

Court Opens The Door To Nationwide Consumer Fraud Class Actions

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Do New Jersey-based companies carry the New Jersey Consumer Fraud Act ("NJCFCA") with them wherever they go to market their products and services? The answer, according to a recent mid-level appellate decision, is a resounding yes. Breaking with established precedent from both the federal courts and the courts of other states, the New Jersey Appellate Division affirmed the certification of a nationwide NJCFA class in *International Union of Operating Engineers Local # 68 Welfare Fund v. Merck & Co., Inc.*, ___ N.J. Super. ___ (2006). Remarkably, the court certified a nationwide class based on a choice-of-law analysis – i.e., that New Jersey law should apply to a nationwide marketing campaign implemented by drug maker Merck because Merck directed that campaign from its corporate headquarters in Whitehouse Station, New Jersey.

What Is The NJCFA, And What Does It Mean For My Company?

The NJCFA was passed into law in 1960, enacted to fight fraud and deceptive practices in consumer sales, espe-

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cially when unscrupulous sellers sought to trade on the lack of bargaining power and sophistication of the poor and uneducated. Modeled on the Federal Trade Commission Act, nearly every state has some form of consumer protection statute. New Jersey's law, however, is particularly aggressive – it provides for mandatory treble damages, makes unlawful an amorphous category of "unconscionable" conduct, and in some cases requires the defendant to pay the plaintiff's legal fees even if the plaintiff loses at trial.

While originally enacted to fight deceptive practices by door-to-door salesmen, home renovation contractors, and storefront retailers, in recent years the NJCFA has been applied to pharmaceutical sales, telecommunications ser-

vices, automobile sales, and other sorts of mass marketing of consumer products. NJCFA claims are also comparatively easy to certify as class actions. In a long line of cases dating back more than thirty years, New Jersey courts have held that NJCFA classes should be certified unless it would be "clearly infeasible" to do so. Given this favored status of NJCFA claims, consumer fraud allegations have become a favorite vehicle for class actions filings in New Jersey.

What Does The Local #68 Opinion Mean For New Jersey-Based Companies?

The *Local #68* opinion creates significant new exposure to nationwide NJCFA class actions for companies who maintain their corporate offices in New Jersey.

In the past, the Delaware River acted as an effective firewall against nationwide class actions. Finding that differences among the consumer protection laws of the various states introduced a predominance of individual questions of law – differences that include what conduct is deemed unlawful, the availability of treble damages, or even whether to permit a private right of action – New Jersey courts had generally only been willing to certify NJCFA classes limited to New Jersey residents. That predominance of individual questions, of course, was based on the assumption that the laws of each state would apply to sales within its borders, and the differences among those laws meant that class members' claims could not be adjudicated on

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a nationwide basis.

That reluctance to certify nationwide NJCFA class actions has now changed. In a published decision, *Local #68* side-stepped the manageability problems inherent in applying the contradictory consumer protection laws of various states, by holding that the NJCFA could apply to *all* of a New Jersey-based company's sales to consumers located throughout the United States.

The allegations of *Local #68* illustrate the potentially massive liability this decision may impose on New Jersey companies. Arising from Merck's recall of its blockbuster drug Vioxx from the marketplace, *Local #68* is brought on behalf of a class of third-party payors (i.e., insurance companies, health maintenance organizations, and others who paid for prescriptions of Vioxx to patients) alleging that Merck suppressed the disclosure of information relevant to the drug's safety and thereby committed consumer fraud. The damages sought by the plaintiffs are enormous – the plaintiffs seek a refund of the billions of dollars paid for Vioxx prescriptions (one of Merck's best-selling pharmaceuticals) over the class period. The factual allegations of *Local #68* demonstrate how far the NJCFA has strayed from its roots – far from being a remedial statute addressing the disparity in bargaining power of unsophisticated consumers, it is now being used by one category of sophisticated corporate enterprises to seek billions of dollars from another corporation.

While cast as a choice-of-law decision premised upon the interests of the state of New Jersey in preventing fraud by its corporate citizens, *Local #68* represents a massive expansion of the NJCFA by regulating sales that occur in other states. Citing plaintiffs' allegation that Merck hatched its alleged fraudulent scheme in New Jersey, the Appellate Division held that New Jersey law would apply to all claims – irrespective of the location of the doctor who prescribed the drug, the patient who took the drug, or the third-party payor who paid for the drug.

Is *Local #68* A Model For Other Nationwide Class Actions?

Absolutely, and already the plain-

tiffs' bar has leaped to bring similar suits against pharmaceutical manufacturers and other types of New Jersey-based companies. Under *Local #68*, a plaintiff can now argue that a defendant's corporate office in New Jersey is alone sufficient to justify the application of the NJCFA to its sales throughout the country and, therefore, the certification of a nationwide class. This decision will make New Jersey a magnet for future nationwide consumer fraud class actions filed against companies that happen to have their corporate offices in the state.

Is the Battle Over Yet, And What Does This Mean For The Future?

No, the battle is not over yet – the New Jersey Supreme Court will be hearing another case involving a similar choice-of-law issue, the outcome of which may affect the precedential value of *Local #68*.

In *Rowe v. Hoffmann-LaRoche, Inc.*, another mid-level appellate panel found that New Jersey product liability law applied to a Michigan plaintiff's complaint about a medical device because the defendant manufacturer had its headquarters in New Jersey. The Michigan plaintiff in *Rowe* sought to avoid the impact of a Michigan statute, which immunized the defendant manufacturer against liability for marketing an FDA-approved medical device. Applying choice-of-law logic similar to that of *Local #68*, the court in *Rowe* side-stepped the Michigan statute by applying New Jersey law because the defendant manufacturer, Hoffmann-LaRoche, was headquartered in New Jersey. Because there is a dissent in the *Rowe* appellate opinion, there is an automatic right of appeal to the Supreme Court – which Hoffmann-LaRoche is currently pursuing. If the Supreme Court overturns the mid-level appellate decision in *Rowe*, then it will substantially undercut (if not overrule entirely) the *Local #68* opinion. Additionally, Merck is seeking leave to appeal the decision in the *Local #68* case to the New Jersey Supreme Court, which could also result in a direct reversal of the opinion.

The Class Action Fairness Act of 2005 ("CAFA") will also help New Jersey-based companies defend themselves

against future suits modeled on *Local #68*. Applicable to cases filed after February 2005, CAFA allows defendants to remove putative class actions with a nationwide character to federal court under principles of minimum diversity of citizenship, provided the class seeks damages in excess of \$5 million. CAFA means that future decisions about the nationwide applicability of the NJCFA will likely be made in the federal courts – which view mid-level state court appellate decisions such as *Local #68* as informative, but not controlling, precedent.

Finally, *Local #68* gave short shrift to the profound Constitutional issues raised by having the NJCFA control sales that occur in other states – issues that may stop other courts (especially federal courts) from blithely giving the NJCFA a nationwide reach when applied against New Jersey-based companies. Ordinarily, the power of a state to regulate commerce ceases at its border – the regulation of sales occurring in Florida, for example, is the province of the Florida Legislature, not the New Jersey Legislature. The Full Faith and Credit Clause of the United States Constitution requires New Jersey to respect the legislative jurisdiction of its sister states – and if a sister state decides not to render unlawful or afford treble damages for conduct proscribed by the NJCFA, that decision ought to be respected by New Jersey law. Indeed, the United States Supreme Court relied on this principle when it overturned a punitive damage verdict under Alabama's consumer protection law because that verdict was largely based upon product sales occurring outside of the state of Alabama. *BMW of North America v. Gore*, 517 U.S. 599 (1996).

Absent a reversal by the Supreme Court, however, the Appellate Division's opinion in *Local #68* creates a substantial new class action exposure for companies that have their corporate headquarters in New Jersey. Should *Local #68* remain the law of New Jersey, there is little in the way of preventative steps that a company can take to mitigate or guard against this risk – except, of course, to move its corporate headquarters to a different state.