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A legal update from Dechert's Mass Torts and Product Liability Group

New Weapon for Early Dismissal of "No-Injury" Consumer Protection Class Actions

On April 24, 2007, a District Court in Florida dismissed a putative nationwide consumer protection class action for lack of Article III standing. *Prohias v. Pfizer, Inc.*, 2007 WL 1228784 (S.D.Fla. April 24, 2007). In so doing, the court wielded a potent new weapon for early dismissal of "no-injury" consumer classes.

Consumer protection class actions have become more common in recent years. State consumer statutes in particular are a favorite of class action plaintiff attorneys because of a large body of law construing such statutes liberally in favor of consumers. The common thread in these class actions is that the plaintiffs have suffered no injury in the classic sense. Indeed, consumer fraud statutes generally do not provide for recovery for personal injury, but are limited to "economic injury." Class action plaintiffs seek compensation for increasingly abstract economic injuries.

Defendants often take issue with "continuing use" plaintiffs—namely plaintiffs or absent class members who continue to use the product at issue after learning the "truth" about the alleged "fraud." Defendants argue that such continuing use undercuts plaintiffs' causation argument and creates an individualized issue necessitating denial of class certification.

In *Prohias v. Pfizer, Inc.*, United States District Court Judge Jordan Adalberto dramatically advanced the continuing use argument. The court found that plaintiffs' continued use of a pharmaceutical product—after learning of alleged misrepresentations about the medicine's efficacy—meant that plaintiffs had suffered no injury under the relevant consumer protection statute and, significantly, lacked federal standing under Article III of the U.S. Constitution. *Id.* at *7-8. Thus, rather than waiting for the class certification stage, the named plaintiffs' continuing use required outright dismissal of the complaint at the pleadings stage.

In *Prohias*, plaintiffs alleged that Pfizer engaged in a misleading marketing campaign about the efficacy of the cholesterol-reducing medicine Lipitor. Plaintiffs claimed that Pfizer marketed Lipitor not just for its effects on cholesterol (the only indication for which it was FDA approved at the time) but also for general protection against heart disease. Plaintiffs brought suit for negligent misrepresentation, unjust enrichment and statutory consumer fraud.

Judge Adalberto found that plaintiffs (1) failed to establish an injury as required by the negligent misrepresentation claim and (2) failed to establish that they did not receive the benefit of their bargain as required by the unjust enrichment claim. *Id.* at *4. The court premised these findings on the fact that plaintiffs continued to use Lipitor after learning of the alleged misrepresentation. *Id.*

The court reasoned that plaintiffs' continued use of Lipitor after learning of the allegedly false representations regarding the prevention of heart disease necessitated the conclusion that these plaintiffs were taking Lipitor solely for its cholesterol-lowering effect. *Id.* As such, plaintiffs got exactly what they paid for and suffered no injury. This same reasoning equally applied to the injury and damages requirement of plaintiffs' statutory consumer fraud claims. *Id.* at *5.

Plaintiffs argued that they were still entitled to recover under the state consumer fraud statute (in this case, the Florida Deceptive and Unfair Trade Practices Act) because they paid an artificially higher price for Lipitor as a result of Pfizer's alleged misrepresentations. The court rejected this claim as well, finding that such

"price inflation" damages, at least in the pharmaceutical medicine context, are too speculative to constitute an injury in fact under Article III. *Id.* at *6. Judge Adalberto found that the pharmaceutical "market" is not "efficient" such that the manufacturer's claims about a product's efficacy result in a change in that product's pricing. *Id*. The court stated that these "price inflation" or "fraud on the market" damages "depend on the faulty premise that the price of Lipitor fluctuates based on the public's knowledge of Lipitor's benefits, even though the drug prices . . . are fixed by the product's manufacturer." *Id.* The court concluded that even expert testimony about the hypothetical price that a drug would have cost absent an alleged misrepresentation is simply too speculative to constitute an injury in fact under Article III. *Id.* at *7.

The court noted that the only case plaintiffs cited in support of their "price inflation" theory is *International Union of Operating Engineers Local # 68 Welfare Fund v. Merck & Co., Inc.* (894 A.2d 1136 (N.J.Super.A.D. 2006) ("Engineers")). *Id*. In that case, a New Jersey state court found that "ascertainable loss," as required by the New Jersey Consumer Fraud Act, could be demonstrated through expert proofs regarding the effect that defendant's alleged misrepresentations had on its product's placement on formularies or even its very presence on the market. *Id*.

The *Prohias* court first noted that even *Engineers'* conceptual expert proofs did not engage in speculative drug pricing based on a "price inflation" theory, but rather addressed whether plaintiffs would have chosen an entirely different drug. *Id.* at *8. The court further noted that, to the extent that *Engineers* supports "price inflation" theory as sufficient to establish damages under the consumer fraud statute, that case "is in conflict with the majority of cases in the pharmaceutical context, which reject the 'price inflation' theory in the context of a safe and effective drug." *Id*. Finally, Judge Adalberto noted that *Engineers*, a state court decision based on a state consumer fraud statute, necessarily failed to address "the Article III concerns" presented by "such speculative 'price inflation' injuries." *Id*.

While the "no injury" approach furthered by the *Prohias* court is a more useful defense against state claims than the traditional "no causation" approach, the truly significant development in the *Prohias* decision rests in the Article III standing determination. Following the adoption of the Class Action Fairness Act of 2005 ("CAFA"), significantly more class action suits will meet federal jurisdiction requirements, allowing defendants to remove these cases to federal court. One of the requirements for federal standing under Article III is an "injury in fact," the very requirement that Judge Adalberto determined plaintiffs simply cannot have met given their continued use of a product after learning of alleged misrepresentations. Lack of standing does not just prevent class certification—it requires prompt dismissal of plaintiffs' claims.

While the causation argument favoring denial of class certification is certainly still available, defendants can now consider adopting this primary line of attack when presented with "continuing use" cases. Indeed, wide adoption of the *Prohias* court's reasoning, coupled with the recent adoption of CAFA, could sound the death knell for consumer protection class action cases involving "continuing use" plaintiffs.

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