

Product Liability & Toxic Tort

N.J. Law Is Not the Law of Choice

The majority of District of N.J. decisions now apply the law of the consumer's home state in nationwide consumer fraud class actions

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As the principal home to many large corporations, and with treble damages available under the New Jersey Consumer Fraud Act (NJCFCA), New Jersey has quickly become a preferred venue among plaintiffs counsel commencing nationwide consumer fraud class actions. However, New Jersey district courts have disagreed over whether New Jersey's conflict of laws rules require the application of the NJCFCA or the consumer fraud statutes of the plaintiff's home state where the allegedly defective product was purchased outside New Jersey. A majority of those courts faced with this issue now hold that the law of the state in which the product was purchased should apply. This issue may have a meaningful impact on the number of nationwide consumer fraud class action suits venued in the District of New Jersey, because requiring the application of the laws of the 50 states presents

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a barrier to class certification.

New Jersey district courts sitting in diversity apply New Jersey's "most significant relationship test" to choice of law issues. The most significant relationship test consists of two prongs: (1) a substantive comparison of the laws of the states to determine whether a conflict exists, and if there is no conflict, then the law of the forum state applies; but (2) if there is a conflict between the states, then the court must apply the factors enumerated in the *Restatement (Second) of Choice of Laws*. New Jersey district courts agree that there is a significant conflict between the NJCFCA and the laws of other states, and, accordingly, an analysis of choice of law is necessary.

In cases involving fraud, Restatement §148 is applied to the second prong of the analysis. Significantly, §148 distinguishes between cases where the alleged misrepresentation and reliance occur within the same state, and when those acts occur in different states. Under § 148(1), a presumption arises that the law of the state in which both the misrepresentation and the act of reliance occurred should be applied, unless another state has a more significant relationship to the litigation.

In contrast, §148(2), which applies

to scenarios where the misrepresentation and reliance occurred in different states, provides six factors that the court must consider to determine which state has the most significant relationship. Those six factors are: (a) the place of plaintiff's act of reliance — usually the consumer's act of purchasing the product; (b) the place where plaintiff received the representations; (c) the place where defendant made the representations; (d) the domicile, residence, nationality, place of incorporation and place of business of the parties; (e) the place where the tangible thing which is the subject of the transaction was situated at the time; and (f) the place where plaintiff is to render performance under the contract.

Initially, there was a split within the District of New Jersey regarding the application of the NJCFCA to nonresident plaintiffs who purchased the product out-of-state. Beginning with *Agostino v. Quest Diagnostics*, 256 F.R.D. 437 (D.N.J. 2009) ("*Agostino I*"), Judge Chesler held that New Jersey's choice of law doctrine, applying §148(1), required the application of the consumer protection laws of the 50 states. There, the plaintiffs alleged that they had been improperly billed by Quest or its outside debt collection agencies. The court applied *Restatement* §148(1), reasoning that both the misrepresentation and the act of reliance occurred in the same state because Quest directed the allegedly illegal bills to the plaintiffs' home states.

Then, in *In re Mercedes Benz Tele Aid Contract Litigation*, 257 F.R.D. 46 (D.N.J. 2009), the court found that *Agostino I* incorrectly applied the choice

of law doctrine by applying §148(1), and held that under §148(2) the NJCFA must be applied to consumer fraud cases where the defendant-manufacturer was based in New Jersey and the misrepresentations emanated from New Jersey but the consumer's act of reliance occurred outside New Jersey. This decision is now the basis for the minority rule developing within the New Jersey district courts.

The *Mercedes* plaintiffs alleged that Mercedes violated the NJCFA due to its failure to disclose the future obsolescence of the analog network on which the vehicle's emergency response system, "Tele Aid," relied. The plaintiffs alleged that the Tele Aid product and advertisement were planned and implemented from the corporate office in New Jersey and, therefore, the alleged misrepresentations emanated from New Jersey. The plaintiffs further alleged that they received and relied on the alleged misrepresentations in their home states. The court agreed, and concluded that §148(2) must apply.

Focusing on the purpose of the NJCFA, the *Mercedes* court concluded that New Jersey had the most significant relationship and that the NJCFA should apply to all the plaintiffs. Although acknowledging that four of the factors — (a) the place of plaintiff's reliance, (b) the place where plaintiff received the representations, (d) the place where the tangible thing was situated at the time and (e) the place where plaintiff is to render performance under the contract — militated in favor of applying the law of the consumer's home state, the court stressed that the test is not a mere tallying of the factors. The *Mercedes* court considered the fact that "all of the conduct underlying plaintiffs' consumer fraud claim" took place in New Jersey to be particularly significant. Thus, the *Mercedes* court concluded that New Jersey had the most significant relationship to the parties and the occurrence and, therefore, held that the NJCFA should apply to all plaintiffs.

Subsequently, in *Agostino v. Quest Diagnostics*, 2010 WL 5392688 (D.N.J. Dec. 22, 2010) ("*Agostino II*"), the court

explicitly disagreed with *Mercedes* and held that under either §148(1) or §148(2) the state in which the product was purchased had the most significant relationship to the transaction and, therefore, its consumer protection law should be applied. *Agostino II* is the basis of the majority rule that has developed within the District of New Jersey.

First, *Agostino II* reaffirmed the decision to apply Restatement §148(1). Nonetheless, the *Agostino II* court also performed the §148(2) analysis and confirmed that the consumer protection laws of the consumer's home state must be applied. In coming to this conclusion, the court gave significantly more weight to the factors in favor of applying the law of the plaintiff's state, i.e., (a) the place of plaintiff's act of reliance, (b) the place where plaintiff received the representations, (e) the place where the tangible thing was located and (f) the place where performance was required. The court further found that the domicile, residence, nationality, place of incorporation and place of business of the parties, i.e., factor (d), was neutral because the various parties and members of the putative class were from all 50 states. Finally, the court noted that factor (c), the place of the representation, militates in favor of applying the NJCFA, assuming, arguendo, that Quest made the representations in New Jersey.

Additionally, the court observed that the NJCFA represents the New Jersey Legislature's balance between consumer protection and creating an environment hospitable for businesses. The court noted that applying the NJCFA to all plaintiffs would effectively supplant the balance struck by New Jersey in the place of every other state legislature, and it found that that would be improper in a situation where the majority of contacts to the parties and occurrence are to the consumer's home state. Thus, the *Agostino II* court concluded that the consumer's home state had the most "significant interest" in the controversy and, therefore, the law of the consumer's

home state had to be applied.

Significantly, in between the *Mercedes* and *Agostino II* decisions, the Third Circuit issued an unpublished opinion, *Cooper v. Samsung Electronics America*, 2010 WL 1220946 (3d Cir. March 30, 2010), that confronted this same issue. In that case, the plaintiffs alleged that a certain Samsung television was not able to accept a high-quality video signal as advertised. The Third Circuit recognized that Samsung's representations emanated from New Jersey and were received and relied upon in Arizona, and, therefore, § 148(2) must be applied to determine whether the New Jersey or Arizona consumer fraud statute should apply. The court summarily noted that "[t]he transaction in question bears no relationship to New Jersey other than the location of Samsung's headquarters" and determined that the claim "bears the most significant relationship with Arizona, the state in which the television was marketed, purchased and used."

Since *Agostino* and *Cooper*, the majority of District of New Jersey decisions that have confronted the issue have agreed with the *Agostino* reasoning, and declined to apply the NJCFA to out-of-state purchasers. In weighing the various factors, many of these courts were persuaded that they should not encroach on the legislatures of the consumers' home states by applying the NJCFA instead of the consumer fraud legislation of a consumer's home state. Ultimately, the majority of the District of New Jersey decisions have found that the quantity and substance of the factors militating in favor of applying the consumer's state law far outweigh corporate presence in New Jersey. Thus, the majority rule that has developed since the *Agostino-Mercedes* split agrees with the holding in *Agostino II*, that the law of the consumer's home state should be applied when a product is purchased in that state and the seller has a corporate place of business in New Jersey. Adoption of this rule may present a barrier to class certification because application of so many different standards is unwieldy, impracticable and often is found to militate against class certification. ■