

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re: BAYCOL PRODUCTS LITIGATION

**MDL No. 1431
(MJD)**

This Document relates to:

Stephen and Margann Lemmons v.
Bayer Corporation et al.

Case No. 02-2991

Eileen McCarthy Brown for and on behalf of Plaintiffs.

Peter W. Sipkins, Dorsey & Whitney LLP and Susan A. Weber, Tamar B. Kelber and Vandhana Balasubramanian, Sidley Austin Brown & Wood, for and on behalf of Defendant Bayer Corporation.

On May 10, 2002, Plaintiffs filed this action against Defendant Bayer Corporation ("Bayer") in the Judicial District for the Parish of Terrebonne, State of Louisiana. In their Petition, Plaintiffs allege that Plaintiff Stephen Lemmons was prescribed Baycol to control his cholesterol levels. He further alleges that within one month of taking Baycol, he began experiencing severe tendinitis in his hands and arms, and problems with his prostrate. He alleges that after meeting with his physician, he was also prescribed Lopid to lower his triglyceride levels. Shortly after taking both Lopid and Baycol, Plaintiffs allege that Mr. Lemmons began to suffer from serious medical conditions, including a major prostrate infection, and muscle atrophy in his upper body. In May 2001, he became violently ill, and was taken to the hospital. At that time, he was diagnosed with severe pancreatitis. As a result, Mr. Lemmons alleges that he now

suffers from Type II diabetes and massive cataracts. Plaintiffs seek damages from Bayer for Mr. Lemmons' injuries as well as loss of consortium damages for Mrs. Lemmons .

Bayer timely removed this action to the United States District Court, Eastern District of Louisiana. Plaintiffs then moved to remand. In their motion, Plaintiffs argue that they have filed a complaint with the Louisiana Patient's Compensation Fund Oversight Board against Mr. Lemmons' physician, Dr. David Sisam. Thereafter, Plaintiffs filed this action in Louisiana state court. Dr. Sisam was not named as a defendant because Louisiana law provides that a suit may not be commenced against a health care provider until completion of the review by the medical review panel. See La. R.S. Stat. 40:1299.47(B)(1)(a)(i). Plaintiffs nonetheless argue that because the petition asserts a claim against Dr. Sisam, removal was inappropriate.

Plaintiffs' motion to remand was pending when this case was transferred to the District of Minnesota by the Judicial Panel on Multidistrict Litigation. Plaintiffs have now filed a motion to amend their complaint to add allegations against Dr. Sisam. They do not move to add Dr. Sisam as a defendant as the medical review panel has not concluded its review of the allegations against Dr. Sisam.

Plaintiffs' Motion to Amend Complaint and 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)).

In this case, Plaintiffs seek to supplement their petition in an effort to bolster their motion to remand this matter to state court. However, even if the Court were to grant the requested motion to amend, this Court retains subject matter jurisdiction over this case. Until such time as Dr. Sisam can be named a defendant in this suit, his citizenship has no bearing on whether this Court has diversity jurisdiction. See 28 U.S.C. § 1332.

Plaintiffs cite to a number of cases from the Eastern District of Louisiana in support of their motion to remand. Most of these cases are distinguishable based on the fact that the health care provider had been originally named as a defendant. One case, Kelly v. Danek Medical, Inc., 1994 U.S. Dist. LEXIS 8946 (E.D. La. 1994), is factually on point to this case, but cites to no controlling authority which provides that a court may remand a case based on speculation that a plaintiff will amend to add a non-diverse defendant in the future. This Court finds more persuasive the opinion in Lillie v. Wyeth-Ayerst Laboratories, 1994 U.S. Dist. LEXIS 13834 (E.D. La. 1994). Relying on Buchner v. F.D.I.C., 981 F.2d 816, 820 (5th Cir. 1993), the court held that remand is warranted where 1) there is a predominance of pendent state claims; 2) lack of subject matter jurisdiction; and 3) defects in the removal procedure. Id. at * 1. "The possible future destruction of diversity, even by the addition of an indispensable party, is not a proper ground for remand. . . The fact that plaintiffs would like to have added the non-diverse defendant already, but are barred for procedural reasons from doing so, is simply not enough to justify remand." Id.

Because this Court has diversity jurisdiction over this case, IT IS HEREBY
ORDERED that Plaintiffs' Motions to Amend and for Remand are DENIED.

Date: October 28, 2002

_____/s/_____
Michael J. Davis
United States District Court

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