APRIL 16, 2018

Leveraging Comcast – beating predominance where challenged product has some value

by Jay Bogan

Takeaway: Alleging a "price premium" or "benefit of the bargain" damages theory is one thing. Proving it is another. A recent decision by Judge Lucy Koh of the Northern District of California shows the difficulty of establishing such a damages theory, where the evidence does not show that a challenged product is *completely* without value. Class action defendants should therefore pay close attention to the Supreme Court's decision in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013) and its requirement of proving class-wide damages, as a potent tool to defeat predominance under Federal Rule 23(b)(3).

In *Nguyen v. Nissan North America, Inc.*, Case No. 16-CV-05591-LHK, Slip op. (N.D. Cal. Apr. 9, 2018), the plaintiff (Mr. Nguyen) bought a brand-new Nissan 370Z for his son. Two years later, his son was driving on the freeway when the car's clutch pedal lost pressure and did not return from its depressed position. The son 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 $270 to fix it.

Mr. Nguyen filed a putative class action against Nissan and later moved for class certification. At the time he moved for class certification, his claims against Nissan consisted of damages claims under California's Consumers Legal Remedies Act, California's Song-Beverly Consumer Warranty Act, and the federal Magnuson-Moss Warranty Act. In his class certification motion, 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 (a FS6R31A manual transmission).

Claiming that the class overpaid for their Nissan vehicles, because Nissan allegedly had failed to disclose that a transmission component (the concentric slave cylinder or CSC) was defective, 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 to be "problematic," because it essentially assumed that consumers had

received *no* value from the allegedly defective CSC. *Id*. at 9. Indeed, the 370Z Mr. Nguyen bought for his son was driven over 26,000 miles before the original CSC malfunctioned, and Nissan replaced the part at no charge during the warranty period. The son then drove the car another 25,000 miles before the replacement CSC failed, and the repair cost that second time was only $270. According to Judge Koh, "[t]he extended use of the defective CSCs indicates that they hold at least some value." *Id*. at 10. For that reason, "[t]he damages model therefore errs in assuming that all consumers would discount the amount they would be willing to pay for the vehicle by the full replacement cost of a CSC even though the consumer received some value from the defective CSC." *Id*.

Judge Koh noted "that it is certainly possible that the defective CSC is completely valueless, in which case the replacement cost may be an appropriate damages measure." *Id*. The damages expert, however, failed to address this issue, which was "all the more striking" in light of the evidence showing the CSC was *not* valueless. *Id*.

Reviewing the caselaw, she explained that "this Court has rejected class action damages models because they assumed that a challenged product was valueless." *Id*. at 11. Quoting the U.S. Supreme Court's decision in *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013), she concluded: "In sum, the benefit of the bargain damages model fails to 'measure only those damages attributable to' Plaintiffs' theory of liability because it awards damages equal to the value of a non-defective CSC (the benefit of the bargain) without deducting the value of the defective CSC." *Id*. at 12. Accordingly, she denied class certification on predominance grounds, for failure to establish class-wide damages: "Therefore, Plaintiff 'cannot show Rule 23(b)(3) predominance: Questions of individual damages calculations will inevitably overwhelm questions common to the class.'" *Id*. at 13 (quoting *Comcast*, 569 U.S. at 34).