

Managing Multi-District Litigation

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The purpose of this chapter is to give a brief overview of current issues affecting the management of multi-district antitrust litigation (MDLs) in federal district courts in the United States from the class action plaintiff's perspective. Each of the topics discussed below could readily be expanded into a chapter of its own, but the goal here is to give the reader a sense of what has been going on in this area over the last 18 months.

An introduction to MDLs

In the United States, multiple class action cases can be filed in federal court against the same defendants with respect to the same subject alleged antitrust violations. Such cases are often filed in different federal districts around the country. A specialised judicial body – the Judicial Panel on Multidistrict Litigation (JPML) – exists, which has the role of consolidating such cases in a single court for pretrial purposes, pursuant to 28 USC, section 1,407. The purposes of such consolidation are to ensure efficient use of judicial resources, avoid forum shopping and avoid inconsistent decisions rendered by different federal courts. The selection of a transferee forum by the JPML is an important juncture in MDLs, given the role that the presiding judge and the precedents in the transferee forum can play in shaping such litigation. The transfer and consolidation process under section 1,407 is not limited to class actions brought by direct purchasers for violations of the federal antitrust laws. Since the passage of the Class Action Fairness Act of 2005 (CAFA),¹ which has, in practice, federalised indirect purchaser class actions brought under state antitrust or consumer protection laws,² the transfer and consolidation process can also encompass class actions brought by such end users as well. It can also encompass individual suits by competitors of the antitrust violators, suits brought by plaintiffs who opt out of the class actions to pursue individual claims or actions by state regulators. The *DRAM* litigation³ exemplifies the kinds of complexities that may arise. In that case, there are four different tracks for: direct purchaser class actions, indirect purchaser class actions, opt-out individual direct purchaser actions brought by major companies like Sun Microsystems or Unisys, and actions brought by 34 state attorneys general. As a result, the different groups had their own distinct trial dates, differing timetables for discovery and separate schedules for motion practice.

Effects of CAFA on the selection of the transferee forum for MDLs

The selection of a transferee forum in antitrust cases has typically been hotly contested, even when the contenders consisted solely of direct purchasers suing under federal law. What has been little remarked upon, however, is the effect that CAFA has had upon this process. As a result, for every one federal direct purchaser antitrust suit challenging some cartel or monopolistic activity, there are often five or even 10 indirect purchaser suits, a fact that can have a radical effect on the distribution of cases among potential forums. The JPML has not made distinctions among these types of cases and takes this distribution into account in deciding on a transferee forum, regardless of whether the cases on file in that forum are direct or indirect in nature. Recent rulings by the JPML in the *LCDs*, *SRAM* and

Graphics Processing Units cases reflect this development.⁴ The end result is that indirect purchaser counsel play a much more important role in the MDL transferee forum selection process than they did previously.

Effects of filing of consolidated amended complaints in the transferee forum

Another issue that has been little remarked upon is the tendency of transferee courts in antitrust MDLs to assume control over both pretrial and trial aspects of such cases as a result of plaintiffs' filing of consolidated amended complaints. Under the *Lexecon* decision,⁵ MDL transfers pursuant to 28 USC, section 1,407 are intended to be for pretrial proceedings only; once such proceedings are concluded, the cases are supposed to be sent back to their respective transferor forums. But what happens if plaintiffs' counsel file a consolidated amended complaint in the transferee forum containing all claims and parties? It is entirely possible that such an action could effectuate a waiver of a plaintiff's rights under *Lexecon*.⁶ A recent development is that federal judges are requesting formal waivers of such rights, either in the amended complaint itself or in subsequent stipulations.⁷ This development only underscores the importance of the initial JPML selection of a transferee forum.

Scope of consolidated complaints

Often in MDLs, different plaintiff groups file their own separate complaints; the *DRAM* case reflects that practice. But it is not a universal practice. In the *Air Cargo* litigation, the parties filed a single consolidated complaint that raised class claims by: (i) domestic direct purchasers under federal law, (ii) domestic indirect purchasers under state law, (iii) US direct foreign purchasers under federal antitrust law, (iv) EU direct foreign purchasers under federal and EU antitrust law, (v) EU indirect foreign purchasers under federal and EU antitrust law, (vi) mixed US-EU foreign purchasers under EU antitrust law, and (vii) EU foreign purchasers under EU antitrust law.⁸ This comprehensive approach may well be a harbinger for future cases.

Organisation of, and interaction among, different groups of plaintiffs and their respective counsel

As a result of CAFA, indirect and direct purchaser counsel often find themselves litigating the same claims against the same antitrust defendants side by side in the same court, something that rarely used to happen. There is nothing impermissible in this. The fact that direct purchasers are also suing should not preclude recovery by indirect purchasers under state law:

Indeed, even if the two actions are joined under the federal court's pendent or diversity jurisdiction, the outcome is the same. Under the Supremacy Clause, the presence of the state suit can in no way deprive the federal direct purchasers of their statutory right to full treble damages for the overcharge, with no discount for that which was passed on. Under state law as approved in the Supreme Court's California [v ARC America] decision, the indirect purchasers are entitled to provable passed-on damages.⁹

As a result, post-CAFA, federal courts have often entered orders creating separate management structures for direct and indirect purchasers in the same case.¹⁰ Counsel for those respective purchasers also often enter into stipulations or protocols regarding the joint conduct of discovery. Typically these types of protocols involve discovery phasing, with discovery common to all plaintiffs preceding discovery unique to specific plaintiff groups (such as pass-on issues relating to state law indirect purchaser claims); *DRAM* provides an example of this.¹¹ And in the *New Motor Vehicles Canadian Export* case, this coordination extended to a joint order issued by a federal and state court setting discovery procedures for a federal class action and parallel pre-CAFA California state court class action.¹² In the latter instance, for example, lead questioners were required to be identified for each deposition, with limited follow-up by other questioners. Different plaintiff groups might also want to take a coordinated approach to expert testimony, using common experts where feasible. The goal underlying all of these judicial approaches is to coordinate the efforts of different plaintiff groups as much as possible while preserving interests unique to each such group. One such separate interest can arise in the context of settlement, where groups with differing interests would need separate settlement counsel.

Effects of pending government investigations on civil discovery

It is no surprise that many private antitrust class actions in the US are brought on the heels of an announcement that the Department of Justice (DoJ) is investigating unlawful antitrust activity. Once those actions are consolidated, there arises the issue of how the civil cases should progress while the government investigation is pending. In a number of recent cases, the DoJ has intervened and sought a limited stay of discovery that would allow private plaintiffs to obtain documents produced by defendants in response to CIDs (civil investigative demands) or grand jury subpoenas, but would preclude the taking of depositions during the pendency of the investigation, subject to periodic review by the presiding court. The *DRAM* and *SRAM* cases are recent examples of this.¹³ Sometimes, the government has taken an even more aggressive stance, as reflected in its recent motion in the *LCDs* case, where it is seeking to stay all discovery for a period of months.¹⁴ These types of motions pose thorny issues for plaintiffs' counsel in such cases and can result in a delay of proceedings until the government investigation runs its course.

Effects of ACPERA

Another recent development that has had a significant effect on the management of MDLs is the enactment of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA).¹⁵ Under this statute, a company can apply for leniency from the DoJ for its participation in antitrust activities if, inter alia, a court in a parallel civil case determines that the applicant has provided "substantial cooperation" to the plaintiffs in that case.¹⁶ ACPERA has furnished a new and powerful weapon to the arsenal of antitrust plaintiffs, but there have been recent cases where amnesty applicants have sought to defer provision of cooperation, claiming that the DoJ has advised them not to disclose facts that might jeopardise an ongoing investigation. One can also expect that amnesty applicants might try to defer the cooperation necessary under ACPERA by citing concerns about disclosure by international regulators, such as the European Commission.¹⁷ These are issues that will eventually need to be resolved by the courts.

Effects of the *Twombly* decision

In its recent decision in *Bell Atlantic Corp v Twombly*,¹⁸ the US Supreme Court ruled that an antitrust plaintiff cannot avoid a motion to dismiss by alleging the mere fact of parallel conduct cou-

pled with conclusory allegations of collusion. The Court ruled that such a plaintiff must plead some facts that make collusion plausible.¹⁹ One of the reasons given for this approach was the costs associated with discovery in antitrust cases.²⁰ Defence counsel have predictably sought to use this ruling to preclude any discovery in such cases until motions to dismiss are first resolved. Such a blanket approach has so far been rejected by the few antitrust courts that have considered the issue. One district court judge has stated that: "I don't read *Twombly* to outlaw discovery prior to the pleadings being settled. There will be limitations on discovery, which we will talk about shortly, but I am not going to order 'no discovery' based on that case or anything else."²¹ Another has said that, "[d]efendants' argument upends the Supreme Court's holding; the decision used concerns about the breadth and expanse of antitrust discovery to identify pleading standards for complaints, it did not use pleading standards to find a reason to foreclose all discovery."²² Despite these decisions, this issue is likely to be a continuing source of controversy as more defendants raise it.

Effects of 2006 discovery rule changes

In 2006, amendments to the Federal Rules of Civil Procedure were promulgated that spelled out in greater detail the duties of all parties to preserve and produce electronically stored information (ESI). In response to this development, federal courts are entering orders at the inception of cases that address ESI issues and establish extensive protocols for such production and preservation.²³ Indeed, amended Federal Rule of Civil Procedure 16(b) permits courts to include in initial scheduling orders provisions for the disclosure and discovery of ESI. Federal courts have also not hesitated to issue at the inception of cases broad litigation holds that include ESI, often extending those holds to third parties. These changes in the federal rules have had a major impact on litigation. Initial disclosures under amended Federal Rule of Civil Procedure 26(a)(1)(B) now include a copy or description of ESI used to support claims or defences. Under amended Federal Rule of Civil Procedure 26(b)(2)(B), sources of potentially relevant information not being searched or produced must be identified. Discovery plans that address ESI are now required under amended Federal Rule of Civil Procedure 26(f). And amended Federal Rule of Civil Procedure 34 now encompasses ESI and permits the requesting party to specify the form in which it is produced. All of these changes have created major litigation risks for parties not sufficiently attuned to their increased discovery obligations with respect to ESI. In the *Intel* antitrust litigation, for instance, Intel failed to preserve adequately the documents of many potential witnesses and is undertaking a multimillion-dollar remediation process in the hope that no sanctions will be enforced against it.²⁴

Settlement notice requirements

Another little remarked upon provision of CAFA is the requirement that each defendant who settles a class action must serve upon "appropriate" federal and state officials a notice of the settlement within 10 days after it is filed with the presiding court.²⁵ The court may not finally approve the settlement until at least 90 days after service of the notice. The appropriate federal officials include the US attorney general and relevant regulators in the case of a depository institution.²⁶ The appropriate state officials are those with regulatory/licensing authority over the defendant or the state attorney general.²⁷ The notice must include notice of scheduled hearings; the complaint and associated documents; proposed or final notices to class members; the settlement agreement; agreements between counsel for plaintiffs and defendant; any final judgment; any relevant judicial opinions; and if feasible, the names of the class members residing in each state and the estimated proportionate share of their claims in the settlement or, where this is not feasible, "a reasonable

estimate of the number of class members residing in each state and the estimated proportionate share of their claims in the settlement”.²⁸ While CAFA is too new to have generated any case law concerning this provision, it imposes major obligations on defendants that can complicate any classwide settlement that a plaintiff may seek. In one case that occurred in 2006, the Florida attorney general challenged a coupon settlement with respect to automatic surcharges added to guest bills by a hotel chain and ultimately obtained a better settlement himself.

Trials of MDLs

Most MDLs settle short of trial. But when they do go to trial, consideration has to be given on how to phase such trials. For example, trial of a competitor’s antitrust claims may very well logically precede trial of consumer claims. On the other hand, in the *HPL* litigation,²⁹ the direct purchaser claims of a national class and a separate subclass for part of Florida were tried jointly.

Notes

- 1 Class Action Fairness Act of 2005, Pub L No. 109-2, 119 Stat 4 (codified in scattered sections of 28 USC).
- 2 Indirect purchasers of price-fixed products have no standing to sue for damages under federal antitrust laws pursuant to the rule announced by the United States Supreme Court in *Illinois Brick Co v Illinois*, 431 US 720 (1977). Numerous states have effected a repeal of that rule, either by legislative enactment or judicial interpretation. These types of state court actions were deemed permissible by the United States Supreme Court in *California v ARC America Corp*, 490 US 93 (1989).
- 3 *In re Dynamic Random Access Memory (DRAM) Antitrust Litig*, No. M-02-1486 PJH, (ND Cal 2007).
- 4 *In re Graphics Processing Units Antitrust Litig*, 483 F Supp 2d 1356 (JPML 2007); *In re TFT-LCD (Flat Panel) Antitrust Litig*, 483 F Supp 2d 1353 (JPML 2007); *In re Static Random Access Memory (SRAM) Antitrust Litig*, 473 F Supp 2d 1384 (JPML 2007). In the *Graphics Processing Units* litigation, there were only six direct purchaser cases, compared to 46 indirect purchaser cases. In *LCDs*, there were 110 indirect purchaser cases, compared to 25 direct purchaser cases.
- 5 *Lexecon, Inc v Milberg, Weiss, Bershad, Hynes & Lerach*, 523 US 26 (1998).
- 6 Federal Judicial Center, *Manual for Complex Litigation (Fourth)*, section 20.132 (2004). See *In re Carbon Dioxide Indus Antitrust Litig*, 229 F3d 1321, 1324-26 (11th Cir 2000) (*cert denied sub nom*). *BC Rogers Processing Inc v BOC Group Inc*, 532 US 920 (2001) (ruling that *Lexecon* does not prohibit parties from waiving venue objections in centralized actions where the transferee court has subject matter jurisdiction).
- 7 ‘Pretrial Order No. 2’, at 2 in *In re Graphics Processing Units Antitrust Litig*, No. C 07-1826 WHA (ND Cal 30 May 2007); ‘Procedural Order’, at 5-7 in *In re New Motor Vehicles Canadian Export Antitrust Litig*, MDL No. 1532 (D Me 25 Feb 2007); ‘Procedural Order for Class Certification’, at 1 in *In re New Motor Vehicles Canadian Export Antitrust Litig*, MDL No. 1532 (D Me 15 March 2005).
- 8 ‘First Consolidated Amended Complaint’ in *In re Air Cargo Shipping Servs. Antitrust Litig*, No. 06-MD-1775 (EDNY 8 Feb 2007).
- 9 XIV H Hovenkamp, *Antitrust Law*, paragraph 2412 at 344 (2nd ed 2005).
- 10 See, eg, ‘Case Management Order No. 2’ in *In re OSB Antitrust Litig*, No. 06-826 (PSD) (ED Pa 2 June 2006); ‘Coordination Order for the Indirect Purchaser Publication Paper Case’ in *In re Publication Paper Antitrust Litig*, No. 3:04 MD 1631 (SRU) (D Conn 16 Feb 2006); ‘Order’ in *In re Methyl Methacrylate (MMA) Antitrust Litig*, No. 10-md-1768 (ED Pa 21 Aug 2006); ‘Order’ in *In re Hydrogen Peroxide Antitrust Litig*, No. 05-666 (ED Pa 13 Oct 2005); ‘Further Case Management Order’ in *In re Dynamic Random Access Memory (DRAM) Antitrust Litig*, No. M-02-1486 PJH (ND Cal 19 July 2005); ‘Pretrial Order No. 2’ in *In re Vitamin C Antitrust Litig*, MDL 06-1738 (DGT) (JO) (EDNY 7 June 2006); ‘Pretrial Order No. 3’ in *In re TFT-LCD (Flat Panel) Antitrust Litig*, No. M 07-1827 SI (ND Cal 13 July 2007); ‘Pretrial Order No. 3C’ in *In re Graphics Processing Units Antitrust Litig*, No. C 07-1826 WHA (ND Cal 4 June 2007); ‘Minute Order’ in *In re Static Random Access Memory (SRAM) Antitrust Litig*, No. C 07-1819 (ND Cal 3 May 2007); ‘Practice & Procedure Order No. 4’ in *In re Air Cargo*

- Shipping Servs Antitrust Litig*, No. 06-MD-1775 (EDNY 6 March 2007).
- 11 See, eg, 'Order re Discovery Plan' in *In re Dynamic Random Access Memory (DRAM) Antitrust Litig*, No. M-02-1486 PJH (ND Cal 24 Feb 2006).
- 12 'Joint Coordination Order' in *In re New Motor Vehicles Canadian Export Antitrust Litig*, MDL No. 1532 (D Me) and Automobile Antitrust Cases I, II, JCCP Nos. 4,298 & 4,303 (San Francisco Cty Super Ct 18 June 2004).
- 13 'Stipulation & Order Limiting the Scope of Discovery' in *In re Dynamic Random Access Memory (DRAM) Antitrust Litig*, No. M-02-1486 PJH (ND Cal 16 Apr 2003); 'Supplemental Case Management Order No. 1' in *In re Static Random Access Memory (SRAM) Antitrust Litig*, No. C 07-1819 (ND Cal 21 June 2007).
- 14 'Notice of Motion & Motion by the United States for a Limited Stay of Discovery' in *In re TFT-LCD (Flat Panel) Antitrust Litig*, No. M 07-1827 SI (ND Cal 20 July 2007).
- 15 Pub L No. 108-237, 118 Stat 665 (22 June 2004), 15 USC § 1 (note).
- 16 ACPERA, section 213(b).
- 17 In the context of non-amnesty applicants, this concern was raised by defendants in a 'Letter' in *In re Air Cargo Shipping Servs Antitrust Litig*, No. 06-MD-1775 (EDNY 25 July 2007).
- 18 127 S Ct 1955 (2007).
- 19 *Idem* at 1964-65, 1968.
- 20 *Idem* at 1967.
- 21 Transcript, at 7 in *In re Static Random Access Memory (SRAM) Antitrust Litig*, No. C 07-1819 (ND Cal 1 June 2007).
- 22 *In re Graphics Processing Units Antitrust Litig*, No. C 06-07417 WHA, 2007 WL 2127577 at *4 (ND Cal 24 July 2007). See also *In re Netflix Antitrust Litig*, No. C 07-643, 2007 WL 1725422 at *11 (ND Cal 14 June 2007) (recognising concerns under *Twombly*, but allowing limited discovery).
- 23 See, eg, 'Order for Discovery of Electronic Documents' in *In re Methyl Methacrylate (MMA) Antitrust Litig*, No. 10-md-1768 (ED Pa 16 Aug 2006); 'Order for Discovery of Electronic Documents' in *Maderazo v Vanguard Health Sys*, No. SAC60A05350G (WD Tex 26 Dec 2006); 'Order for Discovery of Electronic Documents' in *Reed v Advocate Health Care*, No. 06 C 3337 (ND Ill 7 Dec 2006).
- 24 'Report & Proposed Remediation Plan' in *In re Intel Microprocessor Antitrust Litig*, No. 05-MD-1717 (JJF) (D Del 23 Apr 2007).
- 25 28 USC section 1715(b).
- 26 28 USC sections 1715(a)(1), (c)(2).
- 27 28 USC section 1715(a)(2).
- 28 28 USC section 1715(b).
- 29 *In re High Pressure Laminates Antitrust Litig*, No. 00-MD-1368 (CLB) (SDNY 2006).