

Maker of Vioxx Says Some Suits May Be Settled

By ALEX BERENSON
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With the number of Vioxx-related lawsuits soaring, the drug maker Merck may consider offering settlements to plaintiffs in a few cases, the company's general counsel suggested yesterday.

Merck had previously said that it planned to defend every personal-injury lawsuit filed over Vioxx, a painkiller and arthritis medicine that has been shown to raise the risk of heart attacks and strokes.

But the general counsel, Kenneth C. Frazier, said in an interview yesterday that Merck would consider settling suits brought by people who took Vioxx for long periods of time and had few other risk factors for heart disease. Nearly 5,000 Vioxx suits have already been filed, and tens of thousands more are expected.

Mr. Frazier's comments appear to represent a subtle but important shift in strategy for Merck, although he denied that the company had made any change in its position. The issue of possible settlements is extraordinarily sensitive for Merck because of the prospect that plaintiffs' lawyers might file many additional lawsuits if they believe that Merck is willing to settle any of them.

But taking every case to trial also has risks, as Merck discovered last week when a jury found it liable for the death of a Texas man and ordered it to pay millions in the first Vioxx case to reach trial.

In response to a question as to whether Merck would settle cases, Mr. Frazier said, "We would look at the facts of the case and make reasonable decisions." He added, "The point is that each one of these cases raises individual sets of facts." Cases where settlements might be possible represent only a small fraction of all the lawsuits filed against Merck, Mr. Frazier said.

Merck does not plan to offer plaintiffs' lawyers an overall settlement of all the Vioxx suits, Mr. Frazier said.

"We have no interest into entering into any kind of broad global settlement," he said.

Merck's indication that it may consider settling some cases comes less than a week after a jury in Angleton, Tex., found the company liable for the death of Robert C. Ernst, a 59-year-old man who died in his bed in 2001 after taking Vioxx for eight months. The jury award was for Merck to pay \$253 million to Carol Ernst, Mr. Ernst's widow, including \$229 million in punitive damages.

The award was among the highest ever given to an individual plaintiff, although Texas law will automatically reduce it to about \$26 million and Merck has said it will appeal.

W. Mark Lanier, the lawyer who represented Mrs. Ernst, said yesterday that Merck's willingness to consider settling some cases was an important first step in undoing the damage that Vioxx had caused.

"It's about time," Mr. Lanier said. "I hope they'll own up to full responsibility and not partial." Settling some cases may also marginally improve Merck's chance of winning lawsuits that do go to trial, he said.

"It will at least preclude lawyers like me from saying they've resolved to never settle any," Mr. Lanier said.

Merck stopped selling Vioxx in September 2004 after a clinical trial showed that patients taking the drug for more than 18 months had a substantially higher risk of heart attacks and strokes than people taking a placebo. Other trials have shown that Vioxx raises heart risks over a shorter period of time compared with a placebo or with naproxen, an older painkiller.

Sheila Birnbaum, a defense lawyer at Skadden, Arps who is not involved in the Vioxx litigation, said that Merck's willingness to consider settlements could benefit the company by increasing its legal flexibility.

"Whenever you're in this kind of situation where you're confronting lots of cases, you have to look at each case and figure out whether it's a kind of case that you want to settle or not," Ms. Birnbaum said. "One can never say never - you can only get into trouble saying never."

Merck shares fell another 6 cents yesterday, closing at \$27.77.

The next Vioxx suit already scheduled for trial is a state court case next month in New Jersey involving a man who suffered a heart attack after taking the drug for a short time. Yesterday, Merck's lawyers asked the judge in that case to postpone the trial, citing the publicity over last week's verdict in Texas.

And in New Orleans yesterday, a federal judge set trial schedules for four Vioxx cases, including one in November and three more in early 2006.

The judge, Eldon E. Fallon, is overseeing 1,800 Vioxx lawsuits already filed in federal courts around the country. The four scheduled cases are to cover several different kinds of plaintiffs, including people who took Vioxx for a long period of time and those who took the drug for only a few weeks or months, Judge Fallon said.

Merck has pressed to have the federal cases tried quickly because it believes it has a better chance of success in federal court than state court. Federal courts usually have stricter rules on what evidence can be presented than state courts, and federal judges typically have less patience for the aggressive tactics sometimes used by plaintiffs' lawyers.

Merck said at a hearing before Judge Fallon in New Orleans yesterday that as of Aug. 15, it faced 4,951 lawsuits from people who claim that they suffered heart damage after taking the drug, or from the families of people who died after taking it.

The total number of cases has risen by about 650 since July, and has probably jumped again since the Texas jury returned its verdict on Friday.

Lawyers and Wall Street analysts say that Merck could eventually face more than 50,000 lawsuits. Mr. Lanier said his firm alone represented nearly 2,000 plaintiffs.

Mr. Frazier yesterday repeated Merck's vow to appeal the verdict in the Texas case, saying that Judge Ben Hardin had allowed jurors to hear irrelevant and misleading testimony.

"The jury was provided information that was unreliable and prejudicial and irrelevant and misleading," Mr. Frazier said. He said that Mr. Lanier also improperly encouraged jurors to consider the publicity they might receive if they decided against Merck.

Merck has not decided whether to continue using the two law firms that represented it in the Texas case, Fulbright & Jaworski and Williams & Connolly, Mr. Frazier said. In interviews after the case, several jurors sharply criticized Merck's lawyers as patronizing, and some of Merck's witnesses appeared to be ill prepared for Mr. Lanier's questions.

Merck has already designated lawyers from other firms to handle the New Jersey and New Orleans cases, Mr. Frazier said.