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Recommended Citation

Frank M. McClellan, *The Vioxx Litigation: A Critical Look at Trial Tactics, the Tort System, and the Role of Lawyers in Mass Tort Litigation*, 57 DePaul L. Rev. 509 (2008)

Available at: <https://via.library.depaul.edu/law-review/vol57/iss2/14>

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THE VIOXX LITIGATION: A CRITICAL LOOK AT TRIAL TACTICS, THE TORT SYSTEM, AND THE ROLES OF LAWYERS IN MASS TORT LITIGATION

Frank M. McClellan*

INTRODUCTION

On November 9, 2007, Merck & Co., the executive committee of the Plaintiffs' Steering Committee of the federal multidistrict, and plaintiffs' counsel representatives agreed to settle the Vioxx litigation.¹ The plaintiffs' lawyers were charged with obtaining the acceptance of at least 85% of Vioxx plaintiffs before the settlement goes into effect.² If the required number of plaintiffs accept the settlement, it is estimated that each plaintiff who qualifies—by presenting adequate proof that Vioxx caused a heart attack, stroke, or death—will receive an average payment of between \$100,000 and \$200,000, less attorneys' fees ranging from 33⅓% to 40%.³

Merck's settlement announcement highlighted a number of key provisions. To qualify for compensation, claimants must offer objective medical proof that they suffered a heart attack or stroke after taking at least thirty Vioxx pills and show that the injury took place

* Professor of Law, Beasley School of Law, Temple University. I would like to thank Professors Alberto Bernabe, Phoebe A. Haddon, and Robert Rabin for providing critical comments on earlier versions of this Article. I also want to express my appreciation to Professor Stephan Landsman for inviting me to participate in the Symposium and for commenting on and criticizing the draft at the Clifford Symposium. None of these fine scholars had an opportunity to see this Article in its final form, and I want to absolve them from responsibility for the views expressed and any mistakes made in the factual and legal analysis.

1. Press Release, Merck Agreement to Resolve U.S. VIOXX® Product Liability Lawsuits: Agreement Provides for \$4.85 Billion Payment (Nov. 9, 2007), available at http://www.merck.com/newsroom/press_releases/corporate/2007_1109_print.html [hereinafter Merck Settlement].

2. *Id.*

3. The average payment will depend on the number of plaintiffs who ultimately qualify to participate in the distribution in accordance with the terms of the settlement agreement. Alex Berenson, a reporter who has followed the litigation closely for several years, stated that “[d]epending on how many claims are filed to the settlement fund, those people will receive payments averaging about \$120,000 each before legal fees and expenses, which could swallow about 40 percent of their payments.” Alex Berenson, *Analysts See Merck Victory in Vioxx Settlement*, N.Y. TIMES, Nov. 10, 2007, at A1. The average may be as high as \$200,000 if only about 18,000 to 20,000 of the 45,000 people involved in the cases qualify. Karl Stark, *Merck Offers Billions for Vioxx: The Deal, Worth Up to \$4.85 Billion, Would Settle 26,000 Suits Over the Discontinued Pain Reliever*, PHILA. INQUIRER, Nov. 10, 2007, at A01.

within fourteen days of taking Vioxx. Administrators will be appointed to determine whether individual cases qualify. In addition, the agreement provides that Merck does not admit causation or fault. Finally, the settlement agreement provides that law firms on the federal and state Plaintiffs' Steering Committees and firms that have tried cases in the coordinated proceedings are required to recommend enrollment in the program to 100% of their clients who allege either myocardial infarction (MI) or ischemic stroke. These lawyers and law firms are also prohibited from continuing to represent nonparticipating plaintiffs.⁴

The settlement followed the trial of fourteen cases that resulted in nine wins for Merck and five wins for plaintiffs.⁵ Throughout the course of the litigation, Merck vowed to "try every case" and backed its public litigation posture by paying millions of dollars in legal fees and other trial expenses, while running an extensive advertising campaign touting Merck's contributions to public health. The settlement reflects a tremendous victory for Merck, because the company's potential liability exposure was projected to be substantially higher. Wall Street rewarded Merck with a rise in its stock prices the day after the settlement was announced.⁶ Merck and the plaintiffs' lawyers explained to the public that the settlement made pragmatic sense in light of the uncertainty of the outcomes that would follow trying over 27,000 cases one at a time.

Merck's successful employment of a try-every-case strategy to produce a settlement much lower than expected reveals a glaring deficiency in the legal system's ability to achieve the fundamental goals of tort law in prescription drug cases where large numbers of consumers suffer adverse reactions to the same drug. If other corporations with vast financial resources follow Merck's lead, the disparate economic interests among the rich corporation, plaintiffs' lawyers, and injured consumers is likely to result in pragmatic decision making on the part of the business stakeholders that minimizes the importance of individual justice. The strategy of trying every case and making plaintiffs'

4. Merck Settlement, *supra* note 1.

5. As discussed below, an evaluation of the economic, ethical, moral, and justice issues that flow out of this litigation and the proposed settlement must take into account not only the win-loss ratio of the cases that were tried, but also that the plaintiffs who prevailed won jury verdicts awarding them millions of dollars. The plaintiffs who lost had difficulty persuading the jury that Vioxx, rather than other preexisting conditions, caused their injuries.

6. See Berenson, *supra* note 3 (noting that two years ago some analysts projected that Merck would have to pay close to \$25 billion to settle the Vioxx claims). The reaction to the announced settlement of \$4.85 billion "represents only about nine months of profit for Merck, whose stock rose 2.3 percent on news of the agreement, even as the broader stock market was sharply lower." *Id.*

lawyers accept the reality of costly litigation over an extended period of time transforms plaintiffs' lawyers from zealous advocates to pragmatic entrepreneurs. From a pragmatic business perspective, achieving individual justice seems much less important than garnering a settlement tailored toward global considerations and a return on an investment.

A settlement of serious injury claims at a fraction of their potential verdict value is preferable to the uncertainty and time associated with relying on a lethargic, underfunded, and overburdened court system to resolve thousands of cases, whether one looks through the eyes of the judges, the corporate defendant, or the plaintiffs' lawyers. However, from the perspective of a consumer seeking just compensation for a tort injury, the Vioxx settlement sends a message that plaintiffs' lawyers, no matter how rich and skillful, cannot produce just compensation for the harm a defective drug consumer sustained if too many consumers were hurt by the same defective product. The impact of Merck's strategy on the individual consumer's expectation of independent legal counsel and representation is blatantly exposed by the provision in the settlement agreement that each counsel participating in the settlement must recommend acceptance to all of his clients and further advise them that they must seek representation by another lawyer if they do not participate.⁷

This Article reviews the history of and continuing activity in the Vioxx litigation in light of the goals of tort law—deterrence, corrective justice, and social justice—and argues that policymakers should adopt new judicial tools and remedies to discourage parties and lawyers from minimizing the importance of individual consumers' needs and expectations in mass tort prescription drug litigation. Specifically, this Article explores whether the court system has an effective means of managing mass tort cases where individual questions of causation predominate over common issues of liability and a wealthy corporate defendant insists on trying every case and makes no effort to settle, regardless of the strength of the claim or the defense.⁸ After review-

7. As some lawyers have already acknowledged by filing a petition to revise this provision, a client's right to independent representation and advice is substantially undermined. See Alex Berenson, *Lawyers Seek to Alter Settlement Over Vioxx* N.Y. TIMES, Dec. 21, 2007, at C4.

8. Defendants in mass torts brought over the past three decades have at first adopted a strategy of litigating every case, only to capitulate to mass settlement efforts as the litigation progressed. Examples are found in the asbestos, tobacco, and Bendectin litigations. For full discussions of the histories of these mass tort cases, see PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT* (1985) (describing the history of asbestos litigation); MICHAEL D. GREEN, *BENDECTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION* (1996); *SMOKING POLICY: LAW, POLITICS, AND CULTURE* (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

ing the rules and precedents applicable to class actions and the sanctions available to control the conduct of a litigant who insists on a trial, this Article concludes that courts currently lack an effective mechanism to control such a strategy. The best they can do is use the power of persuasion and impose Rule 11 sanctions,⁹ neither of which is likely to be an effective deterrent, because the financial penalties are too low when they are limited to costs and attorneys' fees. The lack of an adequate judicial remedy represents a serious deficiency in a tort system that is required to process mass tort claims.

For the purpose of clarifying the values and policies at stake, it does not matter whether the November 9 settlement is finalized or breaks down. The problem of providing corrective justice to seriously injured individuals remains. The plaintiffs' inability to try every case or litigate the cases as a class action leaves them at the mercy of the practical economic judgments that Merck and the plaintiffs' contingent fee attorneys will make. If the settlement proposal fails to garner the required 85% approval, the plaintiffs will be right back where they started, awaiting trial and hoping that their attorneys have the will and resources to continue litigating for years. If Merck follows through on its stated intention to litigate every case for another five years, it is apparent that plaintiffs' attorneys will not continue to represent them. Otherwise, the attorneys would not have signed an agreement obligating them to take steps to withdraw from representing clients who are unwilling to accept the settlement. On the other hand, if the settlement does not go through and plaintiffs are able to find new attorneys to represent them, the litigation may continue for ten to fifteen more years.¹⁰ This picture should disturb lawyers, judges, and the general public enough to make them critically rethink and reformulate some of the fundamental procedural and ethical rules applicable to mass tort trials involving prescription drugs.¹¹ This Article argues that this

9. FED. R. CIV. P. 11.

10. The time required to try 27,000 Vioxx claims will depend upon court and juror availability, as well as innovative strategies employed by judges. See Sandra Mazer Moss, *Response to Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute from a State Judge's Perspective*, 73 TEX. L. REV. 1573 (1994) (discussing the creative techniques state and federal courts used to expedite the resolution of asbestos claims). Vioxx claims do not present the threat or burden of longevity that asbestos claims imposed on the court system, because there are fewer Vioxx claims, and these do not include many consumers who will bring claims in the future for latent injuries. See Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After Amchem and Orbitz*, 80 TEX. L. REV. 1899 (2002) (discussing the challenge posed by the high number of future claimants in the asbestos mass tort context, particularly after the U.S. Supreme Court ordered a decertification of the settlement class).

11. This Article presents an analysis based on the author's academic research and publications pertaining to tort theory and drug product liability claims, as well as the author's practical experience as a tort litigator. See, e.g., Frank M. McClellan, *Bendectin Revisited: Is There a Right to a*

is a serious deficiency in the system that cries out for reform—for instance, such as the enactment of a rule or statute that subjects defendants to a monetary penalty, such as treble damages, similar to the approach taken in many jurisdictions to control the conduct of insurance companies that act in bad faith. In addition, the Vioxx litigation demonstrates the harm that has been done to mass tort plaintiffs by the narrowing and elimination of class action rules over the past decade.

An examination of the moral and ethical implications of Merck's litigation strategy supports the argument that there is a pressing need for a financial penalty to deter bad faith refusals to settle in mass tort situations. This Article assesses the impact of this strategy in light of the public's interest in maintaining a system of law that achieves justice for individuals in mass tort situations.¹² If the proposed settlement breaks down and Merck uses its vast resources to try 27,000 cases one at a time, this strategy will ultimately clash with the public's interest in maintaining a court system capable of resolving mass tort claims in a fair and efficient manner.¹³

While the ethical rules applicable to Merck's attorneys do not specifically preclude this strategy, there will be instances where the lawyer's duty of candor to the court will require careful client counseling and decisions whether to acknowledge that the position taken does not rest on persuasive evidence. This is likely to occur particularly in the settlement conferences that courts have come to rely upon to resolve a large percentage of cases immediately prior to trial.¹⁴

Jury Trial in an Age of Judicial Gatekeeping?, 37 WASHBURN L.J. 261 (1998); Frank M. McClellan et al., *Strict Liability for Prescription Drug Injuries: The Improper Marketing Theory*, 26 ST. LOUIS U. L.J. 1 (1981); Frank M. McClellan, *Strict Liability for Drug Induced Injuries: An Excursion Through the Maze of Products Liability, Negligence and Absolute Liability*, 25 WAYNE L. REV. 1 (1978). For examples of the author's practical experience as a tort litigator, see *In re Bendectin Litigation*, 857 F.2d 290 (6th Cir. 1988); *McDaniel v. Merck*, 533 A.2d 436 (Pa. 1987); *Stanton v. Astra Pharmaceutical Products, Inc.*, 718 F.2d 553 (3d Cir. 1983).

12. For an in-depth discussion of the court system's current attempts to balance efficiency with individual justice, see THOMAS H. KOENING & MICHAEL L. RUSTAD, *IN DEFENSE OF TORT LAW* (2001) (emphasizing the importance of using tort law to achieve corrective justice). See also JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* (1995).

13. The author acknowledges at the outset that the Vioxx litigation does not yet represent a "mature tort," therefore the emerging picture may change dramatically over the next few years. See Francis E. McGovern, *Resolving Mature Tort Litigation*, 69 B.U. L. REV. 659, 659 (1989) (describing a mature tort as one where "there has been full and complete discovery, multiple verdicts, and a persistent vitality in the plaintiffs' contentions").

14. Empirical studies show that 97% of civil cases never reach trial and that a significant percentage of filed cases are settled. See Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339-40 (1994); Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1 (1996). My experience as a trial lawyer and consultant to trial lawyers

II. THE VIOXX LITIGATION: PRESETTLEMENT PERSPECTIVES AND POSTURES

In the spring of 2000, Vioxx was approved for marketing as a painkiller and took the market by storm, quickly becoming chief competitor to Celebrex—a painkiller that had already established a market niche. Merck marketed Vioxx—in the United States and abroad—from the time of its FDA approval in 2000 to September 30, 2004, when it voluntarily withdrew Vioxx from the market.¹⁵ By 2003, Vioxx was sold around the world, and Merck's sales were reportedly \$2.5 billion.¹⁶ Unfortunately for Merck, a medical study revealed that Vioxx users had a significantly increased chance of suffering a stroke or heart attack,¹⁷ and Merck withdrew Vioxx from the market. Plaintiffs' lawyers and the media immediately raised questions regarding the risks posed by Vioxx, as well as when Merck knew or should have known of the risks. Indeed, even prior to Merck's withdrawal of Vioxx from the market, one plaintiffs' firm had already filed 300 Vioxx lawsuits.¹⁸ Merck knew it had to prepare for an onslaught of thousands more personal injury claims, so it immediately made a preemptive strike aimed at influencing public opinion. It held a press conference on October 1, 2004, at which the president of Merck Research Laboratories explained the timeline of events that produced medical studies that caused Merck to become concerned enough about the risks of Vioxx to take the drug off the market.¹⁹

Anticipating the avalanche of lawsuits shortly after the disclosure of the increased risk of heart attacks and strokes,²⁰ Merck vowed to try every Vioxx case filed against it.²¹ Merck's defense would rely upon evidence that it had produced a desirable and effective product and

leads me to conclude that a large percentage of cases involving serious injuries settle as a result of some type of settlement conference held before the trial is scheduled to begin. At this time, the trial judge plays the most active role in facilitating candid discussions between the parties pertaining to the risks of a trial and the benefits of a settlement.

15. Pamela Kropf, *Making Sense of the Vioxx Mess*, THE PHARMACIST, Mar. 2007, at 9.

16. *See id.*

17. *Id.* at 9.

18. *See* Barnaby J. Feder, *Lawyers Organizing for Mass Suits Over Vioxx*, N.Y. TIMES, Nov. 5, 2004, at C1.

19. Kropf, *supra* note 15, at 7.

20. *See* Omri Ben-Shahar, *The (Legal) Pains of Vioxx: Why Product Liability Can Make Products More Dangerous*, ECONOMISTS' VOICE, June 2006, at 1, <http://www.bepress.com/evl/vol3/iss6/art6/> (arguing that the liability system deters companies such as Merck from taking post-marketing product safety measures, because observers view these remedial measures as a public confession of responsibility for harm).

21. Thomas Ginsberg, *47.5 Million Vioxx Award Against Merck: The Drug Company Plans to File an Appeal in the Case of a Man Who Suffered a Heart Attack*, PHILA. INQUIRER, Mar. 13, 2007, at C1.

acted in a reasonable and timely manner in warning consumers about the known risks of Vioxx.²² Moreover, Merck emphasized that there are numerous causes of heart attacks and strokes and that the mere coincidence of using Vioxx at the time a person suffered a heart attack or stroke does not meet the legal standard requiring each victim to prove more probably than not that Vioxx caused his injuries. Further, Merck noted that the studies showing an increased risk of harm associated with Vioxx related to long-term users and not to many of the potential claimants who had used the drug for a few months before suffering a heart attack.

One Vioxx trial that resulted in a substantial plaintiff's verdict in March 2007 reflects the basic themes that litigants and lawyers have publicly repeated from the litigation's beginning. A jury in Atlantic City, New Jersey awarded \$20 million dollars in compensatory damages and \$27.5 million dollars in punitive damages to sixty-one-year-old Frederick Humelston, who used Vioxx for two months before suffering a heart attack.²³ In their public statements, both the attorneys and the litigants focused on the significance of this verdict in light of the other cases. Counsel for Merck sought to reinforce the Company's argument that science does not support a finding that short-term use of Vioxx causes heart attacks and strokes: "We believe Mr. Humelston would have suffered a heart attack whether he was taking Vioxx or not. We will pursue all avenues of appeal."²⁴ A well-known Philadelphia plaintiffs' attorney, who was not the trial lawyer in the Humelston case, but who represents 2,000 plaintiffs with Vioxx claims, asserted the following: "Merck will win from time to time. But when the plaintiff wins, the jury wallops them."²⁵ A news article reported that the Vioxx litigation cost Merck \$1 million a day, but Wall Street analysts projected that a settlement of all of the cases could cost Merck as much as \$30 billion.²⁶ Responding to this, a pharmaceutical

22. *Id.*

23. *Id.* It is noteworthy that this case was tried a year earlier in Atlantic City, New Jersey, and resulted in a verdict for Merck. However, the court reversed and remanded for a new trial based on evidentiary errors. At the new trial, plaintiffs were able to introduce new evidence that Merck omitted material information about the risks of Vioxx as revealed in a published study. Gregory D. Curfman et al., *Expression of Concern: Bombardier et al., "Comparison of Upper Gastrointestinal Toxicity of Rofecoxib and Naproxen in Patient with Rheumatoid Arthritis," N Eng J Med 2000; 343:1520-8, 353 N. ENG. J. MED. 2813 (2005).* The editors conclude that the 2000 report of the VIGOR study as published in the New England Journal of Medicine presents "inaccuracies and deletions [that] call into question the integrity of the data on adverse cardiovascular events in this article." *Id.* at 2814.

24. Ginsberg, *supra* note 21.

25. *Id.*

26. *Id.*

defense lawyer declared that the litigation costs were far too low to justify a change in tactics from trying cases to settling them: "You could go a lot of days at \$1 million a day before getting to \$30 billion."²⁷

By the time a settlement was proposed in November 2007, Merck faced more than 27,000 product liability claims in federal and state courts.²⁸ Until the agreed upon mass tort settlement, Merck had not settled a single claim and had won jury verdicts in nine of the fourteen cases that proceeded to trial.²⁹ These tort claims shared the basic allegation that Vioxx posed an increased risk of cardiovascular incidents, such as heart attacks and strokes, and that Merck, despite knowledge of those risks, failed to give an adequate and timely warning to consumers and their physicians.³⁰ These cases differed in that the plaintiffs used the drug for different lengths of time and had different medical histories, presenting varying degrees of heart attack and stroke risks caused by factors other than Vioxx.³¹ Merck admitted that studies show that Vioxx use over a period of eighteen months increased cardiovascular risks but denied that these studies showed an increased risk to consumers who used it for only a few months.³²

27. *Id.*

28. Kropf, *supra* note 15; see also Alex Berenson, *Plaintiffs Find Payday Elusive in Vioxx Cases*, N.Y. TIMES, Aug. 21, 2007, at A1.

29. Kropf, *supra* note 15.

30. For a comprehensive discussion of the claims of wrongdoing on the part of Merck, and a rejection of the merits of those claims, see DEBEVOISE & PLIMPTON L.L.P., REPORT OF THE HONORABLE JOHN S. MARTIN, JR. TO THE SPECIAL COMMITTEE OF THE BOARD OF DIRECTORS OF MERCK & CO., INC. CONCERNING THE CONDUCT OF SENIOR MANAGEMENT IN THE DEVELOPMENT AND MARKETING OF VIOXX (Sept. 5, 2006), available at http://www.merck.com/newsroom/vioxx/pdf/001_01_report_of_the_honorable_john_s_martin_jr_introduction.pdf [hereinafter MARTIN REPORT]. See also David Voreacos & Angela Zimm, *Merck Handled Vioxx 'With Integrity,' Study Concludes (Update 2)*, BLOOMBERG.COM, Sept. 6, 2006, <http://www.bloomberg.com/apps/news?pid=20601103&sid=AOM3UKAWUK3g&refer=news#>.

31. See Berenson, *supra* note 28 (discussing the variation in the claims of injuries allegedly caused by Vioxx and noting that trial judges have rejected class action requests because of the variation of material facts in the cases).

32. For a succinct timeline of the studies revealing the cardiovascular injury risk associated with Vioxx and Merck's responses to the information, see W. John Thomas, *The Vioxx Story: Would it Have Ended Differently in the European Union?*, 32 AM. J.L. & MED. 365 (2006). See also Amanda J. Dohrman, *Rethinking and Restructuring the FDA Drug Approval Process in Light of the Vioxx Recall*, 31 J. CORP. L. 203 (2005) (reviewing the facts surrounding the recall of Vioxx and arguing for the need to restructure the FDA to identify drug dangers more quickly to avoid consumer injuries); Jonathan V. O'Steen & Van O'Steen, *The FDA Defense: Vioxx and the Argument Against Federal Preemption of State Claims for Injuries Resulting from Defective Drugs*, 48 ARIZ. L. REV. 67 (2006) (reviewing the process by which Merck marketed and then removed Vioxx from the market and arguing that the threat of litigation provides an important deterrent to the marketing of unsafe products).

Merck focused its defense on the lack of proof of causation.³³ By August 2007, Merck spent more than \$1 billion in legal fees.³⁴

In the final analysis, courts will find that they lack effective means to compel a well-financed corporation to engage in settlement negotiations and good-faith evidence evaluations—especially in a mass tort case, where the corporation makes a cost-benefit analysis that supports a try-every-case strategy. In order for the tort system to promote corrective justice, social justice, and deterrence in mass tort cases,³⁵ Merck's try-every-case tactic demands reconsideration of the ways in which mass tort claims are handled.³⁶

Merck, or a similarly situated corporation faced with thousands of tort claims, may rationalize this strategy on the basis of a corporation's duty to its shareholders to maximize profits. Faced with thousands of claims, many of which are defensible, it is understandable that Merck would adopt a strategy that it believes will minimize its exposure by discouraging additional claims. If the insistence on trying every case persists for hundreds or thousands of trials or, in the alternative, persists long enough to induce a global settlement far below the value of the collective meritorious cases, the consequences to the justice system will be intolerable.

Viewing the Vioxx litigation as primarily a fight between rich, greedy plaintiffs' lawyers seeking more money and a rich corporation seeking to preserve its assets causes one to miss a critical point. The important fight is between thousands of consumers who claim to have suffered heart attacks and strokes and a corporation that revised the warning on its drug's labeling and withdrew the drug from the market, but, nevertheless, contends that the drug caused no harm. It is troubling that there is no viable mechanism or procedure that allows the vast majority of these individual consumers to resolve their cases on the merits in a fair and timely manner, when many of them are in desperate need of compensation—being dependent upon wage earnings and having little in savings—and in all probability have meritorious claims.

33. See Kropf, *supra* note 15.

34. See Berenson, *supra* note 3.

35. For a discussion of these tort theories, see THOMAS C. GALLIGAN ET AL., *TORT LAW: CASES, PERSPECTIVES, AND PROBLEMS* 1–47 (4th ed. 2007); and PHILosophy AND THE LAW OF TORTS 1–21 (Gerald J. Postema ed., 2001).

36. The existing rules governing class action litigation will not allow the courts to compel a fast resolution of a large number of claims on their merits. Moreover, the remedies available to victims aimed at dissuading wealthy corporations from trying every case in future mass torts lacks sufficient punch. A more stringent financial penalty is necessary to encourage good-faith conduct in this type of litigation.

The primary goal of the tort system is to provide individuals with an opportunity for compensation for personal injuries in a timely manner, particularly those individuals who lack the resources to protect their future through the advance purchase of property, life, disability, and health insurance.³⁷ Merck's trial strategy in the Vioxx litigation seriously threatens the goals of corrective and social justice.³⁸ Increased litigation costs and delayed compensation decisions on meritorious cases cannot be condoned on the mere basis of the right to a vigorous defense in the adversarial justice system.

III. MASS TORT LITIGATION

In a thoughtful book discussing mass tort litigation,³⁹ Judge Jack B. Weinstein, a highly regarded trial judge who presided over the Agent Orange litigation and many other mass tort trials, made the following observation: "When an attorney undertakes what is in essence a public litigation, he or she must be prepared for financial destruction as well as glory. The issues transcend traditional one client-one attorney relationships and conflicts. They involve whole communities."⁴⁰

Jonathan Harr's book, *A Civil Action*, highlighted many of the troublesome economic, psychological, and cultural aspects of mass tort cases involving whole communities.⁴¹ *A Civil Action* presents the story of individuals and families who sought compensation for numerous children who contracted leukemia while living in a small Massa-

37. Mark Rahdert provides a succinct explanation of the rationale for compensation as a prime goal of the tort system:

Compensating victims of one kind or another is one of the major undertakings of government in our society. . . . It would seem strange for a society that finds the value of compensation through cost spreading so appealing in other domains to deny its significance in a legal system that deals explicitly and almost exclusively with injury. If the victims of tortious injury were grouped together as victims of some single mass disaster, we would surely recognize the legitimacy of their claims for compensation, as we have for the victims of Hurricane Andrew and the 1993 Mississippi and Missouri River Floods.

MARK C. RAHDERT, *COVERING ACCIDENT COSTS: INSURANCE, LIABILITY, AND TORT REFORM* 180 (1995).

38. The Vioxx litigation is distinguishable from both the Bendectin litigation, which presented serious scientific questions as to whether the drug caused the claimants' injuries, and the asbestos litigation, where multiple defendants were properly held responsible for the injury-causing asbestos. See *In re Bendectin Litig.*, 857 F.2d 290 (6th Cir. 1988); GREEN, *supra* note 8. See also Hensler, *supra* note 10, at 1923 (observing that tort goals of deterrence and justice were served by the initial asbestos litigation, but not in the latter stages, because "as more and more companies with less and less connection to asbestos production [were] drawn into the litigation, the corrective justice and deterrence arguments in favor of litigation [became] weaker").

39. WEINSTEIN, *supra* note 12.

40. *Id.* at 63.

41. JONATHAN HAAR, *A CIVIL ACTION* (1995).

chusetts town. The families believed that drinking water contaminated by two companies that illegally dumped toxic substances into the town's wells caused the illnesses.⁴² The book begins with a description of the repossession of the plaintiffs' lawyer's Porsche and later emphasizes that the lawyer and other members of his law firm risked every asset they possessed in an effort to prove that the defendant corporations caused their clients' injuries.⁴³ In the end, a conscientious but confused jury rendered a verdict on the initial phase of the case that prompted the plaintiffs to settle for monetary compensation substantially less than they and their attorneys had anticipated.⁴⁴

Many other mass tort claims brought over the past two decades have presented similar challenges to the legal system, revealing the need to reassess the ability of procedural and substantive tort law rules to promote the just resolution of mass tort claims.⁴⁵ Under the traditional tort rules and methods of client representation, the effectiveness of the system in prosecuting tort claims, individually or in the aggregate, depends on private attorney-entrepreneurs who have the resources to advance enormous litigation costs and work on contingency. As observed by Judge Weinstein and depicted in *A Civil Action*, the traditional tort paradigm of providing compensation to an individual victim who suffered harm due to a single tortious act does not work efficiently, or in many cases fairly, when applied to mass tort actions.

Because mass tort cases involve enormous costs—both in litigation expenses and attorney labor—plaintiffs' attorneys cannot prosecute mass tort cases and maintain the same type of attorney-client relationship with each client as they do in ordinary tort cases.⁴⁶ Neither can defendants' attorneys evaluate and respond to each individual case as they would if there were only a few claimants. It takes considerable

42. *Id.*

43. *See id.*

44. *See id.*

45. Judge Weinstein provides citations to numerous opinions he wrote in mass tort cases up to April 1994 that concerned injuries caused by the following: Agent Orange, asbestos, DES, Repetitive Stress and Health, Lilco-Atomic Plant, and insecticides. WEINSTEIN, *supra* note 12, at xv-xvii. For a comprehensive collection of cases and authorities on mass torts, see LINDA S. MULLENIX, *MASS TORT LITIGATION; CASES AND MATERIALS* (1996). *See also* Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 *BROOK. L. REV.* 961 (1993).

46. *See* Hensler, *supra* note 10, at 1913. Based on an in-depth review of the asbestos litigation, Hensler argued that whether the plaintiffs in mass tort claims were represented in a class action or by aggregate methods, "individual treatment of asbestos cases—with individual plaintiffs controlling the course of their litigation and the decision to settle—was largely a myth." *Id.*

time and expense to determine which cases among the many potential claims are strong and which are weak. Consequently, mass tort claims expose clients and their lawyers to intense new pressures, and their responses to those pressures have a substantial, cognizable impact upon the community at large. As the toxic waste litigation described in *A Civil Action* illustrates,⁴⁷ the enormous costs in money, time, and emotion required to determine whether the defendants have engaged in conduct or sold a product that caused harm to large numbers of consumers poses a constant threat of overwhelming litigants, courts, and juries.⁴⁸

Lawyers representing parties in mass tort actions also face new ethical issues as they attempt to develop effective litigation strategies. At the forefront is the issue of how to respond to the impact of publicity about the large number of potential injuries and the lawsuits that such publicity is likely to engender.⁴⁹ Defendants are compelled to quickly decide how much information to share with the public about the product's dangers, while balancing the need to reduce future injuries with a desire to minimize incentives to past product users to bring lawsuits. Also at stake is the public's perception of the product's safety—a matter that will affect the perspective of potential jurors who will resolve any claims that are not settled. Defendants have to decide whether to adopt a public posture aimed at a fast resolution that encourages aggregate settlements or a posture of fighting to the end in defense of the product and the corporation's conduct. Most defendants have adopted a middle ground, litigating a few test cases to see how juries respond to the claims and defenses and then pursuing some type of aggregate settlement.⁵⁰ However, no matter what strategy the defendant embraces, mass tort cases place unusual demands on the court system, subjecting it to intense critical analysis regarding its ability to achieve justice in a modern economy. It is not surprising, therefore,

47. See HARR, *supra* note 41.

48. See Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721 (2002); Hensler, *supra* note 10; see also BRODEUR, *supra* note 8.

49. The Vioxx litigation has produced a pervasive flow of public statements from lawyers on both sides. See, e.g., Larry Smith, *Merck's Powerful Tactical Advantage in the Court of Public Opinion*, 25 OF COUNSEL 12 (Nov. 2006) (discussing a gag order issued by a federal judge in the fourth federal Vioxx trial in New Orleans and arguing that the gag order gave Merck an advantage because Merck continued to run image ads arguing that Vioxx is safe and Merck is a wonderful company).

50. For a description of the litigation history of four different mass torts, see Lawrence T. Hoyle, Jr. & Edward W. Madeira, Jr., "*The Philadelphia Story*": *Mass Torts in the City of Brotherly Love*, 2 SEDONA CONF. J. 119 (2001) (recounting the history of mass tort litigation in multidistrict litigation transferred to Philadelphia courts involving the following: asbestos, orthopedic bone screws, latex gloves, and diet drug products (fen/phen)).

that mass tort cases precipitate public debate about the need for tort reform.

When therapeutic drugs such as Vioxx generate mass tort claims, the decision-making processes of the drug company and government regulators justifiably attract scrutiny and criticism from litigants, the public at large, and legislators.⁵¹ The Vioxx litigation shares many of the features of other mass tort drug cases. Trial decision making and public relations are heavily influenced by the recognition of complex questions grounded in science and medicine; enormous economic stakes presented by multiple plaintiffs in multiple jurisdictions; great uncertainty as to the likely long-run stock market reaction; and difficulty in assessing the potential size and number of punitive damage awards. These concerns encourage clients and lawyers to look well beyond the particular merits of individual cases. In these circumstances, the defense lawyer's representation is challenged by her close economic and psychological identification with her corporate client, while the plaintiffs' lawyer's judgment is influenced by the potential economic and psychological impact of a settlement or verdict in connection with an individual client's case. In other words, the fate of corporate counsel—both in-house and outside—is intertwined with the results of mass tort litigation, and plaintiffs' counsel have a chance to press or sacrifice the individual case in favor of the next case or group of cases.

In an ordinary single tort case, the plaintiffs' lawyer's economic and psychological interests rise and fall with the individual client's fate. On the other hand, it is much easier in mass tort cases for the attorney to separate his economic and emotional interests from those of an individual client.⁵² Consequently, mass tort cases require plaintiffs' lawyers to pay special attention to potential conflicts of interest and other potential breaches of fiduciary duties, such as loyalty, confidentiality, communication, and zealous advocacy. The defense attorney's role in

51. Many articles in recent years have described the FDA's weaknesses in performing its primary role of protecting the public from unsafe drugs. See, e.g., Allison M. Zieve & Brian Wolfman, *The FDA's Argument for Eradicating State Tort Law: Why It Is Wrong and Warrants No Deference*, 34 PROD. SAFETY & LIAB. REP. 308 (2006).

52. See Hoyle, Jr., & Madeira, Jr., *supra* note 50, at 122:

In the last two decades . . . a highly-organized and competent segment of the plaintiffs' bar has focused on aggregation of cases with the goal of an ultimate class action settlement or a class trial. For these plaintiffs' counsel, individual trials of claims are a last resort. Counsel for the aggregation plaintiffs acquire power that counsel for individual plaintiffs lack, enhancing—and perhaps exaggerating—their clients' underlying rights. Yet, individual plaintiffs' counsel serve the necessary purpose of pressing cases to trial so that the value of the claims can be tested.

Id.

mass tort cases also presents some troublesome issues, the most relevant of which is litigation control. Because of the large number of claims, the corporate client is likely to play a significantly more active role than usual micromanaging of the litigation to ensure that the tactics are consistent and effectively coordinated. Whether the adversary system effectively promotes efficient compensation of individual consumers, improved judicial administration, and overall public safety has been the subject of much public policy commentary, and the issue warrants continued analysis and empirical study. The next Part discusses the core issues arising out of attorney-client relationships in mass tort cases by describing and analyzing the trial tactics dominating the Vioxx litigation to date.

IV. LIMITATIONS OF CURRENT RULES OF LAW AND ETHICS

Does the existing adversarial process effectively protect and promote the public's interest in a legal system that resolves mass tort claims fairly and efficiently when faced with a well-financed corporate defendant who insists on a try-every-case strategy? Is it a satisfactory answer that individual plaintiffs have an opportunity to be represented as part of an aggregated group by a well-financed and organized portion of the plaintiffs' bar? While plaintiffs' lawyers in the Vioxx litigation fought valiantly for many years, the pragmatic settlement they entered, with draconian terms that separate them from their clients who are unwilling to accept the proposed settlement, demonstrates that the current legal system does not preserve a right to individual compensation through means that promote both corrective and social justice.⁵³ Neither does it promote the optimum deterrent: the sale of unsafe products. The Vioxx litigation demonstrates the danger in mass tort cases that parties and their attorneys may become so focused on the long-range economic consequences of resolving ag-

53. I define "corrective justice" as a means by which to compel a party responsible for causing harm to another to correct the situation through monetary compensation. One commentator stated it succinctly: "I have a duty to repair your loss as a matter of corrective justice just because your loss is an outcome for which I am responsible." Jules Coleman, *Tort Law and Tort Theory*, in *PHILOSOPHY AND THE LAW OF TORTS* 198 (2007). See also Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, *id.* at 214-49 (analyzing causation rules and standards in light of the corrective justice theory); Jules L. Coleman, *The Practice of Corrective Justice*, 37 *ARIZ. L. REV.* 15 (1995). I define "social justice" as the application of substantive rules that promote the predominant values of the community for fairness in distribution of wealth and deterrence of violations of accepted social norms. For a discussion of social justice in the context of tort law, see John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 *GEO. L.J.* 513, 561 (2003); and Leon Green, *Tort Law Public Law in Disguise*, II, 38 *TEX. L. REV.* 257 (1960). See generally KOENING & RUSTAD, *supra* note 12.

gregate cases that individual justice concerns are overwhelmed.⁵⁴ The driving concern about aggregate cases dictates strategy and shapes the nature of the lawyer-client relationship and trial tactics, making it unlikely that the tort litigation process will meet the basic goal of providing compensation to individuals who have suffered injury from the use of Vioxx without being informed in advance of the drug's inherent risks.

This Article advocates two remedies to properly adjust the rights and interests of the parties in a mass tort case where a try-every-case strategy is employed without a good-faith evaluation of each case: Rule 11 sanctions⁵⁵ and an award of treble damages for bad-faith refusal to negotiate and settle individual cases.⁵⁶ The former may be invoked under present law in the federal courts⁵⁷ and most state jurisdictions; the latter requires new legislation aimed at mass tort litigation in most states. Many states have statutes or common law decisions that provide for awards against insurance companies who deny coverage in bad faith.⁵⁸ Merck's strategy shows that there is reason to enact and apply similar statutes specifically tailored to mass tort litigation and directed toward businesses that manufacture and distribute prescription drugs.

54. It is also true that mass tort claims, in general, induce courts to minimize the attention they are willing to give to the impact a case might have on individual claimants. See Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383 (2007) (arguing that mass tort claims push courts toward claims administration instead of adjudication).

55. Rule 11 provides, in part, that a lawyer who files or advocates the support of a "pleading, written motion, or other paper" certifies that factual allegations or denials are "warranted on the evidence." FED. R. CIV. P. 11. Sanctions imposed under Rule 11 are not likely to serve as an effective deterrent because they are discretionary and in most cases limited to costs and attorneys' fees. Rule 11, however, does reflect a perspective on the adversarial system that endorses the notion that fairness and honesty outweigh trial gamesmanship. From the outset, this new perspective has disturbed advocates of the traditional adversarial system. For example, see Justice Scalia's dissenting statement in response to the adoption of the Amendments to the Federal Rules of Civil Procedure in 1993, particularly Rule 11:

By placing upon lawyers the obligation to disclose information damaging to their clients—on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment—the new Rule would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side.

Amend. to Fed. R. Civ. P., 146 F.R.D. 402, 511 (1993).

56. See generally Mark I. Harrison & Samuel Langerman, *Action Against Insurer for Bad Faith Failure to Settle Claim*, 21 AM. JUR. TRIALS 229 (2007).

57. In addition to Rule 11, federal courts have inherent power to award attorneys' fees for bad-faith conduct in litigation. See *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991).

58. See *id.* For an example of a bad-faith statute applicable to unfair claim settlement practices, see MASS. GEN. LAWS ANN. ch. 176D, § 3(9) (West 2007).

Class actions, as presently conceived, are not available to Vioxx consumers, because courts have determined that individual issues are predominant over common issues.⁵⁹ While it is possible to certify a class for settlement purposes only,⁶⁰ such certification is not useful when a defendant is determined not to settle any case. Informal aggregation of claims prosecuted by informal networks of plaintiffs and their attorneys, which have worked in other mass tort cases,⁶¹ will not work if a corporation with vast resources insists upon a full trial in each of 27,000 cases. Merck's strategy impacts lawyer-client relationships in a way that exacerbates the ethical problems faced by plaintiffs' and defendants' lawyers, particularly with respect to the duty of candor to the court, the exercise of independent judgment, and the duty of loyalty to clients. The applicable ethical rules do not prohibit the roles played by the attorneys for both sides in the Vioxx litigation in response to Merck's strategy.⁶² Nevertheless, important questions arise as to whether the manner in which the attorneys function promotes the predominant public interest of achieving individual and social justice.⁶³

Aggressive judicial enforcement of a lawyer's duty of candor to the court will have some positive effect, but the overall impact on individ-

59. See, e.g., *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450 (E.D. La. 2006) (refusing to certify a nationwide class of product liability claimants, reasoning that the unique factual issues trumped any predominating issues). John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1349 (1995) (arguing that "defense counsel have come to understand that the mass tort class action can be utilized to obtain cheap settlements that pay little attention to the interests of certain structurally underrepresented classes of claimants"). See Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Prods., Inc.*, 80 CORNELL L. REV. 1045 (1995); Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439 (1996).

60. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (discussing criteria for settlement-only class action certifications and placing limits on the certification applicable to future claimants); Lahav, *supra* note 54, at 418-24 (arguing that courts are more willing to certify settlement-only classes than litigation classes because settlement-only classes impose less of an administrative burden on the judiciary). For a discussion of the ethical rules and citations to articles critically assessing common practices followed by counsel in aggregate settlements, see AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, DISCUSSION DRAFT NO. 2, ch. 3 (April 6, 2007) [hereinafter ALI DRAFT]. The ALI is currently reviewing and drafting principles applicable to aggregate litigation. See Nancy J. Moore, *The American Law Institute's Draft Proposal to Bypass the Aggregate Settlement Rule: Do Mass Tort Individual Clients Need or Want Group Decision Making?*, 57 DEPAUL L. REV. 395 (2008).

61. For a comprehensive review of informal networks in the prosecution of mass tort claims, see Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863.

62. See ALI DRAFT, *supra* note 60 (requiring full disclosure of all material terms of proposed settlements, including the distribution to each plaintiff).

63. For perspectives on the risks of improper representation of individuals in mass tort cases, see Coffee, Jr., *supra* note 59; Koniak, *supra* note 59; and Wolfman & Morrison, *supra* note 59.

ual and social justice will be minimal. A lawyer's duty to assess the impact of her client's positions and tactics on the promotion of justice remains a subject of contention within the profession.⁶⁴ However, the prevailing view is that the lawyer's duties of loyalty, confidentiality, and zealous advocacy trump her duty to promote justice. That conception of the lawyer's role in the litigation process makes it doubtful that effective solutions to the problem will emerge if the solutions sought focus only on the lawyer-client relationship. It will require a significant change in the culture of the adversarial system for us to develop a different balance between the lawyer's interest in promoting social justice and her duty to win.

The first step toward achieving a different balance occurred when federal courts adopted procedures compelling mandatory disclosure of information to one's adversary,⁶⁵ but, to date, it does not appear that other radical changes in the role of lawyer-advocates are likely. The rules of ethics, which place primary emphasis on a lawyer's duties of confidentiality and zealous advocacy, rest on the fundamental belief that the best way to achieve justice in a civil case is to provide tools for each side to access and present evidence to the court and jury from the biased perspective of adverse litigants. In mass tort cases, a try-every-case approach conflicts with the fundamental goals of the tort system: to promote deterrence, correctional justice, and social justice. Policymakers cannot provide an effective remedy to control such corporate conduct by changing the rules of ethics applicable to lawyers without upsetting other important values promoted by ethical rules. Instead, controlling the try-every-case strategy will require policymakers to adopt and enforce strong economic disincentives that outweigh the short-range benefits motivating the use of tactics relying upon litigants' disparate economic resources.

V. VIOXX LITIGATION: THE DUTY OF CANDOR TO THE COURT

Merck's trial tactics in the Vioxx litigation define the fundamental relationships of lawyers and clients. Merck made a business decision based on a cost-benefit assessment of the mass of tort cases, and, consequently, the judgments of its trial lawyers are not based on an assessment of the merits of defending a particular case but instead are dictated by the overall corporate litigation strategy. While the defense of an individual case in all mass tort litigation is necessarily

64. See Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 *LAW & SOC. INQUIRY* 1 (1999) (reviewing the contemporary debate and relating the history and jurisprudential background of the 1908 ABA committee debate).

65. *FED. R. CIV. P.* 26 (a).

guided by a general corporate strategy, the decision to not make candid assessments of whether an individual case warrants settlement poses some potential ethical problems for defense counsel that do not exist in other mass tort cases. Similarly, because the defendant has publicized its try-every-case strategy, plaintiffs' counsel are not in a position to offer meaningful advice to individual clients as to whether a settlement or an alternative dispute resolution may be in their best interests. The main ethical guidelines that should engage a lawyer's attention in the Vioxx litigation are the duties of exercising independent judgment, presenting candor to the court, and maintaining loyalty to the client. This Part briefly addresses these ethical issues. The ethical duty most pertinent to the present discussion is the duty of candor to the court.⁶⁶

Merck's Vioxx litigation strategy sharply defines and limits the role of counsel for both plaintiffs and the defendant. By publicly declaring that it will not pursue a group settlement strategy or consider settlement of any case, Merck limited the role of its outside counsel to trying cases. With such a specifically defined role, defense counsel are circumscribed or eliminated from their customary role of evaluating each case on its merits and deciding whether to recommend a settlement or trial strategy. Moreover, public statements made by defense counsel must be consistent with Merck's strategy before, during, and after the trial.

To assess the ethics of Merck's lawyers implementing this strategy, it is helpful to consider Rule 3.3(a) of the ABA Model Rules of Professional Conduct mandating candor to the court. This Rule provides in part that "[a] lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. . . . [or] (3) offer evidence that the lawyer knows to be false."⁶⁷ This rule makes it clear that, while the system places great weight on the adversarial process's ability to reveal the truth, it must limit zealous advocacy to protect the integrity of the fact-finding process.⁶⁸

66. In addition to Rule 2.2 of the Model Rules, discussed below, Rule 3.1 is relevant to the duty of candor. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2004). Rule 3.1 provides in part that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law." *Id.*

67. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2004).

68. The Model Code of Professional Responsibility adopts the same balance between zealous advocacy and the duty of candor, providing that a lawyer may not "[f]ile a suit, or assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(1) (1986).

Consider the case of a plaintiff who uses Vioxx for more than eighteen months and suffers a stroke though she has minimal factors in her medical history, other than the use of Vioxx, that present a significant risk of stroke.⁶⁹ Once her lawyers file a complaint, defense counsel confronts a risk of failing to comply with the rule demanding candor and the rules forbidding the presentation of evidence known to be false at the following stages of the litigation: filing an answer to the complaint; preparing and filing affidavits in response to a motion for summary judgment; retaining expert witnesses and presenting their testimony; and presenting the testimony of Merck's science employees and managers. A recent article reporting on the success of Merck's litigation strategy emphasized that not one Vioxx claimant has received compensation for an alleged Vioxx-induced injury and offered the following statement from one of Merck's attorneys: "Merck had not yet found a single case where it believed that Vioxx caused a heart attack."⁷⁰ The attorney also noted that heart attacks are common in many people.⁷¹

It is highly improbable that Merck's evaluation of the Vioxx claims persuaded the company that there were no meritorious claims among 27,000 cases.⁷² While the public posturing of Merck's officials was consistent with their litigation strategy, if one of Merck's attorneys made a similar statement to the judge—that Merck found no case where Vioxx caused a claimant's heart attack—a serious question would have emerged as to whether the attorney was fulfilling her duty of candor to the court. It is one thing to assert that Merck has not identified a case that it cannot offer a meritorious lack of causation or damages defense. It is quite another to assert that Merck's investigation has not identified any case where the evidence persuaded its experts that Vioxx caused a heart attack. In the same vein, it is one thing to play a semantic game with the press, using language like "where Merck believed that Vioxx caused a heart attack."⁷³ However, at some point in the adversarial process—through discovery and trials—evidence will likely show that the strategy of denying every

69. For example, one article highlighted Joseph Farrell, a fifty-nine-year-old insurance broker who had not decided whether he would accept the settlement. Emphasizing the need for some retribution, he asserted that he was induced to take Vioxx based on Merck's advertising and took it for three years before having two heart attacks. "He did not smoke, had low cholesterol, and his family lacked a history of heart disease." Stark, *supra* note 3.

70. Berenson, *supra* note 3.

71. *Id.*

72. A more candid and accurate picture of Merck's assessments of the merits of the various cases is revealed by its designation of qualified participants in the November 9, 2007 settlement agreement. See Merck Settlement, *supra* note 1.

73. Berenson, *supra* note 3.

claim and trying every case conflicts directly with the truth-seeking goal of litigation as reinforced by the duty of candor to the tribunal. The only question is whether the rules, as drafted, allow a court to demand the kinds of disclosure that the duty of candor to the court contemplates—even if that candor is limited to discussions in chambers that are not publicly disclosed.

Merck has the right to insist that plaintiffs in each case present sufficient evidence to prove, more probably than not, that Merck sold Vioxx with an inadequate warning and that Vioxx caused their injuries. However, if there were not a large number of similar claims, Merck would likely acknowledge to the court during the pretrial process that the evidence in a particular case has enough potential to persuade a jury of Merck's liability. At that time, it makes sense to engage in good-faith settlement discussions. Indeed, the tort system manages to dispose of the vast majority of cases without trial, because of the culture, legal rules, and ethical rules that allow the court to penetrate claims and defenses and distinguish among the cases that warrant dismissal, trial, or effort on the part of the court to encourage a settlement. By refusing to engage in a good-faith evaluation of each case and participate in candid discussions with the court, Merck may skillfully walk the line governing permissible trial tactics. However, this delays individuals' rights to the just resolution of their claims, and the costs to litigants and the public are significantly increased. The honest answer provided to the court as to why Merck is unwilling to settle any case is that a settlement will impact negatively on other cases and the overall resolution of the mass tort. Some mechanism of deterrence is necessary, and an award of treble damages may serve as an effective and justifiable tool to promote the public goals of economic efficiency, corrective justice, and social justice.

The effect of Merck's strategy on the plaintiffs' attorney-client relationships impacts every critical phase of the litigation. Merck likely anticipated and desired these effects when it adopted the strategy. The primary goal was to make attorneys more cautious and thoughtful about accepting and filing Vioxx cases by raising the cost of litigation and lowering the expectation of recovery. Inducing a more careful evaluation of cases is consistent both with the public interest in promoting individual and social justice, as well as with ethical rules. From the initial evaluation and decision to accept an individual's case through the final stages of settlement negotiations or trial, the plaintiffs' attorney also owes a duty of candor to the court.

Just as Merck knows that all 27,000 cases are not meritless, plaintiffs' lawyers know that some of the cases lack merit or present more

difficult evidentiary or statute of limitations problems than others. During case evaluations, it is more likely than not that some of the accepted cases did not receive the kind of detailed review and evaluation that the plaintiffs' lawyer would like when accepting or rejecting a case involving serious personal injuries. At some point in the process, the court will compel candor from both Merck and the client.

However, Merck's strategy has likely had an impact on both the number of plaintiffs' attorneys who have represented clients, as well as the number of claims. An attorney's loss of business need not be a cause for concern. But close attention should be paid to whether individual citizens are being denied the opportunity to find competent counsel to prosecute their claims as a result of the court system, the tactics of the litigants, and the manner in which lawyers practice. In the Vioxx litigation, as in most mass tort situations, plaintiffs' lawyers agree to cooperate in some manner, ranging from filing class actions, forming lead counsel committees to conduct discovery, or even simply sharing information. In most situations, a number of local attorneys keep cases they intend to litigate personally. Because most mass tort cases involve a well-financed corporate defendant, attorneys recognize that litigation costs are likely to be huge—it is unlikely that one can litigate an individual drug liability case for less than \$100,000—and the anticipated cost of financing the litigation, along with the work hours required to competently represent the client, leads most attorneys to refer the case to a firm in a better financial position. Given Merck's public litigation position, it is likely that more cases than usual were referred and that counsel for the litigants on both sides were working with substantial financial resources. To the extent that is true, one could conclude that Merck's strategy has laid the groundwork for a more efficient resolution of the litigation by encouraging the pooling of cases so that there are fewer decision-makers to address, at least in terms of plaintiffs' attorneys. However, it is also likely that many potential clients who were turned away were either poor, racial minorities, or both. Those clients probably presented the lowest chance of winning their cases, because they were more likely to have had multiple health problems prior to taking Vioxx.⁷⁴

The plaintiffs' lawyer who has accumulated multiple clients in the Vioxx litigation faces many ethical and economic issues common to mass tort litigation.⁷⁵ As Judge Weinstein noted, these issues include

74. See INST. OF MED. OF THE NAT'L ACADS., *UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE* (Brian D. Smedley et al. eds., 2002).

75. See, e.g., Dennis E. Curtis & Judith Resnik, *Contingency Fees in Mass Torts: Access, Risk and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collec-*

loyalty to the client, confidentiality, and zealous advocacy.⁷⁶ Performing these duties for one client risks breaching that duty to another. Informed consent becomes a critical feature of the lawyer-client relationship in this situation. The ethical problem highlighted by Merck's strategy is that plaintiffs' attorneys have a heightened duty to separate and classify their cases based on their relative strengths and weaknesses—in terms of the persuasiveness of the proof as to causation and inadequate warnings so that stronger cases are presented for trial first. In the absence of a try-every-case policy, it is likely that some cases in the group would be pushed for settlement, mediation, or early trial if the individuals were represented by individual counsel. The availability of settlement or alternative dispute resolution may be particularly important to some of the claimants based on their personal, financial, or emotional needs. These potential conflicts among clients exist in every mass tort situation where individuals are represented as part of a group. However, Merck's public position regarding its trial strategy diminishes the ability of counsel to respond to individual client needs or desires. The terms that Merck bargained for and obtained in the settlement agreement leave no doubt that Merck was successful in convincing plaintiffs' attorneys to sacrifice the interests of individual clients for what they saw as the only practical way to promote the overall good of the group as a whole.

In short, Merck's litigation strategy and the plaintiffs' attorneys' response to it promoted the economic interests of Merck, the plaintiffs' attorneys, and some of the plaintiffs' clients, while clearly leaving a significant number of individual plaintiffs to fend for themselves. From a moral and public policy perspective, this result warrants a more critical examination.⁷⁷

VI. THE MORAL CONSIDERATIONS

One of the most interesting junctures in a first-year torts course occurs when students read cases where courts announce that an individual does not have a duty to come to the aid of another who is in danger and, therefore, cannot be held legally accountable for serious

tives of Clients, 47 DEPAUL L. REV. 425, 432 (1998) (noting that "little by way of rules or case law guides courts in sorting out the relationships among clients and the many lawyers within mass tort group litigation").

76. WEINSTEIN, *supra* note 12.

77. This Article focuses on Merck. The ethical and moral issues of the settlement agreement that the plaintiffs' attorneys entered are important and complex enough to require a separate article that I plan to write in the future.

harm suffered by another that could have been avoided.⁷⁸ The notion that law does not compel moral behavior does not sit well with large numbers of students. The reactions of disillusioned students may be tempered somewhat by noting that the law does not forbid people from engaging in moral conduct to aid others, and, if members of the community regard conduct as immoral, there are ways of attaching social and economic consequences to that behavior.⁷⁹ Law students and lawyers should not stop thinking about and developing techniques to promote moral behavior just because specific laws do not demand moral conduct.

Moreover, this morality discussion encourages students to think about the roles and responsibilities of lawyers to press for changes in law that make it more consistent with community values. In recent years, several commentators have urged critical rethinking about the roles lawyers play in using the law to promote social change. For example, Professor Haddon urged law schools to consider the importance of training lawyers to promote public values such as equality.⁸⁰ Judge Harry Edwards criticized law schools for focusing on legal theories to the exclusion of practical knowledge and emphasized the obligation of a lawyer to serve the public good.⁸¹ Professor Rosenbaum took lawyers and lawmakers to task for not pushing the law toward greater compatibility with morality and spirituality, proposing an alternative paradigm for the legal system that explicitly endorses moral judgments in connection with evaluating the law and resolving legal conflicts.⁸²

78. For an enlightening discussion of the way tort law approaches the duty problem, see Thomas C. Galligan, Jr., *Aiding and Altruism: A Mythopsycholegal Analysis*, 27 U. MICH. J.L. REFORM 439 (1994).

79. For an interesting argument that the legal rule excusing a person from a duty to aid others is consistent with prevailing moral standards, see Alan Calnan, *Reasonableness, Justice and the No-Duty-to-Rescue Rule of Torts* (June 11, 2007), available at <http://ssrn.com/abstract=993118>. For example, economic and social levers were important instruments of the civil rights movement in the 1960s when victims of discrimination lacked political power and the support of the existing law.

80. Phoebe A. Haddon, *Education for a Public Calling in the 21st Century*, 69 WASH. L. REV. 573, 574 (1994).

81. Harry T. Edwards, Remark, *A Lawyer's Duty to Serve the Public Good*, 65 N.Y.U. L. REV. 1148 (1990); see also Mary Ann Dantuono, *A Citizen Lawyer's Moral, Religious, and Professional Responsibility for the Administration of Justice for the Poor*, 66 FORDHAM L. REV. 1383 (1998) (arguing that religious traditions require members to work collectively to make society respond to the needs of the poor, and a lawyer who professes to that religious belief has a special obligation to use her legal skills in that regard).

82. Rosenbaum argues that courts should strive to provide moral remedies such as seeking an apology from a person who has caused harm to another and seeking to restore relationships. He argues that such moral remedies would work to the benefit of the entire community. THANE

Merck's public statements and litigation strategy reflect its view of fulfilling its fiduciary duty to shareholders, but they show little regard for the public that trusted Merck enough to pay for its product. Merck's litigation conduct toward Vioxx consumers, however, is at best indifferent and at worst callous. Millions of consumers used the product, believing that it would treat their pain. At the same time, these consumers were unaware that Vioxx subjected them to a significantly increased risk of suffering a heart attack or stroke. Merck cannot argue in good faith that there are no meritorious claims among the 27,000 filed. This is not a mass tort case, such as *In re Bendectin Litigation*, where the drug manufacturer may argue that scientific evidence does not support a causal link between its drug and the claimant's injuries.⁸³ Studies clearly show an increased risk of heart attack and stroke among persons who have used Vioxx for more than eighteen months.⁸⁴ The best Merck can do is argue that each individual case requires careful analysis to make a good-faith judgment as to whether Vioxx caused the individual's injuries. By shifting away from questions of legal and fiduciary duties, the fundamental issue arises whether litigants and attorneys in mass tort cases continue to have obligations as public citizens to engage in morally acceptable behavior toward one another.

The adversarial process does not justify a corporation that knows its product caused injuries to large numbers of consumers to use all of its resources in an effort to avoid paying any of them—particularly where the evidence shows that the manufacturer devoted enormous resources to persuading consumers to use the product without adequately communicating the drug's true risks. This Article does not argue that Merck, or any manufacturer faced with mass tort claims, lacks the right to defend itself in court. Clearly, the adversarial system does not contemplate one side to a controversy failing to vigorously advocate her position. However, functioning as a zealous advocate does not—and should not—shield a party's conduct from evaluation from a moral perspective. In mass tort actions based on products such as Vioxx that certainly have caused substantial harm to a significant number of consumers, good moral conduct requires a good-faith effort to evaluate individual claims and attempt to reach a fair settlement in any case that warrants a finding of causation between the use

ROSENBAUM, THE MYTH OF MORAL JUSTICE: WHY OUR LEGAL SYSTEM FAILS TO DO WHAT'S RIGHT 39 (2004).

83. 857 F.2d 290 (6th Cir. 1988) (submitting representative cases to a jury to determine whether the evidence showed that Bendectin caused birth defects).

84. See MARTIN REPORT, *supra* note 30.

of the drug and an injury. In other words, possessing the resources to litigate every case in a mass of tort cases does not make it morally acceptable to employ those resources to delay and avoid fairly compensating people who are suffering from heart attacks, strokes, and deaths that the product clearly caused. Such conduct would not be morally acceptable from a trucking company whose driver ran off the road and injured large numbers of individuals, and it is not morally acceptable from a drug company.

Merck has both a moral and legal right to contest any claim that it genuinely believes lacks merit. However, a morally acceptable strategy entails a declaration to consumers that they may either stay in the litigation process and try their cases or participate in an alternative dispute resolution that the company makes available to claimants who meet specific threshold requirements that establish a colorable claim. Courts should have the power to impose substantial monetary penalties for the parties' failure to conduct good-faith evaluations and settlement negotiations.

The public has an interest in both the truth about the risks associated with prescription drugs and the compensation of individuals who may have suffered serious injuries from their use. As Judge Weinstein emphasized, mass tort litigation presents stakes that go far beyond individual litigants and extend to the community as a whole.⁸⁵ Moreover, there is a compelling need to raise and explore the ethical and moral questions in light of the litigants' concerted use of the media to influence public opinion about the merits of Vioxx lawsuits. Assuming any corporation insists on the strategy of not acknowledging responsibility in any case without a full trial, the courts must have tools that compel the defendant to conduct good-faith case evaluations and make good-faith settlement offers.

Some will argue that Merck's efforts to settle the Vioxx litigation under the terms of the proposed November 9 settlement agreement show that Merck's try-every-case strategy should not be condemned as immoral. Rather than denying and disregarding the rights of its consumers, it represents an efficient manner of inducing the plaintiffs and their lawyers to assess their losses more realistically and engage in fair settlement discussions. However, that argument requires one to assess the results in terms of the global settlement only. If one moves from a global view to look at the effects of the settlement on individuals who seek either fair compensation or a day in court, it is apparent that many individuals have been hurt a lot more than they have been

85. See WEINSTEIN, *supra* note 12.

helped. Because the vast majority of plaintiffs' lawyers agreed to recommend settlement to all of their clients even though the compensation represents a small fraction of individual verdict expectancies, it is difficult to support any conclusion other than that Merck's strategy has lowered the compensation claims by encouraging plaintiffs' attorneys to sacrifice individuals for the good of the masses and the economic investments of the attorneys. This resolution is pragmatic and defensible, only because the tort system presently operates in a manner that allows a wealthy defendant to take advantage of its slow movement and high expenses, without concern about significant economic penalties for failing to engage in good-faith evaluations and settlement negotiations of meritorious individual cases among the mass.

VII. TORT LAW, ECONOMICS, AND AMERICAN CULTURE

In order for communities to remain healthy, there must be an accepted process for holding individuals and businesses accountable for causing serious harm to others. Sometimes, an apology is sufficient.⁸⁶ In most cases involving serious personal injuries, the most important goal in the American cultural and legal system is to determine whether the victim is entitled to compensation as a means of achieving corrective justice. In mass tort cases, the issues require consideration of not only corrective justice, but also social justice in light of the large numbers of people who have suffered losses that may require financial, social, and emotional support from family, friends, and others.

With respect to injuries caused by the use of products, the consumer protection movements of the past four decades have reflected the widespread community opinion that corporations should be honest with consumers about the risks and benefits of products and should pay for harm caused by defective products.⁸⁷ The law reflected and explained the consumer demand for safety and compensation by eliminating legal barriers to identifying the business that should be held accountable and changing the standard of liability from negligence to strict liability.⁸⁸ Although the consumer safety perspective has been

86. See generally AARON LAZARE, ON APOLOGY (2004); Jennifer K. Robbennolt, *What We Know and Don't Know About the Role of Apologies in Resolving Health Care Disputes*, 21 GA. ST. U. L. REV. 1009 (2005); Ann J. Kelleit, Comment, *Healing Angry Wounds: The Roles of Apology and Mediation in Disputes Between Physicians and Patients*, 1987 MO. J. DISP. RESOL. 111.

87. See MARSHALL S. SHAPO, TORT LAW AND CULTURE 86-95 (2003) (arguing that, by the 1960s, a combination of factors created a change in attitudes about what constitutes justice with respect to claims for compensation in cases of product injuries).

88. Judge Traynor's succinct statement of the rationale of strict liability law in *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 901 (Cal. 1963), remains true today: "The purpose of

subject to vigorous challenges from political and economic conservatives, courts have stood fast on the standards and justifications deterring the sale of defective products and compensating consumers injured by these products.⁸⁹

The law of strict liability is also a reflection of the strand of American culture that empowers individuals to seek redress for wrongs committed by the rich and powerful by invoking the economic and political power of the community. This focus on individual power is protected by the federal and state constitutions in part by the preservation of the right to a jury trial. This right ensures that, in most important disputes and conflicts, the average member of the community will have the power to ultimately say who is right and who is wrong. The combination of judicial restructuring of legal doctrine to include strict liability as a justification for shifting the costs of accidents and the potential resolution of personal injury claims by juries has functioned as a major source of economic and social relief in the modern American economy.

Merck's strategy in the Vioxx cases appears on the surface to be compatible with, and respectful of, the legal standards governing its marketing of products and the resolution of injury claims. In reality, the strategy directly conflicts with the goals underlying the strict liability system. Faced with the prospect of trying every case in a court system that lacks that capacity in a mass tort situation, most tort victims will have justice delayed beyond the time where monetary compensation may fulfill a meaningful corrective function. In other words, Merck's strategy relies upon the fact that a large number of people may have been hurt by the product as a justification for delaying a resolution of their compensation claim for such a long period of time that very few will receive compensation fast enough to make a difference in their lives.

To address the goal of individual justice in the face of a rich defendant's resolve to litigate every case in a mass of claims, policymakers may need to either change the rules applicable to class actions or aggressively impose a duty of good faith and fair dealing on the part of litigants and their counsel to evaluate and attempt to settle individual cases. A party with extraordinary resources acquired through the

such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."

89. See, e.g., *Potter v. Chi. Pneumatic Tool Co.*, 694 A.2d 1319 (Conn. 1997) (discussing the conflict among the drafters of the Third Restatement of Torts, commentators, and courts about the proper way of determining whether a product has a design defect).

mass marketing of a defective product should not be able to maximize its profits in the marketplace by delaying the removal of, or warning about, dangerous products and then use those resources to delay the resolution of tort claims or make the process so costly that access to court is effectively denied. To allow this result permits a manufacturer or seller of mass consumer goods to use economic power to undermine the goals of product liability law that have been embraced by the country and the culture over the past forty years. In effect, the successful use of a try-every-case tactic ultimately allows a corporation that sold defective products around the world to define the scope and extent of its liability for the sale of defective products.

Courts, legislatures, and the bar should explore changes in the legal process and the roles of lawyers that aim to reduce the effectiveness of this strategy. The most efficient and effective approach may lie in the enactment of statutes that provide for an award of treble damages against a recalcitrant defendant who fails to make a good-faith effort to settle a tort case in a timely manner.⁹⁰ The law of bad faith as applied to insurance companies is well developed and offers great potential as a tool to encourage wealthy corporate defendants in mass tort cases to engage in good-faith evaluations of claims, defenses, and settlement negotiations.⁹¹ For example, Massachusetts law includes unfair settlement practices under its definition of “unfair or deceptive acts or practices in the business of insurance.”⁹² An “unfair claim settlement practice” includes “[r]efusing to pay claims without conducting a reasonable investigation”⁹³ or “[f]ailing to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear.”⁹⁴ The award against an insurer who engages in bad-faith practices may be increased in relation to the degree of wrongfulness of the insurer’s litigation-related conduct. For example, courts may award double damages for the negligent failure to honor a claim and treble damages for the willful failure to honor a claim.⁹⁵ Another approach worth pursuing is some form of mandatory pretrial arbitration process, wherein a third party evaluates

90. MASS. GEN. LAWS ANN. ch. 176D, § 3(9)(m) (West 2007).

91. See generally Harrison & Langerman, *supra* note 56.

92. MASS. GEN. LAWS ANN. ch. 176D, § 3(9) (West 2007).

93. § 3(9)(d).

94. § 3(9)(f).

95. See, e.g., *Fed. Ins. Co. v. HPSC, Inc.*, 480 F.3d 26 (1st Cir. 2007) (affirming a Massachusetts trial court’s holding that an insurer committed an unfair or deceptive trade practice by failing to effectuate a settlement after liability became reasonably clear; an award of double damages and attorneys’ fees was justified due to the insurer’s knowing and willful breach of the duty of good faith).

the merits of the claims and defenses and makes the evaluation available to the court for use in promoting settlement negotiations. In addition, the third party's neutral evaluation should be considered in connection with an assessment of whether the defendant has acted in bad faith.

VIII. CONCLUSION

The Vioxx litigation may produce new insights regarding whether mass torts can be fairly and efficiently handled by the traditional tort system and lawyer-client relationships. If the November 9 settlement is effectuated, it will set a precedent that rewards a litigation strategy of exhausting the resources and will of plaintiffs' attorneys and courts in order to induce global settlements that fail to fairly and adequately compensate individuals with serious injuries. If the proposed settlement fails to receive the support of the required number of plaintiffs and Merck insists on the trial of thousands of cases before it is willing to acknowledge responsibility, the resulting trials will reveal whether groups of plaintiffs' lawyers with millions of dollars can effectively protect the rights of thousands of victims who are opposed by the full force of a billion-dollar corporation, without the advantages that come with class action certification.

This Article contends that Vioxx litigation will most likely demonstrate that the established way of providing legal services to mass tort victims no longer works to provide compensation to individual victims who merit corrective justice. If this contention proves correct, the justice system will need to explore changes to the ways in which tort victims get representation, the manner in which courts process mass tort claims, and the manner in which lawyers and corporations are expected to fulfill their duties as public citizens in the face of mass tort actions. Judges should take aggressive action in demanding honest and candid assessments of the merits of individual claims at an early stage in the litigation, the use of alternative dispute resolution in which the court may compel the parties to participate before having the opportunity to try the case, and an award of double or treble damages against a defendant who fails to make a good-faith effort to investigate and evaluate. There is no justification for forcing the court to serve as a facilitator for parties who refuse to honestly and candidly evaluate the merits of a claim or defense before insisting on a trial in mass tort cases.

