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Product Liability & Toxic Torts

Product Liability Actions and The Consumer Fraud Act: Living Together in Disharmony

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Two years ago, the New Jersey Supreme Court made it clear that in cases where plaintiff alleged injuries from a product, the New Jersey Product Liability Act ("PLA") subsumed all other common-law and statutory claims, including claims under the New Jersey Consumer Fraud Act ("CFA"). In 2010, there has been a flurry of decisions analyzing the circumstances under which the PLA precludes plaintiffs from pursuing a claim under the CFA. With the exception noted below, these decisions have followed established precedent concluding that the CFA claims are subsumed by the PLA when the "essential nature" of plaintiff's claim is akin to a product liability action.

In three separate decisions decided in 2007 and 2008, the New Jersey Supreme Court and Appellate Division squarely held that PLA provides the exclusive remedy for plaintiffs alleging that a product was potentially harmful. In *In re Lead Paint Litig.*, 191 N.J. 405 (2007), plaintiffs sued lead paint manufacturers under a nuisance theory of liability alleging that their products posed a risk of physical harm. The New Jersey Supreme Court held that the "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." Accordingly, the Court dismissed plaintiffs' nuisance claim holding that it was subsumed by the PLA.

A year later, in *Sinclair v. Merck & Co., Inc.*, 195 N.J. 51 (2008), plaintiffs asserted claims under the PLA and the CFA against the manufacturer of Vioxx, alleging that the product increased their risk of suffering a cardiovascular event. In deciding that the PLA subsumed plaintiffs' CFA claim, the Court held:

> The 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. 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.

See also *McDarby v. Merck & Co., Inc.*, 401 N.J. Super. 10 (App. Div.), certif. granted on other grounds, 196 N.J. 597 (2008) (holding that plaintiff's CFA claim was subsumed by the PLA where plaintiff, who allegedly suffered a heart attack as a result of his ingestion of Vioxx, asserted a PLA claim for his physical injuries and a CFA claim to recover the purchase price he paid for the Vioxx).

Since *Lead Paint, Sinclair* and *McDarby* were decided, New Jersey state and federal trial courts have addressed this issue in cases involving FDA-regulated products, although sometimes

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reaching incongruous results. For the most part, however, the courts have closely followed precedent and dismissed CFA claims where the essential nature of plaintiff's claim is that he or she was injured, or at least faced potential physical harm, as a result of alleged defects in the product or its warnings.

In *Fellner v. Tri-Union Seafoods, L.L.C.*, 2010 WL 1490927 (D.N.J. Apr. 13, 2010), plaintiff brought both a PLA and CFA claim alleging that the defendant failed to warn about the harms associated with mercury levels in its tuna products. Plaintiff's complaint asserted a PLA claim based on the physical and emotional injuries she allegedly suffered due to mercury poisoning, but also asserted a CFA claim seeking economic damages related to her purchase of the defendant's products. Even though the court found that plaintiff was asserting claims for two distinct harms, the court dismissed plaintiff's CFA claim because it was subsumed by the PLA. The court found that the heart of plaintiff's claim was that the defendant failed to warn about a product's potential adverse effects, and, therefore, fell squarely within the PLA.

Although presented with a very different factual scenario, the New Jersey Superior Court reached a similar result in *DeBenedetto v. Denny's, Inc.*, Docket No. MID-L-6259-09 (Law Div. Apr. 23, 2010). In *DeBenedetto*, plaintiff asserted a CFA claim premised on allegations that Denny's food contained unhealthy amounts of sodium, and that the restaurant's menu deceptively disclosed the amount of sodium in the food. Plaintiff's second amended complaint expressly disclaimed any recovery for personal injuries, and limited damages to the purchase price plaintiffs paid for Denny's meals. Notwithstanding that plaintiff had not asserted a product liability claim, the court dismissed plaintiff's CFA claim, finding that it was subsumed by the PLA. The court explained that at its core, plaintiff's Complaint fell within the PLA because it alleged that the defendant "misrepresented the safety of its products by failing to warn plaintiff of its dangers."

In *Nafar v. Hollywood Tanning Systems, Inc.*, 2010 WL 2674482 (D.N.J. Jun. 30, 2010), however, the United States District Court took a slightly more restrictive view of *Lead Paint, Sinclair* and *McDarby*. In *Nafar*, plaintiffs brought a CFA claim against the franchisor of a chain of tanning salons, alleging that it exaggerated the benefits of indoor tanning through its website and sales representatives, and failed to warn about the potential cancer risks associated with its tanning systems. Plaintiffs' class-action complaint only sought economic damages related to the purchase of the defendant's tanning services and disclaimed any personal injury claims.

Although the court denied the defendant's initial motion to dismiss in 2007, the defendant renewed its motion to dismiss the CFA claim in light of the new decisions rendered in *Lead Paint, Sinclair* and *McDarby*. In light of these new decisions, the court held that to the extent that plaintiffs' CFA claim was based on a failure to warn or disclose the risks of indoor tanning, plaintiffs' CFA claim was subsumed by the PLA. The court explained that under *Lead Paint* and its progeny, the PLA subsumes CFA claims that are premised on allegations that the product contained inadequate warnings and could potentially cause physical harm. On the other hand, the court held that to the extent that plaintiffs' CFA claims were premised on affirmative misrepresentations made on the defendant's website or by its employees, such a claim was not a traditional product liability claim and therefore, could potentially proceed under the CFA.

The only case we are aware of that departed from the clear holdings in *Lead Paint, Sinclair* and *McDarby* is *Shannon v. Howmedica Osteonics Corp.*, 2010 WL 1492857 (D.N.J. Apr. 14, 2010). In *Shannon*, plaintiff alleged that he suffered extreme bone loss as a result of a tibial insert that plaintiff alleged was defectively packaged, sterilized and/or stored. In addition to asserting a PLA claim for personal injuries, plaintiff also brought a CFA claim seeking recovery for the purchase of a replacement device. Although the court acknowledged that the PLA was the exclusive remedy for personal injuries caused by a product, the court denied the defendant's motion to dismiss the CFA claim as subsumed by the PLA because the PLA did not cover claims for damage to the product itself. Rather than focusing on whether the essential nature of plaintiff's claim was a product liability claim, as the courts did in *Lead Paint, Sinclair* and *McDarby*, the court reached its decision based solely on the basis that plaintiff was seeking recovery for distinct harms.

These recent decisions demonstrate that most trial courts are following the precedent set in *Lead Paint, Sinclair* and *McDarby* that clearly eliminated the availability of CFA and other common-law claims in traditional product liability actions. This has been true even in cases such as *DeBenedetto* and *Nafar,* where plaintiffs have specifically avoided asserting personal injury claims and limited their recovery to purely economic damages. When the plaintiff's injury is alleged to have been caused by a defect in the product, or in its warnings, the courts are more likely to find that the CFA is subsumed by the PLA. Where the claim is based, in whole or in part, on allegations that the defendant made affirmative misrepresentations in advertisements or other promotional efforts, however, the courts seem more receptive to allowing plaintiffs to maintain their CFA claims. Thus far, the *Shannon* decision appears to be the one departure from the clear precedent established by *Lead Paint* and its progeny. ■