No. 02-4582 (Linda Smart, Appellant);
No. 03-2033 (Clara Clark, George M. Fleming, Fleming & Associates, L.L.P., Mike O'Brien and Michael C. Abbott, Appellants); No. 03-4181 (Michelle Corley, et al., Appellants); No. 03-4362 (Linda Eichmiller, Brenda Cook, et al., and Doris Coldwell, et al., Appellants)

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE DIET DRUGS (Phentermine/Fenfluramine/Dexfenfluramine)
PRODUCTS LIABILITY LITIGATION

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
MDL DOCKET NO. 1203
Sheila Brown, et al. v. American Home Products Corporation
Civil Action No. 99-20593
Hon. Harvey Bartle, III
PTOs 2680, 2828

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STATE STATUTES AND RULES

MISCELLANEOUS

1. The *Rooker-Feldman* Doctrine

At oral argument, the Court asked the parties to address whether the *Rooker-Feldman* doctrine[1] would bar the district court from intervening in a situation where a state court awarded damages plainly in excess of those permitted under the Settlement Agreement (which forbids intermediate opt-out plaintiffs from seeking punitive damages). The Court recognized that *Rooker-Feldman* starts with the "fairly simple concept that a judgment of a state court will not be reviewed by intermediate federal courts." Tr. at 25. It then posited a hypothetical in which, at the end of a state court trial, "it turns out that pain and suffering is $200 billion and I'm going to realize that that's not pain and suffering, that's punitive damages under another cloak," asking: "would the district court at that point have the right to in some way remit that or enjoin the collection of that amount?" Tr. at 21.

The immediate response, of course, is that those circumstances are not presented here: appellants do not seek and have not been awarded punitive damages; there is every reason to believe that the state trial judges will enforce the Settlement Agreement, as the Court recognized (Tr. at 17, 33, 47); and there is no reason to conclude (1) that state courts will fail properly to charge juries with respect to permissible damages, (2) that juries would not follow such instructions,

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[1] The doctrine derives its name from the Supreme Court's decisions in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

or (3) that state courts would not modify excessive awards on post-trial motions or appeal. App. Br. at 41-44; Reply Br. at 9-10.

But assuming *arguendo* that the Settlement Agreement clearly has been flouted by a state's courts, *Rooker-Feldman* would not necessarily bar the district court from "weighing-in" (Tr. at 26) under appropriate circumstances, depending on the particular facts of the individual case and the proper presentation of federal law claims by Wyeth (in a manner that does not waive or forfeit such claims). We stress that, ordinarily, the district court could not re-examine state court determinations as to whether particular damages awards represent solely *compensatory* damages or instead contain impermissible *punitive* elements – and certainly could not do so as a matter of routine. *Rooker-Feldman* and Full Faith and Credit principles reflect important values of federalism and respect for the state courts, as well as pragmatic considerations. A system in which a single federal district court attempted to review state court diet-drug judgments as a matter of course would not be consistent with those values and considerations. Here, as elsewhere, state courts must be trusted in their resolutions of federal law.

In extraordinary situations, however, *Rooker-Feldman* could permit a role for the federal district court. Although this Court need not (and could not on this record) delineate the precise circumstances under which such extraordinary relief would be available, it should make clear that such intervention by the district court

must be the rare exception rather than the rule. Further, this Court should make clear that any injunction the district court might enter must be based upon a proper construction of the Settlement Agreement, must be "necessary in aid of its jurisdiction" under the All Writs Act, 28 U.S.C. § 1651(a), and must fit within one of the narrow exceptions to the Anti-Injunction Act, 28 U.S.C. § 2283.

In any event, Wyeth should be required to exhaust its state remedies, permitting the state courts to decide what are permissible compensatory damages as to state law causes of action, before seeking the district court's review. The Agreement clearly contemplated that these actions would be tried in state courts, and state appellate courts can be trusted to correct any judgment that runs afoul of the Agreement. Until they have had an opportunity to do so, federal court intervention cannot be deemed "necessary."

a. Basic *Rooker-Feldman* Principles Constrain Review

The *Rooker-Feldman* doctrine holds that a "United States district court has no authority to review final judgments of a state court in judicial proceedings." *Feldman,* 460 U.S. at 482; *see also Desi's Pizza, Inc. v. City of Wilkes-Barre,* 321 F.3d 411, 419 (3d Cir. 2003). This jurisdictional prohibition protects the judgments of every state court, whether the highest court of the state or a trial court. *See, e.g., FOCUS v. Allegheny County Court of Common Pleas,* 75 F.3d 834, 840 (3d Cir. 1996).

We have previously shown that, subject only to very narrow exceptions, the Anti-Injunction Act generally precludes *ex ante* district court interference with state court proceedings whether or not formally styled an injunction. *See* App. Br. at 47. Likewise, both the Anti-Injunction Act and *Rooker-Feldman* preclude *ex post* district court interference with a state court judgment whether or not formally styled a "review" of that judgment.

Rooker-Feldman prohibits district courts from addressing claims that either were "actually litigated" and decided in the state courts, *see, e.g., Desi's Pizza,* 321 F.3d at 418, or are "inextricably intertwined" with the state court's decision, *see, e.g., Feldman,* 460 U.S. at 482 n.16. A federal claim is deemed "inextricably intertwined" whenever (1) the plaintiff had a full and fair opportunity to litigate the federal claims in state court but failed to do so, *see id.; Valenti v. Mitchell,* 962 F.2d 288, 296 (3d Cir. 1992), (2) the federal claim succeeds only to the extent that the state court wrongly decided the issues before it, *Desi's Pizza,* 321 F.3d at 421,[2] or (3) "the federal court must . . . take action that would render [the state court's] judgment ineffectual," *Desi's Pizza,* 321 F.3d at 421; *FOCUS,* 75 F.3d at 840.

This broad prohibition reflects basic principles of federal jurisdiction. First, district courts are courts of limited, statutory jurisdiction. Jurisdiction to review

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[2] *See also Parkview Assocs. Pshp. v. City of Leb.,* 225 F.3d 321, 325 (3d Cir. 2000); *Gulla v. N. Strabane Twp.,* 146 F.3d 168, 171 (3d Cir. 1998); *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.,* 134 F.3d 133, 143 (3d Cir. 1998); *Centifanti v. Nix,* 865 F.2d 1422, 1430 (3d Cir. 1989).

state court decisions has been conferred only on the Supreme Court, not district courts. 28 U.S.C. § 1257. *See, e.g., Desi's Pizza,* 321 F.3d at 419. As the Supreme Court explained, "[p]roceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately [the Supreme Court]." *Atl. C. L. R.R. v. Bhd. of Locomotive Eng'rs,* 398 U.S. 281, 287 (1970) ("*ACL*").

Second, as a matter of federalism, district courts owe respect and comity to state courts. In *Guarino,* this Court explained that *Rooker-Feldman* functions as the post-judgment corollary of *Younger* abstention: "Just as federal district courts should presume that pending state court proceedings can correctly resolve federal questions, they should also presume that completed state court proceedings have correctly resolved those questions." *Guarino v. Larsen,* 11 F.3d 1151, 1157 (3d Cir. 1993) (citing *Younger v. Harris,* 401 U.S. 37, 41-42 (1971), for the premise).

Third, federal courts are bound by principles of finality. "Like claim preclusion, *Rooker-Feldman* is partly concerned with finality, with ensuring that litigants do not take multiple bites from the same apple. Once litigants' claims have been adjudicated in the state court system, they should not also have access to the entire federal court system." *Guarino,* 11 F.3d at 1157. The Full Faith and Credit Act, 28 U.S.C. § 1738, applies whether the state court judgment construes

state or federal law, *see Allen v. McCurry*, 449 U.S. 90, 104 (1980), and applies both to issues actually raised and to issues that could have been raised in the state courts. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84 (1984). Except for its jurisdictional nature, *Rooker-Feldman* is generally coextensive with res judicata principles. *See In re Diet Drugs,* 282 F.3d 220, 240-41 (3d Cir. 2002); *see also Nat'l R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n,* 342 F.3d 242, 254-57 & n.10 (3d Cir. 2003) (noting that Full Faith and Credit and *Rooker-Feldman* are distinct doctrines, but reaching the same result for the same reasons under each).

Here, if Wyeth came to the district court and asked it to take action that would render ineffectual – directly or indirectly – a state court damages judgment, it would be seeking relief "inextricably intertwined" with the state court's judgment. Indeed, not only would Wyeth's request be inextricably intertwined with the merits of the state court's judgment; it would also likely be inextricably intertwined with issues of state law – such as procedures for assessing, and for granting remittitur of, compensatory damages, and substantive criteria for determining those damages – as to which a federal court lacks the state courts' expertise. The necessary premise of the requested federal relief would be that the

state court erred by failing to confine the plaintiff to those compensatory damages permissible under her particular state law causes of action.[3]

And, Wyeth would be seeking to relitigate an issue – what damages are permissible given the terms of the Settlement Agreement – that it would already have litigated, or at least had an opportunity to litigate, before the state trial and appellate courts. Both the Full Faith and Credit Act and the jurisdictional bar of the *Rooker-Feldman* doctrine would normally prohibit such relitigation.

b. There Is Some Limited Room For Federal Intervention In The Context Of A Federal Court Settlement

In a previous decision involving the diet drug proceeding, this Court addressed whether *Rooker-Feldman* applies in the extraordinary case where a state court order impermissibly encroaches on a federal court's ability to manage a federal class action before it. The Court upheld the district court's injunction declaring "null and void" a state court order that "interfere[d] with [the District] Court's authority to determine the means and methods by which members of such class may elect to opt out of the MDL-1203 class." *Diet Drugs*, 282 F.3d at 228.

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[3] In the typical case in which this Court has found *Rooker-Feldman* to be inapplicable, the Court has concluded that the issue for which federal review is sought was not inextricably intertwined with the state court's judgment. *See, e.g., Desi's Pizza,* 321 F.3d at 423; *Parkview,* 225 F.3d at 326-37; *Whiteford v. Reed,* 155 F.3d 671, 674 (3d Cir. 1998). We do not understand the Court's question here to relate to that issue; and it is hard to imagine how a federal court challenge to damages awarded in an intermediate opt-out trial would not require resolution of questions inextricably intertwined with the state court's judgment.

There, the state court order purported to override the district court's control by opting out a group of Texas plaintiffs from the settlement class. The Court recognized the need to preserve the district court's authority in such matters: "The *Rooker-Feldman* doctrine does not work to defeat a district court's authority over the management of its own case." *Id.* at 241.

To be sure, there is a tremendous difference between the district court's preserving its authority to manage its case by determining "the means and method" of opting-out of a federally-approved settlement and its modifying, or enjoining enforcement of, a state court judgment following trial on individual damages claims that are expressly preserved in the Settlement Agreement. But the point is that *if* there were to be a circumstance in which *Rooker-Feldman* does not apply in this context, it must be limited to the extraordinary situation where a state court order or judgment threatens the federal court's own jurisdiction, and where, as in *Diet Drugs*, the injunction is necessary in aid of the federal court's jurisdiction within the meaning of the All Writs Act and fits within one of the recognized exceptions to the Anti-Injunction Act. *Id.* at 233-39.

c. Even If *Rooker-Feldman* Would Not Bar The Federal Court From Responding To A State Court Judgment In A Particular Case, The District Court's Authority Would Be Limited To Extraordinary Circumstances

Whether aimed at state court proceedings *ex ante* or judgments *ex post*, "injunctive relief under the All Writs Act is to be used sparingly and only in the

most critical and exigent legal circumstances," and such injunctions are "appropriate only if the legal rights at issue are indisputably clear." *Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J.) (internal quotations and citations omitted). Authority under the All Writs Act is further limited by the Anti-Injunction Act, which imposes "an absolute ban upon the issuance of a federal injunction" subject to three narrow exceptions that are to be strictly construed. *Mitchum v. Foster*, 407 U.S. 225, 228 (1972); *see also Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 515-16 (1955) ("This is not a statute conveying a broad general policy for appropriate ad hoc application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions."); App. Br. at 44-47; Reply Br. at 20-21.

"It is settled that the prohibition of [the Anti-Injunction Act] cannot be evaded by addressing the order to the parties *or prohibiting utilization of the results of a completed state proceeding*." *ACL*, 398 U.S. at 287 (emphasis added). Thus, the district court could not avoid scrutiny under the Anti-Injunction Act (or *Rooker-Feldman*) by requiring a plaintiff to return monies received through a state court action and labeling it an effectuation of its original jurisdiction rather than a review of a state court judgment. *See* Tr. at 61-62.

ACL itself involved an attempt by a federal court to prevent implementation of a state court judgment. There, the Supreme Court vacated a federal injunction

against the enforcement of a state court injunction because it did not fall within any of the Act's three exceptions. 398 U.S. at 284-85. In so holding, the Court emphasized that federal courts may not ignore the Act's limitations merely because the state court action "interfere[s] with a protected federal right or invade[s] an area preempted by federal law, even when the interference is unmistakably clear." *Id.* at 294. The Court recognized that even if, as here, the district court has jurisdiction over a matter, "[i]t is not enough that the requested injunction is related to that jurisdiction, but it must be '*necessary in aid of*' that jurisdiction." *Id.* (emphasis in original).[4]

Similarly, in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 643 (1977), the Court reversed a federal court injunction against collection of a judgment obtained in state court. Citing its *ACL* admonition to resolve any doubt against finding an exception under the Anti-Injunction Act, the Court held that an injunction to preserve a case or controversy in federal court from a parallel *in personam* action in state court could not be justified as "necessary in aid of" the federal court's jurisdiction. *Id.*

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[4] Wyeth relies on the district court's customary reservation of jurisdiction to enforce the settlement (Tr. at 32-33), but that reservation cannot expand the court's authority beyond that conferred in the All Writs Act. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (federal courts "possess only that power authorized by Constitution and statute . . . which is not to be expanded by judicial decree") (citations omitted).

d. Any Action The District Court Might Take Must Be Based Upon A Proper Construction Of The Settlement Agreement

Finally, were the Court to recognize an exception to *Rooker-Feldman* under extraordinary circumstances, it should make clear that any action the district court might take must be founded upon a proper construction of the Settlement Agreement. As explained in our briefs and at oral argument, the district court's evidentiary injunctions are premised upon a fundamentally-flawed reading which conflicts with the Settlement Agreement's express terms and is contrary to the "essentially unfettered" rights described at the fairness hearing and in the class notice.

The Court should not permit the district court to overturn or modify state court judgments based upon Wyeth's misguided views that expressly preserved claims have been "water[ed] down" (Tr. at 36) by an undisclosed "understanding" of Wyeth and class counsel (Tr. at 30), or that a provision permitting intermediate opt-out plaintiffs to bring claims based upon specified valvular heart damage ("VHD") means that plaintiffs may not introduce evidence that mentions or might refer to other serious harms caused by the drugs (Tr. at 31-32).

The fundamental error of the district court's evidentiary injunctions was underscored at oral argument. Wyeth conceded that, under its reading of the Agreement, intermediate opt-out plaintiffs' expressly-preserved claims are mere watered-down versions of the claims plaintiffs would otherwise be able to assert.

Tr. at 36. The Court captured Wyeth's position precisely: "So what you're saying basically is that in addition to not getting punitive and exemplary and multiple damages, they can't really put in the strongest evidence, they have to go in on the liability with kind of half the evidence." Tr. at 31.

Wyeth can point to nothing in the Agreement that says the broadly defined "Settled Claims" have been watered down or that plaintiffs can present only half of their liability case. Nor can it demonstrate that class members had been notified in the class notice or otherwise of a serious impairment of facially unfettered rights to pursue compensatory damages (subject only to specific evidentiary limitations explicitly set forth in the Agreement and described in the notice, none of which is at issue here).[5] And, Wyeth had no response to the description of these rights as "essentially unfettered" at the fairness hearing. *See* Reply Br. at 15. As the Court recognized:

> The rights at stake here are the absentee's rights. They've got to be able to read the initial opt-out notice and understand what they're sacrificing. And if there's some understanding between the lawyers for the class and the lawyers for the defense, that doesn't help Mr. and Mrs. Smith out there who are trying to figure out what the deal is.

Tr. at 30.

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[5] Wyeth's claim that the Settlement Agreement "doesn't say anything about evidence" (Tr. at 37) is simply wrong. The Agreement contains specific evidentiary restrictions (JA2:616-17, 704) which were summarized in the class notice (Exhibit 1 to Baron & Budd Amicus Br.). It just does not contain the limitations the district court imposed.

Wyeth's alternative argument, that primary pulmonary hypertension ("PPH") is a "settled claim" (*e.g.*, Tr. at 32) and that there is thus no proper purpose for PPH evidence in an intermediate opt-out trial, is doubly wrong.

First, contrary to Wyeth's repeated representations to the Court (Tr. at 32, 35, 36, 37, 50), PPH is not a settled claim – a matter the district court specifically addressed in an October 10, 2003 order, PTO 3065, which Wyeth did not appeal. As the court held, the Settlement Agreement "carves out an important exception for the claim of any class member suffering from PPH," and "a person diagnosed with PPH . . . may sue Wyeth in the tort system regardless of any opt-out decision." Memorandum and Pretrial Order No. 3065 at 5.[6] Not only does the Settlement Agreement contain an express carve-out for PPH (JA2:572-73), but the class notice materials specifically stated: "If you have a PPH claim . . . you may pursue that claim in court outside of the Settlement, whether or not you opt-out." 3065 Mem. at 9.

Thus, the court rejected Wyeth's request for a "blanket rule that only evidence related to PPH itself may be used to prove a claim based on PPH because non-opt-out class members have released as 'settled claims' everything else" (*id.* at 6), holding: "The Settlement Agreement contains no prohibition against the use of

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[6] PTO 3065 (2:99-cv-20593-HB, docket # 441) was entered after the briefs and joint appendix were filed in this appeal. Appellants would be happy to submit a copy to the Court, if appropriate. Alternatively, it can be found on-line at www.fenphen.verilaw.com/ptos/23371/pto.pdf.

evidence of settled claims to prove a claim based on PPH. . . . Rather, any limitations must depend on state law and due process." *Id.* at 11.

Second, just as VHD evidence may be used to prove a PPH claim (even by class members who released VHD claims), PPH evidence is plainly relevant to a duty to warn or design defect case brought by opt-out plaintiffs, such as appellants, who have suffered VHD. Tr. at 55-56. *See also Dartez v. Fibreboard Corp.*, 765 F.2d 456, 468 (5th Cir. 1985); *Banks v. ICI Americas, Inc.*, 450 S.E.2d 671 (Ga. 1994). PPH evidence also is relevant to the standard of care in negligence actions and to the risk-utility test for strict product liability claims. *See* App. Br. at 32-37; Reply Br. at 12-13. The fact that PPH is a fatal condition may make the subject inflammatory in Wyeth's eyes, but that does not strip the evidence of its relevance nor does it outweigh its probative value. Nothing in the Agreement or class notice says that plaintiffs may not use such evidence to support their expressly-preserved claims.

2. Bifurcation

The Court also asked the parties to address bifurcating liability and damages issues as an alternative to the district court's approach of entering evidentiary injunctions. Tr. at 53-54. Appellants respectfully suggest that bifurcation is not an option available to the district court. Bifurcation cannot be imposed by the district court wholesale, but rather must be considered on a case-by-case basis by the state

and federal trial courts presiding over individual diet drug actions. Because judicial discretion must be applied in each case, this Court has long held that blanket bifurcation orders are impermissible:

> [T]he rule in this circuit since 1972 has been that the decision to bifurcate *vel non* is a matter to be decided on a case-by-case basis and must be subject to an informed discretion by the trial judge in each instance. . . . [B]ifurcation [is to] "be encouraged where experience has demonstrated its worth," but . . . "separation of issues for trial is not to be routinely ordered" . . . . Thus a routine order of bifurcation in all negligence cases is a practice at odds with our requirement that discretion be exercised and seems to run counter to the intention of the rule drafters.

Lis v. Robert Packer Hosp., 579 F.2d 819, 824 (3d Cir. 1978).

a. The Settlement Agreement Does Not Require Bifurcation Of State Court Trials, Nor Does It Authorize The District Court To Impose Such A Requirement

Nothing in the Settlement Agreement indicates a desire to depart from this Circuit's long-standing rule. The Agreement does not purport to govern the administration of opt-out trials or to delegate to the district court authority to do so, and it certainly makes no reference to bifurcation. Accordingly, the order of evidence and proof, like other administrative matters, must be left to the courts responsible for conducting these trials. *See Bremner v. Charles*, 821 P.2d 1080, 1082 (Or. 1991) (noting that court's decision on bifurcation concerns part of "the administration of the business of the trial court").

b. Bifurcation Of State Court Trials Is A Matter Of State Law And Case-Specific Judicial Discretion

Wyeth appears to have conceded during argument that bifurcation would have to be decided by the trial courts on a case-by-case basis (Tr. at 52-53) – a position consistent with Wyeth's approach to date. And, even if there were no rule against blanket bifurcation orders in this Circuit, there could be no such order here because not every jurisdiction permits bifurcation. At least one state, Texas, prohibits the bifurcation of liability and damages in personal injury cases. *See Iley v. Hughes*, 311 S.W.2d 648, 651 (Tex. 1958). Thus, bifurcation may not be used for Appellants Smart and Clark or for any other downstream opt-out whose case will be tried in a Texas state court.

Most state rules on this subject are substantially similar to FED. R. CIV. P. 42(b), which permits separate trials for three purposes: convenience, the avoidance of prejudice, and expedition and economy. Thus, bifurcation must "promote one or more purposes of the rule . . . ." *Bremner*, 821 P.2d at 1083; *see generally* Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE §§ 2387-88 (2d ed. 1995).[7]

One type of bifurcation separates the punitive damages phase of trial from the liability/compensatory damages phase. *See, e.g., Transportation Ins. Co. v.*

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[7] *See, e.g.*, FLA. R. CIV. P. 1.270(b); GA. CODE ANN., § 9-11-42(b); MISS. R. CIV. P. 42(b); N.J. CIV. R. 4:38-2(b); OR. R. CIV. P. 53B; PA. R. CIV. P. 213(b); R.I. SUP. CT. R. 42(b); TEX. R. CIV. P. 174(b); UT. R. CIV. P. 42(b); W. VA. R. CIV. P. 42(c).

Moriel, 879 S.W.2d 10, 29-30 & n. 28 (Tex. 1994) (discussing other jurisdictions). Another type, used by some states, splits liability and damages phases. *See, e.g., Roseman v. Town Square Ass'n, Inc.*, 810 So.2d 516 (Fla. 4th Dist. Ct. App. 2002), *review denied,* 832 So.2d 105 (Fla. 2002).

"Reverse bifurcation" (in which causation and damages issues are tried before liability issues) – the approach Wyeth appears to favor (Tr. at 54) – is used very rarely. It is a "drastic technique" that has been limited almost exclusively to asbestos litigation. *Walker Drug Co., Inc. v. LaSal Oil Co.*, 972 P. 2d 1238, 1245 n. 7 (Ut. 1998); *see also Jones v. Johns-Manville*, 22 Phila. 91, 93 (Pa. Com. Pl. 1991); *State ex rel. Crafton v. Burnside*, 528 S.E.2d 768, 772 (W.Va. 2000) (reverse bifurcation is "a trial procedure . . . contrary to that . . . enjoyed by essentially all other ordinary civil litigants in West Virginia").

In whatever form, bifurcation of state trials is subject to the limits of state procedure, which a federal court must respect. "The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." *Johnson v. Fankell*, 520 U.S. 911, 919 (1997). In those states where bifurcation is permitted at all, the trial courts must decide the appropriateness of bifurcation on a case-by-case basis.[8]

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[8] *See, e.g., Roseman*, 810 So.2d at 520; *Cantrell v. Northeast Ga. Med. Ctr.*, 508 S.E.2d 716, 719 (Ga. App. 1999); *Terrain Enters., Inc. v. Mockbee*, 654 So.2d 1122, 1132 (Miss. 1995); *Iley*, 311 S.W.2d at 651.

c. Because Of Its Potential For Prejudice, Bifurcation Should Be Used Only In Narrowly Defined Circumstances

Evidence relevant to both liability and damages is often intertwined, and thus bifurcation can prevent essential evidence from being heard by the jury during the damages phase (particularly in the case of reverse bifurcation, where damages are tried first). By having the evidentiary context stripped away, a jury may be left with an incomplete, "sanitized" record upon which to base a verdict. It was precisely this concern, triggered by Wyeth's strategy to seek exclusion of the strongest evidence against it, that led the *Clark* trial court to say: "[T]he Court will not require the plaintiff to 'try the case in a vacuum of the defendant's design,' which could result in the jury improperly speculating about liability issues and evidence (or the lack thereof) and factoring such speculation into causation issues or damage evaluations." JA4:1282.

The same general concern led the Pennsylvania Supreme Court to caution:

> [Bifurcation] should be carefully and cautiously applied and be utilized only . . . where informed judgment impels the court to conclude that application of the rule will manifestly promote convenience and/or actually avoid prejudice. Piecemeal litigation is not to be encouraged. Particularly is this so in the field of personal injury litigation, where the issues of liability and damages are generally interwoven and the evidence bearing upon the respective issues is commingled and overlapping.

Stevenson v. Gen. Motors Corp., 521 A.2d 413, 422-23 (Pa. 1987) (quoting *Brown v. Gen. Motors Corp.*, 407 P.2d 461, 464 (Wash. 1965)).

All of these factors demonstrate the need to leave the matter to individual courts conducting diet drug trials.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of Appellants' Consolidated Supplemental Brief has been served via regular mail, postage prepaid, upon all parties listed below, unless otherwise specified, on this 19th day of December, 2003.

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