

**STATE OF MINNESOTA  
IN COURT OF APPEALS**

In re Minnesota Intoxilyzer 5000EN  
Source Code Litigation  
in Implied Consent Cases,  
  
and

**COMMISSIONER'S RESPONSE TO  
PETITION FOR  
DISCRETIONARY REVIEW**

In re Minnesota Intoxilyzer 5000EN  
Source Code Litigation  
in Criminal Cases.

Appellate Court File No. A11-560

Master Court File Nos. 70-CV-09-19459  
70-CR-09-19749

**TO:** The Minnesota Court of Appeals.

On March 28, 2011, liaison defense counsel for petitioners in implied consent cases and defendants in criminal driving while impaired (“DWI”) cases filed a petition for discretionary review in the above-entitled matter. However, the district court’s final order in this matter is appealable as of right.

Under the civil appellate rules, an order is appealable if it “affect[s] a substantial right made in an administrative or other special proceeding.” *See* Minn. R. Civ. App. 103.03(g) (2011). A “special proceeding” is a proceeding commenced independently of a pending action by petition or motion in order to obtain special relief. *See In re GlaxoSmithKline P.L.C.*, 699 N.W.2d 749, 756 (Minn. 2005). A special proceeding adjudicates a substantial right distinct from any judgment entered upon the merits of the original action. *See id.*

In this case, Chief Justice Magnuson directed Judge Jerome B. Abrams to “administer, hear, and decide all pretrial matters concerning challenges to the reliability of Intoxilyzer 5000EN results based on the source code of the instrument . . . .” *See* Order, *In re Minnesota Intoxilyzer Source Code Litigation 5000EN*, No. A09-2109 (Minn. Jan. 11, 2010) (copy attached); *see also* Minn. R. Gen. Prac. 103.03(a) (authorizing the Chief Justice to consolidate

issue with a particular judge “if there is a special need for or desirability of central or coordinated judicial management.”). Based on the Order, more than 4,200 criminal DWI and implied consent cases were assigned and consolidated into a special proceeding before Judge Abrams. The purpose of this special proceeding was to adjudicate the source code issue separately from the 4,200 individual underlying implied consent and criminal DWI cases pending statewide.

On March 8, 2011, the district court issued its final order in the special proceeding, which concluded that “the results of breath alcohol testing conducted on the Intoxilyzer 5000EN which express a numerical value for measured breath alcohol are reliable and unaffected by actual or alleged problems with the source code of the instrument.” *See* Order 20 - Order and Memorandum Following Final Evidentiary Hearing, *In re Source Code Evidentiary Hearings in Implied Consent Matters*, Master File No. 70-CV-09-19459 (Dist. Ct. March 8, 2011) (copy filed with Petition for Discretionary Review). According to the district court, the final order “allows these 4,000 plus cases pending in 69 counties throughout Minnesota to be returned to their home county for further proceedings.” *See id.* at 2. Accordingly, the district court’s final order resolved the distinct source code issue relating to the reliability of the Intoxilyzer 5000EN results, which clearly affects a substantial right. Thus, the final order is immediately appealable pursuant to Rule 103.03(g).

A contrary conclusion would mean that the source code issue is only appealable at the conclusion of each of the more than 4,000 pending implied consent and criminal DWI cases. This result would totally undermine the very purpose of consolidating the source code issue with a single judge, and present absurd judicial inefficiencies with the prospect of more than 4,000 separate appeals. Indeed, as Chief Justice Magnuson stated in his Order consolidating the cases into a special proceeding, “assignment will eliminate duplicative litigation in different districts,

prevent inconsistent rulings, conserve the resources of the parties, their counsel, and the judiciary, and facilitate resolution of the cases.” *See* Order at 3.

Accordingly, review by this Court is available by direct appeal and the request for discretionary review is academic and unnecessary. However, if the Court concludes that the final order in the above-entitled matter is not appealable as of right, then the Commissioner does not oppose the petition for discretionary review under Minn. R. Civ. App. P. 105.01.<sup>1</sup>

Dated: April 4, 2011

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<sup>1</sup> In the event this matter is subject to appellate review, the Commissioner believes accelerated review pursuant to Minn. R. Civ. App. P. 118 is appropriate.

STATE OF MINNESOTA

IN SUPREME COURT

A09-2109

OFFICE OF APPELLATE COURTS

JAN 11 2010

FILED

In re Minnesota Intoxilyzer 5000EN  
Source Code Litigation.

ORDER

The Commissioner of Public Safety has filed a motion pursuant to Minn. R. Gen. Prac. 113.03 for assignment, to a single judge or a panel of judges, of all pending and future implied consent cases in which the petitioner challenges the validity of Intoxilyzer 5000EN results based on allegedly defective source code for the Intoxilyzer 5000EN. At the time the Commissioner's motion was filed there were approximately 717 implied consent cases involving Intoxilyzer 5000EN source code challenges pending in the ten judicial districts.

The Commissioner asserts that all of these cases involve a similar question of fact: that is, whether the Intoxilyzer 5000EN source code contains a material defect that affects the reliability of the instrument's results. The Commissioner further contends that assignment of a single judge or panel of judges to administer and hear pretrial proceedings in these cases relating to the source code challenges will eliminate the risk of inconsistent rulings, provide a more efficient process and forum for adjudication of the source code challenges, and thereby preserve the resources of both the parties and the judiciary. Opposing counsel in all implied consent cases with source code challenges pending when the motion was filed were served with the motion. None has filed a response in opposition.

One attorney for numerous implied consent petitioners has filed a response agreeing with the Commissioner's motion and requesting that the cases in which he is counsel for the petitioner that were initiated after the Commissioner's motion be included in any assignment order.

In addition, the Cities of Apple Valley, Bloomington, Brooklyn Center, Corcoran, Golden Valley, Greenfield, Hassan, Hanover, Hopkins, Independence, Maple Grove, Maple Plain, Minneapolis, Minnetonka, Plymouth, Robbinsdale, and Rogers, and the Minnetonka Conservation District (the "Cities") have moved for assignment, to a single judge or panel of judges, of criminal Driving While Impaired (DWI) cases pending in their jurisdictions that involve Intoxilyzer 5000EN source code challenges, together with the implied consent cases. The Cities assert that the criminal DWI cases raise the same common factual issue concerning the source code as the implied consent cases and present the same logistical issues that favor statewide administration and decision of the source code challenges in those cases. Counsel for defendants in the pending criminal cases that are specifically identified in the Cities' motions have been served with those motions. None of those served attorneys has responded or opposed the motion. However, the Chief Public Defender for the Seventh Judicial District has filed a letter, on behalf of the State Public Defender, the Chief Public Defenders of all the judicial districts, and the Acting Chief Appellate Public Defender, opposing assignment to a single judge of criminal cases involving Intoxilyzer 5000EN source code challenges in which the defendant is represented by a public defender.

The interests of the parties and the judiciary will be furthered by assignment of civil Intoxilyzer 5000EN source code challenge cases to a single judge for administration and

resolution of those challenges. Such assignment will eliminate duplicative litigation in different districts, prevent inconsistent rulings, conserve the resources of the parties, their counsel, and the judiciary, and facilitate resolution of the cases. Although some of the same benefits might accrue from assignment of criminal cases involving Intoxilyzer 5000EN source code challenges to a single judge, the opposed request to include criminal cases in a statewide assignment raises legal issues not appropriate for resolution in this procedural context—a motion directed to the chief justice. Accordingly, the relief afforded in this order for criminal cases must be more limited than for civil implied consent cases.

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED THAT:

1. Pursuant to Minn. R. Gen. Prac. 113.03 and Minn. Stat. §§ 2.724 and 480.16 (2008), the Honorable Jerome B. Abrams of the First Judicial District, having consented, is assigned to administer, hear, and decide all pretrial matters concerning challenges to the reliability of Intoxilyzer 5000EN results based on the source code of the instrument, including scheduling, discovery, and an evidentiary hearing, if necessary, in all pending and future civil implied consent cases in which a party challenges the reliability of Intoxilyzer 5000EN results based on the source code of the instrument, with the exception of cases in which a timely and valid notice to remove Judge Abrams was filed before the filing of this order.

2. Pursuant to Minn. R. Gen. Prac. 113.03 and Minn. Stat. §§ 2.724 and 480.16 (2008), the Honorable Karen J. Asphaug of the First Judicial District, having consented, is assigned to administer, hear, and decide all pretrial matters concerning challenges to the

reliability of Intoxilyzer 5000EN results based on the source code of the instrument, including scheduling, discovery, and an evidentiary hearing, if necessary, in all pending and future civil implied consent cases in which a party challenges the reliability of Intoxilyzer 5000EN results based on the source code of the instrument and in which a timely and valid notice to remove Judge Abrams was filed before the filing of this order.

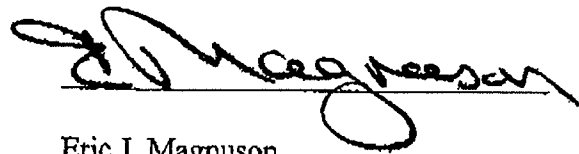
3. Pursuant to Minn. Stat. §§ 2.724 and 480.16 (2008), the Honorable Jerome B. Abrams of the First Judicial District, having consented, is assigned to administer, hear, and decide such pretrial matters as he deems appropriate concerning challenges to the reliability of Intoxilyzer 5000EN results based on the source code of the instrument in all pending and future criminal DWI cases in which (a) a party challenges the reliability of Intoxilyzer 5000EN results based on the source code of the instrument and (b) both the prosecuting authority and the defendant provide written notice to Judge Abrams of their consent to this assignment.

4. Because only the public defenders have objected to statewide assignment of criminal DWI cases that involve an Intoxilyzer 5000EN source code challenge, the motions of the Cities to include criminal cases pending in their jurisdictions in a statewide assignment is granted as to all cases specifically identified in the Cities' motions (listed in Appendix A to this order) in which the defendant is not represented by a public defender, and those defendants are deemed to have consented to the assignment made in paragraph 3 of this order. Because the time to respond to the motion of the City of Minneapolis had not expired by the filing date of this order, that motion is not governed by this paragraph, and the cases identified in that motion are governed by paragraph 3, *supra*.

5. The chief judges of the judicial districts are encouraged to work with prosecution and defense counsel to explore and implement, consistent with the rights of criminal defendants, means of achieving logistical benefits of coordinated administration of pretrial matters involving Intoxilyzer 5000EN source code challenges in criminal DWI cases where consent to participation in the statewide effort is not available.

6. The Clerk of Appellate Courts shall mail a copy of this order to Judges Abrams and Asphaug, the chief judges and district administrators of each judicial district, the court administrator for each district court, and all counsel listed as served with the motions filed here. The Commissioner of Public Safety shall provide Judges Abrams and Asphaug with an updated list of pending implied consent cases in which an Intoxilyzer 5000EN source code challenge has been asserted. To the extent practicable, district court administrators shall provide a copy of this order to the parties or their counsel in pending and future criminal DWI cases in which an Intoxilyzer 5000EN source code challenge is asserted.

Dated: January 11, 2010



Eric J. Magnuson  
Chief Justice