

# TOP 20 FOOD AND DRUG CASES, 2011 & CASES TO WATCH, 2012

*Edited by*

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# CONTENTS

Preface	v
About the Editors	vii
About the Authors	viii
Chapter 1: Goodyear Dunlop Tires Operations, S.A. v. Brown (and J. McIntyre Machinery, Ltd. v. Nicastro) <i>William M. Janssen, Charleston School of Law</i>	1
Chapter 2: United States v. Franck's Lab, Inc. <i>Kathleen Sanzo, Morgan, Lewis &amp; Bockius</i>	33
<b>Chapter 3: Walton v. Bayer Corp. Madeleine McDonough, Shook Hardy &amp; Bacon, Rikin Mehta, U.S. Food and Drug Administration, and Jennifer Stonecipher Hill, Shook Hardy &amp; Bacon</b>	<b>41</b>
Chapter 4: United States v. Lauren Stevens <i>William F. Gould, Andrew R. Oja, Patrick C. O'Brien and Michael M. Gaba, Holland &amp; Knight</i>	51
Chapter 5: United States v. Norian Corp, et al. <i>Michael H. Hinckle and Mark C. Bolin, K&amp;L Gates LLP</i>	61
Chapter 6: United States v. Caronia <i>Ralph F. Hall, University of Minnesota Law School</i>	69
Chapter 7: Sorrell v. IMS Health, Inc. <i>Edward M. Basile and Marian J. Lee, King &amp; Spalding</i>	83
Chapter 8: PLIVA v. Mensing <i>John Reiss and Gregory J. Wartman, Saul Ewing LLP</i>	103
Chapter 9: Bruesewitz v. Wyeth LLC <i>Gregory J. Wartman, Saul Ewing LLP</i>	119
Chapter 10: Degelmann v. Advanced Medical Optics Inc. <i>Ginger Heyman Pigott, Greenberg Traurig and Farah Tabibkhoei, Reed Smith LLP</i>	137
Chapter 11: Hughes v. Boston Scientific Corp. <i>Eric P. Gotting, Keller and Heckman LLP</i>	153

Chapter 12: Graco, Inc. v. PMC Global, Inc. <i>James W. Mizgala and James R.M. Hemmings, Sidley Austin LLP</i>	169
Chapter 13: Williams v. Mast Biosurgery USA, Inc. <i>Carlos Angulo, Zuckerman Spaeder LLP</i>	177
Chapter 14: Microsoft Corp. v. I4i Limited Partnership <i>Theodore Naccarella, Saul Ewing LLP</i>	189
Chapter 15: Prometheus Laboratories, Inc. v. Mayo Collaborative Services <i>Mark J. Nuell, Birch, Stewart, Kolasch &amp; Birch LLP and Adam Bobel</i>	197
Chapter 16: R.J. Reynolds Tobacco Co. v. FDA <i>William A. McGrath, Wiley Rein LLP</i>	209
Chapter 17: Red Earth LLC v. United States <i>Stacy Ehrlich and Will Woodlee, Kleinfeld, Kaplan &amp; Becker LLP</i>	221
Chapter 18: United States ex rel. Nowak v. Medtronic, Inc. <i>Katherine J. Seikaly and Joseph W. Metro, Reed Smith LLP</i>	231
Chapter 19: Astra USA, Inc. v. Santa Clara County, CA <i>Benjamin S. Martin, Epstein Becker Green</i>	249
Chapter 20: Patch v. Hillerich & Bradsby Co. <i>Anand Agneshwar and Kevin A. Cline, Arnold &amp; Porter LLP</i>	255
Chapter 21: Cases to Watch in 2012 <i>Mark E. Haddad and Naomi A. Igra, Sidley Austin LLP</i>	261
Chapter 22: Significant Settlements <i>Daniel Kracov and Kenita Barrow, Arnold &amp; Porter LLP</i>	279
Chapter 23: Key FDA and Other Relevant Agency Actions <i>John B. Reiss and Andrew J. Siegel, Saul Ewing LLP</i>	293
Appendix A: Top 20 Cases of 2011 (Court Rulings)	311
Appendix B: Cases to Watch in 2012 (Issues Presented)	317
Index	319

## PREFACE

This is the third of FDLI's *Top 20 Cases* series. As in previous years, we summarize the cases, administrative actions and settlements from 2011 that made their mark on the field of food and drug law. The major legislative change in 2011 was the Food Safety Modernization Act (FSMA), signed into law on January 4, 2011, that aims to ensure the U.S. food supply is safe by shifting the focus from responding to contamination to preventing it. Many of its provisions were being implemented during this year in review.

The top 20 cases were chosen again using an extensive vetting process by academics and practicing attorneys, including authors and editors of *Food and Drug Law and Regulation*. This year we have changed the presentation format to cluster the cases by topic area rather than presenting them in alphabetical order. If you prefer one approach over the other, please let us know. We fully realize that reasonable legal minds will disagree with our choices for the top 20 cases of 2011. Did you expect more of the Cases to Watch from last year to make it into this year's edition? Let us know about the case we missed—or one that didn't belong on the list.

We hope that the *Top 20 Cases* series will help give our readers a sense of perspective about the evolution of the field of food and drug jurisprudence as laws and regulations change, and court decisions develop the case law. The past few years have been a whirlwind of new legislation and jurisprudence, and it is our hope that these books will help readers understand the changes in the playing field and be prepared for the next challenges to come.

This year some of the Cases to Watch from last year made it into the Top 20, though at least one that we included in the expectation that the United States Supreme Court would have issued a decision by the time we published still awaits the Court's action, so it is likely to appear again in next year's book! As we discussed last year, other cases having to do with criminal indictments of companies and persons demonstrate the time it takes to get to a conclusion on these matters, though we have reported decisions on the majority of such cases.

In our review of agency activities, the Food and Drug Administration (FDA) continues to implement its transparency program, being more open about many aspects of its activities, and increasingly involving industry and the public in discussion of its potential policies. An interesting development is its effort to cooperate with the Centers for Medicare & Medicaid Services by conducting simultaneous review of innovative devices, though the premarket approval process covers a small number of medical devices compared with those subject to FDA clearance. One can hope that success with innovative products will persuade the two agencies to establish a similar program for 510(k) cleared products. FDA has continued to emphasize its enforcement activities, particularly its cooperation with other agencies such as the Federal Trade Commission.

We hope you will use this book as a resource to ensure that you are current on significant litigation in the food and drug area, as well as recent settlement and administrative actions. Looking ahead, the chapter on cases to watch in 2012 discusses selected cases about which there have been generally only preliminary pleadings.

We would like to thank FDLI for its dedication to publishing this valuable book and the authors for their hard work and sharing their expertise in food and drug law and regulation with our readers.

John B. Reiss  
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## CHAPTER 3

# WALTON v. BAYER CORP.

MADELEINE MCDONOUGH, RIKIN MEHTA\*  
AND JENNIFER STONECIPHER HILL

### I. Why It Made the List

In deciding *Walton v. Bayer Corp.*, the Seventh Circuit took a rare opportunity to address a growing body of case law on the propriety of removal based on the fraudulent joinder doctrine. Courts increasingly have addressed whether a pharmaceutical manufacturer may remove a product liability case based on diversity of citizenship, despite a plaintiff's attempt to defeat the removal by joining a nondiverse pharmacy as a defendant. Because federal courts of appeals are prohibited by statute from reviewing most decisions remanding cases to state court for lack of subject matter jurisdiction, the vast majority of cases evaluating these complex questions arise from the federal district courts. The decision in *Walton* clarifies how district courts can evaluate claims of fraudulent joinder when allegations against pharmacies and pharmaceutical manufacturers are joined in suit.

### II. Facts of Case

The plaintiff, Cathy Walton, sued Bayer Corporation and related Bayer entities in Illinois state court for personal injuries allegedly caused by her use of Yasmin, an FDA-approved prescription oral contraceptive.<sup>1</sup> The Bayer defendants ("Bayer") were distributors of Yasmin; the Bayer affiliate that manufactured the product was not named in the lawsuit.<sup>2</sup> The plaintiff also named as a defendant Niemann Foods, Inc. ("Niemann"), the pharmacy that allegedly

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\* The views expressed in this chapter are the author's, and do not necessarily reflect those of the U.S. FDA.

<sup>1</sup> *Walton v. Bayer Corp.*, 643 F.3d 994, 997 (7th Cir. 2011).

<sup>2</sup> *Id.* at 1001.

filled her Yasmin prescription.<sup>3</sup> She asserted claims for strict products liability, negligence, failure to warn, breach of implied warranty and statutory fraudulent misrepresentation.<sup>4</sup>

The Bayer defendants, all citizens of states other than Illinois, removed the case to federal court based on diversity of citizenship, even though complete diversity did not apparently exist because Niemann, like the plaintiff, was an Illinois citizen.<sup>5</sup> Once in federal court, the case was consolidated with the multidistrict litigation, pending in the Southern District of Illinois. The plaintiff moved to remand the case to state court on three bases. First, the plaintiff claimed that the threshold amount-in-controversy requirement for federal court jurisdiction had not been satisfied. The plaintiff's complaint asserted that she:

Incurred substantial damages, including, but not limited to, injury to her gall bladder sufficient to require its surgical removal, as well as other severe and personal injuries, including future thromboembolic events, which are permanent and lasting in nature, physical pain and mental anguish, diminished enjoyment of life, medical, health, incidental and related expenses, the need for lifelong medical treatment, monitoring and/or medications, and the fear of developing any of the above named health consequences.<sup>6</sup>

The plaintiff sought damages “in excess of \$50,000.”<sup>7</sup>

Second, the plaintiff argued that Bayer's removal notice was defective under 28 U.S.C. § 1446(a), which requires a defendant to file its notice of removal along with “a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.” When Bayer filed its notice of removal during the 30-day removal period, it failed to attach a copy of the state court summons.<sup>8</sup> However, shortly after the 30-day removal period expired, Bayer supplemented its original notice to include the summons.<sup>9</sup>

Arguing for remand, the plaintiff claimed that the district court lacked diversity jurisdiction based on the presence of Niemann, an Illinois corporation. Bayer responded by asserting that Niemann had been fraudulently joined to destroy diversity jurisdiction. Although Niemann, the pharmacy that sold Yasmin to the plaintiff, did not manufacture the medication, the plaintiff nonetheless alleged that Niemann failed to warn her of Yasmin's side ef-

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<sup>3</sup> *Id.* at 997.

<sup>4</sup> *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Products Liab. Litig.*, 692 F. Supp. 2d 1025, 1028 (S.D. Ill. 2010), *aff'd sub nom.*, *Walton v. Bayer Corp.*, 643 F.3d 994 (7th Cir. 2011).

<sup>5</sup> *Walton*, 643 F.3d at 997.

<sup>6</sup> *In re Yasmin*, 692 F. Supp. 2d at 1039.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 1029.

<sup>9</sup> *Id.*

facts.<sup>10</sup> According to Bayer, because there was no legal basis for the claims against Niemann, the district court should disregard the citizenship of the nondiverse defendant and retain subject matter jurisdiction.

Niemann moved the district court to dismiss the claims against it under Federal Rule of Civil Procedure 12(b)(6).<sup>11</sup> The district court denied the plaintiff's motion to remand and dismissed Niemann with prejudice.<sup>12</sup> Following the denial of her motion to remand, the plaintiff seemingly abandoned the litigation and failed to respond to discovery requests by Bayer. Subsequently, the district court dismissed the plaintiff's case with prejudice as a discovery sanction, and the plaintiff appealed from the final order.<sup>13</sup>

### III. Court Ruling

In a decision by Judge Posner, the Seventh Circuit affirmed the district court's decision and agreed that subject matter jurisdiction existed and that the case had been properly dismissed. As a preliminary matter, the court rejected Bayer's challenge to the court's jurisdiction over the appeal. According to Bayer, the plaintiff should not have been permitted to challenge the interlocutory order, which denied remand, by dismissing the case altogether.<sup>14</sup> The court concluded that it could properly review the remand order, because the plaintiff had "wagered her entire claim on being proved right about jurisdiction."<sup>15</sup> The court quickly disposed of the plaintiff's challenge that the jurisdictional amount-in-controversy threshold had been satisfied.<sup>16</sup> The court also rejected the plaintiff's argument that Bayer's failure to attach the state court summons required remand.<sup>17</sup>

As for the plaintiff's primary challenge to diversity jurisdiction, the court ruled that Niemann had been fraudulently joined and was properly dismissed, leaving only diverse defendants.<sup>18</sup> A significant aspect of the ruling is that, under the learned intermediary doctrine, pharmacies are not required to warn their customers of the risks associated with the drugs they sell, and therefore the plaintiff's claims against Niemann were groundless.<sup>19</sup> Further, the plaintiff could not rely on the "common defense" exception to avoid a finding

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<sup>10</sup> *Walton*, 643 F.3d at 997.

<sup>11</sup> *In re Yasmin*, 692 F. Supp. 2d at 1029.

<sup>12</sup> *Walton*, 643 F.3d at 997.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 998.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1001.

<sup>19</sup> *Id.* at 1000-01.

of fraudulent joinder by showing that Niemann's learned intermediary doctrine defense was common to all defendants. The court found the allegation that the manufacturer concealed information about Yasmin's side effects was incompatible with the learned intermediary doctrine.<sup>20</sup> Thus, the pharmacy and manufacturer did not share a "common defense." The court affirmed the dismissal.

## IV. Rationale for Decision

Ultimately, the Seventh Circuit's decision thoughtfully analyzed how the learned intermediary doctrine applies to claims against pharmacies and distributors such as Niemann—a pharmacy that merely supplied the prescription drug here at issue.

### A. The Fraudulent Joinder Doctrine

Ordinarily, the presence of a nondiverse defendant will destroy a federal court's diversity jurisdiction under 28 U.S.C. § 1332(a). Thus, to prevent the removal of a state court case to federal court, creative plaintiffs will often join a nondiverse defendant whose citizenship would prevent a federal court from exercising jurisdiction over the case.<sup>21</sup> However, when the claims against the nondiverse defendant have no legal basis, and the nondiverse defendant was joined simply to preclude removal, a federal court may retain jurisdiction over the case under the doctrine of fraudulent joinder.<sup>22</sup>

The fraudulent joinder doctrine has been applied by federal courts across the country.<sup>23</sup> The doctrine has a long history, stemming from United States Supreme Court decisions in the early 1900s.<sup>24</sup> In *Wecker v. National Enameling & Stamping Co.*, the Supreme Court affirmed the denial of remand when there was no basis for allegations against a nondiverse defendant, who was joined merely to prevent removal.<sup>25</sup> The Court reasoned that, "[w]hile the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, . . . the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right."<sup>26</sup> In *Chesapeake & Ohio Railway Co. v. Cockrell*, the Court further solidified the doctrine by explaining that a defendant's "right of removal cannot be defeated by a fraudulent joinder

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<sup>20</sup> *Id.* at 1001.

<sup>21</sup> CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 3641.1 (3d ed. 2009).

<sup>22</sup> *See Walton*, 643 F.3d at 999.

<sup>23</sup> *See* WRIGHT & MILLER § 3641.1 (citing cases).

<sup>24</sup> *See generally* Matthew J. Richardson, *Clarifying and Limiting Fraudulent Joinder*, 58 FLA. L. REV. 119, 126-27 (2006).

<sup>25</sup> *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 185-86 (1907).

<sup>26</sup> *Id.*

of a resident defendant having no real connection with the controversy.<sup>27</sup> Under *Cockrell*, the removing party must show that there was no “reasonable basis” to join the nondiverse party.<sup>28</sup>

Federal courts have described the standard for finding fraudulent joinder, with slight variations.<sup>29</sup> The Seventh Circuit declared that a defendant must establish, after resolving all issues of fact and law in favor of the plaintiff, that there is no “reasonable possibility” that the plaintiff could prevail against a nondiverse defendant.<sup>30</sup> Despite the terminology, actual proof of fraud is not necessary for a finding of fraudulent joinder.<sup>31</sup> Instead, there must be “proof that the claim against the nondiverse defendant is utterly groundless.”<sup>32</sup> Thus, the fraudulent joinder doctrine “permits a district court considering removal to disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the nondiverse defendants, and thereby retain jurisdiction.”<sup>33</sup>

## B. Pharmacy Liability under the Learned Intermediary Doctrine

In evaluating whether Niemann had been fraudulently joined, in that there was no reasonable possibility that the plaintiff could succeed in her claims, the *Walton* court considered the precise allegations against Niemann.<sup>34</sup> The court began by analyzing how the learned intermediary doctrine applied to pharmacies.<sup>35</sup>

As noted by the *Walton* court, the learned intermediary doctrine has been applied by most jurisdictions, including Illinois.<sup>36</sup> The learned intermediary doctrine recognizes that the prescribing physician acts as the “learned intermediary”—“the medical professional who, equipped with the knowledge imparted to him by the drug’s manufacturer, determines, weighing benefit against risk, the drug’s suitability for a particular patient.”<sup>37</sup> Under the learned intermediary doctrine, the manufacturer is not required to directly warn consumers of the risks associated with a drug, as long as the manufacturer adequately warns physicians

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<sup>27</sup> *Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146, 152 (1914).

<sup>28</sup> *Id.* at 153.

<sup>29</sup> Compare *Wiles v. Capitol Indem. Corp.*, 280 F.3d 868, 871 (8th Cir. 2002) (“Joinder is fraudulent and removal is proper when there exists no reasonable basis in fact and law supporting a claim against the resident defendants.”), with *Henerson v. Wash. Nat. Ins. Co.*, 454 F.3d 1278, 1283 (11th Cir. 2006) (A court should deny remand based on fraudulent joinder only where the defendant has proven “by clear and convincing evidence” that there is “no possibility that the plaintiff can establish a cause of action against the non-diverse defendant.”).

<sup>30</sup> *Schur v. L.A. Weight Loss Centers, Inc.*, 577 F.3d 752, 764 (7th Cir. 2009).

<sup>31</sup> *Walton*, 643 F.3d at 999.

<sup>32</sup> *Id.*

<sup>33</sup> *Schur*, 577 F.3d at 763.

<sup>34</sup> *Walton*, 643 F.3d at 999.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*; see also *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 513 N.E.2d 387, 392 (Ill. 1987).

<sup>37</sup> *Walton*, 643 F.3d at 1000.

of the risks, who then can make informed decisions about prescribing drugs to particular patients.<sup>38</sup> As traditionally applied, the doctrine protects manufacturers against claims for failing to warn patients directly.<sup>39</sup>

Recognizing that a prescribing physician acts as a learned intermediary who is responsible for weighing a drug's risks and benefits for a given patient, the *Walton* court noted that only narrow situations give rise to a pharmacy's duty to warn its customers. A pharmacy must warn customers of the risks of prescription drugs only when it knows that a "particular customer" is susceptible to the side effects of a drug.<sup>40</sup> The court explained, "[A] manufacturer or a pharmacy must warn a customer of dangers known to it of which physicians have not been warned, but not of dangers of which physicians have been warned."<sup>41</sup> As applied in *Walton*, the plaintiff's allegations against Niemann were insufficient. "[I]f Niemann knew that the plaintiff was abnormally susceptible to a particular side effect of [Yasmin], it had a duty to warn her or her physician. But she doesn't allege that the pharmacy knew anything about her susceptibility, and so it had the full protection of the learned-intermediary doctrine."<sup>42</sup> Because the plaintiff had no viable claims against Niemann, the Seventh Circuit affirmed the district court's finding of fraudulent joinder.<sup>43</sup>

### C. The "Common Defense" Exception to Fraudulent Joinder

The Seventh Circuit went on to analyze whether the defendants shared a common defense, such that no single defendant could be considered fraudulently joined. Some jurisdictions have expressly limited the district court's ability to disregard the citizenship of nondiverse defendants by applying an exception to the fraudulent joinder doctrine when the defendants share a common defense.<sup>44</sup> Under this exception, a plaintiff can rebut a finding of fraudulent joinder by proving that his claim against the nondiverse defendant "is no weaker than his claim against the diverse defendants."<sup>45</sup> The common defense exception is based on the idea that, when the claims and defenses are identical among diverse and nondiverse defendants, a fraudulent joinder argument is an attack on the merits of the suit; an issue properly addressed in the state court where the lawsuit was filed.<sup>46</sup>

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<sup>38</sup> *Id.* at 999-1000.

<sup>39</sup> *See id.*

<sup>40</sup> *Id.* at 1000.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1000-01.

<sup>43</sup> *Id.* at 1001.

<sup>44</sup> See *Smallwood v. Ill. Cent. R.R.*, 385 F.3d 568, 574-75 (5th Cir. 2004) ("When the only proffered justification for [fraudulent joinder] is that there is no reasonable basis for predicting recovery against the in-state defendant, and that showing is equally dispositive of all defendants rather than to the in-state defendants alone, the requisite showing has not been made."); *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 112-13 (3d Cir. 1990) ("[W]here there are colorable claims or defenses asserted against or by diverse and non-diverse defendants alike, the court may not find that the non-diverse parties were fraudulently joined based on its view of the merits of those claims or defenses."); see also *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1044-45 (9th Cir. 2009) (preemption defense, which would "effectively decide the entire case," could not be the basis for a finding of fraudulent joinder).

<sup>45</sup> *Walton*, 643 F.3d at 1001.

<sup>46</sup> *Id.*

The plaintiff argued that Niemann was identically situated to the Bayer entities, who were the marketers and distributors of Yasmin.<sup>47</sup> However, the *Walton* court determined that the common defense exception did not apply to the plaintiff's claims against Bayer and Niemann. The court explained that the plaintiff's theories asserted against the diverse and nondiverse defendants were inconsistent and did not give rise to a common defense.<sup>48</sup> While the learned intermediary doctrine does not permit distributors to conceal a drug's side effects, the plaintiff alleged that Bayer—not Niemann—concealed the side effects of Yasmin.<sup>49</sup> Therefore, the court reasoned that “[t]he learned-intermediary doctrine that shields Niemann does not shield [the Bayer defendants], and thus is not a defense common both to the diverse defendants and to the nondiverse one.”<sup>50</sup>

Furthermore, the court pointed out the irreconcilable position that the plaintiff had advanced on appeal. Had the plaintiff successfully argued that the learned intermediary doctrine operated as a defense common to all defendants, removal would be barred and the case should be remanded. However, the case would be subject to dismissal in state court because the learned intermediary doctrine would be a complete defense.<sup>51</sup> The plaintiff's only option at that point would be “to turn around and argue in the state court that her claim against the diverse defendants was not subject to the learned-intermediary doctrine after all and so her claim against them should survive Neimann's dismissal.”<sup>52</sup> Based on principles of judicial estoppel, however, the plaintiff would not be permitted to do so.<sup>53</sup>

## V. Impact of Decision

The *Walton* decision clarifies the propriety of joining in-state pharmacies in failure-to-warn pharmaceutical cases. Before *Walton*, the Southern District of Illinois had expressed skepticism as to whether the learned intermediary doctrine could serve as a basis for a fraudulent joinder determination. For example, in *McNichols v. Johnson & Johnson*, the Southern District of Illinois granted a plaintiff's motion to remand in a product liability lawsuit involving a prescription contraceptive device.<sup>54</sup> The plaintiff sued the manufacturer, as well as the nondiverse pharmacy that dispensed the product.<sup>55</sup> The manufacturer removed the case to federal court, arguing that the pharmacy had been fraudulently joined because the claim

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1002.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1002-03.

<sup>54</sup> *McNichols v. Johnson & Johnson*, 461 F. Supp. 2d 736 (S.D. Ill. 2006).

<sup>55</sup> *Id.* at 738.

against it was barred by the learned intermediary doctrine.<sup>56</sup> The court questioned whether the learned intermediary doctrine was a proper basis for a claim of fraudulent joinder, because “it implicates issues about foreseeability and causation germane to the liability of both [the manufacturer and the pharmacy].”<sup>57</sup> The Southern District of Illinois ultimately concluded that the applicability of the learned intermediary doctrine was a question of fact that must be resolved by the state court.<sup>58</sup>

The same court later explained that its previous skepticism had “ripened into a firm conviction” that the learned intermediary doctrine could not serve as a basis for a manufacturer’s argument that a pharmacy was fraudulently joined.<sup>59</sup> In *Brooks v. Merck & Co., Inc.*, the Southern District of Illinois rejected Merck’s claim that a pharmacy defendant had been fraudulently joined.<sup>60</sup> In ordering remand, the court reasoned, “Merck’s invocation of the learned intermediary doctrine is merely an attack on the merits of Plaintiff’s claims.”<sup>61</sup> According to the *Brooks* court, such an attack was insufficient because “fraudulent joinder is not shown merely by removing a case to federal court on the basis of a defense that is equally applicable to a plaintiff’s claims against both [a] diverse and non-diverse defendant.”<sup>62</sup>

The *McNichols* and *Brooks* remand decisions were not reviewed on appeal, and the Southern District of Illinois continued to reach the same result in remanding similar cases.<sup>63</sup> The Seventh Circuit’s lack of appellate review until *Walton* is perhaps not surprising, as appellate courts are prohibited from reviewing remand orders in many situations, and this issue in particular has largely evaded review. 28 U.S.C. § 1447(d) provides that, excepting certain civil rights cases, “[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . .”<sup>64</sup> Unlike *McNichols* and *Brooks*, review of the district court’s decision on fraudulent joinder in *Walton* was not prohibited by section 1447(d) because the statute does not prevent a court from reviewing an order *denying* remand.<sup>65</sup> The plaintiff’s challenge of the district court’s subject matter jurisdiction in *Walton* allowed the Seventh Circuit to analyze a developing body of case law that frequently arises in product liability cases involving prescription medications.

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<sup>56</sup> *Id.* at 739.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 741.

<sup>59</sup> *Brooks v. Merck & Co., Inc.*, 443 F. Supp. 2d 994, 998-99 (S.D. Ill. 2006).

<sup>60</sup> *Id.* at 1005.

<sup>61</sup> *Id.* at 1004.

<sup>62</sup> *Id.* at 1005.

<sup>63</sup> See *Smith v. Merck & Co., Inc.*, 472 F. Supp. 2d 1096, 1099 (S.D. Ill. 2007) (rejecting Merck’s fraudulent joinder argument because “Merck asserts no flaw specific to the joinder of Walgreens and instead merely raises a defense equally dispositive of [the plaintiff’s] claims for relief against both Merck and Walgreens”); *Robinson v. Ortho-McNeil Pharm., Inc.*, 533 F. Supp. 2d 838, 841-42 (S.D. Ill. 2008) (rejecting a claim of fraudulent joinder because the learned intermediary defense was equally dispositive to the manufacturer and pharmacy).

<sup>64</sup> 28 U.S.C. § 1453(c), however, authorizes review of orders granting or denying motions to remand in class actions removed pursuant to the Class Action Fairness Act.

<sup>65</sup> See *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 76 (1996). As the *Walton* court noted, any appeal would nevertheless need to comply with the final-decision rule set forth in 28 U.S.C. § 1291 or an exception thereto.

While *Walton* did not expressly overturn the Southern District of Illinois precedent, the court's reasoning suggests that the decision will have a significant impact on future cases removed from the Seventh Circuit. The court explicitly discussed a pharmacy's limited duty to warn, noting that "[i]t would be senseless, especially given drug regulation by the Food and Drug Administration and the extensive tort liability of drug manufacturers, to make pharmacies liable in tort for the consequences of failing to investigate the safety of thousands of drugs."<sup>66</sup> Although factual distinctions may exist in the specific allegations advanced against pharmacies and manufacturers, the *Walton* decision casts significant doubt on the continued viability of district court precedent within the Seventh Circuit that has refused to find fraudulent joinder by concluding that the manufacturer and pharmacy shared a common defense.

## VI. Conclusion

*Walton* signals a potential shift in Seventh Circuit precedent on fraudulent joinder in pharmaceutical product liability cases. The decision illustrates the critical analysis required for evaluating failure-to-warn claims against pharmacies and allegations of fraudulent joinder. Future litigants should carefully consider the precise legal bases for the theories asserted against each defendant at every stage of the litigation.

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<sup>66</sup> *Walton*, 643 F.3d at 1000.