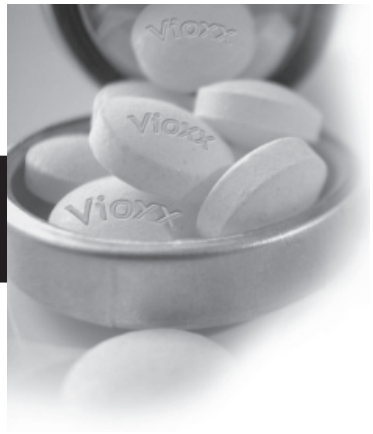
Oregon's VIOXX VICTIMS

A Product Liability Squeeze Play



Lawrence Baron

By Lawrence Baron
OTLA President's Club Plus

The scorecard supposedly reads Merck & Co. 3— Vioxx victims 3. In fact, the scoreboard might read Merck—4 wins, not 3. Here in Oregon, Merck scored a victory so decisive that most Vioxx victims cannot even take their case to court. Using lobbyists and the influence of money, Merck defeated an effort in the legislature by Vioxx victims to amend a quirk in Oregon's statute of limitations—a quirk that barred most Vioxx suits. Merck succeeded despite the fact that the bill in question, Senate Bill 1011, passed in the Senate and had enough votes in the House to pass. How did Merck do this, and where do Vioxx victims go from here?

The Oregon twist

The quirk in Oregon's statute of limitations concerned Oregonians injured by a drug or product prior to January 1, 2004. Oregonians in that category had to file suit within two years of injury even if they did not know the cause of their injury. ORS 30.905.[1] For most individuals, this type of limitation would present no problem. That's because in most product liability cases, the victim knows immediately, or shortly thereafter, the cause of injury. But this is not always the case and certainly was not for most Vioxx victims. They did not learn that Vioxx caused their strokes or heart attacks until September 30, 2004 when Merck publicly announced a recall of Vioxx.

When Vioxx came on the market in 1999 it was a miracle drug, touted as a safe pain reliever for arthritic conditions. Not only was it said to relieve pain, but, unlike most other NSAIDs, it was supposed to be safe on the stomach. (NSAIDs are non-steroidal anti-inflammatory drugs. Ibuprofen is an example of a well known NSAID.) Merck began a widespread campaign to educate both physicians and the public about its new miracle drug. The sad truth was that Merck knew Vioxx increased the risk of cardiovascular events like stroke and heart attack. In one of its earliest studies, Vioxx increased the risk of heart attacks by fivefold. However, because it was a cash cow, Merck hid this evidence. Merck got away with this until September, 30 2004 when it could no longer hide the data. With studies showing the increased risk of heart attacks, Merck recalled Vioxx.

For citizens injured by Vioxx who lived outside Oregon, the recall date was legally neutral. Although they may have suffered injury more than two years before, their statute of limitations contained a discovery clause; their statute did not start to run until they first learned the cause of injury. Thus, for most Vioxx victims, the statute of limitations has not yet expired and will not expire until September 30, 2006.

If not for the Oregon Supreme Court's decision in *Gladhart v. Oregon Vineyard*, 332 Or 226 (2002), Oregonians would be just like Americans elsewhere. In *Gladhart*, the Court interpreted ORS 30.905 to mean that there was no "discovery" provision. According to the Court, Oregonians injured by a product had two years to bring a claim from the date of injury, even if they did not know the cause of injury.

Gladhart reversed what had been the thinking in Oregon. The Court of Appeals had already said in 1982 that Oregon's statute of limitations for product cases did contain a discovery provision. *See Dortch v. A. H. Robbins*, 59 Or App 310 (1982). Indeed, the legislature itself felt that the Supreme Court got it wrong. In the 2003 session, it amended ORS 30.905 to add a discovery provision. This was known as the "Gladhart fix." However, at the urging of business interests, the legislature's amendment was made prospective only: It would apply only to injuries that occurred after January 1, 2004.

At the time, no one was particularly worried that the compromise would, indeed, compromise anyone's rights.

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Certainly, no one knew about the Vioxx recall—it was still a year away.

Looking for a legislative fix

Many may find it surprising, but the Oregon legislature historically has risen to the occasion to amend grossly unfair statutes that bar claims. Most prominently, it has repeatedly amended Oregon's harsh statute of repose that bars product liability claims for any injury occurring more than eight years after the product was first placed in the stream of commerce. Thus it grafted in exceptions to permits suits by asbestos, IUD and breast implant victims.

In 1995, I was involved in one of those amendments. I was asked to represent Anne Kirkwood, who had been burned when a General Motors side-saddle pickup truck collided with her and burst into flames. Although this truck had been associated with similar accidents in hundreds of cases, Kirkwood could not bring suit. The General Motors pickup truck was 18 years old at the time of the incident and Oregon's statute of repose barred her. My thinking was that this situation was so unjust that surely we could ask the legislature to amend the law. That is exactly what we did. Working with lobbyist Brad Higbee, we presented evidence about the dangers associated with side-saddle pickup trucks and GM's knowledge of it. The legislature passed a law, providing victims of side-saddle pickup truck collisions with a chance to bring suit, regardless of Oregon's statute of repose.

Last year, I found myself in the same situation. Vioxx victims needed help, but Oregon's statute of limitations barred their suit. Needless to say, the first thought I had was Anne Kirkwood's case. If we could defeat General Motors on the basis of simple fairness, surely we could defeat Merck. The second thought I had was to call Higbee, who agreed we could do it again.

It would take a book to write the complete account of Senate Bill 1011. We had so many up and downs that the space permitted for this article is not sufficient to tell the whole story. However, the basics can be told. The campaign started with a bang. Higbee worked with legislative counsel to draft Senate Bill 1011. A press conference was called and a dozen Vioxx victims lined up before the cameras to announce the creation of Vioxx Victims United. They asked the legislature to pass Senate Bill 1011.

The bill was assigned to the Senate Judiciary Committee and a hearing was held on April 14, 2005. We presented the testimony of several victims, and all seemed to go well. The only testimony against the bill was that of Jim Gardner who represents Pharma, the Pharmaceutical Research and Manufacturers of America. Significantly, Gardner was involved in the 2003 amendment to ORS 30.905, which restored a discovery clause to the statute of limitation, but was made prospective only. Not only did he concede that the present state of affairs was harsh, but he characterized the statute of limitations as really a statute of repose—it barred claims even before people knew they had a claim. His only argument was that a deal was a deal. Senator Ginny Burdick (D-Portland), the chair of the committee, brushed aside his objections. She got Gardner to concede that if the legislature knew about Vioxx in 2004, the legislature might not have made the bill prospective only. By a vote of 4 to 3, the bill was passed out of committee.

Although the common wisdom was that the bill would pass the Democrat-controlled Senate, it almost failed to do so. The bill was scheduled for a vote several times, only to have our supporters pull it rather than face a loss. Certain Democrats were not supporting the bill and others failed to show for the votes. These were frustrating times as Vioxx victims appeared in the galley, hoping to claim justice, only to be sent home.

Justice denied

We remained optimistic. In Kirkwood's situation, we were told that she could never prevail. That year, 1995, was the year of tort reform and the Republicans controlled the House and Senate. As the Vioxx bill finally made it to the House of Representatives, the session was nearing an end. The bill was assigned to the State and Federal Affairs Committee—one of the last substantive committees still open for business. Lobbying was intense by Vioxx Victims United, which redoubled its efforts. Major newspapers throughout the state endorsed SB 1011, including the Salem *Statesman Journal* and *The Oregonian*. The Republicans held the House by a 33 to 27 vote margin, but Republican legislators slowly began to come around. We had commitments from many of them. Seven Republican Representatives even signed a letter to the Speaker urging passage of SB 1011. That was more than enough to pass the bill if we could get it to the Floor.

As it turned out, the fix was in. The most powerful person in the legislature was Republican Karen Minnis—the Speaker of the House. She held complete control over whether a bill would get a hearing. Repeatedly, she killed bills of all kinds and earned a reputation as a henchperson for corporate interests. She refused to give Senate Bill 1011 a hearing. Not surprisingly, records show that drug companies are among Karen Minnis' largest campaign contributors.

Despite a short-lived, late night deal on the legislature's last day, which would have gotten SB 1011 to the House Floor for a vote, the drug company lobbyists could still smile in gratitude at the Speaker as the bill died in Committee upon adjournment. Vioxx victims were outraged. For a period of time, some consideration was given to putting a measure on the ballot. However, in the end, too much time and money had already been spent. There simply were not the resources available to start a second round of advocacy.

The next step

So where does that leave Vioxx victims in Oregon? Fortunately, not all Oregon Vioxx victims were time barred. Several had their strokes or heart attacks in 2003 or 2004. There was still time on the clock for them when they first found out about the Vioxx recall in September, 2004. Several Oregonians filed their cases in federal court in Oregon.

Indeed, not even all the time barred victims may be left totally hopeless. Many attorneys handling Vioxx cases believe that time-barred Oregonians may still take their cases to other states. One such state is New Jersey, which is the headquarters of Merck, and it has a favorable statute of limitations—that is, one with a discovery provision—for claimants who still are alive and for survival actions. The thinking is that the New Jersey courts will apply its statute of limitations over Oregon's, although this has yet to be tested. Unfortunately, New Jersey's statute of limitations for wrongful death cases is somewhat similar to Oregon's: there is no discovery provision, but even worse there is a two year, and not a three year, deadline.

Another option for Oregonians is Minnesota. For claims arising prior to August 1, 2004, out of state claimants may rely on Minnesota's more lenient statute of limitations.[2] It has a four year statute of limitations for product cases and a six year statute for negligence cases. A number of Oregonians have taken their case to Minnesota.

Merck won the game in Oregon. It played dirty, using behind the scenes influences to corrupt the Democratic process. However, its time will come. Just as it managed to hold off the FDA for years until its day of reckoning came, so will it be with the litigation battles.

Merck swears it will take every case to court, but it will not. It will lose too many cases and ultimately Merck will have to bow again.

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[1] The two year statute of limitations possibly applied to wrongful death claims too, although this has been called into question. *See Kambury v. DaimlerChrysler*, 185 Or App 635 (2003), pending reconsideration. At most, wrongful death claimants had three years to file their claim. ORS 30.020 (1)

[2] The August 1, 2004 date is important because the Minnesota legislature adopted a borrowing statute when considering conflict of law issues. Claims based on law in other states incorporate that state's statute of limitations. One exception to this is that claimants who move to Minnesota may have the benefit of Minnesota's statute of limitations regardless of when the claim arose.

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