



American Enterprise Institute for Public Policy Research

The Vioxx Litigation

Part II

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American Enterprise Institute

AEI WORKING PAPER #124, DECEMBER 14, 2005

www.aei.org/workingpapers
www.aei.org/publication23542
#19382

Abstract

Part I of this AEI Working Paper examined the history of Vioxx and asked questions about potential over-deterrence from having manufacturers bear the full measure of the social cost of drugs through strict products liability or failure-to-warn claims in the context of two early lawsuits brought against its maker, Merck. This installment looks at the problems presented by the Vioxx cases for the litigation system as a whole.

Over-Deterrence through Expanding the Circle of Plaintiffs

Perhaps the most remarkable feature of the first Vioxx trial was the lack of scientific evidence showing how Vioxx might have caused Robert Ernst harm. At fifty-nine years old, Ernst died suddenly of arrhythmia after having taken Vioxx for just seven months. My colleague John E. Calfee has covered the science in detail and persuasively argues that proving specific causation of a heart attack from Vioxx is next to impossible, and that showing general causation is an unlikely proposition in itself.¹ But it is worth exploring the intersection of science and law.

Mark Lanier, Ernst's widow's attorney, regularly ridiculed Merck witnesses for using scientific concepts. The most egregious example occurred during the videotaped cross-examination of Merck's chief executive, Raymond Gilmartin:

Mr. Lanier said during the deposition that the study actually showed that the Vioxx users had six episodes of heart attacks or strokes while the placebo users had only one. Mr. Gilmartin, while not disputing the accuracy of the statistic, responded that the difference didn't reach "statistical significance," the point at which a result is not likely due to just chance.

Then Mr. Lanier asked Mr. Gilmartin, "have you got \$6 on you? I'm going to give you a dollar and you give me the six. It is not statistically significant in the difference. What do you think, are you in or out?"²

This is the very definition of badgering the witness. Is Merck to be punished for failing to heed a statistically insignificant warning if a lay jury cannot be persuaded that statistical significance is a meaningful and important scientific concept?

This was not the only time Lanier asked the jury to reject science. Lanier repeated to the jury numerous times a statement from the *Merck Manual of Medical Information* that "Abnormal heart rhythms (arrhythmias) occur in more than 90% of people who have had a heart attack."³ The press repeated this claim, so seemingly pregnant with significance in the *Ernst* trial, uncritically. Dr. David Egilman—a Brown professor who was in this case presented as a cardiological expert although for years he was used as an expert in occupational lung disease cases—told a jury under oath, according to one sympathetic account, that this demonstrated that Ernst must have died of a heart attack that was

¹ John E. Calfee, "The Vioxx Fallout," AEI Working Paper; John E. Calfee, "Junk Science Reigns," *AEI On the Issues*, September 2005.

² Barbara Martinez, "Lawyer Outlines Attack on Merck for Vioxx Trial," *Wall Street Journal*, June 24, 2005; Kristen Hays, Associated Press, July 12, 2005. Though Lanier bragged to reporters that he intended to use this excerpt ("I'm going to play it for the jury because that's bogus. That's what I call dancing."), plaintiff's attorney Evan Schaeffer argues that Lanier did not actually do so at trial. Press accounts are unclear.

³ Merck, *Merck Manual of Medical Information*, Online Medical Library, February 2003, available at <http://www.merck.com/mmhe/sec03/ch033/ch033c.html> (last accessed November 14, 2005).

caused by Vioxx.⁴ In fact, though, the “90%” statistic is irrelevant to Ernst’s case, and the fact that Lanier chose to prejudice a jury with it demonstrates the consistent disregard for facts in this trial. Even if 100% of heart attacks involve arrhythmia, arrhythmia can still kill without causing a heart attack.

Consider the following thought-exercise: Imagine a scenario where attorney Roscoe W. Chandler declares that African explorer Jeffrey T. Spaulding must have been attacked by a hyena because Spaulding was attacked by an animal with four legs, and, after all, over 90 percent of hyenas have four legs. One can immediately see that this is absurd. The question is not what percentage of hyenas have four legs, but what percentage of four-legged animal attacks are by hyenas, rather than by lions or dogs.

Yet Lanier and Egilman told the jury that 90 percent of heart attacks involve arrhythmias, rather than what percentage of fatal arrhythmias involve heart attacks. The misleading statistic apparently sells, despite its fundamental logical flaw: Lanier still mentions it on television.⁵

An Associated Press story from February 7, 2005, illustrates a typical plaintiff’s theory of causation:

Lawrence E. Feldman, a Jenkintown attorney whose firm has been advertising on the Internet for people who took Vioxx, said most attorneys thinking about getting involved in the litigation are looking for any clients who had a heart attack or stroke within 72 hours of taking the drug, regardless of how much they took or for how long.

Feldman acknowledged that it may be tough for any client to show conclusively that their heart problem was caused by Vioxx, but he said patients, not the drug company, should get the benefit of the doubt.

“One man’s pirate is another man’s hero,” Feldman said. “If you’re talking about people who had a stroke or a heart attack within a few days of taking this drug, I don’t think anyone has to look for any existential truth about whether they should be rewarded.”

Post hoc ergo propter hoc is, of course, the same theory of causation that suggests that the World Series victory of the Red Sox caused a tsunami two months later. Applied to Merck or another manufacturer, though, such reasoning will result in further over-deterrence. Some fraction of Vioxx users are going to suffer from heart-related problems, be they heart attack, stroke, or arrhythmia (if for no other reason than because some fraction of all populations suffer these problems). If the relative risk of Vioxx is, as

⁴ Daniel Keller, “Plaintiffs’ Expert Testifies that Vioxx Caused Death,” First Vioxx Trial blog, July 28, 2005, available at <http://firstvioxxtrial.blogspot.com/2005/07/plaintiffs-expert-testifies-that-vioxx.html> (last accessed November 14, 2005).

⁵ See, for example, *Kudlow & Company*, CNBC, August 23, 2005.

APPROVe suggested,⁶ 1.92, that means a person who took Vioxx for eighteen months who suffered a cardiovascular event is more likely than not to have suffered his or her heart attack or stroke for reasons other than Vioxx. If the relative risk is 1.33, then this is true for three out of four sufferers. The deaths attributable to Vioxx are only a fraction of total deaths, but if a defendant is held liable for each of the deaths on *post hoc* grounds, including deaths from causes not even linked to Vioxx, then the cost-benefit calculus is once again distorted and the only thing the lawsuits deter is the research and development of new socially beneficial drugs.

In the December 2005 federal trial over the death of Dicky Irvin, there was the same attempt to blame Merck for a death almost certainly caused by other factors: Irvin was overweight, had high blood pressure, a family history of heart disease, and atherosclerosis blocking 60–70 percent of the coronary artery where his fatal blood clot formed. But the trial was permitted to proceed under the theory that Irvin’s twenty-three-day usage of Vioxx caused his heart attack, and a single holdout juror was able to hang the jury and cause a mistrial. Plaintiffs need to win only a small percentage of such cases to create over-detering distortions. Mark Lanier frankly admitted that the trial lawyers’ strategy is one of the lottery ticket: “In mass torts, it’s like batting in baseball. The plaintiffs are great if they bat .333.”⁷

This distortion grows even larger because of the dozens of class actions pending under overbroad consumer fraud laws that seek recovery from Merck of moneys paid by plaintiffs who have suffered no physical injury whatsoever. A New Jersey state court has certified a nationwide class action seeking such damages.⁸ Not only can a manufacturer not obtain the full amount of benefits that accrue to society from selling a new drug, but the revenues the manufacturer does obtain are at risk of being confiscated by attorneys through treble damages.⁹

Over-Deterrence through Excessive Damages

In the Ernst case, the Brazoria County jury awarded \$253 million in damages, an amount that will be reduced to approximately \$26 million because Texas law caps punitive damages; \$24 million of that figure is meant to be “compensatory” damages.

The oddity of this “compensatory” damages figure can be illustrated by that fact Mrs. Ernst is better off because her husband, a fifty-nine-year-old produce manager at Wal-Mart, died from a sudden arrhythmia rather than from a brain tumor or lightning strike. Odds are overwhelming that she did not have a \$24 million life insurance policy on him to compensate her in the event of his death. Compensatory damages are supposed to

⁶ R.S. Bresalier et al., “Cardiovascular Events Associated with Rofecoxib in a Colorectal Adenoma Chemoprevention Trial,” *New England Journal of Medicine* 352, no. 11 (2005): 1092–1102.

⁷ Brenda Sapino Jeffreys, “Hundreds of Cases Hang in Balance as First Federal Vioxx Trial Begins,” *Texas Lawyer*, November 29, 2005.

⁸ *International Union of Operating Engineers Local 68 Welfare Fund v. Merck & Co. Inc.* See Tim O’Brien, “Class Action Could Mean Billion-Dollar Exposure for Merck,” *New Jersey Law Journal*, September 2, 2005.

⁹ For much more on this critical question, see Michael S. Greve, *Harm-Less Lawsuits* (Washington, D.C.: The AEI Press, 2005).

compensate the victim, leaving the plaintiff in the same position as if the tort never happened. Awards like the one awarded in the Vioxx case demonstrate the problem with uncapped non-economic damages, which, with no rational basis for computation, are determined solely by the self-serving testimony of the plaintiff and friends, and the whim of the jury. If Mrs. Ernst were less grandmotherly looking, or of a different race than the jurors, or had a hideously grating speaking voice, the award would very likely have been completely different.

(Indeed, the difference in the sympathy factor between Carol Ernst, the grieving widow plaintiff, and Frederick Humeston, the living plaintiff who was caught on the stand exaggerating the impact of his heart attack and was under investigation by the Postal Service at the time of his heart attack for allegedly malingering on a disability claim, may by itself be enough to explain the difference between the two Vioxx juries' verdicts on the question of Merck wrongdoing. Irvin's widow's attorney, Jere Beasley, has suggested as much in an early November interview with the *Star-Ledger* where he trumpeted the fact of Irvin's death as a potential deciding factor that would "move" the jury.¹⁰)

Had there been a \$250,000 cap on non-economic damages in place along with Texas's punitive damages cap, the jury's award would still have been a healthy \$2.3 million, including \$700,000 in compensatory damages—very likely more than whatever insurance policy the Ernsts held.

Mrs. Ernst may well prefer her husband of one-year to still be alive rather than have the money; such is the absurdity of "compensatory" damages that even large amounts seem unable to compensate. But, as a society, we cannot ignore the problem of over-deterrence of defendants. As it is, as mentioned above, Merck cannot collect \$2.3 million for every life it saves. It certainly cannot collect \$26 million, or \$253 million.

If juries are permitted to grant jackpot-sized awards that overcompensate by factors of ten or a hundred, there is a huge distortion in incentives. *First*, even if juries act perfectly, the cost-benefit calculus is upset because the defendant will be paying a multiple of the true costs imposed.

Second, the more likely a jury is to make a mistake, the more distortion is introduced into the system if jurors have the power to award nine-digit sums. Suppose ninety-nine juries correctly exonerate an innocent defendant, but the hundredth incorrectly awards \$253 million. The defendant will be facing an average expense of \$2.5 million (plus defense attorneys' fees) per plaintiff. Even if you believe (as I do) that juries get it right most of the time, an outlier jury making a mistake can undo the work of all the juries that get it right. This fact indicts the system as a whole and shows the irrelevance of liability-reform opponents' arguments that defendants win a (small) majority of cases.

Third, the more likely a jury is to make a mistake, and the greater the damages a mistaken jury can award, the greater incentive there is for plaintiffs' attorneys to treat litigation like a lottery ticket. If a plaintiffs' attorney can bring a thousand cases, and recover in the tens

¹⁰ George E. Jordan, "Vioxx Cases Face Tougher Litmus Test" *Star-Ledger*, November 27, 2005.

of millions for each victorious case, he or she does not have to win very many cases to make a healthy living; one might grow rich simply on the mistaken cases. (While press accounts claim that plaintiffs' lawyer Christopher Seeger laid out several million dollars to try *Humeston*, that figure probably includes the costs of depositions and evidence-gathering that will later be spread among future trials.) The prospect of jackpot justice also creates incentives for outright fraudulent claims, as one has seen in the asbestos, silicosis, and fen-phen arenas. One might already be seeing it in the Vioxx scramble. In *Rogers v. Merck*, an Alabama case that almost preceded *Ernst* to trial, Merck argues that the decedent never even took Vioxx.¹¹

The absence of caps to moor a jury's decision-making can compound the effect of errors in the system and distort the incentives corporations face.

Regulation by Litigation and Public Policy by Game-Show

We have seen how individual mistakes by juries and courts can have an impact that far outweighs the correct decisions of (many) other juries. And we have plenty of reason to believe that the *Ernst* jury made a mistake.

¹¹ Alex Berenson, "Merck Asks Court to Dismiss First Vioxx Suit," *New York Times*, April 13, 2005. The story tells an astonishing tale of chutzpah:

[A]ccording to Merck's filing, Ms. Rogers initially said that her husband "took Vioxx for a long time on a very regular basis." When Merck's lawyers pressed her for details, she said that he had visited a doctor on Aug. 10, 2001, 25 days before he died, and received a prescription for Vioxx. But the prescription was never filled, according to Merck. Instead, Ms. Rogers said that her husband had taken samples of Vioxx he received from his doctor in the month before he died. She said she stood next to him when he received the samples.

At a deposition last January, Ms. Rogers offered an unopened pack of 32 Vioxx sample pills to back her claim. Merck's lawyers then contended that because the pack was not opened, Mr. Rogers could not have taken the sample pills in it.

Ms. Rogers then changed her story, according to Merck's filing yesterday. She claimed that her husband had been given three sample packs, totaling 96 pills. He had taken about 20 pills before he died, she said. She also said she had kept the rest in her safe. Later, she provided Merck with about 12 pills from a second sample pack of 32. She claimed the third pack had been stolen after she moved it from her safe to a book bag in her car, though she acknowledged that she had never filed a police report for the theft.

Suspicious of Ms. Rogers's story, Merck checked the samples, which federal rules require be closely tracked. The company said its records showed that the samples did not arrive at its distribution warehouse until March 2002, six months after Mr. Rogers died.

Dr. William Clancy, the doctor who treated Mr. Rogers, also contradicted Ms. Rogers's story, saying that he usually gave out only two to five days' worth of Vioxx.

The Alabama state-court judge refused to grant summary judgment. Not only is the plaintiff not being charged with perjury, but she still has the opportunity to recover "damages" from Merck.

A *Wall Street Journal* article published some stunning quotes from jurors that seem to demonstrate a decision made on irrational grounds.¹² “‘The big guys didn’t show up,’ said [juror John] Ostrom. ‘That didn’t sit well with me. Most definitely an admission of guilt.’” But there are several thousand Merck lawsuits. Even the senior Merck attorneys with responsibility for Vioxx lawsuits cannot attend every single Merck trial. Is the company supposed to shut down so the executives can serve as a full-time courtroom audience? Ostrom also bragged to the *Journal* that he did not understand the science behind Merck’s argument:

Jurors who voted against Merck said much of the science sailed right over their heads. “Whenever Merck was up there, it was like wah, wah, wah,” said juror John Ostrom, imitating the sounds Charlie Brown’s teacher makes in the television cartoon. “We didn’t know what the heck they were talking about.” . . .

One juror, Ms. Blas, had written in her questionnaire that she loves the Oprah Winfrey show and tapes it. “This jury believes they’re going to get on Oprah,” [jury consultant Lisa] Blue told Mr. Lanier. “They only get on Oprah if they vote for the plaintiff.”

Two days later, facing the jury with his final argument, Mr. Lanier . . . hammered home the point that they would be sending a message that would be heard widely. “I can’t promise Oprah,” he said, but “there are going to be a lot of people who’ll want to know how you had the courage to do it.”

As he made the Oprah reference, Mr. Lanier looked at Ms. Blas in the eye. She says she broke out into laughter and liked the lawyer’s attention to her. “That told me he read those profiles and tried to assess each and every one of us,” Ms. Blas said.

A *Humeston* juror who voted for the defense was not much better: “[Juror Vickie] Heintz also praised Merck lawyer Diane Sullivan for making eye-contact with the jurors and said Humeston’s attorneys were too abrasive. ‘I thought that was a big turnoff,’ she said.”¹³ And in *Plunkett*, jurors reported to the *Wall Street Journal* that the holdout juror was unwilling to consider the causation issue because of his perception of the unrelated issue of Merck’s marketing.¹⁴

Many defenders of the *Ernst* verdict have argued that the problem lies not with the jury, but with the way that Merck tried the case: among the punditry’s second-guessing complaints are claims that Merck should have had a more dynamic lead attorney, that that lead attorney should not have been bald, that attorneys should have done more

¹² Heather Won Tesoriero, Ilan Brat, Gary McWilliams, and Barbara Martinez, “Merck Loss Jolts Drug Giant, Industry,” *Wall Street Journal*, August 22, 2005.

¹³ Theresa Agovino, Associated Press, November 3, 2005.

¹⁴ Heather Won Tesoriero and Barbara Martinez, “Lone Holdout Forces Mistrial in Third Vioxx Case,” *Wall Street Journal*, December 13, 2005.

investigation of the plaintiff's case before the trial, that attorneys should have done a better job of explaining the science, that attorneys should not have cross-examined the widow, and that executives performed poorly on the stand.

Similarly, Christopher Seeger was second-guessed for losing *Humeston*, with other plaintiffs' attorneys suggesting he spent too much time arguing causation and not enough time demonizing Merck's marketing. The latter allegation seems especially unfair: the comments of the jurors to the press suggest that they were not going to respond to additional mischaracterization of Merck documents, with one juror especially unimpressed by the tactic of a plaintiff's expert witness from both trials, Dr. Benedict Lucchesi, being moved to tears by the supposedly damning implications of an innocuous email.¹⁵

These criticisms of the attorneys (and witnesses) seem to suffer from a Panglossian approach to the jury system. The jury decided for Ernst: therefore if Ernst did not deserve to win, the defense attorneys erred by failing to persuade the jury of the soundness of the arguments for exonerating Merck. But this is a curious rationalization: is it really the case that billions of dollars of the economy should be redistributed purely on the basis of oratorical guile, or the emotional appeal of the plaintiff seeking the award? These sorts of game-show contests may be appropriate for *The Apprentice*, but it is hard to justify why, without assuming the conclusion, an ideal democratic society would choose to resolve issues with such huge public policy implications this way.

Moreover, the secondary effects go well beyond the public policy implications in the pharmaceutical industry. If, even at this rarified level of a trial with national attention, an especially skillful trial lawyer has the ability to create multi-million-dollar wealth transfers that a marginally less skillful trial lawyer from a top defense law firm cannot stop, then those with that talent, on both the plaintiffs' side and the defense side, can extract billions of dollars of wealth from the economy. (Billing rates, profits, and salaries for defense firms have skyrocketed in the last ten years as the stakes from litigation have grown, and million-dollar-plus profits-per-partner are commonplace among elite law firms.) As law becomes more and more a means to fantastic wealth rather than a profession with ethical obligations to justice and public service, the lottery effect takes hold. Millennia ago, Aristophanes satirized this problem in Athenian society in his play *The Clouds*. Power in Cloud-Cuckoo Land, a thinly veiled version of Athens, resided in those who could persuade juries through the most sophistic reasoning, while the skills needed to proceed in litigious social life were so valued that the citizenry spent excessive amounts of time and money learning them.

¹⁵ Thomas Ginsberg, "Jurors Fault Plaintiff," *Philadelphia Inquirer*, November 4, 2005. The author of the 1997 email, Briggs Montgomery, argued against permitting patients on a low-dose aspirin regimen to participate in a clinical study on Vioxx. Such studies took place anyway. The email was later the centerpiece of a notorious altercation during the trial when Merck attorney Diane Sullivan shouted at Judge Higbee over the court's ruling striking Montgomery's testimony explaining his email as a sanction for Montgomery's other testimony that consisted of previously undisclosed expert opinions.

The problem is not limited to creating too many lawyers: if billions of dollars rest upon executives' performance on the witness stand, corporate survival will depend less upon executives' business skills than their litigation skills.

Perhaps we do want to create incentives for our best and brightest students to take their creativity and go into law instead of science, engineering, medicine, or business. But if so, we should have that debate before the power of the trial lobby continues to grow to the point where neither political party is willing to challenge it. Those who defend *Ernst* by arguing that it was the consequence of the differing skill of the attorneys do more to indict the system as a whole than any critique of individual legal or procedural rules do.

Why the *Ernst* Verdict May Not Stand and Why This Is Small Consolation for Merck

Some commentators have speculated that cases like *Ernst* could drive Merck into bankruptcy, but this seems overstated. Merck has indicated that they are not going to roll over and settle, but will instead fight an unfair judgment through appeal. While press coverage barely hinted at it, this trial was so ludicrously unfair that it is hard to imagine that Texas appellate courts are going to let the verdict stand.

Most notably, the expert evidence was bootstrapped. Texas effectively adopted a standard similar to the federal *Daubert* standard in *Merrell Dow Pharm., Inc. v. Havner*.¹⁶ *Havner* presented the same fact-pattern as *Ernst*: an expert that testified based purely on speculation and conjecture that a drug was responsible for causation. The Texas Supreme Court noted “Reasonable probability cannot be created by the mere utterance of magic words by someone designated as an expert.” A reasonable appellate court is going to strike the expert testimony, and, at a minimum, reverse the case for retrial; it is not inconceivable for Merck to win judgment if it succeeds in excluding enough expert evidence.¹⁷ A reasonable appellate court is not going to countenance the mass of irrelevant and prejudicial testimony that was introduced regarding executive wealth, evidence that Judge Fallon excluded in the federal trial. I will let others evaluate whether Texas law would also reverse based on the procedural shenanigans of a surprise witness introduced after the opening statements, but it seems rather pointless to have procedural rules against such “sandbagging” if they are not invoked in this circumstance. The case may reach the Texas Supreme Court before it is reversed, but I think there will be a reversal. The fact that, months later, *Ernst* still has not moved for entry of judgment suggests that her attorneys believe the same thing, and wish to delay the day of reckoning as long as possible to attract new clients—if *Ernst* believed the verdict in favor would stand, there would be no reason to delay seeking entry of judgment, since the sooner judgment is entered, the sooner she could collect from Merck.

¹⁶ *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997).

¹⁷ Although federal courts have a reputation for stricter standards of expert evidence admission, Judge Eldon Fallon has committed the same error in the first federal *Vioxx* case by admitting expert evidence that he characterized as “wholly conclusive, rather than explanatory,” and “littered with circular reasoning.” *Plunkett v. Merck* (E.D. La. No. 05-4046 November 18, 2005). Should Merck lose the *Plunkett* retrial, they will have strong grounds for appeal.

It is ironic that many liability reform opponents point to verdict reductions or reversals to argue that further reform is not needed. Why seek the large damages in the first place? A reversal, though, will be only partial consolation for Merck, whose reputation is tainted from the publicity from this verdict. The *Ernst* sound bites in press coverage have not included the details indicative of the tilted playing field Merck was on. Merck will also be hurt to the tune of tens or hundreds of millions of dollars because this suit will entice thousands of additional plaintiffs to come out of the woodwork and sue on similarly flimsy causal connections, or, worse, factually fraudulent claims. The large dollar sign creates a signal to future juries about “appropriate” award amounts; it has gotten to a point that an outrageous verdict in the tens of millions of dollars barely creates a ripple.¹⁸

The Loophole That Led the Way to a \$253 Million Verdict and How to Close It

As discussed above, it is questionable whether these cases second-guessing regulatory decisions should be in the judicial system at all. But if they are, then such cases of national importance, affecting citizens across the fifty states, should be in federal court rather than state court.

Ernst v. Merck was in state court, rather than federal court, because Lanier also sued a Texas doctor and research clinic, and then subsequently dropped them from the case. The public is largely unaware of the significance of these tactics; of all the press coverage, only the *Houston Chronicle* noted the existence of the co-defendant (and then in passing), and even that article failed to mention the reasoning behind and consequences of such a litigation strategy.¹⁹ Because this case was in a state court—rather than a federal one—Lanier was able to obtain a victory from a non-unanimous jury, find a judge who failed to act as a gatekeeper to keep out unscientific expert evidence and prejudicial attacks on Merck for seeking to make a profit, and interrogate the jurors in detail in order to pander to their tastes. If *Ernst* had been in federal court instead of a local Brazoria County courthouse, the result quite likely would have been different. It is thus worth exploring the tactical maneuver that allowed Lanier to pick his forum.

Under the U.S. Constitution, federal courts have jurisdiction in “diversity” cases—i.e., cases “between Citizens of different States.”²⁰ If a plaintiff sues an out-of-state defendant, the defendant has the ability to seek a federal forum. The idea behind diversity jurisdiction is to create a neutral forum to resolve, as Alexander Hamilton put it, “all those [cases] in which the State tribunals cannot be supposed to be impartial and unbiased.”²¹ Hamilton argued that “in order to [achieve] the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in *all cases* in which one State or its

¹⁸ See, for example, the March 2005 \$27 million verdict in *Mikolajczyk v. Ford* (Cook County, Ill.), where the auto manufacturer was held liable for injuries incurred in an accident where a drunk driver plowed into a stopped car at an intersection at 60 mph. The story got only local publicity.

¹⁹ Richard Stewart, “Widow’s Suit against Vioxx Maker to Set Tone for Rest,” *Houston Chronicle*, July 4, 2005.

²⁰ U.S. Constitution, article III, section 2, clause 1.

²¹ Alexander Hamilton, *Federalist Paper* no. 80.

citizens are opposed to another State or its citizens.”²² But an early Supreme Court decision interpreted the statute granting diversity jurisdiction to be limited to those cases where *each* plaintiff was of a different state than *each* defendant.²³ With the limited exception of the Class Action Fairness Act of 2005, Congress has never corrected this two-hundred-year-old loophole, and plaintiffs have learned to take advantage of it in forum-shopping.

If Texas plaintiff Ernst sues New Jersey defendant Merck, the case ends up in federal court. But if Texas plaintiff Ernst sues New Jersey defendant Merck and a Texas defendant doctor, the case stays in state court. The partiality or bias of the Texas court that concerned Hamilton cannot be assumed to have gone away because of the presence of the Texas co-defendant, yet Ernst’s attorney has succeeded in divesting the federal court of jurisdiction by suing the doctor. The result is even more absurd once one realizes that, by waiting a year after the complaint had been filed, Ernst can dismiss the doctor from the case without penalty and maintain an action against the out-of-state defendant in state court.²⁴ The bias Hamilton warned of is more than theoretical; studies have shown that the average verdict against out-of-state defendants is substantially larger than those against in-state defendants—and the difference is even more pronounced in states (like Texas) with partisan judicial elections.²⁵

Plaintiffs’ attorneys often sue in-state defendants whom they have no intention of bringing to trial, or conglomerate differently situated plaintiffs in order to avoid federal diversity jurisdiction and more stringent federal rules for evidence and jury selection. The *Madison County Record* recently covered a complaint filed in St. Clair County on behalf of ten Illinois plaintiffs against Merck and several pharmacies.²⁶ Because one of the pharmacies, Walgreens, is an Illinois resident, there is no complete diversity and the case nominally gets to stay in state court. Of course, Walgreens’ only duty is to accurately fill a doctor’s prescription, and imposing any other duty on the pharmacist would astronomically increase health care costs. One can imagine the problems consumers would have if pharmacists unilaterally refused to fill a prescription. Finally, the fact that any theory of liability that blames Walgreens for Vioxx injuries necessarily exonerates Merck because of the learned intermediary doctrine—making it exceedingly unlikely that the plaintiffs will allow a Walgreens attorney to ever address a jury over Vioxx. The merger of several other plaintiffs into a single case can permit forum-shopping within the state, with a suburban Chicago plaintiff finding a more favorable venue in Madison or St. Clair County.²⁷

²² *Ibid.* (emphasis added).

²³ *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267 (1806).

²⁴ 28 U.S.C. § 1446(b) (“a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action”).

²⁵ Alexander Tabarrok and Eric Helland, “Court Politics: The Political Economy of Tort Awards,” *Journal of Law and Economics* 157 (1999); Tabarrok and Helland, “Exporting Tort Awards,” *Regulation* 23, no. 2 (2000): 21.

²⁶ Ann Knief, “New Round of Vioxx Suits Filed in St. Clair County,” *Madison County Record*, October 13, 2005.

²⁷ Another incentive for attorneys to group plaintiffs is the likelihood that a jury faced with multiple plaintiffs will be less likely to evaluate individualized issues of causation, and thus more likely to find in

Though fraudulent joinder of plaintiffs and defendants is not allowed to divest a federal court of jurisdiction, most courts permit the tactic without penalty except in the most obvious and egregious cases. A minor reform of the removal laws to prevent plaintiffs' lawyers from benefiting by gaming the system would have tremendous benefits to the economy as a whole by preventing this sort of forum-shopping.

We will see the full effects of the forum-shopping in September 2006. Dozens of states, including New Jersey, have a two-year statute of limitations that courts interpret as not beginning to run until September 30, 2004, the date that Merck withdrew Vioxx from the market. Many attorneys are undoubtedly waiting until the eleventh hour to file complaints to best determine which forum—plaintiffs' home state, New Jersey, or federal court—looks to be the most favorable. Unless *Humeston* presages a substantial winning streak for Merck between now and September, one can expect the 7,000 pending complaints (featuring several thousand more plaintiffs) to more than double in 2006.

Conclusion

One has to ascribe mystical wisdom to the jury system to believe that randomly selected panels of a dozen laypeople, unanswerable to their peers, will invariably do a better job than elected officials, their appointees, or the marketplace, of making decisions that accurately weigh social costs and benefits—especially when jury trials are not designed to have juries consider the larger implications and second-order effects of a decision in the individual case. To the extent the jury system presents a problem, it is compounded by the problem that, with unmoored damages determinations, each jury has the *de facto* power to veto a dozen or more other juries' decisions to exonerate.

But even if courts and juries performed flawlessly, the very theory behind holding Merck liable is flawed to begin with and deters the creation of life-saving drugs. As is evident, the court and jury did not perform flawlessly in *Ernst*, disregarding science, disregarding economics, and disregarding basic principles of fairness. Texas appellate courts may correct the individual verdict, but they cannot undo the damage that verdict has done to investors' willingness to support new research and development of the next generation of pharmaceuticals. The effect on the health and well-being of Americans is perhaps incalculable. While there may not yet be the political willpower to completely divest the judicial system of second-guessing decisions by the Food and Drug Administration, simply closing a jurisdictional loophole has the potential to ameliorate some of the worst abuses of the system. Blaming the defense attorneys for the *Ernst* verdict is an indictment, rather than a defense, of the current system: these public policy decisions affect too many innocent lives to be determined by game-show virtues.

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favor of the plaintiff. Michelle J. White, "Explaining the Flood of Asbestos Litigation: Consolidation, Bifurcation, and Bouquet Trials," NBER Working Paper No. W9362 (December 2002) (finding the expected-return to the plaintiff of a consolidated trial of as much as 50 percent due to increased likelihood of liability finding and increased damages).