

CORRECTED

JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

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PATRICIA B. HOWARD
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THE JUDICIAL PANEL
ON
MULTIDISTRICT LITIGATION

MULTIDISTRICT LITIGATION INVOLVING)
BUTTERFIELD PATENT INFRINGEMENT)

DOCKET NO. 29

OPINION AND ORDER

FOR ALFRED P. MURRAH, CHAIRMAN, AND JOHN MINOR WISDOM,
WARD WEINFELD, EDWIN A. ROBSON, WILLIAM H. BECKER, AND
ANLEY A. WEIGEL, JUDGES OF THE PANEL

SEPH S. LORD, III, JUDGE OF THE PANEL

This litigation involves the Butterfield Patent
. 2,544,246. There are presently pending 41 actions
seeking damages for infringement in 19 different districts
and plaintiff has moved under Title 28 U.S.C. Section 1407
for transfer and consolidation of pretrial proceedings. There
seems to be little doubt that several questions of fact are
common to all the lawsuits. The issues of the scope of
the patent, and its validity, including questions of obviousness,
prior art and commercial success are undoubtedly
common to all cases. Additionally, it appears that since
plaintiff waited for eight years and over a year after the
expiration of the patent to bring suit, the question of laches
will be a common question. Finally, questions relating to

notice of infringement as required by Title 35 U.S.C. Section 287 will be common. We have concluded that these are "actions involving one or more common questions of fact" within the requirement of Section 1407.

Those defendants resisting transfer^{1/} do so on one or more of several grounds. All argue that the question of infringement will be peculiar to each defendant and it seems likely that this is so. If it is, the transferee judge can of course separate this issue from the consolidated pretrial proceedings and leave it for local handling. Some argument is made that it would be inconvenient for defendants to travel to a forum other than their own to submit to depositions by plaintiff. This argument, however, has no real force, since if serious inconvenience becomes apparent, the transferee judge has it within his power to order the taking of depositions of defendants' personnel in their own locality.

The most serious argument made by many defendants is that they are small businesses, their volume is small and the recoverable damages so comparatively minor that transfer and consolidation would force on them a disproportionate financial burden. We think, however, that this fear is more fanciful than real. Experience has shown that where, as here, common questions of fact exist in a large number of cases,

^{1/} All defendants appearing at argument oppose transfer, but not all defendants appeared.

it is not only expedient, but less expensive for each individual defendant to join in the selection of lead counsel to handle the consolidated discovery depositions. Thus, all defendants receive the benefit of the consolidated depositions without the necessity of engaging individual local counsel in the transferee court and without the necessity of extensive travel by their own local counsel.

Aside from the undeniable existence of common questions of fact, there is another compelling reason for transfer and consolidation. It seems clear that "pretrial proceedings" include the power of the transferee judge to grant motions for summary judgment. See H.R. Report No. 1130, accompanying S.159; and cf. In Re Plumbing Fixture Cases, 298 F. Supp. 484 (JPML, 1968); In Re Postage Regulation Litigation, 298 F. Supp. 1326 (JPML, 1969). Here, if discovery on the issues of validity, scope, statutory notice or laches reveals no dispute of any material fact, disposition of the litigation by summary judgment may be appropriate. We of course intimate no opinion on the merits of any such motions. Nevertheless, the possibility of summary disposition certainly lurks in the background. If the litigation is transferred, the result on any such motion would be the same for all parties and thus transfer would be "an appropriate means of avoiding injury to like parties caused by inconsistent judicial treatment." In Re Postage Regulation Litigation, 298 F. Supp. 1326 (JPML, 1969). On balance, and considering all the factors involved,

we are convinced that transfer and consolidation of pretrial proceedings will promote the just and efficient conduct of these actions.

The plaintiff originally sought transfer to the Northern District of California, but suggested at argument that the transferee court should be on the East Coast. However, there are four cases presently pending in the Northern District of Illinois and already assigned to the Honorable Hubert Will. We have no doubt that he is familiar with the litigation and its needs. We are advised that his docket is relatively current and that he is willing to accept the transfer of these cases. Since Chicago is geographically central, we think the convenience of the parties will best be served by transfer to Judge Will in the Northern District of Illinois.

There are three related actions in the Central District of California which are not included on Schedule A.^{2/} Pretrial proceedings in those three cases has progressed to such a point that transfer at this time might not result in the promotion of their just and efficient conduct. They are therefore *excluded* from this order of transfer. In Re Grain Shipment Cases, 300 F. Supp. 1402, 1405 (JPML, 1969); In re Protection Device Cases, 295 F. Supp. 39, 40 (JPML 1968).

IT IS THEREFORE ORDERED that the actions listed on Schedule A pending in other districts be and the same are hereby transferred to the United States District Court for the Northern

^{2/} Butterfield v. Obrig Distributors, CA No. 69-871-FW; Butterfield v. Calcon Lab., CA No. 69-958-FW; Butterfield Danker & Wohlk Associates, CA No. 69-997-FW.

District of Illinois and with the consent of that court these actions are assigned to the Honorable Hubert L. Will for coordinated or consolidated pretrial proceedings under 28 U.S.C. Section 1407.

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