

ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

LAWG/J-1396-07
Georgetown University Law Center
Spring 2017

Tuesdays, 5:45 pm - 7:45 pm
Hotung H6005
Dale Collins
dale.collins@shearman.com
www.appliedantitrust.com

Week 7: The Private Right of Action (Unit 4)

This week we should finish the unit on private actions. After spring break, we will start on antitrust class actions.

Co-violator liability relationships and sharing agreements. We will start on Tuesday with a discussion of the *Boyle* complaint's prayer for relief. This will get us into co-violator liability relationships and sharing agreements. These are some of the most interesting and important aspects of the private right of action for treble damages. Slides 77-87 are the best way to get into the subject and it is important to study these carefully. The *Infineon* case in the reading materials (pp. 200-206) is a quick read.

Attorneys' fees. Plaintiffs that prevail on claims under Section 4 and 16 of the Clayton Act are entitled to reasonable attorneys' fees payable by the defendant. This is a statutory exception to the so-called *American rule*, under which each litigant pays their own litigation costs. The contrary rule, known in the United States as the *English rule*, requires the losing party to pay the attorneys' fees of the prevailing party. In the United States, *fee-shifting statutes* such as the Clayton Act split the difference: the defendant always pays its own attorneys' fees, but also must pay the plaintiffs' attorneys' fees if the plaintiffs win. The purpose of a fee-shifting statute is to provide an additional incentive for a plaintiff to litigate by awarding it attorneys' fees if the plaintiff wins but not penalizing it by requiring it to pay the defendant's attorneys' fees if the plaintiff loses. I first would read the slides (Slides 88-91), which will tell you almost everything you need to know, and then read the *Masimo* case for a nice application (pp. 208-221).

Consolidation/transfer of venue/multidistrict litigation. In the usual case, the plaintiff gets to choose the forum in which its case will be tried (assuming venue is proper). In certain situations, however, judicial efficiency requires that the case be moved from the judge or even the court to which the case was originally assigned. I would read Slides 92-102 for a quick overview and then skim the materials for the statutes and some applications (pp. 223-257).

Consolidation under Rule 42(a) involves the reassignment of cases within the same district pertaining to the same set of underlying facts ("related cases") to the same judge. In this situation, the plaintiff retains its original choice of forum—the district court stays the same—but the judge is assigned rather randomly selected through the "wheel."

In other cases, it may be more efficient to try the case in another venue. Section 1404(a) of Title 28 provides for the *transfer of venue* in such cases: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The usual case where a transfer of venue is appropriate is where the cause of action arose, and the most important witnesses are located, in the jurisdiction of another district court. For example (but not in the materials), when the FTC sued in the District Court for the District of Columbia to block LabCorp's acquisition of Westcliff Medical Laboratories, a competitor clinical testing laboratory operating in Southern California, the parties successfully moved to transfer venue to the District Court for the Central District of California (Southern Division), which they presumably thought was a more favorable forum for them than the FTC's choice. (The merging parties did win in the LA forum.) A contrary result

was reached in the DOJ's action to block the H&R Block/TaxACT deal, where the district court denied H&R Block's motion to transfer venue from the District of Columbia to Western District of Missouri (pp. 228-243). Feel free to do a quick read of the *H&R Block* decision.

Multidistrict litigation. Finally, some allegedly wrongful activity can precipitate actions in a number of different forums. A nationwide price-fixing conspiracy could result in dozens of cases filed in district courts around the country. Section 1407 provides a means to consolidate these various actions in the same district court for pretrial proceedings, including motions to dismiss, motions regarding discovery, motions for summary judgment, and motions for class certification. As the end of the pretrial proceedings, however, each case must be transferred back to its original court for trial. Read Section 1407 (pp. 245-246), but do not dwell on it. The Transfer Order in the *Fretted Musical Instruments Antitrust Litigation* (pp. 248-250) will tell you almost everything you need to know about Section 1407. The *Williams* order (pp. 251-257) gives some good contrast between Section 1404 and Section 1407 transfer orders, while the *LIBOR* Memorandum and Order (pp. 259-260) addresses some limitations on consolidation under Rule 42(a) for cases that have been transferred pursuant to Section 1407. Finally, the Conditional Remand Order in the *TFT-LCD (Flat Panel) Antitrust Litigation* (pp. 261-262) gives an example of an order in a Section 1407 case transferring the case back to the original court at the end of pretrial proceedings.

Enjoy the reading. As always, send me an email if you have any questions.

Dale