

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

MEMORANDUM AND PRETRIAL ORDER NO. 3048

Bartle, J.

October 1, 2003

Before the court is the expedited motion of certain class members for an order directing the AHP Settlement Trust (the "Trust") to suspend the Claims Integrity Program and the medical practices questionnaire deadlines.

The Trust was established in accordance with the nationwide Class Action Settlement Agreement ("Settlement Agreement") and approved by the court in Pretrial Order ("PTO") No. 1415 on August 28, 2000. Under the Settlement Agreement, the Trust receives funds deposited by Wyeth¹ and has the responsibility under court oversight for investing these funds, administering the trust, conducting audits of claims, and

1. Wyeth was previously known as American Home Products Corporation.

responsibility under court oversight for investing these funds, administering the trust, conducting audits of claims, and providing benefits to eligible class members. PTO No. 1415, at 60-61.

So-called Matrix benefits, payable to class members under the Settlement Agreement, can be sizeable and are based on non-discretionary criteria. No payment is made without a sworn certification of a board-certified cardiologist or cardiothoracic surgeon that the class member suffers from a particular condition. See Settlement Agreement § VI. In order to prevent fraud, the Settlement Agreement authorized audits of up to fifteen percent of the Matrix claims submitted, under which an independent auditing cardiologist analyzes the relevant documentation, including the claimant's medical history and echocardiogram, and determines whether there is a reasonable medical basis for the physician's representations in support of the claim. Settlement Agreement § VI.E.

The Settlement Agreement also allowed this court to order additional audits and adopt additional claims administration procedures upon a showing of good cause. Settlement Agreement § VI.E. As stated in PTO No. 1415, this court has "exclusive jurisdiction over this action and each of the Parties, including [Wyeth] and the class members, to administer, supervise, interpret and enforce this Settlement in accordance with its terms ... and to enter such other further

orders as are needed to effectuate the terms of the Settlement." PTO 1415, at ¶ 11; Settlement Agreement § VIII.B.

In November, 2002, after a hearing, the court determined that there was no reasonable medical basis for seventy-eight claims attested to by certain doctors and submitted by certain law firms. See PTO 2640. The court found that good cause existed to permit audits of all pending and future attestations of two particular cardiologists and of all the Green Forms³ submitted on behalf of claimants by two New York law firms. See PTO 2640. The court also issued a preliminary injunction to halt payment of benefits on the claims at issue until additional audits had been completed. See PTO 2640. Thereafter, based on the fact that significantly more claims were being submitted than had been contemplated at the time of the Fairness Hearing in May, 2000, the court found good cause to order audits of 100 percent of the claims. See PTO 2662.

The Trust has now instituted what it is calling a Claims Integrity Program ("CIP"), which includes a Claims

3. For each claimant, a physician completed a Green Form, a document upon which the physician certified whether a potential claimant did or did not have a given condition "to a reasonable degree of medical certainty." Green Form, at 7. The Green Form stated, "[y]ou may consider, rely upon and use the patient's echocardiograms, medical records and reports, hospital records or reports, the patient's medical history or other sources of information you regularly and routinely use in your practice." Green Form, at 7. Upon completion of the questions contained in the Green Form, physicians were directed to sign and date it with the understanding that the Green Form would be an official court document and that, under penalty of perjury, the information supplied by the physician was correct to the best of his or her "knowledge, information, and belief." Green Form, at 14.

Integrity Hotline ("Hotline"). The obvious purpose of the CIP is to help it uncover fraudulent and otherwise meritless claims. There is only a limited amount of money in the Trust, and its assets must be preserved for those class members who are entitled to benefits under the terms of the Settlement Agreement. Otherwise, deserving claimants may be left empty-handed.

The Hotline invites the reporting of "potential dishonest or unethical practices intended to get the Trust to pay illegitimate claims." The toll-free number is posted on the Diet Drugs Administration Website. It is important to emphasize that the Hotline does not initiate calls, it merely accepts them. The Hotline is administered by Trust employees, trained by counsel for the Trust, who investigate concerns raised by callers. The Trust employees are not lawyers. Although on three occasions contacts were referred to Special Counsel for the Trust, these referrals did not involve represented claimants or law firm employees.

Movants contend that the Hotline violates the Rules of Professional Conduct because the Trust is attempting to communicate with persons represented by counsel and is encouraging law firm employees to breach the attorney-client privilege.

Rule 4.2 of the Pennsylvania Rules of Professional Conduct provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the

matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Pa. R.P.C. 4.2 (2003). In this case, however, it is non-lawyer employees of the Trust who are receiving information from anyone, including claimants who may have representation. There is no ethical rule prohibiting communication between parties themselves. See Pa. R.P.C. 4.2, comment. Despite the fact that counsel for the Trust may have trained the Hotline employees to seek information regarding fraudulent behavior, those receiving phone calls are agents of the Trust, not agents of the Trust's attorneys. Rest. 3d Law Governing Lawyers § 99, comment k (2000). Indeed, the attorneys are agents of the Trust, not vice versa. As comment k to the Restatement Third of the Law Governing Lawyers states,

[n]o general rule prevents a lawyer's client, either personally or through a nonlawyer agent, from communicating directly with a represented nonclient. . . . while neither a lawyer nor a lawyer's investigator or other agent . . . may contact the represented nonclient, the same bar does not extend to the client of the lawyer or the client's investigator or agent.

Id. In any event, we cannot forget that there is a crime-fraud exception to the duty of confidentiality. "[W]hen the legal consultation is in furtherance of a crime or fraud, the statements exchanged will not be protected." See, e.g., U.S. v. Inigo, 925 F.2d 641, 656-57 (3d Cir. 1991).

The Trust has legitimate reason to seek information pertaining to potential fraud and illegitimate claims, and it does not violate the Rules of Professional Conduct to set up a

means for doing so, particularly one where contact is initiated by the informants, rather than by the Trust. Whether the Hotline will turn out to be useful remains to be seen, but the Trust cannot be faulted for employing it as a tool to help preserve the integrity of the claims process.

By allowing the Hotline to go forward, we are not thereby endorsing any future action or event that emanates from its use. If any problems result, we will deal with them as they arise.

Movants have raised the question whether, even if it is within the Trust's authority to implement the CIP, the Trust can do so without prior court approval. Subject to express limitations set forth in the Settlement Agreement and in the Settlement Trust Agreement, the Settlement Trust Agreement grants the Trustees "fiduciary powers to take any and all actions that, in the judgment of the Trustees, are necessary to be exercised in a fiduciary capacity to fulfill the purposes of the Trust, including, without limitation, each power expressly granted ..., [and] all powers reasonably incidental thereto." Settlement Trust Agreement § 6.01(a). Under the Settlement Trust Agreement, therefore, the Trust has the authority to implement the current Claims Integrity Program Hotline to the extent challenged here, and the Settlement Agreement imposes no limitations in that regard.

Accordingly, we will deny the expedited motion to suspend the Claims Integrity Program Hotline of the AHP Settlement Trust.

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AND NOW, this *1st* day of October, 2003, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the expedited motion of certain class members to suspend the Claims Integrity Program and the Medical Practices Questionnaires deadline is DENIED.

BY THE COURT:

Harvey Bartle J.