

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re: BAYCOL PRODUCTS LITIGATION

**MDL No. 1431
(MJD)**

This Document also relates to:

Blakeney et al., v. Bayer AG et al.,

Case No. 03-2931

T. Roe Frazer, II and Patrick D. McMurtray, Frazer & Davidson, P.A. for and on behalf of Plaintiffs.

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

This matter is before the Court upon Plaintiff's motion for remand.

Background

This action involves multiple plaintiffs who allege they each suffered injury as a result of ingesting Baycol, with the exception of Willie Mae Aikens, who has brought suit individually and on behalf of all wrongful death beneficiaries of Della Easley. All plaintiffs are residents of the state of Mississippi and have asserted claims of strict liability, negligence, breach of warranty, fraud and negligent infliction of emotional distress against Defendants Bayer AG, Bayer Corporation and GlaxoSmithKline (the "Seller Defendants"). In addition, Plaintiff Aikens has asserted a claim against Ms. Easley's treating physician, Dr. Lenito Sinay, and the clinic at which Ms. Easley received medical care. Complaint ¶¶ 48-56. Plaintiffs also name as defendants John Does 1-10, who are identified as "entities and/or individuals whose identities are unknown at this time, but whose conduct has contributed and/or proximately caused or contributed to Plaintiff's injuries." *Id.* ¶ 5(h).

Bayer Corporation 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 petitions, Bayer asserted that the non-diverse defendants, Dr. Sinay and the Central Mississippi Family Health Clinic were fraudulently joined, and that the plaintiffs' claims were fraudulently misjoined.

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. In re Business Men's Assurance Co. of America, 992 F.2d 181, 183 (8th Cir. 1983)(citing Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006, 1010 (3rd Cir. 1987) cert. dismissed 484 U.S. 1021 (1988)).

1. Fraudulent Joinder

"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 Indemnity Corporation, 280 F.3d 868, 870 (8th Cir. 2001). 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 or that there has been outright fraud in the pleading of jurisdictional facts. Parnas v. General Motors Corporation, 879 F. Supp. 91, 92 (E.D. Mo. 1995). In deciding this issue, the Court may consider the pleadings and supporting affidavits. Id.

Generally, the claims asserted against the Seller Defendants are based on allegations that these Defendants falsely and deceptively misrepresented material facts concerning Baycol's risks, and that Baycol is defective, unsafe and unreasonably dangerous, and failed to warn of Baycol's

risks. In addition, Plaintiff Aikens alleges that decedent Della Easley was prescribed Baycol by Dr. Sinay on May 6, 1999, and admitted to the hospital on August 20, 2001 where she was diagnosed with significant renal failure, and elevated liver function tests. Id. ¶¶ 49-50. Ms. Easley continued to have health problems and eventually died of a stroke caused by kidney disease. Id. ¶ 51. Plaintiff Aiken alleges that Ms. Easley's physician, Dr. Sinay, negligently failed to adequately test Plaintiff Easley, and to properly diagnose her Baycol-related injuries, and negligently failed to order her to cease taking Baycol. Id. ¶ 54.

It is the Seller Defendants' position that when considering all of the allegations in the complaint, the main thrust of which is that the Seller Defendants misrepresented the safety of Baycol and failed to warn physicians of the serious risks associated with Baycol, Plaintiff Aikens has failed to sufficiently plead that Ms. Easley's physician proximately caused her injuries, or that the physician knew or should have known of Baycol's risks. Having failed to alleged a cause of action against the physician, the Seller Defendants assert his joinder in this case was fraudulent. The Court disagrees.

In the Complaint, Plaintiff Aikens does more than allege that Ms. Easley's physician negligently prescribed Baycol. As demonstrated above, she has specifically alleged that Ms. Easley's physician failed to properly diagnose and treat the symptoms experienced by Plaintiff after ingesting Baycol, and that he failed to properly diagnose and treat the conditions she suffered that were caused by Baycol. Based on these allegations, this Court cannot find that Plaintiff Aikens has failed to allege a state law claim against Dr. Sinay.

2. Fraudulent Misjoinder

Other than Plaintiff Aikens, no other plaintiff named in the instant action has asserted a claim against a non-diverse defendant. The Seller Defendants argue that the claims of these

plaintiffs were fraudulently misjoined with the claims of Plaintiff Aikens, and that such misjoinder cannot defeat diversity jurisdiction.

Fraudulent misjoinder was first addressed by the Eleventh Circuit in Tapscott v. MS Dealer Service Corp., 77 F.3d 1353 (11th Cir. 1996) abrogated on other grounds, Cohen v. Office Depot, Inc., 204 F.3d 1069 (11th Cir. 2000). At issue in Tapscott was whether the district court properly held that plaintiffs had misjoined claims, disregarded the citizenship of the improperly joined plaintiffs, severed and remanded the remainder of the action to state court. The Eleventh Circuit affirmed, finding that “[m]isjoinder may be just as fraudulent as the joinder of a resident defendant against who a plaintiff has no possibility of a cause of action.” Id. at 1360. The court further stated “[w]e do not hold that mere misjoinder is fraudulent joinder, but we do agree with the district court that Appellants’ attempt to join these parties is so egregious as to constitute fraudulent joinder.” Id.

Courts faced with fraudulent misjoinder claims have interpreted Tapscott as not only requiring a finding of misjoinder, but the additional finding of a bad faith attempt to defeat diversity. See eg., Coleman v. Conseco, Inc., 238 F.Supp.2d 804, 817 (S.D. Miss. 2002)(requiring a finding of “collusive joinder”); Ferry v. Bedum America Corporation, 185 F.Supp.2d 1285, 1291 (M.D. Fla. 2002)(requiring a finding that joinder is “egregious”); In re: Diet Drugs, 1999 WL 554584 (E.D. Pa. 1999)(agreeing that mere misjoinder does not warrant a finding of fraudulent joinder). Other courts have refused to apply Tapscott’s egregious standard when considering misjoinder of plaintiffs in the context of remand petitions. In re: Rezulin Products Liability Litigation, 168 F.Supp.2d 136, 147-148 (S.D.N.Y. 2001). In Rezulin, a number of plaintiffs sued in one action for injuries allegedly sustained as a result of ingesting Rezulin. One of the plaintiffs, however, also alleged a claim against a non-diverse home health care provider. The court found

that the home health care provider had not been fraudulently joined. Id. at 144. The court further found that the plaintiffs' claims were misjoined under Fed.R.Civ.P. 20. Id. at 146. The court then declined to apply the Tapscott egregiousness standard to the misjoinder issue before it because:

Arguably a plaintiff's right to choose among defendants and claims – the principal reason for imposing a strict standard of fraudulent joinder to effect removal – is not compromised where claims of co-plaintiffs are severed or dismissed. This is not to say the cost and efficiency benefits to joined plaintiffs are immaterial; they simply do not carry the same weight when balanced against the defendant's right to removal.

Based on its finding that the plaintiffs' claims had been misjoined, and that the claims of one plaintiff destroyed diversity jurisdiction, the court severed that action, and retained jurisdiction over the remaining claims in which complete diversity existed. Id. at 148.

The doctrine of fraudulent misjoinder has not yet been addressed by the Eighth Circuit Court of Appeals. While the relevant case law does not set forth a specific standard to apply to a fraudulent misjoinder claim, under either the egregious standard, or the standard adopted in Rezulin, this Court finds that the claims of Plaintiff Aikens has been fraudulently joined with the other plaintiffs, warranting severance and remand of Plaintiff Aikens's claims only.¹

This Court has previously found that the fact that plaintiffs were residents of the same state, and who alleged claims against Bayer AG, Bayer Corporation and GlaxoSmithKline based on injuries suffered as a result of ingesting Baycol, without more, did not satisfy the requirements of Rule 20. Pretrial Order No. 31 (July 5, 2002).² With respect to this case, Plaintiffs have made

¹This Court is aware that Plaintiffs' motion to remand had been granted by the district court in the Southern District of Mississippi. That order, however, has no effect as it was filed after the action had been transferred by the Judicial Panel on Multidistrict Litigation. In addition, this Court notes that the Mississippi District Court did not address the fraudulent misjoinder argument in its order.

²Plaintiffs moved for reconsideration of PTO 31, which motion was denied by PTO 61. Plaintiffs moved to reconsider PTO 61, to the extent that joinder of plaintiffs claims may be proper in circumstances where in addition to residing in the same state, plaintiffs' claims share other common characteristics. As demonstrated in Pretrial Order No. 88, joinder may be proper where plaintiffs share a number of common characteristics.

no attempt to demonstrate to the Court that joinder of Plaintiff Aikens' claims with the other plaintiffs is proper, in light of PTO 31 and 61. In addition, there is no showing that the plaintiffs other than Plaintiff Aikens has asserted a claim against a non-diverse defendant. It thus appears that these claims have been misjoined, and that such misjoinder should not defeat diversity jurisdiction.

Pursuant to Fed.R.Civ.P. 21, the Court will sever the claims of Plaintiff Aikens and remand the Aikens action to state court. Subsequent to severance, there is complete diversity among the remaining plaintiffs and defendants. As the Court may exercise diversity jurisdiction over the remaining claims, the motion to remand as to these claims must be denied.

Accordingly, IT IS HEREBY ORDERED that Plaintiff Aikens is severed from this action, and remanded to the Circuit Court of the Second Judicial District of Hinds County, Mississippi. Plaintiffs' motion to remand with respect to the remaining plaintiffs is DENIED.

Date: 2003

Michael J. Davis
United States District Court