

Before the Judicial Panel on Multidistrict Litigation

MDL – 1456

In Re Pharmaceutical Industry Average Wholesale Price Litigation

**BRIEF IN SUPPORT OF MOTION TO VACATE
THE CONDITIONAL TRANSFER ORDER**

1. Plaintiff State of Wisconsin moves, pursuant to Rule 7.4, R.P.J.P.M.L., 199 F.R.D. 425, 435-36 (2001), to vacate the Panel's order conditionally transferring its action to the U.S. District Court for the District of Massachusetts under 28 U.S.C. § 1407.

BACKGROUND OF THE LITIGATION

2. Plaintiff State of Wisconsin filed this lawsuit in the Circuit Court of the State of Wisconsin, Dane County, on June 3, 2004, alleging violations of (1) Wisconsin's consumer fraud statutes, § 100.18, (2) Wisconsin's antitrust laws, Wis. Stats. § 133.05, and (3) Wisconsin's Medicaid fraud laws, Wis. Stats. § 49.49(4m)(a)(2), together with an unjust enrichment claim. Plaintiff State of Wisconsin claimed, among other things, that defendants had defrauded Wisconsin's Medicaid and Senior Care programs by publishing phony, inflated wholesale prices for their drugs, which resulted in huge overcharges to the State. Wisconsin also sought to enjoin defendants' conduct, and as part of its enforcement duties, to recover for those residents and former residents who were also victimized by defendants' fraud.

3. On July 14, 2004, Defendant Bayer removed this action to the U.S. District Court for the Western District of Wisconsin on the basis of diversity alone.

4. On July 22, Defendants moved to stay all proceedings in the district court pending transfer by this Panel. Plaintiff opposed the stay.

5. On July 26, 2004, Plaintiff State of Wisconsin moved to remand the case to state court based on the fact that (1) the only plaintiff in the case is the State of Wisconsin, which is

seeking relief for itself; (2) a State is not a citizen for the purposes of diversity, and (3) thus diversity jurisdiction does not exist.

6. Both Defendants' motion to stay and Plaintiff's remand petition are pending before Judge Crabb.

7. On August 3, 2004, this action was conditionally transferred to this Panel.

**FACTUAL AND LEGAL BASIS FOR VACATING
THE CONDITIONAL TRANSFER**

8. Plaintiff State of Wisconsin requests that the Panel vacate the conditional transfer order and allow the case to remain in the Western District of Wisconsin, where Judge Crabb can decide Plaintiffs' remand petition. Transfer of this action to the Honorable Judge Patti Saris of the District of Maryland for inclusion in Section 1407 pretrial proceedings will not serve the convenience of the parties and witnesses and will not promote the just and efficient conduct of this litigation.

9. As explained below, no efficiencies will be gained by transferring the case because no similar remand issue has been decided or is pending before Judge Saris. Additionally, as set forth below, the delay produced by the transfer to Judge Saris is especially unwarranted given that the removal of a State on diversity grounds is frivolous, and it impinges on the State's sovereign right to be free of unauthorized federal process.

No Efficiencies Will Be Gained Because No Similar Remand Issue Has Been Decided Or Is Pending Before Judge Saris.

10. Having Judge Saris decide Plaintiff State of Wisconsin's remand petition will not promote the just and efficient conduct of this litigation. Plaintiff State of Wisconsin's remand issue is unique—no case pending at the MDL that was brought by a State has been removed on diversity grounds. Thus, no other remand petitions dealing with even remotely similar jurisdictional issues have been decided or are pending before Judge Saris.

11. While the transferee court could decide the Plaintiff's remand petition, Judge Crabb is far more familiar with the law in the Seventh Circuit in connection with jurisdictional issues than is a district court in Massachusetts. In a factual context such as this one where there are no other similar remand petitions pending at the MDL, no economies of scale are realized by sending the case for resolution to the MDL court. As Judge Adelman stated in *Meyers v. Bayer AG*, 143 F. Supp. 2d 1044 (E.D. Wis. 2001):

The only reason to permit the transferee court to decide the jurisdictional issue would be to further judicial economy and consistency. H.R.Rep. No. 90-1190. If the jurisdictional issue in the particular case is different from those in the other cases subject or potentially subject to MDL jurisdiction, these values do not come into play.

Meyers, 143 F. Supp. 2d at 1049.

12. Thus, Judge Adelman concluded that transferring a case to the MDL before deciding a plaintiff's remand motion made sense only when the "the jurisdictional issue is both difficult and similar or identical to those in cases transferred or likely to be transferred." *Id.* Here the remand issue is neither difficult nor likely to be repetitive since no other case currently raises the issue at the MDL and no other removal petition is pending. (Nor, we believe, is the issue likely to be raised again after a decision is made in this case, so baseless is defendants' removal.)

13. In this case, the transferee judge's familiarity with this MDL litigation as a whole in no way furthers the expeditious resolution of this action. Thus, with no similar petitions before Judge Saris, principles of efficiency and judicial economy favor vacating the transfer and having a district court judge in the Seventh Circuit decide jurisdictional issues of Seventh Circuit law.

The removal of the action was frivolous because there is no basis for federal jurisdiction.

14. The removal of the action was frivolous because there is no basis for federal jurisdiction. The law is crystal clear that a State is not a citizen for diversity purposes, and hence cannot be diverse from any defendant no matter where the defendant is located. *See Postal Telegraph Cable Co. v. State of Alabama*, 155 U.S. 482, 487 (1894):

A state is not a citizen. And under the judiciary acts of the United States it is well settled that a suit between a state and a citizen or a corporation of another state is not between citizens of different states, and that the circuit court of the United States has no jurisdiction of it, unless it arises under the constitution, laws, or treaties of the United States.

See also Illinois v. City of Milwaukee, 406 U.S. 91, 97 n.1 (1972). Given that the State of Wisconsin is the only plaintiff in the action and that it is seeking relief for the pecuniary damages it itself has suffered, no diversity exists, and it was frivolous for the Defendants to remove this action on diversity grounds.

An Expeditious Resolution To The Jurisdictional Issue Preserves The State's Sovereignty.

15. The State of Wisconsin as a sovereign should not be subjected to the jurisdiction of the federal courts except upon such circumstances as clearly defined by the United State's Supreme Court. The Eleventh Amendment "serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996) (quoting *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)). With no disrespect intended toward this Panel or Judge Saris, transferring this case to the District of Maryland perpetuates that indignity. The most expeditious resolution of the jurisdictional issue will be by Judge Crabb, thus preserving the State's sovereignty.

CONCLUSION

16. The conditional transfer of this case to the District of Massachusetts should be vacated. Defendants removed the Plaintiff State of Wisconsin, a sovereign, with no basis in law or fact. In order for this case to proceed, a jurisdictional issue *unique* to this case and based in Seventh Circuit law must be decided. Judge Crabb of the Western District of Wisconsin is best situated to make this decision. Thus, there is nothing to be gained by transferring this action to Judge Saris, and such a transfer will only delay resolution of this case.

Dated this ____ day of September, 2004.

Charles Barnhill
One of Plaintiff State of Wisconsin's Attorneys

PEGGY A. LAUTENSCHLAGER
Attorney General
State Bar #1002188

MICHAEL R. BAUER
Assistant Attorney General
State Bar #1003627

CYNTHIA R. HIRSCH
Assistant Attorney General
State Bar #1012870

FRANK D. REMINGTON
Assistant Attorney General
State Bar #1001131

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0332 (MRB)
(608) 266-3861 (CRH)
(608) 266-3542 (FDR)

CHARLES BARNHILL
State Bar #1015932

WILLIAM P. DIXON

State Bar #1012532

ELIZABETH J. EBERLE

State Bar #1037016

Miner, Barnhill & Galland, P.C.
44 East Mifflin Street, Suite 803
Madison, WI 53703
(608) 255-5200