

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: BAYCOL PRODUCTS LITIGATION

MDL No. 1431
(MJD)

This Document also relates to:

Betty Jean Pinkerman et al. v. Bayer Corporation et al.
Fran Artall et al. v. Bayer Corp. et al.

Case No. 02-876
Case No. 02-556

David M. Peterson, Mitchell L. Burgess, M. Tony Patton and Jason L. Bush, Peterson & Associates, P.C. and Patrick J. Mulligan, The Law Offices of Patrick J. Mulligan for and on behalf of the Pinkerman Plaintiffs.

Patrick J. Mulligan, The Law Offices of Patrick J. Mulligan P.C., and David M. Peterson, Mitchell L. Burgess and M. Tony Patton, Peterson & Associates, P.C. for and on behalf of the Artall Plaintiffs.

Bradley Honnold, Leanne DeShong and Kimberly L. Collins, Shook, Hardy & Bacon, L.L.P. and Deborah A. Newman, Phelps Dunbar LLP for and on behalf of Bayer Corporation.

The above actions, although filed in different state jurisdictions, are virtually identical. Both are putative nationwide class actions seeking to represent a class of persons who purchased Baycol, and “ who were deprived of the benefit of the product they purchased, thereby suffering economic loss.” Pinkerman Petition ¶ 1; Artall Petition ¶ 1. Excluded from the class are “[a]ny officer, director or the immediate family of any officer or director of Defendants; Plaintiffs do not at this time claim personal injuries, nor do they seek to represent a class of personal injury claimants. Plaintiffs seek damages for economic losses on behalf of themselves and those similarly situated.” Pinkerman at ¶ 16(a); Artall at ¶ 14(a). Plaintiffs reserved the right, however, to file individual claims

for personal injuries in a separate suit. Pinkerman, at ¶ 18; Artall, at ¶ 15. Plaintiffs also claimed that “[e]ach Plaintiff stipulates that the total amount in controversy (i.e. total amount of damages, including but not limited to compensatory and punitive damages) as to each individual plaintiff is less than the sum or value of Seventy-Five Thousand Dollars (\$75,000), exclusive of interest and costs. Pinkerman at ¶ 17; Artall, at ¶ 16.

In the Pinkerman Petition, Plaintiffs seek relief pursuant to the following claims: violation of the Missouri Merchandising Practices Act, breach of contract, negligence and negligent misrepresentation, breach of implied warranty, unjust enrichment and restitution, violation of the Consumer Protection Act, punitive damages and attorneys fees. For each claim, Plaintiffs seek compensatory damages and all other relief as to which they may be entitled, including but not limited to costs of Baycol, incidental damages, consequential damages, pre-judgment and post-judgment interest, attorney’s fees and costs. Plaintiffs also seek an award of punitive damages. Pinkerman at ¶ 68-69. In the Artall Petition, Plaintiffs allege claims for breach of contract, negligence and negligent misrepresentation, breach of implied warranty, unjust enrichment and restitution, violation of the Texas Deceptive Trade Practices - Consumer Protection Act. For each of these claims, the Artall Plaintiffs also seek compensatory damages and all other relief as to which they may be entitled, including but not limited to costs of Baycol, incidental damages, consequential damages, pre-judgment and post-judgment interest, attorney’s fees and costs. The Artall Plaintiffs also seek an award of punitive damages. Artall at ¶ 65-66.

Bayer Corporation removed these actions to federal court asserting jurisdiction pursuant to 28 U.S.C. § 1332. Specifically, Bayer asserted that the parties were diverse, and that the amount in controversy for both cases exceeds \$75,000 per plaintiff.

Plaintiffs now move the Court to remand their respective actions to state court.

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. Amount in Controversy

The Court begins its analysis with the principle that the amount claimed by Plaintiffs ordinarily controls in determining whether jurisdiction lies in federal court. Zunamon v. Brown, 418 F.2d 883, 885 (8th Cir. 1969)(citing St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-289 (1938)). Nonetheless, “the plaintiffs allegations of requisite jurisdictional amount are not necessarily dispositive of the issue” Id.

Plaintiffs argue that they are entitled to remand because Bayer cannot meet its burden of establishing that the amount in controversy meets or exceeds the requisite jurisdictional amount. Specifically, Plaintiffs assert they are seeking only economic

damages, and have included a stipulation in their Petitions that the amount in controversy does not exceed \$75,000. Plaintiffs argue that many courts have recognized that the existence of such a stipulation renders removal improper, citing for example, Gramc v. Millar Elevator Company/Schindler Enterprises, 3 F. Supp.2d 1082 (E.D. Mo. 1998) in which the court held that a stipulation to limit damages is not a prerequisite to remand “although the plaintiff could choose to make such a stipulation.” Id. at 1084. Gramc is not controlling authority in this District, nor does it support remand in either of these cases.

In both the Pinkerman and Artall Petitions, Plaintiffs have included an allegation that they are not seeking damages in excess of the jurisdictional amount. An allegation in a pleading, however, is not binding. The applicable rules of civil procedure liberally allow the amendment of pleadings. What is required to prevent removal is a binding stipulation or affidavit, separate from the pleadings, and signed by the plaintiffs agreeing to be so bound. See eg. De Aguilar, 47 F.3d at 1412; In re Shell Oil Co., 970 F.2d 355, 356 (7th Cir. 1992); White v. Bank of America, 2001 WL 804517 (N.D. Tex. 2001)(to prevent removal, plaintiff must file with the complaint a binding stipulation or affidavit that limits the scope of their recovery).

A binding stipulation or affidavit is necessary to combat the danger that plaintiffs may manipulate their pleadings in order to avoid federal jurisdiction. As the court in De Aguilar recognized, the procedural rules that prevent a plaintiff from claiming specific amounts in the pleadings “create[s] the potential for abusive manipulation by plaintiffs, who may plead for damages below the jurisdictional amount in state court with the

knowledge that the claim may be worth more, but also with the knowledge that they may be able to evade federal jurisdiction by virtue of the pleading.” Id. at 1410. Thus, even when a plaintiff claims damages below the jurisdictional amount in the complaint, removal may still be proper if the defendant can prove by a preponderance of the evidence that the amount in controversy exceeds \$75,000. Id. at 1412; See also, In re Diet Drugs Product Liability Litigation, 2000 WL 556602 (E.D. Pa. April 25, 2000)(despite pleadings that alleged damages did not exceed \$75,000, remand denied when plaintiff seeking compensatory and punitive damage for serious injuries).

Bayer argues that based on all the claims included in the Petitions, the amount in controversy exceeds \$75,000. Specifically, Plaintiffs have asserted a number of claims arising in tort, contract and statute. Plaintiffs also seek every available remedy, including compensatory and punitive damages, attorneys fees, costs of Baycol, incidental and consequential damages, pre- and post-judgment interest, injunctive relief and any other relief to which they may be entitled. Given the breadth of their requests, Bayer argues the amount in controversy easily exceeds \$75,000 per plaintiff. The Court agrees.

Although the Petitions provide that “Plaintiffs do not at this time claim personal injuries”, the classes, as defined in the Petitions, do not exclude claims for personal injuries. See, Pinkerman at ¶ 16(a); Artall at ¶ 14(a). In addition, the Petitions set forth the necessary claims and requests for relief that would allow recovery for personal injuries. Based on the allegations that Baycol can cause death or other personal injuries, the recovery available to a plaintiff seeking damages for death or injury, together with claims for injunctive and equitable relief, attorney’s fees and punitive damages, would

easily exceed \$75,000.

IT IS HEREBY ORDERED that Plaintiffs' motions for remand in the above-referenced actions are DENIED.

Date: October 9, 2003

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