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Settlements Totaling $688 Million Approved in Merck Vytorin Suits

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A federal judge in Newark on Tuesday gave final approval to a $688 million settlement of litigation over the cholesterol drug Vytorin.

Class counsel called the settlement the largest ever in a securities-fraud case against a pharmaceutical company.

It resolves investors' claims that Merck & Co. and Schering-Plough Corp. concealed clinical trial results showing that the drug was no more effective than cheaper alternatives.

Vytorin is a combination of Zetia and the generic drug simvastatin. The plaintiffs claimed losses from a two-year delay in the release of results from a study that found no benefit from Vytorin over use of simvastatin alone.

U.S. District Judge Dennis Cavanaugh signed off on the settlement in dual actions, captioned *In re Schering-Plough Corp./ENHANCE Securities Litigation* and *In re Merck & Co. Vytorin/Zetia Securities Litigation.*

Merck and Schering-Plough merged in 2009 under the Merck name and sold Vytorin jointly.

The settlement will pay $473 million in the *Schering* suit and $215 million in the *Merck* action, sums Cavanaugh called "fair, adequate and reasonable."

Out of those settlements will come legal fees and expenses of more than $147 million for the plaintiffs' lawyers. Bernstein Litowitz Berger & Grossmann is lead class counsel in both, along with another New York firm, Labaton Sucharow, in the Schering action, while Grant & Eisenhofer of Wilmington, Del., shared that role in the Merck suit.

Carella Byrne Cecchi Olstein Brody & Agnello in Roseland is local counsel.

Legal fees in *Schering* amount to about $80 million and those in *Merck* about $60 million. An additional $3.62 million and $4.07 million, respectively, were allowed for litigation costs.

Eight lead plaintiffs, all but one a pension fund, will receive combined expenses of more than $210,000.

In approving the fees, Cavanaugh adopted the recommendations of special masters Stephen Greenberg and Jonathan Lerner, both of Pilgrim Mediation Group in New York. Their initial Aug. 28 report found the *Schering* fees reasonable based partly on the size of the settlement, which they described as one of the 25 largest for a securities class action since passage of the Private Securities Litigation Reform Act in 1995.

The $473 million amounted to more than 13 percent of the $3.5 billion lost by investors on Jan. 14, 2008, a result they termed "all the more impressive" given the absence of any criminal pleas, government enforcement actions, financial restatements "or even a motivated deep-pocket individual shareholder leading the charge."

The fee application was not backed by an expert report or comparative analyses, but Greenberg and Lerner consulted a NERA Consulting Group Report to see how the settlement measured up.

Even adding an extra $8.2 billion investor loss on March 31, 2008, after more information about the Vytorin study became public, the Schering settlement amounts to 4 percent of $11.7 billion lost, well above the median .7 percent for similar cases, they wrote.

Further justification was that there was just one objection out of the 346,000 potential class members notified and it was found to be without merit.

The special masters also noted the difficulty of the litigation, given the "highly technical nature of the alleged fraud," and the quality of class counsel — "a top tier team" up against formidable opposition.

The defense team included Theodore Wells Jr. of New York's Paul Weiss Rifkind Wharton & Garrison; Douglas Eakeley of Lowenstein Sandler in Roseland; and William McGuire of Tompkins McGuire Wachenfeld & Barry in Newark.

They also mentioned that the Schering fees represent a multiplier of 1.3 on a lodestar of almost $60 million, for more than 126,000 hours.

The sole objection, by a family trust, called the lodestar and multiplier too high, and asked the court to analyze the billing.

Greenberg and Lerner called that position contrary to controlling precedent.

They articulated similar reasons for approving the Merck fees, saying the $215 settlement comprised more than 1.5 percent of the $14 billion lost by investors and more than twice the median recovery in comparable cases.

The Merck fees were based on a $44,941,903 lodestar for 105,342 hours billed and a multiplier of 1.34.

The only objectors were the same trust and an individual with two shares whose attack on the fees, based on a study of averages in cases settling for $100 million to $250 million, was similarly rejected.

An added obstacle to fee approval in the Merck case was a retainer between the Grant firm and a Dutch pension fund that capped its fees at 15 percent.

Greenberg and Lerner said enforcing the cap would shortchange counsel, given the amount of the lodestar.

They had no problem with the expenses in *Schering* but balked at those sought in *Merck* because they were so much higher, despite the smaller lodestar.

They approved the Merck expenses, however, on Sept. 25, after being provided additional information.

Salvatore Graziano of Bernstein Litowitz calls the agreement the largest securities class-action settlement against a pharmaceutical company in the country.

Merck spokeswoman Lainie Keller comments that the companies are "pleased to put this matter behind us as we continue to focus on scientific innovations that improve health worldwide."

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