

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 :  
: :  
THIS DOCUMENT RELATES TO: :  
: :  
SHEILA BROWN, et al. :  
: :  
v. :  
: :  
AMERICAN HOME PRODUCTS :  
CORPORATION : CIVIL ACTION NO. 99-20593

MEMORANDUM AND PRETRIAL ORDER NO. 3085

Bartle, J.

October 24, 2003

Before the court is the motion of certain class members<sup>1</sup> to determine the inadequacy of representation of class members who suffer or will suffer from primary pulmonary hypertension ("PPH") or pulmonary hypertension ("PH"). The class consists of persons in the United States who ingested Pondimin and/or Redux, two diet drugs manufactured and sold by Wyeth.

The movants first contend that persons who suffer or will suffer from PPH, a fatal disease, were not adequately represented during the negotiations of the Settlement Agreement. Specifically, movants maintain that while the Settlement Agreement deems as class members all persons in the United States

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1. The class members who bring this motion are Rita Dix, Donna Franz, Judy Davis, Shanne Webb-Cochran, Renai Kuykendall, Willa Sartin, Dawn Stewart, and Joanne Valenti.

who ingested Pondimin and/or Redux, those who have or will have PPH as a result of ingesting these drugs received no benefit under the Settlement Agreement.

The five subclasses established by Pretrial Order ("PTO") 1415 were:

Subclass 1(a): those class members who took Pondimin or Redux for 60 days or less and who have not been diagnosed as having FDA Positive levels of valvular regurgitation by September 30, 1999;

Subclass 1(b): those class members who ingested Pondimin or Redux for 61 days or more and who, likewise, have not been diagnosed as having FDA Positive levels of valvular regurgitation as of September 30, 1999;

Subclass 2(a): those class members who ingested Pondimin or Redux for 60 days or less and who have been diagnosed as having FDA Positive levels of valvular regurgitation as of September 30, 1999;

Subclass 2(b): those class members who ingested Pondimin or Redux for 61 days or more and who have been diagnosed as having FDA Positive levels of valvular regurgitation by September 30, 1999; and

Subclass 3: those class members who ingested Pondimin or Redux and who are not FDA Positive but who have been diagnosed as having Mild Mitral Regurgitation.

PTO 1415 at 43-44; see also Settlement Agreement § II.c.

Clearly, counsel representing subclasses 1(a) and 1(b) were representing all persons who took Pondimin and/or Redux, including necessarily those who did or would later suffer from PPH.

PPH class members, that is, those who did not exercise an initial opt-out from the settlement, are treated most generously. Unlike other conditions, claims based in PPH are not considered "settled claims." Persons with settled claims are limited to benefits provided by the AHP Settlement Trust funded by Wyeth or to so-called downstream opt-out rights, allowing them to sue only for compensatory damages. In contrast to other class members, those diagnosed with PPH have a right to sue Wyeth in the tort system not only for compensatory but also for punitive damages. The proof used to establish a PPH claim is not limited by the Settlement Agreement but is simply subject to the evidentiary rules in the jurisdiction where suit is filed and to due process requirements, as in any other lawsuit. See PTO 3065. Thus, those suffering from PPH have a right to the full and complete relief allowed by law without any contractual restriction under the Settlement Agreement.

Movants also complain that inadequate representation existed because the Settlement Agreement contains a definition of PPH. Settlement Agreement § I.46. Even assuming that it is not too late to raise this issue, the argument is totally without merit. The meaning of PPH was thoroughly reviewed at the Fairness Hearing in May, 2000. As set forth in PTO 1415 approving the settlement, the Settlement Agreement included the medical definition as articulated by one of the country's leading experts in the field, Robin Barst, M.D. No one, including movants, who were present or who had ample notice and the

opportunity to be present at all relevant stages, ever presented a medical expert either at the Fairness Hearing or at any other time challenging the accuracy or propriety of the description of PPH found in the Settlement Agreement.

In order to avoid the inevitable dispute as to what is meant by PPH, it was imperative that a definition be included. If anything, the definition is more generous to claimants than it might otherwise have been. See PTO 1415 at 69. As stated by my able predecessor, Judge Louis C. Bechtel, "[i]ndeed, Drs. Barst, Shah and Weyman all agreed that, if anything, the definition of PPH included in the Settlement Agreement is over-inclusive in that the Settlement Agreement definition allows a class member with an 'exceedingly mild case' of PPH to maintain an action against AHP on the basis of his or her PPH claim." Id.

Before a class member may bring a claim for PPH, he or she must be diagnosed with PPH, as defined in the Settlement Agreement. See Settlement Agreement § I.46. Class members benefit significantly from this aspect of the definition. Without a diagnosis as the starting point, PPH class members would face problems as to when their causes of action accrued. They might be time-barred in states where there is no discovery rule or encounter serious obstacles because of uncertain and opaque state discovery rules or other tolling requirements.

In summary, those with PPH are not treated adversely when compared with other class members. See PTO 1415. Once a class member meets the threshold for a claim based on PPH, he or

she may file a lawsuit against Wyeth. See PTO 2383. As Judge Bechtle wrote in PTO 1415 in approving the Settlement Agreement, "Although the Settlement Agreement does not provide any direct benefits for PPH, it fully preserves the rights of class members to recover against AHP [Wyeth] if they have or develop PPH as a result of taking Pondimin and/or Redux." PTO 1415 at 70 (emphasis added).

Movants also claim that those who have PH were not adequately represented at the time that the Settlement Agreement was approved. PH, which is quite common in the general population, should not be confused with the fatal disease known as PPH. PH, which involves an elevation in pulmonary artery pressure, is a symptom caused by various conditions, including high blood pressure. The medical testimony and articles in the record before this court set forth evidence of the causal connection between fen-phen and PPH, as well as between fen-phen and left-sided valvular heart disease (VHD). Other than those two conditions, which involve secondary pulmonary hypertension, there is nothing before us that fen-phen causes other diseases or conditions related to PH. There is no requirement that subclasses be established for hypothetical groups of class members. The argument that those suffering from PH were not adequately represented is without substance.

The motion to determine the inadequacy of representation of class members who suffer or will suffer from PPH and PH will be denied.

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AND NOW, this 24<sup>th</sup> day of October, 2003, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motion of certain class members to determine the inadequacy of representation of class members who suffer or will suffer from primary pulmonary hypertension or pulmonary hypertension is DENIED.

BY THE COURT:

Lawrence Bartlett  
J.