
STATE OF WISCONSIN,)	
)	
Plaintiff,)	Case No. 04-CV-1709
)	
v.)	
)	
ABBOTT LABORATORIES, <i>et al.</i> ,)	
)	
Defendants.)	

DEFENDANTS’ MOTION TO QUASH PLAINTIFF’S CROSS-NOTICE OF DEPOSITION OF PROFESSOR THEODORE R. MARMOR

The State of Wisconsin has cross-noticed the deposition of Professor Theodore R. Marmor, an expert witness designated not by it, but by the State of Alabama in different cases, involving different parties, different facts, different claims, different procedures and different substantive laws.¹ The deposition cross-notice should be quashed. Although the State claims the cross-notice promotes efficiency and cost savings, permitting the cross-noticing of the deposition clearly would prejudice Wisconsin defendants (“Wisconsin Defendants” or “Defendants”) and ignore this Court’s recent words that “consideration of fairness to all parties in the presentation of their respective cases is the paramount concern, trumping all others including convenience, speed, and expense.”²

The deposition will not focus on Wisconsin-related matters or on issues of significance to all Wisconsin Defendants. Rather, the deposition is being taken pursuant to a procedure

¹ A copy of the initial cross-notice of October 4, 2007 is attached hereto as Exhibit 1. Professor Marmor’s deposition was rescheduled for November 13-14 because the Alabama Plaintiff had failed to comply with the expert disclosure protocol in that case requiring production of materials the expert had relied upon. On October 12, 2007, the State filed a First Amended Cross-Notice for the rescheduled deposition. A copy of the amended cross-notice of the deposition is attached as Exhibit 2.

² See September 28, 2007 Decision and Order Denying Defendants’ Joint Motion to Sever and Provisionally Granting Defendants’ Joint Motion for Separate Trials.

established by the Alabama Court and Special Masters that essentially denies most of the Wisconsin Defendants any opportunity to examine Professor Marmor at the deposition by: (a) limiting the deposition to two days; and, (b) limiting the questioning to a handful of Alabama First Track Defendants that have been designated by Alabama for early trials.³ The cross-noticing of the deposition in other states will result in a disruption and distraction of the Alabama deposition which is intended to focus on the efforts of the Alabama First Track Defendants to properly ascertain Professor Marmor's opinions in preparation for the trial of those cases.

Moreover, Plaintiff's cross-notice is inappropriate because discovery in this case is far from complete and because the State of Wisconsin has not designated Professor Marmor as an expert witness in this case, nor answered a pending expert interrogatory requesting that the State identify each of its experts and describe the areas of each expert's testimony. In addition to its prematurity, the cross-notice will also prejudice the Defendants in this case if they are required to examine Professor Marmor under the strict limitations imposed in the Alabama cases.

Plaintiff's cross-notice of Professor Marmor's deposition is a transparent attempt to (1) prejudice the First Track Defendants in the Alabama cases, and (2) secure the admissibility of Professor Marmor's testimony in this case without properly designating him and informing the Defendants of his opinions and under circumstances in which most of the Defendants in this case will not have an opportunity to examine him. The State chose to sue Defendants in a separate action in Wisconsin and has repeatedly rejected Defendants' efforts to consolidate this action

³ As the Court is aware, the cases against each defendant were severed in Alabama, resulting in numerous, separate AWP cases there. The deposition is noticed to proceed only in those cases involving those Alabama defendants grouped by the Alabama court to proceed with earlier trial dates, namely AstraZeneca Pharmaceuticals LP and AstraZeneca LP (collectively "AstraZeneca"), Bristol-Myers Squibb Co., SmithKline Beecham Corp., d/b/a GlaxoSmithKline ("GSK"), Novartis Pharmaceuticals Corp., the Johnson & Johnson family of defendants, and the Pfizer family of defendants ("Alabama First Track Defendants" or "First Track Defendants"). Of the First Track Defendants, defendants AstraZeneca, Novartis, and GSK are scheduled to begin trial in Alabama on February 11, 2008.

with other AWP cases in the federal multi-district action for pretrial proceedings. It is therefore unfair for the State to try to force the Wisconsin Defendants to prematurely participate in expert discovery in another case on an incomplete factual record.

BACKGROUND

Professor Marmor is a Professor Emeritus of Public Policy and Management and Professor Emeritus of Political Science at the Yale School of Management. He has been retained as an expert by the State of Alabama in the Alabama cases. Although the State of Wisconsin has provided no expert disclosure concerning Professor Marmor's proposed expert testimony in this case, his expert disclosures for the First Track Defendants in the Alabama cases state that Professor Marmor will opine about, among other things, how "Defendants' pricing scheme interfered with the ability of the Alabama Medicaid Agency (AMA) to accurately estimate the estimated acquisition costs thereby causing overpayment by AMA."⁴ The Alabama expert disclosures go on to say that all of "Dr. Marmor's [sic] opinions are based on his analysis of the data, records, information and deposition testimony provided to him in the [Alabama] case, as well as his education, training, experience and observations."⁵

In Alabama, the fact discovery cut-off for the First Track Defendants has passed. The State of Alabama has provided its expert disclosures to the First Track Defendants and scheduled expert depositions with the First Track Defendants pursuant to the applicable Alabama rules under parameters agreed to by those parties or set by that Court. Professor Marmor's deposition has been noticed only in the Alabama cases involving First Track Defendants, half of whom are

⁴ See Plaintiff's Expert Disclosures in *In re Alabama Medicaid Average Wholesale Price Litigation*, C.A. No. CV-2005-219 (Ala. Cir. Ct. Montgomery County), at pp. 1-3 (attached hereto as Exhibit 3).

⁵ *Id.* at 3.

preparing for a February 11, 2008 trial date, and will focus on Alabama-specific issues relevant to that trial.

ARGUMENT

A. The State of Wisconsin Has Not Properly Designated Professor Marmor as an Expert Witness and Has Not Provided the Necessary Predicate Fact Discovery and Expert Disclosures.

Professor Marmor's deposition is premature because, in Wisconsin, fact discovery is far from complete, and the State has not properly designated Professor Marmor as an expert. Not only is discovery ongoing, the adequacy of the State's document production, the responsiveness of its interrogatory answers and the permissible scope of depositions remain the subjects of an increasingly vigorous discovery motions practice.⁶ Although Defendants have scheduled the depositions of several additional key witnesses for late October and early November, many more need to be taken. Discovery of the State will not be close to being completed by the time Professor Marmor testifies. Third party discovery also is ongoing and far from complete. Thus, discovery has not progressed to a point where the record is sufficiently complete for it to be reasonable to expect Defendants to take expert discovery. Moreover, since the discovery record in this case is far from complete, Professor Marmor will be opining without having reviewed anything close to a full record. It is doubtful that such an exercise could be productive for any Wisconsin Defendant in the Wisconsin case.

⁶ The motions largely relate to the State's efforts to thwart appropriate discovery, apparently because this discovery is proving disastrous to its case. The State, for instance, has refused to undertake any comprehensive search of emails in response to Defendants' document production requests; has refused to offer witnesses to testify as to some topics in the Defendants' deposition notice; has belatedly sought the return of an incredibly damaging document that it now claims is privileged and irrelevant; has sought a protective order "barring defendants from requiring Wisconsin to search its electronic files for what defendants call government knowledge documents;" has (ironically) sought to block the cross-noticing of certain third party depositions; has moved for a protective order to block the deposition of a designee concerning the State's email systems; and, most recently, has moved for a protective order to prevent the depositions of Legislative Fiscal Bureau analysts who authored reports that undermine the very core of the State's case.

Moreover, the State of Wisconsin has not designated Professor Marmor as an expert in this case, nor has the State substantively answered a pending expert interrogatory served on the State on February 20, 2006, which asked it to “[i]dentify the State’s trial witnesses and expert witnesses and the area(s) of their testimony.”⁷ Wisconsin responded that “[n]o decision has been made regarding who will be a witness at trial.”⁸ The State has yet to supplement this interrogatory response, or otherwise disclose Professor Marmor as a witness. Certainly Defendants are entitled to a more complete discovery record and a substantive answer to these very basic questions before deposing Professor Marmor.⁹

B. Allowing the State of Wisconsin’s Cross-Notice Would Effectively Preclude All Defendants, Including the Alabama First Track Defendants, From Having Adequate Opportunities to Examine Professor Marmor.

It is fundamentally unfair to permit the State to force Defendants to examine Professor Marmor in the Wisconsin matter at this time. The procedures established by the Alabama court and the parties involved in the First Track in Alabama do not afford the non-First Track defendants – the vast majority of the Defendants here – the right to examine the witness or even time in which to do so.¹⁰ It also is inefficient and an undue burden to force the non-First Track defendants to master the Alabama discovery record in less than a month so that they can

⁷ See Defendants’ Second Set of Interrogatories Directed to Plaintiff, at Interrogatory No. 31 (attached hereto as Exhibit 4).

⁸ See Plaintiff’s Response to Defendants’ Second Set of Interrogatories, June 19, 2006, Answer to Interrogatory No. 31 (attached hereto as Exhibit 5).

⁹ See Wis. Stat. § 804.01(2)(d) & (5)(a) (requiring a party to supplement his or her response to any question requesting the identity of persons expected to be called as expert witnesses at trial); see also *Jenzake v. City of Brookfield*, 322 N.W.2d 516, 108 Wis.2d 537 (Wis. App., 1982) (finding that where one question on city’s list of interrogatories asked names of expert witnesses, plaintiff was required to supplement her response, even if expert was after-acquired).

¹⁰ See, e.g., September 24, 2007 Letter from Simeon Penton, Alabama Special Discovery Master, to Alabama Liaison Counsel Clinton Carter (plaintiff) and Harlan Prater (defendant), setting forth procedures for Alabama expert discovery, at ¶ 3 (“We recommend that *the Track 1 defendants* be allowed two days to depose each expert.”) (emphasis added).

meaningfully participate in a deposition that has no relevance to this Wisconsin case. Similarly, the First Track Defendants should not be forced to choose between focusing on Alabama-specific discovery necessary for some for their February 2008 trial date and Wisconsin-specific discovery that might some day become relevant for some purpose. Moreover, allowing the cross-notice would change the nature of the deposition, as the focus would shift from simply eliciting Professor Marmor's opinions while reserving at least some cross-examination for trial, to a deposition where the Professor must be cross-examined fully in the event he does not appear at trial in another state.

There are other problems. The Alabama Discovery Masters have limited Professor Marmor's deposition to two days. The Alabama disclosure lists no fewer than 32 separate topics upon which he is expected to opine and lists 285 documents¹¹ (many of which are voluminous) upon which he relied. Clearly, the Alabama First Track Defendants headed to trial in February need all of their allotted time to conduct their examination of Professor Marmor. It is unfair to those First Track Defendants to require them to divert their attention from the task at hand. Similarly, it is unfair for other Defendants to intrude upon the Alabama First Track Defendants' limited time for examination.

It is clear that the State's cross notice would disrupt the Alabama First Track Defendants' ability to engage in orderly trial preparation. Private counsel for the State of Wisconsin represent nine other states. **All** of those states have cross-noticed the deposition. If permitted to proceed with their cross notices, Plaintiff's counsel would effectively force Defendants to use the two days of the Alabama deposition of Professor Marmor to address issues for nine other states. The

¹¹ Notably, approximately 33 of these 285 documents have yet to be produced to Defendants, including two deposition transcripts reviewed by Professor Marmor.

obvious – and seemingly intended – consequence would be to cripple Defendants’ ability to fully address issues for **any** state.

C. The State’s Anticipated Arguments Are Unpersuasive.

Based on correspondence exchanged with the State’s counsel in other cases in which Professor Marmor’s deposition was also cross-noticed, the Defendants are aware of the primary arguments that the State’s counsel will assert. We briefly address each below.

1. The false analogy to Defendants’ cross-notices of fact witness depositions

Plaintiff no doubt will liken its cross-notice to Defendants’ cross-notices of third parties such as federal employees and drug wholesalers. However, these government and third party witnesses all are fact witnesses and are not controlled by Defendants the way an expert witness is by the party who is paying his tab. Indeed, many of these witnesses are effectively unavailable to Defendants, being represented by the government or counsel. The cross-notices may well be the only opportunity Defendants have to obtain their testimony. Furthermore, the purpose, in large part, of the cross-notices of third party fact witnesses is that many of these witnesses have objected to the cost and burden of having to testify multiple times in cases in which they are not parties. Professor Marmor, on the other hand, is an expert witness being compensated for his time.

Moreover, fact witnesses testify to facts, not opinions. By contrast, an expert may testify to opinions when the expert has specialized knowledge and can show that his opinions are based on facts or data of a type reasonably relied on by experts in his field.¹² Falsely equating fact and

¹² See Wis. Stat. § 907.02 (“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”); see also *Martindale v. Ripp*, 2001 WI 113, 246 Wis.2d 67, 629 N.W.2d 698, ¶67 (allowing an expert’s opinion testimony where “[a] fair reading of his testimony shows that Dr. Ryan was not giving his opinion on mere conjecture.”); see also *In Matter of Adoption of R.P.R.*, 98 Wis.2d 613, 297 N.W.2d 833 (Wis. App., 1980) (noting that expert opinion testimony is

expert witnesses wholly ignores these key differences in party control over the witness and the nature of the testimony. Wisconsin rules distinguish expert discovery from all other discovery for good reason.¹³ Thus, fully exploring the basis and data underlying an expert's opinion is entirely different from examining a fact witness, and requires the disclosures and discovery Wisconsin has not yet supplied.¹⁴

2. The contention that Professor Marmor's opinions are general, not Alabama-specific

Much of Professor Marmor's opinions are not focused on the subject matter of *this* case, as required by Wis. Stat. § 804.01(2)(a), but instead are largely Alabama-specific. He has no relevant knowledge as a fact witness. The State of Alabama's Expert Disclosures make plain that several of the thirty-two topics on which Professor Marmor is prepared to testify are Alabama-specific. Not surprisingly, there are no designated topics that are Wisconsin-specific.¹⁵

More to the point, the principal opinion that Professor Marmor is prepared to offer – that “Defendants’ pricing scheme interfered with the ability of the Alabama Medicaid Agency (AMA) to accurately estimate the estimated acquisition costs thereby causing overpayment by AMA”¹⁶ – is unequivocally Alabama-specific. Many of the other sub-topics, though facially general, also are primarily Alabama-specific. For example, several relate to WAC (“wholesale

permissible so long as it is predicated upon something more than conjecture, and that often, the opinion is cast in terms of a “reasonable degree of certainty” in the pertinent field or discipline).

¹³ See Wis. Stat. § 804.01(2)(d) (providing specifically for discovery of facts known and opinions held by experts).

¹⁴ See, e.g. *In re Commitment of Rachel*, 224 Wis.2d 571, 575 (Wis.App.,1999) (“Only once an expert is identified as a person whose opinions may be presented at trial do his or her reports and opinions become discoverable.”); see also *Siker v. Siker*, 593 N.W.2d 830, 225 Wis.2d 522 (Wis. App., 1999) (finding that it is within the discretion of a trial court to disallow the testimony of an expert whose opinions are not disclosed to the opposing party by the deadline set in a pretrial scheduling order).

¹⁵ Similarly, a review of the materials relied upon by Professor Marmor reveals that **none** of the documents reviewed by Professor Marmor are Wisconsin Medicaid materials and **none** of the depositions reviewed are depositions of Wisconsin Medicaid personnel or designees.

¹⁶ Plaintiff's Expert Disclosures, *supra* footnote 3, Ex. 3.

acquisition cost”), not AWP, because unlike Wisconsin’s reimbursement scheme, Alabama reimbursed providers for certain drugs on the basis of WAC.¹⁷ Many of Professor Marmor’s other topics address issues unique to Alabama. For instance, although not specifically mentioning Alabama, topics include references to “this [Alabama] lawsuit,” and “State [Alabama] laws” (*i.e.*, the “wantonness” and “fraudulent suppression” claims at issue in Alabama).

Professor Marmor, moreover, is prepared to offer opinions based on a unique and extensive record of fact discovery in Alabama, including depositions of State of Alabama witnesses (consisting of nearly six full days of testimony)¹⁸ and tens of thousands of pages of documents and voluminous claims data produced by the State of Alabama. Those few Wisconsin Defendants who are also First Track Defendants in Alabama will be focusing their examination of Professor Marmor on issues that are specifically relevant to the claims being made by the State of Alabama, and particularly as they pertain to their clients, and the Alabama-specific factual record.

The Alabama and Wisconsin proceedings also are markedly different, potentially yielding very differently focused and nuanced examinations of the witness. The Alabama cases are in essence based solely on a fraud theory. Here, the case is premised largely on statutory claims, including those under the Deceptive Trade Practices Act, and includes no fraud claim. The potential audiences in the cases (a jury in Montgomery, Alabama and a jury in Madison, Wisconsin) are different as well. This, of course, leads to differences in how the witness might be examined in these cases.

¹⁷ This is not to say that WAC is completely irrelevant to the Wisconsin case, but there is different significance and emphasis due to Alabama’s use of WAC as the basis for certain Medicaid reimbursements.

¹⁸ There were some 133 exhibits marked at these depositions.

3. The “overlapping defendants” argument

The State also likely will argue that each of the Defendants in the Wisconsin case are in the Alabama case and that some use the same national counsel for each case. There are in fact several defendants in Wisconsin that are not in Alabama, and many defendants in Alabama that are not named in Wisconsin.¹⁹ But even if there were perfect overlap, the State must prove its claims in Wisconsin against each Defendant using evidence relevant to the Wisconsin counts.

Further, the State’s suggestion that one Defendant or a few Defendants can defend the interests of other Defendants for the purposes of the expert deposition is particularly untenable in light of the prior ruling of this Court deciding that Defendants are presumptively entitled to separate trials.²⁰ The Court’s words in reaching that determination ring true here:

For this Court, consideration of fairness to all parties in the presentation of their respective cases is the paramount concern, trumping all others including convenience, speed, and expense.²¹

As the Defendants’ submissions in support of their Motion to Sever and for Separate Trials showed, and as this Court found, the Defendants have distinct issues based on how they price and market drugs, as well as many other factors.²²

Moreover, the Alabama First Track Defendants are all manufacturers of only brand name drugs.²³ As such, they are correctly concerned with examining Professor Marmor regarding

¹⁹ For example, a simple side by side comparison of the Alabama and Wisconsin complaints reveals that at least 3 named defendants, Ben Venue Laboratories, Inc., Dey Inc., and Sico Inc., appear in the Wisconsin complaint, but not in the Alabama complaint. Similarly, an initial count reveals that approximately 42 named defendants appear in the Alabama complaint that do not appear in the Wisconsin complaint.

²⁰ See September 28, 2007 Decision and Order, *supra* footnote 2.

²¹ *Id.*

²² *Id.*

²³ See October 12, 2007 Order on Motion to Consolidate issued by Judge Price in *In re Alabama Medicaid Average Wholesale Price Litigation*, C.A. No. CV-2005-219 (Ala. Cir. Ct. Montgomery County), at p. 6 (“[T]he Court notes that the State’s motion seeks consolidation of the trials of only manufacturers of brand-name drugs.”) (attached hereto as Exhibit 6).

issues that are especially pertinent to brand-name drugs and their manufacturers and can have no real interest in representing issues unique to generic drugs and generic drug manufacturers.²⁴ To require the fourteen or fifteen Wisconsin Defendants that are manufacturers of generic drugs to rely upon brand-name drug manufacturers to ask appropriate questions of Marmor regarding issues central and distinct to generic drug manufacturers, but of no concern to brand name drug manufacturers, is fundamentally unfair.

While the Defendants may try to coordinate their examinations to streamline discovery, that is a far cry from wholesale reliance on other counsel, representing another party, faced with different facts and issues specific to their client, to examine an expert witness. These differences make the State's efforts to require the many Defendants in this case to rely on the examination of Professor Marmor by a few defendants in another case unfair and, frankly, inconsistent with due process.

4. The "savings" argument

As with its previous proposals to seek to allow sharing of Defendants' confidential documents with other states (which has been rejected twice, by two different Judges) and with its proposal to have multiple Defendants tried in a single action (which has been provisionally rejected), the State urges that the savings gained by forcing Wisconsin Defendants, prior to completion of discovery or full expert disclosures, to participate in an Alabama expert deposition (and live with whatever record is created) warrant diminishing each Defendant's rights. As the Court recently recognized, however, neither speed nor convenience nor expense should be

²⁴ *See id.* at p. 7 (considering whether consolidation of defendants was appropriate and writing "[o]f particular note is the fact common to each of the Consolidated Defendants that each of these defendants manufactures, distributes, markets, and/or offers for sale brand-name prescription drugs. As such, common questions of fact related to brand-name drugs, such as reimbursement methodologies, exist with respect to the Consolidated Defendants."); *see also id.* at p. 8 ("Finally, the logical grouping of the Consolidated Defendants – all of which manufacture, market and sell brand-name drugs and similarly report prices – minimizes the risk of any prejudice or confusion which could potentially result from consolidation.")

permitted to trample any Defendant's rights. If the State were truly concerned about efficiency and saving all parties' resources it would have acquiesced in the removal and transfer of this action to the MDL Court. In that arena, pretrial coordination would have applied for all parties and would have relieved any burdens on the state courts. Instead, the State and its outside counsel chose for tactical reasons to force all Defendants to litigate in multiple courts, under different rules, subject to different claims, time periods, and state laws in each court.

Much of the "savings" touted by the State may be achieved much more fairly without impairing Defendants' rights. If the State designates Professor Marmor as an expert and provides proper disclosures at the appropriate time, these Defendants can review the Alabama Marmor deposition transcript and determine what, if any, additional deposition discovery is necessary and appropriate under the Wisconsin rules. The parties will thus both benefit from the resulting time savings without the prejudice that arises from the procedure the State has chosen to follow.

5. The "How are defendants harmed?" argument

The State of Wisconsin likely will profess that the Defendants are "completely prepared" for Professor Marmor's expert testimony on the topics in the Alabama disclosure and ask how Defendants can be harmed if the State will agree to provide Professor Marmor for further deposition on Wisconsin-specific matters or if the State adds other general subjects to the designation. Defendants, of course, will not know how they are harmed until they have access to the discovery and disclosures that are to be provided to them prior to expert depositions. Nor should the Wisconsin Defendants be forced to rely on the State's highly-contingent promise of an opportunity to re-depose Professor Marmor in the future. Similarly, basic tenets of justice tell us that the non-Alabama First Track Defendants should not be bound by the testimony of a

witness they had no opportunity to examine, much less without the benefit of proper discovery and disclosure.

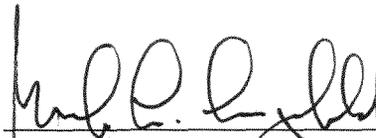
Permitting the State's cross-notice would essentially force the Alabama First Track Defendants to turn their attention away from critical preparation for trial – for some for a trial as early as February 2008 – and force other Defendants to address the risk that Professor Marmor's opinions will be useable against them, even though they will have no opportunity to examine him on his yet to be disclosed opinions.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that this Court quash Plaintiff's Cross-Notice of the Deposition of Theodore R. Marmor.

Dated this 19th day of October, 2007.

Respectfully submitted,



William M. Conley (SBN 1009504)
Mark L. Langenfeld (SBN 1009394)
Foley & Lardner LLP
150 East Gilman Street
Madison, WI 53703
608-257-5035 (phone)
608-258-4258 (fax)

Steven F. Barley
Joseph H. Young
Jennifer A. Walker
Hogan & Hartson LLP
111 S. Calvert St., Suite 1600
Baltimore, MD 21202
410-659-2700 (phone)
410-539-6981 (fax)

Attorneys for Amgen Inc.

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2007, a true and correct copy of the foregoing was served upon all counsel of record via electronic service pursuant to Case Management Order No. 1 by causing a copy to be sent to LexisNexis File & Serve for posting and notification.

/s/ Jennifer A. Walker

Jennifer A. Walker