

# COMMENTS FROM THE BENCH: HONORABLE TOM S. LEE, U.S. DISTRICT COURT JUDGE FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

*By Judge Tom Lee*

*Judge Tom Stewart Lee received his B.A. from Mississippi College in 1963 and his J.D. from the University of Mississippi in 1965. He served as Judge Advocate General in the United States Army Reserve 1965-1973. In 1966, he joined the law firm of Lee and Lee in Forest, MS where he practiced until 1984. He served as prosecuting attorney for Scott County 1968-1972, Scott County Youth Court Judge 1979-1982, and as Municipal Judge for the City of Forest in 1982. Judge Lee is a member of the Federal Judges Association, Federal Bar Association, The Mississippi Bar, Hinds County Bar Association, and Scott County Bar Association. He serves on the Committee on Court Administration and Case Management, United States Judicial Conference and the Fifth Circuit Judicial Council. Judge Lee has also served as Deacon and Sunday School Teacher at Forest Baptist Church; President, School Board of Forest Public Schools; Former President, Forest Jaycees; Former President, Ole Miss Alumni (of Scott County); Director, Mississippi College Alumni Association; President, Scott County Heart Association; American Legion; Board of Trustees of Mississippi College; and Board of Visitors, Mississippi College Law School.*

For several years, the federal courts in Mississippi have been overloaded with a tremendous volume of "removal/remand litigation." Whereas remand motions once comprised around 20% to 25% of pending motions before the court, at any given time over the past three to four years, at least 75% of the motions before the court have been remand motions or motions relating to remand motions. During this same time, the court's docket increased substantially as a result of removals. As a consequence, the district courts have been confronted with numerous removal/remand issues, some of which have been complex and/or controversial.

Given the proliferation of jurisprudence in the Mississippi district courts on many of these various issues, it can be difficult to make definitive pronouncements as to what "the law" is on a particular issue, so that it is best, instead, simply to recognize those issues that tend to arise most frequently.

## **A. DIVERSITY JURISDICTION:**

### 1. Amount in controversy:

Stipulations limiting the amount in controversy: This issue only arises in cases where no amount of damages has been pled or the amount pled is less than \$75,000. In the former case, if it is unclear, plaintiff may submit an affidavit clarifying his damages demand. Yet when the court undertakes to ascertain the amount in controversy, if it appears from the nature of the claims and harm that the amount probably exceeds \$75,000, then

regardless of what the plaintiff has pled, the court will find that the amount in controversy is met, unless the plaintiff is able to show that he is legally certain to recover an amount less than \$75,000<sup>1</sup>. This is typically accomplished by an affidavit or stipulation by plaintiff and/or his attorney.

The district courts in this state consistently hold that it is not sufficient merely to stipulate that the plaintiff does not currently seek more than \$75,000, and instead, the plaintiff must stipulate and agree that the plaintiff will not amend to seek more than \$75,000 and will not accept a verdict of more than \$75,000.

A number of defendants have argued that unless such a stipulation was filed with the complaint, it may not be considered by the court as effectively limiting the plaintiff's damages. No district judge has yet addressed this issue in any reported opinion. While this principle applies where a state's procedural rules prevent the plaintiff from including a specific damages demand in his complaint<sup>2</sup>, it is questionable whether it would apply in states like Mississippi were a plaintiff is freely permitted to plead for specific damages.

Where a plaintiff seeks equitable relief, the value of the object of such relief is included in the amount in controversy.<sup>3</sup>

### 2. Aggregation of punitive damages:

In cases involving multiple plaintiffs, the amount in controversy may at times be satisfied by aggregation of punitive

*Continued on next page*

## Comments from the Bench

damages. Though plaintiffs continue to argue that Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1335 (5th Cir. 1995), has been abrogated by subsequent Fifth Circuit decisions, the district courts have consistently held that Allen is still the law in the Fifth Circuit, so that punitive damages claimed by multiple plaintiffs are aggregated unless the plaintiffs are able to effectively stipulate that they do not seek in the aggregate, including any punitive damages award, an amount over \$75,000.

### 3. Multiple defendants:

It has been argued that the amount involved in a plaintiff's claim of joint and several liability is counted separately as to each defendant and the amounts aggregated. Joint and several liability means that "each defendant is liable to the plaintiff for the whole of plaintiff's damages, except that the plaintiff may not collect, from all the defendants together, more than those damages."<sup>4</sup> However, while it remains to be seen, despite a plaintiff's reference in the complaint to joint and several liability, unless the plaintiff's complaint can fairly and reasonably be construed as seeking a separate award of damages against each defendant that in the aggregate exceeds the jurisdictional minimum, it seems unlikely the courts will find the amount in controversy satisfied.<sup>5</sup>

**B. FRAUDULENT JOINDER:** The most common basis for removal, by far, is fraudulent joinder.

#### 1. Common defenses:

Smallwood is doubtless the most significant outstanding fraudulent joinder issue at the present time. Depending on how the Fifth Circuit rules, the decision in the case has the potential to have a dramatic impact on removal/remand litigation in Mississippi. In the interim, the district courts have stayed cases involving Smallwood issues and until a decision is rendered, no benefit is gained from discussion of these issues.

#### 2. Issues of Individual Liability:

Once fraudulent joinder issue that arises which does not involve Smallwood issues, relates to the joinder of resident/nondiverse to supervisory and/or managerial individuals in various types of litigation. The rule as to such persons is this:

The agent is subject to personal liability when he directly participates in or authorizes the commission of a tort, but individual liability may not be predicated merely on his connection to the corporation but must have as its foundation individual wrongdoing. The thrust of the general rule is that the officer [or agent] to be held personally liable must have some direct, personal participation in the tort, as where the defendant was the guiding spirit behind the wrongful conduct... or the central figure in the challenged corporate activity.

While it is easy enough to state the rule, it is not always easy to determine whether this standard is met in a given case. Ultimately, it is not enough merely to allege that the manager/supervisor has managerial or supervisory authority over a store or function, but rather, his/her liability depends on whether the duty alleged to have been breached is a duty of the corporation or the duty of that individual.

#### 3. Fraudulent Misjoinder:

In multiple plaintiff cases, as well as in multiple defendant cases, an issue that often arises relates to the alleged "fraudulent misjoinder" of parties. Although the Fifth Circuit has embraced the concept of "fraudulent misjoinder" as a basis for removal<sup>6</sup>, the contours of the doctrine are not as yet clearly defined. For example, the court has not yet ruled whether the standard is mere misjoinder or egregious misjoinder.

Similar to the fraudulent joinder analysis, the pertinent question in the misjoinder analysis appears to be whether there is a reasonable possibility that a Mississippi court would find that plaintiffs' claims are properly joined.<sup>7</sup>

The Mississippi Supreme Court's recent deletion of language in the comment to Rule 20 that had formerly counte-

nanced "virtually unlimited joinder" and the addition of language requiring that there be a "distinct litigable event" linking claims, along with its decision in Janssen Pharmaceutica, Inc. v. Armond, 866 So. 2d 1092, 1094 (Miss. 2004), are significant developments in Mississippi law which bear on the "fraudulent misjoinder" analysis in that they have very much constricted the standard for joinder in Mississippi, making joinder and consolidation of separate claims much less available than was formerly the case.

#### 4. Dismissal of Non-Diverse Defendant:

If a resident defendant has been found to be fraudulently joined, the court may dismiss that defendant from the suit on the basis of his/her fraudulent joinder without the necessity of a further motion by such defendant.<sup>8</sup>

**C. FEDERAL QUESTION JURISDICTION:** If a plaintiff asserts claims that have a basis in both federal and state law, then in the absence of complete preemption or the presence of a "substantial federal question," the plaintiff, as "master" of his complaint "may decline to press his federal claims in favor of litigation premised exclusively on state law-effectively defeating the possibility of removal, but accepting the risk that his federal claim may be barred." Willis v. Life Ins. Co. of Ga., Civ. Action No. 4:00CV323-P-B (N.D. Miss. May 31, 2001).

A recurring question in federal question cases is whether a plaintiff may avoid federal court by claimed reliance exclusively on federal law where state law does not recognize the claim or provide the remedy plaintiffs seek.

It has been contended that the Fifth Circuit's decision in Medina v. Ramsey Steel Company Inc., 238 F.3d 674 (5th Cir. 2001), makes clear that a plaintiffs' claims, though purportedly brought solely under state law, are necessarily federal claims if the claims are not cognizable under state law, or that at the very least, that Medina conflicts with the Fifth Circuit's decision in Waste Control Specialists, LLC v. Envirocare of Texas, Inc., 199 F.3d 781 (5th Cir. 2000). However, it is possible to reconcile the

## Comments from the Bench

two cases. Where a plaintiff has been unclear about his intention to rely exclusively on state law, Medina may provide the applicable rule; but in cases where the plaintiff, by his explicit declaration, has made it clear on the face of his complaint that he is proceeding on the exclusive basis of state law so that there is no room for interpretation as to his intention, Waste Control applies, unless or until the Fifth Circuit holds otherwise.<sup>9</sup>

### **D. BANKRUPTCY JURISDICTION**

While district judges in the state may once have been more inclined to retain jurisdiction over cases involving bankrupt plaintiffs where mandatory abstention did not apply, that is no longer the case. The majority of cases contributing to explosion of litigation in this state in recent years have been "predatory lending" cases with multiple plaintiffs; and not surprisingly, a large number of these cases have involved one or more plaintiffs who had either current or former bankruptcy cases which has resulted in a sharp rise in the number of removals on the basis of bankruptcy jurisdiction. Particularly in light of the volume of such cases, which usually involve only state law issues, it has become less practical for the federal courts to keep the cases so that in the absence of circumstances which suggest that a bankrupt plaintiff has attempted to defraud the bankruptcy court (by failing to disclose pending litigation), the court more often than not will remand. If, however, there is evidence of fraud, the federal courts will likely retain jurisdiction; in such a case, the equities hardly favor remand. ■

1. Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1335 (5th Cir. 1995).

2. See De Aguilar v. Boeing Co., 47 F.3d 1404, 1410 (5th Cir. 1995).

3. St. Paul Reinsurance Co., Ltd. v. Greenber, 134 F.3d 1250, 1252-53 (5th Cir. 1998).

4. Bean v. Corning Glass Works, 1995 WL 1945544, \*1 (N.D. Miss. April 26, 1995) (Biggers, J.) (citation omitted). See Bean, 1995 WL 1945544 (finding that despite plaintiff's allegation of joint and several liability and demand of \$50,000, the complaint could not reasonably be construed to demand \$100,000).

5. Hart v. Bayer Corp., 199 F.3d 239, 247 (5th Cir. 2000); Turner v. Wilson, 620 So. 2d 545, 548 (Miss. 1993).

6. See In re Benjamin Moore & Co., 309 F.3d 296 (5th Cir. 2002).

7. Reed, et al. v. American Med. Security Group, et al., Civ. Action No. 4:03CV72LN (S.D. Miss. Mar. 4, 2003) (Lee, J.); See, eg., Jones v. Nاستech Pharmaceutical Co., Inc., 2004 WL 1194712, \*6 (S.D. Miss. April 29, 2004) (Pickering, J.) (find-

ing "egregious misjoinder" of claims against physicians where Mississippi Rule 20 did not authorize the joinder).

8. Griggs v. State Farm Lloyds, 181 F.3d 694, 698 (5th Cir. 1999) (affirming district court's orders dismissing nondiverse defendants as fraudulently joined).

9. Anderson v. Nissan Motor Acceptance Corp., et al., Civ. Action No. 3:03CV6LN, at 7 n.5 (S.D. Miss. Aug. 22, 2003).



The most difficult problems require the most innovative responses. When the shadows of title problems

loom, a unique approach makes all the difference. Mississippi Valley Title responds. With in-depth knowledge

to serve your local needs instantly. Strength to offer national resources and reserves immediately.

Flexibility to change with your business readily. Call us today.



1-800-843-1688, [www.mvt.com](http://www.mvt.com)