

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

MEMORANDUM AND PRETRIAL ORDER NO. 5517

Bartle, J.

July 27, 2005

Before the court is the motion of the AHP Settlement Trust (the "Trust") "for interpretation of the Settlement Agreement regarding matrix claims that are denied because the echocardiograms of attestation contain inserted frames." (Doc. No. 2028).

The Nationwide Class Action Settlement Agreement ("Settlement Agreement") in this massive litigation involving Wyeth's diet drugs Pondimin and Redux provides for certain cash benefits known as matrix benefits for class members who ingested these drugs. The payments, funded by Wyeth, are made by the Trust, which was created under the Settlement Agreement. See Settlement Agreement § III; Pretrial Order ("PTO") No. 1415. A class member claiming matrix benefits must demonstrate entitlement to them by submitting to the Trust an echocardiogram

read by a board-certified cardiologist who has attested that the class member's condition meets the definitions set forth in the Settlement Agreement. Settlement Agreement § VI.C. The Settlement Agreement provided for audits of fifteen percent of claims for matrix benefits, which were to be conducted by board-certified cardiologists engaged by the Trust. See Settlement Agreement §§ VI.E & F. The Settlement Agreement also provided that where there is good cause shown, the court may order additional audits and/or adopt additional claims procedures as it deems appropriate. Settlement Agreement § VI.E.8. For the reasons set forth in PTO No. 2662, this court ordered that all claims for matrix benefits be audited.

As of July 13, 2005, the Trust has identified 153 different echocardiogram studies that appear to contain anachronistic inserts in echocardiograms that support claims for matrix benefits that have not yet been paid. See Trust's Reply, Ex. C. The Trust, Class Counsel, and Wyeth all agree that these inserts are contrary to ordinary clinical practice and interfere with the integrity of the echocardiogram as a medical record. It appears, however, that despite the inserts, some of the class members who rely on those echocardiograms may have matrix-level disease for which benefits are appropriate and some may have FDA Positive or mild mitral regurgitation only, which makes them eligible to apply for future matrix benefits if their conditions worsen. See Class Counsel's Resp. at 3-4.

The Settlement Agreement provides that "if the Trustees and/or Claims Administrator(s) determine that the Class Member ... intentionally made a material misrepresentation of fact, the Trustees and/or Claims Administrator(s) shall not pay the Claim." Settlement Agreement § VI.E.7 (emphasis added). Because the Trust has determined that these inserts are a "material misrepresentation of fact," it has denied each matrix claim supported by an echocardiogram that contains an insert. Its instant motion requests that we determine what, if any, additional remedies should be effected. The Trust relies on § VI.E.8 of the Settlement Agreement, which provides that

For good cause shown, including without limitation, the results of audits conducted on any one or more claims, ... the Court at any time, upon its own motion after notice to [Wyeth] and Class Counsel ... may order the Trustees and/or Claims Administrator(s) to perform such additional audits and/or adopt such additional claims administration procedures as the Court deems appropriate.

Settlement Agreement § VI.E.8. "The heart of the good cause provision lies in allowing the court to order corrective measures to prevent the settlement from being subverted." In re Diet Drugs, 236 F. Supp. 2d 445, 461 (E.D. Pa. 2002).

On June 20, 2005, we ordered all interested parties, including Class Counsel and Wyeth, to file with the court their responses to the Trust's motion. See PTO No. 5359. In addition

to Class Counsel and Wyeth, three law firms¹ that represent class members with inserted frames in their echocardiograms did so.

We are deeply troubled about the insertion of frames into these echocardiograms. As the Trust points out, any interference with the date and time sequence of the frames impedes the ability to determine accurately a claimant's actual medical condition. The insertions can make undeserving claimants appear to qualify for matrix benefits. These alterations of echocardiograms undermine the integrity of the compensation process under the Trust.

At this point in time, no one has suggested that the affected claimants themselves engaged in any wrongdoing with respect to these insertions. As lay persons, claimants would not generally have the technical expertise to understand or knowingly participate in manipulating their echocardiograms through the insertion of anachronistic frames.

Accordingly, we will direct the Trust to advise claimants whose echocardiograms contain inserted frames that they may have their echocardiogram re-audited but only upon prepayment of the reasonable cost of removing the inserts and of conducting the re-audit. The cost shall be stated in the notice letter. Said notice shall be mailed within 15 days of this order. The claimant must also be notified that the re-audit must be

1. These three law firms are Charles F. Abbott, P.C., Braunberger Boud and Draper, P.C., and Driggs, Bills & Day, P.C.

requested in writing within 30 days after the mailing of the notice and accompanied by the required payment or the claim will be denied and no show cause process will follow. The claimant or, if deceased or incapacitated, his or her personal representative must sign and date any request for a re-audit. The Trust shall then remove any anachronistic inserts from any echocardiogram and re-audit the claim of any claimant who makes a proper request. The re-audit, of course, will be made without reference to the previously inserted images. The outcome of the re-audit will determine what benefits, if any, a claimant will receive. As noted above, the claims of those with inserts who do not properly and timely request a re-audit will be denied without a right to proceed to a show cause hearing. The above procedure will apply to claimants whose echocardiograms the Trust discovers in the future to include inserted frames.

If a claimant is represented by counsel, we will require his or her counsel to pre-pay the Trust's reasonable anticipated costs of removing the inserts and re-auditing the claims. As it is likely that counsel arranged for the echocardiograms at issue to be performed, counsel shall not seek reimbursement from their clients for the costs of removing the inserts and undertaking the re-audit.

The Trust has suggested that we should afford all the class members relying on echocardiograms with inserted frames the right to challenge the denial of their claims through the show

cause process provided in PTO No. 2807.² See Settlement Agreement § VI.E.7. We are not persuaded that this proposed solution is appropriate or in the interest of judicial economy. Moreover, because the Trust represents that it is in the process of identifying additional claims with inserts, a single court adjudication is unlikely to result in a comprehensive resolution for all the claims ultimately determined to have anachronistic inserts. Nevertheless, the show cause process will be available for those class members whose claims are denied after they are re-audited with the inserts redacted.

The Trust also insists that an evidentiary hearing would be helpful to assess whether a remedy should be afforded to the claimants and the Trust and whether sanctions should be

2. Under the show cause process, if a claimant contests the Trust's final post-audit determination, the Trust must file an application for issuance of an order to show cause seeking relief requested by the Trust. After the court has issued an order directing the claimant to show cause why the relief requested by the Trust should not be granted, the matter is referred to the Special Master for further proceedings before it is ultimately received by the court for final determination. The claimant has the burden of proving to the court that there was a reasonable medical basis for the attesting physician's answer to each Green Form question at issue and/or the truth of all of claimant's representations of material fact in connection with the claim. If the court determines that plaintiff has not met his or her burden of proof or that the claimant intentionally made a material misrepresentation of fact in connection with the claim, the court shall confirm the Trust's post-audit determination and may grant such other relief as it finds appropriate. If the court determines that there was a reasonable medical basis and that the claimant did not make an intentional misrepresentation of a material fact, the court shall enter an order directing the Trust to pay the claim in accordance with the Settlement Agreement. See PTO No. 2807 (E.D. Pa. Mar. 26, 2003).

imposed upon those responsible. If claimants with inserted frames choose to challenge denials of their claims after re-audit through the show cause process, the court will determine at that time whether it is necessary to hold such a hearing.

The insertion of frames constitutes flagrant, if not fraudulent or criminal, behavior. Our allowing re-audits without the inserted frames is not to be interpreted as condoning such reprehensible conduct or as ending the matter for those who are responsible. We simply seek to ensure that innocent claimants with legitimate injuries are compensated as expeditiously as possible.

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AMERICAN HOME PRODUCTS	:	
CORPORATION, et al.	:	CIVIL ACTION NO. 99-20593
_____	:	

PRETRIAL ORDER NO. 3517

AND NOW, this 27th day of July, 2005 for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the AHP Settlement Trust (the "Trust") shall within 15 days of the date of this order give written notice to the class members whose claims are supported by echocardiograms containing anachronistic inserts. For all echocardiograms hereinafter discovered to have such inserts, the Trust shall within 15 days of the discovery of such insert give notice to affected class members. Said notice shall advise class members that their claims will be denied without an opportunity to proceed to a show cause hearing unless they send a written request to the Trust within 30 days after the notice is sent that their echocardiogram be re-audited. The notice shall inform

class members of the cost of removing the inserts and of conducting the re-audit. Any request for re-audit must be made in writing within thirty days after notice is sent by the Trust. The request must be signed and dated by the class member, or in the case of a deceased class member, by his or her personal representative, and accompanied by the appropriate payment for the cost of the removal of the insert and of the re-audit;

(2) after the request for the re-audit is received with the required payment, the Trust shall remove the anachronistic insert(s) before conducting a re-audit without reference to the previously inserted images to determine whether there is a reasonable medical basis for the claim. Any such re-audits shall be expedited;

(3) for all claimants represented by counsel and electing re-audit, counsel shall pre-pay the Trust for the reasonable cost of removing any inserts and re-auditing the claims. Counsel shall not seek reimbursement from their clients for these costs;

(4) any class members whose claims are denied after re-audit may challenge the denial through the show cause process; and

(5) any class member whose claim is compensable under the criteria of the Settlement Agreement after re-audit shall be paid.

**ECF
DOCUMENT**

BY THE COURT:

/s/ Harvey Bartle III J.

I hereby attest and certify that this is a printed copy of a document which was electronically filed with the United States District Court for the Eastern District of Pennsylvania

Date Filed: 7/27/05
Michael E. Kunz, Clerk

By: [Signature] Deputy Clerk