Nos. 02-4582, 03-2033

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

In re DIET DRUGS (Phentermine/Fenfluramine/Dexfenfluramine)
PRODUCTS LIABILITY LITIGATION

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* the Chamber of Commerce of the United States states that it is not a corporation and has no parent corporation.

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation, representing an underlying membership of more than 3,000,000 businesses and organizations of every size. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases that have raised issues of vital concern to the nation's business community.

The Chamber's members frequently become defendants in class actions that are settled pursuant to agreements that are approved and enforced by federal district courts. These companies have a substantial interest in ensuring that the district courts' authority to enforce those agreements is not unduly limited. The Chamber's members are particularly interested in the district courts' ability to enforce settlement provisions that prohibit future claims for punitive damages. If defendants cannot get sufficient protection from punitive damages, both plaintiffs and defendants will be forced to litigate cases that would otherwise settle. Accordingly, the Chamber has a strong interest in urging this Court to affirm the decisions below.

INTRODUCTION

The appellants contend that federal courts cannot preclude settling plaintiffs from circumventing carefully negotiated settlement agreements because the courts lack the power to enjoin plaintiffs' use of evidence in state court proceedings. If that premise is correct, then defendants no longer will be willing to enter into settlements like the one that benefitted the plaintiffs in this case. Because the defendant in this case is entitled to the benefit of its bargain, and because the viability of future class action settlements depends in large part on the parties' confidence that the agreements shall be enforced, the district court's orders enforcing the *Diet Drugs* settlement should be upheld.

ARGUMENT

I. DISTRICT COURTS MUST HAVE THE POWER TO ENJOIN CLASS MEMBERS WHO SEEK TO CIRCUMVENT THEIR SETTLEMENT AGREEMENTS BY THEIR CONDUCT OF TRIALS IN STATE COURT

A. Bars On Future Claims For Punitive Damages Are Of Central Importance In Many Class Action Settlements.

"The policy in federal court favoring the voluntary resolution of litigation is particularly strong in the class action context." ALBA CONTE AND HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS, § 17.21 (4th ed. 2002). Such settlements "minimize[] the substantial burdens to the parties and to scarce judicial resources such

litigation entails." *Ibid.* However,

> [d]efendants have little reason to resolve expeditiously pending cases without some assurance about future ones or, in particular, * * * without some assurance about punitive damages. * * * [T]he ability of defendants to achieve peace as to punitive damages forms a roadblock to the resolution of the litigation as a whole."

Richard A. Nagareda, *Punitive Damage Class Actions and the Baseline of Tort*, 36 WAKE FOREST L. REV. 943, 952 (2001). Indeed, "resolution of punitive damages may function as the quid pro quo for settlement of the remaining compensatory facets of large-scale tort litigation." *Id.* at 967. Thus, if defendants, plaintiffs, and the judicial system are to reap the benefits of settlement — and to avoid the unending stream of litigation that can arise from a so-called "mass tort" — the parties must be able effectively to resolve the defendants' exposure to punitive damages.

Disposing of punitive liability plays such an important role in the settlement of mass torts for at least three reasons. First, the sheer size of punitive awards means that even a relatively small number of adverse verdicts can radically inflate the overall "cost" to the defendant of resolving mass tort claims. *See, e.g.*, RICHARD L. BLATT, ET AL., PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE 17 (2003) ("in 2001 alone, over $162 billion in punitive damages verdicts of $1 million or more per verdict was awarded at trial or affirmed on appeal"[1]); *see generally id.* at

[1] This number includes the $145 billion punitive damages verdict in *Engle*, since reversed on appeal. *See Liggett Group, Inc. v. Engle*, No. 3D00-3400, 2003 Fla. App.

§ 1.4 (presenting research on the increasing sizes of punitive damage awards). Second, because "punitive awards are highly variable and unpredictable," a defendant cannot rationally assess the costs and benefits of any settlement that leaves the defendant exposed to future punitive damages. *See, e.g.*, Jonathan M. Karpoff & John R. Lott, Jr., *On the Determinants and Importance of Punitive Damage Awards*, 42 J.L. & ECON. 527, 571 (1999) (citing A. Mitchell Polinsky, *Are Punitive Damages Really Insignificant, Predictable, and Rational?*, 26 J. LEGAL STUD. 663 (1997)). Finally, studies have shown that exposure to punitive damage liability affects corporate valuation even more than the actual compensatory and punitive damage awards that result from such exposure. *See, e.g.*, Karpoff & Lott, *supra*, at 571. All in all, "[d]efendants have little reason to make concessions for the compensation of individual claimants [or classes] unless defendants also can put to rest the question of punitive damages." Nagareda, *Punitive*, *supra*, at 944.

The *Diet Drugs* settlement provides "fair, reasonable, and adequate relief" to all class members (*In re Diet Drugs Prods. Liab. Litig.*, 2000 WL 1222042, at *68 (E.D. Pa. Aug. 28, 2000), including class members diagnosed *after* the settlement as having certain injuries allegedly attributable to their exposure to the defendant's product. The settlement gave those class members the ability to decide *after* their

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LEXIS 7500 (Fla. 3d DCA May 21, 2003). However, even considering only the remaining $17 billion, the enormous impact of punitive damages is apparent.

injuries were diagnosed whether to collect damages under the settlement or to seek compensatory damages in court. In exchange for Wyeth's agreement to pay compensation into the future — and to waive its statute of limitations defenses — the company obtained relief from exposure to "punitive, exemplary or multiple damages" (*id.* at *20) by such future plaintiffs. The settlement was possible only because Wyeth "gain[ed] peace of mind with respect to the most normatively troubling source of volatility for mass tort defendants: the prospect of duplicative punitive damage awards over time." Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 797 (2002); *see also* PTO 2828, at 3 ("The prohibition against punitive damages is a critical provision for which Wyeth bargained and which received court approval after a lengthy fairness hearing in May, 2002.").

Because that trade-off was a linchpin of the settlement, any conduct by class members to circumvent their agreement to forgo punitive damages is of great concern. There can be no doubt that the plaintiffs' efforts to inflate their so-called compensatory damages through the presentation of evidence regarding Wyeth's alleged misconduct was appropriately enjoined by the district court.

B. A District Court Must Be Able To Prevent Class Members From Endeavoring To Obtain Inflated Awards Of Non-Economic Damages As A Proxy For Barred Punitive Damages.

Plaintiffs' conduct of their state-court trials was fairly described by the district court judge as "a blatant assault aimed at flouting the Order of [the district] court and undermining the carefully crafted Nationwide Class Action Settlement Agreement." PTO 2717, at 6. Although neither Ms. Smart nor Ms. Clark sought punitive damages expressly, they clearly intended to "permeate the trial with evidence and argument designed to inflame the jury to award punitive damages in effect if not in name" PTO 2717, at 2; *see also* PTO 2680, at 3 ("what [they are] not doing in name, [they are] doing in substance"). The fact that Wyeth was willing to *stipulate* that it would not contest that it breached its duty to the plaintiffs — so that they needed to prove only causation and damages to be entitled to compensation — casts in sharp relief that the purpose of plaintiffs' trial strategy was to collect *more* than fair compensation for their injuries.

This litigation strategy — attempting to recoup the equivalent of punitive damages under the guise of non-economic damages — is becoming increasingly common. *See generally*, Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into "Punishment"*, 54 S.C. L. REV. 47 (2002); Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort:*

Scheduling "Pain and Suffering", 83 NW. U. L. REV. 908 (1989). For example, in a 2001 Mississippi case, a jury awarded each of ten plaintiffs $10,000,000 in compensatory damages, comprised principally of non-economic damages,[2] after the judge granted defendants summary judgment on punitive damages. *See Johnson & Johnson Seeks Relief From $100 Million Verdict*, 6 MEALEY'S EMERGING DRUGS & DEVICES, Nov. 1, 2001, at 11 (discussing *Rankin v. Janssen Pharmaceutica, Inc.*, No. 2000-020 (Miss. Cir. Ct. Sept. 28, 2001)). Similarly, a California jury found that a tire manufacturer "put profits ahead of safety" but did not act with malice. *See* Myron Levin, *Tire Firm Assessed Damages in Crash Court: A Jury Orders Continental General to Pay $55 Million for a Defect that Caused a Rollover*, L.A. TIMES, April 14, 2001, at B1 (discussing *Lampe v. Continental General Tire, Inc.*, No. BC173567 (Cal. Super. Ct. April 13, 2001)). Accordingly, the jury could not impose punitive damages, but it awarded a single plaintiff $41,000,000 in non-economic damages. *See* 34 Trials Digest 4th 12, 2001 WL 1005976 (discussing *Lampe*). Such cases clearly demonstrate that the line between punitive and non-economic damages can be easily blurred — as the U.S. Supreme Court recently observed. *See State Farm Mut. Auto Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1525 (2003) ("In many cases in which

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[2] Although they ranged greatly in age, general health, and alleged injury, each plaintiff received the same $10,000,000 compensatory award, although the highest alleged out-of-pocket loss was $700. *See* Schwartz, *supra*, at 65.

compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's acts, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.") (quoting RESTATEMENT (SECOND) OF TORTS § 908, cmt. c, at 466 (1977)).

1. Because There Are No Specific Objective Standards For Assessing Non-Economic Damages, Jury Verdicts Are Easily Influenced By External Factors.

The nature of non-economic damages make them uniquely subject to illegitimate manipulation by plaintiffs' trial tactics. There are no clear, objective standards for non-economic damages, and, as a result, courts cannot effectively control the jury's deliberation on such damages through instructions or warnings.[3] The inherent subjectivity of non-economic damages "allows the jurors to use

[3] *See, e.g.*, "[T]here is almost no standard for measuring pain and suffering damages, or even a conception of those damages or what they represent." DAN B. DOBBS, 2 DOBBS LAW OF REMEDIES 383 (2d ed. 1993); Schwartz, *supra*, at 59-60 ("the law does not provide an objective formula for valuing [non-economic damages]"); Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 765 (1995) ("A * * * trenchant criticism [of pain and suffering damages] goes to the standardless nature of the jury's task."). "Courts have usually been content to say that pain and suffering damages should amount to 'fair compensation' or a 'reasonable amount,' without any more definite guide." Bovbjerg, *supra*, at 912 (citing DOBBS, *supra*, 545). Indeed, the entire process for awarding non-economic damages has been described as "procedurally simple but analytically impenetrable." David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 265 (1989).

inappropriate criteria [in setting the amount of such damages]." Chase, *supra*, at 768.[4] In particular, "jurors can be improperly influenced by the presentation of 'guilt evidence.'" Schwartz, *supra*, at 60. But because non-economic damages "are meant to compensate the plaintiff for harm suffered," they should not "be influenced by the degree of culpability of a particular defendant," which instead "is a matter for punitive awards." Bovbjerg, *supra*, at 914. Clearly, "[e]vidence of purported corporate wrongdoing is not relevant to establish the appropriate amount of compensation for past and future pain and suffering, particularly in * * * products liability * * * actions. That evidence is not only irrelevant - it is prejudicial." Schwartz, *supra*, at 68.

Because there are no objective standards for non-economic awards, moreover, once prejudicial evidence has come in, it is often difficult if not impossible to determine how it has affected the jury's verdict. After all, the jury "need not explain [its] rationale or methods for arriving at a particular award figure." Bovbjerg, *supra*, at 914-15. Accordingly, "judicial oversight only marginally curbs jury discretion."

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[4] Studies indicate that awards for non-economic damages are influenced by such factors as the race of the parties (AUDREY CHIN & MARK A. PETERSON, DEEP POCKETS, EMPTY POCKETS viii (1985)), the gender of the parties (Jane Goodman et al., *Money, Sex, and Death: Gender Bias in Wrongful Death Damage Awards*, 25 LAW & SOC'Y REV. 263 (1991)), and the financial condition of the defendant (CHIN & PETERSON, *supra*, at v; *see also* Valerie P. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 LAW & SOC'Y REV. 85, 87 (1992) (collecting studies); Brian Ostrom et al., *What are Tort Awards Really Like? The Untold Story from the State Courts*, 14 LAW & POL'Y 77 (1992)).

Ibid. The interjection of irrelevant "bad act" evidence may result in an improperly inflated verdict that is virtually impossible to assail through post-trial motions or on appeal.

2. The Standard Of Review Under State Law Is Inadequate To Enforce The Settlement's Punitive Damages Bar.

When plaintiffs seek punitive damages by name, there are settled guideposts for appellate courts reviewing the award for excessiveness (*see, e.g.*, *State Farm Mut. Auto Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1520 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)), and the jury's verdict is subject to de novo review (*see Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001)). In contrast, when plaintiffs seek to inflame a jury into awarding punitive damages under the heading of pain and suffering, the appellate court's review is highly deferential and, generally, is not guided by objective standards. *See, e.g.*, DOBBS, *supra*, at 383 ("Review of awards for excessiveness or inadequacy, always difficult when due respect is given to the jury's role, becomes a real embarrassment when there are no standards for measurement."); Schwartz, *supra*, at 63 ("[T]he traditionally subjective nature of these damages makes them difficult to consider on appellate review [and] no constitutional guideposts help assess whether the awards are excessive."); Bovbjerg, at 913-16 ("Appellate judges * * * struggle to supply some reasoned basis for their review of pain and suffering awards. * * * [They] are also required to defer

to damage findings below and lack objective standards for altering awards."). Post-verdict and appellate review thus does not provide an effective check on non-economic damage awards, particularly where the issue is whether and to what extent the awards were influenced by a certain type of prejudicial evidence.

3. Regulation Of The Admission Of Evidence May Be The Only Effective Way To Prevent Recalcitrant Plaintiffs From Circumventing An Agreement To Forgo Punitive Damages

Because there are few objective standards or limits on non-economic damages and such awards are easily influenced by extraneous factors, the only way to ensure that non-economic damages do not serve as a proxy for punitive damages is to regulate plaintiffs' presentation of their case. Accordingly, a district court with jurisdiction to enforce a settlement agreement that includes a waiver of punitive damages *must* have the authority to preclude a party to such an agreement from presenting, in state court, evidence designed to encourage the jury to punish the defendant through the award of non-economic "compensatory" damages.

A district court with supervisory jurisdiction over a settlement plainly has the power to enjoin class members' use of evidence in state court proceedings if that use would violate the settlement agreement. *See, e.g.*, *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 365-67 (3d Cir. 2001) (district court has authority to enjoin class members from using evidence of waived claims when pursuing non-

waived claims if necessary to protect settlement); *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202 (7th Cir. 1996) (both the All-Writs Act and the Anti-Injunction Act give a district court the power to enjoin state discovery in order to protect the integrity of a federal court order). Therefore, the plaintiffs' argument in this case must be that they can avoid this authority by flouting the district court's orders until the court is forced to issue specific injunctions regarding the conduct of the state court trial which, plaintiffs argue, overstep the appropriate boundaries between federal and state proceedings. This cannot be the law.

Unless a district court can — ultimately, when forced to do so by a litigant's recalcitrance — enforce specific directives regarding the evidence and arguments that can be employed in a state court proceeding, then any settlement that involves a prohibition on punitive damages will not be fully enforceable. If such provisions are unenforceable, "[d]efendants in [future] suits would always be concerned that a settlement * * * would leave them exposed to countless suits in state court despite settlement [of the issue in federal court]." *In re Prudential*, 261 F.3d at 367. To hold that state court evidentiary matters fall outside the federal court's jurisdiction to enforce a class action settlement agreement, therefore, would call into question every settlement that precludes punitive damages claims while allowing certain claims for compensatory damages to proceed.

II. THE VIABILITY OF THE *DIET DRUGS* SETTLEMENT IS PARTICULARLY IMPORTANT BECAUSE IT PROVIDES A MODEL FOR SETTLING MASS TORT CLASS ACTIONS THAT INVOLVE FUTURE INJURIES

The *Diet Drugs* case is an important step in the development of mass-tort class action settlements because it offers a mechanism for solving some of the problems raised by *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 526 (1997). Specifically, the *Diet Drugs* settlement addresses the due process concerns raised by settlements that purport to resolve the claims of "futures plaintiffs" — that is, exposure-only class members with no currently identified injury. *See Amchem*, 83 F.3d at 631. Although the district court ultimately found, as a factual matter, that diet drugs do not cause latent injuries and thus that there are no "futures plaintiffs" in the class (only plaintiffs who have not discovered their present injuries[5]), there is no question that the settlement was designed to avoid

[5] The settlement court found as a matter of fact that "valvular regurgitation * * * is detectable by echocardiogram shortly after the patients discontinue use of diet drugs" and "there is no evidence that the use of the drugs results in any increased risk of regurgitation that is 'latent' and not detectable by today's sophisticated echocardiographic technology." 2000 WL 1222042, at *46 (citations omitted). Thus, "[t]he instant class does not suffer from the same problems that exposure-only class members suffered from in *Amchem* * * * where some members were unaware of their exposure to asbestos or where their potential injuries could have a latency period of 30 to 40 years." *Ibid*.

Commentators have observed that even though the diet drugs do not cause latent injuries, "[t]he fen-phen deal poses the same 'futures problem' [as *Amchem* and

the "futures" problem that was addressed in *Amchem* and *Ortiz*. Accordingly, the *Diet Drugs* settlement is an important model for future mass-tort class actions.

Many characteristics of the settlement and the process by which it was reached respond directly to the holdings of *Amchem* and *Ortiz*. For example, the plaintiff class was divided into five sub-classes — including two sub-classes of plaintiffs with no currently diagnosed injuries — each with separate class representatives and class counsel. 2000 WL 1222042, at *44. This was an effort to address the holding in *Ortiz* that currently injured class representatives did not adequately represent the interests of plaintiffs whose injuries were not yet manifest. *See* 527 U.S. at 856 ("a class divided between holders of present and future claims * * * requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel"). Furthermore, the parties were careful to avoid "side agreements," "inventory settlements" and improper allocations of sub-class-specific benefits because "[b]oth *Amchem* and *Ortiz* caution against [such dealings]." 2000 WL 1222042, at *45. However, the most innovative aspect of the settlement is the structured, multiple opt-outs available to class members who discover

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Ortiz] in the sense that it purports to change the terms under which class members who are not presently positioned to sue for severe valvular heart disease may seek redress for that condition in the future." Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 805 (2002).

their injury after the settlement goes into effect — the very provisions under which the *Smart* and *Clark* suits were brought

In *Amchem*, this Court found that "presently injured class representatives cannot adequately represent the futures plaintiffs' interests and vice versa" because, among other things, "those who are currently injured would rationally want to maximize current payouts" while futures plaintiffs "would probably desire a delayed opt out." 83 F.3d at 631. The *Ortiz* settlement included such a delayed opt-out, but it was found lacking for several reasons: (i) there was no opportunity to opt out of the settlement itself (the class was mandatory under Rule 23(b)(1)(B)), (ii) the opt-out forced claimants to bring suit against the settlement trust rather than the defendant, and (iii) the settlement placed a dollar cap on tort awards under the opt-out (a cap that was lower than some prior individual settlements). 527 U.S. at 847 & n.23. The Supreme Court found that such a limited opt-out did not adequately protect the legal rights of absent class members with latent injuries. *Ibid*.

After *Amchem* and *Ortiz*, the question of whether a mass tort class settlement can ever be certified "depends on whether one can devise a regime that would, while satisfying other requirements, guarantee appropriate protection for future claimants." Alex Raskolnikov, Note, *Is There a Future for Future Claimants After Amchem Products, Inc. v. Windsor?*, 107 YALE L.J. 2545, 2548 (1998). The *Diet Drugs*

settlement answers that question in large part with "innovative * * * multiple opt-out opportunities" that give futures plaintiffs (or "future discovery" plaintiffs) unprecedented autonomy. Elizabeth J. Cabraser, ATLA'S LITIGATING TORT CASES § 9:64 (2003).

Three of the opportunities for opt-out in the *Diet Drugs* settlement are of particular interest. The initial opt-out allowed class members to remove themselves from the settlement class entirely and pursue their claims, unfettered, within the tort system.[6] 2000 WL 1222042, at *25. Then, "those who remain[ed] in the class relinquish[ed] the opportunity to seek punitive damages in exchange for a put option to choose later between compensation in tort [pursuant to either the intermediate or back-end opt-outs] or under the class settlement." Nagareda, *Punitive*, *supra*, at 971. In effect, such futures plaintiffs "gain[ed] the option to compel defendant [Wyeth] to purchase their rights to sue in the tort system * * * [by] pay[ing] compensation in amounts specified [by the settlement matrix] according to the nature and severity of injury." Nagareda, *Autonomy*, *supra*, at 796 (footnote omitted). The intermediate and back-end opt-outs thus give futures plaintiffs the ability to assess the settlement benefits against an actual injury rather than the possibility of a future harm.

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[6] Furthermore, even plaintiffs who opted out of the class entirely could "opt back in" with the consent of Wyeth, "which shall not be unreasonably withheld." 2000 WL 1222042, at *25 n.7.

Of course, "[m]ass tort defendants have no reason to embrace any class settlement that would do nothing more than establish a pure competitor regime for the tort system. Defendants must get something out of the deal; that something in the fen-phen settlement is the assurance that, if class members choose to sue in tort * * * punitive damages will not be an available remedy." Nagareda, *Autonomy*, *supra*, at 805-06. As noted above, the size and unpredictable volatility of punitive damage awards — especially when multiple, duplicative awards are possible — make resolution of punitive liability a central component of any rational defendant's settlement strategy.

Indeed, waiver of the ability to seek punitive damages is a uniquely appropriate "premium" for the benefits that futures plaintiffs receive through class membership — including future opt-out rights — for several reasons. First, "only a thin doctrinal thread ties [punitive damages] to individual plaintiffs" because they do not compensate for the plaintiff's injuries, but punish the defendant's actions. *Id*. at 817-20. Thus, plaintiffs can be fully compensated in the tort system even if they have "traded in" the ability to seek punitive damages. Second, "the creation of a class settlement involving put options serves the deterrent and expressive goals ascribed to punitive damages" because it ensures that defendants will be held liable and pay for

all of the injuries they have caused. *Id*. at 820-22.[7] Thus, a class action following the *Diet Drugs* model can provide a good measure of peace to defendants while protecting the rights of futures plaintiffs and remaining true to the principles of the tort system.

In fact, the opt-out structure in the *Diet Drugs* settlement has been lauded by the plaintiffs' bar for providing "the most flexible and sophisticated multi-opt out class action settlement to date." Cabraser, *supra*, § 9.17 n.9; *see also* Amicus Curiae Brief of the Association of Trial Lawyers of America in Support of the Respondents, 2003 WL 193559, at *25-26, *In re Agent Orange Prod. Liab. Litig.*, 123 S. Ct. 2161 (2003) (No. 02-271) (arguing that "class actions involving exposure-only class members can safeguard the due process rights of those class members by providing a delayed opt-out" such as the one "provided in the settlement agreement [in the *Diet Drugs* case]") (citing *Diet Drugs*). It has also been commended by academics as one of "[t]he most notable current examples" of "a settlement that will satisfy the dictates of Amchem and Ortiz." Francis E. McGovern, *Settlement of Mass Torts in a Federal System*, 36 WAKE FOREST L. REV. 871, 883 (2001); *see also* Nagareda, *Punitive*, *supra*, at 976 (the *Diet Drugs* settlement "point[s] to a more viable settlement structure [than that in *Amchem* or *Ortiz*]"). In short, "[t]he * * * settlement in the diet

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[7] Nagareda also argues that when class membership involves losing the ability to seek punitive damages, plaintiffs with particularly strong claims will tend to "shake out" during the initial opt-out proceeding. This has the effect of increasing the cohesiveness of the ultimate class. Nagareda, *Autonomy*, *supra*, at 809-17.

drug litigation demonstrates that mass tort settlements are feasible." NEWBERG, *supra*, § 17.21.

If district courts cannot hold class members to their bargain, however, then the wind will go out of the sails of this useful new vehicle for settling mass tort claims. No defendant will agree to a settlement that allows futures plaintiffs to choose the higher of settlement-matrix benefits and tort-system remedies, when the defendant gains no real protection from having to pay *even more* than compensatory damages. If appellants prevail, therefore, future defendants may be forced to litigate class actions that might have been settled, and a promising avenue for dealing fairly with the enormous problems posed by mass tort litigation may well be cut off.

CONCLUSION

The Court should affirm the settlement court's orders enjoining the plaintiffs' conduct in violation of the settlement agreement.

Respectfully submitted.

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