

## Distributor Held Fraudulently Joined

Tuesday, May 24, 2011

Yesterday we brought you some [welcome news](#) on the pharmacy front in the never-ending struggle against fraudulent joinders. But outside of certain parts of Illinois, we've generally done OK where the fraudulently joined party is a pharmacy.

Today, we feature a rarer bird – a court's decision that a claim brought against a local distributor also constituted fraudulent joinder. The case is [Askew v. DC Medical, LLC](#), 2011 WL 1811433 (N.D. Ga. May 12, 2011), decided under Georgia law. That's important, because the law concerning distributors is not nearly as uniform as the 48-state consensus against pharmacy liability mentioned in yesterday's [Walton](#) case.

[Askew](#) is a device case – not surprising because medical device companies tend to have networks of local product distributors more than do pharmaceutical companies. To support the claim of fraudulent joinder, the defendant submitted a “declaration” by the distributor that:

- It “did not know of any alleged defect in the . . . device before it was distributed for use in Plaintiff's surgery.”
- It “was not involved in the design, manufacture, testing, or regulatory approval of the . . . device.”
- It “was not involved in the promotional, marketing, description, or application materials for the ASR device.”
- That the distributor received the device “already labeled and sealed” and did not disturb it.

2011 WL 1811433, at \*1, 6.

The court held that the declaration put the onus on the plaintiff to offer more than bare legal conclusions in response. [Id.](#) at \*5. Under Georgia law, “[a] distributor can be held liable for negligent failure to warn only if, at the time of the sale, it had actual or constructive knowledge that its product created a danger for the consumer.” [Id.](#) at \*4 (citation and quotation marks omitted). Interestingly, the court analogized to [Twlqbal](#) pleading standards, even though Rule 12 was not technically applicable to fraudulent joinder:

Although the Court applies the standards governing allegations of fraudulent joinder to this case rather than the [Twombly/Iqbal](#) pleading standards, those cases usefully illustrate the inadequacy of Plaintiff's conclusory allegations to rebut uncontroverted affidavit testimony denying [the defendant distributor's] knowledge of the . . . Device's alleged defects.

2011 WL 1811433, at \*5 n.5. That should be lesson one – use [Twlqbal](#) pleading standards by analogy to emphasize that the plaintiffs have nothing to back up their allegations against a fraudulently joined defendant.

A paucity of factual support was exactly what the court found in Askew:

Plaintiff has not produced evidence that [the defendant distributor] had actual or constructive knowledge of alleged defects in the . . . device prior to its distribution for use in Plaintiff's surgery. While the burden on Defendants to show fraudulent joinder is a heavy one, Plaintiff must point to some evidence that supports her claim against [the distributor] now that the allegations in their Complaint have been controverted.

Id. at 6 (emphasis added). That's fraudulent joinder lesson two. Get specific facts to contradict the plaintiff's legal conclusions. Remember, the whole point of the fraudulent joinder doctrine is that parties are being sued for no good reason – if a defendant can't show that, then it's highly likely that fraudulent joinder will fail.

There were a few other theories, too, but once negligent failure to warn went by the boards, those followed rather meekly. There was no warranty claim because there was no privity. 2011 WL 1811433, at \*7. The distributor's lack of knowledge (or, more precisely, the absence of any facts suggestive of knowledge) also defeated the fraud claim. Id. Civil conspiracy isn't an independent tort and falls with the other claims. Id.

Askew demonstrates that our side can win fraudulent joinder motions involving distributors. But it's hard. We need both good law (Georgia's actual or constructive knowledge standard) and good facts (establishing same). It's rather reminiscent of Billy Joel's "[new fashion](#)" – "all you need are looks and a whole lot of money" – but fraudulent joinder is a tough standard for our side to win. Congrats to the winner in Askew.