Sills Cummis & Gross P.C.

As Seen In The **New Jersey Law Journal**
Product Liability & Class Action Supplement

December 14, 2020

NJ Supreme Court Opens Door for Plaintiffs to Pursue Product Liability Claims Under CFA

In *Sun Chemical Corp. v. Fike Corp.*, 243 N.J. 319 (2020), the New Jersey Supreme Court ("Court") opened the door for product liability claims to be pursued under either the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1, et seq., alone, or simultaneously under the Product Liability Act (PLA), N.J.S.A. 2A:58C-1, et seq. The Court 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 325. In so holding, the 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*. As a result, manufacturers will now face CFA claims along with, or instead of, product liability claims, and the possibility of treble damages, attorney fees and costs, which are available under the CFA.

Background

Sun Chemical ("Sun") purchased a suppression system ("System") from Fike Corporation and Suppression Systems ("Fike") that would prevent and contain potential explosions in Sun's dust collection system. A fire occurred, and the System failed to issue an alarm. Sun attempted to extinguish the fire, but an explosion resulted in injuries to Sun's employees and property damage.

Sun filed suit in the U.S. District Court, District of New Jersey. Asserting a CFA claim, Sun alleged several material misrepresentations, 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*. at 326. After discovery, the district court granted Fike's motion for summary judgment because Sun's claims were governed by the PLA. On appeal, the Third Circuit certified four questions to the Court to address whether Sun's misrepresentations claims could proceed under the CFA. *Id*. at 327.

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Applicability of the CFA

In support of its CFA claim, Sun argued: 1) although 5% of its losses—facility damage—were the type of "harm" included under the PLA, N.J.S.A. 2A:58C-1(b)(2)(a), the PLA did not apply because the losses were a result of Fike's misrepresentations. 2) the System's cost was recoverable under the CFA because 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)); and 3) damages for lost workhours and workers' compensation benefit payments were economic losses not recoverable under the PLA, N.J.S.A. 2A:58C-1(b)(2)(b) or (b)(2)(d).

Applicability of the PLA

Fike argued: 1) the PLA governed the "essential nature" of Sun's claims, and Sun could not avoid the PLA by pleading only economic damages; 2) the System's cost was not recoverable under the PLA because it was not damaged or otherwise defective and, therefore, did not fall within the PLA's economic loss exception; and 3) Sun's losses from employees' injuries were governed by the PLA.

The Court's Analysis

The Court considered: "[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 325. Because there was no authority directly addressing the "interplay between the CFA and PLA," the Court reviewed "pertinent provisions of the CFA and PLA, their purposes, and cases applying them." *Id*. at 329.

- **CFA's Purpose and Scope**

The CFA prohibits "deceptive, fraudulent, misleading, and other unconscionable commercial practices 'in connection with the sale … of any merchandise or real estate.'" *Id*. (citing N.J.S.A. 56:8-2). The CFA broadly defines "merchandise" and the parties did not dispute that the System fell within this definition. The CFA provides recovery 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 329-30 (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*. at 330 (citations omitted). The CFA also enables 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*, 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 331-32 (citation omitted).

- **PLA's Purpose and Scope**

The Court noted that the PLA was a tort-reform statute codifying the common law governing product liability actions. The PLA imposes liability 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 333 (citations omitted). The Court reviewed *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 nuisance claims, determined that the PLA "subsumed

the plaintiffs' … causes of action that were fundamentally PLA claims." *Id*. at 334 (citing *In re Lead Paint Litig.*, 191 N.J. 405 at 436-37). In *Sinclair*, the Court, faced with a putative nationwide class 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 334-35 (citations omitted).

- **CFA Claims Are Not Subsumed by the PLA**

After reviewing the purpose and history of both the CFA and PLA, the Court explained that the PLA and CFA were "intended to govern different conduct and to provide different remedies for such conduct" and, therefore, there was "no direct and unavoidable conflict" between them. *Id*. at 335-36. The Court noted 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*. at 336. 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 336-37. The Court also 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*. at 337.

With regard to pleading such claims, the Court explained that it will depend on "what is at the 'heart of plaintiffs' case'—the underlying theory of liability." *Id*. at 338 (citing *Sinclair*, 195 N.J. at 66). The Court stated 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 339.

Conclusion

Although the Court had not previously addressed the specific question presented, many New Jersey courts 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. … 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 … to conclude that plaintiffs can maintain separate causes of action under the PLA and the CFA in this case.").

Many plaintiffs may now attempt to assert product liability claims under the CFA and/or the PLA because the CFA permits the recovery of treble damages, attorney fees and costs, which are not available under the PLA. Traditional failure to warn claims may be recast as material misrepresentation or omission CFA claims. See N.J.S.A. §56:8-2. It remains to be seen whether such claims will be successful under the CFA, but the *Sun Chemical* decision has potentially opened the door, if not the flood gates, to a new wave of CFA claims in cases traditionally governed solely by the PLA.