

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

EARL WILLIAM WALKER et al.,

Plaintiffs,

vs.

Civil Action No. 2:97-0102

LIGGETT GROUP, INC. et al.,

Defendants.

AMENDED MOTION AND BRIEF OF COLORADO, ALABAMA, DELAWARE, GEORGIA,
NEBRASKA, OREGON, SOUTH DAKOTA, TENNESSEE, AND WYOMING FOR REMOVAL
FROM THE SETTLEMENT CLASS AND DISMISSAL WITHOUT PREJUDICE, PURSUANT
TO FED. R. CIV. P. 23(d)

COME NOW the States of Colorado, Alabama, Delaware, Georgia, Nebraska, Oregon, South Dakota, Tennessee, and Wyoming, their officers, agencies, institutions and all their political subdivisions (the "Moving States") -- without submitting to the jurisdiction of this Court and by and through their respective Attorneys General -- respectfully move this Court, pursuant to Fed. R. Civ. P. 23(d), for an order: (1) that the Moving States be removed from the Settlement Class; and (2) that the Moving States be dismissed without prejudice from the instant action, for the reasons set forth below in

this combined Amended Motion and Brief for Removal from the Settlement Class and Dismissal Without Prejudice.¹

I. STATEMENT OF THE CASE

On May 15, 1997, this Court entered an Order Preliminarily Approving The Class Action Settlement Agreement, Preliminarily Certifying a Mandatory Settlement Class, Granting An Immediate Temporary Restraining Order And Stay Of All Smoking-Related Claims Against Defendants, And Noticing a Hearing On May 30, 1997 On A Motion For Preliminary Injunction in Walker v. Liggett Group, Inc., Civil Action No. 2:97-0102. In its Order, this Court ruled favorably, albeit preliminarily, on the motion or motions of the representative Plaintiff Earl William Walker and Defendants Liggett Group Inc., Liggett & Meyers, Inc., and Brooke Group Ltd., pursuant to Fed. R. Civ. P. 23, for: (1) certification of the class; (2) for a mandatory settlement of the class action; and (3) for an order enjoining members of the Settlement class from “commencing, continuing or taking any action in any judicial proceeding in any state or federal court against the Defendants with respect to smoking-related claims” pending final settlement. Order at 1-2. In doing so, this Court held that the Settlement Class includes, inter alia, “all persons or entities (including, without limitation, any territory, city, county, state, parish, possession or any other political subdivision thereof, or any agency or instrumentality of any of the foregoing. . .)” Id. at 4. The Court excluded from the Settlement Class, “any state that opts out of the proposed Agreement.” Id. at 5. The Court temporarily enjoined the Settlement Class from,

¹ The Moving States fully support and hereby adopt and incorporate the authorities and arguments in the State of Ohio’s Brief in Opposition filed in this case on May 27, 1997.

inter alia, “taking any action in a judicial proceeding in any state or federal court against the Defendants with respect to any smoking-related claim.” Id. at 7-8. Finally, the Court recognized that members of the Settlement Class may wish to file papers in connection with this Court’s hearing. Id. at 8.

II. REASONS FOR GRANTING THIS MOTION

This Court cannot exercise jurisdiction over the Moving States in this case under Fed. R. Civ. P. 23. The Moving States recognize that class actions are a unique category of lawsuits, and that the United States Supreme Court has adopted a flexible approach in analyzing the due process constraints in such proceedings. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). Just as class actions are unique, so too are States in their role as litigants. In addition to all of the rights, privileges, and immunities which every party has, States shoulder unique responsibilities in promoting and protecting the health, safety and welfare of their citizens.

When the several States formed the Union, and then later as other States joined that Union, each of them surrendered a portion of their sovereignty to promote the greater welfare of this Nation. The States, however, have not surrendered all of their sovereignty to the federal government. The United States Constitution recognizes this fact. U.S. Const. amend. X; New York v. United States, 505 U.S. 144, 156 (1992) (“[t]he States unquestionably do retain a significant measure of sovereign authority”) (quoting Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528, 549 (1985)). The Constitution also recognizes and protects the sovereign immunity that States enjoy. U.S. Const. amend. XI. Seminole Tribe of Fla. v. Florida, 116 S. Ct. 1114, 1122 (1996) (“each State is a

sovereign entity in our federal system,” and is “not to be amenable to the suit of an individual without its consent”) (quoting Hans v. Louisiana, 134 U.S. 1, 13 (1890)). As the Moving States demonstrate below, this Court lacks jurisdiction over the Moving States, and it is therefore improper to include them in the Settlement Class.²

A. THE ELEVENTH AMENDMENT BARS THIS COURT FROM ENTERING INJUNCTIVE RELIEF AGAINST THE MOVING STATES.

This Court has temporarily enjoined the Moving States from commencing, continuing or taking any action against the Defendants in any judicial proceeding in any state or federal court. Should it rule in favor of the representative Plaintiff’s and Defendants’ proposed mandatory settlement, this Court’s further actions would effect the same outcome against the Moving States. Assuming that this Court otherwise has jurisdiction over the Moving States, this Court lacks the authority to enjoin the Moving States from taking any legal action against the defendants with regard to tobacco litigation.

The United States Constitution, and in particular, the Eleventh Amendment, generally bars federal courts from entering any type of order against the States or their agencies.³ Seminole Tribe,

² The Moving States raise at this time only the three arguments contained in this Motion and Brief, but the Moving States do not concede any other jurisdictional or substantive flaws in the representative Plaintiff’s case, or the make-up and certification of the Settlement Class. For example, given the unique responsibilities of Moving States, it is very likely that the Settlement Class, with inclusion of the Moving States, would fail to meet the prerequisites to a class action in that there are likely questions of fact and law relevant to the Moving States that are not common with the other putative members of the Settlement Class, that the representative Plaintiff’s claims or defenses are not typical of those which the Moving States hold, and that the representative Plaintiff will not fairly or adequately protect the Moving States’ interests.

³ The Moving States recognize that, traditionally, the Eleventh Amendment is used as a shield, immunizing states from suits in federal court which citizens of another state have commenced or are

116 S. Ct. at 1122 (1996). There are three exceptions to Eleventh Amendment immunity: (1) a State has consented to jurisdiction; (2) the Congress, exercising its powers under U.S. Const. amend. XIV, § 5, has waived Eleventh Amendment immunity; or (3) the doctrine of Ex Parte Young, 209 U.S. 123 (1908), applies to the State's action. None of these exceptions apply in the instant case.

First, none of the Moving States have consented to this Court's jurisdiction. Second, nothing in any federal statute even remotely suggests that Congress intended to waive Eleventh Amendment immunity with respect to tobacco litigation. Such a statute would have to be based on U.S. Const. amend. XIV, § 5, and there is no such statute of which the Moving States are aware or to which either the representative Plaintiff or Defendants can point.⁴

Finally, the doctrine of Ex Parte Young, which is limited to suits alleging a State's ongoing violation of federal law, Roller v. Cavanaugh, 984 F.2d 120, 122 (4th Cir. 1993),⁵ does not apply.

prosecuting. Thus, the application of the Eleventh Amendment may not seem readily apparent. In the instant case, the Moving States have become, through no action of their own, "unwilling plaintiffs," more in the nature of defendants. Moreover, it would appear from the Court's Order that both the representative Plaintiff and the Defendants have sought to enjoin all putative members of the Settlement Class from "commencing, continuing or taking any action against the Defendants with respect to smoking-related claims," and certainly the Defendants would seek to enforce this Court's final order against the States, should the States litigate against the Defendants in their respective state courts. Thus, the injunction against the States would indeed fall under the Eleventh Amendment's proscription of federal judicial power extending to suits against the States.

⁴ Assuming there were such a statute, it would very likely violate U.S. Const. amend. X, absent compliance with U.S. Const. amend. XIV, § 5.

⁵ See also 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4232 (2d ed. 1988 & 1996 Supp.). (Ex Parte Young means that a "federal court is not barred by the Eleventh Amendment from enjoining state officers from acting unconstitutionally, either because their action is alleged to violate the Constitution directly or because it is contrary to a federal statute or regulation that is the supreme law of the land.")

Indeed, there is no allegation that the Moving States are violating federal law. On the contrary, assuming that there are any violations of federal law, it is the Defendants, not the Moving States, who allegedly have violated those laws. Accordingly, under the Eleventh Amendment, this Court has no jurisdiction over the Moving States, and this Court must therefore exclude them from this action.⁶

B. SINCE THE MOVING STATES ARE NOT “CITIZENS,” FOR PURPOSES OF DIVERSITY, THIS COURT LACKS JURISDICTION.

One possible basis for this Court’s jurisdiction over the Moving States, though it is unclear from the Order, appears to be diversity of citizenship under 28 U.S.C. § 1332, since there does not appear to be a federal question presented. If so, the law is clear that “a State is not a citizen for purposes of diversity jurisdiction and that 28 U.S.C. § 1332 does not deal with cases in which a State is a party.” Wisconsin v. Maryland Nat’l Bank, 734 F.2d 1015, 1916 (4th Cir. 1984) (per curiam). See also Moor v. County of Alameda, 411 U.S. 693, 717 (1973); Ohio v. Wyndotte Chem. Corp., 401 U.S. 493, 498 n.3 (1971); Postal Tel. Cable Co. v. Alabama, 155 U.S. 482, 487 (1894).

⁶ Citing only to selected provisions of Title 28 of the United States Code and Rule 23, this Court has agreed to the representative Plaintiff’s and Defendants’ counsel’s endeavors to certify most, if not all, of the fifty States as part of the Settlement Class, and thus force upon the Moving States a settlement in which they have not participated or negotiated. It is unclear whether a State may be made part of a Settlement Class absent its affirmative consent. In the instant case, the Moving States have not sought participation in this case, have not sought certification of the class, and have not consented to inclusion in the class. Thus, there is no basis whatsoever for the Moving States’ inclusion in the Settlement Class.

Finally, the moving States note that this Court has provided members of the Settlement Class the ability to “opt out” of the class. This option is inappropriate, for the reason that the Moving States have not exercised their sovereign rights to “opt in” to the case. This Court must remove the Moving States as members of the Settlement Class and dismiss them without prejudice from this case.

In the instant case, none of the Moving States have made any effort whatsoever to participate in this case or its settlement. Even had the Moving States chosen to do so, the law is clear that the Moving States cannot maintain an action against the Defendants in this Court under the diversity of citizenship statute. Thus, this Court must remove them as members of the Settlement Class and dismiss without prejudice the Moving States from this case, because this Court lacks jurisdiction.

C. ONLY THE MOVING STATES' ATTORNEYS GENERAL CAN REPRESENT THEIR RESPECTIVE STATES.

The final basis for this motion concerns the purported representation of the Moving States through the representative Plaintiff's counsel. Generally speaking, no person or entity other than the Attorney General of a State is authorized to represent that State in any court or in any case.

For example, in Colorado, the Attorney General is an officer who is recognized in the State Constitution. Colo. Const. art. IV, §1. See also Ga. Const. art. V, §3, ¶ 4 (providing Georgia Attorney General "shall act as the legal advisor of the executive department"). Authority for the Colorado Attorney General to represent the State is found at Colo. Rev. Stat. §24-31-101(1)(a), which provides that the Attorney General "shall be the legal counsel and advisor" of all facets of State government, other than the legislative branch, and that the Attorney General "shall appear for the state and prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party or is interested. . . ." See also Ala. Code § 36-15-21 (stating all "litigation concerning the state, or any department of the state, shall be under the direction and control of the Attorney General"), Ex Parte Weaver, 570 So.2d 675, 684 (Ala. 1990) (holding "the attorney general is authorized to direct the course of all litigation involving the State and its agencies"); Ga. Code Ann. §45-15-3 (requiring

Georgia Attorney General to participate in, on behalf of the State, “all other . . . civil actions to which the state is a part” and “to represent the state in all civil actions tried in any court”), Ga. Code Ann. § 45-15-9 (requiring Georgia Attorney General to represent State in all actions beyond limits of State) ; Neb. Rev. Stat. § 84-202 (providing Nebraska Attorney General “control and supervision of all actions and legal proceedings in which the state of Nebraska may be a party or may be interested and shall have charge and control of all the legal business . . . of the state.”), State v. State Bd. of Equalization and Assessment, 123 Neb. 259, 243 N.W. 264 (1932). Moreover, the Colorado Attorney General possesses the common law powers of the office, including the exclusive duty and responsibility to represent the Sovereign, the State of Colorado, in litigation. Colorado State Bd. of Pharmacy v. Hallett, 88 Colo. 331, 296 P. 540 (1931).

The Moving States hereby advise this Court that none of the States’ Attorneys General have retained or employed counsel for the representative Plaintiff to represent them, nor have the Attorneys General authorized such counsel to represent their respective States. To the extent the representative Plaintiffs’ counsel purport to represent the interests of the Moving States, those counsel are acting ultra vires. As a matter of law, those counsel are simply unable to represent the interests of the Moving States. Therefore, this Court must remove the Moving States from the Settlement Class and dismiss them without prejudice from this action.

III. CONCLUSION

The States of Colorado, Alabama, Delaware, Georgia, Nebraska, Oregon, South Dakota, Tennessee, and Wyoming respectfully move this Court for an order, pursuant to Fed. R. Civ. P. 23(d), removing them from the Settlement Class and dismissing them without prejudice from this action.

May 28, 1997

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within AMENDED MOTION AND BRIEF OF COLORADO, ALABAMA, DELAWARE, GEORGIA, NEBRASKA, OREGON, SOUTH DAKOTA, TENNESSEE, AND WYOMING FOR REMOVAL FROM THE SETTLEMENT CLASS AND DISMISSAL WITHOUT PREJUDICE, PURSUANT TO FED. R. CIV. P. 23(d) upon all parties herein by Federal Express and facsimile, at Denver, Colorado, this 28th day of May 1997, addressed as follows:

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