QFJC-1969a

# MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION



May 19, 1969

Bulletin No. 1

TO ALL JUDGES CONCERNED WITH COMPLEX AND MULTIDISTRICT LITIGATION

Mr. Justice Tom C. Clark, Director of the Federal Judicial Center, has appointed the following judges to serve as a Board of Editors responsible for the initial revision, publication and future maintence of the *Manual for Complex and Multidistrict Litigation:*

Judge Thomas J. Clary, Chairman
Eastern District of Pennsylvania

Judge George H. Boldt
Western District of Washington

Chief Judge Joe Ewing Estes
Northern District of Texas

Judge Edwin A. Robson
Northern District of Illinois

Chief Judge William H. Becker
Western District of Missouri

Judge Hubert L. Will
Northern District of Illinois

The Board met in January with a number of publishers of legal materials to obtain their views as to the best method for publishing and distributing the *Manual*. This discussion was supplemented by informal proposals submitted by various commercial publishers and by the Government Printing Office. After careful consideration the Board decided to release the *Manual* simultaneously and without restriction to all publishers who expressed an interest in it. There will be no *official publication* of the *Manual* although any publisher who reproduces it as released and without editorial comment may refer to it as a *complete and unabridged edition.*

We expect that the *Manual* will be published commercially in a number of different forms. It may be published as a hard bound volume with pocket part supplements. It is sure to be included in one or more existing treatises or services. It is expected to be also published as a single volume loose-leaf service.

The Board of Editors believes that the *Manual* will be most useful to the Bench and Bar if published in a loose-leaf form so that supplementary material can be easily inserted and obsolete material readily discarded. For this reason the Board strongly urges that all judges obtain copies of the *Manual for Complex and Multidistrict Litigation* from one of the five publishers who have agreed to publish the *Manual* as a seperate loose-leaf volume and to supplement it with materials periodically released by the Board of Editors. The publishers are:

Aspen Systems Corporation
The Webster Hall
Pittsburgh, Pennsylvania 15213

The Bureau of National Affairs, Inc.
1231 25th St. N.W.
Washington D.C.

Clark Boardman Company, Ltd.
435 Hudson Avenue
New York, New York 10014

Commerce Clearing House
4025 W. Peterson Avenue
Chicago, Illinois

Matthew Bender Company
235 East 45th Street
New York, New York

The *Manual* is presently undergoing its final revision and should be released to the publishers on June 4, 1969. It is expected that the *Manual* will be available for delivery by August 1, 1969. The Board suggests that you contact the publishers listed above to determine when they expect to have the *Manual* available for distribution.

In addition to the periodic supplements and replacements for the *Manual* which will be distributed by the publishers to their subscribers, the Board of Editors plans to prepare and furnish to all interested judges frequent bulletins containing summaries of recent opinions and orders concerning problems which are known to occur in complex and multidistrict litigation. The Board would appreciate receiving copies of opinions, orders or suggestions relating to the processing of complex litigation so that they can be included in a bulletin and, if appropriate, later included in a revision to the *Manual*. These materials should be sent to the undersigned in care of the Judicial Panel on Multidistrict Litigation, Washington D.C. 20544

This first bulletin is being sent to all federal judges. If you would like to continue to receive these bulletins, please complete the enclosed card and return it to me. Thank you.

Very truly yours,

John T. McDermott
Executive Editor.

Enclosure

# MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION



June 18, 1969

BULLETIN NO. 2

TO ALL FEDERAL JUDGES CONCERNED WITH COMPLEX AND MULTIDISTRICT LITIGATION

The current edition of the *Manual for Complex and Multidistrict Litigation* was released to all interested publishers on Wednesday morning, June 4, 1969. The names and addresses of the five publishers who originally agreed to publish the *Manual* in a *complete and unabridged* loose-leaf form and to supplement it periodically with materials prepared and released by the Board of Editors were furnished you in our initial bulletin. Two of them, Bureau of National Affairs and Commerce Clearing House, have recently advised the Board of Editors that they will not publish the *Manual* as originally planned although C.C.H. will distribute the *Manual* in pamphlet form to subscribers of *Aviation Law Reports* and *Federal Trade Commission Reports*.

The following still plan to publish the *Manual* in a *complete and unabridged* loose-leaf form:

Aspens Systems Corporation
The Webster Hall
Pittsburgh, Pennsylvania 15213

Clark Boardman Company, Ltd.
435 Hudson Avenue
New York, New York 10014

Matthew Bender Company
235 East 45th Street
New York, New York

We have also been advised that a *complete and unabridged* copy of the *Manual* would be made available without additional charge to subscribers of *Moore's Federal Practice* (Matthew Bender).

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We are gratified that over two hundred federal judges have indicated that they wish to continue to receive the bulletins of the Board of Editors. This bulletin, like the first bulletin, is being distributed to all federal judges in order that all will be fully aware of the availability of the *Manual*.

Very truly yours,

John T. McDermott
Executive Editor

# MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION



July 11, 1969

Bulletin No. 3

TO ALL JUDGES CONCERNED WITH COMPLEX AND MULTIDISTRICT LITIGATION

The following opinions and orders have recently come to the attention of the Board of Editors. They all appear to relate to situations which can occur in complex and multidistrict litigation. The inclusion or exclusion of a particular opinion or order in a Bulletin does not necessarily imply that the members of the Board of Editors approve or disapprove of the procedures used or results reached in the particular case.

## A. JURISDICTION - VENUE - SERVICE

### Appealibility - Government Antitrust - Expediting Act

Appeal from an interlocutory order in a government action brought under Section 7 of the Clayton Act. After a hearing, the District Court denied Cities Services' motion for approval of a sale of one of the acquired properties and the defendant appealed.

The Court of Appeals was initially faced with the question of whether it had jurisdiction over *interlocutory appeals* in civil antitrust actions brought by government. *All parties* agreed that the court had jurisdiction but after making its independent examination, the court concluded that the *Expediting Act* precluded courts of appeal from reviewing interlocutory orders in government civil antitrust actions. The appeal was therefore dismissed. *United States v. Cities Service Company* (First Circuit, May 8, 1969)(Judge Coffin)

But *Cf. United States v. United Fruit, infra* p. 4

### Appealibility - Discovery Orders - Third Party Witnesses

Appeal from a discovery order compelling the disclosure of business records by a non-party witness. The court observed that

appeals from orders compelling or denying discovery are generally not final "because such orders bespeak their own interlocutory character." However the appellant urged that because of its *non-party status* the order requiring it to disclose business information was collateral to the litigation and therefore appealable under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)

The Court of Appeals held that the *Cohen Rule* was readily distinguishable and followed U.S. v. Fried, 386 F 2d. 691 (2 Cir. 1967) which held that an appeal by a non-party witness from an order requiring his presence for testimony was non-final and non-appealable. The court emphasized that the district court had entered a protective order. The appeal was dismissed for lack of jurisdiction. *Borden Company v. Sulk* (Third Circuit, May 13, 1969)(Judge Aldisert)

Service of Process - Blurred Corporate Defendants Transacting Business

This is a civil treble damage antitrust action brought against eight individual and 13 corporate defendants who are involved in the distribution of dairy products. This matter was before the court on a motion of all but the two Pennsylvania defendants to quash service of process and dismiss the action against them for lack of jurisdiction and venue.

Service on the individual defendants was made by leaving a copy of the complaint with the statutory agent of one of the Pennsylvania corporate defendants. Service was made on the 13 corporate defendants pursuant to §12 of the Clayton Act by serving a copy of the complaint at the registered office of each of the corporate defendants. As to the individual defendants the question was whether the statutory agent of the Pennsylvania corporate defendant was their agent under 15 U.S.C. §15 and Rule 1000(9)(2)(iii) of the Pennsylvania Rules of Civil Procedure. As to the remaining corporate defendants, jurisdiction and venue depended on whether they are "transacting business" within Pennsylvania through the Pennsylvania corporation.

The court overruled both motions to dismiss holding that (1) because of the disregard for corporate entities and the control which the individual defendants exercised over the local defendant, they were transacting business in Pennsylvania through the local defendant so that the agent of that defendant came within the meaning of "agent" in §14; and (2) that the nonresident corporate defendants, as a part of one overall operation with blurred individual corporate identities, are all transacting business in Pennsylvania through the Pennsylvania corporate defendant. *Country Maid, Inc. v. Vasilios Haseotes et al.*, (ED Pa., April 29, 1969) (Judge Body.

Venue - Patent

On April 2, 1968 General Foods filed an action in the Northern District of Illinois charging Carnation with infringing its patent

for *Gravy Train* dog food. On June 7, 1968 Carnation brought a declaratory judgment action in the Central District of California involving identical parties and identical issues. Carnation then filed a motion to dismiss the Illinois action for lack of venue and/or to transfer the case to the Central District of California under §1404(a) or §1406(a). General Foods then moved the court to enjoin Carnation from proceeding with the California action. The district court denied the motion to dismiss and the motion to transfer and granted General Foods motion to enjoin Carnation from proceeding in the California action. The Court of Appeals affirmed.

Carnation contended that the product method claim (claim 12) could only be infringed where the product was manufactured. The court did not agree that because the method by which the product was produced was practiced in another jurisdiction that the jurisdiction in which it was sold (Northern District of Illinois) lacked venue. The court further found no abuse of discretion in the denial of the motion to transfer under §1404(a) or the granting of injunction as to the California action. *General Foods v. Carnation Company* (Seventh Circuit, June 11, 1969) (Judge Major) But *Cf. Canadian Filters v. Lear Siegler, Inc., infra p.*

B. JUDICIAL MANAGEMENT

Transfer - §1404(a) - Review by Mandamus

Appeal from an order denying a motion under §1404(a) to transfer a diversity action from the Central District of California to the District of Nevada for the convenience of the plaintiffs. The Court of Appeals treated the appeal as a petition for a writ of mandamus since "a judicial rejection of a 1404(a) motion is an interlocutory order not appealable as a final judgment." The court then denied the petition for writ of mandamus finding that the"equities in this case, as revealed by the record, are so decisively against removal . . . (that) transfer at this state would not serve the interest of justice." *Kasey v. Molybenum Corporation*, 408 F. 2d 16 (Ninth Circuit, Feb. 20, 1969) (Judge Barnes)

Class Actions - Multidistrict Litigation

More than 40 separate antitrust actions were transferred to the Northern District of Illinois under 28 U.S.C. Section 1407. Under Rule 23(b)(3) the Attorneys General for several states claimed to represent the public library, school districts and Boards of Education in their respective jurisdictions. The School District and the City of Philadelphia also purported to represent a class composed of the 1324 of the largest public libraries and school districts in the nation.

After reviewing several requests for the establishment of class actions, the court found that the four prerequisites of Rule 23(a) were met, that questions of law and fact common to the members of the class predominate over questions effecting any

individual members, and that a class action is superior to other available proceedings.

As to the *common question issue* the court found that "besides the overriding conspiracy question, each class member stands in an identical position with respect to the following issues: (1) whether prices were actually inflated, (2) whether the higher prices resulted from the illegal agreements, (3) whether defendants fraudulently concealed the conspiracies, thus tolling the statute of limitations, and (4) whether library books are 'unique' products." The court further held that the superiority of class actions was demonstrated by the following facts: (1) many plaintiffs only purchased small quantities of these books and financial considerations would not justify the expense of individual antitrust actions, (2) all class members have had ample opportunity to commence their own litigation due to the widespread notice given the pending cases, (3) allowence of class actions will preclude further intervention and joinder which would be inimicable to economical adjudication, (4) the benefits accruing to such consolidated actions will more than outweigh the administrative chores associated with a class action and (5) the class actions will provide the publishers and wholesalers an opportunity to receive a fair hearing on their defense.

The court then established the national class action to include all public school systems with an enrollment of 12,000 or more students and all states and municipal agencies with libraries having book funds in excess of $10,000. Statewide class actions are also permitted for those states, cities and school districts requesting them. Any overlaps will be included in the statewide rather than the national class unless the overlapping members request inclusion in the national class. *State of Illinois v. Harper & Row Publishers, et al.* (ND, Ill. April 25, 1969) (Judge Decker)

Nearly 100 treble damage antitrust actions involving broad spectrum antibiotics have been filed in the Southern District of New York or transferred to that court by the Judicial Panel on Multidistrict Litigation. The defendants have proposed a settlement premised upon the establishment of class actions embracing the claims of all persons and entities described in the settlement offer with allocation of the $100,000,000 settlement fund among these classes as well as among the members of each class.

Following notice and hearing the court concluded that all criteria for the establishment of (b) (3) classes were met. A temporary national class was established on behalf of all 50 states to include claims by states and other political subdivisions arising from their purchases as well as claims by individual consumers within the states, such claims being asserted by the states as *parens patriae*. Each state may exclude itself from the settlement program or from the temporary national class. Each action commenced by an accepting state will be maintained as a state-wide class action on behalf of the state and its political subdivisions and the individual members of the consuming public within the state. Any city or county governmental entity which elects to do so may represent itself and members of the consuming public within the territorial limits of such city or county.

The court also consolidated several independent wholesaler-retailer class actions for administration of the settlement program. *State of West Virginia v. Charles Pfizer & Co., et al.* (SD New York, May 26, 1969) (Judge Wyatt)

Protective Orders - Divestiture Plans

The appeal challenges the district court's authority to enter and enforce a protective order prohibiting disclosure of divestiture plans filed in compliance with a consent judgment in an antitrust case. The consent judgment provided *inter alia* that United Fruit was to create from its own assets a new competitive banana company United Fruit was required to submit detailed plans for compliance but this information was covered by a protective order designed to prevent other competitors from obtaining this information. One of the competitors filed a motion with the court requesting permission to inspect and copy the plans and progress reports submitted by United Fruit.

The Court of Appeals first held that this appeal was not governed by the *Expediting Act* and second that since the motion was of an ancillary nature the order was sufficiently final to create appelate jurisdiction. The Court of Appeals went on to hold that "the district court unquestionably had authority to enter an order prohibiting revelation of the confidential information filed in this case" and affirmed its judgment. *United States v. United Fruit Company* (Fifth Circuit, April 25, 1969) (Judge Fisher)

Comity - Foreign Jurisdiction - Injunction Against Other Proceedings

In September 1968, Canadian Filters filed an action in the District of Massachusetts against Lear Siegler for a declaration that Lear's U.S. patent was invalid and was not being infringed by Canadian operations. Three weeks later Lear sued Canadian Filters in a Canadian court for infringement of its Canadian patent. On motion of Canadian Filters the district court enjoined the parties from proceeding further in the Canadian action. Lear appealed from the injunction.

The Court of Appeals held that this was an improper departure from the principles of comity and suggested that Canadian Filters, rather than attempting to strong arm the Canadian Court through the use of a United States injunction, should have asked that court to postpone its proceedings until the United States court had taken action. The court recognized that there were times when comity "must give way, for example when the forum seeks to enforce its own substantial interests or when relitigation would cover exactly the same points, as for example when both suits are in rem, and the burden of a second suit thus renders reliance on res judicata alone inappropriate." The court held that these exceptions did not apply here as the actions were based on independent rights, one on a U.S. patent and the other on a Canadian patent. *Canadian Filters v. Lear Siegler, Inc.* (First Circuit, June 9, 1969) (Judge Aldridge)

Attorney Fees - Costs - Antitrust

Following a jury verdict for the plaintiff in the sum of $109,100 (single damages) in a Section 2 Sherman Antitrust Action, the plaintiffs requested the judgement be ammended to include "the cost of suit, including a reasonable attorney's fee" in the sum of $109,100.

After reviewing the criteria for establishing the fair value for attorney's fees, the court concluded that $85,000 would be *reasonable* under the circumstances. It had been disclosed during argument on this motion that the plaintiffs had agreed to pay counsel one third of the trebled award *in addition* to reasonable attorney fees awarded by the court. It was the court's opinion that Congress intended "that a claimant's treble damage recovery should not be substantially diminished by the necessity of paying the fees of his attorneys out of his recovery." The court declined "to be a participant in such a substantial misuse of the statute" and held that in view of the fee arrangement between the plaintiff and its attorneys *no additional attorney fees would be allowed.* The plaintiffs also claimed "cost of suit" including such things as telephone charges, travel expenses and expenses paid to expert witnesses. Citing numerous authorities the court held that the only cost recoverable by the plaintiff would be those taxable by the clerk subject to review under 28 U.S.C. §1920. (See also *Peck-Taxation of Costs,* 37 F.R.D. 481)

Appended to Judge Gignoux's opinion is a table of attorney's fees awarded in approximately 25 treble damage actions and the effective hourly rate of compensation awarded to the attorneys involved in the litigation. *Farmington Dowel Products Company v. Forster Mfg. Co.,* 297 Fed. Supp. 924 (Maine, March 11, 1968) (Judge Gignoux)

C. DISCOVERY

Attorney-Client Privilege - Waiver - Third Party Disclosures

Appeal from a criminal conviction arising from a bankruptcy proceeding. The attorney involved represented the defendant for many years prior to the filing of the petition in bankruptcy. After discussion with the trustee in bankruptcy and the defendants, the attorney wrote to the defendants and sent a copy of the letter to the attorney for the trustee in bankruptcy. This copy was introduced in evidence. In holding that the disclosure of the letter to the trustee destroyed the confidential nature of the communication, the Court of Appeals agreed that "the district court could properly conclude from the face of the letter that it was disclosed to the attorney for the trustee pursuant to a good faith effort on the part of . . .(defendant's counsel) to afford them an opportunity to avoid criminal prosecution and that the disclosure was therefore within their attorney's implied authority." *Stegeman v. United States* (Ninth Circuit, February 27, 1969) (Judge Browning)

Criminal Rule 16 - Grand Jury Testimony - Corporate Employees

An indictment was returned in January 1966 charging United Concrete Pipe Corporation, Gifford-Hill-American, Inc. and an officer of United with a conspiracy to fix prices, to submit rigged bids and to divide the Texas market for concrete pressure pipe. These defendants subsequently filed pretrial motions for discovery under Rule 16, Federal Rules of Criminal Procedure, specifically requesting the production of the testimony of all present and former officers *and employees* of the corporate defendants before the Dallas, Texas Grand Jury which returned the indictment *and* a Los Angeles Grand Jury which previously had investigated a similar conspiracy involving some of the defendants. The motion was granted in part and denied in part and both of the defendants and the United States filed petitions for writs of mandamus. In granting the writ the Court of Appeals essentially allowed the defendants the discovery they requested. (The court initially held that it had jurisdiction and that mandamus was the appropriate remedy since this case was of an exceptional and extraordinary nature.)

After reviewing the background and history of Rules 16A and 16B the Court of Appeals holds that "the defendant corporations may discover the testimony of all present and former officers and employees concerning activities carried on, or knowledge acquired, within the scope of or reasonably relating to their employment." The court noted "that if circumstances exist justifying the denial, restriction, or deferral of discovery in the particular case, the government may seek appropriate orders under Rule 16(e)." The court also recognized "that under the revised Rule the trial judge retains discretion in regulating such incidents of discovery as the time, place, and manner of disclosure so as to assure the orderly progress of litigation." *United States v. Honorable Sarah T. Hughes* (Fifth Circuit, June 2, 1969) (Judge Godbold)

Production of Documents - Bank Records

Appeal from a denial of a defendants motion to quash a subpoena duces tecum. The subpoena was directed to an official at a commercial bank requiring the production of bank records relating to a trustee account in the name of the defendant. In affirming the denial of the motion to quash the court held that customers have no standing to object to subpoenas requiring their banks to produce records of their accounts and that clients' checks are not confidential communications protected by the attorney-client privilege. *Harris v. United States* (Ninth Circuit, June 5, 1969) (Judge James M. Carter)

Self-Incrimination - "Compelling"

Appeal from a criminal conviction for causing misbranded drugs to be shipped in interstate commerce.

While the defendants were under investigation for possible

criminal violations of the Food and Drug Act the government instituted a civil action to condemn certain quantities of the alleged misbranded drug. In the civil action the defendants were served with the written interrogatories seeking comprehensive and detailed information about the corporate defendant and its activities. Before the interrogatories were answered the defendants were advised that the government contemplated criminal prosecutions. The defendants moved to stay the civil proceedings pending outcome of the contemplated criminal actions but the request was denied. The defendants then filed answers to the interrogatories; much of the information supplied was necessary for the government's criminal prosecution. Prior to the trial of the criminal action the defendants moved to suppress the evidence; this motion was denied.

The Court of Appeals observed that the defendants had three choices when the interrogatories were served on them: (1) they could have refused to answer the interrogatories which would have resulted in the forfeiture of their property which had been previously seized by the government; (2) they could have given false answers to the interrogatories which would have subjected them to prosecution for perjury; and (3) they could (and did) supply the information thereby subjecting themselves to criminal prosecution. The Court of Appeals *reversed* the conviction holding that "a person may not be required to supply information which might possibly incriminate him upon penalty of suffering forfeiture of his property. This is a 'compelling' which is prohibited by the fifth ammendment." The Court of Appeals concluded: "We do not hold that a Government agency may not institute and prosecute civil proceedings on charges that may also involve a possible criminal proceeding against the same persons. We hold merely that the Government may not use evidence against a defendant in a criminal case which has been coerced from him under penalty of either giving the evidence or suffering a forfeiture of his property." *United States v. Detroit Vital Foods, Inc.* 407 F 2d. 570, (Sixth Circuit, Feb. 20, 1969) (Judge Combs) Cert. granted, *U.S. v. Kordel* - US - (June 2, 1969)

Illegal Search & Seizure - Suppression - Standing

Interlocutory appeal from an order denying defendants motion to totally suppress illegally seized evidence. (State of Iowa v. Union Asphalt & Roadiols, Inc., 281 F. Supp. 381, 404-11.)

This is a treble damage antitrust class action brought by the State of Iowa and the Iowa State Highway Commission on behalf of all state agencies and political subdivisions against 21 defendants allegedly involved in a price fixing conspiracy relating to the sale of asphalt. The motions to suppress are based on the *concedely unlawful seizure* by the State of Iowa of records of four of the defendants. The district court ordered the illegal evidence suppressed as to the *four defendants* who were subjected to the illegal seizure. The court also ordered the plaintiffs to return all items seized from such defendants together with all copies made therefrom. The court further held "that the plaintiffs may not in any manner use the seized items or any knowledge gained by the illegal searches *against the party from which the knowledge was*

*gained* or the items seized except that the plaintiffs may make use of all knowledge as evidence if it is gained from an independent source." 281 F. Supp. 411(emphasis added). The defendants who were subjected to the illegal search and seizure object to the order as it does not bar use against them of the same information if later obtained from independent sources. The remaining defendants, who were not subjected to the illegal search and seizure, object to the order as it holds that they have no standing to object to the use of such evidence against them.

The Court of Appeals affirms on both issues holding "that the right to suppress evidence illegally seized is limited to the four defendants from whom the seizure was made and that the remaining defendants lack standing to suppress evidence illegally seized form the codefendant . . ." The Court of Appeals cites with approval *McGary v. United States*, 1 Cir., 388 F. 2d. 862, 871: "to impose the greater sanction of permanent immunization whenever a seizure of ordinary business and corporate records had been invalidated would place an incommensurate burden on the government, unnecessary for the protection of commercial privacy." The Court of Appeals concluded that the district court "went as far as it reasonably could on the present record in suppressing evidence illegally seized." *Standard Oil Company v. State of Iowa*, 408 F. 2d 1171 (Eighth Circuit, April 8, 1969) (Chief Judge Van Oosterout)

D. ANTITRUST

Passing-On Defense - Government Reimbursement

The matter came before the court on the plaintiff's objection to one of the defendant's interrogatories which would seek information concerning government reimbursement for the products whose prices were allegedly inflated due to the charged conspiratorial activity. The basic issue was whether state governmental entities have standing to seek *full recovery* from defendants notwithstanding ing the fact that partial reimbursement for various construction projects was made by the federal or state government.

The court held that the "passing-on" or "reimbursement defense" was unavailable to the defendants in this case and that they did not fall within the narrow exception carved out by the Supreme Court in the *Hanover Shoe Decision*. *State of Minnesota v. United States Steel* (District of Minnesota, May 15, 1969)(Judge Neville)

Corporate Indemnification

The plaintiff in this action, Wilshire Oil Company, was fined $10,000.00 after entering a plea of nolo contendre to a charge that it had violated federal antitrust laws relating to price fixing of liquid asphalt sold in the states of Kansas and Missouri. Wilshire is also a defendant in civil actions brought by the State of Missouri and the State of Kansas. This action was brought by Wilshire against its former employees (who were apparently responsible for the illegal activity) to recover the $10,000 fine and other expenditures which Wilshire has incurred or will incur as a result of involvement in the civil and criminal antitrust actions. The action was dismissed on the ground that the complaint failed to

state a claim i.e. antitrust fines and penalties cannot be recouped by a corporate violator from its employees.

The Court of Appeals reversed and held that Wilshire had a right "to redress an injury which was inflicted as a result of an effort on the part of certain of its employees to committ a public wrong." The court went on to point out that damages from pending litigation "are remote and speculative" and cannot be considered "until such time as Wilshire's obligation and resultant loss has definitely been established." *Wilshire Oil Company v. Riffe* (Tenth Circuit, April 5, 1969) (Judge Hill)

## E. AIRCRAFT

### Inflight Injury - Proximate Cause

Appeal from a directed verdict in favor of the defendant Continental Airlines on the ground that there was no evidence from which the jury could find that the plaintiff's injury was proximately caused by the defendant's negligence.

As the commercial airline involved was about to take off the captain's adjustable seat slid backwards "projecting him away from the instrument panel and controls" which caused him to abort the take off. The plaintiff alleged that the deceleration caused by the abort threw him across his seat belt and caused severe injury to his back. The district court was satisfied that the evidence presented a jury question as to whether Continental had acted negligently in permitting the captain's seat to malfunction but found insufficient evidence to establish this negligence as the *proximate cause* of the plaintiff's injury. In reversing, the Court of Appeals was unable to say that reasonable and fair minded men could not conclude that the aborted take off was the *cause in fact* of the plaintiffs decline in health. *Leckbee v. Continental Airlines* (Fifth Circuit, May 5, 1969)(Judge Gewin)

### Cause of Crash - Defective Engine - Duty to Warn

This litigation arose from the crash of a Braniff DC-7C near Miami on March 25, 1958. The action was brought by Braniff and two of the passengers on the plane contending that the crash was caused by the failure of an engine manufactured by the defendant. The actions were based on negligence and on breach of express and implied warranty. The district court directed a verdict for the defendant on the issues of negligence and breach of warranty. There was evidence that the defendant was aware of problems involving this type of engine at least eight months before the crash but took no effective action to correct the problem. The Court of Appeals held that there was sufficient evidence of negligence to require submission of the case to the jury holding that "it is clear that after such a product has been sold and dangerous defects in design have come to the manufacturer's attention, the manufacturer has a duty either to remedy these or, if complete remedy is not feasible, at least to give users adequate warnings and instructions concerning methods for minimizing the danger." The Court of Appeals also held that actions based on implied warranty are barred by the statute of limitations

since under Florida law the period of limitation in an implied warranty action is three years and that the cause of action accrued at the time the engine was sold.

Sometime after the action was commenced Braniff filed a motion to amend its complaint by adding the members of the flight crew as plaintiffs. This motion was denied by the trial court; "Braniff could not properly make this motion; it must be by the parties seeking to intervene." *Braniff Airways, Inc. v. Curtiss-Wright Corporation* (Second Circuit, May 19, 1969)(Judge Hays)

F. PRODUCT LIABILITY - DRUGS

Duty to Warn - Reasonable Method

Appeal from a judgment for $180,000.00 in favor of the plaintiff in a product liability drug case. The plaintiff claimed that the defendant was negligent in the testing, manufacturing and marketing of the drug Aralen, a/k/a Aralen Phosphate, and in failing to warn the public of the potential danger to eyesight and vision from the use of the drug. In affirming the judgment, the Court of Appeals held "that where a drug is manufactured without negligence, but is unreasonably dangerous if a reasonable warning of side effects is not given, that the manufacturer may be held liable for the injury resulting from the failure to give a warning reasonable under the circumstances." The court also held that the question of whether the "Dear Doctor letter" was a *reasonable effort* to warn of the danger for the trier of fact. *Sterling Drug v. Yarrow*, 408 F. 2d 978 (Eighth Circuit, March 12, 1969)(Judge Beck)

Quadrigen - Proximate Cause - Negligence

Judgments of $500,000 each were entered by the trial courts following trial without a jury in these *factually and legally related cases*. Both actions were commenced by a parent as Gardian ad Litem for a young child rendered permanently disabled following an injection of the drug Quadrigen commonly known as DTP-P a diptheria-tetanus-pertussis-polio vaccine. In both cases the child ran a high fever, went into convulsions and serious brain damage occurred. In both cases the defendant attacked the sufficiency of the evidence to support a finding (1) that the drug was the proximate cause of the plaintiff's injury, (2) that the defendant was negligent in its manufacture or distribution and (3) that there was a breach of implied warranty. Both courts of appeal found sufficient evidence to support the conclusions of the trial court and the judgments were both affirmed. *Parke-Davis v. Stromsodt* (Eighth Circuit, June 9, 1969)(Judge Mehaffy); *Tinnerholm v. Parke-Davis* (Second Circuit, May 23, 1969)(Judge Anderson)

G. SECURITIES

In pari dilecto defense - Insider Tip

Appeal from a summary judgment in favor of the defendants in a Rule 10b-5 stock fraud action. Rhame, a former president of

Texstar, gave Kuehnert a *tip* that Texstar had made some secret discoveries and that the stock would increase substantially. Kuehnert *agreed to keep the tip a secret* and purchased, on margin, a substantial amount of stock. The *tip* was false and Kuehnert's losses were substantial. Kuehnert brought this action to recover from Rhame and Texstar.

The district court held that having himself violated Rule 10b-5 Kuehnert could not invoke it in seeking recovery from the defendants. The Court of Appeals affirmed and held that Kuehnert's status as a *tipee* made the defenses of unclean hands and *in pari dilecto* available. (Judge Godbold dissented and would hold *in pari dilecto* inapplicable to SEC as well as antitrust cases.) *Kuehnert v. Texstar Corporation* (Fifth Circuit, May 9, 1969) (Judge Aldridge)

Except where noted, these opinions and orders will be published in the near future. In the meantime copies may be obtained from the authoring judge or, in most cases, from the undersigned.

Your suggestions and comments concerning the content and format of these bulletins are most welcome and we would greatly appreciate receiving copies of opinions and orders which may be appropriate for inclusion in the *Manual for Complex and Multidistrict Litigation* or in a bulletin.

Very truly yours,

John T. McDermott
Executive Editor

# MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION



August 12, 1969

Bulletin No. 4

TO ALL JUDGES CONCERNED WITH COMPLEX AND MULTIDISTRICT LITIGATION

The following opinions and orders have recently come to the attention of the Board of Editors. They all appear to relate to situations which can occur in complex and multi-district litigation. The inclusion or exclusion of a particular opinion or order in a Bulletin does not necessarily imply that the members of the Board of Editors approve or disapprove of the procedures used or results reached in the particular case.

## A. JURISDICTION - VENUE - SERVICE

### Ancillary Jurisdiction - Antitrust - Attorney Fees

Two attorneys who represented the State of Iowa in *asphalt antitrust litigation* in federal court brought an action against the State to recover attorney fees. Although the state objected to the amount awarded by the trial court, its basic contention on appeal was that the district court lacked jurisdiction.

Since the district court unquestionably had jurisdiction in the underlying antitrust litigation, the court of appeals found that it possessed *ancillary jurisdiction* to consider the claim for attorney fees which arose from litigation. *State of Iowa v. Union Asphalt & Road Oils, Inc., et al.* 409 F. 2d. 1239 (Eighth Circuit, April 2, 1969) (Judge Matthes)

## B. JUDICIAL MANAGEMENT

### Rule 15 - Ammended Complaint - Relation Back - Fictious Defendants

The plaintiff commenced this wrongful death action a few days prior to the expiration of the statute of limitations and, in addition to certain named and identified defendants, she listed as defendants "Does I through X." After the statute of limitations had run the plaintiff attempted to amend the

complaint by naming Litton Systems, Inc. as "Doe I." The District Court held that the statute of limitations barred the claim against Litton as the amendment did not relate back to the date of the original complaint.

The Court of Appeals strongly criticized the use of *fictitious defendants* and pointed out that Rule 15(C) makes no mention of the pleading of fictitious parties. The court held that "it is therefore wholly immaterial . . . whether fictitous defendants were named prior to the running of the statute." The Court of Appeals further agreed with the District Court that Litton did not receive notice of the action prior to the running of the statute of limitations and that since the requirements of Rule 15(C) had not been met, the motion to amend the complaint to name Litton was properly denied. *Elizabeth Elaine Craig v. U.S.A., et al.*, (Ninth Circuit, June 24, 1969)(Judge Hanley)

Rule 15 - Amended Complaint - Relation Back
Lack of Notice

The plaintiff based his action on a fire insurance policy and named as the defendant: "General Insurance Company." Process was served on the Superintendant of Insurance of New Mexico, the statutory agent of General Insurance Company. Counsel for the plaintiff subsequently filed a notice that the defendant in this cause was "General Insurance Corporation of Fort Worth, Texas" and not "General Insurance Company of America". The Superintendant of Insurance then sent a copy of the notice to the General Insurance Corporation.

The defendant moved for summary judgment on the ground that the action was barred by the one year contractural and statutory period of limitations. The question was whether the notice naming the General Insurance Corporation as defendant related back to the original filing of the complaint. The Court of Appeals pointed out that there was no identity of interest between the "General Insurance Corporation" and the "General Insurance Company" and that neither had received notice of the action until after the period of limitation had run. The district court's order dismissing the plaintiff's action as being barred by the statutory contractural period of limitations was affirmed. *Glen Graves v. General Insurance Corporation*, (Tenth Circuit, June 26, 1969)(Judge Warren L. Jones)

Rule 23 - Class Actions - Defendant Class
Patent Antitrust

The plaintiffs brought this patent infringement action against the defendants, a class including more than 400 seed corn producers. Over the objection of the named defendants, the court permitted the action to be maintained as a class action under Rule 23.

The court held that the central common question of fact and law was the *validity* of plaintiff's patent. The court recognized that *infringement* was a "more individualized issue" but as most of the named defendants had almost admitted infringement, the possibility that it would be litigated by other defendants was not "sufficient to militate against the class action." The court found that the named parties would fairly and adequately protect the interest of the class notwithstanding their own protestations to the contrary. The court felt that *desire* as opposed to *ability* should not be given more than token weight.

Finding a risk of inconsistent or varying adjudications as to validity of the patent, the court concluded that the class action was maintainable under Rule 23(b)(1)(A). Finding further that selected adjudications of validity or invalidity would tend to impair or impede the nonparty class members' ability to protect their interests, the court concluded that the action was also maintainable under Rule 23(b)(1)(B). Recognizing also that final injunctive relief would be proper whether the patent was held valid or invalid, the court found that the class action was maintainable under 23(b)(2) - notwithstanding the fact the damages were also pleaded.

The court held that venue must be established over *representative parties* under 28 U.S.C. §1400(b) but that it need not be established as to those nonrepresentative-party class members "since to do so would eliminate the use of the class action route in all cases where a defendant class is appropriate."

The complaint also charged an illegal conspiracy by the defendants to oppose the plaintiff's patent. The defendants also oppose maintenance of the class action on this antitrust issue. The court found that there were common questions of law and fact in that all of the class members are alleged to have participated in the conspiracy to oppose the plaintiff's patent. Noting that nearly all of the antitrust actions have been maintained under Rule 23(b)(3) - the so called exclusionary class action - the court permitted the antitrust action to be maintained as a Rule 23(b)(3) class, finding that common questions predominate and that the class action was superior to other available procedures. *Research Corporation v. Pfister Associated Growers, Inc., et al.* (ND Illinois, June 16, 1969) (Judge Robson)

Attorney Fees - Stockholder Action Re Voting Rights

The Missouri Pacific Railroad appealed from a judgment requiring them to pay nearly $600,000 in fees and expenses incurred by attorneys representing a class composed of all Class B stockholders in a declaratory judgment action against the railroad. The Court of Appeals found that "the litigated voting rights issue was of primary importance to both the Class A and Class B stockholders. Any benefit flowing to the corporation as a result of the litigation was incidental and the inescapable result of the litigation. ..... The benefit to the Class B Stockholders resulting from the legal victory

were substantial. No unreasonable burden will be placed on the plaintiffs by their obligation to pay reasonable fees to counsel whom they employed." Finding no reasonable basis for the allowance of attorneys' fees, the judgment of the district court was reversed. *Missouri Pacific Railroad Co., v. Rose Slayton et al.*, 407 F. 2d. 1078 (Eighth Circuit, March 7, 1969) (Chief Judge Van Oosterhout)

C. DISCOVERY

Discovery - Sanctions - Refusal to Answer Interrogatories

The plaintiff disregarded the defendant's repeated interrogatories and notices to take his oral deposition. The plaintiff's subsequent motion for a protective order requiring the defendant to pay the cost of his attendance at the deposition was denied. After he did not appear after further notices, the court ordered that he be produced for oral deposition within sixty days. The plaintiff did not comply with this order and after a hearing the district judge dismissed the complaint with prejudice.

The Court of Appeals found it "regretable that a litigant's cause of action should be lost without consideration of its merits" but held that "whatever may have been the reason for the inability or failure of the plaintiff to appear for oral depositions, there (was) no excuse for the failure to answer the interrogatories." The court emphasized that "even if there had been error in the denial of plaintiff's motion for protective order, the dismissal of the complaint would still be justified because of plaintiff's failure to answer the interrogatories, which impose no hardship on him." The order of dismissal was affirmed. *John F. Hastings v. Maritime Overseas Corporation* (Third Circuit, June 9, 1969)(Per Curiam)

Expert Witness - Cumulative Testimony - Non-Ultimate Fact

This litigation arose from an accident in which two men were electrocuted and one was seriously injured when a metal flag pole which they were erecting came too close to a nearby power line. Appellant contended, *inter alia*, that he was prejudiced by the incorrect ruling of the trial court which prevented him from introducing expert opinion testimony of an *electrical contractor* who was prepared to testify that the metal flag pole did not come into direct contact with the electric wires. The appellant did call an *electrical engineer* who opined that there had been no contact between the steel pole and the wire.

The Court of Appeals pointed out that "exclusion of expert testimony does not generally rise to the level of prejudicial error where the opinions sought to be adduced are proffered in other testimony." The court concluded that since the excluded

testimony did not bear directly on an *ultimate fact* and would have been merely cumulative, its exclusion was not prejudicial error. *Theodore E. Walther, etc. v. Omaha Public Power District, et al.* (Eighth Circuit, July 7, 1969)(Judge Bright)

Expert Testimony - Hypothetical Question
Conflicting Evidence

The appellant sought recovery of damages for personal injuries he sustained when a self-propelled drilling rig he was driving went out of control, hit an embankment and overturned. He sought relief on the ground that the appellee had negligently failed to discover and warn him of a preexisting defect in the vehicle. Both parties relied on expert witnesses and a general verdict was returned in favor of the appellee. The sole issue on appeal was the claim of reversible error in the admission of certain testimony of one of the appellee's experts.

Portions of a deposition, in which the only eye witnesses described the operational conduct of both the machine and the appellant immediately prior to the accident, were introduced into evidence. The appellee's expert (whose qualifications were unchallenged) was asked to express an opinion as to the cause of the accident based on the evidence theretofor introduced. Over objection he responded that in his opinion the "truck was going to fast" and "in too high a gear."

The appellant urged that the testimony was objectionable because (1) it was based on conflicting testimony in the deposition, (2) it was not in response to a hypothetical question and (3) it expressed an opinion on an ultimate fact and thus invaded the province of the jury. The Court of Appeals rejected all three contentions.

The court held that "the contention that expert opinion must be presented by examination through hypothetical questions specifically premised upon evidentiary facts is both ill founded as a generality, and is not supported as a procedural occurrence in the case at bar." The court emphasized that "the test of admissibility remains . . . not how the facts are presented to the expert but whether the expert opinion is founded on substantial factual support." Finding no abuse of discretion in the admission of the testimony, the judgment was affirmed. *Jack Bosse v. IDECO Division of Dresser Industries, Inc.* (Tenth Circuit, June 25, 1969) (Judge Lewis)

D. ANTITRUST

Summary Judgment

This is an appeal from a grant of summary judgment for the defendant in a treble damage antitrust action. The action was

commenced by a temporary Detroit newspaper created during the strike which closed down Detroit's two major daily papers for approximately four months. The defendant U.P.I. is charged with restraining competition and monopolizing news services by refusing to furnish its services to the plaintiff.

The court recognized that summary judgment should be used sparingly in complex antitrust litigation but held that summary judgment was proper here as there was an entire failure of proof as to monopoly or conspiracy. The court further pointed out that the plaintiff had extensive discovery and that the denial of additional discovery was not an abuse of discretion on the part of the District Judge. *The Daily Press v. United Press International* (Sixth Circuit, June 20, 1969) (Chief Judge Weick)

E. AIRCRAFT

Aircrash - FAA Negligence - Proximate Cause

These four consolidated cases arose from the crash of a small plane (a Cessna 310 G) at the Los Angeles International Airport. All actions charge negligence of the Precision Radar Approach (PAR) Controller, an employee of the Federal Aviation Agency.

Approximately 10 minutes before the Cessna attempted to land, an American Airlines Boeing 707 executed a missed approach over the field. The court found that the effects of wing tip vortices caused by the 707 provided the most reasonable explanation for the violent maneuver of the Cessna immediately before its crash. The court found that the PAR Controller was negligent in failing to advise the pilot of the Cessna of the serious low ground fog condition that existed at the approach end of the runway and in failing to advise him of the possible hazard created by wing tip vortices. The court further found that the PAR Controller was negligent per se in that he violated the Air Traffic Control Procedures Manual.

Combined judgments in excess of $1,000,000 were entered against the defendant United States of America. *Geraldine L. Lightenburger v. U.S.A.*, 298 Fed. Supp. 813 (C.D. Calif., April 21, 1969)(Judge Hauk)

F. COLLATERAL ESTOPPEL - RES JUDICATA

Res Judicata - Consent Decree - Without Prejudice

Appeal from an interlocutory decision denying plaintiff's motion for judgment based on *res judicata* with respect to an earlier decree of the same court as to validity and infringement of the patents involved in this litigation.

A prior infringement action was brought by Kiekhaefer (predecessor of Brunswick) against West Bend (predecessor of

Chrysler); that action was terminated by settlement and a consent decree which held the patents valid and infringed and provided that "the above action is hereby dismissed, without prejudice and without cost." The district court held that the consent decree was not subject to *res judicata* effect because of the use of the words "without prejudice".

The Court of Appeals reversed. It found that the words "without prejudice" could not have been used in reference to that which had already been adjudicated but that all that could have been intended was to reserve future action based on changed conditions. The court stressed that "the contention that a plaintiff can obtain a judgment, but that that judgment is not *res judicata* as to matters specifically decided, is so anomalous that it must necessarily be rejected."

Chrysler also urged that it was not a corporate successor to West Bend, had no interest or control in the prior suit and was therefore not bound by the decree. The court found that the acquisition of West Bend by Chrysler was a total take-over and therefore Chrysler did stand in the shoes of West Bend with respect to the consent decree. *Brunswich Corporation v. Chrysler Corporation, et al.*, 408 F. 2d. 335 (Seventh Circuit, March 12, 1969)(Judge Duffy)

Collateral Estoppel - Mutuality - Auto Accident
Penna.

Seperate actions by Harris, Lynch Estate and Smith Estate were brought against Lumbermens (the insuror); all arose from the same automobile accident. The question presented, *inter alia,* was whether a judgment against Lumbermens in the Harris case would be conclusive against it in the other cases. Lumbermens argued that since it could not have asserted a favorable judgment in the Harris case against the Lynch and Smith estates (because these estates were neither parties to Harris' claim not in privity with him), it can not be bound as to the estates by the judgment which it lost to Harris.

Conceding "that mutuality is neither to be retained as a rigid rule nor completely jettison" the Court of Appeals had "no doubt that the Pennsylvania courts would recognize collateral estoppel in a case such as this, where the actual circumstances remove any uncertainty whether Lumbermens, against whom estoppel is asserted, had a full and fair opportunity to try the factual issue and lost it before the same jury which would indubitably have decided the same way on the Lynch and Smith claims . . . as it did on Harris' claims." *Provident Tradesmens Bank and Trust Company et al. v. Lumbermens Mutual Casualty Company*, (Third Circuit, April 2, 1969)(Judge Freedman)(Judge Kalodner, dissented)

Collateral Estoppel - Mutuality - Master/Servant
Virginia

Lober was injured in a cab owned by Arlington and driven by Moore. In an action in Virginia state court against Arlington,

the jury returned a verdict for that defendant. Lober then commenced a suit in federal court against Moore. The court of appeals agreed with the district court which had held that the plaintiff was barred from relitigating the negligence question in the federal court after losing in the state court. The Court of Appeals pointed out that "it is the prevailing rule in the federal and the state courts that a judgment excusing the master or principal from liability on the ground that the servant or agent was not at fault forecloses a subsequent suit against the latter on the same claim." *Blanch H. Lober v. Willis Moore* (District of Columbia, March 18, 1969)(Judge Robinson)

Collateral Estoppel - Prior Criminal Action
Washington

Priest was convicted in the Yukon Territory of conspiracy relating to the unlawful sale of ore. He brought an action in the Western District of Washington claiming ownership in the same ore. The district court held that the Canadian Criminal conviction collaterally estopped him from asserting that he was true owner of the silver ore.

Recognizing that an increasing number of courts are permitting the use of criminal judgments in subsequent civil suits, the Court of Appeals nevertheless concluded "that the district court was clearly wrong in concluding that the courts of Washington would give *collateral estoppel* effect to the described Yukon Territory criminal conviction." The district court's summary judgment against Priest was reversed. *Gerald H. Priest v. American Smelting & Refining Company*, 409 F. 2d. 1229, (Ninth Circuit, March 20 1969)(Judge Hamley)

G. MISCELLANEOUS

National Traffic & Safety Act - Federal Preemption
Chrysler Super Lite

Chrysler appealed from a decision upholding the right of the State of New Hampshire to prohibit the sale of cars equipped with "Super Lite". The issue on appeal involved the extent to which state regulation has been preempted by the National Traffic and Motor Vehicle Safety Act of 1966.

The Court of Appeals found that under §103(d) of the Act, the states are precluded from enacting nonidentical standards where there is a federal standard relating to the same performance; the question was whether there is an existing federal standard applicable to "Super Lite". Standard No. 108 relates to "lamps, reflective devices, and associated equipment" but the court found that "despite its specificity with respect to numerous items of equipment, at no point does Standard No. 108 mention a category of supplementary lighting equipment such as would cover 'Super Lite'." Although such a device may be included in the *purpose and scope section* of Standard No. 108, the court held "that the

purpose and scope section of the federal standard is not by itself any standard at all."

Finding no existing federal standard applicable to "Super Lite" the Court of Appeals upheld the right of the State of New Hampshire to prohibit the sale of automobiles equipped with such a device. [The court was aware that a contrary conclusion had been reached by other courts in Chrysler Corp. v. Malloy (D. Vt., Dec. 30, 1968) and Chrysler Corp. v. Tofany (N.D. New York, March 13, 1969).] *Chrysler Corporation v. Robert W. Rhodes, et al.* (First Circuit, June 26, 1969)(Judge Coffin) rehearing denied, July 25, 1969.

A citation is now available for the following previously reported opinion:

| Bulletin No. | Page | Caption | Citation |
|---|---|---|---|
| 3 | 10 | *Wilshire Oil v. Riffe* Tenth Circuit | 409 F. 2d. 1277 |

It is expected that these opinions and orders will be published in the near future. In the meantime copies may be obtained from the authoring judge or from the undersigned. Your suggestions and comments concerning the content and format of these bulletins are most welcome and we would greatly appreciate receiving copies of opinions and orders which may be appropriate for inclusion in the *Manual for Complex and Multidistrict Litigation* or in a bulletin.

Very truly yours,

John T. McDermott
Executive Editor

# MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION



September 5, 1969

Bulletin No. 5

TO ALL JUDGES CONCERNED WITH COMPLEX AND MULTIDISTRICT LITIGATION

The following opinions and orders appear to relate to situations which can occur in complex and multidistrict litigation. The inclusion or exclusion of a particular opinion or order in a Bulletin does not necessarily imply that the Board of Editors approves or disapproves of the procedures used or results reached in the particular case.

## A. JURISDICTION - VENUE - SERVICE

### Class Action - Jurisdictional Amount - Aggregation

These consolidated appeals are from three separate but related actions (two filed in the District of Rhode Island and one in the District of New Hampshire) in which the plaintiffs, as representatives of a class of horse owners, claim that the defendant race tracks failed to pay them a portion of the *purses* to which they were entitled.

The track agreed to pay 44.7% of its annual share of the receipts to the owners of winning horses but they do not interpret this agreement to include the *breakage* - the odd cents which are divided between the state and the track. (The *breakage* amounts to well over $100,000 per year.) The plaintiffs claim that they are also entitled to receive 44.7% of the tracks' share of the breakage. None of the individual claims exceed $10,000 and all three cases were dismissed for lack of jurisdictional amount. The New Hampshire District Court also determined that the plaintiffs' suit was not a proper class action. The Court of Appeals reversed.

The Court of Appeals held that to be able to aggregate damages to satisfy the *jurisdictional amount*, the plaintiffs had to bring themselves within the rule stated in *Pinel v. Pinel*, 240 U.S. 594, 596 (1916): "[W]hen several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount." The

Court concluded that "it is the amount of the entire fund, and not what each pursewinner's individual share will eventually be, that determines the amount in controversy here." The fact that the amount of the individual claims could not be determined until the right of the class to its share of the breakage was settled and a formula established for dividing these monies among the horse owners showed the *integrated relationship* of the purse winners' interest and made it apparent to the Court that "the instant case is not a collection of individual lawsuits brought solely for the convenience of the claimants." The Court of Appeals held that under the circumstances claims could be aggregated to satisfy jurisdictional requirements.

The Court also concluded that the class was "neither ill-defined nor ephemeral." The Court concluded that to deny a class action because "as a practical matter" some of the members of the class might not share in the award would "defeat the purpose of the rule, *i.e.*, to facilitate the joining of multiple small actions that would otherwise not be brought and to prevent repetitious litigation of claims." *Frank E. Berman, et al. v. Narragansett Racing Association, Inc.*, (First Circuit, July 13, 1969) (Judge McEntee)

Service of Process - Long Arm Statute - Patent Infringement Cases

The District Court dismissed this patent infringement action for want of jurisdiction over subject matter, ineffective service of process and lack of venue. The Court of Appeals reversed, pointing out first that the District Court had jurisdiction over the subject matter under 28 U.S.C. Section 1338.

The defendant, an Ohio corporation, ceased doing business in Illinois on June 15, 1967 and the complaint was filed on July 21, 1967 with service of summons initially made on a former employee of the defendant on July 31, 1967 and subsequently under the Illinois long arm statute on December 1, 1967. The Court of Appeals concluded that the second service under the Illinois long arm statute was valid. It disagreed with the District Court which had held that the specific provisions of 28 U.S.C. §1694 made Rule 4(d)(7) permitting service under the law of the state inapplicable to patent infringement actions.

The defendant also contended that venue was lacking in the Northern District of Illinois since it did not have a regular and established place of business in the district *at the time the suit was filed.* Since the defendant had had a regular place of business in the district up to June 15, 1967 the Court reasoned that "37 days later, when plaintiff filed suit, venue could still be lodged in the district under section 1400(b)." *Welch Scientific Company v. Human Engineering*, (Seventh Circuit, August 5, 1969) (Judge Kerner)

Service of Process - Long Arm Statute - Kentucky

The crane which is involved in this personal injury action was manufactured by the defendant Grove in Pennsylvania and sold to the defendant Nixon in Tennessee. Nixon leased the crane to Blount Bros., the employer of the plaintiff who was injured while using the crane in Kentucky. The action is based on negligence and breach of express and implied warranty. Service of process was attempted on the defendant under the Kentucky long arm statute. The District Court dismissed the complaint and quashed service of process and the Court of Appeals affirmed.

The Court of Appeals determined that both defendants were *doing business* within Kentucky as both had salesmen who regularly solicited business within the state. However the Court concluded that these business activities had nothing to do with the presence of *this particular crane* in Kentucky and therefore the Kentucky statutory requirement that the cause of action must have some connection with the business which the corporation does in the state, was not met. *Roy F. Etheridge v. Grove Manufacturing Company and Nixon Machinery & Supply Company* (Sixth Circuit, July 22, 1969)(Judge Phillips)

Service of Process - Long Arm Statute - Texas

A young girl was seriously injured in a fall from an amusement ride in Dallas, Texas and this action was brought by her father against the manufacturer of the ride (Eyerly). Service was accomplished through the Texas "Long Arm" statute. The defendant appealed from an interlocutory order denying its motion to dismiss and quash service.

The Court of Appeals was initially concerned with whether the corporation had the minimal contacts with Texas so that the maintenance of this suit would not offend *due process*. The amusement ride on which the girl was injured was sold by the defendant and shipped to a company in Chicago which later sold it to a touring company in North Dakota which brought the ride into Texas. The Court found that the defendant contemplated that the ride would ambulate from state to state throughout the nation and that it would eventually tour Texas. The Court also found that through other transactions the defendant had made numerous and repeated contacts with Texas including sales and extension of credit within the state, retention of liens and the filing of such liens with state and county authorities and the servicing of machines and the solicitation of business within the state - these contacts were both continuous and substantial. The Court recognized that if the child's injury had resulted from a defect in a ride *shipped directly* into Texas by the defendant, due process would unquestionably be satisfied but

the Court was satisfied that the unrelated business contacts plus the introduction of the ride into interstate commerce were sufficient to support Texas in personam jurisdiction over the defendant. *Eyerly Aircraft Co. v. Jack Killian* (Fifth Circuit, July 11, 1969)(Judge Goldberg)

B. JUDICIAL MANAGEMENT

Class Action - Civil Rights Case - Notice by Publication

This action was commenced by an unincorporated voluntary association of property owners and numerous individual property owners in Chicago seeking relief under the federal Civil Rights Act, the federal Securities Laws, the federal Antitrust Laws and state laws regarding fraud, usury and unconscionable contracts. The defendants are alleged to have exploited residential racial segregation in Chicago so as to obtain unlawful benefits in their dealings with Negro purchasers of used residential real property. The plaintiff Negro purchasers sought to sue as a class for their own relief and that of all others similarily situated. They also contend that the defendants should be regarded as constituting a defendant class under Rule 23.

The Court first concluded that all provisions of Rule 23(a) were met as to the proposed plaintiff class action. The requirement that the class be so numerous that joinder is impracticable was satisfied since more that 50 persons were named in the original complaint and there allegedly are many additional unnamed persons. The requirement of common questions of law or fact was satisfied by the allegations of conspiracy and concerted action made possible by a common condition of residential segregation. The same violations of law are alleged with respect to all of the contracts and similar relief is requested, thus satisfying the third prerequisite - that the claims of the representative parties are typical of the claims of the alleged class. The Court was satisfied that the representative parties would fairly and adequately represent and protect the interests of the class since the named plaintiffs themselves have a significant economic interest typical of the entire class, and are represented by competent and experienced counsel - and further the Court found no likelihood of collusive or potentially conflicting interests between the named plaintiffs and the other members of the class.

As to the requirements of Rule 23(b)(3), the Court concluded that common questions of law and fact did *predominate* over questions effecting only individual members and that the class action was superior to other available methods. Although there were many individual contracts with somewhat variable terms the Court found that the gist of the complaint is that a broad pattern of similar activity has resulted in the violation

of state and federal laws. The Court further found that common issues of law include whether defendants discriminated against Negroes, whether a private right of action under the Civil Rights Act can properly be maintained, whether the *state action* requisite is present and whether an installment contract is a *security*. The Court concluded that the class action could be maintained on behalf of Negroes who, since January 1, 1952 have entered into installment contracts with one of the named defendant sellers for the purchase of used residential property located in Chicago, Illinois, provided that any payment has been made thereon since January 6, 1964.

The Court refused to establish the requested defendant class because there were no other definable limits for such a class, other than the group of named defendants and there was no substantial reason to define the group of *named defendants* as a defendant class.

In applying the *notice provision* of Rule 23(c)(2) to this litigation, the Court concluded that individual notice would be required to the extent that the identities of the class members are ascertainable. The Court required each defendant to furnish a list of persons known by them to be Negro purchasers on installment contracts of used residential real estate in the city of Chicago since January 1, 1952. As for the rest of the class, the Court determined that notice by publication in newspapers of general circulation in Chicago would be satisfactory. *Contract Buyers League v. F & F Investment, et al.*, (N.D. Illinois, March 28, 1969)(Judge Will)(A latter memorandum opinion denying defendant's motion to dismiss appears at 300 F. Supp. 210)

Transfer Under Section 1404(a)

The defendants moved the U.S. District Court for the District of Delaware to transfer this civil antitrust action to the Eastern District of Louisiana under 28 U.S.C. §1404(a). Since the proposed transferee district had jurisdiction over the subject matter, venue was proper there and the defendant was amenable to process there, the Court concluded that the action could have been brought in the proposed transferee district.

The plaintiff is a Louisiana corporation with its exclusive place of business in that state. The defendant, a Delaware corporation, maintains its principal place of business in Dallas, Texas and has plants, personnel and officers in Louisiana, Oklahoma, and Texas. The defendant's only connection with Delaware is that it is incorporated and maintains a statutory office there. The Court pointed out however that the fact that Delaware was plaintiff's choice of forum and defendant's state of incorporation does not control the theater of litigation under the criteria set forth in Section 1404(a). The Court found that the convenience of witnesses and access to proof would be furthered by the transfer since the witnesses will come from the New Orleans area, Texas and possibly Oklahoma, and that the documents relied upon in any trial are located in either Louisiana or Texas. The Court found an even more important

reason for requiring the transfer - the pendency of a related suit in the Eastern District of Louisiana which raises the same antitrust issues. The Court held that in view of the integral relationship of the two suits it would lead to the wastefulness of time, energy and money that Section 1404(a) was designed to prevent if these two cases should proceed simultaneously in different courts.

The defendant's motion was granted and the case transferred to the Eastern District of Louisiana. *Jancke Service v. OKC Corporation,* (District of Delaware, July 1, 1969)(Judge Latchum)

C. ANTITRUST

Antitrust Defense to Breach of Contract

In 1963 Sunray agreed to supply gasoline to a competitor - Vickers - for a period of at least ten years. Two years later Sunray, asserting that the agreement provided for price fixing in violation of Section 1 of the Sherman Act, sought a declaratory judgment that the contract was voided and unenforceable. The Trial Court declared the contract to be valid, *Sunray DX Oil v. Vickers Refining Company,* 25 Fed. Supp. 403 (W.D. Missouri, 1968) and Sunray appealed; the judgment was affirmed.

Sunray contends that a clause in the contract establishing a pricing formula was a "clear and unambiguous expression of a price fixing agreement" but both courts found the agreement ambiguous and the Trial Court interpreted the disputed provision to mean that Vickers could resell the gasoline at any price, thus negating the *price fixing charge.* The Court of Appeals was satisfied "that this interpretation was a logical and proper one under the evidence submitted." Citing *Kelly v. Kosuga,* 358 U.S. 516, 519 (1959), the Court of Appeals also observed that "the Supreme Court has taken a dim view of private parties seeking to avoid their contractual obligations by asserting the illegality of the contract under the Sherman Act." *Sun Oil Company v. The Vickers Refining Company, Inc.,* (Eighth Circuit, August 5, 1969)(Judge Bright)

Antitrust Defense to Breach of Contract

This action rests on the alleged breach of two agreements between the plaintiff Western Geophysical and the defendant Bolt Associates. Under both agreements the plaintiff obtained an exclusive license to use certain pneumatic acoustical repeater devices (PAR) for use in exploration for natural resources under the sea bottom. The license requires the plaintiff to promote the use of the PAR by government and nonprofit institutions for the first two years, and thereafter by all possible sublicensees.

The defendants assert an antitrust defense on the ground that to grant plaintiff an exclusive license would aid plaintiff in violating antitrust laws. In support of its motion for summary judgment on the antitrust defenses the plaintiff contends that such defenses are legally insufficient under the doctrine of *Kelly v. Kosuga*, 358 U.S. 516 (1959)

The Court recognized that an alleged antitrust violation will not provide a defense in a private contract action unless it would give direct sanction to an illegal restraint. The Court found that if the allegations of the defendant are proven "it may well be that the license agreement is one means by which plaintiff seeks to gain a monopoly." The Court concluded that the allegations raising the antitrust defense were not deficient as a matter of law and the defendant should be entitled to try to prove them. The motion for summary judgment on the antitrust defenses was denied. *Western Geophysical Company v. Bolt Associates, Inc.*, (District of Connecticut, June 27, 1969) (Judge Blumenfeld)

D. RES JUDICATA

Claim Preclusion

The plaintiff appealed from an order of the District Court dismissing its complaint on the ground of *res judicata*. The Court of Appeals agreed with the Trial Court which had held that the cause of action in the present case was the same cause of action adjudicated adversely to the plaintiff in a prior action brought in the same court by the same parties. In attempting to distinguish the causes of action the plaintiff contends that in the first action the disability (which is the basis for the law suit) became permanent in February or March of 1965 while in the second action it is claimed that the disability became permanent in November 1965. In rejecting this argument, the Court of Appeals pointed out that any causes of action for the permanent disability had fully matured prior to the filing of the first action. It held that "the judgment in the first case which we affirmed upon appeal adjudicated and terminated plaintiff's cause of action not only with respect to issues actually tried, but also with respect to issues which could have been tried." *J.H. Pepper v. Bankers Life and Casualty Company.*, (Eighth Circuit, August 6, 1969)(Chief Judge Van Oosterhout)

Citations are now available for the following previously reported opinions:

| Bulletin | Page | Caption | Citation |
|---|---|---|---|
| 3 | 1 | *U.S. v. Cities Service* | 410 F. 2d. 662 |
| 3 | 2 | *Borden v. Sylk* | 410 F. 2d. 843 |
| 3 | 2 | *Country Maid v. Haseotes* | 299 F. Supp. 633 |
| 3 | 3 | *General Foods v. Carnation* | 411 F. 2d. 528 |
| 3 | 5 | *U.S. v. United Fruit* | 410 F. 2d. 553 |
| 3 | 9 | *Minnesota v. U.S. Steel* | 299 F. Supp. 596 |
| 3 | 10 | *Leckbee v. Continental* | 410 F. 2d. 1191 |
| 3 | 11 | *Braniff v. Curtis-Wright* | 411 F. 2d. 451 |
| 3 | 11 | *Tinnerholm v. Parke Davis* | 411 F. 2d. 48 |
| 4 | 7 | *Provident Tradesmens v. Lumbermens* | 411 F. 2d. 88 |

It is expected that these opinions and orders will be published in the near future. In the meantime copies may be obtained from the authoring judge or from the undersigned. Your suggestions and comments concerning the content and format of these bulletins are most welcome and we would greatly appreciate receiving copies of opinions and orders which may be appropriate for inclusion in a bulletin.

Very truly yours,

THE BOARD OF EDITORS FOR THE
*MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION*

By: _____
John T. McDermott
Executive Editor

# MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION



October 1, 1969

BULLETIN NO. 6

TO ALL JUDGES CONCERNED WITH COMPLEX AND MULTIDISTRICT LITIGATION

The following recently filed opinions and orders appear to be potentially relevant to complex and multidistrict litigation. The inclusion or exclusion of a particular opinion or order in a bulletin does not necessarily imply that the Board of Editors approves or disapproves of the procedures used or results reached in the particular case.

## A. JURISDICTION - VENUE - SERVICE

### Venue - Jones Act - Partnership

The question presented in this interlocutory appeal was whether a *partnership* could be sued under the special venue provisions of the Jones Act in a district in which the partnership was doing business but in which neither the parternships' principal office was located nor any partner resided. The district court held that venue existed in the district in which the *partnership* was doing business and the court of appeals affirmed.

In *Denver and R.G.W.R.R. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556, the Supreme Court held that an unincorporated association (a labor union) could be analogized to a corporation for purposes of establishing venue. In the case at bar, the Fifth Circuit concluded that for *venue purposes* there were no significant differences between a partnership and an unincorporated association. The court noted that the little case law and other authority on the problem almost all point towards treating unincorporated associations and partnerships the same for venue purposes. *Penrod Drilling Company v. Johnson* (Fifth Circuit, August 14, 1969) (Chief Judge Brown)

B. JUDICIAL MANAGEMENT

Class Action - Stockholder Derivative Suit

The plaintiff, a minority stockholder in defendant Peoria, brought this action derivatively on behalf of Peoria and also on behalf of himself and all other similarly situated stockholders naming as defendants, in addition to Peoria, U.S. Cold (a corporation owning 87% of Peoria's stock) and ACI (a corporation owning 90% of U.S. Cold's stock). The plaintiff sought to enjoin the sale of Peoria's assets to ACI and to rescind a reorganization agreement between those two companies. The district court held that the action could not be maintained as a class action because the claims of the plaintiff were not "typical of the claims or defenses of the class" and because the class was not so numerous that joinder of all members was impractical within the meaning of Rule 23. Subsequently, summary judgment was rendered for the defendant.

The Court of Appeals reversed both the denial of the class action request and the summary judgment for the defendants. The court found that the proxy statements were materially misleading and deceptive as a matter of law. The defendants pointed out that the reorganizational plan could not have been defeated since U.S. Cold owned 87% of Peoria stock. (A two-thirds vote was needed to effect the reorganization.) The court refused "to sanction a rule of causation which would presume the full disclosure of the minority shareholders could have no transactional function in corporate affairs." The court pointed out that "the misstatements and omissions contained in the proxy statements (may have) caused some Peoria shareholders to approve the sale, thus losing their statutory appraisal remedies." The presence of a controlling shareholder was held not to preclude the possibility of injury to the corporation which could be remedied by means of a derivative action.

The Court of Appeals also found that the plaintiff's action was a proper class action under Rule 23. The court concluded that the central question common to all minority shareholders involved deception, a factor outweighing the minor variations based on degree of reliance. The 151 minority stockholders of Peoria were considered a sufficient number to permit the class suit to proceed. The court commented that even if the class were limited to 40 stockholders (as proposed to the trial court) it would still be a large enough group to satisfy Rule 23(a) especially where the individual members of the class are widely scattered and their holdings generally too small to warrant undertaking individual actions. [Judge Sweigert, dissenting, would affirm for the reasons stated by the district judge in his opinion reported at 288 F. Supp. 60 (S.D. Ill. 1968).] *Knute Swanson v. American Consumers Industries, Inc., et al.* (Seventh Circuit, August 13, 1969)(Judge Commings)

Class Action - Stockholder Action Under Rule 10(b)(5)

Plaintiffs, stockholders of Rand, one of the defendants in this suit, brought this action under 15 U.S.C. §78aa to recover damages caused by alleged violations of Rule 10(b)(5) claiming that the individual defendants conspired to and inflated the price of Rand common stock by disseminating false information concerning Rand's success in finding a cure for cancer.

The plaintiffs sought to define the class as all persons who bought Rand common stock between the date of the alleged misleading report and the date the SEC suspended trading. During this time period, 885 individuals purchased Rand common stock in their own name, 603 of whom resided in the Northern District of Ohio and only 23 in the Southern District of New York. (This figure excludes purchases by brokerage houses since it could not be determined whether these purchases were in *street name* for individuals or for the firm.) The court concluded that there are too many members of the potential class to admit the possibility of joinder and found substantial common questions including the course of conduct of the defendants, the asserted false and misleading nature of the publications, their materiality, and their effect on the market price. The court recognized that the issue of plaintiffs reliance might not be common to each member of the prospective class but found that common issues predominate and that the class was properly maintainable under Rule 23(b)(3). *Harold V. Fogel & Jordan M. Fogel v. Jacques Wolfgang, et al.* 47 F.R.D. 213 (S.D. New York, 1969)(Judge Tyler)

Section 1404 Transfer - Related Litigation

The plaintiff was injured along with five co-workers when a scaffold collapsed at a construction project at Charleston, Coles County, Illinois. This action was commenced in a state court and removed to federal court on the basis of diversity of citizenship. The defendant moved to transfer this case to the Eastern District of Illinois at Danville, Illinois where similar actions brought by two of the co-workers have been consolidated for trial. The plaintiff opposed the transfer principally on the ground that his choice of forum should not be disturbed but also because it would be convenient for at least six of his witnesses to testify at Peoria, Illinois.

The court concluded that the action should be transferred under section 1404(a) noting that the plaintiff's witnesses could with equal convenience, testify at Danville, Illinois. The court found that the plaintiff, most witnesses and both counsel were local to Coles County which is only sixty miles

from Danville, Illinois, The court was particularly impressed by the pendency of two related cases in the Eastern District of Illinois and thought the transfer of this case to that district would result in its consolidation with the other cases pending there. The court concluded that "if such consolidation can be achieved in that court, then it is clearly in the interest of justice to have one less jury hear the evidence and to have all the witnesses testify as few times as possible. Transfer for this purpose alone would be justified, but when coupled with the convenience of the litigants and witnesses, based on considerations of distance that will surely enure if the Eastern District is the trial forum, transfer is mandated." *Ungrund v. Cunningham Brothers, Inc.*, 300 F. Supp. 270 (S.D. Ill. 1969) (Judge Morgan)

Post Judgment Interest - Unliquidated Counterclaim

The narrow issue presented in this appeal concerns the proper interest to be allowed on an unliquidated counterclaim reduced to judgment, then reversed, and then reduced to an identical judgment. On October 16, 1964, the district court entered an order finding the defendant indebted to the plaintiff in the claimed (liquidated) amount of $116,471.60. A trial on the counterclaim was held and the jury fixed the defendants damages at $64,429.47. Judgment on both the original claim ($116,471.60 for the plaintiff) and on the counterclaim ($64,429.47 for the defendants) were entered on November 19, 1964. The judgment on the counterclaim was reversed and the case was retried - the jury again returned a verdict for the defendant in the amount of $64,427.47 and judgment was entered on February 7, 1967. The appeal from this judgment was dismissed for want of prosecution.

The plaintiff contends that it is entitled to statutory interest on the full amount ($116,471.60) from October 16, 1964 until the entry of the second judgment on the counterclaim - February 7, 1967 - and interest on the differential ($52,040.13) from that date. The defendant claims that interest on the full amount should run from October 16, 1964 until the date of the first judgment on the counterclaim - November 19, 1964 - and on the differential from that date.

The district court awarded interest on the full amount only for the shorter period (34 days) and the plaintiff appealed. The Court of Appeals reviewed the four different approaches for computing interest in similar situations but concluded that the trial court's denial of full interest was not "either so unfair or so inequitable as to require us to upset it." *Ralston Purina Company v. Parsons Feed & Farm Supply, Inc., et al.* (Eighth Circuit, August 27, 1969) (Judge Blackmun)

## C. ANTITRUST

### Price Fixing - Injunctive Relief - Mootness

The Government in this civil antitrust action sought the court to "adjudge and decree" that the defendant had violated Section 1 of the Sherman Act and to enjoin the defendants from engaging in future prohibited conduct. The evidence established the existence of 38 episodes in which the defendant salesman took actions intended to curb price cutting. Although the court found that such episodes were too few in number to have any significant impact on competition, it held that they were nevertheless violative of the Sherman Act. The evidence was clear and convincing that the activity complained of had ceased and that the defendant's intent to comply with the law in the future could be accepted as bona fide. The court found no substantial basis, established by creditable evidence, that there was any danger of future violations and injunctive relief was denied.

This determination did not in the opinion of the court render the entire matter moot. Accordingly, a decree was entered adjudging that the defendant had violated Section 1 of the Sherman Act. The court retained jurisdiction so that further relief could be granted in the event of future violations. *United States v. Uniroyal, Inc.*, 300 F. Supp. 84 (S.D. New York, 1969)(Judge Pollack)

### Restraint on Alienation (Schwinn Doctrine) - Mootness; Patent Validity - Rule 12(c) - Standing to Sue; Discovery - Work Product Rule - Legal Contentions

The Government sought declaratory and injunctive relief against two British corporations for alleged violations of Section 1 of the Sherman Act. The matter was before the court on various motions of both parties.

The court granted the Government's motion for summary judgment against Imperial Chemical Industries (ICI) on a *restraint on alienation theory* holding that a bulk resale restriction on its sale of bulk form griseofulvin was a per se violation of the Sherman Act under the *Schwinn Doctrine*. The court also found that ICI's recent decision to eliminate the bulk resale restriction from its sales agreements did not render the matter moot.

The defendant ICI filed a motion under Rule 12(c) contending that the United States lacked standing to challenge the validity of the ICI patent. In granting the motion, the court observed that "the present state of the most apposite case law strictly interpreted indicates that the Government may only sue to cancel a patent when 'fraud or deceit' is

alleged." Since fraud and deceit were not involved here, the court concluded that the Government lacked standing to raise the question of patent validity.

The court also ruled on two preliminary motions involving scope of interrogatories. The court overruled the Government's objection to interrogatories requiring the Government to identify in detail the names and addresses of the parties to communications which the Government claims fall within the work product rule. The court observed that the work product rule protects work product and not *the fact of its existence or non-existence*. The defendants objected to Government interrogatories seeking their defenses to the alienation charge. The court agreed that the query demanded legal contentions not properly discoverable and the objection was sustained. *United States v. Glaxo Group Limited, et al.* (District of Columbia, June 4, 1969) (Judge Gasch)

Tying Arrangement - Attorney Fees

Advance Business Systems, a distributor of Nashua photocopy paper, brought this private antitrust action against SCM claiming violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act relating to alleged illegal *tying arrangements* involving photocopy paper and supplies. The district court found that SCM had violated the antitrust laws with respect to three separate *tying arrangements* made illegal either by Section 3 of the Clayton Act or by Section 1 of the Sherman Act. The court of appeals affirmed. (The case was remanded for modification of the judgment to include an item excluded by the trial court.)

The trial court also awarded the plaintiff attorney fees in the amount of $35,875. The defendant contended that the court abused its discretion by setting a fee in excess of the single damage award ($16,714). The court of appeals approved the award pointing out that "when the damages recovered are relatively small, as in the present case, it is not necessarily an abuse of discretion to grant fees exceeding the amount of single damages." *Advance Business Systems v. SCM Corporation* (Fourth Circuit, August 18, 1969) (Judge Sobeloff)

Clayton Act (Section 7) - Treble Damage Action

Immediately following the Supreme Court's opinion in *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957), the plaintiffs brought this derivative antitrust action alleging, *inter alia*, that du Pont had violated Section 7 of the Clayton Act and claiming treble damages as a result thereof. In an early pretrial decision the trial court concluded that a

violation of Section 7 did not constitute a cause of action for money damages. 221 F. Supp. 488.

The court of appeals reversed, holding that the trial judge erred in deciding that a violation of Section 7 could not support a private cause of action for money damages and that he improperly restricted the weight to be given to the Government judgment in the first *du Pont Case*. The court concluded that Section 7 of the Clayton Act could furnish a basis for claim for money damages under the broad language of Section 4 of the Act and felt that the plaintiff should have a chance to prove injury "by reason" of the violation of Section 7.

The trial court ruled that since the judgment in the Government case covered a different time period than involved in the private action, the ultimate facts determined in the earlier judgment could not be used against the defendants under Section 5(a) but the plaintiffs were permitted to introduce the decree in evidence for historical purposes and background material. The court of appeals did not approve these limitations. The court held that "while a judgment of violation in a government suit covering a given period is insufficient to establish a violation at a later date, that judgment may be of evidentiary weight in the private action if it encompasses findings sufficiently related to the issues of the private action and if sufficient additional evidence is adduced to show that the illegal activities condemned in the government decree carried over into the period in issue." The court conceded that in the ordinary antitrust case there was no presumption of continued unlawful conduct but pointed out that here, what was unlawful was du Pont's status as stockholder in General Motors and that status continued until divestiture. *Callman Gottesman v. General Motors* (Second Circuit, August 13, 1969) (Judge Feinberg)

Conglomerate Merger - Preliminary Injunction - Preserving the Status Quo

The Government contends that the consumation of an exchange offer made by Northwest Industries, Inc. to the stockholders of the B. F. Goodrich Company would violate Section 7 of the Clayton Act. On the day the complaint was filed the Government moved for a temporary restraining order and a preliminary injunction. A temporary restraining order was entered the next day and hearings were held for nearly a month on the request for a preliminary injunction.

After reviewing the extensive evidence relating to the markets and products of Goodrich and Northwest and their numerous subsidiaries the court concluded that "while the

record contains varying degrees of evidence as to the comparatively large number of lines of commerce in which the contemplated acquisition might have a substantial anti-competitive effect, it does not permit a definitive finding at the present time that such an effect will result with respect to any particular products or services. Given the number of alternative possibilities and the combinations and permutations existing with respect to some of them, it must be recognized that there is a very real possibility, if not a probability, that the Government in a trial on the merits will, with respect to one or more products or services, establish the anti-competitive effect to constitute a violation of Section 7." The court rejected the Government's contention that consolidation of two of the countries 100 largest corporations would constitute a violation of Section 7 without any specific demonstration of a substantial lessening of competition in any section of the country.

Since the court was unable to find that the Government has demonstrated *probable success* with respect to *any particular* line of goods or services and since the issuance of a preliminary injunction would, rather than preserve the status quo, foreclose more careful and more comprehensive consideration of the possible anti-competitive effects of the proposed acquisition, the preliminary injunction was denied. However, because of the *substantial number* of areas of *possible* ultimate demonstration of Section 7 violations and its ultimate obligation to preserve the status quo to the maximum extent possible pending a full hearing, the court entered a comprehensive "hold separate and status quo order" requiring Northwest (1) to take all steps necessary to maintain Goodrich as a separate, viable going concern; (2) to take no action which might impair its ability to comply with any future order of divestiture; (3) preserve and protect all assets of Goodrich; (4) take no action which will substantially diminish the operations of Goodrich or dispose of any of its assets; (5) restrain from using the name Goodrich or identifying the relationship between Goodrich and Northwest; (6) restrain from engaging in any reciprocal practices; (7) restrain from issuing any additional securities of Goodrich or incurring any additional indebtedness of Goodrich; (8) retain unencumbered all shares of Goodrich; (9) take such action or refrain from such action as may be necessary to achieve maximum preservation of the status quo. *United States v. Northwest Industries, et al.* (N.D. Illinois, July 11, 1969) (Judge Will)

Price Discrimination - Damages

The district court awarded treble damages to a jobber of plumbing supplies in an amount based solely on the difference in prices charged the plaintiff and his competitors. The

Court of Appeals affirmed holding "that under the Robinson-Patman Act, unless the evidence establishes a greater consequential injury, discrimination in prices or allowances is entitled to be regarded as constituting a direct business injury and that the amount thereof thus properly can be made the basis and measure of a general damage award." The court further pointed out that the Robinson-Patman Act permitted recovery of the amount of discrimination in prices and allowances without necessary proof or findings that a lessening of competition in fact occurred. The court also held that the availability of a similar product on equal terms and conditions could not serve as a defense under the Robinson-Patman Act. *Fowler Manufacturing Company v. H. H. Gorlick, et al.* (Ninth Circuit, August 15, 1969) (Judge Harvey M. Johnsen)

Citations are now available for the following previously reported opinions:

| Bulletin No. | Page | Caption | Citation |
|---|---|---|---|
| 3 | 11 | *Tinnerholm v. Parke Davis* | 411 F.2d. 1390 |
| 4 | 4 | *Hastings v. Maritime Overseas Corp.* | 411 F.2d. 1201 |
| 4 | 6 | *Daily Press v. U.P.I.* | 412 F.2d. 126 |

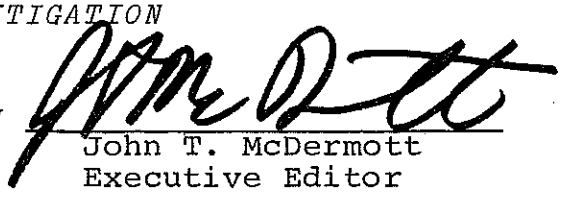
*General Interest Item* - On September 18, 1969 Senator Tydings introduced a bill (S.2924) which would amend 28 U.S.C. §1332 (District Courts; Jurisdiction) to provide:

> "(b) In any case permitted to be maintained as a class action under the Federal Rules of Civil Procedure, the aggregate claims for or against all members of the class shall be regarded as the matter in controversy."

Copies of unpublished opinions may be obtained from the authoring judge or from the undersigned. Your suggestions and comments concerning the content and format of these bulletins are most welcome as are copies of opinions and orders which may be appropriate for inclusion in a future bulletin.

Very truly yours,

THE BOARD OF EDITORS FOR THE *MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION*

By 

John T. McDermott
Executive Editor

# MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION



October 20, 1969

BULLETIN NO. 7

TO ALL JUDGES CONCERNED WITH COMPLEX AND MULTIDISTRICT LITIGATION

The following recently filed opinions and orders appear to be potentially relevant to complex and multidistrict litigation. The inclusion or exclusion of a particular opinion or order in a bulletin does not necessarily imply that the Board of Editors approves or disapproves of the procedures used or results reached in the particular case.

## A. JURISDICTION - VENUE - SERVICE

### Long-Arm Statute (Kentucky) - Airlines Crash - Instrument Manufacturer

This wrongful death action arises from an airplane crash at the Greater Cincinnati Airport, located in Boone County, Kentucky. The plane was manufactured by General Dynamics Corporation and contained certain instruments manufactured by Kollsman Instrument Corporation, a wholly owned subsidiary of Standard Kollsman Industries, Inc. Both Standard Kollsman and Kollsman Instrument moved to dismiss for lack of personal jurisdiction. Neither has manufacturing plants, distribution warehouses, sales agencies, or storage warehouses in Kentucky, nor are they qualified to do business in Kentucky. Although it could not identify the airlines or aircraft which actually used its instrumentation, Kollsman Instrument responded (to an interrogatory) that it "does not know of any commercial airline which does not use Kollsman products." The Court took judicial notice of the fact that numerous commercial airlines serve Kentucky and that their airplanes land and takeoff at various locations within the state. It appeared that the great majority, if not all, of these planes used Kollsman instruments.

The Court concluded that Kollsman Instruments came within the reach of the Kentucky long-arm statute and that by selling

its products to General Dynamics to be used on aircraft which fly throughout the country including Kentucky, it purposely availed itself of the privilege of conducting activities within the State of Kentucky. The Court held that to subject Kollsman Instrument to suit in Kentucky in this action would be "reasonable and just, according to our traditional conceptions of fair play and substantial justice."

As to the parent corporation, Standard Kollsman, the Court concluded that the plaintiff did not establish sufficient contact between it and the Commonwealth of Kentucky to render it subject to jurisdiction there. The Court noted that mere ownership by a corporation of all the stock of a subsidiary amenable to the jurisdiction of a state's court does not in itself subject the parent to the jurisdiction of such court.

The motion to dismiss as to Standard Kollsman Industries was granted while the motion to dismiss as to Kollsman Instrument Corporation was overruled. *Miller v. Trans World Airlines, et al.* (E.D. Kentucky, July 2, 1969) (Judge Swinford)

Long-Arm Statute (South Carolina) - Effectivity - Breach of Contract; Jurisdictional Amount - Aggregation

This action is based on a formal licensing agreement entered into by Deering Milliken and the appellees in May 1964. In its complaint, Deering Milliken alleged that the appellees made a series of underpayments from January 1, 1966 through March 31, 1968. Service of process was obtained under South Carolina's long-arm statute which became effective on January 1, 1968 and which applied "to transactions entered into and events occurring after that date." The appellees successfully contended in the District Court that the statute was inapplicable since the contract was entered into prior to January 1, 1968.

The Court of Appeals disagreed and reversed. The Court pointed out that the provisions governing the effective date were not limited to transactions entered into after January 1, 1968 but also embraced "events occurring after that date." The Court reasoned that the breach of contract and simultaneous accrual of a cause of action were *events* within the meaning of the Act and that the underpayments that occurred after January 1, 1968 were sufficient to make the long-arm statute applicable. The appellees also argued that the lack of proof that the alleged underpayments occurring after January 1, 1968 aggregated $10,000 deprived the Court of subject - matter jurisdiction. The Court disagreed and pointed out that "once jurisdiction over the person is obtained, the entire subject matter of the controversy between the parties comes before the court. Therefore, to determine the jurisdictional amount, the total underpayments, those occurring before and after January 1, 1968 -- here alleged to be $45,000 -- should be considered." *Deering Milliken v. Textured Fibres, Inc.* (Fourth Circuit, September 11, 1969) (Judge Butzner)

B. ANTITRUST

Statute of Limitations - Tolling

On March 10, 1964 a United States Grand Jury at Los Angeles returned five indictments against various defendants charging them with a combination and conspiracy in restraint of interstate trade in steel and concrete pipe in violation of Section 1 of the Sherman Act. On June 19, 1964 *nolo* pleas were entered by all defendants and four days later the Government filed damage actions against the same defendants. However, on October 28, 1964 the Government amended these actions by adding a new count under 15 U.S.C. Section 4 seeking to restrain continuing violations of Section 1 of the Sherman Act. All but one of the defendants settled the Government's civil actions on December 8, 1967 and "partial final judgments" were entered as to all but American Pipe and Construction Co. A final judgment was entered as to that defendant on May 24, 1968.

This action was filed on April 19, 1969 and the defendants urge that it is barred by the statute of limitations. They contend, *inter alia*, that the tolling provisions of Section 5b of the Clayton Act could not be *restarted* by the October 28, 1968 amendment to the June 23, 1964 complaint.

The Court disagreed and held that private antitrust litigation could be filed at any time prior to one year after the termination of *any* criminal or civil proceeding and if two or more periods of tolling happened to overlap, the tolling provisions continue to be viable until the end of the one-year extension following the termination of the *last* Government action. The Court noted that if a *tolling action* was commenced more than one year after the termination of a prior *tolling action* it would not serve to revive any claims already made moribund by the termination of the one-year extension. Here however, the one-year suspension period following the June 19, 1964 termination of the criminal action had not ended when, on October 28, 1964, the Government amended its June 23, 1964 complaint to add the injunctive count.

All defendants, except American Concrete Pipe, further contend that the claims against them are barred by the statute of limitations for the Government civil actions were terminated *as to them* on December 8, 1967 and the instant action was filed more than one year thereafter. The Court held that these defendants, by their prior conspiratorial actions, had become solidly chained to American Concrete Pipe until the Government actions were terminated as to *all defendants* and thus the statute of limitations remained tolled as to *all defendants* until one year after the Government's civil case against American Concrete Pipe had terminated, viz. until May 24, 1969. (This action was commenced on April 15, 1969.)

Two defendants, Martin-Marietta and O'Malley, were not defendants nor were they named as co-conspirators in any of the Government actions, criminal or civil. They argue that the tolling provisions of Section 5b simply do not apply to the actions against them which are barred by the four year statute of limitations (the conspiracy terminated in 1962). The Court found that the alleged conspiratorial acts of these two defendants were entwined with and fundamentally the same as those of defendants named in the Government actions and plaintiff's claims against them are "based in whole or in part on the violations alleged in the government actions and hence the tolling provisions are equally applicable to them."

The Court also rejected the defendants contention that the State of Arizona's "covenant not to sue" barred this action which was commenced by a political subdivision of the state. The Court also rejected the defendants' contention that the action was barred by *laches*. The defendants' motion for summary judgment was denied. *Maricopa County v. American Pipe and Construction Co., et al.* (District of Arizona, August 1, 1969) (Judge Pence)

Treble Damage Action - *Parens Patriae*

In addition to a damage claim based on alleged illegally excessive prices paid for defendant's products by the State in its proprietary capacity, the State of Hawaii brought this antitrust action "by virtue of its duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae* . . ." The defendants moved to dismiss the *parens patriae* claim contending: (1) there could not be a *parens patriae* suit for damages as only equitable relief would be available, (2) the complaint does not allege the injury to the general economy of the state or to the state in its sovereign or quasi-sovereign capacity which would support a *parens patriae* injunction, (3) a *parens patriae* suit for damages is not maintainable under Section 4 of the Clayton Act, (4) the defendants stand the risk of incurring double damages inasmuch as each of the inhabitants would also be entitled to sue for direct damage, and (5) the *parens patriae* suit will not lie because injury to the state is "by its very nature too remote or speculative".

The Court noted that the only case lending *precedential support* to the claim that a state may recover money damages, trebled, in an antitrust action under the aegis of a *parens patriae* claim is *Georgia v. Pennsylvania Rwy. Co.*, 324 U.S. 439 (1945). However, the Court emphasized that "the state's *parens patriae* claim cannot be disguised as an attempt to recover damages on behalf of the state's individual citizen-claimants. It is not a substitute for a class action under Rule 23, F. R. Civ. P. The two *theories for recovery* of damages are separate and distinct. So, here, the state in the guise of *parens patriae* cannot recover for the individual and several possible damage claims of its many citizen-consumers of petroleum products." The Court held that a state would have standing to sue in a

*parens patriae* capacity only if a substantial portion of the inhabitants of the state were adversely affected by the challenged acts of the defendants.

The Court held that the State of Hawaii could maintain its action as *parens patriae* but that since such an action could not be brought to recover the individual damages of the inhabitants of the state, the state would be required to prove actual injury to the state economy - an injury completely severable from the injuries to its individual inhabitants - before it could recover money damages. *State of Hawaii v. Standard Oil of California, et al.* (District of Hawaii, July 2, 1969) (Judge Pence)

Several states in this multidistrict antitrust litigation have asserted their right to bring a Clayton Act damage action as *parens patriae* on behalf of all individual consumers within the states. In its memorandum opinion, the Court first distinguished the majority of the authorities relied upon by the plaintiffs on the basis that they either involved injunctive or other equitable relief or encompassed claims of political subdivisions of the state rather than claims of individual citizens. Two cases were found to be apposit: *Georgia v. Pennsylvania Rwy.*, 324 U.S. 439 (1945) and *State of Hawaii v. Standard Oil* (summarized above). The court held that, even accepting the plaintiffs' and Chief Judge Pence's interpretation of the *Georgia Case*, there was a total absence of support for the *type of damage recovery* sought by the plaintiffs here. The Court noted that suits for the benefit of particular individuals were precisely the ones which were held by Judge Pence in the *State of Hawaii Case* to be improper *parens patriae* claims.

The plaintiffs contended that the denial of their *parens patriae* claims would leave many citizens with no adequate remedy to vindicate their rights however the Court pointed out that the 113 cases now before it for coordinated or consolidated pretrial proceedings included numerous cases in which various plaintiffs claim the right to represent as classes under Rule 23, individual homeowners, owners of apartment buildings, owners of commercial buildings and other consumers. Even these particular plaintiffs (the States of Kansas and California) assert claims on behalf of these same consumers as *representative plaintiffs* in ordinary Rule 23 class actions. The Court agreed with the defendants that to allow a state to recover damages for individual claimants in a substitute type of representative suit without the safeguards provided under Rule 23 would undermine the aims of that Rule.

The plaintiffs also urged that consideration of the legal sufficiency of the *parens patriae* was premature since the matter was before the Court on a motion to amend the complaint.

While recognizing that Rule 15(a) indicates that leave to amend should be granted freely the court concluded that leave should be denied here because: (1) this litigation, already extremely complex, should not be unduly and unnecessarily complicated further by claims without any legal foundation, (2) there were no substantial conflicting authorities; all authorities pointed to the rejection of the claim and (3) the issue had been thoroughly and extensively briefed by all parties. *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corporation* (E.D. Pennsylvania, September 24, 1969) (Chief Judge Lord)

C. AIRCRAFT

Crash - Wing Tip Vortices - Contributory Negligence

In a previous opinion (387 F.2d 870) the Fifth Circuit reversed the District Court's finding that the sole proximate cause of the appellant-decedent's death was his negligence in taking off shortly behind a large jet aircraft, the wing tip vortex from which caused his small plane to crash, killing him and his passenger. On remand, the District Court found the deceased pilot contributorially negligent and, under the Georgia comparative negligence statute, reduced the damage award by 25 percent. The Court of Appeals now construes its prior opinion as determining with finality the questions of liability, fault and causation and holds that the combination of actions by the Tower "in giving clearance and in failing to use the prescribed cautionary phraseology placed the entire responsibility for the crash on the controller." Thus it was held to be error for the Trial Court to have applied the Georgia comparative negligence statute to the case upon remand.

Applicable Georgia law permits recovery of the full value of the life of a decedent "without deduction for necessary or other personal expenses of the decedent had he lived." The Court held that to the extent that Georgia statute permits recovery of more than the loss to the survivor, it is *punitive* and not recoverable under the Federal Tort Claims Act. However, the Court concluded that "guided by the language of the Tort Claims Act, the Trial Court may well have given consideration to the available standard of living of the decedent and his family and made a substantial allowance for personal expenses of (the decedent) in fixing the final amount (of the damage award)." The Court also concluded that it was appropriate for

the Trial Court to include projected federal income tax liability in determining the amount of the award. *Hartz v. United States* (Fifth Circuit, September 11, 1969)(Judge Tuttle)

The plaintiff brought this action under the Federal Tort Claims Act for damages arising from the death of her husband and son in the crash of a small plane which the former was piloting. The plaintiff alleges that the single engine plane crashed because of an entrail encounter with wake turbulence shed from the wings of a recently departed four engine superconstellation. She contends that the government air controllers were negligent in failing to insure that there was sufficient separation between the two planes and in failing to warn the deceased pilot of the possibility of encountering *wing tip vortices*.

The Court first eliminated fire-in-flight and engine stalling as possible causes of the crash and found that the sole cause of the crash was the light plane's encounter with trailing vortices of the departing Lockheed Constellation. The Court further found that "the evidence comes close to proving but does not prove that the separation of the two aircraft fell short of the minimal spacing of Section 422.2 (of the applicable FAA Manual.)" The Court concluded however that compliance with the minimum requirements of the manual did not relieve the air traffic controller of his responsibility to effect safe clearances between the two planes. The Court also found that the controllers lacked the basic knowledge to recognize the hazard of wing tip vortices with which a reasonably prudent controller could base a judgment that clearance of takeoff should have been denied. The Court further found that the controller was negligent in not warning the pilot that he might encounter wing tip vortex turbulence in the wake of the Lockheed Constellation.

The Court, however, held that the clearance to takeoff did not relieve the pilot of his final authority and responsibility for the safe operation of his plane and he should also have anticipated the possibility of a wing tip vortex encounter and its potential hazard when he was informed of the calm wind condition present on the runway. The Court concluded that the pilot failed to exercise reasonable care and that such negligence directly contributed to his death, thereby precludes the plaintiff's recovery for his death. The father's negligence, though it contributed to his son's death, was not imputable to the son and did not defeat plaintiff's recovery on that claim. Nor did the husband's negligence defeat the wife's claim for damage to the aircraft based on her part ownership of it. *Wasilko v. United States*, 300 F. Supp. 573 (N.D. Ohio 1967) (Judge Thomas)

The District Court's award of damages for the death of the son and for the damage to the aircraft *and* its denial of

recovery for the death of the husband due to his own contributory negligence were affirmed. *Wasilko v. United States* (Sixth Circuit, August 13, 1969)(Per Curiam)

D. SECURITIES

Stock Fraud - Punitive Damages - Underwriter Indemnification

Certain purchasers of the stock of Law Research Services, Inc., (LRS) initiated this action against LRS, its president, (Hoppenfeld) and the underwriter of LRS's public stock offer, Blair & Co. (Blair) contending that the defendants violated Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934. The jury found that all three defendants had violated both the Securities Act of 1933 and the Securities Exchange Act of 1934 and awarded compensatory damages to all plaintiffs and punitive damages against Hoppenfeld and Blair based on violation of *Section 17(a)* of the 1933 Act. The jury also found for Blair on a cross-claim asserted by it against LRS based on an indemnity clause included in the underwriting agreement. The District Court set aside the verdict on the cross-claims for indemnity. (The opinion of the District Court is recorded at 287 F. Supp. 188.)

The Court of Appeals noted that this appeared to be the first time punitive damages were actually awarded for violation of the Securities Act. (The Court found it unnecessary to determine whether Section 17(a) standing alone would support an action for compensatory damages since the award of those damages could have been based on violations of Section 10(b) of the 1934 Act.) The Court answered the "seminal question" - whether punitive damage recovery is necessary for the effective enforcement of the Act - in the negative. The Court pointed out the plaintiffs under the Securities Act already possess an entensive "arsenal of weapons" which serve to perform the functions of retribution and deterrents, not the least of which is a class action under Rule 23. It was further noted that the courts have treated the '33 and '34 Acts *in pari materia* and construed them as a single comprehensive scheme of regulation. The Court concluded that to permit punitive damages under the 1933 Act while they are barred under the 1934 Act would create an unfortunate dichotomy between the two Acts and would "create an unreasoned split between buyers and sellers of securities subject to fraud of an equally heinous nature."

As to the indemnification issue, the Court of Appeals agreed with Judge Mansfield that where there was actual knowledge of the misstatement (of a material fact) by the underwriter, and wanton indifference to its obligations, it would be against public policy to permit Blair to enforce

its indemnification agreement against LRS. The Court noted that there was ample basis to find Blair not deserving of recovery under the terms of the indemnity agreement itself which exempted indemnification for willful malfeasance, bad faith, gross negligence, or reckless disregard of its obligations.

The judgment of the District Court was affirmed in all respects except that the award of punitive damages was reversed. *Globus v. Law Research Service, Inc.* (Second Circuit, September 8, 1969)(Judge Kaufman)

Derivative Action - Attorney Fees and Costs

After merger negotiations between Schenley and P. Lorillard Company had terminated, a successful merger agreement was entered into by Schenley and Glen Alden Corporation. The plaintiff commenced this action on his own behalf and on behalf of a class alleged to consist of all holders of Schenley common stock against Glen Alden and various individual defendants, (most of whom were directors of Schenley) alleging that the defendants had misrepresented the true value of the proposed merger offer *and* that they had acted to deprive Schenley stockholders of a more favorable merger with Lorillard. Allegedly because of this action, Glen Alden twice revised the terms of its offer to a point that it was, in the opinion of the plaintiff, equivalent to the original Lorillard offer. Although by his own admission the underlying action has become moot, the plaintiff continues to press his claim for costs and attorney fees on the ground that his diligence in prosecuting this action created a fund of twenty dollars per share (the alleged increase in the Glen Alden offer) out of which he is entitled to recover costs, expenses, and counsel fees.

Although there is no requirement that one seeking counsel fees first win a judgment, the Court observed that the law does require some demonstration of the "meritorious quality" of the underlying action. The Court held that "where the underlying suit has been settled or rendered moot, a demonstration that the basic action could have withstood a motion to dismiss on the pleadings at the time the action was filed, is sufficient to establish its meritorious quality." The Court concluded that neither the original complaint nor the amended complaint could have survived an appropriate motion to dismiss because both pleadings were "colored by two fatal defects: namely, failure to allege that plaintiff or the members of his class were defrauded purchasers or sellers and failure to allege or indicate reliance on the deceptions charged to defendants." The petition for costs, expenses and attorney fees was dismissed. *Kahan v. Rosenstiel* (District of Delaware, June 10, 1969) (Judge Wright) 300 Fed. Supp. 447 (1969)

Citations are now available for the following previously reported opinions:

| Bulletin No. | Page | Caption | Citation |
|---|---|---|---|
| 3 | 3 | *State of Illinois v. Harper & Row Publishers* | 301 F. Supp. 484 |
| 3 | 5 | *Canadian Filters v. Lear Siegler, Inc.* | 412 F. 2d 577 |
| 3 | 7 | *Harris v. United States* | 413 F. 2d 316 |
| 3 | 11 | *Kuehnert v. Texstar* | 412 F. 2d 700 |
| 4 | 2 | *Glen Graves v. General Insurance Corp.* | 412 F. 2d 583 |
| 4 | 4 | *Walther v. Omaha Public Power District* | 412 F. 2d 1164 |
| 4 | 5 | *Jack Bosse v. IDECO* | 412 F. 2d 567 |

Copies of unpublished opinions may be obtained from the authoring judge or from the undersigned.

The United States Supreme Court has taken the following action with respect to cases previously reported in these bulletins:

| Case | Bulletin No. | Page | Action Taken |
|---|---|---|---|
| *United States v. United Fruit* | 3 | 5 | certiorari denied 38 L.W. 3127 |

A Table of Cases and a Topical Index for Bulletins No. 1 - 7 are included. We hope you will find them useful.

Very truly yours,

THE BOARD OF EDITORS FOR THE *MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION*

By 
John T. McDermott
Executive Editor

# MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION



November 17, 1969

BULLETIN NO. 8

TO ALL JUDGES CONCERNED WITH COMPLEX AND MULTIDISTRICT LITIGATION

The following recently filed opinions and orders appear to be potentially relevant to complex and multidistrict litigation. The inclusion or exclusion of a particualr opinion or order in a bulletin does not necessarily imply that the Board of Editors approves or disapproves of the procedures used or results reached in the particular case.

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## A. JUDICIAL MANAGEMENT

### Attorney Fees & Costs - Class Actions - Antitrust

*Philadelphia Electric Company v. Anaconda American Brass Co.*, (E.D. Pa., August 1, 1969)(Judge Fullam)

This private treble damage antitrust litigation was settled for a sum in excess of twenty-two million dollars. Counsel for certain plaintiffs have asked the court for approval of counsel fees at the rate of 25% of the recovery and expenses estimated at $50,000 to be deducted from the settlement.

The court previously established various class actions under Rule 23 and as a result a total of 1481 claimants were entitled to share in the settlement. Of these 1380 engaged the petitioning-attorneys to represent them and agreed to pay 25% of the amount recovered. Several of the other claimants object to the amount of the fee and one claimant, the City of New York (and various departments and agencies thereof), objects to the payment of any fee from its share of the settlement.

Although the fees sought by the petitioning-attorneys were "undeniably generous" the court concluded that the 25% figure was reasonable for the following reasons: (1) the abilities and standing of petitioning counsel are very high; (2) the results achieved were remarkably favorable to the interests of the class members; (3) enforcement of the antitrust laws in this case was solely due to the efforts of the petitioning-attorneys, as the statute of limitation would have barred all of the claims here involved but for counsel's enterprise and

foresight in filing class actions; (4) the treble damage feature of antitrust recoveries means that counsel can be generously paid without actual "cost" to the claimants; *i.e.*, counsel fees merely reduce the windfall; and (5) the 25% fee has already been agreed to by virtually all of the claimants.

The court noted that the City of New York situation differed in that the City entered a separate appearance and sought to intervene in the class action. However, the statute of limitations had expired several months before the City took action and in the court's opinion its entire claim would have been lost had petitioners not filed the class actions. The court recognized that if these actions had not been settled and if the City of New York had persisted in its desire to have a substantial degree of control over its litigation, a severance of the City of New York claims or a redefinition of the class may have been necessary. The court concluded however that the petition for attorney fees must be decided on the basis of what *actually* happened and what happened was that the petitioning-attorneys "salvaged approximately one million dollars for New York by bringing a class action." The court concluded that New York must either reject this benefit or accept it *cum onere* - subject to a lien in favor of the petitioning-attorneys for their services. Since New York's own counsel performed a great deal of the work in pressing its claim and thus considerably lightened the burden of the petitioning attorneys, the court ordered the fee reduced, as to the New York claims, to 15% of the recovery.

Class Actions - Multidistrict Litigation - Conflicting Claims

*Burlington Hospital v. Pfizer & Co.*, (S.D. N.Y., September 16, 1969) (Judge Wyatt)

The State of Iowa commenced an action in the Southern District of Iowa which was later transferred to the Southern District of New York under 28 U.S.C. Section 1407. Sometime later the Burlington (Iowa) Hospital and a number of other Iowa Hospitals also commenced an action in the Southern District of Iowa which was also transferred to the Southern District of New York under Section 1407. The defendants have made a settlement offer which divides the various claims into two separate groups: (a) those made by Government entities and agencies including hospitals, by wholesalers and retailers, and by individual consumers; and (b) those made by *private* hospitals. The State of Iowa action asserts claims which fall entirely within group (a) of the settlement offer while the Burlington Hospital case was originally brought as a class action on behalf of "other non-governmental hospitals" in Iowa - a group (b) class. Subsequently, approximately forty *governmental hospitals* in Iowa filed motions to intervene in the Burlington case

or to designate a governmental sub-class in that action. All parties to the Burlington action consented to the joinder of the governmental hospital claims but the State of Iowa opposed the motion.

The court noted that in a technical sense the State of Iowa has no standing in this controversy but that it would be heard as amicus curiae. The court observed that "all these cases here commenced or transferred must be dealt with, not separately but as a whole, that is the very purpose for their concentration in one district for pretrial purposes." The court denied the motion to intervene but permitted the movants to enter their appearances in the *State of Iowa action* through their own counsel. The court observed that "in this way these movants can be effectively represented by their own counsel in the Iowa action which is a more natural place for them to be heard because the Iowa action involves only claims in group (a) of the settlement offer, such as those of movants. The present plaintiffs in the Burlington action are private hospitals whose claims are in group (b) of the settlement offer and have nothing in common with the claims of movants. It is better, at least for the administration of the settlement offer, that the Burlington action remain as one for private hospitals only."

*The City & County of San Francisco v. Pfizer, et al.*, (S.D. N.Y., October 3, 1969)(Judge Wyatt)

The issue before the court concerned the right of the State of California to intervene under Rule 24(a)(2) in a class action brought by the City and County of San Francisco (filed in the Northern District of California and transferred to the Southern District of New York under 28 U.S.C. Section 1407) on behalf of a class consisting of individual consumers who purchased antibiotic drugs within the City and County of San Francisco. The State of California also filed a class action which was transferred from the Northern District of California to the Southern District of New York under Section 1407. The City and County of San Francisco has accepted a settlement offered by the defendants while the State of California has rejected it. The court characterized the different attitude toward settlement as "the root cause of the present controversy." The court previously permitted San Francisco to maintain its class action following a hearing at which the State of California vigorously opposed such an order. The reasoning of the court was that - at least for the purposes of the administration of the settlement - government entities down to the county level could maintain their actions already commenced as class actions for their residents.

The court characterized California's motion to intervene as an attempt to include the residents of San Francisco as members of its class although there has been no determination that the California action could be maintained as a class action. The court concluded that to permit the intervention here sought would, because of the conflict of attitudes toward settlement,

invite chaos. The motion to intervene was denied.

Cross-claim - Antitrust

*The Old Homestead Bread Company v. Continental Baking Company*, (D. Colorado, August 6, 1969)(Judge Doyle)

The complaint charges several defendants with a combination and conspiracy in violation of Sections 1 and 2 of the Sherman Act and a discriminatory bread pricing scheme in violation of Section 2(a) of the Robinson-Patman Act. One of the defendants - Interstate - sought leave to file a cross-claim. The other defendants objected on the ground that the cross-claim does not arise from the transaction or occurrence described in the complaint and would make the action more complex and would prejudice and confuse the jury.

The court recognized that the claims were somewhat different but found the differences not determinative "because absolute factual identity is not required for finding that claims arise out of the same transaction and occurrence." The court concluded that both claims were offshoots of the same basic controversy and that practices among wholesalers and retailers in the distribution of bread products were the central issues in both claims. The court noted that the evidence needed to prove these claims, while not identical, would be substantially the same. The court agreed that the addition of the cross-claim would make the action somewhat more complex but this did not "overshadow the fact that there is a very close relationship between the amended complaint and the cross-claim." Leave was granted to file the cross-claim.

B. DISCOVERY & EVIDENCE

Experimental Data

*Crown Cork & Seal Co., Inc. v. Morton Pharmaceuticals, Inc.*, (6th Cir., September 30, 1969)(Judge Peck)

The plaintiff (Crown) appealed from a jury verdict in favor of Morton on a counter claim alleging that thirty-six thousand aerosol cans purchased from Crown were defective. Morton filled the empty cans purchased from Crown and then *crimped* the valve cup assembly to the can. Crown attempted to introduce evidence showing the results of the tests on the cans in which a *newly developed micrometer*

was used to measure the depth of the crimp. Crown contended that the evidence showed that the depth of the crimp was improper and that this was the primary cause of the leakage. The district court ruled that since the micrometer had not been invented at the time the cans were filled and crimped, the evidence was inadmissible.

The court of appeals disagreed, observing that the issue was not whether Morton should be held liable for failure to know of or use such a measuring device, but whether the results of the test would be probative of and relevant to the cause of the can leakage. The court pointed out that experimental evidence was admissible "so long as the evidence is relevant and probative, and experimental evidence is deemed to have probative value if the conditions of the experiment were identical with or similar to the conditions of the transaction in litigation." Since one of Crown's primary defenses was that the leakage was caused by faulty crimping, the court of appeals held that the results of the test would certainly have been relevant and would have had probative value.

Although Crown introduced expert opinion evidence tending to show that the cause of the leakage was faulty crimping, the court held that such expert opinion evidence could not be considered the equivalent of factual data based on the results of scientific tests and it could not say that the exclusion of the evidence of the crimp depth micrometer test was harmless error. The judgment was reversed and the cause remanded for new trial.

Freedom of Information Act

*General Services Administration v. Henry Benson*, (9th Cir., August 26, 1969)(Judge Barnes)

GSA appealed from a judgment of the district court enjoining it from withholding certain records relating to property purchased from it by the appellee. The district court, after taking testimony and examining the disputed documents *in camera*, ordered GSA to produce all but two credit reports. The court concluded that the information contained in the requested documents was needed to clarify the nature of the transaction for tax purposes and that GSA had failed to sustain its action in withholding the records. The court of appeals agreed and affirmed.

First noting that the case did not involve any claim of executive privilege, the court of appeals held that Rule 26(B) was sufficiently broad to encompass discovery of the records in dispute especially since they were factual material and not documents comprising the administrative reasoning process of government. The court agreed that the fourth category of exemption under the Freedom of Information Act - trade secrets and commercial or financial information obtained from a person - was inapplicable since this exemption protects information a private individual wishes to keep confidential for his own purposes but reveals to the Government under the express or implied promise by the Government that the information will be kept confidential. The court

concluded that the appraisal reports were not confidential within the meaning of the statute and that GSA has not sustained its burden in proving the privileged nature of such reports.

Past Recollection Recorded

*United States v. FMC Corporation*, (E.D. Pa., August 22, 1969) (Judge Higginbotham) See summary on page 8.

C. ANTITRUST

Group Boycott - Intercompany Conspiracy

*Seagram v. Hawaiian Oke and Liquors, Ltd.*, (9th Cir., September 8, 1969) (Judge Duniway)

The defendants appeal from a jury verdict in favor of the plaintiffs in a treble damage antitrust action charging violations of Section 1 of the Sherman Act. The court of appeals reversed and directed that a judgment be entered dismissing the action.

The plaintiff asserted that an agreement between Seagram, McKesson and Barton which caused the plaintiff to lose the distributorship of Seagram and Barton products was a group boycott - *unlawful per se* under Section 1 of the Sherman Act. The plaintiff urged and the trial court instructed the jury that the defendants' business motives were immaterial. The essence of the jury instructions on this point was that any agreement between two or more suppliers, who have been selling to or through distributor A, to transfer their business to distributor B who is also party to the agreement, is a *per se* violation of Section 1; the court of appeals found this to be "an overstatement of the rule."

The court of appeals relied on the fact that the plaintiff had presented no evidence that either Seagram or Barton had any *anticompetitive* motive for terminating the plaintiff as their distributor nor was there evidence that any of the defendants were primarily motivated by the desire to damage the plaintiff or put it out of business. The court noted that there was much evidence that both Seagram and Barton were dissatisfied with plaintiff as the distributor and the exclusion of the plaintiff was found to be merely the incidental result of the decisions of Seagram and Barton to transfer their lines to McKesson. The court held that in such a situation the *group boycott cases* were not controlling.

The court of appeals also held that the trial court erred in instructing the jury that the product divisions of the *House of Seagram* should be treated as separate entities, capable of conspiring with each other and with their parent company. The court also held that the trial court erred in instructing the jury that it could find a conspiracy on the basis of conscious parallel action alone.

Norris-LaGuardia Act - Clear Proof Test

*Ramsey v. United Mine Workers of America*, (6th Cir., September 26, 1969) (*en banc* - opinions by Judges Edwards & O'Sullivan)
*Tennessee Consolidated Coal Co., et al. v. United Mine Workers of America*, (6th Cir., September 19, 1969) (Chief Judge Weick)

These two appeals present similar factual and legal issues but different approaches by the trial courts result in a unanimous *panel* affirmance in *Tennessee Consolidated* and an equally divided *en banc* affirmance in *Ramsey*.

Both actions are brought by small coal companies against the United Mine Workers of America charging the mine workers and several large coal companies (who form the Bituminous Coal Operators Association) with engaging in an unlawful conspiracy to eliminate and suppress competition in violation of Sections 1 and 2 of the Sherman Act. The primary issue in both actions is whether the plaintiffs must prove violation of antitrust laws by *clear proof* rather than by *a preponderance of the evidence*. The United Mine Workers urge that the *clear proof test* is mandated by Section 6 of the Norris-LaGuardia Act and by the Supreme Court's opinion in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

The *Ramsey Case* was tried to the court without a jury and although the court found that the plaintiffs had proven its case by a *preponderance of the evidence* it held that they did not meet the *clear proof test* and the complaint was dismissed. The judgment was affirmed by an equally divided *en banc* court; opinions were filed supporting affirmance (*i.e.*, use of the *clear proof test*) and favoring reversal, (*i.e.* use of the *preponderance test*).

The *Tennessee Consolidated Case* was tried to a jury which was instructed that it must find the defendant guilty of violations of the antitrust laws by *clear proof*. (The *clear proof* charge to the jury is reproduced in full in the opinion of the court of appeals.) Using the *clear proof test*, the jury returned a verdict in favor of the plaintiff and awarded damages of nearly $1,000,000 reduced by remitter of $500,000 and trebled to nearly $1,500,000. The court of appeals found ample evidence to support the verdict, found no prejudicial error in the instructions, and found no basis for reducing the damages - the judgment was affirmed.

Price Discrimination - Intercompany Conspiracy

*Cliff Food v. Kroger*, (5th Cir., October 1, 1969) (Judge Thornberry)

The district court dismissed the appellant's treble damage antitrust action against the Kroger Company and its wholly-owned, unincorporated sales division, Bi-Lo.

As to the Section 1 Sherman Act conspiracy charge, the appellants argued that although Bi-Lo is an unincorporated division

and thus not a legal corporate entity, it nevertheless formed a separate entity capable of conspiring with the parent Kroger in violation of the antitrust laws. Relying on the recent Ninth Circuit opinion in *Seagram & Sons v. Hawaiian Oke & Liquor* (cited above) the court of appeals concluded that "since Kroger and Bi-Lo are one, it would be contrary to reason and authority to hold that they were capable of conspiring with each other."

As to the Sherman Section 2 monopolization charge the court of appeals found that "there is nothing whatsoever in appellants complaint or in the record itself to indicate that Kroger is in dangerous probability of achieving monopoly power." As to the price discrimination charge the court of appeals held that "retail sales of groceries to the random public are not within the purview of Section 13(a) of the Robinson-Patman Act." The judgment of the district court was affirmed in all respects.

Price Maintenance - Dealer Selection & Control

*United States of America v. O.M. Scott & Sons*, (District of Columbia, August 8, 1969) (Judge Hart)

The United States brought this civil action contending that the defendant unlawfully maintained prices in "non-fair trade states" and in the District of Columbia. The defendant *pre-tickets* its products either by printing the price on the package (as in seed or fertilizer) or by printing the price on a ticket attached to the product (as for a fertilizer spreader). The *pre-ticketed price* has never been modified by the term "suggested price" or similiar words. It was the defendants policy to enter into fair trade agreements with all dealers in fair trade states.

The court found that while the defendant selected dealers in both fair trade and non-fair trade states who it felt would be service-oriented and who would resell at the retail price suggested on the product, the defendant made no effort in non-fair trade states to enter into written or oral price maintenance agreements and it neither terminated nor threatened to terminate any dealership in a non-fair trade state solely for underselling. The court found that the great bulk of Scott products sold in non-fair trade states has been sold at the Scott-designated price but further found that when Scott dealers sold at the Scott-designated prices they did so voluntarily *to advance their own self interest*. The court concluded that the defendant "did not by affirmative action in non-fair trade states gain dealer acquiescence to avoid price competition in such manner that the acquiescence was not the individual free choice of the dealers." The government's request for injunctive and other relief was denied and the complaint was dismissed.

Price Maintenance - Exchange of Information

*United States v. FMC Corporation*, (E.D. Pa., August 22, 1969) (Judge Higginbotham)

Following a nineteen day trial to the court, it concluded that the evidence did not prove that FMC combined and conspired

with others to *increase* prices of chlorine, caustic soda and soda ash. However, the court found that during the period covered by the complaint FMC combined and conspired with others (1) to *stabilize and maintain* the price level of chlor-alkali products by exchanging information and by acting in consort so as to limit the application of discounts to classes of users; and (2) to exchange all relevant freight rate information and to eliminate any disparities in the practice of quoting freight rates which might have detracted from their ability to sell chlor-alkali products at identical prices. The court found that the evidence supported an inference that meetings and discussions among FMC and its competitors and the recurrent exchanges of information with respect to price changes and freight rate practices *and* the adoption of business practices in conformance with the information exchanged had the purpose and effect of restraining interstate commerce in chlor-alkali products in violation of Section 1 of the Sherman Antitrust Act.

Counsel for both parties sought without success to refresh the recollection of a key government witness by reading portions of his grand jury testimony to him. The plaintiff then sought to have the grand jury testimony considered as *substantive evidence* under the *past recollection recorded* exception to the heresay rule since the testimony had been given under oath in a setting calculated to impress the witness with the import of the oath and because the witness "recognized" the truth of his prior testimony The court held the evidence inadmissible due to a lack of adequate safe-guards to insure the accuracy and trustworthiness of the grand jury testimony primarily because the events testified about were too remote from the witness' appearance before the grand jury.

Statute of Limitations - Tolling

*Russ Toggs v. Grinnell Corporation*, (S.D. N.Y., October 2, 1969)(Judge Metzner)

The defendants in these multidistrict private antitrust actions transferred to the Southern District of New York under 28 U.S.C. Section 1407 moved for partial summary judgment on the ground that claims more than four years old were barred by the statute of limitations.

The following dates are important: On June 13, 1966, the Supreme Court affirmed the judgment of the trial court (District of Rhode Island) "except as to the decree." The cause was remanded "for further hearings on the nature of the relief consistent with the views expressed (in the opinion)". On July 11, 1967 the district court entered a final judgment detailing the relief to be granted and fixing the effective date as November 1, 1967. The defendants argue that the government enforcement action "ceased to pend" on June 13, 1966 and therefore the tolling provision of Section 5(b) expired on June 13, 1967. Most plaintiffs take the position that the government action continued pending until July 11, 1967 so that plaintiffs who filed on or before July 11, 1968 can survive the motion. Certain plaintiffs who filed

after July 11, 1968 argue that the enforcement action was pending until September 9, 1967, when the time to appeal from the second decree expired.

The court rejected the *liability relief distinction* and held that "the tolling period expires one year from the date when the appellate process is exhausted as to a final judgment. Exhaustion of appellate process includes the expiration of the time within which to take an appeal. In this case the earliest date for the expiration of the tolling of the statute is September 9, 1968."

Venue - Extraterritorial Service

*State of Illinois v. Harper & Row*, (N.D. Ill., October 10, 1969) (Judge Decker)

Consolidated discovery and pretrial proceedings in the *Childrens' Book cases* are being conducted in the Northern District of Illinois pursuant to order of the Judicial Panel on Multi-district Litigation. The court considered the motions of six defendants in various actions to quash service of process and dismiss the actions for improper venue. The defendants maintained that they were not inhabitants of the forum districts, were not found there, and did not transact business there within the meaning of Section 12 of the Clayton Act.

As to four of the defendants the court found that they did transact business in the relevant districts and their motions were denied. The court pointed out that these defendants made substantial sales to persons in the forum districts and had done so continuously for a number of years. Additionally each defendant was represented by salesmen who visit the relevant states and each sent catalogs and other promotional activities into these states. The fact that the defendants were not incorporated or licensed to do business in the forum states, and that they did not own real estate or maintain offices or telephones in these states was not dispositive in view of the defendants' solicited sales in the district.

As to two of the defendants, however the court found that they did not transact business in the relevant districts. One of the defendants neither solicited, sold, nor purchased within the state while the other defendant's sole contact with the state was *purchases* which did not exceed $1,000 in value. The court held that "although purchasing may, of course, constitute transaction of business, these insignificant sums in the absence of other contacts do not satisfy the substantiality test."

The court held that although venue was improper in the districts in which these actions were originally brought, dismissal was not required. The court decided to sever these claims and to transfer them under 28 U.S.C. Section 1406(a) at the conclusion of pretrial proceedings.

The court also held that substituted service on two defendants under the Wisconsin Business Corporation Act was void since the act only authorized such service on corporations transacting business

in the state *without* a certificate of authority *if* a certificate of authority is required. The court concluded that the defendants were not required to have such a certificate because their contacts with Wisconsin were limited to promotion and solicitation by traveling salesmen, with all sales accepted outside of the state. Since these defendants were not required to have the certificate, the Act did not apply and the service was invalid. Motions to dismiss as to these defendants were granted.

D. SECURITIES

Punitive Damages - Rule 10b-5

*deHaas v. Empire Petroleum*, (D. of Colorado, August 22, 1969) (Judge Doyle)

The sole issue was whether punitive damages could be recovered in a civil action for violation of Rule 10b-5. The defendants contended that Section 28(a) of the Securities Exchange Act of 1934 limits recovery in private suits for damages to "actual damages" but the court held that this limitation applies only to claims for relief which are expressly or impliedly created by the Act itself and since an action for damages resulting from violation of 10b-5 rests on principals of tort law, it does not depend on an express or implied grant of authority in the Act and is therefore not limited by the provisions of Section 28(a). The court previously held that in order to establish a violation of 10b-5 some element of *scienter* had to be shown and thus a violation of 10b-5 necessarily involves the commission of an intentional tort from which punitive damages could flow.

But *Cf. Globus v. Law Research Service*, Bulletin 7, p. 8

Citations are now available for the following previously reported opinions:

| No. | Page | Caption | Citation |
|---|---|---|---|
| 3 | 7 | *U.S. v. Hughes* | 413 F. 2d 1244 |
| 4 | 6 | *Brunswick Corp. v. Chrysler* | 408 F. 2d 335 |
| 5 | 1 | *Berman v. Naragansett Racing Association* | 414 F. 2d 311 |
| 5 | 5 | *Jancke Serv. v. OKC Corp.* | 301 F. Supp. 866 |
| 5 | 5 | *Sun Oil v. Vickers* | 414 F. 2d 383 |
| 6 | 5 | *U.S. v. Glaxo Group Ltd.* | 302 F. Supp. 1 |
| 6 | 7 | *U.S. v. Northwest Industries* | 301 F. Supp. 1066 |

| | | | |
|---|---|---|---|
| 7 | 1 | *Miller v. TWA* | 302 F. Supp. 174 |
| 7 | 4 | *Hawaii v. Standard Oil* | 301 F. Supp. 982 |

Copies of unpublished opinions may be obtained from the authoring judge or from the undersigned.

Very truly yours,

THE BOARD OF EDITORS FOR THE *MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION*

By 
John T. McDermott
Executive Editor

# MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION



December 1, 1969

BULLETIN NO. 9

TO ALL JUDGES CONCERNED WITH COMPLEX AND MULTIDISTRICT LITIGATION

The following recently filed opinions and orders appear to be potentially relevant to complex and multidistrict litigation. The inclusion or exclusion of a particular opinion or order in a bulletin does not necessarily imply that the Board of Editors approves or disapproves of the procedures used or results reached in the particular case.

## A. JURISDICTION - VENUE - SERVICE

### Manufactured Diversity - Improper Joinder - Section 1359

*Lester v. McFaddon*, (4th Cir., September 15, 1969)(Chief Judge Haynsworth)

This is a wrongful death action arising from a truck-pedestrian accident which occurred in South Carolina. The decedent and her statutory beneficiaries and the owner and driver of the truck were all citizens of South Carolina. Diversity jurisdiction was created by the appointment of a Georgia citizen as administrator of the estate.

No objection to federal jurisdiction was made by the parties in the district court or on appeal but the court of appeals, sua sponte, concluded that maintenance of the action was barred by 28 U.S.C. Section 1359. The court pointed out that the administrator had no stake in the litigation since any amount recovered would go directly to the statutory beneficiaries and he had no other responsibilities since there were no other assets in the general estate of the decedent. In concluding that the appointment of a Georgia administrator for the sole purpose of creating diversity was improper within the meaning of Section 1359, the court adopted the reasoning of the majority on *McSparran v. Weist*, 3rd Cir., 402 F. 2d 867, cert. denied *sub nom.*, 395 U.S. 903. Although

noting that the Supreme Court had reserved this question in *Kramer v. Carribean Mills, Inc.*, 394 U.S. 823, the court found no difference between the situation here and that of the assignee in *Kramer*.

However, the court declined to apply this "new rule" to the case at bar and affirmed on the merits.

*O'Brien v. AVCO Corporation*, (2nd Cir., November 13, 1969) (Judge Kaufman)

The sole question in this appeal was whether appointment of an *administrator c.t.a.* for the purpose of invoking federal diversity jurisdiction, is "improper" or "collusive" within the meaning of 28 U.S.C. Section 1359(1964).

The wife of a passenger who died in the crash of a small plane was originally appointed administratrix of his estate and filed a wrongful death action in a New York State court. She later received permission from the Surrogate Court to resign as administratrix and the appellee, a New Jersey resident, was appointed as administrator in her stead for the limited purpose of prosecuting a wrongful death action against the defendants. After his appointment the appellee brought a wrongful death action in the United States District Court for the Southern District of New York. The defendants in that action appeal from the refusal of the trial court to dismiss the action for improper joinder.

Relying in part on the recent Fourth Circuit decision in *Lester v. McFaddan, supra*, the Second Circuit also held that the appointment of an administrator for the purpose of obtaining federal jurisdiction violates Section 1359. The court was unable to find any basis for distinguishing the appointment of an administrator in the instant case from the assignment involved in *Kramer v. Carribean Mills*. The court noted that the plaintiffs had a viable action pending in state court and would suffer no hardship, other than the loss of the federal forum they did not deserve. The court of appeals reversed with direction to dismiss the action.

Removal - Joinder to Destroy Diversity

*Fine v. Braniff Airways, Inc.*, 302 F. Supp. 469 (W.D. Okla. 1969)(Judge Daugherty)

The plaintiffs brought this damage action against Braniff Airways and Young Dogett, Braniff's Oklahoma City Director

of Passenger and Cargo Services. The suit was brought in state court and Braniff removed the action to federal court claiming Doggett was fraudulently joined to destroy diversity. The plaintiff moved to remand and the court held an evidentiary hearing to ascertain if Doggett was "in control, or active charge, of the particular sphere of activity complained of by the respective plaintiffs."

The court observed that a claim of fraudulent joinder of a non-diverse defendant in a removal action essentially involves the determination of whether a cause of action is stated against the non-diverse defendant under applicable state law. If so, the case should be remanded to the state court but if not, the removed case should be entertained and the non-diverse defendant should be eliminated for failure to state a claim against him. The court concluded from the evidence before it and the pertinent law of Oklahoma that "the plaintiffs have probably stated a cause of action against Doggett" and the motion to remand was sustained.

*Gentle v. Lamb-Weston, Inc.*, 302 F. Supp. 161 (D. Maine 1969) (Judge Gignoux)

Nine Maine potato farmers brought a breach of contract action in state court against Snow Flake Canning Co., a Maine corporation, not knowing that several months earlier Snow Flake had merged with Lamb-Weston, an Oregon corporation - the latter surviving. Upon learning of this, plaintiff's counsel brought the present action in a Maine court against Lamb-Weston but adding three additional plaintiffs, one of whom - George O. Tamblyn - is an Oregon citizen. Shortly before filing the second action, Tamblyn took an assignment of 1/100 of each plaintiff's claim for the conceded purpose of defeating the anticipated removal to federal court. The action was removed and the plaintiffs moved to remand on the ground that the court lacked subject matter jurisdiction since that plaintiff Tamblyn and defendant Lamb-Weston are both citizens of Oregon.

The question - framed by the court and then answered in the negative - was whether a federal court is powerless to protect its jurisdiction and the constitutional and statutory right of a defendant of diverse citizenship to have a federal forum free from the potentiality of local bias. The court

held it had the prerogative and duty to pierce the appearance of Tamblyn's interest and having done so it found that the essential diversity of citizenship of the parties was not vitiated by plaintiff's sham transaction. The motion for remand was denied.

Long-Arm Statute - Retroactive Application

*deLeo v. Childs*, (D. Mass, September 26, 1969)(Judge Julian)

This matter was before the court on a motion to dismiss the complaint for lack of personal jurisdiction and insufficiency of process. The motion raises questions concerning the scope, effective date, and retroactivity of the new Massachusetts long-arm statute.

The court first found that the defendants came within the reach of the long-arm statute because the cause of action arose from the defendants' "having an interest in, using or possessing real property" within Massachusetts. The court then held that the statute was remedial "in the purest sense of that term, and neither enlarged not impaired . . . rights or obligations under the contract" and therefore could be applied retroactively. Service of Process made upon defendants under the long-arm statute was deemed sufficient and the motion was denied. Accord, *Hunt v. Nevada State Bank*, (Minn. Sup. Ct., October 22, 1969)(Peterson, J.)

Long-Arm Statute - Hawaii

*Duple Motor Bodies v. Hollingsworth*, (9th Cir., September 19, 1969)(Judge Merrill)

This appeal challenges the in personam jurisdiction of the Hawaii District Court over Duple Motor Bodies, Ltd. (Duple), a corporation engaged in the manufacturing of motor bodies in England. The trial court found that Duple was subject to the court's jurisdiction under Hawaii's "long-arm" statute. The appellant contended that it was not subject to the jurisdiction of the district court because (1) it committed no tortious act within the State of Hawaii and (2) because due process concepts of fair play and substantial justice bar application of the Hawaii statute. As to the first point, the court of appeals concluded that the district court correctly ruled that the negligent manufacture of the bus outside of the state with the resulting injury in Hawaii constituted a commision of a tortious act within the state under Hawaiian statute.

Appellant argued that the *minimum contact* requirements were lacking because it was not registered to do business in Hawaii, never had a representative there or owned property there its sole contact being the buses which it manufactured in England and sold to a Hawaiian dealer. The court of appeals found that

the bus bodies were designed and manufactured by appellant with the knowledge that they were to be used in Hawaii and were specially adapted for use there. The court did not "regard it as offensive to fair play or substantial justice or an undue burden on foreign trade to require a manufacturer to defend his product wherever he himself had placed it, either directly or through the normal distributive channels of trade." The court held that the presence of the buses in Hawaii and the appellant's knowledge that they were to be used in Hawaii was sufficient contact with the state to satisfy the requirements of due process and the judgment was affirmed. (Circuit Judge Ely dissented.)

Long-Arm Statute - Minnesota

*Electro-Craft Corp. v. Maxwell Electronics Corp.*, (8th Cir., October 15, 1969)(Judge Heaney)

This appeal raises the familiar problem of in personam jurisdiction, by substituted service, over a foreign corporation. The district court denied the defendant's motion to quash service of process and to dismiss. The court of appeals affirmed.

Under the Minnesota One Act Statute jurisdiction is obtained over a foreign corporation through substituted service if (1) the corporation and a Minnesota resident are parties to a contract to be performed at least partially by either party in Minnesota; or (2) the corporation commits a tort in whole or in part in Minnesota against a Minnesota resident.

Following approximately one year of negotiations by mail and telephone between the plaintiff, a Minnesota corporation and the defendant-appellant, a Texas corporation, the plaintiff ordered 320 receiver-transmitters to be shipped (F.O.B. Garland, Texas) to plaintiff's plant in Minnesota. Plaintiff commenced this action in a Minnesota state court on the grounds of fraud, misrepresentation, breach of contract and breach of warranty alleging that the receiver-transmitters did not conform to the specifications. Substituted service was purportedly affected on defendants pursuant to Minnesota's One Act Statute and the cause was later removed to the United States District Court for the District of Minnesota.

Whether the plaintiff's action sounding in contract or in tort was immaterial for the court of appeals found that the contract was partially performed by the *plaintiff* in Minnesota and the tort was partially committed in Minnesota - the injury to the plaintiff occurred in that state. Turning to the due process question the court of appeals was convinced "that the exercise of jurisdiction was consistent with constitutional requirements."

B. JUDICIAL MANAGEMENT

Amended Complaint - Conform to Proof - Pretrial Order

*Monod v. Futura*, (10th Cir., September 26, 1968)(Judge Hill)
The court of appeals was faced with what appeared to be a

conflict between Rules 15(b) and 16. In this diversity litigation arising from certain real estate transactions, the plaintiffs originally urged four claims for relief including damages for fraud and deceit, rescission and cancellation, and restitution, but excluding any claim for title. After judgment in favor of the defendants, plaintiffs moved to amend and alter judgment under Rule 59, and to amend the pleadings pursuant to Rule 15(b). The motions were denied and the plaintiffs appealed.

Pursuant to Rule 16 the court , following a pretrial conference, entered a pretrial order limiting the issues. Nowhere in the pretrial order was there any mention of trying title to the tract in dispute nor was there any attempt by the plaintiffs to amend the pretrial order under Rule 16. The court of appeals concluded that a post judgment amendment of a pretrial order to conform is proper only if an issue has been tried with the expressed or implied consent of the parties and not over the defendants' objection. Thus an amendment under Rule 16 will be permitted during the trial to prevent manifest injustice and later under Rule 15(b) if the issues have been tried with the consent of all parties. Here there was no Rule 16 motion during trial and the defendants consistently opposed any amendment which would try title. Although there was some evidence introduced by both parties which bore on the question of title, the court found that this issue was not expressly or impliedly tried by the parties and it held that Rule 15(b) does not permit amendment to include *collateral issues* which may find *incidental support* in the record. The court found no abuse of discretion in denying the motion to amend the pleadings to conform and the judgment was affirmed.

Class Action - Stockholder Cases - Notice

*Weiss v. Tenney Corporation*, (S.D. N.Y., May 21, 1969) (Judge Herlands)

The plaintiff's complaint charged the defendants with making fraudulent misstatements and misrepresentations, and with fraudulently omitting certain material facts in connection with the issuance of Tenney Corp. common stock. The plaintiff contends that the one-count complaint sets forth two separate causes of action, one under Section 11 of the 1933 Act seeking recovery for damages arising from the purchase of stock covered by the September 14, 1960 Registration Statement and prospectus, the other under Section 17(a) of the 1933 Act and Section 10(b) of the 1934 Act. The court was satisfied that the two causes of action, though arising from a common nucleus of operative facts, were distinct in legal theory, requirements of proof, and identity of claimants.

The court held that the plaintiff could maintain separate class actions under Rule 23(b)(3) with respect to each of the

claims. As to the Section 11 claim, the court found that the falsity of the Registration Statement and prospectus was a mixed question of fact and law common to the entire class and one which predominated the individual questions of damages, reliance, and specific affirmative defenses. As the class could include up to 3,800 persons, the court found that the class action was superior, emphasizing that "a class action must be deemed the only practical method of litigating these issues when the complex nature of the litigation and the comparatively small individual financial interests are considered."

The Section 10(b) class could include nearly 1,600 shareholders, and the court concluded that it was "of a size sufficiently large as to make joinder of all members as named plaintiffs impracticable." The defendants argued that there were insufficient common questions since different members of the proposed class relied upon different alleged misstatements. The court agreed with the plaintiff "that there will be questions of fact or law common to the class . . . irrespective of which particular misstatement the individual claimant relied upon, because the various written statements were not independent and unrelated." Once it was established that the various misstatements misrepresentations, and omissions were similar and related and that the charge of manipulation did not refer to any particular period, it became clear to the court that, as with the claims under Section 11, the common questions predominate over individual issues. The court observed that if separate trials become necessary on the issue of reliance or any other individual issue, the court could order separate trials or modify the class action.

Pointing out that Rule 23(c)(2) requires *individual* notices to all members *if* the class can be identified through reasonable effort, the court directed the plaintiffs to send individual notices to each member of each class whose names and addresses are listed in Tenney's stock transfer records.

Transfer - Section 1404(a)

*Everprest, Inc. v. Phillips-Van Heusen Corp.*, 300 F. Supp. 757 (M.D. Ala. 1969)(Judge Johnson)

The defendant (a New York corporation) filed a motion under 28 U.S.C. Section 1404(a) to transfer to the Southern District of New York a patent infringement action brought by a Utah corporation in the Middle District of Alabama. The defendant contended that many of its witnesses and voluminous documentary evidence are located in the vicinity of the Southern District of New York but the court found that the witnesses were mostly either experts, for whom travel and expenses are customary, or employees of defendant, whose convenience is

treated as virtually identical with that of the party. The court held that the interest asserted by the defendants were at least counterbalanced by plaintiff's interest in a *speedy* deposition of this action which was more likely to occur in this district than in the heavily-burdened Southern District of New York. The motion to transfer was denied.

*Owatonna Manufacturing Co. v. Melroe Company*, 301 F. Supp. 1296, 1306-1307 (D. Minn. 1969)(Judge Neville)

The defendants moved to transfer this patent infringement action under 28 U.S.C. Section 1404(a) to the District of North Dakota, the state in which the defendant's principal place of business and manufacturing facilities are located. The court was convinced that on balance the case should continue to be venued in the District of Minnesota since a substantial number of witnesses reside in Minnesota and there was nothing "peculiar" in this case which would require viewing of the manufacturing plants in North Dakota. The court observed that the patented inventions could easily be transported and readily produced for trial in Minnesota. The motion was denied.

Transfer - Section 1406(a)

*John Taylor, et al. v. James Ray Love*, (6th Cir., September 23, 1969)(Judge Edwards)

This interlocutory appeal is from an order granting the defendant's motion to quash service of process but denying his motion to dismiss; the district court granted the plaintiffs' motion to transfer under 28 U.S.C. Section 1406. The defendant contended that the court could not order a transfer under Section 1406 as it lacked personal jurisdiction over the defendant.

The court of appeals held that *Goldlawr, Inc. v. Heiman*, 369 U.S. 463(1962) completely disposes of the argument as to jurisdiction. The court concluded that the district court "had jurisdiction of this complaint although not of the person of defendant. It also had the power under Section 1406(a) to transfer the complaint." The court of appeals found no abuse of discretion on the part of the district court in making the transfer and the judgment was affirmed.

But see *Jones v. Valley Welding Supply Co.*, 303 F. Supp. 9, (W.D. Pa. 1969) where the court held that where the plaintiff could not acquire personal jurisdiction over the defendant in the transferor district and did not submit evidentiary material to support personal jurisdiction in the transferee court, a motion to transfer under either Sections 1404 or 1406 would be denied.

C. DISCOVERY & EVIDENCE

Freedom of Information Act

*Consumers Union of the United States, Inc. v. Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969)(Judge Croake

Consumers Union brought this action to compel the Veterans Administration (V.A.) to release test records of its hearing aid testing program. The accoustical and electronic characteristics of the hearing aids (raw scores) are converted to a single

"quality point score" for each model by using a "scoring scheme". Under its policy, the "quality point scores" and the "scoring scheme" have not been disclosed to anyone but raw scores have been furnished to each manufacturer for his own models.

Two questions were before the court: (1) whether test results of this type are excluded from the Freedom of Information Act and (2) whether the *equities* compel disclosure. The court concluded that none of the exemptions in the Freedom of Information Act precluded the release of raw scores, the scoring scheme, or the quality index scores. The court also found "that the benefits of releasing the raw scores outweigh any harm but that the danger of the public being mislead by releasing the point scores and the disruption of V.A. programs that releasing the scoring scheme would cause outweigh any benefits." The court ordered the V.A. to release only the raw scores.

Grand Jury Transcripts - Debriefing Memoranda - Attorney/ Client Privilege - Work Product Doctrine

*State of Illinois v. Harper & Row Publishers*, (N.D. Ill., October 7, 1969)(Judge Decker)

In connection with "an ambitious discovery program" the plaintiffs in this multidistrict treble antitrust litigation seek to inspect the grand jury transcripts of 11 witnesses who testified about three years ago. Certain of the plaintiffs also seek the production of all *debriefing memoranda* which summarize the testimony of certain witnesses before the same grand jury.

The court found that during the recent depositions of nine witnesses, each "demonstrated a remarkable lack of memory concerning critical events in controversy." The court found from an *in camera* inspection of the witnesses' grand jury transcripts that each witness' recall was substantially more extensive in 1966 and that material discrepancies existed on important factual issues. In view of this, the court held that there was a "compelling need for the disclosure of the requested minutes" and ordered their release subject to the following protective order:

> The transcript is provided solely for the personal perusal of counsel and shall be used only for such further interrogation of deponents as may be authorized. No part of the transcript shall be copied or reproduced, and the entire transcript shall be returned to this court when its use has been completed.

The court also concluded that the importance of preserving the secrecy of these grand jury minutes was minimal and held that *in camera* analysis will not be required in the future if the plaintiffs demonstrate similar recalcitrance and unexplained failures to remember on the part of other deponents.

The court found that the *debriefing statements* were "essentially factual summaries of the witnesses testimony" (and) "may substantially refresh future deposition recollection, thereby rendering extensive transcript requests unnecessary."

Since counsel often assisted witnesses in the preparation of the *debriefing documents*, the defendants urged that the documents were insulated by the *attorney/client privilege* and by the *work product doctrine*. The court found however that the attorneys involved were counsel for the witnesses' employers and not for the witnesses themselves and thus the documents were not protected by a *personal attorney/client privilege*. The court further found that with two exceptions the debriefing documents were not protected by *corporate attorney/client privilege* since most of the witnesses did not participate in the corporation problem about which legal advice was sought - the company's litigation response to the price fixing cases. The court found that the counsels' participation in the preparation of these *debriefing memoranda* were "peripheral" and did not convert a factual summary into an attorney work product. With two exceptions, the court held the documents were not protected and they were made available for examination by the plaintiffs.

D. AIRCRAFT

Pilot Negligence

*Neff v. United States*, (D.C. Cir., October 10, 1969) (Judge Tamm)

The trial court found (1) that control tower personnel were negligent in failing to warn the crew of a Mohawk Airlines flight that a severe thunder storm was on the field when they attempted to take off and (2) that the pilot was not contributorially negligent. Accordingly, a judgment was entered for the plaintiff, the administratrix of the estate of the deceased pilot. The court of appeals reversed - concluding that the pilot's attempt to take off into an obvious thunderstorm constituted contributory negligence as a matter of law.

The trial court rejected the government's contributory negligence claim because "there is no definite demonstration that the crew was sufficiently alerted to the imminence of a thunderstorm on the runway to warrant . . . extra precautions." However, the court of appeals found that "in light of their training and the weather reports available to them, the flight crew must have known that thunderstorms were likely to hit the field at about the time that they were scheduled to take off." The court further held that the magnitude of the crew's negligence was not materially lessened by the take off clearance communicated by the tower to the crew seconds before the fatal crash. The court noted that a clearance for take off is not understood as being an instruction to take off or an implied representation that it will be safe for that particular airplane to take off at that particular time. The court found that in the circumstances no binding mandate could reasonably be inferred from the controller's clearance and the pilot's decision to go ahead clearly reflected lack of due care. The court also held that the presumption that airlines pilots act with diligence and due care when their lives are at stake was overcome by the facts in this case.

*American Airlines v. Creasy*, (5th Cir., September 25, 1969) (Judge Coleman) Rehearing denied November 17, 1969.

This case arises from the crash on November 5, 1965 of American Airlines Flight 383 while making a landing at the Greater Cincinnati Airport in Covington, Kentucky. Mrs. Creasy, the widow of one of the passengers, sued American Airlines under the Kentucky wrongful death statute; American denied negligence and filed a third-party complaint against the United States. After an eighteen day jury trial a judgment of more than $175,000 was entered for the plaintiff. The district judge found the United States not guilty of any negligence which contributed to the crash. American appealed against both Mrs. Creasy and the United States. The judgment was affirmed in all respects.

The court of appeals described the crucial issue as whether the findings of the district court exonerating the United States were clearly erroneous. The jury rendered an advisory verdict in favor of the United States on this claim and the district judge found that no employee of the United States Weather Bureau or of the Federal Aviation Agency was guilty of any negligent act or omission which constituted a proximate cause of the accident. The court of appeals concluded that "a thorough sifting of the record reveals no justification for an appellate opinion that this finding was clearly erroneous."

The court of appeals applied the following standards of duty to the pilot and to the air traffic controller:

1. The pilot is in command of the aircraft, is directly responsible for its operation, and has final authority as to its operation.

2. Before a pilot can be held legally responsible for the movement of his aircraft he must know, or be held to have known, those facts which were then material to its safe operation. Certainly the pilot is charged with that knowledge which in the exercise of the highest degree of care he should have known.

3. The air traffic controller must give the warnings specified by the manuals.

4. The air traffic controller, whether or not required by the manuals, must warn of dangers reasonably apparent to him

5. Determined by the facts of the particular case, due care may require an air traffic controller, over and beyond the requirements of the manuals, to delay clearance for take-off or a landing. If, however, a clearance is duly granted the operation of the aircraft is the sole responsibility of the pilot, with which the air traffic controller is not to interfere except as specifically required by the FAA Air Traffic Control Manuals.

The court of appeals held "that pilot error, repeatedly committed, was the sole proximate cause of this tragic commercial airline accident." The court also held that the admission into evidence of two portions of the CAB Report (a graph plotting the indicated altitude of Flight 383 and a document explaining a read-out from the flight recorder) was not error since they merely displayed and explained the data derived from the flight recorder (which had been admitted with objection) and did not reflect the Board's evaluation of the data or express the agency's views as to the probable cause of the accident.

Citations now available for opinions previously summarized are listed on the attached page.

Copies of unpublished opinions may be obtained from the authoring judge or from the undersigned.

Very truly yours,

THE BOARD OF EDITORS FOR THE
*MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION*

By 
John T. McDermott
Executive Editor

Attachment

CITATIONS

| Bulletin No. | Page | Caption | Citation |
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| 5 | 6 | *Sun Oil v. Vickers* | 414 F. 2d 383 |
| 5 | 7 | *Pepper v. Bankers Life* | 414 F. 2d 356 |
| 6 | 1 | *Penrod Drilling Co. v. Johnson* | 414 F. 2d 1217 |
| 6 | 6 | *Advance Bus. Systems v. SCM* | 415 F. 2d 55 |
| 6 | 6 | *Gottesman v. General Motors* | 414 F. 2d 956 |
| 7 | 2 | *D. Milliken v. Textured Fibres* | 415 F. 2d 875 |
| 7 | 6 | *Hartz v. U.S.* | 415 F. 2d 259 |
| 8 | 11 | *deHaas v. Empire Petroleum* | 302 F. Supp. 647 |

# MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION



December 15, 1969

BULLETIN NO. 10

TO ALL JUDGES CONCERNED WITH COMPLEX AND MULTIDISTRICT LITIGATION

The following recently filed opinions and orders appear to be potentially relevant to complex and multidistrict litigation. The inclusion or exclusion of a particular opinion or order in a bulletin does not necessarily imply that the Board of Editors approves or disapproves of the procedures used or results reached in the particular case.

## A. ANTITRUST

### Breach of Contract (Defense to)

*Western Geophysical Co. v. Bolt Associates, Inc.*, (D. Conn., October 24, 1969)(Judge Blumenfeld)

The court previously denied plaintiff's motion for summary judgment as to the asserted antitrust defense to this breach of contract action (Bulletin No. 5, p. 6) but reserved decision on similar motions for summary judgment on the antitrust *counterclaims*. The court acknowledged that a violation of Section 7 of the Clayton Act could furnish a basis for a claim for money damages under the broad language of Section 4 of the Act (see *Gottesman v. General Motors*, Bulletin No. 6, p. 6) but concluded that the sublicensing requirement of the contract "negatives any possible competitive taint" and the defendant's Section 7 counterclaim was dismissed. (Summary judgment as to other antitrust counterclaims was denied.)

### Higher Education - Accreditation

*Majorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools, Inc.*, 302 F. Supp. 459 (D. D.C., 1969)(Judge Smith)

Majorie Webster Junior College (Webster) brought this action contending that the defendant violated the antitrust laws by refusing to consider Webster's request for accreditation *solely* because it was *not* "a non-profit organization with a governing board representing the public interest."

The court found that defendant had unreasonably restrained the plaintiff's trade in violation of Section 3 of the Sherman Act and that defendant's requirement that accredited institutions of higher education must be non-profit organizations was unrelated

to the legitimate and announced purposes of the Association and was arbitrary, unreasonable and contrary to the public interest. Accordingly, the defendants were enjoined from refusing accreditation *solely* because of the plaintiff's proprietary character.

Clayton Section 7 - Private Damage Action

*Kirihara v. Bendix*, (D. Hawaii, October 21, 1969)(Judge Pence)

In February 1967 Bendix and Fram agreed to merge. Fram subsequently canceled the plaintiff's exclusive Hawaii distributorship and awarded it to Carter, a competitor of the plaintiff and the Hawaii distributor of Bendix products. The plaintiff then brought this action asking (1) that Bendix and Fram be enjoined from merging and the merger agreement rescinded; (2) that it be reinstated as Fram's exclusive distributor and (3) that it be awarded treble damages under Section 4 of the Clayton Act.

The court observed that plaintiff's Clayton Section 4 claim regenerated the still unresolved (by the Supreme Court) question of whether or not an acquisition violating Clayton Section 7 could support a treble damage action. Although the court held in 1964 "that a plaintiff could not state a cause of action for treble damages under Clayton Section 7 for anticipated but unimplemented acts of restraint" it made a *complete reevaluation* of the question and concluded that a treble damage complaint *could* be laid on an alleged Section 7 violation *if* (1) the claimed injury is a direct and proximate result of the acquisition, (2) the injured party is "one of the components of the competitive intra-structure of the relevant market" and (3) there is a reasonable probability that a substantial anticompetitive effect upon *that market* will flow from the condemned acquisition. However, the court found no indication of *any probability* that the removal of the plaintiff as the Fram distributor in Hawaii would have any anticompetitive effect upon the viability of competition in the Hawaiian market and the defendants' motion to dismiss the Section 7 count was granted. (Related claims under Sections 1 and 2 of the Sherman Act and Sections 2 and 3 of the Clayton Act were also dismissed.)

Conglomerate Merger - Hold Separate Order

*United States v. International Telephone and Telegraph*, (D. Conn., October 21, 1969)(Chief Judge Timbers)

The United States sought to enjoin the proposed acquisition by ITT of the stock of Grinnell and the stock of Hartford Fire Insurance Company on the ground that the proposed acquisitions might substantially lessen competition in violation of Section 7 of the Clayton Act.

One of the Government's primary claims as to the proposed ITT - Grinnell merger was that Grinnell, the dominate competitor in several lines of commerce, would derive various marketing and promotional competitive advantages from the merger which would further entrench its position of dominance. The court agreed that the substitution of a powerful acquiring firm for a smaller but already dominate firm could violate Section 7 but found that while Grinnell was the leading or largest manufacturer of three product lines, the evidence did not support a finding of dominance as to two of them. As to the third product line (pipehangers) Grinnell was the dominate competitor in an ogolopolistic market but the court was not satisfied that the government had established a "probability of success" on its claim that Grinnell would derive a competitive advantage from the proposed merger.

As to the reciprocal dealing claim, the court was unable to find from the "inconclusive record" that the proposed merger would create a market structure conducive to reciprocal dealing. The court also pointed out that ITT has a written policy against reciprocity and prohibits the collection and interchange of purchasing and sales data.

The government claims that the ITT - Hartford merger would have characteristics of a vertical merger as ITT and its subsidiaries are substantial purchasers of the type of insurance sold by Hartford and there is a likelihood that ITT and its subsidiaries will transfer their insurance business to Hartford. The evidence was uncontroverted that the 10.8 million dollars ITT paid for property and liability insurance was approximately 1/25 of 1% of the total property and liability insurance premiums paid during a one-year period. The court was satisfied that the size of the perspective market share supposedly foreclosed to competition was of "de minimis proportions."

The government also claimed that the proposed ITT - Hartford merger would eliminate actual and potential horizontal competition since several ITT subsidiaries and Hartford write life insurance. The defendants pointed out however that the combined market position of ITT and Hartford is less than 3/10 of 1% and the court concluded that the asserted foreclosure of competition as a result of the horizontal aspects of the proposed merger were clearly de minimis.

The government also attacked the two acquisitions claiming that they would result in "economic concentration." However, the court emphasized that "section 7 as enacted proscribes only those mergers the effect of which may be substantially to lessen competition, not those mergers the effect of which may be substantially to increase economic concentration." Relying on *U. S. v. Northwest Industries*, (Bulletin 6, page 7) the court held that a merger "which even substantially increases economic concentration

does not necessarily lessen competition substantially and that evidence that a merger may increase economic concentration, without more, is not sufficient to halt a merger under Section 7 without a specific showing that it may have anticompetitive effects."

The court concluded that the government did not sustain its burden of establishing a *reasonable probability of success* in proving at trial that either merger would have substantial anticompetitive effects and preliminary injunctive relief was denied.

The court decided to enter an appropriate "hold separate order" to preserve the *status quo* pending decision on the merits. The chief reasons for entering "hold separate orders" were (1) the willingness of the defendants that such orders be entered (2) the *possibility* (as distinguished from the *probability*) that the government may succeed at trial, (3) the apparent unavailability of immediate appellate review of the instant order and (4) the court's obligation in so far as possible to maintain the *status quo* pending trial. The order provided generally that ITT was to (1) maintain Grinnell and Hartford as separate and viable companies, (2) preserve and protect all aspects of Grinnell and Hartford, (3) refrain from issuing any additional securities of Grinnell and Hartford or from incurring any additional indebtedness of Grinnell and Hartford, (4) retain separate and unincumbered all shares of Grinnell and Hartford, (5) maintain independent management of Grinnell and Hartford, (6) refrain from engaging in any reciprocal dealing, (7) refrain from engaging in package or system selling of ITT or Grinnell products, (8) refrain from using the position and influence of Hartford as an affiliate to assist Grinnell in securing sales, (9) refrain from using Hartford surplus capital, (10) refrain from transferring to Hartford the insurance coverage of ITT and its subsidiaries and (11) take such other action necessary to achieve maximum preservation of the *status quo* consistent with the efficient day-to-day operation of Grinnell and Hartford.

Monopoly - Merger - Permanent Injunction

*United Nuclear Corp. v. Combustion Engineering, Inc.*, 302 F. Supp. 539 (E.D. Pa. 1969) (Judge Fullam)

United Nuclear brought this private antitrust action to enjoin the acquisition of 21% of its stock by Combustion Engineering on the ground that such a merger would violate sections 7 and 8 of the Clayton Act and sections 1 and 2 of the Sherman Act. The court found that the proposed merger would increase Combustion Engineering's share of the fabricated fuel element market from 8/2% to 16.2% and would virtually eliminate all competition in the "reload sub-market." Concluding that the proposed merger was "at odds with Section 7" the court permanently enjoined the proposed merger.

*Metro-Goldwyn-Mayer v. Transamerica Corp.*, 303 F. Supp. 1344 (S.D. N.Y. 1969) (Judge Mansfield)

MGM sought to enjoin the acquisition of its controlling interest by Tracy Investment Co. because Tracy's cash tender offer was financed by Transamerican Financial Corp. whose parent, Transamerica Corp., owns 99.6% of United Artists, a major competitor of MGM. Collateral for the $30,000,000 loan includes the acquired shares of MGM but the loan agreement does not give Transamerican Financial any control over Tracy or MGM except in the event of default.

The court held that acquisition of MGM by United Artist's - Transamerican would violate section 7 and that the loan agreement posed the threat of such an acquisition since, in the event of default, Transamerican - Financial probably would exercise its right to acquire the MGM stock. The court therefore restrained Tracy from proceeding further with the tender offer *unless* the MGM stock was removed as collateral for the loan. The court refused to enjoin the acquisition *altogether* because of the debtor creditor relationship between the two competitors.

Statute of Limitation - Tolling - Government Civil Action

*United States v. Grinnell Corporation*, (S.D. N.Y., October 20, 1969) (Judge Metzner)

The issue before the court was whether the federal government's damage action is a "private right of action" so that it may benefit from the tolling provision of Section 5(b) of the Clayton Act. The defendants sought to bar any claims which accrued over four years before the filing of damage action on June 7, 1965 while the government contends that its *enforcement action* (filed on April 14, 1961) suspended the running of the statute of limitations as to its *damage action*.

After reviewing the legislative history of the Clayton Act, the court concluded that Section 4 "was never intended to give the government the advantages of the tolling period." The court held that the government was limited to causes of action accruing within four years of filing of its civil damage action.

Venue - Substantial Business Test

*Lippa v. Lenox*, (D. Vermont, September 2, 1969) (Judge Leddy)

The defendant moved to dismiss this action for improper venue on the ground that it is not an inhabitant of Vermont, is not *found* in Vermont, and does not transact business in Vermont. The plaintiff admits the defendant is not an inhabitant of Vermont and is not *found* there within the meaning of the statute but contends that the defendant does *transact business* in the district. The defendant sells china to Vermont retail outlets throughout the state and in 1968 its total sales in Vermont were about $15,000. The defendant also sends its district managers into Vermont to sell china, to develop territories, to explain the defendants price maintenance

policy and to advise dealers on merchandising and advertising. The court was satisfied that the character of the defendant's contacts with Vermont was sufficient to lay venue in that district due to its continuing course of dealing with retailers in Vermont.

The defendant also argued that a *substantial amount* of business was not transacted within the district pointing out that in 1968 a mere 0.06% of its gross business was done in Vermont.

Rejecting the "percentage of sales test" advocated by the defendant, the court concluded that a better approach was to consider dollar volume of business and the effect of the business within the district. Pointing out that Vermont is a very small district, the court observed that the percentage of Vermont business must necessarily be small when compared to other states or judicial districts. The court noted that the logical extension of the defendants' argument would be that no national corporation could be sued in Vermont. In view of the continuity of Lenox's relationship with its dealers, its solicitation and advertising, and the size of the district, the court found that Lenox transacted a *substantial* quantity of business in Vermont - the motion to dismiss for improper venue was denied.

Venue - Individual Defendant

*International Business Coordinators, Inc. v. AAMCO Automatic Transmissions, et al.*, (S.D. N.Y., October 30, 1969) (Judge MacMahon)

An individual defendant in this treble damage antitrust action moved to dismiss for lack of venue. He had been served in Florida under the New York long-arm statute and it is conceded that *at the time of service or suit* he had no agent or property and transacted no business within the state of New York. The court observed that since the defendant was an individual, the controlling venue statute was not Section 12 of the Clayton Act but rather Section 7 of the Sherman Act which allows the action to be brought only in the district "in which the defendant resides or is found or has an agent." Since this defendant neither resided nor had an agent in the district at the time the suit was filed, the only question was whether he could be *found* within the district. The court concluded that he could not and the action was dismissed.

The court emphasized that the fact that it had *subject matter jurisdiction* over the action and *personal jurisdiction* over this defendant by reason of Service of Process under the New York long-arm statute did not establish the Southern District of New York as the *proper venue*. The court rejected the argument that venue in a private antitrust action would lie in any district in which the acts in furtherance of the conspiracy occurred.

Venue - Interrogatories

*ABC Great States v. Globe Ticket,* (N.D. Ill., October 16, 1969) (Judge Robson)

Certain of the plaintiff's *venue interrogatories* were objected to by the defendants on the following grounds: (1) information requested for the period preceeding the commencement of the action is irrelevant for *venue purposes* since venue depends on conditions existing when the action is commenced; (2) information relating to conspiratorial meetings of the defendants in Illinois is irrelevant for *venue purposes* since the pertinent antitrust venue statutes relate only to *business activities;* (3) plaintiff's inquiries should not cover the entire state but should be limited to the Northern District of Illinois and (4) information disclosing intra-corporate relationships is irrelevant for *venue purposes.*

The court determined that the plaintiffs' discovery requests were relevant and proper and held that the plaintiffs properly could seek information going back to the date the cause of action arose and covering the entire state of Illinois. Since the actual operation of a parent and its subsidiaries as a single entity would subject "the subsidiaries" to venue in the parent's jurisdiction, information as to the corporate structure was held to be clearly relevant.

Consent Decree (Effect on Private Litigation)

*Control Data Corporation v. IBM,* (D. Minn., November 12, 1969) (Judge Neville)

Three of the actions comprising this multidistrict litigation were transferred by the Judicial Panel on Multidistrict Litigation to the District of Minnesota where the fourth action was originally filed. All were assigned to Judge Philip Neville for coordinated or consolidated pretrial proceedings. IBM, the common defendant, has twice been involved in antitrust litigation with the federal government. The first government action was brought in 1932 and culminated in an injunction entered in the Southern District of New York in 1935 enjoining IBM (and others) from refusing to *sell* "tabulating machines". In 1952 the United States filed a civil complaint in the Southern District of New York charging IBM with violations of Sections 1 and 2 of the Sherman Act. This action ended when a consent decree and judgment were entered on January 25, 1956. Judge Neville found that the principal provision of the 1956 decree (as it relates to the pending actions) required IBM to offer its computer hardware *for sale* "upon terms and conditions which shall not be

substantially more advantageous to IBM that the lease charges, terms and conditions for such machines."

IBM moved to strike from all four complaints allegations referring to the above decrees on the ground that they are totally immaterial and irrevelant and if not stricken will substantially prejudice the defendant when and if the cases are tried to a jury. The court was "of the opinion that all references to both the 1935 and the 1956 decree should be stricken from the four complaints, and that such ruling should be made now in these pretrial proceedings rather than be deferred for ruling until the time of trial: (1) So that the issues may be defined and appropriate appellate review may be sought by either party and a final determination made before trial date. (2) So that the scope of pretrial discovery may be defined and perhaps at least to some extent reduced and (3) So that the parties, in ultimate preparation for trial will not have to make alternate preparation not knowing what the court may rule at the time of trial."

The court concluded that a treble damage plaintiff cannot assert a violation of a prior decree whether it be a consent decree or a decree entered after trial. It seemed to the court that if IBM's practices have been monopolistic and/or violative of the Sherman Act or other laws, they should stand on their own feet and be capable of proof as such; if they are not independently unlawful and provable then the fact that they are contrary to a consent decree entered some 13 years earlier could not make them so. The court entered a Section 1292 certificate allowing for an immediate appeal from its order striking all references to the 1935 and 1956 decrees.

Price Maintenance - Perma-Life Doctrine

*Tamaron Distributing Corporation v. Sam Weiner*, (7th Cir., November 7, 1969)(Judge Kerner)

The defendant Bronner, the exclusive distributor in the United States for Matchbox toys, instituted a program of retail price maintenance and refused delivery to anyone who would not agree to sell the toys at a price not lower than 20% off list price. The defendant Weiner is a manufacturer's representative with offices in Chicago, Illinois and sells Bronner's and other merchandise to wholesalers, jobbers and large retailers in a three state area. The plaintiff-appellants purchase and distribute toys to retailers in the Chicago area. They brought this action against Bronner and Weiner as co-conspirators under Sections 1 and 2 of the Sherman Act, the Clayton Act and the Robinson-Patman Act.

The district court granted the defendants' motion for summary judgment holding that since Weiner was the *agent* of Bronner they could not *conspire together* to fix prices. The court of appeals disagreed and reversed holding that under *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134(1968) Bronner and Weiner are separate legal entities and

their agreement to violate the antitrust laws would be illegal and actionable in a civil action for damages. The court held that there was sufficient evidence to create a *fact question* as to whether or not the acts of Weiner vis a vis the wholesalers and retailers were unilateral.

Oil & Gas - State Regulatory Action

*Woods Exploration & Producing Co. v. Aluminum Co. of America*, (S.D. Tex., October 2, 1969) (Judge Singleton)

This controversy grows out of the discovery and production of natural gas in the Appling Field in Jackson and Calhoun Counties, Texas. The plaintiffs initially claimed that the defendants had conspired together to file false nominations with the Texas Railroad Commission in a successful attempt to monopolize the production and marketing of gas from the Appling Field. The court granted the defendant's motion for summary judgment on this claim holding that *state action*, even if falsely and fraudulently obtained by private parties, could not support recovery under federal antitrust law. *Woods Exploration v. Aluminum Company*, 284 F. Supp. 582 (S.D. Tex. 1968).

The litigation continued and although the jury found that the defendants monopolized or attempted to monopolize the drilling, production and transportation of gas from the Appling Field the court granted the defendant's motion for judgment notwithstanding the verdict. The court found that the Appling Field did not constitute a relevant geographic market for natural gas and that none of the alleged co-conspirators had the power to control prices or exclude competition. The court added the following observation: "It would seem to this court that courts should be reluctant to hold that the Sherman Antitrust Act applies to the type of agreements used in this case. They are the same type of agreements used in almost all activities in the oil and gas field, where the development of the product is regulated and the output is controlled, and the rights of the public are well protected. The ultimate recovery of the product is necessarily controlled, but not for the purpose of restraining trade or reducing competition of a character of a type contemplated by the antitrust laws."

B. SECURITIES

Rule 10b-5 - Damages

*Reynolds v. Texas Gulf Sulpher Company*, (D. Utah, October 17, 1969) (Judge Ritter)

Common to these four consolidated cases are alleged violations of Section 10b of the Securities and Exchange Act of 1934 and

and Rule 10b-5 by Texas Gulf Sulphur and by Dr. Fogarty its executive vice-president: (1) for failing to disclose prior to April 16, 1964 information concerning the results of drilling operations in Northern Canada and (2) in issuing an inaccurate, misleading and deceptive press release on April 13, 1964 describing the early results of drilling tests.

As to the *failure to disclose* issue the court observed that "corporations and their executives undoubtedly owe duties to stock holders to keep them reasonably informed as to corporate affairs and such matters as the mineral discovery here involved but that duty does not surpass all other duties owed to the stock holders. Here, for instance, the company and Fogarty were also under a duty to TGS stockholders . . . to not make information concerning the mineral discovery public until the company could first protect itself by acquiring mineral interests in adjoining lands." However, the court found that the press release of April, 13 1964 was inaccurate, misleading and deceptive with respect to the information disclosed by the drilling operations and violated both the statutory Section 10-b and Rule 10b-5. The court also found that the plaintiffs relied upon the misleading and inaccurate announcement in deciding to sell their stock.

As the aim in cases of this type is to put the plaintiffs in the position they would have been had they not been motivated by the defendant's fraudulent press release, the court concluded that the "true and just measure of damages" should be determined using the *New York Rule*: - the measure of damages in stock transactions is the highest intermediate value reached by the stock between the time of the wrongful act complained of and a reasonable time thereafter. In the circumstances of these cases the court considered a reasonable period to be 20 trading days from the date of the announcement and it deemed it "fair and just" to take the *average* of the highest market prices on the 20 trading days, rather than the *single highest* market price during that period since it appeared improbable that any one of the plaintiffs would have sold at the *highest* price. Interest was allowed at 6% per annum from the date the stock was sold.

Rule 10b-5 - Birnbaum Rule

*Iroquois Industries, Inc. v. Syracuse China Corp.*, (2nd Cir., November 3, 1969) (Judge Wyatt)

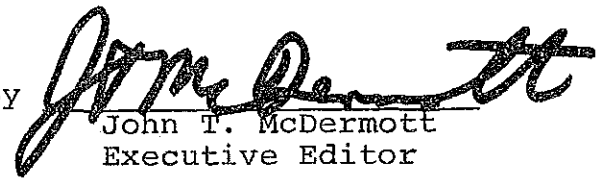
The management of Syracuse China successfully resisted Iroquois' attempt to acquire 50,000 shares of Syracuse China. Iroquois then brought this action charging violations of section 10b and Rule 10b-5, alleging that Syracuse China management wrongfully used corporate funds to defeat the tender offer and made false and intentionally misleading statements to Syracuse China stockholders in a successful effort to convince them not to sell their stock to Iroquois.

Since Iroquois was not a *defrauded* purchaser (or seller) of Syracuse China stock, the district court dismissed the action relying on *Birnbaum v. Newport Steel*, 193 F.2d 461, cert. denied, 343 U.S. 956 (1952) which teaches that liability under Rule 10b-5 depends on a purchase or a sale by plaintiff, involving a claim of fraud. The court of appeals affirmed the judgment, declining the invitation of both appellant and SEC to overrule *Birnbaum*.

Copies of unpublished opinions may be obtained from the authoring judge or from the undersigned.

Very truly yours,

BOARD OF EDITORS FOR THE
*MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION*

By 
John T. McDermott
Executive Editor

Attachment

# MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION



December 29, 1969

11

BULLETIN NO. 11

TO ALL JUDGES CONCERNED WITH COMPLEX AND MULTIDISTRICT LITIGATION

The following recently filed opinions and orders appear to be potentially relevant to complex and multidistrict litigation. The inclusion or exclusion of a particular opinion or order in a bulletin does not necessarily imply that the Board of Editors approves or disapproves of the procedures used or results reached in the particular case.

## A. JURISDICTION - VENUE - SERVICE

### Venue - Patent - Section 1400(b)

*Koratron v. Deering Milliken, Inc.*, (9th Cir., November 15, 1969)(Judge Hufstedler)

The defendant Deering Milliken, moved to dismiss for improper venue claiming that since Koratron's action is based on patent infringement it can be brought only "in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business" and that the Northern District of California is not such a district. Koratron replied that its suit is *not* for patent infringement but rather, it is an action founded on common law tort, with federal jurisdiction resting solely on diversity of citizenship.

The court found that Koratron would have to prove the basic elements of a contributory infringement claim in order to succeed on its tort claim. Although the complaint contained facts which would also sustain a claim for patent infringement, by intentionally omitting such a claim the court held

that Koratron's action did not arise under the patent laws and *a fortiori* was not a patent infringement suit subject to the narrow venue provisions of Section 1400(b). The order of the district court denying Deering Milliken's motion to dismiss for improper venue was affirmed and the cause remanded for further proceedings.

Long-Arm Statutes

*Uppgren v. Executive Services*, 304 F. Supp. 165 (D. Minn. 1969)(Judge Neville)

The court was confronted with an alleged interstate tort and *claimed* in personam jurisdiction over a foreign corporation by substituted service effected under the Minnesota "one-act" statute which subjects a foreign corporation to the jurisdiction of the courts of Minnesota ". . . if such foreign corporation commits a tort in whole or in part in Minnesota against a resident of Minnesota. . . ." Robert A. Uppgren was killed when a helicopter in which he was a passenger crashed in northern Minnesota and this action was commenced by the representative of his estate. The court characterized this as "a classical attempt to bring into this jurisdiction a foreign corporation based on the naked and sole fact that an alleged tort was committed in Minnesota." There were no other contacts of any kind between the defendants and the State of Minnesota other than the fortuitous circumstances that the decedent was killed in Minnesota.

The court first noted that the Minnesota Supreme Court would very likely hold that the facts warranted the application of the "one act" statute to the defendant. Considering the mobile nature of the product and the fact that the helicopter was sold to the United States Government, the court conceded that the defendant could reasonably have expected that its negligence would have consequences in almost any of the fifty states including Minnesota. Although foreseeable use, coupled with the fact of injury in the state, could be a sufficient basis to render the defendant amenable to in personam jurisdiction, the court doubted that the defendant could have foreseen *substantial use* of its product within the state of Minnesota. The court held that the fact of injury in the state was completely fortuitous - an isolated instance even conceding the mobile nature of the helicopter - and that the attempt to establish in personam jurisdiction under the Minnesota "one act" statute was not consonant with federal due process requirements. An order was entered quashing service of process as to the defendant.

The following recently published opinions also deal with the acquisition of *personal jurisdiction* over an out-of-state corporation via the state's long-arm statute:

*Washington Scientific Indus., Inc. v. Polan Indus., Inc.*, 302 F. Supp. 1354 (D. Minn. 1969)

A single meeting in Minnesota relating to the contract involved in this litigation and two unrelated and unsolicited sales in the state were held insufficient to satisfy federal requirements.

*Samson Cordage Works v. Wellington Puritan Mills, Inc.*, 303 F. Supp. 155 (D. R.I. 1969)

The court held that the defendant - through its *regional representative* - was doing business in Rhode Island and thus was subject to service under the Rhode Island Long-Arm Statute. The court also denied defendants' motion to transfer under Sections 1404(a) and 1406(a).

*Fontanetta v. American Board of Internal Medicine*, 303 F. Supp. 427 (E.D. N.Y. 1969)

Since the Board maintained its principal place of business in Philadelphia and did not solicit applicants to take its examinations, the court found the New York aspects of the relationship between the parties minimal, and dismissed for lack of personal jurisdiction.

*Sampson Miller Associated Homes, Inc. v. Washington Holmes, Inc.*, 303 F. Supp. 739 (W.D. Pa. 1969)

Multiple contacts in forum state for purpose of obtaining financing held sufficient under Pennsylvania law.

*Nelson v. Doll Furniture Co.*, 304 F. Supp. 159 (E.D. Pa. 1969)

Applying applicable state law, the court held that the shipment of $79.98 worth of chemicals by the defendant to the forum state did not render it amenable to the jurisdiction of the court. The action (as to the out-of-state defendants) was not dismissed but was transferred to another district under 28 U.S.C. Section 1406(a).

B. JUDICIAL MANAGEMENT

Class Action - Notice

*Berland v. Mack*, (S.D. N.Y., October 1, 1969)(Judge Mansfield)

The court was faced with the necessity of determining whether eighteen consolidated stockholders actions should be maintained as a class action under Rule 23 and if so, what notice would satisfy the requirements of Rule 23(c)(2) and

which parties should bear the expense of such notice. All of the parties favored the maintenance of the class action and the court found that all criteria for maintaining a class under Rule 23(b)(3) were satisfied.

As to the notice requirement of Rule 23(c)(2) the court noted that the Rule required the best notice *practicable* - not *perfect* notice - with the type of notice depending upon the particular circumstances of each case. The court observed that where members of the class are readily identifiable and personal notice would not be prohibitively expensive individual notices by first class mail would generally "be the best notice practicable." However, where members are difficult to locate or identify the court felt that the benefits of a class action should not be denied if there was *any method* for giving notice "reasonably calculated to appraise the class members of their opportunity to object."

Applying this criteria, the court concluded that *individual* notices by first class mail should be given to all transferees who recorded shares, in their own names during the relevant period. As to transfer in "street names" the brokerage houses were requested to furnish the identity of the purchasers for whom they held such shares. In the event that notice by publication is also required the court concluded that a one-eighth page notice in three successive monthly editions of The New York Times and the Wall Street Journal would be "quite sufficient."

Turning to the question of who should pay for the notice, the court directed the defendant, at its expense, to furnish to plaintiff's counsel lists of the names and addresses of all persons who registered acquisitions of stock during the relevant period and directed the plaintiff's counsel, at his expense, to transmit a copy of the notice by first class mail to each identifiable member of the class. If notice by publication is requested by either or both parties, the cost shall be borne by the party requesting it and, if requested by both sides, one-half shall be borne by plaintiffs and one-half by defendants.

## C. DISCOVERY

### Attorney-Client Privilege - Work Product Doctrine

*Guilio Natta, et al. v. Alex Zleta, et al.*, (7th Cir., November 19, 1969)(Judge Cummings)

This is the fourth appeal in an ancilliary action seeking production of documents for use in a patent Interference. The district court reviewed the documents

sought *in camera* and denied production under the attorney-client privilege or work product rule. The appellant first questioned the propriety of the district court basing its rulings on an *in camera* examination of the documents and on the affidavits of counsel. Although observing that "it might have been preferable for the district court to have held an evidentiary hearing to determine the existence of the work product and privilege claims," the court of appeals found no indication of any prejudice and concluded that "the refusal to hold a hearing did not constitute an abuse of the trial court's discretion."

Turning to the merits, the court of appeals held that the district court's rulings were substantially correct. One category of documents included correspondence between house and outside counsel concerning legal advice and assistance and as such was clearly within the attorney-client privilege. Another category consisted of notes and memoranda prepared by outside patent counsel or by corporate patent counsel in connection with their work on the patent Interference claim. The court found that these documents fell "outside the strict scope of the attorney-client privilege but constitute attorneys work product, subject to discovery by opposing parties only after an appropriate showing of 'good cause.'" Since no showing of "good cause" was made, the trial court correctly refused to order the documents produced. A third type of material included correspondence between an expert witness and appellee's patent counsel. The court found that counsel's letter to the expert was privileged but that the expert's letters to counsel were not. Since the expert witness had already testified the court concluded that "good cause exists for the production of this material." The final category of documents, including intra-office memoranda and correspondence relating to the drafting of motions and other papers, were found to be work products of the various attorneys who drafted them and were privileged from discovery.

Except for the letters from the expert witness to the patent attorney (which were ordered produced) all materials were held to be within the work product doctrine or protect by the attorney-client privilege.

Relevancy - Period Following Commencement of Action

*Bass v. Gulf Oil Corporation*, (S.D. Miss., October 13, 1969) (Judge Nixon)

The plaintiffs, principal royalty owners of an oil and gas lease, charged the defendants with fixing and maintaining crude oil prices in violation of Sections 1 and 2 of the Sherman Act. (They charge that the $2.00 per barrel price is at least 25 cents less that the market value of the oil.) The defendants objected to certain questions propounded to a witness in oral deposition relating to a period of time *after* the filing of the complaint. The defendants also object on the same ground to production of certain documents requested by the plaintiff.

The court concluded that the plaintiffs were entitled to inquire into price increase first announced the day after the complaint was filed and subsequently increased on two other occasions. The court held that the discovery sought under Rules 26 and 34 was relevant to the *subject matter* of the pending action - an alleged continuing conspiracy to fix prices in violation of the antitrust laws and the defendants' objections were overruled. The court added that the determination of the *admissibility* of this evidence, in the absence of supplemental amended pleadings, would be made "if and when it is offered during the trial."

D. RES JUDICATA - COLLATERAL ESTOPPEL

Administrative Tribunal

*Painters District Council v. Edgewood*, (5th Cir., October 7, 1969)(Judge Godbold)

The sole issue for determination in this interlocutory appeal was whether the finding of the NLRB that the appellant union had violated Section 8(b)(4) by conducting a secondary boycott was *res judicata* on the issue of that union's liability in a subsequent damage suit.

The district court ruled that the union had been given a full hearing and that the Board's finding, made while acting in a judicial capacity, was supported by substantial evidence. Based on these findings, and the belief that it should not "perpetuate the possibility of inconsistent holdings resulting from dual litigation of the same issue between the same parties" the trial court concluded that the Board's determination that the union had conducted a secondary boycott was *res judicata* as to liability.

The court of appeals *affirmed*, noting that the policy considerations which underlie res judicata -- finality to litigation, prevention of needless litigation, avoidance of unnecessary burdens of time and expense -- are as relevant to the administrative process as to the judicial.

Prior Criminal Conviction

*Breeland v. Security Insurance Co. of New Haven, Conn.* (5th Cir., November 10, 1969)(Judge Dyer)

One of the principal issues was whether the prior *criminal* conviction for fraud perpetrated on the insurance company was conclusive on the fraud issue in the *civil* suit. The court of appeals agreed with the appellant that Louisiana statute precluded the operation of *res judicata* because of the lack of identity of parties in the criminal and civil cases. The court noted however that the common law doctrine of *judicial estoppel* is followed in Louisiana and is given a less rigid construction than the doctrine of res judicata. The court also observed that the number of jurisdictions holding that a criminal conviction precludes litigation of the

same issue in a civil action is ever increasing. Since Louisiana has shown a willingness to apply judicial estoppel in the absence of identity of parties to prevent fruitless relitigation of an issue which has already been judicially determined, the court of appeals concluded that "the Supreme Court of Louisiana would, if presented the facts of this case, hold that the convictions for insurance fraud precludes Breeland from litigating the issue in this civil suit against the insurance company."

Prior State Action

*Rankin v. State of Florida, et al.*, (5th Cir., October 23, 1969)(Judge Morgan)

This is an appeal from an order of dismissal in a class action challenging the constitutionality of a Florida law prohibiting political contributions by persons licensed to sell alcholic beverages. The state's motion to dismiss was granted on the grounds that the issues had been presented, litigated and decided previously by the Florida courts. The court of appeals agreed and affirmed.

The court found that the same cause of action, involving both state and federal constitutional issues, was brought almost simultaneously in both state and federal courts by different members of the same class acting in concert; the state action was litigated first and the plaintiff argued both state and federal constitutional points without reservation; and the decision of the state trial court was favorable to the plaintiffs but they lost in the Florida Supreme Court and now seek readjudication on the merits in federal district court. The court of appeals held that "the plaintiff in the federal class action is therefore barred from litigating further in federal court by the final determination of the state class action, since the parties and issues were identical in substance, if not in form."

*Granader v. Public Bank*, (6th Cir., October 15, 1969) (Judge Edwards)

This is an appeal from the granting of summary judgment for the defendant in a civil treble damage antitrust action. The plaintiff charges an illegal conspiracy by which the Bank of the Commonwealth (Commonwealth) acquired all of the assets of the Public Bank (Public) allegedly in violation of Sections 1 and 2 of the Sherman Act, Section 7 of the Clayton Act and the due process provision of the 14th Amendment. This is, as Judge Edwards points out, "no ordinary antitrust case."

The precarious state of Public Bank became known to both the Banking Commissioner of Michigan and the F.D.I.C. in 1965 and various attempts to strengthen it failed. Subsequent efforts by the Public Bank directors and later by the F.D.I.C. to sell the bank or its assets also were unsuccessful. By September 23, 1966, the impending insolvency of Public was known but was carefully kept from the public gaze by the two

regulatory agencies for fear of a run on the bank's assets. An after-hours hearing in the Wayne County Circuit Court was held on the Banking Commissioner's petition for receivership. The court made a tentative finding of insolvency and appointed the F.D.I.C. as the receiver. F.D.I.C. then negotiated the sale of the assets to Commonwealth. A full hearing was then held before Circuit Judge Blair Moody, Jr. in the Wayne County Circuit Court and the court found that as of October 12, 1966, Public Bank was insolvent and that the sale of Public Bank to Commonwealth was "the best possible and obtainable offer." The plaintiffs were parties to and participants in the proceedings before Judge Moody.

On motion for summary judgment, the trial court held that the plaintiff, having participated in the Wayne County Circuit Court action, was collaterally estopped from denying the validity of that court's critical findings of fact: that Public Bank was insolvent and that the sale to Commonwealth was fair.

The court of appeals affirmed noting that it was appropriate for the trial judge to take judicial notice of the state court receivership proceedings and of Judge Moody's findings of fact therein and to consider this factual determination binding on the parties in this litigation. Since there were no other issues of fact, summary judgment was held to be appropriate.

## E. PRODUCT LIABILITY - DRUGS

### Aralen - Triquin

*Basko v. Sterling Drugs*, (2nd Cir., October 7, 1969) (Judge Smith)(410 F.2d 417)

The plaintiff appeals from a judgment for the defendant following a two week jury trial. She argues (1) that the evidence established a case of strict liability as a matter of law and (2) that the jury was erroneously instructed. The drugs involved, Aralen, Triquin and Atabrine, were used in treating a skin disease called lupus erythematosus. It is claimed that the plaintiff suffered a form of retinal damage known as chloroquine retinopathy from using these drugs.

There was no doubt the defendant made some effort to warn after it learned of the risk involved and the court held that the question of the timeliness of such warnings was for the jury and that the motion for a directed verdict was properly denied.

However, the court of appeals found that the jury was improperly instructed on the basis of causation. The court held that the jury should have been instructed on the "substantial factor" test of multiple causation. The court also found plain error in the trial court's repeated reference to "appreciable number of users" in stating the duty to warn test. The court

held that the manufacturer was obligated to warn in cases where the drug may effect only a small number of idiosyncratic or hypersensitive users.

The judgment was reversed and the cause remanded for a new trial. The court of appeals recommended that the trial court use special interrogatories to resolve the issue of causation.

*Kershaw v. Sterling Drug, Inc.*, 415 F.2d 1009 (5th Cir. 1969)

In affirming a judgment based on a jury verdict of $150,000 for the plaintiff, the court of appeals held, *inter alia*, that the verdict was supported by sufficient evidence that Sterling failed to give adequate warning of the side effects of Aralen.

F. PATENT - TRADEMARK - COPYRIGHT

Patent Misuse - Price Maintenance

*Ansul v. Uniroyal*, (S.D.N.Y., October 31, 1969)(Judge Mansfield)

This action arose out of Ansul's entry into the manufacture and sale of maleic hydrazide, used by tobacco growers to inhibit tobacco sucker growth. Prior thereto, Uniroyal had claimed an exclusive patented right to make and sell the composition and was the sole source of supply. Ansul brought this action seeking a declaratory judgment to the effect that Uniroyal's patent was invalid, not infringed, and unenforceable due to misuse. Uniroyal countered by instituting infringement actions in several district courts against various distributors of Ansul's maleic hydrazide products. At Ansul's request, the court enjoined Uniroyal from prosecuting those actions pending disposition of this action. Many of the distributors then intervened in this action.

After a separate trial on the validity and infringement issues, the court held that the patent was invalid as to the composition itself but upheld the validity of the *method claim*. The court found that the method claim had been infringed by Ansul (and the intervenors) in making and selling of Ansul's maleic hydrazide products *for use* in regulating plant growth. See *Ansul v. Uniroyal*, 301 F. Supp. (S.D.N.Y. 1969).

In the present phase of this litigation the court held that because the patent had been misused by Uniroyal and because that misuse had not been purged or dissipated, the patent was unenforceable. The court found that Uniroyal had engaged in "vigorous and ruthless price maintenance activities" by setting "suggested prices" for resale by distributors and by dealers, limiting the area in which the distributors could sell the product, maintaining a list of "black-balled dealers" to which the distributors were not to sell, and by threatening and by actually terminating distributorships for failing to sell at the "suggested price" or for selling outside of their geographical territory or for selling to "black-balled dealers". The court was convinced that Uniroyal's marketing activities *which were*

*made possible by its patent* constituted *per se* violations of the Sherman Act.

Uniroyal urged that it had ceased its restrictive price maintenance activities and there was evidence that a drift away from strict enforcement of its policies had occurred. But the court noted that where the illegal conduct extends over a period of several years and has substantially rigidified the price structure of the entire market and suppressed competition over a wide area, *affirmative action* would be essential to effectively dispel the consequences of the unlawful activity. The court found that Uniroyal's efforts were "wholly insufficient to constitute a purge."

The court dismissed for insufficient proof of damages the treble damage action brought by Ansul and the treble damage action brought by Daly-Herring, one of Uniroyal's distributors. The court did find that another distributor, Louisville Chemical, was terminated solely because if failed to adhere strictly to Uniroyal's suggested retail prices and had sold to unapproved price cutting dealers after being warned not to do so. However, the court found that Louisville's claim was barred by the statute of limitations.

## G. NATIONAL TRAFFIC & SAFETY ACT

### Super Lite

*Chrysler v. Tofany*, (2nd Cir., November 7, 1969)(Judge Lombard)

This is a consolidated appeal from two declaratory judgments holding that state regulation of Super Lite (an optional third headlamp) is preempted by the National Traffic and Motor Vehicle Safety Act of 1966 and Federal Motor Vehicle Safety Standard No. 108. The court of appeals disagreed on the question of federal preemption and reversed both judgments.

Although reaching the same result as the First Circuit did in *Chrysler v. Rhodes*, (Bulletin No. 4, page 8) the Second Circuit took a different view of the applicability of Standard 108 and concluded that Standard 108 covered Super Lite but only as it effects the operation of required automobile lights and reduces the vision of the *driver* of a car equipped with Super Lite On the other hand, the court concluded that Standard 108 did cover the effects Super Lite has on drivers of other vehicles and that since this is the reason both Vermont and New York have objected to the use of Super Lite, their attempts at regulation of a different aspect of performance does not conflict with the application of the federal scheme but rather contributes to the goal of reducing highway accidents. The judgments of both district courts were reversed with directions to enter a summary judgment in favor of the States in both cases. (Circuit Judge Friendly concurred specially).

Citations now available for opinions previously summarized are listed on the attached page.

Copies of unpublished opinions may be obtained from the authoring judge or from the undersigned.

Very truly yours,

THE BOARD OF EDITORS FOR THE
*MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION*

By _____
John T. McDermott
Executive Editor

Attachment

## CITATIONS

| Bulletin No. | Page | Caption | Citation |
|---|---|---|---|
| 4 | 8 | *Chrysler v. Rhodes* | 416 F.2d 319 |
| 5 | 2 | *Welch v. Human Engineering* | 416 F.2d 32 |
| 5 | 3 | *Etheridge v. Grove* | 415 F.2d 1338 |
| 6 | 2 | *Swanson v. Amer. Consumer Indus.* | 415 F.2d 1326 |
| 6 | 4 | *Ralston v. Parsons* | 416 F.2d 207 |
| 6 | 8 | *Fowler v. Gorlick* | 415 F.2d 1248 |
| 7 | 3 | *Maricopa Cty. v. Amer. Pipe & Cons. Co.* | 303 F. Supp. 77 |
| 7 | 9 | *Kahan v. Rosenstiel* | 300 F. Supp. 447 |
| 8 | 6 | *Seagram v. Hawaiian Oke* | 416 F.2d 71 |
| 9 | 1 | *Lester v. McFaddon* | 415 F.2d 1101 |
| 9 | 5 | *Monod v. Futura* | 415 F.2d 1170 |
| 9 | 6 | *Weiss v. Tenney* | 47 F.R.D. 283 |
| 9 | 8 | *Taylor v. Love* | 415 F.2d 1118 |

The United States Supreme Court has taken the following action with respect to cases previously reported in these bulletins:

| Case | Bulletin No. | Page | Action Taken |
|---|---|---|---|
| *General Foods v. Carnation* | 3 | 2 | cert. denied 38 LW 3190 |
| *U. S. v. Hughes* | 3 | 7 | cert. granted 38 LW 3222 |
| *Craig v. U. S.* | 4 | 1 | cert. denied 38 LW 3222 |
| *Daily Press v. United Press International* | 4 | 5 | cert. denied 38 LW 3223 |

# Manual for Complex and Multidistrict Litigation



EDITORIAL STAFF

JOHN T. McDERMOTT, ESQUIRE
EXECUTIVE EDITOR

TELEPHONE 382-8717
AREA CODE - 202

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BULLETIN NO. 12

TO ALL JUDGES CONCERNED WITH COMPLEX AND MULTIDISTRICT LITIGATION

The Board of Editors met in Dallas, Texas on January 9, 1970 to evaluate several proposed changes and additions to the *Manual for Complex and Multidistrict Litigation*. A substantial amount of new material will be released to the publishers of the *Manual* within the next thirty days but because of the urgency and importance of the material relating to the prevention of potential abuses of class actions, the Board directed that *this material* be promptly distributed to all federal judges. This new material is identified by reference (part, section & page) to its probable location in the *Manual*. Your comments and suggestions will be greatly appreciated.

Very truly yours,

THE BOARD OF EDITORS *FOR THE MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION*

By _____
John T. McDermott
Executive Editor

PART I

Section 1.0

| | |
|---|---|
| Boardman* | p. 15 |
| Moore** | p. 18 |
| West*** | p. 10 |

Delete subparagraph (k) and insert:

(k) in potential class actions under Rule 23, F.R.Civ. P., (1) establish a schedule for early determination of the class action questions including a schedule for prompt completion of discovery relative to the class action issue; and (2) enter appropriate orders to prevent potential abuse of the class action.

* Clark Boardman/Sage Hill Edition
** *Moore's Federal Practice* (Matthew Bender) Vol. 1, Part 2
*** West Publishing Co. Edition

PART I

Boardman p. 22
Moore p. 24
West p. 15

Following the last full paragraph of Section 1.6, insert:

1.61 Preventing Potential Abuse of the Class Action

The class action under Rule 23 is subject to abuse, intentional and inadvertent, unless procedures are devised and employed to anticipate abuse. Among the potential abuses of the class action processes are the following: (1) solicitation of direct legal representation of potential and actual class members who are not formal parties to the class action; (2) solicitation of funds and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (3) solicitation by formal parties of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23; and (4) unauthorized direct or indirect communications from counsel or a party, which may misrepresent the status, purposes and effects of the action and of Court orders therein, may confuse actual and potential class members, and create impressions which may reflect adversely on the Court or the administration of justice. To anticipate and prevent these abuses timely action should be taken by local rule or by orders in the particular civil action or by both.

In absence of some preventive action by the Court, formal parties to the action or counsel for the formal parties may directly or indirectly, without knowledge or consent of the Court, solicit from the potential or actual members of the class (or subclasses) who are not formal parties, funds for attorneys' fees and expenses, or agreements to pay fees and expenses. The solicitation may be direct or indirect. To the party solicited, solicitation may appear to be an authorized activity approved by the Court, simply by reference to the title of the Court, the style of the action, the name of the judge, and to official processes. Such unapproved solicitation may be of doubtful ethical propriety and may result in well founded dissatisfaction with the judicial management of the action. In order to guard against unapproved action of this sort, it is recommended that each court (1) adopt a local rule forbidding unapproved direct or indirect written and oral communications by formal parties or their counsel with potential and actual class members, who are not formal parties, provided that such proposed written communications submitted to and approved by order of Court may be distributed to the parties or parties designated or described in the Court order of approval. In exceptional circumstances involving numerous class members who do not possess the means of understanding the considerations affecting their interests, the Court may authorize miscellaneous communications by counsel for representative parties without express prior approval of each communication. This may be done by an order prohibiting in general language all practices which would constitute abuse of a class action. A sample local rule and a sample pretrial order on the subject are included in Appendix, 1.61.

Section 1.61 (con't)

When there is more than one proposed class action in a single district involving the same subject matters, these actions should be consolidated before a single judge. If it is determined that one or more of the consolidated actions should proceed as a class action, a choice may be required to be made of the formal party or parties who shall represent a class. The primary considerations concerning designation of the formal party or parties to represent a class (or a subclass) are those set forth in Rule 23, F.R.Civ.P. These include under paragraph (a)(4) that "the representative parties will fairly and adequately protect the interests of the class." Often adequate protection of the interests of the class are dependent upon the skill and resources of counsel for the proposed representative party or parties. If a choice is presented between more than one proposed representative party or groups of proposed representative parties represented by different counsel, the Court should take into consideration the probable cost of legal representation to the members of the class or subclass in question. If the counsel representing the competing proposed representative party or parties have substantially equal skill and have substantially equal resources, the Court may make a choice which will result in the least cost of legal representation to members of the class or subclass. In some instances adequate representation can be provided for the class at less cost to the members of the class by designating as a proposed representative party or parties publicly employed counsel who are natural representatives of the class. For instance, the State Attorney General or other publicly employed counsel (not permitted to make a charge for services in the case) may be willing to serve the class members as the representative of a public body designated as a proposed representative party of the class (or subclass).

No settlement of any class action (in whole or in part as to a subclass) should be permitted and approved without full disclosure of the details of the settlement and the attorneys' fees and other expenses to be charged against the members of the class (or subclass). This disclosure should include the identity of all counsel who will share in the receipt and division of fees, and the amounts thereof. No such settlement should be made without adequate notice and opportunity to be heard on the question of approval of the settlement by all representative parties, other formal parties and intervenors, and, where economically feasible, to the members of the class or subclass affected.

PART I

Boardman p. 25
Moore p. 27
West p. 17

Following the last full paragraph of Section 1.10 add:

1.11 Control of Attorneys' Fees and Expenses in Class Actions

The great potential of the class action for speed and efficiency in the administration of justice is attended with equally great potential for unreasonable charges for attorneys' fees and expenses and for improper solicitation of legal representation. The measures recommended in paragraph 1.61, supra, and the implementing suggested local rule and sample order in the Appendix, 1.61, are designed to prevent improper solicitation of funds and expenses and of legal representation from potential and actual class members.

These preventive measures do not expressly deal with the retention of the power by the Court of control over the charges to class members for fees and expenses at the time of conclusion of the class action or thereafter.

If the action is concluded by settlement, the Court should require a statement of all proposed charges for fees and expenses by the counsel for the class and any subclasses, including the identity of all counsel sharing in the fees. Only reasonable charges for fees and expenses should be authorized upon approval by the Court after notice and hearing. All other such charges should be expressly forbidden by Court order.

If the litigation is concluded by determination on the merits, the Court should expressly provide in the judgment, or in one of the earlier class action management orders, for control by the Court of the charges for attorneys' fees and expenses. The cost of the legal representation and of expenses seems to be a proper consideration in determining the identity of the representative parties for the class in an affirmative class action determination under Rule 23.

For example, if there is available competent representation for certain formal parties without charge, by a public legal officer (as state Attorney General, for example), this fact should be taken into consideration in formation of the classes in a manner which will minimize legal costs to a class or subclass.

PART I

Section 5.5

Boardman p. 91
Moore p. 100
West p. 65

Following the last full paragraph of Section 5.5 insert:

In multidistrict litigation the acute problem of conflicting class actions seldom can be solved by coordinated action of several district courts involved. A transfer of the multidistrict litigation to a single district under Section 1407 (or in appropriate cases under Section 1404) provides for solution of all conflicting class action questions. Cf. see In re Plumbing Fixture Cases, 298 F. Supp. 484.

Upon receipt of transfer of multidistrict litigation in which conflicting class actions are pending, the transferee court should take the initiative promptly to prevent potential abuse of the class action in the manner described in Section 1.61, supra, under the title "Preventing Potential Abuse of the Class Action." Multidistrict litigation involving conflicting class action requests may present more acute and more complex problems than are ordinarily present in actions filed and pending in a single district. For example, in defining the classes (and subclasses) in multidistrict litigation, complex choices will be presented, particularly in designating proposed representative parties (or groups of parties) with different counsel. Here again when all other things are equal, proposed representative parties should be represented by skillful and resourceful counsel who may be expected to serve at the least cost to the class members. For example, all the class members in a single state may be defined as a class (or subclass) to be represented by the Attorney General of the state or other publicly employed counsel in the interest of economy. Or, for example, all members of a horizontal national group, such as an existing trade association, an existing professional association or association of public bodies, may be represented by one or more of their members as representative parties with counsel chosen by the association involved.

PART II

Boardman p. 138
Moore p. 246
West p. 98

Following Section 1.6, insert:

1.61 Suggested Local Rule 3.1. Local Rule for Prevention of Potential Abuse of Class Action

In every potential and actual class action under Rule 23, F.R.Civ.P., all parties hereto and their counsel are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent of and approval of the communication by order of the Court. Any such proposed communication shall be presented to the Court in writing with a designation of or description of all addresses and with a motion and proposed order for prior approval by the Court of the proposed communication and proposed addressees. The communications forbidden by this rule, include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses, from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F.R.Civ.P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the action, and of actual or potential Court orders therein, which may create impressions tending, without cause, to reflect adversely on any party, any counsel, the Court, or the administration of justice. The obligations and prohibitions of this rule are not exclusive. All other ethical, legal and equitable obligations are unaffected by this rule.

1.62 Sample Pretrial Order No. 3.1
(To be promptly entered in actual and potential class action orders unless there is a parallel local rule)

In this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addresses by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this

PART II
Section 1.62 (con't)

Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F.R.Civ.P.,; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or any administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

# Manual for Complex and Multidistrict Litigation

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EDITORIAL STAFF

JOHN T. McDERMOTT, ESQUIRE
EXECUTIVE EDITOR

TELEPHONE 382-8717
AREA CODE - 202

April 6, 1970

Judge Inzer B. Wyatt
Southern District of
New York

BULLETIN NO. 13

TO ALL JUDGES CONCERNED WITH COMPLEX AND MULTIDISTRICT LITIGATION

The United States Supreme Court and several courts of appeal have recently reversed, vacated or modified certain decisions summarized in prior bulletins:

*United States v. Honorable Sarah T. Hughes*, 413 F.2d 1244 (5th Cir. 1969) Bulletin No. 3, Page 3

The following per curiam order was entered by the United States Supreme Court in this case:

> Upon consideration of the suggestion of mootness of the Solicitor General and upon an examination of the entire record, the petition for a writ of certiorari is granted, the judgment of the United States Court of Appeals for the Fifth Circuit is vacated, and the case is remanded to that court with instructions to dismiss the mandamus proceedings is [*sic*] moot. *United States v. Gifford-Hill-American*, 38 LW 3338, (February 27, 1970).

*United States v. Detroit Vital Foods, Inc.*, 407 F.2d 570 (6th Cir. 1969) Bulletin No. 3, P. 7

The United States Supreme Court reversed the judgment of the court of appeals in this case. The Supreme Court agreed with the court of appeals which held that "the Government may not use evidence against the defendant in a criminal case which has been coerced from him under penalty of either giving the evidence or suffering a forfeiture of his property" but the Court found "no such violation of the Constitution and no such departure from the proper administration of criminal justice." *United States v. Kordel*, ___U.S.___(February 24, 1970).

*Farmington Dowel v. Forster Mfg. Co.*, 297 F.Supp. 924 (D. Maine 1968) Bulletin No. 3, P. 6

The court of appeals concluded that the district court had both the power and the duty to satisfy itself that it did not become an unwitting accessory to an excessive fee arrangement regardless of how the fee is obtained. However, the court thought that the trial court failed sufficiently to differentiate between its role in awarding a fee under Section 4 of the Clayton Act and its role in exercising its supervisory power over the bar, the first being commonly exercised while the second is reserved for exceptional circumstances. The statutory authority under Section 4 requires the court to arrive at a figure it considered *reasonable*, while its supervisory power requires it to arrive at a figure which represents the *outer limits* of reasonableness. The court of appeals felt that the district court relied too heavily on what was reasonable for Section 4 in determining what was excessive under the Canons of Ethics.

The cause was remanded with instructions to the district court to modify its prior order to include an award of $85,000 as "reasonable attorney fees," but permitting the court to indicate the *maximum total fee* which Farmington's counsel could accept. By awarding treble damages and a "reasonable attorney fee" which could properly be accepted, the court of appeals was convinced that the demands both of Section 4 and of the Canons of Ethics would be satisfied.

Other issues presented in this appeal involved the *prima facie* effect of the prior F.T.C. order, the admissibility of expert damage testimony, and the difference in evidence needed to establish the *fact of damage* and that needed to establish the *amount of damages*. The judgment of the district court was affirmed in all respects *except* as to its denial of statutory attorney fees. ___F.2d___ (1st Cir., December 10, 1969).

*Kahan v. Rosenstiel*, 300 F.Supp. 447 (D. Del. 1969) Bulletin No. 7, P. 9

The court of appeals found that the plaintiff's pleadings stated a cause of action which could be the basis for an award of counsel fees and therefore reversed the order dismissing his petition. The plaintiff, on remand, will have the burden of proving the allegations set forth in his complaint and petition and if the trial judge is satisfied that the plaintiff has discharged this burden, he can award plaintiff counsel fees in

an amount he determines is appropriate under the circumstances of the case. The court of appeals also noted that in the present case it would be appropriate to follow the view taken by a number of the district courts that a suit brought as a class action should be treated as such for the purposes of dismissal or compromise until there is a full determination that the class action is not proper. *Kahan v. Rosenstiel*, ___F.2d___ (3d. Cir., February 20, 1970)

*State of Illinois v. Harper & Row*, (N.D. Ill, October 7, 1969) Bulletin No. 9, page 9

The defendants sought mandamus to vacate the trial court's order insofar as it permitted plaintiffs to inspect and copy certain memoranda generally prepared by attorneys while "debriefing" employees or former employees of the defendant shortly after each had testified before a federal grand jury.

Although the defendants initially claimed that the relationship between the parties and the attorney interviewing them were such as to make the communication privileged, the court of appeals did not find "the existence of personal attorney-client relationships so clearly established that mandamus is appropriate to compel the district court to recognize the privilege which would arise therefrom."

The defendants, alternatively, claimed that the relationship between the person interviewed and the attorney's *corporate client* were such as to make the communication privileged. The trial judge followed the "control group test" but the court of appeals concluded "that the control group text is not wholly adequate, that the corporation's attorney-client privilege protects communications of some corporate agents who are not within the control group, . . . (and) that an employee at a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment."

The court also held "that the district judge incorrectly suggested that some of the memoranda did not qualify as work product because 'the lawyers functioned primarily as investigators.' . . . (but that) where an attorney personally prepares a memorandum of an interview of a witness with an eye toward litigation such memorandum qualifies as work product even though the lawyer functioned primarily as an investigator."

In sum, the court of appeals held that the order was valid as to all defriefing memoranda except in those instances where the *corporation's attorney-client privilege* protects them from discovery. *Harper & Row Publishers, Inc. et al. v. Honorable Bernard M. Decker*, ___F.2d___(7th Cir., February 4, 1970).

The following new decisions appear to be potentially relevant to complex and multidistrict litigation. This bulletin has been prepared by the editorial staff and the inclusion or exclusion of any particular opinion or order does not mean that the Board of Editors approves or disapproves of the procedures used or results reached in the particular case.

## JURISDICTIONAL AMOUNT - AGGREGATION OF CLAIMS

*Craig v. Champlin Petroleum Company*, (10th Cir., January 23, 1970) (Judge Breitenstein)

This action was originally commenced in state court to recover royalties allegedly due and unpaid under oil and gas leases. The defendant removed to federal court on the ground of diversity. As the pleadings stood at the time of removal satisfaction of the jurisdictional amount required aggregating the claims -- which was, at the time, permissible under the controlling decisions of the Tenth Circuit. After removal the plaintiffs amended the complaint to seek lease cancellation; the value of *each lease* exceeded the jurisdictional amount. The "non-aggregation rule" of *Snyder v. Harris*, 394 U.S. 332, was announced after this case had been tried and the defendant then filed a suggestion of lack of subject matter jurisdiction. The district court determined that it had jurisdiction and entered a final judgment.

The court of appeals noted that since *Snyder* made it clear that the trial court did not have jurisdiction at the time of removal, the primary question was whether the subsequent amendment could confer jurisdiction. The court held that it did. The court emphasized that the *removing defendant* went to trial without objection on jurisdictional grounds at a time that the jurisdictional amount was satisfied by each of the separate and distinct claims for lease cancellation. The court held that the defendant was estopped from thereafter asserting that the removal which it had obtained was improper.

*Lonnquist, et al., v. J.C. Penny Company, et al.*, (10th Cir., January 23, 1970) (Judge Breitenstein)

The appellants filed four actions in the state courts charging that the Denver department stores had exacted usurious interest on charge acounts in violation of pertinent Colorado statutes. The excess interest payments by the individual plaintiffs range from 41¢ to $189.69. Each complaint alleged a class action and estimated the amount of usurious interest collected *from the class* as $500,000 per year. The actions were removed to federal court and the plaintiffs moved to remand because of the absence of the requisite jurisdictional amount.

The district court denied the motion to remand sustaining its jurisdiction on *Gas Service Company v. Coburn*, 398 F.2d 831 which was subsequently reversed *sub nom* by the Supreme Court. *Snyder v. Harris*, 395 U.S. 332.

The defendants seek to avoid the effect of *Snyder* by arguing that the jurisdictional amount requirement should be determined by the *total monetary impact* on each defendant but the court of appeals held that this case, unlike *Berman v. Narragansett Racing Ass'n., Inc.*, (Bulletin No. 5, Page 1) involves separate and distinct claims which cannot be aggregated and therefore it would be improper to look to total detriment. The judgment was reversed with directions to remand the actions to the state court.

CLASS ACTIONS - INADEQUATE REPRESENTATION

*Schy v. Susquehanna Corp.*, (7th Cir., January 5, 1970) (Judge Gordon)

This action was brought by one of more than 9000 stockholders of the Susquehanna Corporation as a class action on behalf of all stockholders alleging that Susquehanna had issued a false and misleading proxy statement intended to obtain stockholder approval of a proposed new issue of preferred stock and that it failed to inform the stockholders of a planned merger with Atlantic Research Corporation and of the intended use of the new preferred stock to carry out such a merger. Subsequent to the filing of this action, Susquehanna and Atlantic Research issued a joint proxy statement outlining the contemplated use of the stock in the merger of the two companies, describing in full the terms of the merger and describing in ample detail the plaintiff's pending law suit. The stockholders then approved the entire plan by a resounding vote: 80.8% approved the merger while 0.42% opposed it. The district court refused to allow the plaintiff to maintain this action as a class action on behalf of the stockholders and subsequently dismissed the action on the merits.

With respect to the denial of the class action claims, the court of appeals held that the district court correctly found that this action could not be maintained as a class action. The court noted that after being informed of the nature of the plaintiff's pending suit, over 80% of the stockholders voted in favor of the proposal which the plaintiff opposes. The court held that the plaintiff could not maintain its action as a class action when his interests were antagonistic to the interests of the persons he purports to represent.

APPEALABILITY - CLASS ACTION ORDERS

*Caceres v. International Air Transport Association, et al.*, (2nd Cir., January 13, 1970)(Judge Feinberg)

The plaintiffs brought an antitrust action on their own behalf and as representatives of a class of travel agents against major international air carriers and their association. They appeal from an order determining that their action is not maintainable as a class action. 46 F.R.D. 89 (S.D.N.Y. 1969). The court of appeals held that the order appealed from was not a final decision under 28 U.S.C. §1291 and accordingly dismissed the appeal.

The court distinguished its decisions in *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (1966) - in which a motion to dismiss an appeal from the denial of a class action request was denied - from its more recent decision in *City of New York v. International Pipe & Ceramics Corp.*, 410 F.2d 295 (2d Cir. 1969) which held that such an order was nonappealable. The distinguishing feature is that in *Eissen* the nominal plaintiff's claim amounted to only $70, and "the effect of the district court's order [dismissing the class action], if not reviewed, is the death knell of the action" while the City of New York and the various intervenors in the *concrete pipe case* had "adequate resources to continue the action and with substantial amounts at stake will undoubtedly carry on." Thus the Second Circuit has established a broad proposition that -- absent the "death knell" rationale relied on in *Eisen* -- orders striking class suit allegations are not appealable.

While recognizing the possible use of the interlocutory procedure of Section 1292(b) to test the suitability of actions for class treatment, the court precluded the use of that procedure in *this case* and held that since the case had been briefed and argued on the merits, it would not accept a Section 1292(b) certification because it regarded the action of the district court as well within its discretion and not at all improper.

DISCOVERY - SANCTIONS - CONTEMPT

*Hanley v. McHugh*, (7th Cir., December 30, 1969) Judge Kiley

The corporate defendant was found guilty of criminal contempt for refusal to comply with the district court's discovery order to produce several statements of witnesses relating to a personal injury action against it. The issue before the appellate court was whether the discovery upon which the contempt charge was based was valid in the light of the requirement of Rule 34 that "good cause" must be

shown for the production of documents.

The court first held that it need not limit its review to the criminal contempt order itself but had to test the validity of the underlying discovery order. The discovery order was based on an affidavit of counsel that the statements sought were given by persons "present at the scene and the contents of the statements might well constitute evidence in the cause." The court of appeals held that this affidavit was insufficient to meet the "good cause" requirement of Rule 34. The court concluded that the discovery order was invalid and could not support the criminal contempt order based upon it and the contempt order was reversed.

DISCOVERY - SANCTIONS - DEFAULT JUDGMENT

*Diaz v. Southern Drilling Company*, (5th Cir., March 2, 1970) (Judge Thornberry)

The trial court granted default judgment against appellant Trefina, A.G. as the sanction for the repeated failure of that corporation's officer, Widmer, to make himself available for deposition. Trefina appealed, contending (1) that the intervention of the United States, the party requesting the deposition, was improper and (2) that the entry of default judgment was an abuse of discretion. The court of appeals found that an intervention was proper and that "default judgment was a foreseeable, just and appropriate response to Trefina's failure to comply with the orders of the court." The judgment was affirmed.

Recognizing that this was not a *final order* under Rule 54(b), the court held that the default judgment was an appealable collateral order and that Trefina could also attack the intervention, which was prior to and necessary for the default judgment. The court found that the government was not adequately represented by existing parties and could, as a practical matter, be impeded if intervention was denied and it concluded that the requirements of Rule 24(a)(2) were met and intervention was proper. The court also noted that the appellant failed to appear not once but three times without good cause being shown and held that the trial judge was warranted in concluding that the refusal was intentional and without good cause. The court was unable on review to hold that the trial court could have fashioned an equally effective but less drastic remedy than default judgment.

*Norman v. Young*, (10th Cir., March 5, 1970)(Judge Hill)

This is an appeal from an entry of a default judgment for failure to produce documents ordered by the district court. The court of appeals initially noted that the production order was based on a motion which sufficiently designated the desired

documents, illustrated good cause for the request and demonstrated sufficiently that they were in the defendant's "possession, custody, or control." The court recognized that a party may not be compelled to produce papers or things that are not in his possession, custody or control but held that records which are normally kept in the business of a party, as these were, are presumed to exist absent a sworn denial and a prima facie case of control is all that must be established to justify issuance of a production order. The court held that the defendants, having failed to properly deny that which was presumed to exist, failed to establish their inability to comply with the order.

The court of appeals further held that the entry of default judgment was not vindictive but was compelled by the defendant's conduct, in order to protect the statutorily created right of discovery and the constitutionally-guarded due process rights of the plaintiff. The decision was affirmed in all particulars except as to the computation of prejudgment interest.

DISCOVERY - EXECUTIVE PRIVILEGE - FREEDOM OF INFORMATION ACT

*Epstein v. Resor*, (9th Cir., February 6, 1970)(Judge Merrill)

The plaintiff, a historian with the Hoover Institution on War, Revolution and Peace, desired to examine an Army file prepared over twenty years ago by the Allied Force Headquarters. At the close of World War II, it was classified top secret and has not yet been declassified. The defendant asserted that these documents were included in the exemption covering materials "specifically required by executive order to be kept secret in the interest of the national defense or foreign policy." However, the appellant argued that the district court should have conducted an *in camera* study to determine whether after twenty-four years this file should still be classified in the interests of national defense or foreign policy. The district court disagreed and granted summary judgment in favor of the defendant.

The court of appeals affirmed, holding that the function of determining whether secrecy is required in the national interest is expressly assigned to the executive and that judicial inquiry is limited to the question of whether an

appropriate executive order has been made as to the material in question. The court agreed that judicial inquiry into this narrow area did not, at least in this case, warrant *in camera* examination of the file. The court noted that while the passage of time may cast doubt on the continuing need for secrecy, the appellees made a sufficient showing that questions bearing on that need still persist and require resolution by the executive.

*Grumman Aircraft Engineering Corp., v. The Renegotiation Board*, (D.C. Cir., March 10, 1970) (Chief Judge Bazelon)

This is an appeal from a summary judgment refusing to order production of documents under the Freedom of Information Act. The trial court agreed with the Renegotiation Board that the requested documents were exempt from disclosure because they contain trade secrets and other confidential information.

The court of appeals found that the statute did not render the documents completely immune. The court pointed out that this exemption was designed to prevent the unwarranted invasion of personal privacy which might be caused by the Government's indiscriminate release of confidential information but that it was not intended to exempt an entire document merely because it contained some confidential information. The court noted that the Act specifically recognizes that the interest of confidentiality can be protected by striking out identifying details prior to release of the documents.

The court also pointed out that the exemption for confidential commercial and financial information encompasses only information received from persons outside the Government and was not meant to allow agencies to render documents "confidential" by passing them back and forth among themselves. However information which is confidential in the hands of one agency retains its protected character in the hands of agencies to which it is subsequently furnished. The judgment was reversed and remanded.

RES JUDICATA - COLLATERAL ESTOPPEL - PRIVATE ANTITRUST ACTION

*Exhibitors Poster Exchange, Inc. v. National Screen Service Corporation, et al.*, (5th Cir., January 26, 1970) (Chief Judge Brown)

This is an appeal from summary judgment based on *res judicata* and *collateral estoppel* in a *third* private antitrust action between the same parties. After losing the first two antitrust actions, the plaintiff brought a third action seeking damages from the time of filing of the second action to the commencement of the third action.

The court of appeals found that "the harm that is claimed in Suit No. 3 is not that arising out of the particularized activities resolved in Suit No. 1 or No. 2. Old claims, then, are not being reasserted. A new claim has been alleged. Whether the new claim thus stated is one which under our federal rules is a claim upon which relief can be granted is a matter of substantive antitrust law, considered in the light of the *stare decisis* effect of the cases, and not a matter of res judicata or estoppel by judgment." The judgment was therefore reversed.

SECURITIES - MARKET MANIPULATION

*Crane v. Westinghouse Air Brake*, (2nd Cir., December 19, 1969) (Judge Smith)

Crane appealed from a dismissal after trial of its complaint brought to prevent consumation of the proposed merger of Westinghouse Air Brake Company (Air Brake) and American Standard, Inc. (Standard). Crane's merger proposal to the management of Air Brake was rejected on November 3, 1967 and thereafter Crane embarked on a systematic program of purchasing Air Brake stock in an attempt to obtain representation on the Board of Directors, a plan vigorously opposed by Air Brake management.

On March 4, 1968 the Air Brake Board of Directors approved the merger of Air Brake and Standard and this decision was announced to the stockholders on the following day. Approximately one month later Crane mailed to Air Brake stockholders its tender offer for Air Brake Stock. On April 19, the day that Crane's tender offer was to expire. Standard purchased 170,000 shares of Air Brake at $49.50 per share and sold 120,000 shares at an average price of $44.50 per share taking an apparent loss of more than $500,000 on its purchases and sales for the day.

Crane attached Standard's transactions in Air Brake stock both as illegal purchases of votes or proxies and as market manipulation and fraud. The court of appeals affirmed the trial court's determination that the illegal purchase claim was unsupported by the evidence but it held that the record plainly showed that Standard violated Sections 9(a)(2) and 10(b) of the Exchange Act and the judgment was reversed.

The court of appeals pointed out that the surest way to defeat the Crane offer was to inflate the market price of Air Brake stock past the $50.00 per share level, the value of the tender offer. The court found that Standard's purchases and sales on the last day of the tender offer "inevitably distorted the market picture and deceived public investors, particularly the Air Brake shareholders." The court distinguished *Birnbaum v.*

*Newport Steel Corp.*, 193 F.2d 461 and its progeny *Iroquois Industries v. Syracuse China*, (Bulletin No. 10, P. 10) by holding that the effect of Standard's deceptive manipulation (1) prevented Crane from acquiring controlling interest in Air Brake and (2) made Crane a forced seller of Air Brake stock under threat of a divestiture action under the antitrust laws.

The cause was remanded for a determination of the appropriate remedies which "may include damages, if any, prospective injunctive relief, as well as appropriate retrospective relief (divestiture or separation of Air Brake), notwithstanding the consummation of the merger."

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The United States Supreme Court has ruled on several petitions for certiorari filed in cases previously reported in these bulletins. These rulings are included on the attached list of citations of previously reported opinions.

Copies of unpublished opinions may be obtained from the authoring judge or from the undersigned. Your suggestions and comments concerning the content and format of these bulletins are most welcome as are copies of opinions and orders which may be appropriate for inclusion in a future bulletin.

Very truly yours,

THE BOARD OF EDITORS FOR THE
*MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION*

By 
John T. McDermott
Executive Editor

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# Manual for Complex and Multidistrict Litigation



EDITORIAL STAFF

JOHN T. McDERMOTT, ESQUIRE
EXECUTIVE EDITOR

TELEPHONE 382-8717
AREA CODE - 202

April 16, 1970

Judge Inzer B. Wyatt
Southern District of
New York

BULLETIN NO. 14

TO ALL JUDGES CONCERNED WITH COMPLEX AND MULTIDISTRICT LITIGATION

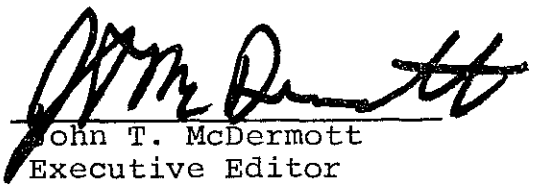
Dear Judges:

The Board of Editors is considering including the attached material in the next revision to the *Manual for Complex and Multidistrict Litigation*. This material includes several orders and notices to class members relating to the compromise of a class action.

The Board directed that this material be circulated to you and requested that any comments and suggestions be submitted to the undersigned by April 27, 1970.

Very truly yours,

THE BOARD OF EDITORS FOR
THE *MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION*

By 
John T. McDermott
Executive Editor

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PART II

## §5.6 Settlement of Class Action Claims

### a) Sample Order and Notice to Consumer Class*

ORDER DIRECTING RULE 23(e)
NOTICE TO CLASS MEMBERS

Pursuant to orders of the Court filed in June, 1969, an appropriate notice under Fed. R. Civ. P. 23(c)(2) of these class actions was given to members of the classes represented herein. The notice to the class of individual consumers was given by extensive newspaper publication.

The notices of these class actions under Fed. R. Civ. P. 23(c)(2) referred to a proposal by defendants of compromise and settlement of all claims represented in these class actions and other such actions. The proposal by defendants was on February 6, 1969 and was modified on May 9, 1969.

As explained in the newspaper notices to individual consumers, such individual consumers were permitted to participate directly in the settlement fund if they filed a claim with the Clerk by August 16, 1969.

Thereafter, pursuant to Paragraph III.E.(1) of the defendants' February 6 proposal (which is Exhibit C to an order of the Court filed May 26, 1969), various plaintiffs submitted seven Proposed Plans for allocation of the settlement fund. The defendants filed on October 20, 1969, an "Election by Defendants to Proceed with a Modified Plan of Allocation".

Paragraph III.E.(2) of the February 6 proposal contemplates that a notice of hearing on the proposed compromise and settlement will be sent to the various class members pursuant to Fed. R. Civ. P. 23(e) but the parties were unable to agree on an appropriate form of notice to be submitted for the Court's consideration. Thereafter, different forms of notice were submitted to the Court by various class representatives and the defendants and, following a hearing thereon, such notices were reviewed and duly considered.

NOW, THEREFORE, IT IS ORDERED:

1. The notices attached hereto as Exhibits B and C are in compliance with Fed. R. Civ. P. 23(e).

* Adapted from orders and notices used in antibiotic drug litigation transferred under 28 U.S.C. §1407 to the Southern District of New York.

(con't.)

2. The Clerk of this Court is directed to send or have sent, on or before February 24, 1970, a copy of the notice Exhibit B hereto by first class mail to all members of the consumer classes who have filed claims pursuant to the notices to consumers published on or about July 1, 1969. The Clerk shall file, or cause to be filed, as soon as practicable, a certificate of the mailing as directed.

3. The Clerk of this Court is directed to arrange to place the notice attached hereto as Exhibit C for publication in every English and Spanish language newspaper of general circulation published in each state (except for Washington, Hawaii, Oregon, California, Utah, Kansas and North Carolina) and in the District of Columbia, in Puerto Rico and in Honolulu, each such newspaper to run such notice on or about February 24, 1970, in 9 point type. Such notice shall also be published in the weekly newspaper of largest circulation in Redford, in Madison Heights and in Dearborn, Michigan. In the case of Honolulu, where the text of any daily newspaper is published in both English and Japanese, then the notice is to be published in both such languages. The Clerk shall file or cause to be filed, as soon as practicable, one or more certificates describing how such publication was effected together with tear sheets of the publication from each newspaper in which the notice was published.

4. Defendants shall advance to the Clerk all sums necessary to defray his necessary out of pocket expenses incurred in administering this Order, which sums shall be reimbursed only in accordance with Paragraph VI of Exhibit C to the Court's Order of May 26, 1969, except that the costs incurred in publishing the notice to consumers shall be subject to reimbursement only to the extent of the cost of publishing in the two papers of largest circulation in each state where published, the District of Columbia, Puerto Rico and Honolulu, and of the cost of composing the publication mats except insofar as these composing costs are incurred by publishing in more than 100 papers.

5. The Clerk is directed to serve a copy of this Order on all counsel of record in these actions and to file a certificate of such service.

NOTICE OF PROPOSED COMPROMISE TO CONSUMERS
OF CERTAIN BROAD SPECTRUM ANTIBIOTICS

(Form B)

There are pending in the United States District Court for the Southern District of New York ("the Court") a number of class actions (the "actions") against [enumerated defendants], alleging that those companies violated the antitrust laws in the sale of certain of their broad spectrum antibiotic products. It is further alleged that as a result purchasers of such products have paid prices higher than they otherwise would have paid. Early last year, the defendants, while denying liability, offered $100 million in settlement of all claims by three

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groups of purchasers, one group including individual consumers.

NOTICE IS HEREBY GIVEN that a hearing will be held before the Court beginning on March 24, 1970 at 10 o'clock in the morning in Room 110 of the United States Court House, Foley Square, New York, New York. The purpose of the hearing is to determine whether a proposed compromise and settlement of all the actions should be approved by the Court under Rule 23(e) of the Federal Rules of Civil Procedure. If so approved, all the settled actions will be dismissed on the merits as against all defendants with prejudice.

The terms of the proposed compromise and settlement are contained (1) in a proposal of the defendants (dated February 6, 1969, as modified May 9, 1969), (2) in a "proposed Plan of Allocation" filed by the State of Alabama and many other states (the "Alabama Plan"; submitted to the Court in chambers and to defendants in August, 1969 and filed with the Clerk, certain pages having been substituted, on January 20, 1970), (3) in an "Escrow Agreement" approved by order of the Court (filed on October 20, 1969), (4) in a document entitled "Election by Defendants to Proceed with a Modified Plan of Allocation" (filed on October 20, 1969), and (5) in an "Addendum" (filed on January 20, 1970) to the "Election" document just described. Copies of these five papers are on file with the Court and copies are available for examination in Room 508 of the Court House, Room 508 being a part of the Clerk's office. Plans of allocation were also filed by the State of Connecticut and others, by the County of Los Angeles, by the City of Philadelphia and others, by the City and County of San Francisco, by the Committee of Counsel in the consolidated wholesaler-retailer class action, and by the State of Vermont. Copies of these plans are also available for examination in Room 508 of the Court House.

A very general description of the proposed compromise follows but the only complete and accurate statement of its terms is contained in the five papers described in clauses (1) through (5) of the paragraph next above.

[General Description of Settlement Offer Including Proposed Distribution]

If the compromise as presently proposed is approved by the Court a division among the various members of the respective classes will be later proposed of the sums found allocable on account of the separate types of claims referred to in (a) and (c) of the paragraph above. Such a division may in some instances also be proposed of the sums found allocable on account of the type of claims referred to in (b) of the paragraph above. Notice will be given, in such manner as the Court determines, of any such further division and further hearings will be held in respect of that division, as well as in respect of any

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expenses (including counsel fees) chargeable to the settlement amounts.

At the hearing on March 24, 1970 any member of any class represented in this action may appear and present any proper argument and evidence, but no person not a named party will be heard and no papers will be received unless notice of intention to appear and copies of such papers are filed with the Clerk of the Court on or before March 19, 1970.

NOTICE OF PROPOSED COMPROMISE TO CONSUMERS OF CERTAIN BROAD SPECTRUM ANTIBIOTICS

(Form C)

There are pending in the United States District Court for the Southern District of New York ("the Court") a number of class actions (the "actions") against [enumerated defendants], alleging that those companies violated the antitrust laws in the sale of certain of their broad spectrum antibiotic products. It is further alleged that as a result purchasers of such products have paid prices higher than they otherwise would have paid. Early last year, the defendants, while denying liability, offered $100 million in settlement of all claims by three groups of purchasers, one group including individual consumers.

NOTICE IS HEREBY GIVEN that a hearing will be held before the Court beginning on March 24, 1970, at 10 o'clock in the morning in Room 110 of the United States Court House, Foley Square, New York, New York. The purpose of the hearing is to determine whether a proposed compromise and settlement of all the actions should be approved by the Court under Rule 23(e) of the Federal Rules of Civil Procedure. If so approved, all the settlement actions will be dismissed on the merits as against all defendants with prejudice.

The terms of the proposed compromise and settlement are contained (1) in a proposal of the defendants (dated February 6, 1969, as modified May 9, 1969), (2) in a "proposed Plan of Allocation" filed by the State of Alabama and many other states (the "Alabama Plan"; submitted to the Court in chambers and to defendants in August, 1969, and filed with the Clerk, certain pages having been substituted, on January 20, 1970), (3) in an "Escrow Agreement" approved by order of the Court (filed on October 20, 1969), (4) in a document entitled "Election by Defendants to Proceed with a Modified Plan of Allocation" (filed on October 20, 1969), and (5) in an "Addendum" (filed on January 20, 1970) to the "Election" document just described. Copies of these five papers are on file with the Court and copies are available for examination in Room 508 of the Court House, Room 508 being a part of the Clerk's office. Plans of allocation were also filed by the State of Connecticut and others, by the County of Los Angeles, by the City of Philadelphia and others,

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by the City and County of San Francisco, by the Committee of Counsel in the consolidated wholesaler-retailer class action, and by the State of Vermont. Copies of these plans are also available for examination in Room 508 of the Court House.

The payments in compromise of the actions, as set forth in Exhibit B to "Election by Defendants to Proceed with a Modified Plan of Allocation" (the paper described in clause (4) in the paragraph next above), are subject to reduction for further administrative expenses and for fees and expenses (as later allowed by the Court) of counsel for plaintiffs in the actions. These amounts must be divided with the Court's approval among all the claims represented in the actions including those of individual consumers.

According to notices already given with the Court's approval, each state and other governmental entity participating in the settlement is authorized to use for the benefit of its citizens in such manner as directed by the Court whatever money is recovered on account of claims of consumers represented in its action who failed to file an individual claim by August 16, 1969.

At the hearing on March 24, 1970 any member of any class represented in the actions may appear and present any proper argument and evidence, but no person not a named party will be heard and no papers will be received unless notice of intention to appear and copies of such papers are filed with the Clerk of the Court on or before March 19, 1970.

b) Sample Order and Notice to Statewide Class*

ORDER DIRECTING RULE 23(e)
NOTICE TO MEMBERS OF CLASSES
REPRESENTED IN THIS ACTION

Pursuant to orders of the Court filed in June, 1969, an appropriate notice under Fed. R. Civ. P. 23(c)(2) of this class action was given to members of the classes represented herein.

The notice of class action under Fed. R. Civ. P. 23(c)(2) referred to a proposal by defendants of compromise and settlement of all claims represented in this class action and in many other class actions. The proposal by defendants was on February 6, 1969 and was modified on May 9, 1969.

Thereafter, pursuant to Paragraph III.E(1) of the defendants' February 6 proposal (which is Exhibit C to an order of the Court filed May 26, 1969), various plaintffs submitted seven Proposed Plans for allocation of the settlement fund. The defendants filed on October 20, 1969, an "Election by Defendants to Proceed with a Modified Plan of Allocation".

Paragraph III.E(2) of the February 6 proposal contemplates that a notice of hearing on the proposed compromise and settlement will be sent to the various class members pursuant to Fed. R. Civ. P. 23(e) but the parties were unable to agree on an appropriate form of notice to be submitted for the Court's consideration. Thereafter, different forms of notice were submitted to the Court by various class representatives and the defendants and, following a hearing thereon, such notices were reviewed and duly considered.

NOW, THEREFORE, IT IS ORDERED:

1. The notice attached hereto as Exhibit A is in compliance with Fed. R. Civ. P. 23(e).

2. The Clerk of this Court is directed to send or have sent, on or before February 24, 1970, a copy of the notice Exhibit A hereto by first class mail to the plaintiff herein for the attention of its chief law officer and to each county, city, other government entity within the plaintiff (other than those of the federal government), hospital district, hospital and other institution to which was mailed a copy of the notice

* Adapted from orders and notices used in antibiotic drug litigation transferred under 28 U.S.C. §1407 to the Southern District of New York.

(con't)

attached to the order of this Court filed in June, 1969, as shown by the two affidavits of Edward Perlstein, respectively sworn to June 27 and July 3, 1969, and on file herein.

3. Defendants shall advance to the Clerk all sums necessary to defray his necessary out of pocket expenses incurred in administering this Order, which sums shall be reimbursed only in accordance with Paragraph VI of Exhibit C to the Court's Order of May 26, 1969.

4. The Clerk is directed to serve a copy of this Order on all counsel of record in this action and to file a certificate of such service.

NOTICE TO GOVERNMENT ENTITIES IN [STATE] OF PROPOSED COMPROMISE OF THIS CLASS ACTION, AND A HEARING THEREON

TO: All Government entities in the State of _____ and their agencies, hospitals and institutions which in the years 1954-1966 purchased or paid for broad spectrum antibiotic products or made payments therefor for the benefit of recipients of welfare programs and to any other members of the class described in paragraph 5(a) of the order filed herein on May 26, 1969.

NOTICE IS HEREBY GIVEN that a hearing will be held before the United States District Court for the Southern District of New York ("the Court") beginning on March 24, 1970 at 10 o'clock in the morning in Room 110 of the United States Court House, Foley Square, New York, New York. The purpose of the hearing is to determine whether a proposed compromise and settlement of this class action (which charges that within the period 1954-1966 defendants violated the antitrust laws in the sale of certain of their broad spectrum antibiotic products) and other such actions should be approved by the Court under Rule 23(e) of the Federal Rules of Civil Procedure. If so approved, this and other such settled actions will be dismissed on the merits as against all defendants with prejudice.

The payment in compromise of this action is proposed by defendants to be $1,647,015, subject to reduction for further administrative expenses and for fees and expenses (as later allowed by the Court) of counsel for plaintiff in this action.

The terms of the proposed compromise and settlement are contained (1) in a proposal of the defendants (dated February 6, 1969, as modified May 9, 1969), (2) in a "proposed Plan of Allocation" filed by the State of Alabama and many other states (the "Alabama Plan"; submitted to the Court in chambers and to defendants in August, 1969 and filed with the Clerk, certain pages having been substituted, on January 20, 1970), (3) in an "Escrow Agreement" approved by order of the Court

(con't)

attached to the order of this Court filed in June, 1969, as shown by the two affidavits of Edward Perlstein, respectively sworn to June 27 and July 3, 1969, and on file herein.

3. Defendants shall advance to the Clerk all sums necessary to defray his necessary out of pocket expenses incurred in administering this Order, which sums shall be reimbursed only in accordance with Paragraph VI of Exhibit C to the Court's Order of May 26, 1969.

4. The Clerk is directed to serve a copy of this Order on all counsel of record in this action and to file a certificate of such service.

NOTICE TO GOVERNMENT ENTITIES IN [STATE] OF PROPOSED COMPROMISE OF THIS CLASS ACTION, AND A HEARING THEREON

TO: All Government entities in the State of _____ and their agencies, hospitals and institutions which in the years 1954-1966 purchased or paid for broad spectrum antibiotic products or made payments therefor for the benefit of recipients of welfare programs and to any other members of the class described in paragraph 5(a) of the order filed herein on May 26, 1969.

NOTICE IS HEREBY GIVEN that a hearing will be held before the United States District Court for the Southern District of New York ("the Court") beginning on March 24, 1970 at 10 o'clock in the morning in Room 110 of the United States Court House, Foley Square, New York, New York. The purpose of the hearing is to determine whether a proposed compromise and settlement of this class action (which charges that within the period 1954-1966 defendants violated the antitrust laws in the sale of certain of their broad spectrum antibiotic products) and other such actions should be approved by the Court under Rule 23(e) of the Federal Rules of Civil Procedure. If so approved, this and other such settled actions will be dismissed on the merits as against all defendants with prejudice.

The payment in compromise of this action is proposed by defendants to be $1,647,015, subject to reduction for further administrative expenses and for fees and expenses (as later allowed by the Court) of counsel for plaintiff in this action.

The terms of the proposed compromise and settlement are contained (1) in a proposal of the defendants (dated February 6, 1969, as modified May 9, 1969), (2) in a "proposed Plan of Allocation" filed by the State of Alabama and many other states (the "Alabama Plan"; submitted to the Court in chambers and to defendants in August, 1969 and filed with the Clerk, certain pages having been substituted, on January 20, 1970), (3) in an "Escrow Agreement" approved by order of the Court

(con't)

(filed on October 20, 1969), (4) in a document entitled "Election by Defendants to Proceed with a Modified Plan of Allocation" (filed on October 20, 1969), and (5) in an "Addendum" (filed on January 20, 1970) to the "Election" document just described. Copies of these five papers are on file with the Court and copies are available for examination in Room 508 of the Court House, Room 508 being a part of the Clerk's office. Plans of allocation were also filed by the State of Connecticut and others, by the County of Los Angeles, by the City of Philadelphia and others, by the City and County of San Francisco, by the Committee of Counsel in the consolidated wholesaler-retailer class action, and by the State of Vermont. Copies of these plans are also available for examination in Room 508 of the Court House.

A very general description of the proposed compromise follows but the only complete and accurate statement of its terms is contained in the five papers described in clauses (1) through (5) of the paragraph next above.

[General Description of Settlement Offer Including Proposed Distribution]

If the compromise as presently proposed is approved by the Court a division among the various members of the respective classes will be later proposed of the sums found allocable on account of the separate types of claims referred to in (a) and (c) of the paragraphs above. Such a division may in some instances also be proposed of the sums found allocable on account of the type of claims referred to in (b) of the paragraphs above. Notice will be given, in such manner as the Court determines, of any such further division and further hearings will be held in respect of that division, as well as in respect of any expenses (including counsel fees) chargeable to the settlement amounts.

At the hearing on March 24, 1970 any member of any class represented in this action may appear and present any proper argument and evidence, but no person not a named party will be heard and no papers will be received unless notice of intention to appear and copies of such papers are filed with the Clerk of the Court on or before March 19, 1970.

c) Sample Order and Notice to Wholesaler-Retailer Class*

ORDER DIRECTING RULE 23(e) NOTICE TO MEMBERS OF THE CLASS REPRESENTED IN THIS ACTION

Pursuant to an order of the Court filed June 16, 1969, and modified by order filed June 18, 1969, appropriate notice under Fed. R. Civ. P. 23(c) (2) of this class action was given to the members of the class. Such notice required that any member who wished to be excluded from the class do so by request in writing mailed with postmark not later than August 1, 1969, and that those members of the class who did not request exclusion and wished to assert a claim do so by mailing a verified claim postmarked not later than August 16, 1969.

The notice of class action under Fed. R. Civ. P. 23(c) (2) referred to a proposal by defendants of compromise and settlement of all claims represented in this consolidated class action and in many other class actions. The proposal by defendants was on February 6, 1969 and was modified on May 9, 1969.

Thereafter, pursuant to Paragraph III.E.(1) of the defendants' February 6 proposal (which is Exhibit C to an order of the Court filed May 26, 1969), various plaintiffs submitted seven Proposed Plans for allocation of the settlement fund. The defendants filed on October 20, 1969, an "Election by Defendants to Proceed with a Modified Plan of Allocation".

Paragraph III.E.(2) of the February 6 Proposal contemplates that a notice of hearing on the proposed compromise and settlement will be sent to the various class members pursuant to Fed. R. Civ. P. 23(e) but the parties were unable to agree on an appropriate form of notice to be submitted for the Court's consideration. Thereafter, different forms of notice were submitted to the Court by various class representatives and the defendants and, following a hearing thereon, such notices were reviewed and duly considered.

NOW, THEREFORE, IT IS ORDERED:

1. The notice attached hereto as Exhibit A is in compliance with Rule 23(e) of the Federal Rules of Civil Procedure.

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* Adapted from orders and notices used in antibiotic drug litigation transferred under 28 U.S.C. §1407 to the Southern District of New York.

(con't)

2. The Clerk of this Court is directed to sent or have sent, on or before February 24, 1970, a copy of the notice attached hereto as Exhibit A by first class mail (i) to each pharmaceutical wholesaler and retailer to whom or which was mailed a copy of the notice attached to the order of this Court filed June 16, 1969, as shown by the affidavit of John D. O'Neill sworn to July 11, 1969 and on file herein, except that no notice need be sent to those wholesalers and retailers who timely elected to be excluded from the wholesaler-retailer class, (ii) to any others whose names and addresses shall be furnished to the Clerk of this Court by counsel for any plaintiff or any defendant on or before February 18, 1970, and (iii) to any other members of the class who have filed claims.

3. The Clerk shall file or cause to be filed, as soon as practicable, a certificate of the mailing of the notice directed in paragraph 2 hereof.

4. Defendants shall advance to the Clerk all sums necessary to defray his necessary out-of-pocket expenses incurred in administering this Order, which sums shall be reimbursed only in accordance with Paragraph VI of Exhibit C of the Court's Order of May 26, 1969.

5. The Clerk is directed to serve a copy of this Order on counsel for defendants and on the designees of the Committee of Counsel. The Clerk will file a certificate of such service.

NOTICE TO WHOLESALERS AND RETAILERS
OF PROPOSED COMPROMISE OF THIS CLASS
ACTION, AND OF A HEARING THEREON

TO: All individuals, proprietorships, partnerships, corporations and other business firms (other than hospitals or physicians) who purchased broad spectrum antibiotic products for resale at wholesale or retail and to any other members of the class described in paragraph 10 of the order filed herein on May 26, 1969, except those wholesalers and retailers who have timely elected to be excluded from the wholesaler-retailer class.

NOTICE IS HEREBY GIVEN that a hearing will be held before the United States District Court for the Southern District of New York ("the Court") beginning on March 24, 1970 at 10 o'clock in the morning Room 110 of the United States Court House, Foley Square, New York, New York. The purpose of the hearing is to determine whether a proposed compromise and settlement of this consolidated wholesaler-retailer class action (which charges that within the period 1954-1966 defendants

(con't)

violated the antitrust laws in the sale of certain of their broad spectrum antibiotic products) and other such actions should be approved by the Court under Rule 23(e) of the Federal Rules of Civil Procedure. If approved, this and other such settled actions will be dismissed on the merits as against all defendants with prejudice.

The payment in compromise of this consolidated wholesaler-retailer class action is proposed by defendants to be $3,013,939 plus a sum which may be $8,000,000 or more representing the interest earned on a sum deposited in escrow by defendants. The proposed payment in compromise of this action is subject to reduction for further administrative expenses and for fees and expenses (as later allowed by the Court) of counsel for plaintiffs in this action.

The terms of the proposed compromise and settlement are contained (1) in a proposal of the defendants (dated February 6, 1969, as modified May 9, 1969), (2) in a "proposed Plan of Allocation" filed by the State of Alabama and many other states (the "Alabama Plan"; submitted to the Court in chambers and to defendants in August, 1969 and filed with the Clerk, certain pages having been substituted, on January 20, 1970), (3) in an "Escrow Agreement" approved by order of the Court (filed on October 20, 1969), (4) in a document entitled "Election by Defendants to Proceed with a Modified Plan of Allocation" (filed on October 20, 1969), and (5) in an "Addendum" (filed on January 20, 1970) to the "Election" document just described. Copies of those five papers are on file with the Court and copies are available for examination in Room 508 of the Court House, Room 508 being a part of the Clerk's office. Plans of allocation were also filed by the State of Connecticut and others, by the County of Los Angeles, by the City of Philadelphia and others, by the City and County of San Francisco, by the Committee of Counsel in this consolidated wholesaler-retailer class action, and by the State of Vermont. Copies of these plans are also available for examination in Room 508 of the Court House.

A very general description of the proposed compromise follows but the only complete and accurate statement of its terms is contained in the five papers described in clauses (1) through (5) of the paragraph next above.

[General Description of Settlement Offer
Including Proposed Distribution]

If the compromise as presently proposed is approved by the Court a division of the payment in compromise among the various members of the wholesaler-retailer class will be later proposed. Notice will be given, in such manner as the Court determines, of such further division and further hearings will be held in respect of that division, as well as in respect of any expenses (including counsel fees) chargeable to the settlement amounts.

(con't)

Notices mailed to wholesalers and retailers on or about July 1, 1969, stated that, if a wholesaler or retailer failed by August 1, 1969, to request exclusion from the wholesaler-retailer class and to mail by August 16, 1969 a proof of claim, such failure might result in an adjudication that such a wholesaler or retailer had no claim. At the hearing on March 24, 1970 the Court will consider whether to enter an order adjudicating that any wholesaler or retailer who failed timely to request exclusion from the class and failed timely to mail a proof of claim has no claim against defendants with respect to purchases of broad spectrum antibiotic drugs and no claim against the settlement fund.

At the hearing on March 24, 1970 any member of the class represented in this action may appear and present any proper argument and evidence, but no person not a named party will be heard and no papers will be received unless notice of intention to appear and copies of such papers are filed with the Clerk of the Court on or before March 19, 1970.

# Manual for Complex and Multidistrict Litigation



Judge Inzer B. Wyatt
Southern District of
New York



May 6, 1970

BULLETIN NO. 15

TO ALL JUDGES CONCERNED WITH COMPLEX AND MULTIDISTRICT LITIGATION

The following new decisions appear to be potentially relevant to complex and multidistrict litigation. This bulletin has been prepared by the editorial staff and the inclusion or exclusion of any particular opinion or order does not mean that the Board of Editors approves or disapproves of the procedures used or results reached in the particular case.

ATTORNEY FEES - REASONABLENESS

*Gossner v. Cache Valley Dairy Association*, 307 F.Supp. 1090 (D. Utah 1970) (Judge Christensen)

Following a verdict for the plaintiff in this antitrust action the trial court determined that $42,500 was a reasonable attorney's fee but found that there was a private agreement between plaintiff and its counsel that the latter should receive a contingent fee of one third of the recovery. Since the court had determined that $42,500 was a reasonable fee and treble damages amounted to $90,000, the total recovery by the plaintiff would be $132,000, one third of which would be $44,166.66. The court agreed that the plaintiff could recover the $42,500 as statutory attorney but apparently limited the amount to be paid plaintiff's counsel to one third of the *total recovery* or $44,166.00.

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CLASS ACTIONS - AGGREGATION OF DAMAGES

*Broenen v. Beaunit Corporation*, 305 F.Supp. 688, 691-692 (E.D. Wisc. 1969)(Judge Gordon)

This diversity action was brought by a holder of two debenture shares of the Beaunit Corp. to prevent the conversion of the debentures into shares of El Paso Natural Gas Company which merged with Beaunit. Mrs. Broenen's shares had a face value of $2000 but she brought her action on behalf of all holders of the debentures. The court allowed the class action claim and held that it was a "true class" and that the damages of the class members *could be aggregated* to satisfy the jurisdictional amount. But *Cf. Aktiebolag v. Babcock & Wilcox Co.*, 305 F.Supp. 803 (S.D.N.Y. 1969).

CLASS ACTIONS - APPROPRIATENESS

*Connell v. Higginbotham*, 305 F.Supp. 445, 449-450 (M.D. Fla. 1969)(Three judge court)

Plaintiff who attacked the constitutionality of the state loyalty oath was allowed to maintain a class action on behalf of all persons seeking employment with any state agency.

*Bonner v. Texas City Independent School District of Texas*, 305 F.Supp. 600, 616-618 (S.D. Tex. 1969) (Judge Noel)

Class action claim which would encompass no more than five Negro teachers denied on grounds that joinder was not impracticable and that common questions of fact and law did not predominate.

DENIAL OF CONTINUANCE - ABUSE OF DISCRETION - UNAVAILABLE COUNSEL

*Smith-Weik Machinery Corp., Inc., et al. v. Murdock Machine and Engineering Co.*, (5th Cir., March 30, 1970) (Judge Wisdom)

The court of appeals reversed the judgment for the plaintiff due to the trial court's refusal to grant defendant's motion for continuance based on the illness of its principal counsel. The court observed that principal counsel was ill, local counsel was relatively unprepared, the requested continuance was short, and the case was complicated.

TRANSFER - §1404(a)

*Price v. Standard Dredging Corp.*, 305 F.Supp. 880 (S.D.N.Y. 1969) (Judge Weinfeld)

Motion to transfer granted where the only relationship the suit had to the transferor district was that the plaintiff's attorney and his expert witnesses maintained offices there. But *Cf. Sinclair Oil Corp. v. Union Oil Co.*, 305 F.Supp. 903 (S.D.N.Y. 1969)

DISCOVERY - SANCTIONS

*Dorsey v. Academy Moving and Storage*, (5th Cir., April 2, 1970) (Judge Wisdom)

The sole issue in this appeal was whether the district court properly dismissed the complaint with prejudice for failure of the plaintiff to fully answer interrogatories and to produce all documents requested by the defendants. This action was brought by Mrs. Tommy Dorsey to recover damages for missing and damaged goods including a valuable collection of phonograph records, which had been turned over to the defendant for shipment.

In response to the defendants' interrogatories Mrs. Dorsey filed a schedule describing 346 missing phonograph records.
The court ordered her to file a supplement showing the year of the recording of each record and when she was unable to do so the court struck the claim for lost records. The court of appeals concluded that such sanctions were improper since Mrs. Dorsey's failure to fully comply with the order was due to inability fostered neither by her own conduct nor by circumstances within her control. The court noted that plaintiff's inability to furnish the manufacturing date might prove a serious handicap in establishing the true value of the records but that this possible inadequacy of proof should not preclude her from being able to reach the merits of the issue and the dismissal order was vacated.

The court also vacated the district court's order precluding the plaintiff from introducing in evidence documents not *timely* furnished since the record reflected the plaintiff's good faith effort to produce the documents and her affidavit satisfactorily explained the circumstances surrounding her failure to furnish the documents when ordered.

*Whitehurst v. Revlon, Inc.*, 307 F.Supp. 918 (E.D. Va. 1969)(Judge Kellam)

The defendant contended in its motion for judgement n.o.v. or for a new trial, that the trial court erred in refusing to permit the showing of motion pictures of experiments conducted by defendant's expert witnesses. The court pointed out that it operated under an extensive well planned pretrial procedure which had been in operation for more than ten years and under which all exhibits which are to be introduced in evidence are to be listed at the final pretrial conference and each counsel given an opportunity to review them. As the movie was not listed as an exhibit at the final pretrial conference the court denied the motion.

DISCOVERY - S.E.C. SUBPOENA DUCES TECUM

*S.E.C. v. Wall Street Transcript Corporation*, (2d Cir., February 2, 1970)(Judge Anderson)

The S.E.C. commenced an investigation of the Wall Street Transcript Corporation to determine whether it was acting as an investment advisor in violation of Section 203 of the Investment Advisers Act of 1940. On advice of counsel, the *Transcript* refused to produce any documents in response to the Commission's subpoena *duces tecum*. The Commission then applied to the district court for enforcement of its subpoena but that court refused enforcement concluding that the *Transcript* was a "bona fide newspaper" or "financial publication of general and regular circulation" expressly excluded by the Act itself.

The court of appeals disagreed and reversed. It held that the determination of whether or not a given publication fits within the statutory exclusion must depend upon the nature of its practices:

> What matters is whether or not a specific publication is engaged in practices which the Act was intended to regulate, such as the offering of professional investment advice without revealing the possibility of personal gain to the publisher from what he reports or how he presents it.

The court found that its characteristic emphasis on particular issues and companies at the very least raises doubt about whether the *Transcript* is outside the exclusion - a suspicion which the court believed the S.E.C. should be allowed to investigate. The court of appeals rejected the appellee's contention that such a probe would deter its own editorial criticism of the Commission and intimidate its subscribers and sources of information. The court did note that if production of materials sought by the Commission's subpoena does actually

threaten the disruption of the *Transcript's* normal operations, the appellee would be free to ask the district court for appropriate protective limitations.

ANTITRUST - DOUBLE JEOPARDY - *LIQUID ASPHALT*

*United States v. Wilshire Oil*, (10th Cir., April 23, 1970) (Judge Hill)

Of the ten corporations indicted for engaging in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in liquid asphalt, all but Wilshire plead nolo contendere. Wilshire was found guilty following a jury trial and the conviction was affirmed.

Wilshire contented, *inter alia*, that since it had been convicted in federal court for participation in an asphalt conspiracy *in Missouri*, the prosecution for engaging in a similar conspiracy in Kansas placed Wilshire in double jeopardy. The court pointed out that while the indictments in Kansas and Missouri are in several respects identical, there were relevent exceptions including different parties, overlapping but different dates, and differences in the actual charge. The court noted that although a single plot cannot be severed in order to proliferate penalties, prosecution for one offense will not confer immunity from subsequent prosecutions of distinct, though related, offenses. The question as viewed by the court of appeals was whether Wilshire had established that it and the other oil companies had a single, common and continuing objective of fixing, maintaining and establishing prices of liquid asphalt in *Kansas and Missouri*. The court of appeals referred to the evidence which established the existence of *separate* conspiracies in Kansas and Missouri and concluded that there was "a general absence of testimonial evidence . . . (supporting) appellant's double jeopardy claim."

ANTITRUST - INSTRUCTIONS - *ANTIBIOTIC DRUGS*

*United States of America v. Charles Pfizer & Co., et al.*, (2d Cir., April 16, 1970) (Judge Moore)

Defendants appealed from convictions following a jury trial on a three count indictment charging (1) a combination and conspiracy in restraint of trade, (2) a combination and conspiracy to monopolize and (3) monopolization.

The court of appeals by a divided vote found that the instructions given by the trial court were prejudicially erroneous and a new trial was ordered. The court concluded that "[a] review of the entire charge leaves the definite impression that although the circumstantial evidence and 'unreasonably high profits' aspects of the case were stressed, the key issue as to the formation of the conspiracy as particularized by the government was not given proper attention and the importance of establishing a conspiracy as charged so minimized that there can be no assurance that the jury was not misled

to the defendants' serious prejudice." The court also found that restrictions placed upon the defendants with respect to evidence relating to similar activity by Parke, Davis (which was neither a defendant, nor a co-conspirator) also constituted reversible error.

AIR DISASTER LITIGATION - FEDERAL JURISDICTION - WARSAW CONVENTION

*Zousmer v. Canadian Airlines, Ltd.*, 307 F.Supp. 892 (S.D.N.Y. 1969) (Judge Lasker)

This wrongful death action arising from a 1966 Canadian Pacific Airlines crash in Tokyo was brought in state court and removed to federal court. In opposing the plaintiff's motion to remand, the defendant urged, *inter alia*, that federal jurisdiction exists since the action "arises under" a treaty of the United States - the Warsaw Convention. The trial court disagreed, and granted the motion to remand, holding that no right of recovery was created expressly by the Warsaw Convention or by the regulations promulgated thereunder.

STOCK FRAUD - MERGER - INJUNCTION

*Butler Aviation v. Comprehensive Designers, Inc.*, 307 F.Supp. 910 (S.D.N.Y. 1969) (Judge Cannella)

The court granted the plaintiff's motion for a preliminary injunction enjoining the defendant Comprehensive Designers, Inc. (CDI) from directly or indirectly exchanging its securities for that of Butler Aviation. The court found representations to the investing public that CDI was a growing and thriving concern while in fact it had suffered a severe earning decline in the last years and concluded that CDI had followed a course of conduct which artificially inflated the market price of its stock. The court was satisfied that the plaintiff had established "a great likelihood of success and that irreparable harm would be caused to the plaintiff should the injunction not be granted." In accordance with Rule 65(c) the plaintiff was required to give security in the sum of $50,000.

STOCK FRAUD - MARKET MANIPULATION

*Securities and Exchange Commission v. North American Research and Development Corporation*, (2d Cir., March 25, 1970) (Judge Medina)

North American and two individuals appealed from an order granting a preliminary injunction restraining them from further violations of Sections 5(a) and (c) of the 1933 Act and Section 10(b) of the 1934 Act. The SEC appealed from the order denying its motion for preliminary injunction against three other

individuals and a Canadian Brokerage House. The court of appeals affirmed the order enjoining North American and the two individuals but vacated the order denying injunctive relief as to the other defendants.

The court of appeals summarized the central scheme in this way: "The first step was to find a publicly-owned corporation whose assets had been sold and the proceeds distributed 'leaving it a worthless, inactive, empty shell, with neither assets nor liabilities; to get control of the shell; to buy up for purely nominal amounts the stock held by the minority stockholders . . .; to funnel the shares thus purchased into the custody of cooperating brokerage houses in Canada, and to gain complete control by transferring these shares to close friends and relatives; to dress up the shell with assets of the type that could readily be blown up as having enormous potential value, without any substantial expenditure of cash; then to begin the process of touting, by sales pressure on American brokerage houses, culminating in the inclusion of the stock in the Pink Sheets in connection with the over-the-counter market."

The court concluded that the inflation of North American's prospects coupled with the failure to include financial data and the deliberate use of ambiguities and half-truths rendered the "Progress Report to the Shareholders" materially false and misleading and the fact that the corporation itself did not disseminate copies of the Progress Report (which was supposedly for distribution to the 100 stockholders but of which more than 1000 copies were made) to persons other than shareholders did not insulate it from responsibility for its transmission to persons not shareholders. The court also held that since White was the central force behind the scheme he violated Section 5 by causing the distribution of unregistered shares in the United States even though none of the shares *he personally owned* were sold in the United States.

The district court absolved two individual defendants who had no financial stake in the distribution of the stock but the court of appeals held that no financial stake or motivation was required to support a charge of a Section 5 violation. The court of appeals found that *all* individual defendants had violated Rule 10b-5 and remanded so the trial court could exercise its equitable discretion in determining which to include in the preliminary injunction.

STOCK FRAUD - STANDING TO SUE

*City National Bank of Fort Smith, Arkansas v. Ilo Vanderboom, et al.*, (8th Cir., February 20, 1970) (Judge Gibson)

The trial court granted summary judgment against the defendants on their counterclaim alleging both common law fraud and fraud proscribed by Rule 10b-5. The court of appeals affirmed.

The defendants invested in Investors' Thrift Corporation (ITC) which later acquired American Homebuilders, Inc. (AHB). In attempting to attack the validity of this acquisition the defendants claim they should be treated as purchasers of AHB since ITC, the actual purchaser, was never an operating company but merely a conduit for the transaction. The court held they lacked standing under Rule 10b-5 and suggested that the proper course of action would be for them to bring a derivative suit on behalf of ITC since the stockholder who brings the derivative suit need not personally be a purchaser or seller if he alleges that the corporation purchased or sold shares in connection with some fraudulent activity.

The court of appeals also found that the alleged misrepresentations and non-disclosures by the plaintiff bank did not fall within the "in connection with the purchase or sale of any security" clause. In applying the Second Circuit's two-step test (*Heit v. Weitzen*, 405 F.2d 909) the court found (1) that a reasonable investor would not have relied upon the representations and (2) that the bank did not owe a duty of full disclosure to the investors since the investors had ready access to the information and it was reasonable to expect them to exercise a higher degree of care than a third party (the bank) would. See also *Vanderboom v. Sexton*, ___F.Supp.___ (8th Cir., February 24, 1970), a related case involving the application of the Arkansas Statute of Limitations to this 10b-5 action.

STOCK FRAUD - VENUE - WILLIAMS ACT

*Bath Industries, Inc. v. Blot*, 305 F.Supp. 526 (E.D. Wisc. 1969) (Judge Reynolds)

Contending that the defendants were acting as a *group* within the meaning of Section 13(d) of the *Williams Act*, the plaintiff corporation brought this suit for preliminary injunction to prevent the group from voting their stock, from requesting a special shareholders meeting or a copy

of the shareholders' list, and from acquiring any additional shares.

Jurisdiction and venue are found under Section 27 which provides that the action may be brought, *inter alia*, in the district where any act or transaction constituting the violation occurred. The defendants argued that the only alleged violation was the failure to comply with Section 13(d) which requires filing a statement with the S.E.C. and sending a copy to plaintiff's corporation office in Milwaukee and that therefore venue rests exclusively in New York. The court disagreed and held that "a careful reading of the statute reveals that if venue is proper in the district where the S.E.C. is located, then it must also be proper in the district where the principal executive offices of the insurer corporation are located."

Holding that the plaintiff proved that it was likely that it would ultimately prevail on its claim that the defendants had violated the Williams Act, the court concluded that enforcement of Section 13(d) required the issuance of a restraining order or injunction enjoining the defendants from proceeding with their plans until they complied with the Williams Act.

SECURITIES - OIL & GAS

*Gilbert v. Nixon*, (10th Cir., April 3, 1970)(Judge Fahy)

The plaintiffs brought this action alleging violations of both federal and state security law with respect to purchases of fractional interests in oil and gas leases. After a lengthy trial without a jury the court held that a seller of fractional interests is not required to state every fact which if known to a prospective purchaser might tend to influence his decision and found that any untrue statements or omissions were not material and that the defendant had sustained his burden of proving that he did not know and that in the exercise of reasonable care could not have known of such untruth or omission.

The court of appeals agreed that fractional interests were securities within the meaning of 15 U.S.C. §77B(1) and that they were transactions by an insurer not involving a public offering and thus exempt from the registration requirements of §77E. However, the court of appeals disagreed with the trial court's definition of materiality and the judgment was reversed in part.

The court of appeals concluded an omission or misrepresentation is material if, considering its full context, including the subject matter and the relationship of the parties, the misrepresentation or omission was of a fact which, considering appellants as reasonable or prudent investors, would affect or influence them in determining whether to buy the fractional interests. The court also noted that *reliance* is not a condition for recovery under Section 12(2). The court observed that while the appellants did not have the burden of proving reliance as a condition of recovery, evidence of reliance, when presented, does bear upon the issue of materiality if that reliance is determined to be reasonable.

ADDENDUM TO BULLETIN NO. 12

The Board of Editors has approved the following additions to the materials relating to "Preventing Potential Abuse of the Class Action":

Part I
§1.61 (added paragraph)

The local rule should except from its operation (1) communications between an attorney and a client or prospective client who has, on the initiative of the client or prospective client, consulted with employed or proposed to employ the attorney; and (2) communications occurring in the regular course of business in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel or misrepresent the status, purposes or effects of the action or orders therein. In appropriate cases the Court may approve the substance of permitted communications and general descriptions of the circumstances under which the communication is approved, and general descriptions of the parties to whom it may be sent, and the parties who may send the communication.

Part II
§§1.61 and 1.62 (added paragraph)

This (rule)(order) does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or office which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

Copies of unpublished opinions may be obtained from the authoring judge or from the undersigned. Your suggestions and comments concerning the content and format of these bulletins are most welcome as are copies of opinions and orders which may be appropriate for inclusion in a future bulletin.

Very truly yours,

THE BOARD OF EDITORS FOR THE
*MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION*

By _____
John F. McDermott
Executive Editor

# Manual for Complex and Multidistrict Litigation



EDITORIAL STAFF

JOHN T. McDERMOTT, ESQUIRE
EXECUTIVE EDITOR

TELEPHONE 382-8717
AREA CODE - 202

May 25, 1970

BULLETIN NO. 16

Judge Inzer B. Wyatt
Southern District of
New York

TO ALL JUDGES CONCERNED WITH COMPLEX AND MULTIDISTRICT LITIGATION

The first revisions and additions to the *Manual* since its publication last August were released to all publishers of the *Manual* on May 18, 1970. The following new sections have been included:

Preventing Potential Abuse of the Class Action
Control of Attorneys' Fees and Expenses in Class Actions
Reducing Expenses for Litigants in Discovery by Depositions
Use of Deposition Judges in Multidistrict Litigation

The following suggested local rules and sample orders and notices are included in Part II (Appendix):

Sample Pretrial Order No. 3D - Production of Documents by Defendants
Sample Pretrial Order No. 15 - Prevention of Potential Abuse of Class Actions
Sample Pretrial Order No. 16 - Reimbursement of Liaison Counsel
Sample Pretrial Order No. 17 - Opportunity for Delayed Examination in Deposition Program in Complex Litigation
Sample Class Action Notices
Suggested Local Rule No. 7 - Prevention of Potential Abuse of the Class Action

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These revisions and additions should be available from the publishers within 60-90 days. It is our understanding that Clark Boardman/Sage Hill and Matthew Bender (*Moore's Federal Practice*) will provide inserts to present holders of the *Manual* and that

West will republish the *Manual* in pamphlet form. We have been advised that Callaghan & Company will also publish the *Manual*.

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The following recent decisions appear to be of interest to judges involved in complex and multidistrict litigation. As these decisions have been collected and summarized by the editorial staff, their inclusion does not mean that the Board of Editors approves of the procedures used or the results reached in any particular case.

CLASS ACTIONS - STOCK FRAUD - *WESTEC LITIGATION*

*Carpenter v. Hall* (S.D. Texas, March 16, 1970) (Judge Hannay)

This multidistrict litigation, transferred to the Southern District of Texas under 28 U.S.C. §§ 1404(a) and 1407, includes an action brought by the court-appointed trustee of the Westec Corporation on behalf of (1) the corporation itself, (2) the Fraud Claimants Fund for Creditors previously established by the court and (3) as a class action "for all persons who sustained a loss as a result of any purchase of or bona fide loan against the common stock of (Westec Corporation) . . . or who otherwise were injured as a result of the unlawful practices, conduct and activities described (in the complaint)." The two principal questions before the court were whether the trustee stated a claim upon which relief could be granted and whether he had standing to maintain a class action under Rule 23.

The court first held that the trustee had standing to assert claims on behalf of both the corporation and the creditors and held that neither were barred by the doctrine of *in pari delicto*. The court also found that this was a proper class action under Rule 23, that the trustee could properly represent the interest of all the class without conflict, and that since the class could include up to 10,000 persons, joinder of all members was impractical. The court found that questions of law and fact relating to "fraud on the market" were common to all actions and predominated over other questions. The court observed that any difficulties encountered in the management of this large class could be adequately controlled by the court with the assistance of the trustee and his counsel but noted that the class could be divided into subclasses if this later became necessary.

CLASS ACTION - AIR DISASTER LITIGATION

*David D. Hobbs v. Northeastern Airlines*, (E.D. Pennsylvania, May 15, 1970) (Judge Fullam)

The plaintiff sought to bring his action on behalf of "all others entitled to compensation or recovery as a result of their injuries or deaths" arising from the Northeast Airlines crash near Hanover, New Hampshire, on October 25, 1968. There were 32 fatalities and ten survivers who suffered varying degrees of physical injury.

The court assumed that the requirements of Rule 23(a) were satisfied and turned to the criteria set forth in Rule 23(b)(3), particularly the requirements that common questions of law or fact predominate and that a class action be superior to other available methods. In applying these standards the court felt that it was "appropriate to consider the interest of individual class members in controlling their own litigation, the extent of other litigation arising from the same crash, the desirability *vel non* of concentrating the litigation in this forum, and the potential management difficulties."

While recognizing that common questions of law and fact may predominate as to liability the court found that each claimant had a legitimate interest in litigating his action independently. Noting that sixteen suits had already been filed, the court concluded "that very little would be accomplished by permitting a class action in this case, and that the few class members who would be likely to remain could presumably intervene in this action if they saw fit." The court also noted that it would be "especially inappropriate" to concentrate this litigation in the Eastern District of Pennsylvania.

The court therefore refused to permit the plaintiff to maintain this action as a class action under Rule 23, but observed that in the absence of federal legislation specifically covering the airline-crash situation, major disasters involving large numbers of claims could be appropriate for class-action treatment. Although finding none in this litigation, the court also noted that "the use of the class action device in personal injury litigation seems to contain at least the suggestion of improper claim solicitation."

CLASS ACTION - *B-2 CLASS*

*United States v. Cantrell*, 307 F. Supp. 259 (E.D. Louisiana 1960) (Judge Rubin)

The court permitted the United States to maintain a B-2 class action against a *defendant class* consisting of persons

operating bars and cocktail lounges in Plaquemines Parish enjoining them from continuing to obey Parish ordinances requiring racial segregation and discrimination against servicemen in uniform. The court noted that Rule 23(b)(2) "was intended to provide the primary vehicle for injunctive class actions, particularly civil rights suits."

*Sullivan v. Houston Inc. School District*, 307 F. Supp. 1328, 1337-38 (S.D. Texas 1969) (Judge Seals)

Plaintiff high school students were permitted to maintain a B-2 class action on behalf of all high school students within the school district over the defendants' contention that a majority of the students were not in sympathy with the plaintiffs' views and therefore were not "similarly situated." The court held that "the fact that each member (of the class) is subject to the same specific sort of deprivation of constitutional rights as the representative parties is enough" and the fact that some of the students might not invoke their first amendment rights was irrelevant.

*Frain v. Baron*, 307 F. Supp. 27, 30 (E.D. New York 1969) (Judge Judd)

The court permitted the plaintiff to maintain a B-2 class action on behalf of all Jamaica (Long Island) high school students wishing to remain in their seats in silence during the Pledge of Allegiance. The court found that questions of law were common to the class, plaintiffs would fairly and adequately protect the interests of the class, and defendants acted on grounds generally applicable to the entire class.

*Butler v. Local Union Four, etc.*, 308 F. Supp. 528, 532-33 (N.D. Illinois 1969) (Judge Napoli)

Plaintiffs, members of two local unions, were permitted to maintain B-2 class action against both locals on behalf of all Negro members of the two locals.

*Arrington v. Massachusetts Bay Transportation Authority*, 306 F. Supp. 1355 (D. Massachusetts 1969) (Judge Garrity)

Plaintiff was permitted to maintain civil rights action on behalf of all black and Spanish speaking persons adversely affected by alleged job discrimination.

TRANSFER UNDER SECTION 1404(a)

*Ladson v. Kibble*, 307 F. Supp. 11 (S.D. New York) (Judge Cannella)

After denying the motion to remand the case to the New York state court from which it had been removed under section 1441(a), the court considered the defendant's motion to transfer the action

to the Northern District of Indiana under section 1404(a). The court found that the action could have been brought in federal court in Indiana and that the defendants would have been amenable to service there. In concluding that the interests of justice and the convenience of the witnesses would be served by transfer to Indiana, the court noted that the accident occurred there, that the defendants are residents of Indiana and that the plaintiff is merely the administrator in New York and undoubtedly could shed little light on the facts surrounding the accident. The court characterized this action as being "*quasi in rem*" and thus proper for transfer under 1404(a). The court noted that the fact that there was another action against the same defendants pending in the Northern District of Indiana dictated that the action should be transferred to that district to avoid the needless duplication of having two different judges concerned with the same case. The motion was granted and the action transferred to the Northern District of Indiana.

*Ryer v. Harrisburg Kohl Bros., Inc.*, 307 F. Supp. 276 (S.D. New York) (Judge Lasker)

The defendants moved to transfer this automobile personal injury action to the Middle District of Pennsylvania on the grounds that the accident occurred there and that more witnesses resided in Pennsylvania than in New York. Plaintiff opposed transfer on the grounds that it was her choice of forum, that some of her medical witnesses resided in New York and because her health was frail.

The court found that this action, originally filed in state court and removed to federal court in New York, could have been brought in the Middle District of Pennsylvania. The court noted that where none of the operative facts occurred in the forum selected by the plaintiff, as where jurisdiction is obtained by attachment of an insurance policy issued by a company doing business in the State of New York, the plaintiff's choice of that forum was entitled to little weight.

The court concluded that the convenience of witnesses militated strongly in favor of transfer since the key witnesses were all residents of Pennsylvania and were beyond the subpoena power of the transferor court. The court also noted that the plaintiff's current condition would not appear to preclude her attendance at a trial in Pennsylvania and that transfer should not be prevented because of her health. The action was transferred to the Middle District of Pennsylvania.

*Kellner v. Saye*, 306 F. Supp. 1041 (D. Nebraska 1969) (Judge Van Pelt)

Although this action was commenced by attachment of a stock certificate in Nebraska the court concluded that it basically was a suit on a promissory note - the attachment merely being a

provisional remedy - and that the plaintiff could have filed suit on the note in Nevada. Finding that all operative facts arose in Nevada, that all potential witnesses are residents of Nevada and that the law of the State of Nevada will govern certain aspects of the cases, the court granted defendant's motion and transferred the action to the District of Nevada.

*McMahon v. General Motors Corp.*, 308 F. Supp. 302 (E.D. Pennsylvania 1969) (Judge Hannum)

Personal injury action resulting from a New Jersey automobile accident was transferred to District of New Jersey where another related action was pending "thus conserving judicial time and effort, avoiding a possible duplication of damages and preventing a multiplicity of litigation arising from this single transaction."

*Smith v. Harris*, 308 F. Supp. 527 (E.D. Wisconsin 1970) (Judge Gordon)

Action involving suit for specific performance of a real estate contract was transferred to the Western District of Wisconsin as the real estate was located in that district.

*Henson v. Fred Harvey, Inc.*, 308 F. Supp. 218 (E.D. Pennsylvania 1970) (Judge Hannum)

Although the court found that personal jurisdiction over the defendant was lacking, it withheld ruling on defendants' motion to dismiss (the statute of limitations had run) to permit the plaintiff to file a motion to transfer the action to a district having personal jurisdiction over the defendant.

SANCTIONS - FAILURE TO PROSECUTE

*David McCombs v. Pittsburgh-Des Moines Steel Co.* (10th Cir., May 12, 1970) (Chief Judge Lewis)

The trial court dismissed the case because counsel for the plaintiff refused to proceed in view of the unavoidable absence of one of its witnesses although a *defense witness*, whose testimony *might* have been substantially similar, was available.

Although recognizing "that the work load within the District of Colorado is so great that strict calendaring is an absolute necessity and that if motions for continuance were freely granted the administration of justice within the district would suffer irreparably", the court concluded that "dismissal of this action with prejudice was too hard a sanction in view of the total circumstances" and the judgment was reversed with directions to reinstate the action. (Judge Bratton dissented.)

*Aetna Casualty v. S/S Green Bay*, 307 F. Supp. 72 (E.D. Louisiana 1969) (Judge Rubin)

Finding that the plaintiff had not been diligent in preparing for trial and had not indicated when, if ever, it would

be ready, the court denied its belated motion for a continuance and entered judgment for the defendant.

RES JUDICATA - COLLATERAL ESTOPPEL - MUTUALITY

*Julia Healey, etc. v. American Airlines, Inc.* (E.D. Kentucky April 1, 1970) (Judge Swinford)

With one exception, all actions arising from the November 8, 1965 American Airlines crash at the Greater Cincinnati Airport were transferred by the Judicial Panel on Multidistrict Litigation to the Eastern District of Kentucky for coordinated or consolidated pretrial proceedings. The exception was *Creasy v. American Airlines* which had been tried to a jury in the Northern District of Texas. The jury returned a verdict for the plaintiff as against American Airlines. The court used the jury in an advisory capacity and exonerated the United States of any liability under the Tort Claims Act. On appeal to the Fifth Circuit, the judgment was affirmed in all respects. *American Airlines v. United States*, 418 F.2d 180.

Shortly thereafter several motions for summary judgment were filed: (1) motions of the United States for summary judgment on claims between it and American Airlines, (2) motions of the United States for summary judgment against the individual plaintiffs and (3) a motion of a plaintiff for summary judgment (as to liability) against American Airlines.

The court first determined that it was clear from a study of the legislative history of section 1407 and the decisions of the Judicial Panel on Multidistrict Litigation that the transferee judge has the power to grant motions for summary judgment and that in circumstances such as these the power should be exercised "to prevent each of the transferor judges from having to decide identical motions and to eliminate the possibility of conflicting results."

As to the claims between American Airlines and the United States, the court found that the criteria governing the application of res judicata were satisfied since the *Creasy Case* involved the same parties and the same subject matter and a final judgment was rendered on the merits but due to lack of *mutuality* the court rejected the government's contention that claims of individual passengers and crew members were also barred.

The action in which the plaintiff filed a motion for summary judgment had been transferred from the Southern District of Ohio and the transferee court concluded that it had to look to the law of the State of Ohio to resolve the "choice of law" questions. The court found that Ohio follows the strict principal of *lex loci delicti* with respect to the choice of law in wrongful death actions and therefore the state court in Ohio would have looked to the state in which the crash occurred (Kentucky) to determine the substantive law to be applied.

Thus the question became whether a Kentucky court would require mutuality of parties or would follow the *Bernhard Doctrine* and apply collateral estoppel to establish liability of American Airlines without mutuality. Although the questions had not been presented to the Kentucky Court of Appeals in recent years, the district court found no inclination of that court to depart from the mutuality requirement and held that the absence of identity or privity between the plaintiff in the *Creasy Case* and the plaintiff in the case at bar prevented the application of collateral estoppel to establish the liability of American Airlines. The motion was denied.

ANTITRUST - ATTORNEY FEES - *LIQUID ASPHALT LITIGATION*

*State, ex. rel. Wilson v. Blankenship*, 308 F. Supp. 870 W.D. Oklahoma 1969) (Chief Judge Bohanon)

This is an ancillary action to the *Asphalt Antitrust Case* brought by the State of Oklahoma against several manufacturers of liquid asphalt in which, after a long trial, the jury returned the verdict of approximately 1.5 million dollars (to be trebled) and to which a reasonable attorney fee of $285,000 was added. While several motions for a new trial were pending, the parties agreed and the court ordered a remittitur of approximately $700,000 and again fixed reasonable attorney fees at $285,000.

This action was brought by a taxpayer under an Oklahoma law charging (1) that the Attorney General had no authority to agree to the remittitur, (2) that the Attorney General and the private attorneys involved in this litigation conspired to defraud the State. Exercising pendant jurisdiction, the court granted the defendants' motion for summary judgment on the ground that the Attorney General, having statutory authority to do so, compromised an honest, good-faith dispute between the parties as to the amount of damages.

ANTITRUST - DAMAGES - SPECIAL MASTER

*Trans World Airlines, Inc. v. Hughes*, 308 F. Supp. 679, 685-696 (S.D. New York 1969) (Judge Metzner)

Following the entry of a default judgment imposed as a sanction for failure of Howard R. Hughes to appear for deposition, the court appointed a special master to assess damages. The report of the master awarding treble damages in the sum of $137,611,435.96 was confirmed by the court.

ANTITRUST - PRIMA FACIE EFFECT OF FTC DECREE

*Purex Corp. v. Proctor & Gamble Co.*, 308 F. Supp. 584 (C.D. California 1970) (Judge Gray)

Following the First Circuit's decision in *Farmington Dowel v. Forster Mfg. Co.* (B. 13, p.6), the court held "that the

divestment order issued by the Commission is a final judgment or decree within the meaning of section 5(a) and therefore is admissible as *prima facie* evidence . . . (but) that the common law principle of collateral estoppel does not serve here to increase the effect of the commission order beyond that accorded by section 5(a)."

*United States of America v. Grinnell Corporation*, 307 F. Supp. 1097 (S.D. New York 1969) (Judge Metzner)

In a prior *enforcement action*, the defendants were found to have violated sections 1 and 2 of the Sherman Act and the Government moved in this *damage action* for a determination that defendants were collaterally estopped from litigating the issue. The court denied the motion holding that the amendments to section 5(a) of the Clayton Act provide that such a judgment "shall be prima facie evidence against such defendant" in any action brought by the United States under section 4A. The court concluded that "Congress must have meant to limit the use of an enforcement action judgment by the United States in later damage suits by making it *no more than prima facie evidence* of antitrust violations." [Emphasis Added]

ANTITRUST - PASSING ON DEFENSE

*State of Minnesota v. United States Steel Corporation* 308 F. Supp. 963 (D. Minnesota 1970) (Judge Neville)

In a previous order (B. 3, p. 9) the court denied the defendant's request to exclude damage claims which were reimbursed by the federal government under various highway construction programs as the federal government (the reimburser) had not filed any damage claims and the statute of limitations had run. Now the defendants attempted to exclude claims relating to the construction of county bridges, the cost of which was reimbursed by the State; the Counties (the reimbursees) have not sued and the statute of limitations has run.

Thus in its previous order the court permitted the reimbursees (the States) to assert claims where the reimburser (the federal government) had not done so - now the court holds that the reimburser (the State) can assert claims where the reimbursees do not do so. While emphasising that it would be "vigilant to prevent any double recovery" the court noted that "[i]f in fact the prices of steel were conspiratorially higher than otherwise they would have been, someone paid the higher price and it comes with poor grace to argue that the wrong party is suing, so long as there is no danger of duplicity of claims."

ANTITRUST - STATUTE OF LIMITATIONS

*Metropolitan Liquor Co. v. Heublein*, 305 F. Supp. 946 (E.D. Wisconsin 1969) (Judge Gordon)

The plaintiff had a sole distributorship of Lancer's Wine in Wisconsin from Vintage Wine, Inc. which was acquired by Heublein

who continued plaintiff's sole distributorship for approximately four years but then announced that other Heublein distributors in Wisconsin would be allowed to sell Lancer's wine.

The plaintiff brought this antitrust action against Heublein who moved to dismiss, *inter alia*, on the ground that the four-year statute of limitations had expired and on the ground that a private party cannot sue under 15 U.S.C. §18 unless that party competes directly with one of the defendants and can thereby establish compensible damages.

The court held that the cause of action accrued not when Heublein acquired Vintage Wines but rather when it appointed additional distributors and, therefore, the action was not barred by the statute of limitations. The court also held that there could be a cause of action for damages accruing to a private party for alleged violation of 15 U.S.C. §18.

ANTITRUST - GOVERNMENT ENFORCEMENT ACTION - PRIVATE INTERVENTION

*United States v. Automobile Manufacturers Association*, 307 F. Supp. 617 (C.D. California 1969) (Judge Curtis)

After eight months of negotiation, the Government and the defendants agreed to settle this action on terms and conditions embodied in a consent decree submitted to the court for approval. The proposed decree was made public and a full hearing was held and numerous parties, including many states and cities, attempted to intervene or appeared as amicus curiae.

The court denied all motions to intervene and approved the consent decree concluding that it provided the government with "subtantially all the relief that it could have obtained if it had tried the case and won" while avoiding the tremendous expense of time and money required in the event of a trial. The court found no authority "which would require the government to prosecute this case to judgment solely to the purpose of aiding treble damage claimants." The court refused to try to force the parties to include "an admission of liability clause" in the proposed decree primarily because the defendants would not agree to its inclusion. The judgment of the district court denying leave to intervene and approving the consent decree was summarily affirmed by the United States Supreme Court on March 16, 1970.

On April 6, 1970, fifteen related private antitrust actions were transferred by the Judicial Panel on Multidistrict Litigation to the Central District of California for coordinated or consolidated pretrial proceedings under 28 U.S.C. §1407.

MERGERS - BANKS

*United States v. Phillipsburg National Bank*, 306 F. Supp. 645 (D. New Jersey 1969) (Judge Shaw)

The government sought to enjoin the merger of two banks which independently ranked seventh and thirteenth in the market

area as to assets and deposits and when combined would rank fifth. The court found that the merger would not cause "any substantial increase in concentration of economic power" nor would it have "any measurable anticompetitive effect." Judgment was entered in favor of the defendants.

MERGERS - PRELIMINARY INJUNCTION

*Stedman v. Storer*, 308 F. Supp. 881 (S.D. New York 1969) (Judge Frankel)

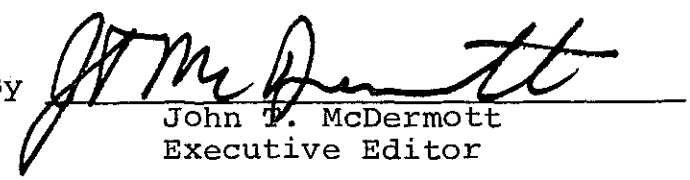
The court denied the plaintiffs' motions for preliminary injunctions aimed at preventing the merger of Northeast Airlines and Northwest Airlines. The court found that "the high probability that plantiffs will fail for want of proof is enough to defeat their application for a preliminary injunction." *Accord*, *Dalmo Sales Co. v. Tysons Corner Regional Shopping Center*, 308 F. Supp. 988 (D. District of Columbia 1970) (Judge Pratt).

*CORRECTION* - In summarizing *Gassner v. Cache Valley Dairy Assoc.* (B. 15, p. 1), we erroneously stated that the court limited the amount the plaintiff could pay his counsel by private arrangement. The court held that plaintiff's *recovery* for attorney fees under the statute would be limited to the amount it determined was reasonable.

Copies of unpublished opinions may be obtained from the authoring judge or from the undersigned. Your suggestions and comments concerning the content and format of these bulletins are most welcome as are copies of opinions and orders which may be appropriate for inclusion in a future bulletin.

Very truly yours,

THE BOARD OF EDITORS FOR THE
*MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION*

By 
John T. McDermott
Executive Editor

# Manual for Complex and Multidistrict Litigation





Judge Inzer B. Wyatt
Southern District of
New York




August 31, 1970

BULLETIN NO. 17

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The following recent decisions appear to be of interest to judges involved in complex and multidistrict litigation. As these decisions have been collected and summarized by the editorial staff, their inclusion does not mean that the Board of Editors approves of the procedures used or the results reached in any particular case.

ANCILLARY JURISDICTION - COMPULSORY COUNTERCLAIM

*United States of America v. Heyward-Robinson, Inc., et al.* (2d Cir., July 24, 1970) (Judge Bryan)

The plaintiff brought this action under the Miller Act to recover payments allegedly due from the defendant prime contractor. The defendant denied liability and counterclaimed for alleged overpayments on the government contract and on a second non-federal construction contract between the two parties. In reply, plaintiff denied liability on the counterclaim and interposed a reply counterclaim to recover monies allegedly due on the non-federal subcontract.

The two subcontracts were treated together at trial and the jury returned a verdict for plaintiff, on which judgment was entered. The defendant appealed, raising for the first time the contention that the district court had no jurisdiction over the counterclaim involving the non-federal subcontract.

The court of appeals, noting that the jurisdictional issue could be raised for the first time on appeal, determined that the counterclaim arose out of the same transaction as the claim and was therefore compulsory in nature and required no independent basis of federal jurisdiction. The court explained that the two subcontracts were between the same parties for the same type of

work and were carried on during substantially the same period. The defendant had the right to terminate both contracts if the plaintiff breached either one and could withhold monies due on one to apply against damages suffered on the other. Payments by the defendants were not allocated between jobs and a single insurance policy covered both contracts. Joint trial of these matters was thus required by Rule 13(a)'s policy of avoiding fragmentation of litigation and multiplicity of suits. In a concurring opinion, Judge Friendly took issue with the court's broad construction of the Rule's "transaction or occurrence" language, but expressed agreement with the result.

VENUE - CORPORATE *PLAINTIFF'S* RESIDENCE

*Manchester Modes, Inc. v. Adolph P. Schuman*, 426 F.2d 629 (2d Cir., April 28, 1970) (Judge Friendly)

In this diversity action filed in the Southern District of New York, a Connecticut corporation, not licensed under New York law but claiming to do business in Manhattan, sued a California resident, who was served while in New York City. The district court dismissed the complaint for improper venue, holding that the second clause of 28 U.S.C. §1391(c) did not make the corporate plaintiff a "resident" of the Southern District of New York for venue purposes under §1391(a).

The court of appeals affirmed this result, which was in accord with the result obtained in two earlier appellate courts, *Robert E. Leech & Co. v. Veatch*, 301 F.2d 434 (4th Cir., 1961); *Carter Beveridge Drilling Co. v. Hughes*, 323 F.2d 417 (5th Cir., 1963). The court doubted that the second clause of §1391(c) could be read to apply to corporate plaintiffs, but chose to rest its decision on the statute's history. The first clause of §1391(c) was obviously intended to make corporate defendants suable in states other than their state of incorporation. The second clause of §1391(c), according to the court, completed this task of widening venue by making the additional districts mentioned in this first clause "residences" of the corporate defendant for purposes of special statutes permitting venue to be laid at the defendant's residence. See, *e.g.*, 46 U.S.C. §688 (The Jones Act). In addition, the silence of the legislative history concerning the impact of the statute on corporate plaintiffs reinforced the court's conclusion that no broadening of venue for corporate plantiffs was intended.

ATTORNEY FEES - APPELLATE COURT

*Farmington Dowel Products Co., v. Forster Mfg. Co., Inc.*, (1st Cir., February 12, 1970) (Judge Coffin)

Plaintiff, having successfully defended its Clayton Act judgment on appeal, sought to recover its costs of appeal, including attorney's fees pursuant to Section 4 of the Clayton Act. Defendant urged that the plaintiff had also presented three unsuccessful claims by cross-appeal in an attempt to secure reversal and the opportunity for a larger verdict and argued that the plaintiff should be allowed to recover only for those claims which proved successful on appeal. The court agreed rejecting plaintiff's claim of $11,269.00, awarding only $4,000.00. Although the court was reluctant to set fees by fragmenting the appeal into issues won and lost, it felt that such analysis was generally required in order to discourage the possible pursuit of unsubstantial claims on appeal.

COSTS - TRANSCRIPTS, BRIEFS, WITNESS FEES

*Kaiser Industries Corp. v. McLouth Steel Corp.*, 50 F.R.D. 5 (E.D. Michigan, 1970) (Judge Freeman)

In this patent infringement action the district court held that the patent relied upon by the plaintiff was invalid and the defendant then sought to tax against the plaintiff the costs of pretrial, trial, and post-trial hearings, transcripts of printing briefs, transportation and subsistence of European witnesses, reproduction of its trial exhibits, interpreters and translators, depositions, foreign tests conducted, and certain tests conducted by expert witnesses.

The district court analyzed each item separately, noting that Rule 54(d) vested the district court with discretion on this matter and that that discretion should be exercised so as to minimize the costs of the litigation. The transcript costs were allowed insofar as they were reasonably necessary for proper trial and decision of the case. The printing of briefs was not required by rule of court and was accordingly disallowed. The costs of transporting witnesses from beyond the 100-mile radius of the court's subpoena power was upheld in light of the essential nature of their testimony. The remaining costs were allowed or disallowed depending on whether they were necessary to the proper presentation of the case.

CLASS ACTION - SETTLEMENT - EFFECT ON NON-PARTY CLASS MEMBERS

*Research Corporation v. Asgrow Seed Company, et al.* 425 F.2d 1059 (7th Cir., May 5, 1970) (Three-Judge Court)

Plaintiff sued a class of defendants for patent infringement and antitrust violations. The district court held the infringement action could be maintained as a class action pursuant to Rule 23(b)(1) or (b)(2), and the antitrust action as a (b)(3) class action (Bull. 4, p. 2). Notice was sent to class members pursuant to Rule 23(c), and subsequently the parties and various class members approved certain settlement documents. Notice was sent to all class members of the proposed settlement, as required by Rule 23(e). Appellants received notice of the proposed settlement, but took no action until it had been approved by the district court and a consent judgment entered.

The court of appeals dismissed the appeal, holding that the appellant lost its right to appeal by failing to object to the settlement prior to entry of judgment. The court held that where the non-party class member failed to indicate its disagreement with the proposed settlement in the district court prior to entry of judgment, it could not thereafter appeal from that judgment.

CLASS ACTION - NON-IDENTIFIABLE CLASS

*Cassell Carpenter, et al. v. Davis, et al.*, 424 F.2d 257 (5th Cir., April 9, 1970) (Judge Rives)

The court of appeals held that inability to clearly identify all present members of a class of plaintiffs did not prevent the finding that such a class existed under Rule 23(b)(2). The individual plaintiffs were officers of a local newspaper who had been arrested and charged with selling obscene literature. The class these plaintiffs claimed to represent included "all those who write for, publish, sell or distribute [the newspaper] or who wish or expect to in the future."

The record showed there were numerous present class members and the probability of others in the future. Citing the Advisory Committee Notes to Rule 23, the court concluded that civil rights actions of this type frequently qualify as class actions under Rule 23(b)(2), even though the class members cannot be specifically enumerated.

TRIAL MANAGEMENT - PRETRIAL ORDER - EXCLUSION OF EVIDENCE

*Ely v. Reading Company*, 424 F.2d 758 (3d Cir., April 9, 1970) (Judge Forman)

The court of appeals affirmed the judgment on the verdict for the defendant railroad and upheld the trial court's exclusion of testimony by the plaintiff's expert witness. The trial court had excluded the testimony since the subject was outside the issues set up by the pretrial order and since the plaintiff failed to give notice of her desire to present such testimony until after the entry of that order. The court of appeals held that only a clear abuse of discretion by the trial court in enforcements of the pretrial order would justify appellate interference and that no such abuse was shown.

TRANSFER - SECTION 1404(a)

*Northern Acceptance Trust 1065, et al. v. Hononorable William P. Gray* (9th Cir., March 23, 1970) (Judge Merrill)

The petitioners sought to have the district court's order for change of venue, pursuant to 28 U.S.C. §1404(a), set aside by writ of mandamus. The petitioners brought suit in the Central District of California - their residence, the location of some third-party witnesses, and the site of some of the transactions involved. The defendants moved for change of venue to the District of Hawaii, where the operative facts occurred, the assets (land) of the companies were available for view, the corporate records were located and the majority of shareholders, witnesses and defendants resided.

The court of appeals affirmed the district court's transfer, holding that where, as here, the district court gave careful consideration of all relevant factors involved in a section 1404(a) transfer, mandamus would not lie.

*Alabama Great Southern RR Co. v. Allied Chemical Co.*, 312 F. Supp. 3 (E.D. Virginia, 1970) (Judge Merhige)

In this action for damages resulting from the derailment of one of plaintiff's trains in Mississippi, the district court granted the motion of certain defendants to transfer the action to the Southern District of Mississippi, pursuant to 28 U.S.C. §1404(a). The court first concluded that service of process could have been effectuated on the defendants in the transferee district, and that subject matter jurisdiction, *i.e.*, diversity, would be satisfied and venue properly laid in the transferee district.

Having decided that the power to transfer existed, the court concluded that transfer was required on the particular facts of the case. Most of the witnesses were located in Mississippi and those located in Virginia seemed to be either expert witnesses or employees of the plaintiff. The court noted that expert witnesses might be expected to travel regardless of the forum and that the plaintiff should have no difficulty in transporting its employees to the Southern District of Mississippi. The court also considered the less congested docket in Mississippi, the fact that plaintiff did no business in and had no relevant contact with Virginia, and that related claims against the plaintiff had been made in Mississippi. The court added that it need not decide the amenability of certain defendants to suit in Virginia, since a finding of no personal jurisdiction over those defendants would not prohibit transfer under section 1404(a). But *cf. Kraft v. Hoskins*, 311 F. Supp. 1405 (E.D. Virginia, 1970).

DISCOVERY - CIVIL INVESTIGATIVE DEMAND

*The Material Handling Institute, Inc. v. McLaren*, 425 F.2d 90 (3d Cir., May 8, 1970) (Judge Seitz)

The court of appeals affirmed the district court's denial of a petition to set aside a Justice Department CID, seeking a list of nonmember firms eligible for membership in the Institute. The CID stated that the information was needed in connection with the government's investigation of a number of violations of Section 1 of the Sherman Act by "a contract or combination in unreasonable restraint of trade."

The court of appeals held that, in light of the two-year history of contact between the Institute and the Justice Department concerning the Institute's restrictive membership policies, the CID's statement of the nature of the conduct under investigation met the requirements of 15 U.S.C. §1312(b)(1). The court also held the list of nonmembers relevant, within the meaning of the Antitrust Civil Process Act, to a determination of the anti-competitive effects of its membership policy. And finally, the definition of "documentary materials" in the Act, was held to encompass all records, including addressograph plates.

DISCOVERY - FREEDOM OF INFORMATION ACT

*Bristol-Myers v. Federal Trade Commission, et al.*, 424 F.2d 935 (D.C. Cir., March 26, 1970) (Chief Judge Bazelon)

The FTC initiated a rulemaking proceeding involving analgesic drugs on the basis of "extensive staff investigation, . . . accumulated experience and available studies and reports . . . ." Bristol-Myers sought disclosure, under the Freedom of

Information Act of the material "contributing to or constituting" the items referred to by the FTC. The district court dismissed the complaint because no "identifiable records" were involved within the meaning of the statute and many of the documents came within the specific exemptions from disclosure set out in the Act.

The court of appeals concluded that insofar as Bristol-Myers sought disclosure of materials relied on and referred to by the FTC, it was a request for "identifiable records." The court of appeals reversed and remanded for specific rulings on the application of the Act's exemptions to the records sought, noting that the Freedom of Information Act "creates a liberal disclosure requirement, limited only by specific exemptions which are to be narrowly construed.

DISCOVERY - PRODUCTION OF MATERIALS FOR TESTING

*Sladen v. Girltown, Inc., et al.*, 425 F.2d 24 (7th Cir., March 20, 1970) (Judge Kerner)

The court of appeals held that the trial court had erroneously ordered the plaintiffs to test the flammability of clothing manufactured by the defendant and erroneously construed by the testing report as an admission of the plaintiff in granting summary judgment for the defendant. Plaintiffs sought damages for injuries sustained when a blouse manufactured by the defendant burst into flames near a gas stove flame. After the plaintiff failed to comply with the defendant's request under Rule 34 that the clothing be tested for flammability, the court ordered that the tests be conducted by a testing company selected by the plaintiff. The tests showed the clothing did not violate federal flammability standards and the court granted the defendant's motion for summary judgment, treating the report as an admission by the plaintiffs.

The court of appeals held that Rule 34 authorized orders to produce objects for testing by the moving party but, unlike Rule 35 concerning mental and physical examination, did not authorize orders that the non-moving party conduct the tests. Nor could the tests be construed as an admission of the plaintiff since no agency relationship existed between them and the testing company. The test results therefore, could not be considered on a motion for summary judgment.

DISCOVERY - PROTECTIVE ORDERS

*Southern California Theatre Owners Association, et al. v. United States District Court for the Central District of California* (9th Cir., June 29, 1970) (Three-Judge Court)

The district court ordered the theater owners to produce certain documents and answer certain interrogatories which the theatre owners claimed violated the attorney-client privilege.

The court of appeals denied their petition for writ of mandamus as premature, noting that neither party had sought a protective order from the district court under Rule 30(b) and that the theatre owners had not sought limitations on the discovery order, but had opposed any discovery at all.

DISCOVERY - SANCTIONS

*McFarland v. Gregory, et al.*, 425 F.2d 443 (2d Cir., April 24, 1970) (Judge Tyler)

In an action for damages arising from a real estate contract, the court of appeals reversed the trial court's imposition of sanctions on the defendant under Rule 37 for failure to cooperate in discovery proceedings. On the basis of an affidavit from plaintiff's accountant, the trial court found that the defendant had refused to allow that accountant to examine its records under appropriate conditions and imposed a penalty of $7,114.00 on the defendants, representing the difference between actual cost of the accountant's work and an estimate of the reasonable cost of the work under appropriate conditions. The court of appeals was unwilling, considering the protracted history of the litigation, to disturb the finding that sanctions were merited but felt that the defendants were entitled to a hearing "on the scope and cost of their default" and an opportunity to cross-examine the plaintiff's accountant before such a large penalty was imposed.

ANTITRUST - GROUP BOYCOTT

*Bridge Corporation of America v. The American Contract Bridge League* (9th Cir., June 25, 1970) (Judge Powell)

The plaintiff, developer of a portable digital computer for scoring duplicate bridge tournaments, alleged that the defendant, a nonprofit corporation conducting and sanctioning bridge tournaments had violated Sections 1 and 2 of the Sherman Act by refusing to sanction a bridge tournament if the computer were used. The district court and the court of appeals both rejected plaintiff's contention that the refusal to sanction constituted a group boycott and was therefore a *per se* violation of the Sherman Act.

The court of appeals distinguished plaintiff's case from those cases in which some anti-competitive objective was involved, citing *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquor, Ltd.* (Bull. 8, p. 6). The defendant was motivated, "not by an anti-competitive motive or purpose to eliminate or damage BCA,

but to insure that the manner in which league bridge was scored would not create a situation where the integrity of the master point system, the inspiration of league tournament play, would be questioned." On these facts, the court refused to apply the group boycott *per se* rule and concluded that "the restraint inspired by the ACBL on BCA was a reasonable one," pointing out that ACBL "did not refuse to sanction any tournament scored by a computer but set forth reasonable conditions, based on a legitimate interest, in order to determine if BCA's computer could do the job accurately, cheaper, faster and without significantly disrupting the manner or conditions of play."

ANTITRUST - *IN PARI DELICTO*

*Premier Electrical Construction Co. v. Miller-Davis Company* (7th Cir., March 6, 1970) (Judge Swygert)

The court of appeals reversed and remanded the district court's judgment on the pleadings dismissing the plaintiff's antitrust complaint. The court held that the factual questions raised by the defense of *in pari delicto* were not settled by the pleadings. It read *Perma Life Mufflers* as holding "only that plaintiffs who do not bear equal responsibility for creating and establishing an illegal scheme, or who are required by economic pressures to accept such an agreement, should not be banned from recovery simply because they are participants." The court found it impossible to say, from the pleadings, who initiated the illegal scheme and whether the defendant had sufficient bargaining power to force the plaintiff to participate in the scheme. Because of the importance of such factual questions in the antitrust case and the consequent caution with which summary procedures should be used, the court reversed and remanded the case. The court also concluded that neither comity nor res judicata required the dismissal of the antitrust action because of the judgment for the defendant in a contract action resting on different operative facts.

ANTITRUST - TYING ARRANGEMENT

*Seigel v. Chicken Delight* (N.D. California, April 1970) (Chief Judge Harris)

In ruling on plaintiffs' motion for a directed verdict court concluded that the central issue was: are the defendants' standard contract and practices requiring the purchase of various packaging items, cookers and fryers, and certain mix preparations for food a *tying agreement* in violation of Section 1 of the Sherman Act?

The court rejected the defendants' argument that this case involved a single product "the Chicken Delight System" and held "that a franchise license is marketable separate and apart from the various products which the franchisees are required to purchase from and through the franchisor." The court held as a matter of law that a tying agreement existed, with the license to use the Chicken Delight name, trademark and method of operation a *tying item* and the required paper packaging products, cookers and fryers, and food preparation mixes the *tied items*. The court rejected as a matter of law three of the four "so called justifications for the tie-in" -- new business justification, convenience of accounting and assurance of continuing source of supply. As to defendants' assertion that the tie-in of the food products can be justified as necessary quality control to protect the good will of their trademark, the court agreed that there was sufficient vitality, as a factual consideration, to reach the jury but held as a matter of law there could be no justification for the tie-in of the paper products. The court further determined as a matter of law that the fact of damage was established with the amount of damage to be left to the jury. The plaintiffs' motion for directed verdict was granted in part and denied in part and the defendants' motion for directed verdict was denied in total.

AIR DISASTER LITIGATION - CONTROLLER NEGLIGENCE

*Stork v. United States* (9th Cir., July 28, 1970) (Judge Merrill)

The issue faced by the court of appeals was what duty rested upon control tower personnel (as agents of the FAA) to forbid or warn against a takeoff under visibility conditions which failed to meet FAA minimums. The aircraft, carrying the California State Polytechnic College football team home from Toledo, took off in the early evening at a time when visibility was less than 165 feet. The aircraft was cleared for takeoff by the tower, without any comment on weather conditions, but then crashed on the runway after attaining an altitude of 50 to 100 feet.

The court rejected the contention of the United States that "the controllers' concern is limited to traffic conditions and that the judgment as to weather conditions, once all relevant information is at hand, is the sole responsibility of the pilot." Although agreeing that such a division of responsibility was intended by the applicable regulations and procedures in the normal situation, the court noted that takeoff was flatly forbidden by FAA regulation, on the facts of this case and that in such a case a warning from the controller would not be interfering

with the pilot's discretionary judgment. The court concluded that this duty to warn existed even where the pilot knew all of the facts known to the controllers, and agreed with the district court that breach of the duty was a proximate cause of this accident.

PRODUCT LIABILITY - ARALEN - DUTY TO WARN

*Schenebeck, et al. v. Sterling Drug, Inc.* (8th Cir., April 1, 1970) (Judge Bright)

The district court had awarded judgment on a jury verdict for the plaintiff in this action for damages resulting from use of the drug, Aralen. The court of appeals affirmed, holding that the drug manufacturer had a duty "to keep abreast of scientific developments touching upon the manufacturer's product and to notify the medical profession of any additional side effects discovered from its use." A jury question was presented on the issue of whether that duty was breached by Aralen's failure to warn the medical profession of possible eye damage from use of Aralen, which resulted in the plaintiff's unnecessary exposure to the drug's toxic effects. The court also held that the trial court properly submitted to the jury the question of whether the plaintiff's cause of action was barred by the applicable state statute of limitations. The cause of action accrued when the plaintiff first suffered actual damage, and the court thought the evidence failed to conclusively establish that the plaintiff suffered such damage at so early a point as to bar the present action.

SECURITIES - RULE 10(b)(5)

*Rekant v. Desser, et al.*, 425 F.2d 872 (5th Cir., April 20, 1970) (Judge Wisdom)

Plaintiff, a stockholder, brought a derivative suit against corporate officers and directors alleging they had defrauded the corporation in connection with the issuance of treasury shares and the signing of a corporate note.

The district court dismissed the complaint, stating that the plaintiff had no derivative cause of action under Rule 10(b)(5) for matters relating to corporate management and that the allegedly defrauded corporation's issuance of treasury stock was not in connection with a purchase or sale of securities, as required for an action under that rule.

The court of appeals reversed, holding that the plaintiff had standing to bring a derivative action against the defendants for violation of Rule 10(b)(5). Adhering to the requirement that the plaintiff in a Rule 10(b)(5) action must be a buyer or seller of securities, the court held that the corporation's issuance of treasury shares and of the corporate note were sales of securities for purposes of that rule.

In addition, the court held that the complaint stated a cause of action under Rule 10(b)(5), concluding that when officers and directors defraud a corporation by causing it to issue securities for grossly inadequate consideration to themselves or others in league with them or the one controlling them, the corporation has a federal cause of action under §10(b) and Rule 10-5, notwithstanding any other resulting liability under state law.

The court refused to rule on the plaintiff's individual and class action claims under the rule because the plaintiff failed to allege that the misrepresentations and omissions of material fact influenced his investment judgment or that of any other stockholder -- a requirement under Rule 10(b)(5). The court also found it unnecessary to decide whether a cause of action existed under Rule 15d-1 since that rule overlapped with Rule 10(b)(5 ) on the facts of the case and relief under Rule 15d-1 was unnecessary.

*Superintendent of Insurance of the State of New York v. Bankers Life and Casualty Co.* (2d Cir., July 22, 1970) (Judge Blumenfeld)

The plaintiff, as liquidator of Manhattan Casualty Co., brought an action alleging violations of the Securities Act of 1933 by the defendants in purchasing the stock of Manhattan and in the sale of treasury bonds owned by Manhattan. The defendants had arranged for certain individuals to purchase Manhattan's stock by borrowing the money from Irving Trust Co. and then selling Manhattan's treasury bonds to repay Irving. To conceal this depletion of Manhattan's assets, the new owners made a second loan from Irving and used the proceeds to purchase a certificate of deposit from Belgian American Bank & Trust Co. The books of Manhattan then reflected the sale of the bonds and the purchase of the certificate of deposit. The certificate, however, was assigned to a third party which then assigned it as collateral for a loan with which to repay the second loan from Irving. Manhattan books did not reflect this assignment and pledge of the certificate of deposit.

The court of appeals affirmed the district court's dismissal of the plaintiff's complaint. Section 17(a) of the 1933 Act provided a cause of action only for a defrauded purchaser and Section 10(b) of the 1934 Act and Rule 10(b)(5) extended a similar right to a defrauded seller as well as a purchaser. There was no theory under which Manhattan, in whose shoes the plaintiff-appellant stood, could be regarded as either purchaser or seller of its stock and plaintiff therefore could not maintain an action for damages incurred as a result of that transaction. The court also rejected the claimed cause of action arising from the sale of Manhattan's treasury bonds, noting that the object of the fraud was to obtain possession of the bonds for the personal use of the perpetrators but that neither the purchaser nor the seller were deceived concerning the terms of the sale itself. And, as to the purchase of certificates of deposit, the court noted that the certificates or their proceeds may have been misapplied, but there was no fraud in connection with their purchase or sale. The court premised its conclusions on its belief that Rule 10(b)(5) was not intended to provide a remedy for schemes amounting to no more than fraudulent mismanagement of corporate affairs which in no way affected the securities market or the investing public.

*Astor v. Texas Gulf Sulphur Company*, 306 F. Supp. 1333 (S.D. New York, 1969) (Judge Bonsal)

This is the most recent in a series of legal actions resulting from the 1964 discovery by TGS of valuable ore bodies in Timmins, Ontario, Canada. See also *SEC v. Texas Gulf Sulphur*, 258 F. Supp. 262 (S.D. N.Y. 1966), 401 F.2d 833 (2d Cir. 1968) and *Reynolds v. Texas Gulf Sulphur*, Bull. 10, p. 9 (D. Utah 1969). In ruling on the defendant's motions for summary judgment, the court held that the plaintiffs could maintain a private right of action for violations of Section 10B or Rule 10(b)(5) and that issues relating to justification for nondisclosure, materiality and reliance and issues of motives, intentions, or knowledge created fact questions inappropriate for summary judgment. The court did grant summary judgment as to certain defendants and as to certain claims based on the prior decision of the court of appeals.

* * * * * * * * * * * * *

The United States Supreme Court has reled on several petitions for certiorari filed in cases previously reported in these bulletins. These rulings are included on the attached list of citations of previously reported opinions.

Copies of unpublished opinions may be obtained from the authoring judge or from the undersigned. Your suggestions and comments concerning the content and format of these bulletins are most welcome as are copies of opinions and orders which may be appropriate for inclusion in a future bulletin.

Very truly yours,

THE BOARD OF EDITORS FOR THE
*MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION*

By John T. McDermott
John T. McDermott
Executive Editor

Attachment

# CITATIONS

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# Manual for Complex and Multidistrict Litigation



EDITORIAL STAFF

JOHN T. McDERMOTT, ESQUIRE
EXECUTIVE EDITOR

TELEPHONE 382-8717
AREA CODE - 202

September 11, 1970

Judge Inzer B. Wyatt
Southern District of
New York

BULLETIN NO. 18

TO ALL JUDGES CONCERNED WITH COMPLEX AND MULTIDISTRICT LITIGATION

The following recent decisions appear to be of interest to judges involved in complex and multidistrict litigation. As these decisions have been collected and summarized by the editorial staff, their inclusion does not mean that the Board of Editors approves of the procedures used or the results reached in any particular case.

APPEALABILITY - CLASS ACTION ORDERS

*Weingartner v. Union Oil Company* (9th Cir., August 3, 1970) (Judge Hamley)

The district court denied plaintiff's motion to establish a class action under Rule 23 and plaintiffs sought to appeal from that order under 28 U.S.C. §1291 (final orders). The court of appeals held the order to be non-appealable and dismissed. The court rejected the argument that appeal was supported by *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) or by *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966). The court read subsequent cases as restricting *Eisen's* rationale of allowing appeal from a class-action decision as limited to dismissals which spell the end of the litigation for all practical purposes. In this case the plaintiffs' claims exceeded the jurisdictional amount and there was no reason why the claims could not be asserted individually.

VENUE - PRINCIPAL PLACE OF BUSINESS

*National Spinning Company v. City of Washington, North Carolina*, 312 F. Supp. 958 (E.D. North Carolina 1970) (Judge Larkins)

Defendant moved to dismiss this diversity action, alleging that no true diversity existed because plaintiff's principal place of business was in North Carolina. Plaintiff, incorporated in New York, was engaged in the manufacture and sale of yarn. All but one of the officers and directors lived and worked in New York, where the corporate planning, financing, sales and marketing, public relations and general administration were carried on. However, ninety-five percent of the yarn was manufactured in North Carolina and over ninety percent of the employees and virtually all of the assets were located there. In addition the Company's computer and communication facilities were located there. The court concluded that under either the "operating assets," "center of corporate activity" or "nerve center" tests, the defendant's principal place of business was in North Carolina and the action was dismissed.

VENUE - AIR DISASTER LITIGATION

*Gardner v. Braniff Int'l.*, 312 Supp. 844 (D. Connecticut 1970) (Judge Timbers)

The district court granted the defendant's motion to dismiss this personal injury action. Plaintiff had rested jurisdiction over the defendant, a Nevada corporation with no other contacts with Connecticut, on defendant's maintenance of an "Enterprise" telephone listing in Connecticut and the use of that listing to make reservations for the flight on which the plaintiff was injured. The court held that maintenance of the telephone listing was insufficient to allow assertion of personal jurisdiction under the Connecticut long-arm statute and the cause of action was held to arise in Virginia (where the injury occurred) and not out of the preliminary transaction of placing a flight reservation by phone from Connecticut. The court found an absence of those minimal contacts with Connecticut required for a Constitutional assertion of personal jurisdiction.

*Gill v. Fairchild Hiller Corporation*, 312 F. Supp. 916 (D. New Hampshire 1970) (Judge Bownes)

Plaintiffs sued the defendants, who had manufactured the instruments and equipment for an aircraft which crashed in New Hampshire, alleging that personal jurisdiction was established under New Hampshire's long-arm statute which made the commission of a tort in New Hampshire equivalent to doing business in

New Hampshire. The court upheld its jurisdiction, holding that the statute as applied was consistent with due process. To require that plaintiffs show the defendants intended their equipment to be used in New Hampshire in order to exercise personal jurisdiction would create an unreasonable barrier against such suits. The defendants must have contemplated the use of their equipment in all parts of the United States and the risk of suit against them in any of those states is one of the risks that their business requires them to bear.

CLASS ACTION - JURISDICTIONAL AMOUNT

*Massachusetts State Pharmaceutical Association, et al., v. Federal Prescription Services, Incorporated,* (8th Cir. August 13, 1970) (Judge Van Oosterhout)

The plaintiffs brought a class action on behalf of all Massachusetts retail pharmacists, seeking to restrain the defendant from soliciting drug prescriptions in Massachusetts in violation of a state court decree. The district court (District of Iowa) dismissed the action for lack of jurisdictional amount and the Court of Appeals affirmed.

The appellate court held that the burden was on the plaintiff to establish the jurisdictional amount, tested by the value of the suits intended benefit to the plaintiff. The court felt that the holding in *Snyder v. Harris,* 394 U.S. 332, required the use of this "plaintiff's viewpoint" rule and precluded valuation from the defendant's viewpoint. In unfair or unlawful competition actions the benefit to the plaintiff is generally measured by the difference in value between plaintiff's business with and without the unfair competition. The Association and the individual pharmacist-plaintiffs failed to establish any substantial lessening of the values of their business and the court refused to rest jurisdiction on the fact that their individual businesses were worth over $10,000 since there was no proof their businesses would be completely destroyed.

Aggregation of the individual claims was not considered by the court since there was no evidence to indicate that the value of the class business has been diminished by more than $10,000.

CLASS ACTION - UNMANAGEABLE CLASS

*Hackett v. General Host Corporation, et al.,* Civ. No. 70-364 (E.D. Pennsylvania, July 31, 1970) (Judge Weiner)

Plaintiff, a consumer of bread purchased from a retail outlet, sought to recover treble damages for an alleged conspiracy by the defendants to fix prices in the sale of bread in the Philadelphia market. This recovery was sought for herself and

for a class composed of all individual consumers situated in the Philadelphia market who had purchased bread at retail for themselves or members of their household. Defendants argued that the class action could not be maintained, one of the reasons being the difficulty of managing the action.

The court agreed with the defendant that the class was unmanageable and denied the plaintiff's request for confirmation of her action as a class action. *State of West Virginia v. Chas. Pfizer & Company,* (S.D. New York 1969) was held to be non-determinative of the issue before the court because the defendants in that case had submitted a settlement offer for all claims of individual consumers of antibiotic drugs. Thus the issue of the manageability of the consumer class was not before that court in that case. Instead, the court relied on the views expressed by Chief Judge Lumbard's opinion in *Eisen v. Carlisle & Jacqueline,* 391 F.2d 572, that "(c)lass actions were not meant to cover situations where almost everybody is a potential member of the class.... Rule 23(b)(3)... requires that the court consider the difficulties likely to be encountered in the management of the class action in making its determination." Citing *Hawaii v. Standard Oil Company of California,* Civ. No. 2826 (D. Hawaii, filed May 27, 1969) and *United Egg Producers v. Bauer International Corporation,* 70 Civ. 194 (S.D. New York, filed April 27, 1970), the court concluded that the "class is so large that it would be unmanageable and could only result in many knotty complicated and unnecessary problems."

## STAY PENDING OUTCOME OF RELATED LITIGATION

*Sunbeam Corporation v. Faberge, Incorporated,* 312 F. Supp. 999 (D. Minnesota 1970) (Judge Devitt)

Sunbeam sought a declaration of the invalidity of Faberge's patent. Faberge moved for a stay of the proceedings, alleging that the validity of the same patent was involved in an infringement action then pending in another district. That action had been pending on that district for two years and the pretrial was completed.

Faberge was the plaintiff in that other action and was suing a wholly-owned subsidiary of Sunbeam. Sunbeam's counsel was also representing its subsidiary in that action. The court concluded that in the interest of economy of time and money it would stay proceedings until ten days after final disposition of the other action.

TRANSFER - SECTION 1404a

*County Maid Incorporated v. Haseotes*, 312 F. Supp. 1116, (E.D. Pennsylvania 1970) (Judge Body)

Defendants in this antitrust action moved for transfer to the District of Massachusetts or District of Rhode Island, pursuant to 28 U.S.C. §1404(a). They alleged that a substantial majority of prospective witnesses and all defendants lived and worked in Massachusetts or Rhode Island, the majority of relevant documents were located there and Pennsylvania had no connection whatsoever with the litigation. In addition to serving the convenience of the parties and witnesses, transfer was said to be in the interests of justice since calendar conditions were better in the proposed transferee districts.

The motion was denied. The court noted that the defendants directed a unitary operation with four plants and five hundred retail stores in New England, New Jersey, Pennsylvania and Delaware. In contrast the plaintiff operated only in Delaware, with one plant and ten stores. The court held that these facts required a greater showing of relative convenience for the defendants to justify the magnified inconvenience to the plaintiff.

Plaintiff's choice of Pennsylvania as a forum was supported by the fact that Pennsylvania and Delaware formed a single commercial community, and defendant's decision to conduct business in the Delaware Valley prevents them from complaining that Pennsylvania is inconvenient to them.

More importantly, compulsory process in the Eastern District of Pennsylvania would be needed for and would reach nearly all of the plaintiff's prospective witnesses while defendants' witnesses were under their control and could be brought to Pennsylvania without compulsory process. Finally, calendar conditions were considered to be of little importance since the defendants had previously stated that they expected pretrial discovery to take several years.

*Faberge, Incorporated v. Schick Electric, Incorporated*, 312 F. Supp. 559 (D. Delaware 1970) (Judge Wright)

Defendant in this patent infringement action moved for transfer to the Southern District of New York pursuant to 28 U.S.C. §1404(a).

The court concluded that defendant had failed to meet the burden imposed by the patent infringement venue statute, 28 U.S.C. §1400(b) and transfer was denied. Defendant's wholly-owned subsidary, Schick Service, Incorporated, did maintain an office in New York but there was no evidence to indicate that the subsidiary was really the agent of the parent. And although

defendant's regional sales manager maintained an office on the subsidiary's premises, no evidence indicated that the subsidiary was held out as a sales office or distribution center for the defendant's products. Finally, the defendant's maintenance of an inventory on the subsidiary's premises in order to fill emergency orders was insufficient to make the premises the defendant's place of business where no telephone listing was maintained by the defendant and the building was not owned by the defendant.

DISCOVERY - MULTIDISTRICT LITIGATION

*ABC Great States, Incorporated, et al. v. Globe Ticket Company, et al.*, Misc. No. 70-113 (E.D. Pennsylvania, filed August 19, 1970) (Judge Fullam)

Plaintiffs brought civil treble damage actions alleging a price-fixing conspiracy by the defendants, manufacturers of admission tickets. The civil actions were consolidated for pretrial proceedings in the Northern District of Illinois. In February, 1970, plaintiffs served a notice of deposition and subpoena *duces tecum* on the Chief of the Middle Atlantic Office, Antitrust Division, Department of Justice, requiring him to bring these sentencing memoranda to the deposition. These memoranda contained excerpts and summons of the grand jury testimony which led to indictments against these defendants and pleas of *nolo contendere* in the initial Government antitrust prosecution.

The Government and the defendants moved to quash the subpoena, contending disclosure of the grand jury testimony was precluded. After ascertaining that the memoranda were, in fact, derived from the grand jury testimony, the court quashed the subpoena in so far as it required production of these memoranda.

One of the plaintiffs subsequently filed a second notice of deposition and had issued a subpoena *deuces tecum* substantially similar to that issued in February and quashed by the courts. Defendants again moved to quash.

In quashing this second summons the court noted that the February proceeding had been initiated by moving counsel on behalf of all plaintiffs in the multidistrict litigation and that no appeal had been taken from its order quashing the subpoena. The court held that the purpose of Section 1407 and the order entered in the Northern District of Illinois consolidating the cases for all "pretrial purposes" would not permit the plaintiff to relitigate the matters already decided against them. Although its prior ruling lacked the finality necessary to make *res judicata* or collateral estoppel applicable, it constituted the law of the case and required that the government's motion be granted.

ANTITRUST - PRELIMINARY INJUNCTION - EMPLOYER ASSOCIATION/UNION CONSPIRACY

*International Container Transport Corporation v. New York Shipping Association*, 312 F. Supp. 562 (S.D. New York 1970) (Judge Mansfield)

Plaintiff warehousing company sued the defendant Association, a membership corporation composed of waterfront employers in the Port of New York, and the International Longshoremans Association, the collective bargaining representative for employees in the Port of New York. The complaint alleged that the defendants had violated the Sherman Act - the Association by refusing to admit it to membership and the ILA by refusing to negotiate a collective bargaining agreement with it.

The plaintiff was engaged in the specialized business of packing and unpacking "containerized" ocean freight at premises located two blocks from the docks. The General Cargo Agreement negotiated between the Association and the ILA included special Container Rules, requiring that containers be packed and unpacked on a waterfront facility by ILA labor employed at ILA rates. The Association had refused membership to plaintiff because it did not perform normal stevedoring operations and had no contract with ILA. The ILA refused to enter a labor contract with the plaintiff, because it was not a member of the Association and did not perform its operations on the piers or docks. The Committee charged with enforcing the Container Rules had fined shippers doing business with the plaintiff, apparently because it was not an Association member and did not employ ILA labor.

The District Court granted plaintiff's motion for a preliminary injunction against the defendant's actions aimed at inducing others not to use plaintiff's services. The court felt that plaintiff had clearly shown the existence of substantial antitrust law questions which required further proceeding. There was no reasonable basis for the Association's refusal to admit plaintiff into membership since the plaintiff's work qualified it for at least associate membership, and would not violate the General Cargo Agreement with the ILA.

The court also concluded that unless temporary relief were granted the plaintiff would be out of business, whereas no appreciable harm would be done to the ILA or the Association. Plaintiffs earlier application for relief from the NLRB did not preempt the court's jurisdiction and the dismissal of an earlier action seeking equitable relief without alleging violations of antitrust laws did not require dismissal of the present action under *res judicata* or collateral estoppel since different causes of action were involved.

ANTITRUST - GOVERNMENT AGENCY EXEMPTION

*George R. Whitten, Jr., Incorporated, v. Paddock Pool Builders,* (1st Cir., March 25, 1970) (Judge Coffin)

Plaintiff alleged that defendant and its dealers had violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act by conspiring to require the use of its pool specifications in the *public* swimming pool industry. The defendants allegedly used salesmanship, threats of litigation and fraudulent statements in attempting to persuade architects to draw up *public* swimming pool specifications in such a manner as to require use of the defendant's equipment.

Defendant moved for summary judgment arguing that such conduct was exempted from antitrust laws. The District Court granted the summary judgment, but was reversed by the Court of Appeals. The court read *Parker v. Brown,* 317 U.S. 341 (1943), as conferring antitrust immunity only when government involvement in the field arose from a judgment that some form of government regulations was preferable to competition. The court concluded that the competitive bidding required in the public swimming pool industry indicated a government policy to encourage, not control, competition and that the exemption was therefore inapplicable. The court also rejected a claim of immunity under *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Incorporated,* 381 U.S. 651 (1965). The court thought the key to this and subsequent cases was the immunization of efforts to influence public officials in the passage or enforcement of laws and deemed such an exemption inapplicable to efforts to sell products to public officials acting under competitive bidding statutes.

ANTITRUST - SUMMARY JUDGMENT - MEETING COMPETITION DEFENSE

*Tilden A. Jones, v. The Borden Company* (5th Cir., July 15, 1970) (Judge Wisdom)

Plaintiff alleged that defendant had violated Sections 13(a) and (c) of the Clayton Act by price discrimination and exclusive dealing arrangements in the distribution of milk. Defendant moved for summary judgment and submitted depositions and affidavits to establish the absence of exclusive dealing arrangements and a §2(b) "meeting competition" defense to the price discrimination charge. The plaintiff submitted no affidavits or depositions and took no other steps to create a genuine issue of material fact.

The Court of Appeals affirmed the District Court's grant of summary judgment to the defendant. The uncontested affidavits established that no exclusive dealing arrangement existed and the affidavits and depositions also established that Borden had, in good faith, lowered its prices to meet the competition. The court said that in order to establish a §2(b) defense a defendant must show facts which would lead a reasonable and prudent person to believe that the lowering of prices would in fact meet the low prices of a competition. The court stressed that the §2(b) defense rested not on defendant's accuracy in lowering their prices to meet their competition but on the defendant's motives in lowering them.

SECURITIES - PROXY SOLICITATION - RULE 14a-9

*Berman v. Thomson*, 312 F. Supp. 1031 (N.D. Illinois 1970) (Judge Austin)

Plaintiff, a stockholder of the Susquehanna Corporation brought a derivative action for alleged violation of Rule 14a-9 governing solicitation of proxies and promulgated by the SEC under the 1934 Act. In attempting to get the necessary approval for a merger of American Gypsum Company into Susquehanna, its directors sent out a balance sheet which stated that the company had recently invested approximately six million dollars "in marketable securities of listed corporations." In fact the money was invested in the shares of only one corporation, General Refractories Company, and further acquisitions were authorized by the directors but deferred until completion of the merger with Gypsum.

Plaintiff's motion for summary judgment on the liability issue was initially denied by the court. However, the court reconsidered the motion in light of *Mills v. Electric Auto-Lite Company*, 396 U.S. 375 (1970), which held that a plaintiff who proved violation of the proxy statute was entitled to judgment, regardless of financial injury and regardless of actual reliance on the defective proxy materials. The court concluded that the materiality of the defect in Susquehanna's proxy materials had been established as a matter of law. Although the question of materiality was generally a question of fact, Susquehanna's investment of twenty-two percent of its assets in the stock of a third corporation was a fact which all reasonable minds would conclude was necessary to consider in evaluating the proposed merger with Gypsum. The policy of disclosure which liability under Rule 14a-9 vindicated was so important that the director's claims of good faith, honest business judgment and protection of corporate opportunity in not disclosing were not a sufficient defense to the charge.

*Colonial Realty Corporation v. Baldwin - Montrose Chemical Company*, 312 F. Supp. 1296 (E.D. Pennsylvania 1970) (Judge Weiner)

Plaintiff, on behalf of itself and all other Chris-Craft Industries, Incorporated shareholders, brought an action alleging that defendants had violated §§10(b) and 14(a) of the Securities Exchange Act of 1934 and Rules 10b-5 and 14(a)-9 thereunder. Baldwin began purchasing shares of Chris-Craft in 1966 and by 1967 held approximately 35 percent of the outstanding shares. Baldwin acknowledged in an application for exemption under the Investment Company Act, that its last acquisition gave it working control of Chris-Craft and that no other individual or group was known to own as much as 5 percent of the Chris-Craft stock. Subsequently the corporations agreed on a merger of Baldwin into Chris-Craft and issued a joint proxy statement to stockholders, who then approved the merger. The fact that Baldwin's shares gave it working control of Chris-Craft was not revealed in the statement, although the amount of shares purchased by Baldwin and the fact that five of Chris-Craft's ten directors were from Baldwin's board was stated.

In granting plaintiff's motion for summary judgment, the court initially accepted the argument that an exchange of stock in a merger was protected by §14(a) and the pertinent rules. It was admitted that the proxy contained no statement concerning Baldwin's working control and the court held that this information was material since the vote of the other Chris-Craft stockholders was required for adoption of the merger. The court also held that a sufficient causal relationship was established between the violation and the plaintiff's injury. (The court certified its order pursuant to 28 U.S.C. §1292(b).)

*Abramson v. Nytronics, Incorporated*, 312 F. Supp. 519 (S.D. New York, 1970) (Judge Mansfield)

Plaintiff brought this derivative and representative stockholder's action on behalf of Gulton Industries, Inc., to enjoin consummation of an agreement between Gulton Industries, and Nytronics whereby Gulton was to acquire 20.4% of its own common stock from Nytronic's in exchange for cash and corporate assets. Plaintiff alleges that certain proxy material sent to Gulton stockholders by its defendant-directors in order to secure approval of the transaction violated §§10 and 14 of the Securities Exchange Act and Rules 14a-9 and 10b-5. It was also alleged that §10b and Rule 10b-5 were violated by the allegedly grossly inadequate consideration to be received by Gulton and by Nytronics failure to disclose that it had unsuccessfully attempted to sell the shares to third parties.

After plaintiff's complaint had been filed, Gulton supplemented its original 52-page proxy statement with a one-page letter describing and briefly rebutting the plaintiff's allegations. Plaintiff then sought a preliminary injunction to prevent the stockholder meeting and the defendants agreed to adjourn the meeting to a later date and to issue supplemental proxy material. Defendants then sent out an eight-page letter containing additional financial information related to plaintiff's contentions. In addition, a superseding proxy card was enclosed. Plaintiff was not satisfied and renewed his motion for preliminary injunction.

The District Court held that plaintiff had failed to make a case for preliminary injunction of the stockholder meeting. Initially, the court noted that enjoining the meeting might prevent the sale from *ever* occurring, while allowing the meeting and sale to proceed would not result in irreparable injury to the plaintiff since the transfer of the cash and two self-contained business entities from Gulton to Nytronics could be reversed with minimal difficulties. The conclusive factor in the court's decision was the plaintiff's failure to present clear evidence of wrongdoing. It observed that proxy material need not present the contentions of both sides so long as it sets forth all facts necessary to enable a reasonably intelligent stockholder to make his own informed decision. The full disclosure provided by the proxy material was also held to eliminate any other possible 10b-5 violation arising out of this transaction. Finally the court exhaustively examined the plaintiff's state law claim of corporate waste and concluded that plaintiff had failed to show such a disparity in value in the transaction as to warrant preliminary injunctive relief.

SECURITIES - TENDER OFFER - §14

*The Susquehanna Corporation, v. Pan American Sulphur Company*, (5th Cir., March 13, 1970) (Judge Ainsworth)

Plaintiff sued defendant and its directors, alleging violation of the disclosure and anti-fraud provisions of the Securities Exchange Act of 1934 in defendant's successful tender offer to purchase thirty-eight percent of the plaintiff's stock. The District Court, after an exhaustive hearing, had granted a preliminary injunction to enjoin Susquehanna from voting its stock pending final hearing.

The Court of Appeals reversed and ordered the complaint dismissed, holding that the defendants' statements in connection with its tender offer were in compliance with Sections 14(d)(1), 14(e) and 13(d)(1) of the Act and regulations thereunder.

Plaintiff had alleged that defendant failed to disclose that it was trying to obtain control of plaintiff by electing its representatives to plaintiff's Board of Directors. The court found that defendant's statements on its Schedule 13D, filed with the SEC in connection with its tender offer, were accurate representations of its intention and would have informed a reasonable stockholder that defendant intended to exercise strong control over the plaintiff. In addition, the record showed that plaintiff understood defendant's intentions and advised the shareholders and public investors of those intentions by its response to the tender offer, as evidenced by Schedule 14D's filed with the SEC and the institution of a civil action in the District of Massachusetts alleging securities law violations by the defendant in its tender offer.

Plaintiff had also alleged that defendant had failed to disclose, in its Schedule 13D statements, that it intended to merge plaintiffs with another company. Defendant's president had proposed a merger of plaintiff with a third corporation, but this was done only after discussion of the plan with plaintiff's president. In any event, neither corporation expressed any interest in the merger and it was never discussed again. The court held that this merger suggestion was not a plan or proposal required to be included in the Schedule 13D statements. And the defendant's Schedule 13D did state that defendant might, in the future, merge plaintiff with another corporation. The court approved the defendants statements as basically fair and complete under the circumstances and noted that the statute did not require the offeror to predict future behavior, which might be relied an unjustifiably by the offeree or investing public.

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Copies of unpublished opinions may be obtained from the authoring judge or from the undersigned. Your suggestions and comments concerning the content and format of these bulletins are most welcome as are copies of opinions and orders which may be appropriate for inclusion in a future bulletin.

Very truly yours,

THE BOARD OF EDITORS FOR THE
*MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION*

By _____
John T. McDermott
Executive Editor

# Manual for Complex and Multidistrict Litigation



EDITORIAL STAFF

JOHN T. McDERMOTT, ESQUIRE
EXECUTIVE EDITOR

TELEPHONE 382-8717
AREA CODE - 202

Judge Inzer B. Wyatt
Southern District of
New York

October 28, 1970

BULLETIN NO. 19

19

TO ALL JUDGES CONCERNED WITH COMPLEX AND MULTIDISTRICT LITIGATION

The following recent decisions appear to be of interest to judges involved in complex and multidistrict litigation. As these decisions have been collected and summarized by the editorial staff, their inclusion does not mean that the Board of Editors approves of the procedures used or the results reached in any particular case.

CLASS ACTION - Fair and Adequate Representation

*Moss v. Lane Co.*, 50 F.R.D. 122 (W.D. Virginia 1970) (Chief Judge Dalton)

The court denied defendant's motion to dismiss this class action brought on behalf of defendant's other Negro employees and alleging discriminatory employment practices. The class action was not defeated by failure of any one to intervene or join in the suit and the affidavits of many Negro employees, stating that plaintiff was not authorized to represent them, did not require dismissal. The court was not convinced of the "displeasure" of these other class members with the suit, but reserved the right to reconsider its decision after a full record was made.

CLASS ACTIONS - Manageability

*United Egg Producers v. Bauer International Corp.*, 312 F. Supp. 321 (S.D. New York 1970) (Judge MacMahon)

The district court granted plaintiffs' motion for partial summary judgment and dismissed two counterclaims asserted by the defendant claiming that plaintiffs had violated Sections 1 and 2 of the Sherman Act by their collective action through farm cooperatives. The court held such combinations immune from the proscriptions of Section 1 and held that the counterclaim failed to allege the fundamental elements of monopolization, i.e., market, monopoly power, and activity monopolized, and thus failed to state a claim under Section 2 of the Sherman Act.

The second counterclaim, brought as a class action on behalf of all consumers of eggs in the United States, was dismissed. The court ruled that ultimate consumers had no standing to sue since the direct injury, if any, was suffered by the primary buyers and was not passed on the ultimate consumer. The court also noted that the proposed class would be unmanageable and that defendant could not adequately represent the class's interests because he was also a supplier of agricultural products.

*Dixon v. Attorney General of Pennsylvania*, 313 F. Supp. 653 (M.D. Pennsylvania 1970) (Per Curiam)

Seven plaintiffs commenced this class action on behalf of the inhabitants of a state mental hospital for the confinement and treatment of the criminally insane. The complaint alleged that the state's "Mental Health and Mental Retardation Act" was unconstitutional on its face and as applied and the plaintiffs moved for summary judgment on the pleadings and on what were asserted to be admitted facts.

The three-judge court denied the motion, relying principally on the difficulties of adjudicating the suit on the record before it. The court felt that the therapeutic treatments sought by the plaintiffs might make the class action unmanageable since the court might be required to supervise the therapy of several hundred patients. The possible variance of treatments precluded the court from finding that the hospital had acted or refused to act on grounds generally applicable to the class, thus undermining the possibility of final injunctive or declaratory relief.

CLASS ACTION - Stockholder Class

*Korn v. Franchard Corp.*, 50 F.R.D. 57 (S.D. New York 1970) (Judge Mansfield)

Plaintiffs sought to recover damages resulting from their purchase of securities in reliance on a fraudulent prospectus issued by defendants. They sought an order permitting the action to be maintained as a class action on behalf of all purchasers of the securities who were damaged by the alleged fraud. No other similar suits were instituted and the defendants did not oppose the motion.

The court concluded that the requirements of Rule 23 were satisfied. Joinder of the potential class of 1,000 investors would be impractical; common questions of fact and law predominated; and plaintiff, a substantial investor with able counsel, could fairly and adequately represent the interests of the class. The class suit was thought superior to other methods of adjudication because of its beneficial effect on the financing of the lawsuit.

The court directed that written notice be sent by first class mail to members of the proposed class at plaintiffs expense. The simultaneous mailing of a "Proof of Claim" form was authorized because it might provide important information concerning the size of the class, the adequacy of plaintiffs as representatives and the nature and extent of reliance.

The court refused to require that the notice provide that any purchaser failing to file a proof of claim be forever barred from recovery. Considering Rule 23's philosophy of protecting small, inarticulate investors, the court concluded that failure to submit a proof of claim should not bar members until liability to the class was established or seemed fairly certain.

*Rosenblatt v. Omega Equities Corp.*, 50 F.R.D. 61 (S.D. New York 1970) (Judge Mansfield)

Plaintiffs in this derivative and representative stockholder's suit sought to recover damages from the officers and directors of Omega for certain securities law violations. They sought to maintain their action as a class action on behalf of two classes of plaintiffs, those who purchased and retained Omega shares and those who sold Omega shares during the relevant period. Similar suits in other states had been temporarily stayed pending determination of this motion.

The court held that a class action was appropriate. The impracticality of joining the class of approximately 2,000 shareholders was clear. It was also apparent that common questions of fact and law would predominate. The presence of several claims under Section 12 of the Securities Act of 1933 raising questions not common to the class did not preclude the use of the class action device. The court felt that Rule 23 should be liberally construed in favor of use of the class action device, especially in suits alleging fraud in violation of the Federal Securities Acts. The existing plaintiffs were judged to be sufficient in number and interest to fairly and adequately protect the interests of the members of the class and were represented by counsel experienced in the particular field. Since there was no indication that any stockholder was prepared to finance the litigation on an individual basis, the class action was found to be superior to any other method of adjudication.

CLASS ACTION - Settlement

*Jacob E. Yaffe v. Detroit Steel Corp.*, No. 70 C 1302 (N.D. Illinois, filed Sep. 1970) (Judge Decker)

Certain Detroit Steel shareholders brought this class action on behalf of themselves and all other shareholders to challenge the legality of the tender offer made to Detroit by another company. In spite of the court's urging, no formal motion for definition of the class was filed and during the absence of the assigned judge, plaintiffs obtained permission to amend their complaint to strike all references to a class action. The named plaintiffs then reached a settlement with the defendants and presented a stipulated dismissal order to the court for approval.

The court held that this lawsuit was still a class action and that dismissal was improper since notice had not been sent to the members of the class as required by Rule 23(a), Fed. R. Civ. P. The fact that no class action determination had yet been made was of no significance. The prior order allowing deletion of the class action allegation was vacated because of possible resulting prejudice to the rights of the class members and because the deletion was an impermissable abuse of the class action device. The court felt that the class action allegations gave the plaintiffs additional leverage with the defendants who might be willing to pay a premimum for the elimination of the class. The court set a hearing date for the purpose of establishing the class.

## COORDINATION OF RELATED LITIGATION

*Prudential Insurance Co. v. Trowbridge*, 313 F. Supp. 428 (D. Connecticut 1970) (Chief Judge Timbers)

After her husband's death Mrs. Trowbridge commenced an action against Prudential in the Southern District of New York to recover on certain life insurance policies. Prudential then commenced interpleader actions in Connecticut to resolve conflicting claims between Mrs. Trowbridge and her children and grandchildren.

Prudential moved to enjoin the other parties from instituting other actions or from proceeding with the Southern District action. Mrs. Trowbridge moved to dismiss these interpleader actions or, alternatively, to stay them and require Prudential to assert its claim as a compulsory counterclaim in the Southern District of New York action.

The court delayed ruling on these motions and ordered the parties to take steps to have all claims arising out of the policies adjudicated in the Southern District of New York action. The court stated its belief that, if jurisdictionally feasible and absent venue objections, the interests of justice and of the parties would best be served by litigating all claims in the Southern District of New York. The court noted that the Connecticut defendants had stated that they would raise no venue or other objections to being interpleaded in the Southern District of New York action pursuant to a Prudential counterclaim. Accodingly, the court ordered Prudential to assert such a counterclaim in the Southern District of New York and reserved jurisdiction pending further action in the Southern District of New York.

## TRANSFER - §1404a

*General Tire and Rubber Co. v. Jefferson Chemical Co.*, 50 F.R.D. 112 (S.D. New York 1970) (Judge van Pelt Bryan)

Plaintiff sought declaration of the invalidity and noninfringement of defendant's patent. The defendant asserted two counterclaims, the first alleging infringement of its patent and the second alleging the invalidity of the Frost Patent owned by General. The court granted General's motion for severance of the counterclaim involving the Frost Patent and transfer of that counterclaim to the District of Delaware pursuant to Section 1404(a).

The court concluded that there was no overlap of operative facts between the defendant's two counterclaims and that severance was compelled by the fact that other litigation involving the Frost Patent was pending in the District of Delaware and sound judicial administration required that these related cases be tried together. Transfer was possible because the court found that the counterclaim could have been brought as an original action in the District of Delaware.

On rehearing the court rejected defendant's argument that plaintiff's motion before the Judicial Panel on Multi-district Litigation was inconsistent with and superceded its motion for transfer under Section 1404(a). The court observed that Sections 1404(a) and 1407 were complementary and held that a motion before the Panel did not oust the court of jurisdiction to decide the Section 1404(a) motion.

*Alameda Oil Co. v. Ideal Basic Industries, Inc.*, 313 F. Supp. 164 (W.D. Missouri 1970) (Judge Hunter)

Former stockholders of the Potash Company of America sought to recover for alleged violations of the Securities Exchange Act of 1934 in connection with the merger of Potash into Ideal. Defendants objected to venue and service and the court ordered a hearing on the question of transfer under Section 1404(a).

The court concluded that the action should be transferred to the District of Colorado. Initially it determined that the action could have been brought in the District of Colorado originally. The court then decided the relevant factors indicated that the action should be transferred to Colorado: both Potash and Ideal were Colorado corporations with their corporate records located there, and the acts alleged by plaintiffs occurred basically in Colorado and many essential witnesses were located there. Another factor influencing the court was the strong likelihood that the suit would be maintained as a class action. The court concluded that in the event the action is later denominated a class action, it should be tried in Colorado rather than Missouri. The action was therefore transferred to the District of Colorado.

*RES JUDICATA*

*Denckla v. Maes*, 313 F. Supp. 515, (E.D. Pennsylvania 1970) (Judge Troutman)

Defendants moved to dismiss this derivative action contending that the action was barred by an earlier proceeding in Delaware state court. The district court agreed that *res judicata* applied to so much of the action as was involved in the Delaware proceedings and granted summary judgment for

defendants as to the remaining claims.

In applying the *res judicata* doctrine, the court was satisfied that there was identity of parties in the two actions since the additional defendants in this action were in privity with the defendants in the Delaware action. The court stressed that the doctrine's requirement of identity of subject matter did not require identity of causes of action in the two proceedings. The ultimate and controlling issue in both proceedings was the propriety of the defendants' conduct in securing control of the corporation and the plaintiffs other claims, although not decided on the merits in Delaware, did not affect the identity of subject matter.

DIVERSITY JURISDICTION - Manufactured

*Butler v. Colfelt*, 313 F. Supp. 527 (E.D. Pennsylvania 1970) (Judge Troutman)

The district court granted the defendant's motion to dismiss this diversity action arising from a traffic accident, finding that diversity was "manufactured" in violation of 28 U.S.C. §1359. The minor plaintiff, his parents and the defendant were all Pennsylvania residents and the accident occurred there, but prior to the commencement of this action an aunt from New Jersey was appointed guardian of the minor plaintiff. She was appointed only for purposes of this litigation, had no special interest in or responsibility for the minor, and had no apparent expertise in the field of finances. Although the guardian was related to the minor and the divorced parents asserted confidence in her ability and a lack of confidence in one another, the court concluded that the local character of the action and the absence of other positive factors indicated in *Groh v. Brooks*, 421 F.2d 589 (3rd Cir. 1970), required dismissal of the action.

VENUE - Limited by Contract

*Goff v. AAMCO Automatic Transmissions, Inc.*, 313 F. Supp. 667 (D. Maryland 1970) (Chief Judge Thomsen)

Plaintiffs, Maryland citizens, commenced this action in the Maryland state courts alleging breach of a franchise contract by the defendant, a Pennsylvania corporation with its principal place of business in Pennsylvania. The defendant removed to the district court and filed a motion to dismiss for lack of venue or to transfer the action under §1404(a) to the Eastern District of Pennsylvania.

The district court denied both motions although the defendant emphasized that the franchise contract entered into in Pennsylvania required the plaintiffs to bring all legal proceedings arising from the contract in the Pennsylvania state and federal courts. The court, applying Maryland conflict of laws rules held that the Pennsylvania courts would enforce such a clause unless *unreasonable*, but held that the clause was unreasonable as applied.

The court found the contract was on a form printed by defendant, the dominant party, and that the alleged breach dealt with the location of plaintiffs' franchise within Maryland. In addition, all plaintiffs witnesses were in Maryland beyond the 100 mile subpoena reach of the Pennsylvania federal courts and beyond the reach of Pennsylvania state court process. Defendant's witnesses were all its own employees. These facts seriously impaired the plaintiffs' ability to pursue their cause of action in Pennsylvania, thus making the jurisdiction-limiting clause unreasonable under the Pennsylvania law.

SERVICE - 100 Mile Radius

*Deloro Smelting & Refining Co. v. Englehard Minerals & Chemical Corp.*, 313 F. Supp. 470 (D. New Jersey 1970) (Judge Cohen)

Deloro sued Englehard in New Jersey state court and Englehard removed the action to federal court in Camden. Englehard then sought to join Klass, a corporation with its principal place of business in Baltimore, as third party defendant. Process was served on Klass, pursuant to Rule 4(f), in Baltimore, Maryland. As a precaution Englehard also served Klass by certified mail, pursuant to Rule 4(e), under the New Jersey long-arm statute. Klass moved to dismiss the third-party complaint or to quash the service of process.

Klass argued that the distance between Camden and Baltimore, measured by the ordinary, usual and shortest route of public travel, is more than 100 miles but the court upheld service under Rule 4(f) by applying an "as the Crow flies" test to the measurement of the permissible 100 mile "bulge" of jurisdiction.

Because of the novelty of the Rule 4(f) issue the court went on to consider and reject service under New Jersey's long-arm statute as it could not find the minimal contacts required by due process to subject Klass to jurisdiction under Rule 4(e). Although Klass did business on a national scale, there was nothing to indicate that Klass, by its conduct, had sought the benefits or protection of the laws of New Jersey.

DISCOVERY - Attorney-Client Privilege - *Work Product*

*Lee Nat'l Corp. v. Deramus*, 313 F. Supp. 224 (D. Delaware 1970) (Judge Latchum)

Lee National commenced this action to recover for alleged securities law violations in connection with Kansas City Southern Industries Inc.'s attempts to amend its certificate of incorporation. At oral depositions of Kansas City's officers plaintiff's attorney inquired whether Kansas City had consulted with its attorneys concerning proposed changes in by-laws and certificate of incorporation and, if so, when and who was present. Kansas City's attorney objected and instructed the deponents not to answer the question in so far as it inquired into the *subject matter* discussed with counsel on any occasion.

The court found a limited waiver of the attorney-client privilege in that Kansas City's officers had previously stated, by affidavit and deposition, that this particular subject matter was discussed with counsel on several specific occasions. Once Kansas City disclosed that it had had some conversations on this subject, it could not invoke the privilege when asked about other discussions of this subject matter with counsel. The objection was overruled and the deponents were ordered to disclose all instances when the subject of charter and by-law amendments was discussed with counsel.

*Honeywell, Inc. v. Piper Aircraft Corp.*, 50 F.R.D. 117 (M.D. Pennsylvania 1970) (Chief Judge Sheridan)

Defendant's motion for production of certain documents was granted in this patent infringement suit. Documents relating to interference proceedings before the Patent Office were protected by the work product rule, since those cases

were of a different nature and involved different parties. There was no indication the documents were prepared "with an eye towards litigation" involved in this *suit*. The plaintiff also failed to meet its burden of showing that these documents were protected by the attorney-client privilege as it was not shown that the communications were between counsel and the corporation's "control group."

DISCOVERY- Confidentiality

*Reed v. Smith, Barney & Co.*, 50 F.R.D. 128 (S.D. New York 1970) (Judge Cooper)

In this action for alleged misrepresentations concerning the adviseability of purchasing a certain stock, the plaintiffs sought to discover documents reflecting the stockholders and their current holdings. The plaintiffs also sought an order requiring one of the defendants to give in his deposition the names of all purchasers of the stock during the relevant period. The plaintiff's avowed purpose was to discover evidence supporting his claim that defendants had misrepresented the desirability of the stock.

Although the court did not characterize plaintiff's discovery attempts as irrelevant or unlikely to produce admissable evidence, the court held that disclosure of all stockholders and their holdings was an unnecessary invasion of the confidentiality of transactions by individuals not involved in this litigation. The defendants were ordered only to give the names of *purchasers* of the stock during the *relevant period*.

DISCOVERY - Depositions

*Midland Investment Co. v. Van Alstyne, Noel & Co.*, 50 F.R.D. 46 (S.D. New York 1970) (Judge Croake)

The court consolidated four actions into the present action and three related actions into a separate action. It also provided that plaintiffs in these two consolidated actions would take any depositions of defendants successively on the same day.

Defendants first noticed the depositions of all plaintiffs in this consolidated action but no agreement was reached concerning a schedule for these depositions and none were taken. Plaintiffs then noticed the depositions of all defendants. Defendants moved the court, pursuant to Rule 30(b), Civ., to order that it be permitted to complete its depositions

before plaintiffs begun. Plaintiffs argued that the complexity of the cases and the need to depose key witnesses before their memories dimmed were sufficient reasons for an exception to the normal order of discovery. The court was not persuaded that the need for prompt examination affected the question of priority, especially where the plaintiff's refusal to comply with defendant's deposition schedule had already delayed discovery.

*Costanza v. Monty*, 50 F.R.D. 75 (E.D. Wisconsin 1970) (Judge Gordon)

Plaintiff, a Wisconsin resident brought a personal injury (automobile) action in Wisconsin, but then moved to Nevada. Defendant sought an order requiring the plaintiff to submit to a physical examination and oral deposition in Wisconsin but she opposed the motion on the basis of financial hardship.

The court granted the motion, reasoning that if the plaintiff chose to bring suit in Wisconsin there was no reason why she should not return to Wisconsin for the examination. Plaintiff's request that defendant pay her travel expenses was also refused.

*Sabado-Ollero Inc. v. United Dairymen's Assoc.*, Civ. No. 7144 (W.D. Washington, Filed August 31, 1970) (Judge Boldt)

Plaintiffs sought to depose certain witnesses in this civil antitrust action and orders were entered confirming immunity to the witnesses under 15 U.S.C. §§32, 33. The Department of Justice intervened as *amicus curiae* and moved to rescind the immunity orders, arguing that the immunity statutes applied only to antitrust action in which the United States was plaintiff. The motion was denied.

The court held that the statutory language on its face granted immunity to witnesses in private civil antitrust actions and that the legislative history indicated no intention to limit immunity in the manner argued by the government.

DISCOVERY - Protective Order

*Williams v. Johnson & Johnson*, 50 F.R.D. 31 (S.D. New York 1970) (Judge Tyler)

In this damage action resulting from the use of the contraceptive, Ortho-Novum, the defendants sought a protective order under Rule 30(b) and 31(d), forbidding plaintiffs or

their attorneys "from divulging any of the material obtained from defendants through the discovery process of this court to any persons or firms not directly connected with the preparation of this action for trial."

The court denied the motion, rejecting the defendant's argument that the fruits of discovery in one action should be used in that action only. The sharing of the fruits of discovery was at least theoretically advantageous to plaintiffs' counsel and would lead to more effective and efficient representation of their clients. The court observed collaboration of this type tended to promote the objectives of Rule 1: "The just, speedy and inexpensive determination of every action." The court also held that no facts had been presented to support defendant's claim that plaintiffs' counsel would use the fruits of discovery to stir up more litigation nor did the court find any factual support for defendant's claim that plaintiffs' counsel had engaged in improper publicizing of the case.

DISCOVERY - Sanctions

*Allied Artist Pictures Corp. v. Giroux*, 50 F.R.D. 151 (S.D. New York 1970) (Judge MacMahon)

Plaintiff moved for a default judgment because of defendant's failure to answer plaintiff's interrogatories within the time prescribed by Rule 33. Alternatively, plaintiff sought an order compelling the defendant to answer the interrogatories and pay plaintiff its reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. Defendant answered the interrogatories on the morning of argument of the plaintiff's motion, some 69 days after the interrogatories were first served.

The court felt default judgment was too harsh a remedy but that pecuniary sanctions were fitting both to compensate plaintiff and to deter such blatant disregard for the Federal Rule and the alternative relief was granted.

* * * * * * * * *

Copies of unpublished opinions may be obtained from the authoring judge or from the undersigned. Your suggestions and comments concerning the content and format of these bulletins are most welcome as are copies of opinions and orders which may be appropriate for inclusion in a future bulletin.

Very truly yours,

THE BOARD OF EDITORS FOR THE
*MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION*

By John T. McDermott
John T. McDermott
Executive Editor

Manual for Complex and Multidistrict Litigation



November 12, 1970

Judge Inzer B. Wyatt
Southern District of New York

BULLETIN NO. 20
*ANTITRUST SPECIAL*

TO ALL JUDGES CONCERNED WITH COMPLEX AND MULTIDISTRICT LITIGATION

The following recent decisions appear to be of interest to judges involved in complex antitrust litigation. As these decisions have been collected and summarized by the editorial staff*, their inclusion does not mean that the Board of Editors approves of the procedures used or the results reached in any particular case.

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ARBITRATION AGREEMENT

*Power Replacement, Inc. v. Air Preheater Co.*, 426 F.2d 980 (9th Cir. 1970) (Judge Jameson)

The parties in this action had, as a result of prior antitrust litigation, entered into a settlement agreement which provided for arbitration of any future antitrust claims. The plaintiff sought recission of that agreement with respect to antitrust claims arising after the date of the settlement agreement. The district court denied relief and the plaintiff appealed.

The court of appeals reversed and held the arbitration agreement unenforceable as to antitrust claims not in existence when the agreement was made. The court first found the district court's order granting a stay of its proceedings pending arbitration, denying abatement of the arbitration proceedings and denying a temporary injunction was appealable under 28 U.S.C. §1292(a)(1). The court then held that the public interest involved precluded the arbitration of such antitrust claims. The court rejected the analogy to settlement discussions between the parties since the agreement to arbitrate *preceded* the present dispute.

* The Editor wishes to thank Mr. Jon Paugh, Administrative Attorney for the Judicial Panel on Multidistrict Litigation, for his assistance in preparing this bulletin.

CLAYTON - Section 4 - Target Area

*Billy Baxter, Inc. v. Coca-Cola Co.* (2d Cir., Aug. 25, 1970) (Judge Anderson)

The plaintiff, a franchisor of a line of nonalcholic carbonated beverages commenced this action against Coca-Cola and Canada Dry, alleging violations of the Sherman, Clayton and Robinson-Patman Acts in that the defendants avoided competition with each other's product lines and had engaged in concerted price concessions, discounts, gifts and allowances to plaintiff's customers, thereby excluding plaintiff's products. The district court granted the defendants' motion for summary judgment, concluding that plaintiff, as franchisor, was outside of the "target area" of alleged antitrust activities - the marketing of bottled beverages.

The court of appeals affirmed, finding that Section 4 of the Clayton Act, which requires that treble damage suits be based on injuries occurring "by reason of" antitrust violations, was not satisfied by plaintiff's allegations. The only facts alleged by plaintiff concerned improper persuasion of retail outlets to buy products other than those produced by plaintiff's franchisees. There was no suggestion of attempts to interfere with plaintiff's relationships with *his franchisees*. The "target" area was the marketing of bottled beverages and plaintiff found to be outside that area.

The plaintiff's contention that the defendants were the plaintiff's "competitors" also failed to provide the necessary causal link between the alleged violation and this plaintiff. Judge Waterman dissented, rejecting the majority's "anachronistic judicial gloss upon the phrase 'by reason of.' "

*Mulvey v. Goldwyn Productions* (9th Cir., Oct. 20, 1970) Judge Hufstedler

The plaintiff appealed from a judgment dismissing his claim for relief under Clayton 4 which charged the defendant with diminishing the value of his contractual rights in five movies by including them in a "block booking" of fifty television movies. The defendant conceded that he "block booked" the fifty films in violation of §1 of the Sherman Act but argued successfully that the plaintiff was outside the "target area." The district court found that Mulvey was neither a supplier of motion pictures to television nor a customer in the market for such pictures and therefore not within the area of the economy endangered by a breakdown of competitive conditions because Goldwyn's acts of licensing were aimed at television stations.

The court of appeals disagreed and reversed. It held that the plaintiff was clearly within the area "which it could be forseen would be affected" by block bookings.

*Fontana Aviation, Inc. v. Beech Aircraft Corp.* (7th Cir., Sept. 23, 1970)(Judge Pell)

The jury had awarded plaintiff $150,000 in damages, which had then been trebled, in its antitrust action alleging a conspiracy between Beech and its distributors to create exclusive distribution territories, fix prices and otherwise control the distribution and sale of Beech's products. The district court had granted judgment n.o.v. to the defendants, holding that plaintiff failed to prove damages, and conditionally granted a new trial in the event of reversal on appeal.

The court of appeals reversed the judgment n.o.v. and remanded for a new trial. The court first examined the antitrust violation issue and concluded that there was enough evidence to support a finding of a horizontal agreement among distributors to lessen competition by dividing markets. There was also sufficient evidence to support a finding of injury to plaintiff's business. Although plaintiff's evidence concerning sales lost as a consequence of defendant's practices was "rather weak", it was sufficient to justify submitting the issue of the jury.

## CLAYTON - Section 7 - Private Actions

*Metric Hosiery Co. v. Spartan Industries Inc.*, 50 F.R.D. 50 (S.D. New York 1970) (Judge Mansfield)

Plaintiff in this private antitrust suit moved to strike defendant's affirmative defense, which asserted that the violation of Section 7 of the Clayton Act alleged by plaintiff gave rise to no *private remedy*. The court granted the motion to strike, relying on *Gottesman v. General Motors Corp.*, 414 F.2d 956 (2d Cir. 1969), which held that a violation of Section 7 supported a claim for money damages. The court made an early ruling on the motion because it was important for the plaintiff to know whether to prepare its Section 7 claim for trial. The apparent lack of damage to the plaintiff was irrelevant for purposes of deciding the validity of plaintiff's cause of action.

*Richetti v. Meister Brau, Inc.* (9th Cir. Sept. 11, 1970) (Judge Taylor)

Three wholesale beer distributors sought to enjoin defendant's termination of their distributorships on the ground that the cancellation, in combination with the defendant's recent acquisition of the brand, constituted a violation of Section 7 of the Clayton Act because the result would be a reduction in competition in the wholesale beer distribution business in California. The district court's dismissal of the action was affirmed on appeal.

The court of appeals agreed that *subsequent* anti-competitive activities might bring an acquisition within Section 7, but there was no suggestion of anticompetitive *motivation* in these cancellations. The facts indicated that defendant was only seeking better equipped and more aggressive distributors, conduct not condemned by the Sherman or Clayton Acts.

COLLEGE ACCREDITATION

*Marjorie Webster Jr. College, Inc. v. Middle States Assoc. of Colleges and Secondary Schools, Inc.* (D.C. Cir., June 30, 1970) (Chief Judge Bazelon)

Defendant refused to consider plaintiff's application for accreditation because plaintiff was not a nonprofit organization with a governing board representing the public interest. Plaintiff then brought this suit to compel accreditation without regard to its proprietary character. The district court found that defendant had violated §3 of the Sherman Act. (See Bulletin No. 10, Page 1)

The court of appeals reversed, concluding that the Sherman Act was inapplicable to defendant and judicial interference with defendant's policies was not warranted. The defendant's objectives in developing its consistent policy of not accrediting proprietary institutions were admittedly not commercial and any incidental restraint of trade did not warrant application of the antitrust laws. Since defendant did not wield monopoly power over the operation of educational institutions and since its decision with regard to accreditation was entitled to substantial latitude, no basis for plenary judicial review of its action existed.

CRIMINAL - *Coram Nobis*

*United States v. National Dairy Products Corp.* (W.D. Missouri, May 12, 1970) (Judge Oliver)

Raymond J. Wise, an individual defendant in these antitrust prosecutions, sought, by *coram nobis*, to have his conviction vacated. Wise and National Dairy Products had been convicted of certain counts of the indictment. Both appealed but for personal reasons Wise dismissed his appeal. Subsequently National Dairy's conviction on these counts

was reversed, remanded and eventually dismissed. Although Wise had dismissed his appeal, the fine imposed against him was vacated and his probation terminated with the agreement of the parties. No request was made to vacate and set aside the conviction but the order entered gave Mr. Wise full relief under the then-existing circumstances.

After that, however, plaintiffs in pending *civil treble damage actions* named Wise as a defendant, with the intention of profiting from the collateral consequences of the conviction under Section 5 of the Clayton Act. To avoid the introduction of his conviction into evidence at the civil trials, Wise sought the vacation of his sentence by writ of error *coram nobis*.

The court granted the relief. It rejected the Governments invocation, on these facts, of the "general rule" of *Sunal v. Large*, 332 U.S. 174 (1947), that collateral proceedings could not be used as a substitute for appeal. That rule, as subsequent Supreme Court cases on the subject made clear, did not preclude the collateral assertion of constitutional claims or claims of flagrant error where no other remedy was available. Interpreting *coram nobis* as a post-conviction procedure available to those federal prisoners falling outside the "custody" requirement of Section 2255, the court concluded that relief should be granted from a conviction which obviously would have been reversed and remanded for a new trial if the appeal had not been dismissed for good and sufficient personal reasons of the appellant.

CRIMINAL - Trial Errors - *Plumbing Fixture Antitrust*

*United States v. Amer. Radiator & Stand. San. Corp.* (3rd Cir., Sept. 23, 1970) (Judge Seitz)

The court affirmed the defendants' convictions for violating Section 1 of the Sherman Act in connection with the sale of plumbing fixtures. The evidence was sufficient to support the verdict against *all defendants* and the few errors committed in the conduct of the trial did not in the opinion of the court of appeals, deprive the defendants of a fair trial or subject them to substantial prejudice. The court reviewed claims of error in the district judge's participation in the trial, prosecutorial misconduct, evidentiary rulings, the charge and submission of the case to the jury, *Brady v. Maryland* and Jencks Act claims, and several other areas. Although errors were found with regard to prosecutorial misconduct, evidentiary rulings, and the Jencks Act, the court emphasized that the defendants were not entitled to a *perfect trial* and reversal was not warranted. Judge Aldisert dissented from the affirmance of the conviction of one manufacturer and would have reversed for improper inflammatory cross-examination by the Government prosecutor.

EMPLOYER ASSOCIATION/Union Conspiracy

*Intercontinental Container Transport Corp. v. New York Shipping Assoc.*, 426 F.2d 884 (2d Cir. 1970) (Judge Hays)

The court of appeals reversed the district court's grant of a preliminary injunction in this antitrust action in which the plaintiff alleged a combination and conspiracy between the dock workers' union (ILA) and the steamship carriers association (NYSA) to exclude all but NYSA members from engaging in the business of packing and unpacking containerized cargo in the Port of New York. (See Bulletin No. 18, Page 7)

The court of appeals concluded that the General Cargo Agreement between ILA and NYSA and actions taken under it appeared to be within the protection of the labor exemption to the antitrust laws. The ILA's position on containerization arose from its legitimate interest in preserving the jobs of its members and NYSA was forced to yield to certain of ILA's demands in arriving at the terms of their General Cargo Agreement. Plaintiff's contention that it had been refused admission to NYSA although it did the same work as some stevedore members and employed ILA labor was also rejected.

In a separate concurring opinion Judge Anderson agreed that plaintiff had not made the required showing of probable success. He felt that the district court had erred in concluding that ILA's valid work preservation rules were being used by ILA and NYSA to exclude an employer willing to comply with their substance. This conclusion was erroneous because plaintiff had not really offered ILA members employment on terms compatible with the General Cargo Agreement since its facilities were not waterfront piers or docks, as required, but isolated warehouses without the peripheral job opportunities available at the piers and docks.

GOVERNMENTAL IMMUNITY

*Hecht v. Pro Football, Inc.*, 312 F. Supp. 472 (D.C. 1970) (Judge Jones)

Plaintiffs alleged that the lease between the Washington Redskins and the managing board of Robert F. Kennedy Stadium violated Sections 1, 2 and 3 of the Sherman Act in that the thirty-year contract provided that the stadium could not be rented to another professional football team during the term of the lease. The court granted the defendants' motion for partial summary judgment on the allegations arising from the stadium contract. The lease and its covenants were held to be valid governmental action immune from the federal antitrust laws.

*Gas Light Co. of Columbus v. Georgia Power Co.*, 313 F. Supp. 860, (M.D. Georgia, 1970) (Judge Elliott)

The district court granted the motions of defendant electric companies for summary judgment in this antitrust action brought by a natural gas company alleging a conspiracy to eliminate gas as a competitive energy source. The court held that each of the challenged acts was the result of orders of the state regulatory agency pursuant to a comprehensive regulatory scheme and were, therefore, excluded from the scope of the federal antitrust laws.

INTERVENTION

*Consolidated Edison v. DiNapoli* (S.D. New York, Oct. 16, 1970) (Judge Palmieri)

This is a treble damage action under the Sherman and Clayton Acts for recovery of overcharges on construction contracts in New York City allegedly resulting from price fixing and bid rigging. The defendants are thirteen construction companies and construction contracting firms and the plaintiff is a large utility serving New York City. The City of New York moved to intervene either as a matter of right under Rule 24(a) or *permissively* under Rule 24(b). All of the parties in the litigation oppose the City's intervention.

The court denied the motion finding that the City had no antitrust claims of its own and was not a party to any of the contractual relationships underlying this litigation. The City claimed to be in a better position to put forth the claims of the consumer interests so as to insure "maximum recovery possible by Consolidated Edison." The court concluded that the City's interest in this litigation was indirect and tangential and it noted that the nature of this complex litigation was such that intervention would create additional problems both in pretrial and trial stages which could seriously delay and impede the resolution of the issues.

*Cf. Boehringer Ingelheim v. Ciba*, (S.D. New York, Sept. 8, 1970) (Judge Frankel)

NORRIS - LaGuardia Act

*U.S. Steel Corp. v. Fraternal Assoc. of Steel Haulers* (3rd Cir., Sept. 17, 1970) (Judge Aldisert)

The question on appeal was the propriety of a preliminary injunction entered by the district court enjoining defendants from picketing or interfering with steel haulers serving the plaintiffs. The defendant, FASH, contended that it was a labor group within the anti-injunction protection of §13(c) of the Norris - LaGuardia Act and immunized from the antitrust laws. The court of appeals disagreed and affirmed the granting of the preliminary injunction.

The court stressed that the determination that FASH's dispute with plaintiff's was not a labor dispute was only a preliminary finding. Examining the facts presented and the case law, the court concluded that FASH, an association of owner-drivers of steel hauling rigs, was really making an "owner's demand for a more profitable operation of his equipment" and thus was not engaging in a labor controversy.

*National Dairy Products Corp. v. Milk Drivers and Dairy Employees Local 680,* (S.D. New York, Feb 4, 1970) (Judge Frankel)

Plaintiff and defendant had negotiated a collective bargaining agreement whereby the plaintiff agreed not to manufacture its product in facilities outside the New York metropolitian area (in which the local operated) for sale or, distribution within that area. An arbitrator found that plaintiff's sale of its product, manufactured in Philadelphia, violated the parties agreement. The arbitrator refrained from ruling on the plaintiff's contention that compliance with the agreement would violate the antitrust laws. This action was then brought to test that issue and the court granted summary judgment to the defendant local.

Complying with the agreement would not, in the opinion of the court, constitute a *per se* violation of the antitrust laws under *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967), because there was no conspiracy to allocate exclusive territories to distributors and no attempt to exclude the distributor involved from selling in the metropolitan area. The court also found that the agreement came within the exemption of union activities from antitrust law as it was an attempt to achieve and preserve minimum wage and hour conditions within the area, not an attempt to stifle or eliminate competition. The court also held that the agreement was not illegal under the "hot cargo" provisions of the Labor Relations Act since there was no agreement to cease dealing in the products of another employer or doing business with another person but it doubted whether the fact an agreement was an unfair labor practice could divest it of its antitrust exemption.

*PARENS PATRIAE*

*Hawaii v. Standard Oil Co.* (9th Cir., Sep. 25, 1970) (Judge Merrill)

In the district court, Hawaii was permitted to maintain its action, *parens patriae,* for damages to its general economy resulting from allegedly illegal fixing and maintaining of gas and asphalt prices on the authority of *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945) (See Bulletin No. 7, Page 4)

The court of appeals reversed and remanded for dismissal of the *parens patriae* count. The *Georgia* case was distinguished on the basis of the portions of the Clayton Act

under which the two actions were brought. Georgia had sought relief under §16 of the Act authorizing "any person" to secure *injunctive relief* whereas Hawaii invoked §4, which provides for recovery of *damages* only by a person injured in his business or property by the alleged violation.

The court was skeptical of the existence of independent harm to an abstraction like the general economy but assumed the existence of such injury and held the claim to be outside of the scope of §4. An injury to the general economy of a state could not be regarded as an injury to the business or property of the state or its people. Any such injury was also too incidental and remote a consequence of any antitrust violation to support recovery.

*In re Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Motor Vechicle Air Pollution Control Equipment*, (C.D. California, Sep. 4, 1970) (Judge Real)

The district court denied in part and granted in part the defendants' motions to dismiss these antitrust complaints seeking treble damages for an alleged conspiracy among automobile manufacturers to prevent the development of air pollution control equipment. The court held that there need be no "commercial relationship" between plaintiffs and defendants to permit recovery of treble damages for antitrust violations and that the plaintiffs' allegations of injury resulting from pollution caused by the defendants' conspiracy sufficiently alleged injury to their respective business or property by reason of the defendants' antitrust violations.
The *parens patriae* claims of the governmental entities were rejected insofar as they were used as a substitute for a class action by individual citizens. The defendants' attack on the plaintiffs' petition for injunctive relief was rejected as premature since the transferee judge was at that point only concerned with coordinating pretrial proceedings and not with granting relief. Finally the court granted the motion to dismiss those counts of the actions asserting violations of a constitutional right to clean air and a safe healthy environment.

PRIMA FACIE EFFECT - FTC Decree

*Lee National Corp. v. Atlantic Richfield Co.* (E.D. Pennsylvania, Feb. 4, 1970) (Judge Troutman)

Plaintiff sought treble damages for defendant's alleged violations of Sections 1 and 2 of the Sherman Act in connection with certain so-called sales commission agreements existing between defendants and their dealers and pertaining to the purchase and sale of tires, batteries and accessories (TBA). It sought summary judgment on the liability issue, asserting that the case law and prior FTC proceedings involving these agreements, established them to be *per se* violations of the antitrust laws.

After a careful review of the case law, the court denied the motion holding that the prior cases did not support the conclusion that FTC findings under Section 5 of the Commission's Act were *per se* determinative of a subsequent private action under Section 4 of the Clayton Act alleging violations of Sections 1 and 2 of the Sherman Act.

STATUTE OF LIMITATIONS

*Hall v. E.I. Dupont DeNemours & Co.*, 312 F. Supp. 358, (E.D. New York 1970) (Judge Weinstein)

In this antitrust action against manufacturers of blasting caps and their trade association, the plaintiffs, minors injured by the explosion of such caps between 1956 and 1961, alleged a conspiracy to inhibit the manufacture of safe blasting caps and to refrain from proper labeling of their products. The court granted the defendants' motion to dismiss, holding that the actions were barred by the Clayton Act's Statute of Limitations, 15 U.S.C. §15. The infancy of the plaintiffs during this period was held not to toll the running of the statute. The court noted the absence of any special circumstances mitigating against application of the statute: there was no allegation that the plaintiffs through their guardians could not have sued at an earlier date; there was no basis for finding that fraud or deceit by the defendants had prevented the plaintiffs from instituting a timely suit; nondisclosure or denial of the existence of the conspiracy did not constitute fraud or deceit for tolling purposes; plaintiffs had known of their injuries and their *state law* causes of action from the time of the explosion and, at most, had only been unaware of the basis for concurrent federal jurisdiction.

*Maricopa County v. American Pipe and Constr. Co.* (9th Cir., Aug. 28, 1970)(Per Curiam)

The court of appeals affirmed the district court's holding that the tolling provisions of Section 5(b) of the Clayton Act continued in effect for one year after the termination of a *second* Government enforcement action *begun within one year* of the initial Government enforcement action. The court did not pass upon the district court's opinion that a Government antitrust proceeding filed more than a year after the termination of a prior Governmental antitrust action could not toll the running of the statute of limitation on private treble damage actions. (See Bulletin 7, Page 3)

SUMMARY JUDGMENT

*Flood v. Kuhn*, 312 F. Supp. 404, (S.D. New York 1970) (Judge Cooper)

Defendants moved to dismiss Curt Flood's action to enjoin the operation of organized baseball's reserve system and to recover damages for antitrust violations in the operation of concessions and the bidding on broadcast rights. The court denied the motion as to the reserve system, holding that the plaintiff's claims of federal jurisdiction were not insubstantial and that substantial factual issues were raised concerning the immunity of baseball from antitrust laws.

The court granted summary judgment for the defendants on the claims involving the operation of concessions and bidding on broadcast rights. The defendant's uncontroverted affidavits established that the baseball club employing plaintiff derived no revenues from concessions and that plaintiff thus lacked standing to maintain his action. The affidavits also established that CBS, owner of the Yankees, did submit a bid for the right to broadcast professional baseball games, contradicting plaintiff's allegation that CBS had refrained from such bidding.

* * * * * * * * * *

The United States Supreme Court has ruled on several petitions for certiorari filed in cases previously reported in these bulletins. These rulings are included on the attached list of citations of previously reported opinions.

Copies of unpublished opinions may be obtained from the authoring judge or from the undersigned. Your suggestions and comments concerning the content and format of these bulletins are most welcome as are copies of opinions and orders which may be appropriate for inclusion in a future bulletin.

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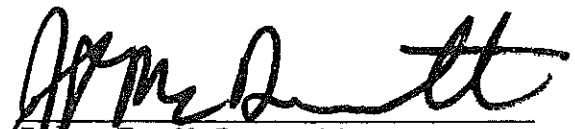
By 
John T. McDermott
Executive Editor

Attachment

| Bulletin No | Page | Caption | Citation |
|---|---|---|---|
| 7 | 4 | State of Hawaii v. Std. Oil | Reversed __F.2d__ (9th Cir., Sept. 25, 1970) |
| 8 | 9 | Russ Toggs v. Grinnell | Aff'd 426 F.2d 851 cert denied 39 LW 3180 |
| 13 | 7 | Diaz v. Southern Drilling | 427 F. Supp. 1118 |
| 15 | 5 | U.S. v. Wilshire Oil | 427 F. Supp. 969 |
| 15 | 8 | Bath v. Blot | 427 F.2d 97 |
| 17 | 6 | Material Handling Institute v. McLaren | 425 F.2d 90 |
| 18 | 7 | Int'l Container Trans. Corp. v. N.Y. Ship. Assoc. | Reversed 426 F.2d 884 |
| 17 | 8 | Bridge Corp. v. Am. Con. Br. | 428 F.2d 1365 |

# Manual for Complex and Multidistrict Litigation



JOHN T. McDERMOTT, ESQUIRE
EXECUTIVE EDITOR

TELEPHONE 382-8717
AREA CODE - 202

November 27, 1970

Judge Inzer B. Wyatt
Southern District of New York

BULLETIN NO. 21
*DISCOVERY SPECIAL*

21

TO ALL JUDGES CONCERNED WITH COMPLEX AND MULTIDISTRICT LITIGATION

Dear Judges:

This is the eighteenth bulletin devoted to the dissemination of recent opinions and decisions thought to be potentially relevant to complex litigation. During the past year more than 300 decisions have been summarized by the staff and are included in these bulletins. We hope you have found these bulletins to be helpful and we constantly seek your help in making them better.

These bulletins are distributed to more than 300 federal judges and to other judicial personnel. In order to try to assess their usefulness, we have prepared and have attached a brief questionnaire. Please take a minute to complete it. If you would like to supplement your remarks by letter we would be especially grateful. If you no longer wish to receive these bulletins please so indicate. (You will still receive bulletins of the Board of Editors announcing changes in the *Manual*.) If you wish extra copies for your law clerks, please indicate on the card. *Thank you!*

The following recent decisions, all involving discovery problems, appear to be of interest to judges involved in complex litigation. As these decisions have been collected and summarized by the editorial staff, their inclusion does not mean that the Board of Editors approves of the procedures used or the results reached in any particular case.

## Attorney/Client Privilege - Corporate Counsel

*Gardner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970) Judge Godbold

The court of appeals vacated the district court's order holding that the attorney-client privilege was not available to a corporation when its stockholders sought access to communications between the corporation and its attorneys. The appellate court said that the corporation's right to assert the privilege in a suit by stockholders alleging acts inimical to their interests was subject to the stockholders' right to show cause why the privilege should not be invoked in a particular instance. After listing some of the factors relevant to a determination of good cause, the court remanded the case for further proceedings.

## Attorney/Client Privilege - Patent Attorneys

*Jack Winter Inc. v. Koratron & Co.*, 50 F.R.D. 225 (N.D. California) Judge Doyle

The motion before the court was filed by Koratron's adversaries to compel answers to certain questions propounded to Koratron's patent attorney who refused to answer on the grounds the information sought fell within the attorney-client privilege. The court initially held that when a patent attorney vis-a-vis a patent agent was consulted, his activities constituted the practice of law but that the decisive factor in determining whether communicated facts are privileged is the nature of the communications. The court found that the patent attorney exercised no discretion over what portion of the information transmitted to him by his client *for the purpose of preparing a patent application* had to be turned over to the Patent Office - the attorney had to turn *all* such factual information over in full to the Patent Office - thus the basic element required for the assertion of an attorney-client privilege was absent. The court concluded that for the most part the information sought by Koratron's adversaries involved factual material of this type and was not privileged, the motion to compel answers was granted.

*Underwater Storage, Inc. v. U. S. Rubber Co.*, 314 F. Supp. 546 (District of Columbia 1970) Judge Corcoran

The defendant moved under Rule 37(a) to compel answers to certain questions posed during the depositions of a Mr. Wiczer, a patent attorney who performed certain services for the plaintiff relating to the preparation and prosecution of his patent application. Mr. Wiczer refused to answer and invoked the attorney-client privilege. The court granted the motion finding that the questions concerned the patent solicitation activities of Mr. Wiczer including, *inter alia*, determining patentability, drafing patent specifications, preparing and processing application before the Patent Office. The court held that "no privilege attached to this type of activity. He (Mr. Wiczer) was not giving legal advice in the accepted sense but was merely performing tasks which could easily have been done by non-lawyers."

Work Product Doctrine

*Dingler v. Halcyon Lijn N.V.*, 50 F.R.D. 211 (E.D. Pennsylvania) Chief Judge John Lord

The plaintiff filed a motion for the production of statements made by him and other witnesses to *agents* of defendant's counsel. After reviewing the statements, the court held that they were protected by the *work product doctrine* and would not be ordered produced without a showing of good cause. The court also held that the claim that the documents would impeach credibility did not establish good cause under Rule 34 and that at least as strong a showing as required by Rule 26(b)(3) is required for the production of documents within the scope of protected work product. Consequently, the motion for production of the statements of the *witnesses* was denied.

The court held that Rule 26 excluded a *party's* own statement taken by another party or its attorney or agents from the work product protection and that Rule 34 no longer required a showing of good cause for the production of a party's own statements. The court held that the plaintiff's statement had to be produced.

*Webb v. Skidmore, Owings & Merrill*, 50 F.R.D. 182 (E.D. Pennsylvania 1970) Judge Higginbotham

In this action against an architect to recover for wind damages to a building, the plaintiff-owner sought the production of certain reports of investigators retained by the architect to investigate the wind damage. The court held

that plaintiff was not entitled to production of these reports since no showing had been made that the information was necessary for trial preparation and unavailable by independent investigation or research. The same result was reached concerning a report by the architect's associate partner.

Production of Documents

*Carr v. Monroe Mfg. Co.*, (5th Cir., August 18, 1970) Judge Godbold

Negro plaintiffs brought this class action against the corporate defendant and individual officers of the Mississippi Employment Security Commission (MESC), charging the defendants with racial discrimination in the handling of job applications. MESC opposed the plaintiffs' motion for production of its records by asserting governmental privilege. The district court ordered the production of the records subject to various protective orders.

The court of appeals affirmed, holding first that the court's order was final and appealable because it involved the assertion of a privilege by the government, which was not a party to the suit. It further held that the district court had not abused its discretion in concluding that the possibility of harm to MESC's program and the invasion of privacy of persons seeking employment was outweighed by benefits of disclosure in securing the eradication of racial discrimination. This conclusion was further supported by the entry of protective orders designed to minimize the harm of disclosure.

*U.S. v. Ling-Temco-Vought, Inc.*, 49 F.R.D. 150 (W.D. Pennsylvania 1970) Judge Rosenberg

The parties in this Clayton antitrust action entered into a stipulation (approved by the court) whereby the United States agreed to make available to the defendants a large number of documents for use in preparing their defense. By motion under Rule 34 the defendants further sought "a vast quantity of information from investigations conducted over a long period of time by various agencies of the United States government."

The court held that "where, as here, such an elaborate demand is made as on the surface would seem to indicate either a desire to be provided with material for a fishing expedition or for the purpose of annoying or disconcerting opposing litigants or their counsel, good cause becomes an absolute necessity before a court can possibly compel production on a scale of such sweeping proportions." The court concluded that the defendants did not demonstrate any compelling necessity or sound reason for requiring the government to comply with such an extensive production demand and the motion was denied.

*Dart Industries v. Liquid Nitrogen*, 50 F.R.D. 286 (D. Delaware) Judge Lachum

Dart, a plaintiff in an action filed in the Central District of California, moved to quash a subpoena duces tecum issued by the Clerk of the District of Delaware upon application of the defendant in the California case. During a related action filed by Dart in the Northern District of Illinois it produced for inspection and copying by Dupont (the defendant in that case), more than 1,000 documents some of which, considered secret and confidential, were under protective orders limiting disclosure and use thereof to Dupont counsel. In moving to quash the subpoena duces tecum Dart argued that the documents were unattainable by the California defendant under Rule 45(b) without a showing of good cause. The court observed "that there is a clear difference under the existing Rules between the conditions for obtaining production by a subpoena duces tecum directed to a *party* in the actions and the conditions for obtaining production by a subpoena directed to a *non-party witness.*" The court held that "when a party desires production of documents of a non-party witness under Rule 45(b) in aid of taking that witness's deposition the good cause requirement of Rule 34 is inapplicable and the only cause for quashing or modifying the subpoena duces tecum is that the demand is unreasonable and oppressive or that the call for documents should be conditioned upon advancement of reasonable costs for the production." Since a subpoena duces tecum in the present case was issued for the purpose of producing documents belonging to Dupont in the aid of taking a pretrial deposition of an independent witness not a party to the California action the court concluded that no showing of good cause was required. With respect to other documents sought by the subpoena duces tecum which are in Dupont's control but were not produced by Dart the court held that Dart had lacked standing to complain that the production was "unreasonable or oppressive."

Time Limitations

*Quonset Real Estate Corp. v. Paramount Film Distributing Corp.*, 50 F.R.D. 240 (S.D. New York 1970) Judge Tenney

The defendant moved for a protective order to prevent the deposition of one William Madden, its general sales manager. By operation of the applicable statutes of limitations, the actionable wrong had to have occurred prior to September 1963 and defendant claimed that Madden had no relevant information with

regard to the plaintiff's business with the defendant from 1963 to the present. The plaintiff contended that Madden's deposition was needed to establish a pattern of conduct *prior* to September 1963.

The court recognized that discovery of defendant's activities for a reasonable period of time antedating the earliest possible date of the actual wrong was often permitted but observed that the period involved here antedated the earliest possible wrong by approximately ten years. Nevertheless the court was reluctant to deny the plaintiff the opportunity to gather evidence of defendant's course of conduct over a period of many years which could manifest an intent to monopolize and which might later be admissible in trial.

The court therefore denied the motion and permitted the deposition but noted that if the examination was conducted in bad faith or became unnecessarily long or oppressive, a protective order under Rule 30 would be appropriate.

Request for Admissions - Rule 36

*Ranger Insurance Co. v. Culberson*, 49 F.R.D. 181 (N.D. Georgia 1969) Judge Henderson

In connection with its subrogation suit, the plaintiff insurance company had sought five requests for admission from the defendant. The defendant neither answered nor denied the truth of these requests but objected to them on the grounds that they pertained to controverted facts or facts which could constitute a principal issue in the case. The question before the court was whether defendant has complied with the provisions of Rule 36(2) so that the matters requested would not be "deemed admitted." The court concluded that the objections had no merit and that the defendant had therefore failed to satisfy the requirement of Rule 36(2). The court pointed out that Rule 36 "was not designed to discover facts; it was designed to circumscribe contested factual issues in the case, *whether crucial or not*, so that issues which were disputed might be clearly and distinctly presented to the trier of facts." The court also pointed out that the defendant could not fail to answer the request simply because she had no independent knowledge of the facts but must at least make a reasonable effort to obtain the information.

Evasive Answers and Technical Objections

*Jackson v. Kroblin Refrigerated Xpress, Inc.*
49 F.R.D. 134 (N.D. West Virginia 1970)
Chief Judge Maxwell

In the course of pretrial discovery in this personal injury action the defendants objected to the plaintiff's interrogatories. The court reviewed each of the defendant's objections to the interrogatories and all were overruled. In commenting on the evasive answers furnished by the defendant, the court made the following observations on the purpose of discovery:

> Free access to facts is an essential consideration when dealing with the discovery process, if the purpose of discovery is to be achieved, and the issues are to be eliminated. The achievement of this objective is, therefore, a higher priority when compared to any allegation of unfairness which may be raised by defendants.
> ....
> The allegation by defendant that he does not have those statements within his possession or under his control must also be looked at with suspicion by the court. A party to civil litigation in the federal system is under a severe duty to make every effort to obtain the requested information and, if after an adequate effort, he is unsuccessful, his answer could recite in detail the attempts which he made to acquire the information.

* * * * *

For rulings on specific objections to interrogatories see *Anderson v. United Airlines*, 49 F.R.D. 144 (S.D. New York 1969) (air disaster litigation) and *Gretener v. Dyson - Kissner*, 49 F.R.D. 174 (S.D. New York 1969)

* * * * *

Depositions

*Grey v. Continental Marketing Assoc. Inc.*, 315 F. Supp. 826 (N.D. Georgia, June 22, 1970)
Judge Edenfield

The plaintiff noticed depositions of certain defendants in Georgia and the defendants objected. The court noted that although the Federal Rules do not prevent plaintiff from designating any place he chooses for the taking of depositions, the cases indicate that it is presumed the defendant will be examined at his residence or at his place of business or employment. The court held that where another place is named and defendant files a timely objection it will be sustained absent "unusual circumstance to justify putting the defendant to such inconvenience." Finding no unusual circumstance, the court would not permit the plaintiff to require defendants to come to Georgia to be deposed and required that depositions be taken at the defendants' residence or place of business.

Patent Interference Proceeding

*Babcock & Wilcox Co. v. Foster Wheeler Corp.*, (3rd Cir., Sept. 14, 1970) Judge Adams

The district court had granted Babcock (the junior party) discovery under 35 U.S.C. §24, ancillary to a patent interference proceeding and Foster (the senior party) appealed. The court of appeals affirmed, concluding that the district court had not abused its discretion in allowing discovery. Possible abuses arising from allowing the junior party in an interference proceeding to examine the senior party's files before proving prior conception were overcome by the requirements imposed on the junior party of good cause, relevance, reasonable designation of documents and the principles of privilege.

Sanctions

*International Assoc. of Machinists and Aerospace Workers v. Nat'l Mediation Board*, 314 F. Supp. 229, (D. C. 1969) Judge Gesell

The plaintiff was involved in a labor dispute with National Airlines which the National Mediation Board, under the authority of the Railway Labor Act, was attempting to mediate. The Union brought this action requesting the court to issue an injunction directing the Board, pursuant to statutory mandate, to endeavor to induce arbitration by the parties. The Union then directed written interrogatories to the Board asking among other things, the basis on which the Board believed efforts to mediate might be successful. The Board not only refused to supply the information requested in the interrogatories but also continued to resist after the court ordered that the answers to the interrogatories be filed.

The court pointed out that the Union's affidavits established arbitrary action by the Board and the duty rested upon the Board to justify its conduct. Because the Board refused to respond to the interrogatories, the court directed that all responses made by the Board be stricken pursuant to Rule 37(b)(2)(i) and that, standing alone, plaintiff's showing was sufficient to warrant granting summary judgment. The court rejected the Board's suggestion that the court was without authority to resolve the matter in this fashion by reason of Rule 55(e) which bars default judgment against the government. The court held that Rule 55(e) does not relieve the government from its obligations to comply with discovery orders.

## JUDICIAL CONTROL OF DISCOVERY

The Rules of the United States District Court for the Southern District of Ohio (September 1, 1969) include provisions designed to promote cooperation among counsel and eliminate unnecessary discovery procedures. The relevant rules are:

### RULE 17

### OBJECTIONS AND MOTIONS RELATED TO DISCOVERY PROCEDURES

(a) CONSULTATION AMONG COUNSEL. Counsel are encouraged to participate in pretrial discovery conferences to reduce, in every way possible, the filing of unnecessary discovery procedures. No interrogatories, request, motion or application will be filed under Rules 26 through 37 of the Federal Rules of Civil Procedure until counsel shall have explored the objective or objectives with opposing counsel in an effort to informally handle the matter or matters and/or reduce the area of controversy. It shall be the responsibility of the party seeking discovery to initiate such personal consultation.

(b) PROHIBITION ON FILING OF UNNECESSARY DISCOVERY MOTIONS OR OBJECTIONS. The presentation to the Court of unnecessary discovery motions, applications, interrogatories and requests, as well as any unwarranted opposition to proper discovery proceedings, will subject the offender to appropriate remedies, including the imposition of costs and counsel fees.

(c) DISCOVERY MOTION, APPLICATION, INTERROGATORIES, ETC. To the extent such personal consultation does not dispose of the matter, the party seeking the discovery may then proceed with the filing of a formal motion, application, interrogatories or request under any of Rules 26 through 37 of the Federal Rules of Civil Procedure. The initial filing should not be accompanied by any supporting brief or memorandum (and is excepted from that requirement as contained in Rule 14 of these rules). Within ten (10) days after such a formal filing, at the initiative of counsel for the party seeking discovery, counsel for the parties shall meet for personal consultation and sincere attempts to resolve differences.

(d) OBJECTIONS TO DISCOVERY MOTION, ETC. Objections to any discovery motion, application, interrogatories or request under Rules 26 through 37 of the Federal Rules of Civil Procedure shall be filed within twenty (20) days after service of the formal motion, application, interrogatories or request, and shall be accompanied by a memorandum or brief, and, in addition, a statement of counsel for the objecting or resisting party describing the consultations between counsel previously held in accord with this rule (dates, times, places of conferences and names of individuals partitipating therein).

(e) ANSWER MEMORANDUM OR BRIEF. The party initiating discovery to which objections are filed, may file an answer memorandum or brief within ten (10) days after service of the objections. This time will be extended only in the most unusual situations. Upon the filing of such answer memorandum or brief, or at the end of the ten (10) day period, the matter will be automatically submitted.

(f) ENTRIES IN ABSENCE OF OBJECTIONS TO DISCOVERY MOTION, ETC. Motions, applications and requests, to which objections are not seasonably filed, may be granted as a matter of course (as will orders directing answers to interrogatories) upon the informal presentation of an appropriate proposed and endorsed order by counsel for the party initiating discovery.

(g) EXTENSIONS. Requests for the extensions of the prescribed periods must be in writing and state the grounds therefor and, in general, will be looked on with disfavor.

(h) DEPOSITIONS TAKEN OUT OF THE SOUTHERN DISTRICT OF OHIO. See Rule 16(d) of these rules requiring motions under Rule 30(h) of the Federal Rules of Civil Procedure to be filed in this District and disposed of by the Judge on whose calendar the action appears.

Related Rules include:

RULE 16 - DEPOSITIONS

(d) DEPOSITIONS TAKEN OUT OF THE SOUTHERN DISTRICT OF OHIO. Any motion under Rule 30(d) of the Federal Rules of Civil Procedure and any proceeding under Rule 30(b) of the Federal Rules of Civil Procedure initiated or arising during the process of taking depositions out of the Southern District

of Ohio will be initiated or filed in this District and disposed of by the Judge thereof on whose calendar the action appears. This rule applies to proceedings initiated by a party to the action involved and does not apply to such proceedings initiated by a deponent (not a party or officer or employee of a party or member of a partnership party). While it is recognized that Rule 30 of the Federal Rules of Civil Procedure extends the option to apply to the District Court in the District where the deposition is being taken and that option may not be denied by this rule (d), application in such other Districts generally tends to unduly increase the business of such other Districts and tends to result in delaying the dispatch of its calendar by this Court. Proceedings initiated in other Districts in violation of this rule may be subject to 28 U.S.C.A. §1927.

RULE 18 - PRETRIAL PROCEDURES AND WITNESSES

(b) DISCLOSURE OF WITNESSES. Any Judge of the District may require counsel, before, at, or after any pretrial conference, to provide opposing counsel with a list of names, identities and whereabouts of each witness expected to be called at the trial, together with a brief statement of what counsel proposes to establish by the testimony of each such witness. Only such material points which counsel proposes to establish by the testimony of such witness need be disclosed, but the refusal or willful failure of any counsel to disclose a material point may render evidence on that point inadmissible at the trial. If such disclosure is made and counsel discovers the name of an additional witness or names of additional witnesses on that point which were not known at the time of the previous disclosure, the same information required to be disclosed previously shall be furnished opposing counsel forthwith by a copy of the original of such disclosure, which shall be filed with the Clerk.

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*SPECIAL ATTENTION.* The Chairman of the Judicial Panel on Multidistrict Litigation asked us to call your attention to an article which recently appeared in the *Villanova Law Review: A Survey of Federal Multidistrict Litigation,* 15 Vill. L. Rev. 916 (1970). It is a very complete and comprehensive review of the work of the Panel.

*ERRATUM.* The summary of the opinion in *Mulvey v. Goldwyn Productions* (Bulletin No. 20, Page 2) contained several errors. The corrected version appears on the attached page. If you retain these bulletins for future use please replace the existing page with the corrected page.

Copies of unpublished opinions may be obtained from the authoring judge or from the undersigned. Your suggestions and comments concerning the content and format of these bulletins are most welcome as are copies of opinions and orders which may be appropriate for inclusion in a future bulletin.

Very truly yours,

THE BOARD OF EDITORS FOR THE
*MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION*

By _____
John T. McDermott
Executive Editor

Attachments

# Manual for Complex and Multidistrict Litigation



December 11, 1970



22

Judge Inzer B. Wyatt
Southern District of New York

BULLETIN NO. 22
*CLASS ACTION SEPCIAL*

TO ALL JUDGES CONCERNED WITH COMPLEX AND MULTIDISTRICT LITIGATION

The following recent decisions appear to be of special interest to judges involved in complex class action litigation. As these decisions have been collected and summarized by the editorial staff*, their inclusion does not mean that the Board of Editors approves of the procedures used or the results reached in any particular case.

Adequacy of Representation

*Syna v. Diners Club Inc.*, 49 F.R.D. 119 (S.D. Florida 1970) Judge Cabbott

The complaint in this class action alleged that the defendant charged the named plaintiff (and members of the class he sought to represent) excessive interest in violation of the Truth in Lending Act and Florida State law. The action was commenced on October 10, 1969, and the plaintiff's membership in the Diners Club was terminated on November 20, 1969, because of his failure to pay the account then overdue.

The court concluded that the plaintiff lacked standing to bring this suit as a class action because he had been expelled from membership in the class he purported to represent - members of the Diners Club. The court noted that "the language of the rule indicates that in order to have standing to bring a class action, the class representative must first and foremost be a member of the class which he seeks to represent." Accord *Newman v. AVCO Corp.*, 313 F. Supp. 1069 (M.D. Tennessee 1970).

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* The Editor wishes to thank Mr. Jon Paugh, Administrative Attorney for the Judicial Panel on Multidistrict Litigation, for his assistance in preparing this bulletin.

*Hyatt v. United Aircraft Corp.*, 50 F.R.D. 242 (D. Connecticut 1970) Chief Judge Timbers

The plaintiff brought this action as a class action under Rule 23(b)(2) seeking declaratory and injunctive relief plus damages under Title 7 of the Civil Rights Act of 1964. The plaintiff attempted to establish a class "composed of all Negro persons who are employed or have heretofore been employed, or might hereafter be employed" at one of defendant's plants.

The court refused to permit the plaintiff to maintain such a class action holding that he could not fairly and adequately protect the interest of a class which includes persons employed during the two years since he resigned as well as persons to be employed in the future. The court observed that since the plaintiff had had no contact with the defendant for more than two years, he had no personal knowledge of defendant's policies either during that period or at the present time. Notwithstanding the plaintiff's capacity to represent Negro employees prior to his resignation, the court concluded that "he certainly can not be said to be in a position fairly and adequately to protect the interest of the *entire* class he purports to represent." The court also concluded that "plaintiff's claim, viewed in the most favorable light permitted by the papers presently before the court, is not typical of the claims of the class" and "there being no questions of law or fact common to the class and plaintiff's claim not being typical of the claims of the class, there is no basis for rendering final injunctive relief or declaratory relief with respect to the class as a whole."

## Commonality of Questions of Fact or Law

*Philadelphia v. Emhart Corp.*, 50 F.R.D. 232 (E.D. Pennsylvania 1970) Judge Wood

Two plaintiffs sought to represent national classes of governmental entities and of builder-owners of commercial buildings in actions alleging antitrust violations by the defendants in the manufacture, sale and distribution of Master Key Systems. Defendants' motion in opposition to the class actions was denied. The court interpreted the case law in its circuit as requiring only a minimal demonstration by plaintiff of the merits of its claim and at this early point in the litigation the court was satisfied that the plaintiff had met its burden.

The defendants also contended that the allegations of a vertical conspiracy between each of the four defendants and their distributors did not contain *predominant* questions of fact and law common to the class as required by Rule 23(b)(3). The court observed that the absence of such common question could not be positively established so early in the proceedings but that such a situation could later be remedied by dividing the class into four subclasses, one for each manufacturer's chain of distribution. The defendants' objection relating to the manageability of the class and feasibility of notice were also rejected.

*Lah v. Shell Oil Co.*, 50 F.R.D. 198 (S.D. Ohio 1970) Judge Hogan

The court refused to allow this antitrust action by a gasoline dealer to be maintained as a class action on behalf of approximately 140 other Shell dealers in Southwest Ohio. The determination of the legal issues raised by plaintiffs under the antitrust statutes were found to require individual inquiry into each dealer's situation and problems posed by the right to jury trial and the antitrust counterclaim asserted by the defendant were thought to make the proposed class unmanageable.

Notice - (b)(2) Class

*Johnson v. City of Baton Rouge, Louisiana*, 50 F.R.D. 295 (E.D. Louisiana 1970) Chief Judge West

This is a class action brought by four Negro plaintiffs purporting to represent a class, composed of all other Negro residents of East Baton Rouge Parish (County) Louisiana. They seek injunctive relief from the recurrence of certain enumerated incidents of discriminatory police treatment. Having previously determined that the matter could precede as a class action, the issue before the court was plaintiffs' motion to require that notice of the pending suit be given to all prospective members of the plaintiffs' class by publication of the series of "advisory" advertisements in two Baton Rouge daily newspapers and in a small weekly newspaper.

The court viewed the question before it as whether or not such notices are mandatory under Rule 23(c)(2) or are at most, discretionary under Rule 23(d)(2).

The court first approached the threshold question as to whether the case is to be maintained under Rule 23(b)(1), (2), or (3) since the notice requirements differ for actions maintained under (b) (1) and (2) on one hand and (b) (3) on the other hand. The court reasoned that if the plaintiffs successfully established that all members of the Negro race in the East Baton Rouge Parish are being discriminated against by law enforcement officials, final injunctive relief or corresponding declaratory relief would be appropriate with respect to the entire class since any such injunctive or declaratory relief would, by its very nature, be applicable to all Negros residing in the parish. The court noted that to allow any member of the class to declare that he would not be covered by injunctive or declaratory relief granted in this suit would "simply make no sense." Thus the court concluded that the action could not be maintained as a class action under Rule 23(b)(3) but instead had to be treated as a 23(b)(2) action.

The court rejected the Second Circuit's view that notice to absent class members was required by due process in all representative actions regardless of whether they are brought under 23(b)(1), (2), or (3) and concluded that "the rule couldn't be plainer, it mandates 23(c) to notice in 23(b)(3) class actions not in 23(b)(1) or 23(b)(2) class actions." The court declined to order publication of notices requested by the plaintiff since it "would only pose an unnecessary risk of further disturbing interracial relations in the community while adding nothing to the lawsuit." The court was satisfied that the rights and interests of all Negro members of the East Baton Rouge Parish community would be adequately protected and represented by the plaintiffs of record.

## Settlement Procedure

*Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, (E.D. Pennsylvania, September 24, 1970) Judge Harvey

Plaintiffs in certain of the more than 300 plumbing fixture antitrust actions before the court sought to vacate an interlocutory order relating to a proposed settlement of the claims of certain plumbing and general contractors.

A prior settlement agreement had been reached between wholesaler plaintiffs and certain defendants and the court established a temporary national class for settlement purposes and provided for notice to prospective class members who could then either accept settlement or prosecute their claims.

The defendants then offered $2,000,000 in settlement of all claims of the plumbing and general contractors and a similar temporary order was approved by the court. Certain plumbing contractors disapproved of the amount of the settlement offer and objected to the court's approval of the order without a hearing. The court refused to stay or set aside its temporary class action order and advised objecting counsel that they must file formal objections to the settlement procedures in order to obtain a hearing. The objections were filed and a full hearing held to determine whether the settlement plan, including the establishment of a temporary settling class, should be allowed to proceed. The court concluded that the objections to the settlement plan were without merit or were premature and the motion to vacate the temporary class action order was denied.

Assuming that the non-settling contractors had standing to object to the settlement order the court emphasized that it did no more than give conditional approval to the proposed settlement so that it could be submitted to the prospective class members for acceptance. The court's order did not constitute a final approval of the settlement, a final determination of the class, or a determination that all nonexcluded claims should be settled or dismissed with prejudice. The court felt that at this stage the questions before it were (1) whether the settlement was fairly reached; (2) whether the settlement was sufficiently fair and reasonable for submission to the prospective class members; and (3) whether proper procedures had been adopted for giving notice to members of the proposed class. The court concluded that these requirements had been satisfied.

The court pointed out that the temporary national class had been established to "try out" the proposed settlement on the prospective class. The information received in response to the notices would greatly aid the court in assessing the fairness and adequacy of the settlement proceedings and the propriety of the class. The fact that the final class determination would not be made until after settlement negotiations were well underway did not violate, in the courts opinion, any requirements of Rule 23.

This procedure precludes the harsh results that can follow from first determining the class and then reaching settlement and entering judgment determining the rights of *all* class members, including those who would prefer to litigate.

The court stressed that this was not a final determination of the fairness of the amount of the settlement but that the possible success of the "pass-on" defense to the contractors' claims, as well as a number of other strategic factors enumerated by the settling plaintiffs, warranted the submission of the settlement plan to the class members.

The claims of the non-settling plaintiffs that counsel negotiating the settlement with defendants were not representative and were motivated solely by a desire for additional fees were rejected as unfounded. The court noted that all fees were subject to its later approval and would be fixed after a full evaluation of the circumstances.

Objections to the adequacy of the notice form were similarly rejected. The notice forms followed those approved by Judge Wyatt in the *Antibiotic Drug Cases* and cited in the *Manual*.

The suggested amendment to the notice to reflect the oppositions of certain counsel to the terms of the settlement was disapproved as it amounted to court-approved solicitation of class claims.

*Hartford Hospital, et al. v. Chas. Pfizer & Co., Inc. et al.*, (S.D. New York 1970) Judge Wyatt

On April 3, 1970 the defendants offered a final settlement of all claims by private hospitals and Blue Cross Plans which purchased broad spectrum antibiotic drugs during all or any part of the period between 1954 and 1967. Subject to several conditions the sum of $32,500,000 will be paid in settlement by the defendants on April 9, 1971. The settlement offer was accepted by all but two of the plaintiffs in the then pending *Private Hospital Cases* (one of which subsequently decided to accept the settlement offer) and by all plaintiffs in the *Blue Cross Plan Actions*.

The court first found that a class action should be maintained for a class consisting of all non-governmentally operated hospitals in the United States and Puerto Rico, whether profit or nonprofit, which purchased broad spectrum antibiotic products during the relevant period. The nineteen *Private Hospital Cases* in which the plaintiffs initially accepted the April 3 settlement offer were consolidated as a class action under Rule 23(b)(3) and the hospital plaintiffs and intervenor hospital plaintiffs in these cases are to be the representative parties for the class composed of all such hospitals. The court concluded that it was advisable to have one all-embracing class rather than to attempt any subdivision in the classes on the basis of geographical areas or otherwise.

The court found that the requirements of Rule 23 were met in that joinder of all members was impracticable, question of law and fact were common to the class, the claims of representative parties were typical of the claims of the class, the representative parties woould fairly and adequately protect the interests of the class, questions of law and fact common to the members predominated over questions affecting individual members only and the class action was superior to any other available method for the fair and efficient adjudication of the controversy.

The court further held that all counsel of record for any of the plaintiffs or intervening plaintiffs in the consolidated class actions are to constitute a committee of counsel and such committee shall act on behalf of all named plaintiffs, intervenor plaintiffs, and all other members of the class. The committee is to select one to three of its members to act in its behalf in sending and receiving notices. The court stressed that "in order to avoid increasing the amount which will be asked for counsel fees and expenses, counsel will keep in mind the necessity of avoiding the duplication of effort."

The court then approved a *Rule 23(c) notice to class members which is attached to this Bulletin as Appendix A and a Rule 23(e) notice which is attached as Appendix B.* The clerk was directed to send or have sent by first class penalty mail a copy of both notices to each private hospital in the United States and Puerto Rico. The defendants were directed to advance the necessary expense for printing such notices. The private hospital plaintiffs in cases in which no class action claims were made, and the private hospital plaintiffs who decided to accept the settlement after initially rejecting it or who commenced their action after the April 3 settlement were not permitted to maintain class actions but "will participate in the settlement proceedings as parties to actions now consolidated rather than members of a class."

All seventy-five *Blue Cross Plans* are involved either as plaintiffs or as intervenor plaintiffs and all have accepted the settlement offer. The court held that there was no necessity that any action be maintained as a class action as all are before the court and will participate in the settlement proceedings as parties to the action consolidated.

The settlement offer provides that two-thirds of the settlement fund shall be distributed among all the private hospitals and one-third shall be distributed among Blue Cross Plans. The settlement offer also provides that all costs incurred in settlement proceedings, including administrative costs, shall be paid only from the fund.

## Final Approval/Rejection of Settlement

*Norman v. McKee*, 431 F.2d 769 (9th Cir. 1970)
Judge Battin

Plaintiffs, investors in the defendant mutual fund, brought this derivative and class action under the Investment Company Act against the fund, its directors and officers, and its underwriter and manager. The complaint alleged that excessive fees had been paid to the management company for its services to the fund. The parties negotiated a settlement and sought the district court's approval under Rules 23.1 and 23(e), Fed. R. Civ. P. After notice to the fund's investors, a hearing was held at which several investors appeared in opposition to the settlement. The SEC also filed an *amicus curiae* brief. The district court disapproved the settlement and the named plaintiffs and defendants appealed.

The court of appeals affirmed the district court, holding that disapproval of a settlement in a class action was appealable as a final order and that the district court had not abused its discretion in disapproving the settlement. Considering the length of trial in such cases and the right of unnamed plaintiffs to fair and adequate representation, the court concluded that the inconvenience of piecemeal review was outweighed by the danger of denying justice by delay. The district judge properly acted as guardian for the absent parties in comparing the settlement with the plaintiff's prayer for relief and the terms of a settlement reached by defendants with the SEC.

*State of West Virginia v. Chas Pfizer & Co., Inc., et al.*, 314 F. Supp. 710 (S.D. New York 1970)
Judge Wyatt

This multidistrict antitrust litigation involves some 150 actions against the same defendants, either filed in the Southern District of New York or transferred by the Judicial Panel on Multidistrict Litigation under 28 U.S.C. §1407. The actions can be divided into four groups: (a) the 66 actions which are the subject of the settlement proceedings, (b) actions in which plaintiffs were offered but rejected the proposed settlement, (c) actions in which the plaintiffs had not been offered any settlement, and (d) about 26 actions in which plaintiffs are private hospitals to which a separate offer of settlement has been made.

On February 6, 1969, the defendants made a written offer of $100 million in the settlement of *all* of the claims of (1) states, counties, cities and political subdivisions arising out of their purchases for the benefit of recipients of welfare or other aid, and (2) wholesalers, retailers and *individual consumers* arising out of their purchases, including claims of states as *parens patriae* on behalf of their citizens or on behalf of classes including the state as a consumer and all other consumers in the state.

The settlement plan provided that appropriate actions would be maintained as class actions; that Rule 23(c)(2) notices, with option to be excluded from the class, would be directed to all class members; that if exclusions were substantial, defendants could withdraw but if they went forward with the settlement, the $100 million settlement would be reduced appropriately to reflect exclusions; that any plaintiff accepting the settlement could suggest a plan for allocation of the fund for submittal to the court for approval under Rule 23(e); that administrative and other costs be paid from the settlement fund; and that if the settlement were approved, all claims covered thereby would be "satisfied or otherwise terminated."

Pursuant to this plan, the court established a "temporary national class" from which any plaintiff state *rejecting* the settlement could by notice, exclude itself and any state *accepting* the settlement could by notice, maintain its own action as a class action. It was further provided that to the states accepting the settlement, each action commenced by them was to be maintained as a class action for two classes: one, on behalf of the state, county and city hospitals and other institutions and the other, on behalf of individual members of the consuming public who bought antibiotics in the state. The court further provided that all actions brought by wholesale druggists and retail drug stores which accepted the offer of settlement were to be consolidated as the "consolidated wholesaler-retailer class action" and that the plaintiffs and class members in the consolidated action were to be represented by a committee of counsel comprised of all counsel then of record in the actions consolidated.

Notice to the consumer class members was given by publication in every daily English and Spanish newspaper of general circulation in each of the accepting states. The consumer class members were given until August 1, 1969, to exclude themselves from the class and were notified that if they wished to make a claim that they were required to do so by August 16, 1969, and that failure to do so would constitute an authorization to the Attorney General of the state to utilize whatever

money he may recover for the benefit of the citizens of the state in such manner as the court may direct. The defendants were directed to advance necessary funds for publication of the notices which were to be reimbursed as an expense of the settlement if it was approved. (The newspaper notices cost about $130,000.)

Notices of exclusion were filed by 61 members of the class consisting of government entities and institutions, by 42 members of the class consisting of individual purchasers and by 1,500 members of the class consisting of wholesalers and retailers. Claims were filed by about 38,000 individual purchases with a face value in excess of $16,500,000.

The Alabama plan for allocation was accepted in principle by the court. It divides the $100 million as follows:

| | |
|---|---|
| Government Entity Claims | |
| Institutional Purchases | $50,000,000 |
| Vendor Reimbursement Programs | 10,000,000 |
| Individual Purchaser Claims | 37,000,000 |
| Wholesaler-Retailer Claims | 3,000,000 |
| Total | $100,000,000 |

These amounts were reduced in proportion to the number of class members who excluded themselves from the settlement and, in the case of the wholesaler-retailers, was increased to approximately $8 million by the defendants' agreement to deposit the settlement amount immediately in an escrow account so that the interest would accrue for the benefit of that class. In approving this portion of the settlement, the court later noted that the allocation might be too high but pointed out that the excess above $3 million was a further contribution to this class by *defendants* and thus did not reduce the amounts for other classes.

Notices of the proposed settlement was then given to all class members pursuant to Rule 23(e) and a two-day hearing was held. Publication of this notice was made in every newspaper of general circulation in each of the states accepting the settlement. In approving the settlement, the court emphasized its responsibility to the many absent class members. The court noted that the most important factor in determining whether or not to approve the settlement was the strength of the plaintiffs' case balanced against the amount offered in settlement, sometimes referred to as the "likelihood of success." The court further observed that the situation was unique in that the evidence upon which liability at trial would depend was in substantial part before the court in the form of the extensive

record before the Sixth Circuit Court of Appeals in the prior Federal Trade Commission proceedings and in the extensive record before the Second Circuit Court of Appeals in the subsequent criminal proceeding. After reviewing these records, the court concluded "that the chances of recovery in any of these cases are no better than fifty-fifty and probably should more realistically be called slight." The court also felt it significant that the proposed settlement was supported by a very high percent of all of the plaintiffs to which it was offered and that the law officers of 43 states, Puerto Rico, and the District of Columbia - almost all with retained specialist counsel - urged approval of the settlement. The court did recognize that California, six other states, two counties in California, and Kansas City, Missouri rejected the settlement and that these rejecting plaintiffs were represented by able and experienced counsel whose opinions about the proposed compromise had to be taken into account, but concluded that "in this instance a misplaced optimism about a highly problematical result has led to the exercise of questionable judgment."

Civil Rights Litigation

*Gerstle v. Continental Airlines Inc.*, 50 F.R.D. 213 (D. Colorado 1970) Judge Doyle

Plaintiff, a former stewardess brought this class action against the defendant claiming that it discriminated against her and members of her class in employment on the basis of her sex in violation of Title 7 of the 1964 Civil Rights Act. Over the defendants objection the court held that all requirements of Rule 23 were established. The class was limited to those stewardesses who were terminated due to marriage after July 2, 1965, or terminated before that date but who were available for reinstatement after July 2, 1965 (the effective date of Title 7). The court did not know the number of stewardesses who fell within the class and recognized that it was possible that when the members of the class are finally identified their number may be small enough to permit joinder. The court noted that in that event it could strike the class allegation but concluded that until the number of class members is determined the action would be maintained as a class action.

The court rejected the defendants contention that plaintiff is not an adequate representative simply because her claim is not identical with that of all other class members. The court further found that the plaintiff qualified under Rule 23(b)(3), that the claim under Title 7 was not only a common question but was the *predominant* question and that the class action was superior to other available methods for the fair and effective adjudication of this controversy. The court observed that "class actions are particularly useful where it is unlikely that individual claimants will file an action."

See also *Wallace v. Brewer*, 315 F. Supp. 431 (M.D. Alabama 1970) and *Broussard v. Schlumber Well Services*, 315 F. Supp. 506 (S.D. Texas 1970).

Stockholder Classes

*Rosenfield v. Integrated Container Svc. Indus. Corp.*, 50 F.R.D. 237 (S.D. New York 1970) Judge Metzner

Plaintiff sought to maintain its action as a class action under Rule 23(b)(3) contending that a prospectus included in a stock registration statement was materially misleading in several respects. The three plaintiffs bought stock costing more than $300,000 soon after the effective date of the prospectus. The court permitted the plaintiff to maintain a class action on behalf of all stockholders who bought shares subject to the allegedly fraudulent registration statement but denied the plaintiff's request to represent stockholders who bought stock prior to the issuance of the registration statement. The plaintiff claimed that the defendants manipulated the market throughout the period but the court held that the requirement that common questions of fact predominate was not met if the class was to include purchased prior to the effective date of the registration statement. The court was aware of a partially overlapping class established by another judge in the same court and suggested that "consolidation would appear to be in order so as to relieve defendants of undue hardship and the court of duplication of effort." The court stayed all proceedings in both actions pending the filing of the motion to consolidate.

*Kaufman v. Dreyfus Fund, Inc.*, (3rd Cir., Sept. 24, 1970) Judge Aldisert

Plaintiff, a shareholder of four mutual funds, filed a three count action against various mutual funds, investment advisers, and directors, charging them with violation of federal antitrust and security laws. He sought to maintain this action in several capacities: as a shareholder against the funds in which he held stock; as a class representative of all similarly situated mutual fund shareholders; by virtue of his class representation of all fund shareholders, derivatively on behalf of all mutual funds; derivatively on behalf of the four funds as a class action on behalf of all mutual funds. The district court overruled objections to the plaintiff's standing to sue in these capacities and certified the question pursuant to 28 U.S.C. §1292(b).

The court of appeals reversed, except as to plaintiff's derivative actions on behalf of funds in which he held shares. Plaintiff had no standing, as shareholder of the four funds, to assert a personal action for violations of the antitrust and securities laws resulting in direct injury to the corporation and only indirect harm to the shareholders. Consequently, he could not maintain a class action on behalf of all fund shareholders or a derivative suit on behalf of all funds by virtue of his class representation of all fund shareholders.

The court also rejected the contention that Rule 23 and 23.1 could be read together to authorize plaintiff, as shareholder of four funds, to bring a class derivative action on behalf of all funds. Rule 23.1 requires that plaintiff be a shareholder of the corporation on whose behalf the suit was brought and that rule was enacted for the purpose of treating derivative actions independently of Rule 23. There was also a serious question whether a shareholder of some of the funds could qualify as a member and representative of the class of funds since the questions of law and fact would not be common to him. Accord *Weiner v. Winters*, 50 F.R.D. 306 (S.D. New York 1970).

*Epstein v. Weiss*, 50 F.R.D. 387 (E.D. Louisiana 1970) Judge Cassibry

This action was brought on behalf of a class of persons who tendered shares of Standard stock pursuant to a joint tender offer. The gravamen of plaintiffs' complaint was that the financial information contained in the defendants' tender offer was materially misleading in that the defendants knew but failed to disclose that the comparative earnings and prospects of Standard had substantially improved during the period prior to the date of the tender offer.

All agreed that the class was too numerous for joinder, that there were questions of law or fact common to the class and that the claims of the representative parties were typical of the claims of the class. The defendants disputed that the representative party would fairly and adequately protect the interests of the class and they claimed that individual issues predominated over class issues precluding the applicability of Rule 23(b)(3).

The court held that adequacy of representation was insured if the representatives share common issues with unnamed class members and vigorously prosecute the rights of the class through qualified counsel. The court was satisfied that both requirements were met in this case.

The court rejected the defendants contention that each member of the class had to establish reliance on the tender letter, materiality of the information omitted from the tender letter and damages suffered by him. The court noted that in securities fraud cases, class questions are deemed to predominate if at least some of the false representations are in writing and reach all members of the class. The court further noted that it was doubtful that even reliance and damages were individual issues since this case involves sale at a fixed price rather than purchases and sales at fluctuating prices. The court held that even if reliance and damages were found to be individual issues, the existence of these issues did not defeat the class action.

The court also rejected the defendant's contention that the litigation was actually composed of several classes because of the difference in the size of stockholdings and because some tendering stockholders were large financial institutions and brokers, some were individuals tendering through brokers and some were related to Standard insiders. The court held "that there exist only one class: those persons who tendered their Standard shares pursuant to the tender offer." The court observed that difficulties likely

to be encountered in the management of class actions of this size should not be overly difficult but that if management of the class action in its present form should in the future prove to be insurmountable the court's decision could be altered or amended pursuant to Rule 23(c)(1).

* * * * * * * * * * * * * * * * * * * * *

Copies of unpublished opinions may be obtained from the authoring judge or from the undersigned. Your suggestions and comments concerning the content and format of these bulletins are most welcome as are copies of opinions and orders which may be appropriate for inclusion in a future bulletin.

Very truly yours,

THE BOARD OF EDITORS FOR THE
*MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION*

By _____
John T. McDermott
Executive Editor

Attachments

NOTICE OF CLASS ACTIONS TO ALL PRIVATE HOSPITALS

There are a number of civil actions pending against the five named defendants in the United States District Court for the Southern District of New York. The claims asserted in these actions are that the defendants commencing in about 1953 and for some sixteen years conspired, in violation of the antitrust laws, to restrain and monopolize trade and commerce in the manufacture and sale of the broad spectrum antibiotic products tetracycline, chlortetracycline, oxytetracycline, and chloramphenicol, and salts, hydrates, esters, complexes, and analogs thereof, and any combination products containing any of them, introduced and generally available to the public on or before December 31, 1966.

Some of the actions are class actions, brought on behalf of private hospitals in the United States and Puerto Rico which purchased broad spectrum antibiotic products during all or part of the period January 1, 1954 - December 31, 1967. Some of the actions are by Blue Cross plans, which are a type of hospital service organization.

A "private hospital" is any non-governmentally operated hospital in the United States or Puerto Rico; put in another way, it is any hospital, whether profit or nonprofit, not operated by a local, state or federal government. A "hospital" means an institution which (1) (a) has at least six beds for the care of patients who are non-related, who are sick, and who stay on the average in excess of 24 hours per admission; (b) has an organized medical staff (which may include doctors of osteopathy); and (c) offers services more intensive than those required merely for room, board, personal services, and general nursing care; or (2) was listed as a hospital in the Hospitals Guide Issue of the Journal of the American Hospital Association for any of the years 1955 through 1967.

Without admitting any liability, defendants under date of April 3, 1970 offered $32,500,000 in full settlement of all claims (as described in the first paragraph of the April 3, 1970 offer) of private hospitals and Blue Cross plans, two-thirds (2/3) of the $32,500,000 (that is, $21,666,667) to be distributed among private hospitals and one-third (1/3) of that sum (that is, $10,833,333) to be distributed among Blue Cross plans. A separate notice is being sent herewith

of a hearing before the Court on February 19, 1971 to consider whether the proposed settlement of the class actions should be approved as fair and reasonable. Reference should be made to the April 3, 1970 offer of defendants, Exhibit A to that separate notice, for the terms of the proposed settlement.

NOTICE IS HEREBY GIVEN that by an order filed November 24, 1970 of the United States District Court for the Southern District of New York ("the Court") it was determined that nineteen civil actions listed in that order were to be maintained as class actions under Rule 23(b)(3) of the Federal Rules of Civil Procedure. The class consists of all private hospitals in the United States and Puerto Rico, as above more particularly defined, which purchased broad spectrum antibiotic products during all or any part of the period January 1, 1954 - December 31, 1967. If you are a hospital included as a member of the class so defined, your rights will be affected by this notice.

NOTICE IS HEREBY FUTHER GIVEN that, under the provisions of Rule 23(c)(2) of the Federal Rules of Civil Procedure:

1. The Court will exclude you from the class if you so request by a writing filed with the Clerk not later than January 18, 1971. If you request exclusion from the class, you will be free to pursue on your own behalf whatever legal remedies you may have but you will not participate in the settlement proceeds if the proposed settlement be approved and carried out. Requests for exclusion sent by mail must arrive not later than January 18, 1971, and should be addressed: Clerk of the United States District Court, United States Court House, Foley Square, New York, New York 10007.

2. The final judgments entered in the class actions, whether favorable or not, will include all members who do not request exclusion.

3. If you do not request exclusion, you may, if you so desire, enter an appearance through your own counsel but not later than January 18, 1971. If you do not request exclusion and do not enter an appearance through your own counsel, then counsel for plaintiffs and intervenor plaintiffs in the nineteen class actions will represent the interests of all members of the class, including yours.

NOTICE OF PROPOSED COMPROMISE OF THESE CLASS ACTIONS, AND OF A HEARING THEREON TO ALL PRIVATE HOSPITALS

NOTICE IS HEREBY GIVEN that a hearing will be held before the United States District Court for the Southern District of New York ("the Court") beginning on Friday, February 19, 1971, at 10 o'clock in the morning in Room 506 of the United States Court House, Foley Square, New York, New York 10007.

The purpose of the hearing is to determine whether a proposed compromise and settlement of nineteen private hospital class actions, listed in section I.B of an order of the Court filed November 24, 1970, should be approved by the Court under Rule 23(e) of the Federal Rules of Civil Procedure. If so approved, the nineteen private hospital class actions will be dismissed on the merits as against all defendants with prejudice.

Under date of April 3, 1970, the defendants, without admitting any liability, offered a final settlement of all claims (as defined in paragraph I of the offer) by private hospitals and by Blue Cross plans which purchased broad spectrum antibiotic products during all or any part of the period January 1, 1954 - December 31, 1967 (this having been determined by the Court to be the period intended by the offer). This proposed compromise has been accepted by the class representatives for the class of private hospitals and has also been accepted by the Blue Cross plans. A copy of the April 3, 1970 settlement offer is attached as Exhibit A.

A very general description of the proposed settlement follows but reference should be made to Exhibit A for a complete and accurate statement of its terms.

The settlement offer provides that defendants will on April 9, 1971 pay $32,500,000 in full settlement of all claims of private hospitals and of Blue Cross plans in the United States and Puerto Rico. Two-thirds (2/3) of the $32,500,000 (that is $21,666,667) is for distribution among private hospitals and one-third (1/3) (that is, $10,833,333) is for distribution among Blue Cross plans.

If any member of the private hospital class requests to be excluded from the class, the defendants may withdraw from the settlement within a specified period but they agree not to withdraw unless requests for exclusion are substantial and material.

The sum of $21,666,667 offered to the class of private hospitals is subject to reduction on account of several matters, as explained hereafter.

The net settlement sum will be first allocated by states, based on the ratio of the non-Blue Cross admissions of all private hospitals in each state to the total non-Blue Cross admissions of all private hospitals in all states. "Non-Blue Cross admissions" refers to admissions not covered by any Blue Cross plan. "State" includes the District of Columbia and Puerto Rico.

The method of the first allocation will be generally as follows. The admissions to each private hospital in a state will be determined for each year in the period 1954 - 1967. The total of admissions to all private hospitals in the state for each year will then be obtained. These totals will then be reduced for each year by the percentage of the population in the state covered by Blue Cross plans. The state totals so reduced will be combined to show the total national non-Blue Cross admissions. The net settlement sum will be allocated to each state in the same proportion which the non-Blue Cross admissions for each state bear to the total national non-Blue Cross admissions.

Within each state, the settlement sum allocated to that state will be further allocated to each private hospital in the same proportion which the admissions to that hospital bear to the total admissions to all private hospitals in the state. The allocation to each private hospital in a state is thus based on all admissions, whether covered by Blue Cross plans or not.

It is expected that statistics published or collected by the American Hospital Association will be employed, among others. The percentage of the population in the states covered by Blue Cross plans will be obtained from statistics published by the Blue Cross Association.

The sum of $21,666,667 offered to the class of private hospitals is subject to reduction on account of the following matters:

(a) Requests for exclusion by members of the private hospital class. The amount of the reduction is calculated by application of the allocation formula set out in paragraph II.A of the April 3, 1970 settlement offer, Exhibit A.

(b) Administrative and other costs (such as, for example, the printing of notices and the calculating of allocations to each class member). This is provided for in paragraph VIII of the settlement offer, Exhibit A.

(c) Counsel fees and expenses. In class actions, the fees and expenses of counsel to the class representatives, in such amounts as may be fixed and allowed by the Court, are properly payable out of the sum recovered, by settlement or otherwise, for the class. This means that if the settlement be carried out, there will be charged to the amount available for the private hospital class the amount of fees and expenses allowed by the Court to counsel for the class representatives. This amount cannot now be known, principally because the work of counsel will not be finished for some time. Before the Court makes any allowances for counsel fees and expenses, it is contemplated that members of the class will be sent a notice of the filed applications for allowances and of a hearing at which such applications will be considered.

During the settlement negotiations, the American Hospital Association made a "preliminary estimate" of how the settlement sum offered to the private hospital class would be broken down by states under the allocation formula of the offer. This is the only estimate available; for your information, the figures for each state from this estimate are set out on Exhibit B. As to this estimate, the following should be kept in mind: no reduction was made on account of exclusions of class members, administrative expenses of settlement, or counsel fees and expenses; the period used was 1955 - 1965 only; the adjustment for Blue Cross admissions was made on the basis of statistics for the median year 1961 only; Blue Cross coverage statistics for Puerto Rico were not available; no admissions figures were used for hospitals not registered with American Hospital Association. The final allocation may show appreciable changes in the amounts for particular states from those in the estimate.

If you desire to do so, you may appear and be heard at the hearing to commence on February 19, 1971, but no person not a named party to one of the civil actions will be heard and no papers will be received unless notice of intention to appear and copies of such papers are filed with the Clerk of the Court on or before February 12, 1971.

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