Class Action Monitor

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Class Action Honors

The Shortcomings of Conjoint Analyses in Measuring Fair Market Value

*By David Singh, Pravin Patel, and Eric Rivas**

Plaintiffs in false advertising class actions often seek to recover the purported "price premium" members of the proposed class allegedly paid as a result of alleged misrepresentations or omissions. To isolate the purported price premium, plaintiffs often retain an expert to prepare a conjoint analysis, an economic analysis that supposedly measures the product's fair market value based on consumer responses to surveys supposedly designed to measure consumers' "willingness to pay."

However, courts have been increasingly skeptical of the use of conjoint analyses as a method of establishing class injury. For example, while conjoint analyses purport to measure some buyers' subjective valuations of product features (*i.e.*, "willingness to pay"), they often ignore supply-side factors for determining a fair market value (*i.e.*, "willingness to sell"). *See, e.g., Zakaria v. Gerber Prods. Co.*, 2017 U.S. Dist. LEXIS 221124, at *57 (C.D. Cal., Aug. 9, 2017) (Plaintiff "failed to show that the [conjoint analysis] employed by [its expert] sufficiently accounted for the actual price of [the allegedly falsely advertised product], or the market conditions in which that product was sold.").

Class Action Plaintiffs Have Struggled to Proffer Reliable Conjoint Analyses to Establish Injury Across the Class

In *Comcast Corp. v. Behrend*, the Supreme Court held that calculation of damages in a class action must not only be subject to common proof; but that the model for the calculation must also "be consistent with [the plaintiffs'] liability case . . . [and] courts must conduct a rigorous analysis to determine whether that is so." 569 U.S. 27, 35 (2013). In an attempt to proffer a method of establishing class injury that is consistent with their liability case, plaintiffs

often rely on conjoint analyses. However, conjoint analyses often fail Rule 23(b)(3)'s predominance requirement because they focus on subjective consumer preferences, without considering supply-side factors, or the seller's willingness to sell.

For example, in *Zakaria,* the plaintiff alleged that Gerber deceptively marketed its baby formula as the "1st and Only" formula to protect against allergies, and plaintiff's expert proffered a conjoint analysis to establish the price premium allegedly paid by class members. 2017 U.S. Dist. LEXIS 221124, at *50. Gerber filed a motion to decertify the class, arguing that plaintiff's expert's conjoint analysis could not reliably calculate class-wide damages. Plaintiff's expert's conjoint analysis purportedly considered market factors, such as (1) the defendant's market share before and after the removal of the 1st And Only label, (2) the close approximation of packaging and prices used in the survey, and (3) marketing and pricing research. *Id.* at *57-58. However, Gerber argued, and the district court ultimately agreed, that plaintiff's expert failed to consider the actual prices paid by consumers for the product or consumers' preferences for competing products. The district court thus granted Gerber's motion to decertify. *Id.* at *58. "[A]t most [the conjoint analysis] bears only on the claimed loss to Plaintiff [, and therefore] the evidence provided by Plaintiff about their potential willingness to pay a premium due to the use of the 1st And Only Label is insufficient to establish a basis for calculating either restitution or actual damages." *Id.* at *62.

On appeal, the Ninth Circuit affirmed the district court's decertification order. It reasoned that the conjoint analysis was insufficient for measuring class-wide damages because it "did not reflect market realities and prices for infant formula products." *Zakaria v. Gerber Prods. Co.*, 755 Fed. Appx. 623, 624-25 (9th Cir. 2018). It explained that the conjoint analysis did not serve as common proof of class-wide damages because solely measuring the consumer's willingness to pay a higher price does not provide "any evidence that such higher price was actually paid . . . ." *Id.* at 625 (emphasis added).

Numerous other decisions reject conjoint analyses that do not reflect "market realities." *See, e.g.*, *Morales v. Kraft Foods Grp., Inc.*, 2017 U.S. Dist. LEXIS 97433, at *63-64 (C.D. Cal. June 9, 2017) (granting defendant's motion for decertification: "[T]he evidence provided by Plaintiffs about their potential willingness to pay a premium due to the use of the 'natural cheese' label is insufficient to establish a basis for calculating restitution."); *In re NJOY, Inc. Consumer Class Litig. II*, 2016 U.S. Dist. LEXIS 24235, at *22 (C.D. Cal. Feb. 2, 2016) (declining to certify class because conjoint analysis based on consumers' perceived valuation of the product, rather than the actual price in any given market, did not permit the court to calculate true market price absent purported misrepresentations); *Saavedra v. Eli Lilly & Co.*, 2014 U.S. Dist. LEXIS 179088, at *20-21 (C.D. Cal. Dec. 18, 2014) (denying motion for class certification: conjoint analysis was insufficient for calculating class damages because it only considered demand and ignored the actual functioning and inefficient market, in which "a consumer's out-of-pocket cost for a drug [wa]s not a proxy for the drug's value to the consumer").

The Limitation of Conjoint Analyses in Capturing Market Realities Also Leaves Claims Vulnerable to Summary Judgment

As the *Zakaria* courts recognized, the "market realities deficiency" also renders class plaintiffs' claims susceptible to summary judgment in favor of the defendant. For example, in a recent case involving alleged fraudulent concealment of a vehicle defect, the defendant moved for summary judgment, arguing in part that the plaintiffs' expert's proposed conjoint analysis "does not and cannot account for the *supply side* of the fair market value equation: what a willing seller, under no obligation to sell, would accept." *Beaty v. Ford Motor Co.*, 2020 WL 639408, at *6 (Feb. 11, 2020) (internal quotations omitted, emphasis in original). The court observed that the plaintiffs' expert did "not purport to address Ford's willingness to sell vehicles in the 'but for' world," *id.* at *7, and that "a conjoint analysis that does not (and perhaps cannot) account for factors in a functioning marketplace other than consumers' willingness to pay is not competent evidence of the quantum of damages." *Id.* Based on the court's prior findings in

favor of the defendant, it declined to determine whether the plaintiffs' "conjoint analysis-based damages claim could survive summary judgment or class certification," but noted "that the better-reasoned cases reject the sort of damages calculations that [the plaintiff]s' expert proposes." *Id. See also In re Gen. Motors LLC Ignition Switch Litig.*, 407 F.Supp.3d 212, 239-241 (S.D.N.Y. 2019) (granting defendant's motion for summary judgment because plaintiffs' conjoint analysis failed to consider whether seller would have wanted to sell the same amount of cars at the price implied by the conjoint analysis) ("More fundamentally, those assumptions are inconsistent with the substantive law. . . .which defines market value to mean 'the price that a willing buyer would pay to a willing seller, neither being under compulsion to buy or sell.'").

Conclusion

Courts are increasingly skeptical of conjoint analysis that are divorced from market realities. When a plaintiff relies on a conjoint analysis as the basis for measuring class-wide damages, defendants should pay close attention to the ways in which the model does not account for the defendant's willingness to sell and other market factors that bear on the price for the product at issue. Depending on the extent of these flaws, courts may be willing to deny certification of a class (or decertify a class), and/or grant summary judgment in favor of the defendant.

* Associate Shireen Leung assisted in the drafting of this article.

Class Action Dominos: Eleventh Circuit Strikes Incentive Awards for Class Representatives

By Edward Soto, Pravin Patel, and Daniel Guernsey

In *Johnson v. NPAS Solutions, LLC*, the Eleventh Circuit Court of Appeals held in a split decision that, despite their omnipresence in class action settlements, Supreme Court precedent prohibits incentive awards for class representatives.

Charles Johnson, individually and on behalf of similarly situated individuals, filed suit against NPAS Solutions, LLC ("NPAS") for alleged violations of the Telephone Consumer Protection Act ("TCPA"). The TCPA prohibits the use of "automatic telephone dialing system[s]," to call an individual without his or her "express consent." 47 U.S.C. § 227. According to Mr. Johnson, NPAS allegedly used an automated dialing system to not only call Mr. Johnson's cell phone without his consent, but also numbers that once belonged to "consenting debtors" but were reassigned to "non-consenting persons." The TCPA provides statutory damages of $500 per violation, and allows treble damages for willful and knowing violations.

The Lower Court's Holding

In an attempt to settle with NPAS less than eight months after he filed suit, Mr. Johnson sought class certification for settlement purposes. The lower court certified the class, naming Mr. Johnson as class representative. It also preliminarily approved the settlement and set the deadline for class members to opt out of the settlement or object to the settlement. The settlement called for the roughly $1.4 million to be placed in a settlement fund after a deduction of 30% for class counsel's fees, $3,475.52 for class counsel's expenses, and a $6,000 incentive award for Mr. Johnson.

One putative class member, Jenna Dickenson, timely objected to the amount of the settlement as too low, the manner in which attorney's fees were calculated, and the incentive award. The lower court summarily overruled Ms. Dickenson's objections, and approved the settlement. The lower court issued a seven-page order describing the fairness of the settlement, stating that the settlement was "fair, reasonable, adequate, and in the best interests of the class members . . ." when considering the totality of several factors.

Ms. Dickenson appealed the lower court's order on several grounds, but relevant here was her challenge to the lower court's approval of the $6,000 incentive award to Mr. Johnson.

The Eleventh Circuit's Holding

Relying on two Supreme Court cases – *Trustees v. Greenough*, 105 U.S. 527 (1882) and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885) – the Eleventh Circuit reversed the lower court's approval of the $6,000 incentive award as improper.

In *Greenough*, a bondholder for the Florida Railroad Company sued the trustees thereof for wasting and destroying trust funds. The bondholder prevailed and a large amount of the trust was secured and saved. Because the bondholder bore the whole burden of the litigation, he sought to recover his expenses and services from the fund. The Supreme Court allowed the bond holder to recover expenses for "his reasonable costs, counsel fees, charges, and expenses incurred in the fair prosecution of the suit, and in reclaiming and rescuing the trust fund[,]" but held that he could not recover for his personal services and private expenses. Specifically, the bond holder was not allowed to recover his salary and money spent on hotels and railroad fares. The Supreme Court disapproved of

these expenses because allowing such expenses “would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors.”

In *Pettus*, the Supreme Court allowed class attorneys to recover their fees from a common fund which was created through their efforts. The Eleventh Circuit relied on *Pettus* as illustrative of the dichotomy highlighted in *Greenough* between fees for litigation expenses and fees for personal services and private expenses. While the former fees are properly awarded from a common fund, the latter are not.

In *Johnson*, the Eleventh Circuit found that modern day incentive awards can function as an award for a salary, a bounty, or both. While Mr. Johnson’s counsel argued that the incentive fee was for Mr. Johnson’s efforts in the case, including responding to discovery and keeping himself appraised of the matter, the Eleventh Circuit determined that these efforts amounted to a salary for time spent litigating the case (*i.e.*, an award for personal services under *Greenough*). The Eleventh Circuit also found that because incentive awards induce class representatives to participate in the suit, they can be viewed as bounties. According to the Eleventh Circuit, such a characteristic creates a pronounced risk that parties will intermeddle in the management of awards from a common fund, a key concern in *Greenough*. Ultimately, the Eleventh Circuit held that regardless of whether Mr. Johnson’s incentive award constituted a salary, a bounty, or both, Supreme Court precedent prohibited it.

Mr. Johnson’s attempts to distinguish *Greenough* and *Pettus* were unpersuasive. Mr. Johnson argued that both *Greenough* and *Pettus* pre-dated Federal Rule of Civil Procedure 23 and were therefore inapplicable. However, the Eleventh Circuit found that the logic of both cases was broadly applicable to the case and that Rule 23 makes no mention of incentive awards, making it irrelevant for determining the validity thereof.

The Eleventh Circuit then addressed Mr. Johnson’s appeal to ubiquity. The Eleventh Circuit noted that challenges to incentive awards were infrequent because they often affect the payout to each class member only minimally. For instance, by striking Mr. Johnson’s incentive award, each class member stood to receive an extra $0.63. In most cases, the cost of challenging the incentive award is not commensurate with the benefit. Despite this, the Eleventh Circuit made clear that it was “not at liberty to sanction a device or practice, however widespread, that is foreclosed by Supreme Court precedent.”

Conclusion

It is unclear what effect *Johnson* will have on class actions going forward. Indeed, finding a class representative may be a tougher task without an incentive award. The same reasons that underlie incentive awards for class representatives are the very reasons that render them improper according to the Eleventh Circuit. Accordingly, practitioners with cases in the Eleventh Circuit should be weary of placing incentive awards in a class action settlement. Even without objection, because class settlements have to be approved by a court, incentive awards may be challenged *sua sponte* in the wake of *Johnson*.

About Weil's Class Action Practice

Weil offers an integrated, cross-disciplinary class action defense group comprising lawyers with expertise across our top-rated practices and hailing from our eight offices across the U.S.

Whether our clients face a nationwide class action in one court or statewide class actions in courts across the country, we develop tailored litigation strategies based on our clients' near- and long-term business objectives, and guided by our ability to exert leverage at all phases of the case – especially at trial. Our principal focus is to navigate our clients to the earliest possible favorable resolution, saving them time and money, while minimizing risk and allowing them to focus on what truly matters—their businesses.

For more information on Weil's class action practice please visit our website.

Class Action Honors (cont.)

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***— Chambers USA*, 2020**

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Keeping a Transferee Judge for Trial in a Multidistrict Litigation

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A Practice Note setting out the ways in which multidistrict litigation (MDL) litigants can keep the transferee judge after the conclusion of pretrial proceedings, despite the limitations of the Multidistrict Litigation Act of 1968.

Where there are multiple civil actions involving one or more common questions of fact that are pending in different federal district courts, the Judicial Panel on Multidistrict Litigation (JPML) can transfer those actions to a single district court for coordinated or consolidated pretrial proceedings (Multidistrict Litigation Act of 1968 (28 U.S.C. § 1407(a))). In large-scale, multi-party, and time-intensive cases, this helps to administer discovery and pretrial rulings more efficiently than if each case progresses through the various federal district courts separately.

However, the cases are temporarily centralized in a transferee court until, at the latest, the conclusion of final pre-trial proceedings. At that time, the transferee court must remand them back to their original transferor courts for trial. (28 U.S.C. § 1407(a).)

This Note examines the various procedural options counsel may pursue to attempt to avoid the statutorily mandated transfer and keep their transferee judge for trial.

For more information on the multidistrict litigation (MDL) process generally, see Practice Note, Product Liability Multidistrict Litigation.

Reasons to Keep the Transferee Judge

Parties may want to retain the same judge handling the pretrial proceedings for multiple reasons.

The transferee judge has an understanding of the facts of the case. Keeping the transferee judge for trial may make the trial more efficient and eliminate the need for the transferor judge to acquaint themselves with those same facts. (See *Cline v. Mentor Worldwide LLC*, Case No. 4:10-cv-5060-CDL, ECF No. 83 (M.D. Ga. Feb. 25, 2014).)

The transferee judge already has familiarity with the parties and their attorneys and vice versa. This can be particularly beneficial in complex cases with numerous parties and also can be strategically advantageous for counsel who, during the discovery process, have gained insight into the judge's preferences, views on the merits of the case, and how the judge may rule on certain issues.

Keeping the same judge can also minimize the delay and expense that is necessitated by transferring the case back to the transferor court (see *In re Mentor Corp. Obtape Transobturator Sling Prod. Liab. Litig.*, 2014 WL 715579, at *2 (M.D. Ga. Feb. 24, 2014)).

Methods to Keep a Transferee Judge

A transferee judge may not self-transfer a proceeding to themselves due to the plain language of § 1407(a) mandating that the JPML remand the case for trial (*Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998)). Therefore, a party wishing to keep the transferee judge for trial must use mechanisms that do not violate the plain terms of § 1407(a).

The limited ways to do this include:

- Waiving *Lexecon* rights (see Waive Lexecon Rights).
- Refiling the action or filing an amended complaint in the transferee court (see Refile the Action in the Transferee Court or File an Amended Complaint).
- Requesting that the transferee judge support a transfer from the transferor court back to the transferee court (Request that the Transferee Judge Suggest that the Transferor Court Transfer the Case Back to the Transferee Court).

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- Seeking an intercircuit assignment for the transferee judge (see Seek an Intercircuit Assignment for the Transferee Judge).

Waive *Lexecon* Rights

A party's right to have its trial in the transferor court, under § 1407 and *Lexecon*, is a venue issue, as opposed to a jurisdictional limitation, and one that the party can waive (see *In re Carbon Dioxide Indus. Antitrust Litig.*, 229 F.3d 1321, 1325-26 (11th Cir. 2000) (quoting *Lexecon*, 523 U.S. at 42)).

Timing

Unless a party is considering participating in a bellwether trial (see Other Considerations), a party wishing to waive its *Lexecon* rights should do so closer to a potential trial. By waiting, the party can gain a rapport with the transferee court and gauge whether it is in that party's best interest to stay with the transferee judge for trial. Waiver is completely within the party's control. Absent objections by the other parties, there is no disadvantage to waiting.

Required Steps

The precise mechanism by which a party waives its *Lexecon* rights can vary. However, no matter what mechanism a party uses to waive its rights, to properly do so it must:

- Ensure the transferee court has subject matter jurisdiction over the claim. If the transferee court does not have subject matter jurisdiction, a *Lexecon* waiver is not possible because jurisdiction does not extend past pretrial proceedings under § 1407.
- Ensure the transferee court has personal jurisdiction over the other party in the case.
- Clairify to the transferee court exactly what *Lexecon* rights the party is waiving (see Clear and Unambiguous Waiver).

Mechanisms to Effect Waiver

Mechanisms that parties have used to waive their *Lexecon* rights include:

- Submissions to the court for pretrial orders.
- Case management orders.
- Representations made during a pretrial hearing.
- Emails to the court.

(See *In re Carbon*, 229 F.3d at 1325-26; *In re Depuy Orthopaedics*, 870 F.3d 345 (5th Cir. 2017).)

One advisable approach is for a party to file a letter with the transferee court expressly setting out its *Lexecon* waiver (see Clear and Unambiguous Waiver).

Clear and Unambiguous Waiver

A party's waiver of its *Lexecon* rights must be clear and unambiguous (*In re Depuy,* 870 F.3d at 351). This means that the party must expressly state exactly what it is and is not waiving. For example, if a party wishes to waive its *Lexecon* rights only for specific bellwether trials (see Other Considerations), it must make that clear. Likewise, if a party wishes for the *Lexecon* waiver to cover all potential trials, it must make that expressly clear (see, for example, *In re Depuy*, 870 F.3d at 352 (holding that the MDL court had reached a "patently erroneous" result by applying the waiver to all potential trials where the party had waived its *Lexecon* rights only for certain bellwether trials)).

On the other hand, if a party does not wish to waive its *Lexecon* rights, it must take care not to make any assertion that a transferee court may interpret as a waiver. Doing so may eliminate that party's ability to exercise its right to return to the transferor forum (see, for example, *In re Carbon*, 229 F.3d at 1326-27 (holding that a party that failed to raise the issue of remand and stipulated to trial in the transferee court was precluded from seeking remand to the transferor court)).

Other Considerations

A party can also use a *Lexecon* waiver to effectuate participation in a bellwether trial in the MDL. A bellwether trial is a case that either the parties or the court has selected as being exemplary of the parties' respective claims and defenses. The purpose of a bellwether trial is to inform the parties on likely outcomes of future trials on these claims and issues and encourage settlement of the other cases (see Country Q&A, Product liability and safety in the United States: overview: Class actions/representative proceedings). If the goal for a party is to have the transferee judge preside over trial, a party can ask that its case be considered as one of the bellwether cases.

If a party is considering participating in a bellwether trial, then it must waive its *Lexecon* rights earlier rather than later. If the party waits, it may miss the opportunity to participate in the bellwether selection pool and case-specific discovery.

Counsel should note that transferee courts considering bellwether trials may require parties to affirmatively maintain their *Lexecon* objections (*In re Chantrix*

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(Varenicline) Prods. Liab. Litig., MDL No. 2092, ECF No. 206 at 4-5 (N.D. Ala. Mar. 10, 2011)).

Refile the Action in the Transferee Court or File an Amended Complaint

If the plaintiff wishes to keep the action in the transferee court for trial, another option is to either:

- Voluntarily dismiss the action in the transferor court and refile it in the transferee court (see, for example, *In re Conagra Peanut Butter Prod. Liab. Litig.*, 251 F.R.D. 689, 695 (N.D. Ga. 2008); see also *Scherer v. Eli Lilly*, No. 4:14-CV-01484-AGF, ECF No. 26 (E.D. Mo. Mar. 17, 2015) (providing an example in an "informal MDL," which is not a formally approved MDL by the JPML, but rather an informal coordination amongst parties with many similar actions)). This may be a risky option because at this point in the litigation, the statute of limitations on the claims are likely to have run (see Required Steps).
- File an amended complaint asserting venue in the transferee court which may require an agreement from the opposing party or leave from the court (see Required Steps).

In doing either, the case continues to be part of the MDL and there is no transferor court to return to as the original jurisdiction of the case then falls to the transferee judge.

Timing

A plaintiff should act quickly to avoid any statutes of limitations issues. Soon after the transfer, the plaintiff should either voluntarily dismiss its action and refile in the transferee court or file an amended complaint asserting venue in the transferee court.

Required Steps

Before seeking to refile the action or file an amended complaint in the transferee court, the plaintiff should:

- Ensure that the transferee court has subject matter jurisdiction over the claim and personal jurisdiction over the parties in the action.
- Ensure that venue is proper within the transferee district or obtain a waiver of venue objections from the defendant.
- Obtain any required consents from the defendants or the court, if necessary, such as if the statute of limitations has run, or if amending the complaint more than 21 days after serving it (FRCP 15(a)(2)).

If refiling the complaint, the plaintiff should also:

- Move to voluntarily dismiss the original complaint in the transferor court without prejudice.
- Refile the complaint in the transferee court.

Other Considerations

Counsel should be aware that it is possible the transferor court may not grant the voluntary dismissal.

Also, once the action is refiled in the transferee district, it may not be assigned to the transferee judge. However, as a practical matter, it is likely that the case can be assigned to the MDL judge already dealing with similar cases.

Request that the Transferee Judge Suggest that the Transferor Court Transfer the Case Back to the Transferee Court

Another option is for the transferee judge to remand the case back to the original transfer court which, in turn, transfers it back to the transferee court under 28 U.S.C. § 1404. This circular mechanism is necessary because the transferee court is not permitted to transfer the case to itself for trial. (See *Lexecon*, 523 U.S. at 40.)

To aid the transferor court in its determination to transfer the case back to the transferee court, transferee judges typically provide support for the notion that the case should be transferred back to transferee court in their suggestion of remand orders (see *Kenwin Shops, Inc. v. Bank of La.*, 1999 WL 294800, at *1 (S.D.N.Y. May 11, 1999)).

Timing

This option occurs right after the case is remanded to the transferee court. However, if a party believes that a transferee judge is amenable to keeping the case for trial, it may provide some form of communication to the judge to indicate that it supports that application before remand.

Required Steps

To effectuate a transfer back to the transferee court, a party must:

- Ensure the transferee court has both subject matter jurisdiction over the claims and personal jurisdiction over the parties in the action (see *Kenwin Shops*, 1999 WL 294800, at *2-*3).
- File a motion to remand the action back to the transferor court. The party may provide support for having the case tried in the transferee court by either:

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- advising the transferee court by letter that it supports a transfer back to the transferee court for trial before making the motion; or
- stating its support for a trial in the transferee court in its actual motion. If the party chooses this option it may also provide language for the transferee judge to use in an accompanying proposed remand order and attach the proposed order to its motion.

If the transferee judge is willing, in their suggestion of remand order, they set out their support for a transfer of the case back to the transferee court following remand.

- Move to transfer the action back to the transferee court under § 1404 once remanded.

Other Considerations

When deciding whether to opt for this alternative, there are several factors counsel should consider.

A party may need to brief not one, but two motions, the original remand motion and then the transfer motion.

This route may however take a substantial amount of time. If the other party objects, a full set of briefing is required for the remand motion, then potentially oral argument in front of the JPML, and then a full set of briefing in front of the transferor court to have the action transferred back to the transferee court. This process can take months. If one believes that the opposing party may object, then a potentially better, though difficult, option is to have the transferee judge sit by intercircuit assignment in the transferor court (see Seek an Intercircuit Assignment for the Transferee Judge).

If the action in the MDL is a federal question case, then the law of the transferee circuit, not the transferor circuit, also most likely applies following transfer (see, for example, *AER Advisors, Inc. v. Fidelity Brokerage Servs., LLC*, 921 F.3d 282, 288 (1st Cir. 2019) (quoting *In re Korean Airlines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1175 (D.C. Cir. 1987))). As a result, if the law of the transferor circuit is favorable, a party may wish to forego this option. This consideration should be kept in mind for all options set out in this Note (Waive Lexecon Rights and Refile the Action in the Transferee Court or File an Amended Complaint), except when seeking an intercircuit assignment (see Seek an Intercircuit Assignment for the Transferee Judge).

Seek an Intercircuit Assignment for the Transferee Judge

A rarely chosen option, but still a possible one, is for the transferee judge to seek an intercircuit assignment under 28 U.S.C. § 292(d). This avenue allows a litigant to keep their transferee judge while also keeping the law of the district in which the case was originally filed.

The Chief Justice of the Supreme Court may assign a judge to another district if provided a certificate of necessity by the chief judge of the circuit where service is needed (28 U.S.C. § 292(d)). At least one circuit has suggested that this necessity is a rarity and is done only during a "severe or unexpected over-burdening" (*In re Motor Fuel Temperature Sales Practices Litig.*, 711 F.3d 1050, 1053 (9th Cir. 2013)).

Timing

A party hoping to keep its transferee judge through an intercircuit assignment should communicate this preference to the transferee judge at the end of coordinated pretrial proceedings as there is no need to do so any earlier. Just like seeking to be transferred back to the transferee court after remand, doing so later in the proceedings also allows a party to assess its rapport with the transferee judge.

Required Steps

Unlike the other options set out above, the transferee judge must initiate and complete the steps to this process. However, the litigants can alert the transferee judge that the parties may be interested in keeping the transferee judge for trial and help further the assignment, if the judge so requested. A party can do this by filing a letter expressing its interest and outlining the steps required for the transferee judge to obtain an intercircuit assignment (see *Sanofi Letter re Notice Seeking Intercircuit Assignment, In re EpiPen Mktg., Sales Practices, & Antitrust Litig.*, ECF No. 2117, 2:17-md-2785 (D. Kan. June 25, 2020) (outlining the process for the Honorable Daniel D. Crabtree to request an intercircuit assignment under § 292(d) to the District of New Jersey)). Just like asking the transferee judge to request that the transferor court transfer the case back to it following remand (see Other Considerations), a party may also provide its support for the intercircuit assignment in its motion for suggestion of remand and by providing language for the judge to use in an accompanying proposed order attached to the motion.

Keeping these facts in mind, to obtain an intercircuit assignment for a transferee judge, the transferee judge must:

- Obtain formal approval from:
  - the Circuit Chief Judge of the transferor court who must request the transfer and provide the Chief

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  Justice of the United States with a Certificate of Necessity;
  - the transferee Circuit Chief Judge permitting the transfer;
  - the Chairman of the Judicial Conference Committee on Inter-Circuit Assignments; and
  - the Chief Justice of the United States.
- File a suggestion of remand requesting the intercircuit assignment.

(See *Jowers v. Airgas-Gulf States, Inc.*, No. 1:07-wf-17010-KMO, ECF No. 136 at 4 (N.D. Ohio Nov. 8, 2007); see also *Sanofi Letter re Notice Seeking Intercircuit Assignment, In re: EpiPen Mktg., Sales Practices, & Antitrust Litig.*, ECF No. 2117, 2:17-md-2785 (D. Kan. June 25, 2020) (outlining the process for The Honorable Daniel D. Crabtree to request an intercircuit assignment under § 292(d) to the District of New Jersey).)

In *Jowers*, the transferee judge obtained all required formal approvals and also sought intercircuit assignment in the judge's suggestion of remand to the JPML. The transferee judge then presided over trial in the transferor court. (*Jowers v. BOC Grp. Inc.*, 608 F. Supp. 2d 724, 729 n.2 (S.D. Miss. 2009); see also *In re Mentor Corp. Obtape Transobturator Sling Prod. Liab. Litig.*, 2014 WL 715579, at *2 (M.D. Ga. Feb. 24, 2014) (noting in the court's suggestion of remand that the transferee judge would "seek an inter-circuit assignment with the understanding that [the transferee judge] would preside over the trial of th[e] matter in the [transferor court]").)

Other Considerations

Not all courts agree that an intercircuit assignment is an appropriate method to keep a transferee judge for trial. In fact, despite recognizing that judicial efficiency may be served by having a transferee judge sit by designation in the transferor court, one judge still refused to sign a certificate of necessity because necessity, as defined by the Guidelines for Intercircuit Assignment of Article III Judges, is narrow and not met in these circumstances. (*In re Motor Fuel Temperature Sales Practices Litig.*, 711 F.3d at 1053-55.) As noted above, this mechanism also requires consent from many judges and refusal by any one of those judges is then fatal.

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