

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE GENETICALLY MODIFIED RICE
LITIGATION

4:06 MD 1811 CDP

This Document relates to:

Thibodeaux Brothers Farms v. Bayer CropScience LP

No. 07-1004

Thibodeaux Land Co., Inc. v. Bayer CropScience, LP

No. 07-984

E&R Farms, Inc. v. Bayer CropScience, LP

No. 07-1005

Ross G. Thibodeaux v. Bayer CropScience, LP

No. 07-1014

**THE BAYER DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR LEAVE TO FILE FIRST
AMENDED, RESTATED AND CONSOLIDATED COMPLAINT**

The Bayer defendants oppose plaintiffs' Motion for Leave to File their First Amended, Restated and Consolidated Complaint insofar as plaintiffs seek to add Thibodeaux Ag Group ("Thibodeaux Ag") as a plaintiff. The proposed addition of Thibodeaux Ag is futile because its claims are time-barred on the face of the proposed Amended Complaint, and Thibodeaux Ag cannot carry its burden of proving that its claims are timely under Louisiana law.

INTRODUCTION

The proposed Amended Complaint seeks to add a new entity into this litigation, Thibodeaux Ag. Thibodeaux Ag's only specific allegation is found in ¶ 8 of the proposed Amended Complaint. There, Thibodeaux Ag admits that it is a partnership that began to grow long grain rice in 2008. Louisiana law applies a one-year prescriptive period for the claims that

Thibodeaux now asserts. And Thibodeaux Ag fails to allege any facts supporting its position that it can assert claims two and one-half years after it began farming operations.

Despite a statement in plaintiffs' Motion for Leave that Federal Rule of Civil Procedure 25(c) applies, there are no allegations in the proposed Amended Complaint that there has been a transfer of legal interest from any existing plaintiffs to Thibodeaux Ag that would be recognized under Louisiana law. To the contrary, the testimony elicited and documents produced in discovery show no such transfer of legal interest in accordance with Louisiana law.

ARGUMENT

I. The Proposed Amendment to Add Thibodeaux Ag is Futile

A. Futile amendments are not permitted

Leave to amend will be denied if the proposed amended pleading would be futile. *Enervations, Inc. v. Minnesota Mining & Manufacturing Co.*, 380 F. 3d 1066 (8th Cir. 2004), quoting *Grandson v. Univ. of Minn.*, 272 F. 3d 568, 575 (8th Cir. 2001); see also *Minor, CF v. Eli Lilly, Inc.*, 2010 U.S. Dist. LEXIS 26863, *5 (W.D. Missouri, March 22, 2010) (court denied motion for leave to file amended complaint adding fraud claim as futile because claims were time-barred).

B. Thibodeaux Ag's claims are prescribed on the face of the proposed Amended Complaint and thus it has the burden of proving that its claims are not time-barred

Thibodeaux Ag's proposed negligence and nuisance claims are delictual actions subject to a one-year statute of limitations or prescriptive period under Louisiana law.¹ See La. Civ. Code art. 3492; *Renfroe v. State ex. rel. Dept. of Transp.*, 809 So. 2d 947, 950 (La. 2002). The

¹ Thibodeaux Ag also seeks to assert a claim for violation under the North Carolina Unfair & Deceptive Practices Act. This Court has repeatedly dismissed this type of claim as a matter of law in other cases where, as here, the plaintiffs have no North Carolina operations. See D.E. 2981, 2075, and 3495. Thibodeaux Ag's attempt to assert that claim is therefore futile because it would not survive a motion to dismiss.

one-year prescriptive period starts when “the plaintiff has actual or constructive notice of the tortious act, the resultant damage, and the causal connection between the two.” *Doucet v. LaFourche Parish Fire Protection Dist. No. 3*, 589 So. 2d 517, 519 (La. Ct. App. 1991). “[P]rescription commences when a plaintiff obtains actual or constructive knowledge of facts indicating to a reasonable person that he or she is the victim of a tort.” *Campo v. Correa*, 828 So. 2d 502, 510-11 (La. 2002).

Prescription begins to run when the plaintiff first suffers actual or appreciable damage, even though he may not know its full extent or may incur future damage. *See Harvey v. Dixie Graphics, Inc.*, 593 So. 2d 351, 352 (La. 1992). “[T]here is no requirement that the quantum of damages be certain or that they be fully incurred, or incurred in some particular quantum, before the plaintiff has a right of action.” *Harvey v. Dixie Graphics, Inc.*, 593 So.2d at 354; *Cameron Parish School Bd. v. Acands, Inc., supra*. “Ignorance or misunderstanding of the probable extent or duration of injuries materially differs from ignorance of actionable harm which delays commencement of prescription.” *Fontenot v. ABC Ins. Co.*, 95-1707 (La. 6/7/96), 674 So.2d 960, 964.

“Where [as here] a petition reveals on its face that prescription has run, the plaintiff has the burden of showing why the claim has not prescribed.” *Wimberly v. Gatch*, 635 So. 2d 206, 211 (La. 1994); *McKnight v. Dresser, Inc.*, 2010 U.S. Dist. LEXIS 138767, *6-7 (W.D. La. Nov. 29, 2010). Thibodeaux Ag links its damages to the August 2006 announcement, which occurred before Thibodeaux Ag began farming in 2008. *See* proposed amended complaint at ¶¶ 54-73. Thus, immediately upon its formation on March 24, 2008,² Thibodeaux Ag knew of its alleged damages from LLRICE. Its claims are clearly prescribed on the face of the proposed amended complaint. The latest date Thibodeaux Ag can conceivably argue that it could file suit was March

² *See* D.E. 2988, Ex. M.

24, 2009. Because its claims are prescribed on the face of its proposed complaint, Thibodeaux Ag has the burden of alleging facts in the amended complaint sufficient to carry its burden that the prescriptive period was suspended or interrupted. That is, Thibodeaux Ag must allege facts sufficient “to state a claim for relief that is plausible on its face.” *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

Thibodeaux Ag has not alleged sufficient facts to satisfy its burden. It simply alleges that it has “taken over” the operations of the other plaintiffs Thibodeaux Brothers, Thibodeaux Land, E&R Farms, Inc. and Ross Thibodeaux. *See* Complaint, ¶ 8. But it has not alleged how that fact suspended or interrupted the prescriptive period on its claims. Moreover, even if it “took over” the other plaintiffs’ operations, it has offered no facts satisfying its burden of showing that its own claims from 2008 forward are not prescribed. It has not alleged facts sufficient to allow the court to draw the reasonable inference that its claims are timely. Thus, its claims do not survive a motion to dismiss. *See McKnight v. Dresser, Inc.*, *supra*, 2010 U.S. Dist. LEXIS 138767 at *9, *citing Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1955, 173 L. Ed. 2d 868 (2007).

II. Rule 25(c) Does Not Rescue Thibodeaux Ag’s State Claims

A. Thibodeaux Ag has not alleged facts sufficient to prove a valid transfer of interest under Louisiana law

Plaintiffs rely on Rule 25 to resurrect Thibodeaux Ag’s prescribed claims. Rule 25(c) permits substitution where there has been a transfer of interest in an existing lawsuit. *ELCA Enterprises, Inc. v. Sisco Equipment Rental & Sales, Inc.*, 53 F. 3d 186, 191 (8th Cir. 1995). The rule is “designed to allow an action to continue unabated when an interest in a lawsuit changes hands.” *Id.*, *quoting General Battery Corp. v. Globe-Union, Inc.*, 100 F.R.D. 258,261 (D. Del. 1982). It typically applies to transfers and assignments, as well as to corporate mergers. Wright & Miller, *Federal Practice & Procedure, Civil 3d*, § 1958. Rule 25 is procedural. “It does not

provide for the survival of rights or liabilities, but merely describes the method by which the original action may proceed if the right of action survives.” *Id.* at § 1952. In a diversity case like this one, state law determines the parties’ substantive rights. *In re Covington Grain Co., Inc.* 638 F. 2d 1357, 1361 (5th Cir. 1981); *Fronings, Inc. v. Johnston Feed Service*, 568 F. 2d 108, 111 (8th Cir. 1978) (applying state law to determine substantive rights in a matter involving Rule 25(c)).

Rule 25(c) does not apply where there has not been a valid transfer of interest under state law. *In re Prasad Chalasani*, 92 F. 3d 1300, 1311 (2d Cir. 1996). But here, Thibodeaux Ag does not allege in its proposed amended complaint that it seeks to substitute under Rule 25(c), or that it has been validly transferred the interest in the other plaintiffs’ actions. The reason for that omission is simple -- Thibodeaux Ag seeks to join in the existing lawsuits as a new and separate entity. Thibodeaux Brothers, Thibodeaux Land, E&R Farms and Ross Thibodeaux still seek recovery of their own separate damages. Moreover, Thibodeaux Ag seeks damages relating to lands that Thibodeaux Brothers, Thibodeaux Land, E&R Farms and Ross Thibodeaux never farmed. For example, Thibodeaux Ag lists Farms 3711, 6357, 7204 and 5384, consisting of about 980 acres of farmland, in its 2008 FSAs. None of these farms is included in Thibodeaux Brothers, Thibodeaux Lands’, E&R Farms’ or Ross Thibodeaux’s FSAs for 2006 or 2007.³

Although Louisiana law allows a transfer of litigious rights under La. Civ. Code art. 2652, the Thibodeauxs deny that Thibodeaux Brothers, Thibodeaux Land, E&R Farms or Ross Thibodeaux transferred or assigned their rights against the Bayer Defendants to Thibodeaux Ag.⁴ There has not been a transfer of interest in the suits by contract.

³ See D.E. 2988, Ex. J, K, E.

⁴ See Ex. L to D.E. 2988 (June 1, 2010 deposition of Robert Dale Thibodeaux) at 34-38.

Nor was there a transfer of interest by operation of Louisiana law. Thibodeaux Ag is a juridical entity distinct from Thibodeaux Brothers Farms and Thibodeaux Land, E&R Farms or Ross G. Thibodeaux. *See* La. Civ. Code art 24 (A juridical person is an entity to which the law attributes personality, such as a corporation or a partnership.”); La. Civ. Code art 2801 (“A partnership is a juridical person, distinct from its partners . . .”). “The proper party to assert the rights of the partnership is the partnership itself.” *1900 Partnership v. Bubber, Inc.*, 662 So.2d 808, 811 (La. Ct. App. 1995), *writ denied*, 668 So.2d 369 (La. 1996). *See also Tessier v. Moffatt*, 93 F. Supp. 2d 729 (E.D. La. 1998) (“In Louisiana, a partnership is a legal entity distinct from the partners who compose it. . . . [A] Louisiana jurisprudential rule holds that as long as a partnership exists and has not been dissolved or liquidated, the partnership itself is the proper party to maintain an action for damages.”) (internal citations omitted).

Robert Dale Thibodeaux admits that Thibodeaux Brothers Farm Partnership, Thibodeaux Land, and E&R Farms all currently exist as separate entities and thus have not merged or consolidated with or into Thibodeaux Ag.⁵ A merger or consolidation of corporations requires a formal written agreement recorded with the Secretary of State. *See* La. Rev. Stat. 12:112-114. Similar rules apply to situations where a corporation merges or consolidates with a partnership, *see* La. Rev. Stat. 9:3441-46. None of the formal requirements for merger or consolidation have been satisfied here.

The Eighth Circuit’s decision in *ELCA Enterprises, Inc.* does not dictate a different result. There, the issue was whether the cause of action survived the transfer, not whether a transfer actually occurred. “Rule 25 does not substantively determine what actions survive the transfer of an interest; rather, it provides substitution procedures for an action that does survive.” 53 F. 3d at 191.

⁵ D.E 2988, Ex. L (June 1, 2010 deposition of Robert Dale Thibodeaux) at 12, 16-17, 29-30.

B. This Court has not previously ruled on whether the proposed amended complaint is proper

After severing Thibodeaux Brothers and Thibodeaux Land's claims from those of the other plaintiff immediately before the Louisiana Bellwether trial, the Court commented on Rule 25(c) and prescription issues concerning the newly identified Thibodeaux Ag partnership. But at that time plaintiffs did not seek to add Thibodeaux Ag as a party through a complaint or an amended complaint. Moreover, the Court mistakenly believed at that time that Thibodeaux Ag operated the same farmlands that Thibodeaux Brothers, Thibodeaux Land, E & R Farms, Inc and Ross Thibodeaux had previously farmed. But Thibodeaux Ag operated at least four farms containing approximately 915 acres of farmland in 2008 (Farms 3711, 5384, and 7204) that none of these entities or Ross Thibodeaux had previously operated. Thibodeaux Ag is not simply a continuation of the other plaintiffs' operations. It is a different entity, operating many different farms and fields, and asserting its own claims relating to those different farms and fields.

In any event, the Court's comments were certainly premised on the plaintiffs filing an amended complaint asserting the facts identifying the purported interests transferred to Thibodeaux Ag, and the legal basis for the transfers under Louisiana law. The proposed Amended Complaint contains no such factual allegations.

Thibodeaux Ag delayed bringing its claims for almost three years. It had the opportunity to timely file its own lawsuit, or timely join in an existing one. Thibodeaux Ag did not do so, and its claims now are time-barred by Louisiana law.

CONCLUSION

Because Thibodeaux Ag's claims are futile, this Court should deny plaintiffs' leave to amend insofar as it seeks to add Thibodeaux Ag as a new plaintiff.

Dated: February 22, 2011

Respectfully submitted,

/s/ Lester C. Houtz

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

/s/ Lester C. Houtz