

ALERTS AND UPDATES

Pennsylvania District Court Dismisses Class Action Against Pharmaceutical Giant Johnson & Johnson

July 26, 2011

Judge Mary McLaughlin of the U.S. District Court for the Eastern District of Pennsylvania tossed a class action lawsuit last week after finding that the named plaintiffs lacked standing in *In re McNeil Consumer Healthcare Litigation*.¹ A group of consumers filed the lawsuit, alleging a multitude of claims purportedly arising from quality-control issues in certain products made by Johnson & Johnson's consumer healthcare division, McNeil Consumer Healthcare. The suit sought solely economic damages claimed to have been sustained by consumers purchasing over-the-counter medications that were recalled after the FDA cited McNeil's Fort Washington, Pa., facility for numerous manufacturing deficiencies.

In *In re McNeil Consumer Healthcare Litigation*, 17 named plaintiffs brought suit against the Johnson / McNeil defendants and third-party contractors. The third-party contractors were hired by McNeil to visit various retailers, act like normal customers and, in what the U.S. Food and Drug Administration (FDA) characterized as a "phantom recall," purchase every drug produced at the Fort Washington facility suspected of quality-control problems. Subsequent to this phantom recall, McNeil announced a public recall. Under the public recall, the company began offering consumers the opportunity of either a partial cash refund or discount coupons on future product purchases. The plaintiffs contended that these benefits were offered to only those consumers who could satisfy certain eligibility criteria, and were otherwise inadequate.

No Injury, No Standing

The 17 named plaintiffs brought suit on behalf of themselves and a putative nationwide class of consumers who had purchased the recalled products. The court took issue with the plaintiffs' consolidated amended complaint, and dismissed the claims against Johnson & Johnson and McNeil without prejudice for lack of standing. The claims against the contractor defendants were dismissed with prejudice for failure of the plaintiffs to establish proximate cause between the removal of products from store shelves during the phantom recall and the plaintiffs' alleged damages.

The primary issue the court found with the complaint is that, according to the court, it failed to demonstrate that any of the named plaintiffs had sustained an "injury in fact." The only damages alleged in the complaint were those sustained by third parties as claimed on Internet blogs. The court noted: "The mere purchase of Recalled Subject Products, therefore, cannot be sufficient to establish injury-in-fact." None of the 17 representative plaintiffs could identify which products they purchased or the precise manner in which they were harmed. The court noted that Article III standing may be demonstrated, for example, in allegations that a named plaintiff "has paid or will pay costs to replace a product that had to be discarded. . . [or] that any harm arising from the recall was not, or could not be, adequately resolved by the refund [offer]." As a consequence, the complaint failed to allege that the named plaintiffs suffered injuries sufficient to establish standing to prosecute their claims.

What This Means for Manufacturers

Following *In re McNeil Consumer Healthcare Litigation*, manufacturers may want to consider offering consumer refunds or coupons for discounts on future purchases in the wake of product recalls. Adequate refunds or other forms of compensation

to consumers, as described by District Judge McLaughlin, may pave the way for a successful standing defense—for although an offer of a refund or discount coupon may not alone defeat standing, "plaintiffs must still show that the remedy offered by a [manufacturer] was somehow inadequate as to them."

For Further Information

If you have any questions about the information addressed in this *Alert*, please contact [Alan Klein](#), [Fletcher W. Moore](#), any [member](#) of the [Products Liability and Toxic Torts Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

Note

1. *In re McNeil Consumer Healthcare*, 2011 U.S. Dist. LEXIS 76800 (E.D. Pa. July 14, 2011).

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