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## THE IMPACT OF CONSOLIDATED MULTIDISTRICT PROCEEDINGS ON PLAINTIFFS IN MASS-DISASTER LITIGATION

JOHN W. BEATTY\*

IN THE EARLY 1960's the federal district courts were on the brink of drowning in a sea of treble damage civil anti-trust actions that had been filed throughout the country following criminal convictions of various electrical equipment manufacturers.<sup>1</sup> Congress came to the rescue in 1968 by enacting section 1407 of Title 28 which, in general, provides a mechanism, the Judicial Panel on Multidistrict Litigation, for consolidating similar litigation that is pending in various and diverse district courts for coordinated pretrial proceedings.<sup>2</sup> Since its creation, the Judicial Panel on Multidistrict Litigation has dealt with almost one hundred multidistrict proceedings and has consolidated most of them.<sup>3</sup> Of these proceedings, twenty-two have been "mass-disaster" cases, and all but two of those have arisen out of airplane accidents.<sup>4</sup> The first of the

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<sup>1</sup> See 2 U.S. CONG. & ADM. NEWS 1898 (1968) for a partial legislative history of 28 U.S.C. § 1407 (1970).

<sup>2</sup> 28 U.S.C. § 1407 (1970).

<sup>3</sup> One of the most recent reported opinions of the Multidistrict Panel bears docket No. 93. See *In re Motion Picture 'Standard Accessories' and Antitrust Litigation*, 339 F. Supp. 1278 (J.P.M.L. 1972).

<sup>4</sup> *In re Air Crash Disaster at Cincinnati Airport*, 295 F. Supp. 51 (J.P.M.L. 1968); *In re Air Crash Disaster at Cincinnati Airport*, 298 F. Supp. 353 (J.P.M.L. 1968), 298 F. Supp. 355, 358 (J.P.M.L. 1969); *In re Air Crash Disaster at Ardmore, Oklahoma*, 295 F. Supp. 45 (J.P.M.L. 1968); *In re Mid-Air Collision Near Hendersonville, North Carolina*, 297 F. Supp. 1039 (J.P.M.L. 1969); *In re Air Disaster at Hong Kong*, 298 F. Supp. 390 (J.P.M.L. 1969); *In re Air Crash at Falls City, Nebraska*, 298 F. Supp. 1323 (J.P.M.L. 1969); *In re Mid-Air Collision Near Fairland, Indiana*, 309 F. Supp. 621 (J.P.M.L. 1970); *In re Air Crash Dis-*

air disasters to be considered by the Multidistrict Panel under section 1407 was the crash of a Trans World Airlines jetliner on November 20, 1967, during an attempted landing at the Greater Cincinnati Airport in which seventy-two persons died.<sup>5</sup> Consolidation was ordered in October, 1968.<sup>6</sup> Thus, several of the "multi-districted" air disaster cases have now matured sufficiently to reach some reasonably reliable conclusions with respect to how well this radically new procedure works in actual practice. It is the purpose of this article to discuss, on the basis of the author's personal observations, the practical effect and impact of consolidated multidistrict proceedings in mass-disaster litigation from the plaintiff's viewpoint.

While the prime beneficiary of section 1407 is the federal judiciary, the defendants also benefit. Were it not for the protection the defendants receive from the consolidation of all pretrial proceedings, they would be subject to intolerably burdensome, duplicative and conflicting discovery in every district where any actions were filed. For the plaintiffs, on the other hand, multidistrict consolidation is a mixed blessing. By creating enormous practical and logistical problems that are not commonly encountered in ordinary civil litigation, it is not at all clear that the benefits of consolidation to plaintiffs outweigh or even equal the attendant problems.<sup>7</sup>

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aster at Santa Monica Bay, California, Docket No. 34 (J.P.M.L. 1970); *In re* Air Crash Disaster Near Dayton, Ohio, 310 F. Supp. 798 (J.P.M.L. 1970); *In re* Air Crash Disaster Near Hanover, New Hampshire, 314 F. Supp. 62 (J.P.M.L. 1970); *In re* San Juan, Puerto Rico Air Crash Disaster, 316 F. Supp. 981 (J.P.M.L. 1970); *In re* Air Crash Disaster at San Antonio, Venezuela, 331 F. Supp. 547 (J.P.M.L. 1971); *In re* Air Crash Disaster at New Orleans, Louisiana, 331 F. Supp. 554 (J.P.M.L. 1971); *In re* Air Crash Disaster at Las Vegas, Nevada, 336 F. Supp. 414 (J.P.M.L. 1972); *In re* Air Crash Disaster at Denver, Colorado, Docket No. 88 (J.P.M.L. 1972); *In re* Air Crash Disaster at Bradford, Penn., Docket No. M.D.L.-42A (J.P.M.L.); *In re* Air Crash Disaster at Bradford, Penn., Docket No. M.D.L.-42B (J.P.M.L.); *In re* Air Crash Disaster at Maracaibo, Venezuela, Docket No. M.D.L.-48 (J.P.M.L.); *In re* Air Crash Disaster at Mandeville, La., Docket No. M.D.L.-84 (J.P.M.L.); *In re* Air Crash Disaster at Huntington, W.Va., Docket No. M.D.L.-94 (J.P.M.L.); *In re* Air Crash Disaster at Anchorage, Alaska, Docket No. M.D.L.-95 (J.P.M.L.); *In re* Air Crash Disaster at Tweed-New Haven Airport, Docket No. M.D.L.-96 (J.P.M.L.).

<sup>5</sup> *In re* Air Crash Disaster at Cincinnati Airport, Docket No. 8B, Jud. Pan. Mult. Lit. Opinion and Order dated October 21, 1968, 298 F. Supp. 353 (J.P.M.L. 1968). This author's law firm was selected to act as lead counsel for all plaintiffs in the consolidated multi-district proceedings.

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., McElhaney, *A Plea for the Preservation of the "Worm's Eye View"*

## I. A HYPOTHETICAL CASE HISTORY

To best focus on the problems of multidistrict litigation, a hypothetical is presented that will prove to be a fairly typical case history. In early January, 1970, a scheduled commercial flight leaves Dallas, Texas and crashes in Iowa with a loss of eighty lives. One of the passengers was an average middle-aged gentleman from Dallas whose surviving widow retains a Dallas attorney to represent the estate. In March the attorney files suit against the airline in the state court, planning to proceed expeditiously with the minimum of discovery, perhaps intending to rely heavily on the published results of the National Transportation Safety Board's investigation. The plaintiff's attorney reasons that since the airline, as a common carrier, owed the decedent the highest degree of care, a *res ipsa loquitur* theory might even be used to establish liability. The defendant airline immediately removes the case to the Federal District Court for the Northern District of Texas. Undaunted, plaintiff's counsel serves interrogatories and requests for production on the airline, but instead of responding, the airline files a motion to have the court stay all discovery on the basis that this case will soon be consolidated for coordinated pretrial proceedings with all other similar cases. The motion is granted and plaintiff's attorney is temporarily stymied.

Perhaps a month passes before the plaintiff's attorney receives notice that a hearing is to be held in Washington, D.C. before the Federal Judicial Panel on Multidistrict Litigation to decide whether these cases (many of which have by then been filed in various districts throughout the country) should be consolidated, and if so, in which district. The hearing date is set for June, a month later. Since the decedent's estate is modest the attorney advances the costs and flies to Washington for the hearing. It is not until July that the plaintiff's attorney receives the Panel's order directing that all cases arising out of the crash be transferred to the United States District Court for the Southern District of Iowa.<sup>8</sup>

Following the transfer order the various district courts where actions are pending begin forwarding their entire case files to Iowa,

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*in Multidistrict Litigation*, 37 J. AIR LAW & COM. 49, 51 (1971).

<sup>8</sup> 28 U.S.C. § 1407(a) (1970) 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 pretrial proceedings."

and in August the transferee district court sends notices to all parties that the first general pretrial conference will be held in September. Again, the Dallas attorney advances costs and flies to Iowa for the hearing. He finds that the expertise of participating counsel varies considerably—from those who have never practiced in federal courts to representatives of law firms specializing in aviation litigation. In addition, the magnitude of the interests of the various attorneys differs markedly; some having cases with relatively insignificant judgment value, while others may represent as many as eight, ten or even fifteen decedent's estates and thus have an enormous stake in the proceedings.

At the hearing, which has a pervasive undercurrent of confusion created by the large number of counsel and parties combined with the diversity and inconsistency of their opinions on how the proceedings should be managed, the court eventually establishes a few ground rules and sets time limits for some preliminary matters such as filing of answers, cross-claims, third-party complaints and answers as needed. These matters become complicated by disputes over jurisdiction and venue between some, but not, all of the parties or related to certain specific cases. Time limits are set for filing and briefing various motions. The court also sets some tentative target dates for the opening salvo of the discovery processes including identification of documentary materials to be produced by each of the various defendants.<sup>9</sup> Ultimately, the court, in attempting to adhere to the pattern suggested by the Manual for Complex and Multidistrict Litigation, asks the plaintiffs' counsel as a group to select one or more of their number to act as "liaison" counsel.<sup>10</sup> The Manual suggests this position but unfortunately does not undertake to define specifically the functions, powers or responsibilities of "liaison" counsel. It is at this point that those attorneys having the greatest financial interest in the outcome assert their legitimate claim to a prominent or controlling role in the conduct

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<sup>9</sup> This hypothetical sequence of events closely parallels the procedure suggested for the first principal pretrial conference in the *MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION* § 1.0 (1970). [hereinafter cited as *MANUAL*].

<sup>10</sup> *MANUAL* § 1.9. This section cautions against "appointing liaison counsel over the objection of one or more parties." Where there are conflicting interests or theories, provision is also made for appointment of more than one liaison counsel. Section 1.9 further provides: "The court should not compel a party to authorize other than his own to make admissions by stipulations in matters of substance."

of all future pretrial proceedings. Unfortunately, the court does not undertake to issue any orders concerning the obligations of all plaintiffs' counsel to share in the costs of pretrial discovery; nor does the court establish any basis for payment of fees to compensate lead counsel in the discharge of the somewhat ambiguous duties that devolve upon him in the capacity of "liaison" counsel. Moreover there are not any agreements or contracts entered into by the various plaintiffs' counsel to provide for the sharing of costs or compensation of those attorneys who take the lead for the benefit of all in the conduct of discovery.

At the close of the hearing our attorney returns to Dallas without any clear understanding of how, when or by whom the pretrial discovery will be conducted on behalf of plaintiffs, or whether or how those attorneys who take the laboring oar will be reimbursed for costs or compensated for their efforts on behalf of all. It is clear by this time, however, that those few attorneys who have surfaced as "liaison" or lead counsel have in mind extremely lengthy and detailed discovery that will inevitably involve dozens of depositions and the production of many thousands of documents and exhibits all of which will inevitably take at least a year to complete and will primarily occur in Iowa. And since the court has allowed three months for tidying-up the pleadings and disposing of various preliminary motions, the first stages of discovery will not begin until January 1971, at the earliest; *i.e.*, one year after the accident and nine months after our Dallas attorney first attempted to begin discovery himself.

Within a few months after the first pretrial hearing, the flow of information from Iowa has been reduced to a sporadic and undependable trickle. The Dallas attorney gradually becomes aware that discovery is underway and is being conducted to a great extent, by agreement between the various defense counsel and a few plaintiffs' attorneys who have become *de facto* lead counsel, and without formal advance notices. Inquiries to the actively participating counsel bring only half-hearted replies suggesting that if he were genuinely interested, he too could keep abreast by coming to Iowa for the next few months and participating himself. But the Dallas attorney concludes that this is a practical and economical impossibility; a conclusion that will be shared by most other plaintiffs' attorneys scattered throughout the nation. His modest case simply

would not justify so great an investment of his time and money. He briefly considers referring the case to an attorney in Iowa, but soon rejects that idea when he remembers that section 1407 provides that the case will be remanded to the Dallas district court for trial upon completion of pretrial proceedings.<sup>11</sup> Thus, our attorney finally reconciles himself to the fact that he is unable as a practical matter, either to participate in or remain abreast of discovery. He consoles himself, however, with the hope that at the termination of pretrial proceedings a complete discovery "package" will be available to him to prepare for trial. He will eventually discover that these expectations go largely unfulfilled.

These problems appear vastly different in the eyes of plaintiffs' "liaison" counsel. He has assumed a prominent and active role in the discovery proceedings because he has "the big case" or a great many cases and thus, the largest stake in the outcome. It soon becomes obvious, however, that gradually there are fewer plaintiffs' attorneys constructively participating in pretrial discovery until "liaison" counsel eventually finds himself carrying the entire burden alone. Some, like the Dallas attorney, find it impossible as a practical matter to participate, while others seem quite content to "ride coat-tails." In any event, the "liaison" counsel by this metamorphosis has become, *de facto*, a lead counsel.

"Liaison" counsel begins discovery without benefit of any order or rule defining specifically his rights or duties and without the comfort of any order or agreement covering sharing of costs or compensation. For this reason he does not feel bound by any particular obligation to other counsel and thus, he pursues his own discovery primarily for his own benefit and without particular concern for the interests or needs of other parties. Costs of pretrial discovery in a complicated air crash case can easily multiply into tens of thousands of dollars. In the absence of some voluntary agreement to share these expenses the lead counsel must bear the considerable burden of having to pay such large sums himself.

Inevitably, not all pretrial discovery is made a part of the formal record. While transcripts of depositions and answers to interrogatories generally will be filed and become available to all parties, other forms of discovery are not as available. For example, lead counsel may reproduce, for his own files, documents that are pro-

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<sup>11</sup> 28 U.S.C. § 1407(a) (1970).

duced for examination by various defendants as well as photographs, analyses and reports from expert consultants he may have retained and yet not file these items for the record. Much of this material may never become available to non-participating attorneys who, at this point, are somewhat on their own.

In due course all pretrial discovery is completed and the district court at Iowa remands all of the cases to the courts where they were originally filed and no further discovery is permitted.<sup>12</sup> As part of the remand procedure the district court duplicates and forwards to each of the transferor courts a complete copy of its docket and file, one set of which is sent to the district court in Dallas.<sup>13</sup> But when our attorney in Dallas examines these materials he discovers to his dismay that far from being the complete discovery package that he expected, some of the most important information is lacking; although it may be in the possession of "liaison" counsel, it is not in the record as filed. At this point his position has become thoroughly untenable. Discovery has been completed and there is no longer any way for him to supply the missing links. His settlement posture is impaired because the defendants are undoubtedly aware of his predicament. The imperfect record may even prejudice his ability to litigate his case adequately. In light of these circumstances the Dallas attorney may quite logically conclude that he has been left with no practical alternative other than refer his case to the "liaison" counsel for trial. In the meantime, an even more serious problem will have developed if prior to completion of discovery the defendants have settled with lead counsel. If no other plaintiffs' counsel have been actively participating and if the time limits set by the court for completion of discovery are running out, the plaintiffs as a group may well have been dealt a severe blow since it may be too late as a practical matter for another attorney who is not intimately familiar with the proceedings to continue with the case.

## II. PROPOSED REMEDIES FOR SHORTCOMINGS IN MULTIDISTRICT PROCEDURES

The foregoing scenario should not be considered merely a parade

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<sup>12</sup> *Id.*

<sup>13</sup> See Rule 16(d) of the *Rules of Procedure of the Judicial Panel on Multidistrict Litigation*, 1 CCH AV. LAW REP. § 3870 (1972).

of horrors. Rather, it is based on actual experience in various multidistrict proceedings to date and is the probable, if not inevitable, result of the procedures as presently designed. Obviously, multidistrict consolidation will benefit some plaintiffs' attorneys. Those who would in the ordinary course file immediately before the running of a statute of limitations and who would not in any event conduct vigorous or diligent discovery will receive the benefit of thorough discovery done by others at a fraction of what it would otherwise cost. On the other hand, plaintiffs' counsel who would, if left to their own devices, pursue their cases carefully and expeditiously will find that multidistrict litigation under the existing rules can severely hamper their ability to adequately represent their clients and to obtain proper and adequate settlements or judgments. Moreover, the diligent counsel will find that the process of multidistrict consolidation unavoidably results in a delay of six to nine months, and in all probability longer.

Two possible remedies are suggested for these serious shortcomings in the present system:

- (1) adoption of a rule by the Multidistrict Panel providing for appointment of a "lead" rather than "liaison" counsel, combined with a clear definition of his responsibilities and provision for his adequate compensation; and
- (2) determination of issues of liability by the transferee court prior to remand to the transferor courts.

#### A. *Lead vs. Liaison Counsel*

Section 1.9 of the Manual for Complex and Multidistrict Litigation suggests that when there are multiple parties on one or both sides of the case the court should urge the participants to select a "liaison" counsel for the purpose of facilitating communication with the court and coordinating activity of the various parties. But the court should go further. It should require all plaintiffs' counsel to select one, two or three from their number to act as *lead* counsel whose duty it would be to take *complete* charge of all pretrial proceedings on behalf of all plaintiffs. Of course, any individual attorney would be entitled to attend all proceedings, but his participation, except in those issues unique to his case, would have to be conducted through lead counsel. The order of the court should provide for a pro-rata sharing of all costs incurred by lead counsel

and for periodic advances by all plaintiffs to cover costs. The court should further order that lead counsel be fairly compensated by all other plaintiffs on the basis of a percentage of the eventual recovery made in each and every case. It is suggested that something between two and seven per cent would be appropriate depending on the number of cases involved; the greater the number of cases the lower the percentage. Moreover, lead counsel, except for extraordinary circumstances, must continue in that capacity until completion of all pretrial proceedings regardless of whether he may have previously settled his own cases. Finally, the court should direct that *all* of the fruits of lead counsel's discovery efforts and *all* of his work product must be made fully available to all plaintiffs regardless of whether it is made a part of the formal record.

Experience since 1968 has shown that these arrangements in consolidated air-disaster litigation are generally not made voluntarily but instead must be mandated.<sup>14</sup> But, while there is some authority for taking these steps<sup>15</sup> and while analogies to class action procedures can be made,<sup>16</sup> some courts have doubted their power to make this order or, at least, have been reluctant to do so.<sup>17</sup> For this reason, an appropriate modification to the Manual for Complex and Multidistrict Litigation is required.

Adoption of this procedure would prevent most of the described problems from occurring. Non-lead counsel would no longer be in jeopardy of being prejudiced by an incomplete "discovery package." In addition, the problem of defendants eliminating lead counsel by settling his cases to gain a tactical advantage over other plaintiffs would be obviated. Continuity of discovery as well as adequate flow of information to all counsel would also be assured. Finally, lead counsel would be fairly compensated for the benefit which others derive from his efforts and would be relieved of the considerable burden of financing the entire proceedings himself.

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<sup>14</sup> See, e.g., *Reidinger v. TWA*, 329 F. Supp. 487 (E.D. Ky. 1971), and all related cases; *Kohr v. Allegheny Airlines, Inc.*, Civil No. IP. 69-C-143 (S.D. Ind. 1971), and all related cases.

<sup>15</sup> See, e.g., *Rando v. Luckenbach Steamship Co., Inc.*, 25 F.R.D. 483 (E.D.N.Y. 1960) where the court acted under Fed. R. Civ. P. 42(a) because defendant moved for appointment of not more than three counsel to supervise pretrial proceedings.

<sup>16</sup> FED. R. CIV. P. 23.

<sup>17</sup> See note 14 *supra*.

### B. *Determination of Liability by Transferee Court*

Even though these recommended procedures might be beneficial, there is still another problem that is inherent in the nature of the consolidated multidistrict proceedings. The attorneys who cannot or do not choose to participate lose out on the educational benefit that flows from direct involvement in the discovery process. Even under ideal circumstances it is difficult to make effective use of another attorney's voluminous record in an extremely complicated and highly technical case without direct participation in the preparation of the discovery. At the close of pretrial proceedings typically there will be few attorneys, other than lead counsel, with sufficient in-depth understanding of the case to be able to try the liability issues adequately.

The existence of only a few well-informed attorneys would suggest the desirability of a consolidated trial on liability in the transferee court. Not only would non-participating plaintiffs' counsel benefit from a consolidated liability trial, but there would also be a considerable savings in judicial time and effort that otherwise might be required for duplicative and repetitive lengthy trials in the various transferor courts. In addition, a determination of liability by the transferee court applicable to all cases would relieve defendants of the burden of exposure to multiple trials with the attendant risk of inconsistent judgments. The question then becomes whether the transferee court has any jurisdiction to conduct a trial on the merits of the pending cases or to decide the issues of liability in those cases.

There are three ways in which a transferee court can litigate or dispose of liability issues in consolidated multidistrict proceedings.

#### 1. Change of Venue for all Purposes

Section 1407(a) states:

Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated. . . .

This language is mandatory and suggests that the only situation in which a case would not be remanded to the transferor court at the conclusion of pretrial proceedings is when it has been "previously

terminated." Obviously the statute does not contemplate a trial on the merits in the transferee court. There is, however, some recent and limited authority holding that the transferee court has the power, pursuant to section 1404(a),<sup>18</sup> to transfer the cases pending before it for pretrial proceedings to itself for all purposes including trial.<sup>19</sup> Section 1404(a) permits change of venue "for the convenience of parties and witnesses and in the interest of justice." Rule 15(d) of the Rules of Procedure of the Multidistrict Panel also suggests the existence of this power in the transferee court.<sup>20</sup>

This procedure may not, however, be appropriate or desirable in every situation. First, a transfer via section 1404(a) is a change of venue for all purposes; plaintiffs would be required to litigate not only liability issues but also damages in the transferee forum, which they may be unwilling to do. Further, a transfer under section 1404(a) can only be made to a district where the action "might have been brought" originally.<sup>21</sup> This requirement will normally not present any particular problems with respect to actions against the United States<sup>22</sup> or against commercial airlines in view of the liberality of long-arm statutes in most states.<sup>23</sup> It may, how-

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<sup>18</sup> 28 U.S.C. § 1404(a) (1970).

<sup>19</sup> *Pfizer, Inc. v. Lord*, 447 F.2d 122 (2d Cir. 1971), *aff'g In re Antibiotic Antitrust Actions*, 333 F. Supp. 299 (S.D.N.Y. 1971); *Jack Winter, Inc. v. Koratron Co.*, 326 F. Supp. 121 (N.D. Cal. 1971).

<sup>20</sup> Rule 15(d) of the *Rules of Procedure of the Judicial Panel on Multidistrict Litigation*, 1 CCH AV. LAW REP. § 3870 (1972) states in part: "In the absence of unusual circumstances, actions terminated in the transferee court by settlement, dismissal or summary judgment shall not be remanded by the Panel and shall be dismissed by the transferee court."

In a recent amendment to these rules, to be effective March 30, 1972, Rule 15(e) now states in part: "Each transferred action that has not been terminated in the transferee court will be remanded to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406."

<sup>21</sup> 28 U.S.C. § 1404(a) (1970) reads as follows: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

<sup>22</sup> 28 U.S.C. § 1404 (1970).

<sup>23</sup> Typical long-arm statutes in force in many states allow for extra-territorial service of process and jurisdiction over nonresidents wherever tortious injury is caused in that state by any act or omission outside the state or where tortious injury is caused anywhere by an act or omission done within that state. *See, e.g.*, OHIO REV. CODE § 2307.382 (1970). Thus, the situs of the crash of an airliner will generally involve the causing of a tortious injury or commission of an act that results in injury within the state where the crash occurred. It thus becomes possible to obtain jurisdiction over a nonresident airline in the state where the crash occurred.

ever, present an obstacle to transfer when there are other defendants who might not be subject to the jurisdiction of the transferee court.

## 2. Summary Judgment in Transferee Court

A second method of litigating liability issues in the transferee court is through summary judgment. The usefulness of this procedure is limited in complex cases since rarely will there be a complete absence of genuine issues of material fact in the record at the completion of discovery.<sup>24</sup> It is certainly conceivable though that under appropriate circumstances some of the parties might be entitled to a judgment as a matter of law.

There would seem to be little question of the jurisdiction of the transferee court to grant summary judgments in appropriate situations. A number of courts have indicated that this power does exist<sup>25</sup> and several others have granted summary judgments in multidistrict consolidation proceedings.<sup>26</sup> The legislative history of section 1407 suggests that the phrase "pretrial proceedings" as used in section 1407 contemplates summary judgments.<sup>27</sup> Finally the rules of the Multidistrict Panel permit this remedy to be granted by the transferee court even though it is a disposition on the merits.<sup>28</sup>

## 3. Trial of a Test Case and Collateral Estoppel

The third method in which a transferee court can effectively dispose of all issues of liability is to set an early trial on one of the cases over which it has original jurisdiction; that case would then become a "test case." A final determination of liability in that action could then be directly used as a basis for partial summary judgments on liability by plaintiffs in those states that have adopted

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<sup>24</sup> FED. R. CIV. P. 56(c).

<sup>25</sup> *In re Alco*—Harvard Fraud Litigation, 325 F. Supp. 315 (J.P.M.L. 1971); *In re Butterfield Patent Infringement*, 328 F. Supp. 513 (J.P.M.L. 1970); *In re Fourth Class Postage Regulations*, 298 F. Supp. 1326 (J.P.M.L. 1968); *In re Plumbing Fixtures Cases*, 298 F. Supp. 484 (J.P.M.L. 1968).

<sup>26</sup> *See Reidinger v. TWA*, 329 F. Supp. 487 (E.D. Ky. 1971) but reversed by the Sixth Circuit on July 6, 1972 (Civil Nos. 71-1721 through 71-1735) upon a finding that genuine issues of material fact existed in the record; *Multidistrict Civil Actions Involving the Air Crash Near Dayton, Ohio on March 9, 1967*, — F. Supp. —, 12 Av. Cas. 17,229 (S.D. Ohio 1972).

<sup>27</sup> *See* note 1 *supra*, at 1900.

<sup>28</sup> *See* note 20 *supra*.

the rule of third-party collateral estoppel.<sup>29</sup> But even if that doctrine is unavailable, a simple determination of liability is generally conclusive as a practical matter since rarely has more than one case ever been tried from a single air-disaster.

### III. CONCLUSION

Multidistrict consolidation is of great benefit both to the federal judiciary and to defendants and is obviously here to stay in mass-disaster cases. But the present procedures as set forth in the Manual for Complex and Multidistrict Litigation have been conceived with little appreciation of their practical impact on plaintiffs. Transfer creates economic and logistic problems that render it virtually impossible for the typical plaintiff's counsel to participate in the pretrial proceedings; and since pretrial proceedings are almost invariably the *only* proceedings in these situations (full trials being a rarity) transfer can seriously impair the attorneys' ability to provide effective representation of his client. Further, those attorneys who take the lead should, in fairness, be compensated. There is no justification for assuming that they should be willing to subsidize other plaintiffs either in terms of payment of costs or investment of their own time and talents. Plaintiffs' attorneys must be protected from the untimely departure of lead counsel and must be assured that, having been effectively precluded from participating personally, they will not be prejudiced by an incomplete discovery package.

Finally, the transferee court should, when possible, determine the basic liability issues before remand; always keeping in mind, however, the great deference that should be accorded to plaintiffs' original choice of forum and their legitimate interest in having damage issues litigated in a forum convenient to them.

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<sup>29</sup> See generally 1B J. MOORE, FEDERAL PRACTICE ¶ 0.412.1, at 1805, *et seq.* (2d ed. 1971).

