**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

**In re: BAYCOL PRODUCTS LITIGATION** **MDL No. 1431 (MJD)**

This Document also relates to:

Gracie Mendietta v. Bayer Corporation et al. Case No. 02-878

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This matter is before the Court upon Plaintiff's motion to remand. Bayer Corporation ("Bayer") opposes the motion on the basis that Plaintiff has fraudulently joined H. E. Butt Grocery Company ("HEB") in an effort to defeat diversity jurisdiction. HEB opposes remand as well.

Background

Plaintiff filed her Petition in the 105th Judicial District, Kleberg County, Texas on October 9, 2001. In the Petition, she alleges that she was prescribed Baycol by her physician, and that she thereafter purchased Baycol from HEB. Plaintiff alleges that she suffered from medical problems and injuries as a result of taking Baycol. She has

asserted state law claims of defective product marketing against Bayer and HEB, based on the defendants' failure to warn or instruct regarding the dangers of Baycol or failed to adequately warn or instruct regarding the dangers of Baycol. With regard to HEB, Plaintiff alleges "that this is not a 'health care claim at this time.'" Petition ¶¶ IV, V and VI.

The action was timely removed to federal court on November 8, 2001. In its removal petition, Bayer asserts that the federal court has diversity jurisdiction over this action because, with the exception of HEB, all parties are diverse and the amount in controversy exceeds $75,000. Bayer further asserts that Plaintiff failed to state a cause of action against HEB, and that fraudulently joined defendants will not defeat diversity jurisdiction.

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 plaintiff's pleading at the time of removal. Pullman Co. v. Jenkins, 305 U.S. 534, 537 (1939). The Court will thus look to the original Petition to determine whether HEB has been fraudulently joined.

A retail pharmacy has no generalized duty to warn patients of adverse reactions to prescription drugs under Texas law. Morgan v. Wal-Mart Stores, Inc., 30 S.W.3d 455, 675-681 (1985). Plaintiff responds that while pharmacies may not have an initial duty to warn regarding prescription drugs, in the event the pharmacy assumes such a duty by providing a warning independent of that provided by the manufacturer, Texas law requires that the pharmacy must exercise that duty in a reasonably prudent manner. Plaintiff alleges in her motion to remand that HEB assumed a duty to warn when it voluntarily chose to provide warnings to patients independent of the manufacturer.

The cases cited by Plaintiff in support of this position address the issue of voluntary assumption of a duty, but do not apply this theory to a pharmacist that provides a warning with a prescription drug. See, Otis Engineering v. Clark, 668 S.W.2d 307 (Tex. 1984) and Seay v. Travelers Indemnity Company, 730 S.W.2d 774 (Tex. Ct. App. 1987). Otis Engineering involved an employer's duty to others concerning the conduct of its employee, while Seay involved the duty of an insurance company, that voluntarily conducted inspections of boilers of the insured, to the insured's employees.

The only Texas case cited to the Court that does address a pharmacist's duty is Morgan, supra. In Morgan, the court held that a pharmacy does not have a generalized duty to warn patients of potential adverse reactions to prescription drugs absent special circumstances. Id. at 469. This holding was based on the "learned intermediary doctrine" which provides that:

> the manufacturer of a prescription drug has a duty to adequately warn the prescribing physician of the drug's dangers. The physician, relying on his medical training, experience, and knowledge of the individual patient, then chooses the type and quantity of drug to be prescribed. The physician assumes the duty to warn the patient of dangers associated with a particular prescribed drug.

Id., 462.

Although Morgan does not squarely address the issue of whether pharmacies can become liable under the theory of assumption of duty, the court's adoption of the "learned intermediary doctrine" based, in part, on opinions issued in other jurisdictions, demonstrates that Plaintiff's claim against HEB would fail. For example, one case cited with approval in Morgan addressed the same allegation as has been asserted here: that the pharmacy does not have an initial duty to warn, but that it voluntarily undertook such duty when it placed two of three suggested warning labels on the prescription drug container. Id. at 465 (citing Frye v. Medicare-Glaser Corporation et al., 605 N.E.2d 557, 558 (Ill. 1992)). In Frye, the court refused to impose liability upon a pharmacist that chose to place warnings on a prescribed drug based on the learned intermediary doctrine, finding "consumers should principally look to their prescribing physician to convey the appropriate warnings regarding drugs, and it is the prescribing physician's duty to convey these warnings to patients." Frye, at 561.

The court in Morgan further noted that in a few of the cases surveyed, courts that have imposed a duty upon a pharmacist have done so when special circumstances were present, such as when a pharmacist dispensed a drug to a known alcoholic patient, and the specific drug was contraindicated with the use of alcohol. Id. (citing Hand v. Krakowski, 89 A.D. 2d 650, 453 N.Y.S.2d 121 (N.Y. App. Div. 1982)). See also, Stebbins v. Concord Wrigley Drugs, Inc., 164 Mich.App. 204, 416 N.W.2d 381 (1987)(where pharmacist has specialized knowledge of patient's medical problems, may be a duty to warn of possible side effects). No such special circumstances are alleged in this case, however.

Because Texas law does not impose a generalized duty upon a pharmacist to warn patients of potential adverse reactions absent special circumstances not alleged in this case, Plaintiff has failed to show that she can maintain a cause of action against HEB. The Court thus finds that HEB was fraudulently joined.[1] Accordingly, Plaintiff's motion to remand must be denied, as the remaining parties are diverse, and the amount in controversy exceeds $75,000, establishing diversity jurisdiction.

[1]Plaintiff also asserts that HEB may be liable for Plaintiff's damages, as there is an alleged error in the actual prescription. These allegations are not contained in the Petition. Accordingly, these allegations cannot be taken into consideration in determining whether removal was proper.

Accordingly, IT IS HEREBY ORDERED that Plaintiffs' Motion to Remand is DENIED.

Date: October 4, 2002

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Michael J. Davis
United States District Court