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JUDGE APPROVES FEN-PHEN SETTLEMENT

AMERICAN HOME PRODUCTS COULD PAY AS MUCH AS \$3.75 BILLION

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A federal judge has approved a massive \$3.75 billion global settlement by American Home Products in the fen-phen diet-drug litigation with a 163-page opinion that says the deal suffers from none of the problems that plagued other proposed masstort settlements in recent years, such as those in asbestos and tobacco litigation.

Senior U.S. District Judge Louis C. Bechtle found that "the benefits provided by the settlement agreement will significantly contribute to the protection and advancement of the public health."

Under the settlement, AHP agreed to provide medical monitoring for the 5.8 million overweight Americans who took its drug in a cocktail form, as well as graduated compensation for those who actually suffer from heart-valve disease as a result.

Injured class members will receive payments ranging from \$36,944 to \$1.485 million depending on their ages and the severity of their injuries. Those who accept less than the maximum payment will also have the right to come forward later and ask for more money if their medical conditions worsen.

"We have always felt this was a fair and equitable settlement, and we're very pleased that Judge Bechtle has agreed," AHP Chairman and Chief Executive Officer John R. Stafford said in a statement.

Bechtle found that "the class overwhelmingly supports the settlement as fair and equitable."

Notice of the settlement was sent to 944,723 individuals. By May 8, 2000, a total of 44,423 had exercised the right of initial opt-out.

Another 119,011 class members registered for "accelerated" benefits, and 97,544 class members registered for settlement benefits.

Bechtle found that "the response by members of the class to the notice is significant in three ways."

First, he said, "it demonstrates that the plan of notice was highly effective in meeting its goals to make class members aware of the circumstances leading up to the proposed settlement, the nature of the settlement and the potential impact of the settlement on their legal rights."

The response also "indicates that the notice program was sufficient to afford all class members a full, informed and effective opportunity to

exercise their initial opt-out rights under the settlement agreement."

Finally, he said, the response "shows that although there are a number of class members who chose to opt-out of the settlement, the class overwhelmingly supports the settlement as fair and equitable."

AHP manufactures Pondimin, the brand name for fenfluramine. In 1992, dieters began taking the drug in a cocktail with phentermine, hence the nickname fen-phen.

But in 1997, researchers announced that the drug combo caused a rare form of heart-valve disease that results in the regurgitation of blood as the heart beats. Pondimin and a third drug, Redux, that was also used with it, were removed from the market, but phentermine, which is considered safe when used alone, remains for sale.

A massive wave of lawsuits followed, and all of the federal cases were assigned to Bechtel in Philadelphia under the Multi-District Litigation program, although thousands of other cases remained pending in state courts around the country.

In his opinion in *In Re: Diet Drugs* yesterday, Bechtel described the process that led to the massive settlement with AHP.

In late April 1999, AHP invited representatives of the varying constituencies of state and federal plaintiffs to begin negotiations with it for a "global resolution" of the fen-phen litigation.

A negotiating coalition was formed among representatives of the plaintiffs' lawyers in both the federal and state courts with pending certified class actions.

"Thereafter, intense, adversarial and arm's-length negotiations ensued for more than four months," Bechtel said.

The terms and conditions of the settlement, he said, "were the product of a bargaining process between the parties involving separately negotiating or 'building up' the settlement's benefits and obligations in contrast to a process of negotiating a lump sum dollar amount that would then be allocated or 'broken down' among class members."

The negotiators proceeded by negotiating the types of screening and compensation benefits to be made available to class members and the eligibility for those benefits. And only when those benefits and compensation amounts had been essentially resolved did the parties negotiate the maximum monetary commitment that AHP would incur in providing those benefits, Bechtel noted.

During the negotiations, Bechtel found AHP never offered, and the plaintiffs never requested, payment of a lump sum to resolve the claims of class members.

"To the contrary, the negotiations were devoted to working out a structure that would appropriately resolve the claims of all individuals who took Pondimin and/or Redux. Only when that structure was agreed upon did the parties determine the amount of money that would be necessary to fund the structure."

Each of the major benefit features of the settlement "was the subject of a separate, independent and, at times, heated negotiation process."

Importantly, Bechtle said, "under the settlement process that was employed, there was no intra-class trading off of benefits. That is, one benefit of the settlement did not have to be reduced in exchange for the creation or increase of another benefit."

And the subject of attorney fees, he said, "was not discussed until the end of the negotiations and then only to limit the award of fees that might otherwise be payable, subject to appropriate limitations for the benefit of the class."

Throughout the negotiations, Bechtle found, "the members of the negotiating coalition were willing to litigate their clients' claims in the event that negotiations broke down."

The negotiators, he said, "were armed with substantial leverage in their negotiations with AHP as a result of plaintiffs' willingness and ability to litigate their claims should negotiations fail."

Attorney Arnold Levin of Levin Fishbein Sedran & Berman, one of the chief negotiators for the plaintiffs, said the settlement was a success because the courts in recent years "gave us a roadmap as to how to do it" by rejecting other proposed massive settlements in asbestos and tobacco cases.

"It's clear when you read [those cases]," Levin said, "that in order for it to work, plaintiffs' counsel have to take the high road."

Bechtle found that the settlement suffered from none of the flaws identified by the U.S. Supreme Court in *Amchem Products, Inc. v. Windsor*.

In *Amchem*, a proposed massive settlement of asbestos litigation, the Supreme Court recognized that adequate notice to the class could be impeded where many class members were not even aware of their exposure to a defendant's product.

The initial opt-out right in *Amchem* was not meaningful because some asymptomatic class members were unaware that they were even exposed to asbestos.

But Bechtle said, "Here, however, there are no class members unwittingly exposed to the diet drugs, which were available only through a doctor's prescription and had to be consciously ingested. In addition, class members were made aware of the risks these drugs posed in 1997, when AHP withdrew them from the market."

And the lawyers, he said, "employed an expansive notice plan to inform class members of their initial opt out right."

Unlike the opt-out right in *Amchem*, he said, "the initial opt out right has meaning because all class members were aware of their exposure to the diet drugs."

The justices in *Amchem* also raised the concern that even if class members "fully appreciate the significance of class notice, those without current

afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out."

But Bechtle said "here, the instant settlement's intermediate and back-end opt out rights allow class members to make informed choices about whether to remain in or opt out of the settlement. Moreover, the settlement's provisions of medical monitoring provide the mechanism to inform class members of their injury status."

Bechtle also found that the fen-phen class "is more cohesive than the classes sought to be certified in the asbestos and tobacco litigation arenas."

For example, he said, "this class is not as 'sprawling' as the class rejected by the Supreme Court in Amchem. Where Amchem involved class members exposed to asbestos in differing ways and through a wide range of different asbestos-containing products, the instant class was exposed to only two diet drugs, which are chemically related, and through a single method of exposure -- oral ingestion of the drugs."

Amchem also involved 20 asbestos defendants, Bechtle said, whereas the fen-phen class "involves a single manufacturer defendant -- AHP."

While Amchem involved a wide variety of injuries including pleural scarring, lung cancer, asbestosis and mesothelioma, Bechtle said the fen-phen class "involves essentially a single type of injury -- heart valve injury" and only one scientific theory of causation.

The fen-phen class also differs from the tobacco class decertified in Barnes v. American Tobacco Co., in which the 3rd Circuit affirmed the decertification of a medical-monitoring class involving tobacco litigation due to the presence of too many individual issues, Bechtle said.

"Where Barnes involved the entire tobacco industry, which manufactured hundreds of different products containing different ingredients, the class here involves a single defendant with essentially a single diet drug product," Bechtle wrote.

In Barnes, the plaintiffs claimed that defendants manipulated nicotine levels. Thus, nicotine levels in different products at different times became an individual issue destroying class cohesion.

But Bechtle said "no such individual issues divide the [fen-phen] class."

And unlike the plaintiffs' lawyers in Amchem, Bechtle said, the negotiating plaintiffs' lawyers in the fen-phen litigation were not disarmed by a lack of leverage in their negotiations.

"Here, class counsel were armed with leverage in their negotiations, including the threat of imminent and ongoing litigation. By the time settlement negotiations were underway, thousands of individual personal injury and medical monitoring suits were proceeding through discovery and toward trial," Bechtle wrote.

"Thus, throughout the negotiations, class counsel were able to use the threat of present and continuing litigation as a bargaining chip in reaching the best possible deal they could achieve for the class."

The chief negotiators for the plaintiffs were attorneys Levin and Michael D. Fishbein of Levin Fishbein Sedran & Berman and attorney Gene Locks of Greitzer & Locks, who represented the state-court plaintiffs.

In addition to Fishbein, Locks and Levin, the class action plaintiffs' team included: Stanley Chesley of Waite Schneider Bayless & Chesley in Cincinnati; John J. Cummings of Cummings Cummings & Dudenhefer of New Orleans; Sol H. Weiss of Anapol Schwartz Weiss Cohan Feldman & Smalley in Philadelphia; and Christopher Placitella of Wilentz Goldman & Spitzer in Woodbridge, N.J.

Five lawyers were also named to serve as counsel for each of the subclasses: Dianne Nast of Roda & Nast in Lancaster, Pa.; Richard Lewis of Cohen Milstein Hausfeld & Toal in Washington, D.C.; R. Eric Kennedy of Weisman Goldberg Weisman & Kaufman in Cleveland; Richard Wayne of Strauss & Troy in Cincinnati; and Mark W. Tanner of FeldmanShepherd & Wohlgelernter in Philadelphia.

(Copies of the 163-page opinion in In Re: Diet Drugs, PICS NO. 00-1739, are available from The Legal Intelligencer. Please refer to the Pennsylvania Instant Case Service order form on Page 7.)