Legal Backgrounder

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"NO-INJURY" CLASS ACTIONS: BAD FOR CONSUMERS AND BUSINESS

by

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"One . . . who sells or distributes a defective product is subject to liability for *harm to persons or property caused by the defect.*"

RESTATEMENT THIRD, TORTS: PRODUCTS LIABILITY § 1 (1998)

This sentence summarizes the common law as it has developed over the course of a millennium: a products liability plaintiff must prove a defect, physical harm, and causation. No-injury class actions turn this bedrock principle of law on its head by basing legal claims on the potential for future harm, which is another way of saying the *absence* of harm.

The core allegation in a no-injury class action is much the same as in a traditional products liability case: that the defendant produced or sold a defective product and/or failed to warn of the product's dangers. The striking feature of the typical no-injury class is that the plaintiffs either have not experienced a malfunction because of the alleged defect (a "non-incident" class) or have experienced a malfunction but have not been harmed (an "incident" class). Because the class members in both types of no-injury cases have not suffered any physical harm or out-of-pocket economic loss because of the alleged defect, they do not claim damages for actual harm. Instead, they seek damages for the cost of future repairs, restitution, a recall, and/or medical monitoring. For this reason, no-injury classes usually include large numbers of people — often all current and former owners of the product. After all, the people who have *not* been harmed by a product ordinarily outnumber those who have been harmed. Because no harm is alleged, causation is not an issue either. Without the individual issues of harm and causation, so the plaintiffs' logic goes, the issue of defect predominates and the case should be certified as a class action. In this context, the issue of defect is being litigated with profound consequences.

Defect has a very precise meaning in products liability law, and for good reason. Without some reasonable limitations on liability for imperfect products, the law would create windfalls to plaintiffs and chill innovation. The Restatement, therefore, requires plaintiffs to prove that some alternative design would have reduced the risk of harm to a reasonable level without imposing offsetting risks and costs. RESTATEMENT THIRD, TORTS: PRODUCTS LIABILITY § 2. The policy behind this rule should apply whether the cause of action pleaded in the complaint is labeled strict liability or consumer fraud.

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Although the no-injury case almost always alleges a defect, the legal claims usually are based upon fraudulent inducement and statutory concepts such as deceptive trade practices. These fraud-based claims should increase the plaintiffs' burden because a fraud action typically requires the plaintiff to prove reliance upon a material misrepresentation of fact. So, if anything, a no-injury case should be harder to prove than a strict liability case — the plaintiff should have to prove *both* the defect *and* fraud.

Anatomy of a Claim. No-injury plaintiffs, however, usually argue that they do not need to prove a defect in the traditional sense; instead, they want to prove only that the product has inordinate risks that were not disclosed to the consumer. They start with the defendant's non-public product goals and evaluations. If the defendant is disappointed by its product, then consumers must be too. The irony, however, is that the more aggressive the defendant's engineers are in setting objectives, the more likely they are to be snared by a no-injury case. The rule of law that emerges from this aspect of no-injury cases is "don't set your goals too high."

Next, the plaintiffs argue that the defendant's warranty repair rates are too high. It doesn't matter what they are because their expert will opine that the cutoff for reasonableness was just below the defendant's rate. If the defendant repairs many products at its own expense, then the product must be defective. And if its products last longer than the warranty period so that the customer bears the cost of repair or replacement, that is fraud. This Catch-22 is, obviously, a perversion of warranty law.

Plaintiffs will argue that any improvements to the product constitute admissions that the prior versions are defective. Subsequent remedial measures are usually excluded in a products liability case, except to prove feasibility. But in a class action including all owners of all versions of the product, the later improvements to the product are offered ostensibly to prove a course of conduct affecting the class. In the process, older products look worse than newer products. But if a company is doing the right thing, then its new products *should* look better. So, again, the no-injury class action has it backward.

Plaintiffs are usually obliged to offer some anecdotes of actual failures. The probative value of this evidence is outweighed by its prejudicial effect because the issue is whether all products in the class are defective, not the circumstances of any particular or some small number of failures. That issue should be determined statistically, not anecdotally. They will also offer self-serving testimony from class members to the effect that they would not have purchased the product had they known that it would fail or might fail. This testimony usually ignores the fact of life that all products can and do fail and does not answer the questions whether the risks were reasonable and whether an alternative design would have reduced the risks to a reasonable level without imposing offsetting risks and costs.

When the defendant is a regulated entity, plaintiffs' lawyers will argue that the defendant concealed "the defect" from the government. If they can raise the slightest doubt about the honesty or completeness of the defendant's disclosures to regulators, they can then argue that the product must be defective, otherwise the defendant would have had nothing to hide. "Fraud on the agency" thus becomes a proxy for proving an actual defect. The obvious question is why a court, rather than the agency itself, should decide whether the agency was deceived. The U.S. Supreme Court is expected to decide this question in its upcoming term in *Buckman Co. v. Plaintiffs' Legal Committee*, No. 98-1768.

Skillful plaintiffs' lawyers attempt to avoid the rules of evidence and their burden of proof by creating a "fictional composite plaintiff." They do this by stitching together arguments from evidentiary fragments that could not state a *prima facie* claim of any one plaintiff, but are offered ostensibly in support of a "class claim" that no class member has. *See Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998). For example, they might argue that the defendant concealed an internal study done in 1986 from the government during a 1987 investigation. That contention would not support the claims of those who purchased their products before the study was done. Nor would it support the claims of those who purchased

products that were redesigned after the study. But that supposed concealment, part of an alleged "course of conduct," is used to taint the defendant with respect to the entire class. A related concept is the statistical plaintiff. Rather than identify any particular person with any particular injury, the plaintiffs use the sheer size of the no-injury class to argue that someone must have been harmed, even if they cannot identify anyone.

No-injury plaintiffs will cry foul when a defendant presents state of the art evidence and other evidence putting its product's performance into perspective. They argue that "this is not a products liability case" and that products liability defenses do not apply. But where defect is an issue, so too are all of the methods by which product liability law judges products.

The Dangers of No-Injury Claims. The danger in all of these approaches to the defect issue is that they attempt to evaluate product performance in a vacuum devoid of any perspective — no analysis of actual effects on real people, no evaluation of real-world engineering tradeoffs, and no consideration of the economic consequences or the rule of law that a plaintiffs' verdict would create. These considerations are built into the Restatement risk/utility standard and there is absolutely no policy reason to exclude them in a no-injury case.

The no-injury approach to litigation exists for only one reason: to facilitate bigger and bolder class actions. No-injury claims can be asserted against any manufacturer of any product because all products have risks that an expert can declare to be inordinate and unacceptable and it is simply impossible to disclose every imaginable risk. And the no-injury class definition sweeps in the largest numbers of consumers because the only thing that no-injury class members need to have in common is ownership or use of a product.

Imagine that a single uninjured plaintiff attempted to assert a no-injury claim solely on his own behalf. Even the most activist court would have a hard time finding any merit in that claim. So why then should the no-injury claims of millions of consumers have merit simply because they are filed as a class action? Class actions are supposed to be a procedure for aggregating otherwise valid claims, not to create new theories of liability or to abolish the rules of evidence.

No-injury claims are not unique to products liability litigation. Claims against service providers alleging that a defendant created an unreasonable risk of future harm are quickly spreading. In the class actions against health maintenance organizations, class members typically do not claim that they have been denied medical services under their insurance plans. Instead, they allege that their plans (which their employers typically selected and paid for in the first place) have a diminished value because *if* they incur certain illnesses, they *might* be denied treatment and that denial *might* be attributable to allegedly concealed cost-containment policies.

The argument in favor of no-injury class actions is that they "level the playing field" for consumers. In fact, they do more *harm* than good for most consumers. Class members give up all of their individual claims for out-of-pocket losses, such as the cost of medical services for which coverage was denied, costs to make actual product repairs or consequential damages for incidents of product failures. They are forced to take extreme litigation positions crafted to ensure that common issues predominate, but which create conflicts of interest among class members. For example, if I own a product that actually failed and I spent $100 to fix it, why would I want to waive that claim in exchange for a claim for a recall on behalf of all owners, including those who had no failure at all? Wouldn't I want to get my $100 back instead of a second fix that I don't need? This is exactly what no-injury class actions do — they force harmed individuals to sacrifice their claims to preserve lesser claims that everyone can assert. But that is exactly what class actions are *not* supposed to do.

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People with real injuries are the biggest losers of all. Assume that you are a member of a no-injury class action that is dismissed on the merits. The next week, you have an actual product failure causing personal injury. If you are estopped from relitigating the defect issue on the facts of your injury, you may feel cheated out of due process. If you are not, the defendant will be denied the benefit of its judgment in the class action and taxpayers must bear the cost of relitigating the same issue between the same parties. Neither result is acceptable.

No-injury class actions can even create dangers for class members. Decisions about safety recalls should be made by expert regulators, not lay juries and judges. When plaintiffs' lawyers are permitted to second-guess or end-run safety experts, they put everyone at risk and they create a risk of dangerously inconsistent results. A judge in California might rule that all car seatbacks that yield in accidents are defective. A judge in Pennsylvania might rule that car seatbacks that do *not* yield in accidents are defective. How can a defendant comply with both judgments? They cannot both be right for consumers. This is precisely why we have federal regulators make these decisions on a national basis.

So what do consumers get from no-injury class actions? Several years of experience and research indicate that they get almost nothing. In a recent report, the Rand Institute for Civil Justice, which conducted a comprehensive review of class action results, concludes that most settlements provide little benefit to class members — often nothing more than coupons to purchase more of the products that are supposedly defective — with less than half of the recovery going to class members and the lion's share going to the plaintiffs' attorneys. When one considers that no-injury plaintiffs, by definition, suffered no harm, even coupons may be a windfall. But if the purpose of the no-injury class action is to reduce future risks, coupons and token cash settlements do not achieve that objective.

Even in cases that actually go to trial and result in a verdict for the class, one has to wonder whether consumers actually "win." In one of the first no-injury class actions to go to trial, a Philadelphia jury awarded about $700 to each owner of certain Chrysler vehicles equipped with airbags that *might* cause burns *if* they deploy in a serious accident. If that verdict is affirmed, several important questions will be left unanswered: What *should* class members do with their $700? There is no airbag that can deploy quickly enough without some risk of injury, so buying a risk-free or a "safer" airbag is not even an option. What *will* class members do with their $700? Common sense tells us that most class members would not seek out a new airbag (assuming *arguendo* that there is a "safer" design to choose from) to replace the incident-free one that they have. Thus, when the case is finally over, class members will be no safer from the risks that ostensibly motivated the litigation. But they will face the risk of dangerous regulations issued from the bench.

Conclusion. The good news is that the no-injury approach to product litigation has been rejected in several important decisions. *See, e.g., Briehl v. General Motors Corp.*, 172 F.3d 623 (8th Cir. 1999); *Ford Motor Co. v. Rice*, 726 So. 2d 626 (Ala. 1998). The bad news is that some trial courts, especially state courts, do not see the dangers of these cases and are permitting them to proceed to trial. Plaintiffs will continue to press the theory with increasing vigor as the federal courts clamp down on certification of product defect classes. The challenge is to convince lawmakers at all levels and in all branches of government that no-injury class actions make bad law — bad for businesses and bad for consumers.

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