

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

MEMORANDUM AND PRETRIAL ORDER NO. 3382

Bartle, J.

March , 2004

Before the court is the motion of the AHP Settlement Trust (the "Trust") in support of and in opposition to the requests of certain claimants for extensions of time to receive Echocardiogram Screening Program benefits under the Nationwide Class Action Settlement Agreement ("Settlement Agreement") involving Wyeth's diet drugs, Pondimin and Redux.

Claimants who were unable to have Screening Program echocardiograms before the July 3, 2003 deadline were required to send a letter to the Trust or the court requesting an extension of time and explaining why a timely echocardiogram was not possible prior thereto. The Trust has reviewed the claimants' letters, claim files, and telephone records and has made decisions on whether each claimant at issue has demonstrated the good cause and due diligence necessary to receive a further

extension of time to have a Screening Program echocardiogram taken. We now review those decisions as required under § I.49 of the Settlement Agreement, which provides:

all such Echocardiograms must be conducted no later than July 3, 2003, unless the court, upon a showing of good cause and due diligence by or on behalf of a Class Member or group of Class Members, allows the Class Member or group of Class Members to receive an Echocardiogram and associated interpretive physician visit after such date.

Settlement Agreement § I.49 (emphasis added). The Settlement Agreement does not define "good cause" or "due diligence."

This court, in another context, has described due diligence as a reasonable effort under the facts and circumstances. The inquiry focuses on whether the claimant "exhibited those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of others." Vitalo v. Cabot Corp., Civ.A. No. 01-6759, 2003 WL 22999240, *6 (E.D. Pa. Feb. 25, 2003) (quoting Burnside v. Abbott Labs., 505 A.2d 973, 988 (Pa. Super. 1985)). We have also observed that, in general, "good cause is a fluid concept, the meaning of which will depend on the circumstances of the individual case." Memorandum and Pretrial Order ("PTO") No. 2662 at 10. In examining the scope of good cause, our Court of Appeals has noted that it requires "at least as much as would be required to show excusable neglect." Dominic v. Hess Oil V.I. Corp., 841 F.2d 513, 517 (3d Cir. 1988).

In In re Orthopedic Bone Screw Products Liability Litigation ("Bone Screw"), 246 F.3d 315 (3d Cir. 2001), the Court of Appeals reiterated the Supreme Court's analysis of excusable neglect as set forth in Pioneer Investment Services Company v. Brunswick Associates Limited Partnership ("Pioneer"), 507 U.S. 380 (1993). Four factors should be evaluated in deciding whether excusable neglect exists: (1) the danger of prejudice to the nonmovant; (2) the length of the delay and its potential effect on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith. Pioneer, 507 U.S. at 395; Bone Screw, 246 F.3d at 322-23. In our view, the due diligence standard is encompassed by the third factor of the excusable neglect test. See Vitalo, 2003 WL 22999240, at *6; Pioneer, 507 U.S. at 395. Accordingly, we conclude that "good cause and due diligence" as used in the Settlement Agreement is synonymous with "excusable neglect" as articulated by the Supreme Court in Pioneer. See Pioneer, 507 U.S. at 395. Thus, we will determine whether the claimants have demonstrated good cause and due diligence for extensions of time to receive echocardiograms through the Screening Program by applying the Pioneer test for excusable neglect.

I.

We first address claimants for whom the Trust supports extensions of time to receive an echocardiogram under the Screening Program. See Pioneer, 507 U.S. at 395. The Trust has

determined that neither the Trust nor other claimants will be prejudiced if the court grants extensions in these cases because the number of claimants is limited, they will receive a benefit to which they were entitled, and there will be no additional cost to the Trust. Second, the length of delay as to these claimants is not great -- the Trust anticipates completing their echocardiograms within ninety days. Third, these claimants made diligent efforts to obtain their echocardiograms before the deadline. The delays in these claimants' submissions were the result of factors outside of their control. In some cases, the claimants had an echocardiogram performed, but the evaluating cardiologist did not return all required information.¹ Other claimants did not receive their echocardiogram eligibility notification until after June 1, 2003 and did not have adequate time to schedule an echocardiogram before the deadline.² In

1. S.C. (DDR No. 3142072), K.C. (DDR No. 1734672), C.G. (DDR No. 141978), V.K. (DDR No. 3187127), S.M. (DDR No. 192682), R.M. (DDR No. 1844125), D.N. (DDR No. 1607621), L.R. (DDR No. 1758432), L.R. (DDR No. 1697085), D.R. (DDR No. 2032894), N.S. (DDR No. 498576), S.S. (DDR No. 2282879), B.S. (DDR No. 3308343), S.S. (DDR No. 1893593), M.T. (DDR No. 2195774), S.T. (DDR No. 8164203), G.T. (DDR No. 1765858), J.V. (DDR No. 8135110), E.W. (DDR No. 880312), and L.B. (DDR No. 1434208).

2. C.A. (DDR No. 3578960), D.A. (DDR No. 3542958), C.B. (DDR No. 1010992), R.B. (DDR No. 8190737), C.D. (DDR No. 8084966), R.D. (DDR No. 1555473), M.F. (DDR No. 1624246), L.F. (DDR No. 8130053), I.F. (DDR No. 1402213), K.G. (DDR No. 8012868), A.H. (DDR No. 3357985), M.H. (DDR No. 2162899), J.J. (DDR No. 8016872), G.K. (DDR No. 2016822), H.M. (DDR No. 8110813), E.M. (DDR No. 1924919), V.O. (DDR No. 8035078), T.R. (DDR No. 2341550), R.S. (DDR No. 2605780), T.S. (DDR No. 2127371), V.S.

(continued...)

still other cases, the untimeliness was due to processing delays or errors on the part of the Trust.³ A number of claimants residing in Minnesota had difficulty finding doctors who were not affiliated with the Mayo Clinic, which had instructed affiliated physicians not to participate in the Screening Program.⁴ One claimant was incarcerated and despite persistent efforts was not able to make arrangements to obtain an echocardiogram within the deadline.⁵ Finally, there were claimants who were obviously diligent in pursuing their echocardiograms but for valid reasons were unable to have them completed before the deadline.⁶ All of the claimants identified in footnotes one (1) through six (6)

2. (...continued)

(DDR No. 1921519), L.S. (DDR No. 8076177), B.S. (DDR No. 1527779), K.S.O. (DDR No. 2844330), M.S. (DDR No. 8019912), R.T. (DDR No. 1252667), V.V. (DDR No. 8042029), J.W. (DDR No. 2920833), and P.W. (DDR No. 1256247).

3. B.A. (DDR No. 1941780), J.C. (DDR No. 8031003), P.C. (DDR No. 8021606), L.E. (DDR No. 1470988), J.K. (DDR No. 8015016), K.R. (DDR No. 1617687), S.R. (DDR No. 3357795), S.S. (DDR No. 3638814), and W.W. (DDR No. 390781).

4. D.A. (DDR No. 3516937), M.B. (DDR No. 3516952), B.C. (DDR No. 8066466), T.C. (DDR No. 411522), K.G. (DDR No. 3666922), P.G. (DDR No. 8246463), A.L. (DDR No. 8048570), C.S. (DDR No. 1297102), J.T. (DDR No. 8060498), R.W. (DDR No. 8059368), and L.Y. (DDR No. 8057206).

5. J.O. (DDR No. 98972).

6. J.B. (DDR No. 8076321), A.C. (DDR No. 786673), R.H. (DDR No. 8061784), K.L. (DDR No. 2548444), M.P. (DDR No. 684563), D.O.P. (DDR No. 8001137), E.T. (DDR No. 54114), and T.W. (DDR No. 2020170).

have established good cause and due diligence, and they are entitled to extensions.

II.

We now examine extension requests opposed by the Trust. We note that the claimant has the burden of demonstrating good cause and due diligence. See Bone Screw, 246 F.3d at 321; Settlement Agreement § I.49.

A.

One category involves claimants who had echocardiograms performed but whose echocardiogram reports and echocardiogram tapes were not returned to the Trust or for whom the associated documentation was not completed by the screening cardiologist. These claimants request an extension to have a second echocardiogram performed. The Trust does not oppose extensions for the majority of claimants falling into this category, and we have approved their extensions above.⁷

There are a small number of claimants in this category for whom a second echocardiogram is no longer necessary because their screening cardiologist has since submitted the necessary echocardiogram information or materials. The requests of these claimants for a second echocardiogram will therefore be denied.⁸

7. See supra n.1.

8. D.B. (DDR No. 2426781), J.D. (DDR No. 417006), G.G. (DDR No. 8119809), E.L. (DDR No. 3321668), W.S. (DDR No. 2218675), and P.S. (DDR No. 2421527).

There are two other claimants requesting a second echocardiogram for whom the Trust opposes an extension. J.B. (DDR No. 2931962) refused to drive forty-five miles to the doctor's office, and J.F. (DDR No. 396762) informed the Trust she was no longer interested.

Under the first prong of Pioneer, we must determine the danger of prejudice to the Trust, should the requested extensions be granted. See Pioneer, 507 U.S. at 395. The prejudice that would result from granting extensions for these two claimants would not be great. As is true for claimants in this group for whom the Trust supports extensions, they were otherwise entitled to the echocardiogram benefit. Furthermore, under the second prong, the length of delay and effect on judicial proceedings would be negligible. See id. These claimants could be incorporated into the group for whom the Trust anticipates having echocardiograms completed within ninety days.

Under the third prong of Pioneer, we must evaluate the claimant's reasons for delay and whether it was within her reasonable control. See id. J.B. had her first echocardiogram on April 1, 2002. She was contacted by the Trust on June 23, 2003 and given the name of a cardiologist who would perform a second required echocardiogram whose office was forty-five miles away. J.B., who was 71 years old, refused to travel the forty-five miles before the end of the Screening Program, or July 3, 2003. In our consideration of J.B.'s request, we note that the Trust has conceded that claimants who received their first

echocardiogram eligibility notification after June 1, 2003 did not have enough time to schedule an echocardiogram prior to the end of the Screening Program. J.B. did not receive notification that she needed a second echocardiogram until just over a week before the deadline. We note also that J.B. was entitled to a second echocardiogram because her evaluating physician failed to submit all necessary information and not because of any lack of diligence on her part. In light of the record before us, J.B. will be afforded an extension.

We reach a different conclusion as to J.F. (DDR No. 396762). She was informed on May 7, 2003 that she needed a second echocardiogram, and on May 29, 2003, she contacted the Trust to inform it that she was no longer interested in pursuing a second echocardiogram. We agree with the Trust that J.F. has not demonstrated good cause and due diligence meriting an extension.

B.

The second category of extensions opposed by the Trust consists of claimants residing in Minnesota who claim they had insufficient time to schedule an echocardiogram. They rely on the fact that physicians affiliated with the Mayo Clinic in Rochester, Minnesota were instructed not to and did not participate in the Screening Program. As a result, the Trust concedes it was difficult to find participating cardiologists.

However, some Minnesota claimants had more than six months from their eligibility notification to make an appointment

with a cardiologist. For these claimants, the Trust opposes extensions because it and other class members will be prejudiced by having to provide benefits for claimants who "sat on their rights" during the Screening Period and because extensions to these claimants will unduly delay other aspects of settlement administration. While we do not find that there would be great prejudice to the Trust from providing benefits to which claimants would already be entitled or that providing extensions to this group would significantly delay judicial proceedings, the third and fourth prongs of Pioneer are determinative. See Pioneer, 507 U.S. at 395. Claimants residing in Minnesota should have been able to obtain echocardiogram appointments within six months by making reasonable efforts. Thus, claimants in Minnesota who waited longer than six months and did not offer an adequate explanation will not be afforded extensions.⁹

C.

Two claimants were unable to have their Screening Program echocardiograms taken before the deadline because they were incarcerated. The Trust had a policy of allowing an echocardiogram if the claimant could arrange a release from the prison or jail and make arrangements for transportation to the facility performing the echocardiogram.

9. D.B. (DDR No. 8069042), J.B. (DDR No. 3638335), T.B. (DDR No. 8124740), J.G. (DDR No. 8026162), L.G. (DDR No. 3686771), A.J. (DDR No. 8143105), J.K. (DDR No. 8051323), J.L. (DDR No. 8166364), P.M. (DDR No. 8105841), S.S. (DDR No. 8148835), and D.T. (DDR No. 8059393).

Of the two, the Trust opposes an extension for M.R. (DDR No. 1409143). M.R. was notified of her eligibility on September 24, 2001. She was incarcerated in January, 2002, before she had done anything to schedule an echocardiogram with the Trust. During the twenty-two months she was in prison, she did not take any steps to arrange an echocardiogram. M.R. has responded that while she has been incarcerated, her husband hid mail from her, including the follow-up letters from the Trust, and that she had written to the Trust previously to inform it that she was not allowed to schedule an echocardiogram appointment herself while she was in prison. We find that M.R. has demonstrated good cause and due diligence, and we will grant her an extension.

D.

The last group of claimants seeking extensions offer various reasons why their requests should be granted. They have not been grouped by the Trust into any particular category. Several are ineligible for echocardiograms under the Screening Program because they were late in filing their Green, Pink, or Blue Forms, or they did not file one of these forms at all, or they never provided other requisite information.¹⁰ Two claimants have not requested extensions but rather have inquired as to

10. G.B. (DDR No. 2930220), D.C. (DDR No. 8122058), R.D. (DDR No. 8284888), L.E. (DDR No. 8185361), D.J. (DDR No. 2263689), B.K. (DDR No. 8209314), J.M. (DDR No. 3193786), T.M. (no DDR No.), and B.S. (DDR No. 8281924).

deficiencies in their claims.¹¹ Two other requests will be denied because the claimants have already received an echocardiogram through the Screening Program.¹²

A number of claimants were notified of their eligibility and matched with a doctor at some time in 2001 or 2002, but never had their echocardiograms performed.¹³ We find that these claimants have not demonstrated good cause and due diligence as required under the Settlement Agreement so as to merit extensions.

Three other claimants are simply not entitled to Screening Program benefits because they are otherwise ineligible under the Settlement Agreement.¹⁴ J.R. (DDR No. 1499045), unfortunately, is deceased. J.S. (DDR No. 8071394) alleged that she took diet drugs for less than sixty days, and she is therefore not entitled to an echocardiogram under the Screening Program. M.V. (DDR No. 1493907) is not entitled to an echocardiogram because she was FDA Positive before September 1, 1999.

11. L.B. (DDR No. 430611), A.G. (DDR No. 991067).

12. D.B. (DDR No. 654004) and E.H. (DDR No. 8076321).

13. K.B. (DDR No. 1737402), P.D. (DDR No. 104675), J.D. (DDR No. 1260926), C.E. (DDR No. 1900273), E.G. (DDR No. 55806), J.H. (DDR No. 877084), A.H. (DDR No. 1468917), R.H. (DDR No. 3537362), J.L. (DDR No. 758573), J.M. (DDR No. 3460995), I.R. (DDR No. 8044226), B.S. (DDR No. 1755834), B.W. (DDR No. 8125173), and E.W. (DDR No. 3374691).

14. J.R. (DDR No. 1499045), J.S. (DDR No. 8071394), and M.V. (DDR No. 1493907).

Several claimants were notified of their echocardiogram eligibility in March or April, 2003 but did not act to secure the benefit before the deadline.¹⁵ These claimants are not entitled to extensions. M.R. (DDR No. 8076636), however, was sent her eligibility notification on April 24, 2003. She was unable to get through on the Trust's 800 number to make arrangements to contact a participating cardiologist. On May 23, 2003, M.R. contacted her attorney, who sent a letter to the Trust stating M.R. had made repeated unsuccessful attempts to contact the Trust, but this letter was answered only with an affirmation that she had received her eligibility notification. M.R.'s attorney made a request for an extension shortly after the July 3, 2003 deadline. We find that M.R. was duly diligent in pursuing this benefit, and she is entitled to an extension.

There are several extensions opposed by the Trust where the claimants assert claims of personal hardship. In three cases, we disagree with the Trust's assessment and grant extensions.

T.C. (DDR No. 8146820) had an echocardiogram scheduled for May 28, 2003 but missed it because her child ran away from home. While T.C. did not attempt to reschedule her echocardiogram before the deadline passed, she made an attempt soon thereafter. The prejudice that would result from granting an extension for this claimant would not be great. T.C. was

15. C.H. (DDR No. 3228095), M.L. (DDR No. 1411386), J.M. (DDR No. 8095571), and A.T. (DDR No. 8059437).

entitled to the echocardiogram benefit. Furthermore, under the second prong of the Pioneer test, the length of delay and effect on judicial proceedings would be negligible. See Pioneer, 507 U.S. at 395. Moreover, under the third and fourth prongs of Pioneer, we find that T.C. has demonstrated diligence and good faith. See id. Thus, we will grant T.C. an extension.

J.C. (DDR No. 8092032) was not sent his eligibility letter until April 10, 2003. He claims he was unable to set up an echocardiogram because he and his wife had both been sick and his sister had been in and out of the hospital and had recently died. M.L. (DDR No. 1411386) was notified of her eligibility on March 6, 2003 and claims she was unable to schedule an echocardiogram before July 3, 2003 because she was caring for her ill spouse who also had been in and out of the hospital. We recognize that J.C. and M.L. were provided a relatively short period in which to arrange a Screening Program echocardiogram. While neither was able to obtain an echocardiogram before the deadline, both sent their requests for extensions soon after July 3, 2003. We find that they have been diligent under the circumstances, and we will grant their requests.

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

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

PRETRIAL ORDER NO. _____

AND NOW, this day of March, 2004, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of the following claimants for an extension of ninety days to obtain an echocardiogram through the Screening Program is GRANTED:

S.C. (DDR No. 3142072)	K.C. (DDR No. 1734672)
C.G. (DDR No. 141978)	V.K. (DDR No. 3187127)
S.M. (DDR No. 192682)	R.M. (DDR No. 1844125)
D.N. (DDR No. 1607621)	L.R. (DDR No. 1758432)
L.R. (DDR No. 1697085)	D.R. (DDR No. 2032894)
N.S. (DDR No. 498576)	S.S. (DDR No. 2282879)
B.S. (DDR No. 3308343)	S.S. (DDR No. 1893593)
M.T. (DDR No. 2195774)	S.T. (DDR No. 8164203)
G.T. (DDR No. 1765858)	J.V. (DDR No. 8135110)

E.W. (DDR No. 880312)	L.B. (DDR No. 1434208)
C.A. (DDR No. 3578960)	D.A. (DDR No. 3542958)
C.B. (DDR No. 1010992)	R.B. (DDR No. 8190737)
C.D. (DDR No. 8084966)	R.D. (DDR No. 1555473)
M.F. (DDR No. 1624246)	L.F. (DDR No. 8130053)
I.F. (DDR No. 1402213)	K.G. (DDR No. 8012868)
A.H. (DDR No. 3357985)	M.H. (DDR No. 2162899)
J.J. (DDR No. 8016872)	G.K. (DDR No. 2016822)
H.M. (DDR No. 8110813)	E.M. (DDR No. 1924919)
V.O. (DDR No. 8035078)	T.R. (DDR No. 2341550)
R.S. (DDR No. 2605780)	T.S. (DDR No. 2127371)
V.S. (DDR No. 1921519)	L.S. (DDR No. 8076177)
B.S. (DDR No. 1527779)	K.S.O. (DDR No. 2844330)
M.S. (DDR No. 8019912)	R.T. (DDR No. 1252667)
V.V. (DDR No. 8042029)	J.W. (DDR No. 2920833)
P.W. (DDR No. 1256247)	B.A. (DDR No. 1941780)
J.C. (DDR No. 8031003)	P.C. (DDR No. 8021606)
L.E. (DDR No. 1470988)	J.K. (DDR No. 8015016)
K.R. (DDR No. 1617687)	S.R. (DDR No. 3357795)
S.S. (DDR No. 3638814)	W.W. (DDR No. 390781)
D.A. (DDR No. 3516937)	M.B. (DDR No. 3516952)
B.C. (DDR No. 8066466)	T.C. (DDR No. 411522)
K.G. (DDR No. 3666922)	P.G. (DDR No. 8246463)
A.L. (DDR No. 8048570)	C.S. (DDR No. 1297102)
J.T. (DDR No. 8060498)	R.W. (DDR No. 8059368)
L.Y. (DDR No. 8057206)	J.O. (DDR No. 98972)

J.B. (DDR No. 8076321) A.C. (DDR No. 786673)
R.H. (DDR No. 8061784) K.L. (DDR No. 2548444)
M.P. (DDR No. 684563) D.O.P. (DDR No. 8001137)
E.T. (DDR No. 54114) T.W. (DDR No. 2020170)
J.B. (DDR No. 2931962) M.R. (DDR No. 1409143)
M.R. (DDR No. 8076636) T.C. (DDR No. 8146820),
J.C. (DDR No. 8092032) M.L. (DDR No. 1411386);

and

(2) the motion of the following claimants for an extension of time to obtain an echocardiogram through the Screening Program is DENIED:

D.B. (DDR No. 2426781) J.D. (DDR No. 417006)
G.G. (DDR No. 8119809) E.L. (DDR No. 3321668)
W.S. (DDR No. 2218675) P.S. (DDR No. 2421527)
J.F. (DDR No. 396762) D.B. (DDR No. 8069042)
J.B. (DDR No. 3638335) T.B. (DDR No. 8124740)
J.G. (DDR No. 8026162) L.G. (DDR No. 3686771)
A.J. (DDR No. 8143105) J.K. (DDR No. 8051323)
J.L. (DDR No. 8166364) P.M. (DDR No. 8105841)
S.S. (DDR No. 8148835) D.T. (DDR No. 8059393)
G.B. (DDR No. 2930220) D.C. (DDR No. 8122058)
R.D. (DDR No. 8284888) L.E. (DDR No. 8185361)
D.J. (DDR No. 2263689) B.K. (DDR No. 8209314)
J.M. (DDR No. 3193786) T.M. (no DDR No.)
B.S. (DDR No. 8281924) L.B. (DDR No. 430611)
A.G. (DDR No. 991067) D.B. (DDR No. 654004)

E.H. (DDR No. 8076321) K.B. (DDR No. 1737402)
P.D. (DDR No. 104675) J.D. (DDR No. 1260926)
C.E. (DDR No. 1900273) E.G. (DDR No. 55806)
J.H. (DDR No. 877084) A.H. (DDR No. 1468917)
R.H. (DDR No. 3537362) J.L. (DDR No. 758573)
J.M. (DDR No. 3460995) I.R. (DDR No. 8044226)
B.S. (DDR No. 1755834) B.W. (DDR No. 8125173)
E.W. (DDR No. 3374691) J.R. (DDR No. 1499045)
J.S. (DDR No. 8071394) M.V. (DDR No. 1493907)
C.H. (DDR No. 3228095) J.M. (DDR No. 8095571)
A.T. (DDR No. 8059437) .

BY THE COURT:

J.