

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 04-CV-1709

AMGEN INC., et. al.,

Defendants.

BRIEF IN RESPONSE TO
"DEFENDANTS' MOTION TO REQUIRE PLAINTIFF TO PRESERVE
POTENTIALLY RELEVANT DOCUMENTS"

The issue before this Court is whether it should grant a motion to require “the plaintiff” to “preserve potentially responsive documents.” This Court should deny defendants’ motion on the ground that the defendants seriously misstate the law in regard to the duty of a party to preserve evidence essential to the opponent’s claim or defense and on the ground that the defendants mischaracterize the actions taken by the plaintiff to date with regard to producing documents in response to their multiple requests for production of documents.

I. THE DEFENDANTS’ PROPOSED ORDER IS WITHOUT
LIMITATION IN TIME, SCOPE AND BREADTH

At the outset, one might think it patently reasonable to require the opposing party to “preserve potentially relevant documents.” Indeed, a cursory reading of defendants’ brief might give this Court that first impression. But the defendants’ motion and the basis

upon which it is predicated is not about preserving relevant evidence, but rather, about perpetuating annoying discovery requests and imposing an undue burden on the State of Wisconsin, as prohibited by Sec. 804.01(3)(a).

The question now before this Court is not whether the Plaintiff should preserve evidence essential or crucial to the claims in this case. The Plaintiff has given the defendants all its documents and records relevant to the claims in this case, (a fact, admittedly, the defendants may likely contest). Instead, the question now presented by the defendants is whether this Court should order **“the plaintiff”** should preserve **“potentially”** relevant documents. This Court should deny the defendants’ motion because “the plaintiff” is defined too broadly and the term “potentially” is not defined at all.

A. THE DEFENDANTS DEFINE “THE PLAINTIFF” SO
EXPANSIVELY AS TO BE RENDERED MEANINGLESS

The defendants define “the plaintiff” in their discovery demand as:

“ ...the State of Wisconsin, including but not limited to its citizens, private payers who pay prescription drugs costs of their members, the Governor’s office, the Wisconsin Legislative Fiscal Bureau, the Wisconsin legislature (including its committees and individual legislators), the Wisconsin Department of Justice, the State of Wisconsin Department of Health and Family Services, the State of Wisconsin Medicare Program, the State of Wisconsin Medicaid Program (including Medical Assistance, BadgerCare, and SeniorCare), any other Wisconsin Medical Assistance Program, any other administrative bodies, legislative agencies, all successors and predecessors, and officials, agents, employees, commissions, boards, divisions, departments, agencies, instrumentalities, administrators and other Persons or entities acting on their behalf’ and/or involved in administering, overseeing, or monitoring any State program, including Medicaid, that provides reimbursement for pharmaceutical products.

(Defendants' Second Set of Document Requests Directed to Plaintiff, at page 7, paragraph 39). Thus, presumably, to order "the plaintiff" to preserve potentially relevant documents is to order all of the above to act accordingly.

Clearly this Court should be hesitant to entertain requests to issue orders to the Governor and all the members of the Wisconsin Legislature, including all their predecessors in office. These individuals are themselves the custodians of their own documents. Sec. 19.33(1), Wis. Stats. Absent a request, the Office of Attorney General has no authority to act as their counsel. Section 165.25(6). They are not parties to this litigation and they act independently as elected officials.

Additionally, serious constitutional issues are raised, but never addressed by the defendants, by the suggestion that this Court should issue orders extending to all past and present members of the Wisconsin Legislature. *See generally, Flynn v. Department of Administration*, 216 Wis.2d 521, 545, ¶38, 576 N.W.2d 245 (1998), ("When the powers of the branches overlap, one branch is prohibited from unduly burdening or substantially interfering with the other.") It is further doubtful that the Attorney General could similarly issue such orders to members of the legislative branch. Article IV, Section 15 of the Wisconsin Constitution exempts legislators from civil process. *See State v. Beno*, 116 Wis.2d 122, 341 N.W.2d 668 (1984).

There is no authority for this Court to enjoin nonparties, citizens of the State and private third party payers, who clearly have no relationship to state government. *See generally Dalton v. Meister*, 84 Wis.2d 303, 311-12, 267 N.W.2d 326 (1978). In short, defendants' motion should be denied because the defendants would have this court issue

an order to “the plaintiff” that reaches beyond the obvious and well beyond the sound jurisdiction and authority of this Court.

Plaintiffs previous attempts to clarify the scope of defendants demands have been consistently rebuffed. As this Court can see in the defendants’ own motion, the defendants have not defined for this Court the breadth of the order that they now seek. Similarly, the defendants have been consistent in refusing to define the offices or departments to whom affirmative steps should be undertaken to preserve the processing of paper and electronic government documents or otherwise interfere with the orderly administration of government operation.

Conceding the point in their brief to this Court, the defendants are unabashed in their refusal to identify to whom instructions should be given. Defendants argue to this Court: “[i]credibly, the State attempts to shift this burden onto the defendants.” (Brief at p. 7). To the contrary, the plaintiff has not and does not seek to shift any burden onto the defendants. Instead, plaintiff has sought clarification in a diligent attempt to faithfully discharge its duties under the law.

The ultimate question on an issue of spoliation is whether the party intentionally destroyed evidence. *See Milw. Constructors v. Milw. Met. Sewer. Dist.*, 177 Wis. 2d 523, 533, 502 N.W.2d 881, 884-85 (Ct. App. 1993). Asking the defendants to reasonably define the universe to which their discovery should apply is part and parcel to avoiding the negligent destruction of relevant evidence. It is hard to imagine at this juncture that the plaintiff can be accused of intentionally destroying evidence essential to the case when the defendants cannot or will not take any steps to identify what they are seeking or

where it might be located. In the end, this Court should deny defendants' motion on this ground alone.

B. DEFENDANTS FAIL TO DEFINE WHAT IT MEANS TO PRESERVE "POTENTIALLY" RELEVANT DOCUMENTS

Defendants' motion should be denied because the defendants do not define what it means to preserve "potentially" responsive documents. There are two consequences of defendants' neglect. First, this court should not issue orders that are so vague as to be meaningless. Orders, like statutes, must be unambiguous so as to give notice and thus be enforceable. What would it mean to order someone to preserve what might "potentially" be relevant? By its nature, that term is so ambiguous as to be unenforceable. Second, more importantly, no court has extended the protection that applies to the preservation of evidence that is essential or crucial to the claims being litigated to documents that might potentially be responsive to one or more document requests.

Published decisions in Wisconsin on the issue of spoliation are stated, discussed, and decided in the factual context of a defined document, object, or other tangible thing. (*See Garfoot v. Fireman's Fund Ins. Co.*, 228 Wis. 2d, 710-711, "[w]hile investigating the cause of the explosion, a technician, hired by the engineer who was hired by Garfoot's attorney, disturbed evidence that would have either proved or disproved Garfoot's claim that a leak in the piping system caused the explosion." *See Jagmin v. Simonds Abrasive Co.*, 61 Wis. 2d 60, 80-81, 211 N.W.2d 810 (1973). "The trial court was entirely correct in its conclusion that the plaintiff had not proven to a reasonable certainty by evidence which was clear, satisfactory and convincing that the defendant intentionally destroyed or fabricated evidence by substituting a second wheel." *See also*

Sentry Ins. v. Royal Ins. Co., 196 Wis. 2d, 907, 913 concerning the destructive testing and ultimate disposal of the refrigerator.)

There is simply no precedence for an order prohibiting what might be “potentially” relevant. In fact, the only case that comes close is *Milw. Constructors v. Milw. Met. Sewer. Dist.*, 177 Wis. 2d, 531. But tellingly, the Wisconsin Supreme Court in effect rejected the claim. In that case, the defendants complained that the plaintiff destroyed documents that were “potentially relevant.” *Id.* at 534. It was undisputed in *Milw. Constructors* that documents were destroyed. *Id.* at 535. But a fair reading of the case shows that the fact that the documents were “potentially” relevant was irrelevant to the ultimate resolution of the case. Instead, only upon an analysis of the nature of the actual documents that were destroyed in the context of what was relevant to the actual issues in the case, the Supreme Court in *Milw. Constructors* reversed the circuit court’s order dismissing the case and remanded the matter back to the circuit court for a determination not whether some “potentially” relevant documents were destroyed, but rather whether: “relevant documents were destroyed, whether copies exist, and how the absence of any relevant documents impairs the defendants’ ability to establish their pertinent claims or defenses.” *Id.* at 538.

C. THE DEFENDANTS DEFINE “DOCUMENT” SO BROADLY AS TO PRACTICALLY INCLUDE ALL THAT IS PRODUCED BY THE GOVERNMENT AND ITS EMPLOYEES.

The defendants defined “document” in their discovery demand as:

“Document” shall be used in a comprehensive sense as contemplated by the Wisconsin Rules of Civil Procedure and shall mean any kind of tangible material, whether written, recorded, microfilmed, microfiched, photographed, computerized, reduced to an electronic or magnetic impulse, or otherwise preserved or rendered, and including, but not limited to, papers, agreements, contracts, notes, memoranda, electronic or

computer-transmitted messages viewed via monitor, correspondence, letters, e-mails, facsimile transmissions, statements, invoices, record books, reports, studies, analyses, minutes, working papers, charts, graphs, drawings, calendars, appointment books, diaries, indices, tapes, summaries and/or notes regarding telephone conversations, personal conversations, interviews, and meetings, and any and all other written, printed, recorded, taped, typed, duplicated, reproduced or other tangible matter in your possession, custody or control, including, all copies which are not identical to the originals, such as those bearing marginal comments, alterations, notes, or other notations not present on the original Document as originally typed, written, or otherwise prepared.

(Defendants' Second Set of Document Requests Directed to plaintiff, at page 3, paragraph 15).

The two terms "potentially" and "document" (as that term is defined above), if incorporated into an order by the circuit court "to preserve" result in the obligation to save virtually everything generated by the government until such time, presumably, as the defendants proclaim they do not need or want it. Not only would the monetary effect of such a judicial decree be felt statewide, but the consequences to the orderly administration of government would be widespread.

The defendants refuse to tell the plaintiff what it is they want and where it might be. Instead, they suggest no state agency, bureau, commission or division is immune. From the Veterans Home in King, Wisconsin, to the basement of the University of Wisconsin Hospital, from the administration of former Governor Martin Schrieber to the personal files of each and every state legislator serving the people of the State of Wisconsin, the defendants demand that the Plaintiff preserve these undefined "potentially" relevant documents. Because the defendants were told that which they requested was not possible, they now would have this Court order the same. The problem has not changed. This Court should deny defendants' motion.

II. THE DEFENDANTS MISSTATE THE CORRECT LEGAL STANDARD

Notwithstanding the serious and substantial linguistic, constitutional, and logistical problems stated above with regard to what the defendants ask this court to do, (which it is respectfully suggested, should be grounds alone to reject defendants' motion), this Court should deny defendants' motion because it is not supported by the law. The defendants suggest that "[i]t is well-established that parties to a litigation are under a legal duty to preserve potentially relevant documents." (Brief at p. 5). As support of this alleged "well-established" proposition, the defendants cite to *Garfoot v. Fireman's Fund Ins. Co.*, 228 Wis. 2d 707, 722, 599 N.W.2d 411, 418 (Wis. App. 1999). However, the court in *Garfoot* does not say what the defendants suggest. In fact, there is no legal support for the proposition asserted by the defendants, as "well-established," that parties have the duty to preserve "potentially relevant" documents.

Instead, the law in Wisconsin is that "[t]here is a duty on a party to preserve evidence essential to the claim being litigated." *Id.* at 722, quoting *Sentry Ins. Co. v. Royal Ins. Co.*, 196 Wis. 2d 907, 918-19, 539 N.W.2d 911, 915-16 (Ct. App. 1995). Or as more recently noted in *Yao v. Bd. of Regents of University of Wisconsin Sys.*, 256 Wis. 2d 941, 953, 649 N.W.2d 356 (Ct. App. 2002), "[w]e concluded in *Sentry* that 'intentional and negligent conduct' by a party in a civil suit that resulted in the failure to preserve crucial evidence was sufficient basis for a court to impose the sanction of disallowing that party from introducing evidence relating to the destroyed item. *Id.* at 918-19. ('There is a duty on a party to preserve evidence essential to the claim being litigated.')

The significance of the difference between what the defendants suggest and what the law requires cannot be overstated. The question is not what is “potentially relevant,” but instead what is “essential” or “crucial” to the “claims being litigated.” The plaintiff respectfully submits that it has given the defendants all the evidence necessary, essential, or even crucial to the claims being made and the defenses tendered. This is not to say that the plaintiff has given the defendants everything they have asked for or will ask for. But the fact that the instant motion is not presented in the factual context of a particular government record reveals that the current question is not about what is crucial or essential, but at best about what might be, in the defendants’ collective mind, something interesting.

III. THERE IS NO FACTUAL BASIS TO SUPPORT THE DEFENDANTS’ PROPOSED ORDER

As a follow up to the last point made above, as a factual matter, the plaintiff respectfully submits that there is no evidence to support the allegation that the plaintiff has destroyed evidence essential or crucial to the claims in this case. On the other hand, the plaintiff has been candid in its dealing with the defendants. Documents kept in the ordinary course of the government’s business are routinely processed according to statutory and administrative procedures, including, resulting in their eventual destruction. The issue may be one day presented to this court as to what consequences should follow from the routine destruction of government records. At that time, it can be discussed whether copies exist and how the absence of any relevant documents impairs or does not

impair the defendants' ability to establish their pertinent claims or defenses. *See Milw. Constructors v. Milw. Met. Sewer. Dist.*, 177 Wis. 2d, 538.

There is no suggestion made, nor evidence shown, that the Plaintiff has destroyed evidence essential or crucial to the claims in this case. At pages 3 through 5 of their brief, the defendants restate testimony by one individual of whom questions were asked as to where he might think "relevant" documents may be found. *See* Deposition of James Vavra. Additionally, defendants restate the accurate description of the steps taken at the Department of Health and Family Services relating to the preservation of documents in that state agency. *See* Deposition of Elias Soto. And in concluding, the defendants criticize the efforts undertaken and the steps implemented to preserve documents within the State's possession.

Instead, the case is put forth by the defendants to this Court that the plaintiff may not be preserving at best "potentially" relevant documents and at worst, evidence unrelated to the claims in the underlying law enforcement action. The published cases cited above all reference an obligation to preserve documents relevant to the claims being made in the case. As this court is aware, the State of Wisconsin filed this law enforcement action seeking damages and forfeitures for defendants' fraudulent publication of false and deceptive "average wholesale prices" which has cost the taxpayers of this state hundreds of millions of dollars. As alleged in the State's complaint, the defendants regularly published false and fraudulent prices that they knew were being used to compute reimbursement rates to providers and they did this to obtain a competitive advantage in the health care industry.

The plaintiff has given the defendants complete and detailed electronic claims data generated by the state's Medicaid Program. With this data, the defendants already know what the state paid, when it was paid, and the basis upon which it was paid. Virtually every government record relating to the Legislature's establishment of the Medical Assistance Program has been copied, scanned, numbered and produced. Documents were produced from not just the Department of Health and Family Services, but the Department of Administration, the Office of the Governor, the Legislative Fiscal Bureau, the Legislative Council, even some of the Department of Justice's own files. Ostensibly in relation to the supposed defense of "government knowledge," (that the State knew the defendants were lying), the plaintiff has given the defendants thousands of pages of documents clearly documenting what information was publicly known at what point in time. The defendants have quoted from these documents in their oral presentations to this court.

As if to say the plaintiff's discovery responses were not enough, the defendants have exercised their right to use the Wisconsin Public Records law to seek additional records from various state agencies. Defendants have reviewed and copied publicly available documents stored in the archives of the Wisconsin State Historical Society.

Little more can be produced relating to what was paid, when it was paid, and the basis upon which it was paid, including the fraudulent price supplied by the defendants. The present debate is not about preserving documents essential or crucial to the claims or defenses in this case. The motion before the Court is defendants' attempt to defend its illegal conduct by over burdening the State of Wisconsin and to somehow sanitize their fraudulent acts by making an issue over what each state employee or public official might

have known at one time or another. This court may soon be asked by the defendants to approve their illegal acts on the ground that some state employee allegedly knew that the published average wholesale price was not truthful. The relevance of that issue, (of which there is none), can and will be argued then. The instant motion instead is about defendants' pursuit of individual and anomalous documents in the personal files of individual state employees, or elected officials, in a desperate attempt to "share the blame" for defendants' illegal acts. Putting the State on trial by claiming that some individual employee knew of defendants' illegal conduct and thus somehow it was all right to lie and cheat is a common and desperate affirmative defense to enforcement actions that the law disfavors.

But back to the issue at bar, as previously stated, the defendants have virtually every government record relating to the Medical Assistance Program. In Wisconsin, what the state pays and how it reimburses providers is established by the Legislature in the state budget as signed by the Governor. Thus, the plaintiff produced records from the Department of Health and Family Services for each year it proposed a system to reimburse providers who dispensed the defendants' products as part of the Medical Assistance Program. The plaintiff produced records from the Governor relating the reimbursement of defendants' products. The plaintiff produced records maintained by the Legislative Fiscal Bureau who assists the Legislature in deciding whether to approve the Governor's budget, which includes how and what to pay, and the specific rate for defendants' products.

The plaintiff has produced and will continue to produce documents, data, and testimony relating to how the Medical Assistance Program was run and upon what

information it relied. What the plaintiff has not done is “order” all state agencies, departments, bureaus, commissions, committees, employees and contractors to not process their electronic or paper records in the ordinary course of business and in accordance with the law relating to document retention and disposal. That information is neither relevant nor is it reasonably likely to lead to the discovery of relevant and admissible evidence. The exception is the Department of Health and Family Services where reasonable steps have been taken to preserve essential and crucial records relating to claims and defenses in this litigation.

III. CONCLUSION

The defendants’ rhetoric obfuscates the truth relating to the plaintiff’s position on the issue of document retention. In deciding the instant motion, this court need only understand the following salient facts. The defendants have served upon the plaintiff four sets of document requests demanding the production of documents relating to about every conceivable topic relating to or likely to lead to the discovery of evidence relating to the issues in this case. The plaintiff has endeavored to comply with these requests and to date producing to the defendants approximately one hundred and twenty six thousand pages of documents.

Notwithstanding the actions taken by the plaintiff, the defendants have repeatedly demanded that the Attorney General issue a “hold order” to “the plaintiff” instructing all state personnel to save all of their “potentially” relevant records. Most recently, on April 18, 2007, in an e-mail to defendants’ counsel, the plaintiff responded to the defendant on this issue stating in relevant part:

I also continue to be perplexed by our discussions about the defendants’ inquires about whether a “hold order” has been put in place. As you

know, Mr. Eli Soto is taking all reasonable steps to preserve records at the DHFS. I have not specifically instructed record custodians outside that agency to deviate from their standard record retention policies because the defendants have not given me any guidance on who or better what should be the focus of such extended retention. We have talked about this. And I have indicated that the State undertook a massive process of obtaining all documents relevant to the defendants' second request for production of documents. Literally thousands and thousands of documents have been scanned and turned over. All relevant data has been produced. Persons have been identified having knowledge about the areas defendants have made inquiry of.

The defendants resort to a fall back position of demanding the state preserve "all potentially responsive records." This tells me nothing about who to contact or more importantly what to say. I have asked the defendants to identify specifically what record custodian I should make inquiry and more importantly to tell me what I should instruct this custodian to retain. As we have discussed, this is not an issue with regard to DHFS. But it is critical with regard to the other agencies who are not intimately involved with the Medical Assistance Program. From my perspective, the defendants prior demands were comprehensive and complete and we have already turned over all of the records the State has relating to these demands. If the defendants could articulate to me in a comprehensible fashion what records they do not already have but would like, or might like, I am happy to convey this message to the appropriate persons. Better than that, I am amenable to producing them to you without delay.

The defendants' only response is to file the instant motion which the State of Wisconsin respectfully suggests should be denied.

Dated this 22nd day of June, 2007.



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June 22, 2007

The Honorable Richard G. Niess
Dane County Circuit Court
215 South Hamilton Street
Room 5103
Madison, Wisconsin 53703-3291

Re: State of Wisconsin v. Amgen et al.
Case No. 2004-CV-1709

Dear Judge Niess:

Enclosed for filing is the State of Wisconsin's "Brief in Response to Defendants' Motion to Require Plaintiff to Preserve Potentially Relevant Documents". I have served the brief and this letter on all counsel of record by posting both on LexisNexis.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Frank D. Remington", written over the typed name and title.

Frank D. Remington
Assistant Attorney General

c: All Counsel of Record by LexisNexis