

PRODUCTS LIABILITY

Class Certification Denied in Vioxx Cases

by **John K. Landay**
Column Editor: **James R. Lance**

John Landay is an associate at Kirby Noonan Lance & Hoge, LLP, where he practices business litigation. He received his undergraduate degree in psychology from Wesleyan University in 2001 and his Juris Doctor from Washington & Lee University School of Law in 2007. He was admitted to the California State Bar in 2008. He may be reached by email at: JLanday@knlh.com.

On December 15, 2009, the California Court of Appeal, Second Appellate District, affirmed a trial court's ruling which denied class certification in a Vioxx case. The court ruled that individual issues predominated over the common issues. *In re Vioxx Class Cases* (2009) 180 Cal.App.4th 116.

Background Facts

Defendant Merck & Co, Inc. ("Merck") manufactured and marketed Vioxx. *Id.* at 120. Vioxx is a non-steroidal, anti-inflammatory drug ("NSAID"), like generic naproxen. *Id.* at 121. Vioxx was developed to have the anti-inflammatory effect without causing adverse gastrointestinal effects. In order to establish the benefits of Vioxx, Merck sponsored a study called the VIGOR study. *Ibid.* The results of the VIGOR study showed that the drug posed a greater risk of adverse cardiovascular effects. Merck went on to advertise the drug to the public as safe, but eventually withdrew the drug from the market on September 30, 2004, when a second study indicated that the drug did pose a greater risk of adverse cardiovascular effects than other NSAIDs. *Id.* at 122.

Procedural History

The purchasers of Vioxx ("Plaintiffs") brought an action against Merck alleging violations of unfair competition law ("UCL"), false advertising law ("FAL"), unjust enrichment, and violations of the Consumer Legal Remedies Act ("CLRA"), each based on the same general theory of relief. *Ibid.* Plaintiffs alleged that Vioxx was no more effective and less safe than generic naproxen. In addition, Plaintiffs alleged that Merck misled customers into paying more money for prescription Vioxx instead of the cheaper over the counter NSAIDs by representing that it was safer. *Ibid.* The Plaintiffs sought economic damages only, seeking the difference between the price they paid for Vioxx and the price they would have paid for the generic naproxen. *Id.* at 122-123.

On July 27, 2007, the Plaintiffs filed a motion for class certification. The motion sought to certify all individuals and entities that purchased Vioxx in California from June 1999 to October 2004. Plaintiffs supported their motion with evidence intended to demonstrate that Merck misrepresented to the public and physicians the cardiovascular risks of Vioxx. *Id.* at 123. Merck opposed the certification motion arguing that individual rather than common issues predominated. *Id.* at 124. Merck provided evidence and expert testimony that the type of drug that each pain patient was prescribed required an individualized approach applicable to each patient's special situation, including the condition being treated, the nature of the pain, the dose and duration of the medication and the patient's medical history. Merck also offered testimony that different

physicians relied on different information when prescribing medication to patients. *Id.* at 125-126.

The trial court denied the Plaintiffs' motion for class certification, concluding that the Plaintiffs could not proceed on the theory that Vioxx was no more effective and less safe than generic naproxen. The trial court reasoned that such a determination should be done based on each patient's specific medical needs and history. The trial court also held that Plaintiffs could not prove damages by comparing Vioxx with naproxen because it was an issue subject to individual proof for each patient. *Id.* at 126. In addition, the trial court ruled that the individually named Plaintiffs did not possess claims typical of prescription drug benefit providers ("Payor Entities") who paid all or part of the Vioxx purchase price for their plan members. *Id.* at 127.

After Plaintiffs filed a notice of appeal, the California Supreme Court decided *In re Tobacco II Cases* (2009) 46 Cal.4th 298. On appeal, the Plaintiffs argued that under the standards reaffirmed *In re Tobacco II Cases*, the trial court's ruling was erroneous. *In re Vioxx Class Cases, supra*, 180 Cal.App.4th at 127. In addition, the Plaintiffs argued that individual issues did not prevail over common elements of reliance and that the court's method of calculating damages was not subject to individual proof. *Ibid.*

Appellate Court's Analysis

In the opinion, the appellate court discussed the trial court's reasons for denying class certification. Quoting *In re Tobacco II Cases*, the court noted that, "a trial court ruling supported by substantial evidence generally will not be disturbed 'unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation].'" *Ibid.*, quoting *In re Tobacco II Cases, supra*, 46 Cal.4th at 311.

The court described the requirements of maintaining a class action, including the community of interest requirement which has three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. *Id.* at 128, quoting *Akkerman v. Mecta Corp. Inc.* (2007) 152 Cal.App.4th 1094, 1100.

The court first discussed the CLRA claim. The court explained that the language of the CLRA provides that a consumer can recover for damages that result from an unlawful practice and recovery requires proof that the alleged conduct was deceptive and caused the consumer harm. *Id.* at 128-129 (citations omitted.) The court, in discussing causation on a class-wide basis, stated "If the trial court finds the material misrepresentations have been made to the entire class, an inference of reliance arises as to the class." *Id.* at 129. However, if the determination of materiality or reliance varies between individual customers, then the issue is not subject to common proof and the class should not be certified as to that action. *Ibid.*

The court then examined the UCL and FAL claims. The court noted that, "On appeal, plaintiffs pursue only the argument that Merck's advertising was fraudulent under the UCL and FAL." *Ibid.* Both the UCL and FAL provide, among other provisions, a prohibition on untrue and misleading advertising. *Ibid.* The court explained that the remedies available in a UCL and FAL action were limited to injunction and restitution. *Id.* at 130. The court dismissed the possibility of injunctive relief based on the fact that Vioxx already had been withdrawn from the market and

explained that, "Injunctive relief is not available when there is no threat that the misconduct to be enjoined is likely to be repeated in the future." *Ibid.* (citations omitted.) Further, the court stated that the measure of restitution is the difference between what the plaintiff paid and the value the plaintiff received. "When the plaintiff seeks to value the product received by means of the market price of another comparable product, that measure cannot be awarded without evidence that the proposed comparator is actually a product of comparable value to what was received." *Id.* at 131.

Agreeing with the trial court's holding that the individual Plaintiffs' claims were not typical of those of the Payor Entities, the court reasoned that the Payor Entities did not just passively pay their share of the prescription drug cost without any influence in the matter. The court explained that not all Payor Entities pre-approved Vioxx for use by all patients and that many conducted their own reviews of published information related to the drug. *Id.* at 132.

On the issue of reliance and materiality related to the CLRA claim, the court agreed with the trial court's holding that the issue could not be resolved on a class-wide basis and instead depended on an individual class member determination. "The trial court found that the decision to prescribe Vioxx is an individual decision made by a physician in reliance on many different factors, which vary from patient to patient." *Id.* at 133. The court rejected Plaintiffs' argument that Merck's common misrepresentation supported a common inference of reliance. After summarizing the evidence that Merck provided to the trial court, the court concluded that regardless whether Merck's misrepresentations were material, "induced reliance, is a matter on which individual issues prevailed over common issues, justifying denial of class certification with respect to the CLRA claim." *Id.* at 134.

The court also concluded that individual issues predominate in the UCL and FAL restitution claims. The court explained that while the trial court stated that class injuries were probably subject to common proof, the trial court specifically found that class damages are not subject to common proof. *Id.* at 135. The court first rejected Plaintiffs' argument that they had offered sufficient evidence that naproxen was a valid comparator to Vioxx, stating that the evidence actually indicated that after Vioxx was taken off the market, most Vioxx patients switched to another COX-2 inhibitor, like Vioxx, rather than a Cox-1 and -2 inhibitor like naproxen. *Id.* at 136. The court also rejected the Plaintiffs' argument that since the UCL and FAL allow an award of restitution without individualized proof, that the validity of naproxen as a comparator should not have been addressed in the motion for class certification. Disagreeing with the Plaintiffs' argument, the court stated that in order to obtain class-wide restitution under the UCL, the Plaintiffs needed to establish a measurable amount of restitution. *Ibid.* The court agreed that the issue of a proper Vioxx comparator was a patient-specific issue and that "the trial court properly concluded that restitution could not be calculated on a class-wide basis." *Ibid.*

CONCLUSION

In the *In re Vioxx Class Cases*, the appellate district court affirmed the trial court's decision to deny class certification primarily because the individual issues in the various aspects of the case predominated over common issues.