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IADC 2020 Midyear Meeting
Program Presentation: Weathering the Bellwethers: Opioid Litigation and Beyond

Do International Bellwethers Exist?

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My topic is whether international bellwethers exist, from the perspective of one who was responsible for the defense of international pharmaceutical product litigation across six continents, in some 30 countries, in more than a hundred jurisdictions, for more than 12 years, in the wake of the withdrawal of Vioxx by Merck & Co., Inc. from markets worldwide. That successful defense included cross-border experiences with class litigation across ten jurisdictions in Canada and 27 jurisdictions in Brazil, class litigation in the Federal Court of Australia and in Israel, and multiparty, case-managed, and other litigation in Europe.[2]

Much of that international claimant activity was driven or fueled by developments leaving US shores in three waves: First, after Merck & Co., Inc. withdrew the drug, claimants around the world began filing actions in their home jurisdictions;[3] some filed in United States courts.[4] Second, after a Texas state court jury returned a verdict of USD 253 million against the company,[5] claimants around the world activated dormant cases and more claimants filed hundreds of actions in their home jurisdictions; some filed or pressed actions in United States courts. Third, after Merck & Co., Inc. announced its resolution of United States personal injury product litigation for USD 4.5 billion, claimants around the world activated actions and still more claimants filed actions in their home jurisdictions; some continued to file or press actions in United States courts (which were dismissed forum non conveniens).

US jury verdicts and the US settlement did not influence court judgments in actions litigated on the merits through to the highest courts in international jurisdictions. The company prevailed in cases in international jurisdictions, based on the facts and on the law applicable in those jurisdictions, and favorably resolved litigation in other international jurisdictions where appropriate. These international judgments also did not reflect any influence of United States pretrial or post trial decisions. Although a few judges in international jurisdictions expressed interest in United States Multidistrict Litigation procedure, they did not adopt that procedure. A decision in Saskatchewan, Canada, certifying a class did refer to and speculate about the United States settlement among other matters but was reversed in its entirety on other grounds in favor of the company on appeal.

International court judgments and other events in some international jurisdictions, however, did influence litigation and outcomes in other international jurisdictions. I offer two examples:

First, the Federal Court of Australia released a 459 page decision dismissing, on a class-wide basis, following a three month bench trial of a class action, all claims against Merck & Co., Inc., which had alleged negligence in drug development, and all claims against the company's Australian subsidiary under the Australian Trade Practices Act provisions on product defect, legislation derived from and nearly identical in important respects to the European Product Liability Directive.[6] This lengthy Australian decision, which reviewed the science and drug development history in detail, would be read in jurisdictions around the world, including in Canada, where Ontario-based class litigation alleged negligence in drug development, and in European countries, where claimants sought relief under national legislation implementing the European Product Liability Directive.

Second, after the company announced a Canada-Wide Settlement Agreement favorable to the company that would fully resolve all class and other claims throughout Canada, the claimants' (pursuers') solicitors

in Scotland reactivated actions they previously had abandoned in the Court of Sessions in Edinburgh. These actions later were resolved favorably to the company.

These observations are based on my experiences defending international Vioxx litigation across six continents over the course of more than 12 years. In sharing these observations today, I draw no conclusions about whether international bellwethers exist, and make no inferences from international Vioxx litigation to any other litigation.

I offer "Do International Bellwethers Exist?" for your consideration and our discussion.

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[1] Previously Executive Director & Senior Counsel, Merck & Co., Inc. Views are my own.

[2] That successful defense across many international jurisdictions continues to inform the defense of international multijurisdictional litigation in the biopharmaceutical, automotive, chemical, financial, and other industries. Today, legislators and judges throughout Europe, for example, faced with emerging and conflicting class legislation as they adopt, amend, implement, and interpret class legislation, can consider the Vioxx international multijurisdictional litigation experience, particularly the cross-border experiences with class litigation across ten jurisdictions in Canada and 27 jurisdictions in Brazil.

[3]For example, in the Vioxx Canada Litigation, 40 putative class claims were brought throughout Canada's ten provinces by two competing factions, one a consortium of 19 law firms based in Ontario, the other a law firm in Saskatchewan with its allies. These class claims were stakes in the ground, launched after the drug was withdrawn, and lay dormant until the Texas state court jury returned a verdict of USD 253 million against the company (later reversed on appeal). After that verdict, the competing claimant law firms promptly filed carriage motions in several provinces; ultimately, actions proceeded to certification hearings in three provinces while actions in the seven other provinces remained dormant. A Quebec-wide class was certified. A Saskatchewan multijurisdictional opt-out class was certified. Merck's motion in Ontario to stay competing multijurisdictional proceedings in that province, based on the prior Saskatchewan order, was denied, and the Ontario court certified a competing overlapping multijurisdictional opt-out class. Then, the Saskatchewan Court of Appeal overturned the Saskatchewan certification order, a result very difficult to achieve in Canada. Claimants' efforts to overturn that Saskatchewan appellate order and Merck's efforts to overturn the Ontario certification order were unsuccessful through to the Supreme Court of Canada. After more than seven years of procedural litigation, the parties announced a Canada-wide settlement agreement. Interestingly, the US personal injury product litigation settled in November 2007 following three years of federal MDL and state case-managed litigation of individual actions, whereas Canada settled in January 2012 (administered through April 2016), illustrating, in this example, that class litigation may not be the "access to justice" route intended by class legislation advocates in Canada and some countries with similar legislation.

[4] Predictably, actions filed in US courts by residents of other countries would be dismissed forum non conveniens. See *Piper Aircraft Co. v. Reyno*, 454 U. S. 235 (1981).

[5] This verdict was reduced by operation of Texas state law to $26.1 million; that judgment would be reversed on appeal and judgment entered for Merck nearly three years later. This plaintiff's further appeals were unsuccessful.

[6] In this 459 page decision, the court also made certain other findings favorable to the company on a class-wide basis. The findings for the individual class representative on his personal claim under the merchantability and fitness for purpose provisions of the Trade Practices Act were overturned on appeal. In the result, the company won the case through to the High Court, and then entered an Australia-wide settlement agreement ending the litigation.