Plaintiffs Pick Your Poison

Curtailing CFA Claims Premised on Traditional Product Liability Risks

by Neal Walters and Michael Carroll

Consumer fraud class action lawsuits seeking only economic damages frequently are based on allegations about the risks of harm from a product. For example, purchasers of baby products file suit seeking only recovery of the purchase price, but they base their claim on allegations regarding the allegedly toxic contents of the products.

A prevailing trend of recent cases in New Jersey federal and state courts, however, has recognized that plaintiffs cannot have it both ways. As will be explained, plaintiffs can either acknowledge when their claims are fundamentally related to the risk of harm from a product and bring a traditional products liability claim, in which case they have all but conceded the ability to pursue a class action, or they can continue to assert class claims seeking only economic loss, in which case they run the risk of having their case dismissed as subsumed by the New Jersey Products Liability Act (PLA).[1]

THE PLA AND THE COMMON LAW

The New Jersey Legislature more than 20 years ago passed the PLA in order to streamline into "one, statutorily defined theory of recovery" all claims for harm caused by a product.[2] The Legislature intended for the PLA "to limit the liability of manufacturers so as to balance the interests of the public and the individual with a view towards economic reality." The act defines a product liability action as "any claim brought by a claimant for harm caused by a product, irrespective of the theory underlying the claim."

It wasn't long after the passage of the PLA that New Jersey courts rightly began dismissing common law claims for alleged products liability injuries, including strict liability, negligence, fraud and conspiracy.[3] This line of cases culminated in the seminal 2007 New Jersey Supreme Court decision, *In re Lead Paint Litigation*.[4] The local government plaintiffs in that case sued manufacturers and distributors of lead paint under a host of legal theories, including the tort of public nuisance. Reviewing the Products Liability Act, the Court summarized that "[t]he language chosen by the Legislature in enacting the PLA is both expansive and inclusive, encompassing virtually all possible causes of action relating to harms caused by consumer and other products." As the "central focus" of the plaintiffs' claims was the defendant manufacturers' awareness—and subsequent failure to warn—of the dangers of lead paint, the New Jersey Supreme Court found that, regardless of the relief sought, the plaintiffs' only recourse was the PLA.

THE CFA MEETS THE PLA

A more difficult question, however, was how the PLA would interact with other statutory rights of recovery, most notably the New Jersey Consumer Fraud Act (CFA).[5] Indeed, as recently as 2006, the Third Circuit Court of Appeals acknowledged "[t]he dearth of authority in New Jersey on how the CFA and the PLA relate to one another."[6]

The CFA historically has been given expansive and liberal application by New Jersey courts. Moreover, plaintiffs' attorneys frequently have utilized the CFA because of its attractive treble damages and attorneys' fees provisions. The CFA has also been recognized as a more suitable basis than the PLA for class certification as the PLA necessarily raises predominant individual causation determinations.

To avoid those individual issues, plaintiffs' lawyers often attempt to argue that an entire class has suffered either a diminution in the value of their products as a result of a defect or from purchasing a product they otherwise would not have purchased. Such claims of strictly economic loss, plaintiffs contend, are amenable to class treatment.

Despite this strategic limitation of their legal claim to economic loss, however, plaintiffs often seek to make their claims more attractive by predicating them upon more serious allegations of physical harm. Indeed, the physical harm evidence may be unavoidable in CFA

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claims where, for example, to show a causal relationship between the misrepresentation and the ascertainable loss, plaintiffs contend they would not have bought the product if they had known about its alleged health risks.

New Jersey courts began to specifically curtail this practice in May 2008, when the Appellate Division, in *McDarby v. Merck & Co., Inc.*,[7] relied on *Lead Paint* to find that the plaintiff's CFA claim, seeking economic loss damages in a pharmaceutical personal injury action, was subsumed by the PLA. The court found that "at its core," the plaintiffs' claims were that Merck had failed to warn them about the dangers of a product. In setting aside the plaintiff's CFA verdict, the Appellate Division noted that "to permit such an expanded form of relief would be to destroy the balance established between the interests of the manufacturers, the public and individuals" by the Legislature's enactment of the PLA.

Significantly, the features of the CFA that make it so attractive to plaintiffs' attorneys are exactly the features the court found would destroy that delicate balance. The court rightly identified that to allow the CFA claim to survive would essentially allow the recovery of treble damages and attorneys' fees in PLA cases despite that the Legislature had included no such rights of recovery in the act.

One month after *McDarby*, the New Jersey Supreme Court reached the same conclusion in another Merck matter, *Sinclair, et al. v. Merck & Co., Inc.*[8] In that class action suit, the plaintiffs sought medical monitoring and consumer fraud damages following their use of a Merck product. As did the Appellate Division, the Supreme Court found that "[t]he language of the PLA represents a clear legislative intent that, despite the broad reach we give to the CFA, the PLA is paramount when the underlying claim is one for harm caused by a product." Specifically, the Court noted that "[t]he heart of plaintiffs' case is the potential for harm caused by Merck's drug. It is obviously a product liability claim. Plaintiffs' CFA claim does not fall within an exception to the PLA, but rather clearly falls within its scope."

Additionally, despite the plaintiffs' questionable arguments to the contrary, the Court acknowledged that the PLA requires a physical injury before any right to relief arises. As the medical monitoring class of plaintiffs had not suffered any such injury, they could not sustain a claim.

In a 2008 *New Jersey Law Journal* article following this landmark opinion, Beth Rose and Stuart Feinblatt identified a number of open questions regarding how this opinion would be applied, including whether a plaintiff could end-run this new precedent by choosing not to assert a products liability claim and instead seeking only economic damages under the CFA.[9] Two years later, these questions have been answered substantially in favor of defendants.

Ironically, the reasoning behind the post-*Sinclair* dismissals of non-PLA claims is perhaps best summarized by the district of New Jersey's opinion in *New Hope Pipe Linders, LLC v. Composites One, LLC*,[10] a case in which the court allowed the plaintiff's claim to survive.

The plaintiff in *New Hope* filed suit over misrepresentations regarding whether a certain resin used in pipe lining was suitable for a particular task. The court reviewed longstanding New Jersey precedent regarding proper interpretation of the PLA and accurately summarized that New Jersey courts "tend to look at the essence of the claims and decide whether or not the plaintiff is disguising what would traditionally be considered a products liability claim as an alternative cause of action." In short, "if the facts of a case suggest that the claim is about defective manufacture, flawed product design, or failure to give an adequate warning, then the PLA governs and the other claims are subsumed." Thus courts must look past the pleadings to determine the "essential nature" of the underlying allegations. This analysis is no different for CFA claims.

As with *McDarby*, a CFA claim is more easily disposed of when plaintiffs simultaneously pursue damages under the PLA. In *Fellner v. Tri-Union Seafoods, L.L.C.*,[11] for example, the plaintiff sued under both statutes alleging the defendant failed to warn about the harms associated with the mercury contained in its tuna products. The New Jersey District Court, relying on *Sinclair*, held that "the fact that Plaintiff, here, seeks economic damages to reimburse her for the cost of the product (in addition to personal injury damages) does not change the fact that this is, in essence, a product liabilities claim." The plaintiff's CFA claim was thus subsumed by the PLA.

As Rose and Feinblatt raised, however, what happens when a plaintiff purposefully excludes a PLA claim and seeks only economic relief under the CFA? This tactic is particularly attractive to class action plaintiffs' attorneys because it provides for treble damages and attorneys' fees while alleviating somewhat the predominant individual issues that attend a PLA personal injury claim.

As it turns out, however, the courts have not been distracted. Following *Sinclair*, courts have dismissed numerous CFA claims based on the fact that these claims are subsumed by the PLA, ***even where the plaintiffs have specifically limited their claims to economic damages under the CFA***. In *O'Donnell v. Kraft Foods, Inc.*,[12] the district of New Jersey dismissed a CFA-only class action complaint regarding the cancer risks of certain processed meat products. Despite the plaintiffs' objection that they had limited their claim to solely economic loss under the CFA (*i.e.*, the cost of the meat), the court, relying on *Sinclair*, held that the plain-

tiffs' claim fell squarely within the scope of the PLA. The court found that the attempt to cast the claim as an economic-damages-only CFA claim could not alter the appropriate analysis: "their theory that they are entitled to recovery of their purchase price for the hot dogs depends upon Defendants' alleged failure to warn of their increased risk of cancer, a failure of 'adequate warnings or instructions' covered by the PLA."

Similarly, in a recent series of class action cases involving the allegedly "toxic" nature of various children's products, Judge Dennis Cavanaugh of the district of New Jersey dismissed all of the CFA (and common law) claims as subsumed by the PLA.[13] The plaintiffs in those cases specifically argued that "while the PLA covers and subsumes causes of action involving physical harms caused by a product, the [CFA] and other remedies remain available when the plaintiffs only claim economic injuries involving the product."

The court was not convinced. Relying predominantly on *Sinclair*, the court found that where the "core issue is the potential injury" from a product, "[l]imiting a claim to economic injury and the remedy sought to economic loss cannot be used to obviate the PLA." As plaintiffs had not actually suffered any physical harm—as defined in and required by the PLA—and because the PLA was their sole source of relief, the court found that "[p]laintiff's claims cannot survive."

In the most recent state court example, Judge Jamie Happas of the New Jersey Superior Court dismissed a class action complaint against Denny's, Inc. alleging that Denny's violated the CFA by "deceptively presenting" menu items without disclosing the "excessive amount of sodium" in the meals.[14] The complaint specifically disavowed any personal injury and sought only economic damages in the form of money paid for meals.

Following a review of *Lead Paint*, *McDarby*, and *Sinclair*, the court found that, despite the plaintiff's attempt to confine class certification to economic damages, "the core of [plaintiff's] allegations is that Denny's has misrepresented the safety of its products by failing to warn plaintiff of its dangers." Accordingly, the plaintiff's "exclusive remedy is the PLA."

Following the increasingly well-developed theme of CFA dismissals in products cases, Judge Happas stated that "the label plaintiff gives to the cause of action does not control whether it is subsumed by the PLA." The plaintiff failed to articulate any other reason than health concerns for avoiding excessive sodium intake.

Finally, and most recently, in June 2010, the district of New Jersey reversed its own prior ruling in dismissing class action claims based on the potential harm of tanning bed UV rays. In *Nafar v. Hollywood Tanning Systems, Inc.*,[15] the plaintiffs alleged they did not receive certain advertised benefits from the tanning beds but also that the defendant misrepresented the risks of harm from UV rays. The plaintiffs specifically disclaimed any personal harm and limited their claims to economic loss based on fraud.

The court originally certified an economic loss class in 2006, prior to the New Jersey decisions in *Lead Paint, Sinclair* and *McDarby*. Following a remand from the Third Circuit (on unrelated issues), the court found that those recent New Jersey opinions constituted "extraordinary circumstances" requiring reconsideration of what would otherwise be the law of the case. The court went on to find the plaintiffs' CFA claims based on a "failure to warn" about the UV risks were now subsumed by the PLA and would be dismissed. The court left open the possibility that plaintiff's CFA claims not premised on a failure to warn could proceed.

EXPLICIT EXCEPTIONS TO THE RULE

To be clear, not all products cases under New Jersey law will result in the subsumption of plaintiffs' non-PLA claims. Specifically, when the plaintiff pursues a claim for damages *specifically excluded* from the PLA, those claims may survive. For instance, in *Shannon v. Howmedica*,[16] the plaintiff sued for injuries sustained when a tibial insert placed into his knee prematurely failed. The complaint included a claim for the cost of replacement of the insert and related expenses.

Because the PLA's definition of "harm" specifically excludes physical harm to the product itself, the plaintiff's CFA claim was permitted to proceed in conjunction with his products claims. The court did concede that if, after discovery, it was clear that all of the damages sought were covered by the PLA, summary judgment might be granted based on subsumption, but the court was not willing to decide this question on a motion to dismiss.

Similarly, in *In re Ford Motor Co. E-350 Van Products Litigation*,[17] the plaintiffs alleged that Ford's vans were defectively designed, leading to an unusually high rollover rate. The complaint included a breach of express warranty claim. Unlike implied warranty claims, damages under express warranties are also excluded by the PLA, and thus express warranty claims can proceed simultaneously with the PLA claims. It should be noted, however, that the cause of action for breach of express warranty is prescriptive and not amendable to class certification.

In addition to cases involving explicit statutory exceptions, other cases may involve claims that, in fact, are not traditional products claims (*i.e.*, not related to harm caused by a product). In the *New Hope* case, for example, the plaintiff's claim was not based on a defective design or manufacture, or on any failure to warn. Additionally, the essence of the claim had nothing to do with any potential for physical harm. The claim, rather, was that the defendant had misrepresented that the product was suit-

able for a specific task. The district court concluded that this kind of "representation-based claim," like express warranty, could proceed under non-PLA causes of action, including the CFA.

WHAT DOES IT ALL MEAN?

The critical question, then, for companies defending consumer fraud class actions involving product or warnings defect allegations, is whether, "at its core," any given plaintiff's claim relates to a risk of harm from the product. In the Denny's matter, the plaintiff asserted a CFA claim because, he alleged, he would not have purchased meals at Denny's if they had disclosed the sodium content. Why? The only answer was related to the health risks of sodium, or, stated alternatively, a risk of harm from the product. In the series of baby products cases, plaintiffs based their CFA claims on the fact that the products they purchased were rendered useless. Why? Because of the alleged presence of "toxic chemicals linked to increased cancer risk," and thus a risk of harm from the defendants' products.

In addition to seeking dismissal of PLA claims improperly disguised as CFA claims, class action litigants should also be mindful of the evidentiary implications of these cases. If plaintiffs' CFA claims are successful in surviving early motion practice by specifically avoiding traditional products liability claims—warranty actions are a perfect example—defendants should consider the usefulness of this line of cases in preventing the all-too-common attempts of plaintiff's counsel to later present evidence that the defendant's defective product poses a safety risk to consumers. Just as plaintiffs' pleadings are not permitted to avoid the authority of the PLA when "the essence" of the claim is related to potential harm, plaintiffs should not later in the case be permitted to end-run this prohibition in their factual proofs.

And so New Jersey plaintiffs are increasingly tasked with an unenviable choice when filing suit over a defective product. They can acknowledge when their claims are fundamentally related to the risk of harm from that product and bring a PLA claim, in which case they are unlikely to ever certify a class, or they can continue to attempt to assert such claims as economic loss claims in which case they run the risk of dismissal based on PLA subsumption. Defendants, on the other hand, should continue to explore opportunities to use this recent and growing authority to draw clearer lines between true economic damages claims and their related proofs and those that are unavoidably related to alleged risks of harm from a product. ■

ENDNOTES

1. N.J.S.A. 2A:58C-1, *et seq.*
2. William A. Dreier, *et al.*, *New Jersey Products Liability & Toxic Torts Law* § 1:2-1 (2007).
3. *See Brown v. Philip Morris Inc.*, 228 F.Supp.2d 506, 516 (D.N.J. 2002).
4. 191 N.J. 405 (2007).
5. N.J.S.A. 56:8-1, *et seq.*
6. *Knoster v. Ford Motor Co.*, 2006 WL 2561234 (3d Cir. Sept. 6, 2006).
7. 401 N.J. Super. 10 (App. Div. 2008).
8. 195 N.J. 51 (2008).
9. 194 *N.J.L.J.* 931 (December 2008).
10. 2009 WL 4282644 (D.N.J. Nov. 30, 2009).
11. 2010 WL 1490927 (D.N.J. April 13, 2010).
12. 2010 WL 1050139 (D.N.J. March 18, 2010).
13. *See Levinson v. Johnson & Johnson Consumer Companies, Inc., et al.*, 2010 WL 421091 (D.N.J. Feb. 1, 2010); *Vercellono v. Gerber Products Co., et al.*, 2010 WL 455388 (D.N.J. Feb. 3, 2010), *Crouch v. Johnson & Johnson Consumer Companies, Inc., et al.*, 2010 WL 1530152 (D.N.J. April 15, 2010); *Boyd v. Johnson & Johnson Consumer Companies, Inc., et al.*, 2010 WL 2265317 (D.N.J. May 31, 2010).
14. *DeBenedetto v. Denny's, Inc.,* Docket No. MID-L-6259-09 (Law Div. 2010).
15. Civil No. 06-CV-3826 (D.N.J. June 30, 2010).
16. 2010 WL 1492857 (D.N.J. April 24, 2010).
17. 2008 WL 4126264 (D.N.J. Sept. 2, 2008).

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