

Taking Back Control of Jurisdiction

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Plaintiffs routinely attempt to circumvent federal jurisdiction by joining malpractice claims against in-state defendants with product liability claims against out-of-state drug or device manufacturers, but manufacturers may be able to combat this often frustrating practice with the evolving defense of fraudulent misjoinder.

Fraudulent Misjoinder in Drug and Device Litigation

In litigation, few things are more aggravating than being stuck in a state court because of plaintiffs' creative complaint drafting. The harsh reality of procedural, or fraudulent, misjoinder of nondiverse or forum parties to a state

court action to prevent removal to federal court can keep drug and device litigants up at night. In multidistrict litigation (MDL), this reality creates even more frustration because a state court forum forecloses a defendant's ability to transfer an otherwise transferrable case to a related MDL—and forecloses the defendant's ability to benefit from the efficiencies created by the MDL. While courts are split on the propriety of this kind of tactical gamesmanship, improper joinder of parties threatens not only defendants' statutory rights of removal, but also the efficiencies and purposes of multidistrict litigation. The courts that have yet to recognize this reality miss the big picture, and they create significant injustice for defendants.

Note that the doctrine of fraudulent *misjoinder* is different from the doctrine of fraudulent *joinder*. Unlike fraudulent *joinder*, a doctrine that protects a defendant

when a plaintiff brings an illegitimate or frivolous claim against a nondiverse defendant, fraudulent *misjoinder* generally occurs in two situations: (1) situations in which a plaintiff brings plausible claims against joined defendants, but there is no real connection between the defendants and their alleged bad behavior; and (2) situations in which several plaintiffs are joined in an action, but the plaintiffs have no connection to each other. This article focuses on the first situation—improperly joining defendants—but most of the arguments and rationales explained below could apply to both situations.

In drug and device litigation, plaintiffs routinely join malpractice claims against nondiverse or forum medical defendants with their product liability claims against the drug or device manufacturer. Plaintiffs argue—and some courts agree—that they properly joined the claims because



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they relate to the same injury. But the elements of these claims, and the evidence required to prove them, are legally and factually distinct. Some courts recognize the inefficiencies caused by litigating these claims together and have allowed defendants to raise the fraudulent misjoinder defense. Other circuits have yet to buy into this theory.

Even if you find yourself in a jurisdiction that has missed the big picture (and has yet to bless a fraudulent misjoinder argument), do not let that stop you from defending your client's right to removal—especially if you are actively defending an MDL in another federal court based on the same product. At least a few jurisdictions have considered an existing MDL as a relevant and material factor in assessing remand in these types of situations. In these cases, defendants successfully removed their cases by arguing fraudulent misjoinder and filing a concurrent motion to sever the nondiverse medical defendants, an approach that will be discussed in detail below.

Even if this theory of removal has not been expressly recognized in your jurisdiction, aggressively defend your client's right to a federal court forum and fight to maintain the efficiencies of multidistrict litigation. By following the steps outlined below, you may be able to present a compelling case for removal, even if your past experience suggests otherwise.

The Birth of Fraudulent Misjoinder

The Eleventh Circuit originally set forth the doctrine of fraudulent misjoinder (also referred to as “procedural misjoinder”) in *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996). In *Tapscott*, the Eleventh Circuit recognized that a plaintiff's joinder of a defendant who has no real connection to the underlying controversy should not deprive a defendant of its right to removal. *Id.* at 1360.

Despite this Eleventh Circuit precedent, some courts have been reluctant to embrace the fraudulent misjoinder doctrine, and this reluctance has plagued the lives of drug and device defendants time and time again. Drug and device plaintiffs habitually join medical negligence and malpractice claims against health-care providers with product liability claims against drug and device manufacturers. In these

situations, plaintiffs have arguably plausible claims against both the product liability defendants and the health-care defendants. Even so, the differing factions of defendants do not belong in the same action because the medical malpractice claims are legally and factually distinct from the product liability claims.

Plaintiffs defend joinder in these cases because the claims result from the same injury, but a reasonable analysis of the claims demands a different conclusion. For example, the Fifth Circuit correctly (and fairly) determined that medical negligence and malpractice claims against health-care defendants should be severed from product liability claims against tobacco companies because the claims, and the burdens of proof required to sustain those claims, are “totally different.” *Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529, 533 (5th Cir. 2006). In the medical device context, several courts have rejected the joinder of medical malpractice claims against treating physicians with product liability claims against device manufacturers because the claims do not involve common questions of law or fact and assert joint, several, or alternative liability arising out of the same transaction or occurrence. *See, e.g., Stone v. Zimmer, Inc.*, 2009 WL 1809990, at *4 (S.D. Fla. June 25, 2009); *Sutton v. Davol, Inc.*, 251 F.R.D. 500, 505 (E.D. Cal. 2008); *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*, 2007 WL 2572048, at *2 (D. Minn. Aug. 30, 2007).

So there is some hope. Having an awareness of the fraudulent misjoinder theory, and the jurisdictions that have discussed it favorably, can be useful in helping to combat this often frustrating reality.

The Law: Inconsistent (and Confusing) at Best

The fraudulent misjoinder doctrine, as established by the Eleventh Circuit, has not been expressly adopted by other circuits. Not surprisingly, most circuits have neither explicitly accepted nor rejected the doctrine.

The Good News

The good news is that the Fifth and Tenth Circuits have considered the fraudulent misjoinder doctrine favorably. Use this to your advantage.

For example, in a 2010 case, the Tenth Circuit stated that “[t]here may be good reasons to adopt procedural misjoinder,” but it ultimately did not adopt the doctrine upon finding that it would not change the result of that particular case. *See Lafalier v. State Farm Fire & Cas. Co.*, 391 F. App'x 732, 739 (10th Cir. 2010). The Fifth Circuit has also referenced *Tapscott* favorably.

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Also in 2010, the Fifth Circuit declined to rule on whether plaintiffs had been fraudulently misjoined, but it did so “[w]ithout detracting from the force of the *Tapscott* principle that fraudulent misjoinder of plaintiffs is no more permissible than fraudulent misjoinder of defendants to circumvent diversity jurisdiction.” *In re Benjamin Moore & Co.*, 318 F.3d 626, 630 (5th Cir. 2002). In a later wrongful death case, the Fifth Circuit considered the plaintiffs' joinder of product liability claims against a tobacco company with medical negligence claims against health-care defendants. The plaintiffs argued that the defective nature of the cigarettes and the health-care defendants' failure to diagnose the decedent's cancer combined to cause her death. Despite the plaintiffs' attempt to assert joint liability, the Fifth Circuit agreed with the state court's decision to sever the claims against the health-care defendants, noting that “joinder is improper even if there is no fraud in the pleadings and the plaintiff does have the ability to recover against each of the defendants.” *Crockett*, 436 F.3d at 533.

Taking a more neutral position, the Eighth Circuit declined to adopt the fraudulent misjoinder doctrine in 2010 in *In re*

Prempro Products Liab. Litig., 591 F.3d 613, 620 (8th Cir. 2010). The court held, “We make no judgment on the propriety of the doctrine in this case, and decline to either adopt or reject it at this time.” Similarly, the Ninth Circuit declined to adopt the theory in a 2001 decision. See *Cal. Dump Truck Owners Ass’n v. Cummins Engine Co., Inc.*, 24 F. App’x 727 (9th Cir. 2001).

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have declined to adopt the doctrine remains a disappointing mystery. And more importantly, it creates inconsistent (and confusing) law.

While the Ninth Circuit assumed that it would at some point in time adopt the theory of fraudulent misjoinder *as it applied to plaintiffs*, the court made no comment on whether the same could be said for the misjoinder of defendants. *Id.* at 729.

While the federal courts of appeal have inconsistently applied the rational doctrine of fraudulent misjoinder, the good news is that several district courts have applied the doctrine and found that claims against forum or nondiverse defendants were procedurally misjoined. For example, in *Sutton*, 251 F.R.D. at 505, the U.S. District Court for the Eastern District of California found that claims brought against medical defendants were fraudulently misjoined with product liability claims brought against the manufacturer of a medical device. The court reasoned that because the claims against the medical defendants could not be based on the allegedly negligent testing and manufacture of the medical device, joinder of the claims was inappropriate. *Id.* The U.S. District Court for the Southern District of Florida came to a similar conclusion in *Stone*, 2009 WL 1809990, at *4; so did another court, in the Southern District of New York, in a

pharmaceutical case in *In re Rezulin Products Liab. Litig.*, 2003 WL 21276425, at *1–2 (S.D.N.Y. June 2, 2003).

A brief analysis of malpractice and product liability claims demonstrates that the elements and the evidence required for these claims differ. Malpractice claims involve the standard of care, the physician’s interactions with the patient, and the physician’s diagnosis and treatment of the plaintiff. Product liability claims are usually unrelated; they involve the design, manufacture, labeling, marketing, and sale of drugs and devices. Sure, we can say that these claims *could* be litigated in the same case, but that does not mean that they should be, and it certainly does not mean that they must be, especially when there is a related MDL ready to house cases involving the product at issue.

The Bad News

Unfortunately, several district courts have failed to recognize the rationale of fraudulent misjoinder. Specifically, some courts believe that fraudulent misjoinder is an improper expansion of diversity jurisdiction by the federal courts that complicates the removal analysis. In *re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Products Liability Litigation*, 779 F. Supp. 2d 846, 854 (S.D. Ill. 2011) (citing cases).

Perhaps worse, some district courts recognize the problems of fraudulent misjoinder, but they have failed to apply the doctrine rationally, due to a lack of guidance from their circuit courts. For example, in *In re Yasmin*, the U.S. District Court for the Southern District of Illinois recognized the doctrine and stated that “this type of tactical gamesmanship is troubling to the Court.” *Id.* at 856. The court further noted that it “agree[d] with other jurisdictions who have concluded that such structural maneuvering wrongfully blocks defendants’ access to federal courts.” *Id.* However, despite agreeing with the purpose and the application of the fraudulent misjoinder doctrine, the court found that it lacked the authority to remedy the situation. The court stated that this type of decision—to expand federal diversity jurisdiction—should be left to Congress. The court also stated that this type of “structural maneuvering and desire to avoid removal to federal court” is

not improper under Seventh Circuit precedent. It cited *Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407 (7th Cir. 2000), in which the court held that plaintiffs are “masters of the complaint” and may include whatever claims or parties they choose to determine the forum. This may be true in some instances, but it should not be applied across the board. Further, this reasoning *allows* plaintiffs to engage in fraudulent misjoinder. After all, should not the “fraudulent” aspect of their pleadings negate the plaintiffs’ right to choose the forum?

If you find yourself in one of these jurisdictions, argue for a better approach. And if you get shot down, find a way to take it up to the circuit court. At some point, courts will realize that the facts of a case (e.g., the existence of a related MDL) may demand a different result.

In declining to adopt the doctrine, other district courts reason that questions regarding the potential misjoinder of viable, state law claims should be resolved by state courts. For example, in *Geffen v. General Elec. Co.*, 575 F. Supp. 2d 865 (N.D. Ohio Sept. 12, 2008), the court surveyed the inconsistent application of the fraudulent misjoinder across district courts, and it ultimately held that in the absence of controlling Sixth Circuit case law, it would decline to adopt the doctrine. The court specifically stated that the better course of action would be for the state court to rule on the propriety of joinder because the state court is in the best position to analyze the joinder under the state’s joinder laws. *Id.* at 871–72. A court reached a similar conclusion in *Kaufman v. Allstate Ins. Co.*, 2010 WL 2674130, at *8 (D.N.J. June 30, 2010), in which the court held that without guidance from the Third Circuit, it would decline to adopt fraudulent misjoinder, and such questions of procedural joinder would be better decided in state court. This rationale, however, assumes that federal courts are not as capable of applying a state’s joinder laws, which is just not true. Further, should not the MDL judge, who knows these cases, claims, and products like the back of his or her hand, decide whether joinder is appropriate? At the end of the day, the goal is to conserve the resources of the parties and the courts, and the MDL judge is in the best position to make that determination.

The Ninth Circuit Dilemma

Why some courts have declined to adopt the doctrine remains a disappointing mystery. And more importantly, it creates inconsistent (and confusing) law. Take the Ninth Circuit, for example. It declined to adopt fraudulent misjoinder in 2001, and cases are all over the map as a result. For example, as discussed above, *Sutton*, issued by the U.S. District Court for the Eastern District of California, applied fraudulent misjoinder. In *Greene v. Wyeth*, 344 F. Supp. 2d 674, 684–85 (D. Nev. 2004), the court said that it agreed with the Fifth and Eleventh Circuits' interpretation, and application, of fraudulent misjoinder. But in the Northern District of California, some district courts feel differently. In *Jurin v. Transamerica Life Ins. Co.*, 2014 WL 4364901, at *4 (N.D. Cal. Sept. 3, 2014), for example, the court found it "inappropriate" to adopt the theory of fraudulent misjoinder due to the current Ninth Circuit law. Even more troubling is the decision in *Goodwin v. Kojian*, 2013 WL 1528966, at *4 (C.D. Cal. Apr. 12, 2013), in which the court found that fraudulent misjoinder did not apply when the plaintiff joined product liability claims against the manufacturer of a pelvic mesh implant with medical malpractice claims against the implanting physician.

The current fraudulent misjoinder law in the Ninth Circuit is more than inconsistent, and the Ninth Circuit is due to provide clarification on this issue. In the meantime, keep pressing district courts in the Ninth Circuit to consider this issue in the hope that they can make better law and maybe even get on the same page.

The Added Element of Multidistrict Litigation

The reality is this: the fraudulent misjoinder of in-state or nondiverse parties threaten a defendant's right to have its case heard in a federal forum. While this right is important in all litigation, the stakes are even higher when the defendant is actively defending a related MDL involving the same product at issue. Indeed, "[i]f plaintiffs can escape the MDL by joining multiple, unconnected and non-diverse parties in a state court of their choice, they defeat the purposes of the MDL and deny defendants their right to removal." *In re Propecia (Finasteride) Products Liability Litigation*, 2013 WL 3729570,

at *8 (E.D.N.Y. May 17, 2013). Time and time again, plaintiffs have bypassed the entire MDL system by strategically joining medical defendants with drug and device manufacturers in state court product liability actions. In addition to frustrating removal, they are forcing defendants (and courts) to waste judicial resources litigating a state court action that rightly belongs in an established consolidated proceeding. Courts should not allow plaintiffs to engage in this tactical gamesmanship.

The Judicial Panel on Multidistrict Litigation (JPML) creates consolidated proceedings for the purpose of convenience and efficiency. As the U.S. District Court for the Eastern District of New York has stated, the MDL procedure is intended to benefit *both plaintiffs and defendants*. *In re Propecia*, 2013 WL 3729570, at *8. Plaintiffs frequently argue that multidistrict consolidation favors defendants and prejudices plaintiffs, but this is not true. For example, the cost and burden to plaintiffs of litigation against MDL defendants drops considerably upon consolidation, and plaintiffs' ability to negotiate settlements is greatly enhanced. *Joseph v. Baxter Int'l Inc.*, 614 F. Supp. 2d 868, 873 (N.D. Ohio 2009); *Mayfield v. London Women's Care, PLLC*, 2015 WL 3440492, at *5 (E.D. Ky. May 28, 2015).

Finally, the prejudice to a defendant of having to litigate a case in separate forums across the country far exceeds any inconvenience that plaintiffs might suffer. *See, e.g., Sullivan v. Calvary Memorial Hosp.*, 117 F. Supp. 3d 702, 707 (D. Md. 2015). Forcing MDL defendants to litigate claims "in state courts throughout the country whenever and wherever the claims might be joined" would defeat the entire purpose of the MDL process. *Id.* Thus, courts have—and should—recognize this reality when considering the doctrine of fraudulent misjoinder in an MDL context.

Making the Case for Removal

If you are faced with a state court complaint that joins product liability claims against a manufacturer with medical malpractice claims against health-care providers, consider your ability to argue fraudulent misjoinder. Regardless of whether your jurisdiction recognizes the fraudulent misjoinder doctrine, you should consider the approach laid out below, which involves

concurrently filing a notice of removal, a motion to sever, a notice of potential tag-along action, and a motion to stay. This type of approach has been successful in at least two district court cases: *Sullivan v. Calvary Memorial Hosp.*, 117 F. Supp. 3d 702, 707 (D. Md. 2015), and *Mayfield v. London Women's Care, PLLC*, 2015 WL 3440492, at *5 (E.D. Ky. May 28, 2015).

Drafting Your Removal Papers

First, you will want to prepare your removal papers, arguing fraudulent misjoinder as the basis for removal. You should be up front about how your circuit has treated the doctrine, whether it has adopted it, cited it with approval, cited it negatively, or remained silent on the doctrine. Even if courts in your district have cited the doctrine unfavorably, do not be afraid to argue the alternative, citing other in-circuit cases that are favorable to your position. Indeed, the number of district courts that have applied the doctrine supply the basis for a colorable argument, and the presence of a related MDL (if you have one) may be a factual circumstance that your district has not yet considered. In arguing the fraudulent misjoinder doctrine, you will want to illustrate how and why the product liability claims are separate and distinct from the medical malpractice claims as discussed above.

Then, if an MDL exists that involves the same product and issues as the state court case, this fact must be included in your removal argument because, as discussed above, courts have considered this as a material factor when deciding motions to remand. Be sure to include how and why the plaintiff's claims are legally and factually consistent with the claims in the MDL and note that removal (and transfer to the MDL) is appropriate so that *the plaintiff and the defendants*, alike, can take advantage of the MDL proceedings.

Procedurally, the JPML often transfers cases to the MDL before the court makes a decision on any pending motion to remand. Therefore, if the MDL court is a "better" jurisdiction for the defendants, then an added benefit to this approach may be that you have a better chance of defeating remand in the MDL court.

Filing a Concurrent Motion to Sever

Concurrently with your removal papers,

you should file a motion to sever the medical defendants from the underlying product liability claims against the drug or device manufacturer. Federal Rule of Civil Procedure 21 provides that “the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.” District courts have broad discretion to sever dispensable parties under Rule 21. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989) (“Rule 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered.”).

You should argue that the basis for the motion to sever is that under Rule 19, the medical defendants are dispensable parties to the underlying product liability cause of action because, much similar to the removal argument, the malpractice claims against the medical defendants are separate and distinct from the product liability claims against the manufacturer. As a result, the medical defendants are not “necessary” parties to the product liability action under Rule 19(a), and they therefore are not “indispensable” under Rule 19(b). Accordingly, the district court can (and should) use its discretion to sever the claims against the medical defendants.

While courts may not always be persuaded by this argument, the presence of a related MDL may significantly bolster your position because severance will allow the product liability claims to be removed and transferred to the MDL. District courts across the country have recognized the fairness and judicial economy that results from such severance and transfer. For example, the U.S. District Court for the Eastern District of California drew this logical conclusion in *Sutton*, 251 F.R.D. at 500. The court severed and remanded the claims against the medical defendants, but it retained jurisdiction over the medical device manufacturer, noting that its decision would “preserve the interests of judicial efficiency and justice so that all pre-trial discovery on the products liability case can be coordinated in a single forum.” *Id.* at 505. The U.S. District Court for the District of Maryland rendered a similar decision in *Sullivan*, finding severance “particularly appropriate... because it would allow for the transfer of [the plaintiff’s] claims against the [manufacturers]

to the [MDL].” 117 F. Supp. 3d at 707. And in *Mayfield*, the U.S. District Court for the Eastern District of Kentucky granted the defendants’ motion to sever the medical defendants, noting that *even if* the medical defendants were found to be necessary parties under Rule 19, “the Court would not have deemed them indispensable to *this case*” because transfer of the case to the MDL had an “undeniable upside.” 2015 WL 3440492, at *5 (emphasis added). These cases provide just a few examples of the many courts that have recognized the importance of an MDL in the context of a motion to sever medical defendants.

Filing a Concurrent Motion to Stay

It is important to remember to file concurrently a motion to stay the proceeding, including, most importantly, any ruling on a motion to remand that the plaintiffs may file, pending transfer of the case to the MDL. This is important because immediately after removing the case, you will want to file a notice of potential tag-along action, in accordance with J.P.M.L. Rule of Procedure 7.1(a), seeking an order from the panel to transfer the removed action to the MDL. The JPML routinely transfers cases to MDL proceedings even while a motion to remand is pending. This is an important step because it means that your case will be transferred to the MDL more quickly, where it rightly belongs, and you may have a better chance of staying in federal court if the MDL judge makes the remand decision.

Your motion to stay should reiterate why removal and transfer of the proceedings to the MDL is preferable and highlight the judicial efficiencies that will be gained by staying the proceedings pending a transfer. Specifically, your motion should highlight the potential for inconsistent rulings if separate courts were to rule on the same or similar jurisdictional issues. It is only logical that the judge presiding over the MDL should consider and rule on jurisdictional issues concerning the MDL because the JPML is best positioned to determine whether the judicial efficiencies of the MDL process will be achieved by consolidation of this particular plaintiff’s claims.

Conclusion: There Is Hope

The fact that some bad (and frankly, wrong) law regarding fraudulent misjoinder exists

should not dissuade you from arguing that it applies. This is true in any litigation, but it is especially important if a defendant is actively defending a related MDL proceeding. To promote and maintain the judicial efficiencies of multidistrict litigation, defendants should try any reasonable, good-faith avenue possible for removal and transfer to an existing MDL. The removal procedure that we have outlined above provides a path for removal of state court cases that may not, at first glance, appear removable. We hope that more district courts will soon recognize the importance of removal and severance, especially in the MDL context, and jump on board with this approach. Until then, the defense bar should run with the cases that have recognized this approach and highlight the many policy arguments in its favor.

