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LITIGATOR OF THE MONTH

Mark W. Davis, Davis & Feder, Gulfport, Miss.

Presentation is the potent weapon in a mass tort win

CASE: *Perry v. American Home Products*, CA-99-0089 (Cir. Ct. of Jefferson Co., Miss.)

OUTCOME: In the trial of a suit by seven plaintiffs, a midtrial, secret settlement including all 2,000 litigants claiming heart or lung damage from diet drugs Pondimin and Redux. Newspaper accounts, attributed to the defense attorney, put the settlement at \$200 million.

WHAT WAS THE KEY FACTOR FOR MAKING THE SETTLEMENT? Sometimes it just takes going to trial. We were about to call Dr. James Oury. Dr. Oury is one of the leading cardiologists in the world who deals with valvular heart disease, which is one of the two injuries that arise out of taking Pondimin and Redux. He was in the courtroom, ready to take the stand. He was going to give generic testimony....He has testified in other cases, and he'd given several depositions, so American Home Products knew what he was going to testify to. He comes across very well and makes a persuasive argument that their drug, Pondimin Redux, causes heart valve problems. Which they still dispute... Until a trial actually starts, you don't know if it's going to get continued. There was also a crashworthiness case involving Honda [on the docket]. The judge would not tell anyone involved whether they would go first or later.... The judge did two trials at one time. We both picked a jury. Their trial would go in the morning, and our case would go in the afternoon. When both sides got to the second day of trial, they had settled their case. So the judge knew what he was doing, the way of getting cases settled.

WHAT WAS THE MOST DIFFICULT HURDLE? I would say, probably holding

them to the trial date. American Home Products, their attorneys, had been asking everyone around the country to continue their trials till after the first of the year, with the understanding they were going to make a bona fide effort to settle the cases. We were asked a number of times, and in fact a number of plaintiffs' attorneys contacted us and were kind of mad, we were rocking the boat because we wouldn't continue. American Home Products didn't want to settle any cases until they had ours resolved. We held firm to our trial setting. They filed a motion for continuance, and the judge wouldn't [grant the motion]... We weren't sure at the last moment what was going to happen. There was a possibility the Honda case was going to bump us until next year. I wasn't worried about losing the case. I was worried about losing the trial setting... We felt we had the right cases at the right place at the right time.

WHAT TIP DO YOU HAVE GENERALLY FOR DEALING WITH A JURY? In the context of mass tort litigation, I think cases are won or lost based on the presentation of the plaintiff's case. You can talk about venue, and I agree that contributes. You can talk about how good the defense lawyer is and how good the defense is. But to me, the presenta-



tion of the plaintiff's lawyer and the plaintiff's case is what makes or breaks it. In a mass tort case where what's at stake is not just one or five trial plaintiffs, but hundreds of thousands, where you represent the plaintiffs, don't short-change the case at all. Our expert witness fees alone...were over \$250,000. Our expenses collectively are over a million. They're still counting. A lot of that is putting together a good PowerPoint presentation. Things like this, you can't put that kind of time and money in a car wreck, but with mass tort, put together the best possible trial that time and money can [buy].

WHAT'S AHEAD FOR YOU? We've gotten involved...this year in putting together a lead paint mass tort. Nobody's gone after them collectively, as a group, like asbestos and most recently in tobacco.

—ELIZABETH AMON