

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: BAYCOL PRODUCTS LITIGATION

MDL No. 1431
(MJD)

This Document also relates to:

Amended Order

Cindy Dickerson v. Bayer Corporation et al.,
Verlean Toles v. Bayer Corporation et al.,
Curtis Coates v. Bayer Corporation et al.,

Case No. 03-1173
Case No. 03-1174
Case No. 03-1175

Joseph C. Langston and John Fletcher Perry, III, The Langston Law Firm and J.P. Sawyer, Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. 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.

Christy Jones, Joshua J. Wiener, and Chad R. Hutchinson, Butler Snow O'Mara Stevens and Cannada for and on behalf of GlaxoSmithKline.

This matter is before the Court upon Plaintiffs motions for remand.

Background

These actions involves hundreds of plaintiffs who allege they each suffered injury as a result of ingesting Baycol. These plaintiffs are residents of the various states and have asserted claims of strict liability, negligence, breach of warranty and fraud against Defendants Bayer AG, Bayer Corporation and GlaxoSmithKline (the "Seller Defendants"). In addition, seven plaintiffs, each residents of Mississippi, have asserted a claim of medical negligence against their treating physicians, who are also residents of Mississippi.

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 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 determining the propriety of remand, the Court must review plaintiffs' pleading as it existed at the time of removal. Pullman Co. v. Jenkins, 305 U.S. 534, 537 (1939).

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 that the Seller Defendants failed to warn of Baycol's risks. With respect to the medical negligence claims against the physicians, Plaintiffs allege:

Said Defendants knew, or should have known, of the dangerous side effects of this medication, and their prescribing said medication in light of such knowledge presents a deviation from the standard of care generally exercised by physicians under the like or similar circumstances and rises to the level of medical negligence.

Dickerson Complaint, ¶ 54, Toles Complaint, ¶ 63, Coates Complaint, ¶ 57.

When considering all of the allegations in the above Complaints, the main thrust of which is that the Seller Defendants misrepresented the safety of Baycol and failed to warn of the serious risks associated with Baycol, the Court finds that Plaintiffs have failed to sufficiently plead that the named treating physicians proximately caused Plaintiffs' injuries, or that the physician knew or should have known of Baycol's risks. Having failed to alleged a cause of action against the physicians, the Court finds that the non-diverse physicians were fraudulently joined, and their citizenship will not be taken into account in determining diversity.

2. Fraudulent Misjoinder

In addition, there are two Plaintiffs, Phyllis Thureau, joined in the Coates action and Connie Brown, joined in the Toles action, that are residents of Pennsylvania. As Bayer Corporation has its principal place of business in Pennsylvania, Plaintiffs argue that diversity is destroyed.

The Seller Defendants argue that the claims of these plaintiffs were fraudulently misjoined with the remaining Plaintiffs and that such misjoinder cannot defeat diversity jurisdiction. In this Court's previous opinion, Blakeney v. Bayer Corp. et al., Civ. No. 03-2931 (D. Minn. August 29, 2003), the Court held that misjoined plaintiffs will not defeat diversity jurisdiction. Rather, the remedy is severing the claims of the non-diverse plaintiff and defendant.

In the above cases, the plaintiffs are residents of different states, were prescribed Baycol at different times and in different amounts by different physicians, and suffered different injuries. The fact that they each allege the same claims against the Seller Defendants is not sufficient to establish joinder under Fed. R. Civ. P. 20. As the claims of Phyllis Thureau and Connie Brown have been fraudulently misjoined, their claims will be severed, and remanded to state court. As there is diversity among the remaining plaintiffs and defendants, this Court has subject matter jurisdiction over their claims.

Accordingly, IT IS HEREBY ORDERED that Plaintiff Phyllis Thureau is severed from the Coates action, Case No. 03-1175 and remanded to the Circuit Court of Humphreys County, Mississippi and that Connie Brown is severed from the Toles action, Case No. 03-1174, and remanded to the Circuit Court of Marshall County, Mississippi. Plaintiffs' motions to remand with respect to the remaining plaintiffs are DENIED.

Date: 2003

_____/s/_____
Michael J. Davis
United States District Court