

Securities Regulation Daily Wrap Up, FRAUD AND MANIPULATION—DNJ: Class Action Certified Against Merck Over Vioxx, (Feb. 1, 2013)

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Securities (Federal) > News & Current Awareness > Securities Regulation Daily > Securities Regulation Daily Wrap Up > 2013 > February 2013 > February 1, 2013 > FRAUD AND MANIPULATION—DNJ: Class Action Certified Against Merck Over Vioxx, (Feb. 1, 2013)

By Mark S. Nelson, J.D.

The federal court in New Jersey has granted class action status to a suit alleging that Merck & Co., Inc. misrepresented or failed to disclose health risks associated with the painkiller Vioxx (*In Re Merck & Co., Inc. Securities, Derivative & "ERISA" Litigation*, (unpublished), January 30, 2013, Chesler, S.). The suit claims that Merck and two officers violated the antifraud, controlling persons, and insider trading provisions of Exchange Act Sections 10(b), 20(a), and 20A. Class plaintiffs dropped related Securities Act claims.

Plaintiff Class. The court used its discretion to modify the plaintiff class' scope. Lead plaintiffs said the class should be anyone damaged by Merck's alleged fraud within the class period. But the court said this view wrongly implied that class members must satisfy a merits requirement. Thus, the court struck "and were damaged thereby" (bold italic below) and approved the class of:

"All persons and entities who, from May 21, 1999 to September 29, 2004, inclusive (the 'Class Period'), purchased or otherwise acquired Merck & Co., Inc. ('Merck') common stock or call options, or sold Merck put options, **and were damaged thereby** (the 'Class')."

Moreover, the court rejected Merck's attempt to move the class start date to March 22, 2000. Merck had claimed that scienter did not exist for earlier claims. The court, however, said Merck prematurely tried to contest the merits of plaintiffs' claims and Merck failed to cite authority for its assertion that scienter cannot be imputed to a corporation if no corporate agent is named.

Class Reqs. FRCP 23(a) requires the class plaintiffs to show numerosity, commonality, and typicality among class members. Class plaintiffs also must show that class representatives are adequate. The court found all of these requirements had been met and approved four class representatives: Public Employees' Retirement System of Mississippi (MPERS), Steven LeVan, Jerome Haber, and Richard Reynolds.

With respect to numerosity, the court said there is no required minimum number of plaintiffs, but the Third Circuit in *Marcus* said a class of 40 plus is enough. Here, the court noted that Merck had 2 billion outstanding common shares and between 216,000 and 280,500 record shareholders during the proposed class period. The court said the "common sense inference" is that the plaintiff class here is sufficiently numerous.

The court briefly looked at the suit's merits to find commonality within the plaintiff class. According to the court, all of plaintiffs' claims derive from a common set of Exchange Act 10(b) legal and factual allegations that can be resolved across the class. Specifically, all class plaintiffs alleged that Merck misrepresented or concealed material information about Vioxx. Plaintiffs' controlling person and insider trading claims arise from these same allegations.

Typicality, said the court, demands scrutiny of the relationship between the class representatives and other class members. Here, the court said plaintiffs "easily met" the typicality prong because the class representatives' claims and those of absent class members derived from the same Exchange Act allegations.

In finding typicality, the court rejected Merck's attempt to cast lead plaintiffs as burdened by unique defenses. The court said Merck's effort to distinguish class members who bought stock and those who traded options was flawed because options track the underlying stock price. The court rebuffed Merck's claims that Haber was atypical because he bought shares through an investment adviser and that Reynolds was atypical because he would have bought shares anyway because "price action" guided his trades.

Moreover, the court refused to deny typicality based on Merck's argument that it could use MPERS' post-correction share purchases to discredit MPERS's claim of reliance at trial. The court also said that Scolnick's claim that MPERS' trades were not contemporaneous with his under Exchange Act 20A was inapt for class certification, but may be raised in a motion to dismiss or for summary judgment.

Lastly, the court found all four class representatives are adequate. The court said Merck's argument that MPERS may be distracted by its role in other suits was unfounded because MPERS is a large, institutional investor with direction from the Mississippi attorney general and the means to pursue many cases simultaneously. The court also rejected Merck's claim that LeVan and Reynolds could not grasp the case. Here, the court noted that lead plaintiffs often rely on counsel to help them navigate class suits. Merck, said the court, never cited any fundamental intra-class conflict that would antagonize absent class members.

Predominance. The court found that the entire Merck plaintiff class met the predominance test. Here, plaintiffs were entitled to a presumption of reliance under the Supreme Court's *Basic* opinion because Merck's stock trades in an efficient market (the NYSE) and Merck's alleged misrepresentations or omissions were public. The court said that plaintiffs who traded options also may invoke *Basic* because option prices are tied to the underlying stock's performance. Moreover, the court said that the remaining elements of plaintiffs' fraud claims derive from common evidence.

Merck had argued that plaintiffs' failed to show that the NYSE is an efficient market. The court rejected Merck's demand for a *Cammer* analysis because copious precedent showed that the NYSE is an efficient market. The *Cammer* test, said the court, is more apt for stocks traded on immature markets.

Superiority. The court found that a class action is the superior mode to resolve the suit against Merck. The court observed that this suit is complex and costly, but has the potential to efficiently give class plaintiffs their day in court. Absent a class suit, many class plaintiffs might forgo solo suits against Merck. The court also said that a multiplicity of suits could produce varied results and may waste private or judicial time and funds.

Class counsel. The court approved the class plaintiffs' choice of counsel. Here, class counsel was familiar to the court from previous appointments and had "extensive experience" in securities class actions. Class counsel is Bernstein Litowitz Berger & Grossmann; Brower Piven; Milberg; and Stull, Stull & Brody.

The case is MDL No. 1658 (SRC).

Attorneys: Brett Van Benthysen (Bernstein Litowitz Berger & Grossmann, LLP), C. Mark Whitehead, III (Whitehead Law Firm), Jules Brody (Stull, Stull & Brody), Lewis Stephen Kahn (Kahn Gauthier Law Group, LLC), Rebecca Zirkle Matthews, and Steven G. Schulman (Milberg, Weiss, Bershad & Schulman, LLP), David A.P. Brower (Brower Piven) for class representatives Public Employees' Retirement System of Mississippi, Richard Reynolds, Steven LeVan, Jerome Haber.

Dan H. Ball (Bryan Cave, LLP), John N. Poulos (Poulos Lopiccio PC), Richard C. Stanley (Stanley, Flanagan & Reuter, LLC), Wilfred P. Coronato (Hughes, Hubbard & Reed, LLP), Robert H. Baron (Cravath Swaine & Moore, LLP) for Merck & Co., Inc., Alise Reicin, and Edward M. Scolnick.

Companies: Merck & Co., Inc.; Public Employees' Retirement System of Mississippi

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