

Opioid Update

The Opioid Wars—Battling Over Remand

By: Erich Eiselt, IMLA Assistant General Counsel

Most observers are familiar enough with the main plot of the opioid litigation: over the past two decades, pharmaceutical manufacturers, distributors, prescribers and retailers flooded America with highly addictive narcotics, failing to provide adequate warnings and ignoring suspicious distribution patterns. Today, states, municipalities, unions, tribes and others demand recourse in the courts, armed with a robust arsenal of claims and seeking billions in compensation.

Against that backdrop, numerous subplots have emerged—battles among law firms vying for clients and for primacy at the bargaining table, internecine friction between localities and Attorneys General about who should lead the charge, and objections by under-represented plaintiff groups, to name but a few.

One of the more interesting side shows, at least for legal practitioners, involves the basic question of whether these actions will be heard in state or federal courts. Almost without fail, the opioid defendants prefer to litigate in a federal forum. This tactic deprives municipal plaintiffs of potentially sympathetic local juries and can drastically reduce the number of actions being simultaneously defended—because removal of a local opioid case to one of the nation's 94 federal district courts virtually guarantees that the action will be transferred further, to *In re: National Prescription Opiate Litigation*, the Multi-District Litigation (MDL) in the Northern District of Ohio. There, it will join nearly 900 federal opioid suits which have already been transferred to the Cleveland courtroom of MDL Judge Dan Polster, who has green-lighted a small subset of roughly 20 representative cases to move ahead rapidly.

As a consequence, fights over in-state jurisdiction are vociferous. They showcase inventiveness—both by plaintiffs and defendants—and expose inconsistent applications of the law.

The Quest for Complete Diversity: An obvious route for some opioid defendants seeking federal removal is to assert **"complete diversity."** Under 28 U.S.C. § 1332 (enacted to avoid excessive "home court" prejudice against out-of-state litigants), Congress gave federal courts original jurisdiction over civil actions between "citizens of different States" where the amount in dispute is more than $75,000. Contrarily, if at least one defendant is from the same state as a plaintiff, concerns about in-state bias are lessened; diversity is **"incomplete"** and removal under § 1332 cannot occur. Accordingly, plaintiffs in the dozen or so states where major defendants are "citizens" (by virtue of having a home office in the state or being incorporated there) should be immune to § 1332 federal removal, because "complete diversity" is absent. This includes municipalities in New York (home to Purdue Pharma L.P.), Pennsylvania (Endo), California (McKesson), or Actavis (New Jersey), to name a few.

Plaintiffs in states where no major corporate defendant is a citizen must cast a wider net. Under Federal Rule 20, and many states' analogues to the Rule, claims may be properly joined if they (1) arise out of the same transaction or occurrence, and (2) present a question of law or fact common to all defendants. Therefore, less high-profile local entities who arguably played material roles in the opioid crisis-- including pain clinics, pharmacies, prescribers and others--become fair game. Adding these in-state names to the complaint can defeat diversity.

The Joinder/Misjoinder Argument: Plaintiffs' attempts to add local parties are vigorously resisted by the primary opioid defendants. They can object based on two companion doctrines emanating from Federal Rule of Civil Procedure 21:

"Fraudulent joinder" asserts that the plaintiff has added a party from whom there is no possibility whatsoever of recovery, or, at its most pejorative, that the added party is so inapposite as to render the complaint fraudulent.

"Fraudulent misjoinder," the more common objection, merely avers that the principal action can be fully determined without considering the additional in-state actor(s)—whose wrongdoing, even if provable, is entirely separable from the main defendants, and who have been added to defeat diversity. In the opioid context, a typical misjoinder debate is whether a distributor's dissemination of millions of doses can be properly evaluated without simultaneously assessing the culpabilty of local clinics, physicians and retailers who effectuated delivery to the end-user.

Practitioners looking for clarity and consistency in opioid joinder/misjoinder remand cases may be frustrated. While the Fifth and Ninth Circuits have acknowledged the doctrines, the Fourth Circuit has not; similar fact patterns in Fourth Circuit jurisdictions have produced divergent results. For example, the Southern District of West Virginia denied remand when McDowell County tried to defeat diversity by adding a local prescriber. The judge found that statutory notice and pleading requirements to join the doctor had not been met—but also added that the case against the doctor was separable from the action against the manufacturers and distributors:

> Dr. Cofer, it is charged, provided written opioid prescriptions for patients, knowing that the drugs were likely to be abused, diverted or misused.
>
> *[T]he court finds no common questions of law or fact in plaintiff's claims against the*

> *corporate defendants and the claims against Dr. Cofer. The cases against each are separate and distinct. Accordingly, Dr. Cofer has also been fraudulently misjoined.* The Motion to Remand is therefore DENIED. (*County Commission of McDowell County v. McKesson Corp*., No. 1:17-00946 (S.D. W.Va. July 3, 2017) (emphasis added).

A judge in West Virginia's Northern District saw similar facts differently. In an opioid case brought by eight counties which added local salespeople to the roster of defendants, the court found:

> *There are common issues of fact and the claims against the Manufacturing Defendants, the Distributor Defendants and the Sales Rep Defendants are intertwined and arise out of the same series of transactions or occurrences.* With respect to these defendants, there is no fraudulent joinder or misjoinder. Accordingly, there is not complete diversity among the properly joined parties, and this Court lacks jurisdiction to consider any further issues in this case. (*Brooke County Commission v. Purdue Pharma L.P.*, no. 5:18 cv 09 (N.D. W.Va., Feb. 23, 2018) (emphasis added).

Shortly thereafter, the Southern District of West Virginia again sided with the defendants and denied remand. The suit in *City of Huntington v. Express Scripts Holding Company,* no. 2:18-cv-00580 (S.D. W.Va. Apr. 25, 2018) was filed by four municipalities against 14 pharmacies (mostly local) and Express Scripts Inc., a national "pension benefits manager" (PBM) responsible for deciding which drugs are included in formularies available to health insurance participants. The municipalities alleged that the West Virginia Public Employees Insurance Agency (PEIA) requested Express Scripts to require prior authorization for OxyContin prescriptions, but Express Scripts did not do so, further facilitating the flood of opioids into West Virginia.

The PBMs and pharmacies argued that their actions were severable from the larger litigation: "Plaintiffs' claims against Express Scripts are premised on an alleged collusion with Purdue to deny PEIA's request for prior authorization of OxyContin in exchange for incentive payments," the removal noticed stated. "In contrast, Plaintiffs' claims against the Pharmacy Defendants are premised on generalized allegations that they dispensed addictive opioids." The case was removed.

That result was not be mirrored in neighboring Maryland—another Fourth Circuit jurisdiction. There, Baltimore officials argued that two local doctors and their pain clinic were instrumental to the opioid defendants' damaging actions. The Maryland District Court agreed:

> Further, the City alleges that the Manufacturer Defendants' false and misleading statements about the nature of opioids caused the Rosen-Hoffberg Defendants to supply City employees with massive quantities of prescription opioids. *. . . Because the City's claims against the Rosen-Hoffberg Defendants are logically related to its claims against the Manufacturer and Distributor Defendants, the Court concludes that the claims arise from the "same transaction or occurrence."*. . . [T]he issue of whether the Manufacturer Defendants violated the Maryland False Claims Act turns, in part, on whether the Manufacturer Defendants caused the Rosen-Hoffberg Defendants to present "false or fraudulent claims" or use "false statements to get false or fraudulent claims paid or approved by the City." . . . In sum, the Rosen-Hoffberg Defendants are not severable under Rule 21 and are properly joined. *Mayor and City Council of Baltimore v. Purdue Pharma L.P.*, No. GLR 18-800 (D. Md. Apr. 25, 2018). (emphasis added).

Notwithstanding this lack of uniformity (which the *Baltimore* judge referenced in his memorandum), a review of recent opioid remand cases suggests that a "well-pled" addition of local defendants should generally preserve remand to state court.

The Class Action/Attorney General Shuffle:

Another tactic occasionally employed by opioid defendants seeking refuge in a federal forum is to characterize the municipal lawsuit as a "class action." The impetus for this move is the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. § 1332(d), 453, and 1711–1715. Passed to prevent perceived class action lawsuit abuse, CAFA gives federal courts jurisdiction where the aggregate amount in controversy exceeds $5 million, where the class comprises at least "100 or more persons" and where there is at least "minimal diversity" between the parties (i.e., at least one plaintiff class member is diverse from at least one defendant). Although various municipalities have joined in actual state-wide class actions and filed in federal court (Georgia, Maine and Missouri, for example), other groups of cities and counties have filed in state court and desire to remain there. For these plaintiffs, characterization as a "class action" could result in removal.

A mechanism exists to keep these broad-based opioid cases in state court--although it requires municipalities to cede authority to a sometimes quixotic torch- bearer: the state's Attorney General. A 2014 Supreme Court decision (*Mississippi ex rel. Hood v. AU Optronics Corp,* 571 U.S. _____ 2014) clarified that Attorney General *parens patriae* actions, even if brought on behalf of more than 100 unnamed plaintiffs (for example, all residents and local governments in the state), are not subject to CAFA's jurisdictional pull. Thus, numerous state AGs (in Florida, Texas, Nevada, Arkansas, North Dakota, New Mexico, Oklahoma and others) have filed opioid actions in in state court, ostensibly avoiding federal courts and the MDL.

The "Federal Question" and "Federal Officer" Obstacles:

Even where actions appear to be safely ensconced in state court, whether through incomplete diversity or where the Attorney General brings the case, further dangers lurk for opioid plaintiffs--specifically, the "Federal Question" and "Federal Officer" hurdles.

Federal Question jurisdiction arises under 28 U.S.C. § 1331: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." In the opioid context, defendants argue that plaintiff's characterization of their wrongdoing inextricably implicates federal laws. An extreme version of this strategy is playing out in Oklahoma as this issue goes to print. There, Attorney General Mike Hunter filed an action against Purdue and other manufacturers in state court over a year ago, and the case was among the most rapidly-moving of state opioid actions, with a trial date

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projected for May 2019.

AG Hunter's complaint references only violations of state law–Oklahoma's False Claims Act, Medicaid Program Integrity Act, Consumer Protection Act—and common law public nuisance, fraud and unjust enrichment. Regardless, defendants recently sought removal to federal court on the basis that, during a deposition, an Oklahoma official referred to the federal Controlled Substances Act. The state court action has been stayed as a federal judge now carefully considers whether the case should be removed.

Other courts to assess similar scenarios have found that federal law is not integral to the opioid complaint and have held for the plaintiffs. A case in point: on June 12, 2018, the District Court in New Mexico rebuffed pharma distributor McKesson's attempt to remove. McKesson argued that, because the New Mexico Attorney General's complaint stated that the distributors had violated their duties under the federal Controlled Substances Act that distributors report "suspicious orders," the case implicated a "Federal Question." But as the court noted, New Mexico's own state laws also require drug distributors to report "diversion" of any controlled substance:

> Thus, contrary to McKesson's claim that Plaintiff can prevail only by showing that Defendants violated the FCSA, it appears that Plaintiff could show that Defendants violated state law duties to control, report and guard against the diversion of prescription drug orders, meaning that the federal statute is not necessarily raised. *State of New Mexico v. Purdue Pharma L.P.*, no. 1:18-cv-00386 (D.N.M. June 2, 2018).

The case was remanded to the First Judicial Court of Santa Fe County, where it had been first filed; the New Mexico district court also referenced two similar AG opioid decisions, in West Virginia and Delaware. In each, removal was denied on substantially similar grounds—both judges found that, despite the AG's reference to defendant's violation of federal statutes, there were ample state law grounds to refuse removal to a federal forum.

"Federal Officer" removal arises under 28 U.S.C. § 1442(a)(1), which provides for federal jurisdiction over any case against "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office."

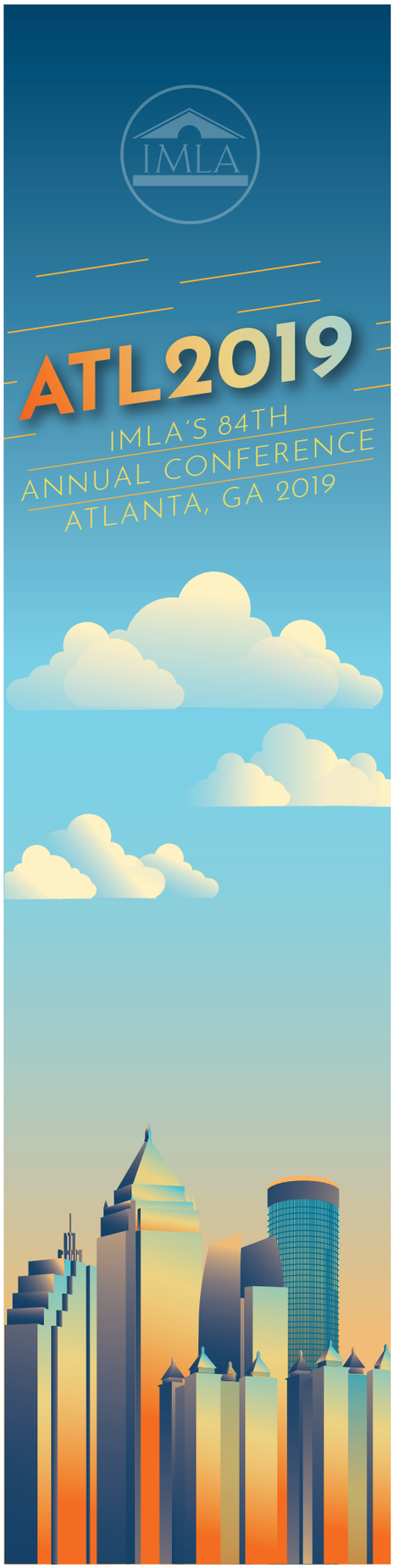
One beneficiary of the language is federal contractors who have acted pursuant to directives issued by the federal government; they can remove in-state cases brought by third parties to a preferred federal forum. Caselaw establishes that government contractors who are involved in "an effort to assist, or help carry out, the duties or tasks of the federal superior" are "acting under" a federal officer. Thus, the manufacturer and distributor defendants have successfully removed numerous opioid actions brought by tribes, on the grounds that the damage complained of arose pursuant to supply contracts with the (federal) Indian Health Service.

And at least one defense has made more expansive use of the Federal Officer provision. In a case brought by a San Francisco health care provider that incurred substantial unreimbursed costs for opioid treatment, McKesson argues that the plaintiff did not expressly exclude governmental actors:

> Because the Plaintiff seeks recovery for harms caused by any and all prescription opioids that were allegedly diverted from the legitimate supply chain in and around the geographic area served by the Plaintiff, without regard to whether or not the customer at the end of that chain was the Indian Health Service, the Department of Veterans Affairs, or another federal agency, its claims necessarily encompass the prescription opioids that McKesson supplied to tribal and federal facilities through the PPV Contract. (Notice of Removal, *Center Point v. McKesson Corp.*, no. 3:18-cv-2535 (N.D. Cal. Apr. 27, 2018).

McKesson, a California corporation, has thus far succeeded in staying the California plaintiff's remand efforts, and *Center Point* could well be removed to federal court and to Judge Polster's MDL on Federal Officer grounds.

The Bottom Line: These jurisdictional sparring matches are only the first battles in what promises to be an all-encompassing legal war. The opioid defendants' initial motions to dismiss are now beginning to arrive, and it is amply evident that municipalities will face even more inventive arguments and tactics as they fight for proper redress. ML



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On the other hand, when all of the Notre Dame Law Review articles are complete it seems likely the academics will have done a thorough and competent job of criticizing every angle of qualified immunity. And more simply, perhaps every winning streak must come to an end.

That said, completely changing course on any major legal doctrine, especially one like qualified immunity, which the liberal and conservative Justices mostly agree on, with some notable exceptions,[55] is unlikely without a number of changes in personnel. Changes to the doctrine at the margins are more likely. For example, in the next few terms maybe the Supreme Court will rule that a lower court improperly granted a state or local government official qualified immunity.[56] Regardless, it seems safe to say that the doctrine as currently configured is destined to meet continuing scrutiny and challenge.

Notes

1. In only two cases since 1982 has the Supreme Court held that police officers have violated clearly established law. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 82 (2018).
2. In *Ziglar v. Abbasi*, 582 U.S. ___ (2017), Justices Kennedy, Roberts, Thomas, and Alito granted qualified immunity to a number of high level federal executive agency officials related to a claim they conspired to violate the equal protection rights of persons held on suspicion of a connection to terrorism after September 11, 2001. Justice Thomas cited to Baude's article stating that the Court needs to focus in qualified immunity cases on whether the immunity existed at common law in 1871. *Ziglar*, 582 U.S. at *5 (Thomas, J., concurring). In *Kisela v. Hughes*, 584 U.S. ___, *6 (2018) (per curiam), a majority of the Supreme Court summarily reversed the Ninth Circuit's denial of qualified immunity to a police officer in an excessive force case. Justices Sotomayor and Ginsburg criticized the majority opinion, citing to Baude's article for the proposition that the Supreme Court "routinely display[ing] an unflinching willingness 'to summarily reverse courts for wrongly denying officers the protection of qualified immunity' but 'rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases.'" *Kisela*, 582 U.S. at *14 (Sotomayor, J., dissenting).
3. Transcript of Qualified Immunity: The Supreme Court's Unlawful Assault on Civil Rights and Police Accountability, CATO Institute, Mar. 1, 2018. *See* Brief for CATO as Amici Curiae Supporting Petitioner, Williams v. Cline (2018) (No. 17-2603).
4. *See* Brief for CATO as Amici Curiae Supporting Petitioner, Allah v. Milling (2018) (No. 17-8654).
5. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 101 (2018) (working draft
6. *See id.* at 104-7.
7. *Id.* at 119, *citing* Mullenix v. Luna, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting).
8. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885 (2014).
9. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127:2 Yale L. J. 1 (2017), *available at* https://www.yalelawjournal.org/pdf/Schwartz_1ki1sac4.pdf.
10. Schwartz, *supra* note 5, at 115.
11. *See id.* at 116-17.
12. *Id.* at 117-18. According to Schwartz "departments' difficulty recruiting law enforcement has been attributed to high-profile shootings, negative publicity about the police, strained relationships with communities of color, tight budgets, low unemployment rates, and the reduction of retirement benefits."
13. *Id.* at 118-19.
14. *See id.* at 126-31.
15. *See id.* at 131-37.
16. *See id.* at 137-39.
17. *Id.* at 139.
18. Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1 (2018) (working draft.
19. Baude, *supra*, note 1, at 51.
20. *Id.* at 55.
21. Neilson & Walker, *supra* note 18, at 13.
22. *See* Baude, *supra*, note 1, at 62-69.
23. *See id.* at 62-69.
24. *See* Neilson & Walker, *supra* note 18, at 19.
25. *See id.*
26. *Id.*
27. *See* Baude, *supra*, note 1, at 69.
28. *See id.* at 70.
29. *See id.* at 71-72.
30. Neilson & Walker, *supra* note 18, at 24.
31. *See id.* at 26.
32. *See id.* at 27-31.
33. *See id.* at 27.
34. *Id.* at 31.
35. *Id.*
36. *Id.* at 33.
37. *Id.* at 34.
38. *Id.* at 34. Neilson and Walker think the Supreme Court should focus its attention on the "unintended effects of the Court's 2009 decision *Pearson v. Callahan*." In that case the Court rejected a rigid requirement that courts must first address whether a constitutional right was violated and, if so, only then address whether that right was clearly established.
Alan K. Chen, *The Intractability of Qualified Immunity*, 93 Notre Dame L. Rev. 1 (2018) (working draft.
40. *Id.* at 1.
41. *Id.* at 1-2.
42. *See id.* at 7-10.
43. *See id.* at 9-10.
44. *See id.* 10-12.
45. *Id.* at 12.
46. *Id.* at 13.
47. *Id.* at 15.
48. *See id.* at 16.
49. *See id.* at 18-22.
50. *See id.* at 23. "While there is no single, systematic statistical account of the amount of qualified immunity litigation, attempts to measure its frequency suggest that it consumes an enormous amount of resources from parties, courts, and society. It is certainly possible that, on balance, more defendants still prevail on summary judgment, thus saving substantial trial costs, but it is equally likely that the administration of the immunity defense itself imposes substantial costs on the parties, the courts, and society."
51. *See id.* at 24.
52. *See id.* at 29-30.
53. *See id.* at 32.
54. Samuel L. Bray, *Foreword: The Future of Qualified Immunity*, 93 Notre Dame L. Rev. 1, 2 n.9 (2018) (working draft.
55. *See, e.g.,* Justice Sotomayor's solo dissent in *Mullenix v. Luna*, 577 U.S. ___ (2015).
56. At the time of this writing the Supreme Court has repeatedly relisted a *certiorari* petition in *Sause v. Bauer*, 859. F.3d 1270 (10th Cir. 2017), *petition for cert. filed* (U.S. Nov. 17. 2017) (No. 17-__) where the Tenth Circuit granted qualified immunity to police officers who stopped the petitioner from praying silently in her home because there was no prior case law involving similar facts. Summary reversal against the officers seems likely in this case. ML