

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re: BAYCOL PRODUCTS LITIGATION

**MDL No. 1431
(MJD)**

This Document also relates to:

Barbara Ruona, et al., v. Bayer Corporation et al.,

Case No. 02-872

Frank Pitre and Mario B. Muzzi, Cotchett, Pitre, Simon & McCarthy, for and on behalf of Plaintiffs.

Peter Sipkins, Dorsey & Whitney, Philip S. Beck, Ada L. Hoeflich and Tarek Ismail, Barlit Beck Herman Palenchar & Scott, Susan A. Weber and Sara J. Gourley, Sidley Austin Brown & Wood, Gene S. Schaerr and Catherine Valerio Barrad, Sidley Austin Brown & Wood LLP, for and on behalf of Bayer Corporation.

This matter is before the Court upon Plaintiffs' motion to amend the Complaint and for remand. Bayer Corporation ("Bayer") opposes the motion, arguing that this Court has diversity jurisdiction over Plaintiffs' claims. Also before the Court is Longs Drug's motions to dismiss and to strike.

Background

Plaintiffs are the children and heirs of decedent Janice Nolan, and initially filed their Complaint in the Superior Court for the State of California, County of Sonoma on October 12, 2001. In the Complaint, Plaintiffs asserted claims of products liability and negligence against Bayer, GlaxoSmithKline PLC and Longs Drug. Plaintiffs have also alleged that Defendant Doctors Does 1 through 5 prescribed Baycol to the decedent, and continued to treat her using Baycol, when they knew or should have known that

the drug posed serious risk of injury or death. Based on these allegations, Plaintiffs have asserted claims of medical negligence and battery against Defendant Doctors Does 1 through 5.

Plaintiffs are citizens of California, Washington and New Mexico. Bayer is an Indiana corporation, with its principal place of business in Pennsylvania and GlaxoSmithKline is a foreign corporation with its principal place of business in Pennsylvania. Longs Drug has its principal place of business in California, and the Defendant Doctors Does are doctors licensed to practice medicine in the State of California and are residents of Sonoma County, California. In the Complaint, Plaintiffs assert that the doctors have been named as Does 1 through 5, in order to comply with the California Code of Civil Procedure § 364. Complaint ¶ 10.

On November 20, 2001, Bayer filed a notice of removal with the United States District Court, Northern District of California, asserting subject matter jurisdiction based on diversity of citizenship under 28 U.S.C. § 1332(a). In its removal petition, Bayer asserts that Plaintiffs failed to state a cause of action against Longs Drug, and that Longs Drug has been fraudulently joined. Bayer further asserts that the citizenship of the Doe defendants is disregarded for purposes of removal pursuant to 28 U.S.C. § 1441(a).

Following the removal of this case to federal court, Plaintiffs filed a motion to remand on January 31, 2002. This motion was taken off the calendar, however, pending the conditional transfer order of the Judicial Panel on Multidistrict Litigation. The conditional transfer order became final on April 18, 2002, and the case was transferred to this Court.

Plaintiffs' Motion to Amend Complaint and For Remand

Plaintiffs seek to amend the Complaint to name Dr. Carroll as a named defendant. Plaintiffs assert that Dr. Carroll was not originally named in the Complaint in order to comply with California Code of Civil Procedure § 364. This rule provides that a medical malpractice action cannot be filed against a physician, until after a 90-day notice has been provided to such physician. Plaintiffs assert that as soon as the notice provisions of § 364 were complied with, they moved to add Dr. Carroll as a named defendant. As Dr. Carroll is a resident of California, adding Dr. Carroll as a named defendant will defeat diversity jurisdiction, warranting remand to state court.

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, it is clear that the court has discretion to either permit or deny such joinder. "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court deny joinder, or permit joinder and remand the action to the State courts." 28 U.S.C. § 1447(e).

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 parties agree that Dr. Carroll is not an indispensable party. Other courts have found that if a non-diverse defendant is not an indispensable party, joinder is not warranted. See, Wheat v. Pfizer, Inc., 31 F.3d 340, 344 (5th Cir. 1994). However, based on the totality of the circumstances, and weighing all factors bearing on the equities, the Court finds that joinder and remand are warranted in this case.

First, it appears that denial of joinder may result in a statute of limitations bar in favor of Dr. Carroll. In California, a medical malpractice action must be brought within three years after the date of injury or one year after the plaintiff discovers, or should have discovered through the exercise of reasonable diligence, the injury, whichever comes first. Ca. Civ. Pro. § 340.5. In this case, the decedent died over one year ago; on July 19, 2001. Arguably, Plaintiffs claims arose on the date of her death. Accordingly, the statute of limitations factor weighs in favor of joinder. Carnegie Mellon University v. Cohill, 484 U.S. 343, 351-352 (1988).

The Court further finds that Plaintiffs were not dilatory in bringing their motion to amend. Prior to naming him as a defendant, Plaintiffs had to provide Dr. Carroll with a 90-day notice of their intent to sue. The evidence shows that this required notice was filed only three months after the initial Complaint was filed.

The Court also finds no evidence to suggest Plaintiffs' motive in seeking to add Dr. Carroll is solely to defeat diversity jurisdiction. Bayer points to the fact that in their initial motion to remand, Plaintiffs did not move to add Dr. Carroll. When that motion was brought, however, Plaintiffs were not free to seek such relief, as the 90-day statutory notice period had not expired.¹ Bayer also argues that Plaintiffs' previous efforts to avoid this multidistrict litigation suggests that Plaintiffs' only motive in seeking to amend the Complaint is to defeat diversity jurisdiction. The Court disagrees. This is not a case in which Plaintiffs' medical negligence claims arose after this matter was removed to federal court. Rather, the medical negligence claims were included in the original Complaint, and the amendment to add Dr. Carroll was necessary in order to comply with § 364.

Bayer also argues that the claims asserted against Dr. Carroll are weak, and that this factor weighs against joinder. Plaintiffs argue that to state a claim of negligence against Dr. Carroll, they must allege that Dr. Carroll was negligent, and that his negligence caused Plaintiffs to suffer injury. California Jury Instructions, BAJI 6.00.1. In Complaint, Plaintiffs allege that Dr. Carroll had been warned by Bayer in May 2001 to

¹Plaintiffs' first motion to remand was filed on December 14, 2001, and the statutory notice period commenced on January 11, 2002.

closely monitor patients using Baycol, and that he negligently failed to exercise the proper degree of care of knowledge and skill in examining, diagnosing, treating and care for the decedent, and that as a result, the decedent was caused to suffer.

Complaint ¶ 88. In addition, Plaintiffs have asserted that Dr. Carroll failed to disclose the potential material hazards, dangers, adverse health risks and health problems associated with Baycol. Id. ¶ 96. These allegations state a claim of medical negligence against Dr. Carroll. Accordingly, this factor weighs in favor of joinder.

Based on the above, the Court will allow Plaintiffs to amend their Complaint to add Dr. Carroll as a named defendant, and will remand this action to California state court. Because this matter shall be remanded, Longs Drug's dispositive motions are best addressed by the California state court.

IT IS HEREBY ORDERED that:

1. Plaintiffs' Motion to Amend and for Remand is GRANTED. This matter is hereby remanded to the Sonoma County Superior Court, State of California.
2. Longs Drugs' Motion to Dismiss is DENIED WITHOUT PREJUDICE.
3. Plaintiffs' Motion for Costs and Attorneys' Fees is DENIED.

Date:

Michael J. Davis
United States District Court