Advances in Protecting Defendants' Right To Remove From State to Federal Court

By Alan E. Rothman, Mark A. Beckman and Jay P. Mayesh

Plaintiffs in product liability cases often expend great effort to stay out of federal court, and out of the multidistrict litigation (MDL) process in particular. In light of those efforts, defense counsel face new and different challenges to removal. Defense attorneys have noted that plaintiffs' attorneys who do not want to participate in the MDL proceedings may name local residents, such as local employees or salespersons, as defendants in an attempt to defeat diversity. Plaintiffs' gamesmanship is particularly aggressive in pharmaceutical product liability actions. The ongoing MDL regarding Rezulin, Warner-Lambert's drug therapy for type 2 diabetes, provides a textbook example of plaintiffs' tactics. As Rezulin plaintiffs' counsel readily concede: "In every case, of course, Warner-Lambert and/or Parke-Davis [a Warner-Lambert operating division] will be a defendant. But for various reasons, other entities, including pharmacies and individual pharmacists, physicians, salespersons, and distributors, will be defendants in these lawsuits as well." ATLA's Litigating Rezulin Cases [Hiawatha Northington II], Screening and Intake of Rezulin Cases, at H-3. Against this backdrop of tactical maneuvering, the Rezulin MDL (and other product liability actions) has yielded evolving case law strengthening defendants' right of removal. This article, the first in a series of three, will examine this phenomenon.

Removal Requirements

Generally, under 28 U.S.C. § 1441 (2002), an action is removable if the plaintiff could have originally brought the action in federal court. An action may be brought in federal court under either federal question or diversity jurisdiction. As removals of product liability cases (and particularly those involving pharmaceutical products) are often based on the latter, only diversity removals will be addressed here.

Two requirements must be satisfied for a federal court to exercise diversity jurisdiction: (1) no plaintiff may be of the same citizenship as any defendant (known as the "complete diversity" requirement); and (2) the amount in controversy must exceed $75,000. Removals are also governed by several statutory timing requirements. This article addresses the complete diversity requirement. Future articles in this series will address the amount in controversy requirement and developing exceptions to the timing constraints.

KAYE SCHOLER LLP

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The Complete Diversity Requirement

In an attempt to evade the complete diversity prong of federal jurisdiction, plaintiffs regularly name as defendants local employees, pharmacies and/or pharmacists and doctors (including hospitals and clinics and other health care providers) who are citizens of the same state as at least one of the plaintiffs.

But the law does not leave plaintiffs unfettered. It provides two valuable doctrines to defense counsel: fraudulent joinder and fraudulent misjoinder. Each of these has developed over time in response to evolving plaintiffs' tactics.

Fraudulent Joinder

The doctrine of fraudulent joinder prevents plaintiffs from defeating federal diversity jurisdiction simply by naming nondiverse defendants. Under this doctrine, in determining whether there is complete diversity, a court must disregard the citizenship of those defendants where "there is 'no reasonable basis' for predicting liability on the claims alleged" against those defendants under the applicable state law. *In re Rezulin Prods. Liab. Litig.*, 133 F. Supp. 2d 272, 279-80 and n.4 (S.D.N.Y. 2001) (*Rezulin I*) (citations omitted). Although some courts have framed the fraudulent joinder standard as whether there is "no possibility" that a plaintiff could establish a claim against the nondiverse defendant, the standard is not truly one of "no possibility' [because] . . . there always would be a 'possibility' . . . [that would] permit the plaintiff to prevail." *Id.* at 280 n.4. In reviewing a lower court's remand decision, the U.S. Court of Appeals for the Fifth Circuit observed, "Plaintiffs appear to argue that *any mere theoretical possibility* of recovery under local law-no matter how remote or fanciful-suffices to preclude removal. We reject this contention. As the cited authorities reflect, there must at least be arguably a *reasonable* basis for predicting that state law would allow recovery in order to preclude a finding of fraudulent joinder." *Badon v. RJR Nabisco Inc.*, 236 F.3d 282, 286 n.4 (5th Cir. 2000). (Emphasis in original.)

In ascertaining whether a nondiverse defendant has been fraudulently joined, courts have rigorously examined complaints for deficiencies in the allegations. In addition, courts have applied the statutory and common law protections available to the particular type of nondiverse defendant (e.g., employee, pharmacist or physician).

There are at least five different pleading deficiencies that courts have seized on to conclude that nondiverse defendants were fraudulently joined:

(1) Complaint fails to allege a connection between the plaintiff and the nondiverse defendants—e.g., the complaint fails to allege that a sales representative called on plaintiff's treating physician or that the pharmacy dispensed medication to the plaintiff or that the physician treated the plaintiff. *Rezulin I*, 133 F. Supp. 2d 272; *In re Rezulin Prods. Liab. Litig.*, Pretrial Order No. 59 (S.D.N.Y. Feb. 21); *Salisbury v. Purdue Pharma, L.P.*, 166 F. Supp. 2d 546 (E.D. Ky. 2001); *Adams v. Warner-Lambert Co.*, No. 3:01-CV-1980-M (N.D. Tex. Nov. 27, 2001).

(2) Complaint makes allegations directed to all of the defendants, collectively. Such allegations merely "lump" accusations of wrongdoing against all named defendants without specifying which defendant proximately caused which alleged harm. *Rezulin I*, 133

F. Supp. 2d 272; *In re Rezulin Prods. Liab. Lit.*, 168 F. Supp. 2d 136 (S.D.N.Y. 2001) (*Rezulin II*); *Badon v. RJR Nabisco Inc.*, 224 F.3d 383 (5th Cir. 2000); *Salisbury*, 166 F. Supp. 2d 546.

(3) Heightened pleading rules as to particular cause of action (e.g., Fed. R. Civ. P. 9(b)) have not been satisfied. *Rezulin I*, 133 F. Supp. 2d 272.

(4) Allegations of the essential elements for particular causes of action are pleaded in conclusory fashion. *Pampillonia v. RJR Nabisco Inc.*, 138 F.3d 459 (2d Cir. 1998); *Strickland v. Brown Morris Pharmacy Inc.*, 1996 WL 537736 (E.D. La. Sept. 20, 1996).

(5) Allegations of a nondiverse defendant's knowledge of the product's risks are refuted by other allegations in the complaint (where knowledge is an essential element of the cause(s) of action asserted against that defendant). For example, the theory underlying many product liability actions is that the manufacturer concealed the risk of the product at issue (whether a pharmaceutical medication, tire or household appliance) from everyone. In the same complaint, plaintiffs have alleged that the nondiverse defendants knew or should have known of the product's risks that the manufacturer allegedly concealed from everyone. Those complaints will often specify that the alleged risks were concealed from the same nondiverse defendants. In the face of such fundamentally incompatible allegations, at least two courts have held that those local nondiverse defendants were fraudulently joined. The allegations of concealment of the risks refute the allegations that the defendants knew of the risks. *Rezulin I*, 133 F. Supp. 2d 272; *Louis v. Wyeth-Ayerst Pharm. Inc.*, No. 5:00CV102LN (S.D. Miss. Sept. 25, 2000).

These five deficiencies can be applied to the various types of non-diverse defendants discussed in this article. In addition, there are statutory and common law arguments with respect to particular types of defendants. These are discussed below.

Fraudulently Joined Employees. Plaintiffs frequently name local employees (e.g., pharmaceutical territory/sales representatives or a retailer's store clerk) together with the manufacturing defendant in order to defeat diversity. However, courts have increasingly rejected this ploy and determined that such employees are fraudulently joined. One argument to support this conclusion is that employees are not "sellers" of products, and therefore not subject to strict liability. *McCurtis v. Dolgencorp Inc.*, 968 F. Supp. 1158 (S.D. Miss. 1997); *Rezulin I*, 133 F. Supp. 2d 272. Support can also be found in § 20 of the Restatement (Third) of Torts: Products Liability (1998). That section provides an explicit definition of "One Who Sells or Otherwise Distributes" for purposes of the Restatement (Third). Comment g to § 20 provides:

> *Other means of commercial distribution: product distribution facilitators.* Persons assisting or providing services to product distributors . . . are not subject to liability under the rules of this Restatement. Thus, commercial firms engaged in advertising products are outside the rules of this Restatement, as are firms engaged exclusively in the financing of product sale or lease transactions. *Sales personnel* and commercial auctioneers *are also outside the rules of this Restatement.* (Emphasis added.)

Fraudulently Joined Pharmacies/Pharmacists. Plaintiffs also name local pharmacies and/or pharmacists ("pharmacy defendants") in an effort to defeat diversity and prevent removal. But as with employees, the evolving case law explains the sound reasons why pharmacy defendants are shielded from liability under state law and are thereby fraudulently joined.

Pharmacists are most commonly sued for failing to warn the plaintiff of the alleged risks of a drug that the pharmacist filled pursuant to a physician's prescription. However, the rule applied in cases from around the country is that "a pharmacist has no . . . duty [to warn its customers about potential hazards or side effects of prescription drugs] when the prescription is proper on its face and neither the physician nor the manufacturer has required that the pharmacist give the customer any warning." *Morgan v. WalMart Stores Inc.*, 30 S.W.3d 455, 461-66 (Texas App.-Austin 2000) (*petition denied*, June 14, 2001) (citing cases).

Morgan and other cases explain that the rule logically stems from application of the learned intermediary doctrine. Under that doctrine, even a drug manufacturer ordinarily has no obligation to warn consumers, but must address warnings only to prescribing physicians. By parity of reasoning, pharmacists also have no obligation to warn consumers. If a pharmacist had such a duty, "[a] risk averse pharmacist would have every incentive to dispense cautions that may be uninformed, inapplicable to or misunderstood by the patient. Such cautions would be at least as likely to undermine the physician's judgment as manufacturer warnings." *Rezulin I*, 133 F. Supp. 2d at 288-89.

The courts have refused to impose on pharmacists a duty to warn of intrinsic dangers of prescription drugs, and have shielded them from claims based on failure to warn, strict liability and breach of warranty. Even in states where the state courts have not expressly addressed the issue of pharmacy liability, federal courts have denied remand in light of what "appears to have emerged [as] a clear national consensus on this issue." *Salisbury*, 166 F. Supp. 2d at 551; *Teague v. Parke-Davis*, No. 3:00CV224LN (S.D. Miss. Dec. 5, 2001). Moreover, in an MDL involving over- the-counter medication, the MDL judge denied remand in cases naming pharmacy defendants. *Johnson v. Bayer*, MDL 1407, No. C01-2014R (W.D. Wash. Feb. 26). In all these cases, the pharmacist is therefore fraudulently joined and the case may be successfully removed.

Fraudulently Joined Physicians. Perhaps some of the most challenging cases to remove are those that name a nondiverse physician defendant. But as with territory representatives and pharmacy defendants, plaintiffs must allege sufficient facts to sustain a claim against the physician, without which the physician is fraudulently joined. Thus, the same five pleading deficiencies discussed above can be applied with equal force to cases naming physicians.

But the complaint is not the only source for demonstrating fraudulent joinder. Many states have enacted statutes governing how and when a plaintiff may sue a physician, most often in state malpractice acts. These statutes sometimes shorten the statute of limitations on claims against physicians (affirmative defenses can be bases for finding fraudulent joinder), and often establish a set of hurdles a plaintiff must overcome before being allowed to pro-

ceed with a claim against the physician in court. Two examples are statutes requiring (1) plaintiffs to provide an expert report detailing the alleged misconduct by the physician defendant, and (2) presentation of the claim to a medical review board before filing suit in court. *Armijo v. Pfizer Inc.*, No. 01-674-M/KBM (D.N.M. Aug. 15, 2001). But see *Johnson v. Scimed*, 92 F. Supp. 2d 587 (W.D. La. 2000). Defense counsel should be mindful of other technical requirements in those statutes, such as a requirement the physician first move to dismiss on that basis, the failure of which may bar removal. See *Rezulin II*, 168 F. Supp. 2d 136.

Fraudulent Misjoinder

Plaintiffs' jockeying is not limited to the defendant's side of the "v". A recent tactic has been to piggyback numerous plaintiffs onto the one plaintiff who has stated a claim against a nondiverse defendant, notwithstanding their lack of any connection to that defendant. To deal with the specious claims of some of these plaintiffs, courts around the country have recognized and applied the doctrine of fraudulent misjoinder.

A recent example is a Texas Rezulin action filed by 53 plaintiffs naming, *inter alia*, a nondiverse physician. The complaint alleged that the physician treated only one of the plaintiffs. After removal, plaintiffs moved for remand. The court then held that the plaintiffs who were not treated by the physician defendant were fraudulently misjoined. The court proceeded to sever and remand only the lone plaintiff with a connection to the physician and denied remand as to the other 52 plaintiffs. *Adams*, No. 3:01-CV-1980-M; *Rezulin II*, 168 F. Supp. 2d 136.

Conclusion

The issue of diversity jurisdiction removals clearly outlines the push and pull between the plaintiffs' and defense counsel. Because plaintiffs expend great energy to litigate in state court by naming nondiverse defendants, similar effort has been used to develop and establish methods to ensure a defendant's right to federal jurisdiction. The doctrines of fraudulent joinder and fraudulent misjoinder not only have been applied by courts across the nation, but also have been expanded as a result of the inclusion of "sham" parties. As outlined above, through a rigorous analysis of the complaints and application of emerging law regarding liability of those nondiverse defendants, defendants have developed new arrows in the removal quiver.