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Defeating predominance on the issue of class-wide injury (W.D.N.Y.)

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Takeaway: In *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013), the Supreme Court confirmed that Rule 23 "does not set forth a mere pleading standard," and that, absent a showing damages can be calculated on a class-wide basis, "[q]uestions of individual damage calculations [would] inevitably overwhelm questions common to the class." In prior post, we have discussed using Comcast to defeat class certification [see *Leveraging Comcast – beating predominance where challenged product has some value*]. The Western District of New York recently added to this post-Comcast line of authority, ruling that individualized damages issues predominated over common ones and denying class certification where a consumer fraud class plaintiff failed to offer evidence in support of her class-wide "diminution in value" damages theory.

In *Haag v. Hyundai Motor America*, No. 12-CV-6521L, 2019 WL 1029002 (W.D.N.Y. Mar. 5, 2019), Ms. Haag alleged a consumer fraud claim under New York General Business Law §349. She claimed that, at the time she bought her 2009 Hyundai Santa Fe from a Hyundai dealership, Hyundai concealed information about a defect in the car's brake system that would have caused her not to have purchased the car (and not to have incurred the expense of seeking to replace parts of the vehicle's braking system). 2019 WL 1029002, at *1.

In her motion for class certification, Ms. Haag described her class-wide damages theory as seeking recovery of the "diminution in value" attendant to the brake defect. In other words, she claimed that Hyundai's failure to disclose information about the brake defect caused the class members to pay too much to buy or lease their Hyundai vehicles. *Id*. at *4.

The district court easily dispensed with Rule 23(a)'s requirements, finding Ms. Haag had shown numerosity, commonality, typicality, and adequacy (although the district court employed the breezy approach to commonality rejected by *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), citing several pre-*Dukes* decisions).

But the certification motion failed 23(b)(3)'s predominance test on the key issue of class-wide injury. On this point, Ms. Haag submitted no evidence showing class-wide damages based on a "diminution in value" theory, and the district court was unwilling to infer or otherwise assume a class-wide injury. Accordingly, Ms. Haag's motion for class certification was denied, "and the action must proceed solely on plaintiff's behalf." *Id*. at *5.

Before Comcast, courts frequently dismissed most challenges to individualized damages evidence as insufficient to defeat class certification. But as demonstrated by *Haag v. Hyundai Motor America* and similar authorities discussed in our prior post, certification of a consumer fraud class can now hinge entirely on the issue of class-wide injury. Defense counsel must always take care to develop evidence and legal argument showing that a class plaintiff has failed to put forward a viable model for assessing

class-wide injury.