

<p>STATE OF WISCONSIN,</p> <p>PLAINTIFF</p> <p>Vs.</p> <p>AMGEN, INC., <i>ET AL</i>,</p> <p>DEFENDANTS</p>	<p><u>DECISION & REPORT</u> <u>OF DISCOVERY MASTER:</u></p> <p><u>DEFENDANT JOHNSON &</u> <u>JOHNSON'S MOTION FOR A</u> <u>PROTECTIVE ORDER</u></p> <p><u>JULY, 2006</u></p> <p>###</p> <p>CASE No. 04 CV 1709 UNCLASSIFIED-CIVIL: 3003</p>
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APPEARANCES

Attys. Donald K. Schott and Andrew D. Schau for the Defendant (oral argument by Mr. Schau).

Attys. Charles Barnhill and Elizabeth Eberle for the Plaintiff State of Wisconsin (oral argument by Mr. Barnhill).

INTRODUCTION

This is an action by the State of Wisconsin against several pharmaceutical manufacturers based on allegations that Defendants have violated Wisconsin antitrust and other laws. Specifically, the State alleges that Defendants have reported artificially inflated “average wholesale drug prices,” or “AWPs,” to pharmaceutical reporting services, while “hiding” the true prices, with the result that purchasers, such as the State of Wisconsin—whose Medicaid reimbursement formula for prescription drugs is based on those published prices¹—have suffered substantial financial loss. And the State

¹ As the trial court has noted:

[Footnote continued...]

claims that these acts violate several Wisconsin statutes dealing with price deception and similar matters. Specifically, the State says:

In sum, it is unlawful for a company to publish a price for a product—whether it is called a suggested list price, a manufacturer’s price or a wholesale price—where that price does not represent a price at which the product is actually sold.

By order of the court dated June 23, 2005, I was appointed Special Master with authority, *inter alia*, to “decide discovery disputes ... within the scope of Wis. Stat. §§ 804.01(3) and (4), and §§ 804.12(1), (2)(b), and (4).”

In these proceedings, Johnson & Johnson seeks a protective order barring the State from proceeding with noticed depositions of J & J company representatives. It characterizes the essential issue as “whether a defendant can be compelled to produce multiple witnesses on issues that are not in dispute, where the topics have already been covered in other depositions that have been provided to the State, and where the State has failed to identify any reason why the previous deposition does not fully address [its] legitimate discovery requirements.” [Motion, p. 2] J & J points out that this case— involving thirty-seven defendants—is but one of several pending around the country, the largest (and most procedurally advanced) being the multi-district class-action litigation presently pending in federal district court in Boston (the MDL litigation). Additionally, several other states have filed individual lawsuits challenging the defendants’ drug pricing in the context of state Medicare programs, and discovery is ongoing in those cases.

[I]n determining reimbursement, the State ... relies heavily on information from Defendants themselves. Among the pricing information available from Defendants are prices known as Average Wholesale Price (AWP) and Wholesale Acquisition Cost (WAC), both of which are prices disseminated by the Defendants to the public via publication in certain medical compendia.”

The State alleges that these listed prices do not represent the actual price paid by providers (and, through them, consumers), but are inflated. And it says that because the market (and the number of drugs involved) is extremely large, and, in its words, “shrouded in secrecy,” it is difficult to gather accurate pricing information.

After an the State issued a deposition notice in 2005, the parties began discussions concerning the evidence being sought by the State. During this time, J & J provided the State (at its request) with transcripts of the depositions of its employees and representatives in the MDL litigation. The parties also began negotiating a stipulation with respect to the State's discovery request and, at some point, the State presented a draft stipulation to counsel for J & J.

For some reason that cooperative venture was unfruitful and the State filed a revised deposition notice asking J & J to designate a person or persons to testify on the following topics:

[1] ... [E]vidence or information, if any, about which it is aware, which shows that any of the drugs listed on the attached sheet ("targeted drugs") were purchased by retail pharmacies at a price equal to or greater than the then current Average Wholesale Price (AWP) published by First Data Bank or the Red Book in any year from 1993 to the present.

[2] ... [E]vidence or information ... which shows, or which defendant believes may tend to show, that the published AWP was higher than the price pharmacies were actually paying for any of the targeted drugs...

[3] What contacts Johnson & Johnson, or its subsidiaries, have had with First Data Bank or the Red Book about any of the targeted drugs.

[4] Whether Johnson & Johnson, or any of its subsidiaries, ever communicated to either First Data Bank or the Red Book that the published Average Wholesale Prices of their drugs were neither a price that was actually paid by the retail classes of trade and, if so, when such communications took place and of what they consisted.²

Pursuant to discussions following issuance of the second deposition notice, J & J wrote to counsel for the State, enclosing a series of page references to the MDL depositions and exhibits it felt would provide the State with at least a substantial portion of the information it was seeking, and asking what additional information the State was interested in. [Exh. 7] Responding, counsel for the State outlined his position as follows:

² J & J has withdrawn its objection to a fifth topic relating to AWP's reported to the federal government by J & J.

Dear Andy:

In response to your letter we are seeking sworn testimony in this case (not some other case) in a form easily understood by the jury which tells the jury the following, if true:

1. That Johnson & Johnson and its subsidiaries have no evidence whatsoever that the average wholesale prices it reports to medical compendiums are in fact accurate average wholesale prices for any of its drugs. If as a corporation Johnson & Johnson has no evidence on this score it should be easy to find a corporate designee to so state. Your assurances are not adequate from an evidentiary standpoint. Nor is it useful to point to testimony in other cases from which I might glean the answer. It is unclear how useful these other depositions will be at a trial in Wisconsin and, in any event, we are entitled to present our evidence to the jury in the form we think makes the most sense, not the form the defendant likes best.

2. Item 2 asks for the converse of item 1. It seeks positive evidence that Johnson & Johnson knew that the AWP's it was reporting were actually higher than the price wholesalers were selling J & J drugs to retailers. In the depositions you sent me one witness testified to anecdotal information he possessed about the wholesale mark up. That is not a sufficient response. We want the information possessed by the corporation testified to by a corporate designee.

3. We are seeking the corporate knowledge of all J & J contacts with First Data Bank or the Red Book. Again, evidence testified to by one or more individual witnesses is inadequate because it does not purport to be the knowledge of the corporation, because it comes in another case and therefore presents evidentiary problems, and because it comes in bits and pieces making it awkward to present to the jury. I would add that no one has testified with knowledge about the AWP verifications J & J apparently sent to the Red Book and to FDB.

4. Apparently J & J never told either the Red Book or FDB that its published wholesale prices were inaccurate until FDB raised the AWP on a few of the drugs in 2003. We want J & J to so testify, and we want a corporate representative to explain in more detail, and in a deposition usable in this case, the circumstances connected with the complaint J & J finally made. [Exh. 8]

The instant motion followed.

DISCUSSION

Section 804.01(3)(a), *Stats.*, authorizes the court to make any order relating to the discovery process that justice may require in order to "protect a party from discovery that

would result in annoyance, embarrassment, oppression, or undue burden or expense;” and the court is said to have “broad” discretionary powers to regulate discovery through the issuance of protective orders. *See*, 8 Wis. Prac., Civil Discovery § 1.11. J & J points to several cases indicating that discovery may be properly curtailed where the facts are already known or within the knowledge of the requesting party. *See*, *City of Neenah v. Alsteen*, 30 Wis.2d 596, 604 (1966).

J & J argues first that the State’s request is unduly burdensome because “it calls for testimony on topics where the answers are known and undisputed.” [Motion, at 9] With respect to Topics 1 and 2, J & J says that, not only was the subject covered at length in the MDL depositions, but J & J is not disputing that it has no evidence that wholesalers charge retail pharmacies the AWP or more than the AWP—and it says it has always been willing to stipulate to that fact. In those circumstances, says J & J, the State’s demand that it “provide duplicate deposition witnesses on subjects established in prior depositions and known to the State would be pointless, inefficient and burdensome.” [Motion at 9] With respect to Topic 3 (contacts with the reporting services), it says that this, too, was fully explored in the MDL proceedings. Finally, J & J states with respect to Topic 4:

Subject No. 4 asks for depositions from witnesses who “communicated to [the reporting services] that the published Average Wholesale Prices of their drugs were neither a price that was actually an average of wholesale prices, nor a price that was actually paid by the retail classes of trade.” The J & J defendants cannot produce such a witnesses because the AWP does not ever purport to represent the price “actually paid by the retail class of trade.”³

J & J continues:

The State already has, and can readily compare, the J & J defendants’ WAC and AWP figures. Although the term “actual average wholesale

³ According to J & J, it has always submitted AWPs to the reporting services, and to wholesalers, that were 120% of the list price of the particular drug. And it says that, as the MDL depositions establish, the reporting services sometimes would publish the figures submitted by J & J, “but they sometimes published different AWPs.” [Motion, at 10; Exh. 7]

price” is not defined by the State, it appears to be the price the *wholesalers* charge their retail pharmacy customers. J The wholesaler’s price is determined by the wholesaler’s mark-up, which is something the wholesaler determines. It is not an appropriate topic for a [J & J corporate representative] witness because it is not something that a pharmaceutical company’s employees could be expected to know any better than the State.

.... The State must know that manufacturers cannot reasonably be expected to provide binding testimony about the prices charged by non-parties. [Motion, at 11]

The state begins its argument by stressing that it is not just engaging in discovery, but is seeking to have J & J

... identify its employees who are knowledgeable about the issues in this case [who can also] provide a single deposition for use at trial. These are legitimate goals and the surest way to simplify this case.” [Response Brief, at 4]

The State also argues that reliance on the MDL depositions is both inappropriate and impractical because: (1) the MDL litigation differs in several respects from the instant case—a fact I have recognized in previous discovery rulings; (2) its ability to use the depositions at trial is questionable from an evidentiary standpoint because it is possible that a party to this action, who was not a party to the MDL litigation, could object to their admissibility for lack of opportunity to cross-examine the witnesses; and (3) use of multiple depositions may be confusing to jurors and impair their ability to follow the evidentiary trail.

Specifically responding to J & J’s assertion that the information sought in Topics 1 and 2 is known, undisputed, and has been stipulated to, the State says:

That is a fine answer but it needs to be memorialized in a deposition so the jury can hear this from an authoritative witness at trial. Letters from ... counsel are not sufficient. Moreover, it is hardly unduly burdensome to have a live witness so testify. [Response Brief, at 8]

Next, with respect to J & J’s argument that it cannot be expected to know what retail pharmacies are paying for specific drugs because that is known only to the

wholesalers and the pharmacies themselves, the State points to the statement in J & J's brief that "it is common knowledge that wholesaler mark-ups ... are very thin." And it asserts that J & J "must know" more than it is saying on this point, and that its depositions in the MDL litigation to the effect that it did not know exactly what the wholesalers' markups were, cannot be believed.⁴

Finally, with respect to Topic 4, which asks whether J & J representatives ever represented to the reporting services that the AWP's they were communicating to them "were neither a price that was actually an average of wholesale prices, nor a price that was actually paid by retail classes of trade," the State says it is important to know whether "J & J ever sought to correct the [published] AWP's ... given what [it] knew about the wholesale prices of its drugs which, as noted above, was and is considerable." [Response Brief, at 12]

* * * * *

To begin, discovery in a case of this size and complexity must necessarily involve a degree of accommodation—a balancing of competing interests and goals—if the litigation is to proceed with any degree of alacrity or efficiency.

Considering first the parties' positions on the MDL depositions, the State, as indicated, claims it should not be forced to rely on piecemeal testimony from these depositions, but rather is entitled to have a "fresh" witness it can examine in this case so the jury will not be unduly confused by references to other litigation, and so it can build its case as, in its discretion, it sees fit. It also stresses that the issues in this case and the MDL litigation are quite different.

⁴ As indicated, the State bases this assertion on the fact that, in papers filed in the instant proceedings, J & J notes that drug wholesalers' margins are quite thin—a fact it says is well known in the industry. I do not consider that statement—or the other remarks the State has culled from one of the MDL depositions—to render J & J's statement that it does not know the exact prices the retail pharmacies pay to the wholesalers either incredible or unduly suspect.

On the latter point, I have, as noted above, recognized some of the differences between the two cases—and they are not insignificant. That is not to say, however, that there are not some significant similarities as well. As J & J points out, central to both cases are claims that the manufacturers have submitted knowingly “fictitious” or “inflated” AWP’s to the reporting services, and that they (the manufacturers) are responsible for any resulting upset or imbalance in applicable drug reimbursement programs. Beyond that, as J & J also points out, the State specifically requested that it be provided transcripts of all J & J witnesses’ testimony in the MDL proceedings, which suggests that the State sees at least some relevance in that testimony.

I agree that a party should be able to build its case as it sees fit—subject, of course, to applicable laws and procedural rules. One of those rules is, of course, that undue burdens not be placed on other parties in the course of that case-building.

It appears that, while the MDL litigation is not of a piece with the instant action, the apparent similarities are sufficient to suggest that those depositions may not be entirely ignored. In that light, J & J offers the following proposal:

“... the State should at least be required to tailor its discovery in a way that avoids needless duplication. It would be one thing for the state to review the MDL discovery, identify any pertinent gaps in the record, and then seek the discovery it thinks it needs to fill in those gaps..” [Reply Brief, at 5]

I agree. J & J has supplied the state with twenty-eight sets of depositions of its employees and representatives in the MDL litigation, and there appears to be testimony in those depositions relating to at least some of the key topics upon which the State now desires to conduct a series of new, “from-scratch,” depositions. And while the actual degree of duplication and repetition is impossible to ascertain at this point, I am satisfied that there are enough indicia of similarity present that to ignore those depositions and begin anew would place an undue burden on J & J. In that light, it seems to me that the procedure proposed by J & J would minimize that burden without seriously compromising the State’s interests.

As discussed above, the State’s resistance to using the MDL depositions—even as a base—is also grounded on its assertions that [a] they will impede the “orderly and informative” presentation of evidence to the jury, and [b] there may be problems with their admissibility. I disagree on both points. First, in my experience at least, juries—especially Dane County juries—are remarkably attentive and not easily sidetracked or confused. References to depositions and other extraneous matters are routinely made in the course of jury trials without any trace of resulting confusion on the part of the jurors. Indeed, juror comprehension and understanding is more a function of the manner in which the counsel submit their cases to the jury, rather than the fact that the evidence may stem from multiple sources. I am not persuaded that this is a problem.⁵

Nor do I see a problem with admissibility of the deposition testimony. Should non-parties to the MDL litigation object to the depositions on confrontation/cross-examination grounds, the testimony can be admitted as to J & J, and the jury instructed not to consider it as to an objecting defendant—an admonition not at all unusual in jury trials.

[I must note my concern that, during the course of the depositions, a rain of “that’s-already-in-the-MDL-depositions” objections could be forthcoming. But, given the fact that I am adopting J & J’s suggestion for “streamlining” the process—to its claimed benefit—I would not expect overuse of any such objections. Certainly the State is entitled to update and clarify the prior testimony, and it should be permitted to do so as part of the discovery/trial preparation process in this case.

Finally, J & J claims that its stipulation that [a] J & J and its subsidiaries do not sell their products to wholesalers at the AWP, [b] they do not believe that wholesalers typically charge AWP to retail pharmacies, and [c] they are not aware of any instance where one of their employees told the reporting services that AWP was not an “actual

⁵ J & J points out in this respect, that the State has offered no examples or other support for its assertion that the MDL depositions “wander all over the lot,” and that there is “no linkage whatsoever between the deposition testimony and Wisconsin’s case.” [Response Brief, at 8] [Reply Brief at 7]

wholesale price,” nullifies the need for any witness to be produced with respect to Topics 1 and 2 of the State’s deposition notice. The State has satisfied me, however, that it would not place an undue burden on J & J to produce a witness to confirm those points in a deposition. Additionally, because there may be relevant and pertinent follow-up or explanatory questions to the corporate witness(es) on those points, I do not believe that any resulting inconvenience on J & J would constitute a sufficient burden to warrant ordering that the noticed depositions be barred in favor of the proffered thirty-seven word stipulation.

* * * * *

In framing the order that follows, I am mindful of the continuing possibility of differences and disputes between the parties. As may be seen by the result reached herein—and as I mentioned earlier in the discussion—discovery in a case of this nature and size works best, if it is to work at all, when all parties accept the fact that the process is, at bottom, one of accommodation and reasonable cooperation. It is not always easy to keep the end in mind in litigation of this nature, but doing so can provide welcome efficiencies and, sometimes, surprising results.

CONCLUSION & ORDER

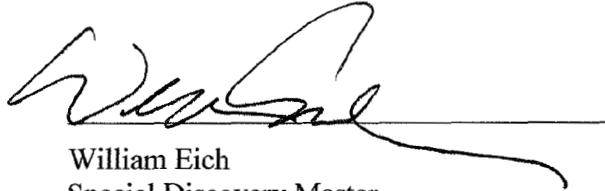
Based on the foregoing, I enter the following Order.

[1] The State’s existing Notice of Deposition is quashed, without prejudice to renewal as a means of supplementing, rather than replacing, the MDL depositions of J & J witnesses presently in the State’s possession. It is my intent in this respect that the Notice be framed so as to reach only such matters as were either not covered, or were inadequately covered, in the MDL depositions.

[2] If called upon by the State to do so, J & J shall, as it has offered to do in submissions to the court, stipulate that the MDL deposition testimony may be used against it at the trial of this action.

[3] J & J's request that it be allowed to substitute a stipulation in lieu of providing corporate-designee witnesses in response to the State's Notice of Deposition is denied.

Dated at Madison, Wisconsin, this 14th day of July, 2006



William Eich
Special Discovery Master