UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: BAYCOL PRODUCTS LITIGATION	MDL No. 1431 (MJD)
This Document Relates To:	
Patterson et al. v. Bayer Corporation et al.,	Civil No. 03-2204 (MJD)

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This matter is before the Court upon Plaintiffs' motion to remand. Bayer Corporation ("Bayer") opposes the motion on the basis that Plaintiffs have fraudulently joined CVS Pharmacy, Inc. and John Swartz, individually and as an employee of CVS Pharmacy.

Also before the Court is CVS Pharmacy's and John Swartz's motion to dismiss.

Background

Plaintiffs, residents of South Carolina, originally filed this action in South Carolina state court. In their Complaint, Plaintiffs allege that they are 'victims of the Defendants' decision to manufacture, market, promote, design, and/or distribute a dangerously defective drug known as Baycol." Amended Complaint, ¶ 14. Baycol is a member of a class of drugs referred to as statins, which act to lower cholesterol. Id. As a result of

ingesting Baycol, Plaintiffs allege they suffered injuries in an amount "greatly in excess of this Court's minimal jurisdictional amount." Id. ¶ 15.

Plaintiffs have asserted claims of strict liability, negligence, misrepresentation and fraud, breach of warranty and gross negligence against Bayer AG, Bayer Corporation and SmithKlineBeecham d/b/a GlaxoSmithKline (hereinafter collectively referred to as the "Baycol Defendants"). In support of these claims, Plaintiffs allege that the Baycol Defendants marketed and sold Baycol with inadequate warnings to Plaintiffs and their physicians, and that they knew or should have known of Baycol's serious risks, yet they continued to aggressively promote Baycol. Id. ¶ 26. Plaintiffs also allege that Baycol's foreseeable risks exceeded its benefits, rendering Baycol defective in design and formulation. Id. ¶ 27. Plaintiffs further allege that the Baycol Defendants made misrepresentations to physicians, the public, and Plaintiffs' insurance company about the safety and efficacy of Baycol and that the physicians and their patients, including Plaintiffs, and the insurance company relied on these misrepresentations and were harmed as a result. Id. ¶ 36.

Plaintiffs have also asserted a claim of negligence against CVS Pharmacy and one of its pharmacists, John Swartz (hereinafter referred to as the "Pharmacy Defendants".) The basis for this claim is that Plaintiff Harry Green received his Baycol prescription from the Pharmacy Defendants, and that the Pharmacy Defendants negligently failed to adequately warn Plaintiff Green of the risks associated with Baycol. Id. ¶ 31. Plaintiffs further allege that the Pharmacy Defendants could have dispensed a more safer statin, but did not do so. Id.

Remand 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).

Analysis

Plaintiffs argue that remand is appropriate as they have asserted a viable claim against the Pharmacy Defendants. Plaintiffs allege that the Pharmacy Defendants failed to warn of Baycol's potential risks and that they failed to substitute a safer statin for Baycol in violation of the South Carolina Pharmacy Practice Act ("SCPPA"). S.C. Code Ann. § 40-43-10 et seq. Bayer responds that South Carolina law does not recognize a cause of action against a pharmacist for failure to warn. In addition, in support of its motion to dismiss, the Pharmacy Defendants argue that South Carolina would adopt the

learned intermediary doctrine and extend it to pharmacies to limit liability of a pharmacy that filled an otherwise valid prescription.

The learned intermediary doctrine recognizes that a physician is in the "best position to understand the patient's needs and assess the risks and benefits of a particular course of treatment." Brooks v. Medtronic, Inc., 750 F.2d 1227, 1231 (4th Cir. 1984). Based on this doctrine, many jurisdictions have held that a manufacturer of a prescription drug has a duty to warn only physicians or other medical personnel permitted to prescribe drugs of any risks or contraindications associated with the drug. Id. (citing cases). Although South Carolina has not explicitly adopted the learned intermediary doctrine, the Fourth Circuit Court of Appeals has determined that South Carolina would do so. Id.; Odom v. G.D. Searle & Co., 979 F.2d 1001, 1003 (4th Cir. 1992)(same); Jones v. Danek Medical, Inc., 1999 WL 1133272 * 7 (D. S.C. 1999)(same).

In Bragg v. Hi-Ranger, Inc., 462 S.E.2d 321 (S.C. Ct. App. 1995), the South Carolina Court of Appeals noted that South Carolina did recognize the learned intermediary doctrine with respect to products that possess inherent dangers or risks:

> under South Carolina law, a manufacturer has no duty to warn of potential risks or dangers inherent in a product if the product is distributed to what we call a learned intermediary or distributed to a sophisticated user who might be in a position to understand and assess the risks involved, and to inform the ultimate user of the risks, and to, thereby, warn the ultimate user of any alleged inherent dangers involved in the product. Simply stated, the sophisticated user defense is permitted in cases involving an employer who was aware of the inherent dangers of a product which the, the employer purchased for use in his business. Such an employer has a duty to warn his employees of the dangers of the product.

Id., at 322-323. Based on Bragg, supra and Brooks, supra this Court similarly finds that

South Carolina would apply the learned intermediary doctrine with prescription drugs.

A number of jurisdictions have also extended the learned intermediary doctrine to pharmacies, where the conduct of the pharmacy is limited to filling a prescription, but the claim is based on failure to warn of risks. See eg. In re Diet Drugs Liability Litigation, 220 F.Supp.2d 414 (E.D.Pa. 2002); In re: Rezulin Products Liability Litigation, 133 F.Supp.2d 272, 289 (S.D.N.Y. 2001)(listing cases); Schaerr v. Stewarts Plaza Pharmacy, Inc., 2003 WL 22387568 (Utah 2003); Moore v. Memorial Hosp. of Gulfport & Winn Dixie Louisiana, Inc., 825 So.2d 658, 663-65 (Miss. 2002); Cottam v. CVS Pharmacy, 764 N.E.2d 814 (Mass. 2002); Nichols v. Central Merchandise, Inc., 817 P.2d 1131 (Kan. Ct. App. 1991); Kirk v. Michael Reese Hospital & Medical Ctr, 513 N.E.2d 387, 395 (Ill. 1987) cert. denied 485 U.S. 905 (1988); McKee v. Amercian Home Products Corp., 782 P.2d 1045 (Wash. 1989); Morgan v. Wal-Mart Stores, Inc., 30 S.W.3d 455, 675-681 (1985).

Although South Carolina has not yet addressed whether the learned intermediary doctrine would limit liability against a pharmacy for failing to warn of a prescription drugs risks, this Court finds that South Carolina would likely adopt the reasoning of the courts that have extended the doctrine to pharmacies.

Plaintiffs nonetheless argue that the SCPPA provides a basis for their claim that the Pharmacy Defendants were negligent in failing to warn of Baycol's risks. Bayer responds that the SCPPA does not provide for a private right of action against a pharmacy for failure to warn of risks associated with a prescription drug. In support, Bayer cites to Evans v. Rite Aid Corporation, 478 S.E.2d 846 (S.C. 1996).

In Evans, the plaintiff asserted that pursuant to the SCPPA, a pharmacist owes a customer a duty of confidentiality. Alleging that the pharmacy defendant breached that duty, the plaintiff brought a negligence claim against the pharmacist. In addressing this claim, the court held "[t]he provisions in S.C. Code Ann. § 40-43-10 et seq. regulate the licensing and practice of pharmacists; however, these provisions do not set forth, explicitly or implicitly, a duty of confidentiality." Id. at 847. The court did, however, find that a claim could be brought against a pharmacist for professional negligence, as "pharmacists do have a duty of care to conform to the generally recognized and accepted practices in their profession." Id. at 849.

In this case, Plaintiffs allege that the Pharmacy Defendants, while properly filling a valid prescription, negligently failed to warn of the drugs risks. Plaintiffs further allege that the Pharmacy Defendants should have substituted a safer statin when presented with a prescription for Baycol. Plaintiffs have not, however, presented any authority that such conduct is not in conformity to the generally recognized and accepted practices of the pharmacy profession in South Carolina. Instead, Plaintiffs argue that many jurisdictions have moved away from a rigid application of the learned intermediary doctrine and have recognized that a duty to warn may arise in certain situations, such as failing to warn of contraindications, or liability based on the voluntary undertaking doctrine. Plaintiffs thus argue that whether the Pharmacy Defendants breached a duty should be left to the trier of fact.

This Court disagrees. First, this case does not involve allegations that the plaintiffs were taking drugs contraindicated with Baycol and that the pharmacist had

specific knowledge of such fact, or that the pharmacist voluntarily undertook the duty to warn of Baycol's risks. Second, as Defendants have pointed out, it is not a generally accepted practice in South Carolina for a pharmacy to alter a prescription, except to substitute a generic equivalent for a prescribed drug when such substitution is authorized by the prescribing practitioner. S.C. Code Ann. § 40-43-10(H)(6)(2002). There is no evidence, however, that a substitute generic equivalent existed for Baycol at the time the prescription was filled.

Based on the above, the Court finds that based on the specific allegations contained in the Amended Complaint, Bayer has met its burden of showing that the Pharmacy Defendants were fraudulently joined in this action. Further, the Court finds that Plaintiffs have failed to state a cause of action against the Pharmacy Defendants.

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiffs' Motion for Remand is DENIED.

2. The Pharmacy Defendants' Motion to Dismiss is GRANTED. CVS Pharmacy and John Swartz are dismissed.

Date:

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Michael J. Davis
United States District Court