Seventh Circuit Delivers Potential Circuit Split on MDL Procedure

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We have offered multiple (83 posts and counting)on Multi-District Litigation. Some of those posts might seem at odds with each other. But as Emerson said, "A foolish consistency is the hobgoblin of small minds." As Whitman said, "Do I contradict myself? Very well then, I contradict myself. I am vast; I contain multitudes." And Charles Barkley, after all, once claimed he had been misquoted in his autobiography. The problem with taking any sort of position on MDL procedure is that you never know which side of the issue you might occupy.

The theory behind Multi-District Litigation is that consolidation of pretrial proceedings should produce efficiency. Who's against efficiency? You'd be surprised. (Or maybe you wouldn't.) If an MDL really resulted in streamlined litigation that is less expensive, without any alteration in substantive rights and outcomes, one would be hard-pressed to squawk. But MDLs can change things in substantive ways. First, creating an MDL inevitably inspires plaintiff lawyers to file boatloads of iffy cases, with the idea of docking them in the MDL for the duration and eventually racking up additional settlements and attorney fees. Second, an MDL puts you in front of a different judge -- the transferee judge. That, friends, can make all the difference in the world. In all likelihood, one side will be much happier with the transferee judge, and the other side will pine for remand just to get away from the transferee judge.

This scenario showed up in the recent case of *FedEx Ground Package System, Inc. v. United States Judicial Panel on Multidistrict Litigation*, No. 11-2438 (7th Cir. Nov. 17, 2011). It's not a product liability case, but it addresses an interesting wrinkle of MDL procedure. FedEx delivery drivers filed class actions against FedEx, alleging that FedEx had inappropriately treated them as independent contractors rather than employees. The Joint Panel on Multi-District Litigation (the JPML -- the defendant in the Seventh Circuit case) sent the cases to a veteran district court judge in South Bend, Indiana. That judge issued a summary judgment in FedEx's favor, ruling that the drivers were, indeed, independent contractors. That ruling resolved all claims in 22 cases, teeing them up for appeal to the Seventh Circuit. But there were 12 other cases with some surviving claims. What would happen to them? The transferee district judge decided to remand those cases to the transferor districts, which would deal with the other claims. Any appeals, including appeals of the ruling by the transferee judge, would be appealed to the circuit court for that transferor court. That would, of course, open the prospect of inconsistent

rulings on the contractor-employee issue.

Not surprisingly, FedEx was happy with the transferee court's substantive ruling as to how to characterize the drivers' status. For all we know, FedEx might've also been happy staying in the Seventh Circuit. So FedEx asked the transferee court to issue Rule 54(b) partial final judgments in the 12 cases, and all the cases would go up to the Seventh Circuit. Following FedEx's approach would ensure that the same appellate issues would go to the same court. Makes sense. But the transferee court decided that consolidated proceedings were over, and ordered remand of the cases to the transferor courts. Following the transferee court's remand approach would ensure "that all issues in the same case, involving the same parties and the same facts, will be appealed at once, and to the same circuit." Slip op. at 4. Arguably, that might also make sense.

The JPML thought it was a close issue, but gave great weight to the district court's remand recommendation: "In most instances the transferee judge has an acute sense about the procedural steps necessary to advance the litigation in the fairest and most efficient way." *Id*. at 5. Did FedEx take those rulings lying down? It did not. Instead, FedEx filed a petition for mandamus with the Seventh Circuit, seeking to overturn the JPML decision and to prevent what FedEx saw as a premature remand.

The Seventh Circuit, like the MDL panel, saw the issue as a close one, and concluded that the choice between the two methods was "best left to the transferee court and JPML, without trying to impose a rigid rule for all cases and circumstyances." *Id*. at 6. Given the tough standard for a mandamus petition, the JPML's ruling would stand.

That sort of case-by-case, defer-to-the-district-court ruling doesn't provide a lot of certainty for future litigants. It is also in tension with *In re Food Lion, Inc., Fair Labor Standards Act "Effective Scheduling" Litig*., 73 F.3d 528 (4th Cir. 1996). In that case, the Fourth Circuit issued a writ of mandamus to the JPML to undo its orders transferring cases back to their original transferor courts to ensure that all related appeals would go to the Fourth Circuit itself. So we have a circuit split, right?

The Seventh Circuit didn't think so. The Seventh Circuit did not understand the Fourth Circuit's *Red Lion* opinion to announce "a sweeping holding that all MDL cases must be managed to

ensure that all related appeals go to only the circuit with jurisdiction over the transferee court." Slip op. at 7. Moreover, the claims in Red Lion arose under federal law, so uniformity was a key consideration. By contrast, the *FedEx* plaintiffs asserted "rights under the laws of many different states." *Id*.

Normally, we expect that circuit splits draw the attention of the Supreme Court of the United States. But maybe the Seventh Circuit's purported distinction will permit the SCOTUS to avoid the issue -- and, given the seeming desire of the SCOTUS to whittle its docket down to 19th Century levels, maybe that is exactly what will happen. In addition, it's not as if the issue inspires huge excitement or comes up all that often. After all, *Red Lion* came down 15 years ago.

AS we said up top, we cannot take a position on this issue, because we could conceivably end up on either side of it. The prospect of dueling *Daubert* decisions in an MDL is not particularly palatable, and we foresee the usual plaintiff forum-shopping, but we've dealt with worse. And maybe we'll want to tease a remand out of a hostile judge. Believe it or not, opposing lawyers have sometimes seen fit to takes our blog posts and try to wedge them down our gullet and argue that we're being inconsistent. One would almost think they'd never read Emerson, Whitman, or Barkley.