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COMMENTS


I. INTRODUCTION

The addition of section 1407 to the United States Judicial Code in 1968 permits the Judicial Panel on Multidistrict Litigation (the Panel) to temporarily "transfer, for coordinated or consolidated pretrial proceedings, civil actions, having one or more common questions of fact, pending in different judicial districts." The Panel first met in 1968, and adopted a set of ten provisional rules to govern its initial proceedings. These provisional rules, amended slightly and expanded, were permanently adopted and became effective November 24, 1969. The Panel is scheduled to meet in Washington, D.C. once each month for two days, during which time it holds hearings on motions filed since the previous hearing, and when appropriate, the Panel meets in other locations. Since the first order was issued by the Panel on September 13, 1968, considerable litigation has arisen pursuant to section 1407, and a need to review the scope of its provisions is apparent. This Comment will consider the policies underlying the enactment of section 1407; the tools provided by Congress, the judiciary, and the Panel for its implementation; the opinions and orders of the Panel; and the advantages and disadvantages experienced by the judiciary and the opposing litigants through the operation of the statute.

II. HISTORY

The need to provide a means for the control of complex or multiple litigation has long been recognized. Multiple litigation — two or more actions having one or more common questions of fact pending in one

2. 28 U.S.C. § 1407(d) (Supp. IV, 1969), provides that the panel shall consist of seven circuit and district judges designated by the Chief Justice of the United States, no two of whom shall be from the same circuit. The first judicial panel was appointed on May 31, 1968. 44 F.R.D. 389 (1968).
6. See Robson, supra note 4, at 113.
federal district — and multidistrict litigation — two or more actions having one or more common questions of fact pending in more than one district — present a situation where the parties would be forced to litigate, and the courts would be forced to consider the same issues repeatedly in the same or different districts respectively. It was evident that neither current federal statutes nor rules provided a satisfactory vehicle for effectively coping with this duplication of effort. In an attempt to expedite the disposition of many similar claims at the trial level, rule 23 of the Federal Rules of Civil Procedure, originally promulgated in 1937, permits maintenance of a class action in appropriate cases where “the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, . . .” The original rule allowed, in part, maintenance of a class action where similar interests were represented and common questions of law or fact existed.

The need to consolidate for trial multiple litigation pending in the same district was first provided for by statute in 1940. This statute was superseded by rule 42(a) of the Federal Rules of Civil Procedure in 1948 which permits consolidation of actions for trial when cases involving common questions of law or fact are pending in one district court. Subsection 1404(a) of the Judicial Code enacted in 1940 authorizes a district court to transfer any civil action to any other district where it might have been filed, if such transfer would be for the convenience of parties and witnesses and in the interest of justice. This section, based on the doctrine of forum non conveniens, permits transfer to a more convenient forum even though proper venue exists.


9. Id.


14. FED. R. CIV. P. 42(a).


16. The United States Supreme Court adopted the common-law doctrine of forum non conveniens for the federal courts in 1947. See 1969 WIS. L. REV. 653, 654, citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). See also Norwood v. Kirkpatrick, 349 U.S. 29, 30-32 (1955), where the Court distinguished the common law doctrine of forum non conveniens from Section 1404(a), and held that the statute was not so strict as the common law doctrine, as it permitted transfer rather than dismissal of the action.
However, neither the Federal Rules of Civil Procedure nor the statutory provisions provide for the transfer of litigation for pretrial purposes exclusively. Since only entire actions were transferable, section 1407 was enacted to provide for coordinated pretrial discovery in multidistrict actions where the various cases themselves will be tried in the original (transferor) district.

The first collection of multidistrict cases having common issues of fact and law stemmed from the government's prosecution of five major motion picture industry producers, distributors and exhibitors for violations of the Sherman Act. The Government commenced its prosecution in 1940 and during the sixteen years that litigation against those defendants was pending, 800 separate actions were filed against the defendants and their subsidiaries. The second group of cases involving multiple litigation descended on the federal courts after the government's criminal prosecution in 1960-61 of several electrical equipment manufacturers for conspiring to fix prices and allocate business in violation of the Sherman Act.

In that litigation, 1,933 actions involving 25,623 treble damage

17. Other federal statutory transfer provisions are: 8 U.S.C. § 1105(a),(b) (1964) (transfer to a district court of order for deportation when issue of petitioner's nationality is raised); 11 U.S.C. § 55 (1964) (transfer when action is filed in wrong court of bankruptcy, or consolidation for convenience or when interest of parties is best served); 28 U.S.C. § 1404(b) (1964) (transfer when parties consent or stipulate and court agrees); 28 U.S.C. § 1406(c) (1964) (transfer to Court of Claims when action is mistakenly filed in district court and the transfer is in the interest of justice); 28 U.S.C. § 1506 (1964) (transfer to a district court where action is mistakenly filed in Court of Claims and the transfer is in the interest of justice); 28 U.S.C. § 1404(b) (1964) (transfer of application for writ of habeas corpus to district court); 28 U.S.C. § 1391(b) (1964) (transfer of limitation of liability proceedings); and 11 U.S.C. §§ 207, 211(b) (1964) (transfer if in the interest of justice). See Comment, Consolidation of Pretrial Proceedings Under Proposed Section 1407 of the Judicial Code: Unanswered Questions of Transfer and Review, 33 U. CHI. L. REV. 558 (1965).


22. Neal & Goldberg, supra note 18, at 621. For additional treatment of the electrical equipment cases, see generally 1967 Hearings, note 18 supra; A.B.A. National Institute on Preparation and Trial of an Antitrust Treble Damage Suit, 38 Antitrust L.J. 1 (1968); Baldridge, supra note 18; Bane, Pretrial Discovery in Multiple Litigation from the Plaintiffs' Standpoint, 32 Antitrust L.J. 117 (1966); O'Donnell, Pretrial Discovery in Multiple Litigation from the Defendants' Standpoint, 32 Antitrust L.J. 133 (1966); Symposia, 14 Antitrust Bull. 91 (1968); Note, The Problem of Venue in Multiple District Litigation, 41 Notre Dame Law. 507 (1966); Comment, note 17 supra; 1969 Wis. L. Rev. 653.

claims were brought in thirty-four districts. The last of these cases was finally disposed of by June 1967.

To cope with the mass of litigation engendered by the electrical equipment cases, Chief Justice Warren appointed a Coordinating Committee for Multiple Litigation of the United States District Courts in September, 1961. This Committee was the predecessor to the present Judicial Panel on Multidistrict Litigation. Section 1407 is based on the Committee's experience in supervising the nationwide discovery proceedings in the electrical equipment litigation. The Coordinating Committee considered its function to be the development of methods of handling all types of multiple litigation, including common disaster cases, products liability cases and patent litigation, as well as antitrust cases. The Committee drafted the original version of section 1407, and in 1965 that proposed legislation was approved by the Judicial Conference of the United States. The bill was signed into law in 1968.

Contemporaneous with the drafting of the statute, the Coordinating Committee prepared the Manual for Complex and Multidistrict Litigation. The Manual was approved by the Judicial Conference in 1968 and distributed in 1969. The purpose of the Manual is to bring to the attention of judges and counsel methods recommended by the Judicial Conference for the assumption of judicial control at the outset of complex litigious was due in part to that provision of the Clayton Act, 15 U.S.C. § 16(a) (1964), which permits use of a defendant's criminal antitrust conviction as prima facie evidence against that defendant in a civil action.

25. 15 U.S.C. § 15 (1964), permits a plaintiff injured by anything forbidden by the antitrust laws to recover three times the actual damages sustained.


27. MANUAL, supra note 8, at viii.


29. Three of the nine members of the Coordinating Committee were later named to the seven member Judicial Panel on Multidistrict Litigation. They are Chief Judges Murrah and Becker, and Judge Robson.


32. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 12, 13 (1965). 28 U.S.C. § 331 (1964) provides, in part, that the Judicial Conference of the United States, composed of members of the federal judiciary, shall carry on a continuous study of the operation and effect of the general rules of practice and procedure . . . in use. . . . Such changes in and additions to those rules . . . shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption. . . .


34. See note 8 supra.

gation, (2) the development of a plan for discovery and pretrial preparation and (3) a comprehensive plan for the conduct of all phases of the trial. While it is directed primarily toward all types of complex litigation, the Manual supplements the statute and procedural rules adopted by the Panel by providing additional tools which are helpful in identifying multidistrict litigation, conducting pretrial proceedings, and dealing with the problem of conflicting class actions.

III. Present Tools Available in Multidistrict Litigation

A. Section 1407

1. Statutory Scheme and its Judicial Interpretation

As previously noted, the Coordinating Committee for Multiple Litigation of the United States District Courts drafted section 1407 on the

36. Id. at 63. To accomplish its purpose, the Manual contains a compilation of suggested procedures for pretrial and trial of complex and multidistrict litigation, and in the second part an appendix of materials to be used in implementing the suggested procedures.


38. 28 U.S.C. § 1407 (Supp. IV, 1969), provides:

§ 1407. Multidistrict Litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. 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: Provided, however, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

(c) Proceedings for the transfer of an action under this section may be initiated by—

(i) the judicial panel on multidistrict litigation upon its own initiative, or

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such
basis of their experience with the electrical equipment antitrust litigation. The Committee took the view that enforced centralization of pretrial proceedings in related multidistrict cases would minimize the costs and burdens caused by overlapping and conflicting discovery. Consequently section 1407 was adopted to provide statutory authority for pretrial consolidation and coordination of actions sharing common questions of fact pending in different districts. This statute provides centralized management of pretrial proceedings under court supervision to assure the just and efficient conduct of such actions. The statute authorizes the mandatory transfer of venue for coordinated pretrial proceedings. Consequently, the judiciary no longer must rely on the voluntary agreement of all parties

transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdictions over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.


For comments on section 1407, see Body, Pre-Trial Experience and Procedures, A.B.A. SECTION OF INS. NEG. AND COMP. L. PROCEEDINGS 588 (1968); Crocker, Consolidated Pre-Trial for Multi-District Litigation, 35 INS. COUN. J. 604 (1968); Robson, supra note 4; Note, The Problem of Venue in Multiple District Litigation, 41 Notre Dame Law. 507 (1966); Comment, supra note 17.

and all presiding judges, as was the case in the electrical equipment litigation,\textsuperscript{40} but may resort to mandatory coordinated pretrial proceedings conducted in one district. The essence of this change is:

[T]he exercise of judicial control over complex litigation plus a positive plan for discovery and pretrial preparation. \ldots \textsuperscript{41}

Section 1407 establishes the Judicial Panel on Multidistrict Litigation and gives the Panel authority to: (1) initiate transfer proceedings and hold hearings thereon; (2) transfer civil actions for consolidated pretrial proceedings; (3) assign a judge or judges to conduct such proceedings, and request the Chief Justice to make intercircuit assignments for this purpose; (4) act as and designate other judges as deposition judges in any district; and (5) remand transferred actions to the districts from which they were transferred.\textsuperscript{42}

2. **Sectional Analysis**

\textit{a. Relevant Factors in Considering Transfer}

Subsection 1407(a) permits the transfer of civil actions for coordinated or consolidated pretrial proceedings where: (1) there exists one or more common questions of fact; (2) those actions are pending in more than one district and (3) transfer would be for the convenience of parties and witnesses and will promote the just and efficient conduct of those actions.\textsuperscript{43} The Panel must remand each action to the original transferor district for trial unless a settlement has been reached. The Panel may separate any claim from an action and remand it before the remainder of the action is remanded. The legislative history of this section\textsuperscript{44} suggests

\begin{itemize}
  \item \textsuperscript{40} H.R. REP. No. 1130, supra note 3, at 1899.
  \item \textsuperscript{41} MANUAL, supra note 8, at 18.
  \item \textsuperscript{42} H.R. REP. No. 1130, supra note 3, at 1900.
  \item \textsuperscript{43} The Manual suggests several sources, such as counsel, other judges, district court clerks, and others which the judiciary should consult to identify complex and multidistrict litigation in its initial stages. MANUAL, supra note 8, at 9. These potential sources may be expected to scrutinize actions filed to determine if any would be handled appropriately under provisions of the Manual. As a further aid in identifying a complex case the Manual suggests three local rules which would require district court clerks, judges, and attorneys to notify appropriate court officers of the filing of potential complex or multidistrict litigation. \textit{Id.} at 10. For example, suggested local rule 2, would require, in all civil cases, that an attorney filing a complaint, answer or other specifically required pleading also file a notice with the district court clerk containing (1) a statement of the nature of the case; (2) an indication of whether related actions had been filed in any other federal court or any state court; and (3) full identification of any related actions filed. \textit{Id.} at 212-13.
  \item This laudable approach could be carried to a ridiculous extreme if counsel were required to file the same information every time any pleading was filed. The better rule would limit the application of this order to the initial pleading filed, and impose on counsel a duty to notify the court if he subsequently learns of the filing of related litigation. \textit{E.g.}, this approach has been adopted in the proposed amendment to \textit{Fed. R. Civ. P.} 26(e)(2) which provides: "A party who knows or later learns that his response [in discovery proceedings] is incorrect is under a duty seasonably to correct the response." FEDERAL RULES OF CIVIL PROCEDURE, (Foundation Press, Inc., Mineola, N.Y., 1968) \textit{Proposed Amendments}, at 278.
  \item \textsuperscript{44} H.R. REP. No. 1130, supra note 3.
\end{itemize}
that if there were only one question of fact common to a small number of cases, for example two or three, pending in different districts, it would be unlikely that the Panel would order a transfer. In such a case, it is doubtful whether a transfer would be for the convenience of the parties and witnesses or would promote judicial efficiency. It is quite conceivable, however, that in the cases that do share complex questions of fact, transfer would be advantageous to parties, witnesses and the judiciary. In allocating the burden of proof to the moving party, the Panel cited this legislative history in the Scotch Whiskey cases saying:

[W]here, as here, there are a minimal number of cases involved in the litigation the moving party bears a strong burden to show that the common questions of fact are so complex and the accompanying common discovery so time consuming as to overcome the inconvenience to the party whose action is being transferred and its witnesses.

The defendants, not having overcome their burden as a moving party, were denied a motion seeking transfer of a case filed in Colorado to the District of New Jersey. The opposite result was reached in the Gypsum Wallboard cases, where the Panel ordered one case pending in Seattle to join three other cases transferred to San Francisco, holding that where "substantial common questions of fact [exist], transfer will generally benefit the parties and witnesses, and the just and efficient conduct of this litigation will be furthered by the transfer."

The different result in these cases can be reconciled. In the Scotch Whiskey cases, two actions shared only one common question of fact. Since transfer of one action would not significantly further the efficient conduct of the actions and the denial of transfer would not necessitate duplicate discovery, the Panel refused to transfer one to join the other. In the Gypsum Wallboard cases, however, four actions shared many common questions of fact. In that situation, the Panel thought transfer would further the efficient conduct of the actions, as well as benefit the parties and witnesses. In these two instances, the Panel demonstrated its sensitivity to variations in individual cases by adopting a pragmatic approach, and not merely resorting to an arbitrary standard of minimum numbers of actions involved to automatically deny transfer. In the first case little,
if anything, would be gained by transfer. In the second, several questions of facts were common to all cases, and transfer was justified.

In the *Photocopy Paper* cases, the Panel, on its own motion, considered the transfer of six actions in four districts. After conducting hearings, the Panel concluded that:

[Although] the predicate common questions of fact exist and that the convenience of the parties and their witnesses would generally be served by transfer, . . . the just and efficient conduct of the presently pending actions would not be promoted by transfer at this time. . . . The number of transferrable actions, their location, their lack of complexity, their relative size, and most significantly the fact that discovery is proceeding with a minimum expenditure of judicial energies combine to make the immediate transfer of any of these actions inconsistent with the goal of promoting the just and efficient conduct of these actions.

The Panel determined that transfer was not appropriate.

On another occasion, in the *Texas Concrete Pipe* cases, the Panel declined to transfer twenty-three cases pending in the Northern District of Texas. The Panel considered these cases on its own motion, to determine whether or not they could be combined with either the "*East of the Rockies*" Concrete Pipe cases previously transferred to the Eastern District of Pennsylvania, or with the "*West of the Rockies*" Concrete Pipe cases previously transferred to the Central District of California. The Panel found that "[t]here is no connection between the Texas cases and the East of the Rockies cases: the defendants are entirely different, there are no common witnesses, and the cases stem from different criminal proceedings." The opinion went on to further distinguish the Texas cases from the West of the Rockies cases, stating that although they are not totally unrelated, and do "involve several common defendants, some common witnesses and a potential for common discovery . . . these 23 [Texas] cases are proceeding expeditiously and we do not believe that their transfer to another district would promote their just and efficient conduct."

The Panel has justified transfer in numerous cases involving considerable inconvenience and additional cost to a party by stating that the cost of litigating in the transferee district would be more than offset by the savings in cost generated from the increased efficiency of coordinated discovery. For example, in one of the *Plumbing Fixture* cases...

51. *Id.* at 62.
55. *In re* Texas Concrete Pipe, 302 F. Supp. 1342, 1343 (JPML 1969).
56. *Id.*
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Cases,\textsuperscript{58} which was a class action brought by two individual plaintiffs, the Panel held that the only additional expense and inconvenience that would be caused by transfer of the action would be counsel's travel from Chicago to Philadelphia. The Panel justified this transfer on the grounds that "[h]ere, the sheer number of cases involved, the substantial identity of factual issues and the potentially conflicting class action claims require that all cases be transferred to a single district for consolidated or coordinated pretrial proceedings . . .\textsuperscript{59}

It can be seen that before transfer will be ordered it must be shown that: (1) common questions of fact exist; (2) the convenience of the parties and their witnesses would generally be served; (3) the just and efficient conduct of the actions considered would be promoted. The fact that the cost to litigate in the transferee district may be offset by savings realized through consolidated discovery proceedings does not seem to be one of the important factors considered by the Panel in this case.

b. Factors Used in Determining the Transferee District

The legislative history refers to several factors that should be considered in the selection of a transferee district — the state of its docket; availability of counsel; and sufficient courtroom facilities.\textsuperscript{60} But some other factors also appear to be relevant. They include: (1) the availability of a judge or judges possessing the ability and the time to efficiently conduct the pretrial proceedings in the transferee district;\textsuperscript{61} (2) the situs of documents and records for which discovery probably will be pursued;\textsuperscript{62} (3) the situs of the incident giving rise to the litigation;\textsuperscript{63} (4) the pattern of settlement which may be expected\textsuperscript{64} and (5) the central location of the

\textsuperscript{58} In re Plumbing Fixtures, 302 F. Supp. 795 (JPML 1969).
\textsuperscript{59} Id. at 796.
\textsuperscript{60} H.R. Rep. No. 1130, supra note 3.
\textsuperscript{61} 1967 Hearings, supra note 18, at 19.
\textsuperscript{62} Id. at 45.
\textsuperscript{63} For example the location of an air crash disaster may be the decisive factor as was the case in six separate disasters dealt with in Panel proceedings reported at 298 F. Supp. 1323 (JPML 1969); 298 F. Supp. 390 (JPML 1969); 297 F. Supp. 1039 (JPML 1969); 298 F. Supp. 353 (JPML 1968); 295 F. Supp. 51 (JPML 1968); 295 F. Supp. 45 (JPML 1968). See note 103 infra for the complete citation of these cases.
\textsuperscript{64} See Comment, supra note 17, at 574-75, where the author states that:

Mass tort cases, such as air crashes, for example, in which liability is either clear or limited because of damage ceilings, will seldom reach the court, for the defendant will settle without permitting the case to be litigated. Even if the trial stage is reached, one or two trials usually establish a pattern for settlement, [citing Galiher, The Defendant's Lawyer Looks at Settlement, 31 INS. Coun. J. 65 (1964)]. It will nearly always be less costly in terms of time and money, both for the courts and the parties, to conduct pretrial of a single action and to try it individually than to conduct coordinated pretrial proceedings for fifty different cases when only one is likely to come to trial [footnote omitted]. Such established settlement patterns may in many instances indicate to the panel that transfer will be unnecessary.
transferee district and its accessibility by air transportation. The House Report on section 1407 states that “[t]hese factors [considered in the legislative history] do not lend themselves to precise measurement. Consequently, the [Coordinating] Committee believes that the informed discretion of the judiciary is the best method for resolving questions as to when and where such cases should be transferred for pretrial.”

In the Admission Tickets cases, the Panel selected the Northern District of Chicago as the transferee district, notwithstanding the fact that six of eleven actions were pending in the Southern District of New York and three of the eleven were pending in the Eastern District of Pennsylvania. The reasons given for the decision were (1) that the only action in which meaningful discovery had occurred was in Chicago; (2) a judge had been appointed to handle all proceedings in the cases pending in Chicago, whereas that was not true in New York and Philadelphia; (3) one of the actions, which included nearly 100 plaintiffs, claimed damages perhaps twice as large as the aggregate of the cases pending in New York and Philadelphia and (4) that more of the defendants had their principal places of business in Chicago than in New York or Philadelphia, and that several of the cases pending in New York or Philadelphia had been settled. In In re IBM, an action involving three cases, two of which were filed in the Southern District of New York and one pending in the District of Minnesota, the Panel selected the District of Minnesota as the transferee court. It ordered both New York cases transferred to Minnesota because the assigned judge was already familiar with the proceedings and would be able to insure that consolidated proceedings were conducted fairly and expeditiously. The assigned judge conducted the first pretrial conference, and under his supervision, discovery progressed.

c. Pretrial Proceedings

Subsection 1407(b) provides that the consolidated pretrial proceedings will be supervised by a judge or judges assigned by the Panel. When the assigned judge is from the transferee district court, the consent of that court is required for such a designation. The Panel is authorized to request temporary intercircuit or intracircuit assignment of judges to particular districts to conduct these proceedings. This provision “is designed to allow for the most efficient allocation of available judicial

65. Crocker, supra note 38, at 605.
68. Judge Robson of the Northern District of Illinois, also a member of the Panel, was assigned for all purposes to the Admission Tickets cases filed in Chicago. Id. at 1341.
69. Id.
71. Id.
72. 28 U.S.C. §§ 291-96 (1964), provide the statutory authority for assignment of judges to other courts.
The practical importance of this provision is reflected in the fact that during the first eighteen months of its existence, the Panel ordered the transfer of 540 actions filed in 141 districts, involving nineteen separate sets of multidistrict litigation.

A judge designated under this subsection to conduct the coordinated pretrial proceedings is granted the "usual powers provided by the Federal Rules of Civil Procedure, including authority to render summary judgment to control and limit pre-trial proceedings, and to impose sanctions for failure to make discovery or comply with pre-trial orders." The only express reservation of the district judge's authority is the requirement of subsection (a) that each action transferred for coordinated pretrial proceedings be remanded for trial to the district from which it was transferred. One commentator suggests that section 1407 "appears to prevent a transfer by this [transferee] court under any other federal transfer provisions." To the contrary, the Panel has ruled that the transfer provisions of sections 1404(a) permitting a change of venue, 1406(a) permitting transfer to cure defects, and 1407 are not mutually exclusive but should be used together where appropriate to efficiently dispose of multidistrict litigation. The Panel's approach seems well founded in that the judge who conducted the coordinated pretrial proceedings is in the best position to appreciate those benefits to be gained by consolidation for trial, and what disadvantages would be incurred. The benefits would include the convenience of parties and witnesses, the accessibility of evidence intended to be introduced, and more efficient judicial management. The disadvantages of consolidation would be that in certain cases the interests of smaller parties might be subordinated to the interests of larger parties, and that

76. Comment, supra note 17, at 561, citing Committee Comment, at 5. 28 U.S.C. § 1407(b) (Supp. IV, 1969), provides in part that:

The judge or judges to whom such actions are assigned, the members of the . . . [Panel] . . . , and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.
77. Comment, supra note 17, at 561.
81. See note 182 infra, and accompanying text.
the differing nature and extent of damages might tend to confuse the jury if one is present. In any event, it is submitted that the judge handling the coordinated pretrial proceedings is in the best position to weigh the opposing arguments presented by counsel concerning consolidation for trial.

Another aspect of pretrial proceedings which must be examined is the question of which court — the transferee or the transferor — has the authority to determine whether the various related actions should be combined as a class action. Conflicting class actions would result if two different district courts ruled in favor of permitting exclusive class actions in their respective courts affecting the same parties. The Panel has considered the problem of conflicting class actions in two instances. In the *Antibiotic Drugs* cases, some of the actions transferred contained "potentially conflicting determinations of class actions on behalf of plaintiffs and potential plaintiffs." The moving plaintiff requested the Panel to exclude from the transferee court the power to determine the class action issue. The Panel refused to do this, however, and held that:

> [T]o grant such a request would deny to the transferee court the power to resolve in early pretrial the potential conflict in multidistrict class action determinations. Under the circumstances of this case, denial of this power, if authorized by law, would not be in the interest of justice and would not promote the efficient and just conduct of the affected action.

The Panel did not examine the issue of whether it had the statutory authority to deny the transferee court the power to determine class action issues. It merely avoided that question, and ordered the transfer of all actions involved.

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82. *In re* Plumbing Fixture Cases, 298 F. Supp. 484 (JPML 1968); *In re* Antibiotic Drugs, 295 F. Supp. 1402 (JPML 1968). In one other opinion, the Panel briefly mentioned the issue, stating: "Determination of all matters involving questions of class actions shall be left to the sound judgment of [the transferee judge]." *In re* Protection Devices, 295 F. Supp. 39, 40 (JPML 1968). The *Manual* addresses the problem of conflicting class actions in multidistrict litigation. If two district courts contemporaneously enter orders declaring that an action in each court shall proceed as a class action for all parties similarly situated, then two courts of exclusive different jurisdictions would be exercising control over the same claim for relief at the same time. The *Manual* prescribes three alternative solutions to this problem:

1. Informal spontaneous consultation and cooperation between the concerned judges and courts.
2. Formal consultation and cooperation between the concerned courts, initiated and recommended by the Coordinating Committee for Multiple Litigation, the chief judges of the courts of appeals for the districts concerned, or upon the initiative of the Judicial Panel on Multidistrict Litigation under new § 1407, Title 28, U.S.C.
3. Assumption of control, by one transferee district court of the pretrial proceedings in all potentially conflicting class actions in multidistrict litigation on transfer under § 1407 by the Judicial Panel on Multidistrict Litigation.


84. Id. at 1403.
85. Id. at 1404.
In the *Plumbing Fixtures Cases*, the Panel considered this problem in detail. The City of New York had filed a class action under rule 23 in the Southern District of New York on behalf of certain city, town, and school district governmental units, and all public housing authorities in the State of New York. In argument before the Panel, the city agreed that pretrial proceedings should be transferred to the Eastern District of Pennsylvania to join other cases previously transferred to that district, but argued that the class action question should be determined by the transferor court, the Southern District of New York. Chief Judge Becker, writing for the majority, disagreed with the City’s contention that under section 1407, the transferee court lacks the power to determine the class action issue, and that such power remains in the transferor court after transfer. After carefully analyzing sections 1407(a) and (b), he concluded that the statute:

[Did] not permit the Panel to order a separate trial “of any separate issue or . . . issues” which are also separable under paragraph (b) of Rule 42 [Federal Rule of Civil Procedure 42(b)]. This unequivocal and obviously deliberate withholding from the Panel of power to separate issues in a single civil action assigning one or more to the transferee court and one or more to the transferor court is a clear, precise and wise limitation on the powers of the Panel.

There are other clear indications that Congress did not intend to permit the Panel to partition the issues in a single claim for relief and to assign powers of supervision and decision of the separate parts to two courts to be exercised contemporaneously. By authorizing the Panel to transfer “civil actions” (not parts thereof) for coordinated or consolidated pretrial proceedings and by limiting the Panel’s powers of separation and remand to claims, cross-claims and counter-claims or third-party claims, Congress has made it “impossible to read the section as excising” the powers to determine the class action questions from the order of transfer.

The opinion continued, quoting extensively from the legislative history, to examine the background of class actions under the Federal Rules of Civil Procedure and referred to that section of the Manual for Complex and Multidistrict Litigation which recommends that the class action issue be considered at the First Principal (Preliminary) Pretrial Conference. The opinion stated:

Unless the determination of the class action question is treated as part of the pretrial proceedings, the transferee court will be unable to exercise the powers of supervision and decision respecting the class action question.
to determine the parties (formal and represented) to the local and transferred actions, will be unable to coordinate the pretrial proceedings and will be unable to control the simplification of the issues through control of amendment of the pleadings, and through comprehensive control of discovery.

Another of the innumerable potential alarming consequences of the construction of section 1407 submitted by the City is the conflict and delay which may result from early appeals from class action determinations. . . .

The majority denied the City's motion to sever the class action question, holding that if granted, the motion would result in an unauthorized and unintended frustrating judicial amendment to the statute, and permit contemporaneous dual control by two district courts of a single claim for relief.

Concerning the question of class action determinations made by the transferor court prior to transfer, the majority held that the transferee court had the power under rule 23 to review and revise any class action order considered desirable or necessary in its discretion. Further, it held that all discovery in progress and discovery orders in the transferor court shall remain in effect unless modified or vacated by the transferee court.

Judge Weinfeld, dissenting in part, was of the opinion that once a motion under rule 23 had been argued or submitted to a judge in the transferor court, the subsequent transfer of that action by the Panel prior to the transferee judge's determination on the motion, does not divest the transferor judge of jurisdiction to make his determination. The five sentence dissent apparently concedes that the transferee judge has authority to amend any order previously entered by the transferor judge, thereby negating any real difference of opinion with the majority members as to the transferee judge's control over transferred litigation.

The Panel has thus clearly established that under the statute, it may transfer litigation involving conflicting class actions. The need for the authority to do so is thoroughly explained in the majority opinion considered above, and is well justified by the background and legislative history of section 1407.

d. Motions and Orders

Subsection 1407(c) permits the Panel, or any of the parties in an action where transfer might be appropriate, to initiate proceedings for transfer. The Panel is required to notify the parties in all actions in which

94. 298 F. Supp. at 494.
95. Id. at 495.
97. 298 F. Supp. at 496.
98. Id.
transfer is being considered, and such notice must specify the time and place of any hearing to be held. The Panel is required to hold a hearing prior to the making of the transfer order. The legislative history states that subsection (c) "requires a hearing upon notice to all parties to determine whether a transfer shall be ordered." Judge Body of the Eastern District of Pennsylvania has indicated that after a motion to transfer has been made, "[a] hearing will then be held, if necessary" thereby implying that when transfer is denied no hearing will be held. The Panel has not yet expressed its view on whether a hearing is required in those cases in which transfer is denied and the statute is silent on this point. It does not appear that the Panel has arbitrarily denied any litigant a hearing. On the contrary, it has refrained from holding hearings only when a hearing was waived by all parties. If this practice continues, there would seem to be no need to statutorily require a hearing in every case. The Panel's discretion thus far has been sufficient to protect the interests of all parties.

In those cases in which transfer is ordered, the order must be based on the record of the hearing at which any party affected by the transfer may offer material evidence. The order must be supported by findings of fact and conclusions of law based on the record. This subsection further enumerates the procedures for the filing of notice of hearing, orders of transfer, orders denying transfer and any other orders the Panel may make. Of the Panel's thirty-nine orders reported as of December 31, 1969, twenty-seven substantially ordered transfer, six denied

102. Cf. notes 156-57 and accompanying text, infra.
transfer, and six denied a party's motion to vacate the conditional transfer order entered by the Clerk of the Panel. The Panel initiated action in twenty instances.

e. Standing and Jurisdiction

The Panel addressed the question of standing to request transfer in the *Western Liquid Asphalt* cases, in which the plaintiffs in six actions filed in the Northern District of California moved to have all actions in that litigation transferred to that district. The only case affected was one pending in the Western District of Washington. The Panel interpreted the following portion of subsection 1407(c)(ii):

(c) Proceedings for the transfer of an action under this section may be initiated by . . .

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate . . .

to hold that "[s]ince the moving plaintiffs are not parties in any action in which transfer is contemplated, we believe they lack standing to file such a motion. Their motion will therefore be denied." The Panel could have transferred this case to the Northern District of California on its own initiative under subsection 1407(c)(i) but thought that the plaintiffs' lack of standing should be controlling.

The question of the Panel's jurisdiction over the parties was neither defined in the statute nor considered in the legislative history. But the Panel has decided, consistent with the decisions under certain other

*In re Air Crash Disaster at Ardmore, Okla.,* 295 F. Supp. 45 (JPML 1968) (Panel).  


106. *See* notes 103-05 *supra.* In some instances, more than one party moved for consideration of transfer under section 1407. Plaintiffs initiated action in eleven instances, and defendant did so in fourteen instances.


110. *Id.*
transfer statutes,\textsuperscript{111} that it may order transfer notwithstanding the lack of personal jurisdiction over the defendant.

In one of the \textit{Children's Books} cases,\textsuperscript{112} the issue arose as to whether the Panel could transfer a case under section 1407 if certain named defendants had neither been served with process nor been given notice of the proposed transfer.\textsuperscript{113} The Panel's opinion made an analogy to transfers under subsections 1404(a) and 1406(a),\textsuperscript{114} stating "[i]t is firmly established that transfers \textit{may} be effected under either section even though a defendant has not been served with process."\textsuperscript{115} The opinion went on to say that:

These cases demonstrate that lack of personal jurisdiction over a defendant does not necessarily bar a transfer as a matter of constitutional law . . . The question before us, therefore, is one of statutory interpretation: Did Congress intend and provide that § 1407 be applicable only to cases in which all defendants have been served?\textsuperscript{116}

The opinion analyzed the purpose of section 1407, the interests affected by transfer and recourse available to defendants in the event of transfer, before arriving at its conclusion that "the power of the Panel and the courts to effectuate a transfer under § 1407 is not vitiated by the transferor court's lack of personal jurisdiction over a defendant."\textsuperscript{117} The Panel has not considered the question of whether the requirements applied to transfers under section 1404(a) and 1406(a) by the United States Supreme Court—that venue be proper and that personal jurisdiction could be obtained in the transferee court\textsuperscript{118}—apply to transfers under section 1407.

Regarding the issue of notice, the Panel held that a section 1407 transfer is not precluded by the failure of an unserved defendant to receive notice of the proposed transfer.\textsuperscript{119} The only reason offered in support of this holding was that such a restriction of the Panel's authority, contingent on its locating and notifying defendants not served by plaintiffs, would severely impede the effectiveness of section 1407.\textsuperscript{120} It is suggested that such a procedure is justified, since to bar the Panel from assuming jurisdiction in such a case would "frustrate the salutory purposes of § 1407

\begin{thebibliography}{9}
\bibitem{111} 28 U.S.C. §§ 1404(a), 1406(a) (1964). \textit{See} cases cited in note 115 \textit{infra}.
\bibitem{113} \textit{Id.} at 1141.
\bibitem{114} 28 U.S.C. §§ 1404(a), 1406(a) (1964).
\bibitem{115} 299 F. Supp. at 1141, where the Panel cited the following cases in support of its point: \textit{Goldlawr, Inc. v. Heiman}, 369 U.S. 463 (1962) (§ 1406(a)); \textit{United States v. Berkowitz}, 328 F.2d 358 (3d Cir. 1964) (§ 1404(a)); \textit{Koehring Co. v. Hyde Constr. Co.}, 324 F.2d 293 (5th Cir. 1963) (§ 1404(a)).
\bibitem{117} 299 F. Supp. at 1142.
\bibitem{119} 299 F. Supp. at 1142.
\bibitem{120} \textit{Id}.
\end{thebibliography}
without meaningfully advancing any other interest."\(^{121}\) Under the Federal Rules of Civil Procedure, proper service of the defendant must still be made after transfer and a party so served may raise all motions he is otherwise entitled to raise at that time in the transferor court.\(^{122}\) The Panel failed to indicate, however, where such motions must be made.\(^{123}\) It would seem that these motions would have to be raised in the transferee court, otherwise, the possibility of conflict exists since the transferee court would have jurisdiction over all action in the litigation except the one in which service is being resisted. That case would be determined by the transferor district, and if this were in another circuit, two different courts of appeals could possibly be embroiled in the situation. To avoid this, the Panel may eventually be forced to decide that such motions must be made in the transferee court.

The Panel was confronted with the jurisdictional question in one of the *Gypsum Wallboard* cases,\(^{124}\) in which a defendant opposed transfer on the grounds that the transferor court lacked personal jurisdiction over the defendant. The Panel again avoided deciding where such motions must be raised and merely compelled the defendant to bring them in the transferee court, saying that:

> [M]otions to quash service or dismiss for lack of jurisdiction are being routinely considered by courts to which multidistrict litigation has previously been transferred and we see no good reason why [the defendant] can not pursue its remedies following transfer.\(^{125}\)

The Panel has avoided a specific holding that these motions must be brought in the transferee court. Rather, it has tacitly resorted to that course. Perhaps after considering more of these motions, it may decide to set forth a specific holding to that effect, or seek to have that requirement added as an amendment to section 1407.

\[f. \textit{Scope of Appellate Review}\]

Subsection 1407(e) limits appellate review of the Panel's action. There may be no review of a Panel decision denying a motion to transfer. A Panel order granting a hearing, and orders issued prior to an order disposing of a motion, may be reviewed only in the court of appeals having jurisdiction over the transferor district. Review of orders transferring cases or of orders subsequent to transfer is permitted only in the court of appeals having jurisdiction over the transferee court. The only review permitted by the statute is the filing of a petition for an extraordinary writ

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121. Id.
122. Id. at n.1. For example, the defendant initially served notice in the transferor court may raise motions to quash service or dismiss for want of jurisdiction.
123. Id.
under title 28, section 1651. The statute clearly limits review so that only one court of appeals will have jurisdiction over the reviewable issue. The drafters’ reasons for limiting review were expressed by Judge Becker during Senator Tydings’ subcommittee hearings on proposed section 1407. He stated that:

[I]f the actions to be transferred by the panel were pending in several circuits, and the transfer orders were entered in the district courts of the several circuits, review proceedings might be filed in several Circuit Courts of Appeals. This could easily result in conflicting decisions of the Courts of Appeals on the validity of the transfer of orders. Much delay could ensue, which would prejudice the efficient disposition of the litigation ordered to be transferred and defeat the purposes of the bill.

In order to avoid the confusion and delay which might otherwise result, paragraph (c) provides that the order of transfer, and such other orders as the panel may make, shall be entered in the office of the clerk of the district court of the transferee district and shall be effective when entered. Further, it is expressly provided in paragraph (e) that no proceedings for any review of an order of the panel may be entertained by any courts other than the United States Court of Appeals having jurisdiction over the transferee District Court and the Supreme Court of the United States. These provisions are very important because they avoid the possibility of multiple review proceedings and conflicting rulings which could frustrate and paralyze the operation of the temporary transfer procedures. At the same time paragraph (e) designates competent courts to entertain whatever review proceedings may be appropriate under the circumstances.

Review by mandamus in the court of appeals having jurisdiction over the transferee court, being the only review provided, avoids consideration of the merits of the issue and affords the appellate court the opportunity to order the lower court to perform some act. The legislative history indicates that this procedure is more expeditious than appeal, and therefore is consistent with the purpose of the statute since the efficient disposition of appellate review contributes to the efficient disposition of the litigation. The legislative history further states that review of the denial of an order to transfer is not considered necessary or desirable, because denial does not adversely affect the course of litigation. This is true in the narrowest sense since the Panel has shown itself to

126. 28 U.S.C. § 1651 (1964) provides:
(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

127. 1967 Hearings, supra note 18, at 18-19.

128. BLACK’S LAW DICTIONARY 1113 (4th ed. 1951) defines mandamus as a writ directed to, among others, an inferior court, commanding the performance of a particular act.

be extremely pragmatic in its approach to cases considered, and has given no indication of arbitrary or capricious tendencies. However, it is to be noted that if the Panel were to arbitrarily or capriciously deny transfer, the parties concerned would not have access to the advantages of transfer under section 1407,130 and therefore no recourse would be available. Moreover, under subsection 1407(c), the Panel would not even be required to conduct a hearing in those cases where transfer was denied because a hearing is required only when the transfer is ordered.131

The necessity for appellate review as a needed safeguard, may be determined from an examination of the Panel's past performance. The Panel has denied plaintiffs' motions to transfer for several reasons. In the *Eisler Patents* cases132 involving twenty-four actions in four districts, the Panel held that "no useful purpose contemplated by section 1407 would be served by the transfer of any of the pending cases to any other district."133 In the "*West of the Rockies* Concrete Pipe cases,134 the Panel refused to transfer one newly filed case to another district in which three cases were nearly ready for trial, holding that such transfer would not "promote the just and efficient conduct of these actions."135 In the *Western Liquid Asphalt* cases,136 the Panel refused to grant a motion made by plaintiffs because those parties lacked standing to file a motion for transfer.137 In the *Scotch Whiskey* cases138 a defendant's motion to transfer was denied on the ground that the just and efficient conduct of the two actions involved could not be furthered by a section 1407 transfer.139 In these instances, the Panel has demonstrated legitimate grounds for denial of transfer. The reasons given in each case — no useful purpose would be served by transfer, transfer would not promote the just and efficient conduct of the actions and lack of standing to move for transfer — were based on a fair appraisal of the facts and due consideration of all interests. Therefore there would appear to be no need for review of these orders denying transfer.

One writer has advanced the position that no appellate review of the Panel's transfer orders is necessary since "such an august membership should be sufficient to guard against any miscarriage of justice. There is no reason to assume that any court of appeals would be more qualified

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130. *See* notes 175–182 and accompanying text *infra*.
133. *Id.* The reasons given by the Panel as justification for its denial of transfer were that of the twenty-four cases involved, fifteen were pending in the Central District of California, thirteen of which were dismissed by the presiding judge: The remaining two cases were then being actively litigated. It may be surmised that the Panel was of the opinion that some or all of the cases pending in the other three districts would also be dismissed.
135. *Id.* at 1126.
137. *Id.* *See* text accompanying notes 107–10 *supra*.
139. *Id.*
than the panel to judge the issues involved." 140 In view of the considerations articulated by the Panel in its first thirty-nine orders, 141 the above argument seems to be convincing. The Panel has brought to bear on its decisions the collective judgment of its members; thus, it would seem that more, not less, judicial talent is applied to these rulings than would normally be the case with a three judge circuit court of appeals decision. 142 However, notwithstanding the Panel's enlightened discretion or its judicial expertise, the fact remains that decisions of the courts of appeals are subject to discretionary review by the United States Supreme Court, while there is no review whatsoever of a panel order denying transfer.

9. Exemption of Government Actions

Subsection 1407(g), added at the request of the Department of Justice, 143 excludes from the operation of section 1407 antitrust actions brought by the United States. The reasons given in support of this exception are that private plaintiffs would be induced "to file actions merely to ride along on the Government's cases," 144 that the delay caused by the additional filings in the Government's suit would disadvantage those injured competitors waiting to predicate their damage actions on the outcome of the Government cases; 145 and that there is no need for private actions to be joined with government actions since subsection 5(b) of the Clayton Act 146 tolls the running of the statute of limitations on their damage suits while the Government action is pending. 147 However, subsection 1407(g) permits the joining of any suit for damages brought by the United States under the antitrust laws 148 with a criminal prosecution. This is not inconsistent since in this instance the Government is suing in a proprietary capacity, the same as the private parties excluded by this subsection. 149 It is allowed, obviously, to promote the efficient conduct of

140. Comment, supra note 17, at 565-66.
141. See notes 103-105 supra.
142. 28 U.S.C. § 46(c) (1964) provides that cases before the Court of Appeals: shall be heard and determined by a court or division of not more than three judges, unless a hearing before the court in banc is ordered by a majority of the circuit judges of the circuit.
28 U.S.C. § 292(a) (1964) provides in relevant part that:
The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires.
144. Id.
145. Id. at 1902-03.
148. 15 U.S.C. § 15(a) (1964) provides that:
Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover actual damages by it sustained and the cost of suit.
actions, as provided in subsection 1407(a). To prohibit such joinder of
government criminal and civil actions would be contrary to the purpose
of the statute.

3. Impact of the Statute

The Panel's performance has fulfilled the expectations of the drafters
of section 1407. They have transferred actions to suit the convenience of
parties and witnesses while promoting the efficient administration of
justice. They have demonstrated an appreciation for the unique factors
of individual actions before them and have given sound reasons for the
disposition of those actions. Some areas in which statutory amendment
might be considered in order to give legislative approval to policies adopted
by the Panel are: jurisdiction of transferor courts; standing to file motion
for transfer and review of orders denying transfer. While there has been
no indication that these potential amendments are necessary at this time, the
legislative history and the statute are silent on the first two points. This
suggests that those two situations were not considered by Congress prior
to passage of section 1407. Even though the Panel has not abused its
power, nor acted arbitrarily or capriciously, the legislature could now
express its judgment on these points. As for the limited scope of review,
the legislature has clearly expressed its view. There does not appear to
be any present need to challenge the prohibition of review of orders
denying transfer, but that need could arise in the future.

B. Panel Rules of Procedure

The Rules of Procedure150 adopted by the Panel pursuant to section
1407(f) implement certain provisions of the statute161 and prescribe

150. See note 5 supra. The Rules are:

Rule 1. Definitions

As used in these Rules "Panel" means all available but not less than four
members of the Judicial Panel on Multidistrict Litigation appointed by the Chief
Justice of the United States pursuant to Section 1407, Title 28, United States
Code.

"Clerk" means the person or official appointed by the Panel to act as Clerk
of the Panel and shall include those deputized by the Clerk to perform or assist
in the performance of his duties.

"Chairman" means the Chairman of the Judicial Panel on Multidistrict
Litigation appointed by the Chief Justice of the United States pursuant to Section
1407, or the member of the Panel designated by the Panel to act as Chairman in
the absence or inability of the appointed Chairman.

A "tag-along case" refers to a civil action apparently sharing common ques-
tions of fact with actions previously transferred under Section 1407 and which
was filed or came to the attention of the Panel after the initial hearing in the
litigation.

Rule 2. Place of Keeping Records and Files

The records and files of the Panel shall be kept by the Clerk in the offices
of the Panel. Records and files may be temporarily removed to such places at

151. See rules 1-7, and 9-11, note 150 supra. Rule 3 is analogous to Fed. R.
App. P. 46; rules 4-7 are analogous to Fed. R. App. P. 25, 27-28, 31 and 32 re-
spectively.
methods of dealing with three situations not covered by the statute. These items include: (1) designation and disposition of a *tag-along* case — "a civil action apparently sharing common questions of fact with actions previously transferred under section 1407 and which was filed or came to the attention of the Panel after the initial hearing in the litiga-

150. (Continued)—

such time as the Panel or the Chairman of the Panel shall direct.

Rule 3. Admission to Practice Before Panel

Every member in good standing of the Bar of any District Court of the United States is entitled without condition to practice before the Judicial Panel on Multidistrict Litigation. No such member shall be required to employ or associate local counsel. There shall be no fee for admission to practice before the Panel.

Rule 4. Place and Manner of Filing of Papers

All papers filed for consideration by the Panel shall be filed with the Clerk of the Panel by mailing to the Clerk, Judicial Panel on Multidistrict Litigation, c/o Supreme Court Building, Washington, D. C. 20544, or by delivering to the office of the Panel, Room 610, Export-Import Bank Building 811 Vermont Avenue, N.W. Washington, D. C. No fee shall be required for the filing of any such papers. An original and nine copies of each paper shall be filed with the Clerk.

Rule 5. Service of Papers Filed

Papers filed with the Clerk shall be accompanied by proof of service on all other parties in all the cases involved in the litigation. Service and proof of service shall be made as provided in the Federal Rules of Civil Procedure.

Rule 6. Motion Practice

All requests for action by the Panel shall be made by written motion as provided in the Federal Rules of Civil Procedure. Every motion shall be accompanied by a brief in support thereof in which the factual and legal contentions of the movant shall be concisely stated in separate portions of the brief with citation of applicable authorities. See Rule 28, Federal Rules of Appellate Procedure. Within fifteen days after service of a motion, the opposing party or parties shall file and serve a brief in opposition thereto. The movant may, within five days after service of a brief in opposition, file a brief in reply.

Rule 7. Form of Papers Filed

(a) Averments in any motion seeking action by the Panel shall be made in numbered paragraphs, each of which shall be limited, as far as practicable, to a statement of a single factual averment. Responses to averments in motions shall be made in numbered paragraphs, each of which shall correspond to the number of the paragraph of the motion to which the responsive paragraph is directed. Each responsive paragraph shall admit or deny wholly or in part the averment of the motion, and shall contain the respondent's version of the subject matter when the averment or the motion is not wholly admitted.

(b) Each document filed shall be flat and unfolded, shall be plainly written, typed in double space, printed or prepared by means of a duplicating process, without erasers or interlineations which materially deface it, on opaque, unglazed, white paper approximately 8-1/2 x 11 inches in size with numbered lines, and shall be secured on the left margin. Each shall bear the caption, descriptive title and number, if any, of the action or proceeding in which it is filed, and on the final page thereof shall contain the name, address and telephone number of the attorney in active charge of the case.

Rule 8. Submission of Proof of Facts

So far as practicable and consistent with the purposes of Section 1407 the offering of oral testimony before the Panel shall be avoided. Accordingly, oral testimony shall not be received except upon notice motion and order of the Panel expressly providing for it. Proof may be submitted as provided in the Federal Rules of Civil Procedure.

Rule 9. Withdrawal of Exhibits

Exhibits submitted to the Panel may be returned to or withdrawn by counsel or a party on order of the Chairman or the Panel.

Rule 10. Failure to Comply with Rules

Documents which fail to comply with the provisions of these Rules shall be filed by the Clerk, subject to being stricken by the Panel on its own initiative or
tion;'' \(152\) (2) hearing procedures and (3) motions for extensions of time. \(153\) Each of these matters not considered in the legislative history nor mentioned in the statute will be examined.

1. **Tag-along case and the conditional transfer order**

Rule 12 authorizes the Clerk of the Panel to enter a conditional order transferring any *tag-along case*. \(154\) The need for some method of

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152. Rule 1, note 150 *supra*.

153. The statute does not mention the authority of the Clerk of the Panel. Through the rules, the Panel delegates significant authority to the Clerk. Rule 12 authorizes the Clerk to conditionally transfer *tag-along cases*, subject to review by the full Panel if transfer is opposed. Rule 14 authorizes the Clerk to act on all applications for an extension of time to file pleadings or to perform other acts required by the rules. *E.g.*, File motions under rule 6; comply with rule 11 *Show Cause Orders*; or file notice and briefs in opposition to rule 12 conditional transfer orders.

154. Upon entry, the conditional order is automatically stayed for ten days during which time any party may file notice of his opposition to the transfer. When such notice is filed, the conditional order is stayed pending the further order of the Panel. A party opposing transfer must file, within ten days of his notice of opposition, a motion to vacate the conditional order accompanied by a supporting brief and must also request a hearing if one is desired. A party failing to file his motion and brief in opposition is deemed to have withdrawn his opposition to transfer. *See* rule 12, note 150 *supra*.

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150. *(Continued)*—

motion of a party.

Rule 11. *Show Cause Orders*

Civil actions may be transferred on the initiative of the Panel pursuant to 28 U.S.C. § 1407(c) (1). If transfer of the particular multidistrict litigation is being considered for the first time, an order will be entered by the Panel directing the parties to show cause why the actions should not be transferred for consolidated or coordinated pretrial proceedings. At the discretion of the Panel, a hearing may be set at the time the show cause order is entered. Any party may file a response to the show cause order and an accompanying brief within fifteen days of the filing of said order unless otherwise provided for in the order. Within five days of receipt of a party's response or brief, any party may file a reply brief limited to new matters. Responses and replies thereto shall be filed and served in conformity with Rules 4, 5, 6, and 7 of these Rules.

Rule 12. *Conditional Transfer Order*

Upon learning of the pendency of a tag-along case the Clerk of the Panel shall as soon as practical enter a conditional order transferring it to the previously designated transferee court on the basis of the prior hearing or hearings and for the reasons expressed in previous opinions and orders in the litigation. The effective date of this order shall be stayed ten days from the entry thereof to afford all parties the opportunity to oppose the transfer, unless the stay is further extended by the Panel.

Any party opposing the transfer shall file a Notice of Opposition with the Clerk of the Panel within the ten-day period. Upon receipt of a timely filed Notice of Opposition the Clerk shall enter an order extending the stay of the conditional transfer order until further order of the Panel. Within ten days of the filing of its Notice of Opposition, the opposing party shall file and serve on all parties a motion to vacate the conditional transfer order and a brief in support thereof and shall notify the Panel if a hearing on the opposition is desired. Failure so to file and serve shall be deemed withdrawal of the opposition.

Motions to vacate orders of the Panel and responses thereto shall be governed by Rules 4, 5, 6, 7 and 8 of these Rules.

Rule 13. *Hearings*

The Panel shall convene whenever and wherever desirable or necessary in the judgment of the Chairman or of four members of the Panel. The Chairman
transferring related cases filed after the Panel initially considered the litigation concerned is apparent. The Panel members each have full time judicial duties to perform in their respective courts, and could not hope to continuously oversee disposition of related litigation. The delegation of the power to transfer conditionally cases related to litigation considered earlier by the Panel is an efficient method of keeping pace with related litigation while preserving all parties' rights to oppose transfer and to demand a hearing by the Panel. Sixteen percent of the cases considered by the Panel in its first six months of operation were *tag-along cases*,¹⁵⁵ which would otherwise have had to wait for formal hearing by the Panel before they could be transferred. This rule well defines the guidelines that the Clerk is to follow and the procedure for review of the Clerk's decision adequately safeguards the interests of all parties.


150. (Continued)—

shall determine which matters shall be set for hearing at each session and the Clerk shall give notice to counsel for all parties involved in the litigation of the time, place and subject matter of such hearing.

Counsel for those supporting transfer under Section 1407 and counsel for those opposing such transfer are to meet separately prior to the hearing for the purpose of organizing their arguments and selecting spokesmen to present all views without duplication.

Unless otherwise ordered by the Panel, one hour will be allotted for matters being considered for the first time and thirty minutes shall be allotted for tag-along cases. The time shall be divided equally among those favoring and those opposing transfer. Counsel for those parties favoring the transfer will be heard first except in hearings on tag-along cases in which the objecting party will be heard first.

The issuance of a show cause or hearing order does not affect or suspend orders and discovery proceedings in the District Courts in which the cases are pending.

Rule 14. Motions for Extensions of Time

Any motion or application for an extension of time to file a pleading or perform an act required by these Rules may be acted upon by the Clerk, whether addressed to him, to the Panel or to a Judge thereof. Any party aggrieved by the Clerk's action on such motion or application may submit its objections to the Panel for consideration by the Panel.

Rule 15. Remand

(a) The Panel shall consider remand of each transferred action or any separable claim, cross-claim or third-party claim at or before the conclusion of coordinated or consolidated pretrial proceedings on

(i) motion of any party filed with the Clerk of the Panel in conformance with Rules 5, 6, 7 and 8 of these Rules, or

(ii) suggestion of the transferor or transferee Judge, or

(iii) its own initiative.

(b) Actions will be remanded to the district from which they were transferred unless an order has been signed by the designated transferee Judge transferring an action to another district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406(a). Such actions will be remanded by the Panel to the district designated in the Section 1404(a) or Section 1406(a) order.

(c) Actions terminated in the transferee court by settlement, dismissal or summary judgment shall not be remanded by the Panel. The original file and a copy of the termination order should be returned to the Clerk of the original transferor court.
The conditional transfer order has been opposed in six cases. In five of these cases, the party opposing the transfer waived hearing. In one of the Grain Shipment cases, a defendant in an action brought in the District of Kansas, the transferee district for this litigation, filed a motion with the Panel "to add his action to those already included in Docket No. 22 [actions previously transferred to the District of Kansas by the Panel]." The Panel denied the motion stating:

Had this action been commenced outside of the District of Kansas, we would have undoubtedly used a conditional transfer order [footnote omitted] to transfer it to the District of Kansas. We have not used conditional transfer orders to assign other cases commenced in transferee courts to the judge assigned by the Panel to conduct coordinated or consolidated pretrial proceedings [citing at n. 3: More than forty tag-along cases originally filed in transferee courts have been assigned to the Panel-designated judge by the transferee court itself.] and we are disinclined to do so here. We think it unseemly for this Panel to interfere with the internal affairs of any district court with respect to assignment of actions filed in it before a motion to transfer has been submitted to the district court in which the affected actions are pending. We have no doubt that the transferee court, on proper application of a party or sua sponte, will take whatever steps are necessary to insure that this action is included in coordinated or consolidated pretrial proceedings being conducted by Judge Templar.

The denial of defendant's motion was made without prejudice to the right of any party to request the transferee court to assign the action to Judge Templar for inclusion in coordinated pretrial proceedings.

156. Since tag-along cases are transferred by the Clerk of the Panel through the conditional transfer order, the full Panel does not consider the merits of the transfer unless a party files notice of opposition. Only orders of the Panel are reported in Federal Supplement. Conditional transfer orders entered by the Clerk are not reported. The six cases in which a party opposed transfer are: In re Grain Shipments, United States v. Missouri-Kan.-Tex. R.R., 304 F. Supp. 457 (JPML 1969); In re Antibiotic Drugs, England v. Charles Pfizer & Co., 303 F. Supp. 1056 (JPML 1969); In re Gypsum Wallboard, 303 F. Supp. 510 (JPML 1969); In re Plumbing Fixtures, 302 F. Supp. 795 (JPML 1969); In re Gypsum Wallboard, 302 F. Supp. 794 (JPML 1969); In re Antibiotic Drugs, 301 F. Supp. 1158 (JPML 1969).

157. See note 156 supra. The only case in which a hearing was held was In re Antibiotic Drugs, England v. Charles Pfizer & Co., 303 F. Supp. 1056 (JPML 1969).

158. The procedure used by the Panel in disposing of each of these cases consisted of three steps: (1) the motion to vacate the conditional transfer order was denied; (2) the mandatory stay provided by rule 12 was lifted and (3) the Clerk of the Panel was directed to transmit the order to the transferee court for filing and distribution. See cases listed in note 156 supra.


160. Id. at 4.


162. Id. As of the date of this writing, the defendants had not requested the District of Kansas to assign the action to Judge Templar for inclusion in the coordinated pretrial proceedings. Letter received from Hon. George Templar, Judge of
2. Hearing Procedures

Rule 8 expresses the Panel’s preference for receiving testimony only at formal hearings and in accordance with the Federal Rules of Civil Procedure. Rule 13 defines the procedure for conducting hearings. This rule also requires opposing counsel for all parties to meet separately prior to the hearing to organize their argument and select a spokesman to represent their position. Total argument time for litigation not previously considered is limited to one hour. Consequently, all parties on each side of the issue must present their contentions in an equally divided portion of that hour. This time limitation could be burdensome in litigation involving numerous parties on each side with dissimilar interests, unless mitigated by the Panel.

The last sentence of rule 13 states that “the issuance of a show cause or hearing order does not affect or suspend orders and discovery proceedings in the District Courts in which the cases are pending.” This clause clearly indicates that only the Panel’s order transferring cases will remove a case from a district court’s jurisdiction and until such an order is issued, the district court has full control over the proceedings in that case. However, once transfer is ordered, the transferor court no longer has jurisdiction to make any determinations in the action. In some instances involving tag-along cases, the parties have waived a hearing and permitted the decision to rest on briefs submitted. In another case,
initiated by plaintiffs' motion to transfer, all counsel involved stipulated to a waiver of the hearing previously ordered, and agreed that a section 1407 transfer to the Northern District of California was appropriate.\textsuperscript{168}

Rule 15 explains who may move for remand of an action, or any separable part of an action, pursuant to subsection 1407(a).\textsuperscript{169} This rule also delineates the authority of a transferee judge under subsection 1407(b) to include the power to transfer for trial cases before the transferee court for pretrial proceedings. This power to transfer for trial may be exercised under the change of venue statute\textsuperscript{170} or under the cure or waiver of defects statute\textsuperscript{171} While district court judges have this power, the statute does not explicitly state that transferee judges do also. The Panel's rule clarifies this question.\textsuperscript{172}

3. \textit{Motions for Extensions of Time}

Rule 14 authorizes the Clerk of the Panel to act on all applications for an extension of time to file a pleading or perform a required act. This broad delegation of authority to the Clerk is necessary because all judges of the Panel have full time duties in their respective courts, each in different circuits\textsuperscript{173} located at a considerable distance from the Panel's offices in Washington, D.C. The Clerk's action under this rule, as well as under Rule 12, is reviewable by the Panel upon application by the aggrieved party.\textsuperscript{174} The Panel's delegation of limited authority to the Clerk of the Panel meets an obvious need to permit continuous supervision of multidistrict litigation, which none of the Panel members are in a position to provide. The Rules allow review of the Clerk's action by the full Panel where requested, and this seems adequate to protect all interests involved. The Panel's endorsement of a transferee judge's authority to consolidate for trial actions transferred to his court for pretrial proceedings only is a beneficial extension of the statute, consistent with the purpose of section 1407. It may also be the seed for an amendment or an addition to the Judicial Code permitting the Panel to transfer multidistrict litigation for consolidated trial purposes, in addition to the existing power to transfer for consolidated pretrial purposes.

\textsuperscript{168} In re Water Meters, 304 F. Supp. 873 (JPML 1969). Notwithstanding the stipulations of the litigants, the Panel held a hearing in this case, at which they also considered the transfer of four cases not included in the original motion. Transfer of all actions in the litigation was ordered. Had the Panel not considered the four additional cases, no hearing would have been required.

\textsuperscript{169} Rule 15(a) provides that the Panel may consider remand when requested by one of the parties, by the transferor or transferee judge, or on its own initiative.


\textsuperscript{172} The Panel held that "[s]ections 1404(a), 1406(a) and 1407 are not mutually exclusive and, when appropriate, should be used in concert to effect the most expeditious disposition of multidistrict litigation." In re Koratron, 302 F. Supp. 239, 242 (JPML 1969).

\textsuperscript{173} This geographical representation is required by Section 1407(d) which provides that no two judges of the Panel shall be from the same circuit.

\textsuperscript{174} Requests for extensions in the courts of appeals are disposed of by a judge of the court. Fed. R. App. P. 26(b).
Coordinated discovery proceedings in extensive litigation such as the electrical equipment cases permits more comprehensive discovery directed by larger plaintiff's prestigious, high powered counsel being made available to all parties participating in the transferee district, at a more economical cost to each party.\textsuperscript{175} Under subsection 1407(b), court supervised discovery\textsuperscript{176} conducted before a deposition judge according to a timetable ordered by the transferee court, serves to frame issues for trial sooner, allows a more rapid and orderly progression to trial, and prevents delays in the discovery schedule by having a judge present to immediately rule on objections raised. In the larger litigation lead counsel may divide areas of responsibility. For example in litigation such as the electrical equipment cases involving separate product lines, when discovery in one product line is complete, counsel in charge may prepare for trial in that product line for all plaintiffs, while associate lead counsel commences discovery in another product line. This results in a reduction of the interval necessary between completion of discovery and trial.\textsuperscript{177} The net effect of these advantages to a plaintiff is that defendants in complex or protracted litigation no longer can expect to "achieve settlement at lower levels...\textsuperscript{178}"

\begin{footnotesize}
\textsuperscript{175} Cf. O'Donnell, supra note 22, at 139 where the author stated:

The benefits from a national disposition program accrue across the board to all plaintiffs. First, costs are lessened and, in fact, there may be virtually no cost to a particular individual plaintiff. Like it or not, from the defendants' standpoint the potential cost to be incurred by plaintiffs in prosecuting a triple damage case is a factor which may lead to a favorable, reasonable and satisfactory settlement under ordinary circumstances. Second, and more important, each plaintiff is handed a ready-made case to the extent that expert lead counsel can establish it and, in any event, a far better case than most plaintiffs' counsel could ever establish without the coordinated program.

Earlier, the author stated that:

[T]he amount and usefulness of information which may be obtained from a witness under examination can be dependent upon counsel's ability was underscored...in an opinion denying a motion for release of a grand jury transcript: "...where disclosure was not made it was more due to the types of questions asked than to any refusal to answer or failure of memory." Atlantic City Electric Company v. General Electric Company, ¶ 71,382 (S.D.N.Y., February 15, 1965); Atlantic City Electric Co. v. General Electric Co., 244 F. Supp. 707, (S.D.N.Y. 1965).

\textit{Id.} at 139 n.22.

See also 1967 Hearings, supra note 18, at 29; MANUAL, supra note 8, at 32 (use of document depositories), 34-56 (proof of facts in complex cases — computer, samples, polls, and survey evidence).

\textsuperscript{176} See text accompanying note 41 supra, and MANUAL, supra note 8, at 19 where it states:

A crucial step in the first phase of judicial management of complex cases is the prompt entry of an order staying all pretrial proceedings until an initial schedule of discovery is approved. \textit{Caveat:} Except in rare cases for good cause appearing, there should, however, be no stay of discovery which is not accompanied by a positive plan for the expeditious accomplishment of discovery or disposition of the litigation without discovery. (Footnotes omitted).

\textit{See also} Bane, supra note 22, at 124.

\textsuperscript{177} O'Donnell, supra note 22, at 141.
\end{footnotesize}
become tired or discouraged." One questionable advantage experienced by plaintiffs in the electrical equipment cases, and presumably available in other treble damage cases, is the subtle prejudice against defendants convicted earlier of a criminal antitrust violation. The unfavorable publicity and the unavoidable presumption of guilt tend to permit plaintiffs, to the defendants' detriment, to associate their interests with the "general welfare clause of the United States Constitution" and to focus attention on the national character of the issues.

One disadvantage to plaintiffs is that in the coordinated pretrial proceedings the interests of smaller parties may be subordinated to the legitimately greater interests of larger parties on the same side. This may be so because of practical necessity, or because of pressure from the court. However, in such instances, parties who have been denied the opportunity to explore fully their particular interests in the consolidated pretrial proceedings do have an alternative remedy. That is, they may conduct local discovery when the case is remanded to the transferor district for trial. Such local discovery would, of course, be conducted by the individual litigant's counsel, who would no longer be under the aegis of lead counsel. If local discovery in the transferor district prior to trial is necessary, it may be questioned what benefit this particular party has gained by participating in the coordinated proceedings. Another disadvantage to transfer under section 1407 is that a smaller party with a relatively minor interest in the outcome of litigation may be forced to participate in the coordinated proceedings and then may be dissatisfied with the result.

178. Bane, supra note 22, at 129. Cf. In re Antibiotic Drugs, 301 F. Supp. 1158 (JPML 1969), where defendants' tentative settlement offer of $120,000,000 in satisfaction of all claims brought in 101 actions was refused by some plaintiffs.

179. See note 24 supra, discussing the use of such a conviction as prima facie evidence of guilt in a civil action.


181. Id. at 140 n.27 where the author states:

"In the first national deposition taken in the electrical cases plaintiffs' lead counsel moved for production of a memorandum prepared after the witness had testified before the grand jury. Plaintiffs' lead counsel stated in support of the motion: "And certainly there is no public policy that protects [the memorandum] and even if there were, in the case or cases of national magnitude and public importance of this kind here, I think everybody is now trying to move discovery along; it is idle . . . to . . . ask this witness a lot of questions when he has got a document which we ought to see . . ." (National deposition of A.C. Allen, October 1, 1962, pages N-71-72).

The memorandum was produced.

182. 1967 Hearings, supra note 18, at 96, where it is stated:

"Moreover, while the cases are being "coordinated", many of the proceedings will be within the control of counsel for a small number of the litigants. As the number of cases and parties subject to mass handling increases, the attention and respect given to the positions of the smaller parties or lesser interests in the litigation inevitably diminishes. Such mass proceedings may well raise substantial constitutional questions affecting, as they do, each litigant's right to have his case handled by his own counsel and his right to due process."

See also Senate Procedures for Coordinated Multi-District Litigation: A Nineteenth Century Mind Views with Alarm, 14 ANTITRUST BULL. 91, 92 (1969).

183. The Panel exerts pressure on the parties by requiring them to meet prior to a hearing, for the purposes of organizing their argument and selecting a spokesman to present the views of all parties on one side in the one-half hour argument time allowed. See rule 13.

travel a great distance at considerable expense to litigate, unless he is willing to concede the issue. Such a situation arose in the Grain Shipment cases where one case was transferred from the Southern District of Texas to the District of Kansas and the amount in controversy was $365.30. In that instance a defendant was disadvantaged but the principle is equally applicable to a plaintiff.

Smaller parties may not be the only ones to resist transfer. In the Children's Books cases, each group of litigants wanted the Panel to designate a different transferee district, namely the one most convenient to the members of each group. The Panel characterized such a position as a "worm's eye view of Section 1407." The Panel declined to select either an east coast district or a west coast district, but opted for the Northern District of Illinois, which happened to be the "center of gravity" of the litigation. One critic of section 1407, commenting on his experiences as defense counsel in the electrical equipment cases, complained of the following consequence, which works to plaintiffs' advantage:

These, and many other cases, were shipped about the country to suit the convenience of the judges, and a major factor which seemed to determine their destination was the willingness of a district judge to accept them. All efforts to obtain appellate relief failed and, in the Philadelphia cases, the Court of Appeals and the Supreme Court refused even to hear argument.

As the practice of transferring cases expanded it gave every appearance of being employed entirely without regard to the convenience of parties and witnesses and either for the relief of judges who didn't want to take the time and trouble to try some difficult cases, or, more importantly, for the purpose of clubbing into settling their cases parties who did not show what the judges thought was sufficient enthusiasm for disposing of their cases in that manner. A great mass of cases were transferred to and consolidated in Chicago for trial and trials were threatened involving many parties and many more individual transactions. Since it became apparent to the defendants that a trial involving such a conglomerate mass of separate transactions would be completely unmanageable and beyond the power of any jury to resolve, no alternative was left but to settle great groups of cases in

185. Cf. Seeley, supra note 182, at 94, where the author says:

It is not alone . . . the cost of consolidated multi-district litigation which is unfair to small defendants. The cost of participating in frequent conferences of counsel, of producing documents in large multiples, of traveling to distant places to attend hearings or depositions, or to inspect records, is indeed considerable. What is more discouraging, however, is the feeling which must come to them that they have no voice in what is going on and that the counsel through whom they had hoped to be represented effectively are nearly as helpless as they themselves to stem the onrushing tide of superefficiency.

187. Id. at 458. See note 206 infra, for an explanation of why the Panel ordered this action transferred.
189. Id. at 386.
190. Id. at 387.
bundles. In this manner some litigants were deprived of any opportunity of presenting such defenses as they had to individual claims or portions of claims.192

And in regard to the effectiveness of the hearing required by subsection 1407(c), that same critic said:

[B]y the time the Co-Ordinating Committee decided to employ the device of intercircuit transfer . . . at least the preliminary decisions to make such transfers were arrived at by the judges in private conversations with each other prior to receiving the factual and legal arguments of counsel, at least counsel for the defendants. Such "hearings" as were held on sua sponte orders to show cause why the transfers should not be made had no effect upon the outcome since for all practical purposes the decisions to transfer had already been made.193

Whatever advantage was available to a party in having the same judge preside over both pretrial proceedings and the trial is lost where the case is remanded for trial to the transferee district under subsection 1407(c). Even though the Manual recommends the assignment of all matters, pretrial as well as trial, to a single judge,194 this may not be possible where there are a large number of actions. For example, in the electrical equipment cases, 1,933 actions were handled by 34 judges over a period of five years.195

B. From the Defendant's Viewpoint

Defendants ostensibly receive some benefits from multidistrict litigation procedures. The establishment of national document depositories should make document production less expensive, less time consuming, and less disruptive.196 The existence of such depositories enables the court and the parties to keep track of what has been produced, thus simplifying the process for obtaining rulings on requests for discovery or protective orders.197 The use of national depositions, as utilized in the electrical equipment cases, obviously benefits defendants in that individuals involved may be deposed once, rather than thirty-four times in thirty-four different locations, as might otherwise be the case.198 The presence of a judge at pretrial proceedings enables the defendant to obtain immediate rulings on objections, request for production of documents or preclusion orders.199

192. Id. at 97.
193. Id.
194. MANUAL, supra note 8, at 12.
195. See notes 23, 26 and accompanying text supra.
196. See MANUAL supra note 8, at 32. See also Bane, supra note 22, at 125-26.
197. MANUAL, supra note 8, at 32.
198. See, e.g., O'Donnell, supra note 22, at 137.
199. Id. at 138. See MANUAL, supra note 8, at 76.
These same advantages however, may also have a detrimental impact on defendants. The information obtained from national document depositories and from national depositions is also available to all plaintiffs.\textsuperscript{200} Traditional defense tactics are no longer available.\textsuperscript{201} The particular interests of smaller defendants may be subordinated to the interests of larger defendants,\textsuperscript{202} and smaller parties with a minor stake in the outcome may be forced to concede the issue or litigate at great expense.\textsuperscript{203}

C. From the Court’s Viewpoint

The judiciary benefits greatly from the transfer provided by section 1407. Court dockets in many districts may be congested as a result of an incident giving rise to multidistrict litigation. By resorting to section 1407, these cases may be consolidated in one district, and assigned to a single judge. Thus, even though one judge must devote more of his time to the particular litigation, other judges are released to consider other litigation. It cannot be disputed that this is a more efficient use of judges’ time. The presence of a judge at the pretrial proceedings prevents delay, contributing to the more efficient administration of justice.\textsuperscript{204} The suggestion has been made that the Panel would be free under section 1407 to transfer litigation to any district it desires.\textsuperscript{205} While it might seem attractive to permit the judiciary to select the forum in which litigants must try their cause, the Panel has properly refrained from transferring cases to particular districts for reasons of judicial convenience alone. Even in the case where actions were transferred to the “center of gravity” of the litigation involved, the Panel had legitimate reasons for its order.\textsuperscript{206} Furthermore, the Panel is not forced to transfer actions to districts with less crowded dockets in order to efficiently utilize the time of those judges available. Once transfer is determined to be appropriate,\textsuperscript{207} the Panel

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\textsuperscript{200} See text accompanying note 175 supra.
\textsuperscript{201} See note 178 and accompanying text supra.
\textsuperscript{202} See notes 182–83 and accompanying text supra.
\textsuperscript{203} See notes 185–87 and accompanying text supra.
\textsuperscript{204} But see Seely, supra note 182, at 92 where the author opines:

The chief virtue claimed for consolidated multi-district procedures is their efficiency in disposing of a great volume of litigation with a minimum of time and effort. Efficiency, however, is not necessarily the highest goal of the law. There will come a day, perhaps sooner than we imagine, when someone will devise a computer capable of deciding cases in seconds and motions in milli-seconds. One can hardly look forward to that day with any satisfaction, however, except from the premise that the main purpose of the courts is to get rid of litigation by the fastest means possible.

\textsuperscript{205} Bane, supra note 22, at 130.
\textsuperscript{206} In re Library Editions of Children's Books, 297 F. Supp. 385, 387 (JPML 1968) where the court said:

A number of reasons support [transfer to the Northern District of Illinois]. . . . The United States filed its seminal antitrust actions in that district and of course, the grand jury documents relating to the actions are in Chicago. Many of the plaintiffs in the instant cases sought to intervene in the Government’s cases; many applied to the district court for release of documents subpoenaed in connection with the grand jury’s investigation before the Government filed suit.

\textsuperscript{207} See notes 60–65 and accompanying text supra for considerations taken into account by the Panel before ordering transfer.
may request the assignment of a judge from any circuit to conduct pretrial proceedings in the transferee district. This offers the same efficient use of the judge-hour without forcing the litigants to travel to a forum selected as the most convenient for the judiciary.

Some objectionable effects of section 1407 on the judiciary are noticeable. In pretrial proceedings of private antitrust actions, judges must resist the prejudicial impact of a defendant's prior criminal antitrust conviction. They must also resist the subtle identification of plaintiffs' interests with the public interest. While pressure exists on an individual judge to rule on the class action issue, this would also be true without section 1407. Finally, there is the consideration that litigants who otherwise might not have the inclination nor resources to file suit would file, as they are entitled to by law with the expectation of realizing the advantages of a section 1407 transfer of multidistrict litigation considered earlier.

V. Conclusion

The Panel has demonstrated consistent, pragmatic judgment in deciding whether related litigation should be transferred under section 1407. Its orders and opinions have considered both sides to questions presented, and it has made reasonable, well justified determinations, consistent with the intent of the drafters and the legislature. The Panel's Rules of Procedure make necessary adjustments to normal judicial procedure to accommodate the unique conditions created by section 1407.

It has been shown that transfer under section 1407 generally works for the benefit of the judiciary and plaintiffs. The apparent benefits to defendants may, in some instances, be offset by the loss of some traditional advantages defendants have known. The Panel's action is compatible with the statute, its Rules of Procedure and the Manual. Counsel familiar with each of these should be able to predict accurately the disposition of actions before the Panel.

F. J. Nyhan

208. 28 U.S.C. § 1407(b) (Supp. IV, 1969), and see note 72 supra.
209. See notes 180-81 and accompanying text supra.
210. See Manual, supra note 8, at 29.