

CLASS ACTION WATCH

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The Vioxx Litigation

by Ted Frank

On September 30, 2004, Merck withdrew its painkiller Vioxx from the market because of a study showing a small but statistically significant increase in risk of cardiovascular events from



differences from state to state, making a class impossible. “No class action is proper unless all litigants are governed by the same legal rules.”¹ This is because variations in state law may swamp any common issues and defeat predominance.”²

long-term usage of the drug. What had been a trickle of litigation over the drug became a flood. As of January, there were over 27,000 personal-injury lawsuits involving over 45,000 plaintiff groups, and another 265 putative class actions filed. Plaintiffs’ attorneys, it seems, are using the procedural class-action mechanism to achieve substantive advantages in litigation. The vast majority of the class actions Merck faces can be placed in one of four categories.

Thus, *In re Vioxx Products Liability Litigation* held that a nationwide personal-injury class was inappropriate in the Vioxx litigation.³

Moreover, as Judge Fallon noted, the individualized issues are complex:

The plaintiffs’ allegations that Merck failed to warn doctors adequately regarding the alleged health risks of Vioxx—whether they sound in strict liability or negligence—necessarily turn on numerous individualized issues such as: the alleged injury; what Merck knew about the risks of the alleged injury when the patient was prescribed Vioxx; what Merck told physicians and consumers about those risks in the Vioxx label and other media, what the plaintiffs’ physicians knew about these risks from other sources, and whether the plaintiffs’ physicians would still have prescribed Vioxx had stronger warnings been given.

Constitutional due process demands Merck have the opportunity to defend against each case individually: “one set of operative facts would

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I. PERSONAL INJURY CLASS ACTIONS

Many seek to try personal-injury cases as a class action. There is very little chance a nationwide personal-injury class will be certified in any jurisdiction. Pharmaceutical products liability litigation requires the substantive law of fifty different states, and product liability law (as well as the learned intermediary defense) has substantial

Welding Fume: A Disappearing Mass Tort?

Over the last several years, a number of prominent plaintiffs’ attorneys have targeted the welding industry with lawsuits that allege that exposure to the manganese in welding fumes causes neurological disorders. These attorneys have blanketed airwaves and billboards with advertisements, held mass screenings, briefed analysts about the threat that this litigation poses to large welding manufacturers, and filed thousands of lawsuits in federal and state courts, in the hopes of bringing the industry to its knees and forcing a large settlement.¹

In recent years, all but one of the welding fume trials resulted in defense verdicts (the one exception was in Madison County). Defendants have undertaken discovery efforts, revealing numerous fraudulent claims that raise questions about the plaintiffs’

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not establish liability and [] the end result would be a series of individual mini-trials which the predominance requirement is intended to prevent.”⁴ Similarly, the fact that plaintiffs have individualized damages claims, including claims for non-economic damages, prevents compliance with the predominance requirements. (In the now-infamous *Dukes v. Wal-Mart* case, in order to shoehorn the case into certification, the Ninth Circuit permitted the class plaintiffs to waive what would be billions of dollars of non-economic damages if the complaint’s allegations were true, a mechanism that seemed designed to benefit the trial lawyers ahead of any class member that had actually suffered injury.) One would not expect Judge Fallon to certify even the individual state personal-injury class actions.

An interesting question is whether Judge Fallon will be willing to hold that his federal decision would bind pending state-court class action certification decisions, or whether plaintiffs will have the opportunity to shop for a better ruling. Judge Easterbrook in *In re Bridgestone/Firestone, Inc.* held that a federal ruling that a class certification was inappropriate precluded state courts from certifying a class action on the same facts, and that the Anti-Injunction Act did not prohibit a federal court from enjoining such proceedings.⁵

Given the unlikelihood of a personal-injury class action certification, why would the plaintiffs’ bar devote any resources? The answer can perhaps be found in the Supreme Court’s decision in *American Pipe & Construction Co. v. Utah* which held that the statute of limitations for individual class members’ causes of action were tolled while a class action certification was pending.⁶ As Jim Beck and Mark Herrmann point out on their *Drug and Device Law* blog, this decision creates an incentive to file putative class actions that are not necessarily strong on the merits. Ironically, as the two note, the *American Pipe* Court justified its holding on the grounds that, without a tolling rule, courts would be deluged with duplicative filings. But *American Pipe* has had no administrative advantage in practice.

II. MEDICAL MONITORING CLASS ACTIONS

Merck faces a variety of class actions seeking medical monitoring relief. Medical monitoring was originally devised as a remedy in the unique case of an airline accident. The case involved depressurization and hypoxia where there was no question that the plaintiff children, refugees from Vietnam, faced irreparable harm without an immediate comprehensive medical exam. Plaintiffs

took that precedent and ran with it, seeking to extend it to situations where relief was not so clear-cut.

Courts have differed on the appropriateness of expansion of this new cause of action to cases where plaintiffs have suffered no physical injury. The Supreme Court, for one, rejected medical monitoring as a remedy under the Federal Employers’ Liability Act in *Metro-North Commuter Railroad v. Buckley*, noting the dangers of creating a new cause of action that might create unlimited liability, the difficulties of having a court administer a complicated medical plan, and the individualized nature of plaintiffs’ medical conditions.⁷ Indeed, a wide-open medical-monitoring cause of action would expose nearly every manufacturer in America to liability, given the possibility of arguing that any given substance from automobile pollution to over-the-counter medicine to saturated fats could bring rise to the need for medical monitoring. Meritorious and meritless claims would be difficult to distinguish, and the confusion would almost certainly encourage fraud. The West Virginia Supreme Court, at the other end of the spectrum, created a medical monitoring cause of action in *Bower v. Westinghouse Electric and North American Philips Corporation*. A very small risk of injury was sufficient to create a cause of action, and there was no requirement that the medical monitoring be effective, or even that there be oversight by the court to ensure that lump sum payments were used for the sought-after remedy.⁸

The Vioxx medical monitoring class action that is furthest along arises in Judge Higbee’s courtroom in Atlantic City, *Sinclair v. Merck*. The New Jersey Supreme Court had already endorsed a broad medical monitoring remedy in *Ayers v. Township of Jackson*, which permitted a lump-sum payment in an environmental tort case involving drinking water.⁹ Even so, with the exception of environmental torts, New Jersey had only permitted medical monitoring where there was physical injury. Moreover, the New Jersey products liability law required an injury before bringing suit.¹⁰ Thus, Judge Higbee dismissed *Sinclair* as outside of New Jersey medical monitoring law: a product-liability suit could not claim risk of injury to support a medical monitoring remedy. The New Jersey Court of Appeals reversed on grounds that the dismissal was premature. Still, even if *Sinclair* returns to the trial court, there remains no evidence that Vioxx has a long-term effect once it has been metabolized from the system, and thus no scientific evidence supporting a medical monitoring remedy.

III. “CONSUMER FRAUD” CLASS ACTIONS

The greatest danger to Merck shareholders comes

from the dozens of “consumer fraud” class actions seeking recovery under various broad state consumer fraud laws. These lawsuits seek recovery, claiming not that Vioxx caused them personal injury, nor that Vioxx did not effectively alleviate pain, but that, because Merck allegedly failed to disclose information to the public, it received a higher price than it would have otherwise. Plaintiffs argue that the broadest of these consumer fraud laws do not require any showing of reliance, or a showing that the consumers for whom recovery is sought were affirmatively misled. In one such case, *International Union of Operating Engineers Local 68 Welfare Fund v. Merck*, Judge Higbee held that New Jersey’s consumer fraud laws applied to all of Merck’s United States sales and certified a nationwide class of third-party insurers; an intermediate court affirmed that class certification, which is now pending before the New Jersey Supreme Court, which will hear argument shortly.

This class action certification did not take into account basic choice-of-law principles by applying New Jersey law to transactions in all fifty states, regardless of the location of the doctor who prescribed the drug, the patient who took the drug, or the third-party payor. The court’s rationale asks, in effect, “What state *wouldn’t* want stricter consumer-fraud liability?” But defendants maintain that it is reasonable to assume that several states are concerned about the disincentives created by overdeterrence when consumer liability attaches without injury at the same time liability attaches with injury.¹¹

Second, the court undid the statute’s requirement that consumer fraud must be shown to cause an individual’s injury by rewriting the requirement to fit the class action, and holding that it was sufficient to allege “pervasive” defendant misconduct. But class actions are procedural devices, and cannot change the underlying substantive law or the rights of a defendant to present every available defense (a right reaffirmed by the Supreme Court in *Philip Morris v. Williams*). Third, it remains unclear how “ascertainable loss” is going to be calculated on a class-wide basis. Every third-party payer has its own individualized means of determining which prescription drugs will be covered by its formulary. Should the *Local 68* suit proceed, plaintiffs will seek treble damages disgorging billions of dollars paid to Merck for Vioxx, plus attorneys’ fees.

IV. SHAREHOLDER CLASS ACTIONS

Merck stock dropped dramatically when it announced the withdrawal of Vioxx from the market. And where there is a large drop in stock price, a shareholder class action usually follows, demanding that present

shareholders compensate previous shareholders’ losses (with a substantial commission for the trial lawyers who make the arrangement). Investors who are diversified shareholders are hurt by such lawsuits in the aggregate: the lawsuits merely transfer wealth from their left-hand pocket to their right-hand pocket, because *ex ante*, one is just as likely to be a seller of an artificially inflated share of stock as a buyer, and shareholder lawsuits do nothing to disgorge wealth from the innocent sellers. (Inside trades are, of course, another matter.) But attorneys’ fees are calculated on the aggregate, and, of course, shareholders also pay for the defense of such claims.

A major event in any shareholder class actions comes when the court chooses the lead plaintiff. The internecine battle is especially noteworthy in this instance, because one of the lead firms appointed, Milberg Weiss, is under the shadow of an indictment after two of its regular lead plaintiffs pled guilty to taking kickbacks from the firm. Its lead client fired the firm, but Milberg Weiss did not inform the court, resulting in months of further litigation that was resolved when Milberg Weiss agreed to cut in another firm, Bernstein Litowitz, in the lead-counsel pay-offs. Merck’s motion to dismiss the entire case is pending.

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Endnotes

- 1 *In re Bridgestone/Firestone*, 288 F.3d 1012, 1015 (7th Cir. 2002) (“*Firestone I*”).
- 2 *Castano v. American Tobacco Co*, 84 F.3d 734, 741 (5th Cir. 1996).
- 3 ___ F.R.D. ___, 2006 WL 3391432 (E. D. La. Nov. 22, 2006).
- 4 *Steering Committee v. Exxon Mobil Corp.*, 461 F.3d 598, 602 (5th Cir. 2006). *See also Philip Morris v. Williams* (U.S. Feb. 21, 2007).
- 5 333 F.3d 763 (7th Cir. 2003).
- 6 414 U.S. 538 (1974).
- 7 521 U.S. 424 (1997).
- 8 522 S.E.2d 424 (W.Va. 1999). *See generally* Victor E. Schwartz *et al.*, *Medical Monitoring: The Right Way and the Wrong Way*, 70 Mo. L. REV. 349 (2005).
- 9 525 A.2d 287 (N.J. 1987).
- 10 N.J.S.A. 2A:58C-2.
- 11 *Firestone I*; *see generally* Michael Greve, *Harm-Less Lawsuits? What’s Wrong with Consumer Class Actions* (AEI Press 2005).