

# THE NATIONAL LAW JOURNAL

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MONDAY, APRIL 17, 2006

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## TOP DEFENSE WINS OF 2005

### Merck overcame unfavorable rulings

By: June D. Bell

**CASE TYPE:** Failure to warn, consumer fraud

**CASE:** *Frederick Humeston v. Merck & Co. Inc.*, No. ATL-L-2272-03 MT (Atlantic Co., N.J., Super. Ct.)

**DEFENSE ATTORNEYS:** Diane P. Sullivan, partner, Dechert, Princeton, N.J., and Hope S. Freiwald, partner, Dechert, Philadelphia; Stephen D. Raber, partner, Williams & Connolly, Washington; and Christy D. Jones, chairwoman of litigation department, Butler, Snow, O'Mara, Stevens & Cannada, Jackson, Miss.

**PLAINTIFF'S ATTORNEYS:** Christopher A. Seeger and David R. Buchanan, partners, and Moshe Horn, of counsel, Seeger Weiss, New York

The second time was the charm for Merck & Co. The pharmaceutical giant lost its first Vioxx trial last summer, when a Texas jury awarded \$253 million to the widow of a man who suffered a fatal heart attack after using the anti-arthritis drug for eight months. The verdict, which included \$229 million in punitive damages, did not augur well for a company facing thousands of additional Vioxx claims.

However, Merck fared far better at its second Vioxx trial, held last fall in New Jersey. This time, the plaintiff walked away empty-handed.

Plaintiff Mike Humeston claimed his two-month use of Vioxx precipitated the heart attack he suffered in 2001. He alleged failure to warn and consumer fraud. His suit is one of more than 8,000



MARY GODLESKI/AP WIDE WORLD PHOTOS

**VIOXX VICTORY:** *Merck & Co.* attorney Diane Sullivan motions to the jury during her closing arguments on Oct. 31, 2005.

that claim the drug company didn't tell users of the drug that they faced a greater risk of heart attacks and strokes.

Lead defense attorney Diane P. Sullivan, a partner in Dechert's Princeton, N.J., office, said the scrutiny that the second Vioxx case received didn't weigh on her nearly as much as a series of evidentiary rulings by Atlantic County Superior Court Judge Carol E. Higbee that excluded vital material Sullivan needed to construct her case. For example, she was not able to tell jurors that Merck had voluntarily decided to withdraw Vioxx from the market in September 2004, or that the U.S. Food and Drug Administration had agreed to allow Merck to apply to reintroduce Vioxx to the market—evidence she said had been admitted in the Texas case and in a federal Vioxx case in Texas that ended in a hung jury last December.

During the 7 1/2-week trial, the defense was temporarily stunned when Higbee struck the testimony of Merck scientist Briggs Morrison, who had helped develop Vioxx. Morrison had already testified for several hours when the plaintiffs objected, claiming he was offering undisclosed expert testimony.

Faced with such a setback, "you regroup," Sullivan said, "and you go back the next day." She tapped the expertise of another Merck scientist instead.

The nine-person jury on Nov. 3, 2005, found unanimously for Merck on the consumer fraud claim and 8-1 in Merck's favor on the failure-to-warn claim.

Humeston's attorney, Christopher A. Seeger, said the defense win won't mean much in the long run. "Merck can't really take too much away from a super-short [length of drug] use case like this," he said. "This was one case and they won it...The science is on our side."

Seeger, a partner at Seeger Weiss in New York, is seeking a new trial.

Merck's defense attorneys don't have time to rest on their laurels. Several cases brought by plaintiffs who took the drug for more than 18 months—doubling their risk of heart attack, according to a medical study—are slated for trial this spring. On April 11, an Atlantic City, N.J., jury awarded \$9 million in punitive on top of \$3 million in compensatory damages to one of those longer term Vioxx users. Sullivan is headed back to court in June.

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### CHOOSING THE TOP 10 DEFENSE WINS

IN CHOOSING THE BEST DEFENSE WINS OF 2005, *The National Law Journal* considered the obstacles that defense attorneys encountered, including plaintiff-friendly venues, the amount of damages at stake and the potential effect on similar cases.

We looked for a mix of bench and jury verdicts—class actions, criminal and significant civil cases—from a variety of jurisdictions. We interviewed dozens of trial counsel in distilling scores of nominations from across the country into the list you find here.

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