November 2, 1999

Joint Report of the ABA Antitrust and Litigation Sections on H.R. 2112

This sets forth the Joint Report of the Antitrust and Litigation Sections of the American Bar Association (the ASections≅) concerning H.R. 2112. The Sections endorse this legislation insofar as it would reverse the Supreme Court=s decision in Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 118 S. Ct. 966 (1998), but because of the lack of time to evaluate the implications, take no position on the balance of H.R. 2112. These views are presented only on behalf of the Section of Antitrust Law and the Section of Litigation of the American Bar Association ("ABA"). They have not been approved by the House of Delegates or the Board of Governors of the ABA, and should not be construed as representing the policy of the ABA.

Overview of H.R. 2112

H.R. 2112, the Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999, was introduced on June 9, 1999 by Rep. F. James Sensenbrenner, Jr. (R-WI). Rep. Sensenbrenner is a member of the House Judiciary Committee and its Subcommittee on Courts and Intellectual Property. Sections 2 and 3 of the bill contain its two substantive provisions. Section 3 of H.R. 2112, entitled Multiparty, Multiforum Jurisdiction of District Courts would expand federal subject matter jurisdiction in certain mass tort cases. As noted above, we express no view on this aspect of the bill.

Section 2 of the bill, entitled Multidistrict Litigation, would essentially overrule Lexecon. As drafted, it would permit a federal transferee court supervising pretrial discovery by order of the Judicial Panel on Multidistrict Litigation (AJPML≅) pursuant to 28 U.S.C. ə 1407 to transfer such cases to itself (or another district court) for trial purposes. It accepts the invitation extended by Justice Souter in the Lexecon decision to legislate a return to pre-Lexecon practice and procedure. This aspect of the bill has been endorsed by the Judicial Conference of the United States.

Section 2 of H.R. 2112 incorporates the substance of H.R. 1852 which had been introduced by Mr. Sensenbrenner on May 18, 1999. Unlike its predecessor, however, H.R. 2112 qualifies the power of the transferee court to try all of the issues in any case that it has retained and specifically directs that any action transferred for trial purposes pursuant to Section 2 of the bill

> shall be remanded by the panel for the determination of compensatory damages to the district court from which it was transferred, unless the court to which the action has been transferred for trial purposes also finds, for the convenience of parties and witnesses and in the interests of justice, that the action should be retained for the determination of compensatory damages.

H.R. 2112, ə 2.

In effect, H.R. 2112 contains a presumption that cases transferred for trial purposes be remanded to the transferor court for determination of compensatory damages unless the transferee court finds that it would be unjust and inconvenient to the parties and witnesses to remand.

A red-lined look at the relevant parts of ə 1407, making the changes to be made if Section 2 of H.R. 2112 were enacted, is as follows:

> (a) 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 by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district court form which it was transferred unless it shall have been previously terminated or ordered transferred to the transferee or other district under section (i).
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> (i)(1) Subject to paragraph (2) and except as provided in subsection (j), any action transferred under this section by the panel may be transferred for trial purposes, by the judge or judges of the transferee district to whom the action was assigned, to the transferee or other district in the interest of justice and for the convenience of the parties and witnesses.
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> (2) Any action transferred for trial purposes under paragraph (1) shall be remanded by the panel for the determination of compensatory damages to the district court from which it was transferred, unless the court to which the action has been transferred for trial purposes also finds, for the convenience of the parties and witnesses and in the interests of justice, that the action should be retained for the determination of compensatory damages.

The Sections note that in 1990 the Antitrust Section=s Arc America Task Force analyzed the problems addressed by Section 2 of H.R. 2112 and recommended that transfer for trial as well as pretrial purposes be permitted. See Arc America Task Force: Report Of The American Bar Association Section Of Antitrust Law Task Force To Review The Supreme Court=s Decision In California v. Arc America Inc., 59 Antitrust L.J. 271, 301-4 (1990). The Sections also note that the JPML is currently authorized by statute to consolidate and transfer cases for both pretrial and trial purposes in very limited circumstances involving parens patriae actions brought under Section 4C of the Clayton Act, 15 U.S.C. ə 15c. 28 U.S.C. ə 1407(h). Given the paucity of parens patriae suits, it appears that this provision has been rarely, if ever, invoked by the federal courts.

Analysis of Section 2 of H.R. 2112

The Supreme Court=s decision in Lexecon marked a dramatic change in long-standing practices in multidistrict litigation ("MDL"). Lexecon holds that the transferee court assigned to oversee the pretrial phase of a multidistrict proceeding under 28 U.S.C. ∋ 1407 may not invoke 28 U.S.C. ∋ 1404(a) to transfer those proceedings to its own trial calendar. These Aself-transfers≅ had been a common practice prior to Lexecon and although not specifically authorized by statute, were permitted by MDL Rule 14(a). The decision=s ramifications for the efficient conduct of the kinds of cases at issue -- which include ongoing antitrust litigation -- are drastic. The legislative solution offered by H.R. 1852 is clearly the preferred correction to the procedural gap created by Lexecon.

The statute at issue, 28 U.S.C. ∋ 1407(a), currently provides in relevant part that:

> (a) 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 by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfer for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions . . .

28 U.S.C ∋ 1407(a) (1999).

Many kinds of litigation fit the ∋ 1407 profile, as is evident from the sheer number of actions transferred by the Panel over the course of its thirty-year history. Between 1968, when Congress enacted ∋ 1407(a) and September 30, 1998, the last year for which complete figures are available, a total of 140,867 civil actions were A[s]ubjected to Section 1407 [p]roceedings.≅ Administrative Office of the United States, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 1998, at 33 & Supp. Tables S-21, S-22. Of these, 121,823 were transferred from one district to another for Acoordinated or consolidated pretrial proceedings≅; the other 19,044 actions were originally filed in the transferee district, id., though not necessarily assigned when filed to the eventual transferee judge. Almost 12% of the total number of transferred cases, or some 16,594 actions, were transferred pursuant to ∋ 1407 in the twelve months ending September 30, 1998.

In addition, it is noteworthy that of the 140,867 civil actions referenced above, 83,107 were terminated by the transferee courts. Only 4,952 were remanded by the MDL Panel to the transferor courts for trial. As of September 30, 1998, 52,529 actions were still pending in fifty-one transferee district courts. Id.

Airplane accident litigation is a prototypical example of multidistrict litigation. Individual cases filed or pending in different federal courts across the country stemming from a single accident are routinely consolidated in a Atransferee≅ court and before a Atransferee≅ judge. This court is often the federal district court nearest the accident site. As the MDL Panel has repeatedly recognized, air crash cases Apresent a prime example of the need which gave rise to enactment of Section 1407.≅ In re Air Crash Disaster Near Chicago, 476 F. Supp. 445, 447 (J.P.M.L. 1979); see also In re Air Crash Disaster at Chattanooga, 393 F. Supp. 1406, 1407 (J.P.M.L. 1975) (AAs is

usually the case in multidistrict air disaster litigation, common factual questions abound among these actions on the issue of liability.≅).

In contrast to air crash litigation, or other familiar MDL contexts -- cases with complicated and often convoluted environmental, labor/discrimination, securities, antitrust, trademark and copyright, patent, and/or mass tort implications, see David F. Herr, MULTIDISTRICT LITIGATION & 5.4.2 (1986 & Supp. 1996) (citing examples in each category) -- the Lexecon decision stems from a single Atag along≅ action in which, ultimately, only a single defamation claim remained. Without belaboring the case details, it was about as far removed from the typical MDL milieu as one can get. Simply put, it provided a poor factual basis for considering the important issues of multidistrict litigation and particularly, the efficiencies in true MDL contexts of a ∋ 1404(a) transfer decision by the judge who has supervised pretrial proceedings pursuant to ∋ 1407.

More importantly, the Lexecon decision flies in the face of well-established case precedent and even a Judicial Panel on Multidistrict Litigation Rule of Procedure authorizing a ∋ 1404(a) transfer by a ∋ 1407 transferee judge. The Panel=s Rule 14(b) stated, in relevant part, that A[e]ach transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial, *unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. ∋ 1404(a) or 28 U.S.C. ∋ 1406.*≅ (Emphasis added.)

Nevertheless, the unanimous decision in Lexecon was not entirely unexpected. The plain language of ∋1407(a) provides that at the end of the consolidated and coordinated pretrial proceedings phase, the case is returned to the Ahome≅ forum. Justice Souter found this statutory language dispositive in his opinion in Lexecon: AEach action so transferred *shall be remanded* by the panel at or before the conclusion of such pretrial proceedings [i.e., Acoordinated or consolidated pretrial proceedings≅] to the district court from which it was transferred unless it shall have been previously terminated.≅ 28 U.S.C. ∋ 1407(a) (emphasis added). The statute, Justice Souter found, is Astraightforward,≅ and Aobligates the [MDL] Panel to remand any pending case to its originating court when, at the latest, those pretrial proceedings have run their course.≅ Lexecon, 523 U.S. at __, 118 S. Ct. at 962, 963. Thus, despite longstanding practice, and the language in Panel Rule 14(b), a transferee court may not utilize ∋ 1404(a) to transfer ∋ 1407(a) cases to itself for trial. AAge≅ -- and presumably efficiency -- Ais no antidote to clear inconsistency with a statute,≅ Justice Souter wrote.

Recovering those efficiencies is of interest to defendants and plaintiffs alike. As the *New Jersey Law Journal* editorialized on April 6, 1998:

> In mass tort, securities and similar cases, the panel will assign all cases to a single judge who will typically devote great effort to the matter and develop extensive knowledge of the case. Nothing can be more wasteful of judicial resources and litigants funds than, at the conclusion of discovery, sending those cases back to the district where complaints were originally filed to be tried by a judge who knows virtually nothing of the complex matter. Most of these cases involve many litigants. Some of these cases have thousands of parties. Justice is served when mass tort and security cases are globally settled before trial. The one tool a judge needs to accomplish global settlement is the threat of going to trial. Without

the authority to keep all transferred cases for trial, a judge=s ability to encourage a global settlement is substantially reduced.

One option currently available to litigants who would like to proceed to trial in front of their ∋ 1407(a) transferee judge is to move the transferor court for a ∋ 1404(a) transfer to the transferee court. A ∋ 1404(a) motion like this could be filed with the transferor court after returning to that forum following an MDL remand. A variation of this option is to have a ∋ 1404(a) motion on file in the transferor court upon remand from the transferee court. The party (or parties) favoring such a transfer might file a motion or otherwise seek form the transferee court an indication that it favored such a transfer back from trial.

A second option, related to the first, is simply to bypass the MDL pretrial consolidation structure altogether by seeking an unadorned ∋ 1404(a) transfer. This tactic would be problematic if there were several Atransferor≅ districts. Additionally, the ∋ 1404(a) standard is harder to meet than that under ∋ 1407, with more exacting venue and other requirements.

A third option, also related to the first, would be some sort of agreement amongst the parties themselves. This tactic would still, of course, require a (joint) motion and order from the court. It may be possible to secure this kind of agreement in antitrust cases if it is made clear that damage trials, if necessary, could be conducted in the plaintiff=s choice of forum following a consolidated liability phase in just one centralized location.

Each of these options has significant drawbacks. The best long term solution would be for Congress to bless by law the former practices and procedures by enacting new law expressly permitting them. This is the solution Justice Souter points to in Lexecon itself. AMilberg may or may not be correct that permitting transferee courts to make self-assignments would be more desirable than preserving a plaintiffs=s choice of venue,≅ he wrote, Abut the proper venue for resolving that issue remains the floor of Congress.≅ Thus, H.R. 1852 was introduced and later folded into H.R. 2112; Rep. Sensenbrenner and others recognized that a concise legislative fix would restore the pre-Lexecon status quo. Given that the JPML already has power to consolidate and transfer for trial purposes parens patriae cases, this legislation is a logical next step to foster efficient resolution of antitrust and other complex litigation.

While the Sections support the provisions of H.R. 2112 authorizing a federal transferee court supervising pretrial discovery by order of the JPML to transfer the case to itself or to another district for trial purposes, we are troubled by the language in paragraph i(2) of the proposed amendment. That language -- not present in H.R. 1852 -- would direct a transferee court that has retained a case for trial to remand the matter to the transferor court for the determination of compensatory damages unless the transferee court concludes that Afor the convenience of the parties and witnesses and in the interest of justice, that action should be retained for the determination of compensatory damages.≅

The Sections have reservations about the need for, and utility of, this provision. It seems to us that in the antitrust context, transfer of a matter to another court for determination of damages following trial on liability issues would likely prove wasteful of judicial and party resources and would unnecessarily delay the ultimate resolution of cases. While the bill would permit the transferee court to retain a matter for damage determination, the proposed amendment seems to

thrust the burden of justifying that action on the district court. As a practical matter, our concern may be academic because we believe that most courts would find a way to retain antitrust cases to make damage assessments. In the end, however, we believe the purposes of this bill would be better served if paragraph (i)(2) were deleted.

Conclusion

The Sections strongly endorse a return to pre-Lexcon practice in multidistricted antitrust cases. A bill restoring the pre-Lexecon efficiencies is already overdue barely a year after the decision in Lexecon was issued by the Supreme Court.

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