

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH H. TANTUM and : CIVIL ACTION  
MARYLOU TANTUM :  
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 :  
 vs. :  
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 :  
 THE AMERICAN TOBACCO :  
 COMPANY, INC.; :  
 BROWN AND WILLIAMSON :  
 TOBACCO CORP.; BATUS :  
 HOLDINGS, INC.; R.J. :  
 REYNOLDS TOBACCO CO.; :  
 LIGGETT GROUP, INC.; :  
 LIGGETT & MEYERS, INC.; :  
 THE COUNCIL FOR TOBACCO :  
 RESEARCH - U.S.A., INC.; :  
 PENNSYLVANIA DISTRIBUTORS :  
 ASSOCIATION, INC.; UNITED :  
 VENDING SERVICE, INC.; :  
 MILLER & HARTMAN, INC.; :  
 JOSEPH H. STOMEL & SONS, :  
 INC.; J.F. WALKER COMPANY, :  
 INC.; THOMAS AND HOWARD :  
 COMPANY, INC.; CONVENIENCE :  
 STORE DISTRIBUTING CO.; F.A. :  
 DAVIS AND SON, INC.; FLEMING :  
 COMPANIES, INC., d/b/a :  
 FLEMING ALTOONA DIVISION; :  
 EBY-BROWN COMPANY, L.P. : NO. 95-7628

ORDER AND MEMORANDUM

ORDER

AND NOW, to wit, this 29th day of June, 1999, upon consideration of the Motion of Plaintiffs Joseph M. Tantum and Marylou Tantum to Remand to the Court of Court of Common Pleas for Philadelphia County Pursuant to 28 U.S.C. § 1447 (Doc. No. 21, filed March 29, 1999); Defendants' Response to Plaintiffs' Motion for Remand (Doc. No. 22, filed April 15, 1999); Motion by Plaintiffs Joseph M. Tantum and Marylou Tantum for Costs and Attorney's Fees for Improper Removal Pursuant to 28 U.S.C. § 1447

(Doc. No. 24, filed May 13, 1999); and Defendants' Response to Plaintiffs' Motion for Costs and Attorney's Fees (Doc. No. 25, filed May 21, 1999), **IT IS ORDERED**, for the reasons set forth in the following Memorandum, that the Motion of Plaintiffs Joseph M. Tantum and Marylou Tantum to Remand to the Court of Court of Common Pleas for Philadelphia County Pursuant to 28 U.S.C. § 1447 is **GRANTED** and the case is **REMANDED** to the Court of Common Pleas for the County of Philadelphia.

**IT IS FURTHER ORDERED** that the Motion of Plaintiffs Joseph M. Tantum and Marylou Tantum for Costs and Attorney's Fees for Improper Removal Pursuant to 28 U.S.C. § 1447 is **DENIED**.

#### MEMORANDUM

#### **I. INTRODUCTION**

Plaintiffs, Pennsylvania domiciliaries, filed state law claims against several cigarette manufacturers and distributors in the Philadelphia Court of Common Pleas on December 1, 1998. None of the claims is based on federal law. While none of the manufacturers is domiciled in Pennsylvania, three of the distributors are domiciled in Pennsylvania.

Defendants filed a notice of removal under 28 U.S.C. § 1441 on February 25, 1999, based on claimed diversity jurisdiction. Plaintiffs then moved to remand on the ground that the distributor-defendants were non-diverse. In addition, plaintiffs filed a motion for costs and attorney's fees related to the removal and remand motion.

Plaintiffs make two arguments in the motion to remand: (1) there is no diversity jurisdiction or any other basis of federal jurisdiction; and (2) defendants' notice to remove is violative of 28 U.S.C. § 1441(b) in that one of the defendants which joined in the removal, Pennsylvania Distributors Association, Inc. ("PDA"), is a Pennsylvania domiciliary.

Defendants claim there was a fraudulent joinder of the distributor-defendants in order to prevent removal. Specifically, defendants argue that (1) plaintiffs have not plead any cognizable cause of action against the non-diverse distributors under Pennsylvania law; and (2) there is no authority for the proposition that it is improper for a fraudulently joined defendant to join a motion for removal.<sup>1</sup>

## **II. MOTION FOR REMAND**

### **A. Removal and Fraudulent Joinder**

When a non-diverse party has been joined as a defendant, absent a substantial federal question the removing defendant may avoid remand only by demonstrating that the non-diverse party was fraudulently joined. The removing party carries a "heavy burden of persuasion" in making this showing. Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006, 1012 n.6 (3d Cir. 1987); See also Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir.

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<sup>1</sup> Because the Court grants plaintiffs' motion to remand on the basis that there is a colorable cause of action against the non-diverse defendants under Pennsylvania law, the Court will not address plaintiffs' argument that PDA improperly joined in the motion to remove.

1990). Removal statutes "are to be strictly construed against removal and all doubts should be resolved in favor of remand." Steel Valley, 809 F.2d at 1010 (citing Abels v. State Farm Fire & Casualty Co., 770 F.2d 26, 29 (3d Cir. 1985)).

Joinder is fraudulent "'where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendants or seek a joint judgment.'" Boyer, 913 F.2d at 111 (quoting Abels, 770 F.2d at 32). But, "'[i]f there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper and remand the case to state court.'" Boyer, 913 F.2d at 111 (quoting Coker v. Amoco Oil Co., 709 F.2d 1433, 1440-41 (11th Cir. 1983)).

"[W]here there are colorable claims or defenses asserted against or by diverse and non-diverse defendants alike, the court may not find that the non-diverse parties were fraudulently joined based on its view of the merits of those claims or defenses." Boyer, 913 F.2d at 113 (citing Chesapeake & O. Ry. Co. v. Cockrell, 232 U.S. 146 (1914)). In evaluating the alleged fraud, the Court must "focus on the plaintiff's complaint at the time the petition for removal was filed[, and the Court] must assume as true all factual allegations of the complaint." Steel Valley, 809 F.2d at 1010 (citation omitted). It also must "resolve any uncertainties as to the current state of controlling substantive law in favor of

the plaintiff." Boyer, 913 F.2d at 111.

Plaintiffs have plead claims against the distributor-defendants under both strict products liability and negligence theories of recovery. The Court must determine whether under Pennsylvania law such causes of action may lie. Under Boyer, if there is any uncertainty as to whether Pennsylvania courts would permit plaintiffs' claims against the tobacco distributors, the Court must remand.

#### **B. Pennsylvania Law**

Pennsylvania has not squarely addressed the issue of whether a tobacco distributor may be held liable for smoking-related injuries under a strict products liability theory. However, in Coyle v. Richardson-Merrel, Inc., 584 A.2d 1383, 1384-85 (Pa. 1991), the Pennsylvania Supreme Court stated that Section 402A claims may be maintained against sellers as well as manufacturers in a number of factual settings, adopting Comment f of the Restatement (2d) of Torts and applying the rule to cases involving suppliers other than sellers as well. See also Webb v. Zern, 220 A.2d 853 (Pa. 1966); Francioni v. Gibsonia Trucking Company, 372 A.2d 736 (Pa. 1977). Although the Coyle court went on to hold that such a cause of action should not lie against a pharmacist for distributing a drug, the court centered its analysis on special public policy concerns surrounding drug distribution. Coyle, 584 A.2d at 1385-87. See also Cafazzo v. Central Medical Health Services, Inc., 668 A.2d 521 (Pa. 1995)(holding policies underlying Section 402A did not support imposing strict liability

on physician who performed surgery to implant defective prosthetic device and hospital where operation was performed); Musser v. Vilsmeier Auction Co., 562 A.2d 279 (1989)(holding policies underlying Section 402A not served by treating auctioneer as "seller" subject to strict liability); Nath v. National Equipment Leasing Corp., 439 A.2d 633 (1981)(holding purpose of Section 402A not advanced by treating financing lessor with only tangential relationship to supply of products as "seller" subject to strict liability); Cf. Francioni v. Gibsonia Trucking Company, 372 A.2d 736 (Pa. 1977)(holding policies underlying strict product liability do support extension of strict liability to those who market by lease or bailment as well as sale).

As of this writing, no Pennsylvania court has addressed the issue before this Court: whether, as a matter of public policy, distributors of tobacco products may be held liable under a strict liability theory. The uncertainty in this area of Pennsylvania law is dispositive; because a state court could find such liability, the Court must remand. See Boyer, 913 F.2d at 111.

Plaintiffs' negligence claim against the distributor-defendants is based on the theory of failure to warn. Pennsylvania has adopted Section 388 of the Restatement (2d) of Torts, which imposes liability for damages caused by suppliers of chattel who fail to use reasonable care to inform likely users of the chattel's dangerous conditions. Binder v. Jones & Laughlin Steel Corp., 520 A.2d 863, 866 (Pa. Super. Ct. 1987). While Pennsylvania has not expressly permitted a cause of action against a tobacco distributor

under a theory of failure to warn, it is possible that such a theory will lie. Thus, in the context of a motion to remand, plaintiffs have stated a colorable negligence claim, and the Court must remand on this alternative ground.

### **III. MOTION FOR COSTS AND ATTORNEY'S FEES**

Under 28 U.S.C. § 1447(c), the Court may require payment of "just costs and any actual expenses, including attorney fees, incurred as a result of the removal." See also Mints v. Educational Testing Serv., 99 F.3d 1253, 1260 (3d Cir. 1996). The Court declines to do so. Imposition of such a penalty is unwarranted where defendants had a colorable basis for removal. See id. at 1260-61. It does not appear that the defendants' removal petition was brought in bad faith, or, given the lack of clarity in Pennsylvania law discussed above, that there was no colorable basis for removal. Id.; See Yellow Cab Company of Pittsburgh v. Gasper, 994 F.Supp 344, 349-50 (W.D. Pa. 1998). Accordingly, plaintiffs are not entitled to any relief under 28 U.S.C. § 1447(c).

**IV. CONCLUSION**

For the foregoing reasons, the Court will grant plaintiffs' motion to remand and deny plaintiffs' motion for attorney's fees.<sup>2</sup>

**BY THE COURT:**

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**JAN E. DUBOIS, J.**

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<sup>2</sup> Because the Court remands the case for lack of subject matter jurisdiction, the Court will not address the motion of defendant Batus Holdings, Inc. to dismiss for lack of personal jurisdiction.