Beheading the hydra: successful management of multidistrict litigation

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Antitrust litigation is a growth industry in the United States today. Between 1998 and 2004, antitrust case filings in federal courts increased approximately 30 per cent. A substantial percentage of these filed cases are class actions. In the past, class counsel waited until after the federal government had successfully prosecuted a criminal price fixing case to file their civil actions seeking treble damages under Section 4 of the Clayton Act. Today, antitrust class action counsel regularly file lawsuits when they simply learn of a pending government investigation, before there has been any determination on the merits. Moreover, plaintiffs’ class counsel now routinely file class actions when an antitrust defendant has lost a case to a private plaintiff and thus cannot contest the underlying conduct that was the subject of the earlier case. Most recently, plaintiffs have filed more than 80 class actions against Intel following the mere filing of a case by a competitor alleging that Intel has monopolised the market for microprocessors. This readiness to initiate antitrust class actions has contributed to an increase of nearly 60 per cent in the number of pending federal civil class actions—from 3,251 in 1999 to 5,179 as of 30 September 2004. The increase in the complexity and sheer number of antitrust cases litigated today presents significant challenges to the involved parties, particularly the defendants. The first and most important step in resolving antitrust cases that have mushroomed through multiple duplicative filings is to coordinate activities in all the cases, thus reducing burden, expense and risk.

The federal Judicial Panel on Multidistrict Litigation (JPML) provides antitrust defendants with the tools to do so. The JPML has the statutory authority to transfer federal cases that are pending in multiple jurisdictions to a single forum for pre-trial coordination under 28 US: § 1407. After such a transfer, a single federal judge assigned to the coordinated cases is entrusted with the authority to rule on threshold issues, to coordinate discovery and even to decide class certification and dispositive motions. As of 30 September 2000, 161,155 actions were subject to § 1407 proceedings. By 30 September 2004, that number grew to 211,317, an increase of over 30 per cent. Of the roughly 226 actions currently pending, 50 are antitrust actions, comprising at least 1234 total actions. The management of multidistrict litigation (MDL) has thus become an important skill that all US antitrust litigators must know how to use.

MDL mechanics and considerations

Practitioners not familiar with the JPML may be surprised to learn that it is not a court or a tribunal. Rather, it is, as the name suggests, a panel that consists of seven federal judges, each of whom is appointed by the chief justice of the United States Supreme Court. Congress created the JPML in 1968 in response to the burden placed on federal trial courts from the class actions that were filed in the wake of the government’s successful prosecution of a price-fixing conspiracy among manufacturers of electrical equipment. Approximately 2000 lawsuits were filed in federal court throughout the country on behalf of municipalities seeking to recover the overcharges that they had to pay to the defendants as a result of the conspiracy. The establishment of the JPML made it easier for the parties to consolidate these multiple actions and resolve them in one forum.

The JPML transfer process is governed by its own set of procedural rules and closely resembles standard motion practice in any US federal court. A party seeking to consolidate cases that are filed in multiple districts begins the process by filing a motion with the Panel to transfer all pending cases for consolidated pre-trial proceedings to a single federal district court. The rules require the movants to file copies of the motion papers with the courts where the actions were originally filed. Since its inception, the JPML has centralised more than 211,000 civil actions for pre-trial proceedings. Today, there are more than 72,000 cases pending in transferee courts.

The JPML must decide two issues: (i) should the cases subject to the motion be coordinated, and, if so, (ii) where should they proceed. In our experience, the parties generally expect and agree that multiple actions should be subject to multidistrict procedures. All participants generally recognise the overwhelming benefits and efficiencies in consolidating all actions in a single forum.

The JPML may transfer cases for coordinated pre-trial proceedings if it finds that they involve common questions of fact. Antitrust cases commonly meet this threshold. Accordingly, the Panel has routinely transferred cases for pre-trial coordination on this basis. The statute also requires that coordination and transfer “promote the just and efficient conduct” of such actions. This too is a relatively easy standard to meet in antitrust cases. The Panel has repeatedly recognised the efficiencies of having a single judge make pre-trial rulings, thus avoiding inconsistent determinations and the duplication of discovery.

For a number of reasons, the real battle among the parties to cases that are subject to § 1407 concerns the location of the transferee court. Among the considerations informing the dispute are that (1) the law may be more favourable in one jurisdiction than in another, (2) the weight of the docket may favour one side or another, and (3) the party moving for consolidation or the lawyers involved may believe that they can better control the litigation if it is in their own jurisdiction. Thus, in order to advise a client on transfer, it is critical that the practitioner be familiar with the applicable law in competing jurisdictions, the respective quality of the bench and any other factors making one forum more appealing than another in order to advise his or her client on transfer.

The Panel addresses multiple considerations in deciding the forum for transfer, and therefore the movant should emphasise these factors during the application process. These include: (i) the location of the first-filed case, (ii) the location where a majority of actions are pending, (iii) the progression of the litigation in a particular forum, (iv) the presence of a related grand jury investigation, (v) the MDL experience of a particular court or judge, (vi) the docket load of one of the suggested transferee courts, (vii) the locations of documents and likely witnesses, and (viii) the level of interest of a transferee court. The JPML also looks at the “convenience of parties and witnesses”, another requirement under § 1407. This includes consideration of the location of parties and witnesses, and the accessibility to the transferee jurisdiction to counsel from multiple jurisdictions.
Risks and limitations

Despite the obvious efficiencies that can be achieved through coordination under § 1407, the MDL process comes with its own set of distinct risks and limitations.

First, the JPM L only can transfer and coordinate cases that are filed in federal court. Therefore, federal and state cases arising from a common nucleus of operative facts will proceed before separate judges in separate forums, potentially resulting in duplicative discovery and conflicting rulings on key issues. Moreover, antitrust defendants face the risk of overlapping liability from cases filed in both federal and state courts on behalf of purchasers at different levels of the distribution chain. Until recently, defendants could not remove indirect purchaser class actions from state court to federal court and then avail themselves of the coordination mechanisms of § 1407. But in February 2005, Congress passed the Class Action Fairness Act (CAFA), discussed infra, which has eased a defendant’s ability to remove certain actions filed in state court to federal court. Still, even after CAFA, non-class action cases filed in state court, and cases between citizens of a state and a defendant corporation resident in that state, will remain in state court.

Second, actions subject to § 1407 proceedings are coordinated only for pre-trial proceedings. The statute requires that the JPM L remand coordinated actions to the court from which it was transferred (transferee court) “at or before the conclusion of such pre-trial proceedings.” Generally, this does not pose much of a problem for the parties, since the vast majority of cases are terminated by settlement or dispositive motions. Indeed, of the 211,317 actions subject to § 1407 proceedings as of 30 September 2004, nearly 70 per cent were terminated by the transferee courts. Nevertheless, the Panel has remanded close to 11,000 actions for disposition in the federal court in which they were originally filed.

Prior to 1998, the transferee court typically kept the cases for trial pursuant to 28 US § 1404(a). This commonly accepted practice was referred to as “self-transfer.” But in 1998, the US Supreme Court terminated that practice with its decision in Lexecon, Inc v Milberg Weiss Bershad Hynes & Lerach. In Lexecon, the Court found that a district court has no authority to invoke § 1404(a) to assign a case transferred under the authority of § 1407 to itself for trial. Consequently, district courts have no authority to invoke § 1404(a) to assign a case transferred under the authority of § 1407 to itself for trial. Lexecon thus ensures that plaintiffs will receive the benefit of their original choice of forum. Unfortunately, it also ensures that, at the conclusion of pre-trial proceedings, parties involved in multiple, complex federal actions involving similar factual and legal issues are compelled to try their cases throughout the United States before judges who lack any experience with the facts and issues of the case.

In response to the Supreme Court’s decision in Lexecon, Congress for years has sought to amend § 1407, but to no avail. In 1999, Congressman F James Sensenbrenner, Jr (R-WI) introduced the ‘Mul tidistrict Trial Jurisdiction Act’, the proposal that the transferee court could retain jurisdiction for trial. The bill unfortunately died in committee. The House of Representatives recently passed a similar bill, entitled the ‘Mul tidistrict Litigation Restoration Act’, the proposal that the transferee court could retain jurisdiction for trial. The bill unfortunately died in committee. The House of Representatives recently passed a similar bill, entitled the ‘Mul tidistrict Litigation Restoration Act’ of 2005. It currently sits in the Senate Judiciary Committee. Until overturned by statute, however, the holding of Lexecon remains good law, and transferee judges must remand § 1407 cases back to the transferee courts.

Notwithstanding Lexecon, the parties involved in an MDL action may take steps to keep the cases before the transferee judge. For example, the parties can stipulate to keeping the cases in the transferee district for trial purposes. In addition, if the cases have been remanded, the parties may stipulate to a § 1404(a) transfer back to the transferee court. Alternatively, the transferee judge can seek an intercircuit or intracircuit assignment to preside over a trial post remand.

Third, neither the petitioning nor opposing party is ensured its choice of forum. In fact, there is no guarantee that the JPM L will transfer cases to any location requested by a party. Thus, by participating in the MDL process, a party runs the risk of litigating in a forum with less favourable law, a less favourable judge or a less convenient location for the client and counsel.

Class Action Fairness Act of 2005

The newly passed CAFA will have a profound effect on MDL practice because it will increase the number of cases that are potentially subject to MDL treatment. Prior to CAFA’s enactment, removal of cases from state to federal court required complete diversity of citizenship, i.e., the named class representatives and all defendants had to be residents of different states. Moreover, the complaint had to reflect that each named class representative sought damages in excess of $75,000 (see 28 USC § 1332). Thus, diversity jurisdiction was lacking whenever a single plaintiff was a citizen of the state as a single defendant. Experienced plaintiffs’ counsel could ensure that result by naming at least one plaintiff and one defendant from the same state and by seeking less than the jurisdictional amount on behalf of the named class representatives.

CAFA facilitates removal by expanding federal subject matter jurisdiction to include class action suits in which the aggregated amount in controversy exceeds $5 million and the class includes 100 or more members, provided that (i) any class member is a citizen of a state different from the defendant, (ii) any member of the plaintiffs’ class is a foreign state and defendant is a citizen of a state, or (iii) any member of the plaintiffs’ class is a citizen of a state and any defendant is a foreign state or a citizen of a foreign state. Thus, plaintiffs can no longer deliberately keep class actions out of federal court by naming a single, non-diverse class representative, or by limiting an individual plaintiff’s claims to an amount that is less than the threshold amount in controversy.

CAFA does not ensure that all class actions filed in federal court can be removed. For example, CAFA requires that a federal district court decline to exercise jurisdiction where: (i) at least two-thirds of the plaintiffs are citizens of the state in which the action is filed, (ii) at least one defendant from whom significant relief is sought and whose conduct forms a significant basis for class claims is a citizen of the state in which the claim is originally filed, and (iii) the principal injuries caused by defendant’s conduct were incurred in the state where the action initially was filed. Additionally, the district court will decline to exercise jurisdiction where at least two-thirds of plaintiffs and the primary defendants are citizens of the state in which the action was originally filed. Lastly, federal courts have discretion “in the interests of justice and looking at the totality of the circumstances” to decline jurisdiction where between one-third and two-thirds of the plaintiffs’ class and the primary defendants are citizens of the state in which the action initially is filed.

The upshot of CAFA will be that private and intrastate disputes will remain in state court. On the other hand, class action suits with national economic implications and involving numerous plaintiffs and defendants from multiple states will proceed in federal court, where they belong. This should lead to an increase of removed cases, which, in turn, will lead to an increase in cases coordinated as part of an MDL proceeding, thus remediating one of the limitations discussed supra.

Even parallel cases that remain in state court post-CAFA, however, can be coordinated with their federal counterparts, whether on a formal or informal basis, so long as federal and state courts are willing to work with one another to achieve the desired judicial efficiencies. Perhaps the finest example to date of joint coordination between an MDL action and parallel state court proceedings is In re New Motor Vehicles Canadian Export Antitrust Litigation, an
antitrust M DL action pending in the US District Court for the District of Maine. In that case, class action plaintiffs brought cases in a dozen federal district courts and 13 states. The federal judge, Judge D Brock Hornby, of the District of Maine, consulted with Judge Richard Kramer of the California Superior Court, County of San Francisco, to fashion an order that both of them entered in the cases before them. Their joint order noted that, if the multidistrict court and a given state court simultaneously enter an order, they can collectively and effectively direct the parties and counsel before them to coordinate. Since then, eight of the other state court judges entered the same order, effectively coordinating discovery and pre-trial proceedings in all cases.

Under the operative terms of the order, all discovery and discovery-related pre-trial scheduling in both cases are to be coordinated. This allows parties in the state cases to participate in the M DL discovery, and vice versa. Written discovery propounded in one action will be deemed to have been propounded in the other action, and deposition testimony may be used in either proceeding. The joint order also allows for other state courts, where similar proceedings involving the same subject matter with substantial overlap of parties are pending, to join the order. Where, as here, an M DL action is in place, and the state court judge cedes the lead role to the federal tribunal, the opportunities increase for state and federal coordination.

Conclusion
The increase in antitrust litigation burdens defendants more than plaintiffs. The multidistrict process enables parties involved in these lawsuits to coordinate all of the cases for pre-trial purposes before a single judge. It is now critical for today's antitrust lawyers to understand the multidistrict process and to know how to use it in order to manage multiple federal actions effectively. Despite its discrete risks and limitations, coordination under § 1407 is an effective tool to take control of complex litigation, while at the same time conserving the resources of the parties, counsel and the courts.

Notes
2 15 USC § 15.
3 See, eg, In re Foundry Resins Antitrust Litig, MDL 1638 (S.D. Ohio 2004) (Eastern Division) (civil complaints filed after defendant disclosed in corporate 10K the existence of a grand jury investigation).
4 See, eg, Keystone Tobacco Co v United States Tobacco Co, Civ Action No. 00-1415 (PLF) (DDC 2000).
5 See, eg, Brauch v Intel Corp, Civ Action No. 05 2743 BZ (ND Cal 2005). Plaintiff's motion for transfer and coordination for pre-trial proceedings is pending before the Judicial Panel on Multidistrict Litigation.
9 See www.jpml.uscourts.gov/Pending_MDLs/pending_mdlsl.html (last visited 15 August 2005); see id at www.jpml.uscourts.gov/Pending_MDLs/PendingMDL-july05.pdf (as of 11 July 2005) (last visited 15 August 2005). MDL actions 97, 1383 and 1413 are now closed.
12 See Kyle, supra n.10, at 589.
14 JPML Rule 5.12(c).
16 See www.jpml.uscourts.gov/Pending_MDLs/PendingMDLjuly05.pdf. (as of 11 July 2005).
17 See 28 USC § 1407(a).
19 28 USC § 1407(a).
20 See, eg, In re High Pressure Laminate Antitrust Litig. No. 1368, 2000 US Dist LEXIS 14849, at *3 (JPML 6 October 2000); In re Polyester Staple Antitrust Litig, 259 F Supp 2d at 1380.
21 See generally Kyle, supra n.10.
22 See, eg, In re High Pressure Laminate Antitrust Litig. 2000 US Dist LEXIS 14849, at *3; see also Gregory Hansel, 'Extreme Litigation: An Interview with Judge Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation', 19 Me. Bar J. 16, 19 (2004) ("We take into account ... the accessibility of the court, particularly air travel in selecting a transferee district.").
23 See, eg, In re High Pressure Laminate Antitrust Litig. 2000 US Dist LEXIS 14849, at *3; see also Gregory Hansel, 'Extreme Litigation: An Interview with Judge Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation', 19 Me. Bar J. 16, 19 (2004) ("We take into account ... the accessibility of the court, particularly air travel in selecting a transferee district.").
24 Only direct purchasers can recover damages under federal law. See Illinois Brick Co v Illinois, 431 US 720, 735 (1977) (holding that direct purchasers are the only parties injured in a manner that permits them to recover damages under Section 4 of the Clayton Act). However, indirect purchasers can recover under the laws of approximately half of the states.
25 Eg, an action brought against a California defendant, pursuant to California's Cartwright Act, Cal Bus & Prof Code § 16720 et seq.
26 28 USC § 1407(a).
27 See 175 FRD at 605; see also 19 Me. Bar J. at 21.
29 Id.
30 Manual for Complex Litigation (Fourth) § 20.132 (2004); see also Pfzer, Inc v Lord, 447 F.2d 122 (2d Cir 1971).
31 523 US 26, 34 (1998) (noting that § 1407 "not only authorises the Panel to transfer for coordinated or consolidated pre-trial proceedings, but obligates the Panel to remand any pending case to its originating court when, at the latest, those pre-trial proceedings have run their course.")
33 HR 1852, 106th Cong. (1999).
34 HR 1038, 109th Cong. (2005).
36 28 USC § 292.
37 See, eg, In re New Motor Vehicles Canadian Export Antitrust Litig, 269 F Supp 2d 1372 (JPML 2003) (ordering transfer for coordination in Maine, despite parties' request for transfer to other venues).
38 See generally Mark Herrmann, 'To MDL or Not to MDL? A Defense Perspective', 24 Litigation 43 (summer 1998).
40 Id at 119 Stat at 10.
41 Id.
42 For a list of factors the district court is entitled to look at in deciding whether to decline jurisdiction, see CAF, Pub L No 109-2, § 4, 119 Stat 4, 9.
CAFA applies to class actions filed on or after 18 February 2005, the date of its enactment, and does not apply to class action litigation already pending.

While CAFA does provide that any action removed to federal court shall not be transferred to any other court pursuant to § 1407 “unless a majority of the plaintiffs in the action request transfer,” id § 4, 119 Stat at 11-12, this limitation does not apply if plaintiffs propose that the action proceed as a class action.

See In re New Motor Vehicles Canadian Export Antitrust Litig, MDL 1532 (D Me 2003).

Judge Hornby entered a similar joint coordination order in In re Compact Disc Minimum Advertised Price Antitrust Litigation, MDL 1361 (D Me May 8, 2001).

See In re New Motor Vehicles Canadian Export Antitrust Litig, MDL 1532, Docket Entry 110 at 4 (D Me 28 April 2004).

See generally Herrmann, supra n.38.