"Infected" Tissue Claim Not A Consumer Fraud Claim

November 19, 2011 by Sean Wajert

Readers have seen my warnings about plaintiff attorneys trying to turn every marketing statement of opinion or puffing into a consumer fraud claim. Now comes a decision about a non-consumer product consumer fraud claim. A federal court recently decided that a plaintiff failed to plead a proper consumer fraud claim against a human tissue product supplier for allegedly providing infected material that was implanted into his body. See Wamsley v. Lifenet Transplant Services Inc., No. 10-00990 (S.D.W. Va., 11/10/11).

Plaintiff sued non-profit corporations who were suppliers and distributors of human tissue products, such as human tendons. Plaintiff alleged that he underwent surgery to repair a rupture to the Achilles tendon in his left ankle, a procedure that involved the implantation of a human tendon obtained from defendants. Plaintiff alleged the product was defective because it was "infected." Consequently, plaintiff alleged he had to undergo additional surgeries "to correct the damage caused by the defective tendon.

Plaintiff claimed that supplying an infected tendon constitutes an unfair method of competition and unfair or deceptive act or practice as defined by the West Virginia Consumer Credit Protection Act. Defendants moved to dismiss the complaint on the grounds that plaintiff had failed to allege any action or inaction on the part of the defendants which would constitute unfair competition, unfair acts or practices, deceptive acts or practices, or fraudulent acts or practices. Plaintiff only formulaically recited the elements of a cause of action under the WVCCPA. the court agreed and had plaintiff file an amended complaint which alleged defendants concealed from plaintiff, his doctors, and his hospital, that the tendon was infected. He claimed the alleged concealment that a tendon provided for human implantation is infected constitutes an unfair method of competition and unfair or deceptive act or practice.

Defendants then filed a motion to dismiss the amended complaint arguing that plaintiff's amended complaint fails to meet the pleading standards articulated in Ashcroft v. Iqbal, 556 U.S. 662 (2009), and Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). Defendants further contended that plaintiff did not have a private cause of action under the WVCCPA because no causal connection exists between the alleged unlawful conduct and the alleged ascertainable loss: because a physician (a "learned intermediary") made the decision as to what product to use to repair the ruptured Achilles tendon, plaintiff could not establish the necessary causal connection between the alleged unlawful practice by defendants and the alleged injury.

The court began by outlining the relevant legal standard, familiar to our readers. The plausibility standard requires a plaintiff to demonstrate more than a sheer possibility that a defendant has acted unlawfully; it requires the plaintiff to articulate facts, when accepted as true, to state a claim to relief that is plausible on its face. While a court must accept the material facts alleged in the complaint as true, bare legal conclusions are not entitled to the

assumption of truth and are insufficient to state a claim. Facts pled that are merely consistent with liability are not sufficient.

Moreover, the court noted in an elegant way, "fraud is a generous tort, encompassing affirmative misrepresentations and omissions alike, its boundaries limited only by the imaginations of crafty and unprincipled minds." A claim that “sounds in fraud” must satisfy Rule 9(b)’s more rigorous pleading standards. Rule 9(b)’s heightened pleading standards advance several interests, including protecting defendants’ reputations from baseless accusations, eliminating unmeritorious suits that are brought only for their nuisance value, discouraging fishing expeditions brought in the dim hope of discovering a fraud, and providing defendants with detailed information in order to enable them to effectively defend against a claim.

Plaintiff’s sole relevant factual allegation concerning defendants’ alleged unlawful conduct was that the defendants concealed from plaintiff, his doctors, and his hospital, that the tendon was infected. But he offered not a single fact in support of his theory that defendants concealed from surgeons the fact that the human tissue they provided was “infected” or knew that the surgeons would implant the diseased tendon into a human body. (Indeed, the serious nature of this allegation made it more at home in a criminal court than a consumer fraud action.) Such an unadorned, conclusory averment leashed to not a single supporting fact failed to meet the pleading standard. Moreover, Plaintiff’s allegation that defendants concealed a material fact sounds in fraud and, thus, triggered rigorous pleading requirements under Fed.R.Civ.P. 9(b). However, the court called this a "shoot-and-ask-questions-later lawsuit" because it offered no facts to support a good faith belief that defendants knowingly distributed diseased or “infected” human body parts to plaintiff’s health care providers. No names, places, dates, or times, and no concrete facts to support the alleged conduct. No narrative on what was medically deficient about the tendon implant except to state that it was “infected.” In sum, plaintiff’s theory of liability failed to cross the line between possibility and plausibility of entitlement to relief.

Even if the amended complaint had been "the model of perfect pleading," it would still fail because it does not state a cognizable claim under the WVCCPA. Plaintiff cannot shoulder his burden of stating a claim upon which relief can be granted because, within the meaning of the WVCCPA, the provisioning of blood and human tissue by the non-profit defendants to the health care providers was not “trade or commerce”; the service provided by the defendants was not performed “in connection with the sale or advertisement of any goods or services”; plaintiff was not a “consumer”; and the parities had not entered into a “consumer transaction.”

The West Virginia Legislature, in accord with many other jurisdictions, expressed its intent that suppliers of human blood and tissue products be held to different legal standards than those businesses that manufacture, distribute, and sell conventional goods and services. Blood and tissue distributors are rendering a service— and not making a sale—when they provide human blood and tissue products according to the West Virginia Legislature, which intended to limit the liability of such distributors in contract warranty and strict liability tort claims, plainly distinguishing human body products from ordinary goods. The court thus applied the West Virginia high court's decision in White v. Wyeth, 705 S.E.2d 828, 837 (W. Va.

2010), which held prescription drugs aren't proper subjects of consumer protection claims; the court refused to allow a plaintiff to morph what is most naturally a product liability or breach of warranty action into a purported statutory consumer protection claim would permit an end-run around the state's blood shield statute.

Finally, the court noted that plaintiff was correct in observing that if his WVCCPA complaint was dismissed, plaintiff would be left with no adequate legal remedy. Defendants had explained that the WVCCPA claim was a products liability claim in disguise, brought only because the statute of limitations had run on plaintiff's traditional tort remedies. Thus, any difficulty plaintiff might having pursuing more traditional causes of action was likely his own fault. The legislature did not intend that WVCCPA serve as "a Plan B litigation backstop" for claims when a plaintiff had—but did not pursue—appropriate traditional causes of action.