

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN**

STATE OF WISCONSIN

Plaintiff,

v.

CASE NO. 05 C 408 C

ABBOTT LABORATORIES, INC., et al.,

Defendants.

**DEFENDANTS' SUPPLEMENTAL AUTHORITY RELATING TO THEIR
MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO
REMAND AND IN SUPPORT OF DEFENDANTS' MOTION TO
STAY CONSIDERATION OF PLAINTIFF'S MOTION TO REMAND**

Defendants respectfully seek leave to file the attached supplemental authority relating to their Memorandum of Law in Opposition to Plaintiff's Motion to Remand and Reply to Plaintiff's Memorandum in Opposition to Defendant's Motion to Stay Action on Plaintiff's Motion to Remand which was filed August 11, 2005. Since that filing, defendants have received the attached decisions from the Illinois and Alabama courts in two of the other cases removed from state courts on the same day that this case was removed. *Illinois v. Abbott Labs., Inc.*, Case No. 05C 4056 (N.D. Ill. July 13, 2005); *Alabama v. Abbott Labs., Inc.*, Case No. 2:05CV647-M (M.D. Ala. July 13, 2005).

In *Illinois v. Abbott Labs.*, Judge Norgle denied defendants' motion to stay consideration of plaintiff's remand motion as moot, because the "parties shall routinely proceed to the transferee court pursuant to the MDL rules." (A copy of the August 12, 2005 minute order issued by Judge Norgle is attached as Exhibit 1.) Judge Norgle issued a subsequent minute order, on August 16, 2005 (a copy of which is attached as Exhibit 2), which made clear that "[a]ny motion to remand an action to state court can be presented to and decided by the

transferee judge.” Thus, as urged by defendants in this case, the very same arguments raised by plaintiff here will be decided by Judge Saris with respect to the claims made by Illinois. For the same reasons, defendants respectfully request that this Court defer consideration of the motion to remand to allow that issue to be decided in the MDL.¹

In *Alabama v. Abbott Labs.*, Judge Thompson issued an order on August 11, 2005 (a copy of which is attached as Exhibit 3) in which he determined, with no explanation of his reasoning, that he did “not believe that the claims ‘necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.’” Exhibit 3 at 1 (citing *Grable & Sons Metal Prods., Inc. v. Darue Eng’g. & Mfr.*, 545 U.S. ___, ___, 125 S. Ct. 2363, 2368 (2005)). Thus, he granted plaintiff’s motion for expedited consideration and remanded the case to state court.²

As explained in defendants’ memorandum in opposition to plaintiff’s motion to remand (*see generally* pp. 24-28), defendants respectfully disagree with Judge Thompson’s conclusion, as it is directly contrary to that reached by Judge Saris in analyzing nearly identical claims brought by other state attorneys general in the MDL. *See State of Montana v. Abbott Labs.*, 266 F. Supp. 2d 250, 255 (D. Mass. 2003) (an “essential element” of state law AWP claims is “proof of a discrepancy between AWP’s reported” by defendants and “the meaning of AWP under the Medicare statute”). *See also Dunlap v. G&L Holding Group Inc.*, 381 F.3d

¹ On August 18, 2005, plaintiff in *Illinois v. Abbott Labs.* filed its Motion to Vacate Transfer Order, to Reinstate Case, and to Allow Filing of Plaintiff’s Reply Brief *Instantly* on the Motion to Remand.

² Notably, while Judge Thompson concluded, erroneously in defendants’ view, that no federal question was raised by Alabama’s claims, he did *not* adopt plaintiff’s primary arguments in this case. In particular, he did not remand the action because *Grable* could not be considered an “order or other paper” from which it could first be ascertained that this action was removable, nor did he conclude that *Grable* merely confirmed existing law.

1285, 1290 (11th Cir. 2004) (a federal issue “really and substantially involves a dispute or controversy respecting the validity, construction, or effect of [federal] law” when “the claim will be supported if the federal law is given one construction or effect and defeated if it is given another.” (citations omitted)). The Alabama order, therefore, creates the very risk of inconsistency which defendants’ motion for stay and the MDL itself were intended to avoid.

Accordingly, for all the reasons set forth in Defendants’ Memorandum of Law in Opposition to Plaintiff’s Motion to Remand and Reply to Plaintiff’s Memorandum in Opposition to Defendant’s Motion to Stay Action on Plaintiff’s Motion to Remand, defendants respectfully request that this Court follow Judge Norgle’s lead and stay consideration of plaintiff’s motion to remand to allow that issue to be decided in the MDL.

Dated: August 22, 2005.



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United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Charles R. Norgle	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	05 C 4056	DATE	8/12/2005
CASE TITLE	Illinois vs. Abbott Laboratories, Inc. et al		

DOCKET ENTRY TEXT:

Transfer Order

On 8/12/2005, the court received an order from the MDL dated 8/9/2005, which transferred this case to the District of Massachusetts. The parties shall routinely proceed to the transferee court pursuant to the MDL rules. The court moves expeditiously to inform counsel, to ensure the parties do not prepare additional briefs. Defendants Joint Motion to Stay [76-1] is denied as moot.

Docketing to mail notices.

	Courtroom Deputy Initials:	ER
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United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Charles R. Norgle	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	05 C 4056	DATE	8/16/2005
CASE TITLE	Illinois vs. Abbott Laboratories		

DOCKET ENTRY TEXT:

Any motion to remand an action to state court can be presented to and decided by the transferee judge. See, e.g., In Re Ivy, 901 F.2d 7 (2nd Cir. 1990); In Re Prudential Ins. Co. of America Sales Practice Litigation, 170 F. Supp. 2d 1346, 1347-48 (J.P.M/L. 2001).

Docketing to mail notices.

STATEMENT

Courtroom Deputy
Initials:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

STATE OF ALABAMA, in its)
capacity as sovereign and)
on behalf of the Alabama)
Medicaid Agency,)
)
Plaintiff,)
)
v.)
)
ABBOTT LABORATORIES,)
INC., et al.,)
)
Defendants.)

CIVIL ACTION NO.
2:05cv647-T

ORDER

After careful consideration of the state-law claims presented in this case, the court does not believe that the claims "necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." Grable & Sons Metal Prods., Inc. v. Darue Eng'g. & Mfr., 545 U.S. ___, ___, 125 S. Ct. 2363, 2368 (2005); see also Caterpillar, Inc. v. Williams, 482 U.S. 386, 107 S.Ct. 2425 (1987); Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 107 S.Ct. 1542 (1987);

Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 106 S.Ct. 3229 (1986); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 103 S.Ct. 2841 (1983); Gully v. First National Bank of Meridian, 299 U.S. 109, 57 S.Ct. 96 (1936).

Accordingly, it is the ORDER, JUDGMENT, and DECREE of the court that plaintiff's motion to remand (Doc. no. 69) is granted and that, pursuant to 28 U.S.C.A. § 1447(c), this cause is remanded to the Circuit Court of Montgomery County, Alabama, for want of subject-matter jurisdiction.

It is further ORDERED that plaintiff's and defendants' motions to stay (Doc. nos. 71 & 109) and plaintiff's motion for expedited ruling (Doc. no. 73) are denied.

It is further ORDERED that all other substantive motions are left for disposition by the state court after remand.

The clerk of the court is DIRECTED to take appropriate steps to effect the remand.

DONE, this the 11th day of August, 2005.

 /s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE