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Ready to Name Vioxx Plaintiffs

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Judge Must OK Consolidation and Number of Cases
'Substantial-Factor' Test

By Bobbi Murray
Daily Journal Staff Writer
Los Angeles Daily Journal
Thursday, May 11, 2006

Rudolph Arrigale's life's work as a trucker included plenty of heavy lifting on loading docks.

Arrigale began taking the painkiller Vioxx for osteoarthritis in November 2001. Four months later, at 73, he had a heart attack, his second.

Stewart Grossberg's heart suffered no such trauma before he began taking Vioxx for arthritis pain.

Other Known Risks

He had high cholesterol but no other known risk factors for cardiovascular trouble, his lawyer said. He used Vioxx for the next 26 months before suffering a heart attack in September 2001, when he was 66.

Both men survived and sued Merck & Co., the drug's manufacturer, adding two more cases to the 11,500 Vioxx lawsuits around the nation.

The plaintiffs and defense tentatively have agreed these two cases will kick off the California Vioxx trials set to begin June 21. Lawyers involved in the litigation said. Superior Court Judge Victoria G. Chaney in Los Angeles, who will oversee California Vioxx cases, must sign off on the deal.

'Until the Ink Is Dry'

"At the moment, these are two stand-alone cases consolidated for trial," said Arrigale's lawyer, Marcus Petoyan, name partner at Gianni Petoyan in Pacific Palisades.

But he cautioned nothing "happens until the ink is dry on the court order".

Discussions in April between the parties and the judge whittled a list of four cases to two, he said. The original pool of potential cases had included 36, 18 from each side.

Chaney repeatedly has emphasized there will be no delaying the June 21 trial.

Six Vioxx cases have been tried in other states, so far, with verdicts against Merck in three of them. Plaintiffs' attorneys in California are proceeding as if consolidation of the two cases is a given, but defense counsel has not yet acceded.

Ralph A. Campillo, Merck's lead defense counsel and a partner at Sedgwick, Detert, Moran & Arnold, said the judge has not addressed the issue since an April hearing when she said she might try as many as three cases together.

“The judge hasn’t decided whether to try them together or separately,” Campillo said.

The defense position is that they should be tried separately, in line with Merck’s oft-repeated vow to fight each case rather than settle any.

“The judge was leaning toward three and might very well end up with two,” Campillo said. “Our position is it should be one, but if she wants to try two, so be it”.

The Arrigale case was one of the defense’s top picks to go to trial first. Plaintiffs’ lawyers said the defense wanted to try this case first because of Arrigale’s previous heart attack.

The Grossberg case, with a plaintiff who had only one relatively minor risk factor that could compromise his cardiovascular system, was one of the plaintiffs’ top choices.

That is consistent with what University of Southern California law professor Gregory C. Keating calls the “paradigm cases” in Vioxx trials elsewhere in the country. Merck’s argument, he said, is causation. The more risk factors, the better the case is for them, he said. A previous heart attack, such as Arrigale’s, is regarded as a significant risk factor.

“The best kind of case for plaintiffs is one with no other risk factors and long-term use,” Keating said. The Grossberg case has characteristics similar to the ideal plaintiffs’ case Keating described.

Thomas V. Girardi, whose firm, Girardi & Keese, is representing Grossberg along with H. Steven Burnside of Palo Alto, downplayed the potential disadvantages of a case where the plaintiff had previous risk factors.

“In one of these cases, there are preexisting problems, making this person even less of a candidate for Vioxx than somebody else,” he said, “It would be good to try those cases so the jury truly appreciates how much damage Vioxx has done, especially to someone who has pre-existing conditions”.

And Petoyan thinks the pre-existing condition argument can be turned to the plaintiffs’ advantage.

“It’s not necessarily a shield for Merck but a sword for the plaintiffs,” he said, “Vioxx poses a clotting risk. People who are most likely to be injured are people with known atherosclerotic disease whose systems are already compromised.”

Kent Jarrell, a spokesman for Merck’s outside trial teams, challenged that assessment.

“That’s an unproven theory,” he said. “They’ll have to prove that to a jury in court.”

Campillo would not comment on the criteria for choosing the Arrigale case but said it is representative of a large group of plaintiffs in California.

Plaintiffs’ attorneys have been inclined to prefer cases for trial involving people who used the drug for longer periods. The Merck study, instrumental in the company’s decision to recall Vioxx in September 2004, showed substantial elevated risk after 18 months of use.

The longest-term use discussed at trial thus far was the 22 months Thomas McDarby, 77, took the drug before suffering a heart attack. A New Jersey jury awarded him \$13.5 million.

But two events have prompted California plaintiffs’ counsel to take a second look at the duration issue. One is the verdict in Texas awarding \$32 million to the family of Leonel Garza, who suffered a fatal heart attack at 71. How long he took Vioxx is in dispute. Trial testimony put it at either a week or a month. Either scenario makes for a big verdict in a short-term-use case.

Plaintiffs’ attorneys also note research published May 2 in the Canadian Medical Association Journal showing a quarter of people who suffered a heart attack did so within two weeks of starting to take Vioxx.

Jarrell questioned the study.

“While we have not seen the results of the specific study it is important to remember that this is an observational study” he said. “Merck & Co. continues to believe that randomized clinical trials provide stronger evidence about the efficacy and safety of medicines.”

Keating thinks California may prove a plaintiff-friendly venue. The state abolished the “but for” test of causation in 1991 and replaced it with the “substantial factor” test in all torts, he said.

“That means a more favorable jury instruction,” he said. “They have to find that Vioxx is not more than 50

percent responsible but more likely than not responsible for the harm done”.

The next status conference in the California Vioxx cases is set for Monday.

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