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## The Most Powerful Federal Venue Statute of All

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In 2003, with the stroke of a Judge's pen, the Northern District of Ohio ("NDOH") became the new venue for what would eventually amount to over 450 federal cases that were originally filed in other federal courts.

Even more important, the Judge's Order made clear that any related cases would be similarly transferred. Thus, to save time, another 12,000 plaintiffs simply filed their cases directly in the NDOH, rather than federal courts around the country that were otherwise closer or more convenient. Who was the Judge, what did the Order say, and why, exactly, did this happen?

The two-page Order, *In re Welding Rods Prods. Liab. Litig.*, 269 F.Supp.2d 1365 (J.P.M.L. 2003), was signed by Judge William Terrell Hodges in his capacity as then-Chairman of the United States Judicial Panel on Multidistrict Litigation (commonly known as "the MDL Panel"). As MDL Panel Chairman, Judge Hodges had the authority to invoke the most powerful federal venue statute of them all: 28 U.S.C. §1407.

The power of this statute is revealed by the facts recited by Judge Hodges in his Order: (1) there were only three *Welding Fume* cases filed in federal courts anywhere, and none was in Ohio – two were in Louisiana and one was in Mississippi; (2) while a few of the defendants were Ohio Corporations, the majority of the defendants were not; and (3) for many of the soon-to-be-transferred cases, it was clear that venue in the NDOH was otherwise improper under 28 U.S.C. §1391(a).

Nonetheless, Judge Hodges ordered transfer to Judge Kathleen M. O'Malley of not only all three existing *Welding Fume* cases, but all future cases as well! Not only that, but the basis for his Order was simply that the three existing *Welding Fume* cases "involve common questions of fact," and a summary conclusion that "centralization . . . in the Northern District of Ohio will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation." Not a very high threshold!

Yet Judge Hodges' conclusion has served to send literally millions of litigation-related dollars into the hands of Cleveland attorneys, hotels, restaurants, and – yes – the Clerk's office at the federal court.

What was Congress thinking when it passed this most powerful venue statute in 1967? The answer is, Congress was thinking Chief Justice Earl Warren was right – certain types of cases were causing a huge drain on federal courts, and there had to be a better way to deal with them.

In particular, as Justice Warren explained, there are certain instances where dozens or hundreds or even thousands of people are injured by essentially the same conduct, such as an airplane crash or an employer's overtime-pay policy. If those thousands of injured people all file cases in different federal courts around the country, the result is a procedural mess: different federal judges will set out various and probably-conflicting discovery deadlines and rules, plaintiffs will fight each other for access to the defendants, defendants will be overwhelmed with subpoenae duces tecum, and federal courts will appear unable to do what they are supposed to be best at – resolving the biggest and most complicated of disputes.

Justice Warren urged that the "better way" was to allow centralization of all the related cases in front of one federal judge, at least for pretrial purposes. By allowing transfer of venue of all cases to a single court, there could be a huge savings of total litigation effort by the parties, as well as conservation of judicial resources. Who knows – the single judge might even obtain a global settlement.

Congress liked Justice Warren's idea, and the "MDL Statute" is the result. As noted, the requirements for transfer under §1407 are much less onerous than the "normal" venue transfer statute, §1404. For example, while §1404 provides a case must be to transferred to a district "where it might have been brought" originally, §1407 allows the MDL Panel to transfer related cases to any district at all – even one where there is not a related case already pending.

While §1404 requires a court to consider a string of factors before ordering transfer of venue, including the plaintiff's initial choice and the availability of process to compel attendance of unwilling witnesses, the MDL Panel need only determine that transfer of venue "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." Somewhat oddly, however, §1407 allows transfer only for "pretrial proceedings" – if a case doesn't settle and the plaintiff does not waive venue, the case must be transferred back to the "transferor court" where it was originally filed, for trial.

The MDL Panel enters an Order invoking §1407 about 100 times each year, creating a new MDL that may involve only a handful of cases or, as could eventually occur in the *Toyota* MDL, hundreds of thousands of cases. Often, the most fought-over aspect of the MDL Panel's decision is not *whether* it should centralize a host of related cases in front of one judge, but *where* the centralization should occur.

The reason for the fight, of course, is the millions of dollars referred to above. (After the Panel has ordered centralization, the next fight is amongst counsel for leading roles in the litigation, for the same reason.)

The Northern District of Ohio has been blessed with attention from the MDL Panel, and is currently the "transferee forum" for ten different MDL cases. In comparison, all of the federal districts courts in Michigan, Tennessee, and Kentucky *combined* are overseeing 17 MDLs. This statistic is a reflection of the high caliber of judicial officers we enjoy.

The table below lists the ten current NDOH MDLs.

| Presiding Judge | MDL Case Number and Name | Cases Pending | Total Cases |
|---|---|---|---|
| Carr | MDL-1953, In re: Heparin Prods. Liab. Litig. | 239 | 264 |
| Economus | MDL-1561, In re: Travel Agent Commission Antitrust Litig. | 1 | 3 |
| Gaughan | MDL-2044, In re: Vertrue Inc. Marketing and Sales Practices Litig. | 13 | 13 |
| Gwin | MDL-2001, In re: Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig. | 9 | 9 |
| Katz | MDL-1742, In re: Ortho Evra Prods. Liab. Litig. | 285 | 1,459 |
| Oliver | MDL-2003, In re: National City Corp. ERISA Litig. | 16 | 21 |
| O'Malley | MDL-1490, In re: Commercial Money Center, Inc., Equipment Lease Litig. | 25 | 38 |
| O'Malley | MDL-1535, In re: Welding Fume Prods. Liab. Litig. | 3,881 | 12,658 |
| Polster | MDL-1909, In re: Gadolinium Contrast Dyes Prods. Liab. Litig. | 495 | 580 |
| Polster | MDL-2066, In re: Oral Sodium Phosphate Solution-Based Prods. Liab. Litig. | 98 | 98 |

The formation of each of the MDL cases in this list began with a simple motion seeking transfer of venue. The final result can be stunning, such as the $4.1 Billion settlement in the *Vioxx* MDL. The great scope and effect of 28 U.S.C. §1407, and the relatively easy transfer standard it sets, reveals that it is, indeed, the most powerful federal venue statute of them all.