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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Multidistrict Litigation: For Better or Worse

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Consolidating multiple complex litigations in a single forum—at least for pretrial purposes—offers parties, particularly defendants, considerable benefits in terms of efficiency and cost. But putting all one's litigation eggs in a single basket concentrates risk in one place as well. Although the rules governing multidistrict litigation generally permit transfer back to the original forum for trial, and thus offer defendants the chance to diffuse litigation risk if desired, not all cases can be transferred back to their original jurisdictions, and a party, through litigation conduct, can waive its right to transfer in those cases where the rules would otherwise have permitted it. Apple's recent experience in multidistrict antitrust litigation before Southern District Judge Denise L. Cote is a case in point.

'In re Electronic Books'

Apple was one of several defendants in *In re Electronic Books Antitrust Litigation*,[1] a multidistrict antitrust litigation consisting of four related lawsuits or groups of lawsuits alleging price-fixing for certain e-books: a civil action brought by the U.S. Department of Justice against Apple and a number of e-book publishers (the Justice Department action); a settlement action brought against certain publishers by 49 states and five territories (settlement action); a litigated action brought against Apple and certain other publishers by 33 states and territories (states' action); and a consolidated class action brought by private plaintiffs against Apple and the publisher defendants.

Transfer by Joint Panel

The first private action was brought in the Northern District of California, followed closely by several similar actions commenced in the Southern District of New York as well as the Northern District of California. Upon motion by the Southern District plaintiffs, the California actions were transferred to Judge Cote pursuant to 28 U.S.C. Section 1407(a), which provides for the transfer of related matters pending in different districts for coordinated or consolidated pre-trial proceedings, where transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."

Section 1407(a) provides that "[e]ach action so transferred shall be remanded…at or before the conclusion of such pretrial proceedings to the district court from which it was transferred unless it shall have been previously terminated." Shortly after transfer the class plaintiffs filed a consolidated amended complaint which Apple answered, admitting to venue in the Southern District of New York.

Several months later the Justice Department action was commenced in the Southern District of New York, on the same day that the states' action was commenced in the Western District of Texas by 16 of the states that would eventually join that action. One of the publisher defendants in that action promptly notified the Joint Panel on Multidistrict Litigation (JPML) that the states' action filed in Texas was a potential "tag-along" action (involving common issues of fact) to the actions in the Southern District.

Thereafter, the states informed Cote that they would not contest transfer—specifically referencing subsection (h) of Section 1407. That sub-provision is dedicated exclusively to actions brought under Section 4C of the Clayton Act, such as the states' action, and provides for transfer of such cases with or without the consent of the parties, and for trial as well as pretrial purposes. In this case,

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no party objected to the transfer and the JPML transferred the action "under 28 U.S.C. §1407" without specifying a particular subsection. The following month the states filed an amended complaint, joined by 17 additional states.

Apple answered the states' complaint, admitting that venue was proper in the Southern District of New York. Thereafter the court and the parties explored various options for trying the several cases, which involved claims for injunctive relief in the Justice Department action (to be tried to the court), and claims for damages in the states and class actions (to be tried to a jury). Although Cote proposed a single trial of all actions, Apple (as well as several other defendants) pressed for the court to try the Justice Department case first, because the bench trial of that action would be more narrow and streamlined, permitting more efficient resolution of the "issues that really matter to this market."

Apple suggested that a second trial might not even be necessary and that the parties might well find a way to resolve their issues following a trial of the Justice Department matter. Cote accordingly agreed to hold a liability and injunctive relief trial, to be followed by a damages trial if necessary. The states then opted to participate alongside the Justice Department in the bench trial—to which neither Apple nor any of the other defendants objected. Cote also set a consolidated discovery schedule for all aspects of all cases.

After the states settled their claims against a subset of the publishers (filing the settlement action), the court held a lengthy conference at which Apple proposed postponing class certification until after the liability trial. Apple specifically eschewed concern for any "one-way benefit" that might enure to the class from concluding the liability trial prior to the close of the opt-out period. Cote thus agreed to "untether" class certification from the liability trial.

At various conferences and in various other submissions, both before and after the liability trial—at which Apple was found to be liable—the parties (including Apple in particular) and the court operated on the understanding that a single damages trial would be held and that it would be held before Cote in the Southern District. For example, Apple made a proposal for organizing the remaining issues which expressly referred to the court holding a joint jury trial on the remaining issues in the states' and the class actions and the court placed the damages trial on its calendar without objection by Apple or any other party.

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At Apple's request, the class plaintiffs filed an amended consolidated complaint which reduced the number of named plaintiffs, modified the class definition and added some additional allegations. In its answer to that complaint, no new allegations relating to venue were alleged, yet Apple, for the first time, denied that venue in the Southern District would be proper after pre-trial proceedings concluded.

After briefing on class certification, Apple filed a motion for suggestion of remand for two separate trials: of the class action to the Northern District of California and of the states' action to the Western District of Texas.

Remand Denied

Cote denied that motion. She found that the general rule, established by the Supreme Court in *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*,[2] that remand of a case transferred pursuant to Section 1407(a) is mandatory, did not require remand in this case for two independent reasons. First, she noted that Section 1407(h), which applies to parens patriae Clayton Act suits such as the states' action, may be transferred for trial as well as pretrial proceedings, even without the consent of the parties. Second, she noted that even with respect to cases transferred under Section 1407(a), the right to remand can be waived if the parties consent to trial in the transferee district.[3]

Cote quickly concluded that the states' action should not be transferred back to the Western District of Texas, where it was originally filed. Although the order transferring the case to Cote had referred only generally to Section 140, without expressly invoking Section 1407(h), the states had conditioned their consent to transfer on Section 1407(h) and no party had objected to transfer under that provision.

Cote rejected Apple's contention that because the JPML transfer order cited the "reasons stated" in its earlier order transferring the California class actions pursuant to Section 1407(a), the JPML should be presumed to have transferred the states' action pursuant to the same section. She concluded that "'reasons' is different from 'purposes[,]'" and that the reason cited for the earlier transfer was judicial efficiency—a reason that applied with equal force to a transfer pursuant to Section 1407(h).[4]

Turning to the question of remanding the California class action, she concluded that remand was, at a minimum, premature, because pretrial proceedings—namely the plaintiffs' summary judgment motion—were still ongoing. More importantly, she found that the original class actions, including those transferred from the Northern District of California, were effectively stayed by the filing of the consolidated amended class action complaint, as to which she had recently certified a class, and which was scheduled to go to trial in July 2014.

Citing authority for the proposition that individual actions are generally merged into a consolidated nationwide class action, Cote observed that in the ordinary course, Apple could make its remand application after the jury trial, at which time the court could determine whether the originally filed class actions had been rendered moot and dismissed, or whether those filed in California should be remanded.[5]

Cote noted other complexities raised by Apple's remand motion that she found Apple had not adequately addressed, principally relating to what remand would mean with respect to the actions not subject to remand. She observed that Apple seemed to assume that if remanded, the California class action would be the only one to proceed, but found that the actions originally filed in New York had as much (or as little) right to proceed as the California-filed proceedings, and that there was no reason why the California case, which had not been certified, should take precedence over the certified class action scheduled to go to trial before her in July.

Judge Cote concluded that Apple's lack of reasoned analysis and effort to engage in the complexities engendered from its remand application suggested that Apple's motion was made for tactical purposes of delay.

She further observed that to the extent the amended consolidated class action complaint represented any of the originally filed actions, it had to represent all of them—including those filed in New York, which could not be transferred to California absent plaintiffs' consent. Finally, she noted that Apple had not answered the question plaintiffs put forward in opposing transfer: Was Apple actually seeking four damages trials—separate trials in New York and Texas in the states' action and in New York and California in the class actions?

She concluded by commenting on the broader implications of Apple's motion (although these implications seem embedded in Section 1407(a)'s mandatory remand requirement) that "if this were a case in which class actions had been filed in many jurisdictions through the nation and transferred to her by the JPML, the number of separate damages trials could grow in number far beyond four if Apple's reasoning were adopted."[6]

Waiver and Estoppel

Cote also held that Apple had waived its right to remand both the states' and the California class action in reliance on *Armstrong v. LaSalle Bank National Assoc.*,[7] a U.S. Court of Appeals for the Seventh Circuit decision holding that a party may waive its right to remand under Section 1040(a) "expressly, or through its actions taken as a whole" that evidence consent to the transferee court's retention of the case.[8] With respect to the states' action she found that Apple waived any right it may have had to remand when it failed to object to a joint trial of the states' action with the Justice Department action.

She held that "Apple can no more object at this point to the resolution of the remaining issues…in this venue simply because the trial has been bifurcated than it could object to venue in the middle of a trial after a Rule 50 motion is denied."[9] She also found that Apple had waived any right to multiple damages trials by not asserting any such need or right at an extended court conference in June discussing how the trials in the case would proceed, and by repeatedly requesting a single damages trial both orally and in writing.

She concluded that Apple's lack of reasoned analysis and effort to engage in the complexities engendered from its remand application suggested that Apple's motion was made for tactical purposes of delay.

Finally, Cote found that Apple was judicially estopped from seeking multiple damages trials. Applying a three-part test set forth by the Supreme Court in *New Hampshire v. Maine*,[10] she found (1) that Apple's remand motion was clearly inconsistent with its previous statements and actions; (2) that Apple had persuaded the court to adopt its earlier position of a joint damages trial in the Southern District; and (3) that the class and the states would be prejudiced by having to participate in multiple trials when they had been planning for a single, joint trial, for example by coordinating on experts.

Noting that the U.S. Court of Appeals for the Second Circuit further limits judicial estoppel to circumstances where the "impact on judicial integrity is certain,"[11] she concluded that because Apple's motion was made for tactical advantage at the expense of its adversaries, "[t]he just and efficient administration of justice would be undermined if Apple's application were granted."[12]

1. 2014 WL 1642813 (S.D.N.Y. April 24, 2014).
2 . 523 U.S. 26 (1998).
3. 2014 WL 1642813, at *8 (quoting *Freeman v. Bee Mcaine Co*., 319 U.S. 448, 453 (1943) (venue is a "personal privilege" which may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct) (internal citations omitted).
4 . 2014 WL 1642813, at *9.
5. 2014 WL 1642813, at *10 (citing *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2002); Diane E. Murphy, Unified and Consolidated Complaints in Multidistrict Litigation, 132 F.R.D. 597, 607 (1991). Notably, the class certified in the consolidated class action was not a nationwide class but is limited to residents in states that are not participating in the states' action.
6. 2014 WL 1642813, at *11.
7. 552 F.3d 613 (7th Cir. 2009).
8. 2014 WL 1642813, at *11.
9. Id.
10. 532 U.S 742, 749 (2001).
11. *DeRosa v. Nat'l Envelope Corp.,* 595 F.3d 99, 103 (2d Cir. 2010).
12. 2014 WL 1642813, at *14.