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Procedure - Transfer - Jurisdiction

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CURRENT LEGISLATION AND DECISIONS

NOTES

Procedure—Transfer—Jurisdiction

On 19 July 1967, a Piedmont Aviation, Inc., Boeing 727 aircraft was involved in a mid-air collision with a Cessna aircraft owned by Lanseair, Inc., and co-operated and co-maintained by Rapidair, Inc. The plaintiff is the personal representative of the heirs of thirteen passengers killed on the Piedmont aircraft. For the purposes of this action, Lanseair and Rapidair were considered as a single business activity and were combined as one defendant. These corporations in conjunction with Piedmont were the principal defendants in the present action. Also joined as defendants in the action were the Boeing Company for designing the 727 cockpit in such a manner as to unreasonably restrict the pilot's field of vision, and the United States of America for negligent operation of an Air Traffic Control Center by employees who failed to issue proper information, instructions, and clearances. The complaint filed in New York, a Federal District Court, averred that the concurrent negligence of all the defendants caused the collision and subsequent crash. At defendants request the case was transferred to a North Carolina Federal District Court to be joined with other actions arising out of the same accident. The plaintiff asserted that the transfer would negate his capacity to sue since he was unable to comply with the applicable North Carolina statute[1] regarding qualification to sue as a decedent's representative. The remedy sought on appeal was a Writ of Mandamus to vacate the district court's order transferring the action under 1404(a)[2] of the Judical Code [Code]. *Held, writ denied*: When an action which meets the requirements of jurisdiction[3] and venue[4] is instituted in federal court, a subsequent transfer of that action for "the convenience of the parties" and "in the interest of justice" will not affect the plaintiff's capacity to sue regardless of the local law of the transferee forum. *Farrell v. Wyatt*, 408 F.2d 622 (2d Cir. 1969).

I. Background of the Action

Analysis of this action is best accomplished after reviewing proceedings undertaken by the same plaintiffs and defendants which predated this

[1] N. C. Gen. Stat. sec 28-8(2) (1905).
[2] 28 U.S.C. 1404 (a)(1966); 408 F.2d 622 (2d Cir. 1969).
[3] 28 U.S.C. 1331 (1952), 1331 (1964).
[4] 28 U.S.C. 1391 (1963).

appeal and which involved procedural issues pertaining to the transfer. The line of decisions rendered on causes presented by these parties are reported in four separate opinions, *viz.* from two district courts and from the United States Court of Appeals for the Second Circuit.[5]

To enable the heirs of the deceased parties to proceed with their suit in a New York federal court, Farrell, a New York citizen, was appointed administrator of the decedents' estates. Utilizing Farrell's citizenship to establish the proper venue,[6] the first action was instituted in the United States District Court for the Southern District of New York. Diversity jurisdiction was established as to all five defendants, as none were residents of New York. The initial action involved three major issues: (1) Generally, federal jurisdiction over all the defendants, (2) specifically, jurisdiction of the New York federal court over Lanseair and Rapidair; and (3) finally, the critical issue of transfer to a forum where state law prohibits continuation of the suit by the plaintiff.

In deciding the first issue of overall federal jurisdiction the court noted that the defendants, Lanseair and Rapidair, were Missouri corporations with their principal place of business in Missouri. In an attempt to clothe the New York Federal Court with jurisdiction over the person of these two defendants, the plaintiff initiated two methods of attaining jurisdiction. First, the plaintiff secured an attachment of Rapidair's aircraft liability insurance policy issued by an insurer doing business in New York to obtain quasi in rem jurisdiction. Service of process was issued to Rapidair in Missouri pursuant to this attachment. Secondly, in an attempt to obtain in personam jurisdiction over Lanseair, personal service of process was executed on the president of Lanseair. Since this officer had made several trips to New York to secure multiple contractual arrangements with New York companies, the second method of service was based on the New York "long arm" statute[6a] as allowed under the doctrine of substantial contacts espoused in *International Shoe*[7] and *McGee v. International Life Insurance Co.*[8] The trial court then proceeded to the next defendant and found that jurisdiction over the claim against the United States for the alleged negligent act of its employee was based on 1346(b) of the Code[9] and the presence of a federal question. Other applicable statutes for recovery against the United States were based on the Federal Tort Claims Procedure Act;[10] however, no specific procedural problem arose with regard to this defendant. Next, jurisdiction over the person with respect to Boeing and Piedmont in the New York court presented no problem which necessitated further analysis by the court.

[5] 295 F. Supp. 228 (S.D.N.Y. 1968); 408 F2d 662 (2d Cir. 1969); 411 F.2d 812 (2d Cir. 1969), *cert. den.* 396 U.S. 840 (1969); 10 Av. Cas. 18, 358 (W.D.N.C. 1969).

[6] 28 U.S.C. 1391 (a) (1963) which provides, "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."

[6A] N.Y. Civil Practice Law and Rules sec. 302(a)(1) (1966).

[7] *International Shoe Co.* v. *State of Washington*, 326 U.S. 310 (1945).

[8] *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957).

[9] 28 U.S.C. 1346(b) (1966).

[10] 28 U.S.C. 2671-2680.

In reaching a decision on the second issue, i.e., jurisdiction over the person with respect to Lanseair and Rapidair, the district court reviewed New York caselaw concerning the attachment of a liability insurance policy issued by a foreign insuror doing business in New York[11] as a basis for allowing out-of-state service of process. The court concluded that the primary prerequisite for allowing an attachment under the authority of *Seider v. Roth*,[12] New York's landmark case allowing out-of-state service, was the facts must indicate that the party for whose benefit the action was undertaken is a New York citizen. This single element must be present to sustain such an attempt at quasi in rem jurisdiction. Here the court looked beyond the citizenship of the administrator to that of the heirs, the real parties in interest, none of whom were New York residents. The result of these findings pointed out the necessity of vacating the attachment, setting aside service based on quasi in rem jurisdiction, and dismissing the action pursuant to Rapidair's motion under Rule 12(b)(2).[13] This initial opinion did not deal with the in personam jurisdiction question of Lanseair; therefore, as to this issue, these parties remain before the New York federal district court.

The third, and possibly most critical issue presented in the initial action, was the New York court's order granting a motion to transfer the entire action to North Carolina. This motion was presented to the court by the United States "for the convenience of the parties and witnesses, in the interest of justice."[14] The reason for the motion was to consolidate this action with sixty-one additional actions pending in North Carolina federal district court involving identical facts. The court stated that "[e] very consideration of convenience and efficiency suggests that all litigation arising from this tragic disaster should be concentrated in one district. . . . It would be wasteful judicial administration for judges in two or more districts to be occupied at the same time by the same problems of fact and law."[15] In opposition, the plaintiff contended that the effect of such transfer would be to deprive him of a forum in which to continue suit. The basis for this contention was that North Carolina law[16] disqualifies non-residents as administrators, and that the doctrine of *Erie v. Tompkins*[17] forces the federal court to apply the substantive law of the state in which it sits. The plaintiff also relied on *Hoffman v. Blaski*[18] for a definition of the phrase

[11] *Seider* v. *Roth*, 17 N.Y. 2d 111, 269 N.Y.S. 2d 99 (1966).

[12] *Id.*

[13] Fed. R. Civ. P. 12(b)(2); The second appellate opinion is significant only in that it affirms the district court's interpretation of *Seider*. The final effect of the decision of the second circuit on this issue is to verify that attachment in New York state to obtain *quasi in rem* jurisdiction is available only to parties who will benefit from the action, with the added requirement that they be New York residents. Certiorari has been recently denied the plaintiff on this issue by the Supreme Court. 396 U.S. 840 (1969). Therefore, non-residents may not use this technique, for even though residency of the administrator is sufficient to grant New York Courts proper venue, it is insufficient to allow the procedure of attachment to obtain jurisdiction.

[14] 28 U.S.C. 1404(a) (1966).

[15] 295 F. Supp. 228 (S.D.N.Y. 1968).

[16] N.C. Gen. Stat. sec. 28-8(2) (1905).

[17] Erie v. Tompkins, 304 U.S. 64 (1938).

[18] Hoffman v. Blaski, 363 U.S. 335 (1960).

"where it [the action] might have been brought"[19] and argued that either *Erie* policy or *Hoffman* should by themselves or in combination prevent the transfer to North Carolina. However, relying on *VanDusen v. Barrack*[20] as the controlling law, the court refused to recognize the plaintiff's position and transferred the action.

The instant case involves the plaintiff's request for mandamus from the Second Circuit seeking to vacate the transfer to a forum whose state law negates the personal representative's capacity to sue thereby generating a problem of proper application of federal law.

II. Legal Effect of a Federal Transfer Order

An order transferring a civil action to "any other district or division where it might have been brought" can be made under 1404(a) of the Code. The plaintiff's first issue concerned the final phrase of section 1404(a) that the transferee forum was not a district where this action could have been brought initially. In support of this point, the plaintiff looked to *Hoffman v. Blaski*[21] for a definitive answer to the problem of where an action may be instituted. In *Hoffman* the Supreme Court provided that, "[i]f when a suit is commenced, plaintiff has a right to sue in that district, independently of the wishes of the defendant, it is a district 'where [the action] might have been brought'. If he does not have that right . . . it is not a district 'where it might have been brought'. . . ."[22] The plaintiff averred that *Hoffman* applied to the instant case in this respect, and that in light of the applicable North Carolina statute,[23] the court is precluded from transferring to a district where suit could not have begun at the outset.

In addition to *Hoffman*, the plaintiff referred to North Carolina's general statutes which provide that, "[t]he clerk shall not issue letters of administration . . . to any person . . . who is a nonresident of this state. . . ." State case law establishing precedent to the early 1900's utilizes the above statute to deny capacity to sue.[24] It should be pointed out that statutes of this type are not confined to North Carolina, but are predominate in most state laws.[25] At first glance this argument of lack of capacity as a result of *Hoffman* and statutory law indicates that, in all cases displaying similar facts to those presented to the federal court in the instant case, the court would automatically be precluded from transferring the action. However, because of the limitation thereby placed on the federal court, and the possibility of encouraging forum shopping by plaintiffs utilizing "constructed jurisdiction," the court rendered a negative judgment relying on more recent case law.[26]

[19] 28 U.S.C. 1404(a) (1966).
[20] Van Dusen v. Barrack, 376 U.S. 612 (1964).
[21] 363 U.S. 335 (1960).
[22] *Id.* at 344.
[23] N.C. Gen. Stat. sec. 28-8(2) (1905).
[24] Hall v. Southern R.R., 59 S.E. 879 (1907).
[25] *See generally* the applicable laws of Alabama, California, Florida, Georgia, Idaho, Illinois, Missouri, Kansas, Nebraska, Oregon, and Utah.
[26] Van Dusen v. Barrack, 376 U.S. 612 (1964).

The trial court ruled that the plaintiff's assertion that *Hoffman* and the North Carolina statute negated the right to bring suit in the transferee forum was incorrect. The basis for this finding was *Van Dusen v. Barrack*[27] where the court held that " 'where it might have been brought' must be construed with reference to the federal laws delimiting the districts in which an action 'may be brought' and not with reference to laws of the transferee state concerning the capacity of fiduciaries to bring suit."[28] *Van Dusen* did not present an entirely new procedure, for an identical question had been previously presented to a court of appeals in *Headrick v. Atchison*;[29] its opinion established the same guidelines as those announced by the Supreme Court in *Van Dusen*.[30]

To quiet arguments that Rule 17(b)[31] would invalidate the application of *Van Dusen*, the Supreme Court held in that case that:

> We think it is clear that the Rule's reference to the State 'in which the district court is held' was intended to achieve the same basic uniformity between state and federal courts as was intended by the decisions which have formulated the Erie policy. . . . Where a section 1404(a) transfer is thus held not to effect a change of law but essentially only to authorize a change of courtrooms, the reference in Rule 17(b) to the law of the State 'in which the district court is held' should be applied in a corresponding manner so that it will refer to the district court which sits in the State that will generally be the source of applicable laws.[32]

It is recognized that today one duty of the Supreme Court is to interpret the application of the federal rules.[33] Here the Court merely redirected the emphasis of Rule 17(b) in order to alleviate the subtle dichotomy that existed between its holding in *Van Dusen* and the Rule.

The court of appeals, in the instant case, was confronted with the planitiff's interpretation of *Van Dusen*. The plaintiff averred that *Van Dusen* would require the transferor forum, New York, to apply its state law, *i.e.*, its choice of law rule to determine the plaintiff's capacity to sue in North Carolina. The court denied the effect of this argument and held that because the plaintiff had qualified under New York law,[34] that state law governs the determination of jurisdiction and venue but federal law and not that of New York applies to determining the substantive law of the transferee court. *Van Dusen* applies only to the substantive law of the state where the action was first instituted. Under this authority the federal court sitting in North Carolina is required to apply the law of New York as to the plaintiff's capacity and in turn disregard the law of the transferee state.

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[27] *Id.* 31 J. Air L. & Com. 160 (1965).

[28] *Id.* at 624.

[29] 182 F.2d 305 (10th Cir. 1950).

[30] *Id.*

[31] Fed. R. Civ. P. 17(b) provides, "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. . . . In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held. . . ."

[32] Van Dusen v. Barrack, 376 U.S. 612, 642-643 (1964).

[33] 28 U.S.C. 2071; 28 U.S.C. 2072 (1966).

[34] N.Y. Estates, Powers and Trusts Law sec. 5-4.1 (1969).

To resolve the apparent inconsistency between *Van Dusen* and *Hoffman*, the court pointed out that *Hoffman* applies to jurisdiction and venue, whereas *Van Dusen* concerns only matters of substance, and that each case must be applied in its proper perspective to avoid procedural confusion.

It should be noted here that *Van Dusen* is not attempting to disregard the application of *Erie*, but instead presents a modification of the Erie Doctrine "in the interest of justice."[35] To prevent the injustice of depriving the plaintiff of a forum, the law of the case should be established in the court where proper jurisdcition and venue were first acquired. To allow the defendant the added tool of the substantive law of the transferee forum, would, in many cases requiring specific qualifications to sue, deprive the plaintiff of a forum. Where the transferor court has refused to hear the case because the witnesses and parties are elsewhere, and *a fortiori* the transferee court under *Erie* would necessarily deny the action for lack of capacity, a *prima facie* case exists for the *Van Dusen* modification "in the interest of justice."

The legal effect of the transfer order under *Van Dusen* is to modify the Erie Doctrine by allowing the law of the case to be established under the state law controlling the federal court where proper jurisdiction and venue were acquired. Any subsequent transfer of this action will require the substantive law of the transferor forum to travel to the transferee court for application. Under this doctrine the plaintiff may continue to select the forum most beneficial to his cause in regard to amount and method of recovery, method of payment, and capacity to sue.

III. Procedure for Transfer[35A]

The action here appealed from might have been ineligible for transfer had all of the jurisdictional issues presented been decided at the trial court

[35] The impact of Erie today does not rest on the facts of the case and should be considered as a Federal policy of judicial administration.

[35A] The transfer of an action is in effect only a change of courtrooms to a forum where the convenience of the parties or the interest of justice may be better served. After the plaintiff has elected his forum, the burden is on the defendant to show why the forum should be changed. It has been held that ". . . unless the balance is strongly in favor of the defendant, the plaintiffs choice of forum should rarely be disturbed." Crawford Transport v. Chrysler, 191 F. Supp. 223 (E. D. Ken. 1961). This viewpoint has been reiterated many times by all the circuits except in the situation where the trial court detects the possibility of forum shopping. U.S. v. United Airlines, 216 F. Supp. 709 (E. D. Wash. & Nev. 1962); 335 F.2d 379 (9th Cir. 1964), *dismissed* 379 U.S. 951 (1964).

28 U.S.C. 1404(a) (1966) is based on the doctrine of forum non conveniens. "It was drafted in accordance with the doctrine of forum non conveniens permitting transfer to a more convenient forum, even though venue is proper." H. R. Rep. No. 308, 80th Cong., 1st Sess. A 132 (1949). Prior to the adoption of this section the federal courts were powerless to transfer any action to a more convenient forum; their single recourse was to dismiss the action utilizing forum non conveniens. U.S. v. National City Van Lines, 334 U.S. 573 (1948).

The proper procedure to initiate a transfer order is by motion from either the defendant or the plaintiff. Opinion has been voiced that the plaintiff should be denied the right to this procedure as he began the action in the forum of his choosing. Trader v. Pope & Talbot, Inc., 190 F. Supp. 282 (E.D. Pa 1961). Although this viewpoint has only been voiced on one occasion, the opposite and generally most accepted authority is that announced in Philip Carey Mfg. Co. v. Taylor, 286 F.2d 782 (6th Cir. 1961), *cert. den.* 366 U.S. 948 (1961), which provides that both parties may initiate the motion. Although no specific time limit is established for making the motion for transfer, it should be made whenever it becomes apparent that the "interest of justice" requires such action. Dill v. Scuka, 198 F. Supp. 808 (E.D. Pa. 1961). The fact that any defendant may present this motion to the court is undisputed. In the instant case the United States initiated the

level rather than requiring additional litigation in the transferee forum for the decision. However, in the instant case the trial court was somewhat handicapped by the withdrawal of a motion to dismiss for lack of jurisdiction by Lanseair. The motion was "withdrawn by Lanseair's counsel upon a stipulation of plaintiffs' counsel that the motion could be withdrawn without prejudice to renew the motion at a subsequent time. . . ."[36] It was not until after the trial court had transferred the action to North Carolina that the motion to dismiss for lack of jurisdiction over the person was reinstituted.

Section 1404(a) presupposes that the original trial court found both jurisdiction over the person and proper venue.[37] Returning to the facts in the original action, two attempts to achieve jurisdiction over Lanseair and Rapidair were made. The quasi in rem jurisdiction was nullified by both the trial court and the appellate court. However, because the motion to dismiss for lack of jurisdiction over the person was withdrawn, the trial court was unable to rule on the personal service on the president of Lanseair to gain the necessary in personam jurisdiction. Therefore, it seems that even though jurisdiction is a prerequisite to transfer, the lack of a determination on jurisdiction will not bar the transfer as the initial forum cannot *sue sponte* rebut the presumption that the necessary jurisdiction over the person exists.[38] Moreover, as a result of this lack of determination on jurisdiction, the transfer appears to only lengthen the time the litigants must remain before the court before a final judgment may be rendered. Here the withdrawal of the 12(b) (2) motion forced the trial court to proceed with a type of judicial administration that may lack the very efficiency that section 1404(a) strives to achieve.[39] Federal caselaw indicates that the mere presence of corporate personnel within a state will not serve as a basis for jurisdiction over the corporation.[40] Provided the contracts between Lanseair and the New York companies were not consummated, this or similar authority might have been utilized to decide the issue of in personam jurisdiction over Lanseair in the initial forum. Had the motion to dismiss not been withdrawn, the time required to settle the issue of capacity to bring suit could have been significantly reduced. On occasion it has been argued that a transfer under 1404(a) may be accomplished by a court without personal jurisdiction; however, the Supreme Court has not yet

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required motion. Because of he nature of the motion, any action taken to grant or deny the transfer is within the discretion of the trial judge with mandamus the only remedy on appeal. N.Y., Chicago, & St. Louis R.R. v. Vardaman, 181 F.2d 769 (8th Cir. 1950); 28 U.S.C. 1292(b) (1958). In the instant case the appellate court specifically refused to grant such relief.

[36] 10 Av. Cas. 18,358 at 18,359 (W.D.N.C. 1969).

[37] Unlike 28 U.S.C. 1406, section 1404(a) requires that all aspects of the federal jurisdiction and venue statutes be met to allow transfer to a more convenient forum.

[38] Sue sponte motions are allowed in the application of the following rules by the district courts: Fed. R. Civ. P. 12(g), 59(a), 60(a), 39(a), 39(c).

[39] Note that "1404(a) has not deprived the court of power to dismiss where there is no other federal court to which a transfer may be made." Gross v. Owens, 221 F.2d 94 (D.C. Cir. 1955).

[40] James-Diskinson Farm Mfg. Co. et al v. Harry, 273 U.S. 119 (1926); Riverside & Dan River v. Menefee, 237 U.S. 189 (1914); International Shoe Co. v. Washington, 326 U.S. 310 (1945); Hanson v. Denckla, 357 U.S. 235 (1958).

interpreted the statute to so provide, and the argument has not been given much credence.[41]

IV. Conflict Between Substance and Procedure on Transfer

Because of *Van Dusen* it is recognized that the substantive law of the original forum becomes the law of the case. However, *Van Dusen* does not go so far as to apply the procedural law of the initial forum to the transferee forum. As far as is possible, the Federal Rules of Civil Procedure will govern the action; however, the procedure for those areas not covered by the Rules is the state law of the transferee forum. A South Carolina federal court has said, "[i]n a wrongful death action arising out of an automobile accident the *lex loci* would govern as to all matters that might be considered substantive and which created the right to sue, but, as to matters that might be considered to be merely procedural, the *lex fori* would govern."[42] North Carolina case law has followed this line of reasoning.[3] The purpose for application of this logic is to remove the unnecessary burden of applying unfamiliar procedure in the transferee court. Thus the only additional burden placed on the plaintiff in the transferee forum will be to conform to those North Carolina rules of procedure[44] which are not within the scope of the federal rules. Therefore, the transferee forum may utilize rules which will affect the action, i.e., determine the competency and credibility of witnesses, relevancy of evidence, and burden of proof.[45] Although it may be argued that the plaintiff remains in a preferred position because of the application of *Van Dusen* and the fact that federal rules override state rules in all cases of conflicts of law,[46] it is still apparent that the party opposing the transfer does in fact lose any advantage that may have accrued to him as a result of procedural law applicable in the transferor forum. The plaintiff implies that such a proposition may well confront him in the North Carolina court.

V. Conclusion

The Supreme Court in *Van Dusen* decided that the substantive law of the initial forum with jurisdiction and proper venue is the law of the case and will accompany any subsequent transfer of the action. If the question of jurisdiction of the court is undecided, a transfer under section 1404(a) may still be made by the court; however, a finding of no jurisdiction will bar the transfer. On procedural issues the transferee court will apply the Federal Rules of Civil Procedure in reaching its decision. In the absence

[41] 30 U. Chi. L. Rev. 735 (1963).

[42] Anderson v. Lane, 97 F. Supp. 265 (E.D.S.C. 1951); Taylor v. Reading Co., Inc., 23 F.R.D. 186 (E.D.Pa. 1958); Lewis v. Food Machinery & Chemical Corp., 245 F.Supp. 195 (W.D.Mich. 1965).

[43] Lowe's No. Wilkesboro Hardware v. Fidelity Mutual Life Ins. Co., 206 F.Supp. 427 (M.D.N.C. 1962).

[44] N.C. Gen. Stat. Div. II Chap. 1-2.

[45] USAA v. Wharton, 237 F.Supp. 255 (W.D.N.C. 1965).

[46] Iovino v. Waterson, 274 F.2d 41 (2d Cir. 1960), *cert. den.* 362 U.S. 949 (1960); Hope v. Hearst Consol. Publication, Inc., 294 F.2d 681 (2d Cir. 1961), *cert. den.* 368 U.S. 956 (1962).

of a Rule on the issue, the procedural law of the new forum will apply. If a jurisdictional question is still pending, the transferee court must decide this issue utilizing the law of the transferor court. In addition, the transferee court must perfect its own jurisdiction under available "long-arm" statutes if the action was transferred under the 1966 amendment to the general venue statutes allowing transfer to the district "in which the claim arose."

The final action undertaken by these parties was in the Western District of North Carolina. The court in that action reviewed the in personam jurisdiction question with regard to Lanseair, and by applying New York law, determined that the first court did not have jurisdiction over this defendant. The trial court, therefore, lacked the power to include Lanseair and Rapidair in the transfer to North Carolina. Because of this error, the North Carolina court vacated the service of process on Lanseair and dismissed the action for lack of jurisdiction over the person; the result being that the plaintiff failed to acquire the proper jurisdiction over Lanseair and Rapidair and suffered a dismissal without prejudice.

Section 1404(a) is primarily concerned with efficient judicial administration and strives to further that end by allowing transfer of civil actions to more convenient forums. To strengthen the purpose of 1404(a), litigants, as well as trial courts, should make every attempt to provide answers to any issues which might invalidate the power of a transferee forum to render a final decision on the central issue contested. Unanswered issues which may destroy the authority of the transferee court and force dismissal have served not to elevate efficient administration of justice, but have created only a greater burden for the entire judicial system.

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