

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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IN RE: NEW YORK CITY  
ASBESTOS LITIGATION  
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NYCAL  
Index m 40000/88

THIS DOCUMENT RELATES TO:

RECOMMENDATION  
OF THE SPECIAL MASTER

ALL WEITZ & LUXENBERG CASES IN WHICH  
GEORGIA-PACIFIC IS A DEFENDANT  
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Plaintiffs represented by Weitz & Luxenberg, P.C. (“W&L”) seek to discover materials and raw data related to, associated with, or underlying, certain published studies undertaken and/or sponsored by defendant Georgia-Pacific (“GP”) in 2005 and thereafter. The published studies at issue relate to asbestos fiber release from “re-formulated” asbestos joint compound and animal inhalation studies using a manufactured-for-study compound. GP opposes this discovery claiming that the studies were commissioned in connection with the defense of litigation and that attorney-client and work product privileges protect the materials and data from discovery.

GP further asserts that the present discovery issue does not become ripe unless or until the relevant researchers have been invited to testify in a particular case and become “testifying experts.” GP’s reliance on the body of law governing testifying and non testifying retained experts is misplaced. This discovery dispute does not implicate issues regarding testifying experts versus non-testifying retained experts.<sup>a</sup> Rather, this dispute, at its core, concerns the researchers’ or research scientists’ interests in their research data and study-related materials – referred to in some jurisdictions as the “research scholar’s privilege.”

Most of the relevant case law on this issue is from the federal courts. As a threshold matter, there is no New York authority that recognizes the existence of a research scholar’s privilege. As the Court concluded in *In re American Tobacco Co.*, 880 F.2d 1520, 1529 (2d Cir. 1989) (applying New York law and noting that “no New York case can be said to have recognized a scholar’s privilege impeding production of research data”):

The publication of [research] findings and conclusions invites use by persons whom the findings favor and invites reliance by the finders of fact. The public has an interest in resolving disputes on the basis of accurate information. Though

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<sup>a</sup> Even under New York law, however, once a non-testifying expert has submitted a report, the privilege claimed here has been waived. *See generally People v. Harris*, 98 N.Y.2d 452, 488 (approving order requiring “the disclosure of notes used by defendant’s nontestifying expert” where testifying expert relied upon nontestifying expert’s report.

under New York law this interest does not warrant requiring scientists to testify or prepare reports in actions with which they have no personal connection, we doubt that New York law would recognize a privilege to withhold the data on which already published findings are based and thereby preclude direct scrutiny of the findings' validity. Thus, even assuming that there is a qualified privilege for research scientists under New York law, we conclude that the scientists may be required to produce data underlying their published findings.

880 F.2d at 1529-30.

Other courts across the nation have reached similar conclusions. *See, e.g., United States Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 162 (E.D.N.Y. 1994) (holding that defendants' claim of attorney-client privilege "goes well beyond the 'outer boundary' of the privilege. . . . [T]hese consultants based their opinions on factual and scientific evidence they generated through studies and collected through observation . . . , information that did not come through client confidences. Such underlying factual data can never be protected by the attorney-client privilege and neither can the resulting opinions and recommendations. There are few, if any, conceivable circumstances where a scientist or engineer employed to gather data should be considered an agent within the scope of the privilege"); *In re Welding Fume Products Liability Litig.*, 534 F. Supp.2d 761 (N.D. Ohio 2008) (noting that defendants therein had undertaken "intensive and repeated efforts to discover . . . a high level of detail regarding the data underlying [plaintiff-favorable] studies of the degree to which welders suffer neurological injury"); *Murphy v. Philip Morris, Inc.*, m 99-7155-RAP (JWJx), 2000 U.S. Dist. LEXIS 21128 at \*2-3 (C.D. Cal. Mar. 17, 2000) (approving defendant's application to compel research entity "to disclose the raw data" and other materials underlying its study); *United States v. Barr Laboratories, Inc.*, 812 F. Supp. 458, 492 (D.N.J. 1993) ("ORDERED that defendant Barr shall produce the data underlying its analytical validation studies relied upon during this proceeding within thirty (30) days of the date of this Order").

Accordingly, GP shall produce the materials and raw data related to, associated with, or underlying, certain published studies that it undertook or sponsored, as described herein and such production shall occur by or on June 30, 2011.

Dated: June 15, 2011

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Laraine Pacheco, Special Master