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**TRADEMARK, COPYRIGHT AND FALSE ADVERTISING GROUP**

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# New Jersey Supreme Court Reverses Certification of Nationwide Class Under New Jersey Consumer Fraud Act

In a much anticipated decision, the New Jersey Supreme Court reversed the certification of a nationwide class of health benefit third-party payors which asserted consumer fraud claims under the New Jersey Consumer Fraud Act ("CFA") against Merck based on its alleged false statements in marketing its Vioxx pain medication as safer and more effective than other pain medications. *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co., Inc.*, 2007 N.J. LEXIS 1055 (Sept. 6, 2007). In doing so, however, the New Jersey Supreme Court declined to reach the issue that had excited the most interest in the appeal, *i.e.*, whether the trial court erred in holding that the CFA could be applied to all putative class members nationwide. Instead of resolving the choice of law issue, the New Jersey Supreme Court held that common issues did not predominate because plaintiffs could not prove on a common basis that class members suffered "an ascertainable loss" and that there was a "causal nexus" between the defendant's unlawful conduct and such loss. The Court rejected plaintiffs' contention that the ascertainable loss and causation requirements could be proven through expert testimony that the price of Vioxx was higher than it should have been as a result of Merck's allegedly fraudulent marketing campaign, reasoning that such proof would be equivalent to an impermissible claim of fraud on the market.

Plaintiffs were health benefit plan sponsors that, among other things, paid pharmaceutical companies for their members' prescription medications. Each of these "third-party payors" maintains a "formulary" that lists the prescription medications for which its members will be reimbursed for some or all of the cost of purchase by the third party payor. Plaintiffs alleged that Merck's marketing for Vioxx failed to disclose adverse information about which Merck was aware concerning the safety and efficacy of the drug, and that had Merck made truthful disclosures about Vioxx, plaintiffs would not have authorized inclusion of Vioxx on their formularies, or would have included Vioxx in the "non-preferred" tier of the formulary. Plaintiffs alleged that the effect on the price caused by Merck's purported fraudulent marketing campaign could be proven on a class-wide basis through expert testimony. Merck, on the other hand, argued that individual questions of fact and law regarding the plaintiffs' alleged loss, and the connection between plaintiffs' loss and Merck's Vioxx marketing, predominated because each third-party payor's inclusion of Vioxx on a formulary and payment for its members' purchase of Vioxx were based on different criteria and resulted in different reactions regarding formulary placement, even after facts concerning Merck's alleged fraud become known. Thus, according to Merck, individual issues of injury and causation would predominate, and class certification would not be a superior method of adjudicating the dispute.

The Supreme Court first set forth the requirements for certifying a class under New Jersey rules, noting that the court must conduct a "rigorous" analysis that goes "beyond the pleadings" to determine whether (1) questions of law or fact common to the class members predominate over individual questions, and (2) the class action is superior to other methods for adjudicating the dispute. As noted above, the Court declined to consider whether the trial court correctly held that the CFA could be applied to all members of the nationwide class, although it noted in a footnote that Merck had presented "strong arguments" in support of its appeal from the Appellate Division's choice of law analysis. The Court, instead, held that plaintiffs could meet neither the predominance nor the superiority prongs of the class certification analysis. In particular, the Court held that individual issues regarding the creation of formularies, the different types of formulary tiers and the various requirements for

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approval or reimbursement that plaintiffs imposed on their members predominated over the common issues regarding Merck's marketing of Vioxx. Additionally, the Court held that plaintiffs could not demonstrate on a class-wide basis the elements of "ascertainable loss" or a "causal nexus" between Vioxx marketing and plaintiffs' alleged injury through reliance on expert evidence purporting to show that the cost of Vioxx increased due to Merck's allegedly fraudulent marketing campaign. The Court analogized plaintiffs' approach to the "fraud on the market" theory that is accepted in the context of federal securities litigation and permits purchasers of securities to establish that they relied on a defendant's unlawful conduct simply by showing a change in the price of the security. The Court concluded that the theory was "inappropriate" in the consumer fraud context, and because the theory was crucial to plaintiffs' showing that common questions of fact or law predominated, class certification was erroneous.

The Court separately held that certification was improper for the additional reason that plaintiffs failed to demonstrate that a class action was superior to other methods of adjudicating the dispute. The Court noted that because plaintiffs were well-organized institutions and sought large sums of damages, there was no reason to conclude that they would not pursue their claims individually were certification of a class denied.

The New Jersey Supreme Court's decision represents a significant victory for pharmaceutical companies faced with consumer fraud class action lawsuits by third party payors. The Court's rejection of a fraud on the market theory in consumer fraud class actions, which already is the law in Pennsylvania and some other states, makes it more difficult for class action plaintiffs in consumer fraud cases to obtain class certification because the issue of causation and damages will often turn on facts unique to each class member.

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