IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-1540

JOANNE NEALE, et al.,

Plaintiffs/Appellees,

vs.

VOLVO CARS OF NORTH AMERICA, LLC, et al.,

Defendants/Appellants.

Appeal from an Order of the United States District Court
for the District of New Jersey
Honorable Dennis M. Cavanaugh, U.S.D.J.
(reassigned to Hon. Jose L. Linares on April 21, 2014)

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INTRODUCTION

As Plaintiffs did in opposing leave to appeal, their arguments on the merits depict a very different case than actually was decided below. Implying that the district court conducted an analysis that is not contained anywhere in its certification Opinion, Plaintiffs again argue that the district court made its class certification decision "only after" considering "nearly one thousand pages" of briefing and exhibits. (Doc. 003111613273, at 12-13; *see also* Doc. 003111462715, at 3 & 5.) They also rely on a certification record that was not before, and arguments never made to, the district court. Finally, Plaintiffs misdescribe the classes actually certified by the district court. They simply ignore that the certified classes include owners and lessees of vehicles without sunroofs. Even more troubling, Plaintiffs make the counterfactual claim (relying on testimony the district court said it did not consider) that "all class members have incurred losses at least equal to the cost of mitigating the defect." (Doc. 003111613273, at 40.) As we have explained repeatedly, however, the certified classes include former owners of class vehicles, many of which now reside in a junkyard. And former owners have no need to repair a vehicle they no longer own and that functioned without incident for as long as they owned it.

Plaintiffs accuse us of hyperbole and legal misstatement. (Doc. 003111613273, at 37 & 53 ("[i]f Volvo's position was an accurate reflection of the

law, no class could ever be certified").) But it is they, not us, who rely on histrionics and whose position advocates a tectonic shift in settled law. The district court's certification Order allows classes to be certified any time a few consumers allege that a mass-produced product did not meet their expectations. In so doing, it facilitates a broadside attack on settled warranty law by allowing consumers to seek recovery of damages allegedly caused by a component that functioned precisely, and for as long, as warranted. There is no logical distinction between the individual component at issue in this case and any of the thousands of other components in vehicles (and other products) that might or might not require repair or replacement after the warranty has expired. The cost of defending such class actions ultimately is borne by consumers in the form of higher costs. Certifying classes full of uninjured members not only violates settled law and provides a windfall to the uninjured, it constitutes bad economic and social policy. *See* Theodore Frank, *The Supreme Court Must Stop the Trial Lawyers' War on Innovation*, Forbes, May 24, 2013 ("Given that every manufacturer is being sued, they can pass the costs along to consumers," who "are paying extra to subsidize wealthy trial lawyers"). Reversing the district court's Order will not create new law. To the contrary, *only* reversal is consistent with recent Supreme Court precedent and with numerous similar decisions from this Court, including *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 600 (3d Cir. 2012), *In re DVI, Inc. Sec.*

Litig., 639 F.3d 623, 630 (3d Cir. 2011), *Malack v. BDO Seidman, LLP*, 617 F.3d 743, 746 n.5 (3d Cir. 2010), and *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008).

ARGUMENT

I. THE DISTRICT COURT DID NOT ANALYZE THE ELEMENTS OF THE CLAIMS CERTIFIED, DID NOT REQUIRE EVIDENCE THAT THE CLAIMS WERE SUSCEPTIBLE OF COMMON PROOF, AND DID NOT IDENTIFY THE INDIVIDUAL ISSUES AND COMMON ISSUES OR WEIGH THEM AGAINST EACH OTHER.

This Court has made it clear that the predominance analysis requires a court at the certification stage to "examine each element of a legal claim 'through the prism' of Rule 23(b)(3)." *Marcus*, 687 F.3d at 600 (quoting *In re DVI*, 639 F.3d at 630); *accord Malack*, 617 F.3d at 746 n.5 ("the District Court correctly stated that at class certification Malack must 'demonstrate that [each essential] element [of his claim] ... is capable of proof at trial through evidence that is common to the class rather than individual to its members'")(alterations in original); *Hydrogen Peroxide*, 552 F.3d at 311-12 (plaintiff must "demonstrate that the element of [the legal claim] is capable of proof at trial through evidence that is common to the class rather than individual to its members"). This also requires the district court to "'formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case.'" *Hydrogen Peroxide*, 552 F.3d at 311 (citation omitted). "'If proof of the essential

elements of the cause of action requires individual treatment, then class certification is unsuitable.'" *Id.* (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 172 (3d Cir. 2001)).

Although the district court here certified more than two dozen claims under the laws of six states, the certification Opinion's perfunctory predominance analysis reveals that the court did not examine the elements of any claim under the laws of any of the implicated states, did not identify common and individual issues with respect to those elements, and did not weigh common and individual issues against each. (JA82-83.) "Absent this analysis," it is "'impossible for the court to know' ... whether the common issues predominate." *Madison v. Chalmette Refining, L.L.C.*, 637 F.3d 551, 557 (5th Cir. 2011). Plaintiffs do not contend that the principle articulated in *Marcus*, *In re DVI*, *Malack*, and *Hydrogen Peroxide* is incorrect or inapplicable. Nor do they explain where or how the district court examined the elements of the claims certified through the prism of Rule 23(b)(3). Instead, they offer three basic arguments, each of which is easily dispatched.

First, they argue substantively that predominance was satisfied here. In doing so, they invite this Court to perform the predominance analysis that the district court did not. (Doc. 003111643903, at 16-36.)[1] Volvo's appeal is not

[1] That, of course, is not this Court's role under Rule 23(f). But even if it were, Plaintiffs waived any substantive response to Volvo's arguments by failing to make the arguments below. *See Birdman v. Office of the Governor*, 677 F.3d 167,

based on a disagreement with the district court's predominance analysis, however, but on the district court's failure to conduct the predominance analysis that the Supreme Court and this Court have held is required. (Doc. 003111613273, at 17-33.) The issue is whether the district court examined the elements of the claims certified, not whether Rule 23(b)(3) predominance is met in a counterfactual world where the district court actually made such an examination.

As noted, Plaintiffs do not attempt to show where or how the district court discharged its obligation to examine the elements of the claims certified. Plaintiffs' failure is, at a minimum, an implicit concession of Volvo's point. And because the district court failed to fulfill the first step of the required predominance analysis, it necessarily failed to perform the subsequent steps of (1) requiring evidentiary proof that the claims were susceptible of common proof, (2) identifying the individual issues and common issues, and (3) weighing them against each other. That was error. *Marcus*, 687 F.3d at 600; *In re DVI*, 639 F.3d at 630; *Malack*, 617 F.3d at 746 n.5; *Hydrogen Peroxide*, 552 F.3d at 311. Although Volvo believes that an appropriate analysis would have shown that predominance was lacking, it is the failure to conduct the analysis that requires reversal. This Court cannot sustain the district court's certification decision by

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173 (3d Cir. 2012) ("It is axiomatic that 'arguments asserted for the first time on appeal are deemed to be waived and consequently are not susceptible to review in this Court absent exceptional circumstances'") (citation omitted).

conducting a predominance analysis for the first time on appeal, as Plaintiffs advocate.

Second, Plaintiffs again attempt to defend the certification decision by implying that the required predominance analysis must have been conducted, *sub silentio*, because the district court reviewed "nearly one thousand pages" of briefing and exhibits. (Doc. 003111643903, at 12-13.) But the inference finds no support anywhere in the Opinion itself. Nothing in the Opinion establishes or even suggests that the district court considered the elements of the claims certified through the prism of Rule 23(b)(3). Indeed, the district court did not even consider the elements of the claims in ruling on Volvo's motions for summary judgment. It summarily adjudicated summary judgment motions against eight Plaintiffs, each of which included multiple arguments for judgment on the many claims pleaded under each state's law, in a single paragraph that did not address any of the arguments Volvo made. Instead, the district court denied summary judgment because it granted class certification and by identifying "triable issues of fact" that were immaterial to the grounds on which summary judgment was sought.[2] (JA84

[2] So cursory was the district court's analysis that it denied summary judgment on a claim Plaintiffs had already conceded. (Doc. 003111643903, at 36 ("Plaintiffs have already conceded their Florida breach of contract claim in the district court") (citing and quoting from DDE 115, at 25).) Rule 23 is not satisfied by inference, but even if it could be, this is more than enough to rebut any inference that the size of the record before the district court is sufficient evidence of an appropriate predominance analysis.

("[i]n finding that certification of Plaintiffs' proposed statewide classes is warranted, the Court finds that triable issues of fact exist").)

Third, Plaintiffs again rely on *Sullivan*. (Doc. 003111613273, at 13-15 (citing *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 306 (3d Cir. 2011).) *Sullivan* stands broadly for the proposition that a settlement class can include individuals who lack statutory antitrust standing under federal or state law because a settlement is a creature of contract. *Sullivan*, 667 F.3d at 306-07, 312-13. *Sullivan* itself specifically acknowledged that "an examination of the elements of plaintiffs' claim is sometimes necessary, not in order to determine whether each class member states a valid claim, but instead to determine whether the requirements of Rule 23 ... are met." *Sullivan*, 667 F.3d at 306 (citing *Hydrogen Peroxide*, 552 F.3d at 311-12). And more than a year after *Sullivan* was decided, this Court reiterated that "[t]o assess predominance, a court at the certification stage must examine each element of a legal claim 'through the prism' of Rule 23(b)(3)." *Marcus*, 687 F.3d at 600. Plaintiffs' predominance arguments ignore *Marcus*.

In sum, the district court abused its discretion and committed multiple reversible errors by certifying more than two dozen claims under the laws of six states without analyzing a single element of any claim, without requiring a showing that these elements could be proved with common evidence, and without

weighing the common and individual issues involving those claims. *See Marcus*, 687 F.3d at 600, *In re DVI*, 639 F.3d at 630; *Hydrogen Peroxide*, 552 F.3d at 311.

II. THE DISTRICT COURT ERRED AND COMMITTED REVERSIBLE ERROR BY CERTIFYING LITIGATION CLASSES FULL OF UNINJURED MEMBERS.

Volvo's opening brief explained how, "[b]y failing to analyze the elements of the claims it certified, the district court also swept into the certified classes individuals who lack Article III standing and whose lack of injury or damages precludes recovery under applicable state law." (Doc. 003111613273, at 34.) Volvo also explained why including such individuals runs afoul of Rule 23's implied ascertainability requirement, and violates the Rules Enabling Act, *Dukes*, and due process. (*Id.* at 36-41.)

A. The District Court's Order Violates the Rules Enabling Act.

In an argument that improperly reverses the burden of proof, Plaintiffs initially say that Volvo offers "no evidence that most class members will never suffer a water leak." (*Id.* at 37.) Although it was not Volvo's burden, the only record evidence establishes that most class members (in classes going back to vehicles purchased in 2003) have never suffered a water leak. (JA404 at 1-24 (testimony of Volvo engineer estimating that only about 0.5% of class vehicles (nationwide) had experienced a water leak, which leaves 99.5% of vehicles that never suffered a leak).) Plaintiffs quibble with that testimony on appeal but fail to

point to any contrary evidence from which the district court could have found that clogged sunroof drains are anything but an infrequent and highly-individualized occurrence. Plaintiffs' own expert, Dr. Benedict, also testified that whether a sunroof drain experiences a clog depends on numerous environmental and geographic variables. And even then, Dr. Benedict admitted that the clog may never result in a water leak into the cabin unless other environmental and geographic variables also are met. (JA4412 at 11-15, JA4420 at 18-21, JA4424 at 9-24, JA4430 at 7-13, JA4431 at 23 to JA4432 at 19; JA4432 at 23 to JA4433 at 2.) Plaintiffs offered no evidence that most, or even a significant percentage of, vehicles in the certified classes would ever experience the combination of environmental, geographic and other factors that make a clogged sunroof drain and resulting leak anything more than a theoretical possibility.

1. The Classes Improperly Include Those Without Article III Standing.

Plaintiffs focus on Article III standing, ignoring for the most part that the certified classes include many members without a legally cognizable loss resulting in damages under applicable state law.[3] (Doc. 003111643903, at 37-46.) Their

[3] Plaintiffs devote a single paragraph of their 53-page brief to the issue of whether all members of the certified classes have suffered damages under applicable state law. Contrary to Rule 23 and decades of jurisprudence interpreting it, Plaintiffs imply that Volvo will be entitled to raise the issue of a class member's lack of damages under state law as a defense at trial. (Doc. 003111643903, at 46.) Even if the argument was not directly contrary to the notion of a class trial, Plaintiffs'

first argument is that Article III standing is satisfied by the class representatives. (*Id.* at 38.) They also contend that there is Article III standing for all class members because each purchased a vehicle with an alleged defect, *i.e.*, the possibility that a sunroof drain would become clogged and cause a water leak. (*Id.* at 39-41.)

a. *Avritt* and *Denney* Are Persuasive.

As explained in our opening brief, this Circuit has not addressed the issue of absent class member standing in a litigation class. (Doc. 003111613273, at 35 n.65.) In cases involving settlement classes, the Court has found that Article III standing need be shown only for the class representatives. Unlike a litigation class, however, a settlement class will not involve a trial. As *Sullivan* explains, a court does not violate the Rules Enabling Act in certifying a settlement class that includes individuals without Article III standing because a settlement class is a creature of contract.

> Thus, a district court's certification of a settlement simply recognizes the parties' deliberate decision to bind themselves according to mutually agreed-upon terms without engaging in any substantive adjudication of the underlying causes of action. In the absence of a finding that plaintiffs are actually entitled to relief under substantive state law, we reiterate that a court does not

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careful phraseology—"nothing in the district court's summary judgment rulings or class certification order suggests that Appellants are barred from making these arguments at trial"—strongly intimates that Plaintiffs would object to such arguments if made.

> "abridge, enlarge, or modify any substantive right" by approving a voluntarily-entered class settlement agreement.

Sullivan, 667 F.3d at 312-13.

There currently is a circuit split regarding the issue of absent member standing. *Compare Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) ("a class cannot be certified if it contains members who lack standing") and *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006) (same) *with Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020-21 (9th Cir. 2011) ("'standing is satisfied if at least one named plaintiff meets the requirements'")(citation omitted) and *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 676-78 (7th Cir. 2009) (same).[4] It is well settled that the Rules Enabling Act prohibits Rule 23 from being interpreted in a way that abridges, ***enlarges*** or modifies any substantive right. Including in a certified class those who could not recover individually under state law would appear to violate the plain language of the Act. The Second and Eighth Circuits have held that all members of the proposed class must therefore demonstrate Article III standing. That is, a person who is precluded under state law from recovering on his own behalf in an individual action cannot, consistent

[4] The Tenth Circuit has held that "only named plaintiffs in a class action seeking prospective injunctive relief must demonstrate standing." *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1197-98 (10th Cir. 2010). That holding may be limited to cases seeking injunctive relief, however, where the impact of an injunction would inure to all, regardless of individual standing.

with Article III, recover simply by changing his status from named plaintiff to absent class member.[5] Prohibiting certification of such classes also is consistent with the Supreme Court's admonition that "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members," *Wal-Mart Stores v. Dukes, Inc.*, 131 S. Ct. 2541, 2550 (2011), and with that Court's even more recent decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1431 & n.4 (2013), holding that Rule 23 requires proof that damages can "be measured on a classwide basis." "The class must therefore be defined in such a way that anyone within it would have standing." *Denney*, 443 F.3d at 264.

b. The Certified Classes Impermissibly Include Those Without Article III Standing.

Although each member of a class does not need to submit evidence of personal standing, "a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves." *Avritt*, 615 F.3d at 1034; *Denney*, 443 F.3d at 263-64. Standing under Article III requires a plaintiff to demonstrate that s/he has suffered an injury in fact that is distinct and palpable, that is fairly traceable to the challenged conduct, and that is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

[5] Although the Ninth and Seventh Circuits have said that only one named plaintiff must satisfy the actual injury component of standing, neither Circuit has addressed the apparent conflict between the Rules Enabling Act and a standing rule that permits an individual to recover as a class member at trial what s/he would be precluded from recovering individually.

Plaintiffs contend that all class members have suffered an injury in fact because they purchased or leased a vehicle with a sunroof drainage system defect that allows for the possibility of a water leak, and Mr. Bratic's expert report shows that "all class members have incurred losses at least equal to the cost of mitigating the defect." (Doc. 003111643903, at 40.) Leaving to one side for now Plaintiffs' improper attempt to rely on Mr. Bratic on this appeal, his testimony does not support the argument. Mr. Bratic did not offer the opinion that *all* class members have incurred a loss at least equal to the cost of mitigating the alleged defect. To the contrary, Mr. Bratic conceded that there were thousands of vehicles in the proposed classes that had been retired from service and thus did not need the proposed "repair." (JA5609-11, at ¶¶ 21-26.) His opinion, furthermore, was offered in terms of class *vehicles*, not class members. And his concession that class vehicles retired from service do not need the proposed repair is equally applicable to class members (including thousands or tens of thousands of former owners) whose ownership experience did not include a water leak caused by a clogged sunroof drain.

Plaintiffs contend that the mere (and remote) possibility a sunroof drain can become clogged and cause a water leak is sufficient to constitute injury in fact. (Doc. 003111613273 at 40-41.) But that contention is not supported by the case law and proves too much in any event. Every vehicle sold or leased in the United

States has the potential for some malfunction, but for most vehicles it is nothing more than a potential problem. Volvo's warranty, like most warranties, promises to repair defects if they occur within the warranty period. The warranty itself thus constitutes "recognition of potential defects (in a statistical sense, the inevitability of defects) in the seller's product and an allocation of risk associated with such defects." *Neuser v. Carrier Corp.*, 2007 WL 484779, at *5 (W.D. Wis. Feb. 9, 2007). Under Plaintiffs' theory of Article III standing, every vehicle purchaser or lessee in the United States would possess Article III standing with respect to every component part in his or her vehicle provided the component malfunctioned at least once in some vehicle somewhere. Article III standing requires more than the speculative risk of future injury Plaintiffs posit here. *See Reilly v. Ceridian Corp.*, 664 F.3d 38, 42 (3d Cir. 2011); *see also Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 320 (5th Cir. 2002) (holding that plaintiff who purchased and ingested drug later removed from the market because it caused liver problems in some people lacked injury in fact and Article III standing where drug functioned as intended for plaintiff).

2. The Certified Classes Improperly Include Those Who Have No Legally Cognizable Loss or Damages Under State Law.

The certified classes violate the Rules Enabling Act in another way that is similar, but not identical to, the issue of Article III standing. As detailed in Volvo's opening brief, these classes include scores of people who did not suffer a

legally cognizable loss under state law with resulting damages. (Doc. 003111613273, at 37-39.) Volvo cited and discussed on-point authority in New Jersey, Massachusetts, Maryland, Florida, and California that precludes recovery on many of the certified claims for those class members who did not experience a water leak from a clogged sunroof drain. (*Id.* at 38.)

Although Plaintiffs did not respond directly to Volvo's arguments on this issue, elsewhere the brief argues that there is an ascertainable loss for all class members under the New Jersey Consumer Fraud Act and Massachusetts G.L. ch. 93A. (Doc. 003111643903, at 16-23 & 23-24.) In addition, the proposed amicus, Consumer League of New Jersey, contends that there is an ascertainable loss for all class members under the New Jersey Consumer Fraud Act. (Doc. 003111651856, at 10-14.) Volvo addresses below the arguments regarding the New Jersey and Massachusetts consumer protection acts. Because Plaintiffs did not respond at all to Volvo's other on-point authority, they should be deemed to have conceded that some members of the certified classes would be precluded from recovering on some certified claims.

a. New Jersey Consumer Fraud Act

Plaintiffs contend that each class member suffered the requisite ascertainable loss for an NJCFA claim because each received less than s/he paid for. Plaintiffs' amicus contends that all class members suffered an ascertainable loss comprised

either of a "diminished value" of a vehicle that could potentially experience a water leak or of a "price premium" that each class member allegedly paid for a vehicle that would not experience a water leak. (Doc. 003111643903, at 16-20; Doc. 003111651856, at 13.) The diminished value and price premium theories are different sides of the same coin. One contends that a consumer receives less than the benefit of her bargain if the vehicle contains an undisclosed "defect." The other contends that the consumer paid a premium for a vehicle that was "defect" free. For the reasons explained below, both theories suffer from a variety of economic and legal infirmities. But even assuming their validity, Plaintiffs presented *no* evidence to support them.[6]

Plaintiffs appear to contend that a loss of value can be inferred from the mere existence of an alleged defect that creates the *potential* for a vehicle malfunction. But that argument is directly contrary to *Thiedemann v. Mercedes-Benz USA, LLC*, 872 A.2d 783, 794 (N.J. 2005), where the New Jersey Supreme Court held that the "mere fact that an automobile defect arises does not establish, in and of itself, an actual and ascertainable loss to the vehicle purchaser."

The logic behind the court's decision in *Thiedemann* is inescapable. As the court recognized in *Thiedemann*, "[d]efects can, and do, arise with complex

[6] Indeed, the expert that they have attempted to resurrect on this appeal specifically testified that he had not made any effort to identify a "diminished value" of the class vehicles. (JA4567.)

instrumentalities such as automobiles." *Id.* In fact, a consumer simply cannot buy a vehicle that is free of the potential for some kind of a malfunction during its life. Like other jurisdictions, furthermore, New Jersey recognizes that the existence of a warranty "contemplate[s] that such defects might occur." *Herbstman v. Eastman Kodak Co.*, 342 A.2d 181, 187 (N.J. 1975); *accord*, *e.g.*, *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 1999 WL 33495352, at *6 (D.N.J. May 14, 1999) (warranty "acknowledge[s] the possibility of defects in factory-supplied materials or workmanship"). The price paid by all consumers for all vehicles necessarily reflects the potential for such defects to occur. That this is true is easily demonstrated by the fact that extended warranties are available, but only at additional cost. Thus, the price paid for a new vehicle necessarily reflects the possibility of a malfunction during the life of vehicle ownership.

In purchasing a vehicle that, like every other vehicle, has a *potential* to malfunction, the purchaser gets exactly what he is paying for.

> Plaintiffs insist that they did not get what they bargained for and instead received an unsafe motor vehicle with a known fuel-reporting defect. Essentially, what plaintiffs urge here is that they are entitled to a Mercedes-Benz motor vehicle without any flaws or glitches, without any reasonably-remediable problems, and without any of the ordinary tribulations of automobile ownership or lease: in other words, a perfect car unaffected by the laws of physics and common sense. Plaintiffs are not so entitled, and they may not seek legal remedies because of their unrealistic disappointment.

Thiedemann, 872 A.2d at 789 (quoting trial court with approval).

Thiedemann did "envision the possibility" that in another case "an expert may be able to speak to a loss in value of real or personal property due to market conditions, with sufficient precision to withstand a motion for summary judgment." *Id.* at 793. That possibility remains a mere possibility in this case. Plaintiffs offered *no* evidence of damages, and the certified New Jersey consumer fraud class thus contains members who did not experience a clogged sunroof drain or water leak and who have no claim under the NJCFA because of the lack of an ascertainable loss.

b. Massachusetts G.L. ch. 93A

Plaintiffs rely on the following statement in *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879 (Mass. 2008), to contend that Massachusetts would not bar the chapter 93A claims of absent class members who did not experience a water leak: "'[w]e do not consider the lack of accident-related injury or manifested defect a bar to recovery under G.L. c. 93A, § 9, in this case.'" (Doc. 003111643903, at 23 (quoting *Iannacchino*, 888 N.E.2d at 882).) But that statement must be read in the context of the court's holding that "[w]hen the standard that a product allegedly fails to meet is not one legally required by and enforced by the government, a claim of economic injury based on overpayment lacks the premise that the purchase price entitled the plaintiffs to a product that met that standard." *Id.* at

888. Plaintiffs did not show that the potential for a water leak violated any governmental safety standard, so *Iannacchino* bars the chapter 93A claims of class members who seek economic damages even though they did not experience a manifestation of the alleged defect. *Id.*; *In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (No. II)*, 2010 WL 2813788, at *78 (D.N.J. July 9, 2010) ("Under Massachusetts law as propounded in *Iannacchino*, mere allegations of a 'defect' unmoored to a violation of a legally required standard does not suffice to state a claim for injury based on purely economic loss under ch. 93A, § 9"); *Rule v. Fort Dodge Animal Health, Inc.*, 604 F. Supp. 2d 288, 304 (D. Mass. 2009), *aff'd*, 607 F.3d 250 (1st Cir. 2010).

c. Plaintiffs' Out-of-Circuit Cases Did Not Examine the Laws of the States Implicated Here.

Both Plaintiffs and their amicus rely heavily on a few out-of-circuit cases, where certified classes were affirmed notwithstanding the inclusion of class members who had not experienced manifestation of the alleged defect. A closer look at the cases, however, reveals that the cases addressed claims under the law of states not implicated here and/or made the same error as the district court below by assuming that a state allowed recovery for an unmanifested defect without examining that state's law and the elements of the claims. In *Daffin v. Ford Motor Co.*, 458 F.3d 549, 553 (6th Cir. 2006), the court held that *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974), precluded addressing whether an

unmanifested defect claim was cognizable under Ohio express warranty law, a holding that is contrary to *Dukes* and *Hydrogen Peroxide*. *Dukes*, 131 S. Ct. at 2552 n.6 (disapproving use of *Eisen* to avoid class certification issues that overlapped merits because such a reading is based on the "purest *dictum* and is contradicted by our other cases"); *Hydrogen Peroxide*, 552 F.3d at 316-17. The *Whirlpool* Court held that Ohio permits recovery for an unmanifested defect, but there are no Ohio claims in this case. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 856-57 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014). Like the district court here, *Wolin* failed to examine the elements of the claims under Michigan and Florida law and assumed—incorrectly—that those states would permit recovery for an unmanifested defect. *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173 (9th Cir. 2010). The *Butler* Court appears to have made the very same mistake by assuming, but not analyzing, whether state law would allow recovery for unmanifested "defects." *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014). These cases are neither controlling nor persuasive on the state law questions at issue here.

* * *

In sum, because the certified classes include members who could not recover had they brought an individual claim, Rule 23 is being used to enlarge those class

members' substantive rights, contrary to the plain language of the Rules Enabling Act. 28 U.S.C. § 2072(b). This requires reversal. *Id.*; *see also Dukes*, 131 S. Ct. at 2561; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999).

B. The Classes Violate the Due Process Rights of Volvo.

Plaintiffs do not directly address Volvo's arguments on this point, except to contend, without authority, that Volvo *may* be able to present an absent class member's lack of damages as a defense at a class trial. (Doc. 003111643903, at 46.) A class trial, however, is not one in which Volvo is allowed to present specific defenses against each individual. Rather, a class trial under Rule 23 involves representative proof, where the class representative's proof is offered as proof on behalf of all members of the certified class: "'as goes the claim of the named plaintiff, so go the claims of the class.'" *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998) (quoting *Sprague v. General Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998)). At a class trial, Volvo will be able to present defenses against the named Plaintiffs' claims only. As such, these classes violate Volvo's Due Process rights because "[a] defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues." *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013). As noted by a unanimous Supreme Court in *Dukes*, a class cannot be certified on the

premise that the defendant will not be entitled to litigate its statutory defenses to individual claims. *Dukes*, 131 S. Ct. at 2561. That is precisely the result of the district court's certification decision here.

III. THE DISTRICT COURT ERRED BY CERTIFYING CLASSES TO LITIGATE ALL ISSUES RELATING TO LIABILITY AND DAMAGES EVEN THOUGH PLAINTIFFS DID NOT ATTEMPT TO DEMONSTRATE THAT THEY COULD SHOW THE FACT OR AMOUNT OF DAMAGES FOR ALL CLASS MEMBERS WITH COMMON PROOF.

Plaintiffs offer several discrete arguments on this point, but they can be broadly separated into two groups, each of which is addressed below.

A. *Comcast*'s Holding Is Applicable.

Plaintiffs initially rely on the dissent to contend that the *Comcast* decision "'is good for this day and case only.'" (Doc. 003111613273, at 50 (quoting *Comcast Corp.*, 133 S. Ct. at 1437 (Ginsberg and Breyer, JJ, dissenting)). According to Plaintiffs, *Comcast* is inapplicable here because Volvo moved to exclude their proposed damages witness and, presumably, *Comcast*'s holding applies *only* where a party does not move for exclusion under *Daubert*. Plainly the dissent cannot circumscribe the reach of the majority opinion. And, Plaintiffs' reliance on the dissent reveals that nothing in the majority opinion limits the reach of *Comcast* in the manner they urge.[7]

[7] Plaintiffs avoided *Daubert* scrutiny by assuring the district court that Mr. Bratic's testimony was *not* offered to support class certification, an assurance accepted by

Plaintiffs next argue that *Comcast* is limited to a case in which the district court prohibits a party from making arguments at the class certification stage that might overlap with the merits. (Doc. 003111613273, at 47 & 50-51.) According to Plaintiffs, since the district court did not deny Volvo's motion to exclude their proposed damages expert for this reason, *Comcast* is inapplicable. (*Id.* at 51.) The reason the district court denied Volvo's *Daubert* motion was that Plaintiffs disclaimed reliance on Mr. Bratic in support of class certification, as they admit in their brief in this Court. (*Id.*) The district court accepted Plaintiffs' representation and denied Volvo's motion to exclude Mr. Bratic as "moot" because "[t]he Court agrees that it can properly make its determination on whether or not to certify the proposed class without considering Dr. Bratic's Report at this time." (JA48.) Plaintiffs' argument also misconstrues the holding of *Comcast*. The Supreme Court held in *Comcast* that there must be evidence at the class certification stage showing that "damages are capable of measurement on a classwide basis." 133 S. Ct. at 1431 & n.4, 1433. The precise reasons why the evidence in *Comcast* was deficient do not limit its holding.

Plaintiffs next argue that *Comcast* is limited to antitrust cases and does not apply to cases involving an allegedly defective product. They say that damages are presumed in cases alleging a defective product because all who purchased the

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the district court, which denied the motion to exclude as moot. (DDE 238, at 1; JA48.) The net effect was as if there was no *Daubert* motion.

product have suffered an economic injury regardless of whether the product ever malfunctions. (Doc. 003111613273, at 52.) According to Plaintiffs, since the Supreme Court did not address a case involving economic damage from an allegedly defective product, it did not address and could not change this "long-standing concept." (*Id.*)

This argument ignores that the Supreme Court vacated and remanded *Whirlpool* and *Butler*—two cases involving economic damage caused by an allegedly defective product—for further consideration following its decision in *Comcast*. *Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013); *Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (2013). It also overlooks that *Daffin*, *Wolin* and *Whirlpool* did not address the substantive state law requirements for the statewide classes certified below. Notwithstanding Plaintiffs' attempt to create and then rely on a contrary "long-standing concept," whether a consumer experiences a legally cognizable loss resulting in measurable damages by purchasing a product with a purported defect that does not manifest during the consumer's ownership experience is a question of *state* law. *Daffin*, *Wolin*, *Whirlpool*, and the other federal cases cited by Plaintiffs do not answer that question for the states implicated here. This case is not exempt from *Comcast*'s requirement that the class proponent must make an evidentiary showing that damages are capable of measurement on a classwide basis. 133 S. Ct. at 1433.

B. There Was No Evidence of Common Damages.

Plaintiffs contend that there was evidence of common damages before the district court because Dr. Benedict opined that there was a common defect and offered an estimated repair time. (Doc. 003111613273, at 49.) This was not the theory on which the district court certified the classes, but Dr. Benedict's opinion would not meet *Comcast*'s requirement in any event.

First, it is not a damages calculation. An estimate of repair time does not provide a monetary amount that can be awarded to each class member; it provides no number at all for damages. Repair charges can and do differ among and within the six states for which classes have been certified, and a mere estimate of time to complete a repair does not provide a quantification of damages.

Second, even if it could constitute a damages calculation, by its own terms it is not common or classwide. Dr. Benedict's repair time applies to *each vehicle* in the classes. The certified classes are not defined by *vehicles*, however, but by *owners*, and they include all current and former owners and lessees as class members. (JA5574-75 at ¶ 58.) Dr. Benedict offered no method to allocate "repair time" among multiple owners or lessees of the class vehicles. Theoretically, a repair would benefit the current owner, but not previous owners. Neither Plaintiffs nor their expert proposed a method to allocate money reflecting the cost of repair between or among class members with potentially antagonistic positions. And

when Mr. Bratic used Dr. Benedict's repair opinion to provide a damages estimate that Plaintiffs repudiated before the district court, he provided an amount per *vehicle*, not an amount for each class member. (JA5604 at ¶ 14, JA5609-10 at ¶¶ 21-24.) As noted, furthermore, Mr. Bratic conceded that there were thousands of vehicles in the proposed class that had been retired from service and that did not need Dr. Benedict's proposed repair, but those vehicles and all of their current and former owners and/or lessees are in the certified classes. (JA5609-11 at ¶¶ 21-26.)

The district court did not rely on Dr. Benedict's opinion as proof of classwide damages, and the opinion does not meet *Comcast*'s standard even if it had. The district court relied on *allegations* of damages, rather than evidence of damages, to certify the classes at issue. As in *Comcast*, the failure to present evidence that damages can be assessed on a classwide basis requires reversal.

CONCLUSION

For these reasons, Volvo respectfully asks the Court to reverse the district court's certification Order.

Respectfully submitted,

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LOCAL APPELLATE RULE 46.1(e) CERTIFICATION

I, Peter W. Herzog III, certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

Dated June 26, 2014

/s/ Peter W. Herzog III
Peter W. Herzog III

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Peter W. Herzog III certifies as follows:

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I hereby certify that, on June 26, 2014, two copies of the foregoing Reply Brief of Appellants Volvo Cars of North America, LLC, and Volvo Car Company were sent by Federal Express overnight delivery to:

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On the same date, an electronic copy of the Reply Brief of Appellants was electronically transmitted to the Clerk of the United States Court of Appeals for the Third Circuit and simultaneously to:

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