"No Injury" Class Actions for "Economic Loss" Due to Produc

t Defects Under State Consumer-Protection Statutes

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Recent years have witnessed a proliferation of putative "no injury" class actions brought by uninjured purchasers of allegedly defective products under state consumer-protection statutes. Plaintiffs in these cases seek recovery of "economic loss" due to the alleged product defect: The defective product, as sold, was worth less than the defect-free product allegedly promised.

Every product manufacturer is vulnerable to these "no injury" actions,[1] and they can pose significant financial risks. The trial court in *Price v. Philip Morris USA, Inc.*, for example, entered a verdict after a bench trial of $10 billion over the allegedly false and misleading marketing of "light" cigarettes in Illinois. *Price v. Philip Morris USA, Inc.*, 2003 WL 22597608 (3d Jud. Cir., Madison Cty., Ill. 2005).

The *Price* verdict subsequently was overturned on appeal to the Illinois Supreme Court, *Price v. Philip Morris USA, Inc.*, 848 N.E.2d 1 (2005), and an overwhelming majority of courts have dismissed these "no injury" actions short of trial. But, as this article suggests, the rationales expressed by the courts, while sufficient to dispose of the cases before them, generally do not develop the larger policy and legal issues that should serve to defeat *all* of these "no injury" class actions.

THE NARROW BASES OF THE COURTS' DECISIONS

Two principal rationales have been articulated by the courts to defeat "no injury" class actions short of trial.

No "Actual Damages." Most state consumer-protection statutes permit purchasers of products to recover "actual damages." A significant number of cases have reasoned that plaintiffs in "no injury" class actions concerning alleged product defects have yet to sustain "actual damages." After all, the product has not yet malfunctioned—it has, so far, performed exactly as the plaintiffs allegedly expected—and plaintiffs accordingly have received the "benefit of their bargain." *See, e.g., Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 320 (5th Cir. 2002) ("[Plaintiff] paid for an effective pain killer, and she received just that—the benefit of her bargain."); *Briehl v. General Motors Corp.*, 172 F.3d 623, 628 (8th Cir. 1999) ("Where, as in this case, a product performs satisfactorily and never exhibits an alleged defect, no cause of action lies."); *In re Canon Cameras*, 237 F.R.D. 357, 360 (S.D.N.Y. 2006) ("A plaintiff who purchases a digital camera that never malfunctions over its ordinary period of use cannot be said to have received less than what he bargained for when he made the purchase."); *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 128 (N.Y.A.D. 1st Dept. 2002) ("In sum, plaintiffs have not been involved in any accidents and have not suffered any personal injuries or property damage. Moreover, plaintiffs do not allege that any seat has failed, been retrofitted or repaired, nor have plaintiffs attempted to sell, or sold an automobile at a financial loss because of the alleged defect."); *Wilson v. Style Crest Prods., Inc.*, 627 S.E.2d 733, 736 (S.C. 2006) ("There is no evidence that the [mobile home] anchor systems have not, to date, been exactly what the Homeowners bargained for."); *Tietsworth v. Harley-Davidson, Inc.*, 677 N.W.2d 233, 240 (Wis. 2004) ("[A]n allegation that a product is diminished in value because of an event or circumstance that might—or might not—occur in the future is inherently conjectural and does not allege actual benefit-of-the-bargain damages. . . ."). *Compare, e.g., Collins v. DaimlerChrysler Corp.*, 894 So. 2d 988, 990–91 (Fla. Dist. Ct. App. 2005) ("We see no requirement in [the Florida Deceptive Trade Practices Act] that a defect manifest itself by failing to operate in an emergency or by causing injury. . . . [Plaintiff] has alleged more than a possible injury. She claims an actual injury in the form of insufficient product value. In other words, she contends that she did not get what she bargained for.").[2]

No Misrepresentation. An essential element under most state consumer-protection statutes is that the defendant has engaged in an "unfair" practice. In most class actions brought over alleged product defects, the alleged unfair practice was an implicit misrepresentation. Courts have dismissed cases where the alleged implied misrepresentation constituted mere "puffing." *Tietsworth v. Harley-Davidson, Inc.*, 677 N.W.2d 233, 245–46 (Wis. 2004) (advertising a motorcycle engine as "a masterpiece" of "premium quality" that is "filled to the brim with torque and ready to take you thundering down the road" was mere puffery, not an actionable representation that the engine was defect-free); *see also* 63 Am. Jur. 2d Products Liability § 685 (1997) (collecting cases regarding "puffing" in the context of warranty claims).

Wholly apart from precedent under state consumer-protection statutes, defense counsel also might consider arguing that the courts should be reluctant to adopt an expansive definition of what constitutes an implicit "misrepresentation" for two reasons.

First, adopting an expansive definition of what constitutes an implicit "misrepresentation" impermissibly would transform manufacturers into insurers against "economic loss" for most product defects.

It is no answer for plaintiffs' counsel to assert that state consumer-protection statutes were intended to make it easier for consumers to recover for false and misleading business practices. They have. At least some states dispense with the necessity of proving objectively reasonable reliance, *scienter*, privity of contract, and certain other common-law requirements. *Davis v. Powertel, Inc.*, 776 So. 2d 971, 973–74 (Fla. Dist. Ct. App. 2000); *Oliveira v. Amoco Oil Co.*, 776 N.E.2d 151, 164 (Ill. 2002); *Gennari v. Weichert*, 691 A.2d 350, 366 (N.J. 1997); *State ex rel. Webster v. Areaco Inv. Co.*, 756 S.W.2d 633, 635

(Mo. Ct. App. 1988); *Forbes v. Par Ten Group, Inc.*, 394 S.E.2d 643, 651 (N.C. Ct. App. 1990); *Stutman v. Chemical Bank*, 731 N.E.2d 608, 611–12 (N.Y. 2000).

Expanding the definition of what constitutes an actionable "misrepresentation," however, effectively would make most manufacturers insurers against "economic loss" due to product defects, which state legislatures could not have intended. Indeed, support for the principle that a manufacturer is not an insurer against all risks of injury or loss associated with its product abounds in the decisional law in most states, even after enactment of state consumer-protection laws. 63 Am. Jur. 2d Products Liability § 4 (2006 Supp.).[3]

Second, an expansive interpretation of what constitutes an actionable, implicit "misrepresentation" may run afoul of the First Amendment. These "no injury" product-defect cases generally challenge commercial speech that is only "potentially misleading," not "inherently" or "inevitably misleading." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 372 (1977). Under *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980), and its progeny, potentially misleading commercial speech is entitled to First Amendment protection. *See, e.g., Bioganic Safety Brands, Inc. v. Ament*, 174 F. Supp. 2d 1168, 1180 (D. Colo. 2001). Such speech may be regulated only if the plaintiffs show that restricting the speech would (1) further a "substantial" government interest; (2) advance that substantial interest "directly"; and (3) do so in a way that "is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566; *Mason v. Fla. Bar*, 208 F.3d 952, 957 (11th Cir. 2000); *Pearson v. Shalala*, 164 F.3d 650, 655 (D.C. Cir. 1999); *Parker v. Ky. Bd. of Dentistry*, 818 F.2d 504, 509 (6th Cir. 1987).

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Conclusion. Both of these arguments drawn from the case law are perfectly sensible, textual rationales for denying recovery.

But plaintiffs may argue that they do not apply universally. For example:

The "no actual damages" rationale arguably would not apply where a product has already malfunctioned without causing any physical injury or property damage. And even for products that have yet to malfunction, there arguably can be "actual damages" at least for those plaintiffs who, for instance, alleged that they sold their used defective product for less money than they would have obtained for the promised defect-free product.

The "no misrepresentation" rationale would not apply where an actionable misrepresentation was made or where it is a violation of the state statute not to disclose the existence of the alleged defect. *Graham v. RRR, LLC*, 202 F. Supp. 2d 483, 491 (E.D. Va. 2002) (the Virginia Consumer Protection Act requires only that the act or practice constitute a false representation of an existing fact); Tex. Bus. & Com. Code Ann. § 17.46(b)(24) ("failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed").

TOWARD A BROADER VIEW

There are sound reasons for denying recovery in *all* "no injury" class actions brought over alleged product defects that pose a risk of future personal injury or property damage which, so far, do not appear to have been developed adequately in the decided cases.

The purported "economic losses" claimed by plaintiffs must be identical or substantially identical to the present value of their expected future personal injuries or property damage from the alleged product defect. In *Rivera*, *supra*, for example, a drug manufacturer failed to disclose adequately a drug's risk of causing future cardiovascular disease. What is the alleged diminution in the product's value? It must be the economic value now of the increased risk of future cardiovascular disease. One is hard-pressed to conjure up examples of "no injury" cases involving product defects in which this is not true.

The true identity of the damages sought ought to preclude their recovery by a prospective class whose members have not yet suffered any actual physical injury or property damage, for at least three reasons:

First, virtually all states preclude recovery of future personal injury or property damage, except in limited circumstances that are not present in these cases. 22 Am. Jur. 2d Damages § 214 (2006 Supp.). In any event, claims for future personal injury or property damage are unsuitable for class-action treatment.

Second, allowing class recovery in "no injury" lawsuits over alleged product defects would permit recovery of essentially the same damages twice—once in the guise of "economic loss" and then again for plaintiffs who actually suffer the personal injury or property damage in the future. Consequently, the level of compensation is greater than that which is socially optimal. As Judge Easterbrook observed in *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 (7th Cir. 2002), since "tort law fully compensates those who are physically injured," any recoveries for "economic loss" under state consumer-protection statutes for allegedly defective products by plaintiffs who have suffered no physical injury or property damage "mean excess compensation." *See also Heindel v. Pfizer Inc.*, 381 F. Supp. 2d 364 (D.N.J. 2004) (dismissing claim for "economic loss" under state consumer-protection act because prescription drug posed allegedly undisclosed risk of cardiovascular disease, noting that imposing liability would mean "excess compensation"); Michael S. Greve, "Consumer Law, Class Actions, and the Common Law," 7 *Chap. L. Rev.* 155, 171 (2004) ("The plain fact is this: so long as the parties actually injured can sue, any additional deterrence is over the top.").[4]

Third, the class is either impermissibly splitting its causes of action or, to the extent that future personal injury or damage claims by plaintiffs are foreclosed, either legally or practically,[5] the class representatives have opted for a division of damages that compensates everybody now for increased risk of future injuries but provides no further compensation to plaintiffs who are actually injured later. Such intraclass conflict (between a group who will never be injured by the alleged defect and a small and unidentified minority who will be injured) can prevent class certification. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997) ("Most saliently, for the currently injured, the critical goal is generous

immediate payments. That goal tugs against the interest of exposure-only [and currently uninjured] plaintiffs in ensuring an ample, inflation-protected fund for the future.").

These doctrinal and underlying policy considerations should effectively preclude recovery in *all* "no injury" class actions over product defects that allegedly pose a risk of future personal injury or property damage.[6] ■

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[1] "No injury" class actions have targeted manufacturers of a wide array of products, including automobiles, motorcycles, electrical receptacles, medical devices, prescription drugs, computers, cigarettes, gasoline, cameras, and mobile homes.

[2] Other rationales have been advanced, some less generally applicable because they are case- or fact-specific.

Some courts, for instance, have held that there is no injury-in-fact and hence no justiciable case or controversy. *See, e.g., Rivera v. Wyeth-Ayerst Labs*., 283 F.3d 315, 319–21 (5th Cir. 2002) (Prospective class of purchasers of prescription drug who did not experience the side effect that the manufacturer allegedly failed to disclose lacked standing. Plaintiffs additionally failed to allege causation—that, had the allegedly nondisclosed side effect been disclosed, plaintiffs would not have purchased the drug.); *Harrison v. Leviton Mfg. Co., Inc.*, 2006 WL 2990524, *4 (N.D. Okla. 2006) (Putative class of homeowners with allegedly defective back-wire push-in electrical terminals that were fundamentally unsafe and increased risk of electrical fires, but who had not actually sustained personal injuries or property damage from the electrical terminals, had no Article III standing to sue under, *inter alia*, the Oklahoma Consumer Protection Act for "economic injuries," including the cost of replacing the electrical terminals, because they had suffered no "actual or threatened distinct injury."). Although dismissal for failure to state a claim was an appropriate result in these cases, the decisions fail to distinguish adequately between (1) traditional consumer fraud cases, such as where a merchant represents that a watch is a Rolex when, in fact, it is a cheap imitation, where few would dispute that standing exists; and (2) claims for "economic loss" based on the presence of a product defect that the defendant allegedly represented was not present or failed to disclose. As developed below, different results in these two circumstances are appropriate.

Other cases deem the alleged "economic loss" due to product defects too speculative to survive. *See, e.g., Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 297–98 (4th Cir. 1989); *Lee v. Gen. Motors Corp.*, 950 F. Supp. 170, 175 (S.D. Miss. 1996); *Yost v. Gen. Motors Corp.*, 651 F. Supp. 656, 658 (D.N.J. 1986); *Weaver v. Chrysler Corp.*, 172 F.R.D. 96, 99 (S.D.N.Y. 1997); *Tietsworth v. Harley-Davidson, Inc*., 677 N.W.2d 233, 240 (Wis. 2004).

Finally, in *In re Canon Cameras*, 237 F.R.D. 357, 360 (S.D.N.Y. 2006), the court initially held that, under New York's Consumer Protection Act, plaintiffs had to prove an actual malfunction. While some members of the proposed class allegedly had experienced actual malfunctions, the cause of the malfunction would have to be shown individually. Thus, common issues did not predominate, and the court denied class certification. *See also Houston County Health Care Auth. v. Williams*, 2007 WL 80797, *12 (Ala. 2007) (no "legal injury" for breast-implantation patients who did not experience a fungal infection or undergo removal of the implants; as to class members who did, common issues did not predominate).

[3] This argument is not to be confused with an attempt to apply tort-based limitations on recovery, such as the "economic loss" rule, to actions brought under state consumer-protection statutes. Most courts have rejected that approach. *See, e.g., Tietsworth*, 677 N.W.2d at 241–44 (collecting authority).

[4] Indeed, there is an argument to be made that, to the extent manufacturers foresaw the recovery of pure economic loss, without any accompanying personal injury or property damage, the manufacturers would have "spread the loss" by charging higher prices. Consequently, consumers have already received the "benefit of the bargain" in the form of lower prices. *See* Moin A. Yahya, "Can I Sue Without Being Injured? Why the Benefit of the Bargain Theory for Product Liability Is Bad Law and Bad Economics," 3 *Geo. J.L. & Pub. Pol'y* 83, 113–22 (2005) (At 113–14: "Paradoxically, for the no-injury suit to work, the manufacturer should have charged more in the first place—effectively negating the 'benefit of the bargain' claim." At 131: "Both the case law and economic analysis suggests [sic] that plaintiffs should recover nothing in no-injury suits. Either the economic loss rule bars recovery . . . or the 'benefit of the bargain' is equal to zero.").

[5] Damages for the risk of future personal injuries in the guise of "economic loss," such as the $10 billion judgment in *Price* against Philip Morris USA, Inc., in Illinois alone, may be so great as to threaten the viability of the defendant and any recovery by those plaintiffs who actually sustain personal injuries in the future.

[6] These same doctrinal and policy considerations pose no obstacle to recovery by plaintiffs in traditional consumer fraud cases. They are not implicated where the claimed "economic loss" bears no relationship to expected future personal injury or property damages.