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Location, Location, Location: A Proposal for Centralized Review of the Now Largely Unreviewable Choice of Venue in Federal Litigation

INTRODUCTION

In real estate, the saying goes that the three most important things are: location, location, and location.[1] The same seems to apply to litigation. Lawyers and clients seem to believe, for better or for worse, that their fate lies in the choice of the right court location.

For that reason, litigants "race" to the courthouse. The early skirmishing in major commercial litigation is about where the case

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[1] For an interesting piece on the origin of the phrase, see William Safire, *On Language: Location, Location, Location: Undisclosed Place of Phrase's Origin*, N.Y. TIMES MAG., June 28, 2009, at MM14, *available at* http://www.nytimes.com/2009/06/28/magazine/28FOB-onlanguage-t.html.

can be filed. Good commercial lawyers draft forum selection clauses for all of their contracts, which in turn has spawned decades of litigation over the enforceability of such clauses.[2] Patent litigators rush to file in federal courts that are seen as friendlier to patent plaintiffs.[3] Removal of cases to federal court (and remands back to state court) has become a cottage industry. New laws, such as the Class Action Fairness Act (CAFA) of 2005,[4] have made removal and remand, at least in the putative class action context, into something of an art form.

Litigants (and their lawyers) assume that the choice of the court, judge, and jury is critical to their success. They may or may not be right, but the importance attributed to "forum selection" continues unabated. Moreover, the actual importance of forum to chances of success in litigation has at least some empirical support in scholarship discussing the issue.[5]

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2 *See generally* Erin Ann O'Hara, *The Jurisprudence and Politics of Forum-Selection Clauses*, 3 CHI. J. INT'L L. 301 (2002) (discussing forum selection clauses in relation to international commercial law).

3 *See, e.g.*, KINNEY & LANGE, P.A., INTELLECTUAL PROPERTY LAW FOR BUSINESS LAWYERS § 4:3 (2010) ("While forum shopping has been considerably reduced due to the creation of the Federal Circuit, venue remains an important and often hotly-contested question in patent infringement suits. Parties often perceive a 'home-court' advantage, largely associated with travel inconvenience for the parties and their counsel at hearings and trial. A home-court advantage may also be perceived based on favoritism of the judge and jury towards a local entity and employer. The existence of declaratory judgment actions for patent infringement often results in a 'race to the courthouse' between the plaintiff and the defendant.").

4 Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 [hereinafter CAFA] (codified in scattered sections of 28 U.S.C. (2006)).

5 *See, e.g.*, Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1511–12 (1995) ("The most striking result that our more comprehensive data set yielded is the dramatic drop in plaintiffs' rate of winning after transfer of venue. In recent federal civil cases, the plaintiff wins in 58% of the nontransferred cases that go to judgment for one side or the other, but wins in only 29% of such cases in which a transfer occurred."). *But see* David E. Steinberg, *Simplifying the Choice of Forum: A Response to Professor Clermont and Professor Eisenberg*, 75 WASH. U. L.Q. 1479, 1486–87 (1997) (noting that the twenty-nine-percent difference in plaintiff win rate calculated by Professors Clermont and Eisenberg included default judgment cases). Additionally, Professor Steinberg noted of Professors Clermont and Eisenberg's calculation that "if one excludes default judgments, plaintiffs win 41% of non-transferred cases and 27% of transferred cases." *Id.* at 1486. Professor Steinberg further opined that "[t]he 14% difference in plaintiff win rates that occurs after excluding default judgments is a good deal less dramatic than the 29% difference that occurs when a researcher includes default judgment cases in the sample," and therefore that, "by including default judgments in their study, Professor Clermont and Professor Eisenberg exaggerated the effect of transfers on the outcome of contested cases. As the effect of forum on outcome becomes less significant, current transfer practice becomes less plausible." *Id.* at 1487.

The following are some of the typical ways in which choice of forum or venue comes up in civil litigation in federal courts:

(1) Motions to change venue made under 28 U.S.C. § 1404[6] are often preceded by a race to the courthouse, especially in patent litigations, where one party files an infringement litigation in one district, and the opposing party files a dueling declaratory relief action in a different district;[7]

(2) Multidistrict litigation consolidation efforts under the Multidistrict Litigation Act;[8]

(3) Common-law forum non conveniens motions;[9] and

(4) Removal and subsequent challenges to removal (including remand motions and special rules for appeals of decisions on remand motions under CAFA).[10]

Change of venue motions under 28 U.S.C. § 1404, enacted in 1948 and entitled "Change of Venue," in particular have become commonplace and pervasive in federal commercial litigation. Section 1404(a) states:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.[11]

As many scholars have detailed over the past fifty-plus years, § 1404 motions have spawned the creation of an enormous body of case law, largely at the district court level, which attempts to interpret and

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6 28 U.S.C. § 1404 (2006).

7 *See, e.g.*, Micron Tech., Inc. v. Mosaid Techs., Inc., 518 F.3d 897 (Fed. Cir. 2008). In *Micron Technology*, the accused infringer filed an action for declaratory relief in the District Court for the Northern District of California, and the patentee filed an infringement action in the District Court for the Eastern District of Texas. *Id.* at 900. The patentee filed a motion to dismiss the Northern California action for lack of subject matter jurisdiction under the Declaratory Judgment Act, which the court granted. *Id.* On appeal, the Federal Circuit reversed, concluding that the district court abused its discretion in declining to exercise declaratory judgment jurisdiction. *Id.* at 905.

8 28 U.S.C. § 1407 (2006).

9 *See, e.g.*, Stowell R.R. Kelner, Note, *"Adrift on an Unchartered Sea": A Survey of Section 1404(a) Transfer in the Federal System*, 67 N.Y.U. L. REV. 612, 614 (1992) ("As a general matter forum non conveniens, is a common law transfer doctrine used when the forum with the minimum acceptable level of convenience is outside the federal system.").

10 CAFA § 5, Pub. L. No. 109-2, 119 Stat. 4, 12 (2005) (providing that CAFA's provision regarding appealability of decisions on motions to remand is 28 U.S.C. § 1453 (2006)).

11 28 U.S.C. § 1404.

apply § 1404's discretionary mandate.[12] In the patent litigation context, given the Supreme Court's recent relaxation of the standard for a district court to exercise subject matter jurisdiction over an action in which an accused infringer is seeking a declaratory judgment of noninfringement or invalidity, more dueling patent lawsuits will likely be filed[13]—increasing the likelihood and frequency of § 1404 venue motions and decisions.[14]

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[12] *See generally* Clermont & Eisenberg, *supra* note 5 (arguing that the statistics regarding plaintiff win rates show that § 1404(a) is important in combating forum shopping); Irving R. Kaufman, *Further Observations on Transfers Under Section 1404(a)*, 56 COLUM. L. REV. 1 (1956) (discussing the development of § 1404(a) during the first eight years of enactment); Steinberg, *supra* note 5 (disagreeing with Professors Clermont and Eisenberg's argument that § 1404 transfers lead to more accurate and fair judicial outcomes); Jeremiah L. Hart, Note, *Supervising Discretion: An Interest-Based Proposal for Expanded Writ Review of § 1404(a) Transfer of Venue Orders*, 72 OHIO ST. L.J. 139 (2011) (discussing factors contributing to whether an appellate court should grant a writ of mandamus in reviewing transfer orders under § 1404(a)); Kelner, *supra* note 9 (surveying the problems resulting from district courts' expanded discretion to grant transfer motions under § 1404(a)).

[13] Specifically, in *Micron Technology*, the Federal Circuit discussed the Supreme Court's decision in *MedImmune, Inc. v. Genentech, Inc.* and commented,

> Whether intended or not, the now more lenient legal standard [for declaratory judgment jurisdiction enunciated in *MedImmune, Inc.*] facilitates or enhances the availability of declaratory judgment jurisdiction in patent cases. The resulting ease of achieving declaratory judgment jurisdiction in patent cases is accompanied by unique challenges. For instance, the ease of obtaining a declaratory judgment could occasion a forum-seeking race to the courthouse between accused infringers and patent holders.

Micron Tech., Inc. v. Mosaid Techs., Inc., 518 F.3d 897, 902 (Fed. Cir. 2008) (citations omitted).

[14] Indeed, in *Micron Technology*, the Federal Circuit recognized,

> District courts, typically the ones where declaratory judgment actions are filed, as occurred in the present controversy, will have to decide whether to keep the case or decline to hear it in favor of the other forum, most likely where the infringement action is filed. Instead of relying solely on considerations such as tenuousness of jurisdiction, broadness of case, and degree of vestment, as in this case, or automatically going with the first filed action, the more appropriate analysis takes account of the convenience factors under 28 U.S.C. § 1404(a). Indeed, in this case a motion to transfer accompanied the motion to dismiss which the court granted. The trial court did not reach the motion to transfer.

Id. at 904.

Ultimately, the Federal Circuit held that the district court abused its discretion in failing to conduct this § 1404(a) analysis in deciding whether to exercise declaratory judgment jurisdiction. *Id.* at 905. Tellingly, as the Federal Circuit noted, the patentee filed *both* a motion to dismiss the Northern California action *and* a motion to transfer venue to the Eastern District of Texas. *See id.* at 904. The District Court for the Northern District of California granted the motion to dismiss and did not rule on the transfer motion. Micron Tech., Inc. v. Mosaid Techs., Inc., No. C 06-4496 JF (RS), 2006 WL 3050865, at *3 (N.D. Cal. Oct. 23, 2006). Ironically, if the district court had instead granted the patentee's

Decisions regarding when a § 1404 transfer is appropriate, and, concomitantly, the weight to be ascribed to a plaintiff's initial choice of forum are inconsistent and vary widely.[15] The result: uncertainty and inconsistency in how to apply § 1404 across the country.

Despite the inconsistent case law that has developed, the continued uncertainty that envelopes § 1404 jurisprudence, and the importance of the initial choice of venue for the entire remainder of the case, current federal law allows few avenues for meaningful, interlocutory appeal of a district court's decision to grant or deny a motion to change venue. Instead, the now well-established final judgment rule[16] makes transfer grants or denials under § 1404 a matter that cannot generally be appealed or reviewed until the case is over (at which time the issue is somewhat moot).[17]

Even the decision on venue is subject to a short circuit. Specifically, even the court making the decision may not be able to reconsider its own decision because once the case is transferred to a

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motion to transfer to the Eastern District of Texas and not substantively ruled on the motion to dismiss, the court's decision would not have been immediately appealable as of right, as discussed herein. *See infra* note 17.

[15] *See* 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3847 (3d ed. 2007) ("Federal courts differ in their statements as to what constitute the relevant factors for transfer of venue." Moreover, "[t]he [relevant] cases . . . reflect the wide variety of verbal formulations federal courts use in evaluating a Section 1404(a) motion but also show their commonality of analysis."); Hart, *supra* note 12, at 150 ("Statements from the federal courts are not uniform regarding which factors should be balanced in the transfer analysis."); Kelner, *supra* note 9, at 614–16 ("The already large number of factors used to gauge the appropriateness of a transfer grows each year . . . . The lack of consistency among the district courts as to which factors they should apply and how to weigh each factor compounds the problem of increased litigation. . . . Because § 1404(a) embraces so many different factors as relevant to a transfer motion, defendants almost always have grounds to argue in good faith that transfer is appropriate . . . . [B]ecause district courts weight the many applicable factors inconsistently, it is hard to predict whether a transfer motion will be successful." (footnotes omitted)).

[16] *See* 28 U.S.C. § 1291 (2006) ("The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all *final* decisions of the district courts of the United States . . . ." (emphasis added)).

[17] *See, e.g.*, WRIGHT, MILLER & COOPER, *supra* note 15, at § 3855 ("It is entirely settled, as the numerous [pertinent] case[s] . . . make abundantly clear, that an order granting or denying a motion to transfer venue under Section 1404(a) of Title 28 of the United States Code is interlocutory in character and not immediately appealable under Section 1291 of the same Title."). Further, Wright, Miller, and Cooper note that while "the order can be reviewed for an abuse of discretion on appeal from a final judgment in the action, . . . not surprisingly, it is very unlikely to constitute reversible error at that mature stage of the case." *Id.* (footnote omitted).

new court and the transferee court opens a docket (which now happens in an electronic second), the transferring court cannot revisit the issue—even if it knows or admits it made a mistake.[18] Nor, absent some creative litigating by the party opposing the initial transfer, can the transferee court review the decision to transfer venue rendered by the transferring court.[19]

Faced with the final judgment rule, the only meaningful option for an interlocutory appeal afforded to litigants who find themselves on

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[18] Absent such immediate transfer, a motion for reconsideration, or for "relief from a judgment or order," might otherwise be brought under Rule 60 of the *Federal Rules of Civil Procedure*. Specifically, FED. R. CIV. P. 60(a) relates to how courts may correct clerical mistakes and omissions and provides:

> The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

Additionally, FED. R. CIV. P. 60(b) relates to the grounds for relief from a final judgment, proceeding, or order and provides:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

But, once a district court enters an order transferring the litigation to another venue and the transferee court opens a docket for the transferred case, the transferring court may lose jurisdiction over the case. *See* Lou v. Belzberg, 834 F.2d 730, 733 (9th Cir. 1987) ("[Some] circuits have held that a section 1404 transfer ends the jurisdiction of . . . the transferor court . . . when the motion is granted and the papers are entered in the transferee court's records."); Benjamin v. Bixby, No. 1:08-CV-1025 AWI DLB, 2009 WL 2588870, at *1 (E.D. Cal. Aug. 18, 2009) (holding that the transferor court lacked power to hear a motion for reconsideration after the transferee court had docketed the case).

[19] Specifically, scholars have suggested that, once a case is transferred, to set up the transfer dispute for an interlocutory appeal or to preserve the issue for later appeal after a final judgment, the party opposing the initial transfer can file a new motion to transfer with the transferee court to retransfer the case back to the original venue. *See, e.g.*, WRIGHT, MILLER & COOPER, *supra* note 15, at § 3855 ("[I]f the transfer was made from a district court in one circuit to a district court in another, the court of appeals in the latter circuit cannot directly review the action of the first district in ordering the transfer. The question may be preserved by making a motion in the transferee court to transfer the case back to the original forum. Denial of that motion is reviewable on appeal from the final judgment, although reversal still will be unlikely." (footnote omitted)). From a practitioner's perspective, however, this strategy may be perceived as a delay tactic by the transferee court and may be ill-received.

the losing end of a § 1404 change of venue motion is a petition for writ of mandamus or prohibition,[20] an extraordinary writ through which a litigant petitions a federal circuit court of appeals for an order requiring a district court to transfer the case to a different venue (i.e., mandamus) or an order prohibiting a district court from effectuating the transfer (i.e., prohibition).[21]

While federal circuit courts of appeals have granted such writs to review and reverse § 1404 decisions, such relief is extraordinary. As the U.S. Court of Appeals for the Federal Circuit recently stated, "The remedy of mandamus is available only in extraordinary situations to correct a clear abuse of discretion or usurpation of judicial power."[22]

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[20] 28 U.S.C. § 1651(a) provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (2006). Rule 21 of the *Federal Rules of Appellate Procedure*, in turn, sets forth the procedural requirements for filing a petition for writ of mandamus or prohibition. FED. R. APP. P. 21.

[21] An alternative to a writ of mandamus might be 28 U.S.C. § 1292(b). That section states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . . .

28 U.S.C. § 1292(b) (2006). As a practical matter, however, it is unlikely that a district court would agree to certify a § 1404 decision as one that "involves a controlling question of law" or would "advance the ultimate termination of the litigation" as § 1292(b) requires.

[22] *In re* Link A Media Devices Corp., 662 F.3d 1221, 1222 (Fed. Cir. 2011) (citing *In re* Calamar, Inc., 854 F.2d 461, 464 (Fed. Cir. 1988)); *see also* 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3933 (2d ed. 1996) ("Justice Brandeis described the discretionary nature of mandamus in the following words: 'Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. . . . Although classed as a legal remedy, its issuance is largely controlled by equitable principles.' [Justice Brandeis's] view is frequently repeated, often mimicking the equitable principle that extraordinary relief should be denied when a lesser remedy is adequate." (citation omitted)); 52 AM. JUR. 2d *Mandamus* § 4 (2011) ("Mandamus is an unusual and extraordinary remedy which the courts issue only as a last resort. It is not a common means of obtaining redress and is available only in rare cases when the parties stand to lose their substantial rights." (citations omitted)).

As such, instances in which a federal court of appeals grants a mandamus petition are rare.[23]

In sum: District courts are inconsistent and unpredictable in how they approach and decide venue transfer motions. No effective mechanism exists for timely appellate review of orders granting or denying change of venue motions under § 1404. Litigants and their lawyers need more certainty, consistency, predictability, and guidance in this critical pretrial issue. And this need has pervaded, yet gone unmet, for many years.

Fortunately, to meet this need, one need not begin with a clean slate. Instead, as discussed in this Article, a reasonably expeditious and centralized review process of § 1404 change of venue decisions can be constructed by combining pieces of two federal procedural statutes already on the books: (1) the multidistrict litigation statute,[24] enacted in 1968 and codified in 28 U.S.C. § 1407, and (2) 28 U.S.C. § 1453(c),[25] enacted as part of CAFA in 2005, which governs the reviewability on appeal of district court decisions granting or denying a motion to remand a putative class action that was removed to the district court under CAFA. In particular, it is proposed that the U.S. Judicial Panel on Multidistrict Litigation's (MDL) jurisdiction should be expanded to allow that Panel to screen and selectively review district court decisions on § 1404 motions. Moreover, in expanding the MDL Panel's jurisdiction over these decisions, Congress should simultaneously enact a review protocol that gives the MDL Panel discretion to accept review, and which provides an expedited schedule

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[23] *See, e.g.*, Robert Iafolla, *Federal Appeals Court Orders Rare Venue Switch*, DAILY J., Dec. 5, 2011. In discussing the U.S. Court of Appeals for the Federal Circuit's decision to issue a writ of mandamus ordering the District Court for the District of Delaware to transfer the case to the District Court for the Northern District of California in *In re Link A Media Devices Corp.*, the author observed, "While the Federal Circuit has ordered cases transferred out of the Eastern District of Texas, [this] ruling appears to be the first time it has done so in a case filed in Delaware." *Id.* (discussing *Link A Media Devices Corp.*, 662 F.3d 1221). The ability of accused infringers to transfer cases out of the Eastern District of Texas has likewise only recently shifted. *See* Elizabeth P. Offen-Brown, *Forum Shopping and Venue Transfer in Patent Cases: Marshall's Response to* TS Tech *and* Genentech, 25 BERKELEY TECH. L.J. 61, 62 (2010) ("Until recently, defendants in the Eastern District of Texas had a very hard time transferring out of the district, but three recent appellate decisions (one Fifth Circuit and two Federal Circuit) clarified the standard governing whether to transfer venue out of that district under 28 U.S.C. § 1404(a)." (citing and discussing *In re* Genentech, Inc., 566 F.3d 1338 (Fed. Cir. 2009); *In re* TS Tech USA Corp., 551 F.3d 1315 (Fed. Cir. 2008); *In re* Volkswagen of Am., Inc. (*Volkswagen I*), 545 F.3d 304 (5th Cir. 2008))).

[24] 28 U.S.C. § 1407 (2006).

[25] 28 U.S.C. § 1453(c) (2006).

for review, like that established for review of CAFA remand decisions by appellate courts under 28 U.S.C. § 1453(c).

First, this Article discusses the MDL Panel and its § 1407 enabling statute. Second, this Article analyzes the appeal protocol in place for review of remand decisions on putative class actions removed under CAFA and discusses the "early returns" on this appeal process as interpreted and applied by federal circuit courts of appeals. Finally, this Article opines how a marriage of the MDL Panel with a review process similar to the discretionary appeal process available to remand decisions under CAFA, but applied to § 1404, offers a reasonable solution that would provide much-needed certainty to § 1404 litigation but at the same time would address the principal concerns and arguments of critics who have voiced opposition to expanded appellate review of § 1404 decisions.[26]

I
THE MDL PANEL

In 1968, Congress passed 28 U.S.C. § 1407, entitled "Multidistrict Litigation," into law.[27] Examining the legislative history, one court summarized the purpose behind Congress's enactment of § 1407 as follows:

> [T]he essential purpose of Congress in enacting § 1407 was to permit the centralization in one district of all pretrial proceedings "[w]hen civil actions involving one or more common questions of facts are pending in different districts." As said in the report of the House Judiciary Committee, "[t]he objective of the legislation is to

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[26] The chief criticism—delay caused by the mandamus appellate review process—is summarized in Charles Wright, Arthur Miller, and Edward Cooper's *Federal Practice and Procedure* treatise:

> A distinguished authority, describing this practice under Section 1404(a) [i.e., review of § 1404(a) transfer decisions through a writ of mandamus or prohibition], has said that "as a delaying tactic, it has few equals." This can be true of invocation of the motion to transfer even at the trial stage. It certainly is true if there is an opportunity to seek, even unsuccessfully, appellate review. It is not clear that appellate courts have any special competence in passing on these discretionary questions of trial location and practice. Even if they do, it appears to be better to sacrifice whatever light an appellate court might shed in a particular case in the interest of prompt and final disposition of the question of the place of trial, one way or the other, at the trial court level.

WRIGHT, MILLER & COOPER, *supra* note 15, at § 3841 (citation omitted).

[27] Act of Apr. 29, 1968, Pub. L. No. 90-296, 82 Stat. 109 (providing for the temporary transfer of consolidated or coordinated pretrial civil proceedings pending in different districts to a single district court).

> provide centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the 'just and efficient conduct' of such actions" and "[t]o accomplish this objective the bill provides for the transfer of venue of an action for the limited purpose of conducting coordinated pretrial proceedings."[28]

The MDL Panel itself similarly describes its purpose and focus on the Panel's website:

> The job of the Panel is to (1) determine whether civil actions pending in different federal districts involve one or more common questions of fact such that the actions should be transferred to one federal district for coordinated or consolidated pretrial proceedings; and (2) select the judge or judges and court assigned to conduct such proceedings.
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> The purposes of this transfer or "centralization" process are to avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve the resources of the parties, their counsel and the judiciary. Transferred actions not terminated in the transferee district are remanded to their originating transferor districts by the Panel at or before the conclusion of centralized pretrial proceedings.[29]

To that end, the principal substantive provision, § 1407(a), provides:

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[28] *In re* N.Y. City Mun. Secs. Litig., 572 F.2d 49, 51 (2d Cir. 1978) (emphasis omitted) (quoting H. R. REP. NO. 90-1130, at 2 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900)).

In another multidistrict litigation case, *In re Library Editions of Children's Books*, the MDL Panel summarized its purpose in this early decision:

> As stated in House Report No. 1130, 90th Cong., 2d Sess., the bill was "drafted by the Coordinating Committee" and "based on the experience of the Coordinating Committee in supervising nationwide discovery proceedings in the electrical equipment cases which flooded the Federal courts in the early 1960's". "The objective of the legislation is to provide centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the 'just and efficient conduct' of such actions. The committee believes that the possibility for conflict and duplication in discovery and other pretrial procedures in related cases can be avoided or minimized by such centralized management." "The basic purpose of assigning [multiple litigation] to a single judge is to provide for uninterrupted judicial supervision and careful, consistent planning and conduct of pretrial and trial proceedings" that will eliminate or reduce conflict and duplication of effort.

297 F. Supp. 385, 386 (J.P.M.L. 1968) (citations omitted).

[29] U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., AN OVERVIEW OF THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, http://www.jpml.uscourts.gov/General_Info/Overview/overview.html (last visited Mar. 7, 2012).

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be *for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions*. 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: *Provided, however*, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.[30]

As the italicized language reveals, the central determination that the MDL Panel must make under § 1407(a) in deciding that a transfer for coordinated or consolidated pretrial proceedings is appropriate is that "such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."[31] This consideration is nearly identical to § 1404(a), under which a district court judge must determine whether change of venue would be "[f]or the convenience of parties and witnesses"[32] and "in the interest of justice."[33] Thus, at least facially, these statutes are similar and serve common goals and policies.[34]

Section 1407(d), in turn, establishes the requirements for the makeup of the MDL Panel:

> The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.[35]

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30 28 U.S.C. § 1407(a) (2006) (emphasis added).

31 *Id.*

32 28 U.S.C. § 1404(a) (2006).

33 *Id.*

34 One principal difference between §§ 1404(a) and 1407(a), however, is that § 1404(a) allows a district court judge to transfer venue only to a "district or division where it might have been brought," meaning a district in which venue is otherwise proper under 28 U.S.C. § 1391. *See* 28 U.S.C. § 1391 (2006). Section 1407(a), by contrast, allows actions to be transferred and consolidated in "any district" for pretrial proceedings, irrespective of whether that venue satisfies § 1391's general venue requirements. 28 U.S.C. § 1407(a); *see* 28 U.S.C. § 1391. This Article does not propose to modify this distinction.

35 28 U.S.C. § 1407(d).

Thus, each decision made by the MDL Panel is made by a neutral panel of at least four district court or circuit court judges assigned to the panel, no two of whom represent the same circuit. This effectively ensures that transfer and consolidation decisions made by the MDL Panel are objective and are not tainted by any regional bias or perception of regional bias. As of December 30, 2011, six of the seven judges sitting on the MDL Panel were federal district court judges.[36] Moreover, in the MDL Panel's history, forty-five judges in total have served (or are currently serving) on the Panel, only eight of whom were circuit court of appeals judges.[37] The rest are, or have been, district court judges.[38] Thus, both currently and historically, the Panel largely has comprised district court judges, judges who, by virtue of their normal function as district court judges, are also intimately familiar with change of venue motions under § 1404(a).

Section 1407(f), in turn, gives the MDL Panel flexibility in shaping its governing rules and procedures, providing: "The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure."[39] The MDL Panel has used this rulemaking authority to codify comprehensive rules and procedures.[40] Collectively those rules establish an efficient and relatively fast track for review and decisions on motions to transfer and motions to consolidate filed with the Panel. Once a transfer motion is filed, for example, the response brief is typically due twenty-one days after filing and service of the original motion.[41] Any reply is due within seven days after filing and service of the opposition.[42] Thus, briefing on a typical MDL motion to transfer, by rule, is completed within a month's time.

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[36] *See* U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., PANEL JUDGES, http://www.jpml.uscourts.gov/General_Info/Panel_Judges/panel_judges.html (last visited Mar. 7, 2012).

[37] *See* U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., ROSTER OF CURRENT AND FORMER JUDGES OF THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION (2011), http://www.jpml.uscourts.gov/General_Info/Panel_Judges/Panel_Judges_Roster-10-16-2011.pdf.

[38] *See id.*

[39] 28 U.S.C. § 1407(f).

[40] *See generally* U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., RULES OF PROCEDURE OF THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION [hereinafter J.P.M.L. R.], *available at* http://www.jpml .uscourts.gov/Rules___Procedures/Panel_Rules-Amended-7-6-2011.pdf (promulgating a series of rules pertaining to the proper procedure when filing and litigating multidistrict lawsuits).

[41] J.P.M.L. R. 6.1(c).

[42] J.P.M.L. R. 6.1(d).

Once a motion has been briefed, motions to the MDL Panel are promptly set for hearing; hearing dates on MDL petitions are scheduled for approximately every two months.[43] For 2012, for example, six hearing dates have been set at two-month intervals throughout the year.[44] As of 2008, as reported by the Chair of the MDL Panel, Judge John Heyburn, the time from hearing to decision on an MDL petition averaged only two weeks.[45] And, also as reported by Judge Heyburn, the Panel had reduced the average time between filing and decision to about thirteen weeks and lowered the range to between ten and seventeen weeks.[46]

Finally, § 1407(e) details the limited procedure for appealing an MDL decision:

> No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.[47]

In total, under § 1407 "the Panel has considered motions for centralization in over 2,200 dockets involving more than 350,000 cases and millions of claims therein."[48]

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[43] *See* U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., HEARING INFORMATION, http://www.jpml.uscourts.gov/General_Info/general_info.html (follow "Hearing Information" hyperlink) (last visited Mar. 7, 2012). Most of the hearings that have already occurred are archived on the MDL Panel's website. *See id.*

[44] *See id.*

[45] John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2242 n.88 (2008) ("Usually within two weeks of oral argument, the Chair has finalized and approved each written opinion pertaining to that session.").

[46] *Id.* at 2242 ("We have reduced the average time between filing and decisions to about thirteen weeks and lowered the range to between ten and seventeen weeks."); *see also* James M. Beck & Mark Herrmann, *How Long Does the MDL Process Take?*, DRUG AND DEVICE LAW (Sept. 9, 2008, 7:00 AM), http://druganddevicelaw.blogspot.com/2008/09/how-long-does-mdl-process-take.html.

[47] 28 U.S.C. § 1407(e) (2006).

[48] *See* U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., *supra* note 29.

II

CAFA AND REVIEW OF REMAND DECISIONS UNDER CAFA

In proposing a new appellate review protocol for § 1404(a) change of venue decisions, this Article draws from the Class Action Fairness Act (CAFA) of 2005.[49]

Through CAFA, Congress enacted significant reform over class action litigation. Specifically, CAFA described its purposes as to: "(1) assure fair and prompt recoveries for class members with legitimate claims; (2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and (3) benefit society by encouraging innovation and lowering consumer prices."[50] At a general level, CAFA attempts to accomplish these purposes by allowing certain putative class actions filed in state courts that were not previously subject to removal to federal court now to be removed to federal court.[51]

Specifically, under conventional jurisdictional rules, class action claims filed in state court that did not arise under federal law could be removed to federal district court based on diversity jurisdiction only if: (1) all of the putative class representatives were diverse from all of the defendants[52] and (2) each and every class member met the minimal amount in controversy requirement (currently $75,000).[53]

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[49] CAFA, Pub. L. No. 109–2, 119 Stat. 4 (2005).

[50] *Id.* § 2(b).

[51] *See* 14B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & JOAN E. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 3724 (4th ed. 2009) ("Insofar as CAFA creates original jurisdiction over cases that previously were beyond federal diversity subject-matter jurisdiction, the Act enlarges the universe of cases that may be removed pursuant to 28 U.S.C.A. § 1441."). *See generally* WILLIAM B. RUBENSTEIN, UNDERSTANDING THE CLASS ACTION FAIRNESS ACT OF 2005 (2005) (summarizing various changes to procedures regarding class actions implemented through CAFA), *available at* http://www.classactionprofessor.com/cafa-analysis.pdf.

[52] *See* RUBENSTEIN, *supra* note 51, at 4 (citing Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921)).

[53] *See id.* (citing Zahn v. Int'l Paper Co., 414 U.S. 291 (1973)). Professor Rubenstein also correctly notes that *Zahn* was overruled in part the same year that Congress passed CAFA (but before Congress passed CAFA) by the Supreme Court's decision in *Exxon Mobil Corp. v. Allapattah Services, Inc.* *Id.* (citing Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005)). There, overruling *Zahn* on this point, the *Exxon Mobil* Court ruled that, if at least one named plaintiff in a putative class action satisfied the amount in controversy requirement, diversity could be satisfied as to that plaintiff and the other class members' claims could be joined by supplemental jurisdiction under 28 U.S.C. § 1367. *Exxon Mobil*, 545 U.S. at 549; *see also* RUBENSTEIN, *supra* note 51, at 4 (discussing *Exxon Mobil* and *Zahn*).

CAFA fundamentally altered conventional jurisprudence on this issue by amending the diversity jurisdiction statute, 28 U.S.C. § 1332. Specifically, Congress added § 1332(d)(2), which now reads as follows:

> The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—
>
> (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
>
> (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
>
> (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.[54]

Thus, under CAFA, any class action that satisfies § 1332(d)(2)'s requirements is generally[55] removable under § 1453(b) and following the procedures of § 1446.[56]

More germane here is § 1453(c), which sets forth the process for appellate review of a district court's decision granting or denying a motion to remand made by a party under § 1447[57] after a class action is removed to district court. Before CAFA, decisions to remand a class action to state court, like other decisions to remand, were not reviewable on appeal.[58] By enacting § 1453(c), however, Congress changed this traditional rule as to decisions granting or denying a motion to remand a class action:

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[54] 28 U.S.C. § 1332(d)(2) (2006); *see also* RUBENSTEIN, *supra* note 51, at 4.

[55] 28 U.S.C. § 1332(d)(3) and (d)(4) set forth certain exceptions in which a district court has discretion to decline (§ (d)(3)) or must decline (§ (d)(4)) class actions that nonetheless meet the § 1332(d)(2) requirements. These exceptions are not germane here.

[56] 28 U.S.C.A. § 1453(b) (West 2011) ("A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants."); *see* 28 U.S.C.A. § 1446 (West 2011).

[57] 28 U.S.C.A. § 1453(c); *see* 28 U.S.C.A. § 1447 (West 2011).

[58] *See* 28 U.S.C.A. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.").

> Review of Remand Orders[:] (1) In general[:] Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), *a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action* to the State court from which it was removed *if application is made* to the court of appeals *not more than 10 days after entry of the order*.
>
> (2) Time period for judgment[:] If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).
>
> (3) Extension of time period[:] The court of appeals may grant an extension of the 60-day period described in paragraph (2) if—
>
> (A) all parties to the proceeding agree to such extension, for any period of time; or
>
> (B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.[59]

Thus, § 1453(c) significantly changes the landscape regarding appealability of decisions to grant or deny a motion to remand a class action, by allowing the party or parties aggrieved by the district court's decision to seek leave to file an expedited appeal with the appropriate regional circuit court of appeals. The court of appeals, however, has discretion whether to hear the appeal, and if it decides to hear the appeal, the appeal process is expedited and must be decided within sixty days.[60]

While CAFA and § 1453(c)'s protocol for appeal of remand decisions are still relatively in their infancy, some courts of appeals have begun to crystallize the process by providing guidance as to when they are likely or unlikely to hear a discretionary appeal under § 1453(c). For example, the U.S. Court of Appeals for the Tenth Circuit has stressed the discretionary nature of a § 1453(c) appeal: "Of course, this statute says only that we *may* hear remand appeals in mass actions. The question remains when we *should* exercise the discretion afforded to us by Congress to 'accept' such an appeal."[61] Similarly, the Tenth Circuit has stated, "[T]he determination whether to allow the appeal rests in our discretion. The statute doesn't place any other conditions on our discretion."[62] And the U.S. Court of

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[59] 28 U.S.C.A. § 1453(c) (emphasis added).

[60] *Id.*

[61] BP Am., Inc. v. Oklahoma, 613 F.3d 1029, 1031 (10th Cir. 2010).

[62] *Id.* at 1033.

Appeals for the First Circuit has commented how "the discretion granted under section 1453(c) is designed, in large part, to 'develop a body of appellate law interpreting the legislation.'"[63]

Further, the First Circuit, in *College of Dental Surgeons of Puerto Rico v. Connecticut General Life Insurance Co.*, developed and set forth a comprehensive list of guiding factors that it will utilize in deciding whether to hear a discretionary § 1453(c) appeal.[64] The Court of Appeals for the Tenth Circuit has cited and embraced these same factors, summarizing them as follows:

> [T]he First Circuit outlined a number of factors it would consider in deciding whether to grant leave to appeal under CAFA. That list includes: (1) "the presence of an important CAFA-related question"; (2) whether the question is "unsettled"; (3) "whether the question, at first glance, appears to be either incorrectly decided or at least fairly debatable"; (4) "whether the question is consequential to the resolution of the particular case;" (5) "whether the question is likely to evade effective review if left for consideration only after final judgment"; (6) whether the question is likely to recur; (7) "whether the application arises from a decision or order that is sufficiently final to position the case for intelligent review"; and (8) whether "the probable harm to the applicant should an immediate appeal be refused [outweighs] the probable harm to the other parties should an immediate appeal be entertained."[65]

Both courts, however, also cautioned that this list of factors should not be viewed as exclusive or all encompassing:

> In the final analysis, lists of criteria are merely guides. The decision about whether to grant leave to appeal under section 1453(c) is a matter committed to the informed discretion of the reviewing court. That discretion is not cabined by rigid rules, and many decisions are apt to be case-specific. But the factors we have identified will, in the majority of cases, serve as buoys to mark channels of inquiry.[66]

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[63] Coll. of Dental Surgeons of P.R. v. Conn. Gen. Life Ins. Co., 585 F.3d 33, 38 (1st Cir. 2009) (quoting S. REP. NO. 109-14, at 49 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 46).

[64] *Id.* at 38–39.

[65] *BP Am.*, 613 F.3d at 1034 (quoting *Coll. of Dental Surgeons*, 585 F.3d at 38–39).

[66] *Coll. of Dental Surgeons*, 585 F.3d at 39; *see also BP Am.*, 613 F.3d at 1035 ("The decision whether to grant leave to appeal remains a matter 'committed to the informed discretion of the reviewing court,' and the factors we have outlined are no more than considerations or guides to help inform that analysis, a set of analytical 'buoys to mark [the] channels' of potential inquiry." (quoting *Coll. of Dental Surgeons*, 585 F.3d at 39)).

Finally, once accepting a § 1453(c) review of a district court remand decision, the courts of appeals have stated that review of this district court determination is de novo.[67]

III

THE PROPOSED NEW REGIME FOR REVIEW OF § 1404 DECISIONS—BORROWING FROM BOTH THE MDL PANEL AND CAFA

The time for certainty and guidance in § 1404(a) venue decisions is overdue. A sensible, manageable appellate review process—one that does not result in time-consuming delays or excessive costs to litigants—should be implemented. And this appellate review process could draw largely from, and marry, the guidance offered by the § 1407 MDL protocol and CAFA's review protocol under § 1453(c) of remand decisions.

Specifically, the review protocol for § 1404(a) decisions could include three basic components.

First, a discretionary, expedited appeal process mirroring that for remand decisions under CAFA should be implemented for review of § 1404(a) change of venue decisions. In other words, a more robust appeal procedure should be implemented that adds a level of review that precedes any petition for writ of mandamus to a circuit court. While a more robust appeal procedure should be implemented, however, given the sheer volume of transfer motions and decisions on those motions by district courts, allowing a pure appeal as of right would be undesirable. Instead, a discretionary appeal process like that implemented under CAFA's § 1453, one which promotes and advances the goal of developing consistency and predictability in § 1404 jurisprudence, is appropriate.

Second, § 1404 should be amended to expand the MDL Panel's decision and allow petitions for discretionary appeals of § 1404 decisions to be filed not with the circuit courts of appeals but instead with the MDL Panel. As noted, the MDL Panel—made up primarily of district court judges—is uniquely positioned and qualified to

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[67] *See* Admiral Ins. Co. v. Abshire, 574 F.3d 267, 272 (5th Cir. 2009) ("We review de novo a district court's order remanding a case to state court."); Lowery v. Ala. Power Co., 483 F.3d 1184, 1193 (11th Cir. 2007) ("We review *de novo* the district court's decision to remand a case to state court for lack of subject matter jurisdiction." (citing Miedema v. Maytag Corp., 450 F.3d 1322, 1326 (11th Cir. 2006))).

decide issues under § 1404.[68] The district court panel members on the MDL Panel already have experience and valuable collective wisdom in deciding such motions. And, as noted, the central determinations under §§ 1404 and 1407 transfer decisions are similar.

Moreover, having the MDL Panel review district court § 1404 transfer decisions would promote much-needed consistency and uniformity in § 1404 jurisprudence that is now lacking. Over time, the MDL Panel, like circuit courts have done (or at least are in the process of doing) with remand reviews under CAFA, could develop uniform screening criteria for determining when to hear discretionary appeals. Moreover, when the MDL Panel decides to review a district court § 1404 decision, the Panel could draw from the various factors and considerations for § 1404 motions currently entertained by district courts across the country, and, in the process, the Panel could consolidate and unify these factors and eliminate inconsistencies between or among circuits or districts. Having a panel of judges from across the country, none being from the same circuit, review and decide § 1404 venue issues would be fair, as such decisions would not be tainted by regional bias or the perception of such bias.

In addition, the MDL already has an expedited review and decision process in place for § 1407 decisions. Thus, an expedited, discretionary review process like that afforded to remand decisions by CAFA should fit well with current MDL rules and procedures.

Third, § 1404 should be amended so that, if a district court grants a motion to change venue, transfer should not be effectuated immediately. Instead, a short holding period of ten days should be codified to afford the losing party the opportunity to (a) seek reconsideration under the *Federal Rules of Civil Procedure* (for example, if a cognizable basis for reconsideration or motion to correct an error exists under Rule 60(a)), or (b) file a petition for leave to appeal the transfer decision. If an aggrieved party unsuccessfully seeks reconsideration, transfer should not be effectuated until ten days after the district court issues a denial of the motion for reconsideration to allow the losing party to file a petition to appeal the transfer decision with the MDL Panel. Finally, if an aggrieved party appeals the grant or denial of a motion to transfer, further district court litigation should be stayed until the MDL Panel decides whether to

[68] With this expanded jurisdiction, the MDL Panel would likely need to be expanded to include more judges and/or be divided into committees of panels, some of which continue to decide § 1407 issues, and others which would be assigned to review § 1404 decisions.

hear a discretionary appeal and, if it decides to hear the appeal, until after the MDL Panel decides the appeal on the merits.

Collectively, these three components would provide an appeal process that would promote consistency in § 1404 law, while at the same time the discretionary and expedited nature of this appeal process would answer the chief criticism of opponents of expanded appellate review—that allowing appeal of transfer decisions would result in long delays and costs.

CONCLUSION

Congress has embraced the importance of "location, location, location" through § 1407 as applied to multidistrict litigation. It has likewise embraced the critical importance of location in class actions, specifically recognizing the importance of the critical, threshold determination of which court—state or federal—will preside over the action. Section 1404 should be similarly amended as described above, which would recognize that location is equally as important in ordinary federal civil litigation. Such a new review procedure would also recognize that § 1404 jurisprudence should be centralized and made more uniform and predictable—especially in the current age, when district court jurisdiction over declaratory judgment actions is now more readily available than ever and when § 1404 disputes over the appropriate forum may take on an even bigger importance in pretrial frequency.