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John H. McElhaney

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A PLEA FOR THE PRESERVATION OF THE "WORM'S EYE VIEW" IN MULTIDISTRICT AVIATION LITIGATION

JOHN H. McELHANEY*

The seven federal district and court of appeals judges composing the Judicial Panel on Multidistrict Litigation have the power to transfer cases involving the same questions of fact to a single district for consolidated pre-trial hearings. The usefulness of this procedure in aircraft crash cases is obvious, but limited. After developing the point that the existing procedures are not patterned for aviation litigation, Mr. McElhaney argues that the interests of the litigants, especially the claimants, are not adequately protected, even harmed. He isolates eight problems that together suggest the creation of separate procedures for aviation cases. As the author himself points out, the article is a partisan criticism; a rebuttal will therefore appear in the next issue.

WITH a colorful twinge of pique the Judicial Panel on Multidistrict Litigation¹ has characterized the assertion of the self-interest of a litigant to be a "worm's eye view of Section 1407."² The conflicting interests of an individual litigant and the interests of collective judicial efficiency squarely confront each other with the inclusion of death and injury claims within the jurisdiction of the Panel.³ This article is intended as a partisan plea for the recognition and protection of the individual rights of the victims, and the survivors of victims, of air crash disasters.⁴

* B.B.A., J.D., Southern Methodist University; Attorney at Law, Dallas, Texas; Lecturer in Law, Southern Methodist University.

¹ See 28 U.S.C. § 1407 (Supp. V, 1968).

² *In re Library Editions of Children's Books*, 297 F. Supp. 385, 386 (J.P.M.L. 1968).

³ *In re Air Crash Disaster Near Dayton, Ohio*, 310 F. Supp. 798 (J.P.M.L. 1970); *In re Mid-Air Collision Near Fairland, Ind.*, 309 F. Supp. 621 (J.P.M.L. 1970); *In re San Juan, P.R. Air Crash Disaster*, 316 F. Supp. 981 (J.P.M.L. 1970); *In re Mid-Air Crash Near Hendersonville, N.C.*, 297 F. Supp. 1039 (J.P.M.L. 1969); *In re Air Crash Disaster at Hong Kong*, 298 F. Supp. 390 (J.P.M.L. 1969); *Radford, Pa. Air Disasters*, ___ F. Supp. ___ (J.P.M.L. 1969) (no written opinion); *In re Santa Monica Bay Air Disaster*, F. Supp. (J.P.M.L. 1969); *Maracaibo, Venez., Air Disaster*, ___ F. Supp. ___ (J.P.M.L. 1969) (not yet reported); *Air Crash Disaster at Ardmore, Okla.*, 295 F. Supp. 45 (J.P.M.L. 1968); *In re Air Crash Disaster at Greater Cincinnati Airport*, 295 F. Supp. 51 (J.P.M.L. 1968); *In re Air Crash Disaster at Greater Cincinnati Airport*, 298 F. Supp. 353, 355, 358 (J.P.M.L. 1968-69); *Hanover, N.H., Air Disaster*, ___ F. Supp. ___ (J.P.M.L. 1968) (not yet reported).

⁴ This article is not written as an impartial overview of the work of the Panel; rather it is a constructive criticism of the operation of § 1407; nor are the arguments advanced intended as a criticism of any court or individual judge who is discharging the

The Panel, of course, is charged with the responsibility of providing for the conduct of consolidated nationwide discovery and pre-trials in federal multidistrict litigation.⁵ The consolidation procedure was made necessary by a flood of antitrust suits involving corporate and governmental parties. The electrical antitrust cases,⁶ involving a deluge of 1,933 treble damage suits, provided the impetus and the generally accepted need⁷ for legislation such as section 1407.⁸ However, the crisis in the antitrust area does not automatically create a necessity, desirability, or even an advisability of treating the significantly smaller number of injury and death claims arising from an air crash in the same manner as the overwhelmingly larger volume of litigation arising out of large scale cor-

serious and important work of the Panel. Likewise, the article is not intended as an analysis of the merits of § 1407 from the standpoint of the interest of defendants, air carriers, aircraft or component manufacturers, or the Federal Government. For an overview of the functions and work of the Panel, see Peterson & McDermott, *Multidistrict Litigation: New Forms of Judicial Administration*, 56 A.B.A.J. 737 (1970); Comment, *A Survey of Federal Multidistrict Litigation*, 15 VILL. L. REV. 916 (1970); Comment, *The Search for the Most Convenient Federal Forum: Three Solutions to the Problems of Multidistrict Litigation*, 64 NW. L. REV. 188 (1969).

⁵ Section 1407(b) provides for transfer, under the direction of the Panel, to a single circuit or district judge who will take exclusive charge of the litigation for pre-trial purposes. Upon completion of that task, § 1407(a) provides for remand, but since the transfer powers of § 1407 are cumulative of those under 28 U.S.C. § 1404 (Supp. V, 1968), nothing would prevent a trial on the merits in the transferee court. *In re Mid-Air Collision Near Hendersonville, N.C.*, 297 F. Supp. 1039 (J.P.M.L. 1969) (dictum); *Cf. In re Plumbing Fixture Cases*, 298 F. Supp. 484 (J.P.M.L. 1968).

⁶ In 1960 indictments were returned in Philadelphia against many manufacturers of heavy duty electrical equipment used by public and private power companies. In that litigation 1,933 suits, involving 25,623 treble damage claims, were filed in 34 federal districts. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 151 (1964). See also, Comment VILL. L. REV. 916, 918-19 nn.23-6 (1970); Comment, *Consolidation of Pre-trial Proceedings Under Proposed Section 1407 of the Judicial Code: Unanswered Questions of Transfer and Review*, 33 U. CHI. L. REV. 558 (1965).

⁷ Counsel for various interests in the *Electrical Equipment Antitrust Cases* were divided as to the desirability of the enactment of § 1407. Some defendants recognized it as a necessity in their field. See, e.g., *Hearings on S. 3815 Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary of the United States Senate*, 89th Cong., 2d Sess. 48 (1966) (statement of Ronald W. Olson): "Key operating and management personnel of many defendants faced the prospect of spending their remaining years in depositions and trials." [Hereinafter cited as *Hearings*].

The American Bar Association opposed the enactment of § 1407. Through its representative, Mr. William Simon, it testified that the combination of a great many cases can "achieve delay just as much as expedition." *Hearings* at 125. In a heated portion of the debate, Senator Joseph P. Tydings Subcommittee Chairman chided Simon:

Well, as I gather, basically the American Bar Association has taken the position that if they have a hundred or 200 cases, and each one with the same set of facts, the same pre-trial for each different district, that if they want to take up the taxpayer's dollar and the court's time, and make it a hundred times as long and more difficult for the judiciary of the United States, that is fine, because the interests of the attorneys and the litigants it is the most important. Is that what you are saying?

Mr. SIMON. I think that is a very unfair characterization of our position, Mr. Chairman.

⁸ 21 U.S. Cong. & Adm. News 1898 (1968); Neal, *Multidistrict Coordination—The Antecedents of § 1407*, 14 ANTITRUST BULL. 99 (1969).

porate business activity. These air crash victims require more expeditious, less complicated, less expensive and less impersonal handling of their claims than is provided by the machinery of the multidistrict format.⁹ In particular, becoming involved in the proceedings is likely to involve one or more of the following disadvantages from the standpoint of an individual claimant in an air disaster case: (1) delay; (2) additional expense, unless the litigant is willing to be relegated to a passive role; (3) involvement in issues that do not necessarily affect every litigant; (4) the creation of a pre-trial record, admissible at a trial on the merits, containing evidence at variance with the litigants' theory of the case; (5) the claimants, who may otherwise voluntarily exchange discovery information, may be left without much practical chance to obtain more liberal discovery rulings if the transferee court, as the only court supervising discovery, fails to permit liberal discovery; (6) the likelihood that the transferee court will try one or more of the cases on the merits before the transferor court reaches the matter on remand after completion of the pre-trial proceedings; (7) the inconvenience associated with the Panel's present policy in aircraft cases to treat the place of the crash as controlling in the selection of the transferee court; and (8) additional expense and inconvenience when the authority to approve settlements involving the estates or interests of minors is retained by the transferee court or is affected by the law of the transferee forum. These disadvantages are the subjects for the present discussion.

1. Delay

An initial period of delay in every case that comes before the Panel is inevitable. The Panel takes jurisdiction only after there is pending litigation in different federal districts.¹⁰ Section 1404(c) provides for notice and hearing before the Panel upon the question of whether transfer will be ordered. Sometime after the hearing the Panel announces its decision, usually in a written opinion.

⁹ See Seeley, *Procedures for Coordinated Multidistrict Litigation: A Nineteenth Century Mind Views With Alarm*, 14 ANTITRUST BULL. 91, 96 (1969): "I do not believe that the consolidation of multi-district litigation is defensible merely on the ground that it is efficient. The question should be: 'Is there such a need for efficiency in a particular group of related cases as to justify the impersonalization which so far seems to have characterized super litigation?'"

¹⁰ 28 U.S.C. § 1407(a) (Supp. V, 1968) provides in part: "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pre-trial proceedings."

Of course it is not necessary to make transfer await the time when every claim has ultimately been reduced to suit. Rule 12 of the *Rules of Procedure of the Judicial Panel on Multidistrict Litigation*, 50 F.R.D. 203; 28 U.S.C. § 1407 (Supp. V, 1968), provide authority for the Clerk of the Panel to enter a conditional order transferring any subsequently filed "tag-along case" as soon as is practical, upon learning of its existence. In the event of an objection to this treatment, review by the Panel is provided by Rule 12 (b) *supra*.

It should be noted here that the first aviation cases before the Panel involved crashes occurring prior to the enactment of section 1407. These early cases involved more delay between the time of the crash and the decision of the Panel to consolidate,¹¹ than have cases occurring since section 1407 became effective.¹²

After the Panel assumes jurisdiction and transfers the pending cases to a common transferee court, delay is caused by the freezing of all discovery until the transferee court has held the "First Principal Pre-trial (Preliminary) Conference"¹³ and has determined an initial schedule of discovery. The practice is to actually stay discovery at this stage of the litigation.¹⁴ It is only after establishment of a timetable for pleadings and nondiscovery motions¹⁵ that the transferee court finally considers "first wave discovery."¹⁶ "First wave discovery" is discovery, not on the merits, but directed only to ascertaining the names and addresses of witnesses, the identity and possible production of documents and other tangible evidence, and background information concerning the transactions that base the claims for relief.¹⁷ The next permissible discovery is limited to "emergency" matters, as in the case of an aged or infirm witness, and to such affirmative defenses as the applicability of a statute of limitations or the existence of facts establishing a defense of *res judicata* that would narrow or terminate the litigation¹⁸ upon such a threshold issue.

Conventional discovery on the merits is contemplated only after the "Second Principal Pre-trial Conference,"¹⁹ but then only after conclusion

¹¹ Two and one half years (April 22, 1966, to October 21, 1968) elapsed between the crash and the Panel's decision to consolidate in the Ardmore, Oklahoma, American Flyers Airline crash. *In re Air Crash Disaster at Ardmore* (Gene Autry), Okla., 295 F. Supp. 45 (J.P.M.L. 1968). Almost three years (November 8, 1965, to October 21, 1968) delay occurred in the American Airlines-Cincinnati crash. *In re Air Crash Disaster at the Great Cincinnati Airport*, 295 F. Supp. 51 (J.P.M.L. 1968).

¹² See, e.g., cases from the Allegheny Airlines mid-air collision of September 9, 1969, near Indianapolis, Ind., which were consolidated by the Panel about six months (February 10, 1970) after the crash. *In re Mid-Air Collision Near Fairland, Ind.*, 309 F. Supp. 621 (J.P.M.L. 1970). However, not all of the post § 1407 aircraft crashes have received such prompt action from the Panel. *In re San Juan, P.R. Air Crash Disaster*, 316 F. Supp. 981 (J.P.M.L. 1970) involves a March 5, 1969, crash in which the Panel did not take jurisdiction until August 6, 1970.

¹³ MANUAL ON COMPLEX & MULTIDISTRICT LITIGATION § 1.0 (1970) [hereinafter cited as MANUAL].

¹⁴ MANUAL § 1.1: "A crucial step in the first phase of judicial management of complex cases is the prompt entry of an order staying all pre-trial proceedings until an initial schedule of discovery is approved."

¹⁵ MANUAL § 1.3.

¹⁶ *Id.* § 1.5.

¹⁷ The latter provision seems slanted toward business or antitrust litigation and seems to alleviate no particular problem of aviation litigation.

¹⁸ MANUAL § 1.7.

¹⁹ *Id.* § 2.0.

of the "first wave" of discovery.²⁰ The Manual wisely encourages the transferee court to establish time limits to govern completion of discovery upon the merits;²¹ yet no timetable imposed by the court, or established by a committee of counsel,²² is equal to what can be accomplished under a conventional application of the Federal Rules of Civil Procedure, unencumbered by the complications of additional parties or possible additional issues added with cases from other districts.²³ Moreover, no matter what timetable is adopted for discovery, work generated by the very nature of the multiparty proceedings fills the available time.²⁴ The statutory scheme remanding to the transferor court for trial on the merits, contemplated by section 1407(a), provides additional opportunity for delay. The transferor court must familiarize itself with the litigation; the knowledge acquired by the transferee court may therefore be wasted. "Are we marching up the Hill only to march down again? Are we engaged in . . . Sisyphean labors?"²⁵

²⁰ MANUAL § 2.3: "The discovery permitted in the first wave should ordinarily be concluded prior to the deadline for filing the remaining requests for discovery on the merits (second wave of discovery)."

²¹ MANUAL § 2.4.

²² Conferences and agreements among counsel may themselves be frustrating. As observed in Seely, *supra* note 9 at 92: "I have traveled, at considerable expense to my client, to hearings where I found myself one of a courtroom full of lawyers, for the most part 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."

²³ The logistical problems inherently involved in formulating and then coordinating the claimants' discovery strategy are significant. Provision for voluntary selection of "liaison counsel" by the parties, with encouragement from the Court, is covered in the MANUAL § 1.9. This section cautions against "appointing liaison counsel over objection of one or more parties." Provision is also made for appointment of more than one liaison counsel when there are conflicting interests or theories. Section 1.9 also provides: "The court should not compel a party to authorize counsel other than his own to make admissions by stipulations in matters of substance."

Use of the term "liaison" rather than "lead" counsel naturally implies less authority, and is desirable in view of the actual and potential conflicts in theory or interest of the parties on the same side of the docket. However, the carefully formulated rules that protect all of the parties from being saddled, against their will, with either an unwanted "lead" or "liaison" counsel still cannot eliminate the necessity of counsel spending additional time in thrashing out the differences which exist among them and spending the time and effort to consolidate, coordinate and reconcile the positions of their clients.

Obviously some lawyers are less energetic, less efficient or more prone toward procrastination than others. These lawyers are not likely to serve as liaison counsel, but this does not mean that the pace of the litigation will not be slowed by them. It would be unwise to force a common discovery schedule to suit only the most diligent, eager or available attorney. Unfortunately, the pace of the litigation tends to sink to a lower common denominator.

²⁴ "Work expands so as to fill the time available for its completion," PARKINSON, PARKINSON'S LAW 2 (1957). The homily, "To many cooks spoil the broth" also has arguable applicability.

²⁵ Pollack, *Pre-trial Conferences*, 50 F.R.D. 427 (1970) (United States District Judge, Southern District of New York). This situation increases the likelihood that the transferee court will try a case first, if any are transferred to it under 28 U.S.C. § 1404 (Supp. V, 1968), and seems to increase the likelihood that a § 1404 transfer would be made. "As in multidistrict air disaster litigation, transfer under § 1404(a) is often desirable but the transfer of these actions for pre-trial proceedings under § 1407 does not

Experience in multidistrict aviation litigation has demonstrated that in the opinion of either the parties or the courts, multidistrict discovery has taken too long. In the Cincinnati-Trans World Airlines, Inc. crash of November 20, 1967,²⁶ the transferee court proposed a schedule completing all pre-trial proceedings in less than one year, but was met with opposition from counsel for both the plaintiffs and defendants, who wanted more time.²⁷ The transferee court in the Cincinnati-Trans World Airlines litigation reported to the Panel "a continual effort on the part of these multiple defendants to exhaust by discovery every conceivable defense."²⁸ Further, the October, 1970, report of the Panel to the Chief Justice and members of the Judicial Conference of the United States²⁹ reflects opinions from the transferee judges of "unlimited time-consuming, expensive and often unnecessary discovery, especially in air disaster litigation."³⁰ In contrast to this judicial criticism, an attorney for the claimants in the Fairland mid-air collision of September, 1969,³¹ has reported³² that a plaintiffs' proposal of a six-month discovery schedule was rejected by the court. Although the Panel assumed jurisdiction in the Fairland case in early February of 1970, after a year no liability depositions have been allowed.

Regardless of where the "blame" may ultimately lie, in any given case, the multidistrict format, administered with reference to a Manual designed to solve problems in administering larger and more complex anti-trust cases, provides a unique catalyst for delay when applied in aviation litigation. A comparison of the actual track record on a non-Panel case and several Panel cases³³ indicates the obvious as well as practical reasons for the preference of the claimants to avoid participation in Panel cases.

The crash in the non-Panel case occurred in November of 1965 at

preclude their later consideration by the appropriate [transferor] court of transfer under § 1404(a)." *In re Silver Bridge Disaster*, 311 F. Supp. 1345 (J.P.M.L. 1970). Sections 1404(a), 1406 and 1407 are cumulative rather than mutually exclusive. *In re Koratron*, 302 F. Supp. 239 (J.P.M.L. 1969); Comment, *A Survey of Federal Multidistrict Litigation*, 15 VILL. L. REV. 916, 927 (1970).

²⁶ *In re Air Crash Disaster at the Greater Cincinnati Airport*, 298 F. Supp. 353, 355, 358 (J.P.M.L. 1969).

²⁷ Interview with Mr. John G. McDermott, Executive Attorney for the Judicial Panel on Multidistrict Litigation, Feb. 1971.

²⁸ *Report of the Panel to the Judicial Conference* in AGENDA E, JUDICIAL PANEL ON MULTIDISTRICT LITIGATION 6 (Oct. 1970).

²⁹ *Id.*

³⁰ *Id.*

³¹ *In re Mid-Air Collision Near Fairland, Ind.*, 309 F. Supp. 621 (J.P.M.L. 1970).

³² In a long distance telephone interview in January, 1971.

³³ Compare *American Airlines, Inc. v. United States*, 418 F.2d 180 (5th Cir. 1969) with *In re Air Disaster at the Greater Cincinnati Airport*, 298 F. Supp. 353, 355, 358 (J.P.M.L. 1968); *In re Mid-Air Collision near Hendersonville, North Carolina*, 297 F. Supp. 1039 (J.P.M.L. 1969); and *In re Air Crash Disaster at Ardmore (Gene Autry)*, Oklahoma, 295 F. Supp. 45 (J.P.M.L. 1968).

the Greater Cincinnati Airport,³⁴ and suit was filed in the Northern District of Texas³⁵ in September of 1966.³⁶ The fatal flight had been an American Airlines flight from New York to Cincinnati. Discovery naturally centered in these cities with additional depositions of National Transportation Safety Board and United States Weather Bureau witnesses, taken in Washington, D.C. Through voluntary cooperation of counsel, and without a formal court order, discovery applicable to pending New York state court suits was conducted jointly with the Texas case. The case was tried because of favorable docket conditions before the New York cases in the Northern District of Texas, resulting in a plaintiff's verdict returned in December of 1967, slightly more than one year after the suit was filed.³⁷ In addition, the appellate decision affirming the plaintiff's judgement against American Airlines formed the basis for a summary judgement in the New York state court cases under the doctrine of collateral estoppel.³⁸ No other cases arising from that crash have, or apparently will, ever be tried.³⁹

In rather sharp contrast with the satisfactory experience in the non-Panel case,⁴⁰ no aviation case that has come under the jurisdiction of the

³⁴ The same airport involved in the TWA crash of November 20, 1967, which is the subject of the Panel case mentioned in footnote 33 *supra*.

³⁵ Then the residence of the widow.

³⁶ Creasey v. American Airlines, Civil No. 3-1680 (N.D. Tex., filed Sept., 1966).

³⁷ The defendant, American Airlines, Inc., appealed, but even allowing for the unusually heavy docket of the United States Court of Appeals for the Fifth Circuit, the case was finally disposed of by affirmance of the plaintiff's judgment against American Airlines on September 25, 1969, three years after suit was filed. The excellent record of the Fifth Circuit in dealing with the deluge of cases facing it, in reducing the time from district court judgment to disposition at the appellate level to a 1969 average of 10.5 months, and in making an effort to reduce delay through use of a summary calendar is discussed in Bell, *Toward A More Efficient Federal Appeals System*, 54 JUDICATURE 237 (1971).

³⁸ Hart v. American Airlines, Inc., 304 N.Y.S.2d 810 (N.Y. Sup. Ct. 1969). A previous New York holding, arising out of the same litigation, refused to bestow the benefits of offensive collateral estoppel upon non-New York domiciliary plaintiffs. Hart v. American Airlines, Inc., 10 Av. Cas. 17, 894 (N.Y. Sup. Ct. 1968), *aff'd per curiam*, 297 N.Y.S.2d 587 (N.Y. Sup. Ct. 1969), *noted in* 68 COLUM. L. REV. 1590 (1968); 35 J. AIR L. & COM. 289 (1969).

³⁹ The Panel took jurisdiction over Cincinnati crash in November 8, 1965, *In re Air Crash Disaster at the Greater Cincinnati Airport*, 295 F. Supp. 51 (J.P.M.L. 1968); assigning it to the same transferee court handling the Cincinnati crash of November 20, 1967. However, according to a telephone interview between the writer and the Executive Attorney for the Panel in February, 1971, all of the cases arising out of the November 8, 1965, crash have finally been settled or dismissed by agreement.

⁴⁰ This contrast was one of the subjects of a panel discussion presented before the meeting of the Aviation Committee of the American Bar Association, Section of Insurance, Negligence and Compensation Law in St. Louis on August 12, 1970. The Panel discussion, *Is there Adequate Judicial Machinery for Handling Aviation Litigation?* is reported in 1970 *Proceedings Section, Insurance, Negligence and Compensation Law*, A.B.A.J. 466. One of the panelists was The Honorable Sarah T. Hughes, United States District Judge for the Northern District of Texas, who tried the non-Panel Cincinnati airport case. Judge Hughes, speaking of the complications connected with the involvement in consolidated multidistrict proceedings, concluded that the exist-

Panel has ever been tried, or remanded ready to be tried.⁴¹ The Piedmont-Hendersonville, North Carolina Litigation, for example, has now been under the jurisdiction of the Panel since January, 1969.⁴² In addition, one claim from the Ardmore (Gene Autry), Oklahoma American Flyers Airline case was originated and filed in the Northern District of Texas on April 19, 1968.⁴³ Instead of receiving the same prompt one-year-from-filing-to-verdict treatment, that case, along with its companions under the jurisdiction of the Panel, was still under the stay order enjoining all depositions on the merits on the first anniversary of its filing.⁴⁴ At that time it had been three years since the crash. The surviving plaintiff-widow finally remarried and, without any liability depositions on the merits ever having been taken, the case became the last case arising from that air disaster to settle.⁴⁵ While this settlement was arguably a victory for judicial efficiency, it was not a triumph for the individual rights of the widow and children. The dismal prospect of the unfinished discovery that had been delayed during the period the Ardmore case was under the jurisdiction of the Panel bore heavily upon the widow's resolve and ultimate decision to settle.⁴⁶ Her bargaining position never improved to the point of having the settlement leverage of an imminent trial setting. It is submitted this widow was short-changed in the measure of her individual legal rights in the name of overall judicial efficiency. While the chief virtue of consolidated procedures is efficiency, this is not necessarily the highest goal of the law.⁴⁷

2. *Additional Expense*

Trips by counsel to cities in other judicial districts for hearings before

ing judicial machinery under § 1407 is "more than adequate—in fact it is too adequate." Judge Hughes also observed: "The statute on multidistrict litigation [28 U.S.C. § 1407 (Supp V, 1968)], in my opinion, has not proved a success. The best way to get rid of litigation is to have a judge who will try the case. The transfer of multidistrict litigation to one court is in my opinion, a method of delaying the case."

⁴¹ February, 1971.

⁴² *In re Mid-Air Collision Near Hendersonville, North Carolina*, 297 F. Supp. 1039 (J.P.M.L. 1969).

⁴³ *Gray v. American Flyers Airline Corp.*, Civil Action No. CA-3-2549, (N.D. Tex., filed April 19, 1968).

⁴⁴ The "first wave" of discovery was still in process. It was still being carried on when a settlement agreement was reached on August 20, 1969. Therefore, not even the first wave was ever completed.

⁴⁵ One other case, *Wills v. American Flyers Airline Corp.*, Civil No. 68-02 (filed 1968, S.D.N.Y.) was settled but remained on the docket because of disagreement between the claimants as to their proportionate share of the settlement proceeds. On November 25, 1970, the Panel issued an order to show cause why it should not be remanded back to the Southern District of New York, presumably to resolve that issue.

⁴⁶ The writer served as counsel in both the Panel and the non-panel cases filed in the Northern District of Texas previously discussed.

⁴⁷ Seeley *supra* note 9 at 92: "The chief virtue claimed for consolidated multidistrict procedures is their efficiency in disposing of a great volume of litigation however, is not necessarily the highest goal of the law."

a transferee court are an obvious expense. It is not satisfactory that some depositions might be taken in the transferee court in any event, or that counsel not attending may make use of them.⁴⁸ Unless a party is willing to be relegated to a passive role, full participation in conferences of counsel and proceedings before the transferee court are an added necessity. Travel time of counsel to and from the transferee court is not particularly productive and the useful time for work is therefore shortened.⁴⁹ Moreover, additional expenses result from the preparation of duplicate copies of exhibits and pleadings that usually should be furnished to all allied as well as opposing counsel. The "efficient" conduct mentioned in section 1407(a) is more easily understood from the standpoint of the judiciary, or the defense, than from the standpoint of the claimants.⁵⁰ Nevertheless, the Panel has repeatedly justified transfer at increased cost to individual parties by giving overriding consideration to collective expense.⁵¹ The traditional weight given to the plaintiff's choice of forum under the doctrine of *forum non conveniens*⁵² gives way to collective considerations under section 1407.

3. Added Issues

Not every claimant's case is based upon the same theory. Typical choices in theories, resulting in variation in the joinder of parties as defendants, stem from legitimate differences in strategy or opinion concerning the question whether the air carrier should be the sole defendant⁵³ or

⁴⁸ The MANUAL § 2.31, recommends the entry of a pretrial order allowing for delayed examination by parties who cannot afford to attend all depositions or initially but erroneously believe that the depositions will not affect their interests. The Panel has cited this provision in overruling the argument of a party that he could not afford to be involved in proceedings before the Panel. *In re San Juan, P.R. Air Crash Disaster*, 316 F. Supp. 981 (J.P.M.L. 1970).

⁴⁹ Address of Mr. George E. Farrel, Practicing Law Institute, *Aircraft Litigation Seminar*, New York, N.Y., January 15, 1971; (to be included in the PLI AVIATION COURSE HANDBOOK, 3d ed. [to be published]).

⁵⁰ The Panel, in addition to its "worm's eye view" pronouncement, *In re Library Editions of Children's Books*, 297 F. Supp. 385 (J.P.M.L. 1968), has upon four other occasions held that increased cost to an individual party is outweighed by total efficiency viewed from the standpoint of the judiciary. *In re Concrete Pipe*, 303 F. Supp. 507 (J.P.M.L. 1969); *In re Plumbing Fixtures*, 302 F. Supp. 795 (J.P.M.L. 1969); *In re Koratron*, 302 F. Supp. 1402 (J.P.M.L. 1969); *In re Antibiotic Drugs*, 295 F. Supp. 1402 (J.P.M.L. 1968).

⁵¹ See, e.g. *In re Concrete Pipe*, 303 F. Supp. 507, 509 (J.P.M.L. 1969); *In re Plumbing Fixtures*, 302 F. Supp. 507, 509 (J.P.M.L. 1969); *In re Koratron*, 302 F. Supp. 239, 243 (J.P.M.L. 1969); *In re Plumbing Fixtures*, 302 F. Supp. 795, 796 (J.P.M.L. 1969); *In re Antibiotic Drugs*, 295 F. Supp. 1402, 1404 (J.P.M.L. 1968). See also *In re Library Editions of Children's Books*, 297 F. Supp. 385, 386 (J.P.M.L. 1968) ("Of course, it is to the interest of each plaintiff to have all of the proceedings in his suit handled in his district. But the Panel must weigh the interest of all the plaintiffs and all the defendants, and must consider multiple litigation as a whole in light of the purposes of the law.") (emphasis provided by the court).

⁵² See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

⁵³ Hill, *Trial Procedure: A Composition Analyzing Some of the Elements*, 36 J. AIR L. & COM. 497, 501 (1970).

whether a case exists against the Government or the aircraft manufacturer.⁵⁴ Discovery in the transferee forum necessarily results in an amalgamation equal to the total of the largest number of the theories of recovery. In addition, those defendants initially named in only a few cases may be exposed to claims that otherwise might not have been brought. The fact that a certain defendant has not been sued by all the plaintiffs, or that the defendant is not subject to ordinary jurisdiction or venue in the transferee court, does not exempt him from the reach of the Panel.⁵⁵

Remand to the transferor court is not likely until all of the varied theories have been explored.⁵⁶ The net result is that trial of the case based upon the simplest theory, or with the least number of defendants, or with the least number of witnesses, will likely be required to wait until full development of the most complicated case with the greatest number of parties or witnesses. Nevertheless, the opposing position is upheld by the Panel: "Neither the presence of different defendants in the several actions nor the fact that there are different classes or types of plaintiffs having different damage theories militates against transfer."⁵⁷

4. *The Creation of a Record Containing Conflicting Interests*

The creation of a record by counsel whose client's interests conflict is a problem having practical as well as theoretical aspects. Obviously, the survivors of crew members in an airline crash must take a fundamentally different approach toward theories of recovery than the survivors of passengers. Contributory negligence and workmen's compensation ceilings, for example, are not a problem of the passenger. In *DuPont v. Southern Pacific Co.*⁵⁸ the court noted the conflict between passenger and driver cases and held consolidation of these cases for trial and the appointment of a lead counsel, placing him in the position of representing conflicting interests, was reversible error. The Panel has cast aside this passenger-crew conflict, however, stating that the two

⁵⁴ Galardi, *Selecting the Defendant in Aircraft Accident and Product Liability Cases* in PLI COURSE HANDBOOK, SYMPOSIUM CONCERNING AVIATION LITIGATION 9-20 (1970); L. KRIENDLER, 2 AVIATION ACCIDENT LAW 119-131 (1963); Speiser, *Airline Passenger Death Cases*, 8 AM. JUR. TRIALS, §§ 72-80 (1965).

⁵⁵ *In re Air Crash Disaster at the Greater Cincinnati Airport*, 298 F. Supp. 353 (J.P.M.L. 1968).

⁵⁶ 28 U.S.C. § 1407(a) (Supp. V, 1968) expressly allows for the separation or remand of "any claim, cross-claim, counter-claim, or third party claim . . . before the remainder of the action is remanded." However, neither the reported decisions of the Panel, nor any action of a transferee court in an aircraft case of which the author has knowledge have involved a remand while additional theories of liability were being explored by other plaintiffs.

⁵⁷ Peterson & McDermott, *Multidistrict Litigation: New Forms of Judicial Administration*, 56 A.B.A.J. 737, 742 (1970). See also *In re Air Crash Disaster at Greater Cincinnati Airport*, 295 F. Supp. 51 (J.P.M.L. 1968).

⁵⁸ 366 F.2d 193 (5th Cir. 1966), *rehearing den.* A concurring opinion by Judge Thornberry expressed a contrary position on the conflict of interest question, *Id.* at 198.

types of cases "may indeed present substantially different legal issues but many of the fact questions are common to all cases."⁵⁹ Nevertheless, the creation of a deposition record containing testimony that may be offered as evidence at a trial on the merits is a troublesome problem. When the dominant interest of the plaintiffs is to uncover evidence tending to establish liability upon the part of an airline for the alleged negligence of the crew, a genuine prospect exists that any additional evidence tending to fix either sole or concurrent responsibility with the other defendants will be blurred in its total impact. In all but the most exceptional airline case, counsel takes the risk of failing to discharge his duty to his client if he does not attempt to establish, in examining witnesses, probable cause involving at least concurrent liability of the airline. In addition, counsel for minority plaintiffs may find that proper protection of their clients requires full participation in all depositions rather than use of section 2.31 of the Manual, which provides for delayed examination of witnesses when counsel believes a deposition will not affect his client's interests.⁶⁰ As a result, notwithstanding the ultimate safeguards at the time of trial, an admissible record has been created under conditions that fail to allow for conflicts of interest. The time of trial is then too late to correct the situation.

Finally, although section 1407(a) provides express authority for the separation of "any claim, cross-claim, counter-claim, or third party-claim," from other claims this authority has only been exercised once to date,⁶¹ and the Panel refuses to apply it to resolve the passenger-crew dilemma.⁶²

5. *The Loss of Discovery Opportunities*

In the pre-Panel days it was possible for plaintiffs in different courts to cooperate in discovering evidence. For example, in litigation arising out of the American Airlines-Greater Cincinnati Airport crash⁶³ initial difficulties or delay encountered in the New York state court cases in obtaining deposition testimony reflecting the readout of the flight data recorder by the National Transportation Safety Board were minimized by an order requiring the deposition to be obtained in the Northern District of Texas. Notice was also served that the deposition would be a part of the New York cases.

The practical advantage of such mutual self-help among the plaintiffs

⁵⁹ *In re Air Crash Disaster at the Greater Cincinnati Airport*, 295 F. Supp. 51 (J.P.M.L. 1968).

⁶⁰ MANUAL § 2.31. 28 U.S.C. § 1407 (Supp. V, 1968) expressly provides for remand to the transferor district rather than a trial on the merits in the transferee district.

⁶¹ *In re Antibiotic Drugs*, 309 F. Supp. 155 (J.P.M.L. 1970).

⁶² *In re Air Crash Disaster at the Greater Cincinnati Airport*, 295 F. Supp. 51 (J.P.M.L. 1968).

⁶³ *American Airlines v. United States*, 418 F.2d 180 (5th Cir. 1969).

might be objectionable as "double-teaming" from the viewpoint of a defendant and can even be argued as a reason for eliminating the possibility of conflicting discovery rulings from different courts. Nevertheless, it is an important practical tool. Consolidated discovery, supervised by only one court, has eliminated the chance, through cooperation, for more than one "bite at the apple."⁶⁴

A more important defect in the consolidation procedure is the lack of a method to correct any departure, by the transferee court, from the espoused policy to allow discovery "sufficiently broad to secure all the information useable under the most liberal ruling which may be expected at the trial."⁶⁵ First of all, the general right of appellate review of interlocutory discovery orders is, of course, quite limited.⁶⁶ Second, section 1407 contains no explicit language authorizing the Panel to review discovery rulings. The Panel has not interceded in litigation pending before a transferee court; it remains to be determined if it has the power or inclination to do so. Although the October, 1970, report of the Panel⁶⁷ leaves some room for hope that the Panel may determine that it has such power,⁶⁸ there is reliable authority for a contrary view.⁶⁹

Since consolidation under section 1407 eliminates the practical chance of obtaining more liberal discovery orders in another trial court and correspondingly increases the importance of the rulings in the transferee court, a more effective method for prompt review of doubtful discovery rulings should be provided.⁷⁰ The Panel has the power to select the transferee court in the first instance; it therefore must have the power to review serious discovery disputes. If not, legislative amendment could correct the deficiency.

⁶⁴ This expression has acquired a gloss of judicial dignity through recognition in an appellate opinion upon another subject. *Jackson v. Ewton*, 411 S.W.2d 715, 719 (Tex. 1967).

⁶⁵ MANUAL § 2.32.

⁶⁶ 2A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 657 (Wright ed. 1961). As a general rule, a party is left to whatever remedy may be available under the All Writs Statute, 28 U.S.C., § 1651 (1968). However, in non-Panel litigation an order quashing a subpoena for the deposition of a witness in a district other than the district where the litigation is a final appealable order. *Horizons Titanium Corp. v. Norton Co.*, 290 F.2d 421 (1st Cir. 1961).

⁶⁷ *Report of the Panel to the Judicial Conference*, *supra* note 28.

⁶⁸ *Report of the Panel to the Judicial Conference*, *supra* note 28 at 5: "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."

⁶⁹ Peterson & McDermott, *Multidistrict Litigation: New Forms of Judicial Administration*, 56 A.B.A.J. 737, 745 (1970).

⁷⁰ This suggestion is made by Mr. George E. Farrell in his Jan. 15, 1971, address to the Practicing Law Institute, *supra* note 49: "There is no reason to seek review or mandamus from the Circuit Courts when the Judicial Panel on Multidistrict Litigation, with full cognizance of the Proceedings, is available to advise the transferee judge, or in event of disagreement, to rule as required."

6. *The Possibility the Transferee Court will also Become the Trial Court*

Proponents of legislation to create exclusive federal jurisdiction and compulsory consolidation in all multiple air disaster litigation consider the likelihood the transferee court will become the trial court to be an actual advantage.⁷¹ Despite the failure of such controversial legislation to be enacted, there remains a very real possibility that the same net result may be achieved through trial in the transferee court of cases which might come to it through transfers under section 1404(a). Reported support for this possibility exists within the Panel and the transferee courts.⁷² However, the possibility of trial on the merits in the transferee court has disadvantages for the claimants. For example, claimants are deprived of a settlement leverage otherwise accruing from a case ready for trial on both liability and damages in the home district. Even without section 1407, more than one trial on the merits in any airline disaster case is unlikely; claimants' counsel can, and often do, turn trial preparation into advantageous settlement. The prospect of more than one liability trial may increase the defendants' willingness to settle.

Moreover, a trial in a distant district, even though it may favorably determine liability, may not increase the prospect for an adequate award. In a trial on damages alone a defendant airline, for example, may occupy a position in the eyes of the jury akin to that of a defendant who has admitted liability. If handled properly, this trial posture can be a valuable defense tactic, especially when there is evidence of culpability or aggravating circumstances indicating liability.⁷³ The depersonalizing of litigation, lamented by one critic of multidistrict litigation,⁷⁴ is carried to a painful end when a wrongful death claim is removed from the home district, and either effectively disposed or its settlement value altered, by events over which the claimant has no control, and by lawyers other than his choosing in another forum.⁷⁵

7. *The Inconvenience of Selecting the Place of the Crash as the Transferee District.*

In the domestic crashes under the jurisdiction of the Panel thus far,

⁷¹ See Tydings, *Air Crash Litigation: A Judicial Problem and a Congressional Solution*, 18 AM. U. L. REV. 299 (1969).

⁷² Address of Mr. George E. Farrell before the Practising Law Institute, Jan. 15, 1971.

⁷³ PIERSON, *THE DEFENSE ATTORNEY AND BASIC DEFENSE TACTICS* § 122, at 273 (1956).

⁷⁴ Seeley, *supra* note 9 at 91: "I really regret, however, the fact, as it appears to me, that the burgeoning of consolidated multi-party, multi-district litigation is depersonalizing the profession of advocacy and rendering increasingly difficult effective communication by parties with the courts in which their rights are adjudicated."

⁷⁵ *Id.* at 94: "What is more discouraging, however, is the feeling which must come to [small defendants] that they have no voice in what is going on and that the counsel through which they had hoped to be represented effectively are nearly as helpless as they themselves to stem the onrushing tide of super-efficiency."

the place of the crash has been controlling in the selection of the transferee district.⁷⁶ But the place of the crash is fortuitous.⁷⁷ It may bear no relationship to the residence of the majority of the claimants or to any significant operation of the defendant. The number of witness depositions taken in the district of the crash is not sufficient to warrant the weight it has received in the Panel's aviation decisions. Since the Federal Rules of Civil Procedure⁷⁸ provide for taking depositions outside the district where the litigation is pending, the additional expense caused by consolidation in the transferee court is probably unnecessary. For example, it may often be more economical to pay the travel expenses of willing witnesses than for an entourage of attorneys to travel to their residence. Inconvenience for counsel may not be relevant in the eyes of the Panel, but "[i]t will dictate whether the lawyers can work five days a week or three days a week . . . [and] have a profound bearing upon the length of time it takes to complete the pre-trial procedures."⁷⁹

8. *The Expense and Inconvenience of Settlements in the Transferee Forum*

Seemingly needless trouble and expense are involved when settlements, involving decedents' estates as parties or the interests of minors, are handled in the transferee forum. As a general rule, neither the representative of an estate nor a guardian of a minor may maintain an action for wrongful death in a state other than the state of his appointment unless ancillary proceedings are maintained in the forum state.⁸⁰ Settlement proceeds paid into a federal court⁸¹ may not be paid by the clerk to a foreign guardian or administrator without the foreign representative first obtaining ancillary letters.⁸² Compliances with local settlement requirements of the transferee district has been described as a "nightmare,"⁸³ and will at least result in a double set of bond, guardian and attorneys' fees, as well as court costs, if the funds are removed to the transferor forum. Aside from the desire of the Panel to be sure that announced settlements are bona fide and are not just a device to escape the conse-

⁷⁶ See *In re Mid-Air Collision Near Fairland, Indiana*, 309 F. Supp. 621 (J.P.M.L. 1970) ("We have consistently held that the district encompassing the situs of the crash is generally the most appropriate transferee district for litigation of this type.").

⁷⁷ *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

⁷⁸ FED. R. CIV. P. 45(d).

⁷⁹ Address by Mr. George E. Farrell, Practicing Law Institute, Jan. 15, 1971. Mr. Farrell listed other time-consuming inconveniences to be: "difficulties in transportation, inadequate quarters, reporters insufficient in number and technical background, [and] less-than-desirable copying facilities."

⁸⁰ Annot., 52 A.L.R.2d 1048 (1957); Annot., 94 A.L.R.2d 162 (1954).

⁸¹ U.S.C. § 2041 (Supp. V, 1968).

⁸² *Ex parte Huffman*, 167 F. 422 (C.C.W.D. Tex. 1909).

⁸³ Address of Mr. George E. Farrell, *supra* note 72.

quence of transfer, there seems to be no practical reason to force final consummation of payment and distribution of settlement proceeds in the transferee court. Although the practice of consummating settlement in the transferee court is now being employed in at least one pending case, it was not followed in another.⁸⁴ In the latter case announcement by the parties of a settlement agreement resulted in remand to the transferor court for final consummation of the settlement. Under this sensible procedure, if it should later appear that the case has not really been settled, the Panel has ample authority to retransfer the case as well as to apply suitable sanctions if the announced settlement agreement was a device to avoid consolidated proceedings under section 1407.

CONCLUSION

The emergency conditions brought by the flood of antitrust litigation threatened "the collapse of our system of justice under the sheer weight of an unprecedented number of cases."⁸⁵ One could hardly quarrel with the wisdom and need for consolidation and coordination under those emergency conditions. The enactment of section 1407 is the result of a truly commendable effort, evidencing careful thought, hard work, keen perception and a high degree of selfless cooperation on the part of the federal judiciary and participating parties.⁸⁶ Nevertheless, the emergency conditions that necessitated the subordination of the traditional procedural rights of individual litigants to considerations of overall judicial economy do not presently exist in the field of aviation litigation. No aviation accident has produced a flood of litigation approaching the enormous size and complexity of the electrical antitrust cases. Aviation accident litigation is tort litigation, involving highly personal rather than commercial affairs of great corporations and governmental bodies. The wrongful death claims, such as those asserted in behalf of a widow, will probably be the most important encounter claimants will have with the administration of justice. The expense, but even more important, the delay, resulting from the treatment of these cases in the same manner as an extraordinary flood of antitrust litigation does not seem defensible when it results from the administration of a statute that has its genesis and justification in the need for economy and efficiency.

⁸⁴ Compare *In re Mid-Air Collision Near Hendersonville, North Carolina*, 297 F. Supp. 1039 (J.P.M.L. 1969) with *In re Air Crash Disaster at Ardmore Oklahoma*, 295 F. Supp. 45 (J.P.M.L. 1968).

⁸⁵ Remarks of The Hon. William H. Becker, Chief Judge, Western District of Missouri, 56 A.B.A.J. 738 (1970).

⁸⁶ Address of Mr. Chief Justice Earl Warren, MANUAL, v: "If it had not been for the monumental effort of the nine judges on this committee of the Judicial Conference and the remarkable co-operation of the thirty-five district judges before whom these cases were pending, the district court calendars throughout the country could well have broken down."

The Panel has recognized that consolidated proceedings are not necessarily justified merely because the requirement of litigation in different districts, involving common questions of fact, is met.⁸⁷ Since the consolidation format has yet to produce an aviation case ready for trial, it would appear that the intended benefits of forced consolidation have not been fully recognized in aviation tort litigation. On the contrary, positive harm from delay interferes with the interests of the claimants. Aviation tort litigation involves unique technical evidence and requires a special degree of sophistication; but we should recognize that it is still basic tort litigation and that "[t]here is nothing 'really extraordinary' . . ."⁸⁸ about the fact that aviation accident litigation involves an effort upon the part of claimants to seek a forum convenient to them.

It is respectively submitted that another look should be given to the necessity and even the desirability of utilizing the machinery of the Panel in aviation tort cases.⁸⁹ In those instances when the necessities of efficiency truly outweigh the individual concerns of the claimants, it would be beneficial if the Panel would consider providing some means of reviewing questionable discovery rulings, provide for a less rigid set of rules for staying discovery, give less weight to the place of the crash in deciding the appropriate transferee court, and encourage remand to the transferor court for settlement. Finally, because aviation tort cases involve a different set of problems than antitrust cases, study should be given to creating a manual for use in aviation cases.

⁸⁷ *In re Scotch Whiskey*, 299 F. Supp. 543 (J.P.M.L. 1969); *In re Photocopy Paper*, 305 F. Supp. 60 (J.P.M.L. 1969).

⁸⁸ *American Flyers Airline Corp. v. Farrell*, 385 F.2d 936 (2d Cir. 1967).

⁸⁹ See Seeley, *supra* note 9 at 97: "I would like to see the procedures for coordinating multidistrict litigation held in reserve for emergencies, much as the National Guard is held in reserve for those occasional crises in the social order which threaten to overwhelm the normal machinery for maintaining that order."