

## ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

LW.11043.001  
NYU School of Law  
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Mondays, 4:10-6:00 pm  
FH 316  
Dale Collins  
[dale.collins@shearman.com](mailto:dale.collins@shearman.com)  
[www.appliedantitrust.com](http://www.appliedantitrust.com)

### Week 7: The Private Cause of Action (Unit 4 con't)

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

*Relief.* We will start on Tuesday with a discussion of the *Boyle* complaint's prayer for relief. Read the materials on damages, injunctive relief, and declaratory relief in the materials (pp. 169-217) and the slides (69-83). We will cover this very quickly in class.

*Co-violator liability relationships and sharing agreements.* 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 84-94 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. 219-225) 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 prevail in the litigation. 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 95-98), which will tell you almost everything you need to know, and then read the *Masimo* case for a nice application (pp. 227-240).

*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 the slides for a quick overview (Slides 99-109) and then skim the materials for the statutes and some applications (pp. 242-303).

*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 for a transfer of venue when the cause of action arose, and the most important witnesses are located, in the jurisdiction of another district court. For example, 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.) *Labcorp* is not included in the materials, but read the *Valspar* decision (pp. 247-258) if you want to see another antitrust case where the motion to transfer was granted. 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. 259-274). Feel free to do a quick read of both the *Valspar* and 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. At the end of the pretrial proceedings, however, each case must be transferred back to its original court for trial. Proceedings in the transferee courts are called *multidistrict litigations* or MDLs. The Judicial Panel on Multidistrict Litigation (more commonly known as the *MDL Panel*) is the body that decides whether and which cases should be consolidated for pretrial proceedings under Section 1407.

Read Section 1407 (pp. 276-277), but do not dwell on it. Take a quick look at the materials to see the distribution of MDLs pending as of the end of 2018 (pp. 278-282). The Transfer Order in the *Fretted Musical Instruments Antitrust Litigation* (pp. 283-285) will tell you almost everything you need to know about Section 1407. The *Williams* order (pp. 286-293) gives some good contrast between Section 1404 and Section 1407 transfer orders, while the *LIBOR* Memorandum and Order (pp. 294-295) addresses some limitations on consolidation under Rule 42(a) for cases that have been transferred pursuant to Section 1407. The *Fresh Dairy Products* and *1-800-CONTACTS* orders (pp. 296-301) are examples of cases where the MDL Panel rejected a Section 1407 motion to consolidate. Finally, the Conditional Remand Order in the *TFT-LCD (Flat Panel) Antitrust Litigation* (pp. 302-303) 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