SCANNED ON 3/22/2007

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARTIN SHULMAN J.S.C. Justice

PART 1

Hohendorf, D

INDEX NO. 109845/06

MOTION DATE ______

- v -

MOTION SEQ. NO. 01

Pfizer Inc

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	
Replying Affidavits	2

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
MAR 22 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: MAR 14 2007

MARTIN SHULMAN J.S.C.
J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

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DAVID J. HOHENDORF,

Plaintiff,

Index No.: 109845/06

-against-

DECISION/ORDER

PFIZER INC.,

Defendant.

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This action arises from plaintiff David J. Hohendorf's ("Hohendorf" or "plaintiff") use of the cholesterol lowering medication Lipitor. Defendant Pfizer Inc. ("Pfizer" or "defendant"), the manufacturer of Lipitor, moves to dismiss the amended complaint pursuant to CPLR 3211(a)(7),[1] alleging that plaintiff's claims are governed by Michigan law, which precludes plaintiff from bringing the instant action. Hohendorf opposes the motion.

Plaintiff, a Michigan resident, asserts claims against defendant for fraud, negligent misrepresentation, failure to warn, design defect, breach of the implied warranty of merchantability and fraudulent concealment. The amended complaint alleges, and defendant does not dispute, that defendant is a Delaware corporation having its principal place of business in New York County. At issue on this motion is whether Mich. Comp. Laws ("MCL") §600.2946(5) applies.

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[1] In response to Pfizer's instant motion to dismiss plaintiff served the amended complaint. Pfizer argues that the motion to dismiss remains viable against Hohendorf's amended complaint and this court bases its analysis of the motion upon the amended pleading. *Sage Realty Corp. v. Proskauer Rose LLP*, 251 A.D.2d 35, 38, 675 N.Y.S.2d 14 (1st Dept., 1998)(moving party has the option to decide whether its motion should be applied to the new pleadings).

Analysis

As summarized in *Garcia v. Wyeth-Ayerst Laboratories*, 385 F.3d 961, 963-964 (6th Cir., 2004), MCL §600.2946(5):

> immunizes drug manufacturers from liability from damages in suits contending that their drug was defective or unreasonably dangerous "if the drug was approved for safety and efficacy by [the FDA], and the drug and labeling were in compliance with [the FDA's] approval at the time the drug left the control of the manufacturer or seller." Mich. Comp. Laws § 600.2946(5). The immunity is subject to two exceptions: (1) if the manufacturer intentionally withheld or misrepresented material information concerning the drug that it is required to be submitted under the Food and Drug Cosmetics Act and the drug would not have been approved, or the FDA would have withdrawn approval if the information was accurately submitted to the FDA, or if the manufacturer bribed an FDA official or employee to secure the drug's approval, Mich. Comp. Laws §§ 600.2946(5)(a) & (b); and (2) if the offending drug was sold after the FDA withdrew approval or ordered the drug removed from the market, *id.*

Pfizer argues that Hohendorf does not and cannot allege that either of the two above exceptions applies. Plaintiff does not dispute the foregoing. Since neither exception applies, defendant contends this action is barred under Michigan law and the amended complaint must be dismissed with prejudice.

Michigan state and federal courts interpret MCL §600.2946(5) as providing drug manufacturers with broad immunity in products liability suits, shielding them from liability with only limited exceptions. *Id.*, 385 F.3d at 965; *Zammit v. Shire US, Inc.*, 415 F.Supp.2d 760, 762 (E.D. Mich., 2006); *Taylor v. Smithkline Beecham Corp.*, 658 N.W.2d 127, 130 (Mich., 2002)(compliance with FDA standards is conclusive as to issue of due care for drugs). New York law does not afford such sweeping immunity from liability to pharmaceutical manufacturers. Plaintiff disputes that MCL §600.2946(5) applies and urges that New York law applies since defendant engaged in marketing,

training and decision-making activities regarding Lipitor in New York. Amended Complaint at ¶¶ 14-18.

In determining choice of law issues, New York courts employ an interest analysis: "[T]he law of the jurisdiction having the greatest interest in the litigation will be applied and . . . the [only] facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict". *Schultz v. Boy Scouts of America, Inc.*, 65 N.Y.2d 189, 197, 491 N.Y.S.2d 90 (1985). "Under this formulation, the significant contacts are . . . the parties' domiciles and the locus of the tort [citations omitted]." *Id.* A distinction is "drawn between laws that regulate primary conduct . . . and those that allocate losses after the tort occurs . . . If conflicting conduct-regulating laws are at issue, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders." *Cooney v. Osgood Machinery, Inc.*, 81 N.Y.2d 66, 72, 595 N.Y.S.2d 919 (1993).

Here, it is undisputed that plaintiff ingested Lipitor and sustained his alleged injuries in Michigan. Regardless, Hohendorf argues that New York "has an interest in ensuring that New York companies are not perceived to export dangerous and unsafe products", as well as an interest in the punishment and deterrence of tortious conduct. Amended Complaint at ¶19; Plaintiff's Mem. of Law at p. 10. Plaintiff, relying upon *Carlenstolpe v. Merck & Co., Inc.*, 638 F.Supp. 901 (S.D.N.Y., 1986), *app. dism.* 819 F.2d 33 (2nd Cir., 1987), urges that an interest analysis mandates that New York law be applied. Plaintiff also cites as persuasive authority the Superior Court of New Jersey, Appellate Division's decision in *Rowe v. Hoffman-La Roche Inc.*, 892 A.2d 694 (N.J.

Super. Ct. App. Div., 2006), wherein a New Jersey appellate court declined to apply MCL §600.2946(5) in an action by a Michigan plaintiff against a New Jersey drug manufacturer.

Carlenstolpe involved a Swedish plaintiff injected with and injured by an allegedly defective hepatitis vaccine in Sweden. The plaintiff sued the New Jersey manufacturer of the vaccine, which had been developed and produced by the manufacturer's Pennsylvania subsidiary, in New York federal court. Applying New York's interest analysis as interpreted in *Schultz v. Boy Scouts of America, Inc.*, *supra*, the court in *Carlenstolpe* concluded that Pennsylvania law, i.e., the law of the jurisdiction where the alleged tortious conduct occurred, should be applied rather than Swedish law.

Carlenstolpe considered the choice of law issue in the context of a motion to dismiss on forum non conveniens grounds, wherein the court must evaluate public interest considerations. In that case, the court noted that its determination of the applicable law raised a public interest concern as to which jurisdiction had a stronger interest in the controversy. The *Carlenstolpe* decision specifically rejected the prevailing view that an American forum (i.e., where the product was developed, tested and/or manufactured) had only a negligible interest in the issues raised by products liability litigation as compared to that of the jurisdiction where the injury occurred. 638 F.Supp. at 909.

The U.S. District Court for the Southern District of New York based its decision in *Carlenstolpe* upon the New York Court of Appeals' rationale in *Schultz v. Boy Scouts of America, Inc.*, *supra*, which cited the "critical interest" of the "locus jurisdiction . . . in protecting the reasonable expectations of the parties who relied on [its law] to govern

their primary conduct and in the admonitory effect that applying its law will have on similar conduct in the future." *Id.*; *Schultz v. Boy Scouts of America, Inc.*, 65 N.Y.2d at 198. This same court subsequently, albeit in *dictum*, called into doubt *Carlenstolpe*'s interest analysis which resulted in the application of the law of the jurisdiction where the tortious conduct occurred. See *Doe v. Hyland Therapeutics Div.*, 807 F.Supp. 1117, 1131 (S.D.N.Y., 1992), at note 16:

> Where rules of product liability are involved, we think the forum where the products are sold and consumed has the predominant interest in implementing the rules that form the basis for the "reasonable expectation of the parties" involved. As already discussed . . . the forum where the product is sold is uniquely qualified to determine the controlling standards that reflect an equilibrium between its need for the product, and its desire to deter the sale of potentially harmful products to its citizens. Therefore, this Court believes that under a true application of the "interest analysis" approach, the law of the forum in which the products are sold should govern. . .

This court finds the foregoing interest analysis to be more persuasive than that in *Carlenstolpe*. Given the Michigan legislature's enactment of MCL §600.2946(5), a Michigan resident such as Hohendorf can only reasonably expect to prevail in a products liability action against a drug manufacturer if one of MCL §600.2946(5)'s two narrow exceptions applies. Conversely, Pfizer, a corporation doing business worlwide, has a reasonable expectation of being shielded from liability in Michigan except under limited circumstances.

Turning to the purpose behind MCL §600.2946(5), Presiding Justice Wefing's dissent in *Rowe v. Hoffman-La Roche Inc.*, 892 A.2d 694 (2006) is compelling. While no express purpose is stated for MCL §600.2946(5)'s 1995 enactment, a Michigan federal court speculated that the "Michigan legislature was concerned that unlimited

liability for drug manufacturers would threaten the financial viability of many enterprises and could add substantially to the cost and unavailability of many drugs." *Garcia v. Wyeth-Ayerst Laboratories*, 385 F.3d at 967. The dissent in *Rowe* specifically rejected the majority's inference that the purpose of MCL §600.2946(5) was protection of Michigan drug manufacturers and noted other concerns with product liability suits against such companies, such as "the adverse impacts of tort liability on pharmaceutical research and development". 892 A.2d at 467-468.

Regardless of MCL §600.2946(5)'s purpose, the statute represents a policy judgment made by Michigan's legislature and upheld by Michigan courts. *Garcia v. Wyeth-Ayerst Laboratories*, *supra*; *Zammit v. Shire US, Inc.*, *supra*; *Taylor v. Smithkline Beecham Corp.*, *supra*. As Presiding Justice Wefing aptly stated: "I am unable to perceive what governmental interest New Jersey has in seeking to assure compensation for a Michigan resident when the Michigan Legislature has determined that compensation is not available." 892 A.2d at 469. Similarly, New York has no interest in this litigation and "should not become the asylum for claims asserted by citizens of another state whose legislature has made a policy choice to immunize a particular defendant from such litigation." *Id.* at 470. Indeed, application of New York law would render MCL §600.2946(5) meaningless. See *Ledingham v. Parke-Davis Div. of Warner-Lambert Co.*, 628 F.Supp. 1447, 1452 (E.D.N.Y., 1986)(applying New York choice of law rules and finding that Canadian law [place of injury] applied, rather than New Jersey [place where defendant drug manufacturer made design and marketing decisions] law, and where application of New Jersey law "would displace the regulatory

scheme that the [Canadian] government has decided is in the best interests of its citizens").

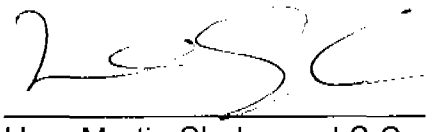
Again, it is undisputed that neither of MCL §600.2946(5)'s two exceptions is applicable in this action. Accordingly, Pfizer's immunity from suit in Hohendorf's home state of Michigan mandates the amended complaint's dismissal.

Accordingly, it is hereby

ORDERED that defendant Pfizer, Inc.'s motion is granted and the amended complaint is dismissed with prejudice.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
March 14, 2007



Hon. Martin Shulman, J.S.C.