

Plaintiffs Strike Out Seeking Remand

Tuesday, July 19, 2011

We love it when plaintiffs make our job easy – and when plaintiff’s counsel is both clueless and obnoxious – well, that’s cause to celebrate in and of itself. When the case is also another decision from the Southern District of Illinois denying remand, well we just can’t help sharing our joy.

It is a well-worn page from plaintiffs’ play book -- to avoid having product liability cases removed to federal court on the basis of diversity jurisdiction, include in the complaint medical malpractice claims against non-diverse treating physicians. In that situation, the removing product manufacturer must convince the federal court to sever (and remand) the malpractice claims, and to retain jurisdiction over the product liability claims. Not an easy task, but also not insurmountable, as evidenced by the recent decision in In re: Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Products Liability Litigation (Cooke-Bates), 2011 U.S. Dist. LEXIS 74076 (S.D. Ill. July 10, 2011).

The game started in typical fashion. First up, plaintiff (a resident of Virginia) sues Bayer (not a Virginia citizen) and her physician (a Virginia resident) in state court. Bayer comes up to bat and removes the case to federal court based on diversity and argues that the claims against the doctor should be severed under Rule 21 either because of improper joinder or because the doctor was not a necessary and indispensable party. Id. at *3-4. Not surprisingly, plaintiff’s next play is a motion to remand – and here they go down swinging.

It makes us smile when any decision starts off with a reprimand to plaintiff’s counsel about the “combative and discourteous tone” of their briefing. Id. at *9. Putting aside the substance of the legal issue for a minute, the court was displeased by plaintiffs’ accusations that defendant made intentional misrepresentations and blatantly disregarded prior orders – especially when those allegations were false and that it was actually plaintiff who made misrepresentations in her filings – including misrepresentations of the court’s own rulings. Id. at *8-10. *Strike one.*

Now on to the substance. After having thus completely forfeited any credibility with the court, plaintiff made three arguments in support of remand: procedural misjoinder is not a proper basis for removal; plaintiff’s physician was properly joined; and severance of a non-diverse defendant is not allowed under Rule 21 absent a finding of fraudulent joinder. Id. at *3. Not until oral argument, several months later, did plaintiff argue for the first time that the removal was procedurally defective because the physician had not consented. Id. But, as we all know, a procedural defect is waived unless raised within 30 days of removal. See 28 U.S.C.A. § 1447(c). *Strike two.*

Ignoring the procedural defect due to the waiver, the court found that the plaintiff's doctor was not a necessary party and severed and remanded the claims against him. In re Yasmin at *6-7. The case was then transferred to the Yasmin MDL -- after both plaintiff's request to certify the issue for appeal and petition for writ of mandamus were denied (we'll call those foul balls) -- where yet again plaintiff again moved to remand the case arguing that the transferor court's severance of the physician was improper and therefore his citizenship still had to be considered in assessing diversity. Id. at *7-8.

Plaintiff tried to distance herself from the transferor court's decision by styling her new motion as one to remand for lack of subject matter jurisdiction and not for reconsideration and arguing that therefore, the transferor court's decision was irrelevant. Id. at 15. But, while plaintiff was looking for low and away, the pitch came in high and tight for [Strike three!](#)

"The authority of a district judge to reconsider a previous ruling in the same litigation, whether a ruling made by him or by a district judge previously presiding in the case, including (because the case has been transferred) a judge of a different court, is governed by the doctrine of the law of the case."

Id. at *17-18 (citation and quotation marks omitted).

Characterized as a motion for reconsideration and applying the law of the case doctrine, plaintiffs would have to have demonstrated a compelling reason for reconsideration "such as a change in, or clarification of, law that makes clear that the earlier ruling was erroneous." Id. at *20. An MDL judge is not free to alter previous rulings of the transferor judge "merely because he has a different view of the law or facts from the first judge." Id. (citation and quotation marks omitted). As we know, courts vary on

"(1) whether a physician is a necessary and indispensable party in a product liability action against a drug manufacturer and (2) whether a district court may sever a dispensable non-diverse party to preserve diversity jurisdiction in an action that has been removed."

Id. at *22. Therefore, at best the transferor court and the MDL court may have had a difference of opinion, but a difference of opinion isn't enough to warrant reconsideration under the law of the case doctrine. Without reconsideration, the case pending before the MDL court was completely diverse. And with that, plaintiff remains in the game but has lost home field advantage.

We're waiting to see if plaintiff chooses to argue with the ump again.