

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

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IN RE: DIET DRUGS (Phentermine/ :  
Fenfluramine/Dexfenfluramine) :  
PRODUCTS LIABILITY LITIGATION: :  
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MDL Docket No. 1203

THIS DOCUMENT RELATES TO: :  
SHEILA BROWN, SHARON GADDIE, :  
VIVIAN NAUGLE, QUINTIN LAYER, :  
and JOBY JACKSON-REID, :  
individually and all others similarly :  
situated, :

CIVIL ACTION NO. 99-20593

Plaintiffs, :

v. :

AMERICAN HOME PRODUCTS :  
CORPORATION, :

Defendant. :

**MEMORANDUM OF LAW IN SUPPORT OF CLAIMANT  
JOHN BACON, III'S MOTION  
TO COMPEL THE AHP SETTLEMENT TRUST TO PAY HIS  
CLAIM AND TO LIMIT THE SCOPE OF DISCRETION  
PERMITTED TO THE TRUST, TRUSTEES AND THEIR  
COUNSEL IN CLAIMS ADMINISTRATION**

NAPOLI KAISER BERN & ASSOCIATES, LLP  
Attorneys for Class Members  
3500 Sunrise Hwy., Suite T-207  
Great River, New York 11739  
(212) 267-3700

HARITON & D'ANGELO, LLP  
Attorneys for Class Members  
3500 Sunrise Hwy., Suite T207  
Great River, NY 11739  
(631) 224-1133

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CORPORATION, :  
Defendant. :  
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**PRELIMINARY STATEMENT**

Class member John Bacon, III hereby requests that this Court enter an order compelling and directing the AHP Settlement Trust and the Trustees thereof to issue this claimant payment for Matrix A, Level II benefits, in accordance with the NATIONWIDE CLASS ACTION SETTLEMENT AGREEMENT WITH AMERICAN HOME PRODUCTS CORPORATION, INC. [the "Settlement Agreement"] and the revised audit rules approved by this Court's Pretrial Order 2807. Mr. Bacon and other claimants who are beneficiaries of the Settlement Agreement further move this Court for an Order limiting the scope of discretion permitted to the Trust, its Trustees and their counsel in subjecting claims under the Settlement Agreement to repeated levels of audit, review and scrutiny with the ultimate aim being the denial of claims.

**STATEMENT OF THE CASE**

On April 1, 2002, John Bacon, III had an echocardiogram performed at the offices of Dr. Robert Smith in Hartford, Connecticut. Dr. Smith is a Board Certified Cardiologist with Level II certification in echocardiography. Dr. Smith personally read and interpreted the

echocardiogram and found that Mr. Bacon had moderate aortic regurgitation, moderate mitral valve regurgitation and left atrial enlargement, 4.52 cm in the PLAX view. See Affidavit of Denise A. Rubin dated March 26, 2004 ["Rubin Aff."], at Exhibit "A".

These findings qualified the claimant for Matrix A Level II benefits. On April 30, 2002, a claim for Matrix A Level II benefits was filed with the AHP Settlement Trust. A copy of that claim is annexed to the Rubin Aff. at Exhibit "B". Pursuant to the terms of the Settlement Agreement, Mr. Bacon expected to receive a final determination of his claim within 120 days of filing his claim. Following the submission of Mr. Bacon's claim, a number of significant changes were adopted, all of which significantly impacted the Trust's ability to process claims in a timely manner.

On August 14, 2003, sixteen months after Mr. Bacon's claim was submitted, his counsel received notification from the Trust that Mr. Bacon's claim had been sent to an auditing cardiologist. That notification is annexed to the Rubin Aff. as exhibit "C". On September 10, 2003, the Trust notified Mr. Bacon's counsel of the auditor's findings. The auditing cardiologist, Peter George, M.D., concluded that Mr. Bacon qualified for Level II benefits. That notification is annexed to the Rubin Aff. at Exhibit "D".

Thereafter, on September 26, 2003, Mr. Bacon appeared at the offices of Dr. Robert Smith for the purposes of compliance with Court Approved Procedure No. 4. Dr. Smith performed a physical examination and took a complete medical history that was transcribed as required. A completed "Physician Verification and DDR Acknowledgement" and transcribed medical history was thereafter forwarded to the Trust on October 2, 2003. A Copy of that document is annexed to the Rubin Aff. as Exhibit "E".

The Trust forwarded a "Post Audit Determination Letter" approving Mr. Bacon's claim for Matrix A, Level II benefits on November 21, 2003. A copy of that document is annexed to the Rubin Aff. as exhibit "F". Mr. Bacon's signed acceptance of the Trust's determination was returned to the Trust on December 12, 2003; a copy is annexed to the Rubin Aff. as exhibit "G".

On January 12, 2004, anticipating that the Trust would place an additional hurdle in the claimant's path, his counsel forwarded a completed "Declaration of Source" form. A copy of that document is annexed to the Rubin Aff. as Exhibit "H". Apparently the Trust's next attempt to delay payment was precisely as anticipated, because on January 14, 2004 they forwarded a request for the "Declaration of Source", annexed to the Rubin Aff. as exhibit "I".

Over the next two months this office contacted Trust representatives through telephone calls and e-mail correspondence, attempting to ascertain the status of the Trust's processing of Mr. Bacon's claim for payment. On March 9, 2004 Trust Counsel Richard Scheff advised that the Trust had evaluated Mr. Bacon's echocardiogram tape again and that there was now a problem with that echocardiogram (despite the Trust's and its auditor's prior approval based on the same tape). Mr. Scheff also advised that a letter from the Trust was forthcoming to notify that the Trust had rescinded its approval of Mr. Bacon's claim.

On March 15, 2004 this office received Mr. Scheff's letter stating that the Trust had rescinded its approval of John Bacon's claim. Specifically, the Scheff letter said that the Trust now deemed the echocardiogram tape to portray an inadequate number of apical loops. That letter is annexed to the Rubin Aff. at Exhibit "J".

Although there is no authority supporting Mr. Scheff's or the Trust's determination to rescind approval of a claim, nor to conduct a second medical review or audit of a claim after it was approved, a digital recording of Mr. Bacon's echocardiogram was forwarded to Mr. Scheff on March 16, 2004 in the hope of resolving any questions about Mr. Bacon's claim. In our letter, (a copy of which is annexed to the Rubin Aff. as exhibit "K"), we demanded that the Trust forward payment of Mr. Bacon's claim. Notwithstanding our compliance with every step of the processing requirements, and notwithstanding the fact that Dr. George had already approved Mr. Bacon's claim, no payment has been forthcoming.

Instead, on March 24, 2004, in a letter signed only "The AHP Settlement Trust," Mr. Bacon was notified that his claim, upon further review *by the Trust*, was being denied. Without

identifying any auditing physician or including a physician's affirmation or certification supporting its decision, the Trust letter said, in pertinent part:

Subsequent to the Trust's issuance of the Post-Audit Determination, on January 14, 2004 and March 15, 2004, the Trust requested additional information regarding your Claim, which you submitted. Based on this information, as well as the GREEN Form and echocardiogram previously submitted, the Trust finds that there is substantial evidence of an intentional and material misrepresentation in connection with your Claim. Your echocardiogram was acquired on a Cypress echocardiogram machine and depicts only a limited number of apical views – including only two frozen frames and one moving frame in the required apical view. The level of color gain used in acquiring the images on the disk is excessive (in the 20s) and is clinically inappropriate. Marked sparkling, noise, and artifacts are displayed on the echocardiogram. The Trust finds that the Attesting Physician, or the sonographer whom he supervised, manufactured the sparkling artifact by use of excessive gain, and then created the appearance of a large regurgitant "jet" by planimetering the manufactured artifact with a very small mitral jet. Your disk demonstrates a methodical manufacture of artifact through excessive gain to inflate your mitral regurgitant jet area. Based on this evidence of an intentional and material misrepresentation, the Trust is prohibited from paying your Claim under Section VI.E.7 of the Settlement Agreement.

See AHP Settlement Trust letter of March 24, 2004, annexed to the Rubin Aff. as Exhibit "k".

Notably, none of the above was mentioned in Dr. George's auditor's certification or his worksheet. More notably, no attorney associated with the Trust or appearing on its behalf was willing to sign this shameful and meritless accusation that impugns the integrity not only of the claimant and his attorneys, but also of the attesting physician, a highly credentialed Board Certified Cardiologist.

## ARGUMENT

### POINT I.

#### THE TRUST HAS NO AUTHORITY TO RESCIND THE APPROVAL OF A CLAIM BASED UPON A SECOND UNAUTHORIZED MEDICAL REVIEW AFTER A CLAIM HAS BEEN APPROVED BY AN AUDITOR

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Unfortunately this is not the first time that the Trust has seen fit to re-audit or conduct a further medical review of an approved claim. As this Court heard last August during oral argument of the motion brought by claimants Barbara Meszaros and John Rodriguez, after receiving audit approvals of the claims and notifying the claimants of their approvals, the Trust sent the claimants' echocardiograms back to the auditing cardiologists for a further review until denials were issued.

During that oral argument on August 6, 2003, this Court raised its concerns about the Trust sending claims for additional reviews after audit.

22                   THE COURT:   What about sending the claims back  
23   for a second bite at the apple?   Weren't certain ones  
24   sent back for a second review? (p 50, 22-25)

25                   THE COURT:   *Is there any procedure for doing*  
1   *that under the trust rules?*

2                   MS. FLETMAN:   *No, your Honor.*

3                   THE COURT:   It should not have been done?

4                   MS. FLETMAN:   *It should not have been done,*  
5   *your Honor.*   (pp 51:1-52:5) (Emphasis added)

Thus, the Trust's counsel *expressly* conceded that there was no authority to support the Trust or its counsel subjecting claims to a second audit or -- as this Court said -- "a second bite at the apple". Nothing has changed since that time. There have been no orders entered that permit the Trust or Mr. Scheff to supplant the auditor's findings with a different opinion.

Nonetheless, the Trust has once again taken that proverbial "second bite," and in so doing, has grievously prejudiced its beneficiary John Bacon, III. There is a difference between

this matter and the case of Meszaros and Rodriguez in that those claimants were at least made aware of the auditors' identity and their findings. In the matter now at bar, Mr. Bacon and his attorneys have been provided no information whatsoever. Further, the Trust has offered no explanation as to what type of review was conducted, who performed the further review (no physician has been identified on the second review, and there is no indication that the Trust auditor who initially passed on the claim has now recanted his prior opinion). Moreover, the Trust has not offered any supporting authority for their right to seek serial reviews of these claims. Rather, their denial letter of March 24, 2004 only offers the claimant the rules for contesting denials that are provided on all denied claims.

The carefully written audit rules and procedures provided claimants with a procedure to follow *to challenge the findings of a Trust auditor*. Here, Mr. Bacon has been given no basis or procedure to challenge Mr. Scheff's and the Trust's findings or the rescission of Mr. Bacon's claim approval and the subsequent denial of Mr. Bacon's claim.

The Trust cannot simply operate outside of the Settlement Agreement and with so little regard for the rights of the beneficiaries to whom the Trustees ultimately owe a duty. Neither Mr. Scheff nor the Trustees unilaterally impose their own policies and procedures, without notice to the Court or the Class, and without this Court's approval, especially when those policies conflict with the Settlement Agreement and the prior orders of this Court. Any holding to the contrary can only create a chaotic situation where the beneficiaries' rights will not be protected. Plainly, that is precisely the case here, where John Bacon's claim, despite Trust approval, has inexplicably been denied despite a prior offer and acceptance under any reasonable interpretation of contract law.

## POINT II.

### **THE TRUSTEES' REFUSAL TO PROVIDE MATRIX BENEFITS TO JOHN BACON, III DEMONSTRATES THEIR BLATANT AND WILLFULL FAILURE TO DISCHARGE THEIR FIDUCIARY OBLIGATIONS TO THE BENEFICIARIES OF THIS TRUST AND A BREACH OF THEIR CONTRACT WITH THE CLAIMANT.**

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The claimants' opposition to the activities of the AHP Settlement Trust and the questions their counsel have raised the competence of the administrators and staff of that Trust, including the Trustees, are well documented. Notwithstanding our prior comment and motions on these issues, however, this incident demonstrates an extraordinary level of disregard for this Court's orders and all tenets of fair play by the Trust, the Trustees and their counsel. Richard Scheff, Esq., reports directly to the Trustees of the AHP Settlement Trust; those Trustees direct his actions. Therefore, it is ultimately the AHP Settlement Trust's Trustees who have directed that John Bacon, III's claim not be paid.

The March 15, 2004 letter provides no valid justification for the Trust's refusal to pay Mr. Bacon's claim. More troubling, the unsigned letter denying his claim on March 24, 2004 is a cowardly attempt to avoid response by Mr. Bacon's counsel and this Court. Simply put, the Trustees, who stand in a fiduciary relationship with John Bacon, III and with the other claimants pursuant to this Settlement Agreement, have demonstrated here that they are willing to place their own interests, *i.e.* their desire to extend the life of the Trust, ahead of the interests of their beneficiary, John Bacon, III. Such conduct is plainly at odds with any interpretation of the applicable law and the stated intent of the parties to the Settlement Agreement and of this Court.

### POINT III.

**THE TRUST STANDS ON THE BRINK OF INSOLVENCY AND LEGITIMATE BENEFICIARIES OF THE TRUST WILL NEVER SEE THE BENEFITS THEY WERE PROMISED UNDER THE SETTLEMENT AGREEMENT. THIS COURT SHOULD IMMEDIATELY CURTAIL THE UNCONSCIONABLE AND ONGOING WASTE OF ASSETS IN MERITLESS INVESTIGATIONS, REPEATED REVIEWS OF LEGITIMATE CLAIMS AND BASELESS LITIGATION AGAINST PHYSICIANS AND ATTORNEYS.**

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In an atmosphere where all of the parties and this Court have acknowledged that the assets of the Trust are woefully insufficient to meet the hundreds of thousands of claims that have been filed, the ongoing waste of the Trust's assets in self-perpetuating witch-hunt litigation is wholly unconscionable and indefensible. Neither this Court nor the Trust and its counsel have found concrete evidence of fraud on the claims submitted by Napoli Kaiser Bern & Associates, LLP or Hariton & D'Angelo, LLP. Nonetheless, these unfounded claims of "systematic fraud" and misrepresentations on the part of attorneys and attesting physicians continue to fly unimpeded through the Trust's correspondence, motion papers, and this Court's orders.

As this Court has already been advised, even the question raised in this Court's Pretrial orders 2640 and 2641 regarding the propriety of a payment arrangement between Hariton & D'angelo, LLP and Dr. Mueller, one of the attesting physicians, has been fully investigated and deemed meritless by the New York State Bar's Grievance Committee. See Letter to this Court from Mario D'Angelo, Esq., annexed at Exhibit "L" to the Rubin Aff.

The dearth of foundation for the accusations of wrongdoing has hardly deterred the Trust and its counsel from using that alleged wrongdoing as an excuse to avoid paying the legitimate claimants we represent. This Court approved a Settlement Agreement that provided for the expeditious and unbiased payment of the class members' claims upon the submission of specifically-defined medical evidence and proof that the class member had ingested the defendants' diet drugs. After the evidentiary basis for the Trust's first accusation of wrongdoing proved wholly incredible (the statements of nurse Compton Shaw), this Court nonetheless found a basis for ordering a 100% audit in the testimony of Dr. John Dent, a physician who reports to

Dr. George Beller, one of the Trustees and the Director of Dr. Dent's Department at the University of Virginia School of Medicine.

That decision, based largely on this Court's determination that Dr. Dent's testimony was somehow more credible than the testimony of any other physician who testified in the six days of hearings in September 2002, is currently on appeal to the United States Court of Appeals for the Third Circuit. Notwithstanding that fact, it cannot be overstated: there is no finding of fraud in the resulting Pretrial Order. There has been no foundation for, nor finding of fraud or other misconduct against these law firms, their attorneys, or the attesting physicians who supported their clients' submissions to the Trust.

Most notably, there is no evidence of any misconduct or wrongdoing in this particular instance, except, perhaps, for that on the part of the Trust and its counsel in rescinding its offer and denying this class member's wholly legitimate claim despite the Trust's own auditor finding to the contrary. There is no reason to believe this waste of time, effort and assets will abate absent an order by this Court limiting the Trust's and its counsel's discretion in denying claims deemed legitimate by their auditors, as well as in precluding serial audits and reviews of claims deemed legitimate and "medically reasonable" by the Trust auditors.

## CONCLUSION

For the reasons set forth above, it is respectfully requested that this Court enter an order directing that the Trustees and the AHP Settlement Trust issue payment forthwith to John Bacon, III for Matrix A, Level II benefits and precluding the Trust and its counsel from subjecting claims under the Settlement Agreement to repeated levels of audit and review where the Trust auditors have deemed the claim medically reasonable.

Dated: Great River, New York  
March 26, 2004

Respectfully submitted,

NAPOLI KAISER BERN & ASSOCIATES, LLP  
Attorneys for John Bacon, III

By: \_\_\_\_\_  
Denise A. Rubin (DR-5591)

3500 Sunrise Hwy., Suite T207  
Great River, NY 11739

HARITON & D'ANGELO, LLP  
Attorneys for John Bacon, III

By: \_\_\_\_\_  
Mario D'Angelo (MD -7550)  
A Member of the Firm

3500 Sunrise Hwy., Suite T207  
Great River, NY 11739

On the Brief:  
Paul J. Napoli

