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# Removal and Lack of Personal Jurisdiction: A Potent One-Two Punch in Multi-Plaintiff Lawsuits

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Companies that are sued in state courts and defense attorneys familiar with litigating such cases know that it is important to remove complex lawsuits to federal court whenever possible. Certain bases for removal are well-known to defendants and their attorneys, such as removal based on diversity of citizenship (often coupled with an argument that a non-diverse defendant has been fraudulently joined to prevent removal); removal based on the Class Action Fairness Act; or removal based on federal-question jurisdiction.

However, defendants should also consider a less well-known removal strategy—invoking diversity jurisdiction due to misjoinder of plaintiffs and simultaneously challenging personal jurisdiction—because it can be a potent one-two punch in a multi-plaintiff lawsuit filed by "litigation tourists." The typical scenario for this removal strategy is a lawsuit filed by multiple, unrelated plaintiffs in a state where at least one plaintiff used a product and allegedly was injured by the product, but the other plaintiffs were injured by the product in other states. That fact pattern presents potential arguments regarding misjoinder of plaintiffs and lack of personal jurisdiction that can be used to remove the case to federal court.

***In re Zofran* District Court Ruling**. A 2016 ruling in a pharmaceutical products-liability lawsuit is a good example of how to land this one-two punch. *See In re Zofran (Ondansetron) Products Liability Litigation*, MDL No. 1:15-md-2657-FDS, 2016 WL 2349105 (D. Mass. May 4, 2016). This case started in Missouri state court, where four unrelated plaintiffs jointly filed suit for birth defects allegedly caused by the drug Zofran (also known as ondansetron). The pharmaceutical company defendant was a Delaware citizen. One plaintiff was a Missouri citizen; one plaintiff was a Delaware citizen; and the other two plaintiffs were citizens of other states.

At first blush, removal based on diversity jurisdiction was not available because a plaintiff and the defendant were both Delaware citizens, but the defendant was not deterred. It removed to federal court based on the doctrines of fraudulent joinder and procedural misjoinder—and simultaneously filed a motion to dismiss the claims of the non-Missouri plaintiffs for lack of personal jurisdiction.[1] The plaintiffs filed a motion seeking remand to state court based on lack of subject-matter jurisdiction, due to an alleged lack of complete diversity of citizenship.

**Which Jurisdictional Challenge to Decide First?** This combination of motions required the district court to address a threshold issue—whether to decide the subject-matter-jurisdiction challenge first (as plaintiffs urged) or the personal-jurisdiction challenge first (as defendants urged). The court stated that "there is no hard-and-fast rule dictating the order in which the district court must decide those issues." *Id*. at *2 (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584-88 (1999)). In *Ruhrgas*, the U.S. Supreme Court held that, when a subject-matter challenge involves "no arduous inquiry," a district court should "dispose of that issue first," *id*. at 587-88 but when the "court has before it a straightforward personal jurisdiction issue presenting no complex question

[1] After the Missouri federal court issued a stay pending a transfer ruling by the Judicial Panel on Multidistrict Litigation, the Panel transferred the case to a federal district court in Boston for coordinated pretrial proceedings with other Zofran cases. *In re Zofran*, 2016 WL 2349105, at *1; *see also* 28 U.S.C. § 1407.

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of state law, and the alleged defect in subject-matter jurisdiction raises a difficult and novel question, the court does not abuse its discretion by turning directly to personal jurisdiction." *Id*. at 588. In accordance with *Ruhrgas*, the *In re Zofran* court decided the personal-jurisdiction challenge first because the removal arguments—that the non-Missouri plaintiffs were fraudulently joined or procedurally misjoined—presented complicated legal issues.

**Lack of Personal Jurisdiction Leads to Denial of Remand Motion**. First, the court considered whether it had general personal jurisdiction over the defendant, based on whether the Missouri federal court from which the case was transferred had general personal jurisdiction. The court held that jurisdiction was lacking because the complaint contained no allegations suggesting that the defendant's operations in Missouri—"simply market[ing] and sell[ing] the product in Missouri, as it presumably does in the other 49 states"—sufficed to make this an "'exceptional case'" where the court could deem the defendant "'at home'" in Missouri even though the defendant was not incorporated, and did not have its principal place of business, in Missouri. *Id*. (quoting *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 & n.19 (2014)).

Second, the court held that it did not have specific personal jurisdiction over the defendant for the claims asserted by the non-Missouri plaintiffs. The "complaint falls far short of establishing any nexus between the non-Missouri plaintiffs' claims and [the defendant's] Missouri-based activities" and does not "allege any facts connecting the conduct of [the defendant] in Missouri, if any, to their own claims." *Id*. at *5. Thus, the court rejected the non-Missouri plaintiffs' effort to satisfy their burden of establishing specific personal jurisdiction by joining their claims with the Missouri plaintiff's claims (for which personal jurisdiction was undisputed).[2]

These rulings ultimately led the court to deny the remand motion. After dismissing the non-Missouri plaintiffs for lack of personal jurisdiction, the court was left with a Missouri plaintiff asserting claims against a Delaware defendant. This meant that the court had subject-matter jurisdiction (diversity) and did not need to address arguments regarding fraudulent joinder or procedural misjoinder.

**Other Rulings Dismissing for Lack of Personal Jurisdiction and Denying Remand**. Although this combination of rulings—dismissing for lack of personal jurisdiction and denying remand—is not a common occurrence, it is not unprecedented. Other federal district courts have issued such rulings in multi-plaintiff lawsuits.[3]

The Supreme Court's recent personal jurisdiction ruling in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017) ("*BMS*"), provides further support for defendants seeking to assert the argument summarized above. Since the *BMS* decision, at least three federal judges have ruled for defendants in multi-plaintiff lawsuits—dismissing certain plaintiffs for lack of personal jurisdiction and declining to remand the remaining plaintiffs' claims to state court.[4]

**Conclusion**. It is no coincidence that the remand-denial rulings cited above were issued after the *Daimler* and *BMS* rulings substantially restricted plaintiffs' attorneys' options for contending that courts should exercise personal jurisdiction over corporate defendants. Defendants and their attorneys should consider using the one-two punch of removal and a lack-of-personal-jurisdiction argument when confronted with multi-plaintiff lawsuits filed by litigation tourists.

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[2] The court also "decline[d] to adopt the doctrine of pendent personal jurisdiction." *In re Zofran*, 2016 WL 2349105, at *2 n.5 (citing *In re Testosterone Replacement Therapy Prod. Liab. Litig. Coordinated Pretrial Proceedings*, 164 F. Supp. 3d 1040 (N.D. Ill. 2016)).

[3] See *Addelson v. Sanofi S.A.*, No. 4:16CV01277 ERW, 2016 WL 6216124 (E.D. Mo. Oct. 25, 2016); *In re Testosterone Replacement Therapy*, 164 F. Supp. 3d 1040 (N.D. Ill. 2016). *But see Robinson v. Pfizer Inc.* Case No. 4:16-CV-439 (CEJ), 2016 WL 1721143 (E.D. Mo. Apr. 29, 2016) (granting remand motion and awarding attorneys' fees to plaintiffs), *vacated*, 855 F.3d 893 (8th Cir. 2017) (granting motion to dismiss appeal as moot and vacating district court order, after plaintiffs disclaimed any interest in collecting attorneys' fee award and then filed motion to dismiss appeal).

[4] *See Douthit v. Janssen Research & Dev.*, Case No. 3:17-CV-00752, 2017 WL 42244031 (S.D. Ill. Sept. 22, 2017); *Jinright v. Johnson & Johnson, Inc.*, Case No. 4:17CV01849, 2017 WL 3731317 (E.D. Mo. Aug. 30, 2017); *Jordan v. Bayer Corp.*, Case No. 4:17-CV-865 (CEJ), 2017 WL 3006993 (E.D. Mo. July 14, 2017); *Siegfried v. Boehringer Ingelheim Pharm., Inc.*, Case No. 4:16 CV 1942 CDP, 2017 WL 2778107 (E.D. Mo. June 27, 2017).

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