

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

In re: BAYCOL PRODUCTS LITIGATION

MDL No. 1431 (MJD)

MEMORANDUM AND ORDER

This Document also relates to:

Francis Bobo, and Clyde Norris

v.

Bayer et al.

Civil Case No. 03-3146

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Edward Blackmon, Jr.; Roy K. Smith; and Kelsey L. Rushing, Blackmon & Blackmon, for and on behalf of Plaintiffs.

William F. Goodman III; Rebecca Wiggs; and C. Alleen McClain, Watkins & Eager PLLC, for and on behalf of Bayer Corporation.

Joshua J. Wiener, and Brooks R. Buchanan, Butler Snow O'Mara Stevens & Cannada, for and on behalf of SmithKline Beecham Corporation d/b/a GlaxoSmithKline.

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This matter is before the Court upon Plaintiffs' Motion for Remand to State Court. Defendants oppose the motion, arguing that this Court has diversity jurisdiction over Plaintiffs' claims.

**I. BACKGROUND**

This case was originally filed in Mississippi state court, and both Plaintiffs are citizens of the state of Mississippi. Plaintiffs allege that they were prescribed Baycol and suffered mental anguish, physical pain, and loss of earning capacity as a result. (Compl. ¶ 49.) Plaintiffs have asserted a number of claims against the Bayer Defendants and GlaxoSmithKline. Plaintiffs have also asserted claims against their treating physicians.

Defendants timely removed this action to the United States District Court, District of Mississippi asserting subject matter jurisdiction based on diversity of citizenship under 28 U.S.C. § 1332(a). In the removal petition, Defendants asserted that the non-diverse defendants, Plaintiffs' treating physicians, were fraudulently joined. Subsequently, these matters were transferred to this Court by the Judicial Panel on Multidistrict Litigation.

(Doc. No. 11.)

## II. STANDARD

Remand to state court is proper if the district court lacks subject matter jurisdiction over the asserted claims. 28 U.S.C. § 1447(c). In reviewing a motion to remand, the court must resolve all doubts in favor of remand to state court, and the party opposing remand has the burden of establishing federal jurisdiction by a preponderance of the evidence. See In re Business Men's Assurance Co. of America, 992 F.2d 181, 183 (8<sup>th</sup> Cir. 1983)(citing Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006, 1010 (3<sup>rd</sup> Cir. 1987), cert. dismissed 484 U.S. 1021 (1988)). In determining the propriety of remand, the Court must review the plaintiffs' pleading as it existed at the time of removal. See Pullman Co. v. Jenkins, 305 U.S. 534, 537 (1939); Crosby v. Paul Hardeman, Inc., 414 F.2d 1, 3 (8<sup>th</sup> Cir. 1969).

"Joinder is fraudulent and removal is proper when there exists no reasonable basis in fact and law supporting a claim against the resident defendants." Wiles v. Capitol Indem. Corp., 280 F.3d 868, 871 (8<sup>th</sup> Cir. 2001) (citation omitted). The burden

is on the removing party to show that there is no possibility that the plaintiff will be able to state a cause of action against the resident defendant. See Masepohl v. American Tobacco Co., Inc., 974 F. Supp. 1245, 1250 (D. Minn. 1997). In deciding this issue, the Court may consider the pleadings and supporting affidavits. See Parnas v. General Motors Corp., 879 F. Supp. 91, 92 (E.D. Mo. 1995).

### III. DISCUSSION

Plaintiffs have asserted a number of claims against Bayer and Glaxo (“Defendants”) based in strict liability, negligence, misrepresentation, fraud, and breach of implied and express warranties. (Compl. ¶¶ 24-30, 39-46.) Generally, the claims against Defendants are based on allegations that Defendants manufactured and sold Baycol in a negligent manner; that Defendants failed to adequately test Baycol; that Baycol was unsafe and in an unreasonably dangerous condition when marketed; that Defendants knew Baycol was unsafe; that Defendants failed to adequately warn of Baycol’s risks; and that Defendants made false statements to physicians and the public regarding Baycol’s safety. (Id.)

Plaintiffs also assert negligence claims against their physicians. Specifically, Plaintiffs allege that their physicians were negligent for failing to advise of Baycol’s risks, for failing to prescribe a safer statin when safer and more effective statins were available, and for failing to diagnose “the condition that Baycol was causing in each of these patient Plaintiffs.” (Id. ¶ 31) (emphasis omitted).

Defendants argue that the main thrust of Plaintiffs' complaint is that Defendants misrepresented the safety of Baycol, and failed to warn of the serious risks associated with Baycol when manufacturing and selling the drug. Thus, according to Defendants, Plaintiffs have failed to sufficiently plead either that the physicians proximately caused Plaintiffs' injuries, or that the physicians knew or should have known of Baycol's risks. Having failed to alleged a cause of action against the physicians, Defendants assert that the physicians' joinder in this case was fraudulent. For support, Bayer cites, *inter alia*, In re Rezulin Prod. Liab. Litig., No. 00 Civ. 2843(LAK), 2003 WL 43356 (S.D.N.Y. Jan. 6, 2003).

In the Rezulin MDL, the court found that a non-diverse physician was fraudulently joined. See id. at \*1. However, Rezulin can be distinguished from the instant case because the claims against the physician in Rezulin were different from the claims Bobo and Norris assert against their physicians. In Rezulin, the plaintiff averred that the physician was negligent because he failed to warn the plaintiff of Rezulin's risks, failed to test and monitor the plaintiff's liver function, and failed to recognize that the plaintiff could not tolerate Rezulin. See id. The court found that the thrust of the plaintiff's "myriad" allegations was that the drug manufacturer withheld information regarding Rezulin's risks. See id. Therefore, the court found that the plaintiff's allegations that the physician should have known of the risks associated with Rezulin, and of the subsequent need for liver function monitoring, were merely conclusory. See

id. Moreover, the court found that the plaintiff had not provided any support for his allegation that the physician should have known of the plaintiff's inability to tolerate Rezulin. See id.

In the instant case, however, Plaintiffs do more than allege that their physicians failed to warn them of risks associated with Baycol, or that the physicians could have used a safer statin instead of Baycol. Plaintiffs also allege that their physicians failed to diagnose the symptoms they were suffering as a result of using Baycol, and that this failure was a proximate cause of Plaintiffs' injuries. (Compl. ¶ 31.) Based on these allegations, the Court cannot find that Plaintiffs have failed to allege a state law claim against their treating physicians. Therefore, Plaintiffs' motion to remand is granted.

**IT IS HEREBY ORDERED** that Plaintiffs' Motion to Remand to State Court [Doc. No. 6] is **GRANTED**. This action is hereby remanded to the Circuit Court of Hinds County, Mississippi.

Date: \_\_\_\_\_

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MICHAEL J. DAVIS  
United States District Court

