

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

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THE STATE OF WISCONSIN,

Plaintiff,

Case No. 5-C-0408-C

ABBOTT LABORATORIES, INC., et al.,

Defendants.

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THE STATE OF WISCONSIN'S REPLY MEMORANDUM  
IN SUPPORT OF ITS MOTION TO REMAND

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Defendants' attempt at removal presents two questions: (1) whether a completely unrelated court decision provides defendants with a new 30-day period in which to remove ongoing state court proceedings, and (2) whether the Supreme Court's decision in *Grable & Sons Metal Prod., Inc. v. Darue Engineering, Inc.*, \_\_\_ U.S. \_\_\_, 125 S. Ct. 2363 (2005), allows state tort and statutory claims brought in state court to be removed solely on the ground that an interpretation of a federal statute may be involved in some manner along the way of resolving the state claims.

As Wisconsin showed in its opening brief on the remand motion, and in its brief successfully opposing the stay motion, these issues are neither complicated nor hard. First, the case law overwhelmingly rejects defendants' argument that an unrelated court decision restarts the removal time period. Indeed, defendants have been forced to rely principally on a decision that was later rejected in the district where it was decided, as well as elsewhere. Second, *Grable* narrowly circumscribes its holding to special circumstances not present here, and reaffirms the

holding in *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), that state court tort and statutory actions are not removable simply because the interpretation of a federal statute is involved.

So easy are these issues that defendants' nationwide attempt to remove these cases is showing signs of crumbling with startling speed. On August 11, 2005, the federal district court to which the Alabama Attorney General's AWP lawsuit was removed remanded the case back to state court. *State of Alabama v. Abbott Laboratories*, No. 2:05CV647-8 (M.D. Ala. August 11, 2005), attached as Exhibit A to this brief. And this Court has already denied defendants' motion to stay proceedings on this the motion to remand.

#### **I. Defendants Removal Notice Is Untimely.**

As Wisconsin's opening brief showed, the great weight of the case law holds that defendants' latest attempt to remove this case is untimely. To recapitulate, the relevant statutory provision is 28 U.S.C. §1446(b), which states:

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 started 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.

Defendants argue that *Grable* is an "order or other paper from which it first may be ascertained that the case is one which is or has become removable." The only case defendants

cited in support of this proposition in their Notice of Removal was *Smith v. Burroughs Corp.*, 670 F.Supp. 740 (E.D. Mich. 1987), a decision that has been described as “unpersuasive” by a subsequent decision from the same district. *Kocaj v. Chrysler Corp.*, 794 F.Supp. 234, 237 (E.D. Mich. 1992). As *Kocaj* pointed out, *Smith* “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.” *Id.*

This criticism of *Smith* may not be harsh enough. *Smith* is devoid of any real reasoning. *Smith*’s only supporting citation was *Warren Bros. Co. v. Community Bldg.*, 386 F.Supp. 656 (M.D.N.C. 1974). *Warren Bros. Co.* held that an action not initially removable only becomes removable by a voluntary act of the plaintiff – a principle which if applied here (or, for that matter, in *Smith*) would require remand.

For these reasons, as Wisconsin showed in its earlier briefs, courts have buried the holding of *Smith* in an avalanche of contrary rulings. After making the *Smith* decision the highlight of their Notice of Removal (without telling the Court that *Smith* had been rejected by another decision in the same district), defendants barely mention it in their latest opus. Instead, defendants offer a series of invalid arguments.

1. **The “plain language” argument.** Defendants argue that the “plain language” of 28 U.S.C. §1446(b) dictates a finding that the Supreme Court’s decision in *Grable* was an “order or other paper from which it may first be ascertained that the case is one which is or has become removable.” This argument has no merit.

Defendants do not contend that a Supreme Court decision in an unconnected case is an “order,” but do contend that it is “a paper.” This interpretation is about as plain as mud. It is contrary to how both laypersons and lawyers reasonably interpret the term “a paper.” As for

laypersons, while Supreme Court decisions are printed on paper, no layperson thinks of a Supreme Court decision as “a paper.” If a politician who disagreed with a Supreme Court decision were to denounce it as “the most un-American paper I have ever read,” no one would have any idea what he was talking about. As for lawyers, no lawyer reasonably thinks of a Supreme Court decision as a “paper.” In legal parlance, a “paper” is a filing in a case by a party. One frequently hears lawyers talk about what is in the other side’s “papers.” One never hears lawyers talk about what is in a *court’s* “papers.”

In short, the “plain meaning” of the words “other paper” in §1446(b) does *not* include a court decision, whether in plain English or legalese. The real meaning of “order or other paper” has been plain to the overwhelming majority of court decisions considering this issue. A case can become removable in two ways. First, a party can file a paper – usually a complaint or amended complaint – presenting a claim which on its face is removable. Second, in a case that was not originally removable, a court can issue an order – for example, dismissing a defendant whose presence in the case had previously interfered with removal – that makes the case removable. But calling a Supreme Court decision in an unrelated case an “other paper” is untenable.

**2. The *Green/Doe* argument.** Defendants do not seriously dispute that the overwhelming number of district courts considering the issue have held that a court decision in an unrelated case not involving the same parties does not qualify as an “order or other paper” under §1446(b). However, they now invoke two Court of Appeals decisions: *Green v. R.J. Reynolds Tobacco Company*, 274 F.3d 263 (5<sup>th</sup> Cir. 2001), and *Doe v. American Red Cross*, 14 F.3d 196 (3d Cir. 1993). Neither case comes close to supporting defendants’ theory.

In *Green*, plaintiff's heirs brought a state court tort action seeking damages for injuries to plaintiff resulting from his tobacco addiction. Defendants sought to remove on the ground that his action was preempted. The district court held that plaintiff's claims were not preempted and remanded the case back to state court. Shortly after remand, the Fifth Circuit, in a different case (*Sanchez*) based upon the same causes of action against the same defendants, held that plaintiff's state court claims were preempted. Based on this *Sanchez* decision, the defendants in *Green* removed again. The Fifth Circuit affirmed the second removal, but not on the basis of any formula that helps defendants here. Indeed, the decision could not be more limited, as the court made clear.

First, *Green* acknowledged the general rule: "Most other courts to address the issue have found court decisions in unrelated cases not to constitute "orders" or "other papers" under §1446(b) and not to be grounds for removal." 274 F.3d at 266. And the court characterized the holding of *Doe v. American Red Cross*, 14 F.3d 196 (3d Cir. 1993), as being extremely limited:

The Third Circuit, however, has held that in very limited circumstances, similar to those here – a decision by a court in an unrelated case, but which involves the same defendant, a similar factual question and the question of removal – can constitute an "order" under sec. 1446(b).

*Green*, 274 F.3d at 267, citing *Doe*. *Green* affirmed the removal, but only in the same narrowly circumscribed circumstances as *Doe*: "We therefore hold that the *Sanchez* opinion, under these very narrow circumstances, was an 'order' for purposes of sec. 1446(b) removal in this case involving the same defendants, and a similar factual situation and legal issue." 274. F.3d at 268.

*Doe* is likewise a very narrow decision, as *Green* noted. Indeed, the court held that a decision in a different case must be directly linked to the pending case before it can constitute an order for purposes of removal: "Some comment is required, however, to express our agreement

with the Appellants' premise that an order, as manifested through a court decision, must be sufficiently related to a pending case to trigger Section 1446(b) removability." *Doe*, 14 F.3d at 202-03. *Doe* found such linkage "because 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." 14 F.3d at 203.

Thus, what *Green* and *Doe* hold is that an order in a different case can only be relied on to restart the removal clock if it concerned the same defendants, similar facts and similar legal issues. Even assuming the correctness of *Green* and *Doe*, the *Grable* decision meets none of these tests.

Defendants' attempt to enlarge the holdings of *Green* and *Doe* to authorize removal any time an unrelated case changes or clarifies the law has been rejected by subsequent decisions. *See, e.g., Bradfisch v. Templeton Funds, Inc.*, 2005 WL 1653798 (S.D. Ill.2005); *Duchesne-Baker v. Extedicare Health Services, Inc.*, 2004 WL 2414070 (E.D. La. 2004); *Ervin v. Stagecoach Moving and Storage, Inc.*, 2004 WL 1253401 (N.D. Tex. 2004). *Ervin* put it this way:

The Fifth Circuit has held that a decision in an unrelated case may only count as "an order" to make an action removable if it involves "a defendant in both cases, involving similar factual situations, and the order expressly authorized removal," which is not the case here. *See Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263, 267-68 (5<sup>th</sup> Cir. 2001) (citing *Doe v. Am. Red Cross*, 14 F.3d 196 (3d Cir. 1993)). The Fifth Circuit noted that a Third Circuit ruling on the same issue expressly avoided deciding whether the unrelated decision constituted an "other paper," and the Fifth Circuit did not rule on that issue as well. *See id.* The "other paper" provision of § 1446(b) has been applied by many courts only to papers "filed in the case," and not to papers filed apart from the case, including Supreme Court opinions. *See, e.g., Phillips v. Allstate Ins. Co.*, 702 F.Supp. 1466, 1468 (C.D.Ca. 1989) ("It is apparent that this case was not subject to removal when it was originally filed.... [V]irtually every court which has considered the question

of what suffices as a removal triggering ‘paper’ has concluded that the term does not include intervening statutory or case law changes.”).

*Id.* at \*2 n.3.

**3. The attempt to distinguish the district court case law.** In light of what is stated above, little need be said in response to the defendants’ discussion of the many district court cases that have rejected their argument. Defendants’ discussion is predicated mainly on their mistaken “plain language” argument and their misdescription of what *Green* and *Doe* held.

Defendants cite three lonesome district court decisions that went their way, but it is those decisions, not the mass of contrary decisions, that fail to impress. *Davis v. Time Ins. Co.*, 698 F. Supp. 1317 (S.D. Miss. 1988), was a very early decision which based its holding solely on another decision from the Southern District of Mississippi that had involved the standard situation of an amended pleading that made the case removable for the first time. *Smith v. Burroughs, supra*, as noted above, has taken a fearful pounding over the years, including from another judge of the same district. *Winningkoff v. American Cyanamid*, 2000 WL 235648 (E.D. La. 2000) is the weakest of this weak lot, for it not only treated an unrelated court decision as an “other paper” but also asserted the right to override, in the name of its “equitable power,” the absolute prohibition in 28 U.S.C. §1446(b) that “a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than one year after commencement of the action.” *Id.* at \*3.

In short, a Supreme Court decision in an unrelated case is not an "other paper" under §1446(b). This conclusion not only fits the "plain language" and the case law, but is sensible. Important time limits, to the maximum extent possible, should not be subject to disputes about when they start running. If Congress had chosen to allow appellate court opinions in unrelated

cases to start the removal time running again, it would have opened the door to endless controversies, similar to the present one, in which the two sides differ on the meaning of the opinion in question and whether it really starts a new removal period. Congress chose not to invite such a class of controversies, recognizing that it is hardly a disaster for justice for a case to remain before a competent state judge instead of being heard by a competent federal judge.

## **II. Even If The Removal Were Timely, *Grable* Does Not Support It.**

Hardly discussing the context or language of the decision, defendants broadly assert that *Grable* dramatically changed the landscape of federal removal law, providing the defendants with a whole new basis of federal jurisdiction. According to defendants, in *Grable* “the Supreme Court has made clear that the presence of a substantial federal question is sufficient to confer federal jurisdiction over a plaintiff’s state law claims.” Defs. Remand Mem., 23. A reading of *Grable* dispels this reading. *Grable* is a limited exception to the general rule of *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), that where Congress has not provided a statute with a private right of action, a strong presumption exists that Congress did not intend a grant of federal jurisdiction.

### **A. *Grable* Is The Exception To *Merrell Dow*’s Rule.**

The entire body of law concerning when a state claim which may or does rely on a federal statute is removable is wrapped up in *Merrell Dow* and *Grable*.

*Merrell Dow* is the Court’s earlier pronouncement, and the case more like this one. There the plaintiff sued the defendant pharmaceutical company as a result of injuries she sustained using defendant’s drug Bendectin. The defendant argued that because one of plaintiff’s claims rested on the Food, Drug and Cosmetic Act (FDCA) the case presented a

federal question. The Court rejected this argument. It held that Congress' failure to provide a private right of action was powerful evidence that Congress did not intend to confer federal jurisdiction on state claims resting on this or similar federal statutes:

The significance of the necessary assumption that there is no federal private cause of action thus cannot be overstated. For the ultimate import of such a conclusion, as we have repeatedly emphasized, is that it would flout congressional intent to provide a private federal remedy for the violation of the federal statute.

*Merrell Dow*, 478 U.S. 804 at 812. The Court made it clear that this analysis applies to state tort claims even if they depend on an interpretation of a federal statute:

Given the significance of the assumed congressional determination to preclude federal private remedies, the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system. This conclusion is fully consistent with the very sentence relied on so heavily by petitioner. We simply conclude that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently "substantial" to confer federal-question jurisdiction.

478 U.S. 804 at 814 (footnote omitted).

Thus, according to *Merrell Dow*, where the statute does not provide a private right of action, a state court tort or statutory claim which may necessitate the interpretation of a federal statute is generally not a candidate for removal.

*Grable* does not alter this rule. *Grable* made it clear that the underlying basis of *Merrell Dow* remained good law:

*Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (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. 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 violations of that federal statute solely because the violation ... is said to be a ... ‘proximate cause’ under state law.” *Id.*, at 812.

*Grable*, 125 S.Ct. at 2369.

In departing from the result (but not the meaning) of *Merrell Dow*, the *Grable* Court focused on factors unique to that case. First, the meaning of the federal statute at issue was an essential element of the claim. Second, the meaning of the statute was in dispute. Third, it was the *only* contested legal or factual issue. Fourth, the Government had a strong tax based interest in the outcome of the litigation. Fifth, there will be few such cases in the future. The Court summed up these factors this way:

The Government thus has a direct interest in the availability of a federal forum to vindicate its own administrative action, and buyers (as well as tax delinquents) may find it valuable to come before judges used to federal tax matters. Finally, because it will be the rare state title case that raises a contested matter of federal law, federal jurisdiction to resolve genuine disagreement over federal tax title provisions will portend only a microscopic effect on the federal-state division of labor.

*Grable*, 125 S.Ct. at 2368.

Clearly the principal factor actuating the *Grable* decision was the uniqueness of a quiet title action raising a federal question, a factor that led the Court to conclude that sustaining removal in that situation would result in the transfer of few cases from state court to federal court. The Court contrasted this end result with what would happen if ordinary state tort and statutory claims were removable:

One only needed to consider the treatment of federal violations generally in garden variety state tort law. “The violation of federal statutes and regulations is commonly given negligence per se effect in state tort proceedings.” Restatement (Third) of Torts (proposed final draft) §14, Comment a. See also W. Keeton, D.

Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Torts*, § 36, p. 221, n.9 (5<sup>th</sup> ed. 1984) (“[T]he breach of a federal statute may support a negligence per se claim as a matter of state law” (collecting authority)). A general rule of exercising federal jurisdiction over state claims resting on federal mislabeling and other statutory violations would thus have heralded a potentially enormous shift of traditionally state cases into federal courts. Expressing concern over the “increased volume of federal litigation,” and noting the importance of adhering to “legislative intent,” *Merrell Dow* thought it improbable that the Congress, having made no provision for a federal cause of action, would have meant to welcome any state-law tort case implicating federal law “solely because the violation of the federal statute is said to [create] a rebuttable presumption [of negligence] ... under state law.” 478 U.S., at 811-812, 106 S.Ct. 3229 (internal quotation marks omitted).

*Grable*, 125 S.Ct. at 2370-71.

The *Grable* case is thus exceptional – a case where even though Congress has not provided a private right of action, the role of federal law was so central, the federal government's interest in the dispute so intense, and the intrusion on federal-state court relations so minimal, that the Court could infer that Congress intended the availability of a federal forum. As discussed next, none of the exceptional circumstances present in *Grable* is present here.

**B. Contrary To Defendants’ Argument, The Federal Medicare Statute Plays At Most A Minor Role In This Case.**

In *Grable* the sole issue to be decided was the meaning of a federal statute the outcome of which was important to the federal government. This case has no such important federal connections.

Wisconsin alleges that defendants have engaged in a scheme to hide the true price of their drugs and by publishing phony wholesale prices, denominated as “Average Wholesale Prices” or AWP, for their drugs in medical compendiums. Wisconsin alleges that this scheme violates its consumer protection act, its antitrust act and its Medicaid Act. No federal claim is asserted in the complaint.

Defendants argue that Judge Saris, who is administering the MDL case in the District of Massachusetts, ruled that the State of Minnesota’s complaint was based, in part, on the “meaning of AWP under the Medicare statute.” Defs. Mem., 25. In this very lawsuit, however, for purposes of seeking dismissal of the case, defendants have argued just the reverse:

At the heart of the State’s claim are two pharmaceutical pricing terms: “Average Wholesale Price,” or “AWP,” and “Wholesale Acquisition Cost,” or “WAC.” *These terms derive their meaning not by statute or regulation, but from how they have been used and understood for years by pharmaceutical manufacturers and reimbursers such as the government and private insurers.*

Defendants’ Memorandum in Support of their Joint Motion to Dismiss The Amended Complaint, p. 8 (emphasis added), attached as Exhibit B to this brief.

Defendants cannot have it both ways. They cannot seek dismissal by arguing that the Medicare statute has nothing to do with the meaning of AWP, then argue, when it suits their forum-shopping purposes, that everything in the Medicare part of this case depends on the statutory meaning of AWP. Thus, defendants cannot overcome even the first hurdle of *Grable* – showing that resolution of this case will require deciding an important issue of federal law.

The truth is that in asserting on the dismissal motion that the meaning of the term “AWP” is not controlled by any statute, defendants were correct.<sup>1</sup> In this suit, Wisconsin claims that by announcing inflated “AWPs” that were far above the real average wholesale prices prevailing for their drugs, defendants (a) obtained excessive reimbursements for providers from Wisconsin under Wisconsin’s Medicaid program, thereby directly damaging Wisconsin itself, and (b) damaged Wisconsin citizens who had to pay copayments or deductibles for drugs that were reimbursed by Medicare. (Those copayments or deductibles were a percentage of the price of the

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<sup>1</sup> Defendants are wrong, however, in their assertion that the name they chose to use for this price, “Average Wholesale Price,” can be ignored in determining its meaning. This issue is discussed at length in the briefing on the motion to dismiss, whose decision has been paralyzed by defendants’ attempt to remove this case.

drug; that price was set by formulas tied to AWP; and hence by announcing inflated AWPs, defendants caused the deductibles and copayments of Wisconsin citizens to be greater than what they would have been.)

Wisconsin's claims for damages for itself on account of its excessive reimbursement for drugs under the Medicaid program have nothing to do with the Medicare statute, as defendants concede. But even as to claims on behalf of Wisconsin citizens who paid excessive copayments or deductibles on account of Medicare-reimbursed drugs, it is implausible to argue that the interpretation of the meaning of "AWP" in the Medicare statute will be decisive. According to defendants, in tying Medicare reimbursement of these drugs to "AWP," Congress meant "AWP" to mean "any price the defendants choose, in their absolute discretion, to say was the Average Wholesale Price." If this argument were correct, defendants would have been free under the Medicare statute to announce AWPs that were a hundred times the *real* average price wholesalers charged providers for defendants' drugs, and the federal government would have been required to accept that figure and pay the resulting grotesquely inflated reimbursements. The chances of this bizarre interpretation of the Medicare statute prevailing are minuscule. Under any common-sense view, the "federal issue" involved in the Medicare claims is nothing more than the non-issue of whether Congress intended the term Average Wholesale Price to have a real meaning. If the answer is yes, as it obviously is, then defendants violated Wisconsin consumer fraud statutes by announcing, without the slightest federal authority to do so, "Average Wholesale Prices" that were utterly meaningless and enormously inflated.

**C. Permitting Removal In This Case Would Violate *Merrell Dow* and *Grable* By Interfering With The Established Workload Between State and Federal Courts.**

Both *Merrell Dow* and *Grable* agree that where there is no express private right of action, it is impermissible to confer federal jurisdiction on a class of cases where to do so would result in a reapportionment of the traditional responsibilities between state and federal courts. And both cases referred to the disruption to the state and federal courts that would occur if state tort or statutory claims were removable simply because they relied on an interpretation of a federal statute.

Yet that is the basis upon which defendants urge the Court to permit removal. The case brought by Wisconsin is nothing more than a series of state tort and statutory claims. These are the very kinds of claims that both *Merrell Dow* and *Grable* held were not removable even assuming that these claims are dependent on the interpretation of a federal statute. As the Court stated in *Merrell Dow*, “Given the significance of the assumed congressional determination to preclude federal private remedies, the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system.” *Merrell Dow*, 478 U.S. at 814. Or as the Court reiterated in *Grable*: “One only needed to consider the treatment of federal violations generally in garden variety state tort law . . . . A general rule of exercising federal jurisdiction over state claims resting on federal mislabeling and other statutory violations would thus have heralded a potentially enormous shift of traditionally state cases into federal courts.” *Grable*, 125 S.Ct. at 2370-71.

Defendants have no answer for this. Instead, buried at the end of their *Grable* analysis is a section which simply says that since the MDL has some state law claims before it, permitting removal in this case will not disrupt the balance of responsibilities between state and federal courts. Of course, permitting removal of one isolated case will not, by itself, disrupt the balance

between state and federal courts. But that is not what either *Grable* or *Merrell Dow* was discussing. Those cases were concerned with a class of cases – state tort and statutory claims relying on a federal statute – and their conclusion was that cases in that class were not meant to be removable without a very strong indication of Congressional intent to confer federal jurisdiction over them. This case falls squarely within the class of non-removable cases.

The two cases defendants call “comparable” to the present case are not. In *Municipality of San Juan v. Corporacion Para El Fomento Economico De la Ciudad Capital*, 415 F.3d 145 (1st Cir. 2005), the involvement of federal law in the case was enormous and the interest of the federal government in making local governments adhere to that body of law was critical. *San Juan* arose out of allegations by the City of San Juan that the defendant agency violated the federal laws and regulations governing the federal block grant funds the agency had been assigned to disburse, and seeking return of all remaining federal funds held by the agency. The only issue argued on appeal was whether the district court had erred in compelling arbitration. In a footnote, the First Circuit addressed the question of jurisdiction as follows:

Although not argued before us, COFECC earlier in the litigation challenged the substantive basis for jurisdiction, asserting that the Municipality's complaint did not state a federal question. After the magistrate judge initially recommended dismissal, the Municipality amended its complaint to draw a more explicit link between its allegations and the federal interest in ensuring compliance with the comprehensive framework of regulations governing recipients of federal block grant funds. The magistrate judge vacated his earlier ruling, relying on Supreme Court precedent recognizing that traditional state law causes of action may present a sufficiently important federal interest to warrant federal jurisdiction. See *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199, 41 S.Ct. 243, 65 L.Ed. 577 (1921); *Templeton Bd. of Sewer Comm'rs v. Amer. Tissue Mills of Mass., Inc.*, 352 F.3d 33, 36 (1st Cir.2003); *Penobscot Nation v. Georgia-Pacific Corp.*, 254 F.3d 317, 321 (1st Cir.2001); *Almond v. Capital Props., Inc.*, 212 F.3d 20, 22-24 (1st Cir.2000).

Because the propriety of COFECC's conduct turns entirely on its adherence to the intricate and detailed set of federal regulatory requirements, and the funds at issue

are federal grant monies, we agree with the magistrate judge and district court that jurisdiction is proper. The Supreme Court recently affirmed the continued viability of the Smith line of cases, albeit narrowly drawn. See *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, --- U.S. ----, ----, 125 S.Ct. 2363, 2368, --- L.Ed.2d ----, ---- (2005) (upholding federal-question jurisdiction where a state-law claim necessarily implicates a federal issue, “actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities”).

2005 WL 164492 at \*4, n.6. Thus, in *San Juan*, the entire claim depended on whether the defendant had obeyed the maze of purely federal laws and regulations governing expenditure of federal money. And the interest of the federal government in assuring that those laws and regulations are obeyed is enormous. In the present case, as discussed above, the federal interest is so tangential that defendants themselves, when it suits their purposes, have asserted that the meaning of “AWP” has nothing to do with the Medicare statute or any other statute. And there is little, if any, ongoing federal interest in that issue, because the Medicare law no longer ties drug reimbursements to AWP, as defendants admit.

Likewise, in *Zyprexa Products Liability Litigation*, 2005 WL 156136 (E.D.N.Y. 2005), plaintiff's two petitions contain numerous references to alleged violations of federal law; plaintiff in effect was “arguing that Eli Lilly violated federal regulations by marketing Zyprexa for pediatric and other off-label uses”; and plaintiff's state law claims “also raise important federal questions relating to Medicaid.” The court concluded that “In the instant cases, the substantial federal funding provisions involved and the allegations about the violation of federal law through improper off-label use present a core of substantial issues more federally oriented than those in *Merrell Dow*. *Id.* at \*2. Whether one agrees with this decision, the present case involves no allegation of federal law at all and involves no “core” of “federally oriented” issues.

**D. Because Defendants Selectively Removed Cases, and Because the District Courts are Already Beginning to Remand Those Cases Defendants Did Remove, Defendants' Professed Goal of Uniformity Is an Illusion.**

Defendants maintain that there is a strong federal interest in the uniform interpretation of the term AWP. As discussed above, this purported “federal issue” is really a non-issue. But in any case, defendants are insincere in their assertion that they seek uniformity of interpretation. Instead, defendants selectively removed only certain state cases involving their inflated average wholesale prices. As far as Wisconsin has been able to determine, at least thirteen AWP cases have *not* been removed by the defendants even though some of them assert claims related to Medicare drug reimbursements and all of them involve the Medicaid program, which defendants also assert as a “federal interest” justifying removal.<sup>2</sup> This fact confirms what is already obvious: defendants are interested not in vindicating any “federal interest,” or seeking any “uniformity,” but simply in forum-shopping.

Any purported federal interest in uniformity of interpretation is also weak because it was never likely that removal would “stick” in any substantial number of these cases, and now the dam has started to crack. As noted at the outset, Judge Thompson has already remanded Alabama’s action back to state court. More such decisions are likely. Thus, the principal

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<sup>2</sup> The non-removed cases, according to Wisconsin’s present information, are *Missouri v. Dey, et al.*, Case No. 054-01216 (St. Louis Cir. Ct., MO); *Arkansas v. Dey, et al.*, Case No. CV04-634 (Fifth Div., Pulaski Co. Cir. Ct., AR); *Ohio v. Abbott Laboratories, Inc., et al.*, Case No. A0402047 (Hamilton Co., OH); *Ohio v. Ben Venue Laboratories, Inc., et al.*, Case No. A0409296 (Hamilton Co., OH); *Connecticut v. Dey, Inc., et al.*, No. CV-03-0824413 (Super. Ct., Hartford, CT); *Connecticut v. GlaxoSmithKline, PLC, et al.*, No. CV-03-0824414 (Super. Ct., Hartford, CT); *Connecticut v. Aventis Pharma, Inc.*, No. CV-03-0824415 (Super. Ct., Hartford, CT); *Nevada v. Abbott Labs., Inc., et al.*, No. CV-00260 (Washoe Co., NV); *West Virginia v. Warrick Pharma. Corp., et al.*, No. 01-C-3011 (Kanawha Co., WV); *Texas v. Abbott Laboratories, Inc., et al. adv State of Texas on behalf of Relator, Ven-a-Care of the Florida Keys, Inc.*, Case No. GV4-01286 (Travis Co., TX); *Texas v. Ben Venue Laboratories, Inc., et al. adv State of Texas, on behalf of Relator, Ven-a-Care of the Florida Keys, Inc.*, Case No. CV3-03079 (Travis Co., TX); *Florida v. Boehringer Ingelheim, et al. adv State of Florida on behalf of Relator, Ven-a-Care of the Florida Keys, Inc.*, Case No. 98-3032-A (Leon Cir. Ct., FL); and *Swanston v. TAP Pharmaceutical Products, Inc. et al.*, Case No. 2002-0049-88 (Super. Ct., Maricopa Co., AZ).

“federal interest” asserted by defendants is unachievable, as much by defendants’ own actions as anyone’s.

Finally, *Merrell Dow* ruled that the quest for uniformity was not enough to catapult state tort and statutory claims based on federal statutes into federal court:

Second, petitioner contends that there is a powerful federal interest in seeing that the federal statute is given uniform interpretations, and that federal review is the best way of insuring such uniformity. In addition to the significance of the congressional decision to preclude a federal remedy, we do not agree with petitioner's characterization of the federal interest and its implications for federal-question jurisdiction. To the extent that petitioner is arguing that state use and interpretation of the FDCA pose a threat to the order and stability of the FDCA regime, petitioner should be arguing, not that federal courts should be able to review and enforce state FDCA-based causes of action as an aspect of federal-question jurisdiction, but that the FDCA pre-empts state-court jurisdiction over the issue in dispute. Petitioner's concern about the uniformity of interpretation, moreover, is considerably mitigated by the fact that, even if there is no original district court jurisdiction for these kinds of action, this Court retains power to review the decision of a federal issue in a state cause of action.

*Merrell Dow*, 478 U.S. at 815-16 (footnotes omitted).

### **III. Defendants Have Already Lost Their Stay Motion. They Are Not Entitled To Another Chance.**

Defendants previously moved the Court to grant a stay so that this action could be transferred to the MDL. Magistrate Judge Crocker denied their motion. Defendants did not file an appeal. Instead, they pretend it never happened, devoting several pages to arguing that they are entitled to a stay. To call this inappropriate is an understatement.

In any event, Wisconsin made its case earlier in its opposition to a stay, with one exception. Wisconsin previously adverted to the fact that the private actions in the MDL gave the district judge there enough to do without adding the state AWP claims to her burden, and that transfer would sentence Wisconsin to a lengthy delay in obtaining a remand decision. Wisconsin

has since learned after it filed its brief opposing a stay that because of the workload in the MDL, remand motions are taking more than a year to resolve. Here is how long it took for the MDL court to reach nine different remand motions:

1. *Geller v. Abbott Labs, Inc.*, (No. CV 02-00553) (C.D. Cal.) (Pregerson, J.): 24 months from removal (1/18/02) to remand decision (1/9/04);
2. *Montana v. Abbott Labs, Inc.*, No. CV 02-09-H (D. Mont.) (Molloy, J.): 14 months (04/15/02 to 06/11/03);
3. *Nevada v. Abbott Labs, Inc.*, No. CV-N-02-80 (D. Nev.) (Reed, J.): 16 months (02/15/02 to 06/11/03);
4. *Nevada v. Am. Home Prods., Inc.*, No. CV-N-02-202 (D. Nev.) (Reed, J.): 14 months (4/17/02 to 06/11/03);
5. *Rice v. Abbott Labs, Inc.*, No. C 02-3925 (N.D. Cal.) (Jenkins, J.): 17 months (08/14/02 to 1/9/04);
6. *Digel v. Abbott Labs., Inc.*, No. 03-2109 (W.D. Tenn.) (Donald, J.): 11 months (2/21/03 to 1/9/04);
7. *Swanston v. TAP Pharma. Prods., Inc.*, No. 03-CV-62-PHX (D. Ariz.) (McNamee, J.): 12 months (1/10/03 to 1/9/04);
8. *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. AstraZeneca PLC*, No. 03-CV03230 (D.N.J.) (Chesler, J.): 25 months, and still pending since 7/3/03;
9. *County of Erie v. Abbott Labs., Inc.*, No. 05-CV-6203T (W.D.N.Y.) (Telesca, J.): 4 months, and still pending since 4/15/05.

Thus, there is an ample evidence that plaintiff will be prejudiced if this case is sent to the MDL without a remand decision.

## CONCLUSION

For the foregoing reasons, Wisconsin asks the Court to remand this case to the State court from whence it came and to award it its costs and fees. Wisconsin also asks that the Court consider sanctioning the defendants in the event they do not withdraw the Notice of Removal.

Dated this 18th day of August, 2005.

Respectfully submitted,

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