Fordham Law Review

Volume 38 | Issue 4 Article 6

1970

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THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION: EMBRYONIC GUIDELINES FOR THE CONSOLIDATION OF PRETRIAL PROCEEDINGS

I. INTRODUCTION

As a result of multiplying caseloads and expanding backlogs, American courts are currently struggling with congested calendars and delayed litigation.[1] However, the problem of court congestion and delay is not of recent origin. As early as 600 years before the dawn of the Christian era, the prophet Habacuc stated: "[T]he law is torn in pieces, and judgment cometh not to the end . . . ."[2] The problem was also recognized in the thirteenth century when the drafters of the Magna Carta pledged that: "To no one will we sell, to no one will we deny, or *delay* right or justice."[3] Nevertheless, two centuries later "[d]evices for delaying, hindering, and obstructing altogether the work of the fifteenth century Court of Common Pleas were many."[4] Congestion and delay in the 16th century German courts caused Goethe to lose his taste for the law and turn to the profession of letters.[5] At the beginning of the 17th century, Shakespeare's Hamlet, in his soliloquy, catalogued life's "troubles" and listed among them "the law's delay."[6]

Although the problem of lagging justice is thousands of years old, its dimensions have recently reached staggering proportions. Our modern society has created demands on our judicial establishment which amount to a "law explosion."[7] The increased workload which has engulfed the courts had already stretched our judicial system to its limits by the mid-twentieth century.[8] In 1954 the seriousness of the situation prompted Justice Jackson to declare that

1. Annual Report of the Director of the Administrative Office of the United States Courts, Reports of the Proceedings of the Judicial Conference of the United States 169-314 (1968) [hereinafter cited as Annual Report with appropriate date]. See also The Courts, the Public, and the Law Explosion (H. Jones ed. 1965); H. Zeisel, H. Kalven, & B. Buchholz, Delay in the Court (1959); Kaufman, Courts in Crisis: Progress Versus Intransigence, 52 A.B.A.J. 1026 (1966); Warren, The Administration of the Courts, 51 J. Am. Jud. Soc'y 196, 197 (1968).

2. Habacuc 1:4 (Douay).

3. W. Swindler, Magna Carta: Legend and Legacy 317 (1965) (emphasis added).

4. M. Hastings, The Court of Common Pleas in Fifteenth Century England 211 (1947).

5. H. Zeisel, H. Kalven, & B. Buchholz, supra note 1, at xxiii-xxiv n.6 (1959).

6. Hamlet, act 3, scene 1. For additional literary references to the law's delay see Gray v. Gray, 6 Ill. App. 2d 571, 578-79, 128 N.E.2d 602, 606 (1955).

7. The Courts, the Public, and the Law Explosion 2 (H. Jones ed. 1965). See H. James, Crisis in the Courts vii, viii (1968).

8. See Congestion of the Docket: A Symposium, 28 Conn. B.J. 369 (1954); Jayne, Tinkering with the Judicial Machinery, 36 J. Am. Jud. Soc'y 84 (1952); Nims, Backlogs: Justice Denied, 42 A.B.A.J. 613 (1956); Wright, The Federal Courts—a Century After Appomattox, 52 A.B.A.J. 742, 743 (1966); Note, 54 Colum. L. Rev. 110 (1954).

"delayed justice has become little less than scandalous . . . ."[9] In 1958 Chief Justice Warren, addressing the American Law Institute, stated:

I must report that the delay and the choking congestion in the federal courts today have created a crucial problem for constitutional government in the United States. It is so chronically prevalent that it is compromising the quantity and quality of justice available to the individual citizen and, in so doing, it is leaving vulnerable throughout the world the reputation of the United States for protecting and securing these rights and remedies.

. . . The federal judiciary is simply unable [without improvements] . . . to keep pace with the dynamic growth of our country.[10]

It is the purpose of this comment to examine the origin, nature, and application of the Judicial Panel on Multidistrict Litigation—a procedural device which has been developed to alleviate a portion of this complex problem.

II. The Judicial Panel on Multidistrict Litigation

In 1961, into a climate of mounting judicial crisis, came the "Electrical Equipment Antitrust Cases"[11] in which twenty-nine manufacturers of electrical equipment were convicted in the Eastern District of Pennsylvania of antitrust violations.[12] Following the criminal convictions, aggrieved purchasers began to file civil suits for treble damages under section 4 of the Clayton Act.[13] The number of actions eventually totalled 1,912 cases, involving 25,623 claims for relief filed in 35 separate federal districts.[14] Such an avalanche of litigation threatened the federal judicial system with impending breakdown and chaos.[15]

9. Knickerbocker Printing Corp. v. United States, 75 S. Ct. 212 (Jackson, Circuit Justice, 1954).

10. Warren, Delay and Congestion in the Federal Courts, 42 J. Am. Jud. Soc'y 6-7 (1958).

11. See Neal & Goldberg, The Electrical Equipment Antitrust Cases: Novel Judicial Administration, 50 A.B.A.J. 621 (1964) [hereinafter cited as Neal & Goldberg].

12. 1962 Annual Report at 95. The defendants had been charged with conspiring to fix prices and allocate business in violation of the Sherman Act. Neal & Goldberg at 621. See the Sherman Anti-Trust Act, 15 U.S.C. § 1 (1964). Extensive commerce had been affected by the price fixing. Neal & Goldberg at 621-22. Sales totaling in the billions of dollars had been made throughout the country. Application of California, 195 F. Supp. 37, 39 (E.D. Pa. 1961).

13. 1962 Annual Report at 95; Neal & Goldberg at 622. The Clayton Act § 4, 15 U.S.C. § 15 (1964) provides that a party injured by a violation of the antitrust laws may bring suit in a federal court for treble damages against the violator. A criminal conviction for a violation will be prima facie evidence against the defendant in a civil action. Clayton Act § 5, 15 U.S.C. § 16 (1964).

14. 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 n.1 (1967) [hereinafter cited as Hearings on S. 915]. "Each of these 25,623 separate claims for relief was a potentially protracted case." Id.

15. Id. at 322; 1962 Annual Report at 95; H.R. Rep. No. 1130, 90th Cong., 2d Sess., in 2 U.S. Code Cong. & Ad. News 1889, 1898 (1968) [hereinafter cited as H.R. Rep. No. 1130].

However, the Judicial Conference of the United States[16] had anticipated the emergency. The Judicial Conference is a permanent organization consisting of judges representing all of the federal jurisdictions in the United States.[17] The Conference conducts a continuous survey of the federal court system and advises the Supreme Court on improvements in the rules of practice and procedure and, through the Chief Justice, recommends legislation to Congress.[18] In 1961, before the criminal cases had been completed, the Conference foresaw the disruptive impact such a mass of litigation would have on the courts.[19] Wasteful and time consuming duplication of effort by both the courts and the parties during the pretrial stages was recognized as a serious problem.[20] Another problem was the possibility[21] of conflicting rulings on preliminary questions being made in the different district courts.[22]

Existing provisions for solving these pretrial problems by coordinating and consolidating the cases were inadequate when applied in multidistrict litigation.[23] The principal devices available for such action were 28 U.S.C. § 1404 (a),[24] which allows a change of venue, and Rule 42(a)[25] of the Federal Rules of Civil Procedure, which provides for the consolidation of actions. Section 1404(a) enables a district court to transfer a civil action to another distict. Although this would make possible the consolidation of cases in multidistrict litigation by transferring all the cases into one district,[26] 1404(a) has a serious shortcoming since the section allows transfer only to a district where the case "might have been brought."[27] Thus, the statute bars a change of forum unless

16. 28 U.S.C. § 331 (1964).

17. S. Rep. No. 1744, 85th Cong., 2d Sess., in 2 U.S. Code Cong. & Ad. News 3023, 3024-25 (1958).

18. 28 U.S.C. § 331 (1964).

19. Hearings on S. 915 at 321; 1962 Annual Report at 95; Neal & Goldberg at 623.

20. 1962 Annual Report at 95; Neal & Goldberg at 623.

21. In complex multidistrict litigation involving a large number of cases filed in many different districts, it is not only "possible," it is "probable." In re Plumbing Fixture Cases, 298 F. Supp. 484, 492-93 (1968).

22. Neal & Goldberg at 623.

23. Id. at 622.

24. "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1964). Section 1404(a) is based upon the superceded doctrine of forum non conveniens. Hoffman v. Blaski, 363 U.S. 335, 342 (1960); Ex parte Collett, 337 U.S. 55, 58 (1949). Cf. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

25. "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." Fed. R. Civ. P. 42(a).

26. In fact the Supreme Court has held that such transfers serve the purpose of the statute. In Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 26 (1960), the Court said that: "To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent."

27. 28 U.S.C. § 1404(a) (1964).

the requirements of venue and jurisdiction could have originally been satisfied in the district to which the cases are to be transferred.[28] Rule 42(a) is an even less effective device in multidistrict litigation, since it allows consolidation only of those cases already pending in the same district.[29]

The Judicial Conference realized that these provisions would be inadequate to meet the challenge of the electrical equipment cases. The Conference therefore created a special Coordinating Committee and directed it to explore the problems of pretrial discovery in multidistrict litigation.[30] Although it lacked statutory authority, the Coordinating Committee obtained the consent and cooperation of all the parties and the district judges in the electrical cases and successfully brought about coordination and consolidation of the pretrial proceedings.[31] The Committee called a series of meetings at which the judges responsible for the litigation agreed on and issued pretrial orders which were national in scope.[32] In addition, a national deposition program[33] and a national document depository were established.[34] The procedural innovations employed by the Coordinating Committee were so effective that by 1967 all of the cases had been disposed of.[35]

As a result of its success with the electrical cases, the Coordinating Committee recommended legislation to establish a formal system for consolidating

28. Hoffman v. Blaski, 363 U.S. 335, 342-44 (1960); C. Wright, Federal Courts § 44, at 167 (1970). It should also be noted that a 1404(a) transfer is of the entire action. The section does not allow separate transfer of only the pretrial proceedings. See Hearings on S. 961 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 233 (1969). Therefore, even if the jurisdiction and venue requirements are met, 1404(a) is ineffective where consolidated pretrial proceedings are desirable but consolidated trials are not. An example of such a situation would be actions based on the same underlying facts but brought on different legal theories. For a discussion of the use of 1404(a) in multidistrict litigation see Note, The Problem of Venue in Multiple District Litigation, 41 Notre Dame Law. 507, 508-18 (1966); Comment, The Search for the Most Convenient Federal Forum: Three Solutions to the Problems of Multidistrict Litigation, 64 Nw. U.L. Rev. 188 (1969).

29. National Equip. Rental Ltd. v. Fowler, 287 F.2d 43, 47 (2d Cir. 1961); Silver v. Goodman, 234 F. Supp. 415, 416 (D. Conn. 1964); 2B W. Barron & A. Holtzoff, Federal Practice and Procedure § 941, at 178 (C. Wright ed. 1961).

30. S. Rep. No. 454, 90th Cong., 1st Sess. 3 (1967) [hereinafter cited as S. Rep. No. 454]. This Committee was a special subcommittee of the Judicial Conference's Committee on Trial Practice and Technique. The Subcommittee was authorized by the Judicial Conference in September 1961, and in January 1962 Chief Justice Warren appointed its members. The Coordinating Committee consisted of nine federal judges. Id.; Hearings on S. 915 at 322.

31. 1962 Annual Report at 95.

32. 1963 Annual Report at 102.

33. Depositions were taken from more than 185 witnesses. 1964 Annual Report at 42.

34. The defendants alone produced more than 600,000 documents. 1963 Annual Report at 102.

35. S. Rep. No. 454 at 4; H.R. Rep. No. 1130, in 2 U.S. Code Cong. & Ad. News 1898, 1899 (1968).

pretrial proceedings.[36] The legislation proposed by the Committee was enacted as section 1407 to title 28 of the United States Code[37] "to provide centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the 'just and efficient conduct' of such actions."[38] To achieve this purpose 1407 established a Judicial Panel on Multidistrict Litigation.

III. The Nature and Function of the Panel

The Judicial Panel on Multidistrict Litigation[39] consists of seven federal circuit and district judges designated by the Chief Justice of the United States.[40] No two members may be from the same circuit.[41] Any action by the Panel requires the concurrence of four members.[42]

Section 1407 provides that "[w]hen civil actions involving one or more common questions of fact are pending in different districts",[43] the Panel may transfer the actions to *any* one district "for coordinated or consolidated pretrial proceedings."[44] The section deals only with pretrial proceedings and not the trial itself.[45] Transfer action may be initiated by a motion submitted to the Panel by an interested party, or *sua sponte* by the Panel itself.[46] A hearing is

36. S. Rep. No. 454 at 4; Hearings on S. 915 at 320.

37. Hearings on S. 915 at 326; H.R. Rep. No. 1130, in 2 U.S. Code Cong. & Ad. News 1898, 1898-1900 (1968).

38. H.R. Rep. No. 1130, in 2 U.S. Code Cong. & Ad. News 1898, 1899 (1968).

39. The office of the Panel is located in Washington, D.C. Rules of Procedure of the Judicial Panel on Multidistrict Litigation 4, 47 F.R.D. 377, 378 (1969) [hereinafter cited as Panel R.]. However, the Panel convenes "whenever and wherever desirable or necessary." Id. Panel R. 13, 47 F.R.D. 377, 380 (1969). See, e.g., In re Texas Concrete Pipe, 302 F. Supp. 1342, 1343 (1969); In re Scotch Whiskey, 299 F. Supp. 543 (1969).

40. 28 U.S.C. § 1407(d) (Supp. IV, 1969).

41. Id.

42. Id.

43. 28 U.S.C. § 1407(a) (Supp. IV, 1969). 1407 is free of the venue and jurisdictional limitations which restrict transfer under 1404(a). See notes 27 & 28 and accompanying text supra.

44. 28 U.S.C. § 1407(a) (Supp. IV, 1969) (emphasis added).

45. Id. This serves to preserve the privilege of the litigants to select the trial forum.

46. 28 U.S.C. § 1407(c) (Supp. IV, 1969). Transfer action is initiated by the Panel by serving the parties with an order to "show cause" why transfer should not be made. Unless the order provides otherwise, a party opposed to transfer has 15 days within which to file his response and brief. Parties favoring transfer may file reply briefs. Panel R. 11, 47 F.R.D. 377, 380 (1969). A party requests transfer action by submitting to the Panel a written motion accompanied by a brief. Opposing parties may file a brief in opposition, and the moving party may file a brief in reply. Id. at 6, 47 F.R.D. 377, 378-79 (1969). The Panel has ruled that "parties" as used in 1407 includes "only those who are named as such in the record and who are properly served with process or enter their appearance." In re Library Editions Of Children's Books, 299 F. Supp. 1139, 1142 (1969). In another case the Panel ruled that in order to have standing to make a motion for transfer, the moving party must be a party in an action which will be transferred if the motion is granted. In re Western Liquid Asphalt, 303 F. Supp. 1053, 1053-54 (1969). Therefore a party cannot move to have related cases transferred to the district in which his case is pending.

conducted by the Panel to determine whether transfer will be made.[47] Section 1407 directs that the Panel shall order transfer to a single district when it is determined that the actions share "one or more common questions of fact" and that such transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."[48]

Where transfer is ordered the coordinated or consolidated pretrial proceedings are conducted by a judge or judges assigned by the Panel. The Panel also has the power to temporarily transfer judges from other federal jurisdictions to assist in handling the proceedings.[49] Upon completion of the coordinated or consolidated pretrial proceedings, the actions are returned for trial to the district from which they were transferred.[50]

Orders of the Panel issued prior to the order directing or denying transfer—such as an order setting a hearing—are reviewed in the court of appeals for the district in which the hearing is to be held or has been held.[51] Orders of the Panel *directing* transfer or orders issued subsequent to transfer are reviewed in the court of appeals for the transferee district.[52] Such review may be obtained only by extraordinary writ[53] filed in the appropriate court of appeals.[54] However, "[t]here shall be no appeal or review of an order of the panel *denying* a motion to transfer . . . ."[55]

The Panel has adopted fifteen Rules of Procedure to govern the conduct

47. "The panel's order of transfer shall be based upon a record of such hearing . . . ." 28 U.S.C. § 1407(c) (Supp. IV, 1969). All parties in all related actions are notified of the time and place of the hearing, and at the hearing evidence may be presented by any party in a case pending in any district which might be affected by the proceedings. Id. A "tag-along case" is one filed in a district court after the Panel has conducted hearings on the main body of cases. Panel R. 1, 47 F.R.D. 377, 378 (1969). "When these cases become known, the parties are ordered to show cause why the tag-along case should not be transferred without further hearing to the previously selected transferee court on the basis of the prior hearing and for the reasons stated in the original opinion of the Panel." Robson, Multi-District Litigation: § 1407 in Operation, 14 Antitrust Bull. 109, 112 (1969). See In re Air Crash Disaster At the Greater Cincinnati Airport, 298 F. Supp. 355 (1969).

48. 28 U.S.C. § 1407(a) (Supp. IV, 1969).

49. 28 U.S.C. § 1407(b) (Supp. IV, 1969).

50. 28 U.S.C. § 1407(a) (Supp. IV, 1969). See note 45 supra.

51. 28 U.S.C. § 1407(e) (Supp. IV, 1969).

52. Id.

53. See 28 U.S.C. § 1651 (1964). Such writ is used "to confine an inferior . . . [judicial body] to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240, 245 (1964), quoting from Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943). An extraordinary writ is "meant to be used only in exceptional cases where there is a clear abuse of discretion or usurpation of judicial power." University Nat'l Stockholders Protective Comm., Inc. v. University Nat'l Life Ins. Co., 328 F.2d 425, 426 (6th Cir. 1964), cert. denied, 377 U.S. 933 (1964). The use of such writ is at the discretion of the court. Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943).

54. 28 U.S.C. § 1407(e) (Supp. IV, 1969).

55. Id. (emphasis added).

of its business.[56] In addition, the Coordinating Committee, whose activities and recommendations resulted in enactment of section 1407, has prepared a *Manual For Complex And Multidistrict Litigation*.[57] The *Manual* contains specific recommendations, suggested local rules, sample forms, and materials "for use in the pretrial and trial of complex and multidistrict litigation."[58] The *Manual* provides a practical approach to the housekeeping problems of judicial administration in such cases.[59]

IV. The Evolution of Standards

By formulating 1407 in broad general terms, Congress left to the discretion of the Panel the development of guidelines on a case-by-case basis.[60] Therefore, a careful examination of the statute, the Panel's Rules of Procedure, and the *Manual for Complex and Multidistrict Litigation* leaves unanswered some major questions. The first of these questions is: What standards are to be considered by the Panel in determining whether to grant or deny transfer? The second question is: What criteria are to be used by the Panel in choosing the district to which the cases will be transferred?[61] Finally: What are the powers of the transferee court?

56. Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 47 F.R.D. 377 (1969). These Rules replace the ten Provisional Rules adopted by the Panel at its first meeting on June 26, 1968. 44 F.R.D. 389 (1968). Section 1407(f) empowered the Panel to "prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure." The Panel Rules of Procedure contain provisions regarding: Rule 1. Definitions; Rule 2. Place of Keeping Records and Files; Rule 3. Admission to Practice Before Panel; Rule 4. Place and Manner of Filing of Papers; Rule 5. Service of Papers Filed; Rule 6. Motion Practice; Rule 7. Form of Papers Filed; Rule 8. Submission of Proof of Facts; Rule 9. Withdrawal of Exhibits; Rule 10. Failure to Comply with Rules; Rule 11. Show Cause Orders; Rule 12. Conditional Transfer Order; Rule 13. Hearings; Rule 14. Motion for Extensions of Time; Rule 15. Remand.

57. 1 J. Moore, Federal Practice pt. 2 (H. Fink & I. Hall 2d ed. 1969). Commerce Clearing House, Inc. and West Publishing Co. have separately published the Manual in booklet form.

58. Id. at 5. The authors of the Manual intended it to be used only as a flexible guide, recognizing that "the suggested procedures are not suitable for every complex case; nor are they the best that can be devised." Therefore it is designed to be continuously revised and supplemented "to reflect the rapidly changing nature of the problems and the accumulation of new experience." Id. at 6-7. See 1968 Annual Report at 33, 83.

59. For a critique of the Manual see Comment, Observations on the Manual for Complex and Multidistrict Litigation, 68 Mich. L. Rev. 303 (1969).

60. "It is believed that a sound judicial discretion to select (1) the cases to be transferred and (2) the district to which they will be transferred is essential to assure just results." S. Rep. No. 454 at 4. "The statutory critria [sic] are necessarily vague, as the value of the procedure will ordinarily turn on various factual circumstances which make inappropriate statutory classification." 7A J. Moore, supra note 57, at JC-632.

61. Some indication of the importance of these two questions to the practicing bar can be seen in the following experience of one attorney before the Panel's predecessor, the Coordinating Committee: "I . . . traveled, at considerable expense to my client, to hearings where I found myself one of a courtroom full of lawyers, for the most part

A. *Criteria for Transfer*

The prerequisite for transfer of cases under 1407 is that there be "one or more common questions of fact."[62] Beyond this basic requirement, the only statutory criteria for transfer are "the convenience of parties and witnesses and . . . the just and efficient conduct" of the proceedings.[63] Therefore, in order to perceive some indication of the specific factors weighed by the Panel in deciding whether or not to transfer the proceedings it is necessary to examine the opinions of the Panel.[64]

1. One or More Common Questions of Fact

The Panel has held the statutory requirement of at least one common factual issue to be the "initial criteria" for transfer.[65] However, the degree of satisfaction required under this standard varies according to the nature of the actions involved. The Panel is quick to find the necessary common factual questions where the cases arise from an air crash disaster and has held that "[t]here is no doubt that this type of litigation arising out of a single disaster involves common questions of fact . . . ."[66] The Panel has also ruled that "[i]t is . . .

strangers to one another, mandated to organize themselves, to elect a lead spokesman and to divide perhaps, at most, one hour of argument among themselves. Since my client was not one of the larger or most frequently named defendants in those cases, and its position was not in all respects common with those of such defendants, I was obliged to choose between silence and five minutes of what I felt was a futile effort to focus the panel's attention on what my client deemed most important to its interests." Seeley, Procedures For Coordinated Multi-District Litigation: A Nineteenth Century Mind Views With Alarm, 14 Antitrust Bull. 91, 92-93 (1969). Such a situation has not been precluded by the Panel's Rules of Procedure which provide that counsel for each side "are to meet separately prior to the hearing for the purpose of organizing their arguments" and that "one hour will be allotted for matters being considered for the first time . . . ." Panel R. 13, 47 F.R.D. 377, 381 (1969). With such a premium on time it is essential that the practicing attorney have some understanding of the process of evaluation and the standards of consideration used by the Panel if he is to effectively represent the interests of his client.

62. 28 U.S.C. § 1407(a) (Supp. IV, 1969).

63. Id. See text accompanying note 48 supra.

64. Opinions of the Panel are published in the Federal Supplement.

65. In re Air Crash Disaster At the Greater Cincinnati Airport, 298 F. Supp. 353, 354 (1968). This case involved fourteen actions filed in six districts. General Dynamics Corp., the manufacturer of the fateful aircraft, was a defendant in only one of the actions and urged that its case not be transferred for consolidated pretrial proceedings. It argued that "1407 is inappropriate where there is a single claim against a single defendant." The Panel rejected this argument and held that "1407 is not operative only where there is multidistrict litigation involving common plaintiffs or defendants. The initial criteria is whether the litigation involves 'one or more common questions of fact.' 28 U.S.C. § 1407(a)." Id. See In re Photocopy Paper, 305 F. Supp. 60, 61 (1969); In re Gypsum Wallboard, 303 F. Supp. 510, 511 (1969).

66. In re Air Crash Disaster At Falls City, Neb., 298 F. Supp. 1323, 1324 (1969). Although common questions of fact were found to exist, the Panel declined to order transfer on other grounds.

undeniable that common questions of fact are present"[67] where the actions are based on a nationwide conspiracy to fix prices and credit in violation of the Sherman Act.[68] On the other hand, where there are relatively few cases involved, a party seeking to justify transfer "bears a strong burden" to show not only that there are common questions of fact, but also that these questions are of a "complex" nature.[69]

However, in situations where the common questions of fact are out-numbered and out-weighed by the uncommon factual issues, transfer may still be ordered. Under 1407(a) those actions having limited commonality may be separated from the mass of litigation and returned by the Panel to the transferor district at the point when the consolidated proceedings in the transferee district are no longer applicable to the particular case.[70]

Finally, it is the facts themselves which must be common to the cases and not the legal theory in which those facts will play a part. Different legal theories will not bar transfer where there is commonality of factual issues.[71]

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67. In re Gypsum Wallboard, 297 F. Supp. 1350, 1351 (1969).

68. 15 U.S.C. §§ 1-7 (1964).

69. In re Scotch Whiskey, 299 F. Supp. 543, 544 (1969). See In re Photocopy Paper, 305 F. Supp. 60, 62 (1969); In re IBM 302 F. Supp. 796, 799 (1969). The legislative history of 1407 provides that: "If only one question of fact is common to two or three cases pending in different districts there probably will be no order for transfer, since it is doubtful that transfer would enhance the convenience of parties and witnesses, or promote judicial efficiency. It is possible, however, that a few exceptional cases may share unusually complex questions of fact, or that many complex cases may share a few questions of fact. In either of these instances substantial benefit may accrue to courts and litigants through consolidated or coordinated pretrial proceedings." S. Rep. No. 454 at 4-5. For an example of an instance where the necessary unusual complexity was found to exist see In re IBM, supra. For examples of the absence of the required degree of complexity see In re Scotch Whiskey, supra and In re Photocopy Paper, supra.

70. See In re IBM, 302 F. Supp. 796, 799 (1969).

71. In re Antibiotic Drugs, 299 F. Supp. 1403, 1406 (1969). In this antitrust litigation, transfer and consolidation was opposed on the grounds that some of the actions involved antibiotic drugs for human consumption, while others involved drugs for use in animal feed. The Panel found the common factual issue in the conspiracy itself. Id. See In re Gypsum Wallboard, 303 F. Supp. 510, 511 (1969); In re Concrete Pipe, 303 F. Supp. 507, 508-09 (1969); In re Air Crash Disaster At the Greater Cincinnati Airport, 295 F. Supp. 51 (1968). Transfer was also opposed by one plaintiff who based his case on the theory that prices would actually have been higher in the absence of the conspiracy. Plaintiffs in the other cases based their argument on the more usual theory that prices would have been lower. The Panel ruled that this difference did not affect the "[c]ommon question of fact in respect to the conspiracy, economic conditions, and what prices would be in the absence of conspiracy . . . ." In re Antibiotic Drugs, 295 F. Supp. 1402, 1404 (1968). See In re Gypsum Wallboard, 303 F. Supp. 510, 511 (1969); In re Antibiotic Drugs, 299 F. Supp. 1403, 1406 (1969). Nor do conflicting class action claims bar transfer if there are common facts underlying the claims. In re Antibiotic Drugs, 299 F. Supp. 1403, 1406 (1969). See also notes 98-101 infra and accompanying text.

2. Convenience of Parties and Witnesses

The Panel has made it clear that in applying the standard of convenience, the multidistrict litigation will be viewed as a whole. Inconvenience to an individual party will not prevent transfer of his case, where consolidation would be generally convenient for *all* the parties and witnesses in *all* the cases.[72] The Panel has recognized that "[s]ome inconvenience to someone is inevitable when cases are transferred,"[73] and has held the extra expense for counsel's travel to the transferee district to be "offset by the savings from . . . coordinated or consolidated pretrial proceedings . . . ."[74]

Nor does any possible inconvenience to witnesses present a serious obstacle to transfer. The Panel has ruled that depositions will be taken at locations which are convenient to the witnesses and, if necessary, deposition judges will be appointed to supervise the taking of depositions outside the transferee district.[75]

3. The Just and Efficient Conduct of Such Actions

Section 1407 was designed primarily as a device to achieve greater efficiency in judicial management.[76] However, lest the interest of the parties be totally sacrificed for a saving in judicial time and effort, the goal of efficiency is tempered by the requirement that the transfer and consolidation must result in "just" as well as "efficient" proceedings.[77] As might be expected, the Panel has considered such factors as the size of the damage claims,[78] the extent of progress already made in pretrial proceedings underway in the various districts,[79] and the likelihood of inconsistent judicial treatment of identical issues.[80]

Ordinarily the factors affecting the just and efficient conduct of the pro-

72. In re IBM, 302 F. Supp. 796, 799 (1969); In re Antibiotic Drugs, 299 F. Supp. 1403, 1405 (1969); In re Library Editions Of Children's Books, 297 F. Supp. 385, 385-86 (1968).

73. In re IBM, 302 F. Supp. 796, 799 (1969).

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

75. In re IBM, 302 F. Supp. 796, 799 (1969). This avoids conflict with Rule 45(d)(2) of the Federal Rules of Civil Procedure which limits the distance a witness can be required to travel for the taking of his deposition.

76. S. Rep. No. 454 at 2; Hearings on S. 159 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. pt. 2, at 115 (1967) [hereinafter cited as Hearings in S. 159]. Cf. Clickenhaus v. Lytton Financial Corp., 205 F. Supp. 102, 105 (D. Del. 1962); Cinema Amusements, Inc. v. Loew's, Inc., 85 F. Supp. 319, 326 (D. Del. 1949).

77. 28 U.S.C. § 1407(a) (Supp. IV, 1969).

78. E.g., In re Grain Shipments, 300 F. Supp. 1402, 1404 (1969).

79. E.g., In re Air Crash Disaster At Falls City, Neb., 298 F. Supp. 1323, 1324 (1969).

80. E.g., In re Fourth Class Postage Regulations, 298 F. Supp. 1326, 1327 (1969). For additional factors see In re Library Editions Of Children's Books, 299 F. Supp. 1139, 1143 (1969).

ceedings will depend on the various circumstances of the particular cases. Therefore a complete list or classification of such factors would be neither practical nor desirable.[81] As the Panel has said: "[E]ach application must be considered upon its merits and in relation to particular problems in the various pending suits which are the subject of the motion for consolidation or coordinated pretrial proceedings."[82]

B. *Criteria for Determining the Transferee District*

Section 1407 allows transfer to *any* district.[83] The Panel is without statutory restrictions on its choice and similarly without criteria for its determination.[84] However, since the primary purpose of 1407 is judicial efficiency it is not surprising that factors relating to this goal predominate in the Panel's choice of transferee district. In this regard the Panel considers the degree of progress achieved in districts where pretrial proceedings have already begun to be "an important part in our selection of the transferee court and the assignee judge."[85] The Panel will ordinarily designate the district with the most advanced discovery program, intending that all previous discovery be made available to transferred parties.[86] These parties will, if necessary, be permitted to supplement that portion of the discovery program already completed.[87]

Similarly, the Panel has given consideration to the number of related cases filed in proposed transferee districts,[88] the location of relevant documents, records, and parties,[89] the situs of the cause of action,[90] and even the amount of damages sought in each district.[91] No one of these elements is controlling and they all go to make up "the litigation's [geographic] center of grav-

81. See 7A J. Moore, supra note 57, at JC-632.

82. In re Air Crash Disaster At Falls City, Neb., 298 F. Supp. 1323, 1324 (1969).

83. 28 U.S.C. § 1407(a) (Supp. IV, 1969).

84. However, the legislative history of 1407 does state that "a number of factors should be weighed in the selection of a transferee district: the state of its docket, the availability of counsel, sufficient courtroom facilities, etc." S. Rep. No. 454 at 5; H.R. Rep. No. 1130, in 2 U.S. Code Cong. & Ad. News 1898, 1901 (1968). See 7A J. Moore, supra note 57, at JC-632.

85. In re Gypsum Wallboard, 303 F. Supp. 510, 511 (1969). See In re Concrete Pipe, 303 F. Supp. 507, 508 (1969); In re Fourth Class Postage Regulations, 298 F. Supp. 1326, 1328 (1969); In re Plumbing Fixture Cases, 295 F. Supp. 33, 34 (1968).

86. In re Gypsum Wallboard, 303 F. Supp. 510, 511 (1969).

87. Id.

88. E.g., In re Antibiotic Drugs, 295 F. Supp. 1402, 1403 (1968); In re Protection Devices & Equip., 295 F. Supp. 39, 40 (1968).

89. E.g., In re IBM, 302 F. Supp. 796, 800 (1969); In re Library Editions Of Children's Books, 297 F. Supp. 385, 387 (1968).

90. E.g., In re Air Crash Disaster At the Greater Cincinnati Airport, 298 F. Supp. 353, 354 (1969); In re Air Crash Disaster At Ardmore, Okla., 295 F. Supp. 45, 46 (1968).

91. In re Admission Tickets, 302 F. Supp. 1339, 1341 (1969).

ity . . . ."[92] The Panel gives serious consideration to a "geographically central forum," particularly where the litigation is "coast-to-coast."[93]

In selecting a district for consolidation, just as in the basic determination of whether or not to transfer, the convenience of parties and witnesses is a factor to be considered, but is not controlling. The Panel will not allow added expense and inconvenience to an individual party to defeat transfer of his case where consolidation of the pretrial proceedings "as a whole" would be "just and efficient."[94]

Nor will transfer be barred by calendar congestion in the proposed transferee district. The Panel will avoid the problem of delay and further congestion by exercising its power under 1407(b)[95] to transfer a judge from another district to handle the proceedings.[96]

C. *Powers of the Transferee Court*

Section 1407(b) provides that the transferee judge conducting the consolidated or coordinated pretrial proceedings "may exercise the powers of a district judge in *any* district . . . ."[97] This simple precept fails to solve problems arising from a conflict in the exercise of powers by the transferee and transferor courts. *In re Plumbing Fixtures Cases*[98] raised such a question with regard to class action determinations. A plaintiff in one of the cases, while agreeing to the transfer of other pretrial issues, requested that all class action questions be separated and reserved for determination by the transferor court.[99] The Panel denied the request.[100] A lengthy majority opinion held that a single claim for relief cannot be subject to the control of two different district courts at the same time. Therefore, the Panel cannot separate the pretrial issues in

92. In re Library Editions Of Children's Books, 297 F. Supp. 385, 387 (1968). See In re Fourth Class Postage Regulations, 298 F. Supp. 1326, 1328 (1969); Robson, Multi-District Litigation: § 1407 In Operation, 14 Antitrust Bull. 109, 114-15 (1969).

93. In re Library Editions Of Children's Books, 297 F. Supp. 385, 387 (1968).

94. See, e.g., In re Antibiotic Drugs, 303 F. Supp. 1056, 1057 (1969); In re Library Editions Of Children's Books, 297 F. Supp. 385, 386 (1968).

95. 28 U.S.C. § 1407(b) (Supp. IV, 1969). See text accompanying note 49 supra.

96. E.g., In re Library Editions Of Children's Books, 297 F. Supp. 385, 387 (1968).

97. 28 U.S.C. § 1407(b) (Supp. IV, 1969) (emphasis added). In the legislative hearings on 1407, it was stated that these powers include "the usual powers provided by the Federal Rules of Civil Procedure, including authority to render summary judgment, to control and limit pre-trial proceedings, and to impose sanctions for failure to make discovery or comply with pre-trial orders." In re Plumbing Fixture Cases, 298 F. Supp. 484, 499 (1968).

98. 298 F. Supp. 484 (1968).

99. Fed. R. Civ. P. 23(c)(1) requires that: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained."

100. 298 F. Supp. at 488.

a claim, designating some for the transferee court and others for the transferor court.[101] The Panel went on to state that:

> [A] transfer under Section 1407 is a change of venue for pretrial purposes.
> On change of venue . . . the jurisdiction and powers of the transferee court are coextensive with that of the transferor court; . . . 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; . . . after an order changing venue 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.[102]

The Panel held it to be within the power of the transferee court "to modify, expand, or vacate" discovery orders which had been issued by the transferor court.[103]

Nor may the Panel "require completion of discovery underway, discovery as the parties have agreed to, or which has been ordered by the transferor court . . . ."[104] Once transfer has been made the treatment of the cases and the conduct of the pretrial proceedings is completely at the discretion of the transferee judge.[105] The Panel is without power "to direct the transferee judge in the exercise of his powers and discretion in pretrial proceedings."[106]

Withheld, however, from the transferee court and reserved to the Panel is the power to remand each case to its transferor court "at or before the conclusion" of the pretrial proceedings.[107] Also reserved to the Panel is authority to "separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded."[108]

101. Id. at 495. See In re Air Crash Disaster At the Greater Cincinnati Airport, 298 F. Supp. 353, 354 (1968) where the Panel rejected a request to withhold from transfer the issue of damages to allow determination of this issue by the transferor court prior to the determination of liability. See also In re Antibiotic Drugs, 299 F. Supp. 1403, 1405, 1406 (1969); In re Antibiotic Drugs, 295 F. Supp. 1402, 1404 (1968).

102. 298 F. Supp. at 495-96 (citations omitted). See also In re Gypsum Wallboard, 302 F. Supp. 794 (1969).

103. 298 F. Supp. at 489. The minority opinion was that, while the transferee court had jurisdiction to determine class action questions, this jurisdiction existed only in the absence of a motion on the subject pending in the transferor court. Fed. R. Civ. P. 23(c)(1) provides that a class action determination "may be conditional, and may be altered or amended before the decision on the merits." It is therefore possible that a determination by the transferor court may, after transfer, be vacated by the transferee court and then be reinstated by the transferor court after remand. See In re Plumbing Fixture Cases, 298 F. Supp. 484, 494 (1968). Only the principles of comity would prevent such a situation from arising.

104. In re Plumbing Fixture Cases, 298 F. Supp. 484, 489 (1968).

105. Id.; see In re Plumbing Fixture Cases, 295 F. Supp. 33, 34 (1968).

106. In re Plumbing Fixture Cases, 298 F. Supp. 484, 489 (1968).

107. 28 U.S.C. § 1407(a) (Supp. IV, 1969).

108. Id.; In re Plumbing Fixture Cases, 298 F. Supp. 484, 489 (1968).

V. CONCLUSION

Congress envisioned 1407 as having application not only in multidistrict antitrust actions such as the electrical cases, but also in cases arising out of aircraft disasters, patent and trademark disputes, products liability cases, securities violations, surety bond actions, and air and water pollution litigation.[109] During its first two years, 1407 has already been widely applied in many of these areas.[110]

Despite some opposition,[111] 1407 has generally been favorably received and commented upon by the profession.[112] However, the acceptance and application of new judicial techniques has always been a slow and careful process[113] and it can be said that the Panel is just emerging from its "early and formative stages."[114] During these initial stages it was essential that the Panel not be unduly restricted in its attempts to strike the necessary balance between justice and efficiency. The proper approach was a flexible one. The general terms in which the standards of 1407 are formulated provided this necessary flexibility. The Panel, in applying the section, has not been hindered by an "excessive reverence for the past and fear of change . . . ."[115] The opinions clearly show that 1407 will not be held in reserve awaiting the development of a mass of litigation having the extreme dimensions and scope of the electrical cases, but rather, the section will be liberally applied in the interest of increased judicial efficiency.

As an ever larger body of case law evolves in the form of Panel opinions, 1407 standards will become more clearly defined and additional guidelines will emerge. The growing body of Panel case law must therefore be continually

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109. 114 Cong. Rec. H1584 (daily ed. March 4, 1968); Hearings on S. 3815 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. 5 (1966); Hearings on S. 915 at 325-26.

110. See In re Scotch Whiskey, 299 F. Supp. 543, 544 n.3 (1969); Hearings on S. 961 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. pt. 2, at 268-73 (1969) [hereinafter cited as Hearings on S. 961].

111. E.g., Statement and testimony of Philip Price, Hearings on S. 159 at 103-04; Seeley, supra note 61.

112. See, e.g., Emmerglick, Procedures In Complex And Multi-District Litigation, 37 Antitrust L.J. 800 (1968); McLachlan, The Multidistrict Litigation Act: The Demise of Venue, 49 Chi. B. Record 367 (1968); Neal, Multi-District Coordination—The Antecedents of § 1407, 14 Antitrust Bull. 99 (1969); Note, The Problem of Venue in Multiple District Litigation, 41 Notre Dame Law. 507, 525-26 (1966); Comment, Consolidation of Pretrial Proceedings Under Proposed Section 1407 of the Judicial Code; Unanswered Questions Of Transfer and Review, 33 U. Chi. L. Rev. 558, 573, 575 (1963).

113. This has been deemed necessary to insure that in improving one element of the legal establishment, another is not injured or destroyed. See B. Botein & M. Gordon, The Trial Of The Future: Challenge to the Law 23 (1965).

114. Hearings on S. 961 at 267.

115. Tydings, Court Of The Future, 13 St. Louis U.L. J. 601 (1969).

reviewed and analyzed if an understanding of the uses and limitations of 1407 is to be achieved. Such an understanding is essential if it is to be used with any degree of skill as one of a growing number of tools for the achievement of a just and efficient litigation process[116]—a process based on the principle that "litigation is the pursuit of practical ends, not a game of chess."[117]

116. For example, it has been held that § 1407 is merely a preliminary step in streamlining litigation and is not incompatible with § 1404(a) transfer. The two sections can and often should be used in conjunction. See In re Grain Shipments, 300 F. Supp. 1402, 1404 (1969); In re Mid-Air Collision Near Hendersonville, N.C., 297 F. Supp. 1039, 1040 (1969); 1 J. Moore, supra note 57, pt. 1, § 5.32 [2], [4], at 96, 97. For a recent proposal which would further streamline litigation see Hearings on S. 961. The bill would extend federal jurisdiction and a uniform federal law to all cases arising from aviation and space activities. This would bring greater efficiency to litigation resulting from air crash disasters. See Comment, 64 Nw. U.L. Rev. 188 (1969), supra note 28.

117. Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 69 (1941).