

Chapter IX: The Vioxx Settlement

Ted Frank*

The Road to Settlement

On November 9, 2007, Merck agreed to the framework of a settlement of the 46,000 pending personal injury claims and another 15,100 claims where tolling agreements had been signed.¹

As noted in Chapter III, the strategy of the Vioxx trial bar was always one of quick settlement. Whether the cases against Merck were meritorious or not, settlement would guarantee the quickest payment for the least amount of work—and, as Chris Guthrie notes, settlements for frivolous claims are likely to be “greater than the expected value of the litigation.”² The trial lawyers speaking to the press stayed on-message throughout the litigation: nearly every interview made the point of putting pressure on Merck shareholders to encourage settlement.

We also know from press coverage that settlement pressure was also coming from the judges with the dockets. In the federal MDL, Judge Fallon said from the beginning that he was hoping to structure a settlement,³ and it was reported that Fallon, Judge Higbee in New Jersey, and the judges of the consolidated cases in Texas and California also encouraged Merck to go to the settlement table.⁴ Judges have many possible motivations for pushing settlements. A judge could view brokering a mass-tort settlement as a source of prestige or pride, much as Judge Weinstein has stated regarding his settlement of the Agent Orange litigation.⁵ A judge could simply be trying to maximize his or her free time, and reducing a docket of thousands of cases through settlement will certainly create less work for a judge than managing the trials of cases.⁶ A judge who is trying cases faces potential criticism for errors at trial or from litigants and the public if there is a perception that he or she is moving cases too slowly; a judge can avoid such criticism for the management of a docket if cases are settled rather than

* In 2005, as an attorney in private practice, I performed legal work for Merck on relating to the Vioxx litigation. This paper reflects only my opinion, and not that of Merck or its attorneys. I thank Sara Wexler for her research assistance, but all errors are my responsibility.

¹ Heather 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”).

² Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 169 (2000).

³ Kristen Hays, *Federal Vioxx Judge Says His Forum Best for Trials*, ASSOCIATED PRESS, Oct. 27, 2005.

⁴ Heather Won Tesoriero, Sarah Rubenstein, & Jamie Heller, *Merck's Tactics Largely Vindicated as it Reaches Big Vioxx Settlement*, WALL ST. J., Nov. 10, 2007.

⁵ William Glaberson, *A Judge Shows Who's the Boss: Dressing Down Lawyers and Dressing Up Gigante*, N.Y. TIMES, July 20, 1997, at 21; see generally PETER H. SCHUCK, *AGENT ORANGE ON TRIAL* (1987).

⁶ Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 7-11 (1993). Cf. also Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does – Boundedly): Rules of Thumb in Securities Fraud Opinions*, 53 EMORY L. J. 83, 111-112 (“...the use of shortcuts by the courts is neither a new phenomenon nor one unique to securities doctrine.”).

tried.⁷ In just three years, Judge Higbee had already been reversed by New Jersey appellate courts several times for her legal rulings in class actions,⁸ and faced the possibility of many more such reversals as the personal injury cases went on appeal.⁹ A judge with an opinion on the outcome of the litigation may feel he has more power to steer the litigation to that preferred conclusion without interference from appellate courts through the settlement process.

Avoiding the Fen-Phen Settlement Disaster

An early settlement would have been disastrous for Merck. As it was, the publicity from the 2004 withdrawal and from the 2005 *Ernst* verdict resulted in tens of thousands of cases filed against Merck. The promise of money would have created a feeding frenzy and tens of thousands more cases: in a world where cases are being settled, rather than fought, the “chicken catchers”¹⁰ become more profitable and there is a greater incentive for such attorneys to join the client-recruitment bonanza.¹¹

This is more than theoretical. In 1999, American Home Products thought it settled fen-phen litigation for \$3.75 billion.¹² AHP perhaps thought it was avoiding the risk of bankrupting punitive damages and saving on litigation expenses. But the early settlements merely opened itself up to further claims and litigation. AHP (which later became Wyeth) ended up paying several times the original amount through modifications to the original settlement agreement, and billions of dollars of those claims were newly brought in response to the settlement, and perhaps billions of dollars more were fraudulent.¹³

Thus, though Merck was facing, and paying, hundreds of millions of dollars a year in litigation expense from the Vioxx litigation, it had little choice but to continue to fight. So long as Merck had sufficient cash flow to defend itself that it need not seek more from the capital markets, any savings from the settlement would have been overwhelmed by the expected additional litigation expense from new cases.¹⁴ Many more cases—and many more fraudulent cases—would have been brought at great expense to Merck. Any settlement that

⁷ Cf. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 19.6 (6th ed. 2003); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 13-16 (1993).

⁸ See Chapter VIII, *supra*.

⁹ See Chapter II, *supra*.

¹⁰ Mary Flood, “Drug doubts put lawyers in motion”, HOUSTON CHRONICLE (June 10, 2007). See Chapter III, *supra*.

¹¹ Professor Nagareda calls this the *Field of Dreams* problem: as with the Kevin Costner character’s ballpark constructed out of an Iowa cornfield, “If you build it, they will come.” RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 147 (2007).

¹² Alison Frankel, *Fen-Phen Follies*, AMERICAN LAWYER, March 1, 2005.

¹³ *Id.* See also NAGAREDA *supra* note 11 at 143-51.

¹⁴ The cash flow element is important: if a defendant has need to access the capital markets, the uncertainty created by an overhang of litigation would raise a defendant’s costs of capital, and raise the expected value of settlement.

promised profit to the plaintiffs, even a nuisance settlement, while cases could still be brought would cost Merck money in the long run.

But Merck did have some assurances that claims would start to peter out. The front-page publicity burst withdrawing Vioxx from the market was a double-edged sword: it created an initial avalanche of litigation, but it also meant that there would be no further incidents of people taking Vioxx after September 30, 2004, and, because there is no scientific reason to believe that past Vioxx usage caused latent injuries once Vioxx usage ceased, ensured that there would be no new alleged injuries from Vioxx usage. And it guaranteed that the clock on the statute of limitations—the time limit to bring suit—would begin ticking in even the most liberal of jurisdictions. (While the statute of limitations normally begins at the time of the alleged injury, many states have a “discovery rule” that tolls the time to bring suit until the plaintiff had reason to know that his or her injury was caused by the defendant. The rules for what constitutes reasonable knowledge vary from state to state—for example, states that put the burden on an attorney might credit earlier Vioxx litigation or the VIGOR study or the change in the Vioxx warning label as putting a plaintiff on notice of the possibility of liability—but no reasonable court would hold that the national front-page news of the Vioxx withdrawal did not trigger the beginning of the statute of limitations.)

Half the states have a statute of limitations of two years, and the majority of the rest have a statute of limitations of three years, which meant that for the vast majority of potential plaintiffs—plaintiffs from 42 of the 50 states—the statute of limitations expired on September 30, 2007 if the clock started ticking when Vioxx was withdrawn from the market. If so, Merck is not facing the risk that AHP did by settling while claims could still be filed.

Indeed, the settlement occurred shortly after September 30, 2007, on November 9, 2007, just one day after Judge Fallon issued a ruling that the statute of limitations did just that.¹⁵

The \$4.85 billion settlement has standard boilerplate in places—Merck does not admit liability; plaintiffs do not admit lack of merit.¹⁶ But it differs from the fen-phen settlement in critical ways—in part because the injuries alleged to be caused by Vioxx are different than the injuries alleged to be caused by fen-phen.

First, the fen-phen settlement worked from a grid: plaintiffs with a particular injury received a particular sum of money. As the number of plaintiffs grew, the settlement amount paid by Wyeth grew, and Wyeth was required to repeatedly amend the settlement and provide more funding for it. In contrast, the Vioxx settlement is a closed settlement: it applies only to cases

¹⁵ *In re Vioxx Prod. Liab. Lit.*, ___ F.R.D. ___, 2007 WL 3332708, MDL No. 1657, Docket No. 12945 (E.D. La. Nov. 8, 2007). A potential fly in the ointment for Merck: Minnesota not only has a six-year statute of limitations, but some Minnesota state courts have recently held that they can use choice-of-law principles to apply Minnesota state law to an out-of-state plaintiff suing an out-of-state defendant who does business in Minnesota, resulting in substantial forum-shopping in that state. Mark Hansen, *Lawsuits Travel Up North*, ABA JOURNAL (Dec. 2007) (“out-of-state plaintiffs make up about 93 percent of drug and medical device cases filed in Minnesota’s state and federal courts” in the last three years). Whether Minnesota will tolerate such blatant forum-shopping in the long run is questionable, but, if they do, it provides a leak that could expose Merck to thousands of additional cases.

¹⁶ Settlement § 13.

pending at trial or on appeal.¹⁷ Cases brought after November 9 are not eligible: thus, there is no feeding frenzy or incentive for attorneys to advertise for more claimants to join the settlement.

Of course, one advantage Vioxx attorneys had that fen-phen attorneys did not is that, to date, there is no scientific case that Vioxx causes latent injuries. If an injury did not manifest itself until several years later, Merck could not hope to stem the tide of new suits until the latency period ended.

Because the \$4.85 billion in the settlement is capped, it becomes a question of dividing up a common fund amongst the settling plaintiffs. But, rather than the standard mass tort settlement mechanism of an inventory settlement where a defendant gives a trial lawyer a lump sum and lets the attorney divvy that amount amongst his clients,¹⁸ the package is administered by neutral, rather than by plaintiffs', attorneys.

Individual plaintiffs who agree to settle will receive points depending on how much Vioxx they used, the nature and degree of their injury, their age, and their preexisting medical conditions.¹⁹ The increased administration costs of this technique will be funded from interest from the settlement fund, and various plaintiffs' attorney administrative committees have the ability to petition the court for common-benefit fees and costs.²⁰

Second, the settlement has strong provisions requiring claims to be provable: plaintiffs must pass three "gates," demonstrating evidence of actual Vioxx usage, evidence of actual injury, and evidence of proximity of Vioxx usage to the injury.²¹ Given the number of plaintiffs who went to trial or almost went to trial who did not use Vioxx and the historical problem of mass tort fraud,²² such protections are impressive. The claims administrator has the power and obligation to audit and investigate fraud.²³ Plaintiffs without such evidence are likely to opt out of the settlement, rather than take nothing, but, with only a couple of exceptions (most notably the Leonel Garza case), Merck has had great success in shutting down these lawsuits. Such a provision, by preventing fraudulent cases from diluting the pot, also increases the amount settling plaintiffs will receive—which is one reason that the plaintiffs' calculator gives such a wide range for the potential value of a point.

Third, the settlement provides strong protections against cream-skimming, the problem whereby the weak cases take the settlement, but the cases with more sympathetic plaintiffs opt

¹⁷ A handful of cases where plaintiffs won, such as *Ernst* and *Garza*, are carved out of the settlement. Settlement § ___ and Exhibit 17.1.23.

¹⁸ *E.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).

¹⁹ Settlement Exhibit 3.2.1.

²⁰ Settlement § 9.2.

²¹ Settlement § 2.2 and Exhibits 2.2.1. – 2.2.3.

²² *See* Chapter III, *supra*.

²³ Settlement § 10.

out and seek larger damages award. Not only does Merck have an out if fewer than 85% of the plaintiffs agree to settle, but Merck can also opt out of the settlement if subclasses of the plaintiffs—such as wrongful death cases—also fail to meet the 85% threshold.²⁴ The large number of opt-outs was a problem that cratered the breast implant class-action settlement.²⁵

Moreover, there is an anti-sandbagging provision to prevent plaintiffs from manipulating the “gate” structure to bring a case to trial. Plaintiffs must bind themselves to submit all of their medical information to the settlement panel.²⁶ Without such a provision, a plaintiff might try to game the system by being excluded from settlement for lack of supporting evidence, and then introducing new evidence at trial to claim that he or she has a strong case. Moreover, participation by those bringing fraudulent cases will reduce Merck’s discovery and pre-trial expenses, as Merck will be able to bring summary judgment motions based on the lack of evidence presented to the settlement administrator.

The most controversial anti-cherry-picking provision of the settlement requires plaintiffs’ attorneys agreeing to the settlement to agree to recommend settlement to all of their clients and attempt to withdraw if they refuse.²⁷ One can recommend all of one’s clients for the settlement, or none of one’s clients, but not an intermediate number. Some have objected to the withdrawal principle, on the ethical grounds that this would leave clients in the lurch,²⁸ but this should be relatively unproblematic: already, attorneys are advertising for the opportunity to represent opt-outs,²⁹ and it is not uncommon for an attorney to refuse to continue to represent a client who refuses to accept a reasonable settlement offer.³⁰ But some states appear to have rules that forbid making agreements to this effect.³¹

²⁴ Settlement § 11.

²⁵ Joni Hersch, *Breast Implants: Regulation, Litigation, and Science*, in REGULATION THROUGH LITIGATION 142, 173-174 (W. Kip Viscusi ed., 2002); Terry Langford, *Judge Warns Parties to Renegotiate \$4 Billion Breast Implant Settlement*, ASSOCIATED PRESS, Aug. 1, 1995.

²⁶ Settlement Exhibit 2.7.3.

²⁷ Settlement § 1.2.8 and Exhibit 17.1.28.

²⁸ 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.

²⁹ Business Wire Press Release, “Kelley / Uustal Reviewing Low Vioxx Settlements” (January 3, 2008).

³⁰ Indeed, many retainer agreements have provisions protecting contingent-fee attorneys in just such an eventuality. *E.g.*, Herbert M. Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 LAW & SOCIAL INQUIRY 795, 810-11 (1998); *cf. also* Note, *Risk-Preference Asymmetries in Class Action Litigation*, 119 HARV. L. REV. 587, 605-06 (2005) (describing renegotiation of fee agreement to encourage client to settle).

³¹ *E.g.*, Texas Disciplinary Rule 5.06(b) (Restrictions on Right to Practice) (“A lawyer shall not participate in offering or making ... an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a suit or controversy....”); Official Comment to TDR 5.06 (“Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.”). The settlement explicitly disclaims the power or intent to operate in contradiction to such rules. Settlement § 1.2.8.

More troubling is the potential conflict of interest an attorney with a large inventory of cases would have. An attorney could very well think that the settlement benefits some of his clients, but not others, and is now in a situation where he cannot fairly represent both sets: to refuse to participate in the settlement because of § 1.2.8 would require him to shortchange the clients who should agree to settlement. Many attorneys can, in good faith, recommend the settlement to all of their clients.³² Those that cannot 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. The settlement agreement permits Merck to “enforce” the provision,³³ but it is unclear what realistic option they have other than precluding client participation,³⁴ 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. Pending motions in the MDL may provide some clarity, but a non-party to the settlement has no right to demand that Merck offer a different settlement than they offered. One possible scenario is for attorneys wishing to retain cases to split their inventories by selling their settling claims to a straw plaintiffs’ attorney for presentment.³⁵ If this becomes widespread, Merck will find that it does not have adequate protection against cherry-picking. However, the Plaintiffs’ Steering Committee, attorney-members of which have the largest bulk of cases, are firmly behind the settlement, and represent that hundreds of other plaintiffs’ attorneys do not object to the settlement.³⁶ Ultimately, the question of whether a plaintiffs’ attorney has complied with the settlement requirements is in the hands of the Settlement Administrator, who will determine the interrelationship between § 1.2.8 and the various state ethical rules, and whose decision is “final, binding, and Non-Appealable.”³⁷

The Vioxx settlement is not a class action settlement, so, though the settlement procedure was overseen by multiple courts where many cases were consolidated, there is no requirement for court approval, and thus no ability for an individual party unhappy with the settlement offer or their particular share of the settlement to crater the entire settlement with a court challenge, as happened in the *Amchem*³⁸ and *Ortiz*³⁹ cases.⁴⁰

³² Mark Lanier has taken this position. Correspondence with Mark Lanier, January 5, 2008.

³³ Settlement §§ 1.2.8, 1.2.9 (“Settlement”).

³⁴ Settlement § 1.2.6.

³⁵ Settlement Exhibit 1.1 requires attorneys to disclose clients in which they have a financial interest, which provides some protection for Merck, as Merck reserves the right under § 1.2.6.3 to reject Enrollment Forms submitted by an Enrolling Counsel who has retained an interest in clients who have not enrolled.

³⁶ Michael Kunzelman and Linda A. Johnson, “Lawyers Challenge Vioxx Settlement,” ASSOCIATED PRESS, January 4, 2008.

³⁷ Settlement §§ 1.2.9, 17.1.62.

³⁸ *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997).

³⁹ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

⁴⁰ See also NAGAREDA *supra* note 11 at ___.

Merck still faces class actions,⁴¹ actions from attorneys general,⁴² and a smaller number of personal injury actions abroad. For example, there are a thousand cases pending in Australia. (There are many fewer claims abroad: Britain's Legal Aid found the Vioxx suits nonviable, and refused to fund them.⁴³ It is only the American system's lack of loser-pays, more lenient evidentiary rules in the admission of for-hire scientific experts, and possibility of unbounded damages that gives them any value in this country.) In addition, the settlement applies only to those claiming heart attack or stroke, and there are several thousand cases (of questionable scientific basis) alleging other injuries. But settling the vast majority of American personal injury actions opens the door for Merck to begin negotiating settlements there. Even if the settlement goes through, one can expect Merck to still end up defending hundreds, and possibly thousands, of suits.

The Michigan Issue

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.⁴⁴ Under a law passed in Michigan in 1996, product-liability suits against pharmaceutical manufacturers are barred if the product was approved by the FDA and there was no FDA finding of fraud.⁴⁵ Thus, no Michigan resident claiming to be injured by Vioxx had a valid claim against Merck.⁴⁶

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.⁴⁷ Michigan residents who did not file suit—and many with ethical lawyers did not file suit—do not get to participate in the settlement.

Other Michigan residents had more brash attorneys who made meritless 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. A number of these cases are pending in the federal and New Jersey MDLs, and there are perhaps even some Michigan residents in some other state courts due to forum-shopping. The New

⁴¹ See Chapter VIII, *supra*.

⁴² *Id.*

⁴³ BBC, "Patients lose Vioxx legal appeal" (Nov. 29, 2005).

⁴⁴ Tex. Civ. Prac. & Rem. Code Ann. §82.007; *Ledbetter v. Merck*, Nos. 2005-59499, 2005-58543, 2007 WL 1181991 (Tex. Dist., April 19, 2007).

⁴⁵ MCL § 600.2649(5).

⁴⁶ *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), *cert. granted*, *Warner-Lambert v. Kent*, 128 S. Ct. 31 (2007). Given the 9-0 ruling in *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001), which *Desiano* essentially eviscerates by limiting it to an implausible procedural posture, it is exceedingly likely that the Supreme Court will reverse in 2008.

⁴⁷ Settlement § 17.1.22.2

Jersey Supreme Court held that New Jersey law did not apply to Michigan cases,⁴⁸ but Judge Higbee refused to dismiss the cases of 250 Michigan plaintiffs pending in her courtroom.

As noted, 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, other contributing risk factors, all of which either augment or discount the eventual settlement amount.⁴⁹ But nowhere in the calculation is there a discount for being a Michigan resident, or for being a Texas resident. Thus, 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 settlement does not distinguish between plaintiffs who live in states with uncapped damages, and plaintiffs who cannot hope to recover millions in non-economic damages. The settlement does not distinguish between plaintiffs whose causes of action are for states that have unfettered punitive damages or plaintiffs.

There are two ways to look at this. One is that the settlement unfortunately rewards Michigan residents with unethical attorneys who filed meritless lawsuits and managed by the luck of the draw to keep them alive while settlement negotiations were pending. The better way to look at it is that the settlement does not treat Michigan residents differently than the residents of any other state because all of the lawsuits are equally meritless, and the settlement is purely one to get out from under the nuisance of litigation and the random lottery award.

The number of potential Michigan plaintiffs left out of the settlement demonstrates the state political collective action problem 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.⁵⁰ Hospitalizations of pregnant women for dehydration have doubled since it has been withdrawn from the market.⁵¹

⁴⁸ *Rowe v. Hoffman-Laroche*, 189 N.J. 615, 917 A.2d 767 (2007).

⁴⁹ Settlement Exhibit 3.2.1; *cf. also* the plaintiffs' steering committee mock calculator of settlement value at <http://www.officialvioxxsettlement.com/calculator/>.

⁵⁰ W. 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).

⁵¹ Paolo 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).

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 Virginia; Merrell Dow Pharmaceuticals or another manufacturer would not be able to limit usage of the drug to Michigan or to suits over the drug to the Michigan courts. Meanwhile, Michigan residents don't 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.⁵² 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 they agreed to a universal preemption rule.

The Economics of the Settlement

The economics of the decision to settle for \$4.85 billion are edifying. Each side allegedly spent millions of dollars at trial in the *Cona* and *McDarby* trials.⁵³ But if cases had continued to go to trial, the marginal expenses would have dropped significantly. Plaintiffs had put together a “trial in a box”—a set of video deposition excerpts and script for exhibits that reduced the expenses of putting on a trial to \$50,000 at the margin.⁵⁴ Though economies of scale would have eventually come into play for Merck, defense costs per trial would remain higher: a plaintiff knows what his or her strategy is going to be and which documents will be used, but the defense has to be prepared to rebut any of a number of allegations of wrongdoing, and familiar with a far greater number of documents and witness statements that might be misrepresented by the plaintiffs.⁵⁵ Add to that the fact that most defense firms bill by the hour, and have the incentive to structure staffing and work schedules accordingly, and Merck could easily expect to pay in the low six digits for each plaintiff's trial (including pre-trial briefing and investigation), and another \$100,000 or so for any appeal. (Plaintiffs would also incur tens of thousands of expenses in appeals were cases go to trial.) With 61,000 plaintiffs, Merck faced \$15 billion in litigation expense were each case to be tried—and that is before the risk of any losses at trial.

⁵² Ironically, 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 thinktank 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).

⁵³ See discussion at Chapter III, *supra*.

⁵⁴ Heather 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 that it would cost him \$2 million to try a case. Correspondence with Mark Lanier, Jan. 5, 2008.

⁵⁵ See Chapter II, *supra*.

Of course, as we have seen,⁵⁶ not every case would be tried. Thousands of plaintiffs' cases were dismissed with prejudice; plaintiffs dismissed with prejudice or postponed dozens more scheduled trials rather than risk give Merck additional momentum and publicity from trial victories. Even with the cases the plaintiffs were willing to take to trial, and even with the problems of pro-plaintiff rulings that were reversible errors, Merck won over two thirds of the seventeen cases that were tried to verdict, with most of the losses expected to be reversed on appeal. It is quite conceivable that, even with a marginal cost of \$50,000, plaintiffs would have lost money. 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. Given that the four judgments entered in favor of plaintiffs *averaged* over \$20 million each, plaintiffs plainly did not expect to win very many cases, or to receive positive rulings from the Texas, New Jersey, and federal courts on appeal.

If 85% of the 61,100 plaintiff groups eligible for the settlement sign up, that is over 50,000 plaintiffs splitting a pot of \$4.85 billion—less than \$100,000 a plaintiff. This small sum is good news in two ways for Merck. There is the obvious reason that indicates that Merck will not be paying much money, and perhaps even saving money over the cost of litigating and winning every case. Moreover, even if a Minnesota or other court reopens litigation against Merck to forum-shoppers, the small settlement amount indicates Merck's confidence (and the trial lawyers' lack of confidence) in the merits of its case: the "chicken catchers" model of recruiting plaintiffs to sue in Minnesota and attempt a settlement add-on is not likely to be successful. There will be holdouts—with 61,100 plaintiffs, some of whom were encouraged to sign on to litigation with wild promises or statements from their trial attorneys, there will be those with unrealistic expectations of walking away millionaires or punishing Merck, and there will be trial lawyers willing to play the lottery litigation game in bringing those cases.⁵⁷

The \$4.85 billion settlement, while large, thus proves itself to be a nuisance settlement: it is cheaper for Merck to pay that money than it is for Merck to win every case in court. But winning every case would cost Merck \$600 million in attorneys' fees (plus countless hours of executive time wasted) a year. The billions of dollars serves as an extortionate insurance payment against having to continue to do so plus the small risk that there would be a set of outlier courts that chose to bankrupt Merck.

The settlement can be seen as a vindication of sorts of Merck's hard-line stance against an early settlement, given some Wall Street analysts' claims that the mass tort litigation could be bankrupting—but, with a nearly \$2 billion payday for plaintiffs' lawyers, it can also be seen as a vindication to the trial bar, which will be rewarded for bringing what their actions have shown to be meritless cases.

⁵⁶ See Chapter II, *supra*.

⁵⁷ Business Wire Press Release, "Kelley / Uustal Reviewing Low Vioxx Settlements" (January 3, 2008).