

U.S. District Court Grants Motion in Favor of Rothwell Figg Client in Important First Amendment Case

The United States District Court for the District of Columbia granted the motion to quash of Rothwell Figg client Paul B. Goldberg, a Washington, D.C.-based, award-winning journalist, and the editor and publisher of The Cancer Letter, on grounds that the information sought by Amgen Inc. is protected by the Reporter’s Privilege under the First Amendment. The dispute arose out of a shareholder class-action lawsuit pending in federal court in the Central District of California, *In Re Amgen Inc. Securities Litigation*, No. 07-2536 (C.D. Cal.). In connection with that case, Respondent Amgen, issued a subpoena to Mr. Goldberg, seeking to depose Mr. Goldberg regarding an article he published titled “Danish Researchers Post Long-Awaited Aranesp Results—Ever So Discreetly” (the “Article”).

In this Article, Mr. Goldberg reported on the results of a study (“DAHANCA 10”) designed, in part, to address safety issues of the drug Aranesp. Aranesp was widely used for treating anemia in patients with chronic kidney disease or undergoing chemotherapy. The DAHANCA 10 results that Mr. Goldberg reported included that the study was temporarily halted in October 2006, and two months later the researchers posted a decision on their website to end the study entirely because results showed that some patients experienced greater tumor growth on Aranesp and overall survival was greater among those not treated with the drug. Following Mr. Goldberg’s report of these results, a congressional hearing was held (because Aranesp was widely used in government health care programs) and the FDA added a black box warning (the most serious warning about a safety risk) to the Aranesp labeling. Mr. Goldberg’s Article is also the purported “corrective disclosure” in re Amgen Securities Litigation. The Plaintiffs in that litigation claim that Defendant misled regulators and investors about the safety and effectiveness of Aranesp by failing to disclose to shareholders the results of the DAHANCA 10 study. The Plaintiffs further allege that the Article published by The Cancer Letter caused the DAHANCA 10 results to become widely known.

Amgen argued that it should be permitted to depose Mr. Goldberg as to five categories of information. The Court’s opinion walked through each of the five categories, giving consideration to the following two factors—(1) the civil litigant’s need for the

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information; and (2) the civil litigant's efforts to obtain the information from alternative sources. In each case, the Court found that Amgen did not satisfy its burden.

(1) First, Amgen sought to depose Mr. Goldberg to confirm that he spoke to two Wall Street sources before the Article's publication. While the Court believed this evidence "could bolster Amgen's defenses," it found that Amgen did not sufficiently exhaust alternative sources.

(2) Second, Amgen sought to depose Mr. Goldberg to verify the statements attributed in the Article to two doctors, Dr. Henke and Dr. Bennett. The Court found that this evidence is neither critical to Amgen's case, nor did Amgen sufficiently exhaust alternative sources (Amgen did not even seek to depose the doctors themselves).

(3) Third, Amgen sought to depose Mr. Goldberg about whether he spoke to anyone else that was aware of the DAHANCA 10 study's results before the Article was published. Here, the Court found that "asking the question would be pointless" since it was already made clear, through counsel, that the only people Mr. Goldberg spoke with who were aware of the study were the two doctors.

(4) Fourth, Amgen sought to depose Mr. Goldberg about how he learned of the DAHANCA 10 study. Here, the Court found that such questions were unlikely to produce evidence that goes to the heart of Amgen's defense.

(5) Fifth, Amgen sought to depose Mr. Goldberg about the basis for an assertion made in his moving papers that the DAHANCA 10 study was "widely available." Here, the Court found that "Amgen is grasping at straws" since the "widely available" language was clearly a statement made in Goldberg's brief in connection with the article being locatable through Google, and it was not a statement of Goldberg's personal beliefs.

The Court declined Amgen's request to compel Mr. Goldberg to invoke the journalist's privilege on a question-by-question.

Mr. Goldberg was represented in this case by Rothwell Figg attorneys Steven Lieberman and Jenny Colgate.