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SUPERIOR COURT OF NEW JERSEY

COUNTIES OF
ATLANTIC AND CAPE MAY

CAROL E. HIGBEE, J.S.C.

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MEMORANDUM OF DECISION ON MOTION
Pursuant to Rule 1:6-2(f)

CASE:	**International Union of Operating Engineers Local #68 Welfare Fund v. Merck & Co., Inc.**
DOCKET #:	**ATL-L-3015-03-MT**
RETURN DATE:	**June 30, 2005**
MOTION:	**Plaintiff's Motion for Class Certification**
ATTORNEYS:	**Plaintiffs – Christopher A. Seeger; David R. Buchanan** **Defendants – Diane P. Sullivan; John H. Beisner; Richard B. Goetz; Jeffrey M. Judd** **Amicus Curiae – Theodore M. Lieverman; David J. Cohen**

Having carefully reviewed the papers submitted and any response filed, I have ruled on the above Motion as follows:

Plaintiff International Union of Operating Engineers Local No. 68 Welfare Fund ("Plaintiff", "the Fund" or "Local 68"), individually and on behalf of all others similarly situated brings this motion for class certification. Plaintiff seeks to certify a nationwide class of third-party non-government payors who have paid any person or entity for the purchase of the prescription anti-inflammatory arthritis and acute pain medication Refocoxib that was manufactured and marketed by Defendant Merck & Company, Inc. ("Merck" or "Defendant") under the brand-name VIOXX®. Merck opposes this motion.

BACKGROUND

VIOXX® belongs to a class of pain relievers called non-steroidal anti-inflammatory drugs ("NSAIDs"). Other NSAIDs include prescription medications such as oxaprozin (Daypro®) and diclofenac (Volaren®) as well as over-the-counter pain medications such as ibuprofen (Advil® or Motrin®), acetaminophen (Tylenol®) and naproxen (Alleve®). NSAIDs are supposed to relieve pain and inflammation by inhibiting the body's production of an enzyme called prostaglandin G/H synthase. There are two forms of this enzyme, cyclooxygenase-1 ("COX-1") and cyclooxygenase-2 ("COX-2"). Traditional NSAIDs, such as naproxen block both COX-1 and COX-2 enzymes. These traditional NSAIDs have been associated with adverse gastrointestinal side effects. Such side effects are believed to include injuries and deaths from gastrointestinal perforations, ulcers and bleeds ("PUBs") that occur in significant numbers every year in the United States alone.

Merck began developing VIOXX® in the early 1990s to address the adverse gastrointestinal side effects of traditional NSAIDs. Merck proceeded on the theory that COX-1 protects the lining of the stomach, whereas COX-2 facilitates inflammation. VIOXX® and other NSAIDs such as Celebrex®, known as COX-2 inhibitors have been developed to block only COX-2 in order to reduce pain and inflammation without having the gastrointestinal PUBs associated with traditional NSAIDs.

On December 16, 1994, Merck filed an Investigational New Drug Application ("IND") for VIOXX® with the Food and Drug Administration ("FDA"). This IND included data and analyses from approximately two years worth of pre-clinical testing. The IND was filed to demonstrate that Merck could safely test VIOXX® in healthy human patients. The FDA granted

approval to allow Merck to proceed with clinical studies. Consequently, Merck conducted 55 studies over the next four years comparing VIOXX® to other NSAIDs and placebo.

In October 1997, Merck sponsored one of these studies lead by Dr. Garrett FitzGerald, of the University of Pennsylvania, known as Protocol 023 a.k.a. the FitzGerald Study. During this study, Dr. FitzGerald observed that patients taking VIOXX® had significantly lower levels of prostacyclin metabolites in their urine than patients taking placebo. Scientists believe that prostacyclin in the bloodstream inhibits platelet aggregation – i.e. blood clotting. Dr. FitzGerald hypothesized that if VIOXX®, as a COX-2 inhibitor was causing reduced prostacyclin levels in blood vessels, as well as urine, then it was possible that COX-2 inhibitors might result in increased blood clots and associated cardiovascular events.

Plaintiff contends that the Merck Board of Scientific Advisors, an independent group of scientists, in response to the FitzGerald hypothesis, recommended that Merck implement a procedure in all future VIOXX® studies that would enable the company to develop data on a pooled basis to better understand future cardiovascular events during the clinical trials.

Local 68 also contends that Merck never engaged in the studies recommended by the FDA to properly evaluate the efficacy of VIOXX®. Local 68 claims that Merck cancelled a study that would compare the safety of VIOXX® to Tylenol because such a study would highlight the benefits of Tylenol. Plaintiff further contends that Merck simply avoided conducting other Outcomes studies to determine if VIOXX® had improved gastrointestinal ("GI") benefits because of the fear of demonstrating the possibility of increased cardiovascular ("CV") events.

Local 68 maintains it can prove by using internal documents from Merck that Merck scientists knew that the use of VIOXX® caused pro-thrombotic effects and that taking VIOXX® would increase the risk of heart attack and strokes.

The plaintiff has presented to the court documents they maintain will prove that Merck intentionally misrepresented the problem with VIOXX® and misrepresented its safety and efficacy from 1997 to when they took it off the market. Local 68 further contends it can prove at trial that Merck intimidated and attempted to silence scientists who were concerned about the cardiovascular risks of VIOXX®. The plaintiffs have provided the court with internal e-mails from 1997 and 1998 which they allege demonstrate an attempt by Merck employees to manipulate studies and conceal safety information on VIOXX®. The court has been supplied evidence that creates a factual issue as to whether Merck attempted to intimidate and silence scientists and doctors who questioned the safety of VIOXX®. Merck claims they did not make intentional omissions or affirmative misrepresentations and that in fact they acted responsibly. They claim they conducted all appropriate studies and that all scientific issues as to safety of VIOXX® were revealed to the scientific community. Merck claims the statements in documents relied upon by plaintiffs are taken out of context out of millions of documents produced. The court cannot and should not make a determination as to the merits of plaintiffs' claims here but the court is very familiar with plaintiffs' allegations and Merck's defenses.

In January of 1999, Merck began the VIOXX® Gastrointestinal Outcomes Research ("VIGOR") trial to determine whether VIOXX® reduced the risk of PUBs relative to naproxen. The VIGOR trial had approximately 8,100 patients and the "unblended" results of the study were released in March of 2000. Patients requiring aspirin for cardiac reasons were excluded from the trial. The results showed that there were fewer adverse GI events in participants taking

VIOXX® as opposed to naproxen, however, the plaintiff maintains it did not decrease deaths from gastrointestinal events. There were fewer CV thrombotic events in patients taking naproxen than in patients taking VIOXX®. The results, according to Local 68, also showed that patients taking VIOXX® suffered more than twice as many serious CV events and five times as many heart attacks than patients taking the drug naproxen.

Merck's position is that because VIGOR did not compare VIOXX® against a placebo, the results could not explain whether the increased CV events were associated with pro-thrombotic effects of VIOXX®, or a cardio-protective effect associated with naproxen, or just chance. Merck claims that after receiving the VIGOR results, it expedited studies where VIOXX® was being compared to placebo in patients seeking prevention or being treated for Alzheimer's disease. Merck also contends that the analysis of these studies indicated that there was no statistically significant difference in the CV rate between patients receiving VIOXX® and those receiving placebo.

In September 2001, the FDA issued a Warning Letter to Merck's then Chief Executive Officer, Raymond V. Gilmartin. The letter stated Merck's promotional activities in relation to VIOXX® were "false, lacking in fair balance, or otherwise misleading." The letter suggests that Merck's promotional activities for VIOXX® minimized the potentially serious adverse findings of the drug, made unfounded claims of the drug's superiority compared to other NSAIDs, and promoted VIOXX® for unapproved uses and in unapproved doses. On April 11, 2002, the FDA approved revised labeling for VIOXX® incorporating the VIGOR results and indicating the number and breakdown of serious CV thrombotic events in the groups of the VIGOR study. The meaning of the VIGOR results are disputed by the parties. Plaintiff points to various documents they state are evidence that the results were purposely misstated by Merck. Merck denies this

and claims the statements that the plaintiff relies on are taken out of context and all studies were properly done and all results disclosed.

After learning of the VIGOR results, Merck began to design a large study of VIOXX®. In 2001, Merck began a study involving three long-term trials in patients at risk of colon or prostate cancer. One of these trials was a three-year study to determine if VIOXX® could prevent recurrent colon polyps and was known as APPROVe. The preliminary results of APPROVe showed an increased rate of adverse CV events in study participants taking 25mg VIOXX® as compared to patients receiving a placebo. On September 23, 2004, the External Safety Monitoring Board for APPROVe delivered preliminary results and recommended that Merck stop the study because of the number of adverse cardiovascular events. On September 30, 2004, Merck voluntarily withdrew VIOXX® from the worldwide market.

Prior to its withdrawal, VIOXX® was one of Merck's best selling drugs. VIOXX® had been widely prescribed and generated billions of dollars in revenue each year for Merck. Plaintiff argues the success of VIOXX® depended upon false representations concerning the drug to third party payors.

Local 68 is a joint union-employer Taft-Hartley trust fund, organized and operating in New Jersey. Local 68 provides health care benefits to its members, including a prescription drug plan. Horizon Blue Cross/Blue Shield of New Jersey ("BCBS-NJ") administered the healthcare benefits plan for Local 68, including their prescription plan. Companies known as prescription benefit managers ("PBMs") often manage the prescription drug benefit programs of most healthcare plans under contracts with managed care organizations and healthcare plan administrators. A PBM, either Pain Prescriptions, Inc. or Advance PCS, managed Local 68's

prescription benefit program under contract with BCBS-NJ during the time period relevant to this matter.

Additionally, third-party payors often have Pharmacy and Therapeutics Committees ("P&T Committees"), made up of independent healthcare professionals, that advise healthcare plans on which prescription drugs should be provided to plan participants and recommending the conditions that must be met before a prescription will be filled. P&T Committees generally consist of practicing physicians, pharmacists, and other health care professionals. Virtually every healthcare plan that provides prescription drug benefits by today's industry standards has a drug "formulary," i.e. a list of prescription and non-prescription drugs that the plan's prescription drug benefit will provide coverage for. Healthcare plans generally engage P&T Committees to make recommendations or decisions about which drugs to include on their formularies. P&T Committee members assess the clinical efficacy and safety of new drugs, on an on-going basis, from many different sources of information in rendering a decision to include or to recommend inclusion of a drug onto a formulary. Such information includes clinical data provided to the FDA by the drug's manufacturer, peer-reviewed medical literature, media publications, leading physicians and scientists' statements, alternative treatments and economic issues. The result of the P&T Committee's findings usually determine the level of preferential treatment a drug will get on the formulary. The level of preference a drug is assigned corresponds with the amount a plan participant must contribute as a co-payment to receive that drug.

Each P&T Committee is different and as a result, different healthcare plans may provide varying amounts of benefit coverage for different drugs. The P&T Committee for BCBS-NJ, and thus for Local 68, determined that VIOXX® should be listed on its formulary as a preferred brand drug that required plan participants to contribute a mid-level co-payment. The status of

VIOXX® on the formularies of other health plans and plan administrators will have varied based upon the types of benefits that each plan offered and on the recommendations made by each individual P&T Committee. However, as previously stated P & T committees all rely on data that is distributed nationally, such as clinical data, medical literature, media publications and opinions of leading physicians and scientists. Plaintiff alleges Merck engaged in a nationwide campaign to get VIOXX® on the third party payors' formularies.

BCBS-NJ and its P&T Committee, as the plan administrator for Local 68, were responsible for making the decision as to VIOXX® being included in the formulary that its members were able to access for their prescriptions benefits.

Here, the proposed class would consist of third-party payors, similar to Local 68, that oversee the authorization and processing of medical claims and prescription purchases sought by their members and pay for the prescription benefit portion of the drug's costs. The proposed class of third-party payors does include a variety of entities such as insurance companies, health maintenance organizations ("HMOs"), large employers, managed care organizations ("MCOs") and Taft-Hartley groups. While BCBS-NJ acts as a plan administrator for Local 68 and other similar entities that provide medical benefits, it can also function as a third-party payor under the proposed class.

In the case of Desiano v. Warner-Lambert, 326 F.3d 339 (2dCir. 2003), the Court reversed a dismissal for failure to state a claim of a similar third party payors class action. In that case, Louisiana Health Service Indemnity d/b/a Blue Cross/Blue Shield of Louisiana and Eastern States Health & Welfare Fund brought an action on behalf of all similar third party payors based on claimed misrepresentations by the pharmaceutical company that manufactured and marketed Rezulin, a diabetes medication. The class action asserted a claim under New Jersey law because

the manufacturer was a New Jersey corporation. The Desiano Court viewed the motion under New Jersey law. The motion to dismiss was based primarily on the health benefit companies not being the direct buyers and therefore having no standing. The Circuit Court described the claim as follows:

> The Plaintiff insurers assert that, had they not been deceived by the Defendants' misrepresentations about the safety of Rezulin, they would have taken steps so as not to purchase Rezulin at the prices set by Warner-Lambert. Among the steps Plaintiffs might have taken were to exclude it altogether from their approved schedules, set a low scheduled value, set a high copay obligation, and otherwise dissuade doctors from prescribing it. Taking account of these allegations, the harm to the insurers was not indirectly caused as a result of the Defendants' misleading of others; the insurers were directly harmed by the deception practiced on them. Id. at 349 n.9.

In reversing the dismissal by the U.S. District Court the 2nd Circuit held "[T]his and other courts have long recognized the right of HBPs to recover from drug companies amounts that were overpaid due to illegal or deceptive marketing practices." Id. at 350.

Plaintiff filed a complaint in this matter alleging that as a result of Merck's marketing, advertising, promotion, and sale of VIOXX®, third-party payors paid approximately 800% more than they should and/or would have for the prescription drug. Plaintiff alleges that Merck knew of the harmful effects of VIOXX® years prior to its withdrawal from the market and that it suppressed this information and continued to aggressively market the drug without properly disclosing the information to the FDA and to the public. Plaintiff alleges that at the time VIOXX® was being developed, the patents on some of Merck's most successful drugs were about to expire and the company needed a successful "blockbuster" drug to offset the loss of these revenue sources. Plaintiff alleges that the need to develop a blockbuster drug was compounded by the competition of Pfizer, another drug company, that was developing Celebrex and scheduled to have it hit the market a few months ahead of VIOXX®. The complaint initially

consisted of two counts, claiming common law fraudulent misrepresentation and/or suppression as well as violations of the New Jersey Consumer Fraud Act ("CFA") (N.J.S.A. § 56:8-1, *et seq.*). The plaintiff now seeks class certification only under the CFA and is not pursuing a common law fraud claim.

Plaintiff's complaint alleges that most purchases of prescription drugs in this country are paid for by third-party payors. According to Plaintiff's complaint, if a prescription drug is not on a given third-party payor's formulary, that third-party payor will not contribute any money to the purchase of the drug and the cost would be borne entirely by the member. When this happens, the member usually chooses a substitute drug of the same class that is on the formulary and paid for by the third-party payor.

It is the Plaintiff's contention that due to the large number of prescriptions that are purchased through third-party payors, it is very important for a drug manufacturer to have their product listed on the formularies of as many third-party payors as possible. The Plaintiff alleges that Merck provided false and misleading information regarding the safety and benefits of VIOXX® to third-party payors and to the public through direct-to-consumer advertising in order to have VIOXX® listed on their formularies. As a result of these actions, Plaintiff alleges that Merck was able to gain significant market share compared to other drugs of the same class made by Merck's competitors.

More specifically, according to Plaintiff's complaint, a 30-day supply of VIOXX® sold for approximately $72.00 while traditional NSAIDs sold at $9.00 or less for the same quantity. Plaintiff contends that as a result of Merck's fraudulent and unconscionable commercial practices for marketing and selling VIOXX®, it was able to induce third-party payors into including the drug on their formularies at a favorable tier thus paying much more than they

otherwise would have for other NSAIDs that were available. Plaintiff asserts that if it and other third party payors knew of the negative information concerning the safety, efficacy, and benefits of VIOXX®, they would not have agreed to provide coverage for the drug, or at least not on the terms that were approved. Plaintiff claims that because Merck misrepresented and concealed information about VIOXX®, third-party payors paid vast amounts of money over what they should have and otherwise would have, had accurate information about the drug been disclosed.

Plaintiff has brought the present motion seeking a certification for the class described as follows:

> All third-party payors in the United States of America, who have paid any person or entity for the purchase of the prescription drug VIOXX® (rofecoxib) since May 1, 1999. Third-party payors include any non-governmental entity that is (i) a party to a contract, issuer of a policy, or sponsor of a plan, which contract, policy, or plan provides prescription drug coverage to natural persons, and is also (ii) at risk, pursuant to such contract, policy, or plan, to purchase or pay for all or part of the cost of prescription drugs dispensed to natural persons covered by such contract, policy or plan. Excluded from the Class are (1) employees of defendant, including its officers or directors; (2) Plaintiff's counsel; and (3) the Judge of the Court to which this case is assigned. (Plaintiff Complaint ¶ 37).

Plaintiff argues that this proposed class satisfies the requirements of R. 4:32-1(a) and R. 4:32-1(b)(3)[1]. The class does not include individual consumers, any government payors nor any personal injury claims.

Merck opposes this motion arguing that a multi-state class action is inappropriate; that the case would be unmanageable as a class action due to predominating individual issues; and that Local 68 is not an adequate class representative. Merck asserts that a class action would be inappropriate because New Jersey's choice of law rules would require that the consumer fraud

[1] As stated, Plaintiff is only seeking certification for only economic claims under the CFA. Plaintiff is not seeking certification for its common law fraud claim. There are no other claims for negligence or products liability.

law of the home state of each putative class member would apply, making the proposed class unmanageable. *This is a key issue in the decision on class certification. There is no controlling Supreme Court or Appellate Division level decision as to whether New Jersey Consumer Fraud Act can be applied to a class action involving out of state plaintiffs and a New Jersey defendant.* Defendant claims that individual issues such as demonstrating an ascertainable economic loss from Merck's alleged wrongdoings and proving that Merck's alleged misrepresentations or omissions caused a putative class member's loss would predominate this litigation and make a class action unmanageable. Finally, Merck contends that Local 68 is not an adequate class representative because its claims and defenses are not typical of the other proposed class members and because potential conflicts of interest as well as a lack of decision-making control make Local 68 an inadequate representative for the proposed class.

ANALYSIS

As a preliminary issue, it should be noted that the Complaint in this matter was filed on October 30, 2003, prior to the passage of the Class Action Fairness Act of 2005. The provisions of the Class Action Fairness Act apply only to civil actions commenced on or after the date the Act was enacted, February 18, 2005. Pub.L. 109-2, § 9. Thus the provisions of the Class Action Fairness Act do not apply to the matter at hand and this court has the authority to certify a nationwide class provided that procedural due process is complied with, under Phillips Petroleum v. Shutts, 472 U.S. 797, 811-812 (1985). The Class Action Fairness Act of 2005 has the effect of allowing removal of nationwide class actions filed in State court for cases filed after February 18, 2005. See 28 U.S.C.A. § 1332. However, Congress specifically narrowed the Class Action Fairness Act to exclude lawsuits that were pending at the time the legislation was enacted regardless of whether class certification had been granted yet.

Pritchett v. Office Depot, Inc., 404 F.3d 1232, 1236 (10th Cir. 2005) (finding that for purposes of the Class Action Fairness Act, an action is considered commenced at the time it is filed in the state court). Thus, as this matter was filed prior to the Class Action Fairness Act being enacted, this VIOXX® related class action against Merck is unaffected by it. See Id. (citing the statement of a Congressional Representative that the Class Action Fairness Act would not effect the numerous class actions pending against Merck due to its withdrawal of VIOXX®).

Class Actions In General

R. 4:32-1 governs the requirements for maintaining a class action under New Jersey law. Part (a) of the Rule provides for certain prerequisites that a proposed class must demonstrate if it is even to be considered for class status. It provides:

> (a) General Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In addition to these prerequisites, part (b) of the Rule provides that the class must satisfy one of the three following requirements:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk either of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The factors pertinent to the findings include: first, the interest of members of the class in individually controlling the prosecution or defense of separate actions; second, the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; third, the difficulties likely to be encountered in the management of a class action.

"[T]he class action rule should be construed liberally in a case involving allegations of consumer fraud." In re Cadillac, 93 N.J. 412, 435 (1983) (certifying a state-wide class of purchasers of automobiles with certain defects). A New Jersey court should consider equitable principles that would allow class actions where consumers with a common injury are seeking redress that would be uneconomical to pursue individually. Varacallo v. Massachusetts Mutual Life Insurance, Co., 332 N.J. Super. 31, 45 (App. Div. 2000). However, certification of a class action may only be done after a court has undergone a "rigorous analysis" and determined that the requirements of R. 4:23-1 have been satisfied. Carroll v. Cellco Partnership, 313 N.J. Super. 488, 495 (App. Div. 1998) (quoting General Telephone Co. v. Falcon, 457 U.S. 147, 161 (1982)).

The burden of establishing that class status is appropriate is on the plaintiff. Id. at 494. A motion for class certification must be determined upon the criteria for maintaining a class action and not upon the plaintiff's chances of prevailing on the merits. Delgozzo v. Kenny, 266 N.J. Super. 169, 180-181 (App. Div. 1993). "The court is bound to take the substantive allegations of the complaint as true, thus necessarily making the class order speculative in the sense that the plaintiff may be altogether unable to prove his allegations." Id. (quoting Blackie v. Barrack, 524 F.2d 891, 901 n. 17 (9th Cir. 1975), cert. den., 429 U.S. 816 (1976)). "Nonetheless, even the identification of the issues to determine the suitability of an action for certification

requires some preliminary analysis." In re Cadillac, supra, 93 N.J. at 426. This preliminary analysis of matters outside the pleadings is necessary because in order to make a proper decision regarding class certification, "a court must understand the claims, defenses, relevant facts, and applicable substantive law..." Carroll, supra, 313 N.J. Super. at 495 (quoting Castano v. American Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996)).

A general summary of the claims, defenses and relevant facts has been provided thus far. A brief discussion of the substantive law underlying Plaintiff's complaint is appropriate prior to determining the outcome of this motion.

The New Jersey Consumer Fraud Act

The Plaintiff's complaint alleges that Merck violated the New Jersey CFA. One provision of the CFA, N.J.S.A. 56:8-2, pertains to the unlawful use of fraud in connection with the sale or advertisement of merchandise. The statute provides in relevant part:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice...

This provision can be violated by an affirmative act, omission, or violation of an administrative regulation. Gennari v. Weichert Co. Realtors, 148 N.J. 582, 605 (1997). "While the element of traditional reliance required in a fraud case need not be proven in order to recover damages under the CFA, a private plaintiff must still 'prove a causal nexus between the alleged [misrepresentation]' and his or her damages." Dabush v. Mercedes Benz USA, LLC, 378 N.J. Super. 105, (App. Div. 2005) (internal citations omitted).

> Consumer fraud violations can be divided, broadly, into three categories: affirmative acts, knowing omissions and regulatory violations. Cox v. Sears Roebuck & Co., 138 N.J. 2, 17, 647 *A.*2d 454 (1994). If a plaintiff demonstrates that a defendant committed a consumer fraud that is an affirmative act, "intent is not an essential element." *Ibid.* If, however, the alleged consumer fraud is the result of a defendant's omission, "plaintiff must show that the defendant acted with knowledge, and intent is an essential element of the fraud." Id. at 18. In the final category, regulatory violations, "intent is not an element of the unlawful practice, and the regulations impose strict liability for such violations." Ibid.
> Feinberg v. Red Bank Volvo, Inc., 331 N.J. Super. 506, 510 (App. Div. 2000).

Additionally, N.J.S.A. 56:8-19 of the CFA details the relief available to claimants. The statute provides:

> Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action or assert a counterclaim therefore in any court of competent jurisdiction. In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. In all actions under this section, including those brought by the Attorney General, the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.

"Thus, to state a claim under the CFA, a plaintiff must allege each of three elements: (1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss." New Jersey Citizen Action v. Schering-Plough Corp. 367 N.J. Super. 8, 12-13 (App. Div.), certif. denied 178 N.J. 249 (2003).

A cause of action under the CFA differs from a claim of common law fraud, "in that common law fraud requires proof of reliance while consumer fraud requires only proof of a causal nexus between the concealment of the material fact and the loss." Varacallo, supra, 332 N.J. Super. at 43.

In other words, Local 68 must prove Merck misrepresented or omitted material information with the intent that third party payors' decision on formulary placement would be affected and prove there was a causal relationship between the formulary decisions and the misrepresentations. It is not necessary to prove that the third party payors decisions were based solely on misrepresentations and/or omissions, but only that the misrepresentation and/or omissions were a substantial factor in the formulary decision that resulted in payments by third party payors.

Merck maintains plaintiffs' claims are based on a "fraud on the market" or "price inflation" theory but this court finds this is not the nature of the claim. In the case of Kaufman v. I-Stat Corporation, 324 N.J. Super. 344 (App.Div.1999), the Appellate Division reversed a dismissal by the trial court of a claim that the defendant corporation had made false statements to the general market that caused an artificial inflation of the defendant's stock price. The plaintiff in that case bought the stock at the inflated price but had never even heard the false statements. The New Jersey Supreme Court in Kaufman v. I-Stat Corporation, 165 N.J. 94 (2000) reversed the Appellate Division and found that the reliance element of common law fraud may not be satisfied through a "fraud on the market" or "price inflation" theory. This was a common law fraud case but the same rationales for rejecting a fraud on market/price inflation also apply to the CFA. See New Jersey Citizens Action v. Schering-Plough Corp., 267 N.J.Super. 8 (App.Div.2003), Fink v. Ricoh Corp., 365 N.J.Super. 520 (Law Div.2003).

However, in those cases, the plaintiffs were simply attempting to sidestep the need for either reliance in common law fraud or causal link under the CFA. Here, plaintiffs allege they can prove Merck orchestrated a fraud on a national level that was directly targeted at the third party payors. Plaintiff claims they can prove misrepresentations and omissions by Merck were

part of the decision making process in the formulary decisions made by third party payors. The fact that the price was so much higher than other older medications on the market goes to the damages claimed, not to proof of causal link. The complaint alleges that Merck provided false and misleading information to the decision makers used by third-party payors in a deliberate attempt to get VIOXX® listed on the formularies of health care providers, and based on this fraudulent information decisions were made that resulted in damages. Regardless of the veracity of such claims, they are distinct from the fraud on the market/price inflation theory.

FINDINGS

A. The Requirements of Rule 4:32-1(a)

Before determining if the class action is maintainable, the court must determine that the proposed class meets all of the prerequisites of R. 4:32-1(a).

1. Numerosity

In order to meet the first prerequisite of a certifiable class, the class must be so numerous that joinder of all members is impracticable. R. 4:32-1(a)(1). There is no predetermined number to establish when numerosity has been achieved and further, a plaintiff does not need to know the exact size of the proposed class in order to satisfy this requirement of the rule. Fink v. Ricoh Corp., 365 N.J. Super. 520, 557 (Law Div. 2003); see also Delgozzo, supra, 266 N.J. Super at 184-185.

In the matter at hand, Plaintiff does not know the exact number of third-party payors that may qualify as class members and has not even provided an estimate. Third-party payor funds, such as Plaintiff, are fairly common in New Jersey and throughout the United States. While Plaintiff has not provided figures relating to the estimated size of the overall proposed class, "it can be presumed at this point that such a class would ... be sufficiently numerous to meet this

criterion." Delgozzo, supra, 266 N.J. Super. at 184-185. Numerosity in this matter can be inferred primarily because of the prevalence of third-party payors in providing prescription benefits and also because of the overall success of VIOXX® while it was on the market. Indeed, Merck's has basically conceded the proposed class meets this requirement.

2. Commonality

The second prerequisite for certification is that "there are questions of law or fact common to the class." R. 4:32-1(a)(2). Not every question needs to be common throughout the class, and indeed a single common question may be sufficient to satisfy this requirement. Fink, supra, 365 N.J. Super. at 558, citing Delgozzo, supra, 266 N.J. Super. at 185. "The existence of questions concerning individual representations made to a plaintiff, or relating to proof of damages, should not be a bar to upholding a class action where there are significant common questions as to liability." Delgozzo, supra, 266 N.J. Super. at 185.

Here, there are clearly questions of fact and law common to all members of the proposed class. The complaint in this matter alleges fraudulent misrepresentation and violations of the CFA. While the matter at hand is not based on physical injury from consumption of VIOXX®, the outcome of the case does hinge on the conduct of Merck in making representations about its drug. This issue will be relevant to all third-party payors that could potentially be members of this class.

Local 68 has provided the court with a list of questions that they assert would be common to all members of the proposed class. The list includes:

- Whether Merck concealed or suppressed material information regarding the safety and efficacy of VIOXX®;
- Whether Merck misrepresented the safety and efficacy of VIOXX®;

- Whether Merck engaged in deceptive or misleading promotional campaigns designed to induce class members to add VIOXX® to their formularies, or to authorize the purchase of VIOXX® by their plan participants;
- Whether Merck violated the CFA; and
- Whether, as a result of Merck's misrepresentations and failure to disclose material information regarding the safety and efficacy of VIOXX®, class members were damaged.

The court finds that these questions are common to the members of the class. Merck is a large, global corporation. Many of the alleged wrongdoings Plaintiff alleges Merck to have committed are claimed to have been done high within the corporate structure in order to have a uniform message regarding the efficacy and safety of VIOXX® distributed throughout the marketplace. In order for any individual plaintiff to establish that Merck committed fraud in violation of the CFA, they would have to establish the same activities as other plaintiffs alleging fraud related to VIOXX®.

There are of course, individual issues that will pertain to each class member. While these issues may indeed be significant, there has been a sufficient showing of common issues of law and fact to satisfy the commonality prerequisite of R. 4:32-1(a)(2).[2]

3. Typicality

The third prerequisite for class certification is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." R. 4:32-1(a)(3). According to the New Jersey Supreme Court, this means that "[t]he claims of the representatives must 'have the essential characteristics common to the claims of the class.'" In re Cadillac,

[2] The court will discuss whether these common questions meet the "predominance" element of R. 4:32-1(b)(3) *infra*.

supra, 93 N.J. at 425 (quoting 3B Moore's Federal Practice, para. 23.06-2 (1982)). "A plaintiff's claim is typical of the claims of the class if it arises from the same event or course of conduct which has given rise to the claims of the other class members." Gross v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co., 303 N.J. Super. 336, 342 (Law Div. 1997).

Merck argues that certification cannot be granted because Local 68 is not an adequate class representative. Merck claims that Plaintiff cannot represent the proposed class because: (1) the Plaintiff is not typical of most-third party payors because plaintiff had no role in deciding whether its plan would or would not cover VIOXX®; (2) because of reason #1, Plaintiff cannot prove that Merck's alleged misrepresentations caused it to incur any obligation to pay for VIOXX®; and (3) Local 68 may have a claim against BCBS-NJ, also a putative class member, as the healthcare plan administrator that Local 68 retained to manage its healthcare plan.

Merck argues that Local 68 is atypical of the proposed class members because it retained BCBS-NJ to manage its healthcare plan and because it was BCBS-NJ that received all the information regarding VIOXX® and made the ultimate decision to list the drug on its formulary. Local 68 contends that whose role in deciding whether VIOXX® would be covered under their prescription plan is irrelevant because the third-party payor ultimately bore the responsibility of paying for the drug.

Plaintiff's complaint alleges that the members of the proposed class were damaged when they paid more money than they otherwise would have for VIOXX® because of fraud perpetuated by Merck. The court finds that whether the representations were made to an employee of Local 68 or to an agent or administrator that it retained does not appear to affect the end result that Plaintiff did ultimately pay for its members to receive VIOXX®. New Jersey law has established that a principal is deemed to have the knowledge or notice provided to an agent

while the agent is acting within the scope of his or her duties. Benjamin v. Corcoran, 268 N.J. Super. 517, 529 (App. Div. 1993). Additionally, there is no indication that Local 68 is less typical than other proposed class members merely because it retained an agent to manage its healthcare program. Merck's own witness, Dr. Kolassa, has testified that it is common for companies like BCBS-NJ to administer the healthcare plans for third-party payors.

In Kaufman v. I-Stat Corp., supra, the Supreme Court of New Jersey stated:

> New Jersey already allows proof of indirect reliance to satisfy this element. *Id.* at 349,735 A.2d 606. Indirect reliance has also been adopted by the *Restatement (Second of Torts* for situations involving reliance by party B on a false representation initially made to party A who the maker knew or had reason to expect would communicate the information to party B such that the information would influence party B's conduct in a transaction. *Ibid.* (citing *Restatement (Second) of Torts § 533 (1977)*).
> 165 N.J. at 101.

Thus, if the third party payors can prove fraudulent misrepresentation and/or omissions caused them to act, then it doesn't matter if the misrepresentations were made to intermediaries or administrators of the plan. A causal relationship is what is required.

Merck also argues that Local 68 is not a typical class member because Merck's disclosures about VIOXX® changed over time as new information developed. Defendant consequently asserts, that for this reason there is *no* typical representative who can advance the claims of the proposed class. The court finds that while the disclosures may have changed over time, the plaintiffs claim is that the omissions and misrepresentations about VIOXX® remained essentially the same for all third-party payors and continued until the drug was taken off the market.

Plaintiff's complaint sets forth allegations that Merck realized VIOXX® caused adverse side effects that were not properly disclosed to the FDA or the public years before the drug was pulled off the market. Plaintiff contends that this realization occurred prior to VIOXX® gaining

FDA approval and that despite its awareness of the potential harmful effects of the drug, Merck omitted or misrepresented information in order to improve sales of the drug and increase its profits. The underlying theme of Plaintiff's cause of action is that Merck, from at least the time of the FitzGerald hypothesis, to the time of the drug's withdrawal, misrepresented or omitted essential information about VIOXX®. The fact that some of the marketing varied over the years that VIOXX® was on the market does not indicate that the alleged misrepresentations were inconsistent, nor does it indicate that Local 68 is an atypical class member. The court has reviewed documents the plaintiff relies upon and Merck's response but it is not necessary to discuss the proposed proofs here. There are clearly issues of fact but Local 68 appears to be a typical member of the class as far as how it obtained information and on what information it relied to place and keep VIOXX® on it formulary.

With regards to typicality, Merck finally contends that it has a unique defense against the claims brought by Local 68 and the need to respond to this defense will affect it's ability to represent the proposed class. Merck asserts that it can rebut the existence of a causal nexus between Merck's conduct and Plaintiff's alleged loss because Plaintiff continued to pay for VIOXX® after it knew of Merck's alleged misrepresentations and omissions. Plaintiffs claim that once a drug is on a formulary and a number of members of a payor's organization have been receiving the drug, it is very difficult to remove a drug and this would be true for all third party payors.

The court does not believe this is a "unique" defense. It may in fact be a defense but one common to most third party payors. As the identities of purported class members are as yet unknown, it is impossible to determine whether Merck's rebuttal of a causal nexus is actually a unique defense but it will probably apply to most, if not all, class members. Similarly, at this

point in the litigation, there is no support for Merck's contention that this defense will usurp a significant portion of Local 68's time and energy. See In re CBC Co. Collection Letter Litig., 181 F.R.D. 380, 385 (N.D. Ill. 1998) (granting class certification, but noting that if a defense unique to the class representative became unduly burdensome for the representative, typicality would be destroyed). Merck has not provided sufficient evidence to refute the assertions made by Plaintiff that the typicality prong of R. 4:32-1(a)(3) has been met.

4. Adequacy of Representation

The fourth prerequisite for class certification is that "the representative parties will fairly and adequately protect the interests of the class." R. 4:32-1(a)(4). In order to meet this requirement: "(a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." Delgozzo, supra, 266 N.J. Super. at 188 (quoting In re Asbestos School Litigation, 104 F.R.D. 422, 430 (D.C.Pa. 1984)). "The defendant bears the burden of demonstrating that the proposed representation will be inadequate." Id.

In its opposition to this motion, Merck attempts to meet this burden by arguing that Local 68 may have interests adverse to a potential class member, namely BCBS-NJ. Local 68 filed its complaint in this matter in October 2003 claiming that it would not have paid such a high price for VIOXX® had Merck not misrepresented or omitted information about the drug. Merck asserts that the plaintiff has a potential claim against BCBS as Local 68's administrator for retaining VIOXX® on its formulary. the simple answer to this is that plaintiff has not asserted any claim against BCBS and does not intend to assert any claim against BCBS. Plaintiff alleges Merck made misrepresentation that resulted in BCBS and Local 68 and all other class members

paying for an expensive product under the misconception it was safer than the products on the market.

Merck also argues that Plaintiff cannot adequately represent putative class members because it had no control over whether it would purchase VIOXX® because it left such matters up to BCBS-NJ. This issue was similarly addressed in the discussion of the typicality prong. The submissions of the parties in relation to this motion show that it is common for a third-party payor to hire an administrator such as BCBS-NJ to handle its healthcare program. Local 68 admittedly delegated the choice of what drugs were listed on the formulary to BCBS-NJ. However, Local 68 was the payor in the relevant transactions and therefore constitutes an adequate class representative. Local 68 collected funds for its members, retained BCBS-NJ, and paid for the health care benefits provided to its members. The mere fact that BCBS-NJ, acting as an agent for Local 68, decided how to place the drug to be on the formulary of Local 68 does not destroy the causal link.

With regards to the qualifications of counsel for Local 68, Merck has not contested their qualifications and the court is satisfied that the attorneys are qualified and sufficiently experienced to conduct this litigation. In fact, there is probably no other law firm as knowledgeable about VIOXX®. Christopher Seeger is both liaison counsel in New Jersey where the largest number of VIOXX® cases are filed, and also on the Plaintiff's Steering Committee in the MDL. He and his firm have lead the discovery process in VIOXX® litigation. They are well respected among the mass tort bar. The seven million documents already produced in the VIOXX® litigation are maintained in a depository at Seeger Weiss's offices.

B. The Requirements of Rule 4:32-1(b)(3)

The only one of the three alternative requirements necessary for class certification under R. 4:32-1(b) that is relevant to this case is R. 4:32-1(b)(3). In order to determine if the proposed class meets this requirement, the court must decide two issues: "(1) whether plaintiffs have met the burden of proving that common questions of law and fact predominate over individual claims and (2) whether a class action is superior to other methods of adjudication." In re Cadillac, supra, 93 N.J. at 426. In deciding these issues, the court must identify the relevant issues of fact and law but not to the extent that would be required in a summary judgment motion or at trial. Id.

> In determining predominance and superiority, *R.* 4:32-1(b)(3) dictates consideration of three factors: (1) "the interest of members of the class in individually controlling the prosecution or defense of separate actions;" (2) "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;" and (3) "the difficulties likely to be encountered in the management of a class action."
> Carroll, supra, 313 N.J. Super. at 495 (internal citations omitted).

1. Predominance of Common Issues

The predominance requirement is more difficult to establish than the commonality prerequisite. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623-624 (1997). The plaintiff bears the burden of showing that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." R. 4:32-1(b)(3); Fink, supra, 365 N.J. Super. at 567. This means that a plaintiff must demonstrate that "issues common to the class outweigh those that are not." Id. at 568. It is the significance of the issues, not the number that determines whether a class will predominate over individuals. Id. "A conclusion on the issue of predominance requires an evaluation of the legal issues and the proof needed to establish them." In re Cadillac, supra, 93 N.J. at 430.

> Although plaintiffs' causes of action embrace common legal and factual elements, the critical question remains whether the benefit from the

> determination in a class action of the existence of a common defect and a common pattern of fraud outweighs the problems of individual actions involving such other issues as causation, reliance, and damages.
> Id.

"If a common nucleus of operative facts is present, predominance may be found. From another perspective, the basic question is whether the potential class, including absent members seeks 'to remedy a common legal grievance.'" Id. at 431 (internal citations omitted).

For certification of a nationwide class, a predominance inquiry must include an analysis of variations in state law. Carroll, supra, 313 N.J. Super. at 496. This is because variations in state law and how the court would deal with such variations could overwhelm common issues and negate predominance. Id. A court must also consider "whether any individual class member expressed an interest in controlling this litigation, or whether there was any pending litigation that might have already been commenced by or against the members of the class." Id. at 497. In Carroll, the court was faced with whether to affirm a nationwide class. With regards to the issue of conflict of laws, the court stated:

> This court has determined that conflict of law issues do not per se foreclose certification of a multistate class. Delgozzo v. Kenny, 266 N.J.Super. 169, 190, 628 *A.*2d 1080 (App.Div.1993). However, this does not imply that an analysis of the different state laws and the effect on the predominance of common legal issues is not necessary. A thorough analysis of state laws is particularly important in circumstances where... there is a possibility that common issues could be subsumed by substantive conflicts in state laws... Of course, depending on variations in state laws, the members of the class in different states may be grouped into subclasses. See id. at 188, 628 *A.*2d 1080. But there may be differences in how each state defines common law fraud, negligent misrepresentation, or consumer fraud, thus making a trial judge's task of instructing a jury on relevant law impossible.
> Carroll, supra, 313 N.J. Super. at 497 (reversing and remanding class certification in part for a more thorough analysis of choice of law issues).

For purposes of this motion a choice of law analysis is necessary. Should the laws of every state apply, a nationwide certification would be much less manageable. Additionally, the

court must determine whether individual issues pertaining to proofs, causation, and damages outweigh issues common to all proposed class members.

a. Choice of Law

Because Plaintiff has brought this action in New Jersey, New Jersey's choice of law rules will govern this decision. See Gantes v. Kason Corp., 145 N.J. 478, 484 (1996). To decide a choice-of-law issue, New Jersey Courts apply a flexible "governmental-interest" analysis that consists of a two-pronged test to determine which state has the greatest interest in having its law apply to the particular issue being litigated. Fu v. Fu, 160 N.J. 108, 118 (1999); see also, Erny v. Estate of Merola, 171 N.J. 86, 94 (2002). Whether a conflict exists must be determined for each specific issue being litigated. Erny, supra, 171 N.J. at 94-95.

In order to determine which state has the greatest interest in applying its law to the specific issue being litigated, a court must first decide "that an actual conflict exists between the laws of" New Jersey and other states that have an interest in applying their laws to this litigation. Fu, supra, 160 N.J. at 118. As Plaintiff is seeking a nationwide class, there is a potential that a citizen of every state in the nation will participate in this litigation. In addition to having residents of these states, there are other contacts that this litigation has with states outside of New Jersey that give those states an interest in applying their laws. VIOXX® was sold throughout the United States. The transactions between third-party payors and their members regarding VIOXX® occurred in multiple states. As there exists a potential for every state to have an interest in applying their law to this action, the laws of every state must be reviewed to determine which state laws present a conflict with the NJ CFA.

As both parties correctly point out in their moving papers, and as a cursory review of other state laws involving consumer fraud indicates, there are sufficient variations between the

laws of the varying states and the CFA to constitute an actual conflict. The provisions of the various consumer fraud laws, the policies behind them, and case law interpretations all show variations between other states and New Jersey. See Fink, supra, 365 N.J. Super. at 570-584 (detailing various conflicts between the CFA and the consumer fraud statutes of other states). Both parties agree that the CFA conflicts in some ways with the consumer fraud laws of the other states. Thus, the first prong of the governmental-interest analysis has been met.[3]

"The second prong of the governmental-interest analysis requires the Court to determine which state has the most significant relationship to the occurrence and the parties with respect to the issue ..." before the court. Fu, supra, 160 N.J. at 119. In deciding the second prong, a court must first "identify the governmental policies underlying the law of each state and how those policies are affected by each state's contacts to the litigation and to the parties." Veazey v. Doremus, 103 N.J. 244, 247 (1986).

After reviewing the competing states' policies on the issue in dispute, if it is found that either state's contacts to the litigation do not further the asserted policies, then that state's law should not apply. Erny, supra, 171 N.J. at 101. For resolving governmental interests involving tort law, there are five main factors the court should use to guide its decision: "(1) the interests of interstate comity; (2) the interests of the parties; (3) the interests underlying the field of tort law; (4) the interests of judicial administration; and (5) the competing interests of the states." Fu,

[3] In determining that there is an actual conflict for the choice-of-law analysis, the court only acknowledges that none of the consumer fraud laws of other states is identical to the CFA. Some states have statutes that are similar enough to the CFA as to create a question as to whether there is truly a conflict at all while others provide sharply contrasting remedies and requirements. As the parties concur that there is an actual conflict, the court will provide a state by state analysis of the consumer fraud statutes to determine which states have the strongest relationship to the litigation.

supra, 160 N.J. at 122 (summarizing factors set forth in the Restatement (Second) of Conflict of Laws § 6). The fifth factor is the most important. Erny, supra, 171 N.J. at 101.

To evaluate the competing interests of the States, the courts must consider "what policies the legislature or court intended to protect by having that law apply to wholly domestic concerns, and then, whether those concerns will be furthered by applying that law to the multi-state situation." Fu, supra, 160 N.J. at 125 quoting Pfizer, Inc. v. Employers Ins. of Wausau, 154 N.J. 187, 198 (1998). In other words, a state only has an interest in applying its law if the state's contacts with the litigation are related to the policies for the applicable law. Id. The court should consider the qualitative contacts that the litigation has with the state's policies and not the quantitative contacts. Id. The contacts that are most significant to the analysis are: "the place where the injury occurred; the place where the conduct causing the injury occurred; the domicile, residence, nationality, place of incorporation and place of business of the parties; and the place where the relationship, if any, between the parties is centered." Id.

The Restatement (Second) of Conflict of Laws § 148 details a list of factors to consider when determining the appropriate law to apply to a claim of fraud where the plaintiff's alleged actions in reliance occurred in a state other than where the representations were made. The factors to consider are as follows:

> (a) the place, or places, where the plaintiff acted upon the defendant's representations,
> (b) the place where the plaintiff received the representations,
> (c) the place where the defendant made the representations,
> (d) the domicile, residence, nationality, place of incorporation and place of business of the parties,
> (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time and,
> (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.
> Restatement (Second) of Conflict of Laws § 148.

In cases where pecuniary loss is said to have occurred due to fraud, the place of loss is often difficult to determine and thus, less important for determining the governing law than does the place of injury in cases of physical personal injury. Id. comment (c). "The place where the defendant made his false representations, on the other hand, is as important a contact in the selection of the law governing actions for fraud and misrepresentation as is the place of the defendant's conduct in the case of injuries to persons or to tangible things." Id.

Evaluating the interests of interstate comity "require[s] courts to consider whether application of a competing state's laws would frustrate the policies of other interested states." Fu, supra, 160 N.J. at 122. A state should only impose its law on a particular issue if it has a strong state policy that will be fostered by the application its law. Id. At 122-123. In assessing the interests underlying the field of tort law, the courts are required "to consider the degree to which deterrence and compensation, the fundamental goals of tort law, would be furthered by the application of a state's local law." Fu, supra, 160 N.J. at 123. The interests of the parties and the interests of judicial administration are "less significant for the purpose of making choice-of-law determinations in tort actions." Erny, 171 N.J. at 102.

In the matter at hand, in order to determine which state has the strongest interest in this litigation, first, New Jersey's policies and intentions underlying the CFA must be discussed.

> The CFA was enacted to "protect [the consumer] against fraudulent and unconscionable practices in the sale of goods and services." Marascio v. Campanella, 298 N.J.Super. 491, 500, 689 *A*.2d 852 (App.Div.1997). The purposes of the Act are: (1) to compensate the victim for his or her actual loss; (2) to punish the wrongdoer through the award of treble damages; and (3) to attract competent counsel to counteract the "community scourge" of fraud by providing an incentive for an attorney to take a case involving a minor loss to the individual. Lettenmaier v. Lube Connection, Inc., 162 N.J. 134, 139 (1999). The Act is "remedial legislation and should be liberally construed to accomplish its dual objectives of deterrence and protection." Joe D'Egidio