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Class certification and warranty claims

THE IMPLICATIONS OF CLASS-CERTIFICATION REQUIREMENTS IN CALIFORNIA STATE AND FEDERAL DISTRICT COURTS FOR BREACH OF WARRANTY CLAIMS IN PRODUCTS-DEFECT CLASS ACTIONS

The following scenario should be familiar to most plaintiffs' attorneys: A potential client presents with legitimate complaints of a product failure or defect based on design, manufacturing or failure to warn. No one has been injured, but the potential client wants a replacement or refund. Perhaps the product is an automobile, a smartphone, or television.

Then, the plaintiff's attorney discovers there are other individuals who share similar grievances. In this scenario, the damages per individual are often too low to justify the time and expense of individual lawsuits or perhaps the issue is widespread, potentially affecting thousands of consumers. The question then becomes whether the defective product gives rise to a viable class-action lawsuit.

The most common causes of action in products-based class actions include breach of express warranty, breach of implied warranty, and violation of state and/or federal consumer statutes (i.e., the Unfair Competition Law, Consumers Legal Remedy Act, and the Song-Beverly Consumer Warranty Act in California and the Magnuson-Moss Warranty Act in federal cases). Each of these claims presents its own unique challenges at both the pleading and class certification stages. Breach of warranty claims however, are particularly difficult to certify. If class certification is denied, the class claims are dismissed. Although California state law and the Federal Rules of Civil Procedure on class certification nearly mirror one another, the threshold for breach of warranty claims differs depending on the venue – state or federal.

The California State Court approach

Section 382 of the California Code of Civil Procedure authorizes a class action when "the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . ." (Code Civ. Proc., § 382.) In California, class certification requirements are defined in case law. (*Sav-On Drug Stores v. Sup. Ct.* (2014) 34 Cal.4th 319, 326.) The moving party has the burden to establish: 1) that the proposed class is ascertainable; and, 2) that there is a well-defined community of interest among class members. (*Ibid.*) To establish whether the putative class is ascertainable, courts examine the class definition, estimated class size, and the means of identifying class members. (See *Noel v. Thrifty Payless, Inc.* (2019) 445 P.3d 626.) The "community of interest" requirement is established based



on three factors: 1) predominant common questions of law or fact; 2) class representatives with claims or defenses typical of the class; and, 3) class representatives who can adequately represent the class. (*Lockheed Martin Corp. v. Sup. Ct.* (2003) 29 Cal.4th 1096, 1104.)

The difficulty in achieving class certification in California state court on breach of warranty claims lies in the community interest requirement, i.e., whether common questions of law or fact predominate. In *American Honda Motor Co., Inc. v. Sup. Ct.* (2011) 199 Cal.App.4th 1367 (*American Honda*), the court clarified that under California law, the party moving for class certification in a breach of warranty action must provide "substantial evidence of a defect that is substantially certain to result in malfunction during the useful life of the product." (*Id.* at 1375.) Meeting the standard set forth in *American Honda* often poses a significant hurdle.

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In *American Honda*, plaintiff moved for class certification pursuant to California law, alleging, among other claims, violation of breach of express and implied warranty under the Song-Beverly Consumer Warranty Act, Civil Code sections 1791.2 and 1794, and Commercial Code section 2103, arising out of transmission defects which caused his vehicle to operate unsafely. (*Id.* at p. 1369.) The trial court approved plaintiff's certification motion for his breach of warranty claims and relied almost entirely on *Wolin v. Jaguar Land Rover North America*, (9th Cir. 2010) 617 F.3d 1168 (*Wolin*), as the basis of its decision. The Court of Appeal reversed the trial court's decision to certify the putative class and distinguished *Wolin*, explaining that *Wolin* applied Michigan and Florida substantive warranty laws, and not those of California. The court further stated that, although California "does not require a current malfunction to prove breach of warranty," that "does not mean it should not require proof of any malfunction, present or future." (*Id.* at p. 1375.)

Relying on another California appellate decision, *Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, the *American Honda* court held that "the party moving for class certification must provide substantial evidence of a defect that is substantially certain to result in malfunction during the useful life of the product." (*Id.* at p. 1376.) Although the plaintiff in *American Honda* presented evidence that the putative class bought or leased 19,470 affected vehicles and less than four percent reported a problem, he did not present any evidence as to the remaining 18,755 class members that the defect was substantially certain to occur. Applying the standard adopted from *Hicks*, the court stated that by not presenting evidence that the alleged defect was substantially certain to affect all class members' transmissions, the plaintiff was unable to satisfy the common interest requirement for class certification. The court concluded that plaintiff's failure to provide evidence

establishing that it was substantially certain the product would malfunction as a result of the defect presented too many individualized issues for class treatment, and thus, was fatal to his motion to certify.

The *American Honda* case essentially establishes a heightened standard of proof to obtain class certification in California state court. As the court itself noted, proof that a defect is "substantially certain" to result in malfunction "is an issue that must be considered not only to determine the merits of a plaintiff's claim, but also in a class certification motion." (*Id.* at p. 1375.) Although *American Honda* does not explicitly require expert analysis to establish that common questions of law and fact predominate, it is reasonable to infer that expert testimony may be the only way to provide "substantial evidence of a defect." To circumvent this issue, consumer attorneys may be tempted to file products-defect class actions in federal district court. However, since *American Honda*, federal district courts in California are divided on their approach to class certification of warranty claims.

The federal district court approach in California

The prerequisites of class certification are defined under Rule 23(a) of the Federal Rules of Civil Procedure. Plaintiffs must plead and prove: 1) the class is so numerous that joinder of all members is impracticable; 2) there are questions of law or fact common to the class; 3) the claims of the representative parties are typical of the claims of the class; and 4) the representative parties will fairly and adequately protect the interests of the class. (Fed. Rules Civ. Proc., rule 23(a).) Once these four factors are satisfied, to acquire class certification, plaintiffs must also prove one of the three requirements of Rule 23(b).

The most common section of Rule 23(b) used in the realm of products-defect cases alleging breach of warranty is Rule 23(b)(3), which is intended for classes seeking monetary damages. Rule 23(b)(3) requires the court find that "the

questions of law or fact common to class members predominate over any questions affecting only individual members," and that a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." (Fed. Rules Civ. Proc., rule 23(b)(3).) Under federal procedural law, "proof of the manifestation of a defect is not a prerequisite to class certification." (*Wolin*, *supra*, 617 F.3d at p. 1173.)

However, since *American Honda*, California's federal district courts are divided as to whether class certification of a breach of implied and express warranty under California law requires a plaintiff to provide substantial evidence that a defect is substantially certain to result in a malfunction.

In *Keegan v. American Honda Motor Co., Inc.*, for example, the court refused to follow *American Honda*, explaining that the court in *American Honda* appeared to have "conflated the substantive requirements of California warranty law and California procedure governing class certification." (*Keegan v. American Honda Motor Co., Inc.* (C.D.Cal. 2012) 284 F.R.D. 504, 535.) The court followed the Ninth Circuit decision in *Wolin* and applied federal procedural law, not California substantive law, and granted class certification in breach of express and implied warranty claims brought under the Song-Beverly and Magnuson-Moss Warranty Acts and California Commercial Code section 2313 for a products-defect case alleging a design defect in Honda Civic vehicles which would result in premature tire wear. It concluded that the breach of warranty claims may be "susceptible to common proof." (*Id.* at p. 537.)

The district court stated that having considered both *American Honda* and *Hicks*, it could not "discern why, at the class certification stage, plaintiffs must adduce evidence that a defect is substantially certain to arise in all class vehicles during the vehicles' useful life." (*Id.* at p. 536.) The court further added that the necessary analysis – whether
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the design specification is substantially certain to result in the malfunction alleged in the plaintiff's complaint – is "particularly suited to resolution as a class action." (*Ibid.*)

Most recently, in *Victorino v. FCA US LLC*, (S.D. Cal. 2018) F.R.D. 282, 299, a case involving breach of implied warranty of merchantability claim under the Song-Beverly Warranty Act, the district court in San Diego followed the *Keegan* court's analysis using *Wolin*'s standard of class certification requirements as to breach of warranty claims. It further noted that it did not find *American Honda*'s heightened standard, which requires a determination on the merits for warranty claims, as proper in determining class certification.

Unlike *Keegan* and *Victorino* however, a different district court in the Central District denied class certification on plaintiff's breach of implied and express warranty claims pursuant to the Song-Beverly and Magnuson-Moss Warranty Acts and breach of express warranty under California Commercial Code section 2313 because plaintiffs failed to meet the heightened standard established in *American Honda*. (*Torres v. Nissan N. America, Inc.* (C.D. Cal. 2015) WL 5170539.) In *Torres*, plaintiffs alleged transmission defects in Nissan Pathfinders, which caused unsafe driving conditions and premature wear of the transmission. In its class certification analysis on the breach of warranty claims, the court considered both *Wolin* and *American Honda* as well as the *Keegan* court's analysis of these two cases. It concluded that *Wolin* and *American Honda* are reconcilable and stated that while the former elucidates federal procedural law,

the latter clarifies California substantive law on the elements of a warranty claim. It explained that although the *Wolin* court held that plaintiffs need not prove manifestation of a defect as to all putative class members when seeking class certification under Rule 23 for warranty claims, it reached its decision by considering Michigan and Florida consumer protection laws. It further explained that plaintiff's burden to prove that common issues predominate are linked with the substantive law of underlying the claims. Thus, it held that because *American Honda* addresses both California class action procedure and California substantive law, it must follow that decision.

Thus, after *American Honda*, a federal venue to litigate products-defect class actions does not guarantee that courts will follow plaintiff-friendly federal procedure laws to establish predominance for class certification purposes.

Implications for consumer attorneys

The impact of *American Honda* on products-defect class actions alleging California breach of warranty law is significant. Under *American Honda*, plaintiffs are essentially forced to prove their case on the merits at the class-certification stage. Although *American Honda*'s holding did not expressly require expert analysis to establish the existence of a product defect, providing "substantial evidence of a defect that is substantially certain to result in malfunction," necessarily requires expert testimony. Ideally, expert analysis should be done before filing the lawsuit to opine on the nature and cause of the defect. At the

class-certification stage, experts may need to design samples and analyze product usage and product failure data to identify relevant patterns, thereby establishing the existence of the defect. This type of analysis often requires an expert to analyze extensive data obtained through class certification discovery. Conducting expensive expert analysis before class certification often makes products-defect class actions financially prohibitive for most plaintiffs' lawyers in California.

Although California law does not expressly require expert analysis to establish the existence of a product defect in class actions alleging California breach of express and implied warranty law, it is clear from the state and federal cases discussed above that a prudent plaintiff's attorney should spend time and money investigating, either before filing the lawsuit or during discovery, whether the alleged defect is "substantially certain" to manifest during the useful life of the product.

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