Stopped Before They Start

Dismissing No-Injury Class Actions

By Nora Coleman and Scott L. Haworth

Because of the scale of the threat that they represent, corporations must take no-injury class actions very seriously and defend them vigorously, both procedurally and on the merits.

Over the past decade, there have been an increasing number of putative class actions and multi-district litigations filed against product manufacturers, alleging not that any single plaintiff actually sustained injury as a result of a defect in a product, but rather that the plaintiffs *could have* sustained injury, or *may become* injured in the future. While this may sound more like the plotline of a Philip K. Dick story, later turned into a Tom Cruise vehicle, these lawsuits actually do seek to hold corporations responsible for something that has not yet happened, and may not ever happen.

Billed as "consumer protection" measures, these cases allege causes of action under the auspices of both product liability and consumer fraud. However, these so-called "no-injury" actions are very often nothing more than an attempt by creative plaintiffs' lawyers to cash in on the class action concept—the plaintiffs themselves, if successful, would each be entitled to a relatively minimal amount of money, while their attorneys would collect millions upon millions of dollars in fees. Nevertheless, these lawsuits represent a serious threat to product manufacturers. Indeed, any such action, in which there could be millions of plaintiffs and an even greater amount of damages, poses one of the most substantial litigation risks to many corporations.

As with any such litigation, a corporate defendant must first pursue the clearest, most immediate line of defense when faced with a no-injury case—stop it before it starts. There are several strategies to be considered when pursuing an immediate dismissal. Here, we will explore some of the options for addressing issues common to many no-injury class actions, in the context of a pre-answer motion to dismiss.

Assessing the Potential for Removal

No-injury class actions are brought in both state and federal court. Naturally, defendants must analyze the relative benefits and detriments of all available forums on a case-by-case basis. In the event that federal court would be a more favorable venue from a defendant's perspective in a state-filed ac-

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tion, the first step in stopping the action may be removal pursuant to the Class Action Fairness Act of 2005 (CAFA). For example, successful removal to federal court under CAFA may allow a defendant to seek immediate dismissal for lack of Article III standing, which is discussed below.

CAFA was enacted, in part, as a result of the increasing number of abusive class actions driven by a desire to increase attorneys' fees. 28 U.S.C. §1711(a)(3)(A). Following the adoption of CAFA, significantly more class action suits meet federal jurisdiction requirements, allowing defendants to remove these cases to federal court. CAFA increased the federal courts' jurisdiction over class actions by eliminating the need for "complete diversity"—CAFA amended U.S.C. §1332 to require only "minimal diversity" in class actions. Specifically, federal district courts were granted original jurisdiction over class action cases where (a) any member of the proposed class is a citizen of a different state from any defendant; (b) the amount in controversy is over $5 million in the aggregate, exclusive of interest and costs; and (c) the case involves a class of 100 or more members. 28 U.S.C. §1332(d)(2) and (5). In addition, under CAFA, any defendant may remove a class action to the appropriate district court without the consent of the other defendants. 28 U.S.C. §1453(b).

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The inquiry is not that simple, however, since CAFA also contains the "local controversy exception," which leaves in state court cases in which over two-thirds of the members of the putative class are citizens of the state in which the action was filed, and either (i) the "primary defendants" are citizens of that state; or (ii) at least one of the defendants from whom "significant relief" is sought is a state citizen and the allegedly culpable conduct and the principal injuries occurred within the state. 28 U.S.C. §1332(d)(4). Furthermore, federal district courts may, in their discretion, decline to exercise jurisdiction if (i) more than one-third but less than two-thirds of the members of a proposed class of plaintiffs and the "primary defendants" are all citizens of the state in which the action was filed; and (ii) the court determines that the claims raise issues that are truly local in nature based on its consideration of several specifically enumerated factors. 28 U.S.C. §1332(d)(3). Defendants must carefully consider whether the local controversy exception would prevent successful removal.

In addition, while orders remanding a case to state court are generally not appealable, CAFA provides for appellate review of federal court orders granting motions to remand class action lawsuits to state court. 28 U.S.C. §1453(c).

CAFA inhibited the plaintiffs' ability to manipulate class action complaints in order to keep a case in a state court, and granted increased review of remand orders. If it is determined that a company sued in state court would benefit from the complete defenses available to no-injury class action defendants in federal court, the availability of removal under CAFA should be explored.

Challenging Standing in Federal Court

A motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) may be the quickest way to stop a no-injury class action pending in federal court. Back in first year Constitutional Law, we learned that federal courts are "courts of limited jurisdiction," which derive their authority from Article III of the Constitution. Article III §2 requires that there be a "case or controversy" between parties in order to litigate actions in federal court, which requirement is satisfied only where a plaintiff has standing.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court set forth the three elements of "the irreducible constitutional minimum of standing": (1) "injury in fact," or an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) the likelihood that the injury will be redressed by a favorable decision. In the context of no-injury class actions, it is significant to note that the Court in *Lujan* made a point of describing standing requirements as supportive of "the Constitution's central mechanism of separation of powers," serving to delineate a "common understanding of what activities are appropriate to legislatures, to executives, and to courts"—specifically, to "identify those disputes which are appropriately resolved through the judicial process." This theoretical discussion serves to undercut most consumer protection arguments proffered by plaintiffs, since it is the legislature, and not the judiciary, that is the most appropriate venue in which to effectively promulgate necessary regulation of the corporate sphere.

"Injury in fact" is the element of standing that poses the greatest challenge to no-injury class action plaintiffs. Since plaintiffs in these actions have not been physically injured in any way, they seek damages for potential future injuries, or economic damages that are purely abstract in nature. For example, in *Koronthaly v. L'Oréal USA, Inc.*, 2008 WL 2938045 (D.N.J.), *aff'd*, 2010 WL 1169958 (3d Cir. 2010), plaintiff alleged that she had been injured by mere exposure to the defendants' red lipstick, which contained trace amounts of lead, and by her "increased risk of being poisoned by lead." Plaintiff also alleged that she was entitled to a refund of the purchase price of the lipstick, because she would not have bought it had she known that it contained trace amounts of lead. Such allegations, however, often do not pass muster for purposes of establishing an injury in fact sufficient to confer standing. An injury in fact "must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to [the plaintiff] that is distinct and palpable… as opposed to merely abstract." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). A purely subjective injury is not sufficient. *City of Los Angeles v. Lyons*, 461 U.S. 95, 107, n. 8 (1983). The district court

in *Koronthaly* concluded, and the Third Circuit affirmed, that the plaintiff's allegations of future injury and economic loss were "too remote and abstract to qualify as a concrete and particularized injury." Notably, *Koronthaly* is a classic example of a case where the only person who stood to genuinely benefit from the adjudication of the claims was the plaintiff's attorney—even if the courts had accepted plaintiff's damages allegations, each class member would be entitled to no more than the purchase price of a lipstick, which contained one one-hundreth of the amount of lead that the Food and Drug Administration allows to be present in a piece of children's candy. Plaintiff's attorney, on the other hand, would have received an inordinately large sum in attorney's fees.

Federal courts have noted that the disparity between claims arising out of tort allegations and those arising out of contract damages is essentially a distinction without a difference in the context of establishing an injury in fact sufficient to confer standing. In *Rivera v. Wyeth Ayerst Laboratories*, 283 F.3d 315 (5th Cir. 2002), the plaintiffs took a pain medication that was later withdrawn from the market due to reports of liver failure in some patients. Since plaintiff admittedly suffered no physical injury, she instead asserted causes of action for violations of Texas consumer protection statutes, breaches of express and implied warranties, and unjust enrichment, based on an alleged failure to receive the benefit of the bargain. The Fifth Circuit noted that there was no applicable contract, but held that even if there had been a contract, plaintiffs had suffered no damages. Rejecting the "benefit of the bargain" argument, the *Rivera* court dismissed the case for lack of standing.

> The confusion arises from the plaintiffs' attempt to recast their product liability claim in the language of contract law. The wrongs they allege—failure to warn and sale of a defective product—are products liability claims. Yet, the damages they assert—benefit of the bargain, out of pocket expenditures—are contract law damages. The plaintiffs apparently believe that if they keep oscillating between tort and contract law claims, they can obscure the fact that they have asserted no concrete injury. Such artful pleading, however, is not enough to create an injury in fact.

Rivera, 283 F.3d at 320–21.

In cases where plaintiffs allege only subjective economic damages, the argument against conferring standing is, at its essence, that buyer's remorse is simply not an injury in fact where plaintiffs suffered no physical injury as a result of using the product, and the product adequately served its purpose. In *Whitson v. Bumbo*, 2009 WL 1515597 (N.D. Cal. 2009), plaintiff alleged only the following: that she bought a child seat that was recalled by the Consumer Product Safety Commission; that its manufacturer had misrepresented the safety and intended uses of the seat; that some children somewhere in the country were harmed while using the seat; and that she, and a class of seat purchasers that her lawyers would have liked her to represent, therefore deserve damage awards. The district court found that plaintiff did not have standing for her claims under a "benefit of the bargain" theory or any other stated theory, since the complaint "oscillate[d]s between tort and contract law language but fail[ed] to allege any actual injury."

As the party invoking federal court jurisdiction, plaintiff bears the burden of establishing standing. *Common Cause of Pennsylvania v. Pennsylvania*, 558 F.3d 249, 257 (3d Cir. 2009). As the sample of cases discussed in this article demonstrates, federal courts are generally reluctant to allow no-injury product liability lawsuits to proceed, even if there is some inconsistency as to how and when they arrive at that conclusion. (While there are, of course, several exceptions, they are not discussed here.) At its core, this reluctance is based on the concern that the "damages" alleged are too speculative and hypothetical to warrant adjudication. Many no-injury class actions suffer from these defects, so a defendant's first and most direct line of defense may be to challenge plaintiff's Article III standing by establishing that there is no injury in fact.

Attacking Fatal Substantive Defects

A standing argument may or may not be available to a defendant in a no-injury class action that remains in state court, for either procedural or strategic reasons. In addition, even in federal court, a corporate defendant should consider seeking an immediate dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6), since it may preclude a plaintiff from attempting to re-file a dismissed federal action in state court. In this regard, many of the defects that prevent a plaintiff from establishing standing in federal court due to a lack of injury in fact, also prevent a plaintiff from stating a claim under the given forum's applicable substantive law, in federal or state court.

For example, in *Sinclair v. Merck & Co., Inc.*, 195 N.J. 51 (2008), a New Jersey state court action, the putative class alleged damages even though they had not suffered any bodily injury from their use of Vioxx. The New Jersey Supreme Court held that under the New Jersey Product Liability Act (NJPLA), a plaintiff must allege that he or she suffered "harm caused by a product," which is expressly defined in the statute as physical harm or similar injury. N.J.S.A. 2A:58C-1b(2), *et seq.* This state statute does not permit the recovery of solely economic loss, much less the refund of purchase price based on subjective buyer's remorse. N.J.S.A. 2A:58C-1b(2). Much like a failure to allege an injury in fact, failure to allege physical harm caused by a product is insufficient to state a product liability claim in New Jersey.

In Illinois, the plaintiff in *Frye v. L'Oréal USA, Inc.*, 583 F. Supp. 2d 954 (N.D. Ill. 2008), like the plaintiff in *Koronthaly, supra*, alleged that she had purchased lipsticks, unaware that they allegedly contained trace amounts of lead, and was entitled to a full refund. The court, applying the Illinois Consumer Fraud and Deceptive Practices Act (ICFDPA), held that plaintiff had alleged no compensable loss, since she did not allege that had she known of the presence of lead, "she would not have purchased lipstick, that she would have purchased cheaper lipstick, or that the lipstick in question had a diminished value because of the lead. Simply put, there [was] no allegation that the presence of lead in the lipstick had any observable economic consequences."

In *Herrington v. Johnson & Johnson Consumer Companies, Inc.*, 2010 WL 3448531 (N.D. Cal. 2010), the plaintiffs alleged that the defendants manufactured and sold bath products for children containing carcinogens and other unsafe substances. The district court analyzed plaintiff's claims

under the unfair and deceptive trade practices statutes and common-law of not only California, but also the consumer protection laws of 35 states and the District of Columbia. Plaintiffs' claims were dismissed not only for lack of federal standing, but also for failure to state a claim for unfair and deceptive trade practices, unlawful and unfair business practices, unfair competition, intentional or negligence misrepresentation, fraudulent concealment, unjust enrichment or breach of warranty, in part due to their failure to "allege a cognizable injury to consumers."

In New York, the appellate division in *Frank v. DaimlerChrysler Corporation*, 229 A.D.2d 118 (1st Dep't 2002), dismissed a putative class action brought by owners of vehicles containing an allegedly dangerous "single recliner mechanism," none of whom had actually suffered any physical injury. The court found that plaintiffs had failed to plead "actual injuries or damages," which were "essential element[s] of each of the first six [state law] causes of action": negligence, strict liability, breach of implied warranty, negligent misrepresentation, fraud and violation of the New York State Consumer Protection Act.

Defendants must fully analyze all applicable state statutes and common law to determine whether any complete defenses to plaintiff's substantive claims are available.

Medical Monitoring Claims

Some no-injury class action plaintiffs claim that the need for medical monitoring qualifies as damages. Medical monitoring claims mainly originated in the environmental, toxic tort context, and were fashioned as a remedy to address significant environmental toxic exposure, or at least a traumatic physical impact. *See*, *e.g.*, *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829 (3d Cir. 1990). The policy underlying such claims was that the nature of an environmental tort made proving specific causation difficult, and there was no adequate governmental program for testing possible victims of environmental toxic exposures. *See Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997). However, no-injury plaintiffs attempt to allege the need for medical monitoring as a result of interaction with an unmanifested defect in a prescription drug, medical device, or other product, where the justification for medical monitoring is absent.

Twenty-nine out of the 50 states recognize a claim for medical monitoring. *See* D. Scott Aberson, Note, *A Fifty-State Survey of Medical Monitoring and the Approach the Minnesota Supreme Court Should Take When Confronted With the Issue*, 32 Wm. Mitchell L. Rev. 1095 (2006). Although the standards across these jurisdictions vary, most generally require that plaintiff prove some version of the following elements: significant exposure; to a proven hazardous substance; through defendant's tortious conduct; resulting in significantly greater risk of a serious latent disease; for which periodic diagnostic testing different from what would be proper in the absence of the exposure is reasonably necessary; and those tests make early detection of the disease possible. *See* James Graves, *"Medical" Monitoring for Non-Medical Harms: Evaluating the Reasonable Necessity of Measures to Avoid Identity Fraud After a Data Breach*, XVI Rich. J.L. & Tech. 2 (2009).

In 1997, the Supreme Court in *Buckley* rejected, for several policy-based reasons, an asbestos plaintiff's medical monitoring claim under the Federal Employers' Liability Act. Since *Buckley*, most courts addressing the issue of medical monitoring have rejected medical monitoring for asymptomatic plaintiffs. *See* Herbert L. Zarov, *et al.*, *A Medical Monitoring Claim for Asymptomatic Plaintiffs: Should Illinois Take the Plunge?*, 12 DePaul J. of Health Care L. 1 (2009). Of those 29 states that recognize a claim for medical monitoring, 16 allow recovery only when the plaintiff has shown a present physical injury. *See* Graves, *supra*. As with Article III standing and state substantive law requirements, the claims of no-injury class action plaintiffs often do not meet this threshold.

Defendants faced with medical monitoring claims must assess the state of the law in their jurisdiction, and make either a precedent-based or policy-based argument for dismissal.

Conclusion

Because of the scale of the threat that they represent, corporations must take no-injury class actions very seriously, and defend them vigorously, both procedurally and on their merits. This requires the development of joint and consistent defense strategies among defendants, and consideration of the economies of scale. Pre-answer motions to dismiss are an important first step in this process. Even if the action is not dismissed on procedural or substantive grounds, courts deciding these motions often take the opportunity to prune the plaintiff's claims, which may not only limit the potential recovery, but will also serve to focus and narrow the continuing defense strategy. FD