

\$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.

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Monday, Mar. 13, 2007

After recent courtroom victories, Merck & Co. Inc. lost a Vioxx case with \$47.5 million in damages yesterday and quickly vowed an appeal.

An Atlantic County jury ordered the maker of the now-recalled pain reliever to pay \$20 million in compensatory damages and \$27.5 million in punitive damages to an Idaho postal worker, Frederick Humeston, 61, who had used Vioxx for two months in 2001 before suffering a heart attack.

The award raised Merck's total potential damages in all state and federal cases to \$94.8 million, according to an unofficial compilation of verdicts. Plaintiff attorneys hope the rising damages and high caseload, fueled by high publicity, will compel Merck to settle with plaintiffs to avoid the expense of trials.

But Merck has appealed or said it plans to appeal all of the losses, and has not paid any damages yet. It says it has not settled any cases and plans to fight each case, numbering at least 27,000 nationwide.

The total damages, in fact, pale in comparison with the \$785 million Merck already has spent on its own lawyers in the last two years - more than \$1 million a day - to fight a settlement that some Wall Street analysts have said could go as high as \$30 billion.

Humeston had lost his first trial against Merck in 2005 after claiming Vioxx, not hypertension, high cholesterol or other risk factors, caused his heart attack. In his retrial, ordered by the judge because of evidence problems in the first trial, Humeston said he was a high-risk patient who would not have taken Vioxx if he had proper risk warnings.

"Merck will win from time to time. But when the plaintiff wins, the jury wallops them," said **Thomas Kline**, a Philadelphia plaintiff attorney who has helped prepare and strategize the cases.

Hope Freiwald, an attorney from Dechert L.L.P. along with Diane Sullivan, who defended Merck, criticized the unusual two-part structure of the trial.

"We believe Mr. Humeston would have suffered a heart attack whether he was taking Vioxx or not," Freiwald said. "We will pursue all avenues" of appeal.

The Humeston verdict is the largest damage award that Merck currently faces. In 2005, a Texas jury awarded a Vioxx user \$253.4 million, but that amount is capped at \$26 million under Texas law.

Last year a federal jury awarded a plaintiff \$51 million, but a judge threw out the award as "excessive" and ordered the panel to reconsider the amount.

Merck has won nine cases and lost five in state and federal courts. At least two overturned verdicts have not yet been retried.

Merck argued that Humeston had a variety of cardiovascular risk factors and could not prove he was taking Vioxx at the time of his heart attack.

Rejecting the argument, the Atlantic City jurors decided that Vioxx was, in fact, a cause of Humeston's heart attack and Merck acted recklessly in marketing it. In an earlier phase of the trial, the jury concluded on March 2 that Merck had failed to properly warn Humeston and his doctor that Vioxx posed some increased risks.

Merck withdrew Vioxx in September 2004 after its own study found higher risk of heart attack after 18 months of Vioxx use.

Humeston was represented by Christopher Seeger, of Seeger Weiss L.L.P.

Kline, the Philadelphia plaintiff lawyer, said the verdict should tell Merck the time to settle has arrived.

"It's going to continue to cost them \$1 million to \$2 million a day to defend this litigation," Kline said.

But Charles Babcock, a pharmaceutical defense attorney at Jackson Walker L.L.P. in Texas, said Merck's costs are far from tipping in favor of settling.

"You could go a lot of days at \$1 million a day before getting to \$30 billion," Babcock said, referring to the estimates of Merck's settlement costs. He said he would not expect talk of settlement for another year or so.

Another defense attorney, Alan Klein of Duane Morris L.L.P. in Philadelphia, said: "It's way too early for any kind of swan song for Merck."

Merck shares closed down 32 cents, or less than 1 percent, to \$44.29.

Merck is headquartered in Whitehouse Station, N.J., and employs about 11,000 in Montgomery County, its largest outpost, where much of the Vioxx marketing work was done.