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# Drug and Device Law

Sunday, November 11, 2007

## Thoughts on the Vioxx Settlement

We know, we know: The parties announced the Vioxx settlement on Friday, and it's already Sunday, and we haven't yet chimed in.

We have two excuses. First, Bexis's tongue is tied. His firm is involved in the Vioxx litigation, so he can't comment on the settlement. He, of course, played no role in drafting this post.

Second, Herrmann was busy. Sorry about that, guys, but work comes first, and recreational blogging comes second. ("Recreational blogging." I bet you don't often see those words in that order, huh?)

Anyway, we're not surprised by the Vioxx settlement. We think it was almost predictable. Here's why.

Start with a product recall. That gets the drug off the market, and starts the statute of limitations ticking (except for claims of latent injuries, which we'll address momentarily). The recall makes the defense strategy easy: Fight like hell until the statute of limitations expires; then, settle.

You can't start settling right away. If you throw big bucks at the early plaintiffs, you're just chumming the waters. You'll attract many more lawsuits, and the mass tort will get worse. Instead, you must announce that you'll defend every case until the last *cert* is denied, to discourage the filing of new cases.

(There's one exception to that rule: If there's a narrowly defined subcategory of claims that are very hard to defend -- maybe mesothelioma in the case of asbestos or rhabdomyolysis for Baycol -- you can announce that you'll settle those cases only. Although you'll pick up more meso or rhabdo cases, that's only a small piece of the overall mass tort. And you're better off settling those tough cases than trying and losing them -- big jury verdicts chum the waters, too.)

## About

This blog contains JIM BECK and MARK HERRMANN's personal views of various topics that arise in the defense of pharmaceutical and medical device product liability litigation. Our first post, dated October 2006, contains a discussion about the nature of this blog. Please read it, and understand that you are accepting its terms, before reading any of our posts.

## About Me

**Name:** Beck/Herrmann

JAMES M. BECK is a Counsel resident in the Philadelphia office of Dechert LLP. He is the author among other things, Drug and Medical Device Product Liability Handbook (2004) (with Anthony Vale). He can be reached at james.beck@dechert.com. MARK HERRMANN is a partner resident in the Chicago office of Jones Day. He is the author of, among other things, The Curmudgeon's Guide to Practicing Law (2006), and Statewide Coordinated Proceedings: State Court and Federal MDL Process (2nd ed. 2004) (with Geoff Ritts and Katherine Larson). He can be reached at mherrmann@jonesday.com.

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[Vioxx Settlement](#)

Okay. Announce that you'll pay billions for defense and not a penny for tribute. Then, fight like the dickens for three years.

The average state statute of limitations for a product liability case is two years; after three years, the statute has expired in 42 of the 50 states. You'd like to fight for six years -- until the statute has expired everywhere -- but that's expensive and exhausting. So fight for a minimum of two years, and three years if you can afford it.

Then, settle. After the statute of limitations has expired, you can safely spend a lot of money to settle the mass tort, because potential new plaintiffs will be time-barred.

Not only that, you've already proved that you're tough. New plaintiffs will be discouraged from suing you in one of the eight states that permit products cases to be filed more than three years after the date of injury, because you've proved to those potential new plaintiffs that you're willing and able to defend yourself.

(It's also a good idea to keep the amount that you pay in settlement as low as reasonably possible. You'll attract fewer new lawsuits if you minimize the likely payday for new plaintiffs.)

Finally, solve the latency problem. Sometimes, it solves itself. If, for example, your mass tort involves a medical implant that either cures the plaintiff or breaks within two years, there's no latency. Everyone was either cured or hurt by a specified time. If, however, your drug may be associated with a disease that manifests itself years after the drug is ingested, there's no closing date to the mass tort. The exposure runs for the length of the latency period.

We frankly don't know enough about the science underlying Vioxx to have a sense of whether claims for latent injuries -- heart attacks or strokes suffered years after ingesting Vioxx -- are viable. In the Vioxx settlement, however, the parties agreed to terms that minimize any claims for latent injury: Plaintiffs' counsel agree to withdraw from representing any client who declines the settlement. Thus, plaintiffs can pursue claims for latent injuries, but they'll lose their present lawyer and may have to proceed with a lawyer who wasn't previously involved in the litigation and so is less likely to be able to win at trial.

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## Google Groups

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The Vioxx settlement is, notably, not a class action settlement. *AmChem* and *Ortiz* make it awfully hard to design a class action settlement these days, so the Vioxx parties negotiated an inventory settlement. It's not clear that inventory settlements protect plaintiffs more effectively than class action settlements do, but the Supreme Court has clearly pushed mass tort settlements into that mode.

After this settlement, Merck faces the not insignificant challenge of wrapping it up. The settlement is conditioned on 85 percent of certain specified plaintiff groups accepting it. That provision is likely to be satisfied -- when the plaintiffs' lawyers recommend settlement to their clients and threaten to withdraw if the clients don't accept the settlement, the clients will fall in line. A scant few clients may realize that they have exceptionally strong cases and so will reject the settlement and retain new counsel, but those people will be the rare exception to the general rule.

(We'll watch with interest to see whether the Vioxx settlement generates a new species of plaintiffs' lawyer -- a lawyer offering to represent Vioxx plaintiffs as neutral counsel to advise plaintiffs whether (1) to accept the settlement or (2) to reject it and hire the neutral advisor as replacement counsel. If you see ads for those services springing up on the internet, it's the first sign of trouble for Merck. It portends a 15 percent opt-out rate (which will be nearly 7500 plaintiffs), consisting primarily of the toughest lawsuits.)

Finally, Merck has to avoid late-filed cases -- new lawsuits filed more than three years after the Vioxx recall. That hinges on a few different things. First, judges must actually enforce statutes of limitations. If Minnesota judges, for example, apply a six-year limitations period to product liability claims, and apply Minnesota law to the claims of all plaintiffs who file in Minnesota, then Merck will face a resurrected mass tort in Minnesota. People from all over the country will be drawn to Minnesota, as moths are drawn to light, to file lawsuits there.

For mass tort settlements to work in the post-*AmChem* and *Ortiz* era, courts must enforce statutes of limitations rigorously.

Will the Vioxx settlement be a model for the future? The original *Breast Implant* settlement collapsed because too many plaintiffs opted out the class action settlement. Other mass tort settlements have been hamstrung when a multitude of plaintiffs submitted weak (or frivolous) claims that nonetheless had to be processed or paid. If the Vioxx settlement indeed

manages to capture 85 percent of claimants and to avoid paying frivolous claims, then later defendants will follow this model. If the Vioxx settlement does not capture claims effectively, later litigants will tweak this model to try to do better next time.

One last thing: How do you settle a mass tort if you haven't recalled your product, so there's no definitive date on which the statute of limitations begins to run (and, later, expires)?

You need an alternative to a recall to act as the statute-triggering event: a re-designed product that eliminates the alleged defect about which plaintiffs complain, or a new and stark warning that eliminates any possible failure-to-warn claims. To end a mass tort, you need an end to potential claims. For Vioxx, it was a recall; for mass torts of the future, it will predictably be other types of events.

For those interested in reading more about the Vioxx settlement, start with the [Mass Tort Litigation Blog](#) and Point of Law ([here](#) and [here](#), among others); those posts will, in turn, lead you to others. Happy reading.

posted by Beck/Herrmann at [10:29 AM](#) 

### 3 Comments:

Vioxx Plaintiffs: Attention

If you're a plaintiff in the Vioxx litigation and have questions or concerns about the recent settlement offer, visit our group. The group was started by a plaintiff for the sole use of plaintiffs to exchange information. Tell your story or just observe. If you're not a plaintiff, but know someone who is, please pass this information along.

<http://groups.yahoo.com/group/MerckSettlement/>

Also note:

Source: Vioxx Plaintiffs Education Group

Website: <http://vioxxplaintiffs.blogspot.com>

Headline: VIOXX PLAINTIFFS DISCUSS ISSUES RAISED BY MERCK SETTLEMENT

Date: December, 2007

For Immediate Release:

Within days after the proposed Vioxx settlement was announced, individual plaintiffs began to go online to find out what others thought about it. One Yahoo plaintiffs' forum soon buzzed with members who found themselves feeling "unsettled" when news reports characterized the offer as a victory for Merck. The proposed


\$4.8 billion offer was far less than the \$19 - \$50 billion estimated Vioxx liability that analysts had earlier predicted. At this point it is not clear that the required 85% of eligible claimants will agree to the settlement. With many questions still being raised, the online group is reaching out to other plaintiffs to discuss their reactions and concerns.

The settlement contains several controversial terms. One requires attorneys to recommend it to all eligible clients regardless of the merits of each case. Another requires attorneys to cease representing clients who won't accept. Some legal observers have noted that plaintiffs who refuse could be left without adequate representation. Despite the size of the settlement, it remains unclear whether many claimants who suffered heart attacks and strokes will receive fair compensation, especially after lawyers and others are paid. One estimate was that individual net payments for those who suffered hearts attacks and strokes might be as low as \$50,000, or even less. However, individual payouts would depend on several variables and would be determined only after a claimant agrees to enroll. Thus, claimants who accept have no certain idea what amount, if any, they will receive. Some law firms have already indicated that they will recommend that all of their eligible clients accept the settlement. Others have stated that they view some of the terms as questionable.

The online group does not provide legal advice or referral, but is acting as a clearinghouse for news and discussion. By inviting other plaintiffs to discuss the settlement, it seeks to inform plaintiffs about ongoing developments and viewpoints. Interested Vioxx plaintiffs can join the online discussion at Yahoo groups "MerckSettlement" , or by going to <http://vioxxplaintiffs.blogspot.com/> [end]

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About Vioxx Plaintiffs Education Group:

Vioxx Plaintiffs Education Group was formed after the Merck Vioxx Settlement was announced. It is an informal discussion group consisting of plaintiffs with Vioxx claims, many of whom have expressed concerns, questions, or reservations about the settlement terms. It allows Vioxx plaintiffs to discuss their concerns but does not offer legal advice. It maintains an online forum at Yahoo Groups called "MerckSettlement" which any Vioxx plaintiff is welcome to join.

By  Henry, at 4:47 PM

Is it really that predictable that the plaintiffs will fall in line? That's a question I've had since the settlement was offered. I was immediately struck by a number of the questionable stipulations written into the settlement, and my first reaction was that I couldn't possibly agree to such a restrictive and opaque document. I looked for answers and found a message board for plaintiffs-only which has been, if nothing else, empowering.

<http://groups.yahoo.com/group/MerckSettlement/>

But with the volume of plaintiffs out there who have not weighed in on our message board, how do we know what the other multiple-thousands of plaintiffs are thinking? Are we simply a cranky group of rabble-rousers? I strongly doubt it, but I really would like to

know. In any case, it's my belief that this settlement is a smug, disdainful gesture and I'm actually appalled that the plaintiffs representatives accepted it. I predict it will not pass without substantial resistance, and will wait until the very last minute before making my decision. At this point in time, it is a firm NO WAY.

By  [plaintiff x](#), at 9:17 PM

My father suffered a major heart attack and stroke in 2003.

On his behalf I filed a claim that is being represented by Mark Lanier Law Firm.

He was on the docket in federal court for trial. Unfortunately this settlement was brokered.

My dad suffered major brain damage and is in a nursing home.

I looked forward to his day in court.

I am not happy with the terms. Once again Merck wins and controls the situation.

I will not allow my father to become just another number.

My dad was taking Vioxx for 2 years prior to his injury. Unfortunately he had taken it last 30 days prior to his injury not the required 14 days as in the proposed settlement.

The consulstion prize of \$5,000 will not begin to cover his and my expenses for the last 4 years not including the damage caused by this drug.


All I can do is be his voice. I encourage everyone to write victim impact statements on behalf of yourself or loved one detailing what this has done to you and your feelings about Merck. Forward that along with before and after photos of your loved ones.

Victims have the absolute right to be heard. Make them put a name with the face. These people are not numbers.

We may have to have the settlement crammed down our throats but we can be heard.

Another thought might be some media attention for the victims.

Do not be intimidated by your attorneys or Merck. Your attorneys work for you. They will also become fairly wealthy after the settlement thanks to those suffering.

By  [Monty](#), at 10:30 AM

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