

Merck Braces for More Vioxx Lawsuits

One down. Only 4,199 or so more to go.

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Merck & Co. lost its first Vioxx case in a Texas state court last week, when a jury found the painkiller was a cause of death of Robert Ernst, 59 years old. Now the Whitehouse Station, N.J., drug maker is gearing up for a series of cases this fall that will shed more light on its legal liability and defense strategy.

The next case begins Sept. 12 in a New Jersey state court, followed by another state case in October in Texas and a federal case in New Orleans. Merck is facing roughly 4,200 lawsuits, with more expected to be filed in the coming months. Its legal liability is estimated by analysts to be as much as \$30 billion. The company has vowed to fight each case one by one.

Merck's defense will likely continue to be based on the science, and how other factors besides Vioxx caused heart attack or stroke. Plaintiffs' attorneys will continue to stress internal company emails dating back to 1997 that show Merck was aware of increased heart risks for years, but continued to heavily market the drug. Merck pulled Vioxx off the market last September when it was linked to a small number of heart attacks and strokes.

The Sept. 12 case in state superior court in Atlantic City, N.J., is expected to last four to five weeks. Frederick Humeston of Boise, Idaho, is suing Merck, alleging that a heart attack he had Sept. 18, 2001, was caused by Vioxx. Mr. Humeston was 56 when he says he began taking the drug regularly on July 16, 2001 -- two months before his heart attack, which he survived.

Merck argues that Mr. Humeston had numerous risk factors, including his age, male gender, cholesterol problems, borderline hypertension, obesity and paucity of physical activity. "Heart attacks happen every day," lawyers for Merck responded in court documents. "There is no evidence that the clot would have been smaller or less significant without Vioxx, much less that it wouldn't have happened at all."

Mr. Humeston's attorney, Christopher Seeger of Seeger Weiss in Newark, N.J., says his client was hampered by injuries suffered in Vietnam but was in decent overall health before he started taking Vioxx. The heart attack caused muscle damage in his heart, and Mr. Humeston is now on medication for the rest of his life, Mr. Seeger says.

Mr. Seeger says the health issues will vary from patient to patient, but he believes Merck's own documents will hamper its defense, as they did in the Texas. "The documents speak for themselves," he says. "My job is to get out of the way and let the jury see the evidence."

In October, Mark Lanier, the Texas attorney who won the \$253 million verdict in Texas, will represent the family of Anna Marie Guerra, who is suing Merck in state court in Edinburg, Texas. Ms. Guerra, 39, began taking Vioxx in April 2001 and died on May 6, 2001. She was overweight and had a family history of heart disease.

Given some of the jurors' comments following last week's verdict, Merck needs to simplify complex medical issues for juries, says Peter Bicks, an attorney at Orrick, Herrington, Sutcliff LLP in New York. Mr. Bicks isn't involved in Vioxx litigation, but defeated Mr. Lanier last year in an asbestos case filed in Texas against Union Carbide. Merck must also take "head on plaintiff's anticipated attacks on the company's behavior," he says. Mr. Bicks also said Merck should have top executives, such as former Chief Executive Raymond Gilmartin, testify in person. "Jurors need to know that the company cares," he says.

The first federal case is scheduled to begin Nov. 28 in New Orleans. Evelyn Irvin is suing Merck for the wrongful death of her husband Richard Irvin Jr. of Florida. Mr. Irvin died in May 2001 of a heart attack after taking Vioxx for just one month.

The attorney for the Irvin case, Thomas Kline of Kline & Specter in Philadelphia, agreed that Merck will bring up the short time Mr. Irvin took the drug. The study that led Merck to withdraw Vioxx from the market showed a higher risk of heart attacks only after 18 months.

But Mr. Kline said there is enough scientific evidence to show that short-term and long-term usage of Vioxx cause heart attacks. Like Mr. Seeger, the New Jersey attorney, Mr. Kline says Merck's own documents and emails are the strength of his case. "There are individual factors affecting each case, but the core issue of Merck's conduct remains hard to defend," he says.