IADC COMMITTEE NEWSLETTER
SUPERIOR ADVOCATES. GLOBAL PERSPECTIVE.
CELEBRATING 100 YEARS 1920-2020

PRODUCT LIABILITY

MARCH 2020

IN THIS ISSUE

This article explores recent developments in the area of fraudulently joined distributors in product liability litigation. It examines successes with more traditional approaches to challenging plaintiffs' claims against the distributor and raises newer, more inventive approaches to demonstrating that a distributor was joined solely for the purpose of defeating diversity jurisdiction.

Defeating Remand:
Proving Fraudulent Joinder of a Non-Diverse Distributor

ABOUT THE AUTHORS

Robin Shah is an attorney in Skadden, Arps, Slate, Meagher & Flom's New York office where she is a member of the Mass Torts, Insurance and Consumer Litigation group. Robin represents an array of clients including medical device manufacturers, consumer product manufacturers, and pharmaceutical companies in complex civil litigation. She advises clients on all aspects of litigation including pre-trial discovery, factual investigation, fact and expert witness preparation and trial strategy. She can be reached at robin.shah@skadden.com.

Kate Mullaley is an attorney in Skadden, Arps, Slate, Meagher & Flom's New York office where she is a member of the Mass Torts, Insurance and Consumer Litigation group. Kate has experience in various aspects of litigation, including fact and expert discovery, *Daubert* and dispositive motions, fact and expert witness preparation, and trial preparation. She can be reached at kate.mullaley@skadden.com.

ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

Daniel Higginbotham
Vice Chair of Newsletters
Thomas Combs & Spann, PLLC
dhigginbotham@tcspllc.com

*The **International Association of Defense Counsel** serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

w: www.iadclaw.org p: 312.368.1494 f: 312.368.1854 e: mmaisel@iadclaw.org

In product liability cases, plaintiffs often join non-diverse distributors of drugs and medical devices as defendants for the purpose of defeating diversity jurisdiction. Defendants may obtain relief by invoking the fraudulent joinder doctrine, which allows a federal district court to assume jurisdiction over a removed, facially non-diverse case, dismiss the non-diverse defendants and retain jurisdiction. In order to invoke the fraudulent joinder doctrine, defendants must show that "there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendants or seek a joint judgment." *In re Zoloft (Sertraline Hydrochloride) Prod. Liab. Litig.*, 257 F. Supp. 3d 717, 719 (E.D. Pa. 2017) (quoting *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990)); *see also In re Taxotere (Docetaxel) Prod. Liab. Litig.*, No. 19-CV-1164, 2020 WL 598043, at *1 (E.D. La. Feb. 7, 2020) ("[T]o establish improper joinder, a defendant must show that 'there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant.'")

Historically, defendants have struggled to overcome the burden of establishing fraudulent joinder, including with respect to distributors, because courts tend to view "all factual allegations" regarding fraudulent joinder "in the light most favorable to the plaintiff," and several courts have found that "any uncertainties in state law must be resolved in the plaintiff's favor." *In re Abilify (Aripiprazole) Prod. Liab. Litig.*, No. 3:16MD2734, 2018 WL 6258903, at *2 (N.D. Fla. Nov. 8, 2018); *see also Harris v. Zimmer Holdings, Inc.*, No. 18 CIV. 11271 (PAC), 2019 WL 1873178, at *3 (S.D.N.Y. Apr. 26, 2019) ("In deciding a motion premised on fraudulent joinder, the court resolves all factual and legal issues in plaintiff's favor, "and all doubts [are] resolved against removability and in favor of remand." (quoting *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MD-2543 JMF, 2015 WL 3776385, at *1 (S.D.N.Y. June 17, 2015))). However, in certain cases, defendants have been able to successfully prove that plaintiffs cannot establish their claims against an in-state distributor by demonstrating that the requisite elements of liability under state law cannot be met. In addition, recent successes in the *Zoloft* and *Taxotere* litigations demonstrate that there are newer and more creative ways to establish that distributors were fraudulently joined and, in turn, defeat motions to remand.

No Liability Under State Law

One of the main, and arguably the most straightforward, arguments in opposing joinder of distributors is to examine the product liability requirements under the relevant state law. Courts have denied remand and found that a non-diverse distributor was fraudulently joined on the grounds that the state law either limits liability to manufacturers or to distributors with actual knowledge of the defect alleged. For instance, in *Harris v. Zimmer Holdings, Inc.*, plaintiffs brought suit against the manufacturer of an artificial hip and joined the in-state distributors alleging that they negligently distributed, marked and/or promoted the medical device and failed to convey adequate warnings. No. 18 CIV. 11271 (PAC), 2019 WL 1873178, at *2

(S.D.N.Y. Apr. 26, 2019). Plaintiffs moved to remand the case, and in response, the manufacturer argued that the in-state distributors were fraudulently joined because plaintiffs' claims were implausible. *Id.* In siding with defendants, the court first examined plaintiffs' defective design and failure to warn claims under the Ohio Product Liability Act and found that the Act extended liability solely to manufacturers, with some exceptions, none of which were alleged. *Id.* at *4. As a result, the court found that plaintiffs' claims under the Ohio Product Liability Act failed as a matter of law. *Id.* In addition, the court examined plaintiffs' claim under the Ohio Consumer Sales Practices Act, "a remedial law designed to compensate for traditional consumer remedies," and found that it did not apply to plaintiffs' claims for personal injury associated with the device. *Id.* With no likelihood of success on any of their claims against the in-state distributors, the court held that "even under Ohio's lenient pleadings standard, Defendants have met their high burden of showing fraudulent joinder as to the Ohio Defendants." *Id.* The court denied remand and explained that where "state case law or legislation removes all reasonable possibility that the plaintiff would be permitted to litigate the claim, then remand must be denied." *Id.* at *3.

Similarly, in *Millman v. Biomet Orthopedics Inc.*, the court denied remand, finding that under Illinois law, plaintiffs could not state a claim against the in-state distributor. No. 3:13-CV-77 RLM-CAN, 2013 WL 6498394, at *3 (N.D. Ind. Dec. 10, 2013). Specifically, the court noted that pursuant to the Illinois Distributor Statute, "[i]n any product liability action based in whole or in part on the doctrine of strict liability in tort," a court must dismiss a non-manufacturer defendant once that defendant "files an affidavit certifying the correct identity of the manufacturer of the product." *Id.* at *2. The distributors filed an affidavit stating that Biomet, the out-of-state defendant, manufactured the device and the distributors did not play any role in or exercise control over the design, testing or manufacture of the devices other than by merely delivering the devices to hospitals. *Id.* Because the plaintiffs failed to "set forth specific facts" that the distributors had "actual knowledge of the defect in the product," the court denied remand, finding that plaintiffs failed to "demonstrate that they ha[d] a reasonable probability of prevailing" on any claim against the in-state distributor under Illinois law. *Id.* at *3-5.

Likewise in *Askew v. DC Medical, LLC*, the court found that the sole distributor of a medical device was fraudulently joined where the plaintiff failed to offer evidence under Georgia law that the distributor had actual or constructive knowledge of a defect. No. 1:11-CV-1245-WSD, 2011 WL 1811433, at *7-8 (N.D. Ga. May 12, 2011). In denying remand, the court rejected plaintiffs' "general, conclusory allegations" that, as the exclusive distributor, DC Medical "was or should have been in possession of evidence demonstrating that the DePuy ASR Hip Implant Devices caused serious injuries and would fail." *Id.* at *5. Moreover, the court noted that DC Medical submitted a declaration unequivocally stating that DC Medical did not have knowledge of any defect prior to the distribution of the device. *Id.* at *5-6. Without "any evidence supporting their allegations that DC Medical

had knowledge of a defect prior to distributing the ASR device," the court concluded that the plaintiffs did not have a viable claim of negligence against the distributor under Georgia law and that it could ignore the distributor's residence and retain jurisdiction. *Id.* at *7-8.

These cases suggest that, in certain jurisdictions, defendants can successfully prove that distributors were fraudulently joined by showing that the requirements for product liability under state law cannot be satisfied.

No Actual Intent To Pursue Claims

In addition to approaching fraudulent joinder from the angle of failure to state a claim, at least one recent opinion suggests that even if plaintiffs can reasonably assert a claim, defendants may still be able to establish fraudulent joinder by demonstrating that plaintiffs have no intent to pursue that claim. In *In re Zoloft (Sertraline Hydrochloride) Product Liability Litigation*, plaintiffs filed an action in California state court against both the manufacturer (Pfizer) and an in-state distributor (McKesson) alleging numerous state law claims. 257 F. Supp. 3d 717, 718 (E.D. Pa. 2017). Defendants removed the case on the grounds that McKesson was fraudulently joined and requested transfer to the *In re Zoloft (Sertraline Hydrochloride) Product Liability Litigation* MDL, and the plaintiffs moved to remand. *Id.* The court found that, although the plaintiffs pled sufficient facts to assert a claim against McKesson, "the history of the Zoloft litigation show[ed] that Plaintiff [had] no real intention to pursue claims against McKesson, such that McKesson was fraudulently joined." *Id.* Specifically, the court found merit in defendants' argument that because Zoloft plaintiffs in other cases had regularly failed to propound discovery on McKesson in either state or federal court, it was clear that plaintiffs were simply joining McKesson to defeat diversity rather than engage in litigation against them. *Id.* at 720. The court further found that, "[e]ven more significantly, the plaintiffs in numerous Zoloft cases ha[d] dismissed claims against McKesson both before and after the Court granted summary judgment in favor of Pfizer," indicating that plaintiffs lacked good faith intent to prosecute their claims against McKesson. *Id.* at 720-21. As a result, the Court concluded that McKesson was fraudulently joined and denied remand. *Id.* at 721. In doing so, the MDL court suggested an opportunity for defendants in future cases to go beyond the actual pleadings and argue that plaintiffs' intent to pursue their claims is a relevant factor in examining whether a distributor was fraudulently joined.

No Direct Link Between the Distributor And Plaintiffs

Finally, in an opinion just last month, one court opened the door to arguing that an in-state distributor cannot defeat diversity where there is no proof that the distributor actually provided the particular product that the plaintiff received. In *In re Taxotere (Docetaxel) Product Liability Litigation*, sixteen plaintiffs filed an action in California state court alleging that Taxotere, a chemotherapy drug, caused them to suffer permanent hair loss. No. 19-CV-1164, 2020 WL 598043, at *1 (E.D. La. Feb. 7, 2020).

Plaintiffs sued several pharmaceutical companies that manufactured Taxotere as well as McKesson, an in-state distributor. *Id.* Defendants removed the case and requested transfer to the *In re Taxotere (Docetaxel) Product Liability Litigation* MDL claiming that McKesson was fraudulently joined, and plaintiffs responded by filing a motion to remand. *Id.* In denying the plaintiffs' motion, the court placed clear limits on the extent to which a distributor can be joined by requiring a showing that McKesson distributed the particular doses of the drug that the plaintiffs themselves were administered. *Id.* at *1-2. The court found that without an allegation that McKesson was the sole packager or distributor of the drug, the plaintiffs could not conclude that the doses they were administered were received from McKesson. *Id.* at *1. Moreover, plaintiffs' allegation that McKesson distributed to an infusion facility where one of the plaintiffs received treatment fell short of providing a reasonable basis upon which the court could conclude that McKesson was a proper defendant. *Id.* at *2. While it is unclear if other courts will adopt a similar approach, this opinion provides defendants with grounds to argue that, without a direct and concrete link between the distributor and the plaintiffs, the distributor is an improper defendant.

Conclusion

In sum, defendants should be vigilant for attempts by plaintiffs to defeat diversity jurisdiction by joining non-diverse distributors. Despite the often high burden, recent opinions demonstrate that defendants can defeat motions to remand by establishing fraudulent joinder in multiple ways. One of the traditional approaches is to argue that plaintiffs failed to state a viable cause of action against the non-diverse distributor in light of the limits placed on distributor liability under state law. Recent decisions also indicate that courts are amenable to more nuanced fraudulent joinder arguments, including focusing on the extent of the relationship between the distributor and the plaintiffs (or lack thereof) as well as on plaintiffs' behavior in other, related cases.

Past Committee Newsletters

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

FEBRUARY 2020
Updates on E-Cigarette Litigation and Practitioner Takeaways Related to Social Media Marketing
Shayna S. Cook and Symone D. Shinton

JANUARY 2020
Rule 23(b)(3) Predominance in Benefit-of-the-Bargain Actions
Kelly Luther and Jacob Abrams

DECEMBER 2019
Is *Daubert* Broken?
Bill Anderson

NOVEMBER 2019
Reviving Failure to Warn Defenses in Cases Involving Deceased Prescribing Physicians
Daniel Higginbotham and Brenda A. Sweet

OCTOBER 2019
E-cigarettes: How the Situation in the US could Give Rise to Litigation in the EU
Sylvie Gallage-Alwis and Guillaume Racle

SEPTEMBER 2019
An Introduction to Product Liability Regimes in the Asia Pacific Region
Nicole Boehler and David Goh

AUGUST 2019
Old and New Targets: IARC Releases its 2020-2024 Priority List for Evaluation
Eric G. Lasker and John M. Kalas

JUNE 2019
Design Thinking for Litigators
Whitney Frazier Watt and Jennifer Henry Jackson

MAY 2019
Recent Supreme Court Decision Rejects Bare-Metal Defense in Maritime Cases
Jessie Zeigler and Courtney Hunter

APRIL 2019
Fear of Cancer: The Start of a New Worrying Era in France
Sylvie Gallage-Alwis

FEBRUARY 2019
Do Enhanced-Injury Crashworthiness Cases Filed in Missouri Mean Enhanced Liability for Product Manufacturers?
Mary Anne Mellow, Timothy C. Sansone, and Hayley C. Bohnert