

below, and we propose a new order that responds to these changed circumstances and yet protects the defendants' confidentiality concerns to the extent they need protecting.

I. Plaintiff is Seeking to Modify a Protective Order, Not Reconsider a Final Judgment.

Defendants' memorandum gets off on the wrong foot by characterizing plaintiff's motion to modify Judge Krueger's Order as a motion to reconsider under Wis. Stat. sec. 806.07. This contention is meritless. Judge Krueger's order is simply a non-final discovery order which is subject to modification as conditions arise.

Indeed, in connection with protective orders designed to hide documents from public viewing, and, even more importantly, drafted to preclude sharing with other law enforcement officials, defendants have the burden backwards. As one discovery text puts it: "A protective order may be modified. Requests to modify an order are directed to the court's discretion. The party opposing modifications generally bears the burden of showing good cause for continuing the protection." 8 Wis. Prac., Civil Discovery sec. 1:50 (2d ed.) *See Beckman Industries, Inc. v. International Ins. Co.*, 966 F.2d 470, 475 (9th Cir. 1992), *see also Mallon v. Campbell*, 178 Wis.2d 278, 504 N.W.2d 357 (Ct. App. 1993).

A particularly instructive case is *Wilk v. American Medical Ass'n.*, 635 F.2d 1295, 1301 (7th Cir. 1980). There the state of New York brought an anti-trust action against the American Medical Association for attempting to eliminate chiropractors. A similar class action law suit had been brought by a group of chiropractors in the Northern District of Illinois and a huge amount of discovery had been completed there all hidden by a protective order. New York sought to lift the protective to obtain the fruits of this discovery, a motion denied by the District Judge. The Seventh Circuit reversed holding that:

Federal Rule of Civil Procedure 26(c) permits protective orders to be issued "for good cause shown" to protect litigants from burdensome or oppressive discovery.

Yet, “(a)s a general proposition, pre-trial discovery must take place in the (sic) public unless compelling reasons exist for denying the public access to the proceedings.” This presumption should operate with all the more force when litigants seek to use discovery in aid of collateral litigation on similar issues, for in addition to the abstract virtues of sunlight as a disinfectant, access in such cases materially eases the tasks of courts and litigants and speeds up what may otherwise be a lengthy process. Particularly in litigation of this magnitude, we, like the Multidistrict Panel, are impressed with the wastefulness of requiring the State of New York to duplicate discovery already made. Rule 1 of the Federal Rules requires the Rules to be construed “to secure the just, speedy, and inexpensive determination of every action”. We therefore agree with the result reached by every other appellate court which has considered the issue, and hold that where an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another’s discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification.

635 F.2d 1295, 1299 (citations omitted).

This analysis applies with special force here. The states are seeking to avoid a duplicative discovery by working together. As we show below defendants are clearly frustrating this goal without any good reason other than to obtain an inappropriate litigation advantage. The cases cited above make it clear that such conduct should not be given court sanction.

Defendants’ cases do not support their characterization of Wisconsin’s modification request. Both of them involve motions to reconsider final decisions on legal claims which are to be decided under Wis. Stat. sec. 806.07. Discovery motions, particularly motions to modify orders secreting documents, are not controlled by that section. See the cases cited above and particularly *Mallon v. Campbell*, 178 Wis.2d 278, 283-84, 504 N.W.2d 357, 359 (Ct. App.1993), specifically holding that a discovery order is not subject to Wis. Stat. sec. 806.07.

II. The Dramatically Changed Litigation Picture Now Supports Sharing.

The current factual context overwhelmingly favors sharing. When Judge Krueger entered her order denying the Attorney General her traditional prerogative to share documents with other state law enforcement officers the context was dramatically different. Few states had filed suits,

there was no federal presence, and the MDL in Boston had not authorized the sharing of documents discovered in that case with the states. All this has changed in a way that makes some kind of sharing a reality and an orderly sharing order a requisite for efficient judicial management and fair play. Since Judge Krueger entered her order all the following things have happened significantly altering the landscape.

First, well over 20 states and the Federal Government have now sued the defendants. Defendants' primary concern when they initially opposed sharing was that other states would get incriminating documents from Wisconsin and sue them based on these documents. (They suggested, without any basis whatsoever, that plaintiff's counsel might use the documents to entice other states to sue them.) Assuming that such a concern is a legitimate one, it is no longer valid. The cat has been out of the bag for some time. Anyone can find out about almost any aspect of defendants' notorious conduct through a variety of current sources ranging from newspaper articles, to the many judicial opinions of Judge Saris in the MDL, to Congressional hearings. And, as we show below, some states now have sharing orders in place that permit the sharing of defendants' documents with other states. In short, letting Wisconsin share will not halt the train of lawsuits against the defendants; it will only interfere with Wisconsin's ability to litigate its case. This is not a legitimate basis for barring sharing.

Second, sharing is a reality both in this case and other cases. A number of states have protective orders permitting the sharing of discovery with other states including Texas, Florida, Alabama and Illinois. Alabama, alone, has sued over 80 companies including every company named as a defendant here and anyplace else. Thus, any discovery Alabama obtains can be shared with Wisconsin and other states. And recently the defendants offered Hawaii the same

sharing arrangement they had agreed to in Alabama knowing that Hawaii is represented by the same outside counsel as Wisconsin.

Additionally, the Federal Government is now actively pursuing a number of defendants including Roxane, Abbott and Dey, defendants here. Judge Saris, who is overseeing those cases and the MDL case, entered an order expressly permitting the Department of Justice to share any discovery it obtains with the states that have active investigations ongoing.

Finally, defendants in this case have chosen to share when they can use it to their advantage. Five defendants have agreed to share their documents as long as those states reviewing the documents agreed to take a unified corporate designee deposition usable in those states.

Thus, documents can and will flow into and out of Wisconsin, from and to a variety of sources because of sharing orders in other courts and stipulated orders here. As plaintiff shows below the best way to organize this flow of information, and to prevent misunderstandings and discovery abuse, is to enter an order with clear rules protecting the interests of all the parties.

Third, defendants' concerns about what will happen to its confidential information if a sharing order is in place have proven to be completely overblown. Multiple law suits over defendants' phony prices have been ongoing for more than five years. Sharing agreements with some states have been in place for almost that long. Defendants cannot point to a single instance during this entire period where a document has been leaked and caused them harm.

Moreover, it is unclear what defendants' interest in opposing sharing truly is. Usually protective orders are entered to protect trade secrets from competitors. But here all the information flowing to and from the defendants from discovery, including their pricing practices, customers and selling methods, is also flowing directly to the other defendants—their

competitors. And all the pricing information on defendants' drugs which plaintiff has secured goes to the defendants in an undifferentiated package. Who are the defendants trying to keep in the dark? Nothing in their memorandum provides a clue on this subject. Defendants merely say that they need to control their own confidential documents. Why they need such secrecy is unexplained. In any event, as it now stands the only group barred from learning the truth about defendants' inflated prices are the taxpayers who have been the victimized by defendants conduct.

This leads into the fourth way things have changed since Judge Krueger entered her opinion: defendants are abusive when controlling their own confidential documents.

Defendants have abused the protective order underlying Judge Krueger's no sharing decision in a number of different ways. First, defendants have cross noticed depositions in other cases without entering into sharing agreements. This disadvantages Wisconsin because they must attend these depositions without being able to review the documents produced by the parties who are taking the deposition. Defendants' attempt to pass this tactic off by characterizing these depositions as only involving government documents, but that is not true. These depositions, among other things, concerned communications between the defendants and the government and documents reflecting them.

Moreover, defendants have cross noticed these depositions without bothering to even ask plaintiff's counsel if they are available on the deposition dates. The newest example of this is the continued deposition of the former CMS Administrator, Thomas Scully which has been noticed for July 13, a date that neither of Wisconsin's lawyers who are responsible for the federal depositions can attend. (This unilateral scheduling also violates Wisconsin SCR 62.02 requiring that all scheduling be considerate of the schedules of participants.)

Some defendants have taken the position that they will not share their documents with other states but, nevertheless, if a deposition of one of their employees is taken in Wisconsin they will not produce the person for a deposition in another state. This means that taking depositions in Wisconsin will disadvantage other state Attorneys General either because they will be barred from a subsequent deposition or, at a minimum, have a lengthy and wholly unnecessary fight on their hands about whether such a deposition is appropriate. This reality compels Wisconsin to pass such deponents to other states with sharing provisions. And this puts these depositions on a schedule controlled by another state which may or may not be compatible with this Court's orders. (Defendants' argument that Wisconsin's attorneys are acting unethically in their efforts not to disadvantage law enforcement actions in other states is, particularly coming from defendants who are refusing to share and simultaneously threatening to refuse to produce deponents more than once, absurd.)

Defendants have also abused the confidentiality order by designating literally everything—and we mean everything—as confidential, including such things as publicly disseminated catalogs almost a decade old. Here is how Judge Saris, who has presided over the MDL from the inception, described defendants' behavior:

Well, can I tell you something? You know, for better or for worse, I have a long history with pharmaceutical litigation, and I find in general the defendants grossly overstate confidentiality. They basically print "confidential" on everything. And every time I challenge it, maybe at the end of the day there are two lines that are excluded. So I am going to allow McKesson to see everything, and I am going to open it all up to the public record unless there's a good-faith basis for excluding it. And so do you have copies right here with you that they can just take a look at so that we can do this today?

(Order of Judge Saris dated October 24, 2006.)

When confronted with their excesses defendants take the position that the only route available to the plaintiff to undo their handiwork is to go through each of the hundreds of

thousands of documents defendants have produced, one by one, and have a meet and confer about each one before filing a motion to undesignate the documents, an obviously completely unfeasible undertaking.

Judge Saris recently tried to step around this problem by signing a confidentiality order that only protects current documents. See Protective Order in the MDL action dated 06/22/07 (Appendix 1, attached hereto) where Judge Saris unilaterally modified the parties proposed confidentiality order by limiting such protection to “current” proprietary documents.

In short, we now have a crazy quilt of holdings and procedures which are confusing and inefficient both at the local level and at the national level. Plaintiff has a proposal to change this and be fair to everyone.

III. Plaintiff’s Suggested Sharing Order.

Plaintiff’s proposal comes right from the stipulations entered into by the five defendants who have agreed to share; a copy of one such stipulation is attached (Appendix 2). Plaintiff proposes that the Court permit Wisconsin to share discovered documents common to the claims of any state bringing an action against a particular defendant so long as the Attorney General seeking access to such documents agrees not to disclose such materials to persons not bound by a confidentiality order. More specifically, under a reasonable protective order Wisconsin could share a defendant’s discovery; 1) only with those States, New York counties,¹ or the Federal Government who have active claims against a particular defendant, 2) where that state has a protective order in place that provides protections comparable to Wisconsin’s, 3) where the order permits the disclosure of transactional data on a particular drug only if the other state is suing for

¹ The New York counties and New York City are together represented by two law firms and are proceeding essentially as a single entity. Defendants’ attempt to portray them as 58 individual litigants operating independently in an effort to make sharing looking more complex is just silliness.

the same drugs, and 4) where any improper disclosure would be dealt with in the state where it occurs, not Wisconsin.

Such a procedure would allay Judge Krueger's earlier concerns. Thus, for example, Wisconsin would not be the enforcing court if documents shared with other states were impermissibly made public in another state because that would be a violation of the other state's confidentiality order, not Wisconsin's. This was pretty obviously the single largest concern of Judge Krueger who was worried she might be responsible for deciding every shared document dispute.

Moreover, a sharing provision will bring order out of the sharing chaos. Right now Wisconsin can obtain documents and not reciprocate except with documents received from certain defendants. And defendants can either agree to share or not. Indeed, the current problem with Judge Krueger's order is that it gives the defendants the whip hand. The current regime replaces the traditional prerogative of the Attorneys General to share documents with defendants' prerogative of deciding whether they, and not the Court, will permit sharing. Plaintiff's proposed order will level the playing field.

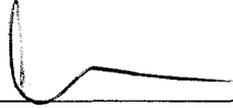
Plaintiff's proposal is fair to everyone. It protects the defendants' interests, whatever they now are, and it restores Wisconsin's traditional ability to work with its sister states, something it badly needs in a case of this size (as well as ameliorating defendants' chronic abuse of the protective order).

CONCLUSION

For all of the above reasons Wisconsin asks that the protective order in this case be modified to permit the Attorney General of Wisconsin to share discovered materials with other

enforcement authorities who have brought claims against the same defendants.

Dated this 10th day of July, 2007.



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