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How to Remove Multi-Plaintiff Cases Involving Personal Jurisdiction Challenges and Avoid Subject Matter Remand

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The Challenge:

Your pharmaceutical client has just been served with a multi-plaintiff complaint in state court. Only one plaintiff is from the state of filing; the other 74 are citizens of other states and allege no meaningful contact with the filing state. There are not enough plaintiffs to remove under the Class Action Fairness Act (“CAFA”). Accordingly, the only vehicle for removal is diversity jurisdiction. But one of the out-of-state plaintiffs is a resident of the state in which your client is incorporated, which facially defeats diversity.

To establish personal jurisdiction in the filing state, plaintiffs allege that your client subjected itself to general jurisdiction by introducing products into the stream of commerce and doing business in the state,. But the Supreme Court has rejected this argument, finding that a corporation is only subject to general jurisdiction where it is “at home”, which, absent unusual circumstances, is only in the state(s) where it is incorporated and/or has its principal place of business. *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (reiterating its holding in *Goodyear Dunlap Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011)).

After *Daimler*, the practical question remained of how to overcome the “jurisdictional hierarchy” often presumed by reviewing courts that subject-matter jurisdiction must be considered before personal jurisdiction. If subject-matter jurisdiction is considered first, the district court will lack jurisdiction because there is no diversity on the face of the complaint. But if personal jurisdiction is addressed first, the out-of-state, non-diverse plaintiffs would be dismissed and the court would retain jurisdiction over the remaining in-state plaintiff through complete diversity.

Put another way, how can your pharmaceutical client raise a personal-jurisdiction challenge to remove or dismiss the 74 out-of-state plaintiffs from the multi-plaintiff state court case *before* the court has to decide potentially thornier subject-matter jurisdiction issues, such as fraudulent joinder, fraudulent misjoinder, or sham joinder?

The Solution:

Enter *Ruhrgas v. Marathon Oil Co.*, 526 U.S. 574 (1999). In *Ruhrgas*, the Supreme Court was faced with this very issue: “If . . . jurisdiction generally must precede merits in dispositional order, must subject-matter jurisdiction precede personal

jurisdiction on the decisional line?” *Id.* at 577–78. The Supreme Court unequivocally held that “in cases removed from state court to federal court, as in cases originating in federal court, there is no unyielding jurisdictional hierarchy.” *Id.* at 578. A district court has discretion to resolve personal jurisdiction *before* subject-matter jurisdiction when presented a “straightforward” personal-jurisdiction question and a “difficult” subject-matter jurisdiction question. *Id.* at 585.

Applying *Ruhrgas* to the multi-plaintiff claim, three discretionary factors support deciding personal jurisdiction before subject-matter jurisdiction. First, the personal jurisdiction question presented invokes the limits of a court’s authority, as it arises directly from the constitutional protections of due process. In contrast, the potential issue of subject-matter jurisdiction—a lack of complete diversity where both an out of state plaintiff and out of state defendant have been joined—is purely statutory. *See Ruhrgas*, 526 U.S. at 584 (“[T]he impediment to subject-matter jurisdiction on which [plaintiff] relies . . . rests on statutory interpretation, not constitutional command. . . . In contrast, [defendant’s personal jurisdiction argument] relies on the constitutional safeguard of due process to stop the court from proceeding to the merits of the case.”).

Second, “judicial economy and restraint” support beginning with personal jurisdiction. *Ruhrgas*, 526 U.S. at 586. The *Ruhrgas* Court explained that “in most instances subject-matter jurisdiction will involve no arduous inquiry[,]” and in such cases “expedition” and federalism suggest beginning with subject-matter jurisdiction. *Id.* at 587. But where, a case presents a “straightforward personal jurisdiction issue” and the subject-matter jurisdiction question is more difficult, these discretionary considerations favor deciding personal jurisdiction first. *Id.* at 586 (“the district court may find that concerns of judicial economy and restraint are overriding”). Under *Daimler*, the personal jurisdiction question is clear. The subject-matter jurisdiction questions usually implicated—fraudulent joinder, fraudulent misjoinder, and/or sham joinder—by contrast, present a more searching inquiry. *See Ruhrgas*, 526 U.S. at 579-80, 587-88 (noting that the notice of removal asserted a “difficult” fraudulent joinder inquiry).

Lastly, beginning with personal jurisdiction provides clarity and certainty to the litigation. *See Hertz Corp. v. Friend*, 559 U.S. 77, 94-95 (2010) (noting Supreme Court’s discretionary preference for “[s]imple jurisdictional rules” that “promote greater predictability” rather than more “[c]omplex jurisdictional tests” which “eat[] up time and money” and “produce appeals”).

Accordingly, combining the substantive *Daimler* personal-jurisdiction argument with the *Ruhrgas* approach to the “hierarchy of jurisdiction” question provides defendant corporations with a potential anecdote to the multi-plaintiff state-court case problem. This approach has been employed with success in recent cases.

Solution Applied:

In *Locke, et al. v. Ethicon, Inc., et al.*, No. 4:14-cv-2648, 2014 WL 5819824 (S.D. Tex. Nov. 10, 2014), 77 plaintiffs filed suit in state court in Texas alleging negligence and products liability claims. Only one plaintiff was a Texas resident. But some of the out-of-state plaintiffs were from the state where the defendants were incorporated and had their principal place of business.

The defendants removed the case to federal court based upon diversity of citizenship, disputing the joinder of all out-of-state plaintiffs for the lack of personal jurisdiction and specifically the joinder of the New Jersey plaintiffs who destroyed diversity. In response, the plaintiffs moved to remand, urging the court to resolve the subject-matter jurisdiction issue first.

The defendants also moved to dismiss all claims by out-of-state plaintiffs for lack of personal jurisdiction because the out-of-state plaintiffs did not allege injury in Texas to trigger specific jurisdiction and the defendants were not “at home” in

Texas under *Daimler*. The plaintiffs countered that the defendants were advocating a “rigid, overly-simplistic interpretation of *Daimler*.” *Id.* at *1. Plaintiffs claimed that defendants were “at home” in Texas because they derived significant revenue in the State, hired and trained sales representative and divisions managers that market and sell their products in Texas, paid a Texas-based consultant, and maintained a website to market mesh products in the state. *Id.*

The court noted the “procedural dilemma” presented by the dueling motions.

If the court addresses the question of subject matter jurisdiction first, then Ms. Miller’s New Jersey citizenship destroys diversity, thereby justifying remand for the Texas state court to resolve the jurisdiction issue. Alternatively, if this Court addresses the question of personal jurisdiction first and finds for the defendants, dismissal simultaneously reduces the number of plaintiffs to one and permits the Court to retain jurisdiction over the case.

Id. at *2. The court chose the latter option, finding in favor of defendants and dismissing the out-of-state plaintiffs because “resolution of the personal jurisdiction questions leads to a more efficient result without offending principles of federalism.” *Id.* (citing *Ruhrgas*).

The court reached a same result in *Evans v. Johnson & Johnson*, No. H-14-2800, 2014 WL 7342404 (S.D. Tex. Dec. 23, 2014). In *Evans*, 96 plaintiffs filed a personal injury action in Texas state court, but only one plaintiff was a resident of Texas. Two of the out-of-state plaintiffs, however, were from the defendant’s state of incorporation and their presence precluded diversity on the face of the complaint. Defendants removed based on diversity jurisdiction following the strategy employed in *Locke*, and followed their removal petition with a motion to dismiss all out-of-state plaintiffs for lack of personal jurisdiction.

The court began its analysis by citing *Ruhrgas* as precedent for its discretion to decide personal jurisdiction before considering subject-matter jurisdiction. *Id.* at *3. The court then held that “the most efficient course of action is to consider the motion to dismiss for lack of personal jurisdiction, which results in dismissal of the claims of all plaintiffs except the single Texas plaintiff, [and] thereafter deny the motion to remand because no non-diverse plaintiffs remain.” *Id.* In short, Texas could not “exercise general jurisdiction over the [d]efendants with regard to the claims asserted by the non-Texas plaintiffs.”

Conclusion

It is well known that *Daimler* provides a powerful tool for defendants to attack claims of personal jurisdiction. But the novel combination of the *Daimler* personal-jurisdiction argument with the *Ruhrgas* approach to the “hierarchy of jurisdiction” question provides an even more powerful removal option for multi-plaintiff cases filed in state court.

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