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AN APOLOGIA FOR TRANSFER OF AVIATION DISASTER CASES UNDER SECTION 1407

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THE TRANSFER of related air disaster cases to a single judge under section 1407 of Title 28 "for coordinated or consolidated pretrial proceedings" has generally resulted in the expeditious conclusion of the litigation.[1] Not all requested transfers, however, have been granted. Of the sixteen cases considered by the Judicial Panel on Multidistrict Litigation during its first three years, thirteen were transferred and three were denied.[2] Accordingly, this article will consider the criteria to be utilized in determining whether a transfer of such cases should be made.

I. CONSOLIDATION CRITERIA

The statutory criteria of section 1407 for transfer and consolidation are sound and produce beneficial results when properly implemented by the type of judicial management envisioned by the Manual For Complex and Multidistrict Litigation.

There is no doubt that full use of the Manual by court and counsel, with necessary deviation and innovation, is the only way these cases can be handled with efficiency and dispatch. Analysis and experience reveal that there has been criticism of consolidated pretrial when the judicial management principles of the Manual were *not* applied, and the advocates were permitted to proceed without judicial supervision.

Under section 1407 a case may be transferred if there are com-

* LL.B., J.D., University of Florida; United States District Judge, Southern District of Florida. Transferee Judge, cases arising out of the 1969 Maracaibo Venezuela crash and currently, the Yarn Processing Patent Validity Litigation.

[1] For an objective analysis supporting this conclusion see McDermott, *A Plea for the Preservation of the Public's Interest in Multidistrict Litigation*, 37 J. AIR L. & COM. 423, 451 (1971).

[2] *Id.* at 437.

mon questions of fact and the Panel concludes that transfer will be for the "convenience of parties and witnesses and will promote the just and efficient conduct" of the action.

II. CONVENIENCE OF THE PARTIES AND WITNESSES

In another article in this issue, George E. Farrell has urged that in any aviation disaster litigation the transfer is not for the convenience of the parties and witnesses because the parties do not participate.[3] When all passengers in a plane lose their lives in an aircraft disaster, the passengers obviously do not participate in the ensuing litigation. It is agreed that in most aviation cases the plaintiffs have little to contribute on the issue of causation. But the defendant airlines, manufacturers of the plane and component parts, and the government frequently do participate and provide relevant knowledge of probative facts.

When the documents concerning maintenance and repair of the plane and its components are collected and are available in a central location, it may be a great convenience for plaintiffs and defendants to conduct pretrial proceedings in the district in which the documents are located. For the same reason, it may be convenient to conduct the pretrial proceedings in the district in which the control tower operational voice recordings were made and are kept in custody.

In many cases there are third party witnesses and party witnesses. While third party witnesses must be deposed near their residences, this limitation does not exist for managing agent witnesses of third parties,[4] since the latter can be required to travel to another district to give a deposition. Transfer of the cases to a district at or near the residence of party witnesses obviously serves the convenience of those witnesses. The necessity for the transportation of records under a subpoena duces tecum or production order may be avoided by consolidation of the pretrial proceedings in a district in which the records are located, again serving the convenience of parties and witnesses.

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[3] See the article by Mr. Farrell appearing in this issue.

[4] FED. R. CIV. P. 37(b)(2) provides for sanctions if a designated managing agent of a party fails to appear for his deposition.

At least one appellate court[5] has upheld the power of the section 1407 transferee court to make a transfer for trial under section 1404(a). If this becomes settled law, it makes a section 1407 transfer a stepping stone to an ultimate section 1404(a) transfer for trial.

III. TRANSFER WILL PROMOTE THE JUST AND EFFICIENT CONDUCT OF THE ACTIONS

The criterion that transfer "will promote the just and efficient conduct of such actions" is the overriding, controlling standard. Transfers of aircraft disaster litigation to a single most convenient transferee district, followed by fair and effective judicial management, in the absence of exceptional circumstances, will always promote the efficient and just conduct of the actions. Implicit in the obligation of the Multidistrict Panel is prompt action on motions to transfer for pretrial purposes. This avoids the derailing problem of "catch-up" discovery when some consolidated cases are substantially farther along than others when they are finally consolidated.

Emphasis must be placed upon "fair and effective judicial management." Without this the objective of section 1407 can be aborted.

New material from the Manual[6] is pertinent here:

> The essence of the program suggested herein is the exercise of judicial control over complex litigation plus a positive plan for discovery and pretrial preparation.

The Federal Rules of Civil Procedure contemplate that discovery in the ordinary case will be directed by counsel with infrequent intervention by the judge when counsel are unable to agree.[7] This

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[5] *In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions (A.O. 71-5; S.D.N.Y. 1971). Petition for Writ of Mandamus to the Second Circuit was denied. Pfizer, Inc. v. Lord, 447 F.2d 122 (2d Cir. 1971). Section 1404(a) transfers were made by section 1407 transferee judges in the Library Editions of Children's Books Litigation in Wisconsin v. Harper & Row Publishers, Inc. and in the Koratron Patent Litigation, 326 F. Supp. 121 (N.D. Cal. 1971).

[6] MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION 14 (rev. ed. 1971).

[7] *Advisory Committee's Explanatory Statement Concerning Amendments of the Discovery Rules*, 48 F.R.D. 487, 488 (1970).

usual pattern, however, may be ineffective in complex cases if they are to be processed expeditiously.

The trial judge has the undoubted power and inescapable duty to control the processing of a case from the time it is filed. In the complex case the judge must assume an active role in managing all steps of the proceedings. Therefore, firm judicial control must be exercised over a complex case from the time of its filing to its disposition. Under the adversary system each advocate has a mission and commitment to process and present the case in the manner most favorable to his client, consistent with ethics and good faith. It is the commitment of the judge to see that justice results as speedily and economically as possible. Opposing advocates, if left to themselves, each pursuing that course that is most favorable to his particular client, should not be expected to conceive, present and execute a plan which will expeditiously and justly determine a complex case. Nor is it likely that the judge will be able to agree at all times throughout the litigation with either of the opposing advocates on the precise manner of processing the litigation, or rulings on the pretrial questions. It is implicit that the parties and their advocates expect the judge to perform his commitment, and failure by the judge leads to disappointment, confusion and injustice.[8]

Efficiency is best promoted by providing that the discovery be simultaneously accomplished in all cases and by making available to all litigants the information and evidence secured in the pretrial proceedings. Often a single trial of a case pending in the transferee district, or transferred under section 1404(a) will control final determination of all cases under the doctrine of collateral estoppel or by influencing settlements.

The just conduct of all actions is also promoted by uniform discovery and pretrial rulings and by discouraging secret settlements more favorable to certain plaintiffs with more skilled lawyers. Some objections to consolidated pretrial proceedings are based on the ground that it makes impossible settlements that are unknown to others representing similarly situated plaintiffs.[9] There is much

[8] MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION 14-15 (rev. ed. 1971).

[9] *See, e.g., Hearings on S. 961 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess., pt. 2, at 249 (1969).

evidence that private interests of some practitioners, rather than interest in even administration of justice, are the motive behind much of the criticism. Frequently this criticism is expressed in the complaint that "it is unfair to permit others to secure the benefit of my expertise without paying for it."

To remedy this complaint counsel can, by agreement or through court order, make arrangements for inactive counsel to compensate active counsel for expenses and services rendered all. When appropriate, it should be required that five per cent of each lawyer's fee be placed in a fund for ultimate payment of any quantum meruit award to liaison counsel for their services. Certainly original counsel should not object to this contribution because it saves them time and they and their clients get the benefit of the services of competent counsel.

IV. Aviation Disaster Cases Generally Are Complex

It is conceded that some aviation disaster cases may not be "complex." But the great majority are complex in the sense that they require special judicial management. For example, the claim for relief, the defenses, or both, may involve alleged negligence of the United States, alleged pilot or crew error, alleged defective manufacture or design of the plane or an important component. It is naive to argue that this type of case is not complex.

V. Pretrial Procedures Require Special Management

Valuable investigative work is performed by the National Transportation Safety Board and Federal Aviation Administration. Nevertheless, the problems of discovery to test and to convert these administrative findings into usable evidence against the airline, the manufacturer of the plane or its components and particularly against the United States are exceedingly difficult. It is not unusual for witnesses to refuse to answer questions or parties to refuse to admit uncontroverted facts. Only fair anticipatory judicial management can prevent disorderly practices and the chaos that otherwise results. The difficulties in aviation disaster cases have resulted, in this author's judgment, from a lack of judicial management, not the presence of it.

VI. CONSOLIDATION IS NO FINANCIAL BURDEN ON THE PLAINTIFF

Consolidation is not a financial burden when all the plaintiffs are considered as a whole. The obvious economy in consolidated pretrial proceedings is permitting use in all cases of a single deposition of a critical witness on common issues, and of a single set of plaintiffs' interrogatories and answers on common issues. Only in unmanaged, disorderly pretrial processes are there financial burdens on all concerned.

It seems obvious that if an expert or any other witness, is going to be required to testify in 100 aircraft disaster cases, that the securing of his testimony in one deposition for use in all those cases makes for substantial savings. The production of documents relating to the aircraft in these cases would be the same in each instance. Therefore to require the parties to go through the process in each separate case, filed in many districts around the country, is ludicrous.

A lawyer who has a case involving a small amount of money, has the advantage in consolidated cases of not having to attend a deposition in a distant city. He should be permitted to review the deposition taken by more affluent lawyers, who are selected as lead counsel, by a counsel committee, and who have a vital, substantial interest in the outcome. The depositions can be ordered adjourned for thirty days after the transcript is available, subject to being reconvened on motion of the "poor" lawyer if it appeared the deposition did not serve his interest. In addition, this author believes that permitting the "poor" lawyer to propound further questions to the witness by written interrogatories is a viable alternative.

In tag-along cases, filed after the initial consolidation under section 1407, an order will be entered making all prior discovery binding on the parties in the newly filed cases unless, for cause shown, further discovery of the deponent is necessary. This also is not without effect upon economy and efficiency.

VII. OTHER CONSIDERATIONS

This author agrees with Mr. Farrell that, when practicable, considerations for selection of a transfer situs should include such

things as central geographical location, adequate transportation, hotel and restaurant facilities. Transferee judges should be selected in districts where there are other judges in the same district to assist with his remaining case load and with sufficient clerical personnel available. Likewise, adequate deposition rooms and document storage facilities in the courthouse should be given proper weight.

Nevertheless without the availability of the authority granted by section 1407, the lawyers and judges would be plagued, as they were before its enactment, with the practical chaos that exists in the choice of law field in respect to aircraft disaster cases. When the state rule can be discerned, many times the considerations that produced the ruling are irrelevant to jet aircraft travel.

Confusion and delay at the taking of pretrial depositions in consolidated cases can be effectively prevented by the Panel's sending a district judge to preside at any sensitive deposition, i.e., any deposition that is likely to require rulings and when disorder is likely to prevail. This was done in the electrical equipment litigation that proceeded with great efficiency. An examination of the depositions filed in about thirty-five district courts of the United States where these cases were begun is demonstrative evidence of the resultant labor saving.

This author's experience has been that when the judge takes firm charge of the air disaster case promptly and, when possible, announces a realistic trial date sufficiently far enough in the future to permit adequate discovery, the cases settle. In the Maracaibo, Venezuela crash litigation, the cases in which that was done were disposed of in 7.2 months after transfer. Every transferee assignment must be regarded as a mandate to put those cases on a priority control basis. This approach is consistent with recent directives of the United States Judges Conference requiring procedures for immediate screening of complex cases and their handling on an expedited basis.[10]

To suggest, as Mr. Farrell does,[11] that when counsel for all the parties oppose consolidation it should not be required is to disregard the public's interest in the expeditious and just determination

[10] *Report of the Proceedings of the Judicial Conference of the United States*, at 71, October 28, 1971.

[11] See the article by Mr. Farrell appearing in this issue.

of complex litigation. When any action is filed, it becomes a public matter, not subject to the complete control of the parties. Even more so is this a verity in air disaster cases.

VIII. CONCLUSION

In final analysis, the lawyers and judges are on the same team, so to speak, the goal of which should be the effective administration of justice. If we fail in that duty, our system has failed. In short, the lawyer's interest must be subordinated to the public's interest.

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