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Plaintiffs Thwart Drug Manufacturers' Removal by Adding Local Med Mal & Pharmacy Defendants

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Hale v. Jarrott, ___ F.Supp. ___ (E.D. La. 4/9/02) (Judge Barbier)

In this trio of cases plaintiffs persuaded Eastern District judges that local doctors and pharmacies were not fraudulently joined in suits against drug manufacturers. Each of the cases was sent back to state court for lack of diversity of citizenship.

Federal courts have jurisdiction over claims brought between parties from different states. Such a case, when filed in state court, may be removed by any non-Louisiana defendant to federal court. To prevent the removal, plaintiffs often join defendants whom they would not otherwise have sued, simply because those defendants are citizens of Louisiana and destroy diversity of citizenship. Under the doctrine of fraudulent joinder, the court may ignore the citizenship of these additional defendants if the removing party shows that there is no possibility of recovery under state law or no reasonable basis for predicting recovery against the non-diverse defendant under the facts of the case.

In *Alman* fifteen Louisiana plaintiffs brought product liability claims in state court against GlaxoSmithKline, the manufacturer of a prescription drug called LOTRONEX used to treat Irritable Bowel Syndrome. The plaintiffs also sued several Louisiana pharmacies and Louisiana physicians. The defendants removed the case to federal court contending that the physicians and pharmacies were fraudulently joined and that their citizenship was therefore irrelevant to determining diversity.

Judge Engelhardt found that at least one physician was properly joined despite the fact that plaintiffs failed to comply with the requirements of Louisiana's Medical Malpractice Act prior to filing suit. As to the pharmacies, GlaxoSmithKline argued that under Louisiana law, pharmacists do not owe a duty to warn customers about the potential side effects of drugs when the prescription is proper on its face and when neither the manufacturer nor the physician has required that the pharmacists give any warning. Because the LOTRONEX package insert instructed purchasers to "ask the pharmacist about LOTRONEX" and advised purchasers that pharmacists could provide a more complete list of side-effects, Judge Engelhardt decided that there was a fact issue concerning whether the manufacturer required pharmacists to give their customers warnings. Accordingly, the Louisiana pharmacies were properly joined as defendants and the case was remanded to state court.

In *Catalano* and *Hale* Judge Barbier further explored the effect of the requirements of the Louisiana Medical Malpractice Act on removed cases, while coming to the same conclusion as Judge Engelhardt that the cases had to be remanded. Both of these suits were brought in state court by

plaintiffs asserting that the drug OxyContin was unreasonably dangerous and marketed without proper warnings. In addition to the manufacturers and distributors of OxyContin, the plaintiffs sued local Louisiana prescribing physicians in both cases.

Plaintiffs brought motions to remand and the defendants contended that the non-diverse physicians were fraudulently joined. The defendants argued that the suits against the doctors were premature because the plaintiffs filed suit before presenting their claims to a medical review panel as required by the Louisiana Medical Malpractice Act. Judge Barbier adopted Judge Engelhardt's reasoning that "a premature petition under Louisiana's Medical Malpractice Act does not preclude a finding that the petition states a cause of action against medical defendants."

Judge Barbier also rejected the defendants' argument that the claims against the physicians should be ignored because at the time of filing they were prescribed (barred by the statute of limitations). He found that issues related to prescription and the onset date of the plaintiffs' injuries were likely to be fact intensive, particularly in *Catalano* where part of the damages plaintiff claimed included "his alleged addiction to OxyContin, which is unlikely to have a clear-cut onset date." Such issues were not amenable to the summary judgment-like determination that the court must make when considering questions of fraudulent joinder.

- Stacie M. Hollis

- Richard D. Bertram

- Madeleine Fischer

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U.S. 5th Cir. Revives Product Claim Against Manufacturer of Replacement Knee Fluid

Pipitone v. Biomatrix, Inc.,
___ F.3d ___ (5th Cir. 4/18/02).

The Fifth Circuit has reversed a summary judgment in favor of the manufacturer of a replacement knee fluid on the ground that the district court should not have rejected the testimony of one of plaintiff's experts. The court found that the plaintiff had raised several issues of material fact which precluded summary judgment.

The plaintiff developed a salmonella infection in his knee after receiving an injection of a replacement synovial fluid, Synvisc, manufactured by Biomatrix. Plaintiff sued Biomatrix on theories of manufacturing defect and redhibition. The defendant moved to exclude the opinion testimony of Dr. Millet, plaintiff's treating physician, and Dr. Coco, his infectious disease expert. The district court granted this motion and then granted the defendant's motion for summary judgment, reasoning that without his experts, plaintiff had no way to prove his case.

The Fifth Circuit agreed with the trial court that Dr. Millet's opinion should have been excluded – Dr. Millet felt it was equally possible that the salmonella infection came from a tainted syringe as from the Synvisc itself. A perfectly equivocal opinion does not tend to prove any fact and is therefore irrelevant.

However, the Fifth Circuit felt differently about plaintiff's infectious disease expert, Dr. Coco. Dr. Coco theorized that the Synvisc was the source of the salmonella infection in part because it was the only knee injectable product made from chicken parts, a known source of salmonella. Dr. Coco supported his opinion by conducting a literature search which revealed no report of a salmonella infection with the use of any other injectable knee product.

The court observed that the methodology used by Dr. Coco did not lend itself to a neat analysis under the traditional *Daubert* criteria. He did not test his hypothesis, but his literature search did support his conclusion that the infection did not arise due to unsterile techniques or other source

unrelated to Synvisc. There was no "rate of error" associated with Dr. Coco's hypothesis, but the court found that this criterion is "not particularly relevant, where ..., the expert derives his testimony mainly from first-hand observations and professional experience." Lastly Dr. Coco's opinion was based in part on a body of accepted medical knowledge of how salmonella functions and how it infects humans. While the defendant raised a number of valid arguments concerning various aspects of Dr. Coco's opinion, the court ultimately concluded that it was not so unreliable as to be excluded.

The court also rejected the notion that plaintiffs had produced no significant evidence of a defect in the manufacturing process (one of the few claims not preempted by the federal Medical Devices Act). In a Catch-22 argument the court found that since the affidavit testimony of a Biomatrix witness asserted that salmonella could not survive the rigorous procedures attendant to the manufacture of Synvisc, it logically followed that if the content of the Synvisc was contaminated with salmonella, there may have been a deviation from Biomatrix's standard manufacturing procedures.

Last, the court affirmed that plaintiff's redhibition claims (claims for rescission of a sale) were limited to recovery of economic loss only. This final holding conforms to several prior cases interpreting the Louisiana Products Liability Act as preserving a redhibition cause of action only to the extent the claimant seeks to recover the value of the product or other economic loss.

- *- Madeleine Fischer*

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Products Suit Must Be Timely to Interrupt Prescription Against Med Mal Defendants

Pendarvis v. State of Louisiana, Through the Department of Health and Hospitals,
2001-2206 (La. 4/12/02), ____So.2d ____

As reported in the August, 2001, Volume 8, issue of the Jones Walker Products Liability E*Zine, the Louisiana First Circuit Court of Appeal held in this case that a timely filed products liability claim interrupts the prescriptive period applicable to medical malpractice actions when the complaint alleges that the product manufacturer and qualified health care provider are solidarily liable.

This suit arose when the "Johnny Jump Up" swing the child plaintiff was sitting in broke on July 13, 1992. The plaintiff parents did not file suit against the product's manufacturers until July 14, 1993, 366 days after the incident. While the Court of Appeal found that the products liability action was timely filed, both parties conceded during their arguments at the Supreme Court that the products liability suit was untimely. Thus, the Court found that this was no longer an issue in the case.

Justice Calogero, concurring in part and dissenting in part, stated that the plaintiff's argument that the suit against the manufacturers interrupted prescription as to the medical malpractice defendants should still be considered. In his opinion, the prescriptive period on the products liability action had not run, despite the fact that the suit was filed over a year after the accident, because the injured individual was a minor. Justice Calogero cited Louisiana Civil Code article 3492 in support of his position, which states that the liberative prescriptive period for delictual actions "does not run against minors ... in actions involving permanent disability and brought pursuant to the Louisiana Products Liability Act or state law governing products liability actions in effect at the time of the injury or damage."

- Meredith P. Young

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Louisiana Supreme Court Strikes Additional Tobacco Jurors

Scott v. The American Tobacco Co.,
2002-0770 (La. 3/28/02), ___ So.2d ___.

The Louisiana Supreme Court struck four additional prospective jurors in the so-called smokers' "addiction" class action pending in the Civil District Court, Parish of Orleans. (See TOBACCO JURORS RELATED TO CLASS MEMBERS UNSEATED WHERE INFLUENCE SUSPECTED reported in Vol. 9, Sept. 2001.) The court overruled the trial court's denial of challenges for cause of the following prospects: 1) a female juror whose brother had a heart problem and had smoked when he was younger; 2) a male juror whose father had been smoking since he was a child; 3) a male juror whose father had been a smoker until he died of heart disease and whose uncle and mother-in-law were current smokers; 4) a female juror whose son was a former smoker and whose mother, father and sister were current smokers. In each instance, the Supreme Court found that the responses given to voir dire questions demonstrated that each juror might be swayed by the prospect of family members receiving medical monitoring and/or cessation assistance.

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