THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION: TIME FOR RETHINKING

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[I]t is time for the Panel [and Congress] to reevaluate and redefine the future use of section 1407.¹

The Judicial Panel on Multidistrict Litigation (Panel) is in its twenty-third year of existence. It was created to coordinate the discovery, or pretrial, phase of cases involving common questions of fact that have been filed in different federal district courts.² The Panel's objective is to promote efficient and expeditious processing of these factually related cases.³ It has affected tens of thousands of cases in the federal judicial system⁴ and, no doubt, will continue

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¹ Stanley J. Levy, *Complex Multidistrict Litigation and the Federal Courts*, 40 *FORDHAM L. REVIEW* 41, 66 (1971).

² See H.R. REP. NO. 1130, 90th Cong., 2d Sess. 1 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1898; S. REP. NO. 454, 90th Cong., 1st Sess. 3 (1967).

³ See H.R. REP. NO. 1130, *supra* note 2, at 2, *reprinted in* 1968 U.S.C.C.A.N. at 1899.

⁴ See Patricia D. Howard, *A Guide to Multidistrict Litigation*, 124 F.R.D. 479 (1989). Between September 1968 and June 1988, over 10,200 actions were transferred by the Panel. Combining these cases with the 6,500 that were already pending in the transferee districts, nearly 17,000 cases were consolidated by the Panel during its first 20 years. See *id.* at 480. There is no indication that the number of transfers is diminishing. A monumental transfer of gargantuan proportions took place this past summer. After refusing to consolidate various asbestos litigations on five different occasions, the Panel transferred 26,639 asbestos cases to Judge Charles R. Weiner in the Eastern District of Pennsylvania. See *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 418 (J.P.M.L. 1991) (reasoning that "this litigation has reached a magnitude . . . that threatens the administration of justice and that requires a new, streamlined approach").

In addition to the Panel's obvious impact on an action it transfers, the Panel may affect cases in subtler ways. A litigant's viewpoint on the virtues of multidistrict litigation may influence the choice of judicial system in which to litigate; the availability or possibility of consolidation in federal district courts may encourage or discourage litigants from bringing their actions in or removing their actions to federal court. Additionally, a plaintiff who is in the federal system yet unable to participate effectively in proceedings transferred to a distant forum may be encouraged to settle. Although less likely, a defendant, too, may prefer settlement to consolidation.

to do so. The Panel's role in multidistrict litigation, however, needs to be enhanced.

The statute governing the Panel, 28 U.S.C. § 1407,⁵ permits the Panel to transfer cases solely for pretrial purposes—it is forbidden to transfer cases for consolidated trial.⁶ Nonetheless, through manipulation of other venue statutes, the courts receiving the cases consolidated by the Panel often decide on their own to retain the cases for trial. Despite the benefits that may be realized from this practice, Congress's scheme for multidistrict litigation does not permit these courts to try the transferred actions. Moreover, the "experts" in multidistrict litigation—the judges on the Panel—are completely eliminated from the serious decision of whether to consolidate for trial.

This Comment addresses the impropriety and shortcomings of the ad hoc system developed by the courts to try the cases transferred for pretrial proceedings. Yet recognizing the advantages of consolidated trial in some instances, this Comment urges modification of § 1407 to permit the Panel to consolidate cases for trial. Part I provides a brief account of the events giving rise to the Panel's creation. A short explanation of the Panel's purpose and operation follows in Part II.⁷ Part III discusses techniques for terminating litigation in the transferee forum.⁸ Termination can occur through dispositive motions during pretrial (Part III.A) or through trial in the transferee forum (Part III.B). The benefits of consolidated trial are reviewed in Part III.C.

Part IV.A analyzes the primary method of effecting trial in the transferee court: using § 1404(a)⁹ in conjunction with § 1407. It demonstrates that this practice violates the legislative history,

⁵ 28 U.S.C. § 1407 (1988).

⁶ See *id.* § 1407(a).

⁷ Because many fine articles comment on Panel "basics," see, e.g., Robert A. Cahn, *A Look At the Judicial Panel on Multidistrict Litigation*, 72 F.R.D. 211, 212-19 (1977); Wilson W. Herndon & Ernest R. Higginbotham, *Complex Multidistrict Litigation—An Overview of 28 U.S.C. § 1407*, 31 BAYLOR L. REV. 33, 37-48 (1979); Levy, *supra* note 1, at 44-58; Robert J. Ward, *Multidistrict Litigation Procedures in the United States*, 1982 TRIAL LAW. GUIDE 249, 250-54; Richard A. Chesley & Kathleen Woods Kolodgy, Note, *Mass Exposure Torts: An Efficient Solution to a Complex Problem*, 54 U. CIN. L. REV. 467, 508-26 (1985), only the statutory essentials and a few more intimate aspects of the Panel's operation will be discussed in this Comment.

⁸ The "transferee" forum is the district court to which individual actions are sent for coordinated pretrial purposes. The "transferor" forum is the district court in which an individual action is originally filed.

⁹ 28 U.S.C. § 1404(a) (1988).

language, and purpose of § 1407. Part IV.B shows that the alternative trial technique—consent of the parties—is also highly suspect under the present statutory scheme. Beyond these “legalistic” arguments, however, are practical problems with the present system for obtaining consolidated trial. Part IV.C shows the desirability of expanding the *Panel’s* power to include transfer for trial. Modifying § 1407 in this manner would, among other things, permit an impartial, expert body—the Panel—to scrutinize the appropriateness of consolidated trial, eliminate the rigid and prohibitive limitations on transfer under § 1404(a), and increase the flexibility in selecting the trial forum. This change would create a highly pragmatic system for multidistrict litigation. Part V examines how the Panel would wield its expanded power.

I. THE ORIGINS OF THE PANEL

In the early 1960s federal courts were swamped with electrical equipment antitrust cases. After successful criminal prosecutions of the manufacturers, some 2,000 private damage actions were filed in thirty-five federal district courts during a twelve-month period.¹⁰ Massive duplication of pretrial efforts was imminent, creating fears of interminable discovery delays. In response, Chief Justice Earl Warren, following a recommendation of the Judicial Conference of the United States, created the Coordinating Committee for Multiple Litigation of the United States District Courts (Coordinating Committee).¹¹ Using uniform pretrial and discovery orders, national depositions,¹² and central document depositories, all of the cases were concluded by 1967.¹³ The vice chairman of the Coordinating Committee, Judge Edwin A. Robson, estimated that

¹⁰ See S. REP. NO. 454, *supra* note 2, at 3.

¹¹ See *id.*

¹² A “national deposition” is described in the Senate Report as follows:

National depositions were held, attended by large numbers of plaintiffs’ and defendants’ counsel. Lead counsel, chosen by lawyers for the plaintiffs and defendants, propounded questions on behalf of all the parties. Other attorneys present, however, were given the opportunity to ask additional questions to protect their particular interests. Arrangements were made for [sic] the additional deposition of any witness if the need arose.

Id.

¹³ See H.R. REP. NO. 1130, *supra* note 2, at 2, reprinted in 1968 U.S.C.C.A.N. at 1899; S. REP. NO. 454, *supra* note 2, at 3-4. For a more complete discussion of the disposition of the electrical equipment cases, see Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621 (1964).

without the ad hoc committee cases might have lingered for as long as twenty years.¹⁴

Although judges were quite pleased with the expeditious termination of the electrical equipment cases,¹⁵ the shortcomings of the Coordinating Committee were readily evident. The procedure was inefficient. Often thirty or more district judges had to coordinate their personal schedules to convene in one location to discuss problems and meet with counsel. In addition, the voluntary process hinged upon complete agreement among the judges.¹⁶ The Coordinating Committee's members envisioned a legislatively created judicial panel designed to deal efficiently with instances of mass, multidistrict litigation. Their vision soon became a reality.

II. CREATION AND FUNCTIONING OF THE PANEL

In the spring of 1968, § 1407 was added to the United States Judicial Code.¹⁷ Congress enacted into law, for the most part, the blueprint drafted by the Coordinating Committee;¹⁸ it created the Judicial Panel on Multidistrict Litigation.

A. *The Statutory Scheme*

The Panel consists of seven circuit and district court judges chosen by the Chief Justice of the United States Supreme Court.¹⁹ The Panel is empowered to transfer to any federal district court "civil actions involving one or more common questions of fact . . . for coordinated or consolidated pretrial proceedings."²⁰ Two points warrant emphasis. First, the Panel can transfer an action to *any* district; jurisdiction and venue objections will not prevent the Panel from transferring a case.²¹ Second, transfer is only for

¹⁴ See S. REP. NO. 454, *supra* note 2, at 6.

¹⁵ See, e.g., MANUAL FOR COMPLEX LITIGATION at vii (4th ed. 1977) (quoting from Chief Justice Earl Warren's address to the American Law Institute on May 16, 1967: "Our alarm was understandably great and makes equally understandable the measure of my satisfaction in being able to report to the Institute at this meeting that every single one of these cases has been terminated.").

¹⁶ See S. REP. NO. 454, *supra* note 2, at 4.

¹⁷ See Act of Apr. 29, 1968, Pub. L. No. 90-296, 82 Stat. 109 (codified as amended at 28 U.S.C. § 1407 (1988)).

¹⁸ See S. REP. NO. 454, *supra* note 2, at 4.

¹⁹ See 28 U.S.C. § 1407(d) (1988). Although the appointment has no set term, a judge usually sits for seven years. See Susan M. Olson, *Federal Multidistrict Litigation: Its Impact On Litigants*, 13 JUST. SYS. J. 341, 343 (1988-89).

²⁰ 28 U.S.C. § 1407(a).

²¹ See, e.g., *In re Aircraft Accident at Barrow, Alaska* on Oct. 13, 1978, 474 F.

pretrial purposes. When pretrial affairs are completed, the case "shall be remanded . . . to the district from which it was transferred."²²

Proceedings to consolidate may be initiated by the Panel *sua sponte*²³ or upon motion "by a party in any action in which transfer . . . may be appropriate."²⁴ After consolidation proceedings are initiated, "the parties in all actions in which transfers . . . are contemplated"²⁵ receive notice of a hearing at which the issue of transfer is argued. Consolidation is ordered "upon [the Panel's] determination that transfers for such [coordinated and consolidated pretrial] proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."²⁶ If a party disagrees with a Panel decision ordering transfer, review is sought by extraordinary writ.²⁷ An order denying transfer for pretrial, however, is not reviewable.²⁸

Congress has granted the Panel authority to promulgate rules "for the conduct of its business."²⁹ The Panel has adopted nineteen rules governing ministerial and procedural aspects of its involvement in multidistrict litigation.³⁰

Supp. 996, 999 (J.P.M.L. 1979) ("The Panel's discretion under Section 1407 is not limited by venue considerations . . . and the fact that defendants may not all be amenable to suit in the same jurisdiction does not prevent transfer to a single district for pretrial proceedings where the prerequisites of Section 1407 are otherwise satisfied.").

²² 28 U.S.C. § 1407(a).

²³ See *id.* § 1407(c)(i).

²⁴ *Id.* § 1407(c)(ii).

²⁵ *Id.* § 1407(c).

²⁶ *Id.* § 1407(a).

²⁷ See *id.* § 1407(e). An extraordinary writ is requested pursuant to 28 U.S.C. § 1651 (1988).

²⁸ See 28 U.S.C. § 1407(c).

²⁹ *Id.* § 1407(f). These rules, of course, must not be inconsistent with congressional acts or the Federal Rules of Civil Procedure. See *id.*

³⁰ In addition to these nineteen rules, the Panel has adopted six more pertaining to its authority under 28 U.S.C.A. § 2112(a)(3) (West Supp. 1991), to handle multiple petitions instituted in the courts of appeals to review or enforce orders of administrative agencies. This Comment will not deal with the Panel's role in § 2112 proceedings.

The Panel's rules are reprinted in the *United States Code* immediately after 28 U.S.C. § 1407. Because the rules have been modified substantially since the 1988 edition of the *Code*, West's *United States Code Annotated* should be consulted. See 28 U.S.C.A. § 1407 app. (West Supp. 1991).

B. The Panel in Action

1. The Mechanics of a Panel Session

Once every two months the Panel holds hearings to determine if the matters before it should be consolidated for pretrial proceedings.³¹ On a hearing day, the Panel entertains arguments in the morning and retires to an executive meeting in the afternoon.³² In a typical morning session, it hears oral argument on eight to fifteen matters.³³

A "matter" is a group of closely related cases, ostensibly having one or more common questions of fact, that are being considered under a motion to consolidate. Because of the enormous number of actions that may be transferred in one order, counsel in each individual case is usually not heard.³⁴ On each new matter, a maximum of one-half hour of oral argument is permitted; parties with different viewpoints are allotted equal amounts of time.³⁵ The Panel grants argument time sparingly and is very strict with its time limits.³⁶ It keeps a stringent clock because lawyers often want to argue the merits of their cases³⁷ when the issues before the

³¹ See Howard, *supra* note 4, at 479.

³² See Telephone Interview with Patricia Howard, Clerk of the Panel (Jan. 10, 1991) [hereinafter Howard Interview I].

³³ See *id.*

³⁴ See Howard, *supra* note 4, at 480 (noting that 1600 actions were combined in the Swine Flu Immunization Products Liability Litigation, 1100 in the A.H. Robins Co. "Dalkon Shield" IUD Products Liability Litigation, and 1100 in the Richardson-Merrell, Inc. "Bendectin" Products Liability Litigation (No. II)).

There may, however, be instances in which all counsel involved in the cases under consideration will be heard. As few as two or three actions may be combined and transferred for pretrial proceedings. See, e.g., *In re Balcro Film Investors Sec. Litig.*, No. 89-805, 1989 U.S. Dist. LEXIS 13663 (J.P.M.L. Aug. 23, 1989) (consolidating two actions); *In re AT&T Equip. Lease Contract Litig.*, No. 88-781, 1988 U.S. Dist. LEXIS 17027 (J.P.M.L. Oct. 12, 1988) (consolidating three actions).

³⁵ See R. PROC. J.P.M.L. 16(f). If the matter before the Panel is not new—that is, a group of cases has already been transferred for pretrial and the Panel is considering consolidation of additional cases in the same docket—a maximum of 20 minutes is allowed for oral argument. See *id.* These late-arriving cases are known as "tag-along" actions. See *infra* note 43.

³⁶ See David Lauter, *Mastering MDL*, NAT'L L.J., Nov. 21, 1983, at 1, 24 (noting that "few people get more than five minutes" for oral argument). This article quotes the clerk's announcement one day before hearings began: "In docket 82, Mr. Crabtree's time has been cut to five minutes . . . In docket 537, both counsel have been cut to three minutes . . . Mr. Madole has two minutes; Mr. Dombroff has two minutes; Mr. Charfoos, one minute' . . ." *Id.*; see also Howard Interview I, *supra* note 32 (stating that the Panel adheres strictly to its time allocations).

³⁷ See Howard Interview I, *supra* note 32.

Panel typically are narrow: do the actions warrant § 1407 treatment and, if so, where is the appropriate transferee forum?³⁸ Although these issues are fundamental in multidistrict litigation, they are relatively straightforward; limited oral argument encourages counsel to focus on the transfer issues. In special circumstances the Panel will allow for more argument.³⁹ A hearing on each matter is not necessary, however, and oral argument is not encouraged.⁴⁰ Sometimes parties waive oral argument, allowing the Panel to decide a transfer motion on the basis of briefs.⁴¹

In the afternoon executive conference, the Panel discusses cases argued in the morning session and addresses other pertinent business.⁴² A decision regarding transfer of "tag-along" actions is usually made within a week.⁴³ Rulings on new matters may take longer. The Panel cannot transfer cases, however, until it receives consent from the proposed transferee court.⁴⁴ Generally, the entire process, from oral argument to transfer, is completed within a month.⁴⁵

³⁸ The "transferee" and "transferor" forum are defined *supra* note 8.

³⁹ See, e.g., *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 416 (J.P.M.L. 1991) (noting that a four hour hearing was held on the question of transfer).

⁴⁰ See R. PROC. J.P.M.L. 17 (noting that counsel must request oral argument and may waive it).

⁴¹ See, e.g., *In re Ross Capital Corp. Dividend-Capture Inv. Program Litig.*, No. 89-811, 1989 U.S. Dist. LEXIS 13661, at *2 n.1 (J.P.M.L. Aug. 16, 1989) (noting that parties waived oral argument); *In re Western Monetary Consultants, Inc., Sec. Litig.*, No. 89-804, 1989 U.S. Dist. LEXIS 13659, at *1 n.1 (J.P.M.L. Aug. 14, 1989) (same); *In re Leitz Autofocus SLR Camera Patent Litig.*, No. 88-792, 1988 U.S. Dist. LEXIS 17011, at *2 n.2 (J.P.M.L. Dec. 5, 1988) (same).

⁴² See Telephone Interview with Patricia Howard, Clerk of the Panel (Jan. 30, 1991) [hereinafter Howard Interview II].

⁴³ See *id.* A "tag-along" action is a case that is factually similar to several other cases already transferred pursuant to § 1407. The tag-along claim is transferred to the court that took the original matter and consolidated in the same docket for pretrial. See R. PROC. J.P.M.L. 1 (defining tag-along action).

⁴⁴ See 28 U.S.C. § 1407(b) (1988) ("With the consent of the transferee district court, such [consolidated] actions may be assigned by the panel to a judge or judges of such district."). Alternatively, a transferee judge may be procured by assignment. See *id.* ("[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 . . . in accordance with the provisions of chapter 13 of this title.").

⁴⁵ See Howard Interview II, *supra* note 42.

2. Factors Influencing the Transfer Decision

In the Panel's early years, most of its decisions/orders were published. The Panel was resolving novel issues, and multidistrict litigants needed its guidance. Since that time, the Panel has, for the most part, simply applied the existing doctrine to issues arising under § 1407. As a result, the Panel no longer publishes every order.⁴⁶ The decision to publish is made on a case-by-case basis.⁴⁷ To aid the consolidation of all claims related to the incident, orders dealing with large numbers of victims, such as air crash disasters or toxic torts, are typically published,⁴⁸ as are orders entailing new developments.

Thus, to find in-depth treatment of § 1407 issues, rulings from the Panel's formative years must be consulted. Novel rulings do exist⁴⁹ and the Panel's recent orders do offer rationales for their conclusions, but the record of the late 1960s and 1970s is much richer than that of recent years.⁵⁰ The following skeletal treatment of factors affecting transfer is best supplemented by Panel opinions or law review articles from that period.⁵¹

⁴⁶ Most of the Panel's orders are available on the LEXIS and/or WESTLAW databases.

⁴⁷ See Howard Interview I, *supra* note 32.

⁴⁸ See *id.*

⁴⁹ The recent transfer of the asbestos cases is testimony to the continuing development of multidistrict litigation. See *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991).

⁵⁰ Many early Panel decisions went beyond merely determining the propriety of transfer in the matter under consideration. The decisions also construed § 1407, defining its role and use. See, e.g., *In re Grain Shipments*, 300 F. Supp. 1402 (J.P.M.L. 1969).

Recent transfer orders are of a *pro forma* nature and rarely deal with construing § 1407. Rather, the concern is whether the particular matter before the Panel should be consolidated, and if so, in which transferee forum. The orders are characteristically short and simple, stating merely the Panel's conclusion. The typical order consists of four paragraphs. The first paragraph identifies the actions: "This litigation presently consists of . . ." The second paragraph reveals the decision on transfer: "On the basis of the papers filed and the hearing held, the Panel finds . . ." The third paragraph identifies the transferee forum: "We are persuaded that [X] District is the appropriate . . ." The fourth paragraph contains the order: "It is therefore ordered that . . ." For paradigmatic examples, see *In re Balcor Film Investors Sec. Litig.*, No. 89-805, 1989 U.S. Dist. LEXIS 13663 (J.P.M.L. Aug. 23, 1989); *In re Triad Am. Energy Sec. Litig.*, No. 89-789, 1989 U.S. Dist. LEXIS 13674 (J.P.M.L. Jan. 3, 1989). Of course, the order varies from this form when the Panel denies a transfer.

⁵¹ See, e.g., Herndon & Higginbotham, *supra* note 7, at 41-46 (citing numerous cases expounding the statutory transfer factors); Levy, *supra* note 1, at 46-52 (same); Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1002-13 (1974) (same).

a. *Promoting Just and Efficient Conduct of the Actions Involved*

The most influential factor in the transfer decision is whether a saving in resources will result from consolidation.⁵² On this score, Congress was unambiguous: "The main purpose of transfer for consolidation or coordination of pretrial proceedings is to promote the ends of efficient justice"⁵³ "Efficient justice" is largely oriented toward saving judicial resources, although litigants' resources may be preserved simultaneously.⁵⁴ Efficient judicial administration can be achieved by conducting the pretrial proceedings of related cases in one forum. The duplication of discovery that would result from trying the actions individually can be avoided. One judge can issue a single ruling on pretrial matters, avoiding repeated rulings on the same issue and the possibility of conflicting rulings by numerous judges.⁵⁵

Generally, pretrial consolidation will not conserve judicial resources nor serve the interests of the litigants if the cases are nearing trial in the transferor forum, or if discovery is well along.⁵⁶ In these circumstances the Panel often refuses to transfer cases. In *In re "Lite Beer" Trademark Litigation*,⁵⁷ for example, the Panel, noting that "it appears from the parties' representations . . . that discovery is substantially completed in the *Schlitz* and *Peter Hand* actions and that both actions are nearing trial," concluded: "Under these circumstances, transfer will not further the purposes of section 1407."⁵⁸

⁵² This is not surprising as such a concern gave rise to § 1407. See *supra* notes 10-14 and accompanying text.

⁵³ S. REP. NO. 454, *supra* note 2, at 2; see also H.R. REP. NO. 1130, *supra* note 2, at 3, reprinted in 1968 U.S.C.C.A.N. at 1900 ("It is expected that such transfer is to be ordered only where significant economy and efficiency in judicial administration may be obtained.").

⁵⁴ See *infra* note 60 and accompanying text.

⁵⁵ See *In re Air Crash Disaster Near Chicago*, 476 F. Supp. 445, 447 (J.P.M.L. 1979) (listing benefits derived from consolidated pretrial); see also Herndon & Higginbotham, *supra* note 7, at 45 (listing six factors which the Panel uses to justify a finding that consolidation will promote efficiency).

⁵⁶ Cf. *Suggested Procedures for Multidistrict Litigation*, 124 F.R.D. 488, 489-90 (1989) ("The early identification of multidistrict litigation is essential to insure that the full value of coordinated or consolidated pretrial proceedings is realized . . .").

⁵⁷ 437 F. Supp. 754 (J.P.M.L. 1977).

⁵⁸ *Id.* at 755; see also *In re National Master Freight Agreement Drug Testing Litig.*, No. 88-769, 1988 U.S. Dist. LEXIS 17036, at *1 (J.P.M.L. Aug. 15, 1988) (denying consolidation because discovery had been completed in the three individual actions); *In re Royal Regency, Mt. Vernon, Bishops Glen, North River & Mount Royal Towers Sec. Litig.*, No. 88-770, 1988 U.S. Dist. LEXIS 17035, at *2 (J.P.M.L. Aug. 15, 1988)

b. *Convenience of Parties and Witnesses*

The Coordinating Committee draft of the multidistrict litigation statute did not include "convenience of parties and witnesses" as a factor in the transfer decision; this provision was added by Congress in § 1407(a). The Senate Committee on the Judiciary noted that the "amendment makes it clear that the convenience of parties and witnesses shall be weighed as a factor in determining whether transfer should be made."⁵⁹

In practice, the weight accorded the convenience factor has been minuscule.⁶⁰ The Panel's failure to heed this congressional admonishment prompted one commentator to remark that "the Panel has assumed—and routinely rules without further explanation—that transfer of an action which meets the other statutory requirements will be for the convenience of the parties and witnesses, despite the protests of counsel and parties."⁶¹ Indeed, the Panel may consolidate even if all parties in the matter object.⁶²

Despite inconveniences to individual litigants, benefits may accrue to the parties collectively as a result of consolidation. In litigation where documents abound, central depositories can greatly reduce the overall cost of duplication, and common depositions may save hundreds of hours of the attorneys' and deponents' time. If "convenience" is viewed from a group perspective, the Panel may be satisfying § 1407's command that transfers be "for the convenience of parties and witnesses" more often than some commentators imply.⁶³

(listing the well-advanced status of pretrial proceedings as a strike against transfer); *In re Grain Shipments*, 300 F. Supp. 1402, 1405 (J.P.M.L. 1969) (consolidating some related cases but refusing to transfer actions against one defendant because discovery was nearly complete and the cases were ready for trial).

⁵⁹ S. REP. NO. 454, *supra* note 2, at 2.

⁶⁰ Herndon & Higginbotham state that "the Panel has largely eliminated this guideline as a determinative standard." Herndon & Higginbotham, *supra* note 7, at 43.

⁶¹ Herndon & Higginbotham, *supra* note 7, at 44.

⁶² See *In re Air Crash Disaster at Stapleton Int'l Airport*, 720 F. Supp. 1505, 1513 (D. Colo. 1989) ("Courts may order consolidation of cases without consent and over the objections of parties.").

⁶³ *In re Antibiotic Antitrust Actions*, 333 F. Supp. 299 (S.D.N.Y. 1971), may help elucidate the concept of "convenience" in the multidistrict litigation context. Like § 1407, transfer of a case for all purposes under § 1404(a) must be "[f]or the convenience of parties and witnesses." In light of this phrase, the district court stated:

The court is not considering the transfer of *one* case from *one* district to another but rather the transfer and consolidation of 32 cases filed in twelve

c. *Actions Involving One or More Common Questions of Fact*

The statutory requirement that cases must involve common questions of fact poses no barrier when the Panel deems transfer proper. A common question of fact in the related cases is not difficult to identify. "[T]he cases suggest that if the Panel feels the matter should be consolidated under section 1407, common questions of fact will be found to exist in order to justify the transfer."⁶⁴ In sum, the Panel has wide latitude to transfer cases it believes will be beneficially handled through consolidated pretrial proceedings.⁶⁵

3. Choosing the Transferee Forum

The liveliest topic at most Panel proceedings is the debate over the appropriate transferee forum. Not uncommonly, the parties and the Panel will agree that consolidation is proper, but will vehemently disagree as to the best transferee court.⁶⁶ Although

districts into one district for trial. Thus, instead of looking to the individual convenience of *each* party and *each* witness, the court must look to the overall convenience of all parties and witnesses.

Id. at 304 (footnote omitted).

In the § 1407 context, the Panel has held:

Of course it is to the interest of each plaintiff to have all of the proceedings in *his* suit handled in *his* district. But the Panel must weigh the interests of all the plaintiffs and all the defendants, and must consider multiple litigation as a whole in the light of the purposes of the law.

In re Library Editions of Children's Books, 297 F. Supp. 385, 386 (J.P.M.L. 1968).

⁶⁴ Levy, *supra* note 1, at 48 (citing *In re* Fourth Class Postage Regulations, 298 F. Supp. 1326 (J.P.M.L. 1969) and *In re* Air Fare Litig., 322 F. Supp. 1013 (J.P.M.L. 1971)). Although the primary issue in both of these cases was one of law, the Panel "rationalized its decision [to transfer] by saying that it was necessary to discover the underlying or surrounding facts." *Id.*; see also Herndon & Higginbotham, *supra* note 7, at 42 (reporting that as of 1979 not a single decision by the Panel denied transfer for lack of common factual questions).

⁶⁵ There are two additional objective requirements for § 1407(a) consolidation: the cases must be civil actions and they must be pending in different judicial districts. See 28 U.S.C. § 1407(a) (1988).

⁶⁶ See *Air Fare Litig.*, 322 F. Supp. at 1015 ("As is so often the case, the real issue among the parties is not whether these actions should be transferred under Section 1407 but rather to which district they should be transferred."); see also *In re* Balcors Film Investors Sec. Litig., No. 89-805, 1989 U.S. Dist. LEXIS 13663, at *1 (J.P.M.L. Aug. 23, 1989) (noting that all parties agreed to centralization, but differed as to forum); *In re* Air Disaster near Honolulu, Hawaii, on Feb. 24, 1989, No. 89-807, 1989 U.S. Dist. LEXIS 13665, at *1 (J.P.M.L. Aug. 14, 1989) (same); *In re* Wirebound Boxes Antitrust Litig., No. 88-793, 1988 U.S. Dist. LEXIS 17015, at *1 (J.P.M.L. Nov. 29, 1988) (same).

Congress provided loose statutory guidelines for ordering a transfer, it gave the Panel no guidance for deciding where to transfer. Theoretically, § 1407 permits the Panel to consolidate a case in the Southern District of New York with a case in the Eastern District of New York (all components of the cases located in New York) and transfer them to Alaska for pretrial, though no such order will be found in the Panel's records.

The Panel has developed its own general guidelines for selecting the transferee forum, taking in to account both the desires of the parties and the specific facts of the cases. A variety of factors may be considered in the forum decision process. The more influential include the parties' principal places of business,⁶⁷ the number of cases pending in a given district,⁶⁸ the location of documents and witnesses,⁶⁹ whether discovery is at an advanced stage in one of the districts,⁷⁰ and the convenience of the parties.⁷¹ Of course, a myriad of additional considerations also exist.⁷² The Panel will cite a combination of the foregoing and sundry other factors when determining the appropriate forum.

⁶⁷ See *In re Revco/Anac Sec. Litig.*, No.90-851, 1990 U.S. Dist. LEXIS 13981, at *3 (J.P.M.L. Sept. 7, 1990); *In re Incepts, Inc.*, No. 88-772, 1988 U.S. Dist. LEXIS 17037, at *3-4 (J.P.M.L. Aug. 17, 1988).

⁶⁸ See *In re Commercial Gen. Liab. Ins. Antitrust Litig.*, No. 88-767, 1988 U.S. Dist. LEXIS 17033, at *3 (J.P.M.L. Aug. 30, 1988) (noting that more than half of the actions in the litigation were pending in the chosen transferee district); *In re "Sabre" Air Passenger Computer Reservation Sys. Antitrust & Contract Litig.*, No. 88-761, 1988 U.S. Dist. LEXIS 17046, at *3 (J.P.M.L. June 7, 1988) (noting that 32 of the 40 actions in the matter were pending in the transferee forum).

⁶⁹ See *Balcor Film*, 1989 U.S. Dist. LEXIS 13663, at *2 (noting that the majority of the corporate defendants' documents and witnesses were located in Chicago, within 100 miles of the transferee courthouse); *In re Dun & Bradstreet Commercial Credit Info. Servs. Litig.*, No. 89-806, 1989 U.S. Dist. LEXIS 13660, at *3 (J.P.M.L. Aug. 14, 1989) (noting that relevant documents could be found within or near the chosen transferee forum).

⁷⁰ See *In re Terra-Drill Partnerships Sec. Litig.*, No. 89-791, 1989 U.S. Dist. LEXIS 13670, at *2 (J.P.M.L. May 8, 1989) (noting that discovery was "well under way" in the transferee forum); *In re Mountain States Tel. & Tel. Co. Employees Benefit Litig.*, No. 89-798, 1989 U.S. Dist. LEXIS 13673, at *2 (J.P.M.L. Feb. 2, 1989) (noting that "extensive" discovery had taken place in the transferee court).

⁷¹ See *In re Air Disaster near Honolulu, Hawaii*, on Feb. 24, 1989, No. 89-807, 1989 U.S. Dist. LEXIS 13665, at *2 (J.P.M.L. Aug. 14, 1989) ("We note that this district is conveniently located for many parties and witnesses . . ."); *In re Triad Am. Energy Sec. Litig.*, No. 89-789, 1989 U.S. Dist. LEXIS 13674, at *2 (J.P.M.L. Jan. 3, 1989) (noting that the chosen transferee forum would "best serve the convenience of the parties and witnesses").

⁷² For lists of additional factors, see Herndon & Higginbotham, *supra* note 7, at 47, and Levy, *supra* note 1, at 57.

4. Cases Commonly Consolidated

Actions of any nature may be transferred by the Panel. The most routinely consolidated matters, however, are antitrust cases, securities litigation, products liability suits, and air crash disaster claims.⁷³ This is unsurprising; litigation of this sort frequently involves large numbers of litigants, and the Panel was created to handle such matters efficiently.

III. TERMINATION IN THE TRANSFeree FORUM

Section 1407 requires individual cases to be remanded to their respective transferor courts upon completion of pretrial proceedings in the transferee forum.⁷⁴ The Panel holds this remand power, although in practice it will not remand without approval by the transferee judge.⁷⁵ There is, however, a "hidden" proviso in § 1407(a) which may preclude remand: "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 . . .*"⁷⁶

A. Pretrial Termination by the Transferee Judge

Transferee judges have paid substantial allegiance to the proviso. Hundreds of § 1407-transferred cases have not returned to their transferor courts. The House Committee on the Judiciary initially suggested one method to dispose of consolidated actions in the

⁷³ The Senate report on § 1407 suggested that these types of matters would be particularly susceptible to transfer. See S. REP. NO. 454, *supra* note 2, at 7. That foresight has come to fruition.

Examples of other consolidated claims include patent litigation, see *In re Burke, Inc.*, Personal Mobility Vehicle Patent Litig., No. 89-809, 1989 U.S. Dist. LEXIS 13662 (J.P.M.L. Aug. 22, 1989), suits involving investments, see *In re Ross Capital Corp. Dividend-Capture Inv. Program Litig.*, No. 89-811, 1989 U.S. Dist. LEXIS 13661 (J.P.M.L. Aug. 16, 1989), and actions regarding insurance, see *In re Chubb Corp. Drought Ins. Litig.*, No. 88-782, 1988 U.S. Dist. LEXIS 17026 (J.P.M.L. Oct. 13, 1988).

⁷⁴ See 28 U.S.C. § 1407(a) (1988).

⁷⁵ See *In re Richardson-Merrell, Inc. "Bendectin" Prods. Liab. Litig.*, 606 F. Supp. 715, 716 (J.P.M.L. 1985) (remanding cases with support of transferee judge and reiterating fact that the Panel is "greatly influenced by the transferee judge's suggestion that remand is appropriate"); *In re Evergreen Valley Project Litig.*, 435 F. Supp. 923, 924 (J.P.M.L. 1977) (noting that the transferee judge plays a key role in the remand decision); R. PROC. J.P.M.L. 14(d) ("The Panel is reluctant to order remand absent a suggestion of remand from the transferee district court.").

⁷⁶ 28 U.S.C. § 1407(a) (1988) (emphasis added).

transferee forum: summary judgment.⁷⁷ Transferee judges soon recognized others. Judge Stanley Weigel, a former member of the Panel, compiled the following list:

It is generally accepted that a transferee judge has authority to decide all pretrial motions, including motions that may be dispositive, such as motions for judgment approving a settlement, for dismissal, for judgment on the pleadings, for summary judgment, for involuntary dismissal under Rule 41(b), for striking an affirmative defense, for voluntary dismissal under Rule 41(a) and to quash service of process.⁷⁸

For the most part, use of these disposal techniques is non-controversial. The statute itself recognizes the possibility of termination during pretrial proceedings,⁷⁹ and to effectuate termination the transferee judge must be empowered to decide dispositive motions.

An example of the propriety, and perhaps necessity, of pretrial disposal is evident in *In re "Agent Orange" Product Liability Litigation*.⁸⁰ Hundreds of claims against manufacturers of Agent Orange, a herbicide used in Vietnam, were transferred to Judge Jack Weinstein in the Eastern District of New York. The Panel consolidated many of these cases, and others came from state courts. After five years of litigation, the parties agreed to a \$180 million settlement. In addition, Judge Weinstein granted summary judgment against all plaintiffs who opted out of the certified class. It would have been an awkward situation and a waste of judicial time if Judge Weinstein had not possessed power to approve the settlement offer. Presumably, each case would have been remanded to its transferor court, and each judge therein would have had to individually approve the settlement offer. Greater difficulty and confusion would have arisen if on remand some judges rejected the settlement offer. Remanding for transferor court approval would create the problem encountered by the Coordinating Committee; settlement approval would hinge upon complete agreement among a multitude

⁷⁷ See H.R. REP. NO. 1130, *supra* note 2, at 3, reprinted in 1968 U.S.C.A.N. at 1900.

⁷⁸ Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 582-83 (1978) (footnotes omitted). The omitted footnotes cite cases upholding the power of the transferee judge to rule on each of the listed motions.

⁷⁹ See 28 U.S.C. § 1407(a).

⁸⁰ 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd in part and rev'd in part*, 818 F.2d 226 (2d Cir. 1987).

of district court judges.⁸¹ Use of the remand process to seek approval of settlement offers would be time consuming and perhaps unsuccessful.⁸²

For many of the same reasons, the advantages of summary judgment power are apparent. If the transferee judge deems summary judgment appropriate, there would be a waste of resources to require remand to each transferor judge for reconsideration of the identical issue. The transferor judges would have to be familiarized with the case, the files would need to be retransferred, the possibility of diverse rulings by transferor judges would be created, and the potential for several appeals in different circuits on the same issue would exist.

It is also evident that a transferee court needs the ability to rule on a motion to dismiss. If this capability did not exist, the transferee court would be placed in a compromising position. It might refuse to remand,⁸³ forge ahead with discovery, and hope the motion to dismiss will be denied by the transferor judges. But if on remand the transferor courts grant the motion to dismiss, valuable time and resources spent in discovery will go for naught. On the other hand, the transferee court might immediately recommend remand in the hope that the motion to dismiss will be granted. But if the transferor courts deny the motion to dismiss the cases would be sent back to the transferee court. Moreover, the transferor judges might rule differently upon the motion. At least two unnecessary and time consuming transfers are precluded by permitting the transferee judge to rule upon the motion to dismiss.⁸⁴

In sum, it is highly desirable for a single transferee judge to entertain summary judgment motions and motions to dismiss, and to decide other dispositive issues in pretrial proceedings. Congress recognized this desirability, at least implicitly, when § 1407 was in the process of enactment.⁸⁵

⁸¹ See *supra* note 16 and accompanying text.

⁸² Transferee judges have approved settlement in other huge multidistrict litigations. See, e.g., *In re Ampicillin Antitrust Litig.*, 526 F. Supp. 494 (D.D.C. 1981).

⁸³ Recall that although the Panel ultimately holds the power to remand, it is reluctant to do so without support from the transferee judge. See *supra* note 75 and accompanying text.

⁸⁴ For a recent example of a transferee court ruling on motions to dismiss, see *Majeski v. Balcor Entertainment Co. Ltd.*, 740 F. Supp. 563 (E.D. Wis. 1990).

⁸⁵ See H.R. REP. NO. 1130, *supra* note 2, at 3, reprinted in 1968 U.S.C.C.A.N. at 1900 ("[T]he term 'pretrial proceedings' [refers] to the practice and procedure which precede the trial of an action. These generally involve deposition and discovery, and

B. Termination by Trial in the Transferee Forum

Despite the design of § 1407—that cases be remanded after pretrial is completed—the vast majority of cases are never remanded. From September 1968 to June 1988, nearly 15,000 actions were processed by the Panel.⁸⁶ Only eighteen percent of these cases were remanded to their transferor courts.⁸⁷ Some of the actions ended by summary judgment, settlement, or other pretrial disposal in the transferee court, preventing the possibility of remand. A significant number, however, were not (and are not) remanded because the cases are retained by the transferee judge for trial.⁸⁸ This is accomplished in one of two ways:⁸⁹ the transferee court orders transfer for all purposes under § 1404(a)⁹⁰ or, alternatively, parties consent to trial in the transferee forum. Section 1404(a)'s role in multidistrict litigation is elaborated immediately below. Trial by consent in the transferee forum is self-explanatory; after the Panel transfers a matter pursuant to § 1407, the parties agree to have the transferee judge proceed with trial.

... are governed by the Federal Rules of Civil Procedure. . . . Under the Federal rules the transferee district court would have authority to render summary judgment").

⁸⁶ See Howard, *supra* note 4, at 480.

⁸⁷ See *id.* One commentator, writing in the early 1980s, noted that "slightly less than five percent of the actions transferred by the Panel have been remanded." See Ward, *supra* note 7, at 256.

⁸⁸ See *In re Air Crash Disaster Near Chicago, Illinois*, on May 25, 1979, 476 F. Supp. 445, 450 (J.P.M.L. 1979) ("[M]ost actions transferred pursuant to Section 1407 are not remanded to their transferor districts, either because the actions are terminated prior to trial by settlement or otherwise in the transferee district, or because the actions are transferred by the transferee court under Sections 1404(a) or 1406.").

⁸⁹ Transferee courts may also acquire cases for trial by using 28 U.S.C. § 1406(a) (1988). This venue statute provides:

The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such a case to any district or division in which it could have been brought.

Id. Sections 1406(a) and 1404(a) are quite similar; therefore, § 1406(a) will not be treated as an independent method to achieve trial in the transferee forum. There is, however, an important distinction between these statutes. When § 1404(a) is used, a case is being removed from a forum in which the plaintiff was entitled to bring his claim. But, a case transferred pursuant to § 1406(a) could not have remained in the original forum. If not transferred, the case would be dismissed.

⁹⁰ See 28 U.S.C. § 1404(a) (1988).

1. The Use of Section 1404(a) to Effectuate Trial in the Transferee Court

Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."⁹¹ This statute, which existed before and is unrelated to § 1407,⁹² permits a district court to transfer a case to another court for all purposes—pretrial and trial. Judges may use it independently of § 1407 to consolidate similar actions in one court for trial. Discretion to transfer under § 1404(a) rests with the court in which an action is originally filed.⁹³ This discretionary aspect of § 1404(a)⁹⁴ can obstruct the consolidation of all related cases in a single forum. Some judges may transfer cases while others may not.⁹⁵

When used in conjunction with § 1407, however, § 1404(a) discretion rests solely with the transferee judge. The use of § 1404(a) in the multidistrict context to achieve trial in the transferee court involves two simple steps. First, the Panel consolidates claims under § 1407, sending all cases in the matter to one transferee court for pretrial. Then, during pretrial, a party makes a § 1404(a) motion for transfer of venue. If the transferee judge grants this motion the actions will stay in the transferee court for trial.

⁹¹ *Id.*

⁹² Section 1404(a) was enacted in 1948. *See* Act of June 25, 1948, ch. 646, 62 Stat. 937. Section 1407 was enacted in 1968. *See* Act of Apr. 29, 1968, Pub. L. No. 90-296, 82 Stat. 109.

⁹³ *See* *Stewart Org. Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) ("[T]he statute is intended to place discretion in the district courts to adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness."); *Vanguard Fin. Serv. Corp. v. Johnson*, 736 F. Supp. 832 (N.D. Ill. 1990) ("The resolution of a 1404(a) motion to transfer rests within the sound discretion of the district court.").

⁹⁴ This is an important distinction between § 1404(a) and § 1407. Under the latter, if the Panel deems transfer beneficial, all related cases will be combined; consolidation does not depend on the transferor judges whose cases are affected by the Panel's order.

⁹⁵ It is also possible that courts do not know of related actions in other districts to which a case could be transferred for consolidated proceedings.

2. Transferee Courts and Section 1404(a): The Historical Development

When § 1407 was enacted, Congress did not envision trial of § 1407-consolidated matters in the transferee court. Although it was aware that § 1404(a) and § 1406(a) could aid multidistrict litigation, it did not foresee these statutes being utilized by the transferee judge.⁹⁶ Even so, it did not take long for the Panel and transferee judges to use the statutes in combination with § 1407 to achieve trial in the transferee forum.

During the Panel's first two years, the ability of transferee judges to employ § 1404(a) was uncertain. In *In re Mid-Air Collision Near Hendersonville, North Carolina on July 19, 1967*,⁹⁷ the Panel transferred cases to North Carolina for pretrial despite a pending § 1404(a) motion in the Missouri district court (the transferor forum). The defendant argued that Judge Collinson, the transferor judge, should rule on the § 1404(a) motion before the Panel transferred the cases for pretrial. If the motion was granted, the defendant noted, a § 1407 transfer would be unnecessary. Refusing to wait for Judge Collinson's ruling, the Panel stated, "[c]ounsel for the plaintiffs . . . point out quite correctly that Judge Collinson may consider transfer of the cases for trial under Section 1404(a) following completion of pretrial proceedings."⁹⁸ The Panel did not suggest that the North Carolina transferee judge could decide the pending § 1404(a) motion.⁹⁹

⁹⁶ See S. REP. NO. 454, *supra* note 2, at 5; H.R. REP. NO. 1130, *supra* note 2, at 3-4, reprinted in 1968 U.S.C.C.A.N. at 1900, 1902.

⁹⁷ 297 F. Supp. 1039 (J.P.M.L. 1969).

⁹⁸ *Id.* at 1040.

⁹⁹ The Panel again discussed the interplay of § 1404(a) and § 1407 in *In re Air Crash Disaster at Falls City, Nebraska* on August 6, 1966, 298 F. Supp. 1323 (J.P.M.L. 1969). It stated:

An added factor that militates against a transfer at this time under Section 1407 is the outstanding and substantial venue and service question still unresolved in the Illinois, Texas and Nebraska District Court actions. Such undetermined issues will not be resolved by a transfer under Section 1407, whereas transfers to the Southern District of New York under Section 1406, if warranted, will resolve the venue and service problems now existing in some of those cases; in others, transfer may be effected under Section 1404(a). Thus, where appropriate, consolidation and coordination of all these cases for all purposes may be achieved by transfers under Section 1406 in some cases and under Section 1404(a) in others.

Id. at 1324 (footnotes omitted). Unlike *Hendersonville*, the Panel postponed a § 1407 transfer decision because of potential consolidation for all purposes under § 1404(a) or § 1406. But like *Hendersonville*, it did not imply that parties could bring § 1404(a)

In *In re Grain Shipments*¹⁰⁰ the Panel provided a more pointed discussion of the relationship between § 1407 and § 1404(a). And it seemingly limited use of § 1404(a) to the transferor court:

Section 1407 is not the exclusive vehicle for insuring the just and efficient conduct of cases having common questions of fact and law. Sections 1404(a), and 1406(a) when applicable, may be used in conjunction with or in place of Section 1407 to transfer related cases to a single court. It should be emphasized that the transfer of these cases under Section 1407 does not prevent the *appropriate* court from considering the possibility of transferring these cases for trial under Section 1404(a) *when pretrial proceedings are complete*.¹⁰¹

By "appropriate court," the Panel could only have meant the transferor forum.¹⁰² Soon after *Grain Shipments*, however, the Panel's understanding of the relation between the statutes shifted. In *In re Koratron*,¹⁰³ the Panel declared 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."¹⁰⁴

In 1971, § 1407 and § 1404(a) were used in combination to effectuate transferee court trial for the first time.¹⁰⁵ In the previous year the Panel had clarified its position when it promulgated Rule 15(d):

Actions will be remanded to the district from which they were transferred unless an order has been signed by the designated

and § 1406 motions before the transferee court. On the contrary, the Panel said: "Such undetermined issues will *not* be resolved by a transfer under Section 1407 . . ." *Id.* (emphasis added).

¹⁰⁰ 300 F. Supp. 1402 (J.P.M.L. 1969).

¹⁰¹ *Id.* at 1404 (emphasis added) (citations omitted).

¹⁰² Although "appropriate court" was not expressly defined, logically, it could only mean the transferor court. It would be impossible under § 1407 for a transferee court to handle a § 1404(a) motion "when pretrial proceedings are complete" because at the conclusion of pretrial the cases must be remanded unless previously terminated. *See* 28 U.S.C. § 1407(a) (1988).

¹⁰³ 302 F. Supp. 239 (J.P.M.L. 1969).

¹⁰⁴ *Id.* at 242.

¹⁰⁵ The first use of § 1407 in conjunction with another venue statute occurred in 1969. In *Illinois v. Harper & Row Publishers, Inc.*, 308 F. Supp. 1207 (N.D. Ill. 1969), the transferee court found that two cases before it were originally filed in an improper venue (i.e. venue in the transferor forum was improper). Rather than remanding the cases to the transferor forum at the conclusion of pretrial, it transferred the actions, using § 1406, to districts in which they could have been brought. *See id.* at 1211; *see also supra* note 89 (explaining § 1406(a)). It did not transfer the cases to itself for trial.

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.¹⁰⁶

In *In re Antibiotic Antitrust Actions*,¹⁰⁷ the role of § 1404(a) in § 1407 proceedings was directly at issue. The court considered "whether this judge, as a transferee judge, has the authority to transfer actions transferred to the court under section 1407 to another district under section 1404(a)."¹⁰⁸ It answered in the affirmative, reasoning that § 1407 did not "in any way limit the normal authority of a district court."¹⁰⁹ The court viewed a motion to transfer as a pretrial motion that "generally should be determined prior to the completion of discovery."¹¹⁰ Finally the court stated:

Any other holding would create an anomalous situation for the Panel has held that from the time of entry of its order of transfer until the time of entry of an order of remand, the transferor court is without jurisdiction and can issue no further orders. In re Plumbing Fixture Cases, 298 F.Supp. 484, 486 (Jud.Pan.Mult.Lit. 1968). Thus, if the transferee judge cannot make a section 1404(a) . . . transfer, no court can and . . . section[] 1404(a) . . . will have been temporarily suspended by section 1407. That surely cannot have been the intent of Congress.¹¹¹

One defendant vehemently protested and petitioned the Second Circuit Court of Appeals for a writ of mandamus directing Judge

¹⁰⁶ R. PROC. J.P.M.L. 15(d), *reprinted in* 50 F.R.D. 203 (1970). The current version of this rule states:

Each transferred action that has not been terminated in the transferee court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406. In the event that the transferee judge transfers an action under 28 U.S.C. §§ 1404(a) or 1406, no further action of the Panel shall be necessary to authorize further proceedings including trial.

R. PROC. J.P.M.L. 14(b) (note change in rule number).

¹⁰⁷ 333 F. Supp. 299 (S.D.N.Y. 1971).

¹⁰⁸ *Id.* at 302.

¹⁰⁹ *Id.* at 303. Judge Lord, the transferee judge, felt it would be anomalous to conclude that transferee judges have less power than transferor judges. Because transferor judges clearly can rule on § 1404(a) motions, it followed that transferee judges should be able to do the same.

¹¹⁰ *Id.*

¹¹¹ *Id.* (footnote omitted) (emphasis omitted).

Lord to vacate his § 1404(a) transfer order.¹¹² The Second Circuit refused to grant the writ, holding that a transferee judge could use § 1404(a) to consolidate cases for trial.¹¹³

After promulgation of Rule 15(d) and the *Pfizer* decision (which was buttressed by contemporaneous cases¹¹⁴) everyone—parties, courts,¹¹⁵ and commentators¹¹⁶—fell in line; the 1407-1404(a) combination was legitimized.

C. *Advantages of Trial in the Transferee Court*

The 1407-1404(a) combination did not develop arbitrarily and parties do not consent to trial in the transferee forum capriciously. Trial in the transferee court is ordered or consented to because it promotes efficient judicial administration and/or is in the interest of litigants. Certainly consolidated trial of every multidistrict litigation is not warranted, but it is often advantageous, and on occasion imperative.

After spending weeks, or even months, governing pretrial stages of a matter, a judge acquires an unparalleled familiarity with the litigation. This familiarity can enhance the smooth and speedy processing of cases through trial. The sentiments of Judge Bownes elucidate this point strikingly:

This multidistrict litigation was assigned to me on June 1, 1970, and since that time I have been actively engaged in the supervision of the pretrial preparation of all of the cases arising

¹¹² See *Pfizer, Inc. v. Lord*, 447 F.2d 122 (2nd Cir. 1971).

¹¹³ See *id.* at 124-25. The court agreed with Judge Lord that an anomaly would result if "all proceedings on any section 1404(a) motion would have to be suspended for the entire period of pretrial." *Id.* at 125. Moreover, permitting the transferee judge to rule on § 1404(a) motions would promote the just and efficient conduct of the litigation; it would avoid remand to several district courts where separate § 1404(a) rulings would be made. See *id.*

¹¹⁴ See *In re Air Crash Disaster Near Hanover, New Hampshire* on October 25, 1968, 342 F. Supp. 907 (D.N.H. 1971); *Jack Winter, Inc. v. Koratron Co.*, 326 F. Supp. 121 (N.D. Cal. 1971).

¹¹⁵ Three years after *Pfizer*, the Seventh Circuit Court of Appeals spoke of the procedure without comment. See *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400, 402 (7th Cir. 1974) (noting that the cases had been transferred for pretrial under § 1407 and consolidated for all purposes by the transferee court with the aid of § 1404(a)), *cert. denied*, 421 U.S. 978 (1975), *aff'd in part and rev'd in part*, 586 F.2d 53 (7th Cir. 1978).

¹¹⁶ One writer mentioned in passing the possibility that using § 1404(a) after a § 1407 transfer was inappropriate. See John F. Cooney, Comment, *The Experience of Transferee Courts Under the Multidistrict Litigation Act*, 39 U. CHI. L. REV. 588, 606 (1972).

out of the crash in Hanover, New Hampshire. I think it is fair to conclude that I have a working familiarity with the facts, issues, and problems involved. While it would be easy on me, as well as for me, to transfer the cases back to their transferor districts on the completion of pretrial discovery, such transfers would be an abdication of responsibility on my part and would constitute, in this era of congested calendars and long delays of trials, an affront to the orderly and expeditious administration of justice.¹¹⁷

The federal court system has yet to exit the "era of congested calendars and long delays of trials."¹¹⁸

*In re Antibiotic Antitrust Actions*¹¹⁹ further demonstrates the efficacy of trial in the transferee forum. Judge Lord, sitting in the Southern District of New York, conducted pretrial in several cases transferred to him by the Panel. Near completion of pretrial, he was assigned, pursuant to 28 U.S.C. § 292(c),¹²⁰ to the Northern District of California to try seven of the consolidated cases that had been filed there originally.¹²¹ Three inefficiencies are associated with this assignment procedure. First, using § 292(d) is a time consuming process. When used in § 1407 proceedings, cooperation and communication among the Panel, the district judge to be assigned, the chief judge of the assignee circuit, and the Chief Justice of the United States Supreme Court are required.¹²² Second, judges have dockets to manage in their own courts. Sending them to distant forums for the benefit of litigants in those districts is at the expense of litigants in the judge's home district. Third, if cases are remanded to several districts at the conclusion of pretrial, it could take months, or years, for a judge to travel to each

¹¹⁷ *Hanover*, 342 F. Supp. at 908. The advantage of getting the transferee judge in a position to conduct trial has been recognized on other occasions. See, e.g., *In re Air Crash Disaster Near Chicago, Illinois*, on May 25, 1979, 476 F. Supp. 445, 450 n.5 (J.P.M.L. 1979) (noting that the Panel had recently aided two transferee judges in obtaining intercourt assignments so they could try the remanded actions).

¹¹⁸ *Hanover*, 342 F. Supp. at 908.

¹¹⁹ 333 F. Supp. 299 (S.D.N.Y. 1971).

¹²⁰ See 28 U.S.C. § 292(d) (1988) (note change in subsection letter).

¹²¹ The Panel had earlier recognized that § 292(d) might be used to get the transferee judge in the transferor forum. See *In re CBS Color Tube Patent Litig.*, 329 F. Supp. 540, 541 n.3 (J.P.M.L. 1971) (stating that "it would be possible to temporarily assign the judge familiar with the litigation to any district in which a trial is to be held").

¹²² One commentator has suggested that a simple motion by the transferee judge to the Panel at the conclusion of pretrial could replace the current assignment process. See Ward, *supra* note 7, at 258-59. This procedure, however, would not quell the other problems with assignment.

transferor district to conduct trial. All the problems attendant to intercourt assignments are avoided by allowing a judge to try the cases in his own court. Even if these inefficiencies are not bothersome, the practice of assigning judges lends credence to the proposition in this subpart: it is often desirable to get the pretrial judge in a position to conduct trial.

The second, and more pressing, problem exposed by *Antibiotic Antitrust* is the difficulty of trying one case independently from the rest of the actions in a matter. Ultimately, Judge Lord's special assignment to California went unused. The actions were so complex and intertwined that trial of the seven cases apart from the others was impossible.¹²³ In complicated matters a workable trial plan may require consolidation in a single forum.

Trial in the transferee forum produces additional benefits. One trial in the transferee court replaces several trials of the same issues in various transferor courts. Savings in transactional costs and the parties', witnesses', and courts' time are also realized. Conflicting decisions by transferor courts after remand are avoided¹²⁴ as are multiple appeals from these decisions.¹²⁵ Finally, the task of transferring case files back to transferor courts is avoided.¹²⁶

¹²³ See *Antibiotic Antitrust*, 333 F. Supp. at 301 ("[S]ince these overlaps and conflicts cannot . . . be resolved prior to trial, it has become increasingly clear that they can only be satisfactorily resolved by a coordinated or consolidated trial or trials in one district directed by the judge who is most familiar with this massive litigation.").

¹²⁴ See Sherrill P. Hondorf, *A Mandate for the Procedural Management of Mass Exposure Litigation*, 16 N. KY. L. REV. 541, 557 (1989) (noting that remand can lead to inconsistent verdicts on the same issue).

¹²⁵ Choice of law rules can result in multiple appeals even within the transferee circuit, which may or may not affect the desirability of consolidated trial.

For a discussion of choice of law problems in multidistrict litigation, see Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 662-706 (1987).

¹²⁶ More is involved in transferring files than simply dropping them in the mail. See R. PROC. J.P.M.L. 19 (outlining the process of transferring files in multidistrict litigation). The burdensome nature of this chore was recognized by the Panel in the *In re Asbestos Products Liability Litigation* (VI), 771 F. Supp. 415 (J.P.M.L. 1991), when it suspended Rule 19 to keep Judge Weiner's head above a sea of 26,000 case files. See *id.* at 424 & n.12. He is permitted to request from transferor courts the files he wishes to examine. See *id.* at 424 n.12.

IV. PROBLEMS WITH THE CURRENT PROCESS FOR OBTAINING TRIAL IN THE TRANSFEREE FORUM

Although benefits are realized through consolidated trial of certain multidistrict litigations, Congress designed § 1407 so that it would not affect the place of trial in any case. The House and Senate Committees on the Judiciary articulated four specific reasons why they did not allow for trial consolidation through § 1407.¹²⁷

This Part is divided into three Subparts. Subpart A provides a detailed examination of the legislative history, language, and purpose of § 1407, demonstrating that a transferee court's use of § 1404(a) sets Congress's carefully crafted plan for multidistrict litigation on its head. Subpart B scrutinizes the validity of consenting to trial in the transferee court. This practice also conflicts with the design of § 1407 and is rendered suspect by the Supreme Court's ruling in *Hoffman v. Blaski*.¹²⁸ Even if transferee courts could legitimately utilize § 1404(a) or ratify litigants' consent, there are numerous concerns with these methods of procuring cases for trial. Amending § 1407 to permit the Panel to make the decision whether the cases should be consolidated for trial would lend fairness and flexibility to multidistrict litigation. An impartial, expert body would be involved in the decision, the limitations of § 1404(a) would be avoided, and the choice of trial forums would be expanded. Subpart C addresses these issues. The analysis in this Part, combined with the observation that trial in the transferee court can be advantageous (or even necessary), leads to the conclusion that § 1407 needs to be revised.

A. Transferee Court's Use of Section 1404(a) is Prohibited

Judge Lord, in *Antibiotic Antitrust*, asserted:

There is absolutely no reason to believe that the district judge to whom a case has been assigned under section 1407 has any less authority or power as to matters preceding the actual trial of a

¹²⁷ First, the experience of the Coordinating Committee for the electrical equipment antitrust cases was limited to pretrial and it was deemed desirable to stay within those bounds. Second, from the standpoint of parties and witnesses, trial in the original forum is generally preferable. Third, it may be impracticable for one transferee court to try all the cases in mass litigation. Fourth, local discovery will probably be necessary to supplement coordinated discovery. See S. REP. NO. 454, *supra* note 2, at 5; H.R. REP. NO. 1130, *supra* note 2, at 4, *reprinted in* 1968 U.S.C.C.A.N. at 1900-02.

¹²⁸ 363 U.S. 335 (1960).

case than would a judge before whom the case was originally filed.¹²⁹

To the contrary, there are several reasons.

1. Legislative History of Section 1407

The Senate's and House of Representative's final reports on § 1407 make clear that remand is to occur when pretrial is completed.¹³⁰ The most telling indication of congressional intent is the following statement from the reports: "if proposed section 1407 should be enacted and future experience justifies extending it to include consolidation and coordination *for trial purposes as well*, only minor amendments to the present language of the bill will be necessary."¹³¹ It is not by happenstance that § 1407 permits *pretrial* transfer only; Congress considered allowing consolidation for trial as well, but decided not to permit such transfers and gave explicit reasons for its conclusion. A transferee court's use of § 1404(a) achieves precisely what Congress did not allow—trial in the transferee court. Congressional amendment, not judicial proclamation, is necessary for consolidated cases properly to be tried in the transferee forum.

The legislative history clearly reflects an understanding that § 1407 cannot effect a change in the location of trial. Several letters included in the Senate Report mention the "temporary" nature of a transfer.¹³² Section 1407 was the brainchild of the Coordinating Committee for the electrical equipment antitrust cases.¹³³ In its report on then proposed § 1407, the Committee declared:

¹²⁹ *Antibiotic Antitrust*, 333 F. Supp. at 303.

¹³⁰ See S. REP. NO. 454, *supra* note 2, at 5 (proclaiming that "[p]aragraph (a) [of § 1407] also requires transferred cases to be remanded to the originating district at the close of coordinated pretrial proceedings. The bill does not, therefore, include the trial of cases in the consolidated proceedings."); H.R. REP. NO. 1130, *supra* note 2, at 4, *reprinted in* 1968 U.S.C.C.A.N. at 1901 (same).

¹³¹ S. REP. NO. 454, *supra* note 2, at 5 (emphasis added). The House Report contains identical language. See H.R. REP. NO. 1130, *supra* note 2, at 4, *reprinted in* 1968 U.S.C.C.A.N. at 1902.

¹³² See Letter from William E. Foley to James O. Eastland (Apr. 5, 1967), *reprinted in* S. REP. NO. 454, *supra* note 2, at 7-8; Letter from Ramsey Clark to James O. Eastland (Feb. 7, 1967), *reprinted in* S. REP. NO. 454, *supra* note 2, at 8-9.

¹³³ See *supra* text accompanying notes 15-18.

Scope of the Statute.

The statute affects only the pre-trial stages in multi-district litigation. It would not affect the place of trial in *any* case or exclude transfer under other statutes (e.g., Title 28, U.S.C. §§ 1404(a) and 1406(a)) prior to or at the conclusion of pre-trial proceedings.

....

Limited Transfer.

The major innovation proposed is transfer solely for pre-trial purposes. The statute's objectives of eliminating conflict and duplication and of assuring efficient and economical pre-trial proceedings would thus be achieved without losing the benefits of local trials in the appropriate districts.¹³⁴

Does the use of § 1404(a) in a § 1407 proceeding "affect the place of trial in any case?" Certainly it does, as hundreds of litigants can attest. Clearly this was not the intention of the Coordinating Committee or of Congress.¹³⁵

The report depicts how § 1404(a) and § 1406(a) interact with § 1407. The former sections may be used "prior to or at the conclusion of pre-trial proceedings."¹³⁶ Before pretrial, cases are in the transferor forum. It would be impossible for a transferee court to handle a § 1404(a) motion; the transferee court would be unknown. Likewise, at the conclusion of pretrial proceedings the transferee court is precluded from making a § 1404(a) ruling. "[A]t or before the conclusion of . . . pretrial proceedings" actions must be remanded,¹³⁷ if they were not previously terminated. A case cannot be in the transferee forum after the conclusion of pretrial. This analysis leads to one feasible conclusion: transferor courts are singularly empowered to make § 1404(a) decisions. If not, Congress

¹³⁴ Report of the Co-ordinating Committee on Multiple Litigation Recommending New Section 1407, Title 28 (Mar. 2, 1965), *reprinted in In re Plumbing Fixture Cases*, 298 F. Supp. 484, 499 (1968) (emphasis added) [hereinafter Co-ordinating Committee Report].

¹³⁵ Congress was in agreement with the Coordinating Committee on the scope of § 1407. In its final report, the House incorporated language virtually identical to that used in the Coordinating Committee's "Scope of the Statute" section. *See* H.R. REP. NO. 1130, *supra* note 2, at 2-3, *reprinted in* 1968 U.S.C.C.A.N. at 1899-1900.

¹³⁶ Co-ordinating Committee Report, *supra* note 134, at 499.

¹³⁷ 28 U.S.C. § 1407(a) (1988).

repeatedly emphasized the “pretrial” nature of § 1407 for no reason and wasted its ink when explicating specific reasons for not permitting complete transfer.

2. Language of Section 1407

Congress enacted § 1407 in accordance with the understanding of the statute in its development stage. Section 1407 states:

Each action so transferred *shall* be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated¹³⁸

This language admits of one interpretation: if a transferred action is not terminated before the conclusion of pretrial proceedings,¹³⁹ it must be remanded. When a transferee judge uses § 1404(a) to retain an action for trial, the case remains in the transferee district despite the conclusion of pretrial proceedings, a plain violation of § 1407’s language.

Given the plain language of the statute and Congress’s express statement that § 1407 would require amendment if transfer for trial were to be permitted,¹⁴⁰ it is somewhat troubling that courts have nevertheless developed the § 1407-§ 1404(a) technique to retain cases for trial in the transferee forum. *In re Air Crash Disaster Near Hanover, New Hampshire on October 25, 1968*¹⁴¹ is a principal case in the judicial development of the § 1407-§ 1404(a) combination. Judge Bownes, sitting in the transferee court, acknowledged the difficulty with the statute’s language:

I must recognize candidly that there is nothing in the language of 28 U.S.C. § 1407(a) or 1404(a) which directly allows, or even suggests, that the transferee judge has the power to transfer cases to his district, or any district, for purposes of trial. . . . The power to transfer 1407 cases pursuant to 1404(a) to a single district for trial has been developed by judicial interpretation to meet the problems imposed upon the federal courts by complex and multidistrict cases.¹⁴²

¹³⁸ *Id.* (emphasis added).

¹³⁹ For a discussion of termination during pretrial, see *supra* notes 77-85 and accompanying text.

¹⁴⁰ See *supra* text accompanying note 131.

¹⁴¹ 342 F. Supp. 907 (D.N.H. 1971).

¹⁴² *Id.* at 909.

The judge's candor is splendid bar one word: the development of § 1407-§ 1404(a) transfers occurred not through judicial "interpretation," but rather through judicial "manipulation."¹⁴³

Judge Lord, in *In re Antibiotic Antitrust Actions*,¹⁴⁴ similarly discounted the defendant's statutory language argument by remarking: "[a]lthough the defendants' reasoning has a certain initial appeal, it breaks down on careful analysis."¹⁴⁵ Strangely, Judge Lord's careful analysis required a selective view of § 1407's language and legislative history.¹⁴⁶ The decision was upheld on appeal to the Second Circuit Court of Appeals.¹⁴⁷

There is one sure way to get by a statutory language barricade—do an end run around it. The courts, as well as the Panel,¹⁴⁸ have done so.

3. Section 1404(a) is Unnecessary for Pretrial

Section 1407 is undeniably pretrial-oriented. The only powers a transferee court need exercise are those necessary to conduct pretrial proceedings¹⁴⁹ or to dispose of actions in the pretrial

¹⁴³ The advantages of trial in the transferee court, *see supra* part III.C, undoubtedly make § 1404(a) tempting to the transferee judge. In *Hanover*, Judge Bownes had before him 32 cases which arose out of a single airplane crash. *See id.* at 907. On the issue of liability, each plaintiff would have presented very similar evidence and examined the same witnesses, producing up to 32 repetitious trials (assuming no cases came from the same transferor forum). Section 1404(a) enabled Judge Bownes, who was intimately familiar with the matter, to bring all the cases together for a single liability trial.

It is understandable that Judge Bownes and other transferee judges foresaw and were tempted by the economies accompanying a § 1404(a) transfer of cases for all purposes. Nonetheless, acting within its constitutional powers, Congress announced that § 1407 would not affect the location of trial in any case. There are numerous situations in which judges may see economies or efficiencies and desire to implement their ideas but are limited by federal statutes. *See, e.g.,* *Finley v. United States*, 490 U.S. 545 (1989) (holding that pendent party jurisdiction is not permitted by statute). The "dilemma" faced under § 1407 is no different.

¹⁴⁴ 333 F. Supp. 299 (S.D.N.Y. 1971).

¹⁴⁵ *Id.* at 303.

¹⁴⁶ *See id.* Nonetheless, Judge Lord's twisted reasoning seemed necessary in light of his conclusion at an earlier stage of the matter that the cases before him were so intertwined and complex that transfer "to a single district for trial purposes was a prerequisite to working out a realistic 'trial plan.'" *Id.* at 301. Judge Lord was truly between a rock and a hard place.

¹⁴⁷ *See* *Pfizer, Inc. v. Lord*, 447 F.2d 122 (2d Cir. 1971).

¹⁴⁸ The Panel's Rule 14(b) also contradicts the legislative history and language of § 1407. *See* R. PROC. J.P.M.L. 14(b).

¹⁴⁹ *See* Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 807 (1985) (arguing "that any power of the transferee judge to make

stage.¹⁵⁰ Neither the statute's language nor its legislative history suggest that Congress intended the transferee court to possess all powers that a judge holds in an ordinary case. Yet the courts have held otherwise. In *In re Plumbing Fixture Cases*,¹⁵¹ Judge Becker stated that "the transferee court may make any order . . . that might have been rendered by the transferor court in the absence of transfer."¹⁵² When a § 1404(a) transfer is made with no involvement of § 1407, this statement is true; a § 1404(a) transferee court has unfettered control over the case.¹⁵³ Judge Becker's statement, however, is not attributable to a § 1407 transferee court. An example will show why.

Federal Rule of Civil Procedure 42(a) permits a judge to order joint trial of any actions involving a common question of law or fact pending before the court.¹⁵⁴ This power is vested in every district court judge. Suppose a party in a pending action consolidated for pretrial purposes under § 1407 brings a Rule 42(a) motion before the transferee judge. Can the transferee judge grant the motion and retain the cases for trial? The holding in *Plumbing Fixture* would lead one to believe he could. Yet this ability would utterly pervert the congressional design of § 1407 and convert "pretrial" in § 1407 to verbiage. If the transferee judge held this power, then anytime § 1407 was employed the judge could try the combined cases simply by using Rule 42(a). Granting a Rule 42(a) motion in a consolidated § 1407 matter is incompatible with the purpose of § 1407 and must, therefore, be outside the limits of the transferee judge's power, if the limitations in the multidistrict litigation statute are to be taken seriously. Judge Becker's statement in *Plumbing Fixture*—that a transferee judge's power is "coextensive with that of

legal rulings [must] be an adjunct to the discovery process"). Transgrud argues that transferee judges are precluded from using § 1404(a). See *id.* at 804-09.

¹⁵⁰ See *supra* notes 77-85 and accompanying text. A § 1407 transferee court does not have the power to rule on any and all available pretrial motions. Indeed, certain motions that are "pretrial," in the sense that they are most often decided before the start of trial, are incompatible with § 1407's purposes and its mandate of remand at the conclusion of pretrial proceedings.

¹⁵¹ 298 F. Supp. 484 (J.P.M.L. 1968)

¹⁵² *Id.* at 495. *Plumbing Fixture* is cited in support of the § 1407-§ 1404(a) combination in two of the seminal cases condoning the tactic. See *Hanover*, 342 F. Supp. at 909; *Antibiotic Antitrust*, 333 F. Supp. at 303.

¹⁵³ Such a court is entitled to use § 1404(a) to transfer the case to yet another district if it deems a second transfer appropriate. Moreover, nothing prevents the court from using § 1404(a) to send the case back to the court from which it came.

¹⁵⁴ See FED. R. CIV. P. 42(a).

the transferor court"¹⁵⁵—cannot apply when the transferee court is created through § 1407.

Recognizing that a transferee court's powers are limited, it becomes important to determine what powers may properly be exercised. Given the pretrial orientation of § 1407, this determination must be informed by considering which powers are "necessary" and which are "unnecessary" to conduct pretrial proceedings or terminate the claims. Rule 42(a) neither assists a § 1407 transferee judge in pretrial matters nor terminates litigation. Accordingly, Rule 42(a) cannot be utilized. For the same reasons, a change of venue under § 1404(a) is beyond the scope of a transferee court's power. Ruling on a § 1404(a) motion is not necessary to continue or terminate pretrial proceedings.

4. The Limitations of Section 1404(a)

In addition to the § 1407 problems, § 1404(a) has its own limitations. The panel has noted: "after an order changing venue the jurisdiction of the transferor court ceases . . . thereafter, the transferor court can issue no further orders, and any steps taken by it are of no effect."¹⁵⁶ During pendency of § 1407 proceedings, no court other than the transferee court has jurisdiction over or venue of the transferred case—the transferred case does not exist, except in the transferee forum. It does not make sense for a transferee court to assume jurisdiction over a case for trial by ordering a "change" of venue under § 1404(a); the venue is already the transferee court and none other. The language of § 1404(a) illustrates this point: "a district court may transfer any civil action to any *other* district."¹⁵⁷ A transferee court using § 1404(a) is not transferring a case to *another* district. It is simply proclaiming trial jurisdiction over the case.

Transferee courts improperly use § 1404(a) to acquire, rather than relinquish, jurisdiction. A judge granting a § 1404(a) motion always *divests* himself of jurisdiction over the transferred case. He cannot use this statute to bring actions into his court.¹⁵⁸ In es-

¹⁵⁵ *Plumbing Fixture*, 298 F. Supp. at 495.

¹⁵⁶ *Id.* at 496.

¹⁵⁷ 28 U.S.C. § 1404(a) (1988) (emphasis added).

¹⁵⁸ A short illustration may prove beneficial. Case X is filed in the Eastern District of New York. Defendant would like the case tried in the Northern District of Iowa. Where can a § 1404(a) motion be filed? *Only* in the Eastern District of New York. The Northern District of Iowa has no power to rule on such a motion. If the New

sence, these courts have created a new "venue" statute *sua sponte*.¹⁵⁹ Section 1404(a) is merely a convenient decoy.

Transferee courts using § 1404(a) often violate its terms in another manner. When contemplating transfer under § 1407, the Panel must consider if transfers "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of [the] actions."¹⁶⁰ Section 1404(a), however, can be used only when transfer is "for the convenience of parties and witnesses."¹⁶¹ The courts sometimes forget which statute they operate under. In *Pfizer, Inc. v. Lord*,¹⁶² the Second Circuit affirmed the transferee court's use of § 1404(a), stating that the transfer would assist in the efficient and just conduct of the actions.¹⁶³ This statement typifies a transferee court's reasons for employing § 1404(a); the concern is with judicial economies, not, as § 1404(a) requires, the parties' convenience.

Moreover, even a transferee court's idea of "convenience of parties and witnesses" may vary greatly from a transferor court's. The concept of "convenience of parties and witnesses" takes on an entirely different meaning when a § 1404(a) motion, encompassing tens or hundreds of cases, is brought before a § 1407 transferee court. In such a setting, the interests of the individual litigants are subordinated to the collective good.¹⁶⁴ For this reason, transferee courts are more likely to grant a § 1404(a) motion than transferor courts.¹⁶⁵

Despite Judge Lord's contention that there is "absolutely" no reason why transferee judges should be barred from using § 1404(a) to try § 1407 consolidated cases, there are numerous reasons: (1) Congress clearly stated that, if appropriate, it would amend § 1407

York judge grants the motion, he purges himself of the case. A judge ruling on a § 1404(a) motion never, except in the § 1407 context, brings a case into his jurisdiction.

¹⁵⁹ By focusing on the propriety of using § 1404(a) in combination with § 1407, courts have masterfully, perhaps unwittingly, avoided an inquiry into precisely what § 1404(a) permits.

¹⁶⁰ 28 U.S.C. § 1407(a) (1988).

¹⁶¹ See *id.* § 1404(a).

¹⁶² 447 F.2d 122 (2nd Cir. 1971)

¹⁶³ See *id.* at 125.

¹⁶⁴ See *supra* note 60 and accompanying text.

¹⁶⁵ See Chesley & Kolodgy, *supra* note 7, at 525 ("The major problem that has arisen when these two proceedings [§ 1407 and § 1404(a)] are combined is that the efficiency standards of section 1407 many times overshadow the important individual concerns that the courts examine under section 1404."); *infra* text accompanying note 188.

to authorize trial in the transferee forum; (2) the statute's plain language requires remand at the conclusion of pretrial if termination has not occurred; (3) § 1404(a) is unnecessary for a transferee judge to conduct pretrial proceedings or terminate the litigation; and (4) transferee judges ignore the requirements of § 1404(a).¹⁶⁶

B. *The Questionableness of Trial in the Transferee Court by Consent*

Section 1404(a) may prove incapable of consolidating all § 1407-transferred cases for trial. If a particular action could not originally have been brought in the transferee court, the transferee judge cannot obtain jurisdiction over the case through § 1404(a).¹⁶⁷ When judges have been unable to consolidate cases for trial via § 1404(a), parties have sometimes consented to trial in the transferee court.¹⁶⁸ The legitimacy of consent, however, is highly suspect in light of § 1407's design and the Supreme Court's ruling in *Hoffman v. Blaski*.¹⁶⁹

Section 1407's language provides one reason to doubt that consent to trial in the transferee court is permissible. The statute provides that remand "shall" occur upon completion of pretrial proceedings unless the case has been terminated.¹⁷⁰ The fact that the parties agree to trial in the transferee forum seems irrelevant to the statutory scheme; if the transferee court retains the cases for trial by any means it violates the remand requirement. Congress designed § 1407 so that it would not affect the place of trial in any

¹⁶⁶ There is at least one additional argument. 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." 28 U.S.C. § 1407(a) (1988). If a transferee court orders change of venue, the Panel would be precluded from remanding any of the claims listed above. This would be an absurd result in light of the Panel's congressional grant of power.

¹⁶⁷ See *id.* § 1404(a) (declaring that a transfer can only be made to a district where the action "might have been brought"); see also *id.* § 1406(a) (providing for transfer of cases where venue is improperly laid to "any district or division in which it could have been brought").

¹⁶⁸ See, e.g., *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 551 n.7 (S.D. Tex. 1980) (noting that although a § 1404(a) transfer was precluded because the cases could not have been brought in that district, the parties had waived venue and consented to the resolution of a particular issue in the transferee court). But see *In re Tax Refund Litig.*, 723 F. Supp. 922, 925 (E.D.N.Y. 1989) (ruling that one of four § 1407-consolidated cases could not be acquired for trial for lack of consent by the parties).

¹⁶⁹ 363 U.S. 335 (1960).

¹⁷⁰ See *supra* text accompanying note 138.

case.¹⁷¹ The statute does affect the place of trial when parties consent—but for § 1407 the consent opportunity would not exist.

The rule announced by the Supreme Court in *Hoffman* also undermines the argument that consent is a valid basis for retaining an action for trial in the transferee court. In *Hoffman*, the Court considered whether a district court “is empowered by § 1404(a) to transfer [an] action . . . to a district in which [the defendant consented to trial, but] the plaintiff did not have a right to bring it.”¹⁷² The plaintiff, Blaski, brought suit in the Northern District of Texas against Howell for patent infringement.¹⁷³ Howell moved, under § 1404(a), to transfer the action to the Northern District of Illinois.¹⁷⁴ Blaski objected, arguing that the judge could not transfer the case to the Illinois court because Blaski could not have originally brought his action in that forum.¹⁷⁵ The district judge granted the motion, holding that transfer would be “for the convenience of the parties and witnesses in the interest of justice.”¹⁷⁶ The Fifth Circuit Court of Appeals affirmed.¹⁷⁷

Upon transfer, Blaski immediately requested that the Illinois district judge, Judge Hoffman, remand the case.¹⁷⁸ Judge Hoffman denied the motion, and Blaski petitioned the Seventh Circuit Court of Appeals for a writ of mandamus ordering Judge Hoffman to reverse his decision.¹⁷⁹ The court of appeals granted the writ, ruling that § 1404(a)’s language—“where it might have been brought”—made clear that a case can only be transferred to a district where the plaintiff had a right to bring it.¹⁸⁰

On further appeal in the Supreme Court, the defendant argued that if he “move[d] to transfer the action to some other district and consent[ed] to submit to the jurisdiction of such other district, the

¹⁷¹ See *supra* notes 131-32 and accompanying text.

¹⁷² *Hoffman*, 363 U.S. at 336.

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ See *id.* at 336-37 (noting that “the defendant[] did not reside, maintain a place of business, or infringe the patents in, and could not have been served with process in, the Illinois district”).

¹⁷⁶ See *id.* at 337.

¹⁷⁷ The appellate court held that “[t]he purposes for which § 1404(a) was enacted would be unduly circumscribed if a transfer could not be made ‘in the interest of justice’ to a district where the defendants not only waive venue but to which they seek the transfer.” *Id.* (quoting *Ex parte Blaski*, 245 F.2d 737, 738 (5th Cir. 1957)).

¹⁷⁸ See *id.*

¹⁷⁹ See *id.* at 338.

¹⁸⁰ See *id.*

latter district should be held one 'in which the action might *then* have been brought.'¹⁸¹ The Supreme Court disagreed:

Of course, venue, like jurisdiction over the person, may be waived. A defendant, properly served with process by a court having subject matter jurisdiction, waives venue by failing seasonably to assert it, or even simply by making default. But the power of a District Court under § 1404(a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but, rather, upon whether the transferee district was one in which the action "might have been brought" by the plaintiff.¹⁸²

Quoting partially from the Seventh Circuit opinion, the Court added:

If when a suit is commenced, plaintiff has a right to sue in that district, independently of the wishes of defendant, it is a district 'where [the action] might have been brought.' If he does not have that right, independently of the wishes of defendant, it is not a district 'where it might have been brought,' and it is immaterial that the defendant subsequently [makes himself subject, by consent, waiver of venue and personal jurisdiction defenses or otherwise, to the jurisdiction of some other forum].¹⁸³

Thus, under *Hoffman*, a § 1407-pretrial judge cannot order transfer under § 1404(a), even with a party's consent, when the plaintiff could not have brought suit in the transferee forum. Although *Hoffman* does not expressly apply to simple submission by both parties to trial in the transferee court (the ruling prevented the combination of consent *and* a § 1404(a) transfer¹⁸⁴), its principle

¹⁸¹ *Id.* at 342.

¹⁸² *Id.* at 343-44 (citations omitted).

¹⁸³ *Id.* at 344 (bracketed material in original).

¹⁸⁴ In *In re Alien Children Education Litigation*, 501 F. Supp. 544 (S.D. Tex. 1980), the transferee court noted:

On December 20, 1979, the parties made a joint motion to resolve in this court the issue of the constitutionality of the state statute. The Judicial Panel on Multidistrict Litigation, of course, did not transfer these cases for such a resolution but only for consolidated pretrial proceedings. It would have been inappropriate for this court to grant a motion for a change of venue transferring the cases originally filed in the other districts to this court; they could not "have been brought" here. . . . Neither the convenience of the parties nor judicial economy, however, would be promoted by remanding the cases for trial of the one controlling issue in four different districts. Accordingly, the parties waived proper venue and consented to have the issue resolved in this court. The court ratified that consent.

Id. at 551 n.7 (citations omitted).

is instructive and applicable: a court's ability to accept a litigant's consent is limited; given the language, legislative history, and purpose of § 1407, courts arguably are prohibited from ratifying consent to trial in the multidistrict context. Congress expected "[§ 1407] would not affect the place of trial in any case" ¹⁸⁵

C. Policy Considerations

Even disregarding the impropriety of using § 1404(a) and/or consent to achieve trial in the transferee court, there are serious shortcomings in such a system. These shortcomings, combined with the observation that some multidistrict litigations are beneficially handled through consolidated trial, ¹⁸⁶ demonstrate the need to amend § 1407.

1. The Transfer Decision

Currently, the nation's "specialists" in multidistrict litigation—the Panel judges—have absolutely no voice in the trial decision. This is the predominant and individually sufficient reason to amend § 1407; placing the trial decision solely in the hands of the transferee judge is problematic. ¹⁸⁷

Transferee judges are prone to subverting legitimate concerns of individual parties in the interest of expediency. They have been more willing to grant § 1404(a) transfers than transferor judges. "[D]ifferent standards may be applied depending upon whether the 1404 motion is decided by the transferee or the transferor court." ¹⁸⁸ This variance is explained by the different perspectives of transferor and transferee courts. The transferee court weighs "convenience of parties and witnesses" on a collective scale; the transferor court has only to focus on the individual litigants in a single case. ¹⁸⁹ Moreover, it is very difficult to reverse a transferee

¹⁸⁵ H.R. REP. NO. 1130, *supra* note 2, at 3, *reprinted in* 1968 U.S.C.C.A.N. at 1900. Obviously, by allowing parties to consent to trial in the transferee court, § 1407 affects the place of trial.

¹⁸⁶ See *supra* part III.C.

¹⁸⁷ Two early commentators split on the issue of who should make the trial decision if § 1407 was amended to permit consolidated trial. Compare Note, *supra* note 51, at 1038-40 (recommending the Panel have power to make the decision) with Cooney, *supra* note 116, at 611 (treating the question tersely, but opining that the transferee judge decide).

¹⁸⁸ Levy, *supra* note 1, at 63; see also *supra* note 165.

¹⁸⁹ See *supra* notes 63 & 160-65 and accompanying text.

court's decision to consolidate under § 1404(a). The court has broad discretion to utilize § 1404(a).¹⁹⁰

The decision to transfer for trial is a serious one. Unlike pretrial, key witnesses may be vital at the trial stage, yet unable to travel to a distant transferee forum. More importantly, litigants lose individual control over their cases in consolidated proceedings.¹⁹¹ Additionally, local discovery may be needed to supplement coordinated pretrial.¹⁹² The Panel is uniquely situated to evaluate the merits of consolidated trial from a neutral viewpoint. While appreciating the savings in judicial resources, the Panel could also champion the interests of individual litigants who would be unduly burdened by a consolidated trial. In addition, the Panel would bring its expertise to bear on this important determination and provide guidance to multidistrict litigants through written opinions.

In one specific type of action—*parens patriae* claims brought by state attorney generals under the Clayton Act for violations of the Sherman Act—Congress has already permitted consolidation for trial.¹⁹³ Importantly, Congress mandated that the Panel, *not* the transferee court, decide whether joint trial is appropriate. Although this provision did not exist when the § 1407-§ 1404(a) combination developed,¹⁹⁴ its implications are profound. First, it shows that Congress knows how to permit trial in the transferee forum—by express language.¹⁹⁵ Second, it shows whom Congress desires to make the trial decision—its expert panel on multidistrict litigation.

¹⁹⁰ The courts of appeals will issue a writ of mandamus only when the transferee judge clearly abuses his discretion. See *Mills v. Beech Aircraft Corp.*, 886 F.2d 758, 761 (5th Cir. 1989) (stating that "1404 transfers are committed to the sound discretion of the transferring judge"); *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1293 (7th Cir. 1989) (noting that district courts have "broad discretion" in determining § 1404(a) motions and that they "will not be reversed absent a clear abuse of discretion").

¹⁹¹ Loss of individual control of the lawsuit was a notable concern of the Coordinating Committee. "Proposed § 1407 [allowing transfer for pretrial only] would maximize the litigant's traditional privileges of selecting where, when and how to enforce his substantive rights or assert his defenses while minimizing possible undue complexity from multi-party jury trials." Co-ordinating Committee Report, *supra* note 134, at 499.

¹⁹² This was one of Congress's reasons for not originally allowing transfer for trial. See H.R. REP. NO. 1130, *supra* note 2, at 4, reprinted in 1968 U.S.C.A.N. at 1901-02.

¹⁹³ See 28 U.S.C. § 1407(h) (1988).

¹⁹⁴ Section 1407(h) was added in 1976. See Act of Sept. 30, 1976, Pub. L. No. 94-435, § 303, 90 Stat. 1394, 1396.

¹⁹⁵ This fact buttresses the argument that transferee courts are improperly using § 1404(a) to try the cases consolidated by the Panel for pretrial.

2. Limited Transfers Under Section 1404(a)

Section 1404(a) allows transfer only if the proposed district is one in which the action might originally have been brought.¹⁹⁶ If the transferee forum is one in which some of the cases consolidated for pretrial could not have been brought,¹⁹⁷ and if parties do not consent to trial, the transferee court simply cannot try the cases.¹⁹⁸ This limitation is particularly troublesome when the transferee court needs to consolidate the cases to create a realistic trial plan.¹⁹⁹ Amending § 1407 to authorize consolidated trial in any judicial district would eliminate this dilemma.

In light of this limitation, the Panel may be adding to the inconvenience of multidistrict litigants. The Panel is fully cognizant of the transferee courts' use of § 1404(a).²⁰⁰ For this reason it may overlook the most convenient *pretrial* transferee court because all cases in a matter could not be consolidated for trial, through § 1404(a), in that forum.²⁰¹ In *In re Yarn Processing Patent Validity Litigation*²⁰² the Panel chose the Southern District of Florida as the pretrial forum despite serious doubts that it was the most convenient pretrial forum. Judge Weinfeld, joined by Judge Wisdom and Judge Weigel, dissenting from the Panel's forum choice, argued that the Eastern District of New York was clearly the most convenient forum and would best promote the ends of efficient justice, and he provided a detailed analysis of the facts supporting his position.²⁰³ The Panel had other considerations in mind:

We are convinced that of the two proposed districts, the Southern District of Florida is better suited to pretrial *and* ultimate

¹⁹⁶ See 28 U.S.C. § 1404(a) (1988); see also part IV.B (discussing *Hoffman v. Blaski*, 363 U.S. 335 (1960), in which the Court affirmatively recognized this limitation).

¹⁹⁷ The Panel can transfer cases to any district for pretrial, whether or not the case might have originally been brought there. See *supra* note 21 and accompanying text.

¹⁹⁸ See, e.g., *In re Tax Refund Litig.*, 723 F. Supp. 922, 923 (E.D.N.Y. 1989).

¹⁹⁹ See *supra* note 123 and accompanying text (discussing Judge Lord's conclusion that joint trial was necessary because of the interrelated and complex nature of the matter before him).

²⁰⁰ The Panel's Rule 14(b) reminds transferee courts that they may use § 1404(a) or § 1406(a). See R. PROC. J.P.M.L. 14(b).

²⁰¹ Compare Conversation with Judge Charles Weiner, Former Member of the Panel (March 7, 1991) (stating that the Panel often looked down the line to transferee court trial when choosing the transferee forum) with Telephone Interview with Judge Louis Pollak, Member of the Panel (February 19, 1991) (stating that the Panel's usual focus is upon the best forum for pretrial).

²⁰² 341 F. Supp. 376 (J.P.M.L. 1972).

²⁰³ See *id.* at 384-89 (Weinfeld, J., dissenting).

trial of the principal issues involved in the litigation. . . . Lex-Tex has not been named a defendant in the Eastern District of New York. The briefs and arguments of the parties have created grave doubt whether it can be made a party defendant in that district for purposes of trial. Counsel for the New York plaintiffs conceded at the hearing that Lex-Tex was not named in the amended complaint because the plaintiffs initially doubted whether it could be sued there. . . . No such problem is presented in Florida, where Lex-Tex is incorporated and maintains its only office.²⁰⁴

The Florida forum was "better suited" because that transferee judge could use § 1404(a) to consolidate the cases for trial.²⁰⁵ Amending § 1407 to permit the Panel to transfer for pretrial and trial would alleviate this unfortunate extra inconvenience placed upon some multidistrict litigants.

3. Adding Flexibility

In addition to dispensing with the limitations in § 1404(a), amending § 1407 to permit the Panel to consolidate would create other advantages. Section 1407 provides 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."²⁰⁶ When a transferee judge consolidates under § 1404(a) the Panel is denied the opportunity to exercise its statutory power to remand these types of claims. Placing the ability to consolidate for trial in the Panel's hands would permit this "early remand" power to be exercised and this obligation to be taken seriously.²⁰⁷

The asbestos litigation²⁰⁸ points to another tremendous advantage that could be realized by amending § 1407. Judge Weiner has over 26,000 cases before him as the transferee judge. Even if every single litigant could originally have brought suit in the Eastern District of Pennsylvania so that § 1404(a) could be used to

²⁰⁴ See *id.* at 382 (footnote omitted) (emphasis added).

²⁰⁵ See *id.* at 382 ("[W]hen, as here, our decision precedes some potential transfers under Section 1404(a), we believe it our duty to select the transferee district best able to serve as trial forum . . .").

²⁰⁶ 28 U.S.C. § 1407(a) (1988).

²⁰⁷ This clause in the statute again raises the argument for amending § 1407 because using § 1404(a) in the multidistrict context is statutorily impermissible. The power of the Panel to remand a specific claim "before the remainder of the action," presupposes that remand will in fact occur.

²⁰⁸ See *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991).

consolidate the cases in Pennsylvania for trial, doing so would prove futile. There are countless different types of claims in this massive litigation;²⁰⁹ it would perhaps take a lifetime for a judge to try the different groups of claims. The Panel, however, could do wonders if it had the ability to transfer the claims for trial. After Judge Weiner gains an understanding of the types of plaintiffs, claims, defenses, defendants, etc., through pretrial proceedings, the Panel could strategically transfer groups of cases by type, geographic location, or both to forums throughout the nation for consolidated trials. The ability to vary the trial forum from the pretrial forum could produce significant efficiencies.

V. MULTIDISTRICT LITIGATION UNDER AN AMENDED § 1407.

Placing the power to transfer for trial in the Panel's hands would not mean the Panel would make its decision in a vacuum. The Panel is not in day-to-day contact with transferred matters. The transferee judge's intimate knowledge of a matter has resulted in the Panel deferring to his remand recommendation,²¹⁰ even though the Panel is empowered to order remand at any time.²¹¹ Developments during pretrial can affect the appropriateness of a consolidated trial just as they can affect the appropriateness of remand under the current § 1407. Therefore, a Panel decision to transfer a matter for all purposes when the matter is first before the Panel might prove erroneous as pretrial events unfold.²¹² Like the remand decision, the Panel should not make the consolidation decision without input from the transferee judge.

A system to determine whether to consolidate for trial must be modeled on the current system for determining whether to remand: input from the transferee judge as to the suitability of consolidated trial with final authority vested in the Panel. Under this proposal, the Panel would conduct an initial hearing on pretrial transfer, as presently done, during which it would become familiar with the matter. Based on the type of matter, the Panel could make a

²⁰⁹ See *id.* at 423 (providing examples of the types of cases: "maritime asbestos actions, railroad worker actions, friction materials actions, tire worker actions, etc.").

²¹⁰ See *supra* note 75.

²¹¹ See 28 U.S.C. § 1407(a) (1988).

²¹² Cf. Note, *supra* note 51, at 1039 (asserting that although the Panel might sometimes have to delay a decision on trial until completion of pretrial, "the Panel will usually be able to make early determinations because there is a large degree of predictability in the issues which are suitable for consolidated trial").

preliminary assessment of the possibility for consolidated trial.²¹³

Upon transfer for pretrial, one or two Panel judges would act as liaison with the transferee judge and monitor the transferred matter. Under the present statute, monitoring is implicitly required because the Panel is obligated to remand all actions, unless terminated in pretrial,²¹⁴ and to remand claims, when necessary, before the rest.²¹⁵ The Panel's current policy of deference to the transferee judge and the use of § 1404(a) by the transferee courts severely diminishes the monitoring responsibility. Under the proposal, the assigned transferee judge or judges would pay close attention to each matter, considering seriously the possibility of remand, early remand of selected claims, and consolidation for trial. In certain types of matters, of course, very little monitoring would be required.

At the conclusion of pretrial, litigants would voice their opinions on consolidated trial, if the transferee judge, the Panel, or a party made such a suggestion. If all parties agree to trial in the transferee forum it would automatically occur, assuming the transferee judge is available. A motion to transfer for trial should only involve the Panel when there is difference of opinion.²¹⁶ If one litigant favored complete transfer and others opposed it, or if the transferee judge favored joint trial in contrast to the parties, the Panel would become involved.

When there is difference of opinion on a motion for consolidated trial or when the transferee judge believes remand is appropriate, the judge would apprise the Panel of the situation. Like the current remand policy, the Panel judges would often be

²¹³ One commentator notes:

In air disaster cases, liability has frequently been handled on a consolidated basis while determination of damages has been left to transferor courts and local juries. Similarly, the issue of patent validity has frequently been litigated in a single trial; and although infringement has been decided in the same manner, it is more often appropriate for individual handling. The liability issue in antitrust cases has been found suitable for a consolidated trial, and if class actions are involved, disposition in the transferee court is almost certain. Securities litigation also often involves class actions appropriate for consolidation beyond pretrial.

Id. at 1039-40 (footnotes omitted).

²¹⁴ See 28 U.S.C. § 1407(a) (1988) (indicating that "action[s] . . . shall be remanded by the panel at or before the conclusion of . . . pretrial").

²¹⁵ See *id.*

²¹⁶ This difference of opinion might arise over the extent of consolidated trial; litigants may agree that certain issues warrant joint trial (such as liability), but prefer trial on other issues in the original forum (such as damages).

deferential to the transferee judge. But the Panel's unique insight, expertise in multidistrict litigation, or knowledge gained through monitoring activities might prompt them to decide differently or remand particular individual actions in which continued consolidation would place high burdens on the parties. Moreover, the Panel could provide structure to the issue of consolidated trial through its opinions.

In light of the hardships that a combined trial can create, the Panel should intervene to breathe life into the phrase, "for the convenience of parties and witnesses."²¹⁷ By vesting the Panel with authority to make the final decision on transfer for trial, it would be forced to play a more active monitoring role, which in turn might resuscitate "convenience of parties."

In most instances the pretrial forum would continue as the trial forum. Changes in the nature or scope of the litigation during pretrial, however, could make the pretrial court a less convenient trial forum than other courts. When choosing a trial forum, the Panel would consider which district best serves the "convenience of parties and witnesses" and "promotes the just and efficient conduct" of the actions. The factors that currently guide the Panel in picking the pretrial transferee court would continue to form the framework for picking a trial forum.²¹⁸

This proposed scheme is notably one in which the transferee judge, who is most knowledgeable of a matter, plays a significant role in the decision for consolidated trial. The Panel would rely to some extent upon his guidance, but monitor the cases and/or hold a second hearing on the trial consolidation issue to help inform its decision.²¹⁹

²¹⁷ There is no reason to think that convenience of parties should always be sacrificed to judicial economy. If a deserving situation presents itself, convenience must be elevated above judicial economy.

As previously noted, *see supra* notes 63 & 165, "convenience of parties" may be viewed as an aggregate or individual concept. When the § 1407 transferee judge considers a § 1404(a) motion the tendency is to ignore individuals. *See supra* part IV.C.1. A well-informed Panel could combat this tendency.

²¹⁸ These factors are intensely case specific and it would prove futile to attempt a listing of them. A few of the commonly cited factors were previously mentioned. *See supra* notes 67-71 and accompanying text.

²¹⁹ Recall that frequently some parties do not argue before the Panel at the pretrial transfer hearing as there are often too many cases in a matter for the Panel to hear each litigant. *See supra* note 34 and accompanying text. To assist proper accounting of the hardships of a distant trial, a second hearing would prove advantageous. Alternatively, if the transferor court had become familiarized with the case before pretrial transfer, its communication with the Panel could be beneficial.

CONCLUSION

Commentators have long suggested that § 1407 be amended.²²⁰ With support for emendation currently mounting, especially recommendation by the Federal Courts Study Committee,²²¹ Congress may modify § 1407 on its own initiative. But if the past is indicative of the future, Congress will remain inactive.²²² The search is then for a catalyst to prompt congressional action.

Presumably, Congress recognizes that consolidated trial is conducive to efficient judicial administration. In the past two decades it has not thwarted the use of § 1404(a) in conjunction with § 1407. If this procedure were abruptly halted, a "rush" to the drafting table would likely ensue.

The discussion in Part IV.A shows that a transferee court violates § 1407 and § 1404(a) when it consolidates a matter for trial. Several courts of appeals have yet to rule on the propriety of this judicial innovation.²²³ A decision condemning the practice in even one court of appeals could spark the amendment fire.

Like most courts of appeals, the Supreme Court has not squarely confronted the propriety of the § 1407-§ 1404(a) combination.²²⁴ A prohibiting decision by the Court would probably result in expedited congressional action; the impact would be nationwide. Moreover, the Court, could make an appeal to Congress for

²²⁰ See Cooney, *supra* note 116, at 609-11; Note, *supra* note 51, at 1037-38.

²²¹ See Report of the Federal Courts Study Committee, April 2, 1990, at 45. The Committee stated: "We believe . . . that the federal trial forum should be available to ensure the economy of one court's resolving disputes involving multiple parties from many states. Thus we recommend that Congress broaden § 1407(a) to allow for consolidated trial as well as pretrial proceedings." *Id.* Other notables are in agreement. Judge Weinstein contends that "[t]ransfer of cases within the federal system for full trial under the multidistrict litigation statute" would prove beneficial. Jack B. Weinstein, *Preliminary Reflections on the Law's Reaction to Disasters*, 11 COLUM. J. ENVTL. L. 1, 23 (1986).

²²² In 1983, Representative Kastenmeier unsuccessfully proposed an expansion of multidistrict litigation to allow consolidated trial on the issue of liability. See H.R. 4159, 98th Cong., 1st Sess. (1983). In 1984, Senator Specter introduced a bill, to no avail, to permit consolidated trial of antitrust cases. See S. 2260, 98th Cong., 2d Sess. (1984).

²²³ Only the Second Circuit has faced this issue directly. See *Pfizer, Inc. v. Lord*, 447 F.2d 122, 125 (2d Cir. 1971) (holding that the district judge, to whom cases were assigned by the Panel, had the authority to order a § 1404(a) transfer). Other circuits have made note of the practice in their opinions, but have not ruled specifically on its appropriateness.

²²⁴ In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Court mentioned the practice in dicta. See *id.* at 762-63.

clarification, as it recently did on another jurisdictional issue.²²⁵ The difficulty is, of course, getting the Court to grant certiorari. A ruling contrary to *Pfizer* would create a division in the courts of appeals, a situation in which the Court often grants certiorari.²²⁶

Judicial legitimization of the § 1407-§ 1404(a) process has likely slowed the evolution of § 1407. If transferee courts and the Panel had not attempted to solve the transfer-for-all-purposes problem by sophistry, Congress would likely have amended § 1407 by now. The present situation is less than ideal; a restructuring of the statute to enhance the Panel's role in multidistrict litigation is needed. But a complacent Congress needs prodding to act. The sharpest prodding could come from those who placated Congress in the first place—the courts.

²²⁵ See *Finley v. United States*, 490 U.S. 545 (1989). The *Finley* Court refused to condone pendent party jurisdiction because Congress had not spoken. The Court suggested: "Whatever we say regarding the scope of jurisdiction . . . can of course be changed by Congress." *Id.* at 556. Shortly thereafter Congress codified supplemental jurisdiction. For an examination of this "successful dialogue," see Thomas M. Mengler, Stephen B. Burbank & Thomas D. Rowe, Jr., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213, 214, 216 (1991).

²²⁶ See, e.g., *Pavelic & Leflore v. Marvel Entertainment Group*, 493 U.S. 120 (1989) (settling a circuit split over a Federal Rule of Civil Procedure Rule 11 issue); *Hoffman v. Blaski*, 363 U.S. 335 (1960) (clarifying a circuit split regarding § 1404(a)).