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Third Circuit revives class claims against Bayer based on benefit-of-the-bargain theory of economic loss

by Stephanie N. Bedard

The Third Circuit breathed new life into claims asserted by four of the nine named plaintiffs in a proposed class action over Bayer's 2021 recall of benzene-contaminated antifungal sprays, finding they had sufficiently alleged they paid for an unusable and essentially worthless product. *Huertas v. Bayer US LLC*, --- F.4th ----, No. 23-2178, 2024 WL 4703136 (3d Cir. Nov. 7, 2024).

In October 2021, Bayer recalled millions of dollars' worth of antifungal spray products with certain lot numbers after discovering benzene in samples of the products. 2024 WL 4703136, at *1-2. In November 2021, two named plaintiffs – Juan Huertas and Eva Mistretta – filed a putative class action against Bayer. After the district court dismissed the original complaint without prejudice, the named plaintiffs filed an amended complaint in September 2022 that added seven additional named plaintiffs. *Id.* at *2. All the named plaintiffs alleged they purchased Bayer antifungal spray products during the recall period, but only four of the nine plaintiffs provided lot numbers specified in the recall. *Id.*

In May 2023, the district court dismissed the amended complaint with prejudice for lack of standing, on the grounds that the named plaintiffs failed to sufficiently allege they suffered economic loss or harm stemming from an increased risk of developing a future physical injury as a result of the contaminated spray. *Id.*

The Third Circuit reversed, finding that the plaintiffs had plausibly alleged that the potential contamination and subsequent recall rendered the antifungal sprays worthless and deprived buyers of the benefit of the bargain. The panel explained that "[t]he logic requires little elaboration: if a product contains a manufacturing flaw so severe that it cannot be used, it is not worth the full price purchasers paid with the understanding they would be able to use all of the product." *Id.* at *3. The Third Circuit noted that its conclusion that contaminated products are worth less than uncontaminated products aligned with decisions by other Courts of Appeals. *Id.* at *5 (citing *In re Aqua Dots Products Liab. Litig.*, 654 F.3d 748, 749 (7th Cir. 2011), and *Debernardis v. IQ Formulations, LLC*, 942 F.3d 1076, 1085 (11th Cir. 2019)).

The Third Circuit distinguished *Huertas* from a prior opinion, *In re Johnson & Johnson Talcum Powder Prod. Mktg., Sales Pracs. & Liab. Litig.*, 903 F.3d 278 (3d Cir. 2018), where it rejected claims from a consumer who claimed she did not receive the benefit of the bargain after she fully used a container of talcum powder that allegedly carried a risk of cancer.

Unlike in *Johnson & Johnson*, where the plaintiff had fully consumed the product and did not allege the product was ineffective for its intended purpose, the plaintiffs in *Huertas* claimed that (1) they were told to stop using and discard the contaminated products; and (2) Bayer allegedly admitted the products were defective when it separately sued the manufacturer of the benzene-contaminated component in the sprays for the costs associated with the recall. *Id.* at *4-7.

However, the Third Circuit affirmed the dismissal of claims brought by five of the nine named plaintiffs who failed to allege a lot number impacted by the recall. *Id.* at *8.

Takeaway: The *Huertas* decision aligns with a growing body of case law finding that plaintiffs may pursue benefit-of-the-bargain theories of economic loss when a manufacturing defect renders contaminated products unusable and thus inherently worth less than uncontaminated products.