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Defending Competing and Repetitive Class Actions

Race to Judgment, First-to-File Rule, Venue Transfer, Consolidation, Anti-Suit Injunctions, and More

WEDNESDAY, APRIL 10, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Dealing With Competing and Repetitive Class Actions:

A Toolkit for Defendants and Defense Counsel

April 10, 2019

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Competing and Repetitive Class Actions

- Common feature of class action landscape
- Multiple class cases frequently follow in the wake of product recalls, announced regulatory action, data breach announcements, mass disasters and the like
- Class counsel angling for “front of the line”; often looking to carve out one or more states in dispute with nationwide impact
- Challenges for defendant and counsel – Defend them all and race to judgment? Attempt to consolidate them in some form or fashion? Attempt to settle one to shut the rest down?

RACE TO JUDGMENT

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Competing: Race to Judgment

- First certified action to reach judgment on the merits will be conclusive as to all class members
- Preclusive effect may depend on closeness of overlap between classes and claims asserted
  - No preclusive or full faith and credit effect as to non-class members in action #1
  - Preclusive effect upon different claims will depend on preclusion law applicable to action #1 (particularly if judgment #1 is not by settlement)

Competing: Race to Judgment

- Potential benefits of litigating to judgment
  - All class members bound; competing or repetitive classes likely to fail

Competing: Race to Judgment

- Potential downside of litigating to judgment
  - Ability to control which case “goes first” may be quite limited
  - Limited ability to slow or stop later cases while first case is litigated
  - As a result of this, defendant potentially subject to conflicting discovery demands, court orders, and expense of defending multiple cases
  - Court in later actions normally determines preclusive effect of judgment in case #1; favorable decision on class cert probably not preclusive
  - Litigation downsides increase settlement pressure

Competing: Race to Judgment (Settlement)

- Preclusive effect of settlement creates “reverse auction” incentive
- Inadvisable to negotiate with class counsel in multiple cases simultaneously
- Regardless, defendant retains leverage in such situations
- Non-settling class counsel can be expected to attack the settlement. Considerations for reducing risks presented by such attacks:
  - Paper carefully; avoid questionable notice
  - There is such a thing as too good a deal

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Competing – Race to Judgment (Settlement)

- Considerations for reducing risks presented by such attacks:
  - Make sure the judgment in settled case will in fact be preclusive in case #2
  - Paper carefully; avoid questionable notice
  - Make sure there are no standing or adequacy problems with settling class reps
  - If possible, have class counsel's fee not be contingent on approval of settlement
  - There is such a thing as too good a deal

The “First to File” Rule

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The “First to File” Rule

- A discretionary, equitable rule to stay competing cases involving overlapping issues and overlapping parties.
- The rationale is judicial economy and avoiding a race to judgment.
- The rule applies to all cases, but applies to class actions in a unique way.

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First-Filed Rule (cont'd)

- The rule is discretionary, and will not be applied in a "wooden" manner.

- That said, the balance tilts heavily in favor of the first-filed case.

- "Where two actions involving overlapping issues and parties are pending in two federal courts, there is a strong presumption across the federal circuits that favors the forum of the first-filed suit under the first-filed rule." *Manuel v. Convergys Corp.*, 430 F.3d 1132, 1135 (11th Cir. 2005) (collecting cases)

First-Filed Rule: Exceptions

- The “strong presumption” for the first-filed case can be overcome if the party objecting in the first-filed case can show “compelling circumstances.”
- Three common exceptions: (1) improper forum shopping; (2) improper anticipatory lawsuits; and (3) declaratory judgment actions.
  - Some courts list “bad faith” and “inequitable conduct” as exceptions.
- All exceptions are equitable and malleable.
- Class-action defendants rarely attempt to file first.

First-Filed Rule: Exceptions (cont'd)

- The forum shopping exception can apply.
  - Courts will look at venue considerations such as the convenience of witnesses.
  - Ability to subpoena witnesses may matter.
  - Choice-of-law is also a consideration.

First-Filed Rule: "Same Parties"

- Claims must involve the same or overlapping parties.
- Some Defendants must overlap or be related.
  - The presence of "extra" defendants matters but is not dispositive.
- In putative class actions, look to ***class definitions*** (not class reps) to decide whether the same parties are involved.
  - *See*, *e.g.*, *Baatz v. Columbia Gas Transmission, LLC*, 814 F.3d 785, 790-91 (6th Cir. 2016) (applying rule even where plaintiffs promised to opt out); *Martin v. Cargill, Inc.*, 295 F.R.D. 380, 388-89 (D. Minn. 2013); *Catanese v. Unilever*, 774 F. Supp. 2d 684, 688 (D.N.J. 2011).

First-Filed Rule: "Same Parties" (cont'd)

- This rule has limits: an individual action filed by plaintiff within an earlier-filed putative class action may not be barred.
  - *Compare Swetra v. Directv, LLC*, 2016 WL 4208440 at *3 (D.N.J. Aug. 9, 2016) (individual claim not barred)
  - *With Baatz* (individual claim barred)

- This is a rare instance where absent class members count as parties before a class is certified. Compare *Smith v. Bayer*, 564 U.S. 299, 314 (2011)

First-Filed Rule: Same Claim

- No bright-line test for how similar two cases need to be.
- The most commonly-used language is “substantially overlap.”
- Perfect identity of claims is ***not*** required.
- Most courts use a sliding scale: the more overlap between the claims and parties, the more likely to apply the rule.
  - The equitable exceptions matter here, too.

First-Filed Rule: Limitations

- Requires all cases to be in federal court.
- Expanded jurisdiction through the Class Action Fairness Act and Securities Litigation Uniform Standards Act makes this issue less of a concern.
- Even in the absence of removal, some states will abate state-court class actions if they overlap with previously filed federal class actions. *See Ex parte AmSouth Bank*, 735 So. 2d 1151, 1153 (Ala. 1999).

First-Filed Rule: Procedure

- Everything runs through the first-filed court:
  - "The first-filed rule not only determines which court may decide the merits of substantially similar cases, but also generally establishes which court may decide whether the second filed suit must be dismissed, stayed, or transferred and consolidated." *Collegiate Licensing Co. v. Am. Cas. Co of Reading, Pa.*, 713 F.3d 71, 78 (11th Cir. 2013).
- Parties should move to stay, dismiss, or transfer later-filed cases in the first-filed venue.
- Judges talk, so best practice is to notify both the later-filed and first-filed court.

First-Filed Rule: Remedies

- Courts have a broad range of options.
- Dismissal is ***available***…
  - *See*, *e.g.*, *Merial Ltd. v. Cipla Ltd.*, 681 F.3d 1283, 1299 (Fed. Cir. 2012); *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000); *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 606 (5th Cir. 1999); *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 628 (9th Cir. 1991); E.E.O.C. v. Univ. of Pa., 850 F.2d 969, 976 (3d Cir. 1988).
- …But not if it will prejudice a party. *Baatz v. Columbia Gas Transmission, LLC*, 814 F.3d 785, 794-95 (6th Cir. 2016) (reversing district court's decision to dismiss under first-filed rule)

First-Filed Rule: Remedies (cont'd)

- Less extreme and more common remedies include
  - Staying the later-filed case.
  - Transferring the later-filed case.
  - If available, consolidating the duplicative cases.
- In our experience, dismissal is rare.

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VENUE TRANSFER

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Venue Transfer: Introduction

- A federal statute and many states' laws allow courts to transfer cases between venues.

- 28 U.S.C. § 1404(a): "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 or to any district or division to which all parties have consented."

Venue Transfer: Factors

- The test is broad: convenience and “interest of justice.”
- Courts often consider location of parties, witnesses, and (to a lesser extent) evidence.
- Choice-of-law may also matter: courts transfer to court sitting in state whose law will apply.
- Administrative difficulties (however defined)

Venue Transfer: Plaintiff's choice of forum

- This factor weighs heavily in individual cases.

- It weighs less in class actions:

"[W]here there are hundreds of potential plaintiffs, all equally entitled voluntarily to invest themselves with the corporation's cause of action and all of whom could with equal show of right go into their many home courts, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened." *Koster v. Am. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947).

Venue Transfer: Practical Consideration

- Transferring venue is often brings efficiency and consistency…
- ... But the various cases remain distinct.
- Venue transfer thus often accompanies other procedures, such as a first-to-file motion or a consolidation under Rule 42(a).
  - The decision to seek transfer is not always an easy strategic call.

Venue Transfer: State Options

- State law can be helpful here, too.
- Various state statutes mirror 1404(a):
  - Ala. Code § 6-3-21.1
  - O.C.G.A. § 9-10-31.1(a)
  - 735 ILCS 5/2-619(3)
  - Tex. Civ. Prac. & Rem. Code Ann. § 15.002(b)
  - Utah Code Ann. § 78B-3-309(3).
- Transfer between states is generally impossible.

MULTI-DISTRICT LITIGATION

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Multi-District Litigation

- MDLs are all the rage.
- Excluding prisoner cases and social-security appeals, ***more than half*** of all federal civil cases are filed in MDLs.
- The Judicial Panel on Multidistrict Litigation ("JPML") often grants requests to create MDLs for overlapping class actions.

MDLs: The Basics

- Authorized by 28 U.S.C. § 1407:

- Test for consolidation is ***very*** lenient:

"When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made [if] transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."

MDLs: The Basics (cont'd)

- MDL consolidation does ***not*** require
  - **The same parties** – several defendants may be lumped together, and all plaintiffs may be different.
  - **Identical claims** – one common factual issue is enough. *See In re Satyam Computer Servs., Ltd., Sec. Litig.*, 712 F. Supp. 2d 1381, 1382 (JPML 2010) ("Section 1407, however, does not require a complete identity or even majority of common factual and legal issues as a prerequisite to centralization.")
  - **Meaningful geographic consideration** – cases from one district can be consolidated as long as one case is pending outside of the district, as can cases from across the country.

MDLs: The Basics (cont'd)

- Consolidation is discretionary, and several factors cut against consolidation:
  - Less overlap of parties and issues.
  - Fewer cases to be transferred.
    - *See In re Corvette Z06 Marketing and Sales Practices Litig.*, 289 F. Supp. 3d 1348, 1349 (JPML 2018) ("[W]here only a few actions are involved, the proponent of centralization bears a heavier burden to demonstrate that centralization is appropriate.")
  - Overlapping counsel.
  - Availability of 1404 transfer or other consolidation procedures.

MDLs: The Basics (cont'd)

- Any party can seek MDL consolidation by filing a motion with the JPML.
  - The judges presiding over the cases have no say, unlike with the first-filed rule or 1404(a) transfers).
- The JPML can also propose to transfer cases on its own initiative. 28 U.S.C. § 1407(c)(i).
- The JPML's hearings are severely truncated, and its conclusions are not reviewable except by extraordinary writ.
- It is comprised of seven federal judges from different circuits.

MDLs: The Transferee Court

- JPML will select a judge to preside over the MDL.
- This judge will preside of all of the consolidated cases all the way up to trial.
- If a case is to be tried (and unless the parties agree otherwise) the case is remanded to the transferor court for trial.
  - In reality, this procedure looks very different in different MDLs, many of which feature “direct filed” cases.

MDLs: The Transferee Court (cont'd)

- The JPML picks the transferee court based on several factors.
  - Parties' preference
  - First-filed case
  - Number of cases pending
  - Progress of cases pending (*i.e.*, who is further along)
  - Experience of judge
  - Headquarters of defendant
  - Locus of dispute
  - Convenience for plaintiffs, witnesses, etc.
  - Capacity of the district of the court to handle the cases
  - Transportation and lodging issues.

MDLs: Advantages

- Consolidated discovery
  - Do it once – no duplication
  - Do it the same way
  - One set of rules and rulings
  - One set of lawyers
- Consistent Rulings
  - Motion to Dismiss and Summary Judgment
  - Class certification

MDLs: Advantages (cont'd)

- All players in one action
  - Negotiate discovery
  - Settle the case
  - Avoid cases marching at different speeds
- More predictable

MDLs: Disadvantages

- Rules of Civil Procedure often do not apply
- More cases get filed, and it is hard to weed the weak ones out.
- Settlement pressure is immense.
- Discovery goes fast and can be very broad

MDLs: Disadvantages (cont'd)

- Much—maybe too much—rides on the transferee judge
- Plaintiffs combine forces and resources, which removes the big battalions advantage that defendants usually have.

MDLs: Bottom Line

- Big disputes will go to MDL: Resistance is futile.
- The best arguments against consolidation come when fewer cases are pending.
- MDLs are growing in importance.
  - *Bristol-Myers Squibb* personal jurisdiction issue.
- MDLs can treat individual actions like class actions, but without procedural protections.

ANTI-SUIT INJUNCTIONS

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Anti-Suit Injunctions (cont.)

- May be possible for defendant to enjoin prosecution of competing class action
- Limited circumstances (and growing more limited)
- Federal court's authority to do this derives from:
  - All Writs Act ("AWA"), 28 U.S.C. sec. 1651
  - Anti-Injunction Act ("AIA"), 28 U.S.C. sec. 2283

All Writs Act and Anti-Injunction Act

- AWA permits federal courts to issue “all writs . . . in aid of their respective jurisdictions”
- AIA – federal courts may not grant injunctions against state court proceedings except “where necessary in aid of its jurisdiction or to protect or effectuate its judgments”
- A injunction proper under this authority must be acceded to by a state court under the Supremacy Clause
- Courts have recognized that anti-suit injunctions should be sparingly used

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"In aid of jurisdiction" exception to AIA

- Typically only applies when a *res* at stake; thus, to actions *in rem*
- Another exception recognized: when federal court retains jurisdiction over "complex, *in personam* lawsuits," resolution of which is threatened by competing state court litigation
- Practically, the *in personam* exception usually applicable if federal case has been or is being settled

"in aid of jurisdiction" exception to AIA

- "In aid of jurisdiction" rationale also relied – though not often – to preserve pre-trial rulings like discovery orders. See *Newby v. Enron Corp.*, 338 F.3d 467, 476 (5th Cir. 2003); *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1203 (7th Cir. 1996).
- Mere existence of parallel lawsuit not enough to justify federal injunction, however. *Ret. Sys. of Ala. v. J.P. Morgan Chase & Co.*, 386 F.3d 419, 430 (2d Cir. 2004) (protection of federal trial date insufficient to justify AIA injunction against competing state case)

“Relitigation exception” to AIA

- Permissible where necessary to “protect and effectuate” the federal court’s judgments
- Applicability turns on principles of issue and claim preclusion, and is strictly and narrowly applied. *See Chick Kam Choo v. Exxon Corp.*, 430 U.S. 140, 148 (1988).
- *Smith v. Bayer Corp.* (SCt, 2011) casts doubt on reach of relitigation exception

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"Relitigation exception" to AIA

- *Smith* – denial of class certification by federal district court insufficient to uphold injunction against prosecution of competing state court class action
  - Class certification analysis under Fed. R. 23 different from West Virginia Rule 23 analysis, so no identify of issues
  - Unnamed members of putative and uncertified class not "parties" for preclusion purposes
- In wake of *Smith*, courts at odds over what effect denial of class cert should have in later state litigation; views range from "none" to a rebuttable presumption against certification

"relitigation exception" to AIA

- *Dicta* from *Smith* suggests that defendant's remedy, in the event of a final judgment favorable to it, is a *res judicata* defense asserted in the state court case, rather than an injunction
- Ease of getting most (or many) state court class actions into federal court via CAFA removal make *Smith* rather less problematic
- A state court has no authority to enjoin prosecution of federal court *in personam* proceedings; *see Donovan v. City of Dallas,* 377 U.S. 408, 412-13 (1964).

Conclusion

- Defendant frequently has multiple options in dealing with competing class cases – litigate to judgment; settle; attempt transfer or consolidation
- One size doesn't fit all – strategy depends on ultimate objectives and chances of success

Questions?

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