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This article briefly considers a subset of product liability cases – those alleging that a defect in a product itself constituted, rather than caused, plaintiffs' injury – and the circumstances in which these plaintiffs' classwide damages model have been found to satisfy Rule 23(b)(3)'s predominance requirement.

Rule 23(b)(3) Predominance in Benefit-of-the-Bargain Actions

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In one subset of product liability cases – those alleging that a defect in a product itself *constituted*, rather than *caused*, plaintiffs' injury – a classwide damages model can sometimes be found to satisfy Rule 23(b)(3)'s predominance requirement.[1] In those cases, plaintiffs argue that their alleged damages are held to be susceptible to uniform proof because the measure of damages is the same or very similar among the members of the class: either the difference between the value of the product as advertised and as sold (with a defect) or the cost to replace the defective product. Such plaintiffs usually allege that they were misled into purchasing a product that is not as valuable as advertised, thereby denying them the benefits of their respective bargains. This article briefly considers recent caselaw on class certification of product defect claims premised on a benefit-of-the-bargain theory of recovery.[2]

In *Nguyen v. Nissan*[3], a case from the Ninth Circuit, Nguyen sued Nissan to recover damages for a defective composite clutch system in his son's vehicle that had a tendency to "stick" and to prevent drivers from shifting gears once it reached high temperatures.[4] Nguyen sought "the difference in value between the non-defective vehicle[] Nissan promised and the defective vehicle[] that [was] delivered based on the cost to replace the composite [clutch] with one that is solid cast-aluminum"[5] – but, critically, Nguyen did not seek to recover for any injury that was allegedly caused by the defect.

Nguyen sought to certify a class of California purchasers of Nissan vehicles that were manufactured with the defective clutch system.[6] Nguyen's proposed damages model measured each putative class plaintiff's damages as the average cost of replacing the defective clutch system under a benefit-of-the-bargain theory.[7]

Nissan argued – and the Northern District of California agreed – that this damages model did not satisfy Rule 23(b)(3)'s predominance requirement because "the model assumed that 100% of the vehicles would manifest a clutch assembly defect, and none of them would malfunction but for the design flaw,"[8] and that "class members might have

[1] Rule 23(b)(3) provides that a court may certify a class where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3).

[2] *See In re Fluidmaster, Inc., Water Connector Components Prod. Liab. Litig.*, No. 14-CV-5696, 2017 WL 1196990, at *45 (N.D. Ill. Mar. 31, 2017) ("'benefit of the bargain' damages are economic losses – that is, they do not relate to personal injuries or damage to property other than the product itself, but concern a product not performing as expected.").

[3] *Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811 (9th Cir. 2019).

[4] *Id*. at 814.

[5] *Id*. at 815-16.

[6] *Id*. at 816.

[7] *Id*.

[8] *Id*. at 819.

received varying levels of value based on if and when they experienced a sticky clutch problem."[9] That is, class members whose vehicles manifested sticky clutches from the date of purchase clearly derived no value from the clutch systems and likely would have been willing to pay nothing therefor; but plaintiffs who drove their vehicles for a significant number of miles, as did Nguyen's son, were likely to place at least some value on the clutch system and therefore may have reaped a windfall by receiving replacement damages when they had derived a substantial benefit (and potentially the benefit of their bargains).[10] The district court therefore denied plaintiff's motion to certify a class.

The "central issue" before the Ninth Circuit on appeal was whether or not Nguyen's damages model satisfied Rule 23(b)(3)'s predominance requirement.[11] The court first stated that "uncertainty regarding class members' damages does not prevent certification of a class as long as a valid method has been proposed for calculating those damages."[12] The court then held that Nissan and the district court had mischaracterized Nguyen's liability and damages theories by focusing on whether the defect in the clutch system had *manifested* in each putative class plaintiff's vehicle; because Nguyen alleged that the class plaintiffs were injured when they purchased vehicles with faulty clutches, the court held that this was not the proper inquiry.[13]

> Nissan's argument, however, conflates cases where a defect *causes* an injury, and those, like this one, where the defect itself *is* the injury…. This distinction is key, and it underscores the fundamental disconnect between Plaintiff's damages theory and Nissan's mischaracterization of what it entails. ***As we have explained, Plaintiff does not seek damages for the faulty performance of the clutch system; such a theory of liability would … require individualized analysis that might defeat predominance***.[14]

The Ninth Circuit therefore reversed the denial of class certification and remanded.[15] A similar issue was addressed in the Northern District of Illinois in *In re Fluidmaster, Inc., Water Connector*

[9] *Id*. at 819.
[10] *See id*. at 816 (noting that the district court held that "the difference between value represented and value received only equals the cost to replace the defective [clutch] *if* consumers would have deemed the defective part valueless" and that "if a class member 'derived value from the defective [clutch] – be it by selling it, repurposing it, or simply driving a ways before replacing it – the class member will have received the full benefit of the bargain *and* the monetary value of the defective part," which is "not an appropriate measure of damages").
[11] *Id*.
[12] *Id*. at 817.
[13] *Id*. at 819 ("Both Nissan and the district court mischaracterized Plaintiff's theory as being centered on performance issues, rather than the defective system itself. Nissan argues that Plaintiff's 'model assumed that 100% of the vehicles would manifest a clutch assembly defect, and none of them would malfunction but for the design flaw.' But this is not accurate; Plaintiff's theory is that the defect was inherent in each of the Class Vehicles at the time of purchase, regardless of when and if the defect manifested.").
[14] *Id*. at 822 (emphasis added).
[15] *Id*.

Components Products Liability Litigation.[16] In that case, plaintiffs alleged that a flexible water line product sold by Fluidmaster was defectively designed and manufactured so as to be prone to failure (bursting) prior to the expiration of Fluidmaster's warranty on the product.[17] Plaintiffs sought to certify a class consisting of consumers who purchased the product and consumers who suffered property damage when the water lines burst.[18]

Plaintiffs' theory of liability asserted that Fluidmaster misrepresented and/or omitted material information concerning the propensity of the water line to burst (at least during the ten-year warranty period).[19] Although their claim sounded in fraud, plaintiffs argued for class certification by presenting a classwide damages model purportedly reflecting "the difference between the market price of the product as represented and as delivered"[20] – *i.e.*, benefit-of-the-bargain damages – based on the putative class members' willingness to pay for the product with or without a ten-year warranty and/or "no burst" representation,[21] and also sought to recover for the property damage allegedly caused when the water lines burst.

That Court refused to accept plaintiffs' benefit-of-the-bargain theory, finding that the theory as pled did not satisfy the standard promulgated by the Supreme Court in *Comcast Corp. v. Behrend*,[22] a seminal case that mandates that "a model purporting to serve as evidence of damages in [a] class action must measure only those damages attributable to" the theory asserted by the plaintiffs.[23] The Fluidmaster Court stated that:

> The problem for Plaintiffs, however, is that their … price premium damages model does not measure damages attributable to their liability theory. If class members were injured by the fact that Defendant "omitted material information about the propensity" of its product to fail, then damages should be the difference in the market price for a product with and without this "propensity" to fail…. The Court does not see how measuring a consumer's preference for a ten-year warranty or a "No Burst" representation has anything to do with an "omission of failure propensity" theory…. Even assuming that the "NO BURST" is somehow connected to Defendant's failure to disclose its product's propensity to fail, determining the [consumer's willingness to pay] for that attribute provides no insight into the value of the product that consumers ultimately received.[24]

After determining that plaintiffs' "price premium" theory failed to satisfy Rule 23(b)(3)'s predominance requirement under

[16] No. 14-CV-5696, 2017 WL 1196990, at *59 (N.D. Ill. Mar. 31, 2017).
[17] *Id*. at *1.
[18] *Id*.
[19] *Id*. at *54.
[20] *Id*. at *57.
[21] *Id*. at *58.
[22] 133 S. Ct. 1426 (2013).
[23] 2017 WL 1196990, at *56 (citing *Comcast*, 133 S. Ct. at 1433).
[24] *Id*. at *57.

Comcast, the court explained that "Plaintiffs are left with their effort to recover property damages caused by the failure of Defendant's product. And here is where individualized issues overwhelm the common ones."[25] The court therefore refused to certify a class.[26]

This distinction between claims where the injury is an alleged defect in the product itself and where the injury is allegedly caused by a defective product can also be seen in cases where plaintiffs essentially predicate their claims on the *manifestation* of the alleged defect. In *Gonzalez v. Corning*,[27] a Third Circuit case, plaintiffs alleged that they purchased defective roof shingles from Corning that were prone to cracking and disintegration prior to the ends of their warranted 25-year useful lives,[28] thereby preventing plaintiffs from receiving the benefit of their bargains,[29] and that the defect issue "was common and predominant for purposes of Rule 23(b)(3)."[30] However, plaintiffs did not allege that each shingle was necessarily defective when sold (as did the plaintiff in *Nguyen*), and admitted that "a shingle-by-shingle inspection [was] necessary to distinguish ones that are likely to fail before the end of their warranty periods from ones that are likely to perform as expected (*i.e.*, that are not defective)."[31] The district court held that the "defect question [was] primary, because success on each claim requires a finding that [the] shingles [were] defectively designed," but nevertheless denied class certification on the grounds that it was "impossible for plaintiffs to meet their burden to prove a design defect by evidence common to the class."[32] The Third Circuit affirmed, reasoning that because plaintiffs admitted that many putative class plaintiffs received non-defective shingles and did not allege a defect common to all of the shingles, "resolving the defect issue can be done only by examining each individual shingle or by accepting a speculative theory of defect."[33] The Third Circuit also affirmed the district court's denial of certification under Rule 23(c)(4) for the same reasons.[34]

In sum, plaintiffs' attorneys continue to seek certification of class actions under creative theories. When faced with these motions, product liability defense counsel need to pay particular attention to how the product defect claims are framed by putative class plaintiffs. On the one hand, if plaintiffs allege that a product was manufactured with a latent defect that reduced the value thereof, precedent exists in which some courts have found that Rule 23(b)(3) predominance is satisfied (at least with respect to that claim). Moreover, even in cases where plaintiffs have not met their predominance burden with respect to *any* of their claims under Rule 23(b)(3), courts *may* nevertheless certify a class where a defect in a good constitutes the alleged injury if "[t]he discrete question of whether a defect exists is the dominant issue common to all cases

[25] *Id*. at *59.
[26] *Id*. at *65.
[27] 885 F.3d 186 (3d Cir. 2018), *as amended* (Apr. 4, 2018).
[28] *Id*. at 189.
[29] *Id*. at 198.
[30] *Id*. at 197.
[31] *Id*.
[32] *Id*. at 196 (citing *Gonzalez v. Owens Corning*, 317 F.R.D. 443, 512 (W.D. Pa. 2016)).
[33] *Id*. at 199 (citation omitted).
[34] *Gonzales*, 885 F.3d at 202-203.

and causes of action" under Rule 23(c)(4).[35] On the other hand, however, if plaintiffs allege that the *manifestation* of a defect constitutes – or that the defect caused – an injury, courts will be much more reluctant to find that the plaintiffs have met Rule 23(b)(3)'s predominance requirement.

[35] *In re FCA US LLC Monostable Elec. Gearshift Litig.*, No. 16-MD-02744, 2019 WL 6696110, at *13 (E.D. Mich. Dec. 9, 2019) (granting in part motion for class certification).

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