

Fraud on the Market Takes It on the Chin – Again

Monday, February 13, 2012

We can't say all that much about Merck & Co. v. Ratliff, ___ S.W.3d ___, 2012 WL 413522 (Ky. App. Feb. 10, 2012), because of our involvement in the Vioxx litigation, but we'd be remiss not to point out that the Kentucky appellate court joined the [vast majority of other jurisdictions](#) in rejecting "fraud on the market" outside of the securities area while reversing (overcoming a tough abuse of discretion standard) class certification in Ratliff. Id. at *7. No fraud on the market theory was appropriate for: (1) consumer fraud, (2) regular fraud, (3) negligent misrepresentation, and (4) unjust enrichment.

Three other points of interest about Ratliff: First the court recognized that "class certification is typically not granted in prescription drug cases because of the individualized inquiries such litigation typically involves." Id. at *6 n.6. Our class action cheat sheets – [state](#) and [federal](#) – underscore the accuracy of this point. Second, the court recognized the similarities between fraud on the market and agency fraud theories such as fraud on the FDA. Id. at *7. Third, the court held that the "inequitable conduct" element of unjust enrichment would require an individualized determination of medical risk and benefit for every user of the drug. Id.