

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 7

DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

AMGEN INC., et al.,

Defendants.

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Case No. 04-CV-1709
Unclassified – Civil:30703

**PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR ENTRY
OF PROTECTIVE ORDER PERMITTING WISCONSIN TO SHARE DISCOVERY
WITH OTHER STATES SUING THE SAME DEFENDANTS FOR RELATED CAUSES
OF ACTION**

To cut costs, save valuable time and energy, and avoid a wholly unnecessary and massive duplication of resources, the State of Wisconsin wishes to share discovery with those states who are suing the same defendants on the same or related causes of action (or with states who have launched formal investigations of defendants investigating the same causes of action). Each state with whom such information will be shared (and each person within that state) will be required to sign an agreement agreeing to hold all such materials confidential and to submit to this Court's jurisdiction.¹ Although for tactical reasons defendants have fought such discovery sharing in every state where deceptive pricing lawsuits have been filed, California, Texas, Florida and the United States Department of Justice have put in place universal sharing arrangements and they have been implemented without incident. Moreover, in this case outside counsel for Wisconsin are also counsel for the states of Illinois and Kentucky making restrictions on information sharing between these states a practical impossibility.

¹ Plaintiffs' proposed order is submitted herewith. The only difference between it and the temporary order signed by the Court are paragraphs 2, 9, 11, 12, 13, 14, 27(c) and Exhibit C. The differences are underlined. See Appendix 1. A clean copy of Plaintiffs' proposed order is also being submitted. See Appendix 2.

Defendants nevertheless seek to block discovery sharing under Wis. Stats. §804.01(3) which requires that defendants to show “good cause” for this preclusion. Defendants’ do not come close to meeting this standard. Indeed, as the case law plaintiffs cited in their initial brief makes clear, discovery sharing is generally regarded by the courts as a virtue not a vice, and Wisconsin case law supports it. Finally, to the extent that defendants have raised notice issues—for example defendants want plaintiffs to provide notice to the defendants when such information is to be shared—Wisconsin is willing to accommodate defendants.

Any analysis of defendants’ attempts to preclude discovery sharing begins (and pretty much ends) with the case of *Earl v. Gulf & Western Manufacturing Company*, 123 Wis.2d 200, 208-09, 366 N.W.2d 160 (Ct. App. 1985). That case holds that the very reason defendants have advanced for opposing sharing here—that other states may use the documents in connection with their litigation against them—is not good cause for a protective order as a matter of law: “The only reason advanced by Gulf & Western for the protective order is its fear that the Earls might pass the information along to other plaintiffs involved in litigation against Gulf & Western. This does not rise to the level of “good cause” for a protective order.” (Emphasis added.) *Earl*, *supra*, at 208.

Defendants seek to sidestep *Earl* by arguing that their concern is that the documents may become public if sharing is allowed. Thus, they contend that the Court may not be able to control who sees the shared documents, and they argue that it is hypothetically possible that the documents would be transmitted to a state that has a broad Freedom of Information Act which would permit the public to see the produced documents. Neither of these concerns has the slightest merit.

Under the procedure outlined by Wisconsin, every party who obtains access to Wisconsin documents designated “confidential” by any defendant must sign a confidentiality agreement and submit to this Court’s jurisdiction in connection with its enforcement. This insures that the Court has the power to control to whom the documents are shown. (Moreover the attorneys in the states with whom Wisconsin may share documents are also simultaneously bound by confidentiality orders entered in those states giving the defendants double protection—a belt and suspenders, so to speak.)

Defendants’ other stated concern, that some states’ Freedom of Information Act will cause documents they designate as “confidential” to be made public, is unsupported conjecture. Defendants do not identify any state where this is a realistic possibility and Wisconsin has been unable to identify any such state. Nevertheless, Wisconsin is willing to cure even this purported problem. Thus, Wisconsin will give the defendants advance notice of any state with which it seeks to share discovery. If, after such notice, defendants can show that turning over the documents to a particular state risks the documents becoming public then Wisconsin will not turn them over or, if the parties disagree about this risk, the Referee, appointed by the Court, can decide the controversy before the documents are shared. The same analysis applies to sharing discovery with states where discovery orders are in effect that (defendants argue) may make discovery inappropriate. Defendants are free to object to any such production if they feel doing so is warranted. And the documents will not be shared until the issue is resolved.

To sum up, all of defendants’ concerns are addressed in the protective order tendered by Wisconsin or can be dealt with (if any arise) on a case by case basis pursuant to the terms of the protective order. This system works. The three largest states suing the defendants, Texas, California and Florida, as well as the United States Department of Justice, all have sharing

arrangements in place and all are sharing their materials with Wisconsin. Not a single problem has arisen from this arrangement. Thus, defendants lack any factual basis upon which the Court may exercise its discretion on their behalf.

Contrast defendants' failure to even colorably show that they will be injured if the states are allowed to share discovery with the indisputable harm to Wisconsin if such sharing is not permitted. If states cannot cooperate, each state will have to duplicate every other state's efforts including copying the same documents, interviewing the same witness, independently hiring their own experts, etc., etc. This may enrich the paper industry and the expert witness profession but it will do no good for the taxpayers. That is why the courts have consistently endorsed the sharing of discovery, as Wisconsin's initial Memorandum showed. *See, e.g., Garcia v. Peebles*, 734 S.W.2d 343 (Tex. 1987); *Koval v. General Motors Corporation*, 610 N.E.2d 1199, 1202 (Ohio Co. Pl. 1990); *Wilk v. American Medical Association*, 635 F.2d 1295 (7th Cir 1981). As the Court stated in *Koval v. General Motors Corporation, supra.*, 610 N.E.2d 1202:

These and other courts have noted the efficiencies, in terms of time and cost, that are created when two similarly situated litigants share discovery and have further noted that such sharing imposes on the producing party, such as General Motors, the duty to provide full, fair and consistent disclosure to each similarly situated plaintiff . . . The court finds that the sharing of documents is beneficial, and that requiring the return of these documents would hamper such practice, and, of utmost importance, that the decisions and the denial of this motion comport with the spirit of our Civil Rules. As Civ. R.1(B) states: "These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense, and all other impediments to the expeditious administration of justice.

Defendants have not even attempted to distinguish this uniform authority.

Moreover, shared discovery facilitates truth telling. As the court observed in *Garcia v. Peebles*, 734 S.W. 343, 347 (Tex. 1987): "Shared discovery is an effective means to insure full and fair disclosure. Parties subject to a number of suits concerning the same subject matter are

forced to be consistent in their responses by the knowledge that their opponents can compare those responses.” In short, the benefits of sharing in this case substantially outweigh defendants’ speculative concerns.

Finally, defendants’ attempt to isolate Wisconsin, if successful, will be a nightmare to enforce. Sharing is already going on among the largest plaintiffs in the Country. In such a context how will the Court be able to determine whether a document in the hands of Illinois, which was produced in Wisconsin, came from Wisconsin or from another state where sharing is permitted? This problem is even more acute here because outside counsel for Wisconsin are also outside counsel for Illinois and Kentucky. Can defendants truly be arguing that counsel discovering an important document in one state cannot tell the other states they represent about its existence? No adequate justification exists for such an inefficient use of the judicial process.

Defendants have accused Wisconsin of seeking to become the national clearing house for documents. This is just hyperbole. Wisconsin has carefully limited those with whom it will share; only the attorneys and agents who represent states suing the defendants, or who have launched formal investigations of the defendants in connection with the same causes of action may see such documents. States such as Connecticut, New York and West Virginia, where the Attorneys General were precluded from sharing, argued for a much broader distribution pattern including any law enforcement officials without regard to their involvement in deceptive pricing litigation. The courts found this request too broad. Wisconsin, on the other hand, has carefully limited its protective order to permit distribution only to those with an authentic need for such documents. However, if the Court is concerned about the breadth of Wisconsin’s request the solution would not be to bar all sharing—that is neither legally supportable nor in the public interest—rather the Court could limit Wisconsin’s sharing to attorneys representing states who

are actually suing the defendants and who themselves are operating under a confidentiality order. Any additional restriction on Wisconsin's use of its discovery would be unwarranted as the case law makes clear.

CONCLUSION

It is in the public interest to permit Wisconsin to share discovery with other states and there is no provable jeopardy in doing so. Plaintiff therefore requests that the Court, consistent with Wisconsin law, enter the protective order tendered by the Plaintiff (or as modified by the Court).

Dated this _____ day of June, 2005.

Respectfully submitted,

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A handwritten signature in black ink, appearing to be 'W.P. Dixon', written above a horizontal line.

One of Plaintiff's Attorneys