
INVESTOR'S BUSINESS DAILY

MONDAY, APRIL 10, 2006

ISSUES & INSIGHTS

VIEWPOINT

Case Against Merck's Vioxx Shows Trial Lawyers' Playbook In Action

STEVEN B. HANTLER

Lenin once said if you tell a lie often enough it becomes truth. The trial bar successfully tested that theory during its latest trial against Merck's Vioxx pain reliever, winning a \$4.5 million verdict for a New Jersey man and his wife. With punitive damages still to be considered by the jury, the verdict could go even higher.

Yet a federal jury in New Orleans in February needed less than four hours to reject the plaintiffs' lawyers' claims that Merck hid Vioxx data from the Food and Drug Administration during the approval process and clear Merck of any wrongdoing in the death of a Florida man who took the pain reliever.

An FDA advisory committee reached the same conclusion when it gave Merck the green light to put Vioxx back on the market.

Unfortunately, Merck's shareholders are discovering that being right isn't enough when the trial lawyer industry puts your company in the cross hairs.

While the New Orleans decision was certainly a major legal victory, Merck must deal with 9,600 more Vioxx lawsuits, once again reminding us that lawsuit frenzy remains a serious problem.

The Washington Post recently reported that we may still be several years away

from making a meaningful estimate on how much the Vioxx suits will ultimately cost Merck: "Wall Street analysts have estimated the costs at \$12 billion to \$20 billion."

So far, the war against Merck has followed a predictable pattern straight out of the trial lawyer's playbook.

After Vioxx was approved by the Food and Drug Administration, it instantly became one of the most popular painkillers on the market, gaining some 20 million regular customers by 2004. The FDA, in fact, had put its seal of approval on the entire new class of pain relievers — known as cox-2 inhibitors — to which Vioxx belongs. That fact should carry considerable weight in any courtroom.

Then came the cloud: On Sept. 29, 2004, a single study was released that raised the possibility that Vioxx could increase the risk of heart attack and stroke after 18 months of use. Merck immediately pulled the drug from the market. The next day, Merck's stock plunged by \$12 a share, wiping out \$25 billion in shareholder value.

Within weeks, investors lopped off another \$15 billion in Merck's market value, creating a cumulative loss of about \$40 billion of investor wealth.

Investors have clearly been

pricing litigation risks into Merck's share price. They know the trial bar's playbook and how it has been used to destroy dozens of companies in recent years.

In going after Merck, the trial bar has followed this playbook to the letter.

First, entrepreneurial plaintiffs' firms rack up the prospective clients. Google the word "Vioxx" and up pops a list of law firms ready to sue the drug maker on your behalf, many predicting huge settlements for signing up with their firms.

Second, they keep the Vioxx scare playing in the media. The first Vioxx case, decided in Texas in August 2005, resulted in a headline-grabbing \$250 million verdict against Merck. Yet more than six months later, the lawyers for the plaintiffs have yet to register the verdict, meaning that the widow cannot receive her payment and Merck can't appeal the verdict. Why are they holding back? Because the lawyers know the verdict is sure to be drastically reduced and they want to keep using the \$250 million headline to attract clients.

Third, they exploit the lawsuit frenzy and the media to keep investors on the sidelines, creating an intolerable situation for Merck. The goal is to leave the company no choice but to settle these cases — regardless of the actual merits of the case.

To its credit, Merck has refused to play the dupe in the trial lawyers' high-stakes game. Its commendable decision to defend itself against each and every lawsuit, rather than simply resign itself to some massive, asbestoslike mass settlement, was described by the Post as a "scorched earth strategy."

It is certainly true that these mass-tort cases easily lend themselves to the terms of warfare. Yet who can blame Merck? This really is all about survival. Vioxx litigation is one of many mass-tort cases in recent years in which the real wrongs are being done by the plaintiff bar. Investors have lost tens of billions in shareholder wealth.

Merck has set aside billions in reserves to cover Vioxx cases — funds that will never go to researching new life-saving drugs. Millions of patients have lost access to a whole class of pain relievers that promised a better life. None of this bodes well for discovery of new medications we will need in the future.

As usual, the only group that stands to gain is the trial bar.

■ **Hantler** is a senior fellow at the Pacific Research Institute, chairman of the American Justice Partnership and assistant general counsel at DaimlerChrysler Corp.