

SUN CHEMICAL V. FIKE: NJ PRODUCT LIABILITY ACT CLAIMS CAN BE PAIRED WITH NJ CONSUMER FRAUD ACT CLAIMS

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The New Jersey Supreme Court recently ruled that claims under the New Jersey Consumer Fraud Act (“NJCFCA”) relating to the sale of a product are not per se subsumed by the New Jersey Product Liability Act (“NJPLA”), leaving open the possibility that a defendant who engages in fraudulent practices in connection with the sale of a product could face a NJCFCA claim, a NJPLA claim, or both. The opinion, however, is limited in scope and does not overrule other important decisions in the NJCFCA/NJPLA context, which prevent such claims from co-existing under many other circumstances.

NJCFCA AND NJPLA CLAIMS PRIOR TO SUN CHEMICAL V. FIKE

In *Sinclair v. Merck & Co., Inc.*, 195 N.J. 51 (2008), a product-liability class action, the New Jersey Supreme Court addressed the issue of whether a claim seeking medical monitoring costs could be brought under the NJCFCA. The class in *Sinclair* alleged that a prescription drug manufactured by Merck caused certain cardiovascular injuries, which required medical monitoring for possible latent injuries. *Id.* at 54-55. The New Jersey Supreme Court determined that the claim fell clearly within the scope of the NJPLA and reasoned that “[t]he language of the PLA represents a clear legislative intent that, despite the broad reach we give the CFA, the PLA is paramount when the underlying claim is one for **harm cause by a product.**” *Id.* at 66 (emphasis added). See also *Hindermeyer v. B. Braun Med. Inc.*, 419 F. Supp. 3d 809 (D.N.J. 2019) (holding that plaintiff’s fraud claims arising from alleged injuries from a medical device were subsumed by the NJPLA); *Schraeder v. Demilec (USA), LLC*, 2013 U.S. Dist. LEXIS 97515 (D.N.J. Jul 12, 2013) (dismissing a NJCFCA

claim against the manufacturer of allegedly defective spray polyurethane foam insulation as subsumed by the NJPLA); *DeBenedetto v. Denny’s, Inc.*, 2011 N.J. Super. Unpub. LEXIS 63 (App. Div. Jan. 12, 2011) (affirming dismissal of a NJCFCA claim against a restaurant as subsumed by the NJPLA); *Nafar v. Hollywood Tanning Sys.*, 2010 U.S. Dist. LEXIS 65183 (D.N.J. Jun. 30, 2010) (dismissing a NJCFCA claim against a tanning salon franchise for failing to warn of alleged risks of cancer as subsumed by the NJPLA).

For more than a decade since *Sinclair*, courts have relied on *Sinclair* in dismissing NJCFCA claims as subsumed by the NJPLA when the underlying harm was caused by a product. There was very little room, if any, to distinguish a NJCFCA claim from a NJPLA claim, especially in the pharmaceutical and medical device industries. However, in *Sun Chemical v. Fike*, the New Jersey Supreme Court recognized a narrow exception to the NJPLA subsumption doctrine as it pertains to NJCFCA claims.

THE SUN CHEMICAL V. FIKE DECISION

In *Sun Chemical v. Fike*, the Supreme Court addressed the following question from the Third Circuit: “whether 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.” *Sun Chemical Corporation v. Fike Corporation*, A-89-18 (Jul. 29, 2020). The Supreme Court answered that question in the affirmative.

The case involved a fire that occurred in an explosion isolation and suppression system purchased by Sun Chemical Corporation (“Sun

Chemical”) from Fike Corporation (“Fike”). Sun Chemical asserted a single claim against Fike in the District of New Jersey under the NJCFCA, alleging that Fike made various oral and written misrepresentations regarding the system. Sun Chemical did not assert a NJPLA claim. In particular, Sun Chemical alleged that Fike represented the suppression system would prevent explosions, would have an audible alarm, and that it complied with industry standards. Additionally, Sun Chemical alleged that Fike represented that the suppression system had never failed. The District Court granted Fike’s motion for summary judgment, finding that the NJPLA subsumed Sun Chemical’s claims. Sun Chemical appealed, and the Third Circuit certified the question to the New Jersey Supreme Court.

In holding that NJCFCA claims could coexist with NJPLA claims, the Supreme Court reasoned that the two statutes govern different conduct and that there is no conflict between the NJCFCA and the NJPLA. While the NJPLA encompasses (and subsumes) claims for design defect, manufacturing defect, and warning defect, it does not encompass claims for deceptive, fraudulent, or misleading commercial practices – claims governed by the NJCFCA. The Supreme Court explained that claims for fraud and misrepresentation require unique remedies to prevent such conduct. Thus, “a [NJ]CFCA claim alleging express misrepresentations – deceptive, fraudulent, misleading, and other unconscionable practices – may be brought in the same action as a [NJ]PLA claim premised upon product manufacturing, warning, or design defects.”

The Supreme Court confirmed, however, that where a claim is “premised upon a product’s manufacturing, warning, or design defect, that claim must be brought under the [NJ]PLA with damages limited to those available under that statute; [NJ]CFA claims for the same conduct are precluded.” In other words, “aside from breach of express warranty claims, claims that sound in the type of products liability actions defined in the [NJ]PLA must be brought under the [NJ]PLA.” For example, failure-to-warn claims continue to fall squarely within the ambit of the NJPLA and therefore may not be cast as NJCFA claims. The Supreme Court, in a departure from *Sinclair*, explained that the “theory of liability” underlying a claim determines whether the cause of action falls under the NJCFA or NJPLA—not the nature of the plaintiff’s damages.

THE POST-SUN CHEMICAL V. FIKE LANDSCAPE

The *Sun Chemical v. Fike* decision allows for the co-existence of the NJCFA and NJPLA in limited situations, e.g., where a plaintiff plausibly frames his “product” claim as arising from a fraudulent misrepresentation. Thus, manufacturers that once could be confident that their potential liability arising from the sale of products would be confined to the NJPLA, now face the possibility that they will be subject to the broad array of available remedies under the NJCFA – including treble damages and attorneys’ fees. Because of this, there is likely to be an uptick in product liability claims alleging

that manufacturers’ and sellers misrepresented the efficacy or benefits of their products – allegations that could allow NJCFA claims to exist where they otherwise would have been barred pre-*Sun Chemical*.

The *Sun Chemical* decision does not, however, completely erode the subsumption doctrine. As noted above, where the theory underlying a claim is that a product is *defective*, that claim continues to fall squarely under the NJPLA – not the NJCFA. Thus, while *Sun Chemical* may invite crafty pleading intended to circumvent that general rule, product defect claims couched as NJCFA remain subject to dismissal. And importantly, even if a product-related claim is properly pled as an NJCFA claim, that claim – unlike claims asserted under the NJPLA – will be subject to a heightened pleading standard. See, e.g., *Levinson v. D’Alfonso & Stein*, 320 N.J. Super. 312, 315 (App. Div. 1999) (affirming dismissal of a fraud claim for failing to meet the proper pleading standard); *Hoffman v. Hampshire Labs, Inc.*, 405 N.J. Super. 105, 112 (App. Div. 2009) (explaining that *Rule 4:5-8(a)* imposes a heightened pleaded standard on allegations of fraud).

Moreover, *Sun Chemical* did not involve a pharmaceutical or drug, or another highly regulated product, and therefore does not upset the long line of decisional law declining to apply the NJCFA to activities that are comprehensively regulated by federal or state agencies. See, e.g., *N.J. Citizen Action v. Schering-Plough Corp.*, 367 N.J. Super. 8, 14 (App. Div. 2003).

In *Schering-Plough*, a group of not-for-profit organizations and individuals brought a consumer fraud class action against the pharmaceutical manufacturer alleging that certain allergy medications were not efficacious and therefore sold at artificially inflated prices. *Id.* at 11-12. The trial court dismissed the action for failure to state a NJCFA claim, finding that the company had not made any actionable statements of fact and instead used only puffery, which did not result in any ascertainable loss to any class member. *Id.* at 12. The Appellate Division affirmed the trial court’s ruling, but added that the pharmaceutical industry is heavily regulated by the FDA. *Id.* at 14. The Appellate Division reasoned that because drug companies’ advertising is subject to FDA oversight, it is not actionable. *Id.*

Thus, while *Sun Chemical v. Fike* allows for the coexistence of NJCFA and NJPLA claims, it does so only in limited circumstances. That is, on its face, the decision creates only a narrow exception to the NJPLA subsumption doctrine. Of course, as with all Supreme Court decisions, it will take years of decisional law to fully understand the true impact and significance of *Sun Chemical v. Fike*.