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The Blurring Of Product Liability, CPA Laws

Law360, New York (March 17, 2009) -- In *Green v. N.B.S. Inc.*, No. 94, September Term 2008, the Maryland Court of Appeals recently heard oral arguments on the issue of whether a Maryland statute, which sets a cap on recovery for non-economic damages, should apply to a lead paint lawsuit brought pursuant to the Maryland Consumer Protection Act.

Green is yet another instance in which a court is being urged to blur the lines between product liability laws and consumer protection statutes.

Obscuring these two separate bases of liability, however, could result in varying changes in the law, defeat the legislative intent in enacting the different statutes, create a broad cause of action under the consumer protection statute, consume traditional tort law, undermine damages caps statutes or provide plaintiffs' lawyers with an avenue to diminish the well-established requirements of product liability law.

The Case of *Green v. N.B.S. Inc.*, et al.

Kelly Green, a minor, by her parent and next friend, Celestine Green (the "Petitioner"), brought suit against the owners and managers (the "Respondents") of a house the Petitioner rented in Northeast Baltimore.

The lawsuit was filed as a result of alleged injuries Kelly Green suffered due to her exposure to lead-based paint while living at the property. Following a 2007 trial, a Baltimore City jury awarded Petitioner \$2.3 million.

The jury found that Respondents were liable to Petitioner for common law negligence as well as violations of the Maryland Consumer Protection Act. Over Petitioner's objection, the verdict was reduced from \$2.3 million to \$515,000.

On appeal, Petitioner is challenging the application of the statutory cap, arguing that the cap should only apply to personal injury lawsuits arising from a defendant's negligence

or tortious activity, and not to claims brought under the Maryland Consumer Protection Act.

Respondents, on the other hand, assert that noneconomic damages are not an available form of relief under the Maryland Consumer Protection Act.

Additionally, Respondents argue that noneconomic damages are not available under the consumer protection statutes of the vast majority of states.

Below we will explore the varying viewpoints on whether damages in product liability cases can be brought under the guise of consumer protection acts, and, if so, the consequences of such applications.

Approaches to Statutory Caps on Noneconomic Damages

Under the traditional common law scheme, the amount awarded for noneconomic damages such as pain and suffering, mental distress, or loss of enjoyment of life, was typically determined by a jury based upon evidence presented at trial.

Today, many states have imposed statutory caps in order to limit such noneconomic damages through widely varying approaches. Some state statutes impose limitations only in medical malpractice litigation while others have extended the limitations to all personal injury litigation.

Alaska, Colorado, Hawaii, Idaho, Kansas, Maryland, Ohio and Texas have all enacted legislation generally limiting noneconomic damages in personal injury actions.

Although there is disagreement among the states as to what types of actions to which statutory caps should apply, the one area of agreement appears to be that limitations on the maximum amount of noneconomic damages recoverable are necessary.

The Objectives of Consumer Protection Statutes

State consumer protection acts (“CPAs”), also referred to as unfair and deceptive trade practices acts, serve a distinct purpose: to promote protection of consumers and to prevent unfair or deceptive practices.

Each state has its own list of practices that are considered unfair or deceptive, including: false or misleading oral or written statements, misrepresentations that consumer goods are of a particular standard or quality, and failure to disclose a material fact with regard to the product or service if the failure deceives or tends to deceive consumers.

States specifically adopted these laws to provide consumers with a remedy when the traditional elements of misrepresentation claims and contract actions rendered it unmanageable to obtain relief after being misled into purchasing goods and services.

See Victor E. Schwartz & Cary Silverman, Common-Sense Construction of Consumer Protection Acts, 54 Kan. L. Rev. 1, 6-7, 15-16 (2005).

These laws are typically drafted using broad language, prohibit all conduct considered “unfair” or “deceptive,” and often require a much more relaxed burden of proof than actions asserted under traditional tort theories. See generally, e.g., Md. Code Ann., Com. Law § 13-301 (2009)(prohibiting a wide range of practices considered to be unfair or deceptive trade practices).

Indeed, in most instances, the plaintiff need only show an actual injury or loss as a result of an unfair or deceptive practice in order to successfully establish a claim under a CPA. See, e.g., *id.* at § 13-408(a).

Additionally, although parties to civil actions in the United States are typically required to pay their own attorneys’ fees and costs, unless explicitly authorized by statute, many states’ CPAs provide such an authorization. See, e.g., *id.* at § 13-408(b).

The Blurring of Product Liability Actions and CPA Actions

In recent years, lawsuits have increasingly included CPA claims with traditional tort and product liability claims stemming from a personal injury. In many states, this recent trend can arguably be attributed to the breadth of the applicable CPA.

For example, the Maryland Consumer Protection Act provides that “any person may bring an action to recover for injury or loss sustained by him as a result of a practice prohibited by this title.” *Id.* at § 13-408(a).

As mentioned above, Maryland’s Consumer Protection Act, like most CPAs, expressly prohibits a wide expanse of practices. This broad language, coupled with the fact that the statute permits consumers to recover damages without meeting each of the elements necessary to establish an action based in fraud, provides a strong incentive to pursue litigation.

A relaxed burden of proof arguably provides consumers with the means to recover for losses sustained as a result of being misled into purchasing a good or service.

When applied to a CPA claim based upon a personal injury that traditionally would have arisen under product liability law, such a decreased burden of proof creates an enticing approach for plaintiffs’ lawyers to circumvent long-standing elements of tort law, including duty and causation.

As a result of this relaxed burden of proof, consumer protection actions have been pled in instances when a plaintiff may be unable to prove the fundamental elements of a traditional tort claim.

For example, in *In re: West Virginia Rezulin Litigation v. Hutchinson*, plaintiffs alleged that a diabetes medication caused liver damage in some patients. 585 S.E.2d 52 (W. Va. 2003).

Among their product liability claims, plaintiffs, who had used the medication but had suffered no harm, asserted an action against the drug manufacturers under the West Virginia Consumer and Protection Act (“WVCPA”). Plaintiffs alleged that the manufacturers committed a deceptive practice by not disclosing to consumers problems with the drug.

The court found for the plaintiffs and held, under the WVCPA, that the plaintiffs needed only to allege that they received a product that was different or inferior to that which they believed they purchased.

Similarly, in the product liability context, there have been instances where a plaintiff, who is unable to establish that a product was defectively designed, alternatively alleged that the incident manufacturer should be liable for a CPA violation.

The basis for the violation was that the manufacturer misrepresented a product’s design or failed to disclose certain risks or dangers associated with the product.

A recent example of this trend is evidenced by the class action lawsuits filed against E.I. du Pont de Nemours and Company (“DuPont”) in its use of Teflon in certain consumer products.

The lawsuits, brought under various states’ CPAs, alleged that a chemical used in Teflon was dangerous and that DuPont failed to adequately warn consumers of the risk.

In so doing, the plaintiffs’ lawyers asserted that it was not necessary for plaintiffs to prove causation, but rather, plaintiffs need only prove that DuPont kept information from consumers.

Cases such as these, without the knowledge that they are brought under a CPA, would be considered a typical product liability claim. Because of the difficulty in proving causation, however, more and more cases of this type are being asserted under the guise of CPAs.

Potential Implications of *Green v. N.B.S. Inc., et al.*

Despite lawsuits that have sought to bring a personal injury action under a CPA claim, several courts have rejected the blurring of product liability and CPA law. Those courts have maintained a clear distinction between product liability and consumer protection laws.

Courts in Hawaii, Washington and Oregon have expressly rejected the intrusion of personal injury claims into their respective CPAs. See *Zanakis-Pico v. Cutter Dodge*

Inc., 47 P.3d 1222, 1232 (Haw. 2002); Stevens v. Hyde Athletic Indus. Inc., 773 P.2d 871, 872-873 (Wash. Ct. App. 1989); Gross-Haentjens v. Leckenby, 589 P.2d 1209, 1211 (Or. Ct. App. 1979); Sacks v. Phillip-Morris Inc., No. Civ. A. WMN-95-1840, 1996 WL 780311 (D. Md. Sept. 19, 1996).

In fact, the U.S. District Court for the District of Maryland went so far as to acknowledge that if it were to accept the plaintiffs' theory, "every product liability claim could also be converted into a claim under" a CPA. See Sacks, 1996 WL 780311 at *2.

While Maryland has yet to clarify whether CPAs provide for noneconomic personal injury damages, other courts have held that CPAs are not intended to provide for such remedies. See Pecarina v. Tokai Corp., No. 01-1655, 2002 WL 1023153 (D. Minn. May 20, 2002).

The Petitioner in Green asserts that a statutory limit on noneconomic damages should not apply to a cause of action brought pursuant to a CPA because it is not a personal injury action.

The Petitioner's theory, however, appears to be the latest in a series of challenges asserted by plaintiffs' lawyers against statutory caps.

Maryland's cap, like every statute limiting noneconomic damages across the country, has been challenged on numerous grounds since its enactment.

Plaintiffs' lawyers have sought to defeat the limitation on damages by arguing that such a statutory limitation is unconstitutional under various constitutional challenges including: equal protection challenges, due process challenges, and right to jury trial challenges. Maryland's judiciary has rejected all such challenges.

A finding for the Petitioner in Green, therefore, could have a significant impact on long-standing Maryland law and potentially create a springboard for plaintiffs in other jurisdictions to challenge limitations placed on noneconomic damages by pleading their product liability actions as consumer protection violations.

Such misuse of these statutes could greatly expand the scope of CPAs. It would provide plaintiffs' lawyers with an avenue to circumvent statutory caps that apply to personal injury actions while simultaneously evading traditional elements of product liability law. It would defeat the legislative intent in enacting such statutory caps.

The Court of Appeals of Maryland heard oral arguments in Green v. N.B.S. Inc., et al. on Feb. 10, 2009. The court did not indicate when it would render a decision in the case.

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