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MATTHEW ENRIQGUEZ, individually and on behalf of all others similarly situated	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION / CAMDEN COUNTY
Plaintiff,	:	
v.	:	DOCKET NO. CAM-L-4677-18
JOHNSON & JOHNSON; JANSSEN PHARMACEUTICALS, INC.; ACTAVIS PHARMA, INC.; and ACTAVIS LLC,	:	Civil Action CBLP Action
Defendants.	:	**OPINION**

Decided: October 10, 2019

Joshua Morris Neuman, Esquire, Kilcoyne & Nesbit, LLC, Counsel for Plaintiff Matthew Enriguez, individually and on behalf of all others similarly situated.

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STEVEN J. POLANSKY, P.J.Cv.

INTRODUCTION

Plaintiff, Matthew Enriguez, is a New Jersey resident who alleges that he purchased health insurance from Blue Cross Blue Shield. Plaintiff asserts that as a result of the conduct of Defendants, New Jersey health insurers paid higher costs for both opioids and addiction treatment, resulting in increased costs to health insurers. Plaintiff alleges that health insurers passed these higher costs on to their insureds, causing class members to pay higher costs for health insurance.

Defendants, Johnson & Johnson Pharmaceuticals, Janssen Pharmaceuticals, Inc., Actavis Pharma, Inc. and Actavis LLC, have filed the present motion seeking to have the court dismiss with prejudice Plaintiff's Complaint for failure to state a claim pursuant to R. 4:6-2(e). The Actavis Defendants further assert that they only manufacture generic opioid medications and do no promotion for those medications. Janssen Pharmaceuticals, Inc. asserts that it is a separate corporate entity which does not manufacture opioid medications.

BACKGROUND

This matter arises from the opioid epidemic that has had far-reaching consequences. New Jersey has been hit particularly hard by this crisis. In 2016, there were 1,409 opioid-related deaths in New Jersey alone. New Jersey Opioid Summary, National Institute on Drug Abuse, *available at* https://www.drugabuse.gov/drugs-abuse/opioids/opioid-summaries-by-state/new-jersey-opioid-summary (last visited June 28, 2019). With this rise in opioid-related deaths and addiction has come a swell of litigation seeking to hold pharmaceutical companies responsible for their part in creating, distributing and marketing opioids. See, e.g., In re Schering-Plough Corp. Intron/Temodar Consumer Class Action, 678 F.3d 235 (3d Cir. 2012).

The opioid epidemic has become a plague upon modern society. This crisis resulted in 42,249 opioid overdose deaths in 2016 and 47,600 opioid overdose deaths in 2017. 2018 Annual Surveillance Report of Drug-Related Risks and Outcomes, United States Centers for Disease Control, National Center for Injury Prevention and Control 2018, https://www.hhs.gov/opioid/about-the-epidemic/index.html (last visited Aug. 7, 2019). In 2016, 40% of opioid deaths involved prescription opioids. Id. The opioid epidemic has had a devastating effect upon families throughout the country. These statistics reflect only a small portion of the problem. The American Society of Addiction Medicine estimates that in 2016, 20.5 million Americans suffered from a substance abuse disorder. At least two million of these individuals suffered a substance abuse disorder involving the use of prescription pain medication. Opioid Addiction 2016 Facts and Figures, American Society of Addiction Medication, *available at* https://www.asam.org/docs/default/source/advocacy/opioid-addition-disease-facts-figures.pdf (last visited Aug. 7, 2019) (citing Center for Behavioral Health Statistics and Quality 2016).

This litigation falls within four main groups of lawsuits—those brought by individuals directly harmed by deceptive marketing (such as addicts), those brought by third party payors (such as employers and insurance companies), those alleging to have paid inflated drug prices or who purchased a more expensive drug or off-label drug because of the deceptive marketing practices, and those brought by persons claiming to have paid higher insurance costs as a consequence of misconduct by manufacturers, distributors and marketers.

Courts have found cases asserting third party payor claims or inflated drug price claims deficient based upon a lack of causation or failure to plead cognizable injuries. See, e.g., Sidney Hillman Health Ctr. Of Rochester v. Abbott Labs., 873 F.3d 574, 578 (7th Cir. 2017) (noting that

a long causation chain negated proximate cause in a myriad of third party payor cases); In re Schering-Plough Corp. Intron/Temodar Consumer Class Action, 678 F.3d 235, 253 (3d Cir. 2012) (affirming the District Court of New Jersey's dismissal of a consumer's claim for paying for drugs at inflated prices due to lack of causation); In re Neurontin Mktg. & Sale Practices & Prods. Liab. Litig., 257 F.R.D. 315, 326 (D. Mass. 2009) (questioning whether Plaintiffs, who claimed that Defendants' deceptive marketing resulted in them purchasing a drug for an off-label use they would not otherwise have purchased, would be entitled to class certification due to issues related to the alleged misrepresentations and causal nexus between those representations and the Plaintiffs' injuries). As for the final claim of increased insurance premiums, this claim is the newest to enter the opioid litigation sphere. There are no reported decisions directly on point.

Plaintiff's claim is based upon alleged inflated insurance premiums paid by Plaintiff because his insurance company paid for opioid medication or addiction rehabilitation treatment for other insureds. Plaintiff is not the first to make such a claim. Plaintiff's complaint is almost a mirror image, both in factual allegations and legal assertions, to a class action complaint filed in the District in New Jersey, Sardella v. Purdue Pharma. et al. 3:2018cv08706, which was transferred to the Northern District of Ohio where federal opioid cases are being heard. In 2018, class action lawsuits were filed in five different federal courts, including New Jersey, charging manufacturers and distributors alike with fraudulent and deceptive marketing practices, negligent distribution, and other violations of state law. Thomas Sullivan, Opioid Class Action Suit Filed in Five States, POLICY & MEDICINE, May 14, 2018, https://www.policymed.com/2018/05/opioid-class-action-suit-filed-in-five-states.html (last visited September 20, 2019). These lawsuits, strikingly similar to this suit filed by Plaintiff, allege that defendants knew the risk of opioids,

engaged in unlawful and unfair misconduct, and that this misinformation campaign resulted in a dramatic increase in opioid use, thus raising health insurance costs for all insureds.

Plaintiff asserts that Defendants employed a multi-pronged and multi-tiered scheme aimed at misinforming doctors and patients of the risks associated with opioid use. This scheme, in turn, allegedly caused more doctors to prescribe, and more people to take, opioids, costing insurance companies money by paying for opioids and related addiction treatment, thus raising insurance costs for Plaintiff and those similarly situated to Plaintiff. The alleged conduct of the pharmaceutical companies includes direct communications with doctors and patients through in-person visits and advertisements, even though Defendants had previously been reprimanded by the United States Food and Drug Administration (FDA) for misrepresenting and minimizing the risks associated with certain opioids.

Specifically, Plaintiff's Complaint alleges that in 2011, opioid manufacturers spent more than $14 million dollars on journal advertising for opioids. Of this $14 million, $4.9 million was spent by Defendant Janssen. It is further alleged that in 2014, opioid manufacturers spent $168 million dollars on detailing branded opioids to doctors.[1] A total of $34 million dollars was allegedly spent by Defendant Janssen and $2 million dollars by Defendant Actavis.

Plaintiff further asserts that Defendants retained and funded third-party organizations to communicate with doctors and patients in order to avoid scrutiny by the FDA, and that such marketing often contradicted information contained in materials provided to and reviewed by the

[1] Plaintiff's Complaint ¶31. Detailers are alleged to be sales representatives who visit individual doctors and medical staff at their offices as part of marketing efforts by pharmaceutical companies. These representatives represent the detailing expense.

FDA. These third-party organizations, under the control of Defendants, created materials unsupported by scientific evidence and in stark contrast with Centers for Disease Control and Prevention (CDC) guidelines. Specifically, the Pain Care Forum, created by the American Pain Foundation, a third-party organization controlled by Defendants, worked to ensure that any FDA studies on opioids did not produce results deemed too negative. It also included enlisting and funding independent medical professionals, paid to serve as consultants and as advisors, to assist in spreading incorrect information about opioids through continuing medical education programs and other means. These professionals further helped develop treatment guidelines which strongly encourage the use of opioids over other methods of treatment for chronic pain.[2]

The alleged false marketing scheme did not end there. Plaintiff alleges that Defendants funded studies advocating "pseudoaddiction," a theory, not recognized by the CDC, which has been touted as an excuse to prescribe patients more opioids. Plaintiff claims Defendants trivialized and failed to disclose known long-term risks of opioid use with misrepresentations debunked and rejected by the FDA and CDC. Defendants opined that opioids had a low-risk of addiction. For example, Defendant Actavis continued to distribute a brochure claiming that addiction, while possible, was unlikely if one did not previously suffer from addiction. Defendant Janssen distributed a guide describing the claim that opioids are addictive as a myth.[3] These representations contravened one study that found 75% of those addicted to opioids first took them after receiving a prescription, and a 2016 CDC Guideline finding that opioids present serious risks, including addiction.

[2] Plaintiff's Complaint ¶37-¶47
[3] Plaintiff's Complaint ¶53.

Defendants further instructed insurers, doctors and patients about tools that could allow them to reliably identify those predisposed to addiction, and therefore safely prescribe opioids. Such tools have been criticized by the CDC, since there are no studies addressing their effectiveness. Defendants informed doctors that patients would not experience withdrawal if they stopped using opioids. A 2016 CDC guideline noted a multitude of symptoms attributed to opioid withdrawal, and concluded that opioid use should be limited in time and amount.

Plaintiff asserts that as a direct and proximate result of the above misrepresentations, he and class members sustained losses and injuries in the form of higher insurance premiums, co-payments and deductibles. This conduct by the Defendants is alleged to have been wanton, willful, outrageous, and with reckless disregard to the consequences of their actions.

Plaintiff's Complaint consists of five (5) separate Counts.

I. **Count I** alleges violations of New Jersey's Consumer Fraud Act (NJCFA or CFA) based on Defendants' alleged deceptive marketing practices resulting in the improper sale of opioids, causing Plaintiff and Class Members to pay higher insurance premiums, co-pays and deductibles.

II. **Count II** alleges "an unreasonable interference with a common right to the general public" causing a Public Nuisance based upon Defendants' promotion of opioids in such a fashion that they knew or should have known was false and misleading, causing harm to Plaintiff and Class Members.

III. **Count III** alleges unjust enrichment against all Defendants as a result of Defendants voluntarily accepting and retaining the inflated prices for opioids for which Plaintiff and Class Members incurred the cost by paying higher health insurance costs.

IV. **Count IV** alleges negligence against all Defendants. It is asserted that Defendants had a duty to exercise reasonable care in manufacturing and distributing highly dangerous medications, namely opioids, and further that Defendants knew or should have known that by providing misleading information to doctors and insurers about such pharmaceuticals, it was foreseeable that not only would there be misuse, abuse and addiction, but further that the costs for both the drugs and addiction treatment would ultimately fall on health insurers who would pass those costs along to purchasers of health insurance.

V. **Count V** alleges negligent interference with prospective economic advantage against all Defendants. Plaintiff asserts that each Defendant had a duty to exercise reasonable care in manufacturing and distributing opioids. Plaintiff claims that he and Class Members had an economic relationship with the insurers and that Defendants' conduct interfered with that relationship, causing Plaintiff and Class Members to pay increased health insurance costs.

Plaintiff explained at oral argument that to prove damages, he would first obtain a sample of prescriptions for opioids that were written by physicians. Plaintiff asserts that it is unnecessary to explore each patient's medical record for his evaluation. From this statistical data, Plaintiff then would have an expert evaluate which prescriptions were appropriate and which should not have been written. Presumably, Plaintiff then would determine a percentage of prescriptions for opioids that should not have been written and extrapolate from that data to calculate the total unnecessary opioid prescriptions. Plaintiff then intends to have an expert evaluate how the costs of the prescriptions they determine should not have been written impacted the amount charged to class members for health insurance.

Defendants move to dismiss all Counts of the Complaint for failure state a claim. Defendants assert Plaintiff's claims fail for: lack of causation for all claims; failure to plead the fraud claim with particularity; failure to plead a cognizable injury; lack of CFA applicability; and failure to plead an interference with a public right. Defendants further move to dismiss the class allegations for lack of commonality and predominance.

The issue presented to the court is not whether Defendants should be held responsible for the conduct alleged. This court agrees that if Plaintiffs are able to prove the dangerous and callous conduct of Defendants alleged in the Complaint, they should be held accountable for their conduct.[4] Rather, the question presented to the court is whether this Plaintiff and this proposed class are the appropriate representatives to seek compensation and accountability for the reprehensible conduct alleged.

LEGAL ANALYSIS

Failure to State a Claim

New Jersey is a notice-pleading state, requiring only that a general statement of the claim need be pleaded. Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989). It is still necessary for the pleadings to include a statement of facts that will "fairly apprise the adverse party of the claims and issues to be raised at trial." Jardine Estates, Inc. v. Koppel, 24 N.J. 536, 542 (1957). On a motion to dismiss for failure to state a claim, the court will accept as true the facts alleged in the complaint. Craig v. Suburban Cablevision, 140 N.J. 623, 625-26 (1995). "The test for determining the adequacy of the pleading is whether a cause of action is suggested by the facts." Velantzas v. Colgate-Palmolive Corp., 109 N.J. 189, 192

[4] An Oklahoma Court recently found similar allegations against the opioid industry established by a preponderance of the evidence following a non-jury trial.

(1998). The court must search in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement in the Complaint, particularly if further discovery is conducted. Printing Mart-Morristown, 116 N.J. at 772. The court in Printing Mart cautioned that a Rule 4:6-2(e) motion to dismiss "should be granted in only the rarest of instances." Ibid. at 772; see also Lieberman v. Port Auth. of N.Y. & N.J., 132 N.J. 76, 79 (1993).

Particularity Requirement of R. 4:5-8(a)

Defendants assert that Plaintiff has failed to plead fraud with the required particularity to sustain a claim for fraud, and further aver that this standard applies to all of Plaintiff's claims, as they rest upon factual allegations of misrepresentation or omissions. Moreover, Defendants argue that Plaintiff fails to differentiate between the Defendants as required by R. 4:5-8(a), and therefore the court should dismiss Plaintiff's complaint, citing unreported decisions.[5]

Plaintiff in response asserts that R. 4:5-8(a) does not impose the sort of rigid pleading requirements opined by Defendants, arguing that if the pleader does not have access to specific fraudulent actions, assertions based upon information and belief are sufficient. Further, when transactions are both numerous and cover a range of time, less specificity in pleading fraud is required. South Broward Hosp. Dist. v. MedQuist Inc., 516 F. Supp. 2d 370, 385 (D.N.J. 2007). Plaintiff asserts that Defendants engaged in a multi-tiered marketing scheme to deceive doctors and patients that had far-reaching consequences. One such consequence was a hike in insurance premiums for Plaintiff and others similarly situated. Plaintiff's complaint contains a detailed explanation of the scheme and its effects, citing to an unreported case filed by the New Jersey

[5] R. 1:36-3 prohibits the court from citing unpublished opinions.

Attorney General which found that the complaint provided sufficient details of Purdue's marketing scheme to survive a motion to dismiss, and Sellers v. Boehringer Ingelheim Pharms. Inc., 881 F. Supp. 2d 992, 1008-09 (S.D.Ill. 2012), where the Illinois Court found fraud pleaded with particularity where it was alleged defendant's marketing campaign "contained knowing misrepresentations or omissions regarding the safety and efficacy" of the prescription anticoagulant warfarin.

Plaintiff also asserts he made clear which allegations applied to each Defendant, and is not required to recite and name every defendant in the facts and counts applicable to all defendants. Plaintiff argues there is no authority mandating that Plaintiffs recite the name of each and every defendant within every fact and under each count when it is plausible that each defendant was involved in all of the actions averred in the complaint.

R. 4:5-8(a) imposes a heightened pleading standard on allegations of misrepresentation, fraud, mistake, breach of trust, willful default, or undue influence. Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 112 (App. Div. 2009). A complaint must set forth the "particulars of the wrong, with dates and items if necessary...stated insofar as practicable." R. 4:5-8(a). Malice, intent, knowledge, and other conditions of the mind of a person may be alleged generally. R. 4:5-8(a). This includes claims under the CFA. Hoffman, supra, at 112. A court may dismiss a complaint alleging fraud if "the allegations do not set forth with specificity, nor do they constitute as pleaded, satisfaction of the elements of legal or equitable fraud." Levinson v. D'Alfonso & Stein, 320 N.J. Super. 312, 315 (App. Div. 1999); see also Kavky v. Herbalife Int'l of Am., 359 N.J. Super. 497, 509 (App. Div. 2003); Rieder v. State Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). At a minimum, a claim for fraud should

contain the what, when, where, who and how. Rebish v. Great Gorge, 224 N.J. Super. 619, 626 (App. Div. 1988) ("[P]leadings alleging fraud [must] to particularize the wrong with dates and items to an extent practicable.").

The complaint alleges in great detail the conduct of each defendant supporting each cause of action. These assertions are sufficient to comply with R. 4:5-8(a).

Consumer Fraud Act

Defendants assert that Plaintiff's claims under the CFA fail for the following reasons: (1) Plaintiff is not a consumer as defined under the statute; (2) the CFA does not apply to highly regulated products such as opioids, see N.J. Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 14 (App. Div. 2003); (3) the learned intermediary doctrine prevents the application of the CFA, see Lee v. First Union Nat. Bank, 199 N.J. 251, 263 (2009); and (4) Plaintiff has failed to plead an ascertainable loss.

Plaintiff opposes the motion asserting that the CFA is not limited to goods and services as argued by Defendants. See N.J.S.A. 56:8-2; see also Lemelledo v. Beneficial Mgmt. Corp., 150 N.J. 255, 264 (1997) ("The language of the CFA evinces a clear legislative intent that its provisions be applied broadly in order to accomplish its remedial purpose, namely, to root out consumer fraud."). Moreover, Plaintiff's complaint avers numerous unlawful actions by Defendants, an ascertainable loss in the form of overpayment for health insurance and a causal connection between the acts and the loss. Further, Plaintiff asserts neither the learned intermediary doctrine nor the exclusion for highly regulated products applies, as Plaintiff is neither suing any learned professionals nor is there a conflict between the FDA regulations and the application of the CFA. See Macedo v. Dello Russo, 178 N.J. 340, 345-46 (2004) (holding

that it is only "learned professionals [that are] beyond the reach of the CFA so long as they are operating in their professional capacities"); Lemedello, 150 N.J. at 269 (finding there is a presumption that the CFA applies unless there is a "direct and unavoidable conflict" between "application of the CFA and application of [another] regulatory scheme or schemes.").

As amended in 1971, the CFA "provides a private cause of action to consumers who are victimized by fraudulent practices in the marketplace." Gonzalez v. Wilshire Credit Corp., 207 N.J. 557, 576 (2011). "It was enacted to combat 'sharp practices and dealings' that victimized consumers by luring them into purchases through fraudulent or deceptive means." Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 121 (2014) (quoting Cox v. Sears Roebuck & Co., 138 N.J. 2, 16 (1994)). The CFA prescribes a cause of action on behalf of "[a]ny 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 . . . ." N.J.S.A. 56:8-19.

A CFA claim brought by a consumer requires proof of three elements: "(1) unlawful conduct by defendant; (2) an ascertainable loss by plaintiff; and (3) a causal relationship between the unlawful conduct and the ascertainable loss." Manahawkin, 217 N.J. at 121 (quoting Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 557 (2009)). "A plaintiff who proves all three elements may be awarded treble damages, 'attorneys' fees, filing fees and reasonable costs of suit." Ibid. (quoting N.J.S.A. 56:8-19).

Pursuant to N.J.S.A. 56:8-2, an "unlawful practice" includes:

> 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 . . . .

"An unlawful practice contravening the CFA may arise from (1) an affirmative act; (2) a knowing omission; or (3) a violation of an administrative regulation." Dugan v. TGI Fridays, Inc., 231 N.J. 24, 51 (2017) (citation omitted). "The first two are found in the language of N.J.S.A. 56:8-2, and the third is based on regulations enacted under N.J.S.A. 56:8-4." Cox, 138 N.J. at 17.

The Court finds the reasoning of the Appellate Division in James v. Arms Technology, Inc., 359 N.J. Super. 291 (App. Div. 2003) to be instructive with respect to the issues presented. James involved a suit by the City of Newark against numerous manufacturers of firearms seeking recovery for the costs incurred by the City, seeking damages for the increased cost of governmental services required. Id. at 314-15. The court first noted that New Jersey has a low threshold to establish standing, with a financial interest in the outcome of litigation normally sufficient to confer standing. Id. at 321 (citing Associates Commercial Corp. v. Langston, 236 N.J. Super. 236, 242 (App. Div.), certif. denied, 115 N.J. 225 (1989)). The Court distinguished the direct cost of governmental services as separate and distinct from gun violence related medical expenses resulting from harm to others. Id. at 314. The court explained that alleged harm in the form of increased costs for medical expenses which were merely derivative of injuries to others was too remote to support the claim. Id. at 314-16.

Causation under the Consumer Fraud Act

In contrast to common law fraud, the causation element of N.J.S.A. 56:8-19 is not "the equivalent of reliance." Dugan, 231 N.J. at 53 (quoting Lee v. Carter-Reed Co., 203 N.J. 496, 522 (2010)). Instead, in a private action, "the CFA requires a showing of 'a causal relationship

between the unlawful conduct and the ascertainable loss.'" Ibid. (quoting Bosland, 197 N.J. at 557). The statutory phrase "as a result of" connotes a "causal nexus requirement." Bosland, 197 N.J. at 557-58 (quoting N.J.S.A. 56:8-19). However, contractual privity is not required to bring a CFA claim. Perth Amboy Iron Works, Inc. v. Am. Home Assurance Co., 226 N.J. Super. 200, 210-11 (App. Div. 1988).

Our courts "have generally found causation to be established for CFA purposes when a plaintiff has demonstrated a direct correlation between the unlawful practice and the loss; they have rejected proofs of causation that were speculative or attenuated." Heyert v. Taddese, 431 N.J. Super. 388, 421 (App. Div. 2013). A complete lack of any relationship between the defendant's unlawful conduct and the plaintiff's loss compels a finding of a lack of causation under the CFA. Marrone v. Greer & Polman Constr., Inc., 405 N.J. Super. 288, 296 (App. Div. 2009).

In cases in which the alleged misrepresentation was made to a prior purchaser and not to a plaintiff asserting the CFA claim, courts have held there was a fatal lack of proof of a causal connection between the misrepresentation and the alleged loss. See Dean v. Barrett Homes, Inc., 406 N.J. Super. 453, 462 (App. Div. 2009); Marrone, 405 N.J. Super. at 295-97; O'Loughlin v. Nat'l Cmty. Bank, 338 N.J. Super. 592, 606-07 (App. Div. 2001); Chattin v. Cape May Greene, Inc., 216 N.J. Super. 618, 641 (App. Div. 1987).

In Chattin, a group of homeowners instituted a class action suit against the builder for damages allegedly caused by defective windows. 216 N.J. Super. at 622. The trial court dismissed the claims filed by subsequent home purchasers, holding that only plaintiffs who had direct contact with the builder could recover under the CFA. Id. at 624. The Appellate Division affirmed, explaining that:

> Plaintiffs' argument that subsequent purchasers of homes should have been permitted to recover consumer fraud damages, even though they never received either the brochure or any oral representation from [the builder] concerning the windows, is clearly lacking in merit. There is no basis for finding a violation of the [CFA] with respect to these purchasers because [the builder] made no representation to them. Stated another way, these purchasers have not suffered "any ascertainable loss of moneys or property" as a result of [the builder's] use of a practice declared unlawful by the [CFA], and hence they have no claim under *N.J.S.A.* 56:8-19.

Id. at 641.

In Marrone, the plaintiffs asserted CFA claims against the manufacturer and distributor of defective exterior siding, which was used in the construction of their home eight years before their purchase. 405 N.J. Super. at 291. The original owners were unaware that the siding was defective and had not experienced any problems with the siding. Id. at 295. After the plaintiffs purchased the home they discovered that the siding was defective and that it was improperly installed. Id. at 292. The court affirmed the dismissal of the CFA claims because there was "a complete lack of proof of a causal connection between the . . . defendants' alleged misrepresentations about their product and plaintiffs' decision to purchase the house." Id. at 296.

Here, Defendants had no contact with Plaintiff, and did not make any misrepresentations or omissions to Plaintiff. Rather, the allegations are that Defendants' misrepresentations and omissions were made to doctors for the purpose of increasing the volume of prescriptions written, and to health insurers for the purpose of obtaining approval of their pharmaceuticals on the formulary list.[6] Plaintiff's connection with Defendants here is far more tenuous than that of the plaintiffs in Dean, Marrone, O'Loughlin, and Chattin. Plaintiff's causal theory, that if

[6] Drug formularies are a list of prescription medications approved by a particular health insurer. Insurers typically will not pay for a medication that is not on the formulary list. Most formulary lists have different tiers, with drugs on each tier subject to a different co-pay by the insured.

Defendants had not marketed opioids aggressively to doctors and health insurers the rate paid by Plaintiffs and other proposed class members for health insurance would have been lower, is speculative and attenuated.

Cognizable Injury Under the Consumer Fraud Act

Defendants argue that Plaintiff has failed to allege a cognizable injury, relying upon Rosen v. Cont'l Airlines, Inc., 430 N.J. Super. 97, 107 (App. Div. 2013). They assert Plaintiff must show more than payment for a product, such as the ineffectiveness of the product or the harm caused by the product, to allege a cognizable injury. Plaintiff contends his insurance premiums are inflated due to prescriptions obtained by others and paid for by insurers, and that the insurer paid for opioid-related costs for addiction treatment.

Defendants rely upon Teamsters Local 237 Welfare Fund v. AstraZeneca Pharm. L.P., 136 A.3d 688, 696 (Del. 2016), where the court held that payors "who continue to pay or reimburse for [a drug], while claiming they were harmed by allegedly false advertising, are neither 'victims' of the allegedly false advertising nor were they injured by reason or as a result of it". Defendants argue that absent allegations that the drug was inferior or worth less than what was paid, Plaintiff fails to plead a concrete financial loss in the form of an overpayment, citing Williams v. Purdue Pharma Co., 297 F. Supp. 2d 171, 176 (D.D.C. 2003).

Plaintiff responds that New Jersey has a low threshold for standing when it comes to a cognizable injury. Bondi v. Citigroup, Inc., 423 N.J. Super. 377, 436 (App. Div. 2011). All a plaintiff need show is a sufficient stake and real adverseness. Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 107 (1971). A financial interest in the outcome of the case suffices as a sufficient stake. Fairfax Fin. Holdings Ltd. v. S.A.C. Capital Mgmt., L.L.C., 450

N.J. Super. 1, 103 (App. Div. 2017). As Plaintiff is averring monetary harm in the form of higher insurance costs as a result of the actions of Defendants, Plaintiff asserts he has satisfied the standard for a cognizable injury.

There is no allegation Plaintiff was aware of Defendants' misrepresentations before he purchased health insurance, or that even if Plaintiff was aware he did not have the option to switch to a provider unaffected by Defendants' misrepresentations. Further, Plaintiff acknowledged at oral argument a lack of direct proof, and seeks to establish his loss using statistical data.

Public Nuisance[7]

Defendants assert that Plaintiff's claim for public nuisance fails as Plaintiff does not plead interference with a public right common to all members of the general public, and has failed to assert how Defendants exercised control over the interference alleged.

Plaintiff responds asserting that he has properly pled a public nuisance claim because Defendants are engaged in a continuing course of conduct that is calculated to result in physical harm or economic loss to so many persons as to become a matter of serious concern. James v. Arms Tech., Inc., 359 N.J. Super. 291, 329 (App. Div. 2003). Citing to unpublished cases from other jurisdictions, Plaintiff argues that since public nuisance claims have been allowed elsewhere in factually similar situations, this claim should be allowed to survive Defendant's motion to dismiss.

Claims for public nuisance flow from "interference with the interests of the community at large." In re Lead Paint Litig., 191 N.J. 405, 422 (2007) (quoting Restatement (Second) of Torts

[7] The Complaint does not assert a claim based upon a private nuisance.

§821B cmt. b (1979)). "[P]ublic nuisance has historically been tied to conduct on one's own land or property as it affects the rights of the general public." Id. at 423-24. The Restatement defines public nuisance as "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts §821B (1979). The circumstances required to sustain such a claim require an examination of the following factors:

> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and as the actor knows or has reason to know, has a significant effect upon the public right.

Ibid.

Two issues surrounding claims for public nuisance are the definition of public or common right and the distinction between a public right and a private right. In re Lead Paint Litig., 191 N.J. at 426. "A public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not be assaulted or defamed or defrauded or negligently injured." Restatement (Second) of Torts §821B, cmt. g (1979). Moreover, a plaintiff making a public nuisance claim must also make a showing of causation. See In re Lead Paint Litig., 191 N.J. at 410, 413 (noting that both the trial court and appellate panel discussed plaintiffs' claims in relation to causation, specifically proximate cause).

The Third Circuit Court of Appeals rejected a public nuisance theory brought by Camden County against multiple firearm manufacturers asserting a public nuisance cause of action based upon the widespread availability of illegal guns. Camden County Board of Chosen Freeholders v. Beretta, 273 F.3d 536 (3rd Cir. 2001). The trial court dismissed claims asserting negligence in the marketing and distribution of firearms, a negligent entrustment claim and a public nuisance claim.

Camden County Board of Chosen Freeholders v. Beretta U.S.A. Corp., 123 F. Supp. 2d 245 (D.N.J. 2000). The county only appealed from dismissal of the public nuisance claim, which dismissal was affirmed. 273 F.3d at 539.

A public nuisance involves an unreasonable interference with the right of the general public. Beretta, 273 F.3d at 539 (citing Mayor & Council of Alpine v. Brewster, 7 N.J. 42, 50 (1951); Philadelphia Electric Co. v. Hercules, Inc., 762 F.2d 303, 315 (3d Cir. 1985)). A defendant must exercise a sufficient degree of control over the source of the nuisance. Public nuisance claims are typically restricted to those connected with real property or the infringement of public rights. Beretta, 273 F.3d at 539-40. The court noted that "no New Jersey court has ever allowed a public nuisance claim to proceed against manufacturers for lawful products that are lawfully placed in the stream of commerce." Id. at 540. The Third Circuit ultimately rejected the public nuisance claim, explaining:

> A public-nuisance defendant can bring its own conduct or activities at a particular physical site under control. But the limited ability of a defendant to exercise control beyond its sphere of immediate activity may explain why public nuisance law has traditionally been confined to real property and violations of public rights. In the negligence context, this court recently held that a defendant has no duty to control the misconduct of third parties. See Port Auth. V. Arcadian Corp., 189 F.3d 305, 312-17 (3d. Cir. 1999). We agree with the District Court that this logic is equally compelling when applied in the public nuisance context. See Camden County v. Beretta, 123 F. Supp. 2d at 266. If independent third parties cause the nuisance, parties that have not controlled or created the nuisance are not liable. See New Jersey Dept. of Envt'l Prot. V. Exxon Corp., 151 N.J. Super. 464, 376 A.2d 1339, 1349 (N.J. Super. Ct. 1977).

Id. at 541.

The Appellate Division in James permitted a public nuisance claim asserted by a municipality to proceed based upon allegations that defendants had fostered an illegal secondary

gun market, thereby creating a public nuisance. 359 N.J. Super. at 331-332. The court there noted that a private nuisance claim is limited to the private use and enjoyment of land. Id. at 329. The New Jersey Supreme Court questioned the James decision, suggesting that the remedy may be limited to abatement rather than civil damages. In re Lead Paint Litigation, 191 N.J. 405, 435, fn. 10 (2007).

Typically, a suit involving a public nuisance is sustainable only by a suit brought by a governmental entity or an individual who sustains some special damage over and above that suffered by the general public. Howell v. Waste Disposal, 207 N.J. Super. 80, 99 (App. Div. 1986). Here, the allegations of the Complaint do not demonstrate or allege the type of special injury which would allow an individual as opposed to a public entity to bring an action seeking monetary damages resulting from an alleged public nuisance.

Unjust Enrichment

Defendants aver that Plaintiff's claim for unjust enrichment fails because Plaintiff has failed to allege a sufficiently direct relationship with Defendants, citing Snyder v. Farnam Cos., Inc., 792 F. Supp. 2d 712, 724 (D.N.J. 2011). Defendants also assert that the Complaint does not allege that Plaintiff conferred a benefit on Defendants. Defendants argue that because Plaintiff has failed to allege that they purchased the products directly from Defendants, they cannot rightfully expect any remuneration from Defendants, since they never directly conferred a benefit on Defendants in the first instance.

Plaintiff responds that Defendants rely upon the wrong standard for an unjust enrichment claim. They argue that all a plaintiff must plead is: (1) that the defendant has received a benefit from the plaintiff, and (2) that the retention of the benefit by the defendants is inequitable, citing unreported decisions. Plaintiff avers he has sufficiently pled that Plaintiff paid increased health

insurance premiums due to Defendants' actions, and that to allow Defendants to retain these benefits would be inequitable. Plaintiff also asserts that just because the benefit conferred by Plaintiff to Defendants did not pass directly from Plaintiff to Defendants, but instead passed through a third party insurer, does not preclude an unjust enrichment claim.

To establish unjust enrichment, a plaintiff must show both that defendant received a benefit and that retention of that benefit without payment would be unjust. Associates Commercial Corp. v. Wallia, 211 N.J. Super. 231, 243 (App. Div. 1986); Russell-Stanley Corp. v. Plant Industries, Inc., 250 N.J. Super. 478, 510 (Ch. Div. 1991). "The unjust enrichment doctrine requires that plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights." VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994) (citing Associates Commercial Corp., 211 N.J. Super. at 244; Callano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 108-09 (App. Div. 1966); St. Paul Fire & Marine Ins. Co. v. Indemnity Ins. Co., 32 N.J. 17, 22 (1960)).

Unjust enrichment is not an independent theory of liability in New Jersey. Goldsmith v. Camden County Surrogate's Office, 408 N.J. Super. 376, 382 (App. Div. 2009). Courts have recognized "that a claim for unjust enrichment may arise outside the usual quasi-contractual setting." County of Essex v. First Union Nat. Bank, 373 N.J. Super. 543, 550 (App. Div. 2004). Generally, if all other tort claims fail due to causation issues, a claim for unjust enrichment should also fail. See, e.g., Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 937 (3d Cir. 1999) ("We can find no justification for permitting plaintiffs to proceed on their unjust enrichment claim once we have determined that the District Court

properly dismissed the traditional tort claims because of the remoteness of plaintiffs' injuries from defendants' wrongdoing").

Plaintiff can point to no direct benefit received by any Defendant from Plaintiff. Rather, any benefit Plaintiff conferred was directed to his health insurer. The facts presented are far too remote to permit a cause of action based upon unjust enrichment to proceed.

Negligence

Defendants aver that Plaintiff cannot establish a duty owed by Defendants nor the breach of any duty they may have owed to Plaintiff.

To prove a defendant was negligent, a plaintiff must establish that: (1) the defendant owed a duty of care; (2) the defendant breached that duty; and (3) the plaintiff suffered an injury proximately caused by defendant's breach. Endre v. Arnold, 300 N.J. Super. 136, 142 (App. Div.), certif. denied, 150 N.J. 27 (1997). The mere happening of an accident or damage raises no presumption of negligence. Universal Underwriters Grp. V. Heibel, 386 N.J. Super. 307, 321 (App. Div. 2006); Malzer v. Koll Transp. Co., 108 N.J.L. 296, 297 (E. & A. 1931). Negligence will not be presumed, but rather, must be proven. Rocco v. N.J. Transit Rail Ops., Inc., 330 N.J. Super. 320, 338-39 (App. Div. 2000). There is a presumption against negligence, and the burden of establishing negligence is on plaintiff. Buckelew v. Grossbard, 87 N.J. 512, 525 (1981).

"Negligence is conduct which falls below the standard established by law for the protection of others against an unreasonable risk of harm." Pfenninger v. Hunterdon Cent. Reg'l High Sch., 167 N.J. 230, 240 (2001) (quoting Restatement (Second) of Torts § 282 (1965)). A person acts negligently when he or she does not take reasonable precautions to prevent causing harm to another. Id. at § 284. To determine whether a defendant's conduct is negligent, the court

considers what a prudent person would have done in the defendant's circumstances. Weinberg v. Dinger, 106 N.J. 469, 484 (1987). In addition to showing that a defendant failed to act with reasonable care, a plaintiff must show that a defendant owed the injured party a duty of care. Kelly v. Gwinnell, 96 N.J. 538, 548 (1984). Traditionally, courts have determined the circumstances under which a defendant owes a legal duty to another. Carvalho v. Toll Bros. & Developers, 143 N.J. 565, 572 (1996). The scope of the duty owed is a matter of law. Kelly, 96 N.J. at 552. "[W]hether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution." Id. at 544 (quoting Goldberg v. Housing Auth. of Newark, 38 N.J. 578, 583 (1962)); see Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993).

Plaintiff asserts that looking to the factors outlined in J.S. v. R.T.H., 155 N.J. 330, 337 (1998), "including the nature of the underlying risk of harm...its foreseeability and severity, the opportunity and ability to exercise care to prevent the harm, the comparative interests of, and the relationship between or among, the parties, and, ultimately, based on considerations of public policy and fairness, the societal interest in the proposed solution" favors imposing a duty on Defendants."[8] Plaintiff cites to a myriad of unpublished cases from other jurisdictions finding it proper to impose a duty of care on defendant opioid manufacturers. Plaintiff also relies upon James v. Arms Tech., Inc., 359 N.J. Super. at 323, where the Appellate Division found it proper to impose a duty upon defendant gun manufacturers in favor of plaintiffs, a city and its mayor.

Plaintiff's Complaint alleges that Defendants had a duty to exercise reasonable care in manufacturing and distributing highly dangerous medications in the State of New Jersey. The critical issue presented here however is how far that duty extends. There is no doubt that this

[8] Plaintiff brief at 31-32.

duty extends to individuals likely to purchase opioids. Conceivably, that duty could extend to a non-patient purchasing the opioids who is not a consumer. Consumers of health insurance however are simply far too remote from the conduct of Defendants to find a duty to exist as a matter of law. The nature of the risk to consumers of health insurance is too far removed, and any risk too attenuated, to find as a matter of fairness that a duty should extend to such outer limits.

Tortious Interference with Prospective Economic Advantage

Defendants seek dismissal of Plaintiff's claim for tortious interference with prospective economic advantage, asserting Plaintiff fails to allege an identifiable class to whom Defendants owe a duty of care. Plaintiff opposes the motion, asserting that Defendants' argument is premature, as no discovery has been taken regarding whether Plaintiff can actually show an identifiable class, and at this stage all allegations of the Complaint must be accepted as true.

While Count V is titled "Negligent Interference with Prospective Economic Advantage", the allegations contained in the Complaint are those for intentional inference with prospective economic advantage.[9] New Jersey case law refers to the cause of action as tortious interference with prospective economic advantage or intentional interference with prospective economic advantage. No reported decision has recognized a cause of action for negligent interference with prospective economic advantage, and no cases are cited to support such a claim. The Printing Mart-Morristown court used the terms tortious interference and intentional interference interchangeably. 116 N.J. at 744.

[9] Plaintiff's Complaint ¶210.

"An action for tortious interference with a prospective business relation protects the right to pursue one's business...free from undue influence or molestation. [Citation omitted]. What is actionable is the luring away, by devious, improper and unrighteous means, of the customer of another." Printing Mart-Morristown v. Sharp Electronics Corp., supra. at 750 (1989) (quoting Louis Kamm, Inc. v. Flink, 113 N.J.L. 582, 586 (E. & A. 1934)). An enforceable contract is not required for a claim of tortious interference. Ibid. The complaint must "allege facts that show some protectable right, a prospective economic or contractual relationship." Id. at 751. There must be sufficient facts giving rise to a reasonable expectation of economic advantage. Ibid.

The complaint must: (1) demonstrate plaintiff was in pursuit of business; (2) allege facts that the interference was done intentionally and with malice; and (3) allege facts that lead to the conclusion that the interference caused the loss of the gain. Id. at 751-52. "The term malice is not used in the literal sense requiring ill will toward the plaintiff. Rather, malice is defined to mean that the harm was inflicted intentionally and without justification or excuse." Id. at 751 (quoting Restatement (Second) of Torts § 37 at 5 (1975); Rainier's Dairies v. Raritan Valley Farms, Inc., 19 N.J. 552, 563 (1955)) (internal quotations omitted).

Here, there are no allegations that Plaintiff was in pursuit of a business or that a prospective business relation was influenced. While Plaintiff alleges that the conduct of Defendants impacted the price which they paid for health insurance, health insurance was not the business of Plaintiff. Further, there are no allegations that the conduct of Defendants somehow tortuously interfered with the ability of Plaintiff to purchase health insurance. There is an absence of any allegation that Defendants lured away by devious and improper or unrighteous means the customer of another. For these reasons the Complaint fails to state a cause of action for tortious interference with prospective economic advantage.

Proximate Cause

All of Plaintiff's claims require a showing of causation. Plaintiff asserts that Defendants' misrepresentations and deceptive statements caused he, and others similarly situated, to pay higher insurance premiums.

Defendants argue that Plaintiff's claims fail for lack of causation, specifically a lack of proximate cause, because the alleged conduct is too remote from the alleged harm, relying upon Interchange State Bank v. Veglia, 286 N.J. Super. 164, 183 (App. Div. 1995) (finding that the plaintiff "failed to demonstrate a direct relation between the injury asserted and the injurious conduct as required") (internal quotations omitted) and Hinojo v. New Jersey Mfgs. Ins. Co., 353 N.J. Super. 261, 271 (App. Div. 2002) (holding an employer's negligence in the maintenance of a machine may constitute a superseding cause sufficient to relieve a manufacturer of liability in certain instances). Defendants assert there are too many independent decision makers between the actions of Defendants and the harm alleged by Plaintiff to establish causation.

Defendants argue that there are twelve separate steps in the chain of causation between the alleged conduct by Defendants and the harm alleged by Plaintiff. Defendants identify these links as follows:

> Link One: Defendants manufacture opioids that are FDA-approved and contain FDA-mandated risk disclosures;
>
> Link Two: Defendants sell the medications to distributors;
>
> Link Three: Distributors sell the medications to a pharmacy;
>
> Link Four: A prescriber, instead of exercising independent judgment honed over years in medical practice, prescribes an opioid medicine to a New Jersey resident because of an allegedly false statement made by Defendants and without knowledge or an understanding of the risks of the opioid medicine as a learned intermediary, and despite prominent and extensive labeling information for the opioid medicine;

> Link Five: The patient chooses to fill the medically unnecessary prescription without any knowledge of the medication risks;
>
> Link Six: The pharmacist dispenses the medically unnecessary opioid prescription, without informing the patient about the risks;
>
> Link Seven: The patient (or someone who illegally obtained the opioid from the patient) misuses, abuses, and/or becomes addicted to opioids due to the allegedly fraudulently-induced prescription, as opposed to other facts or other medically appropriate prescriptions;
>
> Link Eight: Plaintiff's insurance company decides to place the opioid on formulary, without knowledge of the medication risks;
>
> Link Nine: Plaintiff's insurance company chooses to reimburse for the medically unnecessary prescription and/or subsequent addiction-related cost;
>
> Link Ten: Plaintiff's insurance company decides to increase premiums for New Jersey residents because of the cost of medically unnecessary prescriptions, as opposed to other factors;
>
> Link Eleven: Plaintiff's insurance company passes that increase on to Plaintiff; and
>
> Link Twelve: Plaintiff chooses to continue to pay increased premiums for his insurance, rather than switching to another plan.[10]

Plaintiff responds citing to an unreported decision holding that the same causal relationship can easily be described as having only four steps without a break in the causal relationship chain. They assert that the affirmative act of supplying opioids through legal channels with knowledge it was being diverted to criminal or improper use, the foreseeable illegal distribution of opioids, the misuse and abuse of opioids by individual users and the subsequent injuries were all a direct and foreseeable sequence of events.

[10] Defendant's brief at page 7.

Defendants argue this type of indirect and attenuated harm in relation to false marketing claims has routinely been found by courts in New Jersey to be insufficient to establish causation. They rely upon Camden County Bd. Of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536, 539-41 (3d Cir. 2001), where the court held that claims alleging gun manufacturers released more handguns into the marketplace than they expected to sell to law-abiding purchasers was too attenuated.

Plaintiff avers he need only show Defendants' conduct be a cause which sets off a foreseeable sequence of consequences, unbroken by any superseding cause, and which is a substantial factor in producing the particular injury. Showalter v. Barilari, Inc., 312 N.J. Super. 494, 503 (App. Div. 1998). Plaintiff's Complaint, the factual allegations of which are accepted as true for the purpose of this Motion, avers that Defendants' fraudulent conduct, in an effort to increase the sale of opioids, resulted in a foreseeable increase in costs borne by health insurers and purchasers of health insurance. Plaintiff argues that contrary to Defendants' assertion that the prescribers and addicts were superseding causes, such causes are foreseeable or the normal incidents of the risk created, and such foreseeable causes will not break the chain of causation and relieve a defendant of liability. Komlodi v. Picciano, 217 N.J. 387, 418 (2014).

In support of this assertion, Plaintiff cites several unpublished decisions. Plaintiff also cites to In re: Neurontin Mktg. & Sales Practices Litig., 712 F.3d 60 (1st Cir. 2013). There, the Court found the district court improperly granted summary judgment against third party payors who claimed to have purchased prescriptions for a drug fraudulently marketed by defendant, and held that a reasonable jury could have found plaintiffs' injuries were proximately caused by the actions of defendants. Id. at 67. Since that court found the record regarding plaintiffs' CFA

claims insufficient, the lower court decision was vacated and remanded to the district court to decide remaining questions of state law. Id. at 70-71.

Plaintiff further contests Defendants' reliance on cases involving federal Racketeer Influenced and Corrupt Organizations Act (RICO) claims, as New Jersey does not have the relatively narrow directness requirements applied by the federal courts under RICO. Desiano v. Warner-Lambert Co., 326 F.3d 339, 349 (2d Cir. 2003). Relying upon James v. Arms Tech., Inc., Plaintiff argues that the same reasoning for the Appellate Division's rejection of the defendants' proximate-cause arguments applies here. 359 N.J. Super. 291, 319 (App. Div. 2003) ("[A]ccepting the truthfulness of the City's pleadings, it does not seem 'highly extraordinary' that defendants' alleged purposeful or negligent 'feeding' of guns to an illegal secondary gun market through their manufacturing, advertising and distribution scheme would yield the criminal use of the firearms in Newark, and result in substantial harm to the City itself."). Plaintiff argues defendants are not tobacco companies, who have no connection to third-party payors or health insurance purchasers, but rather intended to, and did, deceive the medical community so insurers and purchasers would pay for opioids. See Perry v. Am. Tobacco, Co., 324 F.3d 845, 847 (6th Cir. 2003).

Plaintiff also argues that the court is not required to inquire into the specifics of each physician-patient relationship, but rather can recognize the existence of aggregate evidence that is sufficient to prove wrongdoing on the part of a drug manufacturer alleged to have undertaken comparable deceptive marketing efforts, citing In re Nuerontin Mktg. & Sales Practices Litig., 712 F.3d at 46. Plaintiff further asserts that since proximate cause is a question for the jury, it is unsuited for resolution on a motion to dismiss.

Plaintiff is correct that generally proximate cause is "peculiarly within the competence of a jury." Anderson v. Sammy Red and Assoc's, 278 N.J. Super. 50, 56 (App. Div. 1994) (citing Hambright v. Yglesias, 200 N.J. Super. 392, 396 (App. Div. 1985)). However, other courts have found that it is prudent for the court to determine proximate cause in similar cases at this stage of the litigation. See Southeast Laborers Health & Welfare Fund v. Bayer Corp., 655 F. Supp. 2d 1270 (S.D. Fla. 2009) (dismissing Plaintiff's complaint on a motion to dismiss).

Proximate cause is "any cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the result complained of and without with the result would not have occurred." Vuocolo v. Diamond Shamrock Chems. Co., 240 N.J. Super. 289, 294 (App. Div. 1990) (quoting Fernandez v. Baruch, 96 N.J. Super. 125, 140 (App. Div. 1967), rev'd on other grounds, 52 N.J. 127 (1968)). It includes situations where an actor's conduct is a substantial factor in bringing about harm to another. Ibid. (citing Restatement (Second) of Torts §431 at 428 (1965)). "A proximate cause need not be the sole cause of harm. It suffices if it is a substantial contributing factor to the harm suffered." Perez v. Wyeth Labs, Inc., 161 N.J. 1, 27 (1999). Thus, the existence of multiple links between defendants' conduct and the ultimate harm suffered by the plaintiff does not necessary mean proximate cause cannot be established. James v. Arms Tech., Inc., 359 N.J. Super. 291, 311 (App. Div. 2003).

The New Jersey Supreme Court explained that "our CFA does not require proof that a consumer has actually relied on a prohibited act in order to recover. In place of the traditional reliance element of fraud and misrepresentation, we have required that plaintiffs demonstrate that they have sustained an ascertainable loss." Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co. In., 192 N.J. 372, 391 (2007). Accordingly, this court will apply the less stringent proximate causation requirement under the CFA.

This is only the first step. It is not enough to show a fraud on the marketplace. "To the extent that plaintiff seeks to prove only that the price charged for [a drug] was higher than it should have been as a result of defendant's fraudulent marketing campaign, and seeks thereby to be relieved of the usual requirement that plaintiff prove an ascertainable loss, the theory must fail." Operating Eng'rs Local No. 68 Welfare Fund, 192 N.J. at 392; see also N.J. Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 16 (App. Div. 2003) (allowing a fraud on the market theory to satisfy the mandatory element of an ascertainable loss would "virtually eliminate the requirement that there be a connection between the misdeed complained of and the loss suffered [which would] ... fundamentally alter the concept of causation in the CFA context."); Southeast Laborers Health & Welfare Fund v. Bayer Corp., 655 F. Supp. 2d 1270 (S.D. Fla. 2009) (finding that plaintiff's complaint, which alleged defendant drug marketers deceptively marketed a drug causing plaintiff to pay more than necessary for the drug, asserted an impermissible fraud on the market theory).

Plaintiff cannot establish an ascertainable loss through statistical data as proposed. This is essentially a fraud on the market theory which has been rejected as a basis to establish an ascertainable loss in a claim based upon the CFA. The New Jersey Supreme Court in International Union of Operating Engineers Local No. 68 Welfare Fund specifically rejected proof of damages using similar statistical data. 192 N.J. at 391-93. The claim presented here is more attenuated than that rejected by the court in Operating Engineers Local No. 68 Welfare Fund. The Supreme Court there rejected the assertion that statistical data could be utilized to establish that insurers paid increased costs for Vioxx. Here we are one step further removed. Plaintiff's proposal to prove the increased costs of opioids and the costs of addiction treatment through statistical data, and then further establishing its impact on the cost of health insurance

with statistical data, essentially constitutes a fraud on the market theory to prove damages which has been rejected in this state.

But-For Causation

Defendants also assert that Plaintiff's theory of causation is devoid of any allegations of but-for causation. This causation requirement's purpose is to limit the scope of potential liability. Shackil v. Lederle Labs., a Div. of Am. Cyanamid Co., 116 N.J. 155, 162-63 (1989). Conclusory allegations of higher insurance premiums due to Defendants' actions are insufficient. Scheidt v. DRS Techs., Inc., 424 N.J. Super. 188, 205 (App. Div. 2012). In support of this, Defendants point to numerous alleged deficiencies in Plaintiff's complaint, including the failure to identify a single interaction between any Defendant and any prescriber, failure to allege that a specific prescriber relied on false or misleading comments by Defendants in connection with an opioid prescription, or any facts indicating insurance premiums increased because of unnecessary opioid prescriptions paid by plaintiff's insurance company. Defendants assert that Plaintiff fails to identify any specific advertisements he viewed, how he was misled by these advertisements, how these advertisements affected any prescriptions and how these advertisements caused any of the alleged injuries to the class, citing District 1199P Health and Welfare Plan v. Janssen, L.P., 784 F. Supp. 2d 508, 530 (D.N.J. 2011) (dismissing claims under New Jersey law brought by third-party payors for lack of causation).

Plaintiff responds he need only allege that Defendants' actions were a substantial factor in causing Plaintiff's harm, citing Conlkin v. Hannoch Weisman, 145 N.J. 395, 417 (1996) (noting that the substantial factor test, rather than an inquiry into proximate cause, should be employed when there are concurrent causes of harm). Plaintiff's Complaint provides a detailed explanation of the marketing practices used by Defendants and their agents, and alleges how

these false or misleading representations were distributed to persons throughout the state. Further, Plaintiff asserts that there is no requirement that Plaintiff provide specific details of all the alleged misrepresentations, down to specific doctors who relied on the misstatements, because one can reasonably infer from the allegations in the Complaint that Plaintiff would not have reimbursed some prescriptions if Defendants' representatives had not made misrepresentations to physicians.

Defendants also assert that the learned intermediary doctrine constitutes a break in the causal chain. Because licensed physicians are an indispensable part in the attenuated causal chain presented by Plaintiff, they argue Plaintiff's claim necessarily fails. N.J. Citizens Action, 367 N.J. Super. at 14-15. See UFCW Local 1776 v. Eli Lilly & Co., 620 F.3d 121, 135 (2d Cir. 2010) (noting that numerous factors can influence a physicians' decision whether to prescribe a certain drug). Plaintiff responds that the learned intermediary doctrine is inapplicable because if Plaintiff's allegations are accepted as true, Defendants misrepresented the benefits and risks of opioids to the learned intermediaries, preventing them from making an informed decision.

The New Jersey Supreme Court in Perez v. Wyeth Labs, Inc. rejected the learned intermediary doctrine as a bar to a finding of causation in a case involving direct marketing of prescription pharmaceuticals to consumers. 161 N.J. at 21-22. The question presented there was whether the direct marketing to consumers was sufficient to break the chain of causation where a prescription from a physician was required to purchase the medication at issue. Here, the causal chain is far less attenuated. The marketing allegedly conducted by defendants was specifically directed to cause a learned intermediary to prescribe opioids. Because of this, the court finds that the learned intermediary doctrine does not break the causal chain where the pharmaceutical marketing is directed at physicians and health insurers.

Class Certification

Defendants move to dismiss Plaintiff's class allegations for lacking commonality and predominance. Plaintiff responds asserting that a court must be slow to hold that a suit may not proceed as a class action, and that it would be rare that a decision to deny a class action should be made on the face of the complaint, citing Riley v. New Rapids Carpet Ctr., 61 N.J. 218, 225 (1972). R. 4:32-2(a) grants the court the authority to determine whether to certify a class action at an early practicable time.

Plaintiff defines the proposed class as follows:

> All current New Jersey citizens (including natural persons and entities) who purchased health insurance policies in New Jersey from 1996 through the present' and all current New Jersey citizens who paid for any portion of employer-provided health insurance from 1996 through the present. Excluded from the class are: (1) any Judge presiding over this action and members of their families; (2) Defendant, Defendant's subsidiaries, parents and its current, former, purported, and alleged employees, officers, and directors; (3) counsel for Plaintiff and Defendant; (4) persons who properly execute and file a timely request for exclusion from the Class; (5) the legal representatives, successors, or assigns of any such excluded persons; (6) all persons who have previously had claims similar to those herein finally adjudicated or who have released their claims against Defendant; and (7) any person who is not a current New Jersey citizen.

Class actions are governed by R. 4:32-1 and R. 4:32-2. Lee v. Carter-Reed Co., LLC., 203 N.J. 496, 505 (2010). This is a procedure that allows larger groups of claimants with smaller claims to act as one. Id. at 517; see also In re Cadillac V8-6-4 Class Action, 93 N.J. 412, 435 (1983). It permits "claimants to band together." In re Cadillac, 93 N.J. at 424. Essentially, "the class action is a device that allows 'an otherwise vulnerable class' of diverse individuals with small claims access to the courthouse." Lee, 203 N.J at 517 (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 120 (2007). The rule is required to be liberally construed, and the class action

permitted, unless there is a clear showing that it is inappropriate or improper. Id. at 518. Further, when there is a common nucleus of facts linking the defendants with a class member, the class claims may proceed against multiple defendants. United Cons. Fin. Serv. v. Carbo, 410 N.J. Super. 280, 295-96 (App. Div. 2009).

The court agrees with Plaintiff and therefore finds it premature to determine class certification pursuant to R. 4:32-2(a). See In re Cadillac, 93 N.J. at 423.

DECISION

New Jersey courts "have generally found causation to be established for CFA purposes when a plaintiff has demonstrated a direct correlation between the unlawful practice and the loss. They have rejected proofs of causation that were speculative or attenuated." Heyert v. Taddese, 431 N.J. Super. 388, 421 (App. Div. 2013). A "complete lack" of any relationship between the defendant's unlawful conduct and the plaintiff's loss compels a finding of a lack of causation under the CFA. Marrone v. Greer & Polman Constr., Inc., 405 N.J. Super. 288, 296 (App. Div. 2009).

Notably, both parties rely heavily on unpublished cases to support their causation arguments. All of the unpublished cases upon which Plaintiff relies involve a public entity—a state, municipality, or person bringing suit on behalf of such an entity—not a private individual suing drug manufacturers.

While Defendants are correct that a majority of courts in actions similar to Plaintiff's find a lack of causation, the Second Circuit applying New Jersey law held that "[p]laintiffs allege an injury directly to themselves; an injury, moreover, that is unaffected by whether any given patient who ingested [the drug]...became ill." Desiano v. Warner-Lambert Co., 326 F.3d 339, 349 (2d Cir. 2003). The Court emphasized there that plaintiffs' claims did not rely on injuries

sustained by users of the drugs, but rather on the misrepresentation of the drug to plaintiffs which resulted in overpaying to purchase the drug. Id. at 350. That court held that since the insurance companies were direct victims of the fraudulent marketing, their complaint would survive a Rule 12(b)(6) motion. Id. at 351.

The Plaintiff here is not alleging that he, nor those in the potential class, overpaid for opioids or that class members purchased opioids. Plaintiff does not assert any misrepresentations to members of the proposed class by defendants. Rather, Plaintiff's claims are based upon the harm caused by opioids to those who took the medication, some of whom became addicted, for which insurance companies reimbursed medication costs and addiction-related treatment costs, allegedly causing Plaintiff's health insurance premiums to increase. As such, the Second Circuit's reasoning in Desiano is inapplicable in this matter.

Claims asserted by a health and welfare fund against Janssen were rejected as being too remote to permit a finding of causation as a matter of law in District 1199P Health & Welfare Plan v. Janssen, L.P., supra. There, it was asserted that defendants were aware that plaintiff and other third party payors would bear the cost of off-label prescriptions for the medication Risperdal. It was alleged that defendants illegally marketed off-label use of the medication which costs substantially more than other medications which were available to treat similar conditions. The court rejected this claim in part on the basis that the independent judgment of the prescribing physician could have been influenced by many other factors when deciding to prescribe a certain medication, explaining:

> "[e]stablishing that Plaintiffs' injuries were caused by Defendants' misconduct would require an inquiry into the specifics of each doctor-patient relationship implicated by the lawsuit. In other words, each physician who prescribed [Risperdal] . . . would have to be questioned as to whether his or her independent medical judgment

was influenced by Defendants' misrepresentations, and to what extent."

784 F. Supp. 2d at 524 (quoting Ironworkers Local Union No. 68 v. AstraZeneca Pharms., L.P., 585 F. Supp. 2d 1339, 1344 (M.D. FL. 2008).

This case is most similar to, although one step further removed from, third party payor actions which have been routinely dismissed by courts as failing to establish sufficient causation. See, e.g., In re Schering-Plough Corp. Intron/Temedor Consumer Class Action, 678 F.3d 235 (3d Cir. 2012) (plaintiffs were third party payors and individual consumers who paid for prescriptions for drugs for off-label uses); Southwest Laborers Health & Welfare Fund v. Bayer Corp., 655 F.Supp. 2d 1270 (S.D.Fla 2009) (class was composed of private entities that reimbursed and/or paid for an off-brand use of a drug). Plaintiff's Complaint in the instant case does not name a single physician who was caused by Defendants' misinformation campaign to unwittingly prescribe opioids. Nor does the Complaint detail a single instance where Plaintiff's insurer reimbursed opioid-related costs, and due to those costs decided to raise insurance premiums for New Jersey insureds. Curing this deficiency would still not be sufficient to establish causation.

The unreported cases relied upon by Plaintiff allege much more direct harms to public entities, such as payment for non-reimbursable off-brand uses for prescription drugs. In such cases, the public entity could identify the amount it reimbursed for such prescriptions. Plaintiff here cannot aver what percentage or what amount his insurance premiums were raised due to opioids. Other than bare assertions, Plaintiff provides no information linking any hike in insurance premiums to the conduct of Defendants.

An insurance payor does possess standing to sue a drug manufacturer for their misrepresentations when it results in the insurance company's payment of inflated prices for a

drug, or where low price generic alternatives are available. In re Warfarin Sodium Antitrust Litigation, 391 F.3d 516, 531 (3d Cir. 2004). Plaintiff readily acknowledged at oral argument that no evidence of such direct correlation exists. Rather, Plaintiff explained that he intends to rely upon statistical data to estimate the likely percentage of prescriptions that were legitimate as opposed to illegitimate, along with the increased cost of opioid addiction treatment resulting from such improper marketing. Plaintiff then intends, through the same statistical data, to calculate what increase in health insurance premiums occurred as a result of these increased costs, but does not offer an adequate explanation with respect to how such calculations could be made.

The CFA, while not requiring proof of actual reliance upon a prohibited act, does require that the Plaintiff establish that he has sustained an ascertainable loss. International Union of Operating Engineers Local No. 68 Welfare Fund vs. Merck & Company, Inc., 192 N.J. 372, 392-93 (2007). Plaintiff's theory to establish damages is essentially a fraud on the market theory utilized in federal securities fraud litigation. The court in International Union of Operating Engineers Local No. 68 Welfare Fund vs. Merck & Company, Inc., supra, specifically rejected the argument that Plaintiff should be relieved of the requirement to establish an ascertainable loss by proving only that the price was higher as a result of Defendant's conduct and fraudulent marketing campaign. Ibid.; New Jersey Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 16 (App. Div. 2003). As the New Jersey Citizen Action court explained, allowing such a theory would "virtually eliminate the requirement that there be a connection between the misdeed complained of and the loss suffered". 367 N.J. Super. at 15-16.

Even accepting all of the allegations in Plaintiffs complaint as true, the Court finds the following links of causation separate Defendants' actions from Plaintiff's alleged injury:

1. Defendants manufactured opioids and engaged in a deceptive marketing campaign targeting prescribers and patients and further manufactured far more pills than reasonably anticipated for legal use;
2. Doctors prescribed opioids as a result of Defendants deceptive marketing campaign and not due to the needs of the patient;
3. The patient's use of opioids resulted in the patient misusing, abusing and/or becoming addicted to opioids;
4. Plaintiff's insurer reimbursed the patient for the initial prescription and/or for subsequent addiction-related costs; and
5. Plaintiff's insurer increased premiums for New Jersey residents due to opioid-related costs resulting from improper prescribing or addiction treatment related to opioid pill use or abuse.

In reality, to say that insurance premiums increased, and to calculate how much of the increase was due to the opioid crisis is not only inherently problematic, but highly impracticable. See Ironworkers Local Union No. 68, 585 F. Supp. 2d at 1344 ("Establishing that Plaintiffs' injuries were caused by Defendants' misconduct would require an inquiry into the specifics of each doctor-patient relationship implicated by the lawsuit."); United Food & Commercial Workers Unions, Employers Health & Welfare Fund v. Philip Morris, Inc., 223 F.3d 1271 (11th Cir. 2000) (holding that the increased cost of medical care caused by years of smoking was far too attenuated from the manufacturer's alleged fraud to establish proximate cause). Plaintiff can point to no method that would allow a fact finder without individualized proof to distinguish between addiction treatment related to the improper prescribing of opioids as opposed to other causes for such treatment.

There are a myriad of reasons, independent of the opioid epidemic, which have an impact on insurance costs. Some costs may be borne by insurers resulting in lower profits, some may be paid by employers and some may be passed on to the purchasers of health insurance. These costs may also be subject to higher co-pays, deductibles or limitations of coverage. Plaintiff's argument that statistical data can be used to determine what increases were the direct cause of Defendants' actions, and what increases are attributable to other factors, is inadequate to establish the facts required. See McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 226 (2d Cir. 2008). Plaintiff's claim fails because the issue of causation cannot be established by statistical data to show an ascertainable loss resulting from an increase in market demand and addiction treatment. The claim here requires individualized proof, as multiple factors could have led to an increase in the cost of health insurance or the need for addiction treatment.

CONCLUSION

The allegations of the complaint sufficiently allege facts to support Plaintiff's claim of the complicity of Defendants in creating and perpetuating the opioid crisis. The court concludes that while Defendants should be held responsible for such conduct if established, this particular Plaintiff and this particular proposed class are simply not the appropriate vehicle to vindicate the rights of those who have been impacted by the alleged conduct of Defendants. The alleged harm to Plaintiff is far too attenuated and remote. This deficiency cannot be cured by amending the Complaint. For the reasons set forth herein, the motion to dismiss will be granted, and Plaintiff's Complaint will be dismissed, with prejudice.