



# Merck Facing First Federal Vioxx Trial

**Week's Business: Two State Trials Down, First Federal Trial Next Up for Merck**

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*The Associated Press*

**HOUSTON** - With Merck & Co. now 1-and-1 in state lawsuits over its Vioxx painkiller, the nation's No. 5 drug maker may face higher stakes later this month in the first federal trial of charges that it knowingly rushed a potentially lethal drug to market to pocket billions in profits.

"They have a fresh crack at it in a court that is a very important court," said Benjamin Zipursky, a professor at Fordham Law School in New York. "For Merck, reputationally, investors will look at what happens in federal courts as a signal of the strength of the goods on Merck."

The federal Vioxx trial is scheduled to begin Nov. 29 in Houston, just 40 miles north of the state court where Texas jurors last August slapped Merck with a \$253 million verdict in the first Vioxx trial in the nation. Texas caps on punitive damages will cut that amount to no more than \$26.1 million.

On Thursday, the Whitehouse Station, N.J.-based Merck had a win in a New Jersey state court when a jury absolved it of liability, finding that the company disclosed proper warnings about Vioxx risks.

Jere Beasley, lead lawyer for the plaintiff in the first federal trial, said his team was undaunted by the New Jersey verdict.

"We will prove our case in Texas and let a jury decide whether or not our client should receive a verdict in her case. What happened in New Jersey the home base of Merck won't have any effect on us in my opinion," he said.

Jonathan Skidmore, a member of Merck's legal team, said Merck won the New Jersey case with facts and science, and will use that same strategy in the federal trial.

"We feel at the end of the day, the company, by continuing to tell the truth, and continuing to tell a very strong scientific story, has confidence going into this trial," he said.

Civil litigators say Merck could enter the federal forum with an edge. Federal courts are often viewed as business-friendly and disciplined while less tolerant of attorney theatrics and flimsy evidence than state courts. Also, federal civil trials have six jurors rather than 12 who must render a unanimous verdict, adding more pressure on plaintiffs.

Merck faces about 7,000 state and federal lawsuits so far over the drug the company withdrew from the market last year when a study showed it doubled risk of heart attack or stroke if taken for 18 months or longer. Analysts say Merck could pay billions over Vioxx, through jury verdicts, settlements and the cost of paying its legal team.

If Merck loses the first federal battle before U.S. District Judge Eldon Fallon of New Orleans, who oversees all the federal Vioxx litigation, the company may have to rethink its oft-repeated vow to fight nearly every lawsuit, lawyers said.

"They're loading up," said Houston litigator Scott Lassetter, noting that Merck's lead lawyer in the federal trial will be Phil Beck, who represented President Bush in the Florida "hanging chad" case during the disputed 2000 presidential election. "They're taking a gun to a knife fight. They've got to win this one."

Plaintiffs claim the company knew Vioxx could be dangerous years before withdrawing the drug in 2004, but downplayed such concerns in skewed studies to keep the \$2.5 billion seller on the market. "Merck knew about the cardiovascular risks and rolled the dice," Beasley said.

Merck maintains the company acted responsibly and disclosed research.

State trials can have different factors, but results of the November trial and three more before Fallon early next year will help establish a pattern that can help the company gauge potential liability, said Jay Feinman, a professor at the Rutgers University School of Law.

Fallon said in a hearing last month that after the fourth federal trial ends next year, he intends to meet with lawyers on both sides to evaluate verdicts and gauge possibilities of a global settlement for all federal Vioxx litigation.

Attorneys said Fallon and other federal judges can wield a great deal of influence with juries, by voicing skepticism or questioning witnesses, and they assume more control in choosing jurors than state court judges do.

"He has a lifetime appointment. He doesn't have to fear anybody. Once Fallon makes decisions, (Merck) can't say it's some strange judge in some strange place," said noted Houston plaintiff's lawyer John O'Quinn, who won a \$1 billion verdict in an East Texas state court last year in a case involving Pondimin, part of the now-banned weight-loss combination of fen-phen.

The first federal case centers on the May 2001 death of 53-year-old Richard Irvin Jr. of Florida, who had a fatal heart attack after he took Vioxx for about a month to alleviate back pain.

His widow, Evelyn Irvin Plunkett, claims her husband was in "very good health" when he started taking the once-popular painkiller. Merck maintains that clogged arteries, not Vioxx, caused Irvin's death.

Beasley, former lieutenant governor of Alabama, founded his Montgomery, Ala., law firm after he lost the 1978 Alabama gubernatorial race, will lead Plunkett's legal team.

In addition to representing Bush in 2000, Beck, of Chicago, represented Bayer Corp. in the nation's first Baycol trial in Corpus Christi in 2003, where the company was cleared of ignoring research linking the cholesterol-lowering drug to dozens of deaths.

And Fallon is no stranger to Big Pharma. Since 2000, the former trial lawyer has been handling pretrial proceedings in thousands of lawsuits involving the former heartburn drug Propulsid, withdrawn from the market by Janssen Pharmaceutica Inc., part of Johnson & Johnson of New Brunswick, N.J.

On the Net:

<http://www.merck.com>

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