

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff,

v.

**PHILIP MORRIS INC., R.J. REYNOLDS TOBACCO
COMPANY, BROWN & WILLIAMSON TOBACCO
CORPORATION, B.A.T. INDUSTRIES P.L.C.,
LORILLARD TOBACCO COMPANY, LIGGETT
GROUP, INC., NEW ENGLAND WHOLESALE
TOBACCO CO., INC., THE COUNCIL FOR
TOBACCO RESEARCH - U.S.A., INC., and
THE TOBACCO INSTITUTE, INC.,**
Defendants.

Case No. 96-10014 (GAO)

January 2, 1996

NOTICE OF REMOVAL

**TO: THE HONORABLE JUDGES OF THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS**

Petitioners Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, B.A.T. Industries plc, Lorillard Tobacco Company, Liggett Group, Inc., New England Wholesale Tobacco Co., Inc., Albert H. Notini & Sons, Inc., The Council for Tobacco Research - U.S.A., Inc. and The Tobacco Institute, Inc., who are each and all of the defendants in the above-entitled action,¹ state:

1. Petitioners desire to exercise their rights under the provisions of Title 28 U.S.C. § 1441, *et seq.*, to remove this action from the Superior Court

¹ Each of the petitioners has decided to join in this single notice of removal in order to avoid a multiplicity of notices of removal. Each petitioner is represented by a separate counsel and preserves its right to assert its independent interests as to any issue or matter, including with respect to any issues or matters relating to the above-titled action. By joining in this single notice of removal, no petitioner authorizes any other party to act on its behalf as to any matter or any issue relating to the above-titled action. Each of the petitioners reserves all rights including defenses and objections as to venue, personal jurisdiction, and service, and the filing of this notice of removal is subject to, and without waiver of, any such defenses and objections.

Department of the Trial Court of Middlesex County, Massachusetts, in which said action is now pending under the above-captioned title.²

2. This is an action in which the District Courts of the United States have been given original jurisdiction upon each of the following bases:

(a) Plaintiff seeks in this action (*inter alia*) to recover from defendants payments made by Massachusetts pursuant to the federal Medicaid program. As more fully described below, plaintiff's claim is founded in federal law and arises under the laws of the United States within the meaning of 28 U.S.C. § 1331.

(b) Plaintiff seeks in this action to recover from defendants payments made pursuant to the federal Medicaid program. As more fully described below, the relevant federal Medicaid statute and regulations issued pursuant thereto both authorize and require the designated Medicaid agency of each participating State such as Massachusetts to bring suit to recover, *inter alia*, on behalf of the United States government, reimbursement of Medicaid payments from third parties who may be liable for such reimbursement. Accordingly, this action is within the original jurisdiction of this Court under 28 U.S.C. §§ 1331 and 1345 in that: (i) it is in the nature of an action by the United States, or by an officer or agency acting on behalf of the United States pursuant to an express authorization in an Act of Congress; and (ii) this action is *de facto* brought by and on behalf of the United States in that the plaintiff is acting, and is required by federal law to act, as a conduit for the United States in obtaining reimbursement for those Medicaid payments originally made by the United States via the Commonwealth of Massachusetts .

3. As further described below, the claims alleged in the complaint in principal part fall within the original jurisdiction of this Court. Under the provisions of 28 U.S.C. § 1441, *et seq.*, the right exists

² It would appear that, as of the date of the filing of this notice of removal, none of the defendants has been served in this action.

to remove this action from the Superior Court Department of the Trial Court of Middlesex County, Massachusetts, to the United States District Court for the District of Massachusetts, which embraces the place where this action is pending. Under 28 U.S.C. § 1441 and principles of supplemental jurisdiction under 28 U.S.C. § 1367, the right exists to remove the entire case to this Court.

4. This action is related to a previously commenced action that is currently pending in the United States District Court for the District of Massachusetts (before the Honorable George A. O'Toole) brought by petitioners Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company and Liggett Group, Inc., against Scott Harshbarger, the Attorney General of Massachusetts, Civil Action No. 95-12574-GAO, which seeks certain declaratory and injunctive relief. (The Complaint in that related action is annexed hereto as Exhibit A.)

A. This Action Is Founded In Federal Law And Arises Under The Laws Of The United States

5. In this action, the Commonwealth seeks to recover from defendants payments made by Massachusetts under the program established under Title XIX of the Social Security Act, commonly known as the Medicaid Act, 42 U.S.C. § 1396 *et seq.* (see State Court Complaint, annexed hereto as Ex. B, at ¶ 6). Under the Medicaid Act, participating states receive federal financial assistance for administering a medical treatment program in accordance with the requirements of the comprehensive federal scheme set forth in the Medicaid Act and regulations promulgated thereunder.

6. The United States government provides the major source of funding for the Medicaid programs throughout the country, and in particular provides 50% of the funds attributable to Massachusetts' participation in Medicaid. In light of this fact, the Medicaid Act and the regulations thereunder create a detailed and comprehensive system governing the recovery by states of monies paid out under the Medicaid program where third parties may be liable for the payment of services provided under the Medicaid program. Accordingly, the federal Medicaid Act requires that each Medicaid recipient assign to the state his or her rights to payment for medical care from any third party, see 42 U.S.C. § 1396a(45), 1396k; 42 C.F.R. §§ 433.145-148, and that the state Medicaid agency must, as assignee of those rights, follow federally-mandated procedures to determine the least liability of third parties and seek recovery of Medicaid payments from any third parties who may be liable. See 47 U.S.C. § B96a(25), 42 C.F.R. §§ 443.135-148. In

addition, the federal Medicaid Act and regulations require that if a state receives recovery of Medicaid payments from any liable third party, the state must repay the federal government the applicable federal share of any such recovery. See 42 U.S.C. § 1396b(d); 42 C.F.R. §§ 433.140(c) & 433.154.

7. Accordingly, the Supreme Judicial Court of Massachusetts has held that an action by the plaintiff in this action, the Commonwealth of Massachusetts, seeking to recover Medicaid payments from third parties is "based in Federal law." In *Harlow v. Chin*, 545 N.E.2d 602., 610 (Mass. 1989), the Massachusetts Supreme Judicial Court stated:

A Federal statute requires that States receiving Federal [Medicaid] funds must pursue recovery of the funds from legally liable third parties. 42 U.S.C. § 1396a(25). A Federal regulation requires the State to reimburse the Federal government a proportion of such recovery. A state statute duly provides for recovery from third parties and subrogation of the plaintiff's claim.... The Federal statute implementing partial reimbursement of State Medicaid programs mandates that any State receiving these funds must pursue reimbursement from legally liable third parties. The fact that technically a state statute provides for the subrogation is irrelevant. Because the Commonwealth's pursuit of reimbursement is required by Federal law, the right of subrogation is "based in" Federal law.

8. By virtue of the operation of 28 U.S.C. §§ 1441 and 1331, "if the basic right asserted by plaintiff is one based on federal law, then the case is properly [removable], whether or not the complaint expressly states that the right sought to be enforced is a federal one. It is the real nature of the claim and not the characterization given it by plaintiff which must govern," *E.g., Produce Terminal Realty Corp. v. New York N.H. & H.R. Co.*, 116 F. Supp. 451, 453 (D. Mass. 1953) (quoted in 1A *Moore's Federal Practice*, ¶ .160[3.3], at p. 233 (1995)). See also *Maine Association of Independent Neighborhoods v. Commissioner, Maine Department of Human Services*, 876 F.2d 1051, 1052-53 (1st Cir. 1989). Since the plaintiff in this action seeks to recover from defendants payments made by the Commonwealth pursuant to the federal Medicaid program and such a claim is necessarily "based in federal law," this action is properly removable to this Court irrespective of the manner in which plaintiff seeks to characterize the claims in its complaint.

B. This Action Is In The Nature Of An Action Brought By Or On Behalf Of The United States Pursuant To An Express Authorization By An Act Of Congress

9. This action is removable to this Court on the alternative (and independently sufficient) grounds (a) that it is in the nature of an action by the United States, or by an officer or agency acting on behalf of the United States pursuant to an express authorization in an Act of Congress; and (b) that the action in principal part is *de facto* one brought by and on behalf of the United States in that 50% of any proceeds of the action are required to flow to the United States via the conduit of the named plaintiff, the Commonwealth of Massachusetts.

10. As described above, the federal Medicaid Act and regulations issued pursuant thereto both authorize and require the designated Medicaid agency of each participating state such as Massachusetts to bring suit to recover, *inter alia* on behalf of the United States government reimbursement of Medicaid payments from third parties who may be liable for such reimbursement. For purposes of determining whether federal jurisdiction exists in an action, state officials in parallel situations have been deemed to be acting as agents or officers of the federal government. *See e.g., Kuehner v. Schweiker*, 717 F.2d 813, 826 (3d Cir 1983) (Becker, J., concurring) (state officials responsible for administering social security disability procedures "are essentially the alter egos of their [federal] counterparts and effectively are officers, employees, or agents of an agency of the United States"), *vacated and remanded on other grounds*, 469 U.S. 977 (1984) And, of course, in the converse situation -- where funds being paid out by the state agency are provided in part by the United States Government -- it is well settled that this fact of dollars flowing indirectly *out* of the Federal Government suffices to invoke the jurisdiction of the federal courts to prosecute as a federal crime false statements made to the state agency. *See e.g., United States v. Goldstein*, 695 F.2d 1228, 1236 (10th Cir. 1981), *cert. denied* 462 U.S. 1132 (1983); *United States v. Baker*, 626 F.2d 512, 514 (5th Cir. 1980).

11. In addition, as described above, the federal Medicaid Act (and the regulations thereunder) expressly authorizes and requires the state Medicaid agency of the Commonwealth of Massachusetts to seek recovery of Medicaid payments from liable third parties, and mandates that the applicable "federal share" of any monies recovered be returned to the United States government. Thus, since the above-entitled action seeks to recover Medicaid payments

(*See* Complaint ¶ 6), it is an action that is *de facto* brought by and on behalf of the United States in that the plaintiff is acting, and is required by federal law to act, as a conduit for the United States in obtaining reimbursement for those Medicaid payments originally made by the United States via the Commonwealth of Massachusetts.

* * *

12. Plaintiff here has sought to include as defendants two cigarette distributors -- defendants New England Wholesale Tobacco Co., Inc. and Albert H. Notini & Sons, Inc. -- that are citizens of The Commonwealth of Massachusetts. Such joinder, even if proper, is irrelevant to the first ground of removal set forth herein (¶¶ 5-8), which rests upon federal question jurisdiction under 28 U.S.C. § 1331. *See* 28 U.S.C. § 1441(b). The joinder of these distributors likewise should not operate to bar removal under the second ground for removal set forth herein (¶¶ 9-11). Properly viewed, this second ground for removal likewise rests upon 28 U.S.C. § 1331 as well as 28 U.S.C. § 1345 and, thus, joinder of these distributors, even if proper, is irrelevant to this second ground as well. Alternatively, as to this second ground, these two distributor defendants are not properly joined herein and plaintiff cannot be permitted to utilize such improper joinder to attempt to defeat removal: (i) the Massachusetts statute upon which plaintiff purports to rest its right to bring this action by its terms refers only to suits brought by the Attorney General against "manufacturers of cigarettes" (*see* 1994 Mass. Acts 60, § 276, annexed hereto as Exhibit C); defendants New England Wholesale Tobacco Co., Inc. and Albert H. Notini & Sons, Inc. are distributors of cigarettes manufactured by others and are not and have not been themselves manufacturers of cigarettes; (ii) the claims purported to be stated against these two distributor defendants do not state valid claims; and (iii) the claims purported to be stated against the two distributor defendants are not properly joined with the claims against the remaining defendants, none of whom are citizens of the Commonwealth of Massachusetts. Moreover, the two distributor defendants do not remotely have the financial wherewithal to answer to the monetary claims of the magnitude publicly asserted by the Attorney General and the non-monetary relief sought by plaintiff would appear to be directed at the defendants who are manufacturers, not the two distributor defendants who are not manufacturers of cigarettes; the two distributor defendants are "straw man" defendants whose joinder in this action by plaintiff is not in good faith and has been done solely for purposes of seeking to manipulate jurisdiction.

13. Pursuant to 28 U.S.C. § 1446, a copy

of this Notice of Removal is being filed with the Superior Court Department of the Trial Court of Middlesex County, Massachusetts.

14. Pursuant to Rule 81.1 of the Local Rules of the United States District Court for the District of Massachusetts, within thirty days of the filing of this Notice of Removal, defendants will file in this Court certified or attested copies of the summons and complaint and docket entries in the Superior Court Department of the Trial Court of Middlesex County, Massachusetts.

15. Petitioners reserve the right to amend or supplement this Notice of Removal.

WHEREFORE, petitioners hereby remove the action now pending against them in the Superior Court Department of the Trial Court of Middlesex County, Massachusetts, at Docket No. 95-7378, to this Court.

Respectfully submitted,

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