

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re: BAYCOL PRODUCTS LITIGATION

**MDL No. 1431
(MJD)**

This Document also relates to:

Robert Raskey v. Bayer Corporation et al.,

Case No. 02-874

Richard J. Rosenblum, Rubin & Machado, Ltd, of Plaintiff.

Peter Sipkins, Dorsey & Whitney, Philip S. Beck, Adam L. Hoeflich and Tarek Ismail, Barlit Beck Herman Palenchar & Scott, Eugene A. Schoon, Susan A. Weber, Peter J. Tarsney and J. Randal Wexler, Sidley Austin Brown & Wood, Gene S. Schaerr and Catherine Valerio Barrad, 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

Plaintiff, Robert Raskey, is an individual that was prescribed Baycol in February 2001. Approximately one month later, he was admitted to the hospital with abdominal and muscular pain. In the Complaint, Plaintiff alleges his injuries were caused by his ingestion of Baycol, and therefore has asserted claims of products liability and negligence against Bayer. Plaintiff further alleges that his injuries are severe and permanent.

This action was filed on September 27, 2001, in Illinois state court, and removed to the United States District Court, Northern District of Illinois court on November 5,

2001. In the removal petition, Bayer asserted that the federal court had subject matter jurisdiction based on diversity of citizenship under 28 U.S.C. § 1332(a). The action was later transferred to this court by the Judicial Panel on Multidistrict Litigation in May 2002.

On August 15, 2002, Plaintiff moved to amend his Complaint to add two nondiverse defendants, Drs. Jack Dobkin and Jose Aruguetta, for the purpose of asserting claims of medical negligence against them. The addition of these doctors would destroy diversity jurisdiction, robbing this Court of subject matter jurisdiction over this case. Therefore, upon obtaining approval to file an amended complaint, Plaintiff seeks remand of this case to state court.

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. In this case, there is no dispute that the named doctors are not indispensable parties. While this factor may weigh against joinder, see, Wheat v. Pfizer, Inc., 31 F.3d 340, 344 (5th Cir. 1994), the Court finds that based on the totality of the circumstances, and weighing all factors bearing on the equities, joinder and remand are warranted in this case.

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).

The Court finds that Plaintiff was not dilatory in bringing this motion to amend. Plaintiff informed Bayer as early as January 2002 of the possible joinder of the nondiverse treating physicians when he opposed the Conditional Transfer Order. Further, pursuant to Illinois law, a plaintiff may not bring suit against a physician without attaching to the complaint an affidavit from the plaintiff’s attorney, declaring that the affiant has consulted with a health professional about the case, and the

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).

reviewing health professional has issued a written report that there is a reasonable and meritorious complaint to be filed against the physician. 735 ILCS 5/6-622. Plaintiff asserts that the requisite report from a reviewing health professional was obtained in July 2002. The motion to amend was filed approximately one month later.

Based on the report from the health care provider, it also appears that the claims against the doctors are not frivolous. This evidence suggests that the motion to amend was not filed for the purpose of defeating diversity jurisdiction.

Finally, the Court finds that even though Plaintiff is not barred from filing a separate action against the doctors in state court, requiring Plaintiff to try two separate lawsuits will be unduly burdensome and will not promote judicial economy.

Based on the above, the Court will allow Plaintiff to amend his Complaint to add Drs. Jack Dobkin and Jose Aruguetta as named defendants, and will remand this action to Illinois state court.

IT IS HEREBY ORDERED that Plaintiffs' Motion to Amend and for Remand is GRANTED. Plaintiff may file and serve an amended complaint in the form attached to his motion to amend within thirty (30) days from the date of this Order. Upon the filing of the amended complaint, this matter shall be remanded to the Circuit Court of Cook County, Illinois.

Date:

Michael J. Davis
United States District Court