

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

COMMONWEALTH OF PENNSYLVANIA
by **THOMAS W. CORBETT, JR.**, in his capacity as
Attorney General of the Commonwealth of
Pennsylvania,

PLAINTIFF,

v.

TAP PHARMACEUTICAL PRODUCTS, INC., et al.

DEFENDANTS.

Case No.: 05CV3604

Judge Juan R. Sanchez

ORDER

AND NOW, this _____ day of _____, upon consideration of Plaintiff's Motion for Remand, for Expedited Hearing, and for an Award of Fees and Costs, it is hereby ORDERED and DECREED that said Motion is GRANTED and this case is hereby remanded back to the Commonwealth Court of Pennsylvania.

It is further ORDERED that defendants are to pay the fees and costs that the Commonwealth's counsel incurred in the presentation of this Motion.

Sanchez, U.S.D. J.

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**MOTION FOR REMAND, EXPEDITED RULING,
AND AN AWARD OF FEES AND COSTS**

Pursuant to 28 U.S.C. § 1447(c), The Commonwealth of Pennsylvania hereby moves for an Order remanding this case to the Commonwealth Court of Pennsylvania and for an award of its counsels' fees and costs in bringing this motion for the reasons that the attempted removal is untimely and there is no basis for federal jurisdiction over this litigation. The Commonwealth requests oral argument and further requests that this motion be heard on an expedited basis. In support of this motion, the Commonwealth relies on the Memorandum of Law submitted herewith. A proposed form of Order is attached.

Respectfully submitted,

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Dated: July 26, 2005

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

COMMONWEALTH OF PENNSYLVANIA
by **THOMAS W. CORBETT, JR.**, in his capacity as
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Pennsylvania,

PLAINTIFF,

v.

**TAP PHARMACEUTICAL PRODUCTS, INC.; ABBOTT
LABORATORIES; ASTRAZENECA PLC; ZENECA
HOLDINGS, INC.; ASTRAZENECA PHARMACEUTICALS
LP; ASTRAZENECA LP; BAYER AG; BAYER
CORPORATION; SMITHKLINE BEECHAM
CORPORATION D/B/A GLAXOSMITHKLINE; PFIZER,
INC.; PHARMACIA CORPORATION; JOHNSON &
JOHNSON; ALZA CORPORATION; CENTOCOR, INC.;
ETHICON, INC.; JANSSEN PHARMACEUTICAL
PRODUCTS, L.P.; MCNEIL-PPC, INC.; ORTHO
BIOTECH, INC.; ORTHO BIOTECH PRODUCTS, L.P.;
ORTHO-MCNEIL PHARMACEUTICAL, INC.; AMGEN,
INC.; IMMUNEX CORPORATION; BRISTOL-MYERS
SQUIBB COMPANY; BAXTER INTERNATIONAL INC.;
BAXTER HEALTHCARE CORPORATION; IMMUNO-
U.S., INC.; AVENTIS PHARMACEUTICALS, INC.;
AVENTIS BEHRING, L.L.C.; HOECHST MARION
ROUSSEL, INC.; BOEHRINGER INGELHEIM
CORPORATION; BOEHRINGER INGELHEIM
PHARMACEUTICALS, INC.; BEN VENUE
LABORATORIES, INC.; BEDFORD LABORATORIES;
ROXANE LABORATORIES; SCHERING-PLOUGH
CORPORATION; WARRICK PHARMACEUTICALS
CORPORATION; SCHERING SALES CORPORATION;
DEY, INC.,**

DEFENDANTS.

Case No.: 05CV3604

Judge Juan R. Sanchez

**THE COMMONWEALTH OF PENNSYLVANIA'S
MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR REMAND, EXPEDITED
RULING, AND AN AWARD OF FEES AND COSTS**

I. INTRODUCTION

Defendants' attempt to remove this case to federal court is a meritless delay tactic that is both procedurally and substantively infirm, and therefore should be rejected.

First, defendants' attempted removal is untimely.

Second, the two federal district court cases defendants cite for the proposition that a pronouncement of the Supreme Court in an *unrelated case* resurrects an expired removal right have been rejected by all subsequent courts to consider the issue. The Court of Appeals for the Third Circuit has recognized that an order of a superior court must be sufficiently related to the pending case and parties to trigger a renewed removal right, factors not present here.

Third, the Supreme Court opinion defendants cite for the proposition that federal question jurisdiction exists here does not support that conclusion. *Grable & Sons Metal Prods. v. Darue Engineering & Manufacturing*, 545 U.S. ___, 125 S. Ct. 2363 (2005) is both factually and legally inapposite. Moreover, it does not articulate a new or different standard for removal than that applied in *In re Pharmaceutical Industry Average Wholesale Price Litigation*, Docket No. MDL 1456 (D. Mass.), the proceeding to which defendants seek to have this case transferred. By its express language, *Grable* has not changed the test for removeability based on federal question jurisdiction.

Fourth, the same argument defendants raise here was rejected by Judge Saris in MDL 1456 when she remanded cases brought by other State Attorneys General. Nothing new is being presented here.

Finally, the claims asserted in the instant litigation are not as narrowly circumscribed as defendants contend, and therefore the claimed "substantial federal question" is nonexistent. Contrary to defendants' *ipse dixit* assertions, this case does not rise and fall on the narrow question of the "meaning of AWP [Average Wholesale Price] in the federal Medicare statute and

regulations.” See Notice of Removal at ¶ 9. Rather, as set forth in the Commonwealth’s Amended Complaint, this case presents exclusively state-law claims, under the common law and statutes of Pennsylvania, alleging that the Commonwealth and its consumers were defrauded as a result of defendants’ unlawful marketing and sales practices respecting their prescription drugs sold throughout the state. The fact that defendants are alleged to have manipulated the Average Whole Price (“AWP”) for their drugs as part of the overall scheme does not cause this factual element to become the overriding issue. This case does not present a substantial or overriding issue of federal law demanding resolution in federal court, and the *Grable* opinion does not change this conclusion.

Defendants’ attempted removal, combined with their immediate request for transfer, should be seen for what it is: an unabashed effort to impose an interminable delay on this case. Cases removed by defendants and transferred to MDL 1456 for ruling on remand have sat for months and in at least one instance years awaiting ruling.¹ This Court has the power to minimize the damage caused by the defendants’ conduct by promptly ruling on the instant Motion for Remand and

¹Two of the “AWP” cases cited by defendants in footnote 2 of their Notice of Removal as cases in which courts issued stays pending transfer to MDL 1456 (though defendants have not as of this date sought a stay here) also involve undersigned outside counsel to the Commonwealth. These cases demonstrate the prejudicial delay to the Commonwealth if a decision on remand is deferred to the MDL proceedings. In *Swanston, et al. v. TAP Pharmaceutical Products, Inc., et al.*, No. 03-CV-62 (D.Ariz), defendants sought to remove the case nine (9) months after it was filed, and after motions to dismiss had been filed, briefed, argued, and denied. Over plaintiffs’ objections, the Arizona district court stayed the case and declined to decide the remand. The MDL court remanded the case a day shy of one year from the date of removal. *International Union of Operating Engineers Local No. 68 Welfare Fund, et al. v. AstraZeneca PLC, et al.*, No. 03CV03230 (D.N.J.), is the quintessential example of the confusion and delay that can occur if a transferor court declines to determine the remand motion. In *Local 68*, defendants filed their notice of removal on July 3, 2003 and a motion for stay on July 8, 2003. Plaintiff filed its motion for remand on July 9, 2003. The stay motion was argued before the New Jersey district court and granted on July 23, 2003. The Judicial Panel on Multi-District Litigation issued a transfer order to the MDL on December 3, 2003. To date, plaintiff still has no ruling on remand from the MDL court. Neither efficiency nor fairness resulted from deferral of the remand ruling in either *Swanston* or *Local 68*.

returning this case to the Commonwealth Court where it belongs. The Commonwealth respectfully requests that the Court do so immediately and not defer the ruling to Judge Saris in MDL 1456.

II. BACKGROUND

Long before there was the federal MDL 1456, or any civil litigation in state or federal court for that matter, Attorneys General throughout the country were actively engaged in both criminal and civil investigations into unlawful marketing and sales practices by the drug industry, including the unlawful inflation and promotion of AWP. *See* “Special Report: States Mull Suit Against Drug Companies” attached hereto as Exhibit “A.” By early 2001, members of the National Association of Attorneys General (“NAAG”) had convened a special Pharmaceutical Pricing Task Force (“PPTF”) to investigate unlawful marketing and sales practices in the drug industry, among other things. Pennsylvania joined as a co-convenor in PPTF. In fulfilling its mission, the members of the NAAG worked with the United States Department of Justice, the United States Attorneys of several states, and the National Association of Medicaid Fraud Control Units (“NAMFCU”) to complete the criminal and civil investigations and to initiate new ones.

On March 10, 2004, the Commonwealth of Pennsylvania filed its lawsuit against thirteen (13) pharmaceutical companies that had engaged in a widespread marketing and sales scheme and conspiracy to overcharge the Commonwealth and its consumers for prescription drugs. The Complaint pled claims for common law fraud, consumer fraud under the Pennsylvania Unfair Trade Practices and Consumer Protection Law (“UTPCPL”), civil conspiracy, and unjust enrichment.

Defendants filed preliminary objections seeking dismissal of the Complaint on March 30, 2004, asserting, *inter alia*, that the Commonwealth had failed to plead with sufficient particularity under the Pennsylvania Rules of Civil Procedure and had failed to state claims for unjust enrichment, fraud, civil conspiracy, or violations of the UTPCPL. Oral argument was heard

on September 8, 2004. On February 1, 2005, the Commonwealth Court sustained the preliminary objections, ruling that the Complaint did not satisfy Pennsylvania's pleading requirements. The Court dismissed the Complaint without prejudice. *See Commonwealth v. TAP Pharmaceutical Products, Inc.*, 868 A.2d 624 (Pa. Commw. Ct. 2005).

The Commonwealth filed its Amended Civil Action Complaint on March 8, 2005 and a Corrected Amended Civil Action Complaint ("Amended Complaint") two days later. Though the Amended Complaint was 222 pages long, five times longer and much more detailed than the original complaint, defendants again filed preliminary objections generally alleging the same deficiencies. This time, however, defendants raised claims of Medicare preemption, "filed rate doctrine," and the state action doctrine, after having received unfavorable rulings in the MDL Court on these issues. Oral argument was held on June 8, 2005, and the parties are awaiting a decision.

On July 13, 2005, without prior notice, this case was removed to federal court along with ten (10) other cases brought in state court by the Attorneys General of Minnesota, New York, Kentucky, Wisconsin, Alabama and Illinois. Motions for Remand are being filed in each of these cases.

III. ARGUMENT

A. DEFENDANTS CANNOT MEET THEIR HEAVY BURDEN TO ESTABLISH THAT REMOVAL IS PROPER.

Upon a motion for remand, the removing party bears the burden of showing that removal was proper. *Dukes v. U. S. Healthcare, Inc.*, 57 F.3d 350, 359 (3d Cir.), *cert. denied*, 516 U.S. 1009 (1995). Furthermore, because lack of jurisdiction in the federal court would make any decree in the case void and continuation of the litigation in federal court futile, the removal statute must be strictly construed, with any doubts resolved in favor of remand. *Abels v. State Farm Fire & Cas. Co.*, 770 F.2d 26, 29 (3d Cir. 1985). *See also Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988),

appeal after remand, 915 F.2d 965 (5th Cir. 1990), *aff'd*, 503 U.S. 131 (1992) (removal jurisdiction “raises significant federalism concerns”). Thus, if there is any doubt as to the propriety of removal, removal should be denied. *Brown v. Francis*, 75 F.3d 860, 865 (3d Cir. 1996). This burden of establishing a right to remove “extends not only to demonstrating a jurisdictional basis for removal, but also necessary compliance with the requirements of the removal statute.” *Albonetti v. GAF Corporation Chemical Group*, 520 F. Supp. 825, 827 (S.D. Tex. 1981). Defendants here cannot meet their burden to establish that removal is proper for reasons of untimeliness and a lack of any federal basis for jurisdiction. Accordingly, this motion for remand should be granted.

1. Defendants’ Notice of Removal is Untimely.

Defendants’ Notice of Removal is untimely and a recent Supreme Court decision in an unrelated case involving unrelated parties does not cure the jurisdictional defect.

Pursuant to 28 U.S.C. 1446(b), defendants were required to file their Notice of Removal within 30 days of service of the initial pleading in this case. The statute plainly provides:

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. § 1446(b). *See Murphy Brothers, Inc., v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999).

Defendants made no effort to remove this case upon their receipt of the initial pleading in March/April 2004, nor upon the receipt of the Amended Complaint earlier this year. Indeed, rather than seek to timely remove based upon the same federal question jurisdiction defendants contend exists today (as it allegedly did at the time of the filing of the initial pleading),² defendants invoked the jurisdiction of the Commonwealth Court of Pennsylvania seeking dismissal of all claims on the grounds of alleged procedural and substantive deficiencies under Pennsylvania law. After these preliminary objections were granted in part and the Commonwealth filed its Amended Complaint, defendants again invoked the state court jurisdiction, seeking to have the Amended Complaint dismissed. Those preliminary objections have been briefed and argued and are awaiting ruling.³

To get around the problem of their failure to timely remove this action on commencement, defendants seek to place this case into one of the narrowly circumscribed other circumstances permitting removal. Specifically, defendants argue that the recent decision of the Supreme Court in the case of *Grable & Sons Metal Products, Inc., v. Darue Engineering & Manufacturing*, 125 U.S. 2363 (2005), decided on June 13, 2005, resurrects their removal right. They claim the decision

² None of the Commonwealth's claims has changed since filing of the initial Complaint.

³ Some courts have held that such affirmative invocation of state court jurisdiction constitutes a waiver of a removal right. *See, e.g. See Kam Hon, Inc. v. Cigna Fire Underwriters Ins. Co.*, 933 F. Supp 1060, 1062 (M.D. Fla. 1996) (motion to dismiss in state court constituted waiver); *Scholz v. RDV Sports, Inc.*, 821 F. Supp. 1469, 1471 (M.D. Fla. 1993) (same); *Kiddie Rides, USA, Inc. v. Elektro-Mobiltechnik GmbH*, 579 F. Supp. 1476, 1479 (C.D. Ill. 1984) (motion to vacate order of attachment); *Harris v. Brooklyn Dressing Corp.*, 560 F. Supp. 940, 942 (S.D.N.Y. 1983) (filing of permissive counterclaim). *See generally* Wright & Miller, "Waiver and Revival of the Right of Removal," 19A Fed. Prac. & Proc. Juris. App. Fed. Jud. Code Revisions Pt. III, Rptr. Note J. These rulings derive from recognition that a "defendant simply cannot . . . experiment on his case in the state court, and, upon an adverse decision, then transfer it to the Federal Court." *Aynsworth v. Beech Aircraft Corp.*, 604 F. Supp. 630, 637 (W.D. Tex. 1985) (quoting *Rosenthal v. Coates*, 148 U.S. 142, 147 (1893)).

constitutes an “order or other paper” from which they “first...ascertained” that the case was removable. See Notice of Removal at ¶ 14.

While the two cases defendants cite for this proposition, *Smith v. Burroughs Corp.*, 670 F.Supp. 740 (E.D. Mich. 1987) and *Davis v. Time Ins. Co.*, 698 F. Supp. 1317 (S.D. Miss. 1988), do support their view that a new, relevant Supreme Court decision can trigger a renewed 30 day removal period,⁴ defendants fail to inform the Court that *Smith* has been repudiated within its own district. See *Kocaj v. Chrysler Corp.*, 794 F.Supp. 234 (E.D. Mich. 1992). Indeed, the *Smith* holding was revisited and summarily rejected by the district court just five years later:

Smith is unpersuasive. This Court has found no other case that follows the *Smith* decision. As aptly noted by the court in *Phillips v. Allstate Ins. Co.*, 702 F. Supp. 1466, 1468 n.2 (C.D. Cal. 1989) “The decision by the court for the Eastern District of Michigan in *Smith v. Burroughs Corp.*, 670 F.Supp. 740 (E.D.Mich. 1987) seems to stand alone in its conclusion that a removal is timely if filed within 30 days of a court decision which first renders the action removable.”

Kocaj, 794 F. Supp. at 237.

Rejection of the idea that a recently decided Supreme Court opinion triggers a new removal period has been universal among courts that have since addressed this issue. *Morsani v. Major League Baseball*, 79 F.Supp.2d 1331, 1333 (M.D. Fla. 1999), sums up the state of the law:

Many courts have examined and rejected the defendants’ argument that an order entered in another case may constitute an “order or other paper” pursuant to Section

⁴In both of these cases the courts concluded that the rulings in *Pilot Life Ins. v. Dedeaux*, 481 U.S. 41 (1987) and *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) relating to ERISA preemption constituted an “order or other paper” creating a renewed removal right. The majority of courts that have assessed those same Supreme Court opinions have, in marked contrast, concluded that the rulings do not create a renewed right. See, e.g., *Scalfani v. Ins. Co. of N. Am.*, 671 F. Supp.364, 365 (D. Md. 1987); *Johansen v. Employee Benefit Claims, Inc.*, 668 F. Supp. 1294, 1296 (D. Minn. 1987); *Holiday v. Travelers Ins. Co.*, 666 F. Supp. 1286, 1289-90 (W.D. Ark. 1987); *Hollenbeck v. Burroughs Corp.*, 664 F. Supp. 280, 281 (E.D. Mich. 1987). Cf. *Johnson v. Trans World Airlines, Inc.*, 660 F. Supp. 914, 917 (C.D. Cal. 1987).

1446(b). These courts interpret Section 1446(b) to refer only to “an amended pleading, motion, order or other paper” that arises within the case for which removal is sought. The plain language of the statute, referring to the “receipt by the defendant, through service or otherwise,” implies the occurrence of an event within the proceeding itself; defendants do not in the ordinary sense “receive” decisions entered in unrelated cases. Accordingly, the courts consistently hold that publication of an order on a subject that might affect the ability to remove an unrelated state court suit does not qualify as an “order or other paper” for the purposes of Section 1446(b).

79 F. Supp.2d at 1333 (footnote 4 at 1333, collecting cases, omitted). The *Morsani* court addressed both the *Smith* and *Davis* opinions, finding them to be the only published opinions contrary to the universal proposition and describing them as “anomalous and unpersuasive.” *Id.* See also *Scalfani v. Ins. Co. of N. Am.*, 671 F. Supp. 364, 365 (D. Md. 1987) (Section 1446(b)’s reference to “other paper” “does not include ... a subsequent court decision, in a wholly unrelated case, defining what constitutes a basis for removal to federal court.”); *Johansen v. Employee Benefit Claims, Inc.*, 668 F. Supp. 1294, 1297 (D. Minn. 1987) (collecting cases and noting that “[t]hese decisions stem from the recognition that permitting later court decisions to be a basis for removal would subject all state court litigation to the specter of impending interruption and the concomitant waste of judicial resources”).

In *Doe v. American Red Cross*, 14 F.3d 196 (3d Cir. 1993), the Court of Appeals for the Third Circuit was presented with the question of whether a ruling by the Supreme Court, which had held that the “sue and be sued” provision of the Red Cross congressional charter conferred original jurisdiction on federal courts over all cases to which the Red Cross was a party, created a renewed removal right to the Red Cross in the matter before it. While the Court of Appeals held that the Supreme Court ruling in a related case⁵ constituted an order granting the Red Cross the right to

⁵ The Court noted that while the case before it and that before the Supreme Court were “different,” they were not “unrelated” because the Supreme Court ruling expressly authorized

remove the subject action, the Court expressly distinguished the case before it from those involving rulings in unrelated cases. In the latter category – as here – a Supreme Court decision does not confer a renewed right of removal. In *Doe*, the Third Circuit reasoned that the particular Supreme Court opinion was an “unequivocal order directed to a party to the pending litigation [the Red Cross], explicitly authorizing it to remove any cases it is defending.” 14 F.3d at 202.⁶

The *Doe* Court expressly elected not to construe the entire provision of 1446(b), “order or other paper.” 14 F.3d at 202. Instead, it took “an extremely confined view” of the case before it and issued a “holding [that] is equally narrow.” *Id.* The Court, however, stated its agreement with the “premise that an order, as manifested through a court decision, must be sufficiently related to a pending case to trigger Section 1446(b) removability,” continuing:

We believe that an order is sufficiently related when, as here, the order in the case came from a court superior in the same judicial hierarchy, was directed at a particular defendant and expressly authorized that same defendant to remove an action against it in another case involving similar facts and legal issues.

Id. See also *Green v. R.J Reynolds Tobacco Company*, 274 F.3d 263, 268 (5th Cir. 2001) (adopting exception recognized in *Doe* in the “very narrow circumstances” where the same party was a defendant in both cases and similar factual situations and legal issues are presented).

Though the *Grable* decision is clearly from “a court superior in the same judicial hierarchy,”

the Red Cross to remove any cases it was then defending. 14 F.3d at 203 n.7. In granting *certiorari*, the Supreme Court had observed that more than 40 district court cases had considered this issue and the two courts of appeals opinions on the issue had reached conflicting results. 14 F.3d at 197. The *Doe* case, like the case before the Supreme Court, involved allegations that the Red Cross was responsible for transmitting AIDS to plaintiffs through tainted blood transfusions.

⁶ The Court distinguished the case before it from *Avco Corp. v. Local 1010 of the Int’l Union*, 287 F. Supp. 132, 133 (D. Conn. 1968) in which removal was denied where the Supreme Court order defendants sought to rely upon was directed to another local union that was not a party in the case. *Doe v. American Red Cross*, 14 F.3d 196, 203 n.7 (3d Cir. 1993).

its order is neither “directed at” any defendant in this case nor does it “expressly authorize” any defendant in this case to remove this action to federal court. Consequently, under *Doe, Green*, and the overwhelming majority of case law, including every case to consider the issue since the two dated decisions cited by defendants, the Supreme Court’s decision in *Grable* does not constitute an “order or other paper” permitting a renewed right of removal in this case.

2. The *Grable* Case Provides No New Grounds For Removal.

According to defendants, Judge Saris’ order remanding certain cases brought by Minnesota and Nevada in *State of Montana v. Abbott Laboratories, Inc.*, 266 F.Supp. 2d 250, 255-56 (D. Mass. 2003) was “incorrect” because the Judge relied in part on *Merrell Dow Pharmaceuticals Inc., v. Thompson*, 478 U.S. 804 (1986) in concluding that federal question jurisdiction did not exist over the state law claims pled in those cases. Notice of Removal, ¶ 13. Defendants contend that the Supreme Court ruling in *Grable* somehow vitiates both *Merrell Dow* and Judge Saris’ opinion. Also according to defendants, because the Commonwealth’s claims allegedly are similar to those covered by Judge Saris’ Order, defendants should somehow be permitted to now remove the Commonwealth’s case based on *Grable* so that they presumably can seek reconsideration of Judge Saris’ Opinion on a grander scale. Defendants completely miss the point. It is irrelevant to the question of whether federal jurisdiction exists that the Commonwealth’s claims may or may not be similar to claims asserted by *other plaintiffs* in *other cases*.⁷ All that matters is whether *Grable* involved one or more of *the defendants* here – which it does not – and whether or not it *expressly authorizes* one or more of the defendants to remove this case – which it does not. Consequently,

⁷The Commonwealth’s claims exclusively under Pennsylvania law are unlike any other asserted by State Attorneys General in their respective cases, including those asserted in the Minnesota and Nevada cases at issue in Judge Saris’ Order.

even if it is assumed that defendants' Notice of Removal was timely, the *Grable* opinion does not create a new basis for removal of this case.

In *Merrell Dow*, the Supreme Court rejected the notion that the need to construe a federal statute as part of a state-law claim is sufficient to confer federal jurisdiction on a case brought in state court. Indeed, even where the state-law claim is premised upon a notion of the federal law, federal jurisdiction does not automatically follow: "...a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim" arising under the Constitution, laws, or treaties of the United States. *Merrell Dow*, 478 U.S. at 817.

Based in part on the holding *Merrell Dow*, Judge Saris remanded the cases brought by several State Attorneys General that defendants had removed to federal court and thereafter had transferred by the JPMDL. Judge Saris found that the States' cases had pled no federal causes of action and any possible need to interpret federal Medicare regulations, without more, did not confer federal question jurisdiction. 266 F. Supp.2d at 255-56. Despite such holding, defendants present here the same argument that a State's claim based on state law to recover Medicare Part B co-payments raises a substantial federal question because allegedly "it requires resolution of the issues of federal law relating to the federal Medicare program, namely the meaning of AWP in the federal Medicare statute and regulations." Notice of Removal, ¶ 9.

In the context of *this case* – which is all that matters⁸ – the Commonwealth of Pennsylvania has pled no federal causes of action. In this narrow sense, the Commonwealth's claims are similar

⁸Defendants gloss over the fact of the distinct claims brought by the Commonwealth, urging that "this case is virtually identical" to other cases. More is required for defendants to carry their substantial burden of demonstrating the existence of federal jurisdiction.

to those of the States which Judge Saris remanded. Here, the Commonwealth has alleged that defendants engaged in a widespread fraudulent scheme and conspiracy to overcharge the Commonwealth and its consumers for prescription drugs in violation of state common law and the Pennsylvania UTPCPL. At issue is the defendants' marketing and sales practices, *not* the use of AWP in any particular statute.⁹

While Defendants contend that *Grable* has overruled *Merrell Dow*, nothing could be further from the truth. The *Grable* Court expressly embraced *Merrell Dow* as part of removal jurisprudence. *Grable*, 125 S.Ct. at 2371 (“*Merrell Dow*'s analysis thus fits within the framework of examining the importance of having a federal forum for the issue, and the consistency of such a forum with Congress' intended division of labor between state and federal courts”).¹⁰

⁹The term Average Whole Price is used in many health and benefit programs in Pennsylvania, such as the Pennsylvania Employees Benefit Trust Fund (the “PEBTF”), the Medicaid program, the Pharmaceutical Assistance Contract for the Elderly or “PACE” program, the Communicable Disease Program, programs under the Bureau of Family Health, including the Renal, Spina Bifida, Cystic Fibrosis, Metabolic Conditions and Metabolic Formula programs, and programs for Pennsylvania Consumers who receive Workers' Compensation benefits. Consequently, that AWP was also part of Medicare at one time – but no longer – is insubstantial.

¹⁰The *Grable* Court made explicit that its opinion was not an attempt to reconsider *Merrell Dow* and that the conclusions reached in *Merrill Dow* derived from the same analysis and application of law:

Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986), on which *Grable* rests its position, is not to the contrary. *Merrell Dow* considered a state tort claim resting in part on the allegation that the defendant drug company had violated a federal misbranding prohibition, and was thus presumptively negligent under Ohio law. *Id.*, at 806, 106 S.Ct. 3229. The Court assumed that federal law would have to be applied to resolve the claim, but after closely examining the strength of the federal interest at stake and the implications of opening the federal forum, held federal jurisdiction unavailable. Congress had not provided a private federal cause of action for violation of the federal branding requirement, and the Court found “it would ... flout, or at least undermine, congressional intent to conclude that federal courts might nevertheless exercise federal-question jurisdiction and provide remedies for

The sole matter to be decided in the *Grable* case was whether 26 U.S.C. § 6335(a) required personal service when the plaintiff had actual knowledge of the sale of property. *See id.* at 2368. The sole issue before the Supreme Court was whether this question conferred federal jurisdiction. *See id.* at 2366. In explaining the framework guiding its inquiry, the Court wrote:

[F]ederal jurisdiction demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum.

* * * *

But even when the state action discloses a contested and substantial federal question, the exercise of federal jurisdiction is subject to a possible veto. For the federal issue will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331.... [T]he presence of a disputed federal issue and the ostensible importance of a federal forum are never necessarily dispositive; there must always be an assessment of any disruptive portent in exercising federal jurisdiction.

Id. at 2367-68.

Applying this reasoning, the Court concluded that federal question jurisdiction was warranted in the case before it because: (1) the meaning of the statute was the only contested factual or legal issue in the case; (2) the federal government had a strong and substantive interest in the interpretation of the federal tax provision that governed its abilities to pursue collection of taxes and pursue property of delinquents to satisfy its claims; and (3) a finding of jurisdiction in the very rare quiet title circumstances presented would “portend only a microscopic effect on the federal-state division of labor.” *Id.* at 2368.

violations of that federal statute solely because the violation ... is said to be a ... ‘proximate cause’ under state law.” *Id.* at 812, 106 S.Ct. 3229.

Grable at 2369.

None of these factors exists in the present case. First, the meaning of the Medicare statute is nowhere implicated by any of the Commonwealth's four (4) causes of action. Indeed, to the extent Medicare is relevant to the litigation, it will likely only relate to the *uncontested* fact that Medicare at one time relied in part on the Average Whole Prices in setting reimbursement for drugs under the program.¹¹ Second, even assuming a "disputed federal issue" exists as to Medicare, the same is not "substantial" because Medicare Part B beneficiaries make up only a subset of the Commonwealth's claimed damages. And finally, were this Court to find that any case brought by the Commonwealth which includes purchases and/or reimbursements under Medicare as part of the overall claim for damages belonged in federal court, the "sound division of labor between state and federal courts" would surely be "disrupted."

In sum, *Grable* is simply an application of settled law to a unique factual context. *Grable* does not overturn prior precedent. It does not create a new standard of removeability, nor can it be read as creating a grounds for removal that did not previously exist in the law. *Grable* not only does not endorse removing state tort claims which depend on a federal statute as defendants argue, it makes clear that such cases are not removable.¹² A recent decision by Judge Kauffman in this District confirms this conclusion:

In *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, the Supreme Court held that "a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause

¹¹There is no dispute as to the role of AWP in Medicare. Instead, defendants contend that everyone knew that reported AWPs were inflated – a fact the Commonwealth does not concede.

¹²An irony noted by the *Morsani* case, *supra*, is equally applicable here. Defendants are essentially asking this Court to revisit a ruling of Judge Saris that was not itself appealable. Remand based on lack of subject matter jurisdiction, whether rightly or wrongly granted, divests the federal courts of jurisdiction and, pursuant to 28 U.S.C. § 1447(d), is not appealable. 79 F. Supp.2d at 1334 n.9 (citing *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-28 (1995)).

of action for the violation, does not state a claim “arising under federal law.” 478 U.S. 817. That is precisely the case here. Moreover, the Supreme Court has recently referred to a state-law negligence claim that cites a federal statute to establish a defendant’s duty to the plaintiff as the classic example of what does *not* raise a federal question. *Grable & Sons*, 2005 WL 1383693 at *7.

Thomas v. Friends Rehabilitation Prog., Inc., 2005 WL 1625054 (E.D. Pa., July 11, 2005) at *3.¹³

IV. CONCLUSION

For the foregoing reasons, the Commonwealth’s Motion should be granted, this matter remanded to the Commonwealth Court of Pennsylvania, and an award of fees and costs made.

Respectfully submitted,

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¹³This Court may award fees and costs pursuant to 28 U.S.C. § 1447(c) upon an order of remand. An award is particularly appropriate when the attempt at removal is “insubstantial,” *see Shrader v. Legg Mason Wood Walker, Inc.*, 880 F. Supp. 366, 368 (E.D. Pa. 1995), or “where the lack of jurisdiction is plain in the law and would have been revealed to counsel for defendants with a minimum of research.” *Mitchell v. Street*, 310 F. Supp. 2d 724, 728 (E.D. Pa. 2004). *See also Mints v. Educational Testing Service*, 99 F.3d 1253, 1260 (3d Cir. 1996) (granting fees and costs where allegations that plaintiff lost ERISA-protected benefits as result of defendants’ conduct were “not even close” to the types of cases where ERISA preempted state law). Here, removal is not timely. The cases cited to support a renewed removal right have been rejected. And, *Grable* states no new holding that permits removal. Defendants’ attempted removal borders on the frivolous and the Commonwealth should be awarded fees and costs.

EXHIBIT “A”



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MONDAY, APRIL 2, 2001

SPECIAL REPORT: States Mull Suit Against Drug Companies

By Mary Guiden, Staff Writer, Stateline.org

In an action modeled on their 1998 class action lawsuit against the tobacco industry, at least six states are poised to go to court to try to force pharmaceutical companies to lower prescription prices, law enforcement and health care officials tell Stateline.org.

"The goal is nothing less than changing the way the industry does business," says Mark Schlein, director of Florida's Medicaid Fraud Control Unit in the Attorney General's office.

Attorneys general in Florida, Georgia, Maine, Massachusetts, Nevada and Texas are among those considering legal action, officials from some of the offices said. Nevada's Tim Terry, director of the state's Medicaid Fraud Control Unit, says while he's "not at liberty to comment" on specifics, he expects "other developments [on this matter] in the next couple of months."

A state health official familiar with discussions about state action said there's a strong consensus across the country. "I really get the sense there's a lot of energy, mostly from attorney generals' offices. As soon as there's any kind of endorsement from the Health Care Financing Administration (HCFA), all 50 states are going to jump on it," said the official, who spoke on condition of anonymity.

HCFA, the federal agency that oversees Medicaid and Medicare, requires drug manufacturers to report their lowest drug prices, or "best price." "We've asked for their assistance to determine whether or not pharmaceutical manufacturers violated agreements with HCFA to provide states with the best price on drugs," says Martin Smith, spokesperson for Georgia's Department of Community Health.

A HCFA spokesperson declined comment on any potential problems.

State attorneys general aren't waiting for HCFA's permission to seek information from the drug companies. Bristol-Meyers Squibb says it and other manufacturers have responded to subpoenas from Massachusetts and several other states.

"We have cooperated fully with the subpoenas, and we're not aware we're the subject of any investigation. Bristol-Meyers is not the only company being investigated in an attorney general's office. We're confident that our practices are fully compliant with state and federal laws," says spokesperson Patrick Donahue.



The potential for litigation grows out of a three year-old Justice Department investigation of the Bayer Corporation that in January resulted in Bayer settling with the states and the federal government for \$14 million.

In a Jan. 23 news release announcing the settlement, the Justice Department said the government's investigation "revealed that the pharmaceutical company beginning in the early 1990s falsely inflated the reported drug prices referred to by the industry as the Average Wholesale Price."

The AWP is the average price that wholesalers give to retailers for a given medication. Medicare and Medicaid programs use the AWP in calculating reimbursements to pharmacists and doctors.

"By setting an extremely high AWP and, subsequently, selling the product to doctors at a dramatic discount, Bayer induced physicians to purchase its products rather than those of competitors by enabling doctors to profit from reimbursement paid to them by the government," the Justice Department said. As part of the agreement, Bayer said it would "provide the state and federal governments with the average selling prices of its drugs ... and potentially prices for its competitors' products," the Justice Department said.

Meantime, Texas Attorney General John Cornyn brought a lawsuit against three drug companies seeking \$79 million for alleged Medicaid fraud. The firms are Dey, Inc., Roxane Laboratories, Inc. and Warrick Pharmaceuticals Corp.

In court documents filed by the state in Travis County District Court on Sept. 7, the suit says that the firms "knowingly and intentionally made false representations of prices and costs for certain of their inhalation drugs directly and indirectly to the Texas Medicaid program."

The state also says the "Medicaid program relied on the false and deceptive inflated prices and costs reported by the [pharmaceutical companies] and thus was defrauded into paying amounts that substantially exceeded a true and correct price for the drugs in question." Justice Department spokesperson Jill Stillman and Barbara Zelner, a spokesperson for the National Association of Medicaid Fraud Control Units, refused to comment on inquiries into other manufacturers, citing an "ongoing investigation." The Pharmaceutical Research and Manufacturers of America (PhRMA)--which drug companies defer to--also refused comment, citing the "ongoing" nature of the case.

A catalyst for state legal action is Florida businessman Zachary Bentley, who is going from state to state urging state attorneys general to sue drug manufacturers. It was Bentley who triggered the Bayer case. He says he alerted federal authorities years ago about "the corrupting influence" of pharmaceutical manufacturers after his healthcare company was "put out of business" by a competitor. Under whistleblower and federal False Claims laws, Bentley gets a portion of any settlement that results from what he's revealed.

Through his company, which delivered intravenous drugs for diseases like AIDS to a patient's home, Bentley says he discovered discrepancies between the published Average Wholesale Price (AWP) of prescription drugs and what the drug companies actually charged retailers for the same drugs. "Medicaid and Medicare reimburse certain drugs at ten times the cost. Providers, as a result, make a huge windfall profit," Bentley says.

Because of Bentley's efforts, the Justice Department last May released to states a list of 479 drugs that the department said had inflated AWP's. A partial copy of the list obtained by Stateline.org shows that:



- Adriamycin, an antibiotic used in cancer treatment and manufactured by Pharmacia, had an AWP of \$241.36 as of April 2000. DOJ said the real wholesale price was \$33.43.
- Amikacin, used to treat an infection that HIV+ people get and manufactured by Abbott, had an AWP of \$54.56. DOJ said the actual best price was \$6.75.
- Toposar, also manufactured by Pharmacia, is used to treat testicular and lung cancer. Its AWP as of April 2000 was \$28.38; DOJ found that retailers were buying it for \$1.70.
- Vancomycin, an antibiotic used to treat intestinal infections and manufactured by Abbott, had an AWP of \$68.77 as of April 2000. DOJ adjusted it to \$8.14.

Bentley says that the AWP "is only part of" the price inflation controversy. "There's a whole area of questionable conduct and questionable areas manufacturers have used," he says.

Congressman Pete Stark (D-CA) wrote letters to PhRMA President Alan Holmer last fall and to Pharmacia Upjohn, Bristol-Meyers Squibb and Abbott on Feb. 27, alleging among other things, "the exploitation of America's seniors and disabled who are forced to pay inflated drug costs."

In a five-page letter to Bristol-Meyers Squibb president Peter Dolan, Stark alleges there is "compelling evidence that Bristol-Meyers Squibb ('Bristol') for many years deliberately overstated the prices of some of its prescription drugs in order to cause the Medicare and Medicaid programs to pay inflated amounts to Bristol's customers."

Stark's letter also contains a chart that details an alleged spread between the AWP and actual price to Florida oncologists for the drug Blenoxane. In 1995, the AWP was \$276.29 but oncologists were charged \$224.22, for a spread of \$52.07. In 1998, the AWP was listed at \$304.60; the price charged to doctors was \$140 for a spread of \$164.60.

Florida's Schlein says abuse is widespread. "The whole area of prescription drug fraud is incredibly important and involves virtually every manufacturer. It involves nothing less than a conspiracy among manufacturers, middlemen and doctors who prescribe [the drugs]. The bottom line is everyone is doing this with a nod and a wink and [taxpayers] are paying for it," he says.

Other state officials have voiced similar concerns. Georgia Department of Community Health director Russ Toal said at a Medicaid forum in February that his state has reason to believe that pharmaceutical manufacturers are overcharging Medicaid programs. "We've sent some evidence of that to both the Health Care Financing Administration and the Department of Justice, and I hope that other states are doing the same," he said.

Former Maine Attorney General Andrew Ketterer says "the area [of AWP] is fertile for attorneys general to look into. Pharmaceutical companies spend a fair amount of money on research and development for wells that don't have oil and they have to recover from those losses in some way. [A lawsuit] is not out of the range of possibilities that would come on to the radar screen. It's an area that is of great interest to a lot of people."

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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2005, a true and correct copy of the Commonwealth of Pennsylvania's Motion for Remand, for Expedited Hearing, and for an Award of Fees and Costs, supporting Memorandum of Law, and proposed form of Order were served on the parties on the attached service list via U.S. First Class mail.

Date: 07/26/05

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