

**FILED**

MAY 02 2006



Carol E. Higbee, P.J.Cv.

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OPINIONS**

**SUPERIOR COURT OF NEW JERSEY  
COUNTIES OF  
ATLANTIC AND CAPE MAY**

CAROL E. HIGBEE, J.S.C.

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**MEMORANDUM OF DECISION ON MOTION**  
**Pursuant to Rule 1:6-2(f)**

**CASE:** Clark v. Hoffmann-La Roche, Inc., et al  
**DOCKET #:** ATL-L-67-05  
**DATE:** May 2, 2006  
**MOTION:** Defendant's Motion to Dismiss the Complaint with Prejudice  
**ATTORNEYS:** Diane E. Lifton – Defendants  
Christopher A. Seeger - Plaintiffs

Having carefully reviewed the papers submitted and oral arguments presented, I have ruled on the above Motion as follows:

Defendants Hoffmann-La Roche, Inc. and Roche Laboratories, Inc. (collectively “domestic defendants”) bring this motion to dismiss plaintiffs Codie & James Clark and Sarah Clark’s complaint with prejudice for failure to state a claim upon which relief can be granted pursuant to R. 4:6-2(e). Plaintiffs oppose this motion.

**BACKGROUND**

On December 22, 2004, Plaintiffs filed a complaint with the Superior Court of New Jersey – Atlantic County – Law Division seeking to recover for birth defect related injuries allegedly caused to Sarah Clark by Codie Clark’s ingestion of the prescription drug Accutane.

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Plaintiffs' complaint consists of five counts: (1) defective design under the New Jersey Products Liability Act ("NJPLA"); (2) failure to warn under the NJPLA; (3) breach of implied warranty under the NJPLA; (4) punitive damages under the common law and NJPLA; and (5) violations of the New Jersey Consumer Fraud Act ("NJCFA").

Defendants have filed this motion asserting that all of these claims are premised on a theory of failure to warn and thus, they are barred as a matter of law by the "learned intermediary doctrine." Domestic defendants also argue that neither Utah law nor New Jersey law allows for causes of action against United States Food and Drug Administration ("FDA")-approved prescription drugs. Additionally, defendants assert that Plaintiff's claims are barred by the statute of limitations for personal injuries. Domestic defendants believe that Utah law properly governs these claims.

Plaintiffs oppose this motion arguing that the learned intermediary doctrine does not bar their claims. Plaintiffs assert that they have properly pleaded a claim for design defect and that domestic defendants' motion is otherwise inappropriate as the complaint adequately states a claim. Plaintiffs believe that New Jersey law applies to this matter.

On May 2, 2005 the New Jersey Supreme Court designated all pending and future litigation in New Jersey involving the drug Accutane as a mass tort to be handled on a coordinated basis before this court. This case represents one of the matters in the Accutane mass tort.

#### ANALYSIS

R. 4:6-2(e) allows a party to bring a motion to dismiss a complaint for failure to state a claim upon which relief can be granted. R. 4:5-7 provides that "[e]ach allegation of a pleading shall be simple, concise and direct, and no technical forms of pleading are required.

Additionally, all pleadings shall be liberally construed in the interests of justice.

On a motion under R. 4:6-2(e), the complaint is to be thoroughly and liberally searched in order to determine if a cause of action can be garnered from the document, even if it is contained in an obscure statement, and an opportunity to amend should be given if necessary. Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1989). This is especially so if the litigation is in its early stages with further discovery yet to be taken. Id. On a motion to dismiss, the plaintiff is accorded every reasonable inference and the motion “should be granted only in rare instances and ordinarily without prejudice. As such, ‘if a generous reading of the allegations merely suggests a cause of action, the complaint will withstand the motion.’” Smith v. SBC Communications Inc., 178 N.J. 265, 282 (2004) (quoting F.G. v. MacDonell, 150 N.J. 550, 556 (1997)).

In the case at hand, defendants claim that plaintiffs have failed to state a claim upon which relief can be granted and refer to the warnings that were provided in association with the drug Accutane as well as to the matters alleged in the pleadings. The parties do not dispute that the warnings that accompanied the drug are integral to the decision in this motion. See e.g. Pension Benefit Guaranty Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993); Syncsort, Inc. v. Sequential Software, Inc., 50 F.Supp.2d 318, 325 (D.N.J. 1999) (finding that “undisputably authentic documents expressly relied upon or integral to the pleadings” may be considered without turning a motion to dismiss into one for summary judgment). Plaintiffs attached a number of exhibits to their opposition to this motion, defendants object to all but one and have filed a separate motion to exclude same from consideration. The exhibit that was not objected to was the Patient Information/Consent form signed by Ms. Clark. This form is part of the “Pregnancy Prevention Program for Women on Accutane” and is integral to the allegations set forth in the pleadings. The remaining seven exhibits attached to the opposition are evidentiary documents that plaintiffs could use to support their allegations. Defendants want the

court to view only the exhibit helpful to their position. These items are all helpful to the court in deciding whether to dismiss the complaint and are all integral to an understanding of the allegations. This court will therefore deny the defendant's motion to exclude these documents and consider them in making the decision in this case.

Plaintiffs claim that defendants Hoffmann-LaRoche Inc., and F. Hoffmann-La Roche, Ltd. ("Swiss defendant") are part of a unified conglomerate known as "the Roche Group." Domestic defendants are New Jersey corporations with their principal place of business located in Nutley, New Jersey. Accutane is a drug manufactured and distributed in New Jersey by the defendants. Accutane is a prescription drug intended to treat people suffering from severe cystic acne. There is no dispute that Accutane is a teratogen, a drug that can cause severe physical and cognitive birth defects and malformations in children exposed to the drug during gestation. Accutane was first developed in 1971. In 1982, the FDA approved Accutane for treatment of cases of severe cystic acne not responding to other treatments.

Plaintiffs Codie and James Clark allege that their daughter Sarah was born with significant birth deformities because Codie Clark ingested Accutane while pregnant. Plaintiff was prescribed Accutane by her dermatologist and began taking the drug on or about March 1, 2001. At this time Ms. Clark was unaware that she had recently become pregnant with Sarah Clark. Ms. Clark resided in Utah at the time she was prescribed Accutane and during the time she ingested Accutane. Her prescribing physician was located in Utah. Plaintiffs allege Sarah was conceived, was born and resides in Utah.

Plaintiffs claim that the defendants, as a whole, had a duty to both advise of the danger of birth defects and to provide adequate instructions, information and safety procedures essential to ensure that the use of Accutane was as safe as possible. Plaintiffs assert that Accutane is so

dangerous that in order to ensure its safe use, special requirements and limitations must be provided as well as advice and monitoring to avoid prescribing the drug to pregnant women.

The plaintiffs allege in their complaint that defendants knew from 1971 when Accutane was developed that it was a powerful teratogen. They further allege specifically that in order to get the drug approved by the FDA for use in the United States the defendants intentionally deceived the FDA and, in fact, concealed foreign studies and results of United States clinical trials that would have disclosed to the FDA the extent of the danger of birth defects.

The contention of the plaintiffs is that the defendants for years took steps to over promote the drug in the United States because abortion was legal here and defendants viewed abortion as the answer to the birth defect problem. The plaintiffs allege that despite growing concern by the FDA over the failure of the warnings which were made stronger and stronger over time, the defendants resisted any attempt to create a national pharmacy registry which they knew or should have known would have prevented the drug from being taken by pregnant women. Such a registry is now required.

Plaintiffs also allege that the risk of children being born with tragic birth defects far outweighed the benefits of Accutane which treats acne.

The complaint specifically alleges:

“56. In 1988, the FDA became alarmed at the growing number of children being born with Accutane related birth defects. At that time, the FDA had received confirmation of 66 known cases of deformed children being born to mothers ingesting Accutane since 1982. In response, the FDA’s Director of the Division of Birth Defects and Developmental Disabilities at the Center for Disease Control concluded:

In closing, let me note that I feel a great urgency to prevent infants and children from having the serious birth defects and birth defects and developmental disabilities associated with the Accutane embryopathy. As you know, the problems are as serious as the Thalidomide embryopathy . . . . It is not often that we know how to prevent all cases of a particular serious birth defects or developmental disabilities. In this instance, however, we know how to prevent further cases. We simply need to remove the drug from the market.

I know that because the product is effective against cystic acne that removing the drug from the market will no be popular. On the other hand, I know that 40 infants born alive after first trimester exposure to Accutane have died as infants or children because of developmental errors that Accutane caused. I believe that if 40 teenagers or young adults with acne had died as a result of therapy caused by this drug that the drug would have been viewed as too dangerous, even though effective, to be on the market. I do not believe that the benefits outweigh the risk and that the drug should be removed from the market as soon as possible.

57. Accordingly, the FDA requested that Roche conduct a study to test the effectiveness of its efforts to prevent pregnancies. In response, Roche proposed a study that the FDA *rejected* because the FDA concluded the study was not scientifically valid and contained a bias resulting in a falsely inflated success rate for pregnancy prevention.

58. Meanwhile, the number of patients using Accutane more than doubled between 1992 and 1999. Out of these patients being treated with Accutane, Roche knew that 50 percent were females, of whom 85 to 90 percent were of childbearing age and potential. By 2000, Roche received reports of almost 2,000 cases of Accutane-exposed pregnancies since the drug's approval, with 70% of the exposures occurring after the implementation of Roche's defective pregnancy prevention program."

Plaintiffs allege that the defendants have attempted to avoid using safeguards to prevent birth defects resulting from Accutane throughout the history of the drug in order to maximize the profits received from the drug.

The written information that accompanies a prescription of Accutane is replete with warnings to avoid pregnancy while taking the drug. Indeed, the drug contains a black box warning, the strongest warning the FDA requires, that begins by stating, "Accutane must not be used by females who are pregnant or who may become pregnant while undergoing treatment." The black box warning provides that Accutane is contraindicated in females of childbearing potential unless a patient meets all of eight listed requirements. These requirements include that the patient undergo two pregnancy tests with negative results prior to being prescribed Accutane. Further, the requirements repeatedly assert the need for the patient to communicate with and understand instructions from the prescribing physician.

On February 23, 2001, Ms. Clark (at the time she was still Codie Stark), signed the one-page Patient Information/Consent form that was part of the Pregnancy Prevention Program for Women on Accutane. The form instructs patients in bold, capital letters to not sign the form or take Accutane if there is anything that the patient does not understand. The form contains fifteen paragraphs of information regarding the hazards of taking Accutane and the patient is supposed to sign their initials after each paragraph to indicate that they understand the various warnings and instructions associated with the drug. Ms. Clark initialed each of the fifteen paragraphs on the form and signed the form at the bottom of the page.

The parties vigorously dispute which state's laws should apply to this litigation. As is obvious from plaintiffs' complaint, plaintiffs feel that New Jersey law should apply based upon the defendants' contacts with the forum state. Thus, plaintiffs seek remedies under the NJPLA and the NJCFA. By contrast, the defendants assert that Utah law should apply based upon the

plaintiffs' contacts with Utah. While the complaint solely refers to the application of New Jersey law, plaintiffs' opposition to this motion asserts that even if Utah law were determined to apply, this matter should not be dismissed for failure to state a claim, but rather, plaintiffs should be afforded an opportunity to amend the complaint and plead under Utah law.

As noted above, all New Jersey state litigation pertaining to alleged injuries stemming from Accutane have recently been consolidated as a mass tort before this court. At present there are over two-hundred cases pending, although only a few involve birth defects. Discovery is proceeding as agreed to by the parties.

Both New Jersey and Utah afford defenses to drug manufacturers that comply with certain FDA requirements in obtaining approval for public consumption of their products. See Perez v. Wyeth Laboratories, Inc., 161 N.J. 1, 24 (1999) (stating that "FDA regulations serve as compelling evidence that a manufacturer satisfied its duty to warn the physician about potentially harmful side effects of its product"); Grundberg v. Upjohn Co., 813 P.2d 89, 99 (Utah 1991) (holding "that a broad grant of immunity from strict liability claims based on design defects should be extended to FDA-approved prescription drugs in Utah").

Under the learned intermediary doctrine, because a physician functions as an intermediary between manufacturer and consumer, "a pharmaceutical manufacturer generally discharges its duty to warn the ultimate user of prescription drugs by supplying physicians with information about the drug's dangerous propensities." Niemiera by Niewmiera v. Schneider, 114 N.J. 550, 559 (1989). Both New Jersey and Utah recognize the learned intermediary doctrine. See Id.; Schaerrer v. Stewart's Plaza Pharmacy, Inc., 79 P.3d 922, 929 (Utah 2003) (finding that the learned intermediary doctrine applied to pharmacists as well as drug manufacturers).

The instant matter is not governed solely by the learned intermediary doctrine because despite whatever information was given to the physician, and despite whatever direct-to-consumer advertising, if any, had been conducted, warnings about Accutane were provided directly to the patients, including Ms. Clark. Perez, supra, 161 N.J. at 19 (“When all of its premises are absent, as when direct warnings to consumers are mandatory, the learned intermediary doctrine ... simply drops out of the calculus, leaving the duty of the manufacturer to be determined in accordance with general principles of tort law.”) (quoting Edwards v. Basel Pharms., 116 F.3d 1341, 1343 (10th Cir. 1997)). Normally, the adequacy of a warning is a question of fact for a jury to determine. Feldman v. Lederle Laboratories, a Div. of American Cyanamid Co., 125, N.J. 117, 140 (1991) (discussing Abbot v. American Cyanamid Co., 844 F.2d 1108, 1115 (4th Cir. 1988)); see also House v. Armour of America, Inc., 886 P.2d 542, 551 (Utah App. 1994) (“Whether the warning provided by the label was adequate presents a question of fact, to be resolved by the trier of fact.”). However, “where the warning is accurate, clear, and unambiguous,” it can be deemed adequate as a matter of law. Felix v. Hoffmann-LaRoche, Inc., 540 So.2d 102, 105 (Fla. 1989) (finding that the warnings to avoid pregnancy on Accutane were adequate as a matter of law); see also, Hammock v. Hoffmann-LaRoche, Inc., 269 N.J. Super. 289, 293 (App. Div. 1993) rev’d on other grounds 142 N.J. 356 (1995). “Adequacy, of course, must be gauged in terms of probable efficacy in sparing the consumer the hazard of a risk not reasonably appreciated by him in his use of the product.” Torsiello v. Whitehall Laboratories, Division of Home Products Corp., 165 N.J. Super. 311, 321 (App. Div.) certif. denied, 81 N.J. 50 (1979).

The NJPLA, specifically, N.J.S.A. 2A:58C-4 provides:

In any product liability action the manufacturer or seller shall not be liable for harm caused by a failure to warn if the product contains an adequate warning or instruction or, in the case of dangers a manufacturer or seller discovers or

reasonably should discover after the product leaves its control, if the manufacturer or seller provides an adequate warning or instruction. An adequate product warning or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates adequate information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons by whom the product is intended to be used, or in the case of prescription drugs, taking into account the characteristics of, and the ordinary knowledge common to, the prescribing physician. If the warning or instruction given in connection with a drug or device or food or food additive has been approved or prescribed by the federal Food and Drug Administration under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040, 21 U.S.C. § 301 et seq. or the "Public Health Service Act," 58 Stat. 682, 42 U.S.C. § 201 et seq., a rebuttable presumption shall arise that the warning or instruction is adequate. For purposes of this section, the terms "drug", "device", "food", and "food additive" have the meanings defined in the "Federal Food, Drug, and Cosmetic Act."

The New Jersey Supreme Court noted with regard to prescription drugs, "a manufacturer who knows or should know of the danger or side effects of a product is not relieved of its duty to warn. Rather, as the comment expressly states, it is only the unavoidably unsafe product '*accompanied by proper warning*' that is not defective." Feldman v. Lederle Laboratories, 97 N.J. 429, 447 (1984) (internal citations omitted) (emphasis in the original).

In the matter at hand, the court finds that the warning provided to plaintiffs was adequate as a matter of law. The warnings/instructions communicate adequate information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons by whom the product is intended to be used. One does not need to be a physician to understand the language in the black box warning on Accutane that states in part:

Accutane must not be used by females who are pregnant or who may become pregnant while undergoing treatment. Although not every fetus exposed to Accutane has resulted in a deformed child, there is an extremely high risk that a deformed infant can result if pregnancy occurs while taking Accutane in any amount even for short periods of time. Potentially any fetus exposed during pregnancy can be affected. Presently, there are no accurate means of

determining after Accutane exposure which fetus has been affected and which fetus has not been affected.

Consequently, defendants have satisfied their burden under either New Jersey or Utah law to provide an adequate warning with respect to the risks associated with pregnancy while taking Accutane to the patients who use this drug. As to the New Jersey law, the decision on the Accutane failure to warn claim as it relates to birth defects has been made by the Appellate Division in the case of Banner v. Hoffmann-LaRoche Inc. & Roche Laboratories Inc., 383 N.J.Super. 364 (App.Div. 2006). The court in that case found that the warnings were adequate. Id. at 377. This court is bound by that decision. The parents Codie Clark and James Clark's claims for failure to warn are dismissed.

The failure to warn counts are stricken for all parties. All claims for personal injury of James and Codie Clark are stricken based on the statute of limitations under either New Jersey or Utah law. The plaintiff parents were advised that Accutane could cause substantial birth defects. They knew when their daughter was born that she had severe birth defects. Both Utah and New Jersey have two year statutes of limitations. Utah Code Ann. § 78-15-3; N.J.S.A. 2A:14-2. Although both states have discovery rules, they would not be applicable under these facts. The complaint was filed three years after Sarah's birth and both parents' claims are barred.

The Supreme Court of New Jersey in the Banner decision further stated that the court could not conclude that Roche had a duty to withhold the drug from a woman unless she agreed to use a contraceptive technique that may have violated her religious principles. Banner, supra, 383 N.J.Super. at 384. In Banner, the patient was a 24 year old married woman who was prescribed Accutane and elected not to use birth control because of religious reasons. Id. at 372. Plaintiff intended to abstain from sex while using Accutane. Id. However, while on Accutane

she and her husband did engage in sexual relations and the tragic result was a profoundly disabled child. Id.

The facts before this court are similar but also different from those in the Banner case. The difference is that in Banner the claim was for wrongful birth and for wrongful life, that is, that better control of the mother's methods of contraception would have prevented the Banner child from being conceived. This is the claim that is dismissed by the Appellate Division in the Banner decision.

Here, the allegation is that the child Sarah Clark was a living entity already conceived and growing in her mother's womb when she was exposed to Accutane sold to her mother to cure her mother's acne. The child does not have a failure to warn claim because adequate warnings were given to the mother. The question that is posed in this case is does Sarah Clark have her own strict liability claim based on design defect against defendants.

The law on whether a living child can make a claim for damages it suffered in utero independent of its parents is well settled. The Supreme Court of New Jersey held for the first time in 1960 in the case of Smith v. Brennan, 31 N.J. 353 (1960) that a surviving child has a right in tort for prenatal injuries whether inflicted when the child was viable or not:

We are not aware of a single case since *Stemmer v. Kline* was decided in 1942 in which a court of last resort, considering the question for the first time, denied the right of a child born alive to maintain a common law action for prenatal injuries. And as we have mentioned above at least four states have overruled prior decisions denying liability. Today it certainly cannot be said that there is any lack of precedent permitting such an action. Indeed, Dean Prosser has said the trend toward allowing recovery "is so definite and marked as to leave no doubt that this will be the law of the future in the United States." *Prosser, supra*, at p. 175. Id. at 361.

The New Jersey Supreme Court then held:

We conclude that the reasons advanced for the decisions denying recovery to a child who survives a prenatal injury are inadequate. They deny basic medical knowledge; they ignore the protection afforded unborn children by other branches of the law, and are founded upon fears which should not weigh with the courts. We believe that a surviving child should have a right of action in tort for prenatal injuries for the plain reason that it would be unjust to deny it. Therefore, the rule of *Stemmer v. Kline* is no longer the law of this State. Id. at 366.

As to the requirement that the fetus be "viable" at the time of injury, the Supreme Court held:

Whether viable or not at the time of the injury, the child sustains the same harm after birth, and therefore should be given the same opportunity for redress. Id. at 367.

All states except Alabama have allowed such claims. 40 A.L.R.3d 1222 (2005). In the Utah case of Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832 (1984), the Supreme Court of Utah upheld a verdict for a minor plaintiff brought on her behalf by her parents as her guardians ad litem. The minor plaintiff had suffered severe birth defects after her mother was treated during her pregnancy with a hormone injection of a drug manufactured by E.R. Squibb. Id. at 834.

Sarah Clark, therefore, can have an action for design defect brought on her behalf if the law allows an action based on the facts of her claim. The Utah Products Liability Act ("UPLA") and the case law interpreting the UPLA generally provides immunity to a drug manufacturer for claims of design defect when the drug was approved by the FDA. Grundberg, supra, 813 P.2d at 91.

The Supreme Court of Utah in Grundberg states:

We hold that a drug approved by the United States Food and Drug Administration ("FDA"), properly prepared, compounded, packaged, and distributed, cannot as a matter of law be "defective" in the absence of proof of inaccurate, incomplete, misleading, or fraudulent information furnished by the manufacturer in connection with FDA approval. We acknowledge that by characterizing all FDA-

approved prescription medications as "unavoidably unsafe," we are expanding the literal interpretation of comment k. Id. at 90.

The complaint in this case at hand specifically alleges the FDA was provided inaccurate, incomplete and misleading information. Thus, the holding in Grundberg would not preclude a claim. The Utah statute substantially limits common law design defect claims in other ways. In the case of Brown v. Sears, Roebuck & Co., 328 F.3d 1274, 1279 (2003), the United States Court of Appeals for the Tenth Circuit stated that Utah imposes additional "barriers" as they describe them to a cause of action. The Tenth Circuit also found that the Utah statute does not allow a risk/utility test. Id. at 1281.

The Brown case specifically holds that the UPLA requires an objective consumers expectations test as the first barrier to a cause of action. Id. at 1282. The test is whether an objective consumer would anticipate the danger; and if so, then the product is not unreasonably dangerous. Id. In the Brown case, the court held the fact the victim was a child, not a purchaser or user of the product, did not change the requirement of the objective consumer expectation test. Id. Since the objective consumer given the warnings that accompanied Accutane would be aware of the danger, a cause of action for design defect under Utah law does not exist.

Pursuant to the NJPLA, there are three causes of action for a defective product. N.J.S.A. 2A:58C-2. In all cases, the plaintiff must prove "by a preponderance of the evidence that product causing the harm was not reasonably fit, suitable or safe for its intended purpose because it" fits one of three criteria. Id. The first cause of action is a manufacturing defect, which is not alleged here. Id. The second cause of action is based on inadequate warnings, which has already been excluded. Id. The third is that the product was designed in a defective manner. Id.

Under the NJPLA, if "at the time the product leaves the manufacturer or seller, there is no feasible alternative design that would have prevented the harm without substantially impairing

the reasonably anticipated use or intended function of the product,” then the manufacturer is not liable. N.J.S.A. 2A:58c-3(1). This would seem to dispose of plaintiff’s claim as no feasible alternative product is proposed by plaintiff. The statute goes on to state that the provisions above do not apply if the court finds by clear and convincing evidence:

- (1) The product is egregiously unsafe or ultrahazardous
  - (2) The ordinary user or consumer of the product cannot reasonably be expected to have knowledge of the product’s risk, or the product poses a risk of serious injury to persons other than the user or consumer; and
  - (3) The product has little or no usefulness.”
- N.J.S.A. 2A:58c-3b(1)-(3).

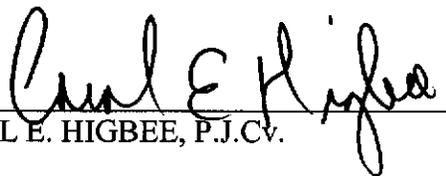
This court certainly could find that Accutane was egregiously unsafe under N.J.S.A. 2A:58c-3b(1) based on the allegations of the complaint. This court could also find that Accutane poses a risk of serious injury to persons other than the user or consumer under N.J.S.A. 2A:58c-3b(2). The product had no usefulness to the plaintiff Sarah Clark, but the product is a treatment for severe acne that is useful to many people and has been used with success by dermatologists for many years. The court finds, therefore, that there is no cause of action for strict liability on a design defect claim under the NJPLA.

Plaintiffs also allege that defendants violated the NJCFA. The NJCFA describes fraud in connection with the sale or advertisement of merchandise (including prescription drugs) as unlawful practice. N.J.S.A. 56:8-2. Given the adequacy of the warnings that defendants provided to purchasers about birth defects, there can be no finding that defendants engaged in a violation of the NJCFA.

The Utah Consumer Sales Practices Act, Utah Code Ann. § 13-11-2 (1953) also focuses on deceptive sales practices but would not apply under these facts.

The complaint is dismissed as to all plaintiffs and all causes of action.

Motion GRANTED.

  
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CAROL E. HIGBEE, P.J.Cv.

XXXX Order is attached.