Subsection (D) Of H.R. 985: Misjoinder Of Plaintiffs In Personal Injury And Wrongful Death Actions. Is The Proposed Legislation Necessary To Block Litigation Tourism?

by Alan G. Schwartz and Laura Ann P. Keller

Plaintiffs in pharmaceutical personal injury litigation frequently join non-diverse, non-resident claims with those of resident plaintiffs in order to have all claims heard in a favorable state court. The proposed Fairness in Class Action Litigation Act of 2017 addresses this problem, commonly referred to as "litigation tourism."[1] Subsection (d) of the Act would permit defendants to remove on the basis of diversity jurisdiction, and to sever and remand to state court any claims that do not satisfy the requirements of diversity jurisdiction.[2] The proposed legislation permits the federal court to retain jurisdiction over the remaining claims that are diverse. The House of Representatives passed the Act, but the Senate is not likely to approve it.

Defense lawyers do not despair. Recent Supreme Court decisions have seriously eroded "litigation tourism." As discussed below, *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco*,[3] can prevent non-resident, non-diverse plaintiffs from depriving defendants of their right to remove the claims of resident plaintiffs to a federal forum on the basis of diversity jurisdiction. So despite the lack of progress on a legislative end to litigation tourism, the defense bar now can rely on Supreme Court authority to curb this abuse.

The recent Supreme Court decision held that California could not constitutionally exert specific jurisdiction over Bristol-Myers Squibb ("BMS") in a pharmaceutical product liability case where (1) a large number of plaintiffs acknowledged that they did not purchase or take the drug in California, (2) BMS activities in California could not be linked to plaintiffs' alleged injuries, and (3) these plaintiffs were not residents of California.[4] The Court flatly rejected the California Supreme Court's "sliding scale approach" to the exercise of specific jurisdiction, where "the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims."[5] The Supreme Court found that its cases "provide no support for this approach, which resembles a loose and spurious form of general jurisdiction."[6]

Notably, 86 California residents, and 592 non-residents from 33 other states joined their claims in California. Anticipating the California State Court's dismissal of the claims of the 592 non-resident plaintiffs, the Court noted that all the plaintiffs could still "join[] together in a consolidated action in the States that have general jurisdiction over BMS." Alternatively non-resident plaintiffs could "sue together in their home states."[7]

The Supreme Court's sharp rejection of the California court's "sliding scale approach" to personal jurisdiction is significant. No longer can non-diverse, non-resident plaintiffs and resident plaintiffs consolidate their claims in any state court, including so-called judicial "hellholes." Under the circumstances of *Bristol-Myers Squibb*, defendants no longer need to rely on fraudulent misjoinder to remove cases that, absent the misjoined plaintiffs, are properly litigated in federal court. Without an "affiliation" between the non-resident plaintiffs' injuries and the defendant company's in-state activities, a court may not exercise specific jurisdiction.[8] Coupled with the Court's decision in Daimler AG v. Bauman, limiting general jurisdiction to a corporation's "home," such as its place of incorporation or principal place of business,[9] the Bristol-Myers Squibb decision brings us closer to the end of litigation tourism.

In a post-*Bristol-Myers Squibb* world, defendants can establish federal subject matter jurisdiction over the resident claims by removing the entire case, severing the claims of the non-resident, non-diverse plaintiffs, and obtaining the dismissal of those claims on the basis of lack of personal jurisdiction.[10] Plaintiffs often move to remand for lack of

1 See Subsection (d), "Misjoinder of Plaintiffs in Personal Injury and Wrongful Death Claims," p. 9, line 7 of H.R. 985.

2 Once remanded to state court, defendants could move to dismiss the remanded non-resident, non-diverse claims for lack of personal jurisdiction or *forum non conveniens*.

3 137 S.Ct. 1773 (2017).

4 *Id.*at 1781.

5 *Id.*

6 *Id.*

7 *Id.* at 1783.

8 *Id.* at 1780.

9 134 S.Ct. 746, 758 (2014).

10 *See Jinright v. Johnson & Johnson*, 2017 WL 3731317 at *4 (E.D. Mo. Aug. 30, 2017) (relying on the *Bristol-Myers Squibb* holding to (1) dismiss the claims of 79 non-resident plaintiffs because they did not allege that they purchased the defendants' products in Missouri, that they ingested or applied the product in Missouri, or that they were injured in Missouri, so there were "no facts connecting nonresident plaintiffs to the State of Missouri," and (2) deny plaintiffs' motion to remand because the remain-

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physician was deposed, the Mayo Clinic and the defendant sought a protective order. In response, the trial court revoked the commission. It also ruled that the Mayo Clinic physicians' notes regarding causation were inadmissible because they were based on hearsay. The Appellate Court reversed both trial court decisions. It ruled that the Mayo Clinic records were admissible, and held that the trial court abused its discretion by terminating the commission. The Appellate Court opined that, although a person cannot be compelled to offer expert testimony simply because he is an expert in a particular field, a treating physician may be compelled to testify at deposition as to opinions documented in his medical records.[13] Thus, the Appellate Court in *Milliun* refused to recognize an absolute expert privilege in Connecticut, but it left the door open for a qualified expert privilege.

The Supreme Court granted certiorari in *Milliun* to resolve the limited question of whether the trial court abused its discretion in failing to admit the treating physicians' statements in medical records as proof of causation. The Supreme Court affirmed the Appellate Court's holding on that limited issue. It did not, however, resolve whether a testimonial privilege for unretained experts exists in Connecticut. Indeed, it unequivocally refused to address the issue:

> The plaintiff suggested at oral argument … that it would be useful to the bench and bar for this court to address questions that have arisen in the trial courts with regard to whether physicians have a testimonial privilege against being compelled to provide expert testimony under various circumstances. To do so, however, would contravene this court's jurisprudential rule against rendering advisory opinions.[14]

Milliun muddied the waters considerably. Attorneys seeking to compel unretained expert testimony have cited the *Milliun* decision as precedent that Connecticut does not recognize any unretained expert privilege. Attorneys defending unretained experts observe that the Appellate Court ruling in *Milliun* is narrow, applying only to opinions previously expressed by an expert in his or her records. Just one month before *Redding* was decided, the debate played out in *LaPierre v. Pareles*.[15] The decision, which grants the physicians' motions for protective orders, carefully analyzes *Milliun* and the competing lines of trial court cases, and concludes that treating physicians cannot be compelled to give causation and standard of care opinions regarding treatment by other providers, unless they have expressed such opinions in their records.

Redding provides much-needed clarity on the rights of unretained experts. The facts of *Redding* are simple: a property appraiser was subpoenaed to appear at a deposition in a lawsuit for which he had not been retained.[16] The appraiser filed a motion for a protective order, but the lower court denied the motion and required the deposition of the appraiser. The appraiser filed a writ of error with the Supreme Court, which transferred the matter to the Appellate Court. Following Wisconsin's *Burnett* decision, which it cited extensively in its opinion, as well as the *Hill* and *Drown* trial court decisions, the Appellate Court recognized a common law qualified privilege for unretained experts.[17] The privilege is limited, in that it does not apply where "(1) under the circumstances, [the expert witness] reasonably should have expected that, in the normal course of events, [the witness] would be called upon to provide opinion testimony in subsequent litigation; and (2) [where] there exists a compelling need for [the witness's] opinion testimony in [the] case."[18] The Appellate Court stated that additional considerations may play into the analysis, such as whether the individual was retained by a party "with an eye to the present dispute."[19]

It remains to be seen when courts will find a "compelling need." In a footnote, the court in *Redding* suggested that the opportunity to examine the patient, or other subject of inquiry, may have some bearing on the issue of compelling need.[20] However, as the trial court recognized in *Hill*, an exception premised on the treating physician's examination of the patient would threaten to swallow the rule. In *Hill*, the plaintiffs argued that treating oncologists had unique insight concerning the decedent, which could not be gained from reviewing the medical record. The trial court rejected that argument, observing that "[t]his part of the plaintiffs' argument, taken to its logical extension, would necessitate that any physician who treats a patient after alleged malpractice has occurred is required to become an expert witness in an ensuing malpractice action. Such a blanket requirement would be contrary to the distinction, cited in *Thomaston*, 'between the duty of a witness to testify to factual matter within his knowledge and the imposition of a requirement that he voice his opinion concerning a subject with which he is conversant as an expert.'"[21]

13 *Id.* at 108.

14 310 Conn. 711, 740 (2013).

15 No. X03-HHD-CV-13-6046945S, 2017 WL 2817672 (May 31, 2017)

16 174 Conn. App. at 195.

17 *Id.* at 205.

18 *Id.* at 206.

19 *Id.*

20 *Id.* at 205 n.10.

21 *Hill*, 2008 WL 2802907, at *4.

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only encourage frivolous litigation to skyrocket[3], but it will result in a chilling effect on schools and providers of youth outdoor activities.

From the perspective of the defendant and amicus groups, the Supreme Court was faced with a difficult position having to balance the goal to protect the public from danger, while recognizing that as [m]uch as the law devotes itself to the protection of children, it is powerless to protect them against childhood itself. *Greaves v. Bronx, YMCA*, 87 A.D.2d 394, 402, 452 N.Y.S2d 27 (1982). Courts have long recognized that the outdoors is "rustic" and often the most beautiful places in the world are untamed, full of wild animals, and it is reasonable to expect that one who engages in outdoor activities will confront these typical outdoor elements. Therefore, it was the position of the defendant and amicus groups that to hold someone liable for injury from the very rustic nature that they are encouraged to visit, especially when dealing with extremely remote risks, does nothing to enhance safety, but rather it is an unreasonable attempt to sterilize the outdoors. Rather, the law should limit the legal consequences of wrongs to a controllable degree and not impose a duty in those situations where the risk is undeniably remote.

Connecticut Supreme Court Decision: To the dismay of the defendant, amicus groups, and those hoping for a clear decision eliminating liability for undeniably remote risks, the Supreme Court found that because of the trial court's ruling on foreseeability, they were constrained in their decision and ultimately ruled that there was not sufficient grounds to oppose extending the duty. The Supreme Court also held that a jury verdict should not be altered by the Courts simply based on the size of the award alone. However, two justices issued separate concurring opinions which may yet impact the outcome of this case as it returns to the Second Circuit.

The concurring opinion by Senior Justice Carmen E. Espinosa focused on whether public policy supports extending a duty to Hotchkiss? While she did not disagree with the Supreme Court's ruling on this issue, she stressed that the Second Circuit should revisit whether there was sufficient evidence for the jury to find that Munn's injuries were reasonably foreseeable. She opined that the risk of someone contracting TBE while on a brief field trip to Mt. Panshan during a school trip is far more remote than other risks which have been legally deemed unforeseeable and went as far as to estimate the plaintiff had less than a one in two million chance of contacting TBE. She also cited to trial evidence/testimony that Munn's potential exposure was drastically below even those considered to be low risk exposure which required prolonged stays involving hiking, camping, and similar outdoor activities in wooded/rural at risk areas. She further criticized the Second Circuit's holding that Munn's injuries were foreseeable. In support of her position, she cited to multiple cases and arguments raised by Hotchkiss and the amicus groups and even suggested that the legislature adopt a version of the rule adopted in *Mercier v. Greenwich Academy Inc.*, No. 3:13-CV-4 JCH, 2013 WL 3874511 (D. Conn. July 25, 2013) (holding that a coach and school are liable only for reckless or intentional conduct resulting in player injury during a high school athletic contest). Justice Espinosa's opinion echoed the concerns of the defendants and the amicus groups namely that the imposition of a negligence standard risks sterilizing the activity and stripping it of its primary value or purpose.

The concurring opinion by Justice Andrew J. McDonald focused on whether the verdict excessive. In short, Justice McDonald stated that while this verdict certainly shocked his conscience, Connecticut law does not currently have a recognized basis to find that the Trial Court's accepting of it was improper. He explained that in his opinion the verdict was so excessive it was clearly motivated by sympathy for the plaintiff. He also opined that neither Hotchkiss nor its insurers could possibly have foreseen such an extensive verdict and there are likely numerous unfortunate fallouts as a result (i.e., increased insurance premiums and policy exclusions for non-economic damages) which will discourage schools and other organizations from offering similar outdoor trips and excursions. Justice McDonald's opinion urged a review and possible change to the current laws on this issue.

Future of Case: Now that the matter is back before the Second Circuit, Hotchkiss, the amicus groups, and everyone from students and campers to parents and administrators, should hope that the concurring opinions of Justice McDonald and Justice Espinosa may yet influence the remaining issues. The Second Circuit now has before them the following issues to resolve: (1) Should defendant have foreseen harm of the general nature plaintiff sustained; (2) Did the charge directing the jury to consider the gravity of the harm in the midst of the charge on foreseeability probably mislead the jury; (3) Did the court erroneously and prejudicially strike the defendant's expert on standard of care, while permitting plaintiff's unqualified experts to testify; (4) Could the jury conclude, without speculation, that the plaintiff proved she was infected with TBE on Mt. Pan; (5)

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3 An example cited by the amicus group was another tick bite case defended by Attorney Renee Dwyer of Conway Stoughton which was filed against the YMCA by the same plaintiff's counsel shortly after the *Munn* trial verdict. See *Horowitz, et al v. YMCA Camp Mohawk, Inc.*, No. 3:13-CV-01458-SRU, 2013 WL 9981204 (D. Conn. 2013).

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Redding is good news for professionals who do not want to become embroiled in third parties' litigation. It is, however, important to keep *Redding's* parameters and limitations in mind. *Redding* recognizes a privilege for opinion testimony only. If a professional is a fact witness with personal knowledge of a plaintiff's condition, she will be compelled to divulge that knowledge under oath. Additionally, like other privileges, the unretained expert privilege must be asserted or it is waived. Further, if the unretained expert is a third party to the lawsuit, she should retain counsel to assert the privilege on her behalf; the privilege cannot be asserted by the defendant. Finally, pursuant to *Milliun*, witnesses can be compelled to testify regarding opinions that they already formulated, which are clearly expressed in their records.

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Did the release of claims unambiguously release defendant from liability, and if so is the release against Connecticut public policy?

In deciding the remaining issues, the Second Circuit will hopefully find a balance between ensuring reasonable safety precautions against realistic risks, while at the same time encouraging all to experience the outdoors and protecting childhood itself from the fear of excessive litigation.

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subject matter jurisdiction at the same time. Though courts commonly address subject matter jurisdiction prior to proceeding further with a case, courts applying *Bristol-Myers Squibb* have addressed personal jurisdiction first because "recent decisions have made personal jurisdiction the more straightforward inquiry."[11] Alternatively, *Bristol-Myers Squibb* supports challenging personal jurisdiction in the state court, and obtaining dismissal of the non-diverse, non-resident plaintiffs.[12] The defendant then can remove the matter to federal court on the basis of diversity jurisdiction. Notwithstanding the positive direction the federal court cases are going post-*Bristol-Myers Squibb*, it is important to note that removal must still be timely.[13]

Defense counsel should be aware that neither *Bristol-Myers Squibb*, nor the proposed Act, address the plaintiff's effort to avoid federal jurisdiction by including in his complaint a non-diverse defendant, thereby destroying complete diversity. Resident defendants typically include physicians (prescribing and treaters), hospitals, distributors, and sales representatives. In the past, courts have taken different approaches to the misjoinder of non-diverse, "token" defendants. Some courts have permitted removal, severed and remanded the claim against the non-diverse defendant to state court, and exercised subject matter jurisdiction over the remaining claims.[14] In other cases, courts have refused to entertain substantive challenges to claims made against the non-diverse defendants and remanded the entire case back to state court.[15]

Though beyond the scope of this article, plaintiffs' inclusion of a token non-diverse defendant to defeat diversity jurisdiction is a close cousin to the misjoinder of non-diverse plaintiffs. While a legislative fix would be welcomed by defense lawyers, federal courts should be urged to distinguish between bona fide claims against non-diverse defendants from those that are not, and to dismiss them before addressing a plaintiff's motion to remand. A practical piece of advice to defense counsel is to prepare and file your motion to sever and dismiss with your removal papers.

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ing parties had complete diversity); *Covington v. Janssen Pharmaceuticals*, 2017 WL 3433611 at *4-5 (E.D. Mo. Aug. 10, 2017) (relying on the *Bristol-Myers Squibb* holding to (1) dismiss the claims of 53 out of 54 plaintiffs who failed to allege that they ingested the drug at issue in Missouri or suffered from resulting injuries in Missouri, or that there was any connection between Missouri and the non-resident plaintiffs, and (2) deny plaintiffs' motion to remand the case to state court because after dismissal of the non-Missouri plaintiffs, there was complete diversity); *Jordan v. Bayer Corp.*, 2017 WL 3006993 at *4 (E.D. Mo. July 14, 2017) (relying on the *Bristol-Myers Squibb* holding to (1) dismiss the claims of 86 non-Missouri residents for lack of personal jurisdiction because the non-Missouri residents did not allege that they acquired the device at issue in Missouri, that they were injured or treated in Missouri, or that the defendants developed, manufactured, labeled, packaged, or created a marketing strategy for their product in Missouri, so there was no specific jurisdiction, and (2) deny plaintiffs' motion to remand to state court because the plaintiffs that allegedly destroyed complete diversity had been dismissed).

11 *Jordan v. Bayer*, 2017 WL 3006993 at *2. See also *Covington v. Janssen Pharmaceuticals, Inc.*, 2017 WL 3433611 at *2; *Jinright v. Johnson & Johnson*, 2017 WL 3731317 at *2.

12 *See In Re: Pelvic Mesh Litigation*, No. 140200829 (Pa. Ct. Common Pleas of Phila., Aug. 2, 2017) (vacating previous denial of defendants' motion to dismiss and granting defendants' motion for reconsideration regarding jurisdiction over claims of out-of-state plaintiffs); *Swann v. Johnson & Johnson*, No. 1422-CC09326-01 (Cir. Ct. Mo. June 20, 2017) (granting defendants' motion for mistrial regarding personal jurisdiction the day after the *Bristol-Myers Squibb* ruling).

13 At least one federal district court has recognized the impact of *Bristol-Myers Squibb*, but denied removal of the case because the removal was more than one year after commencement of the action, and there was no indication that the plaintiffs acted in bad faith to prevent removal. See *Dunn v. Johnson & Johnson*, 2017 WL 3087673 at *2-3 (E.D. Mo. July 20, 2017) (recognizing that "Plaintiffs clearly sought to secure an advantageous forum in the state court and joined certain Plaintiffs for the very purpose of avoiding federal jurisdiction over this case," but ultimately holding that defendants' removal was untimely, and accordingly granted plaintiffs' motion to remand).

14 *See Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529, 533 (5th Cir. 2006) (agreeing with the district court's decision in a product liability claim against a tobacco company to sever claims against the health care providers because the claim and the burden of proof to sustain the claim are "totally different" from the burden of proof necessary for a product liability claim, and therefore concluding that the federal district court had subject matter jurisdiction after severing claims against the non-diverse healthcare provider). *See also Sutton v. Davol*, 251 F.R.D. 500, 505 (E.D. Cal. 2008) (holding that plaintiffs' claims of products liability against the manufacturers of mesh patch were separate from their claims of medical malpractice against the healthcare providers who surgically implanted the patch, and accordingly severed the claims and remanded the claims against the healthcare providers to state court). (*Cf Bahalim v. Ferring Pharmaceuticals, Inc.*, 2017 WL 118418 (N.D. Ill., Jan. 12, 2017) (court extends fraudulent joinder doctrine to forum defendant where plaintiff's claims had no chance of success.)

15 *See, e.g., Goodwin v. Kjian*, 2013 WL 1528966 at *4 (N.D. Cal. 2013) (remanding a product liability case regarding pelvic mesh to state court because the plaintiff and the treating defendant healthcare provider were from the same state and the "claims against [the product manufacturer] for product liability and [the] negligence claim against [the healthcare provider] share common questions of fact and law"). *See also Labrecque v. Johnson & Johnson*, 2015 WL 5824724 at *2-3 (D. Conn. Oct. 2, 2015) (declining to sever claims against healthcare providers from claims against a pelvic mesh manufacturer because plaintiff alleged product liability claims against the Hospital, a non-diverse defendant, and accordingly, the claims against all defendants were based on the same underlying facts); *In re Propecia (Finasteride) Product Liability Litigation*, 2013 WL 3729570 at *4 (S.D.N.Y. May 17, 2013) (citing cases).