Drugmaker’s libel suit against medical journal threatens research

OCT 19, 2022

Tanya Albert Henry
Contributing News Writer

A lawsuit a pharmaceutical company filed after a medical journal criticized one of their drugs burdens public health and suppresses scientific advancement, physicians tell a federal court.

In an amicus brief, the Litigation Center of the American Medical Association and State Medical Societies and the Medical Society of New Jersey (MSNJ) are urging the 3rd U.S. Circuit Court of Appeals to uphold a lower-court decision that dismissed the lawsuit that Pacira Biosciences Inc. filed against the American Society of Anesthesiologists (ASA) and the authors of articles published in the ASA’s journal, Anesthesiology.

The articles examined whether there were enough medical benefits for physicians to justify using liposomal bupivacaine (marketed by Pacira as Exparel) compared with lower-cost analgesics. The articles concluded that, generally, Exparel was not, in most cases, more effective or worth the extra cost—up to 100 times more than alternative options.

Pacira filed a trade libel complaint and the lower court dismissed it, saying that such a lawsuit against a scientific article must be based on intentionally falsified data—an allegation that wasn’t part of the Pacira lawsuit. Pacira is asking the appellate court to overturn the lower court decision so the lawsuit can continue.

The AMA Litigation Center and MSNJ argue that the court should not allow the lawsuit because “were the judicial system to impose its heavy hand on the scientific method, medical advancements would inevitably be impeded.”

“Academic medical journals constantly publish studies, commentaries, and editorials about the effectiveness of drugs, providing invaluable service to physicians and the patients they serve. These journals must be free to conclude that a particular drug is ‘not superior’ or more costly than another, without the risk of litigation,” the brief tells the court in the case, Pacira Biosciences Inc. v. American
Society of Anesthesiologists Inc. et al.

Find out more about the cases in which the AMA Litigation Center is providing assistance and learn about the Litigation Center’s case-selection criteria.

**Litigation would hamper research**

Allowing a lawsuit like the *Pacira* one to move forward—even if a judge or jury ultimately does not find in favor of the company—would still suppress medical research in the long run because decisions may be made out of fear that a certain article could trigger a libel action.

The AMA Litigation Center and MSNJ brief quotes from a *BMJ* article noting that “the minatory presence of the libel law does not merely give an easy tool to those who wish to quell criticism but forces self censorship so that the criticisms are not even made.”

It goes on to note that the journal *Pediatrics* encountered an instance that required heavy editing to avoid a potential libel lawsuit and, ultimately, the authors withdrew the paper.

Numerous articles on the efficacy of liposomal bupivacaine have been published and “if the debate on this drug and the many other drugs whose use may be questioned could be suppressed, the harm to medical research and to patient care would be incalculable,” the brief tells the court.

**Physicians, not courts, must decide**

The brief explains that physicians make their decisions based on a patient’s individual needs and they read articles in peer-reviewed journals such as *Anesthesiology* so they can educate themselves about drugs they are using and how they compare with one another. They know that no single experiment, study or journal article is the final say on anything.

In this case, nothing in the *Anesthesiology* articles said that Exparel is wholly without value or that no patient could benefit from the drug. Instead, the takeaway was that anesthesiologists should be cautious about using it.

If physicians “are to care for their patients properly, they will evaluate the articles’ conclusions judiciously to decide on a case-by-case basis what is best for each different situation,” the brief says.

Further, the legal system is not the place to debate technical, scientific opinions like the ones in the *Anesthesiology* articles, the AMA Litigation Center and MSNJ tell the court, saying “anesthesiologists are guided by their need to care for their patients, while the judicial system adheres to a democratic
imperative: let the people—represented by a lay jury—decide.”