UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: BAYCOL PRODUCTS LITIGATION	MDL No. 1431 (MJD)
This Document also relates to:	
Marilyn Rolland et al. v. Bayer AG et al.	Case No. 02-875

Shawn M. Raiter and Deanna Dailey, Larson * King, LLP for and on behalf of Plaintiff.

Jeffrey Feikens, Feikens, Stevens, Kennedy & Galbrath, P.C. for and on behalf of Bayer Corporation.

This action was originally filed in Michigan state court and is a putative nationwide class action seeking to represent "[a]ll persons, personal representatives, their estates, or other legal representatives, in the United States who were prescribed purchased or ingested Baycol manufactured, distributed or sold by defendants." Complaint ¶ 28. Plaintiff also seeks to represent subclasses that include residents of Michigan who seek reimbursement for the purchase of Baycol, and for medical testing; and/or residents of Michigan who have suffered transient episodes of muscular pain throughout their body or in specific parts of the body as a result of taking Baycol and emotional distress. Id. ¶ 29(A) and (B).

In the Complaint, Plaintiff alleges that Defendants failed to warn of Baycol's dangerous side effects, failed to use due care in the design of Baycol, failed to conduct adequate pre-clinical testing of Baycol, were otherwise negligent and careless. Id. ¶ 12. Plaintiff further alleges that Defendants engaged in fraudulent conduct by failing to warn

of known dangers, and to market Baycol with inadequate warnings. Id. ¶¶ 13-15. "As a direct result and proximate result of Defendants' wrongful acts and/or negligence, the Plaintiff and others have suffered including, but not limited to, severe pain and suffering, mental distress, emotional anguish, reduced enjoyment of life, increased medical, therapeutic and pharmaceutical expenses." Id. ¶ 25. Plaintiff further alleges that based on "Defendants' unfair methods of competition and unfair or deceptive acts or practices, Plaintiff and others similarly situated have suffered actual damages and are threatened with irreparable harm by undue risk of physical injuries or death." Id. ¶ 37

In the Complaint's ad damnum clause, the Plaintiff seeks general, special and punitive/exemplary damages as well as attorney fees, costs and expenses. Id. ¶ 3. Plaintiff also asks that the Court enter an Order requiring Bayer to disgorge all or part of their ill-gotten gains and benefits received from the sale of Baycol, monetary compensation for transient episodes of muscular pain, suffering and discomfort and emotional distress, pre-judgment and post-judgment interest and such further relief as the Court deems necessary, just and proper. Id.

Bayer Corporation removed this actions to federal court asserting jurisdiction pursuant to 28 U.S.C. § 1332. Specifically, Bayer asserted that the parties were diverse, and that the amount in controversy exceeds $75,000. Before the Court is Plaintiffs' motion to remand.

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 (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. Amount in Controversy

The Court begins its analysis with the principle that the amount claimed by Plaintiffs ordinarily controls in determining whether jurisdiction lies in federal court. Zunamon v. Brown, 418 F.2d 883, 885 (8th Cir. 1969)(citing St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-289 (1938)). Nonetheless, "the plaintiffs allegations of requisite jurisdictional amount are not necessarily dispositive of the issue." Id.

Plaintiff argues remand is appropriate because Bayer cannot meet its burden of establishing that the amount in controversy meets or exceeds the requisite jurisdictional amount. Specifically, Plaintiff asserts that the class is seeking limited damages, and have alleged in the Complaint that damages per individual will not exceed $75,000. Complaint ¶ 5.

A plaintiff cannot avoid removal, however, through artful pleading "that would artificially minimize the damages at issue for purposes of federal jurisdiction yet permit recovery of higher damages in state court." Kobaissi v. American Country Insurance Company, 80 F.Supp.2d 488, 490 (E.D. Pa. 2000); See also, De Aguilar v. Boeing Co. 47 F.3d 1404, 1412 (5th Cir. 1995); In re Diet Drugs Product Liability Litigation, 2000 WL

556602 (E.D. Pa. April 25, 2000)(despite pleadings that alleged damages did not exceed $75,000, remand denied when plaintiff seeking compensatory and punitive damage for serious injuries). Nor can a plaintiff avoid removal by subsequently filing an affidavit or stipulation, stipulating to damages less than the jurisdictional amount. Id. Rather, in determining the propriety of removal, the Court looks only to the pleadings as they existed at the time of removal.

In reviewing the Complaint in this case, the Court finds that Bayer has met its burden of demonstrating that the amount in controversy has been met. Specifically, Plaintiff alleges that the class has suffered from "severe pain and suffering, mental distress, emotional anguish, reduced enjoyment of life, increased medical, therapeutic and pharmaceutical expenses." Complaint ¶ 25. For their injuries, the class seeks compensatory, special and punitive damages, disgorgement of Bayer's profits, attorney's fees, and costs. Given the severity of injuries allegedly suffered, and the breadth of the relief sought, the amount in controversy easily exceeds $75,000.

Plaintiff responds that she is seeking to represent only those class members that have suffered from transient episodes of muscular pain, suffering and discomfort and emotional distress. Tellingly, Plaintiff does not define "transient" or "temporary", nor does she specifically exclude from the class definition those class members that have allegedly suffered permanent injuries as a result of taking Baycol. Nonetheless, Plaintiff has not demonstrated that a class member suffering from severe pain and suffering, albeit transient or temporary, would be compensated in an amount less than $75,000. In fact Plaintiff's own witness, Dr. Richard Friedlander, has submitted an affidavit that

supports the proposition that transient muscle pain may lead to life-threatening conditions or death. Clearly, such an injury is compensable in an amount in excess of $75,000.

2. Consent to Remand

Finally, Plaintiff argues that the removal in this case was deficient because Bayer AG did not consent to the removal. See, Brierly v. Alusuisse Flexible Packaging, 184 F.3d 527, 533-34 n. 3 (6th Cir. 1999)(rule of unanimity requires that all served defendants must consent to the removal petition). There is a dispute, however, as to whether Bayer AG has been properly served, and Bayer AG filed a motion to dismiss, or in the alternative to quash purported service upon Bayer AG. In its motion, Bayer AG argues that as it is a foreign corporation, Plaintiff had to comply with the provisions of the Hague Convention to effect proper service. Bayer Corporation argues that as Bayer AG was not properly served at the time of removal, Bayer AG's consent to remove was not required.

The law is clear that the Hague Convention applies in "all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988). In Volkswagenwerk, the Supreme Court held that "[i]f the internal law of the forum state defines the applicable method of serving process as requiring the transmittal of documents abroad, then the Hague Service Convention applies." Id. at 700. The Court further held, however, that where the applicable state law provided that a foreign corporation could be served through its domestic wholly-owned subsidiary,

without sending documents abroad, the Hague Convention did not apply. Id. at 707-708.

Pursuant to Michigan law, service upon a foreign corporation is effected as follows:

> Sec. 1920. Service of process upon a corporation, whether domestic or foreign, may be made by
>
> (1) leaving a summons and a copy of the complaint with any officer or the resident agent, or
>
> (2) leaving a summons and a copy of the complaint with any director, trustee, or person in charge of any office or business establishment and sending a summons and a copy of the complaint by registered mail, addressed to the principal office of the corporation, or
>
> (3) leaving a summons and a copy of the complaint with any of the persons who may have been the last presiding officer, president, cashier, secretary, or treasurer, in the case of any corporation which may have ceased to do business by failing to keep up its organization by the appointment of officers or otherwise, or whose term of existence may have expired by limitation, or
>
> (4) mailing a summons and a copy of the complaint by registered mail to the corporation or an appropriate corporation officer and to the Michigan corporation and securities commission if:
>
> (a) the corporation has failed to appoint and maintain a resident agent or to file a certificate of such appointment as by law required; or
>
> (b) the corporation has failed to keep up its organization by the appointment of officers or otherwise, or the term of whose existence has expired by limitation.

MI. ST. 600.1920.

Plaintiff argues that service was effected consistent with state law by serving a copy of the summons and complaint upon CT Corporation System ("CT Corp."). However, Bayer AG has provided evidence that although CT Corp. is the registered agent

of its subsidiary, Bayer Corporation, Bayer AG has never authorized CT Corp. to accept service on its behalf. Schulze Althoff Decl., at ¶ 3. Nor has Plaintiff put forth any evidence that Bayer Corporation is authorized to accept service on behalf of Bayer AG. Finally, Plaintiff has not met her burden of showing that service upon a subsidiary constitutes service upon the parent.

Since service under state law requires the transmittal abroad of a copy of the summons and complaint upon Bayer AG, the Hague Convention is implicated. See, Melia v. Les Grands Chais de France, 135 F.R.D. 28 (D. Rhode Island 1991)(noting that where state statute allows for substituted service upon the Secretary of State, but also requires plaintiff to mail notice directly to the defendant implicates Hague Convention); Wasden v. Yamaha Motor Co. Ltd., 131 F.R.D. 206 (M.D.Fla. 1990)(where state statute provided for service upon the Secretary of State, and that Secretary should forward copy to person to be served implicates Hague Convention).

To effect service upon a German corporation pursuant to the Hague Convention, the summons and complaint must be sent to the appropriate central authority. There is no evidence in the record to show that at the time Bayer Corporation removed this action to federal court, a copy of the summons and complaint had been sent to the appropriate central authority. As Bayer AG was not properly served at the time of removal, its consent to remove was not needed.

IT IS HEREBY ORDERED that

1. Plaintiff's motion for remand in the above-referenced action is DENIED.

2. Defendant Bayer AG's motion to quash service is GRANTED. Plaintiff must serve Bayer AG pursuant to PTO No. 23[1] within 20 days from the date of this Order.

Date:

Michael J. Davis
United States District Court

Rolland v. Bayer AG et al., Civ. No. 02-875

[1]In PTO No. 23, Bayer AG agreed to accept service of process as provided in PTO No. 23, rather than requiring service through the central authority.