

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re: BAYCOL PRODUCTS LITIGATION

**MDL No. 1431
(MJD)**

This Document also relates to:

James Fink and Patricia Fink v. Bayer Corporation et al., Case No. 02-436

Gayle M. Blatt, Herman, Mathis, Casey, Kitchens & Gerel for and on behalf of Plaintiffs.

Peter Sipkins, Dorsey & Whitney, Philip S. Beck, Adam L. Hoeflich and Tarek Ismail, Barlit Beck Herman Palenchar & Scott, Susan A. Weber and Sara J. Gourley, Sidley Austin Brown & Wood, Thomas P. Hanrahan and Nicholas P. Miller, Sidley Austin Brown & Wood LLP, Gene S. Schaerr, Sidley Austin Brown & Wood LLP, and Richard Dandrea, Eckert Seamens Cherin & Mellott, LLC, for and on behalf of Bayer Corporation.

This matter is before the Court upon Plaintiff's motion to amend the Complaint and for remand. Bayer Corporation ("Bayer") opposes the motion, arguing that this Court has diversity jurisdiction over Plaintiff's claims.

Background

Plaintiffs originally filed suit against Bayer AG and Bayer Corporation (collectively referred to as "Bayer") in California state court on November 1, 2001. Bayer timely removed this action to federal court, and in March 2002, the action was transferred to the District of Minnesota by the Judicial Panel on Multidistrict Litigation. On August 10, 2002, Plaintiffs filed a separate action in California state court, alleging claims of professional negligence against Plaintiff James Fink's treating physician, Dr. Paul Speckart. Now, over ten months later, Plaintiffs seek to amend the Complaint in this case to add claims against Dr. Speckart. Defendants oppose the motion, arguing the amendment is an attempt is for the sole purpose of defeating diversity jurisdiction.

Standard For Remand

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 a 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)).

When a plaintiff seeks to amend the complaint by adding a non-diverse defendant, the court has discretion to either permit or deny such joinder. See, 28 U.S.C. § 1447(e)¹. Typically, a motion to amend a complaint is governed by Rule 15(a) of the Federal Rules of Civil Procedure, which provides that leave to amend “should be freely given when justice so requires.” However, when amending the complaint will defeat diversity jurisdiction, the court instead should take the following into account: 1) the extent to which the purpose of the amendment is to defeat federal jurisdiction; 2) whether the plaintiff has been dilatory in seeking the amendment; 3) whether plaintiff will be significantly injured if the amendment is not allowed; and 4) any other factor bearing on the equities. Hensgens v. Deere & Company, 833 F.2d 1179, 1182 (5th Cir. 1987).

Plaintiffs argue that they have not been dilatory in seeking the amendment, arguing that it wasn't until certain medical records were reviewed that it became evident that an action existed against Dr. Speckart. While this explanation applies to the delay in bringing the separate action against Dr. Speckart in California state court, it does not explain why Plaintiffs waited almost

¹The statute provides: “If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State courts.” 28 U.S.C. § 1447(e).

another year to move to add these claims to the instant action. Based on these circumstances, the Court finds that Plaintiffs have been dilatory in seeking amendment in this action, and that such delay supports a finding that the amendment was filed for the purpose of defeating diversity jurisdiction.

Denial of the amendment in this case will not prejudice Plaintiffs, as an action is already pending against Dr. Speckart in state court. Plaintiffs assert they will be prejudiced if forced to try the two cases in separate forums, but such consideration did not prevent Plaintiffs from choosing, in the first instance, to file a separate action in state court with the knowledge that their related action against Bayer was pending in federal court.

IT IS HEREBY ORDERED that Plaintiffs' Motion to Amend and for Remand is DENIED.

Date:

Michael J. Davis
United States District Court