A Catalyst for Reforming Self-Transfer in Multidistrict Litigation: Lexecon, Inc. v. Milberg Weiss

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A CATALYST FOR REFORMING SELF-TRANSFER IN MULTIDISTRICT LITIGATION: LEXECON, INC. V. MILBERG WEISS

INTRODUCTION

Discovery demands in massive, multidistrict litigation ("M.D.L.")\(^1\) can place tremendous burdens on the federal court system. Congress enacted a specific M.D.L. statute, 28 U.S.C § 1407 ("§ 1407"), to reduce the burden of discovery demands by providing for temporary transfer of civil actions from multiple districts to a single district for consolidated pretrial proceedings.\(^2\) Section 1407 provides for temporary transfer when civil actions involve common issues of fact, transfer is for the convenience of the parties, and transfer will promote judicial efficiency.\(^3\) District court judges to whom such cases were transferred ("transferee judges") expanded the scope of the M.D.L. statute by invoking the change of venue statute, 28 U.S.C. § 1404(a) ("§ 1404(a)"), to transfer cases to themselves for trial after those cases had been consolidated for pretrial proceedings.\(^4\) This judicial practice, known as "self-transfer" or "self-assignment," violated the plain language of the M.D.L. statute,\(^5\) which

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1 See Patricia D. Howard, A Guide to Multidistrict Litigation, 124 F.R.D. 479, 481 (1989) ("Multidistrict litigation simply means related actions pending in more than one district.").
4 See infra notes 13-17, 49-70 and accompanying text.
provides that all cases "shall be remanded" at the conclusion of pretrial proceedings. 6

Congress enacted § 1407 upon the recommendation of the Judicial Conference ("Conference"). 7 The statute was prompted by a concern that pretrial discovery demands in massive litigation would engulf the federal courts. 8 In proposing the M.D.L. statute, the Conference balanced the need for efficient judicial administration with the desire to preserve the parties' original choice of forum. 9 The drafters sought to streamline judicial administration by providing for consolidated pretrial proceedings, thus avoiding conflicting and duplicative discovery. 10 In deference to the parties' forum choice, the

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7 See H.R. REP. NO. 90-1130 at 2, reprinted in 1968 U.S.C.C.A.N., at 1899. The bill enacted as 28 U.S.C. § 1407 was recommended by the Committee on the Judiciary in the 90th Congress and passed without amendment. See id. at 1, reprinted in 1968 U.S.C.C.A.N., at 1898. A predecessor to the bill was introduced upon the request of the Judicial Conference of the United States and was the subject of hearings in the second session of the 89th Congress. See id. The stated purpose of the legislation was "to provide judicial machinery to transfer, for coordinated or consolidated pretrial proceedings, civil actions, having one or more common questions of fact, pending in different judicial districts." Id.
8 See id. at 2, reprinted in 1968 U.S.C.C.A.N., at 1899. The need for statutory authority to consolidate multidistrict litigation was demonstrated by filings of multiple civil actions against manufacturers of electrical equipment, after the government successfully prosecuted the manufacturers for antitrust law violations. See id; see also DAVID F. HERR, MULTIDISTRICT LITIGATION § 2.1 (1986); William W. Schwarzer, et al., Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts, 73 TEX. L. REV. 1529, 1531 (1995) ("Huge multi-party, multiform disputes have become a recurring feature of modern litigation.") (quoting AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT 7, 12 (1994)).
9 See H.R. REP. NO 90-1130 at 2, reprinted in 1968 U.S.C.C.A.N., at 1899. The stated objective of § 1407 was "to provide centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the 'just and efficient conduct' of such actions." Id. The drafters determined that this objective could be achieved by limited transfers. See id. "The proposed statute affects only the pretrial stages in multidistrict litigation. It would not affect the place of trial in any case or exclude the possibility of transfer under other Federal statutes." Id. at 3, reprinted in 1968 U.S.C.C.A.N., at 1900.
10 See id. at 2, reprinted in 1968 U.S.C.C.A.N., at 1899-1900; see also Barry, supra note 3, at 59 (noting that, in addition to preventing duplicative discovery, the object of a transfer is to "avoid conflicting rulings and schedules, reduce litigation cost, and save time and effort on the part of the parties"); Wilson W. Herndon & Ernest R. Higginbotham, Complex Multidistrict Litigation—An Overview of 28 U.S.C. § 1407, 31 BAYLOR L. REV. 33, 45 (1979) (listing six factors that the Judicial Panel uses to determine if a transfer would promote efficiency).
lawmakers required remand at or before the completion of pretrial proceedings, thereby preserving the parties' right to conduct a trial in the district where the litigation originated. In addition to these transfer and remand provisions, § 1407 created the Judicial Panel on Multidistrict Litigation ("J.P.M.L.") , a panel exclusively empowered to authorize transfers pursuant to § 1407(a) , remand transferred cases to the originating districts, and prescribe rules for conducting its business. Shortly after Congress enacted § 1407 , transferee judges decided the statute did not go far enough toward achieving judicial efficiency. Because § 1407(a) orders all cases shall be remanded "at or before the conclusion of such pretrial proceedings," the judicial efficiency benefits could not be as fully realized as they could under a system that permitted consolidation for pretrial proceedings and for trial. Consequently, transferee judges innovated the practice of self-transfer whereby, pursuant to change of venue statute § 1404(a) , judges transferred cases to themselves for trial,

11 See H.R. REPORT. No. 90-1130, at 4, reprinted in 1968 U.S.C.C.A.N., at 1901 (proposing remand to court of original jurisdiction following coordinated pretrial proceedings); see also 28 U.S.C. § 1407(a) ("Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated.").

12 See H.R. REPORT. No. 90-1130, at 4-5, reprinted in 1968 U.S.C.C.A.N., at 1900-02. Subsection (a) authorizes transfer by the J.P.M.L.; subsection (d) provides authority for the Chief Justice of the United States to appoint the members of the J.P.M.L., consisting of seven circuit and district judges; subsection (f) grants the J.P.M.L. the power "to prescribe rules for the conduct of its business not inconsistent with acts of Congress and the Federal Rules of Civil Procedure." Id. at 5, reprinted in 1968 U.S.C.C.A.N., at 1902; see also HERR, supra note 8, at §§ 3.1-3.9.

13 See In re Air Crash Disaster Near Hanover, N.H., on Oct. 25, 1968, 342 F. Supp. 907 (D.N.H. 1971) (recognizing that judicial efficiency would be maximized by a single liability trial of cases consolidated and transferred under § 1407). Conceding that § 1407(a) did not authorize self-transfer, the judge observed that solutions to "the problems imposed upon the federal courts by complex and multidistrict cases" have been "developed by judicial interpretation." Id. at 909; see also Pfizer, Inc. v. Lord, 447 F.2d. 122, 125 (2d Cir. 1971) (asserting that self-transfer "comport[s] with the essential [sic] purpose of § 1407 to 'promote the just and efficient conduct of complex multidistrict litigation' ") (quoting 28 U.S.C. § 1407(a)).


15 See In re Air Crash Disaster, 342 F. Supp. at 908 (stating that a single liability trial of consolidated M.D.L. cases would expedite the administration of justice).

16 28 U.S.C. § 1404(a) (1994) ("For the convenience of parties and witnesses, in
which had been consolidated under § 1407(a) for pretrial proceedings. The practice of self-transfer gained support despite the fact that it violated the statute.

The J.P.M.L. exceeded its rulemaking power by incorporating self-transfer into its rules of procedure in Rule 14(b). Similarly, district and circuit court judges condoned it, albeit with minimal independent examination. Although commentators agreed that self-transfer violated § 1407(a), many urged Congress to authorize the practice. The practice of self-transfer developed at the

the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

See Lexecon, Inc., 118 S. Ct. at 961 (explaining that the practice of self-transfer has resulted in multiple trials in transferee districts. See generally CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 3867 (Supp. 1997) (stating "[s]elf-transfer under Section 1404(a) has become a routine aspect of multidistrict litigation practice").

See infra note 23 and accompanying text. See, e.g., Manual for Complex Litigation §§ 21.61 and 31.133 (3d ed. 1995) (acknowledging that transferee judges may invoke §§ 1404(a) or 1406(a) to consolidate for trial cases transferred under § 1407).

See R. PROC. J.P.M.L. 14(b) ("Each transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406.").


See Roger H. Trangsrud, Joinder Alternatives in Mass Tort Litigation, 70 CORNELL L. REV. 779, 804 (1985); Julian O. von Kalinowski, The Power of a Transferee Judge to Transfer Liability and Damages Trial, 38 J. AIR. L. & COM. 197, 197 (1972); see also Rex Bossert, M.D.L. 'Power Grab,' NAT'L L.J. Sept. 1, 1997, at A20-21 (noting that self-transfer has been called "an outrageous usurpation of judicial power" and that it has been criticized for "rais[ing] serious questions about the attorney-client relationship and the effective representation of massive numbers of clients in far-flung federal districts").

See John F. Cooney, Comment, The Experience of Transferee Courts Under the Multidistrict Litigation Act, 39 U. CHI. L. REV. 588, 611 (1972) (concluding that § 1407 needs to be amended to provide transferee judges with a "coherent and workable mechanism" within which to consolidate cases for trial in order to achieve efficient judicial administration in M.D.L.); Note, The Judicial Panel and the Conduct of Multidistrict Litigation, 87 HARV. L. REV. 1001, 1030-31, 1036-39 (1974)
discretion of transferee judges, without careful congressional formulation regarding the circumstances under which cases should be consolidated for trial. Since the value of self-transfer as an administrative tool is evident, it is incumbent upon Congress to amend § 1407 to permit M.D.L. cases to be consolidated for trial.

Recently, in *Lexecon v. Milberg Weiss Bershad Hynes & Lerach* ("Lexecon"), the Supreme Court reversed a Ninth Circuit decision which had affirmed a transferee judge's power to order self-transfer and conduct trial in the transferee forum. Writing in dissent for the Ninth Circuit, Judge Alex Kozinski presaged the Supreme Court's ruling by characterizing self-transfer as "a remarkable power grab by federal judges," because the practice exceeded the authority Congress granted to transferee judges.

Justice David Souter, writing for a unanimous Supreme Court, held that § 1407(a) "obligates" remand and thus bars self transfer. The Ninth Circuit majority had relied on the substantial body of case law which consistently recognized self-transfer and the presumptive validity of J.P.M.L. Rule 14(b) to justify its result. Judge Kozinski had decried the case law on self-transfer as devoid of critical analysis and discredited (calling for reform of § 1407 to permit the J.P.M.L. to consolidate cases for trial, suggesting the drafters overestimated the benefits of local trials when they restricted the reach of the statute to pretrial proceedings only); Rhodes, supra note 2, at 731 (urging congressional action to adopt the §§ "1407-1404(a) combination" because § 1407 does not provide for trial in the transferee court, yet trial in the transferee forum "promotes efficient judicial administration and/or is in the interest of litigants").

Not all commentators who have noted that self-transfer violates § 1407(a) have applauded it as a judicial innovation. See Trangsrud, supra note 22, at 804 (concluding that self-transfer is "undesirable as a matter of policy in most mass tort cases"); von Kalinowski, supra note 22, at 204 (asserting that self-transfer is a quest toward a "nebulous concept of judicial efficiency" which is neither authorized by statute nor fair to litigants).

24 See infra notes 48-70 and accompanying text.
26 Id. at 959.
27 *Lexecon* Inc. v. Milberg Weiss Bershad Hynes & Lerach (*In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*), 102 F.3d 1524, 1540 (9th Cir. 1996) (Kozinski, J., dissenting) (arguing that "the language itself [of § 1407] is clear as sunlight"), rev'd, 118 S. Ct. 956 (1998).
28 See *Lexecon*, 118 S. Ct. at 962.
29 See *Lexecon*, 102 F.3d at 1532 (Sneed, J.).
30 See id. at 1541 (Kozinski, J., dissenting) (arguing that following *Pfizer, Inc. v. Lord*, 447 F.2d 122, 124-5 (2d Cir. 1971) district and circuit courts had not given serious consideration as to whether self-transfer is proper). Other courts that
J.P.M.L. Rule 14(b), characterizing it as an attempt to "broaden the transferee court's authority to act."31 As was foreshadowed by Judge Kozinski's dissent, the Supreme Court recognized that self-transfer was a "longstanding practice under the statute" yet rendered it invalid because of the statutory remand provision. 32 Moreover, the Court invalidated J.P.M.L. Rule 14(b) holding that the statutory mandate could not be compromised by the J.P.M.L.'s rulemaking authority.33 In addition, Judge Kozinski had observed that nearly 30 years of congressional silence on the issue of self-transfer merited little deference since Congress exercises little oversight in the M.D.L. area. 34 Confirming this observation, Justice Souter stated that subsequent amendments to § 1407 demonstrated that "Congress knew how to distinguish between trial assignments and pretrial proceedings" and supported the conclusion that the statute does not permit self-transfer. 35

Judge Kozinski's dissent in Lexecon undoubtedly focused attention on self-transfer, which previously had been relatively inconspicuous.36 The Court's decision in Lexecon should provide considered the issue had merely assumed self-transfer authority exists. See, e.g., In re Food Lion, Inc., Fair Labor Standards Act Litig., 73 F.3d 528, 532 n.7 (4th Cir. 1996) (finding that transferee courts typically resolve cases completely, including handling the trial, while acknowledging statutory limitations).

31 Lexecon, 102 F.3d at 1549.
32 See Lexecon, 118 S. Ct. at 962.
33 See id.
34 See Lexecon, 102 F.3d at 1549 (Kozinski, J., dissenting) (contrasting this area with Congress' "vigorous oversight" of tax laws, where congressional silence could properly be considered ratification).
35 See Lexecon, 118 S. Ct. at 963.
36 See Bossert, supra note 22, at A1 (characterizing transfer in multi-district litigation as a "little-known legal procedure").

The Administrative Office of the United States Courts maintains M.D.L. statistics on cases consolidated by the J.P.M.L. for pretrial proceedings, and cases remanded by the J.P.M.L. to originating districts. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 1996 REPORT OF THE DIRECTOR 74-77 (Statistics Division 1996). Consolidated cases may be terminated in the transferee district by a variety of methods, some of which do not involve consolidated trials. Thus, not all cases which are not remanded to the originating district were necessarily subject to self-transfer and trial in the transferee district.

Self-transfer has generated commentary throughout its history. In particular, shortly after Pfizer was decided, commentators called for Congress to authorize the practice. See Cooney, supra note 23, at 611; Note, supra note 23, at 1036-39. After In re Korean Air Crash, commentators again began to lament the court's inattention to the choice of law question in the context of M.D.L. self-transfer. See Richard L.
the impetus for congressional reform of § 1407 because now that the Supreme Court has invalidated self-transfer, if Congress does not amend § 1407 to permit consolidation for trial, federal courts may be left without a viable alternative to reducing the burden of M.D.L. cases.

Part I of this Comment discusses the evolution of self-transfer. It analyzes the legislative history of § 1407 and details cases that had advanced the self-transfer power of transferee judges, ultimately focusing on the Lexecon case. Part II examines the Supreme Court's decision in a three-part attack on the judicial practice of self-transfer: (1) whether the practice of self-transfer was a proper use of § 1404(a); (2) whether J.P.M.L. Rule 14(b) was a valid exercise of rulemaking power; and (3) whether nearly 30 years of congressional silence should have been considered as legislative ratification of self-transfer. Part III posits the argument that the Supreme Court should have issued a prospective ruling because self-transfer did not deprive litigants of substantive rights and because a retroactive ban may have a potentially disruptive impact upon courts burdened with pending M.D.L. cases. Additionally, Part III part proposes congressional reform of § 1407, which would allow the J.P.M.L. to consolidate cases for trial.

I. EVOLUTION OF SELF-TRANSFER

A. Legislative History of § 1407

The legislative history of § 1407 is unequivocal.37 In


37 The Judicial Conference established the Coordinating Committee for Multiple Litigation ("Committee") and charged it with supervising nationwide discovery proceedings in the electrical equipment antitrust civil actions. See H.R. REP. NO. 90-1130, at 2, reprinted in, 1968 U.S.C.C.A.N., at 1898, 1899. The Committee marshaled the cooperation of the judges and parties involved in the litigation to conduct joint pretrial proceedings. See id. The effort was successful in minimizing the potentially disruptive impact the litigation may have had upon the federal courts. See id. Following its supervision of voluntary consolidated discovery proceedings, the Committee drafted § 1407 to provide a statutory foundation for pretrial consolidation and coordination. See id. "The experience of the Coordinating Committee was limited to pretrial matters, and the committee consequently considers it desirable to keep this legislative proposal within the confines of that experience." Id. at 4, reprinted in 1968 U.S.C.C.A.N., at 1901 (1968).
propounding the statute, the Conference carefully balanced the competing objectives of efficient judicial administration and protecting the parties' forum privilege. The House Report on proposed § 1407 stated that subsection (a) authorized transfer of civil actions only upon a determination that the transfer served the "convenience of [the] parties and witnesses" and promoted the "just and efficient conduct" of judicial administration. Moreover, subsection (a) "requires that transferred cases be remanded to the originating district at the close of coordinated pretrial proceedings." The lawmakers supported the logic of this remand mandate with policy statements reflecting the desirability of local trials: "[T]rial in the originating district is generally preferable... [for] parties and witnesses, and... it may be impracticable to have all cases in mass litigation tried in one district. Additionally,... there will be a need for local discovery... and... remand to the originating district for this purpose will be desirable."

The Committee evaluated the existing venue statutes, particularly § 1404, before proposing the enactment of § 1407. See Co-Ordinating Committee on Multiple Litigation, Comment on Proposed § 1407 Multi-District Litigation Recommending New § 1407, Title 28, reprinted in In re Plumbing Fixtures Cases, 298 F. Supp. 483, 500 (J.P.M.L. 1968). The Committee concluded that existing venue statutes were insufficient to achieve transfer and consolidation for pretrial proceedings only; this objective could only be achieved by the "limited and specific statute" that it proposed. Id. at 498. For a discussion of the legislative history of § 1407, see generally Rhodes, supra note 2, at 735-36.

38 See H.R. REP. No. 90-1130, at 4, reprinted in 1968 U.S.C.C.A.N., at 1901. The Committee contemplated that § 1407 would be invoked in extraordinary circumstances, when significant judicial efficiency benefits could be expected to accrue. "It is expected that such transfer is to be ordered only where significant economy and efficiency in judicial administration may be obtained." Id. at 3, reprinted in 1968 U.S.C.C.A.N., at 1900.

39 Id at 4, reprinted in 1968 U.S.C.C.A.N., at 1901; see also In re Liquid Carbonic Truck Drivers Chem. Poisoning Litig., 423 F. Supp. 937, 939 (J.P.M.L. 1976) (holding that § 1407 authorizes transfer for pretrial proceedings only and not consolidation for purposes of trial); In re Antibiotic Drugs, 299 F. Supp. 1403, 1406 (J.P.M.L. 1969) (stating that a transferee judge is free to determine that certain of the transferred cases are ready for trial and can remand after common discovery is completed).

40 H.R. REP. No. 90-1130, at 4, reprinted in 1968 U.S.C.C.A.N., at 1901-02; see also In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975, 479 F. Supp. 1118, 1123 (E.D.N.Y. 1978) (remanding cases to transferor court for trial on the issue of damages in consideration of the convenience of parties and witnesses and the interest of justice; and finding that there was no commonality of facts or considerations that would tie the cases together). But see In re Career Academy Anti-trust Litig., 57 F.R.D. 569, 571 (E.D. Wis. 1972) (holding that where return of the four cases to their respective districts would result in four identical class action
The House Report also describes, in lengthy detail, the sort of pretrial proceedings which were within the scope of authority conferred upon the transferee judge:

These generally involve deposition and discovery, and, of course, are governed by the Federal Rules of Civil Procedure. See, e.g., rule 16 and rules 26-37. Under the Federal rules the transferee district court would have authority to render summary judgment, to control and limit pretrial proceedings, and to impose sanctions for failure to make discovery or comply with pretrial orders. 41

The Conference did not intend for transferee judges to conduct trials. Trial procedural rules only begin at Federal Rule 38, 42 and were thus not contemplated in the express authority granted to the transferee judge. Therefore, the Conference intended that transferee judges only have the authority to oversee pre-trial proceedings.

References to other venue statutes, specifically § 1404(a), were recorded in the House Report. The proponents of § 1407 envisioned “28 U.S.C. 1404, providing for changes of venue generally... [would still be] available in those instances where transfer of a case for all purposes is desirable.”43 This

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41 H.R. REP. No. 90-1130, at 3, reprinted in 1968 U.S.C.C.A.N., at 1900; see also In re Penn Cent. Commercial Paper Litig., 62 F.R.D. 341, 344 (S.D.N.Y. 1974) (determining that pretrial proceedings do not include the transferee court consolidating a case with another case pending in another district), aff’d sub nom. Shulman v. Goldman Sachs & Co., 515 F.2d 505 (2d Cir. 1975); Control Data Corp. v. Int’l Bus. Mach. Corp., 306 F. Supp. 839, 852 (D. Minn. 1969) (finding that pretrial proceedings include determining important questions of law), aff’d sub nom. Data Processing Fin. & Gen. Corp. v. Int’l. Bus. Mach. Corp., 430 F.2d 1277 (8th Cir. 1970); In re Air Crash at Schenley Golf Course, Pittsburgh, Pa., on August 21, 1977, 509 F. Supp. 252, 254 (J.P.M.L. 1979) (suggesting that § 1407 pretrial proceedings include proceedings that are unique to particular parties, claims, or actions); In re San Juan P.R. Air Crash Disaster, 316 F. Supp. 981, 982 (J.P.M.L. 1970) (stating that pretrial proceedings are not limited to discovery of liability only and could also encompass damages); In re Plumbing Fixture Cases, 298 F. Supp. at 498 (stating that pretrial proceedings within the meaning of § 1407 include all judicial proceedings before trial, including pretrial determination of class questions).

42 Compare FED. R. CIV. P. 38 (Jury Trial of Right), with FED. R. CIV. P. 16 (Pretrial Conferences; Scheduling; Management) and FED. R. CIV. P. 26-37 (Depositions and Discovery).

43 H.R. REP. No. 90-1130, at 4, reprinted in 1968 U.S.C.C.A.N., at 1902; see, e.g., In re Air Crash Disaster Near Chicago Ill., on May 25, 1979, 476 F. Supp. 445, 450 (J.P.M.L. 1979) (holding that a § 1407 transferee court retains authority under § 1404(a) to transfer case to any appropriate district for all purposes), aff’d, 644 F.2d 633 (7th Cir. 1981), rev’d in part 644 F.2d 594 (7th Cir. 1981).
affirmative award of § 1404(a) power does not extend to the transferee judges, whose powers are delineated above. Section 1404(a) power applies only to transferor judges. The drafters expressly conferred § 1404(a) power to transferor judges who otherwise may have thought they were stripped of discretion to transfer cases originally filed within their district, once those cases were under consideration for M.D.L. consolidation, or once they were remanded following consolidated pretrial proceedings.44

Perhaps of greatest weight in discerning Congress’ intent when enacting § 1407 is the statement in the House Report that “future experience . . . [may justify extending the statute] to include consolidation and coordination for trial purposes as well” and should that be the case, “only minor amendments to the present language of the bill will be necessary.”45 After enacting § 1407, Congress amended the statute to allow the J.P.M.L. to consolidate and transfer cases for both pretrial proceedings and for trial when brought under specific provisions of antitrust laws.46 More recently, the House approved a bill that would have provided authority for limited self-transfer; however, this was not enacted into law.47 Therefore, the present state of § 1407

44 See Rhodes, supra note 2, at 723. The interaction between §§ 1404(a) and 1407(a) was the subject of discussion in the J.P.M.L’s earliest rulings. See id. at 728. For example, the J.P.M.L. refused to postpone ruling on consolidating cases arising out of a single air crash until after the transferor judge had decided a § 1404(a) motion to transfer the cases for all purposes. See In re Mid-Air Collision Near Hendersonville, N.C. on July 19, 1967, 297 F. Supp. 1039, 1040 (J.P.M.L. 1969) (stating the transferor judge could consider the § 1404(a) motion again at the conclusion of consolidated pretrial proceedings). Likewise, the J.P.M.L. instructed the transferor court to consider transferring cases pursuant to § 1404(a) “when pretrial proceedings are complete.” In re Grain Shipments, 300 F. Supp. 1402, 1404 (J.P.M.L. 1969).


does not contemplate consolidation for trial purposes.

B. Case Law Development

While the drafters of § 1407 devised a strategy that carefully balanced the competing goals of streamlining judicial administration and preserving plaintiff's choice of forum, transferee courts have routinely used the statute in combination with § 1404(a) to achieve trial in the transferee court. Since trial in the transferee court was not contemplated by the proponents of § 1407, decisions regarding the circumstances under which judicial efficiency should override plaintiff's forum choice and which forum's law governs the transferred cases have been rendered on an ad hoc basis, rather than by careful congressional formulation.

1. Origins of Self-Transfer

Beginning as early as 1971, judges have relied upon their own ingenuity rather than the statutory mandate of § 1407(a) to administer complex multidistrict cases. M.D.L. jurisprudence has, in large part, been characterized by efficient judicial administration. In In re Air Crash Disaster Near Hanover, New Hampshire on Oct. 25, 1968 the transferee judge consolidated cases for trial on the issue of liability alone, remanding the cases for individual trials on damages. While

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48 See H.R. REP. No. 90-1130, at 3, reprinted in 1968 U.S.C.C.A.N., at 1900. Even cases that interpreted § 1407 broadly to authorize self-transfer, or transfer to some court other than the transferor court, still acknowledged that the subsequent transfer for trial purposes was limited by § 1404(a) which only allows transfer "to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1994). See, e.g., Pfizer, Inc. v. Lord, 447 F.2d 122, 124-25 (2d Cir. 1971); In re Caesars Palace Secs. Litig., 360 F. Supp. 366, 374 (S.D.N.Y. 1973).
50 See In re Air Crash Disaster Near Hanover, N.H., 342 F. Supp. at 910 (noting "the administration of justice can be advanced by an intelligent and imaginative judge").
51 See id. at 909.
53 See id. at 910.
conceding that his actions lacked statutory foundation," the transferee judge concluded that a consolidated trial under his supervision maximized judicial efficiency, and to do otherwise would constitute "an abdication of [his] responsibility."

In Pfizer, Inc. v. Lord, the leading case on self-transfer, the Second Circuit held that a transferee judge had the power to permit self-transfer. In Pfizer, the transferee judge consolidated cases for trial on both liability and damages, citing his familiarity with the proceedings. Pfizer involved the interaction of three federal procedural statutes, 28 U.S.C. §§ 292, 1404(a), and 1407(a). The Second Circuit had to decide whether a judge sitting by designation pursuant to § 292, had the power to rule on a § 1404(a) motion in cases consolidated under § 1407(a) for pretrial proceedings. The panel, which included Justice Thomas Clark, a retired Supreme Court justice sitting by designation, ruled that a district judge sitting by designation pursuant to § 292, "shall have all the powers of a judge of the court . . . to which he is designated and assigned" and concluded that those powers included ordering a § 1404(a) transfer of cases consolidated under § 1407. Satisfied that its conclusion "comport[ed] with the essential [sic] purpose of § 1407 to 'promote the just and efficient conduct' of complex multidistrict litigation," the Pfizer court tipped the balance in favor of judicial efficiency at the expense of the plaintiff's choice.

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54 See id. at 909 ("I must recognize candidly that there is nothing in the language of 28 U.S.C. § 1407(a) or § 1404(a) which directly allows, or even suggests, that the transferee judge has the power to transfer cases to his district, or any district, for purposes of trial.").

55 See id. at 908.

56 Id.

57 447 F.2d 122 (2d Cir. 1971).

58 Id. at 125.

59 See id. In Pfizer, the transferee judge, Miles W. Lord, was sitting by designation pursuant to 28 U.S.C. § 292 in the Southern District of New York, while permanently assigned to the District of Minnesota. Id. at 123. Pursuant to § 1407, antibiotic antitrust civil actions were consolidated and transferred to him for consolidated pretrial proceedings. See id. Upon completion of consolidated proceedings, Judge Lord invoked § 1404(a) to transfer the "non-settling cases" to the District of Minnesota for trial, where upon transfer he would be the trial judge. See id. at 124; see also Columbia Broad. Sys. v. Zenith Radio Corp. (In re CBS Color Tube Patent Litig.), 342 F. Supp. 1403, 1405 (J.P.M.L. 1972) (holding that consideration of a § 1404(a) motion is "within the discretion of the transferee judge").


61 Id. at 125 (quoting 28 U.S.C. § 1407(a)).
of forum. Moreover, in In re Fine Paper Antitrust Litigation, the Third Circuit held that judicial efficiency "outweighed" plaintiffs' forum privilege, and affirmed a self-transfer without quantifying any of its benefits other than the transferee judge's familiarity with the case. Furthermore, the Third Circuit never even examined self-transfer as a possible violation of § 1407(a).

The choice of law question has presented particular difficulty in the M.D.L. self-transfer context. In In re Korean Air Lines Disaster of Sept. 1, 1983, the D.C. Circuit had to decide whether the law of the transferor court applied in claims transferred between two federal courts. The court determined that it was unnecessary to retain the law of the plaintiff's chosen forum when a unified system interpreted federal law. Thus, there was "no compelling reason [for the court] to allow [the] plaintiff to capture the most favorable interpretation of [federal] law." Consequently, the court concluded that transferee circuit law attended cases transferred pursuant to § 1407(a). The D.C.

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62 685 F.2d 810 (3d Cir. 1982).
63 Id. at 820. The court of appeals concluded that the district court did not abuse its discretion when it ordered a § 1404(a) transfer without "expressly quantifying" the interest in plaintiffs' convenience. Id. at 819-20. The plaintiffs, however, did not dispute the transferee judge's power to rule on § 1404(a) motions. Rather they petitioned the court to transfer the cases to the Northern District of California, contending that the Eastern District of Pennsylvania (the transferee district) would have been improper as to some of the defendants at the time the actions were brought. See id. at 818. This argument failed as the court properly noted that those defendants had settled and were no longer parties to the case at the time of the § 1404(a) transfer. See id. at 819.
65 See id. at 1174.
66 See id. at 1175.
67 Id.
68 See id. at 1175-76. In In re Korean Air Lines, the choice of law question arose in the context of a summary judgment motion which was denied by the District Court for the District of Columbia based upon that court's interpretation of the applicable federal law. Id. at 1172. Plaintiffs contended that the Second Circuit's interpretation of the Warsaw Convention, as modified by the Montreal Agreement, should attend to the cases that originated in the Southern and Eastern Districts of New York. See id. The court of appeals in the transferee circuit held that the transferee court was not bound by the interpretation of the transferor district. See id. The text of the court's opinion twice stated that § 1407(a) effected a transfer for pretrial purposes only. See id. at 1174, 1176. The court presumably was aware of self-transfer. In fact, the court's opinion reflected reality when it stated "most cases transferred under § 1407 are not remanded." Id. at 1176 n.9. Additionally, the concurrence made express reference to this practice. See id. at 1178 (D.H. Ginsburg, J., concurring).
Circuit rejected contentions that transferor circuit law should apply, reasoning that since § 1407 transfers are for pretrial purposes only, the transferee court should be “free to decide a federal claim . . . without deferring to the interpretation of the transferor circuit.” Acknowledging the complexity of the inquiry, the D.C. Circuit urged congressional attention to the issue.

2. The Demise of Self-Transfer: Lexecon, Inc. v. Milberg Weiss

Despite urging from commentators and courts to the contrary, Congress left transferee courts free to innovate procedural practices and invoke self-transfer in cases where the

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A transferee court’s power to dispose of a case by summary judgment was expressly contemplated by Congress. See H.R. REP. NO. 90-1130, at 3 (1968), reprinted in 1968 U.S.C.C.A.N. 1898, 1900. This power has also been recognized by the courts. See Kaufman v. Trump’s Castle Funding (In re Donald J. Trump Casino Sec. Litig.-Taj Mahal Litig.), 7 F.3d 357, 367 (3d Cir. 1993) (stating that “§ 1407 empowers transferee courts to enter a dispositive pretrial order terminating a case”); Temporomandibular Joint (TMJ) Implant Recipients v. E.I. Du Pont de Nemours and Co. (In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig.), 97 F.3d 1050, 1055 (8th Cir. 1996) (“A transferee court has the authority to enter dispositive orders terminating cases consolidated under 28 U.S.C. § 1407.”).

69 In re Korean Air Lines, 829 F.2d at 1174 (alteration in original) (quoting Marcus, supra note 36, at 721).

70 See id. (“The question before us . . . whether . . . the law applicable in the transferor forum attends the transfer [ ] should apply to transferred federal claims . . . is a question meriting attention from [h]igher [a]uthority. Congress, it appears, has not focused on the issue . . . .”). For thorough discussions of the choice of law question in multidistrict litigation, see Marcus, supra note 36 and Ragazzo, supra note 36.

71 Recently, the Fourth Circuit expanded the powers of the transferee court even further. See Royster v. Food Lion, Inc. (In re Food Lion, Inc., Fair Labor Standards Act “Effective Scheduling” Litig.), 73 F.3d 528 (4th Cir. 1996). In litigation involving alleged violations of the Fair Labor Standards Act, 29 U.S.C. § 201 et. seq., the transferee judge, in Royster, granted summary judgment, dismissing the claims of half of the plaintiffs. Id. at 531. The judge, however, did not enter final judgments against them pursuant to Fed. R. Civ. P. 54(b) before suggesting the dismissed claims be remanded. See id. In what the dissent called an “unprecedented” move, the court of appeals ordered the J.P.M.L. to reverse their remand order and retransfer the cases back to the transferee court. Id. at 534. Upon retransfer, the Fourth Circuit would retain jurisdiction over any appeals. See id. at 533 (Butzner, J., dissenting). The court determined that “permitting the transferor courts . . . to reconsider the transferee court’s summary judgment orders will frustrate the aims of § 1407.” Id. at 532. In dissent, Senior Circuit Judge Butzner contended that the “suggestion of remand was designed to provide a fair opportunity . . . to seek a revision of the pretrial orders in light of evidence that might be disclosed in further proceedings in the transferor courts.” Id. at 534 (Butzner, J., dissenting). Further, he urged a retreat from the sort of judicial
judicial efficiency gains were not outweighed by inconvenience to the parties. Not until the Supreme Court’s decision in *Lexecon* have transferee courts been thwarted in their drive to push the limits of self-transfer.

*Lexecon* initiated its complaint against Milberg Weiss Bershad Hynes & Lerach and other class counsel (“Milberg Weiss”) subsequent to, and as a consequence of, the massive multidistrict securities litigation resulting from the failure of the Lincoln Savings and Loan (“Lincoln Savings”). *Lexecon* had been named as a defendant in the litigation because, in its capacity as advocate, it allegedly had submitted false and misleading reports to federal and state regulators about the solvency of Lincoln Savings. The Lincoln Savings litigation, consolidated and transferred under § 1407, was supervised by Judge Richard Bilby of the District of Arizona as M.D.L. 834. By means of a “resolution,” *Lexecon* was dismissed from the litigation without prejudice.

*Lexecon* filed its complaint in the Northern District of Illinois in the aftermath of its dismissal from M.D.L. 834. The complaint accused Milberg Weiss of “malicious prosecution, abuse of process, tortious interference, commercial activism which had characterized the courts’ treatment of § 1407: “The great[est] danger to our system comes ... from failure to honor the role that Congress prescribed for the transferee court ... in establishing a system of multidistrict litigation.” *Id.* at 535.

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72 See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach (In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.)*, 102 F.3d 1524, 1547 (9th Cir. 1996) (Kozinski, J., dissenting) (stating that neither the convenience of the parties and witnesses nor the interests of justice were served by the transfer pursuant to § 1404 (a)), rev’d, 118 S. Ct. 956 (1998).


74 See *id.*

75 See *Lexecon*, 102 F.3d at 1529. The terms of the resolution included three basic provisions: (1) Judge Bilby would enter an order dismissing *Lexecon* from the Lincoln Savings litigation without prejudice; (2) the parties would execute a stipulation that dismissed *Lexecon* with prejudice, but Judge Bilby would refrain from entering the stipulation as an order unless new claims were lodged against *Lexecon*, Inc.; and (3) *Lexecon* would perform professional services for the plaintiff class. See *id.* Subsequently, the third provision was modified and *Lexecon*, rather than perform professional services, paid the plaintiff class approximately $700,000, which represented the approximate fees received by *Lexecon* from Lincoln Savings and Loan. See *id.*

76 See *id.* at 1529. The parties agreed to the resolution on June 22, 1992. *Lexecon* paid $700,000 in lieu of performing class services in October 1992 and filed suit in the Northern District of Illinois on November 25, 1992. See *id.*
disparagement and defamation.  

Upon motion by Milberg Weiss, the J.P.M.L. transferred Lexecon's case to the District of Arizona, pursuant to § 1407(a), for pretrial consolidation with the remaining M.D.L. 834 cases.  

There it was assigned to a new judge, Judge John Roll, because Judge Bilby had recused himself after filing an order in the M.D.L. 834 record characterizing Lexecon's allegations against Milberg Weiss as "markedly at odds" with the conditions under which Lexecon was dismissed from the case.

Twice, Lexecon petitioned Judge Roll to remand the case to Illinois. The first request came after the remaining M.D.L. cases were resolved and the second when discovery was complete.  

Judge Roll denied both motions and subsequently entered dispositive rulings on all but one of Lexecon's claims.  

The judge then granted Milberg Weiss' motion to transfer the case to his court for trial.  

Lexecon's sole remaining defamation claim was tried in Judge Roll's court where the jury found for the defendant.

The Ninth Circuit, in affirming Judge Roll's transfer for trial, noted that self-transfer often promotes efficiency by eliminating "[t]he time required for a new judge to become acquainted with the litigation" and by avoiding the "possibility of conflicting or duplicative rulings and proceedings." The court's conclusion that judicial efficiency favored self-transfer in Lexecon was erroneous. The nature of the proceedings involved in the litigation, particularly Judge Bilby's recusal, obviated any

77 Lexecon, 118 S. Ct. at 959.  
78 See id.  
79 Id. The terms of the resolution dismissing Lexecon from the securities litigation served two discrete functions with regard to Lexecon's case against Milberg Weiss: (1) it largely formed the basis of Lexecon's complaint which alleged, in part, that (a) the dismissal of Lexecon from M.D.L. 834 was an implicit acknowledgment that the complaint against Lexecon lacked merit, (b) Lexecon's offer to provide professional services to the class was voluntary, as was its payment of $700,000, and (c) Lexecon's dismissal from M.D.L. 834 was a termination in Lexecon's favor; and (2) it swept Lexecon's complaint against the class attorneys into the consolidated litigation and deposited it back into the District of Arizona. See Lexecon, 102 F.3d at 1529-31. Because Lexecon had been dismissed without prejudice, the District Court for the District of Arizona retained jurisdiction.  
80 See Lexecon, 118 S. Ct. at 959-60.  
81 See id.  
82 See id. at 960.  
83 See id.  
84 Lexecon, 102 F.3d at 1532.
benefit of the judge's familiarity with the case, a theory on which
self-transfer was often justified. Likewise, the judicial objective
of maintaining consistent rulings was not achieved in *Lexecon*
because Judge Roll's dispositive rulings were factually specific.
The Supreme Court agreed that Judge Roll's actions were
unlikely to improve judicial efficiency significantly because the
*Lexecon* litigation "was not 'consolidated' with any other [cases]
for the purpose . . . of litigating identical issues on common
evidence . . . [and] Judge Bilby's recusal . . . limited the prospects
for coordination."

The Ninth Circuit had also relied upon the body of case law
that consistently recognized self-transfer and the presumptive
validity of J.P.M.L. Rule 14(b) to uphold Judge Roll's self-
transfer. Dissenting, Judge Kozinski charged that the case law

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65 Judge Roll, the transferee judge, was one of three federal judges who knew
about the facts surrounding the case when he denied *Lexecon*’s petition to remand
the case to Illinois. Judge Bilby was obviously well-versed in the Lincoln Savings
litigation, albeit unavailable by recusal. See id. at 1529. Additionally, Judge Zagel of
the Illinois district court had capably supervised the *Lexecon* litigation from
November 25, 1992, when *Lexecon* filed its complaint against Milberg Weiss in the
Northern District of Illinois, until June 1993 when the J.P.M.L. transferred the case
to Judge Roll. See Carter G. Phillips et al., *Rescuing Multidistrict Litigation from
the Altar of Expediency*, 1997 BYU L. REV. 821, 839 (1997). Thus, Judge Roll was
not necessarily better positioned to conduct trial as would be a single judge who had
presided over all proceedings and developed an intricate familiarity with the facts,
the issues and the parties involved. Judge Roll had neither entered his dispositive
rulings nor set the case for trial in his court when he denied *Lexecon’s* August 5,
1994 remand motion. See id. at 1531, 1550 n.22 (Kozinski, J., dissenting).

66 See *Certified Collateral Corp. v. Allnet Communication Servs., Inc. (In re
(approving the transferee judge's reversal of the transferor judge's ruling to comport
with other pre-consolidation rulings and subsequent decisions of the FCC); *In re
Plumbing Fixtures Cases*, 298 F. Supp. 484, 493 (J.P.M.L. 1968) (holding transferee
judges are empowered to make determinations of class action questions to avoid
conflicting judicial actions).

67 *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach (In re American
Continental/Lincoln Sav. & Loan Sec. Litig.)*, 884 F. Supp. 1388 (D. Ariz. 1995),
aff’d, 102 F.3d 1524 (9th Cir. 1996), rev’d, 118 S. Ct. 956 (1998). The district court
held "[n]o reasonable jury could find that defendants intentionally . . . [acted] to
harm [the] plaintiff." *Id.* at 1393. "[T]he statements . . . are clearly expressions of
opinion . . . [and] are not actionable as defamation," commercial disparagement, or
tortious interference. *Id.* at 1396.

68 *Lexecon*, 118 S. Ct. at 961.

69 See, e.g., *Lexecon*, 102 F.3d at 1532 (stating that the power of transferee
duces to effect self-transfer has been recognized by every court that has considered
the issue).

70 See id. at 1533 n.7 )"Respect for our brethren, and their longstanding
practice, requires us to presume, absent compelling evidence to the contrary, that
following the *Pfizer* decision "reveal[ed] a remarkable lack of
critical attention to this issue" and the J.P.M.L.'s rules "cannot
broaden the transferee court's authority to act under section
1404(a)." The Supreme Court agreed with the dissent and gave
effect to the mandatory remand provision of § 1407(a), "'[e]ach
action so transferred shall be remanded,' " without deference to
case law or J.P.M.L. Rule 14(b). The Court dismissed the case
law that approved self-transfer when it reasoned the language of
§ 1407(a) was "impervious to judicial discretion," and
invalidated Rule 14(b) by holding that the remand provision
could not be excised from the statute by an "exercise in
rulemaking."

II. A THREE-PART ATTACK ON SELF-TRANSFER

A. Was Self-Transfer a Proper Use of § 1404(a) ?

The Supreme Court intimated that transfers pursuant to
change of venue statute § 1404(a) may have been appropriately
decided by transferee judges, but for the statutory remand
provision of § 1407(a). The Court's reasoning that a § 1404(a)

the rules promulgated pursuant to [§] 1407(f) are 'not inconsistent with Acts of
Congress.'") (quoting 28 U.S.C. § 1407(f)).

91 *Id.* at 1541 (Kozinski, J., dissenting).

92 *Id.* at 1549.

Judge Kozinski also concluded that trial in the transferee district unfairly
inconvenienced the plaintiff. *See id.* at 1547-48. The inconveniences to the plaintiff
included the increased cost of litigating in Arizona and the inability to litigate in
their chosen forum of Illinois. The costs were greater than they would have been in
Illinois because, as Judge Kozinski noted, two of the four testifying witnesses were
from Illinois, the transferor district, while none resided in Arizona. Additionally,
one of the parties nor their attorneys of record were from Arizona. *See id.; cf In re
Air Crash Disaster Near Hanover, N.H., on Oct. 25, 1968, 342 F. Supp. 907, 908
(D.N.H. 1971) (justifying the consolidation of a trial for liability cases pursuant to §
1407(a) because of the considerable savings in litigation costs). Moreover, the
inability to litigate in Illinois disadvantaged the plaintiff because the case called for
an application of Illinois common law. *See Lexecon,* 102 F.3d at 1547; *see also
Lexecon,* 884 F. Supp at 1388 (deciding the merits of the defamation case based on
Illinois law).

93 *Lexecon,* 118 S. Ct. at 962 (quoting 28 U.S.C. § 1407(a)).

94 *Id.*

95 *Id.* at 963.

96 *See id.* at 962 (stating that the statutory requirement that transferee judges
conduct only consolidated or coordinated pretrial proceedings did not preclude
transferee judges from ruling on § 1404(a) motions; transferee judges were
precluded from ruling on § 1404(a) motions only by the obligatory remand provision
of § 1407(a)).
motion may properly be decided in the context of consolidated or coordinated pretrial proceedings fails to recognize the individualized nature of the § 1404(a) inquiry. Section 1404(a), which grants district courts discretionary power to "transfer any civil action to any other district or division where it might have been brought" when such transfer is done "[f]or the convenience of [the] parties and witnesses, [and] in the interest of justice," codifies the common law doctrine of *forum non conveniens* and accords district courts greater discretion to change venue than was available at common law. The objective of a § 1404(a) inquiry is, however, the same as the common law *forum non conveniens* inquiry: to balance the litigants' private interests with the competing public interest in an efficient system of judicial administration.

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In Judge Kozinski's *Lexecon* dissent, he posited that self-transfer violated the plain language of § 1404(a), wherein it states "to any other district." See *Lexecon*, 102 F.3d at 1548 (Kozinski, J., dissenting). This comment does not elaborate on Judge Kozinski's linguistic analysis of § 1404(a), since § 1404(a) was enacted twenty years before § 1407(a) at a time when self-transfer could not have envisioned by Congress. See Act of June 25, 1948, ch. 646, 62 Stat. 937 (1948) (codified at 28 U.S.C. § 1404 (1994)); Act of Apr. 29, 1968, Pub. L. No. 90-296, § 1, 82 Stat. 109 (1968) (codified at 28 U.S.C. § 1407 (1994)). The Supreme Court, having reasoned that § 1407(a) was a bar to any § 1404(a) motion in the transferee court, did not address the question of whether § 1404(a) would permit a transferee court only to transfer a case "to another district." See *Lexecon*, 118 S. Ct. at 964 n.4.

98 See 28 U.S.C. § 1404 Historical and Revision Notes (1994) (stating "[s]ubsection (a) was drafted in accordance with the doctrine of *forum non conveniens*, permitting transfer to a more convenient forum, even though the venue is proper"); *Ex parte* Collett, 337 U.S. 55, 71 (1949) (construing the newly-enacted § 1404(a) as recognizing the common law doctrine of *forum non conveniens* and concluding that Congress intended it to apply in cases filed under federal statutes with specific venue provisions).

99 See *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955). In *Norwood*, the Court held that the district court properly transferred personal injury suits, which were filed under federal law, from the District of Pennsylvania to the Eastern District of South Carolina pursuant to § 1404(a). *See id.* at 29-30. The court reasoned that the statute both codified and revised the doctrine of *forum non conveniens* because at common law dismissal of an action was the only remedy when the original forum was not convenient, whereas the statute provided for the transfer of an action when the original forum was inconvenient. *See id.* at 31-32.

100 *See id.* at 32 explaining that although Congress intended, when enacting § 1404(a), to broaden the exercise of discretion to grant transfers as compared to the law of *forum non conveniens*, the facts to be considered remain the same.

101 *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509-10 (1947) (invoking the common law doctrine of *forum non conveniens* to dismiss a tort action which plaintiffs filed in a New York federal district court based solely on diversity of citizenship when the incident giving rise to the tort occurred in Virginia, all fact
Factors relevant to the § 1404(a) inquiry include plaintiff's choice of forum, accessibility of proof, availability of witnesses, as well as administrative factors of preventing "congested centers" of litigation and imposing jury duty upon a community not connected to the litigation. The forum non conveniens analysis is "flexible and multifaceted," involves an "individualized, case-by-case consideration," and should be invoked to disturb plaintiff's choice of forum only when "the balance is strongly in favor of the defendant."

In the M.D.L. context, transferee judges are empowered to "provide centralized management... of [consolidated or coordinated] pretrial proceedings," which involves different considerations than judges invoking § 1404(a) to transfer cases for all purposes. Transferee judges achieve the central goal of § 1407, "improvements in judicial administration," by simultaneously managing consolidated pretrial proceedings in multiple cases, thus avoiding conflicting and duplicative discovery. The primary focus of a forum non conveniens inquiry is to achieve a balance between the individual litigants' witnesses resided in Virginia, and Virginia state and federal courts provided an adequate forum for plaintiff to assert his rights.

102 See Norwood, 349 U.S. at 32 (emphasizing that a plaintiff's choice of forum is not to be excluded from consideration under the doctrine of forum non conveniens).
103 See Gulf Oil, 330 U.S. at 508.
104 See id.
105 Id.
106 See id. at 508-09 ("Jury duty is a burden that ought not be imposed upon the people of a community which has no relation to the litigation.").
107 Stewart Org., Inc. v. Rich Corp., 487 U.S. 22, 31 (1988) (holding that a forum-selection clause is a valid consideration in the determination whether to transfer a case, and that the decision is left up to the court subject to § 1404(a)).
108 Van Dusen v. Barrack, 376 U.S. 612, 622 (1964). The Court in Van Dusen held that 28 U.S.C. § 1404(a) does "not... effect a change of law" but effects only a "change of courtrooms," and the Court emphasized that the law of the transferor governs the case in a 28 U.S.C. § 1404(a) transfer. Id. at 642-43; see also Ferens v. John Deere Co., 494 U.S. 516, 521-23 (1990) (establishing that the Van Dusen rule applies regardless of which party initiates the § 1404(a) motion).
109 Gulf Oil, 330 U.S. at 508.
111 See In re South Cent. States Bakery Prods. Antitrust Litig., 433 F. Supp. 1127, 1130 (J.P.M.L. 1977) (noting that antitrust cases pending in several district courts may be consolidated for pretrial proceedings pursuant to § 1407(a), even after the denial of a § 1404(a) motion which would have consolidated the pending cases to one district for all purposes).
convenience and the administration of justice. Thus, the transferee judge may not properly consider a § 1404(a) motion within the M.D.L. framework because consolidated proceedings affect multiple cases, whereas the § 1404(a) determination requires an “individualized, case-by-case consideration of convenience and fairness.” Administrative efficiency, although a valid factor to be weighed in the forum non conveniens inquiry, is not dispositive. Thus, transferee judges who, relying on their familiarity with the proceedings or the overall efficiency of a consolidated trial, transferred cases to themselves using § 1404(a), derogated the individualized, multifaceted nature of a § 1404(a) inquiry into a collective, one-dimensional query. The § 1404(a) analysis, rather than being a factual examination of plaintiff's forum choice, parties' convenience, access to proof, and witness availability, became a perfunctory process with judicial efficiency as its sole objective. The Supreme Court improvidently failed to acknowledge the fundamental difference between the powers of a transferee judge and the nature of the § 1404(a) inquiry when it suggested that transferee judges may properly consider § 1404(a) motions but for the statutory remand

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113 See Norwood v. Kirkpatrick, 349 U.S. 29, 35 (1955) (Clark, J., dissenting) (agreeing with the standard applied in Gulf Oil that the court, when weighing various factors, should support the plaintiff's forum choice unless it finds the balance overwhelmingly in the defendant's favor); Gulf Oil, 330 U.S. at 508-09 (stating that the court will consider both the private interests of litigants and the effects of the choice of forum on the practicality and fairness of the trial when making its decision); Franklin v. Blaylock, 218 F.Supp. 261, 262 (S.D.N.Y. 1963) (holding that the court should adhere to the plaintiff's choice of forum unless the balance is clearly in the favor of the defendant).


115 See Gulf Oil, 330 U.S. at 505 (describing various factors that ought to be considered by courts when making a forum non conveniens decision); Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach (In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.), 102 F.3d 1524, 1564-47 (9th Cir. 1996) (Kozinski, J., dissenting) (stating that although M.D.L. courts are to consider the interests of the individual parties, they often give the greatest weight to judicial efficiency), rev'd, 118 S. Ct. 956 (1998).

116 See Lexecon, 102 F.3d at 1547 (Kozinski, J., dissenting) (emphasizing the important individual considerations of a § 1404 inquiry).

117 See Gulf Oil, 330 U.S. at 508.

118 See Rhodes, supra note 2, at 741 (emphasizing transferee courts' common concern with judicial efficiency rather than the convenience of parties); compare with 28 U.S.C. § 1407(a) (establishing that the convenience of the parties and witnesses must be considered in addition to judicial efficiency when making transfer decisions). See, e.g., Trangsrud, supra note 22, at 809 (1985) (noting that §§ 1404 and 1407, "in some cases," result in increased judicial efficiency).
provision.

The J.P.M.L., when selecting a transferee district for consolidated pretrial proceedings pursuant to § 1407(a), is not bound by the venue restriction of § 1404(a) which states that transfer may be made to any district where the case may have been brought. Thus, in some cases self-transfer may have deprived litigants of due process and created administrative inefficiencies by relegating parties to inconvenient fora and imposing jury duty upon community members who did not have any direct connection to the litigation. Lexecon illustrated how a § 1404(a) transfer in the M.D.L. context could inconvenience the parties and deny a community the opportunity to participate in the resolution of a local controversy, without even achieving judicial efficiency.

B. Was J.P.M.L. Rule 14(b) a Valid Exercise of Rulemaking Power?

The Ninth Circuit relied on J.P.M.L. Rule 14(b) to uphold

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119 See H.R. REP. NO. 90-1130, at 3 (1968), reprinted in 1968 U.S.C.C.A.N. 1898, 1900 (stating the "existing law is inadequate for ... pretrial consolidation, since under 28 U.S.C. [§] 1404(a) transfer is restricted to a district where the action 'might have been brought.'"); see also id. at 4, reprinted in 1968 U.S.C.C.A.N., at 1901 (stating that "a number of factors should be weighed in the selection of a transferee district: the state of its docket, the availability of counsel, sufficient courtroom facilities, etc.").

Some commentators suggest that the J.P.M.L. considers the prospect of self-transfer when selecting transferee districts. See Rhodes, supra note 2, at 740. This policy favors self-transfer by minimizing the risk that parties will be in districts where the action could not have been brought. Moreover, it may impair the J.P.M.L.'s ability to select the district best suited to manage the consolidated proceedings by implicitly imposing an additional venue requirement. See id.

120 See International Shoe Co. v. Office of Unemployment Compensation and Placement, 326 U.S. 310, 316 (1945) (holding that, in order to establish in personam jurisdiction over a defendant, he must have "certain minimum contacts ... such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'") (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)); see also U.S. CONST. amend. XIV, § 1 (guaranteeing citizens "due process of law"); Milliken, 311 U.S. at 463 (establishing the factor of "traditional notions of fair play and substantial justice").

121 See, e.g., Lexecon, 102 F.3d at 1547 (Kozinski, J., dissenting) (stating that the transfer to Arizona for trial was not justified by judicial efficiency nor was it proper for the transferee court to deprive the plaintiff of the opportunity to litigate in its home forum where the community may have had an interest in resolving the particular controversy).

122 See id. at 1547 n.13 (asserting "both plaintiff and the community have an interest in resolving the controversy at home") (citations omitted).
the district court's self-transfer in Lexecon. The Supreme Court observed that the obligation § 1407(a) imposed on the J.P.M.L. to remand cases upon completion of consolidated pretrial proceedings could not be eliminated by the panel's own rulemaking authority. The rulemaking power of the J.P.M.L. is circumscribed by 28 U.S.C. § 1407(f), which authorized the panel to "prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure." Thus, the J.P.M.L.'s authority to promulgate rules is analogous to that conferred on the district courts by § 2071 "to ... prescribe rules for the conduct of their business ... [which] shall be consistent with Acts of Congress and rules of practice and procedure" and Rule 83 of the Federal Rules of Civil Procedure, which governs the district courts' rulemaking practice. The rulemaking power of the courts is limited both by the federal consistency mandate and a requirement that such power be narrowly exercised. Since local rules are not subject to rigorous procedural requirements, they may not change

123 See id. at 1533 n.7.
126 28 U.S.C. § 2071(a); see Lexecon, 102 F.3d at 1549 (Kozinski, J., dissenting).
127 See FED. R. CIV. P. 83. The rule states, in relevant part:

Each district court, acting by a majority of its district judges, may after giving appropriate public notice and an opportunity for comment, make and amend rules governing its practice. A local rule shall be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and 2075.

Id. The FRCP were amended effective December 1, 1995 to provide for heightened scrutiny of local rule-making processes. See Walter W. Heiser, A Critical Review of the Local Rules of the United States District Court for the Southern District of California, 33 SAN DIEGO L. REV. 555, 580 (1996).

Concerned by the proliferation of local court rules, resulting from 28 U.S.C. § 2071 and FRCP 83, the Judicial Conference, as policy-makers for the federal court system, commissioned the Local Rules Project, in 1986, to review local rules' conformity with federal law. See id. at 555-59, 580. The report of the Local Rules Project documented the extensive proliferation of local rules by some district courts and identified widespread instances of inconsistencies with federal rules or statutes. See id. at 558-59.

128 See FED. R. CRIM. P. 57 Advisory Committee Note (emphasizing that local rules must comport with federal rules and Congressional laws). The language of Federal Criminal Procedure Rule 57 is almost identical to that of 28 U.S.C. §1407(f) and § 2072, stating "each district court ... may ... make and amend rules governing its practice ..." not inconsistent with Congressional acts or federal rules. FED. R. CRIM. P. 57(a)(1).
129 See FED. R. CIV. P. 83 advisory committee's note (stating that local rules are
federal policies" or introduce procedural innovations. Furthermore, such rules are invalid to the extent that they violate or extend beyond the purview of federal statutes.

Rule 14(b) ordered the J.P.M.L. to remand "(e)ach transferred action that has not been terminated in the transferee district... unless ordered transferred by the transferee judge... under 28 U.S.C. §§ 1404(a) or 1406." First, it issued a directive to the J.P.M.L. to remand transferred cases. This directive is consistent with the language and the dual policy goals of the statute: to achieve the efficiency benefits of consolidated pretrial proceedings and to preserve trial in the subject to "modest procedural prerequisites," causing many commentators to question their validity).

See Johnson v. Manhattan Ry. Co., 289 U.S. 479, 498 (1933) (finding local rules restricting the powers of an assigned judge invalid because they contravened stated federal policy to "establish a liberal and flexible plan" of assigning circuit judges to sit in district courts if either the state of the docket or a particular case so warranted).


See 28 U.S.C. § 2071(a) (establishing that local rules must be consistent with congressional actions); Frazier v. Heebe, 482 U.S. 641, 645-46 (1987) (holding a district court rule regarding the admission procedures of non-resident attorneys invalid because it was inconsistent with Supreme Court rules of practice and procedure); Manhattan Ry. Co., 289 U.S. at 503 (finding local rule interfering with federal judicial procedure invalid); McKee v. Bi-State Dev. Agency, 801 F.2d 1014, 1017 (8th Cir. 1986) (declaring a district court rule that attempted to render an entered judgment "not final" was invalid because it was inconsistent with the court's construction of 28 U.S.C. § 1291).

R. PROC. J.P.M.L. 14(b). In 1970, the J.P.M.L. promulgated the current Rule 14(b) from the former Rule 15(d), which stated, "[a]ctions will be remanded... to the transferor district] unless an order has been signed by the designated transferee judge transferring an action to another district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406(a). Such actions will be remanded by the Panel to the district designated in the section 1404(a) or section 1406(a) order." R. PROC. J.P.M.L. 15(d), reprinted in 50 F.R.D. 203, 209 (1970).
originating forum.\textsuperscript{134} Additionally, the rule condoned the transferee judge’s use of § 1404(a) and § 1406(a) to transfer cases “to the transferee or other district” for trial.\textsuperscript{135} This provision violated the policy objectives of the statute and overreached the J.P.M.L. authority to “prescribe rules . . . [to conduct] its business” and not that of the transferee judges.\textsuperscript{136} Thus, the rule was invalid because it was neither consistent with the statute nor a proper exercise of the J.P.M.L.’s rulemaking authority.\textsuperscript{137}

C. Did Congress Intend to Ratify Self-Transfer by its Silence?

The Supreme Court recognized that by giving effect to the statutory remand obligation of § 1407(a), it was reversing almost 30 years of judicial precedent.\textsuperscript{138} The Court reasoned that its obligation was to enforce the explicit statutory language that Congress enacted and not defer to erroneous precedent.\textsuperscript{139} In this instance, judicial precedent was not persuasive, even in light of congressional silence, because Congress had not reenacted the language of § 1407(a) subsequent to the Pfizer decision and, consequently, the presumption that Congress adopted the judicial interpretation of the statute did not apply.\textsuperscript{140} The “bare

\textsuperscript{134} See supra notes 37-47 and accompanying text (discussing the legislative history and policies behind the enactment of § 1407).

\textsuperscript{135} R. PROC. J.P.M.L. 14(b).

\textsuperscript{136} 28 U.S.C. § 1407(f) (emphasis added).


The J.P.M.L.’s interpretation of § 1407, as evidenced by its promulgation of Rule 14(b), was not compelling. The J.P.M.L. first passed the predecessor to Rule 14(b) two years after Congress enacted § 1407; the rule was later amended to comport with the Second Circuit’s decision in Pfizer. See Rhodes, supra note 2, at 729-31. It is the “ ‘contemporaneous construction of a statute’ ” by those charged with its implementation which is “entitled to great weight.” See United States v. American Trucking Ass’ns, 310 U.S. 534, 549 (1940) (quoting Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933)) (citing Fawcus Mach. Co. v. United States, 282 U.S. 375, 378 (1931)). Since J.P.M.L. Rule 14(b) was not the panel’s contemporaneous construction of § 1407, it was not entitled to great deference. In American Trucking, the Court accorded great weight to the Interstate Commerce Commission’s (“ICC”) construction of the Motor Carrier Act of 1935. The ICC’s construction of the statute was contemporaneous with its enactment. See American Trucking, 310 U.S. at 549. Moreover, the ICC sought to restrict, not expand, its jurisdiction under the statute. See id. By contrast, the J.P.M.L. sought to expand the reach of the M.D.L. statute when it enacted Rule 14(b).

\textsuperscript{138} See Lexecon, 118 S. Ct. at 962.

\textsuperscript{139} See id.

\textsuperscript{140} See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 185 (1994) (stating that since Congress had not reenacted § 10(b) of
force" of congressional silence was not persuasive,\textsuperscript{141} where Congress enacted precise statutory language.\textsuperscript{142} Also unavailing was the sheer duration of the practice because "[a]ge is no antidote to clear inconsistency with a statute."\textsuperscript{143}

As the \textit{Lex econ} Court pointed out, Congress added § 1407(h) to the M.D.L. statute, expressly granting the J.P.M.L. authority to "consolidate and transfer . . . for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act."\textsuperscript{144} While Congress neither ratified nor repudiated \textit{Pfizer} or J.P.M.L. Rule 14(b), the then-settled principle of law,\textsuperscript{145} § 1407(h) demonstrated Congress' ability to permit trial consolidation.

\textsuperscript{141} See \textit{Brown} v. \textit{Gardner}, 513 U.S. 115, 120-21 (1994) (invalidating 38 C.F.R. § 3.358(c)(3), which imposed a fault requirement on a VA medical facility in order for veterans to qualify for benefits, because the regulation violated the controlling statute, 38 U.S.C. § 1151). The Court rejected 60 years of consistent judicial interpretation and congressional silence in connection with this issue. \textit{See id. at 122; see also Central Bank}, 511 U.S. at 173-78 (rejecting 30 years of judicial precedent that held § 10(b) of the Securities Exchange Act of 1934 created a private cause of action for aiding and abetting liability because congressional silence did not equal acquiescence); \textit{Lindahl} v. Office of Personnel Mgmt., 470 U.S. 768, 782-83 (1985) (seeking express affirmation that Congress knew of the judicial interpretation of 5 U.S.C. § 8347(c) concerning administrative review of federal disability retirement programs, rather than relying on the "bare force" of congressional silence, before holding Congress adopted the judicial interpretation).

\textsuperscript{142} See \textit{Patterson} v. \textit{McLean Credit Union}, 491 U.S. 164, 175 n.1 (1989) (stating "[c]ongressional inaction cannot amend a duly enacted statute" while upholding prior judicial interpretation of § 1981); \textit{Johnson} v. Transportation Agency, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting) (urging the assumption that congressional silence validates judicial construction of a statute be "put to rest" since the enacted statutory language should provide the answer to the inquiry).

\textsuperscript{143} \textit{Lex econ}, 118 S. Ct. at 962 (quoting \textit{Brown}, 513 U.S. at 122); \textit{see also Central Bank}, 511 U.S. at 173-78 (rejecting 30 years of judicial precedent).


\textsuperscript{145} \textit{See Kohr} v. \textit{Allegheny Airlines, Inc.}, 504 F.2d 400, 402 (7th Cir. 1974) (rehearing en banc) (allowing a § 1404(a) transfer by a judge authorized to supervise pretrial discovery pursuant to § 1407(a)); \textit{In re Air Crash Disaster Near Hanover, N.H.}, on Oct. 25, 1968, 342 F. Supp. 907, 908 (D.N.H. 1971) (stating that a transferee judge supervising pre-trial discovery may self-transfer the cases and consolidate them in the interest of time).
when it saw fit. In 1983, a bill was introduced in the House that would have provided statutory authority for limited self-transfer, however, it presumably died in committee. Congress’ failure to validate or vitiate Pfizer when presented with two opportunities to do so could engender conflicting inferences regarding congressional intent; however, given the exacting statutory language, Congress’ inaction supports Judge Kozinski’s contention that Congress exercises little oversight in the M.D.L. area, rather than the opposite conclusion that Congress assumed the statutory validity of self-transfer.

III. SETTING A TIMETABLE FOR CONGRESSIONAL REFORM OF MULTIDISTRICT LITIGATION

A. Lost Opportunity: A Prospective Ruling in Lexecon

The Supreme Court did not consider the argument that the Court should ban self-transfer on a prospective basis because it stated that the argument had not been properly preserved by Milberg Weiss. A prospective ruling in Lexecon would have been a courageous decision by the Supreme Court and may have set a timetable for Congress to amend § 1407 to permit consolidation for trial. Congress originally enacted § 1407 to respond to the Judicial Conference’s concerns that the discovery demands of massive litigation would overwhelm federal courts.

146 See Lexecon, 118 S. Ct. at 963. ("[T]he fact that the later section distinguishes trial assignments from pretrial proceedings generally is . . . confirmation for our conclusion . . . that the subjects of pretrial proceedings . . . do not include self-assignment orders.").

147 See supra note 47 and accompanying text.

148 See Lexecon, 102 F.3d at 1549 (Kozinski, J., dissenting).

149 See, e.g., Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (stating "several equally tenable inferences may be drawn from [congressional] inaction, including the inference that the existing legislation already incorporated the offered change") (quoting Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990)).

150 See Lexecon, 118 S. Ct. at 966 n.5.


Following the successful Government prosecution of electrical equipment manufacturers for antitrust law violations civil actions were filed in 33 federal district courts. Unless coordinated action was undertaken it was feared that conflicting pretrial discovery demands for documents and witnesses would disrupt the functions of the federal courts. See supra notes 2-12, 37-47 and accompanying text.
Federal district courts innovated self-transfer on the same policy grounds that motivated Congress: efficient administration of justice will be threatened without the power to consolidate actions.\textsuperscript{152} The district courts, however, acted without statutory authority. If, as the Court has suggested, it concurs that a policy of judicial efficiency has merit,\textsuperscript{153} then the Court may well have exercised its discretion to issue a prospective ruling, in order to facilitate an orderly resolution of M.D.L. cases already consolidated for trial, and urge congressional reform of § 1407.

Even before \textit{Lexecon}, the Court had already given notice that a policy of judicial efficiency, however desirable, would not override a statutory mandate.\textsuperscript{154} Thus, the Court's decision proscribing self-transfer as violative of § 1407(a) may have been expected. Not all decisions of the Court, however, are given retroactive effect.\textsuperscript{5} Had the prospectivity argument been properly preserved, the Court would have had discretion to

\textsuperscript{152} See \textit{In re} Air Crash Disaster Near Hanover, N. H., on Oct. 25, 1968, 342 F. Supp. at 908 (stating that to remand cases to the transferor districts "would constitute, in this era of congested calendars and long delays of trials, an affront to the orderly and expeditious administration of justice.").

\textsuperscript{153} See, e.g., Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231, 2252 (1997). In \textit{Amchem}, the Court arguably conceded that a comprehensive system to compensate toxic tort victims was a desirable alternative to litigation.

\textsuperscript{154} See Finley v. United States, 490 U.S. 545, 555-56 (1989). In \textit{Finley}, the Court rejected pendent-party jurisdiction where plaintiff asserted a claim against the Federal Aviation Administration ("FAA") under the Federal Tort Claims Act ("FTCA"), and non-diverse state defendants. See \textit{id.} at 546, 555-56. While the FTCA mandates that actions against the government be brought in federal court, there was no federal jurisdiction as to the state defendants. See \textit{id.} Hence, the claim against the non-diverse defendants had to be litigated in a separate state court proceeding. See \textit{id.} While acknowledging the "efficiency and convenience of a consolidated action," the Court deferred to Congress' authority to enlarge the scope of federal jurisdiction. \textit{Id.} at 555; see also \textit{Amchem}, 117 S. Ct. at 2252 (1997) (refusing to certify a proposed class action settlement because the class-certification requirements of FRCP 23, common issue predominance and adequacy of representation, were not met). The \textit{Amchem} Court observed that it is within Congress' domain to enact an alternative compensation scheme for toxic tort victims. See \textit{id.}

\textsuperscript{155} See \textit{Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.}, 458 U.S. 50, 87-88 (1982) (issuing a prospective ruling that held the federal bankruptcy court system violated Article III of the Constitution); \textit{Chevron Oil Co. v. Huson}, 404 U.S. 97, 105-09 (1971); \textit{George v. Camacho}, 119 F.3d 1383, 1386-1401 (9th Cir. 1997); \textit{cf. Harper v. Virginia Dept of Taxation}, 509 U.S. 85, 94-99 (1993) (discussing the history of Supreme Court cases dealing with the issue of whether a ruling should be retrospective or prospective and adopting the "retroactivity approach"). \textit{But see Robinson v. Neil}, 409 U.S. 505, 507 (1973) (recognizing "a general rule of retrospective effect for the constitutional decisions of this Court.").
prospectively ban self-transfer. The Court's prospectivity analysis affords litigants the opportunity to know what rule of law governs their actions and avoid perpetrating inequities. In *Chevron Oil Company v. Huson* the Court set forth the following three-part test to determine when a decision shall apply prospectively only: (1) if the decision announces a new rule of law; (2) if prospective application would not render the rule ineffective; and (3) if retroactive application would produce substantial inequities.

The first *Chevron* factor favored prospective application in *Lexecon* because in holding that self-transfer violated § 1407(a), the Court overruled clear precedent and consequently announced a new rule of law. The second *Chevron* factor also favored prospectivity in *Lexecon* because the new rule would not be rendered ineffective by prospective application. Rules of law which deprive litigants of substantive rights are rendered ineffective by prospective application. Self-transfer, as a rule of law, did not deprive litigants of substantive rights. It may have relegated some litigants to distant venues in which to conduct their litigation, but it did not preclude them from asserting their rights altogether. Finally, the third *Chevron* factor favored prospectivity in *Lexecon* because retroactive application may disrupt pending M.D.L. cases already consolidated for trial and cause substantial inequities for litigants who have prepared for trial in the respective transferee

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156 When the Court announces a prospective ruling, it may not apply that ruling to the case before it. *See Harper*, 509 U.S. at 97 (stating that, when the Court applies a rule to the parties before it, that rule must be applied retroactively); *George*, 119 F.3d at 1398 (stating that the Supreme Court's decision in *Northern Pipeline*, to apply the rule of law prospectively only, meant that the decision was not to be applied to the parties before it).

157 *See George*, 119 F.3d at 1396.


159 *Id.* at 106-07; *see Harper*, 509 U.S. at 113-14 (O'Connor, J., dissenting).

160 *See Chevron Oil*, 404 U.S. at 108 (defining a new rule of law as that which overrules clear past precedent or decides an issue of first impression whose outcome could not be clearly foreseen); *George*, 119 F.3d at 1398 (announcing rule of law shall apply prospectively when the new rule corrects an error in judicial interpretation).

161 *See Harper*, 509 U.S. at 86; *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1981) (applying retroactively a law which deprived federal employees of benefits provided to state employees).

Accordingly, prospective application would not have propagated a substantive injustice, and the retroactive ban may result in multiple new trials, contravening the central objective of § 1407 - judicial efficiency. A ruling that prohibited any new self-transfers while permitting district courts to conclude litigation already consolidated for trial would have afforded litigants essential fairness and predictability and preserved the efficiency of judicial administration. Moreover, a prospective ruling may have acted as an impetus to Congress to reform the M.D.L. statute to permit consolidation for trial.

B. Future Opportunity: Congressional Reform of § 1407

Experience has justified extending § 1407 to provide for consolidation for pretrial proceedings and for trial. Transferee judges recognized the statute’s potential for streamlined judicial administration when they began transferring cases to themselves for trial, at the conclusion of pretrial proceedings. The problem encountered in self-transfer, however, was that it relied upon a venue statute never designed for such a purpose and allowed a single judge too much discretion. It is only through congressional review and reform of § 1407 that consolidation for trial should be achieved.

Section 1407 should be amended to authorize the J.P.M.L. to consolidate and transfer actions for both pretrial proceedings as well as for trial. The amended statute should provide that civil actions may be considered for consolidated pretrial proceedings and for consolidated trial upon motion by any party to the litigation or upon the J.P.M.L’s initiative. The amended statute should also provide that the J.P.M.L. may consolidate only portions of civil actions for trial, such as a consolidated trial

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163 See Rhodes, supra note 2, at 749.
165 See Cooney, supra note 23, at 611 (concluding that § 1407 needs to be amended to provide transferee judges with the authority to consolidate cases for trial in order to achieve efficient judicial administration in M.D.L.); Note, supra note 23, at 1030-31, 1036-39 (considering that the J.P.M.L. should be permitted to consolidate cases for trial, suggesting the drafters overestimated the benefits of local trials); Rhodes, supra note 2, at 731, 735 (proposing Congress amend § 1407 to empower the J.P.M.L. to consolidate multiple actions for trial).
166 See 28 U.S.C. § 1407(c)(i) and (ii). The current statute provides that civil actions may be considered for pretrial consolidation upon motion by either party or the J.P.M.L.
on liability only and individual trials on damages after remand. In all cases, the J.P.M.L. must first consider whether pretrial consolidation is appropriate by examining the common issues of fact and the expected gains in efficient judicial administration. The J.P.M.L. should order pretrial consolidation upon its determination that such consolidation will advance the interest of justice and not unduly inconvenience the parties.

1. Initial Consideration of Trial Consolidation

After a determination that pretrial consolidation is appropriate, the statute should provide that proceedings to consolidate the actions for trial may be initiated by: (1) any party to the litigation or (2) by the J.P.M.L. In all cases, the J.P.M.L. should consider whether a consolidated trial is practical, given the type and number of the cases.

(a) Trial Consolidation Upon Motion of a Party

When a party requests that the J.P.M.L. consolidate the actions for trial, and all other parties consent, the J.P.M.L. should order the cases transferred and consolidated for trial upon a determination that the consolidated trial advances the interest of justice. If, however, one of the parties opposes consolidation for trial, the parties should be required to submit briefs to the J.P.M.L. in support of their position on trial consolidation, and the J.P.M.L. may hear oral arguments at their discretion. When one of the parties opposes trial consolidation, the statute should provide that the J.P.M.L. may transfer and consolidate cases for trial only upon a finding that the transfer significantly advances the interest of justice and does not inconvenience the parties or witnesses.

(b) Trial Consolidation Upon Motion by the J.P.M.L.

If none of the parties to the litigation request consolidation for trial, the J.P.M.L. should be authorized to initiate proceedings to consolidate the cases for trial and direct the parties to show cause why the actions should not be consolidated.

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167 See In re Air Crash Disaster Near Hanover, N.H., 342 F. Supp. 901 (D.N.H. 1971); see also H.R. 4159, 98th Cong. (1983) (proposing consolidation of cases for trial on the issue of liability only).
for trial. When consolidation proceedings are initiated by the J.P.M.L., it should be permitted to consolidate cases for trial only upon a determination that such consolidation will significantly advance the interest of justice and will be for the convenience of the parties and witnesses.

2. Subsequent Reconsideration of Trial Consolidation

If upon initial review, the J.P.M.L. does not consider consolidation for trial warranted by the facts, the J.P.M.L. should be authorized to reconsider such consolidation during and at the conclusion of pretrial proceedings. The statute should provide that during pretrial proceedings, any party to the litigation may request reconsideration of a motion to consolidate for trial; at the conclusion of pretrial proceedings, any party or the transferee judge may request reconsideration. The J.P.M.L. should not be authorized to initiate reconsideration proceedings because once pretrial proceedings are underway the parties and the transferee judges have intimate knowledge of the matter and are better positioned to recommend reconsideration. The final determination for trial consolidation should always rest with the J.P.M.L.

(a) Subsequent Reconsideration Upon Motion by a Party

If reconsideration is requested by a party to the litigation, the J.P.M.L. should adhere to the same levels of judicial efficiency and parties' convenience as would be required for initial consideration. When a party requests that the J.P.M.L. reconsider consolidating the actions for trial, and all other parties consent, the J.P.M.L. should order the cases transferred and consolidated for trial upon a determination that the consolidated trial advances the interest of justice. If, however, one of the parties still oppose the consolidation, the parties should be required to submit briefs to the J.P.M.L. in support of their position concerning the trial consolidation, and the J.P.M.L. may then, after discretionary oral arguments, transfer and consolidate cases for trial only upon a finding that the

168 J.P.M.L. Rule 11 Show Cause Orders (a) states that "[w]hen transfer of multidistrict litigation is being considered on the initiative of the Panel pursuant to 28 U.S.C. § 1407(c)(1), an order shall be filed by the Clerk of the Panel directing the parties to show cause why the action or actions should not be transferred for coordinated or consolidated pretrial proceedings." R. PROC. J.P.M.L. 11(a).
transfer significantly advances the interest of justice and does not inconvenience the parties or witnesses.

(b) Reconsideration Upon Motion by the Transferee Judge

If reconsideration is requested by the transferee judge, the J.P.M.L. should grant consolidation only upon a determination that such consolidation will significantly advance the interest of justice and will be for the convenience of both the parties and the witnesses. When reconsideration is initiated by the transferee judge, the J.P.M.L. should consolidate cases only upon the same showing of judicial efficiency vis-à-vis parties' convenience, as when initial consideration is initiated by the J.P.M.L.

CONCLUSION

In 1991, one commentator wrote, "the Supreme Court has not squarely confronted the propriety of the § 1404-§ 1407(a) combination. A prohibiting decision by the Court would probably result in expedited congressional action; the impact would be nationwide." InLexeconis that prohibiting decision, and its impact will be felt nationwide. Currently, there are consolidated M.D.L. civil actions pending in nine federal circuits. Now that the Supreme Court has ruled that self-transfer violates § 1407(a), Congress should act with a sense of urgency to restore the judicial efficiency benefits which may be achieved by M.D.L. trial consolidation. Had the Supreme Court issued a prospective ruling banning self-transfer, it could have facilitated an orderly resolution to M.D.L. cases already consolidated for trial, and urged Congress to enact amendments to § 1407 to permit the J.P.M.L. to consolidate cases for trial. As it stands, Congress, on its own initiative, must act quickly to do so.

Noreen Dever Arralde

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169 Rhodes, supra note 2, at 752 (citation omitted).

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