

Consumer Fraud Class Action Decertified in Drug Case

February 21, 2012 by [Sean Wajert](#)

A state appeals court last week de-certified a class action by consumers over alleged misrepresentations in marketing a drug. See [Merck & Co. v. Ratliff](#), No. 2011-000234 (Ky. Ct. App., 2/10/12).

The case involved the drug Vioxx, which was a highly effective medication formerly in widespread use for patients with arthritis and other conditions causing chronic or acute pain. Plaintiff was a former user of Vioxx for his chronic osteoarthritis. Although Ratliff's insurance paid for most of the cost of the drug, which was at the time approximately \$66 per month, Ratliff contributed about \$5 each month out of pocket. Ratliff discontinued using Vioxx in early 2004.

Plaintiff brought a putative class action on behalf of product users who had not suffered cardiovascular side effects, alleging that the defendant deceived the members of the proposed class in violation of the state Consumer Protection Act by promoting and/or allowing the sale of Vioxx with the use of unfair, false, misleading or deceptive acts or practices. As a result, the class purchased the drug when it wouldn't have otherwise.

The case followed a twisting path, to federal court, to the MDL, back to state court, up to the state supreme court on mandamus, and back. Long story short, the class was certified by the trial court, and that decision eventually became ripe for review by the court of appeals.

The Kentucky rules are similar to the federal class action rules. The trial court certified the class under the prong (like b3) requiring that the questions of law or fact common to members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The trial court found that common questions of law and fact did predominate, stating that there was a common nucleus of facts from which the potential plaintiffs' claims arose. All of the potential plaintiffs were prescribed Vioxx by doctors who supposedly relied on Merck's assertions that it was safe and effective.

On appeal, Merck contended that plaintiff's claims would require individualized proof such that common questions would not predominate. Merck argued that individual proof would be necessary to show that Merck made fraudulent or negligent misrepresentations toward each putative class member or his or her physician through the marketing and sale of Vioxx, that the alleged misrepresentations were received by each putative member's physician, that each putative member's physician relied on such representations in his or her decision to prescribe Vioxx over another drug, and the amount of any damages suffered by each putative member.

The court of appeals noted that the common law misrepresentation claims would require proof of causation in the nature of reliance, and while "there are fewer obstacles to a class claim proceeding under the" state consumer protection act, that law still requires loss as a result of

the wrongful act. Plaintiffs alleged that there was supposedly a consistent pattern of deception lasting essentially the entire time that Vioxx was on the market, and thus that generalized proof could be used to show the elements of fraud and misrepresentation in this case. This theory concerning generalized proof regarding Merck's alleged conduct was similar to the rebuttable presumption of reliance and causation known in securities litigation as "fraud-on-the-market." The court of appeals noted that the "fraud-on-the-market" approach had never been recognized in the state for a fraud or misrepresentation case. Indeed, pretty much every other jurisdiction which has been confronted with the theory has rejected it outside of the securities litigation context. See, e.g., *Kaufman v. i-Stat Corp*, 754 A.2d 1188, 1191 (N.J. 2000); *International Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co., Inc*, 929 A.2d 1076, 1088 (N.J. 2007); *Mirkin v. Wasserman*, 858 P.2d 568, 584-95 (CA. 1993); *Southeast Laborers Health and Welfare Fund v. Bayer Corp.*, 2011 WL 5061645 (11th Cir. 2011); *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001).

Accordingly, causation, reliance, and damages must be shown on an individual basis. Thus, if the action were tried as a class, even after the alleged common questions of Merck's representations were decided, the case would essentially fragment into a series of amalgamated "mini-trials" on each of these individualized questions. Because these individualized questions would substantially overtake the litigation, and would override any common questions of law or fact concerning defendant's alleged conduct, the court found that a class action was not the superior mechanism by which to try these cases. See, e.g., *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1192 (9th Cir. 2001).

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