



## After Vioxx victory, Merck faces bigger legal test

By Peter Loftus

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**Merck & Co. (MRK), following a significant but unsurprising court victory Friday, faces a more difficult challenge of its Vioxx legal defense strategy next week when a trial involving long-term use of its pulled painkiller begins in Atlantic City.**

So far, the Vioxx trials that have gone before a jury involved short-term users of the drug, or those who have used Vioxx for less than 18 months, with Merck losing the first one but winning two. Merck withdrew Vioxx from the market in 2004 after a study showed the former blockbuster drug elevated the risk of heart attack and stroke in people taking the drug for at least 18 months.

"They are now up in the win column and that's a good place to be," said David Stahl, a commercial-defense attorney with Eimer Stahl Klevorn & Solberg LLP in Chicago. "But I think the cases coming up in New Jersey... are going to be a little more of a true test of which way things go. These are long-term users. The ability of plaintiffs to argue causation will be substantially enhanced."

Cases involving Vioxx use of 18 months or longer is a key test for Merck because the company has acknowledged that duration of usage increased the health risk in a study. Two such cases have been consolidated into one trial that is scheduled to begin Monday with jury selection in state court in Atlantic City, N.J. Merck has asked the judge to try the cases separately; a ruling is pending.

The plaintiffs in that trial, Thomas Cona and John McDarby, allege their use of Vioxx for more than 18 months contributed to their respective heart attacks. Their lawyers couldn't be reached Tuesday.

Stahl said he thinks it'll take 10 to 15 trials before a clearer picture emerges of whether Merck will continue its case-by-case defense strategy, or pursue a settlement. Analysts have estimated Merck's ultimate Vioxx liability could be several billions of dollars.

Merck, for its part, believes it still has good defense arguments in cases involving longer-term use. In a conference call Friday, Merck General Counsel Kenneth Frazier suggested that the study which led Merck to pull Vioxx from the market isn't sufficient evidence that Vioxx caused a specific heart event.

"It is a long way from that proposition to showing that Vioxx, in fact, caused an individual's heart attack," Frazier said. He noted that individual patients may have other risk factors that contributed to a heart attack, even if they took Vioxx for at least 18 months.

And causation isn't the only issue. Juries in Merck's two trial victories also rejected plaintiffs' allegations that Merck failed to properly warn of Vioxx's health risks. Plaintiffs have presented evidence they say shows that Merck knew of Vioxx's risks but took steps to conceal them.

"And so I think that it's also fair to read into these jury verdicts that the juries are not buying the claim that Merck failed to provide information that was known or knowable at the time, and therefore provided inadequate warning based on the facts," Frazier said.

Stahl said it's important for Merck to demonstrate that it acted responsibly. "You really do have to convince the jury that your client, your company, dealt fairly with the general public and wasn't hiding information," he said.

In the latest Vioxx decision Friday, a federal jury in New Orleans ruled in Merck's favor. The lawsuit alleged that the company's Vioxx painkiller caused the fatal heart attack in 2001 of a 53-year-old Florida man, who had taken the drug for less than a month, and that Merck failed to properly warn of Vioxx's health risks. The Whitehouse Station, N.J., pharmaceutical company denied these charges.

The victory appears to underscore Merck's strategy of defending itself against each of the more than 9,000 Vioxx lawsuits, rejecting the notion of any global settlement, analysts and attorneys said.

"I think it was an important momentum builder for Merck," said Chilton Varner, a corporate defense attorney with King & Spalding LLP in Atlanta.

Wall Street analysts said Friday's verdict was a plus for Merck, but some remain cautious as the company heads into the long-term usage cases. Morgan Stanley analyst Jami Rubin called the verdict "satisfying" partly because it vindicated Merck's behavior in studying Vioxx and making public its health risks. She wrote in a research note that if "juries continue to be rational and focus on the facts," Merck's chances of winning most cases are good and her previous estimate of total Vioxx liability of \$15 billion will be too high.

Still, Rubin and other analysts agreed that the outcome of the long-term usage cases will be key. "We remained concerned about the company's ability to defend itself against longer-term Vioxx user liability lawsuits," Banc of America analyst Chris Schott said in a note.

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