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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Going Meta: A Class Of Class Counsel

Law360, New York (May 05, 2015, 1:09 PM ET) --

Andrew D. Carpenter

In a very meta turn, Riceland Foods Inc. found itself on the receiving end of a class action composed of class action counsel and plaintiffs from the genetically modified organism rice multidistrict litigation overseen by U.S. District Judge Catherine D. Perry of the Eastern District of Missouri.

This state and federal litigation involved several thousand rice farmers (i.e., producers) and other businesses involved in the rice business (i.e., nonproducers) based upon the allegation that Bayer CropScience AG's genetically modified rice had tainted the U.S. rice supply. Riceland had been a co-defendant along with defendant Bayer AG in that litigation and had then cross-claimed Bayer, won a verdict in Arkansas state court and then settled for $92 million.

Following the district court's orders awarding common benefit expenses and fees, three law firms that had incurred legal fees and expenses while performing class benefit work sought to certify a class representing not only other law firms but also clients who had paid for common benefit services and expenses. The proposed class brought claims of unjust enrichment and quantum meruit against Riceland on the basis that Riceland had benefited from the putative class' common benefit work in obtaining a judgment against Bayer, and sought 10 percent of Riceland's gross recovery against Bayer.

The district court certified a 23(b) class in a March 19 memorandum and order.[1] Before delving into the 23(b) requirements, the district court performed a limited choice of law analysis to determine which state's laws would govern the unjust enrichment and quantum meruit claims of the multistate putative class. Using Missouri's "Significant Relationship Test," the district court found that Missouri had the most significant relationship to the unjust enrichment claim and the quantum meruit claim, primarily because the claims arose from an MDL venued in Missouri.

In applying the most significant relationship test to the unjust enrichment claim, the district court focused on the fact that the parties' relationship was centered in Missouri due to the location of the MDL, and dismissed the fact that the parties all hailed from varied states as bearing "little significance to the legal issue in dispute." Likewise, in applying the test to the quantum meruit claim, the district court again found that the majority of contact factors enumerated by Missouri law "bear little significance to

the issue in dispute" and defaulted to contacts based on the location of the MDL. Other important contacts, such as where a benefit was conferred or received, or the location of the parties, were dismissed as either of "little significance" or "too taxing" to determine individually. This begs the question of why such individualized contacts would be disregarded rather than considered as creating individualized choice of law issues potentially compromising the superiority or manageability of a (b)(3) class, as well as the wisdom of basing choice-of-law considerations on happenstance as variable as the predilection of the judicial panel of multidistrict litigation.

The district court also concluded that common questions of law and fact predominated over individual ones and rejected Riceland's assertion that each plaintiff must first identify each attorney that created each piece of work product utilized by Riceland in its cross-claim against Bayer and then identify which particular class member paid for each piece of work in order to determine at whose expense Riceland was unjustly enriched or which party conferred a benefit on Riceland. The district court specifically distinguished the facts of this case from prior cases denying the certification of such claims on the basis that because the putative class members undertook to "pool their resources" in the MDL as part of a "collective effort," they need not show which client or counsel paid for specific items, only that the class jointly incurred expenses to provide a benefit on Riceland. This is an interesting distinction and it will be interesting to see if the members of the class agree that they all jointly agreed to pool their efforts and recover equally regardless of which client or counsel undertook those efforts when it comes time to divide the common benefit pie among themselves.

As in most MDL rulings, however, there is considerable subtext explaining the transferee court's thinking. As far back as its Feb. 24, 2010, memorandum and order,[2] the district court seems to have been contemplating some way to cajole state court plaintiffs and their counsel into paying their fair share of the common benefit fund. In that order, the district court approved the establishment of the common benefit trust, funded from various percentages of holdbacks from the gross recoveries by various subclasses of the approximately 5,000 plaintiffs whose cases had been transferred to that court.

However, the district court declined to order funding from holdbacks of the estimated 2,000 additional plaintiffs whose cases remained pending in various state courts, despite the fact that most of the counsel representing state court plaintiffs also had cases pending in the MDL, and despite evidence that the state court plaintiffs' counsel were making good use of documents and deposition testimony generated by the MDL's leadership group. The district court perspicaciously concluded that it lacked jurisdiction to compel state plaintiffs not before it to pay contribution to the common benefit fund, but strongly hinted that to allow these state court plaintiffs to escape scot-free would constitute "unfair free riding" and "unjustly enrich" those counsel who declined to voluntarily pay their fair share of the freight.

The district court declined to follow U.S. District Judge Edmund V. Ludwig's analysis in In re Latex Gloves Prod. Liab. Litig.[3] In that decision, Judge Ludwig overruled the objections of counsel who had cases both in state court and before the MDL and had refused to agree to an assessment on his state court recoveries in exchange for access to the plaintiffs' document depository.[4] Although the objector argued the MDL court lacked jurisdiction to assess his state court cases, Judge Ludwig avoided discussing the jurisdictional niceties and instead focused on the obvious (but somewhat irrelevant) inequities of allowing access without payment, as well as the fact that this particular counsel maintained cases in both the MDL and state court.[5]

Judge Perry's decision turned out to be the correct one. In an opinion issued Aug. 22, 2014, the Eighth Circuit affirmed her decision to decline to attempt to exercise jurisdiction over the state court cases to order holdbacks.[6] Rejecting a cross-appeal on behalf of all common benefit attorneys, the panel

followed the lead of the Fourth and Ninth Circuits[7] in concluding that the power of the transferee court to coordinate MDL is merely procedural, and does not expand the jurisdiction of the transferee court, which necessarily means that the transferee court lacks jurisdiction over parties whose cases are not before it.[8]

The Eighth Circuit also rejected lead counsel's suggestion that the MDL transferee court might simply exercise jurisdiction over the attorneys appearing in the MDL that also had state court cases and order them to contribute to the common benefit fund.[9] In doing so, the Eighth Circuit panel astutely noted that authority over counsel does not confer jurisdiction over that counsel's clients. Interestingly, the same Eighth Circuit panel rejected a group of objectors' appeal of the district court's Feb. 24, 2010, order establishing a common benefit fund and its Dec. 6, 2012, order requiring the objectors/appellants to contribute to the common benefit fund. In finding no abuse of discretion, the Eighth Circuit specifically cited the district court's finding that the state court cases (presumably including Riceland's efforts in Arkansas against Bayer) benefited greatly from the work accomplished by the common benefit attorneys.[10]

Unsurprisingly, the district court found before it years later a proposed class action seeking recovery in unjust enrichment and quantum meruit when Riceland declined to contribute the common coffers. Less shocking still, the district court was receptive to the same theory of recovery it had all-but telegraphed years before and which had been vindicated by the Eighth Circuit.

In the end, the class counsel class action filed in a receptive MDL transferee court with firsthand knowledge of the equities of the common benefit contribution scheme looks like a viable way to turn out the pockets of recalcitrant state court free riders, a much more practical situation than attempting to extend the jurisdiction of the MDL court beyond its natural limits. In other words, the MDL court needn't have jurisdiction over you to make you comply with what it wants you to do.

In terms of what this decision can tell us in regard to predominance, typicality and choice, of law, however, this may likely prove to be a narrowly applicable decision based on a unique and fairly egregious set of facts with little application to other contexts.

—By Andrew D. Carpenter, Shook Hardy & Bacon LLP

Andrew Carpenter is a partner in Shook Hardy & Bacon's Kansas City, Missouri, office.

[1] Downing v. Riceland Foods Inc. (E.D. Mo. March 19, 2015).

[2] In Re GMO Rice Litig. (E.D. Mo. Feb. 24, 2010).

[3] In re Latex Gloves Prod. Liab. Litig., 2003 U.S. Dist. Lexis 18118 (E.D. Pa. 2003).

[4] Id. at *1.

[5] Id. at *5.

[6] In re Genetically Modified Rice Litig., 764 F.3d 864 (8th Circ. 2014).

[7] In re Showa Denko K.K. L-Tryptophan Prods. Liab. Litig.-II, 953 F.2d 162, 165-66 (4th Circ. 1992); Hartland v. Alaska Airlines, 544 F.2d 992, 1001 (9th Circ. 1976).

[8] In re Genetically Modified Rice Litig., 764 F.3d. at 873-74.

[9] Id. at 874.

[10] Id. at 872.
