

Merck Agrees to \$4.85 Billion Settlement in Vioxx Claims

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Merck & Co. Inc., the pharmaceutical company behind the Vioxx pain medication, said it will pay \$4.85 billion to settle thousands of the federal and state products liability claims against it.

The settlement will cover 47,000 litigants who allege they or their loved ones suffered injurious, sometimes fatal heart attacks and strokes after using the arthritic painkiller.

Attorneys representing 47,000 federal litigants and state litigants from California, Louisiana, New Jersey and Texas involved in 26,600 lawsuits and 264 possible class actions, and attorneys representing the New Jersey based pharmaceutical company signed a settlement plan Friday morning at the U.S. Louisiana Eastern District Court courthouse in New Orleans.

The settlement of the federal multi district litigation and state cases was entered in front of U.S. Louisiana Eastern District Court Judge Eldon E. Fallon, New Jersey Superior Court Judge Carol E. Higbee and California Superior Court Judge Victoria G. Chaney.

Texas County Court Judge Randy Wilson, also involved in the case, was not present. Fallon and the other judges long pushed for a settlement, involved attorneys said.

Merck took Vioxx off the market on Sept. 30, 2004, after a study showed that the painkiller possibly doubled the risk of heart attack and stroke among patients using the drug.

Merck estimated that the global settlement potentially resolves more than 95 percent of Vioxx claims. Analysts predicted that Merck's liability could have risen to \$50 billion, according to The Associated Press, but Merck's final costs will be much lower, considering it has spent \$1.2 billion on its legal defense so far and has reserved \$1.92 billion for legal expenses.

"The number does take into account the amount that had been reserved to defend these suits that we had seen going forward for some time," said Jim Fitzpatrick, a partner with the New York firm Hughes Hubbard Reed and outside counsel for Merck.

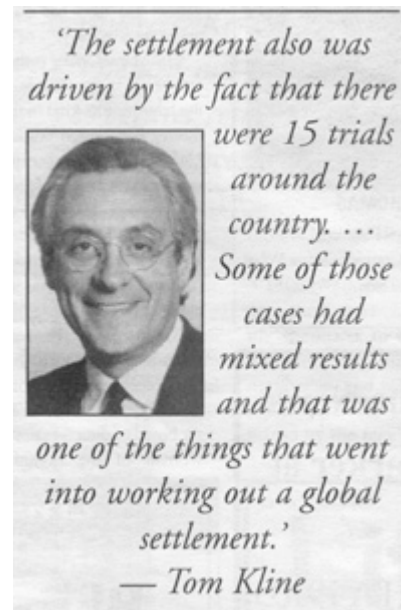
Tom Kline, of Kline & Specter - which represents 800 Vioxx claims - and a member of the plaintiffs' multidistrict litigation steering committee, said that the mixed result of Vioxx-related trials drove the interest in a settlement.

According to Merck, jurors have rendered verdicts in favor of the company 12 times and in favor of plaintiffs five times. Two cases were set aside; one was not retried and the other, on retrial, reversed in favor of the plaintiff. There were two unresolved mistrials. A Texas jury returned a verdict of \$253.5 million in August 2005, but Merck won the majority of the other cases that were tried.

"It . . . eventually proved irrefutable that Vioxx was associated with increased risk of heart attack and strokes," Kline said. "Having said that, the settlement also was driven by the fact that there were 15 trials around the country. . . . Some of those cases had mixed results and that was one of the things that went into working out a global settlement."

David Jacoby, of Anapol Schwartz Weiss Cohan & Feldman, the co-liaison counsel of Vioxx claims in New Jersey who represented 800 cases along with Sol Weiss, called the case a "blueprint" on how attorneys from many different jurisdictions can coordinate their efforts as a "super law firm" on mass torts.

"Everyone will learn in future litigation on how to defend these cases and how to prosecute these cases," Jacoby said. "It will be a textbook case."



Merck will pay \$4.85 billion into two settlement funds; \$4 billion will be devoted to heart attack claims and \$850 million will be devoted to ischemic stroke claims. The total payment is fixed and must be divided among the claimants. It will record the \$4.85 billion as fourth-quarter 2007 pre-tax charge to cover the agreement.

To receive funds, plaintiffs must meet three criteria: medical proof of a heart attack or stroke injury, documentation of receiving at least 30 Vioxx pills and documentation of receiving enough pills to demonstrate they presumably ingested Vioxx within 14 days of their stroke or heart attack.

Plaintiffs who meet this three-pronged threshold must apply to have their individual cases examined by March 1, 2008, by an independent claims committee and evaluated on a point system - which involves factors including consistency of Vioxx usage, age, severity of injury and smoking and other health history - that will determine what type of award they deserve.

A total of 18,000 to 20,000 cases will meet the criteria set out in the settlement agreement, Kline estimated.

Plaintiffs faced the challenge of proving their individual heart attacks or strokes were directly and definitively caused by Vioxx when there were multiple possible causations, Kline said.

Merck's obligation to pay will only be triggered if 85 percent of claimants in each of four categories accept the settlement, Fitzpatrick said. Those categories include claims related to myocardial infarction, or heart attacks, claims of ischemic stroke, claims involving death and claims alleging 12 months of Vioxx use.

The settlement agreement requires attorneys to recommend enrollment in the settlement to 100 percent of their clients; attorneys will not be able to cherry-pick out the best cases and attempt to take them to trial, Kline said.

However, any plaintiffs who are determined to not qualify for a settlement will still have the right to take their claim to trial, he said.

Merck also is retaining its right to reject the settlement and defend each claim individually if the settlement terms are not met.

The settlement also applies to 14,100 claims subject to tolling agreements.

The litigation involved 2,000 depositions, 380,000 deposition pages and 54 million documents, Kline said.

The case was unique in comparison to other products liability cases because the number of cases was already known to both plaintiffs and the defense, especially with Vioxx pulled of the market, no longer in use and no longer causing injuries, Kline said. The case also was unique because state-level Vioxx plaintiff litigators and federal-level litigators cooperated and did not pursue separate courtroom battles.

Fitzpatrick said Merck was committed to litigating each Vioxx trial individually, which led to a settlement with terms requiring that each claimant be examined individually. Orders granting summary judgment in nine jurisdictions said that the statute of limitations had expired for Vioxx claims.

"We believe the settlement is a product of that litigation strategy," Fitzpatrick said. "It continues that process of looking at each of the claims individually. . . . We have been able to win cases."

Eliminating huge legal fees well into the future also made settlement desirable, Fitzpatrick said.

Kline said Merck's stated intention to fight each claim individually was less bravado and more a tactic to test the strength of the plaintiff's case before settling.

"When Merck was saying they were going to fight each case individually that was really a euphemism for, 'We are going to test the plaintiff's case in the courtroom,' which is not uncommon," Kline said. "After a series of bellwether cases, significant legal cases, Merck, like many corporations, made a decision that the litigation needed to be settled."

Jacoby said that the need to resolve all the litigation was high for Merck because it couldn't try each case one at a time on a sustainable basis. The need to settle also was high for plaintiffs, because unlike other litigation, there were no minor cases in litigation involving heart attacks and strokes, Jacoby said.

"For the purpose of certainty, they needed to move on, run their company and their business and it lets these plaintiffs now . . . move on with their personal lives," Jacoby said. "It's very important."

Merck, according to a press release, is not admitting causation or fault in the settlement.

"Another reason Merck feels strongly this is a good agreement, it allows Merck to concentrate more on discovering and developing medicines," Fitzpatrick said.

Merck still faces a number of government investigations, both state and federal, the AP reported.