

**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 Actions.

JONATHAN LEBEDOFF, Chief United States Magistrate Judge

The above-entitled matter is before the undersigned Chief Magistrate Judge of District Court on Defendants' Joint Motion to Enforce Employment Record Authorization Requirement of Pretrial Order No. 10. 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 52.

I. INTRODUCTION

Defendants Bayer Corporation and SmithKline Beecham Corporation d/b/a GlaxoSmithKline ("Defendants") ask this Court to compel certain Plaintiffs to produce to Defendants Authorizations for Release of Employment and Unemployment Records ("Employment Authorizations"). Plaintiffs represented by the law firms of Weitz & Luxenberg, P.C. and Lieff, Cabraser, Heimann & Bernstein, LLP ("Opposing Plaintiffs"), oppose the motion on behalf of Plaintiffs who are not making any wage loss claims, on the grounds that the privacy interests in employment records exceed Defendants' limited interests in obtaining them.

II. BACKGROUND

In order to streamline the discovery processes in this multi-district litigation, representatives of the Plaintiffs and Defendants met and negotiated the terms and language of “Plaintiff Fact Sheets” (“PFS”) and associated authorizations for medical and employment records. Although the parties apparently negotiated separate authorizations based on whether a Plaintiff has psychological injury claims, it does not appear that the parties negotiated separate authorizations based on whether a Plaintiff has wage claims. Rather, the PFS instructs the Plaintiffs to “[c]omplete and sign” the attached authorizations, including the “Authorization for Release of Employment and Unemployment Records (No Psychological Injuries Claimed).” (PFS ¶ X.)

Once the parties agreed upon the language for the PFS and authorizations, the Honorable Michael J. Davis, United States District Judge for the District of Minnesota, incorporated those documents into his Pretrial Order No. 10, noting that the “Fact Sheet and Authorization will be completed by each Plaintiff...”¹ Pretrial Order No. 10, ¶ I. Judge Davis continues to issue Pretrial Orders which contemplate the execution of the PFS authorizations by Plaintiffs. In April, 2002, Judge Davis required newly transferred Plaintiffs to “complete and serve upon defendants a responsive Plaintiff’s Fact Sheet and

¹The Court’s Order specifically refers to an “Authorization for Release of Medical Records.” Opposing Plaintiffs argue that the Order is therefore ambiguous as to whether Employment Authorizations must be executed in addition to medical authorizations. Because the Court’s Order attaches several authorizations seeking predominantly medical information, including the Employment Authorizations, this Court finds that the Employment Authorizations are included in the scope of the Order.

Authorizations required therein.” Pretrial Order No. 12, ¶ 1. The Court has also provided a procedure by which any Plaintiff may object to the use of the authorizations. Pretrial Order No. 16, ¶ 3.

The Opposing Plaintiffs argue that Plaintiffs who do not have lost wage claims should not be required to execute the Employment Authorizations. Opposing Plaintiffs claim that the employment files of these Plaintiffs contain confidential information and that the Plaintiffs’ privacy rights in those files outweigh any interest that Defendants may have in them. Defendants contend that Court order obligates all Plaintiffs, regardless of wage claims, to complete the Employment Authorizations. Defendants claim that they are entitled to obtain the employment files in any event as the files “may” contain references to the Plaintiffs’ medical conditions.

After the present motion was filed, Defendants informed the Court in their Reply Memorandum that they had arrived at a mutual resolution to the motion with the Plaintiffs represented by Lieff, Cabraser, Heimann & Bernstein, LLP. Defendants ask that the Court modify the Pretrial Orders to reflect the stipulated proposal, which requires the Plaintiffs who have been employed in the last ten years to execute Employment Authorizations. However, under the proposal, any objecting Plaintiffs may be the first to review the documents that are collected as a result of the Employment Authorizations and designate which documents should not be produced to Defendants, giving the reason for the designation. If Defendants dispute the designation, the parties will then

resolve the issue according to the guidelines established by Pretrial Order No. 16, ¶ 4, by submitting the dispute to this Court.

Plaintiffs represented by Weitz & Luxenberg, P.C. have not agreed to the stipulated proposal between Defendants and Plaintiffs represented by Lieff, Cabraser, Heimann & Bernstein, LLP.

III. DISCUSSION

This Court finds that the parties have stipulated to the execution of Employment Authorizations by Plaintiffs. Although the parties stipulated to different authorizations for Plaintiffs with psychological damage claims, they apparently chose not to similarly distinguish the Plaintiffs with no wage loss claims. The Court has incorporated and relied upon the parties' stipulation to ensure fair and efficient administration of all the parties' interests here. Accordingly, this Court finds that all Plaintiffs who have been employed (other than self-employed) in the last ten years must execute the Employment Authorizations attached to Pretrial Order No. 10, regardless of whether they are making wage claims.

Although the parties' stipulation and associated Court orders require all Plaintiffs to execute Employment Authorizations, the parties and the Court have preserved the Plaintiffs' abilities to object to the use of the Employment Authorizations. Opposing Plaintiffs' concerns over the use of the Employment Authorizations is well-taken; this Court finds tenuous, at best, the argument that employment files of non-wage claim Plaintiffs are relevant.

Defendants have ample opportunity to fully discover Plaintiffs' medical conditions through appropriate discovery into their medical histories.

In order to balance the interests of the parties and the efficient administration of justice, this Court adopts the stipulated proposal negotiated by Defendants and the Plaintiffs represented by Lieff, Cabraser, Heimann & Bernstein, LLP for resolution of the present dispute. Specifically, where a Plaintiff does not assert a claim for lost wages:

- A. If Plaintiff has not been employed or has been self-employed in the ten years prior to the date upon which the PFS is served, then Plaintiff need not complete and serve upon Defendants an Authorization for Release of Employment and Unemployment Records.
- B. If Plaintiff has been employed in the ten years prior to the date upon which the PFS is served, then Plaintiff shall complete and serve upon Defendants an authorization for Release of Employment and Unemployment Records.
 1. If Plaintiff does not make an objection pursuant to ¶ 3(a) of Pretrial Order No. 16, then collection of employment/unemployment records will proceed in accordance with Pretrial Order Nos. 4, 10, 12, and 16.
 2. If Plaintiff does make an objection pursuant to ¶ 3(a) of Pretrial Order No.16, then collection of employment/unemployment records will take place as follows:
 - a. Despite the objection, MCS will proceed to collect employment/unemployment records from all sources identified in sections II.M. and N. of the PFS.
 - b. Those employment/unemployment records collected by MCS will first be delivered to the objecting Plaintiff's counsel, who will have 45 days to review the records and designate by Bates number(s) those records that are not to be produced to Defendants, along with the basis for nonproduction. If Defendants dispute

Plaintiffs' designation, resolution will take place according to the guidelines established by ¶ 4 of Pretrial Order No. 16. Defendants shall not have access to any records collected by MCS that are designated for nonproduction, unless Plaintiff's objection is resolved in Defendants' favor pursuant to ¶ 4 of Pretrial Order No. 16, or unless Plaintiffs fail to timely review the records as set forth here.

- c. Should Plaintiff fail to serve his or her designation on Defendants and MCS within the 45 days, Plaintiff's objection will be deemed waived, and MCS will provide Defendants with a copy of the records at issue.

Based upon all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that Defendants' Motion to Enforce Employment Record Authorization Requirement of Pretrial Order No. 10 is **GRANTED** as set forth in this Order.

Dated: January 14, 2003

JONATHAN LEBEDOFF
Chief United States Magistrate Judge