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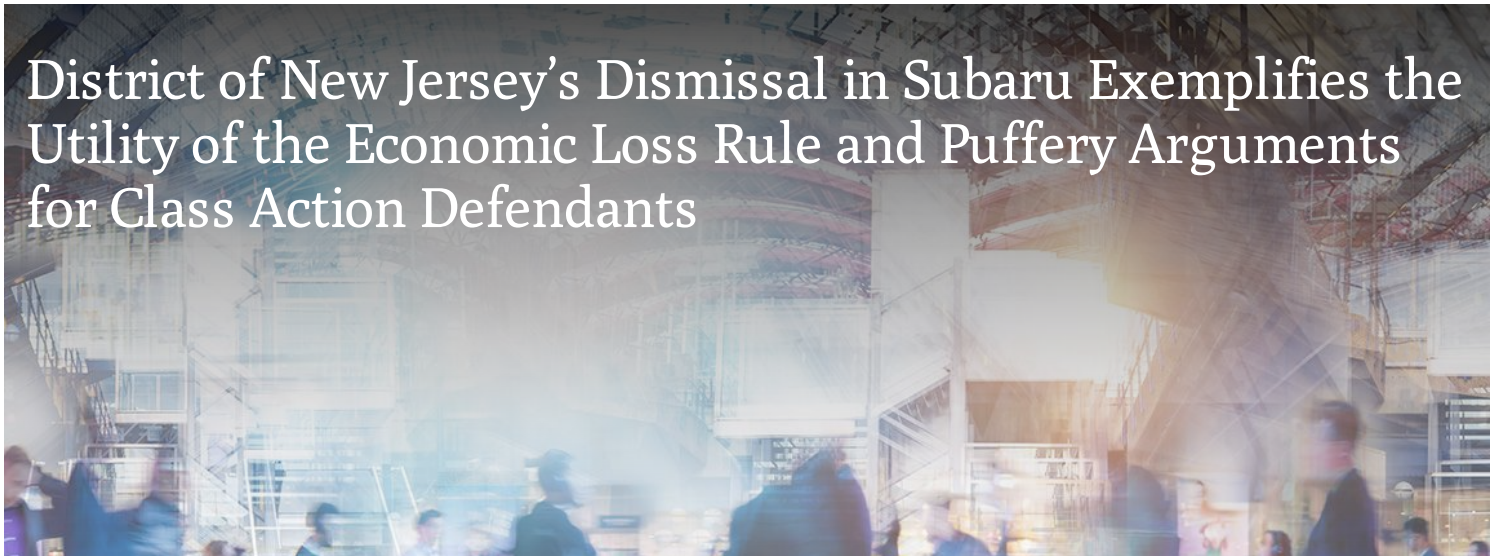

District of New Jersey's Dismissal in Subaru Exemplifies the Utility of the Economic Loss Rule and Puffery Arguments for Class Action Defendants

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Key Takeaways

1. Plaintiffs seeking tort liability should be aware of the Economic Loss Rule and whether the applicable jurisdiction has adopted it.
2. A fraudulent concealment/omission claim may be dismissed if based on "mere puffery" found in sales materials.

The United States District Court for the District of New Jersey's dismissal of several claims in *Cohen v. Subaru Corporation* exemplifies the utility of the economic loss rule and puffery arguments in the class action and false-advertising contexts. Class action defendants should take note of these defenses as an opportunity to slice at the size and scope of plaintiffs' cases.

On April 16, 2020, Subaru Corporation and Subaru of America, Inc. (collectively, "Subaru") recalled 188,000 vehicles in the United States – all of which were 2019 models. Subaru explained that the low-pressure fuel pumps included in these models – manufactured by co-defendants Denso Corporation and Denso International of America, Inc. ("Denso") – contained a defect causing fuel system failures. Things worsened for Subaru when, in 2021, it recalled an additional 165,000 vehicles for the same problem.

Plaintiffs then filed four separate putative class actions against Subaru and Denso, which were consolidated before Judge Joseph H. Rodriguez in the District of New Jersey. Each of the actions allege that all Subaru vehicles manufactured since 2013 contain this defective part. Collectively, the various plaintiffs brought 59 substantive counts against the defendants, including breach of warranty, breach of contract, and various state law claims. Subaru responded by filing motions to dismiss, arguing that the court lacked subject matter jurisdiction and that defendants had failed to raise valid claims for several of their counts.

The Court granted Subaru's motion to dismiss in-part. Notably, Judge Rodriguez tossed most of plaintiffs' strict product liability claims against Denso under the economic loss rule. Under this rule (adopted by several states), plaintiffs generally cannot recover damages under negligence or strict product liability theories if the asserted tort claims are based on the same facts as breach of contract claims. The justification for this rule is simple: if the parties have entered into a contract governing their rights as to the underlying facts, then that contract – rather than

the common law – should govern their rights and obligations as to the relevant transactions. Here, because multiple states relevant to the class (New Jersey, California, and Wisconsin) have adopted the economic loss rule, and because the plaintiffs' common-law and statutory fraud claims were based on the same facts as their contractual claims, Judge Rodriguez dismissed class-wide common-law fraud claims for states that had adopted the economic-loss rule. Class action defendants should take note of whether their applicable jurisdictions follow such a rule. This is especially true when the class raises claims under both tort and contract law, although defendants should note that many states will apply the economic loss rule even when the plaintiffs have not, but could have, pleaded a breach of contract claim.

Judge Rodriguez also dismissed most of the common law fraudulent concealment/omission claims brought against Subaru. Plaintiffs relied on Subaru's advertisements and sales brochures for these claims, which promoted the safety and reliability of Subaru's vehicles. Judge Rodriguez held, however, that these marketing statements were "non-actionable puffery," defined as "exaggerated statements regularly made by companies, which are unverifiable." Because the aforementioned materials failed to make any "specific claims" as to the defective fuel pumps (e.g., their expected shelf life), the court held they were inadequate to support plaintiffs' fraudulent concealment/omission claims. Again, class-action defendants should take note, and carefully analyze whether they have viable puffery arguments when the allegedly offending materials are marketing or advertising for an allegedly defective product or service.

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