

# A View from the Panel: Part of the Solution

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*The Article traces the development of the Judicial Panel on Multidistrict Litigation and its role in the management of complex litigation before providing an overview of its current practices and future direction. Its purpose is to provide the reader with some insight into the Panel's operations, to suggest how those operations have generally benefitted litigants in complex multidistrict cases, and to confirm the Panel's intention to continue addressing the challenges that multidistrict litigation poses. In doing so, the Article provides comprehensive statistics that dispel a number of myths about multidistrict litigation and confronts concerns expressed by practitioners and academics about such varied topics as the time allotted to oral argument, the factors involved in selecting the transferee court, and the standards for transferring and remanding cases. The Article concludes with a look toward the role the Panel hopes to play in the future of complex litigation.*

The *Tulane Law Review* organized an interesting Symposium that examined “The Problem of Multidistrict Litigation.” As the Symposium discussions demonstrated, the challenges associated with multidistrict litigation (MDL) are complex and interrelated. There are global complexities: changing class action laws, evolving litigation strategies, and the increasing complexity of multidistrict litigation generally. There are also case-specific complications: the difficulties that transferee courts<sup>1</sup> encounter in processing and overseeing the influx of multiple cases, multiple parties, and (at times) multiple counsel from multiple locations; the integration of later-filed actions with an existing multidistrict litigation; and the presence of multiple claims brought under the laws of multiple jurisdictions.<sup>2</sup>

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1. In MDL parlance, the court to which an action or actions are transferred (or centralized) under 28 U.S.C. § 1407 is referred to as the “transferee” court, and the court from which the action or actions are transferred is called the “transferor” court.

2. When considering questions of state law, the transferee court applies “the state law that would have applied to the individual cases had they not been transferred” to the MDL. See *In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 97 F.3d 1050, 1055 (8th Cir. 1996). On issues of federal law, however, the transferee court applies the law of the circuit in which it is located. *Id.*

My own conversations at the Symposium focused upon how the Judicial Panel on Multidistrict Litigation (Panel) can remain part of the solution to these challenges. My limited purpose here is to provide the reader with some insight into the Panel's operations, to suggest how those operations have generally benefitted litigants in complex multidistrict cases, and to confirm the Panel's intention to continue addressing the challenges that multidistrict litigation poses.

The Panel traces its origins to the 1960s when more than 1800 related civil actions involving conspiracy allegations among electrical equipment managers flooded the federal courts.<sup>3</sup> To coordinate discovery in the over thirty involved courts, Chief Justice Earl Warren created the Coordinating Committee for Multiple Litigation of the United States District Courts.<sup>4</sup> At the end of its work, the Committee recommended a more formalized procedure for handling groups of similar cases.<sup>5</sup> In response, in 1968, Congress enacted 28 U.S.C. § 1407,<sup>6</sup> the statute to which the Panel owes its existence.

The statute provides for seven Panel members without any limitation on their terms.<sup>7</sup> Chief Justice Earl Warren appointed a stellar initial group that included Alfred P. Murrah as Chair; John Minor Wisdom, who later became the Panel's second Chair; Joseph S. Lord III; and Edward Weinfeld. Other later appointments to the Panel include such outstanding jurists as past Chair John F. Nangle;<sup>8</sup> Sam C. Pointer, Jr.; Milton Pollack; Louis H. Pollak; John F. Keenan; Julia Smith Gibbons; Louis C. Bechtle; and Wm. Terrell Hodges, the Panel's immediate past Chair<sup>9</sup>—to name just a few. Although the Panel's

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3. See Kyle Brackin, Comment, *Salvaging the Wreckage: Multidistrict Litigation and Aviation*, 57 J. AIR. L. & COM. 655, 663-64 (1992); Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47, 48-49 (2007).

4. Ostolaza & Hartmann, *supra* note 3, at 48-49.

5. See *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 493 (J.P.M.L. 1968).

6. Act of Apr. 29, 1968, Pub. L. No. 90-296, § 1, 82 Stat. 109, 109, *as amended by* Act of Sept. 30, 1976, Pub. L. No. 94-435, § 303, 90 Stat. 1383, 1396.

7. See 28 U.S.C. § 1407(d) (2000) (providing that Panel members shall be "designated from time to time by the Chief Justice"). The only limitation on appointments is that no two Panel members may be from the same circuit. *Id.*

8. For a useful article on the Panel, see John F. Nangle, *From the Horse's Mouth: The Workings of the Judicial Panel on Multidistrict Litigation*, 66 DEF. COUNS. J. 341 (1999).

9. A very informative interview with Judge Hodges concerning the Panel's history and operations appeared in an issue of the *Maine Bar Journal* in 2004. See Gregory Hansel, *Extreme Litigation: An Interview with Judge Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation*, 19 ME. B.J. 16, 18 (2004).

member-appointment process has been termed a “black box,”<sup>10</sup> it should not be viewed as anything particularly mysterious.

During the first two decades of its existence, many of the Panel appointees served for over a decade. In June 2000, however, then-Chief Justice William H. Rehnquist imposed some regularity and predictability on the appointment process by establishing staggered seven-year terms for each member. Chief Justice John G. Roberts, Jr., has continued his predecessor’s practice and the quality of the Panel’s membership remains high. The current members, like their predecessors, have vast experience in judiciary-wide affairs, as well as years of experience on the bench and as attorneys in complex cases.<sup>11</sup>

Under § 1407, Congress gave the Panel broad powers to transfer<sup>12</sup>

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10. Peter Geier, *MDL Panel: “Traffic Cop” Seeing Its Power Grow*, NAT’L L.J., Mar. 26, 2007, at 1.

11. As of June 1, 2008, the Panel’s current members, in order of their Panel seniority, are: (1) Judge J. Frederick Motz (United States District Court for the District of Maryland, appointed 1985; former United States Attorney; Judicial Conference Federal-State Jurisdiction Committee; Board of Editors, *Manual for Complex Litigation*); (2) Chief Judge Robert L. Miller, Jr. (United States District Court for the Northern District of Indiana, appointed 1985; former Indiana state trial judge); (3) Chief Judge Kathryn H. Vratil (United States District Court for the District of Kansas, appointed 1992; ABA Federal Rules Revision Committee; fourteen years private practice); (4) Senior Judge David R. Hansen (United States Court of Appeals for the Eighth Circuit, appointed to the district court in 1986 and to the court of appeals in 1991; Chair, Judicial Conference Committee on the Judicial Branch; ten years private practice); and (5) the Author (appointed to the federal bench in 1992 after sixteen years of private practice; Chair, Judicial Conference Budget Committee, 1996-2004). Two members have recently left the Panel. The term of Senior Judge D. Lowell Jensen (United States District Court for the Northern District of California), expired in June 2008. Judge Jensen was appointed to the federal bench in 1986, served as Deputy Attorney General of the United States under President Reagan, and on the Judicial Conference Advisory Committee on Criminal Rules. Chief Judge Anthony J. Scirica, United States Court of Appeals for the Third Circuit, resigned from the Panel, effective June 15, 2008, subsequent to his appointment as chair of the Executive Committee of the United States Judicial Conference. Judge Scirica was appointed to the district court in 1984 and to the court of appeals in 1987. He served as chair of the Judicial Conference Committee on Civil Rules and as a member of the Committee on Rules of Practice and Procedure. At present, Judge Motz is serving as transferee judge in two MDLs, Judge Vratil has three MDLs, and Judge Miller has one MDL. Judge Jensen previously oversaw an MDL that is now closed.

12. The Panel uses the terms *transfer* and *centralize* somewhat interchangeably (and this Article does so as well), although there is a technical difference. In general, the term *centralize* is used to describe the process by which the Panel, having found that a group of cases filed in multiple districts meets the § 1407 criteria, creates a new MDL and orders one or more of the cases transferred to a single district for “coordinated or consolidated” pretrial proceedings with one or more cases already pending there. 28 U.S.C. § 1407(a). The term *transfer* technically refers only to those cases that come from the transferor court(s). The Author will leave to the bloggers the job of answering that eternal question: What is the difference between coordination and consolidation? The Panel has previously stated:

Clearly the term “coordinated” and the term “consolidated” denote different judicial functions. And we are of the view that a judge deciding whether to consolidate actions

groups of cases to a single district court for the purpose of conducting pretrial proceedings without consideration for personal jurisdiction over the parties and without having to meet the venue requirements of 28 U.S.C. § 1404.<sup>13</sup> Since the early years of its operation, the legal grounds for the Panel's actions have, for the most part, remained constant and become well-established.<sup>14</sup> The Panel considers only two issues in resolving transfer motions under § 1407 in new dockets. First, the Panel considers whether common questions of fact among several pending civil actions exist such that centralization of those actions in a single district will further the convenience of the parties and witnesses and promote the just and efficient conduct of the actions.<sup>15</sup> Second, the Panel considers which federal district and judge are best situated to handle the transferred matters. In deciding those issues, the Panel exercises its considerable and largely unfettered discretion within the unique circumstances that each motion presents.<sup>16</sup> In fact, appeal from a Panel ruling seldom occurs<sup>17</sup> and is available

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for all purposes is necessarily performing a different judicial function than a transferee judge who is supervising coordinated or consolidated pretrial proceedings under Section 1407.

*In re* S. Cent. States Bakery Prods. Antitrust Litig., 433 F. Supp. 1127, 1130 (J.P.M.L. 1977); see *In re* Equity Funding Corp. of Am. Sec. Litig., 375 F. Supp. 1378, 1384 (J.P.M.L. 1974) (same).

13. See *In re* FMC Corp. Patent Litig., 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) ("Transfers under Section 1407 are simply not encumbered by considerations of in personam jurisdiction and venue.").

14. Compare *In re* Practice of Naturopathy Litig., 434 F. Supp. 1240, 1242 (J.P.M.L. 1977) ("Transfer under Section 1407 is . . . necessary in order to eliminate duplicative discovery, avoid the possibility of conflicting pretrial rulings and conserve judicial effort."), with *In re* KFC Corp. Fair Labor Standards Act Litig., 530 F. Supp. 2d 1356, 1357 (J.P.M.L. 2008) ("Centralization under Section 1407 will eliminate duplicative discovery; prevent inconsistent pretrial rulings . . . ; and conserve the resources of the parties, their counsel and the judiciary.").

15. 28 U.S.C. § 1407(a) provides, in pertinent part:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.

16. See *In re* Wilson, 451 F.3d 161, 173 (3d Cir. 2006) ("The JPML retains 'unusually broad discretion' to carry out its functions, including 'substantial authority . . . to decide how the cases under its jurisdiction should be coordinated.'" (quoting *In re* Collins, 233 F.3d 809, 811-12 (3d Cir. 2000))).

17. E.g., *In re* Wilson, 451 F.3d at 163-64; *In re* Collins, 233 F.3d at 810-11; *In re* Carbon Dioxide Indus. Antitrust Litig., 229 F.3d 1321, 1323 (11th Cir. 2000); *In re* Patenaude, 210 F.3d 135, 138 (3d Cir. 2000). The United States Court of Appeals for the

only by petition for a writ of mandamus or prohibition.<sup>18</sup>

More often than not, the proposed dockets meet the § 1407 criteria and the Panel orders centralization. This has been true throughout the Panel's existence. For example, between 1970 and 1980, the annual "grant" rate on § 1407 motions in new dockets ranged from 51% (in 1980) to over 85% (in 1972). Since 2000, that rate has ranged between 67% and 87%. Only in one year—1981—did the rate fall below 50%, and then only to 47%.<sup>19</sup> For the last five years, the grant rates have ranged between 72% in 2007 and 86% in 2006. One should not infer from these statistics, however, that the Panel is somehow predisposed in favor of centralization. The opposite may indeed be true. The Panel is mindful that centralization is a limited exception to the generally applied rules of venue and jurisdiction. More likely, the data merely reflects the clarity of the standards that the Panel has applied faithfully and consistently over the years. As a result, practitioners who have done their homework will generally refrain from bringing unfounded motions that do not satisfy the prerequisites of § 1407.

Since its creation, the Panel has considered motions for centralization in over 1950 dockets involving more than 250,000 cases and literally millions of claims therein. These dockets encompass litigation categories as diverse as single accidents, such as airplane crashes, train wrecks, and hotel fires;<sup>20</sup> mass torts, such as those involving asbestos and hormone replacement therapy drugs;<sup>21</sup> other types of products liability;<sup>22</sup> patent validity and infringement;<sup>23</sup> antitrust

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Fourth Circuit granted relief in *In re Food Lion, Inc., Fair Labor Standards Act "Effective Scheduling" Litig.*, 73 F.3d 528, 533 (4th Cir. 1996).

18. See 28 U.S.C. § 1407(e) ("No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code.").

19. The Panel ordered centralization in eighteen of thirty-eight new dockets in 1981.

20. *E.g.*, *In re Air Disaster Near Peixoto de Azeveda, Braz.*, on Sept. 29, 2006, MDL No. 1844 (E.D.N.Y. transferred June 22, 2007); *In re Air Crash at Belle Harbor, N.Y.*, on Nov. 12, 2001, MDL No. 1448 (S.D.N.Y. transferred Apr. 22, 2002); *In re Ski Train Fire in Kaprun, Austria*, on Nov. 11, 2000, MDL No. 1428 (S.D.N.Y. transferred Nov. 19, 2001); *In re Fire Disaster at Dupont Plaza Hotel, San Juan, P.R.*, on Dec. 31, 1986 MDL No. 721 (D.P.R. transferred May 13, 1987).

21. *In re Prempro Prods. Liab. Litig.*, MDL No. 1507 (E.D. Ark. transferred Mar. 4, 2003); *In re Asbestos Prods. Liab. Litig. (No. VI)*, MDL No. 875 (E.D. Pa. transferred July 29, 1991).

22. *E.g.*, *In re Gadolinium Contrast Dyes Prods. Liab. Litig.*, MDL No. 1909 (N.D. Ohio transferred Feb. 27, 2008); *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, MDL No. 1873 (E.D. La. transferred Oct. 24, 2007).

price fixing;<sup>24</sup> securities fraud;<sup>25</sup> and employment practices.<sup>26</sup> More recently, the Panel has noticed some uptick in the number of new dockets involving alleged violations of the Fair and Accurate Credit Transactions Act,<sup>27</sup> as well as patent dockets involving Hatch-Waxman Act issues.<sup>28</sup>

Among some common misconceptions about MDLs are that most are “mega-cases” and that they linger in the transferee courts for many years. To be sure, some MDLs meet the “mega-case” definition. And others, for various reasons, do remain in the transferee courts for lengthy periods of times. However, most MDLs do not fit either of these descriptions. Only thirty-seven out of about 300 active MDLs comprise more than 100 constituent actions and only ten have more than 1000.<sup>29</sup> By contrast, about one-half of all open MDLs are comprised of ten or fewer actions. And, while it is true that a handful of open MDLs are quite old, there are not many, the number of their actions and claims is dwindling, and there are valid reasons for their continued existence.<sup>30</sup> The data, in fact, show that the transferee courts

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23. *E.g.*, *In re Rembrandt Techs., LP, Patent Litig.*, MDL No. 1848 (D. Del. transferred June 18, 2007); *In re Mirtazapine Patent Litig.*, MDL No. 1445 (D.N.J. transferred Apr. 23, 2002).

24. *E.g.*, *In re Orthopaedic Implant Device Antitrust Litig.*, MDL No. 1831 (S.D. Ind. transferred Apr. 18, 2007); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1827 (N.D. Cal. transferred Apr. 17, 2007).

25. *E.g.*, *In re Refco Inc. Sec. Litig.*, MDL No. 1902 (S.D.N.Y. transferred Dec. 28, 2007); *In re Sterling Fin. Corp. Sec. Litig.*, MDL No. 1879 (E.D. Pa. transferred Oct. 26, 2007).

26. *E.g.*, *In re Terminix Employment Practices Litig.*, MDL No. 1809 (N.D. Cal. transferred Dec. 19, 2006); *In re FedEx Ground Package Sys., Inc., Employment Practices Litig. (No. II)*, MDL No. 1700 (N.D. Ind. transferred Aug. 10, 2005).

27. *E.g.*, *In re Tex. Roadhouse Fair & Accurate Credit Transactions Act (FACTA) Litig.*, MDL No. 1927 (N.D. Ill. transferred Apr. 7, 2008); *In re OSI Rest. Partners, LLC, Fair & Accurate Credit Transactions Act (FACTA) Litig.*, MDL No. 1904 (E.D. Pa. transferred Feb. 20, 2008); *In re Boscov's Dep't Store, LLC, Fair & Accurate Credit Transactions Act (FACTA) Litig.*, MDL No. 1881 (D.N.J. transferred Oct. 17, 2007).

28. *E.g.*, *In re Brimonidine Patent Litig.*, MDL No. 1866 (D. Del. transferred Aug. 20, 2007); *In re Desloratadine Patent Litig.*, MDL No. 1851 (D.N.J. transferred Aug. 16, 2007).

29. The three largest current MDLs are MDL No. 875, *In re Asbestos Products Liability Litigation (No. VI)* (over 42,000 actions remain pending out of the approximately 120,000 centralized in the litigation); MDL No. 1657, *In re Vioxx Marketing, Sales Practices and Products Liability Litigation* (over 9300 pending actions), in which Judge Eldon Fallon has recently approved a settlement; and MDL No. 1769, *In re Seroquel Products Liability Litigation*, (over 5600 pending actions).

30. The oldest MDL is MDL No. 381, *In re “Agent Orange” Products Liability Litigation*, which began in 1979 and is still receiving new tag-along cases. The second-oldest presently active MDL, which is MDL No. 799, *In re Air Disaster at Lockerbie, Scotland, on December 21, 1988*, has been prolonged, in part, by the extraordinarily complicated nature of the litigation (which involves claims against the Libyan government), as well as a

do their utmost to resolve cases as expeditiously as possible. Thus, of the 301 MDLs created from 1990 through 1999, only sixteen (or less than 6%) are still open.<sup>31</sup> Similarly, of the 317 new MDLs created from 2000 through 2006, only 192 remain open. In most instances, cases are resolved (through settlement or otherwise) in the transferee court.<sup>32</sup>

Forty years ago, few would have imagined this volume and diversity of MDL cases. Perhaps owing at least partly to the Panel's newness, initial business was slow. In the first year of its existence, the Panel heard only seventeen § 1407 motions in new dockets.<sup>33</sup> Although that number doubled in the following year, the Panel's workload throughout the 1970s and 1980s remained relatively constant, with between twenty-eight and fifty motions to centralize annually. During the 1990s, however, the Panel's workload gradually increased. Indeed, over the 1980s and 1990s, the nature of civil litigation in the federal courts was changing, and with it, the Panel's role. Class actions, mass tort actions, and complex litigation generally were creating increasingly complex problems for both state and federal courts.

In 1996, the number of requests for centralization in new dockets surpassed sixty for the first time.<sup>34</sup> This trend has only accelerated in the new century. Between 2003 and 2006, the Panel received over seventy motions for centralization annually.<sup>35</sup> In 2007, that number

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postcentralization amendment to the Foreign Sovereign Immunities Act that resulted in the filing of additional actions in the MDL. The third oldest is MDL No. 875, *In re Asbestos Products Liability Litigation (No. VI)*, and, like MDL No. 381, new tag-along actions are still being transferred to this docket on a regular basis.

31. Seven out of these sixteen MDLs have three or fewer actions remaining in the transferee court.

32. As of September 30, 2007, more than 175,000 civil actions were resolved in the transferee courts, thereby obviating the need to remand them to their originating courts.

33. Twelve motions were filed in 1968, and eleven were granted. Interestingly, the Panel denied centralization in the very first docket, concluding that "no useful purpose . . . would be served by the transfer of any of the pending cases to any other district." See *In re Multidistrict Patent Infringement Litig. Involving the Eisler Patents*, 297 F. Supp. 1034, 1034 (J.P.M.L. 1968).

34. Over half of those requests (thirty-two) involved cases with class action allegations. By contrast, in 1980, there were only ten requests for creation of new dockets involving cases with class allegations.

35. Although the Panel has authority to centralize actions "upon its own initiative," 28 U.S.C. § 1407(c) (2000), it has invoked that authority sparingly. See, e.g., *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415, 416 (J.P.M.L. 1991) (noting that the Panel had issued an order to ascertain why actions involving asbestos were not centralized); *In re Air Crash Disaster Near Papeete, Tahiti*, on July 22, 1973, 397 F. Supp. 886, 887 (J.P.M.L. 1975) (noting that on its own initiative, the Panel ordered the parties to show cause as to why actions stemming from an air crash should not have been consolidated); *In re Midwest Milk*

reached almost 100, with the filing of ninety-eight motions.<sup>36</sup> Correspondingly, the number of MDL dockets has grown steadily over the years. At the conclusion of the 1997 fiscal year, there were 161 open MDL dockets encompassing just over 54,000 actions. At the close of the 2007 fiscal year, there were 297 open MDL dockets encompassing over 76,000 pending actions.<sup>37</sup>

Throughout this time, many in academia, the judiciary, and Congress have struggled to find solutions to the difficulties these multiparty/multijurisdictional cases bring to the courts. For instance, Congress has recently reduced, to some extent, the attractiveness of the class action device to the plaintiffs' bar,<sup>38</sup> and recent United States Supreme Court decisions have made class actions less certain as a tool for resolving mass litigation.<sup>39</sup> As the class action mechanism has evolved and, to some extent, become less available or desirable, some litigants may be turning to the MDL processes as a way of achieving some of the benefits or advantages formerly available under Rule 23.<sup>40</sup> Inevitably, over the past two decades, the Panel's role in helping

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Monopolization Litig., 379 F. Supp. 989, 990 (J.P.M.L. 1974) (noting that the Panel acted pursuant to statutory authority when it sought centralization for actions arising out of antitrust allegations in the milk industry).

36. At the January 2008 hearing session, the Panel considered eighteen motions for centralization. Assuming that number to be an accurate gauge, the Panel may rule on more than 100 new § 1407 motions during this year. It should be noted that in some instances, the merits of transfer under § 1407 are not ruled on by the Panel, as, on occasion, the § 1407 movant will withdraw its motion, or the motion will be rendered moot by the dismissal or transfer of one or more of the constituent actions.

37. The 76,000 number is somewhat deceptive in that the asbestos MDL alone accounted for almost half of it, with over 34,000 pending actions.

38. See 28 U.S.C. § 1712 (Supp. V 2005) (containing provisions of the Class Action Fairness Act (CAFA) governing coupon settlements). At the same time, of course, CAFA, which was enacted in 2005, also provides a more available federal forum for class actions commenced in state court. CAFA requires only minimal diversity. 28 U.S.C. § 1332(d)(2). In enacting the statute, Congress also eliminated the one-year removal deadline and the requirement that all defendants consent to removal. See 28 U.S.C. § 1453(b).

39. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (holding that applicants for certification of a mandatory settlement class on a limited fund theory under Rule 23(b)(1)(B) "must show that the fund is limited by more than the agreement of the parties, and has been allocated to claimants belonging within the class by a process addressing any conflicting interests of class members"); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (holding that although a district court faced with a request for settlement-only class certification need not inquire if the case, if tried, would present intractable management problems, other requirements of Rule 23 "demand undiluted, even heightened, attention").

40. See *In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 269-70 (E.D.N.Y. 2006); see also *In re Copley Pharm., Inc.*, 158 F.R.D. 485, 492 (D. Wyo. 1994) ("It is true that (centralization) by the MDL Panel before this Court offers many of the same benefits as class certification.").



manage not only putative class actions but also other complex cases seems to have grown steadily.

The Panel does more than rule upon motions to create new MDLs. The Panel manages its own docket by transferring new cases to existing MDLs and remanding old cases to the transferor court when the transferee court has finished its work. This work happens quite efficiently and quietly every day. The Panel transfers new cases from other districts to existing MDLs when these so-called “tag-along” actions are brought to its attention, typically either by the clerk’s office of the court where the action was filed or by one of the parties.<sup>41</sup> When the Panel receives such a notification, it may issue a Conditional Transfer Order (CTO) transferring the action to the designated MDL transferee court.<sup>42</sup> In about 90% of the cases, no affected party opposes the CTO within the time established by the Panel,<sup>43</sup> and the Panel automatically transfers the case to the transferee court.<sup>44</sup> If a party opposes transfer, however, the Panel considers the matter at its next hearing session.<sup>45</sup> In this manner, the Panel efficiently processes and transfers literally thousands of tag-along actions (over 6000 in 2007 alone)<sup>46</sup> each year from their respective transferor courts to the involved MDLs.

The remand procedure is the reverse of, but similar to, the tag-along transfer procedure. The transferee court ordinarily lacks authority to try actions transferred from other jurisdictions,<sup>47</sup> and one

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41. Panel Rule 1.1 defines *tag-along action* as “a civil action pending in a district court and involving common questions of fact with actions previously transferred under Section 1407.” See Rules of Procedure of the Judicial Panel on Multidistrict Litigation R.P. 1.1, 199 F.R.D. 425, 427 (2001) [hereinafter J.P.M.L. R.P.].

42. See *id.* at R. 7.4-.5, 199 F.R.D. at 435-36.

43. Under Panel Rule 7.4(c), an opposition to a CTO must be filed within fifteen days of the CTO’s entry. *Id.* at 7.4(c), 199 F.R.D. at 435. The opposing party then has an additional fifteen days within which to submit a formal motion detailing the grounds on which the opposition is based. *Id.* at 7.4(d), 199 F.R.D. at 435.

44. See *id.* at 7.4(a), 199 F.R.D. at 435.

45. See *id.* at 7.4(d), 199 F.R.D. at 435. The Panel ordinarily does not hear oral argument on motions to vacate CTOs or CROs, which are discussed *supra* notes 47-50 and accompanying text.

46. The asbestos and Vioxx MDLs accounted for over 3000 of this number.

47. A continuing unresolved controversy over the Panel’s history has concerned the power of transferee judges to retain transferred actions for trial. For nearly thirty years, numerous transferee judges tried such actions after first transferring the actions to themselves under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406—a practice expressly recognized in then-operative Panel Rule 14(b), which provided that “[e]ach transferred action that has not been terminated in the transferee district 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.” See, e.g., *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 32-33 (1998) (quoting Panel Rule 14(b)). This

of the Panel's final responsibilities, therefore, is to remand individual cases to the original transferor court.<sup>48</sup> Upon receiving a suggestion of remand from the transferee judge (or upon motion by one or more of the parties or at the Panel's own initiative), the Panel issues a

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further transfer was necessary, of course, because § 1407 authorizes transfer for pretrial proceedings only. *See* 28 U.S.C. § 1407(a) (2000).

In 1998, however, the Supreme Court held that transferee courts lack such self-transfer authority, concluding that the practice was at odds with § 1407(a). *See Lexecon*, 523 U.S. at 36 (stating that "self-assignment" by a transferee court "conclusively thwarts the Panel's capacity to obey the unconditional command of § 1407(a)."). In response to the *Lexecon* decision and at the Panel's recommendation, the Judicial Conference of the United States immediately urged Congress to enact a statutory fix, and has continued to advocate such a change, as has the Panel. Indeed, two past Panel chairs, Judge Hodges in 2006 and Judge Nangle in 1999, testified before Congress and, echoing the views of many experienced transferee judges, strongly urged that § 1407 be amended to fix the situation that *Lexecon* created. Despite these best efforts, Congress appears unlikely to act on our request at this time.

To be sure, the *Lexecon* imperative does create severe inefficiencies in some cases as the transferor judge must refamiliarize himself or herself with the remanded action (perhaps many months after it was transferred out of the district under § 1407). However, efficiency is not the only touchstone of justice. A substantial body of opinion and a respect for jurisdictional principles suggest that a plaintiff ordinarily has a right to a trial in the forum of his or her choosing. *See, e.g., Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947) (noting that a plaintiff ordinarily should not be denied the advantages of his chosen jurisdiction). Aggregation of cases for the purpose of facilitating settlement is a by-product of § 1407, but is not its central statutory purpose. *See In re Patenaude*, 210 F.3d 135, 144 (3d Cir. 2000) ("[T]here is no basis for concluding that settlement conferences are not pretrial proceedings.").

Transferee judges are nothing if not resourceful where necessity dictates and several appropriate strategies are available by which the *Lexecon* conundrum may be avoided. For example, provided the plaintiff is amenable and venue lies in the transferee district, the action could be refiled there. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132, at 224 (2004). The parties could also agree to waive objections to venue. *See In re Carbon Dioxide Indus. Antitrust Litig.*, 229 F.3d 1321, 1325-26 (11th Cir. 2000). Alternatively, the transferee court could try a "bellwether" case that was originally filed in the transferee district, the result of which may promote settlement of the transferred actions in the MDL. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra*, § 20.132, at 224; *see also In re Air Crash Near Cali*, Colom. on Dec. 20, 1995, Case No. 1:96-MD-01125-KMM (S.D. Fla. Jan. 12, 2000) (noting that plaintiffs in certain transferred actions had agreed to be bound by the results of a consolidated liability trial in the transferee court). Another option, suggested in the *Lexecon* opinion itself, is for the transferor court to transfer the action back to the transferee court under § 1404(a). *Lexecon*, 523 U.S. at 39 n.2; *see also Kenwin Shops, Inc. v. Bank of La.*, No. 97 Civ. 907 (LLM), 1999 WL 294800, at \*1 (S.D.N.Y. May 11, 1999) (transferring an action remanded under § 1407 to the transferee court under § 1404). Still another option would be for the transferee judge to follow the action to the transferor court after obtaining an intracircuit or intercircuit assignment. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra*, § 20.132, at 224; *see also Dippin' Dots, Inc. v. Mosey*, 476 F.3d 1337, 1341-42 (Fed. Cir. 2007) (stating that an MDL judge from the United States District Court for the Northern District of Georgia, sitting by designation, presided over the trial of a remanded action in the United States District Court for the Northern District of Texas).

48. The authority to remand an action to the transferor court rests with the Panel and not with the transferee court. *See In re Roberts*, 178 F.3d 181, 183 (3d Cir. 1999).

Conditional Remand Order (CRO). About 35% of the time, someone will file a notice of opposition.<sup>49</sup> Where the transferee judge has suggested remand, however, the party seeking to vacate the CRO faces an uphill battle, as the Panel “gives great deference to a transferee judge’s suggestion that an action pending before [that judge] is ripe for remand.”<sup>50</sup> Since 2000, the Panel has remanded over 2100 actions.

The Panel’s procedures, including rules setting forth relatively short deadlines for motion practice,<sup>51</sup> are designed to promote fairness, efficiency, and an opportunity to be heard. The Panel keeps its written opinions brief and to the point. Each decision follows a similar format, succinctly addressing the relevant issues. And, over the past two decades, nearly every one of those decisions has been unanimous. The straightforwardness and unanimity of the Panel’s decisions are not because every decision is easy, and this dynamic is not a result of the complete absence of differences among the Panel members. The Panel devotes considerable discussion to the more complex and difficult dockets. Those discussions invariably lead to a consensus about the best course of action.

Perhaps the most remarked-upon aspect of these procedures concerns oral arguments on new § 1407 motions. These arguments are scheduled at different locations around the country every two months.<sup>52</sup> During oral argument, each advocate is allowed between two and five minutes to present his or her party’s position.<sup>53</sup> The Panel’s oral argument docket often contains fifteen to twenty § 1407 motions for creation of a new MDL, with between two and seven (or, on rare

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49. With respect to the approximately 240 actions that the Panel remanded in 2006 and 2007, it received a total of eighty-nine oppositions to CROs. As with CTOs, *see* discussion *supra* note 43, the notice of opposition must be filed within fifteen days of the CRO’s entry, and the party or parties opposing remand then have an additional fifteen days within which to submit a formal motion to vacate the CRO. *See* J.P.M.L. R.P. 7.6(f)(ii)-(iii), 199 F.R.D. 425, 438 (2001).

50. *See In re Franklin Nat’l Bank Sec. Litig.*, 407 F. Supp. 248, 248 (J.P.M.L. 1976).

51. Panel Rule 7.2 governs motion practice before the Panel. *See* J.P.M.L. R.P. 7.2, 199 F.R.D. at 433-34. Absent extraordinary circumstances, the Panel will deny any motion to extend the briefing schedule where the proposed extension will result in the matter being carried to the next hearing date.

52. In recent years, the Panel has scheduled oral arguments on the fourth Thursday of every other month, beginning in January. Usually these hearings are conducted in a federal courthouse. This fall, for the first time, the Panel will conduct its business at a law school forum. In September 2008, Harvard Law School will host the Panel in Cambridge, Massachusetts.

53. The principal exception to this is where two (or more) parties are advocating the same transferee district, yet each wants to speak separately in support of selection of that district. In such a situation, the staff typically has given those particular parties one minute each.

occasions, more) attorney appearances per motion. Once you do the math, it becomes evident that the Panel generally must accommodate fifty to seventy lawyers during the normal two and one-half hour session. The Panel staff attempts to divide the available time fairly among the new dockets and among those advocating or contesting centralization or advocating the selection of a particular transferee district.<sup>54</sup>

To the uninitiated, this may seem like an entirely unreasonable procedure. In practice, it works quite well for a variety of reasons. The Panel is composed of seasoned and attentive judges who are well-versed in the details and implications involved in each docket.<sup>55</sup> Oral argument provides a unique opportunity for counsel to focus our attention on those issues that most affect the litigation and that really speak to the statutory criteria. Experienced counsel can distill the essential points of their argument within the few moments allowed. They emphasize their substantive concerns about why centralization under § 1407 will either promote or impede the just and efficient resolution of their case or the litigation as a whole.<sup>56</sup> In a given docket, such arguments can be decisive.<sup>57</sup>

As a general rule, the Panel considers that eliminating duplicate discovery in similar cases, avoiding conflicting judicial rulings, and conserving valuable judicial resources are sound reasons for centralizing pretrial proceedings with respect to a given group of

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54. The parties are free to waive oral argument. Waiver most frequently occurs where the § 1407 motion in a new docket is unopposed. *E.g., In re PepsiCo, Inc., Bottled Water Mktg. Sales Practices Litig.*, MDL No. 1903, 2008 WL 1944220, at \*1 (J.P.M.L. 2008).

55. *See supra* note 11 and accompanying text.

56. Over the years, creativity has not been a quality lacking in the quest for selection of a particular transferee district. While the presence of pleasing civic amusements, adequate restaurants, and sunshine has never been a deciding factor in the Panel's deliberations, this has not deterred frequent references to such attributes. Similarly, the opportunity to provide an economic boost to a depressed region is sometimes urged as a reason for a transferee district assignment. The Author's personal favorite was the assertion that the supposed poor quality of drivers in a particular state made travel there so unduly dangerous that it should be avoided as a transferee district. Though comic relief is a quality not to be lightly dismissed, none of these arguments proved decisive.

57. Oral argument occasionally can also have some unintended favorable consequences. In one recent docket, for example, plaintiffs in the thirteen involved actions had advocated eight different transferee districts in their written submissions to the Panel. *See In re LTL Shipping Servs. Antitrust Litig.*, 528 F. Supp. 2d 1378, 1379 (J.P.M.L. 2007). At oral argument, however, plaintiffs coalesced to support selection of either the United States District Court for the Southern District of California or the United States District Court for the District of Columbia. *See id.* at 1379 n.2. The Panel's hearing session also provides an opportunity for the parties, who may be meeting and conferring in person for the first time, to resolve some differences and begin the planning process for centralized proceedings.

actions.<sup>58</sup> Every transfer decision has the potential to prejudice a particular party or claim among the many. In difficult cases, the Panel will weigh the likely benefits of centralization against the possibility of such resulting unfairness. The Panel's purpose is to benefit the judicial system and the litigants as a whole, not any particular party.<sup>59</sup> Thus, the following considerations are usually of great interest to the Panel.

The Panel focuses solely upon the potential for convenience, efficiencies, and fairness in pretrial proceedings centralized before a single court. In doing so, the Panel evaluates whether the parties' legitimate discovery needs are substantially similar in all of the proposed transferee actions.<sup>60</sup> Thus, the Panel looks to whether similar facts are at issue with respect to the various claims in the different cases. The greater the factual commonality of the cases, the more likely it is that centralization will benefit the involved parties and the system as a whole. The more troublesome dockets to evaluate are those where the potential transferee cases may contain different groups of plaintiffs or defendants and may contain some differing legal claims, yet nevertheless may appear to require similar factual discovery.

The Panel considers only the underlying record on its face and does not attempt to make independent judgments about the state of the record or the reasons for, or the correctness of, a particular transferor court ruling.<sup>61</sup> The Panel does not consider the legal or factual strength of a given case, nor does it consider the likely outcome of pending jurisdictional motions.<sup>62</sup> Indeed, it is important to emphasize that until the Panel's transfer order is actually filed in the transferee court, the transferor court is free to resolve any pending issues, including

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58. See *supra* note 15 and accompanying text.

59. See *In re* Multidistrict Private Civil Treble Damage Litig. Involving Library Editions of Children's Books, 297 F. Supp. 385, 386 (J.P.M.L. 1968) ("[T]he 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." (emphasis added)).

60. Under the statute, the Panel does not look to the similarity of the parties' legal claims in its centralization analysis. Section 1407 requires only that the actions involve "common questions of fact." 28 U.S.C. § 1407(a) (2000); see also *In re* Multidistrict Civil Antitrust Actions Involving Antibiotic Drugs, 309 F. Supp. 155, 156 (J.P.M.L. 1970) ("[T]he applicability of different legal principles will not prevent the transfer of an action under section 1407 if the requisite *common questions of fact* exist.").

61. See *In re* Glenn W. Turner Enters. Litig., 368 F. Supp. 805, 806 (J.P.M.L. 1973) ("[T]he Panel is not vested with authority to review decisions of district courts, whether they are transferor or transferee courts.").

62. See *In re* Ivy, 901 F.2d 7, 9 (2d Cir. 1990) ("Section 1407 does not empower the MDL Panel to decide questions going to the jurisdiction or the merits of a case, including issues relating to a motion to remand.").

challenges to its own jurisdiction.<sup>63</sup> Although the Panel has the power to separate claims from a transferred action and remand them to the transferor court,<sup>64</sup> it is more likely to transfer the action in toto, and thereby afford maximum discretion to the transferee judge. In the Panel's view, the transferee judge is typically in the best position to determine whether unique legal claims can be handled within the MDL (for example, through the use of such pretrial techniques as separate discovery and motion tracks),<sup>65</sup> or whether those claims should be returned to the transferor court.<sup>66</sup>

The relative stage of pretrial proceedings in the various actions is often important. Centralization works best when a group of actions are all in the initial phases of discovery and motion practice. Older cases may be less suitable for transfer because significant discovery may have already occurred, and, thus, centralization with other cases could delay the more advanced actions.<sup>67</sup> Nevertheless, more recently filed actions could benefit from coordination with those that are further advanced, as could the parties in all actions taken as a whole.<sup>68</sup>

The number of actions in a proposed new MDL can also be important in determining whether the parties could benefit from centralization. The greater the number of cases and the greater

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63. See J.P.M.L. R.P. 1.5, 199 F.R.D. 425, 427 (2000) ("The pendency of a motion, order to show cause, conditional transfer order or conditional remand order before the Panel concerning transfer or remand of an action pursuant to 28 U.S.C. § 1407 does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court").

In its communications with judges assigned to actions that are the subject of pending § 1407 motions, the Panel emphasizes that they should feel free to continue overseeing those actions as they see fit and to rule on motions where appropriate.

64. See *In re* 1980 Decennial Census Adjustment Litig., 506 F. Supp. 648, 650 (J.P.M.L. 1981) ("The Panel is empowered by statute to couple its order of transfer with a simultaneous separation and remand of any claims in an action." (citing 28 U.S.C. § 1407(a))).

65. See, e.g., *In re* Kugel Mesh Hernia Patch Prods. Liab. Litig., 493 F. Supp. 2d 1371, 1373 (J.P.M.L. 2007) (noting that the transferee court "can employ any number of pretrial techniques—such as establishing separate discovery and/or motion tracks—to efficiently manage [the] litigation").

66. See J.P.M.L. R.P. 7.6(c), 199 F.R.D. at 437.

67. See, e.g., *In re* Allianz Life Ins. Co. of N. Am. Deferred Annuity Mktg. & Sales Practices Litig., 517 F. Supp. 2d 1364, 1365 (J.P.M.L. 2007) (denying centralization where four of the five constituent actions were "at a significantly advanced stage").

68. See *In re* Refco Secs. Litig., 530 F. Supp. 2d 1350, 1351 (J.P.M.L. 2007) (centralizing ten actions in the United States District Court for the Southern District of New York, including cases that had already been pending for approximately two years, and noting that the assigned transferee judge "ha[d] already developed familiarity with the issues . . . as a result of presiding over motion practice and other pretrial proceedings in the [constituent] actions pending before him"); MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 47, § 11.453, at 88; *id.* § 20.132, at 222-23 & n.665.

number of common parties, the more likely it is that centralization will create significant efficiencies.<sup>69</sup> A smaller number of relatively straightforward cases may not justify centralization.<sup>70</sup> On the other hand, even two or three cases pending in different districts, each seeking class certification under similar facts, may be appropriate for centralization.<sup>71</sup>

Finding the best district for centralization and identifying the best district judge to serve as the transferee judge are closely related issues. This is often the most difficult decision the Panel faces. The difficulty can arise from an abundance of good options; the absence of them, or from tactical differences among the parties, even among parties ostensibly on the same side. In a given docket, the particular location of the transferee court can be of greater importance because of the nature of the discovery and the concentration of the witnesses.<sup>72</sup> In other dockets, location may be less of an overriding consideration, particularly where the litigation lacks a singular geographical focal point.<sup>73</sup>

Other criteria that the Panel has considered in making its transferee court decision include the location of related grand jury proceedings,<sup>74</sup> the existence of a qui tam action predicated on the same

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69. See, e.g., *In re Seroquel Prods. Liab. Litig.*, 447 F. Supp. 2d 1376, 1377-79 (J.P.M.L. 2006) (granting a § 1407 motion involving 114 constituent actions and 120 potential tag-along actions).

70. See, e.g., *In re Movie Artwork Copyright Litig.*, 473 F. Supp. 2d 1381, 1382 (J.P.M.L. 2007) (denying centralization of four actions, and finding that “[t]he asserted common factual questions identified by defendants appear to be either simply a generic listing of elements found in virtually every copyright and trademark infringement action, or issues that arise in any situation involving multiple actions brought against a common defendant or defendants”).

71. See, e.g., *In re Charlotte Russe, Inc., Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 505 F. Supp. 2d 1377, 1378 (J.P.M.L. 2007) (holding that centralization was appropriate).

72. See, e.g., *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 528 F. Supp. 2d 1339, 1341 (J.P.M.L. 2007) (centralizing litigation in the district where the defendant pharmaceutical manufacturer had its principal place of business, explaining that “many witnesses and documents relevant to the litigation are likely to be found there”); *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 469 F. Supp. 2d 1348, 1350 (J.P.M.L. 2006) (centralizing litigation in the District for the District of Columbia, in part because “most, if not all, discovery will likely come from the federal Government and documents and witnesses are likely to be in or near the District of Columbia”).

73. See, e.g., *In re Motor Fuel Temperature Sales Practices Litig.*, 493 F. Supp. 2d 1365, 1367 (J.P.M.L. 2007) (“Given the geographic dispersal of constituent actions and potential tag-along actions, no district stands out as the geographic focal point for this nationwide docket.”).

74. See, e.g., *In re Orthopaedic Implant Device Antitrust Litig.*, 483 F. Supp. 2d 1355, 1355-56 (J.P.M.L. 2007) (centralizing claims in the district where the grand jury proceedings were located).

facts as those at issue in the MDL,<sup>75</sup> the possibility of coordination with related state court proceedings,<sup>76</sup> the location of the first-filed action,<sup>77</sup> and the location of a majority of the actions.<sup>78</sup> What is important to remember is that any single factor can only be properly evaluated in the context of both the particular docket and the other factors that may be relevant.

The ideal transferee judge is one with some existing knowledge of one of the cases to be centralized and who may already have some experience with complex cases, if the new docket appears to require it.<sup>79</sup> For instance, a judge already assigned many of the transferee cases would be a likely choice,<sup>80</sup> unless he or she is unable to devote the time to the combined transferee cases. On the other hand, the Panel may opt for an available experienced judge even though he or she does not sit in a district where one or more of the constituent actions were originally brought.<sup>81</sup>

The willingness and motivation of a particular judge to handle an MDL docket are ultimately the true keys to whether centralization will benefit the parties and the judicial system. This may have little to do with the number of cases on the judge's docket and more to do with the presence of a few complex and time-consuming actions. The Panel

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75. See, e.g., *In re Neurontin Mktg. & Sales Practices Litig.*, 342 F. Supp. 2d 1350, 1351-52 (J.P.M.L. 2004) (finding that centralization of the actions in the litigation was appropriate).

76. See, e.g., *In re Gen. Motors Corp. Sec. & Derivative Litig.*, 429 F. Supp. 2d 1368, 1370 (J.P.M.L. 2006) (centralizing actions, in part, because of related state court proceedings).

77. See, e.g., *In re Mattel, Inc., Toy Lead Paint Prods. Liab. Litig.*, 528 F. Supp. 2d 1367, 1369 (J.P.M.L. 2007) (centralizing, in part, because the first-filed action had been pending in the transferee court).

78. See, e.g., *In re Air Crash Near Athens, Greece, on Aug. 14, 2005*, 435 F. Supp. 2d 1340, 1342 (J.P.M.L. 2006) (noting that the transferee forum contained a majority of the actions in the dispute).

79. See *In re Refco Sec. Litig.*, 530 F. Supp. 2d 1350, 1351 (J.P.M.L. 2007) (selecting the Southern District of New York, in part because “[m]any actions are already proceeding apace in the [the] district”); *In re Nat’l Sec. Agency Telecomms. Records Litig.*, 444 F. Supp. 2d 1332, 1335 (J.P.M.L. 2006) (“We conclude that the Northern District of California is an appropriate transferee forum in this docket because the district is where the first filed and significantly more advanced action is pending before a judge already well versed in the issues presented by the litigation.”).

80. See, e.g., *In re RC2 Corp. Toy Lead Paint Prods. Liab. Litig.*, 528 F. Supp. 2d 1374, 1375-76 (J.P.M.L. 2007) (centralizing fourteen actions in the United States District Court for the Northern District of Illinois, before Judge Harry D. Leinenweber, who was already assigned to seven of the nine actions that had been brought in that district).

81. See, e.g., *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 269 F. Supp. 2d 1372, 1373 (J.P.M.L. 2003) (centralizing six actions in the United States District Court for the District of Maine before Judge D. Brock Hornby, even though no constituent action was pending in that district).



may only become aware of such a circumstance via a telephone conference with that judge. Depending on the situation, considerable interplay, both direct and indirect, may take place between the Panel and the transferor and proposed transferee courts. The Panel may make informal contact with various transferor and transferee judges to clarify matters.<sup>82</sup>

Ultimately, the Panel's goal is to pair an experienced, knowledgeable, motivated, and available judge in a convenient location with a particular group of cases. The Panel therefore attempts to apply those factors in a given docket in the manner that will most benefit the litigants and the judiciary. The Panel's sole purpose is to benefit the system as a whole rather than a particular party or a particular point of view within the litigation. Clearly, such decisions involve considerable discretion and intuition.

As a general rule, the Panel likes to accommodate the parties in selecting an appropriate transferee district. Consequently, if the parties or a group of them can make a joint recommendation, the Panel may be favorably impressed.<sup>83</sup> The Panel is particularly alert, however, to parties who may venture to use the MDL process for some substantive or procedural advantage, and will act to avert or deflect attempts by a party or parties to "game" the system.

Although the Panel's purpose is to "promote the just and efficient conduct of such actions" throughout the multidistrict litigation process,<sup>84</sup> the Panel also recognizes that the MDL process itself may have some undesirable yet entirely avoidable side effects, such as temporarily slowing progress in ongoing cases. While Panel Rule 1.5 expressly provides that the pendency of a motion, CTO, or CRO before the Panel "does not affect or suspend orders and pretrial proceedings" in the transferor court,<sup>85</sup> some district courts nevertheless elect to stay constituent proceedings (typically on the motion of one or more of the parties) while awaiting the Panel's decision on centralization. In such situations, the time tolled by the stay between the filing of the § 1407

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82. For example, where the docket sheet of a particular case suggests that a ruling on a given motion by a transferor court may be imminent, the Panel may elect to contact that judge to ascertain whether he or she does intend to rule shortly on the motion. Also, under certain circumstances, the Panel might seek a transferee judge's input as to whether he or she believes a "tag-along" action belongs in the MDL to which it appears to be related.

83. See, e.g., *In re Am. Honda Motor Co., Oil Filter Prods. Liab. Litig.*, 416 F. Supp. 2d 1368, 1369 (J.P.M.L. 2006) ("We are persuaded that the Central District of California is an appropriate transferee forum for this docket, in accordance with the unanimous support of the parties.").

84. 28 U.S.C. § 1407(a) (2000).

85. J.P.M.L. R.P. 1.5, 199 F.R.D. 425, 427 (2001).

transfer motion and its resolution may amount to dead time that can delay the existing litigation. The Panel recognizes that such a delay or dead time is dispositive and perhaps detrimental to one party or another.

Centralizing a large number of actions before a single judge also can create a somewhat unwieldy new MDL (at least initially). More delays can occur after the Panel enters its transfer order while the transferee court organizes the new files and convenes the parties. Centralization of cases may also create conflict among lawyers and between parties that did not previously exist. In this regard, the Panel notes that it can only do so much to further the “just and efficient conduct”<sup>86</sup> of the involved actions; the parties and their counsel have their parts to play as well.

Every member of the Panel recognizes the potential for these delays and is absolutely committed to reducing or eliminating them to the extent possible. Consequently, the Panel has already begun and expects to continue a wide-ranging series of initiatives to make our processes more just and more efficient. The Panel’s rules already require a tight briefing schedule prior to oral argument on all § 1407 transfer motions.<sup>87</sup> The Panel prepares extensively for oral argument and usually reaches a decision on each case during its conference immediately afterwards.<sup>88</sup>

Over the past year, the Panel studied the time frames required for each part of its decision-making process. Previously, depending on the time that the § 1407 motion is filed relative to the nearest scheduled hearing date, the Panel would require between twelve and twenty-four weeks to reach a decision on § 1407 motions in new dockets. Our analysis and the docket management we have employed have already produced results. We have reduced the average time between filing and decisions to about thirteen weeks and lowered the range to between ten and seventeen weeks.

The Panel has neither the power nor the desire to force an MDL docket upon a district judge. Consequently, one of the Panel members will make a personal call to each proposed transferee judge to request his or her consent to oversee the new docket. The governing statute also requires formal consent of the chief judge of the newly designated

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86. 28 U.S.C. § 1407(a).

87. *See supra* note 51 and accompanying text.

88. Usually within two weeks of oral argument, the Chair has finalized and approved each written opinion pertaining to that session.

transferee district.<sup>89</sup> Usually, these consents are quickly obtained. But on some occasions, the proposed transferee district or judge is unable to accept an assignment, thus requiring the Panel to identify another appropriate district for centralization.<sup>90</sup> Sometimes the chief judge approval process takes longer than we would like. Consequently, the Panel has initiated new procedures to hasten these approvals and eliminate avoidable delays.

The most frustrating delay for everyone may occur after the Panel has finished its work and filed its opinion. Depending, in part, on the number of actions involved in the new MDL, the transferee court may require anywhere from three weeks to eight weeks to obtain and docket the records of the transferred actions from the various transferor courts, and then schedule counsel for an initial conference.<sup>91</sup>

The Panel is devoting considerable attention to developing a case management/electronic case filing (CM/ECF) system. This task is entirely feasible, but by no means easy. It may require several years to complete. Nevertheless, such a system holds the potential for quicker turnaround time on motions, orders, and file transfers. Those initiatives hold the promise of reducing the average delay between the transfer order and the first meeting with, or action by, the transferee court. These improvements should benefit all parties to the process as well as the involved courts.

Most commentators on the Panel's work believe that it has been successful in meeting its goals.<sup>92</sup> A singular reason for our overall success in MDL cases is the quality of experience, motivation, organizational ability, and sheer tenacity that transferee judges bring to

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89. See 28 U.S.C. § 1407(b) ("With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district.").

90. See, e.g., *In re Merscorp Inc.*, Real Estate Settlement Procedures Act (RESPA) Litig., 473 F. Supp. 2d 1379, 1379-80 (J.P.M.L. 2007) ("While the Eastern District of Texas was the stipulated choice of the parties as transferee forum for this docket, that court declined the assignment due to its heavy caseload.").

91. Therefore, the current range of time from filing of the § 1407 motion seeking creation of a new MDL to the first MDL conference in the transferee court is between sixteen and twenty-nine weeks.

92. See, e.g., DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL: PRACTICE BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION § 1.1, at 6 (2005) ("The Panel continues to be one of the most effective means of making it possible for federal courts to manage cases and accomplish the just and efficient resolution of civil actions."); Ostolaza & Hartmann, *supra* note 3, at 75 ("The MDL Statute has proven to be a useful procedural tool for [coordinating or] consolidating thousands of related cases pending in federal courts and has led to substantial judicial and party savings."); see also Geier, *supra* note 10 ("The panel's success in [centralizing] pretrial proceedings has helped to convince at least 15 states to create their own regimes for handling litigations.").

the process. Handling one (or more) of these difficult groups of cases is perhaps the greatest challenge that could be thrust upon a federal judge. The willingness of so many judges to accept these challenges is always impressive and appreciated. These judges receive no additional “combat” pay in return for taking on these significant additional responsibilities.<sup>93</sup> Recognizing our reliance on these judges, the Panel is focusing even more effort to ensure transferee judges and their case administrative staff receive the MDL-specific training that they may need, as well as guidance concerning the best practices and access to resources as they perform the difficult task of organizing and supervising a new MDL. These efforts will go beyond the highly successful transferee judge education conference that the Panel hosts every October.

In all these efforts, the Panel seeks neither to expand its role nor to shy away from its statutory responsibilities. Our current belief is that through all the changing statutes, new modes of litigation, and unforeseen complex common law and statutory issues that now confront the federal courts, the Panel can continue to be an important part of the solution to these challenges. We can do this by continuing to do our own job with great care and even greater efficiency.

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93. See *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1231 (9th Cir. 2006) (“A district judge . . . in an MDL proceeding must have discretion to manage them that is commensurate with the task. The task is enormous, . . . the court must figure out a way to move thousands of cases toward resolution on the merits while at the same time respecting their individuality.”). In that decision, the United States Court of Appeals for the Ninth Circuit addressed appeals taken from judgments of dismissal entered in MDL No. 1407, which at one time involved over 3000 actions. *Id.* at 1223 n.3.