



## DECISION

The existence of the temporary protective Order and the assumption that some protective Order will continue is of significance. The meaning is that both sides recognize that materials provided by defendants are worthy of protection so as to keep their revelation from harming the defendants' business interests. This is a legitimate concern for any Court ruling on discovery issues. See, Wis. Stat. § 804.01(3)(a) (7).

This need for a protective Order distinguishes this case from *Earl v. Gulf & Western Manufacturing Company*, 123 Wis. 2d 200, 366 N.W. 2d 160 (Ct. App. 1985). Yet, plaintiff relies massively on the *Earl* case: "Any analysis of defendants' attempts to preclude discovery begins (and pretty much ends) with the case of *Earl*." <sup>2</sup> However, the gist of *Earl* is that no protective Order was justified under its facts. Here, the question is the scope, not the necessity for such an Order. If *Earl* truly stands as an imprimatur for a general dissemination of materials produced in discovery, it does so for cases in which no protective Order is appropriate. This is not such a case.

Uncontroverted facts presented by defendants also undercut plaintiff's position. <sup>3</sup> Only a minority of Courts asked to permit sharing in drug pricing cases have done so. In those cases allowing it, far fewer defendants were involved, and in some of the states for which sharing is proposed, most of the defendants in this case are not parties. The universe into which these

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<sup>2</sup> Plaintiff's reply brief at p. 2. [Citation omitted.]

<sup>3</sup> See, footnote 7 in defendants' memorandum of law.

materials would flow is far from defined. Nonetheless, plaintiff volunteers to have this Court enforce any violations of the proposed Order by any of these unidentified potential recipients. To say this is not a task welcomed by this decision-maker is to put it diplomatically. Almost three decades at this job have shown me the futility and frustration of trying to apply contempt powers beyond state lines. The practicality of plaintiff's proposal is dubious, at best.<sup>4</sup> The additional work that could be created by such enforcement is daunting, and, if required, it would do NOTHING to advance this case.

Combining three dozen major pharmaceutical companies in this one lawsuit is plaintiff's prerogative, but this crowded caption inures to only plaintiff's benefit. Being part of such a big group can increase delay, add to attorneys' fees, and afford less individual attention for the defendants. Just addressing the filings, issues, and disputes of the many parties relating to the issues in this lawsuit is enough work, even if this Branch did not have hundreds of other cases. While reaping the advantages of putting so many defendants in one lawsuit, plaintiff also wants to share what it learns with other jurisdictions and have this Court monitor how that is done. Defendants' point is well taken that this dissemination is well-beyond the proper purposes of discovery. Other than creating extra work and knotty legal issues, such sharing does nothing to promote resolution of this case.

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<sup>4</sup> This section also includes consideration of defendants' example of the impact of such sharing on other Courts' discovery Orders (see, pp. 4-5 of their memorandum of law) and of the possibility of varying affect of Freedom of Information statutes.

There is a time-honored precept favoring the efficient administration of justice that guides the work of trial Courts. Expanding the Court's duties to include policing the individual actions of non-parties of unknown numbers and geographical locations is not consistent with that precept. Plaintiff's proposal has the potential for stretching the duties of this state trial Court far beyond its capabilities.

Outside counsel for plaintiff are already part of the litigation team in similar cases in Illinois and Kentucky, and they argue that this involvement makes "restrictions on information sharing between these states a practical impossibility."<sup>5</sup> Not only is this argument unique, it is also soundly countered by defendants:

... attorneys represent multiple clients all of the time and are prohibited from using information they learn about a client in one case to assist a client in a different case. Prohibiting plaintiff's counsel from sharing information it learns in the Wisconsin case with its clients in other cases is effectively no different than what attorneys must do regularly, making it far from impractical or "bizarre." Moreover, the fact that the Kentucky and Illinois attorneys general hired the same outside counsel as the State of Wisconsin in separate cases should not have any bearing on defendants' rights with respect to the confidentiality of their information. Allowing plaintiff to share information may make plaintiff's counsel's job easier, but this ease should not be at the expense of protecting defendants' confidential materials.<sup>6</sup>

If outside counsel cannot follow this Court's protective Order, consideration should be given as to whether they should remain as counsel in this case.

Clearly the rights of so many defendants to a protective Order should not

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<sup>5</sup> Plaintiff's reply memorandum, p. 1.

<sup>6</sup> Defendants' memorandum, footnote 4, p. 6.

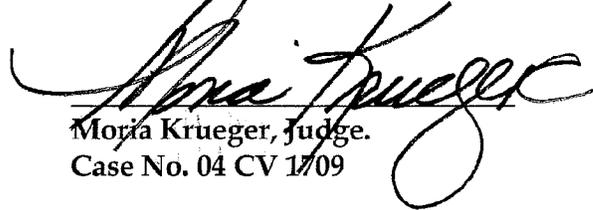
hinge on the identity of the lawyers the plaintiff selected to help it prosecute this case.

**ORDER**

1. Plaintiff's motion to be allowed to share materials produced by defendants pursuant to discovery in this case is DENIED.
2. The Temporary Qualified Protective Order entered on May 11, 2005 is now the governing Protective Order in this case.

Dated this 29<sup>th</sup> day of November 2005 at Madison, Wisconsin.

BY THE COURT:



Moria Krueger, Judge.  
Case No. 04 CV 1709

CC:

Attorney General Peggy A. Lautenschlager  
Attorney Charles Barnhill  
Attorney Beth Kushner\*  
Attorney John C. Dodds  
Attorney Scott A. Stempel  
The Honorable William F. Eich

\*Attorney Kushner is requested to share copies of this document with counsel with the rest of the defendants.