

Fight for the Forum

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IN THE early 2000s, our firm was retained by a target defendant in asbestos litigation who was facing a surge of claims in Texas state court arising from alleged exposure to chrysotile asbestos in its former products. We embarked on an aggressive, science-based defense that within a few years contributed to significant improvements in Texas case law, particularly with respect to plaintiffs' "every fiber" theory. But by the time this battle was won (and a broader tort reform effort in Texas had succeeded as well), plaintiffs had simply moved on and begun filing their cases *en masse* in California instead.

As this and many similar stories make clear, defendants cannot hope to turn the tide in products liability

without winning the fight for the forum. If plaintiffs can simply file any suit in their favored forum, the benefits of jurisdiction-by-jurisdiction tort reform or even seminal legal victories will be limited. With twelve federal circuits and 50 (+ DC) state forums at their disposal, plaintiffs can always move on to a new forum where defendants will be forced to litigate under procedural and evidentiary rules stacked in plaintiffs' favor and before juries pre-inclined to plaintiffs' arguments.

There have been some notable successes for defendants on this front in recent years, most notable the Supreme Court's *Bristol-Myers*

Squibb (“*BMS*”) ruling in 2017,¹ which significantly narrowed the circumstances in which non-resident plaintiffs may sue out-of-state corporate defendants. But the plaintiffs’ bar is fighting back hard, and unless the defense bar meets this challenge, the future for product liability defendants will be grim.

Since *BMS* was decided, plaintiffs’ counsel have redoubled their efforts to file cases only in their preferred forums. They have tried to avoid federal jurisdiction through the creative targeting of tangential, but non-diverse co-defendants, consolidated their serial litigation in a limited number of plaintiff-friendly state courts that have adopted expansive notions of venue and multi-plaintiff trials, and misapplied basic concepts of personal jurisdiction. These tactics have led to a number of run-away plaintiff verdicts following sharply uneven proceedings. The message to the defense bar is clear: As long as the plaintiffs’ bar can choose their ground for battle, even the strongest defense in fact and law stands little chance.

Fortunately, as discussed below, there are weapons that defense counsel can employ to break out of these plaintiff-preferred jurisdictions. Such strategies, which must be considered at the outset of litigation, include: (1) removal to

federal court based upon fraudulent joinder theory; (2) vigorous enforcement of state venue statutes that have been reformed to curb forum shopping; and (3) an unyielding defense of *BMS*. Some of these battles are discussed below.

Fraudulent Joinder. Plaintiffs in products liability litigation routinely attempt to escape federal diversity jurisdiction by suing not only the product manufacturer, but any one of a number of non-diverse but at best tangential co-defendants, including distributors or retailers and/or their employees, advertising or marketing agencies, treating (non-prescribing) physicians, and clinical laboratories that tested the product. The gamesmanship is obvious: plaintiffs have only sued these non-diverse defendants to prevent the federal court from exercising diversity jurisdiction. In our experience, plaintiffs have routinely dismissed such defendants before trial, and indeed, have every incentive to do so to maintain their preferred narrative of a big foreign defendant against a local (and injured) individual. But they are always careful to wait until after the one-year deadline for removing cases to federal court has expired. If it’s obvious that plaintiffs do not intend to actually pursue claims against

¹ Bristol-Myers Squibb v. Superior Court of California, 137 S. Ct. 1773 (2017).

these local defendants, what can we do about it?

The answer is aggressive use of the “fraudulently joinder” doctrine, through which courts can see through this mirage and dismiss sham defendants from the diversity analysis. Generally, fraudulent joinder may be established by showing there is not “any reasonable possibility” that the plaintiff can prevail in his state law claims against the non-diverse defendant. Note that this “any reasonable possibility” standard can be more stringent than the Federal Rule 12(b)(6) motion to dismiss standard, and that some circuits (including the Ninth Circuit) apply an even more onerous “no possibility” standard in determining fraudulent joinder. In those jurisdictions in particular, defendants face a very difficult removal hurdle.

On the plus side, however, courts addressing fraudulent joinder arguments are not limited (as in a motion to dismiss) to the allegations made in the complaint. Rather, a court may consider summary judgment-type evidence, including affidavits; deposition testimony; sales records showing purchases of items (or demonstrating the lack of purchases and therefore lack of privity of contract or purchases); and incorporation documents (which could establish whether a local corporate defendant even

existed at the time of the relevant transaction, sale, or injury forming the basis of the lawsuit)). Moreover, if the removing defendant puts forth such evidence supporting removal, a plaintiff may not rest on the allegations in the complaint, but must instead provide a factual basis for his claims. Equally important, new evidence can also re-start the clock for removal, allowing the defendant additional time to remove the case after the original 30-day removal period has expired. This places increased emphasis on defense counsel to make sure they secure necessary discovery and other information from these non-diverse defendants before the hard one-year deadline.

Finally, defense counsel facing a plaintiff who has joined a local non-manufacturer seller should be aware of any state laws that protect (or at least limit the liability of) “innocent sellers.” “Innocent seller” laws shield non-manufacturer sellers from tort liability under certain circumstances, making it more difficult for plaintiffs to prevail against those sellers. In turn, these statutes provide defendants with a leg up in arguing that these non-manufacturers are not “reasonably possible” defendants and cannot be used to defeat diversity jurisdiction.

Reform Efforts to State Venue Statutes. To secure plaintiff-friendly forums, plaintiffs’ counsel often join local “anchor plaintiffs”

(those with an actual connection with the local forum) with out-of-state plaintiffs who allege independent injury from the same product. Plaintiffs will group this single plaintiff with as many as 98 wholly unrelated plaintiffs from all over the country (stopping 1 plaintiff short from triggering the CAFA removal provisions). Plaintiffs' counsel then argue that if venue is proper for one plaintiff, then venue is proper for all other plaintiffs joined in the same lawsuit.

Fortunately, several states have recently enacted venue statutes to block these "anchor plaintiff" tactics. For example, the West Virginia venue statute now requires a non-resident plaintiff to establish that "all or a substantial part of the acts or omissions giving rise to the claims asserted" took place there."² Similarly, in 2019, Missouri amended its venue statute so that plaintiffs may not bring claims "arising out of separate purchases of the same product or service, or separate incidents involving the same product or service."³ In other words, plaintiffs cannot attempt to join their claims together in to establish proper venue on a collective basis; venue must be established plaintiff by plaintiff.

Plaintiffs' counsel, of course, are fighting back. As mass complaints with anchor plaintiffs are being challenged, the plaintiffs' bar have looked for local "anchor defendants,"

stealing a page from their federal-diversity-defeating playbook, and then seeking to obscure the lack of connection between such local "anchor defendant" and the out-of-venue plaintiffs. The claims against these anchor defendants often have the same merit (or more accurately lack thereof) as the claims against non-diverse defendants discussed above. As a fallback, plaintiffs have sought to reconfigure previously filed anchor-plaintiff complaints, proposing to add and delete plaintiffs from individual complaints to create new mass complaints joining the claims of all former "anchor plaintiffs." Unfortunately, some courts have been all too willing to accept these obvious, statute-defying "work-arounds." Just because a tort reform battle is "won," the fight continues.

Pushing Back Against Plaintiffs' Attempts to Limit BMS.

Plaintiffs' counsel also have not accepted defeat on *BMS*. One recent (and popular) argument by plaintiffs is to argue that if an out-of-state corporation signs an agreement to do business within a particular state, and has a registered agent in that state, then that corporation should be deemed "at home" in that state. Thus far, federal courts of appeal have rejected this gambit, but some federal district courts and state courts have been more open to the

² W.VA. CODE § 56-1-1 (2018).

³ RSMo. 2019 § 507.040(as amended).

argument. Even a strong U.S. Supreme Court opinion is no guarantee in this fight. Plaintiffs will have their preferred forum, come hell or high water.

The “fight for the forum” is a fight that defendants literally cannot afford to lose. We cannot rest on old laurels or rely upon even seemingly impregnable defenses. We must fight on the beaches, we must fight on the landing grounds, we must fight in the fields and in the streets, we must fight in the hills. We must never surrender. And we must prevail.