

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)

February 1, 1996

**MEMORANDUM OF LAW IN SUPPORT OF  
COMMONWEALTH OF MASSACHUSETTS'  
MOTION TO REMAND**

**INTRODUCTION**

This is an action brought exclusively under Massachusetts state law to recover health-care expenses and other costs incurred by the Commonwealth of Massachusetts as a result of the wrongful conduct of the defendants. The Commonwealth seeks monetary damages, as well as injunctive relief against certain defendants to require, *inter alia*, the disclosure of their long-suppressed research on smoking, health and addiction. Complaint, pp. 73-74.

All five counts in the complaint -- alleging liability for negligent performance of a special duty, breach of warranty, conspiracy, restitution and unjust enrichment -- arise under Massachusetts law. No claim under federal law is alleged in the complaint, no federal issue is raised, and no federal issue needs to be decided to establish the defendants' liability under state law. Indeed, there is not a single reference to any federal law in the Commonwealth's 74-page complaint in this case.

Nevertheless, the defendants seek to remove this action to federal court. As grounds for removal,

the defendants argue, first, that the Commonwealth's state-law claims actually arise under the federal Medicaid Act, 42 U.S.C. § 1396 *et seq.* Second, they argue that this case is removable because it is "in the nature of an action brought by or on behalf of the United States." Notice of Removal at 6.

These arguments are fundamentally wrong. Under bedrock principles of federal jurisdiction, this action arises exclusively under the principles of state law set forth in the Commonwealth's complaint. The provisions of federal Medicaid law cited by defendants in the Notice of Removal merely establish conditions on the States for the receipt of federal Medicaid funds. They do not create the purely state-law claims asserted in the complaint, nor do they supply any necessary element of any of these state-law claims. For that reason, this action could not have been brought originally in federal court, and it cannot be removed to this Court. As to defendants' second argument, this is an action by the Commonwealth of Massachusetts, a sovereign state, to vindicate state law, protect its fiscal integrity, and provide for the general welfare of its citizens.

The Commonwealth is in no sense acting as an instrumentality of the federal government, and defendants' assertion to the contrary is insupportable.

Indeed, defendants' arguments in this case are *identical* to the arguments asserted by the cigarette manufacturers in support of removal to federal court of a similar action filed against them by the Attorney General of Mississippi. The arguments were flatly rejected by the United States District Court for the District of Mississippi, which found no subject-matter jurisdiction over the action and remanded the case to Mississippi state court. *See Moore v. American Tobacco Co., et al.*, No. 94-293GR (Order dated August 17, 1994).<sup>1</sup> The arguments for removal are equally meritless in this action and should be rejected here as well.

Because the Commonwealth's claims in this case arise entirely and exclusively under state law, there is no federal subject-matter jurisdiction over this action, and it must be remanded to Middlesex Superior Court. Retention of this action in federal court would contravene not only well-established principles of subject-matter jurisdiction, but also principles of federalism and comity that protect the States from interference by the federal courts.

---

<sup>1</sup> Copies of the Notice of Removal and the Remand Order in the Mississippi action are attached as Exhibits 1 and 2, respectively.

## STATEMENT OF THE CASE

On December 19, 1995, the Commonwealth filed this action in Middlesex Superior Court against five cigarette manufacturers (the "cigarette manufacturers"), two cigarette manufacturer trade associations, and two cigarette distributors (all defendants, collectively, "defendants" or "the cigarette companies"). In its complaint, the Commonwealth seeks both monetary damages and injunctive relief under five state-law theories of liability. These state-law claims are based upon, *inter alia*, the Commonwealth's allegations that the cigarette manufacturers and their trade associations misled the Commonwealth and the public through (i) affirmative misrepresentations about the health consequences of smoking, (ii) false promises to provide the public with objective information about smoking and health, (iii) suppression and concealment of critical information about the health effects of smoking and the addictiveness of nicotine in cigarettes, and (iv) continuing false claims that nicotine in cigarettes is not addictive and that the cigarette manufacturers do not independently control and manipulate the nicotine in cigarettes.

The complaint also alleges that these defendants engaged in such wrongful and illegal conduct as part of a conspiracy that was intended to protect cigarette sales, and that they continue to use marketing and advertising techniques that have a particular appeal to children and teenagers. The complaint further alleges that all defendants are liable for the sale and/or distribution of defective and unreasonably dangerous products in the Commonwealth.

This is a direct action by the Commonwealth against the defendants under state law to recover the substantial costs the Commonwealth has incurred, including increased health care expenditures in its Medicaid program, as a result of the defendants' wrongful conduct.<sup>2</sup> This action is not brought on behalf of individual cigarette smokers, nor are the Commonwealth's claims premised upon an "assignment" to the State of the rights of individual smokers, or upon any theory under which the State is subrogated to rights of individual smokers.

The Commonwealth's complaint alleges

<sup>2</sup> The Commonwealth also seeks injunctive relief to require the defendants to disclose their research on smoking, addiction and health, to fund a remedial public education campaign on the health consequences of smoking, and to fund smoking cessation programs for nicotine-dependent smokers. See Complaint, pp. 73-74.

causes of action under well-established principles of state law. Specifically, the complaint asserts that the cigarette manufacturers have acted in breach of a special duty they undertook to the citizens of Massachusetts and to the Commonwealth (Count I); breached express and implied warranties (Count II); engaged in an unlawful conspiracy in violation of state law (Count III); and are liable for restitution (Count IV) and unjust enrichment (Count V) under state common law.<sup>3</sup> The Commonwealth's complaint does not rely on, and indeed makes no mention of, any provision of federal law.<sup>4</sup>

On January 2, 1996, the cigarette companies filed a notice of removal of the Commonwealth's state-court action to this Court. The bases for federal subject-matter jurisdiction set forth in the notice of removal are (1) that the Commonwealth's state-law action actually arises under the federal Medicaid Act, 42 U.S.C. § 1396 *et seq.*, and (2) that the Commonwealth's action is "in the nature of an action brought by or on behalf of the United States,"

## ARGUMENT

## I

**THIS ACTION DOES NOT ARISE UNDER FEDERAL LAW**

Despite the Commonwealth's exclusive reliance on state law in its complaint, the cigarette companies nevertheless claim that removal is proper under 28 U.S.C. § 1441(a) because the Commonwealth's claims "arise under" the laws of the United States within the meaning of 28 U.S.C. § 1331.<sup>5</sup> The cigarette

<sup>3</sup> In addition, on December 19, 1995, the Attorney General sent written notice to certain defendants of his intention to assert claims under the Massachusetts Consumer Protection Act, Mass. G.L. c. 93A, § 2(a), and, absent an out-of-court resolution of those claims, the Attorney General intends to amend the complaint to add state Consumer Protection Act claims.

<sup>4</sup> On December 19, 1995, the Commonwealth filed a motion to dismiss a suit for declaratory and injunctive relief filed against the Attorney General of Massachusetts in this Court by the five cigarette manufacturer defendants in this action. *Philip Morris Inc., et al. v. Harshbarger*, Civil Action No. 95-12574-GAO. The declaratory judgment action seeks a declaration that a "threatened Lawsuit" against them by the Commonwealth of Massachusetts to recover health-care expenditures -- *i.e.*, this lawsuit -- would violate certain alleged rights under federal and state law. In the memorandum in support of its motion to dismiss, the Commonwealth argues that, for many of the same reasons set forth in this motion to remand, the declaratory judgment action is not properly within the jurisdiction of the federal courts.

<sup>5</sup> There can be no jurisdiction based on diversity of citizenship, because the Commonwealth of Massachusetts is not a "citizen[]" if [a] State" under 28 U.S.C. § 1332. See *Moor v.*

companies' arguments run contrary to settled law governing the subject-matter jurisdiction of the federal courts. Under the "well-pleaded complaint" rule, an action arises under federal law only if a federal issue affirmatively appears on the face of the plaintiff's complaint. The Commonwealth's complaint does not affirmatively rely upon or raise any issue of federal law, and this action is therefore not within the federal subject-matter jurisdiction of this Court.

**A. The Well-Pleaded Complaint Rule Determines the Existence of Federal Subject-Matter Jurisdiction.**

The removal statute on which defendants rely, 28 U.S.C. § 1441, provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed" to federal district court. *Id.* § 1441 (a) (emphasis added). Thus, the question whether this action was properly removed turns upon whether the Commonwealth's complaint could have been brought originally in federal court. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) ("Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant." (footnote omitted)); C.A. Wright, A.R. Miller, & E.H. Cooper, 14A Federal Practice & Procedure § 3721 at 189 (1985 ed.). The burden of establishing federal subject-matter jurisdiction is, of course, on the party seeking removal -- here, the defendant cigarette companies. *See Id.* § 3721 at 209-210; *Hunneman Real Estate Corp. v. Eastern Middlesex Ass'n of Realtors, Inc.*, 860 F. Supp 906, 911 (D. Mass. 1994).<sup>6</sup>

The cigarette companies contend that this

---

*County of Alameda*, 411 U.S. 693, 717 (1973); *State Highway Comm'n of Wyoming v. Utah Constr. Co.*, 278 U.S. 194, 199-200 (1929).

<sup>6</sup> In addition, the Supreme Court has long emphasized that the removal statute should be strictly construed, in deference to principles of federalism and state autonomy:

Not only does the language of the [removal statute] evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation... Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.

*Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941) (internal quotation omitted).

action is within the original federal jurisdiction of this Court under 28 U.S.C. § 1331, which provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." *Id.* (emphasis added). The test for determining whether an action "arises under" the laws of the United States is the "well-pleaded complaint" rule: "It is long settled law that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1983); *See also American Policyholders Ins. Co. v. Nyaacol Products, Inc.*, 989 F.2d 1256, 1262 (1st Cir. 1993) ("a claim arises under federal law . . . if a federal cause of action appears on the face of a well-pleaded complaint"), *cert. denied*, 114 S. Ct. 682 (1994). The federal issue "must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal." *Gully v. First Nat'l Bank*, 299 U.S. 109, 113 (1936); *See also Caterpillar Inc.*, 482 U.S. at 392; *American Policyholders*, 989 F.2d at 1262; *Nashoba Communications Ltd. Partnership No. 7 v. Town of Danvers*, 893 F. 2d 435, 437 (1st Cir. 1990).

Under the well-pleaded complaint rule, "the plaintiff [is] the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc.*, 482 U.S. at 392 (footnote omitted). The plaintiff "can choose to keep its nun' in state court if its well-pleaded complaint does not affirmatively rely on federal law." *Hunneman Real Estate*, 860 F. Supp. at 909 (quoting *Allstate Ins. Co. v. 65 Sec. Plan*, 879 F.2d 90, 93 (3d Cir. 1989)). If the plaintiff elects not to assert a federal claim, the action is not removable, regardless of whether there is a federal claim that could have been asserted based on the same facts. *See id.*; *Anderson v. American Airlines, Inc.*, 2 F.3d 590, 593-94 (5th Cir. 1993)

By the same token, federal defenses to state-claims do *not* give rise to federal jurisdiction and therefore do not make those state-law claims removable to federal court. "[I]t is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar Inc.*, 482 U.S. at 393 (emphasis in original); *See also American Policyholders*, 989 F.2d at 1262 n.10.

Thus, "the mere existence of a disputed question of federal law does not confer federal question jurisdiction." *Greenfield and Montague Trans. Area v. Donovan*, 758 F.2d 22, 26 (1st Cir. 1985); *See also Nashoba Communications*, 893 F.2d at 438.

"It is only if that question also is a *necessary element* of one of the well-pleaded state claims that federal jurisdiction can be found." *United Jersey Banks v. Parell*, 78 3 F.2d 360, 366 (3d Cir.) (emphasis added), *cert. denied* 476 U.S. 1170 (1986); *See also Gully*, 299 U.S. at 112 ("a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action"). Similarly, the mere presence of a federal program as a backdrop to a claim arising under state law does not "federalize" that claim and bring it within the jurisdiction of the federal courts. *See Id.* at 115-18; *Greenfield and Montague Trans. Area*, 758 F. 2d at 27 (no federal jurisdiction over contract dispute related to federally funded transportation program); *Inter-American university of Puerto Rico. Inc. v. Concepcion*, 716 F. 2d 933, 934-35 (1st Cir. 1983) (federal jurisdiction lacking in suit to collect loans made under federal student loan program).

The only exception to the well-pleaded complaint rule is the "artful pleading" doctrine: A plaintiff cannot disguise as a state claim a cause of action that is necessarily federal in nature. That is, if state law in a particular field is completely preempted by federal law, so that the plaintiff's cause of action is *exclusively* federal, then the plaintiff's "artful" attempt to characterize that claim as one arising under state law will not defeat federal jurisdiction. *See Goepel v National Postal Mail Handlers Union*, 36 F. 3d 306, 310 (3d Cir. 3994), *cert. denied*, 115 S. Ct. 1691 (1995); *Hunneman Real Estate*, 860 F. Supp. at 909. In such cases, even though the suit "purports to raise only state law claims," it is "necessarily federal in character by virtue of the clearly manifested intent of Congress n to preempt *all* state law. *Metropolitan Life Ins. Co.*, 481 U.S. at 67.

The artful pleading exception is "necessarily a narrow one," however "[b]ecause state and federal laws have many overlapping or even identical remedies and because generally [courts] respect a plaintiff's choice between state and federal forums." *Hunneman Real Estate*, 860 F. Supp. at 909 (quoting *In re Agent Orange Product Liability Litigation*, 996 F.2d 1425, 1430-31 (2d Cir. 1993), *cert. denied*, 114 U.S. 1125 (1994)). State law must be *completely* preempted, so that the plaintiff in fact has no state law claims to assert. Only then are the plaintiff's claims necessarily federal. If federal and state law co-exist, then the plaintiff's selection of state law must be respected and the action cannot be removed to federal court. *See Hunneman Real Estate*, 860 F. Supp at 909-11 (holding that claims brought under Massachusetts' Antitrust Act did not "necessarily" arise under federal law, even though no such claim had

ever been asserted under state law and the state statute incorporated federal standards of liability).<sup>7</sup>

**B. The Commonwealth's Claims Arise Under State Law, Not the Federal Medicaid Act.**

These principles of federal jurisdiction demonstrate unequivocally that the Commonwealth's action arises under state law and must be remanded to state court. All five claims for relief set forth in the Commonwealth's complaint arise exclusively out of state law. The first count asserts that the cigarette manufacturers are liable under state law because they breached a special duty and responsibility they undertook to provide the public truthful and objective information about smoking and health. Count two alleges that the defendants are liable for breach of warranty. The third count asserts that defendants have engaged in an unlawful conspiracy in violation of state law. Count four alleges liability under the state common law of restitution, and count five asserts common-law liability for unjust enrichment.<sup>8</sup>

State law, therefore, supplies the basis for each claim asserted in this case. The Commonwealth can establish the liability of the defendants based *entirely* on the principles of state law asserted in the complaint. This fact, alone, establishes that the Commonwealth's claims fall outside the subject-matter jurisdiction of this Court. As the First Circuit has matter-of-factly stated:

A suit is customarily deemed to arise under the law that gives birth to the cause of action. Applying that approach, this suit is based upon, and, therefore, arises under, state law.

*American Policyholders*, 989 F.2d at 1262 (footnote and citations omitted); *See also Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983) ("straightforward application of the well-pleaded complaint rule precludes original federal-court jurisdiction" where state law supplies all elements necessary to establish defendant's liability);

<sup>7</sup> The Supreme Court has found complete preemption, and resulting automatic federal jurisdiction, in only two contexts: under section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C., § 185, *Avco Corp. v. International Ass'n of Machinists and Aerospace Workers*, 390 U.S. 557 (1968); and under the broad preemption provision found in ERISA, 29 U.S.C. §§ 1001 *et seq.*, which was modelled after section 301 of the LMRA, *Metropolitan Life Ins. Co.*, 481 U.S. at 65-66. *See American Policyholders*, 989 F.2d at 1262 n.10 (discussing the "rare case" in which state law is completely preempted).

<sup>8</sup> In addition, as noted above, the Attorney General sent demand letters to certain defendants under Mass. G.L. c. 93A on December 19, 1995. *See supra* n.3.

*Hunneman Real Estate*, 660 F. Supp. at 911 (remanding for lack of jurisdiction where, "[i]n order for the plaintiffs to prevail, they do not have to prove or rely on any proposition of federal law").

Nevertheless, the cigarette companies argue that the Commonwealth's state-law claims actually arise under the laws of the United States, because, they say, those claims are based in the federal Medicaid Act. *See* Notice of Removal at 56. To create the illusion of federal jurisdiction, they cite several provisions of federal Medicaid law setting forth conditions the State must meet in order to be eligible for federal funding. First, the defendants refer to a provision in the Act by which the State must condition eligibility for Medicaid benefits upon the recipient assigning to the State his or her right to payment for medical care from any third party. 42 U.S.C. § 1396a(a)(45), § 1396k; 42 C.F.R. §§ 433.145-148. Second, the defendants refer to a provision requiring the State to take "all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services under the [State Medicaid] plan . . ." and to "seek reimbursement for such assistance" where the amount the State can reasonably expect to recover exceeds the costs of recovery. 42 U.S.C. § 1396a(a)(25)(A) and (B); 42 C.F.R. §§ 433.135-148. And, third, the defendants refer to a provision requiring that, if a State recovers payments from a liable third party, "the State must pay the Federal government a portion of the reimbursement" based on the amount of the federal contribution to the State program. 42 U.S.C. § 1396b(d); 42 C.F.R. §§ 433.140(c), 433.154.

The relevance of these funding conditions to the Court's subject-matter jurisdiction over the Commonwealth's state-law claims in this case is not apparent from the Notice of Removal. In fact, these provisions are irrelevant to the only jurisdictional issue in this case -- whether the claims in the Commonwealth's complaint "arise under" state or federal law. The defendants, attempt to manufacture federal jurisdiction under the Medicaid Act is frivolous and should be rejected.

First, to the extent defendants are arguing that these Medicaid provisions *create a federal* cause of action that the Commonwealth is asserting in this action, that myth is easily dispelled. Under the federal Medicaid statute, 42 U. S. C §§ 1396-1396q, each State seeking federal financial participation in its medical assistance program must submit to the United States Department of Health and Human Services a "state plan" containing certain statutorily required features. 42 U.S.C. §§ 1396a(a). *See Atkins v. Rivera*, 477 U.S. 154, 156-57 (1986). The provisions invoked by defendants merely set forth certain features the State

plan must contain as a condition to the State's eligibility for federal Medicaid funds. The provisions do not create a new federal cause of action against third parties who may be liable to the State for Medicaid expenditures.<sup>9</sup>

The third-party reimbursement provision in 42 U.S.C. § 1396a (a) (25), for example, simply imposes an obligation on the State to "take all reasonable measures" to ascertain the liability of third parties to pay "for care and services." This statutory provision neither expressly creates, nor indirectly furnishes any basis for creating by judicial implication, a *federal* cause of action in favor of the States against such third parties.<sup>10</sup> The *only* legal basis for the "liability of third parties" referred to by section 1396a(a)(25) must therefore be supplied by State law.<sup>11</sup>

Similarly, whether and how a portion of the Commonwealth's recovery in this action will be paid to the federal government is a matter between the United States and Commonwealth. It is *not* an element of the State's claim against the cigarette companies.

It is well settled that the mere fact that the federal government has an interest in a portion of a plaintiff's state-law recovery does *not* "federalize" the underlying state-law claim. *See Becote v. South Carolina State Highway Dep't*, 308 F. Supp. 1266, 1268 (D.S.C. 1970) (mere fact that United States has right under federal

<sup>9</sup> The defendants' argument is wrong on another level as well. As noted above, the Commonwealth, as master of its complaint, "can choose to keep its suit in state court if its well-pleaded complaint does not affirmatively rely on federal law." *Hunneman Real Estate*, 860 F. Supp. at 909. Therefore, even if the Medicaid Act created a federal cause of action -- which it very clearly does not -- the Commonwealth has not relied on any such cause of action, and it may not serve a basis for federal jurisdiction.

<sup>10</sup> Indeed, given the Supreme Court's jurisprudence all but forbidding the judicial creation of "implied" federal causes of action, *See Suter v. Artist M.*, 503 U.S. 347 (1992); *Cort v. Ash*, 422 U.S. 66 (1975), it would be astonishing if these provisions were found to establish a new federal cause of action against potentially liable third parties. *Cf. Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 805-12 (1986) (where Congress did not create federal cause of action, federal jurisdiction is lacking and removal is improper even where plaintiffs expressly alleged the violation of a federal statute as an element of their claim).

<sup>11</sup> Section 1336a(a) (25) and the corresponding regulations merely outline what, at a minimum, must be included in the State plan to insure that States seek to recover Medicaid expenditures from liable third parties. 42 C.F.R. §§ 433.138(a) ("At a *minimum* such [third party reimbursement] measures must include the requirements specified in paragraphs (b) through (k) of this section..." (emphasis added)). Section 1396a(a) (25) and its regulations in no way *limit* how the State may proceed; they certainly do not suggest that the State must proceed by invoking some unspecified *federal* source of substantive liability.

statute to recover against liable third party the value of medical treatment furnished to plaintiff does not create federal jurisdiction over plaintiff's state-law claim). Indeed, under defendants' expansive view of jurisdiction, whenever the recovery in a state-law suit is potentially subject to federal taxation, giving the United States a pecuniary interest in the judgment, the state-law action could be removed to federal court.<sup>12</sup>

Second, to the extent defendants seek to invoke these Medicaid provisions in *defense* to the Commonwealth's state-law claims -- the provisions in fact afford them no defenses, but to the extent they argue otherwise -- they fundamentally misunderstand the law of federal jurisdiction. Issues of federal law raised in *defense* of state-law claims do not create federal jurisdiction. As the Supreme Court has forcefully stated:

[T]he presence of a federal question . . . in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule -- that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that a plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court. . . . [A] defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated.

*Caterpillar, Inc.*, 482 U.S. at 398-99 (emphasis added; footnote omitted); see also *Oklahoma Tax Comm'n v. Graham*, 489 U.S. B3B, 841 (1389) (possible federal immunity defense "did not convert Oklahoma tax claims into federal questions"); *Franchise Tax Bd.*, 463 U.S. at

<sup>12</sup> Finally, the provisions cited by defendants requiring States to obtain assignments from Medicaid beneficiaries are in no way implicated in this action. This is a direct action by the Commonwealth; it is not an action brought to recover damages suffered by any one or more individual Medicaid recipients under an "assignment" of rights from those individual recipients. The assignment provisions relied upon by the cigarette companies are therefore wholly inapposite. Moreover, even if the Commonwealth were proceeding by assignment, the rights that the Commonwealth would have received via such assignment, and would be asserting here, would be recipients' state-law claims against parties potentially liable to them for their injuries. It is absurd to suggest that these Medicaid recipients possessed federal claims against the cigarette companies under the Medicaid Act, which they then assigned to the State.

14; *Greenfield and Montague Trans. Area*, 758 F.2d at 27.

Third, it is well-established that the mere presence of a federal statute as a backdrop to what is decidedly a state-law cause of action is *not* sufficient to confer subject-matter jurisdiction on the federal courts. Thus, the fact that the Commonwealth's state-law causes of action are consistent with the State's satisfaction of funding conditions in the federal Medicaid statute does not alter their essential character as *state-law* claims. As the Supreme Court has recognized, there are few state claims that do not bear some attenuated connection to a provision of federal law:

[C]ountless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are . . . necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.

*Gully*, 299 U.S. at 118 (Cardozo, J.). Indeed, this case is much like *Inter-American University of Puerto Rico, Inc. v. Concepcion* 716 F.2d 933 (1st Cir. 1983), in which the First Circuit held that a suit to collect a student loan does *not* arise under federal law merely because the loan was made pursuant to the National Direct Student Loan Program, 20 U.S.C. § 1087aa-1087ii, even though the federal government made a capital contribution to the loan fund and federal regulations "prescrib[ed] the procedures for making and collecting the loans." *Id.* at 934. As the First Circuit stated:

It is the nature of the action before the court [*i.e.*, a state-law claim to collect a debt], not the nature of the loan program, that establishes the existence or absence of federal jurisdiction.

*Id.*; See also *Greenfield and Montague Trans. Area*, 758 F.2d at 27 (dispute over provision in transportation contract does not arise under federal law even though disputed provision was inserted to meet eligibility requirements for federal funding under Surface Transportation Assistance Act, 49 U.S.C. § 1614).

Once it is apparent that the provisions of Medicaid law raised in the Notice of Removal neither create nor are necessary elements of any of the Commonwealth's state-law claims, the only remaining

argument available to the cigarette manufacturers is that, by artful pleading, the Commonwealth has disguised claims that are exclusively federal. For such an argument to prevail, the cigarette companies must establish that this is the "rare case" in which federal law "so *completely* displaces state causes of action in a particular area that all such claims are "necessarily federal in character." *American Policyholders*, 989 F.2d at 1262 n. 10 (emphases added) (quoting *Metropolitan Life Ins. Co.*, 481 U.S. at 63-64). In other word" the cigarette companies' premise must be that *all* claims seeking payments made under a state Medicaid program as an element of damages arise *exclusively* under the Medicaid Act and are therefore within the jurisdiction of the federal courts.

Defendants cite no authority for the extraordinary proposition that the Commonwealth is preempted by the federal Medicaid Act from bringing an action under state law for damages, and that argument is clearly wrong. The Medicaid program is "a cooperative federal-state program through which the Federal Government provides financial assistance to State" so that they may furnish medical care to needy individuals." *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 502 (1990). "The Medicaid program exemplifies what is often referred to as 'cooperative federalism.'" *State of Washington v. Bowen*, 815 F.2d 549, 557 (9th Cir. 1987) (quoting *Harris v. McRae*, 44B U.S. 297, 308 (1980)).

Far from *completely* preempting state law, the federal statute and its implementing regulations plainly contemplate the continued vitality of complementary state law in many areas, including the pursuit of claims under state law against potentially liable third parties. See 42 U.S.C. § 1396a(a) (25); 42 C.F.R. §§ 433.135-148. Indeed, as noted above, the federal provisions expressly set forth only the "*minimum*" a State must do to maintain its eligibility for federal funds, See *supra* n.11, and do not themselves supply the substantive legal basis for any reimbursement claim, which therefore must be supplied entirely by state law. Nowhere in the federal provisions cited by the defendants, or in any other federal statute of which the Commonwealth is aware, is there the slightest suggestion that the States are required to locate some *federal* as opposed to state cause of action through which to pursue parties potentially liable for Medicaid expenditures.

If defendants' argument were correct, a wide array of ordinary state-law claims would suddenly fall within the jurisdiction of the federal courts. For example, in many tort actions, the damages sought by the injured plaintiff include medical expenses for which the state Medicaid program initially provided

compensation. In all of these cases, the State and, ultimately, the federal government have potential interests in the recovery. See, e.g., *Miller v. Lankenau Hosp.*, 61B A 2d 1197 (Pa. Comm. Ct. 1992) (medical malpractice case in which Commonwealth of Pennsylvania intervened to assert interest in Medicaid reimbursement). Similarly, the States seek third-party reimbursement of Medicaid benefits in actions under state law to collect child support from an absent father.<sup>13</sup> See, e.g., *Steuben County Dep't of Social Servs. v. Deats*, 560 N.Y.S.2d 404, 560 N.E.2d 760 (N.Y. 1990) (action in state Family Court, under state law, to collect from unwed father Medicaid payments made in connection with the birth of his child). Under defendants' theory, these and other garden-variety state-law actions would "arise under" the federal Medicaid Act and would be within the subject-matter jurisdiction of the federal courts.

It is therefore obvious that the cigarette companies cannot meet their heavy burden of demonstrating that the Medicaid statute completely preempts state law, so as to convert the Commonwealth's state-law claims into causes of action that are necessarily federal in character.<sup>14</sup> The Commonwealth's claims, therefore, are precisely what they purport to be -- state claims based on the state-law causes of action set forth in the complaint -- and are not within the jurisdiction of this Court. See *Moore v. American Tobacco Co.*, C.A. No. 94cv293GR (S.D. Miss. 1994) (copy attached as Exhibit 2) (rejecting argument that State of Mississippi's state-law claims against cigarette companies arose under Medicaid Act, and remanding to state court).<sup>15</sup>

<sup>13</sup> See 42 U.S.C. § 1396a(a) (25) (F) (requiring that State Medicaid plan provide that State will seek reimbursement from third party who has failed to pay child support).

<sup>14</sup> Indeed, there is *no* case holding that the Medicaid Act completely preempts state law and converts all claims touching upon Medicaid benefits into federal causes of action. In *State of Washington v. Bowen*, 815 F.2d 549 (8<sup>th</sup> Cir. 1987), the court expressly held that the federal Medicaid Program did *not* preempt the State of Washington from calculating payment levels based on state community property law. *Id.* at 557; cf. *Vang v. Healy*, 804 F. Supp. 79, 82 (E.D. Cal. 1992) (broad delegation to States in federal food stamp regulations of authority to collect food stamp over-issuance "cuts squarely against the view that the federal act was intended to preempt any and all state law claims that relate to it").

<sup>15</sup> See also *American Policyholders*, 989 F.2d at 1264 (finding no subject matter jurisdiction and remanding to state court even though action would be dispositive of plaintiffs' potential liability to the United States under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.*); *United Jersey Banks*, 783 F.2d at 367 (holding that complaint alleging that merger of national banks violated state statutes arose under state law and was not removable, notwithstanding possibility that state statutes conflicted with federal banking laws); *Inter-American Univ. of Puerto Rico, Inc.*, 716 F.2d at 934 (holding that suit to collect

The weakness of the cigarette companies' argument is further demonstrated by their reliance on *Harlow v. Chin*, 405 Mass. 697, 545 N. E 2d 602 (1989), which is in fact irrelevant to the jurisdictional analysis. *Harlow* was a medical malpractice case in state court; the issue of federal jurisdiction was never raised or discussed.<sup>16</sup> Rather, the court was called upon to interpret a provision of the Massachusetts medical malpractice statute allowing the trial judge to deduct from a damage award certain payments received by the plaintiff from collateral sources. Mass. G.L. c. 231, § 60G. The statute excluded from this set-off any compensation from any collateral source "whose right of subrogation is based in any federal law." Mass. G.L. c. 231, § 60G(c) The issue was whether Medicaid payments received by the plaintiff fell within this exclusion.

In construing the *state-law* phrase "based in any federal law" as it is used in Mass. G.L. c. 231, § 60G, the *Harlow* court appropriately looked to factors altogether different from those that determine whether an action "arises under" federal law as that phrase is used in 28 U.S.C. § 1331. *See* 545 N.E.2d at 609-11. The court observed that, in order to receive federal Medicaid funding, the Commonwealth is required under 42 U.S.C. 1396a(25) to "pursue recovery of the [Medicaid] funds [expended for plaintiff's care] from legally liable third parties." *Id.* at 610. The court explained that if these amounts were deducted from a malpractice plaintiff's award under Mass. G.L. c. 231, § 60G, then "the entity which provided the benefit cannot collect that amount from the plaintiff." *Id.* The court therefore recognized that a narrow construction of subsection 60G(c) -- requiring that Medicaid payments be deducted from an award -- would potentially frustrate compliance with the federal funding condition mandating pursuit of third-party reimbursement of Medicaid expenditures.<sup>17</sup> The court

---

student loan issued pursuant to federal loan program arises under state, not federal, law); *Hunneman Real Estate*, 860 F. Supp. at 909-911 (holding that claims of violation of state antitrust laws are not removable to federal court even though the state statutes incorporate federal standards of liability).

<sup>16</sup> A state court, of course, has no occasion to determine whether claims arise under federal law so as to give rise to federal subject-matter jurisdiction, and the court in *Harlow* was doing no such thing. Moreover, the fact that *Harlow* is a *Massachusetts* decision is as irrelevant as the substance of the decision itself, because the question of whether the Commonwealth's claims in this case "arise under" the laws of the United States is a question of *federal*, not state, law.

<sup>17</sup> Where a Medicaid recipient recovers amounts for Medicaid-funded medical treatment from a liable third party, Massachusetts law provides the Commonwealth with an efficient means to then obtain these amounts from the recipient, including a lien directly against the judgment. *See* Mass. G.L. c. 18, § 5G; c. 118E, § 22 (requiring Medicaid

determined that the State Legislature's objective in creating the exception in subsection 60G(c) was "to prevent conflicts between G.L. c. 231, § 60G, and any Federal law, which of course must be supreme." *Id.* The court found that the State Legislature "chose to use the expansive term 'based in any federal law' rather than the more stringent . . . 'provided for by federal law'" in subsection 60G(c) to achieve this purpose. *Id.* For these reasons, the court, after carefully delineating that it is Massachusetts' state law that provides the mechanism for recovery of Medicaid expenditures from liable third parties, *Id.* at 610 and n. 17, held that "[a] provision that a State receiving Federal money must pursue reimbursement suffices to make the consequent right of subrogation 'based in' Federal law" within the meaning of Mass. G.L. c. 231, § 60G(c). *Id.* at 610.

The holding of *Harlow v. Chin*, therefore, does not in any way indicate that the Commonwealth's state-law claims in this case "arise under" the laws of the United States within the meaning of 28 U.S.C. § 1331. The phrase "based in federal law," which defendants borrow from this state statute, is not part of "[t]he century-old jurisdictional framework governing removal of federal question cases from state into federal courts." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. at 63. The only question in this case is whether the action "arises under" federal law under section 1331, and the narrow meaning of that statutory phrase, set forth in this Memorandum, has been carefully developed by the federal courts over the last century. For the reasons discussed above, the Commonwealth's claims arise under the state law creating the causes of action set forth in the complaint, and nothing in the Massachusetts court's holding in *Harlow v. Chin* indicates otherwise.<sup>18</sup>

## II.

---

recipient to pay third-party payments to the Medicaid agency, and creating a lien in favor of the Commonwealth for such amounts). If, however, these amounts were deducted from the plaintiff's recovery under section 60G, the Commonwealth would be left only with the more cumbersome option of pursuing recovery against the third party.

<sup>18</sup> Defendants also rely in their Notice of Removal on *Maine Association of Independent Neighborhoods v. Commissioner of Maine Dep't of Human Services* ("M.A.I.N."), 876 F.2d 1051 (1<sup>st</sup> Cir. 1989), a case in which an organization representing low income persons alleged that the State of Maine was administering its welfare program in violation of federal law. Obviously, a suit alleging that the State is administering a public assistance program in violation of a federal statute "arises under" federal law -- indeed, in *M.A.I.N.*, "[a]ll parties... agree[d] that [the] action 'arises under' federal law." *Id.* at 1053. *M.A.I.N.* does not in any way support the assertion of subject-matter jurisdiction over this case, in which the Commonwealth alleges that defendants have violated *state* law.

**THIS ACTION IS NOT "IN THE NATURE OF AN ACTION BROUGHT BY OR ON BEHALF OF THE UNITED STATES."**

As an alternative basis for removal under section 1441(a), the cigarette companies make the astonishing claim that this action is "in the nature of an action by or on behalf of the United States." and that original federal jurisdiction therefore lies under 28 U.S.C. § 1345,<sup>19</sup> because the United States may be entitled to a portion of any recovery by the Commonwealth. *See* Notice of Removal at 6-7.

Not surprisingly, given the nature of the proposition that this is an action by the United States, the authority cited by the cigarette companies in the notice of removal is utterly unresponsive. The cigarette companies rely primarily on the concurring opinion in *Kuehner v. Schmeiker*, 717 F.2d 813 (3d Cir. 1983), *cert. granted and judgment vacated*, 469 U.S. 977 (1984). *Kuehner* was a suit against federal and state officials, challenging policies of the Social Security Administration that were adopted by federal authorities and merely implemented by the States; the United States Department of Justice appeared in the case on behalf of all defendants. The single concurring judge found that state officials were merely the "alter egos" of the Social Security officers, implementing policies imposed by the federal authorities, so that mandamus jurisdiction could be invoked against the state defendants under 28 U.S.C. § 1361. *Id.* at 826 (Becker, J., concurring).<sup>20</sup>

This action, in stark contrast, is brought by the Attorney General of the Commonwealth of Massachusetts, pursuant to his authority under, *inter alia*, Massachusetts common law, Mass. G.L. c. 12, § 3, 5 and 10, Mass. G.L. c. 118E, § 22, and Mass. St. 1994, c. 60, § 276; it is brought exclusively under principles of state law, to recover losses suffered by the Commonwealth. Federal officials played no role whatsoever in the initiation of this litigation, and will play no role in its continued progress. The Commonwealth is no sense acting as an instrumentality

of the United States.<sup>21</sup> Nor is the commencement of this action a ministerial act that the Commonwealth was *required* to undertake by federal law. Indeed, defendants' suggestion that the Commonwealth is merely carrying out a federal mandate by filing this suit flatly contradicts their assertion in their declaratory Judgment action that federal law in fact bars the Commonwealth's suit. *See* Complaint for Declaratory Relief at ¶¶ 65-68. Carried to its logical conclusion, defendants' argument would mean that the forty-five states that have not commenced actions against the cigarette manufacturers to recover Medicaid losses stand in defiant violation of federal law.

Second, defendants rely upon two criminal cases for the proposition that the criminal jurisdiction of the United States under 18 U.S.C. § 1001 extends to false statements made to state agencies, if federal funds are involved. *E.g.*, *United States v. Baker*, 626 F.2d 512, 514 (5th Cir. 1980). of course, the reach of federal laws enacted by Congress to proscribe criminal conduct touching upon federal interests has nothing whatever to do with the subject-matter jurisdiction of the federal courts over civil actions brought by state officials under state law. More to the point than the authorities cited in the Notice of Removal, this Court has specifically held that the existence of federal funding does not convert a state-law action into one within the subject-matter jurisdiction of the federal courts. *In Evans v. Sentry Property Management Co.*, 852 F. Supp. 71 (D. Mass. 1994), the plaintiff, a tenant of a property managed by defendant Sentry Property and owned by the United States Department of Housing and Urban Development (HUD), brought an action against Sentry in state court alleging violations of state landlord/tenant law. The defendant attempted to remove the action to federal court, on the theory that Sentry was an agent of HUD. The Court rejected the theory and remanded to state court:

Federal courts should not expand their jurisdiction by federalizing matters which are, in essence, state claims. . . . It would be a dangerous precedent to hold that federal funding alone can transform that which is strictly a state cause of action

<sup>19</sup> Section 1345 provides:

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized by Act of Congress.

<sup>20</sup> The *majority* concluded that the action arose under the Social Security Act and that federal-question jurisdiction existed under 28 U.S.C. § 1331, and therefore did not rely in any way on the concurring judge's "alter ego" theory. *See* 717 F.2d at 816.

<sup>21</sup> *Cf. M.A.I.N.*, 876 F.2d at 1054-55 (rejecting argument that Commissioner of Maine Department of Social Services, in administering AFDC rules and regulations, is, for purposes of removal under 28 U.S.C. § 1442(a)(1), an "officer of the United States or any agency thereof, or person acting under him,... act[ing] under color of such office....," because "[t]he promulgation of *state* regulations... is clearly an act taken under color of the Commissioner's *state* office, not under color of federal office" (emphasis in original)); *Vang v. Healy*, 804 F. Supp. at 82 (rejecting contention that State of California is an agent of the federal government in administering the food stamp program in California).

into a federal case, for the consequence would be that federal courts would then become inundated by the minutiae of state litigation.

*Id.* at 72; *See also District of Columbia v. Owens-Corning Fiberglass Corp.*, 604 F. Supp. 1459, 1461-62 (D.D.C. 1985) (rejecting the "novel" and "unrealistic" argument that the District of Columbia is an agency of the United States under 28 U.S.C. § 1345, and remanding to District of Columbia Superior Court). More fundamentally, defendants' argument that the Commonwealth, in bringing this suit, is a mere instrumentality of the federal government, flies in the face of established principles of federalism and state autonomy. As the Supreme Court recently reiterated:

States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart.

*New York v. United States*, 505 U.S. 144, 188 (1992); *See also FERC v. Mississippi*, 456 U.S. 742, 777 (1982) (O'Connor, J., concurring in part and dissenting in part) ("State legislative and administrative bodies are not field offices of the national bureaucracy.... Instead, each state is sovereign within its domain, governing its citizens and providing for their general welfare. ").

In bringing this action under state law to recover state losses, the Commonwealth is exercising its authority as a sovereign state. It is in no sense acting as an agent or "alter ego" of the United States, and defendants' baseless argument to the contrary should be rejected.

### III.

**HOLDING THIS CASE REMOVABLE ON THE  
 GROUNDS URGED BY THE CIGARETTE  
 COMPANIES WOULD CONTRAVENE  
 ESTABLISHED PRINCIPLES OF FEDERALISM  
 THAT PROTECT THE STATES AND THEIR  
 JUDICIAL PROCESSES FROM INTERFERENCE BY  
 THE FEDERAL COURTS**

The principles discussed above suffice to establish beyond doubt that this action arises under state, not federal, law, and is therefore not within the subject-matter jurisdiction of the federal courts. If further support for that conclusion were sought, however, it is readily supplied by established principles

of judicial federalism that protect state courts, and the enforcement therein of important state interests, from interference by federal courts. By allowing the removal of this action, the Court would thwart these principles and exercise jurisdiction over a purely state-law action that should be heard and decided by the Massachusetts courts. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941) (removal statute must be strictly construed in deference to principles of federalism). These principles constitute additional grounds for remand here.

Fundamental principles of federalism require "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10 (1987) (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)); *see also Bettencourt v. Board of Registration in Medicine*, 904 F. 2d 772, 776 (1<sup>st</sup> Cir. 1990) (comity "counsels federal courts to be sensitive to the existence of a parallel system of state governance" and requires "respect for both enforcement of state laws and the ability of state courts to give proper attention to federal law defenses") (quoting *Marcal Paper Mills, Inc. v. Ewing*, 790 F.2d 195, 196 (1<sup>st</sup> Cir. 1986)).

These principles are embodied in the Constitution, federal statutes, and established judicial doctrines. For example, the "well-pleaded complaint rule" excludes from federal jurisdiction claims that merely anticipate federal defenses to state-law actions. *See* Argument I, *supra*. Federal courts likewise lack subject matter jurisdiction where the party invoking jurisdiction seeks relief that would effectively "reverse or modify the judgment" of a state court, and thereby assert federal appellate jurisdiction that lies exclusively in the United States Supreme Court. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923); *District of Columbia Court of Appeal v. Feldman*, 460 U.S. 462, 476 (1983).<sup>22</sup>

<sup>22</sup> In their own federal complaint, the cigarette manufacturers seek a federal judicial determination that any judgment against them in the Commonwealth's state court action would contravene their federal rights. The only way that they can hope to avoid the *Rooker/Feldman* barrier to such an attempt to have a lower federal court pass upon a state court judgment is to suggest that such a forbidden intrusion on the United States Supreme Court's exclusive appellate jurisdiction may be excused if a lower federal tribunal jumps the gun and enters a preemptive ruling on an anticipated state court judgment, before the state court has even had the opportunity to consider the tobacco manufacturers' federal defenses. Thus, *Rooker/Feldman* may be avoided only by an equally intrusive, but preemptive, federal judicial interference with the state

Other jurisdictional bars appear in the federal Anti-injunction Act, 28 U. S. C. § 2283, which generally prohibits injunctions that would stay proceedings in state courts, in order to "prevent needless friction between state and federal courts," *Mitchum v. Foster*, 407 U.S. 225, 233 (1972), and the Eleventh Amendment, which bars claims against the States for monetary relief or for alleged violations of state law. *Pennhurst State School v Halderman*, 465 U.S. 89, 103, 106 (1984)

Abstention doctrines likewise rest on these important principles of judicial federalism. See *Younger v. Harris*, 401 U.S. at 44; *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941); *Bettencourt*, 904 F.2d at 776. The policy underlying abstention under *Younger*, for example, is to "permit state courts to try state cases free from interference by federal courts." 401 U.S. at 43. Under *Pullman*, federal courts should abstain from deciding a case where "difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984); See also *Pustell v. Lynn Public Schools*, 18 F.3d 50, 53-55 (1<sup>st</sup> Cir. 1994).<sup>23</sup> These policies would be defeated if, via removal, the defendants could derail this state-court proceeding in which the Commonwealth seeks only to vindicate State law, and re-route this litigation into federal court. For these reasons, this Court and other federal courts have repeatedly held that abstention is a proper ground for remand of a case removed to federal court.<sup>24</sup>

---

courts. To accept that position would be to exalt form (and timing) over substance and to turn judicial federalism on its head.

<sup>23</sup> In what are actually anticipated defenses to the Commonwealth's suit, the cigarette manufacturers have already asserted in their declaratory judgment action that the Attorney General has misconstrued recently enacted Massachusetts statutes under which he is, in part, proceeding in this action, and that as a result, rights they claim under the federal Constitution will be abridged. See Decl. Judg. Comp. ¶¶ 10, 12, 22, 43, and 60 (citing Mass. G.L. c. 118E, § 22 (as amended by Mass. St. 1995, c. 38, § 131) and Mass. St. 1994, c. 60, § 276). Indeed, if the Court decides not to remand this case, it is certain to face a series of requests for certification of issues of state law to the Massachusetts Supreme Judicial Court.

<sup>24</sup> See *Doughty v. Underwriter's at Lloyd's, London*, 812 F. Supp. 13, 14 (D. Mass.), *aff'd*, 6 F.3d 856, 860-64 (1<sup>st</sup> Cir. 1993) (refusing to review by appeal or mandamus district court's decision to remand under *Burford* abstention); See also *Garcia v. Island Program Design, Inc.*, 4 F.3d 57, 62 (1<sup>st</sup> Cir. 1993) (remanding based on *Burford* abstention); *Corcoran v. Ardra Ins. Co.*, 842 F.2d 31, 36-37 (2d Cir. 1988) ("If a district court has the power to dismiss an action on grounds of abstention, it has the power to remand to the state court on these grounds."); *Melahn v. Pennock Ins.*, 965 F.2d 1497, 1501-1502 (8<sup>th</sup> Cir. 1992) ("abstention" proper ground for remand, though *Burford* abstention not applicable under facts of case); *Rodrigues v. County of Hawaii*, 823 F. Supp. 798,

Each of these constitutional principles, statutes, and judicial doctrines is implicated in the cigarette companies' attempt to remove the Commonwealth's purely state-law action from state to federal court. The exercise of federal jurisdiction over the removed action in this case would impose the very harms to federalism that these doctrines were developed to protect -- and, indeed, the very same harms to state judicial processes that would flow from the exercise of federal jurisdiction over the cigarette manufacturers' original federal action to enjoin the state case. In both cases, the result of the exercise of federal jurisdiction would be to "disrupt substantially," if not "immobilize," the state proceeding. See *Bettencourt*, 904 F. 2d at 777. In both cases, the State by motion (to dismiss and remand) has asserted its right to prosecute and adjudicate in its own courts its claims that the cigarette companies have violated state law.

If, as the cigarette companies apparently assert, these doctrines of comity and federalism may be evaded simply by filing a notice of removal, then the doctrines would become irrelevant in every civil case in which a defendant to a state civil enforcement action argues that his federal rights are implicated by the state action. Under the companies' theory, each such case could simply be removed to federal court. The result would be to destroy comity between the federal and state courts.

The concerns for federalism and comity are particularly grave here, because of the strong public interests advanced by the Commonwealth's state-law

---

801-03 (D. Haw. 1993) (remanding based on *Pullman* and *Younger*); *Administaff, Inc. v. Kasten*, 799 F. Supp. 685, 690 and n. 12 (W.D. Tex. 1992) (remanding based on *Pullman* abstention); *Ganz v. City of Belvedere*, 739 F. Supp. 507, 509-10 (N.D. Cal. 1990) (same); *City of Chesapeake v. Sutton Enterprises, Inc.*, 138 F.R.D. 468, 473-75 (E.D. Va. 1990) (the argument that removal defeats *Younger* abstention "exalts form over substance," because "but for [the] removal,... state court proceedings would be ongoing").

The Court should reject the contrary conclusion reached by the Eighth Circuit in *In Re Burns & Wilcox, Ltd.*, 54 F.3d 475, 478 (8<sup>th</sup> Cir. 1995). In *Burns*, the Court held that a district court abused its discretion in remanding an action to state court. In a single sentence, the court stated that "*Younger* abstention is inapplicable in the absence of an ongoing state proceeding." *Burns*, 54 F.3d at 478 (citing *Ankenbrandt v. Richards*, 504 U.S. 689, 705-06 (1992)). *Burns* does not address the arguments discussed above -- arguments that were accepted in *City of Chesapeake v. Sutton*, 138 F.R.D. at 474. Furthermore, the *Ankenbrandt* case cited by *Burns* states only the general rule that *Younger* applies where there is an "ongoing state proceeding." *Ankenbrandt* did not involve a removal; indeed, the federal plaintiff alleged in support of his complaint that "[state] proceedings ended prior to her filing th[e] lawsuit." *Id.* For these reasons, *Burns* does not undercut the application of abstention principles to the Commonwealth's motion to remand here.

suit. The case filed by the Attorney General implicates the Commonwealth's vital interest in the health and safety of Massachusetts citizens, their protection against fraud and deception, and the economic well-being of the Commonwealth. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 528-29 (1992); *Head v. New Mexico Bd. of Examiners*, 374 U.S. 424, 445 (1963) (Brennan, J., concurring). The Supreme Court has expressly held that a state "civil enforcement action . . . brought by the State in its sovereign capacity" to "vindicate . . . the fiscal integrity" of "its public-assistance programs" is protected by the doctrines of federalism and comity. *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977). The Commonwealth's suit here seeks to vindicate, among other things, precisely these interests. Removal here would interfere with the powers of the Massachusetts courts (1) to decide the state-law claims asserted in the complaint; (2) to impose liability under state law; and (3) to enforce their own judgments. The Supreme Court has repeatedly recognized that concerns for federalism are at their peak when the operation of the state judiciary is at stake. *Pennzoil Co. v. Texaco, Inc.* 481 U.S. at 13; *Pulliam v. Allen*, 466 U.S. 522, 539 (1974); *Atlantic Coastline Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 297 (1970); cf. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (Age Discrimination in Employment Act does not apply to state judges).

"Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." *Younger v. Harris*, 401 U.S. at 43. Interference with the Commonwealth's state-court suit would destroy comity between federal and state courts. "[P]roper respect for state functions," *Younger v. Harris*, 401 U.S. at 44, requires this Court to remand this case to state court.

**CONCLUSION**

For the reasons stated above, the Court should grant the plaintiff Commonwealth of Massachusetts' Motion to Remand.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS

SCOTT HARSHBARGER,  
ATTORNEY GENERAL

Thomas A. Barnico  
William W. Porter  
Assistant Attorneys General  
One Ashburton Place  
Boston, MA 02108

(617) 727-2200

On the brief:  
J Leib Dodell  
Assistant Attorney General  
One Ashburton Place  
Boston, MA 02108  
(617) 727-2200

Laurence H. Tribe  
Special Assistant Attorney General  
Hauser Hall 420  
1575 Massachusetts Avenue  
Cambridge, MA 02138  
(617) 495-4621

Brian Stuart Koukoutchos  
Special Assistant Attorney General  
9 Avon Road  
Bedford, MA 01730  
(617) 275-4900