

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

In Re: Lupron Marketing and Sales
Practices Litigation

MDL No. 1430
File No. 01-CV-10861

This Document Relates to: ALL ACTIONS

Judge Richard G. Stearns

MEMORANDUM OF THE ATTORNEY GENERAL OF THE
STATE OF MINNESOTA IN RESPONSE TO THE COURT'S
APRIL 15, 2005 ORDER

On November 24, 2004, this Court entered an order granting preliminary approval to a nationwide class settlement and providing the procedures for filing a Notice of Exclusion and appointing a Minnesota corporation¹ to act as a class representative on behalf of certain third-party payors ("November 24 Order"). On March 31, 2005, pursuant to the notice provided regarding the November 24 Order, the State of Minnesota ("Minnesota") filed a valid Notice of Exclusion on behalf of Minnesota's departments, bureaus, and agencies and as a representative of, and as *parens patriae* on behalf of the citizens of Minnesota.

Minnesota voluntarily files this Memorandum of Law as invited by this Court's Order Regarding Notices of Exclusion Submitted by the Attorneys General of Idaho, Illinois, Kentucky, Minnesota, Pennsylvania, and Wisconsin, dated April 15, 2005.² Minnesota respectfully declines the opportunity to participate in the proposed nationwide settlement and objects to the jurisdiction of this Court. Minnesota possesses the authority to exclude the totality

¹ The MDL Plaintiffs never explain how a Minnesota corporation purporting to represent Minnesota can object to Minnesota's *parens patriae* jurisdiction which has benefited the class representative in the past.

² Minnesota files this Memorandum without waiving jurisdictional arguments it may have regarding challenges to its Notice of Exclusion.

of its claims from the proposed nationwide settlement, including the claims of the State's departments, bureaus and agencies, as well as claims for its citizens under the State's *parens patriae* authority.

I. ARGUMENT

A. The State of Minnesota's Timely Notice Of Exclusion Complies with this Court's November 24, 2004 Order.

MDL Plaintiffs curiously allege that Minnesota's Notice of Exclusion that provides all information requested in the published notice suffers from a host of defects making it impossible to "determine which state claims the Attorney[] General seek[s] to exclude." MDL Plaintiffs' Response Regarding the Purported "Exclusions" by Idaho, Illinois, Kentucky, Wisconsin, Minnesota, and Pennsylvania, April 11, 2005 ("Response") at 6-7. This claim is without merit.

Minnesota's Notice of Exclusion complies with *all* requirements established in the Court's November 24 Order. In pertinent part, the Order requires individuals who wish to be excluded from the class to submit a written notice clearly stating:

the name, address, taxpayer identification number, telephone number and fax number (if any) of the individual or entity that wishes to be excluded from the nationwide Lupron® Purchaser Class as well as the time period during which the class member made Lupron® Purchases. For Third Party Payors, the notice of exclusion must also include a signed certification containing the following language * * * In addition, for the purpose of implementing the Class Agreement . . . each [Third Party Payor] Class Member requesting exclusion shall be required to set forth in the Exclusion Form the amounts paid for Lupron® during the 2000 through 2001 time period.

November 24, 2004 Order at 10-11.

The November 24 Order does not allow piecemeal exclusion of claims. A Notice of Exclusion informs the Court, MDL Plaintiffs and Defendants that the class member has chosen to exclude *all* claims from the proposed settlement. Accordingly, the November 24 Order does

not require class members to list separately each claim they seek to exclude from the settlement; identification of the party seeking exclusion is sufficient.

In the case of Third Party Payors, the November 24 Order also requires the Notice of Exclusion to include a signed certification setting forth the amounts paid for Lupron during the 2000 to 2001 time period. Contrary to MDL Plaintiffs' assertions, nothing in the November 24 Order requires the State to list individual Third Party Payors covered by the Notice of Exclusion. *See* Response at 1 ("exclusions are procedurally defective because they fail to identify the name of third party payer [sic] entities for which exclusion is sought.").

Minnesota timely submitted a Notice of Exclusion on March 31, 2005 on behalf of the State's departments, bureaus, and agencies and as a representative of, and as *parens patriae* on behalf of the citizens of the State thereby excluding all claims by the State and its citizens from the proposed settlement. The Notice of Exclusion included the exact wording of the requisite certification and the certified amounts paid for Lupron during the 2000 to 2001 time period. If MDL Plaintiffs or defendants wanted more information, then they should have so moved this Court and including the requests in the written and published notice.³

Minnesota's Notice of Exclusion fully complies with the requirements established in this Court's November 24 Order.

B. The Eleventh Amendment of the United States Constitution Bars This Court from Taking Action against the State of Minnesota

The Eleventh Amendment provides that "[t]he judicial power of the United States shall not extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State." Even assuming *arguendo*, that Minnesota's Notice of Exclusion was defective, the Eleventh

³ Minnesota finds no support for MDL Plaintiffs' or defendants' claims regarding the insufficiency of notice in any of the materials posted on the official website.

Amendment precludes this Court from exerting authority over the State of Minnesota in this case.

The immunity under the Eleventh amendment “is an immunity from being made an involuntary party to an action in federal court....” *Moore ex rel. State of Mississippi v. Abbott Laboratories*, 900 F.Supp. 26, 30 (S.D.Miss. 1995). Furthermore, the Eleventh Amendment protects the State from coercion of any sort. *Thomas v. FAG Bearings Corp.*, 50 F.3d 502, 506 (8th Cir. 1995) (“[C]oncern and respect for state sovereignty are implicated whenever a state is involuntarily subjected to an action, regardless of the role it is forced to play in the litigation.”).

The cases interpreting the Eleventh Amendment draw a sharp distinction between a state voluntarily submitting to the jurisdiction of a federal court and a state being forced to litigate in federal court. As to the latter category, no party has the power to force the state into federal court absent a federal issue which is not present here.

The Supreme Court’s ruling in *State of Missouri v. Fiske*, 290 U.S. 18 (1933) is especially instructive on this Court’s lack of power to force Minnesota to litigate its claims in federal court. In *Fiske*, the Supreme Court invoked the Eleventh Amendment in holding that the district court had no power to issue an injunction preventing a State from prosecuting certain proceedings on the ground that doing so interfered with the district court’s jurisdiction. *Id.* at 29. The Supreme Court noted that “[t]he entire judicial power granted by the Constitution does not embrace the authority to entertain a suit brought by private parties against a state without consent given.” *Id.* at 26.

The facts in *Fiske* are remarkably similar to the facts before this Court. In *Fiske*, respondents sought an injunction restraining the State of Missouri from exercising its authority to prosecute certain proceedings in the probate court of the City of Saint Louis. Here, the MDL

plaintiffs seek an order barring Minnesota from exercising its right to opt out of the nationwide settlement on its own behalf and on behalf of its citizens with a right to later prosecute its claims in the Minnesota district courts.

Minnesota did not enter this action voluntarily. It was forced to file a Notice of Exclusion from the nationwide settlement class to protect its own interests and the interests of its citizens. The Minnesota corporation purporting to act as the class representative for Minnesota never consulted Minnesota regarding the terms of the settlement; never asked whether Minnesota would be asserting *parens patriae* rights; never inquired whether Minnesota wanted to participate as a SHP or TPP; and never asked whether Minnesota would consent to a non-governmental entity acting as its representative. MDL Plaintiffs now seek an order extinguishing Minnesota's right to opt out of the Class of Lupron Purchasers thereby forcing Minnesota to submit to this Court's jurisdiction. This Court may not grant MDL Plaintiffs' Motion to Strike Minnesota's Notice of Exclusion because the Eleventh Amendment forbids this Court's exercise of jurisdiction over Minnesota.

C. Minnesota has the authority to exercise its *Parens Patriae* powers in this case.

The right of the Minnesota Attorney General to file actions to protect citizens of the State is derived from English common law. In the United States, what was once the King's *parens patriae* authority to exercise his royal powers in his capacity as "father of the country" passed to the state governments. See *Hawaii v. Standard Oil*, 405 U.S. 251, 257 (1972). Under the *parens patriae* doctrine, a State has standing to bring an action in its own name and in its *parens patriae* capacity as a protector of its citizens.

To bring a *parens patriae* action, Minnesota must assert an injury to a "quasi-sovereign interest" which includes the "health and well-being – both physical and economic – of its

residents in general.” *Alfred L. Snapp & Sons, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). The state’s interest in maintaining channels of commerce which are undisturbed by unlawful pricing and marketing practices constitutes a quasi-sovereign interest sufficient to invoke the *parens patriae* authority. *Snapp*, 458 U.S. at 607-08 (court found that Puerto Rico has the right to bring an action to guarantee that its residents enjoy the full benefit of federal legislation); *see also Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 447-52 (1945) (in which Georgia maintained a quasi-sovereign interest in assuring its residents the benefits of federal anti-trust legislation) *rehearing denied* 324 U.S. 890; *Maryland v. Louisiana*, 451 U.S. 725, 737-39 (1981) (in which Maryland maintained a quasi-sovereign interest in securing benefits of the Natural Gas Act for its residents). The State’s *parens patriae* authority is neither entirely derived from the claims of its citizens nor is it curtailed by a citizen’s individual action.⁴

The Minnesota federal district court has previously addressed the issue of whether the courts or Minnesota should decide whether there has been an injury to a quasi-sovereign interest sufficient to support a *parens patriae* action. The Minnesota District Court observed that courts “should defer to a state’s analysis of its quasi-sovereign interests in determining whether the state may bring a *parens patriae* action.” *State of Minn. by Humphrey v. Standard Oil Co.*, 568 F.Supp 556, 564 (D.Minn. 1983), *accord Snapp*, 458 U.S. at 607 (leaves “articulation of such interests” as “a matter for case-by-case development”); *State v. First National Bank of Anchorage*, 660 P.2d 406, 422 (Alaska 1982) (“it is not the court’s function to pass upon the Attorney General’s determination of what is or is not in the ‘public interest’”) (citation omitted); *Hyland v. Kirkman*, 385 A.2d 284, 290 (N.J. Super. Ct. 1978) (“Attorney General has discretion to determine what matters are in the public interest ... His determination is strongly

⁴ To the extent that Minnesota recovers in its *parens patriae* capacity, defendants would receive a credit for any monies they paid to individuals.

persuasive.”). Accordingly, the Court need look no further than Minnesota’s assertion that it is seeking to vindicate an injury to a “quasi-sovereign interest” to determine that the Notice of Exclusion on behalf of Minnesota’s citizens is in the public interest.⁵

Having established a public interest, the state must next demonstrate that it has interests distinct from the interests of particular private parties. *See Snapp*, 458 U.S. at 607. The pursuit of its own interests insures that a State is more than a nominal party in an action and that the action will be prosecuted vigorously. *Id.* at 593. In this case, Minnesota has distinct claims against the Defendants in addition to claims to protect its citizens. Minnesota’s interest in protecting the physical and economic welfare of its citizens is clearly implicated in a case involving unlawful pricing and marketing of prescription medications.⁶

Minnesota courts have found that a *parens patriae* action satisfies the “different interests” requirement if individual citizens would not likely or realistically bring a case. *State by Humphrey v. Ri-Mel, Inc.*, 417 N.W.2d 102, 112 (Minn. Ct. App. 1987); *Standard Oil*, 568 F.Supp. at 564. Similarly, the United States Supreme Court has also upheld the use of *parens patriae* authority where a State’s citizens are unlikely to protect their own interests due to the legal complexity of pursuing a claim or the relatively small nature of their individual interests. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 238-239 (1907), *Kansas v. Colorado*, 185 U.S. 125, 145-147 (1902); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901); *Louisiana v. Texas*, 176 U.S. 1, 28 (1899).

⁵ Minnesota’s present intent is to return all money recovered under its *parens patriae* authority back to Minnesota Lupron purchasers and/or consumers.

⁶ Minnesota’s interest is only heightened here where damages rightfully belonging to Minnesota (individually and in its *parens patriae* capacity) and its citizens will inure to the benefit of other states and their citizens if Minnesota’s Notice of Exclusion is not honored.

Minnesota determined, as a preliminary matter, that the proposed nationwide settlement does not adequately compensate the claims of Minnesota or of all of its citizens.⁷ Now, as we approach the end of the claims process, it appears that thousands of Minnesota purchasers are either unwilling or unable to protect their interests as the claim rate is relatively small. The proposed nationwide settlement is proving to be an insufficient mechanism by which Minnesota's citizens can protect their own interests. Minnesota, if it ever had to justify its decision to exclude itself from the class and to exercise its *parens patriae* authority, has demonstrated both its legal basis and judgment to secure adequate redress for all of its claims. Pursuit of such claims not only advances the individual interests of the State's citizens, but also advances the State's quasi-sovereign interest in maintaining the flow of commerce untainted by unlawful pricing and marketing practices.

In an attempt to defeat the State's Notice of Exclusion, Defendants raise the unfounded concern that allowing the State to exercise its *parens patriae* authority to exclude its citizens from the proposed nationwide settlement would defeat "the finality of virtually every class action involving pending state claims....". Defendants' Combined Reply to the Responses of the Attorneys General to the Court's April 15, 2005 Order, May 4, 2005 at 1. The Notice of Exclusion by Minnesota does not invite the Court to reopen a settlement, nor does it open the door for other courts to do so in the future. Rather, Minnesota seeks to protect its claims by opting out of a settlement that does not adequately protect its interests *before* the settlement is finally approved. Minnesota seeks to do nothing more for its claims in all capacities than the

⁷ The defendants' various briefs in support of this settlement underscore this point by emphasizing a \$100 minimum to incentivize participation. The point of the matter is that even with this "incentive," relatively few Minnesotans have submitted claims. To the extent that they are unable or unwilling to do so, Minnesota's *parens patriae* authority is available to ensure that the damages due for Minnesota are shared with Minnesota purchasers.

Federal Rules of Civil Procedure specifically allow any person or entity to do in any class action—opt out. See Fed. R. Civ. Pro. 23(c)(2)(B). Use of an opt-out in this case is not an extraordinary use of the *n patriae* power and is not a threat to the finality of this or any other class action settlement.

II. CONCLUSION

For the foregoing reasons, the State of Minnesota, by and through its Office of the Attorney General, respectfully requests that this Court deny Defendant's Motion to Strike Minnesota's Request for Exclusion.

Date: May 11, 2005

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