

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

COMMONWEALTH OF VIRGINIA)	
EX REL. KENNETH T. CUCCINELLI, II,)	
in his official capacity as Attorney)	
General of Virginia,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 3:10CV188–HEH
)	
KATHLEEN SEBELIUS,)	
SECRETARY OF THE DEPARTMENT)	
OF HEALTH AND HUMAN SERVICES,)	
in her official capacity,)	
)	
Defendant.)	

MEMORANDUM ORDER

(Failure to Join the Secretary of the Treasury as an Indispensible Party)

In her Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment, the Secretary, at this late stage, asserts that the Commonwealth’s failure to join the Secretary of the Treasury as an indispensable party entitles her to judgment.¹ Relying principally on Federal Rules of Civil Procedure 19(a) and (b), she contends that in the absence of the Secretary of the Treasury, the Court cannot award complete relief because he is the official responsible for administering the Internal Revenue Code. Therefore, in her view, an adverse ruling would necessarily affect the Secretary of the Treasury’s administration of the Minimum Essential Coverage Provision.

Both parties have fully addressed this issue in their memoranda and oral argument is unnecessary because it will not aid in the decisional process. Federal Rule of Civil Procedure

¹ The Secretary of the Treasury is clearly not an indispensable party as contemplated under Federal Rule of Civil Procedure 19(b). The Secretary of the Treasury is subject to process from this Court and his presence would not destroy this Court’s jurisdiction. The Court will therefore consider the Secretary of the Treasury as a putative necessary party.

19(a)(1)(A) reads collectively, in pertinent part, that “[a] person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (A) in that person’s absence, the court cannot accord complete relief among existing parties” The Secretary maintains that the failure to include the Secretary of the Treasury as a necessary party “does not place the proper government party or official on notice of the suit.” *Gardner v. Gartman*, 880 F.2d 797, 799 (4th Cir. 1989). The Secretary adds that even if the Commonwealth chose to amend its Complaint at this late stage of the proceedings, it could not satisfy the good cause requirement to do so under Federal Rule of Civil Procedure 16(b). Moreover, she points out that an attempt to add an additional party at this point would violate the scheduling order in this case.

The Commonwealth counters that not only is the motion to dismiss untimely,² but the Secretary of the Treasury is not a necessary party to a lawsuit filed essentially against the United States government. Unlike *Gardner*, there is no statutory requirement that the Secretary of the Treasury be named as a party. *Id.* at 797. In *Gardner*, the Fourth Circuit held that the Secretary of the Navy was a necessary party in a Title VII action filed by an employee of the Department of the Navy because it was specifically required under 42 U.S.C. § 2000e–16(c). *Id.* at 799.

The legislative enactment at issue, promulgated by the United States Congress, is the law of the United States, of which both the Department of the Treasury and the Department of Health and Human Services are components. Both cabinet secretaries are represented by the Attorney General of the United States, who is counsel of record in this case. If the Secretary of the Treasury were joined and served separately with the Complaint, it would provide the United States government with no further notice than previously received in this case.


² The Commonwealth asserts that the Secretary has waived her objection to the failure to name the Secretary of the Treasury as a necessary party. Although the Court appreciates the Commonwealth’s concern, the Court need not reach the issue.

As the United States Supreme Court noted in *Karcher v. May*, “[w]e have repeatedly recognized that the real party in interest in an official-capacity suit is the entity represented and not the individual officeholder.” 484 U.S. 72, 78, 108 S. Ct. 388, 393 (1987) (citations omitted). The critical concern is whether the government entity that is the real party in interest in an official capacity lawsuit “receives notice and an opportunity to respond.” *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S. Ct. 3099, 3105 (1985).

In this case, the Court is not persuaded that the Secretary of the Treasury is a necessary party. The real party in interest, the United States government through its Attorney General, has received notice of this lawsuit and an opportunity to respond. That is all the law requires. Therefore, Defendant’s request for judgment for failure to join the Secretary of the Treasury is DENIED.

The Clerk is directed to send a copy of the Memorandum Order to all counsel of record.

It is so ORDERED.

 /s/

Henry E. Hudson
United States District Judge

Date: Oct 13 2010
Richmond, VA