

Dismissal of Actimmune Proposed Class Action Affirmed

January 10, 2012 by [Sean Wajert](#)

The Ninth Circuit late last month upheld the dismissal of a proposed class action concerning alleged off-label marketing of the drug Actimmune. [In re: Actimmune Marketing Litigation](#), Nos. 10-17237 and 10-17239 (9th Cir. 12/30/11).

The panel, in an unpublished opinion, affirmed the judgment of the district court “for the reasons set forth in the district court’s orders.” See *In re Actimmune Marketing Litig.*, 614 F.Supp.2d 1037 (N.D. Cal. 2009) (Actimmune I); *In re Actimmune Marketing Litig.*, 2009 WL 3740648 (N.D. Cal. Nov. 6, 2009)(Actimmune II); *In re Actimmune Marketing Litig.*, 2010 WL 3463491 (N.D. Cal. Sept. 1, 2010) (Actimmune III).

In September 2010, the trial court had issued a ruling dismissing the amended complaints filed by consumers and an insurer, who alleged that defendants had improperly marketed Actimmune as a treatment for idiopathic pulmonary fibrosis. Despite the additional allegations included in plaintiffs’ latest amended pleadings, plaintiffs still failed to properly allege that defendants’ conduct caused plaintiffs’ injuries. Therefore, plaintiffs lacked standing to pursue their off-label marketing claims under the asserted consumer fraud claims. Establishing that a defendant violated a law only accomplishes part of a plaintiff’s burden; plaintiffs were also required to prove that they were injured “as a result of” defendants’ alleged law-violating conduct.

In the context of the instant case, the “as a result of” language placed the burden on plaintiffs to establish that they actually relied upon the representations delivered through defendants’ off-label marketing. Plaintiffs failed to allege a plausible causal chain of injury as required by *Iqbal/Twombly*.

The shortcoming in the consumer plaintiffs’ pleadings was simple: all of the consumer plaintiffs failed to allege that their doctors believed that Actimmune was an effective treatment for IPF “as a result of” defendants’ off-label promotion of Actimmune. With respect to each plaintiff, the complaint alleged only that their doctors were “exposed to at least some of InterMune’s unfair and unlawful off-label marketing.” That was not enough; claims dismissed.