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EDVA Judge Denies Motion to Transfer Antitrust Action Against Google to the SDNY

Virginia Rocket Docket Blog

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In perhaps the first case addressing transfer of a federal antitrust action to an MDL court, Judge Leonie Brinkema of the Alexandria Division of the EDVA recently denied a motion to transfer an antitrust action against Google brought by the federal government and eight states, including Virginia. *United States v. Google LLC*, Case No. 1:23CV108 (LMB/JFA), 2023 U.S. Dist. LEXIS 42231 (E.D. Va. March 14, 2023).

The Virginia antitrust action challenges alleged monopoly and anticompetitive practices in the digital advertising technology (ad tech) industry. Shortly after the case was filed, Google moved under 28 U.S.C. §1404(a) to transfer the action to be litigated alongside more than two dozen similar actions that had been consolidated in a multidistrict litigation (MDL) in the Southern District of New York (SDNY) in 2021.

On those facts alone, the Virginia action would appear ripe for transfer. The MDL proceeding in New York has been pending for almost two years, and the claims asserted in the Virginia and MDL cases admittedly shared a common set of facts and claims. Judicial efficiency would seem to favor consolidation of all of the cases before one judge.

The difference in the Virginia action was the presence of the federal government as a plaintiff. When the Multidistrict Litigation Act was enacted in 1968, Congress specifically exempted any antitrust action in which the United States is a complainant from consolidation in an MDL proceeding. See 28 U.S.C. 1407(g).

Google argued that it wasn't asking for the Virginia action to be consolidated with the MDL actions, only that it be transferred to the same court where one judge could coordinate and oversee both the MDL proceeding and the federal government action.

Judge Brinkema didn't buy that argument, finding that transfer would contravene the Congressional intent in exempting antitrust cases brought by the government from MDL consolidation. The legislative history, Judge Brinkema found, showed that Congress enacted the exemption to avoid the delays that might be caused by consolidation with private antitrust suits. Congress, Judge Brinkema found, clearly prioritized concerns about delay of government antitrust suits above the goals of efficiency, judicial economy and duplicative litigation. Granting transfer, even just for coordination with the MDL actions, would effectively circumvent the Congressional exemption and subvert Congress' intent. Given the number of plaintiffs in the MDL, coordination with the MDL would inevitably delay the government's suit. Google pointed to a 2008 case in which the D.C. district court

transferred an antitrust action brought by the FTC to a district where several similar cases were pending, but the Court found that case distinguishable because no MDL proceeding was pending at the time of transfer.

While Congressional intent was Judge Brinkema's primary reason for denying transfer, she also relied on the greater speed of litigation in the EDVA. She noted, for example, that the greater docket speed in the EDVA would minimize the risk of inconsistent rulings because many discovery issues, and summary judgment would likely be resolved in the EDVA before the SDNY. Based on these and other factors, Judge Brinkema found "no doubt that docket congestion and the likelihood of swift resolution" favored the EDVA over the SDNY.

As to the other §1404(a) factors, Judge Brinkema found that the plaintiff's choice of forum weighed against transfer due to alleged injuries sustained by federal agencies in Virginia, even though the vast majority of the factual allegations in the Complaint were not alleged to have occurred in Virginia. Convenience of the parties and witnesses, the court found, was neutral because both party and non-party witnesses were located throughout the country. On balance, the interests of justice, which encompassed the strong public policy expressed in the Congressional exemption of federal antitrust actions from MDL consolidation, and the relative speed of the EDVA, dictated that transfer was inappropriate.

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