

Docket # X07 CV03 – 0083299 S (CLD)
STATE OF CONNECTICUT : SUPERIOR COURT
 :
v. : COMPLEX LITIGATION DOCKET
 : AT TOLLAND
 :
AVENTIS PHARMACEUTICALS, INC. : MARCH 11, 2005

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO MOTION TO COMPEL RE:
AVENTIS’ SECOND SET OF WRITTEN DISCOVERY REQUESTS**

I. INTRODUCTION

The State of Connecticut (“State”) has brought this sovereign enforcement action against Aventis Pharmaceuticals Inc. (“Aventis”) pursuant to the State’s police powers under Conn. Gen. Stat. §§42-110m and 42-110o of the Connecticut Unfair Trade Practices Act (“CUTPA”). This sovereign enforcement action was properly and duly authorized by the Commissioner of Consumer Protection, as required by Conn. Gen. Stat. §§42-110m(a). In response to Aventis’ first set of written discovery requests, the State has produced its factual basis for this litigation, including the State’s understanding of average wholesale prices. Aventis’s second set of written discovery requests solely seek to discover (and ultimately challenge) the Commissioner’s enforcement discretion when he authorized this CUTPA lawsuit. Because the Commissioner’s enforcement discretion is not subject to review, Aventis is not entitled to discovery regarding what the Commissioner did or did not consider when he authorized this suit. Moreover, discovery as to what evidence were before the Commissioner is not reasonably calculated to lead to the discovery of admissible evidence. Aventis’ motion to compel should be denied.

A. Aventis' Second Set of Written Discovery Requests

The State provided the Commissioner's CUTPA authorization letter to Aventis on October 8, 2004. On October 28, 2004, Aventis served the State with a second round of written discovery requests consisting of a second set of interrogatories, second request for production and second set of requests for admission. The objective of the entire second set of discovery was to examine the Commissioner of Consumer Protection's authorization for this lawsuit.

Through responses dated November 24, 2004, the State objected to all four of the second set of interrogatories as well as the second request for production, copies of which are attached at Exhibits 1 and 2. On the same date, the State responded to the second requests for admission by objecting to all four requests but, without waiving its objections, answering Requests Nos. 3 and 4, a copy of which is attached as Exhibit 3. By supplemental response dated December 21, 2004, the State answered Interrogatory No. 4 and supplemented its response to the request for production, attached as Exhibits 4 and 5 hereto. The State continued to object to Interrogatories Nos. 1, 2 and 3 of the Second Set of Interrogatories, to Request for Production No. 1 of the Second Request for Production, and to Requests for Admission Nos. 1 and 2 of the Second Requests for Admission.

II. STANDARD OF REVIEW.

Although the granting or denial of discovery requests is within the sound discretion of the court, *Blumenthal v. Kimber Manufacturing, Inc.*, 265 Conn. 1, 7 (2003), states that discretion is not without limitation. The provisions of Conn. Prac. Bk. §13-2 govern the permissible scope of discovery and allows for the disclosure of information

- if it is “material to the subject matter involved in the pending action”;
- “if the disclosure sought would be of assistance in the prosecution or defense of the action”;
- “if the information sought appears reasonably calculated to lead to the discovery of admissible evidence”.

Conn. Prac. Bk. §13-2.

However liberally the rules of discovery may be construed, they should not be used in bad faith, to annoy, embarrass or oppress or to search for the irrelevant. *Lamar v. St. Mary’s Hospital Corp.*, 31 Conn. Supp. 335, 336 (Conn. Super. 1974), *citing Hickman v. Taylor*, 329 U.S. 495, 507-508, 67 S.Ct. 385 (1947). Discovery is not to be used as a “club” but rather “to facilitate the orderly preparation of trial”. *Welch v. Welch*, 48 Conn. Supp. 19, 26 (Conn. Super. 2003).

III. ARGUMENT

The sole focus of Aventis’ second round of discovery requests is the decision by then Commissioner of Consumer Protection James T. Fleming to authorize the filing of this litigation. Whereas the State has produced to Aventis the factual information underlying its litigation against it, Aventis seeks to have the State specifically identify exactly which pieces were before the Commissioner when he authorized the suit. Moreover, Aventis seeks production of three memoranda from the Office of the Attorney General to the Commissioner of Consumer Protection regarding the AWP litigation, for which the State claims attorney-client and work-product privileges. Aventis has revealed to the State that it seeks the information in order to challenge the exercise of the Commissioner’s discretion in authorizing this suit.

The requests by Aventis are not within the scope of permissible discovery, nor are they reasonably calculated to lead to the discovery of admissible evidence. As a fundamental matter, the decision by the Commissioner to exercise his charging discretion to authorize an action under CUTPA is not material to this case, and his decision to charge is not an appropriate subject for scrutiny in a judicial proceeding. Further, a decision to charge is also protected under the deliberative process privilege. Finally, the attorney work-product doctrine and attorney-client privilege clearly protect communications between the Attorney General and the Commissioner.

A. The Decision by the Commissioner to Exercise his Charging Discretion to Authorize an Action under CUTPA is Not Subject to Judicial Scrutiny.

The charging discretion to bring a sovereign enforcement action rests within the sound discretion of the Commissioner of Consumer Protection. Conn. Gen. Stat. §42-110m(a) provides in pertinent part:

Whenever the commissioner has reason to believe that any person has been engaged or is engaged in an alleged violation of any provision of this chapter said commissioner may . . . request the Attorney General to apply in the name of the state of Connecticut to the Superior Court for an order temporarily or permanently restraining and enjoining the continuance of such act or acts or for an order directing restitution and the appointment or a receiver in appropriate instances, or both.

(emphasis added). As with any civil enforcement action, and similar to criminal enforcement actions, the Commissioner of Consumer Protection has absolute enforcement discretion, and his basis for having a “reason to believe” is not subject to judicial scrutiny. Therefore, none of Aventis’ second set of written discovery requests are reasonably calculated to lead to the discovery of admissible evidence.

In an analogous situation, the Secretary of Labor had brought an action under the Labor-Management Reporting and Disclosure Act with respect to a union election. *Wirtz v. Local 30, International Union of Operating Engineers*, 34 F.R.D. 13 (S.D.N.Y. 1963) (copy attached). Under the Act, the Secretary could commence an action if he found “probable cause,” and the union sought discovery into his “probable cause” decision. 34 F.R.D. at 14. The Court’s analysis is instructive:

Like indictment by a Grand Jury, the Secretary is the initiator or instigator of an action against a labor organization under 29 U.S.C. § 482(b) but as such his action establishes nothing as to the merits of the action. As in other statutes, an action is commenced if the Secretary “finds probable cause”. His determination as to this is conclusive; defendant cannot question in this Court either his investigation or his determination of probable cause.

Wirtz, supra, 34 F.R.D. at 14, citing *Ewing v. Mytinger & Casselberry*, 339 U.S. 594 (1950); *Madden v. International Hod Carriers Union*, 277 F.2d 688 (7th Cir. 1960) (“scope, conduct or extent of the preliminary investigation” not to be inquired into by the Court), cert. denied, 364 U.S. 863 (1960). For civil enforcement matters, the authorized administrative agency head’s charging determination is “conclusive and neither his investigation nor his determination of probable cause is subject to challenge.” *Donovan v. Dallas Area Local*, 110 L.R.R.M. 2510 (D.N.Tx. 1981) (copy attached); *Wirtz*, supra. The adequacy of the preliminary investigation is judicially tested only by the agency’s subsequent ability to prevail in the litigation authorized. *Madden*, supra, 277 F.2d at 693.

The decision by the Commissioner to commence a civil enforcement action also is analogous in many ways to prosecutorial charging decisions in the criminal context. Prosecutors

have broad discretion “in determining when, who, why and whether to prosecute” for violations of the law. *State v. Angel*, 245 Conn. 93, 119 (1998); *State v. Kinchen*, 243 Conn. 690, 699 (1998). The courts give great deference to the exercise of this discretion by prosecutors and have long recognized that “undue judicial interference in the exercise of their discretion is to be eschewed.” *State v. Angel*, supra, 245 Conn. 119.

The basis for this deference is twofold. First, the courts have recognized that the doctrine of separation of powers requires a judicial respect for, and a concern not to unnecessarily impair, the discretionary decisions of executive branch officials. *Massameno v. Statewide Grievance Committee*, 234 Conn. 539, 574 (1995); *State v. Kinchen*, supra, 243 Conn. 699, 700. Secondly, such discretionary decisions are not of such a nature as to readily lend themselves to judicial scrutiny.

We have recognized that "the basis of prosecutorial charging decisions is one area not generally well suited for broad judicial oversight because it involves exercises of judgment and discretion that are often difficult to articulate in a manner suitable for judicial evaluation. . . . The judicial branch . . . [is] not in the best position to consider the various factors that prosecutors weigh, such as the strength of the evidence, the visibility of the crime, the availability of resources and possible deterrent effects. Nor is the judicial branch anxious to consider the validity of various rationales advanced for particular charging decisions.

State v. Angel, supra, 245 Conn. 119, quoting *Massameno v. Statewide Grievance Committee*, supra, 234 Conn. 575. In addition, such judicial examination of prosecutorial charging decisions threatens to delay the enforcement proceeding, chill law enforcement by subjecting the prosecutor’s motives and decision making to outside inquiry and may undermine prosecutorial effectiveness by revealing enforcement policy. *State v. Kinchen*, supra, 243 Conn. 699, 700.

In the instant case, the Commissioner of Consumer Protection does not even need to reach the level of “probable cause” – he simply needs “reason to believe.” Like the charging decisions of the Secretary of Labor, or a criminal prosecutor, that determination and the preliminary investigation supporting it are not subject to either judicial scrutiny or discovery.

In attempting to justify its requests, Aventis cites to the importance of the knowledge and understanding of the “particular state departments responsible for pharmaceutical reimbursement, such as the Connecticut Department of Social Services” and the officials “charged with the daily administration of the Medicaid and Medicare programs”. Memorandum of Law in Support of Aventis Pharmaceutical Inc.’s Motion to Compel Answers to Second Set of Interrogatories pp. 9, 10. However, the second set of requests is not directed at any of those departments or officials. The second discovery requests are directed exclusively at the former Commissioner of Consumer Protection.

The Commissioner of Consumer Protection and the Department of Consumer Protection are not involved in the daily administration of Medicaid, Medicare or of any of the pharmaceutical reimbursement programs. The Department of Social Services and the Department of Consumer Protection are separate and distinct agencies with no direct connection in the exercise of their daily functions. A review of Aventis’ requests exposes Aventis’ thinly veiled effort to blur the roles of the two agencies and to treat those separate state agencies as one monolithic entity in order to gain access to information surrounding the decision-making process of the Commissioner of Consumer Protection. Aventis’ second discovery requests seek information relating solely to the information which formed the basis of the Commissioner of

Consumer Protection's decision of March 10, 2003 to authorize the current litigation. Clearly, none of the requests relate to Medicare, Medicaid or any other pharmaceutical reimbursement program which is the subject of this litigation or to any departments or officials involved in the operation or administration of those programs.¹ Therefore, they are not material to the subject matter of this litigation nor are they reasonably calculated to lead to the discovery of admissible evidence.

Aventis also heavily relies upon *State v. Leary*, 217 Conn. 404 (1991), in support of its argument that the information Aventis seeks is material. This reliance is misplaced. In *Leary*, the trial court had already determined that the defendants had violated the Connecticut Unfair Trade Practices Act (CUTPA) in the selling of tickets to various entertainment events. In their appeal challenging the trial court's adverse ruling, the defendant alleged that the action was commenced against them was improper, and thus the action was invalid, because the action was initiated by the Commissioner at the suggestion of the Attorney General rather than as a result of consumer complaints, and because purportedly the Commissioner did not have sufficient "reason to believe" a violation had taken place when the action was initiated. *Leary*, 217 Conn. at 414. The Court flatly rejected the proposition that the Commissioner could not initiate an action at the suggestion of the Attorney General. *Leary*, 217 Conn. at 415. Moreover, the issue of the sufficiency of the investigation was raised and resolved before the trial court, and the supreme

¹ Aventis' first set of discovery requests did address these programs and the State has provided Aventis with all relevant material sought which is related to the operation of these programs and to the current litigation.

court affirmed the trial court's determination. *Id.* The issue of whether the inquiry was proper in the first place was not presented, or ruled upon by either of the courts in *Leary*.

In its memorandum in support of its motion to compel, Aventis expresses its "belief" that the instant lawsuit was prompted by the Office of the Attorney General rather than the Department of Consumer Protection or the Department of Social Services. See Aventis Memorandum at 4, 8-9. Even if true, under the holding of *Leary*, the issue is simply not relevant, because the *Leary* Court expressly upheld the Commissioner's authorization for the bringing of the suit where it was based on a referral from the Attorney General's Office rather than an actual consumer complaint. *Id.* 414.² The holding in *Leary* also reflects the reality of the ongoing relationship between the Department of Consumer Protection and the Attorney General in enforcing CUTPA.

Under Conn. Gen. Stat. §42-110m(a), the Commissioner of Consumer Protection's determination that there was "reason to believe" that a CUTPA violation occurred when he authorizes a CUTPA lawsuit is "conclusive", and neither his determination nor the preliminary investigation is subject to judicial scrutiny. Rather, the sufficiency of the allegations are tested by the crucible of civil litigation. More important, as established by *Leary*, an attack upon the sufficiency of the preliminary investigation is a red herring, for it does not provide a "silver bullet" to invalidate the initiation of the suit, nor affect the jurisdiction of the Court.

² Nor has Aventis asserted any standing or subject matter jurisdiction argument in this case. This, suggestion, of course, is a complete red herring as the principle requisites for a sovereign CUTPA action under Conn. Gen. Stat. §§42-110m, 42-110o are a request by the Commissioner of Consumer Protection and action by the Attorney General. That is exactly what happened here.

B. The Information Sought Also is Protected by the “Deliberative Process” Privilege.

Connecticut courts have long recognized a deliberative process privilege which precludes just the type of probing of the “mental processes” of agency decision-makers that Aventis is seeking here. *See, e.g., Stewart J. Leonard v. State of Connecticut Department of Consumer Protection*, 1994 Conn. Super. LEXIS 2665, at *4 (Conn. Super. Ct. Oct. 27, 1994) (copy attached) (granting the Commissioner of Consumer Protection’s motion for a protective order barring the Commissioner’s deposition in an administrative appeal because plaintiffs were “merely attempting to probe the mental decision-making process of the Commissioner.”); *Welch v. Zoning Board of Appeals*, 158 Conn. 208 (1969); *Adriani v. Commission on Human Rights and Opportunities*, 228 Conn. 545, 548 (1994); *Zinker v. Doty*, 637 F. Supp. 138, 140 (D. Conn. 1986); *see also United States v. Morgan*, 313 U.S. 409, 61 S.Ct. 999 (1941); *United States v. Hooker Chemicals & Plastics*, 123 F.R.D. 3 (W.D.N.Y. 1988).

For example, *United States v. Morgan*, 313 U.S. 409, is a case in which the U.S. Secretary of Agriculture had been required to provide testimony regarding the basis for his decision in a rate setting matter, including “the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates.” The Supreme Court made it unequivocally clear that such questioning of the Secretary should never have occurred. The Court ruled that the probing of the mental processes of the Secretary was just as destructive to the administrative decision making process as it would be to the judicial process if judges were subjected to the same scrutiny. *Id.* 422. In looking at the exercise of enforcement discretion the U.S. Supreme Court has also pointed out that “the

decision to prosecute is particularly ill suited to judicial review.” *Wayte v. United States*, 470 U.S. 598, 607–08, 105 S. Ct. 1524, 1530-31 (1985).

The Connecticut Supreme Court has adopted and followed the reasoning of the *Morgan* decision in *Welch v. Zoning Board of Appeals*, *supra*, 158 Conn. 208. In ruling that the administrative board members could not be subjected to extra record probing of the basis for their decision the Court held that the integrity of the administrative decision making process must be protected to the same extent as that of the judicial process, *citing Morgan. Id.* 158 Conn. at 215. The general rule is that an administrative decision maker may not be subjected to inquiry concerning the mental processes used in reaching a decision. *See Adriani v. Commission on Human Rights and Opportunities*, 228 Conn. 548; *Martone v. Lensink*, 215 Conn. 49, 54 (1990); *Henderson v. Dept. of Motor Vehicles*, 202 Conn. 453, 459 (1987); *Breiner v. State Dental Commission*, 57 Conn. App. 700 (2000).

An analogous privilege has evolved under federal law which protects the pre-decisional deliberative thought processes of members of the executive branch of government. “The deliberative process privilege, or executive privilege, ‘protects the decision making processes of the executive branch in order to safeguard the quality and integrity of governmental decisions.’” *See Marisol A. v. Giuliani*, 1998 U.S. Dist. LEXIS 3719, at *17 (S.D.N.Y. March 23, 1998) (copy attached) (*quoting Hopkins v. H.U.D.*, 929 F.2d 81, 84 (2d Cir. 1991); *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975); *Local 3, Int’l Brotherhood of Electrical Workers, AFL-CIO v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988); *New York City Managerial Employee Ass’n v. Dinkins*, 807 F. Supp. 955, 956 (S.D.N.Y. 1992); *Carl Zeiss Stiftung v. V.E.B.*

Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

“In addition to communications with others, the executive privilege extends to the mental processes by which an executive reaches a decision.” *Giuliani*, 1998 U.S. Dist. LEXIS, at *19. As the court noted in *Giuliani*, the United States Supreme Court has clearly stated that the mental processes of executives should not be probed. *Id.* (citing *Morgan*, 313 U.S. 409, 422 (1941)) (holding that “the integrity of the administrative process must be [] respected,” and therefore discouraging the practice of calling high level officials as witnesses); *Morgan v. United States*, 304 U.S. 1, 18 (1938) (recognizing that it is “not the function of the court to probe the mental processes of the Secretary [of Agriculture] in reaching his conclusions”); *Carl Zeiss Stiftung*, 40 F.R.D. at 325-26). “Top executive [] officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions.” *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985).

While the federal deliberative privilege is not absolute, it is only overridden in certain limited circumstances and after careful consideration and application of several factors. This is best illustrated in *Zinker v. Doty*, 637 F. Supp. 138. *Zinker* is an employment discrimination case in which the plaintiff sought the handwritten notes of the Department of Administrative Services hearing officer from a prior administrative hearing regarding her discharge from State employment. The Court ruled that the material sought was deliberative in nature and further held that it should not be disclosed as it was protected by the privilege. In upholding the privilege the Court found, among other factors, that the factual information sought was not relevant to the

plaintiff's procedural claims, not relevant to the substantive claims in the pending case and was not demonstrated to be otherwise unavailable from another source. *See Greater Newbury Clamshell Alliance v. Public Service Co. of New Hampshire*, 838 F.2d 12, 20 (1st Cir. 1988) (presumption in favor of the privilege can only be overcome upon defendant's showing that important evidence related to its claims and defenses will be unavailable if the privilege prevails).

In this case, all factual information sought by Aventis is available from sources other than the Commissioner of Consumer Protection. In fact, the State maintains that all factual information relevant to the operation of the pharmaceutical reimbursement programs and relevant to Aventis' practices and CUTPA violations which would be disclosed in response to the pending discovery requests has already been disclosed through the State's responses to the Aventis' first round of discovery. Thus, the pending requests would not yield new factual data but would only serve the purpose of identifying which of the previously disclosed factual information was used in the deliberative process as well as disclosing the manner in which the decision to litigate was reached. Just as in *Zinker*, none of the information sought relating to the deliberative process of the Commissioner of Consumer Protection is relevant to the substantive claims in the pending litigation (as discussed previously in this memorandum) and its disclosure should not be required.

Connecticut courts have only allowed the administrative decision maker to be subject to any inquiry where the decision-making process itself is the subject of the litigation and a showing has been made that prejudicial procedural irregularities have occurred that would

impact the outcome of the underlying decision. Even then, the inquiry of the public official has been limited to observable and relevant facts, without probing the actual mental processes of the decision maker. *Adriani*, 228 Conn. 548 (administrative decision of CHRO was the subject of appeal, procedural irregularities alleged, limited factual inquiry of investigator allowed); *Martone*, 215 Conn. 49 (appeal from decision of Commissioner of Mental Retardation where documents had been submitted to decision maker *ex parte*, limited factual inquiry permitted); *Henderson*, 202 Conn. 453 (administrative appeal, admittedly *ex parte* communications occurred between hearing officer and witness); *Breiner v. State Dental Commission*, 57 Conn. App. 700 (action to enjoin administrative proceeding due to futility based on undue bias of two commissioners).

No such exception exists here. The subject matter of the case before the court involves Aventis' manipulation of its reported AWP and thereby, the reimbursement paid to health care providers by Medicare and Medicaid, in violation of CUTPA. The Commissioner's exercise of discretion in deciding to authorize this action is not the subject of this litigation and, as discussed in the previous section, is not relevant to any determination of the merits of the case. Aventis has not, for instance, asserted that the Commissioner made an administrative ruling that was biased or prejudiced. As a result, no exception to the executive deliberative privilege applies and Aventis is barred from probing the Commissioners' pre-decisional mental processes.

C. Information Sought in Defendant’s Second Requests for Discovery is Protected by the Attorney Work-Product and the Attorney-Client Privileges.

The four interrogatories in Aventis’ Second Set of Interrogatories request information relating to any examination, report or other inquiry which formed a basis for the Commissioner of Consumer Protection’s decision to authorize this litigation, any other facts which were presented to the Commissioner when he made his decision and more specifically, any documents relating to this action prepared for the Commissioner by the Office of the Attorney General prior to the decision.³ The Second Request for Production requests all documents identified in response to the Interrogatories. In addition Second Request for Admissions No. 2 requests that the State admit that the Commissioner’s authorization to litigate this action was “initiated” by the Office of the Attorney General. Since these requests call for information that was prepared by attorneys in the Office of the Attorney General and communicated to their client, the Commissioner of Consumer Protection, it is protected from disclosure by the attorney work-product and attorney-client privileges.

1. Attorney work-product privilege.

Attorney work-product has been defined as “the result of an attorney’s activities when those activities have been conducted with a view to pending or anticipated litigation.” *Stanley Works v. New Britain Redevelopment Agency*, 155 Conn. 86, 95 (1967). It protects an attorney’s

³ In response to Interrogatory No. 4, and reserving its objections, the State identified three memoranda prepared by assistant attorneys general to the Commissioner of Consumer Protection. The State objects to the actual production of these documents as requested in the Defendant’s Second Request for Production on the basis of attorney-client and work-product privileges.

“interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs and countless other tangible and intangible items.” *Barksdale v. Harris*, 30 Conn. App. 754, 760, cert. denied, 225 Conn. 927 (1993); *Hickman v. Taylor*, 329 U.S. 495, 511, 67 S.Ct. 385 (1947).

Practice Book §13-3 provides that such work product may only be obtained upon a showing by the requesting party that it has substantial need of the material in the preparation of its case and that it is unable to obtain the equivalent material by other means without undue hardship. Aventis has not attempted to make such a showing. In fact, since all factual information relevant to the allegations in this case have been provided in response to Aventis’ first discovery requests, and the information would be otherwise available to Aventis without undue hardship, Aventis could not make a sufficient showing to justify the disclosure of work product materials. Lastly, even if such a showing were made Conn. Prac. Bk. §13-3 absolutely protects from disclosure the “mental impressions, conclusions, opinions or legal theories of an attorney.” The State maintains that the information requested is inextricably intertwined with such protected material and could not be disclosed without disclosure of this absolutely protected material. Therefore, if it is deemed to be attorney work-product it is absolutely protected from disclosure.

Aventis has attempted to sidestep this protection by arguing that the materials in question were not prepared in anticipation of litigation. Aventis argues that since the Attorney General can only file a CUTPA action under Conn. Gen. Stat. §42-110m at the request of the Commissioner of Consumer Protection, the Attorney General does not have the authority to

anticipate litigation until the receipt of the authorization from the Commissioner. It considers any materials submitted to the Commissioner prior to the authorization to be merely a solicitation for legal action.

Aventis' argument that the Attorney General cannot anticipate litigation prior to a formal authorization from the agency to file suit is without any legal support and would lead to absurd results. The courts have imposed no such formal requirement on the application of the work product doctrine. The work need only be performed by an attorney "*with a view* to pending or anticipated litigation." *Stanley Works*, 155 Conn. 95. This is a far cry from the Defendant's proposed interpretation which would apply to work performed by an attorney only after a formal authorization to file an action. Aside from imposing a new requirement on the application of this doctrine, never before mentioned by the courts, this approach makes no logical sense. Once the Attorney General receives the authorization to commence a legal action, he no longer has to anticipate the action but merely files it in court where it becomes a pending action. Thus, according to Aventis, that portion of the doctrine relating to work done with a view to anticipated litigation would have little or no application to the Office of the Attorney General.

The role of the Attorney General is not so limited as the Defendant claims. The authority and responsibilities of the Attorney General are set forth in Conn. Gen. Stat. §3-125. The Attorney General is given general supervision over all civil legal matters involving the State, its agencies, public officials and employees acting in their official capacities. The statute mandates that "[a]ll legal services required by such officers and boards in matters relating to their official duties shall be performed by the Attorney General or under his direction." Clearly, advising a

client agency of the existence of violations of law within the subject area of its enforcement authority, discussing appropriate legal theories for enforcement, and recommending a course of legal action are well within the scope of the legal services which the Attorney General is not only authorized but required to provide.⁴ This is especially true here where the law itself creates an ongoing attorney-client relationship between the Attorney General and the Commissioner of Consumer Protection — the sole and exclusive attorney through whom the Commissioner can commence litigation is the Attorney General.

Aventis' contention that the authority of the Attorney General does not encompass the authority to anticipate litigation is simply without merit. It certainly cannot be argued that as the chief civil law enforcement officer for the State, the Attorney General does not have the authority and even the duty to report violations of law to the appropriate enforcement agencies of the State which he represents. Since there is a legal presumption that public officials act properly in the fulfillment of their duties⁵, it is entirely reasonable to expect that upon receipt of information concerning such violations of law the agency will initiate legal action. Indeed, it could be argued that under these circumstances the provision of competent legal services mandates that an attorney anticipate litigation, counsel his client accordingly and prepare for such litigation on behalf of the client agency. To suggest that attorneys for the State must delay

⁴ The memoranda identified in the State's response to Second Request for Interrogatories No. 4 contain precisely this type of information.

⁵ *Imbrugno v. Stamford Hosp.*, 28 Conn. App. 113, 123 (1992) (“ a public official is presumed to have performed his duty properly unless the contrary appears”); *Cahill v. Board of Education*, 198 Conn. 229, 242, 502 A.2d 410 (1985).

preparation for anticipated litigation, as Aventis contends, until the moment they are formally authorized by the client agency to file suit is to suggest that the State, its agencies and officials and the public interest they represent, are not entitled to the same level and quality of legal services as any private individual in our civil justice system. This argument lacks any merit.

2. Attorney-client privilege.

The attorney-client privilege was created “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observation of law and administration of justice.” *Metropolitan Life Ins. Co. v. Aetna Casualty and Surety Co.*, 249 Conn. 36, 52 (1999), citing *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677 (1981).

In Connecticut, the attorney-client privilege protects both the confidential giving of professional advice by an attorney acting in the capacity of a legal advisor to those who can act on it, as well as the giving of information to the lawyer to enable counsel to give sound and informed advice.

Metropolitan Life Ins. Co., supra, *Olson v. Accessory Controls and Equipment Corp.*, 254 Conn. 145, 157 (2000).

Aventis’ requests for information which formed the basis of the decision of the Commissioner of Consumer Protection to authorize this litigation specifically include material prepared for the Commissioner by the Office of the Attorney General. The State has identified three such memoranda in its response to Second Set of Interrogatories No. 4. The State’s position is that the information sought, and particularly these memoranda, was prepared specifically to advise the Commissioner of the existence of violations of law within his regulatory authority, to

provide analysis and legal theories for enforcement and to advise and recommend a course of enforcement action. The communication of factual information within this context is inextricably linked to the legal advice provided. While the communication of factual information from an attorney to a client ordinarily would not be covered by the attorney-client privilege, it would be protected if it were inextricably linked to the giving of legal advice. *Ullman v. State*, 230 Conn. 698, 713 (1994).

Confidential communications between government attorneys and public officials are expressly protected by Conn. Gen. Stat. §52-146r. Under these provisions such communications may not be disclosed unless an authorized representative of the public agency consents. Conn. Gen. Stat. §52-146r(b).

In addition, case law discusses the attorney-client privilege in the public agency context. Communications between a client and a public agency are protected by the attorney-client privilege if

- (1) the attorney is acting in a professional capacity for the agency,
- (2) the communications are made between the attorney and a current member of the public agency,
- (3) the communications relate to legal advice sought by the agency from the attorney and
- (4) the communications are made in confidence.

McLaughlin v. Freedom of Information Commission, 83 Conn. App. 190, 197 (2004), *citing Shew v. Freedom of Information Commission*, 245 Conn. 149, 159 (1998). The communications from the Office of the Attorney General to the Commissioner satisfy these criteria.

First, all of the subject communications were made by assistant attorneys general acting in their official capacities to the individuals who were officials or employees of the Department

of Consumer Protection at the time of the communications. The communications also were made with the expectation of both parties that they be kept in confidence. Aventis appears to be challenging only the third factor. While not disputing that the communications contain legal advice, Aventis contends that the privilege only applies to legal advice from counsel if the client agency formally requested the legal advice first.

Nearly all of the cases relied upon for this proposition involve the application of the privilege to communications from the client to the attorney. Clearly it is intended that the attorney-client privilege only apply if the communication from the client relates directly to the seeking of legal advice from the attorney. The purpose of this requirement, however, is to exclude client communications from the protection of the privilege which are unrelated to the process of obtaining legal advice. *Shew*, 245 Conn. 157 (attorney-client privilege protects only those disclosures that are necessary to obtain informed legal advice). Nothing in the cited cases demonstrates an intent to exclude actual legal advice from the protection of the privilege. To the contrary, the attorney-client privilege was created to protect communications between an attorney and client for the purpose of giving, as well as seeking, legal advice. *Metropolitan Life Ins. Co.*, 249 Conn. 52; *Olson*, 254 Conn. 157; *Ullman*, 230 Conn. 711.

Aventis also raises the novel argument that the attorney-client privilege should not apply to the communication of legal advice in this case because the Attorney General is without authority to provide legal advice to State agencies and officials unless they formally request it. In support of this contention the Defendant cites to that portion of Conn. Gen. Stat. §3-125 which states that the Attorney General “shall advise or give his opinion to the head of any executive

department or any state board or commission upon any question of law submitted to him.” The State sees this provision as a mandate which imposes responsibilities on the Attorney General, as evidenced by its mandatory language, rather than a limitation.

As noted previously, pursuant to Conn. Gen. Stat. §3-125 the Attorney General is given general supervision over all civil legal matters involving the State, its agencies, public officials and employees acting in their official capacities. The statute mandates that “[a]ll legal services required by such officers and boards in matters relating to their official duties shall be performed by the Attorney General or under his direction.” Apparently Aventis takes the view that providing legal advice and counsel are not within the scope of the “legal services” which the Attorney General is required by statute to provide. Such a view fails to take into account the unique nature of the attorney-client relationship between the Attorney General and State agencies and officials, which is created by statute to be ongoing and continuous.

In Aventis’ view the Attorney General, upon learning of changes in the law resulting from new legislation or court decisions, would have no authority to provide client agencies with confidential legal advice on compliance issues or on new strategies for enforcement action that would have to be pursued. According to Aventis, the Attorney General would have to wait until an agency realizes that it needs legal advice, perhaps through misapplying or violating the law, potentially suffering adverse legal consequences or imposing such consequences on the public, and then formally requests assistance from the Attorney General before he could render confidential legal advice. It is unimaginable that either the language or the public policy embodied in Conn. Gen. Stat. §3-125 would support such a bizarre result.

Aventis tries to compare the relationship between the Attorney General and the Department of Consumer Protection to that of a private party seeking to retain an attorney in order to commence litigation. Such a view utterly fails to take into account (1) that Conn. Gen. Stat. §3-125 itself creates an attorney-client relationship and specifies that the Attorney General is the exclusive attorney through whom the Department of Consumer Protection may initiate litigation; and (2) that Conn. Gen. Stat. §3-125 goes well beyond litigation and also provides that *all* legal services for state officials such as the Commissioner of Consumer Protection be provided by the Attorney General or under the Attorney General's direction.

In other words, there is an ongoing attorney-client relationship between the Attorney General and the Department of Consumer Protection, which attorney-client relationship significantly predated the instant litigation. Confidential attorney-client communications between the Attorney General and the Department of Consumer Protection are protected, as noted above. It is highly improper for Aventis to be seeking such privileged information.

IV. CONCLUSION

In response to Aventis' first set of written discovery requests, the State produced the factual basis supporting its claims, and Aventis will be deposing the state officials and employees with knowledge regarding Medicaid and Medicare reimbursement. However, Aventis is not entitled to any discovery into the Commissioner of Consumer Protection's "reasonable belief" when he authorized this litigation. The Commissioner's determination is conclusive, and not subject to judicial review. Aventis is not entitled to explore the Commissioner of Consumer Protection's deliberations resulting in the authorization of this

litigation. Aventis is not entitled to attorney-client communications and attorney work-product memoranda between the Office of the Attorney General and the Commissioner of Consumer Protection. Aventis' Motion to Compel should be denied.

STATE OF CONNECTICUT

**RICHARD BLUMENTHAL
ATTORNEY GENERAL**

BY: _____

Clare E. Kindall
Assistant Attorney General
(*Juris #415004*)
Garry Desjardins
Assistant Attorney General
(*Juris #085113*)
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
Tel: (860)808-5020/ Fax: (860)808-5347
e-mail: clare.kindall@po.state.ct.us
garry.desjardins@po.state.ct.us

Attachments: Cases:

Donovan v. Dallas Area Local, 110 L.R.R.M. 2510 (D. N.Tx. 1981)

Marisol A. v. Giuliani, 1998 U.S. Dist. LEXIS 3719 (S.D.N.Y. March 23, 1998)

Stewart J. Leonard v. State of Connecticut Department of Consumer Protection, 1994 Conn. Super. LEXIS 2665 (Conn. Super. Ct. Oct. 27, 1994)

Wirtz v. Local 30, International Union of Operating Engineers, 34 F.R.D. 13 (S.D.N.Y. 1963)

Exhibits:

- Exhibit 1: November 24, 2004, State objections & responses to Aventis' second set of interrogatories,
- Exhibit 2: November 24, 2004, State objection & responses to Aventis' second requests for production
- Exhibit 3: November 24, 2004, State objections & responses to Aventis' second set of admissions
- Exhibit 4: December 21, 2004 State supplemental response to Aventis' second set of interrogatories
- Exhibit 5: December 21, 2004 State supplemental response to Aventis' second requests for production

CERTIFICATION

I hereby certify that true and accurate copies of the foregoing Plaintiff's Memorandum in Opposition to Motion to Compel re: Aventis' Second Set of Written Discovery Requests were served by first-class mail, postage prepaid, in accordance with Conn. Prac. Bk. §10-12 on this 11th day of March, 2005, to all counsel of record, as follows:

R. Cornelius Danaher, Jr.
Frank H. Santoro
Danaher, Tedford, Lagnese & Neal
700 Capitol Place, 21 Oak Street
Hartford, CT 06106-8000

Michael J. Koon
Nicola Heskett
Shook, Hardy & Bacon, LLP
2555 Grand Boulevard
Kansas City, MO 64108-2613

Clare E. Kindall
Assistant Attorney General