

## Fraudulent Joinder

### *Successful Removal of Actions to Federal Court*

By Melissa R. Levin and Heather K. Hays

As most pharmaceutical and medical device products liability cases are based on state law claims, diversity jurisdiction may be the only way to obtain a federal forum. Plaintiffs often join non-diverse defendants, such as local doctors, hospitals, pharmacies, employees and/or sales representatives, in an attempt to defeat diversity jurisdiction and prevent removal of cases to federal court. Defendants — who generally prefer to proceed in federal court — may be able to remove such cases for fraudulent joinder using some of the following arguments.

#### **FRAUDULENT JOINDER**

Fraudulent joinder occurs when a plaintiff adds a sham, nominal, or unknown defendant to avoid federal court jurisdiction. A removing defendant attempting to establish fraudulent joinder bears a heavy burden, and must plead a claim of fraudulent joinder with particularity and support the claim by clear and convincing evidence. *McLeod v. Cities Serv. Gas Co.*, 233 F.2d 242, 246 (10th Cir. 1956). In determining whether a nondiverse defendant has been fraudulently joined, the court is not limited to the allegations of the pleadings, but should assess the record as a whole, including any affidavits and depositions submitted by the parties. See *AIDS Counseling*, 903 F.2d at 1004 (stating that in determining whether an attempted joinder is fraudulent, “the court ... may ... consider the entire record, and determine the basis of joinder by any means available”) (citation omitted). The standard favors the plaintiff, as the court must resolve “any disputed questions of fact and ambiguities in the controlling ... state law in favor of the non-removing party.” See, e.g., *Alexander v. Electronic Data Sys. Corp.*, 13 F.3d 940, 949 (6th Cir. 1994) (quoting *Carriere v. Sears Roebuck & Co.*, 893 F.2d 98, 100 (5th Cir. 1990)). Courts, however, are not required “blindly to accept whatever plaintiff may say no matter how incredible or how contrary to the overwhelming weight of the evidence.” *In re Diet Drugs Prods. Liab. Litig.*, MDL 1203 (*Brown and Price v. American Home Prods. Corp.*), Pretrial Order 2710 (E.D. Pa. Jan. 17, 2003).

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A removing defendant can counter a plaintiff's emphasis on the heavy burden the defendant bears to prove fraudulent joinder by arguing that the court's decision on the issue of fraudulent joinder is not a decision upon the merits of the case. Defense counsel must remind the court that plaintiff's contentions should not be taken at face value but should be examined to determine if the plaintiff's claims have merit.

### THE TESTS COURTS APPLY TO DETERMINE FRAUDULENT JOINDER

All courts agree that a defendant is fraudulently joined where there is no cause of action against it or where a plaintiff has committed fraud in pleading jurisdictional facts. Courts, however, apply different tests to determine whether a plaintiff has fraudulently joined a defendant. Some federal circuits have articulated the fraudulent joinder standard as "no reasonable basis for predicting" that a plaintiff can establish liability against a non-diverse defendant on pleaded claims under state law. See, e.g., *Badon v. RJR Nabisco Inc.*, 224 F.3d 382, 390 (5th Cir. 2000). Other circuits require proof that a plaintiff has "no possibility" of prevailing against the non-diverse defendant in order to find fraudulent joinder. See, e.g., *Pampillonia v. RJR Nabisco*, 138 F.3d 459 (2d Cir. 1998). Counsel should first determine which standard the court in his or her jurisdiction will likely apply. And, even if the court in your jurisdiction applies the rigorous "no possibility standard," defense counsel can argue that this standard actually means "no reasonable possibility." See *In re Rezulin Prods. Liab. Litig.*, 133 F. Supp. 2d 272, 288 (S.D.N.Y. 2001) ("[T]he 'no possibility' standard is a misnomer. It is expressed more accurately as one of no reasonable possibility.").

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Fraudulent joinder also may exist where a plaintiff has no "real intention" of obtaining a joint judgment against a non-diverse defendant. See *Chicago, Rock Island & Pacific Ry. Co. v. Schwyhart*, 227 U.S. 184 (1913). But see *Parks v. New York Times Co.*, 308 F.2d 474, 478 (5th Cir. 1962). In this situation, defense counsel can explore whether the plaintiff has promised the non-diverse defendant that the plaintiff will dismiss that defendant after a year — the limit for removal of cases pursuant to 28 U.S.C. § 1446(b).

### DEFENSE ARGUMENTS IN SUPPORT OF REMOVAL

When removing a case, defense counsel should analyze plaintiff's motion for judgment or complaint and argue that the allegations support defendant's contention that plaintiff has fraudulently joined a non-diverse defendant. For example, if a plaintiff collectively refers to all defendants but fails to specify which defendant caused which alleged injury, the removing defendant may argue that such failure demonstrates 1) plaintiff's lack of intent in pursuing a judgment against certain defendants; 2) the lack of a cause of action against certain defendants; or 3) the lack of connection between certain defendants and the claims. See, e.g., *In re Rezulin Prods. Liab. Litig.*, 133 F. Supp. 2d 272, 280 n.4 (S.D.N.Y. 2001); *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 140 (S.D.N.Y. 2001) (plaintiffs fraudulently joined non-diverse sales representative of manufacturer defendant when they made "no specific allegations against [him] at all, instead attributing wrongdoing to the collective 'defendants'").

Similarly, a plaintiff must properly plead the essential elements of a cause of action against the non-diverse defendant, or the removing defendant will argue that the complaint fails to state a viable claim against the local defendant. See, e.g., *In Re Rezulin*, 133 F. Supp. 2d at 283-84. Finally, if a complaint is inconsistent as to the non-diverse defendant, the non-diverse defendant may be

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fraudulently joined. *See, e.g., Id.; Louis v. Wyeth-Ayerst Pharm. Inc.*, No. 5:00CV102LN (S.D. Miss. Sept. 25, 2000) (when the allegations directed toward the pharmacies were in direct contradiction to other allegations within the complaint, the non-diverse defendants were fraudulently joined). For example, where a plaintiff alleges that a product manufacturer concealed risks associated with its product but also alleges that the non-diverse defendant knew or should have known of the allegedly concealed risks, the non-diverse defendant may be fraudulently joined. *See In re Rezulin*, 133 F. Supp. 2d at 290 (“[T]he theory underlying the complaints is that the manufacturer defendants hid the dangers of Rezulin from plaintiffs, the public, physicians, distributors, and pharmacists — indeed, from everyone. Plaintiffs’ allegations that pharmacists knew and failed to warn of the dangers are therefore purely tendentious.”). In response, a plaintiff should argue that modern rules of procedure permit pleading in the alternative, though this argument has failed in some cases. *See, e.g., In re Rezulin*, 2002 U.S. Dist. LEXIS 24436 (S.D.N.Y. 2002) (denying remand and noting that while plaintiffs may allege inconsistent theories of recovery, plaintiffs are not relieved of the burden to provide sufficient notice to defendants of the claims against them).

Depending on the type of in-state defendant named in a complaint, an out-of-state defendant may have several grounds on which to remove the case. If, for example, a plaintiff joins a local health care provider whose claims are barred by the statute of limitations, the diverse defendant can remove the case based on fraudulent joinder. *See, e.g., Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998) (upholding removal when claims against non-diverse defendants were barred by the statute of limitations); *In re Diet Drugs Prods. Liab. Litig.*, MDL No. 1203 (*Alexander v. Wyeth, et al.*)

Pretrial Order 3230 (E.D. Pa. Jan. 29, 2004) (denying plaintiffs’ motions to remand); *Case v. Merck & Co.*, 2002 U.S. Dist. LEXIS 15712 (E.D. La. Aug. 15, 2002) (claim against hospital barred by the statute of limitations). Likewise, if a plaintiff sues a health care provider who has never treated the plaintiff, a defendant can successfully argue that the local defendant was fraudulently joined. *See, e.g., In re Diet Drugs Prods. Liab. Litig.*, MDL 1203, 220 F. Supp. 2d 414, 422 (E.D. Pa. 2002) (ruling that the non-diverse defendants who never treated the plaintiffs were

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fraudulently joined and denying the plaintiffs’ motion to remand). Similarly, if a plaintiff fails to satisfy statutory prerequisites to suing a local health care provider, the remaining defendant can argue that plaintiff’s inability to recover against the doctor makes the joinder fraudulent. *See In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136 (S.D.N.Y. 2001) (stating that health care providers could assert plaintiffs’ failure to meet statutory filing prerequisites as a basis for dismissal, but granting motion to remand because the defendant manufacturer had no standing to urge dismissal on this basis). *But see, e.g., Ohler v. Purdue Pharma, L.P.*, 2002 WL 88945 \*5 (E.D. La. 2002).

If a plaintiff joins a non-diverse pharmacist as a defendant, the removing defendant can assert fraudulent joinder on the ground that courts have declined to impose on pharmacists a duty to warn their customers of the risks and hazards of a prescription medication. *See, e.g., In re Rezulin Prods. Liab. Litig.*, 133

F. Supp. 2d 272, 288-89 (S.D.N.Y. 2001). *But see Little v. Purdue Pharma, L.P.*, 227 F. Supp. 2d 838 (S.D. Ohio 2002). Many courts in pharmaceutical litigation have not permitted plaintiffs to name local pharmacies to defeat a defendant’s right to removal. *In re Rezulin*, 133 F. Supp. 2d 272; *In re Diet Drugs*, 220 F. Supp. 2d 414, 424 (E.D. Pa. 2002); *Louis v. Wyeth-Ayerst Pharm. Inc.*, No. 5:00CV102LN (S.D. Miss. Sept. 25, 2000).

In addition to doctors, hospitals and pharmacists, plaintiffs often name non-diverse company employees, such as pharmaceutical sales representatives, in an attempt to defeat diversity. Some courts have found fraudulent joinder in this context. *See, e.g., Johnson v. Parke-Davis*, 114 F. Supp. 2d 522 (S.D. Miss. 2000); *In re Rezulin*, 168 F. Supp. 2d 136. In these cases, defense counsel can argue that employees do not “sell” products and therefore cannot be subject to liability under theories such as strict liability or breach of warranty. *McCurtis v. Dolgencorp Inc.*, 968 F. Supp. 1158, 1160-61 (S.D. Miss. 1997); *see also McCoy v. Bergeron*, 1992 U.S. Dist. LEXIS 2437 (E.D. La. 1992) (denouncing practice of plaintiffs who “name an employee as a co-defendant for the sole purpose of defeating diversity jurisdiction when the primary, if not sole, liability lies with the employer); *Johnson*, 114 F. Supp. 2d 522 (if any duty was breached it was to plaintiffs’ physicians, not plaintiffs themselves; thus no cause of action exists against sales representatives).

### **CONCLUSION**

Defendants often have much to gain and plaintiffs much to lose from the successful removal of actions to federal court. While we’ve been able to provide only a brief overview of the issues associated with fraudulent joinder, the cases and arguments cited here can serve as a starting point for attorneys facing these issues in pharmaceutical and medical device litigation.

