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## Commentary

### Out-of-State Roadshow for N.J.'s Consumer Fraud Act

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The legislative reach of New Jersey's laws traditionally stopped at the Delaware and Hudson rivers. According to a recent Appellate Division decision, however, the New Jersey Consumer Fraud Act governs advertising and sales of New Jersey-based companies throughout the United States.

Breaking with precedent in federal and other state courts, the Appellate Division affirmed the certification of a nationwide NJCFA class in *International Union of Operating Engineers Local #68 Welfare Fund v. Merck & Co. Inc.*, A-0450-05. The appeals court held that New Jersey law applies to a marketing campaign for Vioxx supposedly directed from Merck's New Jersey headquarters.

While supplying a reason why executives may choose in the future not to locate their headquarters in New Jersey, the March 31 decision also implicates significant constitutional issues involving the legislative jurisdiction of other states.

Modeled on the Federal Trade

Commission Act, consumer protection statutes have been adopted by practically every state. There are, however, important differences among those laws. Some make treble damages discretionary, some are more expansive in defining the scope of illegal conduct and several do not provide for a private right of action. Among the various laws, the NJCFA is particularly aggressive; it provides for mandatory treble damages and, sometimes, requires payment of legal fees even when the plaintiff loses at trial.

Historically, the Delaware and Hudson rivers acted as an effective firewall against nationwide NJCFA class actions. Finding that differences among consumer protection laws of various states introduced a predominance of individual questions of law that rendered the litigation unmanageable as a class action, New Jersey courts generally only certified NJCFA classes consisting of New Jersey residents.

*Local #68*, however, sidestepped that manageability issue by holding that the NJCFA applies to *all* of a New Jersey-based company's sales throughout the nation, based on New Jersey's supposedly paramount interest in pre-

venting fraud by its corporate citizens.

The allegations of *Local #68* illustrate the massive liability this decision may impose. Arising from Merck's recall of Vioxx, *Local #68* is brought on behalf of a class of third-party payors of Vioxx prescriptions, alleging Merck suppressed drug safety information, thereby committing consumer fraud. The damages sought are enormous, including a refund of billions of dollars paid.

While cast as a choice-of-law decision premised on New Jersey's interest in preventing fraud by its corporate citizens, *Local #68* represents a massive expansion of the NJCFA by regulating sales in other states. Citing the plaintiffs' allegation that Merck hatched its allegedly fraudulent scheme in New Jersey, the court held that New Jersey law applies to all claims — irrespective of the location where the doctor prescribed the drug, the patient took it or the third-party payor paid for it. For its legal doctrine, *Local #68* followed another recent Appellate Division decision, *Rowe v. Hoffmann-LaRoche*, A-4522-03. In that Feb. 28 ruling, the appeals court applied a New Jersey product liability law to a claim by a Michigan plaintiff arising from a medical device bought and used in Michigan, because the defendant manufacturer happened to be located in New Jersey.

Of course, the NJCFA can only apply to advertising and sales in other states by disregarding the legislative jurisdiction of those states. While New Jersey may feel its laws are better-reasoned than those of other states — in the

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*Hoffmann-LaRoche* case, Michigan law insulated the manufacturer from liability because it sold a device approved by the Food and Drug Administration — other states' policy judgments ought not to be so lightly set aside.

Indeed, the framers of the Constitution included the Full Faith and Credit Clause so the states' legislative jurisdiction, and not simply the judicial effects of court judgments, would be recognized by other states. It is the Michigan Legislature's place to decide

the legal framework for consumer sales within its borders for the protection of its citizens, and Michigan law ought not to be ousted of jurisdiction by the happenstance of the defendants' headquarters being in New Jersey.

The Supreme Court soon will hear the *Hoffmann-LaRoche* appeal, given that an Appellate Division judge dissented. The Court also may hear the *Local #68* case if it grants leave to appeal. In deciding one or both these cases, we hope the justices will provide appropri-

ate deference due to the legislative jurisdiction of other states.

Indeed, it is hard to conceive of a New Jersey court telling a New Jersey plaintiff she has no claim for an injury from a product purchased in New Jersey simply because the law of the manufacturer's headquarters state insulated the manufacturer from liability. By the same token, however, New Jersey ought not to oust the legislative jurisdiction of other states for sales and marketing within their borders. ■