UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: BAYCOL PRODUCTS LITIGATION	MDL No. 1431 (MJD)

This Document Relates To:

Phylis Olkein v. Bayer Corporation et al.,	Civil No. 02-3900 (MJD)
Irene Moore v. Bayer Corporation et al.,	Civil No. 02-3901 (MJD)

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This matter is before the Court upon Plaintiffs' motions to remand. Bayer Corporation ("Bayer") opposes the motions on the basis that Plaintiffs have fraudulently joined Longs Drug Stores, Inc. ("Longs Drug") in an effort to defeat diversity jurisdiction.

Background

Plaintiff Phylis Olkein filed her Complaint in California state court on June 26, 2002. In her Complaint, Plaintiff alleges that she suffered from serious personal injury and related damages after ingesting Baycol. First Amended Complaint, ¶ 1. She further alleges that Defendants falsely and deceptively misrepresented or omitted material facts regarding the frequency and seriousness of adverse health effects reported after Baycol ingestion. Id. Despite knowing of the dangers of Baycol, Plaintiff alleges that Defendants continued to promote the drug, and failed to warn Plaintiff of the risks and

dangers associated with Baycol. Id. "Defendants intended to deceive the public, the FDA and medical professionals into believing that Baycol was safe when they knew, or should have known, it was not." Id.

Plaintiff alleges that in August 5, 1999, she was prescribed Baycol for treatment of high cholesterol. Id. ¶ 44. She filled this prescription at Longs Drug, and thereafter experienced dark urine, back tenderness and pain, difficulty walking difficulties and muscle weakness. Id. ¶¶ 45 and 46. In September or October 2000, Plaintiff alleges that Longs Drug filled a prescription for Plaintiff for gemfibrozil, despite warnings that reports of rhabdomyolysis, with associated renal failure, had been reported and that most of such cases involved concomitant gemfibrozil, resulting in further injury and damages. Id. ¶¶ 27 and 47. In addition to asserting claims against Bayer and GlaxoSmithKline, Plaintiff has asserted the following claims against Longs Drug: negligent misrepresentation; negligence; negligence per se; and negligent failure to warn.

Plaintiff Irene Moore also brought an action in California state court, alleging that she suffered serious personal injury and damages after ingesting Baycol. First Amended Complaint, ¶ 1. She alleges that she was prescribed Baycol on July 20, 2000, which prescription was filled by Longs Drug. Id. ¶¶ 44 and 45. On or about August 19, 2000, Plaintiff alleges she was rushed to the emergency room and diagnosed with severe rhabdomyolysis, with acute renal failure. Id. ¶ 47. In addition to asserting claims against Bayer and GlaxoSmithKline, Plaintiff Moore has also asserted the following claims against Longs Drug: negligent misrepresentation; negligence; negligence per se;

and negligent failure to warn.

Bayer Corporation removed both actions to the United States District Court, Northern District of California. In its removal petitions, Bayer asserted that Plaintiffs failed to state a cause of action against Longs Drug, and that the court therefore had jurisdiction over Plaintiffs' Complaints based on diversity of citizenship under 28 U.S.C. § 1332(a).

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).

Bayer argues that, pursuant to California law, Plaintiffs have failed to state a cause of action against Longs Drug. Bayer asserts that each of Plaintiffs' claims against

Longs Drug is based on the contention that Longs Drug knew or should have known of the alleged risks associated with Baycol, and that Longs Drug had a duty to warn Plaintiffs of such risks. Bayer argues that both Plaintiffs have failed to allege sufficient facts supporting the contention that Longs Drug knew or should have known of Baycol's risks.

California does not recognize a cause of action against a retail pharmacy based on strict liability. Murphy v. E.R. Squibb & Sons, Inc., 40 Cal.3rd 672, 675-681 (1985). Nor has it explicitly imposed a duty upon retail pharmacists to warn of a prescription drugs intrinsic risks. In Murphy, the court discussed the role of a pharmacist in California:

> A pharmacist is required not only to assure that the drug prescribed is properly selected, measured and labeled but, according to the Board, he must be alert to errors in prescriptions written by doctors, and contact the doctor in case of doubts or questions regarding the drug prescribed. In addition, the pharmacist *may* discuss with the patient the proper use of the drug and the potential side effects, and must be aware of the possibility of harmful interaction between various medications which the pharmacist knows the patient is using.

Id. at 678 (emphasis added). As the emphasized language demonstrates, a pharmacist may discuss potential side effects with customers, but is not required to do so. A pharmacist is, however, required to be aware of harmful interactions with other drugs the pharmacist knows the patient is taking. It would follow that when a pharmacist has knowledge that a patient has been prescribed drugs whose interaction may cause injury, the pharmacist must act on such knowledge. Thus, Murphy can be interpreted as imposing a duty to warn of dangerous drug interactions. See, Hooper v. Thrifty Payless, Inc., 2002 WL 31820207 at *1 (Cal. App. Dec. 17, 2002)(assuming, for purposes of this

opinion, that a pharmacist has a common law duty to warn).

Bayer also argues that Longs Drug cannot be held liable under negligence theories because California recognizes the "learned intermediary doctrine." This doctrine provides that the duty to warn runs to the physician, not the patient. Carlin v. Superior Court (Upjohn), 13 Cal. 4th 1104, 1116 (1996). "Thus, a pharmaceutical manufacturer may not be required to provide warning of a risk known to the medical community." Id. Although the California courts have not yet applied "learned intermediary doctrine" in a negligence action brought against a retail pharmacist, Bayer argues that a retail pharmacist should not be held to a greater duty than a pharmaceutical manufacturer. Others jurisdictions have limited a retail pharmacist's liability by application of the learned intermediary doctrine, but have done so when the claim involves a prescription drugs' intrinsic dangers. See In re: Rezulin Products Liability Litigation, 133 F.Supp.2d 272, 289 (S.D.N.Y. 2001)(listing cases). When the claim involves extrinsic dangers, such as interactions among drugs the pharmacist knows the patient is taking at the same time, courts have recognized that a duty to warn may still exist. Id. (noting that learned intermediary doctrine has no application to claim of failing to warn of extrinsic dangers, such as drug interactions).

In the Olkein case, Plaintiff alleged that based on the label issued in January 1999, Longs Drug knew or should have known that Baycol and gemfibrozil should not be prescribed concomitantly. The 1999 label reads:

> The following events have been reported since market introduction. While these events were temporally associated with the use of Baycol, a causal relationship to the use of Baycol cannot be readily determined due to the spontaneous nature of

> reporting of medical events, and the lack of controls; hepatitis [i.e. liver inflammation], myositis [i.e. muscle inflammation], rhabdomyolysis [i.e. the destruction of muscle cells], some with associated renal failure (most cases involved concomitant gemfibrozil), . . .

Complaint ¶ 27.

Bayer argues that knowledge of the warnings contained in the 1999 label are not sufficient to put Longs Drug on notice that concomitant use of Baycol and gemfibrozil is contraindicated, especially in light of Plaintiffs' other allegations that the 1999 label was inadequate to warn of Baycol's dangers. The Court disagrees. While Plaintiff alleged the label is inadequate, the label itself provides that most cases of rhabdo with acute renal failure occurred with concomitant use of Baycol and gemfibrozil. These allegations are sufficient to state a cause of action based on Baycol's extrinsic dangers. The Court thus finds that Bayer has not met its burden of showing that Plaintiff Olkein has failed to state a cause of action against Longs Drug. Remand is thus warranted as there is a lack of complete diversity amongst the parties.

The same is not true regarding the Moore case. The claims asserted against Longs Drug in the Moore First Amended Complaint involve only the intrinsic dangers of Baycol. There is no allegation that Plaintiff Moore took Baycol concomitant with gemfibrozil. As California has limited a pharmaceutical manufacturer's duty to warn based on the learned intermediary doctrine, it is likely that California will similarly limit a retail pharmacist's duty to warn of a drug's intrinsic dangers.

But even if California did recognize such a claim, the Court finds that the allegations included in Plaintiff Moore's First Amended Complaint do not sufficiently

state a cause of action against Longs Drug. The main thrust of this action is that Defendants mislead the FDA , the public and medical professionals into believing that Baycol was safe, when they knew or should have known that it was not. First Amended Complaint ¶ 1. Although Plaintiff alleges that "Defendants" knew of Baycol's dangers, and misrepresented or failed to disclose such dangers, the Complaint includes no allegations specific to Longs Drug, showing that Longs Drug knew or should have known of Baycol's dangers. Rather, as set forth in the Complaint, the only information made available to Longs Drug at the time it filled Plaintiff's prescription is the 1999 warning label. Yet, as alleged by Plaintiff, this label was misleading because the language used in the label minimized the dangers of Baycol. Complaint ¶ 27. Plaintiff thus cannot show that Longs Drug knew or should have known of Baycol's intrinsic dangers based on a label that misrepresented or minimized the risks of Baycol.

Plaintiff argues that in addition to the January 1999 label, Longs Drug also received adverse reports, thus putting it on notice of the risks associated with Baycol. In referring to the Complaint, however, Plaintiff alleged:

> During all of this time, defendants continued to receive notice of adverse events associated with Baycol, both directly from doctors and the FDA. These adverse events occurred more frequently with dose levels of 0.4 mg and above. Since both BAYER CORPORATION and BAYER AG share officers and directors, and since BAYER CORPORATION was co-marketing the drug with GLAXOSMITHKLINE, defendants were aware of the growing number of adverse events reported concerning the use of Baycol.

Id. ¶ 31. A reasonable reading of this paragraph, however, leads to the conclusion that only Bayer Corp., Bayer AG and GlaxoSmithKline were the parties that received or were made aware of adverse events.

Finally, Plaintiff asserts that as the complaint includes the allegation that "Defendants, and each of them, knew or should have known that Baycol was and is a dangerous defective product. . ." Id. ¶ 100. Conclusory allegations, however, will not defeat a finding of fraudulent joinder. See eg. In re: Rezulin Products Liability Litigation, 2003 WL 43356 at *1 (S.D.N.Y. Jan. 6, 2003)(citing Strickland v. Brown Morris Pharmacy Inc., 1996 WL 537736 at *2 (E.D. La. Sept. 20, 1996). See also, Silver v. H & R Block, Inc., 105 F.3d 394 (8th Cir. 1997)(conclusory allegations not sufficient to withstand motion to dismiss).

Based on the above, the Court finds that Bayer has met its burden of showing that Longs Drug was fraudulently joined in the Moore action, as Plaintiff has failed to state a cause of action against Longs Drug.

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff Olkein's Motion for Remand is GRANTED. The above-captioned case Olkein v. Bayer Corporation et al., Civil No. 02-3900 (MJD) is hereby remanded to the Superior Court of the State of California, Contra Costa County.

2. Plaintiff Moore's Motion for Remand is DENIED. Longs Drug Stores, Inc. is dismissed from Civil No. 02-3901 (MJD).

Date:

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Michael J. Davis
United States District Court