Economic Loss Plaintiffs Don't Step Up To The Plate

Thursday, July 21, 2011

When we convince a court that an action against one of our clients must be dismissed for failure to state a claim – say, for TwIqbal reasons – under Rule 12, we sometimes say that the plaintiff's case was so poor that s/he couldn't even get to first base. A much rarer form of dismissal, however, essentially holds that the plaintiffs can't even get to the plate, let alone to first base. That's when a complaint is dismissed for lack of standing. A dismissal for lack of standing recently occurred in In re McNeil Consumer Healthcare, Marketing & Sales Practices Litigation, 2011 WL 2802854 (E.D. Pa. July 15, 2011). When that kind of dismissal occurs, you can bet the complaint is really bogus.

When it happens in an MDL, you can bet that the bogus nature of the complaint is no accident.

Here's the scoop. The MCH litigation involves "purported quality control issues affecting certain over-the-counter healthcare products" made by the manufacturer defendant. 2011 WL 2802854, at *1. It's typical of much current mass tort litigation (described in our "Anatomy of a Mass Tort" post) in that it stems from "regulatory action" (#2 on our list of litigens) – in this instance various FDA recalls.

All this litigation in the wake of FDA action makes a mockery of the other side's public chest-beating that product liability litigation somehow increases product safety by uncovering product defects. In fact, the opposite is true. The FDA discovered the problem, worked with the defendant to fix it, and only afterwards did the private litigants show up with their hands out. They didn't improve the safety anything. All product liability does in this type of situation is increase the price of every product that a defendant makes to everyone who buys it.

But the claims at issue in the recent MCH decision are even worse than that. They don't have anything to do with safety. They're just ginned up claims for purely economic loss filed by people who really weren't hurt at all.

That's why the court found there was no standing.

The biggest problem the court found is that, while the complaint alleged that there were quality control problems involving dozens ("twenty-one different products, and at least seventy-four types," 2011 WL 2802854, at *9) of products ("subject products"), some of which were recalled ("recalled subject products"), **none** of the seventeen plaintiffs bothered to allege that s/he had purchased any particular product, sought but did not obtain any particular refund, *etc*.:

"The plaintiffs do not claim that they suffered any physical injury; instead, their claims are based entirely on economic injuries. The allegations of specific economic injury . . . are sparse. The plaintiffs do not allege which particular Subject Products or Recalled Subject Products they purchased. The plaintiffs also do not allege that they availed themselves of any refund offers, and were inadequately compensated thereby. Instead, the [complaint] sets forth identical allegations with respect to each of the twenty-seven named plaintiffs."

2011 WL 2802854, at *7.

Standing is what gives a plaintiff the right to appear in court in the first place. Under the constitution, any "case or controversy" can be brought (assuming other jurisdictional requirements are met) in federal court. But a person doesn't have standing in the abstract. A defendant must have hurt a plaintiff in some way. That's called the "injury in fact" requirement of standing. Id. at *8. The legal definition is, "an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent." Id. There's also a causation element to standing.

"In product liability cases that means that the plaintiff had to buy or otherwise come into harmful contact with the product. A plaintiff can't come into court seeking to recover for injuries done to other people. That's not a "concrete" injury – at least not to that particular plaintiff."

But the MCH complaint was egregiously deficient:

"[P]laintiffs do not allege which particular products they purchased. Instead, each named plaintiff alleges that he or she "purchased Subject Products including some Recalled Subject Products." . . .At no point in the [complaint] do the plaintiffs identify a single product that they purchased."

2011 WL 2802854, at *10. That's pretty bad.

Simple rule #1: If you didn't buy the product, you can't claim economic loss from purchasing it.

But that's not all. The complaint also failed to allege what was wrong with the products.

"In addition, the plaintiffs do not allege how the unspecified Subject Products they purchased were defective. Instead, the plaintiffs allege only that each Subject Product suffered from "serious problems." . . .Notably, several of the products that appear on the "Subject Products" list are not even alleged to have been recalled or subject to any FDA citations. Because the plaintiffs do not identify which products were purchased, it is impossible to match the many incidents outlined in the [complaint] with the specific drugs that fall under the Subject Products category."

2011 WL 2802854, at *10.

Simple rule #2: There has to be something wrong with the product before you can sue over it.

That's no injury and no defect. How about the trifecta? Did the plaintiffs at least allege causation?

No.

"The plaintiffs do not, however, allege that they purchased the affected lots of . . . and were not made whole. The same logic applies to all of the remaining allegations in the [complaint]. . . . [P]laintiffs cite to approximately eleven recalls . . . and a handful of FDA reports, but do not allege how they were harmed by any of these incidents. Instead, the plaintiffs only allege,

in general terms, that they "suffered damage" as a result of their "out of pocket payments for Subject Products" that were unsafe."

2011 WL 2802854, at *10. Incredible as it may sound, plaintiffs did a better job alleging injury to other people (people who complained on the defendant's blog) than they did to themselves. Id. at *12.

Simple rule #3: What you didn't buy can't cause you any injury from its mere purchase. See simple rule #1.

Because of the complaint's pervasive failure to link any of the 17 plaintiffs to any of the many drugs or any of the many allegations of "serious problems," the court dismissed the entire mess for lack of standing:

"[P]laintiffs have not established injury-in-fact with respect to claims involving the Subject Products. Even if the Court were to read the allegations of "serious problems" generously, . . . the plaintiffs have not alleged that they . . . have suffered injury as a result of said problems. . . . [P]laintiffs must establish that they themselves have suffered injury. In the absence of particularized harm, the plaintiffs' injuries are abstract and hypothetical, rather than distinct and palpable."

2011 WL 2802854, at *10.

As the fundamental problem was plaintiffs' total failure to establish "injury in fact," we have added MCH to our no injury scorecard.

The court threw out, for similar reasons, allegations relating to product recalls/refunds and a supposed "phantom recall." 2011 WL 2802854, at *12-18. The "phantom recall" claim was particularly egregious because, even assuming everything plaintiffs alleged was true – injury was inherently impossible, because the whole point of the purported exercise was to take the products at issue off the shelves:

"It is not clear how the plaintiffs could have been harmed by the removal of products that they contend were defective. Instead, each purportedly defective unit . . . that was removed from

store shelves became unavailable for purchase by a consumer. It does not logically follow that the plaintiffs could have been injured by these actions."

Id. at 16.

Simple rule #4: Don't allege physical impossibilities.

Some of our readers may be asking a simple question of their own – why? MCH was multi-district litigation. That kind of litigation attracts the best lawyers on both sides. Good plaintiff lawyers certainly know how to plead the fundamental elements of product identification, causation and injury that were totally lacking from this complaint. Heck, even bad ones can do that if forced. So what gives?

We think we know. The complaint dismissed by MCH was a class action. Even more after Dukes, but also under abundant prior precedent, the commonality and predominance requirements for certification of class actions place a huge premium on every claim being the same. What was left out of MCH were the particulars of each plaintiff's claim – the what, where, and when that establish any individual's right to sue.

Maybe the vague, generalized pleading that got these MCH plaintiffs thrown out of court can be fixed, at least to the extent that any plaintiff actually bought a product subject to recall (whether they can ever show injury without improper "fraud on the market"-type theories is another matter altogether). But once those particulars creep in – that plaintiff X bought product Y under circumstances linking it to purported misconduct Z – the individualized nature of each and every claim becomes blatantly obvious, even on the face of the complaint.

So to the extent that the plaintiffs opt to replead in compliance with MCH, they're only cutting their own throats down the road at the class certification stage. And without class certification, this sort of pure economic loss claim – even assuming it could state a claim under some bizarre theory – is simply not worth pursuing.