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Sixth Circuit vacates certification of ten statewide classes against Nissan based on district court's failure to ascertain common issues

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Takeaway: The Sixth Circuit recently emphasized how demanding Rule 23's commonality requirement can be. In *In re Nissan North America, Inc. Litigation*, --- F.4th ----, No. 23-5950, 2024 WL 4864339 (6th Cir. Nov. 22, 2024), the panel eviscerated a district court's certification of ten statewide classes, finding the district court glossed over material differences arising from changes made to an allegedly defective product over time. Even beyond the commonality requirement, *Nissan* provides a roadmap for class action defendants to follow.

In that case, consumers from ten states – California, Connecticut, Florida, Illinois, Massachusetts, Missouri, New York, Ohio, Pennsylvania and Texas – sued Nissan, alleging Nissan sold them automobiles with defective automatic electronic braking systems. They alleged that, due to a faulty radar component in the systems, the systems mistakenly detected other cars, objects, or obstacles ("phantom activations"), causing the breaks to be activated, unnecessarily slowing or stopping the cars. *Nissan*, 2024 WL 4864339, at *1. According to the plaintiffs, this led to dire safety hazards and reduced the value of the automobiles they purchased.

Plaintiffs' allegations focused on four Nissan car models: the Rogue, Rogue Sport, Altima, and Kicks. Given the years over which these models were manufactured (from 2017 to 2021), plaintiffs' allegations implicated fourteen separate year-by-year car models.

Plaintiffs alleged a variety of related causes of action, including violations of state consumer protection statutes, breach of warranty, fraud, and unjust enrichment. They moved to certify ten statewide classes. The district court (the Middle District of Tennessee) agreed with the plaintiffs and certified ten classes. Nissan then sought an interlocutory appeal of the certification ruling under Federal Rule 23(f), which the Sixth Circuit granted.

As is common in class litigation, the parties articulated two different views to the district court. The plaintiffs contended: "a single radar problem plagues each Nissan car and lies at the center of each state-law claim. Nissan acknowledged that an incorrect prompt from the radar could pose a safety hazard." *Id.* at *2. Nissan of course presented a different perspective: "this case involves dozens of distinct products and many versions of those products—and at any rate does not concern one product liability tort action about one alleged defect but dozens of distinct consumer claims, including claims for

express warranty, implied warranty, fraudulent concealment, consumer protection, and unjust enrichment." *Id.*

Nissan's implementation of computer fixes to the automatic braking systems over time stood at the center of the class certification fight, and it was these fixes that doomed the district court's class certification decision on appeal.

According to the panel, "[t]he district court disregarded those [software] changes," instead basing its class certification decision on a generalization that the plaintiffs' causes of action were "based on the same Brake System Defect across all Class Vehicles." *Id*. at *4 (citations omitted). Federal Rule 23, said the panel, "demands that the district court grapple with evidence of material changes to the allegedly defective product. Only by coming to grips with changes to the challenged component of the car could the court decide whether any central questions 'can each be answered in one stroke.'" *Id*. Accordingly, the district court "did not give the defect's alleged commonality the scrutiny required," thus failing to identify a single common question uniting the plaintiffs' claims. *Id*. Because the district court fundamentally erred in its analysis of Rule 23's commonality requirement, the Sixth Circuit reversed the class certification decision.

But that was not all. On remand, the panel directed the district court – in analyzing commonality – to map out the essential elements of each separate state law claim to determine whether a key element of the plaintiffs' claims could be resolved in favor of a class in "one stroke," as required by the U.S. Supreme Court's decision in *Wal-Mart v. Dukes*, 564 U.S. 338 (2011).

In a similar vein, the district court would be required on remand to balance those element-by-element analyses and weigh whether common issues truly "predominated" over individualized issues, as required by Rule 23(b)(3): "The rule requires a court to put the common issues on one side, the individual issues on the other, then 'qualitatively evaluate which side 'predominates.'" *Id.* at *8.

Finally, addressing the standard for evaluating expert testimony under *Daubert,* the panel ruled that a district court must conduct a full *Daubert* analysis at the class certification stage because it is only with opinion testimony that passes muster under *Daubert* that class plaintiffs could actually "prove" that they have satisfied Rule 23's elements. *Id*. at *9 (citing *In re Blood Reagents Antitrust Litig*., 783 F.3d 183, 187 (3d Cir. 2015)). On this issue, the panel said it was following the majority view as expressed in the Third, Fifth, Seventh, and Eleventh Circuits. *Id*. at *8 (noting that the Eighth and Ninth Circuits endorse "a more limited *Daubert* analysis").