

The Legal Intelligencer

ALM Properties, Inc.

Page printed from: [The Legal Intelligencer](#)

[Back to Article](#)

Another GSK Venue Question Sent to Third Circuit

Another federal judge has certified for interlocutory appeal a question left open by the Third Circuit when it determined that GlaxoSmithKline is a corporate citizen of Delaware

Saranac Hale Spencer

2013-12-23 12:00:01 AM

A second federal judge has certified for interlocutory appeal a question left open by the Third Circuit when it determined that GlaxoSmithKline is a corporate citizen of Delaware.

U.S. District Senior Judge Michael Baylson of the Eastern District of Pennsylvania has joined the chief judge of the Middle District, Christopher Conner, in serving up the question of whether the drugmaker may remove cases filed in Pennsylvania state courts to federal court on the basis of diversity. Before the U.S. Court of Appeals for the Third Circuit ruled in June on its citizenship, district judges had been splitting over treating GSK as a citizen of Delaware or Pennsylvania. Since the citizenship decision, district judges have now been splitting on whether GSK may remove the cases—even those filed as many as several years ago—against it.

Many of the cases alleging that GSK's antidepressant drug Paxil caused birth defects in infants born to mothers who took it while pregnant were first filed in the Philadelphia Court of Common Pleas, then removed to federal court by GSK, then remanded when a district judge held that GSK was a Pennsylvania company. After the June appeals court opinion declaring GSK a Delaware company, GSK sought to remove cases back to federal court, although the year window since the filing of the cases had passed.

District courts have since split over whether the timeframe for GSK to again remove the cases to federal court has lapsed.

"This court will certify the order for interlocutory review ... so the Third Circuit can determine a fair and uniform resolution for all similarly situated cases. The court will form the issue in the same language used by Judge Conner," Baylson said.

When Conner issued the certification for interlocutory appeal in *Miller v. GSK* earlier this month, he said, "This case presents a unique issue of civil procedure that involves a split of authority and has the potential to arise in future disputes. A decision on this issue will also immediately affect the eight other Paxil cases removed to federal court."

The plaintiffs in that case plan to submit their petition for permission to appeal to the Third Circuit today, according to Howard Bashman, who is representing them for the appeal.

Since June, three district judges have denied motions to remand and two have granted motions to remand in Paxil cases.

Baylson was one of the judges who had decided that GSK shouldn't be able to remove the actions to federal court a second time following the Third Circuit's June decision on the company's citizenship.

Referring to the open question of how trial court judges are to interpret the new precedent set by that opinion, Baylson said in the remand opinion in *Powell v. GSK* that he issued in September, "The Third Circuit was silent, however, on what effect, if any, its ruling would have on similar cases, such as the one at bar."

He concluded that GSK had missed its window for removal and, regardless of the Third Circuit's recent ruling, would have only one

opportunity for it.

"Removal is, by congressional design, a one-time event. Counsel need to move promptly and correctly. The judge only gets one 'shot' at the decision," Baylson said.

However, U.S. District Judge Mary McLaughlin of the Eastern District of Pennsylvania was among the judges who decided that removal is allowable in light of the Third Circuit's decision on GSK's citizenship. She ruled on the remand issue in the *Miller* case and then granted GSK's motion to transfer to the Middle District, which put the case in Conner's court.

"The court concludes that the case was initially removable and that the defendant's second removal notice was simply a way of effectuating the timely and proper first removal," McLaughlin said in the July order denying the plaintiffs' motion for remand. It is that order that prompted the plaintiffs in *Miller* to seek interlocutory appeal.

Although the plaintiffs in the *Powell* case won remand, they still sought certification from Baylson for interlocutory review from the Third Circuit.

"The question the United States Court of Appeals for the Third Circuit should address is: Whether a defendant may remove a case a second time based on diversity jurisdiction more than one year after the commencement of the case, where a final remand order determining the case is not removable had already been issued and the plaintiff has not prevented timely removal," the *Powell* plaintiffs wrote in their brief seeking certification.

"Although this court correctly answered that controlling question of law in the negative, in light of the split of decisions on that question among the various Eastern District of Pennsylvania courts, it is prudent for this court to certify that question for interlocutory review," they argued.

"This issue is very likely to be accepted for review," said Bashman, since there is a conflict within the Eastern District and it comes close on the heels of the Third Circuit's June ruling on the citizenship issue.

Both cases, *Miller* and *Powell*, present the same issue, but with a different party prevailing at the district court level. The first case to ask for appeal will probably be the one that the Third Circuit will take, Bashman said.

Saranac Hale Spencer can be contacted at 215-557-2449 or sspencer@alm.com. Follow her on Twitter @SSpencerTLI.

(Copies of the two-page opinion in Powell v. GSK, PICS No. 13-3368, are available from The Legal Intelligencer. Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information.) •

*Read more about it in an upcoming issue of the The Legal. **Saranac Hale Spencer** can be contacted at 215-557-2449 or sspencer@alm.com. Follow her on Twitter [@SSpencerTLI](https://twitter.com/SSpencerTLI).*