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An Update from the Pharmaceutical
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REMOVAL LOOPHOLE FOR NEW JERSEY DRUG AND DEVICE DEFENDANTS NARROWING

Removal of a case from state to federal court is an important procedural option for many defendants, especially pharmaceutical and medical device manufacturers. Because many drug and device-based suits raise only state law product liability or consumer fraud claims, removal on the basis of diversity of citizenship is often the only viable basis for such defendants to seek a federal forum. In an individual case, diversity jurisdiction requires that none of the parties on the plaintiff side of the caption shares citizenship with any of the parties on the defendant side. However, under the so-called "forum defendant rule" set forth in 28 U.S.C. § 1441(b), a case can be removed on the basis of diversity "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." In other words, a defendant sued in a state court in a state in which that defendant has its corporate headquarters or its principal place of business, even if there is otherwise complete diversity of the parties, cannot remove to federal court.

The literal language of § 1441(b) has given rise to a loophole in the forum defendant rule. Specifically, the argument is that the limitation on removability is triggered only when an in-state defendant has been "properly joined and served." 28 U.S.C. § 1441(b). Accordingly, the argument continues, if the forum defendant has not properly been joined and served at the time of removal, removal is not precluded by the forum defendant rule.

This argument has met with mixed success in New Jersey. On the positive side, for exam-

ple, is Thomson v. Novartis Pharmaceuticals Corp., 2007 U.S. Dist. LEXIS 37990, (D.N.J. 2007), in which the out-of-state plaintiffs filed suit in New Jersey state court. Defendant Novartis Pharmaceuticals Corporation, a corporation with its principal place of business in New Jersey, removed the case under diversity principles prior to being served with process. On plaintiffs' application for remand, Novartis argued that a plain reading of § 1441(b) established that, so long as it removed the case prior to being served with process, removal was proper. Novartis further asserted that, under Third Circuit precedent, the district court was obligated to give effect to the plain reading of § 1441(b) unless the result would be "demonstrably at odds" with Congressional intent. Thomson at *11 (quoting Mitchell v. Horn, 318 F.3d 523, 535 (3d Cir. 2003)). United States District Judge Jerome Simandle agreed, finding that a straightforward application of § 1441(b) "warrants denial of plaintiff's motion" because Novartis had not been properly joined and served when it filed its notice of removal. Thomson at *11-12.

More recently, however, the ability of in-state defendants to circumvent the removal limitation set forth in 1441(b) was rejected by another federal judge in New Jersey. In companion decisions issued on December 12, 2007, Fields v. Organon USA, Inc., 2007 U.S. Dist. LEXIS 92555 (D.N.J. 2007) and DeAngelo-Shuayto v. Organon USA, Inc., 2007 U.S. Dist. LEXIS 92557 (D.N.J. 2007), United States District Judge Stanley Chesler rejected the literal interpretation of § 1441(b) that would allow removal by an unserved forum defendant and remanded both cases to

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the New Jersey Superior Court. In his decisions, Judge Chesler recognized that the real purpose of federal diversity jurisdiction is to avoid possible prejudice to an out-of-state defendant. In holding that a forum defendant cannot remove to federal court even if the forum defendant has not been properly joined and served, Judge Chesler explained that “[t]he result of blindly applying the plain ‘properly joined and served’ language of § 1441(b) is to eviscerate the purpose of the forum defendant rule.” Fields at *12. Noting that the “goal of judicial statutory interpretation is to actualize legislative intent,” Fields at *11 (citing U.S. v. Am. Trucking Ass’ns., 310 U.S. 534, 542 (1940)), Judge Chesler concluded that allowing a forum defendant to remove to federal court, even if it had not been served, was not the intent of § 1441(b). Id. at *13.

Of note, the conflicting decisions in Thomson, Fields, and DeAngelo-Shuayto all grounded themselves in legislative intent. In Thomson, Judge Simandle held that Congress “plainly intended to require the service of the complaint, and not just proper joinder,” to preclude removal by a forum defendant, concluding that to permit removal prior to the time of service would not “create such a ‘bizarre’ outcome ‘that Congress could not have intended it.’” Thompson at *15; quoting Mitchell, 318 F.3d at 535. Conversely, in Fields and DeAngelo-Shuayto, while acknowledging that the plain language of § 1441(b) implies that a forum defendant may remove prior to being served, Judge Chesler refused to believe that “such a bizarre result” could possibly have been the intent of Congress. Fields at *10.

IMPACT ON NEW JERSEY DEFENDANTS

New Jersey is home to many pharmaceutical and medical device manufacturers having either corporate headquarters or principal places of business in this state. New Jersey is also home to a coordinated, plaintiff-friendly mass tort program, in

which large numbers of out-of-state plaintiffs are drawn to file product liability suits in the New Jersey state courts. With the advent of docket-notification services that can provide information about newly filed suits to defendants before they are served, the removal loophole recognized in cases such as Thomson will allow New Jersey-based drug and device defendants an avenue into federal court if they act promptly prior to being served. However, more decisions such as Judge Chesler’s in Fields and DeAngelo-Shuayto will narrow this beneficial option for defendants. And, even without such judicial narrowing, careful plaintiffs’ attorneys will seek to effect service much more quickly after filing, further decreasing defendants’ ability to seek removal on this basis. For the time being, however, New Jersey pharmaceutical and medical device manufacturers should remain proactive and diligent to take advantage of this avenue into federal court.

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Current Mass Torts in New Jersey

<i>Accutane</i>	<i>J. Higbee, Atlantic County</i>
<i>Asbestos</i>	<i>J. McCormick, Middlesex County</i>
<i>Bextra/Celebrex</i>	<i>J. Higbee, Atlantic County</i>
<i>Ciba-Geigy</i>	<i>J. McCormick, Middlesex County</i>
<i>Depo-Provera</i>	<i>J. Harris, Bergen County</i>
<i>Gadolinium</i>	<i>J. Happs, Middlesex County</i>
<i>HRT</i>	<i>J. Happs, Middlesex County</i>
<i>Mahwah Toxic Dump Site</i>	<i>J. Harris, Bergen County</i>
<i>Ortho Evra</i>	<i>J. Happs, Middlesex County</i>
<i>Risperdal/Seroquel/Zyprexa</i>	<i>J. Happs, Middlesex County</i>
<i>Vioxx</i>	<i>J. Higbee, Atlantic County</i>
<i>Zometa/Aredia</i>	<i>J. Higbee, Atlantic County</i>

The Coughlin Duffy Pharmaceutical and Medical Device Group

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