district, even if it is not one proposed by them.<sup>106</sup>

Often the type of case will be a determinative factor. For example, bankruptcy cases are generally transferred to the district where the bankruptcy is pending,<sup>107</sup> and antitrust cases are frequently transferred to the district where the government's case is pending.<sup>108</sup> Aviation cases, with one exception, have been transferred to the district which was the fortuitous site of the accident,<sup>109</sup> without any real consideration given to the particular facts involved. Thus, all of the cases arising out of the mid-air collision of a Piedmont airplane and a private plane near Hendersonville, North Carolina, were transferred to the Western District of North Carolina even though all of the attorneys participating in the litigation were from distant states and all but a few minor witnesses were from outside the district.<sup>110</sup>

Except in the area of aviation cases, the Panel has avoided any inflexible rule to determine the transferee court. It has wisely enunciated the factors it considers relevant and has evidenced a careful balancing of competing considerations in the selection of the transferee forum.

## VII. POWERS AFTER TRANSFER

### A. *In General*

It is generally accepted that when a case is transferred by the Panel, the transferor court ceases to have any jurisdiction over the case until it is remanded at the completion of pretrial discovery. Section 1407 provides that when a case is transferred the "coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom

106. *In re Air Fare*, 322 F. Supp. 1013 (JPML 1971); *In re Butterfield Patent Infringement*, No. 29 (JPML, Feb. 2, 1970).

107. *In re Penn Cent. Sec. Litigation*, 322 F. Supp. 1021 (JPML 1971); *In re Westec Corp.*, 307 F. Supp. 559 (JPML 1969). However, the Panel has rejected assignment of the case to the judge handling the bankruptcy because of the difficulty involved in managing both, and because of the possible conflict in duties which may result. *In re Penn Cent. Sec. Litigation*, *supra*, at 1023.

108. *In re Ampicillin Antitrust Litigation*, 315 F. Supp. 317 (JPML 1970); *In re Motor Vehicle Air Pollution Control Equip.*, 311 F. Supp. 1349 (JPML 1970); *In re Library Editions of Children's Books*, 297 F. Supp. 385 (JPML 1968).

109. *In re Mid-Air Collision Near Fairland, Ind.*, 309 F. Supp. 621 (JPML 1970); *In re Mid-Air Collision Near Hendersonville, N.C.*, 297 F. Supp. 1039 (JPML 1969). The one exception is *In re Air Crash Disaster at New Orleans, La.*, No. 64 (JPML, Aug. 25, 1971), a unique situation which really should not have been subject to section 1407 at all.

110. *In re Mid-Air Collision Near Hendersonville, N.C.*, 297 F. Supp. 1039 (JPML 1969).

such actions are assigned . . . .”<sup>111</sup> The Panel has interpreted this language to mean that it must transfer the complete claim, that it cannot separate the various issues reserving some for resolution by the transferor court,<sup>112</sup> and that even if it could, such partitioning would be unsound. Also, once the case is transferred the transferor court is totally divested of jurisdiction. In *In re Plumbing Fixture Cases*, the Panel said:

[A]fter an order changing venue [a § 1404 transfer] the jurisdiction of the transferor court ceases; and . . . thereafter the transferor court can issue no further orders, and any steps taken by it are of no effect. These principles are applicable to a transfer under Section 1407 from the time of entry of the order of transfer until the time of entry of an order of remand.<sup>113</sup>

The statute, as drafted, granted the Panel no substantive power. Its authority was limited to determining the transfer question, designating judges “when needed” to assist the transferee court in the processing of the transferred cases,<sup>114</sup> and ultimately remanding the cases “to the district from which [they were] transferred.”<sup>115</sup> However, the Panel has assumed a role far beyond that contemplated by section 1407. As the Panel itself modestly stated in a recent report: “Although it lacks explicit statutory authority to supervise discovery, the Panel retains an active interest in and responsibility for insuring that the transferred litigation is processed efficiently, expeditiously and economically.”<sup>116</sup> The Panel has demonstrated its “responsibility” by maintaining a constant and often direct supervision of cases transferred. Not only has it offered advice to

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111. 28 U.S.C. § 1407(b) (Supp. V, 1970). The Panel’s order of transfer is filed in the clerk’s office of the transferee court and is effective when filed. The clerk then sends certified copies of the Panel’s order to the transferor courts. Id. § 1407(c). The entire file is then transferred to the transferee court. Any appeal from the order of transfer must be taken in the circuit court having jurisdiction over the transferee district. Id. § 1407(e).

112. *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 489-90, 495 (JPML 1968). However, the Panel treats an individual “claim, cross-claim, counter-claim, or third-party claim” separately on motions to transfer and remand. 28 U.S.C. § 1407(a) (Supp. V, 1970).

113. 298 F. Supp. at 496 (citations omitted). As noted previously (see text accompanying note 90 supra), Judge Weinfeld dissented from that part of the opinion which held that the transferor court was divested of jurisdiction over a motion which was sub judice, stating: “However, when a motion under Rule 23 already has been argued or submitted to a judge in the transferor court and is undetermined by him at the time of the entry of the transfer order by the Panel under section 1407, such transfer order does not divest the transferor judge of jurisdiction to make his determination of the Rule 23 motion.” 298 F. Supp. at 497.

114. 28 U.S.C. § 1407(b) (Supp. V, 1970).

115. Id. § 1407(a). To date only one matter transferred pursuant to section 1407 has been remanded. *In re Air Crash Disaster At Hong Kong*, No. 15 (JPML, Feb. 11, 1970). A number have been settled or disposed of while pending in the transferee court.

116. Report of the Judicial Panel on Multidistrict Litigation 5 (Oct. 1970).

transferee judges, but the Panel's staff has, on occasion, been present and taken part in the consolidated pretrial proceedings. It has required status reports from the transferee judges concerning the progress of the litigation, and has held conferences for them, offering advice and suggestions on how to handle the cases. In addition, the Panel has published reports and bulletins and has used its published opinions to define and, indeed, expand the authority of the transferee courts. This subtle development of the Panel's power has led some to dub it a "super-court" despite its apparent lack of any substantive statutory authority.

However, the real substantive power clearly rests in the transferee court, although there is some dispute concerning the full extent of that power. In *In re Plumbing Fixture Cases*, the Panel made clear its understanding that the transferee court's power was coextensive with that of the transferor court. It stated:

In substance a transfer under Section 1404(a) is a 'change of venue' (that is a 'change of courtrooms') for completion of pretrial and for trial or other disposition. . . . By analogy a transfer under Section 1407 is a change of venue for pretrial purposes.

On change of venue the overwhelming authority holds that the jurisdiction and powers of the transferee court are coextensive with that of the transferor court; that the transferee court may make any order to render any judgment that might have been rendered by the transferor court in the absence of transfer. . . . These principles are applicable to a transfer under Section 1407 from the time of entry of the order of transfer until the time of entry of an order of remand.<sup>117</sup>

The Panel also made it explicitly clear that the power of the transferee court is not limited to rulings relating to pretrial discovery. One of the parties had argued that the transferor court should rule on its class action motion since the class action determination was not a "pretrial proceeding." Rejecting the claim that the term "pretrial proceeding" as used in section 1407 was limited to discovery only, the Panel said it included "all judicial proceedings before trial."<sup>118</sup>

Gradually, the Panel and the transferee courts have been defining the extent of the latter's authority. Obviously all normal pretrial discovery motions must be addressed to the transferee court. But in addition, transferee courts, either by their own action or by pronouncement of the Panel, have assumed the power to decide motions addressed to the pleadings,<sup>119</sup> challenging venue and jurisdiction,<sup>120</sup> seeking dismissal of third-party

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117. 298 F. Supp. at 495-96 (citations omitted).

118. *Id.* at 493-94.

119. *In re CBS Licensing Antitrust Litigation*, 5 Trade Reg. Rep. (1971 Trade Cas.) ¶ 73,447, at 89,847 (JPML, Jan. 20, 1971).

120. *Monkelis v. TWA*, 303 F. Supp. 651 (E.D. Ky. 1969); *In re Gypsum Wallboard*, 302 F. Supp. 794 (JPML 1969).

complaints,<sup>121</sup> attacking standing to sue,<sup>122</sup> seeking remand to the state courts,<sup>123</sup> seeking injunctive relief,<sup>124</sup> and seeking summary judgment.<sup>125</sup> Furthermore, transferee courts have assumed the power to control the settlement.

### B. *Class Action Determinations*

One of the most interesting questions concerning the powers of the transferee court involves the determination of class action questions. As noted previously,<sup>126</sup> the Panel is quick to consolidate class actions to avoid chaos and confusion. It has also rejected any suggestion that it delay transfer to permit the transferor court to make class action rulings. Accordingly, the Panel has stated that:

[I]t is not certain that each district court will always be able to learn of the conflicting requests made to other courts. It is certain, however, that if these conflicting requests are determined under Section 1407 in a transferee court, the information and means for fair, speedy and economical coordinated determinations will exist. It is the clear intent of Section 1407 to invest the transferee court with the exclusive powers, after transfer, to make the pretrial determinations of the class action questions.<sup>127</sup>

In the opinion of the Panel, class action rulings are "the most urgent of the pretrial proceedings,"<sup>128</sup> and their determination is properly left to the transferee court.<sup>129</sup> Furthermore, not only will this advance the efficient conduct of the litigation at the district court level, but it will also permit any appellate review to be coordinated in one court of appeals.<sup>130</sup> Following the Panel's lead, many transferee courts have established the

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121. *Allegheny Airlines, Inc. v. Le May*, No. 71-1034 (7th Cir., July 2, 1971). The Seventh Circuit dismissed Allegheny's attempt to appeal from the transferee court's dismissal of the third-party claim, noting that a determination concerning dismissal of a third-party complaint was not "a 'pretrial proceeding' as that term is contemplated in §1407." *Id.* at 5. The court stated that the district court had refused to authorize an intermediate appeal and held that the order was not "final." It went on to state that the decision could be reviewed by the appellate court of the transferor district after the entry of judgment.

122. *Id.* at 3.

123. *In re Antibiotic Drugs*, 299 F. Supp. 1403, 1405 n.4 (JPML 1969).

124. *In re Fourth Class Postage Regulations*, 298 F. Supp. 1326 (JPML 1969).

125. *In re Also-Harvard Fraud Litigation*, 325 F. Supp. 315 (JPML 1971); *In re Butterfield Patent Infringement*, No. 29 (JPML, Feb. 2, 1970); *In re Fourth Class Postage Regulations*, 298 F. Supp. 1326 (JPML 1969); *In re Plumbing Fixture Cases*, 298 F. Supp. 484 (JPML 1968). However, some judges have refused to rule on summary judgment motions.

126. See notes 70-73 *supra* and accompanying text.

127. *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 493 (JPML 1968).

128. *Id.* at 494.

129. *In re Protection Devices & Equip.*, 295 F. Supp. 39, 40 (JPML 1968).

130. *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 495 (JPML 1968).

classes, and proceeded to administer them.<sup>131</sup> Moreover, the Panel has stated that the transferee court "can review and if necessary modify the orders [which established national class actions and which set forth a discovery schedule] at any time."<sup>132</sup>

However, the fact that the transferee court may have the power to make class action determinations does not resolve all the problems. The Panel recognizes that most class action orders, including those defining the class, selecting lead counsel, and establishing notice requirements, are conditional and "may be altered or amended" at any time before final decision. Therefore, upon remand the transferor court apparently has the power to amend the class action rulings and presumably may reinstate conflicting classes, appoint new lead counsel or take some other action inconsistent with the decision of the transferee court. To date there is no indication that this has ever happened and it is not likely that such action would be taken without substantial justification.

### C. Section 1404 Transfers

Another area of special importance is the relationship between section 1404<sup>133</sup> and section 1407. The two sections are not mutually exclusive and it is possible that a case might be subject, at different times, to transfers pursuant to both of them.<sup>134</sup> A case begun in one forum might be transferred to a second one pursuant to section 1404 and then transferred for pretrial proceedings under section 1407. Similarly, a case begun in one district might be transferred for pretrial discovery under section 1407 and then transferred for all purposes pursuant to section 1404 after it had been remanded by the Panel. Recently, several cases<sup>135</sup> transferred under section 1407 for pretrial proceedings have subsequently been transferred under section 1404, one<sup>136</sup> for the limited purpose of trial on the issue of liability only.

A 1404 transfer is far more serious than the more limited and temporary 1407 transfer. A 1407 transfer, unlike a 1404 transfer, must, according to the statute, be returned to the original forum for trial and

131. *E.g.*, *Illinois v. Harper & Row Publishers, Inc.*, 301 F. Supp. 484 (N.D. Ill. 1969). No appellate review has been reported challenging the right of the transferee court to make the class action determination.

132. *In re Master Key*, 320 F. Supp. 1404, 1407 (JPML 1971).

133. 28 U.S.C. § 1404(a) (1964). See text accompanying notes 13 & 14 *supra*.

134. *In re Grain Shipments*, 300 F. Supp. 1402 (JPML 1969); *In re Air Crash Disaster At Falls City, Neb.*, 298 F. Supp. 1323 (JPML 1969).

135. *In re Air Crash Disaster Near Hanover, N.H.*, No. 43 (D.N.H., June 3, 1971); *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, Admin. Order No. 71-5 (S.D.N.Y., May 14, 1971); *Illinois v. Harper & Row Publishers, Inc.*, No. 67 C 1899 (N.D. Ill., March 23, 1971).

136. *In re Air Crash Disaster Near Hanover, N.H.*, No. 43 (D.N.H., June 3, 1971).

final disposition. Thus, section 1404 motions are generally vigorously opposed. The determination of the motion is vitally important and the decision may depend upon which court rules on it, since a party opposing transfer may receive more understanding and sympathetic treatment in his home forum than in an unfamiliar court. In the local court a case is more likely to be treated as an individual matter with appropriate consideration given to the convenience of the specific parties and local witnesses. On the other hand, if the motion is before a distant transferee court, that court may be more inclined to view the entire litigation as a complex whole rather than weigh the convenience of the parties and witnesses in the particular case. For example, in a serious personal injury case a transferee court having responsibility for consolidated pretrial liability discovery may be inclined to put greater emphasis on the liability witnesses than on the damage witnesses. Even though judicial economy is not a factor to be considered in a 1404 transfer motion, if the motion is before the transferee court it may give consideration to the familiarity it has acquired with the case, concluding that it would be more efficient for it to keep all the cases rather than permit them to be returned to transferor judges unfamiliar with the cases. If the transferee judge rules on the 1404 motion, he may also be inclined to downgrade the need for supplemental local discovery and local witnesses despite its recognized importance in each case. The unfortunate result, therefore, is that different standards may be applied depending upon whether the 1404 motion is decided by the transferee or the transferor court.

This danger is highlighted by several recent decisions where section 1407 transferee judges have undertaken to rule on 1404 transfer motions. In *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*,<sup>137</sup> the court specifically disregarded the rights and interests of the parties in the individual cases, stating:

The Court is not considering the transfer of *one* case from *one* district to another but rather the transfer and consolidation of 32 cases filed in twelve districts into one district for trial. Thus, instead of looking to the individual convenience of *each* party and *each* witness, the Court must look to the overall convenience of all parties and witnesses.<sup>138</sup>

In *In re Air Crash Disaster Near Hanover, New Hampshire*,<sup>139</sup> the court transferred, under section 1404, to the District of New Hampshire for the limited purpose of liability only, all cases previously transferred to it pursuant to section 1407. However, the court at least realized that individual differences existed and refused to order transfer of the cases for

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137. Admin. Order No. 71-5 (S.D.N.Y., May 14, 1971).

138. *Id.* at 6 (footnote omitted).

139. No. 43 (D.N.H., June 3, 1971).

assessment of damages. It recognized that the damage issue in each case was distinct, that the convenience of the parties and witnesses would be better served by a trial in the originating district, that there was a difference in composition and attitude of juries, and that to force the transferee court to try each damage case would impose upon it a sizeable burden, resulting in both delay in trial and injustice to each plaintiff.<sup>140</sup>

The Panel's decisions have demonstrated its inexorable progress toward suggesting that a transferee court should rule on a 1404 transfer motion, despite the language<sup>141</sup> and legislative history<sup>142</sup> of section 1407, which clearly indicate that the cases must be remanded to the transferor district. It had originally appeared to be a futile exercise for a 1407 transferee court to rule on a 1404 transfer motion. However, after some uncertainty, the Panel has apparently concluded that consolidation of multidistrict litigation beyond the pretrial phase would enhance judicial efficiency. It also seems to have concluded that the transferee judge, who has supervised the pretrial phase, would be more inclined to order a transfer under section 1404 than would a disinterested judge who, sitting in the originating district, evaluates the matter after remand of the 1407 case.<sup>143</sup>

In an early case, the Panel had stated that the transferor judge "may consider transfer of the cases for trial under Section 1404(a) following completion of pretrial proceedings."<sup>144</sup> It then shifted its emphasis to state that "the appropriate court [could consider] the possibility of transferring these cases for trial under Section 1404(a) when pretrial pro-

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140. *Id.* at 2-3.

141. Section 1407 provides that the case "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) (Supp. V, 1970).

142. As stated by the Senate Judiciary Committee: "Paragraph (a) also requires transferred cases to be remanded to the originating district at the close of coordinated pretrial proceedings. The bill does not, therefore, include the trial of cases in the consolidated proceedings. The experience of the Coordinating Committee was limited to pretrial matters, and your 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 would be impracticable to have all cases in mass litigation tried in one district. Finally, the committee recognizes that in most cases there will be a need for local discovery proceedings to supplement coordinated discovery proceedings, and that consequently remand to the originating district for this purpose will be desirable." S. Rep. 454 at 5.

143. See *In re Air Crash Disaster Near Hanover, N.H.*, No. 43 (D.N.H., June 3, 1971); *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, Admin. Order No. 71-5 (S.D.N.Y., May 14, 1971); *Illinois v. Harper & Row Publishers, Inc.*, No. 67 C 1899 (N.D. Ill., March 23, 1971).

144. *In re Mid-Air Collision Near Hendersonville, N.C.*, 297 F. Supp. 1039, 1040 (JPML 1969).

ceedings are complete,"<sup>145</sup> but never defined what it meant by the "appropriate court." Finally, the Panel adopted Rule 15 of its Rules of Procedure which explicitly proclaimed the Panel's view that a transferee court may rule on a 1404 motion:

Actions will be remanded to the district from which they were transferred unless an order has been signed by the designated transferee judge transferring an action to another district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406(a). Such actions will be remanded by the Panel to the district designated in the section 1404(a) or section 1406(a) order.<sup>146</sup>

The courts<sup>147</sup> that have ruled pursuant to Rule 15 have given little real consideration to the language of section 1407 or to the legislative history which clearly expressed the intent that the cases were to be remanded to the transferor court. Since the transfers involved multiple cases, the rights, interests and convenience of the individual parties were swept aside in the drive toward apparent judicial economy. While there may be merit in effecting consolidation of some cases for determination of liability, it is regrettable that this has been done by sacrificing the rights of the individual parties and through judicial rewriting of section 1407.

### VIII. CONCLUSION

Within the last ten years the federal courts have experienced an enormous expansion of their caseload. The expansion has been due in large part to recent rulings in the criminal law area but also to the development of new or previously underutilized types of civil actions. Multidistrict litigation, particularly in such commercial fields as antitrust, securities fraud, environmental protection, and patent infringement, has contributed greatly to the pressure already on the courts. As a result, new administrative procedures have had to be developed to meet these problems. The experience with massive civil antitrust litigation such as the Electrical Equipment Cases led to the enactment of section 1407 which has been a valuable tool for improved judicial administration. The Judicial Panel on Multidistrict Litigation has wisely used 1407 transfers and consolidations to handle massive and complex antitrust and securities cases. The

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145. *In re Grain Shipments*, 300 F. Supp. 1402, 1404 (JPML 1969); see *In re Air Crash Disaster Near Hanover, N.H.*, 314 F. Supp. 62, 63 (JPML 1970); *In re Silver Bridge Disaster*, 311 F. Supp. 1345, 1346 (JPML 1970).

146. Rules of Procedure of the Judicial Panel on Multidistrict Litigation, R. 15, 50 F.R.D. 203, 209 (1970), superseded by Panel R. 15, at 15,771. In its recently revised rules the Panel has again reaffirmed its view that actions transferred under section 1407 need not be remanded to the originating district. Panel R. 15, at 15,771.

147. See, e.g., cases cited at note 135 *supra*.

Panel has also avoided serious confusion and chaos by applying section 1407 where competing class actions were involved.

However, section 1407 treatment has, at times, been meted out in cases to which it was never intended to apply. It has been applied where there were few common questions of fact, where the factual issues were not significant to the litigation, and where only a few cases were involved. At times, the Panel has ordered transfer without giving full consideration to the impact it would have on the litigants, even though transfers cause "inherent inconvenience" and hardship.

Because of the hardship caused by the transfers, each case requires that the factors in favor of transfer and those in opposition to it be given due consideration. Inflexible rules should be rejected in favor of an analysis of the relevant factors in each case. Additionally, a careful analysis should be undertaken to determine if transfer and consolidation does result in any substantial efficiency or economy to the courts and the parties in each type of case handled by the Panel. In theory, transfer and consolidation should result in economy and efficiency. However, reality and theory do not always coincide. As indicated previously,<sup>148</sup> practical experience in aviation cases has demonstrated that, in such cases, 1407 transfers did not result in any saving of time, money or effort, nor did they shorten the litigation. The same may be true of other fields which should, therefore, be objectively examined.

A careful study by the Judicial Conference and the Panel may determine that the expected benefits of section 1407 have not accrued. It may lead to the conclusion that section 1407 should be applied with greater discrimination and that time, money and judicial manpower would be saved if many types of cases were permitted to proceed in the normal manner, without forced consolidation and transfer. In any event, it is time for the Panel to reevaluate and redefine the future use of section 1407.

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148. See text accompanying notes 58-62 *supra*.