UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re BAYCOL PRODUCTS LITIGATION

MDL No. 1431 (MJD/JGL)

O R D E R

This document relates to:

All Cases

JONATHAN LEBEDOFF, Chief United States Magistrate Judge

The above-entitled matter came before United States Chief Magistrate Judge Jonathan Lebedoff on Plaintiffs' Motion to Compel Production of Bayer Corporation and Bayer A.G. Documents. The case has been referred to the undersigned for resolution of pretrial discovery matters pursuant to 28 U.S.C. § 636, D. Minn. LR 72.1, and Pretrial Order No. 52.

I. BACKGROUND

Plaintiffs move the Court for an order compelling Defendants Bayer Corporation and Bayer A.G. ("Bayer Defendants") to produce certain documents which Plaintiffs claim are being improperly withheld from discovery in this Multidistrict Litigation ("MDL"). Bayer Defendants contend that the documents being withheld are properly withheld from production because they are subject to the attorney-client privilege, the self-critical analysis privilege, and/or German privacy laws. Pursuant to this Court's request, the Bayer Defendants have submitted to this Court, for *in camera* review, documents to which they are claiming privilege, and this Court has met *in camera* with

defense counsel with Plaintiffs' consent. The Court has now completed its review of the documents.

II. LEGAL ANALYSIS

A. Applicable Privilege Law

In their motion to compel, Plaintiffs claim that the law of privilege is procedural and that the Court may accordingly apply Minnesota state privilege law to the discovery disputes in this MDL. The Bayer Defendants argue that, because the law of privilege is substantive, a transferee court in an MDL "must apply the state law that would have applied to the individual cases had they not been transferred for consolidation." Bayer Memo. at p. 4 (citing In re Temporomandibular Joint Implants Products Liability Litigation, 97 F.3d 1050, 1055 (8th Cir. 1996)). However, the Bayer Defendants have not provided this Court with the elements of privilege for the states from which the individual cases were transferred.[1] Instead, the Bayer Defendants argue that their "claims of attorney-client privilege are valid when tested by the propositions for which plaintiffs cite Minnesota law," and as such, "this Court does not need to deal with the thorny problem of analyzing privilege claims

---

[1] The Bayer Defendants bear the burden of establishing that the documents they withhold satisfy the elements of privilege. State v. Lender, 124 N.W.2d 355, 358 (Minn. 1963). Upon reviewing the Bayer Defendants' Memorandum of Law, the Court informed the Bayer Defendants that if they sought to have this Court apply the law of the multiple jurisdictions, the Bayer Defendants needed to provide the Court with a survey of the applicable law. Because no such supplementation was provided, the Bayer Defendants have not met their burden of establishing privilege under non-Minnesota law and they have further waived their right to apply privilege law from the other jurisdictions.

under the law of multiple jurisdictions." Bayer Memo. at p. 4.

1. MDL Policy Considerations

It is not surprising that the parties have submitted neither a survey of the various jurisdictions' privilege laws nor legal precedent in which a court applies multiple privilege analyses to a single set of discovery in an MDL. A primary objective of consolidating pretrial proceedings into an MDL under 28 U.S.C. § 1407 is to "avoid or minimize conflict and duplication in discovery and other pretrial procedures in related cases by providing centralized management under court supervision." Steinman, Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation, 135 U.Pa.L.Rev. 595, 664 (1987). As explained in In re Exterior Siding & Aluminum Coil Antitrust Litigation:

> The transfer to a single jurisdiction, for pretrial proceedings, of numerous cases pending in various district courts, affords the opportunity for centralized, coordinated and consolidated management thereby avoiding the chaos of conflicting decisions and fostering economy and efficiency in judicial administration.

538 F. Supp. 45, 47 (D. Minn. 1982), vacated on other grounds, 696 F.2d 613 (8th Cir. 1982). The impracticability of applying laws of multiple jurisdictions in a single MDL was recognized as being contrary to the purpose of an MDL by the Honorable Ruth Bader Ginsburg, writing on behalf of the United States Court of Appeals, District of Columbia Circuit, in finding that a transferee court may apply its own circuit's federal law to the case:

> The conduct of multidistrict litigation, which is invariably time consuming as it is, will grind to a

> standstill while transferee judges read separate briefs, each based on the case law of a transferor circuit, on a single issue of federal law. Much of the advantage that transfer was intended to produce, and particularly the desiderata of furthering efficiency and preventing inconsistent rulings, will be lost by requiring transferee judges to wear a number of judicial hats.

In re Korean Air Lines Disaster of September 1, 1983, 829 F.2d 1171, 1184 (D.C. 1987). Other transferee courts involved in § 1407 litigation have applied their own substantive law of the case, without conducting an analysis as to whether another forum's law would be more appropriate. See, e.g., In re Upjohn Co. Antibiotic Cleocin Prod. Liab. Litig., 664 F.2d 114, 118 (6th Cir. 1981).

This Court similarly finds that the interests of fairness, consistency, judicial efficiency, and the MDL are best served by applying a consistent law of privilege to discovery in the pretrial proceedings.

2. Choice-of-Law Analysis

Questions of privilege are determined by state law in a federal diversity case. Cervantes v. Time, Inc., 464 F.2d 986, 990 (8th Cir. 1972). See also Simon v. G.D. Searle & Co., 816 F. 2d 397, 402 (8th Cir. 1987); Fed. R. Evid. 501. To determine the applicable state law in a federal diversity case, a court must apply the choice-of-law rules of the state in which it sits. Klaxon Co. v. Stentor Electric Mnfg. Co., Inc., 313 U.S. 487, 496 (1942); Cervantes, 464 F.2d at 990. See also Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508 (2001) (claim preclusion case in which Court adopts, "as the federally prescribed rule of decision,

the law that would be applied by state courts in the State in which the federal diversity court sits.")

Minnesota courts have adopted a flexible approach to choice-of-law methodology, taking into account policy as well as factual considerations. Schwartz v. Consolidated Freightways Corp., 221 N.W.2d 665, 669 (1974). The five primary factors considered in a Minnesota choice-of-law analysis are:

(a) Predictability of results;

(b) maintenance of interstate and international order;

(c) simplification of the judicial task;

(d) advancement of the forum's governmental interests; and

(e) application of the better rule of law.

Milkovich v. Saari, 203 N.W.2d 408, 412 (Minn. 1973). See also Davis v. Furlong, 328 N.W.2d 150, 152 (Minn. 1983); Schwartz, 221 N.W.2d at 668.

Applying Minnesota choice-of-law principles to the present case, this Court finds that all five factors favor the application of Minnesota law to the questions of privilege presented here. Indeed, the parties have essentially acknowledged their acceptance of Minnesota privilege law in this case, as it is the primary case law which they presented to the Court for consideration. As such, application of Minnesota law is most likely to satisfy factors (a) and (e). The consistency of applying the law of the MDL's forum state satisfies factors (b), (c) and (d) by creating order, simplifying the process, and advancing the forum's interests. Accordingly, this Court finds that Minnesota privilege law is appropriately applied to the questions presented in the present motion.

3. Application of Minnesota Privilege Law

Minnesota law protects from discovery confidential communications between a client and its attorney which are made for the purpose of seeking legal advice. Brown v. St. Paul City R.R. Co., 62 N.W.2d 688, 700-01 (Minn. 1954); Marvin Lumber v. PPG Industries, Inc., 168 F.R.D. 641, 644 (D.Minn. 1996). The attorney-client privilege does not protect client communications that relate only to business information, and a business document cannot be made privileged by simply providing a copy to counsel. Simon v. G.D. Searle & Co., 816 F.2d 397, 403 (8th Cir. 1987). As noted by the Eighth Circuit, applying Minnesota law, "[j]ust as the minutes of business meetings attended by attorneys are not automatically privileged, business documents sent to corporate officers and employees, as well as the corporation's attorneys, do not become privileged automatically." Id. at 403.

This Court has conducted an *in camera* review of the documents the Bayer Defendants are withholding on the basis of attorney-client privilege. Because of the close relationship between Bayer's many in-house attorneys and businesspeople, the Court acknowledges that determination of whether the privilege applies to a particular document is not always simple or clear. The Court finds that the majority of documents presented for review are appropriately withheld as privileged. Nevertheless, the Court grants Plaintiffs'

motion to compel in part by determining that the following documents being withheld are not privileged and should be produced to Plaintiffs:[2]

Bayer A.G. Privilege Log, 11/2/02 - 2/13/03 numbered 23, 25, 31, 38, 53, 55, 74, 81, 82, 90, 127, 130, 132, 133, 134, 135, 139, 152, 328, 500, 923, 946, 1030, 1046, 1050, 1058, 1195;

Bayer A.G. Privilege Log, 9/30/02 numbered 17;

Bayer Corp. Privilege Log, 11/12/02 - 2/13/03 numbered 3, 20, 34;

Bayer Corp. Privilege Log, 12/23/02 numbered 143;

Bayer Corp. Privilege Log, 10/2/02 numbered 9.

Because of the volume of documents, the number of duplications in communications reflected in those documents, and the short time frame this Court had for review, this Court was not able to ensure that all duplicates of communications are similarly disclosed. If this Court has determined a particular communication to be non-privileged, the Bayer Defendants must disclose all versions of that communication; Bayer Defendants may redact from duplicate copies additional information or communications which have not been ordered disclosed.

4. Self-Critical Analysis Privilege

Plaintiffs move the Court to compel the Bayer Defendants to produce documents they are withholding pursuant to the "self-critical analysis"

---

[2] Production of any documents pursuant to this Court Order shall not be found to constitute any waiver of attorney-client privilege to the documents or to any related, privileged communications.

privilege, arguing that it is not a valid privilege. The Bayer Defendants urge the Court to adopt the self-critical analysis privilege in this case.

Federal courts generally disfavor evidentiary privileges. Stabnow v. Consolidated Freightways, 2000 U.S. Dist. LEXIS 13612, *11 (D. Minn. 2000). As the Supreme Court recognized in Trammel v. United States,

> Testimonial exclusionary rules and privileges contravene the fundamental principle that "the public…has a right to every man's evidence." United States v. Bryan, 339 U.S. 323, 331 (1950). As such, they must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding predominant principle of utilizing all rational means for ascertaining truth." Elkins v. United States, 364 U.S. 206, 234; Accord, United States v. Nixon, 418 U.S. 683, 709-10 (1974).

445 U.S. 40, 50-51 (1980).

The self-critical analysis privilege was originally recognized in the context of an affirmative action case by the United States District Court for the District of Georgia. Stabnow, at *7 (citing Banks v. Lockheed-Georgia Co., 53 F.R.D. 283 (N.D. Ga. 1971)). The privilege is premised "upon the concern that disclosure of documents reflecting candid self-examination will deter or supress socially useful investigations and evaluations or compliance with the law or with professional standards." Hardy v. New York News, Inc., 114 F.R.D. 633, 640 (S.D.N.Y. 1987).

Like other federal and state courts throughout the nation, Minnesota courts "have not warmly embraced the 'self-critical analysis' privilege." Stabnow at * 10-11. Noting Minnesota's reluctance to accept the

privilege, the United States District Court for the District of Minnesota has refused to recognize the privilege, further explaining that "the argument that potential disclosure would discourage self-criticism is not compelling." Capellupo v. FMC Corp., 1988 U.S. Dist. LEXIS 3792, *15 (D. Minn. 1988). See also Union Pacific v. Mower, 219 F.3d 1069,1076 n.7 (9th Cir. 2000). ("assertion of a self critical analysis privilege is particularly questionable…this Court has not recognized this novel privilege.")

When given the opportunity, the Eighth Circuit has declined to recognize the self-critical analysis privilege. See Emerson Electric Co. v. Schlesinger, 609 F.2d 898, 906-07 (8th Cir. 1979). The Eighth Circuit has further noted that courts which seem to accept the purported privilege

> typically concede its possible application in some situations, but then proceed to find a reason why the documents in question do not fall within its scope. As the court stated in Lloyd v. Cessna Aircraft Co., 74 F.R.D. 518, 522 (E.D. Tenn. 1977), the privilege "at the most remains largely undefined and has not generally been recognized." FTC v. TRW, Inc., 628 F.2d 207, 210 (D.C. Cir. 1980) (other citations omitted).

In re Burlington Northern, Inc., 679 F, 2d 762, 765 n.4 (8th Cir. 1982).

In the present case, this Court declines to extend the self-critical analysis privilege to discovery in this MDL. Minnesota has not recognized the privilege, and this Court finds nothing in this case which warrants the extension of the privilege here. Like most courts, this one is unpersuaded that failure to recognize the privilege will have a chilling effect on a party's internal investigations, legal compliance, or evaluations. Accordingly, Plaintiffs' motion

to compel documents being withheld on the basis of the "self-critical analysis privilege" is granted.

B. German Privacy Law

Plaintiffs move the Court for an order compelling the Bayer Defendants to produce certain Bayer AG personnel documents. The Bayer Defendants contend that the requested documents are performance evaluations of Bayer AG employees in Germany and are subject to the German Federal Data Protection Act, which prohibits the dissemination of private information. It has been represented to this Court by the Bayer Defendants that the only documents in issue are performance evaluations of German employees, conducted in Germany, by Germans, for work performed in Germany. It appears that Plaintiffs contend that such documents may be relevant to this action as they may include observations, comments or critiques of individuals' job performance relating to Baycol.

When a foreign party relies on foreign law to resist production of discoverable information, a court should balance its interests with the interests of the foreign sovereign. See, e.g., Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 544 n.28 (1987); Restatement (Third) of Foreign Relations Law § 442 (1987). In Aerospatiale, the Supreme Court adopted the Third Restatement of Foreign Relations Law which suggests that courts consider five factors when determining whether foreign law should preclude production of information:

(a) The importance to the litigation of the information

> requested;
>
> (b) the degree of specificity of the request;
>
> (c) whether the information originated in the United States;
>
> (d) the availability of alternative means to obtain the information; and
>
> (e) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the foreign country.

Aerospatiale, 482 U.S. at 544 n.28.

In the present case, Plaintiffs have not established that their interest in performance evaluations of Bayer A.G. employees in Germany outweighs German interests in their privacy. Plaintiffs have made no showing of the importance of this information or even of the specificity of their request for the information. Nor can Plaintiffs show that they cannot otherwise obtain the information they need, as they may ask the Bayer A.G. employees for the information they seek in depositions. The evaluations were conducted of German employees in Germany by German employees. Accordingly, this Court finds that Germany's interest in protecting the privacy of such information outweighs the Plaintiffs' claimed interests in this litigation. Plaintiffs' motion to compel the personnel documents is denied.

Based upon all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that Plaintiffs' Motion to Compel Production of certain

Bayer Corporation and Bayer A.G. Documents is **GRANTED IN PART** and **DENIED IN PART** as set forth above.

Dated: March 21, 2003

JONATHAN LEBEDOFF
Chief United States Magistrate Judge