

Merck can expect more highs, lows, verdicts, fortunes and morale will certainly vary as the remaining 6,400 Vioxx cases come to trial

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Minutes after Merck & Co. Inc.'s big victory last week in its second Vioxx trial, two predictable events put the win in sobering perspective.

Merck's value on the New York Stock Exchange soared by \$2.7 billion, or 4.2 percent, then fell like a slowly deflating balloon as investors digested the news, sliding by \$483 million within a half hour.

About the same time, Merck's general counsel, Kenneth Frazier, sent a memo to the company's 62,000 employees calling the verdict a vindication of Merck's actions and legal strategy over the blockbuster pain reliever. Then he threw some cold water.

"We must put it in its appropriate context. There are more trials to come," Frazier wrote, according to a copy provided by an employee. For good measure, Frazier urged employees to keep their noses to the grindstone and "not allow media reports and courtroom battles to distract us."

In coming months, swings in verdicts, fortunes and morale are almost guaranteed for Merck employees, investors and customers as more cases come to trial among at least 6,400 filed nationwide so far.

Merck's nearly unanimous support from a New Jersey Superior Court jury followed an equally staggering loss in August from a Texas panel, a \$253 million verdict Merck is appealing.

The New Jersey verdict briefly restored much of the market value Merck lost after the Texas case, when an 8 percent stock decline wiped out about \$5.1 billion. As of Friday's closing price of \$29.22, Merck was valued at \$64.2 billion.

With Merck's Vioxx trial record now 1-1, experts in mass tort litigation said it would take at least four or five straight victories for one side or the other before Merck's real costs become clear and it faces real pressure - from Wall Street - to consider a settlement strategy.

Various estimates by equity analysts have put its liability at between \$5 billion and \$30 billion.

If the sides keep trading victories, bank on at least eight to 10 more trials before there is a settlement plan in sight, they said. Nobody expects the sides to fight 6,400 lawsuits. But neither will they declare victory or defeat after just a few cases, lawyers said.

"The lawyers need to see how the next series of cases play out, to see which one, Texas or New Jersey, was an aberration," said Howard M. Erichson, a Seton Hall University law professor who has been following the cases.

"This victory lets Merck, for the time being, continue with its no-settlement strategy and fight each case," Erichson said. "At the same time, it would surprise me a lot if there were many plaintiff lawyers who were interested in scaling back simply because Merck won."

Two key variables to watch in coming cases are the individual characteristics of plaintiffs and the venues, in either state or federal court.

The first two cases involved plaintiffs who used Vioxx for a relatively short period. In the Texas case, Robert Ernst died after taking it for about eight months. In the New Jersey case, Frederick "Mike" Humeston survived a mild heart attack after taking it intermittently for barely two months.

The first two cases also were held in state courts, which are generally considered more favorable to plaintiffs than federal court.

Diane P. Sullivan, Merck's lead attorney in the Humeston case, said the New Jersey verdict affirmed Merck's position that "the science doesn't support the link to heart attacks in short-term use."

According to jurors interviewed after the Humeston verdict, Merck succeeded in undermining the plaintiff's credibility and his claim for compensation.

It is a delicate task to attack a plaintiff without coming across as a corporate ogre impugning his or her honesty. "Our intention wasn't to do that," Sullivan said. "We just said, 'Here's the evidence.' We were very careful not to characterize it and just let the jury decide."

That task is even harder in so-called death cases, when Merck will face a widow or survivor of a person on Vioxx, whether a long- or short-term user.

The next case, set to begin Nov. 28 in federal court in Houston, also involves short-term use. The case was filed by the widow of Richard "Dicky" Irvin of Florida, who took Vioxx for about a month.

"That's going to balance things out a lot," said Christopher Seeger, of Seeger Weiss L.L.C., who represented Humeston. "The jurors in our case just weren't moved by him. They looked at him every day and he looked fine."

Beyond the next federal case, a state case awaiting trial in Texas involves a woman who died of "complications" after taking Vioxx - which could test the sides' arguments on causation.

This week, New Jersey Superior Court Judge Carol E. Higbee will hold a hearing to determine which case to take next, of more than 2,700 consolidated in her courtroom.

Several plaintiff attorneys said they had no plans to delay or drop their short-term-use cases, although Seeger said they might refine their strategies and emphasis.

Humeston "was a bump in the road, not a pothole," said Tom Kline of the Philadelphia firm Kline & Specter P.C.

Merck, for its part, has dropped its chief scientific expert, John Michael Gaziano, from its expert list for the Irvin case in federal court, according to plaintiff lawyer Jere Beasley. Sullivan declined to confirm or deny whether Gaziano would testify.

He was criticized by two Harvard University colleagues after telling the New Jersey jury there was no evidence supporting cardiovascular risk in short-term and possibly long-term use.

Sullivan said she again would press Higbee on her evidentiary rulings that caused the two to yell at each other in the courtroom, clashes that could set the tone for future trials.

"The judge and I have talked, and we're fine," Sullivan said.