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## If At First You Don't Succeed, Talk to the Jury: Fosamax Plaintiff Wins \$8 Million Verdict Against Merck in Retrial of Bellwether Case

By **Victor Li**

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When the first Fosamax products liability trial against Merck ended in a mistrial last September, plaintiff's counsel Timothy O'Brien of Levin Papantonio Thomas Mitchell Echsner & Proctor wanted to know where he had gone wrong. He got the answers straight from the horse's mouth.

"I learned a lot about what the last jury absorbed," said O'Brien, who received permission to speak with the first trial's jury foreperson from the judge who oversaw the case, Manhattan federal district court judge John Keenan of the Southern District of New York. "In the retrial, we simplified our message, and we now know how to try these cases. I call it my \$500,000 focus group."

O'Brien certainly put the juror's lessons to good use: On Friday, he and his co-counsel, Gary Douglas of Douglas & London, won an \$8 million verdict against Merck on behalf of their client, Shirley Boles, a 71-year-old Florida woman who claimed she experienced jaw degeneration after taking the osteoporosis drug Fosamax. Boles is the first plaintiff to win against Merck in the 900-case mass tort; in two other bellwether trials, Merck won a summary judgment ruling and a defense verdict. The fourth trial, which O'Brien is also handling, is scheduled for trial in November.

The biggest change in O'Brien's strategy for the Boles retrial was calling his client's oral surgeon to testify about her injuries. "The jury said that they had really wanted to hear from him," said O'Brien. "In the first case, Merck said that Shirley's oral surgeon screwed up, and that if she was injured, her oral surgeon had caused it and not Fosamax. In the retrial, we brought him to trial to address these issues, and he hit it out of the park."

Merck's defense at the retrial was led by Paul Strain of Venable, who, according to O'Brien, handled most of the courtroom work for the pharmaceutical company. (Former *Litigator of the Week* Christy Jones, who won a defense verdict in the last Fosamax trial to reach a jury, wasn't a courtroom presence this time around.) Strain said in a statement that the company intends to appeal. "We believe the jury verdict was a result of plaintiff's counsel's inflammatory and prejudicial remarks," the statement says. Noting that Boles has a history of smoking, Merck's statement asserts that she was at increased risk for dental and jaw problems even if she were not taking Fosamax.

Additionally, Strain disagreed with O'Brien's assessment of the testimony of Boles's oral surgeon. "While there were some disagreements, he made some very important concessions--that she had serious dental disease long before taking Fosamax, that it had escalated into a disease of the jaw, and the disease actually killed her jawbone, not Fosamax," he told us.

Plaintiff's co-counsel Douglas disputed Merck's argument. "Our plaintiff had many teeth extracted during her life and never had a problem," he said. "The first tooth she had extracted after Fosamax was when her problems started."

O'Brien, meanwhile, told us he's gearing up for the November trial against Merck, in which he said he'll be able to put on an even stronger case than he did in the Boles retrial. "They're both Florida cases, so the instructions of law will be largely the same," O'Brien said. But unlike Boles, he said, the plaintiff in the next Fosamax trial has already had her jaw replaced. "We were limited in [the Boles] case from presenting evidence of the jaw replacement because Shirley hadn't had it yet. It's a very invasive procedure--they use bones from your body to rebuild your jaw. It's not a procedure you would want an old woman to go through."

Strain, on the other hand, told us he's not sure if he'll be defending Merck in the November trial, but he remains adamant about Fosamax. "Fosamax is safe and effective," said Strain. "It's approved by the FDA, and there is no scientific evidence that Fosamax causes this injury."

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