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A MODEST PROPOSAL FOR EXPANDING THE AUTHORITY OF THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

JOHN T. McDERMOTT*

The Judicial Panel on Multidistrict Litigation was established in 1968 for the purpose of transferring related civil actions from many different federal courts to a single district "for coordinated or consolidated pretrial proceedings" pursuant to section 1407 of Title 28.¹ Much has been written in this *Journal*² and elsewhere³ concerning the advantages and disadvantages of transfer under section 1407, but most commentators have come to accept the reality of transfer of related cases and few have seriously urged repeal of section 1407 and the abolishment of the Judicial Panel on Multidistrict Litigation. The critics generally favor a *reduction*, either judicially or statutorily imposed, of the power and discretion of the Panel. This proponent on the other hand favors a substantial increase in the Panel's authority and discretion.

On December 31, 1971, the Panel completed its third year of operation. At that time more than 2,000 civil actions had been in-

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¹ For a general description of the early work of the Panel see Peterson & McDermott, *Multidistrict Litigation: New Forms of Judicial Administration*, 56 A.B.A.J. 737 (1970).

² McElhaney, *A Plea for the Preservation of the "Worm's Eye View" in Multidistrict Aviation Litigation*, 37 J. AIR L. & COM. 49 (1971); McDermott, *A Plea for the Preservation of the Public's Interest in Multidistrict Litigation*, 37 J. AIR L. & COM. 423 (1971).

³ E.g., Harris, *Consolidation and Transfer in the Federal Courts: 28 U.S.C. § 1407 Viewed in Light of Rule 42(a) and 28 U.S.C. § 1404(a)*, 22 HASTINGS L.J. 1289 (1971); 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. U.L. REV. 188 (1969).

cluded in pretrial proceedings under section 1407.⁴ Fifty-seven groups of multidistrict cases have been transferred to thirty-three different district courts⁵ where they are and have been processed by some fifty federal judges. While these 2,000 cases represent a mere fraction of the total number of civil actions filed during the same three year period, section 1407 has affected a very substantial percentage of the types of cases involved in multidistrict litigation. For example, approximately forty-five per cent of the private treble damage antitrust cases filed in federal courts during the past three years have been included in coordinated or consolidated pretrial proceedings under section 1407.⁶ It is this author's opinion that the provisions of section 1407 could and should be made applicable to an even larger number of federal cases.

The Panel's authority is presently limited to the transfer of civil actions pending in different districts involving one or more common questions of fact. In addition the Panel is allowed to transfer only for "coordinated or consolidated pretrial proceedings." The time has come to consider expanding this jurisdiction to include other types of cases, to provide for transfer for trial and to include limited appellate jurisdiction.

I. CRIMINAL CASES

Presently, section 1407 permits the transfer of only "civil cases." Transfer for pretrial proceedings of criminal cases, however, would appear to be appropriate in either of two situations:⁷ (1) when there are related criminal actions pending in other districts involving common defendants, common questions of law, or common questions of facts; or (2) when there are related civil and criminal

⁴Of these, 1307 actions were actually transferred under § 1407 and consolidated with 790 related cases originally filed in the transfer districts.

⁵The following districts have received more than one group of multidistrict litigation: Northern District of California (5), Central District of California (5), District of Columbia (2), Northern District of Illinois (5), Eastern District of Kentucky (2), District of Massachusetts (2), Southern District of New York (7), and Eastern District of Pennsylvania (4).

⁶During the same period, 7.5% of the stockholder suits, 6.1% of the patent infringement actions and 28.5% of the air disaster cases were processed under § 1407.

⁷Possibly the defendant's consent to transfer might be necessary to avoid constitutional problems.

cases pending in different districts that involve common questions of fact and law, particularly cases in the antitrust field.⁸

Although transfer may not always be appropriate in strictly criminal matters, transfer would be desirable in certain circumstances; for example, several persons charged with crimes occurring in different districts but which were allegedly part of a multistate conspiracy. These conspiracy cases might share common questions of fact, (*i.e.* the existence of the conspiracy) and transfer might be appropriate for discovery or other pretrial proceedings relating to those common questions.

If, on the other hand, numerous defendants are charged in different parts of the country with violating the same law to which their only defense is the invalidity or unconstitutionality of that law, then transfer to a single district would also be warranted. These cases would clearly involve common questions of law and transfer to a single district *for trial*, if constitutionally permissible would avoid duplicitous litigation on the same legal question and would preclude inconsistent judgments. Even if these cases could not be consolidated for trial,⁹ they could be transferred for discovery and other pretrial proceedings.

II. NATIONAL LABOR DISPUTES

The second limitation on the authority of the Panel is that cases can only be transferred when they involve "common questions of fact." On at least one occasion the Panel has stretched this limitation and transferred cases when there were no disputed questions of fact but when denial of transfer could have resulted in incon-

⁸ See, *e.g.*, *In re Plumbing Fixtures Antitrust Litigation*, 295 F. Supp. 33 (J.P.M.L. 1968). The *Alsco-Harvard Fraud Litigation*, 325 F. Supp. 1326 (J.P.M.L. 1971) also involves related criminal and civil litigation and much of the discovery in the criminal case was used by the parties in the civil cases.

⁹ The Federal Rules of Criminal Procedure provide that a defendant must be tried in a district where the offense was committed unless on his motion the court transfers the case to another district either "for the convenience of the parties and witnesses, and in the interest of justice" or because "there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial." Fed. R. Crim. P. 18, 21.

Consolidation of criminal cases is now possible only when the defendants could have been joined in a single indictment or information. Fed. R. Crim. P. 13. Defendants who are charged with committing related or similar crimes in different districts could not be charged in the same indictment or information and therefore their cases could not be transferred and consolidated for trial under the existing rules.

sistent decisions that would have had a competitively disastrous effect on some of the parties.¹⁰

Perhaps another appropriate application of an expanded section 1407 would be in the area of litigation arising out of the national labor disputes. The litigation resulting from the recent air traffic controller's "strike" or "sick-out" was clearly multidistrict but contained few, if any, common questions of fact and consequently transfer was denied.¹¹ This litigation produced a great deal of confusion because the United States was able to obtain injunctive relief in some districts but not in others. This type of litigation should be handled on a nationwide basis and the Panel should have the authority to transfer such cases to a single judge so that a uniform ruling can be made on *all* cases.¹²

In this age of growing court congestion and increasing delays in the administration of justice, there can be little justification for requiring many different federal judges to rule on the same question of law when decisions could be made by a single judge and reviewed by one court of appeals. Substantial judicial energy could be conserved by permitting transfer of cases involving common questions of law to a single district where such a transfer would serve the convenience of the parties and the ends of justice.

III. EXPANSION OF PANEL'S DISCRETION TO TRANSFER

At the present time the Judicial Panel on Multidistrict Litigation can only make transfers for "coordinated or consolidated pretrial proceedings." Section 1407 clearly contemplates that all cases not disposed of in the transferee court by settlement or summary judgment will be remanded to the courts of origin for trial or other disposition upon completion of pretrial proceedings. When section 1407 was first enacted it was thought desirable to limit the power of the Panel to transfers for pretrial proceedings primarily because the experience of the Coordinating Committee for Multiple Litigation, the Panel's predecessor, was limited to discovery and other

¹⁰ *In re* Fourth Class Postage Regulations, 298 F. Supp. 1326 (J.P.M.L. 1969).

¹¹ *In re* Professional Air Traffic Controllers Litigation, unpublished order, July 1, 1970.

¹² The Panel should also have the authority to enter temporary injunctions and other similar orders in all cases to preserve its jurisdiction until transfer is ordered or denied.

pretrial proceedings in the Electrical Equipment Antitrust Cases.¹³

Experience with multidistrict litigation—and common sense—has led to the inescapable conclusion that it is both unnecessary and undesirable to remand related cases for multiple trials on common issues. The transferee judges have generally avoided the debilitating impact of this limitation by (1) trying a “local” case and applying collateral estoppel to the other cases; (2) deciding common questions in all cases by partial summary judgment; or (3) ordering section 1404(a) transfers in the cases assigned to them under section 1407.¹⁴ Mr. von Kalinowski argues in this issue that a transferee judge does not have the authority to make further transfers for trial under section 1404(a) or 1406(a).¹⁵ This argument has already been rejected by the United States District Court for the Southern District of New York,¹⁶ and the Court of Appeals for the Second Circuit.¹⁷ Both courts concluded that section 1407 limited the authority of the Panel and notwithstanding section 1407, the transferee judge has the power, as would any other federal district judge, to make transfers under sections 1404(a) and 1406(a). The other transferee judges who have faced this problem have concluded that they also have the power to make such transfers. The important question then is not whether related cases should be transferred to a single court for trial,¹⁸ but rather whether the transfer should be made by the Judicial Panel, by the transferee judge or by the various transferor judges after remand of the cases by the Panel.¹⁹ Of these three, the transferor judges are probably

¹³ See Neal & Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A.J. 621 (1964) for a complete discussion of the “Electrical Equipment Company cases.”

¹⁴ For a further discussion of these techniques see McDermott, *A Plea for the Preservation of the Public's Interest in Multidistrict Litigation*, 37 J. AIR L. & COM. 423, 431-37 (1971).

¹⁵ See the article by Mr. von Kalinowski in this issue.

¹⁶ *In re Antibiotic Antitrust Actions*, 333 F. Supp. 299 (S.D.N.Y. 1971); see also *In re Antibiotic Antitrust Actions*, 333 F. Supp. 309 (S.D.N.Y. 1971).

¹⁷ *Pfizer, Inc. v. Lord*, 447 F.2d 122 (2d Cir. 1971).

¹⁸ Multiple trials of related cases, at least concerning common issues (*i.e.* liability) were exceedingly rare even before the Panel. No one has been heard to advocate multiple trials, but many attorneys apparently feel that the decision about which cases should be tried and in which district, should be left to them. It has even been suggested that the first case ready should be the first case tried, regardless of how well it has been prepared or whether it is truly representative of the remaining cases.

¹⁹ The Panel has held that the transferor judge is without jurisdiction “from

in the worst position to decide whether a large group of related cases should be transferred for trial, and if so, to which district. Their contact with the litigation will have been limited and they will generally be unfamiliar with both the magnitude and the complexities of the litigation.

The transferee judge, on the other hand, unquestionably has the greatest familiarity with the litigation and is in the best position to decide whether a transfer for trial should be made. However, the transferee judge who has been deeply involved in the litigation, perhaps for several years, may lack the necessary objectivity to make the best decision. Thus it would seem that the Panel is in the best position to make the decision. The Panel uniquely combines a broad familiarity with the cases being considered for transfer, a comprehensive understanding of the problems that generally occur in the trial of the cases and a high degree of objectivity. In addition, the decision by the Panel to assign the cases to the transferee judge for trial could not be misconstrued as an attempt by the transferee judge to "reach out" for the litigation.²⁰ Finally, if the decision to transfer cases of national scope and importance to a single district for pretrial proceedings is one that Congress felt should not be made by a single judge, but rather by the specially created Judicial Panel on Multidistrict Litigation, then it would seem obvious that the decision to transfer the same cases for trial would also be one that should be made by the Panel and not by a single judge.

The provision limiting the authority of the Panel to transfer cases for "coordinated or consolidated pretrial proceedings" likewise restricts the Panel in two entirely different ways. First, as mentioned above, it prevents the Panel from making transfers of related cases for trial. Moreover, it also prevents the Panel from making more limited transfers when desirable. While there are situations when related cases should be transferred for all purposes,

the time of entry of the order of transfer until the time of entry of order of remand." *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 496 (J.P.M.L. 1968).

²⁰ On the other hand, the transferee judge might be reluctant to assign the cases to himself for trial if the trial was likely to be long for fear that it would create a substantial burden on the other members of the court. The Panel, however, under similar circumstances, could arrange for the assignment of an "outside judge" to handle the regular work of the transferee judge during the course of an extended trial.

there are also situations where the cases should be transferred only for the resolution of conflicting class action claims and then returned to their original courts for further proceedings. In other circumstances it might be appropriate to transfer related cases for discovery of a central issue and then allow the cases to return to their courts of origin for further discovery, other pre-trial proceedings and trial. At the present time, the Panel cannot exercise its discretion to determine the scope of the proceedings subsequent to transfer; actions must be transferred only for "coordinated or consolidated pretrial proceedings." Thus, it would be desirable to provide the Panel with broader discretion to enable it to order transfer for the appropriate purpose under the circumstances.²¹

IV. PANEL'S SUPERVISION FOLLOWING TRANSFER

Undoubtedly the most controversial area for expansion of the jurisdiction of the Panel relates to the Panel's role in *supervising* proceedings following transfer. Section 1407 is silent concerning the authority of the Panel to *supervise* proceedings following transfer or to review decisions made by transferee judges.²² In the absence of a specific grant of this power, the Panel has properly assumed that it lacks the power to supervise or otherwise control the actions of the transferee judges.²³

²¹ The Panel should have continuing jurisdiction to reconsider the extent of the proceedings being conducted by the transferee judge and to reduce or expand the transferee judge's responsibilities as the exact nature of the litigation becomes better known.

²² The Panel does have the authority to remand the cases "at or before the conclusion of such pretrial proceedings." 28 U.S.C. § 1407(a) (1972). If the Panel is unsatisfied with the progress of a certain group of cases following transfer, it could remand them and then re-transfer them to another district or to another judge. This would be a most drastic procedure, one which would probably only be used if the transferee judge became incapacitated or asked to be relieved of his responsibility for all or some of the cases.

²³ There have been some suggestions that the Panel attempts to control the processing of cases following transfer through more subtle techniques such as transferee judge meetings and the participation of the Panel's staff in the proceedings being conducted by the transferee judge. Levy, *Complex Multidistrict Litigation and the Federal Courts*, 40 *FORDHAM L. REV.* 41, 59-60 (1970). This is a completely unfounded allegation. Transferee judge meetings are run by and for the transferee judges themselves. The Panel is responsible for scheduling and planning these meetings and arranging for the agenda, but members of the Panel seldom appear as principal speakers. These meetings are primarily devoted to discussions among the transferee judges of the problems they have encountered, the solutions they employed and the success they achieved. Panel members sim-

At the present time there is little opportunity for meaningful review of the decision of transferee judges on important questions of law since the Panel has no appellate jurisdiction over transferee judges and because the orders of transferee judges are, by nature, generally not appealable.²⁴ That the orders are unappealable however, does not mean that they are unimportant or insignificant. A decision establishing a large national class may affect the rights of millions of people and require the expenditures of thousands of dollars for publication or mailing of notices to members of the class. A decision denying class action status, on the other hand, might effectively preclude the absent class member from ever recovering for his injuries. Notwithstanding their significance neither order is appealable.²⁵

Discovery may have become the "monster" of multidistrict litigation.²⁶ Even in allegedly "uncomplicated" aviation litigation, discovery programs frequently last up to two years and involve many months of the taking of depositions and the production and review of thousands of documents. The problem is magnified in antitrust litigation when the number of documents produced may run into the millions.²⁷ Moreover, if too permissive the transferee judge's decision will cost the defendant substantial sums of money to copy and produce the documents, and if too restrictive, can prevent a plaintiff from uncovering the evidence necessary to establish

ply do not attempt to tell transferee judges how to manage their cases or how to resolve their problems.

When multidistrict litigation is first assigned to a transferee judge, the services of the Panel's staff are extended as a courtesy. Staff attorneys become involved in proceedings in the transferee court at the invitation of the transferee judges and to the extent that the judge desires. In a sense they serve the transferee judge with the same diligence and loyalty that the judge is served by his individual law clerks. They do not act as a conduit relaying directions from the Panel to the transferee judge.

²⁴ Most pretrial orders are by nature non-final and non-appealable orders under 28 U.S.C. § 1291 (1970) and many are even inappropriate for an interlocutory appeal under 28 U.S.C. § 1292(b) (1970).

²⁵ See *Caceres v. International Air Transp. Ass'n*, 422 F.2d 26 (9th Cir. 1970); *Gosa v. Securities Investment Co.*, 449 F.2d 1330 (5th Cir. 1971).

²⁶ See *Dolgow v. Anderson*, 53 F.R.D. 661 (E.D.N.Y. 1971) and *Jack Winter, Inc. v. Koratron Co.*, 54 F.R.D. 44 (N.D. Cal. 1971) for an insight into some of the typical discovery problems that occur in complex multiparty litigation.

²⁷ For rather typical examples of the extensive document production occurring in complex multiparty litigation and the numerous "privilege" problems that arise see *Pfizer, Inc. v. Lord*, 456 F.2d 545 (8th Cir. 1972) and *Jack Winter, Inc. v. Koratron Co., Inc.*, 54 F.R.D. 44 (N.D. Cal. 1971).

its cause of action. These orders, however, are also not generally appealable.

Even though these orders may be subject to review by writ of mandamus or prohibition²⁸ these methods are truly extraordinary remedies, with a limited scope of review. They simply do not provide a satisfactory method for reviewing critical orders in important national litigation.²⁹ Notwithstanding these inadequacies mandamus petitions are certainly not uncommon in multidistrict litigation. Regardless of the outcome they seriously delay the proceedings of multidistrict litigation and frequently require the transferee judge to stay all proceedings until the court of appeals has ruled on the particular question. In one group of cases there were two mandamus petitions, one of which went all the way to the United States Supreme Court. As a result these proceedings effectively delayed completion of the litigation by six months or more.³⁰

If its authority were expanded the Judicial Panel on Multidistrict Litigation would be able to provide a prompt and expeditious review of non-appealable orders of transferee judges. The Panel is composed of judges who have had substantial experience in multidistrict litigation and who have a basic awareness of the problems involved. Since the Panel has virtually no "backlog" it could probably hear oral argument on appeals from decisions of transferee judges within thirty days or less.³¹ In addition, the review of all pre-trial orders by the Panel regardless of the location of the transferee district would provide a greater degree of consistency and uniformity than does the present procedure. Finally, the present procedure may permit the litigants to "forum shop" for the most favorable court of appeals since the district selected as the transferee court determines the court of appeals to have appellate jurisdiction over the litigation.³² Moreover, since the Panel is responsible

²⁸ Compare *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957) with *Will v. United States*, 389 U.S. 90 (1967).

²⁹ See Note, *Mandamus Proceedings in the Federal Courts of Appeals: A Compromise with Finality*, 52 CAL. L. REV. 1036 (1964).

³⁰ *Illinois v. Harper & Row Publishers Inc.*, 50 F.R.D. 37 (N.D. Ill. 1970), *rev'd sub. nom. Harper & Row Publisher's Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970); affirmed by an equally divided court, 400 U.S. 348 (1971).

³¹ If the Panel is to have limited appellate jurisdiction it might be desirable to increase the size of the Panel, perhaps to eleven (one from each circuit) and to provide that they could sit "in division" of three or more members.

³² This factor may also pose problems for the "out-of-circuit" transferee judge

for determining the appropriate cases for transfer, for selecting the transferee district and for assigning them to a particular judge, it seems reasonable to authorize the Panel to review decisions of those same transferee judges.

V. REVIEW OF PANEL ORDERS

While considering a change in the method for reviewing orders of transferee judges, it might be well to consider changing the method for reviewing orders of the Panel itself. Section 1407 presently provides for review of Panel decision by writ of mandamus directed to the court of appeals for the district to which the transfer was made, or if no transfer was made, to the circuit for the district in which a hearing was held or is scheduled to be held.³³ In the four years that the Panel has been in existence, there has been but a single petition for review by mandamus of an order of the Panel. This is not to say that attorneys have always been pleased with the decisions of the Panel, but the absence of "appeals" probably reflects the realization that review by writ of mandamus by a three judge court of appeals of the decision of the seven judge Judicial Panel on Multidistrict Litigation³⁴ would be futile. The only meaningful supervision that can and should be exercised over the Panel is by the Supreme Court of the United States. Section 1407 should be changed to provide that decisions of the Panel on motions to transfer or if vested with appellate jurisdiction on appeals from orders of the transferee judges would be subject to review by writ of certiorari to the United States Supreme Court.

VI. CONCLUSION

During its short life the Panel has played a very important role in the battle against increasing court congestion and delay. During its first few years the Panel was frequently criticized because little seemed to be happening to the cases that had been transferred under section 1407. But now, only three years later, the Panel can report "that significant inroads are being made in processing

who may not be familiar with the standards generally used by the court of appeals particularly with regard to discovery and class actions.

³³ 28 U.S.C. § 1407(e) (1970).

³⁴ Two of the members of the Panel are also circuit judges.

this type of litigation."³⁵ During the first three years of its operation (July, 1968, through June 30, 1971) over 400 cases were terminated or remanded to the courts of origin.³⁶ In the past six months alone (July 1, 1971, to December 31, 1971) more than 200 more cases were terminated or remanded, reducing the number of pending cases to less than 1,500.³⁷ Settlements totalling more than 150 million dollars have been negotiated in two groups of antitrust cases and most of the aviation cases have been settled. These statistics graphically demonstrate that transfers under section 1407 have promoted the just and efficient conduct of the litigation. The time has come to make a broad examination and analysis of the impact that the Panel has made on the Federal Judicial System with the goal of determining to what extent the powers of the Panel should be expanded to achieve even greater advances in the administration of justice.

³⁵ REPORT OF THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION TO THE JUDICIAL COUNCIL OF THE UNITED STATES, 2 (April 1, 1972).

³⁶ REPORT OF THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION TO THE JUDICIAL CONFERENCE OF THE UNITED STATES (October, 1971).

³⁷ REPORT OF THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION TO THE JUDICIAL CONFERENCE OF THE UNITED STATES (April, 1972).

