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THE POWER OF A TRANSFEREE JUDGE TO TRANSFER LIABILITY AND DAMAGES TRIAL

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A DISTURBING trend has been developing in multidistrict litigation cases by which a transferee judge is permitted to transfer cases to himself for trial on the issues of liability and damage. The Second Circuit has recently spoken on this procedure in *Pfizer, Inc. v. Lord*[1] wherein the transfer was permitted. It is believed that the cases creating this trend ignore not only the clear mandate of section 1407 of Title 28,[2] but also the intent and purpose of Congress in enacting the multidistrict litigation statute.

One can hardly quarrel with the basic principles that underlie the multidistrict litigation statute, nor with its intended purpose. For example, in the field of anti-trust, it is not uncommon for dozens of cases to be brought alleging identical causes of action. It would be utter chaos to have simultaneous pretrial proceedings in each case.

Different considerations apply to transfer, however, often accompanied by consolidation of cases for trial after the completion of

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[1] 447 F.2d 122 (2d Cir. 1971) (per curiam). Multiple civil treble damage actions alleging a conspiracy to fix prices and exclude competitors were brought against five antibiotic drug manufacturers after they had initially been convicted in a criminal prosecution under the Sherman Act, which has subsequently been reversed and remanded. United States v. Chas. Pfizer & Co., 281 F. Supp. 837 (S.D.N.Y. 1968), *rev'd for new trial*, 426 F.2d 32 (2d Cir. 1970) *opinion modified and rehearing denied*, 437 F.2d 957, *aff'd*, 92 S. Ct. 731 (1972). The Judicial Panel transferred over 150 of these cases, including many class action claims, to the Southern District of New York. After a settlement offer by the defendants, many of the cases were settled, including various class action claims brought on behalf of the consuming public, state and county hospitals, private hospitals and retail and wholesale groups. *See* West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971). The cases whose transfer was before the Second Circuit represented most, but not all, of the remaining non-settling actions.

[2] 28 U.S.C. § 1407 (1970).

pretrial proceedings. These considerations argue against the emerging rationale that permits a transferee court to transfer to itself multidistrict litigation cases for purposes other than pretrial proceedings.

I. THE BASIC PREMISES INVOLVED

Two basic premises underlie the decisions permitting the transferee court to try liability and damages. First is the assumed power of the transferee court to decide the propriety of transfer of a case under section 1404(a).[3] The rationale of permitting the transferee judge to decide whether the multidistrict cases should be transferred to himself for trial is mainly predicated upon the language of section 296.[4] Particular reliance is placed upon the provision that states that a judge to whom the multidistrict cases have been assigned by the Judicial Panel has "all the powers of a judge of the court, circuit or district to which he is designated and assigned. . . ."[5] Accordingly, so the reasoning goes, a transferee judge has the power to transfer cases under section 1404(a) the same as any other judge. Little difficulty is found with the provision of section 1407(a) which 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. . . . .[6]

What appears to be the clear mandate of the statute is avoided by the courts on the grounds that section 1407 deals *only* with the powers of the multidistrict litigation panel, and not with the powers of the judge to whom the cases have been assigned by the Panel.[7] To hold otherwise, said the Second Circuit in *Pfizer*, "would mean that all proceedings on any section 1404(a) motion would have to be suspended for the entire period of pretrial, the cases remanded to a number of different districts, and then each district judge consider separate 1404(a) motions."[8] The *Pfizer* court ignored, how-

[3] 28 U.S.C. § 1404(a) (1970).

[4] 28 U.S.C. § 296 (1970).

[5] *Id.*

[6] 28 U.S.C. § 1407(a) (1970).

[7] Pfizer, Inc. v. Lord, 447 F.2d 122, 124 (2d Cir. 1971).

[8] *Id.* at 125.

ever, the notion that a section 1404(a) motion can be heard either before or at the conclusion of the pretrial proceedings. There is no requirement that the motion must be made during the pretrial proceedings. Moreover, none of the interests of the parties would be adversely effected by having the motion for transfer determined by the transferor court after remand, as provided by section 1407. The transferor court would be better equipped to make an appropriate determination as it could focus on the interests of the immediate parties before it and could evaluate more readily those circumstances favoring local and separate trial as against transfer and consolidation.

The second premise permitting the transferee judge to transfer the cases to himself, even on his own motion, rests upon postulated interests of judicial efficiency irrespective of whether the factors explicitly set forth in section 1404(a) have otherwise been satisfied. The factors that the courts have given predominent weight are the experience and convenience of the transferee judge. This is "because of the complexity of these cases the interests of judicial efficiency make it highly desirable that the judge who conducted the pretrial proceedings continue as the trial judge. . . ."[9] In other words, since the judge gained knowledge about the applicable issues and facts, he should try the case. But that factor is unpersuasive since any judge who conducts coordinated pretrial proceedings gains this knowledge of the case.

In *Pfizer*, none of the thirty-one cases transferred to Minnesota for trial originated in that state or had any apparent connection with the District Court of Minnesota, a forum chosen for the convenience of the transferee judge. None of the parties,[10] plaintiff or defendant, came from Minnesota. None of the principal counsel in any of the cases sought to be transferred were from the District of Minnesota. None of the witnesses who might be called to testify were from Minnseota. Moreover, the document repository established by court order, containing hundreds of thousands of documents, was located in New York City. Finally, none of the prior proceedings had been held in Minnesota.

What was demonstrated in this antibiotic drug litigation was the determination by the transferee judge that, in the first instance,

[9] *Id.*

[10] *Id.*

he should try the cases.[11] Since it was inconvenient for him to try them in the Southern District of New York where they had been assigned for coordinated pretrial proceedings, he transferred them to his home district via section 1404(a).[12] It is submitted that section 1404(a) was never intended for this purpose; if the convenience of the transferee judge is the key factor in determining whether an action or group of actions should be transferred under section 1404(a), then every case that has been transferred by the Panel under section 1407 will end up being tried by the transferee judge.

Moreover, if a section 1404(a) transfer turns on the convenience of the transferee judge, then this ignores the obvious purpose of section 1404(a), which is to permit transfer of an action from a technically proper venue that may be entirely *inconvenient for one of the parties.* Professor Moore points out that the most important factors bearing on whether transfer should be ordered are (i) plaintiffs' initial choice of forum; (ii) the relative ease of access to sources of proof; and (iii) the availability of compulsory process and the location of witnesses.[13] Indeed, in *Gulf Oil Co. v. Gilbert,*[14] the Supreme Court explicitly accepted these factors.

In the multidistrict cases, these factors have been set aside by judicial fiat. At the present stage of interpretation the important and controlling factor is whether the transferee judge who conducts the pretrial proceedings *wants* to try the cases. If so, then all he has to do is transfer the cases to himself for trial on his own motion, irrespective of the desires of the litigants.[15] If this is true, then section 1407, which explicitly states that the action transferred "shall be remanded by the panel at or before the conclusion of such pretrial proceedings,"[16] is meaningless.

II. THE FALLACIES OF THE COURT'S RATIONALE

Apart from the premises underlying the decisions allowing the transferee court *to try liability* and *damages* is the more basic ques-

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[11] *Id.*

[12] *Id.*

[13] 1 J. MOORE, FEDERAL PRACTICE ¶ 0.145 [5], at 1780 (2d ed. 1971).

[14] 330 U.S. 501 (1947).

[15] Levy, *Complex Multidistrict Litigation and the Federal Courts,* 40 FORDHAM L. REV. 41, 63 (1971).

[16] *See* note 17 *infra.*

tion of whether the transferee judge has the power to transfer the cases to another district for purposes of trial. The pertinent decisions concede that the multidistrict panel has *no* power to transfer the case because of the mandatory language of section 1407. Although the transferee judge derives his authority solely from section 1407, nevertheless, according to these authorities, he does have authority to transfer the cases because he "has all of the powers of a judge of the court . . . to which he is designated or assigned." One of the powers of any judge is to hear section 1404(a) motions. Except in the unique circumstances of transferred cases, the section 1404(a) motion involves the transfer of the case from the hearing judge to a judge in another district, not to himself. In this author's opinion, this reasoning is bottomed upon a fallacious premise—that the general language of section 296, dealing with the assignment and designation of judges, controls over the very explicit language of section 1407.

The district court's jurisdiction over the cases in the first instance is derived solely from section 1407, resulting from transfer of the cases to himself by the multidistrict panel acting under that section. Section 1407 *specifically* requires the Panel to remand an action to its transferor court, unless the case has been terminated.[17] There are no other statutory options. The Panel cannot transfer cases to any district other than the transferor court nor can it leave coordinated cases in the transferee district for trial purposes.

This statutory mandate was chosen by Congress after an extensive review of the alternatives. The legislative history is replete with statements emphasizing the non-transferability of multidistrict litigation by the transferee court.

Illustrative is the report of the Senate Judiciary Committee, which states:

> Paragraph (a) also requires transferred cases to be remanded to the originating district at the close of the coordinated pretrial proceedings. The bill does not, therefore, include the trial of cases in the consolidated proceedings. The experience of the Coordinating Committee was limited to pretrial matters, and your committee consequently considers it desirable to keep this legislative proposal

[17] 28 U.S.C. § 1407 (1970). Section 1407 provides in pertinent part: "Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial to the district which it was transferred unless it shall have been previously terminated . . . ."

> within the confines of that experience. Additionally, trial in the originating district is generally preferable from the standpoint of the parties and witnesses, and from the standpoint of the courts, it would be impracticable to have all cases in mass litigation tried in one district. Finally, the committee recognizes that in most cases there will be a need for local discovery proceedings to supplement coordinated discovery proceedings, and that consequently remand to the originating district for this purpose will be desirable. Of course, 28 U.S.C. § 1404, providing for changes of venue generally, is available for those instances where transfer of a case for all purposes is desirable.[18]

By withholding the authority to consolidate multidistrict cases for trial from the transferee court, Congress recognized the legitimate and substantial interest in the local determination of transfer motions, which should be made on case-by-case basis. As the Report of the Senate Judiciary Committee indicates, factors such as the necessity of local discovery, the availability of witnesses and compulsory process, the status of local calendars and the desire to avoid massive over-centralization of litigation in one court, were all factors entering into the congressional decision.[19]

Thus, it is quite clear that the legislation, which was based on the experience of the Coordinating Committee in the Electrical Equipment Cases, was not intended to consolidate cases for trial. The courts had had no experience with the massive trials, did not contemplate the trials and would be unable to cope with them.

Indeed, Chief Judge William Becker, a member of the Coordinating Committee in the Electrical Equipment Cases, made this quite clear in his testimony before the Senate Judiciary Committee. He told the Committee that one of the reasons transfer for pretrial purposes *only* was desirable was ". . . the inability of one or a few transferee districts to try fully hundreds of thousands of claims for relief as distinguished from ability to conduct pretrial of hundreds of thousands of claims involving one or more common questions of fact, not local in scope."[20]

Moreover, the legislative history further demonstrates that transfers under section 1404(a), even if desirable, could be made prior

[18] S. REP. No. 454, 90th Cong., 1st Sess. at 5 (1967).

[19] *Id.*

[20] *Hearings on S. 3815 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. at 17 (1966).

to the commencement or after the conclusion of the pretrial proceedings. The comments of the Coordinating Committee for Multidistrict Litigation of the Judicial Conference of the United States, which were read into the record, are quite pertinent.

> The statute affects only the pretrial stages in multidistrict litigation. *It would not affect the place of trial in any case or exclude transfer under other statutes* (e.g., Title 28 U.S.C. §§ 1404(a) and 1406(b)) *prior to or at the conclusion of pretrial proceedings. . . .*The major inovation proposed is transfer solely for pretrial purposes. The statute's objectives of eliminating conflict and duplication and of assuring efficient and economical pretrial proceedings would thus be achieved without losing the benefits of local trials in the appropriate districts.[21]

It should be added that this author is not unmindful that rule 15(e) of the Panel's Rules of Procedure seems to give the transferee judge the power to consider transfer of a particular case. That rule states that actions will be remanded to the district from which they were transferred "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(a)."[22]

But this rule cannot increase the power of the transferee court contrary to the mandatory letter and spirit of section 1407(a). The Panel's rules cannot be "inconsistent with Acts of Congress . . . "[23] and, therefore, any rule that expands the authority given to it by Congress is of no effect.

III. CONCLUSION

Should the clear mandate of Congress in enacting section 1407, as reflected by the legislative history, be ignored under the label of "judicial efficiency" to fit the convenience of the transferee judge's conducting the pretrial proceedings.

What about the expenses to the litigants of trying the case in a strange jurisdiction, the availability of witnesses who must be transported from other areas and the necessity of employing local counsel? Are not these factors the most important? Why should the con-

[21] H.R. 8276, 89th Cong., 2d Sess. at 21, 24 (1966) (emphasis added).

[22] *Rules of Procedure of the Judicial Panel of Multidistrict Litigation*, Rule 15(e), 1 C.C.H. AV. L. REP. § 3870 (1971).

[23] 28 U.S.C. § 1407(f) (1970).

venience of the judge who wants to try the case be a consideration at all?

Rights of litigants should not be cast aside to satisfy some nebulous concept of judicial efficiency, absent some controlling reason and statutory authority.

It is time for the reviewing courts to put some brakes upon the usurpation of power by the district courts contrary to a direct statutory command. In view of the attack upon our judicial institutions from many fronts, the courts must be increasingly alert to abuses creeping into the judicial system. Disregard of congressional mandates is an abuse that should not be countenanced.