

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

DOCKET #

U.S. DISTRICT COURT
WEST DIST. OF WISCONSIN

JUL 13 2005

THE STATE OF WISCONSIN

Plaintiff,

v.

ABBOTT LABORATORIES, INC., ET AL.

Defendants.

FILED
THERESA M. OWENS, CLERK
CASE NO. 05 C 0408 C
NOTICE OF REMOVAL

(Federal Question)

NOTICE OF REMOVAL

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United States District Court for the
Western District of Wisconsin
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CIRCUIT COURT
2005 JUL 13 PM 3:45
DANE COUNTY, WI

Pursuant to 28 U.S.C. § 1441 *et seq.*, defendants hereby notice removal of this civil action from the Circuit Court for Dane County, Wisconsin, to the United States District Court for the Western District of Wisconsin. This Court now has removal jurisdiction because

this is a civil action “of which the district courts have original jurisdiction” and an action “founded on a claim or right arising under . . . the laws of the United States.” 28 U.S.C. § 1441(a)-(b); *see* 28 U.S.C. § 1331. In particular, federal question jurisdiction now exists because the State of Wisconsin’s claim to recover Medicare Part B co-payments raises a substantial federal question requiring the resolution of issues of federal law relating to the federal Medicare program and permitting its removal pursuant to the United States Supreme Court’s recent decision in *Grable & Sons Metal Prods., Inc. v. Darue Engineering & Manufacturing*, 545 U.S. ___, 125 S. Ct. 2363 (June 13, 2005) (a copy of which is attached as Exhibit A); *cf State of Montana v. Abbott Laboratories, Inc.*, 266 F. Supp. 2d 250, 255-56 (D. Mass. 2003) (a copy of which is attached as Exhibit B).

In further support of this Notice, defendants allege:

1. On or about June 3, 2004, the State of Wisconsin filed the civil action captioned *State of Wisconsin v. Abbott Laboratories, Inc., et al.*, 04 CV 1709, in the Circuit Court for Dane County, Wisconsin. On or about November 1, 2004, the State of Wisconsin filed an amended complaint in the above-captioned action in the Circuit Court for Dane County, Wisconsin (the “Complaint”).
2. On July 14, 2004, defendants removed this action to this Court based on its diversity jurisdiction (Case no. 04 C 477 C), the only basis for jurisdiction available in good faith to defendants at the time. *See* Section III, *infra*. On October 5, 2004, this Court remanded the action to the Circuit Court for Dane County, Wisconsin.
3. Pursuant to 28 U.S.C. § 1446(a), attached hereto as Exhibit C is a true and correct copy of the pleadings, process and orders served on defendants in this action.

4. Pursuant to 28 U.S.C. § 1446(d), defendants shall file a copy of this Notice of Removal with the Clerk of the Circuit Court for Dane County, Wisconsin, and serve plaintiff and all other parties with this Notice of Removal promptly after the filing of this Notice.

I. THE STATE OF WISCONSIN ACTION

5. As the Court is aware, this case is virtually identical to numerous cases that have been transferred and consolidated from district courts throughout the country in a Multidistrict Litigation (“MDL”) proceeding, *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL No. 1456 (the “AWP MDL”), which is currently pending before the Honorable Patti B. Saris in the United States District Court for the District of Massachusetts.

6. Like this case, many of the cases now pending in the AWP MDL were originally filed in state courts before removal to federal court. The AWP MDL currently includes similar actions brought by the States of Montana and Nevada. To preserve judicial resources and avoid potentially inconsistent rulings, almost all of the removed cases were initially stayed pending transfer by the Judicial Panel on Multidistrict Litigation to the AWP MDL.¹ Defendants shall similarly seek a stay of proceedings in this action pending transfer by the Judicial Panel on Multidistrict Litigation.

¹ Specifically, the courts issued stays in the following twelve average wholesale price (“AWP”) actions: (i) *Geller v. Abbott Labs., Inc. et al.*, Case No. CV 02-00553 DDP (C.D. Cal. Mar. 22, 2002) (Pregerson J.) (“The Court finds that all factors, including the jurisdictional issues presented and the potentially expansive nature of this litigation, favor granting the stay”); (ii) *Montana v. Abbott Labs., Inc. et al.*, Case No. CV 02-09-H-DWM (D. Mont. June 21, 2002) (Molloy J.) (“In this case, the benefit of judicial economy and consistency among pretrial rulings outweighs any prejudice plaintiff may suffer as a result of a stay.”); (iii) *Nevada v. Abbott Labs., Inc. et al.*, Case No. CV-N-02-80-ECR (D. Nev. Jul. 26, 2002) (Reed J.); (iv) *Nevada v. American Home Prods., Inc.*, No. CV-N-02-202-ECR (D. Nev. Jul. 26, 2002) (Reed J.); (v) *Thompson v. Abbott Labs. Inc. et al.*, Case No. CGC-02-411813 (N.D. Cal. Sept. 30, 2002) (Wilken J.); (vi) *Rice v. Abbott Labs., Inc. et al.*, Case No. C 02-3925 (N.D. Cal. Nov. 26, 2002) (Jenkins J.); (vii) *Virag v. Allergan, Inc. et al.*, Case No. 02-8417 RSWL (C.D. Cal. Jan. 7, 2003) (Lew J.); (viii) *Turner v. Abbott Labs., et al.*, Case No. 02-CV-05006 (N.D. Cal. Mar. 3, 2003) (Jenkins J.) (order granting stipulation by parties regarding stay of all proceedings); (ix) *Digel v. Abbott Labs., Inc. et al.*, Case No. 03-2109 (W.D. Tenn. Mar. 10, 2003); (x) *Swanston v. TAP Pharm. Prod. Inc., et al.*, Case No. 03-CV-62 (D. Ariz. May 16, 2003); (xi) *Int’l Union of Operating Eng’rs Local No. 68 Welfare Fund v. AstraZeneca PLC*, 03 CV 03230 (D.N.J. (continued...))

7. The Complaint alleges that each defendant drug manufacturer caused the State of Wisconsin's Medicaid program to overpay for that company's pharmaceutical products by reporting inflated average wholesale price ("AWP") and other pricing information, which serves as the basis for Wisconsin's Medicaid reimbursement rates for prescription drugs. Compl. ¶¶ 57-61. In particular, the Complaint alleges that for Wisconsin Medicaid beneficiaries who are also qualified to receive federal Medicare benefits, Wisconsin Medicaid pays the Medicare beneficiaries' 20% co-payment under Medicare Part B, which until recently was based on AWP. Compl. ¶¶ 62-66; *see also* 42 U.S.C. § 1395l(a); 1395u(o). The State alleges that by reporting allegedly inflated AWP pricing information, defendants have caused the Wisconsin Medicaid program to make inflated Medicare Part B co-payments. Compl. ¶ 1. The State seeks to recover the amounts allegedly overpaid for these Medicare Part B co-payments. *Id.*

8. The State of Wisconsin is the named plaintiff in this action, although the State also purports to prosecute this action *parens patriae* on behalf of its citizens and Wisconsin organizations who pay prescription drugs costs of their members ("private payers") and who allegedly have paid inflated prices for defendants' prescription drugs as a result of defendants' unlawful conduct concerning AWP information. Compl. ¶¶ 1, 66, 74; *see also* Compl. ¶¶ 79, 83, 88 (requesting restitution for private payers).

9. The five-count Complaint alleges claims for violation of Wis. Stat. §100.18(1) (Count I), violation of Wis. Stat. § 100.18(10)(b) (Count II), violation of the Wisconsin Trust and Monopolies Act (Count III), violation of Wis. Stat. § 49.49(4m)(a)(2), Medical Assistance Fraud (Count IV), and unjust enrichment (Count V). The Complaint seeks

July 23, 2003); and (xii) *County of Erie v. Abbott Laboratories, Inc., et al.*, 05-CV-0259E (SC) (W.D.N.Y. June 1, 2005).

restitution, forfeitures, disgorgement, damages (including treble damages), injunctive relief, attorney's fees, and costs.

II. REMOVAL BASED ON FEDERAL QUESTION JURISDICTION

10. This Court has original jurisdiction over this action under 28 U.S.C. § 1331 because it arises under the laws of the United States. Specifically, federal question jurisdiction exists because the State of Wisconsin's claim to recover Medicare Part B co-payments raises a substantial federal question in that it requires the resolution of issues of federal law relating to the federal Medicare program, namely the meaning of AWP in the federal Medicare statute and regulations. *See Grable & Sons Metal Prods., Inc. v. Darue Engineering & Manufacturing*, 545 U.S. ____, 125 S. Ct. 2363, 2368 (June 13, 2005) (removal jurisdiction exists where the meaning of a federal statute is an essential element of a state law claim); *cf State of Montana v. Abbott Laboratories, Inc.*, 266 F. Supp. 2d 250, 255-56 (D. Mass. 2003).

11. The state law claim asserted by the State relating to Medicare Part B co-payments necessarily depends on an interpretation of the federal statute and regulations governing Medicare Part B reimbursement, which until recently pegged such reimbursement (and the corresponding 20% co-payment) to a drug's AWP. Indeed, as Judge Saris has already ruled, a plaintiff in an AWP action cannot recover on its state law claims relating to Medicare Part B co-payments unless it proves its fundamental assertion that the AWP was "inflated" as the term AWP has been interpreted under the federal Medicare reimbursement statute and regulations. *See State of Montana v. Abbott Laboratories, Inc.*, 266 F. Supp. 2d 250, 255-56 (D. Mass. 2003) (holding that an essential element of the State of Minnesota's claims relating to Medicare Part B co-payments "is proof of a discrepancy between the AWPs reported by [defendant] and the meaning of AWP under the Medicare statute.").

12. This Court has supplemental jurisdiction over all of plaintiff's non-federal claims pursuant to 28 U.S.C. § 1367.

III. REMOVAL IS TIMELY

13. When originally filed, this action was not removable on the basis of federal question jurisdiction because Judge Saris, presiding over the AWP MDL, had ruled in an earlier attempt to remove other AWP actions brought by states that under *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808 (1986), state law claims relating to Medicare Part B co-payments were not removable because there is no private cause of action under the federal Medicare statute, notwithstanding the fact that she found that interpretation of the federal Medicare statute was an essential element of those claims. *See State of Montana*, 266 F. Supp. 2d at 256-57. Defendants thus could not remove this case in good faith because it would have been transferred to Judge Saris who had already made clear her opinion on the federal question issue.

14. In *Grable & Sons Metal Prods., Inc. v. Darue Engineering & Manufacturing*, 545 U.S. ____, 125 S. Ct. 2363, (June 13, 2005), however, the Supreme Court ruled directly to the contrary, holding that state law claims that raise a substantial federal question are removable to federal court regardless of whether the particular federal statute involved has a private right of action. *Grable* made clear that Judge Saris's previous removal decision in the *State of Montana* action had been incorrect. Thus, the Supreme Court's decision in *Grable* rendered this case removable where it had previously been non-removable.

15. Pursuant to the second paragraph of 28 U.S.C. § 1446(b), this removal is therefore timely because it is filed within thirty days of receipt by defendants of the United States Supreme Court's decision in *Grable*, which constitutes an "other paper from which it may first

be ascertained” that this case is removable. *See Smith v. Burroughs Corp., et al.*, 670 F. Supp 740, 741 (E.D. Mich 1987) (removal petition timely where defendants filed notice of removal within thirty days of Supreme Court decision rendering claim removable); *see also Davis v. Time Ins. Co.*, 698 F. Supp. 1317, 1321-22 (S.D. Miss 1988); *but see Holiday v. Travelers Ins. Co.*, 666 F. Supp. 1286, 1289 (W.D. Ark. 1987).

16. Simultaneous with the removal of the Wisconsin action, defendants are removing to federal court numerous other AWP actions brought by other states. The basis for removal of those actions is the same as for this case. The interest of judicial efficiency would best be served by having Judge Saris, who has been dealing with AWP issues for over three years, decide any potential remand motions in these cases. Moreover, Judge Saris is exceptionally well-suited to decide any motion to remand because, as discussed above, Judge Saris is familiar with the precise federal question issue that is raised in this case. Finally, allowing Judge Saris to determine this jurisdictional issue in all of the removed AWP cases will avoid the substantial risk of inconsistent rulings.

IV. CONSENT TO REMOVAL

17. All served defendants consent to and have joined in this Notice of Removal.

18. No defendant waives any defense to the Complaint, including but not limited to lack of service, improper service or lack of personal jurisdiction.

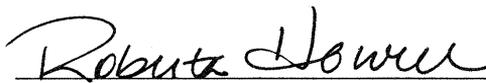
V. TRANSFER TO THE AWP MDL

19. As discussed above, this action is substantially identical to dozens of cases that have been transferred and consolidated from district courts throughout the country to the AWP MDL. Once this action is removed to federal court, defendants will notify the Judicial

Panel on Multidistrict Litigation that this action is closely related to those pending before Judge Saris in the AWP MDL and thus should be treated as a “tag-along action” within the meaning of the Rules of the Judicial Panel on Multidistrict Litigation.

WHEREFORE, defendants notice the removal of this case to the United States District Court for the Western District of Wisconsin pursuant to 28 U.S.C. §§ 1331 & 1441 *et seq.*

Dated this 13th day of July, 2005.



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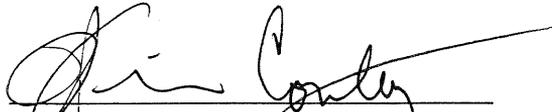
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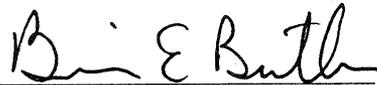
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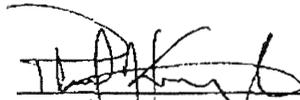
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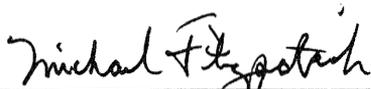
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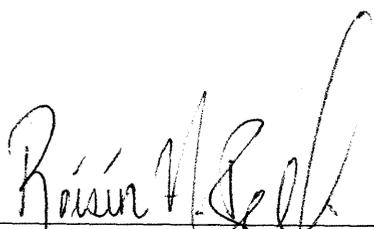
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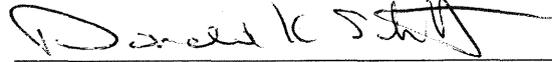
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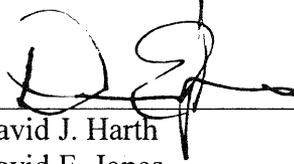


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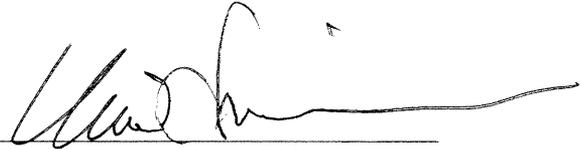


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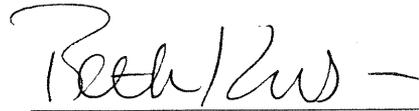
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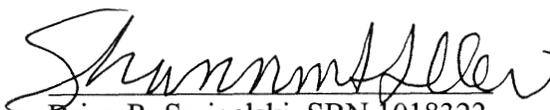
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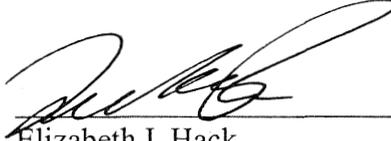
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Dated: July 13, 2005

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By its attorneys,

A handwritten signature in black ink, appearing to read "Elizabeth I. Hack", is written over a horizontal line.

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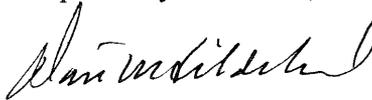
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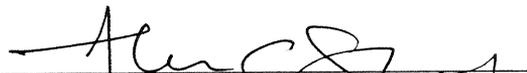
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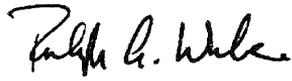
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