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REDUCING THE RISK OF NANOTECHNOLOGY PERSONAL INJURY LITIGATION

By Richard G. Morgan[1] and Ronald C. Wernette[2]

The Age of Nanotechnology has arrived. How will the American legal system impact the fantastic promise of nanotechnologies? How can an understanding of tort litigation help avoid mistakes made in implementing new technologies in the past? This article aims to provide some practical guidance for chemical organizations, manufacturers, and risk managers so that good planning can prevent or mitigate future personal injury litigation risk from nanotechnologies or any new technology.

THE RISKS OF NANOMATERIALS

The commercialization of nanotechnologies is already well underway, and sufficient information exists to warrant caution in light of the risk of personal injury litigation. The caution is rooted in key "nano" characteristics, such as particle size as well as other engineered nanoparticle properties.

First, nanomaterial size facilitates biological and environmental mobility, allowing movement of nanoscale substances through organisms and the ecological system that would be prohibited to their

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LETTER FROM THE NEWSLETTER EDITOR VALERIE KELLNER

Dear Everyone:

I hope everyone is having a wonderful summer. We have six great articles for the Summer Newsletter for the Products, General Liability, and Consumer Law Committee. The articles are all very informative and there is something for all of our readers. I would like to thank all of our contributors for the wonderful articles and their time and effort in writing the articles.

Our first article is written by Richard G. Morgan and Ronald C. Wernette, which is a fascinating article regarding a potentially new area of litigation involving nanotechnology exposure and what your clients need to know in dealing with this new area of litigation. It is a fascinating article.

For our second article written by Angela Higgins, it is a great article for lawyers who are faced with a situation where there is a joinder of multiple claims in order to defeat diversity jurisdiction. The article provides an in-depth analysis of severance of claims which may allow for removal to federal court. It is a must read.

Our third article is written by Anthony J. Madormo, which is a particularly relevant article applicable to any litigation attorney regarding the Medicare, Medicaid and Schip Extension Act of 2007 (MMSEA) and provides great insight into understanding MMSEA.

The article written by Richard S. Baron and Brian H. Phinney provides an in-depth analysis of the recent Sixth Circuit Court decision, *Bennett, et al v. MIS Corporation, et al* regarding the right of non-military contractors to utilize the governmental contractor defense and possible ramifications of the decision. It is a very informative article.

Our next article is written by Patrick J. Lytle which provides a great analysis of the recent California court decision of *Diaz v. Carcamo* and whether alternative theories of liability can be pursued against an employer even when they have already admitted respondeat superior liability.

Our sixth article is written by Jackie Terry Hughes and Carry Hanger and discusses the recent rise in lawsuits against medical device sales representatives and provides important practical tips in training sales representatives.

We hope everyone enjoys the rest of their summer. Hope to see you in San Francisco. ⚖⚖

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SEVERANCE AND REMOVAL OF CLAIMS

By Angela M. Higgins[1]

INTRODUCTION

Defendants in complex tort cases increasingly find that multiple plaintiffs have joined their claims together, or that they have been joined with a multitude of other defendants (often responsible for very different products) in a single action. While it may sometimes be appropriate for these claims to be joined,[2] more commonly such joinder is a scatter-shot approach to litigation often motivated by plaintiffs' desire to frustrate removal to federal court. Practitioners should be aware that it is often possible to sever multiple claims, and that this severance often allows removal to federal court.

SEVERANCE VS. BIFURCATION FOR SEPARATE TRIAL.

Initially, we should note that there is considerable confusion in the reported case law and amongst the trial courts and practitioners as to the difference between "severance" and "separate trial."[3] Severance creates two different actions that are discrete and independent.[4] The severed claims proceed independently to judgment and may be individually appealed.[5]

An order for separate trial, or bifurcation, does not produce the same result. An order of bifurcation for separate trial (sometimes the terminology "severance for separate trial" is erroneously used) only provides that certain claims in a single case will be tried at different times, and may be subject to individual scheduling orders or other rulings.[6] Cases in which some claims are separately tried cannot be appealed until a final judgment is entered that resolves all claims remaining in the action.[7]

Most significantly, bifurcated claims cannot be removed to federal court, while properly severed claims *can* be removed. Even if a case is originally not removable (if there is a diversity-destroying party, for example), it may become removable by a subsequent order of the court.[8] If removal is based on diversity jurisdiction, it may be removed at any time up to one year following the initial filing.[9] Severance is an event that triggers this right to file a later notice of removal.[10]

If there is reason to believe that diversity of citizenship exists or might later exist, it is critical that the defendants who seek severance prepare an appropriate order that makes it clear that the claims are not simply being bifurcated for separate trial, particularly if removal is desired. Federal courts to which a severed claim are removed need to be certain that the claim is actually a separate action following the state court's order; accordingly, the federal courts will look for the state court's intent to "sever," rather than merely order "separate trial" of claims, which is most easily shown by the assignment of a new case number to the severed claim, a new caption, new judicial assignment, and, of course, liberal use of the term "sever" in the order.[11]

Most states have rules that are analogous to Federal Rules 20 and 21, which address joinder and severance of claims. Practitioners should, where appropriate, rely upon the extensive federal law regarding severance of claims when arguing for severance in state court, as severance is a topic that is not commonly addressed in the reported case law of the various states.

CLAIMS RIPE FOR SEVERANCE.

MISJOINED CLAIMS.

Misjoinder of claims is a fairly obvious basis for seeking severance. Federal Rule 20(a) provides that

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2 For example, in the case of alternative liability, where plaintiff does not know which of the defendants is responsible for her injuries. 7 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 1654, at 278 (2d ed. 1969).

3 Note also that there is scant reported case law regarding severance or misjoinder, and virtually none since the 1970s.

4 *See, e.g., See Snyder v. Jensen*, 281 S.W.2d 819, 822-23 (Mo. 1955) (after the trial court's order of severance, the severed claim "was an independent action to the same extent as though [defendant] had filed his claim as a separate suit").

5 *See, e.g., Wolfner v. Miller*, 711 S.W.2d 580, 582 (Mo. App. E.D. 1986).

6 *See* Fed. R. Civ. P. 42(b); Mo. R. Civ. P. 66.02.

7 *See, e.g.,* Mo. R. Civ. P. 74.01(a); *Avidan v. Transit Cas. Co.*, 20 S.W.3d 521, 523 (Mo. banc 2000).

8 28 U.S.C. § 1446(b).

9 *Id.*

10 *See Crump v. Wal-Mart Health Plan*, 925 F. Supp. 1214, 1219 (W.D. Ky. 1996); *Central of Georgia Ry. Co. v. Riegel Textile Corp.*, 426 F.2d 935, 938 (11th Cir. 1970) (approving the removal of a severed claim).

11 *See, e.g., Whetstone v. Unitog, Inc.*, 960 F. Supp. 267, 269 (N.D. Ala. 1997) (holding that a state court avoids confusion and shows its intent is to sever a claim, rather than merely order separate trials, by assigning a new case number to the severed claim).

parties may be properly joined only where claims by or against them arise out of the same transaction or occurrence and present common questions of law or fact. Rule 21 authorizes the court to sever any claim, rather than dismiss for misjoinder. The federal rules have been extensively construed.

Multiple Plaintiffs in Product Liability Cases.

The federal courts consistently find that product liability claims that involve multiple plaintiffs are misjoined under Fed. R. Civ. P. 20(a), because they do not arise out of the same occurrence or transaction. This is particularly the case in actions that allege personal injury resulting from exposure to a chemical or drug ("toxic tort" cases). "Unlike cases involving a pure product defect, toxic tort cases raise more complicated issues of causation and exposure. . . depending on such variables as exposure to the drug, the patient's physical state at the time of taking the drug, and a host of other known and unknown factors that must be considered at trial with respect to each individual plaintiff. . . Joinder 'of several plaintiffs who have no connection to each other in no way promotes trial convenience or expedites the adjudication of asserted claims.'"[12]

The federal courts have considered dozens of cases of alleged common exposure to a particular chemical, drug, or substance. These courts overwhelmingly find that the claims of multiple plaintiffs in such actions are misjoined, when the only commonality amongst plaintiffs is that they allege damages resulting from exposure.[13] Such plaintiffs' exposures and resulting illnesses would vary depending upon where each plaintiff worked, for how long, and with what products, and the plaintiffs' claims therefore have no logical connection to each other.[14] Drug and chemical exposure cases are generally inappropriate for multi-plaintiff joinder because such cases involve highly individualized facts and "[l]iability, causation, and damages will . . .be different with each individual plaintiff."[15]

In one case, multiple plaintiffs' claims of injuries from hormone replacement drugs were improperly joined, and that the diverse claims were properly removed from state to federal court and then severed.[16] The court noted that, while the plaintiffs alleged that they all took a hormone replacement drug with the same active hormone, they did not all take the same drug, were residents of different states, received prescriptions from different doctors, took the drugs for different times in different amounts, and even their alleged common injury, breast cancer, manifested differently in the various plaintiffs.[17]

It is Plaintiffs' burden to meet the threshold pleading requirement by making sufficient factual allegations of why unrelated plaintiffs belong in the same action.[18] Factual allegations that could properly support a finding that the claims arise out of the "same transaction, occurrence, or series of transactions or occurrences" would include allegations that the plaintiffs were exposed to the same products, in the same environment, and during the same time periods.[19] *Abdullah* involved claims by disparate, unrelated plaintiffs of exposure to asbestos on various maritime vessels over different periods of time, and the court concluded that the claims were clearly misjoined.[20]

Similarly, the courts have found that claims of a group of unrelated plaintiffs were misjoined in the following cases, which is not an exhaustive list:

Six plaintiffs who all alleged exposure to the chemical phenylpropanolamine (PPA) in various over-the-counter drugs were misjoined because the exposures occurred at different times, through different products manufactured by different defendants and sold by different retailers. The circumstances of exposure, the knowledge of the parties, the plaintiffs' alleged reliance on warnings, the exact nature of the injuries or damages, the potential for contributing factors, the health conditions and histories of the plaintiffs, and the nature of medicines with distinct individual properties, were all questions peculiar to each claim.[21]

12 *In re Rezulin Products Liability Litigation*, 168 F. Supp. 2d 136, 146-48 (S.D.N.Y. 2001).

13 *See, e.g., In re Silica Products Liability Litigation*, 398 F. Supp. 2d 563, 651 (S.D. Tex. 2005) (addressing misjoined claims of exposure to respirable silica over the course of each particular plaintiffs' work life).

14 *Id*.

15 *Janssen Phameceutica, Inc. v. Armond*, 866 So. 2d 1092, 1096 (Miss. 2004).

16 *In re Prempro Products Liability Litigation*, 417 F. Supp. 2d 1058, 1060 (E.D. Ark. 2006). Note that, while this case provides authority for removing an entire action and then seeking severance and remand of the non-diverse claims, the author does *not* recommend this practice, as most federal courts will remand the action if it appears on its face to be non-diverse. The best practice is to seek severance of diverse claims before attempting removal.

17 *Id*.

18 *See, e.g., Abdullah v. Acands, Inc*., 30 F.3d 264, 269 n.5 (1st Cir. 1994).

19 *Id*.

20 *Abdullah*, 30 F.3d at 269 n.5 (citations omitted).

21 *Graziose v. American Home Products Corp*., 202 F.R.D. 638, 640 (D. Nev. 2001).

Plaintiffs having nothing in common other than the allegation that they all took the same diet drug are misjoined.[22]

When plaintiffs' commonality is limited to the fact that they have the same model of medical device implanted in their spines, they are misjoined.[23]

Some 7,000 individual plaintiffs who alleged exposure to the drug Seroquel were misjoined.[24]

Plaintiffs were misjoined in various toxic exposure cases.[25]

Multiple Unrelated Defendants.

A plaintiff's claim is also misjoined with those of the other plaintiffs when that plaintiff names additional defendants not common to the other others.[26] Joinder of multiple defendants is also improper where each defendant acted independently and did not know of the other defendants' transactions or purposes, even though the claimed violations of the law were identical as to all defendants.[27] In asbestos products liability cases, for example, plaintiffs may raise "failure to warn" and breach of warranty claims against all defendants, but the defendants each made or failed to make its own individual warnings and warranties, and these warnings and warranties may have been provided in the context of entirely different products in different industries.

PERMISSIVELY JOINED CLAIMS.

Even if the claims are permissively joined, the court may still, in its discretion, order that the claims be severed.[28] Federal Rule 21 does not limit severance to circumstances where a claim has been misjoined, but permits severance of *any* claim.[29]

Factors considered by the courts in determining the propriety of severance present many of the same issues considered in ordering separate trial of claims, and the courts thus often refer to the factors set forth in the separate trial rule (if one exists) in their analysis.[30] These factors include the convenience of the parties; avoiding prejudice to any party; promoting expedition and economy (including the expeditious resolution of claims); separating jury-triable claims from bench-tried claims; separating claims with very different discovery postures; and separating claims that are legally and factually distinct and separable.[31] Fairness is the most significant factor in determining the appropriate joinder of claims.[32] Any relevant case-specific facts that make severance appropriate should be argued in the motion for severance.

Avoiding Prejudice and Jury Confusion.

A court may sever claims to avoid prejudice to any party. Cases under the federal rule for severance, Fed. R. Civ. P. 21, support this basis for discretionary severance.[33] In *DIRECTV*, one of several unrelated defendants successfully argued that the facts against each defendant were distinct and separate and constituted separate claims and causes of action, and that the moving defendant would be prejudiced if he had to defend in the same trial as other defendants due to the risk of the confusion of issues, the additional costs and expenses of a multi-defendant trial, and the likelihood the jury would fail to distinguish the facts applicable to each defendant.[34]

Judicial economy and convenience of the parties.

A number of other factors may be considered in the court's discretion, including convenience to the parties and to the court. One factor that has proven significant in the federal courts (particularly in the current economic climate) is that, by joining multiple plaintiffs who do not all state claims against all defendants, the

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22 *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liability Litigation*, 294 F. Supp. 2d 667, 678 (E.D. Pa. 2003).

23 *In re Orthopedic Bone Screw Prods. Liab. Litig., MDL No. 1341*, 1995 WL 428683, at *1-2 (E.D. Pa. July 15, 1995).

24 *In re Seroquel Products Liability Litigation*, No. 6:06-md-1769-Orl-22DAB, 2007 WL 737589 (M.D. Fla. Mar. 7, 2007).

25 *Jones v. Nastech Pharmaceutical*, 319 F. Supp. 2d 720, 728 (S.D. Miss. 2004); *Simmons v. Wyeth Laboratories, Inc*., 1996 WL 617492, at *4 (E.D. Pa. Oct. 24, 1996); *Purdue Pharma, L.P. v. Estate of Heffner*, 904 So. 2d 100, 103 (Miss. 2004); *Adams v. Baxter Healthcare Corp*., 998 S.W.2d 349, 358 (Tex. App. 1999); *Blalock Prescription Center, Inc. v. Lopez-Guerra*, 986 S.W.2d 658, 663-64 (Tex. App. 1998); *Baumgardner v. Wyeth Pharmaceuticals*, No. 05-05720-JF, slip op. at 3 (E.D. Pa. May 11, 2006).

26 *In re Baycol Products Litigation*, 2003 WL 22341303, at *3 (D. Minn. 2003).

27 *DIRECTV v. Loussaert*, 218 F.R.D. 639, 644 (S.D. Iowa 2003).

28 Fed. R. Civ. P. 21.

29 Fed. R. Civ. P. 21.

30 *See Snyder*, 281 S.W.2d at 822.

31 *See, e.g., Stanley v. Bray Terminals, Inc*., 197 F.R.D. 224, 230 (N.D.N.Y. 2000); *Old Colony Ventures I, Inc. v. SMWNPF Holdings, Inc*., 918 F. Supp. 343, 350 (D. Kan. 1996); *T.S.I. 27, Inc. v. Berman Enterprises, Inc*., 115 F.R.D. 252, 254 (S.D.N.Y. 1987); *United States v. O'Neil*, 709 F.2d 361, 364-65 (5th Cir. 1983); *Toro Co. v. Alsop*, 565 F.2d 998, 999 (8th Cir. 1977).

32 *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724 (1966).

33 *See, e.g., DIRECTV v. Loussaert*, 218 F.R.D. 639, 641 (S.D. Iowa 2003).

34 *Id*.

plaintiffs avoid paying multiple court filing fees.[35] The federal courts have found that it is an unreasonable burden on the court's resources to require it to manage a voluminous and complex case that can be broken down into several more easily managed cases. *Id*.

Numerous of the previously-cited federal cases have also found that it is not in the interests of judicial economy to keep together disparate claims, because the trial of such would be confusing, would involve the management of a significant volume of evidence and expert testimony that is not admissible or relevant to all claims, and would tax the court's resources.[36]

Relative Complexity of the Claims.

Severance is appropriate where one claim is significantly more lengthy and complicated than another.[37] This may be the case with cross-claims. For example, some states, including Missouri, have an insurance policy garnishment procedure that frequently results in the joinder of a claim to garnish the policy and the insured's bad faith claim against the insurer.[38] Where the garnishment claim presents a relatively straightforward question of law for the court, the bad faith claim is a more complex tort claim with more extensive discovery and is jury-tried. In such circumstances, it may be appropriate to seek severance.[39]

CONCLUSION

Practitioners facing joinder of multiple claims, particularly where such claims appear to have been joined expressly to defeat diversity jurisdiction, should consider pursuing severance and removal to federal court. Bifurcation of claims for separate trial may avoid some of the prejudice that would result from trying the claims together, but does not provide the advantages of severance, including the ability to remove the severed claim(s) and the ability to independently appeal the judgments on the claims.

35 *See, e.g., In re Seroquel Products Liability Litigation*, No. 6:06-md-1769-Orl-22DAB, 2007 WL 737589 (M.D. Fla. Mar. 7, 2007).

36 *See, e.g., In re Rezulin Products Liability Litigation*, 168 F. Supp. 2d 136, 146-48 (S.D.N.Y. 2001).

37 *See, e.g., Union Electric Co. v. Mansion House Center North Redevelopment Co*., 494 S.W.2d 309, 312 (Mo. 1973); *B-W Acceptance Corp. v. Benack*, 423 S.W.2d 215, 217 (Mo. App. St. L. 1967) (where "one claim can be disposed of quickly and summarily while the other will require a considerable trial" severance and separate trial is appropriate).

38 *See* Mo. Rev. Stat. § 379.200.

39 In the illustrative case, counsel for the garnishor is almost always a fact witness with knowledge of settlement discussions relevant to the bad faith claim, making severance of these claims particularly appropriate.

STATUTORY MEDICARE CHANGES: WHAT ARE THEY? HOW DO THEY IMPACT SETTLING LIABILITY CLAIMS INVOLVING MEDICARE BENEFICIARIES?

By Anthony J. Madormo[1]

INTRODUCTION

For years, risk managers or insurance professionals dealing with liability claims involving payments by Medicare were aware of the Medicare "Super Lien." In those instances, when settlement occurred, the defendant typically waited several months before receiving the amount to be paid to Medicare, or simply issued a check to the claimant, her counsel, and Medicare. The defendant generally perceived there was no obligation or risk provided Medicare was included on the settlement draft.

Today, a payment made to a Medicare beneficiary involving a liability claim has numerous statutory obligations attached to it. These obligations create additional potential exposure to the beneficiary, the insurer, self-insured, plaintiff's and defense counsel. In 1980, the Medicare Secondary Payor Act (MSP) was enacted with the intention to make Medicare the secondary payor when there was another source of funds available to pay for medical care received by a Medicare beneficiary. In cases where there was health insurance coverage for a Medicare beneficiary through a group insurance plan or other insurance coverage including: liability coverage, self insurance, no fault, or workers compensation insurance, Medicare was the secondary payor. In those instances, Medicare was to be, at a minimum, reimbursed if Medicare made primary

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