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Client Alert Product Liability Law

New Jersey Supreme Court Opens The Door For Plaintiffs To Pursue Traditional Product Liability Claims Under New Jersey's Consumer Fraud Act

In a surprising decision that opens the door for plaintiffs to pursue traditional product liability claims under either New Jersey's Consumer Fraud Act ("CFA") alone, or simultaneously under New Jersey's Product Liability Act ("PLA"), the New Jersey Supreme Court in *Sun Chemical Corp. v. Fike Corp.*, A-89, 2020 WL 4342658 (N.J. July 29, 2020) held that, "irrespective of the nature of the damages sought, a CFA claim alleging express misrepresentations – deceptive, fraudulent, misleading, and other unconscionable commercial practices – may be brought in the same action as a PLA claim premised upon product manufacturing, warning, or design defects." *Id*. at *4. In so holding, the *Sun Chemical* Court concluded that the "nature of the claims brought, and not the nature of the damages sought" will be "dispositive of whether the PLA precludes the separate causes of action" and that the "PLA will not bar a CFA claim alleging express or affirmative misrepresentations." *Id*. Based on this decision, many product manufacturers will now be faced with CFA claims along with, or instead of, traditional product liability claims under the PLA. This will subject them to not only actual damages, but also the possibility of treble damages, attorneys' fees and costs, which are available under the CFA.

A. Background

Plaintiff Sun Chemical Corporation ("Sun") operated an ink manufacturing business and purchased from Defendant Fike Corporation and Suppression Systems Inc. ("Fike") an explosion isolation and suppression system ("Suppression System") that would prevent and contain potential explosions in Sun's dust collection system. *Id*. A fire occurred in the dust collection system, and while the Suppression System's control panel activated, it failed to issue an audible alarm. *Id*. Sun's employees attempted to extinguish the fire, but there was an explosion sending a fireball through the dust collection system's ducts resulting in personal injuries to Sun's employees and property damage to the facility. *Id*.

Sun commenced an action under the CFA in the United States District Court for the District of New Jersey. In its complaint, Sun alleged that Fike made "material oral

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and written misrepresentations about the Suppression System, including: "(1) the Suppression System would prevent explosions; (2) the Suppression System would have an audible alarm; (3) the Suppression System complied with industry standards; and (4) the system had never failed." *Id*. After discovery, the District Court granted Fike's summary judgment motion determining that Sun's claims were governed by the PLA. On appeal, the United States Circuit Court for the Third Circuit certified four questions to the New Jersey Supreme Court[1] and noted that while Sun's claims resembled a product liability action, the CFA "seems potentially hospitable to Sun's argument that 'affirmative misrepresentations can be brought under the CFA . . . even though the damages claimed for those representations involve[] personal injuries to third parties and some property damage.'" *Id*.

B. Sun's Arguments In Favor Of Applying The CFA

Sun presented three arguments on why it should be permitted to pursue a CFA claim. First, although Sun conceded that five percent of its losses – damage to its facility – were the type of "harm" included under the PLA, *N.J.S.A.* 2A:58C-1(b)(2)(a), Sun argued that the PLA did not apply to these losses because they were a result of Fike's misrepresentations, and not alleged to be product defects. *Id*. Second, Sun argued that the cost of the Suppression System did not fall under the PLA because it was an economic loss that was not recoverable under the PLA, but recoverable under the CFA. In particular, the PLA specifically excludes from the definition of "harm" any "physical damage to property, other than to the product itself." *Id*. (citing *N.J.S.A.* 2A:58C-1(b)(2)(a)). Third, Sun argued that losses resulting from lost workhours and payment of workers' compensation benefits to injured employees were economic losses and not losses from personal injuries under the PLA, *N.J.S.A.* 2A:58C-1(b)(2)(b) ("personal physical illness, injury or death") or (b)(2)(d) ("any loss of consortium or services or other loss deriving from any type of harm described in subparagraphs (a) through (c) of this paragraph"). *Id*. at *5. Sun, therefore, argued that it should be permitted to pursue damages recoverable under the PLA in one count and also pursue non-PLA damages in a separate count under the CFA. *Id*.

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[1] The Third Circuit posed the following four questions:

(1) When a court decides a CFA claim based on affirmative and material misrepresentation about the features of a product, but the plaintiff is seeking damages for harm caused by the product's failure to conform to those features, what criteria should the court consider to determine whether the claim may proceed as a CFA claim or is subsumed under the PLA?

(2) In determining whether a claim may proceed under the CFA or is subsumed under the PLA, what significance should a court place on a plaintiff's assertion that its harm resulted primarily from physical injury to third parties (like employees) rather than property damage or personal physical injury?

(3) Where a complaint pleads a single CFA claim that asserts multiple harms, some of which fall within the ambit of the PLA, and others which do not, is the entire claim subsumed by the PLA or should the distinct categories of harm be deemed severable claims, some of which would not be subsumed and could instead be pursued under the CFA?

(4) Under the CFA, when can a commercial purchaser of a product recover consequential economic losses -- such as workers' compensation payments, attorneys' fees incurred in litigation, fees incurred in government investigations, and increased labor or production costs -- based on alleged misrepresentations the seller made about the features and capabilities of the product?

C. Fike's Arguments In Favor Of Applying The PLA

Fike argued that the "essential nature" of Sun's claims were product liability claims governed by the PLA, and that Sun could not avoid application of the PLA by pleading only economic damages. *Id*. Fike argued that the cost of the Suppression System was recoverable under the PLA because the Suppression System was not damaged during the explosion or otherwise defective and, therefore, did not fall within the economic loss exception under *N.J.S.A.* 2A:58C-1)b)(2) of the PLA. *Id*. Fike further argued that Sun's alleged losses from injuries to its employees were the type of personal injuries that were governed by *N.J.S.A.* 2A:58C-1(b)(2)(b) and (b)(2)(d) of the PLA.

D. Court's Analysis

The Court considered the following question: "[w]hether 'a Consumer Fraud Act claim [can] be based, in part or exclusively, on a claim that also might be actionable under the Products Liability Act.'" *Id*. at *3. Because there was no authority directly addressing the "interplay between the CFA and PLA," the Court began its analysis by reviewing "pertinent provisions of the CFA and PLA, their purposes, and cases applying them." *Id*. at *5.

1. Purpose And Broad Reach Of The CFA

The CFA prohibits "deceptive, fraudulent, misleading, and other unconscionable commercial practices 'in connection with the sale . . . of any merchandise or real estate.'" *Id*. at *5 (citing *N.J.S.A.* 56:8-2). The CFA broadly defines "merchandise" and the parties did not dispute that the Suppression System fell within this definition. *Id*. The CFA provides consumers with private causes of action to recover for an "ascertainable loss of moneys or property, real or personal," has a long history of "constant expansion of consumer protection," and is broadly applied. *Id*. at *6 (citations omitted). The CFA's "rights, remedies, and prohibitions" are "in addition to and cumulative of any other right, remedy, or prohibition accorded by the common law or statutes of this State." *Id*. (citations omitted). The CFA also enables private plaintiffs to recover "treble damages, reasonable attorneys' fees and costs and 'any other appropriate legal or equitable relief.'" *Id*. (citations omitted).

Against this backdrop, the Court reviewed two CFA cases, *Lemelledo v. Beneficial Management Corp. of America*, 150 N.J. 255 (1997) and *Real v. Radir Wheels, Inc.*, 198 N.J. 511 (2009). In both cases, the Court rejected arguments that the CFA did not apply when other statutes regulating the conduct also existed (consumer loans and Used Car Lemon Law) unless there was a "direct and unavoidable conflict . . . between application of the CFA and application of the other regulatory scheme or schemes." *Id*. at *6-7 (citation omitted).

2. Purpose And Scope Of The PLA

The Court noted that the PLA was a tort-reform statute codifying the common law governing product liability actions and the remedies available for such claims. *Id*. at *7-8. The PLA imposes liability on a product manufacturer or seller for a product's

"manufacturing defects, warning defects, and design defects," with the exception of claims for breach of an express warranty and environmental tort actions. *Id*. at *7 (citations omitted). The Court reviewed two prior decisions, *In re Lead Paint Litigation*, 191 N.J. 405 (2007) and *Sinclair v. Merck & Co.*, 195 N.J. 51 (2008), which considered the types of claims covered by the PLA. In *In re Lead Paint*, the Court, faced with a nuisance-based complaint, determined that the PLA "subsumed the plaintiffs' common law public nuisance causes of action that were fundamentally PLA claims." *Id*. at *8 (citing *In re Lead Paint Litig.*, 191 N.J. at 436-37. In *Sinclair*, the Court, faced with plaintiffs' attempt to certify a nationwide class action of non-injured persons seeking medical monitoring, held that "plaintiffs' claimed risk of future injury was not cognizable under the PLA because the statute 'require[s] a physical injury," and plaintiffs were only asserting CFA claims to avoid the "harm" requirements of the PLA even though "[t]he heart of [their] case [was] the potential for harm caused by Merck's drug." *Id*. at *8-9 (citations omitted).

3. CFA Claims Are Not Subsumed By The PLA

After reviewing the purpose and history of both the CFA and PLA, the Court noted that the CFA and PLA were "intended to govern different conduct and to provide different remedies for such conduct" and, therefore, there was "no direct and unavoidable conflict" between the statutes. *Id*. at *9. The Court explained that the "PLA governs the legal universe of products liability actions as defined in that Act and the CFA applies to fraud and misrepresentation and provides unique remedies intended to root out such conduct." *Id*. As a result, the Court held:

> If a claim is premised upon a product's manufacturing, warning, or design defect, that claim must be brought under the PLA with damages limited to those available under that statute; CFA claims for the same conduct are precluded. But nothing about the PLA prohibits a claimant from seeking relief under the CFA for deceptive, fraudulent, misleading, and other unconscionable commercial practices in the sale of the product. . . . Said differently, if a claim is based on deceptive, fraudulent, misleading, and other unconscionable commercial practices, it is not covered by the PLA and may be brought as a separate CFA claim.

Id. at *9. Furthermore, the Court noted that "PLA and CFA claims may proceed in separate counts of the same suit, alleging different theories of liability and seeking dissimilar damages." *Id*.

With regard to how a particular claim must be pled, the Court explained that it will depend on "what is at the 'heart of plaintiffs' case' – the underlying theory of liability." *Id*. at *10 (citing *Sinclair*, 195 N.J. at 66). The Court explained that "[i]t is the nature of the action giving rise to a claim that determines how a claim is characterized" and, therefore, "[t]he nature of the plaintiff's damages does not determine whether the cause of action falls under the CFA or PLA; rather it is the theory of liability underlying the claim that determines the recoverable damages." *Id*. at *10-11.

E. Conclusion

Although the New Jersey Supreme Court had not previously addressed the specific question presented – "whether tort-based claims that can be pled under the PLA can also – or instead – be pled under the CFA," *id*. at *9, many New Jersey courts previously have held that CFA claims were subsumed by the PLA where the claims involved harms alleged to have been caused by consumer and other products. *See Sinclair v. Merck & Co.*, 195 N.J. at 66 (2008) ("the 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. Consequently, plaintiffs may not maintain a CFA claim."); *In re Lead Paint Litig.*, 191 N.J. at 436-37 (the PLA "encompass[es] virtually all possible causes of action relating to harms caused by consumer and other products"); *McDarby v. Merck & Co.*, 401 N.J. Super. 10, 98 (App. Div.), *certif. den.*, 196 N.J. 597 (2008) ("[W]e find no basis, in legislative history, statutory language or Court decisions, to conclude that plaintiffs can maintain separate causes of action under the PLA and the CFA in this case. . . . [T]o permit such an expanded form of relief would be to destroy the balance established between the interests of manufacturers, the public and individuals established by the Legislature in enacting the PLA by introducing an otherwise unavailable treble-damage remedy for harms resulting from a failure to warn . . . .").

With the *Sun Chemical* decision, many plaintiffs are likely to assert product liability claims under the CFA and/or the PLA because the CFA affords plaintiffs with the ability to recover treble damages, attorneys' fees and costs, which are not available under the PLA. What have been traditional failure to warn claims will undoubtedly be recast as CFA claims as a "misrepresentation or the knowing[] concealment, suppression or omission of any material fact." *See N.J.S.A.* § 56:8-2. It remains to be seen whether plaintiffs will be able to sustain failure to warn and other product liability claims under the CFA, but it seems clear that the *Sun Chemical* Court has opened the door, if not the flood gates, to a new wave of CFA claims being asserted against product manufacturers in cases that have been traditionally governed solely by the PLA.

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