Hot Topics in Products Liability Litigation: The Depreciation-Based Injury Theory Used to Support Standing in a Products Case

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The depreciation-based injury theory is a method that has been increasingly tested by the plaintiffs' bar to support the assertion of standing necessary to bring a product liability case. Under this theory, a plaintiff who has purchased a product that later depreciates in value due to a defect or other issue alleges that they have suffered an injury that is sufficient to create standing to bring a lawsuit. Notably absent from this theory of standing is *physical injury* to a plaintiff in the conventional or colloquial sense that we usually associate with products cases.

The theory is rooted in the idea that a product that is sold with a defect or other issue is not worth as much as it would have been if it had been sold without the defect. In other words, the defect reduces the value of the product, and the plaintiff suffers a financial injury as a result. When pursuing this theory, the plaintiff often seeks monetary damages for overpayment, arguing that had they known about the defective nature of the product, they would not have purchased it, would have paid less for the same product, or would have purchased a safer and defect-free alternative product. While fighting over the specifics of depreciation and the mechanics for calculating it can get complex, the plaintiffs' bar still falls back on the straight-forward allegation that plaintiff overpaid for something they did not receive. This practical crux of this can be that courts sometimes conclude that the amount by which the product depreciated is a question best left to experts, and not something to be handled at the pleading stage.

This battle has played out in recent years, most notably in California. *See e.g. In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 500 F. Supp. 3d 940, 943 (N.D. Cal. 2020) (cleaned up). Such decisions come as the plaintiffs' bar is standing on the shoulders of other cases leading up to this point in which courts have rejected standing challenges where consumers allege that a product manufacturer's misrepresentation of a product caused them to overpay for the product—especially where a specific misrepresentation caused the consumer to pay a premium for a characteristic that the product did not actually have. *See, e.g., Victor v. R.C. Bigelow, Inc.*, 2014 WL 1028881, at *4 (N.D. Cal. Mar. 14, 2014) (concluding that plaintiff had standing where they alleged that they "paid a premium for purported nutritional and health benefits that the product did not have"); *In re Clorox Consumer Litig.*, 2013 WL 3967334, at *3-4 (N.D. Cal. July 31, 2013) (concluding that plaintiff had standing where they alleged that defendant's product did not "perform as advertised" but that the plaintiff paid a premium for the non-performing features); *Morgan v. Wallaby Yogurt Co., Inc.*, 2013 WL 5514563, at *3-4 (N.D. Cal. Oct. 4, 2013) (concluding that plaintiff had standing where they alleged that they paid "a premium price for inferior or undesirable ingredients").

The same or similar depreciation-based injury theory has also been asserted by plaintiffs elsewhere. *See In re Duramax Diesel Litig.*, 298 F. Supp. 3d 1037, 1052 (E.D. Mich. 2018) ("Plaintiffs' overpayment theory suffices to provide standing to sue GM"); *Ackerman v. U.S. Dep't of Agric.*, 2018 WL 1858165, at *7 (E.D. Mich. Apr. 18, 2018) ("Claims of overpayment, wherein a plaintiff paid a premium but did not receive the anticipated consideration, are cognizable injuries in fact.") (*citing Wuliger v. Mfrs. Life Ins. Co.*, 567 F.3d 787, 794 (6th Cir. 2009)); *Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Practices, & Prod. Liab. Litig.*, 295 F. Supp. 3d 927, 945–51 (N.D. Cal. 2018) ("Allegations of overpayment based on a defendant's failure to disclose a product's limitations are clearly sufficient to satisfy Article III's injury-in-fact requirement."); *Counts v. Gen. Motors, LLC*, 237 F. Supp. 3d 572, 582-83 (E.D. Mich. Feb. 14, 2017) (concluding that injury-in-fact existed where "Plaintiffs allege that GM's misrepresentations resulted in their overpaying for a vehicle because the vehicle did not work in the way GM promised it would.")

This theory continues to be tested and will continue to evolve. We predict that the theory may be more likely to be accepted in cases where the alleged defect or issue affects the value of the product in a significant way, rather than just causing minor inconvenience. The plaintiffs' bar finds the depreciation-based injury theory to be useful in cases where the defect does not necessarily cause physical harm or property damage, yet results in a financial loss for the plaintiff of miniscule, or even theoretical, significance. This becomes a slippery slope, however, as this theory has the risk of transforming every garden-variety product defect into a national class action, even when no one was physically harmed. That sobering reality ought to give courts pause.

As the depreciation-based injury theory continues to be litigated, this is a hot topic in products liability law to watch closely. We predict that this theory will be seen in more jurisdictions in the future.