Jurisdictional gamesmanship has long been a source of frustration for pharmaceutical and medical-device defendants. Plaintiffs have frequently avoided federal jurisdiction – and by extension, inclusion in federal multidistrict litigation (“MDL”) proceedings – either by joining non-diverse defendants for the sole purpose of staying in state court or by misjoining plaintiffs in a manner that defeats diversity jurisdiction. Recent case law has suggested that judges are finally growing skeptical of plaintiffs’ tactics, although the success of fraudulent joinder arguments often varies based on underlying state law (such as innocent-seller statutes).

This article explores recent developments in the law of fraudulent joinder and misjoinder, with a particular focus on theories for removing cases involving distributors, sales representatives, hospitals and pharmacies. It also sets forth several practical tips for defense lawyers seeking to successfully remove pharmaceutical cases to federal court.

I. Recent Developments in Fraudulent Joinder

A. Distributors

Cases involving non-diverse distributors have long been some of the most difficult to remove based on a fraudulent joinder argument, largely because many states have strict-liability regimes that allow claims to proceed against any defendant in the chain of distribution. Nonetheless, defendants have enjoyed some success in removing these cases, and a recent U.S. Supreme Court case has provided a new ground for these removals.

First, many states have adopted “innocent seller” statutes that limit the liability of non-manufacturing defendants as long as the seller did not have significant control over the production or design of the product, did not create the defect, and had no actual knowledge of the defect. See, e.g., Md. Code Ann. Cts. & Jud. Proc. § 5-405(b); Tex. Civ. Prac. & Rem. Code § 82.003; 735 Ill. Comp. Stat. 5/2-621. Using declarations or affidavits, removing defendants have been able to establish that the in-state distributor had no control over the product, no actual knowledge of the product defect, and did nothing to create the defect sufficient to show fraudulent joinder. See, e.g., McCabe v. Gen. Foods Corp., 811 F.2d 1336, 1339 (9th Cir. 1987) (denying remand in part based on sworn declarations submitted by fraudulently joined defendants); Higley v. Cessna Aircraft Co., No. CV-103345-GHK (FMOx), 2010 U.S. Dist. LEXIS 91153, at *3-4 (C.D. Cal. July 21, 2010) (same). For example, in Askew v. DC Medical, LLC, the court found that the distributor was fraudulently joined when the plaintiff failed to produce any evidence rebutting a declaration by the distributor disclaiming any knowledge of the alleged defect. No. 1:11-cv-1245-WSD, 2011 WL 1811433, at *6 (N.D. Ga. May 12, 2011). In addition, some defendants have had success in opposing remand by establishing that the distributor does not meet the definition of "seller" for purposes of state liability laws. See, e.g., Wade Transportation, Inc. v. Puckett Machine Co., No. 2:07CV6KS-MTP, 2007 U.S. Dist. LEXIS 38137, at *11 (S.D. Miss. May 24, 2007) (non-diverse distributor "was not a 'seller' of the Caterpillar engines at issue in this case” and therefore joinder was fraudulent); Kite v. Zimmer US, Inc., No. 2:06-CV-0745-RJC (RJJ), 2006 U.S. Dist. LEXIS 85420, at *11-12 (D. Nev. Nov. 21, 2006) (denying motion to remand on fraudulent joinder grounds where non-diverse distributor "could not be held liable in Nevada under the theories of strict product liability and warranty because it [was] not a 'seller'" of the medical device at issue in the lawsuit).
Courts have also found fraudulent joinder where a plaintiff's allegations are insufficient to link the distributor to the plaintiff's injury. In Aronis v. Merck & Co., for example, the plaintiff joined a distributor in a case alleging physical injury from use of the prescription drug Vioxx. No. CIV. S-05-0486 WBS DAD, 2005 U.S. Dist. LEXIS 41531, at *3-4 (E.D. Cal. May 3, 2005). But the plaintiff did not allege that the distributor had ever handled the specific pills that were the alleged cause of her injuries, and Merck had more than one distributor. Accordingly, the court found an "obvious" failure to state a claim and denied remand. Id. at *3; see also In re Yasmin v. Bayer Corp., 2010 U.S. Dist. LEXIS 105532, at *52 (S.D. Ill. Oct. 4, 2010) (finding that non-diverse distributor was fraudulently joined because plaintiffs "do not sufficiently allege that [distributor] supplied the pills that the Plaintiffs ingested"); Wachovia Bank, N.A. v. Bourn, No. 7:02CV00773, 2003 U.S. Dist. LEXIS 519, at *7-8 (W.D. Va. Jan. 7, 2003) (denying remand in case involving allegedly defective weight loss supplement because non-diverse distributor defendant did not distribute the specific product that allegedly caused injury to the plaintiff). Several other California judges, however, have remanded similar cases, finding that plaintiffs have alleged a sufficient connection between the allegedly fraudulently joined distributor and their injuries. See, e.g., Order Granting Pls.' Mot. To Remand To State Court at 3, Albright v. Merck & Co., No. 2:05-cv-4025 (C.D. Cal. July 5, 2005) (finding that plaintiffs' "allegations clearly connect [the distributor] to Plaintiffs' alleged injuries").

While efforts to remove cases involving distributors have met with mixed success, a recent Supreme Court decision involving preemption of claims against generic drug manufacturers may provide defendants with a foolproof ground for removing cases that name non-diverse distributors. Since the Supreme Court's ruling in PLIVA, Inc. v. Mensing that failure-to-warn claims against generic drug manufacturers are preempted by federal law, a number of courts have extended the rationale of Pliva—i.e., that generic manufacturers have no power to change FDA-approved labels—to distributors. In In re Fosamax Products Liability Litigation, for example, the court dismissed claims by a number of plaintiffs against the distributor of the drug. No. 3:08-cv-00008-JAP-LHG, 2012 U.S. Dist. LEXIS 5817, at *26-28 (D.N.J. Jan. 17, 2012). According to the court, such claims were preempted because the distributor had no power to change the labeling and thus "could not independently do under federal law what state law requires of it." Id. at *28. See also, e.g., Stevens v. Community Health Care, Inc., No. ESCV200702080, 2011 WL 6379298, at *1 (Mass. Super. Oct. 5, 2011) (since a distributor has no ability to change labeling or warnings, it cannot be subject to liability in connection with a state law failure-to-warn claim).

Defendants have begun removing cases on this ground, arguing that distributors are fraudulently joined because the claims against them are legally doomed, but thus far, there have not been any published rulings on this issue. See, e.g., Notice of Removal at 9-11, Porter v. DePuy Orthopaedics, Inc., No. 1:12-cv-00801 (N.D. Ill. Feb. 3, 2012).

B. Sales Representatives/Employees

Plaintiffs in pharmaceutical cases also frequently join resident sales representatives or other employees of a drug or device manufacturer in an effort to defeat diversity jurisdiction. Defendants typically argue that such employees cannot be held liable for failure-to-warn because they do not owe an independent duty to the plaintiff or physician, and because they are not "sellers" for purposes of warranty law, insofar as they never have title to the products to begin with.

The Eleventh Circuit's seminal ruling in Legg v. Wyeth, gave defendants a significant boost in fighting this form of fraudulent joinder. 428 F.3d 1317 (11th Cir. 2005). In Legg, a plaintiff attempted to join a non-diverse sales representative in a product-liability case to defeat diversity jurisdiction. The defendant argued that the sales representative was fraudulently joined and submitted an affidavit from the representative stating that she had "no involvement in the development or preparation of package inserts for any of the [products], and had no control over the content or other written warnings." Id. at 1321. On appeal, the Eleventh Circuit agreed that the sales representative had been fraudulently joined because there was no basis to find that the sales representative "knew or should have known of [the product's] allegedly dangerous effects." Id. at 1324-25. The Legg court further explained that when a defendant presents affirmative evidence, such as declarations that are not rebutted by the plaintiff, "the court cannot then resolve the facts in the Plaintiff[s]' favor based solely on the unsupported allegations" in a complaint. Id. at 1323. Thus, the court held, remand had been erroneously granted. Id. at 1325. Other courts have relied on Legg in finding fraudulent joinder under similar circumstances—i.e., where the sales representative defendant submits an uncontradicted affidavit that he or she did not know or have reason to know of an alleged defect. See, e.g., Slay v. DePuy Orthopaedics, Inc., No. 1:11 dp 20524, 2011 WL 3052531, at *4 (N.D. Ohio July 25, 2011).
C. Pharmacies and Hospitals

The fraudulent joinder of pharmacies attracted congressional attention in the debate over the Class Action Fairness Act when Hilda Bankston, the owner of a drug store in Mississippi, testified that her pharmacy had been sued in hundreds of lawsuits brought by individual plaintiffs against a variety of pharmaceutical manufacturers. Fortunately, courts have grown highly skeptical of efforts to avoid federal jurisdiction by naming pharmacies (and hospitals) as product-liability defendants. Many courts have held that: (1) under the learned-intermediary doctrine, pharmacies have no affirmative duty to warn customers of potential side effects of prescription medications; and (2) hospitals and pharmacies provide a "service" rather than a "sale," and are thus not subject to claims grounded in theories of breach of warranty or strict liability. See, e.g., Walton v. Bayer Corp., 643 F.3d 994, 999-1000 (7th Cir. 2011) (noting that under the learned-intermediary doctrine, which is in full force in 48 states, a pharmacy has no duty to warn a customer where the physician has been warned); Coney v. Mylan Pharm., Inc., No. 6:11-cv-35, 2011 U.S. Dist. LEXIS 91062, at *9-10 (S.D. Ga. Aug. 16, 2011) (finding fraudulent joinder where pharmacy had no duty to warn under state law and was protected by the learned-intermediary doctrine); In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig., 692 F. Supp. 2d 1025, 1032-34 (S.D. Ill. 2010) (surveying a litany of policy rationales for precluding liability for pharmacies, including: (1) the duty would run contrary to public policy against expanding liability risks of health professionals; (2) potential for interference with doctor-patient relationship; (3) burden it would impose on pharmacists; and (4) lack of foreseeability of injury to a particular consumer from absence of particular warning); Roell v. Stryker, No. 3:06-cv-443, 2007 U.S. Dist. LEXIS 70556, at *4 (S.D. Miss. Sept. 24, 2007) (holding that the hospital was fraudulently joined because it did not meet the definition of "seller" under Mississippi's product-liability statute or under the Uniform Commercial Code); Kavalir v. Medtronic, No. 07 C 0835, 2007 U.S. Dist. LEXIS 30002, at *9 (N.D. Ill. Apr. 19, 2007) (denying remand in case involving allegedly defective cardiovascular implant because "plaintiff d[id] not have any possibility of succeeding" on her warranty claims against non-diverse hospital defendants insofar as the transaction was not a "sale of goods" under the applicable state law).

Courts have expressed particular skepticism about suits against hospitals and pharmacies where the underlying complaint alleges that the manufacturer hid the dangers of the drug or device from the public, the healthcare community and physicians. See, e.g., In re Phenylpropanolamine (PPA) Prod. Liab. Litig., No. C02-423R, slip op. at 6-7 (W.D. Wash. Nov. 27, 2002) (pharmacy defendant fraudulently joined where the allegations that "manufacturer defendants concealed material facts regarding PPA through product packaging, labeling, advertising, promotional campaigns and materials, and other methods . . . directly undermines and contradicts the idea that [the resident retail defendant] had knowledge or reason to know of alleged defects"); In re Rezulin Prods. Liab. Litig., 133 F. Supp. 2d 272, 290 (S.D.N.Y. 2001) (resident retail pharmacies facing failure-to-warn claims fraudulently joined where "the theory underlying the complaint [was] that the manufacturer defendants hid the dangers of Rezulin from Plaintiffs, the public, physicians, distributors and pharmacists -- indeed from everyone"). For instance, in the Vioxx litigation, Merck was successful in convincing several courts that plaintiffs could not defeat diversity by simultaneously alleging failure-to-warn claims against non-diverse doctors, pharmacies and hospitals. See, e.g., Omobude v. Merck & Co., No. 3:03CV528LN, 2003 U.S. Dist. LEXIS 27006, at *5-6 (S.D. Miss. Oct. 3, 2003) (physician fraudulently joined where plaintiff alleged that "Merck withheld and concealed and misrepresented the true facts regarding Vioxx; and yet, without alleging any factual basis for the charge, plaintiff conclude[d] that [physician] 'knew or should have known' the truth about Vioxx"). These rulings have led plaintiffs to be more careful about their pleadings, but on the whole, defendants have nonetheless fared reasonably well in deflecting the fraudulent joinder of pharmacies and hospitals in both drug and device cases.

D. Misjoinder of Plaintiffs and Claims

Under the fraudulent-misjoinder doctrine, federal diversity jurisdiction exists "where diversity is destroyed only through misjoinder of parties." Asher v. 3M, No. 04-CV-522-KKC, 2005 U.S. Dist. LEXIS 42266, at *37 (E.D. Ky. June 30, 2005). The fraudulent-misjoinder doctrine applies where plaintiffs' claims are "egregious[ly]" misjoined to defeat federal jurisdiction and "have no real connection" to one another. Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1360 (11th Cir. 1996), abrogated on other grounds by Cohen v. Office Depot, Inc., 204 F.3d 1069 (11th Cir. 2000). Fraudulent misjoinder has not been recognized in every circuit and can still present a significant challenge to defendants.

Fraudulent-misjoinder removals usually take two forms: (1) fraudulent misjoinder of plaintiffs; and (2) fraudulent misjoinder of claims.
Misjoinder of plaintiffs occurs when multiple plaintiffs join their claims together with those of one plaintiff who is not diverse from the defendant manufacturer, arguing that all the claims in the suit are immune from removal because one plaintiff and one defendant share citizenship. Defendants typically argue in such cases that the various plaintiffs' claims do not arise "out of the same transaction, occurrence, or series of transactions or occurrences" or give rise to common questions of law or fact – and that they should therefore be severed before jurisdiction is determined. Fed. R. Civ. P. 20(a); see also In re Rezulin Prods. Liab. Litig., 168 F. Supp. 2d 136, 144 (S.D.N.Y. 2001) (“Misjoinder of parties occurs when a party fails to satisfy the conditions for permissive joinder under Rule 20(a).”). In Chaney v. Gate Pharmaceuticals, for example, eleven plaintiffs from seven different states sued fourteen defendants, alleging injuries from use of the diet drugs phentermine, fenfluramine and dexfenfluramine, or some combination of those drugs. No. 98-20478, 1999 U.S. Dist. LEXIS 111414 (E.D. Pa. July 16, 1999). Seven of the plaintiffs were diverse from all the defendants and four were not. The court found that the claims of the plaintiffs who had not purchased or received diet drugs from an identical source, such as a physician, hospital or diet center, were misjoined and, accordingly, denied the motion to remand as to the plaintiffs whose claims were fully diverse from the defendants.

Misjoinder of claims typically arises in pharmaceutical cases where a plaintiff combines product-liability claims against a manufacturer with medical-malpractice claims against a physician. In contrast to an argument based on alleged fraudulent joinder, removal is not based on the contention that the claim against the physician is meritless; rather, the argument is that the malpractice claim does not arise out of the same transaction or occurrence as the product-liability claim. For instance, in Sutton v. Davol, the court found that plaintiffs fraudulently misjoined their product-liability claims against the manufacturer of a medical device with medical-malpractice claims against resident physician and hospital defendants. 251 F.R.D. 500 (E.D. Cal. 2008). Similarly, in In re Guidant Corp. Implantable Defibrillators Products Liability Litigation, the court denied remand where the plaintiff had joined product-liability claims against the manufacturer of a defibrillator and a medical-negligence claim against the physician. No. 07-1487, 2007 U.S. Dist. LEXIS 64942 (D. Minn. Aug. 30, 2007). In both cases, the courts found that the claims were misjoined because the malpractice claims were not based on – and could not be based on – the alleged negligence of the manufacturer. Sutton, 251 F.R.D. at 505; In re Guidant Corp., 2007 U.S. Dist. LEXIS 64942, at *7.

II. Practical Tips for Defense Lawyers

In deciding how and when to pursue fraudulent joinder arguments, removing defendants should consider the following strategies:

- **Use extrinsic sources.** Although the fraudulent joinder standard is theoretically higher than that for motions to dismiss, it may be easier in practice to achieve removal based on fraudulent joinder than to succeed on a motion to dismiss. This is so because a court may look beyond the pleadings to determine whether a defendant is fraudulently joined. Indeed, courts have held that “[w]hen the Defendants' affidavits are undisputed by the Plaintiffs, the court cannot then resolve the facts in the Plaintiffs' favor based solely on the unsupported allegations in the Plaintiffs' complaint.” Legg v. Wyeth, 428 F.3d 1317, 1323 (11th Cir. 2005); see also Slay v. DePuy Orthopaedics, Inc., No. 1:11 dp 20524, 2011 WL 3052531, at *3 (N.D. Ohio July 25, 2011) ("[W]here the non-moving party has presented unrebutted evidence in the form of an affidavit or declaration, the Court will give weight to the sworn testimony rather than the unsupported allegations of the complaint."). Thus, defense counsel should always consider how an affidavit or declaration might assist removal or remand opposition efforts.

- **Effectively leverage the existence of an MDL.** Defendants may have better success with jurisdictional arguments if they are able to remove a case to federal court and then immediately "tag" the case for transfer to an existing MDL proceeding. Federal courts are much more likely to defer consideration of a remand motion if a conditional transfer order is in place, and MDL judges often have a better contextual understanding of forum-manipulation efforts and are more alert to fraudulent joinder issues.

- **Familiarity with state tort laws is critical to crafting persuasive fraudulent joinder arguments.** A choice-of-law analysis is critical to most fraudulent joinder arguments, and defendants should familiarize themselves with the underlying state statutory and common law with respect to all claims. States may preclude liability for certain types of claims or defendants, or they may require plaintiffs to exhaust administrative remedies before pursuing a civil suit (e.g., in malpractice claims), rendering claims against non-diverse defendants meritless.
• **Highlight deficiencies in the complaint.** Often, plaintiffs fail to make particularized allegations in a complaint because they cannot do so. For example, they may not know which distributor or sales representative can be tied to their specific pills or device and therefore offer only generic allegations against the non-diverse defendants. In such instances, defendants should capitalize on plaintiffs’ vagueness to highlight the lack of any concrete allegations against the in-state defendants. This is particularly true in fraud-based actions, where Rule 9(b) adds a heightened pleading requirement that plaintiffs can rarely satisfy with respect to a fraudulently joined defendant.

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In the end, regardless of how clear or compelling a fraudulent joinder argument might be, the outcome of these inquiries often depends on the court’s perception of – and experience with – such claims. Some courts – particularly those with a lot of experience in seeing how pharmaceutical and medical device product defect claims normally play out – are highly dubious of efforts to join non-manufacturer parties. Other courts manifest a much narrower view of federal jurisdiction, leading them to more reflexively remand cases regardless of the futility of a plaintiff’s state-law claims against non-manufacturer parties.

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