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Class-wide damages model: Ninth Circuit cabins Comcast

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Takeaway: In a prior post – *Leveraging Comcast – beating predominance where challenged product has some value* (April 16, 2019) – we reported on a decision by Judge Lucy Koh of the Northern District of California demonstrating the difficulty of constructing a viable class-wide damages model where the evidence shows that a challenged product is not completely without value. In our view, Judge Koh's decision showed how a class defendant could leverage *Comcast Corp. v. Behrend,* 569 U.S. 27 (2013), as a means of defeating predominance under Federal Rule 23(b)(3). But in a recent decision that attracted amicus briefs from the likes of the U.S. Chamber of Commerce, the National Association of Manufacturers, and others, the Ninth Circuit reversed Judge Koh's decision. *Nguyen v. Nissan North America, Inc*., --- F.3d ---, No. 18-16344, 2019 WL 3368918 (9th Cir. July 26, 2019). The panel in *Nguyen* cabined *Comcast* in a significant way, ruling that where the plaintiff predicates liability on the defectiveness of a product at the point of sale (even though the defect did not manifest until much later), constructing a class-wide damages model is not that difficult. According to the panel, a class plaintiff need only demonstrate a nexus between his theory of liability and the damages model, and questions going to the accuracy of the damages model are merits issues to be resolved after class certification. If left intact, *Nguyen* will have a significant impact on class litigation in the Ninth Circuit and perhaps beyond.

In *Nguyen*, the plaintiff (Mr. Nguyen) bought a brand-new Nissan 370Z for his son, Michael. Two years later, Michael was driving on the freeway when the car's clutch pedal lost pressure and did not return from its depressed position. Michael took the car to a Nissan dealership, which fixed the car at no charge, because it was still under warranty. Nearly two years later, he experienced a similar problem. Because the car was no longer under warranty, it cost over $700 to fix it.

Mr. Nguyen filed a putative class action against Nissan and moved for class certification on his claims under California's Consumers Legal Remedies Act, California's Song-Beverly Consumer Warranty Act, and the federal Magnuson-Moss Warranty Act. He sought the certification of a class of all individuals in California who purchased or leased from an authorized Nissan dealer a new Nissan vehicle equipped with the specific manual transmission at issue.

Claiming that the class overpaid for their Nissan vehicles because Nissan allegedly had failed to disclose the defective transmission component (the concentric slave cylinder or CSC), Mr. Nguyen submitted the opinion of a damages expert to prove class-wide damages. The expert's "benefit of the bargain" damages model assumed that class members had bargained for a Nissan vehicle with a working CSC and that, if Nissan had disclosed the alleged CSC defect, all class members would have paid less for their vehicles or would not have purchased them at all. The model set each class member's damages as the full cost to replace the defective part with a functioning part. According to the expert, each class

member was entitled to receive roughly $724 in damages (the cost for a functioning CSC, new hydraulic fluid, other necessary parts, and roughly four hours of labor).

Judge Koh found this approach "problematic" because it essentially assumed consumers had received no value from the allegedly defective CSC. *Id*. at *3. Indeed, Michael Nguyen drove the car over 26,000 miles before the original CSC malfunctioned, and Nissan replaced the part at no charge during the warranty period. He then drove it another 25,000 miles before the replacement CSC failed. "Because the record contained no evidence that the defective clutch was valueless," Judge Koh "rejected plaintiff's damages model as being an improper measure of the benefit of the bargain." *Id*. at *3.

Reversing the district court, the Ninth Circuit panel viewed Comcast as simply requiring a class plaintiff to develop a "damages model [that] flows from his theory of liability." *Id*. at *5. Plaintiff's theory of liability focused on Nissan's sale of cars with a defective CSC. According to the panel, "[t]his characterization is crucial. Plaintiff's legal theory is not based on the performance of the allegedly defective clutch system, but instead the system itself, which he claims is defective." *Id*. According to plaintiff, "the sale of the vehicle with the known defect is the liability-triggering event," not the later manifestation of the defect. *Id*.

In the panel's view, "[b]oth Nissan and the district court mischaracterized plaintiff's theory as being centered on performance issues, rather than the defective system itself." *Id*. "Had Plaintiff alleged that performance problems constituted the defect and caused his and the class members' injuries, then the benefit of the bargain would not be the appropriate measure of damages because, as the district court noted, class members might have received varying levels of value based on if and when they experienced a sticky clutch problem." *Id*

The panel dismissed Nissan's challenges to the accuracy of plaintiff's proposed "replacement cost" calculation as simply a merits issue "unrelated to class certification. For now, it is sufficient that Plaintiff has demonstrated the nexus between his legal theory—that Nissan violated California law by selling vehicles with a defective clutch system that was not reflected in the sale price—and his damages model—the average cost of repair." *Id*. at *7. Quoting a prior California appellate decision, the panel stated: "The primary right alleged to have been violated . . . was the right to take a product free from defect. The defect did not cause the plaintiff's; the defect was the injury." *Id*. (quoting *Hicks v. Kaufman & Broad Home Corp*., 107 Cal. Rptr. 2d 761, 771–72 (Cal. Ct. App. 2001)) (emphasis in original).

Not surprisingly, Nissan has petitioned for rehearing, again supported by amici. It remains to be seen whether *Nguyen* represents an anomalous panel decision or a serious dent in the armor of *Comcast*'s damages model class certification defense. The ruling may even percolate to the Supreme Court for further clarification of the import of *Comcast*'s reasoning.