

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re: BAYCOL PRODUCTS LITIGATION

**MDL No. 1431
(MJD)**

This Document also relates to:

Harold Gene Linzay v. Bayer A.G. et al.,
B.J. and Betty Dufour v. Bayer A.G. et al.,

Case No. 03-873
Case No. 03-874

Dawn Barrios and Bruce Kingsdorf, Barrios, Kingsdorf & Casteix, Matthew E. Lundy, Lundy & Davis, LLP for and on behalf of Plaintiffs.

Mary L. Meyer, John F. Olinde and Charles D. Marshall, Chaffe, McCall, Phillips, Toler & Sarper, LLP for and on behalf of Bayer Corporation.

E. Paige Sensenbrenner and Elisia E. Shofstahl, Adams and Reese, LLP for and on behalf of GlaxoSmithKline.

Deborah D. Kuchler and Matthew A. Ehrlicher, Abbott, Simses & Kuchler for and on behalf of Professional Detailing, Inc.

This matter is before the Court upon Plaintiffs' motions to remand.

Background

1. Dufour Plaintiffs

The Dufour Plaintiffs originally filed this action in the Third Judicial District Court for the Parish of Lincoln, Louisiana on August 8, 2002. In their Complaint, Plaintiffs assert claims against Bayer A.G., Bayer Corporation ("Bayer"), GlaxoSmithKline, Professional Detailing, Inc. and Dr. George Smith for injuries suffered by B.J. Dufour allegedly as a result of ingesting Baycol.

Under Louisiana law, prior to bringing a medical malpractice suit against a physician, a plaintiff must present such claim to the Commissioner of Administration of the Louisiana Medical

Review Panel, and the panel must issue a decision. La. R. S. 40:1299.47(A). It is clear that at the time the instant action was filed, plaintiffs had not yet presented their claim to the Louisiana Medical Review Panel.

Defendants removed the case to federal court, asserting that the only non-diverse defendant, Dr. Smith, was fraudulently joined, thereby establishing diversity jurisdiction. Plaintiffs move to remand, arguing that they have asserted a viable claim against Dr. Smith.

2. Linzay

Plaintiff Linzay originally filed this action in the Fourth Judicial District Court for the Parish of Morehouse, Louisiana on August 10, 2002. In his Complaint, Plaintiff also asserts claims against Bayer A.G., Bayer Corporation (“Bayer”), GlaxoSmithKline, Professional Detailing, Inc. and his treating physician, Dr. Robert Lyon, for injuries suffered by Plaintiff allegedly as a result of ingesting Baycol. Like the Dufour Plaintiffs, Plaintiff Linzay had not commenced an administrative action with the Louisiana Medical Review Panel prior to bringing suit. Defendants removed this action to federal court as well, on the basis that Dr. Lyon was fraudulently joined.

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 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)).

Fraudulently joined defendants will not defeat diversity jurisdiction. Ritchey v. Upjohn

Drug Company, 139 F.3d 1313, 1318 (9th Cir. 1998). “Fraudulent joinder exists if, on the face of plaintiff’s state court pleadings, no cause of action lies against the resident defendant.” Anderson v. Home Insurance Company, 724 F.2d 82, 84 (8th Cir. 1993). Dismissal of fraudulently joined non-diverse defendants is appropriate. Wiles v. Capitol Indemnity Corp., 280 F.3d 868, 871 (8th Cir. 2002). 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).

Analysis

At the time of removal, Plaintiffs admittedly had not met the state requirements for bringing a malpractice action against both Dr. Smith and Dr. Lyon. Plaintiffs nonetheless argue that the named physicians were not fraudulently joined, because although the claims against the physicians are premature, a viable claim will exist once the administrative reviews are complete. In support, Plaintiffs cite to a number of decisions from the Districts of Louisiana which have held that a prematurity defense to a medical malpractice claim does not establish fraudulent joinder. See eg., Johnson v. Scimed, 92 F.Supp.2d 587 (W.D. La. 2002); Doe v. Cutter, 774 F. Supp. 1001 (E.D. La. 1991); but see, Carter v. Warner-Lambert, 2001 U.S. Dist. LEXIS 23993 at *5 (W.D. La. June 29, 2001)(remand denied as plaintiff had failed to present claim to medial review panel); Boxie v. Gate Pharmaceuticals, 1999 U.S. Dist. LEXIS 23150 at *8 (W.D. La 1999).

This Court is not bound by the decisions rendered in the Louisiana District Courts. The law of the Eighth Circuit applicable to claims of fraudulent joinder requires the Court to analyze the state court complaint at the time of removal. In this case, there is no dispute that at the time of removal, proceedings before the Louisiana Medical Review Panel had arguably just commenced. Thus, it is clear that at the time of removal, defendants’ exception of prematurity would have to be sustained, and the cases against the physicians dismissed. Dunn v. Bryant, 701

So.2d 696, 699 (La. Ct. App. 1st Cir. 1997).

Accordingly, the requirements of diversity jurisdiction are met and remand is unwarranted in the Dufour and Linzay actions.

IT IS HEREBY ORDERED that Plaintiffs' Motions to Remand are DENIED.

Date:

Michael J. Davis
United States District Court