

JUDGE WILLIAM EICH  
840 FARWELL DRIVE  
MADISON, WISCONSIN 53704

(608) 244-1004

FAX (608) 244-4121

November 2, 2007  
[Sent Via E-Mail]

Atty. Benjamin Blustein  
Miner, Barnhill & Galland  
14 West Erie Street  
Chicago IL 60610

Atty. Steven F. Barley  
Hogan & Hartson  
111 S. Calvert Street, Suite 1600  
Baltimore MD 21202

*Re: State v. Amgen, et al., No. 04-DV-1709*

Dear Counsel:

I have enclosed my decision on the Defendants' Motion to Quash Plaintiff's Cross-Notice of the Deposition of Professor Theodore R. Marmor.

A signed original is being forwarded to Judge Neiss.

Thank you again for your cooperation and assistance in these matters.

Sincerely,

William Eich

STATE OF WISCONSIN,

PLAINTIFF,

Vs.

AMGEN, INC., ET. AL,

DEFENDANTS

**DECISION & ORDER OF THE SPECIAL  
DISCOVERY MASTER ON DEFENDANTS'  
MOTION TO QUASH PLAINTIFF'S CROSS-  
NOTICE OF THE DEPOSITION OF  
THEODORE MARMOR**

CASE No. 04 CV 1709

**APPEARANCES**

Attys. Ben Bluestein and Charles Barnhill for Plaintiff

Atty. Steven Barley for Defendants

**DISCUSSION**

Defendants have moved to quash the State's cross-notice of the deposition of Prof. Theodore Marmor. Prof. Marmor has been designated as an expert witness by the State of Alabama in a companion case, and the State, asserting that Marmor will be testifying as to matters relevant to the Wisconsin action, wishes to preserve that testimony for possible use in that action.

Defendants raise several arguments in support of their motion, but the central issue under the Wisconsin Rules of Civil Procedure is: [a] whether the proposed

testimony is relevant to the instant action;<sup>1</sup> and [b] if it is, whether Defendants have established that the protective order they seek is necessary to protect them from “annoyance, embarrassment, oppression, or undue burden or expense.” Section 804.01(2)(a), *Stats.*

As to the first, Alabama’s designation identifies Marmor as an expert witness “on the history and growth of Medicaid and Medicare, and how the defendants have intentionally caused false prices to be published....etc.,...” While, as the State acknowledges, much of Marmor’s testimony is likely to be Alabama-specific, it appears from the foregoing, and also from other matters listed in the Alabama expert disclosure documents, that at least some of his testimony will be relevant to the Wisconsin action as well. I appreciate the fact, as Defendants stress, that the Alabama and Wisconsin cases do not overlap to any significant degree, but I am satisfied from the documents offered on the instant motion that at least portions of Marmor’s testimony are likely to lead to the discovery of evidence relevant to the Wisconsin action.

As to whether Defendants have made the requisite showing under § 804.01(2)(a), their principal arguments may be summarized as follows:

- The State of Wisconsin has not designated Marmor as an expert in this case, and, in addition, the discovery record is insufficiently developed at this stage of the proceedings for Defendants to effectively examine Marmor on any Wisconsin-specific issues.<sup>2</sup>
- Marmor’s deposition has been limited to two days by the Alabama Discovery Masters, and allowing the cross-notice will disrupt the deposition and, in

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<sup>1</sup> In this regard, the code states that “[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” Section 804.01(2)(a), *Stats.*

<sup>2</sup> The Wisconsin case is still in the early stages of discovery, and has not yet proceeded to the point where witnesses must be designated.

particular, will divert counsel for the First-Track Alabama Defendants from their preparation for the upcoming trial in that case.

- There are at least three Wisconsin Defendants who are not parties to the Alabama action and thus will have no opportunity to examine Marmor.
- There is no guarantee that Defendants will have the opportunity to re-depose Marmor should he become a witness in the Wisconsin proceedings.

The State points out that it will not be examining Marmor at his Alabama deposition, and emphasizes that, should it designate Marmor as an expert witness in the Wisconsin action, all Defendants will have the opportunity to depose him; and it suggests that that alone effectively responds to all arguments posed by Defendants in their motion. I think the State is largely correct in this regard.

Marmor has been designated as an expert witness in the Alabama proceedings and Defendants' examination of him will undoubtedly concentrate on his expert observations and conclusions. And I am not satisfied that the fact that some of those observations and conclusions will be general enough in form and format to be relevant to proceedings in other states, such as Wisconsin, necessarily places an undue burden on the participating Defendants by unduly lengthening the examinations, or causing counsel to waste large amounts of time, or otherwise be diverted from trial preparation tasks.

It is most unlikely, for example, that the Alabama deposition will be unduly lengthened by the State's cross-notice, for, under the terms of the order I enter today, its attorneys will not be permitted to participate in Marmor's examination. As for the claimed diversion of First-Track lawyer time because of a need to "protect" the deposition record with respect to such Wisconsin-specific or Wisconsin-relevant evidence as may be brought forth, Defendants will be able to depose and examine Marmor, should he become a designed witness in the instant case, and they have not satisfied me that this will not provide them adequate "protection" in that regard.

Similarly, the fact that the Alabama deposition is taking place at a time when the Wisconsin record is not yet complete enough to fully evaluate the evidence, expert and otherwise, does not, in my opinion, unduly burden or prejudice the Defendants' case for, again, if Marmor is a designated expert witness in the Wisconsin case, the required disclosure will be made, and depositions on behalf of all Wisconsin Defendants may follow as a matter of course.<sup>3</sup>

It is important to note that, in essence, all the State attempts to do here is to preserve Marmor's Alabama deposition testimony—or, more appropriately, such portions of his testimony as may be relevant in the Wisconsin case—for use in those proceedings. Then, as I have pointed out several times above, at such time as the State designates him as an expert witness in Wisconsin, Defendants will have the opportunity to depose and examine him.

I have considered all of the arguments made, and positions taken, by Defendants in their briefs and at the hearing; and they have not persuaded me that a protective order quashing the State's cross-notice of the Marmor deposition is necessary under the "annoyance, embarrassment, oppression, or undue burden or expense" standards of § 804.01(2)(a), *Stats.* I do believe, however, that the following qualification is appropriate: counsel for the State of Wisconsin should be prohibited from participating in the examination of Prof. Marmor at his Alabama deposition. In all other respects, the Motion is denied.

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<sup>3</sup> Defendants make the point that, should the State attempt to use Marmor's testimony as "fact," rather than "opinion," testimony, they will not have the opportunity to depose him, as he is beyond Wisconsin subpoena authority. They also note counsel's comment that the Alabama deposition could also be used in support of a summary judgment motion in one or more of the cases, and that state that, in that instance, too, they would lose the ability to cross-examine him. As to the first point, however unlikely the situation, if the State were for some reason to put forth Marmor as a fact witness, the facts he testifies to may be countered just like those of any other fact witness—not just by cross-examination, but by opposing fact witnesses. And the same is true in the summary-judgment situation, where all that needs to be done by those opposing the motion is to counter a fact-based affidavit or deposition is to provide evidence showing that there is a conflict in the testimony (or that even if not contradictory, the evidence admits of conflicting inferences). I am not persuaded that either argument warrants granting the Defendants' motion to quash Plaintiff's notice in this proceeding.

I therefore enter the following

**ORDER**

For the reasons stated above:

[1] Defendants' Motion to Quash Plaintiff's Cross-Notice of the Deposition of Theodore R. Marmor will be, and hereby is, denied; and

[2] Plaintiff is prohibited from participating in the examination of Prof. Marmor at his scheduled Alabama deposition.

Dated at Madison, Wisconsin, this 2nd day of November, 2007

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William Eich  
Special Discovery Master