Nos. 04-3591, 04-3643, and 04-4096

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE DIET DRUGS (Phentermine/Fenfluramine/Dexfenfluramine)
PRODUCTS LIABILITY LITIGATION
(*In re Clara Clark, et al.*)

Appeal from the United States District Court for the
Eastern District of Pennsylvania
MDL No. 1203
Hon. Harvey Bartle, III
PTO 3888

APPELLANTS' PETITION FOR PANEL AND EN BANC REHEARING

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CERTIFICATION OF COUNSEL
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I express a belief, based on a reasoned and studied professional judgment, that the Panel decision is contrary to the decisions of the United States Court of Appeals for the Third Circuit, and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this case, in that:

(1) the Panel's decision is contrary to the decisions of this Court in *In re Diet Drugs Prods. Liab. Litig.*, 369 F.3d 293 (3d Cir. 2004), *cert. denied*, 125 S.Ct. 439 (2004), and in *Lis v. Robert Packer Hosp.,* 579 F.2d 819 (3d Cir. 1978); and

(2) the appeal involves a question of exceptional importance, implicating principles of federalism and comity: whether a federal court may interfere with pending state court proceedings by (a) ordering the parties promptly to stipulate to reverse-bifurcated trials, regardless of whether the state courts have deemed the procedure advisable; (b) imposing a one-sided injunction prohibiting plaintiffs from arguing against the procedure to state courts; (c) limiting plaintiffs' communications with state courts by confining them to answering the courts' questions only on certain specified subjects; and (d) prescribing a script for plaintiffs to follow in answering state courts' questions.

By: ________________________________
George M. Fleming
Attorney for Appellants

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INTRODUCTION AND STATEMENT OF THE CASE

This case arises from the MDL 1203 diet drug (fen-phen) litigation, and specifically from this Court's unanimous decision in *In re Diet Drugs Prods. Liab. Litig.*, 369 F.3d 293 (3d Cir. 2004), *cert. denied*, 125 S.Ct. 439 (2004) ("*Diet Drugs*"). The *Diet Drugs* Court held that a federal district court overseeing the diet drug settlement lacked the authority, under the All Writs Act, the Anti-Injunction Act, and principles of federalism, comity and equity, to regulate state court trial proceedings by interfering with the admission of evidence relevant both to punitive damages and to permissible claims for compensatory damages ("dual-purpose evidence"). The Court observed briefly that the district court could consider certain other measures to enforce the terms of the Settlement Agreement, such as ordering the parties to agree to bifurcation — if the state court deemed the procedure advisable. The Court ended by directing the district court to modify the injunctions in accordance with its opinion. *Id.* at 318-19.

On remand, the district court issued PTO 3888, enjoining plaintiffs from proceeding with their cases in the courts of various states, unless and until they stipulated promptly to reverse bifurcation. The court also enjoined them from arguing against reverse bifurcation to any state trial court. In relevant part, paragraph (3) of PTO 3888 provided:

> (3) the parties in the above actions are ordered promptly to agree and stipulate to a reverse-bifurcated trial, that is a trial . . . in

which the issues of causation, injury and compensatory damages only are tried first and apart from liability . . . .

Paragraph (5) of PTO 3888 stated:

(5) plaintiffs, their agents, attorneys, and derivative claimants . . . are ENJOINED from arguing to the state trial court that the reverse-bifurcation procedure . . . should not be used.

On review in this Court, the Panel concluded in an unpublished opinion that although "[f]or the most part, the terms of PTO 3888 are appropriate," "PTO would be improved by a brief elaboration." Op. at 11-12 (attached). To that end, the Panel "suggest[ed]" several revisions to PTO 3888. Op. at 12. For present purposes, the most relevant of these revisions are:

(4) The parties are ordered promptly to agree and stipulate to . . . a reverse-bifurcated trial in which the issues of causation, injury and compensatory damages are to be tried first and apart from liability . . . .

(5) Plaintiffs, their agents, attorneys and derivative claimants in the above actions are ENJOINED from trying their actions unless and until they have filed the . . . written stipulations described in provision (4) with the state trial court . . . .

Op. at 14-15. The Panel added the following proviso as the last sentence of paragraph (4): "However, the state trial court will make the ultimate determination on reverse bifurcation . . . ." Op. at 14.

Next, the Panel suggested a one-sided provision enjoining plaintiffs and their counsel (but not defendants) with respect to reverse bifurcation, with certain limited exceptions:

> (6) Plaintiffs, their agents, attorneys and derivative claimants, are ENJOINED from arguing to the state trial court that the reverse bifurcation procedure . . . that they stipulated to pursuant to paragraph (4) should not be used; however, [the parties and counsel] may respond to questions or inquiries from the state trial court about matters which may affect the state trial court's decision to reverse bifurcate . . . including, but not limited to, applicable legal precedent about bifurcation, the potential length of the trial, the number of witnesses, and the relatedness of evidence to the phases of a reverse bifurcated trial;

Op. at 15.

Finally, the Panel prescribed an unprecedented federally mandated script governing plaintiffs' communications with state trial courts:

> (7) If asked by the state trial court whether reverse bifurcation is appropriate, advisable or should otherwise be implemented, plaintiffs, their agents, attorneys and derivative claimants must answer, "I am directed by the United States District Court for the Eastern District of Pennsylvania to stipulate to the use of a reverse bifurcated trial and I am not permitted to argue or otherwise make statements against this Court's discretionary use of that procedure."

Id.

ARGUMENT

The injunction approved by the Panel impermissibly interferes with state-court trial procedures. The Panel has required plaintiffs to stipulate to, and to refrain from arguing against, a highly unusual trial procedure — reverse bifurcation — heretofore unknown in most state trial courts. The injunction will prevent plaintiffs from fully informing the state courts about the lawfulness and

wisdom of reverse bifurcation. Neither the Panel nor Wyeth could cite any comparable injunction issued by any other federal district court, much less any affirmed by a court of appeals. Because the Panel's injunction is inconsistent with precedent of this Court and principles of federalism, the decision merits en banc review.

A. The Panel Decision Conflicts With *Diet Drugs*

1. The Panel Decision Violates the Federalism Principles Adhered to by *Diet Drugs*

In *Diet Drugs*, this Court established that "principles of comity, federalism and equity always restrain federal courts' ability to enjoin state court proceedings," even in the course of implementing a settlement agreement approved by a federal district court. 369 F.3d at 306 (citations omitted). The Panel opinion in this case runs roughshod over those principles.

Diet Drugs held that "'[f]ederal courts should always seek to minimize interference with legitimate state activities in tailoring remedies.'" *Id.* at 307 (citation omitted). Any injunction "should be fashioned in a manner that presumes that the state judge is capable and willing to enforce th[e] settlement without close and intrusive supervision by the District Court." *Id.* at 317. *See also Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603-04 (1975); *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 297 (1970).

Although the Panel reiterated *Diet Drugs'* holding that "state judges are capable and willing to enforce the settlement," Op. at 13, it presumed just the opposite — that state courts are not capable of deciding for themselves, on the basis of a full presentation by the parties, whether reverse bifurcation is appropriate in a given case. The Panel approved a one-sided injunction that will skew state-court proceedings by requiring plaintiffs to stipulate to reverse bifurcation at the outset, and by limiting plaintiffs' (but not defendants') ability to communicate with state judges regarding reverse bifurcation. The Panel justified its intrusion into the state court's procedures on the basis that the injunction preserved the state court's ultimate authority over whether to order reverse bifurcation. Yet that authority is hardly meaningful where, as here, the parties are prevented from providing adequate argument to the state court regarding the advisability of the procedure. The injunction threatens to deprive state courts of the information they need to exercise informed judgment and discretion.

Under the Panel's injunction, plaintiffs apparently must remain silent as to reverse bifurcation unless and until a state trial court specifically requests their input. But because the state court will already have been presented with a stipulation reflecting plaintiffs' supposed consent, it is questionable whether any state court will even request the parties' input.

Moreover, the non-specific terms of the injunction approved by the Panel raise as many questions as they answer. *See* FED. R. CIV. P. 65(d) (requiring specificity and reasonable detail). Under paragraph (6), plaintiffs are permitted to "respond to questions or inquiries from the state trial court." But the order does not define an "inquiry" or "question." For example, must an inquiry or question be oral, and specifically directed to plaintiffs' counsel? What if a state judge makes a statement in open court that reverse bifurcation is favored by applicable state law? May plaintiffs' counsel address that statement, if it is incorrect under the law of the relevant jurisdiction? Or would a declaratory statement fail to qualify as a "question or inquiry"? A wrong guess by plaintiffs' counsel could expose the parties and counsel to the risk of contempt. *See, e.g., In re Diet Drugs*, 369 F.3d at 315 (an injunction "is enforceable, of course, by the sanction of contempt"); *Saudi Basic Indus. Corp. v. Exxon Corp.*, 364 F.3d 106, 110 (3d Cir. 2004) (same) (citation omitted).

Further, it is unclear how the injunction approved by the Panel would operate in the fairly routine situation where the defendant moves for reverse bifurcation via written motion. In such a circumstance, there may be no state court hearing (and thus no opportunity for a "question or inquiry," oral or not) before a written response deadline. Would a scheduling order deadline be considered a "question" or an "inquiry"? Would a response deadline in the local rules, without

more, be considered a question or inquiry by a state trial court? Those questions remain unanswered under the language of the injunction.

In addition, the Panel's wording of paragraph (6) lacks any guideline as to the contents of a response or answer. For example, the Panel has enjoined plaintiffs from arguing that reverse bifurcation "should not be used." Yet if plaintiffs respond to a state court's request by noting the likelihood of jury confusion, the adverse impact on the plaintiff's presentation of her case, and other practical problems arising from reverse bifurcation, Wyeth will no doubt contend that plaintiffs have argued that reverse bifurcation "should not be used." Although the Panel's order lists certain topics, a state court might choose to reject reverse bifurcation for many other reasons.

The Panel indicates that plaintiffs are allowed to discuss "precedent in the jurisdiction applicable to the use of reverse bifurcation." Op. at 12. Assuming a given jurisdiction has not addressed the issue, however, are counsel permitted to address precedent outside the jurisdiction?

In *Diet Drugs*, the Court recognized the practical problems arising from attempts to regulate the statements of counsel in state courts. The Court warned, when rejecting the prior evidentiary injunctions, that "it is hard to see what purpose would be served — and easy to see the problems that would arise — in restraining counsel from making arguments in state court." 369 F.3d at 316; *see also id.*

(PTO 2828 "is even more problematic insofar as it bans counsel from making argument 'to the court'" regarding forbidden topics).

Thus, the injunction approved by the Panel is a recipe for further litigation and confusion in the state courts. It will serve only to embroil the federal court more deeply (and impermissibly) in state court proceedings. Moreover, the problems introduced by the federal injunction cannot be cured by minor tinkering or further elaboration in the wording of the order. The problems arise from the impossibility of a writing a one-size-fits-all federal order to govern day-to-day matters in state-court proceedings around the country. Litigation is fluid, not static, and the issues that arise often cannot be anticipated, let alone dictated in advance by a single federal court.

And, most fundamentally, the notion that a federal court may micro-manage a state court proceeding — to the point of prescribing a specific script for an attorney to recite when addressing the state court judge — is simply incompatible with the "etiquette of federalism." *United States v. Lopez,* 514 U.S. 549, 583 (1995) (Kennedy, J., concurring). State courts are to be treated as coequal partners in Our Federalism, not as marionettes whose decisions are to be manipulated from afar by a federal court sitting in Philadelphia — even if, on paper, the state court retains the final say in the process engineered by a federal judge.

2. The Panel Decision Inverted the Proper Sequence of State-Court Decisionmaking

The Panel disregarded the approach to bifurcation proposed at the conclusion of the *Diet Drugs* opinion. There, this Court suggested that the district court could "direct the parties to agree to a bifurcated trial — where damages are determined apart from liability — *in the event that the state court were to deem it advisable*." *Id.* at 318 (emphasis added). Notably, the Court did not refer to the uncommon procedure of reverse bifurcation; indeed, when the Court referred to bifurcation at oral argument it described the traditional form: "one [phase] on liability and then one on damages." (12/10/03 3d Cir. Tr. at 52).

Moreover, the *Diet Drugs* Court contemplated a sequence of decisionmaking exactly opposite to the one imposed by the Panel. Under the *Diet Drugs* Court's suggestion, a precondition of action by the district court is that a state court must first deem bifurcation "advisable." The injunction approved by the Panel, however, improperly inverts the sequence: the federal court will issue its injunction *regardless* of whether state courts have deemed reverse bifurcation advisable and *before* the state courts have had the opportunity to hear the parties' arguments. The *Diet Drugs* Court required comity and cooperation between the federal district court and the state trial courts, and trusted that the state courts would make wise decisions. By contrast, the injunction approved by the Panel evinces fundamental mistrust of the state courts.

3. The Panel Decision Violates the Rights of Absent Class Members

Bifurcation — let alone reverse bifurcation — presents difficult questions of prejudice, jury confusion, and trial management. As one state supreme court has explained, "reverse bifurcation would result in significant confusion of the complex issues. Further, we do not believe that reverse bifurcation would permit the parties to present evidence in an organized and effective order." *State ex rel. Atkins v. Burnside*, 569 S.E.2d 150, 161 (W. Va. 2002). *See also* n. 3, *infra*. In fact, the Supreme Court has warned that in some situations, bifurcation could "amount to a denial of a fair trial." *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931).

In *Diet Drugs*, this Court similarly noted the hardship on plaintiffs when a federal court requires them to split up the presentation of their case:

> [R]estricting plaintiff to . . . the right to litigate [causation and damages questions in isolation] would seriously disadvantage her at trial (as skilled counsel for Wyeth surely recognized). Jurors might well wonder at the fairness of determining causation and damages in a vacuum devoid of any suggestion of liability or negligence.

369 F.3d at 315. "A trial is more than a matter of presenting a series of individual fact questions in arid fashion to a jury. The jury properly weighs fact questions in the context of a coherent picture of the way the world works." *Id.* at 314. "Unduly sterilizing a party's trial presentation can unfairly hamper her ability to shape a compelling and coherent exposition of the facts." *Id.*

Yet the injunction approved by the Panel threatens to have these deleterious effects on opt-out plaintiffs in state court. Accordingly, the Panel's decision is inconsistent with *Diet Drugs*, where this Court held that both the Settlement Agreement and class notice (neither of which makes mention of reverse bifurcation) preserved the rights of opt-out plaintiffs to pursue their cases in state court. As the Court opined in *Diet Drugs*, "plaintiffs never agreed to relinquish their right to try their allowed claims effectively in state court." *Id.* at 315. The Panel's opinion fails to recognize the rights of opt-out plaintiffs and is therefore inconsistent with the *Diet Drugs* decision in this additional respect.

B. The Panel Decision Conflicts With *Lis*

In *Lis v. Robert Packer Hosp.,* 579 F.2d 819, 824 (3d Cir. 1978), this Court held that bifurcation is "a matter to be decided on [a] case-by-case basis [which] must be subject to informed discretion by the trial judge in each instance." *Id.* Noting that "in many cases, especially personal injury negligence cases, the separation might affect the outcome of the case," the Court ruled that bifurcation "'is not to be routinely ordered.'" *Id.* (quoting Advisory Committee Notes to FED. R. CIV. P. 42(b)). "[W]e disapprove of a general practice of bifurcating all negligence cases . . . . " *Id.* at 823.

This Court has followed *Lis* consistently. *See Franklin Music Co. v. American Broadcasting Cos., Inc.*, 616 F.2d 528, 538 (3d Cir. 1980) ("The court

made an independent determination that bifurcation was appropriate in this case."); *see also Smith v. Holtz*, 210 F.3d 186, 200-01 (3d Cir. 2000) (affirming the denial of trifurcation under an abuse of discretion standard); *Barr Labs., Inc. v. Abbott Labs.*, 978 F.2d 98, 115 (3d Cir. 1992) (reiterating *Lis'* condemnation of the district court's general practice of bifurcation). District courts in this Circuit have faithfully applied *Lis* by considering bifurcation on a case-by-case basis.[1]

Contrary to *Lis*, the injunction at issue here imposes a global order upon all state trial courts in which the enjoined parties and counsel are to try their cases. The Panel's blanket bifurcation injunction stands in direct conflict with the case-by-case approach that *Lis* established.

C. The Panel Decision Presents a Federalism Question of Exceptional Importance

Few questions are as important to our legal system as the proper balance between federal and state authority. The Panel's decision upsets that balance. Indeed, it works a palpable interference with state judicial systems, engendering federal-state conflict, confusion, and further litigation.

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[1] *E.g., John Middleton, Inc. v. Swisher Int'l, Inc.*, 2004 WL 792762 (E.D. Pa. Apr. 8, 2004) (denying bifurcation); *Forrest v. Beloit Corp.*, 2003 WL 23112338 (E.D. Pa. Dec. 2, 2003) (same); *Reading Tube Corp. v. Employers Ins. of Wausau*, 944 F.Supp. 398, 404 (E.D. Pa. 1996) (same); *Mangabat v. Sears, Roebuck & Co.*, 1992 WL 211561, *2 (E.D. Pa. Aug. 26, 1992) (denying bifurcation because "[t]o accept [the defendant's] argument would be to sanction bifurcation in all jury cases, in contravention of the Third Circuit construction the trial judges are not to regard bifurcation as 'routine'") (quotation marks in original; citation omitted).

Plaintiffs are required to stipulate to reverse bifurcation and are enjoined to be silent unless and until the state court issues a "question" or "inquiry" regarding reverse bifurcation. Even then, plaintiffs must confine their responses to certain issues and are required, on pain of contempt, to adhere to a federally imposed script when addressing the state court.

Every plaintiff bound by the injunction in this case resides in a jurisdiction where reverse bifurcation is either barred or highly disfavored. Hampering the plaintiffs' ability to communicate openly with state courts therefore carries a significant risk that a state court will be misinformed as a result of the injunction. For example, Texas law (governing Clark and Smart) prohibits bifurcation of liability issues from compensatory damages in personal injury cases. *See Iley v. Hughes,* 311 S.W.2d 648, 651 (Tex. 1958) (Texas procedure "does not authorize separate trials of liability and damage issues in personal injury litigation"). The Texas Supreme Court has consistently enforced that rule. In *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 430 (Tex. 2000), the supreme court held that a bifurcation order scheduling a trial on punitive damages before liability and causation for certain class action plaintiffs was improper. *See also Eubanks v.*

Winn, 420 S.W.2d 698, 701 (Tex. 1967); *Estrada v. Dillon*, 44 S.W.3d 558, 562 (Tex. 2001).[2]

And, in Mississippi, where Wilson, James, Caldwell, and Cook reside, state trial courts have rejected reverse bifurcation in initial opt-out cases not governed by the Settlement Agreement. *See Hampton v. Wyeth*, Holmes County Circuit Court, No. 2001-453; *Amos v. Wyeth*, Holmes County Circuit Court, No. 200-293; *Card v. AHP Corp.,* Tallahatchie County Circuit Court, No. 2000-36-C72. Louisiana statutory law (applicable to Gatlin) forbids bifurcation without the "consent of all parties." *See, e.g.,* LA. CODE CIV. PROC. Art. 1562. Other state courts have rejected reverse bifurcation (and sometimes even ordinary bifurcation) as well — all, of course, on a case-by-case basis.[3]

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[2] Below, the district court cited *Transportation Ins. Co. v. Moriel,* 879 S.W.2d 10 (Tex. 1994). *See also* TEX. CIV. PRAC. & REM. CODE ANN. § 41.009 (codifying *Moriel*). But that case involved a narrow exception allowing the amount of punitive damages to be addressed separately from the balance of the trial, where requested. *Moriel* provides no authority for bifurcating the liability and causation/damages phases, and certainly no support for *reverse* bifurcation, in which causation and damages are tried first.

[3] *See, e.g., Darcars Motors of Silver Spring, Inc. v. Borzym,* 841 A.2d 828, 843 (Md. 2004) ("this duplication [of evidence] would burden both witnesses and jurors as well as waste judicial resources") (citation omitted); *Stevenson v. Gen. Motors Corp.*, 521 A.2d 413, 422-23 (Pa. 1987) ("[T]he trial judge should be alert to the danger that evidence relevant to both issues may be offered at only one-half of the trial. . . . '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.'") (citing *Brown v. Gen. Motors Corp.*, 407 P.2d 461, 464 (Wash. 1965)); *Walker*

Reverse bifurcation presents difficult questions of state law — both as a matter of a state court's authority to employ it at all, and as a matter of the court's discretionary decision to use it in a particular case. Yet the order as approved by the Panel is calculated to ensure that state courts will receive only a misleading one-sided presentation on those questions. The effect will surely be to prevent a balanced discussion of reverse bifurcation before the state courts, even though the procedure is a highly unorthodox one on which untrammeled argument is sorely needed. "'[T]ruth . . . is best discovered by powerful statements on both sides of the question.'" *United States v. Cronic,* 466 U.S. 648, 655 (1984) (citation omitted). The order as approved by the Panel ignores that basic premise.

CONCLUSION

For the foregoing reasons, Appellants respectfully request Panel rehearing as well as rehearing en banc.

Respectfully submitted,

By ___________________________________
Thomas C. Goldstein

Drug Co. v. La Sal Oil Co., 972 P.2d 1238, 1245 n.7 (Utah 1998) (reverse bifurcation is "so drastic a technique" that it "has never been employed in Utah"); *Waters ex rel. Skow v. Pertzborn*, 627 N.W. 2d 497, 502-03 (Wis. 2001) (state statute forbids bifurcation of liability and damages).

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CERTIFICATE OF COMPLIANCE

1. In accordance with FED. R. APP. P. 35(b)(2), the petition is no more than 15 pages.

2. The petition complies with the typeface and typestyle requirements in FED. R. APP. P. 32(a)(5) and 32(a)(6) because the brief has been prepared in proportionally spaced typeface using Microsoft Word 2000 in Times New Roman 14-point type for text and footnotes.

____

George M. Fleming

CERTIFICATE OF ADMISSION

Pursuant to 3D CIR. LOC. R. 28.3(d), the undersigned certifies that at least one of the attorneys whose names appear on the petition is a member of the bar of this Court.

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George M. Fleming

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Appellants' Petition for Rehearing has been provided to all parties, as described below, on February 7, 2005.

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