

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 9

DANE COUNTY

---

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 04 CV 1709

ABBOTT LABORATORIES, et al.

Defendants.

---

**DECISION AND ORDER DENYING PLAINTIFF'S MOTION TO AMEND  
PROTECTIVE ORDER TO ALLOW SHARING OF CONFIDENTIAL  
DISCOVERY DOCUMENTS**

---

On November 29, 2005, then-presiding Judge Moria Krueger issued a decision denying plaintiff State of Wisconsin's motion to share with various other states and governmental entities confidential discovery materials produced by defendants under protective order in this case. Some of these governmental entities were involved in pending litigation with some of the defendants here; some were only investigating the potential for litigation.

Currently before the court is plaintiff's new motion seeking much the same relief, premised upon the contention of changed circumstances.

The motion is denied.

While I agree with plaintiff that the defense argument misses the mark where it contends that a discovery order may not be revised by the court absent a showing that the order emanated from an erroneous exercise of discretion, I find plaintiff's arguments in favor of sharing outweighed by countervailing considerations.

The bottom line, at least for the court, is this. Either the defense documents at issue are justifiably classified as "confidential", or they are not. Where they are, their confidentiality deserves as much protection from the court

as possible, consistent with plaintiff's rights to full discovery accorded by the Wisconsin Rules of Civil Procedure.

There is no suggestion here that plaintiff's access to discovery materials is impeded by non-sharing, only that the discovery process and overall litigation are made more burdensome, largely due to the volume of material produced by defendants responding to plaintiff's discovery requests. In other words, plaintiffs do not contend that Chapter 804, Stats., provides insufficient tools to fully discover the case, but that it would be more convenient and efficient if similarly situated plaintiffs lawyers in other jurisdictions could work cooperatively together in threshing the universe of discovery materials produced in the separate proceedings throughout the country, including those produced here Wisconsin.

I have no doubt this is true. And I also agree that the court should foster efficiencies and convenience in litigation wherever possible, consistent with protecting the rights of *all* parties to the case. However, no matter how you cut it, no matter how many protective orders and other safeguards are put into place in other jurisdictions, once a confidential document is disseminated beyond the borders of Wisconsin, as Judge Krueger noted, this court loses the ability to adequately protect a party's' confidentiality interests in that document. This is too high a price to pay for one party's efficiency and convenience, even a party that has its hands full as much as the State of Wisconsin does here.<sup>1</sup> Equally important, this court's duties to its litigants are, I believe, non-delegable. Thus the argument that other states will protect parties to the Wisconsin litigation through enforcement of their own protective orders is, in one sense, beside the point.

It is no argument in favor of sharing that defendants are abusing the "confidentiality" designation. While the presumption under Wisconsin discovery law is against confidentiality, and thus the court has no interest in protecting a party's claim of confidentiality except where it is truly legitimate, other mechanisms exist under Chapter 804, Stats., to remedy discovery abuses, including referral to the special master and consideration of sanctions. Similarly, sharing confidential documents with other governmental entities is not the answer to claimed prejudicial discovery abuses arising from the cross-noticing of third-party depositions by defendants. In any situation where plaintiff-- or any party-- can demonstrate procedural or substantive unfairness in discovery, whether from cross-noticing of third-party deponents or otherwise, the court can and will fashion necessary and sufficient remedies from the Chapter 804 armamentarium.

---

<sup>1</sup> Judge Krueger referenced the benefit plaintiff gained from exercising its prerogative to sue three dozen major pharmaceutical companies in one lawsuit. (November 29, 2005 "Decision and Order", page 3). Certainly, the court recognizes that disadvantages to plaintiff have also ensued, as this decision denying sharing illustrates. But Judge Krueger's point remains-- plaintiff set the table.

Finally, several times plaintiff invokes the "traditional prerogative of the Attorneys General to share documents" in support of its motion. Yet no legal authority nor evidence is provided supporting this proposition, let alone demonstrating its applicability to those documents produced as "confidential" under a protective order entered in pending litigation. Accordingly, to those not steeped in the venerable tradition of Attorneys General, the argument as cast is not particularly helpful.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2007.

BY THE COURT:

---

Richard G. Niess  
Circuit Judge

CC: Attorney William M. Conley  
(for immediate service on all parties per  
usual practice in this case)