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Pursuing Sanctions Under 28 U.S.C. § 1927: An Underused Defense Strategy

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In serial pharmaceutical litigation, the number of cases pending against a corporate defendant is just as important—and can be even more important—than the legal and factual merits of those cases. Some members of the plaintiffs' bar view mass tort litigation as a high-stakes game of poker where each individual case is a poker chip that must be protected at all costs regardless of its legal merits. These lawyers are betting—rightly so in some cases—that the press coverage and possible business implications of a huge number of lawsuits regarding an important drug will force a company to overpay and settle quickly rather than engage in protracted litigation.

In these circumstances the plaintiffs' lawyers' true goal is to file as many cases as possible and keep them each alive long enough to be included in their desired endgame—an inventory settlement. A company's best response to this type of attack—even with the ultimate goal of complete resolution—is usually to litigate case by case to reduce the number of "chips" that each plaintiffs' lawyer brings to the negotiating table. The fight itself will serve the dual purposes of forcing plaintiffs' counsel to spend time and money to protect their investment—their chips—while also reducing their inventory and devaluing their claims.

This affirmative defense strategy has proved effective in many mass torts, including recently in one of the country's most active serial pharmaceutical personal injury battles, the Aredia/Zometa litigation. In that litigation, the defendant sliced the inventory of cases pending against it by 33 percent, disposing of roughly 300 cases through either summary judgments or dismissals over the course of the litigation and thereby significantly reduced the value of plaintiffs' claims.

The process of analyzing and preparing to litigate each individual case will also, inevitably, expose a high percentage of the inventory as frivolous and un-winnable claims. Once these cases are identified, defense counsel will demand that plaintiffs dismiss these meritless claims before unnecessarily incurring further litigation costs. But what incentive do plaintiffs' counsel have to comply? Some might argue that avoiding the costs and effort to pursue such claims is an obvious incentive to dismiss, but many plaintiffs' lawyers would reject that because voluntarily thinning out their inventory directly undermines their chip-hoarding business model. So creative plaintiffs' lawyers have instead concocted an elegantly simple litigation tactic that allows them to keep frivolous claims alive and part of their inventory without having to spend significant time or money doing so—the "pocket dismissal." Here's how it works.

1. A defense counsel learns through discovery that a claim is baseless for a number of reasons. Maybe the claim is time barred, or a plaintiff admits in a deposition that he or she still would have taken the drug even if warned specifically of the risk of his or her alleged injury, or the prescribing physician swears that he or she knew of the risks and warned the plaintiff of those risks before prescribing the drug and the plaintiff gave informed consent, or all of the above.

2. The defense counsel explains to the plaintiff's lawyer why his or her claim is frivolous and that he or she cannot win and therefore should drop the case to avoid incurring additional litigation costs.

3. The plantiff's counsel recognizes (or cannot objectively deny) that the plaintiff's claim lacks merit and should be dismissed, but ignores defense counsel's requests for a dismissal. Instead, the plaintiffs' lawyer either completely stops working up that particular case or continues pursuing it in the most half-hearted and cheapest way possible. This pocket dismissal advances the plaintiff's attorney's poker chip business model in multiple ways. First, it delays reducing the inventory of the often significant amount of time that it will take a court to consider fully and rule upon any dispositive motion. Second, it forces the defense counsel to expend time and resources getting rid of a hopeless case rather than focusing attention on bona fide claims, with the additional side benefit of driving up the defendant's litigation costs. That's already a win-win scenario for the plaintiffs' bar without even accounting for the fact that many judges loath granting summary judgments even in the most deserving of circumstances, or routinely withhold rulings until the eve of a trial and after trial work-up is essentially complete.

The Counter-Attack to a "Pocket Dismissal"

So how can a serial mass tort defendant avoid being held hostage by pocket dismissals and forced to continue litigating obviously frivolous claims? Sanction authority under 28 U.S.C. § 1927 provides a potentially strong countermeasure. t empowers courts to sanction "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously . . . [by compelling them] to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. §1927. Courts interpret § 1927 sanctions as requiring a showing of "subjective bad faith," which "is present when an attorney knowingly or recklessly raises a frivolous argument." *E.g., B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1107 (9th Cir. 2002) (quoting *In re Keegan Mgmt. Co., Sec. Lit.,* 78 F.3d 431, 436 (9th Cir. 1996)). Refusing to drop a case once it becomes apparent that the evidence will not support the claim is a perfect example of sanctionable bad faith under § 1927 because such pocket dismissals are specifically *intended to* and inevitably result in the unreasonable multiplication of the proceedings in a frivolous case. *E.g. Haynes v. City & Cnty. of San Francisco*, 474 F. App'x 689 (9th Cir. 2012); *Barnes v. Dalton*, 158 F.3d 1212 (11th Cir. 1998) (affirming award of sanctions under 28 U.S.C. § 1927 due to plaintiffs' counsel's refusal to drop unsupportable claims that resulted in defense counsel's need to prepare and file dispositive motions); *Avrigan v. Hull*, 932 F.2d 1572, 1581–82 (11th Cir. 1991) (affirming award of sanctions under § 1927 because plaintiffs refused to drop a case even after it became apparent that the evidence would not bear out their claim); *Dzwonkowski v. Dzwonkowski*, No. 05-0544-KD-C, 2008 WL 2163916, at *20–24 (S.D. Ala. May 16, 2008) (awarding sanctions for bad-faith under § 1927 because plaintiff "recklessly asserted frivolous arguments," while noting that "[w]hen it became apparent—very early on in this case—that his claims were frivolous . . . Plaintiff and his counsel should have discontinued their quest"). Courts recognize this by holding that § 1927 imposes on counsel an affirmative "duty [that is sanctionable when breached] to correct or withdraw litigation positions after it becomes obvious that they are meritless." *In re Girardi*, 611 F.3d 1027, 1064 (9th Cir. 2010). *See also id*.

In *Haynes*, the Ninth Circuit held that when deposition testimony makes "clear that none of the plaintiff's remaining claims against any of the defendants had any merit," then counsel's "continued pursuit of these frivolous claims after this point was at the very least reckless," if not intentional, "and thus the costs subsequently incurred by the defendants may properly be awarded as sanctions pursuant to § 1927." 474 F. App'x at 690. Likewise, the Eleventh Circuit has held that pursuing "claims which plaintiffs' counsel knew or should have known were time-barred," and "without any evidence to support such theories of recovery" constituted bad-faith conduct that is sanctionable under § 1927. *See Barnes*, 158 F.3d at 1213-14.The *Barnes* court further noted that "[a] finding of bad faith is warranted where an attorney knowingly or recklessly raises a frivolous argument." *Id.* at 1214 (quoting *Primus Automotive Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 649 (9th Cir. 1997)). In the court's view, "the pursuit of a claim without reasonable inquiry into the underlying facts can be the basis for a finding of bad faith." *Id.* at 1214.

Similarly, in *Dzwonkowski*, the court held that because "it became quite clear, very soon after the Complaint was filed, that his claims were frivolous," that plaintiff's counsel's refusal to dismiss the case was tantamount to bad faith. *SeeDzwonkowski*, 2008 WL 2163916, at *21. The court ordered the plaintiff's counsel to pay the attorney's fees that were incurred as a result of the plaintiff's counsel's refusal to drop the obviously frivolous claims because the "purpose of § 1927 is to deter frivolous litigation and abusive practices by attorneys and to ensure that those who create unnecessary costs bear them." *Id.* at *21–22.

Perhaps most importantly from a deterrence perspective, high-profile mass tort plaintiffs' lawyers are well aware of the risks posed by a motion for sanctions under § 1927 should they continue pursuing objectively unsupportable claims. For example, the Ninth Circuit upheld an award of $365,000 for the defendants' attorneys' fees under § 1927 against Girardi & Keese for refusing to drop claims that were "both baseless and made without a reasonable and competent inquiry." *In re Girardi*, 611 F.3d at 1062 (quoting *Holgate v. Baldwin*, 425 F.3d 671, 677 (9th Cir. 2005)). The court held that continuing to pursue obviously meritless legal theories that lacked even basic evidentiary support, rather than dropping the claims,

"result[ed] in further unreasonable and vexatious multiplication of the proceedings" and therefore violated § 1927 and warranted an award of attorney's fees to defendants. *Id*. at 1064.

Because § 1927 places an affirmative duty on plaintiffs' counsel to dispose of unsupportable cases, and plaintiffs' counsel face severe monetary sanctions for breaching that duty, motions for sanctions under § 1927 can effectively prevent a pocket dismissal from serving its intended purpose and provide a strong disincentive for refusing to drop frivolous claims.

Five Takeaways

First, in serial mass tort litigation, the value of a plaintiffs' lawyer's inventory is directly proportional to the number of cases in that lawyer's inventory. Therefore, inventory reduction is the best way to slash inventory value. Plaintiff's' counsel have a vested interest in protecting even the meritless cases within their inventories.

Second, some within the mass tort plaintiffs' bar have adopted a strategy—the "pocket dismissal"—to keep unsupportable claims alive as part of their case inventories while at the same time driving up defense costs and distracting defense counsel from defending bona fide cases.

Third, pocket dismissals are unsusceptible to traditional dispositive motion attacks because plaintiffs' counsel already know and accept that they are highly likely to be poured out on summary judgment, and either they intend to dismiss some cases eventually or benefit from the time that it takes a court to consider and grant a defendant's dispositive motions. In fact, pocket dismissals thrive on the fact that the time and effort necessary to win dispositive motions drives up defense costs at little or no cost to plaintiffs or their lawyers.

Fourth, pocket dismissals are susceptible to a motion for sanctions under 28 U.S.C. § 1927 because, by definition, they unreasonably and vexatiously multiply the proceedings in a frivolous case.

Fifth, defense attorneys should therefore consider filing a motion for sanctions under 28 U.S.C. § 1927, either as a standalone motion or in conjunction with a dispositive motion, when encountering a pocket dismissal strategy. The legitimate threat of harsh sanctions against a plaintiff's counsel, including awards of attorney and expert witness fees incurred by a defendant once it became obvious that a case lacked merit, will often convince counsel to drop the case sooner rather than later. Moreover, if your analysis is correct and a plaintiff truly cannot support a claim, then the plaintiff's counsel may be inclined to dismiss before having to file an opposition to such a motion. Finally, since motions for sanctions are so uncommon, if done properly, one will highlight the strong rationale for judgment as a matter of law while encouraging a judge to act quickly on any pending dispositive motion ruling.

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