Removal And All That Yaz

July 22, 2011

Our friends at Sidley have sent along another interesting removal/remand decision out of the Yazmin/Yaz MDL in the Southern District of Illinois. Since we all get some joy from orders denying remand that come from this district (encompassing some notorious hellholes), they shared it with us, and we're sharing it with you. While the order in Taundra Taylor v. Paula Senn Peters, slip op., won't provide the defense bar with as much mileage as, say Judge Posner's Walton decision, (this is a rarer situation), it's still pretty interesting.

To make a long story short, plaintiff Taylor sued defendant Peters in Alabama state court for injuries arising from a car crash. That case was non-removable since both were citizens of Alabama. Defendant Peters, represented by the Alabama plaintiffs' firm Beasley Allen, filed an answer and third-party complaint against Bayer, alleging that Peters' use of the drug Ocella (we're hazy on how that ended up in Yazmin/Yaz, but assume there's good reason) caused her to lose control of her car, and thus collide with Taylor. We're only doing removal today, but anyone substantively interested in this sort of theory should read our "Holding the Line on Duty to Warn" post, describing its rejection by Maryland's highest court.

At this point, removal would still have been tough, particularly since third-party defendants are not generally allowed to remove cases where there's no diversity between the original parties. But as the litigation progressed, things got interesting. The folks at Sidley found out that supposed defendant Peters had settled supposed plaintiff Taylor's original claim and obtained a release in 2009, **before Taylor filed any lawsuit against anybody**. In short, the initial lawsuit was a sham – involving no active case or controversy – and intended solely as a vehicle for keeping the ostensible "third-party" claim against Bayer in state court.

Relying on the release (obtained from supposed defendant Peters' insurer), Bayer filed an "other paper" (one not based on an initial summons or complaint) removal, and simultaneously requested that the court end the sham by realigning Peters as a plaintiff for purposes of diversity jurisdiction. Further confirming the

sham, Peters, the supposed co-defendant represented by a plaintiffs' firm, took the lead on opposing transfer to the MDL and in moving for remand. Tellingly, Peters didn't raise the settlement as a defense in her answer, never tendered defense of the lawsuit to her insurer, never acknowledged (or denied) the existence of a settlement agreement during the remand proceeding, and argued that Taylor's claims against her were "viable" in an effort to show that their interests were not aligned.

The court had none of it.

In denying remand, Chief Judge Herndon called out "plaintiff" and "defendant" on their prior settlement agreement and their blatant collusion:

> "Clearly, in light of these agreements, no actual, substantial controversy existed between Ms. Taylor and Ms. Peters when this suit was commenced (nor does an actual, substantial controversy presently exist). The Court also notes that Ms. Peters' conduct – failing to tender this action to her insurer for defense, failing to raise the settlement and release agreements as a defense, and forcefully arguing that the claims against her are viable – indicates that Ms. Peters and Ms. Taylor are colluding in this matter; a factor that further supports the conclusion that no actual, substantial controversy exists."

Slip op. at 9.

Because there was "no actual, substantial controversy" between Ms. Taylor and Ms. Peters, Judge Herndon found it appropriate to realign Ms. Peters as a plaintiff, thereby creating complete diversity. Thus remand was denied.

In this instance the plaintiffs (both the fake and real ones) were too clever by a half. Too bad a successful removing defendant can't seek to tax its costs in defeating remand.