Consolidation and Transfer in the Federal Courts: 28 U.S.C. Section 1407 Viewed in Light of Rule 42(a) and 28 U.S.C. Section 1404(a)

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In the federal court system, there are three useful techniques for the judicial management of litigation. These weapons in the judicial arsenal are: (1) consolidation of separate but related actions under rule 42(a);1 (2) transfer of actions to a more convenient forum under United States Code, title 28, section 1404(a);2 and (3) consolidation and transfer of pretrial proceedings by the Judicial Panel on Multidistrict Litigation under United States Code, title 28, section 1407.3

The necessity of procedures which can be implemented to manage the “big case” is manifest. The electrical appliance antitrust actions filed in the early 1960’s are cases in point. Even with informally coordinated pretrial procedures, the various parties produced over 1.5 million documents. If no procedures for consolidation or coordination had been used, it might have been necessary to produce those documents in each of the over 1900 actions that were filed. That efficient “management” of the litigation was required to dispose of the cases expeditiously is evident. Furthermore, the multistate nature of many business transactions will probably produce litigation as complex as the electrical appliance cases.4

These procedures—rule 42(a), section 1404(a) and section 1407—constitute the foundation of the federal system of “judicial management.” An understanding of that foundation is essential if the federal judiciary is to “manage” complex litigation properly.

Since much has previously been written about both rule 42(a) and section 1404(a), this Note will attempt only to present the information necessary for understanding the functions which those procedures were designed to serve, the limitations placed upon these procedures and

4. The Antibiotic Drug Litigation may already have become more complex than the electrical appliance cases. In a very recent decision the panel held that the case had become too complex for a single judge. “We do believe that this litigation has simply become too massive and burdensome for any one judge to process efficiently and expeditiously.” In re Antibiotic Drug Antitrust Litigation, 320 F. Supp. 586, 589 (JPML 1970).
their current usefulness in the management of multidistrict litigation. The procedures, intended function, and actual performance of the Judicial Panel on Multidistrict Litigation in its first 2 years of existence will then be thoroughly examined. The result of this inquiry will be to provide an overview of the procedures available for efficient management of complex and multidistrict litigation.

**Rule 42(a)**

Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all of the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.\(^5\)

Unlike either sections 1404(a) or 1407, rule 42(a) has enjoyed a protracted development. The rule, adopted in its present form in 1938, is derived from an 1813 statute which allowed federal courts to structure pending actions in any reasonable manner to avoid unnecessary costs or delay.\(^6\) This extended development has had at least two discerni-

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6. Act of July 22, 1813, 3 Stat. ch. 21. This statute was carried forward in the Revised Statutes at section 921. However, at that point in the development, the Revised Statutes combined the 1813 Act with a statute passed in 1853, 10 Stat. ch. 162. This latter statute attempts to explain consolidation in terms of “classes” of cases, both civil and criminal. This confusion of the concepts of consolidation and joinder might be explained by the proximity of time between the 1853 Act and the advent of the code pleading procedure, which placed emphasis on “classes” of cases among other concepts contained in the 1853 Act. Section 921 of the Revised Statutes was carried forward into the Judicial Code in 1940 by the enactment of 28 U.S.C. § 734 (repealed 1948) which reads: *Orders to save costs; consolidation of causes of like nature.* When causes of like nature or relative to the same question are pending before a court of the United States, or any Territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so.* 28 U.S.C. § 734, from which rule 42(a) was directly derived, was repealed by the Judicial Code of 1948 because it was superfluous in light of the expansive provisions of rule 42(a). 5 J. Moore, Federal Practice ¶ 42.02, at 42-4 (2d ed. 1969). The only substantive revision of this statutory doctrine which was effected by rule 42(a) was the clarification of which types of cases would be consolidated. 28 U.S.C. § 734 and its antecedents had allowed consolidation of “causes of a like nature or relative to the same question.” Rule 42(a) allows consolidation of actions “involving common questions of law or fact.” Professor Moore indicates that this new phrase is more inclusive than that contained in the earlier statutes, but offers no cases that would show this possible expansion of the application of rule 42(a). 5 J. Moore, Federal Practice ¶ 42.02, at 42-10. The better justification for this change in the language of the rule is that rule 42(a) as it presently reads now conforms to the rule of application used in a number of the other Federal Rules. See rule 20(a) (joinder), rule 23 (class actions) and rule 24(b) (intervention).
ble effects upon the usefulness of rule 42(a) as a method of judicial management.

First, the policy underlying the federal court rule and its statutory antecedent was to confer upon the trial judge broad discretion in framing the orders which he deemed appropriate for the case at hand. Hence the exact bounds of the court's discretion have developed on a case-by-case basis, as each judge struggled with the complexities of the specific situation presented. The cases deciding questions arising under rule 42(a) issues thus form a coherent body of law which may give guidance to a district judge attempting to exercise his discretion in a novel situation.

Second, the courts developed a policy that rule 42(a) and its statutory predecessors should be used to streamline litigation, thus promoting the public interest in judicial economy. The benefits or detriments that might accrue to the litigants from the consolidation of the actions were irrelevant to the judge's decision. The sole limitation upon the court's discretion under the 1813 statute was that the order avoiding court costs "appear reasonable." The public interest in the swift and efficient administration of justice has consistently been held to outweigh the private considerations in such cases.7

A. Practical Operation of Rule 42(a)

Rule 42(a) provides that when "actions involving a common question of law or fact are pending before the court, it may order a joint hearing. . . ." The rule does not delimit the procedures under which the court may make such an order. The cases have held, consistent with the judicial interpretation of similar provisions in other rules, that a consolidation order may issue on noticed motion of either party8 or on the court's own motion.9

The motion for consolidation must be timely10 and is normally

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7. This distinction is important, as it will appear below that the original purpose of section 1404(a) was to effect justice between the litigants and to mitigate the defendant's disadvantage flowing from the plaintiff's choice of an inconvenient forum. Only as a more recent and secondary development has 1404(a) been viewed as an instrument of effecting public policy. See note 62 infra. Section 1407, on the other hand, attempts a synthesis of these two interests; however, the practice of the Panel has been to tend to heavily weight the public interest factors. See notes 172-75 and accompanying text infra.

8. 5 J. Moore, Federal Practice \(\mathbb{1} 42.02\), at 42-7 (2d ed. 1969).

9. Id. Consolidation may be ordered by the court even over the objection of both parties. See Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892).

10. See Borup v. National Airlines, 159 F. Supp. 807 (S.D.N.Y. 1956). It appears that procedural due process would require a noticed hearing on the court's motion as well. See Swindell-Dressler Corp. v. Dumbaund, 308 F.2d 267 (3d Cir. 1962) (dealing with 1404(a)). This problem is most likely to occur when a number of similar cases
premature before the filing of an answer. An interesting case involving consolidation for which both the parties and the court moved is Minnesota v. United States Steel Corp. Eight class actions for treble damages under the Clayton Act had been filed in different divisions of the same district. The classes were each allegedly composed of different types of governmental units; Minnesota water districts, for example, comprised one such class. Because these classes overlapped considerably in their representation, the smaller governmental unit classes moved to consolidate some of the actions. The district court not only granted their unopposed motion, but on its own motion consolidated all related cases pending in the entire district. The application of rule 42(a) in this case illustrates consolidation's tremendous potential for streamlining complicated and cumbersome litigation.

The criteria for granting consolidation set forth in rule 42(a) have been the subject of little controversy. The rule provides that the several cases must be “pending before the court” and must involve “common questions of law or fact.”

“Pending before the court” means pending before any of the judges in one judicial district. The only real questions that have arisen under this clause concern the applicability of rule 42(a) to cases either already transferred or subject to transfer under section 1404(a). It has been held that a case pending in one judicial district may not be consolidated with a case previously transferred out of that district. However, rule 42(a) does permit consolidation of cases in one district for transfer of the consolidated case out of the district. Conversely, cases may be transferred under section 1404(a) for consolidation in the transferee district. Tiernan v. Westext Transport, Inc. indi-

have already been consolidated and the case in question is exactly like the previous cases, e.g., a number of air crash disaster cases filed in the same district. A similar problem is created by the "tag-along" cases presented to the Judicial Panel under 1407. It appears that an unnecessary hearing is required in such cases as well. The Judicial Panel has attempted to solve this problem by the adoption of Rule 12 of the Rules of the Judicial Panel on Multidistrict Litigation, which is discussed in text accompanying note 120 infra.

11. 5 J. Moore, Federal Practice ¶ 42.02, at 42-7 n.5 (2d ed. 1969).
12. 44 F.R.D. 559 (D. Minn. 1968).
14. Some problem with consolidation of a civil case with an admiralty case was initially presented, but the fact that the cases were originally of different "jurisdiction" is now of no consequence. 5 J. Moore, Federal Practice ¶ 42.02, at 42-7 n.4 (2d ed. 1969).
icates the judicial economy that can be achieved by application of both rule 42(a) and section 1404(a) to complex litigation. Because the plaintiff was uncertain whether one court could acquire jurisdiction over all of the defendants, he filed the same action in Rhode Island, New York and Massachusetts federal courts. The New York and Massachusetts actions were transferred to Rhode Island, for the purpose of consolidation with the Rhode Island action. Thus, there was a saving of both time and effort.

The second provision of rule 42(a), that consolidated actions "involve common questions of law or fact" is more often contested than the "pending before the court" requirement. However, the question before the court usually involves only a determination of the limit of the applicability of rule 42(a). For example, the rule is applied almost without exception in multiple cases alleging infringement of a single patent, class actions for Sherman Act antitrust violations and Robinson-Patman violations. Consolidation also has been ordered in four cases arising from the same auto accident; however, a fifth action brought by the driver of one of the vehicles was not consolidated because of the additional issue of contributory negligence. Consolidation was ordered of separate suits to compel arbitration of a contract dispute and to force the joinder of noncompulsory counterclaims that had been filed as separate suits.

Because of the diverse situations in which consolidation may be ordered, it is more useful to discuss the limitations upon its application. Generally the federal courts will refuse a consolidation for three reasons. First, it will be denied if the trial of the case will be confusing to the jury. Second, it will not be ordered when a consolidation will not actually save time or expense. Third, there will be no consolidation if

25. Atkinson v. Roth, 297 F.2d 570 (3d Cir. 1962); Reliance Life Ins. Co. v. Fancher, 30 F. Supp. 264 (W.D. Mo. 1939). See also cases cited in 5 J. Moore, Federal Practice ¶ 42.02, at 42-18 n.27 (2d ed. 1969), holding it was error to consolidate where consolidation would confuse the jury. But see Kelly v. Greer, 295 F.2d 18 (3d Cir. 1961), which allowed consolidation for pretrial by leaving open the question whether a severance might later be allowed.
26. See cases cited 5 J. Moore, Federal Practice ¶ 42.02, at 42-19 n.28 (2d ed. 1969). See also Adler v. Seaman, 266 F. 828 (8th Cir. 1920), wherein a stockholder's derivative suit was sought to be consolidated with a mortgage holder's suit to
it will substantially prejudice the rights of any party. 27

B. The Nature of the Consolidated Action

Because rule 42(a) provides for both "joint hearings" and "consolidated trials" it is necessary to consider the exact nature of the consolidated action. Does it become one action with all parties filing combined pleadings, or does it remain several actions, each presenting its own issues for determination and simply "sharing" courtroom time? Professor Moore believes the former characterization is incorrect unless an actual joinder is ordered. 28

Subdivision (a) speaks both of joint hearings or trials and of consolidation. This wording should not serve to give renewed life to a mistaken notion that there is some inherent distinction between a joint hearing (or trial) of particular issues, and consolidation. The rule is worded as it is to reflect the prior practice to merge the hearing or trial of separate actions so far as necessary for their expeditious handling. Thus, one or many or all of the phases of the several actions may be merged. But merger is never so complete even in consolidation as to deprive any party of any substantial rights which he may have possessed had the actions proceeded separately. The actions retain their separate identity, and the parties and pleadings in one action do not automatically become parties and pleadings in other action. 29

have the corporation declared insolvent, on the basis that both actions sought appointment of a receiver. Consolidation was denied because a receiver had already been appointed in the mortgage holder's action. The court indicated by way of dictum that even if a reciver had not been appointed, consolidation would have been denied in such a case where the only common question asserted was the identity of the remedy sought in the two actions.

27. 5 J. Moore, Federal Practice ¶ 42.02, at 42.17 n.26 (2d ed. 1969). See also Maschmeijir v. Ingram, 97 F. Supp. 639 (S.D. N.Y. 1951), where the same defense of laches was raised in two separate actions—one for breach of contract and the other for unfair competition. The district court held consolidation was improper. However, rights alleged to be "substantial" in the facts of the following cases have been held not to bar consolidation: (1) there were more issues in one case than in the other where the same defendant is charged in both cases, National Nut Co. v. Susu Nut Co., 8 Fed. Rules Serv. 42a.33 Case 1 (N.D. Ill. Nov. 28, 1941); (2) one case had legal issues and the other equitable issues, Sample v. Plating and Galvanizing Co., 27 F. Supp. 125 (D.N.H. 1939); (3) one case was originally brought in court, and the other was removed to the federal courts, Prudential Ins. Co. v. Saxe, 134 F.2d 16 (D.C. Cir. 1943); (4) one case was civil and the other was in admiralty, Close v. Calmar S.S. Corp., 11 Fed. Rules Serv. 2d 38e.1, Case 2 (E.D. Pa. Feb. 15, 1968); (5) there was no identity of parties in the several actions, Bankers Trust Co. v. Missouri, Kansas and Topeka R.R., 251 F. 789 (8th Cir. 1918); and (6) the fact that the relief sought in the two actions is in direct opposition, Lant v. Kinne, 75 F. 636 (6th Cir. 1896).

28. See note 6 supra. See also examples cited in notes 22 and 23 supra.

29. 5 J. Moore, Federal Practice ¶ 42.02, at 42-21, -22 (2d ed. 1969) (footnotes omitted).
C. Appellate Review of Consolidation Determinations

It is clear from the cases involving rule 42(a) that the decision to consolidate, while not overtly affecting the "substantial rights of the parties," may indirectly influence the ultimate outcome of the case. Therefore, the ability to get prompt appellate review of such orders may be crucial. Although the procedure to be employed in seeking appellate review is not clear, all of the cases agree that the standard on appeal is whether the trial court abused its discretion.\(^{30}\)

Regarding the procedure to be implemented, Professor Moore asserts that the order granting or denying consolidation is neither appealable under the Interlocutory Appeals Act\(^ {31}\) nor reviewable by mandamus.\(^ {32}\) However, such an order may fall within the "collateral order" doctrine of Cohen v. Beneficial Industrial Loan Corp.\(^ {33}\) Although the unavailability of review under the Interlocutory Appeals Act seems to be unchallenged, the cases do not support (or refute) Moore’s position on the availability of mandamus.\(^ {34}\)

The rule, however, suffers from the limitation that it can be applied only after the cases have been assembled in one federal judicial district. As will be explained in the next section, cases cannot always be transferred into a single district. To the extent that the power of the court to transfer cases under section 1404(a) is limited by the provisions of that statute, the federal courts cannot use rule 42(a) to manage litigation.

28 U.S.C. Section 1404(a)

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.

Unlike rule 42(a), which has had an extended development, section

30. Id. at 42-8 n.9 (2d ed. 1969). The propriety of the order is determined by the conditions at the time of the consolidation order. Adler v. Seaman, 266 F. 828, 835 (8th Cir. 1920).


32. 5 J. Moore, Federal Practice ¶ 42.02, at 42-8 n.7 (2d ed. 1969).

33. 337 U.S. 541 (1949). The "offshoot" rule of Cohen v. Beneficial Loan Corp. allows interlocutory appeal of orders which are not "final" within the meaning of 28 U.S.C. § 1291, but which are final determinations of claims of right "separate from" the rights asserted in the action and "too important to be denied review." Generally the rights must be of such a nature that continuation of the case with review of only a final decision will deny effective review of the collateral rights. See 5 J. Moore, Federal Practice ¶ 42.02, at 4-8 nn.6 & 8, citing Nolfi v. Chrysler Corp., 324 F.2d 373 (3d Cir. 1963) (held, the consolidation order did not fall within the doctrine); MacAllister v. Guterma, 263 F.2d 65 (2d Cir. 1958) (held, the order did fall within the doctrine).

34. See American Pac. Dairy Prods. Inc. v. District Court of Guam, 217 F.2d (589 (9th Cir. 1955) (held, mandamus was proper to review a rule 42(b) order but no prejudice was shown on the facts of this case. Hence mandamus was refused).
1404(a) was precipitated by a single occurrence: the Supreme Court decision in *Gulf Oil Corp. v. Gilbert*, which held that the doctrine of forum non conveniens was applicable to diversity actions in the federal courts. Conceived in 1945 by Professor Moore, the legislation was specifically designed to avoid the harsh result of dismissal of the action in the *Gulf Oil* case, while maintaining forum non conveniens as a tool of judicial administration. Because section 1404(a) was "drafted in accordance with the doctrine of forum non conveniens," an analysis of that doctrine as it existed prior to the enactment of section 1404(a) is helpful to determine the changes in federal procedure occasioned by the statute’s addition.

A. History of Forum Non Conveniens

The words "forum non conveniens" were introduced into American legal terminology in a law review article written in 1929 by Paxton Blair. The doctrine had been formalized much earlier in the English and, particularly, the Scottish practice, in which it was allowed as a formal plea in abatement. In pleading either "forum non conveniens" or "forum non competens," the defendant conceded that the court had the power to decide the case but prayed that the court abstain from using that power because the case could be more justly decided in another court. The decisional law developed criteria for deciding this issue, which criteria will be discussed below. As the doctrine developed, the courts, in exercising their inherent power to protect the integrity of the judicial process, could dismiss a case upon finding of "forum non conveniens."

The doctrine in America was first developed in admiralty cases and in the decisions from states bordering with Canada. Apparently, few

39. Id.
40. See, e.g., MacMaster v. MacMaster, [1833] 11 Sess. Cas. 685 (Scot.). This second plea was originally construed to mean that the court lacked jurisdiction; such a plea was not compatible with the doctrine of forum non conveniens. The later Scottish cases reinterpreted this plea to mean that jurisdiction was present but that the court in its discretion could decline to exercise it—precisely the meaning of forum non-conveniens. See Macadam v. Macadam, [1873] 11 Sess. Cas. 3d Ser. 860 (Scot.).
41. Because the plea was not jurisdictional and it lay in the court's discretion to dismiss, it was held in the early cases not to be barred if not raised as a threshold question. Panama R.R. v. Johnson, 289 F. 964, 982 (2d Cir. 1923).
42. Blair, *supra* note 37, at 1.
43. See, e.g., *Canada Malting Co. v. Paterson S.S. Co.*, 285 U.S. 413 (1932);
decisions were reported before the turn of the century. While the English cases considered almost exclusively the "private interests" to be furthered by the plea, American courts recognized that they could also serve the "public interest" by using this discretionary doctrine of abstention. In describing the ambit of the early doctrine, Blair found only one strict limitation on its application: The defendant must show another forum existed where the case might be tried. However, the American courts applied this reasonable limitation by making the plain-tiff prove that no other forum existed. Only then would the court deny the defendant's motion, if inconvenience had otherwise been shown.

The courts gradually developed and expanded the applicable criteria. A good summary of the "private" factors which the courts considered may be found in La Société du Gaz de Paris v. La Société Anonyme de Navigation "Les Armateurs Français." In addition American courts considered (1) the availability of witnesses; (2) increased expenses of judicial administration; (3) delays in justice to residents; (4) the "inextricable union of right and remedy" in the law creating the cause of action; and (5) other considerations such as the difficulty of construction of foreign revenue laws. Blair succinctly stated the traditional requirements for the application of the doctrine:

[T]he court will not hold its hand unless there be, in the circumstances of the case, such hardship on the party setting up the plea as would amount to vexatiousness or oppression if the court persisted in exercising jurisdiction. The inconvenience, then, amounts to actual hardship and this must be regarded as a condition sine qua non of success in putting forward a defense of forum non conveniens.

Disconto-Gesellschaft v. Umbreit, 127 Wis. 651, 106 N.W. 821 (1906); Great Western Ry. v. Miller, 19 Mich. 305 (1869).

44. 1 J. Moore, Federal Practice ¶ 0.145, at 1754 (2d ed. 1969).
46. Disconto-Gesellschaft v. Umbreit, 127 Wis. 651, 106 N.W. 821 (1906) wherein the court stated: "To hold that two foreigners may import, bodily, a cause of action, and insist, as a matter of right, that taxpayers, citizens, and residents shall await the lagging steps of justice in the anteroom, while the courts [sic] hears and decides the foreign controversy, seems on the face of it, to be unreasonable, if not absurd." Id. at 662, 106 N.W. at 823-24.
47. Blair, supra note 37, at 32.
48. Id. at 33. Blair noted that the doctrine as early applied in New York was only applicable in tort cases; however, because of a lack of any theoretical basis, this distinction would not stand analysis. Id. at 30-32.
50. Blair, supra note 37, at 23-30.
51. Id. at 2, quoting A. Giff, International Law of Jurisdiction in England and Scotland 212-13 (1926).
B. Adoption and Interpretation of Forum non Conveniens by the Federal Courts

The doctrine of forum non conveniens developed in the federal courts in a 15-year period prior to the passage of section 1404(a). Its evolution is primarily manifested in four Supreme Court cases.

In the first, *Canada Malting Co. v. Patterson Steamship Co.*, an in personam action was brought by Canadian citizens against other Canadian citizens for damages arising out of a shipping collision in the territorial waters of the United States. It was clear that the federal courts had jurisdiction of the subject matter. The plaintiffs, while conceding that the district court had the power to dismiss a wholly foreign claim, argued that this discretion did not extend to the case at bar because of the domestic element (the collision) and the constitutional mandate of the federal courts to try "all civil cases of Admiralty and Maritime jurisdiction." Although the Supreme Court claimed that an unbroken line of authority supported the dismissal, it nevertheless felt compelled to render an opinion. In affirming the dismissal, the Court stated:

> Nor is it true of courts administering other systems of our law [that they have no discretion to dismiss]. Courts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal.

*Canada Malting* was not a case of first impression, for earlier courts sitting in admiralty had rendered similar decisions. Those cases, however, did not fully consider the issue at hand.

The first nonadmiralty federal case to apply the doctrine was *Rogers v. Guaranty Trust Co.* The New York plaintiff, a stockholder in the defendant American Tobacco Co., a New Jersey corporation, claimed that an employee stock option plan was ultra vires. The district court dismissed "in the exercise of discretion."

In affirming dismissal the Supreme Court said:

> It has long been settled doctrine that a court—state or federal—sitting in one state will as a general rule decline to interfere with or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another state but will leave controversies as to such matters to the courts of the state of domicile. [Citations omitted.] *While the district court had jurisdiction to adjudge the rights of the parties, it does*

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52. 285 U.S. 413 (1932).
54. 285 U.S. at 422-23.
56. 288 U.S. 123 (1933).
not follow that it was bound to exert that power. [Citations omitted.]
It was free in the exercise of a sound discretion to decline to pass
upon the merits of the controversy and to relegate the plaintiff to an
appropriate forum. [Citations omitted.] . . . But it safely may be
said that jurisdiction will be declined whenever considerations of
convenience, efficiency and justice point to the courts of the State of
the domicile as appropriate tribunals. . . . 57

In Baltimore & Ohio Railroad v. Kepner, 58 the third case in the pre-
section 1404(a) development of forum non conveniens, the defendant in
a FELA action sought a state court injunction to prevent the plaintiff
from bringing the action in the federal court located in another state.
The Supreme Court held that the doctrine of forum non conveniens
would not apply in such a situation despite the defendant's proof of in-
convenience. The Court interpreted the venue provisions of the Federal
Employers Liability Act to be a legislative determination that the con-
templated action was not "inconvenient." In dissent, Mr. Justice Frank-
furter defended the doctrine of forum non conveniens and its applica-
tion to the case at bar. The value of his opinion in Kepner lies in his
consideration of two points which are essential to the effective applica-
tion of the doctrine. First, he urged that courts evaluate the "public
factors" which are present in all cases involving forum non conveniens. 59
Secondly, Justice Frankfurter recognized that a problem similar to that
in Kepner would be presented in every case in which a statute laying
venue in a specific court was applicable. A similar result in such cases
would greatly undermine the effectiveness of forum non conveniens in
the federal courts. 60

The most important case involving forum non conveniens decided
by the Supreme Court prior to the passage of section 1404(a) is Gulf
Oil Corp. v. Gilbert. 61 In that case the plaintiff was a Virginia resident
injured in an explosion at a filling station in Virginia. The defendant
was a Pennsylvania corporation doing business in Virginia and New
York. The negligence of Gulf's employee in delivering gasoline to the
station allegedly caused the explosion. The plaintiff filed suit in the
Southern District of New York, a jurisdiction of much higher damage
verdicts than Virginia. Defendant's motion to dismiss for forum non
conveniens under the New York law, which the federal court held ap-

57. Id. at 130-31. (emphasis added).
58. 314 U.S. 44 (1941).
59. 314 U.S. 44, 57-58 (1941). While his assertion that a burden on railroads
is a "public inconvenience" is overstated, the coequal importance of "public factors,"
later recognized in Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), is an important as-
pect of his opinion in Kepner.
60. 314 U.S. 44, 62 (1941). Also interesting to note is Mr. Justice Frankfurter's
reference to the "familiar and settled" doctrine of forum non conveniens, barely 12
years after the appearance of Blair's article.
Applicable under the *Erie* doctrine, was granted. The court of appeals reversed, holding the application of the state law of forum non conveniens was error. The Supreme Court refused specific decision on this question, stating:

The law of New York as to the discretion of a court to apply the doctrine of *forum non conveniens*, and as to the standards that guide discretion is, so far as here involved, the same as the federal rule. [Citations omitted.] It would not be profitable, therefore, to pursue inquiries as to the source from which our rule must flow. Instead of basing the decision on the *Erie* principle of applying state substantive law, the Court held that the doctrine of forum non conveniens previously developed by the federal courts, primarily in the three cases discussed above, was applicable to a diversity suit. It was the inherent power of the federal court to dismiss the action, thus furthering justice by respecting those considerations underlying the doctrine of forum non conveniens.

The lasting value of the *Gulf Oil* opinion lies not so much in the extension of the doctrine, but in the compendious listing of factors which a federal court should consider in deciding a plea of forum non-conveniens:

An interest to be considered, and the one most likely to be pressed, is the private interest of the litigant. Important considerations are [1] the relative ease of access to the sources of proof; [2] availability of compulsory service of process for attendance of unwilling witnesses; [3] cost of obtaining the attendance of willing witnesses; [4] the possibility of a view of the premises if that is appropriate . . . ; [5] all other practical problems that make trial of the case easy, expeditious and inexpensive; [6] . . . enforceability of a judgment [and] [7] relative obstacles to a fair trial. . . . But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

However, in addition to the above "private interests" to be considered, the Court enumerated the following relevant "public" concerns in the trial of actions in the most convenient forum: (1) the administrative difficulties arising from congested courts; (2) the imposition of jury duty upon persons in a community which has no interest in the outcome of the case; (3) the importance of holding a trial near the residence of people collaterally involved, so that they may be aware of the events of the trial; (4) the interest of having purely local controversies decided at home; and (5) the familiarity of the court with applicable state law.

It was in this context that section 1404(a) was enacted. It was established that federal courts had an inherent power to dismiss an action.

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63. *Id.* at 509.
64. *Id.* at 508.
65. *Id.* at 508-09.
and that it could be used to manage the litigation workload. Congress then acted to mitigate the potential harshness of the doctrine.

C. The Enactment of Section 1404(a)

While section 1404(a) was "drafted in accordance with the doctrine of forum non conveniens," it avoided the drastic result of dismissal, the only possible result under the prior doctrine, and provided instead for a change of venue. Although some doubt existed about the extent to which section 1404(a) modified the older doctrine, these doubts were generally settled by the Supreme Court decision of Norwood v. Kirkpatrick. There the Court said:

Congress, in writing 1404(a), which was an entirely new section, was revising as well as codifying. . . . When the harshest part of the doctrine (dismissal) is excised by statute, it can hardly be called mere codification. As a consequence, we believe that Congress, . . . intended to permit courts to grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader. The Court in Norwood, however, limited the new remedy to the situation where the federal court found that another federal court was a more convenient forum. If the court makes such a finding, then it can transfer the action to the appropriate court; it is without power, however, to dismiss the action. However, if the federal court rules that a state court is the most convenient forum, then it may dismiss the case. To that extent, the common law form of forum non conveniens still exists in the federal court system.

Furthermore, under the broad provisions of section 1404(a), the transfer may be initiated by either party. In contrast, the earlier doctrine was strictly a defendant's plea. Thus, if the plaintiff's chosen forum subsequently becomes inconvenient, he may under proper circum-

66. 1 J. Moore, Federal Practice ¶ 0.145(1), at 1751 n.1 (2d ed. 1969).
67. Id. at 1752-53.
69. Id. at 32. However, the defendant must still make a "convincing showing" of inconvenience. Peyser v. General Motors Corp., 158 F. Supp. 526 (S.D.N.Y. 1958).
70. 349 U.S. at 32. See also Headrick v. Atchison, T. & S.F.R.R., 182 F.2d 305 (10th Cir. 1955).
stances transfer the action. This modification of forum non conveniens clearly showed that Congress intended that the doctrine be applied by either party whenever the "public factors" in the case justified a transfer.

The transfer may be sought at any time during the litigation, but it is most properly brought at the outset. However, since the statute is remedial and is partially intended to aid administration of the litigation, a court is not precluded from ordering transfer "whenever the facts" militating for transfer appear. When a party moves for transfer solely to delay disposition of the case, the tardiness of his motion is cause for its denial.

D. Criteria to be Considered Under 1404(a)

The classic statement of the applicable criteria set forth in Gulf Oil is unaffected by the passage of section 1404(a). Courts still apply these principles in deciding whether to transfer. The only real change in the criteria has been that a moving party may make a lesser showing of inconvenience than was required under the common law doctrine. With the clear establishment of the relevant factors, much of the litigation concerning this section has turned on the "degree" to which a forum must be inconvenient. Since this question is a matter of the trial court's discretion, its decision is rarely reversed. However, three general statements can be made. First, the burden of showing inconvenience is on the moving party. Second, the burden is not met by a mere showing that another forum is "slightly more convenient" and that a transfer would simply shift the inconvenience to the other party. Third, if the defendant proves that there are no compelling local interests in the litigation and that the plaintiff's choice of forum was simply the result of forum shopping, then he need only make a lesser showing.

E. Application and Limitation of 1404(a)

In three cases the application and limitation of section 1404(a) have been subjected to close scrutiny by the Supreme Court. The sec-

73. 1 J. Moore, Federal Practice ¶ 0.145(4-3), at 1768 (2d ed. 1969).
75. 1 J. Moore, Federal Practice ¶ 0.145(4-4), at 1769 (2d ed. 1969).
76. See cases cited in 1 J. Moore, Federal Practice ¶ 0.145(5), at 1781-82 n.16 (2d ed. 1969).
77. Ford Motor Co. v. Ryan, 182 F.2d 329 (2d Cir. 1950).
tion clearly emerged from the first decision as a stronger measure for handling complex litigation. The second case severely curtailed its remedial purpose. The third decision suggests that the Court will adopt a broader interpretation of section 1404(a) in the future.

In *Ex parte Collett*\(^80\) the Court considered the application of section 1404(a) to "any civil action." The Supreme Court had held in *Kepner*\(^81\) that forum non conveniens had no application to an action covered by a special venue provision. The question presented in *Collett* was whether Congress intended to overrule that decision by the later enactment of section 1404(a). The Court held that the act did abrogate the rule of *Kepner*.\(^82\) The result of this expansive interpretation is that section 1404(a) may be applied to all "noncriminal" actions,\(^83\) including FELA cases.\(^84\)

In *Hoffman v. Blaski*\(^85\) the Court placed a severe restriction upon the scope of section 1404(a). The action, originally filed in Texas, was transferred on the defendant's motion to the Northern District of Illinois. This order was affirmed on appeal by the Fifth Circuit. Plaintiff moved that the District Court in the Northern District of Illinois remand the case to the Texas court, which motion was denied. Plaintiff then petitioned the Seventh Circuit for mandamus, which was issued, ordering transfer of the case back to Texas. The legal basis of the plaintiff's objection to the trial of the case in the Northern District of Illinois was that the action could not have been originally filed there. The court did not have jurisdiction over the defendant; nor was venue properly laid in that district. The Supreme Court granted certiorari to review the issuance of mandamus by the Seventh Circuit. The majority opinion, written by Mr. Justice Whittaker, considered the controlling question to be: Was the Northern District of Illinois a district where the action "might have been brought?" The Court found the language of the statute to be "unambiguous, direct and clear." It affirmed the Seventh Circuit's construction of section 1404(a): the possible dis-

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82. Moore proposed adoption of section 1404(a) or a similar provision very soon after the *Kepner* decision. He indicated to congressional committees in hearings on section 1404(a) that such a statute would apply in the *Kepner*-type case. 1 J. Moore, *FEDERAL PRACTICE* ¶ 0.145(1), at 1762-63 (2d ed. 1969).
83. See *Young v. Director*, 367 F.2d 331 (D.C. Cir. 1966) (applying section 1404(a) to a habeas corpus proceeding). However, section 1404(a) allows transfer of "actions" only, not parts of actions. Hence transfer of one "claim" contained in an action will be allowed only if the claim can be severed and treated as a separate "action." *Wyndham Associates v. Bintliff*, 398 F.2d 614 (2d Cir. 1968).
85. 363 U.S. 335 (1960).
districts for transfer are those in which "the plaintiff has a right to sue in that district, independently of the wishes of defendant." 86

Mr. Justice Frankfurter, a consistent advocate of the expansion of section 1404(a) to accomplish its remedial purpose, vigorously dissented. First, he observed that the issuance of mandamus by the Seventh Circuit was a refusal to accept the Fifth Circuit's decision that the action could be transferred to Illinois. Thus, the Seventh Circuit declined to apply res judicata to a case where it was clearly applicable. The result was a waste of judicial time and energy which section 1404(a) was designed to conserve. 87

Second, Mr. Justice Frankfurter considered the result in light of the law of jurisdiction and venue. Had the plaintiff incorrectly brought an original action in the Northern District of Illinois and had the defendant desired trial there, the latter could have consented to jurisdiction and venue and the trial then could have proceeded in Illinois. Moreover, the defendant's motion for transfer would suggest that he had acquiesced to the jurisdiction of the transferee court. 88 However, because the plaintiff chose to bring his action in the inconvenient Texas forum, the judicially economical result of the above example was denied under the Court's narrow construction of the statute. 89 Justice Frankfurter then commented about "the interest of justice":

If the plaintiff's objection to proceedings in the transferee court is not consonant with the interests of justice, a good reason is wanting why transfer should not be made.

On the other hand, the Court's view restricts transfer, when concededly warranted in the interest of justice, to protect no legitimate interest on part of the plaintiff. 90

Third, Mr. Justice Frankfurter attacked the Court's assertion that the statute's language was "plain," pointing out that a majority of both the courts of appeal and the district courts had previously reached the opposite conclusion. 91 The result of the Blaski opinion was the creation of a "verbal prison" in the holding that the phrase "might have been brought" means "[where the plaintiff had] a right to bring these actions in the respective transferee districts." 92 Had Mr. Justice Frankfurter prevailed, the necessity for many of the pressures leading to the adoption of section 1407 might well have been obviated:

The limitations upon the section [1404(a)] should only be those which recognize legitimate countervailing considerations to the free

86. Id. at 344.
87. Id. at 347-48.
88. Id. at 361.
89. Id.
90. Id. at 362.
91. Id. at 356-58.
92. Id. at 358.
CONSOLIDATION AND TRANSFER

reign of actual convenience, namely limitations regarding the power of the federal courts to adjudicate, and limitations recognizing the historic privilege of the defendant, should he choose to exercise it, to object to the place of trial unless it is affirmatively designated by the venue statute.\(^93\)

**Blaski** is a severe limitation even on the rule announced in *Ex parte Collett*,\(^94\) for although section 1404(a) will apply to cases covered by special venue statutes, these statutes will limit the possible districts to which the cases may be transferred.\(^95\) Although **Blaski**'s construction of section 1404(a) was consistent with the common law doctrine of forum non conveniens, the decision lessened the utility of the statute for judicial management.

The third major Supreme Court decision to construe section 1404(a) is *Van Dusen v. Barrack*.\(^96\) That case involved a number of wrongful death actions arising out of an airline crash in Boston harbor. Several actions were filed in Pennsylvania by the personal representatives of Pennsylvania residents who were killed in the crash. The defendants moved to transfer all of these actions to the District of Massachusetts, where they might be consolidated with similar actions pending in that court. The plaintiffs objected, undoubtedly because they feared that the Massachusetts wrongful death act and its severe damage limitations would then apply. They argued that they were not qualified as administrators in Massachusetts and hence did not have an "unqualified right to sue" in that state at the time the action was filed, as required by *Hoffman v. Blaski*.\(^97\) The district court granted the transfer, but the Third Circuit reversed on mandamus, ordering District Court Judge Van Dusen to vacate the transfer order. The Supreme Court reversed the court of appeals, holding that the phrase "where the action might have been brought" referred only to the "suability" of the defendant and to limitations placed upon the possible place of trial by federal jurisdiction and venue statutes. Section 1404(a) did not relate to the capacity of the plaintiff to bring suit; that was governed by state law.

The Court recognized, however, that the real issue was the applicability of the Massachusetts Death Statute. By way of dictum, the

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93. *Id.* at 368 (emphasis added).
95. *See* Technograph Printed Circuits, Ltd. v. Packard Bell Electronics, 290 F. Supp. 308 (C.D. Cal. 1968) (patent venue statute limited the districts to which the action could be transferred). An excellent example of how this problem is solved by section 1407 is *In re Butterfield Patent Litigation*, — F. Supp. — (JPML 1970). In that case no consideration of the patent venue statute was necessary. The transfer district was chosen primarily because of its central geographical location.
Court indicated that a transfer under section 1404(a) is "merely a change in courtrooms," not a change in the applicable body of law. Therefore, the "whole law" of the transferor court will be applied by the transferee court.\textsuperscript{98} In this case, the Massachusetts court was to view the case just as if it were a federal court sitting in Pennsylvania. Consequently, it had to apply the Pennsylvania choice of law rules to the accident in Massachusetts. Because of the complicated conflicts of law question, the Court remanded the case to the district court for reconsideration of its transfer order. The Court believed that since the transfer was partly motivated by the possibility of consolidation of these cases with those already pending in Massachusetts, the possible application of different bodies of law to the two classes of cases might affect the granting of the transfer.\textsuperscript{99}

The result of \textit{Van Dusen} represents an attempt to broaden the construction of section 1404(a). Although the action can be transferred only to a district where the defendant might have been served, transfer will not necessarily be denied because the plaintiff could not sue in the state in which the transferee court sits. \textit{Van Dusen}, however, was a "hard case" on its facts because it involved the possible application of the Massachusetts Wrongful Death Statute. Many courts, trying to avoid the application of that statute, have created bad law.\textsuperscript{100} While the \textit{Van Dusen} dictum did not necessarily create bad law, its choice-of-law rule complicates a transfer decision which may involve the consolidation of several cases from different states for trial in a single district.\textsuperscript{101}

F. Appellate Review of 1404(a) Orders

As in the case of rule 42(a) consolidations,\textsuperscript{102} the proper procedure for a review of a section 1404(a) determination is not clear.\textsuperscript{103} It is certain, however, that a transfer under section 1404(a) is not a


\textsuperscript{101} The confusion created by this just ruling, that "transferor law" will apply, is lessened in the transfer under section 1407, because the transfers under section 1407 are ostensibly only for discovery and settlement of common factual questions. \textit{See In re Air Crash Disaster near Hanover, New Hampshire on October 25, 1968}, 314 F. Supp. 62 (JPML 1970).

\textsuperscript{102} \textit{See text accompanying notes 34-36 supra.}

\textsuperscript{103} \textit{See 1 J. Moore, Federal Practice ¶ 0.147 (2d ed. 1969). \textit{See also Kitch, Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice?}, 40 Ind. L. Rev. 99, 110-31 (1965).}
final judgment subject to appeal. It is also clear that the courts of
appeal have the power to review by mandamus a transfer order under
their general supervisory control of the actions of the district courts.
However, it may also be possible to review a district court's decision
pursuant to the Interlocutory Appeals Act of 1958.

That statute permits a district judge, upon determining that a deci-
sion on an interlocutory matter may be dispositive of or crucial to the
litigation, to certify the question for discretionary review to the court of
appeals. With reference to a transfer order, it is hard to imagine the
granting or denial of such an order as dispositive of the litigation.
Moreover, because most cases have come before the courts of appeal on
mandamus, it is a fair conclusion that mandamus is the proper vehicle
for review.

Section 1404(a) has had an effect, not only on the administration
of litigation in the federal system, but upon the doctrine of forum non
conveniens itself. The development of the doctrine in numerous cases,
both state and federal, has been fostered by the enactment of section
1404(a) and the numerous cases arising under it. Section 1404(a) fur-
ther served to highlight the advantage of prosecuting litigation in the
most convenient court. The application of section 1404(a) is limited,
however, by the requirement that the action can be transferred only
to a district which had proper jurisdiction and venue. Under section
1407, to be examined next, these limitations do not apply.

28 U.S.C. Section 1407: The Judicial Panel on
Multidistrict Litigation

A. Historical Development

The Judicial Panel on Multidistrict Litigation had its genesis in
the Electrical Appliance antitrust cases which arose about 10 years ago.
In those cases, which involved the fixing of prices of numerous lines of
electrical appliances, over 1900 claims were filed in 36 different dis-
tricts. Because it would have been impossible for one court to have
administered such a complex action if all cases had been transferred to
a single district under section 1404(a), and because the claims in-
volved many disparate lines of commerce, transfers under section
1404(a) were not advisable.

A Committee of the Judicial Confer-
eence of the United States was established to aid the individual district
judges in the administration of the cases. Two document deposi-

104. 1 J. Moore, Federal Practice ¶ 0.147, at 1962 (2d ed. 1969).
105. Id. at 1966.
107. Peterson & McDermott, Multidistrict Litigation: New Forms of Judicial Ad-
tories were established, one in Chicago for the defendants and the other in New York for the plaintiffs, into which were deposited nearly 1.5 million documents. If discovery had proceeded in each of the 36 districts in which actions were pending, it might have been necessary to have reproduced the documents for use in all of the districts. Clearly, efficient administration of the case was necessary to dispose of the cases economically and expeditiously.

The Coordinating Committee, working without guidelines, developed a national discovery program which included almost 300 depositions, uniform interrogatories and nationally uniform pretrial orders. As a result, discovery was completed in about 3 years,\(^\text{108}\) a remarkable accomplishment. Transfers of action involving similar product lines were then ordered under section 1404(a) and the entire litigation had been substantially completed by settlement or trial in 1967—5 years after it was begun. While the primary purpose of the Coordinating Committee was to handle this litigation, the Judicial Conference also desired the development of established procedures to manage any complex litigation that would arise in the future.\(^\text{109}\) Several proposals were presented,\(^\text{110}\) all emphasized that traditional ideas about the virtues of proper venue and local forums should not obscure the necessity for new procedures to handle the "big case." The most substantial results of the Committee's work have been the enactment of United States Code, title 28, section 1407 and the compilation of the Manual for Complex Multi-district Litigation.

B. Organization and Procedure of the Panel

The Coordinating Committee submitted its proposal, the basis for section 1407, to the Judicial Conference, which forwarded it to the Congress.\(^\text{111}\) Introduced in 1966, it became part of the Judicial Code in April 1968. Section 1407 provides that the Chief Justice of the United States designate seven circuit and district judges to serve on the Panel.\(^\text{112}\) Once constituted, the Panel was empowered to establish its

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108. \textit{Id.}


112. "The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United
own rules of conduct, which it has done. The statute outlines the procedures which the Panel follows in deciding upon a transfer; these procedures have been carried forward and clarified in the Rules of the Panel. The statute provides that proceedings for the transfer of an action may be initiated by the Panel or by the motion of “any party in any action in which transfer . . . may be appropriate.”

Once a hearing has been ordered, the Panel gives notice of the time, place and subject matter of the hearing to all parties to the litigation for which transfer is being considered. The criteria which the Panel considers in deciding the propriety of transfer are stated in the statute:

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. . . . [U]pon 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,

The statute emphasizes “efficiency and convenience” as standards to be applied by the Panel. The cases demonstrate that the Panel gives little weight to other considerations.

After the hearing, the Panel issues an order either granting or denying the transfer; if a transfer is granted, the Panel designates the district and the judge to which the transferred cases will be assigned. The district judge must consent to the assignment of the cases to his court, and an issue in many of the Panel’s decisions is the most appropriate court to which an action should be transferred. The factors in such a determination are discussed below. Once the case has been transferred, the transferor court loses all power over the case unless and until the Panel remands the case to the original court.

States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.” 28 U.S.C. § 1407(d) (Supp. V, 1969).


114. 28 U.S.C. § 1407(c) (ii) (Supp. V, 1969). See In re Western Liquid Asphalt Anti-trust Litigation, 303 F. Supp. 1053 (JPML 1969) where the motion to transfer was filed by the parties in the proposed transferee court only. It was held by the Panel that these parties lacked standing to request transfer of the case into their district.

115. JPMILR. Pro. 13.


117. Id. § 1407(b).

118. Occasionally, the Panel will exclude certain issues before transfer. See In re "East of the Rockies" Concrete Pipe Antitrust Litigation, 302 F. Supp. 244, 249 (JPML 1969); In re Fourth Class Postage Regulations, 298 F. Supp. 1326, 1327-28 (JPML 969).

It should be emphasized that, although section 1407 speaks of transferring and
A transfer order may be reviewed only by extraordinary writ in the court of appeals for the transferee circuit. And no review either by appeal or extraordinary writ is allowed from the Panel's denial of transfer. The denial of review is apparently a conclusive legislative determination that no prejudice can befall a party whose transfer is denied. As a practical matter, an appellate court would be reluctant to review a transfer determination, for it has been made by a Panel of well known and respected judges who have passed on a question of law in which they have particular expertise. It is not surprising that there are no reported cases in which appellate review has been sought.

Subsequent to the initial meeting of the Panel, an immediate problem in the procedure arose. The procedural safeguard of providing a hearing before any transfer order was issued, while well intended, often became cumbersome. For example, after the Panel had already decided that transfer was proper in a particular litigation, additional cases, either filed subsequent to the transfer order or not discovered before the original hearing, were brought before the Panel for transfer. As a general rule, the parties did not oppose transfer in these “tag-along” cases because the Panel had already disposed of any substantive objections that might have been raised. The requirement of a noticed hearing was thus a mere formality and threatened to compound the workload of the Panel.

As a result, the Panel promulgated Rule 12, adopting a device known as the conditional transfer order. The order is filed in the transferor court, transferring the action to the transferee court previously selected by the Panel. The effect of transfer is stayed for 10 days to allow any party to the newly transferred action to file opposition with the Panel. If no such opposition is filed, the action is automatically transferred. If opposition is filed, the Panel will decide the question after oral or written arguments. This procedure has been extremely successful, enabling the Panel to hear and transfer actions after the first few cases of the litigation have been filed without fear that a rehearing will be necessary if more cases are subsequently filed.

It has kept the consolidating cases for pretrial purposes only, no reported decision in the 2 years of the Panel's operation has remanded a case once it has been consolidated and transferred. As a practical result, therefore, the court to which pretrial proceedings are transferred will also adjudicate the merits of the cases. It is a fair conclusion that, practically speaking, section 1407 has circumvented all of the limitations which the federal courts had placed on section 1404(a).

120. Id.
121. An appellate court reached a similar conclusion in Adler v. Seaman, 266 F 828 (8th Cir. 1920), reviewing the denial of consolidation under rule 42(a).
122. Of the 320 “tag-along” cases transferred under this procedure in the first 1 months of the Panel’s operation, only four required a hearing.
work load and paper work of the Panel to a minimum and has limited the number of published opinions.\textsuperscript{123}

The first hearing of the Panel was held on August 8, 1968.\textsuperscript{124} Since that time, the Panel has considered and decided 41 different combinations of litigations. The system that section 1407 has created is still in its infancy. Thus, the Panel has not yet devised a uniform name or label to characterize the determinations which it makes; nor has the Panel developed a uniform citation for its decisions.\textsuperscript{125} However, with the published opinions of the Panel appearing in the Federal Supplement with increasing frequency, it is an appropriate time for analysis of the Panel's performance. The following discussion will first consider specific types of litigation most commonly before the Panel and the peculiar characteristics and problems presented by each. Then, general procedural problems arising out of conflicting class actions and bifurcated trials will be examined.

C. Disasters

The Panel has been involved in fourteen disaster litigations: twelve air crashes, the Silver Bridge collapse and an oil platform disaster. In all but three of these litigations, the Panel ordered transfer almost as a matter of course. In fact, after the first few decisions, the Panel never considered the possibility that the separate cases might not involve common questions of fact. Under the present state of the law, it is accurate to say that the Panel will \textit{assume} that it should order a

\begin{footnotesize}
\footnotesize{\bibitem{MOTT, supra note 107, at 745. The Panel's appreciation of the value of catching a nationwide action in its incipiency and ordering transfer with the view of automatically transferring later filed cases is quite clearly shown in \textit{In re} Motor Vehicle Air Pollution Control Equipment Antitrust Litigation, 311 F. Supp. 1349, 1350 (JPML 1970).}
\footnotesize{\bibitem{123. For examples of such waste of space in the Federal Supplement, see \textit{In re} Aircrash Disaster at the Greater Cincinnati Airport on November 20, 1967, 298 F. Supp. 355 (JPML 1968); \textit{Id.} at 358.}
\footnotesize{\bibitem{124. \textit{In re} Eisler Patents Litigation, 297 F. Supp. 1034 (JPML 1968).}
\footnotesize{\bibitem{125. The Panel's docketing system has undergone similar development. Apparently the Panel would separately number each request for transfer. This procedure worked in docket number one, \textit{In re} Eisler Patent Litigation, because only one request for transfer was received. However, beginning with docket number 2, a number of different motions relative to the same litigation were received and given separate docket numbers. Hearing all together, the Panel rendered a single opinion, \textit{In re} Library Editions of Children's Books Antitrust Litigation, 297 F. Supp. 385 (JPML 1968).}
\footnotesize{Thereafter the Panel began docketing multiple requests for transfer or related litigation under the same number. Even this procedure has caused some problems, particularly in the cases of separate air crashes at the same airport. See \textit{In re} Air Crash Disaster at Greater Cincinnati Airport on November 20, 1967, 298 F. Supp. 353 (JPML 1968). \textit{In re} Air Crash at Greater Cincinnati Airport on November 8, 1965, 295 F. Supp. 51 (JPML 1968).}
}\end{footnotesize}
transfer in a disaster litigation.¹²⁶ The three litigations in which transfer was denied, In re Air Crash Disaster at Falls City, Nebraska on August 6, 1966;¹²⁷ In re Air Crash Disasters near Bradford, Pennsylvania on December 24, 1968 and January 6, 1969;¹²⁸ and In re Galveston, Texas Oil Well Platform Disaster Litigation,¹²⁹ all involved anomalous situations.¹³⁰ In Falls City, the Panel's action apparently came too late in the proceedings because the plaintiffs had already settled the Illinois actions and the discovery in the New York cases had progressed to the point where those cases were ready for trial. The Panel would not penalize those litigants by ordering a useless transfer. In the Bradford, Pennsylvania cases, the Panel found that the plaintiffs had brought all the actions in the district court of the crash, that an informal coordinated discovery program was working effectively and that it would serve no purpose to consolidate the cases formally.¹³¹ In the Galveston Oil Platform case the Panel found that pretrial procedures of the nine affected actions had progressed satisfactorily, leaving only questions of subrogation for further discovery. In addition, all of the plaintiffs opposed transfer. The Panel thus refused to transfer simply to accommodate the defendants. In all other cases involving multiple claims arising out of a disaster, however, the Panel has ordered transfer.¹³²

In transferring cases, the Panel has rejected the argument that the composition of the consolidated actions would prejudice individual actions that were essentially different from the rest of the cases. Specifically, in cases involving multiple suits by passengers of downed air-

¹³⁰. The Panel also refused to transfer one action in In re Mid-Air Collision near Hendersonville, North Carolina, on July 19, 1967, 297 F. Supp. 1039 (JPML 1969), on the grounds that the plaintiffs were appealing a previously issued transfer order under section 1404(a) and that a transfer under section 1407 would prolong determination of the appeal. The Panel ordered, in effect, a stay of the transfer in that action pending outcome of the appeal, upon the agreement of counsel to participate informally in the discovery and pretrial.
¹³¹. The Panel rejected the contention that informal procedures were working satisfactorily in In re Crash Disaster near Dayton, Ohio, on March 9, 1967, 310 F. Supp. 798 (JPML 1970), where all of the actions had not been brought in, or previously transferred to, the districts around the situs of the crash.
¹³². It is not certain whether the Panel's operations will obviate the need for the proposed measures currently pending in Congress to give federal courts exclusive jurisdiction of air crash disaster litigation and to lay venue in the district of the situs of the crash. Certainly, if the Panel is able to devise a system for effectively monitoring the case input of the federal courts, such legislation would help the problem only so far as it divested the state courts of jurisdiction in such cases.
liners, the Panel has refused to separate the following actions from the general transfer order: actions brought by survivors of the crew on the downed airliner;\textsuperscript{133} actions on behalf of passengers in a private plane involved in a mid-air collision;\textsuperscript{134} and an action which alleged products liability against the plane's manufacturer.\textsuperscript{135} The Panel found that the grounds for the opposition to transfer in these cases went to questions of liability; no one opposing transfer denied the existence of a common nucleus of fact surrounding the occurrence of the crash.

Once the Panel has decided whether to transfer, it must then decide where to transfer the cases for consolidation. In nine of the eleven disaster litigations in which transfer was ordered, the Panel transferred the cases to the district where the situs of the crash was located. In the two apparent exceptions, transfer to the district of the situs of the crash was impossible. In \textit{In re Air Crash Disaster at Hong Kong on June 30, 1967},\textsuperscript{136} the situs was outside of the United States. Instead, transfer was ordered to the Northern District of California, where the greatest number of actions had been filed. In \textit{In re Silver Bridge Disaster}\textsuperscript{137} the "situs" of the disaster was a bridge spanning two different districts. Again, the Panel ordered transfer to the district in which the greatest number of actions had been filed.\textsuperscript{138} Therefore, it is accurate to state that multiple litigation arising from disasters in the future will be transferred to the district in which the situs of the disaster is located, if possible.\textsuperscript{139}

D. Patent and Trademark Litigation

The trend of Panel decisions in patent litigation follows closely the development of the disaster cases in that the Panel assumes that "common questions of fact" exist in such cases. In one trademark case and

\begin{itemize}
  \item \textsuperscript{133} \textit{In re Air Crash Disaster at Greater Cincinnati Airport on November 8, 1965}, 295 F. Supp. 51 (JPML 1968).
  \item \textsuperscript{134} \textit{In re Mid-Air Collision near Hendersonville, North Carolina on July 19, 1967}, 297 F. Supp. 1039 (JPML 1969).
  \item \textsuperscript{135} \textit{In re Air Crash Disaster at Greater Cincinnati Airport on November 20, 1967}, 298 F. Supp. 353 (JPML 1968).
  \item \textsuperscript{136} 298 F. Supp. 390 (JPML 1969).
  \item \textsuperscript{137} 311 F. Supp. 1345 (JPML 1970).
  \item \textsuperscript{138} Recognizing the validity of the parties' objections based on the crowded dockets of the most likely transferee judges, the Panel assigned the cases to Judge Kaufman of the District of Maryland who was assigned to the District of West Virginia for the purpose of handling the litigation.
  \item \textsuperscript{139} This is clearly shown in \textit{In re Mid-Air Collision near Fairland, Indiana, on September 9, 1969}, 309 F. Supp. 621 (JPML 1970), where the transfer was ordered to the district of the situs of the crash which was not the district in which the greatest number of actions had been filed. \textit{See also In re San Juan, Puerto Rico Air Crash Disaster}, 316 F. Supp. 981 (JPML 1970), which required assignment of Judge Weinfeld to the District of Puerto Rico to act as transferee judge.
\end{itemize}
seven patent litigations, the Panel has refused transfer only twice. In *In re Eisler Patent Litigation* 140 22 of the 24 actions sought to be transferred had been dismissed before the Panel considered the litigation. Moreover, the Coordinating Committee had apparently "monitored" the cases prior to the establishment of the Panel. Therefore, transfer would have served no useful purpose. In the other litigation in which transfer was refused, *In re Deering-Milliken Patent Litigation*, 141 the Panel emphasized the fact that, in *all* of the actions in which transfer under section 1407 was sought, the litigants had moved to transfer to the same district under section 1404(a). The Panel thus stayed consideration of the section 1407 transfer until the section 1404(a) motions had been decided. As will be discussed below, it is common for the Panel to decline to act until the section 1404(a) question has been decided. Thus, the Panel has tried to make the two statutes complementary. 142

Of the six cases in which transfer has been ordered, defendants argued that no "common questions of fact" existed. While the Panel has conceded that there may be separate questions relating to infringement, notice and damage, all cases share the common issues of scope and validity of the patent. 143 Although the consolidated pretrial and discovery might not be as extensive as in other litigations, these questions are generally very complex and their resolution in a single proceeding saves time and expense.

Since patent cases rarely involve questions of fact that are appropriate for a jury, the Panel has concluded that summary judgment for defendants may be proper after pretrial and discovery have determined the scope and validity of the patent. If the cases have been consolidated, the transferee judge would then be able to dispose of the entire litigation at an early state. 144

Unlike the disaster cases, the patent decisions give no clear guidance to determine the district to which the Panel will transfer the case.

In *In re Butterfield Patent Litigation*\(^{145}\) the Panel felt that, because the many actions were spread across the United States, it would least inconvenience most of the litigants to transfer the cases to centrally located Chicago. That the greatest number of actions had been filed in California was less important than the geographical consideration. In *In re Kaehni Patent Litigation*\(^{146}\) the Panel also declined transfer to the district in which the greatest number of actions had been filed, transferring instead to Maryland where the discovery was more advanced than in any other district.\(^{147}\) The Panel also gave weight to the fact that the Maryland plaintiffs had brought suit against the infringing manufacturers and wholesalers, while the transferred actions were primarily against retailers. In both *In re Frost Patent Litigation*\(^{148}\) and *In re Willingham Patent Litigation*\(^{149}\) the Panel ordered transfer to the district in which the greatest number of actions had been filed. In addition, the Panel may have been influenced by the fact that discovery was most advanced in those districts.

The only generalization that can be made from these five litigations is that multidistrict patent cases are appropriate for judicial management by the Panel, which will transfer these cases in the absence of “management” considerations militating against transfer. However, the district to which they will be transferred may not be predicted with certainty; it will depend on the facts of the individual case.

### E. Antitrust Litigation

Antitrust litigation is apparently the focal point of the Panel’s activity, not only because the Panel’s existence grew out of a large antitrust case, but also because private antitrust actions\(^{150}\) following or concurrent with a government conviction are numerous and widespread. Along with air crash disasters, antitrust litigation is probably the easiest for the Panel to monitor. Consequently, 19 litigations, nearly half of all litigations considered by the Panel, have involved private antitrust actions. Again, the Panel virtually presumes that the “common question of fact” criterion has been met in the groups of litigation before it.

\(^{145}\) *Id.*


\(^{150}\) Section 4 of the Clayton Act, 15 U.S.C. section 15 (1964), permits private parties injured by a violation of the antitrust laws to recover treble damages from the violator. Moreover, 15 U.S.C. section 16 provides that a final judgment rendered against a defendant in a civil or criminal action brought by the government “shall be prima facie evidence against such defendant” in a subsequent proceeding brought by a private party.
In only two instances did the Panel find that there was no common question. In *In re Texas Concrete Pipe Antitrust Litigation*\(^{151}\) the Panel issued a conditional transfer order to include 23 actions pending in the Northern District of Texas in a consolidated action previously transferred to the Eastern District of Pennsylvania. All parties to the Texas action opposed transfer, claiming that the Texas cases involved a completely different conspiracy than that involved in Pennsylvania. The Panel therefore denied transfer. A similar situation arose in the original hearing of *In re "East of the Rockies" Concrete Pipe Antitrust Litigation*.\(^{152}\) The Panel found that an action brought in New Mexico involved an entirely different conspiracy from the one in the rest of the cases with which it had been consolidated. In both cases the Panel's decision was clearly correct.\(^{153}\) In no other cases has the Panel denied transfer in an initial decision on the sole ground that no common questions of fact were presented.\(^{154}\) The Panel has denied transfer for other reasons in only two other cases: *In re Scotch Whiskey Antitrust Litigation*\(^{155}\) and *In re Photocopy*.
In Scotch Whiskey the Panel was presented with the classic de minimus case. Two actions, one in Colorado and one in New Jersey, challenged Schenley's acquisition of controlling interest in Buckingham. The Panel, while not holding that transfer would always be denied in a case involving only two actions, indicated that transfer would generally be harder to obtain:

[W]here, as here, there are a minimal number of cases involved in the litigation, the moving party bears a strong burden to show that the common questions of fact are so complex and the accompanying common discovery so time consuming as to overcome the inconvenience to the party whose action is being transferred and its witnesses.157

However, the Panel has ordered transfer in two such de minimus cases: In re CBS Licensing Antitrust Litigation158 and In re IBM Antitrust Litigation.159 CBS Licensing presented the same factual situation as did Scotch Whiskey save for the fact that the two actions were pending in adjoining districts, the Southern District of New York and the Eastern District of Pennsylvania. In Scotch Whiskey the districts were 1500 miles apart. Dissenting in CBS Licensing, Judge Weigel found the litigations indistinguishable.

Although in In re IBM, the Panel also permitted transfer in a de minimus situation, the transfer may be explained on the ground that the transferred action was a "tag-along" case. Thus, because the Panel had already ordered transfer of four cases in the main litigation, it may have required a lesser showing of necessity. However, at the time the transfer was sought, only one case was still pending from the original transferred cases, the others having been settled. The Panel rejected the de minimus argument, holding that the complex questions which had prompted the initial transfer of a small number of cases were still present in these two remaining cases.

In Photocopy Paper,160 the only other antitrust litigation where transfer was denied, discovery was progressing so rapidly in most of the cases that transfer would have served no useful purpose. This ground for denial of transfer is thoroughly consistent with the very purpose of the Panel: to facilitate and expedite litigation.

In selecting the transferee court, the Panel, especially in the earlier cases, often favored the district in which the government action, if any, had been brought.161 In choosing that court, the Panel often rejected
as the proper forum the district in which the greatest number of actions had been filed.\textsuperscript{162} In all but a few cases, however, the Panel has transferred the cases either to the district in which the government has brought its action or to the district in which the greatest number of actions are filed.\textsuperscript{163}

In choosing a transferee court, the Panel has indicated that other factors are relevant. If, for example, a federal district court had transferred one of the cases pursuant to section 1404(a), the Panel will consider that transfer to be an indication that the transferee district is the most appropriate forum.\textsuperscript{164} In its selection of a transferee district, the Panel may consider the location of the defendant's principal offices since much of the evidence in these cases comes from the defendant's files.\textsuperscript{165} Finally, the opinions of the Panel suggest it may select as a transferee forum the court in which discovery has already progressed efficiently.\textsuperscript{166} Nevertheless, the disposition of the cases indicates that the Panel will almost always transfer the litigation to the district where the


\textsuperscript{163} The most notable exception is \textit{In re} IBM Antitrust Litigation, 302 F. Supp. 796 (JPML 1969), wherein the Panel transferred three New York cases to Minnesota to be joined with a single case pending there. The sole ground for this transfer appears to have been a preference for the Minnesota assignment system, whereby the single case had already been assigned to the judge at the time of filing. In contrast, the cases were not assigned in the Southern District of New York until the time of trial. (It should also be noted that discovery had proceeded in the Minnesota action.) For further evidence of the Panel's preference for the single judge assignment method of docketing, see \textit{In re} Air Crash Disaster near Dayton, Ohio, on March 9, 1967, 310 F. Supp. 798 (JPML 1970); \textit{In re} Revenue Properties Co., Ltd. Litigation, 309 F. Supp. 1002 (JPML 1970); \textit{In re} Admission Ticket Antitrust Litigation, 302 F. Supp. 1339 (JPML 1969).


\textsuperscript{166} \textit{In re} Water Meters Antitrust Litigation, 304 F. Supp. 873 (JPML 1969); \textit{In re} Admission Tickets Antitrust Litigation, 302 F. Supp. 1340 (JPML 1969); \textit{In re}
government has prosecuted its action or the most claims have been filed. The considerations just discussed merely serve as additional justification for the decision.

F. Miscellaneous Panel Decisions

Nine litigations have come before the Panel which neither fit into any of the above three classifications nor form an identifiable fourth classification. Only two of the litigations are similar\(^{167}\) and represent a type of litigation which the Panel was expected to handle. The remainder have few, if any, common characteristics. Therefore, because generalization is impossible, the nine litigations will be discussed individually.

*In re Fourth Class Postage Litigation*\(^{168}\) involved numerous suits by book publishers to enjoin the Post Office Department's enforcement of revised fourth class postage regulations, which required fourth class mailers to segregate their parcels according to destination. The defendant United States Government objected to transfer, claiming that the suits did not present any "common questions of fact." However, the Panel, obviously stretching that standard, found that the expense of sorting the mail and the "history of sorting" presented questions common to all the actions. More significantly, the Panel found that in many of the actions the plaintiffs had asked for temporary restraining orders and preliminary injunctions. Thus, the possibility of conflicting determinations militated for transfer. The Panel concluded:

> While there is nothing strikingly novel about inconsistent decisions in the United States District Courts, interests of justice are not ordinarily served by such disparities. This consideration has been recognized as a basis for ordering cases to be transferred under 28 USC § 1404(a). [Citations omitted.] Similarly, during the course of multidistrict litigation, 1407 is an appropriate means for avoiding injury to like parties caused by inconsistent judicial treatment.\(^{169}\)

The selection of the place of transfer received less attention. The Panel held that transfer to the District of New Jersey was advisable in light of the facts that (1) the greatest number of actions had been filed there; (2) the New Jersey District Judge was familiar with the problems of the litigation; and (3) the district was near to Washington, D. C., the probable location of many relevant documents. The

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\(^{167}\) Id. at 1327.
case is important in understanding the operations of the Panel for two reasons. First, it illustrates that section 1407 can be used to facilitate disposition of any type of litigation which involves numerous parties. Second, it shows the Panel’s concern for the uniform handling of related cases which might otherwise be decided with conflicting results.

In In re Grain Shipments Litigation170 the Federal Government sued numerous railroads and shipping companies to recover government grain which was mysteriously lost in shipment on locked and sealed container cars. Many of the defendants argued that transfer was unwise, pointing out that a number of the cases involved small amounts of damage.171 Furthermore, since each claim related to a specific shipment, the defendants asserted that there was no common question of fact. The Panel held that the shippers’ common defenses, such as “loss of moisture” in the cargo, presented common questions of fact. Observing that transfer could facilitate efficient conduct of the litigation, the Panel transferred the case to the District of Kansas, where the government records were located. The Panel also emphasized that the district judge was familiar with the litigation.

Grain Shipments suggests, as did the previous case, the diverse nature of litigation which may be reviewed by the Panel. This litigation also indicates that section 1407 makes it economically feasible for the federal judiciary to entertain claims of meager monetary value.172 Because the goal of the Panel is to conduct litigation efficiently, its decision will not normally be affected by the value of the claims.173

The recent group of cases denoted in In re Air Fare Litigation174 involved numerous class actions which sought refunds of fares paid to airlines. It was alleged in all suits that the increase granted by the CAB at a “non-public” hearing was without force and that the airlines’ reliance on the CAB action was unjustified. Although questions of fact concerning liability were really not in issue,175 the Panel transferred the actions because of the possible “overlap” in the classes and, consequently, in the “damages” claimed. While the greatest number of actions had


171. One of the “tag-along” cases to this litigation was transferred, although it involved only $365.30 (Because the United States was a plaintiff, there was no minimum jurisdictional amount required. 28 U.S.C. § 1345 (1964) ). The Panel held that although transfer might not effect a saving for this defendant, it would decrease the aggregate cost of the litigation. In re Grain Shipments Litigation, 304 F. Supp. 457 (JPML 1969).


173. See note 171 supra.


175. See note 154 supra.
been filed in the Northern District of California, the Panel ordered transfer to the centrally located Northern District of Illinois, the most convenient forum for the counsel of the parties.\textsuperscript{176} This litigation clearly indicates that the panel will almost always consolidate litigations which are "truly national" in scope. This type of case will undoubtedly become more important in the future as consumers attempt to monitor activities of federal regulatory agencies.

\textit{In re Iowa Beef Packers, Inc. Litigation}\textsuperscript{177} involved claims of an illegal secondary boycott against union locals and the international union. Four actions were pending in three districts at the time of the Panel hearing. The Panel, relying somewhat on the \textit{Scotch Whiskey litigation},\textsuperscript{178} found this litigation presented a \textit{de minimus} situation in which no complex common questions of fact were involved. Although informal cooperation was urged, transfer was denied. However, the Panel declined to state that it had no jurisdiction to consider such a case in the future.

The two related miscellaneous cases, \textit{In re Revenue Properties Co., Ltd. Litigation}\textsuperscript{179} and \textit{In re Seeburg-Commonwealth United Merger Litigation},\textsuperscript{180} both involved claims arising out of securities transactions. In \textit{Revenue Properties} stock purchasers brought actions against the parties offering the stock. The Panel found that two groups of plaintiffs could be discerned: those who claimed false representations in the stock offering,\textsuperscript{181} and those who alleged the issuance of unregistered stock violated the federal security laws.\textsuperscript{182} The Panel, finding that the two causes of action presented separate questions of fact, established two groups for pretrial and discovery.

The Panel transferred both classes to the District of Massachusetts because: (1) a greater number of plaintiffs preferred Massachusetts, (2) a greater number of shares were involved in the Massachusetts actions and (3) the Massachusetts actions had been assigned to a single district judge. The litigation is important to illustrate the flexibility with which the Panel implements its own procedures. Although neither section 1407 nor the Rules of the Panel provide for the division of litigation into two "classes" or the transfer of the "classes" of litigation, the Panel's decision in \textit{Revenue Properties} was the appropriate procedure to handle

\begin{itemize}
  \item \textsuperscript{176} \textit{ Accord, In re Butterfield Patent Litigation, — F. Supp. — (JPML Feb. 2, 1970).}
  \item \textsuperscript{177} 309 F. Supp. 1259 (JPML 1970).
  \item \textsuperscript{178} 299 F. Supp. 543 (JPML 1969).
  \item \textsuperscript{179} 309 F. Supp. 1002 (JPML 1970).
  \item \textsuperscript{180} 312 F. Supp. 909 (JPML 1970).
  \item \textsuperscript{181} 15 U.S.C. § 77q (1964).
  \item \textsuperscript{182} 15 U.S.C. § 77e (1964).
\end{itemize}
that litigation. This desire to innovate and experiment has been characteristic of the Panel's operations in its 2.5-year history.

The Panel invoked this procedure of splitting the two “classes” of cases almost immediately in the *Seeburg-Commonwealth Litigation*.\(^{183}\) Two separate groups of suits had been filed—one by the stock owners of Seeburg, the other by shareholders of Commonwealth. Both “classes” of suits charged that the proposed merger was intended to enrich insiders and that it would be contrary to the interest of their respective corporations. The Panel, referring directly to *Revenue Properties*, noted that the issues presented in the “Commonwealth cases” were much broader and more time-consuming than those in the “Seeburg cases.” Therefore the Panel ordered transfer of the litigation in two classes, stating that the district judge could best determine the amount of coordinated discovery and pretrial necessary for both classes of litigation. Both groups were transferred to the Southern District of New York, primarily because of the greater number of cases pending there. Both *Revenue Properties Litigation* and *Seeburg-Commonwealth Litigation* demonstrate that this procedure of division and transfer will be used whenever the cases, although similar, may be conveniently classified into two or more categories. As will be discussed later, the Panel has taken a somewhat different approach when class actions, used in the technical sense, have been involved.

Two other “miscellaneous” litigations arose in connection with the bankruptcy and dissolution of corporations: *In re Westec Corporation Litigation*\(^{184}\) and *In re Penn Central Securities Litigation*.\(^{185}\) In *Westec* the trustee in bankruptcy filed suit in the Southern District of Texas against individuals who had allegedly manipulated Westec stock. Twenty other similar suits, filed by stockholders and others in the Southern District of New York, were transferred to the Southern District of Texas under section 1404(a). Later four related suits were filed in the Northern District of Texas, including a libel action by one of the alleged manipulators against the trustee. The Panel ordered transfer of these four cases to the Southern District of Texas. Because the facts necessary to prove the trustee’s defense of truth in the libel action would also be litigated in the other actions the Panel saw no reason to segregate the defamation suit. The addition of the libel case again illustrates that the Panel will make efforts to consolidate all of the related litigation for transfer to a single court. Although the causes of action involved in the cases may be distinct, transfer will be ordered if there is a common nucleus of fact. And, as is clear from the preceding cases,

the Panel gives a very broad interpretation to the term "common nu-
cleus."

In *Penn Central*\(^{186}\) stockholders and bondholders brought nu-
merous actions following the petition for reorganization filed by the
Penn Central Railroad. Plaintiff bondholders, attempting to distinguish
their claims from those of the stock owners, wanted a bifurcated transfer
with separated pretrial similar to that in *Revenue Properties*. The Panel
found that the intervening element of the pending bankruptcy pro-
ceeding and the policy of the bankruptcy laws to consolidate control of
all of the financial affairs and litigations mandated a transfer and con-
solidation of all of the actions. The Panel ordered transfer to the East-
ern District of Pennsylvania, the district in which the reorganization was
centered. However, the Panel declined to transfer to the judge handling
the reorganization, fearing a possible conflict of interest. Thus the Panel
may manage litigation of suits arising out of a complicated bankruptcy,
while keeping those actions separate from the principal case in the in-
terest of judicial propriety.

The most recent of the "miscellaneous" litigation is *In re Oral
Contraceptives Products Liability Litigation*.\(^{187}\) In a brief opinion the
Panel denied transfer of twenty cases which alleged that G. D. Searle Co.
had manufactured defective birth control pills. All parties to all of the
cases opposed transfer, arguing that few, if any, common questions
of fact existed. While recognizing that the House Committee Report is-
sued on section 1407 specifically included products liability cases as ap-
propriate for Panel action,\(^{188}\) the Panel held that there was no basis for
finding common questions of fact sufficient to order transfer.

Little generalization can be made from these cases. The diverse-
ness of the situations, however, shows the versatility of the Panel pro-
cedure and the willingness of the Panel to expedite the disposition of
multidistrict litigation of related cases by use of uniform pretrial and dis-
covery methods. Because of the novelty of the Panel and its methods
of management, special problems arising out of its operations have
arisen. Some of these problems will now be examined.

G. Procedural Problems

1. *Class Actions*

The most thorough discussion of conflicting class action claims is
found in *In re Plumbing Fixtures Antitrust Litigation*.\(^{189}\) *Plumbing
Fixtures* was a "tag-along" case to the main litigation which had previ-

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186. *Id.*
ously been transferred to the Eastern District of Pennsylvania. It involved nine cases filed previous to hearing on the main litigation but not included in the original transfer order. The City of New York, which had filed a class action on behalf of all cities in excess of 50,000 population, filed the main objection to transfer. The city wanted the New York District Court to determine, prior to transfer, whether a class had been properly established.

The Panel denied a separation of the class action issue in the transfer order, holding that the Panel had power to transfer "civil actions," not to divide issues. The Panel felt that transfer facilitated the separation of conflicting class action claims and that the power of the transferee court to pass on class action claims was essential to its success in management of the litigation. In a later "tag-along" case in In re Plumbing Fixtures Antitrust Litigation, the Panel concluded that conflicting class action allegations required that the cases be transferred for solution of the conflict.

In the wake of this decision, few plaintiffs raised the issue of conflicting class action allegations. However, the Panel has ruled that when a motion to declare a class is already under submission in the transferor court at the time of the Panel's hearing on transfer, the transfer will be stayed in that case, pending decision on the motion.

Although the Panel once believed that a class action question restricted its power to transfer cases, it now takes the position that transfer may be necessary in such cases. Examination of this development shows clearly that the Panel has strived to maintain its procedures free from restrictions and considerations other than convenience and ease of administration.

190. This interpretation of "civil actions" is consistent with the construction of that phrase under section 1404(a). See Wyndham Associates v. Bintliff, 398 F.2d 614 (2d Cir. 1968), cert. denied, 393 U.S. 975. Neither this nor any other case was cited by the Panel as authority for this proposition. In re Plumbing Fixtures Antitrust Litigation, 298 F. Supp. 484, 494 (JPML 1968).

191. 298 F. Supp. 484, 494 (JPML 1968). For evidence that the power to determine all cases is necessary to the District Judge's ability to handle the litigation, see In re Antibiotic Drug Antitrust Litigation, 301 F. Supp. 1158 (JPML 1969). The defendant drug companies offered a lump sum settlement of $120,000,000.00, provided that certain class determinations were made that would preclude any further litigation.


2. **Bifurcated Pretrial of “Non-common” Issues of Fact**

A number of litigants have argued that, although there may be common questions of fact in regard to liability, the several cases inevitably involve separate questions of damage. Therefore, because many items of damages are particularly well suited for local determination, pretrial and discovery on those issues should proceed in the transferor court.\(^1\) The point was forcefully argued in *In re San Juan, Puerto Rico Air Crash Disasters*,\(^2\) where one of the plaintiffs was fearful of having to pay for his medical experts to fly to Puerto Rico for depositions. The Panel, apparently conceding that the argument had some validity, still refused to split up the actions. The Panel simply assured the plaintiff's attorney that the transferee judge would order the doctors' Puerto Rican vacation only under the most extreme circumstances.

It may be argued that the bifurcated procedure is wasteful because the issue of damages might never be reached if a finding of no liability is made in the consolidated actions. In the type of litigation handled by the Panel, it is not often that the defendants are absolved of liability. In the disaster cases, there is generally no question that the plaintiff will recover from one of the defendants; he need only offer proof of the amount of his damages. In the antitrust cases, particularly those filed after the government has won conviction, the litigation involves a determination of the parties who have been injured and the extent of their injury. Only in the patent and miscellaneous cases is the question of liability an issue. Therefore, allowing the damage issue to proceed in the transferor court would seem a reasonable procedure with which to experiment.\(^3\) However, in those litigations where the fact of liability is in issue, such as the patent and trademark cases, this procedure may be wasteful and perhaps should not be used.

**H. Absence of Remand Orders**

As indicated in the introduction, the Panel has never remanded a case to the transferor court for trial after a complete pretrial.\(^4\) Two

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3. However, the Panel's construction of section 1407 may preclude the use of this procedure. See text accompanying note 190 supra. Solution may require statutory amendment.

4. However, one decision of the Panel has related specifically to its continuing power to control multidistrict litigation even after transfer. In *In re Antibiotic Drugs Antitrust Litigation*, 320 F. Supp. 586 (JPML 1970), the plaintiffs in those cases not settled moved for “retransfer” of the actions from the Southern District of New York to the District of Minnesota. They argued that the litigation had become too great a burden for a single district judge. The Panel agreed and, without deciding on its
reasons may be advanced. First, trial on the merits is often unnecessary, because the cases are generally settled out of court. After the discovery process has been completed, the questions of liability and its extent are often no longer issues.

Second, if there is a trial on the merits, it is usually more convenient for all parties to prosecute the action in the transferee court. The judge has handled the case for a long period of time and is familiar with the facts. The counsel on each side have developed working arrangements which promote the interests of their respective clients. Therefore the parties may stipulate to in personam jurisdiction and venue in the transferee court. The practical result of transfer under section 1407 has been a transfer for all purposes. Undoubtedly the Panel will order remands in the future; however in light of the practical considerations against such procedure, it should be done only under the most compelling circumstances.

To conclude, an examination of the procedures for consolidation and transfer reveals a substantial “arsenal” with which the federal court system can attack complex litigation. The introduction of section 1407 into this arsenal, as a quasi-combination of rule 42(a) and section 1404(a)—but also with a purpose of its own—makes the array nearly complete. The litigations managed under section 1407 prove that its procedures can justly and efficiently dispose of the most complicated cases presented to the federal system today.

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power to “retransfer” the litigation out of the New York court, assigned the nonsettled cases to Judge Lord who is currently assigned to the Southern District of New York. The decision indicates the Panel’s belief that they have the power to do whatever they deem expeditious in the administration of the litigation. It will, however, exercise those powers only on a very strong showing.

200. Motions for remand which have been filed in the Butterfield Patent Litigation are being held in abeyance, pending the final findings of fact and conclusions of law in the consolidated pretrial on the issues of scope and validity.

* Member, Third Year Class.