

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

STATE OF MARYLAND

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Plaintiff

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v.

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CIVIL ACTION NO. CCB 96-1691

PHILIP MORRIS INCORPORATED
(Philip Morris U.S.A.) et. al

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Defendants

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REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR REMAND

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REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR REMAND

INTRODUCTION

Defendants, undaunted by the resounding rejection by three federal courts of defendant's prior attempts to remove complaints seeking virtually identical relief brought by the Attorneys General of Mississippi¹, the Commonwealth of Massachusetts² and Louisiana³, have resorted to similar tactics in an unavailing attempt to oppose this motion for remand. As Judge O'Toole of the federal court in Massachusetts so accurately stated, "The defendants' parsing of the statutory text is selective," Commw. of Massachusetts v. Philip Morris, et al., No. 96-10014-GAO at 15 (D. Mass. May 20, 1996), and "[t]heir argument seeks to extrapolate from . . . inapposite cases . . ." Id. at 19.

¹ Moore v. American Tobacco Co., et al., No. 94-293GR (D. Miss. 1994).

² Commonwealth of Massachusetts v. Philip Morris Inc., et al., No. 96-10014-GAO (D. Mass. May 20, 1996).

³ Ieyoub v. The American Tobacco Company, et al., No. 96-0908 (W.D. La. July 17, 1996) (Attached as Exhibit A).

Viewed in this perspective, it becomes evident that there has been no attempt to "disguise" federal claims as state claims in an effort to avoid federal question removal jurisdiction. In fact, "there is no question of federal law, substantial or otherwise, to be determined in the prosecution of the pleaded claims." *Id.* at 8. Finally, even the defendants must concede that if the need arises to address a federal question in the context of their affirmative defenses, such a prospect may not serve as the basis for removal jurisdiction.⁴

I. DEFENDANTS HAVE NOT SHOWN THAT PLAINTIFF'S WELL-PLEAD COMPLAINT PRESENTS A FEDERAL QUESTION ON ITS FACE.

Plaintiff's complaint plainly states thirteen counts against the Defendants, all of which arise under Maryland law. These counts include common law causes of action such as Restitution Based Upon Unjust Enrichment (Count Five), Fraud and Deceit (Count Seven); Negligent Misrepresentation (Count Eight), Negligence (Count Eleven), Strict Liability (Count Twelve); and Conspiracy (Count Thirteen).

Defendants argue that federal question jurisdiction exists because Counts Two, Three and Four alleging violations of the Maryland Antitrust Act, MD. COMM. LAW ANN. § 11-201, et seq., are "artfully plead" to deliberately avoid asserting claims that are necessarily federal in nature. In addition, they argue that the request for reimbursement of state Medicaid expenditures contained in each count mandates federal jurisdiction for the entire complaint. To bolster these arguments, Defendants have distorted the nature and application of the legal principles of artful pleading and federal question removal jurisdiction.

This Court recently reviewed the framework for determining removal jurisdiction in

⁴ *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, L.Ed.2d 318, 107, S. Ct. 2425 (1987).

L.H.W. Sr., Inc. v. Exxon Company, U.S.A., 921 F. Supp. 1436 (D. Md. 1996) where Judge Chasanow invoked the well-plead complaint rule of Caterpillar Inc. v. Williams, 482 U.S. 386 (1987):

This rule "provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Id.* Because "[t]he well-pleaded complaint rule applied to the original jurisdiction of the district court as well as to their removal jurisdiction," Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal., 468 U.S. 1, 10 n. 9, 103 S.Ct. 2841, 2847 n. 9, 77 L.Ed.2d 420 (1983), a plaintiff "may avoid federal jurisdiction by exclusive reliance on state law" in pleading its case, Caterpillar Inc., 482 U.S. at 392, 107 S.Ct. at 2429.

L.H.W. Sr., Inc., 921 F. Supp. at 1438, (quoting Rosciszewski v. Arete Assoc., Inc., 1 F.3d 225 (4th Cir. 1993)). Judge Chasanow also explained that, "(i)n the Fourth Circuit, the artful pleading exception has been recognized, but must be applied sparingly." *Id.*, 921 F. Supp. at 1440 (emphasis supplied).⁵

Defendants rely upon Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981), for the proposition that Plaintiff's antitrust complaint is artfully plead. However, the first sentence of the Moitie decision makes clear that: "[t]he only question presented in this case is whether

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Judge Chasanow also quoted from a decision referred to by Defendants, Cheshire v. Coca-Cola Bottling Affiliated, 758 F. Supp. 1098 (D.S.C. 1990), stating that "Judge Anderson recognized, but rejected, an artful pleading argument" in that case. L.H.W. Sr., Inc., 921 F. Supp. at 1441. Cheshire involved an argument that South Carolina's unfair trade practices act was preempted by federal antitrust law. While Defendants properly refer to certain statements in that decision (Defendant's Opposition Brief at 2, 3), they conveniently omit the following passage:

Application of the artful pleading doctrine is most appropriate in cases where federal law altogether preempts and supplants state law, but plaintiff seeks to avoid the effects of preemption by pleading only state causes of action. *See, Avco Corp. v. Aero Ledge (sic) No. 735, International Association of Machinists*, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1988). In the area of antitrust and unfair trade practices, Congress has never expressed any intent to occupy the regulated area exclusively, and the courts have inferred none.

Cheshire, 758 F. Supp. at 1100.

the Court of Appeals for the Ninth Circuit validly created an exception to the doctrine of res judicata." *Id.*, 452 U.S. at 395. The Supreme Court reversed the Ninth Circuit and held that dismissal of these claims was mandatory under the settled principles of res judicata. *Id.*, 395 U.S. at 398-402. ⁶

In dicta, *Moitie* did suggest that removal had been appropriate because "at least some of the claims had a sufficient federal character." 452 U.S. at 397 n.2. However, the claims that were removed were not antitrust claims. In his dissent, Justice Brennan identified the causes of action alleged in the state complaints. They were "(1) fraud and deceit, (2) unfair business practices, (3) civil conspiracy, and (4) restitution." 452 U.S. at 404-05.

Moreover, in *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208 (1st Cir. 1987) the First Circuit questioned the efficacy of the *Moitie* dicta. Referring to footnote 2, the court wrote:

This footnote does have language about claims which are "federal in nature" or which have a "sufficient federal character to support removal." *Id.* Professor Wright calls this footnote "mystifying." C. Wright, *The Law of Federal Courts* § 38, at 212 n. 19 (1983). Whether it was meant to work a revolution in the law of federal removal jurisdiction must, in this circuit, await another case. Even if that were its intent, this radical change may have been overruled sub silentio in *Franchise Tax Board*, which so strongly reaffirmed the well-pleaded complaint rule. *Franchise Tax Board*, 463 U.S. at 7 (noting that the law of removal jurisdiction "has remained basically unchanged for the past century").

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See also *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423 (9th Cir. 1984), where after a federal antitrust claim was dismissed on statute of limitations grounds, plaintiffs commenced a state action against the same defendants, alleging six common law counts and a state antitrust count. The complaint was removed, and the federal district court held that, although the claims would not have been removable if brought as original state law actions, the claims had to be dismissed on res judicata grounds as they were all related to the matters concluded by the previous federal judgment. *Salveson v. Western States Bankcard Ass'n*, 525 F. Supp. 566 (N.D. Cal. 1981). The Court of Appeals stated that removal jurisdiction should be strictly construed to preserve plaintiffs' rights to choose their forum, especially if the claim can be state or federal. However, it affirmed, holding that since plaintiffs should not be allowed to recast dismissed federal claims as state claims to the prejudice of defendants, removal was proper under principles of res judicata as "artful pleading."

834 F.2d at 216-17. This court should decline defendants' invitation to resurrect the footnoted dicta in Moitie and to extend it to this case.

II. PLAINTIFF HAS PROPERLY PRESENTED CLAIMS UNDER THE MARYLAND ANTITRUST ACT.

A. Federal courts have consistently upheld the power of States to bring State antitrust enforcement actions in their own courts.

Defendants ask this Court to extend federal jurisdiction over a properly pleaded State antitrust enforcement action. Yet, the Supreme Court has been reticent to extend federal jurisdiction over state plaintiffs that have chosen to bring state claims in state court. In Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 21 n. 22 (1983), the Court stated that "considerations of comity make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it."

No such clear rule exists in antitrust cases. In California v. ARC America Corp., 490 U.S. 93 (1989), the Supreme Court upheld state antitrust law allowing indirect purchasers to recover for state antitrust violations despite prior Supreme Court decisions barring indirect purchaser actions under federal law. The Court held that the state antitrust law, an exercise of "the historic police powers of the States," was not preempted by federal antitrust law. Id. Id., 490 U.S. at 101.

The ARC America appellants that prevailed in the Supreme Court were four states which brought suit in federal court on their own behalf and on behalf of all of their political subdivisions alleging a "nationwide conspiracy to fix prices of cement in violation of § 1 of the Sherman Act." Id. at 97. All four states appended claims alleging violations of their respective state antitrust acts for this same nationwide conduct. The Supreme Court upheld each of these interstate claims in relatively short order. Indeed, the Court suggested that these state claims took precedence over federal claims, pointing to the

legislative history of the Sherman Act, which was enacted to “supplement, not displace, State antitrust remedies.” *Id.* at 102.

Even before ARC America, district courts uniformly permitted state plaintiffs to use state rather than federal antitrust laws to attack conspiracies of an interstate nature. State of Connecticut v. Levi Strauss & Company, 471 F. Supp. 363 (D. Conn. 1979), cited with approval in In Re Wiring Devices Antitrust Litigation, 498 F. Supp. 79 (E.D.N.Y. 1980), is strongly analogous to the situation at bar. In that case, the state attorney general filed an action in state court under the Connecticut Antitrust Act law against Levi Strauss, a large, multi-national corporation incorporated in Delaware and headquartered in San Francisco. Levi Strauss filed a notice for removal based on the theory that the interstate nature of their business necessitated a federal, rather than state, cause of action. Acknowledging that the facts alleged would have supported a federal antitrust claim, Connecticut insisted on its prerogative to choose a state forum. *Id.* 471 F. Supp. 366.

After rejecting a preemption argument, the district court found that the Connecticut statute, even when applied to a national price-fixing conspiracy, did not operate to impose an undue burden on interstate commerce. In finding a legitimate local interest under Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), the court reasoned, “Price-fixing in a region or a state is no less local because it may also occur elsewhere. Nor is a burden on a company to defend a variety of lawsuits an undue burden (if any burden at all) on commerce.” State of Connecticut, 471 F. Supp. at 368. The court concluded that even if Connecticut imposed a stricter standard regarding pricing than other states or the federal government, variations in permissible pricing practices do not inevitably impose undue burdens on commerce. Stating that “[t]he sensitive issues presented here should be first considered by the courts of the state,” *Id.* at 369, the trial judge remanded the case to state court for a definitive construction of state law.

Similarly, in *Iowa v. Binney & Smith, Inc.*, 1982-2 Trade Cas. ¶ 64 at 781 (S.D. Iowa 1982), the district court granted Iowa’s motion to remand even though, as the court acknowledged, Iowa’s petition alleging violations of the Iowa Competition Law was “virtually identical” to those filed by other state attorneys general in a multidistrict case, alleging violations of the Sherman Act. *Id.* at 71,827. More recently, in *Texas v. Insurance Services Office, Inc.*, 699 F. Supp. 601 (W.D. Tex. 1988), the court remanded the Attorney General’s claim although it alleged an international conspiracy of insurers, reinsurers and trade associations.

In the present case, the State has acted in its sovereign capacity, bringing a law enforcement action in addition to filing proprietary claims. This is the exercise of “historic police power,” which the Supreme Court intended to protect. See *ARC America*, 490 U.S. at 101. Only by remanding this case can this Court act in harmony with “the long history of state common-law and statutory remedies against monopolies and unfair business practices” in this “area traditionally regulated by the States.” *Id.*

B. The Maryland Antitrust Act reaches interstate conduct with injurious effects in Maryland.

Defendants seek to evade the jurisdiction of the state court by arguing disingenuously that the Maryland Antitrust Act is limited to “intrastate” conduct. Their argument ignores the plain language of the Act and its legislative history and conflicts with the contemporaneous view of the Act by the two leading commentators.

The General Assembly articulated the clear intent that the Act reach interstate conduct which caused injury within Maryland. Section 11-202(a)(3) of the Act expressly authorized scrutinizing interstate conduct providing:

It is also the intent of the General Assembly that, in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition within the State, determination of the relevant market or effective area of competition may not be limited by the boundaries of the State.

Md. Com. Law Code Ann. § 11-202(a)(3) (1990) (emphasis added). “Relevant market” is a term of art referring to the “area of effective competition” within which the defendant operates. Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327-28 (1961). See also, U.S. v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593 (1957). The relevant market is used to measure the impact of a defendant’s conduct to determine whether a restraint is “unreasonable” or whether the defendant has “monopolized.” See Md. Com. Law Code §§ 11-204(a)(1), (2) (1990).

Determining relevant market involves “discovering patterns of trade which are followed in practice,” U.S. v. United Shoe Machinery Corp., 110 F. Supp. 295, 303 (D. Mass. 1953) *aff’d* 347 U.S. 521 (1954), and which “correspond to the commercial realities.” Brown Shoe v. U.S., 370 U.S. 294, 336 (1962). The commercial reality in the State of Maryland is that markets and economic conduct frequently cross state lines. The General Assembly realized this and directed courts enforcing the Maryland Antitrust Act to look across state lines at interstate conduct affecting Maryland.

The interstate reach of the Maryland Antitrust Act was apparent to the authors of the then leading commentary on the Act, Reynolds and Wright, “A Practitioner’s Guide to the Maryland Antitrust Act,” 36 Md. L. Rev. 323 (1976). Writing shortly after the Act became law, Reynolds and Wright, stated, “[T]he Maryland Act, like the federal antitrust laws, regulates a wide variety of activity.”

Id. at 334. Considering the definition of “trade or commerce” regulated by the Act, Md. Com. Law Code Ann. § 11-201(h) (1990), Reynolds and Wright observed:

Because “trade or commerce” is defined as “includ[ing] all economic activity within the State which relates to any commodity or service,” the Act’s potential coverage of economic activity in Maryland is very broad.

36 Md. L. Rev. at 335 (emphasis in original). This definition, extending the coverage of the act to “all” economic activity, covers conduct that is interstate as well as intrastate. Indeed, the intended scope of

coverage is so broad that the authors expressed concern about its interstate reach. “Because most state antitrust acts, including Maryland’s, assert jurisdiction over activities in interstate commerce, there are latent constitutional questions in every state antitrust case.” 36 Md. L. Rev. at 340.⁷

The legislative history cited by defendants is consistent with this long standing interpretation of the Act. Certainly, the Economic Matters Committee sought to remedy restraints of trade “within the State of Maryland”. Defendant’s Brief at 10-11. It was, after all, the impact or effects of antitrust violations in Maryland, “intrastate problems,” that troubled the General Assembly. An expression of concern about the impact of conduct on Maryland, however, does not require limiting the reach of Act reaches to conduct that occurs only in Maryland. Indeed, defendant’s narrow reading of the scope of the Act ignores the General Assembly’s instruction that the Maryland Antitrust Act “shall be liberally construed to serve its beneficial purpose.” Md. Com. Law Code Ann. § 11-202(b)(2) (1990).

No Maryland court has yet been asked to determine the scope of the Maryland Antitrust Act.⁸ In this regard, the instant case is very different from In re Wiring Devices Antitrust Litigation, 498 F. Supp. 79 (E.D.N.Y. 1980) and Three I Farms, Inc. v. Alton Box Board Co., 1978-1 Trade Cas. (CCH) ¶ 62, 423, rev’d, 609 F.2d 112 (4th Cir. 1979), cert. denied 445 U.S. 911 (1980), where both courts were considering a South Carolina statute that had been restricted to intrastate conduct by that State’s Supreme Court. The courts of the State of Maryland should be allowed to construe the

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These constitutional issues were raised, and were resolved in favor of state antitrust statutes, in California v. ARC America Corp., 490 U.S. 93 (1989).

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Contrary to defendants’ assertions, Maryland’s Court of Appeals did not address the scope of the Maryland Antitrust Act in ANA Towing, Inc. v. Prince George’s County, 314 Md. 711, 552 A.2d 1295 (1989). That case involved only whether a political subdivision of the State was statutorily immune from antitrust scrutiny arising from the award of a police towing contract. The interstate scope of the Maryland Antitrust Act was not an issue in that case.

Maryland Antitrust Act. If, indeed, the Maryland Antitrust Act does not reach the conduct at issue in this case, defendants may have a valid defense. But, it is a defense that is properly heard before the Circuit Court for Baltimore City. See Caterpillar, Inc. v. Williams, 482 U.S. 386, 393 (1987).

The defendants also resort to Sun Dun, Inc. of Washington v. The Coca-Cola Co., 740 F. Supp. 381 (D. Md. 1990) to support their removal case. Removal was not at issue in Sun Dun. Judge Smalkin did not hold that the Constitution requires removal of state antitrust claims when they seek to reach beyond intrastate commerce. Rather, in dicta, Judge Smalkin wrote that it would be “unconstitutional under the Commerce Clause to apply the D.C. Code to claims which, though bearing some connection to the District of Columbia, are in fact interstate in nature...” Id. at 396.

The State certainly does not agree with this proposition. As Judge Smalkin noted, ARC America involved use of state statutes to reach nationwide conduct. 740 F. Supp at 396. Moreover, in Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985), the Supreme Court envisioned a case where both state and federal antitrust law (thus necessarily involving interstate commerce) might be applied to the same anticompetitive conduct and where separate damage recoveries might be had under each statute. 470 U.S. at 385.

In any event, defendants here raise the Sun Dun dicta as a probable defense to the State’s antitrust claims. Defenses, even constitutional defenses, are not grounds for removal, and are appropriately heard by the state court. See Caterpillar, Inc., 482 U.S. at 393; See also Craig v. Government Employees’ Insurance Company, 134 F.R.D. 126, 127 (D. Md. 1991) (Smalkin, J.).

Because the State of Maryland has properly presented State antitrust claims in the courts of its own State, the case should be remanded to those courts. If there are any “sensitive issues” of State law presented, as in the State of Connecticut v. Levi Strauss, they should be first considered by the Circuit Court for Baltimore City.

III. THE STATE'S CAUSES OF ACTION DO NOT "ARISE UNDER FEDERAL LAW" SIMPLY BECAUSE THE INJURIES CLAIMED BY THE STATE INCLUDE FINANCIAL HARM TO A PROGRAM FUNDED IN PART BY THE UNITED STATES, OR BECAUSE THE UNITED STATES HAS A FINANCIAL INTEREST IN THE POTENTIAL RECOVERY.

It is clear from the Complaint that no provision of the federal Medicaid Act, 42 U.S.C. § 1396 *et seq.*, or related federal regulations, "is a necessary element of one of the well-plead state claims." Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 13 (1983). The State does not seek to sue "under" or to "enforce" the Medicaid Act, and it is not proceeding in this case under assignment of, or as a subrogee to, the rights or claims of any individual Medicaid recipient.

Nonetheless, simply because the damages claimed include expenditures from the state Medicaid program, which is in part federally funded, the defendants claim that this entire action "arises under" federal law pursuant to 42 U.S.C. § 1331. To arrive at this conclusion, the defendants assert that, because the federal government has imposed certain conditions upon the States' receipt of federal Medicaid funds -- including the requirement that the States "take all reasonable measures to ascertain the legal liability of third parties (including health insurers) to pay for care and services," 42 U.S.C. § 1396a(a)(25) -- all suits that seek damages that included allegedly avoidable Medicaid expenditures "arise under" federal law, even those alleging only violations of state law and seeking recovery only under state causes of action.

These claims of the Defendants have been exhaustively briefed and argued before the United State District Courts for Mississippi and Massachusetts; nevertheless, Defendants insist that those courts were in error in rejecting their arguments. As explained by Judge O'Toole of the United States District Court for Massachusetts:

Here, there is no question of federal law, substantive or otherwise, to be determined in the prosecution of the pleaded claims. Vindication of the rights that Massachusetts claims under its own

statutory and common law will not turn on any construction of federal law. Nor is any proposition of federal law an essential element of any of Massachusetts' claims. Whether the defendants, as "third parties," are liable to Massachusetts for costs expended under Medicaid, either directly or by way of subrogation, will be judged by reference to Massachusetts law. So, for example, Title XIX does not establish any ground for such liability, nor does it even require that any ground for liability be established by the State. . . . [T]he State has the obligation to "take all reasonable measures to ascertain the legal liability of third parties," 42 U.S.C. § 1396(a)(25)(A), and to pursue recovery in those cases "where such a legal liability is found to exist." *Id.*, § 1396a(a)(25)(B). No obligation is imposed on the State to see to it that "such a legal liability" does exist. And where it does exist, federal law has nothing to say about its proof, and the action to establish the liability may proceed on entirely non-federal grounds.

Commw. of Massachusetts v. Philip Morris, Inc., et al., Memorandum & Order at 8-9 (D. Mass., May 20, 1996).

In Inter-American University of Puerto Rico v. Concepcion, 716 F.2d 933 (1st Cir. 1983), the First Circuit rejected the argument that a state common law action brought to collect money under the National Direct Student Loan program arose under federal law. The Court held that neither the federal capital contribution (which was joined by funds from the local eligible lending institution), nor extensive and specific federal regulations prescribing the procedures for making and collecting N.D.S.L. loans, was sufficient to confer federal question jurisdiction over the University's debt collection cases. The Court stated that "[i]t is the nature of the action before the Court, not the nature of the loan program, that establishes the existence or absence of federal jurisdiction." *Id.*, 716 F.2d at 934. "In other words, the presence of an overarching federal influence on a program does not make into a federal question a suit brought under state law, even where the plaintiff is pursuing rights under state law because federal law has required it to do so." Commw. of Massachusetts v. Philip Morris, Memorandum & Order at 11.

Defendants cannot point to any provision of the federal Medicaid Act that creates a

right or cause of action for states to obtain reimbursement of Medicaid expenditures. The act directs States to develop plans to "take all reasonable measures" to ascertain the liability of third parties and thereafter to pursue reimbursement, if, among other things, it is cost-effective to do so. 42 U.S.C. § 1396a(a)(25); 42 C.F.R. §§ 433.135-138. This directive does not create any "federal" cause of action, nor does it confer any substantive rights to the States.⁹ It stands in contrast to the Federal Medical Care Recovery Act ("FMCRA"), 42 U.S.C. § 2651 *et seq.*, which governs actions by the United States to recover from third persons the cost of medical services provided to members of the armed services and others. The FMCRA explicitly states that ". . . the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished . . ." 42 U.S.C. § 2651(a) (emphasis added). The FMCRA also sets out what the United States may do to "enforce such right" and states that actions commenced by the United States may be brought in state or federal court. 42 U.S.C. § 2651(b). Such a specific federal cause of action stands in stark contrast to the general provisions of the Medicaid Act.¹⁰

⁹ Defendants' attempt to analogize the present case to Hollander v. Brezenoff, 787 F.2d 834 (2d Cir. 1986), is simply inaccurate. That complaint was brought in federal court by a nursing home provider against the Commissioner of the Department of Social Services of the City of New York. According to the court, "Two theories of relief are asserted. Under the first, appellant claims that his due process rights were violated by appellee when he was denied a predeprivation hearing. The second alleges that the appellee's actions violated the reimbursement provisions of the Social Security Act . . ." *Id.*, 787 F.2d at 836. Clear federal question jurisdiction was therefore present on a Constitutional and federal statutory basis; however, appellant asserted that he should be allowed a six year statute of limitations, since his claim was based in state common law contract rather than federal law. The appellate court rejected this contradictory contention, ruling that since the plaintiff had relied upon his rights under the federal statute, he was bound by New York's three year statute of limitations for statutorily-created rights. *Id.*, 787 F. Supp. at 839.

¹⁰ City of New York v. Rapgal Associates, 703 F. Supp. 284 (S.D.N.Y. 1989), cited in Opponents Brief at 24-26, 31, also is not analogous to this case. In that case the City of New York filed their cause of action in federal court against developers of low-income housing to enforce conditions allegedly agreed to by the developers prior to the approval of federal subsidies for their project. In describing the joint federal/local project, the court stated the following:

The defendants' expansive construction of the funding conditions in the Medicaid Act -- to the effect that the federal cause of action, if it exists, is exclusive of any state cause of action in a case such as this -- might well contravene the Constitution's limitations on the authority of Congress to attach conditions to the disbursement of federal money to the States. Article I, § 8, cl. 1 of the Constitution, commonly referred to as the "Spending Clause," grants Congress the authority "to pay the Debts and provide for the . . . general Welfare of the United States." Incident to this authority, Congress may attach conditions to federal funds disbursed to the States or individuals, but only if it acts within certain parameters. See e.g. South Dakota v. Dole, 483 U.S. 203 (1987) (spending power permits Congress to condition highway funds on States' adoption of minimum drinking age). Those parameters are that (i) the expenditure must be for the "general welfare", (ii) the conditions imposed by Congress must be reasonably related to the purpose of the expenditure, and (iii) the conditions imposed must not violate any independent constitutional prohibition. South Dakota v. Dole, 483 U.S. at 207-208; see New York v. United States, 505 U.S. 144, 158, 167, 171-172 (1992). Even where Congress acts within these limitations, conditions it imposes on the States' receipt of funds must be "unambiguous." Dole,

After a city determines that a project satisfies its local development plans and codes, it then forwards the project to HUD [the United States Department of Housing and Urban Development] for approval. If approval is granted, then the developer becomes eligible for federal subsidies and local tax abatements. . . .

The defendants then submitted an application to the City, which was accepted by the City and then HUD.

Id., 703 F. Supp. at 285 (emphasis added). Therefore, while the City of New York may have been doing the "leg work", every significant step in this specific project was approved by the federal government. By contrast, Plaintiff's action has been filed in state court by the State of Maryland, with no interaction, input or approval by the federal government.

483 U.S. at 207; Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981).

Under defendants' argument, by accepting federal funds under the conditions set forth in the Medicaid Act, Maryland must be deemed to have relinquished its right to recognize an independent state-law action against parties alleged to have harmed the State by conduct injuring, *inter alia*, its Medicaid program, and must be deemed to have agreed to pursue any claims for such harm in federal court, rather than through the State's own judicial system, whenever the defendant so elects. Among other things, any statute passed by the Maryland legislature providing a remedy which may be applicable in the recovery of Medicaid expenditures would be null and void except to the degree that it implements the purported federal "Medicaid" cause of action. Such a result would manifestly entail a massive sacrifice of state sovereignty, which the Constitution protects not for its own sake but as a structural safeguard for the rights and interests of the States' citizens, *see New York v. United States*, 505 U.S. at 181, who are guaranteed a republican form of government by Article IV of the Constitution. *Id.* at 183-185.

There is serious question whether *any* funding condition could constitutionally exact such a profound sacrifice of the ordinary incidents of State sovereignty under our federal system.¹¹ That question need not be resolved here. For if Congress ever sought to impose so extravagant and

¹¹ Compare Steward Machine Co. v. Davis, 301 U.S. 548, 593 (1937) (upholding Social Security tax and ancillary scheme of conditioned federal funding "where [the] statute does not call for surrender by the states of powers essential to their quasi-sovereign existence."); *cf. Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 12-13 (1987) (recognizing each State's important sovereign interest in its judicial processes). There is, for example, no rational reason why a mandatory "federal" cause of action to recover Medicaid expenditures would be "reasonably related to the purpose of the [federal Medicaid] expenditure," *Dole*, 483 U.S. at 207-208, where state law will typically control who is a "liable third party." Moreover, if a State could constitutionally be induced to sacrifice, in return for federal Medicaid funds, this much of its citizens' rights to a government that is fully empowered to represent their fiscal and medical interests, it is unclear why a State could not simply be induced to trade *all* of its sovereign legislative and judicial functions in return for a sufficiently attractive package of federal benefits.

constitutionally controversial a condition, it would, at the very least, have to do so in the clearest possible terms: "[I]f Congress desires to condition the States' receipt of federal funds, it `must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." Dole, 483 U.S. at 207, quoting Pennhurst State School and Hospital, 451 U.S. at 17; cf. Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991) (federal statutes should be interpreted so as not to intrude upon fundamental state governmental functions absent a clear statement of congressional intent to do so); id. at 464 ("[T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which Garcia [v. Metropolitan Transit Authority] relied to protect states' interests.' ") (quoting L. Tribe, AMERICAN CONSTITUTIONAL LAW § 6-25, at 480 (2d ed. 1988) (emphasis in original)).

Nothing cited in the defendants' Opposition comes close to providing such a "clear statement" of congressional intention to limit a State to the assertion of "federal" rights whenever that State files suit to recover damages any part of which may involve increased expenditures in the State's Medicaid program. As set forth in the Plaintiff's Remand Memorandum at 17-19, the funding conditions upon which defendants rely to justify removal, by their terms, show nothing more than an intention to require the States to undertake a certain minimum level of effort to obtain reimbursement from liable "third parties." 42 C.F.R. § 433.138(a). The States are free at all times to go beyond this federal "floor" in pursuing methods of cost recovery in any way they see fit. Where, as here, a condition for disbursement of funds imposed by Congress under the Spending Clause expresses only a "generalized duty," it is up to each State, within the "broad limits" of the statute, to determine how best to discharge that duty. Suter v. Artist M., 503 U.S. 347, 359-360 (1992); cf. Albiston v. Maine Commissioner of Human Services, 7 F.3d 258, 267 (1st Cir. 1993) (distinguishing Suter where statute presented a "straightforward, identifiable standard"). Consequently, the defendants' invocation of the

funding conditions in the Medicaid Act as a basis for federal jurisdiction of this lawsuit must be rejected.

IV. DEFENDANTS HAVE NOT SHOWN THAT THE STATE IS AN AGENCY OR OFFICER OF THE UNITED STATES UNDER 28 U.S.C. § 1345.

Under 28 U.S.C. § 1345, federal district courts may assert original jurisdiction over "civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof, expressly authorized to sue by act of Congress." Defendants have not shown that the State of Maryland is any of these things, namely an agency or officer of the United States government, as opposed to a sovereign state, or that it is expressly authorized to sue by act of Congress in order to recover Medicaid expenditures. This argument also was rejected in both prior removal petitions heard before federal district courts in Mississippi, Massachusetts and Louisiana.

Since there is no authority to support the claim that a state can be analogized to a federal agency under section 1345, defendants attempt to analogize this cases to actions brought under the federal officer removal statute, 28 U.S.C. § 1442(a)(1), as well as those requesting mandamus jurisdiction under 28 U.S.C. § 1361. However, neither of these provisions are pertinent to an analysis of section 1345, which is clearly more restrictive. As Judge O'Toole stated in Commw. of Massachusetts v. Philip Morris, "[Defendants] have identified no case law, nor can the Court identify any, in which parties other than the United States or an actual federal agency have successfully employed § 1345 to pursue their claims in federal court." *Id.* at 16.

Section 1442(a)(1) provides for removal to federal court of any civil action brought against "any officer of the United States or agency thereof, or person acting under him, for any act under color of such office" 28 U.S.C. § 1442(a)(1) (emphasis added). Thus, in Maine Association of Independent Neighborhoods v. Maine Commissioner of Human Services ("M.A.I.N."), 876 F.2d 1051 (1st Cir. 1989), referred to in the Opposition Brief at 34, the Court observed that the Maine

Commissioner for Human Services, in administering the State's Aid to Families with Dependent Children ("AFDC") program, "might be considered a `person acting under' the Secretary [of the Department of Health and Human Services], who is an `officer of the United States." *Id.*, 876 F.2d at 1054. However, the Court held that the Maine Commissioner, in promulgating state regulations to conform with federal AFDC requirements, was not acting "under color of" any federal office, and therefore that removal jurisdiction could not be asserted under section 1442(a)(1):

The promulgation of state regulations . . . is clearly an act taken under color of the Commissioner's state office, not under color of federal office.

Id. at 1054-55 (emphasis in original).

Defendants reliance upon *Ellis v. Blum*, 643 F.2d 68 (2d Cir. 1981), is also misplaced.

In that case the Court ruled that the plaintiffs were contesting pretermination procedures of the state and federal agencies administering the Social Security Disability program, 42 U.S.C. § 401 et seq. Under that program the state administrative agency reviews the eligibility of benefit recipients periodically, and makes a determination of whether that recipient has ceased to be disabled, "which is then reviewed by the SSA (Social Security Administration). If the SSA agrees with the state agency, it notifies the beneficiary in writing of the termination and of the opportunity for de novo reconsideration by the state agency." *Id.*, 643 F.2d at 71. Based upon that program structure, the Court ruled that the state agency was acting "under color of federal law." However, it also made a revealing statement: "Title II of the Social Security Act contrasts with other benefits programs in that the funds are entirely of federal origin and the state agencies function solely as agents of the Secretary in making determinations of disability, applying federal law and federal regulations in accordance with procedures prescribed by her." *Id.*, 643 F.2d at 83, n. 17. This program stands in contrast with the significant Maryland financial contribution and substantial autonomy of the State of Maryland in the operation of its Medicaid

program.¹²

Section 1442(a)(1) is called the federal officer removal statute because it "was designed to entitle defendants associated with the United States to escape local prejudice and have their case heard in federal court." Willingham v. Morgan, 395 U.S. 402, 405 (1969), cited in Commw. of Massachusetts v. Philip Morris, Memorandum & Order at 20. Similarly, section 1345 is manifestly designed to enable the United States, and its officers and agents acting pursuant to congressional authority, to commence actions on behalf of the United States in its own courts. The arguments of the Defendants provide no basis for believing that such a statute can be used by a non-government defendant to remove a State's cause of action to federal court.

CONCLUSION

¹² Similarly, any analogy to the federal False Claims Act, 18 U.S.C. § 1001, is unavailing. Judge O'Toole rejected such an argument, stating the following:

Section 1001 prohibits making false statements "in any matter within the jurisdiction of any department or agency of the United States." That statute has been interpreted to permit prosecutions where the statements are made to state agencies so long as the fraud might involve federal money, *see, e.g., United States v. Notarantonio*, 758 F.2d 77, 787 (1st Cir. 1985); United States v. Goldstein, 695 F.2d 1228, 1236 (10th Cir.1981), cert. denied, 462 U.S. 1132 (1983). The Supreme Court, however, has specifically stated that, for purposes of the substantive prohibition expressed in § 1001, "the term 'jurisdiction' should not be given a narrow or technical meaning." United States v. Rodgers, 466 U.S. 475, 480 (1984) (quoting Bryson v. United States, 396 U.S. 64, 70 (1969)). In contrast, that "narrow or technical meaning" is precisely the one at issue here. Accordingly, the defendants' claim to jurisdiction by analogy to a civil action brought under the False Claims Act must be rejected.

Commw. of Massachusetts v. Philip Morris, Memorandum & Order at 20.

Since Defendants have shown no basis for this court to assert original federal question jurisdiction under 28 U.S.C. § 1331 or the 28 U.S.C. § 1345, this case should be remanded to the Circuit Court for Baltimore City.

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

STATE OF MARYLAND

*

Plaintiff

*

v.

*

CIVIL ACTION NO. CCB 96-1691

**PHILIP MORRIS INCORPORATED
(Philip Morris U.S.A.) et. al**

*

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Defendants

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ORDER

Considering the State of Maryland's Motion to Remand,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the Motion of the State of Maryland to Remand be and is hereby granted.

Thus done and signed on _____ day of _____, 1996.

JUDGE CATHERINE C. BLAKE