Merck Agrees to Settle Vioxx Suits for $4.85 Billion

By Alex Berenson

Nov. 9, 2007

Three years after withdrawing its pain medication Vioxx from the market, Merck has agreed to pay $4.85 billion to settle 27,000 lawsuits by people who claim they or their family members suffered injury or died after taking the drug, according to two lawyers with direct knowledge of the matter.

The settlement, one of the largest ever in civil litigation, comes after nearly 20 Vioxx civil trials over the last two years from New Jersey to California. After losing a $253 million verdict in the first case, Merck has won most of the rest of the cases that reached juries, giving plaintiffs little choice but to settle.

The settlement will help put Vioxx behind Merck, as well as sharply reduce its Vioxx-related legal defense fees, which are now running at more than $600 million annually.

Judges in Louisiana, New Jersey and California, who oversee nearly all the lawsuits, had pressed for a deal before a new wave of trials was scheduled to begin in January.

The agreement could still collapse, though lawyers with knowledge of the deal said that was unlikely. The deal becomes binding only if 85 percent of all plaintiffs agree to drop their cases and take the deal.

Plaintiffs will receive different settlement payments depending on the severity of their injuries and the length of time they took Vioxx.

“We’ve been asked by the judge to talk to the plaintiffs and we are talking to them,” Kent Jarrell, a spokesman for Merck, said at 12:30 Friday morning. “Right now, there is no finalized agreement.”

Two lawyers with knowledge of the deal, however, confirmed it independently.

Based on the fact that the 27,000 suits cover about 47,000 sets of plaintiffs, the average plaintiff will receive just over $100,000 before legal fees and expenses, which usually swallow between 30 and 50 percent of payments to plaintiffs. Plaintiffs who do not want to accept the settlement can pursue their own claims, but with so many of the top trial lawyers in the United States agreeing to the deal, they may have difficulty doing so.

After several weeks of negotiations, Merck reached the settlement with lawyers who are on the steering committee that represents attorneys for the plaintiffs who have sued Merck in federal court. Those lawyers, and a handful of others, represent most of the 47,000 different groups of plaintiffs.

“It’s a fantastic deal,” said Danny Becnel, a Louisiana lawyer who said he represented about 1,000 plaintiffs. Mr. Becnel credited Judge Eldon E. Fallon of Federal District Court, who is overseeing the federal lawsuits from his court in New Orleans, with pressing the two sides to the table.

“He had everything to do with it,” Mr. Becnel said. “He was critical.”

The settlement does not end the government investigations that Merck faces, which include both civil and criminal inquires from several states and the Justice Department.

But for Merck, which has already spent more than $1.2 billion on Vioxx-related legal fees, the settlement will put to rest any fears that Vioxx lawsuits might bankrupt the company, or even have a significant financial impact. While eye-popping, the settlement payment represents less than one year’s profits for the company, the third-largest American drug maker.

For plaintiffs, the settlement will provide a measure of vindication and financial relief. And plaintiffs' firms will earn nearly $2 billion in fees at their standard rates of 33 percent to 40 percent.

But the agreement is far smaller than Wall Street analysts and lawyers predicted when Merck withdrew Vioxx, and especially after the verdict in the first case. In 2005, most analysts estimated that Merck's ultimate liability in Vioxx would be between $10 billion and $25 billion.

Merck withdrew Vioxx from the market in September 2004, after a clinical trial proved that it increased the risks of heart attacks and strokes. But internal company documents showed that Merck's scientists were concerned about the risks of Vioxx several years earlier. And a large clinical trial that ended in 2000 also showed that Vioxx was much riskier than naproxen, an older painkiller sold under the name Aleve.

The settlement vindicates Merck's risky decision to take cases to trial rather than agree to a quick, early settlement. By aggressively defending itself, Merck exposed the weaknesses in many plaintiffs' cases. Some plaintiffs could not prove they had taken the drug, and others were overweight, smoked, or had other risk factors for heart attacks.

That strategy looked as though it had badly backfired in August 2005, when a jury in Angleton, Tex., returned a verdict of $253.5 million on behalf of Carol Ernst, whose husband, Robert, had died after taking Vioxx for less than a year.

But Merck decided to stick to its strategy, continuing to insist it would not settle cases. And in a series of cases in 2006 and 2007, Merck defeated plaintiffs in California, Florida, New Jersey, Illinois and Louisiana, while losing only a handful of cases.