Seventh Circuit Shoves the S.D.Ill. Back Into Line On Removal

Monday, May 23, 2011

We've remarked before about the odd, detrimental position that the Southern District of Illinois has taken towards removal, fraudulent joinder, and diversity jurisdiction in cases claiming that pharmacies should be liable for prescription drugs just like any other intermediate product seller. The Illinois Supreme Court, as a substantive matter, has rejected pharmacy liability repeatedly as a consequence of the learned intermediary rule. See Happel v. Wal-Mart Stores, Inc., 766 N.E.2d 1118, 1127 (Ill. 2002); Frye v. Medicare-Glaser Corp., 605 N.E.2d 557, 559-61 (Ill. 1992); Kirk v. Michael Reese Hospital & Medical Center, 513 N.E.2d 387, 392 (Ill. 1987). Yet plaintiffs in the South Illinois "hellhole" counties, Madison, St. Clair, etc., kept alleging pharmacy liability, and numerous Southern District of Illinois decisions let them get away with it - remanding the cases based upon a combination of a "presumption" in favor of remand, and something called the "common defense" exception. Funny, but that didn't stop federal district courts in other parts of the country from finding fraudulent joinder where (as in most states) pharmacy liability was similarly barred under the relevant state's law.

Well, we think that's come to an end. As we also discussed before, with the Yazmin/Yaz litigation, the S.D. Ill. got its own MDL. Where a judge stands apparently depends somewhat on where s/he sits, and in that litigation, the court broke ranks and - rather than tolerate a large number of similar state-court suits trenching on the MDL - held that, contrary to a lot of other S.D. Ill. precedent - pharmacy liability claims constituted fraudlent joinder, and denied remand.

MDLs are a little different from individual litigation in other ways, too. For one thing, plaintiffs lawyers have lots and lots of "clients" and are not adverse to using them as cannon fodder when they want to make a legal point - or at least try to. That's what happened in Yazmin/Yaz. Counsel for one of the non-remanded plaintiffs, named Walton, decided to risk tanking the client's claim in order to appeal the failure to remand. So poor Ms. Walton defaulted on discovery obligations, the MDL court dismissed her case with prejudice as a sanction, and the plaintiff's lawyer challenged the dismissal for lack of federal subject matter litigation.

Yeah, a plaintiff can do that.

But the plaintiff had better be right, because if s/he loses the appeal - no more case.

That's usually a deterrent, except in MDL litigation, where there are plenty of plaintiffs available to be sacrificed, Grindelwald-style, to the "greater good."

Well, we're happy to report that, today, plaintiff Walton lost - big time. See Walton v. Bayer Corp., slip op. (7th Cir. May 23, 2011). And in losing, Walton should bring the Southern District of Illinois' removal precedent back into line with the rest of the country's (the S.D. Ill. is bound by 7th Circuit precedent).

Here's what the Seventh Circuit had to say in Walton:

(1) Yeah, dismissal of a case as a sanction is appealable, and can be challenged for lack of subject matter jurisdiction. Slip op. at 3-4. The plaintiff (or more to the point, counsel) can "wager[] her entire claim on being proved right about jurisdiction." Id. at 4.

(2) Don't make us laugh; of course a case about strokes and possible strokes meets the $75,000 jurisdictional minimum for diversity jurisdiction. Otherwise "her suit [would] not [be] worth the expense of litigating it." Slip op. at 4-5.

(3) The plaintiff's claim of a technical violation of one of the minor requirements of the rules for removal (not attaching an as-served copy of the summons), was trivial. The summons were added promptly and there was not even a whiff of prejudice. Slip op. at 5-6. "[T]otally inconsequential" defects in removal papers don't deprive federal courts of jurisdiction. Id. at 6.

After having sacrificed credibility with the court (never a good thing with Judge Posner) by making dumb arguments, the plaintiff went on to her significant argument - and lost that, as well.

(4) In light of the learned intermediary doctrine, as applied to pharmacists by the Illinois Supreme Court, the claims against the pharmacist defendant in Walton were "utterly groundless." Slip op. at 7-8.

> Pharmacies . . . can't be expected to warn their customers of the possible defects and dangers of the prescription drugs they sell. It would be senseless, especially given drug regulation by the Food and Drug Administration and the extensive tort liability of drug manufacturers, to make pharmacies liable in tort for the consequences of failing to investigate the safety of thousands of drugs.

Id. at 8-9. It doesn't matter how Illinois gets to that point, since what's "important is that in 48 states including Illinois" a pharmacy cannot be liable where there are risk warnings directed to physicians. Id.

at 10.

(5) The "common defense" exception to fraudulent joinder doesn't apply to the pharmacy liability claims, because plaintiffs also allege (as all plaintiffs do) that the manufacturer defendants failed to warn/concealed the risk from the medical community. Since pharmacists are within the group allegedly targeted by the concealment, their position with respect to the learned intermediary rule/warning claims isn't in fact the same as the other defendants. With the defendants in differing positions, the "common defense" exception doesn't apply.

> [A]pplying the common-defense exception to this case is barred by the plaintiff's allegation that the [manufacturer] defendants concealed the existence of [the drug's side effects. . . . [The pharmacy] was no doubt one of the entities from which the [manufacturer] defendants (if the charge of concealment against them has any merit) concealed the side effects.

Slip op. at 11. Plaintiff must be held to her allegations, and would prevented by judicial estoppel from arguing "no, I didn't mean it about concealment" later on. Id. 12-15.

(6) Bye-bye hellholes; diversity jurisdiction exists.

Walton should kill off the unduly constricted reading of fraudulent joinder that courts in the Southern District of Illinois were using to remand cases where jurisdiction exists. Might it do more? Anybody representing of the unfortunates in a case that was remanded to a hellhole improperly should take a look. Most decisions aren't retroactive, so it seems to us that there's a decent argument that Walton created a new ground for removal by overturning existing Southern District precedent. That should help if the case is less than a year old, and possibly more (we haven't looked into whether grounds for removal might exist in older cases).

Anyway, thanks, Judge Posner, for shoving the Southern District of Illinois back into line on fraudulent joinder - and Sherry Knutson, of Sidley Austin for tipping us off to the Walton opinion.