

RIVERBOAT POKER & PARADOXES: THE VIOXX MASS TORT SETTLEMENT

by

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Poker players learn to read the cards of the other players at the table by their actions. Betting patterns and other “tells” can permit a good poker player to understand the strength of his opponents’ cards without ever seeing them. There have been only a handful of Vioxx trials, but the announced settlement of the Vioxx litigation provides strong tells as to the weakness of the plaintiffs’ claims—and of the weaknesses of current pharmaceutical product liability law.

On November 9, 2007, in New Orleans, Merck agreed to the framework of a settlement of approximately 47,000 pending or tolled claims of personal injuries alleged to have been caused by Vioxx, which was withdrawn from the market in 2004 in the wake of studies showing increased cardiovascular risk for use of the painkiller.¹ Subject to a walk-away right if certain thresholds for opt-ins are not met, Merck agreed to have a fixed \$4.85 billion divvied up among plaintiffs. Right away we see the first tell: trial lawyers made astonishing concessions on the terms and conditions of the settlement. The exact value of any individual claim will not be decided by the plaintiffs’ attorneys, as is common in an inventory settlement,² but will be assessed by a neutral claims administrator based on a point system taking into account degree of injury and possible causation issues. Settlement Exhibit 3.2.1. Plaintiffs who cannot prove they were taking Vioxx or that they were injured will walk away with nothing other than the ability to continue on in court. Settlement § 2.2 and Exhibits 2.2.1. – 2.2.3.

The Michigan Paradox. Another tell is the strange windfall for plaintiffs from Michigan. Many states have preemption laws of varying strengths barring certain claims or damages in the case of a drug or warning label approved by the FDA. Texas, for example, bars failure to warn claims in such circumstances.³ Under a law passed in Michigan in 1996, product-liability suits against pharmaceutical

¹Heather Won Tesoriero, Sarah Rubenstein, & Jamie Heller, *Merck’s Tactics Largely Vindicated as it Reaches Big Vioxx Settlement*, WALL ST. J., Nov. 10, 2007; Settlement Agreement Between Merck & Co., Inc. And The Counsel Listed on the Signature Pages Hereto Dated As Of November 9, 2007 (“Settlement”). While there were approximately 60,000 total personal injury cases pending or tolled, about 13,000 of these were ineligible for the settlement, which only covers specific types of cardiovascular injuries.

²E.g., Ted Frank, “Fen-Phen Zen”, THE AMERICAN (Apr. 4, 2007) (plaintiffs’ attorneys divert several million dollars of \$200 million lump-sum settlement of fen-phen claims for 440 clients in Kentucky).

³TEX. CIV. PRAC. & REM. CODE ANN. §82.007; *Ledbetter v. Merck*, Nos. 2005-59499, 2005-58543, 2007 WL 1181991 (Tex. Dist., April 19, 2007).

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manufacturers are barred if the product was approved by the FDA and there was no FDA finding of fraud. MCL § 600.2649(5). Thus, no Michigan resident claiming to be injured by Vioxx had a valid claim against Merck.⁴

The Vioxx settlement applies only to eligible claimants with pending suits. Those who have not filed suit as of the date of the settlement are ineligible to latch on; those who had their suits dismissed with prejudice and do not have a pending appeal are ineligible. Settlement § 17.1.22.2. Michigan residents who did not file suit—and many with ethical lawyers did not file suit because of the absence of a colorable argument for a cause of action—do not get to participate in the settlement.

Other Michigan residents had more brash attorneys who made arguments that the suits should be brought under New Jersey, rather than Michigan, law, notwithstanding the standard conflict-of-laws practice that the law of a tort suit is the place of the alleged injury. The New Jersey Supreme Court held that New Jersey law did not apply to Michigan cases, *Rowe v. Hoffman La-Roche* 189 N.J. 615, 917 A.2d 767 (2007), but Judge Carol Higbee refused to dismiss the cases of 250 Michigan plaintiffs pending in her courtroom.

The settlement has several dozen factors modifying the settlement amount: age, severity of alleged injury, type of alleged injury, time and amount of Vioxx taken, and other contributing risk factors, all of which either augment or discount the eventual settlement amount.⁵ But nowhere in the calculation is there a discount for being a Michigan resident, or for being a Texas resident. Nor does the settlement distinguish between plaintiffs who live in states with uncapped damages, and plaintiffs who cannot hope to recover millions in non-economic damages. A Michigan resident with a pending suit will get the same settlement as if he or she lived in New Jersey or West Virginia—the catch being that he or she had to have a pending suit.

The political storm over the number of potential Michigan plaintiffs left out of the settlement⁶ demonstrates why preemption must come from the federal level. Limiting product-liability lawsuits against FDA-approved drugs reduces the expense of drugs to all consumers, and encourages the sale of drugs that the FDA has found to be safe and effective, but cannot be profitably sold because of the risk of litigation. The classic example is Bendectin, a drug for morning sickness that has been used safely and effectively in Europe and Canada for decades, but unavailable in America since 1983 because of the litigation expense and risk from trial lawyers improperly blaming it for unrelated birth defects.⁷ Hospitalizations of pregnant women for dehydration have doubled since it has been withdrawn from the market.⁸

But this is not something that can be done effectively on the state level: the Michigan law benefits the residents of all fifty United States (and the rest of the world) *ex ante*, but the *ex post* cost of that law is borne entirely by Michigan residents. Bendectin is not any more available in Michigan than it is in West

⁴*Garcia v. Wyeth-Ayerst Labs.*, 385 F.3d 961 (6th Cir. 2004). *But see Desiano v. Warner-Lambert*, 467 F.3d 85 (2d Cir. 2006) (purporting to find exception to preemption that would permit Michigan product liability claims to go forward with clever pleading), *aff'd by an equally divided Supreme Court*, *Warner-Lambert v. Kent*, No. 06-1498, ___ U.S. ___ (Mar. 3, 2008). Even under the Second Circuit's narrow view of federal preemption under *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001), Michigan plaintiffs would have an uphill battle, as they would be required to prove the additional element of fraud on the FDA causing injury to defeat the affirmative defense of FDA approval, an additional element not required in other states.

⁵Settlement Exhibit 3.2.1; *cf. also* the plaintiffs' steering committee mock calculator of settlement value at <http://www.officialvioxxsettlement.com/calculator/>.

⁶*Fight over Michigan drug law intensifies after Vioxx settlement*, ASSOCIATED PRESS, Dec. 17, 2007 ("Fight").

⁷W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 584 (2000) ("The risk of juror error coupled with high litigation costs led manufacturers to withdraw Bendectin from the market notwithstanding the continuing assessment by the FDA and the scientific community that Bendectin provides benefits exceeding its risks."); G. Koren *et al.*, *Drugs in pregnancy*, 338 NEJM 1128 (1998) (noting lack of evidence that Bendectin was teratogenic given that birth defects had not declined after its withdrawal despite the fact that 40% of pregnant women took the drug).

⁸Paolo Mazzotta, *et al.*, *Attitudes, Management and Consequences of Nausea and Vomiting of Pregnancy in the United States and Canada*, 70 INT'L J. GYNECOLOGY & OBSTETRICS 359 (2000).

Virginia; Merrell Dow Pharmaceuticals or another manufacturer would not be able to limit usage of the drug to Michigan or suits over the drug to the Michigan courts. But Michigan residents do not get to participate in the litigation lottery that the residents of the other forty-nine states do. There is thus great political pressure on Michigan legislators to undo the law in the one state where the law is most reasonable.⁹ As in the classic collective action problem, the residents of the state have the incentive to accrue litigation benefits to themselves at the expense of out-of-state patients and investors, even though everyone would be better off if all fifty states agreed to a universal preemption rule. Meanwhile, those Michigan residents with more unethically zealous lawyers who filed facially meritless claims will recover, and thus the message is sent to the plaintiffs' bar: frivolous litigation pays.

The Ethics and Economics of the Settlement. The Manhattan Institute's Marie Gryphon, writing about the settlement in *City Journal*, takes away another message from the jurisdictional disparity, echoing a slightly different claim by Adam Liptak in *The New York Times*: plaintiffs' attorneys agreeing to the settlement are shortchanging their clients.¹⁰ After all, one provision of the settlement requires attorneys agreeing to the settlement for one client to commit to signing up all their clients to the settlement, and withdrawing from representation of those who do not. Thus, to the extent some clients are made worse off under the settlement—because, say, their relatively strong case in a plaintiff-friendly jurisdiction is treated no differently than a case in a jurisdiction where it will be dismissed for failure to state a claim—the lawyer would be breaching his duty of loyalty.

There is something of a point to this. After all, by failing to negotiate for a jurisdiction-specific settlement, attorneys benefited their Michigan clients at the expense of California clients. But the same problem arises with respect to other decisions made in the settlement: a set sum is going to plaintiffs with myocardial infarctions, and a different sum goes to plaintiffs with strokes; the point discounts for risk factors pits smokers against non-smokers for the same common fund. But neither Liptak nor Gryphon trace their argument to its natural conclusion. Any mass-tort attorney with hundreds of clients is necessarily favoring some clients to the prejudice of others. Andy Birchfield's early scheduling of Evelyn Plunkett's trial favored Plunkett to the detriment of hundreds of his other clients who would have to wait for a trial. It seems strange to criticize the ethics of a mass-tort attorney only at the settlement stage, when the complained-of ethical violation was an inevitable consequence of the attorney's decision to represent hundreds or thousands of clients with individualized claims. Yet such mass-tort representation is considered unremarkable.

Moreover, both Liptak's and Gryphon's argument rests on the premise that there are plaintiffs who are being made worse off from the settlement. This premise is false for two reasons. *First*, consider the economics of the decision to settle for \$4.85 billion. Though each side allegedly spent millions of dollars at trial in the *Cona* and *McDarby* trials,¹¹ plaintiffs had put together a "trial package"—a set of video deposition excerpts and script for exhibits that reduced the expenses of putting on a trial to as low as \$50,000 at the margin,¹² though that figure probably does not include expert fees. Merck, on the other hand, would likely face higher costs due to the use of hourly-fee attorneys and the need to be prepared to rebut any

⁹Ironically, Vioxx plaintiff and Michigan resident Leslie Richter, who was extensively used in television advertising against state Republicans in 2006 over the pharmaceutical immunity, and singled out by the pro-trial-lawyer think tank Drum Major Institute as a "tort reform victim," is a plaintiff in New Jersey whose case has not yet been dismissed, and will be eligible for participation in the Vioxx settlement. Kyle Mellinn, *MIRS Capitol Capsule* (Dec. 7, 2007); *Fight, supra* note 6.

¹⁰Adam Liptak, *In Vioxx Settlement, Testing a Legal Ideal: A Lawyer's Loyalty*, N.Y. TIMES (Jan. 22, 2008); Marie Gryphon, *Unjust Deserters*, CITY J. (Jan. 28, 2008), <http://www.city-journal.org/2008/eon0128mg.html>. See also Nathan Koppel, *Vioxx Plaintiffs' Choice: Settle or Lose a Lawyer*, WALL ST. J., Nov. 16, 2007 at B1; Michael Kunzelman and Linda A. Johnson, *Challenge Filed to Merck's Vioxx Settlement*, ASSOCIATED PRESS, Jan. 5, 2008.

¹¹Ted Frank, *\$4 million fee award for forty-five-dollar "consumer fraud" victory in Cona v. Merck*, Point of Law blog (June 18, 2007), <http://www.pointoflaw.com/archives/004008.php>.

¹²Heather Won Tesoriero, *Vioxx 'Trial in a Box' Cuts Cost of Filing Suit*, WALL ST. J. (Apr. 17, 2006) at B1. Of course, that \$50,000 figure does not include opportunity cost, which, for a Mark Lanier, might be substantial, which may be why he has stated in correspondence that it would cost him \$2 million to try a case. Correspondence with Mark Lanier, Jan. 5, 2008.

of a number of different plaintiff theories. With tens of thousands of plaintiffs, Merck faced between \$5 and \$15 billion in litigation expense without settlement—and that is before the risk of any losses at trial.

Yet, as of March 3, 44,000 plaintiffs have signed up to split a pot of \$4.85 billion—just slightly more than \$100,000 a plaintiff. Given that the four judgments entered in favor of plaintiffs *averaged* over \$20 million each, plaintiffs neither expected to win very many cases, nor to receive positive rulings from the Texas, New Jersey, and federal courts on appeal. Certainly the plaintiffs’ bar would not settle for a fraction of the cost of Merck to litigate the remaining cases had they expected to prevail or successfully obtain punitive damages in any reasonable fraction of cases: if the average case had an expected value of just \$300,000, plaintiffs would come out ahead litigating.

The small settlement amount is thus a strong tell of what was in the cards on appeal. Either the savviest trial lawyers in the business somehow mistakenly left tens of billions of dollars on the table in a negotiation, or they recognized that the litigation against Merck only had value for a nuisance settlement less than the cost of litigation. Given the low value of individual cases, attorneys concerned about the long-term legal merits of their clients’ cases can, in good faith, recommend the settlement to all of their clients.

Second, the all-or-nothing provision forbidding settling attorneys from further litigation is unlikely to have bite. Many attorneys are likely to simply evade the provision: the *Wall Street Journal*’s Nathan Koppel quotes a Houston attorney who openly states his plans to do just that.¹³ The settlement agreement permits Merck to “enforce” the provision, Settlement §§ 1.2.8, 1.2.9, but it is unclear what realistic option they have other than precluding client participation,¹⁴ which in turn might reduce the value to Merck of settling. At this early stage, it remains unclear what, if anything, attorneys will do to evade or otherwise game this provision, and what Merck will do if faced with that game of chicken. What is clear is that every attorney who filed objections to the settlement on ethical grounds in the MDL has been assuaged by the Plaintiffs’ Steering Committee into withdrawing their objections.

The settlement can be seen as a vindication of Merck’s hard-line stance against an early settlement, given some Wall Street analysts’ claims that the Vioxx litigation could cost tens of billions. But, with a nearly \$2 billion payday for plaintiffs’ lawyers, it can also be seen as a vindication to the trial bar, who will profit mightily for bringing what their actions have shown to be largely meritless cases. In modern mass-torts litigation, trial lawyers can bluff with weak cards against a stronger opponent that knows it is ahead, yet still walk away winners.

¹³Nathan Koppel, “Does Vioxx Settlement Raise Ethical Issues?”, WSJ Law Blog (Nov. 12, 2007), <http://blogs.wsj.com/law/2007/11/12/does-vioxx-settlement-raises-ethical-issues/>.

¹⁴Settlement § 1.2.6. This provision does give Merck the option of doing its own cherry-picking of the claims tendered to it, however, so a plaintiffs’ attorney does face some malpractice risk in failing to comply with the all-or-nothing provision.