UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: BAYCOL PRODUCTS LITIGATION	MDL No. 1431 (MJD)
This Document also relates to:	
Richard Shampaine and Karen Shampaine v. Bayer Corporation et al.,	Case No. 02-1422

Justin G. Witkin, Bryan A. Aylstock and Douglass A. Kries, Aylstock, Witkin & Sasser, P.L.C. and Wil H. Florin, Florin Roebig & Walker, P.A. for and on behalf of Plaintiffs.

Peter W. Sipkins and Elizabeth S. Wright, Dorsey & Whitney, Philip S. Beck, Adam 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 Paul J. Zidlicky, 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.

Background

Plaintiffs are husband and wife and are residents of the state of Florida. On January 29, 2002, this action was filed in state court arising from injuries suffered by Mr. Shampaine as a result of concomitant ingestion of Baycol and Lopid. In the Complaint, Plaintiffs asserted claims of products liability and negligence against Bayer AG, Bayer Corporation, GlaxoSmithKline PLC, Pfizer, Inc. Professional Detailing, Inc., Eckerd Corporation of Florida, Inc. ("Eckerd") and sales representatives Mark Demps, Kathleen

Davine and Nanette Ehlders.

On April 26, 2002, Bayer filed a notice of removal with the United States District Court, Middle District of Florida, 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 the non-diverse Defendants, Eckerd and sales representatives Mark Demps and Nanette Ehlders.

Following the removal of this case to federal court, Plaintiffs filed a motion to remand on May 22, 2002. Thereafter, this case was transferred to this District by order of the Judicial Panel on Multidistrict Litigation, which became final on June 26, 2002. Plaintiffs now renew their motion to remand before this Court. In addition, Plaintiffs seek leave to file an amended complaint in order to assert a cause of action against Mr. Shampaine's physician, Dr. Ronald Vicencio.

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)).

1. Fraudulent Joinder

"Joinder is fraudulent and removal is proper when there exist no reasonable basis in fact and law supporting a claim against the resident defendant." Wiles v. Capitol Indemnity Corporation, 280 F.3d 868, 870 (8th Cir. 2001). The burden is on the removing party to show that there is no possibility that the plaintiff will be able to state a cause of action against the resident defendant or that there has been outright fraud in the pleading of jurisdictional facts. Parnas v. General Motors Corporation, 879 F. Supp. 91, 92 (E.D. Mo. 1995). In deciding this issue, the Court may consider the pleadings and supporting affidavits. Id.

Bayer argues that a retail pharmacy cannot be held strictly liable for dispensing prescription drugs pursuant to Florida law. McLeod v. W.S. Merrell Company, 174 So.2d 736 (Fla. 1965). Plaintiffs do not dispute that McLeod is good law. Plaintiffs argue, however, that Florida law nonetheless recognizes a cause of action against a pharmacy for its role as marketer, promoter or distributor of the drug at issue, relying on a number of unpublished decisions from the Middle District of Florida. The Complaint includes allegations that Eckerd was in the business of marketing, promoting, selling and/or distributing Baycol and Lopid. Complaint ¶ 10. The Complaint further alleges that "Eckerd made affirmative representations to the consuming public and the Plaintiff that it could detect and safeguard against dangerous drug-drug interactions, and Plaintiffs relied on those representations. Eckerd's negligence, however, caused it to fail to detect and/or warn the Plaintiffs about the dangers posed by the combination use of Baycol and Lopid, as a result, the Plaintiffs suffered grievous bodily harm." Id.

In Sanderson v. Eckerd Corporation, 780 So.2d 930, 933 (Fla. 5th DCA 2002), the court held that the voluntary undertaking doctrine could be applied to a dispensing pharmacist in a proper case. In the opinion, the court suggested that to properly plead such a cause of action against a pharmacist who advertised that it would detect and warn customers of adverse drug reactions and interactions, a plaintiff would have to allege that Eckerd's pharmacist negligently operated the computer system, or that the plaintiff relied on Eckerd's advertised promise and for that reason had his/her prescription filled there. Id. at 933-934.

Bayer argues that Plaintiffs have not sufficiently plead a claim under the voluntary undertaking doctrine, but the Court disagrees. Plaintiffs have plead that despite the advertised detection system, Eckerd negligently failed to warn Plaintiffs of the dangerous interaction of Baycol and Lopid, and that Plaintiffs relied on Eckerd's advertised promise. Based on Sanderson, these allegations are sufficient.

Bayer has submitted the affidavit of Michael Lops, Vice President for Legal Compliance for Eckerd. In this affidavit, Mr. Lops states that Eckerd is not, and has never been in the business of marketing, advertising, promoting or distributing Baycol or Lopid. Lops Aff. ¶ 3. He further states that Eckerd has not entered into any agreements to market or distribute Baycol or Lopid. Id. ¶ 4. Absent from this affidavit, however, is any statement concerning the alleged Eckerd advertisement concerning its computer system. As Plaintiffs have shown that there is a possibility they can recover against Eckerd under the doctrine of voluntary undertaking, Eckerd's joinder was not fraudulent and remand is appropriate.

2. Motion to Amend

Plaintiffs have also filed a motion to amend the Complaint to add a cause of action against Mr. Shampaine's physician. It is clear that based upon the applicable state law, Plaintiffs have stated a claim against Dr. Vicencio. However, as this Court does not have subject matter jurisdiction over this matter, the Court must defer this motion to the state court.

Accordingly, IT IS HEREBY ORDERED that Plaintiffs' motion for remand is GRANTED. This matter is hereby remanded to the Circuit Court of the Thirteenth Judicial Circuit, Hillsborough County, Florida.

Date: February 26, 2003

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Michael J. Davis
United States District Court