STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF RAMSEY **SECOND JUDICIAL DISTRICT**

Case Type: Other Civil

THE STATE OF MINNESOTA,

BY HUBERT H. HUMPHREY, III,
ITS ATTORNEY GENERAL, **COURT FILE NO. C1-94-8565**

and

BLUE CROSS AND BLUE SHIELD
OF MINNESOTA,

Plaintiffs,

vs.

PHILIP MORRIS INCORPORATED,
R.J. REYNOLDS TOBACCO COMPANY,
BROWN & WILLIAMSON TOBACCO CORPORATION,
B.A.T INDUSTRIES P.L.C.,
LORILLARD TOBACCO COMPANY,
THE AMERICAN TOBACCO COMPANY,
LIGGETT GROUP, INC.,
THE COUNCIL FOR TOBACCO RESEARCH - U.S.A., INC., and
THE TOBACCO INSTITUTE, INC.

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' PROPOSAL
FOR ADDENDUM TO THE CASE MANAGEMENT ORDER
REGARDING FACT DEPOSITIONS

I. INTRODUCTION

The predominant and recurring theme of the Manual for Complex Litigation, Third ("the Manual"), published by the Federal Judicial Center in 1995 for the purpose of providing courts with guidance in the management of complex litigation, is that active and decisive judicial intervention in the pre-trial management of a complex case is essential. A pro-active court is the best deterrent to the delays and tactics which are inevitable in unsupervised discovery. Specifically, the Manual strongly encourages judicial control over the fact deposition phase of discovery:

> Depositions are . . . often overused and conducted inefficiently. As a result, depositions tend to be the most costly and time consuming activity in complex litigation. Management of litigation should therefore be directed at avoiding unnecessary depositions, limiting the number and length of those that are taken, and insuring that the process of taking depositions is conducted as fairly and efficiently as possible.

The Manual, at § 21.45, p. 82, Exhibit 1 (emphasis added).[1]

The cigarette industry has a well-known record of conducting costly and time consuming depositions. For example, in one reported decision, the court noted that cigarette manufacturers took **222 days of fact depositions** in a case involving the personal injury claim of **a single smoker**. Haines v. Liggett Group, Inc., 814 F.Supp. 414, 418 n. 7 (D.N.J. 1993). Accordingly, it is critical, from the outset, that the parties be guided by a clear framework laid by the Court addressing the fact deposition phase of this litigation.

At the heart of the present dispute between the parties in this case is defendants' resistance to the types of structure, guidance and restrictions on depositions which have become commonplace in complex litigation. Moreover, defendants propose that certain depositions **of third parties** proceed immediately, despite the fact that there is still so much work to be done and progress to be made on the production of documents **by the parties** to this case. Plaintiffs encourage the Court to adopt plaintiffs' proposal which seeks to reach a balance between necessary flexibility and a clear framework to govern this most important part of this case.

II. DEFENDANTS' PROPOSAL D-1; PLAINTIFFS' PROPOSAL P-1: OBTAINING DOCUMENTS FROM THIRD PARTIES

With eight months having passed since plaintiffs served their first requests for production of documents, the U.S. defendants have produced only slightly more than ten percent of their anticipated production in the Minneapolis depository. While defendants maintain that they are producing documents as quickly as possible, they are at the same time attempting to divert resources and focus to **nonparty** discovery. Several months ago, defendants proposed that they proceed immediately to the depositions of Medicaid recipients, before the bulk of defendants' own documents were produced. In keeping with the proper sequencing of discovery, this Court ordered that the defendants may proceed with such depositions, but only after the parties' document production is complete. See Order of December 21, 1995,

[1] All exhibits are to the Affidavit of Susan Richard Nelson.

¶ 2 ("Medicaid Order").

Now defendants now approach the Court, by way of their current proposal, seeking the liberty to take depositions of document custodians of third parties beginning April 1st of this year, again attempting to allocate resources away from their own document production which is so critically behind. Defendants argue, on the one hand, that their prolonged document production schedule is mandated by the magnitude of the undertaking and the resources which must be garnered to achieve it. On the other hand, defendants argue that they should be permitted to focus resources instead on taking the depositions of third-party custodians to obtain third party documents. The gross inconsistency in these positions is evident.

It is fundamental that the parties complete the production of the documents of the parties before proceeding with third-party discovery. In light of defendants' continuing protestations regarding the magnitude of the undertaking to respond to plaintiffs' requests, it is hardly appropriate for them to focus their energies instead on document production by third parties. Plaintiffs urge the Court to permit such depositions to proceed only at the conclusion of the document production by the parties. Accordingly, plaintiffs' proposal (P-1), which is modeled on paragraph 2 of this Court's Medicaid Order, sequences third-party discovery until after the production of documents properly requested in discovery requests made on or before December 31. 1995.[2]

III. PLAINTIFFS' PROPOSAL P-2, P-3 P-4: LIMITATIONS ON THE NUMBER OF FACT DEPOSITIONS

Minn.R.Civ.P. Rules 26.02(a) and 26.06 provide this Court with express authority to set reasonable limitations on the number of fact depositions. In addition, pursuant to Rule 111.02 of the General Rules of Practice for the

[2] It is also worth noting that plaintiffs have been seeking the depositions of defendants' document custodians for months in an effort to expedite the production of defendants' documents. See Transcript of November 7, 1995, at 11-12, Exhibit 2. To allow defendants to depose third parties -- but preclude plaintiffs from deposing the parties to this action -- would turn case management principles on their head.

District Courts, it is the general practice for parties to file an Informational Statement at the outset of litigation which provides the court, inter alia, with an estimate of the number of fact depositions which will be taken. See Form 111.02. In the present case, the parties now have the advantage of having litigated this case for more than a year and a half. Defendants, therefore, certainly cannot be heard to complain that it is premature to make such an estimate. Despite that fact and despite the fact that plaintiffs have provided defendants with a specific proposal for the number of fact depositions in this case, defendants refuse to set any restrictions whatsoever on the number of depositions in this case.

Defendants, instead, simply argue that it is impossible to determine the number of fact depositions to be taken at this stage of the litigation. This argument rings hollow. It is readily apparent from the specificity of defendants' requests to the State of Minnesota that this industry has made an intense study of the Medicaid system. Moreover, this industry is involved in litigation with several other states and their Medicaid systems. More than one-third of plaintiffs' documents have been produced in the Minneapolis depository. Indeed, the defendants could identify today most of the fact depositions they need to proceed in this case.

The Manual specifically recommends that the court set limits on a reasonable number of fact depositions to be taken. The Manual, at § 21.45, p. 82, Exhibit 1. Such a provision serves a multitude of purposes, including disciplining counsel to notice those depositions which are truly probative of the case. [3]

Plaintiffs propose that no party shall be required to produce for deposition more than 15 deponents. However, plaintiffs' proposal also incorporates a significant degree of flexibility. It provides that the parties may agree to change the numbers of deponents or may approach the Court for good cause shown. In addition, plaintiffs' proposal specifically exempts

[3] The Federal Rules of Civil Procedure, Rules 30(a)(2)(A) and 31(a)(2)(A) impose a presumptive limit of ten depositions each for plaintiffs, defendants, and third-party defendants.

from the limitation depositions seeking information regarding the identity of witnesses; the location, identity, foundation or production of documents, or the corporate structure, organization and inter-relationships among the parties and affiliates. Plaintiffs' proposed limit does not apply to third-party depositions (a limit of 15 per side is proposed) or to the Medicaid depositions specifically ordered in this case. Plaintiffs' proposal, therefore, reaches a balance between appropriate and necessary case management and discovery flexibility.

Even under plaintiffs' proposal, a vast number of depositions would be allowed in this case. Assuming 15 depositions per party, there would be up to 165 depositions of parties. Over and above these 165 depositions, the parties may take depositions pertaining to the identity of witnesses; the location, identity, foundation or production of documents, and the corporate structure, organization and inter-relationships among the parties and affiliates. Over and above these depositions would be up to 30 third-party depositions, as well as 10-20 Medicaid depositions. **All told, under plaintiffs' proposal, the parties may take in excess of 200 fact depositions.** With document production lagging and limited time for fact deposition discovery, this proposal is critical in order to effectively manage this case -- and meet the 1998 trial date set in the Case Management Order ("CMO").

Defendants' adamant refusal to propose any restrictions on depositions is inconsistent not only with well-established law and case management practice -- it is also inconsistent with defendants' position in other litigation, where they have urged the limitation on the number of depositions taken by plaintiffs. In the Castano case, the large class action lawsuit currently pending in federal court in New Orleans on behalf of addicted smokers, the defendants specifically proposed a case management provision imposing limits on the number of fact depositions to be taken by plaintiffs. Indeed, in their brief in Castano, these very defendants cited from The Manual on Complex Litigation, Second, endorsing the imposition of such limits. Exhibit 3, at 24-25.

Specifically, in Castano defendants argued that plaintiffs be limited to

no more than 10 depositions of each defendant's current or former employees, a proposal which sounds remarkably similar to the proposal plaintiffs make in this case. In their brief, defendants argued as follows:

> Rule 26(b)(2) of the Federal Rules of Civil Procedure expressly authorizes this court to impose limits on the number of depositions that will be permitted as well as their length. And, MCL2d, § 21.421 endorses the imposition of such limits early in the discovery process: "although such limitations have often been imposed only after abuse of the discovery process has become apparent, they may be of greater benefit if imposed in advance as part of a discovery program under Fed.R.Civ.P. 26(f). . . . " In order to deter such burdensome, duplicative and wasteful discovery, defendants propose that plaintiffs be limited to no more than ten (10) depositions of each defendant's current or former employees and Rule 30(b)(6) depositions. . . .

Exhibit 3, at 24. Accordingly, plaintiffs respectfully request that their proposal for limits on depositions, not unlike the cigarette industry's proposal in Castano, be incorporated into the Case Management Order Addendum in this case.

IV. PARAGRAPH 9 AND PLAINTIFFS' PROPOSAL P-5: THE ONE DEPOSITION RULE

The parties are in essential agreement that, except as otherwise provided by order of the Court for good cause shown (or under plaintiffs' proposal, by agreement of the parties), no person may be deposed more than once in this case. Plaintiffs' proposal seeks to clarify what will constitute "good cause" for re-opening a deposition. Plaintiffs' Proposal P-5 provides:

> For purposes of this paragraph, good cause shall include, *inter alia*, the production or discovery of new documents or new information, and the taking of a deposition for the sole purpose of establishing the foundation of documents.

It is critical to establish at the outset that no party will be prejudiced and precluded from resuming the deposition of a witness who may have probative testimony regarding new documents or new information. Moreover, given the early difficulties with establishing the foundation of documents in this case, it might well be necessary to resume the deposition of an individual for the sole purpose of establishing the foundation of certain documents.

V. OBJECTIONS, DIRECTIONS NOT TO ANSWER, OBJECTIONS TO RESPONSIVENESS OF ANSWER, AND CONSULTATION WITH COUNSEL. (PLAINTIFFS' PROPOSAL P-6, P-7, P-8, AND P-9 AND DEFENDANTS' PROPOSAL D-2)

The Manual specifically addresses the need for the court to state at the outset of complex litigation its expectations with respect to the conduct of depositions, including the use of objections, instructions not to answer,and conferring with witnesses. The Manual, at ¶ 21.251, pp. 83-84, Exhibit 1.

Indeed, courts frequently express those expectations very directly in case management orders for complex litigation. In fact, plaintiffs' proposal in this case is modeled in large part on the order of by Judge Shumaker in the Amended Case Management Order No. 1 in the Minnesota Silicone Breast Implant Litigation, dated December 10, 1993. Exhibit 4, at 25, ¶¶ 24(F)(G) and (H). As with plaintiffs' proposal, Judge Shumaker's order mandates that:

• The only objections to be raised at a deposition are those involving a privilege against disclosure or some matter that may be remedied at the time, such as to the form of the question or the responsiveness of the answer.

• Objections shall be concise and shall not suggest answers to the deponent.

• There shall be no speaking objections.

• Directions to deponents not to answer are improper, except on the ground of privilege or to enable the party to present a motion to the court for termination of the deposition or for protection under the rules.

Finally, to insure against coaching at a deposition, Plaintiffs' Proposal P-9 provides that a witness may consult with counsel, but not while a line of questions is pending (except for consultations regarding the assertion of a privilege). If a question is pending, the witness must first answer the question before consulting with counsel. See The Manual, at § 21.451, p. 84 n. 202, Exhibit 1 ("The court may prohibit counsel from even conferring with the deponent during interrogation for any purpose but deciding whether to assert a privilege.").

VI. DEFENDANTS' PROPOSAL D-3: THE PREDESIGNATION OF DEPOSITION EXHIBITS

Defendants Proposal D-3 would require the party noticing a deposition to predesignate all exhibits 15 days in advance of each deposition. Even if, for any number of legitimate reasons, a party failed to include a particular

document in its predesignation, this rigid provision provides that that party would be precluded from using the document at the deposition, except by order of the Court. Plaintiffs strenuously object to this proposal as (1) entirely unworkable, from a logistical perspective and (2) an unnecessary and unwarranted impediment to plaintiffs' ability to effectively cross-examine deponents.

From a logistical perspective, plaintiffs are simply not able to meet the draconian requirements of defendants' proposal. Plaintiffs are simply not in a position to be fully prepared -- with a comprehensive list of exhibits -- a full 15 days before each deposition. It is utterly infeasible to expect counsel to be so fully apprised of the anticipated testimony of every witness as to be able to predict all of the twists and turns that will be taken in each deposition and to designate all potential exhibits. To the contrary, it is anticipated that plaintiffs' counsel will develop information during these depositions which will require the use of additional exhibits if it turns out that the witness has additional information. Accordingly, it is literally impossible to determine every deposition exhibit which will be probative.

Even if it were possible for plaintiffs to identify and pre-designate all deposition exhibits, such a procedure would be an unwarranted intrusion into effective cross-examination. Defendants' proposal would give them two weeks to work with -- and coach -- witnesses prior to their depositions. Indeed, it is presumed that this is the principal reason motivating defendants' proposal.

However, defendants already have ample knowledge and information to prepare their witnesses. For example, defendants already are receiving notice of plaintiffs' attorneys highly-selective choice of documents from the depositories. As defendants deposit a high proportion of documents of marginal relevance into the depository, the burden of sifting through millions of pages of documents falls upon plaintiffs' counsel. Under current court orders, defendants are immediately informed of plaintiffs' selection of documents from the depository. Thus, defendants already are gaining insight into plaintiffs' selection of documents and theory of the case, which

defendants undoubtedly will put to use in preparing deponents. In addition, defendants have been collecting and analyzing their own documents for years and presumably are well prepared to anticipate which documents and areas of inquiry will be used with deponents.

Defendants' insistence on obtaining plaintiffs' selection of deposition exhibits also is highly inconsistent with defendants' arguments to this Court regarding the production of their document indices. In the year-long battle over the indices, defendants have repeatedly asserted that their indices -- which list millions of documents -- are opinion work product which cannot be disclosed under any circumstances. However, the pre-designation of deposition exhibits would amount to a much greater invasion of work product than the disclosure of objective information from defendants' indices. The selection of exhibits for a specific deposition -- even plaintiffs' selection of documents from the depository -- is much more selective than defendants' massive indices, which were not even assembled for this specific case. Moreover, defendants have made no showing of good cause for their proposal to overcome the protections of the work product doctrine.[4]

In sum, the extraordinary burden of defendants' proposal far outweighs any de minimis benefit that might enure to the parties from such a requirement. Accordingly, plaintiffs urge that the Court not enter a provision which would preclude honest and fair cross-examination in this case.[5]

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[4] The Manual provides that, "The discovery plan should establish procedures for . . . exchanging in advance papers about which the examining party intends to question the witness (except those to be used for genuine impeachment.)" § 21.45, p. 84, Exhibit 1, citing pre-trial order in the San Juan Hotel Fire Litigation; see also In re San Juan Dupont Plaza Hotel Fire Litigation, 859 F.2d 1007 (1st Cir. 1988). However, unlike the present case, good cause was demonstrated in the San Juan litigation by the fact that there were more than 2,000 parties and more than 2,000 depositions, rendering case management a literal nightmare. Moreover, The Manual is careful to note that pre-designation should not be required for exhibits to be used for impeachment. In the present case, given the nature of defendants' public statements on smoking and health -- and the inconsistencies when compared against defendants' internal documents -- it is clear that many if not most deposition exhibits will be used for impeachment.

[5] Judge Schumacher's order in the breast implant litigation does not call for the predesignation of documents.

VII. DEFENDANTS' PROPOSAL REGARDING WITNESS' RIGHT TO HAVE DEPOSITION COMPLETED WITHOUT ADJOURNMENT (DEFENDANTS' PROPOSAL D-4).

Defendants propose that a witness have the right to require his or her deposition to be completed without deferral or adjournment by reason of any other previously scheduled deposition. Although it is certainly optimal to limit the inconvenience to a witness for a deposition, defendants' proposal could seriously disrupt a heavily-laden deposition schedule, especially if there are lengthy speeches and numerous objections on the record which prevent counsel from having the opportunity to cover the material planned for that witness in a reasonable period of time. It would be a far better procedure to ask the parties to proceed in good faith and attempt to complete a deposition in the scheduled amount of time and, if unable to do so, to meet and confer pursuant to paragraph 4 of the proposed order to arrange for the continuation of the deposition at a mutually-convenient time.

VIII. CONCLUSION

Plaintiffs have endeavored to create a balance between the needs and expectations of counsel and witnesses in this critical portion of the discovery phase of this case. Accordingly, plaintiffs urge that the Court adopt plaintiffs' proposals for the Addendum to the Case Management Order regarding fact depositions.

Date: February 16, 1996 ROBINS, KAPLAN, MILLER & CIRESI

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