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Go Big or Go Home: A Primer on Multidistrict Litigation

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Go Big or Go Home:
A Primer on Multidistrict Litigation

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Overview

- Why care about MDLs?
- What are MDLs?
  - **What** actions are subject to MDL?
  - **Why** do MDLs exist?
  - **Who** decides whether to create an MDL?
  - **Where** do MDLs get resolved?
  - **How** and **when** are MDLs initiated?
- What happens during an MDL?
- What happens after pretrial proceedings?
- Appeals

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Why care about MDLs?

Year	MDLs Pending	Actions Pending in MLDs
2018	207	46,188
2017	221	33,210
2016	250	40,461
2015	273	37,663
2014	290	53,091

https://www.jpml.uscourts.gov/statistics-info

https://www.uscourts.gov/statistics-reports

- "Since its inception, the Panel has considered motions for centralization in more than 2,750 dockets involving over 600,000 cases and millions of claims therein." (https://www.jpml.uscourts.gov/overview-panel-0)
- MDLs are becoming increasingly important in the efficient handling of large, complex disputes spanning judicial districts.

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Why care about MDLs? (cont'd)

- MDLs can encompass individual actions, class actions, or both.
- A wide variety of actions have been transferred into MDLs, including:
  - single accidents actions (e.g., airplane crashes, train wrecks, hotel fires);
  - mass torts (e.g., asbestos, drug and other products liability actions);
  - marketing and sales practices;
  - patent validity and infringement;
  - antitrust price fixing;
  - data security breaches;
  - securities fraud;
  - employment practices

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What is an MDL?

- MDLs were first created in the early 1960s in response to price-fixing litigation involving the electrical equipment industry – the first modern mass litigation.
- This same period saw a vast expansion in mass tort and antitrust litigation.
- Chief Justice Earl Warren created the Coordinating Committee for Multiple Litigation for the United States District Courts, which, in turn, proposed 28 U.S.C. § 1407. (*In re Plumbing Fixture Cases*, 298 F. Supp. 484 (J.P.M.L. 1968).)

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What is an MDL?

- 28 U.S.C. § 1407

(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.** 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.**

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What is an MDL?

- What actions are subject to MDL?
  - "**civil** actions"
  - "pending in **different** jurisdictions"
  - with "one or more **common questions of fact**"
- Why do MDLs exist?
  - "coordinated or consolidated **pretrial** proceedings"
  - "for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions"
  - "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. (https://www.jpml.uscourts.gov/overview-panel-0)

- MDLs are a form of "consolidation" for actions across federal jurisdictions.

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What is an MDL?

- Who decides whether to create an MDL?
  - the Judicial Panel on Multidistrict Litigation: seven federal judges from different circuits assigned by the Chief Justice for an indefinite term
    - currently, seven district judges: Sarah S. Vance (E.D. La.), Lewis A. Kaplan (S.D.N.Y.), Ellen Segal Huvelle (D.D.C.), R. David Proctor (N.D. Ala.), Catherine D. Perry (E.D. Mo.), Karen K. Caldwell (E.D. Ky.), Nathaniel M. Gorton (D. Mass.)
    - circuit judges have been appointed at various times
  - Role of the Panel
    - **not** a "super court" or, technically, a "special" court
    - serves a case management rather than adjudicatory role
    - largely limited to deciding whether MDL is appropriate and what district/judge should receive the assignment

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What is an MDL?

- Who decides whether to create an MDL? (cont'd)
  - Scope of Panel's Authority
    - broader transfer authority that district courts
    - can transfer actions where venue/personal jurisdiction would not originally be proper
    - transfer authority supersedes statutory exclusive venue provisions
    - can transfer claims or entire actions
    - can transfer claims against defendants who have not been served

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What is an MDL?

- Who decides whether to create an MDL? (cont'd)
  - Limitations on Panel's Authority
    - authority limited by statute
    - limited to deciding if common questions of fact warrant an MDL and when to remand
    - can only transfer **pending** actions for **pretrial** proceedings
    - can only transfer entire actions or entire claims – not partial claims or issues
    - no authority to transfer actions within a district
    - no authority over state court actions
    - no involvement in the substance of a action or claim
    - no authority to review decisions of the transferor or transferee courts

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What is an MDL?

- Where do MDLs get resolved?
  - Transferee court " 'inherits the entire pretrial jurisdiction that the transferor district judge would have exercised if the transfer had not occurred." (*In re Korean Air Lines Co., Ltd. Antitrust Litig.*, 642 F.3d 685, 699 (9th Cir. 2011).)
    - This includes all pretrial proceedings (e.g., discovery, discovery motions, class certification, dispositive motions) – even those that may affect trial, but rulings are reviewable by the transferor court upon remand. (*In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 169 F.R.D. 632, 637 (N.D. Ill. 1996).)
  - Transferor court exercises authority over the trial of an action **but** many actions are never remanded because they are resolved on dispositive motions, settle, the parties agree to trial by the transferee court.

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What is an MDL?

- How and when are MDLs initiated?
  - The Panel can initiate transfer of actions into an MDL on its own. (28 U.S.C. §1407(c)(i))
    - This method is rarely invoked when there are no related actions already in MDL.
  - Any party can move the Panel to have a group of actions transferred into an MDL. (28 U.S.C. § 1407(c)(ii))
  - Irrespective of the impetus, the Panel considers whether:
    - there are one or more common questions of fact
    - an MDL will "duplication of discovery" (*In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 405 F. Supp. 316, 319 (J.P.M.L. 1975).)
    - an MDL will "eliminate the possibility of colliding pretrial rulings by courts of coordinate jurisdiction" (*Id.*)
    - an MDL "will be for the convenience of the parties and witnesses" (28 U.S.C. § 1407(a).)
    - an MDL "will promote the just and efficient conduct of such actions" (*Id.*)

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What is an MDL?

- The list of considerations is vast!

  Many factors are relevant to the answer. . . . It will be useful— for illustration, if nothing more— to articulate some of these considerations.

  How many common questions of fact are there? What is their nature? How many cases are presently and prospectively involved? What is the geographical location of the districts in which the cases pend? If it is anticipated that further cases will be filed, in what districts? Who are the principal witnesses in the cases and where do they reside? What detriment, financial or otherwise, will be imposed upon any of the parties by ordering transfer? Will transfer result in a substantial saving of duplicative work? Will transfer usefully avoid conflicting rulings in the pretrial proceedings of the cases involved? Can many of the advantages of transfer be worked out by cooperation among counsel without transfer? Are pretrial proceedings already far along in any one or more of the cases? Will transfer hasten or delay progress in the cases? What is the availability of a judge or judges in the proposed transferee court or courts? Will the advantages of transfer overcome the normal desirability of having the same judge who conducts the trial also conduct pretrial proceedings? Will transfer impede or promote the prospect of settlements? Will transfer serve any ulterior motive of any party or parties, such as forumshopping? If class actions are involved, will transfer make for complexity or for simplification? Will transfer unjustly delay or deny any party's right to provisional remedies such as injunctive relief? What is the status and possible effect of any appeals pending in any of the cases? Will transfer operate to eliminate or avoid an undesirable multiplicity of appeals on similar issues?

(*In re Concrete Pipe Antitrust Cases*, 302 F. Supp. 244, 255 (J.P.M.L. 1969).)

- The key determination, however, seems to be whether an MDL will be more efficient and individual actions.

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What is an MDL?

- The Nuts and Bolts
  - Any attorney admitted to practice in any federal district court may appear before the Panel. (JPML Rule 2.1(c).)
  - If the Panel initiates transfer of a newly filed action, it typically issues a show cause order.
  - If the Panel initiates transfer of a potential "tag-along" action, it typically issues a conditional transfer order.
  - Otherwise, any party may move for transfer of actions into a new MDL or transfer of an action into an existing MDL. (JPML Rule 6.2(a).)

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What is an MDL?

- The Nuts and Bolts (cont'd)
  - A motion for transfer is in the form of a pleading (i.e., a Complaint) describing the relief sought and setting forth the facts supporting transfer. (JPML Rule 6.1(b).)
  - Argument concerning the facts and relevant authority are included in a separate brief or memorandum. (JPML Rule 6.1(b)(i).)
  - Responses are due within 21 days after filing.
    - While no longer required, responses are typically in the same form as an Answer
  - Replies are due within 7 days after the deadline for responses.

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What is an MDL?

- The Nuts and Bolts (cont'd)
  - "The Panel shall not consider transfer or remand of any action pending in a federal district court when any party timely opposed such transfer or remand without first holding a hearing session for the presentation of oral argument." (JPML Rule 11.1(c).)
    - **BUT** the Panel may dispense with a hearing if (i) dispositive issues have already been conclusively decided or (ii) the facts and arguments are adequately presented in the written briefs. (JPML Rule 11.1(c)(i) and (ii).)
  - In general, each motion receives a **maximum** of 20 minutes divided among the various viewpoints.
  - Hearings are typically held six times per year across the country.
  - The Panel will schedule 15-20 motions for each hearing.

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What is an MDL?

- The Nuts and Bolts (cont'd)
  - Panel decisions are typically in writing.
  - Those dissatisfied with the Panel decision can move for reconsideration or rehearing, **but** such motions are disfavored.
    - These motions are likely to be more successful if new facts have been developed.
  - Orders of the Panel are reviewable **only** by extraordinary writ (i.e., writ of mandamus or writ of prohibition). (28 U.S.C. § 1407 (e).)
    - Thus, the bar for reviewing a Panel decision is **very** high – appeals are unlikely to be successful.
  - **BUT** "[t]here shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings." (*Id.*)

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What is an MDL?

- The Nuts and Bolts (cont'd)
  - After the Panel orders transfer and filing takes place in the transferee court, the transferee court is fully vested with pretrial jurisdiction. (28 U.S.C. § 1407(c).)
    - As a practical matter, the Panel's file remains open until all proceedings in the transferred or tag-along actions have been terminated.
- What about the "when"? There is no strict deadline for moving to transfer, **but** the farther along an action is, the less likely it is to satisfy the goal of coordinating pretrial proceedings.

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What is an MDL?

- Selecting the Transferee Court and Judge
  - Neither the statute nor the Panel rules explain how.
  - There are essentially no limits on which district the Panel can transfer an MDL to.
  - In practice, the Panel usually relies on one or more of a set of factors:
    - Where the evidence is
    - Where the tort/event occurred
    - Where the parties/attorneys are
    - Where one/some/most of the actions are pending
    - Where the biggest action(s) is/are pending
    - Coordination with other federal/state proceedings
    - Experience of the Judge
    - Docket conditions

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What happens during an MDL?

- The transferor court maintains jurisdiction (and can rule on motions) until the filing of the Panel's transfer order.
  - Sometimes, the Panel even considers the pendency of matters before and timing of decisions from the transferor court in timing the transfer order.
- After issuing the transfer order, the Panel ceases involvement in the proceedings of the actions in the MDL.
- All decisions on pretrial proceedings rest with the transferee court.

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What happens during an MDL?

- Actions in an MDL are **not**, however, formally consolidated – i.e., merged into one action.
  - Each remains a separate action. (*In re Nissan Motor Corp. Antitrust Litig.*, 471 F. Supp. 754, 759 (S.D. Fla. 1979) ("The mere fact the cases were transferred under s 1407 does not have the effect of merging the suits into a single cause, or change the rights of the parties, or make those who are parties to one suit parties in another.").)
  - Though, the transferee court can order consolidation in appropriate circumstances.

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What happens during an MDL?

- Orders of the transferor court that precede transfer, remain binding on the parties, but the transferee court can modify those orders. (*In re Master Key Antitrust Litig.*, 320 F. Supp. 1404, 1407 (J.P.M.L. 1971).)
- The touchstone, though, is that the transferee court exercises the authority any U.S. District Court has in any action.
- While the Panel has no involvement in management of actions after transfer, it has approved (and expressed a preference for) the use of the Manual for Complex Litigation.

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What happens during an MDL?

- One area of particular focus in the transferee court is discovery.
  - While it is left to the individual Judge to determine how best to fulfill this mandate, recall that avoiding duplication of discovery and convenience of the parties and witnesses are two purposes of MDLs.
- Choice of law is also a potential concern.
  - In diversity actions, the Panel has recognized that the transferee court must apply the law that the transferor court would apply using the transferor court's choice of law rules. (*In re Plumbing Fixtures Litig.*, 342 F. Supp. 756 (J.P.M.L. 1972); *In re Volkswagen & Audi Warranty Extension Litig.*, 692 F.3d 4, 18-19 (1st Cir. 2012).)
  - In federal question actions, the transferee court gives consideration to the law that the transferor court would apply, but only the law of the transferee circuit and the Supreme Court are binding. (*See In re Korean Air Lines Disaster of Sept. 1, 1938*, 829 F.2d 1171, 1175-76, 1180 (D.C. Cir. 1987).)

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What happens during an MDL?

- Transferee courts have to consider how best to coordinate multiple parties and attorneys.
- They can appoint attorneys in an MDL to play specific roles.
  - "Liaison counsel" facilitates communications between the court and other counsel.
  - "Lead counsel" formulates and presents positions on substantive and procedural issues.
  - "Trial counsel" are the principal attorneys at trial.
  - "Committees of counsel" are appointed to represent disparate interests among various group members. These are also called "steering," "coordinating," "management," or "executive" committees.
- Attorneys who serve on a committee of counsel take on an enormous amount of work but also typically receive a portion of every plaintiffs' damages/settlement. (*See, e.g.*, *In re Zyprexa Prods. Liab. Litig.*, MDL No. 1596, 2007 WL 2340790 (E.D.N.Y. Aug. 17, 2007), *review denied*, 594 F.3d 113 (2d Cir. 2010).)

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What happens after pretrial proceedings?

- Technically, when pretrial proceedings are complete, the action should be remanded to the transferor court.
- This is initiated in one of three ways:
  - transferee court's suggestion of remand
  - the Panel's entry of an order to show cause, a conditional remand order, or another order
  - the motion of any party

  (JPML Rule 10.1(b).)
- In practice, most actions are never remanded. They terminate in the transferee court.

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What happens after pretrial proceedings?

- Disposition on Pretrial Motions
  - The transferee court's authority over pretrial proceedings extends to dispositive motions. (*See, e.g.*, *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966 (C.D. Cal. 2012) (granting summary judgment on antitrust claims).)
- Settlement
  - Global settlements are common in MDLs, particularly after a bellwether trial.
- Consent to Trial by Transferee Court
  - Historically, transferee courts sometimes transferred actions to themselves for trial. The Supreme Court stopped this practice relying on the express language of 28 U.S.C. § 1407. (*Lexecon, Inc. v. Milberg Weiss Bershad Heynes & Lerach*, 523 U.S. 26 (1998).)
  - The parties, however, sometimes consent to trial before the transferee court.
    - It is not entire clear that parties can do this – and it can be viewed as a form of forum shopping – but a party would be hard- pressed to appeal on that basis if it consented.
  - Often, transferee courts try to obtain consent from parties to conduct "bellwether" trials. The purpose is to illuminate the strengths and weaknesses of each parties' position and facilitate settlement.

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Appeals

- As mentioned previously, review of Panel decisions is difficult to obtain.
  - Only extraordinary writ review it allowed and not for orders denying transfer. (28 U.S.C. § 1407 (e).)
- The Panel has no authority to review transferee court decisions.
  - The Panel is also attuned to efforts to obtain such review via motions for "retransfer" or remand.
- Transferee court rulings may be appealed to the court of appeals for the transferee circuit. (*In re Corrugated Container Antitrust Litig.*, 662 F.2d 875 (D.C. Cir. 1981).)

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Have Additional Questions?

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Materials Accompanying
Go Big or Go Home: A Primer on Multidistrict Litigation

1. 28 U.S.C. § 1407
2. Introduction to the United States Judicial Panel on Multidistrict Litigation
3. Summary of Panel Rules
4. Rules of Procedure of the United States Panel on Multidistrict Litigation
5. Checklist for Filing a New MDL Motion for 28 U.S.C. § 1407 Transfer
6. *In re Plumbing Fixture Cases*, 298 F. Supp. 484 (J.P.M.L. 1968)
7. *In re Korean Air Lines Co., Ltd., Antitrust Litig.*, 642 F.3d 685 (9th Cir. 2011)
8. *In re Factor VIII or IV Concentrate Blood Prods. Litig.*, 169 F.R.D. 632 (N.D. Ill. 1996)
9. *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 405 F. Supp. 316 (J.P.M.L. 1975)
10. *In re Concrete Pipe Antitrust Cases*, 302 F. Supp. 244 (J.P.M.L. 1969)
11. *In re Nissan Motor Corp. Antitrust Litig.*, 471 F. Supp. 754 (S.D. Fla. 1979)
12. *In re Master Key Antitrust Litig.*, 320 F. Supp. 1404 (J.P.M.L. 1971)
13. *In re Plumbing Fixtures Litig.*, 342 F. Supp. 756 (J.P.M.L. 1972)
14. *In re Volkswagen & Audi Warranty Extension Litig.*, 692 F.3d 4 (1st Cir. 2012)
15. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987)
16. *In re Zyprexa Prods. Liab. Litig.*, MDL No. 1596, 2007 WL 2340790 (E.D.N.Y. Aug. 17, 2007)
17. *In re Zyprexa Prods. Liab. Litig.*, 594 F.3d 113 (2d Cir. 2010)
18. *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966 (C.D. Cal. 2012)
19. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998)
20. *In re Corrugated Container Antitrust Litig.*, 662 F.2d 875 (D.C. Cir. 1981)

TAB 1

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 87. District Courts; Venue (Refs & Annos)

28 U.S.C.A. § 1407

§ 1407. Multidistrict litigation

Currentness

(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. 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.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

(c) Proceedings for the transfer of an action under this section may be initiated by--

(i) the judicial panel on multidistrict litigation upon its own initiative, or

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to

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determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(d) 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.

(e) 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.

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

(g) Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws. “Antitrust laws” as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56); but shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a).

(h) Notwithstanding the provisions of section 1404 or subsection (f) of this section, the judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act.

CREDIT(S)

(Added Pub.L. 90-296, § 1, Apr. 29, 1968, 82 Stat. 109; amended Pub.L. 94-435, Title III, § 303, Sept. 30, 1976, 90 Stat. 1396.)

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28 U.S.C.A. § 1407, 28 USCA § 1407
Current through P.L. 116-5.

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TAB 2

Origin and Purposes

The United States Judicial Panel on Multidistrict Litigation, known informally as the MDL Panel, was created by an Act of Congress in 1968 – 28 U.S.C. §1407. 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. 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.

Historical Summary

Since its inception, the Panel has considered motions for centralization in more than 2,870 dockets involving almost 670,000 cases and millions of claims therein. These dockets encompass litigation categories as diverse as airplane crashes, other single accidents such as train wrecks or hotel fires; mass torts, such as those involving asbestos, drugs and other products liability cases; data security breaches, patent validity and infringement; antitrust price fixing; marketing and sales practices, securities fraud; and employment practices. Statistical and other information can be found on the Panel's web site:

www.jpml.uscourts.gov

Membership of the MDL Panel

The MDL Panel consists of seven sitting federal judges, who are appointed to serve on the Panel by the Chief Justice of the United States. The multidistrict litigation statute provides that no two Panel members may be from the same federal judicial circuit. The current Chair of the Panel is Judge Sarah S. Vance, who sits in the Eastern District of Louisiana. The remaining Panel members, in order of appointment to the Panel are Lewis A. Kaplan (S.D. New York), Ellen Segal Huvelle (D. District of Columbia), R. David Proctor (N.D. Alabama), Catherine D. Perry (E.D. Missouri), Karen K. Caldwell (E.D. Kentucky, and Nathaniel M. Gorton (D. Massachusetts).

For additional information,
please contact the Clerk's Office:

United States Judicial Panel
on
Multidistrict Litigation

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United States Judicial Panel on Multidistrict Litigation

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An Introduction to the United States Judicial Panel on Multidistrict Litigation

TAB 3

SUMMARY OF PANEL RULES

[Revised October 4, 2010]

Responses and replies to motions or orders to show cause are to be filed and served in conformity with Rules 3.2, 3.3, 4.1 and 6.1 of the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation. Please note the following:

Address:
Clerk of the Panel
Judicial Panel on Multidistrict Litigation
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Room G-255, North Lobby
Washington, DC 20002-8041

Telephone: 202/502-2800
Office Hours: 9 a.m. to 4 p.m.

FAX: 202/502-2888 (24 hours)
Website: www.jpml.uscourts.gov

NO PAPERS ARE TO BE LEFT WITH OR MAILED TO A JUDGE OF THE PANEL OR HIS/HER CHAMBERS FOR FILING.

Rule 3.2 requires filing of papers electronically (using CM/ECF) with pleadings attached as PDF documents. The rule also outlines the format for pleadings filed with the Panel. Each pleading shall bear the heading "Before the Judicial Panel on Multidistrict Litigation," the identification "MDL Docket No. ___" and the descriptive title designated by the Panel. For new litigations, movant should use an appropriate descriptive title. Briefs are limited to 20 pages, exclusive of exhibits. Exhibits should be numbered separately and clearly identified.

Rule 3.3 identifies filing procedures for non-CM/ECF users. All pro se individuals are non-CM/ECF users, unless the Panel orders otherwise.

Rule 4.1 requires that all papers filed with the Panel must be served on all parties in all actions involved in the litigation. If liaison counsel has been appointed by the transferee court in an existing MDL docket, this rule is satisfied by serving each party in each affected action and all liaison counsel. Recipients of a motion have 14 days (Rule 4.1(c)) to notify this office in writing of one attorney per party designated to file and to receive service of future Panel pleadings filed in the litigation.

Rule 5.1 requires any non-governmental corporate party to file a Corporate Disclosure Statement within 14 days of the filing of a motion or order to show cause.

Rule 6.1 provides a general outline for motion practice, including required accompaniments to motions under 28 U.S.C. §1407.

Rules 6.1(f) and 7.1(g) require counsel to advise the Panel of any developments in the litigation which would partially or completely moot a matter being considered by the Panel.

Rules 6.2(d), and 7.1(a) require parties and counsel to notify the Panel of any potential tag-along actions in which they are involved.

Rule 6.3 provides guidance on requesting extensions of time, and other forms miscellaneous relief.

Rule 11.1, deals with setting matters for oral argument or for submission without oral argument, notices of appearance or waiver of oral argument, parties entitled to present oral argument, and time limits.

Please note in Rule 2.1(d) that pendency before the Panel does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court.

← SEE OTHER SIDE FOR MORE INFORMATION →

Copying and certification fees are charged in accordance with Rule 3.1(c) and are as follows: $.50 per page for copying, $9.00 per document for certification, $25.00 per diskette, and $26 for each name/item researched. Payment for copying and certification must be made by check or money order payable to the "Judicial Panel on Multidistrict Litigation."

Fasten documents in top, left-hand corner

Start document 1.5" from top of page

BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In re: [descriptive title used by Panel or appropriate descriptive title for new motion]

MDL No. _____

Identify document:

MOTION

BRIEF (limited to 20 pages – giving background of litigation; factual and legal contentions of movant w/citation of applicable authorities)

RESPONSE TO MOTION

REPLY

EXHIBITS (identified and numbered separately)

ONE COURTESY PAPER COPY OF CERTAIN PLEADINGS IS REQUIRED WITHIN ONE BUSINESS DAY.
See Rule 3.2(d).

Schedule of Actions
[Must be attached to motions]

Include only related cases pending in FEDERAL DISTRICTS. Necessary information as follows:

COMPLETE name of each case, listing full name of each party on district court's docket sheet [Do NOT include "et als., etc."]
DISTRICT in which case is pending
DIVISION (or division number)
CASE NUMBER
Name of assigned JUDGE

DO NOT INCLUDE terminated actions or actions pending in state courts.

Notices or letters advising of RELATED ACTIONS or of TAG-ALONG ACTIONS must include this information. **One copy of each complaint and docket sheet is required. Rule 6.1(b)(iv).**

MOTIONS FILED WITH THE PANEL:

When a motion is filed, the Panel will send a Notice of Electronic Filing (NEF) to all recipients of the motion as notification of the filing date, MDL docket number and caption, briefing schedule and pertinent Panel policies.

CALENDAR

Appearances: 14 days after filing of original motion
Corporate Disclosure Statement: 14 days after filing of motion
Responses to motion: 21 days
Reply to Responses (by movant): 7 days
Oppositions to Conditional Transfer Order (CTO) or Conditional Remand Order (CRO): **7 days**
Motions to Vacate CTO or CRO: 14 days (after opposition is filed)

TAB 4

UNITED STATED JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION
FILED

October 4, 2016

JEFFERY N. LÜTHI
CLERK OF THE PANEL

RULES OF PROCEDURE
OF THE
UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

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RULES OF PROCEDURE
OF THE
UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

(Effective, October 4, 2010, Amended July 6, 2011)
(Housekeeping revision, October 4, 2016. *See* Note p. 17)

I. RULES FOR MULTIDISTRICT LITIGATION

UNDER 28 U.S.C. §1407

The United States Judicial Panel on Multidistrict Litigation promulgates these Rules pursuant to its authority under 28 U.S.C. § 1407(f).

RULE 1.1: DEFINITIONS

(a) "Panel" means the members of the United States Judicial Panel on Multidistrict Litigation appointed by the Chief Justice of the United States pursuant to 28 U.S.C. § 1407.

(b) "Chair" means the Chair of the Panel appointed by the Chief Justice of the United States pursuant to Section 1407, or the member of the Panel properly designated to act as Chair.

(c) "Clerk of the Panel" means the official that the Panel appoints to that position. The Clerk of the Panel shall perform such duties that the Panel or the Panel Executive delegates.

(d) "Electronic Case Filing (ECF)" refers to the Panel's automated system that receives and stores documents filed in electronic form. All attorneys filing pleadings with the Panel must do so using ECF. All pro se individuals are non-ECF users, unless the Panel orders otherwise.

(e) "MDL" means a multidistrict litigation docket which the Panel is either considering or has created by transferring cases to a transferee district for coordinated or consolidated pretrial proceedings pursuant to Section 1407.

(f) "Panel Executive" means the official appointed to act as the Panel's Chief Executive and Legal Officer. The Panel Executive may appoint, with the approval of the Panel, necessary deputies, clerical assistants and other employees to perform or assist in the performance of the duties of the Panel Executive. The Panel Executive, with the approval of the Panel, may make such delegations of authority as are necessary for the Panel's efficient operation.

(g) "Pleadings" means all papers, motions, responses, or replies of any kind filed with the Panel, including exhibits attached thereto, as well as all orders and notices that the Panel issues.

(h) "Tag-along action" refers to a civil action pending in a district court which involves common questions of fact with either (1) actions on a pending motion to transfer to create an MDL or (2) actions previously transferred to an existing MDL, and which the Panel would consider transferring under Section 1407.

(i) "Transferee district" is the federal district court to which the Panel transfers an action pursuant to Section 1407, for inclusion in an MDL.

(j) "Transferor district" is the federal district court where an action was pending prior to its transfer pursuant to Section 1407, for inclusion in an MDL, and where the Panel may remand that action at or before the conclusion of pretrial proceedings.

RULE 2.1: RULES AND PRACTICE

(a) Customary Practice. The Panel's customary practice shall govern, unless otherwise fixed by statute or these Rules.

(b) Failure to Comply with Rules. When a pleading does not comply with these Rules, the Clerk of the Panel may advise counsel of the deficiencies and set a date for full compliance. If counsel does not fully comply within the established time, the Clerk of the Panel shall file the non-complying pleading, but the Chair may thereafter order it stricken.

(c) Admission to Practice before the Panel. Every member in good standing of the Bar of any district court of the United States is entitled to practice before the Panel, provided, however, that he or she has established and maintains a CM/ECF account with any United States federal court. Any attorney of record in any action transferred under Section 1407 may continue to represent his or her client in any district court of the United States to which such action is transferred. Parties are not required to obtain local counsel.

(d) Pendency of Motion or Conditional Order. The pendency of a motion, order to show cause, conditional transfer order or conditional remand order before the Panel pursuant to 28 U.S.C. § 1407 does not affect or suspend orders and pretrial proceedings in any pending federal district court action and does not limit the pretrial jurisdiction of that court. An order to transfer or remand pursuant to 28 U.S.C. § 1407 shall be effective only upon its filing with the clerk of the transferee district court.

(e) Reassignment. If for any reason the transferee judge is unable to continue those responsibilities, the Panel shall make the reassignment of a new transferee judge.

RULE 3.1: ELECTRONIC RECORDS AND FILES; COPY FEES

(a) Electronic Record. Effective October 4, 2010, the official Panel record shall be the electronic file maintained on the Panel's servers. This record includes, but is not limited to, Panel pleadings, documents filed in paper and then scanned and made part of the electronic record, and Panel orders and notices filed. The official record also includes any documents or exhibits that may be impractical to scan. These documents and exhibits shall be kept in the Panel offices.

(b) Maintaining Records. Records and files generated prior to October 4, 2010, may be (i) maintained at the Panel offices, (ii) temporarily or permanently removed to such places at such times as the Clerk of the Panel or the Chair shall direct, or (iii) transferred whenever appropriate to the Federal Records Center.

(c) Fees. The Clerk of the Panel may charge fees for duplicating records and files, as prescribed by the Judicial Conference of the United States.

RULE 3.2: ECF USERS: FILING REQUIREMENTS

(a) Form of Pleadings. This Rule applies to pleadings that ECF users file with the Panel.

(i) Each pleading shall bear the heading "Before the United States Judicial Panel on Multidistrict Litigation," the identification "MDL No.___" and the descriptive title designated by the Panel. If the Panel has not yet designated a title, counsel shall use an appropriate description.

(ii) The final page of each pleading shall contain the name, address, telephone number, fax number and email address of the attorney or party designated to receive service of pleadings in the case, and the name of each party represented.

(iii) Each brief submitted with a motion and any response to it shall not exceed 20 pages, exclusive of exhibits. Each reply shall not exceed 10 pages and shall address arguments raised in the response(s). Absent exceptional circumstances and those set forth in Rule 6.1(d), the Panel will not grant motions to exceed page limits.

(iv) Each pleading shall be typed in size 12 point font (for both text and footnotes), double spaced (text only), in a letter size document (8 ½ x 11 inch) with sequentially numbered pages.

(v) Each exhibit shall be separately numbered and clearly identified.

(vi) Proposed Panel orders shall not be submitted.

(b) Place of Filing. Counsel shall sign and verify all pleadings electronically in accordance with these Rules and the Panel's Administrative Policies and Procedures for Electronic Case Filing found at www.jpml.uscourts.gov. A pleading filed electronically constitutes a written document for the purpose of these Rules and the Federal Rules of Civil Procedure and is deemed the electronically signed original thereof. All pleadings, except by pro se litigants, shall conform with this Rule beginning on October 4, 2010.

(i) Pleadings shall not be transmitted directly to any Panel member.

(c) Attorney Registration. Only attorneys identified, or to be identified, pursuant to Rule 4.1, shall file pleadings. Each of these attorneys must register as a Panel CM/ECF user through www.jpml.uscourts.gov. Registration/possession of a CM/ECF account with any United States federal court shall be deemed consent to receive electronic service of all Panel orders and notices as well as electronic service of pleadings from other parties before the Panel.

(d) Courtesy Copy of Specified Pleadings. Counsel shall serve the Clerk of the Panel, for delivery within 1 business day of filing, with a courtesy paper copy of any of the following pleadings: (i)

a motion to transfer and its supporting brief; (ii) a response to a show cause order; (iii) a motion to vacate a conditional transfer order or a conditional remand order; and (iv) any response, reply, supplemental information or interested party response related to the pleadings listed in (i), (ii) and (iii). No courtesy copies of any other pleadings are required. Courtesy copies of pleadings totaling 10 pages or less (including any attachments) may be faxed to the Panel. The courtesy copy shall include all exhibits, shall be clearly marked "Courtesy Copy-Do Not File," shall contain the CM/ECF pleading number (if known), and shall be mailed or delivered to:

Clerk of the Panel
United States Judicial Panel on Multidistrict Litigation
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Room G-255, North Lobby
Washington, DC 20544-0005

(e) Privacy Protections. The privacy protections contained in Rule 5.2 of the Federal Rules of Civil Procedure shall apply to all Panel filings.

RULE 3.3: NON-ECF USERS: FILING REQUIREMENTS

(a) Definition of Non-ECF Users. Non-ECF users are all pro se individuals, unless the Panel orders otherwise. This Rule shall apply to all motions, responses and replies that non-ECF users file with the Panel.

(b) Form of Pleadings. Unless otherwise set forth in this Rule, the provisions of Rule 3.2 shall apply to non-ECF users.

(i) Each pleading shall be flat and unfolded; plainly written or typed in size 12 point font (for both text and footnotes), double spaced (text only), and printed single-sided on letter size (8 ½ x 11 inch) white paper with sequentially numbered pages; and fastened at the top-left corner without side binding or front or back covers.

(ii) Each exhibit shall be separately numbered and clearly identified. Any exhibits exceeding a cumulative total of 50 pages shall be bound separately.

(c) Place of Filing. File an original and one copy of all pleadings with the Clerk of the Panel by mailing or delivering to:

Clerk of the Panel
United States Judicial Panel on Multidistrict Litigation
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Room G-255, North Lobby
Washington, DC 20544-0005

(i) Pleadings not exceeding a total of 10 pages, including exhibits, may be faxed to the Panel office.

(ii) The Clerk of the Panel shall endorse the date for filing on all pleadings submitted for filing.

RULE 4.1: SERVICE OF PLEADINGS

(a) Proof of Service. The Panel's notice of electronic filing shall constitute service of pleadings. Registration/possession by counsel of a CM/ECF account with any United States federal court shall be deemed consent to receive electronic service of all pleadings. All pleadings shall contain a proof of service on all other parties in all involved actions. The proof of service shall indicate the name and manner of service. If a party is not represented by counsel, the proof of service shall indicate the name of the party and the party's last known address. The proof of service shall indicate why any person named as a party in a constituent complaint was not served with the Section 1407 pleading.

(b) Service Upon Transferor Court. The proof of service pertaining to motions for a transfer or remand pursuant to 28 U.S.C. § 1407 shall certify that counsel has transmitted a copy of the motion for filing to the clerk of each district court where an affected action is pending.

(c) Notice of Appearance. Within 14 days after the issuance of a (i) notice of filing of a motion to initiate transfer under Rule 6.2, (ii) notice of filed opposition to a CTO under Rule 7.1, (iii) a show cause order under Rules 8.1, (iv) notice of filed opposition to a CRO under Rule 10.2, or (v) notice of filing of a motion to remand under Rule 10.3, each party or designated attorney as required hereinafter shall file a Notice of Appearance notifying the Clerk of the Panel of the name, address and email address of the attorney designated to file and receive service of all pleadings. Each party shall designate only one attorney. Any party not represented by counsel shall be served by mailing such pleadings to the party's last known address. Except in extraordinary circumstances, the Panel will not grant requests for an extension of time to file the Notice of Appearance.

(d) Liaison Counsel. If the transferee district court appoints liaison counsel, this Rule shall be satisfied by serving each party in each affected action and all liaison counsel. Liaison counsel shall receive copies of all Panel orders concerning their particular litigation and shall be responsible for distribution to the parties for whom he or she serves as liaison counsel.

RULE 5.1: CORPORATE DISCLOSURE STATEMENT

(a) Requirements. A nongovernmental corporate party must file a disclosure statement that: (1) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or (2) states that there is no such corporation.

(b) Deadline. A party shall file the corporate disclosure statement within 14 days after issuance of a notice of the filing of a motion to transfer or remand, an order to show cause, or a motion to vacate a conditional transfer order or a conditional remand order.

(c) Updating. Each party must update its corporate disclosure statement to reflect any change in the information therein (i) until the matter before the Panel is decided, and (ii) within 14 days after issuance of a notice of the filing of any subsequent motion to transfer or remand, order to show cause, or motion to vacate a conditional transfer order or a conditional remand order in that docket.

RULE 6.1: MOTION PRACTICE

(a) Application. This Rule governs all motions requesting Panel action generally. More specific provisions may apply to motions to transfer (Rule 6.2), miscellaneous motions (Rule 6.3), conditional transfer orders (Rule 7.1), show cause orders (Rule 8.1), conditional remand orders (Rule 10.2) and motions to remand (Rule 10.3).

(b) Form of Motions. All motions shall briefly describe the action or relief sought and shall include:

(i) a brief which concisely states the background of the litigation and movant's factual and legal contentions;

(ii) a numbered schedule providing
  (A) the complete name of each action involved, listing the full name of each party included as such on the district court's docket sheet, not shortened by the use of references such as "et al." or "etc.";
  (B) the district court and division where each action is pending;
  (C) the civil action number of each action; and
  (D) the name of the judge assigned each action, if known;

(iii) a proof of service providing
  (A) a service list listing the full name of each party included on the district court's docket sheet and the complaint, including opt-in plaintiffs not listed on the docket sheet; and
  (B) in actions where there are 25 or more plaintiffs listed on the docket sheet, list the first named plaintiff with the reference "et al." if all the plaintiffs are represented by the same attorney(s);

(iv) a copy of all complaints and docket sheets for all actions listed on the Schedule; and

(v) exhibits, if any, identified by number or letter and a descriptive title.

(c) Responses and Joinders. Any other party may file a response within 21 days after filing of a motion. Failure to respond to a motion shall be treated as that party's acquiescence to it. A joinder in a motion shall not add any action to that motion.

(d) Replies. The movant may file a reply within 7 days after the lapse of the time period for filing a response. Where a movant is replying to more than one response in opposition, the movant may file a consolidated reply with a limit of 20 pages.

(e) Alteration of Time Periods. The Clerk of the Panel has the discretion to shorten or enlarge the time periods set forth in this Rule as necessary.

(f) Notification of Developments. Counsel shall promptly notify the Clerk of the Panel of any development that would partially or completely moot any Panel matter.

RULE 6.2: MOTIONS TO TRANSFER FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS

(a) Initiation of Transfer. A party to an action may initiate proceedings to transfer under Section 1407 by filing a motion in accordance with these Rules. A copy of the motion shall be filed in each district court where the motion affects a pending action.

(b) Notice of Filing of Motion to Transfer. Upon receipt of a motion, the Clerk of the Panel shall issue a "Notice of Filing of Motion to Transfer" to the service list recipients. The Notice shall contain the following: the filing date of the motion, caption, MDL docket number, briefing schedule and pertinent Panel policies. After a motion is filed, the Clerk of the Panel shall consider any other pleading to be a response unless the pleading adds an action. The Clerk of the Panel may designate such a pleading as a motion, and distribute a briefing schedule applicable to all or some of the parties, as appropriate.

(c) Notice of Appearance. Within 14 days of issuance of a "Notice of the Filing of a Motion to Transfer," each party or designated attorney shall file a Notice of Appearance in accordance with Rule 4.1(c).

(d) Notice of Potential Tag-along Actions. Any party or counsel in a new group of actions under consideration for transfer under Section 1407 shall promptly notify the Clerk of the Panel of any potential tag-along actions in which that party is also named or in which that counsel appears.

(e) Interested Party Responses. Any party or counsel in one or more potential tag-along actions as well as amicus curiae may file a response to a pending motion to transfer. Such a pleading shall be deemed an Interested Party Response.

(f) Amendment to a Motion. Before amending a motion to transfer, a party shall first contact the Clerk of the Panel to ascertain whether such amendment is feasible and permissible considering the Panel's hearing schedule. Any such amendment shall be entitled "Amendment to Motion for Transfer," and shall clearly and specifically identify and describe the nature of the amendment.

(i) Where the amended motion includes new civil actions, the amending party shall file a "Schedule of Additional Actions" and a revised Proof of Service.

(ii) The Proof of Service shall state (A) that all new counsel have been served with a copy of the amendment and all previously-filed motion papers, and (B) that all counsel previously served with the original motion have been served with a copy of the amendment.

(iii) The Clerk of the Panel may designate the amendment with a different denomination (*e.g.*, a notice of potential tag-along action(s)) and treatment.

(h) Oral Argument. The Panel shall schedule oral arguments as needed and as set forth in Rule 11.1.

RULE 6.3: MOTIONS FOR MISCELLANEOUS RELIEF

(a) Definition. Motions for miscellaneous relief include, but are not limited to, requests for extensions of time, exemption from ECF requirements, page limit extensions, or expedited consideration of any motion.

(b) Panel Action. The Panel, through the Clerk, may act upon any motion for miscellaneous relief, at any time, without waiting for a response. A motion for extension of time to file a pleading or perform an act under these Rules must state specifically the revised date sought and must be filed before the deadline for filing the pleading or performing the act. Any party aggrieved by the Clerk of the Panel's action may file objections for consideration. Absent exceptional circumstances, the Panel will not grant any extensions of time to file a notice of opposition to either a conditional transfer order or a conditional remand order.

RULE 7.1: CONDITIONAL TRANSFER ORDERS (CTO) FOR TAG-ALONG ACTIONS

(a) Notice of Potential Tag-along Actions. Any party or counsel in actions previously transferred under Section 1407 shall promptly notify the Clerk of the Panel of any potential tag-along actions in which that party is also named or in which that counsel appears. The Panel has several options: (i) filing a CTO under Rule 7.1, (ii) filing a show cause order under Rule 8.1, or (iii) declining to act (Rule 7.1(b)(i)).

(b) Initiation of CTO. Upon learning of the pendency of a potential tag-along action, the Clerk of the Panel may enter a conditional order transferring that action to the previously designated transferee district court for the reasons expressed in the Panel's previous opinions and orders. The Clerk of the Panel shall serve this order on each party to the litigation but shall not send the order to the clerk of the transferee district court until 7 days after its entry.

(i) If the Clerk of the Panel determines that a potential tag-along action is not appropriate for inclusion in an MDL proceeding and does not enter a CTO, an involved party may move for its transfer pursuant to Rule 6.1.

(c) Notice of Opposition to CTO. Any party opposing the transfer shall file a notice of opposition with the Clerk of the Panel within the 7-day period. In such event, the Clerk of the Panel shall not transmit the transfer order to the clerk of the transferee district court, but shall notify the parties of the briefing schedule.

(d) Failure to Respond. Failure to respond to a CTO shall be treated as that party's acquiescence to it.

(e) Notice of Appearance. Within 14 days after the issuance of a "Notice of Filed Opposition" to a CTO, each opposing party or designated attorney shall file a Notice of Appearance in accordance with Rule 4.1(c).

(f) Motion to Vacate CTO. Within 14 days of the filing of its notice of opposition, the party opposing transfer shall file a motion to vacate the CTO and brief in support thereof. The Clerk of the Panel shall set the motion for the next appropriate hearing session. Failure to file and serve a motion and brief

shall be treated as withdrawal of the opposition, and the Clerk of the Panel shall forthwith transmit the order to the clerk of the transferee district court.

(g) Notification of Developments. Parties to an action subject to a CTO shall notify the Clerk of the Panel if that action is no longer pending in its transferor district court.

(h) Effective Date of CTO. CTOs are effective when filed with the clerk of the transferee district court.

RULE 7.2: MISCELLANEOUS PROVISIONS CONCERNING TAG-ALONG ACTIONS

(a) Potential Tag-alongs in Transferee Court. Potential tag-along actions filed in the transferee district do not require Panel action. A party should request assignment of such actions to the Section 1407 transferee judge in accordance with applicable local rules.

(b) Failure to Serve. Failure to serve one or more of the defendants in a potential tag-along action with the complaint and summons as required by Rule 4 of the Federal Rules of Civil Procedure does not preclude transfer of such action under Section 1407. Such failure, however, may constitute grounds for denying the proposed transfer where prejudice can be shown. The failure of the Clerk of the Panel to serve a CTO on all plaintiffs or defendants or their counsel may constitute grounds for the Clerk to reinstate the CTO or for the aggrieved party to seek § 1407(c) remand.

RULE 8.1: SHOW CAUSE ORDERS

(a) Entry of Show Cause Order. When transfer of multidistrict litigation is being considered on the initiative of the Panel pursuant to 28 U.S.C. §1407(c)(i), the Clerk of the Panel may enter an order directing the parties to show cause why a certain civil action or actions should not be transferred for coordinated or consolidated pretrial proceedings. Any party shall also promptly notify the Clerk of the Panel whenever they learn of any other federal district court actions which are similar to those which the show cause order encompasses.

(b) Notice of Appearance. Within 14 days of the issuance of an order to show cause, each party or designated attorney shall file a Notice of Appearance in accordance with Rule 4.1(c).

(c) Responses. Unless otherwise provided by order, any party may file a response within 21days of the filing of the show cause order. Failure to respond to a show cause order shall be treated as that party's acquiescence to the Panel action.

(d) Replies. Within 7 days after the lapse of the time period for filing a response, any party may file a reply.

(e) Notification of Developments. Counsel shall promptly notify the Clerk of the Panel of any development that would partially or completely moot any matter subject to a show cause order.

RULE 9.1: TRANSFER OF FILES; NOTIFICATION REQUIREMENTS

(a) Notice to Transferee Court Clerk. The Clerk of the Panel, via a notice of electronic filing, will notify the clerk of the transferee district whenever a Panel transfer order should be filed in the transferee district court. Upon receipt of an electronically certified copy of a Panel transfer order from the clerk of the transferee district, the clerk of the transferor district shall transmit the record of each transferred action to the transferee district and then, unless Rule 9.1(b) applies, close the transferred action in the transferor district.

(b) Retention of Claims. If the transfer order provides for the separation and simultaneous remand of any claim, cross-claim, counterclaim, or third-party claim, the clerk of the transferor district shall retain jurisdiction over any such claim and shall not close the action.

(c) Notice to Clerk of Panel. The clerk of the transferee district shall promptly provide the Clerk of the Panel with the civil action numbers assigned to all transferred actions and the identity of liaison counsel, if or when designated. The clerk of the transferee district shall also promptly notify the Clerk of the Panel of any dispositive ruling that terminates a transferred action.

RULE 10.1: TERMINATION AND REMAND

(a) Termination. Where the transferee district court terminates an action by valid order, including but not limited to summary judgment, judgment of dismissal and judgment upon stipulation, the transferee district court clerk shall transmit a copy of that order to the Clerk of the Panel. The terminated action shall not be remanded to the transferor court and the transferee court shall retain the original files and records unless the transferee judge or the Panel directs otherwise.

(b) Initiation of Remand. Typically, the transferee judge recommends remand of an action, or a part of it, to the transferor court at any time by filing a suggestion of remand with the Panel. However, the Panel may remand an action or any separable claim, cross-claim, counterclaim or third-party claim within it, upon

(i) the transferee court's suggestion of remand,

(ii) the Panel's own initiative by entry of an order to show cause, a conditional remand order or other appropriate order, or

(iii) motion of any party.

RULE 10.2: CONDITIONAL REMAND ORDERS (CRO)

(a) Entering a CRO. Upon the suggestion of the transferee judge or the Panel's own initiative, the Clerk of the Panel shall enter a conditional order remanding the action or actions to the transferor district court. The Clerk of the Panel shall serve this order on each party to the litigation but shall not send the order to the clerk of the transferee district court for 7 days from the entry thereof.

(i) The Panel may, on its own initiative, also enter an order that the parties show cause why a matter should not be remanded. Rule 8.1 applies to responses and replies with respect to such a show cause order.

(b) Notice of Opposition. Any party opposing the CRO shall file a notice of opposition with the Clerk of the Panel within the 7-day period. In such event, the Clerk of the Panel shall not transmit the remand order to the clerk of the transferee district court and shall notify the parties of the briefing schedule.

(c) Failure to Respond. Failure to respond to a CRO shall be treated as that party's acquiescence to it.

(d) Notice of Appearance. Within 14 days after the issuance of a "Notice of Filed Opposition" to a CRO, each opposing party or designated attorney shall file a Notice of Appearance in accordance with Rule 4.1(c).

(e) Motion to Vacate CRO. Within 14 days of the filing of its notice of opposition, the party opposing remand shall file a motion to vacate the CRO and brief in support thereof. The Clerk of the Panel shall set the motion for the next appropriate Panel hearing session. Failure to file and serve a motion and brief shall be treated as a withdrawal of the opposition and the Clerk of the Panel shall forthwith transmit the order to the clerk of the transferee district court.

(f) Effective Date of CRO. CROs are not effective until filed with the clerk of the transferee district court.

RULE 10.3: MOTION TO REMAND

(a) Requirements of the Motion. If the Clerk of the Panel does not enter a CRO, a party may file a motion to remand to the transferor court pursuant to these Rules. Because the Panel is reluctant to order a remand absent the suggestion of the transferee judge, the motion must include:

(i) An affidavit reciting whether the movant has requested a suggestion of remand and the judge's response, whether the parties have completed common discovery and other pretrial proceedings, and whether the parties have complied with all transferee court orders.

(ii) A copy of the transferee district court's final pretrial order, if entered.

(b) Filing Copy of Motion. Counsel shall file a copy of the motion to remand in the affected transferee district court.

(c) Notice of Appearance. Within 14 days of the issuance of a "Notice of Filing" of a motion to remand, each party or designated attorney shall file a Notice of Appearance in accordance with Rule 4.1(c).

RULE 10.4: TRANSFER OF FILES ON REMAND

(a) Designating the Record. Upon receipt of an order to remand from the Clerk of the Panel, the parties shall furnish forthwith to the transferee district clerk a stipulation or designation of the contents of the record or part thereof to be remanded.

(b) Transfer of Files. Upon receipt of an order to remand from the Clerk of the Panel, the transferee district shall transmit to the clerk of the transferor district the following concerning each remanded action:

(i) a copy of the individual docket sheet for each action remanded;

(ii) a copy of the master docket sheet, if applicable;

(iii) the entire file for each action remanded, as originally received from the transferor district and augmented as set out in this Rule;

(iv) a copy of the final pretrial order, if applicable; and

(v) a "record on remand" as designated by the parties in accordance with 10.4(a).

RULE 11.1: HEARING SESSIONS AND ORAL ARGUMENT

(a) Schedule. The Panel shall schedule sessions for oral argument and consideration of other matters as desirable or necessary. The Chair shall determine the time, place and agenda for each hearing session. The Clerk of the Panel shall give appropriate notice to counsel for all parties. The Panel may continue its consideration of any scheduled matters.

(b) Oral Argument Statement. Any party affected by a motion may file a separate statement setting forth reasons why oral argument should, or need not, be heard. Such statements shall be captioned "Reasons Why Oral Argument Should [Need Not] Be Heard" and shall be limited to 2 pages.

(i) The parties affected by a motion to transfer may agree to waive oral argument. The Panel will take this into consideration in determining the need for oral argument.

(c) Hearing Session. The Panel shall not consider transfer or remand of any action pending in a federal district court when any party timely opposes such transfer or remand without first holding a hearing session for the presentation of oral argument. The Panel may dispense with oral argument if it determines that:

(i) the dispositive issue(s) have been authoritatively decided; or

(ii) the facts and legal arguments are adequately presented and oral argument would not significantly aid the decisional process.

Unless otherwise ordered, the Panel shall consider all other matters, such as a motion for reconsideration, upon the basis of the pleadings.

(d) Notification of Oral Argument. The Panel shall promptly notify counsel of those matters in which oral argument is scheduled, as well as those matters that the Panel will consider on the pleadings. The Clerk of the Panel shall require counsel to file and serve notice of their intent to either make or waive oral argument. Failure to do so shall be deemed a waiver of oral argument. If counsel does not attend oral argument, the matter shall not be rescheduled and that party's position shall be treated as submitted for decision on the basis of the pleadings filed.

(i) Absent Panel approval and for good cause shown, only those parties to actions who have filed a motion or written response to a motion or order shall be permitted to present oral argument.

(ii) The Panel will not receive oral testimony except upon notice, motion and an order expressly providing for it.

(e) Duty to Confer. Counsel in an action set for oral argument shall confer separately prior to that argument for the purpose of organizing their arguments and selecting representatives to present all views without duplication. Oral argument is a means for counsel to emphasize the key points of their arguments, and to update the Panel on any events since the conclusion of briefing.

(f) Time Limit for Oral Argument. Barring exceptional circumstances, the Panel shall allot a maximum of 20 minutes for oral argument in each matter. The time shall be divided among those with varying viewpoints. Counsel for the moving party or parties shall generally be heard first.

RULES 12-15: [RESERVED]

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II. RULES FOR MULTICIRCUIT PETITIONS FOR REVIEW UNDER 28 U.S.C. § 2112(a)(3)

RULE 25.1: DEFINITIONS

The Panel promulgates these Rules pursuant to its authority under 28 U.S.C. § 2112(a)(3) to provide a means for the random selection of one circuit court of appeals to hear consolidated petitions for review of agency decisions.

An "Agency" means an agency, board, commission or officer of the United States government, that has received two or more petitions for review in a circuit court of appeals to enjoin, set aside, suspend, modify or otherwise review or enforce an action.

RULE 25.2: FILING OF NOTICES

(a) Submitting Notice. An affected agency shall submit a notice of multicircuit petitions for review pursuant to 28 U.S.C. §2112(a)(3) to the Clerk of the Panel by electronic means in the manner these Rules require and in accordance with the Panel's Administrative Policies and Procedures for Electronic Case Filing, except that the portion of Rule 3.2(d) requiring a courtesy copy is suspended in its entirety.

(b) Accompaniments to Notices. All notices of multicircuit petitions for review shall include:

(i) a copy of each involved petition for review as the petition for review is defined in 28 U.S.C. § 2112(a)(2);

(ii) a schedule giving

(A) the date of the relevant agency order;

(B) the case name of each petition for review involved;

(C) the circuit court of appeals in which each petition for review is pending;

(D) the appellate docket number of each petition for review;

(E) the date of filing by the court of appeals of each petition for review; and

(F) the date of receipt by the agency of each petition for review; and

(iii) proof of service (*see* Rule 25.3).

(c) Scope of Notice. All notices of multicircuit petitions for review shall embrace exclusively petitions for review filed in the courts of appeals within 10 days after issuance of an agency order and received by the affected agency from the petitioners within that 10-day period.

(d) Filing at the Panel. The Clerk of the Panel shall file the notice of multicircuit petitions for review and endorse thereon the date of filing.

(e) Filing with Each Circuit Clerk. The affected agency shall file copies of notices of multicircuit petitions for review with the clerk of each circuit court of appeals in which a petition for review is pending.

RULE 25.3: SERVICE OF NOTICES

(a) Proof of Service. Notices of multicircuit petitions for review shall include proof of service on all other parties in the petitions for review included in the notice. Rule 25 of the Federal Rules of Appellate Procedure governs service and proof of service. The proof of service shall state the name, address and email address of each person served and shall indicate the party represented by each and the manner in which service was accomplished on each party. If a party is not represented by counsel, the proof of service shall indicate the name of the party and his or her last known address. The affected party shall submit proof of service for filing with the Clerk of the Panel and shall send copies thereof to each person included within the proof of service.

(b) Service on Clerk of Circuit. The proof of service pertaining to notices of multicircuit petitions for review shall certify the affected party has mailed or delivered copies of the notices to the clerk of each circuit court of appeals in which a petition for review is pending that is included in the notice. The Clerk shall file the notice with the circuit court.

RULE 25.4: FORM OF NOTICES; PLACE OF FILING

(a) Unless otherwise provided here, Rule 3.2 governs the form of a notice of multicircuit petitions for review. Each notice shall bear the heading Notice to the United States Judicial Panel on Multidistrict Litigation of Multicircuit Petitions for Review," followed by a brief caption identifying the involved agency, the relevant agency order, and the date of the order.

(b) Rule 3.2(b) and (c) govern the manner of filing a notice of multicircuit petitions for review.

RULE 25.5: RANDOM SELECTION

(a) Selection Process. Upon filing a notice of multicircuit petitions for review, the Clerk of the Panel shall randomly select a circuit court of appeals from a drum containing an entry for each circuit wherein a constituent petition for review is pending. Multiple petitions for review pending in a single circuit shall be allotted only a single entry in the drum. A designated deputy other than the random selector shall witness the random selection.

Thereafter, an order on behalf of the Panel shall be issued, signed by the random selector and the witness,

(i) consolidating the petitions for review in the court of appeals for the circuit that was randomly selected; and

(ii) designating that circuit as the one in which the record is to be filed pursuant to Rules 16 and 17 of the Federal Rules of Appellate Procedure.

(b) Effective Date. A consolidation of petitions for review shall be effective when the Clerk of the Panel enters the consolidation order.

RULE 25.6: SERVICE OF PANEL CONSOLIDATION ORDER

(a) The Clerk of the Panel shall serve the Panel's consolidation order on the affected agency through the individual or individuals, as identified in Rule 25.2(a), who submitted the notice of multicircuit petitions for review on behalf of the agency.

(b) That individual or individuals, or anyone else designated by the agency, shall promptly serve the Panel's consolidation order on all other parties in all petitions for review included in the Panel's consolidation order, and shall promptly submit a proof of that service to the Clerk of the Panel. Rule 25.3 governs service.

(c) The Clerk of the Panel shall serve the Panel's consolidation order on the clerks of all circuit courts of appeals that were among the candidates for the Panel's random selection.

NOTE: October 4, 2016, non-substantive housekeeping revision to Rule 3.2(d). Deleted "and (v) a corporate disclosure statement", thus eliminating the need to provide a courtesy paper copy of the corporate disclosure statement.

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III. CONVERSION TABLE - October 2010

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IV. INDEX

Abbreviations:

CRO = Conditional Remand Order
CTO = Conditional Transfer Order
ECF = Electronic Case Filing
MDL = Multidistrict Litigation
MCP = Muiticircuit Petition

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END

TAB 5

CHECKLIST FOR FILING A NEW MDL MOTION FOR 28 U.S.C. § 1407 TRANSFER

COURT RULES FOR THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

- ☐ Motion must consist of at least two actions with common questions of fact pending in two different federal district courts.

- ☐ Motion shall be captioned "BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION" followed by a brief descriptive caption of the new litigation. (Rule 3.2) *See Sample M-1*.

- ☐ Final page of each pleading shall contain the name, street address, email address and phone number of the attorney and shall include the name of each party represented.

- ☐ Brief (memorandum) in support of motion may not exceed 20 pages. *See Sample M-2.*

- ☐ Schedule of Actions must include the complete name of each action, listing the full names of each party (do not shorten with "etc." or "et al.") and shall also include any additional parties such as movants, intervenors, etc.; the district court and division; the civil action number; and the judge assigned for each action. *See Sample M-3.*

- ☐ Proof of Service shall indicate service of papers on the clerk of each district court that may be affected by the motion and shall include the name and address of each attorney served and the party represented by each. Double check the proof of service against the schedule of actions to make sure each party has been listed with counsel or, if counsel are unknown, serve the party directly. If unable to obtain the address of a party, you must state so in the proof of service. (Rule 4.1) *See Sample M-4.*

- ☐ Excessive exhibits are not helpful and generally do little to assist the Panel in ruling on a motion for transfer. Exhibits should be provided separately from the motion papers. DO NOT include as exhibits copies of the Panel's own orders.

- ☐ Provide the Panel with one courtesy copy of those pleadings listed on Rule 3.2(d) within one business day of filing. This will facilitate processing of the motion papers.

- ☐ An Oral Argument Statement is not required, however, one may be submitted with the motion papers.

FORMAT FOR NEW MOTION FOR 28 U.S.C. § 1407 TRANSFER

COURT RULES FOR THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

Rule 6.1: Motion Practice

BEFORE THE
UNITED STATES JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

In re John Doe Litigation MDL-_____

MOTION OF PLAINTIFFS FOR TRANSFER OF ACTIONS TO THE NORTHERN DISTRICT OF CALIFORNIA PURSUANT TO 28 U.S.C. § 1407 FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS

Plaintiffs Billy Jones, John Jones, Bill Smith in the N.D. California action listed above, and plaintiffs Karen Jones, Susan Jones, Bill Smith in the S.D. Ohio action, respectfully move this Panel , pursuant to 28 U.S.C. §1407 . . .

Atty Name
Address, Email Address, Phone
Counsel for plaintiffs: *YOU MUST NAME ALL PARTIES REPRESENTED*

A separate schedule of actions is required.

Averments in any motion seeking action by the Panel shall be in numbered paragraphs, each limited to a single factual averment.

Last page should contain name, street address, email address and telephone number of attorney or party in active charge of case and should name the parties represented.

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FORMAT FOR BRIEF IN SUPPORT OF NEW MOTION FOR 28 U.S.C. § 1407 TRANSFER

COURT RULES FOR THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

Rule 6.1: Motion Practice

BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In re John Doe Litigation MDL-____

BRIEF IN SUPPORT PLAINTIFFS' MOTION FOR TRANSFER OF ACTIONS PURSUANT TO TO 28 U.S.C. § 1407

BACKGROUND:

Plaintiffs Billy Jones, John Jones, Bill Smith in the N.D. California action and plaintiffs Karen Jones, Susan Jones, Bill Smith in the S.D. Ohio action filed their complaints . . .

ARGUMENTS:

Transfer of these actions to the Northern District of California is appropriate because . . .

Atty Name
Street Address, Email Address, Phone
Counsel for plaintiffs: *YOU MUST NAME ALL PARTIES REPRESENTED*

Brief is limited to 20 pages.

Background of the litigation and factual and legal contentions of the movant shall be concisely stated in separate parts of the brief with citation of applicable authorities.

Last page should contain name, street address, email address and telephone number of attorney or party in active charge of case and should name the parties represented.

Exhibits shall be provided separately from the accompanying pleading.

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FORMAT FOR NEW MOTION SCHEDULE

BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION
MDL-___ – In re John Doe Litigation

SCHEDULE OF ACTIONS

Case Captions	Court	Civil Action No.	Judge
Plaintiffs: Bill Jones, Tom Jones, Susan Jones **Movant:** Sharon Smith **Defendants:** Smith Corp.; Jones & Jones; Mary Jones Corp.; Johnson & Smith, Inc.	N.D. California (Bky. Court, Advy.)	1:04-12345	Jack J. Jones
Plaintiffs: Mary S. Smith, Executer of the Estate of John Smith; Mary S. Smith, on Behalf of Minor Child Susan Smith, and Mary S. Smith, Individually **Intervenor:** State of New York **Defendants:** Smith Corp.; Jones & Jones; Mary Jones Corp.; Johnson & Smith, Inc.	D. Delaware	1:05-00001	William Justice

For each action on the Schedule you must include:

Complete name of action, do not use "et al." or "etc."

Individuals that have been added to the docket sheet such as Movants or Intervenors are considered parties by the Panel and should be identified within your case caption.

District court.

Please group cases by "district " in ascending order.

Division & civil action number.

Within each district list cases in ascending order by civil action number.

Name of judge assigned.

A copy of the complaint and docket sheet for each action listed on the Schedule must be provided as an exhibit.

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PROOF OF SERVICE FOR MOTION FOR 28 U.S.C. § 1407 TRANSFER

BEFORE THE UNITED STATES
JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

In re John Doe Litigation MDL-____

Proof of Service

I hereby certify that a copy of the foregoing Motion, Brief, Schedule of Actions and this Certificate of Service was served by [Email, Overnight Delivery, First Class Mail, Hand Delivery . . .] on Month Day, Year, to the following:

Clerk, Northern District California
San Francisco, CA

Clerk, Southern District of Ohio
Cincinnati, Ohio

William Smith, Esq.
Smith, Smith & Smith
One Main Street
San Francisco, CA 22222
Email Address *(if known)*
Counsel for Plaintiffs: Andrea Resnick, Gary Bunker, John Haley, Amy Latham, and Kevin Simpson
N.D. California, No. 1:04-12345

John Johnson, Esq.
Johnson, Johnson & Johnson
Two Brown Street, Room 1
San Francisco, CA 22222
Email Address *(if known)*
Counsel for Plaintiffs: Andrea Resnick, Gary Bunker, John Haley, Amy Latham, and Kevin Simpson
D. Delaware, C.A. No. 1:05-00001

Joe Jones, Esq.
Jones, Smith & Johnson
Three Green Street
San Antonio, TX 22433
Email Address *(if known)*
Counsel for Defendant: Johnson & Smith

. . . and continue for the rest of the actions, including counsel for Movants or Intervenors where appropriate.

Rule 4.1 requires a proof of service on all other parties in all actions involved in the litigation. The proof of service shall indicate the name, complete street address and email address (if known) of each person served and shall indicate the party represented by each. Parties not represented by counsel shall be served at the party's last known address.

Service of a common defendant may be listed just once; however, organization of certificate of service should track organization of schedule of actions, so that counsel are listed in a district by district and case by case basis.

Individuals that have been added to the docket sheet as Movants or Intervenors are considered parties by the Panel and should be included on your certificate of service.

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TAB 6

298 F.Supp. 484
Judicial Panel on Multidistrict Litigation.

In re PLUMBING FIXTURE CASES.

No. 3.
|
Dec. 27, 1968.

Synopsis

The Judicial Panel on Multidistrict Litigation, William H. Becker, Judge of the Panel, transferred without condition to Eastern District of Pennsylvania nine multidistrict civil treble damage antitrust actions involving plumbing fixtures despite contentions by one plaintiff in one of the actions that conditions should be imposed that class action questions be reserved for determination after transfer by transferor court and secondly that discovery which had been agreed on or which had been ordered by transferor court should be completed.

Order accordingly.

Edward Weinfeld, Judge of the Panel, dissented in part.

***486** Before ALFRED P. MURRAH, Chairman, and JOHN MINOR WISDOM, EDWARD WEINFELD, EDWIN A. ROBSON, WILLIAM H. BECKER, JOSEPH S. LORD, III, and STANLEY A. WEIGEL, Judges of the Panel.

Opinion

OPINION AND ORDER

WILLIAM H. BECKER, Judge of the Panel.

After a hearing on August 8, 1968, on September 13, 1968, the Judicial Panel on Multidistrict Litigation, under Section 1407, Title 28, U.S.C., ordered the transfer to the Eastern District of Pennsylvania of 37 related multidistrict civil treble damage antitrust actions, pending in seven other districts, and assigned them to the Honorable John W. Lord, Jr., District Judge, 295 F.Supp. 33.

The actions so transferred included actions originally filed in the Northern District of California, the Southern District of New York and the District of Columbia.

Later the Panel learned of nine additional similar actions pending in the Northern District of California, the Eastern District of Virginia, the Southern District of New York, the Eastern District of Wisconsin, the District of Kansas and the District of Columbia. These nine additional actions are listed in the appended Schedule B.

On October 8, 1968, in accordance with current practice the Panel, on its initiative, issued an order to show cause why the nine additional similar actions should not also be transferred under Section 1407 to the Eastern District of Pennsylvania and assigned to Judge John W. Lord, Jr., on the basis of the record of the hearing of August 8, 1968. This order further provided for a hearing on October 16, 1968, on all matters relating to (1) the proposed transfer and assignment of the additional actions to Judge Lord, (2) the transfer of the actions to another district or districts, and (3) defendants' motion to transfer the actions under Section 1407 to the Western District of Pennsylvania.

In the written responses to the order to show cause and notice of hearing, all parties except the City of New York agreed in substance to the proposed transfer and assignment of the nine additional actions to Judge John W. Lord, Jr., under Section 1407.

For the reasons hereinafter stated all actions listed in Schedule B will be transferred on the initiative of the Panel to the Eastern District of Pennsylvania and assigned to the Honorable John W. Lord, Jr., District Judge.

The Position of the City of New York

The City of New York and its related agencies (the ‘City’) on behalf of themselves and of a class to consist of all City, twon and school district governmental units in the State of New York having a population in excess of 50,000 persons, and of all public housing authorities in the State of New York, filed a civil treble damage antitrust action in

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the Southern District of New York on August 2, 1968. By letter of the same date addressed to the Clerk of the Panel, counsel for the City requested that it be allowed to participate in the hearing of August 8, 1968, although its case was not among those listed in the defendants' motion to transfer or in the notice and order for the hearing of August 8.

At the hearing on August 8, counsel for the City Voluntarily appeared and stated, 'We agree wholeheartedly * * * with coordination, and we agree wholeheartedly that the proper forum would be Philadelphia, Pennsylvania' in the Eastern District of Pennsylvania.

In its response to the order to show cause and notice of hearing of October ***487** 16, 1968, the City expressly adheres to its position that the proper forum for transfer under Section 1407 would be the Eastern District of Pennsylvania but requested that the Panel order transfer of its action subject to the following two requests:

'First, since the New York City action is brought as a class action, the court in New York has the following obligation under Rule 23(c)(1) of the Federal Rules of Civil Procedure: 'As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained * * *.' Upon such determination, the court is required to direct notice to the members of the class. We do not believe that under Section 1407(a) 'pretrial proceedings' encompass a class action determination. Certainly if the entire file is transferred it would be impossible for the transferor court to discharge its obligations under Rule 23. Therefore, we request the Panel to order, as Mr. Margolis requested on August 8, that the City's action 'be allowed to go forth in the Southern District of New York for a determination of the class and the validity of the class action (by that Court) at the same time that coordinated discovery * * * continues.' (Transcript, pp. 117-8).

'Second, extensive pretrial discovery is already underway in the City's case. The City requests that any transfer order by the Panel require completion of such discovery as the parties have agreed to or which has been ordered by the District Court for the Southern District of New York prior to the date of the Panel's order.'

In summary the City requests that, in the civil action in which the City is plaintiff, the Panel order that action be transferred in part, that is for all pretrial purposes except determination of the class action questions which would be reserved by Panel order for determination after transfer by the transferor court.

In its response and in oral argument counsel for the City state that under Section 1407(a) 'pretrial proceedings do not include a class action determination.'

In oral argument the consequences of this contention were illuminated by the following colloquy with counsel for the City:

'JUDGE WEINFELD: Why do you call it a local action? Are you referring to the fact that you brought it within the Southern District and it involves municipalities within the State of New York and housing authorities within the State of New York?

'MR. MARGOLIS: What I meant was the court where we filed the suit should be the one to determine the class action.

'JUDGE WEINFELD: There are housing authorities right adjacent to New York State. You have them in New Jersey, you have them in Connecticut, you have them in Pennsylvania, and you have municipalities that come within the same categories. Why should you not go on a metropolitan or regional basis? In fact, that is the whole thrust of housing today, isn't it?

'MR. MARGOLIS: Yes. Well, the City (chose) to restrict, in bringing its class action, on the basis of various judicial opinions on class actions.

'JUDGE WISDOM: You recognize that there may be conflicts in the courts with respect to the scope of this class action, do you not?

'MR. MARGOLIS: Yes.

'JUDGE WISDOM: Now, isn't one of the purposes of this Act to avoid such pretrial conflicts?

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'MR. MARGOLIS: Our position is that we don't believe that the class action is part of pretrial. That is our position.

'JUDGE WISDOM: I recognize that that is your position, but how do you justify it?'

The City apparently requests that the reservation of power of the transferor court to determine the class action issue ***488** be accomplished by dividing the papers in the file between the transferor court and the transferee court, that is, by not transferring 'the entire file'.

In substance the City contends that in a transfer under Section 1407 the transferee court lacks the power to determine the class action issue, and that that power remains in the transferor court after transfer.

Rulings on the City's Requests

We do not agree with this interpretation. On the contrary we hold that there should not be separation of the class action issues and a reservation to the transferor court of power to determine the class action issues because (1) the Panel lacks the power to order such a separation or reservation, and (2) the exercise of such a power, if possessed, would be unwise and indiscrete.

The second request, that the Panel in its order of transfer require completion of discovery agreed upon or which has been ordered by the transferor court, is denied for the same reasons.

Reasons for the Rulings

First, the nature of the questions to be determined by the Panel should be analyzed.

The contentions of the City raise questions of statutory construction. No question of the constitutionality of Section 1407 or of its application in these cases is raised. Only transfer under Section 1407 is under consideration. The City does not appeal to the discretion of the Panel or to forbearance by the Panel in the use of its statutory powers on principles of comity, but rather contends the Panel has no power to transfer the class action issue. In these circumstances, the questions presented are plainly questions of construction of the statute authorizing transfer. See Hoffman v. Blaski, 363 U.S. 335, 80 S.Ct. 1084, 4 L.Ed.2d 1254, 1. c. 1260, and Ex Parte Collett, 337 U.S. 55, 69 S.Ct. 944, 93 L.Ed. 1207, 10 A.L.R.2d 921, 922, both of which involved analogous questions of costruction of the related Section 1404(a) providing for inter-district transfer for all purposes (change of venue) of civil actions for the convenience of parties and witnesses in the interest of justice. See also annotations on constitutionality, construction and application of Federal Statutes providing for transfer of civil actions. 5 A.L.R.2d 1239; 10 A.L.R.2d 932.

Construction of the Clear Language of Section 1407

Under applicable principles of statutory construction, the language of the statute should be examined first. If the statutory language is clear, the words plain and the meaning clear, 'there is no need to refer to the legislative history'. Ex Parte Collett, supra, 337 U.S., l.c. 61, 69 S.Ct., l.c. 947, 93 L.Ed., l.c. 1211.

Paragraph (a) of Section 1407 is relied on by the City and contains some of the critical language. It reads as follows:

'(a) When civil action involving

'(a) When civil actions involving 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 multi-district 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.'

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Paragraph (b) following immediately is as follows:

'(b) Such coordinated or consolidated pretrial proceedings shall be conducted ***489** by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.'

The language of paragraph (a) plainly and clearly authorizes transfer of 'civil actions'. The power is not granted to transfer of 'civil actions or parts thereof' or 'civil actions except the class action issue' as the City would have us hold. In federal civil procedure, and particularly in federal statutes authorizing transfer, the phrase 'civil action' has a definite meaning. Rules 2 and 3, F.R.Civ.P.; cf. Ex Parte Collett, supra, 337 U.S. 55, 69 S.Ct. 944, 93 L.Ed., l.c. 1210.

Nor does paragraph (a), or any other, invest the Panel with the power to require completion of discovery underway, discovery as the parties have agreed to, or which has been ordered by the transferor court as requested by the City.

No contention has been made by the City that discovery is not a part of the pretrial proceedings contemplated by Section 1407. It is only in respect to determination of the class action questions under Rule 23, F.R.Civ.P., that this contention is made. Yet the Panel is requested to make special orders about discovery binding on the transferee court.

Paragraph (b) clearly provides that the 'coordinated or consolidated pretrial proceedings shall be conducted by the judge or judges to whom such actions are assigned' by the Panel. So if discovery, including completion of discovery, and determination of the class action questions are part of the pretrial proceedings, then those powers are by clear statutory mandate required to be conducted by the transferee court. The use of the word 'shall' in the first sentence of paragraph (b) of Section 1407 makes this clear. The pretrial powers of the transferee court include the powers to modify, expand, or vacate earlier discovery orders. To coordinate discovery in the related cases, exercise of these powers may be necessary or desirable. The Panel has neither the power nor the disposition to direct the transferee judge in the exercise of his powers and discretion in pretrial proceedings.

The only power granted to the Panel to limit exercise of the pretrial powers of the transferee court is found in the proviso of paragraph (a) permitting the Panel to separate any 'claim, cross-claim, counter-claim, or third-party claim' of a transferred civil action and to remand 'any of such claims before the remainder of the action is remanded.' This power is in harmony with a portion of paragraph (b) of Rule 42, F.R.Civ.P., authorizing the ordering of separate trials of claims, cross-claims, counter-claims and third-party claims in furtherance of convenience and to avoid prejudice where conducive to expedition and economy.

While paragraph (a) of Section 1407 permits separation and remand by the Panel of claims, cross-claims, counter-claims and third-party claims separable under paragraph (b) of Rule 42, it does not permit the Panel to order a separate trial 'of any separate issue or * * * issues' which are also separable under paragraph (b) of Rule 42. This unequivocal and obviously deliberate withholding from the Panel of power to separate issues ***490** in a single civil action assigning one or more to the transferee court and one or more to the transferor court is a clear, precise and wise limitation on the powers of the Panel.

There are other clear indications that Congress did not intend to permit the Panel to partition the issues in a single claim for relief and to assign powers of

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supervision and decision of the separate parts to two courts to be exercised contemporaneously. By authorizing the Panel to transfer 'civil actions' (not parts thereof) for coordinated or consolidated pretrial proceedings and by limiting the Panel's powers of separation and remand to claims, cross-claims and counter-claims or third-party claims, Congress has made it 'impossible to read the section as excising' the powers to determine the class action questions from the order of transfer. Cf. Ex Parte Collett, supra, 337 U.S., l.c. 58, 69 S.Ct., l.c. 946, 93 L.Ed., l.c. 1210.

The purpose of Section 1407 as shown independently by its clear language, corroborated by the legislative history, [1] including the reports of the ***491** Congressional Committees and of the Judicial Conference, and by testimony before Congress of its authors, makes it clear that its remedial aim is to eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate ***492** district and appellate courts in multidistrict related civil actions. The contentions of the City in this case, if sustained, would make possible, and perhaps ***493** probable, pretrial chaos in conflicting class action determinations which Section 1407 was designed to make impossible.

In March 1965, a draft of Section 1407 was recommended for approval by the Judicial Conference of the United States by the Co-Ordinating Committee for Multiple Litigation in a formal report dated March 2, 1965, describing the purposes and operation of the proposed section. The section in its original form was drafted by the Co-Ordinating Committee. This report is part of the legislative history. Ex Parte Collett, supra, 337 U.S. 55, 69 S.Ct. 944, 93 L.Ed., 1. c. 1214. In March 1965, the Judicial Conference of the United States approved the proposed legislation in principle. On the basis of this approval a bill incorporating the proposed new section was introduced in the House of Representatives as H.R. 8276, 89th Congress, by Congressman Emanuel Celler and referred to the Committee on Judiciary. This report contained not only the original draft of the proposed Section 1407, but also a formal comment thereon which recognized the dangers in simultaneous prosecution of separate class actions under then proposed and now adopted Class Action Rule 23. The comment included a reference to difficulties of separate actions involving repetitious discovery mentioned in the Advisory Committee note to the proposed amended, now adopted, Rule 23. The full comment of the Co-Ordinating Committee is set forth in the appendix following this opinion and order.

It is in the field of class action determinations in related multidistrict civil actions that the potential for conflicting, disorderly, chaotic judicial action is the greatest. Under the recently amended Class Action Rule 23, F.R.Civ.P., powers for defining classes of parties, including plaintiffs and defendants, are not expressly limited by space, time, description of party of nature of claim or defense. Already, in related multidistrict litigation coming to the attention of the Panel, separate district courts have been requested to make conflicting class action determinations. In these circumstances it is not certain that each district court will always be able to learn of the conflicting requests made to other courts. It is certain, however, that if these conflicting requests are determined under Section 1407 in a transferee court, the information and means for fair, speedy and economical coordinated determinations will exist. It is the clear intent of Section 1407 to invest the transferee court with the exclusive powers, after transfer, to make the pretrial determinations of the class action questions. In the similar protection devices litigation we said: 'Determination of all matters involving questions of class actions shall be left to the sound judgment of Judge Metzner (the transferee judge).' In re Protection Devices and Central Station Protection Service Antitrust Cases, No. 9,295 F.Supp. 39 at page 40.

To this concept the City replies that the pretrial determination of the class questions is not a part of the 'pretrial proceedings' as used in Section 1407. No authority is cited for this unusual contention. The easy answer to this contention is probably the best one, ***494** namely, that pretrial, as an adjective, means before trial— that all judicial proceedings before trial are pretrial proceedings. This is known not only by lawyers and judges, but is known or can readily be learned by laymen. See Random House Dictionary of the English

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Language, unabridged ed. 1141. See also 'Pretrial Calendar' 33 Words and Phrases 511.

From a legal standpoint the class action request and its determination are the most urgent of the pretrial proceedings. This is recognized explicitly in subparagraph (c)(1) of Rule 23, F.R.Civ.P., which specially commands that 'as soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.' Under this subparagraph the order when made may be conditional, and may be altered or amended at any time before the decision on the merits. (So the process may continue through pretrial and after the pretrial proceedings have been completed. This leaves the transferor court some power and discretion before transfer and after remand.)

In an action filed as a class action most pretrial processes (specifically and generally listed in Rule 16, F.R.Civ.P., under the title 'Pretrial Procedure; Formulating Issues') involve or are affected by an affirmative class action determination. Those specifically listed in Rule 14 include:

'(1) The simplification of the issues;

'(2) The necessity or desirability of amendments to the pleadings;

'(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof; * * *.'

In order to make it clear that the Rule 16 orders and Rule 23 orders are of the same pretrial nature, subparagraph (d)(3) of Rule 23 expressly permits the Court to combine Rule 23 orders and Rule 16 pretrial orders. It would be interesting to learn how this could be done in a single civil action with the Rule 16 proceedings in the transferee court and the Rule 23 proceedings in the transferor court. The problem becomes practically insoluble when the class action request is in the complaint, with control of amendment of the complaint, the addition of parties and the giving of notice shared contemporaneously by one transferee court and several transferor courts with exclusive separate jurisdiction.

Further, the wide and general understanding that determination of the class action questions is a part of pretrial proceedings constitutes the basis of the listing of this as a subject, the processing of which should begin at the First Principal (Preliminary) Pretrial Conference, in the suggested procedures of the Manual for Complex and Multidistrict Litigation approved in September 1968 by the Judicial Conference of the United States. See Manual, pages 14, 22 and 23.

Unless the determination of the class action question is treated as a part of the pretrial proceedings, the transferee court will be unable to determine the parties (formal and represented) to the local and transferred actions, will be unable to coordinate the pretrial proceedings and will be unable to control the simplification of the issues through control of amendment of the pleadings, and through comprehensive control of discovery.

Another of the innumerable potential alarming consequences of the construction of Section 1407 submitted by the City is the conflict and delay which may result from early appeals from class action determinations. Under current interpretation there is a right to early appeal by the plaintiff from an order 'dismissing' the class action request before trial of the action. Eisen v. Carlisle & Jacquelin (C.A.2, 1966), 370 F.2d 119, cert. den. 386 U.S. 1035, 87 S.Ct. 1487, 18 L.Ed.2d 598 (1967), 2nd appeal (C.A.2, 1968), 391 F.2d 555. If, in multidistrict-multicircuit litigation such as this, powers to determine the class issues are reserved to the transferor ***495** courts, under the City's construction of the statute, multicircuit appeals on conflicting class action requests would be possible. Such multicircuit appeals would be fraught with multiplied delay, confusion, conflict, inordinate expense and inefficiency, which Section 1407 intended to eliminate. With multiple pretrial class issue action orders and appeals in the transferor districts and circuits, the transferee court would be helpless to process the pretrial proceedings in a manner which 'will promote the just and efficient conduct of such actions' in accordance with paragraph (a) of Section 1407. On the other hand, if all pretrial proceedings, after order of transfer and before remand, are conducted in

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the transferee court the pretrial proceedings and appellate proceedings for early review of pretrial rulings will ordinarily lie in the Court of Appeals for the transferee district from the time of transfer until remand. Consequently, coordination at the appellate level will also be achieved in one Court of Appeals, in the absence of an exceptional appeal before transfer.

As shown above, the contentions of the City are based on an erroneous construction of the phrase 'pretrial proceedings' as used in the text of the bill. No judicial authority is cited in support of the City's contentions. No other reasons or analogous experience is cited by the City. No part of the legislative history is cited by the City. On the other hand, the legislative history unequivocally supports the plain meaning of the statute. Adoption of the construction proposed by the City would result in an unauthorized and unintended frustrating judicial amendment to this salutary legislation.

Partition of the pretrial processes in a single claim for relief, with contemporaneous exercise of jurisdiction by two or more district courts over the separated parts, is not only unprecedented in federal jurisprudence but violates well settled principles of judicial management. Two courts of exclusive different jurisdictions, or venues, cannot exercise control over the same single claim for relief at the same time. As noted above under Rule 42(b), F.R.Civ.P., and Section 1407, separate claims for relief can be separated and transferred under Section 1404 as in Leesona Corp. v. Cotwool Manufacturing Corp. (D.S.C.) 204 F.Supp. 139, app. dismissed (C.A.4, 1962), 308 F.2d 895, or remanded under Section 1407. This is possible because several separate claims for relief in a single civil action are severable in the interests of justice. A single claim for relief, however, is separable by issues for trial under Rule 42 only if the entire action and all issues therein remain under control of one court (as distinguished from a judge of the one court). The reason is that, in federal civil procedure, the claim for relief is the irreducible legal unit for purposes of venue and jurisdiction by a single court at a particular time. This unitary concept of the claim for relief permits transfer of the claim for relief from one district court to another as in case of a transfer under Sections 1404(a), or 1407. But in no such separation and transfer is contemporaneous dual control by two or more district courts of a single claim for relief (or separate issues thereof) permissible in the federal system.

In substance a transfer under Section 1404(a) is a 'change of venue' (that is a 'change of courtrooms') for completion of pretrial and for trial or other disposition. Van Dusen v. Barrack, 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945, l.c. 962-963. By analogy a transfer under Section 1407 is a change of venue for pretrial purposes.

On change of venue the overwhelming authority holds that the jurisdiction and powers of the transferee court are coextensive with that of the transferor court; that the transferee court may make any order to render any judgment that might have been rendered by the transferor court in the absence of transfer. 92 C.J.S. Venue § 207 pp. 980-981 and cases therein cited, cf. ***496** Greve v. Gibraltar Enterprises (D.N.M.) 85 F.Supp. 410, l.c. 414; that after an order changing venue the jurisdiction of the transferor court ceases; and that thereafter the transferor court can issue no further orders, and any steps taken by it are of no effect. Phebus v. Search (C.A.8) 264 F. 407, l.c. 409; 21 C.J.S. Courts § 517a; 20 Am.Jur.2d § 149; 56 Am.Jur. Venue, § 78, p. 79. These principles are applicable to a transfer under Section 1407 from the time of entry of the order of transfer until the time of entry of an order of remand.

In the case of class action determinations made by the transferor court prior to transfer, the provisions of Rule 23 apply permitting the transferee court to determine the class action questions and to review and revise any class action order as in its sound judicial discretion is desirable or necessary in the interests of justice.

In the case of the City under consideration, it does not appear that the class action question is under submission, or that an initial decision is imminent. Discovery processes have been employed but all discovery processes completed or in progress will be useful after the transfer. No cause to defer transfer of the case of the City appears. Transfer without condition will be ordered.

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What has been said of the power to determine the class action issue disposes of the request for an order in respect to discovery. This matter is committed to the transferee court after order of transfer. All discovery processes in progress and discovery orders remain in effect unless vacated or modified by the transferee court in the same manner they could be modified by the transferor court. It is clearly stated in the notice and order for hearings of the Panel that discovery processes are not suspended thereby

The Principles of Comity

The Panel is keenly aware of the problems of the District Courts and Courts of Appeal in which is pending multidistrict litigation subject to transfer under Section 1407. There is no disposition on the part of the Panel to act hastily or without a considerate and well deserved respect for these courts, on principles of comity.

It is obvious that, under Section 1407, there will be proposals to transfer civil actions in which important pretrial motions are under submission or are reaching the point of submission. These motions include motions for dismissal, for summary judgment or for determination of the class action questions, among others. In one case of which the Panel has formal notice, an appeal from a pretrial denial of the class action issue is presently pending in the Court of Appeals of a proposed transferor court. The problems arising from these special circumstances require careful and thoughtful solution by the Panel.

On principles of comity, where appropriate, the Panel has in the past timed its actions and constructed its orders in a manner which will permit the transferor courts (and Courts of Appeals if any are involved) to reach timely decisions on particular issues without abrupt, disconcerting, untimely or inappropriate orders of transfer by the Panel. This policy of comity has been followed in the past and will be followed in the future by the Panel.

The successful use of Section 1407 requires cooperation among the Courts, and by the Panel in an atmosphere of trust, confidence, comity and good will. The Panel believes these conditions exist and will continue to exist.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that, on the initiative of the Panel, the nine civil treble damage antitrust actions listed in Schedule B attached be, and they are hereby, transferred without special conditions or reservations to the Eastern District of Pennsylvania and assigned to the Honorable ***497** John W. Lord, Jr., District Judge of the Eastern District of Pennsylvania, with the consent in writing of the transferee court attached hereto.

EDWARD WEINFELD, Judge of the Panel (concurring in part, dissenting in part).

I concur in the transfer of the actions for coordinated or consolidated pretrial proceedings. However, I dissent with respect to class action motions as follows:

I agree that upon the entry of an order by the Panel pursuant to section 1407 of Title 28, the transferee court has jurisdiction to determine class action motions under Rule 23, absent a pending motion in the transferor court. However, when a motion under Rule 23 already has been argued or submitted to a judge in the transferor court and is undetermined by him at the time of the entry of the transfer order by the Panel under section 1407, such transfer order does not divest the transferor judge of jurisdiction to make his determination of the Rule 23 motion. Notwithstanding, the transferor judge, as a matter of comity, may decline to exercise jurisdiction and defer to the transferee court.

SCHEDULE B *

Northern District of California

1.	The City of Los Angeles and Department of Water and Power of the City of Los Angeles v. American Radiator & Standard Sanitary Corporation, et al.	Civil Action No. 49866
2.	State of Hawaii v. American Radiator & Standard Sanitary Corporation, et al.	Civil Action No. 49541

Eastern District of Virginia

3.	Edward S. Petros v. American Radiator & Standard Sanitary Corporation, et al.	Civil Action No. 4887-A
4.	Vincent A. Mangano and M & M Builders, Inc. v. American Radiator & Standard Sanitary Corporation, et al.	Civil Action N. 4888-A
5.	Vincent A. Mangano v. American Radiator & Standard Sanitary Corporation, et al.	Civil Action No. 4889-A

Southern District of New York

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6.	The City of New York, et al, v. American Radiator & Standard Sanitary Corporation, et al.	Civil Action No. 68-3149

Eastern District of Wisconsin

7.	State of Wisconsin v. Plumbing Fixture Manufacturers Association, et al.	Civil Action No. 68-C-230

District of Kansas

8.	The State of Kansas, ex rel. Robert C. Londerholm, Attorney General v. American Standard, Inc., et al.	Civil Action No. T-4481

District of Columbia

9.	Blake Construction Co., Inc. v. American Standard, Inc.,et al.	Civil Action No. 2104-68

***498** APPENDIX

From Report of the Co-Ordinating Committee on Multiple Litigation Recommending New Section 1407, Title 28

PART I

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Comment on Proposed § 1407. Multi-District Litigation

As directed by the March 1964 resolution of the Judicial Conference of the United States, the Co-Ordinating Committee for Multiple Litigation (a subcommittee of the Committee on Pre-Trial Procedure and Practice) has examined the need for legislation and rules to treat the special problems presented by multi-district litigation. During the past year the Committee has analyzed its experience in the electrical equipment litigation, consulted with the judges and lawyers who participated in the ad hoc coordination program for those cases, and appraised numerous proposals designed to expedite proceedings when related civil actions are pending in more than one district. Proposed § 1407 is recommended as an important step in improving judicial administration for this class of cases.

The Co-Ordinating Committee considered whether the necessary procedural changes could be accomplished under existing rule-making authority. Study led to the conclusion that venue, historically a matter of legislative concern, would be affected by any appropriate solution of the problems. An earlier draft of a similar proposed statute would have provided the necessary statutory authority but would have required substantial implementation by the panel under specifically delegated flexible rule-making authority. After considering the comments received on an earlier draft, the Committee has concluded that its objectives can be achieved by the more limited and specific statute now proposed which authorizes only implementing rules not inconsistent with any Act of Congress or the Federal Rules of Civil Procedure.

Two techniques, court control of pretrial proceedings and centralization of such proceedings, are basic to the proposal. By authorizing unified treatment for multi-district actions involving one or more common questions of fact, the statute would create the possibility of applying to these cases ordered pre-trial procedures like those generally recommended ***499** for protracted cases pending in a single district. See, Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 351 (adopted by the Judicial Conference of the United States — March 1960). Centralization of pre-trial proceedings is sought in order to minimize the additional litigation costs which are engendered in multi-district litigation through overlapping and conflicting discovery, such as repetitive depositions and document production and minor variances in written interrogatories which may impose undue burdens on the answering parties.

Scope of the Statute.

The statute affects only the pre-trial stages in multi-district litigation. It would not affect the place of trial in any case or exclude transfer under other statutes (e.g., Title 28, U.S.C. §§ 1404(a) and 1406(a)) prior to or at the conclusion of pre-trial proceedings.

The civil actions which would be affected by the statute must meet several general requirements. First, they must involve one or more common questions of fact. Second, they must be pending in more than one district. Although present procedures permit coordinated or consolidated treatment of related cases brought in or transferable to a single district, these procedures do not provide for such treatment where the cases must remain pending in several districts. The proposed statute would not affect existing methods of coordinated or consolidated treatment of cases pending in a single district. Third, the circumstances must be such that coordinated or consolidated pre-trial proceedings would promote the just and efficient conduct of such actions. This final requirement limits the applicability of the proposed statute to litigation in which significant economy and efficiency in judicial administration may be obtained.

Limited Transfer.

The major innovation proposed is transfer solely for pre-trial purposes. The statute's objectives of eliminating conflict and duplication and of assuring efficient and economical pre-trial proceedings would thus be achieved without losing the benefits of local trials in the appropriate districts. An advantage of this statute in multi-district litigation over alternative techniques, such as the class action, is that each action remains as an individual suit with the litigants retaining control over

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their separate interests. The Advisory Committee's Note to Proposed Rule 23 (F.R.Civ.P.) comments that, 'Even when a number of separate actions are proceeding simultaneously, experience shows that the burdens on the parties and the courts can sometimes be reduced by arrangements for avoiding repetitious discovery or the like.' Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts 118 (U.S. Government Printing Office, 1964). Proposed § 1407 would maximize the litigant's traditional privileges of selecting where, when and how to enforce his substantive rights or assert his defenses while minimizing possible undue complexity from multi-party jury trials.

Under proposed § 1407 the transferee district court would have the usual powers provided by the Federal Rules of Civil Procedure, including authority to render summary judgment, to control and limit pre-trial proceedings, and to impose sanctions for failure to make discovery or comply with pre-trial orders. The deposition judges would have powers over the deponents and the actions as judges of the districts in which the depositions are taken.

Transfer to the most desirable forum is provided by permitting pre-trial transfer 'to any district.' Present transfer provisions for civil actions, which are not limited to pre-trial proceedings, ***500** restrict the transferee districts available. For example, Title 28, U.S.C. § 1404(a) limits the change 'to any other district or division where it (the civil action) might have been brought.' Similarly, Title 28, U.S.C. § 1406(a) restricts transfer 'to any district or division in which it (a case) could have been brought.' Analogous problems are presented when multiple bankruptcy petitions are filed by or against the same bankrupt. Section 32 of the Bankruptcy Act, title 11, U.S.C. § 55, permits transfer and consolidation 'in the court which can proceed with the same for the greatest convenience of parties in interest.'

Benefits from consolidated pretrial procedures for related cases have been recognized as grounds for transfer under Title 28, U.S.C. § 1404(a). In Popkin v. Eastern Air Lines, Inc., et al., 204 F.Supp. 426, 431 (E.D.Pa.); mandamus granted sub nom., Barrack, Administratrix, et al., v. Van Dusen U.S. District Judge, et al., 309 F.2d 953 (1962), rev'd. and remanded, 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964), the district court granted defendants' § 1404(a) motions to transfer 55 personal injury and wrongful death actions to another district where 114 cases which arose from the same crash were pending, stating that:

'The interest of justice requires the transfer of these cases to the transferee District for these reasons, among others: (1) Consolidation of all the cases arising from this accident for purposes of proceedings before trial is likely to procure fairer and more orderly trials for all litigants and save needless time and expense for the public, including jurors, and other litigants whose cases are awaiting trial.'

Judicial Panel on Multi-District Litigation.

The statute provides for the designation of a judicial panel n multi-district litigation empowered to: (1) initiate transfer proceedings; (2) transfer civil actions for coordinated or consolidated pre-trial proceedings with the consent of the district courts from which the actions are transferred; (3) assign a judge or judges to conduct such proceedings and request the Chief Justice to make inter-circuit assignments for this purpose; (4) act as and designate other judges as deposition judges in any district; and (5) remand transferred actions to the district from which they were transferred at or before the conclusion of pre-trial proceedings. The Chief Justice is granted authority to designate the panel's membership which shall consist of seven circuit and district judges.

When allocating multi-district litigation among the districts or assigning a judge or judges to conduct pre-trial proceedings, the panel would be functioning primarily in an administrative capacity. Analogous procedures for dividing the judicial business of a single district are found in certain districts where this function is performed by an executive committee of the district judges. For example, General Rule 10(c), Rules of the United States District Court for the Northern District of Illinois, provides:

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'(c) Executive Committee: The assignment of cases to calendars and judges * * * shall be done under the general direction of an Executive Committee consisting of three judges of this court * * *.'

The Committee's experience in organizing the deposition program for the electrical equipment antitrust litigation indicates that swifter and more flexible procedures for inter-circuit assignment of judges to conduct depositions are desirable. At some stages a program may not require judges or may require several deposition judges. At other times prompt attention from a larger group of judges may be useful. Frequent changes of the judicial personnel assigned to this task may also be ***501** advantageous. To permit rapid changes in the assignment of judicial personnel, the statute authorizes the panel and the judges to whom the cases are assigned to 'exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.' In addition, the panel is empowered to delegate this responsibility to other judges 'when needed.'

In accordance with the national character of the litigation with which the panel will be concerned, its membership will be drawn from seven judicial circuits. The members will be designated by the Chief Justice who presently has analogous functions in connection with inter-circuit assignments and in his capacity as presiding officer of the Judicial Conference of the United States. Title 28, U.S.C. §§ 291-295, 331.

Transfer would be effected by entry of the panel's order and the filing of the required consent of the district courts from which the actions are transferred in the office of the clerk of the transferee district court. This procedure is modeled on present techniques for effecting removal from state courts. Title 28, U.S.C. § 1446(e).

By providing for entry of the Panel's transfer orders in the transferee district it is intended to insure that appellate review, when available, will take place in one Court of Appeals. The proposed section does not attempt to alter or clarify present doctrines as to the availability or scope of review of transfer orders. Transfer orders under §§ 1404(a) and 1406(a) may be reviewable solely by mandamus. See, Philip Carey Mfg. Co., et al. v. Taylor, 286 F.2d 782 (C.A. 6, 1961), cert. den., 366 U.S. 948, 81 S.Ct. 1903, 6 L.Ed.2d 1242 (1961) § 1404(a) proceeding); Bankers Life & Casualty Co. v. Holland, Chief Judge, et al., 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106 (1953) § (1406(a) proceeding). On the other hand, it has been argued that such orders are appropriate for direct review under the doctrine of Cohen, Executrix, et al., v. Beneficial Industrial Loan Corp., et al., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1948). Note, Appealability of 1404(a) Orders: Mandamus Misapplied, 67 Yale L.J. 122 (1957). Orders of the district court remanding cases improperly removed from state courts are not reviewable. Title 28, U.S.C. § 1447(d).

The Electrical Equipment Antitrust Cases.

The national coordination program for the electrical equipment antitrust cases utilized many novel procedures to simplify and expedite that complex multi-district litigation. The broader and less expensive discovery that resulted from the planned program of eliminating repetitive examinations of deponents and production of documents was possible because of the cooperation of bench and bar under emergency conditions. For a more complete description of that program, see, Neal and Goldberg, The Electrical Equipment Antitrust Cases: Novel Judicial Administration, 50 A.B.A.J. 621 (1964). The devices which were effective in the national program, such as central management of pre-trial proceedings in related cases, and the reduction of deposition delays by assigning a judge to be available for prompt rulings throughout a deposition, commend themselves for use in future multi-district litigation. Proposed § 1407 would enhance the possibility that these and other effective economic procedures will be applied in the future to multi-district litigation.

Submission.

Your Sub-Committee to study problems of multiple litigation submits this report to supplement the previous reports and respectfully recommends ***502** favorable consideration of proposed § 1407 at the forthcoming meeting of the Judicial Conference of the United States.

Chief Circuit Judge Alfred Chief Judge Joe E. Estes

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P. Murrah, Chairman.	Judge George H. Boldt
Chief Judge Sylvester J. Ryan	Judge William M. Byrne
Chief Judge Thomas J. Clary	Judge William H. Becker
Chief Judge Roszel C. Thomsen	Judge Edwin A. Robson

March 2, 1965

Part II

Congressman Celler requested the views of the Department of Justice. The Department, in a letter dated January 7, 1966, and signed by Deputy Attorney General Ramsey Clark, favored the enactment of the bill with two amendments, (1) excluding government prosecutions under the antitrust laws from the scope of the bill, and (2) deletion of the provisions of the original bill requiring consent of the district court from which the action is transferred before the transfer is made. This letter reads as follows:

'This is in response to your request for the views of the Department of Justice concerning H.R. 8276, a bill 'To provide for the temporary transfer to a single district for coordinated or consolidated pretrial proceedings of civil actions pending in different districts which involve one or more common questions of fact, and for other purposes.'

'The bill would add a new section 1407 to title 28, United States Code, which would permit the transfer to a single district for coordinated or consolidated pretrial proceedings of civil actions pending in different districts which involve one or more common questions of fact. Such transfer shall be made by a judicial panel on multidistrict litigation, consisting of seven circuit and district judges appointed by the Chief Justice of the United States, upon determination by the panel that the transfer will promote justice and efficient conduct of such suits. The transfer requires the consent of the court in which the suit is pending, and each action so transferred shall be remanded by the panel at or before the conclusion of the pretrial proceedings to the district from which it was transferred. The panel may separate any claim, cross claim, counterclaim, or third party claim and remand any of such claims before the remainder of the action is remanded.

'The coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges assigned by the judicial panel. The panel may request, for this purpose, the temporary assignment of a circuit or district judge to the transferee district by the Chief Justice of the United States or the chief judge of the circuit. Proceedings for the transfer of an action may be initiated by the judicial panel by notice to the parties in all of the actions concerned of the manner, time and place of the hearing to determine whether the transfer shall be made. The concurrence of four members of the panel shall be necessary to any action of the panel. When actions have been transferred by order of the panel, no district court refusing to consent to the transfer of related litigation may make any order for or ***503** permit discovery in conflict with the discovery proceedings in the transferred actions.

'At present, there is no specific provision governing the conduct of discovery and pretrial proceedings on a consolidated basis. The massive national discovery program, which was established in response to the unprecedented number of electrical equipment treble damage actions, was instituted under the authority of Supreme Court rule-

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making power, which in turn resulted in a delegation of authority to a coordinating committee of judges for the purpose of working out an appropriate procedure for handling common discovery problems. The bill is an outgrowth of the experience gained under this national discovery program, and is an apparent attempt to codify some of the steps taken thereunder. (For a general discussion of the Program, see Neal and Goldberg, The Electrical Equipment Antitrust Cases: Novel Judicial Administration, 50 A.B.A.J. 621 (1964).)

'This legislation was recommended by the Judicial Conference of the United States. The Department of Justice favors its enactment but suggests that it be amended in two respects.

'We believe that Government prosecutions under the antitrust laws should be excluded from the scope of the measure. If the bill applied to such antitrust actions, it is anticipated that numerous private plaintiffs would file treble damage suits immediately following the filing of a Government suit. In consequence, Government suits filed by this Department would almost certainly be substantially delayed, often to the disadvantage of injured competitors who are awaiting the outcome of the Government suit upon which to predicate their damage actions. Furthermore there is no need for participation of injured competitors at this stage since section 5(b) of the Clayton Act (15 U.S.C. 16(b)) tolls the running of the statute of limitations on their damage suits while the Government litigation is proceeding. Private plaintiffs may use discovery to uncover information relating only to damages or information that we have already obtained through the use of grand juries, civil investigative demands or informal interviews. Moreover, if we wish to avoid such delay, we may be forced to share with private plaintiffs information already in our possession that we prefer to keep confidential and to relinquish the control of a consolidated discovery proceeding to a private plaintiff's attorney. While exempting the Government from this legislation may occasionally burden defendants because they may have to answer similar questions posed both by the Government and by private parties, this is justified by the importance to the public of securing relief in antitrust cases as quickly as possible. To treat the Government differently is not arbitrary, for the purpose of the governmental suit normally differs from that of a private suit: the Government seeks to protect the public from competitive injury, while private parties are primarily interested in recovering damages for injuries already suffered. We therefore recommend that the Government's civil antitrust suits be exempted from this legislation. On the other hand, the Government's damage suits should be included, for the Government's purpose in bringing such a suit is the same as that of a private party. Accordingly, it is suggested that a new subsection (g) be added to section 1 of the bill to read as follows: '(g) Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws. 'Antitrust laws' as used herein include those acts referred to in the Act of October 15, 1914, as amended, (38 Stat. 730; 15 U.S.C. 12), and ***504** also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117, 15 U.S.C. 56); but shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a).

'Also, we believe that the provision of the bill which requires the consent of the district court from which an action is transferred should be deleted. To require such consent seems superfluous since seven circuit and district judges must consider the proposed transfer and four members of the panel approve it before it can take place. Requiring the consent of the transferor district judge would give a veto power and in essence require voluntary cooperation of all in order to consolidate discovery proceedings.

'The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.'

All Citations

298 F.Supp. 484

Footnotes

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1 S. 3815 (S. 159, 90th Congress) was referred to the Subcommittee on Improvements in Judicial Machinery before which an initial hearing of the advocates of the bill was held on October 20, and 21, 1966. During those hearings Dean Neal,* one of the authors of the Judicial Conferences bill, answered relevant questions on the precise issue here, as follows:

*Dean Phil C. Neal, of the University of Chicago School of Law, formerly Executive Secretary of and Consultant to the Co-Ordinating Committee for Multiple Litigation. Dean Neal was one of the authors of and advocates of the passage of Section 1407, Title 18, U.S.C.

'Mr. Tydings. The bill provides for the transfer of claims for pre-trial procedures. It has been suggested that this conceivably is too broad and that the transfer should be for discovery under the Federal Rules of Civil Procedure only, leaving other pre-trial matters to the transferor district, to be conducted at perhaps the same time or later.

'The suggestion is also that the 'unit' which is transferred under the bill, the claim, is too broad, and that only 'issues of fact' need be transferred. Do you have any thoughts with respect to those two points?

'Dean Neal. Let me take the second question first. I think the appropriate unit to deal with is a claim or a cross-claim or counterclaim, because that is the basic unit under the Federal Rules of Civil Procedure insofar as they deal with separability of actions.

'Reference might be made specifically to Rule 42(b) of the Federal Rules of Civil Procedure, which deals with the problem of consolidation. I might say that Senate Bill 3815 really provides for a procedure that is quite analogous to what Rule 42 provides for, where cases are pending in the same district, and Rule 42(b) provides that in furtherance of convenience or to avoid prejudice, the court may in actions which it has consolidated, order the separate trial of any claim, cross-claim, counter-claim, third-party claim, et cetera.

'The provision in the proposed Section 1407 splitting off claims and sending them back to the originating district is based on the analogy to Rule 42(b) and I think that is correct.

'Now, the other suggestion, as I understood it, was that instead of transferring the case in toto for consolidated or co-ordinated pre-trial proceedings, only certain questions might be transferred to the transferee court and other issues left to be disposed of, presumably during the same period of time, by the transferor court. It seems to me that there are at least three rather serious objections to that.

'In the first place, I think it would be very difficult to frame any satisfactory definition that would tell you what kinds of issues should be dealt with by the transferee court and what kind by the transferor court, and I can imagine a great deal of argument and discussion going on as to whether a particular issue is of the kind that should be disposed of back home or should be disposed of by the transferee court.

'In the second place, it seems to me that it would be exceedingly awkward to have the determination of issues in the case being made partly in one jurisdiction and partly in another.

'The idea that a case could be pending in two different districts at the same time just seems to me to be a most awkward and inconvenient idea, and there are great problems of timing that would be involved, I would suppose. Certainly it would be convenient to dispose of certain issues before you got on to other issues and if you had to decide that certain of these issues must first be determined by another district court, the whole process of getting on with the co-ordinated or common proceedings might be interrupted.

'In the third place, it seems to me that the idea of leaving anything pending in the transferor district while the consolidated proceedings are going forward is really a way of depriving the judicial system of some of the important advantages of bringing the cases together.

'I think, for example, about the various rulings on questions of law which came up early in the electrical equipment cases such as the tolling of the statute of limitations, the effect of the fraudulent concealment doctrine, the effect of the pleas of nolo contendere and so on.

'I think one of the important things about the conduct of the electrical equipment cases was that these questions were all brought on early for hearing and were determined, appeals were taken and we did not have the questions decided at widely different times in the different parts of the litigation.

'Also, there would certainly be an advantage in having only one court decide those questions instead of having to get dozens of different decisions in different courts with conflicts eventually resolved by appeal.

'It seems to me, in short, that the suggestion of leaving the litigation in this divided state is quite impractical and that the only way, if one wants to have a case determined partly in the originating district and partly in the transferee district, to do it is the division in time that 3815 calls for, that is to say, the case is moved

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for all purposes to the transferee district, up to the conclusion of pre-trial proceedings, and then may be sent back.'

None of the suggestions to restrict the pre-trial powers of the transferee court mentioned by Senator Tydings were incorporated in the new section.

At the same hearing the writer, in a statement describing operation of the bill, said:

> 'Upon a temporary transfer under new Section 1407 the pretrial proceedings in the transferee court would be conducted in accordance with the current provisions of the Federal Rules of Civil Procedure. The transferee court would possess all powers which may be ordinarily exercised by a district court in a case pending before it under the Federal Rules of Civil Procedure except that the transferee court would be required to remand the action for trial of the factual issues disclosed by the pretrial proceedings in the transferee court. Only if an action was settled, dismissed, determined by summary judgment, or otherwise disposed of in accordance with the Federal Rules of Civil Procedure, would there be no remand.'

Others testifying at this hearing in support of the bill were Chief Judge Alfred P. Murrah (10th Cir.), Judge Edwin A. Robson (N.D.Ill.), Charles A. Bane, Esquire, Edward R. Johnston, Esquire, and Ronald W. Olson, Esquire, of the Chicago Bar. Chief Judge Thomas J. Clary (E.D.Pa.) testified in support of the bill before the same subcommittee on January 24, 1967.

In addition, the House Report No. 1130, 90th Congress, 2d Session, in which the Committee on Judiciary recommended passage of the bill, stated the following:

'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. To accomplish this objective the bill provides for the transfer of venue of an action for the limited purpose of conducting coordinated pretrial proceedings. The proposed statute affects only the pretrial stages in multidistrict litigation. It would not affect the place of trial in any case or exclude the possibility of transfer under other Federal statutes.

'By the term 'pretrial proceedings' the committee has reference to the practice and procedure which precede the trial of an action. These generally involve deposition and discovery, and, of course, are governed by the Federal Rules of Civil Procedure See, e.g., rule 16 and rules 26-37. Under the Federal rules the transferee district court would have authority to render summary judgment, to control and limit pretrial proceedings, and to impose sanctions for failure to make discovery or comply with pretrial orders.'

In Senate Report No. 438, 90th Congress, 1st Session, the Committee on Judiciary recommended passage of the bill, stating, among other things:

'The purpose of the proposed legislation is to provide formal machinery to transfer, for coordinated or consolidated pretrial procedures, civil actions pending in different judicial districts, and have one or more common questions of fact. 'Paragraph (e) provides that judicial review of transfer and subsequent orders of the panel is to be had only by extraordinary writ pursuant to 28 U.S.C. 1651, the All Writs Act. This procedure, more expeditious than appeal, is consistent with the overall purposes of proposed 1407. Paragraph (e) also provides that no review of a panel order shall be in any other forum than the U.S. Court of Appeals of the transferee district, thus avoiding multiplicity of review proceedings and minimizing the possibilities of conflicting rulings.'

Congress was keenly aware of the meaning of the bill on the question presented by the City.

Professor Thomas S. Currier, of the University of Virginia Law School, studied and analyzed H.R. 8276 for Deputy Counsel Trubow, of the Tydings Subcommittee. His analyses and suggestions were included in the appendix to the printed transcript of Hearings on S. 3815 at Chicago, October 20, and 21, at pages 84 to 87, inclusive. In his analysis Professor Currier correctly stated the following:

'(2) Scope of transfer.— The proposed legislation contemplates transfer of an 'action' to the transferee court, but for limited purpose of pretrial and discovery proceedings. The judicial panel on multidistrict

litigation is authorized to separate and remand any 'claim, cross-claim, counterclaim, or third-party claim' before remanding the entire civil action, and is to remand the entire action 'at or before' the conclusion of consolidated pretrial proceedings. Thus the minimum unit of litigation transferred is a 'claim.' The claim that is to be transferred must involve 'one or more common questions of fact,' and transfer is to be ordered when it will 'promote that just and efficient conduct' of the action— i.e., by preventing duplication of pretrial and discovery proceedings as to the common issue or issues.'

Professor Currier submitted for consideration of the subcommittee amendment of the bill to permit the transferor court to process the 'unique issues' while the transferee court processed the 'common issues'. The suggestion was as follows:

'The minimum unit to be transferred appears to be larger than is necessary to permit maximum realization of the purpose of the legislation. The action that is to be transferred, and even the 'claim' that will remain in the transferee court after it separates and remands other claims, cross-claims, etc., will normally include some unique factual issues, such as damages, in addition to the common issues that are the ground for transfer. Pretrial proceedings as to these unique issues will not be facilitated by consolidation and hence normally ought not to be conducted by the transferee court unless, under the criteria of section 1404(a), the entire action is one which should be transferred there.

'It is extremely likely, of course, that the transferee court under the proposed legislation would limit pretrial proceedings to the common issues even though the bill does not require such limitation. The unique issues could be left for pretrial proceedings in the transferor court after the action has been remanded. But it is questionable whether pretrial proceedings on the unique issues should always be made to await conclusion of pretrial proceedings on common issues. Efficiency may require that precedence be given, in the event of conflict, to pretrial of the common issues. But such conflicts may prove to be infrequent. In the context of the recent electrical equipment cases, for example, many potential deponents on issues of damages may have had no role to play in the pretrial proceedings on issues of conspiracy, and the only other likely source of conflict— the inability of a defendant's attorney to attend two pretrial proceedings simultaneously— is not, as a practical matter, really applicable to large corporate defendants, which are apt to be represented by a host of attorneys anyway.

'It thus appears that dispatch of litigation would be better served if the proposed legislation limited the scope of transfer to common issues of fact (including issues of mixed fact and law), and permitted the transferor court to conduct contemporaneous pretrial proceedings on the unique issues, subject only to priority, in the event of conflict, of pretrial proceedings in the transferee court. In any event, the legislation should expressly limit pretrial proceedings in the transferee court to common issues.'

This suggested amendment was deliberately omitted in the bill, S. 159, enacting the new section into law. The City now is asking the Panel by construction to do what Congress deliberately declined to do.

In addition attention is invited to discussions of the Judicial Conference Bill prior to its amendment and enactment. Consolidation of Proceedings Under Proposed Section 1407 of the Judicial Code: Unanswered Questions of Transfer and Review, 33 U. of Chicago L.Rev. 558, l.c. 561 (1966); The Problem of Venue in Multiple District Litigation Part IV. The Celler Bill, 41 Notre Dame Lawyer 507, l.c. 523-526 (1966).

* (Lettered "B" because of Schedule A listing cases originally transferred. 295 F.Supp. 33)

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TAB 7

KeyCite Yellow Flag - Negative Treatment
Distinguished by Otto v. Employee Retirement Income Plan-Hourly West, C.D.Cal., June 5, 2015

642 F.3d 685
United States Court of Appeals,
Ninth Circuit.

In re KOREAN AIR LINES CO., LTD., ANTITRUST LITIGATION,
Soon Ja Chun, Individually and on behalf of all others similarly situated;
Bernard Jung Kim, Individually and on behalf of all others similarly situated;
Elizabeth Bahn, Plaintiffs–Appellants,
v.
Korean Airlines Company, Ltd.; Asiana Airlines Inc., Defendants–Appellees.

No. 08–56385.
|
Argued and Submitted Sept. 2, 2010.
|
Filed April 18, 2011.

Synopsis

Background: Indirect purchasers of airline tickets brought putative class action against foreign air carriers, alleging violations of state antitrust and consumer protection laws. Action was transferred intradistrict for pretrial purposes as part of multidistrict litigation (MDL). Air carriers moved to dismiss. The United States District Court for the Central District of California, S. James Otero, J., 567 F.Supp.2d 1213, granted motion, dismissing claims as preempted by federal law, and denied indirect purchasers' motion to amend complaint to add federal claims. Purchasers appealed.

Holdings: The Court of Appeals, Gould, Circuit Judge, held that:

in a matter of first impression, Airline Deregulation Act (ADA) preempted state regulation of foreign as well as domestic air carriers;

indirect purchasers' claims under California Business and Professions Code and unfair competition laws were "related to a price" of an air carrier, and claims were thus preempted under ADA;

district court abused its discretion in denying motion to amend; and

Court of Appeals lacked jurisdiction over appeal of case management order (CMO).

Affirmed in part, vacated in part, and remanded.

Attorneys and Law Firms

***688** Patrick J. Coughlin, Joseph D. Daley, Frank J. Janecek, Jr., and Mary Lynne Calkins of Coughlin Stoia Geller Rudman & Robbins LLP, and Christopher M. Burke and Kristen M. Anderson of Scott + Scott LLP, Jared H. Beck and Elizabeth Lee Beck, Beck & Lee, Miami, FL, for the plaintiffs-appellants.

Ian Simmons, Sri Srinivasan, Irving L. Gornstein, Alexander Okuliar, Kathryn E. Tarbert, and Anton Metlitsky of O'Melveny & Myers LLP, and Willard K. Tom, Peter E. Halle, J. Clayton Everett, Jr., and Joseph Brooks of Morgan, Lewis & Bockius LLP, for the defendants-appellees.

Appeal from the United States District Court for the Central District of California, S. James Otero, District Judge, Presiding. ***689** D.C. No. 2:07–cv–06542–SJO–AGR.

Before: ALEX KOZINSKI, Chief Judge, DIARMUID F. O'SCANNLAIN and RONALD M. GOULD, Circuit Judges.

OPINION

GOULD, Circuit Judge:

Plaintiffs Soon Ja Chun, Bernard Jung Kim, and Elizabeth Bahn ("Plaintiffs"), acting individually and on behalf of those similarly situated, appeal the dismissal of their putative class action asserting

antitrust claims against Defendants Korean Air Lines Co., Ltd. and Asiana Airlines, Inc. ("Defendants" or "Korean Air and Asiana"). Before its dismissal, their case was one of many similar suits pending against Defendants on the same multidistrict litigation docket. Plaintiffs allege that the fares they paid for airline tickets were unlawfully excessive, in violation of both state and federal antitrust and consumer protection laws. The district court dismissed Plaintiffs' state law claims as preempted by federal law and denied Plaintiffs' motion to amend their complaint to add federal claims, effectively extinguishing Plaintiffs' case. Thereafter, Plaintiffs' complaint was dismissed with prejudice.

We have jurisdiction, pursuant to 8 U.S.C. § 1291, to review the district court's dismissal. We hold, as a matter of first impression, that the Airline Deregulation Act of 1978, 49 U.S.C. § 41713, preempts state regulation of foreign air carriers, and we affirm the district court's dismissal of Plaintiffs' state law claims. We conclude that the district court erred in denying Plaintiffs leave to amend to add federal claims. To the extent that Plaintiffs seek review of the interlocutory case management order governing the pretrial coordination of pending cases in the same multidistrict litigation, however, we lack jurisdiction to review such non-final decisions. We affirm in part, vacate in part, and remand for proceedings consistent with this opinion.

I

Plaintiffs allege that Defendants illegally conspired to impose a surcharge on passenger airfares. Plaintiffs are indirect purchasers of airline tickets; that is, they did not purchase tickets directly from Korean Air or Asiana but instead bought them from direct purchasers such as travel agents and consolidators.

Plaintiffs brought their action for violations of federal antitrust and related state laws in the Central District of California. Their initial complaint sought damages and injunctive relief under the Sherman Act, and under state antitrust and unfair competition laws, on behalf of two putative classes. The case was transferred intradistrict to Judge S. James Otero, to whom similar actions, alleging virtually identical conduct, had been sent for pretrial purposes as part of multidistrict litigation ("MDL"). *See In re Korean Airlines Co., Ltd. Antitrust Litig.,* No. 07–ml–01891 (C.D. Cal. filed Dec. 28, 2007) (hereinafter "MDL No. 1891"). [1] The district court consolidated the case with other pending cases and ordered that all plaintiffs together file an amended consolidated complaint.

690** Shortly thereafter, Plaintiffs filed an amended complaint, asserting then that their action was "brought only under state laws and only on behalf of ***indirect purchasers of Korean Air and Asiana passenger tickets" (emphasis in original). In a status report tendered to the district court, Plaintiffs urged that their case differed from the other consolidated MDL cases, in that it was the only case that involved the indirect purchase of tickets from travel agents or consolidators rather than direct purchase from the airlines, and they recommended that the "direct" and "indirect" cases be placed on coordinated but separate tracks for pretrial purposes. At the next status conference, the district court accepted this division and set out parallel briefing schedules for Plaintiffs' indirect purchaser action and the consolidated direct purchaser actions. Plaintiffs' counsel, as the only firm to have brought a case with indirect purchaser plaintiffs, was appointed as interim counsel to pursue indirect purchaser actions. The district court also appointed different co-lead counsel to pursue claims on behalf of the direct purchaser plaintiffs.

Pursuant to the court's briefing schedule, both the direct and indirect purchaser plaintiffs filed second amended complaints. Plaintiffs' Second Amended Indirect Purchaser Class Action Complaint ("Original Second Amended Complaint") asserted claims predicated not only on state antitrust and unfair competition laws, as their first amended complaint had done, but also on the Sherman Act. The direct purchaser plaintiffs' second amended complaint alleged violations of federal antitrust laws only. As clarified in a subsequent stipulation

made to the district court, however, the direct purchaser plaintiffs' second amended complaint included within its proposed class "persons who qualify as direct purchasers under *Illinois Brick* [*Co. v. Illinois,* 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977)] or who would be deemed to be falling within an exception under *Illinois Brick* so that they have a claim as a direct purchaser under the Sherman Act." Stated another way, the direct purchasers' consolidated complaint sought to pursue federal claims for direct purchasers as well as for indirect purchasers who had standing under an *Illinois Brick* exception.

Three days after Plaintiffs filed their Original Second Amended Complaint, the direct purchaser plaintiffs submitted a proposed case management order ("CMO") intended to encompass all actions asserting Sherman Act claims. The CMO asserted that it would apply to:

> all pending actions and all actions later instituted in, removed to, or transferred to this Court as part of MDL No. 1891 or [that] are otherwise related to these actions (collectively, "the Consolidated Actions") including, but not limited to, actions asserting claims under Section 1 of the Sherman Act, 15 U.S.C. § 1, or foreign law for alleged fixing of prices for passenger air transportation to or from the Republic of Korea, except for actions brought on behalf of indirect purchasers of passenger air transportation under the laws of the several states of the United States, such as *Soon Ja Chun, et. al v. Korean Air Lines Co., Ltd., et al.,* Case No. CV 07–06542 SJO (AGRx). All such indirect purchaser actions shall be coordinated for pretrial purposes with the Consolidated Actions and subject to a separate case management order.

Plaintiffs objected to the CMO on procedural and substantive grounds, contending that they had not been consulted before its filing and that, in light of their Original Second Amended Complaint's reassertion of federal claims, it "potentially usurp[ed] the role of interim class counsel for indirect ***691** purchasers." Plaintiffs filed their own proposed case management order ("proposed CMO") to govern actions of indirect purchaser plaintiffs.

Through a minute order, the district court approved the direct purchaser plaintiffs' CMO, rejected Plaintiffs' proposed CMO, and clarified its intentions regarding the appointment of interim lead counsel, explaining that it "intended that the Indirect Purchaser Plaintiffs would only represent those claims arising under state law." The district court struck Plaintiffs' Original Second Amended Complaint and directed Plaintiffs to file an amended complaint consistent with its order.

Plaintiffs thereafter filed a revised complaint ("Second Amended Complaint") asserting only state law claims, based on California unfair competition and unfair business practices laws, as well as on similar laws of nineteen other states and the District of Columbia. Defendants moved to dismiss the complaint, arguing, among other things, that Plaintiffs' claims for relief arising under state law are preempted by the express preemption provision of the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. § 41713. Plaintiffs opposed the motion and later requested leave to reinstate their Sherman Act Claims.

The district court denied Plaintiffs' request to add Sherman Act claims, reaffirming its previous order "that the Indirect Purchaser Plaintiffs may only represent those claims arising under state law." The next day, the district court granted Defendants' motion to dismiss on preemption grounds. In a footnote, the court reiterated that it had denied

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Plaintiffs' request for leave to add claims under the Sherman Act on the basis of its "conclu[sion] that Plaintiffs may only assert state law claims."

Plaintiffs timely appeal the dismissal of their California state law claims, arguing that they are not preempted by federal law.[2] Plaintiffs also argue that denial of leave to amend was error and that they should be allowed to reinstate their federal antitrust claims on behalf of indirect ticket purchasers.

II

We first address Plaintiffs' argument that their California state law claims are not preempted by federal law. The district court held that Plaintiffs' state law claims were preempted by the ADA, which provides that a "[s]tate ... may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart."[3] 49 U.S.C. § 41713(b)(1). Plaintiffs contend that Congress statutorily defined "air carrier" and "foreign air carrier" as mutually exclusive terms and, therefore, that Congress's use of the term "air carrier" in the preemption provision means that foreign air carriers are excluded from its reach. *See id.* §§ 40102(a)(2), (21). They also contend that their state law claims are not "related" to the price of an air carrier and ***692** therefore are not preempted. We disagree.

A

Defendants argue that, for the purposes of the ADA preemption provision, Congress intended the term "air carrier" to encompass all air carriers, whether domestic or foreign, consistent with the term's ordinary meaning. In arguing that the provision has a more limited scope, Plaintiffs stress that Congress has defined the term "air carrier" as "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation," 49 U.S.C. § 40102(a)(2), and the term "foreign air carrier" as "a person, not a citizen of the United States, undertaking by any means, directly or indirectly, to provide foreign air transportation," *id.* § 40102(a)(21).[4] Plaintiffs contend that Congress intended the terms "air carrier" and "foreign air carrier" to refer to different entities and that it consistently employed those terms for distinct uses. In this regard, they note that, in fifty-one separate provisions of law, Congress used both terms to make clear that a provision applies to both types of carriers. *See, e.g., id.* § 40101(a)(10) (using the phrase "air carrier or foreign air carrier"); *id.* § 40109(a) (using the phrase "air carriers and foreign air carriers"). Plaintiffs assert that, because Congress used only the term "air carrier" in the preemption provision, it did not intend to preempt state regulation of "foreign air carrier[s]."

An examination of the FAA shows that Congress's use of the term "air carrier" throughout the Act does not always correspond with that term's statutory definition and that "air carrier" is sometimes used to refer generally to both domestic and foreign airlines. For example, 49 U.S.C. § 44901(i) refers to "an air carrier providing air transportation under a certificate ... or a permit." Only a domestic "air carrier" provides air transportation under a certificate, and only a "foreign air carrier" provides air transportation under a permit. *See id.* §§ 41102, 41302. Thus, the term "air carrier" in this context refers to both a domestic "air carrier" and a "foreign air carrier." Also, 49 U.S.C. § 44940(a)(2)(B)(ii) refers to "an air carrier described in subparagraph (A)," which in turn covers both "air carriers and foreign air carriers," *see id.* § 44940(a)(2)(A). Likewise, many of the FAA's subsections contain only the term "air carrier" in their titles even though their content plainly regulates both domestic and foreign operators. *See id.* § 40129(f) (subsection entitled "Eligibility of air carriers" refers to "air carrier[s]" and "foreign air carrier[s]" participating in collaborative decisionmaking pilot programs); *id.* § 44940(a)(2) (subsection entitled "Air carrier fees" authorizes the Secretary of Transportation to impose certain fees on "air carriers and foreign air carriers"); *see also Carter v. United States,* 530 U.S. 255, 267, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (noting that title of statute may be of use when it

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sheds light on an ambiguous phrase). Congress's occasional use of the term "air carrier" to include "foreign air carrier" counsels strongly that the meaning of "air carrier" is ambiguous in the ADA's statutory preemption provision.

(i)

"Once it is established that [a statutorily defined term has different ***693** meanings in different sections], the term standing alone is necessarily ambiguous and each section must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 343–44, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997).[5] Here, the context in which the term appears in the preemption provision indicates that Congress intended that it apply to all air carriers and not only to domestic carriers.[6] The preemption provision prohibits state regulation of "an air carrier that may provide air transportation under this subpart." 49 U.S.C. § 41713(b)(1). The use of the modifying phrase "that may provide air transportation under this subpart" indicates that the term "air carrier" is defined in a particular way in this provision. *See, e.g., Nw. Forest Res. Council v. Glickman,* 82 F.3d 825, 834 (9th Cir.1996) ("We have long followed the principle that [s]tatutes should not be construed to make surplusage of any provision." (internal quotation marks omitted) (alteration in original)). Because the subpart to which the phrase refers, entitled "Economic Regulation," has provisions regulating both domestic and foreign air carriers, a sensible reading of the preemption provision implies that "air carrier" was intended to have its broader and ordinary meaning in this section of the statute. *See* 49 U.S.C. § 41101 et seq., Subtitle VII, Part A, Subpart II.

Plaintiffs argue, however, that the modifying phrase is consistent with their reading of "air carrier" and that the provision prohibits state regulation of a domestic "air carrier" that has permission to provide air transportation. Under Plaintiffs' interpretation, states could regulate a domestic "air carrier" that does not have permission to provide air transportation—that is, a carrier flying illegally without a certificate from the Department of Transportation. Plaintiffs' interpretation is neither reasonable nor convincing. If accepted, it would mean that Congress wanted states to be able to regulate the prices and services of domestic air carriers that were not at all authorized to provide air transportation. It is unlikely that Congress would have created an explicit exception to allow state regulation of the prices and services of domestic air carriers that are not authorized to provide air transportation. *See Armstrong Paint & Varnish Works v. Nu–Enamel Corp.,* 305 U.S. 315, 333, 59 S.Ct. 191, 83 L.Ed. 195 (1938) ("[T]o construe statutes so as to avoid results glaringly absurd, has long been a judicial function.").

(ii)

A review of the ADA preemption provision's purpose and legislative history similarly ***694** indicates that Congress intended to prevent states from regulating foreign air carriers. *See Cosmetic Ideas, Inc. v. IAC/InteractiveCorp.,* 606 F.3d 612, 618 (9th Cir.2010) ("When statutory language proves unclear, we work to discern its meaning by looking to the broader context of the statute as a whole and the purpose of the statute." (internal quotation marks omitted)); *Merkel v. Comm'r of Internal Revenue,* 192 F.3d 844, 848 (9th Cir.1999) ("[I]f the statute is ambiguous, we consult the legislative history, to the extent that it is of value, to aid in our interpretation." (internal quotation mark omitted)).

The purpose of the ADA's preemption provision is "[t]o ensure that the [s]tates would not undo federal deregulation with regulation of their own." *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 378, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992). "In addition to protecting consumers, federal regulation insures a uniform system of regulation and preempts regulation by the states" in a field where state-based variations "would be confusing and burdensome to airline passengers, as well as to the airlines." H.R. Rep. 98–793, at 4, 1984 U.S.C.C.A.N. 2857, 2860 (1984). This purpose would be undermined if states could regulate foreign air carriers. Reading the statutory scheme to preempt state regulation

of domestic air carriers while permitting such regulation of foreign air carriers would create a confusing patchwork of regulations for airline passengers to navigate, as their decision to purchase tickets for international flights would carry different consequences depending on whether they bought tickets from a U.S.-based carrier or an airline headquartered in a foreign country. Such a result would not be consonant with Congress's express purpose in enacting the statute.

The legislative history behind the ADA also demonstrates that Congress intended to preserve its authority to regulate the airline industry by prohibiting states from regulating all air carriers, both domestic and foreign. As originally enacted in the context of the deregulation of domestic air transportation, *see Sanchez v. Aerovias De Mexico, S.A. De C.V.,* 590 F.3d 1027, 1030 (9th Cir.2010), the ADA's preemption provision prohibited state regulation of carriers with authority "to provide interstate air transportation," 49 U.S.C.App. § 1305(a)(1) (1978). [7] Then, as now, only domestic air carriers could provide "interstate air transportation." Following on the heels of the ADA, Congress extended deregulation to foreign air transportation through the International Air Transportation Competition Act of 1979 ("IATCA"), Pub.L. No. 96–192, 94 Stat. 35 (1980). With almost identical language to that used in the domestic deregulation context, the IATCA sought to promote competition in international air transportation through "[t]he placement of maximum reliance on competitive market forces and on actual and potential competition." *Id.* § 102(a)(4).

The Civil Aeronautics Board Sunset Act of 1984 ("Sunset Act"), Pub.L. No. 98–443, 98 Stat. 1703 (1984), amended the ADA's preemption provision by deleting the term "interstate," so that preemption extended to "any air carrier having authority ... to provide air transportation." *Id.* The Sunset Act was born out of a belief that, as the Congressional deregulatory effort was coming to a close, "legislation [was] needed ***695** to clarify the ADA and to ensure that some limited but highly important [Civil Aeronautics Board ("CAB")] functions, such as consumer protection, [would] continue to be carried out by other agencies after CAB sunset." H.R. Rep. 98–793, at 2, 1984 U.S.C.C.A.N. 2857, 2858. It conferred upon the Department of Transportation ("DOT") the CAB's authority "to prevent unfair or deceptive practices or unfair methods of competition in air transportation ... [and] to ensure that carriers providing interstate or overseas air transportation [were] fit, willing, and able to perform." *Id.* at 13. "[I]n administering these responsibilities DOT [was to] preserve the competitive direction adopted in the [ADA] and the [IATCA]." *Id.* at 8. As it is clear that the ramifications of the IATCA were in the minds of the Sunset Act's drafters, the Sunset Act's deletion of the limiting term "interstate" from the ADA preemption provision leads us to conclude that Congress intended to expand the ADA's preemptive scope to cover state regulation of "foreign air carrier[s]." [8]

(iii)

The applicable case law supports our determination that state law claims are preempted. Although few courts have explicitly discussed the issue raised by Plaintiffs, numerous courts—including the Supreme Court—have applied the provision to foreign carriers without reservation. *See, e.g., Morales,* 504 U.S. at 383–85, 112 S.Ct. 2031 (concluding that state law claims were preempted with respect to all respondents, including foreign air carriers); *Buck v. Am. Airlines, Inc.,* 476 F.3d 29, 36 (1st Cir.2007) (concluding that preemption prevented state law claims against six foreign air carriers); *Read–Rite Corp. v. Burlington Air Express, Ltd.,* 186 F.3d 1190, 1197 (9th Cir.1999) (concluding state law claim for cargo damage preempted against foreign air carrier).

The few courts that have squarely considered the issue have determined that the preemption provision applies equally to domestic and foreign air carriers. In addition to the district court's persuasive reasoning in this case, [9] we find instructive the reasoning of the district court in *Lawal v. British Airways, PLC,* 812 F.Supp. 713 (S.D.Tex.1992). There, the district court analyzed the pre–1994 language of the preemption provision,

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which provided for preemption of state laws applied to "any air carrier having authority ... to provide air transportation." *Id.* at 717 (emphasis omitted). The court concluded that "the prefatory use of the word 'any' would be mere surplusage" if the provision were read to apply to only a domestic "air carrier" and that the modifying language extended to "various types of carriers, including foreign air carriers." *Id.* at 717–18. Because the 1994 revision to the preemption provision was intended to effect no substantive change, *see supra* note 8, such reasoning strengthens our decision ***696** that the preemption provision is not limited to domestic air carriers.

(iv)

Our conclusion that the ADA precludes state regulation of both domestic and foreign air carriers is reinforced by an important pragmatic concern: If the preemption provision only sheltered domestic air carriers, it would be more difficult for foreign carriers to enter the U.S. market for international flights. This added burden would be to the detriment of U.S. consumers, who benefit from price competition between as many carriers as possible. Moreover, discriminating against foreign carriers would be contrary to our country's general preference for free trade. *See* U.S. Dep't of Commerce, Strategic Plan: FY 2007–FY 2012, 7–8, *available at* http://www.osec.doc.gov/bmi/Budget/07 strplan/DOC07strplan.pdf ("The [U.S.] Department [of Commerce] is committed to free trade by opening and expanding foreign markets for U.S. goods and services and improving U.S. export performance.... Unfair trade negatively affects the ability of U.S. firms to sell overseas and impacts the U.S. jobs that depend on the Nation's international trade."). If state regulation makes it harder for foreign air carriers to compete with domestic carriers, U.S.-based airlines might soon encounter additional, retaliatory barriers when they try to sell tickets abroad.

(v)

Finally, the approach championed by Plaintiffs would discriminate against foreign air carriers in favor of domestic ones, contrary to U.S. treaty obligations mandating nondiscrimination. *See, e.g.,* Convention on International Civil Aviation, art. 11, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (providing for application of laws and regulation "without distinction as to nationality" of airlines of signatory states); U.S.-Korea Air Transport Agreement, art. 11, June 9, 1998, State Dept. No. 98–111, 1998 WL 468488 ("Each Party shall allow a fair and equal opportunity for the designated airlines of both Parties to compete in providing the international air transportation governed by this Agreement."); Treaty of Friendship, Commerce and Navigation, U.S.-Korea, art. 1, Nov. 28, 1956, 8 U.S.T. 2217 ("Each Party shall at all times accord equitable treatment to the persons, property, enterprises and other interests of nationals and companies of the other Party."). This result would offend the longstanding principle that statutes should be construed in accordance with international law. *See Murray v. The Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains....").

For these reasons, we hold that the ADA's preemption of state regulation covers regulation of all air carriers, whether domestic or foreign.

B

We further conclude that Plaintiffs' state law claims, alleging that Defendants engaged in price-fixing in violation of the California Business and Professions Code and unfair competition laws, are "related to a price" of an air carrier for purposes of preemption under the ADA. 49 U.S.C. § 41713(b)(1). The words of the ADA preemption provision "express a broad pre-emptive purpose," such that "[s]tate enforcement actions having a connection with, or reference to, airline 'rates, routes, or services' are pre-empted." *Morales,* 504 U.S. at 383–84, 112 S.Ct. 2031. The district court accurately concluded that Plaintiffs seek "to regulate the manner by which Defendants set fares, or components ***697** of fares, for air transportation services." Because Plaintiffs allege

a price-fixing conspiracy, their claims are plainly related to a price of an air carrier and consequently are preempted.

Contrary to Plaintiffs' assertion, it is immaterial that the state laws do not interfere with the purposes of the federal statute or that they might be consistent with promoting competition and deregulation. The Supreme Court has rejected this argument. *Id.* at 386–87, 112 S.Ct. 2031 (stating that, for the purpose of the ADA preemption analysis, the consistency of state and federal laws is "beside the point"). Recently, in *Rowe v. New Hampshire Motor Transport Ass'n,* 552 U.S. 364, 128 S.Ct. 989, 169 L.Ed.2d 933 (2008), the Supreme Court reiterated that a state law "*having a connection with, or reference to* " rates, routes, or services is preempted and that "it makes no difference whether a state law is consistent or inconsistent with federal regulation." *Id.* at 370–71, 128 S.Ct. 989 (internal quotation marks omitted).

Plaintiffs unsuccessfully argue that the Supreme Court's decision to limit the scope of the term "relate to" in the ERISA preemption provision, *see De Buono v. NYSA–ILA Med. & Clinical Servs. Fund,* 520 U.S. 806, 812–13, 117 S.Ct. 1747, 138 L.Ed.2d 21 (1997), shows that it also intended to limit the ADA preemption provision. The Supreme Court's 2008 *Rowe* decision held that "it makes no difference whether a state law is 'consistent' or 'inconsistent' with federal regulation." 552 U.S. at 371, 128 S.Ct. 989. Although the Court was interpreting the Federal Aviation Administration Act, it looked to the ADA's "identical" preemption provision for guidance. *Id.* at 370, 128 S.Ct. 989. If the Supreme Court intended to narrow the scope of these preemption provisions because of its ERISA decisions, it could have done so in *Rowe,* but it did not. *See Agostini v. Felton,* 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (" 'If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.' " (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.,* 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989) (alteration omitted)); *Musladin v. Lamarque,* 555 F.3d 830, 837 (9th Cir.2009) ("The Supreme Court has made clear that the circuit courts must follow Supreme Court precedent until the Supreme Court itself declares it no longer binding."); *United Airlines, Inc. v. Mesa Airlines, Inc.,* 219 F.3d 605, 608 (7th Cir.2000) ("[I]f developments in pension law have undercut holdings in air-transportation law, it is for the Supreme Court itself to make the adjustment. Our marching orders are clear: follow decisions until the Supreme Court overrules them.")).

We conclude that Plaintiffs' state law claims are preempted, and we affirm the district court's order dismissing them.

III

We next address Plaintiffs' challenge to the district court's denial of leave to amend their complaint to assert previously abandoned federal claims.[10] In arguing that the district court erred in refusing to let them add federal antitrust ***698** claims, Plaintiffs challenge two separate decisions of that court: (1) its adoption of the direct purchaser plaintiffs' CMO in its March 14, 2008 order, and (2) its refusal to allow Plaintiffs to add federal antitrust claims via amendment.[11] Plaintiffs contend that the district court erred in assigning responsibility for litigating purported indirect purchaser claims to direct purchaser plaintiffs' counsel because such counsel are incapable of adequately pursuing the interests of both direct and indirect purchasers, given an inherent conflict of interest between the two groups. Plaintiffs argue that they instead should have been allowed to bring federal antitrust claims on behalf of indirect purchaser plaintiffs. Defendants, for their part, portray both of the district court's decisions as unreviewable interlocutory case management orders whose sole effect is to permit different counsel to pursue Plaintiffs' claims. They argue that Plaintiffs' federal claims are still alive —even though their case has been dismissed— and that the district court may revisit and reassess problems associated with potential conflicts of interest, if necessary, as the litigation progresses.

We have jurisdiction to review the district court's denial of leave to amend pursuant to 28 U.S.C. § 1291. Although such orders are usually not immediately appealable, *see, e.g., Skoog v. Cnty. of Clackamas,* 469 F.3d 1221, 1228–29 (9th Cir.2006), the district court's denial of leave to amend to add federal claims, in conjunction with its dismissal of Plaintiffs' state law claims, effectively extinguished Plaintiffs' entire case, *see, e.g., Watson v. Weeks,* 436 F.3d 1152, 1155 (9th Cir.2006) (finding jurisdiction to review denial of leave to amend where entire complaint was dismissed). The district court's denial of leave to add Sherman Act claims thus "end[ed] the litigation on the merits and [left] nothing for the court to do but execute judgment," rendering the decision final and reviewable. *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978). We conclude that the district court erred in denying Plaintiffs leave to amend based on its determination that other counsel would pursue the federal antitrust claims. However, we lack jurisdiction at this juncture to assess the wisdom of the district court's decision to place pretrial responsibility for both direct and indirect purchaser claims in the hands of counsel for direct purchaser plaintiffs only.

A

Defendants contend that Plaintiffs' claims survive and are simply being pursued by different counsel. They therefore argue that Plaintiffs' appeal of the district court's denial of leave to amend is premature. But Defendants misapprehend the nature of multidistrict litigation.

The MDL process seeks to "promote the just and efficient conduct" of "civil actions involving one or more common questions of fact [that] are pending in different districts" by permitting their transfer to a single district for "coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). To promote efficiency in a context involving the juggling of ***699** dozens or thousands of independent cases, a "district court needs to have broad discretion to administer the proceeding as a whole." *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.,* 460 F.3d 1217, 1232 (9th Cir.2006) (hereinafter "*In re PPA* "). A district judge exercising authority over cases transferred for pretrial proceedings "inherits the entire pretrial jurisdiction that the transferor district judge would have exercised if the transfer had not occurred." 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3866 (3d ed. 2010). Such authority is broad and encompasses the power to decide dispositive pretrial motions. *In re PPA,* 460 F.3d at 1231 (stating that a transferee judge's power "includes authority to decide all pretrial motions such as motions to dismiss, motions for summary judgment, motions for involuntary dismissal under Rule 41(b), motions to strike an affirmative defense, and motions for judgment pursuant to a settlement"); *see In re Patenaude,* 210 F.3d 135, 144 (3d Cir.2000).

Transferee courts have handled such procedural matters as dismissal of original complaints, filing of amended omnibus complaints, and resolution of motions. *Minisan v. Danek Med., Inc.,* 79 F.Supp.2d 970, 971 (N.D.Ind.1999). A transferee court may require parties to file consolidated amended complaints superseding original ones. *Armstrong v. LaSalle Bank Nat'l Ass'n,* 552 F.3d 613, 614 (7th Cir.2009). A transferee court may rule on pretrial motions. *In re Eli Lilly & Co., Prozac Prods. Liab. Litig.,* 789 F.Supp. 1448, 1450 (S.D.Ind.1992). It may enforce venue requirements. *In re Tax Refund Litig.,* 723 F.Supp. 922, 924 (E.D.N.Y.1989). It may require individuals to attend settlement conferences. *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo., on Nov. 15, 1987,* 720 F.Supp. 1433, 1436 (D.Colo.1988). It may permit amendment or adjustment of pleadings. *Sentner v. Amtrak,* 540 F.Supp. 557, 558 (D.N.J.1982). It may handle and resolve discovery motions, including those involving scope of discovery, appropriateness of protective orders or sanctions, and regulation of depositions. *See generally In re Flat Glass Antitrust Litig.,* 288 F.3d 83 (3d Cir.2002); *In re Burlington N., Inc.,* 679 F.2d 762 (8th Cir.1982); *In re Vioxx Prods. Liab. Litig.,* 501 F.Supp.2d 789 (E.D.La.2007); *In re Air Crash at Charlotte, N.C. on July 2, 1994,* 982 F.Supp. 1052 (D.S.C.1995); *Meeder v. Superior Tube Co.,* 72 F.R.D. 633 (W.D.Pa.1976).

We confirm the general rule that, in multidistrict litigation, a transferee judge can handle all types of pretrial matters that otherwise would have been handled by the transferor court. A corollary to this principle is that the MDL transferee court is generally bound by the same substantive legal standards, if not always the same interpretation of them, as would have applied in the transferor court. [12] However, the district court's jurisdiction ***700** as an MDL transferee court is generally coextensive with pretrial proceedings. As a result, a district court does not have authority to transfer a case to itself for trial, *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 28, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998), nor may it consolidate actions for all purposes, as might be proper in other circumstances pursuant to Federal Rule of Civil Procedure 42, *see* Wright et al., *Federal Practice & Procedure* § 3866. Within the context of MDL proceedings, individual cases that are consolidated or coordinated for pretrial purposes remain fundamentally separate actions, intended to resume their independent status once the pretrial stage of litigation is over. [13]

In addressing motions to amend brought in the context of multidistrict litigation, courts have proceeded in a manner that respects these principles. The substantive rules governing a district court's consideration of a motion to amend are the same as those for ordinary litigation on an ordinary docket. *See, e.g., Khulumani v. Barclay Nat'l Bank Ltd.,* 504 F.3d 254, 260 (2d Cir.2007) (vacating denial of motion to amend where district court's decision was predicated on legal error); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.,* 39 F.Supp.2d 458, 467 (D.N.J.1999) (assessing MDL plaintiffs' motion for leave to file an amended complaint under standard discretionary considerations); *In re Brand Name Prescription Drugs Antitrust Litig.,* 177 F.R.D. 414, 419 (N.D.Ill.1997) (same). There might be room for some slight variations in approach to applying the standards for amendment, as we have noted in the context of motions to dismiss. *See In re PPA,* 460 F.3d at 1222 ("[C]onsiderations that inform the exercise of discretion in multidistrict litigation may be somewhat different, and may tip the balance somewhat differently, from ordinary litigation on an ordinary docket."). Still, the basic ground rules for assessing motions for leave to amend, including the instruction of Federal Rule of Civil Procedure 15 ("Rule 15") that amendments should be freely given, may not be tossed out the window in an MDL case.

There is much, of course, that an MDL court can do in its sound discretion in order to manage multidistrict litigation effectively. It can designate a lead counsel. It can hold some cases in abeyance while proceeding with others. In discretionary matters going to the phasing, timing, and coordination of the cases, the power of the MDL court is at its peak. But when it comes to motions that can spell the life or death of a case, such as motions for summary judgment, motions to dismiss claims, or, as here, a motion to amend pleadings, it is important for the district court to articulate and apply the traditional standards governing such motions. A total disregard for the normal standards of assessing these critical motions would improperly ***701** subject MDL cases to different and ad hoc substantive rules.

Federal Rule of Civil Procedure 15(a)(2) provides that when a party moves to amend before trial, "[t]he court should freely give leave when justice so requires." District courts generally consider four factors in determining whether to deny a motion to amend: "bad faith, undue delay, prejudice to the opposing party, and the futility of amendment." *Kaplan v. Rose,* 49 F.3d 1363, 1370 (9th Cir.1994); *see also Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) (stating that Rule 15(a)'s "mandate is to be heeded," and that "[i]n the absence of any apparent or declared reason ... the leave sought should, as the rules require, be 'freely given.' ").

In this case, instead of considering the usual factors, the district court denied Plaintiffs leave to amend solely on the basis of an improper consideration, namely the court's intention "that the Indirect Purchaser Plaintiffs would only represent those claims arising under state law." The court essentially concluded that allowing Plaintiffs to add federal claims would be inconsistent with its prior CMO. But the district court's

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decision to allow Plaintiffs to bring only state law claims misapprehends the separate and independent nature of Plaintiffs' case. Although a district court overseeing MDL proceedings has the authority to decide which law firm should serve as lead counsel for the purposes of *pretrial* proceedings, MDL proceedings do not expand the grounds for disposing of individual cases.

By denying leave to amend on the basis of the court's prior CMO, the court applied an incorrect legal standard to Plaintiffs' motion. Such an error constitutes an abuse of discretion. *Casey v. Albertson's Inc.,* 362 F.3d 1254, 1257 (9th Cir.2004) ("A district court abuses its discretion if it does not apply the correct law...."). We therefore vacate the district court's denial of leave to amend and remand for an analysis of Plaintiffs' request for leave to add federal antitrust claims under the proper standard. *See Khulumani,* 504 F.3d at 260 (vacating denial of leave to amend and remanding, in MDL context).

B

In seeking review of the district court's denial of leave to amend their complaint, Plaintiffs also implicitly request that we review the district court's adoption of the direct purchaser plaintiffs' CMO and its rejection of Plaintiffs' proposed CMO.[14] Because these decisions governing case management do not represent final judgments on the merits, we lack jurisdiction to review them. 28 U.S.C. § 1291.

A district court's case management orders are generally not appealable on an interlocutory basis. *See Moglia v. Pac. Emp'rs Ins. Co. of N. Am.,* 547 F.3d 835, 838 (7th Cir.2008) ("Treating case-management orders as injunctions would permit not one appeal per suit, but dozens, and make a mockery of the final-decision requirement."). The CMO at issue here is interlocutory because the district court retains ***702** the ability to modify it at any time. *See Z–Seven Fund, Inc. v. Motorcar Parts & Accessories,* 231 F.3d 1215, 1218–19 (9th Cir.2000) (holding that an order designating a lead plaintiff is unappealable and interlocutory because it is "not a conclusive, immutable determination of the issue" since the district court might later change the lead plaintiff "consistent with[its] *continuing* duty to see that a class is adequately represented by counsel" (emphasis in original)). If permitted upon remand to reinstate their federal claims, Plaintiffs will be able to reassert their conflict of interest concerns at later stages of litigation, and the district court will be able to reassess its decisions in this regard.

There is another reason for declining to view the CMO as subject to interlocutory consideration. We have held that "only after assessing ... the final judgment could an appellate court decide whether the client's rights had been prejudiced [by the appointment of certain counsel]." *In re Westwood Shake & Shingle, Inc.,* 971 F.2d 387, 390 (9th Cir.1992) (internal quotation marks omitted) (alterations and omission in original). If Plaintiffs' conflict of interest concerns have merit, an " 'opportunity for meaningful review will [not] perish' because [the] circuit court can conclude after trial that continued representation was prejudicial and can vacate judgment." *Id.* (quoting *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 377–78, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981) (first alteration in original)).

We hold that decisions regarding the CMOs involved in this case are interlocutory. That the district court improperly based its denial of leave to amend on its decision that direct purchaser plaintiffs' counsel would represent indirect purchaser plaintiffs suing under *Illinois Brick* exceptions does not render the CMOs themselves reviewable. Given our determination that the district court improperly denied leave to amend, no causal nexus remains between the challenged CMO and the dismissal of Plaintiffs' claims. We therefore decline to review the district court's adoption of the direct purchaser plaintiffs' CMO, and the court's rejection of Plaintiffs's proposed CMO, at this time.

IV

For the foregoing reasons, the district court's order is AFFIRMED IN PART, VACATED IN

PART, and REMANDED for further proceedings consistent with this opinion.

The parties shall bear their own costs on appeal.

All Citations

642 F.3d 685, 2011-1 Trade Cases P 77,417, 11 Cal. Daily Op. Serv. 4520, 2011 Daily Journal D.A.R. 5477

Footnotes

1 We grant Plaintiffs' motion to take judicial notice of documents in MDL No. 1891. *See United States v. Wilson,* 631 F.2d 118, 119 (9th Cir.1980) ("[A] court may take judicial notice of its own records in other cases, as well as the records of an inferior court in other cases.").

2 Plaintiffs do not mention on appeal the other nineteen state and District of Columbia laws listed in their Second Amended Complaint and have therefore waived any argument related to state laws other than those of California. *See Dream Games of Ariz., Inc. v. PC Onsite,* 561 F.3d 983, 994–95 (9th Cir.2009) (stating that matters not raised in appellant's opening brief are waived).

3 We review de novo both a district court's dismissal of a case on federal preemption grounds and a district court's interpretation of federal statutes. *Peck v. Cingular Wireless, LLC,* 535 F.3d 1053, 1055 (9th Cir.2008).

4 A domestic "air carrier" may also provide foreign air transportation services. For example, American Airlines, a domestic "air carrier," may fly routes both within the United States and between the United States and a foreign country. A "foreign air carrier" is restricted, however, to flying routes between the United States and a foreign destination; it is not allowed to fly routes between U.S. destinations.

5 Such a section-by-section analysis is appropriate in light of the drafting history of the FAA. Section 101 of the Federal Aviation Act of 1958 defined "air carrier" as being a U.S. citizen "unless the context otherwise requires." Pub.L. No. 85–726, 72 Stat. 731 (1958). The 1994 re-enactment of Title 49 and its slight amendment, which removed this "context" proviso, was not to be construed as making a substantive change in the law, *see* S.Rep. No. 103–265, at 5 (1994) ("[T]his bill makes no substantive change in the law."), so considering context in construing the meaning of "air carrier" is consistent with Congress's intent in drafting the statute. *See Port Auth. of N.Y. & N.J. v. Dep't of Transp.,* 479 F.3d 21, 32 (D.C.Cir.2007).

6 We decline to apply a general presumption against preemption here because the ADA preemption provision involves preclusion of state regulation in "an area where there has been a history of significant federal presence," namely navigable airspace. *United States v. Locke,* 529 U.S. 89, 108, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000); *see Skysign Int'l, Inc. v. City & Cnty. of Honolulu,* 276 F.3d 1109, 1115–16 (9th Cir.2002).

7 As enacted in 1978, the preemption provision of the ADA read: "[N]o State ... shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to the rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide interstate air transportation." 49 U.S.C.App. § 1305(a)(1) (1978).

8 Subsequent modification of the preemption provision's language does not cast doubt on this conclusion because, when Congress revised the preemption provision in 1994 to its current form, it "intended the revision to make no substantive change." *Am. Airlines, Inc. v. Wolens,* 513 U.S. 219, 223 n. 1, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995); *see also* S.Rep. No. 103–265, at 5 (1994).

9 The district court reasoned that "air carrier," as modified by the phrase "that may provide transportation under this subpart" was "not immune to a construction that would include 'foreign air carriers,' " and it noted the uniformity of opinion applying the ADA preemption provision against foreign air carriers. Stating that there were no compelling policy reasons for limiting preemption only to claims against domestic air carriers, the district court held that the provision extended to foreign carriers.

10 Plaintiffs characterize their claim in this regard as a claim that the district court should have allowed them to "reinstate" their federal claims. However, as there is no indication that Plaintiffs' initial abandonment of their federal claims was not done voluntarily, we consider the issue as a denial of a proposed amendment of Plaintiffs' complaint.

11 We review a denial of leave to amend for abuse of discretion. *Kaplan v. Rose,* 49 F.3d 1363, 1370 (9th Cir.1994). "A district court abuses its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of a material fact." *Casey v. Albertson's Inc.,* 362 F.3d 1254, 1257 (9th Cir.2004).

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A review for abuse of discretion requires looking at both whether the trial court applied the correct legal rule, and, if so, whether application of the rule was illogical, implausible, or without support in the record. *See United States v. Hinkson,* 585 F.3d 1247, 1251 (9th Cir.2009) (en banc).

12 *See, e.g., Toll Bros. v. Dryvit Sys., Inc.,* 432 F.3d 564, 568 n. 4 (4th Cir.2005) ("When considering questions of state law, ... the transferee court must apply the state law that would have applied to the individual cases had they not been transferred for consolidation." (internal quotation marks omitted) (omission in original)); *Menowitz v. Brown,* 991 F.2d 36, 40 (2d Cir.1993) ("[A] transferee federal court should apply its interpretations of federal law, ... [but] applies the substantive state law, including choice-of-law rules, of the jurisdiction in which the action was filed."); *In re Korean Air Lines Disaster of Sept. 1, 1983,* 829 F.2d 1171, 1176 (D.C.Cir.1987) ("[T]he law of a transferor forum [on a federal question] ... merits close consideration, but does not have stare decisis effect in a transferee forum situated in another circuit.").

13 Where, as here, the particular case at issue is initiated in the transferee court's district, the district court's jurisdiction is not always similarly circumscribed to purely pretrial proceedings. *See In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.,* 333 F.3d 763, 767 (7th Cir.2003) ("Because the decision stemmed from a complaint filed in the Southern District of Indiana, ... the district court had original jurisdiction and was not acting as a transferee court under 28 U.S.C. § 1407 with respect to this complaint."). In such a case, the district court's jurisdiction beyond pretrial matters is part of its original jurisdiction, not the MDL jurisdiction. But considerations that animate the restrictions placed on a transferee court's exercise of jurisdiction over its MDL docket—including the principle that individual cases remain separate actions despite being coordinated or consolidated for pretrial purposes—do not dissipate because a particular case was filed in the MDL's home district.

14 Plaintiffs argue that the district court abused its discretion in denying leave to amend because it did not act to protect indirect purchaser absentee plaintiffs by allowing direct purchaser plaintiffs alone to maintain federal antitrust claims. It is not clear if Plaintiffs independently attack the district court's adoption of the CMO, as they seem to assume that the reinstatement of their federal claims would make them lead counsel for indirect purchaser plaintiffs during the pretrial stage of litigation. But because these decisions are procedurally and analytically distinct, we treat Plaintiffs' objections as posing a challenge to the district court's adoption of the CMO.

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TAB 8

169 F.R.D. 632
United States District Court,
N.D. Illinois,
Eastern Division.

In re FACTOR VIII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION.

No. MDL–986.
|
No. 93 C 7452.
|
Dec. 17, 1996.

Synopsis
Numerous products liability claims asserted by or on behalf of hemophiliacs against pharmaceutical companies which had produced blood products based on exposure to human immunodeficiency virus (HIV) were consolidated by Judicial Panel on Multidistrict Litigation, and discovery schedule was entered requiring parties to designate expert witnesses. After companies designated total of 137 common-issue expert witnesses, plaintiffs requested order limiting number of witnesses. The District Court, Grady, J., held that: (1) transferee court in multidistrict litigation has authority to enter order limiting number of expert witnesses who may be called at trial, and (2) limit of 24 common-issue expert witnesses would be sufficient to allow companies to make effective presentation of their position on common issues at any trial.

So ordered.

Attorneys and Law Firms

***633** David S. Shrager, Philadelphia, PA, for plaintiffs.

Sara Gourley, Chicago, IL, Duncan Barr, San Francisco, CA, Richard Berkman, Philadelphia, PA, David I. Bell, Glendale, CA, for defendants.

MEMORANDUM OPINION AND ORDER

GRADY, District Judge.

The broad question addressed in this opinion is whether a transferee court in multidistrict litigation under 28 U.S.C. § 1407 has the authority to limit the number of common-issue expert witnesses at trials which will take place after remand to the transferor districts. If the answer to that question is in the affirmative, then the second question is what the limit should be in this particular litigation.

Background of the Litigation
Plaintiffs in these consolidated cases are persons suffering from hemophilia, a hereditary disease in which the protein that causes blood clotting is missing. The principal treatment for the disease is the intravenous injection of the missing protein, derived from the plasma of blood donors. Four of the defendants are pharmaceutical companies which collect and process the plasma to derive "factor concentrates," which are then sold for use by hemophiliacs. The manufacturing process for deriving the finished factor concentrate from blood plasma is known as "fractionating," and the four defendants involved in the present dispute are known as "fractionators." [1] Together, they produce all or virtually all of the factor concentrates used in the United States.

In the early 1980s, some hemophiliacs using the defendants' factor concentrates began to show symptoms of a disease later identified as Acquired Immune Deficiency Syndrome ("AIDS"). As is now known, this disease is transmitted by the Human Immunodeficiency Virus ("HIV"). Plaintiffs allege that they were infected with the virus as a result of injecting the defendants' factor concentrates derived from donors who were themselves infected. Plaintiffs allege a variety of negligent acts and omissions on the part of the fractionator defendants, principally the failure to sterilize their products to eliminate the possibility of viral infection (viral inactivation), failure to screen plasma donors so as to eliminate classes of persons, such as intravenous drug users, who presented a high risk of viral infectivity, failure to engage in "surrogate testing" of donors to determine whether they had viral infections (such as hepatitis) suggesting the possibility of other, undetectable viruses as well, failure to warn users

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of their products of the danger of infection once they knew or reasonably should have known that the newly observed symptoms were caused by a disease that was viral and blood-borne, and failure to withdraw their products from the market when the danger of infection became known.

Defendants have a variety of defenses to plaintiffs' negligence allegations. Among the more important are that the virus in question was unknown and unforeseeable during any period of time defendants were not taking the precautions plaintiffs claim they should have been taking and that, as soon as the presence of a new virus became apparent, they did all they reasonably could have done to eliminate it from their products. With regard to each of the measures plaintiffs allege should have been undertaken earlier, defendants respond with specific reasons as to why it was not feasible to do so. For instance, heat treatment of the concentrates, ***634** the method of viral inactivation plaintiffs claim should have been used, was not, in defendants' view, a procedure that was technologically effective or even legally permissible for them to use until most of the plaintiffs had already been infected with the virus. Defendants contend that they began the effective heat treatment of their products as soon as they were able to do so.

A number of lawsuits based upon diversity of citizenship were filed against the fractionators in various federal districts by infected hemophiliacs, their spouses, guardians, and personal representatives. On December 7, 1993, the Judicial Panel on Multidistrict Litigation transferred the then pending federal cases to this court for consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. The total number of cases now pending, including tag-a-longs, is approximately 192. Another 300 similar cases are pending in various state courts. A Steering Committee appointed by the court, chosen from among the attorneys who represent plaintiffs in individual cases, has been conducting the litigation on behalf of all plaintiffs.

Prior to the MDL consolidation, thirteen cases were tried to verdict in state and federal courts. Twelve verdicts were for defendants and the lone plaintiffs' victory was reversed on appeal. No cases have been tried subsequent to the MDL consolidation.

Not long after the MDL consolidation, plaintiffs moved for nationwide class certification in one of the cases, contending that the claims of the plaintiffs were typical of thousands of claims which had accrued to infected hemophiliacs across the country. We declined to certify all issues for class treatment, but did decide that certification of the negligence issues was appropriate pursuant to Rule 23(c)(4)(A) of the Federal Rules of Civil Procedure. *Wadleigh v. Rhone–Poulenc Rorer, Inc.,* 157 F.R.D. 410 (N.D.Ill.1994). We were of the view that trial of the class action would effectively decide the litigation one way or the other, and therefore directed the parties to concentrate on preparing for trial of the class action. This concentration was consistent with the purpose of the MDL, inasmuch as the common issues which would have been tried in *Wadleigh* were identical to the common issues that prompted the MDL consolidation. However, *Wadleigh* was not to be tried, at least as a class action. Defendants had opposed class certification, and on a petition for a writ of mandamus, obtained a ruling from the Court of Appeals that class treatment was not appropriate. *Matter of Rhone–Poulenc Rorer, Inc.,* 51 F.3d 1293 (7th Cir.), *cert. denied,* 516 U.S. 867, 116 S.Ct. 184, 133 L.Ed.2d 122 (1995). Pursuant to the writ, we decertified the class.

The most recent development is that in April of this year the fractionator defendants made a joint offer to settle the claim of each infected hemophiliac who used any of their products (as well as the claims of persons who had become infected by reason of specified relationships with infected hemophiliacs) for the sum of $100,000.00. The parties jointly sought certification of a settlement class, which the court granted. There are various contingencies involved in the proposal (such as waiver of subrogation claims by medical providers and insurers), and we are unable to make a determination as to the fairness of the settlement until those matters are resolved. More than 6,000 claims have been filed by apparent class members who desire to accept the settlement. However, even if the settlement is ultimately approved, the MDL will run its course, because over 500 class members,

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including more than 200 who are the plaintiffs in 69 of the MDL cases, have opted out of the settlement. It appears that these opt-out cases are headed for eventual remand to the transferor districts for trial or other disposition.

The practical issue now pending before this court is *how much* discovery remains to be completed before the cases are ready for remand, and that brings us back to the questions posed in the opening paragraph of this opinion.

How the Questions Arose

Until the present dispute arose, discovery had proceeded relatively smoothly, with no more than the usual number of questions requiring decision by the court. We were under the impression that both sides had the same view of what we are doing: conducting the discovery that is common to all of the ***635** transferred cases and which is necessary to prepare them for trial. This obviously includes taking whatever depositions are necessary to acquaint the parties with the testimony of the common-issue witnesses who are likely to appear at each trial. For example, each side must depose the expert witnesses the other side is going to present on the question of what was known about blood-borne viruses, and how to prevent their transmission through blood products, in the late 1970s and early 1980s.

To establish the procedures that would govern the conduct of the litigation in this court, we entered a Case Management Order on May 5, 1994. The order was largely a result of cooperative effort. Much of it consists of agreed submissions by the parties, adopted *verbatim* by the court.

One of the agreed submissions incorporated *verbatim* was a definition of "Core Subjects for Discovery."[2] The next paragraph of the Case Management Order, another agreed submission, sets forth, in the parties' language, the discovery schedule they requested:

The point to remember here is that, as of the date of the Case Management Order, May 4, 1994, the fractionators believed it was realistic to expect that the remaining MDL discovery would be completed between May 4, 1994, and July 31, 1995, a period of about fourteen months. Expert depositions were to be completed in a period of five months (i.e., during the period March 1, 1995–July 31, 1995). Because defendants had until April 30 to name their experts, the plaintiffs would have a three-month period (May 1–July 31) in which to depose them. Obviously, the parties had in mind a manageable number of experts who would need to be deposed.

This discovery schedule was not adhered to because of the subsequent diversions created by the class certification in *Wadleigh* (preceded by extensive briefing in this court) and the mandamus petition in the Court of Appeals. Following the resolution of that matter, and the decertification of the class, discovery resumed. Further orders requiring the parties to designate expert witnesses on core discovery issues were entered on July 6, 1995, and December 4, 1995. Plaintiffs designated seventeen experts, and all but three of their discovery depositions have been completed.

The present dispute arises from the fact that the fractionator defendants have designated a total of 137 common-issue expert witnesses. Plaintiffs have objected to this number as excessive and have requested an order limiting the defendants to a reasonable ***636** number. They suggest twenty-six as a maximum.

Defendants concede that they do not intend to call 137 witnesses in any particular trial, but contend that, for reasons discussed below, they nonetheless need to designate this number as possible trial witnesses. Defendants suggest that plaintiffs should choose which of the witnesses they wish to depose during the MDL proceeding. If defendants choose at any particular trial to present common-issue experts whom plaintiffs have not deposed, the solution, say the defendants, will be for plaintiffs to depose the witnesses at that time. Defendants are making no commitment that any of the 137 witnesses plaintiffs might select for depositions in the MDL would be called at any trial, and they have carefully avoided giving any indication of who the actual trial witnesses are likely to be. Thus, plaintiffs would proceed at their own risk and could well

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waste their time and resources deposing witnesses who will not be called at trial. In short, if defendants have their way, they reserve the right to render any expert witness depositions taken by the plaintiffs in the MDL a complete waste of time.

Defendants make a number of arguments as to why 137 is a reasonable number of witnesses, but they also advance the basic argument that this court, as transferee court under § 1407, lacks the authority to limit the number of their trial witnesses in any event:

> The role of an MDL Court is to oversee 'coordinated or consolidated pretrial proceedings.' 28 U.S.C. § 1407. This role does not include the determination of issues related only to trial.

Defendant Fractionators' Memorandum of Law in Opposition to Plaintiffs' Motion to Limit Expert Testimony, at 8. Orders that pertain to the trial of a case, say the defendants, can be made only by the "trial judge," meaning the transferor judges to whom the cases will be remanded upon completion of the MDL discovery.

The Authority of a Transferee Court

Defendants fundamentally misconceive the nature of multidistrict litigation and "the role of an MDL court." The source of their confusion is their failure to understand, or at least to acknowledge, the relationship between the "pretrial proceedings" referred to in § 1407 and the trial itself. The pretrial and the trial are not, as defendants imply, two unrelated phases of the case. Rather, they are part of a continuum that results in resolution of the case, and the relationship between them is intimate. "Pretrial" proceedings are conducted to prepare for trial. A judge who has no power to impose limits as to what will happen at trial is obviously a judge who has little ability to manage pretrial proceedings in a meaningful way, since there would be no assurance that the judge's efforts are directed toward what is likely to happen at trial. That it is essential for the "pretrial" judge to have the authority to enter orders that will be binding as to the conduct of the trial is recognized by Rule 16(c)(4), (13), (14) and (15), of the Federal Rules of Civil Procedure, which gives the judge conducting pretrial conferences authority to enter a variety of orders that will shape the conduct of the trial, including authority to limit the number of expert witnesses and to establish time limits for presenting evidence at trial. Rule 16 conferences are not necessarily conducted by the same district judge who will ultimately try the case; and some district judges routinely refer Rule 16 conferences to magistrate judges who, in the absence of consent by the parties, would not even be authorized to try the case.

A transferee judge in a multidistrict proceeding is one to whom the Judicial Panel on Multidistrict Litigation has transferred a number of different cases pending in different districts "involving one or more common questions of fact" because the Panel has determined that such a transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). The purpose of the transfer is "for coordinated or consolidated pretrial proceedings." *Id.* Unless the transferee judge has the authority to enter pretrial orders that will govern the conduct of the trial, there would be little prospect that the "coordinated or consolidated pretrial proceedings" contemplated by the ***637** statute would "promote the just and efficient conduct of such actions." *Id.* If the transfer is to serve the legislative purpose of § 1407, the transferee judge must have the same authority that any pretrial judge has to enter orders that will ensure the relevance of the pretrial proceedings to the conduct of any trial that occurs after remand to the transferor court. Rule 16 applies to multidistrict proceedings the same as it applies to individual cases, and the transferee court may exercise the authority granted under Rule 16(c)(4) to limit the number of expert witnesses to be called at trial.

The answer to the first question posed in the introduction to this opinion, then, is that the MDL transferee judge is, by force of the statute itself, in charge of the consolidated cases for all purposes consistent with the objectives of § 1407 and of

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necessity has the authority to limit the number of common-issue trial witnesses. If an additional basis for that authority is desired, Rule 16 of the Federal Rules of Civil Procedure provides it.

It is true, of course, that no pretrial judge, one managing an individual case as well as one managing consolidated pretrial proceedings in a multidistrict litigation, can anticipate everything that might happen up to the point of trial. Obviously, pretrial orders containing limitations that are overtaken by events are subject to adjustment by the judge who will try the case. For instance, a designated expert witness whose deposition has been taken may die before trial, necessitating the designation of a substitute witness and another deposition before trial. But the need for such adjustments is exceptional, not routine. Normally, witness limitations work well. This is especially true in the case of expert witnesses, who often are highly paid and, short of death, likely to be available for trial. Pretrial proceedings have to be conducted on the assumption that the needs of the trial can be fairly anticipated by the pretrial judge. Any other approach would render pretrial proceedings pointless.

This is not to suggest that in the absence of unforeseen developments the transferor judges in this litigation are bound by what this court does. The extent to which any transferor judge might see fit to vary what we do here is a matter of his or her own good judgment. We would expect any error on our part to be corrected before the case went to trial. This is not a matter of trying to tie the hands of the trial judge. It is a matter of defining what this court's authority is to enter orders that will bind the parties at trial to the extent the trial judge sees fit to enforce them. (It is also a matter of determining whether the transferor court can, as a matter of law, safely adhere to the orders of the transferee judge should he or she find it otherwise appropriate to do so.) But it is obvious that the objectives of § 1407 can best be achieved when a departure from the transferee judge's pretrial orders is the exception rather than the rule, and it is this court's impression that such departures are in fact exceptional. [3]

Holding that we do have the authority, as the transferee court, to enter an order limiting the number of common-issue expert witnesses the fractionator defendants will be permitted to call at trial, so that we can determine what depositions need to be taken, we turn now to the question of what that number should be.

A Reasonable Limit for These Cases

A threshold question raised by defendants is what is meant by "common-issue expert witnesses." Defendants indicate that one reason they have listed so many expert witnesses is that they believed they had to include not only opinion witnesses but also experts who will testify as fact witnesses on common issues. For instance, a highly skilled employee of one of the fractionators, such as the supervisor of a plasma collection center, might be called to testify as a fact witness concerning the procedures followed at the center. This would have to do with plasma collection, a common issue, and the witness would be an "expert" in the sense of knowing far more about the procedures than the jury would know. Federal Rule of Evidence 702. But unless the witness is to be called to offer *opinion* testimony based on his or her expertise, the court does not consider the witness an "expert" for purposes of ***638** this discussion. (Nor does it appear to be the kind of witness the parties had in mind when they submitted to us the language concerning the schedule for "Expert Identification" included in the Case Management Order, *supra* at p. 635.) To the extent that there has been any genuine uncertainty about what is meant by a common-issue "expert," let it be clear that we mean an expert who will be called by a fractionator to give *opinion* testimony on an issue which is common to all cases. [4]

One of defendants' main arguments is that because the facts of individual cases differ from each other, defendants should not be required to use the same relatively small group of common-issue expert witnesses in all cases that might be tried. Because they have not yet had the opportunity to do the case-specific discovery they need to try each of the individual cases in the MDL, they claim a need to designate a large number of possible

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expert witnesses in order to cover themselves for any contingency. [5]

The argument is not persuasive. The facts concerning the hemophilia of an individual plaintiff, his HIV infection and his use of concentrates should not require different experts to testify on common issues from case to case. All plaintiffs claim to have been infected by using the concentrates of one or more of the defendants, and all plaintiffs charge one or more defendants with the same negligent acts and omissions. Defendants' argument that they need to complete case-specific discovery before they can designate their common-issue expert witnesses is difficult to reconcile with the fact that they have deposed plaintiffs' common-issue experts without any indication that their interrogation has been hampered by a lack of case-specific information. To be consistent, it seems that defendants should have requested that case-specific discovery be completed before they undertook to determine by deposition what plaintiffs' common-issue experts will say at any trial that occurs. But, of course, any such suggestion would turn the MDL proceeding on its head. Section 1407 consolidations take place when there are "civil actions involving one or more *common* questions of fact ..." The multidistrict proceeding is not the appropriate mechanism for the conduct of *case-specific* discovery. By definition, that discovery is not of general interest to the parties in all of the individual cases which comprise the MDL. [6] In this litigation, for instance, it would make no sense for members of Plaintiffs' Steering Committee to attend the depositions of the plaintiffs in each of the individual cases, or the depositions of their treating physicians, and no one has suggested that they have any such intention. Nor would it be necessary for a fractionator not named in a particular case to attend the depositions of the plaintiff and treating physician in that case. These witnesses would not be testifying about *common* issues.

Adopting defendants' view of MDL proceedings would mean that discovery concerning ***639** the "one or more common issues of fact" contemplated by § 1407 would not be completed, or perhaps even commenced, until the case-specific discovery was finished. This would prolong the MDL indefinitely, force the parties to await the completion of discovery that would be of no relevance to their particular cases and frustrate the possibility of settling individual cases between completion of the common discovery and completion of case-specific discovery. Although we have not made a formal decision on the matter as yet, and will hear from the parties before we do, our present inclination is to suggest to the Panel after completion of the common-issue discovery that the individual cases be remanded to the transferor districts. We see no point in retaining jurisdiction of the cases during the case-specific discovery, which can probably be best conducted after remand. It may be that some of the transferor courts will wish to address dispositive motions before expensive and time-consuming case-specific discovery is undertaken.

Aside from the procedural convolution of defendants' position, a number of circumstances tend to belie their need for a large group of experts from which to select witnesses who are particularly suited for individual cases. Among these circumstances is the fact that in two cases pending in Indiana and Arizona state courts, the fractionators have filed these *same lists* of 137 common-issue experts. Fact-specific discovery has been completed in the Indiana case, and, except for the depositions of defendants' common-issue experts, it is ready for trial. The fractionators have resisted the efforts of plaintiffs in the Indiana and Arizona cases to require the designation of a smaller number of experts who will actually be used at the trials. Defendants offer no explanation to this court as to how their tactics in the Indiana and Arizona cases are consistent with the argument one of their attorneys made to us in open court when we first discussed plaintiffs' objections to the number of expert witnesses defendants had designated:

> I was frankly surprised when the Plaintiffs' Steering Committee said that ... there are only 12 or 14 experts that they wish to use ... in all these many different trials. [W]e took a different tack.

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> We said if we are designating experts for one trial or two trials or three trials, we may be able to designate a small number of experts ... [W]e will designate a lot of experts, not to call a hundred or 50 experts in a particular trial, but so that as we try hundreds of cases potentially around the country, we can call the experts in each trial that we think most appropriate. [7]

Another circumstance which undercuts defendants' contention about the need for this long list of experts has been mentioned earlier in this opinion. At the time defendants agreed upon the terms of the Case Management Order, they had already tried each of the thirteen cases that have been tried in the history of this litigation. They knew all there was to know about whether they would need different opinion witnesses on common issues, depending upon case-specific facts. The deposition of an expert witness in this litigation has typically taken more than one day, and understandably so, considering the complexity of the testimony and the volume of material to be covered. The defendants joined plaintiffs in proposing to this court, for incorporation in the Case Management Order, a discovery schedule that allowed approximately twelve weeks for plaintiffs to depose their experts. The notion that 137 expert witnesses, or any such number, could be deposed in twelve weeks is absurd. If plaintiffs deposed two defense experts a week, which is generous, that would mean 24 witnesses could be deposed in twelve weeks' time. This strikes the court as something like what the defendants actually had in mind at the time they agreed upon the terms of the Case Management Order in May of 1994. Whatever has happened in the meantime to change defendants' attitude, it seems unrelated to the legitimate needs of the litigation.

Defendants have attempted to break down the various "core issues" listed in the Pretrial Management Order (Note 2, *supra*) into a ***640** much larger number of subcategories, to bolster their argument that a large number of experts will be required to cover the common issues. This attempted splintering of the core issues is illustrated by defendants' suggestion that they might need different experts to testify to what was known about HIV before 1983 and after 1983. The idea that an expert on HIV would be so specialized as to be able to testify to what was known about the virus in 1983, but not before, or not after, is implausible on its face. If it is possible to find such an expert (where would one look?), clearly it would be easier to find one who is knowledgeable about what was known during the entire span of time relevant to the litigation.

The fact is that, rather than being specialized in only one facet of a core issue, an expert in any area of this litigation is often knowledgeable about more than one core issue and testifies accordingly. This court presided over one of the thirteen cases that was tried prior to the MDL consolidation. It was the case of *Poole v. Alpha,* No. 86 C 7623. Stephen Poole was a hemophiliac who became infected with HIV as a result of using factor concentrate and eventually developed AIDS, from which he died, leaving a widow and children surviving. His estate sued these same four fractionators, alleging that Poole had used each of their concentrates. He alleged the same negligent acts and omissions that have been commonly alleged in the MDL cases, and the defenses raised by the fractionators were the same as those they have raised in the other cases. After five and one half weeks of trial in October and November of 1993, the jury returned a special verdict finding that none of the fractionators had been negligent in any of the ways claimed by plaintiff. [8]

If there is any reason to believe that the common-issue expert testimony in the Poole trial was different in any essential way from what may be anticipated in the trial of any other MDL case, the defendants have not told us what it is. [9] In the course of this proceeding, we have from time to time found it useful to draw on our experience in *Poole,* and have done so explicitly. Presumably the defendants anticipated, before they filed their briefs on the questions under discussion, that to some

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extent we would be inclined to do so here as well. In the absence of some demonstration to the contrary, we believe the expert testimony presented in *Poole* was fairly typical of what will be presented in the trial of any remanded case. It will be instructive, therefore, to review what took place in *Poole.* [10]

The Poole estate called eleven experts to testify on issues that were the same as the common issues in this MDL litigation. [11] Eight of the witnesses were presented live, two by written deposition (Rodell, Hink) and one by a video deposition (Ratnoff).

The four fractionator defendants combined called a total of twelve expert witnesses to give opinions concerning common issues. Alpha called four of the witnesses (McAuley, Mealey, Weidman, Preston). Miles (the predecessor of Bayer Corporation) called three (Aledort, Levy, Mozen). Armour called two (Kessler, Rodell). Baxter called one (Levine). The court is unable to tell from its notes which defendant or defendants called the remaining two experts (Aaronson, Abildgard).

***641** None of the defense experts gave opinion testimony about any matter that concerned fewer than all four of the defendants. This demonstrates the extent to which the issues are indeed common in these cases. But more than that, it is part of the explanation for why the defendants needed to call only twelve opinion witnesses. The common-issue testimony that benefits one defendant necessarily benefits all of the defendants just about equally. [12] An expert who gives an opinion favorable to the defendants on the question of whether the defendants should have begun heat treating their products before they did, or whether they should have screened out donors infected with hepatitis, will be giving testimony that, if accepted by the trier of fact, will be beneficial to all defendants. It will not be necessary for each defendant to call its own experts on those subjects. To do so might even risk taxing the patience or losing the attention of the jury, which, at best, has to sit through a long, complex trial. Counsel for each defendant can, of course, put additional questions to the witnesses called by other defendants, as happened in *Poole.*

Another reason the defendants were able to present a successful defense with only twelve witnesses is that some of the witnesses gave opinions that related to more than one of the common issues. The witness Milton Mozen, for instance, testified on numerous subjects, as did the witness Peter Levine.

Much of the opinion testimony favorable to defendants was not even offered through their own experts. It was elicited on cross-examination of plaintiff's experts, often by having them agree with the opinions expressed by recognized authorities in learned treatises. Whole areas of potential dispute were eliminated in just this fashion by trial counsel well-versed in the relevant medical literature.

Defendants argue that another reason for their long list of experts is that they may be compelled to engage in simultaneous trials throughout the country, necessitating the use of different expert witnesses at the different trial locations. The plaintiffs respond that this prospect is far-fetched, and the court agrees. First, defendants' suggestion that there may be hundreds of federal trials seems unlikely in view of the fact that during the decade or more since the first case was filed there have only been thirteen trials, state and federal. Most of the cases that have been resolved have either been settled or decided in defendants' favor on dispositive motions. [13] But even assuming a large number of trials, it is customary for courts to defer to the engagements of counsel and to adjust their trial calendars accordingly. Certainly this court does that routinely and would be surprised if that is not what occurs as a general rule after remand to the transferor districts. Putting aside altogether the convenience and availability of expert witnesses, the small number of trial counsel who are experienced in this highly specialized litigation makes it unlikely that a significant number of simultaneous trials will occur.

Defendants say they have a preference for presenting their expert witnesses live, rather than through video depositions, and that this requires a large array from which to choose, because these are “extremely busy people” who “may be able to testify at no more than one or a handful of trials.” [14] We have no way of knowing how many times any

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particular defense expert may be willing to testify at trial. Nor, as we have just indicated, do we have any way of knowing how many trials ***642** there are going to be. But if these pretrial proceedings are to be conducted with any semblance of the economy sought by the consolidation, there must be a reasonable limit to the number of witnesses to be deposed, and therefore to the number of witnesses who are eligible to testify at trial. Any speculation as to the number of trials, and the attitudes of extremely busy people—who stand to earn considerably more money by testifying than by engaging in their normal work (and some of whom are employed by the defendants and have no choice in the matter in any event) does not afford the court a satisfactory basis for determining a reasonable number. [15]

Granting that there must be some leeway for the designated expert who may for some unforeseen reason become unavailable to testify at trial, it does not require the designation of 137 witnesses to deal with that contingency. A recent experience of this court in a patent case illustrates the kind of adjustment that can be made. The deposition of one party's designated expert had been taken for several days, at great expense, but as the trial date drew near the witness announced that he was no longer willing to testify. The adverse party who had taken the deposition of the witness objected to having to depose a substitute. The problem was solved by retaining another expert who read the first expert's deposition, agreed with it, and stipulated that his trial testimony would differ in no material way from the first expert's deposition testimony. In that way, the need to take a second deposition was avoided. The same procedure might work just as well in this MDL in the event that any expert designated by defendants might have to be replaced. Presumably, defendants' designated experts will not be expressing opinions that other equally well-qualified experts would find unacceptable.

Another reason defendants give for the long list is their alleged need to use "local" common-issue experts in the trial of particular cases. They suggest that juries would be more likely to accept the testimony of experts from their own locales than that of experts brought in from a distance. This is a highly speculative proposition, especially in terms of a subject matter as complicated as that involved in these cases. Even if it were desirable to use "local" experts, there may be no suitable ones residing in the locality. In the *Poole* trial, it is our recollection that none of the twelve common-issue experts called by the defendants resided in Illinois. They came from widely separated parts of the United States and one came from Germany. But even if there were something to defendants' argument, it would not be possible to conduct consolidated discovery in an MDL if each party were allowed to designate common-issue experts who resided in every venue where a trial might possibly take place. This would result in the absurd kind of number that defendants have designated here. The economy that is one objective of § 1407 sometimes requires compromise. Loss of the speculative benefit from designating a multitude of "local" experts seems a small price to pay for a reasonable limit.

CONCLUSION

Defendants have placed the court in the position of having to determine, without any help from them, what reasonable number of common-issue experts they really need to designate for trial. They say they need 137 and can designate no smaller number at this time. Yet, this is the time we need the designation. Plaintiffs have to know whom to depose, so that they can get on with it, complete the common-issue discovery and be ready for a remand to the transferor districts.

Based on our experience in the *Poole* trial and the additional insights we have gained in presiding over the MDL, we believe that 24 common-issue expert witnesses will be a sufficient number to enable the defendants to make an effective presentation of their position on common issues at any trial that is likely to occur. This is twice the number these defendants utilized at the *Poole* trial, and it leaves them ample room for any additions ***643** or variations they might think appropriate.

In the decade this litigation has been pending, the defendants have learned the identities of all recognized experts in the relevant subject matter

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and have used many of them as witnesses or consultants. They should be able to select their 24 common-issue experts without difficulty within the time we will provide.

IT IS HEREBY ORDERED that:

1. By January 20, 1997, the fractionator defendants jointly shall designate up to 24 common-issue expert witnesses the defendants, or any of them, may call to testify at any trial of an MDL case.

2. If the defendants do not desire to make a joint designation, but instead desire to designate individually, then each of the four defendants shall designate up to six common-issue expert witnesses it may call to testify at the trial of any MDL case.

3. Whether the defendants designate jointly or individually, any defendant shall be permitted to call at trial any common-issue expert witness designated by itself or any other defendant pursuant to this order.

4. The fractionator defendants shall not be permitted to call at the trial of any MDL case a common-issue expert witness who has not been designated by itself or another fractionator defendant pursuant to this order, unless the trial judge, in his or her discretion, permits it for good cause shown.

5. The time the plaintiffs will need to complete the depositions of witnesses designated by defendants pursuant to this order will be a subject of the next status conference.

All Citations

169 F.R.D. 632

Footnotes

1 The four fractionator defendants are Baxter Healthcare Corporation, Bayer Corporation, Alpha Therapeutic Corporation and Armour Pharmaceutical Company.

2 This is Paragraph 10 of the Case Management Order, which reads as follows:

> 10. *Core Subjects for Discovery.* The following are deemed core subjects for MDL–986 discovery:
>
> (A) Plaintiffs' hemophilia treatment, including use, source and identification of blood and blood derivatives
>
> (B) Viral infectivity of blood and blood derivatives used by plaintiffs
>
> (C) Laboratory tests and results regarding plaintiffs' HIV infection
>
> (D) Plaintiffs' alternative risk factors
>
> (E) General nature and treatment of hemophilia
>
> (F) Knowledge concerning risk of viral infectivity and HIV
>
> (G) Warnings and information regarding viral infectivity and HIV
>
> (H) Communications between or among: fractionators, plaintiffs, NHF and other hemophilia organizations, the United States government, healthcare providers, blood and blood derivative suppliers and distributors, plasma procurers and trade associations and marketing consultants.
>
> (I) Plasma collection practices, including donor screening
>
> (J) Surrogate testing
>
> (K) Viral inactivation
>
> (L) Transmission of HIV by hemophiliacs to others
>
> (M) Recalls, withdrawals and exchanges of factor concentrates
>
> It will be noted that Items (A)–(D) are case-specific issues, rather than common issues, inasmuch as they pertain to the particular circumstances of the individual plaintiffs' cases. The remaining Items (E)–(M) are pertinent to all cases.

Discovery	Date Completed
All Non–Expert Discovery	February 1, 1995
Expert Identification:	
—Plaintiffs	February 28, 1995
—Defendants	April 30, 1995

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Expert Depositions	July 31, 1995

Except for good cause shown, relief from the above schedule shall not be granted, and all discovery shall be completed by July 31, 1995.

3 The writer happens to be a current member of the Judicial Panel on Multidistrict Litigation.

4 This would not include expert witnesses, such as physicians, who might be called by a defendant to give expert testimony concerning the medical condition of a particular plaintiff. The witness would be an expert, and would be giving opinion testimony, but the opinion would not relate to a common issue in the MDL litigation.

5 In fact, considerable case-specific discovery has been furnished in the form of "Patient Profile Forms" most of the MDL plaintiffs have completed. This form was agreed upon by the parties and made an exhibit to the Case Management Order of May 5, 1994. The form calls for the plaintiff's history of hemophilia treatment, the date the plaintiff contracted HIV, the date of the HIV diagnosis, whether the plaintiff has AIDS, and, if so, when it was diagnosed, and a listing of all factor concentrates the plaintiff used during the years 1978 through 1985, the period during which almost all infections occurred.

6 Should it turn out that in a particular case there are medical and other scientific questions that are so specific to the facts of that case that the defendants do indeed require a "special" kind of expert, not designated in the MDL, to fairly present their position on an MDL common issue as it impacts that case, we would regard that as *case-specific* situation to which our witness limitation would not apply. We are extremely doubtful that there are any such cases, and assume that trial judges will carefully examine any claim by a defendant that the subject matter of any proposed testimony by a common-issue defense expert not designated in the MDL could not have been covered equally well by a witness who was or could have been designated within the limitation we will fix.

7 Transcript of proceeding of June 4, 1996, pp. 115–116 quoted in Plaintiffs' Reply Memorandum to Motion to Limit the Number of Fractionator Defendants' Expert Witnesses, p. 5.

8 The judgment for defendants was reversed on appeal for reasons not related to the expert witness questions under discussion in this opinion. *Gruca v. Alpha Therapeutic Corp.,* 51 F.3d 638 (7th Cir.1995).

9 *Poole* may have required somewhat more opinion testimony than most of the other cases, since plaintiff was contending, and offered opinion testimony to prove, that a person once infected by the injection of a contaminated factor concentrate can suffer the aggravation of his condition by the subsequent injection of another contaminated concentrate. *See, Gruca,* 51 F.3d at 641–643. Much of the opinion testimony concerned this vigorously disputed issue, which is not present in all MDL cases.

10 The review is based on our handwritten notes of the trial.

11 These were the witnesses Weiser, Subramanian, Terman, Hildebrandt, Feldman, Berger, Ratnoff, Rodell, Drees, Hink and Trobisch. The court is unsure from its notes whether all eleven gave opinion testimony, but we are nonetheless using the number eleven so as not to risk minimizing the number of opinion witnesses likely to be called in an MDL trial.

12 The jury was given the customary instruction that "In determining whether any proposition has been proved, you should consider all of the evidence bearing on the question without regard to which party produced it."

13 Some plaintiffs face considerable difficulty in terms of product identification and the statute of limitations. Many plaintiffs used the factor concentrate of more than one fractionator. If a plaintiff is unable to prove which defendant's concentrate caused his infection, the substantive law of some states will prevent his recovery. Causation is a case-specific issue which we cannot handle in the MDL. Limitations questions—when should the plaintiff have known that he had a claim, and did he file it on time?—are also case-specific and will have to await the attention of the transferor courts after remand.

14 Defendant Fractionators' Memorandum of Law in Opposition to Plaintiffs' Motion to Limit Expert Testimony, p. 5.

15 The court is not even clear about the defendants' allegedly strong preference for live testimony. In the *Poole* trial, two of the defendants opinion witnesses (Levy, Levine) testified by written deposition and another (Aaronson) by video deposition.

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TAB 9

405 F.Supp. 316
Judicial Panel on Multidistrict Litigation.

In re WESTINGHOUSE ELECTRIC CORP. URANIUM CONTRACTS LITIGATION.

No. 235.
|
Dec. 19, 1975.

Synopsis
After a uranium supplier notified its public utility customers that it would be unable, because of uranium shortages, to fulfill its contractual obligations to provide uranium to fuel nuclear power plants operated by the utilities or planned for operation in the future, and that it regarded full performance of its contracts as excused because of commercial impracticability, the supplier moved to transfer all actions subsequently filed against it by the utilities to the Western District of Pennsylvania for coordinated or consolidated pretrial proceedings. The Judicial Panel on Multidistrict Litigation held that the actions involved common questions of fact and that their transfer to the Eastern District of Virginia would best serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation.

Transfers ordered.

***317** OPINION AND ORDER

Before JOHN MINOR WISDOM, Chairman, and EDWARD WEINFELD, EDWIN A. ROBSON, WILLIAM H. BECKER, [1] , JOSEPH S. LORD, III, STANLEY, A. WEIGEL, and ANDREW A. CAFFREY, Judges of the Panel.

Opinion

PER CURIAM.

Westinghouse Electric Corp. is the sole defendant in thirteen federal actions in as many districts [1A] filed by a number of its utility customers. [2] Each of these actions, to a large extent, involved an alleged contractual obligation on Westinghouse's part for the present or future delivery of uranium to fuel nuclear power plants operated by the plaintiff-utilities or planned for operation in the future.

These actions were spawned by a notice sent by Westinghouse to its uranium customers on September 8, 1975, in which Westinghouse stated that full performance of any contractual obligations which it may have had for the supply of uranium had become 'commercially impracticable' by reason of unforeseen developments resulting from the worldwide energy crisis and that Westinghouse was accordingly excused from such performance by reason of Sec. 2-615 of the Uniform Commercial Code.

The September 8, 1975 notice further stated that Westinghouse had established a program pursuant to Sec. 2-615(b) of the Uniform Commercial Code to allocate uranium in its inventory or on order fairly and equitably among its customers. Under the allocation plan, each customer would have received slightly less than nineteen percent of its anticipated uranium needs as those needs were described in the allocation plan.

On October 30, 1975, Westinghouse filed a complaint styled as one in the nature of interpleader in the Western District of Pennsylvania for the purpose of securing resolution of what it saw as the conflicting claims of the various utility-plaintiffs to the limited quantities of uranium which it had in inventory or on order from its suppliers. [3] On November 6, 1975, Westinghouse's interpleader action was dismissed by Chief Judge Herbert P. Sorg who concluded that the requisite adversity of claims necessary to sustain jurisdiction under 28 U.S.C. § 1335 was absent. [4]

This matter is before the Panel on Westinghouse's motion to transfer all actions to the Western District of Pennsylvania for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. All responding parties, with one exception, [5] oppose the motion. In ***318** the alternative, respondents suggest that in the event the Panel does transfer these actions, a district other than the Western District of Pennsylvania should be selected as the transferee forum. The

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most frequently mentioned alternative transferee courts are the Eastern District of Tennessee, the Southern District of Florida, the District of South Carolina or the Eastern District of Virginia. In addition, if any transfer is ordered, two of the respondents have requested that we exercise our powers under the proviso of sub-section (a) of Section 1407 by separating certain 'claims' in their actions and remanding them to their respective transferor courts. [6]

We find that these actions involve common questions of fact and that their transfer under Section 1407 to the Eastern District of Virginia will best serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. Because we believe that the transferee judge is in the best position to determine the relationship between the 'claims' that respondents TVA and Florida Power & Light Company seek to have separated and remanded and the remainder of the litigation, we deny their requests for us to exercise our powers under Section 1407(a). [7]

The arguments in opposition to transfer rest heavily on an asserted distinction between the seeming legal commonality of the defense of commercial impracticability under Sec. 2-615 of the Uniform Commercial Code and the separate factual inquiries necessary to sustain that defense in each action. Since each contract was negotiated at a different time by different individuals, respondents maintain, a determination of whether performance has been rendered commercially impracticable by the occurrence of intervening circumstances that were not within the contemplation of the parties at the time of contracting would entail an examination of the different intervening factors as compared with each separate party's contemplation of them at the time of contracting. Hence, they insist, the factual commonality between their actions is purely illusory. Moreover, respondents argue, the contracts in question differ in their essential terms. Some, they note, were for the supply of uranium only while others included enrichment contract administration, fabrication contracts, delivery of completed fuel assemblies and/or the supply and servicing of an entire nuclear steam supply system.

Although respondents' arguments have a certain attractiveness, they fail, in our view, to appreciate that there are some very significant common questions of fact among these actions. For example, a determination of the impracticability of the present and future performance of Westinghouse's contractual obligations for the supply of ***319** uranium depends, in part, on the present and foreseeable supply of uranium on the open market and its cost. And even assuming that a large part of the Sec. 2-615 defenses rests on the separate contemplation of the individual parties negotiating each of the contracts, it is nonetheless clear that common factual questions will be raised concerning the effect of any alleged unforeseen intervening circumstances on the price and supply of uranium. Thus, while we recognize that these actions involve some individual questions of fact pertaining to each utility's contractual relationship with Westinghouse, we are persuaded that sufficient commonality of factual issues exists to warrant transfer and that the most just and efficient conduct of these actions can best be achieved through centralized management by a single judge. Specifically, Section 1407 proceedings will prevent duplication of discovery, eliminate the possibility of colliding pretrial rulings by courts of coordinate jurisdiction, and avoid potentially conflicting preliminary injunctive demands on Westinghouse with respect to its delivery of uranium.

Moreover, under the guidance of the transferee judge, a pretrial program can be developed that would insure that the needs of the respective parties for any unique discovery or individual judicial attention can be accommodated concurrently with the common pretrial matters. See In re Republic National-Realty Equities Securities Litigation, 382 F.Supp. 1403, 1405-06 (Jud. Pan. Mult. Lit. 1974). Such a program will streamline the entire litigation and thereby benefit all parties, the witnesses and the judiciary.

We turn now to the selection of a transferee district for this litigation. At the outset, we note our reluctance to transfer these actions to the Western District of Pennsylvania, movant's preference, since no related federal action is presently pending there. See In re Air Crash Disaster Near Papeete, Tahiti,

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on July 22, 1973, 397 F.Supp. 886, 887 (Jud. Pan. Mult. Lit. 1975). Although several other districts were suggested in the briefs submitted to the Panel, on balance, we believe that the Eastern District of Virginia is the most appropriate transferee forum. Indeed, this district was apparently preferred by the greatest number of utilities during oral argument before the Panel and was also Westinghouse's second choice. Furthermore, the record reveals that Judge Robert R. Merhige, Jr., to whom the Virginia action is assigned, has had an opportunity to gain a familiarity with the complicated issues involved here, which will enable him to supervise this litigation toward its most just and expeditious termination. See In re Griseofulvin Antitrust Litigation, 395 F.Supp. 1402, 1403 (Jud. Pan. Mult. Lit. 1975).

IT IS THEREFORE ORDERED that the actions listed on the following Schedule A and pending in districts other than the Eastern District of Virginia be, and the same hereby are, transferred to the Eastern District of Virginia and, with the consent of that court, assigned to the Honorable Robert R. Merhige, Jr. for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407 with the action pending in that district and listed on Schedule A.

SCHEDULE A

DOCKET NO. 235

District of Connecticut

Northeast Utilities Service Co. et al. v. Westinghouse Electric Corp.

Civil Action No. H-75/373

Southern District of New York

Consolidated Edison Company of New York v. Westinghouse Electric Corp.

Civil Action No. 75CV 5503-CHT

Eastern District of New York

Long Island Lighting Co. v. Westinghouse Electric Corp.

Civil Action No. 75C1878

District of South Carolina

South Carolina Electric & Gas Co. v. Westinghouse Electric Corp.

Civil Action No. 75-1863

Southern District of Florida

Florida Power & Light Co. v. Westinghouse Electric Corp.

Civil Action No. 75-2319

Northern District of Alabama

Alabama Power Co. v. Westinghouse Electric Corp.

Civil Action No. 75-P1892S

Eastern District of Virginia

Virginia Electric & Power Co. v. Westinghouse Electric Corp.

Civil Action No. 75-0514-R

Eastern District of Tennessee

Tennessee Valley Authority v. Westinghouse Electric Corp.

Civil Action No. 3-75-298

Northern District of Texas

Texas Utilities Services, Inc. v. Westinghouse Electric Corp.

Civil Action No. 3-75-1241C

Southern District of Texas

Houston Lighting & Power Co. v. Westinghouse Electric Corp.

Civil Action No. 75-H-1729

Eastern District of Missouri

Union Electric Co. v. Westinghouse Electric Corp.

Civil Action No. 75-893C (3)

District of Kansas

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Kansas Gas & Electric Co., et al. v. Westinghouse Electric Corp.

Civil Action No. 75-250-C6

Eastern District of Wisconsin

Wisconsin Electric Power Co., et al. v. Westinghouse Electric Corp.

Civil Action No. 75-C-571

All Citations

405 F.Supp. 316

Footnotes

1 Judge Becker recused himself and took no part in the consideration or decision of this matter.

1A See Schedule A following this opinion for a listing of the actions involved and the districts in which they are pending.

2 An additional action brought by another of Westinghouse's utility customers is presently pending in Pennsylvania state court at Pittsburgh, although no federal action is now before the court in the Western District of Pennsylvania.

3 Two of the actions presently before the Panel, Long Island Lighting Company v. Westinghouse Electric Corporation, E.D.N.Y., Civil Action No. 75 Civ. 1878 and Northeast Utilities Service Company, et al. v. Westinghouse Electric Corporation, D. Conn., Civil Action No. H 75-373 had not yet been instituted at the time Westinghouse filed its interpleader action. Accordingly, plaintiffs in those actions were not named as adverse claimants by Westinghouse.

4 Westinghouse has argued that Judge Sorg's dismissal of its interpleader action was predicated, in large measure, on the utilities' representation that they would not oppose a motion by Westinghouse to transfer all actions to a single district under 28 U.S.C. § 1407. Although it appears that several of the utilities present during the pertinent hearing did indeed state such lack of opposition, at least one of the utilities was reluctant to make that concession without time for further reflection. In any event, the decision we reach herein is based on our resolution of the merits of the transfer request and not on any principles of estoppel applied against the utility-plaintiffs.

5 Union Electric Company favors the request for coordinated or consolidated pretrial proceedings but suggests a transferee forum other than the Western District of Pennsylvania.

6 Respondent Florida Power & Light Company has asked the Panel to separate the 'claims' in its action relating to irradiated fuel and contract termination date and remand them to the Southern District of Florida, while respondent Tennessee Valley Authority has asked us to separate Counts I, II and III of its complaint relating to ostensibly unique claims arising from TVA's status as a federal agency and remand them to the Eastern District of Tennessee.

7 See In re Midwest Milk Monopolization Litigation, 386 F.Supp. 1401, 1403 (Jud. Pan. Mult. Lit. 1975), where the Panel made the following observation with respect to a request for separation and remand:
'Although we are sensitive to the arguments advanced by plaintiff, we believe that they should properly be addressed to the transferee judge. He is in the best position to determine whether Milk, Inc.'s claims are susceptible to immediate remand or whether they are inextricably related to Keystone's defense and counterclaim and the litigation pending in the Western District of Missouri. See, e.g., In re Four Seasons Securities Laws Litigation, 361 F.Supp. 636, 638 (Jud. Pan. Mult. Lit. 1973). Should the transferee judge deem an immediate remand of Milk, Inc.'s claims appropriate, procedures are available whereby this may be accomplished with a minimum of delay. (See Rule 11, R.P.J.P.M.L., 65 F.R.D. 253, 260-63 (1975)).'

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TAB 10

302 F.Supp. 244
Judicial Panel on Multidistrict Litigation.

In re 'East of the Rockies'
CONCRETE PIPE Antitrust Cases.

Docket No. 12.
|
May 23, 1969.

Synopsis

The Judicial Panel on Multidistrict Litigation, William H. Becker, Judge of the Panel, transferred, except in respect to New Mexico action, civil actions arising out of alleged antitrust conspiracies in regard to sale of concrete pipe to the Eastern District of Pennsylvania for consolidation of coordinated pretrial proceedings where to do so would be for the convenience of parties and witnesses and would promote the just and efficient conduct of such actions.

Order accordingly.

***244** Before ALFRED P. MURRAH, Chairman, and JOHN MINOR WISDOM, WILLIAM H. BECKER, JOSEPH S. LORD, III, EDWIN A. ROBSON, STANLEY A. WEIGEL, and EDWARD WEINFELD, Judges of the Panel.

Opinion

***245** OPINION AND ORDER

WILLIAM H. BECKER, Judge of the Panel.

General Factual Background

Certain plaintiffs and intervening plaintiffs, in civil treble damage antitrust actions pending in the United States District Courts for the Eastern District of Pennsylvania and the Southern District of New York, have moved for transfer under Section 1407, Title 28, U.S.C., to the Eastern District of Pennsylvania of the civil actions listed in the attached Schedule A. On the initiative of the Panel an order was issued to the parties to show cause why the civil actions listed in the attached Schedule B should not be transferred under Section 1407. The product involved in each of those actions is described generally as concrete pipe.

The filing of each of the affected actions followed the return in the District of New Jersey of two criminal indictments charging violations of the antitrust laws. These criminal actions, in that district, were given the numbers Cr. No. 9-66 and Cr. No. 10-66. (None of the affected civil actions were filed in the District of New Jersey.) The defendants in these criminal actions were convicted on pleas of nolo contendere.

Some of the plaintiffs in the affected civil actions are end-users of concrete pipe and some are competitors of one or more of the defendants.

The indictment in Cr. No. 9-66 described the defendants, their states of incorporation, principal place of business and short descriptive names as follows:

Name of Corporation	State of Incorporation	Principal Place of Business	Hereinafter Referred to as
International Pipe and Ceramics Corporation	Delaware	East Orange New Jersey	Interpace
Lock Joint Pipe Company	New Jersey	East Orange New Jersey	Lock Joint

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Kerr Concrete Pipe Company	New Jersey	Paterson New Jersey	Kerr
Martin Marietta Corporation	Maryland	New York New York	Martin Marietta
North Jersey Concrete Pipe Co. Inc.	New Jersey	Irvington New Jersey	North Jersey

Interpace is the successor to the concrete pipe business formerly carried on by Lock Joint. Martin Marietta is the successor to the concrete pipe business formerly carried on by the Martin Company, a Maryland corporation, and by American-Marietta, an Illinois corporation, which merged in October 1961 to form Martin Marietta Corporation.

The product 'concrete pipe' was defined, in the indictment in Cr. No. 9-66, to mean non-pressure pipe constructed of concrete, either with or without metal components, to convey water or sewage. The metal components were defined, in the same indictment, to mean steel rods, wire and mesh used in the manufacture of concrete pipe. The indictment charges that cement and metal components account for 80% Of the cost of raw materials used in the manufacture of concrete pipe; that the metal components are the most costly ingredients; that over 75% Of the cement and metal components were produced outside of New Jersey. In this indictment the defendants ***246** and their predecessors are charged with an unlawful conspiracy in restraint of interstate trade and commerce (in violation of Section 1, Title 15, U.S.C.) beginning in August 1960, and continuing thereafter until at least April 1962. This indictment further charged the alleged conspirators, including other individuals not named as formal defendants, with the following unlawful acts:

(a) submission of collusive non-competitive prices for the sale of concrete pipe in Northern New Jersey:

(b) allocation and division of orders of concrete pipe in Northern New Jersey among Martin Marietta, Kerr, North Jersey and Lock Joint; and

(c) increasing fixing and stabilizing prices at which concrete pipe was sold in Northern New Jersey.

In Cr. No. 10-66 only Interpace, Lock Joint and Martin Marietta were named as corporate defendants. The product involved in that indictment was 'concrete pipe' defined as low pressure and nonpressure pipe (constructed of concrete and metal components, having rubber gaskets and steel ring joints) and low pressure concrete pipe having concrete joints and rubber gaskets. This 'concrete pipe', the indictment charges, was used to convey water, primarily for drinking and irrigation purposes, and sewage for sanitation and similar purposes. The time period of the alleged conspiracy, charged in Cr. No . 10-66, began in 1955 and continued at least until 1962. The unlawful overt acts alleged to have been committed by the conspirators are similar to those alleged in Cr. No. 9-66, supra.

In Cr. No. 10-66 the territory, in which the alleged conspiracy was designed to be effective, was the 'Eastern United States' defined as all states lying east of the Rocky Mountains (except Texas, Louisiana, and Mississippi), from which is derived the description in the title 'East of the Rockies.'[1]

The indictment in Cr. No. 10-66 further alleged that, during the period involved, Lock Joint (predecessor of Interpace) and Martin Marietta were the principal manufacturers of concrete pipe in the eastern United States; that Lock Joint then

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had plants in New Jersey, New York, Connecticut, Maryland, South Carolina, Florida, Michigan, Illinois, Missouri, Oklahoma, Kansas, Colorado, Wyoming and Ohio; that Martin Marietta then had plants for the manufacture of concrete pipe in the following states: Alabama, Colorado, Florida, Georgia, Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, New Jersey New York, Pennsylvania and Tennessee.

At the time the motion to transfer these cases under Section 1407 was filed there were more affected civil actions (13) filed in the Northern District of Illinois than in any other district; but there were far more plaintiffs in the 6 cases in the Eastern District of Pennsylvania.[2] Nevertheless counsel for the ***247** plaintiffs in the Northern District of Illinois, and others, concede that the Eastern District of Pennsylvania is the logical transferee district. In view of the number of plaintiffs in the eastern United States, and the number of plaintiffs in the actions in the Eastern District of Pennsylvania, counsel for the plaintiffs in the Western District of Missouri agree that the Eastern District of Pennsylvania is the logical transferee district. And as stated hereinabove, counsel for the moving plaintiffs in actions in the Southern District of New York also agree that the Eastern District of Pennsylvania is the logical transferee district, if the actions are to be transferred elsewhere.

Before creation of this Panel, the Co-Ordinating Committee for Multiple Litigation, with concerned trial judges, conducted hearings at Philadelphia and Chicago, as a result of which preliminary coordinated discovery was recommended to explore the existence of the relation between the cases in the several districts. Under the orders of the Honorable John Morgan Davis, United States District Judge of the Eastern District of Pennsylvania, to whom all the cases in that district have been assigned, these recommendations have been implemented and discovery is current. In some of the other districts, this discovery has been wholly or partially accomplished.

In the affected civil actions in the Eastern District of Pennsylvania and in the Southern District of New York conflicting class action requests have been made. With one dissenting opinion a class action issue in the Southern District of New York has been determined adversely to the City of New York by interlocutory decision of the district court and of a Panel of the Second Circuit Court of Appeals, decided April 10, 1969, City of New York v. International Pipe and Ceramics Corp., 410 F.2d 295.

The Common Questions of Fact

These actions involve many common questions of fact. All are based on the two criminal indictments in the District of New Jersey, one of which charged a conspiracy effective in most of the states and concerned districts east of the Rockies. The other indictment charged a conspiracy effective in the Northern District of New Jersey. It is true that different products are designated in the two indictments. But these differences do not render the proposed transfers improper. They may or may not affect the manner in which the transferee court conducts the pretrial proceedings. In re Plumbing Fixture Cases, Judicial Panel on Multidistrict Litigation, 295 F.Supp. 33.

The complaints in all the affected actions contain allegations similar to those in the indictments mentioned above. Although some of the complaints involve additional years and additional allegations not found in the indictments with respect to pressure pipe (said to be manufactured only by Interpace) and with respect to a violation of Section 2, Title 15, U.S.C., nevertheless the common conspiratorial questions of fact respecting price fixing, allocation of orders and collusive bidding, among others, remain.

Furthermore, in additional to these common conspiratorial questions of fact there are many more common questions of fact in the affected civil actions. The additional common questions of fact include, among others, the following:

(1) question of fraudulent concealment, necessary to toll the statute of limitations;

(2) the several factual questions under Rule 23, F.R.Civ.P., which must be resolved to determine the propriety of the many and conflicting class action requests; and

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(3) the many economic questions of fact affecting prices in the absence of conspiracy; including, for example, methods of manufacture, prices of steel products and cement used as components, and production costs, none of which are unique local market questions.

***248** Counsel for the defendants, opposing transfer, argue that the criminal indictments are limited in their averments of time periods, parties, products, geographic markets and conspiracy allegations, and are not as broad as the complaints in the civil actions. One answer to these arguments is that the plaintiffs are not limited in their bases of civil actions by the particular averments of the indictments.

Treble damage antitrust actions may be maintained without an indictment and without conviction or other government proceeding. A fortiori, when there has been a government action, private treble damage civil plaintiffs are entitled to the statutory remedial assistance of the government action (such as the tolling of limitations under Section 5(b)) despite difference in time periods, conspiratorial details and parties, provided there is substantial identity of subject matter. There is such identity when the private complaint is based in whole or in part on any matter complained of in the government action. Section 16, Title 15, U.S.C. Leh v. General Petroleum Corp., 382 U.S. 54, 86 S.Ct. 203, 15 L.Ed.2d 134, l.c. 138; Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 85 S.Ct. 1473, 14 L.Ed.2d 405. Cf. State of Michigan v. Morton Salt Co., D.C., 259 F.Supp. 35, l.c. 55, affirmed sub. nom. Hardy Salt Co. v. State of Illinois (C.A. 8) 377 F.2d 768, cert. den. 389 U.S. 912, 88 S.Ct. 238, 19 L.Ed.2d 260. In the Leh case, supra, the Supreme Court expressly approved the 'substantial identity of subject matter' rule announced in Union Carbide & Carbon Corp. v. Nisley (C.A. 10) 300 F.2d 561, l.c. 670, app. dism. sub. nom. Wade v. Union Carbide & Carbon Corp., 371 U.S. 801, 83 S.Ct. 13, 9 L.Ed.2d 46, and rejected the narrow rule of Steiner v. 20th Century-Fox Film Corp. (C.A. 9) 232 F.2d 190. The rule of the Leh case shows that the argument of defendants in these cases is not relevant and not sound.

In light of the Leh case it would be inappropriate to sustain the defendants in their technical view that differences between the underlying indictments and the civil complaints in respect to geographic areas in which the conspiracy is operative, and in respect to time periods, conspiratorial details and parties, somehow militate against transfer under Section 1407. Genuine common questions of fact do not depend upon the limits or breadth of the indictments or convictions in any case.

Defendants urge that there are no common questions of fact in these cases because there are only local markets for delivery of concrete pipe, since the pipe can economically be delivered only a few miles beyond the point of manufacture. Assuming this to be true, the two major defendants, according to the indictments, found this to be no barrier to multi-state organization of its industrial activity in producing, selling and delivering the pipe to many 'local markets'. Further, in the view of the government, the major defendants found the delivery problem no barrier to multi-state conspiratorial activities affecting a great number of local markets. [3] The defendants in the criminal actions, by pleading nolo contendere, chose not to challenge this view of the government by trial on the factual issues. The plaintiffs in the civil actions have the right to raise similar questions of fact.

As in many of the instances of multi-district litigation, 'small defendants' ***249** oppose transfer of actions in which they are defendants on special grounds of alleged excessive costs. It is by no means clear that the small defendants' interest of overall costs would be served by denying transfer of the claims for relief against them. It is clear, however, that the transferee court can exercise its discretion in scheduling pretrial proceedings in a manner which will protect the legitimate interests of small defendants in the costs of litigation. Cf. In re Plumbing Fixture Cases, supra, 295 F.Supp. at page 34.

Except in respect to the New Mexico action, it is found that transfer of these affected actions to the Eastern District of Pennsylvania for consolidated or coordinated pretrial proceedings will be for the convenience of parties and witnesses and will

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promote the just and efficient conduct of such actions.

The New York Class Action Question

As stated above, in the affected actions pending in the Southern District of New York, the district court has ruled adversely on a request for an interlocutory class action determination. A panel of the Second Circuit Court of Appeals has, by a divided vote, held this interlocutory determination unappealable. Until these class action issues are no longer subject to early appellate review in the Second Circuit and no longer subject to review by extraordinary writ, including certiorari, ruling on the motion of transfer of these cases pending in the Southern District of New York should be deferred. So action will be stayed in those cases until further order of the Panel. At an appropriate time the multidistrict class action conflicts should be given special consideration by the Panel. Cf. In re Multidistrict Private Civil Treble Damage Litigation Involving Plumbing Fixtures, Judicial Panel on Multidistrict Litigation, 298 F.Supp. 484 (filed December 27, 1968).

The New Mexico Case

Because counsel agree that the New Mexico case is not a part of the alleged 'East of the Rockies' conspiracy, transfer of that case should be denied.

The Colorado Cases

The affected actions in the District of Colorado differ in some respects from the other cases, but many common questions of fact remain. Those cases should be transferred because there are many common questions of fact in those cases and the remaining affected cases. Transfer should not be denied because there are additional questions of fact in the Colorado cases.

The Honorable John Morgan Davis is willing to accept transfer of any of the affected civil actions pending in districts other than the Eastern District of Pennsylvania. The United States District Court for the Eastern District of Pennsylvania has consented to the transfer of any of the affected civil actions and the assignment of any of the actions to Judge Davis, as shown by the consent attached hereto signed by Chief Judge John W. Lord, Jr., for that Court.

For the foregoing reasons, it is hereby

Ordered that all civil actions listed in the attached Schedules A and B except those pending in the District of New Mexico and in the Southern District of New York be, and they are hereby, transferred to the Eastern District of Pennsylvania pursuant to Section 1407, Title 28, U.S.C., and assigned to the Honorable John Morgan Davis, United States District Judge. It is further

Ordered that transfer under Section 1407, Title 28, U.S.C., of the civil action pending in the District of New Mexico, listed in Schedule B attached, be, and it it hereby, denied. It is further

Ordered that ruling on the transfer under Section 1407, Title 28, U.S.C., of the civil actions pending in the Southern District of New York, listed in Schedule A attached, be, and it is hereby, stayed until further order of the Panel.

SCHEDULE A

Eastern District of Pennsylvania

1.	City of Philadelphia, et al. v. International Pipe & Ceramics Corp., et al.	Civil Action No. 43008

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2.	Board of County Road Commissioners of the County of Wayne & City of Detroit v. International Pipe & Ceramics Corp., et al.	Civil Action No. 43528
3.	City of Akron, City of Cleveland and County of Summit v. International Pipe & Ceramics Corp., et al.	Civil Action No. 44421
4.	City of Rochester, County of Erie and City of Buffalo v. International Pipe & Ceramics Corp., et al.	Civil Action No. 68-1212
5.	State of Alaska v. International Pipe & Ceramics Corp., et al.	Civil Action No 68-154
6.	Ocean Leasing Corp., et al. v. International Pipe & Ceramics Corp., et al.	Civil Action No. 68-1211

Northern District of Illinois

7.	Metropolitan Sanitary District of Greater Chicago, etc., et al. v. Martin Marietta Corp., et al.	Civil Action No. 67 C 684
8	City of Harvey, Illinois, et al. v. Martin Marietta Corp., et al.	Civil Action No. 67 C 711
9.	Metropolitan St. Louis Sewer District v. Martin Marietta Corp., et al.	Civil Action No 67 C 712
10.	Village of Hinsdale, Illinois v. Martin Marietta Corp., et al.	Civil Action No. 67 C 2165

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11.	City of Gary, Indiana v. Martin Marietta Corp., et al.	Civil Action No. 67 C 2164
12.	Sanitary District of the City of Gary, Indiana v. Martin Marietta Corp., et al.	Civil Action No. 67 C 2166
13.	The County of Cook v. Martin Marietta Corp., et al.	Civil Action No. 67 C 706
14.	Louisville and Jefferson County Metropolitan Sewer District v. Martin Marietta Corp., et al.	Civil Action No. 67 C 713
15.	Dover Construction Co., et al. v. Martin Marietta Corp., et al.	Civil Action No. 67 C 703
16.	Nathan Yorke, assignee, etc. v. Martin Marietta Corp., et al.	Civil Action No 67 C 704
17.	State of Connecticut v. Martin Marietta Corp., et al. & International Pipe & Ceramics Corp., et al.	Civil Action No.67 C 1182
18.	State of New Jersey v. Martin Marietta Corp., et al.	Civil Action No.67 C 1563
19.	Washington Suburban Sanitary Commission v. Martin Marietta Corp., et al.	Civil Action No. 67 C 1451

Southern District of New York

20.	State of New York v. International Pipe &	Civil Action

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	Ceramics Corp., et al.	No. 67 Civ. 1642
21.	The City of New York, etc. v. International	Civil Action
	Pipe & Ceramics Corp., et al.	No. 67 Civ. 1698

District of Maryland

22.	The Mayor and City Council of Baltimore v. Martin Marietta Corp., et al.	Civil Action No. 18964
23.	Baltimore County, Maryland v. Martin Marietta Corp., et al.	Civil Action No. 18965
24.	State of Maryland v. Martin Marietta Corp., et al.	Civil Action No. 19110
25.	Anne Arundel County, Maryland v. Martin Marietta Corp., et al.	Civil Action No. 19834
26.	County Commissioners for Cecil County, Maryland v. Martin Marietta Corp., et al.	Civil Action No. 19833
27.	Montgomery County, Maryland v. Martin Marietta Corp., et al.	Civil Action No. 19835

Western District of Missouri

28.	Kansas City, Missouri v. Martin Marietta Corp., et al.	Civil Action No. 16458-4
29.	Udell-Niles Concrete Products Co. v. Marietta Corp., et al.	Civil Action No. 16504-2

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SCHEDULE B

Eastern District of Kentucky

1.	Commonwealth of Kentucky, et al. v. Martin Marietta Corp., et al.	Civil Action No. 296

District of Colorado

2.	City and County of Denver v. International Pipe and Ceramics Corp.	Civil Action No. 67 C 630
3.	Coppco, Inc. v. International Pipe and Ceramics Corp.	Civil Action No. 67 C 472

District of New Mexico

4.	State of New Mexico, et al., v. American Pipe and Construction Co., et al.	Civil Action No. 7183

***252** SCHEDULE OF MOVANT PLAINTIFFS

I. Plaintiffs and Intervenor Plaintiffs in Actions Pending in the Eastern District of Pennsylvania

City of Philadelphia, School District of Philadelphia, Allegheny County Sanitary Authority and Allegheny County v. International Pipe and Ceramics Corporation, et al., Civil Action No. 43008

City of Pittsburgh

Commonwealth of Pennsylvania

Board of County Road Commissioners of the County of Wayne and City of Detroit v. International Pipe and Ceramics Corporation, et al., Civil Action No. 43528

State of Michigan

City of Madison Heights

City of Akron, City of Cleveland and County of Summit v. International Pipe and Ceramics Corporation, et al., Civil Action No. 44421

State of Ohio

State of Alaska v. International Pipe and Ceramics Corporation, et al., Civil Action No. 68-154

State of Alaska

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Ocean Leasing Corporation and those plaintiffs listed on Exhibit 'A' v. International Pipe and Ceramics Corporation, et al., Civil Action No. 68-1211

American Apartments, Inc.

Amherst Leasing Corp.

Annapolis Leasing Corp.

Arcadia Leasing Corp.

Argentine Leasing Co.

Atlantis Leasing Corp.

Bel-Air Leasing Corp.

Belt Parkway Construction Corp.

Birch Leasing Corp.

Brazilia Leasing Co.

Buick Leasing Corp.

Cadillac Leasing Corp.

Cambridge Leasing Corp.

Canada Leasing Corp.

Carolina Gardens, Inc.

Citadel Leasing Corp.

Colgate Leasing Corp.

Colombia Leasing Co.

Copenhagen Leasing Corp.

Cornell Leasing Corp.

Country Leasing Corp.

Dakota Leasing Co.

Danbury Leasing Corp.

Darthmouth Leasing Corp.

The Lefrak Organization, Inc.

d/b/a Delaware Leasing Co.

District Leasing Corp.

Dodge Leasing Corp.

Dover Leasing Corp.

Earth Leasing Corp.

Elm Leasing Corp.

Ford Leasing Corp.

Forest Hills Leasing Corp.

Garden Leasing Corp.

Georgetown Leasing Corp.

Grand Leasing Co.

Greenwich Leasing Corp.

Hampton Leasing Corp.

Hartford Leasing Corp.

Harvard Leasing Corp.

Hollywood Leasing Corp.

Illinois Leasing Co.

Indiana Leasing Co.

International Leasing Corp.

Iowa Leasing Co.

Kansas Leasing Corp.

Kentucky Leasing Co.

LaFrance Leasing Corp.

Lincoln Leasing Corp.

London Leasing Corp.

Maple Leasing Corp.

Massachusetts Leasing Co.

Mexico Leasing Corp.

Minnesota Leasing Corp.

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Missouri Leasing Co.

Montauk Leasing Corp.

Nautilus Leasing Corp.

Nebraska Leasing Co.

Newport Leasing Corp.

North Carolina Leasing Co.

Northwestern Leasing Corp.

Oak Leasing Co.

Ocean Leasing Corp.

Oxford Leasing Corp.

Panama Leasing Corp.

Pennsylvania Leasing Corp.

Peru Leasing Co.

Plymouth Leasing Corp.

Pontiac Leasing Corp.

Portland Leasing Corp.

Purdue Leasing Corp.

Queens Leasing Corp.

Regent Leasing Corp.

Riviera Leasing Corp.

Road Leasing Corp.

Rome Leasing Corp.

Surf Leasing Corp.

Syracuse Leasing Corp.

Town Leasing Corp.

Uess Leasing Corp.

Utah Leasing Co.

West Point Leasing Corp.

Westport Leasing Corp.

Wisconsin Leasing Co.

Wyoming Leasing Co.

Yaille Leasing Corp.

City of Rochester, County of Erie and City of Buffalo v. International Pipe and Ceramics Corporation, et al., Civil Action No. 68-1212

II. Intervenor Plaintiffs in City of New York v. International Pipe and Ceramics Corporation, et al., Civil Action No. 1698

State of Alaska

City of Tampa

City of Blaine

Village of Circle Pines

City of Cleveland

Allegheny County

City of Philadelphia

Board of County Road Commissioners of the County of Wayne

Allegheny County Sanitary Authority

School District of Philadelphia

City of Detroit

City of Pittsburgh

State of Ohio

County of Summit

Passaic Valley Water Commission

City of Buffalo

County of Erie

City of Hastings

City of Rochester

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Commonwealth of Pennsylvania

State of Michigan

Commonwealth ofMassachusetts

City of Madison Heights

Dade County Board of Public Instruction

***253** WEIGEL, Judge of the Panel (concurring).

The record in this matter makes it clear that a very substantial amount of discovery in each case will be pertinent only to those cases brought in the same district. This accentuates the question as to whether transfer for coordinated or consolidated pretrial proceedings will, in fact, 'be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.' ***254** 28 U.S.C. 1407. If we are to order transfer, the statute requires us to determine that the answer to that question, including each of its four elements, is in the affirmative.

The cases here involve non-pressure pipe for sewers and culverts. Because of the difficulty of transporting such pipe and because of the ease of entry into the industry, non-pressure pipe is sold in distinctly local markets by competitors with plants in those areas. Only two defendants, Interpace and Martin Marietta, sold such pipe throughout the area 'East of the Rockies.' Martin Marietta had 67 plants in the area; Interpace, 36 permanent plants and 16 temporary ones. All the plaintiffs allege that these two defendants conspired to fix prices and to allocate markets throughout the region, and implemented their scheme through various local conspiracies.

Plainly, then, the cases do present some common questions of fact, i.e., those concerning region-wide industry conditions as well as concerning the existence and local effect of the alleged broad conspiracy between Interpace and Martin Marietta. Even so, much— probably most— of the pretrial discovery and proceedings will concern local witnesses, local records and local aspects of the alleged conspiracies. Such matters are best handled by the local United States District Courts.

If the statute required all pretrial proceedings to be conducted by the transferee court, then the case against ordering transfer would be compelling. However, it is manifest from the statute and its legislative history that the Panel may order remand to the transferor courts for local discovery. Subsection (a) of 28 U.S.C. 1407 provides, in part, that 'each action so transferred shall be remanded by the panel at or before the conclusion of such (joint) pretrial proceedings to the district from which it was transferred * * *.' The Judiciary Committee of the House of Representatives observed with regard to subsection (a):

In most cases there will be a need for local discovery proceedings to supplement coordinated discovery proceedings, and * * * consequently remand to the originating district for this purpose will be desirable.

H.R.Rep. No. 1130 90th Cong., 2d Sess. 4 (1968) U.S.Code Cong. & Admin.News 1968, p. 1901.

This is not to say that the provisions for remand justify anything less than the most careful assessment of the pros and cons of transfer. The statutory objectives are not necessarily served by requiring joint pretrial whenever some— even many — questions of fact are common to a large number of cases. In some such cases, if not in these at hand, coordination and consolidation may impair, not further, convenience, justice and efficiency. To put it in other words, neither the convenience of witnesses and parties nor the just and efficient conduct of actions are served, ipso facto, by transfer just because there are common questions of fact in the civil actions involved.

There are a number of inherent inconveniences in transfers for coordinated or consolidated pretrial. Some plaintiffs are temporarily deprived of their choices of forum and some defendants may be forced to litigate in districts where they could not have been sued. Considerable time and trouble are involved in the sheer mechanics of transferring and remanding.[1] After transfer, the process of segregating the pretrial matters which should be remanded for handling by the ***255** transferor

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courts may be time-consuming as well as subject to reasonable disagreement. Since remand must be by order of the Panel, the Panel may have to hold further hearings to resolve disagreements among the parties.

The basic question before the Panel in each proceeding looking to coordinated or consolidated pretrial is, then, whether the objectives of the statute are sufficiently served to justify the necessary inconveniences of transfer and remand. Many factors are relevant to the answer. Some will be applicable to all proceedings under the statute; some will not. Some will count heavily in some proceedings; lightly in others. It will be useful— for illustration, if nothing more— to articulate some of these considerations.

How many common questions of fact are there?[2] What is their nature?[3] How many cases are presently and prospectively involved?[4] What is the geographical location of the districts in which the cases pend?[5] If it is anticipated that further cases will be filed, in what districts?[6] Who are the principal witnesses in the cases and where do they reside? What detriment, financial or otherwise, will be imposed upon any of the parties by ordering transfer?[7] Will transfer result in a substantial saving of duplicative work?[8] Will transfer usefully avoid conflicting rulings in the pretrial proceedings of the cases involved?[9] Can many of the advantages of transfer be worked out by cooperation among counsel without transfer?[10] Are pretrial proceedings already far along in any one or more of the cases?[11] Will transfer hasten or delay progress in the cases?[12] What is the availability of a ***256** judge or judges in the proposed transferee court or courts? Will the advantages of transfer overcome the normal desirability of having the same judge who conducts the trial also conduct pretrial proceedings? Will transfer impede or promote the prospect of settlements? Will transfer serve any ulterior motive of any party or parties, such as forumshopping? If class actions are involved, will transfer make for complexity or for simplification?[13] Will transfer unjustly delay or deny any party's right to provisional remedies such as injunctive relief? What is the status and possible effect of any appeals pending in any of the cases?[14] Will transfer operate to eliminate or avoid an undesirable multiplicity of appeals on similar issues?

In evaluating such of the foregoing considerations as are relevant to this proceeding, the balance does seem very close to me. Notwithstanding the conceded common questions of fact and the anticipated advantages of joint pretrial, the countervailing considerations here are fairly strong. To begin with, there are the inherent inconveniences referred to above. In addition, the indications are that there will be genuine financial hardship upon a number of small defendants, that much of the saving of judicial time through transfer will be offset by the time required for segregation of local from common issues, and that the advantage of having all pretrial proceedings conducted by the trial judge will be lost in all transferred cases. Moreover, since a great number of the plaintiffs are represented by the same counsel, the opportunity exists for gaining many of the advantages of transfer through informal cooperation. However, I am not convinced that these factors weighing against consolidated or coordinated pretrial sufficiently tip the scale to require dissent from the decision of the Panel.

All Citations

302 F.Supp. 244

Footnotes

1 A similar indictment alleging a similar conspiracy in ten states 'West of the Rockies led to the filing of similar multidistrict litigation in the Ninth Circuit and others. On the recommendation of the Co-Ordinating Committee for Multiple Litigation, pretrial proceedings in these 'West of the Rockies' cases in the Ninth Circuit were coordinated (before Section 1407 was enacted). This coordination was managed by the Honorable Martin Pence, Chief Judge of the United States District Court for Hawaii. For this purpose, Judge Pence was assigned, by the Honorable Richard H. Chambers, Chief Judge of the Ninth Circuit Court of Appeals,

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to all districts in which these cases were pending. Practically all of this 'West of the Rockies' multidistrict litigation has been efficiently terminated as a result of this coordination under the judicial supervision of Judge Pence (with the assistance of the Honorable George H. Boldt, Judge of the United States District Court for the Western District of Washington). In coordinating the pretrial procedures Judge Pence and Judge Boldt employed a great many of the procedures recommended by the Co-Ordinating Committee for Multiple Litigation, including central document depositories. These procedures are described in the Manual for Complex and Multidistrict Litigation.

2 See schedule of plaintiff movants attached.

3 If there is, as claimed by plaintiffs, an overall unlawful multi-state conspiracy affecting a large number of local markets, in which small local producers join, each small local producer is responsible for the conspiratorial activities of all on the basis of agency. McCandless v. Furlaud, 296 U.S. 140, 56 S.Ct. 41, 80 L.Ed. 121; Standard Oil Co. of Cal. v. Moore (C.A.9) 251 F.2d 188, cert. den. 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148. Local markets and local conspiracies are not synonymous.

1 In the proceeding at bar, for instance. a total of 24 cases must be transferred to the Eastern District of Pennsylvania from five different district courts. The Manual for Clerks circulated by the Panel indicates that the most efficient procedure would be as follows: Upon receiving the Panel's order of transfer, the clerk of the transferee court transmits a certified copy thereof to the clerks of the transferor courts. After receiving and filing this order, each transferor clerk makes an appropriate entry on the docket sheet of each affected case and then forwards to the transferee court the files, records, and a copy of the docket sheet of each transferred case.

The transferee clerk usually maintains a master docket sheet for all transferred cases, individual docket sheets for each such case and a complete combined pretrial file for each transferor court. Thereafter, copies of all motions, depositions, exhibits, and other pretrial papers are included in each combined district file. Notices, orders and pleadings must be served on all counsel for all parties, unless alternative arrangements can be agreed upon.

Motions for remand may be initiated by any party, the transferor or transferee courts or the Panel. Only the Panel has the power to order a remand. Hearings may be necessary. Orders of remands must be transmitted to each transferor court by the transferee court and appropriate entries must be made on all the aforementioned docket sheets. The individual case file, a docket sheet for each remanded case, a copy of the master docket sheet and the combined district file must then be transmitted back to the appropriate district court. If some but not all of the cases from a specific district are remanded, then copies of all subsequent motions, orders and other filings must be sent to the transferor court for inclusion in the combined district file.

2 See In re Plumbing Fixture Cases, 295 F.Supp. 33 (Jud.Pan.Mult.Lit.1968).

3 See In re Air Crash Disaster at Greater Cincinnati Airport (American Airlines), 295 F.Supp. 51 (Jud.Pan.Mult.Lit.1968).

4 See In re Scotch Whiskey Antitrust Litigation, 299 F.Supp. 543 (Jud.Pan.Mult.Lit.1969).

5 See In re Library Editions of Children's Books, 297 F.Supp. 385 (Jud.Pan.Mult.Lit.1968).

6 See In re Air Crash Disaster at Greater Cincinnati Airport (TWA), 298 F.Supp. 353 (Jud.Pan.Mult.Lit.1968).

7 See In re Library Editions of Children's Books, supra.

8 See In re Gypsum Wallboard Antitrust Cases (Roundy v. Kaiser Gypsum), 303 F.Supp. 510 (Jud.Pan.Mult.Lit.1969).

9 See In re Fourth Class Postage Regulations, 298 F.Supp. 1326 (Jud.Pan.Mult.Lit.1969).

10 See In re Scotch Whiskey Antitrust Litigation, supra.

11 See In re Protection Devices and Equipment and Central Station Protection Service Antitrust Cases, 295 F.Supp. 39 (Jud.Pan.Mult.Lit.1968).

12 See In re Air Crash Disaster at Falls City, Neb. on Aug. 6, 1966, 298 F.Supp. 1323 (Jud.Pan.Mult.Lit.1969).

13 See In re Plumbing Fixture Cases, 298 F.Supp. 484 (Jud.Pan.Mult.Lit. Dec. 27, 1968).

14 See In re Mid-Air Collision Near Hendersonville Northern Carolina on July 19, 1967, 297 F.Supp. 1039 (Jud.Pan.Mult.Lit.1969).

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TAB 11

471 F.Supp. 754
United States District Court, S. D. Florida.

In re NISSAN MOTOR CORPORATION ANTITRUST LITIGATION.

MDL No. 120.
|
March 29, 1979.

Synopsis

In antitrust litigation brought against manufacturer of foreign automobiles, defendant moved for summary judgment on plaintiffs' customer and territorial allegations and plaintiffs' conspiracy allegations, and plaintiffs concurrently moved for an in limine ruling that the district court's prior entry of judgment against one plaintiff had no collateral estoppel effect on the pending statewide actions. The District Court, Atkins, Chief Judge, held, inter alia, that plaintiffs in antitrust suit which unsuccessfully alleged a nationwide conspiracy to fix the prices of Datsun automobiles were not essentially in privity with the remaining class plaintiffs, and therefore, as regarded the remaining plaintiffs' customer and territorial allegations and their conspiracy allegations, entry of judgment against the plaintiffs in the prior suit had no collateral estoppel effect on the pending statewide actions; contrary to defendant's claim, the nonparticipating plaintiffs did not, in effect, “control” the prior litigation through the plaintiffs in that litigation.

Order in accordance with opinion.

Attorneys and Law Firms

***755** Granvil I. Specks, Specks & Goldberg, Chicago, Ill., for plaintiffs.

Frank Cicero, Jr., Kirkland & Ellis, Chicago, Ill., for Nissan Motor Corp.

OPINION ON APPLICATION OF COLLATERAL ESTOPPEL DEFENSE

ATKINS, Chief Judge.

In July, 1972, P.D.Q. of Miami filed a private class action antitrust suit against Nissan Motor Corporation before this Court on behalf of all non-dealer Datsun purchasers ***756** across the country. The suit alleged a nationwide conspiracy between Nissan-U.S.A. and Nissan-Japan to fix prices in violation of s 4 of the Clayton Act, 15 U.S.C. s 15.[1] Once this suit was filed, several others were filed throughout the United States. The cases were transferred by the Judicial Panel on Multidistrict Litigation to this Court for consolidated pretrial proceedings. See In re Nissan Motor Corp. Antitrust Litigation, 352 F.Supp. 960 (Jud.Pan.Mult.Lit.1973); In re Nissan Motor Corp. Antitrust Litigation, 385 F.Supp. 1253 (Jud.Pan.Mult.Lit.1974).

P.D.Q. was certified as a class representative by this Court, P.D.Q. Inc. of Miami v. Nissan Motor Corp., 61 F.R.D. 372 (S.D.Fla.1973), and thereafter this Court entered judgment on a jury verdict that no nationwide conspiracy had existed. The Court of Appeals affirmed, 577 F.2d 910 (5th Cir. 1978), but remanded the case for modification of the order awarding costs. Certiorari was denied by the Supreme Court this year. In re Nissan Motor Corp. Antitrust Litigation, 439 U.S. 1072, 99 S.Ct. 843, 59 L.Ed.2d 38 (1979).

Defendant Nissan Motors has moved for summary judgment on plaintiffs' customer and territorial allegations and plaintiffs' conspiracy allegations. Plaintiffs have concurrently moved for an In limine ruling that this Court's entry of judgment against P.D.Q. has no collateral estoppel effect on the pending statewide actions. These three motions involve an analysis of the proper application of the collateral estoppel doctrine in the case at bar. This Court holds that collateral estoppel may not be invoked on due process grounds and, therefore, the motions by Nissan Motors are denied.

I.

A fundamental principle of due process is that collateral estoppel may not be asserted against one who was not a party in the previous action. The

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Supreme Court originally enunciated this principle in Bigelow v. Old Dominion Copper Co., 225 U.S. 111, 131, 32 S.Ct. 641, 644, 56 L.Ed. 1009 (1911):

> "No judgment can be regarded as Res judicata as to any matter where the rights in the subject-matter arise out of mutuality, and not by succession, unless the party could, as a matter of right, appear and defend, even though he may have knowledge of the suit. Otherwise he might be bound by a judgment as to which he had never had the opportunity to be heard, which is opposed to the first principles of justice."

The abrogation of the mutuality doctrine has not affected the validity of that principle. In Blonder Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971), the Supreme Court stated:
"Some litigants those who never appeared in a prior action may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications on the identical issue which stands directly against their position." 402 U.S. at 329, 91 S.Ct. at 1443.

Earlier this year, in Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), the Court reaffirmed this position, "(i)t is a violation of due process for a judgment to be binding on a litigant who is not a party or privy and therefore has never had an opportunity to be heard." —- U.S. 645 n.7, 99 S.Ct. at 649 n.7. This Court fully embraced this position in its recent opinion in In re Yarn Processing Patent Validity Litigation, MDL 82, (1979) 472 F.Supp. 174 wherein it was stated:

> ***757** "To allow this would enable these nonparticipants to reap the benefits of a favorable determination while escaping the binding effect of an unfavorable determination, because should Lex Tex prevail on the merits, due process considerations would preclude it from asserting collateral estoppel against these defendants in the subsequent action."

Nissan Motors asserts these due process requirements would not be violated in the application of collateral estoppel in the present action. It argues that the P.D.Q. plaintiffs were essentially in privity with remaining class plaintiffs in MDL 120. More specifically, it is alleged that (1) the complaints in the remaining actions are identical with P.D.Q.; (2) the plaintiffs' counsel closely coordinated and shared responsibility in the consolidated pretrial proceedings, including discovery and pretrial hearings; (3) joint motions were filed evincing common legal analysis, theories, and strategies; (4) the pretrial submissions show no material distinctions among any of the plaintiffs; (5) plaintiffs controlled the trial through joint pretrial submissions, which were conducted by a party with identical interests; (6) there was no deficiency in the proceedings or additional evidence of genuine substance to offer at any future trial; and (7) the precise legal issue central to all the plaintiffs' case was decided adversely against them in the P.D.Q. trial. Defendant cites some authority in the Fifth Circuit to support the proposition that these factors establish the plaintiffs have received "a full and fair opportunity to be heard." Significantly, Nissan also relies on the recent Supreme Court case of Montana v. United States, —-U.S. ——, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979).

II.

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When the issue of class certification was originally raised in the P.D.Q. case, this Court was faced with the question of whether a nationwide class would be appropriate. The Court stated that in view of the plaintiffs' reluctance to advance more than a few thousand dollars to finance the action, a nationwide class would be infeasible. The Court ordered the class to be limited to purchasers in New York County, New York, and Dade County, Florida. 61 F.R.D. at 381. In a subsequent order on May 28, 1976, the Court indicated that the class actions would be remanded to their original transferor forums for trial.[2] This order was later modified to provide that the Scharf action would also be sent back to the Southern District of New York for trial.[3]

This Court later denied a s 1404(a) motion by the plaintiffs in the Lewis and Horowitz cases,[4] for transfer to the Southern District of Florida. Throughout the entire length of these proceedings, the Court's rulings have indicated the necessity that the P.D.Q. case and the remainder of the actions be tried separately. The defendant, Nissan Motors, now raises the issue of whether under the circumstances, those non-participating plaintiffs may be bound by the P.D.Q. litigation because they, in effect, "controlled" the litigation through the P.D.Q. plaintiffs.

None of the cases cited by the defendant lead the Court to that conclusion. In Montana v. United States, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979), a contractor brought suit in state court contending that the gross receipt tax unconstitutionally discriminated against the Government and companies with which it dealt. Soon after that, the Government filed suit in the United States District Court of Montana. In holding that collateral estoppel should be applied in that case, the Supreme Court stated: "(t)hese interests are similarly implicated when non parties assume control over the litigation in which they have a ***758** direct financial or proprietory interest, and then seek to redetermine issues previously resolved." The Court then listed the factors it found as evincing Government "control" of the litigation. The Government had stipulated that it:

(1) required the first lawsuit to be filed;

(2) reviewed and approved the complaint;

(3) paid the attorney's fees and costs;

(4) directed the appeal from the state district court to the Montana Supreme Court;

(5) appeared and submitted an amicus brief in that court;

(6) directed the filing of a Notice of Appeal to the Supreme Court of the United States; and

(7) effectuated the abandonment of that appeal.

In light of those circumstances, the Supreme Court concluded that "although not a party, the United States plainly had a sufficient 'laboring oar' in the conduct of the state-court litigation to actuate principles of estoppel." —- U.S. at ——, 99 S.Ct. at 975.

In Southwest Airlines Co. v. Texas International Airlines Inc., 546 F.2d 84 (5th Cir.), Cert. denied, 434 U.S. 832, 98 S.Ct. 117, 54 L.Ed.2d 93 (1977), the Fifth Circuit held that due process would not be violated by binding Civil Aeronautics Board carriers to a prior judgment, even though they were not parties to the action; since their interests were sufficiently represented by the Public authorities that promulgated the ordinance and had the primary responsibility of enforcing it. In a footnote, the Court of Appeals noted an important factual distinction from the present action. In distinguishing the earlier case of E. B. Elliot Advertising Co. v. Metropolitan Dade County, 425 F.2d 1141 (5th Cir.), Cert. denied, 400 U.S. 805, 91 S.Ct. 12, 27 L.Ed.2d 35 (1970), the Court stated:

"In Elliot a private plaintiff challenged the constitutionality of a city ordinance after another Private litigant had lost a similar challenge. The question was whether in the first suit the private litigant had represented the interests of the later challenger . . .

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Representation by a government authority never came up because both of the private parties Opposed the city. As a result, the case has no bearing on the Southwest litigation . . .." 546 F.2d at 99, n.54.

Nor does Cauefield v. Fidelity and Casualty Co. of New York, 378 F.2d 876 (5th Cir. 1967) have any bearing on this case. Cauefield involved the use of the doctrine of "judicial estoppel" from Louisiana law. That case involved plaintiffs who actively participated in the first trial, represented by the same counsel, with evidence and testimony admittedly identical with the state court proceeding. The Court of Appeals concluded that due to the "unusual facts" of that case "absolutely nothing would be gained were appellants permitted to pursue their action . . ." 378 F.2d at 879.

The present case differs drastically from the cases cited by the defendant. There has been no showing of any degree of "control" approaching that exhibited in Montana. Few, if any, of the "unusual facts" present in Cauefield are present here. Nor do we have a case similar to Southwest Airlines Co., where a public authority that promulgated an ordinance and who had the primary responsibility of enforcing it was a party in the first action. Here, as in Elliot, we have private litigants in both cases.

The Court rejects Nissan Motors' argument that a likeness in complaint, closely coordinated pretrial responsibilities and joint motions and strategies are sufficient to enforce collateral estoppel against parties not represented in an action.[5] This ***759** Court has already held that P.D.Q. did not adequately represent the other class plaintiffs. The mere fact the cases were transferred under s 1407 does not have the effect of merging "the suits into a single cause, or change the rights of the parties, or make those who are parties to one suit parties in another." In re Equity Funding Corp. of America Securities Litigation, 416 F.Supp. 161, 176 (C.D.Cal.1976), quoting Johnson v. Manhattan Railway, 289 U.S. 479, 496-97, 53 S.Ct. 721, 77 L.Ed. 1331 (1933). The relevance of that statement to this cause is apparent from the procedural history outlined above. This Court has consistently found these cases inappropriate for consolidation with the P.D.Q. action. By adopting a contrary position at this late date, it cannot be fairly said "that the procedure adopted fairly ensures the protection of the interests of absent parties who are to be bound by it." Hansberry v. Lee, 311 U.S. 32, 42, 61 S.Ct. 115, 118, 85 L.Ed. 22 (1940). Nor is it relevant that joint statements were filed by counsel that evinced a common strategy or purpose. It is in the interest of judicial economy that the Court ordered joint submissions, a procedure it follows in other multidistrict cases and which is specifically sanctioned by The Manual for Complex Litigation. See, e. g., ss 1.93 and 4.53. In s 1.93 at page 86 it is stated that "counsel should be urged to meet and voluntarily provide for joint presentation of common contentions of law and fact and to eliminate repetitive or unnecessary objections, motions, briefs, arguments, depositions and written interrogatories." Plaintiffs also convincingly point out in their memorandum that much of this pretrial material was not introduced by P.D.Q. counsel, and that their strategy at trial would be different than that of P.D.Q.'s counsel. In light of these many factors, this Court cannot confidently state that absolutely nothing further could be gained if the plaintiffs are permitted to pursue their separate actions.

A case almost directly on point is Humphreys v. Tann, 487 F.2d 666 (6th Cir. 1973), Cert. denied, 416 U.S. 956, 94 S.Ct. 1970, 40 L.Ed.2d 307 (1974). Humphreys involved an airline crash between Transworld Airlines and an aircraft owned by Tann. Several wrongful death actions were filed against both. The Panel transferred a number of the cases to the Southern District of Ohio for consolidated pretrial proceedings. The transferee court indicated it would try only one case and remand the others. The trial resulted in acquittal for Tann and liability for Transworld.

Tann then filed a motion for summary judgment before the District Court which was granted, the Sixth Circuit reversed citing Blonder Tongue. The Court made the following statement of direct relevance to this case:

"We share the concern of the district court for the crowded dockets of federal courts and proper utilization of judicial time. However, we do not believe that these considerations can overcome the

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due process objection which was raised by the appellant as his first response to appellee's motion for summary judgment and which he has relied upon continuously." 487 F.2d at 671.

Nissan Motors attempts to distinguish Humphreys on factual grounds. It notes that different legal theories were being pursued, that the non-party plaintiff was not a participant in a critical pretrial conference, that different issues were presented to the jury as would have been in the subsequent cases, and that none of the parties expected to be bound by the testimony in the first case. Although many of these factors alleged by Nissan as present in this ***760** case are disputed by the plaintiffs, [6] such an analysis misses the mark.

"Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which this one in question belongs." Chicago, Burlington & Quincy Railroad Co. v. Chicago, 166 U.S. 226, 240, 17 S.Ct. 581, 586, 41 L.Ed. 979 (1896), quoting Cooley's Const.Lim. 356-357.

See also Hansberry v. Lee, 311 U.S. 32, 40-44, 61 S.Ct. 115, 85 L.Ed. 22 (1940).

The rationale of Humphreys is not limited solely to the facts of that case. The test in the Fifth Circuit for a violation of due process is still a "weighing test" that balances the factors in any one case. See Southwest Airline Co., supra, at 101-2. As Humphreys and the cases previously reviewed indicate, the balance is struck for the application of collateral estoppel against one not present in the previous action only under the most extraordinary circumstances. The history and circumstances of this case do not allow the conception of "privity" to be stretched far enough to allow its application in light of the restrictions of due process.

III.

The Court declines to accept defendant's argument that the Supreme Court's ruling in Continental T. V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977), requires the entry to summary judgment for Nissan Motors. The fact that P.D.Q. failed to establish the necessary evidence to escape judgment in an earlier case has no bearing on the present action.

The Court also rejects Nissan's assertion that Alabama v. Blue Bird Body Co., 573 F.2d 309 (5th Cir. 1978) holds that there must be proof that a conspiracy impacted upon each and every plaintiff and member of the state classes, and that its absence mandates summary judgment in their favor. While certifying a class in Blue Bird Body Co., the Fifth Circuit in discussing Shumate & Co., Inc. v. National Ass'n of Sec. Deal, Inc., 509 F.2d 147 (5th Cir. 1975) stated:

> "The holding is also a recognition that 'impact' is a question unique to each particular plaintiff and one that must be proved with certainty. That does not mean of course that cases do not exist wherein this requirement cannot be established by some sort of classwide proof. But it does not mean that cases do exist wherein generalized proof of the impact would be improper."

The court stated that it wished to "emphasize" the importance of this consideration in class certification. 573 F.2d at 328.

This Court had previously rejected the defendant's argument that the establishment of damage "will require inquiry into each retail sale in each section of the country, in each of the time frames involved," in order to ascertain what the price of the automobile would be in the absence of the conspiracy. 61 F.R.D. at 375. Implicit in that ruling is a rejection of the need for an individualized impact analysis for each plaintiff. Nothing in Blue Bird affects the validity of that earlier decision.

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All Citations

471 F.Supp. 754, 1979-1 Trade Cases P 62,550

Footnotes

1 15 U.S.C. s 15 reads as follows:
"Any person who shall be injured in his business or property by reason of anything forbidden under the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."

2 Order Denying Motion to Decertify Class, pp. 4-5.

3 Scharf v. Nissan Motor Corporation, No. 73-121-Civ-CA. Order Following Pretrial Conference Held June 18, 1976, entered June 28, 1976.

4 Lewis v. Nissan Motor Corporation, 75-2080-Civ-CA; Horowitz v. Nissan Motor Corporation, 75-2202-Civ-CA. Order Following Pretrial Conference Held June 18, 1976, entered June 28, 1976.

5 The Court notes that some of the identical factors were present in the Southwest Airlines Co. case. The court found that the CAB carriers had closely followed the Southwest litigation and were present at various hearings. It also noted that the airlines submitted amicus briefs, that there was no deficiency in counsel's performance, and that "relitigation would constitute a blatant disregard for the decision of this Court and for the judgment of the federal district court in Southwest I. It would damage the public's interest in the most efficient allocation of resources in both the state and federal systems of justice." 546 F.2d at 102.
The Court in Southwest found none of these factors in and of itself was determinative. Rather, it looked at any number of factors "that could tip the scales toward finding a violation of due process" before concluding that no violation existed. The Court in the present case finds the scales balanced differently.

6 The plaintiffs argue that at no time did they agree this would be a "test case." They also assert that P.D.Q. did not introduce at the trial much of the evidence and testimony that they will.

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TAB 12

320 F.Supp. 1404
Judicial Panel on Multidistrict Litigation.

In re MASTER KEY Antitrust Litigation.

No. 45.
|
Jan. 14, 1971.

Synopsis
The Judicial Panel on Multidistrict Litigation held that the nine related private antitrust actions, which were pending in four different districts and which had common questions of fact, would be transferred for coordinated pretrial proceedings to the District of Connecticut to which three actions had been previously transferred for convenience of parties and witnesses, where the four corporate defendants were located either in that state or an adjoining state and most of the witnesses and relevant documents were in or near that state.

Ordered accordingly.

***1405** Before ALFRED P. MURRAH, Chairman, and JOHN MINOR WISDOM, EDWARD WEINFELD, EDWIN A. ROBSON, WILLIAM H. BECKER, JOSEPH S. LORD, III, and STANLEY A. WEIGEL, [*] Judges of the Panel.

OPINION AND ORDER

PER CURIAM.

This is the second time this matter has been before the Panel for possible transfer for coordinated or consolidated pretrial proceedings under 28 U.S.C. § 1407. The first time there were only three relevant actions pending in two different districts and all parties opposed transfer under § 1407. Accordingly an order was entered on June 8, 1970 declining to transfer any of these actions, but the order was without prejudice to the right of any party to move for transfer at a later time. Since that time six new actions have been filed and there are now a total of nine related actions pending in four different districts. On October 6, 1970 defendants Emhard Corporation, Sargent and Company, and ILCO Corporation moved for transfer of all related actions to the District of Connecticut for coordinated or consolidated pretrial proceedings. [1]

Since all parties now agree that transfer under § 1407 is necessary there is no need for an extended discussion of the pending cases other than to point out that they involve both common questions of fact and, to some extent, overlapping or conflicting class action claims. [2] All parties agree, and we so find, that there are common questions of fact among these related civil actions and that the convenience of parties and their witnesses and the just and efficient conduct of this entire litigation would be served by a transfer to a single district for coordinated or consolidated pretrial proceedings.

The dispute between the parties, as is so often the case in multidistrict litigation, is not whether the actions ***1406** should be transferred but rather to which district they should be transferred. However the parties take a rather parochial view of the 'convenience factor.' The defendants favor the District of Connecticut, the New York plaintiffs [3] favor the Southern District of New York, the Philadelphia plaintiffs [4] favor the Eastern District of Pennsylvania, and the Chicago plaintiffs [5] originally favored the Northern District of Illinois. The exceptions are the Florida plaintiffs [6] who support consolidation and favor transfer to the Eastern District of Pennsylvania.

We think the District of Connecticut stands out as the most appropriate transferee forum. At the time the motion was filed there were no private civil actions pending in Connecticut, [7] but since that time all three of the actions originally commenced in the Northern District of Illinois have been transferred to the District of Connecticut for all purposes pursuant to 28 U.S.C. § 1404(a). Where transfer under § 1407 is preceded by transfer of some cases under 1404(a), the district selected by the transferor judge or judges and the reasons given therefor are entitled to great weight in selecting the most appropriate district for transfer of the remaining actions under § 1407. Cf. In re Frost Patent Litigation, 316 F.Supp. 977 (JPML 1970);

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Hanover, New Hampshire Air Disaster Litigation, 314 F.Supp. 62 (JPML 1970); Dayton, Ohio Air Disaster Litigation, 310 F.Supp. 798 (JPML 1970); In re Westec Corp., 307 F.Supp. 559 (JPML 1969); In re Koratron Patent and Antitrust Litigation, 302 F.Supp. 239 (JPML 1969); Hendersonville North Carolina Air Disaster Litigation, 297 F.Supp. 1039 (JPML 1969); Ardmore, Oklahoma Air Disaster Litigation, 295 F.Supp. 45 (JPML 1968).

A second reason for selecting the District of Connecticut is the fact that all four defendant corporations are located either in Connecticut or in an adjoining state, and most of the witnesses and relevant documents are located in or near Hartford, Connecticut. In addition the fact that the four government actions were commenced in the District of Connecticut is a factor which favors the transfer of these private actions to that district, although this factor is less significant because little discovery has occurred in connection with the government's suits. Cf. In re Motor Vehicle Air Pollution Litigation, 311 F.Supp. 1349 (JPML 1970).

While it is unquestionably true that other districts would be more convenient for individual plaintiffs, we 'must weight the interests of all of the plaintiffs and all of the defendants and must consider multiple litigation as a whole in light of the purpose of the law.' In re Childrens Books Litigation, 297 F.Supp. 385 (JPML 1968). With this in mind we are certain that the convenience of parties and their witnesses and the just and efficient conduct of this entire litigation would be served ***1407** by transfer of this litigation to the District of Connecticut.

The parties favoring transfer to the Eastern District of Pennsylvania fear that transfer to another district will substantially impede the progress of this litigation. They point out that a comprehensive discovery schedule has been established in the Eastern District of Pennsylvania and that two national class actions have been approved. We commend the early establishment both of class actions and discovery schedules and we would be loath to take any action which would delay the processing of complex and multidistrict litigation but we see no reason why the transfer of these cases to the District of Connecticut should result in any delay in the proceedings. As to the existing discovery schedule, the parties will, of course, be expected to comply with all orders entered prior to transfer and requests for delays or extensions should not be granted as a matter of course. Counsel for some plaintiffs anticipate that immediately upon transfer counsel for defendants will move to stay all discovery until after the initial pretrial conference is held by the transferee court. We think the better course would be to follow the discovery schedule established in the Eastern District of Pennsylvania until modified by the transferee judge after the initial pretrial conference. Indeed the Manual for Complex and Multidistrict Litigation provides:

Except in rare cases for good cause appearing, there should, however, be no stay of discovery which is not accompanied by positive plan for the expeditious accomplishment of discovery or disposition of the litigation without discovery. Part I, § 1.1

Similarly, with regard to the national class actions established by Judge Wood,[8] the transferee court can review and if necessary modify the orders at any time. Rule 23 F.R.C.P.

It is therefore ordered that all actions listed on Schedule A pending in other districts are hereby transferred to the United States District Court for the District of Connecticut for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. With the consent of said court,[9] all actions listed on Schedule A as well as all related actions hereinafter filed in or transferred to the District of Connecticut are hereby assigned to the Honorable M. Joseph Blumenfeld for coordinated or consolidated pretrial proceedings.

All Citations

320 F.Supp. 1404, 1971 Trade Cases P 73,444

Footnotes

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* Judge Stanley A. Weigel was unable to attend the hearing in this matter but with the consent of all parties participated in this decision.

1 On December 4, 1970, the fourth defendant, Eaton, Yale and Towne, Inc., joined in this motion.

2 The background for these private antitrust actions was provided by four government civil actions filed in the District of Connecticut, one against each defendant and each charging separate vertical conspiracy between the defendant and its distributors. No horizontal conspiracy among the four manufacturers was asserted in any of the government's suits. Three of these actions were terminated by entry of a consent decree before any significant discovery had taken place. The fourth action, against Eaton, Yale and Towne Inc., is still pending in the District of Connecticut. The nine private antitrust actions contain somewhat broader allegations of a horizontal conspiracy among the four defendants as well as a conspiracy between each defendant and its distributors.

3 The City of New York, the New York City Housing Authority, The Board of Higher Education of the City of New York, the Board of Education of the City of New York and the State of New York.

4 The City of Philadelphia and the Amherst Leasing Corp.

5 The State of Connecticut, the State of Indiana and the Commonwealth of Pennsylvania.

6 The State of Florida and the Bermar Construction Corp., the Hospital Development and the Miami International Merchandise Mart, Inc.

7 Of course the presence of a related action in the transferee district is not a statutory prerequisite to transfer under Section 1407.

8 City of Philadelphia v. Emhart Corporation, 50 F.R.D. 232 (E.D.Pa.1970).

9 The written consent of the Chief Judge of the District of Connecticut to the assignment of the cases to Judge M. Joseph Blumenfeld has been duly filed with the Clerk of the Panel.

SCHEDULE A

District of Connecticut

State of Connecticut v. Eaton Yale & Towne, Inc., et al.	Civil Action No. 14147 *
State of Indiana v. Eaton Yale & Towne, Inc., et al.	Civil Action No. 14148 *
Commonwealth of Pennsylvania, etc. v. Eaton Yale & Towne, Inc., et al.	Civil Action No. 14191 **

Southern District of Florida

State of Florida v. Emhart Corp., et al.	Civil Action No. 70-1411-Civ.
Bermar Construction Corp., et al. v. Emhart Corp., et al.	Civil Action No. 70-1410-Civ.

Eastern District of Pennsylvania

City of Philadelphia v. Emhart Corp., et al.	Civil Action No. 70-352
Amherst Leasing Corp. v. Emhart Corp., et al.	Civil Action No. 70-494

Southern District of New York

The City of New York, et al. v. Emhart Corp., et al.	Civil Action No. 70-2417
State of New York v. Emhart Corp., et al.	Civil Action No. 70-4164

* FN* Transferred from N.D. Illinois—11/10/70

** FN** Transferred from N.D. Illinois—12/8/70

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TAB 13

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by In re Taxable Mun. Bond Securities Litigation, E.D.La., May 20, 1992

342 F.Supp. 756
Judicial Panel on Multidistrict Litigation.

In re PLUMBING FIXTURES LITIGATION.
The State of North Carolina v.
American Standard Inc., et al.,
E. D. North Carolina, Civil Action No. 2844.

No. 3.
|
May 5, 1972.

Synopsis
The Judicial Panel on Multidistrict Litigation transferred plumbing fixture case for coordinated or consolidated pretrial proceedings to Eastern District of Pennsylvania where approximately 370 actions were pending in that District as a part of the litigation and plaintiff state's fears that transferee court would not apply laws of circuit in which action was filed in deciding whether state could maintain treble damage action against defendants under provision of Clayton Act were groundless.

Order accordingly.

***757** Before ALFRED P. MURRAH, Chairman, and JOHN MINOR WISDOM [*], EDWARD WEINFELD, EDWIN A. ROBSON, WILLIAM H. BECKER [*], JOSEPH S. LORD, III, and STANLEY A. WEIGEL, Judges of the Panel.

OPINION AND ORDER

PER CURIAM.

In 1968 the Panel filed its initial Opinion and Order in the Plumbing Fixtures Litigation, transferring 37 actions to the Eastern District of Pennsylvania for pretrial proceedings with two related actions pending in that district. [1] Since that time additional actions have been transferred [2] and there are approximately 370 actions pending in that district as a part of the litigation. The State of North Carolina recently filed an action against defendants in this litigation in the Eastern District of North Carolina, seeking recovery as *parens patriae* on behalf of all individual consumers within the state and also as Rule 23 class representative on behalf of all governmental entities within the state.

A conditional transfer order was entered in the North Carolina action by the Clerk of the Panel, acting pursuant to the Panel's Rule 12, 53 F.R.D. 119. North Carolina filed a timely opposition to the proposed transfer and moved to vacate the conditional transfer order. Defendants opposed that motion and urged transfer of the action to the Eastern District of Pennsylvania. At the initial argument on this matter North Carolina did not dispute that its action was substantially similar to the actions now pending before Judge Harvey. It did assert, however, that the proposed transfer might deprive it of a fair opportunity to present its claim for relief, noting that Section 1407 requires transfer only where it will "promote the *just* and efficient conduct of the action." 28 U.S.C. § 1407(a). [Emphasis added]

North Carolina argued that in its previous decisions [3] the transferee court dismissed claims similar to those asserted in this complaint. And in reaching those decisions the transferee court is said to have interpreted the requirements of Section 4 of the Clayton Act, ***758** 15 U.S.C. § 15, [4] less favorably to antitrust plaintiffs than to courts of the transferor district and circuit. [5] Accordingly, North Carolina contended that transfer will result in the dismissal of its claims as too remote in the plumbing fixtures chain of distribution to support recovery of damages while denial of transfer will assure that the allegedly more generous law of the transferor circuit is applied to its case.

After the initial hearing the Panel vacated the conditional transfer order and reserved decision of the transfer question to give the parties an opportunity to obtain a ruling from the transferor court concerning the standing of North Carolina to bring this action. [6]

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Defendants now move for reconsideration or clarification of the Panel's order. Their primary contention is that the matter should be reconsidered and the North Carolina action transferred. We have determined, on the basis of the briefs and arguments, that the motion for reconsideration should be granted and the action transferred to the Eastern District of Pennsylvania.

The sole basis for opposing transfer is North Carolina's fear that the transferee court will not apply the laws of the circuit in which its action was filed in deciding whether the state can maintain a treble damage action against these defendants under Section 4 of the Clayton Act. In our view these fears are groundless. It is clear that the substantive law of the transferor forum will apply after transfer, Van Dusen v. Barrack, 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964). Indeed, the transferee court has expressly affirmed this point. Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 309 F.Supp. 1053, 1055 (E.D.Pa.1969). Since North Carolina does not deny that its action is otherwise appropriate for transfer, it must be transferred for pretrial proceedings with the other actions.

It is therefore ordered that the action, State of North Carolina v. American Standard Inc., et al., E.D. North Carolina, Civil Action No. 2844, be, and the same hereby is, transferred to the Eastern District of Pennsylvania and, with the prior consent of that court, is assigned to the Honorable Alexander Harvey II for coordinated or consolidated pretrial proceedings, pursuant to 28 U.S.C. § 1407, with the related actions pending in that district.

All Citations

342 F.Supp. 756, 1972 Trade Cases P 73,964

Footnotes

* Judges Wisdom and Becker were unable to attend the Panel hearing but have, with the consent of all parties, participated in this decision.

1 In re Plumbing Fixtures Litigation, 295 F.Supp. 33 (Jud.Pan.Mult.Lit.1968).

2 *See* In re Plumbing Fixtures Litigation, 298 F.Supp. 483 (Jud.Pan.Mult.Lit.1968); 298 F.Supp. 484 (Jud.Pan.Mult.Lit.1968); 302 F.Supp. 795 (Jud.Pan.Mult.Lit.1969); 308 F.Supp. 242 (Jud.Pan.Mult.Lit.1970); 311 F.Supp. 349 (Jud.Pan.Mult.Lit.1970); 332 F.Supp. 1047 (Jud.Pan.Mult.Lit.1971).

3 Maricopa County v. American Radiator & Standard Sanitary Corp., 323 F.Supp. 381 (E.D.Pa.1970); Mangano v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13, aff'd, 438 F.2d 1187 (3d Cir. 1971).

4 Section 4 provides:
"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731."

5 In support of this contention, North Carolina cites South Carolina Council of Milk Producers v. Newton, 360 F.2d 414 (4th Cir. 1966) and ABA, Antitrust Developments 1955-68, 280 n. 52.

6 Part of defendants' argument for reconsideration of this order is based on the alleged ambiguity of the word "standing." In view of our disposition of the motion, it is unnecessary to discuss this point further.

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TAB 14

KeyCite Yellow Flag - Negative Treatment
Distinguished by Tyler v. Michaels Stores, Inc., D.Mass., December 9, 2015

692 F.3d 4
United States Court of Appeals,
First Circuit.

In re VOLKSWAGEN AND AUDI WARRANTY EXTENSION LITIGATION.
Volkswagen Group of America, Inc.; Volkswagen AG; Audi AG, Defendants, Appellants,
v.
Peter J. McNulty Law Firm; Irwin & Boesen, P.C.; Berger & Montague, Interested Parties, Appellees.

Nos. 11–1438, 11–1857.
|
Heard May 10, 2012.
|
Decided July 27, 2012.

Synopsis

Background: Class actions were filed in diversity alleging improprieties in automobile manufacturer's warranty extension or reimbursement program. After actions were consolidated, the District Court, Joseph L. Tauro, J., 273 F.R.D. 349, approved settlement. After motion by plaintiffs, the United States District Court for the District of Massachusetts, Joseph L. Tauro, J., 784 F.Supp.2d 35, awarded attorney fees and costs based on report and recommendation from special master. Defendant appealed.

Holdings: The Court of Appeals, Lynch, Chief Judge, held that:

state law, rather than federal law, governed determination of award of attorneys' fees;

district court did not have inherent federal equitable powers to fashion attorneys' fee award; and

Massachusetts law applied.

Reversed and remanded.

Attorneys and Law Firms

***7** Kenneth S. Geller, with whom Michael B. Kimberly, Mayer Brown LLP, Michael Hoenig, Jeffrey L. Chase, Daniel V. Gsovski, Miriam Skolnik, Michael B. Gallub, Herzfeld & Rubin, P.C., David A. Barry, and Sugarman, Rogers, Barshak & Cohen, PC were on brief, for appellants.

Michael B. Bogdanow, with whom Victoria M. Santoro and Meehan, Boyle, Black & Bogdanow, P.C. were on brief, for appellees.

Before LYNCH, Chief Judge, SELYA and BOUDIN, Circuit Judges.

Opinion

LYNCH, Chief Judge.

This appeal is from the district court's award of $30 million in attorneys' fees to several groups of plaintiffs' attorneys who achieved a class action settlement agreement. It presents the question of what source of law governs the award of such fees in a diversity suit, where the parties' settlement agreement contains, inter alia, a provision expressly stating that the parties have not agreed on the source of law to apply to the fee award. We hold that under these circumstances, where there is an agreement that the defendants will pay reasonable fees, state law governs the award of fees. We vacate the fee award, which was based on federal sources of law, and remand for a new determination of the proper reasonable fee award under the relevant state law.

I.

A. *The Lawsuit*

This suit arises out of alleged engine defects in certain Volkswagen and Audi vehicles, which plaintiffs asserted were prone to the formation of damaging engine sludge unless particular types of motor oil were used. Five putative statewide

class actions were filed in five federal district courts, alleging, among other claims, consumer fraud and unfair and deceptive trade practices. *In Re Volkswagen & Audi Warranty Extension Litig.,* 452 F.Supp.2d 1354, 1355–56 (J.P.M.L.2006). On August 29, 2006, these suits were consolidated by the Judicial Panel on Multidistrict Litigation and, as multidistrict litigation ***8** (MDL) cases, were transferred to the District of Massachusetts for pretrial proceedings.[1] *Id.* at 1356. The Massachusetts district court ordered the plaintiffs to file and serve a consolidated amended complaint. *In re Volkswagen & Audi Warranty Extension Litig.,* No. 07–1790 (D.Mass. Feb. 7, 2007).

Plaintiffs filed their second amended consolidated complaint on October 15, 2007. The factual allegations underlying the complaint were that the 1.8 liter turbo-charged engines contained in 1997 to 2004 model Audi vehicles and 1998 to 2004 model Volkswagen Passat vehicles were defectively designed, and that the defendants concealed this defect. The plaintiffs sought to bring claims "on behalf of all persons or entities in the United States who are current or former owners and/or lessees" of those particular vehicles. The complaint named as defendants Volkswagen of America, Inc., a New Jersey corporation, Volkswagen of America, Inc., d/b/a Audi of America, Inc., a New Jersey corporation, the domestic distributors of the vehicles, as well as Volkswagen AG and Audi AG, two German corporations.

The second amended complaint raised a number of legal theories of recovery, including that defendants had violated the New Jersey Consumer Fraud Act, N.J. Stat. Ann. §§ 56:8–1 *et seq.,* and other state consumer fraud statutes that are "the same or substantially similar to the New Jersey" law. The complaint also alleged breach of contract, breach of implied warranty of merchantability, unjust enrichment, and violation of certain California laws. The complaint stated that diversity subject matter jurisdiction was proper under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(2), (d)(6), and sought a declaratory judgment, injunctive relief, actual and treble damages, restitution, and an award of costs, including attorneys' fees.[2]

On October 23, 2008, a special master was appointed to "supervise all aspects of discovery," to "decide all nondispositive pretrial motions," to make recommendations as to all dispositive motions, and to assist the parties in any settlement efforts. *In re Volkswagen & Audi Warranty Extension Litig.,* No. 07–1790 (D.Mass. Oct. 23, 2008).

At some point, serious settlement discussions between the parties began, and on December 14, 2009, the special master reported that the parties "seem[ed] very close to reaching an agreement." *In re Volkswagen & Audi Warranty Extension Litig.,* No. 07–1790 (D.Mass. Dec. 14, 2009). On May 12, 2010, the special master reported that the parties had begun drafting a proposed settlement agreement and associated documents. *In re Volkswagen & Audi Warranty Extension Litig.,* No. 07–1790 (D.Mass. May 12, 2010).

***9** B. *The Settlement Agreement*

On September 13, 2010, a proposed settlement agreement was submitted to the district court, along with a motion requesting conditional approval of the settlement and certification of a class for settlement purposes. The final settlement as approved by the court did not change the terms of the proposed settlement. So we discuss several material portions of the proposed settlement: the benefits obtained by the class, the appointment of a settlement administrator, the terms as to attorneys' fees, and the choice of law provision.

The settlement stated it was not "an admission by Defendants of any liability or wrongdoing whatsoever." The settlement class consisted of all current and former owners and lessees of model year 1997–2004 Audi A4 vehicles or model year 1998–2004 Volkswagen Passat vehicles equipped with 1.8 liter turbo engines, comprising a total of 479,768 vehicles. The proposed settlement offered several benefits to the class, including (1) payment for engine repair or replacement costs, (2) a warranty extension for a subset of the vehicles, (3) a one-time $25 oil change discount for a subset of the vehicles, and (4) an education and information program designed to inform class members of the

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risks to their engines and means to prevent those risks. The proposed settlement did not place a monetary value on these benefits.

The proposed settlement created an "Oil Sludge Settlement Administrator" to oversee the claims process for class members. The administrator was to record every claim for reimbursement, to determine whether the claim was to be allowed or denied, and to explain the basis for any claim that was denied.

The proposed settlement contained a procedure for providing notice to all settlement class members of the certification and fairness hearing and the settlement agreement. Notice of the proposed settlement was to be prepared by defendants, reviewed and approved by class counsel, and disseminated by the settlement administrator.

The proposed settlement also "reserve[d] to the [district] [c]ourt exclusive and continuing jurisdiction over this action, the [p]arties, ... and this Settlement Agreement for purposes of administering, supervising, construing, and enforcing this Settlement Agreement."

Most relevant to this appeal, the proposed settlement contained a section regarding "Attorney Fees and Costs." It provided:

> 1. Class Counsel will submit an application to the Court for an award of reasonable attorneys' fees and expenses on or before a date to be set by the Court ("Fee Application"). Each Settling Party reserves all rights to appeal from a Class Counsel fees and expenses award if that Party files a timely and proper objection with the Court. The Class Counsel fees and expenses award and Final Judicial Approval shall be separate so that the appeal of one shall not constitute an appeal from the other.
>
> 2. Subject to Section VI.A.2 above, Class Counsel fees and expenses shall be paid entirely and exclusively by Defendants and shall not diminish, invade, or reduce, or be derived from, benefits afforded to Settlement Class Members under this Settlement Agreement.
>
> 3. Any Class Counsel fees and expenses awarded shall be paid by Defendants to Class Counsel within thirty (30) days of the entry of a final judgment or order by the Court with respect to Class Counsel fees and expenses, except in the event of an appeal, ... All matters pertaining to an award of Class Counsel fees and expenses including, ***10** but not limited to, any dispute amongst class/plaintiffs' counsel as to their respective attorneys fees and expenses, have been referred to the [special master]. [The special master's] recommendation with respect to Class Counsel fees and expenses shall be made to the Court. [3]

Section VI.A.2 of the proposed agreement provided:

> It is expressly understood and confirmed that the parties have not agreed to any choice, selection or waiver of state or federal law to be applied to any aspect of the construction, preliminary or final approval, or application of any provision of this Agreement of Settlement, including but not limited to attorney fees and costs.

The attorneys' fees provision expressly states that it is "subject to" this section.

C. *Notice of the Proposed Settlement with Statement About Attorneys' Fees*

On September 22, 2010, the special master issued a recommendation that the district court (1) conditionally approve a class for settlement purposes only and (2) conditionally approve the proposed settlement agreement, with a hearing on the final agreement to be held on March 11, 2011, after notice of the settlement was sent to class members. *In re Volkswagen & Audi Warranty Extension Litig.,* No. 07–1790, 2010 WL 3769259,

at *1, *7 (D.Mass. Sept. 22, 2010).[4] The district court adopted this recommendation in full. *In re Volkswagen & Audi Warranty Extension Litig.*, No. 07–1790, 2010 WL 3810625 (D.Mass. Sept. 24, 2010).

On December 20, 2010, notice of the proposed settlement was mailed to 1,603,013 class members, *see* Fed.R.Civ.P. 23(e)(1), whose names and addresses were determined by use of Volkswagen and Audi Vehicle Identification Numbers on record in each state registry of motor vehicles throughout the United States. The proposed settlement agreement provided that the notice was to be drafted by the defendants and reviewed and approved by class counsel, and this procedure appears to have been followed. The notice contained a section addressing the question "How will the lawyers be paid?"[5] That section stated:

> Class Counsel will ask the Court for up to $37.5 Million for attorneys' fees and up to approximately $1.75 Million for reimbursement of costs and expenses incurred in the prosecution and settlement of these actions. The Defendants do not dispute Class Counsel's entitlement to an appropriate fee and reimbursement for cost and expenses, but may oppose the amounts requested by Class Counsel. The Defendants will pay whatever attorneys' fees and costs and expenses that the Court awards without ***11** reducing or limiting any of the benefits available to Settlement Class Members.

D. *The Request for Attorneys' Fees*

On December 20, 2010, class counsel submitted a request for $37.5 million in attorneys' fees, for all attorneys working for plaintiffs,[6] as well as costs not to exceed $1.75 million, under Federal Rule of Civil Procedure 23(h). Class counsel argued that federal law governed the award of fees. *See* Fed.R.Civ.P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement."). The argument was that the court should apply the percentage of fund methodology[7] for determining the size of an appropriate fee award, the settlement value was at least $414 million, and $37.5 million was a reasonable percentage of the value of the settlement. An exhibit outlining the hours expended by class counsel on the suit was provided so that the court could perform a lodestar[8] cross check. Based on the 23,191 hours that class counsel spent on the case,[9] they argued that a fee award of $37.5 million would be reasonable under the lodestar method.

The defendants did not argue that the court should award no attorneys' fees at all but strongly opposed the argument that federal law could apply, arguing that any fee award would only be proper under New Jersey's fee-shifting statute, not federal law. Defendants also opposed class counsel's fee calculation methodology. They argued that the settlement value could not be determined until after June 27, 2011, when certain reimbursement claims would be due. Defendants that said this was particularly necessary as their expert valued the settlement at only approximately $50 million, as opposed to the over $400 million valuation of plaintiffs' expert.

On February 18, 2011, the special master issued a report and recommendation which, after finding that federal law governed the attorneys' fees award and that the New Jersey statute was irrelevant, recommended an award of $30 million in attorneys' fees and approximately $1.2 million in costs. ***12** *In re Volkswagen & Audi Warranty Extension Litig.*, No. 07–1790, 2011 WL 721970, at *2–3, *11 (D.Mass. Feb. 18, 2011). On March 4, 2011, the defendants duly filed objections to the recommended fee award and preserved all of the arguments they make on appeal.

The district court held a hearing on both the proposed settlement agreement and the attorneys' fees award on March 11, 2011, *see* Fed.R.Civ.P. 23(e)(2), (h)(3), where defendants again argued that state law must govern the fee award.

On March 24, 2011, the district court issued two opinions. In the first opinion, the district court approved the proposed settlement.[10] *In re Volkswagen & Audi Warranty Extension Litig.*, 273

F.R.D. 349 (D.Mass.2011). No appeal has been taken from the approval of the settlement.

In the second opinion, the district court adopted, virtually verbatim, the special master's recommendation that the court award $30 million in attorneys' fees and approximately $1.2 million in costs and expenses. *In re Volkswagen & Audi Warranty Extension Litig.,* 784 F.Supp.2d 35 (D.Mass.2011).

The district court applied federal law to determine the amount of fees to award, for two reasons. First, the district court found that "where, as here, a fee award is a result of the parties' private agreement, federal law governs the decision." *Id.* at 40. Second, the court explained that a fee award pursuant to the state fee-shifting statutes would not be appropriate because plaintiffs would not be "prevailing parties" within the meaning of those statutes. *Id.* at 41. The district court also noted that "[i]n the context of a class action settlement in the First Circuit, however, fees may be awarded, as part of the court's equitable powers over such settlement agreements, from a fund created to benefit the class." *Id.* at 39.

The district court then applied the percentage of fund method, finding that a $30 million award would be a reasonable percentage of the value of the settlement, against the parties' experts' estimation at somewhere between $50 million (defendants' expert) and $223 million (class counsel's expert's revised estimate). *Id.* at 43–44, 47. The court did not determine the value of the settlement.

The district court also said it applied a lodestar cross check, taking the 23,191 hours spent by class counsel, reducing those hours by one-third for unnecessary hours, and multiplying the remaining hours by $500 per hour to produce a base lodestar value of $7,734,000.[11] *Id.* at 46–47. The district court then "[a]ssum[ed] a multiplier of 2.50," which would result in a lodestar value of $19,335,000, which the district court said supported its determination that $30 million in fees was a reasonable percentage of the value of the settlement. *Id.* at 47.

Defendants appealed the award of fees. They also filed a motion to vacate, alter, or amend the fee award under Rules 52(b), 59(e), and 60(b), which again argued, among other points, that the district court should have applied New Jersey rather ***13** than federal law to determine the value of the fee award. The district court denied the motion, *In re Volkswagen & Audi Warranty Extension Litig.,* No. 07–1790 (D.Mass. July 11, 2011), and the defendants separately appealed that order.

II.

"We review a district court's determination regarding attorney's fees for abuse of discretion." *Airframe Sys., Inc. v. L–3 Commc'ns Corp.,* 658 F.3d 100, 108 (1st Cir.2011). That said, "mistakes of law ... always constitute abuses of a court's discretion," and in addition, "we will set aside a fee [determination] ... if it clearly appears that the trial court ignored a factor deserving significant weight, relied upon an improper factor, or evaluated all the proper factors (and no improper ones), but made a serious mistake in weighing them." *Id.* (alteration in original) (quoting *Gay Officers Action League v. Puerto Rico,* 247 F.3d 288, 292–93 (1st Cir.2001)) (internal quotation marks omitted). "The issue of whether a district court may use a given methodology in structuring an award of attorneys' fees is one of law, and, thus, is subject to *de novo* review." *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.,* 56 F.3d 295, 304 (1st Cir.1995).

Defendants raise two primary arguments in challenging the attorneys' fees award.[12] First, defendants claim that the district court erred in applying general federal-law principles, rather than state law, to determine the amount of attorneys' fees to which class counsel were entitled. Second, defendants claim that even if federal law applied, the district court made a number of errors of law and fact in its determination of the fee award.

Because the court erred as a matter of law in applying federal-law principles instead of the relevant state's law, we do not reach the defendants' other claim of error. We vacate the fee award

and remand for application of Massachusetts law principles, as described below.

A. *The Settlement Agreement and Choice of Law*

We typically review the district court's interpretation of a settlement agreement de novo, and do so here. *See Ricci v. Patrick,* 544 F.3d 8, 17 (1st Cir.2008); *F.A.C., Inc. v. Cooperativa de Seguros de Vida de P.R.,* 449 F.3d 185, 192 (1st Cir.2006). We also review choice of law issues de novo. *See Robidoux v. Muholland,* 642 F.3d 20, 22 (1st Cir.2011) ("Choice of law determinations are questions of law, which we also review de novo."); *see also Torre v. Brickey,* 278 F.3d 917, 919 (9th Cir.2002) (per curiam) ("Whether state or federal law applies to a particular issue in a diversity action is a question of law which we also review de novo.").

1. *The Settlement Agreement*

It is axiomatic that, under the "American Rule," "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Hardt v. Reliance Standard Life Ins. Co.,* 560 U.S. 242, 130 S.Ct. 2149, 2157, 176 L.Ed.2d 998 (2010); *see also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 257–59, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) (discussing exceptions to the American Rule).

***14** Here, the defendants agreed to pay reasonable attorneys' fees as part of the settlement agreement. The agreement first provides that "Class Counsel will submit an application to the Court for an award of reasonable attorneys' fees and expenses." The agreement goes on to provide that "Class Counsel fees and expenses shall be paid entirely and exclusively by Defendants and shall not diminish, invade, or reduce, or be derived from, benefits afforded to Settlement Class Members under this Settlement Agreement." The agreement further states that "[a]ny Class Counsel fees and expenses awarded shall be paid by Defendants to Class Counsel within thirty (30) days of the entry of a final judgment or order by the Court with respect to Class Counsel fees and expenses."

This language makes clear that the defendants agreed to pay "reasonable attorneys' fees and expenses;" further, the notice sent to the class made clear that "[t]he Defendants do not dispute Class Counsel's entitlement to an appropriate fee and reimbursement for cost and expenses."

However, the settlement agreement expressly disclaims any agreement between the parties as to what choice of law governs the award of attorneys' fees:

> It is expressly understood and confirmed that the parties have not agreed to any choice, selection or waiver of state or federal law to be applied to any aspect of the construction, preliminary or final approval, or application of any provision of this Agreement of Settlement, including but not limited to attorney fees and costs.

The fee award here is based on the agreement and not on any statute, federal or state. The question then is what source of law governs the fee award. The district court incorrectly concluded that federal law governed.

To determine the source of law that governs the settlement agreement in this diversity case, we engage in a two-part inquiry. First, we evaluate whether under the *Erie* doctrine, *see Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), federal or state law governs the matter. This assessment is made first because "[a]lthough state law generally supplies the rules of decision in federal diversity cases, it does not control the resolution of issues governed by federal statute." *Budinich v. Becton Dickinson & Co.,* 486 U.S. 196, 198, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988) (citations omitted); *see also* U.S. Const. art. VI, cl. 2 (Supremacy Clause); *Sun Oil Co. v. Wortman,* 486 U.S. 717, 727, 108 S.Ct. 2117, 100 L.Ed.2d 743 (1988) ("It is never the case under *Erie* that either federal *or* state law—if the two differ—can properly be applied to a particular issue...."); *Erie,* 304 U.S.

at 78, 58 S.Ct. 817 ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.").

Second, if state law governs, and a choice of law must be made, we determine which state's law applies by applying the choice of law rules of the forum state (subject to the complexities of MDL litigation). *See Servicios Comerciales Andinos, S.A. v. Gen. Elec. del Caribe, Inc.,* 145 F.3d 463, 479 (1st Cir.1998) (a federal court sitting in diversity first "determines whether a particular matter is procedural or substantive for *Erie* purposes;" only if the matter is procedural does federal law apply; "if substantive, the court follows the law of the forum state;" and "if a choice of law must be made," the federal court "applies the law that would be applied under the conflict of laws rules of the forum state").

***15** 2. *Federal Law Does Not Govern the Award of Reasonable Attorneys' Fees*

State law, rather than federal law, governs the determination of the award of attorneys' fees in this case.

As a general matter, "interpreting [settlement] agreements and their scope is a matter of state contract law." *Fábrica de Muebles J.J. Álvarez, Inc. v. Inversiones Mendoza, Inc.,* 682 F.3d 26, 33 (1st Cir.2012); *see also, e.g., Fanning v. Potter,* 614 F.3d 845, 848 n. 2 (8th Cir.2010) (same); *In Re: Chira,* 567 F.3d 1307, 1311 (11th Cir.2009) (same); *Howmedica Osteonics Corp. v. Wright Med. Tech., Inc.,* 540 F.3d 1337, 1347 (Fed.Cir.2008) (same). [13]

We also start with the basic premise that the issue of attorneys' fees has long been considered for *Erie* purposes to be substantive and not procedural, and so state-law principles normally govern the award of fees. *See IOM Corp. v. Brown Forman Corp.,* 627 F.3d 440, 451 (1st Cir.2010) ("Where, as here, the court's jurisdiction is based on diversity of the parties, a district court's award of attorneys' fees is governed by relevant state law...."); *Titan Holdings Syndicate, Inc. v. City of Keene,* 898 F.2d 265, 273 (1st Cir.1990) (same); *N. Heel Corp. v. Compo Indus., Inc.,* 851 F.2d 456, 475 (1st Cir.1988) (same); *see also, e.g., Northon v. Rule,* 637 F.3d 937, 938 (9th Cir.2011) (per curiam) (same); *Scottsdale Ins. Co. v. Tolliver,* 636 F.3d 1273, 1280 (10th Cir.2011) (same); *Chin v. Chrysler LLC,* 538 F.3d 272, 279 (3d Cir.2008) (same).

Class counsel defend the choice of federal-law principles on two grounds: first, that Rule 23(h)(3), Fed.R.Civ.P., provides a basis for federal law governing the award of attorneys' fees; and second, in a qualitatively different argument, that federal courts' inherent equitable powers provide a basis for applying federal-law principles to the award of attorneys' fees. We reject each argument and hold that state law applies to interpretation of the settlement agreement.

a. *Rule 23(h), Fed.R.Civ.P.*

Apparently attempting to argue in this case that the award is "procedural" under *Erie,* class counsel point to Rule 23(h). We reject the argument that Rule 23(h) provides a basis for applying federal-law principles to the award of attorneys' fees here. Rule 23(h) provides: "In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed.R.Civ.P. 23(h). The Advisory Committee's notes make plain that "[t]his subdivision does not undertake to create new grounds for an award of attorney fees or nontaxable costs. Instead, it applies when such awards are authorized by law or by agreement of the parties." Fed.R.Civ.P. 23 advisory committee's notes on the 2003 amendment. The text does not say such awards have to be governed by federal fee award principles.

Rule 23(h) does not provide a free-floating grant of authority to apply federal law to award attorneys' fees in class actions; rather it *allows* the federal court to make fee awards where they "are authorized by law or by the parties' agreement." Fed.R.Civ.P. 23(h); *see also* ***16** 7B Wright, Miller, & Kane, *Federal Practice & Procedure* § 1803, at 325 (3d ed. 2005) (noting that "the power of the court to award attorney fees in a class action does not derive from the rule itself"). The first portion is

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of no help to class counsel; other than certain equitable doctrines, discussed below, they do not claim any federal law authorizes an award of fees here. The portion of Rule 23(h) authorizing fee awards pursuant to the parties' agreement does not here provide a federal-law basis governing the award. The settlement agreement itself has no agreement that federal law applies.

It is clear that Rule 23(h) does not "undertake to create new grounds for an award of attorney fees or nontaxable costs." Fed.R.Civ.P. 23 advisory committee's notes on the 2003 amendment. As a result, Rule 23(h) is not " 'sufficiently broad' to cause a 'direct collision' with the state law or, implicitly, to 'control the issue' before the court, thereby leaving no room for the operation of that law." [14] *Burlington N. R.R. Co. v. Woods,* 480 U.S. 1, 4–5, 107 S.Ct. 967, 94 L.Ed.2d 1 (1987) (quoting *Walker v. Armco Steel Corp.,* 446 U.S. 740, 749–50 & n. 9, 100 S.Ct. 1978, 64 L.Ed.2d 659 (1980)). Because there is no conflict between Rule 23(h) and application of state-law principles to determine the award, class counsel's reliance on *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.,* 559 U.S. 393, 130 S.Ct. 1431, 176 L.Ed.2d 311 (2010), is inapposite.

b. *No Inherent Federal Equitable Powers*

The district court erred in finding that it had inherent federal equitable powers to fashion an attorneys' fee award.

This based on inherent equitable powers argument is not an argument, like the Rule 23 argument, that the determination of the award is a matter of procedural law. Further, the argument is based on a series of cases which rest on federal question jurisdiction, not diversity jurisdiction. *See Boeing Co. v. Van Gemert,* 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980); *Alyeska,* 421 U.S. 240, 95 S.Ct. 1612; *Hall v. Cole,* 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973); *Mills v. Elec. Auto–Lite Co.,* 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970).

The basis for the award here is the agreement itself, a contract under state law, and not federal law. The fact that attorneys' fees are provided for by the settlement agreement is one of several reasons why there is no basis to resort to these federal equitable doctrines. *Cf. United States ex rel. Bogart v. King Pharm.,* 493 F.3d 323, 331 (3d Cir.2007) (where plaintiffs' attorneys are awarded fees under statutory fee-shifting regime, there is no need to resort to the common fund doctrine because "there is no iniquity to redress" given that the defendants paid attorneys' fees).

Beyond that, this is not a common fund or a common benefit case, and so equitable powers to award attorneys' fees are unavailable under those theories. The common fund method should apply only where attorneys seek compensation from a discernable pot of money won by the plaintiffs. *See In re Thirteen Appeals,* 56 F.3d at 305; *see also Boeing,* 444 U.S. at 478–79, 100 S.Ct. 745 (explaining that the common ***17** fund doctrine may apply where "each member of a certified class has an undisputed and mathematically ascertainable claim *to part of a lump-sum judgment* recovered on his behalf," and noting that the doctrine rests on the court's "[j]urisdiction over the fund involved in the litigation" (emphasis added)). Here, there is no discernable pot.

In any event, the reasonable fees class counsel will receive come not out of the settlement proceeds but are in addition to the settlement proceeds, [15] rendering the common fund method inapplicable. *See Boeing,* 444 U.S. at 479, 100 S.Ct. 745 (for the common fund doctrine to apply, there must be "reason for confidence that the costs [of litigation] could indeed be shifted with some exactitude to those benefiting" from the litigation (alteration in original) (quoting *Alyeska,* 421 U.S. at 264 n. 39, 95 S.Ct. 1612) (internal quotation mark omitted)).

By the same token, the common benefit method is unavailable here because this is not a case in which the cost of the fees is being "spread around" among the parties benefitted; the fees are on top of the class-wide benefits. *See Alyeska,* 421 U.S. at 264 n. 39, 95 S.Ct. 1612 (noting that "[i]n this Court's common-fund and common-benefit decisions ... there was reason for confidence that the costs could indeed be shifted with some exactitude to those

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benefiting"); *Mills,* 396 U.S. at 393–94, 90 S.Ct. 616 (stating that the substantial benefit doctrine applies where "the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among" the class members); *see also Savoie v. Merchants Bank,* 84 F.3d 52, 56 (2d Cir.1996) ("The common fund doctrine does not apply, however, when fees are sought from the assets of the losing party, and the fee award would not come from a common fund nor be assessed against persons who have derived benefit from the lawsuit.").

3. *Horizontal Choice of State Law*

Having concluded that state law governs, we turn to the question of which state's choice of law principles law applies to determine which state's attorneys' fees law applies.

In a diversity case, "[u]nder *Klaxon v. Stentor Electric Mfg. Co.,* 313 U.S. 487 [61 S.Ct. 1020, 85 L.Ed. 1477] (1941), a court ordinarily must apply the choice-of-law rules of the State in which it sits." *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 243 n. 8, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981); *see also Auto Eur., LLC v. Conn. Indem. Co.,* 321 F.3d 60, 64 (1st Cir.2003) ("A federal court sitting in diversity jurisdiction must employ the choice-of-law principles of the forum state....").

Special rules apply in MDL cases as to determining the forum state. Here, the litigation in Massachusetts was consolidated from suits filed in federal district courts in multiple states and transferred to the District of Massachusetts under 28 U.S.C. § 1407. *In Re Volkswagen,* 452 F.Supp.2d at 1356. Where a suit is consolidated and transferred under § 1407, courts typically apply the choice of law rules of each of the transferor courts.[16] ***18** *See Chang v. Baxter Healthcare Corp.,* 599 F.3d 728, 732 (7th Cir.2010) ("When a diversity case is transferred by the multidistrict litigation panel, the law applied is that of the jurisdiction from which the case was transferred...."); *In re Air Disaster at Ramstein Air Base, Ger.,* 81 F.3d 570, 576 (5th Cir.1996) ("Where a transferee court presides over several diversity actions consolidated under the multidistrict rules, the choice of law rules of each jurisdiction in which the transferred actions were originally filed must be applied."); *In re Korean Air Lines Disaster of Sept. 1, 1983,* 932 F.2d 1475, 1496 (D.C.Cir.1991) (Mikva, J., dissenting) ("When a case is transferred pursuant to 28 U.S.C. § 1407(a) by the Panel on Multi–District Litigation, the transferee court must apply the choice of law rules of the states where the transferor courts sit."); *Phelps v. Cont'l Ill. Nat'l Bank & Trust Co. of Chi. (In re Nucorp Energy Sec. Litig.),* 772 F.2d 1486, 1492 (9th Cir.1985) ("In this case, however, we must apply the choice of law rules of Illinois because the claims were originally filed in district court in Illinois before they were transferred to California by the Judicial Panel on Multidistrict Litigation."); *see also* 19 Wright, Miller, & Cooper, *Federal Practice & Procedure* § 4506, at 114–15 (2d ed. 1996) ("In actions transferred under Section 1407 for consolidated pretrial discovery, ... the transferee court should apply the substantive law of the transferor state, including its choice-of-law rules.").

This approach is consistent with the Supreme Court's holding that "where a case is transferred pursuant to 28 U.S.C. § 1404(a), [a court] must apply the choice-of-law rules of the State from which the case was transferred." *Piper Aircraft Co.,* 454 U.S. at 243 n. 8, 102 S.Ct. 252; *see also Ferens v. John Deere Co.,* 494 U.S. 516, 519, 110 S.Ct. 1274, 108 L.Ed.2d 443 (1990) (holding that the choice of law rules of the transferor court apply regardless of whether the defendant or the plaintiff moves for the transfer under 28 U.S.C. § 1404(a)).

Here, a total of seven cases were ultimately transferred to and consolidated in the district of Massachusetts, from the following jurisdictions: California, Florida, Illinois,[17] New Jersey, Ohio, and Pennsylvania. One additional case was filed directly with the district court, in Massachusetts.

Most of the states in which the suits originated (the exceptions are Florida and California) follow the "most significant relationship" test for determining the source of law that applies to contracts that do not contain choice of law provisions, based on Section 188 of the Restatement (Second) of Conflict of Laws. *See Safeco Ins. Co. v. Jelen,*

381 Ill.App.3d 576, 319 Ill.Dec. 792, 886 N.E.2d 555, 558 (2008) ("If the claim raised is a contract, the most significant contacts test is used.") (citing § 188);[18] ***19** *Nile v. Nile,* 432 Mass. 390, 734 N.E.2d 1153, 1161 (2000) ("The settlement agreement did not express a choice of law so we look to factors such as those enumerated in Restatement (Second) of Conflicts of Laws § 188(2)."); [19] *Pfizer, Inc. v. Emp'rs Ins. of Wausau,* 154 N.J. 187, 712 A.2d 634, 637 (1998) (noting that "section 188 sets forth the general rule governing choice of law in contract actions"); [20] *Ohayon v. Safeco Ins. Co. of Ill.,* 91 Ohio St.3d 474, 747 N.E.2d 206, 209 (2001) (noting that Ohio has "expressly adopted Section 188"); [21] *Guy v. Liederbach,* 501 Pa. 47, 459 A.2d 744, 748 n. 5 (1983) (noting that Pennsylvania "follow[s] a flexible conflicts methodology combining interest analysis and the Restatement (Second) of Conflicts," and citing § 188). [22]

Under this approach, "[t]he rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties." Restatement (Second) of Conflict of Laws § 188(1) (1971). The Restatement enumerates several factors to consider in making this determination:

> (a) the place of contracting,
>
> (b) the place of negotiation of the contract,
>
> (c) the place of performance,
>
> (d) the location of the subject matter of the contract, and
>
> (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

Id. § 188(2). The Restatement notes that the contacts are to be assessed in the context of the principles of § 6 of the Restatement. *Id.* § 188(1). The Restatement further provides that "[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue." *Id.* § 188(2). The Restatement also explains that "[i]f the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied." *Id.* § 188(3).

Under the Restatement's approach, it is clear that Massachusetts law would be applied in this case. The settlement agreement was drafted to settle litigation that was ongoing in the District of Massachusetts. Many of the settlement negotiations took place in Boston, at settlement conferences with the special master. The agreement was entered into "subject to Final Judicial Approval," and so required approval by the district court in Massachusetts. The agreement provided that the district court retained "exclusive and continuing jurisdiction over this action, the Parties, ... and this Settlement Agreement for purposes of administering, supervising, construing, and enforcing this Settlement Agreement." The district court approved the settlement agreement, which was incorporated into the judgment and possessed "the full force and effect of an ***20** Order of the Court." *In re Volkswagen,* 273 F.R.D. at 356.

The substance of the litigation also has significant contacts with Massachusetts. One of the suits was filed directly in the District of Massachusetts. One of the class representatives resides in Massachusetts. Moreover, the Judicial Panel on Multidistrict Litigation found that transfer of the suits to the District of Massachusetts would "serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation." *In Re Volkswagen,* 452 F.Supp.2d at 1355.

As a result, the weight of the relevant factors indicates that Massachusetts has the most substantial relationship to the issue of attorneys' fees under the settlement agreement, and so these five states would apply Massachusetts law.

Florida applies the "lex loci contractus" rule, which "provides that the law of the jurisdiction where the contract was executed governs the rights and liabilities of the parties." *State Farm Mut. Auto. Ins. Co. v. Roach,* 945 So.2d 1160, 1163 (Fla.2006); *see also Shaps v. Provident Life & Accident Ins. Co.,* 826 So.2d 250, 254 n. 3

(Fla.2002) ("This Court has held that under *lex loci contractus,* the law of the jurisdiction where the contract was executed governs substantive issues regarding the contract."). Under this rule, Massachusetts law would also apply: the settlement is properly viewed as having been executed in Massachusetts,[23] as that was the location where the settlement agreement was judicially approved, which was an express condition of the effectiveness of the settlement agreement.

Under the law of the last transferor jurisdiction, California, "[a] contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." Cal. Civ.Code § 1646; *see also Frontier Oil Corp. v. RLI Ins. Co.,* 153 Cal.App.4th 1436, 63 Cal.Rptr.3d 816, 821 (2007) ("We conclude that notwithstanding the application of the governmental interest analysis to *other* choice-of-law issues, Civil Code section 1646 is the choice-of-law rule that determines the law governing the *interpretation* of a contract."). Given that the settlement agreement provided that the district court is to maintain jurisdiction over the settlement "for purposes of administering, supervising, construing, and enforcing this Settlement Agreement," the settlement agreement is properly construed as to be performed in Massachusetts. Even if it were decided that the state of performance is indeterminable, for the reasons given above it is properly viewed as having been "made" in Massachusetts. Either way, under California's choice of law rules, Massachusetts law would apply to the interpretation of the settlement agreement.

As a result, we conclude that all of the transferor jurisdictions would apply Massachusetts law to determine what constitutes "reasonable attorneys' fees and expenses" under the settlement agreement.[24] The district court's conclusion that state law did not govern was error. We vacate the district court's award of fees and remand ***21** for resolution of the remaining issues under Massachusetts law.

B. *Application of Massachusetts Law*

"Massachusetts generally follows the 'American Rule' and denies recovery of attorney's fees absent a contract or statute to the contrary." *Police Comm'r of Bos. v. Gows,* 429 Mass. 14, 705 N.E.2d 1126, 1128 (1999). Under Massachusetts law, there appear to be two permissible approaches to determining attorneys' fees pursuant to a contractual agreement.

First, the lodestar approach is permissible in contractual fee cases. *See WHTR Real Estate Ltd. P'ship v. Venture Distrib., Inc.,* 63 Mass.App.Ct. 229, 825 N.E.2d 105, 111 (2005); *see also Raymond Leasing Corp. v. Callico Distribs., Inc.,* 62 Mass.App.Ct. 747, 820 N.E.2d 267, 271 (2005) (affirming attorneys' fees award based on an adjusted "number of hours expended" multiplied by "the hourly rate customarily charged by attorneys with experience and expertise in this particular area of the law"). It has been used in some contractual fee cases.

Under Massachusetts's lodestar approach, attorneys' fees are "calculated by multiplying the number of hours reasonably spent on the case times a reasonable hourly rate." *Fontaine v. Ebtec Corp.,* 415 Mass. 309, 613 N.E.2d 881, 890 (1993). This figure is "the basic measure of a reasonable attorney's fee" under this approach. *Id.* at 891. After the base lodestar figure is calculated, "[i]n limited circumstances" it may be "enhanced to compensate for the risk of nonpayment." *Id.; see also WHTR,* 825 N.E.2d at 111. The Supreme Judicial Court has held that no enhancement was appropriate where the case was "not complex," "raised no novel issues of law," and did not have "significance ... for a wider class of persons" beyond the particular plaintiff. *Fontaine,* 613 N.E.2d at 892.

The second permissible approach is a multi-factor analysis. Under this approach, a court may consider a number of factors, originally outlined in *Cummings v. National Shawmut Bank of Boston,* 284 Mass. 563, 188 N.E. 489 (1934), to arrive at a determination of reasonable attorneys' fees,

> including the ability and reputation of the attorney, the demand for his services by others, the amount and importance of the matter involved, the time spent, the prices usually charged for similar services by other attorneys in the same neighborhood, the amount of money or the value of the property affected by [the] controversy, and the results secured.

Id. at 492 (quoted in *WHTR,* 825 N.E.2d at 111–12); *see also Margolies v. Hopkins,* 401 Mass. 88, 514 N.E.2d 1079, 1082 (1987) (considering these factors where parties agreed to pay counsel fees as part of a settlement); *Citizens Bank of Mass. v. Travers,* 69 Mass.App.Ct. 174, 866 N.E.2d 974, 977 (2007) (holding that these factors govern reasonableness of attorneys' fees awarded under a contract).

The district court on remand should determine which method Massachusetts would apply here. It is clear that the present award cannot stand.

If under Massachusetts law the lodestar approach is called for, or if it is highly relevant under the multi-factor approach, the litigation on remand may be simplified. In this case, the district court calculated a base lodestar figure of $7,734,000 (encompassing only class counsel), and neither side mounted a real challenge to the figure, as a pre-award figure, on appeal. Class counsel agreed at oral argument that the base lodestar value would only need to be increased to the extent that it did not ***22** include additional work, undertaken after the district court's award of fees, and even then "would not be an appreciably different number." That claim of increase due to additional work is preserved for remand. The defendants likewise agreed at oral argument that remand for consideration of only the increase for additional work and any lodestar multiplier would be acceptable.

Given the absence of any direct challenge to this figure, the base lodestar figure of $7,734,000 shall be the base figure used on remand as to class counsel, save for an increase for extra work. The use of this figure is appropriate given the courts' "interest in avoiding burdensome satellite litigation" over attorneys' fees. *City of Burlington v. Dague,* 505 U.S. 557, 566, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992). Because no lodestar calculation was performed as to plaintiffs' attorneys who were not class counsel, the district court will need to perform a separate lodestar calculation as to those attorneys.

Under both methods used by Massachusetts law, a question remaining on remand is the question of the appropriate contingency enhancement, if any. The district court's choice of a multiplier figure was not based on Massachusetts law nor justified by the record, and it is therefore vacated. We understand the parties to have agreed, at oral argument, that if there were a remand, the issues open on remand would include, inter alia, the further time remaining to be spent by all counsel, not just class counsel; the risks undertaken; and the value of the settlement. As to this last question, the actual claims data collected by the settlement administrator is relevant to the enhancement question and in determining the appropriate fee. We also urge the parties to attempt to resolve the remaining issues between them.

III.

We reverse the district court's decision for legal error and vacate the award of attorneys' fees. We remand for calculation of an appropriate fee under Massachusetts law, consistent with this opinion. [25]

No costs are awarded.

All Citations

692 F.3d 4, 83 Fed.R.Serv.3d 174

Footnotes

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1 Two additional cases were later transferred and consolidated.

2 On January 30, 2008, the defendants moved to dismiss the complaint under Rule 12(b)(6). Among other arguments, the defendants argued that application of New Jersey law to all claims in the case would violate relevant choice of law rules as well as the Constitution, and New Jersey law could only apply where the relevant sale or lease transaction took place in New Jersey. Plaintiffs' response to the choice of law argument was that it was premature and required discovery to determine what law ought to apply, and in any event New Jersey law could properly apply to all claims.

On June 9, 2008, the district court denied the motion to dismiss in a one-sentence order which stated that the motion was "denied without prejudice to be resubmitted as a Motion for Summary Judgment." *In re Volkswagen & Audi Warranty Extension Litig.,* No. 07–1790 (D.Mass. June 9, 2008) (emphasis omitted). Discovery began shortly thereafter.

3 *See* Fed.R.Civ.P. 23(h)(4) ("The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).").

4 As to conditional approval of the class for settlement purposes, the special master found that the requirements of Federal Rule of Civil Procedure 23(a) and (b)(3) were satisfied. *In re Volkswagen & Audi Warranty Extension Litig.,* No. 07–1790, 2010 WL 3769259, at *2–4 (D.Mass. Sept. 22, 2010). The special master found that the proposed notice to the class satisfied the requirements of Rule 23(c) and (e). *Id.* at *5. As to conditional approval of the settlement, the special master found that the settlement was entered into after extensive negotiation and was reasonable in light of the claims raised and the litigation risks. *Id.* at *1.

5 *See* Fed.R.Civ.P. 23(h)(1) (notice of motions requesting attorneys' fees for class counsel must be "directed to class members in a reasonable manner").

6 The procedure established by the special master for awarding attorneys' fees provided that class counsel would file "[a] motion for all fees and all counsels' costs." *In re Volkswagen & Audi Warranty Extension Litig.,* No. 07–1790, 2010 WL 6334859, at *1 (D.Mass. Dec. 22, 2010). Class counsel would bear initial responsibility for distributing the award of attorneys' fees among all plaintiffs' counsel, based on their contribution to the litigation. *Id.* Only after such an initial distribution was made, and after all appeals as to the fee award itself were resolved, would the special master address any disputes by "non-Class Counsel" as to the distribution of attorneys' fees. *Id.* The district court's opinion awarding attorneys' fees approved this procedure. *In re Volkswagen & Audi Warranty Extension Litig.,* 784 F.Supp.2d 35, 47 (D.Mass.2011).

7 Under the percentage of fund method, "the court shapes the counsel fee based on what it determines is a reasonable percentage of the fund recovered for those benefitted by the litigation." *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.,* 56 F.3d 295, 305 (1st Cir.1995).

8 Under the lodestar method, the court determines the fee award by "ascertain[ing] the number of hours productively expended and multiply [ing] that time by reasonable hourly rates." *Spooner v. EEN, Inc.,* 644 F.3d 62, 68 (1st Cir.2011).

9 While the fee request covered all attorneys working for plaintiffs, not just class counsel, the hours submitted for the lodestar calculation were those of class counsel only.

10 The district court found that the certification requirements of Rule 23(a) and 23(b) were met, and that the settlement was fair, reasonable, and adequate. *In re Volkswagen & Audi Warranty Extension Litig.,* 273 F.R.D. 349, 354 (D.Mass.2011). The district court entered judgment approving the settlement and stating that "each and every term and provision of the Agreement for Settlement shall be deemed incorporated into this Final Approval Order and Judgment as if expressly set forth and shall have the full force and effect of an Order of the Court." *Id.* at 356.

11 The district court's math was slightly incorrect; a one-third reduction in hours should have resulted in 15,461 hours, not 15,468 hours; the resulting dollar figure would be $7,730,500.

12 Defendants do not challenge the award of approximately $1.2 million in costs, so we do not address that award.

13 Because this is a diversity suit, and the settlement agreement involved only state-law claims, we have no occasion to address the question of when federal-law principles govern the construction of settlement agreements disposing of federal claims. *Cf. Michaud v. Michaud,* 932 F.2d 77, 80 n. 3 (1st Cir.1991) (applying "federal law to the issue of an attorney's authority to settle a civil action brought under federal law").

14 As made clear in *Stewart Organization, Inc. v. Ricoh Corp.,* 487 U.S. 22, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988), the "direct collision" language does not "mandate that federal law and state law be perfectly

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coextensive and equally applicable to the issue at hand" but rather "expresses the requirement that the federal statute be sufficiently broad to cover the point in dispute." *Id.* at 26 n. 4, 108 S.Ct. 2239.

15 The settlement agreement provides that "Class Counsel fees and expenses shall be paid entirely and exclusively by Defendants and shall not diminish, invade, or reduce, or be derived from, benefits afforded to Settlement Class Members under this Settlement Agreement."

16 We assume that this rule applies here without deciding the question. Given that all of the transferor jurisdictions' choice of law rules would result in application of Massachusetts law, we need not decide the matter here, because there is no conflict between the results of the various transferor jurisdictions' choice of law rules. *See Okmyansky v. Herbalife Int'l of Am., Inc.,* 415 F.3d 154, 158 (1st Cir.2005) ("[W]hen the resolution of a choice-of-law determination would not alter the disposition of a legal question, a reviewing court need not decide which body of law controls.").

17 Two separate cases were transferred from Illinois.

18 *See also Eclipse Mfg. Co. v. U.S. Compliance Co.,* 381 Ill.App.3d 127, 319 Ill.Dec. 586, 886 N.E.2d 349, 357–58 (2007) (applying § 188 to contractual choice of law determination); *Emp'rs Ins. of Wausau v. Ehlco Liquidating Trust,* 309 Ill.App.3d 730, 243 Ill.Dec. 384, 723 N.E.2d 687, 694 (1999) (same).

19 *See also Bushkin Assocs., Inc. v. Raytheon Co.,* 393 Mass. 622, 473 N.E.2d 662, 669 (1985) (applying § 188 to contractual choice of law determination); *Clarendon Nat'l Ins. Co. v. Arbella Mut. Ins. Co.,* 60 Mass.App.Ct. 492, 803 N.E.2d 750, 753 (2004) (same).

20 *See also Gilbert Spruance Co. v. Pa. Manufacturers' Ass'n Ins. Co.,* 134 N.J. 96, 629 A.2d 885, 888 (1993) (applying § 188 to contractual choice of law determination).

21 *See also Gries Sports Enters., Inc. v. Modell,* 15 Ohio St.3d 284, 473 N.E.2d 807, 810 (1984) (applying § 188 to contractual choice of law determination).

22 *See also Gillan v. Gillan,* 236 Pa.Super. 147, 345 A.2d 742, 744 (1975) (applying § 188 to contractual choice of law determination).

23 The settlement agreement states that it was "duly executed" on September 2, 2010, but does not state a location of execution.

24 Because all of the transferor courts would apply Massachusetts law, we do not assess what would occur if fewer than all of the transferor jurisdictions would apply Massachusetts law. No party has briefed this issue and in this case the concern is hypothetical.

25 We also remand the motion of class counsel requesting that they be paid the award of costs without further delay.

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TAB 15

KeyCite Yellow Flag - Negative Treatment
Called into Doubt by In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation, S.D.N.Y., January 18, 2005

829 F.2d 1171
United States Court of Appeals,
District of Columbia Circuit.

In re KOREAN AIR LINES
DISASTER OF SEPTEMBER 1, 1983.
Appeal of Plaintiff's Steering Committee.

No. 85–5982.
|
Argued Jan. 20, 1987.
|
Decided Sept. 25, 1987.

Synopsis

Actions were brought seeking damages sustained when Korean airliner was shot down by Soviets over Sea of Japan. Plaintiffs sought determination that Warsaw Convention's limitation of liability did not apply. Following transfer of the actions for consolidated pretrial proceedings, the United States District Court for the District of Columbia, Aubrey E. Robinson, Jr., Chief Judge, 664 F.Supp. 1463 and 664 F.Supp. 1488, adhered to its own interpretation of Warsaw Convention/Montreal Agreement in all the actions, including those transferred from district courts within Second Circuit, and determined that $75,000 per passenger damage limitation was applicable. On appeal, the Court of Appeals, Ruth Bader Ginsburg, Circuit Judge, held that law of transferor forum on federal question merits close consideration, but does not have stare decisis effect in transferee forum situated in another circuit.

D.H. Ginsburg, Circuit Judge, filed concurring opinion in which Williams, Circuit Judge, joined.

***1172** ****40** Appeal from the United States District Court for the District of Columbia (Misc. No. 83–00345).

Attorneys and Law Firms

Milton G. Sincoff, New York City, with whom Donald W. Madole, Washington, D.C., and Steven R. Pounian, New York City, were on the brief for appellant.

George N. Tompkins, Jr., New York City, for appellee.

Before RUTH B. GINSBURG, WILLIAMS and D.H. GINSBURG, Circuit Judges.

Opinion

Opinion for the Court filed by Circuit Judge RUTH B. GINSBURG.

Concurring opinion filed by Circuit Judge D.H. GINSBURG, in which Circuit Judge WILLIAMS joins.

RUTH BADER GINSBURG, Circuit Judge:

This case arises out of an air disaster and raises turbulent federal questions. On September 1, 1983, Korean Air Lines (KAL) Flight 007, a commercial craft departing from Kennedy Airport in New York and bound for Seoul, South Korea, was destroyed over the Sea of Japan by Soviet Union military aircraft. Wrongful death actions were filed against KAL in several federal district courts; the Judicial Panel on Multidistrict Litigation transferred these actions to the District Court for the District of Columbia for pretrial proceedings pursuant to 28 U.S.C. § 1407 ("[C]ivil actions involving one or more common questions of fact ... pending in different districts ... may be transferred to any district for coordinated or consolidated pretrial proceedings.").

The nub of the controversy relates to the per passenger damage limitation of the Warsaw Convention,[1] raised to $75,000 by an accord among airlines known as the Montreal Agreement.[2] By motion for partial summary judgment, plaintiffs sought a declaration "that [KAL] is liable without fault for compensatory damages without any limitation of $75,000."

Joint Appendix (J.A.) at 26. Plaintiffs grounded this motion on the inadequate type size of the liability limitation notice printed on KAL passenger tickets. The notice appeared in 8 point type; the Montreal Agreement specifies 10 point type. Denying plaintiffs' motion, the district court, on July 25, 1985, held that KAL could avail itself of the $75,000 per passenger limitation. *In re Korean Air Lines Disaster of September 1, 1983,* 664 F.Supp. 1463, 19 Av.L.Rep. (CCH) 17,584 (D.D.C.1985). In so ruling, the district court considered and rejected contrary Second Circuit precedent: *In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980,* 705 F.2d 85 (2d Cir.), *cert. denied,* 464 U.S. 845, 104 S.Ct. 147, 78 L.Ed.2d 138 (1983).

On September 24, 1985, the district court certified for interlocutory appeal under 28 U.S.C. § 1292(b) the question whether KAL "is entitled to avail itself of the limitation of damages provided by the Warsaw Convention and Montreal Agreement despite its defective tickets." We ruled that the requirements of section 1292(b) were met and that "wise exercise of our discretion dictates that the appeal be allowed." D.C.Cir. Order filed April 8, 1986.

On January 30, 1987, after argument of the appeal, we remanded the record for clarification of the scope of the district court's order denying plaintiffs' partial summary judgment motion. Specifically, ***1173 **41** we observed that the cases consolidated in this appeal

> can be grouped into three categories on the basis of the fora in which they were originally filed and to which they are to be remanded at or before the conclusion of pretrial proceedings, unless the actions are earlier terminated: (a) the Southern and Eastern Districts of New York; (b) the Eastern District of Michigan and the District of Massachusetts; and (c) the District of Columbia. The district judge, in his order denying plaintiffs' motion for partial summary judgment, did not expressly consider the contention that, by analogy to the principle set forth in *Van Dusen v. Barrack,* 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964), he was bound by Second Circuit precedent in resolving the claims of plaintiffs in the first category enumerated above.
>
> The extent of a transferee court's authority under 28 U.S.C. § 1407 independently to resolve issues of [federal] law already passed upon by the federal court of appeals for the circuit in which the transferor forum is located is apparently a question of first impression, and our consideration of this issue is hampered by uncertainty as to which plaintiffs were covered by the district court's July 1985 order.

D.C.Cir. Order filed January 30, 1987.

By Memorandum dated May 7, 1987, 664 F.Supp. 1488, the district court held that its July 25, 1985 decision denying plaintiffs' partial summary judgment motion applies to all three categories of cases described in this court's January 30, 1987 remand-for-clarification order. We now affirm the district court's dispositions. On the Warsaw Convention/Montreal Agreement $75,000 per passenger damage limitation issue, we adopt as our opinion the comprehensive July 25, 1985 decision of the district court, reported at 664 F.Supp. 1463. We set out below our reasons for concluding that the district court properly adhered to its own interpretation of the Warsaw Convention/Montreal Agreement in all actions, including those transferred from district courts within the Second Circuit.

The Supreme Court, in *Van Dusen v. Barrack,* 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964), addressed and resolved this question: when a defendant in a diversity action moves for a venue transfer under 28 U.S.C. § 1404(a),[3] which state's law applies post-transfer? The state law that would have applied in the transferor court adheres to the case, the Supreme Court held; in the Court's words, "with respect to state law," the venue change will accomplish "but a change of courtrooms." *Van Dusen,* 376 U.S. at 639, 84 S.Ct. at 821.[4]

The *Van Dusen* interpretation of 28 U.S.C. § 1404(a), as the latter applies in diversity actions, rests on principles advanced in *Erie R.R. v.*

Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and cases in the *Erie* line. *Van Dusen,* 376 U.S. at 637–40, 84 S.Ct. at 819–21; *see particularly Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941) (on issues of state law arising in diversity cases, federal courts must apply choice-of-law rules of states in which they sit). Justice Goldberg explained for the Court in *Van Dusen:*

> [O]ur interpretation [of § 1404(a)] ... is supported by the policy underlying *Erie* ****42** ***1174** [.] ... [W]e should ensure that the "accident" of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed.... What *Erie* and the cases following it have sought was an identity or uniformity between federal and state courts; and the fact that in most instances this could be achieved by directing federal courts to apply the laws of the States "in which they sit" should not obscure that, in applying the same reasoning to § 1404(a), the critical identity to be maintained is between the federal district court which decides the case and the courts of the State in which the action was filed.

Van Dusen, 376 U.S. at 637–39, 84 S.Ct. at 820 (footnotes omitted).

Defendants in *Van Dusen* sought to transfer the case from the Eastern District of Pennsylvania to the District of Massachusetts. (Massachusetts, but not Pennsylvania, limited the damages plaintiffs could recover.) Were the transfer to be made, the Supreme Court ruled, though all further proceedings would take place in the Massachusetts district court, Pennsylvania law, not Massachusetts law, would furnish the governing state prescriptions.

The question before us is whether the *Van Dusen* rule—that the law applicable in the transferor forum attends the transfer—should apply to transferred federal claims. It is a question meriting attention from Higher Authority. Congress, it appears, has not focused on the issue,[5] nor has the Supreme Court addressed it. The Judicial Panel on Multidistrict Litigation assumed, on at least one occasion, that the *Van Dusen* rule would apply to transferred federal claims, *see In re Plumbing Fixtures Litigation,* 342 F.Supp. 756, 758 (J.P.M.D.L.1972),[6] but the Panel, from what we can glean, has given the matter only fleeting consideration.[7] Recognizing that the question is perplexing, particularly in the context of 28 U.S.C. § 1407, a statute authorizing transfers only for pretrial purposes, we are persuaded by thoughtful commentary that "the transferee court [should] be free to decide a federal claim in the manner it views as correct without deferring to the interpretation of the transferor circuit." Marcus, *Conflict Among Circuits and Transfers Within the Federal Judicial System,* 93 YALE L.J. 677, 721 (1984); *see also* Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation,* 135 U.PA.L.REV. 595, 662–706 (1987).

As the district court stressed in response to our remand, the *Erie* policies served by the *Van Dusen* decision do not figure in the calculus when the law to be applied is federal, not state. Given the reality of conflict among the circuits on the proper interpretation of federal law, however, why ***1175** ****43** deny to a plaintiff with a federal claim the "venue privilege" a diversity claimant enjoys? Plaintiffs in the *Van Dusen* situation could effectively pick Pennsylvania rather than Massachusetts law and retain the benefit of that choice after transfer. Why deny a similar right of selection and retention to plaintiffs who would fare better under the Second Circuit's interpretation

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of federal law than under the D.C.Circuit's interpretation?

The point has been cogently made that venue provisions are designed with geographical convenience in mind, and not to "guarantee that the plaintiff will be able to select the law that will govern the case." *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 257 n. 24, 102 S.Ct. 252, 266 n. 24, 70 L.Ed.2d 419 (1981); *see* Marcus, *supra,* 93 YALE L.J. at 696–701. In diversity cases, however, federal courts are governed by *Klaxon* and therefore may not compose federal choice-of-law principles; instead, they must look to state prescriptions in determining which state's law applies. With "no federal choice-of-law principles that favor the application of the law of one state over the law of another," the diversity plaintiff's opening move or "venue privilege" ordinarily fills the gap—it "prevails by default." Marcus, *supra,* 93 YALE L.J. at 700–01. For the adjudication of federal claims, on the other hand, "[t]he federal courts comprise a single system [in which each tribunal endeavors to apply] a single body of law," *H.L. Green Co. v. MacMahon,* 312 F.2d 650, 652 (2d Cir.1962), *cert. denied,* 372 U.S. 928, 83 S.Ct. 876, 9 L.Ed.2d 736 (1963); there is no compelling reason to allow plaintiff to capture the most favorable interpretation of that law simply and solely by virtue of his or her right to choose the place to open the fray.

As summarized in the commentary we find persuasive:

> The *Van Dusen* Court stressed the venue privilege because [under *Klaxon*] there is no federal principle by which to select the state law that should govern diversity cases. Where federal claims are transferred, however, the principle that the transferee federal court is competent to decide federal issues correctly indicates that the transferee's interpretation should apply.
>
> For federal courts, the most significant choice-of-law difference between issues of state law and issues of federal law is that they lack competence to [develop rules of decision for] the former and are presumptively competent to decide the latter.... [T]he federal courts have not only the power but the duty to decide [issues of federal law] correctly. There is no room in the federal system of review for rote acceptance of the decision of a court outside the chain of direct review. If a federal court simply accepts the interpretation of another circuit without [independently] addressing the merits, it is not doing its job.

Marcus, *supra,* 93 YALE L.J. at 679, 702; *see also* Friendly, *The "Law of the Circuit" and All That,* 46 ST. JOHN'S L.REV. 406, 412 (1972) ("I take [*Van Dusen*] to be limited to choices of *state* law.") (emphasis in original).

Application of *Van Dusen* in the matter before us, we emphasize, would not produce uniformity. There would be one interpretation of federal law for the cases initially filed in districts within the Second Circuit, and an opposing interpretation for cases filed elsewhere. Applying divergent interpretations of the governing federal law to plaintiffs, depending solely upon where they initially filed suit, would surely reduce the efficiencies achievable through consolidated preparatory proceedings. Indeed, because there is ultimately a single proper interpretation of federal law, the attempt to ascertain and apply diverse circuit interpretations simultaneously is inherently self-contradictory. Our system contemplates differences between different states' laws; thus a multidistrict judge asked to apply divergent state positions on a point of law would face a coherent, if sometimes difficult, task. But it is logically inconsistent to require one judge to apply simultaneously different and conflicting ***1176** ****44** interpretations of what is supposed to be a unitary federal law. [8]

The district judge in the instant case observed that

> [i]f ... more than one interpretation of federal law exists, the Supreme Court of the United States can finally determine the issue and restore uniformity in the federal system. The

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> uniformity achieved in this [way] is an "informed uniformity" unlike the "blind uniformity" which would result from one court applying the interpretation of another by rote.

May 7, 1987 D.D.C. Memorandum 664 F.Supp. at 1489. We agree. The federal courts spread across the country owe respect to each other's efforts and should strive to avoid conflicts, but each has an obligation to engage independently in reasoned analysis. Binding precedent for all is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit.

We return, finally, to the most anomalous feature of this case. As earlier observed, we deal here not with an "all-purpose" transfer under 28 U.S.C. § 1404(a), but with a transfer under 28 U.S.C. § 1407 "for coordinated or consolidated pretrial proceedings." We have held, in accord with the district court, that the law of a transferor forum on a federal question—here, the law of the Second Circuit—merits close consideration, but does not have stare decisis effect in a transferee forum situated in another circuit. Should the several cases consolidated for pretrial preparation in the instant proceeding eventually return to transferor courts outside this circuit,[9] would our district court's Warsaw Convention/Montreal Agreement ruling, which we have affirmed, have binding force? We believe it should, as "law of the case," for if it did not, transfers under 28 U.S.C. § 1407 could be counterproductive, *i.e.,* capable of generating rather than reducing the duplication and protraction Congress sought to check. *See* Steinman, *supra,* 135 U.PA.L.REV. at 664–67, 700–704. On this issue in the case at hand, however, our circuit is not positioned to speak the last word.

We affirm the order of the district court that KAL is entitled to avail itself of the limitation on damages provided by the Warsaw Convention and raised to $75,000 by the Montreal Agreement; and we note again that the proper interpretation of the Convention and Agreement, as well as the scope of the transferee court's interpretive authority in a case such as this one, are matters in need of definitive resolution for our national court system.

Affirmed.

D.H. GINSBURG, Circuit Judge, concurring in which WILLIAMS, Circuit Judge, joins:

I join in the court's opinion and add some reflections on the "choice of law" problem in the context of a federal claim transferred under 28 U.S.C. § 1407 from courts in various circuits to a court in another circuit. I write separately to emphasize the practical problems inherent in any resolution of this problem under the statute as written, and to surface preliminarily some ameliorative steps open only to Congress.

I. CONGRESSIONAL INTENT IN SECTION 1407(a)

The problem is simply enough stated. The Second Circuit takes one view of the ***1177 **45** relevant federal law, this court takes another, and still other circuits have not addressed the question. Cases filed in district courts in the Second Circuit, in this circuit, and in other circuits were consolidated in the district court here for pretrial proceedings under § 1407. On a motion for summary judgment as to all the cases, which view of the applicable federal law is the district court to apply to the cases filed outside this circuit? The New York plaintiffs in this case contend that, under *Van Dusen v. Barrack,*[1] the transferee district court must apply the Second Circuit's interpretation to the cases filed originally in that venue. The court rejects that argument because the *Erie* policies underlying *Van Dusen* do not extend beyond the state law context of that case.[2] I agree.

Quite apart from whether *Van Dusen* is controlling, there are some circumstances in which a federal court is bound to apply the decisions of another circuit, but they are the rare instances where a

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preclusion doctrine so requires. The doctrines of *res judicata,* collateral estoppel, and law of the case come to mind. The New York plaintiffs do not, and cannot, however, rely upon any of these doctrines to support application of *Polish Airlines* to their transferred cases.

Consequently, the New York plaintiffs' suggestion that transfer under section 1407(a) presents the type of exceptional circumstance that justifies imposing upon a federal court the duty to accept as binding another circuit's interpretation of federal law would constitute a novel departure from the norm of independent judgment. ***1178** ****46** If Congress had intended such a departure, therefore, we should expect to find language in section 1407(a) that mandates, or at least suggests, it. Obviously, Congress could have directed transferee courts to apply the case law of the transferor court. Less directly, Congress could have suggested this practice by transforming the transferee judge into a temporary judge of each transferor court for the purposes of deciding the transferred cases. [3]

We find no such language in section 1407(a), however. [4] Instead, the transfer scheme contemplates that a transferee court will adjudicate transferred cases no differently than cases originally filed before it. This is apparent throughout the scheme, from the point of transfer to the final disposition of the case. Rather than confine the transferee judge merely to presiding over the pretrial phase of cases that may be resolved finally in the transferor courts, section 1407(a) transfers jurisdiction over whole cases to the transferee court; upon transfer, the transferor courts retain no jurisdiction whatsoever. [5] Indeed, Congress contemplated that transferred cases might never return to the transferor courts, but instead might be settled or resolved by summary judgment in the transferee court, [6] or else transferred under section 1404(a) to that same transferee court for joint trial. [7] In practice, the vast majority of transferred cases are so resolved, and do not return to the transferor courts. [8] Finally, during the period of the 1407(a) transfer, any appeals—interlocutory or after summary judgment—go to the court of appeals for the transferee court, not to the courts of appeals for the transferor circuits. ****47** [9] ***1179** I can see no indication, from the outline of this scheme, that Congress intended for transferee courts to apply to each transferred case the case law of the transferor court, nor any reason why it would so intend.

Before concluding, based on the lack of any evidence to the contrary, that Congress did not intend transferee federal courts to depart from the norm of independent judgment on matters of federal law, one final inquiry is necessary. For we should still hesitate to adhere to that norm if doing so would, for some other reason, frustrate the purpose of section 1407(a) "to promote the just and efficient conduct" of multidistrict actions, in part by "eliminat[ing] the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts." [10]

In order to discern whether the norm of independent judgment would have this result, we may assess its operation in the instant case. To recapitulate the procedural facts a bit, cases from district courts in the First, Second, and Sixth Circuits were transferred to the District Court for the District of Columbia for pretrial proceedings to be conducted jointly with cases filed here. Plaintiffs then filed a motion for summary judgment on the issue of damages, arguing that the Warsaw Convention's maximum no-fault liability of $75,000 per passenger was not a bar to full compensatory damages in these actions. When the motion was filed, only the Second Circuit had spoken on the pertinent question, holding in *Polish Airlines* [11] that an airline that does not give passengers tickets with 10–point type loses the protection of the damage ceiling. The other circuits, in particular the District of Columbia, First, and Sixth Circuits, had not yet addressed the issue. [12] Analyzing the Convention for himself, Chief Judge Robinson concluded that *Polish Airlines* was wrongly decided: noncompliance with the "10–point type" rule does not remove the ceiling.

Adhering to the norm of independent judgment, Chief Judge Robinson also determined that his ruling should apply to all of the cases before him,

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not only to those originally filed here. At least in the first instance, such uniform application of his ruling furthers considerably the efficiency and consistency goals of section 1407(a). All the cases will be governed by one rule as to damages, and they will all proceed in a like direction, rather than being bifurcated into two groups of cases with diverging litigation paths.

The only problem that does seem potentially to arise from this approach involves the eventual appellate review of Chief Judge Robinson's ruling on the Convention. Assuming for the purposes of illustration that interlocutory appeal to this court had not been granted and, furthermore, that the cases would not subsequently terminate for one or another reason in this circuit, then the transferred cases would return to the respective transferor courts for trial. The several courts of appeals, either on interlocutory appeal or on appeal of the final judgment, would in all probability review the course of pretrial proceedings, including Chief Judge Robinson's potentially ***1180 **48** outcome-determinative ruling on the Convention. Reversal would be most likely to occur, of course, in the Second Circuit, where his ruling would conflict directly with *Polish Airlines.*

Since this court would still review the cases filed in the District of Columbia, and as confirmed by the court today we do not agree with the *Polish Airlines* decision, the results on appeal would lead to two (or depending upon the views of the First and Sixth Circuits, perhaps more) different holdings on a determinative issue of damages.[13] A series of inconsistent appellate judgments is not a desirable outcome, however, particularly since the result in some cases might be to require renewed pretrial or trial proceedings. This whole course of case development, starting with divergent paths of appeal and ending with either conflicting or duplicative results, would clearly frustrate the primary goals of section 1407 (a) "to promote the just and efficient conduct" of multi-district actions.

Having a transferee court apply the norm of independent judgment in ruling on transferred cases, therefore, does pose some risk of undermining on appeal the interests served by section 1407(a). The question is therefore whether this potential risk is great enough to frustrate Congress' remedial intent in enacting section 1407(a), and thereby to persuade us that transferee courts must abandon the norm of independent judgment in deciding transferred cases. In this regard, I believe that, although there is some risk of cases unraveling upon review by transferor circuits, it is not significant. First, relatively few cases ever return to the transferor courts.[14] Second, most transferee court rulings will not be outcome-determinative, but instead will involve routine matters, such as discovery orders, that will not provide grounds for a transferor circuit court to reverse a pretrial ruling by the transferee district court.

Third, as to those few outcome-determinative rulings of the transferee district court, there exists the possibility of interlocutory appeal to the transferee circuit, pursuant to 28 U.S.C. 1292(b), as indeed occurred in this case. If the transferee circuit reviews such a ruling, it of course would also exercise independent judgment and apply its own precedents rather than those of the transferor circuits. By reviewing the ruling, the transferee circuit probably will have insured that, if the cases are retransfered to the transferor courts, they will not unravel on later appeal. That is because, in contrast to the rulings of the district court under review, the interlocutory decisions of a coordinate court of appeals are likely to be accepted as binding, under the doctrine of law of the case, in the courts of appeals reviewing the final decision of the district court.[15] I therefore believe that if (1) transferee circuits are ***1181 **49** receptive to interlocutory appeals involving outcome-determinative rulings by a transferee district court—again, as occurred in this case as well as in *Polish Airlines*[16] ; and if (2) transferor circuits are receptive, on appeal after retransfer, to the law of the case as it was decided in the transferee circuit court, then even a continuing disagreement between the transferee and transferor circuits on the certified issue need not cause particular cases in a multi-district litigation to come unglued.

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As a result, any harm to the interests Congress meant to further in section 1407(a) will be limited to those outcome-determinative rulings of a transferee district court that are not the subject of an interlocutory appeal in the transferee circuit, and, assuming that the cases are transferred back to the transferor courts, result in reversals by one or more transferor circuit courts.[17] Whether this harm, which seems likely to be insignificant, is nevertheless great enough that transferee district courts must abandon the norm of independent judgment depends upon the probable effects of the alternative rule, under which the transferee district court would apply what it believes would be the interpretations of the respective transferor courts.[18] Again, the facts of this case are illustrative.

***1182** ****50** Under that alternative, Chief Judge Robinson, having determined that KAL's issuance of 8–point type tickets did not remove the limitation on damages provided under the Convention, would then have to determine the scope of his ruling. Certainly it would govern the cases filed in this district originally; no one disputes that proposition. Under the New York plaintiffs' argument, however, the ruling should not govern their cases, because *Polish Airlines* clearly dictates the contrary interpretation of the Convention.

When applied only to the District of Columbia and New York cases, adherence to the case law of the transferor circuit would be a fairly easy procedure for the transferee district court. It is almost a certainty, however, that the bifurcated ruling it produces would place the District of Columbia and New York cases on increasingly divergent courses. The District of Columbia plaintiffs, in conducting discovery, will have to pursue evidence of fault on the part of KAL, whereas the New York plaintiffs would be able to recover without such a showing. The entire course of discovery, and thus the motions that come before Chief Judge Robinson, would differ entirely between what would have become, in effect, two separate groups of consolidated cases. These differences would be further magnified by the vastly different incentives for settlement facing the two groups of plaintiffs. The District of Columbia plaintiffs, having to prove fault, will presumably be more amenable to settlement than would be the New York plaintiffs. All in all, therefore, it is unlikely that the bifurcated ruling would preserve, to any significant extent, either the efficiency or the consistency that section 1407(a) was intended to promote.

Under the New York plaintiffs' rule, therefore, the threat that the Second Circuit would reverse Chief Judge Robinson and thereby unravel the New York cases is averted, in effect, by preemptively unraveling them in the transferee court. This seems to be a high price to pay—a virtual abandonment of the efficiency and consistency goals of section 1407(a)—to protect against a threat, i.e. unraveling in the transferor circuit courts, that could instead be avoided, at no cost to consistency and at a much lower cost in efficiency, through interlocutory appeal to the transferee circuit court and subsequent application by the transferor circuit of the law of the case doctrine.

The price that must be paid in abandoning the norm of independent judgment, however, looms even larger when one realizes that the New York plaintiffs have presented us with the deceptively easy alternative by applying *Polish Airlines* to the New York cases, without suggesting to us how the district judge should have ruled with respect to the cases from districts in the First and Sixth Circuits, which have not decided this issue.[19] In attempting to rule as would a district court in those circuits, he could have simply applied his own ruling to those cases, happy to believe that, if called upon, those circuits would see things his way. Or, taking to heart the New York plaintiffs' contention that, under *Van Dusen,* transfer should result in merely "a change of courtrooms,"[20] he could have seriously attempted to divine how the First and Sixth Circuits might interpret the Convention if called upon to do so.

This enterprise is far more problematic than *Erie*' s familiar requirement that a federal court assume the perspective of the highest court in each transferor state, and anticipate how each one of those courts ***1183** ****51** would decide an issue of state law. As to some *Erie* issues, the transferor states will have significantly different laws; as to others, such as those addressed by the sundry and not entirely

"uniform" codes adopted by the several states, there may be only subtle differences, difficult to discern, among them. Regardless of the difficulty, however, the duty of the transferee court under *Van Dusen* and *Erie* is simply to arrive at what it, in good faith, believes to be an accurate statement of each state's law, as applied to the facts before it. When this results in the transferee court rendering different judgments in cases transferred from different fora, therefore, it is only because the states in question have exercised their undoubted "right to pursue local policies diverging from those of [their] neighbors." [21]

When we turn to questions involving federal law, the transferee judge's task becomes much more difficult, because here the court deals with a single federal law that can ultimately have only one proper interpretation. For example, in the instant case, a violation of the "10–point type" rule cannot both impose *and* not impose unlimited liability under the Warsaw Convention; either the Second Circuit or we have interpreted it erroneously. [22] As a result, any attempt by Chief Judge Robinson to predict how the First and Sixth Circuits would interpret the Warsaw Convention on this precise point would necessitate casuistical musings concerning whether another circuit's case law might be read to compel, or even perhaps just to suggest, an interpretation in conflict with his. [23] Such intellectual practices fall within the domain of the sophist, not that of the judge.

The practice suggested by the New York plaintiffs, therefore, differs qualitatively from accepted instances in which a federal court must apply the ruling of another court. Under the preclusion doctrines of res judicata, collateral estoppel, and the law of the case, a court applies a known ruling of another court—usually to the very facts from which it arose. Under the New York plaintiffs' suggestion, however, the transferee district court will often have to engage in pure guesswork in order to apply another circuit's precedents, if any there be, to the unique facts before it. In this respect, they propose a practice that is unprecedented in the context of federal courts interpreting federal law. Furthermore, when the transferee district court will not be able to rely on a decision on point, there is no assurance, try as it might, that it will always be able correctly to predict how an undecided transferor circuit will eventually decide the kind of close issue over which circuits tend to split. As a result, even though abandonment of the norm of independent judgment appears at first glance to provide a way to prevent cases from unraveling after returning to the transferor courts, the effectiveness of that course might be quite limited, in this case perhaps only to the New York cases.

I have undertaken to assess the implications of applying alternative interpretive models—the exercise of independent judgment versus the application of transferor circuit case law—in order to determine whether, although congressional silence would generally counsel us against doing so, we should nevertheless break with practice by having transferee courts apply transferor circuit case law. Such a break, as I indicated, would be justified only if the ***1184 **52** exercise of independent judgment would frustrate Congress' remedial purposes in enacting section 1407(a). The analysis of these alternatives, however, tends to confirm that we should adhere to existing practice. The purposes of section 1407(a) would more likely be frustrated, not when a transferee district court exercises independent judgment, but rather when it attempts to anticipate the various transferor courts. [24]

Section 1407(a) was enacted "to eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts." [25] Under the New York plaintiffs' rule, however, transfer under section 1407(a) will simply yield "conflicting contemporaneous pretrial rulings" by one judge rather than by many. The transferee judge, on the most insignificant as well as outcome-determinative rulings, will have to wonder whether he or she would rule differently if located instead in one of the transferor circuits. No doubt, a considerable amount of the judge's time will be consumed attempting to determine whether litigants accurately describe differences in other circuits' interpretations of federal law. And, if the judge is persuaded that some difference does or

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may exist, it will be no small task to explain the inconsistent and contradictory rulings.

The conduct of multidistrict litigation, which is invariably time consuming as it is, will grind to a standstill while transferee judges read separate briefs, each based on the case law of a transferor circuit, on a single issue of federal law. Much of the advantage that transfer was intended to produce, and particularly the desiderata of furthering efficiency and preventing inconsistent rulings, will be lost by requiring transferee judges to wear a number of judicial hats. It is the prospect of this kind of quagmire that is likely to yield the result feared by the Court in *Van Dusen*—that courts would be "reluctant to grant transfers" and thereby "frustrate the remedial purposes of [section 1407]."[26] It may well be preferable to have multidistrict litigation remain dispersed in the courts of origin than to have transferee judges burdened with the hopelessly complex task of sitting as several federal judges at once.[27] Consequently, even though having transferee judges exercise independent judgment may in isolated instances result in an unraveling of a transferred case, I believe that this approach, although not a perfect solution, is by far the less problematic and the more consistent with the intent of Congress in enacting section 1407.

II. BEYOND INTERPRETATION

Under section 1407(a), cases involving federal law are transferred from one circuit to another, and are conceivably subject to appellate review in several circuits, at various stages in the litigation. Given these facts, any resolution of the problem of whose case law will be applied entails, under the statute as currently written, some cost in efficiency and consistency; losses are truly unavoidable. They may be minimized, however, and that is why I reject the New York plaintiffs' suggestion, which in addition to exacting a much higher cost also requires federal courts, in the absence of any congressional mandate, to depart completely from the accepted norm of independent circuit interpretation.

In order for cases to be transferred from one circuit to another with a minimum loss of efficiency and consistency, the only solution is for Congress to amend section 1407(a), as well as section 1404(a),[28] to provide ***1185 **53** that rulings by a court in one circuit will not be reviewed under the case law of another circuit. In this respect, the options seem to be: (1) adopt the New York plaintiffs' position, and have the law of the transferor court govern a transferred case throughout its disposition; (2) provide that a ruling in a transferred case is to be reviewed, by whatever circuit court, under the case law of the circuit in which the ruling was made; and (3) make transfer comprehensive, extending through trial and appeal in the transferee circuit (applying its own circuit precedents, of course). For the reasons I have given, the first option involves considerable costs. Because the transferee court will have to treat cases from different circuits differently, this alternative virtually guarantees the sacrifice of the efficiency and consistency gains that were supposed to result from conducting consolidated pretrial proceedings. Furthermore, it places the transferee district court in the almost impossible position of determining whether courts of appeals in other circuits would disagree in interpreting federal law.

The second option appears to be far more advantageous. Under this scheme, the transferee district court applies its circuit case law—which it knows best—and its own best judgment to all the transferred cases. By treating all the cases similarly, the statutory goals of efficiency and consistency would be immediately furthered. In addition, the risk that these goals would be undermined by a later unraveling of the cases in the transferor courts is substantially lessened. In reviewing a transferee district court's ruling, the transferor circuit courts would all apply the transferee circuit's case law, and in conducting this review they would be aided by the opinion of the transferee district court.[29] (The transferor circuit courts would thus be placed in a far more advantageous position than is the transferee district court under the New York plaintiffs' suggestion, which would often have to engage in pure guesswork, entirely without guidance about how a court in another circuit would rule.) Furthermore, transferor circuit courts

are far less likely to reach conflicting conclusions if they all interpret transferee circuit case law than if they each exercise independent judgment. Consequently, unraveling is not likely to occur under this rule.

The second option is also more attractive because it involves a lesser departure from the norm of independent judgment. Whereas a transferee district judge must make frequent rulings, few cases ever return to the transferor courts and—unlike the first option—the second option would not create any greater incentive for a litigant to persist until the case is remanded. Moreover, in only a few of those that do return will the transferor circuit court have to review a ruling of the transferee district judge on an issue of federal law that will create disagreement among the circuits and thereby require the transferor circuit court, in applying transferee circuit case law, to issue a decision that does not reflect its own view. [30]

The third option entails all of the benefits of efficiency and consistency and none of the drawbacks of the second option. Insofar as transfer is burdensome for ***1186 **54** plaintiffs, however, it would tend to magnify their hardship, especially if they are to testify at trial. This detriment may be more or less offset by the reciprocal advantage accruing to a defendant that does not have to defend multiple trials at different places. A risk-averse defendant, on the other hand, might value the diversification of risk attendant to multiple trials, rather than having everything depend—even more than it already does as a result of the relaxation of the mutuality requirement for plaintiffs' use of estoppel—upon the fortuities of a single proceeding. As between the second and third options, therefore, considerable study would be needed in order to make an informed judgment, one that balances the goals of judicial economy and consistency against the distribution of costs imposed on plaintiffs and defendants in the course of realizing those goals.

III. CONCLUSION

As a court, however, we must address the statute as it is, not as it might be. Nothing in the Supreme Court's opinion in *Van Dusen* nor in the language of section 1407(a) requires a federal court to engage in the unprecedented practice of interpreting federal law through the analytical prism of another circuit's case law. The New York plaintiffs have not shown, nor can I imagine, how the purposes underlying section 1407(a) would be furthered rather than frustrated by that approach. Under these circumstances, I can see no reason to condemn transferee district courts to perform often futile exercises in mental gymnastics.

Accordingly, I reject the New York plaintiffs' argument and join the court's opinion holding that our interpretation of the Warsaw Convention must be applied to all the cases before us.

All Citations

829 F.2d 1171, 265 U.S.App.D.C. 39, 56 USLW 2195

Footnotes

1 Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 1502 note (1982).

2 Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, 31 FED.REG. 7302 (1966) (approved by CAB Order E–23680, May 13, 1966).

3 Under this change of venue prescription, "[f]or 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."

4 The *Van Dusen* Court expressly did not decide whether the law of the state in which the transferor court sits would apply if plaintiff rather than defendant sought the transfer, or if a state court in the transferor court's state would dismiss the case on forum non conveniens grounds. *Van Dusen,* 376 U.S. at 640, 84 S.Ct. at 821. Wright, Miller & Cooper indicate that several courts have applied the law of the transferor court even when

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plaintiff, rather than defendant, moves for a transfer. 15 C. WRIGHT, A. MILLER & E. COOPER, *Federal Practice and Procedure* § 3846, at 367 (2d ed. 1986). A strong argument, however, favors application of the law of the transferee state in such instances. *See* ALI, *Study of Division of Jurisdiction Between State and Federal Courts,* § 1306(c) & commentary (1969).

5 In Senate hearings on the bill that eventually became the multidistrict litigation statute, two witnesses stated that *Van Dusen* would apply to choice-of-law issues under the measure. The experience of those witnesses related to federal claims for antitrust law violations and it may be that they intended their statements to cover such claims. *See Multidistrict Litigation: Hearings on S. 3815 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,* 89th Cong., 2d Sess. 13, 25 (1966) (statements of Dean Phil Neal and Judge William Becker). The Supreme Court, however, in explicit and repeated qualifications, confined its *Van Dusen* opinion to questions of state law. *See* 376 U.S. at 625–26, 630, 633, 635, 639, 84 S.Ct. at 813–14, 816, 817, 818, 820. The snippet of legislative history just described, therefore, is at best equivocal; the two witnesses perhaps "mean[t] only that *Van Dusen* would apply to state law issues in cases transferred under the new statute." Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System,* 93 YALE L.J. 677, 710–11 (1984).

6 In *Plumbing Fixtures,* a plaintiff resisted § 1407 transfer of his price-fixing claim on the ground that under transferee forum precedent, his standing to sue would be rejected. The Panel stated, with no elaboration: "It is clear [under *Van Dusen*] that the substantive law of the transferor forum will apply after transfer." 342 F.Supp. at 758.

7 Several lower courts have also declared, without exposition, that *Van Dusen*'s reasoning would apply to transferred federal claim cases. *See* Marcus, *supra* note 5, 93 YALE L.J. at 692–93 & n. 100 (citing cases). Other lower courts have stated that *Van Dusen* does not apply to transferred federal claims. *Id.* at 693 n. 102 (citing cases).

8 Even if it appears plausible to legal minds to mete out in a consolidated case one version of federal law to plaintiffs whose counsel filed in the Southern or Eastern District of New York, another to plaintiffs whose counsel filed in the District Court for the District of Columbia, it would be difficult to explain the rationality of such divergencies to the lay persons served by the federal judicial system.

9 In practice, it has been reported, most cases transferred under § 1407 are not remanded. *See* 1986 Ann.Rep.Director Admin.Off.U.S.Courts 128 (as of June 30, 1986, 15,026 actions had been subject to § 1407 proceedings; of those, 10,903 had been terminated by the transferee court); Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation,* 135 U.PA.L.REV. 595, 667 & n. 247, 700 & nn. 410, 411 (1987); Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts, and Transferee Courts,* 78 F.R.D. 575, 583 (1978).

1 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964).

2 Opinion of the Court, *supra,* at 1174. Plaintiffs cite several authorities for the proposition that *Van Dusen* requires a transferee court under section 1407 to apply the case law of the transferor circuit to a transferred case. Plaintiffs' Brief at 7. *See Berry Petroleum v. Adams & Peck,* 518 F.2d 402, 408 n. 7 (2d Cir.1975) ("Since this case was brought in a district court in the Fifth Circuit, the substantive law of that circuit is the law we must consider here."); *In re National Student Marketing Litigation,* 517 F.Supp. 1345, 1346 n. 3 (D.D.C.1981); *In re Haven Industries,* 462 F.Supp. 172, 179 (S.D.N.Y.1978); *Stirling v. Chemical Bank,* 382 F.Supp. 1146, 1150 n. 5 (S.D.N.Y.1974), *aff'd* 516 F.2d 1396 (2d Cir.1975); *In re Four Seasons Securities Laws Litigation,* 370 F.Supp. 219, 228 (W.D.Okl.1974); *In re Plumbing Fixtures Litigation,* 342 F.Supp. 756, 758 (Jud.Pan.Mult.Lit.1972); *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.,* 309 F.Supp. 1053, 1055 (E.D.Pa.1969).

The cursory "analysis" employed in the cases amounts to the following. In *Philadelphia Housing Authority,* the parties did not dispute the proposition, and the court cited *Van Dusen* as authority. The issue was disputed in *Plumbing Fixtures,* but the court relied upon *Van Dusen* and *Philadelphia Housing Authority* without analysis. *National Student Marketing, Four Seasons,* and *Stirling v. Chemical Bank* merely bootstrapped on *Plumbing Fixtures,* while *Haven Industries* cited *Plumbing Fixtures* as well as the Second Circuit's decision in *Berry Petroleum* (the only court of appeals decision favorable to the New York plaintiffs) which itself cited both *Plumbing Fixtures* and *Van Dusen* without discussion. That these cases fail to acknowledge the differences between the application of state and federal law was also pointed out *In re Pittsburgh & L.E.R. Co. Securities & Antitrust Litigation,* 543 F.2d 1058, 1065 n. 19 (3rd Cir.1976),

which particularly undermines the value of *Philadelphia Housing Authority* as precedent on this point. *Berry Petroleum* is also questionable because it fails to address two prior decisions of the Second Circuit that are in direct conflict with it. *See H.L. Green Co. v. MacMahon,* 312 F.2d 650 (1962), *cert. denied,* 372 U.S. 928, 83 S.Ct. 876, 9 L.Ed.2d 736 (1963); *Ackert v. Bryan,* 299 F.2d 65, 69–70 (1962); *see also Clayton v. Warlick,* 232 F.2d 699, 706 (4th Cir.1956); *Scheinbart v. Certain-Teed Products Corp.,* 367 F.Supp. 707 (S.D.N.Y.1973).

Two other cited cases, *In re Air Crash Disaster at Boston, Massachusetts on July 31, 1973,* 399 F.Supp. 1106, 1108 (D.Mass.1975); *In re Air Crash Disaster Near Hanover, New Hampshire,* 314 F.Supp. 62, 63 (Jud.Pan.Mult.Lit.1970), are inapposite here; like *Van Dusen,* they involved the issue of which *state* law to apply. *See also In re Nucorp Energy Securities Litigation,* 772 F.2d 1486, 1491–92 (9th Cir.1985); *In re Eastern Airlines, Inc., Engine Failure, Miami International Airport on May 5, 1983,* 629 F.Supp. 307, 315–16 (S.D.Fla.1986). Judge Weigel cited the federal and state law cases together as supporting the proposition that "the transferee court must apply the substantive law of the transferor forum." Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts,* 78 F.R.D. 575, 584 (1978). *See also* Manual for Complex Litigation, Second § 31.122 at 254 n. 25 (1985) ("The transferee judge is bound ... by the law that would apply in the transferor court, even if the case is later transferred to the transferee court under 28 U.S.C. § 1404").

3 Congress took this type of approach in Section 1407(b) in apparent recognition that transferee judges, because they often preside over cases from far-flung transferor courts, would of necessity have to perform in unfamiliar roles. In section 1407(b), Congress authorized transferee judges to order pretrial depositions outside of their normal jurisdiction. As we determined *In re Corrugated Container Antitrust Litigation,* 662 F.2d 875, 880–881 (D.C.Cir.1981), however, it did so by making the transferee judge, for that purpose, a "temporary judge" of the district court for the district in which the deposition is taken. Congress seemingly could have drafted section 1407(a) also to transform the transferee judge into a judge of each transferor court for purposes of deciding the cases transferred from that court. (Such an approach would still preserve the efficiencies of requiring only one federal judge to become versed in the facts of a controversy.) If Congress also provided for transferor circuit review of such cases, then we might conclude that Congress' intent under such a version of section 1407(a) was for the case law of the transferor court to govern the transferred case.

4 Section 1407(a) was enacted in 1968, and its legislative history indicates that *Van Dusen,* decided four years earlier, would apply in the pretrial context. *See* Opinion for the Court, *supra,* at n. 5. There is no indication, however, that Congress believed that *Van Dusen* extended beyond its own context of federal courts applying state law.

5 *See Glasstech, Inc. v. AB Kyro OY,* 769 F.2d 1574 (Fed.Cir.1985); *Astarte Shipping v. Allied Steel & Export Service,* 767 F.2d 86, 87 (5th Cir.1985); *In re Upjohn Co. Antibiotic Cleocin Products Liability Litigation,* 664 F.2d 114, 118 (6th Cir.1981); *General Elec. Co. v. Byrne,* 611 F.2d 670, 673 (7th Cir.1979); *In re FMC Corp. Patent Litigation,* 422 F.Supp. 1163, 1165 (Jud.Pa.Mult.Lit.1976). *Cf. Starnes v. McGuire,* 512 F.2d 918, 924 (D.C.Cir.1974) (en banc) (transfer under section 1404(a)).

6 *See* Weigel, *supra* note 2, 78 F.R.D. at 582–83; *Pfizer Inc. v. International Rectifier Corp.,* 538 F.2d 180 (8th Cir.), *cert. denied,* 429 U.S. 1040, 97 S.Ct. 738, 50 L.Ed.2d 751 (1977); *Humphreys v. Tann,* 487 F.2d 666, 668 (6th Cir.1973), *cert. denied,* 416 U.S. 956, 94 S.Ct. 1970, 40 L.Ed.2d 307 (1974); *In re Western Liquid Asphalt Cases,* 487 F.2d 191 (9th Cir.1973), *cert. denied sub nom. Standard Oil Co. v. Alaska,* 415 U.S. 919, 94 S.Ct. 1419, 39 L.Ed.2d 474 (1974); *Reidinger v. Trans World Airlines, Inc.,* 463 F.2d 1017, 1018 n. 2 (6th Cir.1972).

7 *See, e.g., In re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975,* 479 F.Supp. 1118, 1121–22 (E.D.N.Y.1978), and cases cited; *In re Yarn Processing Patent Validity Litigation,* 472 F.Supp. 174 (S.D.Fla.1979); *In re Antibiotic Actions,* 333 F.Supp. 299 (S.D.N.Y.1971).

8 *See* Weigel, *supra* note 2, 78 F.R.D. at 583, which reports that less than 5 percent of transferred cases return to the transferor courts. More recent statistics indicate that the number may now approximate 25 percent. *See* 1986 Ann.Rep.Director Admin.Off.U.S.Courts 128; Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation,* 135 U.Pa.L.Rev. 595, 700 (1987).

9 *See Corrugated Container,* 662 F.2d at 88; *Glasstech, Inc. v. AB Kyro OY,* 769 F.2d at 1576–78; *Astarte Shipping v. Allied Steel & Export Service,* 767 F.2d at 880. In a number of other decisions, *see, e.g., Gulf Oil Co. v. Copp Paving Co.,* 419 U.S. 186, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974), as well as the cases cited

supra note 6, the authority of the transferee circuit to review a transferee district court's order was assumed *sub silentio.*

10 *In re Plumbing Fixtures Cases,* 298 F.Supp. 484, 491–92 (Jud.Pan.Mult.Lit.1968).

11 *In re Air Crash Disaster at Warsaw Poland,* 705 F.2d 85 (2d Cir.), *cert. denied sub nom. Polskie Linie Lotnicze v. Robles,* 464 U.S. 845, 104 S.Ct. 147, 78 L.Ed.2d 138, *reh. denied,* 464 U.S. 978, 104 S.Ct. 416, 78 L.Ed.2d 353 (1983), *subsequent proceedings,* 748 F.2d 94 (2d Cir.1984), on appeal after remand, *Harris v. Polskie Linie Lotnicze,* 820 F.2d 1000 (9th Cir.1987).

12 Subsequent to the district court's denial of summary judgment in this case, the Fifth Circuit adopted the *Polish Airlines* rule. *See In re Air Crash Near New Orleans, Louisiana,* 789 F.2d 1092, 1098, *vacated,* 795 F.2d 381 (1986), *aff'd in relevant part,* 821 F.2d 1147 (1987) (*en banc*). As the district court's opinion in this case was not then published, however, the Fifth Circuit discussed only the Second Circuit's decision.

13 In other situations, the disputed issue may involve liability.

14 *See supra* note 8. Of course, fewer cases would be settled and more would return to their transferor courts if the other circuits show themselves ready to reverse transferee courts' pretrial rulings, thus inviting such encore appearances.

15 No decision of this court has directly resolved the question of how courts should apply the law of the case doctrine after a case is transferred back to a transferor court. *See Int'l Union, UAW v. Donovan,* 756 F.2d 162, 165 n. 16 (D.C.Cir.1985); *Laffey v. Northwest Airlines, Inc.,* 740 F.2d 1071, 1082–83 (D.C.Cir.1984), *cert. denied,* 469 U.S. 1181, 105 S.Ct. 939, 83 L.Ed.2d 951 (1985); *McCandless v. Beech Aircraft Corp.,* 697 F.2d 1156 (D.C.Cir.1983). Our precedents do suggest, however, that the transferor circuit should not disturb the transferee circuit ruling. In *Laffey,* we held that the law of the case doctrine precludes—absent clear error or manifest injustice—our reviewing, on appeal from a final judgment, a previous ruling of this court rendered on interlocutory appeal. The next question is whether the fact of transfer, and the resulting lack of identity of the two appellate courts, would alter our conclusion that an interlocutory appellate ruling is law of the case for the purpose of a subsequent appeal. *Donovan* would seem to reject this possibility by holding that, in the context of a transfer for lack of jurisdiction, the transferee court should not reexamine the ruling of a transferor court of *coordinate* jurisdiction absent exceptional circumstances. In fact, this principle has been stated by other circuits. *See Kori Corp. v. Wilco Marsh Buggies & Draglines, Inc.,* 761 F.2d 649, 657 (Fed.Cir.), *cert. denied,* 474 U.S. 902, 106 S.Ct. 230, 88 L.Ed.2d 229 (1985); *Central Soya Co., Inc. v. Geo. A. Hormel & Co.,* 723 F.2d 1573, 1580 (Fed.Cir.1983); *Hayman Cash Register Co. v. Sarokin,* 669 F.2d 162, 169 (3rd Cir.1982); *Skil Corp. v. Millers Falls Co.,* 541 F.2d 554, 558 (6th Cir.), *cert. denied,* 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed.2d 631 (1976). *See also Sentner v. Amtrak,* 540 F.Supp. 557, 558–59 n. 3 (D.N.J.1982); Steinman, *supra note* 8, 135 U.Pa.L.Rev. at 702–03 & n. 417; Weigel, *supra* note 5, 78 F.R.D. at 577.

While a transferor court of appeals might disagree with the transferee circuit's reading of the law, there is good reason in this context to accept a reasoned opinion as presenting something less than the clear error or exceptional circumstance that warrant departing from the law of the case doctrine. Chief Judge Robinson well put the case for transferor courts giving preclusive effect to rulings of a transferee court: "if transferor courts were free to readjudicate issues determined by transferee courts, transfers pursuant to 28 U.S.C. § 1407 could become meaningless exercises perpetuating the very duplication they were designed to eliminate." *In re Korean Air Lines Disaster of September 1, 1983,* 664 F.Supp. at 1489.

See also In re Multi-Piece Rim Products Liability Litigation, 653 F.2d 671, 678 (D.C.Cir.1981) ("Proper coordination of complex litigation may be frustrated if other courts do not follow the lead of the transferee court."). *Multi-Piece Rim Products* did not directly address the situation discussed in the text. Instead, it involved whether a pre-transfer order of a transferor district court had preclusive effect, as law of the case, on a transferee district court. *Cf. Blaski v. Hoffman,* 260 F.2d 317, 322 (7th Cir.1958), *aff'd,* 363 U.S. 335, 80 S.Ct. 1084, 4 L.Ed.2d 1254 (1960) (the transferee Seventh Circuit refused to abide by the "erroneous" jurisdictional ruling of the transferor Fifth Circuit; the Supreme Court adopted the Seventh Circuit's view of the merits; although the law of the case issue was not raised to the Court, in *dictum* it suggested that, because the ruling involved the Seventh Circuit's jurisdiction, it would not be bound by the Fifth Circuit's ruling on that point, 363 U.S. at 340 & n. 9, 80 S.Ct. at 1088 & n. 9); *In re Upjohn Co. Antibiotic Cleocin Products Liability Litigation,* 664 F.2d 114, at 118–20 (6th Cir.1981); *In re Long Distance Telecommunication Litigation,* 612 F.Supp. 892, 900–03 (E.D.Mich.1985).

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16 *Polish Airlines,* 705 F.2d at 86 n. 2 (a second interlocutory appeal followed—*see* 748 F.2d at 94–95). *See Gulf Oil Corp. v. Copp Paving Co.,* 419 U.S. at 192, 95 S.Ct. at 397; *In re Western Liquid Asphalt Cases,* 487 F.2d at 192–93; *In re Air Disaster at John F. Kennedy International Airport,* 479 F.Supp. at 1124–29, and cases there cited.

17 This harm would be further minimized if transferor circuit courts required, as a condition of reviewing a ruling by the transferee district court, that the appellant at least have sought interlocutory appellate review of that ruling while in the transferee circuit. This rule is comparable to that under which an appellate court will decline to reach an issue not raised before the trial court, *see District of Columbia v. Air Florida, Inc.,* 750 F.2d 1077, 1084–85 (D.C.Cir.1984), and the institutional interests served are similar. In each instance, the rule requires the litigant to raise an issue at a particular stage in the litigation in order to prevent the litigant from, in effect, confronting the court on appeal with an issue that has not been sorted out by a court of first instance, thereby creating " '[e]normous confusion and interminable delay.' " *Id.* at 1084, *quoting Johnston v. Reily,* 160 F.2d 249, 250 (D.C.Cir.1947). In the transfer context, this suggestion would deprive parties who lose before the transferee district court, and anticipate losing as well before the transferee circuit court, of the incentive to avoid interlocutory appeal and to forestall settlement in the hope of having the case retransferred to the circuit whose more favorable case law renders appellate success more likely.

18 If transferor circuit law were applicable, the transferee district court might also remand the case to the respective transferor districts for resolution of an issue. Depending upon the issue and its disposition, retransfer (even after interlocutory appeal in the transferor circuit) might be in order. The cost and delay of proceeding in this manner undercuts, however, Congress' purpose in enacting section 1407.

19 We see nothing in section 1407(a) that would justify a transferee court in applying transferor precedent when it is clear, as is *Polish Airlines* in the Second Circuit, but not trying to discern what other transferor circuits would decide when their case law is not as clear on the precise point in question but offers some guidance. Introducing such a distinction would constitute an act of legislation appropriate for Congress, not one of interpretation of the existing statute by a court. Hence, either a transferee court must apply its own interpretation of federal law to all transferred cases, or it must attempt to apply what it believes to be each transferor court's probable interpretation. There is no middle road.

20 376 U.S. at 639, 84 S.Ct. at 821.

21 *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.,* 313 U.S. 487, 496, 61 S.Ct. 1020, 1022, 85 L.Ed. 1477 (1941).

22 Albeit not necessarily "clearly erroneous" for purposes of the law of the case doctrine. *See* note 15, *supra.*

23 *See* Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System,* 93 Yale L.J. 677, 713–14 (1984). For the federal-law transfer situation to be analogous to what occurs under *Van Dusen,* in which the federal court assumes the perspective of the transferor state's highest court (i.e. of the supreme interpreter of the state's law), the question in the KAL case would *not* be (as the New York plaintiffs suggest it is)—"how would the other federal circuits interpret the Warsaw Convention?" Rather, the analogous question would be the same one that a circuit court normally poses when addressing an issue of federal law—"how would the U.S. Supreme Court (the supreme interpreter of federal law) interpret the Warsaw Convention?"

24 *A fortiori,* when it throws up its hands and remands the cases to the transferor courts for determination of the issue. *See* note 18, *supra.*

25 *In re Plumbing Fixtures Cases,* 298 F.Supp. at 491–92.

26 *Van Dusen,* 376 U.S. at 636, 84 S.Ct. at 819.

27 This is particularly the case insofar as the rule applicable to transferee judges under section 1407(a) is applied as well in the analogous context of a transfer under section 1404(a). The prospect of a trial presided over by a judge expected to simulate different district courts throughout as many as twelve circuits is likely to discourage any court from ordering transfer under section 1404(a).

28 *See* note 27, *supra.*

29 It may also be that the transferor circuit courts should afford some deference to the transferee district court's application of transferee circuit case law. *Cf. Bishop v. Wood,* 426 U.S. 341, 345–46 & n. 10, 96 S.Ct. 2074, 2077–78 & n. 10, 48 L.Ed.2d 684 (1976); *Abex Corp. v. Maryland Cas. Co.,* 790 F.2d 119, 121 (D.C.Cir.1986); *Hull v. Eaton,* 825 F.2d 448, 454 n. 9 (D.C.Cir.1987).

30 In fact, the litigation that followed the Second Circuit's ruling in *Polish Airlines* illustrates this. As indicated above, *supra* note 16 and accompanying text, *Polish Airlines* was decided on interlocutory appeal from a ruling by the transferee district court. After pretrial proceedings were complete, the cases were remanded

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to the transferor courts for trial. On appeal from one of these trials, the Ninth Circuit held that calculation of damages was governed by the law of Poland, not that of California. *Harris v. Polskie Linie Lotnicze,* 820 F.2d 1000 (9th Cir.1987). Accordingly, the plaintiffs received $75,399.78 in damages, $10,000 less than they would have received under California law. Given this disposition, it is not surprising that the Ninth Circuit merely mentions the Second Circuit's holding in passing, *id.,* at 1001 since the question of whether the Convention's $75,000 damage litigation applied had become all but irrelevant.

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TAB 16

2007 WL 2340790
Only the Westlaw citation is currently available.
United States District Court,
E.D. New York.

In re ZYPREXA PRODUCTS
LIABILITY LITIGATION.
This Document Relates to: All Actions.

MDL No. 1596 (JBW)(RLM).
|
Aug. 17, 2007.

ORDER COMMON BENEFIT FUND

JACK B. WEINSTEIN, Senior United States District Judge.

***1** Following a hearing upon notice to all parties, Special Discovery Master Peter H. Woodin issued a Recommendation and Proposed Order (Common Benefit Fund Set-Aside) dated July 31, 2007. Objections to the Special Discovery Master's Recommendation and Proposed Order were filed. A full evidentiary hearing on the issues raised in the objections was held on August 14, 2007. A member of the Executive Committee of the PSC II offered testimony concerning the work carried out by the PSC II on behalf of all plaintiffs with cases pending in the MDL. His testimony is fully credited.

Having considered the Special Discovery Master's Recommendation and Proposed Order, the issues raised by objections, and the arguments and evidence received at the August 14, 2007 hearing, the Recommendation and Proposed Order of the Special Discovery Master is adopted as an order of the court.

1) Every personal injury plaintiff whose case is or will be included in MDL No. 1596 and is now, or will be, before this court (even if a motion to remand is pending), and whose claims were not settled as part of the November 2005 settlement, shall be assessed a common benefit fund set-aside in the amount of 3% of the plaintiff's gross recovery, whether received by way of settlement or judgment. This assessment shall apply to all cases in the MDL, including those that may be subject to remand to state courts or transfer to other federal courts.

2) The common benefit fund set-aside shall be paid at the time each individual plaintiff's settlement or judgment becomes final and funds are paid or released to the individual plaintiff. As between attorney and client, the 3% assessment shall be paid½ (1.5%) from the plaintiff's share of the gross recovery and½ (1.5%) from the attorney fee portion of the gross recovery. The attorney fee limitations set out in *In re Zyprexa Prods. Liab. Litig.*, 424 F.Supp.2d 488 (E.D.N.Y.2006) ("March 28, 2006 Fee Order") that applied to all cases included in the November 2005 settlement shall apply to all cases within the scope of this order.

3) All common benefit fund assessments shall be remitted promptly to the Executive Committee of PSC II, which shall establish an escrow account at a national bank in which the set-aside assessments shall be deposited. The Executive Committee of PSC II shall submit periodic reports to magistrate judge Mann concerning the status of the escrow account, and will not authorize the release of any funds from the escrow fund except pursuant to orders of magistrate judge Mann or this court.

4) All applications seeking compensation from the common benefit fund for work done and expenses incurred for the common benefit of Zyprexa plaintiffs shall be submitted to magistrate judge Mann for review and final determination, with notice, and opportunity to be heard, to all plaintiffs and counsel whose recoveries have been subject to the assessment.

5) Given the contingent nature of some of the settlements entered into between Lilly and settling law firms on behalf of their clients, and the fact that work done by the PSC II and others in the continued prosecution of Zyprexa claims in this litigation inures to the benefit of all plaintiffs whose counsel may have already agreed to contingent settlements,

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the court declines to set any specific cut-off date after which work for the common benefit will not be compensated. That date can best be determined at a later time as settlements become final and settlement monies begin to be distributed.

***2** 6) The parties may apply for modification of this order at any time on notice.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2007 WL 2340790

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TAB 17

594 F.3d 113
United States Court of Appeals,
Second Circuit.

In re ZYPREXA PRODUCTS LIABILITY LITIGATION.
Mulligan Law Firm, Appellant,
v.
Zyprexa MDL Plaintiffs' Steering Committee II and Eli Lilly and Company, Appellees. *

Docket No. 07–3815–cv.
|
Argued: March 12, 2009.
|
Final Submission: June 17, 2009.
|
Decided: Feb. 3, 2010.

Synopsis

Background: Consumers brought actions in state and federal courts against manufacturer of antipsychotic medication used to treat schizophrenia and bipolar disorder, alleging that it caused diabetes. Manufacturer removed many of the state-court cases to federal court, and they were transferred to multidistrict litigation court. The United States District Court for the Eastern District of New York, Jack B. Weinstein, J., 2007 WL 2340790 and 2007 WL 2340791, ordered law firm representing the consumers to comply with the attorney compensation protocols established in the multidistrict litigation and enjoined the firm from making any disbursements from a settlement fund it had established until a fund administrator had certified that the protocols had been followed. Firm appealed and petitioned for writ of mandamus.

Holdings: The Court of Appeals held that:

orders were not appealable under the statute granting the federal courts of appeals jurisdiction over interlocutory injunctive orders, and

firm was not entitled to mandamus relief.

Appeal dismissed; petition denied.

Lewis A. Kaplan, District Judge, sitting by designation, concurred and filed opinion.

Attorneys and Law Firms

***115** Robert J. Lack, Friedman Kaplan Seiler & Adelman LLP, New York, N.Y. (Eric Roberson, The Mulligan Law Firm, Dallas, TX, and William David George and Earnest W. Wotring, Connelly, Baker, Wotring LLP, Houston, TX, on the brief) for Appellant.

William M. Audet, Audet & Partners, LLP, San Francisco, CA (James M. Shaughnessy, Milberg LLP, New York, NY, on the brief) for Appellee Zyprexa MDL Plaintiffs' Steering Committee II.

Anthony Vale, Pepper Hamilton LLP, Philadelphia, PA (Nina M. Gussack, Philadelphia, PA, and Samuel J. Abate, Jr., New York, NY, on the brief) for Appellee Eli Lilly and Company.

Before: McLAUGHLIN and SACK, Circuit Judges, and KAPLAN, District Judge. **

Opinion

PER CURIAM:

This interlocutory appeal concerns the attorney compensation structure established by the district court in this ongoing multidistrict litigation ("MDL"), and the applicability of that compensation structure to the Mulligan Law Firm ("Mulligan"). Mulligan represents more than two thousand plaintiffs in upwards of seventy cases that have been transferred by the Judicial Panel on Multidistrict Litigation to the United States District Court for the Eastern District of New York (the "MDL court" or the "district court"), where they are being considered alongside many similar cases. Mulligan asserts that the federal courts do not have jurisdiction over sixty-one of these cases, all of which were originally filed in various state courts, removed to federal courts, and then transferred to the MDL court. It has therefore filed motions in the MDL court to remand the cases to the state courts from which they came.

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While the motions to remand were pending, the district court instituted several attorney compensation protocols. Included were a cap on attorneys' fees and the creation of a common benefit fund—generated by a three percent set-aside from funds from all settlements and judgments—to compensate members of the appellee Zyprexa MDL Plaintiffs' Steering Committee II (the "PSC II") for their work on behalf of all of the MDL plaintiffs.

In a pair of orders dated August 17, 2007, the MDL court (Jack B. Weinstein, *Judge*) ruled that all of Mulligan's cases that were pending in that court were subject to these attorney compensation strictures. The court also enjoined Mulligan from making any disbursements from a fund that it maintained (the "Qualified Settlement Fund") until a fund administrator had certified that the protocols had been adhered to.

Mulligan appeals from the August 17 orders. The firm asserts: 1) that the district court lacks jurisdiction over the sixty-one cases for which remand motions are pending, and that it therefore also lacks jurisdiction to impose a fee cap and a set-aside requirement with respect to those cases, and 2) that the court abused its discretion in *sua sponte* placing a cap on attorneys' fees in *all* of the *Zyprexa* cases pending in the MDL court.

***116** The PSC II and Eli Lilly and Company ("Eli Lilly"), the manufacturer of the drug Zyprexa and the defendant in the underlying litigation, have moved to dismiss this interlocutory appeal. They assert, *inter alia,* that we lack jurisdiction to hear it. Mulligan disagrees. Mulligan further argues that if we conclude that we do not have such jurisdiction, we should grant its petition for mandamus relief with respect to the sixty-one cases over which, it asserts, the district court lacks jurisdiction.

We conclude that we do not have jurisdiction to hear this appeal, and that mandamus relief is unwarranted. We therefore dismiss the appeal.

BACKGROUND

The multidistrict litigation underlying this appeal consists of hundreds of lawsuits brought by thousands of plaintiffs against Eli Lilly, which manufactures the drug Zyprexa. Zyprexa is an antipsychotic medication that has been approved by the Food and Drug Administration to treat schizophrenia and bipolar disorder. Eli Lilly had been the subject of many lawsuits based on allegations that Zyprexa causes diabetes.

In April 2004, thousands of Zyprexa cases that were pending against Eli Lilly were transferred to the United States District Court for the Eastern District of New York—the MDL court—pursuant to an order of the Judicial Panel on Multidistrict Litigation. Transfer Order, *In re Zyprexa Prods. Liab. Litig.,* 314 F.Supp.2d 1380 (J.P.M.L.2004). A group of lawyers was established as the Plaintiffs' Steering Committee to help prosecute the cases in the MDL court. That litigation was settled in late 2005. *See In re Zyprexa Prods. Liab. Litig.,* No. 04–MD–1596, 2005 WL 3117302, 2005 U.S. Dist. LEXIS 29071 (E.D.N.Y. Nov. 22, 2005). A second Plaintiffs' Steering Committee (the "PSC II") was then established to help prosecute the many new Zyprexa cases that had been filed.

As part of this second wave of Zyprexa litigation, Mulligan, a Dallas-based law firm, filed scores of cases involving thousands of plaintiffs in state and federal courts throughout the United States. Many of the state—court cases were removed by Eli Lilly to federal court and then transferred to the MDL court. Mulligan asserts that sixty-one of those cases —brought by more than one thousand plaintiffs- were improperly removed, and that the federal courts do not in fact have jurisdiction over them. In 2006, Mulligan filed motions to remand these cases to state court. The motions were pending at all times relevant to this appeal.

In an order dated March 28, 2006, the district court established the following fee restrictions for the Zyprexa litigation: 1) all attorneys' fees for claims of less than $5,000 were capped at no more than twenty percent of the client's recovery; 2) all other attorneys' fees were capped at thirty-five percent of the client's recovery; and 3) four special settlement masters, whom the court had appointed to oversee

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settlement negotiations and administer settlement agreements, were given discretionary authority to order reductions or increases of fees down to thirty percent or up to thirty-seven and one-half percent depending on the circumstances.

In an order dated December 5, 2006, the district court granted in part a motion by PSC II to establish a common benefit fund to compensate PSC II attorneys for their "significant discovery work." The court ordered a set-aside equal to three percent of judgments and settlements in favor of the plaintiffs in any of the cases in the MDL court, including those for which remand motions were pending, to be paid ***117** into the common benefit fund. The court denied PSC II's motion, however, with respect to cases that were at that time in state court.

At the end of 2006 or the beginning of 2007, Mulligan reached a tentative settlement of all of the MDL cases against Eli Lilly in which it represents the plaintiffs. The settlement is contingent on certain conditions being fulfilled, including, with respect to each case, the individual approval of the plaintiff or plaintiffs that Mulligan represents. [1]

At a status conference on June 22, 2007, Mulligan advised the district court of the tentative settlement and inquired of the court as to the status of the fee cap and the common benefit fund. The court responded with a pair of orders dated August 17, 2007, and filed August 23, 2007. The first noted that although Mulligan's contracts with its plaintiffs call for a fee of forty percent of recovery, the firm was nonetheless bound by the March 2006 order and the cap on attorneys' fees there instituted. The second order rendered all of Mulligan's cases pending before the MDL court, including the cases for which motions to remand remained pending, subject to the March and December 2006 orders. The second order therefore enjoined Mulligan from making any disbursements from the Qualified Settlement Fund until a fund administrator had certified that there had been a segregation of funds representing both the amount of fees sought by Mulligan in excess of the fee cap, and the three percent set-aside for the common benefit fund.

Mulligan appeals from both of the August 17, 2007 orders.

DISCUSSION

I. Jurisdiction

Mulligan argues that we have jurisdiction over this appeal under 28 U.S.C. § 1292(a), [2] which confers on the federal courts of appeals jurisdiction over, *inter alia,* "[i]nterlocutory orders of the district courts of the United States ... granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions...." *Id.* § 1292(a)(1).

"As a general matter we have interpreted § 1292(a)(1) to authorize an appeal only from an injunctive order that gives, or aids in giving, substantive relief sought in the lawsuit in order to preserve the status quo pending trial. We have held nonappealable under § 1292(a)(1) orders that were unrelated to the substantive issues of ***118** the litigation and that instead regulated, or purported to regulate, such matters as pretrial discovery and disclosure." *Bridge C.A.T. Scan Assocs. v. Technicare Corp.,* 710 F.2d 940, 943 (2d Cir.1983) (citations omitted); *cf. Polymer Tech. Corp. v. Mimran,* 975 F.2d 58, 64 (2d Cir.1992) ("An order awarding interim fees during the course of litigation is not an injunctive order subject to interlocutory appeal."). We have been instructed to "approach [section 1292(a)(1)] somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders." *Switz. Cheese Ass'n v. E. Horne's Mkt., Inc.,* 385 U.S. 23, 24, 87 S.Ct. 193, 17 L.Ed.2d 23 (1966).

We conclude that the injunction at issue here does not give or aid in giving substantive relief sought in the lawsuit. Indeed, it does not so much as relate to the substantive issues in the litigation. The only argument Mulligan makes in this regard is a conclusory one: Because the only task that remains in these cases is distribution of the settlement proceeds, [3] and because the injunction prevents Mulligan from distributing those proceeds in accordance with its contracts with its clients, the injunction "goes directly to the cases' substantive issues" as they currently stand. Appellant's Br. at

7. Those facts simply do not render the issues substantive.

"To qualify as an 'injunction' under § 1292(a)(1), a district court order must grant at least part of the ultimate, coercive relief sought by the moving party." *Henrietta D. v. Giuliani,* 246 F.3d 176, 182 (2d Cir.2001). The district court orders here at issue do not relate to the ultimate relief that is sought in this litigation. Indeed, to the extent that there is a "moving party"—PSC II filed a motion to create the set-aside fund, compliance with which is one requirement of the injunction before us—it is not a party to the litigation itself and is therefore not seeking "ultimate, coercive relief." In other words, the injunction at issue does not "give [ ], or aid[ ] in giving, substantive relief sought in the lawsuit." *Bridge C.A.T. Scan Assocs.,* 710 F.2d at 943. The orders are collateral to the substance of the lawsuits.

We therefore conclude that we lack jurisdiction to hear this appeal.

II. Mandamus

Anticipating that we might determine, as indeed we now have, that we lack jurisdiction to hear this appeal, Mulligan petitions for a writ of mandamus. 28 U.S.C. § 1651(a) codifies this common law writ. [4] *Cheney v. U.S. Dist. Court for Dist. of Columbia,* 542 U.S. 367, 380, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004). Mandamus "is a drastic and extraordinary remedy reserved for really extraordinary causes.... [O]nly exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this extraordinary remedy." *Id.* (citations and internal quotation marks omitted). Mulligan has given us no basis in fact or in law on which we ***119** might conclude that the district court usurped its power or clearly abused its discretion. We will deny the petition.

Finally, while Judges McLaughlin and Sack are in sympathy with the carefully reasoned concurring views of Judge Kaplan, the issues he addresses need not be resolved by this panel in order to render our judgment here. Judges McLaughlin and Sack therefore decline to use the extraordinary means of an advisory mandamus order for the purpose of resolving those issues.

CONCLUSION

For the foregoing reasons, we dismiss the appeal for lack of jurisdiction and deny the petition for mandamus.

LEWIS A. KAPLAN, District Judge, concurring.

I concur in the dismissal of the interlocutory appeal and denial of the petition for writ of mandamus. I write separately, however, to address whether a district court may order that a percentage of settlement monies paid in pending multidistrict litigation ("MDL") cases be set aside to fund possible fee awards to counsel whose efforts confer a common benefit when motions to remand those cases remain undecided in the district court.

This question arises frequently in MDLs, often affecting hundreds or thousands of plaintiffs. It is important and, as it has not been addressed by any circuit, novel. I therefore have concluded that the issue should be addressed head-on.

Facts

Zyprexa is an anti-psychotic drug manufactured by Eli Lilly and Company ("Lilly"). It has been prescribed for the treatment of schizophrenia and bipolar disorder in over twelve million patients. The litigation below involved over 30,000 individuals who were prescribed and took Zyprexa and claimed that they consequently suffered injuries. [1]

Many of these individuals filed personal injury law suits in state courts across the country. Lilly removed most of the cases to federal district courts. Some *Zyprexa* plaintiffs moved to remand in the districts to which the cases were removed, arguing that the federal courts lacked subject matter jurisdiction.

Beginning in 2004, the Judicial Panel on Multidistrict Litigation ("JPML") transferred

thousands of the *Zyprexa* cases from federal district courts throughout the United States to the Honorable Jack B. Weinstein in the Eastern District of New York for coordinated or consolidated pretrial proceedings.[2] Any pending motions, including remand motions filed in the transferor districts, accompanied the transferred cases.[3]

Soon thereafter, Judge Weinstein appointed a Plaintiffs' Steering Committee ("PSC I") composed of attorneys from thirteen law firms who represented various individual plaintiffs. PSC I was responsible for, among other things, coordinating and conducting pretrial discovery for all plaintiffs, speaking for all plaintiffs in pretrial proceedings, making and arguing any motions, and pursuing settlement.[4]

***120** In November 2005, virtually all of the cases then pending in the MDL were settled.[5] The settlement contemplated the creation of a claims administration process pursuant to which settling cases were divided into three tracks, attorneys fees were capped for cases in each track, and special masters were appointed to oversee and apply that process.[6]

In early 2006, the district court entered an order which, as far as is relevant here, provided that "the costs, disbursements and fees of the plaintiffs' steering committee shall be paid out of the general settlement fund" to the extent approved by the special masters.[7] This was implemented in part by setting aside one percent of the gross settlement amount payable to each settling plaintiff in an escrow fund.[8]

The district court then appointed a second Plaintiffs' Steering Committee ("PSC II") to coordinate pretrial proceedings in the few non-settling early cases and in the thousands of incoming and remaining cases, most of which had been filed, removed to federal court, and subsequently transferred by the JPML following the original settlement.[9] Lilly and PSC II moved for the establishment of a fund to compensate the attorneys who had worked and would continue to work for the common benefit of all *Zyprexa* plaintiffs after the original settlement. The district court granted the motion and provided for the establishment of a common benefit fund with certain details to be worked out in subsequent proceedings.[10]

In due course, the district court ordered that three percent of each remaining plaintiff's gross recovery, if any, whether from a settlement or judgment, be placed in an escrow account.[11] Half the money was to come from each plaintiff's recovery and half from fees otherwise payable to his or her attorney.[12] Any lawyer who worked for the common benefit of all federal *Zyprexa* plaintiffs, including but not limited to members of PSC II, were eligible to apply for compensation from this account. Compensation would be granted only on a showing that the attorney "provided significant assistance to all plaintiffs."[13] If any money remained in the fund after all claims on it settled, it would be distributed on a *pro rata* basis to those who had paid portions of their recoveries into the account.[14]

Petitioner-appellant the Mulligan Law Firm ("Mulligan") represents over two thousand plaintiffs who originally filed their actions in state and federal courts in seven states and whose cases against Lilly ***121** are pending in the MDL.[15] Motions to remand sixty-one of these cases to state courts remain pending in the district court.

In December 2006, Mulligan and Lilly agreed in principle to settle all of Mulligan's *Zyprexa* cases, although the settlement had not yet been implemented as of the date of argument, because the settling plaintiffs had not fully satisfied the preconditions to consummation.[16] Hence, it was not then certain that the settlement funds in fact will be distributed to the Mulligan plaintiffs.[17]

Anticipating that the settlement would be finalized, the district court enjoined Mulligan from distributing settlement funds to itself or its clients until the fund administrator certified that three percent of the funds designated for each settling plaintiff had been set aside.[18] It specified that

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"[p]ayments may be made to individual plaintiffs as soon as that can be done while ensuring that sufficient funds have been held back to comply with the three percent common benefit assessment." [19] As of the date of oral argument, however, the court below had not awarded any fees or costs out of the fund. Mulligan acknowledges that it will have the opportunity to oppose any award of fees in the event fee applications are filed. [20]

Plaintiffs appeal the district court's order enjoining them from distributing any settlement funds without a certification that the set-aside had been made. [21] Alternatively, they seek a writ of mandamus ordering the district court to vacate the injunction.

Discussion

I. Mandamus

A. The Traditional Mandamus Standard

Mandamus and other prerogative writs "are reserved for really extraordinary causes." [22] Mandamus is "not to be used as a substitute for appeal, even though hardship may result from delay and [a] perhaps unnecessary trial." [23] Indeed, it ***122** often has been said that mandamus is not available unless the petitioner's right to relief is "clear and indisputable" [24] and a direct appeal from a final judgment would not be an adequate remedy. [25] Moreover, while traditional formulations of the standard have spoken of using the writ to confine a lower court to the exercise of its proper jurisdiction, [26] it long has been clear that mandamus will not lie to review a claim of mere error in a lower court's jurisdictional determination. [27] Indeed, any different view would conflict with the requirement that the petitioner's right to relief be clear and indisputable.

Mulligan argues that this Court may grant its petition under the traditional mandamus standard because the district court lacked jurisdiction to issue the set aside order in sixty-one of the cases Mulligan originally filed in state court. At least until the district court actually awards fees out of the common benefit fund, however, Mulligan cannot demonstrate a need for traditional mandamus because it has not yet suffered any injury. In any case, it lacks a "clear and indisputable" right to relief [28] even assuming that the set aside order were erroneous. But traditional ***123** mandamus is not the only potentially relevant standard.

B. Advisory Mandamus

The stringencies of traditional mandamus standards admit of a limited exception for what has been termed "advisory mandamus"—the use of mandamus to provide guidance on a novel question of general or exceptional importance to the administration of justice that should not await review by appeal from a final judgment.

In *Schlagenhauf v. Holder,* [29] the Supreme Court "departed in some degree" from the traditional mandamus standards to countenance the use of the writ for such advisory purposes. [30] There, the Court indicated that mandamus may be used to settle important questions of first impression where there is a "substantial allegation of usurpation of power" by the district court. [31] Thus, courts of appeals have some scope for use of mandamus to settle novel questions. On the other hand, as this Court has written, "[n]o one could reasonably suppose that the [Supreme] Court has now subscribed ... to a doctrine that any non-frivolous claim of error in a decision is a claim of 'usurpation of power' on the theory that courts are bound to decide all issues correctly." [32]

The Second Circuit's decisions subsequent to *Schlagenhauf* do not resolve entirely the uncertainty as to the criteria dividing appropriate from inappropriate uses of advisory mandamus. The cases that bear most strongly on the facts at bar are *In re International Business Machines Corp.* [33] and *United States v. Amante.* [34] In *IBM,* the Circuit granted ***124** mandamus to halt the district court's consideration of whether the Tunney Act requirement of judicial approval of consent

decrees in government antitrust cases [35] applied to stipulations of dismissal under Federal Rule of Civil Procedure 41(a)(1). [36] It did so, however, not simply because it disagreed with the district court's retention of jurisdiction to consider the issue, but for three other reasons. First, both parties were united in their desire that the case be dismissed outright. [37] Second, the case already had gone on for thirteen years, tying up "one of the nation's largest industrial concerns," during which time "many of the underlying products [had become] commercially outmoded." [38] Finally, there was no serious basis for the assertion that the Tunney Act applied to a Rule 41(a)(1) dismissal in light of the plain language of the statute and "the clear and indisputable legislative history." [39]

Amante concerned a different question, *viz.* whether a district court had erred in bifurcating a simple felon-in-possession firearm case to require first a trial on the issue of possession and then a separate trial on the issue of the prior felony conviction, the latter of which would take place only after a jury finding of possession. In granting mandamus to vacate the bifurcation order, the Circuit relied upon its conclusions that (1) the issue was significant because "[i]ts resolution will affect numerous defendants in similar trials and will aid in the administration of criminal justice," and (2) "no remedy [wa]s available to the government other than mandamus." [40]

Both *IBM* and *Amante* demonstrate that this Court has granted mandamus for advisory purposes when presented with questions of significance and the district court had committed a clear abuse of discretion and usurpation of power. [41] In addition, both cases reached the merits of the issues presented by the petitions as, of course, the Court was compelled to explain the district court's error. But they did not involve the question whether this Court may reach the merits for advisory purposes to deny a petition for mandamus where the issue and need for review are sufficiently pressing.

This question was answered in the affirmative in *Kaufman v. Edelstein.* [42] There, two expert witnesses whom the government had subpoenaed to testify in a civil antitrust case petitioned for a writ of mandamus ***125** directing the district court to quash the subpoenas. Observing that the district court's denial of the motions to quash "clearly was no 'usurpation of power' " nor a clear abuse of discretion, the Court, speaking through Judge Friendly, stated that the only argument in favor of granting the writ was that the case presented a "novel and important" issue. [43] The Court then discussed the merits of the case at some length, concluding that, although there existed no privilege protecting expert witnesses from being called to testify, courts in their discretion could protect expert witnesses when good cause was shown. [44] Judge Friendly listed a number of factors pertinent to deciding whether a particular expert witness merited the protection of the court. [45]

In sum, we have held that it is appropriate for us to discuss the merits of a challenged district court action to deny mandamus when the question is of sufficient importance and there is a dearth of guidance on the issue.

C. Application To This Petition

The district court's set aside order, in my view, raises just such a question. The issue never has been addressed by this Circuit. Yet it arises frequently in MDLs, [46] many encompassing hundreds and sometimes thousands of cases and affecting hundreds or thousands of plaintiffs. [47] A resolution of the issue here would be "applicable to [this] entire class of cases." [48] A decision on the merits thus would offer guidance to both courts and litigants and aid the efficient administration of justice.

II. The District Court's Order

A. Subject Matter Jurisdiction

The fundamental question here is whether a district court has subject matter jurisdiction—power—to order that settlement funds be set aside to fund possible fee awards to counsel in MDL cases that

have been removed to federal court and in which motions to remand remain undecided in the district court. In essence, Mulligan argues that it does not and that we therefore either should (1) decide the jurisdictional issues that were not passed upon below and exempt from the set aside order any cases in which removal was improper or, alternatively, (2) exempt all of these cases from the set aside order on the ***126** theory that the entry of the set aside order in advance of determination of the remand motions was erroneous. These contentions are unpersuasive.

The starting point for this analysis is the proposition that a federal court has jurisdiction to determine its own jurisdiction. [49] While it must make this determination before it reaches the merits of the case before it, [50] it is empowered to issue non-dispositive orders between the filing of the action and its ultimate determination on the merits. [51]

Mulligan nevertheless argues that federal courts are permitted, prior to a ruling disposing of any subject matter jurisdiction challenge, to take only such actions as may aid in determining their jurisdiction and that actions reaching the merits are void. [52] The district court's set aside order, in its view, reached the merits and thus went beyond the limits of the court's authority. Mulligan relies for this proposition on *United States Catholic Conference v. Abortion Rights Mobilization, Inc.* [53]

Catholic Conference involved an appeal from an order holding two non-party witnesses in civil contempt, over their objection that the district court lacked subject matter jurisdiction, for refusing to comply with a subpoena. The Supreme Court held that a non-party witness can challenge the subject matter jurisdiction of a court in defense of a civil contempt citation. [54] It stated further that the contempt orders would be void if the district court lacked subject matter jurisdiction. Mulligan argues that *Catholic Conference* therefore stands for the proposition that federal courts are permitted only to "take actions in aid of determining [their] jurisdiction." [55] But he overreads the decision.

In *Willy v. Coastal Corp.,* [56] the Supreme Court upheld a district court's Rule 11 sanctions order notwithstanding a subsequent determination that the district court had lacked subject matter jurisdiction, and it rejected the petitioner's contention that this result was precluded by *Catholic Conference.* As the Court explained:

> "[a] final determination of lack of subject-matter jurisdiction of a case in federal court, of course, precludes further ***127** adjudication of it. But such a determination does not automatically wipe out all proceedings had in the district court at a time when the district court operated under the misapprehension that it had jurisdiction." [57]

Thus, a district court's order that is "collateral to the merits" may be upheld despite a later conclusion that the court lacked subject matter jurisdiction over the litigation. [58]

In this case, the set aside order simply imposed an assessment in order to create a fund that could be used to compensate attorneys who demonstrate that their efforts conferred a benefit on *Zyprexa* plaintiffs generally. [59] It is even less related to the ultimate merits than orders awarding attorney's fees, which are collateral matters over which a court retains jurisdiction even if it ultimately is determined to lack subject matter jurisdiction. [60] It does not preclude the Mulligan plaintiffs from challenging any proposed distribution of funds on the ground that they did not benefit from the efforts of counsel to whom a distribution might be made. At least in these circumstances, the set aside order was collateral to the merits and well within the district court's power.

The district court's determination to defer consideration of the jurisdictional challenges also was comfortably within the bounds of its discretion. While it usually is advisable for district courts to rule on any challenge to subject matter jurisdiction early in a lawsuit, district courts have broad scope to manage their own dockets in light of considerations of "economy of time and effort for itself, for counsel, and for litigants." [61] The impact of such considerations in this case, and in some

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other MDL and mass tort cases, often may suggest a different course.

Alleged mass torts, as the term implies, spawn masses of litigation. Plaintiffs understandably sue in *fora* that they regard as convenient or likely to be favorable including, in many instances, state courts. Indeed, some frame their complaints in ways that raise issues concerning removability. Defendants, moved by similar considerations, frequently remove many of these cases to federal courts. These tactical steps in turn often provoke large numbers of remand motions, as occurred in this MDL.[62] Indeed, Mulligan alone has ***128** filed motions to remand in over 50 of its *Zyprexa* cases.[63]

A district judge managing such a complex situation reasonably may conclude that the court's time, especially early in the litigation, is better spent on activities other than deciding scores or hundreds of individual remand motions. It often would be appropriate to conclude that many of the cases in which such motions are filed are likely to settle and that the expenditure of judicial resources on remand motions likely would be wasted. Moreover, even if an MDL or comparable court dealt immediately with remand motions pending at a given moment, new cases and new remand motions are likely to be filed throughout the pendency of the litigation.[64] Deciding each motion prior to addressing other issues common to all or most cases therefore could require a significant expenditure of judicial time and resources, derailing the progress of the litigation as a whole. Delays of this nature could well frustrate the purpose of MDLs, which is "to promote just and efficient conduct" of actions involving common questions of fact.[65]

While every case turns on its own facts, I cannot say that the district court's decision to give priority to moving thousands of *Zyprexa* cases towards settlement or other disposition over focusing promptly on the hundreds of pending remand motions was an improvident exercise of the broad discretion that inheres in its docket management function.

B. The Common Fund Doctrine

The district court's set aside order raises also the question whether a district court in an MDL or other litigation involving a large number of separately represented individual claimants, in which any recovery will be unique to each plaintiff, has the authority to create a fund out of those recoveries for the purpose of financing an award of fees and expenses to those counsel whose work benefits the entire group of plaintiffs. The answer to this question lies in the common fund or common benefit doctrine.

The so-called "American rule" is that the prevailing litigant ordinarily must bear the litigant's own attorney's fees.[66] Since the nineteenth century, however, the Supreme Court has recognized an equitable exception to this rule[67]—known as the common fund or common benefit doctrine—that permits litigants or lawyers who recover a common fund for the benefit of persons other than themselves to obtain reasonable attorney's fees out of the fund, thus spreading the cost of the litigation to its beneficiaries.[68] The doctrine "reflects the traditional practice in courts of equity,"[69] which recognized "that persons who obtain the benefit of a lawsuit without contributing ***129** to its cost are unjustly enriched at the successful litigant's expense."[70] A court acting in equity therefore may assess attorney's fees proportionally among those benefitted by the suit.[71]

In *Alyeska Pipeline,* the Supreme Court identified several characteristics of cases in which the application of the common benefit doctrine may be appropriate. These include the ease in identifying the persons, or classes of persons, benefitted by the recovery, ease in tracing the benefit flow from the fund to those persons, and confidence that the costs of litigation can be shifted with some exactitude to those benefitted by the litigation.[72] Courts routinely employ the common benefit doctrine in awarding fees to counsel in class actions[73] which, when successful, often result in lump sum recoveries that benefit identifiable classes. Class actions present also the free-rider

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problems the common fund doctrine was designed to remedy, as class members who do not hire counsel nonetheless benefit from any recovery. The doctrine thus prevents the unjust enrichment of these class members at the expense of class counsel by compensating counsel in proportion to the benefit they have obtained for the entire class, rather than just the named class representatives with whom they contracted. Likewise, it prevents the unjust enrichment of class members at the expense of the class representatives who contracted with attorneys to prosecute the action. [74]

Application of the doctrine to class actions is straightforward. The class generally is represented by counsel. Any proceeds from the litigation are awarded to the class as a whole or by a formula that permits determination of the amount of the aggregate benefit conferred on the class. Courts may set some percentage of the lump sum recovery as the fee or, using the "lodestar approach," ascertain the number of hours reasonably billed to the class, multiply it by an appropriate hourly rate, and deduct the product from any recovery. [75]

The situation is somewhat different with respect to MDLs consisting of individual cases prosecuted by individual plaintiffs, sometimes numbering in the thousands, [76] and other litigation involving large numbers of separately represented claimants. Unlike most class actions, recoveries by individual plaintiffs or groups of plaintiffs ***130** in such matters may occur at different times, and individual plaintiffs or groups of plaintiffs, unlike most individual class members, usually are represented by individual counsel. Nevertheless, there are substantial similarities to class actions as well. As an initial matter, the efficient handling of such cases demands a similar approach to case management. District courts typically appoint a lead counsel or plaintiffs' steering committee to coordinate and conduct pretrial proceedings on behalf of all plaintiffs in order to avoid what otherwise might well become chaotic. [77] Moreover, while individual plaintiffs are separately represented, they typically benefit also—often predominantly—from the work of the lead counsel or committee.

The same equitable considerations that warrant payment of class counsel out of common funds generated by their efforts apply in these circumstances as well. The desirability—indeed, the compelling need—to have pretrial proceedings managed or at least coordinated by lead counsel or a steering or executive committee demands the existence of a source of compensation for their efforts on behalf of all. The logical, and a most equitable, source of that compensation is recoveries of individual plaintiffs who benefit from that work. Indeed, foreclosing those recoveries as a source of funding for the common benefit work would enrich the non-contributing individual plaintiffs unjustly at the expense of either or both of the lead counsel and any contributing individual plaintiffs. [78] The district court thus acted within the scope of its discretion when it established an account to compensate counsel for common benefit work funded by a set aside of future *Zyprexa* MDL recoveries. [79]

Conclusion

For the foregoing reasons, I conclude that the district court did not err as a matter of law or abuse its discretion in ordering a set aside of settlement monies in a common benefit fund. I therefore concur in the denial of the petition and dismissal of the appeal.

All Citations

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Footnotes

* The Clerk of Court is directed to amend the caption to appear as set forth in this opinion.

** The Honorable Lewis A. Kaplan, United States District Judge for the Southern District of New York, sitting by designation.

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1 When this appeal was briefed, the relevant cases were all still pending before the district court, and the settlement agreement was tentative. Since oral argument, we have received a communication from Mulligan implying that at least some of the individual cases at issue are now in the Indiana state court system, where the distribution of settlement proceeds has begun. *See* Letter from Robert J. Lack to Clerk of Ct. (June 17, 2009). Neither party has explained the chain of events that led to this, nor have the parties offered any arguments regarding the possible impact of this development on the case at hand. Nor are we aware of the exact status of all (or, indeed, any) of the sixty-one individual cases, originating not just in Indiana but also in California and New Jersey, that underlie this appeal. We therefore address only the arguments that are before us and the facts as they are set forth in the record on appeal.

2 Mulligan explicitly waives any assertion of jurisdiction under 28 U.S.C. § 1291. *See* Appellant's Reply Br. at 14 ("The steering committee argues that this case is not appealable under 28 U.S.C. § 1291 because the MDL court has not entered a final judgment. The Mulligan Firm agrees. As the Mulligan Firm said in its opening brief, the only appellate jurisdiction is under 28 U.S.C. § 1292(a).") (footnotes omitted). We therefore do not consider whether we have jurisdiction to entertain this appeal Under it.

3 It appears that this is not entirely true, insofar as the settlement remains tentative for at least some plaintiffs. While some of the settlement proceeds have already been distributed in part, *see* Letter from Robert J. Lack to Clerk of Ct. (June 17, 2009), the claims of other plaintiffs remain unresolved, *see* Certification of Settlement Administrator at 2, *Cope v. Eli Lilly & Co.,* No. 79D01–0602–CT–14, at 2 (Tippecanoe Super. Ct., Ind., June 15, 2009) (referring to cases for which settlement funds had not yet been approved by Eli Lilly).

4 "[A]ll 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).

1 *In re Zyprexa Prods. Liab. Litig.,* 549 F.Supp.2d 496, 498–99 (E.D.N.Y.2008).

2 *See In re Zyprexa Prods. Liab. Litig.,* 314 F.Supp.2d 1380, 1382–83 (J.P.M.L.2004).

3 *See* FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION FOURTH § 22.35, at 371 (2004) (hereinafter "MANUAL").

4 *See In re Zyprexa Prods. Liab. Litig.,* No. 04 MDL 1596, 2004 WL 3520245, at *2–3 (E.D.N.Y. Jun. 17, 2004).

5 *See In re Zyprexa Prods. Liab. Litig.,* 467 F.Supp.2d 256, 261 (E.D.N.Y.2006).

6 *In re Zyprexa Prods. Liab. Litig.,* 424 F.Supp.2d 488, 490 (E.D.N.Y.2006).

7 *Id.* at 497.

8 *In re Zyprexa Prods. Liab. Litig.,* 467 F.Supp.2d at 263.

9 *See In re Zyprexa Prods. Liab. Litig.,* 467 F.Supp.2d at 261.

10 *Id.* at 275.

11 *In re Zyprexa Prod. Liab. Litig.,* No. 04 MD 1596, 2007 WL 2340790, at *1 (E.D.N.Y. Aug. 17, 2007). An earlier order imposed a set aside of a percentage of plaintiffs' attorney's fees, rather than of each plaintiff's gross recovery. Following hearings before a special master and Judge Weinstein, the nature of the set aside was modified. *Compare id. with In re Zyprexa Prod. Liab. Litig.,* 467 F.Supp.2d at 266.

12 *In re Zyprexa Prod. Liab. Litig.,* 2007 WL 2340790, at *1.

13 *In re Zyprexa Prod. Liab. Litig.,* 467 F.Supp.2d at 266.

14 *Id.*

15 A–319, 349, 393, 589.

16 *In re Zyprexa Prod. Liab. Litig.,* No. 04 MD 1596, 2007 WL 2340791, at *1 (E.D.N.Y. Aug. 17, 2007).

17 Oral Arg. 11:34–36.

18 *Id.*

19 *Id.*

20 Oral Arg. 11:04–05; 11:24–27.

21 A–816.

22 *Ex parte Fahey,* 332 U.S. 258, 260, 67 S.Ct. 1558, 91 L.Ed. 2041 (1947); *see also Aref v. United States,* 452 F.3d 202, 206 (2d Cir.2006) ("Mandamus is an extraordinary remedy, available only in extraordinary circumstances." (citing *In re United States,* 10 F.3d 931, 933 (2d Cir.1993))); *In re Nagy,* 89 F.3d 115, 117 (2d Cir.1996) (requiring an "extraordinary showing" to get mandamus review in lieu of appeal from final judgment (citing *In re Drexel Burnham Lambert Inc.,* 861 F.2d 1307, 1312 (2d Cir.1988))); *In re Repetitive Stress Injury Litig.,* 11 F.3d 368, 373 (2d Cir.1993) ("The granting of a writ of mandamus is an extraordinary measure

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and should be done sparingly."); *United States v. Victoria—21,* 3 F.3d 571, 575 (2d Cir.1993) ("Such writs may not be used as a mere substitute for an appeal, but rather the power should only be exercised in extraordinary situations.") (internal quotations omitted).

23 *Schlagenhauf v. Holder,* 379 U.S. 104, 110, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964) (citations omitted); *accord Bankers Life & Cas. Co. v. Holland,* 346 U.S. 379, 383, 74 S.Ct. 145, 98 L.Ed. 106 (1953); *Roche v. Evaporated Milk Ass'n,* 319 U.S. 21, 30, 63 S.Ct. 938, 87 L.Ed. 1185 (1943); *In re Ivy,* 901 F.2d 7, 10 (2d Cir.1990) (quoting Roche); *cf. In re Traffic Executive Ass'n–E. R.R.s,* 627 F.2d 631, 634 (2d Cir.1980) (denying writ where district court disapproved settlement agreement, noting that "[t]he likelihood that class members will find it tedious and time consuming to prove their losses does not make this an out-of-the-ordinary case").

24 *E.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 18, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); *Bankers Life,* 346 U.S. at 384, 74 S.Ct. 145; *In re Certain Underwriter,* 294 F.3d 297, 302 (2d Cir.2002); *In re Aguinda,* 241 F.3d 194, 202 (2d Cir.2001); *Drexel,* 861 F.2d at 1312.

25 *E.g., United States v. Giffen,* 473 F.3d 30, 38 n. 7 (2d Cir.2006); *United States v. Amante,* 418 F.3d 220, 222 (2d Cir.2005); *In re SEC ex rel. Glotzer,* 374 F.3d 184, 187–88 (2d Cir.2004); *United States v. Coppa,* 267 F.3d 132, 138–39 (2d Cir.2001); *In re von Bulow,* 828 F.2d 94, 98–99 (2d Cir.1987).

26 *See, e.g., Parr v. United States,* 351 U.S. 513, 520–21, 76 S.Ct. 912, 100 L.Ed. 1377 (1956); *Bankers Life,* 346 U.S. at 382–83, 74 S.Ct. 145; *Roche,* 319 U.S. at 26, 63 S.Ct. 938; *Hong Mai Sa v. Doe,* 406 F.3d 155, 159 (2d Cir.2005) (citing *Richardson Greenshields Secs., Inc. v. Lau,* 825 F.2d 647, 652 (2d Cir.1987)).

27 *See, e.g., Ex parte Chicago, R.I. & Pac. Ry. Co.,* 255 U.S. 273, 275–76, 41 S.Ct. 288, 65 L.Ed. 631 (1921) (Brandeis, J.) (mandamus does not lie to review doubtful district court jurisdictional determination); *In re Ivy,* 901 F.2d at 10 ("[T]he writ will not issue to review an order overruling a plea to the jurisdiction ...." (quoting *Roche,* 319 U.S. at 31, 63 S.Ct. 938)); *Ward Baking Co. v. Holtzoff,* 164 F.2d 34, 36 (2d Cir.1947) (denying writ where "[w]e are not satisfied that the district court 'clearly' lacks jurisdiction"); *see also United States v. DiStefano,* 464 F.2d 845, 850 (2d Cir.1972) (Friendly, J.) ("[M]ere error, even gross error in a particular case, as distinguished from a calculated and repeated disregard of governing rules, does not suffice to support issuance of the writ."); *accord, e.g., Nat'l Right to Work Legal Def. v. Richey,* 510 F.2d 1239, 1242 (D.C.Cir.1975) ("If the lower court is clearly without jurisdiction, the writ will ordinarily be granted. If, however, the jurisdiction of the lower court is doubtful ... the writ will ordinarily be denied." (quoting *Ex parte Chicago,* 255 U.S. at 275, 41 S.Ct. 288)) (citations omitted); *Comfort Equip. Co. v. Steckler,* 212 F.2d 371, 373 (7th Cir.1954) ("If a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling the case is not appropriate for mandamus or prohibition even though on normal appeal a reviewing court might find reversible error." (quoting *Am. Airlines v. Forman,* 204 F.2d 230, 232 (3d Cir.1953))).

28 *Moses H. Cone Mem'l Hosp.,* 460 U.S. at 18, 103 S.Ct. 927; *see also In re Vazquez–Botet,* 464 F.3d 54, 57 (1st Cir.2006) (" '[E]ven where the merits clearly favor the petitioner, relief may be withheld for lack of irreparable injury[.]' " (citing *In re Martinez–Catala,* 129 F.3d 213, 217 (1st Cir.1997))); *In re Nat'l Presto Indus., Inc.,* 347 F.3d 662, 663 (7th Cir.2003) (requiring showing of irreparable harm before granting mandamus relief); *United States v. Wexler,* 31 F.3d 117, 128 (3rd Cir.1994) (same).

29 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152.

30 *Kaufman v. Edelstein,* 539 F.2d 811, 817 (2d Cir.1976) (Friendly, J.). *See generally* Note, *Supervisory and Advisory Mandamus Under the All Writs Act,* 86 HARV. L.REV.. 595 (1973) (hereinafter "Harvard Note").

> The Supreme Court has recognized a second limited exception to traditional mandamus standards for the exercise of "supervisory control of the District Courts by the Courts of Appeals." *La Buy v. Howes Leather Co.,* 352 U.S. 249, 259–60, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957). In *La Buy,* the district court, notwithstanding prior admonitions by the Seventh Circuit against excessive use of special masters, referred two antitrust cases to special masters on the ground that its docket was too congested. It did so in line with a prior practice of too frequent references to special masters that the Supreme Court characterized as "little less than an abdication of the judicial function." 352 U.S. at 256, 258, 77 S.Ct. 309. In those circumstances, the Court held that supervisory mandamus was appropriate. *Id.* at 259–60, 77 S.Ct. 309. The case therefore appears to authorize "supervisory" mandamus "when a plausible case could be made for the danger of frequent recurrence" of a "probably erroneous practice." *See* Harvard Note, 86 HARV. L.REV.. at 609–10; *see also, e.g., United States v. Yemitan,* 70 F.3d 746, 748

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(2d Cir.1995) ("[A]n arbitrary practice of sentencing without proferred [sic] reasons would amount to an abdication of judicial responsibility subject to mandamus.") (dictum).

As demonstrated by the discussion below, because the practice challenged here was not "probably erroneous," much less an "abdication of the judicial function," supervisory mandamus has no proper role in this case.

31 379 U.S. at 110–11, 85 S.Ct. 234.

32 *Kaufman,* 539 F.2d at 819 (citations omitted).

33 687 F.2d 591 (2d Cir.1982).

34 418 F.3d 220.

Additionally, this Court has read *Schlagenhauf* as creating an "escape hatch" from the finality rule in the context of discovery, when the "question is of extraordinary significance *or* there is extreme need for reversal of the district court's mandate before the case goes to judgment." *Am. Express Warehousing, Ltd. v. Transamerica Ins. Co.,* 380 F.2d 277, 282 (2d Cir.1967). Subsequent discovery cases also have invoked this standard. *See, e.g., In re Attorney Gen. of the United States,* 596 F.2d 58, 63 (2d Cir.1979); *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.,* 591 F.2d 174, 181 (2d Cir.1979); *see also Glotzer,* 374 F.3d at 187 (quoting *Coppa,* 267 F.3d at 137–38 (applying same standard, but without characterizing mandamus review as "advisory")).

These cases establish that mandamus sometimes may be granted to reverse an erroneous discovery ruling where the ruling orders discovery that could not be undone on appeal from a final judgment because the allegedly undiscoverable information will have been disclosed. But the discovery cases shed little light on the appropriate course in this case, in part because Mulligan would suffer no cognizable harm if review were denied unless and until there is a final order to disburse money it contributes to the set aside.

35 15 U.S.C. § 16(e)(1).

36 The district court had heard argument on the issue but had not yet issued a decision. 687 F.2d at 596.

37 *Id.* at 600.

38 *Id.* at 599–600.

39 *Id.* at 600–02.

40 418 F.3d at 222.

41 *Id.* at 222; *see also IBM,* 687 F.2d at 603.

42 539 F.2d 811.

43 *Id.* at 819.

44 *Id.* at 819, 821.

45 *Id.* at 822; *see also Stans v. Gagliardi,* 485 F.2d 1290, 1292 (2d Cir.1973).

46 The *Manual for Complex Litigation* instructs courts "[e]arly in the litigation" to "determine the method of compensation" for lead and liaison counsel "and establish arrangements for their compensation, including setting up a fund to which designated parties should contribute in specified proportions." MANUAL § 14.215, at 202.

47 *See, e.g., In re Wilson,* 451 F.3d 161, 163 (3d Cir.2006) (30,000–35,000 plaintiffs with suits pending before MDL court); *In re Diet Drugs,* 369 F.3d 293, 298 (3d Cir.2004) (MDL involved 18,000 individual lawsuits and over 100 putative class actions); *In re Orthopedic Bone Screw Prods. Liab. Litig.,* 193 F.3d 781, 784 (3d Cir.1999) ("thousands of plaintiffs" in MDL); *In re San Juan Dupont Plaza Hotel Fire Litig.,* 111 F.3d 220, 222 (1st Cir.1997) ("hundreds of claims" filed by "thousands of plaintiffs" consolidated in MDL); *In re Dow Corning Corp.,* 86 F.3d 482, 485 (6th Cir.1996) (440, 000 plaintiffs elected to become class members for purposes of settlement in MDL); *In re Food Lion, Inc. Fair Labor Standards Act "Effective Scheduling" Litig.,* 73 F.3d 528, 531 (4th Cir.1996) (nearly 1,000 plaintiffs in MDL); *In re Agent Orange Prod. Liab. Litig.,* 818 F.2d 145, 165–66 (2d Cir.1987) (240,000 claimants in MDL).

48 *SEC v. Stewart,* 476 F.2d 755, 758 (2d Cir.1973) (discussing standard for supervisory mandamus).

49 *United States v. United Mine Workers of Am.,* 330 U.S. 258, 291, 67 S.Ct. 677, 91 L.Ed. 884 (1947); *Kuhali v. Reno,* 266 F.3d 93, 100–01 (2d Cir.2001).

50 *Sinochem Int'l Co., Ltd. v. Malaysia Int'l Shipping Corp.,* 549 U.S. 422, 431, 127 S.Ct. 1184, 167 L.Ed.2d 15 (2007) (citing *Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 585, 119 S.Ct. 1563, 143 L.Ed.2d 760

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(1999) and *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 100–01 & n. 3, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)).

51 *See Sinochem,* 549 U.S. at 431, 127 S.Ct. 1184 (recognizing that federal court "has leeway 'to choose among threshold grounds for denying audience to a case on the merits' " before determining jurisdiction and noting permissibility of dismissal of state law claims on discretionary grounds, dismissal based on Younger abstention, and dismissal under *Totten v. United States,* 92 U.S. 105, 23 L.Ed. 605 (1876), all before considering jurisdictional questions); *United Mine Workers,* 330 U.S. at 290, 67 S.Ct. 677 (district court "unquestionably had the power to issue a restraining order ... pending a decision upon its own jurisdiction"); *see also id.* at 295, 67 S.Ct. 677 (noting Supreme Court would affirm district court's judgment of criminal contempt as validly punishing violations of order then outstanding, even if it was later determined that the district court lacked jurisdiction).

52 Pet. Br. at 32–34.

53 487 U.S. 72, 108 S.Ct. 2268, 101 L.Ed.2d 69 (1988).

54 *Id.* at 76, 108 S.Ct. 2268.

55 Pet. Br. at 32.

56 503 U.S. 131, 112 S.Ct. 1076, 117 L.Ed.2d 280 (2001).

57 *Id.* at 137, 112 S.Ct. 1076.

58 *Id.*

59 *In re Zyprexa Prod. Liab. Litig.,* 467 F.Supp.2d at 266.

60 *See, e.g., Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 395, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) ("It is well established that a federal court may consider collateral issues after an action is no longer pending. For example, district courts may award costs after an action is dismissed for want of jurisdiction."); *Moore v. Permanente Med. Group, Inc.,* 981 F.2d 443, 445 (9th Cir.2003) ("It is clear that an award of attorney's fees is a collateral matter over which a court normally retains jurisdiction even after being divested of jurisdiction on the merits."); *see also In re Nineteen Appeals,* 982 F.2d at 609 ("[A]n order which definitively resolves claims for attorney's fees and expenses payable out of a common fund is severable from the decision on the merits.") (citing *Trustees v. Greenough,* 105 U.S. 527, 531, 26 L.Ed. 1157 (1881)); *Overseas Dev. Disc Corp. v. Sangamo Constr. Co.,* 840 F.2d 1319, 1324 (7th Cir.1988) (declaring it to be "settled that a decision awarding or denying attorney's fees and expenses from a common fund ... is severable from the decision on the merits"); *Memphis Sheraton Corp. v. Kirkley,* 614 F.2d 131, 133 (6th Cir.1980) (award of attorney's fees from common fund "is collateral" to the merits (citing *Sprague,* 59 S.Ct. at 780)).

61 *Landis v. North Am. Co.,* 299 U.S. 248, 254–55, 57 S.Ct. 163, 81 L.Ed. 153 (1936).

62 *See, e.g., Galati v. Eli Lilly & Co.,* No. 05–4338–CV–C–NKL, 2005 WL 3533387, at *1 (W.D.Mo. Dec. 22, 2005) (hundreds of remand motions pending in Zyprexa MDL).

63 A–814–15.

64 *See, e.g., In re Zyprexa Prods. Liab. Litig.,* 467 F.Supp.2d at 261–62.

65 28 U.S.C. § 1407.

66 *See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975).

67 *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980) (citing *Cent. R.R. & Banking Co. v. Pettus,* 113 U.S. 116, 5 S.Ct. 387, 28 L.Ed. 915 (1885) and *Trustees v. Greenough,* 105 U.S. 527, 26 L.Ed. 1157 (1882)).

68 *Id.; Alyeska,* 421 U.S. at 245, 95 S.Ct. 1612; *Mills v. Elec. Auto–Lite Co.,* 396 U.S. 375, 392–92, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970); *Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161, 164–65, 59 S.Ct. 777, 83 L.Ed. 1184 (1939); *Cent. R.R.,* 113 U.S. at 124–25, 5 S.Ct. 387; *Greenough,* 105 U.S. at 532.

69 *Boeing,* 444 U.S. at 478, 100 S.Ct. 745 (citing *Greenough,* 105 U.S. at 532–37).

70 *Id.* (citing *Mills,* 396 U.S. at 392, 90 S.Ct. 616).

71 *Id.* (citing *Mills,* 396 U.S. at 394, 90 S.Ct. 616).

72 *Alyeska,* 421 U.S. at 264 n. 39, 95 S.Ct. 1612; *see Boeing,* 444 U.S. at 478–79, 100 S.Ct. 745; *In re Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.,* 982 F.2d 603, 607 (1st Cir.1992).

73 *See, e.g., Boeing,* 444 U.S. at 479–81, 100 S.Ct. 745; *In re Agent Orange Prod. Liab. Litig.,* 818 F.2d 226, 237 (2d Cir.1987).

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74 *Boeing,* 444 U.S. at 477, 100 S.Ct. 745; *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.,* 487 F.2d 161, 165 (3d Cir.1973); 4 NEWBERG ON CLASS ACTIONS § 14:6 (4th ed.2002).

75 *Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 47 (2d Cir.2000).

76 For example, in many MDLs involving personal injury claims, courts have denied class certification pursuant to FED.R.CIV.P. 23(b)(3) based on findings that questions affecting individual members of the putative class regarding injury, causation and/or damages predominate over questions of fact or law common to the putative class. *See, e.g., In re Rezulin Prods. Liab. Litig.,* 210 F.R.D. 61, 66–68, 71 (S.D.N.Y.2002); *In re Phenylpropanolamine Prods. Liab. Litig.,* 208 F.R.D. 625, 633 (W.D.Wash.2002); *see also In re Prempro,* 230 F.R.D. 555, 566–67 (E.D.Ark.2005) (consumer fraud claim).

77 *See, e.g., Smiley v. Sincoff,* 958 F.2d 498, 499 (2d Cir.1992) (district court did not abuse its discretion in requiring that attorney fee paid to plaintiffs' committee be distributed pro rata among committee members); *Vincent v. Hughes Air West, Inc.,* 557 F.2d 759, 774–75 (9th Cir.1977) (district court had authority to direct appointment of committee of lead counsel); *MacAlister v. Guterma,* 263 F.2d 65, 68 (2d Cir.1958) (approving appointment of "general counsel" and consolidation of actions for pretrial purposes to avoid unnecessary expenses, duplication and delay in three stockholders' derivative actions); MANUAL § 10.221 at 24–25.

78 *See In re Diet Drugs,* 582 F.3d 524, 546 (3d Cir.2009) (approving district court's apportionment of settlement funds among class counsel in MDL pursuant to common benefit doctrine); *In re Air Crash Disaster,* 549 F.2d 1006, 1016, 1018–19 (5th Cir.1977) (holding that district court properly exercised its authority to award fees to MDL lead counsel committee paid by other plaintiffs' counsel pursuant to common benefit doctrine); *see also Sprague,* 307 U.S. at 166, 59 S.Ct. 777 ("That the party ... neither purported to sue for a class nor formally established by litigation a fund available to the class, does not seem to be a differentiating factor so far as it affects the source of the recognized power of equity to grant reimbursements."); *Smiley,* 958 F.2d at 499, 501 (holding that district court did not abuse its discretion in establishing fee structure whereby non-committee member attorneys placed percentage of their fees in escrow for *pro rata* distribution among committee members).

79 *Zyprexa,* 467 F.Supp.2d at 265–67.

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TAB 18

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by ChampionsWorld, LLC v. U.S. Soccer Federation, Inc., N.D.Ill., August 17, 2012

863 F.Supp.2d 966
United States District Court,
C.D. California.

In re LIVE CONCERT ANTITRUST LITIGATION.
This Document Relates to:
Lauren J. Hammer V. Clear Channel Communications, Inc. et al., 2:06–CV–04987 SVW (VBK)
Margaret A. Thompson V. Clear Channel Communications, Inc. et al., 2:05–CV–06704 SVW (VBK).

Case No. 06–ML–1745–SVW (VBK).
|
March 23, 2012.

Synopsis

Background: In class action alleging that promoters had engaged in anticompetitive conduct in connection with their promotion of live rock concerts in the Denver and Los Angeles markets, promoters moved to exclude the testimony of plaintiffs' expert economist, and for summary judgment.

Holdings: The District Court, Stephen V. Wilson, J., held that:

economist's purported analysis of the relevant product market was neither sufficiently reliable nor sufficiently helpful to the trier of fact to satisfy requirements for admissibility of expert testimony;

economist failed to utilize a reliable methodology to populate relevant product market; and

absent a defined economically significant product market, claims of monopolization and attempted monopolization in the Denver and Los Angeles markets could not be maintained against promoters.

Motions granted.

Attorneys and Law Firms

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ORDER RE:

DEFENDANTS' MOTION TO EXCLUDE TESTIMONY OF DR. OWEN R. PHILLIPS [403]

DEFENDANTS' MOTION FOR CLASS DECERTIFICATION [410]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DENVER ACTION) [438]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (LOS ANGELES ACTION) [441]

PLAINTIFFS' MOTION FOR APPROVAL OF PLAN FOR CLASS NOTICE, TO ORDER DEFENDANTS TO PRODUCE CLASS MEMBER INFORMATION, AND TO MODIFY THE CLASS DEFINITION [460]

PLAINTIFFS' MOTION TO EXCLUDE THE "AFFINITY ANALYSIS" OF DR. JANUSZ ORDOVER [469]

PLAINTIFFS' MOTION TO STRIKE DECLARATION OF JULIA VANDER PLOEG [516]

STEPHEN V. WILSON, District Judge.

***969 I. INTRODUCTION AND PROCEDURAL BACKGROUND** [1]

On June 13, 2002, Malinda Heerwagen filed a putative class action in the United States District Court for the Southern District of New York, alleging claims of monopolization, attempted monopolization, and unjust enrichment against Clear Channel, Inc. and related entities. Heerwagen claimed that the defendants had engaged in anticompetitive conduct in connection with their nationwide promotion of live music concerts. On August 11, 2003, the district court denied Heerwagen's motion for class certification, concluding that the putative class's antitrust claims required a separate analysis for each relevant geographic market, and, therefore, certification of a *nationwide* class was unwarranted. The Second Circuit affirmed. *Heerwagen v. Clear Channel Commc'ns, Inc. et al.,* 435 F.3d 219 (2d Cir.2006). Heerwagen subsequently dismissed the case voluntarily.

Twenty-two regional putative class actions subsequently were filed against Clear Channel, Inc. and related entities, alleging substantively identical claims of: (1) Monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2; (2) Attempted Monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2; and (3) Unjust Enrichment. These actions ultimately were consolidated and assigned to this Court as part of this Multi–District Litigation ("MDL").

On November 1, 2006, this Court issued an order staying discovery in every action except those in the following five geographic markets: Los Angeles, Chicago, New Jersey/New York, Boston, and Denver. (Dkt. 36, 37). On October 22, 2007, this Court issued an order certifying classes in these five markets and denying Defendants' motion for judgment on the pleadings as to Plaintiffs' attempted monopolization claims. (Dkt. 160); *Thompson v. Clear Channel Communs., Inc. (In re Live Concert Antitrust Litiq.),* 247 F.R.D. 98 (C.D.Cal.2007).

On November 16, 2009, the Court denied Plaintiffs' motion for approval of plan for class notice, and further ordered that the action be stayed pending the Ninth Circuit's *en banc* decision in *Dukes v. Wal–Mart,* 509 F.3d 1168 (9th Cir.2007). (Dkt. 215). On October 7, 2010, the Court granted Defendants' motion to lift the stay, denied Defendants' motion for reconsideration based on the Ninth Circuit's decision in *Dukes v. Wal–Mart Stores, Inc.,* 603 F.3d 571 (9th Cir.2010) (en banc), and ordered the parties to submit a joint stipulation as to how best to proceed with this action. (Dkt. 240).

Pursuant to the parties' stipulation, the Court entered an Order Regarding Scheduling of Action

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on December 10, 2010. (Dkt. 260) Under this stipulated order, the parties agreed to limit further discovery to the Denver and Los Angeles markets. "The remaining three certified template markets (Chicago, New York and Boston) shall be stayed until the Denver and Los Angeles markets are tried or otherwise resolved." (*Id.*).

On February 7, 2011, Defendants filed a Motion for Partial Summary Judgment Regarding Statute of Limitations (with respect to the Denver and Los Angeles actions). (Dkt. 271). On April 7, 2011, the Court granted the motion. (Dkt. 310).

The following motions are currently pending before the Court:

***970** • Defendants' Motion to Exclude the Testimony of Dr. Owen R. Phillips, (Dkt. 403);

• Defendants' Motion for Class Decertification, (Dkt. 410);

• Defendants' Motion for Summary Judgment (Denver Action), (Dkt. 438);

• Defendants' Motion for Summary Judgment (Los Angeles Action), (Dkt. 441);

• Plaintiffs' Motion for Approval of Plan for Class Notice, to Order Defendants to Produce Class Member Information, and to Modify the Class Definition, (Dkt. 460); and

• Plaintiffs' Motion to Strike Declaration of Julia Vander Ploeg, (Dkt. 516).

For the reasons set forth below, Defendants' Motion to Exclude the Testimony of Dr. Owen R. Phillips, (Dkt. 403), is GRANTED IN PART. Defendants Motions for Summary Judgment, (Dkt. 438, 441), are GRANTED. The remaining motions are DISMISSED AS MOOT.

II. PRIOR CLASS CERTIFICATION ORDER

As noted above, on October 22, 2007, the Court issued an Order Granting Plaintiffs' Motion for Class Certification (in the Chicago, Boston, New York/New Jersey, Denver, and Los Angeles markets). *In re Live Concert Antitrust Litig.*, 247 F.R.D. 98 (C.D.Cal.2007). At that time, however, the Court was bound by then-governing Ninth Circuit precedent, under which district courts were precluded from resolving factual disputes —and, in particular, weighing conflicting expert testimony—at the class certification stage. Thus, the Court concluded "*Dukes* [*v. Wal–Mart, Inc.*, 474 F.3d 1214, 1229 (9th Cir.2007)] clearly precludes the Court from conducting a *Daubert* analysis or weighing expert testimony," *id.* at 116 n. 7, and effectively accepted as true, for purposes of that motion only, the representations of Plaintiffs' expert. "[T]his order views the allegations, expert testimony, and evidence through the very narrow prism permitted by *Dukes.* Accordingly, Plaintiffs have satisfied the requirements of Rule 23[.]" *Id.* at 155.

The original decision in *Dukes,* however, was subsequently withdrawn and replaced by *Dukes v. Wal–Mart Stores, Inc.*, 603 F.3d 571 (9th Cir.2010) (en banc), which was, in turn, reversed by the Supreme Court in *Wal–Mart Stores, Inc. v. Dukes,* —— U.S. ——, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). In its decision, the Supreme Court enunciated a significantly different standard than that applied by this Court in its 2007 Class Certification Order. "[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.... Frequently that 'rigorous analysis' will entail some overlap with the merits of the Plaintiffs' underlying claim. That cannot be helped." *Dukes,* 131 S.Ct. at 2551. The Court went on to observe, "The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so[.]" *Id.* at 2553–54.

In short, the Court's prior Order Granting Class Certification was based on a legal standard that is no longer in effect, which precluded the Court from undertaking a meaningful analysis of either the underlying facts of the case or the representations of the parties' respective experts. As such, that order has little to no precedential value at this point in the litigation. The Court is writing on a proverbial "clean slate."

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III. PENDING MOTIONS (ORDER OF ANALYSIS)

There are several motions currently pending before the Court, including: (1) ***971** Defendants' motion to exclude the testimony of Plaintiff's expert Dr. Owen Phillips, pursuant to Federal Rule of Evidence 702; and (2) Defendants' motions for summary judgment as to the Denver and Los Angeles markets. These motions require two distinct inquiries. First, the Court must evaluate the admissibility of Dr. Phillips' proffered expert testimony in its role as "gatekeeper" under Rule 702. *See Claar v. Burlington N. R.R.,* 29 F.3d 499, 501 (9th Cir.1994) (prior to ruling on summary judgment motion, "[t]he trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. The primary locus of this obligation is Rule 702.") (emphasis in original) (quoting *Daubert v. Merrell Dow Pharms.,* 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)).

Second, the Court will evaluate the merits of Defendants' motions for summary judgment, considering Dr. Phillips' testimony only to the extent that it is admissible under Rule 702. *See generally id.* at 504–05 (affirming summary judgment based on the exclusion of testimony by plaintiffs' damages expert, holding: "To survive [defendant's] motion for summary judgment, plaintiffs were required to offer admissible expert testimony showing that exposure to chemicals in the workplace played some part in producing their injuries.").

IV. DEFENDANTS' MOTION TO EXCLUDE TESTIMONY OF DR. OWEN R. PHILLIPS

A. Legal Standard

Federal Rule of Evidence 702 governs the admissibility of expert testimony in federal courts. Rule 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed.R.Evid. 702. [2]

"[T]he admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence." Fed.R.Evid. 702, Notes of Advisory Committee on 2000 amendments (citing *Bourjaily v. United States,* 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987)).

The admissibility of expert testimony is a question for the Court. Fed.R.Evid. 104(a); *Bourjaily,* 483 U.S. at 175–76, 107 S.Ct. 2775. To that end, the Supreme Court has recognized the obligation of the trial court to fulfill a "gatekeeping role" in order to "ensure that any and all [expert] testimony ... is not only relevant, but reliable." *Daubert v. Merrell Dow Pharm.,* 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). "The objective of that [gatekeeping] requirement is ... to make certain that an expert, whether basing ***972** testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

With respect to the reliability of expert testimony, the Supreme Court in *Daubert* identified several factors that the court may consider when making its determination, including: (1) whether the expert's technique or theory can be or has been tested; (2)

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whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence, and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. *Daubert,* 509 U.S. at 594, 113 S.Ct. 2786; *accord Kumho,* 526 U.S. at 151, 119 S.Ct. 1167 (holding *Daubert* factors may be applied to non-scientific expert testimony, depending upon "the particular circumstances of the particular case at issue").

The Supreme Court has emphasized, however, that these factors are not exclusive, and that "the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination." *Kumho,* 526 U.S. at 142, 119 S.Ct. 1167 (emphasis in original). "[T]he trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Id.* at 152, 119 S.Ct. 1167. Thus, the admissibility of expert testimony is "a subject peculiarly within the sound discretion of the trial judge, who alone must decide the qualifications of the expert on a given subject and the extent to which his opinions may be required.' " *United States v. Chang,* 207 F.3d 1169, 1172 (9th Cir.2000) (quoting *Fineberg v. United States,* 393 F.2d 417, 421 (9th Cir.1968)).

Since "[d]istrict courts are not required to hold a *Daubert* hearing before ruling on the admissibility of scientific evidence," this Court may rule on Defendant's *Daubert* motion on the basis of the parties' papers. *In re Hanford Nuclear Reservation Litigation,* 292 F.3d 1124, 1138 (9th Cir.2002) (citing *United States v. Alatorre,* 222 F.3d 1098, 1100 (9th Cir.2000)).

B. Discussion

Defendants argue that the testimony of Plaintiffs' expert economist, Dr. Owen Phillips, should be excluded on several grounds. In particular, Defendants seek to exclude Dr. Phillips' testimony regarding: (1) the fact and amount of damages; (2) causation of Plaintiffs' injury; (3) the definition of the relevant product market; (4) Defendants' share of the relevant market; and (5) Defendants' alleged anticompetitive conduct. The Court will address each of these issues in turn.

1. Damages and Causation

Dr. Phillips performed several statistical analyses in order to estimate the damages suffered by Plaintiffs as a result of Defendants' allegedly anticompetitive conduct. These analyses are of four basic types: (1) the "Yardstick" approach; (2) the "Before–and–After" approach; (3) the "pooled sample" analysis; and (4) damages attributable to ticket surcharges. Defendants do not dispute that Dr. Phillips is qualified as an expert economist, nor do they dispute that statistical analysis may, under appropriate circumstances, properly be admitted into evidence. Instead, Defendants contend that Dr. Phillips failed to "reliably appl[y] the principles and methods [of proper statistical analysis] to the facts of the case" in violation of Rule 702(d).

*973 a. Legal Requirements For Statistical Analysis

As a general matter, flaws in a proffered expert's analysis typically go to the weight, rather than the admissibility, of the expert's testimony. *See, e.g., Hemmings v. Tidyman's Inc.,* 285 F.3d 1174, 1188 (9th Cir.2002) ("In most cases, objections to the inadequacies of a study are more appropriately considered an objection going to the weight of the evidence rather than its admissibility. Vigorous cross-examination of a study's inadequacies allows the jury to appropriately weigh the alleged defects and reduces the possibility of prejudice.") (internal citation omitted). "In some cases, however, the analysis may be 'so incomplete as to be inadmissable as irrelevant.' " *Id.* (quoting *Bazemore v. Friday,* 478 U.S. 385, 400, n. 10, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986)).

A somewhat unique body of law has developed governing whether and under what circumstances statistical analysis proffered by an expert—and, in particular, regression analyses such as those

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conducted by Dr. Phillips—pass muster under Rule 702. In the seminal case *Bazemore v. Friday,* 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986), the Supreme Court held that the Court of Appeals for the Fourth Circuit erred in ignoring statistical evidence presented by plaintiffs in connection with their employment discrimination claim. *Id.* at 386, 106 S.Ct. 3000. The Court reasoned:

> While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an analysis which accounts for the major factors "must be considered unacceptable as evidence of discrimination." Normally, failure to include variables will affect the analysis' probativeness, not its admissibility.

Id. at 400, 106 S.Ct. 3000. The Court further reasoned that "[t]here may, of course, be some regressions so incomplete as to be inadmissible as irrelevant; but such was clearly not the case here." *Id.* at 400, n. 10, 106 S.Ct. 3000.

"*Bazemore,* however, does not give blanket approval to the introduction of all evidence derived from multiple regression analyses." *Penk v. Or. State Bd. of Higher Educ.,* 816 F.2d 458, 464–65 (9th Cir.1987). Instead, courts have recognized that by its own terms, the Supreme Court's reasoning in *Bazemore* applies only to a regression analysis "which accounts for the major factors." *See Bazemore,* 478 U.S. at 400, 106 S.Ct. 3000. Thus, in *Bickerstaff v. Vassar College,* 196 F.3d 435, 449 (2d Cir.1999), the Second Circuit concluded that the district court properly gave plaintiff's expert report "no probative value," holding:

> the district court did not reject Gray's regression analysis because it included less than all the relevant variables; rather, it found the evidence not probative because it omitted the major variables. Thus ... Gray's statistical analysis falls within the *Bazemore* exception—that "there may ... be some regressions so incomplete as to be inadmissible as irrelevant."

Id. at 449 (quoting *Bazemore,* 478 U.S. at 400 n. 10, 106 S.Ct. 3000) (internal citations omitted).

The importance of accounting for the relevant "major variables" has been recognized as particularly important in the context of antitrust litigation.

> Damage estimates in antitrust cases hinge on careful statistical analysis, reasonable assumptions, reliable data, and the robustness of the results. If any of these areas are circumspect, then the analysis could provide faulty conclusions ***974** as to the existence or the amount of damages.

2A P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 399c, p. 447 (3d ed. 2006).

> The correct application of the before-and-after approach [in the context of an alleged conspiracy to monopolize] requires using the prices in the "before" period as an evidentiary foundation for inferring what the prices would have been in the conspiracy period but for the illegal activity. **The determination of the "but for" prices, however, must take into account nonconspiratorial factors that would have caused prices to be different in the conspiracy period even if there had been no conspiracy.**

Id. ¶ 399b, at 446 (emphasis added) (discussing potential problems with the application of the "before-and-after" and "yardstick" methodologies in antitrust cases).

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> By not including any additional variables in the regression, the possibility of omitted variable bias is high. In other words, there are omitted factors that may influence market share growth. These omitted factors could confound the results of the statistical analysis by biasing the damage estimates. In this way, the regression results do not necessarily identify an effect of USTC's alleged behavior on Conwood's market-share growth by state. Rather, the results only suggest a relationship between initial market share and market-share growth. Because the possibility of omitted variable bias is high, we cannot, therefore, infer anything from these results as to whether there was any illegal behavior and, if so, whether that behavior had any anticompetitive effects.

Id. ¶ 399c2, at 455 (discussing flaws in plaintiff's statistical analysis in *Conwood Company, LP v. United States Tobacco Company,* 290 F.3d 768 (6th Cir.2002)).

Accordingly, the key question regarding the admissibility of Dr. Phillips' statistical analyses is whether they account for the "major factors." In making this determination, the Court cannot simply assume that variables omitted from the analysis are, in fact, "major factors" which should have been included. There must be some indication that the excluded variables would have impacted the results. *See Sobel v. Yeshiva University,* 839 F.2d 18, 34 (2d Cir.1988) ("We read *Bazemore* to require a defendant challenging the validity of a multiple regression analysis to make a showing that the factors it contends ought to have been included would weaken ... the analysis."). The burden of proof, however, remains on the proponent of the expert testimony. *See Bourjaily,* 483 U.S. at 175–76, 107 S.Ct. 2775.

b. "Yardstick" Approach

Dr. Phillips' "Yardstick" methodology of calculating damages is fairly straightforward. (*See* Dkt. 494, Exh. A, Economic Report of Owen R. Phillips. Ph.D. as it Relates to Denver and Los Angeles Markets ("Phillips Expert Report"), at ¶¶ 264–66). In each geographic market (Denver and Los Angeles), Dr. Phillips calculated the average ticket price for rock concerts promoted by Defendants, and compared this amount to the average ticket price for rock concerts promoted by other promoters (*i.e.,* the "yardstick"). Dr. Phillips found that the average ticket price was higher for rock concerts promoted by Defendants, and concluded that this disparity in price was the result of Defendants' anticompetitive conduct. Dr. Phillips then calculated the difference between these average ticket prices in each market, and multiplied this amount by the total number of tickets sold by Defendants during the relevant time period, resulting in estimated damages of $21,700,599 (Denver market) and $70,596,699 (Los Angeles market). (Dkt. 494, Exh. B, Rebuttal Economic ***975** Report of Owen R. Phillips. Ph.D. as it Relates to Denver and Los Angeles Markets ("Phillips Rebuttal Report"), at 39 (revised damages calculations)).

Dr. Phillips' "Yardstick" comparison, however, simply assumes—without further examination—that the difference in average ticket prices observed by Dr. Phillips is due entirely to Defendants' allegedly anticompetitive conduct. The analysis does not account for *any* other possible explanation(s) for this disparity. Among other variables, Dr. Phillips' analysis fails to account for differences in artist quality/popularity. Common sense dictates that a more popular music artist typically will command higher ticket prices than a less popular artist. Thus, if Defendants consistently

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promoted concerts for highly popular acts, one would expect their average ticket prices to be higher than those of rival promoters.

Dr. Phillips himself has acknowledged that artist popularity affects ticket prices and that Defendants promoted many of the most popular artists during the relevant time period. During the June 4, 2007 hearing on class certification, for example, the following exchanges with Dr. Phillips took place:

> Q. And you realize that there are factors in addition to considering the competitive price versus the monopoly price that you would have to consider in this analysis, correct?
>
> A. Well, there's going to be complications, because as Clear Channel became larger, they also [began] attracting the very best talent.... But I think there needs to be a check done on the quality of the artists that Clear Channel promotes versus the rest of the market so that damages aren't ... overestimated in effect.
>
> Q. Is there a way, as an economist, that you can do that check for quality in doing a damage analysis here?
>
> A. Yes.
>
> ....
>
> THE COURT. It seems to me that if Clear Channel was attracting the best talent, that, as you said, that talent would command a higher ticket price, correct?
>
> WITNESS. Correct.
>
> THE COURT. So the damage analysis would have to include some further analysis to account for that qualitative difference in talent, correct?
>
> WITNESS. Yes, to see if there is a difference.
>
> ....
>
> Q. Do you believe that using those average ticket prices will bias damages against Clear Channel?
>
> A. It's possible. And that is why we have to look at differences in qualities of the artists.... [W]e have to make some adjustments for quality in doing the damage analysis.

(Dkt. 405, Exh. 2, at 41:6–51:1; *see also id.* at 43:17–23 (artist popularity can be accounted for by using, *e.g.,* CD sales)).

The only "check" that Dr. Phillips performed to account for artist popularity, however, was to compare Defendants' promoter share (measured in ticket sales) of the "Top 100" rock acts in each geographic market to Defendants' share of the overall market. Dr. Phillips concluded that "Clear Channel's market share for the Top 100 Acts is consistent with its market share in the remainder of the market." (Phillips' Expert Report, at ¶ 263). The glaring flaw in this purported analysis is that the Top 100 rock acts in each market account for virtually all of the relevant ticket sales.[3] In other words, the Top 100 ***976** acts in each geographic market effectively comprise the entire market. Thus, Dr. Phillips' "analysis" amounts to nothing more than a simple tautology: Defendants' share of the overall market is consistent with Defendants' share of the overall market. Dr. Phillips conceded as much in his deposition:

> Q. So your conclusion is that Clear Channel's share of all concerts is the same as Clear Channel's share of all concerts?
>
> A. In Los Angeles, yeah.

(Dkt. 405–3, Phillips Depo., at 102:11–14).

> Q. So the [Top 100] analysis is meaningless? [referring to the Denver market]
>
> A. The money is in the top 100 concerts.
>
> Q. The top 100 analysis is meaningless?
>
> A. Right. Yeah. The top 100—the money is in the top 100 concerts.

(Phillips Depo., at 103:7–11).

In contrast, Defendants have submitted evidence that the artists promoted by Defendants during

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the relevant time period were, on average, more popular than the artists promoted by rival promoters.[4] This evidence is consistent with Dr. Phillips' observation that Defendants attracted "the very best talent."

Moreover, in order to demonstrate the impact of Dr. Phillips' failure to account for artist popularity, Defendants' expert economist, Dr. Janusz Ordover, conducted a comparison of ticket prices for concerts promoted by Defendants to concerts promoted by other promoters *for the same artists.* Dr. Ordover found that Defendants' ticket prices generally were comparable to, and in several instances lower than, those of competing promoters for concerts by the same artist. (Ordover Expert Report, ¶¶ 170–80).

In his Rebuttal Report, Dr. Phillips contends that Dr. Ordover's analysis fails to account for venue size and, therefore, "is meaningless because the venue size is an important determinant of how prices are set.... A popular artist in a small venue will command a higher price than the same performance at a large venue." (Phillips Rebuttal Report, at 34). This assertion by Dr. Phillips, however, simply provides another reason to exclude his "Yardstick" analysis, which similarly fails to account for venue size (or artist popularity, or any variable other than the identity of the concert promoter).

In any event, while Dr. Ordover's analysis may be flawed, artist popularity is undoubtedly a "major factor" in determining ticket prices, which should have been included in Dr. Phillips' "Yardstick" analysis. The failure to do so renders this analysis "so incomplete as to be inadmissible as irrelevant." *See Bazemore,* 478 U.S. at 400, n. 10, 106 S.Ct. 3000.

Plaintiffs have not met their burden of establishing that Dr. Phillips' "Yardstick" damages analysis satisfies the requirements of Rule 702. Accordingly, the Court GRANTS Defendants' Motion to Exclude this testimony.

c. "Before–and–After" Approach

Dr. Phillips' "Before–and–After" analysis is similarly flawed. In performing this analysis, Dr. Phillips first analyzed average ticket prices (for all live rock music ***977** concerts in the Denver and Los Angeles markets) from 1981 through 1998, a period that Dr. Phillips characterizes as "competitive." (*See* Phillips Expert Report, at ¶¶ 267–73). Dr. Phillips then uses this data to "predict" the expected average ticket prices from 2000 through 2006.[5] Next, Dr. Phillips compares these expected average ticket prices to the actual average ticket prices from 2000 to 2006. Because the actual ticket prices are higher than the "expected" values, Dr. Phillips concludes that Defendants' entry into the market in 2000 caused an increase in ticket prices. Based on the difference between the expected ticket prices and the actual prices, Dr. Phillips calculates damages as follows:

With respect to Dr. Phillips' "Before–and–After" analysis, the court's holding in *In re REMEC Inc. Sec. Litig.,* 702 F.Supp.2d 1202 (S.D.Cal.2010) is instructive. There, the plaintiffs' expert performed a multivariate regression analysis (as part of an "event study") to analyze the impact of "corrective disclosures"[7] on the stock price of a public company. *Id.* at 1271–72. The plaintiffs' expert first created a "market index" and an "industry index" (the "independent variables") to account for the market and industry forces that one would expect to impact the company's stock price. *Id.* He then used these independent variables to calculate the daily predicted return on the company's stock (*i.e.,* the "dependent variable"). *Id.* Finally, the plaintiffs' expert compared this predicted return with the actual return during the relevant time period and found that on the day following a corrective disclosure, the actual stock return "varie[d] markedly from the predicted return." *Id.* Based on his analysis, the plaintiffs' expert concluded that the corrective disclosures had caused these declines in stock price. *Id.*

The court granted defendants' motion to exclude the above-described analysis, holding that it did not meet Rule 702's standards for admissibility as articulated in *Daubert. Id.* at 1273–74. The court reasoned:

> Dr. Nye predetermines the results of his analysis. Nye purports to test the hypothesis that REMEC's corrective disclosures exerted a material negative influence on the per-share price of REMEC stock during the class period.... **Nye's model assumes that the difference between actual return and predicted return is necessarily a result of company-specific information.**
>
> **Dr. Nye makes no attempt to account for other possible causes,** *i.e.,* industry-specific news (for example, if an increase in global sales of defense products due to an increase in U.S. presence in Iraq was announced during the class period), market-specific news (for example, if a 5% decline in stock prices occurred across the market due to an announcement of an expected drop in consumer sales in December), or other measurable ***978** macroeconomic variables (for example, the inflation rate and GDP).

Id. at 1273 (emphasis added).

Accordingly, the court held that Dr. Nye's expert opinion was not relevant and reliable as required under Rule 702. *Id.* at 1275.

> Where a study accounts for the "major factors" but not "all measurable variables," it is admissible. [*Bazemore v. Friday,* 478 U.S. 385, 400, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986).] However, where significant variables that are quantifiable are omitted from a regression analysis, the study may become so incomplete that it is inadmissible as irrelevant and unreliable. *Bickerstaff,* 196 F.3d at 449. Because the burden of proving helpfulness and relevance rests on the proponent of a regression analysis, it is the proponent who must establish that other major factors have been accounted for in a regression analysis. Dr. Nye makes no attempt to do so here, aside from his assertion/assumption that company-specific information is the only major factor.

Id. at 1273.

Notably, Dr. Phillips' "Before–and–After" analysis is significantly *less* robust than the analysis rejected by the Court in *In re REMEC Inc. Sec. Litig.* There, the expert's analysis accounted for two independent variables (the "market index" and the "industry index"), in addition to the corrective disclosures that allegedly caused the declines in stock price. Here, Dr. Phillips' "Before–and–After" analysis accounts for no independent variables other than time.[8] Moreover, in *In re REMEC Inc. Sec. Litig.,* the expert observed stock declines after several corrective disclosures by the defendants, arguably supporting his hypothesis that the disclosures were, in fact, the cause of the declines. Here, only one "event" (*i.e.,* the entry of Defendants into the market in 2000) was considered. Finally, as discussed in more detail below, Dr. Phillips improperly excluded data from the year 1999 from his analysis.

Thus, as in *In re REMEC Inc. Sec. Litig.,* Dr. Phillips impermissibly *assumes* that any observed increase in average ticket prices after 2000 is due entirely to Defendants' anticompetitive conduct, without meaningfully testing this assumption. In particular, Dr. Phillips' analysis impermissibly fails to account for at least two major variables, both of which he has conceded could impact ticket prices: (1) changes in artist quality over the relevant time period; and (2) the emergence of digital downloading of music (using, *e.g.,* Napster or iTunes) and its impact on the price of tickets for live concerts.

With respect to artist quality, Dr. Phillips testified in his deposition that he believes ticket prices have increased due to changes in the "quality" of rock

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concerts, and that this increase began *prior* to Defendants' entry into the market.

> I let the market self-adjust for quality. So when you look at the market, you can see prices even before the entry of Clear Channel going up. Even without any anticompetitive behavior in the market, I see prices going up, and I presume and I believe that's because of quality changes in rock and roll concerts. So I am saying that the self-adjustment took place in the market.

(Phillips Depo., at 88:11–18). (*See also* Phillips Expert Report, at ¶ 274 (referring to "the emergence of 'superstar' acts in the late 1990s that continued to exist throughout the class period here")).

***979** Nevertheless, Dr. Phillips' "Before–and–After" analyses fail to account for changes in concert quality during the relevant time period. In effect, Dr. Phillips simply assumes—without analysis—that to the extent concert quality changed from 1981 through 1998, concert quality continued to change from 2000 to 2006 at precisely the same rate. This is, of course, not necessarily true. For example, if the Rolling Stones and other highly popular acts began touring more heavily in 2000, one would expect average concert "quality" (and, consequently, average ticket prices) to increase. Moreover, given Dr. Phillips' stated belief that changes in concert quality affect ticket prices, such changes undoubtedly constitute a "major factor," which should have been accounted for under *Bazemore* and its progeny.

With respect to the emergence of digital downloading, at least one industry observer has concluded that the increasing availability of music on the Internet is the "main reason" for the recent increase in concert ticket prices.

> I suspect the main reason [for rising ticket prices] is that the growing ability of fans to download music free from the Web—legally or illegally—has cut into artists' revenues. Millions of people have downloaded music from Napster, Morpheus and KaZaA—and bought fewer records as a result. Music sales are plummeting, putting downward pressure on artists' royalties.
>
> In this environment, concerts take on a different meaning for artists and their managers. In pre-Napster days, concert prices were kept below their market rate to help sell albums, a complementary good. Now concert prices are set with an eye toward maximizing concert revenue.
>
> Bands have always had cadres of fans, whose loyalty conferred monopoly power. Yet they were reluctant to exploit this power by charging higher prices because they wanted to sell more albums. When revenue from albums began to dry up, it was natural for bands to raise concert prices.
>
> ....
>
> It is not that bands have become greedier; it is that the technology changed to make it less profitable to charge below-market prices for concerts.

(Dkt. 405–12, Alan B. Krueger, Economic Scene; Music sales slump, concert ticket costs jump and rock fans pay the price, New York Times (October 17, 2002)).

In his deposition, Dr. Phillips conceded that digital downloading of music has, in fact, affected artists' approach to concert profitability.

> Q. What is Napster?
>
> A. Napster is a digital download music site back in the late #90s.
>
> Q. 1998, 1999, right?
>
> A. Yes.
>
> Q. Didn't that fundamentally change the pricing of concert tickets?

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MS. CONNOLLY: Objection to form.

A. Possibly. You know, it's interesting. I don't—it's hard to sort out the impact of Napstar (sic) from iTunes, and in my mind, Napster really started the digital download movement, but I think iTunes really had more of an impact.

Q. (BY MR. JACOBSON) So isn't it true before Napster and iTunes that artists performed in concerts to promote record sales, while after Napster and during iTunes, artists now release records to promote concert revenue?

MS. CONNOLLY: Objection to form.

Q. (BY MR. JACOBSON) Isn't that undeniably true?

MS. CONNOLLY: Same objection.

***980** A. I don't know if it's true because here's what I think. I think that all along there's a relationship there where an artist will do a concert to promote their recordings and they will do recordings to promote their concerts. It's a complementary relationship, but I think, you know, over time, given the popularity of digital downloads that the complementary relationship has changed. I'm not quite sure how it has changed, but it has changed, and artists are doing more concerts now because they have the opportunity to make more profit from the concert, more revenue from the concert relative to their recordings than I think before.

Q. All right. So how does your Before–and–After analysis capture that impact?

A. It captures the trend. I mean the trend begins, and it just maps it out.

(Phillips Depo., at 211:24–213:10).

Notably, the emergence of digitally-available music on the Internet (in approximately 1998/1999 according to Dr. Phillips) occurred immediately prior to 2000, the year in which Dr. Phillips concluded Defendants' entry into the market caused ticket prices to increase. This fundamental change in marketplace dynamics clearly qualifies as a "major factor," which should have been accounted for—in some fashion—in Dr. Phillips' analysis.

Finally, and perhaps most troubling to the Court, Dr. Phillips' "Before–and–After" analyses completely ignore the dramatic increase in ticket prices that occurred in 1999, the year *before* Clear Channel entered the rock concert promotion market. To the Court's chagrin, Dr. Phillips simply excluded 1999 from his data set, and performed the "Before–and–After" analyses as though 1999 had never occurred.

Dr. Phillips explains that he excluded data from 1999 because "during this year SFX [whom Clear Channel ultimately acquired] was actively acquiring and consolidating concert promoters. In my opinion there was anticompetitive conduct taking place, and there were Department of Justice investigations in the company's conduct. Including 1999 would be using an anticompetitive year in the markets to predict future competitive prices beginning in 2001." (Phillips Rebuttal Report, at 36 (citing a September 3, 1998 Los Angeles Times article)).

This purported explanation for the exclusion of 1999 fails for several reasons. First, according to Dr. Phillips' own data, Defendants' market share in 1999 was 2.34% in the Denver market and 0.0% in the Los Angeles market. (*See* Phillips Rebuttal Report, Revised Exhs. 1, 2).[9] These *de minimis* market shares are insufficient as a matter of law to support monopolistic conduct. *See* 2 J. Von Kalinowski, *Antitrust Laws and Trade Regulation* § 25.03 [3][a], at 25–37 (Matthew Bender 2d ed.) (hereinafter "*Antitrust Laws and Trade*") ("[C]ourts have held that a low market share (generally below 40 percent) either precludes a finding of monopoly power or requires a finding of no monopoly power.").

Second, this explanation is directly contrary to Dr. Phillips' previous representations to this Court, based upon which the Court granted Plaintiffs' Motion for Class Certification. *See In re Live Concert Antitrust Litig.*, 247 F.R.D. at 136 & n. 32 ("At the hearing, Phillips testified that he

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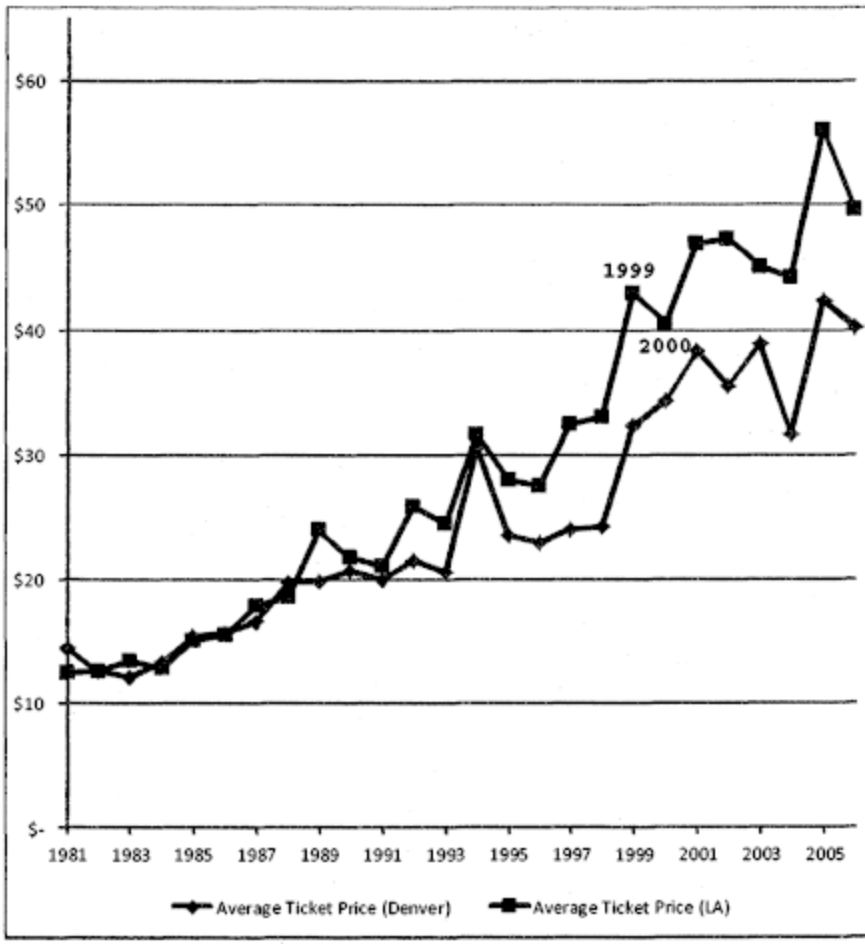
could determine whether Clear Channel imposed a monopoly overcharge through a variety of methods. First, Phillips testified that he could use the relevant market ***981** in 1999 as a benchmark because Clear Channel possessed a small market presence in 1999 and its ticket prices were comparable with competitors' ticket prices in 1999. This approach is commonly referred to as the 'before-and-after' approach.") (citing Hearing Tr. at 39:25–40:19).

Finally, even if anticompetitive conduct was, in fact, occurring in 1999, this conduct would not justify the wholesale exclusion of 1999 from Dr. Phillips' analysis. The law is clear that Dr. Phillips must *account for* major factors (such as allegedly anticompetitive conduct in 1999); he cannot simply *ignore* them and perform the analysis as if they did not exist.

The exclusion of 1999 undoubtedly had a significant impact on the results of Dr. Phillips' analysis. (*See generally* Ordover Expert Report, ¶ 192). As demonstrated in the chart below, the average ticket prices (for all concerts) in both Denver and Los Angeles increased dramatically in 1999. In Los Angeles, the change in average ticket price from 1998 to 1999 represented the largest one-year increase (30.11%) in the twenty-five years studied by Dr. Phillips. In fact, average ticket prices in Los Angeles actually *decreased* in 2000, the year that Dr. Phillips concludes Defendants' entry into the market caused ticket prices to rise to supracompetitive levels. Moreover, by excluding the significant price increase that occurred in 1999 from the "before" period, Dr. Phillips' model effectively builds the full amount of this increase into his estimated damages—notwithstanding the fact that this increase occurred *before* Defendants' entry into the market. As such, the analysis is hopelessly flawed.

Average Ticket Prices (all concerts) [10]

***982**



Plaintiffs have not met their burden of establishing that Dr. Phillips' "Before–and–After" approach to calculating damages satisfies the requirements of Rule 702. Accordingly, the Court GRANTS Defendants' Motion to Exclude this testimony.

d. "Pooled Sample" Analysis

In his Rebuttal Report, Dr. Phillips performed an additional "pooled sample" analysis. For purposes of this analysis, Dr. Phillips combined all concerts from 1981–2006 (including concerts in both Los Angeles and Denver). (*See* Phillips Rebuttal Report, at 39, 64–67). He then analyzed this data in order to test his hypothesis that a "structural break" occurred in 2000. According to Dr. Phillips, this analysis "allows for a structural break in the market starting in 2000." (*Id.* at 64).

This "pooled sample" analysis is fatally flawed for the same basic reason discussed above; namely, it fails to account for any "major factors" (other than

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Defendants' entry into the market in 2000) that could have caused and/or contributed to an increase in ticket prices. Moreover, the "pooled sample" analysis fails even to consider whether a so-called "structural break" occurred in any year other than ***983** 2000. To the contrary, Dr. Phillips concedes that there may be "structural breaks" in other years; he simply did not test for them. (*See* Dkt. 405–4, Phillips Depo., at 450:8–452:8). Finally, the "pooled sample" analysis impermissibly combines two geographic markets (Denver and Los Angeles) in order to reach the desired result. While these MDL actions have been consolidated for the sake of judicial efficiency, this Court consistently has recognized that the antitrust analysis in each case must be done on a market-specific basis.

Plaintiffs have not met their burden of establishing that Dr. Phillips' "pooled sample" analysis satisfies the requirements of Rule 702. Accordingly, the Court GRANTS Defendants' Motion to Exclude this testimony.

e. Ticket Surcharges

In his Expert Report, Dr. Phillips opines that Defendants' monopoly power allowed them to add a variety of surcharges to the base price of tickets for the concerts they promoted. (*See* Phillips Expert Report, ¶¶ 276–82). "[W]hile Clear Channel assesses these charges, for the most part its competitors do not." (*Id.* at ¶ 279). In particular, Dr. Phillips contends that Defendants charged "monopoly rent" in the form of: (1) facility maintenance fees ("FMF"); and (2) parking fees in certain Los Angeles venues, which were charged regardless of whether the purchaser actually parked at the venue in question. According to Dr. Phillips, the total damages attributable to these surcharges is $2,753,709.12 (Denver) and $12,043,947.41 (Los Angeles). (Phillips Expert Report, at ¶ 282).

Defendants do not argue in their *Daubert* Motion that Dr. Phillips' testimony regarding these surcharges should be excluded; Defendants address these surcharges only in their Motions for Summary Judgment. Nor can the Court discern any obvious reason why this testimony should be excluded under Rule 702. The damage calculations appear to be straightforward, with no apparent methodological flaws that would render them unreliable. With respect to causation, Dr. Phillips' opinion that Defendants' monopoly power allowed them to assess the above-described surcharges generally appears to be within his area of expertise as an economist.

Accordingly, the Court will not exclude Dr. Phillips' damages calculations based on the ticket surcharges assessed by Defendants under Rule 702.

2. Definition of the Relevant Market

Dr. Phillips opines that for purposes of Plaintiffs' antitrust claims, the relevant product market is comprised of "live rock music concerts." (*See* Phillips Expert Report, ¶¶ 40–64). Defendants contend that this opinion should be excluded under Rule 702, because Dr. Phillips failed to utilize a reliable methodology in defining this purported market. As a result, Defendants contend that Dr. Phillips' proposed market definition is both under-inclusive and over-inclusive; under-inclusive in that it improperly excludes concerts that are reasonable substitutes for concerts included in Dr. Phillips' definition (*e.g.,* concerts by certain "pop" artists); over-inclusive in that it improperly includes concerts that are not reasonable substitutes for one another (*e.g.,* "classic rock" concerts, which are not reasonable substitutes for "heavy metal" concerts). (*See* Motion, at 16).

For the reasons set forth below, the Court agrees that Plaintiffs have failed to meet their burden of establishing that Dr. Phillips' proposed definition of the relevant product market is sufficiently reliable and helpful to the trier of fact to warrant inclusion under Rule 702 and *Daubert.*

a. Applicable Substantive Law

"For antitrust purposes, a 'market is composed of products that have reasonable ***984** interchangeability for the purposes for which they are produced—price, use and qualities considered.'

" *Paladin Assocs. v. Montana Power Co.,* 328 F.3d 1145, 1163 (9th Cir.2003) (quoting *Int'l Boxing Club, Inc. v. United States,* 358 U.S. 242, 250, 79 S.Ct. 245, 3 L.Ed.2d 270 (1959)). "The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand." *Oltz v. St. Peter's Cmty. Hosp.,* 861 F.2d 1440, 1446 (9th Cir.1988).

> In standard antitrust analysis, the court considers both "demand elasticity" and "supply elasticity" in determining whether anticompetitive effects are likely. *Rebel Oil,* 51 F.3d at 1436. In other words, courts determine the degree to which price increases will cause marginal buyers to turn to other products or marginal suppliers to increase output of the product.

United States v. Oracle Corp., 331 F.Supp.2d 1098, 1118 (N.D.Cal.2004).

As this Court observed in its previous Order Granting Class Certification, calculating the cross-elasticity of demand is often an economist's first step in defining the relevant product market. *See In re Live Concert Antitrust Litig.,* 247 F.R.D. at 123. Nevertheless, while calculating the cross-elasticity of demand (and supply) is the preferred methodology, it is not an absolute requirement. In *Independent Ink, Inc. v. Trident, Inc.,* 210 F.Supp.2d 1155 (C.D.Cal.2002), for example, the court observed that in order to define the relevant product market:

> Plaintiff must proffer "market data, figures or other relevant material adequately describing the nature, cost, usage, or other features of competing products" to determine the bounds of the relevant market.

Id. at 1170–71 (quoting *Bhan v. NME Hosps., Inc.,* 669 F.Supp. 998, 1018 (E.D.Cal.1987), *aff'd,* 929 F.2d 1404 (9th Cir.1991)).

> Reliable measures of supply and demand elasticities provide the most accurate estimates of relevant markets. However, it is ordinarily quite difficult to measure cross-elasticities of supply and demand accurately. Therefore, it is usually necessary to consider other factors that can serve as useful surrogates for cross-elasticity data.

U.S. Anchor Mfg. v. Rule Indus., 7 F.3d 986, 995 (11th Cir.1993) (quoting *International Tel. & Tel. Corp.,* 104 F.T.C. 208, 409 (1984)).

In the seminal *Brown Shoe* decision, the Supreme Court identified several "practical indicia," which it concluded could be relied upon to determine the boundaries of a product submarket for purposes of antitrust analysis.

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition

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> of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962).

Although *Brown Shoe* involved the challenge of a merger under Section 7 of the ***985** Clayton Act, courts have recognized that its submarket analysis is equally applicable to claims brought under the Sherman Act.

> Although *Brown Shoe* involved a claim under Clayton Act § 7, its submarket analysis is applicable in Sherman Act cases. *See Greyhound* [*Computer Corp., Inc. v. International Business Machines Corp.*], 559 F.2d [488], at 494 n. 7 [(9th Cir.1977)]. Such applicability follows because the same considerations essential to line of commerce analysis under the Clayton Act are essential to market analysis under the Sherman Act. *Twin City Sportservice, Inc. v. Charles O. Finley & Co.,* 512 F.2d 1264, 1270–71 (9th Cir.1975).

Thurman Industries, Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1375 n. 1 (9th Cir.1989).

Moreover, while the Court in *Brown Shoe* was evaluating the definition of a product "submarket" (where the relevant product "market" already had been defined), the Ninth Circuit has observed: "Because every market that encompasses less than all products is, in a sense, a submarket, these [*Brown Shoe*] factors are relevant even in determining the primary market to be analyzed for antitrust purposes." *Olin Corp. v. FTC,* 986 F.2d 1295, 1299 (9th Cir.1993) (citing *United States v. Continental Can Co.,* 378 U.S. 441, 449–55, 84 S.Ct. 1738, 12 L.Ed.2d 953 (1964)).

> "[S]ubmarket indicia" are best viewed as "proxies for cross-elasticities [of supply and demand], and thus the identification of a submarket is in principle no different than the identification of a relevant market." This is to say that nothing would be lost by deleting the word "submarket" from the antitrust lexicon.

2A Areeda & Hovenkamp, *Antitrust Law,* ¶ 533, at 257 (quoting *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,* 792 F.2d 210, 218 n. 4 (D.C.Cir.1986)).

While the Ninth Circuit has acknowledged that the practical indicia identified in *Brown Shoe* are "relevant" to the definition of the primary product market, *see Olin,* 986 F.2d at 1299, it has never expressly held that a plaintiff (and, more specifically, a plaintiff's expert economist) can define the relevant product market *exclusively* by reference to these "practical indicia." This case provides an additional wrinkle, in that Dr. Phillips effectively bases his proposed product market definition entirely upon his *qualitative* assessment of the market, without any supporting *quantitative* economic analysis.[11] Even where ***986** an economist is unable to calculate the cross-elasticity of demand (and/or supply), at least two of the practical indicia identified in *Brown Shoe*—"distinct prices" and "sensitivity to price changes"—would appear to lend themselves well to a quantitative approach.

The Court has had some difficulty in locating cases addressing the unique circumstances presented in this case. Nevertheless, for purposes of the instant motion, the Court assumes that an expert economist may, under appropriate circumstances, define the relevant product market through an entirely qualitative assessment of the "practical indicia" identified in *Brown Shoe*. *See generally*

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Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc., 311 F.Supp.2d 1048, 1082 (D.Colo.2004) (collecting cases in which courts held that a plaintiff may define the relevant product market without calculating the cross-elasticity of demand, so long as sufficient evidence of other indicia of reasonable interchangeability is introduced).

Under these circumstances, however, the Court will closely scrutinize Dr. Phillips' proposed product market definition in order to ensure that his analysis is sufficiently robust to warrant admission under Rule 702 and *Daubert. See generally Grason Elec. Co. v. Sacramento Mun. Utility Dist.,* 571 F.Supp. 1504, 1521 (E.D.Cal.1983) ("As the defendant fairly observes, such a determination [of the relevant product market] generally requires a ***detailed examination*** of 'market data, figures or other relevant material adequately describing the nature, cost, usage or other features of competing products.' ") (quoting *Morton Buildings, Inc. v. Morton Buildings, Inc.,* 531 F.2d 910, 919 (8th Cir.1976)) (emphasis added).

b. Dr. Phillips' Definition of the Relevant Product Market

Here, the Court finds that Dr. Phillips' proffered definition of the relevant product market is inadmissible for two independent, albeit related, reasons. First, Dr. Phillips failed to satisfy Rule 702's requirements in formulating his definition of the relevant product market; *i.e.,* in determining that the relevant product market is comprised of "live rock music concerts." Second, Dr. Phillips failed to utilize a reliable methodology to populate this market as defined; *i.e.,* in determining which performers qualify as "rock" artists, and thus which concerts qualify as "rock" concerts, under his proposed definition.

(1) Definition of the Relevant Market

In formulating his proposed definition of the relevant product market ("live rock music concerts"), Dr. Phillips: (1) failed reliably to apply his chosen methodology to the facts of this case; (2) failed adequately to consider the "practical indicia" identified in *Brown Shoe;* and (3) failed to consider the cross-elasticity of supply. The Court will address each of these deficiencies in Dr. Phillips' analysis in turn.

(a) The SSNIP Test

In his Expert Report, Dr. Phillips states that in defining the relevant product market, he utilized the methodology set forth ***987** in the U.S. Department of Justice and Federal Trade Commission's Horizontal Merger Guidelines, issued August 19, 2010 (the "Horizontal Merger Guidelines"). The Court will refer to this methodology as the "SSNIP" methodology. [12] As described by Dr. Phillips in his Expert Report, the SSNIP methodology requires an iterative approach. "In order to define a relevant market, economists begin with the *narrowest* definition of a product (or product group) and expand that definition until all reasonable substitutes are included." (Phillips Expert Report, at ¶ 41 (emphasis in original)); *see also* 2 Kalinowski, *Antitrust Laws and Trade,* § 24.04[2], at 24–69, 24–70 (describing methodology set forth in the 1992 Guidelines).

As a general matter, the Court assumes that the SSNIP methodology may, under appropriate circumstances, provide an acceptable framework with which to define a relevant product market for purposes of antitrust analysis under Section 2 of the Sherman Act. *See generally* 2 Kalinowski, *Antitrust Laws and Trade,* § 24.02, at 24–34 ("The Department of Justice and Federal Trade Commission have issued a set of guidelines describing how those agencies will review transactions generally and define markets specifically when considering a proposed combination. The guidelines do not deviate from judicial precedent but attempt to provide a simplified approach. These guidelines are not binding on the courts."); *see also Thurman Industries,* 875 F.2d at 1375 n. 1 (noting *Brown Shoe*'s analysis of the relevant market under Section

7 of the Clayton Act (*i.e.,* in a merger case) is applicable in Sherman Act cases).

After careful review of Dr. Phillips' Expert Report, however, it is apparent to the Court that Dr. Phillips did not reliably apply the SSNIP methodology to the facts of this case. Accordingly, Dr. Phillips' market definition must be excluded. *See* Rule 702(d) (expert testimony is admissible only where "the expert has reliably applied the principles and methods to the facts of the case.").

Here, Dr. Phillips did not employ the iterative approach called for under the SSNIP methodology. Instead, his market analysis both started and ended with the purported market for live "rock" music concerts. Dr. Phillips never meaningfully considered any *narrower* definition of the market, nor did he ever "expand that definition until all reasonable substitutes [were] included" as required under his own formulation of the SSNIP methodology. *See id.* In his deposition, for example, Dr. Phillips conceded that he never specifically evaluated any potential product markets *narrower* than his proposed market of live rock music concerts.

> Q. What did you do to apply the smallest market principle in this case?
>
> A. ... **[M]y smallest market principle stopped at the music genre rock.**
>
> Q. You would agree, wouldn't you, that there are subgenres of rock?
>
> A. There are.
>
> ....
>
> Q. What did you do to test whether applying the smallest market principle one could determine a market under your own methodology that is ***988** smaller than rock, such as a subgenre?
>
> [Objection to form]
>
> A. It's subjective in the sense that rock concerts generally substitute for one another....

(Phillips Depo., at 123:17–124:17 (emphasis added)).

Thus, instead of starting with the *"narrowest* definition of a product (or product group)"—*e.g.,* an identifiable "subgenre" of rock—and expanding that definition until he was satisfied that all reasonable substitutes were included, Dr. Phillips simply started his analysis with the assumption that "rock" concerts constituted the relevant market, and looked for corroborating evidence without meaningfully testing this assumption. *See Claar v. Burlington N. R.R.,* 29 F.3d 499, 502–03 (9th Cir.1994) ("Coming to a firm conclusion first and then doing research to support it is the antithesis of [the proper application of the scientific method under *Daubert*].").

As a result, instead of answering the critical question: "What products comprise the relevant market?" Dr. Phillips' analysis devolved into a determination of: "Which performers qualify as 'rock' musicians?"

> Q. To populate your relevant market and to exclude those outside of it, it was purely and simply a determination of, quote, whether an artist was, quote, rock or not, correct?
>
> [Objection]
>
> A. That was the main determinant, rock—
>
> Q. What else was there?
>
> A. —did they do rock music.
>
> Q. What else was there?
>
> A. That was the determination. It was rock, yeah.
>
> Q. Okay.
>
> A. Were they rock or not. If they were rock, they were in the market. If not, they were out of the market.

(Phillips Depo., at 116:24–117:14).

This approach impermissibly predetermined the results of Dr. Phillips' analysis; i.e., that the relevant product market is comprised of live music concerts by "rock" artists. *See generally In re REMEC Inc. Sec. Litig.,* 702 F.Supp.2d at 1273 (expert

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analysis inadmissible where expert's methodology "predetermines the results of his analysis.").

Dr. Phillips' failure even to consider the possibility of a narrower product market is also contrary to the approach outlined in the Horizontal Merger Guidelines, upon which Dr. Phillips purported to rely, which stresses the importance of defining the relevant market as narrowly as possible.

> Market shares of different products in narrowly defined markets are more likely to capture the relative competitive significance of these products, and often more accurately reflect competition between close substitutes. As a result, properly defined antitrust markets often exclude some substitutes to which some customers might turn in the face of a price increase even if such substitutes provide alternatives for those customers.

(Horizontal Merger Guidelines, at 8).

In evaluating Dr. Phillips' market analysis, the Court's focus is exclusively on Dr. Phillips' methodology, not his results. *See GE v. Joiner,* 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997) ("[T]he 'focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.... [But a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.") (citations omitted). Here, the Court finds that Dr. Phillips' failure to analyze, in a meaningful way, the possibility of a narrower or broader product market renders his purported application ***989** of the SSNIP methodology unreliable under Rule 702(d).

(b) *Brown Shoe* Analysis

In addition to the methodological deficiencies discussed above, the Court also finds that Dr. Phillips' analysis of the relevant product market does not adequately consider the "practical indicia" identified in *Brown Shoe,* and fails to satisfy Rule 702's requirements on this basis as well.

As noted above, Dr. Phillips' failure to calculate the cross-elasticity of demand (or supply) is not necessarily fatal to his proposed market definition. Further, the Court has assumed that (under appropriate circumstances) an expert economist may define the relevant product market based entirely on a qualitative assessment of the "practical indicia" identified in *Brown Shoe, i.e.*: (1) industry or public recognition of the market as a separate economic entity; (2) the product's peculiar characteristics and uses; (3) unique production facilities; (4) distinct customers; (5) distinct prices; (6) sensitivity to price changes; and (7) specialized vendors. *Brown Shoe,* 370 U.S. at 325, 82 S.Ct. 1502.

The existence of three or four of these indicia has been held "sufficient to delineate a submarket[.]" 2 Kalinowski, *Antitrust Laws and Trade,* § 24.02[2][a], at 24–86.

(i) Analysis Based on a Single Factor

Here, Dr. Phillips' analysis of the relevant market rests, for all intents and purposes, on a single *Brown Shoe* practical indicium: "industry or public recognition of the submarket as a separate economic entity." *Brown Shoe,* 370 U.S. at 325, 82 S.Ct. 1502. As described by Dr. Phillips in his Expert Report:

> [T]he collective perceptions of buyers and sellers and other persons close to the industry must be relied upon to make a determination of the relevant market.

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> Specifically, if participants in and agents close to the industry perceive goods to be close substitutes in the sense defined by the Merger Guidelines, economists are inclined to place the goods in the same market.

(Phillips Expert Report, ¶ 43 (emphasis in original omitted)).

Even assuming that this statement is correct (and the "collective perceptions of buyers and sellers and other persons close to the industry" support Dr. Phillips' proposed definition of the relevant product market), [13] the fundamental flaw in Dr. ***990** Phillips' analysis is that he goes no further. In focusing on industry/public recognition of the purported market for live rock music concerts, Dr. Phillips either ignores, or addresses in cursory fashion, the remaining six *Brown Shoe* practical indicia.

The Court briefly addresses each of these additional *Brown Shoe* practical indicia below.

(a) Peculiar Characteristics and Uses

The closest that Dr. Phillips' Report comes to identifying a peculiar characteristic or use of "live rock music concerts" is quoting, without further discussion, the dictionary definition of "rock music." (*See* Phillips Expert Report, at ¶ 50 ("Webster's Ninth New Collegiate Dictionary (p. 1020) defines rock music as 'popular music played on electronically amplified instruments and characterized by a persistent heavily accented beat, [with] much repetition of simple phrases....")). The mere quotation of a dictionary definition—absent more—simply does not constitute meaningful expert *economic* analysis of this factor. Moreover, Dr. Phillips' Expert Report fails to consider whether the above-quoted definition applies exclusively to "rock" music, or whether it accurately characterizes a broader category of music (*e.g.,* "rock/pop") or whether it would, in contrast, better characterize one or more sub-genres of "rock" (*e.g.,* "classic rock" or "heavy metal").

Dr. Phillips' failure adequately to consider this factor is noteworthy in that " 'peculiar characteristics and uses,' although not necessary to the finding of a submarket, is the factor most often cited by courts in cases where product submarkets are demonstrated." 2 Kalinowski, *Antitrust Laws and Trade,* § 24.02[2][c], at 24–71.

(b) Unique Production Facilities

In the section of Dr. Phillips' Expert Report entitled "The Relevant Market," Dr. Phillips does not discuss the presence (or absence) of any purportedly "unique production facilities" for live rock music concerts. (*see* Phillips Expert Report, at ¶¶ 40–64). In the preceding section, entitled "Production Inputs for Live Concerts," Dr. Phillips opines that there are three "production inputs" for live music concerts in general: (1) music talent (*i.e.,* the music artist(s) performing at the concert); (2) radio promotion (*i.e.,* advertising and promotion for the concert on one or more radio stations); and (3) venue (i.e., the physical location at which the concert is held). (*Id.* at ¶¶ 28–39). Dr. Phillips, however, describes these production inputs as necessary components for the promotion of *all* live music concerts. (*See id.*). He does not argue that these production inputs are unique to the purported market for live *rock* music concerts, such that they support his proposed definition of the relevant product market under *Brown Shoe.* (*See generally* Phillips Expert Report, at ¶¶ 28–39 (discussing "production inputs"); ¶¶ 50–62 (discussing product market); ¶¶ 239–47 (discussing barriers to entry)).

The Court further addresses the three "production inputs" identified by Dr. Phillips below.

***991 (i) Venue**

With respect to venue, Dr. Phillips expressly conceded in his deposition that this "production input" is not unique to live rock music concerts.

Q. Isn't it true that all promoters use the same facilities to promote rock concerts as they do country and jazz concerts?

A. I would say so. There's music venues, and it doesn't really depend on the music.

(Phillips Depo., at 151:20–24).

(ii) Radio Promotion

With respect to the radio "production input," Dr. Phillips notes in his Expert Report that radio stations often play a "mix" of different types of music, (*see, e.g.,* Phillips Expert Report, at ¶ 53 ("there are formats like contemporary Hit Radio (CHR) which play a mix of rock and popular music")), [14] and that there is "cross-promotion" among radio stations, meaning that "rock" concerts may be promoted on radio stations that play non-"rock" music. (*See* Phillips Expert Report, at ¶ 81 ("A fifth Clear Channel station, KFMD (KHIH) is a top 40, contemporary hits station, and cross-promotes with rock music concerts, and could be added to the above list [of radio stations relevant to the purported 'rock' market]")).

While Dr. Phillips expressly excludes "pop" music concerts from his definition of the relevant product market, (*See* Dkt. 405, Yen Decl., Exh. 17 (defining concerts as either "rock", "pop", or "other")), Dr. Phillips expressly includes "pop" radio stations (*i.e.,* "contemporary hits" stations) in his analysis of the "radio" production input. (*See, e.g.,* Phillips Expert Report at ¶ 88 ("This list [of "rock" radio stations] specifically includes CHR formats."); *id.* at ¶¶ 81, 89–90).

(iii) Music Talent

Similarly, when evaluating Clear Channel's allegedly anticompetitive conduct in his Expert Report, Dr. Phillips treats "rock" and "pop" artists as functionally interchangeable. When discussing Clear Channel's alleged control of the relevant "production inputs", for example, Dr. Phillips states:

> When promoting concerts, [Clear Channel] owns or controls radio inputs, venues, and much of its music talent through long-term exclusive contracts with artists such as the Rolling Stones, Madonna, U2, Jay–Z, Shakira, Nickelback and the Jonas Brothers.

(*Id.* at ¶ 27). While Dr. Phillips categorizes The Rolling Stones, Madonna, U2 and Nickelback as "rock" artists, he classifies both Shakira and the Jonas Brothers as "pop" artists, and Jay–Z as "other". (*See* Dkt. 405, Yen Decl., Exh. 17). Nevertheless, Dr. Phillips refers to these non-"rock" artists as "production inputs" in precisely the same manner as he refers to "rock" artists. (*See also, e.g.,* Phillips Expert Report, at f 126 (discussing allegedly anticompetitive behavior in connection with "Wango Tango[,] an annual day-long concert festival promoted by Clear Channel's KIIS FM radio. The festival invites a collection of pop and rock artists to perform free of charge at large venues in Southern California")).

* * *

Dr. Phillips does not base his definition of the relevant product market on any purported uniqueness of production facilities. (*See* Phillips Expert Report, at ¶¶ 40–62). Moreover, to the extent that ***992** Dr. Phillips' Expert Report can be said to address this issue, it does so in a manner contrary to his ultimate conclusion that the relevant market is comprised only of live *rock* music concerts. *Cf.* 2 Kalinowski, *Antitrust Laws and Trade,* § 24.02[2][f], at 24–76, 24–77 ("Evidence that a product ... requires facilities or technology ***markedly different*** from that used to produce its alleged substitutes supports the existence of a submarket.") (emphasis added).

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(c) Distinct Prices and Specialized Vendors

With respect to "distinct prices" and "specialized vendors," Dr. Phillips does not address these indicia as they relate to his proposed product market definition of live *rock* music concerts. He addresses them only as to live music concerts generally.

> It is also my opinion live music concerts are separate products from other live events or other types of entertainment. They have several features distinct from performances that are filmed or purely audio.... [C]oncerts are distinct from movies, videos, and audio recordings.... In addition, there are distinct prices for concert tickets.... And there are specialized vendors. The major promoters—Clear Channel and Anschutz Entertainment Group (AEG)—do not sell or rent video or audio recordings except as an adjunct to specific concerts.

(Phillips Expert Report, at ¶¶ 60–61).

(d) Sensitivity to price changes

Dr. Phillips does not address this factor.

(e) Distinct Customers

The only portion of Dr. Phillips' market analysis that arguably addresses the issue of distinct customers for "live rock music concerts" states: "[According to a survey by the U.S. Census Bureau,] '[s]even in ten young adults (age 18 to 24) say they like rock, compared with only 7 percent of adults aged 75 and older.' " (Phillips Expert Report, at ¶ 52). [15]

The mere observation that younger people are more likely to listen to rock music, however, is insufficient—on its own—to constitute meaningful expert analysis of this factor. As a preliminary matter, the cited survey appears to address general music listening patterns (e.g., when listening to music on the radio); it says nothing about *live concert* attendance, which is the relevant issue in this case. Moreover, as with all *Brown Shoe* indicia, the purpose of the "distinct customers" inquiry is to *distinguish* the products in the proposed market (or submarket) from potential substitutes. Here, however, Dr. Phillips does not purport to identify any "distinct" customer base for live rock music concerts, nor does he make any attempt to differentiate any such customer base from that of potentially larger markets (e.g., the market for live "rock/pop" music concerts), or smaller markets (e.g., the market for live "classic rock" or "heavy metal" concerts). [16]

(f) *Brown Shoe* Practical Indicia: Conclusion

The Court has found minimal case law addressing the application of Rule 702's ***993** requirements to an expert economist's proposed product market definition based on an analysis of the practical indicia identified in *Brown Shoe.* In related contexts, however, several courts have held that, in the absence of additional economic analysis, the relevant product market cannot be defined solely by reference to a single *Brown Shoe* factor. *See* 2 Kalinowsi, *Antitrust Laws and Trade,* § 24.02[2][b], at 24–70 ("Industry recognition of a separate market, alone, does not suffice to establish a submarket."); *id.* at § 24.02[2][a], at 24–67 (the presence of three or four *Brown Shoe* factors is sufficient to define a market); *see also IT & T v. General Tel. & Elecs. Corp.,* 518 F.2d 913, 932 (9th Cir.1975) (holding district court clearly erred in finding a valid submarket based on only two *Brown Shoe* indicia: industry recognition (including statements by the defendant itself) and distinct customers).

While not directly on point, the Court finds these cases helpful by analogy. In particular, the Court finds that Dr. Phillips' purported analysis of the relevant product market—which focuses almost entirely on a single *Brown Shoe* factor (industry/public recognition), with little relevant analysis of the remaining six factors [17]—is neither sufficiently reliable nor sufficiently helpful to the trier of fact to satisfy Rule 702's requirements.

(ii) Economic Significance

Moreover, an indispensable component of any market analysis based on the practical indicia identified in *Brown Shoe* is an evaluation of the *economic significance* of these indicia.

> Whether or not a court is justified in carving out a submarket depends ultimately on whether the factors which distinguish one purported submarket from another are "economically significant" in terms of the alleged anticompetitive effect.

IT & T, 518 F.2d at 932. Here, Dr. Phillips not only failed meaningfully to consider any *Brown Shoe* indicia other than industry/public recognition, but he also failed to provide any meaningful discussion as to whether and how any such indicia are "economically significant" in this particular case. Instead, Dr. Phillips' analysis of the relevant product market essentially boils down to: plenty of people (including consumers and industry participants) recognize "rock" as a type of music; therefore, the relevant market in this case is comprised of "live rock music concerts." A key ingredient missing from Dr. Phillips' Expert Report, however, is *economic analysis* (be it quantitative or qualitative) tying these statements by industry observers to Dr. Phillips' ultimate conclusion that the relevant market is comprised of "live rock music concerts."

(c) Cross–Elasticity of Supply

When defining the relevant product market, Dr. Phillips admittedly failed to consider cross-elasticity of supply.

> Q. How did you apply the principle of cross-elasticity of supply in your analysis? It's not mentioned in your report, is it?
>
> A. No, it's not.
>
> Q. So how did you apply that principle in this case?
>
> A. Yeah, I didn't give it much thought.

***994** (Phillips Depo, at 150:21–151:3). "But defining a market on the basis of demand considerations alone is erroneous. A reasonable market definition must also be based on 'supply elasticity.' " *Rebel Oil Co. v. Atlantic Richfield Co.,* 51 F.3d 1421, 1436 (9th Cir.1995) (internal citations omitted).

In some respects, the "unique production facilities" indicium identified in *Brown Shoe* can be viewed as a proxy for the cross-elasticity of supply.

> [I]f two products can be manufactured with the same or similar equipment, i.e., a manufacturer of one can shift with little expense to production of the other, this is evidence of 'cross-elasticity of supply.' Evidence of cross-elasticity of supply or production flexibility may be adduced to support a broad market definition.

2 Kalinowski, *Antitrust Laws and Trade,* § 24.02[2][f], at 24–77.

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As discussed above, however, to the extent that Dr. Phillips considered "unique production facilities," he did so in a manner that undermined his proposed market definition (by focusing on "production inputs" common to *all* live music concerts—or in some cases common to "rock" and "pop" concerts —as opposed to production inputs unique to live *rock* music concerts).

(d) Definition of the Relevant Market: Conclusion

Dr. Phillips' analysis of the relevant product market: (1) fails to comport with Dr. Phillips' chosen methodology (*i.e.,* the "SSNIP" methodology); (2) is effectively predicated on the analysis of a single *Brown Shoe* factor; and (3) fails to consider the cross-elasticity of supply. Accordingly, the Court finds that this purported definition of the relevant product market is neither sufficiently reliable nor sufficiently helpful to the trier of fact to warrant admission under Rule 702.

(2) Populating the Relevant Market

The Court's discussion in the preceding section focused on Dr. Phillips' opinion that the relevant product market is comprised of "live rock music concerts." This section addresses the means by which Dr. Phillips populated this purported market; i.e., his determination of which artists qualify as "rock" artists and, therefore, which concerts qualify as "rock" concerts, such that they should be included in the market as defined by Dr. Phillips.

As set forth in more detail below, to the extent that Dr. Phillips relied on his own subjective opinion in order to determine which performers qualify as "rock" artists, he is not qualified to make this determination. Further, to the extent that Dr. Phillips purported to rely on "industry information" in order to categorize the artists at issue, he did not utilize a reliable methodology for interpreting and applying this information. Under either view, this testimony is inadmissible under Rule 702 and *Daubert.*

(a) Opinions Outside of Dr. Phillips' Area of Expertise

In connection with his analysis of the relevant product market, Dr. Phillips made a concert-by-concert determination of whether the performer(s) at issue qualified as "rock" artists. Dr. Phillips, however, has no expertise in this area. Nor can the Court discern any meaningful application of Dr. Phillips' expertise as an economist to these determinations.

When discussing his methodology for defining the relevant market, Dr. Phillips noted, "Indeed, some of what I did was similar to what Live Nation **Music Analyst** Dan Condon testified he did when his work called for him to categorize a particular artist by genre: namely, when a particular artist was not already categorized by the company, he looked to industry ***995** sources like Pollstar." [18] (Phillips Expert Report, at ¶ 62, n. 85 (emphasis added)). Similarly, when asked in his deposition, "Isn't a juror perfectly capable of determining whether Paul McCartney is rock?" Dr. Phillips replied: "Yes, and in fact, the juror may be part of the fan base that has preferences for Paul McCartney or The Rolling Stones or someone else." [19] (Phillips Depo., at 128:22–129:2).

Thus, in determining whether each performer qualified as a "rock" artist, Dr. Phillips was, in his own words, doing the work of a "music analyst" (or perhaps a lay juror). He was not relying on his experience and expertise as an economist. *See* 4 J. McLaughlin, Weinstein's Federal Evidence § 702.04[6], at 702–68.9 (Matthew Bender 2d ed. 2011) ("[E]ven though a proposed witness might possess credentials to render some expert opinions, the trial court may, and perhaps must, exclude on grounds of disqualification any testimony that extends beyond the witness's demonstrated expertise.").

(b) Unreliable Methodology

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Plaintiffs argue that in categorizing the music artists at issue, Dr. Phillips simply relied on the types of materials typically used by experts in his field (consumer surveys, trade publications, etc.). The Court recognizes, as a general matter, that economists are entitled to rely on relevant trade publications and comparable industry materials when conducting an economic analysis of a particular industry. Here, however, the manner in which Dr. Phillips utilized the industry publications upon which he relied—and the corresponding lack of any discernable economic analysis of these materials—render his categorization of music artists unreliable under Rule 702(c) (expert testimony is admissible only where it "is the product of reliable principles and methods").

More specifically, Dr. Phillips categorized each concert that took place during the relevant time period as "rock", "pop" or "other." (*See* Dkt. 405, Yen Decl., Exh. 17; Phillips Depo., at 134:3–25). With respect to this categorization, Dr. Phillips listed a "source" for each artist. (*See id.*). Dr. Phillips' primary source was Billboard. (*Id.* at 139:4–6). Billboard, however, does not categorize artists by genre (e.g., as a "rock" artist).[20] (*Id.* at 139:7–21; 141:16–18). Consequently, Dr. Phillips read the Billboard "bio" for each artist, and made a "subjective determination based upon [his] opinion" as to whether that artist qualifies as a "rock" musician. (*Id.* at 141:19–23). In some cases, additional sources were consulted (*e.g.,* www.allmusic.com), but Dr. Phillips recorded only the "primary" source for each artist in his Report. (*Id.* at 135:5–8). Dr. Phillips decided for himself which source(s) to rely on when categorizing each artist. (*Id.* at 135:2–3). He ***996** did not consult a music expert when making this determination.[21] (*Id.* at 143:4–6). *See generally* 4 J. McLaughlin, Weinstein's Federal Evidence § 703.04[3] & n. 26, at 703–19 (under Rule 703, expert may reasonably rely on opinions of other experts).

By way of example, in Dr. Phillips' Expert Report, the "source" listed for Simon & Garfunkel is "Billboard." (*See* Phillips Depo., at 167:7–25). Simon & Garfunkel's Billboard bio refers to the group as "[t]he most successful folk-rock duo of the #60s." (Phillips Depo., at 167:7–9). Dr. Phillips, however, categorized Simon & Garfunkel as "pop," not "rock." (*Id.* at 167:22–25). When asked why, Dr. Phillips responded: "Because considering all of the industry information, they were considered to be more folk than rock." (*Id.* at 168:2–4). Dr. Phillips was unable to specifically identify any such "industry information," nor was it listed in his Report. (*Id.* at 169:4–13).

In effect, Dr. Phillips' explanation for this classification is: I am an economist, I reviewed a large amount of "industry information"—which does not explicitly categorize artists as "rock" versus non-"rock", which is not specifically identified in my Report, and which I am unable specifically to recall—and this industry information supports my conclusion.[22] This "methodology" does not satisfy the requirements of Rule 702 or Rule 703. *See Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 157, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) ("Of course, [the expert] himself claimed that his method was accurate, but, as we pointed out in *Joiner,* 'nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert.' ") (quoting *General Elec. Co. v. Joiner,* 522 U.S. 136, 143, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997)).

The Court's conclusion may have been different if Billboard, or any other resource identified by Dr. Phillips, provided a comprehensive, objectively-verifiable categorization of music artists. Courts consistently have allowed economists to rely on such data. *See, e.g., Clinchfield R. Co. v. Lynch,* 784 F.2d 545, 553–54 (4th Cir.1986) (expert entitled to rely on reports of the United States Census Bureau); *see also* 2 Kalinowski, *Antitrust Laws and Trade* § 24.02[2][b] & n. 170, at 24–70 (Industrial classification codes of the U.S. Census Bureau may be used as evidence of "industry or consumer recognition" under *Brown Shoe*). Here, however, the "industry information" upon which Dr. Phillips purports to rely failed to provide the specific information that he needed, forcing Dr. Phillips to engage in further *non-economic* analysis in order to categorize the artists at issue.

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As noted in the Court's prior Class Certification Order, the definition of any product market necessarily will entail some "gray area" around the edges. Here, however, Dr. Phillips applied an unreliable methodology in determining whether every concert at issue in this litigation qualified as a "rock" concert, which should be included in the relevant product market. This unreliable methodology does not merely implicate the "gray area" at the fringes; it fatally undermines Dr. Phillips' ***997** definition of the relevant product market in its entirety.

> to define the market, his opinion is sufficiently reliable for admission on the issue of market definition under *Daubert.* The court elects to refrain from ruling on defendants' motion as to the admissibility of Dr. Phillips' opinion on damages at this time, since [that] decision is not relevant to the summary judgment motion. [23]

c. NIPP Litigation

In *Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc.,* 311 F.Supp.2d 1048, 1082 (D.Colo.2004) ("*NIPP*"), a Denver-based concert promoter brought an antitrust action against Clear Channel Communications, Inc., Clear Channel Broadcasting, Inc. (Defendants in this litigation) and other entities. In that case, Dr. Phillips offered expert testimony regarding several potentially relevant product markets, including the purported market for rock music concerts. *See id.* at 1083. In response to Defendants' motion to exclude Dr. Phillips' testimony, the court held:

> Although Dr. Phillips did not calculate cross-elasticity of demand, he did rely on other economic data, including industry materials, pricing data, and public recognition of the market, all of which have been held relevant to determining the scope of a market. Additionally, Dr. Phillips does not base his opinion on his subjective beliefs but on his research of industry materials regarding the industry's categorization of rock music. Because Dr. Phillips relies on sufficient data and applies that data

Id. at 1120. Both Plaintiffs and Dr. Phillips cite the *NIPP* decision in support of their proposed product market definition. The court's decision in *NIPP.* however, is not binding on this Court. Moreover, the *NIPP* case is distinguishable from the instant action in several key respects.

As a preliminary matter, the court in *NIPP* undertook an extensive analysis of Dr. Phillips' proposed market definitions in connection with defendants' motion for summary judgment, followed by a very brief discussion (quoted above) of defendants' motion to exclude Dr. Phillips' testimony under Rule 702. As noted earlier, this Court's analysis proceeds in the reverse order: first, a thorough examination of Dr. Phillips' proffered expert testimony in the Court's role as "gatekeeper" under Rule 702; second, an analysis of Defendants' motions for summary judgment, considering Dr. Phillips' testimony only to the extent that it is admissible under Rule 702. *See Claar v. Burlington N. R.R.,* 29 F.3d 499 (9th Cir.1994).

Furthermore, in *NIPP.* Dr. Phillips relied on the assistance of a music expert in performing his market analysis. In this case, no music expert was retained. [24] (*See* ***998** Phillips Depo., at 143:4–144:21 (discussing the use of a music expert in *NIPP,* but not in this litigation)).

Moreover, in evaluating the plaintiff's proposed product market in *NIPP.* the court relied, in part, on a pricing comparison in which "Dr. Phillips set [ ] forth average ticket prices for both rock, rock-pop,

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and all music concerts." *NIPP,* 311 F.Supp.2d at 1084. Here, Dr. Phillips cites no such comparative-pricing analysis in support of his proposed product market definition (nor does Plaintiff argue that Dr. Phillips' proposed product market definition is based on any such analysis). [25] Instead, in defining the relevant product market, Dr. Phillips compared the average price of live music concerts generally to entirely different forms of entertainment (e.g., movies). (*See* Phillips Expert Report, at ¶ 60).

Notably, the plaintiffs in *NIPP* argued in support of multiple relevant product markets, leading the court to conclude, "Alternatively, a reasonable jury could surely find that NIPP has set forth evidence of practical indicia showing a distinct market for all live music concerts." *NIPP,* 311 F.Supp.2d at 1084. Here, in contrast, the only relevant product market argued by Plaintiffs is the purported market for live rock music concerts.

The court in *NIPP* concluded that plaintiff raised a triable issue of fact with respect to cross-elasticity of supply. *See NIPP,* 311 F.Supp.2d at 1085. Here, Dr. Phillips conceded that he did not consider cross-elasticity of supply in his analysis.

Finally, the court's decision in *NIPP* did not address the *methodology* employed by Dr. Phillips, which is the focus of this Court's analysis under Rule 702. The methodology employed by Dr. Phillips in *NIPP* differed in at least one material respect from the methodology employed here, namely, the use of a music expert to categorize artists by music type. Because the court in *NIPP* did not further elaborate on its *Daubert* findings, this Court is unable to discern whether Dr. Phillips' methodology in that case differed in other material respects as well.

d. Definition of the Relevant Market: Conclusion

The Court finds that Dr. Phillips' Expert Report fails to satisfy Rule 702's requirements in both: (1) defining the relevant product market; and (2) populating this market for purposes of his analysis. Accordingly, Plaintiffs have failed to meet their burden of demonstrating that Dr. Phillips' opinion regarding the definition of the relevant product market is admissible under Rule 702.

3. Defendants' Market Share & Exclusionary Conduct

Finally, Defendants argue that the Court should exclude Dr. Phillips' opinions regarding Defendants' share of the relevant market and Defendants' allegedly anticompetitive conduct. The gravamen of Defendants' arguments as to this testimony, however, is not that Dr. Phillips is unqualified to offer opinions on these matters (or that his methodology is so flawed as to warrant exclusion under Rule 702). Instead, Defendants argue that Dr. Phillips' ***999** opinions on these issues are insufficient, as a matter of law, to support Plaintiffs' antitrust claims. Accordingly, these arguments are not amenable to analysis under Rule 702, but instead should be analyzed under the summary judgment standard.

V. DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

A. Legal Standard

Rule 56(c) requires summary judgment for the moving party when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Tarin v. Cnty. of Los Angeles,* 123 F.3d 1259, 1263 (9th Cir.1997).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323–24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The moving party may satisfy its Rule 56(c) burden by " 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex,* 477 U.S. at 325, 106 S.Ct. 2548. Once the moving party has met its initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify specific facts that show a genuine issue for trial. *See id.* at 323–24, 106 S.Ct. 2548;

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact. *Addisu v. Fred Meyer,* 198 F.3d 1130, 1134 (9th Cir.2000). Only 'genuine disputes over facts that might affect the outcome of the suit under the governing law, i.e., "where the evidence is such that a reasonable jury could return a verdict for the nonmoving party," will properly preclude the entry of summary judgment. *See Anderson,* 477 U.S. at 248, 106 S.Ct. 2505.

Under Local Rules 56–2 and 56–3, these triable issues of fact must be identified in the non-moving party's "Statement of Genuine Issues" and supported by "declaration or other written evidence." *See also Sullivan v. Dollar Tree Stores, Inc.,* 623 F.3d 770, 779 (9th Cir.2010) ("Federal Rule of Civil Procedure 56(e)(2) requires a party to "set out specific facts showing a genuine issue for trial."). If the non-moving party fails to identify the triable issues of fact, the court may treat the moving party's evidence as uncontroverted, so long as the facts are "adequately supported" by the moving party. Local Rule 56–3; *see also International Longshoremen's Ass'n, AFL–CIO v. Davis,* 476 U.S. 380, 398 n. 14, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986) ("[I]t is not [the Court's] task *sua sponte* to search the record for evidence to support the [parties'] claim[s]."); *Carmen v. San Francisco United School District,* 237 F.3d 1026, 1029 (9th Cir.2001) ("A lawyer drafting an opposition to a summary judgment motion may easily show a judge, in the opposition, the evidence that the lawyer wants the judge to read. It is absurdly difficult for a judge to perform a search, unassisted by counsel, through the entire record, to look for such evidence.").

B. Sherman Act Claims

Defendants argue that summary judgment is warranted based, *inter alia,* on Plaintiffs' failure to raise a triable issue of fact as to the relevant product market.

"As long held by the Supreme Court, proof of a relevant market is an essential element of a Section 2 monopolization and attempted monopolization case." 2 Kalinowski, *Antitrust Laws and Trade,* § 24.01[3][a], at 24–5, 24–6 (citing *Spectrum* ***1000** *Sports v. McQuillan,* 506 U.S. 447, 457, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993) ("[I]t is beyond doubt that [a monopolization claim under Sherman Act § 2] requires proof of market power in a relevant market."); *Spectrum Sports,* 506 U.S. at 459, 113 S.Ct. 884 ("[P]etitioners may not be liable for attempted monopolization under § 2 of the Sherman Act absent proof of a dangerous probability that they would monopolize a particular market[.]")).

For the reasons set forth above, Dr. Phillips' testimony regarding the relevant product market is inadmissible under Rule 702. Plaintiffs do not argue (nor does the Court conclude) that there is an adequate evidentiary basis in the record, absent Dr. Phillips' testimony, for a jury to find that Plaintiffs have defined an economically significant product market. *See IT & T,* 518 F.2d at 932. Accordingly, summary judgment is appropriate with respect to Plaintiffs' claims of monopolization and attempted monopolization in the Denver and Los Angeles markets. *See Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc.,* 875 F.2d 1369, 1380 (9th Cir.1989) (affirming district court's order granting summary judgment, where plaintiff failed to raise a triable issue of fact as to its proposed product submarket definition); *Plush Lounge Las Vegas LLC v. Hotspur Resorts Nev., Inc.,* 371 Fed.Appx. 719, 721 (9th Cir.2010) (affirming summary judgment as to plaintiff's claim under Sherman Act § 2, where the district court excluded under Rule 702 significant portions of the declarations of plaintiff's proffered experts).

In rare instances, a claim under the Sherman Act may succeed absent a specifically-defined product market.

> [D]ispensing with market definition and relying on direct evidence [of anticompetitive behavior] might be appropriate in cases involving highly suspicious restraints, such as horizontal

> agreements examined under the "quick look" rule of reason. For all other restraints, however, a relevant market must be shown.

2B Areeda & Hovenkamp, *Antitrust Law,* ¶ 531, at 241 (citing *Republic Tobacco Co. v. N. Atl. Trading Co., Inc.,* 381 F.3d 717, 736–39 (7th Cir.2004)).

Here, however, Plaintiffs do not argue that Defendants' conduct was so "highly suspicious" that it can support an antitrust claim absent a properly-defined product market. Nor do they argue that Defendants' alleged anticompetitive behavior may be evaluated under a "quick look" analysis. Instead, Plaintiffs contend that Defendants' activities, even if lawful when viewed in isolation, amount to a violation of the Sherman Act when considered in their entirety. (*See generally* MSJ Opposition (Denver), at 9–11 (arguing that Defendants' conduct must be evaluated as a whole)). Accordingly, this action does not involve the rare circumstances under which a Sherman Act claim may succeed absent a viable definition of the relevant product market.

Accordingly, Defendants' Motions for Summary Judgment are GRANTED with respect to Plaintiffs' claims for monopolization and attempted monopolization under Section 2 of the Sherman Act (in the Denver and Los Angeles markets). Based on the Court's conclusion that summary judgment is warranted based on Plaintiffs' failure adequately to define the relevant product market, the Court need not address Defendants' remaining arguments as to the merits of Plaintiffs' antitrust claims.

C. Unjust Enrichment Claims

Plaintiffs' claims of unjust enrichment are predicated entirely on their Section 2 claims. Accordingly, Defendants' Motions for Summary Judgment are GRANTED with respect to Plaintiffs' claims of unjust enrichment.

*1001 VI. REMAINING MOTIONS

The Court hereby DISMISSES AS MOOT Defendants' Motion for Class Decertification (as to Case Nos. 2:05–CV–06704 (Los Angeles market) and 2:06–CV–04987 (Denver market)), (Dkt. 410); Plaintiffs' Motion for Approval of Plan for Class Notice, (Dkt. 460); Plaintiffs' Motion to Exclude the "Affinity Analysis" of Dr. Janusz Ordover, (Dkt. 469); and Plaintiffs' Motion to Strike Declaration of Julia Vander Ploeg, (Dkt. 516).

VII. FURTHER BRIEFING

The parties are hereby ORDERED promptly to meet and confer and to submit a joint stipulation as to how best to proceed with the remaining MDL actions before this Court within twenty-one (21) days of the date of this Order.

IT IS SO ORDERED.

All Citations

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Footnotes

1 A more detailed factual and procedural history is set forth in this Court's October 22, 2007 Order Granting Plaintiffs' Motion for Class Certification. (Dkt. 160); *Thompson v. Clear Channel Communs., Inc. (In re Live Concert Antitrust Litig.),* 247 F.R.D. 98 (C.D.Cal.2007).

2 Effective December 1, 2011, "[t]he language of Rule 702 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility." Fed.R.Evid. 702, Notes of Advisory Committee on 2011 amendments.

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3 From 2000 to 2006, the Top 100 artists accounted for 95% of ticket revenue in Los Angeles and 94% of ticket revenue in Denver. (Dkt. 485–2, Expert Report of Janusz A. Ordover, Ph.D. ("Ordover Expert Report"), ¶ 167).

4 From 2001 to 2006, Defendants' share of the top 25 acts in Denver was 63%, compared with a 48% share of the rest of the market; Defendants' share of the top 25 acts in Los Angeles was 71%, compared with a 37% share of the rest of the market. (Ordover Expert Report, ¶ 169).

5 Dr. Phillips performed two versions of the "Before–and–After" analysis, one using a "convergence" model to predict future ticket prices, and one using a "linear trend model" to predict future ticket prices. (*See* Phillips Expert Report, at ¶¶ 267–73). Both analyses are flawed for the reasons set forth below.

"Before–and–After" Damages Calculations [6]

	Convergence Model	**Linear Time Trend Model**
Denver	$ 36,005,988	$21,295,572
Los Angeles	$126,772,722	$69,725,212

6 *See* Phillips Rebuttal Report, at 39 (revised damages calculations).

7 "A 'corrective disclosure' is a disclosure that reveals the fraud [allegedly perpetrated by defendants on a public company], or at least some aspect of the fraud, to the market." *In re REMEC Inc.,* 702 F.Supp.2d at 1266–67.

8 In his Rebuttal Report, Dr. Phillips incorporates the Consumer Price Index ("CPI") into his analysis. This minor modification does not affect the Court's reasoning.

9 Presumably, this data includes SFX, whom Defendants acquired in 2000.

10 Source: Phillips Rebuttal Report, Appendix 1: Revised Exhibit 5 (Denver Market), Revised Exhibit 7 (Los Angeles Market).

11 Dr. Phillips has, of course, performed a number of quantitative analyses, several of which are discussed earlier in this Order. Notably, however, none of these analyses address the fundamental question of what products should be included in the relevant market. Instead, they primarily relate to the calculation of Defendants' market share (presuming the product market is defined as Dr. Phillips proposes) and damages. (*See generally* Phillips Expert Report, Exhs. 1–10; *cf. id.* at ¶¶ 50–62 (defining the relevant product market without reference to quantitative economic analysis)).

During his deposition, Dr. Phillips conceded, "I didn't look at any particular cross-price elasticity analyses. I looked at the qualitative evidence in defining the market," but went on to state "I did look at the prices of Clear Channel and their sales and tracked their prices and sales as part of my definition of the market." (Phillips Depo., at 373:8–13). In support, Dr. Phillips cited Exhibits 1 and 2 of his Expert Report. (*Id.* at 376:14–15). These Exhibits are not, however, analyses of what products should be included in the relevant product market. Instead, they appear to be precisely what they are entitled, namely, analyses of "[Denver/Los Angeles] Rock Concert Ticket Prices and Sales, Clear Channel Market Shares and Damage Calculations." When analyzing and defining the relevant product market in his Expert and Rebuttal Reports, Dr. Phillips does not rely on either of these Exhibits. (*See* Expert Report, at ¶¶ 50–62; Rebuttal Report, at 1–3; 7–9). As one would expect, Dr. Phillips instead relies on these Exhibits to support his opinions regarding Defendants' market share, monopoly power, and damages calculations.

Accordingly, Dr. Phillips' unsupported statements at his deposition, indicating that Exhibits 1 and 2 support his proposed product market definition, do not transform his admittedly qualitative evaluation of the relevant product market into a quantitative analysis. *See Kumho,* 526 U.S. at 157, 119 S.Ct. 1167 ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert.").

12 *See* Horizontal Merger Guidelines, at 9 ("Specifically, the test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products ("hypothetical monopolist") likely would impose at least a small but significant and non-transitory increase in price ('SSNIP') on at least one product in the market, including at least one product sold by one of the merging firms.").

13 For purposes of this analysis, the Court accepts Dr. Phillips' conclusion that there is industry/public recognition of the purported market for "live rock music concerts" (*i.e.,* the first *Brown Shoe* practical indicium

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is satisfied). Nevertheless, the Court notes that the industry materials upon which Dr. Phillips purports to rely in reaching this conclusion are far from consistent.

For example, the website www.allmusic.com, upon which Dr. Phillips relied in order to classify various artists by music genre, (*see* Phillips Depo., at 140–41), does not identify "rock" as a standalone music category, but instead lists an umbrella category for "pop" and "rock" combined (i.e., "pop/rock"). The website further identifies a number of different sub-genres of "pop/rock" music. (*See* http://www.allmusic.com/explore/genre/pop-rock-d20).

Similarly, Dr. Phillips cites a June 8, 2009 USA Music Preferences report for the proposition that "there is a well-defined market for the promotion of rock concerts" and "rock music appeals to very different audiences than [do other types of music.]"). (*See* Phillips Rebuttal Report, at 7 & n. 17 (citing David McLaughlin, USA Music Preferences, Appendix 1: Music Preferences in the U.S. 1982–2002 (June 8, 2009), available at http://www. scribd.com/doc/l6203729/Usa-Music-Preferences)). This Report, however, does not analyze "rock" as a stand-alone category. Instead, it divides "rock" into two categories—"Classic Rock/Oldies" and "Rock/Heavy Metal"—each of which the Report analyzes independently.

To reiterate, the Court does not cite these inconsistent industry definitions of various music genres in an attempt to refute Dr. Phillips' conclusion that there is industry/public recognition of the purported market for "live rock music concerts." Instead, the Court notes these inconsistencies because they underscore the importance of performing a *thorough* analysis of the practical indicia identified in *Brown Shoe,* which (as discussed below) Dr. Phillips failed to do. *See generally Grason,* 571 F.Supp. at 1521 (determination of the relevant product market requires a "detailed examination" of the relevant materials). In other words, the Court could envision a scenario in which the evidence supporting a single *Brown Shoe* indicium was so overwhelming that it (at least arguably) would obviate the need for meaningful analysis of the remaining indicia. This is not such a case.

14 *See also* Phillips Expert Report, at ¶ 76 (discussing various radio stations "that often play high percentages of rock music").

15 The Report similarly states: "A survey conducted for the National Endowment for the Arts by the U.S. Census Bureau found that, for example, 'Country audiences have a distinct demographic profile, and they tend not to cross over into other types of music.' " (*Id.; see also* Phillips Rebuttal Report, at 7 & n. 17).

16 In his Rebuttal Report, Dr. Phillips purports to bolster his analysis based on discussions with his students regarding their music listening patterns. (*See* Phillips Rebuttal Report, at 8). The definition of the relevant product market cannot, however, properly be based on such "limited anecdotal evidence." *Metro Indus. v. Sammi Corp.,* 82 F.3d 839, 848 (9th Cir.1996) (quoting *Vollrath Co. v. Sammi Corp.,* 9 F.3d 1455, 1462 (9th Cir.1993)).

17 As discussed above, to the extent that Dr. Phillips addressed the remaining six *Brown Shoe* factors, he did so primarily by reference to product markets (*i.e.,* the market for all live music concerts, or "rock/pop" music concerts) other than what he contends is the relevant product market in this case (*i.e.,* live rock music concerts). Thus, to the extent that this mismatched analysis is relevant to Dr. Phillips' proposed product market definition, it undermines his ultimate conclusion.

18 Under certain circumstances, it would be appropriate for an economist to rely on work performed by a music analyst as a basis for further *economic* analysis. Here, however, Dr. Phillips does not purport to rely on work done by Dan Condon (or any other music analyst). Instead, he categorized artists—i.e., performed the work of a "music analyst"—himself.

19 When asked, "What evidence can you point to supporting your market definition that a member of the jury couldn't do on their own?" Dr. Phillips responded, "Well, if a member of a jury had a Ph.D. in economics and wanted to immerse themselves in this case for nine or ten years, they'd have a go at it, they'd have a possibility of reaching the same opinions I did." (Phillips Depo., at 128:14–21). With respect to the specific task of categorizing artists as "rock" versus non-"rock", however, Plaintiffs do not argue that a Ph.D. in economics is required (or that Dr. Phillips' background in any way qualifies him to make this determination on his own).

20 From the record before the Court, there does not appear to be any "definitive" industry resource that categorizes artists in this manner.

21 In contrast, Dr. Phillips relied on the assistance of a music expert when performing his market analysis in the *NIPP* litigation, which is discussed further below. (*See* Phillips Depo., at 143:4–144:21).

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22 Dr. Phillips also contends that Defendants' internal classifications of certain artists support his conclusions. These internal classifications, however, are similarly ambiguous. (*See, e.g.,* Phillips Depo., at 162:13–63:3 (arguing that Defendants' classification of Madonna as "rock/pop" supports his categorization of Madonna as "rock" instead of "pop")).

23 While the *NIPP* court declined to rule on the admissibility of Dr. Phillips' opinion on damages, its brief discussion of this issue in connection with defendants' motion for summary judgment supports this Court's analysis of Dr. Phillips' damages calculations (discussed above):

> To the extent that NIPP argues that Clear Channel's prices are above industry average based on a comparison between average ticket prices charged in a given year by Clear Channel versus average ticket prices charged by other promoters, Clear Channel is correct that NIPP's failure to consider the different costs born by Clear Channel is fatal to NIPP's argument. If Clear Channel promotes all of the most expensive, top artists, Clear Channel's ticket prices will be higher than tickets sold by other promoters, and this price difference does not indicate monopolistic pricing or conduct.

NIPP, 311 F.Supp.2d at 1100–01.

24 In connection with his Expert Report submitted in this case, Dr. Phillips lists "NIPP" as the source for his classification of certain music artists. (*See* Yen Decl., Exh. 17). Presumably, the music expert in *NIPP* assisted Dr. Phillips in classifying these artists. Given the relatively small number of artists for which Dr. Phillips lists "NIPP" as the source, however, his prior use of a music expert in *NIPP* does not materially affect the Court's analysis in this case.

25 Nor has the Court located any such analysis in the voluminous record. *See generally Carmen,* 237 F.3d at 1029 ("A lawyer drafting an opposition to a summary judgment motion may easily show a judge, in the opposition, the evidence that the lawyer wants the judge to read. It is absurdly difficult for a judge to perform a search, unassisted by counsel, through the entire record, to look for such evidence.").

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TAB 19

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by In re Motor Fuel Temperature Sales Practices Litigation, 9th Cir., March 19, 2013

118 S.Ct. 956
Supreme Court of the United States

LEXECON INC. et al., Petitioners
v.
MILBERG WEISS BERSHAD HYNES & LERACH et al.

No. 96–1482.
|
Argued Nov. 10, 1997.
|
Decided March 3, 1998.

Synopsis

Law and economics consulting firm and one of its principals, former defendants in class action arising out of failure of savings and loan, brought action against counsel for plaintiff class in the Northern District of Illinois, claiming various tort violations, including defamation. After suit was transferred to the District of Arizona for pretrial proceedings by order of the Judicial Panel on Multidistrict Litigation, and after final judgment was entered in multidistrict litigation, former defendants moved for referral of case back to Panel for remand to the Northern District of Illinois. Denying the motion, the United States District Court for the District of Arizona, John M. Roll, J., 884 F.Supp. 1388, permanently transferred to itself former defendants' sole remaining claim for defamation and subsequently entered judgment dismissing all claims and counterclaims. Parties appealed. The Ninth Circuit Court of Appeals, Sneed, Circuit Judge, 102 F.3d 1524,affirmed. Certiorari was granted. The Supreme Court, Justice Souter, held that: (1) federal district court conducting pretrial proceedings pursuant to multidistrict litigation statute has no authority to invoke change-of-venue statute to assign transferred case to itself for trial, and (2) remedy for denial of former defendants' right to remand once pretrial stage was completed was reversal.

Reversed and remanded.

**957 *26 *Syllabus* [*]

Petitioners, a law and economics consulting firm and one of its principals (collectively, Lexecon), were defendants in a class action brought against Charles Keating and the American Continental Corporation in connection with the failure of Lincoln Savings and Loan. It and other actions arising out of that failure were transferred for pretrial proceedings to the District of Arizona under 28 U.S.C. § 1407(a), which authorizes the Judicial Panel on Multidistrict Litigation to transfer civil actions with common issues of fact "to any district for coordinated or consolidated pretrial proceedings," but provides that the Panel "shall" remand any such action to the original district "at or before the conclusion of such pretrial proceedings." Before the pretrial proceedings ended, the plaintiffs and Lexecon reached a "resolution," and the claims against Lexecon were dismissed. Subsequently, Lexecon brought this diversity action in the Northern District of Illinois against respondent law firms (hereinafter Milberg and Cotchett), claiming several torts, **958 including defamation, arising from the firms' conduct as counsel for the class-action plaintiffs. Milberg and Cotchett moved for, and the Panel ordered, a § 1407(a) transfer to the District of Arizona. After the remaining parties to the Lincoln Savings litigation reached a final settlement, Lexecon moved the Arizona District Court to refer the case back to the Panel for remand to the Northern District of Illinois. The law firms filed a countermotion requesting the Arizona District Court to invoke § 1404(a) to "transfer" the case to itself for trial. With only the defamation claim against Milberg remaining after a summary judgment ruling, the court assigned the case to itself for trial and denied Lexecon's motion to request the Panel to remand. The Ninth Circuit then denied Lexecon's petition for mandamus, refusing to vacate the self-assignment order and require remand because Lexecon would have the opportunity to obtain relief from the transfer order on direct appeal. After Milberg won a judgment on the defamation claim, Lexecon again appealed the transfer order. The Ninth Circuit affirmed on

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the ground that permitting the transferee court to assign a case to itself upon completion of its pretrial work was not only consistent with the statutory language but conducive to efficiency.

***27** *Held:* A district court conducting pretrial proceedings pursuant to § 1407(a) has no authority to invoke § 1404(a) to assign a transferred case to itself for trial. Pp. 961–966.

(a) Two sources of ostensible authority for Milberg's espousal of self-assignment authority are that the Panel has explicitly authorized such assignments in Panel Rule 14(b), which it issued in reliance on its rulemaking authority; and that § 1407(a)'s limitations on a transferee court's authority to the conduct of "coordinated or consolidated" proceedings and to "pretrial proceedings" raise no obvious bar to a transferee's retention of a case under § 1404. Beyond this point, however, the textual pointers reverse direction, for § 1407 not only authorizes the Panel to transfer for coordinated or consolidated pretrial proceedings, but obligates the Panel to remand any pending case to its originating court when, at the latest, those pretrial proceedings end. The Panel's remand instruction comes in terms of the mandatory "shall," which normally creates an obligation impervious to judicial discretion. *Anderson v. Yungkau,* 329 U.S. 482, 485, 67 S.Ct. 428, 430, 91 L.Ed. 436 (1947). Reading the statute whole, this Court has to give effect to this plain command, see *Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469, 476, 112 S.Ct. 2589, 2594–2595, 120 L.Ed.2d 379 (1992), even if that will reverse the longstanding practice under the statute and the rule, see *Metropolitan Stevedore Co. v. Rambo,* 515 U.S. 291, 300, 115 S.Ct. 2144, 2149-2150, 132 L.Ed.2d 226 (1995). Pp. 961–963.

(b) None of Milberg's additional arguments based on the statute's language and legislative history can unsettle § 1407's straightforward language imposing the Panel's responsibility to remand, which bars recognizing any self-assignment power in a transferee court and consequently entails the invalidity of the Panel's Rule 14(b). Pp. 963–964.

(c) Milberg errs in arguing that a remedy for Lexecon can be omitted under the harmless-error doctrine. That § 1407's strict remand requirement creates an interest too substantial to be left without a remedy is attested by a congressional judgment that no discretion is to be left to a court faced with an objection to a statutory violation. The § 1407 mandate would lose all meaning if a party who continuously objected to an uncorrected categorical violation of the mandate could obtain no relief at the end of the day. *Caterpillar Inc. v. Lewis,* 519 U.S. 61, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996), distinguished. Pp. 965–966.

102 F.3d 1524, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, which was unanimous except insofar as SCALIA, J., did not join Part II–C.

Attorneys and Law Firms

Michael K. Kellogg, for petitioners.

***28** Jerold S. Solovy, Chicago, IL, for respondents.

Opinion

Justice SOUTER delivered the opinion of the Court. †

Title 28 U.S.C. § 1407(a) authorizes the Judicial Panel on Multidistrict Litigation to transfer civil actions with common issues of fact "to any district for coordinated or consolidated pretrial proceedings," but imposes a duty on the Panel to remand any such action to the original district "at or before the conclusion of such pretrial proceedings." *Ibid.* The issue here is whether a district court conducting such "pretrial proceedings" may invoke § 1404(a) to assign a transferred case to itself for trial. We hold it has no such authority.

I

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In 1992, petitioners, Lexecon Inc., a law and economics consulting firm, and one of its principals (collectively, Lexecon), brought this diversity action in the Northern District of ***29** Illinois against respondents, the law firms of Milberg Weiss Bershad Hynes & Lerach (Milberg) and Cotchett, Illston & Pitre (Cotchett), claiming malicious prosecution, abuse of process, tortious interference, commercial disparagement, and defamation. The suit arose out of the firms' conduct as counsel in a prior class action brought against Charles Keating and the American Continental Corporation for violations of the securities and racketeering laws. Lexecon also was a defendant, charged with giving federal and state banking regulators inaccurate and misleading reports about the financial condition of the American Continental Corporation and its subsidiary Lincoln Savings and Loan. Along with other actions arising out of the failure of Lincoln Savings, the case against Lexecon was transferred under § 1407(a) for pretrial proceedings before Judge Bilby in the District of Arizona, where the matters so consolidated were known as the Lincoln Savings litigation. Before those proceedings were over, the class-action plaintiffs and Lexecon reached what they termed a "resolution," under which the claims against Lexecon were dismissed in August 1992.

Lexecon then filed this case in the Northern District of Illinois charging that the prior class action terminated in its favor when the respondent law firms' clients voluntarily dismissed their claims against Lexecon as meritless, amounting to nothing more, according to Lexecon, than a vendetta. When these allegations came to the attention of Judge Bilby, he issued an order stating his understanding of the terms of the resolution agreement between Lexecon and the class-action plaintiffs. 102 F.3d 1524, 1529, and n. 2 (C.A.9 1996). Judge Bilby's characterization of the agreement being markedly at odds with the allegations in the instant action, Lexecon appealed his order to the Ninth Circuit.

Milberg, joined by Cotchett, then filed a motion under § 1407(a) with the Judicial Panel on Multidistrict Litigation seeking transfer of this case to Judge Bilby for consolidation with the Lincoln Savings litigation. Although the judge entered ***30** a recusal because of the order he had taken it upon himself to issue, the law firms nonetheless renewed their motion for a § 1407(a) transfer.

The Panel ordered a transfer in early June 1993 and assigned the case to Judge Roll, noting that Lexecon's claims "share questions of fact with an as yet unapproved settlement involving Touche Ross, Lexecon, Inc. and the investor plaintiffs in the Lincoln Savings investor class actions in MDL–834." App. 18. The Panel observed that "i) a massive document depository is located in the District of Arizona and ii) the Ninth Circuit has before it an appeal of an order [describing the terms of Lexecon's dismissal from the Lincoln Savings litigation] in MDL–834 which may be relevant to the *Lexecon* claims." *Ibid.* Prior to any dispositive action on Lexecon's instant claims in the District of Arizona, the Ninth Circuit appeal mentioned by the Panel was dismissed, and the document depository was closed down.

In November 1993, Judge Roll dismissed Lexecon's state-law malicious prosecution ****960** and abuse of process claims, applying a "heightened pleading standard," 845 F.Supp. 1377, 1383 (Ariz.1993). Although the law firms then moved for summary judgment on the claims remaining, the judge deferred action pending completion of discovery, during which time the remaining parties to the Lincoln Savings litigation reached a final settlement, on which judgment was entered in March 1994.

In August 1994, Lexecon moved that the District Court refer the case back to the Panel for remand to the Northern District of Illinois, thus heeding the point of Multidistrict Litigation Rule 14(d), which provides that "[t]he Panel is reluctant to order remand absent a suggestion of remand from the transferee district court." The law firms opposed a remand because discovery was still incomplete and filed a countermotion under § 1404(a) requesting the District of Arizona to "transfer" the case to itself for trial. Judge Roll deferred decision on these motions as well.

***31** In November 1994, Lexecon again asked the District Court to request the Panel to remand the

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case to the Northern District of Illinois. Again the law firms objected and requested a § 1404 transfer, and Judge Roll deferred ruling once more. On April 24, 1995, however, he granted summary judgment in favor of the law firms on all remaining claims except one in defamation brought against Milberg, and at the same time he dismissed Milberg's counterclaims. 884 F.Supp. 1388, 1397 (Ariz.1995). Cotchett then made a request for judgment under Federal Rule of Civil Procedure 54(b). Lexecon objected to the exercise of Rule 54(b) discretion, but did not contest the authority of the District Court in Arizona to enter a final judgment in Cotchett's favor. On June 7, 1995, the court granted respondent Cotchett's Rule 54(b) request.

In the meantime, the Arizona court had granted the law firms' § 1404(a) motions to assign the case to itself for trial, and simultaneously had denied Lexecon's motions to request the Panel to remand under § 1407(a). Lexecon sought immediate review of these last two rulings by filing a petition for mandamus in the Ninth Circuit. After argument, a majority of the Circuit panel, over the dissent of Judge Kozinski, denied Lexecon's requests to vacate the self-assignment order and require remand to the Northern District of Illinois. The Circuit so ruled even though the majority was "not prepared to say that [Lexecon's] contentions lack merit" and went so far as to note the conflict between "what appears to be a clear statutory mandate [of § 1407 and § 1404]" and Multidistrict Litigation Rule 14(b), which explicitly authorizes a transferee court to assign an action to itself for trial. *Lexecon v. Milberg Weiss,* No. 95–70380, 1995 WL 432395 (C.A.9, July 21, 1995), p. 4. The majority simply left that issue for another day, relying on its assumption that Lexecon would have an opportunity to obtain relief from the transfer order on direct appeal: "[t]he transfer order can be appealed immediately along ***32** with other issues in the event the petitioners lose on the merits [at trial]." *Id.,* at p. 3.

Trial on the surviving defamation claim then went forward in the District of Arizona, ending in judgment for Milberg, from which Lexecon appealed to the Ninth Circuit. It again appealed the denial of its motion for a suggestion that the Panel remand the matter to the Northern District of Illinois, and it challenged the dismissal of its claims for malicious prosecution and abuse of process, and the entry of final judgment in favor of Cotchett. Lexecon took no exception to the Arizona court's jurisdiction (as distinct from venue) and pursued no claim of error in the conduct of the trial.

A divided panel of the Ninth Circuit affirmed, relying on the Panel's Rule 14 and appellate and District Court decisions in support of the District Court's refusal to support remand under § 1407(a) and its decision to assign the case to itself under § 1404(a). 102 F.3d, at 1532–1535. While the majority indicated that permitting the transferee court to assign a case to itself upon completion of its pretrial work was not only consistent with the statutory language but conducive to efficiency, Judge Kozinski again dissented, relying on the texts of §§ 1407(a) and 1404(a) and a presumption in favor of a plaintiff's choice of forum. We granted certiorari, ****961** 520 U.S. 1227, 117 S.Ct. 1818, 137 L.Ed.2d 1026 (1997), to decide whether § 1407(a) does permit a transferee court to entertain a § 1404(a) transfer motion to keep the case for trial.

II

A

In defending the Ninth Circuit majority, Milberg may claim ostensible support from two quarters. First, the Panel has itself sanctioned such assignments in a rule issued in reliance on its rulemaking authority under 28 U.S.C. § 1407(f). The Panel's Rule 14(b) provides that "[e]ach transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the ***33** transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406." Thus, out of the 39,228 cases transferred under § 1407 and terminated as of September 30, 1995, 279 of the 3,787 ultimately requiring trial were retained by the courts to which the Panel had transferred them. Administrative Office of the United States, L. Mecham, Judicial Business of the United States

Courts: 1995 Report of the Director 32. Although the Panel's rule and the practice of self-assignment have not gone without challenge, see, *e.g.,* 15 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3866, p. 619 (2d ed. 1986) (hereinafter Wright, Miller, & Cooper); Trangsrud, Joinder Alternatives in Mass Tort Litigation, 70 Cornell L.Rev. 779, 809 (1985); Levy, Complex Multidistrict Litigation and the Federal Courts, 40 Ford. L.Rev. 41, 64–65 (1972), federal courts have treated such transfers with approval, beginning with the Second Circuit's decision in *Pfizer, Inc. v. Lord,* 447 F.2d 122, 124–125 (1971) *(per curiam)* (upholding MDL Rule 15(d), the precursor to Rule 14(b)). See, *e.g., In re Fine Paper Antitrust Litigation,* 685 F.2d 810, 820, and n. 7 (C.A.3 1982); *In re Air Crash Disaster at Detroit Metro. Airport,* 737 F.Supp. 391, 393–394 (E.D.Mich.1989); *In re Viatron Computer Sys. Corp.,* 86 F.R.D. 431, 432 (D.C.Mass.1980).

The second source of ostensible authority for Milberg's espousal of the self-assignment power here is a portion of text of the multidistrict litigation statute itself:

> "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." 28 U.S.C. § 1407(a).

Although the statute limits a transferee court's authority to the conduct of "coordinated or consolidated" proceedings and ***34** to those that are "pretrial," these limitations alone raise no obvious bar to a transferee's retention of a case under § 1404. If "consolidated" proceedings alone were authorized, there would be an argument that self-assignment of one or some cases out of many was not contemplated, but because the proceedings need only be "coordinated," no such narrow limitation is apparent. While it is certainly true that the instant case was not "consolidated" with any other for the purpose literally of litigating identical issues on common evidence, it is fair to say that proceedings to resolve pretrial matters were "coordinated" with the conduct of earlier cases sharing the common core of the Lincoln Savings debacle, if only by being brought before judges in a district where much of the evidence was to be found and overlapping issues had been considered. Judge Bilby's recusal following his decision to respond to Lexecon's Illinois pleadings may have limited the prospects for coordination, but it surely did not eliminate them. Hence, the requirement that a transferee court conduct "coordinated or consolidated" proceedings did not preclude the transferee Arizona court from ruling on a motion (like the § 1404 request) that affects only one of the cases before it.

Likewise, at first blush, the statutory limitation to "pretrial" proceedings suggests no reason that a § 1407 transferor court could not entertain a § 1404(a) motion. Section 1404(a) authorizes a district court to transfer a case in the interest of justice and for the convenience of the parties and witnesses. See § 1404(a). Such transfer requests are typically resolved prior to discovery, see Wright, Miller, & Cooper § 3866, at 620, and thus are classic "pretrial" motions.

****962** Beyond this point, however, the textual pointers reverse direction, for § 1407 not only authorizes the Panel to transfer for coordinated or consolidated pretrial proceedings, but obligates the Panel to remand any pending case to its originating court when, at the latest, those pretrial proceedings have run their course.

> ***35** "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." § 1407(a) (proviso without application here omitted).

The Panel's instruction comes in terms of the mandatory "shall," which normally creates an obligation impervious to judicial discretion. *Anderson v. Yungkau,* 329 U.S. 482, 485, 67 S.Ct. 428, 430, 91 L.Ed. 436 (1947). In the absence of any indication that there might be circumstances in which a transferred case would be neither "terminated" nor subject to the remand obligation, then, the statutory instruction stands flatly at odds with reading the phrase "coordinated or consolidated pretrial proceedings" so broadly as to

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reach its literal limits, allowing a transferee court's self-assignment to trump the provision imposing the Panel's remand duty. If we do our job of reading the statute whole, we have to give effect to this plain command, see *Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469, 476, 112 S.Ct. 2589, 2594–2595, 120 L.Ed.2d 379 (1992), even if doing that will reverse the longstanding practice under the statute and the rule, see *Metropolitan Stevedore Co. v. Rambo,* 515 U.S. 291, 300, 115 S.Ct. 2144, 2149-2150, 132 L.Ed.2d 226 (1995) (" 'Age is no antidote to clear inconsistency with a statute.' " (quoting *Brown v. Gardner,* 513 U.S. 115, 122, 115 S.Ct. 552, 557, 130 L.Ed.2d 462 (1994))).

As the Ninth Circuit panel majority saw it, however, the inconsistency between an expansive view of "coordinated or consolidated pretrial" proceedings and the uncompromising terms of the Panel's remand obligation disappeared as merely an apparent conflict, not a real one. The "focus" of § 1407 was said to be constituting the Panel and defining its authority, not circumscribing the powers of district courts under § 1404(a). 102 F.3d, at 1533. Milberg presses this point in observing that § 1407(a) does not, indeed, even apply to transferee courts, being concerned solely with the Panel's duties, whereas § 1407(b), addressed to the transferee courts, says nothing about the Panel's obligation to remand. But this analysis fails to persuade, for the very reason that it ***36** rejects that central tenet of interpretation, that a statute is to be considered in all its parts when construing any one of them. To emphasize that § 1407(b) says nothing about the Panel's obligation when addressing a transferee court's powers is simply to ignore the necessary consequence of self-assignment by a transferee court: it conclusively thwarts the Panel's capacity to obey the unconditional command of § 1407(a).

A like use of blinders underlies the Circuit majority's conclusion that the Panel was not even authorized to remand the case under its Rule 14(c), the terms of which condition the remand responsibility on a suggestion of the transferee court, a motion filed directly with the Panel, or the Panel's *sua sponte* decision to remand. None of these conditions was fulfilled, according to the Court of Appeals, which particularly faulted Lexecon for failing to file a remand motion directly with the Panel, as distinct from the transferee court. [1] This analysis, too, is unpersuasive; ****963** it just ignores the fact that the statute places an obligation on the Panel to ***37** remand no later than the conclusion of pretrial proceedings in the transferee court, and no exercise in rulemaking can read that obligation out of the statute. See 28 U.S.C. § 1407(f) (express requirement that rules be consistent with statute).

B

Milberg proffers two further arguments for overlooking the tension between a broad reading of a court's pretrial authority and the Panel's remand obligation. First, it relies on a subtle reading of the provision of § 1407(a) limiting the Panel's remand obligation to cases not "previously terminated" during the pretrial period. To be sure, this exception to the Panel's remand obligation indicates that the Panel is not meant to issue ceremonial remand orders in cases already concluded by summary judgment, say, or dismissal. But according to Milberg, the imperative to remand is also inapplicable to cases self-assigned under § 1404, because the self-assignment "terminates" the case insofar as its venue depends on § 1407. When the § 1407 character of the action disappears, Milberg argues, the strictures of § 1407 fall away as well, relieving the Panel of any further duty in the case. The trouble with this creative argument, though, is that the statute manifests no such subtlety. Section 1407(a) speaks not in terms of imbuing transferred actions with some new and distinctive venue character, but simply in terms of "civil actions" or "actions." It says that such an action, not its acquired personality, must be terminated before the Panel is excused from ordering remand. The language is straightforward, and with a straightforward application ready to hand, statutory interpretation has no business getting metaphysical.

Second, Milberg tries to draw an inference in its favor from the one subsection of § 1407 that does authorize the Panel to transfer a case for trial as

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well as pretrial proceedings. Subsection (h) provides that,

> ***38** "[n]otwithstanding the provisions of section 1404 or subsection (f) of this section, the judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act."

Milberg fastens on the introductory language explicitly overriding the "provisions of section 1404 or subsection (f)," which would otherwise, respectively, limit a district court to transferring a case "to any other district or division where it might have been brought," § 1404(a), and limit the Panel to prescribing rules "not inconsistent with Acts of Congress," § 1407(f). On Milberg's reasoning, these overrides are required because the cited provisions would otherwise conflict with the remainder of subsection (h) authorizing the Panel to order trial of certain Clayton Act cases in the transferee court. The argument then runs that since there is no override of subsection (a) of § 1407, subsection (a) must be consistent with a transfer for trial as well as pretrial matters. This reasoning is fallacious, however. Subsections (a) and (h) are independent sources of transfer authority in the Panel; each is apparently written to stand on its own feet. Subsection (h) need not exclude the application of subsection (a), because nothing in (a) would by its terms limit any provision of (h).

Subsection (h) is not merely valueless to Milberg, however; it is ammunition for Lexecon. For the one point that subsection (h) does demonstrate is that Congress knew how to distinguish between trial assignments and pretrial proceedings in cases subject to § 1407. Although the enactment of subsection (a), Act of Apr. 29, 1968, 82 Stat. 109, preceded the enactment of subsection (h), Act of Sept. 30, 1976, § 303, 90 Stat. 1394, 1396, the fact that the later section distinguishes trial assignments from pretrial proceedings generally is certainly some confirmation for our conclusion, on independent grounds, that the subjects of pretrial ****964** ***39** proceedings in subsections (a) and (b) do not include self-assignment orders. [2]

C

There is, finally, nothing left of Milberg's position beyond an appeal to legislative history, some of which turns out to ignore the question before us, and some of which may support Lexecon. Milberg cites a House Report on the bill that became § 1407, which addresses the question of trial transfer in multidistrict litigation cases by saying that, "[o]f course, 28 U.S.C. 1404, providing for changes of venue generally, is available in those instances where transfer of a case for all purposes is desirable." H.R. Rep. No. 1130, 90th Cong., 2d Sess., p. 4 (1968) (hereinafter H.R. Rep.), cited in Brief for Respondents Milberg et al. 25. But the question is not whether a change of venue may be ordered in a case consolidated under § 1407(a); on any view of § 1407(a), if an order may be made under § 1404(a), [3] it may be made after remand of the case to the originating district court. The relevant question for our purposes is whether a transferee court, and not a transferor court, may grant such a motion, and on this point, the language cited by Milberg provides no guidance.

If it has anything to say to us here, the legislative history tends to confirm that self-assignment is beyond the scope of the transferee court's authority. The same House Report that spoke of the continued vitality of § 1404 in § 1407 cases also said this:

> ***40** "The proposed statute affects only the pretrial stages in multidistrict litigation. It would not affect the place of trial in any case or exclude the possibility of transfer under other Federal statutes.
>
> . . . . .
>
> "The subsection requires that transferred cases be remanded to the originating district at the close of coordinated pretrial proceedings. The bill does not, therefore, include the trial of cases in the consolidated proceedings." H.R. Rep., at 3–4.

The comments of the bill's sponsors further suggest that application of § 1407 (before the addition of subsection(h)) would not affect the place of trial. See, *e.g.,* Multidistrict Litigation: Hearings on

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S. 3815 and S. 159 before the Subcommittee on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess., pt. 2, p. 110 (1967) (Sen. Tydings) ("[W]hen the deposition and discovery is completed, then the original litigation is remanded to the transferor district for the trial"). Both the House and the Senate Reports stated that Congress would have to amend the statute if it determined that multidistrict litigation cases should be consolidated for trial. S.Rep. No. 454, 90th Cong., 1st Sess., p. 5 (1967).

D

In sum, none of the arguments raised can unsettle the straightforward language imposing the Panel's responsibility to remand, which bars recognizing any self-assignment power in a transferee court and consequently entails the invalidity of the Panel's Rule 14(b). See 28 U.S.C. § 1407(f). Milberg may or may not be correct that permitting transferee courts to make self-assignments would be more desirable than preserving a plaintiff's choice of venue (to the degree that § 1407(a) does so), but the proper venue for resolving that issue remains the floor of Congress. See ***41** *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 628-629, 117 S.Ct. 2231, 2252, 138 L.Ed.2d 689 (1997); *Finley v. United States,* 490 U.S. 545, 556 [109 S.Ct. 2003, 2010–2011, 104 L.Ed.2d 593] (1989). [4]

****965** III

The remaining question goes to the remedy, which Milberg argues may be omitted under the harmless-error doctrine. Milberg posits a distinction between a first category of cases erroneously litigated in a district in which (absent waiver) venue may never be laid under the governing statute, see *Olberding v. Illinois Central R. Co.,* 346 U.S. 338, 340, 74 S.Ct. 83, 85, 98 L.Ed. 39 (1953), and a second category, in which the plaintiff might originally have chosen to litigate in the trial forum to which it was unwillingly and erroneously carried, as by a transfer under § 1404. In the first, reversal is necessary; in the second, affirmance is possible if no independent and substantial right was violated in a trial whose venue was determined by a discretionary decision. Since Lexecon could have brought suit in the Arizona district consistently with the general venue requirements of 28 U.S.C. § 1391, and since the transfer for trial was made on the authority of § 1404(a), Milberg argues, this case falls within the second category and should escape reversal because none of Lexecon's substantial rights was prejudicially affected, see § 2111. Assuming the distinction may be drawn, however, we think this case bears closer analogy to those in the first category, in which reversal with new trial is required because venue is precluded by the governing statute.

Milberg's argument assumes the only kind of statute entitled to respect in accordance with its uncompromising terms is a statute that categorically limits a plaintiff's initial choice of forum. But there is no apparent reason why courts ***42** should not be equally bound by a venue statute that just as categorically limits the authority of courts (and special panels) to override a plaintiff's choice. If the former statute creates interests too substantial to be denied without a remedy, the latter statute ought to be recognized as creating interests equally substantial. In each instance the substantiality of the protected interest is attested by a congressional judgment that in the circumstances described in the statute no discretion is to be left to a court faced with an objection to a statutory violation. To render relief discretionary in either instance would be to allow uncorrected defiance of a categorical congressional judgment to become its own justification. Accordingly, just as we agree with Milberg that the strict limitation on venue under, say, § 1391(a) (diversity action "may ... be brought only ...") is sufficient to establish the substantial character of any violation, Brief for Respondents Milberg et al. 43 (citing *Olberding, supra*), the equally strict remand requirement contained in § 1407 should suffice to establish the substantial significance of any denial of a plaintiff's right to a remand once the pretrial stage has been completed.

Nor is Milberg correct that our recent decision in *Caterpillar, Inc. v. Lewis,* 519 U.S. 61, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996), is to the contrary. [5] In ***43** that case, which got no new trial, the jurisdictional defect (a lack of complete diversity) had been cured

by subsequent events. While the statutory error (failure to comply with the § 1441(a) requirement that the case be fit for federal adjudication when the removal petition is filed) "remained in the unerasable history of the case," *id.,* at 73, 117 S.Ct., at 475, in the sense that it had not been cured ****966** within the statutory period, it had otherwise been cured by the time judgment was entered. The instant case is different from that one, inasmuch as there was no continuing defiance of the congressional condition in *Caterpillar,* but merely an untimely compliance. It was on this understanding that we held that considerations of "finality, efficiency and economy" trumped the error, *id.,* at 75, 117 S.Ct., at 476. After *Caterpillar,* therefore, since removal is permissible only where original jurisdiction exists at the time of removal or at the time of the entry of final judgment, the condition contained in the removal statute retains significance. But the § 1407(a) mandate would lose all meaning if a party who continuously objected to an uncorrected categorical violation of the mandate could obtain no relief at the end of the day. [6]

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

All Citations

523 U.S. 26, 118 S.Ct. 956, 140 L.Ed.2d 62, 98 Daily Journal D.A.R. 2041, 98 CJ C.A.R. 940, 11 Fla. L. Weekly Fed. S 361

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

† Justice SCALIA joins this opinion, except as to Part II–C.

1 The Ninth Circuit stopped short of expressly inferring a waiver from Lexecon's failure to file a motion for remand directly with the Panel, and any inference of waiver would surely have been unsound. Although the Panel's Rule 14(c)(i) does authorize a party to file such a motion, Rule 14(d) comes close to saying that only under extraordinary circumstances will such a motion be granted without a suggestion of remand by the transferee court. (The Rule reads: "The Panel is reluctant to order remand absent a suggestion of remand from the transferee district court.") Therefore, even if a party may waive the § 1407 remand requirement by failing to request remand from the transferor court, see 28 U.S.C. § 1406(b), Rule 14(d) precludes an inference of waiver from mere failure to request remand from the Panel.

In this case, moreover, one can say categorically that a motion before the Panel would have failed; the transferee court denied Lexecon's motion for a remand suggestion simultaneously with an order assigning the case to itself for trial, thus exercising the authority that the Panel's Rule 14(b) expressly purported to recognize. Under the Panel's own rules, in sum, Lexecon never had a chance to waive a thing.

2 It is well to note the limitations of a related argument. It may be tempting to say that the incompatibility of a self-assignment under § 1404(a) with the Panel's mandate is confirmed by the authority of a transferor court to assign a case to a § 1407(a) transferee district for trial if that would be appropriate following pretrial proceedings under § 1407(a). But there is one circumstance in which a transferor court would be unable to do that. As noted, transfers under § 1407 are not limited by general venue statutes; those under § 1404 are.

3 See n. 2, *supra.*

4 Because we find that the statutory language of § 1407 precludes a transferee court from granting any § 1404(a) motion, we have no need to address the question whether § 1404(a) permits self-transfer given that the statute explicitly provides for transfer only "to any other district." 28 U.S.C. § 1404(a).

5 In its brief to this Court, Milberg suggests that any decision rejecting multidistrict litigation courts' practice of ruling on § 1404 transfer motions should be applied only prospectively under *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106–107, 92 S.Ct. 349, 355–356, 30 L.Ed.2d 296 (1971). Because this argument was not presented below, see Brief for Milberg Defendants in No. 95–16403 et al. (CA 9), or to this Court when

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Milberg opposed petitioners' petition for certiorari, see Brief in Opposition for Respondents Milberg et al., it is unnecessary for us to consider it here.

Milberg's brief also argues that petitioners are not entitled to relief because the only claim that survived for trial should have been dismissed during pretrial proceedings. We do not address the propriety of the District Court's decision to allow this claim to go forward; the issue falls outside the question on which we granted certiorari. See this Court's Rule 14.1(a) (“Only the questions set forth in the petition, or fairly included therein, will be considered by the Court”).

6 Although Cotchett's request for an order of dismissal under Rule 54(b) was not granted until after the Arizona court had assigned the case to itself for trial, there is no reason to reconsider that dismissal order. It was perfectly proper as a pretrial order and, for that matter, was merely the formal reflection of the Arizona court's decision on the merits of the claims that had been resolved prior to that court's decision on the § 1404 transfer.

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TAB 20

KeyCite Yellow Flag - Negative Treatment
Distinguished by Hill v. Henderson, D.C.Cir., November 12, 1999

662 F.2d 875
United States Court of Appeals,
District of Columbia Circuit.

In re CORRUGATED CONTAINER ANTITRUST LITIGATION-
John W. Culy, Appellant.

No. 81-1443.
|
Argued June 24, 1981.
|
Decided Aug. 28, 1981.

Synopsis

In multidistrict civil litigation concerning alleged price-fixing, the presiding judge, whose home district was the Southern District of Texas, issued an order of contempt over the telephone to nonparty witness who was being deposed in Washington, D.C., and witness appealed. The Court of Appeals, Wald, Circuit Judge, held that: (1) such Court had jurisdiction over the appeal; (2) testimony sought to be elicited by questions asked of the witness was incriminating within meaning of Fifth Amendment; and (3) witness was entitled to assert his right against self-incrimination, in light of indication that prosecution of witness would not be fanciful or barred by applicable statute of limitations, that there was substantial question as to protection afforded witness under verbal promise of immunity in FBI interview and that there was no authority for ruling that such an oral promise by an investigator, not in accord with statutory requirements, would bind all prosecutors.

Vacated.

***877** ****321** On Appeal from an order issued from the District Court for the Southern District of Texas by the presiding judge in MDL-310 exercising the powers of the United States District Court for the District of Columbia (Southern District of Texas Civil MDL-310).

Attorneys and Law Firms

Steven P. Handler, Chicago, Ill., with whom George Vernon and Richard A. Sloan, Chicago, Ill., were on the brief, for appellant.

Jerrold E. Salzman, Chicago, Ill., for appellees.

Before: WALD and MIKVA, Circuit Judges and MARKEY [*], Chief Judge, United States Court of Customs and Patent Appeals.

Opinion

Opinion for the Court filed by Circuit Judge WALD.

WALD, Circuit Judge:

This case is an appeal from an order of civil contempt entered against John W. Culy (appellant), a non-party witness, as a result of his invocation of the fifth amendment privilege against self-incrimination and his refusal to answer certain questions at a deposition taken in Washington, D.C. in connection with multidistrict civil litigation concerning alleged price-fixing in the corrugated paper industry. The contempt order was issued over the telephone from the United States District Court for the Southern District of Texas by the presiding judge in In Re Corrugated Container Antitrust Litigation, M.D.L. No. 310, exercising the powers of the United States District Court for the District of Columbia pursuant to 28 U.S.C. s 1407(b). For the reasons stated below we hold that jurisdiction over the appeal properly lies in the District of Columbia Circuit but we vacate the order of civil contempt.

I. BACKGROUND

During his career, appellant has worked for several different companies in the corrugated container industry. Before 1976-the critical period in the controversy-he was employed by the Weyerhaeuser Company (Weyerhaeuser) and the Corrugated Container Company (CORCO), two of the defendants in pending civil antitrust suits. From

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1968 to mid-1970 appellant was sales representative and later sales manager of Weyerhaeuser's sales office in Indianapolis, Indiana. From mid-1970 through early 1972 he was assistant sales manager of the Weyerhaeuser plant in Columbus, Indiana. From early 1972 through February 1976 he ***878 **322** was sales manager and later general manager of CORCO's plant in Muncie, Indiana. Appellant left CORCO in 1976 to become general sales manager of the Indiana Box Corporation (Indiana Box). He is currently the regional sales manager of the Anderson Box Company (Anderson Box) in Staunton, Virginia. Anderson Box is a subsidiary of Inland Container which is also a defendant in the civil antitrust cases.

In October, 1977 appellant voluntarily submitted to an interview in Dallas, Texas by an FBI agent and his associate (a law student) in connection with a federal criminal investigation of antitrust violations in the corrugated container industry. Appellant was informed that the interviewers were empowered to act as agents of a grand jury, which had instructed them to conduct appellant's interview. During the interview appellant was orally advised that he would not be prosecuted for any of the statements or testimony that he gave.[1] Appellant was not placed under oath. A transcript was later prepared from a tape recording of the interview. Appellant was not subpoenaed to appear and he did not testify before the grand jury. Instead, the interview transcript was given to the grand jury.

In January, 1978 a federal grand jury in Houston, Texas indicted fourteen companies and twenty-six individuals for an alleged nationwide conspiracy to fix prices in the corrugated container industry. These consolidated cases were assigned to Chief Judge John V. Singleton of the United States District Court for the Southern District of Texas. Appellant was not indicted at that time and he has not subsequently been prosecuted for any offense. In the ensuing criminal trial, a jury acquitted of all charges each defendant who stood trial. Appellant did not testify at the trial.

While the grand jury investigation and the subsequent criminal trial were in progress, purchasers of corrugated products filed numerous class and non-class actions in various United States District Courts throughout the country. These actions alleged the same type of nationwide price-fixing conspiracy as alleged in the criminal cases. The defendants in the civil actions included the companies named in the criminal indictments as well as a number of companies that were not indicted. Pursuant to 28 U.S.C. s 1407, the Judicial Panel for Multidistrict Litigation consolidated these civil actions in the Southern District of Texas as In Re Corrugated Container Antitrust Litigation, M.D.L. 310, and assigned this litigation to Judge Singleton for pretrial proceedings.

The class action civil cases now have been either tried or settled.[2] However, a number of opt-out cases remain pending before Judge Singleton. In the course of discovery, opt-out plaintiffs (appellees) noticed the deposition of appellant for April 3, 1981 in Washington, D.C. Appellant was not subpoenaed but appeared voluntarily in response to the notice of deposition.

At his deposition appellant, upon the advice of counsel, asserted his fifth amendment privilege with respect to pricing and price communications occurring prior to 1975, while he was employed by Weyerhaeuser and CORCO, on the grounds that the answers to appellees' questions would tend to incriminate him. The questions appellant refused to answer were either taken verbatim from, or closely tracked, the transcript of the 1977 FBI interview submitted to the grand jury, portions of which had been previously released to appellees.[3]

***879 **323** Upon appellant's refusal to answer the questions in dispute, appellees' counsel telephoned Judge Singleton on-the-spot and moved to compel appellant to answer. After hearing argument from both sides and questioning appellant over the phone the judge expressly invoked his authority to exercise the powers of the District Court for the District of Columbia pursuant to 28 U.S.C. s 1407(b) and ordered appellant to answer six specific questions. However, appellant persisted in his assertion of the fifth amendment privilege. Judge Singleton then held appellant in civil contempt, sentenced him to

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six months in jail and fined him $5,000.[4] Judge Singleton suspended imposition of sentence pending appeal and ruled that appellant would have a chance to purge himself of contempt if the court of appeals affirmed the contempt order.[5] This appeal followed.

II. JURISDICTION

The initial question concerns which circuit court has jurisdiction over this appeal. The general appellate jurisdiction statute, 28 U.S.C. s 1294, states that:

> Appeals from reviewable decisions of the district and territorial courts shall be taken as follows:
>
> (1) From a district court of the United States to the court of appeals for the circuit embracing the district....

The multidistrict litigation statute provides in relevant part:

> The judge or judges to whom such (multidistrict) actions are assigned, ... may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

28 U.S.C. s 1407(b). Thus, the precise issue before us is whether an appeal from a multidistrict litigation transferee judge's order of contempt issued over the telephone from the transferee judge's home district in Texas to a non-party witness being deposed in Washington, D.C. should be taken in the Fifth Circuit which embraces the transferee district or in the District of Columbia Circuit which embraces the deposition district. It is clear to us that the District of Columbia Circuit has jurisdiction because the contempt order was issued pursuant to the exercise by Judge Singleton of the powers of a district judge in the District of Columbia rather than in his capacity as a sitting judge in the Southern District of Texas where the multidistrict litigation is now based. Our conclusion as to the appropriate appellate forum is in accord with the Fifth Circuit's earlier ruling that it lacked jurisdiction over this appellant,[6] as well as the prior jurisdictional rulings by the Second, Fifth, and Seventh Circuits with respect to similar appeals by other non-party deponents in this same multidistrict litigation.[7]

A. Section 1407's Limited Grant of Power

In our federal judicial system, judges of a particular district court may exercise their authority only within that district except under specific limited designations permitted by statute. See, e. g., 28 U.S.C. ss 292, 295, 296.[8] When so designated, the judge ***880 **324** sits as a judge of the court to which he is assigned, but he does not exercise extraterritorial jurisdiction in his capacity as a judge of his home court to which he is permanently assigned.

Section 1407, which established special procedures allowing the transfer of pretrial proceedings in multidistrict litigation, contains two kinds of authority. One is for the transfer of pending causes of action from one district to another district for pretrial purposes only. 28 U.S.C. s 1407(a).[9] The judge who is assigned to preside over the transferred action exercises his authority as a member of the district court to which the action has been transferred. Congress believed

> that the possibility for conflict and duplication in discovery and other pretrial procedures in related cases (could) be avoided or minimized by ... centralized management. To accomplish this objection the (statute) provides for the transfer of venue of an action for the limited purpose of conducting coordinated pretrial proceedings.

H.R. Rep. No. 1130, 90th Cong., 2d Sess. 2 (1968) U.S. Code Cong. & Admin.News 1968, pp. 1898, 1899. See generally In re: Multi-Piece Rim Products Liability Litigation (Appeal of Firestone Tire & Rubber Co.), 653 F.2d 671 at 677 (D.C. Cir., 1981) (authorities cited). Ordinarily, as appellant points out, appeals from

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the orders of the judge appointed to preside over the transferred case go to the appellate court which normally rules over the transferee district court rather than the appellate court embracing the transferor district. Utah v. American Pipe & Construction Co., 316 F.Supp. 837 (C.D. Cal. 1970). See In re Plumbing Fixture Cases, 298 F.Supp. 484 (Jud.Pan.Mult.Lit. 1968).

The second grant of authority in section 1407 is of a different sort. It grants to the judges who have been assigned multidistrict litigation the powers of a district judge in other districts in order to supervise depositions being conducted in those other districts.[10] 28 U.S.C. s 1407(b) (see text supra). The deposition proceedings remain anchored in the courts of the districts where they are being conducted, but because of the obvious policy reasons for allowing a single judge to preside over the disparate activity in a multidistrict case, see In re IBM Peripheral EDP Devices Antitrust Litigation, 411 F.Supp. 791 (Jud.Pan.Mult.Lit. 1976), the multidistrict judge is granted the ***881** ****325** same powers as a judge of those courts where the depositions are being taken.[11]

Appellant does not dispute that Judge Singleton here adjudged him in contempt while acting as a judge of the District Court for the District of Columbia. Acting as such, Judge Singleton was bound by the rules and procedures of the District of Columbia District Court and although as a temporary judge thereof he had the power to adjudge the deponent in contempt and set a penalty, any execution of that penalty would have to be in accord with the rules and procedures of the District Court for the District of Columbia. It follows that any appeal from his exercise of the powers of a district judge of the District Court for the District of Columbia must be heard by the Court of Appeals for the District of Columbia.

B. The Requirements of the Federal Rules of Civil Procedure

The legislative history of section 1407 shows that Congress envisioned that "pretrial proceedings" in multidistrict litigation, defined to include "deposition and discovery" were to be governed by the Federal Rules of Civil Procedure. H.R. Rep. No. 1130, supra at 3. Our resolution of the jurisdictional question is consistent with that Congressional intent because there is no question that jurisdiction would lie in this circuit if this appeal were not part of a section 1407 multidistrict litigation.

Fed.R.Civ.P. 37, which governs the imposition of sanctions against persons unjustifiably resisting discovery, says that a motion to compel the testimony of a non-party deponent must be made to the court in the district where the deposition is being held.[12] The reason for this, of course, is to spare the non-party witness the inconvenience and hardship of traveling to a distant forum in order to defend himself. Only a judge of the court in the deposition district can adjudge the recalcitrant witness in contempt. See Multi-Piece Rim, supra, 653 F.2d at 675-676 & n.1; 4A Moore's Federal Practice PP 37.02 & 37.03 (1980-81 Supp.); Wright & Miller, Federal Practice and Procedure, Civil s 2287.[13]

***882** ****326** Fed.R.Civ.P. 45 demonstrates that if appellant had not voluntarily responded to the notice of his deposition he could not have been required to travel to the Southern District of Texas for a deposition by a subpoena issued from that district.[14] As a non-party witness, he was not subject to the jurisdiction of the District Court for the Southern District of Texas. Multi-Piece Rim, supra; Franey, 620 F.2d at 1090 & n.3, citing Lincoln Laboratories, Inc. v. Savage Laboratories, Inc., 27 F.R.D. 476, 477, 478-79 (D. Del. 1961). Since appellant lives and works in the vicinity of the District of Columbia, a subpoena could only have issued in or near the District of Columbia and only a judge in the district where the deposition is taken, not where the litigation is pending, could hold appellant in contempt. Id.

Therefore, with regard to the procedures governing the depositions of non-party witnesses, section 1407 and the Federal Rules of Civil Procedure are not conflicting but complementary and nothing in either persuades us that this appeal should be heard in any other circuit.

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III. THE GROUNDS FOR THE CONTEMPT ORDER

"No person ... shall be compelled in any criminal case to be a witness against himself." U.S.Const. Amend. V. The privilege against compulsory self-incrimination "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigative or adjudicatory...." Kastigar v. United States, 406 U.S. 441, 444, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212 (1972). A witness may properly invoke the privilege when he reasonably apprehends a risk of self-incrimination though no criminal charges are pending against him. Marchetti v. United States, 390 U.S. 39, 53, 88 S.Ct. 697, 705, 19 L.Ed.2d 889 (1968); Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951); Franey, 620 F.2d at 1091; Wehling v. Columbia Broadcasting System, 608 F.2d 1084, 1087 n.5 (5th Cir. 1979). However, if the answers which a witness might give to the questions asked could not be incriminating within the meaning of the fifth amendment, the witness must answer. Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472, 92 S.Ct. 1670, 32 L.Ed.2d 234 (1972). The witness is not exonerated merely because he declares that he would incriminate himself, "(i)t is for the court to say whether his silence is justified" and to require him to answer if "it clearly appears to the court that he is mistaken." Hoffman, supra, 341 U.S. at 486, 71 S.Ct. at 818.

> To sustain the privilege, it need only be evident from the implications of the question, and the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.

Id. at 486-87, 71 S.Ct. at 818. "Injurious disclosure" is not confined to answers that would support a conviction. It includes any statements "which would furnish a link in the chain of evidence needed to prosecute." Id. at 486, 71 S.Ct. at 818. Moreover, the witness is not required to prove that "injurious disclosure" would occur:

> (I)f the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually ***883 **327** required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee.

Id.

If testimony is incriminatory, i. e., tending to show that the witness has engaged in criminal activities, then the propriety of invoking the fifth amendment privilege depends on whether the risk of prosecution is substantial and real and not merely fanciful. Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472, 478, 92 S.Ct. 1670, 1675, 32 L.Ed.2d 234 (1972); Marchetti v. United States, 390 U.S. 39, 53, 88 S.Ct. 697, 705, 19 L.Ed.2d 889 (1968); Hoffman, supra; Franey, 620 F.2d at 1091-92; In re Folding Carton Antitrust Litigation, 609 F.2d 867, 871 (7th Cir. 1979). When a witness can demonstrate a fear of prosecution, which is more than fanciful or merely speculative, he has a claim of privilege that meets constitutional muster. Id.

The district court here refused to accept appellant's invocation of the fifth amendment privilege. During the contempt hearing the judge stated:

> that the answers would not lead to possible prosecution under the Fifth Amendment or to any prosecution, (prosecution) is either fanciful

> or has been barred by the Statute of Limitations, it's fanciful at most.

Tr. 125.[15] The subsequent written order embodying this ruling contained two grounds for holding appellant in contempt: (1) that the questions asked were derived from immunized testimony and therefore appellant's answers could not be used against him, and (2) appellant's fear of prosecution was unfounded because it was barred by applicable statutes of limitations. Under the standards set forth above, we now consider whether these were, in fact, sufficient grounds for holding appellant in contempt.

A. The Incriminating Nature of the Desired Testimony and the Possibility of Prosecution

There is little doubt that the testimony sought from appellant is of an incriminating nature, and the central question, aside from whether appellant is protected by a valid grant of immunity, is whether the possibility of prosecution is "fanciful at most."

The six questions that appellant refused to answer relate to potentially incriminating matter because they concern alleged exchanges by appellant of price information with competitors in the corrugated container industry, and they might reveal his participation from 1968-75, while he worked with Weyerhaeuser and CORCO, in an alleged ongoing price-fixing conspiracy that purportedly continued until 1978. The fact that appellant was given an oral promise of immunity, presumably authorized, and that comparable information from similar witnesses in this litigation was obtained under grants of formal immunity, strongly attests to the injurious nature of appellant's evidence. Indeed, the established policy of federal prosecutors precludes them from offering formal or informal immunity to a witness unless he possesses information which is self-incriminatory.[16] Three of the six questions, repeated from appellant's FBI interview, explicitly asked about exchanges of price information with competitors.[17] Appellant was also asked to identify ***884 **328** the transcript of his FBI interview.[18] This question is potentially incriminating as well because an affirmative answer would constitute an admission under oath that appellant made the prior statements, which could lay the foundation for the introduction of the transcript in a subsequent trial or enable the use of the transcript to impeach appellant. Cf. United States v. Livingston, 661 F.2d 239 (D.C. Cir. 1981), at 242-244. Still another question asked appellant to identify who has a copy of the interview transcript.[19] This seemingly innocent question also harbors hidden dangers for the unwary witness. For instance, an answer could reveal the identity of persons with whom appellant has discussed the substance of his interview; this in turn might reveal a waiver of whatever effective immunity from prosecution that he may have received. See, e. g., United States v. Kuehn, 562 F.2d 427, 432 (7th Cir. 1977). Further, identification of persons who do not have a copy of the interview transcript by not naming them in an answer may lay the groundwork for a subsequent prosecutor to establish that his questions are not derivative of the interview transcript and therefore not covered by a prior grant of immunity. The sixth and final question asks:

> Is your memory today regarding conversations pertaining to exchanges of prices or exchanges of information concerning materials and conditions of sales with competitors, as fresh as it was on October 11, 1977, when you gave the interview to the FBI agent on behalf of the grand jury?

Tr. 127-28. This question has a predicate of incrimination and appellant could not answer it without admitting that he had price exchanges. In addition, the question has a potential for opening a whole new view of testimony which was not obtained in the prior FBI interview if the respondent should admit new or additional incidents of price-fixing. In sum, it seems plain that answers by appellant to the six questions could well result in injurious disclosures or at least furnish a link in the chain of evidence needed to prosecute. Hoffman v. United States, 341 U.S. 479, 486-87, 71 S.Ct. 814, 818-819, 95 L.Ed. 1118 (1951). Thus, the testimony in question is

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incriminating within the meaning of the fifth amendment.

Since all of the questions are potentially incriminating, we next need to determine whether appellant's fear of prosecution on the basis of admissions as to pre-1975 price communications is realistic or reasonable and not merely fanciful. In this regard we cannot agree with the district judge that the likelihood of prosecution is "fanciful at most," and we must conclude that it was clearly erroneous for him to find that for all practical purposes the statute of limitations had run on possible prosecutions.

Appellees downplay the prospect of future criminal prosecution by referring to the obvious fact that the federal criminal trial is finished, and that "there is not the least indication that any prosecutor in any state has any interest in reinvestigating such well-researched territory." [20] But that ***885 **329** does not guarantee, especially in light of the conduct involved in this case, that a criminal action would not be started in some state or federal jurisdiction, if the statute of limitations did not bar it. See In re Master Key Litigation, 507 F.2d 292, 293 (9th Cir. 1974). The district judge's rather cursory inquiry during the contempt hearing into this possibility did not illuminate the record before us on this point. See Tr. 124-25. [21] It is, therefore, not appropriate to conclude that absent a legal bar to prosecution such as immunity or the statute of limitations, the possibility of prosecution is too remote to allow appellant to invoke the privilege to remain silent. Appellant was a middle level executive in two of the fourteen companies indicted in a federal criminal antitrust case arising from events occurring during his employment with the defendant companies. Appellant's sales positions with these companies put him in the vortex of the price decisions which were the subject matter of the antitrust suit. Twenty-six other individuals were indicted for their involvement in these events. Given these facts we cannot say that appellant's apprehension of prosecution is fanciful. The Fifth Circuit reached the same conclusion in another part of this same case when it vacated contempt orders against two other non-party witnesses who refused to answer appellees' questions concerning their knowledge of and participation in the alleged nationwide price-fixing conspiracy. Franey, 620 F.2d 1086, 1092 (5th Cir. 1980) (noting that a federal grand jury sitting in Ohio had begun its own investigation of the corrugated container industry).

Thus, appellant's fifth amendment privilege in this case should not be overridden on statute of limitations grounds unless it is clear that none apply. The district judge's written order stated:

> Counsel for (appellant) did not present proof that any applicable statute of limitations had not run. The federal statute of limitations is four years which indicates that (appellant) would not be subject to prosecution for the period before December 31, 1975.

J.A. 2. [22] We do not believe this to be a sufficient basis for the order for several reasons. First, during the telephone conference ****330 *886** call appellant's counsel requested but was denied an opportunity to brief the statute of limitations issue. The district court ruled without the benefit of a written submission on the issue. Second, it is readily apparent now that relevant statutes of limitations have not yet run out. The alleged criminal conspiracy which spawned this litigation involved the period between 1960 and 1978. The statute of limitations begins to run for an individual defendant involved in a continuing conspiracy from the conclusion of the conspiracy unless an individual can show that he withdrew from the conspiracy by an affirmative act designed to defeat the purpose of the conspiracy. E. g., United States v. James, 609 F.2d 36 (2d Cir.), cert. denied, 445 U.S. 905, 100 S.Ct. 1082, 63 L.Ed.2d 321 (1979); United States v. Fitzgerald, 579 F.2d 1014 (7th Cir.), cert. denied, 439 U.S. 1002, 99 S.Ct. 611, 58 L.Ed.2d 677 (1978); Thomas v. Petro-Wash, Inc., 429 F.Supp. 808, 812-13 (M.D.N.C.1977). See also In re Multidistrict Vehicle Air Pollution, 591 F.2d 68, 70-71 (9th Cir. 1979); Fontana Aviation, Inc. v. Baldinelli, 418 F.Supp. 464, 469-70

(W.D.Mich.1976). Before the statute runs out the individual remains liable for his own criminal acts, and also for the acts of his co-conspirators, including those acts occurring after the individual's own last overt act in furtherance of the conspiracy. Id. If appellant's answers to questions about his pre-1975 action linked him to a conspiracy ending in 1978, it must be presumed that the statute began to run in 1978 since there is no basis that we are aware of for concluding that appellant withdrew from the alleged conspiracy. The federal statute of limitations referred to by the district judge is four years and would not run out until 1982. 15 U.S.C. s 15b. More significantly, however, in view of the federal promise of immunity, discussed below, no relevant state statute of limitations would apparently run out before 1983.[23] In sum, in 1981 appellant did have reasonable cause to fear prosecution for his answers.

B. The Lack of Formal Statutory Immunity

It thus becomes critical to determine whether appellant's answers to the six questions would be protected under the terms of the immunity granted him earlier in his 1977 interview with the FBI. Unless the answers are validly immunized, an order requiring him to answer would violate appellant's privilege against self-incrimination.

The district court as well as both parties on this appeal appear to have assumed that appellant received the equivalent of statutory immunity for his FBI interview and have consequently focused on the issue of whether use immunity under 18 U.S.C. s 6002 covers answers to questions in civil depositions where the questions themselves are derived from the transcript of the immunized testimony. There is indeed a split of authority on this issue.[24] However, an even more basic problem presents itself in our reading of the transcript of the proceedings below. Every one of the other cases which have addressed the issue of the applicability of use immunity granted in the course of a criminal proceeding to compelled ***887 **331** testimony in a subsequent civil case involved a deponent who was initially compelled to testify only after the issuance of a judicial order conferring statutory use immunity.[25] Appellant's FBI interview was not compelled by any order formally granting him full statutory use immunity, but came about only as a result of an oral promise by the FBI agent, the precise nature of which we cannot discern from the record on this appeal. Without formal statutory immunity we do not believe it is reasonable to assume that whatever protection appellant may have received against future federal prosecution is sufficient to protect him against any future use, direct or indirect, by federal or state prosecutors. Thus to require appellant to offer incriminating testimony at his civil deposition would be to do so at his peril.

Federal statutes prescribe a specific and exclusive procedure whereby a district judge, upon motion by a United States Attorney approved by high-ranking Justice Department officials, may order a witness to testify or provide other information before, or ancillary to, a federal court or grand jury, notwithstanding the witness' fifth amendment privilege. 18 U.S.C. ss 6002, 6003.[26] The witness is not thereby immunized from prosecution. The only benefit as far as the witness is concerned is that no testimony or other information compelled under the order, or any information directly or indirectly derived from such testimony may be used against him in a subsequent criminal prosecution. Id. This limited use immunity is available only if the immunity is granted in compliance with the clear requirements of the statute.[27]

***888 **332** This appellant did not receive anything remotely resembling statutory use immunity.[28] The parties agree that he was given only an oral promise that he would not be prosecuted by the federal authorities by reason of any of his interview statements. We cannot even be sure of the precise scope of this promised immunity because the discussion containing the details of the purported agreement between appellant and the FBI agent is not part of the record.[29] At a minimum there is (1) a substantial question on this record as to the extent of the protection promised appellant by the verbal promise made to him during his 1977 interview and (2) no authority for ruling that oral promises of immunity by an investigator, not in accord with statutory requirements, bind

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all federal and nonfederal prosecutors. In the face of such uncertainties he is entitled to rely on his fifth amendment rights as to potentially incriminating questions when prosecutions are neither fanciful nor barred by the applicable statute of limitations. [30]

Given all this, we hold that appellant could not be compelled to answer the six questions he refused to respond to, and the district court's order of civil contempt is hereby

Vacated.

All Citations

662 F.2d 875, 213 U.S.App.D.C. 319, 32 Fed.R.Serv.2d 592, 1981-2 Trade Cases P 64,272

Footnotes

* Sitting by designation pursuant to 28 U.S.C. s 293(a).

1 The record in this case, so far as we can ascertain it, contains no details of this no-prosecution agreement. See note 29 infra.

2 The settlements have been remanded by the Fifth Circuit to the district court for further findings regarding their fairness to the class. In re Corrugated Container Antitrust Litigation, 643 F.2d 195 (5th Cir. 1981), J.A. 64-118. "J.A. ——" refers to pages in the Joint Appendix filed in conjunction with this appeal.

3 The propriety of disclosing the grand jury testimony is currently being litigated in the Fifth Circuit. See In re Corrugated Container Anti-trust Litigation, 620 F.2d 1086, 1089 n.2 (5th Cir. 1980) (Consolidated Appeals of Franey, Fleischacker and Hopkins) (hereinafter Franey).

4 This ruling rendered April 3, 1981 was embodied in a written order dated April 7, 1981. J.A. 1-3.

5 The district court treated appellees' motion to compel testimony as an oral application pursuant to the recalcitrant witness statute, 28 U.S.C. s 1826, J.A. 1. Upon appellant's motion, argument was heard on an expedited basis.

6 The Fifth Circuit dismissed this appeal for lack of jurisdiction on the basis of its decision in Franey. In re Corrugated Container Antitrust Litigation, 647 F.2d 460 (5th Cir. 1981).

7 In re Corrugated Container Antitrust Litigation, 644 F.2d 70, 73-74 n.6 (2d Cir. 1981) (Appeal of Fleischacker) (hereinafter Fleischacker); Franey, 620 F.2d 1086, 1090-91; In re Corrugated Antitrust Litigation, 655 F.2d 748 at 750 n.2 (7th Cir. 1981) (Appeal of Conboy) (hereinafter Conboy).

8 See also 28 U.S.C. s 132:

> (a) There shall be in each judicial district a district court ...
>
> (b) Each district court shall consist of the district judge or judges for the district in regular active service. Justices or judges designated or assigned shall be competent to sit as judges of the court.

And in Ch. 13 of Title 28, Assignment of Judges To Other Courts:

> Section 292 (Designation of district judges to districts in other circuits as business or necessity requires)
>
> Section 295 (No designation and assignment shall be made without consent of the chief judge or judicial council of the circuit from which the judge is to be designated; all designations and assignments shall be filed with the Clerks of the Courts from and to which made)
>
> Section 296 (Designated judge may be required to perform any duty which might be required of a judge of the court to which he is designated).

9 28 U.S.C. s 1407(a) provides:

> (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. 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.

(Emphasis in original.)

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10 Section 1407(b) not only gives the transferee judge the power to conduct depositions in foreign jurisdictions, but also "the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel...." See H.R. Rep. No. 1130, supra at 3, U.S.Code Cong. & Admin.News 1968, pp. 1898, 1900 ("Judicial Panel on Multidistrict Litigation ... is empowered to ... designate ... judges as deposition judges in any district....").

11 The transferee judge, of course, remains a judge of his home district. When presiding over a foreign deposition he may be "exercising the powers of" the foreign deposition district court, but that does not transform the transferee judge into a new member of the deposition court. See 28 U.S.C. s 132(b).

The legislative history is sparse on the interpretive question we face. We have found one snippet of relevant legislative history and it supports our finding of jurisdiction over this appeal. See (Judicial Conference) Report of the Co-ordinating Committee on Multiple Litigation Recommending New Section 1407, Title 28 (1965), reprinted in appendix to In re Plumbing Fixture Cases, 298 F.Supp. 484 (Jud.Pan.Mult.Lit.) (1968) ("The deposition judges would have powers over the deponents and the actions as judges of the districts in which the depositions are taken"). 298 F.Supp. at 499.

The Second Circuit accurately identified the policy trade-offs raised by the present jurisdictional issue. Fleischacker, 644 F.2d at 73-74 n.6. Any potential lack of uniformity engendered by appellate review by different circuit courts of depositions presided over by a single transferee judge in different districts is balanced against the need for uniformity in decisions on depositions within each of those circuits. It seems eminently reasonable that the rules governing deposed non-party witnesses should be determined by the jurisdiction in which they may be deposed rather than by a distant place in which the multidistrict litigation is pending.

12 Fed.R.Civ.P. 37(a)(1) provides: "An application for an order to a deponent who is not a party shall be made to the district where the deposition is being taken." Fed.R.Civ.P. 37(b)(1) authorizes sanctions by the court in the district where the deposition is taken for failure to comply with the order.

13 Were appellant a party, or "an officer, director, or managing agent of a party," an argument might be made that the transferee court where the action is pending had jurisdiction to adjudge him in contempt. See Fed.R.Civ.P. 37(b) (2) and discussion in 4A Moore's Federal Practice PP 37.02 & 37.03 (1980-81 Supp.). The appellant here makes a half-hearted attempt to bring himself within that rule by noting that the deposition was taken pursuant to a notice, not a subpoena, identifying appellant as an employee of one of the subsidiaries of a party corporation. The short answer, however, is that the judge specifically referred to appellant as a nonparty witness, so that he was obviously not acting pursuant to his powers as a judge of the transferee forum. And it is not entirely clear that sanctions may be imposed on the individual employee as well as against the corporate party by a judge of the transferee district when the employee fails to appear or answer questions. See 4A Moore's Federal Practice, PP 37.02(1), nn.4-5, 37.03(2) (and cases cited therein).

In any event at most appellant can only be considered a managing agent of Inland Container and he has not refused to answer questions covering the period of his employ with Inland Container.

14 Fed.R.Civ.P. 45(d)(2) provides:

> A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.

15 "Tr. " refers to pages in the transcript of appellant's April 3, 1981 deposition.

16 See "Principles of Federal Prosecution," United States Attorney's Manual, s 9-27.000 at Part F (Provisions governing formal and informal no-prosecution agreements apply only with a person who might otherwise be prosecuted. They are unnecessary if the person is only a potential witness and not a potential defendant).

17 Two of the questions repeated questions verbatim from the interview transcript:

> "Question: Who did you talk to at PCA concerning prices?" (Question on page 67 of interview transcript)

Tr. 123-24.

> "Who did you speak with at Westvaco? What was that gentleman's name again at Westvaco?" (Question on page 90 of interview transcript)

Tr. 124.

A third question asked appellant to affirm an answer in the interview transcript:

Isn't it the fact that in response to that question which asked of you at the interview conducted on October 11, 1977, you stated as follows: “Okay, talked to two people (naming person), who was sales manager at that time, and big guy, I can't remember the general manager's name. He's moved. He's now a vice president.” End of question.

Id.

18 Q Mr. Culy, I'm going to show you again what was previously marked Culy 1, which purports-we represent is a copy of the pretrial interview statement which you have had an opportunity to read, and I will ask you if that is a copy of the-a partial copy of the interview conducted between yourself and the representative of the grand jury, the FBI agent on or about October 11, 1977?

Tr. 121.

19 “Q ... Who has a copy, a complete copy of the interview transcript.”

Tr. 127.

20 Appellees' Brief at 13-14. Appellees also argue that the prospect of prosecution is fanciful because all discovery in the Corrugated Container Antitrust Litigation is subject to a protective order. Id. This argument is without merit. The district court's protective order is only binding on parties. Further, it states “(n)othing contained in this order shall prevent the use of documents or information designated as confidential at trial or at depositions.” Pretrial Order No. 47, at 22, In re Corrugated Container Antitrust Litigation, M. D. L. 310 (S.D.Tex., April 8, 1980), J.A. 140. More important, it is not possible to construe the protective order as forestalling criminal prosecution because this would amount to an unauthorized judicial grant of immunity by the court. See Franey, 620 F.2d at 1094; United States v. Davis, 623 F.2d 188 (1st Cir. 1980); United States v. Lenz, 616 F.2d 960 (6th Cir. 1980); United States v. Housand, 550 F.2d 818 (2d Cir. 1977); United States v. Garcia, 544 F.2d 681 (3rd Cir. 1976).

We also reject appellees' implication that in order to establish a substantial likelihood of prosecution it is necessary to show that an investigation or prosecution is actually in progress in some jurisdiction.

21 The district judge might possibly have been apprised of facts relevant to the possibility of prosecution as presiding judge over the grand jury investigation in 1978, the plea arrangements of some defendants, the criminal trial, the class action trial and now discovery in the opt-out cases; if so his judgment in evaluating appellant's claim of privilege would warrant considerable deference. See United States v. Van Deveer, 577 F.2d 1016, 1017 (5th Cir. 1978); Ryan v. Comm'r of IRS, 568 F.2d 531, 539 (7th Cir. 1977). However, the district judge's terse statement of the reasons for his contempt order does not suggest that he relied on any facts developed outside the contempt hearing as to the likelihood of future prosecution. During the hearing the district judge referred to “Mr. Favaretto's letter regarding no prosecution.” Tr. 122. This letter, dated June 18, 1980, was sent from the Justice Department to another witness' counsel. The letter concerns the Department's intention not to prosecute this other individual. We do not believe the general statements in this letter regarding the Department's intention not to prosecute other individuals is a sufficient guarantee against all future prosecutions to support the contempt order in this case.

22 The Fifth Circuit apparently places the burden of proving the running of statutes of limitations on the moving party, and not, as the district judge did here, on the witness. See Franey, 620 F.2d at 1092. (The witnesses' answers to the deposition questions may well reveal that they have violated federal and state criminal antitrust laws, in part because “(t)here has been no suggestion that the applicable statutes of limitations have run....”)

23 In Indiana where appellant worked for Weyerhaeuser and CORCO the statute of limitations is five years. Ind.Code ss 24-1-1-3, 35-41-4-2. Appellant was transacting business during 1968-1975 with plants in Michigan and Ohio among other places. The statute of limitations in Michigan is six years, Mich.Stat.Ann. s 28.964 (M.C.L.A. s 767.24), and in Ohio there is no limitation period for antitrust actions, Ohio Revised Code s 1331.12. In Ohio where criminal prosecution of appellant would never be time-barred by statute there was at least recently a federal grand jury investigating antitrust violations in the corrugated container industry. See Franey, 620 F.2d at 1092.

24 Compare Franey, 620 F.2d at 1092-95; Conboy, slip op. at 11-37 (Sprecher, J., dissenting) (deposition answers not protected by prior statutory immunity grant and contempt order should be vacated with Fleischacker, 644 F.2d at 75-80; Franey, 620 F.2d at 1095-96 (Johnson, J., dissenting); Conboy, slip op. at 1-11; Appeal of Starkey, 600 F.2d 1043 (8th Cir. 1979) (deposition answers are protected by prior statutory immunity grant and contempt order should be upheld).

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25 Although one of the deposition witnesses in Franey received an informal no-prosecution letter for his FBI interview, he later testified at trial and then received a formal grant of immunity. For that reason, the Fifth Circuit specifically declined to rule on the validity of the informal immunity grant or its scope. 620 F.2d at 1092 n.4.

26 18 U.S.C. s 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to-

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. s 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment-

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

27 Fleischacker, 644 F.2d at 78 n. 13 citing United States v. Bryan, 339 U.S. 323, 70 S.Ct. 724, 94 L.Ed. 884 (1950); In re Daley, 549 F.2d 469, 479 (7th Cir.), cert. denied, 434 U.S. 829, 98 S.Ct. 110, 54 L.Ed.2d 89 (1977). See generally "Immunity-Compelled Testimony," United States Attorney Manual, ss 1-11.000 et seq. (1977).

While a witness may not have the benefit of statutory use immunity, he may nevertheless have some protection from prosecution either because the prosecutor is estopped from reneging on his agreement not to prosecute, e. g., Shotwell Mfg. Co. v. United States, 371 U.S. 341, 347, 83 S.Ct. 448, 453, 9 L.Ed.2d 357 (1963); Mobley v. Meek, 531 F.2d 924, 926 (8th Cir. 1976); United States v. Carter, 454 F.2d 426 (4th Cir. 1972); United States v. Pellon, 475 F.Supp. 467, 479 (S.D.N.Y.), aff'd 620 F.2d 286 (2d Cir. 1979), or by de facto immunity when the district court errs in compelling the witness over his objection to answer questions. Adams v. Maryland, 347 U.S. 179, 181, 74 S.Ct. 442, 444, 98 L.Ed. 608 (1954). This latter de facto immunity must, however, be distinguished from statutory immunity because it is essentially an after-the-fact exclusionary rule which "is solely remedial and cannot be used as a rationale to support a judicial decision" to compel testimony or hold a witness in contempt. Fleischacker, 644 F.2d at 78 n. 13, quoting In re Folding Carton Antitrust Litigation, 609 F.2d 867, 872 n. 11 (7th Cir. 1979).

28 In contrast to the requirements of 28 U.S.C. ss 6002, 6003, see note 26 supra, appellant voluntarily agreed to submit to the interview. Nothing on the record indicates that he did or would have otherwise refused to testify. In addition, we have no knowledge, that the FBI agent received approval from his superiors for the no-prosecution agreement, appellant was not placed under oath during the interview, Tr. 100, and there was no court order compelling his interview testimony. These facts may be contrasted to the procedures for obtaining formal statutory immunity, United States Attorney Manual, ss 1-11.000 et seq. (1977), and informal no-prosecution agreements, United States Attorney Manual, ss 9-27.000 et seq., Part F.

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29 Nine pages of appellant's interview transcript that was submitted to the grand jury were released to the parties. This portion of the transcript does not contain any information about a no-prosecution agreement. We have not been able to obtain the rest of the transcript because it is not part of the record in the pending civil suits. We also have been unable to discover any other record of the nature of the prosecutorial promises made to appellant. See note 21 supra regarding the Justice Department's intention not to prosecute one other individual.

30 The district court was not itself empowered to immunize appellant for civil deposition testimony and thereby prevent him from legitimately invoking his privilege to remain silent.

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