

ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

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Georgetown University Law Center
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Tuesdays, 3:30 pm - 5:30 pm
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Class 7: The Private Cause of Action (Unit 3 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 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. 166-214) and the slides on damages (74-90). We will cover these materials 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 practically important aspects of the private right of action for treble damages. Slides 91-101 are the best way to get into the subject and it is important to study these slides carefully. The *Infineon* and *Broiler Chicken* opinions in the reading materials (pp. 216-229) are quick reads and will give you two good applications of the law in the area.

Attorneys' fees. Plaintiffs who prevail on claims under Sections 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 its own litigation costs regardless of which side wins. 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 would first read the slides (Slides 102-107), which will tell you almost everything you need to know. Then read the *Masimo* case for a nice application (pp. 231-44).

Consolidation/transfer of venue/multidistrict litigation. In the usual case, the plaintiff chooses the forum where 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 107-21) and then skim the materials for the statutes and some applications (pp. 246-308).

Consolidation under Rule 42(a) involves the reassignment of cases within the same district regarding 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 through the "wheel." Related cases are usually reassigned to the judge in the first case filed.

In other situations, 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 is when the cause of action arose, and the most important witnesses are located, in another district court's jurisdiction. 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) where the target company was located. Presumably, the merging parties moved to transfer venue to the Central District of California because they thought it was a more favorable forum for them than the FTC's choice of the District of Columbia. (The merging parties did win in the LA forum.) *Labcorp* is not included in the materials, but read the *Valspar* decision (pp. 251-62) 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 the Western District of Missouri (pp. 263-78). Feel free to do a quick read of both the *Valspar* and the *H&R Block* decisions.

Multidistrict litigation. Finally, some allegedly illegal activity can precipitate actions in multiple different forums. A nationwide price-fixing conspiracy, for example, can and often does result in dozens of cases filed in district courts around the country. Section 1407 provides a means of consolidating 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. However, at the end of the pretrial proceedings, each case must be transferred back to its original court for trial (if the case has not already been settled). 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. When the MDL Panel decides to consolidate a set of cases for pretrial proceedings, the panel selects not only the transferee forum but also the judge. This is another exception to the usual rule that judges are assigned randomly to cases.

Read Section 1407 (pp. 281-82), but do not dwell on it. Take a quick look at the materials to see the recent distribution of pending MDLs (pp. 282-88). The Transfer Order in the *Fretted Musical Instruments Antitrust Litigation* (pp. 282-284) will tell you almost everything you need to know about Section 1407. The *Williams* order (pp. 292-99) gives some good contrast between Section 1404 and Section 1407 transfer orders, while the *LIBOR* Memorandum and Order (pp. 300-01) addresses some limitations on consolidation under Rule 42(a) for cases that have been transferred under Section 1407. The *Fresh Dairy Products* and *1-800-CONTACTS* orders (pp. 302-07) 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. 308-15) 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. In antitrust cases, transfers back to the original court are rare since most antitrust MDLs settle during pretrial proceedings in the transferee court. When this happens, and the settlement requires court approval (the usual situation since almost all antitrust MDLs are class actions), the transferee court is the proper venue.

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