THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

WILLIAM BOYD,	:	January Term, 2001
Plaintiff	:	
	:	No. 965
v.	:	
	:	Commerce Case Program
JOHNSON & JOHNSON, et al.,	:	
Defendants	:	Control No. 102188

OPINION

This opinion addresses the preliminary objections ("Objections") of Defendants Johnson & Johnson and Janssen Pharmaceutica, Inc. to the second amended complaint ("Complaint") of the Plaintiff William Boyd. For the reasons set forth in this Opinion, two of the Plaintiff's claims are legally insufficient, and the Objections so asserting are sustained.

BACKGROUND

This proposed class action centers on Propulsid, a prescription drug produced by the Defendant to combat nocturnal heartburn in individuals with gastroesophageal reflux disease. Propulsid was approved for use by the Federal Drug Administration in 1993, even though the Defendants were allegedly aware of the fact that the drug caused heart rhythm disorders. Before the Plaintiff began taking Propulsid in May 1995, he had no history of irregular heartbeats, ventricular fibrillation or heart disease.

According to the Plaintiff, the Defendants engaged in an extensive marketing campaign to encourage heartburn sufferers to request prescriptions for Propulsid, but failed to include a warning as

to the drug's side effects. As of December 31, 1999, however, Propulsid has been implicated in at least 341 instances of serious heart rhythm abnormalities, 103 deaths and numerous cases of arrhythmia and hypertensive crises. The Plaintiff ceased using Propulsid in the summer of 1996 and claims to have suffered a significantly increased risk of contracting serious latent heart disease as a result of taking Propulsid.

On the basis of these allegations, the Plaintiff has asserted claims against the Defendants for negligence/medical monitoring, breach of express warranty and violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL").[1] In response, the Defendants have filed the Objections, which contend that the Plaintiff's breach of express warranty and UTPCPL claims do not comport with certain procedural rules and are legally insufficient.

DISCUSSION

The Plaintiff's breach of express warranty and UTPCPL claims comport with the Pennsylvania Rules of Civil Procedure, but are not legally sufficient. As a result, the Objections thereto are sustained.

When a court is presented with preliminary objections based on legal insufficiency,

> [I]t is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit recovery. If there is any doubt, it should be resolved by the overruling of the demurrer. Put simply, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.

Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa. Super. Ct. 1999). When examining preliminary objections to a class action complaint, a court should concern itself with the allegations and claims of

[1] 73 Pa. C.S. §§ 201-1 to 201-9.3.

the individual defendants only. Sherrer v. Lamb, 319 Pa. Super. 290, 294, 466 A.2d 163, 165 (1983). See also Janicik v. Prudential Ins. Co. of Amer., 305 Pa. Super. 120, 128, 451 A.2d 451, 454 (1982) ("A court may not make the initial class action determination until after the close of pleadings to ensure that the class proponent is presenting a non-frivolous claim capable of surviving preliminary objections.").

I. The Plaintiff's Breach of Express Warranty and UTPCPL Claims Comport with the Relevant Procedural Rules

The Defendants contend that the Plaintiff has failed to comply with the Pennsylvania Rules of Civil Procedure[2] by failing to plead with the required degree of specificity and particularity and failing to attach necessary documents. The Court disagrees.

To determine if a pleading meets Pennsylvania's specificity requirement set forth in Rule 1019(a), a court must ascertain whether the allegations are "sufficiently specific so as to enable [a] defendant to prepare [its] defense." Smith v. Wagner, 403 Pa. Super. 316, 319, 588 A.2d 1308, 1310 (1991) (citation omitted). See also In re The Barnes Found., 443 Pa. Super. 369, 381, 661 A.2d 889, 895 (1995) ("[A] pleading should . . . fully summariz[e] the material facts, and as a minimum, a pleader must set forth concisely the facts upon which [a] cause of action is based."). Allegations of fraud are must be pled with particularity. Pa. R. Civ. P. 1019(b). See also Martin v. Lancaster Battery Co., 530 Pa. 11, 18, 606 A.2d 444, 448 (1992) (An allegation of fraud must "explain the nature of the claim to the opposing party so as to permit the preparation of a defense" and

[2] Each of the Pennsylvania Rules of Civil Procedure is referred to as a "Rule."

be "sufficient to convince the court that the averments are not merely subterfuge."); Maleski v. DP Realty Trust, 653 A.2d 54, 65 (Pa. Commw. Ct. 1995) (To determine whether fraud has been pled with particularity, a court must "look to the complaint as a whole."). In addition, Rule 1019(i) requires a plaintiff to attach a copy of a writing on which his or her claim is based.

In the instant case, the Plaintiff has alleged that the Defendants "expressly warranted that their products were both efficacious and safe for their intended use." Comp. ¶ 72. In addition, they have alleged the manner in which these warranties were delivered and have attached examples of the supposed warranties that appeared in the Physicians' Desk Reference, Dear Doctor letters, advertisements and other print forms. Id. ¶ 73, Exs. A, B. This is sufficient to comply with the requirements of the Pennsylvania Rules of Civil Procedure, and the Objections asserting otherwise are overruled.

II. The Plaintiff's Breach of Express Warranty and UTPCPL Are Legally Insufficient

Each of the Plaintiff's breach of express warranty and UTPCPL claims contain numerous flaws that render them legally insufficient. Accordingly, the Objections to them are sustained.

An obvious requirement of a breach of express warranty claim is an express warranty, which is defined as being one of the following:

> (1) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
> (2) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
> (3) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

13 Pa. C.S. § 2313 ("Section 2313"). As is readily apparent, the focus is on whether the alleged warranty has become part of the "basis of the bargain."

In general, all of the statements of the seller become part of the basis of the bargain "unless good reason is shown to the contrary." Section 2313 cmt. 8. It is important, however, that the buyer at least be aware of the seller's representation prior to the transaction's consummation:

> In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof.

Section 2313 cmt. 3. See also 1 James J. White & Robert S. Summers, Uniform Commercial Code (5th ed. 2000) § 9-5 (stating that the circumstances under which post-transaction representations become express warranties are limited); 3 Ronald A. Anderson, Uniform Commercial Code (3rd ed. 1985) § 2-313:39 ("[w]hen a buyer is not influenced or induced to make the purchase because of the particular statement, that statement is not a basis for the bargain"). But see Section 2313 Pennsylvania Bar Ass'n note (1)(c) ("[T]he qualification that affirmations, etc. create a warranty if made 'as a basis of' the bargain, appears to be substantially the same as the 'reliance' qualification in § 12 of the Uniform Sales Act.").

Contrary to the Defendants' assertions, a number of the documents attached to the Complaint omit a warning regarding certain side effects of Propulsid, even if the majority of the documents do, in fact, include such warnings. However, there is no indication anywhere in the Complaint that the Plaintiff ever saw or heard any warningless warranties before he purchased Propulsid or that the documents and

representations the Plaintiff saw or heard are of the kind that can create a warranty. See Sowers v. Johnson & Johnson Med., Inc., 867 F. Supp. 306, 313 (E.D. Pa. 1994) ("[A]n express warranty must be 'directed at consumers in order to induce purchases of the product.'"); Kenepp v. American Edwards Labs., 859 F. Supp. 809, 817 (E.D. Pa. 1994) (citing Silverman v. Samuel Mallinger Co., 375 Pa. 422, 100 A.2d 715 (1953), to hold that drug company's material data safety sheets could not give rise to a warranty because "the representations made therein were not directed at consumers in order to induce purchases of the product"). Cf. Hahn v. Richter, 543 Pa. 558, 563, 673 A.2d 888, 891 (1996) ("[W]here the adequacy of warnings associated with prescription drugs is at issue, the failure of the manufacturer to exercise reasonable care to warn of dangers, i.e., the manufacturer's negligence, is the only recognized basis of liability."). For these reasons, the Plaintiff's breach of express warranty claim is legally insufficient.

The Plaintiff's UTPCPL claims fail for similar reasons. Because the Plaintiff stopped using Propulsid in 1996, the UTPCPL claims are governed by the version of the UTPCPL that requires proof of each element of common law fraud.[3] These elements include:

---

[3] Since the UTPCPL was enacted in 1968, a debate has raged across Pennsylvania as to which UTPCPL claims, if any, require proof of each of the elements of fraud. Although an amendment to the UTPCPL effective in 1997 has clouded the issue, it is clear that each of the UTPCPL provisions on which the Plaintiff's claim is predicated required proof of fraud prior to that time. For a full discussion and analysis of this issue, see Weiler v. SmithKline Beecham Corp., __ D. & C.4th __ (C.P. Phila. 2001) (available at http://courts.phila.gov/cptcvcomp.htm).

In this instant matter, the Defendants assert that the Plaintiff's claims are governed by the earlier version of the UTPCPL because the Plaintiff stopped taking Propulsid in the summer of 1996, and the Plaintiff does not contest this assertion. As such, the Court will apply the pre-1996 UTPCPL and its concomitant requirements.

> (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance.

Gruenwald v. Advanced Computer Applications, Inc., 730 A.2d 1004, 1014 (Pa. Super. Ct. 1999) (citing Gibbs v. Ernst, 538 Pa. 193, 207, 647 A.2d 882, 889 (1994)). As discussed supra, it is unclear that the Plaintiff saw or heard any misrepresentation, precluding a finding of reliance, whether justifiable or otherwise. Moreover, there is no allegation of intent or knowledge, and the Complaint does not allege what damages the Plaintiff incurred. Accordingly, the Plaintiff's UTPCPL claim is legally insufficient and must be dismissed.[4]

CONCLUSION

The Plaintiff's UTPCPL and breach of express warranty claims are legally insufficient and must be repled.

BY THE COURT:

_____

JOHN W. HERRON, J.

Dated: January 22, 2002

[4] The Court is skeptical of the Plaintiff's ability to plead either its UTPCPL or breach of express warranty claim successfully, but will nevertheless allow the Plaintiff a final opportunity to do so. See Harley Davidson Motor Co. v. Hartman, 296 Pa. Super. 37, 42, 442 A.2d 284, 286 (1982) ("Even where a trial court sustains preliminary objections on their merits, it is generally an abuse of discretion to dismiss a complaint without leave to amend.").

THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

WILLIAM BOYD,	:	January Term, 2001
Plaintiff	:	
	:	No. 965
v.	:	
	:	Commerce Case Program
JOHNSON & JOHNSON, et al.,	:	
Defendants	:	Control No. 102188

ORDER

AND NOW, this 22nd day of January, 2002, upon consideration of the Preliminary Objections of Defendants Johnson & Johnson and Janssen Pharmaceutica, Inc. to the Second Amended Complaint of Plaintiff William Boyd, and the Plaintiff's response thereto, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED as follows:

1. The Preliminary Objections to Count II - Breach of the Express Warranty and Count III - Violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law are SUSTAINED, and Counts II and III are DISMISSED.

2. The Plaintiffs are directed to file a third amended complaint within twenty days of the date of entry of this order.

BY THE COURT:

_____
JOHN W. HERRON, J.