

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re: BAYCOL PRODUCTS LITIGATION

**MDL No. 1431
(MJD)**

This Document also relates to:

Frank Talbot and Betty Talbot v. Bayer Corporation et al., Case No. 02-923

James Esparza, Esq. for and on behalf of Plaintiff.

David W. Slagle, Camille N. Johnson and Terence L. Rooney, Snow, Christensen & Martineau, Gene C. Schaerr, Nicholas P. Miller and Michael S. Lee, Sidley Austin Brown & Wood, Susan A. Weber and Sara J. Gourley, Sidley Austin Brown & Wood, Philip S. Beck, Adam L. Hoeflich and Tarek Ismail, Barlit Beck Herman Palenchar & Scott, and Richard K. Dandrea and Michael R. Borasky, Eckert Seamens Cherin & Mellott, LLC, for and on behalf of Bayer Corporation.

This matter is before the Court upon Plaintiffs' motion to remand.

Background

Plaintiff filed a Complaint in Utah state court on February 20, 2002, and it was timely removed by Bayer Corporation ("Bayer") on March 12, 2002 to the United States District Court, Central Division of Utah based on diversity jurisdiction. The matter was later transferred to this Court pursuant to a Conditional Transfer Order of the Judicial Panel on Multidistrict Litigation, which became effective April 25, 2002.

In the Complaint, it is alleged that Plaintiff Frank Talbot began taking Baycol on May 30, 2001. Shortly thereafter, he began to experience leg pain, and was unable to walk. He was admitted to the hospital on June 26, 2001, where he was diagnosed as

suffering from acute renal failure, and rhabdomyolysis secondary to Baycol.

Plaintiffs have asserted claims of strict liability and negligence against the named defendants, and have specifically filed a medical malpractice claim against defendant Dr. Almony.

The parties do not dispute that, with the exception of Dr. Almony, there is complete diversity among the parties. In the removal petition, Bayer argued that this Court does not have subject matter jurisdiction over Dr. Almony, as Plaintiffs have failed to comply with the requirements of the Utah Health Care Malpractice Act, Utah Code Ann. § 78-14-1 et seq. This statute provides that as a condition precedent to bringing a medical malpractice action, there must be a prelitigation hearing concerning the allegations against a medical doctor. Ut. St. Ann. § 78-14-12(1)(c). Because Dr. Almony should not be a part of this suit, and because the amount in controversy exceeds \$75,000, Bayer argues that this Court has diversity jurisdiction over this suit.

Plaintiffs do not dispute that Utah law requires that a prelitigation hearing be held, and asserts that a prelitigation hearing was scheduled for April 8, 2002. The record currently before the Court does not indicate whether such hearing ever took place.

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)).

Fraudulently joined defendants will not defeat diversity jurisdiction. Ritchey v. Upjohn Drug Company, 139 F.3d 1313, 1318 (9th Cir. 1998). "Fraudulent joinder exists if, on the face of plaintiff's state court pleadings, no cause of action lies against the resident defendant." Anderson v. Home Insurance Company, 724 F.2d 82, 84 (8th Cir. 1993). Dismissal of fraudulently joined non-diverse defendants is appropriate. Wiles v. Capitol Indemnity Corp., 280 F.3d 868, 871 (8th Cir. 2002). In determining the propriety of remand, the Court must review plaintiffs' pleading as it existed at the time of removal. Pullman Co. v. Jenkins, 305 U.S. 534, 537 (1939).

Analysis

At the time of removal, Plaintiffs admittedly had not met the state requirements for bringing a malpractice action against Dr. Almony. Specifically, Plaintiffs had not participated in a prelitigation hearing prior to commencing suit. Pursuant to Utah law, this failure warrants dismissal of the action against Dr. Almony. See, Carter v. Milford Valley Memorial Hospital, 996 P.2d 1076, 1079 (Ut. Ct. App. 2000)(failure to participate in prelitigation panel review warrants dismissal of action against health care provider). Accordingly, the requirements of diversity jurisdiction are met and remand is unwarranted.

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiffs' Motion to Remand is DENIED.
2. Defendant Gregory Almony, M.D. is DISMISSED.

Date:

Michael J. Davis
United States District Court

Talbot v. Bayer Corporation
Case No. 02-923