

Special Master Rules Against SmithKline Beecham Privilege Log

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On October 28, 1999 MDL 1203 Special Discovery Master, Gregory P. Miller, from the Philadelphia, Pennsylvania law firm of Miller, Alfano & Rasponi, PC, issued a long anticipated ruling regarding the propriety of various document privilege logs submitted by phentermine manufacturer/distributor SmithKline Beecham Corporation, which had submitted voluminous privilege logs in lieu of producing thousands of pages of documents sought by the MDL 1203 Plaintiffs' Management Committee. *Decision and Recommendation No. 36 of the Special Discovery Master (As to Defendant SmithKline Beecham Corporation's Privilege Log)*. The Special Master's ruling rejected SmithKline Beecham's privilege assertion over hundreds of documents, requires SmithKline Beecham to re-do their privilege log and to produce documents and awards costs against SmithKline Beecham. *Id.* at pp. 9-10.

Special Master Miller's Decision No. 36 provides a detailed analysis of the factual background and governing law pertaining to SmithKline Beecham Corporation's assertion of privilege over thousands of documents. In particular, Special Master Miller focused his analysis on documents pertaining to articles and other media selected or compiled by counsel for SmithKline Beecham and/or by SmithKline Beecham's "Litigation Media Consultant." Although the court recognized that, "in certain situations, courts have held that counsel's selection and compilation of documents may fall within the protected category of opinion work product," Special Master Miller also observed that, "the selection and grouping of documents does not necessarily constitute protected opinion work product." Decision No. 36, pp. 7-8. In this case, Special Master Miller concluded:

The SKB Media Documents were not selected or compiled from documents produced in this litigation, nor were they selected or compiled exclusively for use by SKB in witness depositions. These documents were simply culled from the public domain by searching for information applicable to Fen-Phen related issues. As such, the articles and media in question were probably known to the PMC. SKB has not met its burden of proof in establishing that the SKB Media Documents are entitled to heightened opinion work product protection and should not be produced. Therefore, I am instructing SKB to produce immediately the SKB Media Documents, and all other similar documents withheld from production, to the PMC.

Decision No. 36, pp. 8-9.

Special Master Miller's Decision No. 36 chronicles substantial efforts to narrow SmithKline Beecham's privilege assertions though various meet and confer efforts. Those efforts succeeded, for example, in persuading SmithKline Beecham to produce a chart containing

detailed information about legal personnel involved as recipients or authors of the various privileged documents and this sensible process led SmithKline Beecham to admit that two individuals, J. D. Foggio and J. A. Marlino were not even attorneys, as originally indicated, and that Lawrence Olon was a SmithKline Beecham attorney who also served in a business capacity as a Director of Regulatory Affairs. Following the admission, SmithKline Beecham promised to review all documents involving Mr. Olon and produce those in which he acted in his capacity as a director, not an attorney. Decision No. 36 at p. 6. The meet and confer process also led to the voluntary withdrawal of the privilege assertion for hundreds of other documents. Special Master Miller's efforts appear to have been greatly aided by his wise decision to randomly audit SmithKline Beecham's privilege log, which contained so many thousands of entries that a document-by-document review would likely have been impracticable. Decision No. 36 at p. 4.

Special Master Miller's Decision No. 36 represents an excellent example of the means in which a Special Discovery Master may scrutinize privilege claims over thousands and thousands of documents in an orderly, fair and expedient fashion.