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Panel Promotes Just and Efficient Conduct of Litigation

Judge John G. Heyburn (W.D. Ky.) was named chair of the Judicial Panel on Multidistrict Litigation in 2007. He was appointed to the U.S. District Court for the Western District of Kentucky in 1992. Prior to chairing the Panel, he served as chair of the Judicial Conference Committee on the Budget for seven years.

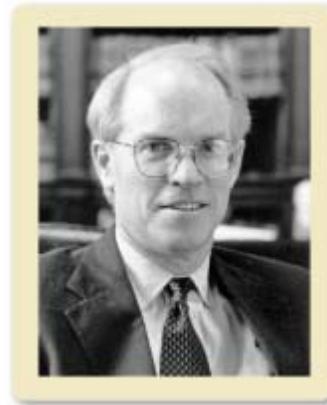
Q: Please describe the Panel's composition and purpose.

A: The Panel consists of seven Article III judges. The Chief Justice appoints each member to a seven-year term, and no two Panel members can be from the same circuit. In addition to myself, the other current Panel members are, in order of Panel seniority: Judges Robert L. Miller Jr. (N.D. Indiana), Kathryn H. Vratil (D. Kansas), David R. Hansen (8th Cir.),

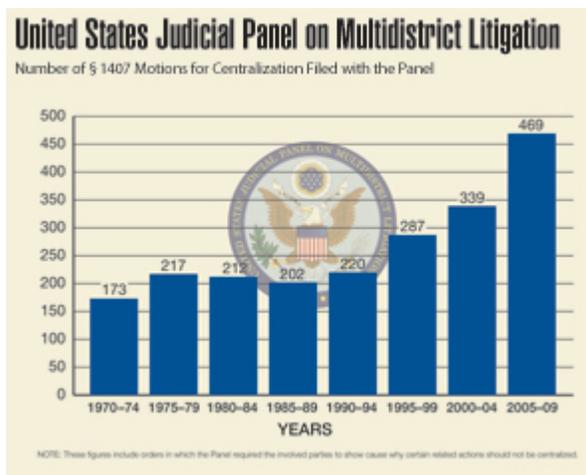
W. Royal Furgeson Jr. (N.D. Texas), Frank C. Damrell Jr. (E.D. California), and David G. Trager (E.D. New York). Past chairmen have included Judges Alfred Murrah (10th Cir.), John Minor Wisdom (5th Cir.), John Nangle (E.D. Mo.), and Terry Hodges (M.D. Fla.). The current Panel is a great group of experienced judges.

In 1968, Congress enacted 28 U.S.C. § 1407, which created the Panel and which authorizes it to transfer or "centralize," for pretrial purposes, cases that are pending in different districts in a single district (called the transferee court). The cases must involve common questions of fact, and the Panel must find that centralizing them will further the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation.

Under current case law, centralization is available for pretrial purposes only. Thus, in most circumstances, when pretrial proceedings have been completed in the transferee court, the Panel—typically acting upon a formal suggestion issued by the assigned transferee judge—remands any remaining pending actions to their transferor courts.



Judge John G. Heyburn
(W.D. Ky.)



United States Judicial Panel on Multidistrict
Litigation

Q: How does the Panel function?

A: The Panel conducts hearing sessions at different locations every two months. The Panel usually hears argument in a federal courthouse. However, recently we held two sessions at Harvard Law School, and we plan for sessions at Vanderbilt and Duke Law Schools in the coming year.

At these sessions, the Panel considers new motions for centralization (i.e., motions for creation of a new multidistrict litigation docket or “MDL”), as well as motions in which parties to a particular action are seeking either to include or exclude their action (often referred to as a “tag-along”) from an existing MDL. The Panel generally hears oral argument only on motions to create new dockets, but decides motions regarding tag-alongs on the paper record. The Panel rules quickly, usually issuing all of its orders within two weeks of the hearing session. Except for those hearing sessions, Panel members work out of their respective chambers, as their Panel service is in addition to their normal judicial responsibilities. The Panel’s administrative operations are located in Washington, D.C.

Q: How does centralization benefit the federal courts and the litigants?

A: By gathering together all cases with common factual and legal issues in a single federal district court, one judge can rule on all discovery disputes and other pretrial matters such as motions concerning the sufficiency of the pleadings, class certification, claim construction issues in patent actions, Daubert and other evidentiary issues, and summary judgment. Doing so significantly alleviates the strain on other judges. For the involved litigants, a single forum means eliminating duplicative discovery and multiple motions on the same issue. It also eliminates the possibility of inconsistent rulings, and reduces the time and expense of the litigation. Because the Section 1407 process gathers all the involved parties in a single forum, it often enhances or hastens the prospects of a global settlement.

Q: What kinds of cases does the Panel typically centralize?

A: The Panel’s docket is quite varied. In 2009, the Panel ruled on Section 1407 motions seeking creation of new MDLs encompassing marketing and sale practices cases, securities and ERISA cases, antitrust cases, product liability cases, employment-related cases, and patent cases—not to mention a number of litigations involving aircraft disasters, contract disputes, and other subjects. I have noticed that many prominent news stories often have an MDL connection. For example, the Bernard Madoff scandal, issues arising from the recent financial crisis, and the thousands of claims concerning Chinese-manufactured drywall have all been the subjects of recently-centralized MDLs. The recent highly praised Vioxx settlement owes much to the efforts of Judge Eldon Fallon (E.D. La.), the involved MDL judge.

Q: What are the primary criteria for selection of the transferee district and judge for a new MDL?

A: Selecting the “right” transferee judge is critically important, because the success of an MDL largely turns on the work of that judge and the parties. Typically, the Panel seeks a judge with some existing knowledge of the involved cases or the issues presented. Ultimately, however, the willingness and motivation of a judge to undertake the often substantial additional responsibilities of an MDL are the most important attributes.

The selection of an appropriate transferee district is usually of lesser importance. The location of the transferee court can be significant, where a particular district is convenient to likely discovery needs, related grand jury proceedings, or ongoing state court litigation involving the same parties and subject matter.

Among other criteria, the Panel considers the location of the involved actions, and particularly that of the most advanced action, and the existence of a qui tam action based on the same factual allegations. If a significant number of plaintiffs and defendants favor a particular district, the Panel will also take that into consideration, although it is generally not dispositive.

Q: How many pending MDL dockets and involved cases are there?

A: Section 1407 MDL cases comprise an increasingly significant portion of the federal civil case docket. Currently, approximately 310 MDLs are pending in over 60 federal districts. About 240 judges are overseeing one or more MDLs. Approximately 92,000 pending individual cases are part of an MDL docket, of which approximately 48,000 are asbestos cases. Even setting the latter aside, MDL cases constitute about 15 percent of the entire federal civil docket. And these numbers do not tell the full story: the Panel's docket is growing in complexity as well.

Q: What is the current composition of the Panel's docket and how has it changed over the years?

A: The advent of the Class Action Fairness Act (CAFA) and evolving judicial views of class certification under Rule 23 have coincided to make centralization under Section 1407 an often attractive alternative for resolving complex aggregated claims. This apparent trend presents many challenges for the Panel and its transferee judges. Not surprisingly, many MDL cases are among the most complex and significant in the federal docket.

The Panel's docket is growing in sheer numbers, as the accompanying chart demonstrates. During the 1970s and 1980s, the Panel ruled, on an annual basis, on roughly 30 to 50 motions for centralization. In 1996, the number exceeded 60 for the first time, and between 2003 and 2006, the Panel received over 70 motions for centralization annually. This trend has only continued. In 2009, the Panel ruled on a total of 102 new motions for centralization—not including motions that were mooted or withdrawn. For the May 2009 hearing session in Louisville, Kentucky, the Panel received so many new motions for centralization (over 30) that—for only the second time in its history—it heard oral argument over two days rather than the usual one.

Q: How is the Panel handling this increasing workload?

A: Over the past two years, the Panel has taken a number of steps to shorten the time between the filing of a motion and a decision on that motion. As a consequence, the Panel now decides most cases within 90 days of their being filed, which is an overall improvement of about 60 days. This improvement makes a big difference in avoiding undue delay in the underlying cases. The Panel plans a major operations enhancement with implementation of CM/ECF. This system will expedite our ability to process new motions and will facilitate the efficient and uniform handling of cases after transfer.

We have given district court clerks more explicit and consistent guidance in handling MDL dockets. Together with the Federal Judicial Center, the Panel produced "Ten Steps to Better Case Management: A Guide for Multidistrict Litigation Transferee Court Clerks." The guide provides helpful advice for implementing an efficient case management system for a new MDL, as well as assistance with MDL-specific rules and procedures.

Q: What does the Panel do to assist transferee judges?

A: The Panel views assistance to transferee judges as one of its most important responsibilities. With that in mind, Judge Barbara J. Rothstein, the director of the FJC, and I recently collaborated in creating a companion to the clerks' guide called, "Ten Steps to Better Case Management: A Guide for Multidistrict Litigation Transferee Court Judges." Although every MDL is unique, the guide discusses useful "best practices" that transferee judges have developed over the years. The Panel provides a copy of this helpful guide to every newly assigned MDL judge. (Both this guide and the guide for transferee court clerks are available on the FJC's website and the Panel's internal website, or by contacting the Panel's clerk's office.)

We are continuing to upgrade the MDL Judge Resources website with timely articles and reference materials. Judge Bill Duffey (N.D. Ga.) is working on two important additions to the Judicial Resources website: (1) a listing of experienced transferee judges who have

volunteered to serve as “mentors” for new MDL judges or for those assigned an MDL involving an unfamiliar subject area; and (2) a database of generally applicable orders issued in past or ongoing MDLs. We hope these additions will make the website an even more dependable and helpful resource for transferee judges.

Finally, the Panel organizes a highly regarded annual conference for all current transferee judges. The conference provides an invaluable opportunity for transferee judges to brainstorm and share their experiences and recommendations regarding best (and worst) practices. This past year, for the first time in many years, we added several non-judge speakers to provide an outsider’s perspective on various aspects of the MDL process and transferee court litigation. The Panel is committed to doing whatever possible to assist transferee judges in carrying out their responsibilities. Their work is the ultimate testament to whether the MDL process is successful, and we owe them a great debt of gratitude.

Q: How does the Panel evaluate the success of its work?

A: The Panel regularly evaluates its procedures and the consequences of its decisions. In 2010 we plan a more formal and in-depth review of those matters. In particular, the Panel anticipates analyzing such issues as whether its centralization decisions may have the (unintended) tendency of benefitting certain groups of lawyers over others, whether there are certain kinds of cases where centralization’s benefits are more—or less—clear, and whether there are circumstances in which the Panel should discontinue transferring tag-along actions to an existing MDL.

I am indebted to my fellow Panel members, both past and present, for their wise counsel and recommendations. Each of us believes that the Panel is making a positive contribution to justice in these most difficult cases.