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The Case For Appellate Review Of Choice Of Venue

Law360, New York (September 11, 2012, 1:22 PM ET) -- The venue in which a federal case will be litigated is often fiercely contested at the outset of federal litigation, especially in an era of increased bicoastal litigation. Section 1404(a) implicitly recognizes the importance of this early consideration, providing that, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."[1] Motions asking the district court to invoke Section 1404(a)'s discretionary power to transfer litigation to a different federal district — many times across the country — are common. An enormous body of case law been written, mostly by federal district court judges, attempting to interpret and apply the discretionary mandate.

Nonetheless, decisions granting or denying transfer of venue have been largely unreviewable on appeal. While such decisions can be challenged through a special writ, the Federal Circuit has emphasized that "[t]he remedy of mandamus is available only in extraordinary situations to correct a clear abuse of discretion or usurpation of judicial power."[2] And, more recently in its July 2012 decision, In re Altera, in refusing to disturb a district court's Section 1404(a) decision, the Federal Circuit again emphasized that it would exercise its extraordinary writ power "only to the extent that the trial court's analysis amounted to a clear abuse of discretion."[3]

Further, as the Federal Circuit has recognized, now that the U.S. Supreme Court has relaxed the standard for a district court to exercise subject matter jurisdiction over a declaratory judgment action filed by an accused infringer, more dueling litigations will likely be filed, at least in patent litigation — which will only increase the likelihood and frequency of Section 1404(a) venue motions and decisions.[4]

And, compounding the centrality of venue consideration in the patent arena, the number of patent litigations being brought by "nonpracticing entities" (sometimes called patent trolls) against multiple defendants who are generally spread across the United States is fast on the rise.[5] In sum, the maxim that "location, location, location" are the three most important considerations in purchasing real estate now seems to apply with equal vigor for venue in federal litigation.

A reliable protocol to review transfer decisions on appeal would help ensure greater uniformity and predictability in those decisions. But a protocol that is anything short of reasonably expeditious would be unworkable because it would slow down federal dockets even further and likely make federal litigations even more expensive.

Fortunately, an appeal protocol that promotes uniformity, but which is also reasonably expeditious, need not be designed using a blank canvas. Instead, one can be designed by: (1) expanding the judicial panel on multidistrict litigation's jurisdiction to include review of Section 1404(a) decisions, and (2) borrowing from the expedited, discretionary appeal process for remand decisions implemented in 2005 through the Class Action Fairness Act.

Currently, Section 1404 Decisions Are Inconsistent and Not Effectively Reviewable on Appeal

Decisions interpreting and applying Section 1404(a) are both myriad and widely inconsistent. Yet, few avenues exist for an interlocutory appeal of a Section 1404 transfer decision. Generally, they cannot be appealed until after a final judgment (at which time, the issue is somewhat moot). And, even the court making the decision may not be able to reconsider its own decision because once the case is transferred to a new court and the transferee court opens a docket (which now happens instantaneously given electronic docket management), the transferring court cannot revisit the issue — even if solid grounds exist for the losing party to ask for reconsideration.

The only meaningful option for an interlocutory appeal of a Section 1404(a) decision is a petition for writ of mandamus or prohibition, an extraordinary writ requesting that the court of appeal issue an order requiring a district court to transfer the case to a different venue (mandamus) or prohibiting a district court from effectuating the transfer (prohibition). But, as noted, mandamus relief is generally considered to be extraordinary.[6] Moreover, while the Federal Circuit has shown some increased willingness to entertain an extraordinary writ in the patent litigation context, clear guidance has yet to materialize from the Federal Circuit's decisions on those extraordinary writ.

For example, in a 2011 case, the Federal Circuit ruled that a Delaware district court judge abused its discretion by placing too much weight on the plaintiff's choice of forum, relying too heavily on the fact that the defendant was incorporated in Delaware, and not considering the convenience of witnesses and the location of books and records as part of its decision denying transfer.[7] Yet, in a July 2012 decision, the Federal Circuit denied a petition for writ of mandamus that challenged another Delaware district court decision denying defendants' motion to transfer.[8]

There, the Federal Circuit distinguished its 2011 decision because, unlike in the prior decision, the district court "endeavored to evaluate each of the forum non conveniens factors," and because, "unlike Link A Media [the district court decision spawning the Federal Circuit's 2011 decision], there are rational grounds for denying transfer given that all of the parties (not just a single defendant) had incorporated in Delaware and some witnesses would potentially find Delaware more convenient."[9]

Attempting to harmonize just these two decisions, it is unclear whether a district court must expressly consider each factor in its Section 1404(a) decision, whether "rational grounds" must be otherwise apparent on the face of the district court's decision, or some combination of both. Compounding the uncertainty, in both decisions, the Federal Circuit stated it was applying the law of the regional circuit (in those cases, the Third Circuit) in deciding the writ petition. This self-stated limitation naturally raises the question, then, of whether these decisions would have come out differently applying the law of a different regional circuit.

In sum: District courts are inconsistent and unpredictable in how they approach and decide Section 1404(a) venue transfer motions. No effective mechanism exists for timely appellate review of those decisions. And more certainty, consistency, predictability, and guidance is desirable, especially given the Supreme Court's relaxation of the declaratory judgment threshold.

The MDL's Jurisdiction Should Be Expanded to Include Review of Section 1404 Transfer Decisions, and the MDL Should Implement a Review Process Modeled After CAFA's Review of Remand Decisions

One viable solution is to implement an appellate review process that borrows from and combines aspects of the MDL panel rules and procedures and the rules for expedited, appellate review of removal/remand decisions of class actions under the CAFA. In particular, the proposed appeal protocol would have three principal components:

First, the MDL panel's jurisdiction should be expanded to allow Section 1404(a) appeals to be filed with the MDL panel, instead of having circuit courts of appeal review those decisions through an extraordinary writ process. This expansion would fit well with the MDL's already-existing skill set. Specifically, in deciding whether a transfer for coordinated or consolidated pretrial proceedings is appropriate, the MDL asks whether "such proceedings [will] be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions."[10]

This consideration is nearly identical to Section 1404(a), which explores whether change of venue would be "for the convenience of parties and witnesses" and "in the interest of justice." And, as noted, as part of deciding whether to consolidate for pretrial proceedings patent litigations brought in multiple forums by nonpracticing entities against multiple defendants, the MDL panel must also decide where to consolidate those multiple actions. Almost by necessity, traditional Section 1404(a) venue factors must be weighed as part of that process. Thus, the MDL panel is routinely analyzing the same or substantially the same factors and considerations as it would need to analyze if its jurisdiction were expanded to include Section 1404(a) appeals.[11]

Further, each MDL decision is made by a neutral panel of at least four district court or circuit court judges, each from a different circuit. The district court judge panel members (which comprise the large majority of panel members) already have experience and valuable, collective wisdom in deciding such motions. To have the MDL panel employ this collective wisdom to review section 1404(a) venue decisions and create a uniform body of MDL panel decisions would help achieve consistency and predictability.

Second, for review of Section 1404(a) decisions, the MDL should adopt a discretionary, expedited process modeled after the process for review of remand decisions under CAFA. Through CAFA, Congress amended the diversity jurisdiction statute, 28 U.S.C. § 1332, to create diversity jurisdiction over more class actions. Before CAFA, decisions whether to remand a class action to state court were not immediately reviewable on appeal.[12] Congress changed this through CAFA by enacting an expedited, discretionary appeal process for remand decisions.

Under CAFA's process, a litigant can petition the relevant, regional circuit court of appeal within 10 days of an adverse remand decision. The court has discretion whether to hear the appeal, and if it grants the petition to hear the appeal, the appeal must be decided within 60 days.[13] Adopting a substantially similar procedural protocol for Section 1404 (a) appeals would promote and advance the goal of developing consistency and predictability in Section 1404 jurisprudence. And the MDL panel already has an expedited review and decision process in place for Section 1407 decisions. Thus, an expedited, discretionary review process like that afforded to remand decisions by CAFA should fit well with current MDL rules and procedures.

Third, Section 1404 should be amended so that, if a district court grants a motion to change venue, transfer should not be effectuated immediately. Instead, a 10-day holding period should be enacted to allow the losing party the opportunity to (1) seek reconsideration by the district court (if appropriate grounds exist), or (2) petition the MDL panel for leave to appeal the transfer decision. Finally, upon appeal, further district court litigation should be stayed until the MDL panel decides whether to hear the appeal and, if it decides to hear the appeal, until after the appeal is decided on the merits.

Collectively, these components would promote consistency in Section 1404(a) decisions. At the same time the discretionary and expedited nature of this proposed appellate protocol would answer the chief criticism voiced by opponents of expanded appellate review: that allowing appeal of transfer decisions would result in long delays and costs. Such reform is especially appropriate now, at a time when declaratory judgment jurisdiction has been relaxed and multidefendant, bicoastal patent litigations have become ubiquitous.

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[1] 28 U.S.C. 1404(a).

[2] In re Link A Media Devices Corp., 662 F.3d 1221, 1222 (Fed. Cir. 2011).

[3] In re Altera Corp., at *2 (July 20, 2012).

[4] Micron Technology Inc. v. Mosaid Technologies Inc., 518 F.3d 897, 902 (Fed. Cir. 2008) discussing the potential impact of the Supreme Court's decision in MedImmune Inc v. Genentech Inc., 549 U.S. 118 (2007)).

[5] See FTC: Watch, No. 812, at 1-2 (Aug. 1, 2012).

[6] In re Link A Media Devices Corp., 662 F.3d 1221, 1222 (Fed. Cir. 2011).

[7] Id. at 1223-24.

[8] In re Altera Corp. (July 20, 2012).

[9] In re Altera Corp., at *2.

[10] 28 U.S.C. § 1407(a).

[11] See FTC: Watch, No. 812, at 1-2 (Aug. 1, 2012).

[12] See generally 28 U.S.C. § 1447(d).

[13] 28 U.S.C. § 1453(c).