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Products liability: Avoiding the "land of the lost"

Getting your medical-device case back from the federal court

Your new client has been injured by a medical device, transvaginal mesh, and has required ten difficult explant surgeries to remove it. She is permanently disabled, can no longer work, and she's in pain 24/7. Liability is clear, damages are significant, and there are no statute-of-limitations issues. To top it off, your client is educated, had a great job before the injury, has three wonderful children, and a loving husband of 20 years. In sum, this is as good as a case gets.

You quickly identify the medical manufacturer, which is based out of Delaware, and the implanting doctor from Los Angeles. You draft your complaint against manufacturer and doctor and file it in the Los Angeles County Superior Court.

Two weeks later the manufacturer unilaterally removes the case from California state court to the U.S. District Court for the Central District of California, claiming that doctor has been "fraudulently misjoined," and thus the federal court has jurisdiction because there is complete diversity among the parties in accordance with 28 U.S.C. §§ 1332(a) and 1441(b).

The manufacturer also states that the Judicial Panel on Multidistrict Litigation ("JPML Panel") has established a Multi-District Litigation proceeding ("MDL") in West Virginia for claims related to the manufacturer's medical device.

Additionally, in a separate step, the manufacturer requests the JPML Panel to transfer the now California federal district-court case across the country to the MDL Court in West Virginia in accordance with the "tag-along" procedure contained in the MDL rules.

Finally, the manufacturer files a motion to stay the case at the district court, so that the JPML Panel has time to transfer the case to the MDL court. The manufacturer hopes to have your case transferred to the MDL court so it will die a slow death with approximately 20,000 other similar cases.

Confused yet? You don't need to be. In California you have an 80 percent chance of convincing the California federal district court to remand your case to state court before any attempted transfer is made to the MDL court. But you have to jump through several procedural hoops to get the case returned. Let's look at what you have to do from a procedural standpoint.

The Courts and the JPML Panel

Before filing anything, you need to know what entities you're dealing with.

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There's the state court, the federal district court in the Central District, the Judicial Panel on Multidistrict Litigation (JPML Panel), and the MDL Federal District court in West Virginia. You'll only be filing motions in the California district court and the JPML Panel. If successful, your case will not be transferred to the MDL court in West Virginia (or wherever your MDL court may be located).

Once the case is removed by the manufacturer to federal court, the state court no longer has jurisdiction in any capacity, until the case is remanded. (State courts sometimes try to ignore this rule, and continue to schedule status conferences. It's best to attend and remind the court that it lacks any jurisdiction over the case. But technically, you can ignore the orders because they are void.) Keep in mind the entire case, even the claims against the doctor, are removed to the California federal district court once a notice of removal is filed.

Procedural steps you must make to get your case returned to state court

Step 1. Make sure you are admitted to practice before the federal court.

Make sure you are admitted to practice in front of the federal court where your case was removed. In this article I'll use the Central District of California for the California federal district court.

Step 2. Set up your PACER and Federal courts' user IDs and passwords.

Get a PACER user ID and password. You'll need it. You'll also need separate user IDs and passwords for filing your pleadings/motions with the Central District Federal court and the JPML Panel.

Step 3. Draft your Motion to Remand.

Draft your motion to remand the case, which you will file with the Central District Federal court. Keep in mind that the Central District, under its local rule 7-3, requires you to meet and confer with that manufacturer, and then wait 7 days, before filing your motion to remand. Thus, get the meet and confer completed as soon as possible after you receive the notice of removal. Also, be sure to read the initial standing order of the district judge you've been assigned to when that manufacturer filed its notice of removal.

Step 4. Draft your Opposition to Manufacturer's Motion to Stay.

By now Manufacturer has filed its motion to stay (or soon will) in the Central District Federal court. You'll need to prepare an opposition to the motion to stay.

Step 5. File your Notice of Opposition and your Motion to Vacate the Conditional Transfer Order at the JPML Panel.

At some point the JPML Panel will issue a conditional transfer order ("CTO") regarding transferring your case to the MDL Court. Sometimes you get notice of this by e-mail, other times you don't. So make sure you carefully follow your case on the JPML Panel Web site after you receive Manufacturer's initial notice of removal. After the JPML Panel issues the CTO you only have seven days to file a notice of opposition with the JPML Panel. Don't miss this filing. Once the JPML Panel receives your timely notice of opposition, it then sends you notice by e-mail with a briefing schedule that gives you 14 days to file your motion to vacate the CTO with the JPML Panel.

Let's simplify

Let's simplify that a bit. Four primary filings: (1) You will file a motion to remand with the Central District federal court, (2) you will file an opposition to the manufacturer's motion to stay that was filed with the Central District Federal court, (3) you will file a notice of opposition to the CTO with the JPML Panel, and (4) you will file a motion to vacate the CTO with the JPML Panel. You can also file a reply to the manufacturer's opposition to your motion to remand, but that's up to you. And that completes the procedural hoops you have to jump through to get your case returned to state court.

Substantive arguments at the Central District Federal court

- **Motion to Remand**

The motion to remand is straightforward. (I'm happy to provide examples of the motion to remand and the opposition to the motion to stay. Just e-mail me at stewart@aldavlaw.com). Your sole purpose is to get the district judge in the Central District to consider your motion to remand *before* considering the manufacturer's motion to stay. If you get the district court to consider your motion to remand first, you have a good chance of getting your case remanded to state court.

In your remand motion, argue that the federal court must normally resolve questions of subject-matter jurisdiction before reaching other issues. (*Potter v. Hughes* (9th Cir. 2008) 546 F.3d 1051, 1061.) And if federal jurisdiction does not exist, the case should be remanded before federal resources are further expended. (*Tortola Restaurants, L.P. v. Kimberly Clark Corp*. (N.D. Cal. 1997) 987 F.Supp. 1186, 1188 [denying motion for stay pending a determination of transfer by the MDL Panel and deciding threshold jurisdiction issue].) Also, point out that there is a strong presumption against removal jurisdiction. (*Gaus v. Miles, Inc*. (9th Cir. 1992) 980 F.2d 564, 566.)

The manufacturer will invariably rely on *Tapscott v. MS Dealer Service Corp*. (11th Cir. 1996) 77 F.3d 1353, 1360, as the basis for its "fraudulent misjoinder" argument as to the doctor. Point out that the Ninth Circuit has not adopted the Eleventh Circuit's controversial fraudulent-misjoinder doctrine that came out of *Tapscott*. But then show that even if *Tapscott* is considered, it does not apply to the facts of your case. Read *Tapscott* and you'll see that it does not apply to the facts in this type of medical-device case.

Then establish with the facts of your case that there is a "real connection" between the product-liability claim and the medical-malpractice claim. You do this by showing that warnings regarding the medical device may or may not have been given by the manufacturer to the doctor. Or, if given, the warnings may not have been adequate warnings. Or the warnings were nullified by overpromotion of the medical device to the doctor. (See generally, *Stevens v. Parke Davis and Co.* (1973) 9 Cal.3d 51.)

Also, point out that the manufacturer's affirmative defenses establish a "real connection" between the claims, since the manufacturer will invariably plead the "learned intermediary doctrine," which is

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a fancy way of saying that the manufacturer met its duty-to-warn when it warned the prescribing doctor about the risks associated with the medical device. Another affirmative defense you'll see is the manufacturer pleading that someone else (hinting at the doctor) caused your client's injuries. Again, all of this helps to show a real connection between the manufacturer, the doctor, and your client's injuries and claims.

Then hit them where it hurts by pointing to other Central District orders (and any other California district court orders) remanding cases like yours to state court. There are many orders out there. A few of the more recent ones include*: Goodwin v. Kojian*, No. SACV 13-325-JST(JPRx) [Court finding that the fraudulent misjoinder did not apply and that both the Plaintiff and implanting doctor were citizens of California for diversity purposes]; *Guardado v. Highshaw*, No. EDCV 13-365 PSG(SPx) [Court found it was appropriate to address the plaintiff's motion to remand rather than staying the case and deferring the jurisdictional issues to the MDL Court]; *Haston v. Yeo*, No. 5:13-cv-00364-JWF-OP [Defendant failed to demonstrate fraudulent joinder under California law and complete diversity of citizenship was therefore lacking]; *Lung v. Schlesinger*, No. CV 13-00672 SJO(CWx) [Court finding that the California doctor was not fraudulently joined and there was not complete diversity, and thus removal was improper.]; and *Perry v. Luu*, No. 1:13-cv-00729-AWI-JLT [Defendants failed to demonstrate Plaintiffs improperly joined claims against implanting doctor and thus the Federal court lacked diversity jurisdiction.]

Conclude powerfully by stating, (i) the federal court does not have jurisdiction because your client and the doctor are both California citizens, (ii) the case should be remanded before federal resources are further expended, (iii) *Tapscott* does not apply in the Ninth Circuit, and even if it did, it does not apply to your case, and (iv) there is a real connection between the product-liability and medical-malpractice claims.

• Opposition to Manufacturer's Motion to Stay

Your opposition to the manufacturer's motion to stay is easy to deal with. Make the following arguments:

First, the federal court should address your motion to remand before deciding the manufacturer's motion to stay. (*Conroy v. Fresh Del Monte Produce, Inc.* (N.D. Cal. 2004) 325 F.Supp.2d 1049, 1054 ["[I]t is in the interest of judicial economy to decide issues of jurisdiction as early in the litigation process as possible. If Federal jurisdiction does not exist, the case can be remanded before Federal resources are further expended …"]; *Tortola Restaurants, L.P. v. Kimberly Clark Corp.* (N.D. Cal. 1997) 987 F. Supp.1186, 1188 [denying motion for stay pending a determination of transfer by the MDL Panel and deciding threshold jurisdiction issue].)

Second, show the court that your client will be harmed by the significant delay if her case is sent to languish in the MDL court. It will be years before your client's case gets to trial. And it will be months, if not years, before the MDL Court can entertain your motion to remand, which will likely not be granted in any event. Explain that the matter is fully briefed and ready for the California district court to decide now. Also, the California district court is in a better position to apply Ninth Circuit law than the MDL Court across the country in West Virginia.

Third, point out that the manufacturer should have sought relief of the alleged misjoinder in state court, "and then, if that court severed the case and diversity then existed, [Manufacturer] could seek the removal of the cause to federal court." (*Osborne v. Metropolitan Life Ins. Co.*, 341 F.Supp.2d 1123, 1127 (E.D. Cal. 2004).

Substantive arguments at the JPML Panel

The notice of opposition to the CTO is a simple one-page document that simply states you represent your client in the matter and you are opposing the transfer of the case to the MDL Court. The motion to vacate the CTO is based on the same arguments that you include in your motion to remand. While these are fairly simple documents to complete, you must not miss the filing deadlines. If you do miss either deadline, it is very likely your case will be transferred to the MDL court.

Conclusion

You greatly increase the value of your client's case if you can return it to state court. You also have control of your case at the state-court level – whereas you have no control if it gets transferred to the MDL Court. The manufacturer knows that your client's case is worth pennies on the dollar if it gets transferred to the MDL Court. Now you know how to stop it. Go do it!

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