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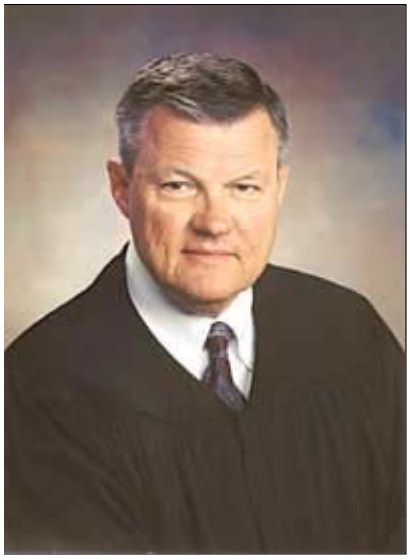
Chair of Judicial Panel Sees Role as Gatekeeper

Judge Wm. Terrell Hodges (M.D. Fla.) has served as chair of the Judicial Panel on Multidistrict Litigation since December 1, 2000. He was chair of the Executive Committee from October 1, 1996, to October 1, 1999, and a member of the Committee beginning in 1994. He was only the second district judge in the history of the Conference to be appointed chair of the Executive Committee. He also served on a variety of other Conference committees, including three years as chair of the Advisory Committee on Criminal Rules. Hodges was the recipient of the 21st Annual Devitt Distinguished Service to Justice Award.



Judge Wm. Terrell Hodges (M.D. Fla.)

Q: How many judges sit on the Judicial Panel on Multidistrict Litigation (JPML) and how are the members chosen?

A: The multidistrict litigation statute (28 U.S.C. § 1407) provides that the Panel should consist of seven members, circuit or district judges, no two of whom may come from the same circuit, so that some geographic dispersion is provided. The appointments are made by the Chief Justice and the members serve at his pleasure.

Several years ago, the late Chief Justice Rehnquist revised his approach to the panel and appointed the present membership to staggered and stated terms. Prior to that time, the appointments had all been open-ended and some members, usually senior judges, had served for quite a few years. Now the Panel consists of active as well as senior judges and the maximum term is a term of seven years and then we rotate off.

Q: What is the process for deciding which cases will come to the Panel?

A: There are two principle ways. A docket is created and cases are initially considered for centralization only on the motion of one of the parties in one or more of the constituent actions. Specifically, a party can file a motion under the statute to have a group of cases transferred to a single judge in a given district for pretrial management.

Then, if the Panel decides to grant the motion and centralize the cases in a transferee district, related cases may later be filed, actions we refer to as tag-along cases. If those cases are deemed to be substantially similar to the ones already pending and centralized in the Multidistrict Litigation docket, an order is entered

transferring those cases into the centralized proceedings in the transferee court.

Under our present practice, we normally conduct oral argument on the motions for initial centralization—motions that would, if granted, result in the creation of a new docket. Then afterward, with respect to tag-along actions, unless some unusual question is presented, those are considered by the Panel on the briefs and papers of the parties and oral argument is not heard.

Of course, once a docket is created, our rules provide that it is the duty of counsel to bring the attention of the Panel to any other cases that might constitute tag-along actions. But the initial process is triggered exclusively by the motions of the parties.

The Panel has traditionally met and sat to hear arguments and decide matters that have come before it on the last Thursday of every other month. It's a full day's work, and its probably a week's work in preparing for each session.

Q: What are some of the advantages of centralizing a group of cases before one judge?

A: Well, of course some parties want centralization; some don't. It depends on the individual case. The statute itself is designed to provide the benefit of centralized management and a reduction in duplicative discovery, for example, or the waste of judicial resources by having two or more judges in different districts ruling on essentially the same issues in the same litigation. By centralization, then, the discovery can be managed in an orderly way by the transferee judge. It also reduces the amount of judicial time that's required by the overall litigation—at least that's one of the objectives. It also minimizes or reduces the potential for inconsistent adjudication on the same issue in different districts, which can result in considerable confusion in the litigation and in the law itself.

Q: What kinds of cases is the JPML currently handling?

A: From the Panel's inception, our dockets have involved those kinds of cases that tend to produce mass litigation in different districts, for example, pharmaceutical claims. Presently, the high profile example would be the Vioxx cases that are being managed by Judge Eldon Fallon in New Orleans as the transferee judge.

Patent cases frequently come before the Panel because there will be infringement actions pending in two or more districts involving the same patent.

Presently, we have a number of active dockets involving sales practice claims in the insurance industry. Air crash disasters frequently produce multiple claims in multiple jurisdictions. Unfortunately, we always have two or more of those dockets pending. Securities and ERISA cases that are generated by corporate collapse on a large-scale basis frequently come before the Panel; we have a number of those.

Bear in mind that we don't become involved, at all, in the merits of the claims or disputes in multidistrict litigation. We really are gatekeepers, deciding whether certain litigation should be let through the gates, so to speak, and, if so, where it should go. After that, it's entirely within the prerogative of the transferee judge to manage the litigation and make all procedural and substantive rulings the case might require in a pretrial context.

Q: If the Panel declines to centralize certain cases, can the cases be considered again at a later date?

A: Yes. As a matter of fact, we did have that issue on a recent docket. Some cases had been filed two or three years ago, and at the time there were only two cases pending. Normally, if there's only a small number of cases, two or three in different districts, and it doesn't appear that there are going to be any more, and there are some differences between those cases, we would probably not centralize them. We had done that in this case. But recently, a number of other cases had been filed. I think when we next considered the matter, there were seven cases matter, there were seven cases pending in various districts. So, confronted with that circumstance, we changed our minds and entered an order centralizing the cases.

Q: When you vote to centralize a number of cases, does it have to unanimous?

A: No, the statute provides that a vote of four members of the Panel is required to take action. However, we have a unique record on the Panel. So long as I've served on it, we have not yet encountered any decision that wasn't determined unanimously. We had one abstention one time, but it was not a dissent. We come to a consensus rather well on the Panel.

Q: How does the JPML decide which judge will handle a centralized case?

A: There aren't any hard and fast rules about that; it depends on the circumstances of the case. Normally, we would first look to those judges who already have pending before them one or more of the constituent actions that would be involved in the multidistrict docket. If we see that there is a judge in a given district who already has one or more of these cases, or indeed has more of them on his or her own docket than other judges, that would identify that judge as a probable transferee judge, if he or she would consent.

But we also consider such things as the experience of the judge. We wouldn't normally ask a brand-new judge to take on a multidistrict litigation. Not that they couldn't handle it, but that it would be more of an imposition probably on that judge in preparing for the litigation than it would on judges with more experience. And we also look at the workload of the district and the transferee judge. If it's a heavily burdened district, then the transfer of a case there could impose an inordinate burden on the clerk because the handling of a multidistrict docket does increase not only the work of the court and the judge, but especially the clerk. And we would look at the judge's caseload. If it appears that the judge already has a substantial caseload, so that it would be an imposition or a burden to ask him or her to take on the extra work involved, then we might look elsewhere.

Presently, we have something over 185 district judges all over the country acting as transferee judges, handling multidistrict litigation. That fact is little known. Those judges are performing a service for which they are entitled to substantial commendation because they're not getting an extra penny in pay. It's all volunteer work, done out of a desire to be of service and to have a professional challenge, which this kind of litigation brings.

Q: In 1998, the Supreme Court held in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, that explicit statutory authority was absent for judges, to whom a case has been transferred by the Panel, to retain it for trial or transfer it to another district. How has Congress responded to the Lexecon decision?

A: That's a timely question. The House has passed H.R. 1038, which would effectively over-rule Lexecon by statutory amendment. That is possible, of course, because Lexecon involved a case of statutory construction and not a constitutional principle. The Supreme Court, itself, in effect suggested that perhaps the remedy for the result of the decision would be an amendment to the statute.

I'm informed that the bill has passed both the House and the Senate at different times, but never in a way in which it would become law. The House has passed it again this time and it is about to be introduced, I think, in the Senate. We're hopeful that in this Congress the legislation will pass and that Lexecon will be a thing of the past.

It's hard to know how many multidistrict dockets actually have been affected in some substantial way by the requirement of Lexecon that constituent actions be remanded to the transferor courts as soon as the case is ready for trial. A number of devices, frankly, have been utilized by innovative judges since Lexecon to minimize its effect. For example, Judge Thomas W. Thrash Jr. in Atlanta, is handling a multidistrict docket for us. Some of the actions have been transferred to him from one of the districts in Texas. When the cases were ready for trial, rather than revisit that litigation on the judges in Texas, he volunteered to go to Texas through designation by the chief judge of the circuit and the Chief Justice to hold court there, and actually try the case.

Q: Has your perception of the JPML changed since you've become chairman?

A: The way it worked out, I was essentially appointed as chairman of the Panel

when I first joined it. And I must say, while I was—I thought—familiar with the work of the Panel and the administration of the statute and so forth, I was very surprised by the volume of work that the Panel does. Everyone is familiar with the high-profile cases such as Vioxx, which I mentioned, or the asbestosis cases, or others of similar scope. But the fact is that every session, we will have a very full calendar of new cases to be considered.

We have space in the Thurgood Marshall Building in Washington, DC, and a staff of about 25 employees, including five attorneys. It's a very substantial and time-consuming operation administratively, quite apart from the judicial work of the members of the Panel itself. Frankly, this was something that caught me entirely by surprise. And the work of the Panel continues at the same, if not even a greater level, now than when I came on.

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