IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

SHIRLEY IVY, et al. Plaintiffs v. DIAMOND SHAMROCK, et al. Defendants	MDL Docket No. 381 JBW

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PLAINTIFFS' MOTION FOR REMAND

Plaintiffs Shirley Ivy, et al., by counsel, pursuant to 28 U.S.C. § 1447 and F.R.C.P. 12(h)(3), hereby move for remand of this action for lack of federal subject matter jurisdiction, and as grounds state:

1. Plaintiffs originally brought this action in the Orange County, Texas state court. Plaintiffs' claims involve injuries caused by exposure to various herbicides, including Agent Orange, manufactured by the Defendant chemical companies. Shirley Ivy and other named Plaintiffs are residents of Texas, where at least one Defendant maintains its home office. The Complaint is expressly based solely on state law and eschews any federal basis for its claims.

2. On June 19, 1989, Defendants removed the action to federal court, purportedly based on federal question jurisdiction, under 28 U.S.C. § 1331. Defendants knew no

federal question is presented by Plaintiffs' Agent Orange claims, however, because that same issue was decided in previous litigation to which Defendants were parties, In re Agent Orange, 635 F.2d 987, 995 (2d Cir. 1980), and it is well settled law that no new federal defenses Defendants may assert can provide a basis for federal question jurisdiction. On the same date that they removed this action, Defendants also sought a transfer pursuant to the Multidistrict Litigation Act, 28 U.S.C. § 1407.

3. Plaintiffs sought remand to state court, in the U. S. District Court for the Eastern District of Texas, stating as grounds therefor the lack of federal subject matter jurisdiction over this case. Plaintiffs also opposed transfer before the Multidistrict Litigation Panel ("MDL"), both for lack of federal subject matter jurisdiction and for absence of the statutory prerequisites for transfer that there be pending in another district another case raising one or more common questions of fact for pretrial proceedings. Plaintiffs' Motion for Remand was deferred by Judge Cobb of the Eastern District of Texas pending disposition of the transfer request, which was subsequently granted in the MDL Panel Order of October 4, 1989.

4. On January 31, 1990, Plaintiffs petitioned the Second Circuit Court of Appeals for review of the MDL Panel's Order. That petition was denied, on the ground that the issue of federal subject matter jurisdiction should first be submitted to this Court. The Court of Appeals held that the MDL Panel

has jurisdiction to transfer a case for purposes of determining whether the federal courts have subject matter jurisdiction, and did not review the question whether the MDL Panel has jurisdiction to make a § 1407 transfer. The Court of Appeals thus assigned to this Court the task of determining whether federal subject matter jurisdiction exists in this case. In re Ivy, 901 F.2d 79 (2d Cir. 1990). Plaintiffs therefore move this Court, pursuant to the Court of Appeals' instruction, to remand this case to Texas state court based on the lack of federal subject matter jurisdiction.

5. Because the Multidistrict Litigation Statute, 28 U.S.C. § 1407(e), precludes review of MDL transfer orders other than by petition for extraordinary writ to the court of appeals having jurisdiction over the transferee court, Plaintiffs on this date have also filed in the Second Circuit a petition for extraordinary writ based solely on the lack of statutory prerequisites for § 1407 transfer, in order to preserve that issue for review, if necessary, after this Court rules on Plaintiffs' Motion for Remand now before this Court. See Petition for Extraordinary Writ, Ex. E.

6. The Court of Appeals has not yet addressed the question of whether § 1407's statutory requirements for multidistrict transfer for plenary pretrial proceedings have been met. If this Court agrees that federal subject matter jurisdiction over Plaintiff's claims is lacking, as shown in the instant Motion for Remand, the question of multidistrict

transfer of this case for purposes of all other pretrial matters will be moot.

WHEREFORE, and for the reasons set forth in the accompanying Memorandum in Support of Plaintiffs' Motion for Remand, Plaintiffs Shirley Ivy, et al. respectfully request that this Honorable Court remand the instant action to the state court for Orange County, Texas, and grant Plaintiffs such other and further relief as justice might require, including attorneys fees and costs incurred as a result of Defendants' wrongful removal.

Respectfully submitted,

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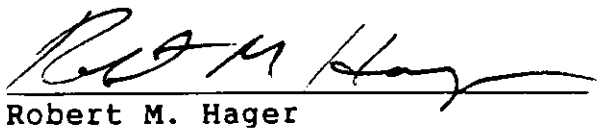
By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Plaintiffs' Motion for Remand and Memorandum in support were mailed, postage prepaid, this [redacted] day of September, 1990: to:

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2437M

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re:	)
SHIRLEY IVY, et al.	)
	)
Petitioners,	)
	)
	)

PETITION FOR EXTRAORDINARY WRIT TO REVIEW TRANSFER FOR PRETRIAL PROCEEDINGS OTHER THAN FOR THE DETERMINATION OF FEDERAL JURISDICTION

This Petition requests relief from the unauthorized transfer, from a Texas court to the U.S. District Court for the Eastern District of New York, of claims for personal injuries caused by exposure to Agent Orange.

I. STATEMENT OF THE ISSUE PRESENTED

Did the Multidistrict Litigation Panel commit reversible error by transferring this civil action to a federal district court for plenary pretrial proceedings under 28 U.S.C. § 1407, without making the findings mandated by § 1407(c), supported by evidence of record, that there exists another civil action:

(a) that is pending in any other federal district court;

(b) in which any pretrial proceedings will be conducted; and

(c) in which there are one or more questions of fact common to this case and therefore amenable to contemporaneous treatment in a coordinated or consolidated pretrial proceeding.

II. STATEMENT OF FACTS

Petitioner Shirley Ivy is the widow of a Vietnam Veteran, and a citizen of Texas, who sued in Texas state court, on behalf of herself, her deceased husband, and other persons similarly situated, for damages arising from injuries which were caused by

exposure to a contaminated defoliant used in the Vietnam War, known as "Agent Orange," and whose cause of action for those injuries arose only after May, 1984.

Petitioners' causes of action against the defendant manufacturers of "Agent Orange," which include a Texas corporation, arise solely under state law, sounding in negligence, product liability, and punitive damages. 1/ See Plaintiffs' Original Petition filed in the state District Court for Orange County, Texas, Exh. A. (Lettered Exhibit references herein refer to the Appendix submitted by petitioners with their Petition for Review of Multidistrict Litigation Transfer Order, January 31, 1990, Docket No. 90-3007 (hereafter "Petition")).

These causes of action arose only after petitioners' injuries were discovered and diagnosed, subsequent to the 1984 "Agent Orange" class action settlement. For example, in the case of lead plaintiff Shirley Ivy's decedent Donald Ivy, death resulted from cancer discovered in 1987 and later diagnosed as caused by exposure to Agent Orange. Donald Ivy had no prior knowledge that he had incurred injuries caused by Agent Orange while he was serving as a Marine Captain in Vietnam. No known principle of law permits settlement of a cause of action without

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1/ Defendants do not dispute that 28 U.S.C. § 1332 diversity of citizenship jurisdiction is clearly lacking in this case. Indeed diversity would furnish no basis for removal in any event, because one defendant is a citizen of Texas. 28 U.S.C. § 1441(b). Moreover, this Court has held that Agent Orange cases present no basis for § 1331 federal question jurisdiction. In re "Agent Orange" Product Liability Litigation, 635 F.2d 987 (2d Cir. 1980) cert. denied, 454 U.S. 1128 (1981) (MDL Docket 381). No other relevant bases for federal jurisdiction exists.

knowledge or consent of the plaintiff and before the cause of action even accrued.

On June 19, 1989, Defendant Dow Chemical Company, after filing a general denial to Plaintiffs' Original Petition in Texas state court on behalf of all Defendants, simultaneously, 1) removed this case from state court, see Notice of Removal, Exh. B, and 2) requested that the Judicial Panel on Multidistrict Litigation ("MDL Panel") transfer the removed case from the Texas District Court to that of Judge Jack B. Weinstein in the Eastern District of New York.

Judge Weinstein had presided over an earlier class action settlement of claims arising out of injuries to Vietnam Veterans caused by the use of "Agent Orange." The settlement, entered in May, 1984, terminated that case by dismissal with prejudice. 2/ Other cases, of persons who prior to May, 1984 had opted out of the settled class action, were also dismissed by Judge Weinstein, on grounds of insufficient expert evidence on the issue of causation. In re "Agent Orange" Product Liability Litigation, 611 F. Supp. 187 (E.D.N.Y. 1985), aff'd, 818 F.2d 187 (2d Cir. 1987), cert. denied, 487 U.S. 1234 (1988). A few cases filed after 1984, apparently for injuries arising before 1984, have also been dismissed by Judge Weinstein. Memorandum of Law of Dow Chemical, Exh. F (attachments, Exh. D, F, & G). One other case,

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2/ See In re "Agent Orange" Product Liability Litigation, 597 F. Supp. 740, 865, Para. 13 (E.D.N.Y. 1984), aff'd, 818 F.2d 145 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988). Pursuant to the agreement of the parties Judge Weinstein retained authority over the settlement Fund for the limited purpose of supervising the procedures for its distribution. Id. at 866, Para. 19.

Hartman, was voluntarily dismissed on September 25, 1989 by order of Judge Weinstein after following a course similar to this case.

This class action involves causes of action which arose only after the respective May 1984 dates of the settlement and of the deadline for opting out of the class certified in the settled multidistrict litigation in New York. Aside from this case, no Agent Orange case has been identified by Defendants which remains pending in any federal district court.

III. STATEMENT OF THE CASE

Petitioners opposed Defendants' request for multidistrict transfer of this case from the Eastern District of Texas for two reasons. First, there was in no other federal district court any pending case in pretrial presenting common questions of fact so as to warrant such a transfer under the governing MDL statute, 28 U.S.C. § 1407. See Brief, Exh. E, pp. 3-5; Reply Brief, Exh. G, pp. 10-16. Second, no prima facie good faith assertion of any colorable basis for federal subject matter jurisdiction could be or was made by the Defendants. See Brief, Exh. E, pp. 5-19. As to the latter issue, Petitioners argued that, while transfer for purposes of determining federal jurisdiction may be appropriate when a colorable jurisdictional issue can be identified, when Defendants present no colorable basis for federal jurisdiction, the MDL Panel, as a federal court, is foreclosed from acting and must dismiss Defendants' transfer request. Reply Brief, Exh. G., pp. 2-10.

Petitioners also opposed, for lack of any colorable

federal subject matter jurisdiction, the removal of this case from Texas state court. See Motion to Remand the Cause of Action to the State Court in Orange County Texas, filed in the Eastern District of Texas on September 22, 1989, Exh. D (hereafter "Motion to Remand"). U.S. District Judge Cobb of the Texas court declined to rule on petitioners' Motion to Remand pending the outcome of the MDL proceedings.

After conducting a hearing on petitioners' opposition to transfer, the MDL Panel, on October 4, 1989, granted Defendants' request for a Transfer Order without reaching the question of federal subject matter jurisdiction. Exh. H. The MDL Panel expressly held that it was not bound in this case by the multidistrict litigation statute, 28 U.S.C. § 1407(a)(1988), which provides as follows:

> 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.

But the MDL Panel,

> reject[ed] any suggestion by plaintiffs that the status of proceedings in this docket, including the recent dismissal of Hartman, limits either our authority or the transferee judge's authority under Section 1407(a) in this matter.

Transfer Order, Exh. H.

On January 31, 1990, petitioners Shirley Ivy, et al., petitioned this Court pursuant to 28 U.S.C. §§ 1407(e) 3/ and 1651

3/ 28 U.S.C. § 1407(e) provides: "No proceedings for review of any order of the [MDL] panel may be permitted except by extraordinary writ pursuant to the provisions of" 28 U.S.C. § 1651.

for review of the Transfer Order entered in this matter by the MDL Panel. See Petition for Review of Multidistrict Litigation Transfer Order, Docket No. 90-3007. This Court stated in its March 28, 1990 opinion that the Petition sought a,

> writ of mandamus directing the MDL Panel to vacate the transfer order on the ground that there is no federal subject matter jurisdiction.

Ivy v. Diamond Shamrock Chemical Co., 901 F.2d 7, 9 (2d Cir. 1990) (hereafter Ivy). The Ivy Court held that "the sole issue before" this Court was whether, in light of the "purposes of the multidistrict statutory scheme," petitioners' objections to federal subject matter jurisdiction should be resolved by the transferee court to the exclusion of the MDL Panel. Id. But cf. p.26 n.6 infra. Finding that, "[t]he jurisdictional issue in question is easily capable of arising in hundreds or even thousands of cases in district courts throughout the nation," and that "[c]onsistency as well as economy is ... served" by having that issue "heard and resolved by a single court," expressly mentioning Judge Weinstein, this Court held that, "the MDL Panel has jurisdiction to transfer a case in which a jurisdictional objection is pending [citation omitted], that objection to be resolved by the transferee court." Id.

The legal basis for this Court's holding in Ivy can be discovered by reference to the case to which it analogized its holding. The Court reasoned, briefly, that the MDL Panel has the power to act "for the purpose of [facilitating a determination of jurisdictional issues] pending a decision upon" the

subject matter jurisdiction of the federal court. See United States v. United Mine Workers, 330 U.S. 258, 290 (1947) (case and page cited by this Court at 901 F.2d at 9). The Court concluded from this analogous source of inherent judicial authority that the MDL Panel may act, if consistent with the "purposes" - although not the letter - of its governing statute, to delegate to a single transferee court the question of federal subject matter jurisdiction raised in a case before it.

The Ivy Court further held that it would not review the question of MDL Panel jurisdiction, reasoning that it is generally inappropriate for a Court of Appeals to review, by way of mandamus, "action ... denying a motion to remand a cause to the state court from which it had been removed" when to do so would avoid the prescribed "method of appeal." 901 F.2d at 10 (quoting Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943)).

Petitioners had not requested the MDL Panel to rule on their Motion to Remand to state court, which, prior to transfer, was pending in the Texas District Court, but had requested a ruling on the MDL Panel's own jurisdiction to act. Petitioners sought "a writ vacating the Multidistrict Transfer Order" on grounds that the MDL Panel "was without authority to order the transfer" because there was no basis for even arguing the existence of federal subject matter jurisdiction. Petition 14. Indeed Petitioners pointed out that this Court had already decided the question in its 1980 ruling denying federal question jurisdiction over Agent Orange cases. Id. at 11. Their Petition

to this Court employed the only possible "statutory method of review ... prescribed" by Congress, id., for challenging the MDL Panel's own jurisdiction to act. See 28 U.S.C. § 1407(e).

Significantly, this Court ruled for the first time, in Ivy, that "Section 1407 does not empower the MDL Panel to decide questions going to the jurisdiction" of a federal court, including, implicitly, that of the MDL Panel itself. 901 F.2d at 9. The Court thereby rejected petitioners' contention that whenever there appears to be no colorable basis for federal jurisdiction, the express language of 28 U.S.C. § 1407(f) would subject the MDL Panel to the same non-discretionary duty commanded of any federal court by 28 U.S.C. §§ 1331 and 1447(d), and by F.R.Civ.P. 12(h)(3), that the proceedings before the court shall be dismissed. Reply Brief, Exh. G, 8-10; Petition, 6, 12 n.5, 14.

Accordingly, this Court's March 28, 1990 Ivy decision made three rulings on matters of first impression in the federal courts:

1) that, unlike any other federal court, the MDL Panel lacks power to determine its own jurisdiction as a federal court;

2) that the MDL Panel does have inherent judicial power, analogous to that granted federal courts by United Mine Workers, to transfer a case over which the federal courts have no apparent jurisdiction, for the limited purpose of assigning a specific judge to determine federal jurisdiction, provided such a transfer is consistent with the legislative intent of the multidistrict

statutory scheme to permit transfers "only where significant economy and efficiency" are served, 901 F.2d 9; and,

3) that the Courts of Appeals may refuse to review MDL Panel § 1407 jurisdiction by way of mandamus, although this is the only statutorily prescribed means to review MDL Panel orders.

In accordance with these rulings, petitioners have moved in the transferee U.S. District Court for the Eastern District of New York to remand this case to the Orange County, Texas, state court. In that motion Petitioners argue that Defendants have removed this case from Texas without any colorable basis for either federal question or diversity jurisdiction. A copy of the Plaintiffs' Motion to Remand is appended hereto as Attachment 1.

Having acted in accordance with this Court's decision on the jurisdictional issue, petitioners do not question, in the instant Petition, the Court's March 28, 1990 Ivy ruling that the limited question of federal jurisdiction be transferred for decision first by a District Court. Petitioners do not seek herein review of the novel question whether the MDL Panel has inherent authority, analogous to that found in United Mine Workers, to transfer for a determination solely of federal question jurisdiction by the transferee court, irrespective of whether 28 U.S.C. § 1407(a) would permit transfer of the case to the transferee court for plenary pretrial proceedings. 4/

4/ It is interesting to note in passing the paradox created by this ruling. Where the federal courts have no grounds for jurisdiction and also lack grounds for MDL transfer, a transfer may be made, albeit only for the narrow purpose of determining jurisdiction; however, where there is federal jurisdiction, but no grounds for transfer, the transfer cannot be made. [cont'd]

In light of this Court's ruling in Ivy on this inherent MDL power, petitioners now bring the instant petition, pursuant to 28 U.S.C. § 1407(e), for review of the merits of the MDL Panel's Transfer Order in order to preserve for review the separate question of whether the terms of the MDL statute preclude transfer for any pretrial proceedings other than the determination of federal jurisdiction over this case. The purpose of this petition, therefore, is to clearly present an entirely different question from that decided in Ivy, that is, of the propriety of MDL transfer, not when made pursuant to the inherent judicial power to transfer for the narrow purpose of deciding subject matter jurisdiction only, but rather when made under the authority of § 1407(a) for purpose of proceeding with plenary pretrial proceedings on issues other than jurisdiction.

This question will arise only if the transferee court finds some basis for federal jurisdiction which survives any available "review[] at the appellate level." 901 F.2d at 9. Therefore the issue presented by this Petition need be addressed by this Court only if a finding of federal subject matter jurisdiction were made, and possibly sustained by this Court through one of the two means for immediate appellate review outlined in Ivy: 1) mandamus after denial of a voluntary dismissal, or 2) certification under 28 U.S.C. § 1292(b). See 901 F.2d at 10. Only in such event would the following question,

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(note 4 cont'd) Therefore, in this circumstance the lack of federal jurisdiction is the very source of the federal MDL Panel's jurisdiction to make a transfer, albeit for a limited purpose only.

preserved by the instant Petition, become ripe for review by this Court: Must the MDL transfer of this case, other than to determine the issue of federal subject matter jurisdiction, be vacated because the Order fails to make the findings required by 28 U.S.C. § 1407(a) & (c) for such a transfer, and because such findings cannot be made on the record of this case.

IV. ARGUMENT

1. Introduction

The MDL Panel's governing statute, 28 U.S.C. § 1407(c), provides that the Panel "shall" make findings of fact and conclusions of law, based on a record, concerning the statutory prerequisites to transfer. In the absence of such findings, the statute does not allow multidistrict transfer. The MDL Panel's Transfer Order, Exh. H, omits the express findings required by the statute to effect a valid transfer for plenary pretrial proceedings under § 1407(a).

At the same time, the MDL Panel did not expressly restrict the transfer of this case solely to the limited question of federal subject matter jurisdiction as is now permitted, independent of § 1407, by this Court's Ivy ruling. The order might be read broadly by the transferee court, in the event it does find a basis for federal jurisdiction, to also permit its conduct of full pretrial proceedings pursuant to a § 1407 transfer, including such matters, for example, as summary judgment on substantive issues of state law.

As mentioned above, it would be unnecessary to address the question presented by this petition, i.e., the propriety of a transfer under 28 U.S.C. § 1407(a) for full pretrial proceedings, if the transferee court should first rule that the federal courts lack subject matter jurisdiction over this case. This case would then be remanded to the Texas state court, as requested by petitioners in their motion to remand now pending before the United States District Court for the Eastern District of New York, and consequently the § 1407 transfer issue presented in this petition would be moot.

Both the jurisdictional issue and the § 1407 transfer issue were presented to the MDL Panel. See Reply Brief, Exh. G, pp. 10-16; Hearing Transcript, Exh. I, pp. 84-94. The MDL Panel resolved the first issue -- petitioners' jurisdictional objection -- in the same manner as did this Court in Ivy. The Panel declined to address the apparent lack of any colorable federal subject matter jurisdiction in this case, and instead referred the jurisdictional question to the transferee judge for decision.

As to the second issue -- the statutory transfer issue presented by this petition -- the MDL Panel failed to make findings on the three threshold statutory prerequisites for § 1407(a) transfer of a federal case, i.e., that there be another civil action, 1) pending in a different federal district, 2) which is in pretrial proceedings, 3) where one or more questions of fact are presented that are common to the case for which transfer is sought and are therefore amenable to being addressed

contemporaneously with the latter in coordinated or consolidated pretrial proceedings. The MDL Panel's Transfer Order, Exh.H, does frankly acknowledge "the recent dismissal without prejudice of Hartman," the only other Agent Orange case that was pending in any federal court at the time this case was briefed before the MDL Panel. Nevertheless the MDL Panel "reject[ed] any suggestion by plaintiffs that the status of proceedings in this docket, including the recent dismissal of Hartman, limits either our authority or the transferee judge's authority under Section 1407(a) in this matter." Exh. H.

Hartman was a Texas case which, like this case, had been removed from Texas state court and transferred from the Eastern District of Texas to the Eastern District of New York. The Hartman case was dismissed prior to the MDL Panel hearing in this case, but would not in any event have satisfied the first statutory prerequisite to transfer, i.e. that the cases be from "different districts" because Hartman originated in the same district as this case. All other Agent Orange cases in the federal courts had previously been settled and dismissed, and therefore were neither pending nor in pretrial.

During the oral argument of this matter before the MDL Panel, counsel for petitioners informed the court that Hartman was being dismissed and that the appropriate clerks of both the U.S. District Court for the Eastern District of New York and of the MDL Panel itself had confirmed that no other Agent Orange case was then pending. See Transcript, Exh. I, p. 85. Prior to

its issuance of the Transfer Order the MDL Panel was provided with the district court's order dismissing Hartman, and, as mentioned above, the Panel did note this dismissal in its Order.

At no time have Defendants identified any other Agent Orange case pending in any federal court. The record in this case contains no evidence that any other such case was pending, was in pretrial proceedings, or raised any question of fact common to this case and amenable to being addressed in contemporaneous pretrial proceedings. As shown below, the MDL Panel has made no express findings on any of these essential threshold issues, without which the multidistrict litigation statute does not authorize transfer.

2. The MDL Panel Transfer Order Lacks the Findings of Fact and Conclusions of Law Required to Support a Transfer for Plenary Pretrial Proceedings Under 28 U.S.C. § 1407(c).

The multidistrict litigation statute, 28 U.S.C. § 1407, authorizes the MDL Panel to transfer a federal case solely for the purpose of conducting "coordinated or consolidated pretrial proceedings" if "civil actions involving one or more common questions of fact are pending in different districts ...." To assure that these conditions for exercise of the MDL transfer power are satisfied before any transfer is made, the MDL statute requires the MDL Panel to make specific findings of fact and conclusions of law in support of an MDL transfer order:

> The panel's order of transfer shall be based upon a record of [the] hearing ... and shall be supported by findings of fact and conclusions of law based upon such record.

28 U.S.C. § 1407(c).

In its three paragraph Transfer Order the MDL Panel makes no findings of fact or conclusions of law on any of the three essential threshold issues required by the multidistrict transfer statute, § 1407(a). Several statements that at first might appear to be of relevance to the statutory conditions for transfer, on closer reading are found unavailing.

First, one of petitioners' essential objections to the transfer of this case is based on the fact, presented at the hearing on the record, and not disputed, that there were no pretrial proceedings occurring in In Re Agent Orange, MDL Docket No. 381, at the time of the transfer. Without making any required finding of fact or conclusion of law, the MDL Panel refers twice to "pretrial proceedings occurring there," when alluding to the cases which were concluded by settlement and dismissal with prejudice in the Eastern District of New York. Thus the MDL erroneously assumed that there were "centralized pretrial proceedings occurring" in Brooklyn with which pretrial in the Ivy case could be coordinated or consolidated. Exh. H.

The MDL Panel's unsupported assumption simply ignores the fact that although there were pretrial proceedings occurring in the Eastern District of New York over six years ago, those pretrial proceedings concluded with dismissal and settlements long ago. At the time the Transfer Order now under challenge was issued, there were no other pretrial proceedings in any "Agent

Orange" case pending in the Eastern District of New York or any other district. The MDL Panel did not make a formal conclusion of law that there was such a case. The MDL Panel's assumption that there was such a case is neither supported by any finding of fact nor consistent with any evidence of record.

Second, "the Panel finds that Ivy involves common questions of fact with actions in this litigation previously transferred." Transfer Order, Exh. H. This conclusion is supported by no findings of fact with regard to precisely what questions are, or could possibly be, presented in any such other case that would be amenable to simultaneous treatment in pretrial proceedings along with common questions of fact arising in this case. The MDL Panel simply ignores the fact, of record, that all "previously transferred" cases had been dismissed, and left no questions of fact for pretrial.

There is no precedent for MDL transfer in a case which presents questions of fact similar to questions that arose in a "previously transferred" case which has been concluded by settlement or dismissal. The purpose of the MDL statute is to coordinate or consolidate simultaneous pretrial proceedings in actual "pending" cases, in order to deal with actual live questions of fact presented contemporaneously in active pretrial processes. See In re Plumbing Fixture Cases, 298 F.Supp. 483, 490-93 (J.P.M.L. 1968). Thus the MDL Panel's statement about "questions of fact ... in ... litigation previously transferred" is at best irrelevant, because no question of fact exists in any

such terminated case which could conceivably be addressed in simultaneous coordinated or consolidated proceedings in common with a question of fact presented in the instant case.

Accordingly, though the Transfer Order contains some language seemingly couched in terms of the threshold statutory prerequisites for transfer, this language is conclusory at best, or simply irrelevant, because it refers to the past -- cases, proceedings and questions that are no longer pending -- rather than the present. The transfer statute only concerns cases which "are pending." 28 U.S.C. § 1407(a). The MDL Panel could transfer this case only by rejecting, as the Panel expressly did, the restrictions placed on its transfer powers by § 1407. See pp. 19-20 & n.5 infra.

Dismissed cases no longer pending or in pretrial bear no relationship to the express terms of the MDL statute, nor to the purposes of the MDL statute to save time and resources in pretrial proceedings in cases where common questions of fact, that would otherwise be addressed simultaneously in different pretrial proceedings, can be addressed in a coordinated or consolidated manner. The notion that a judge who conducted pretrial in a similar case in the past might more efficiently conduct full pretrial proceedings in a later case is an untested proposition. Nowhere does the statute or its legislative history even suggest that Congress intended to create in the MDL statute a system of judge-experts to which all similar cases would be referred over time as a means to promote judicial efficiency.

See H.R. Rep. No. 1130, 90th Cong., 2d sess.

The purpose of the transfer statute is to combine similar "pending" cases and questions of fact for contemporaneous pretrial proceedings "for the convenience of parties and witnesses," id., not to combine judges with certain types of cases with which they have become familiar through previous pretrial experiences. If Congress had intended that particular knowledgeable judges should be assigned specific types of cases filed in the federal courts, for the benefit of other judges who would otherwise presumably spend more time familiarizing themselves with these kinds of cases, it would have expressly provided for transferring cases to judges that have dealt with similar cases in the past. That is not the law Congress enacted in § 1407. Any change in the traditional policy of random assignment of cases to generalist judges, to create instead a judiciary of specialists, would not come from Congress sub silentio. To support its request for transfer in this case Defendants would have to rewrite the statute to delete the requirements that there must be pending in another district at least one other case, with which the transferred case can be coordinated or consolidated for pretrial proceedings, so that common questions of fact may be addressed simultaneously.

3. Federal Law Limits Transfer To Circumstances Not Present In This Case.

Under 28 U.S.C. § 1407(a), a case may be transferred from one District Court to another only 1) if at least two or more

"civil actions ... are pending in different districts," 2) in each of which civil actions there are, or will be, "pretrial proceedings" that can be "coordianted or consolidated," and 3) in which civil actions there will be raised "common questions of fact." That is, similar, contemporaneous, "multidistrict" litigation at a similar stage of proceeding is required to trigger the transfer powers of the MDL Panel under its governing statute.

When the MDL Panel issued its Transfer Order, the only evidence of record in this case was that no "Agent Orange" case other than this one was "pending" for "pretrial proceedings." There was no evidence of record about any other pending case which presented any question of fact common to this case that would be amenable to coordinated or consolidated pretrial proceedings. In the course of briefing and the hearing before the MDL Panel no such other pending case, nor any specific common question of fact, was ever suggested, mentioned or in any way identified by the MDL Panel or defendants. The record is simply devoid of any positive evidence on the essential facts upon which every MDL transfer order must be premised.

In its Transfer Order, the MDL Panel, without considering the specific requirements of 28 U.S.C. § 1407(a), or addressing the undisputed facts set forth above, expressly "reject[ed] any suggestion by plaintiffs that the status of proceedings in this docket, including the recent dismissal of Hartman, limits either our authority or the transferee judge's authority under Section

1407(a) in this matter." Exh. H. 5/ This petition seeks to invoke the only means provided by the MDL statute for appealing the legal question presented by the foregoing unprecedented holding of the MDL Panel. That question is whether the MDL Panel is in fact bound by the express terms of the MDL statute, 28 U.S.C. § 1407(a), when transferring a case under that statute for purpose of full pretrial proceedings.

The MDL statute itself states:

> 28 U.S.C. § 1407. Multidistrict litigation
> (a) 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.

The statute does not permit transfer in any other circumstances or for any other reasons than those expressly provided. After the Ivy ruling, transfer may also be made for the narrow purpose of determining federal subject matter jurisdiction, independent of the terms of § 1407. But if the MDL Panel is bound for all other purposes by the express terms of the MDL statute, then, contrary to the holding of the MDL Panel, the "status of proceedings in this docket" does indeed limit the Panel's

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5/ The impression given by the Transfer Order, that the MDL Panel has held it may ignore the express terms of § 1407(a) & (c), is confirmed by a statement made during the hearing by the Judge who signed the Order. Judge Schnacke dismisses the basic legal prerequisite for transfer -- that there be at least one other case pending in which there exists some pretrial activity -- as merely "technical." See Exh. I, p. 86. Although the MDL Panel may ignore the specific threshold requirements of § 1407(a) when exercising its inherent powers granted by this Court's Ivy ruling, i.e, when transferring for the narrow purpose of determining the question of jurisdiction, this ruling does not exempt any court from the statute's express requirements when exercising the transfer authority granted by the statute.

authority to transfer this case for full pretrial proceedings in three separate ways.

First, the statute requires that there be pending contemporaneously in different districts a plurality of "civil actions" to be "coordinated or consolidated." If all other "Agent Orange" cases have been settled and dismissed, as indeed is the undisputed fact on the record of this case, then there is simply no "multidistrict" litigation here. The record clearly showed there was only one "pending" Agent Orange case in any federal court -- the instant case. The statute simply does not permit the transfer of a case where there is only one case of the kind pending, irrespective of whether there was another similar case in the past which is no longer pending because it was terminated by settlement or otherwise dismissed. In the absence of a single other similar case pending from a different district there is simply no occasion for exercising the transfer authority granted by § 1407.

No pending case other than this one has been identified by either defendants or the MDL Panel. The only cases identified have been settled or dismissed and are therefore not "pending." The previously transferred civil actions have been terminated and replaced by a settlement agreement. Residual supervisory duties after dismissal, incident to a settlement agreement, cannot constitute a "pending" civil action. When an "action has been dismissed, it is no longer pending ..." In re Petroleum Products Antitrust Litigation, 393 F.Supp. 1091, 1092 (J.P.M.L 1975)(per

curiam).

Second, even if another "pending" case could be identified, the statute requires that there be "common questions of fact" between the separate cases before transfer is allowed. So even if the MDL 381 cases previously dismissed with prejudice were nevertheless somehow considered to be still "pending," there would be no question of fact in pretrial in those dismissed cases to be addressed through coordinated or consolidated proceedings together with any common question of fact in this case.

Some dismissed cases in the MDL Docket 381 are still undergoing distribution of the Fund over which the District Court exercises some supervisory authority, pursuant to the settlement agreement. Supervision of the distribution of settlement moneys neither involves pretrial activity in a pending case, nor would it involve any matters for adjudication whatsoever. Therefore, such supervision could involve no "question of fact" to be addressed in a pretrial proceeding at all, let alone any that would be common to those to be adjudicated, and therefore addressed in pretrial proceedings, in this tort case. More to the point, no such common questions of fact have so much as been suggested by either the defendants or the MDL Panel. In the absence of findings by the MDL Panel identifying one or more specific questions of fact common to this case and one other pending case from a different district, the statute does not allow a transfer.

Third, the statute only permits transfer for conduct of

"coordinated or consolidated pretrial proceedings." But the MDL Panel made no findings that there is any other Agent Orange case in "pretrial." In fact, no other Agent Orange case could be identified that was in "pretrial" at the time of the Transfer Order. The MDL Docket 381 cases have terminated in final settlement and dismissal. Plaintiffs in the settled and dismissed cases have exhausted their respective appellate remedies. They are not and never will be in pretrial. There is no precedent for the proposition that a settled or otherwise dismissed civil action is nevertheless still in "pretrial" for any purpose. There has not been identified any other case in pretrial with which this case can be consolidated or coordinated. In the absence of some other pending federal case that is in "pretrial proceedings," the statute does not allow a transfer.

Defendants, as the proponent of the transfer, had the duty to adduce evidence that each of these three conditions were satisfied. Yet the lack of factual support for these three statutory prerequisites is uncontested. Petitioners advanced the negative of each of these three requirements by clearly asserting them in briefs and in the hearing on the record, and inviting evidence to the contrary. However, neither the defendants nor the MDL Panel, sua sponte, have produced any evidence of record that would satisfy a single one of these three legal prerequisites for transfer.

Failure to satisfy any one of these three separate provisions of the statute would independently foreclose the MDL

Panel from transferring this case. The statute does not state these conditions merely to be suggestive. They are mandatory prerequisites for transfers among the federal district courts. These conditions serve Congress' intended purpose to circumscribe the narrow range of cases where transfer clearly serves a legitimate purpose, and to exclude those cases where reliance on some vague and standardless notion of efficiency could be abused to facilitate mere judge-shopping by defendants and inconvenience to plaintiffs.

Far from complying with the terms of its governing statute, the MDL Panel arbitrarily transferred this case in express disregard of the statutory conditions for transfer that define and limit its powers.

4. This Petition for Extraordinary Writ is the Appropriate Means for Obtaining Review of a Transfer Order Which Violates 28 U.S.C. § 1407.

The issues discussed above were presented to the MDL Panel. Plaintiffs expressly asserted, and that assertion was uncontested in briefing or argument, that no case is pending in pretrial, in a different federal district, which raises questions of fact common to this case. But the MDL Panel failed to make the mandatory specific findings on these essential factual issues. The MDL Panel instead made conclusory and unsupported assumptions which were contrary to the record. The Panel also expressly ruled that it is not limited by the statutory constraints on its authority to transfer cases under § 1407. Supra pp. 19-20 & n.5. This ruling is without precedent, and is

clear error.

The MDL transfer statute, 28 U.S.C. § 1407(e), provides only one means to review a decision ordering transfer of a case in violation of its terms: an extraordinary writ pursuant to 28 U.S.C. § 1651. It is also consistent with the Court of Appeals' supervisory function to review "an issue new to this court" by extraordinary writ. Sporck v. Piel, 759 F.2d 312, 315 (3d Cir. 1985). See, Schlagenhauf v. Hoder, 379 U.S. 104, 110 (1964) (mandamus appropriate to decide "basic, undecided question"); Societe Nationale Industrielle Aerospacetiale and Societe de Construction D'Avions de Tourism v. United States District Court for the Southern District of Iowa, 482 U.S. 522 (1987) ("the novelty and importance of the question presented" are factors in determining propriety of extraordinary review). See also cases cited at Petition 8-10.

The issue presented by this petition is not only new to this court, but has not been addressed in a published decision by any other court. It is also important, both to the Agent Orange victims whose causes of action arose only after the 1984 settlement, as well as to other plaintiffs who seek a convenient venue of their choice for toxic tort claims. The concept, apparently subscribed to by the MDL Panel, that a federal judge who has handled a certain multidistrict toxic tort case should thereby hear all future cases complaining of similar injuries, has profound implications for our judicial system.

Because the issue presented by this petition need be

decided only in the event that federal jurisdiction is found in this case, it would be an efficient use of judicial resources to reserve decision of this important question of first impression under § 1407(a) until after the District Court has resolved the issue of federal subject matter jurisdiction in accordance with this Court's March 28, 1990 Ivy ruling. 6/

V. CONCLUSION

The MDL Panel may transfer a case from one federal district court to another for the purpose of conducting coordinated or consolidated plenary pretrial proceedings only pursuant to the terms of its governing statute, 28 U.S.C. § 1407. That statute provides for MDL transfer (1) "for coordinat[ing] or consolidat[ing] pretrial proceedings," (2) in "civil actions [that] are pending in different districts," (3) in order to address "one or more common questions of fact" raised simultaneously in the different cases. A valid MDL transfer must

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6/ It was the intention of petitioners to present the § 1407 transfer issue in addition to the federal subject matter jurisdiction issue in their January 31, 1990 petition. However it is apparent from this Court's March 28, 1990 ruling, which addresses only the question of the appropriate court to determine federal subject matter jurisdiction, that the § 1407 transfer issue was not clearly presented and was not resolved, or even considered by this Court, in disposing of the January 31, 1990 petition.

Any delay in presenting the transfer issue contained in this petition was therefore not deliberate, or done for any advantage. In any event it is well established that there is no time limit for the filing of a petition for writ of mandamus under 28 U.S.C. § 1651. See Coastal Steel v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 197 (3d Cir. 1983). Submission of this petition while petitioners' motion to remand for lack of federal subject matter jurisdiction remains pending before the District Court for the Eastern District of New York, should occasion no untoward delay in this case nor any prejudice to defendants.

satisfy all three of these conditions.

Plaintiffs showed in the hearing below that none of these three threshold requirements are satisfied in this case:

1) No Agent Orange case is pending in a different district;

2) No other Agent Orange case is in pretrial;

3) No other pending case presents any question of fact to be coordinated or consolidated for contemporaneous pretrial proceedings on questions of fact common with those in this case.

Defendants failed to make any record on these issues, and the MDL Panel failed to make the findings of fact, as is required by § 1407(c), to support any contrary conclusion.

This Court's March 28, 1990 ruling in Ivy, Docket No. 90-3007, found the MDL Panel has inherent power, analogous to that in United Mine Workers, to transfer a case for the narrow purpose of determining federal subject matter jurisdiction, even where no colorable basis for such jurisdiction has been asserted. This Court has not authorized transfer of this case under § 1407 for full pretrial proceedings where there is no evidence of record or findings based on that record that the three above-stated statutory conditions for transfer are satisfied. To do so would be to abandon Congress' carefully crafted limits on the transfer power in favor of undefined notions of efficiency which could be easily abused.

The Transfer Order issued by the MDL Panel on October 4, 1989 in this matter may be read to assert authority to transfer a case under § 1407 notwithstanding that the status of proceedings are such that the three above-stated statutory conditions for

transfer cannot be satisfied. Petitioners therefore respectfully request that the Transfer Order be vacated, in so far as it assigns to the U.S. District Court for the Eastern District of New York the conduct of any pretrial proceedings other than the determination of federal subject matter jurisdiction.

Alternatively, petitioners respectfully request that this Honorable Court remand this case to the MDL Panel for the findings of fact and conclusions of law required by § 1407(c) as to the three threshold requirements for transfer under § 1407(a), describing with particularity: 1) the specific "pending" case with which this case should be coordinated or consolidated for contemporaneous pretrial proceedings, naming plaintiffs and defendants therein; 2) the specific stage of "pretrial proceedings" which any such case is presently in, and 3) the specific "question of fact" which any such case has in common with this case.

Respectfully submitted,

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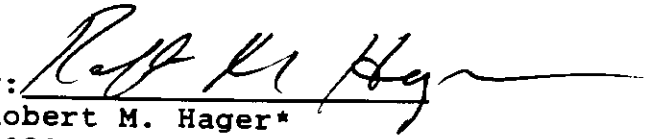
By: 
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the threshold limit for safe exposure to asbestos in 1946, and reaffirmed the standard in 1961 and 1964. State governments also adopted the five million particle per cubic foot standard. In 1945, the state of New York, where Lorenz resided at the time of his death, adopted the five million standard. Ohio, where Philip Carey had its headquarters and principal insulation plant, adopted the standard in 1947. Most importantly, the state of Texas, whose law governs this case, adopted the five million particles per cubic foot standard in 1958. It was not until after the period of Paul Lorenz's exposure that governments began to reduce the acceptable asbestos dust count.

Lorenz contends that none of the government standards offered by Celotex should apply in this case because none of those standards applies to the *labeling* of asbestos products. This argument cannot withstand analysis. To establish Celotex's liability for failure to warn of the dangers of using its products, Lorenz had to prove that Celotex "knew or should have known of such dangers at the time the products were marketed." *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1145 (5th Cir.1985). Evidence of compliance with government safety standards (here, evidence that use of Celotex's insulation products produced dust counts below the threshold limit) constitutes strong and substantial evidence that a product is not defective. *See Id.* at 1144. Thus, evidence that use of Celotex's products produced dust counts below the threshold limit is, logically, strong and substantial evidence that Celotex did not know or should not have known that its products were so dangerous or defective that they required a warning. Accordingly, we conclude that Celotex presented evidence of an applicable government standard.

Likewise, Celotex presented sufficient evidence that it complied with the applicable standards. First, Celotex introduced the results of several studies of asbestos exposure among insulation workers. In each case, the study concluded that exposure levels were below the five million particles per cubic foot threshold. Second, Celotex offered uncontroverted evidence that to the extent that its products differed from those being used in the studies it introduced, Celotex's insulation was *less* dusty. Arthur Mueller, a former research and development worker at Philip Carey, testified that Philip Carey's products contained a smaller percentage of asbestos than the competition's. He also testified that Philip Carey's insulation was designed to be cut with a knife rather than a saw, came with preformed fittings, and used an asbestos-free cement. Taken together, the evidence that asbestos counts for insulation workers in general were below the safety standard and that Celotex's products were less dusty than the typical insulation product constitutes evidence that Celotex's products complied with the five million particles per cubic foot standard.

CONCLUSION

The trial court did not err by instructing the jury that compliance with government safety standards constitutes strong and substantial evidence that a product is not defective. The instruction was substantively correct and was supported by the evidence. Therefore, the judgment of the district court is AFFIRMED.

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(7:611.52) Ivy v. Diamond Shamrock Chemical Co.

No. 90-3007 (2d Cir. Mar. 28, 1990) (per Winter, J.; Lumbard & Cardamone, JJ., concur), 901 F.2d 7

Product Liability: Agent Orange.

Petitioners brought an Agent Orange product liability action in a Texas court in 1989, long after the settlement in the Agent Orange class action. Although petitioners denied any federal law basis for their action, defendants successfully removed the case to the U.S. District Court for the Eastern District of Texas. Thereupon they asked the Multidistrict Litigation Panel to transfer the case to the Eastern District of New York for proceedings that would be consolidated or coordinated with MDL 381, the Agent Orange multidistrict litigation.

The MDL panel transferred the case, basing its decision on a finding that it presented common questions of fact with litigation previously transferred as MDL 381 matters. The panel also noted that the transferee Eastern District was legally authorized to hear plaintiff's motion pending in the Eastern District of Texas to undo the removal by remanding the case to state court. Rather than moving for remand in the transferee court, however, petitioners have sought mandamus against the MDL panel, asking that it be directed to vacate the transfer order on the ground that there is no federal subject matter jurisdiction.

The court of appeals rules that the scope of its mandamus authority is narrower than the petition before it. 28 U.S.C. §1407(e), governing multidistrict litigation, does not empower the MDL panel to decide issues going to the jurisdiction or merits of a case when it considers a transfer request. Further, it also limits the court of appeals to reviewing only the transfer order itself. Thus, before this court, the sole justiciable issue is the merits of the transfer, irrespective of a pending jurisdictional objection. On this question, the court finds that the common issues of fact and the experience of the transferee court in MDL 381 suit this case to transfer. In furtherance of the purpose of §1407, the court will hold that the MDL panel has authority to transfer a case in which a jurisdictional issue is pending. For its part, the appeals panel is also restrained from reaching jurisdiction at this time by the Supreme Court's ruling in *Roche, infra*, that appeals courts should abstain from deciding jurisdiction on mandamus petitions. Cases cited by petitioners that deviate from this rule appear, on closer inspection, to be more than simple mandamus cases, or to invoke an "exceptional circumstance" exception to the rule.

The petition for mandamus is denied, and the issue of subject matter jurisdiction must be raised by the remand motion, now pending in the transferee court.

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Cases Discussed:
Agent Orange Product Liability Litigation, in re, 611 F. Supp. 1396, 13 MLR 2546 (E.D.N.Y. 1985), *aff'd/rev'd in part*, 818 F.2d 179, 15 MLR 2371 (2d Cir. 1987)
BancOhio Corp. v. Fox, 516 F.2d 29 (6th Cir. 1975)
Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943)
Sugar Antitrust Litigation, in re, 588 F.2d 1270 (9th Cir. 1978)

Statutes and Regulations Construed:
28 U.S.C. §1407(e); Rule 21, F. R. App. P.

Document Available From MLR
- Circuit court opinion (9pp.)

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(17:446.1) United States v. Carlson

No. 89-10226 (9th Cir. Apr. 3, 1990), 900 F.2d 1346

Assimilative Crimes Act: Local "Crimes."

Appellant challenges his conviction in federal court for speeding, prosecuted under the Assimilative Crimes Act, incorporating local traffic statute, as criminal, see 17 MLR 2769. The Ninth Circuit reverses, holding that the federal statute incorporates only local "criminal law"; the local statute is defined by local law as a "violation," which is not considered a crime under state law. It is thus not "crime" under the ACA.

Under *Marcyes, infra*, a local determination that a statute was criminal was held not binding for federal application of the ACA, *Yellow Cab, infra*. Federal analysis concluded the local statute was regulatory. Court here rejects government's argument that this "regulatory/prohibitory" analysis should be applied here. That analysis is applicable only after local law defines the statute as "criminal." The governing requirement is that the Act only incorporates local "criminal" law, *Best, infra*. Other circuit holdings that local traffic laws are criminal are inapplicable because they apply to the law of different states from this one. Prosecutions for violations of local traffic laws on federal lands may be done directly under local law as incorporated by federal regulations.

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