

Civil Justice Reform – Law Firms

The Long Reach Of The New Jersey Consumer Fraud Act And Similar State Legislation

The Editor interviews **Gavin J. Rooney**, a Member of the firm and Chair of the Consumer Fraud Practice Group of Lowenstein Sandler PC.

Editor: Please remind our readers of your practice area and background.

Rooney: I am a litigator, concentrating on defending corporate clients sued in class actions, often involving consumer protection laws such as the New Jersey Consumer Fraud Act (NJCA). I chair the Consumer Fraud Litigation Group at Lowenstein Sandler.

Editor: Four years ago you presented our readers with a highly acclaimed article relating to the possible nationwide application of the New Jersey Consumer Fraud Act. How has this development fared in later litigation?

Rooney: It remains an issue of debate within the courts. The article that you are referring to related an emerging theory of New Jersey law that applied the NJCA to a defendant's nationwide sales of its products or services, in effect displacing the laws of other states where the consumer actually bought and used the product. The theory arose out of Vioxx-related litigation brought by a putative class of health insurance companies, HMOs and other third-party payors, who claimed that Merck should refund the purchase price of Vioxx. Plaintiffs claimed that the NJCA applied because Merck is headquartered in New Jersey.

The mid-level appellate court decided that the NJCA should be applied nationwide, allowing for a nationwide class action against Merck under New Jersey law. The New Jersey Supreme Court reversed, but on other grounds, finding that the case was not appropriately certified as a class action. The court did not address the issue of whether the New Jersey law should be applied nationwide. Since that time, the lower courts have been split on the question. Judges in the New Jersey federal district court have held that the NJCA can be applied nationwide if the defendant has its headquarters in New Jersey. Other judges in New Jersey have held otherwise, finding that the laws of the states where the transactions occurred or where the plaintiff resides should determine jurisdiction. This has led to a confused mass of case law in New Jersey on the question from which it is difficult to conclude any unified rule.

Editor: You authored an article, "Does the Failure of the Preemption Defense in *Wyeth v. Levine* Expose New Jersey-Based Drug Companies to Consumer Fraud Act Claims?" Does the preemption ruling in *Wyeth* apply also to cases where non-pharmaceutical companies have been involved?

Rooney: I think that *Wyeth* has a broad extension. *Wyeth* itself dealt with whether the FDA's regulation over the safety and efficacy of an approved drug product preempted claims under state law – specifically, claims under product liability law – that, if accepted, contradicted the FDA's decision that the drug was safe. The Supreme Court held that federal law did not preempt the state law products liability protection, absent an extreme circumstance that I winnow down to this: the federal reg-

ulator told the defendant not to do it, and if the federal regulator was that specific, then the defendant cannot be held liable in court by a plaintiff claiming that the defendant should have done it. In other words, preemptions require a direct, head-on conflict between the plaintiffs' theory of liability under state law and prior direction given by the federal regulator. If one considers other state law claims outside the pharmaceutical context in the absence of some statute, the standards set forth in *Wyeth* will control.

Editor: Would you say that's the disposition of the current Supreme Court – to yield more to the states in these areas?

Rooney: Yes. While the personnel on the court has changed slightly since *Wyeth*, I don't think the balance has changed to go in the other direction.

Editor: Have other states followed New Jersey in enacting sweeping anti-fraud legislation?

Rooney: They have. Many states have enacted what are generally referred to as "baby FTC acts" (after the Federal Trade Commission Act), providing for certain kinds of consumer protection. Many states have tried to expand upon the FTC Act through their own statutes – the NJCA being one – but at last count nearly every state in the country has some kind of consumer protection law. They do vary significantly. There are a couple that do not afford plaintiffs a private right of action, that is, only the regulators can bring a suit. Some statutes provide for double damages, and some, like New Jersey's, provide for treble damages; some states exempt regulated conduct from the statute's reach, and in other states the recovery of double or treble damages is discretionary on the part of the jury as opposed to mandatory, as it is in New Jersey. I will say that New Jersey courts seem to enjoy boasting about the fact that they have the strongest of these consumer protection acts in the country.

Editor: That's why the courts might be thought of as anti-business.

Rooney: Exactly. If you think about what I was talking about in my 2006 article about the nationwide application of the New Jersey statute merely by virtue of the fact that the defendant keeps its headquarters in New Jersey – I think you can view that as anti-business as well, because the easiest thing the defendant can do to avoid that kind of exposure is to move out of the state.

Editor: Would you describe your defense of Schering-Plough in a recent putative class action?

Rooney: We defended Schering-Plough in a putative class action brought by a would-be class of third-party payors – that's insurance companies, health-maintenance organizations and the like – who were seeking to recover for payments of certain cancer drugs that they alleged were prescribed by doctors in an off-label fashion as a result of



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Schering's alleged promotional activities. When the FDA approves a drug, it approves the drug for a defined indication; if a drug is prescribed for a different indication, that's generally referred to as off-label prescription. Doctors are certainly permitted to prescribe drugs off-label, and in cancer cases that's often the standard of care among physicians. That said, and with a number of nuanced rules, drug makers generally are not permitted to market their drugs off-label. In this case, Schering-Plough had been prosecuted by the United States for alleged off-label promotion of these cancer drugs and had settled those claims in a case that was pending in Boston, having paid over \$400 million in a series of criminal fines and civil restitutions to the United States in its capacity as a third-party payor. In my case, the plaintiff's lawyers sought to capitalize on that settlement and essentially ride the coattails of the government settlement by suing on the part of various private insurance companies seeking to recover for payments for these two cancer drugs, Temodar and Intron. We were able to secure a dismissal with prejudice at the pleading stage in our case in New Jersey by arguing that the plaintiffs were unable to tie themselves to any particular prescription of a drug that was allegedly induced by some false or misleading statement to get the doctor to prescribe it in an off-label fashion and in turn provide ineffective treatment to a patient who was a beneficiary of one of the plaintiff's plans. While the plaintiffs could speak in very broad terms about alleged off-label marketing, they were fundamentally unable to point to an instance of fraud that affected them as plaintiffs. In the absence of such pleading, the district court dismissed the claim, initially without prejudice, and gave plaintiffs another shot at repleading. When this failed, the court dismissed the complaint with prejudice in a decision issued in July of 2010.

Editor: How would you describe the current climate regarding class actions? Do you foresee that many class actions are incubating now, waiting to come forth as a result of the legislation that has recently been enacted? How will Dodd-Frank affect class certification, if at all?

Rooney: The pendulum tends to swing back and forth in terms of the regulatory and legal climate for class action claims. You can think back to 1995 when the Private Securities Litigation Reform Act was enacted to curb the abuses of securities fraud class actions. Then, the pendulum swung to the other extreme with the bursting of the tech bubble at the end of the 1990s, which led to the passage of Sarbanes-Oxley and similar statutes to rein in perceived abuses by corporate America. The pendulum then swung back. A few years ago, Congress passed the Class Action Fairness Act in order to curb class action abuses, in part by moving those cases into federal court. Again, however, that was followed by financial tumult – and as a result of the financial meltdown of 2007-2008, you see the pendulum swinging in the other direction with many consumer- and plaintiff-friendly provisions in the Dodd-Frank bill. If you are a plaintiff, it's actually a propitious time to be exploring new areas for class actions.

Editor: Do you anticipate that the new whistleblower provisions of Dodd-Frank will increase claims?

Rooney: Without question they will increase claims. Whistleblower claims have become common, and there's a profound financial incentive on the part of whistleblowers and the lawyers who represent them to bring these claims. In the pharmaceutical area, for example, the use of these *qui tam* cases has become commonplace and lucrative. With regard to many of the off-label investigations brought by the government against drug makers, they usually find their origin in some sort of whistleblower or *qui tam* case that a sales rep filed against the company. Dodd-Frank expands the ability to bring these claims into the financial services sector and allows employees at banks and credit card companies to bring whistleblower claims in the same fashion that sales reps brought them in the past decade against drug makers.

Editor: Will Dodd-Frank and the Consumer Financial Protection Bureau (CFPB) have the effect of creating enhanced exposure to corporations to civil class actions?

Rooney: Dodd-Frank will increase potential exposure in two ways: first of all, Dodd-Frank expresses a growing belief among some portions of the government that the use of predispute arbitration clauses has become an anti-consumer issue. Arbitration clauses can be put into a customer services agreement when a customer opens an account stating that in the event of a dispute, the customer promises to arbitrate, and not litigate, with the service provider – an immediate way to defeat a class action claim before it is even brought. While Dodd-Frank does not go so far as to outlaw those clauses, it calls for special attention and regulations by the new CFPB. The import of that direction from Congress is for that agency either to eliminate or severely restrict the ability of companies to use those sorts of mandatory predispute arbitration clauses in their customer agreements. That's certainly one area where protection that was previously available to corporate defendants is likely to go away as a result of the statute. The second significant area is that the CFPB has the authority to go out and define what it deems to be unfair practices by corporations. Once it defines those unfair practices, the regulators can take certain enforcement actions to combat those practices. With regard to civil liability, however, having the regulator define certain things as unfair practices will give plaintiffs the ability to sue under state law, such as the NJCA, to seek a private remedy for those sorts of abuses. For example, the NJCA outlaws misrepresentations, omissions, and a third amorphous category of conduct called an "unconscionable commercial practice," which is left vague under state law. But if a certain practice is defined as unfair under Dodd-Frank, then it doesn't take much of a leap for a plaintiff to argue that it's therefore an unconscionable commercial practice prohibited by the NJCA, and one for which a plaintiff can recover treble damages. In that sort of back-door way, this new form of regulation will expand civil liability that defendants may face in the future.

Please email the interviewee at grooney@lowenstein.com with questions about this interview.