

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS : MDL DOCKET NO. 1203
(PHENTERMINE, FENFLURAMINE, :
DEXFENFLURAMINE) PRODUCTS :
LIABILITY LITIGATION :
: :
: :
: :
SHEILA BROWN, et al. :
: :
: :
v. :
: :
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AMERICAN HOME PRODUCTS :
CORPORATION, et al. : CIVIL ACTION NO. 99-20593

MEMORANDUM AND PRETRIAL ORDER NO. 4515

Bartle, J.

February 24, 2005

Before the court is the motion of class member Wesley Ann Hobgood Carraway to opt-out of the Seventh Amendment. Movant asserts that she submitted a change of address to the Trust on September 2, 2003 "to go to [her] niece's and nephew's address in Jackson, Mississippi ... and they never forwarded any notice to [her] in Tennessee, so that [she] could have made a timely decision."

On August 26, 2004, this court entered Pretrial Order ("PTO") No. 3880, preliminarily approving the Seventh Amendment to the Nationwide Class Action Settlement Agreement with Wyeth in this Diet Drugs litigation. In addition to preliminarily approving the Seventh Amendment, PTO No. 3880 directed Wyeth and Class Counsel to mail notice of the Seventh Amendment to:

all Class Members who have ever registered or purported to register with the Trust or who have submitted any type of form to the Trust (including Class Members who have exercised or attempted to exercise any right of opt-out) ... at the addresses reflected in the most recent version of the Trust's database made available to the Parties at the time Notice is disseminated.

PTO No. 3880 ¶ 4. Set forth in PTO No. 3880 was the right of a Class Member to opt out of the Seventh Amendment and remain bound by the terms of the Settlement Agreement prior to the Seventh Amendment. Id. at ¶ 5. The deadline to opt out of the Seventh Amendment was November 9, 2004.

As described at the Fairness Hearing for the Seventh Amendment held on January 18 and 19, 2005, Wyeth and Class Counsel went to great lengths to ensure that distribution of the notice was as complete as possible. (Fairness Hearing Tr. 1/19/05 at 32-57.) After all their efforts, less than five percent of the notices sent out were returned as undeliverable. Id.

Movant's claim must be examined under an excusable neglect analysis, under which we must consider all relevant circumstances in making an equitable determination. See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship ("Pioneer"), 507 U.S. 380, 395 (1993); Fed. R. Civ. P. 6(b). In our analysis, we must consider "the danger of prejudice to the [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the

movant acted in good faith." Pioneer, 507 U.S. at 395. We also must keep in mind that too liberal construction of the excusable neglect analysis in a class action such as this would threaten the finality of judgments entered in class actions and discourage settlements in similar cases. PTO No. 2345 at 6 (quoting Georgine v. Amchem Prods. Inc., Civ. A. No. 93-0215, 1995 WL 251402, *6 (E.D. Pa. Apr. 26, 1995)).

A notice packet was mailed to movant at the Mississippi address on file with the Trust, which was the same address provided by movant in the change of address form she submitted in September, 2003. This packet was not returned as undeliverable. Notably, Ms. Carraway did not inform the Trust that she had moved back to her address in Tennessee.

Moreover, as we have previously held in the context of a motion to extend the initial opt-out deadline under the original Settlement Agreement, "the fact that a class member did not actually receive the notice that was mailed does not remove him or her from the settlement class." PTO No. 2345 at 8. In addition, the prejudice to Wyeth if we extended the opt-out deadline for this movant would be great. Wyeth specifically negotiated a walk-away right under the Seventh Amendment, pursuant to which it was entitled to abandon the Seventh Amendment if it determined that an insufficient number of class members chose to participate. This right expired on January 8, 2005. As we found in denying opt-out deadlines for the original Settlement Agreement, "allowance of a late opt-out in this case

would undoubtedly inspire other members of the Brown Class to file similar motions because 'it does not strain the imagination to conclude that the excuses here are not unique.'" PTO No. 2345 at 7 (quoting Georgine, 1995 WL 251402, at *7).

Accordingly, we will deny the motion to opt-out of the Seventh Amendment.

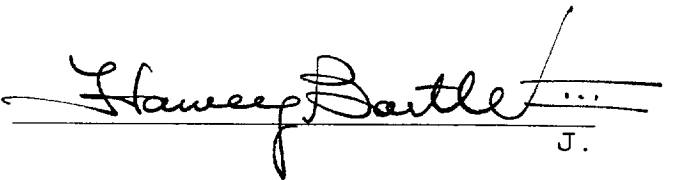
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AND NOW, this 24th day of February, 2005, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motion of class member Wesley Ann Hobgood Carraway to opt-out of the Seventh Amendment (Doc. No. 207278/1748) is DENIED.

BY THE COURT:


J.