Throw Enough Mud at the Wall and Some of it Will Stick

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We could have gone with "if at first you don't succeed, try, try again." Or, Dory's famous "Just keep swimming" from Disney's Finding Nemo. But, when talking about plaintiffs, slinging mud just feels more appropriate (to us). And, I guess somewhere in here is a backhanded compliment about being persistent, but really we would describe our children as "persistent" when they ask for the 20th time to go see the latest Disney movie – and it wouldn't be a compliment. In fact, under our breath you'd probably catch a few words we wouldn't want our children to hear. Since our message here isn't for impressionable children but rather hardened plaintiffs' counsel – we'll shout it right out: YOU CAN'T BRING A *&$%#%& CLAIM FOR FRAUD ON THE FDA. Phew, that felt good.

In a much more diplomatic and reserved fashion, that is what the court said in Pontious v. Medtronic, 2011 U.S. Dist. Lexis 140717 (D. Kan. Dec. 7, 2011). Plaintiff attempted to bring her fraud-on-the-FDA claim as a consumer fraud action alleging that "[d]efendants violated the KCPA . . . when they willfully failed and refused to timely report information . . . as required by 21 C.F.R. § 805.50(a)." Id. at *5-6. The court quickly concluded that

> "Here, as in Buckman, the federal regulation is critical to plaintiff's state-law claim. . . . Claims that a defendant failed to make a report to the FDA as required by the [MDA] are among those that are preempted and cannot give rise to a state law cause of action."

Id. at *6-7 (citations omitted). Like putting lipstick on a pig, it doesn't matter if you dress it up as strict liability, negligence, misrepresentation, or consumer fraud – state law claims for alleged failure to provide information to the FDA are preempted under Buckman. End of story.

Well, it wasn't quite the end of this story. Having not succeeded and wanting to keep swimming, plaintiff decided to throw a little mud. While the court granted defendant's motion to dismiss, it also granted plaintiff's motion to amend her complaint. Plaintiff's new consumer fraud claim alleges "that defendants designed, manufactured, marketed, distributed, and/or sold a defective product; and . . .that defendants violated the KCPA by willfully marketing and/or selling that defective product." Id. at *10. Because the claim now focuses on alleged misrepresentations to consumers rather than to the FDA, the court found the new claim not

preempted under Buckman. Id. Although not willing to toss out the amended complaint, the court did recognize that it was "short on facts" supporting plaintiff's consumer fraud claim and acknowledged that the claim might still be preempted "to the extent that any misrepresentation was based on a failure to comply with the FDA's regulatory standards." Id. at *11. The court just wasn't quite ready to go there yet.

So, while it is clear to us that the fat lady has sung on fraud-on-the-FDA claims, this plaintiff, at least, has lived to fight another day.