Vioxx Settlement's Next Big Question: How to Split It Up?

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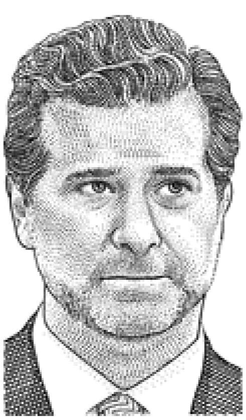
Wall Street largely hailed the $4.85 billion Vioxx settlement deal Merck & Co. announced Friday as closing an ugly and costly chapter for the company. But plaintiffs lawyers reviewing the news questioned whether the deal would yield adequate payouts for some of their clients.

Beth Klein, a Denver plaintiffs lawyer who filed four Vioxx suits in New Jersey state court, said that while the settlement provides a welcome opportunity to avoid litigation, she would need a lot more information before she could recommend it. "People are going to want to know the lowest amount they could get, the worst-case scenario, before they agree to that settlement," she said. That includes figuring out the cut that will go to health insurers and exactly how much her clients could get docked for having risk factors for cardiovascular disease. Right now, she said, "I don't have a handle on what the payout will be."

The real question for clients, says Tommy Fibich, a Houston plaintiffs lawyer with about 600 cases, is "'Well, what do I get after you take your fees and expenses?' That's the only number they're concerned about; $4.85 billion really is a meaningless number to me."

Merck pulled the widely used painkiller Vioxx from the market in September 2004 because it was tied to higher risk of heart attack and stroke. Thousands of lawsuits ensued. The agreement brokered by Merck and plaintiffs lawyers aims to resolve the most serious cases, those that resulted in heart attack or ischemic stroke. The settlement figure is one of the biggest in mass product-liability cases in recent years. Plaintiffs who participate in a global settlement may receive less than a jury verdict would have yielded, but they eliminate the risk of trial and get money without having to wait for their case to wend its way through the courts.


Christopher A. Seeger

Christopher Seeger, a lead plaintiffs lawyer who helped negotiate the settlement, estimates that, depending on issues such as age and risk factors, individual payouts would range from $50,000 to $100,000 on the low end to $1 million to $1.5 million on the high end, with an average of above $200,000. Those figures are subject to attorneys fees and expenses. Liens from government entities like Medicaid and Medicare would also apply against awards, he says. Plus, in some instances private health insurers may also pursue payment. An administrator will be assigned to help negotiate with the government, and the plaintiffs steering committee aims to try a version of that program for private carriers, Mr. Seeger says.

Paul Rheingold, a partner at a small plaintiffs firm in New York that filed 65 Vioxx lawsuits in New Jersey state court, said he "welcomed" the settlement, though private insurers have already sent him letters giving him notice of their claims for a few of his clients. "It's a frequent and annoying problem that will be resolved late in the settlement program through the many precedents that already exist, but it could eat substantially into what the clients get from the settlement because medical bills are so high," he says.

It may take years to sort out the claims of private insurers, says Roger M. Baron, a law professor at the University of South Dakota and an expert on health-insurance reimbursement. "Just because someone was injured by Vioxx doesn't mean 100% of the medical bills will need to be reimbursed, and that's just one of the things" that will be the subject of debate, he says. "It's going to be a battle royal."

Merck can bail out on the settlement deal if fewer than 85% of the eligible claims are enrolled in it, though if the percentage ends up smaller, the company could nevertheless decide to stick with the plan to avoid having to go back to square one. W. Mark Lanier, a Texas lawyer with more than 1,000 Vioxx clients, says he believes that the 85% enrollment requirement is "likely to be met," but "it's possible this could fall apart." Merck's co-lead counsel, Theodore Mayer, says he is optimistic that "we'll meet and beat the 85% threshold."

Plaintiffs lawyers have a lot invested in the Vioxx litigation. Kim Wilson, a North Carolina lawyer, says she started advertising for Vioxx clients in 2004, shortly after Merck withdrew the painkiller from the market. About 1,500 people responded, says Ms. Wilson, who hired three extra staff members to handle the deluge of calls. She signed up about 50 clients, most of whom had suffered a stroke or heart failure. "In light of tort reform . . . we only took cases where we felt like if we got it before a jury, it would be a slam dunk," she says.

Ms. Wilson estimates that she invested $300,000 in the litigation, a significant outlay, she says, for a firm of 10 partners. She hopes that, through the settlement, some of her clients will take home as much as $400,000. She declined to estimate her own earnings.

One of Ms. Wilson's clients, Harry Black, a 72-year-old retired South Carolina factory worker, filed suit in 2005 after suffering a heart attack that he alleges was caused by taking Vioxx. Last year, he says, he traveled to New Jersey to be deposed for hours about his injuries. "I was relieved when I heard about the settlement."

As for the hundreds of plaintiffs lawyers involved in the case, some estimate they will share in excess of $1 billion in fees, not including expenses. The number is unclear because the percentage of a payout that goes to lawyers will depend on the lawyers' agreements with their clients and state laws. There is an arrangement built into the settlement to provide extra compensation, out of the total fee pot, to attorneys who did more legwork in the case. Mr. Lanier, the Texas lawyer, estimates that he will recover as much as $30 million in fees as well as more than $10 million in expenses.

Distributing the legal fees could prove difficult. In some instances, Mr. Lanier says, several law firms claim to represent the same client. The confusion, he says, could stem from the fact that some Vioxx users signed up multiple lawyers. And some attorneys, he adds, may have shopped their clients to several law firms without clarifying which firm ultimately would handle the matter. "You can find a case that five different lawyers think they have." He adds, "When Vioxx was pulled in 2004, all of sudden the plaintiffs lawyers came out like mosquitoes on a hot August night."

A provision in the settlement that experts call unusual requires any plaintiffs lawyer with a client who enrolls in the settlement to recommend it to all of his clients. Legal ethics experts have expressed concern, saying this could create a conflict of interest if the attorneys feel some clients might not benefit, says Deborah Rhode, a legal ethics professor at Stanford Law School. The U.S. Supreme Court has held that in settling cases lawyers need to be sure that, she says, the "interests of individual plaintiffs aren't sacrificed for the good of the whole, which not coincidentally serves the interests of the attorneys."

Merck's Mr. Mayer says the settlement isn't a one-size-fits-all approach, but rather provides differing payouts depending on the severity of a claimant's injury. "We have crafted a program that law firms should feel very comfortable recommending to all their clients," he says.

Many of Merck's lawyers have already pocketed substantial earnings. Those firms include Hughes Hubbard & Reed LLP, Williams & Connolly LLP, Dechert LLP, O'Melveny & Myers LLP and Bartlit Beck Herman Palenchar & Scott LLP. The company set aside $1.9 billion for litigation costs "not including any payouts to plaintiffs" and has spent $1.2 billion of that so far, though that wasn't all paid to lawyers. Mr. Seeger says when one adds up the time invested by plaintiffs lawyers, "they work for a lot less than defense lawyers."

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