

Third Circuit Prepares to Sew Up Its Decision on GSK Corporate Citizenship



The U.S. Court of Appeals for the Third Circuit is taking an interlocutory appeal on a question that it opened after declaring last June that GlaxoSmithKline is a corporate citizen of Delaware, not Pennsylvania.

Since that opinion, which effectively preserved GSK's ability to remove to federal court cases filed against it in Pennsylvania state courts, district judges have been splitting on the issue of whether or not the pharmaceutical giant can re-remove cases to the district courts after those cases had been remanded to state court before the circuit court's June decision.

Last month, two district judges—U.S. District Chief Judge Christopher Conner of the Middle District of Pennsylvania and U.S. District Senior Judge Michael Baylson of the Eastern District of Pennsylvania—certified for interlocutory appeal to the Third Circuit the question of whether or not a defendant can remove a case based on diversity jurisdiction for a second time after more than a year has passed since the original filing.

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.

"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," Conner said in his December certification for interlocutory appeal in the case captioned *Miller v. GSK*. That is the case on which the Third Circuit granted appeal.

Before *Miller* was transferred to Conner's court, U.S. District Judge Mary McLaughlin of the Eastern District of Pennsylvania ruled on the removal issue, holding that the case was properly in federal court in light of the Third Circuit's June decision.

The plaintiffs sought appeal to the Third Circuit.

GSK, however, warned the circuit court in its opposition brief that the issue presented is so narrow that any decision from the appeals court would have "exceedingly limited precedential value."

The company said in its brief, "The district court's order denying remand arises in a highly unusual set of circumstances, and any decision this court could issue reviewing that order would be of correspondingly limited precedential value."

The court's decision would directly impact about nine cases.

The Third Circuit wasn't persuaded and a three-judge panel of the court issued a short order Jan. 24 accepting the interlocutory appeal. On the panel were Judges Thomas L. Ambro, Michael A. Chagares and Thomas I. Vanaskie.

Once the case is redocketed, the court will enter a briefing schedule and the case will be briefed on the merits, as is any ordinary appeal, said Howard Bashman, who is representing the plaintiffs in the case. He expects that it will be fully briefed by mid-May, Bashman said.

With its decision to take the appeal, Bashman said, the Third Circuit has "recognized that the two U.S. district judges that believe this was appropriate for interlocutory appeal were correct—the issue is both important and unsettled."

In their petition seeking interlocutory appeal, the plaintiffs also argued: "Whether such re-removals are barred by 28 U.S.C. 1146's one-year time limit applicable to diversity cases impacts all future cases in which defendants attempt a second diversity-based removal, more than a year after a case was filed, based on the occurrence of some post-remand event," like the June decision that GSK is a Delaware citizen.

The company had a different view of the Third Circuit's acceptance of the appeal.

"Judge McLaughlin's original decision to keep this case in federal court was correct, and it is a decision shared by other judges in this court," GSK said in a statement provided by spokeswoman Mary Anne Rhyne. "GSK remains convinced that these cases properly belong in federal court and looks forward to briefing the issue and having the Third Circuit resolve it."

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