# PUBLICATION

## Shouldn't Fixing the Problem Be Enough? Post-recall Civil Litigation and the Prudential Mootness Doctrine

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**As night follows day, the announcement of a potential technical issue with a product is consistently followed by litigation over that issue. Technical service bulletins and service instructions to automotive dealers, for instance, are promptly cited in consumer fraud and misrepresentation lawsuits as the claimed basis for "overpayment" by putative classes of purchasers of the vehicles – thereby transforming an occasional mechanical concern in some subset of vehicles (most appropriately addressed via warranty claims, should the issue actually arise) into a universal harm alleged to exist in every car of the same make and model year. Many of these claims are brought by people who have never experienced the alleged defect at issue themselves, and most putative class actions exclude – for purposes of smoothing the path to class certification – any class members who have allegedly suffered any injury from the claimed defect. The mere existence of a potential "defect," even if it has been fixed, is the foundation for these types of economic loss cases.**

This same cycle is also seen with the announcement of a product recall. Product recalls undertaken in coordination with relevant regulatory authorities, such as the National Highway Traffic Safety Administration (NHTSA) or the Consumer Product Safety Commission (CPSC), are met with immediate civil litigation – particularly class action litigation. These lawsuits invariably claim that the condition that is the subject of the product recall was known, or should have been known, by the manufacturer and was wrongfully withheld or concealed from consumers at the time of purchase. The result is a claimed economic harm to every purchaser of the product, regardless of whether the condition at issue has ever manifested in their product, or even if the recall itself has been performed and the alleged defect thus corrected. Fixing the potential problem – for free – is not sufficient in the eyes of these litigants and their attorneys.

Recent authority, however, establishes that, where a manufacturer engages in a formal recall process that remedies the concern, such class claims can be barred under the doctrine of prudential mootness. Prudential mootness is a discretionary doctrine whereby a court can determine that events that post-date the alleged injury have eliminated the need for court involvement, even if the claims themselves are not technically moot in a constitutional sense. As now-Justice Gorsuch stated when writing for the Tenth Circuit Court of Appeals, mootness "always . . . describes a situation where events in the world have so overtaken a lawsuit that deciding it involves more energy than effect, a waste of effort on questions now more pedantic than practical." But in addition to pure constitutional mootness, sometimes "mootness carries a more prudential complexion, permitting [courts] to withhold relief [they have] the authority to grant."[1] As the Fourth Circuit has held, "[e]ven if a court has jurisdiction under Article III to decide a case, prudential concerns may militate against the use of judicial power, i.e., the court 'should treat [the case] as moot for prudential reasons.'"[2] "Where it is so unlikely that the court's grant of [remedy] will actually relieve the injury, the doctrine of prudential mootness – a facet of equity – comes into play. This concept is concerned, not with the court's power under Article III to provide relief, but with the court's discretion in exercising that power."[3]

Most circuits have adopted the doctrine of prudential mootness.[4] While not unique to product recall cases, the doctrine has been applied in that context on a number of occasions. *Winzler*, one of the leading opinions on the subject, arose in the context of a putative class action seeking to force Toyota to notify all owners of a claimed stalling defect and to create an equitable fund to pay for repairs.[5] While the case was pending, Toyota announced a nationwide recall to address the precise condition at the heart of the plaintiffs' claims.[6] Because the relief offered in the recall provided everything that the plaintiff sought in her lawsuit, and because the recall process itself was conducted under the supervision and jurisdiction of NHTSA and "the great grinding gears of a statutorily mandated and administratively overseen national recall process" that obligated Toyota to provide the notice and free repair, the court determined that the case was prudentially moot.[7]

Although decided with respect to a NHTSA-coordinated recall, the court's reasoning in *Winzler* was not limited to the acts of that administrative agency. To the contrary, the court's discussion of prudential mootness encompassed any situation where the remedial act was either initiated or supervised by an administrative agency, or otherwise had indicia of reliability: "However it comes about, once the plaintiff has a remedial promise from a coordinate branch in hand, we will generally decline to add the promise of a judicial remedy to the heap. While deciding the lawsuit might once have had practice importance, given the assurances of relief from some other department of government it doesn't any longer."[8] As the court noted, "It should come as no surprise that the remedial commitments of the coordinate branches of the United States government bear special gravity."[9] In addition, the court was wary of potential inconsistency in end results where judicial remedies were sought where administrative solutions had already been provided.[10] This rationale is equally applicable to recalls or corrective actions supervised by agencies such as CPSC or the FDA as it is to NHTSA-coordinated recalls.[11]

A series of recent cases from the Eastern District of Michigan also apply the prudential mootness doctrine in dismissing economic loss class actions involving defects subject to NHTSA recalls, or even voluntary customer satisfaction campaigns by manufacturers undertaken without NHTSA involvement. In *Pacheco v. Ford Motor Company*,[12] the district court held that a NHTSA-coordinated recall prudentially mooted a putative class action based on alleged defects in the engines of 2020-2022 Ford Hybrid Escapes, 2022 Ford Hybrid Mavericks, and 2021-2022 Lincoln Hybrid Corsairs. Plaintiffs alleged that "the engines in affected vehicles 'can leak and cause significant quantities of engine oil and/or fuel vapors to accumulate near ignition sources, resulting in under hood smoke and fires.'"[13] They sought damages for "overpayment of their vehicles" and an order "enjoining Ford's deceptive acts and practices" in failing to disclose the alleged defect prior to their purchases.[14] None of the named plaintiffs involved in the case had actually experienced such a smoke or fire incident.[15]

The description of the defect alleged in *Pacheco* tracks almost word-for-word the description of a potential issue that was addressed by Ford in a NHTSA-coordinated recall issued the month ***before*** the *Pacheco* lawsuit was filed.[16] The recall involved modifications to the under-engine shield to insert additional holes and remove blinds from the active grill shutter system, with both changes improving air flow to permit fluid and vapors to escape in the event of an engine failure.[17] Plaintiffs disputed the efficacy of the recall repairs, claiming that the changes either incorporated new risks (such as environmental hazards from leaking fluids) or altered vehicle performance (by increased aerodynamic drag, reducing fuel efficiency)–although these were not the supposed safety defect that was specifically pleaded in the complaint as the basis for the suit.[18] Accordingly, plaintiffs denied that the case was prudentially moot because they alleged that the recall remedy was inadequate.

Citing to *Winzler*, the district court held that plaintiffs' claims were prudentially moot. The act of notifying NHTSA about the recall and the potential issue was of particular importance to the court, which stated that "Ford has subjected itself to the continuing oversight of NHTSA, which monitors each safety recall to make sure owners receive safe, free, and effective remedies from manufacturers according to the Safety Act and Federal regulations."[19] Because "Ford has offered to repair the vehicles at issue and reimburse owners who

have already paid for repairs, Ford's promise to remedy the Spontaneous Fire Risk, backed by NHTSA, renders Plaintiffs' claims regarding the defect prudentially moot."[20] The district court rejected plaintiffs' subjective challenges to the sufficiency of the recall remedy, noting that plaintiffs did not contest that the recall procedure eliminated the "Spontaneous Fire Risk" that was the centerpiece of their safety allegations, and further observing that none of the named plaintiffs had ever experienced the "risk" of leaking fluids that they cited as a post-recall concern.[21] The court held that "[t]his alleged risk has not caused any actual, concrete injury to Plaintiffs."[22] The court also rejected the notion that a claimed change to fuel economy from the repair constituted an actionable injury because no plaintiff claimed to have experienced such reduced fuel economy in their vehicles.[23] In short, the district court held that plaintiffs' subjective "disagree[ment] with the approach taken by Ford to fix the problem" does not establish a "cognizable danger that the recall remedy supervised by NHTSA will fail," and does not "counsel against a finding of prudential mootness."[24]

The district court also rejected plaintiffs' arguments that their request for money damages inherently made prudential mootness inapplicable, because the recall did not provide them with the complete relief sought in the complaint. The court specifically rejected the "overpayment theory" of damages based on the notion that "they overpaid for their vehicles at the point of purchase, because the undisclosed defect diminished the value of the vehicles."[25] As the court noted, the recall remedied the Spontaneous Fire Risk defect and thereby "remove[s] the defect upon which the plaintiffs' diminished-value injury claim is based."[26] Accordingly, the court dismissed the case as prudentially moot, and an appeal is currently pending.

A virtually identical outcome was seen recently in *Solak v. Ford Motor Co.*[27] *Solak* involved an alleged defect in the side curtain airbags of certain Ford vehicles that was identified by NHTSA in an audit.[28] The condition was the subject of a NHTSA-coordinated recall to correct the deviation from the federal standard. Ford issued a notification letter to consumers of the impending recall, and that letter was followed several months later by a letter from Solak stating an intent to sue over the same issue, and then by his subsequent lawsuit.[29] Ford moved to dismiss that lawsuit on the grounds of prudential mootness, and the district court granted that motion, citing to *Winzler* and *Pacheco*. The court specifically rejected the notion that plaintiff and the putative class, who were seeking money damages, were not obtaining complete relief from the recall.[30] The court accepted the rationale from *Hadley* that the recall eliminated the claimed cause of the "diminished value" sought in the lawsuit.[31] Interestingly, the court also rejected the holding of *In re Chevrolet Bolt EV Battery Litig.,*[32] which accepted the notion that repair of an alleged defect did not moot a claim based on alleged overpayment.[33]

The court also rejected the contention that the effectiveness of the pending recall could not be established as the "root cause" of the deviation was unknown. The court held that "[n]umerous courts have declined to adjudicate automotive defect cases based on the mere prospect that a recall proves ineffective,"[34] and that "the plaintiff had to show some 'cognizable danger' that the NHTSA-monitored recall 'will fail and [the plaintiff] will be left without a complete remedy' to withstand a motion to dismiss."[35] The court stated that "the plaintiff would have to identify something more than the mere possibility of failure sufficient to keep the case alive for Article III purposes."[36]

A similar outcome is seen in *Sharp v. FCA*.[37] Plaintiffs there purchased or leased 2019 or 2020 Ram 2500 or 3500 trucks and claimed that the Cummins engine installed in those trucks contained a defective high-pressure fuel injection pump. Plaintiffs claimed the pump was defective because it was known to be incompatible with American diesel fuel, which allegedly provides less lubrication than diesel fuel refined to European specifications.[38] Without adequate lubrication, the pump was alleged to generate metal shavings that contaminate the fuel system and potentially lead to an unexpected loss of vehicle power.[39] Some of the named plaintiffs had experienced the claimed problem with their fuel pumps, but their vehicles were repaired under warranty.[40] All the plaintiffs sought "benefit of the bargain" damages because they claimed "[t]here is a substantial difference in the market value of the vehicle promised by Defendants and the market value of the vehicle received[.]"[41]

The defect at issue in *Sharp* was addressed by FCA in a NHTSA-coordinated recall issued thirteen days after the lawsuit was filed. Per the recall, FCA agreed to "replace the [high pressure fuel pump], update the Powertrain Control Module ('PCM') software, and inspect and, if necessary, replace additional fuel system components," as well as to reimburse owners who incurred the costs of repairing the problem.[42]

The court granted FCA's motion to dismiss on prudential mootness grounds, finding that the NHTSA-supervised repair and reimbursement process addressed the defect at issue in the case and "there remains not enough value left for the courts to add in this case to warrant carrying on with the business of deciding its merits."[43] The court reached this conclusion despite plaintiffs' contention that prudential mootness is inapplicable where plaintiffs seek money damages in addition to injunctive relief (such as an order compelling a repair or the sending of a notice of the defect), and despite plaintiffs' contention that the recall was "utterly ineffective" because dealers were not able to apply the recall repair immediately.[44]

The court rejected plaintiffs' claims that suits for money damages were not subject to prudential mootness dismissals following a recall repair. The court held that while some prudential mootness precedents – such as *Winzler* – only involved a request for injunctive relief, that did not necessarily preclude the operation of the doctrine where money damages were asserted.[45] Other cases that ***did*** involve claims for money damages still dismissed claims based on prudential mootness, particularly where the alleged cause of the supposed "benefit of the bargain" damages was the defect that was repaired for free via the recall.[46] The court also rejected the argument that the recall was "ineffective" because the remedy was not immediately available, specifically noting the Sixth Circuit in *Hadley* and the Tenth Circuit in *Winzler* "found the cases prudentially moot despite the fact that the recalls of the defective vehicles at issue were ongoing and had not yet proven successful."[47] As the court noted, the relevant consideration for prudential mootness purposes was that NHTSA had already been notified of the recall, and NHTSA's own statutory obligation to assure that an adequate remedy was provided to the owners free of charge was sufficient to satisfy the requirements of prudential mootness.[48] A "hypothetical possibility" that the recall would not adequately repair the vehicles is not sufficient.[49] Accordingly, the court dismissed the case under the prudential mootness doctrine.

While reliance on the NHTSA-coordinated recall process played a significant role in the dismissal in *Sharp*, not every prudential mootness case has required such affirmative regulatory involvement. In *Flores v. FCA US LLC*[50], plaintiffs alleged that certain 2015-2017 Jeep Renegades contained a defective radiator cooling fan that posed a risk of overheating or engine fire.[51] Notably, the three named plaintiffs all claimed to have experienced issues with their cooling fans at various mileage.[52] They alleged that FCA knew or should have known about the cooling fan condition, based on warranty claims data or consumer complaints to NHTSA's defect reporting database. Plaintiffs sought certification of a nationwide class action, along with restitution, damages, and "appropriate injunctive, declaratory, and equitable relief."[53] Before the case was filed, FCA had been investigating the potential for a defect in the cooling fans, and it issued a Customer Satisfaction Notification to all 2015-2017 Jeep Renegade owners offering a free "engine cooling fan replacement or reimbursement if that repair was already performed."[54] This was the same repair that plaintiffs sought in the lawsuit.

FCA sought dismissal of the lawsuit under the prudential mootness doctrine, arguing that the existence of the Customer Satisfaction Notification provided the relief sought by plaintiffs. Plaintiffs opposed the dismissal, arguing that the case was not moot, because they still sought "monetary damages due to the Defendant's failure to correct the defective product,"[55] and that the Customer Satisfaction Notification – which is not a NHTSA-coordinated recall – still presented a "cognizable danger that Defendant may not provide the relief."[56]

The district court rejected plaintiffs' arguments, noting that under Sixth Circuit precedent plaintiffs suffered no compensable injury from a mere "delay" in receiving a repair of the defect.[57] The court adopted the Sixth Circuit's reasoning in *Hadley* that "because defendant acknowledged the defect prior to lawsuit, promised to repair the defect for free as quickly as possible, and did in fact repair the plaintiffs' vehicle, there was no

evidence that plaintiffs had suffered an actual injury."[58] Without a compensable injury because of the free repair, the court applied the prudential mootness doctrine and dismissed the case – notwithstanding the fact that the manufacturer was not performing the repair pursuant to a federally-supervised recall.[59] In so holding, the court specifically rejected the notion that "a vague assertion that a repair campaign may not work" would be sufficient to avoid dismissal.[60]

In addition to the body of prudential mootness cases involving recalls coordinated by NHTSA, the doctrine should also apply to other federal agencies with the statutory or regulatory obligation to supervise product recalls. For instance, the CPSC, like NHTSA, is charged with receiving notification of potential product defects and supervising recalls or other corrective action plans.[61] Thus, recalls issued in coordination with the CPSC should be as entitled to prudential mootness deference as recalls issued by NHTSA. This argument was raised in *Charlton v. LG Energy Solution Michigan, Inc.*,[62] where plaintiffs filed consumer fraud claims against the defendant relating to alleged defects in residential energy storage unit batteries. Plaintiffs claimed that the batteries at issue were defective, and that the manufacturer fraudulently concealed those defects at the time of purchase. Prior to the filing the of the lawsuit, the defendant had already engaged with the CPSC regarding a potential overheating issue for its batteries and had agreed to a Fast Track recall whereby it offered to replace the existing batteries with new units and extend a 10-year warranty for the replacement units.[63] Thus, those replacement batteries and warranties would have longer useful lives and longer warranty coverage than any existing batteries already installed by plaintiffs. Pursuant to CPSC regulations, the recall was widely announced both by the defendant and by the CPSC.[64] The defendants argued that their voluntary steps through the CPSC-supervised recall provided plaintiffs with all the relief that they sought in their lawsuit, and accordingly plaintiffs lacked Article III standing and/or their claims were barred by the prudential mootness doctrine.[65]

Plaintiffs argued that the recall itself was inadequate and did not address their concerns because it did not offer a refund option; defendant had not made reasonable efforts to identify all potential California consumers; and that defendant was not compensating plaintiffs for lost energy-arbitrage opportunities.[66] The court rejected the notion that the recall campaign was inadequate, finding that "Defendant has notified consumers that they will receive replacement products through CPSC's Fast Track Recall program and CPSC is monitoring the progress of the recall program. Thus, the Court finds that Plaintiff has not adequately pled how Defendant's recall program is insufficient, and plaintiff cannot elect his preferred remedy."[67] Accordingly, the court dismissed plaintiffs' claims as moot. While the defendant moved to dismiss pursuant to both lack of Article III standing and prudential mootness owing to CPSC's supervision of the recall process, the court's ruling primary spoke in terms of Article III standing – while simultaneously emphasizing CPSC's role in monitoring the recall. Thus, while technically the motion appears to have been granted on Article III no-injury grounds, its animating rationale remains consistent with the prudential mootness grounds also identified by the defendant in its motion to dismiss.

In conclusion, while prudential mootness remains a discretionary remedy (and thus dependent on the perception or predisposition of a given judge), recent opinions applying the doctrine to consumer fraud and diminished value claims where voluntary recalls have already resolved the alleged defect further establish the doctrine as a powerful tool in defending post-recall civil litigation.

## Endnotes

[1] *Winzler v. Toyota Motor Sales USA, Inc.*, 681 F.3d 1208, 1209 (10th Cir. 2012) (Gorsuch, J.).

[2] *United States v. (Under Seal)*, 757 F.2d 600, 603 (4th Cir. 1985).

[3] *Penthouse International, Ltd. v. Meese*, 939 F.2d 1011, 1019 (D.C. Cir. 1991).

[4] *See F.D.I.C. v. Kooyomjian*, 220 F.3d 10, 14-15 (1st Cir. 2000); *Sierra Club v. U.S. Army Corps of Engineers*, 277 Fed. Appx. 170, 172-73 (3d Cir. May 14, 2008) (Unpub. Disp.) ("The central question in a prudential mootness analysis is 'whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief,'" *quoting International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers v. Kelly*, 815 F.2d 912 , 915 (3d Cir. 1987)); *(Under Seal)*, 757 F.2d at 603 (A court may treat a case "as moot for prudential reasons," including the court's "inability to given an effective remedy under the circumstances now developed and with the imprudence of deciding on the merits a difficult and sensitive constitutional issue whose essence has been at least substantially altered by supervening events; which is not likely to recur in its original form in respect of these appellees; and which in its altered form is now subject to determination in a more appropriate forum and litigation setting"); *281-300 Joint Venture v. Onion*, 938 F.2d 35, 38 (5th Cir. 1991) (dismissing "on prudential grounds" where "there will never be any assets with which to satisfy a judgment"), *cert. denied*, 502 U.S. 1057 (1992); *Hadley v. Chrysler Grp., LLC*, 624 F. App'x 374, 379-80 (6th Cir. 2015) (affirming dismissal of a class action complaint on mootness grounds because the defendant had initiated a vehicle recall program and the plaintiffs' allegations that the program would be ineffective were hypothetical); *Chamber of Commerce of U.S. of America v. U.S. Dep't of Energy*, 627 F.2d 289, 291 (D.C. Cir. 1980); *Lopez v. Griswold*, No. 22-1082, 2023 WL 1960802 (10th Cir. Feb. 13, 2023) ("Under the doctrine of prudential mootness, [the court] can treat an appeal as moot when the potential injuries are remote enough for the district court to withhold equitable relief"); *Nasoordeen v. F.D.I.C.*, 2010 WL 113588, at *6 (C.D. Cal. Mar. 17, 2010) (collecting cases applying prudential mootness doctrine within the Ninth Circuit).

[5] 681 F.3d at 1209.

[6] *Id.*

[7] *Id.* at 1211.

[8] *Id.* at 1210.

[9] *Id.*

[10] *Id.* at 1211 ("We also take [government-supervised remedies] seriously because affording a judicial remedy on top of one already promised by a coordinate branch risks needless inter-branch disputes over the execution of the remedial process and the duplicative expenditure of finite public resources.")

[11] *See, e.g.*, *Clark v. Actavis Group hf*, 567 F.Supp.2d 711, 717 (D.N.J. 2008) (noting in primary jurisdiction context that "Congress vested the FDA with the authority to monitor and supervise product recalls. These regulations set forth specific recall procedures whereby FDA assumes control over monitoring recalls and assesses the adequacy of a firm's efforts in undertaking the recall").

[12] No. 22-11927, 2023 WL 2603937 (E.D. Mich. Mar. 22, 2023)

[13] *Id.* at *1.

[14] *Id.* at *2.

[15] *Id.* at *1.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at *3 (internal quotation marks omitted).

[20] *Id.*

[21] *Id.* at *4.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* at *5.

[26] *Id.* (citing *Hadley*, 625 F. App'x at 378).

[27] *Solak v. Ford Motor Co.*, --- F.Supp.3d ----, 2023 WL 4628456 (E.D. Mich. Jul. 19, 2023)

[28] *Id.* at *1.

[29] *Id.*

[30] *Id.* at *4.

[31] *Id.* at *4.

[32] *In re Chevrolet Bolt EV Battery Litig.*, --- F.Supp.3d ----, 2022 WL 4686974 (E.D. Mich. Sep. 30, 2022).

[33] *Id.* at *5.

[34] *Id.*

[35] *Id.* (quoting *Winzler* at 1211-12).

[36] *Id.* (internal quotation marks and citations omitted).

[37] *Sharp v. FCA*, No. 21-12497, 2022 WL 14721245 (E.D. Mich. Oct. 25, 2022).

[38] *Id.* at *2.

[39] *Id.*

[40] *Id.* at *3.

[41] *Id.*

[42] *Id.*

[43] *Id.* at *7 (quoting *Winzler*, 681 F.3d at 1211).

[44] *Id.*

[45] *Id.* at *8.

[46] *Id.* (citing *Hadley* and *Flores v. FCA US LLC*, No. 19-10417, 2020 WL 7024850 (E.D. Mich. Nov. 30, 2020) (discussed *infra*)).

[47] *Id.* at *9.

[48] *Id.* ("So it is that, to find this case moot, we need (and do) only take notice of the existence of filings with NHTSA purporting to identify a defect and announce recall") (quoting *Winzler*, 681 F.3d at 1212).

[49] *Id.* at *9-10.

[50] *Flores v. FCA US LLC*, No. 19-10417, 2020 WL 7024850 (E.D. Mich. Nov. 30, 2020).

[51] *Id.* at *1.

[52] *Id.* at *2.

[53] *Id.*

[54] *Id.*

[55] *Id.* at *4.

[56] *Id.*

[57] *Id.* at *4-5 (citing *Hadley*, 624 F. App'x at 378).

[58] *Id.* at *4 (internal quotation marks omitted).

[59] *Id.* at *5.

[60] *Id.* at *6.

[61] *See, e.g.,* 15 U.S.C. § 2064(c), (d)(3) (authorizing CPSC to order manufacturers to notify consumers of substantial product hazards or to repair or replace product or issue refunds, and to supervise effectiveness of approved corrective action plans); 16 C.F.R. § 1000.1 (noting the purpose of CPSC is to prevent, and investigate causes of, product-related consumer injuries).

[62] *Charlton v. LG Energy Solution Michigan, Inc.*, No. 3:21-cv-02142, 2023 WL 1420726 (S.D. Cal. Jan. 31, 2023).

[63] *Id.* at *1.

[64] *Id.*

[65] *Id.* at *2.

[66] *Id.* at *4.

[67] *Id.* at *5 (citing *Sugasawara v. Ford Motor Co.*, No. 18-cv-06159, 2019 WL 3945105, at *5 (C.D. Cal. Aug. 21, 2019), and *In re MacBook Keyboard Litig.*, No. 5:18-cv-02813, 2019 WL 1765817, at *8 (N.D. Cal. Apr. 22, 2019)).