

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. 3123

Bartle, J.

November 13, 2003

Wyeth has moved for an injunction to enforce the Nationwide Class Action Settlement Agreement ("Settlement Agreement") in this diet drug litigation as to class member Crystall Gatlin. Specifically, Wyeth seeks to prevent Ms. Gatlin from introducing evidence related to punitive damages at the trial of her lawsuit against Wyeth in the state of Louisiana entitled Gatlin v. American Home Products Corp., et al., No. 2003-4007 (Orleans Parish). This case is set for trial on November 17, 2003.

The Settlement Agreement, which was approved by the court in PTO 1415, allows class members under certain circumstances to opt out of the settlement and sue Wyeth for damages in the tort system. Ms. Gatlin, as was her right, exercised what is known as an intermediate opt-out and brought an

action against Wyeth in the state court in Louisiana. She claims she had ingested the diet drugs, Pondimin and/or Redux, and as a result now suffers from valvular heart disease ("VHD"). Ms. Gatlin remains a class member and is bound by the terms of the Settlement Agreement even though she has elected her opt-out right and has chosen to sue Wyeth individually. See Settlement Agreement §§ II.B. and IV.D.3. Under the Settlement Agreement, in return for Wyeth's waiver of the statute of limitations, class members electing to sue Wyeth rather than to receive what are known as Matrix benefits are prohibited from seeking "punitive, exemplary, or multiple damages" against settled parties, including Wyeth. Settlement Agreement § IV.D.3.c; see PTO 2625 and PTO 2680.

In April, 2003, this court issued PTO 2828 in response to a similar motion by Wyeth against a Texas VHD claimant, Clara Clark. PTO 2828 enjoined Ms. Clark and her counsel from introducing or referring to any evidence related to punitive damages or any evidence the probative value of which is outweighed by the prejudicial effect. Ms. Gatlin has refused to agree to abide voluntarily by the terms of such an order in connection with her trial. Instead she argues that an order such as PTO 2828 is superfluous because no punitive damages can be awarded under Louisiana law.

The fact that Louisiana law may not allow punitive damages does not end our inquiry. As we have noted on previous occasions, a class member cannot be allowed to evade the

Settlement Agreement by seeking punitive damages de facto even though he or she is not seeking punitive damages de jure. It is clear that Ms. Gatlin intends to make an end run around the prohibition by introducing proof that is designed solely to inflame the jury in order to obtain more than compensatory damages. While she may not call what she is doing an effort to collect punitive damages, that is what she is attempting to do in reality. Regardless of the relevant state substantive, evidentiary, or procedural law, we will enforce the Settlement Agreement to prevent Ms. Gatlin from interjecting punitive damages into her case. In re Prudential Insur. Co. of Am. Sales Practice Litig., 261 F.3d 355 (3d Cir. 2001).

PTO 2828 and PTO 3088 outlined a number of subjects which relate solely to the issue of punitive damages or whose probative value is clearly outweighed by the unfair prejudice to Wyeth with respect to punitive damages. In order to uphold the Settlement Agreement pursuant to PTO 1415 and to eliminate as much chance for evasion as possible, we will enjoin plaintiff and her counsel from introducing evidence or making any statement before or argument to the court or jury related directly or indirectly to the following subjects. They are: (a) Wyeth's profits, size, or financial condition; (b) the amount or size of Wyeth's sales of diet drugs or other products; (c) Wyeth's marketing or promotion of diet drugs to the extent that Wyeth placed marketing or promotion ahead of health or safety concerns; (d) any deception or any destruction, hiding, overwriting, or

deliberate miscoding of documents or information by Wyeth; (e) any involvement by Wyeth in the ghostwriting of articles; (f) primary pulmonary hypertension ("PPH"); (g) neurotoxicity; and (h) any disease, illness, or condition, or persons suffering from any disease, illness, or condition caused by Pondimin or Redux except for left-sided mitral valve regurgitation or pulmonary hypertension ("PH") secondary to left-sided mitral valve regurgitation; and (i) "the four cases label" and the "black box warning."

Subjects (a) through (c) have no relevance whatsoever to whether Pondimin or Redux caused Ms. Gatlin's current medical condition. They focus on Wyeth's wealth, size, or overriding financial motives, which have nothing to do with the merits of the case and everything to do with punishment of Wyeth. Subjects (d) and (e), concerning any deception or any destruction, hiding, or deliberate miscoding of documents or information, or the ghostwriting of articles paid for by Wyeth are designed to demonstrate willful, wanton, or malicious conduct rather than negligence or strict liability.

Subject (f), dealing with PPH, and subject (g), dealing with neurotoxicity, can have no other purpose in this case than to inflame the jury to award more than compensatory damages. PPH is a fatal, although rare, condition allegedly caused by fen-phen. Gratefully, Ms. Gatlin does not claim to suffer from such a condition. Likewise, she has not been diagnosed with neurotoxicity, a serious brain injury allegedly resulting from

exposure to fen-phen. Plaintiff's effort to inject subject (h) can have no legitimate purpose to prove her claim for compensatory damages. Ms. Gatlin alleges only that she has VHD. Other illnesses or persons suffering from other illnesses caused by fen-phen can only have the effect of unfairly arousing the jury against Wyeth without otherwise supporting her allowable claims under the Settlement Agreement.

The same reasoning applies to subject (i). As explained in PTO 3088, the issues of "the four cases label" and the "black box warning" concern PPH, which, as stated above, is a fatal disease from which Ms. Gatlin does not suffer. The four cases label and the black box warning do not relate to PH or even to PH secondary to VHD.¹ Allowing evidence of the four cases label and the black box warning would simply be another way of improperly injecting PPH into the trial in violation of the prohibition against punitive damages in the Settlement Agreement. To reiterate what we said in PTO 3088, class members and their counsel may make no reference, direct or indirect, to PPH at any trial where class members are suing Wyeth for VHD. Likewise, they may not refer to PH, except as a secondary condition to VHD.

There have now been several occasions where we have had to restrain a violation of the contractual prohibition against

1. If a plaintiff were allowed to introduce evidence, however spurious, that the four cases label is about PH secondary to VHD and not about PPH, Wyeth would face the necessity of introducing truthful evidence that it really is about PPH. A plaintiff would thus have achieved indirectly what the Settlement Agreement forbids, that is, the introduction of the inflammatory issue of PPH into a case involving VHD.

punitive damages in lawsuits brought by class members. We will continue vigorously to enforce this provision of the Settlement Agreement. If class members have carte blanche to seek and obtain punitive damages in VHD cases, as some have attempted to do, this multi-billion dollar settlement will be placed in jeopardy. If claims and awards are improperly inflated, thousands of deserving class members may receive no compensation.

The present pending motion for injunctive relief, like a number of others, has been made on the eve of trial. We urge class members in opt-out cases to provide Wyeth with a list of trial exhibits and deposition designations at the earliest possible stage so as to avoid a flurry of motions and briefs at the last minute. The parties should promptly confer in good faith about disputed evidence with the goal of eliminating what would be in breach of the punitive damages prohibition of the Settlement Agreement. The court has made its position quite clear. We are confident that through early good faith discussion and cooperation, these issues can be resolved without the need for court intervention.

We will grant Wyeth's motion and enter the attached injunction.

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PRETRIAL ORDER NO. 3123

AND NOW, on this day of November, 2003, for
the reasons set forth in the accompanying Memorandum, it is
hereby ORDERED that:

(1) the plaintiff, Crystall Gatlin, and her agents,
attorneys, and derivative claimants are ENJOINED in the case of
Gatlin v. American Home Products Corp., et al., No. 2003-4007,
pending in Orleans Parish, Louisiana, from introducing any
evidence, making any statements before or argument to the court
or jury related directly or indirectly to:

- (a) punitive, exemplary, or multiple damages,
however described;
- (b) malicious, wanton, or other similar conduct
of Wyeth, however described;
- (c) or any medical condition of plaintiffs caused
by Wyeth other than left-sided mitral valve

regurgitation or pulmonary hypertension
secondary to mitral valve regurgitation.

(2) without limitation as to the scope of the injunction set forth in ¶ 1, the plaintiff, Crystall Gatlin, and her agents, attorneys, and derivative claimants are ENJOINED in the case of Gatlin v. American Home Products Corp., et al., No. 2003-4007, pending in Orleans Parish, Louisiana, from introducing any evidence, making any statements before or argument to the court or jury related directly or indirectly to:

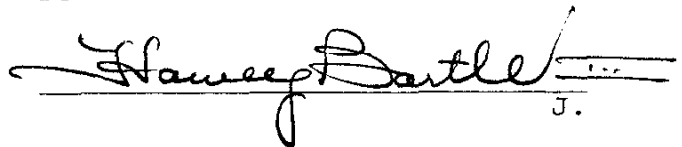
- (a) Wyeth's profits, size, or financial condition;
- (b) the amount or size of Wyeth's sales of diet drugs or other products;
- (c) Wyeth's marketing or promotion of diet drugs to the extent that Wyeth placed marketing or promotion ahead of health or safety concerns;
- (d) any deception or any destruction, hiding, overwriting, or deliberate miscoding of documents or information by Wyeth;
- (e) any involvement by Wyeth in the ghostwriting of articles;
- (f) primary pulmonary hypertension ("PPH");
- (g) neurotoxicity;
- (h) any disease, illness, or condition, or persons suffering from any disease, illness, or condition caused by Redux or Pondimin

except for left-sided valvular heart disease or pulmonary hypertension secondary to left-sided valvular heart disease; and

(i) the "four cases label" for Pondimin and the "black box warning" for Redux in 1995 and 1996; and

(3) the parties shall deliver forthwith to the state trial judge a copy of this Memorandum and Pretrial Order.

BY THE COURT:



J.