

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

In re: BAYCOL PRODUCTS LITIGATION

MDL No. 1431  
(MJD)

This Document also relates to:

Shirley Spencer v. Bayer AG et al.,

Case No. 02-4828

---

Andy Stewart, Andy Stewart and Associates for and on behalf of Plaintiff.

C. Alleen McLain, Watkins & Eager PLLC for and on behalf of Bayer Corporation.

---

This matter is before the Court upon Plaintiff's motions for remand. Bayer Corporation ("Bayer") opposes the motion, arguing that this Court has diversity jurisdiction over Plaintiffs' claims.<sup>1</sup>

Background

Plaintiff is a citizen of the state of Mississippi. She was prescribed Baycol by Defendant Dr. John Downer in December 1998. Complaint ¶ 50. She alleges that after taking Baycol for several days, she began to suffer from severe muscle pain in her legs, general muscle pain and tenderness as well as malaise. *Id.* ¶ 52. Plaintiff thereafter filed the instant action against the Defendants Bayer AG, Bayer Corporation and GlaxoSmithKline, her treating physician Dr. Downer, Russell's Mr. Discount Drugs and three sales representatives in Mississippi state court.

---

<sup>1</sup>Defendant Russell's Mr. Discount Drugs, Inc. joins in Bayer Corporation's opposition to Plaintiff's motion to remand.

Bayer Corporation timely removed this action to the United States District Court, District of Mississippi asserting subject matter jurisdiction based on diversity of citizenship under 28 U.S.C. § 1332(a). In the removal petitions, Bayer asserted that the non-diverse defendants, Dr. Downer, Russell's Mr. Discount Drugs, and the sales representatives were fraudulently joined.

### 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 (8<sup>th</sup> Cir. 1983)(citing Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006, 1010 (3<sup>rd</sup> Cir. 1987) cert. dismissed 484 U.S. 1021 (1988)).

“Joinder is fraudulent and removal is proper when there exists no reasonable basis in fact and law supporting a claim against the resident defendants.” Wiles v. Capitol Indemnity Corporation, 280 F.3d 868, 870 (8<sup>th</sup> 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.

Plaintiff has asserted a number of claims against Bayer AG, Bayer Corporation and SmithKlineBeecham (the “Baycol Defendants”) based in strict liability, negligence, misrepresentation and fraud, and breach of warranty. Generally, the claims against these Defendants are based on allegations that these Defendants falsely and deceptively misrepresented material facts concerning Baycol’s risks, Id. ¶ 46, provided improper or inadequate warnings of Baycol’s risks, Id. ¶ 49, failed to perform adequate testing, Id. ¶ 55, manufactured and/or supplied Baycol defectively due to inadequate post-marketing warnings or instructions, Id. ¶ 56, and defective design, Id. ¶ 64 and 65. Plaintiff alleges that the Baycol Defendants are liable under theories of strict liability and negligence.

In addition, Plaintiff alleges that her physician, Dr. Downer, was negligent in prescribing Baycol and that Dr. Downer violated his duty to exercise the ordinary care and diligence exercised by other physicians and was negligent during the course of treatment in a number of areas, including: failing to fully inform Plaintiff of Baycol’s risks; failing to adequately warn of contraindications, warnings, precautions, adverse reactions and drug interactions; failing to prescribe alternate treatments; failing to adequately test for potential problems when he knew or should have known such problems would arise; failing to obtain careful medical history of Plaintiff prior to prescribing Baycol; failing to properly diagnose and treat the symptoms experienced by Plaintiff; and failing to administer the proper treatment for the conditions caused by Baycol. Id. ¶ 82.

It is the Bayer’s position that by considering all of the allegations in the complaint, the main thrust of which is that the Baycol Defendants misrepresented the safety of

Baycol and failed to warn physicians of the serious risks associated with Baycol, Plaintiff has failed to sufficiently plead that her physician proximately caused her injuries, or that the physician knew or should have known of Baycol's risks. Having failed to alleged a cause of action against the physician, Bayer asserts his joinder in this case was fraudulent. The Court disagrees.

In her Complaint, Plaintiff does more than allege that her physician negligently prescribed Baycol. As demonstrated above, she has specifically alleged that her physician failed to properly diagnose and treat the symptoms experienced by Plaintiff after ingesting Baycol, and that he failed to properly diagnose and treat the conditions she suffered that were caused by Baycol. Based on these allegations, this Court cannot find that Plaintiff has failed to allege a state law claim against her physician. As inclusion of the treating physician destroys complete diversity between the parties, remand is appropriate.<sup>2</sup>

Accordingly, IT IS HEREBY ORDERED that Plaintiff's motion for remand is GRANTED. This matter shall be remanded to the Circuit Court for Holmes County, Mississippi.

Date: 2003

---

Michael J. Davis  
United States District Court

---

<sup>2</sup>Based on the Court's finding that Dr. Downer was not fraudulently joined, there is no need to address whether the pharmacy or the sales representatives were fraudulently joined as well.

