



Fosamax litigation ready for next step

By Correy E. Stephenson
 Staff writer

Six years after the first Fosamax lawsuit was filed, litigation over the osteoporosis drug is about to start a new chapter.

The suits against Merck, the drug's manufacturer, fall into two categories: plaintiffs alleging they suffer from osteonecrosis, or jaw damage, and those claiming they suffered a non-traumatic femur fracture as a result of taking the drug.

"The primary allegation is that Fosamax does just the opposite of what it is supposed to do," said Paul Sizemore of the Sizemore Law Firm in El Segundo, Calif., who represents roughly 200 jaw plaintiffs and has tried one of the bellwether suits in the litigation.

In total, more than 3,000 cases have been filed in state courts and in two separate multi-district litigations.

To date, the femur fracture trials have yet to begin while the parties have tried a handful of bellwether cases in the jaw suits.

Merck has won all but one of the trials.

But Timothy O'Brien, national lead counsel for the Fosamax litigation and a partner at Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor in Pensacola, Fla., said the tide is about to turn.

Now that the jaw MDL is one trial away from being disbanded, with the cases returned to their own jurisdictions, he predicted that the plaintiffs' trial record will improve.

"It makes a big difference to have a local plaintiff and a local doctor rather than everybody flying up to New York," he said. "That is a handicap [for the bellwether trials], no doubt about it."

In addition, Merck will soon face the next wave of cases. The bellwether trials in the femoral fracture suits are set for 2013.

Christy Jones of **Butler Snow O'Mara Stevens & Cannada** in

Ridgeland, Miss., who has represented Merck at multiple trials, referred requests for comment to the company.

In a statement, a spokesperson for Merck said the company plans to continue its strategy of "vigorously" defending Fosamax.

"We are confident in our defense both because of our track record in the courts and because we acted responsibly at all times in our research and labeling with respect to this life-saving medicine," the spokesperson said.

'Time to try these cases'

In 2006, the first suit was filed against Merck over Fosamax.

By 2008, almost 700 lawsuits had been filed alleging that the drug maker failed to warn users of the potential risk of osteonecrosis of the jaw, or severe jaw decay.

The suits were consolidated into an MDL in the U.S. District Court for the Southern District of New York.

The plaintiffs allege that they suffered injuries including infec-



tions or sores on their jawbone; others had teeth fall out.

To help determine a value for the cases in the hopes of a potential settlement, U.S. District Court Judge John Keenan scheduled bellwether trials.

The first resulted in a mistrial after deliberations grew so heated that one juror complained she had been threatened by another juror who threw a chair at her.

The next two cases resulted in defense verdicts, as did a state trial.

The sole plaintiff's victory oc-

Fosamax: Femur fracture trials set for 2013.

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curred in the retrial of the first suit, in which plaintiff Shirley Boles, who took Fosamax from 1997 to 2006 and developed jaw disease in 2003, was awarded \$8 million.

That victory was tempered by the judge's ruling that Boles must accept a remittitur of damages to \$1.5 million or choose a new trial on damages.

Boles chose a new trial, but reached an agreement with the defense on damages in September.

Neither side would divulge the dollar amount of the settlement, but Merck noted that it was strictly limited to financial terms and was not a concession of liability.

"Merck intends to promptly appeal the Boles case and will be seeking to overturn the verdict in its entirety," the company spokesperson said. "We believe that Fosamax was not responsible for Ms. Boles' injuries and that she was at increased risk for dental and jaw problems even if she was not taking Fosamax."

The stipulation to a confidential damages agreement "resulted from a unique confluence of circumstances and does not herald any change in the company's strategy," the company said.

Indeed, a prior attempt to settle the litigation failed.

Last December, a special master was appointed to help the parties attempt a settlement.

But just months later, the special master formally declared an impasse to the proceedings.

"It was a frustrating process to say the least," said O'Brien, who headed the plaintiff's negotiating committee. "From our perspective, it informed our consideration that these cases are not going to be settled at the MDL level, so let's shift the playing field."

That shift will occur after the final bellwether trial – scheduled for January 2013 – concludes.

The plaintiffs will ask that Judge Keenan formally end the MDL and send the cases home.

Common discovery is complete and the cases now require only limited discovery specific to each plaintiff, O'Brien said.

Sizemore, who tried one of the bellwether cases resulting in a defense verdict, said having multiple cases being tried in multiple venues will be a huge benefit to the plaintiffs' cases.

Trials being held at the same time around the country will result in a multifaceted attack on the manufacturer, he said, noting that the one plaintiff's victory resulted in a "substantial" verdict.

"It's time to try these cases," he said.

Femur suits set to begin

In addition to turning a corner in the jaw cases, plaintiffs' attorneys foresee success with the femur fracture cases.

There are already more femur suits than jaw cases filed, with more than 2,000 pending in the MDL in New Jersey federal court.

And the cases have a higher dollar value as well.

The most severe of the jaw cases had "fairly profound" injuries and significant potential damages, O'Brien said, but plaintiffs with lesser stages of injury had no in-patient hospitalization at all.

The femur cases, on the other hand, all deal with serious injuries and therefore sizable damages, he said.

"These are sudden, catastrophic fractures without evidence of any trauma," Sizemore said. They occur when patients are in the middle of a stride and suffer a fracture of the femur.

"The femur is the largest bone in the body and you typically see a fracture like that as a result of substantial trauma," he said.

When the femur is fractured, the patient must undergo an operation called an open reduction internal fixation, in which a doctor cuts the thigh open and

uses a rod inside the bone to bolt it back together.

"It's a horrific surgery that is typically only seen in severe automobile crash cases where you drive by and look at a car and say, 'Oh, I don't think that guy survived,'" O'Brien said.

U.S. District Court Judge Carole E. Higbee has scheduled bellwether trials in the femur cases starting in the spring of 2013.

Merck's strategy for the second MDL mirrors the first.

"The litigation regarding femur fractures is in the early stages, and we intend to vigorously defend the company," the company spokesperson said.

Questions or comments can be directed to the writer at:
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A molecule of Alendronate,
also known as Alendronic Acid
and Fosamax.