Searching for Standing: Benefit-of-the-Bargain Theory of Injury

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Federal circuit courts are split on whether consumers who purchase defective products suffer an Article III injury in fact at the point of sale, even when the defect never manifests in their particular product. Courts recognizing the benefit-of-the-bargain theory treat overpayment as a concrete economic harm sufficient to confer standing: Consumers paid more than a product was worth because of a latent defect, and that shortfall in value is the injury. Courts requiring defect manifestation reject this theory as speculative, insisting that a product must malfunction or cause physical harm before any cognizable injury exists. The divide carries high stakes at the intersection of Article III standing and Federal Rule of Civil Procedure 23, where the availability of the benefit-of-the-bargain theory can determine whether a class is certifiable and, in turn, whether consumers retain any meaningful path to aggregate relief. This Comment argues that courts dismissing the benefit-of-the-bargain theory as a novel plaintiffs' invention are wrong. It advances two independent historical arguments demonstrating that overpayment injury is firmly rooted in legal tradition. First, drawing on the English bill of peace—the equitable predecessor to the modern class action—it shows that equity courts entertained representative suits for shared economic harms without requiring uniform defect manifestation or identical individual losses. Second, it identifies common law analogues in breach of contract and warranty doctrine, in which the buyer's injury has always been complete at the moment of acceptance, when goods worth less than promised are delivered. These historical foundations satisfy the Supreme Court's "history and tradition" framework articulated in Spokeo, Inc. v. Robins *and* TransUnion LLC v. Ramirez*, and they demonstrate that manifest defect requirements impose a second injury threshold that Article III does not demand.*

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INTRODUCTION

In 2007, parents learned that the popular children's toy Aqua Dots contained a chemical that metabolized into gamma-hydroxybutyric acid, also used as a date-rape drug, when ingested.[1] Some children who swallowed the beads became sick and at least two fell into comas.[2] The product was immediately recalled. Although the beads were defective, many children who played with the toy did not fall ill or otherwise suffer any physical harm.[3] Still, their parents felt cheated. Had they known the truth about Aqua Dots, they would not have purchased the product, much less paid full price for it. And potentially deadly beads would fare poorly on the resale market. Seeking recourse, consumers filed a class action against the Aqua Dots manufacturer.[4]

Their argument was simple: The consumers paid for something they never received—a safe children's toy. The Seventh Circuit agreed and found that the plaintiffs suffered an injury in fact sufficient to confer standing. Judge Frank Easterbrook explained, "The plaintiffs' loss is financial: they paid more for the toys than they would have, had they known of the risks the beads posed to

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1 *See In re* Aqua Dots Prods. Liab. Litig., 654 F.3d 748, 749–51 (7th Cir. 2011); *see also Date Rape Drugs*, HEALTHLINKBC (Mar. 22, 2023), https://perma.cc/WJ92-3AU8.

2 *See Aqua Dots*, 654 F.3d at 750.

3 *See id.*

4 *See id.*

children. A financial injury creates standing."[5] Here, the court recognized a tangible injury when consumers paid more than a product was worth given a hidden defect. In other words, the plaintiffs were denied the benefit of the bargain.

By "benefit of the bargain" (sometimes called the "overpayment" theory), this Comment refers to a concrete economic injury that occurs at the moment of purchase, when the buyer pays a price that exceeds the product's actual value because of a latent defect or misrepresentation. The harm is the shortfall in value at the point of sale, not a subsequent malfunction or physical injury.[6] That pocketbook injury is thus a concrete economic injury sufficient to confer standing.[7]

However, not all courts agree with Judge Easterbrook that overpayment confers standing. Plaintiffs in class actions concerning infant formula and automobiles, for example, have been denied standing on this same theory.[8] Presently, most circuit courts agree with Judge Easterbrook and permit standing based on the benefit-of-the-bargain theory of harm.[9] Those courts treat

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[5] *Id.* at 751.

[6] Some courts use the terms "benefit of the bargain" and "overpayment" as synonymous. *See* Podroykin v. Am. Armed Forces Mut. Aid Ass'n, 634 F. Supp. 3d 265, 272 (E.D. Va. 2022) ("[P]laintiff alleges an overpayment or benefit-of-the-bargain injury."); *In re* Marriott Int'l, Inc., Customer Data Sec. Breach Litig., 440 F. Supp. 3d 447, 463–67 (D. Md. 2020). Other courts do not. Those that distinguish the terms do so for different reasons. Some courts use "overpayment" to describe the injury and "benefit of the bargain" to describe damages flowing from the overpayment injury. *See, e.g.*, Zapadinsky v. Blue Diamond Growers, 2023 WL 5116507, at *5 (E.D. Wis. Aug. 7, 2023) ("Plaintiff has no overpayment injury or benefit-of-the-bargain damages."). Others understand "benefit of the bargain" to mean an economic injury flowing from the failure to receive a benefit bargained for and "overpayment" to mean overpaying or purchasing a product a plaintiff would otherwise not have purchased due to a misrepresentation or nondisclosure. *See* Solis v. Coty, Inc., 2023 WL 2394640, at *6, 8 (S.D. Cal. Mar. 7, 2023) (explaining that "[a] plaintiff adequately alleges a concrete economic injury when she adequately pleads 'she bargained for a product worth a given value but received a product worth less than the value'" and "a plaintiff can demonstrate a concrete economic injury by showing he or she was induced into overpaying or purchasing a product he or she otherwise would not have, based upon either a defendant's (1) false representation and/or (2) actionable non-disclosure" (quoting McGee v. S-L Snacks Nat'l, 982 F.3d 700, 705–06 (9th Cir. 2020))). How a court evaluates the injury will invariably depend on the pleadings. To avoid confusion, this Comment takes a broad view of the theory as described in the text above and treats the terms as synonymous.

[7] *See* Cottrell v. Alcon Lab'ys, 874 F.3d 154, 163 (3d Cir. 2017) ("[F]inancial harm is a 'classic' and 'paradigmatic form[ ]' of injury in fact." (second alteration in original) (quoting Danvers Motor Co. v. Ford Motor Co., 432 F.3d 286, 293 (3d Cir. 2005))); Garza v. Woods, 150 F.4th 1118, 1124 (9th Cir. 2025) ("'[A] classic pocketbook injury' is both concrete and tangible." (quoting Tyler v. Hennepin Cnty., 143 S. Ct. 1369, 1374 (2023))).

[8] *See infra* Part I.B.

[9] *See infra* Part I.B.2.

overpayment as a concrete financial injury. Other circuits view it as a speculative "no-injury" theory, insisting that a defect must manifest—poisoning from a children's toy, for example—before standing exists. As a result, consumers who themselves suffer no physical injury or never experience a malfunction have not been injured and thus lack standing to sue, even if that product is worth less as a result of a defect manifesting in the product class.

Whether a court permits plaintiffs to proceed on a benefit-of-the-bargain theory of injury has high stakes, particularly at the class certification stage, when Federal Rule of Civil Procedure 23 and Article III converge. Recognizing overpayment injury would align standing with predominance because all putative class members would have experienced the same economic injury.[10] Rejecting it would deny standing and require plaintiffs to produce individual evidence of defect manifestation to get into court,[11] stifling aggregate resolution and leaving some purchasers who suffered economic but not physical harm without recourse. This matters because Article III stands as a critical gatekeeper to class certification.[12] On the one hand, corporate spending on class action defense has reached record highs.[13] And once a class is certified, the settlement rate nears 90%.[14] As Judge John Nalbandian explained, "For many damages class actions, certification is the whole ballgame"[15] because a district court's decision to certify a class "places pressure on the defendant to settle even unmeritorious claims."[16] On the other hand, manifest defect requirements threaten to shift the court's focus from the merits and the

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[10] In damages class actions, the predominance requirement of Federal Rule of Civil Procedure 23(b)(3) requires common questions of law or fact to predominate over any questions affecting only individual members.

[11] *See infra* Part I.B.1.

[12] *See, e.g.*, Robertson v. Monsanto Co., 287 F. App'x 354, 359 (5th Cir. 2008) ("[T]he question of Article III standing is a threshold one that we must resolve before addressing the issue of class certification.").

[13] CARLTON FIELDS, 2024 CARLTON FIELDS CLASS ACTION SURVEY 6–8 (2024) (explaining that class action defense costs reached $3.9 billion in 2023 and that nearly 62% of companies, a record number, faced class actions in 2023).

[14] BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, MANAGING CLASS ACTION LITIGATION 6 (2005). Class action settlements also command hefty judgments. For example, the Volkswagen emissions class action settled for between $1.2 billion and $4 billion. *See In re* Volkswagen "Clean Diesel" Mktg., Sales Pracs. & Prods. Liab. Litig., 2017 WL 2212783, at *24 (N.D. Cal. May 17, 2017).

[15] Speerly v. Gen. Motors, LLC, 143 F.4th 306, 351 (6th Cir. 2025) (Nalbandian, J., concurring).

[16] *Id.* at 352 (quoting Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting)).

vindication of consumer rights toward procedural games. In other words, the court asks plaintiffs to allege two separate injuries to gain standing (deprivation of one's bargain and a physical injury) when Article III requires only one injury.

The benefit-of-the-bargain conflict is evolving against a rapidly shifting constitutional backdrop in class action standing. In *Spokeo, Inc. v. Robins*[17] and *TransUnion LLC v. Ramirez*,[18] the Supreme Court emphasized that courts must tether standing in class actions to harms "traditionally [ ] regarded as providing a basis for a lawsuit in English or American courts."[19] And in the 2024 Term, the Court in *Laboratory Corp. of America Holdings v. Davis*[20] declined to resolve whether Rule 23 allows certification of a class that includes members lacking injury.[21] Lower courts, wrestling with *Spokeo*, *TransUnion*, and the shadow of *Davis*, have often blurred the line between standing doctrine and Rule 23 predominance, wavering between requiring all class members to show concrete injury and permitting standing based on allegations of economic overpayment alone.[22] The uncertainty has produced increased interest in injury theories like benefit of the bargain, which, if available, could both provide standing and meet class-wide injury requirements.[23]

This Comment argues that courts are missing something fundamental: The benefit-of-the-bargain theory is not a novel plaintiffs' invention but is instead based on understandings of economic injury historically grounded in both equity and common law. To that end, this Comment advances two independent historical arguments. First, it places the overpayment theory in historical context by asking whether a benefit-of-the-bargain suit would be entertained under a bill of peace. Today, courts increasingly turn to the bill of peace—the English equitable predecessor of the class action—to inform modern practice and the contours and limits of class action doctrine.[24] Equity's tradition informs both

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17 578 U.S. 330 (2016).

18 141 S. Ct. 2190 (2021).

19 *Spokeo*, 578 U.S. at 341.

20 145 S. Ct. 1608 (2025).

21 *See id.* at 1609 (Kavanaugh, J., dissenting) (disagreeing with dismissal of certiorari as improvidently granted).

22 *See infra* Part I.B.

23 *See, e.g.*, Petition for Writ of Certiorari at 15, Nissan N. Am., Inc. v. Johnson, 146 S. Ct. 118 (2025) (No. 24-1289) ("The Court Should Grant Review To Decide Whether This Class Was Properly Certified Based On An 'Overpayment' Theory Of Harm.").

24 *See infra* notes 161–68 and accompanying text.

standing and class construction.[25] Second, it follows the Supreme Court's history-and-tradition framework from its class action standing cases and identifies common law analogues for overpayment standing. Together, these inquiries provide historical support for a theory that may at first glance be thought of as simple economic injury or a modern invention derivative of products liability.

First, this Comment looks to equity's tradition to argue that English and early American courts recognized loss of expected economic value in bills of peace—without physical harm or manifest defect—as a complete legal injury. English bills of peace, the predecessors of the class action, were granted for plaintiffs sharing common economic harms even when individual dollar amounts or defenses differed, as long as a common interest existed.[26] Equity courts' practice informs both standing and procedure, and judicial interest in bills of peace makes studying the practice instructive for modern class action law.[27]

Second, this Comment takes *Spokeo* and *TransUnion* to task and theorizes the doctrine by arguing that overpayment injury is rooted in common law breach of contract and warranty. The injury may be properly understood as breach, not just mere financial injury, and breach has always conferred standing.[28] Modern courts therefore err when they frame overpayment as too speculative or abstract absent manifest defect. Properly understood, benefit of the bargain aligns with historically recognized injuries and should satisfy Article III standing in most class action contexts.

Why should we turn to history to analyze a modern standing theory?[29] There are two reasons. First, although equity's tradition is conventionally thought to shape the contours of equitable relief in federal courts,[30] judges and scholarship "overlook[ ] the implications of equity's unique history for the more foundational issue of injury in fact."[31] This Comment builds on scholarship and

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25 *See infra* Part II.A.

26 *See infra* Part II.A.

27 *See infra* notes 147–52 and accompanying text.

28 *See infra* Part II.B.

29 This Comment does not wade into, but acknowledges here, the scholarly debate over history's connection to standing. For a summary of the debate, see Ernest A. Young, *Standing, Equity, and Injury in Fact*, 97 NOTRE DAME L. REV. 1885, 1888–96 (2022).

30 For a recent example, see Trump v. CASA, Inc., 145 S. Ct. 2540, 2551 (2025) (limiting the scope of injunctions to equitable remedies historically available). *See also* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 473 (2017) ("[T]he Judiciary Act of 1789 [ ] has been interpreted as requiring the federal courts to trace their equitable doctrines to traditional equity.").

31 Young, *supra* note 29, at 1896–97.

indulges the curiosities of judges interested in the lessons we can learn from equity in the class action context.[32] Because "the English bill of peace [ ] developed into what is now known as the class action,"[33] it should follow that the "distinctive traditions and practices of equity['s]"[34] bill of peace inform how courts today understand class action theory and practice. And presently they do, at least in the remedial context.[35] This Comment goes further: Equity's tradition informs standing. Second, in the standing context, the Supreme Court's history-and-tradition test guides us to consider whether seemingly novel standing theories have common law analogues suggesting that those theories should confer standing.[36] Together, finding historical roots in equity and the common law may provide support to plaintiffs pleading novel class action standing theories.

This Comment proceeds in three parts. First, it surveys the class action doctrinal landscape and the benefit-of-the-bargain circuit split. Second, it situates the benefit-of-the-bargain theory of injury within the Supreme Court's history-and-tradition standing framework, demonstrating that English and early American equity courts were flexible enough to allow common claims when individual losses or circumstances differed, as long as a common question predominated. Third, it analogizes benefit of the bargain to common law contract and warranty law.

By uncovering the historical and doctrinal foundations of benefit of the bargain, this Comment both clarifies the proper class action standing analysis and provides courts with a principled framework for evaluating economic injury in modern class actions. This Comment also contributes to the literature on lessons from equity in the standing and procedure contexts. Insights into this question are timely and important, as the legitimacy of judicial class action adjudication and billions of dollars in consumer protection recoveries turn on whether Article III standing doctrine can recognize the reality that when consumers pay full price for defective goods, they have already been harmed.

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[32] *See infra* note 164.

[33] *CASA*, 145 S. Ct. at 2555 (quoting 7A WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 1751 (4th ed. 2021)).

[34] Young, *supra* note 29, at 1908.

[35] *See, e.g.*, *CASA*, 145 S. Ct. at 2554–55; *Speerly*, 143 F.4th at 337–38, 349–52.

[36] *TransUnion*, 141 S. Ct. at 2204.

I. CURRENT STATE OF THE LAW

This Part maps the contemporary landscape of Article III standing for class actions invoking the benefit-of-the-bargain standing theory. It begins by reviewing the state of the class action landscape, focusing on the intersection between Rule 23 and Article III's injury-in-fact framework and relating these doctrines to the benefit-of-the-bargain theory. Next, it canvasses the circuit split, contrasting "manifest defect" approaches with courts that recognize a benefit-of-the-bargain theory, while noting recent doctrinal shifts in the Seventh Circuit.

A. Class Action Controversies

Two open questions in class action doctrine complicate application of the benefit-of-the-bargain theory of injury: Article III's injury-in-fact requirement for standing and the intersection between that requirement and Rule 23 certification requirements. Properly pled, an overpayment injury theory should satisfy both the standing and certification requirements. This Section reviews those open questions in turn and describes how the benefit of the bargain might resolve them in the products liability class action context.

1. Standing in class actions.

Anytime a plaintiff wishes to sue in federal court, she must be able to answer the question, "What's it to you?".[37] The Constitution's Case or Controversy Clause has been interpreted to set out three requirements for standing: injury, causation, and redressability.[38] The injury requirement is the prong that the benefit-of-the-bargain theory purports to meet. In recent years, the Supreme Court has emphasized that an injury must be concrete and particularized, not merely speculative or abstract.[39] The Court has also indicated that standing must be grounded in a traditional basis.[40] In *Spokeo* and *TransUnion*, the Court held that federal courts may not "loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard" and must instead look to

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[37] Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983) (quotation marks omitted).

[38] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

[39] *See, e.g.*, *Spokeo*, 578 U.S. at 340.

[40] *TransUnion*, 141 S. Ct. at 2204.

harms "traditionally recognized as providing a basis" for suit.[41] Common law analogues and equity's tradition can inform that inquiry.[42]

In the products liability class action context, plaintiffs increasingly rely on what several courts consider to be an economic or financial injury theory to satisfy the injury-in-fact requirement: the benefit-of-the-bargain theory of injury. According to this theory, consumers who purchase a defective product suffer an economic injury the moment they pay a price exceeding the product's true value. For example, in the case of a car with a faulty ignition switch, cars manifesting the defect and cars of the same make and model that might at some point in the future exhibit that defect may decline in value by a certain amount.[43] In an extreme case, a wholly defective dietary supplement might drop in value to zero.[44] In both types of cases, the harm arises from overpayment—a financial loss complete at the point of sale—regardless of whether the product ever malfunctions.[45]

Courts accepting this theory emphasize that monetary harm is the paradigmatic concrete injury: If a product contains a hidden or unknown defect at the time of purchase, consumers did not receive the value they bargained for, or the benefit of the bargain.[46] On this view, a defectively designed child's car seat, infant

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[41] *Id.* (citing *Spokeo*, 578 U.S. at 340–41).

[42] *See infra* Part II.

[43] *See, e.g.*, *In re* Gen. Motors LLC Ignition Switch Litig., 339 F. Supp. 3d 262, 276 (S.D.N.Y. 2018).

[44] *See, e.g.*, Debernardis v. IQ Formulations, LLC, 942 F.3d 1076, 1086–88 (11th Cir. 2019).

[45] For more on how damages might be calculated, see generally Lisa Cameron, Daniel McFadden & Pablo Robles, *Price Premium Damages in Product Market Litigation: Issues in Survey-Based Market Simulations*, *in* INTERNATIONAL COMPARATIVE LEGAL GUIDES: PRODUCT LIABILITY, at 23 (Adela Williams & Tom Fox eds., 2022). The authors explain that benefit-of-the-bargain damages are often measured under a "market price premium" standard as the difference between the actual-world market price paid for the product with the misrepresentation and the "but-for" market price that would have prevailed had the defect or misrepresentation been disclosed at the time of purchase. *Id.* at 23. When observed market data are available, experts can assess such damages using statistical techniques such as difference-in-difference, hedonic regression, or synthetic control analyses, but when such data are unavailable, experts may rely on choice-based conjoint survey data to estimate consumer demand, which must then be incorporated into an economically sound market simulation model that accounts for the interaction of both willing buyers and willing sellers. *Id.* The authors note that several courts have rejected damages models predicated on demand-side conjoint analysis alone or on the unsupported assumption that supply is "fixed as a matter of history," as such models fail to reflect market equilibrium pricing and tend to overstate the price premium. *Id.* at 23 n.15, 27.

[46] *See infra* Part I.B.2.

formula subject to contamination risk, or a vehicle with a latent safety flaw is worth less than a properly functioning product—even if the defect never causes physical harm. Upon learning of the defect, the consumer might be less likely, or even entirely unwilling or unable, to use the product, and any potential resale value similarly suffers. The injury is economic and immediately present, as opposed to impermissibly speculative.

Courts rejecting the benefit-of-the-bargain theory, however, characterize it as a no-injury theory of harm. These courts insist that a defect must manifest in individual class members' products before consumers experience loss, reasoning that a product that performs as expected causes no injury.[47] In the view of these circuits, overpayment alone—without failure, malfunction, or safety incident—is too speculative to constitute concrete injury. Thus, the central doctrinal divide is whether Article III allows plaintiffs to allege diminution in product value as concrete injury or whether a manifest defect is constitutionally required.

2. Rule 23 and Article III standing.

Courts vary in their understanding of the point in the litigation at which standing must be shown (that is, before or after class certification) and by whom (that is, by only a single plaintiff or all plaintiffs, including absent class members). What is uncontested is that at some stage of the proceedings, plaintiffs must satisfy both Article III standing requirements and Rule 23 class certification requirements for their suit to proceed. What courts disagree about is the sequence and rigor of these showings, and critically, whether every absent class member must independently demonstrate standing or whether the named plaintiff's injury suffices.[48] This step is especially consequential because defendants face significant settlement pressure following certification to avoid trial and potentially daunting jury verdicts.[49] To determine whether a class may be certified, a court must follow the procedure outlined in Federal Rule of Civil Procedure 23. Any class must meet four requirements: numerosity, commonality,

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[47] *See infra* Part I.B.1.

[48] In evaluating a motion for class certification, the court establishes standing before analyzing whether Rule 23's requirements are met. Without standing, the case ends. *See, e.g.*, Shutler v. Citizens Disability LLC, 347 F.R.D. 663, 671–73 (S.D. Fla. 2024).

[49] *See supra* notes 12–16 and accompanying text.

typicality, and adequacy of representation.[50] However, the relationship between Rule 23 certification and Article III standing is complex and contested.

At certification, federal courts deploy competing frameworks for the standing inquiry.[51] The standing approach requires proof that all—or nearly all—absent members[52] have an Article III injury, reasoning that including uninjured members defeats predominance under Rule 23(b)(3) because common issues would not control the outcome for the class as a whole.[53] Justice Brett Kavanaugh made this point in dissent in *Davis*, explaining that "Rule 23 requires that common questions predominate in damages class actions. And when a damages class includes both injured and uninjured members, common questions do not predominate."[54] The class certification approach "evaluates only a named plaintiff's individual standing. The court's determination that the named plaintiff demonstrated individual standing concludes the inquiry."[55] Several circuits have adopted hybrid approaches that ask for a class-wide mechanism without demanding proof of each member's injury up front.[56] The Supreme Court's dismissal in *Davis* left

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50 FED. R. CIV. P. 23(a)(1)–(4). Most relevant to this Comment is Rule 23(a)(2), which requires questions of law or fact to be common to the class. *Id.* 23(a)(2). Relevant to damages class actions like those involving products liability, Rule 23(b)(3) requires common questions of law or fact to "predominate over any questions affecting only individual members."

51 *See* Melendres v. Arpaio, 784 F.3d 1254, 1261–62 (9th Cir. 2015) (comparing the "standing approach" to the "class certification approach"); 1 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 2:6 (6th ed. 2025).

52 There is also a circuit split over whether and to what extent a class may be certified that includes uninjured class members at the time of certification. *See, e.g.*, *In re* Rail Freight Fuel Surcharge Antitrust Litig., 934 F.3d 619, 624–25 (D.C. Cir. 2019) (noting that "5% to 6% constitutes the outer limits of a *de minimis* number" of uninjured class members (quotation marks omitted) (quoting *In re* Rail Freight Fuel Surcharge Antitrust Litig., 292 F. Supp. 3d 14, 137 (D.D.C. 2017))); *In re* Asacol Antitrust Litig., 907 F.3d 42, 47 (1st Cir. 2018) (putting the de minimis amount at "around 10%" (quotation marks omitted) (quoting *In re* Asacol Antitrust Litig., 323 F.R.D. 451, 482 (D. Mass. 2017))); Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672, 677 (7th Cir. 2009) ("[A] class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant."); Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 825 (7th Cir. 2012) ("There is no precise measure for 'a great many.'"). For more on this circuit split, see Morgan Lloyd, Comment, *Swimming Against the Current: The Ninth Circuit's Incorrect Jettisoning of the De Minimis Rule in Class Action Certification*, 64 B.C. L. REV. E. SUPP. 68, 77–79 (2023).

53 *See, e.g.*, Denney v. Deutsche Bank AG, 443 F.3d 253, 264 (2d Cir. 2006) ("[N]o class may be certified that contains members lacking Article III standing.").

54 *Davis*, 145 S. Ct. at 1609 (Kavanaugh, J., dissenting).

55 Wilson v. Centene Mgmt. Co., 144 F.4th 780, 788 (5th Cir. 2025).

56 *See id.* at 789 (discussing hybrid tests to the "standing approach" in the Second and Eleventh Circuits).

this tension unresolved, but Justice Kavanaugh's dissent signaled skepticism toward damages classes that contain uninjured members,[57] a signal that may encourage lower courts to conflate Article III standing with predominance and commonality.

Whether overpayment counts as a concrete injury at the point of sale may determine the outcome of these certification fights. If Article III recognizes benefit of the bargain as a completed monetary harm, plaintiffs could propose common proof—such as a price-premium or diminution-in-value model—to demonstrate class-wide injury and impact, aligning the standing inquiry with Rule 23's predominance requirement and avoiding member-by-member manifestation showings. That alignment, in turn, minimizes the risk that modest percentages of uninjured members will defeat certification, a problem that some judges have treated as outcome determinative in predominance analyses when they view injury as individualized.[58] If, by contrast, standing requires defect manifestation, plaintiffs must establish injury through individualized evidence of performance failures, which typically fractures common issues, swamps predominance, and renders damages models uncertifiable for failure to track the theory of liability on a class-wide basis.[59]

The choice also drives class-definition strategies. Recognizing overpayment as injury permits class definitions keyed to uniform misrepresentation or defect periods, possibly allowing proof of injury and damages at scale. Rejecting it might push courts toward narrow, malfunction-based classes, individualized mini-trials on injury, and heightened concerns about uninjured members, likely resulting in certification denial. Post-*Davis*, this pressure intensifies: If damages classes cannot include uninjured members, courts that deny overpayment as injury will more frequently find predominance lacking and decertify or refuse certification, effectively foreclosing aggregate resolution even when the alleged wrong and loss are uniform.

Resolving the benefit-of-the-bargain split therefore carries significant implications. A rule that accepts benefit of the bargain as a paradigmatic monetary injury would harmonize Article III with Rule 23's commonality and predominance inquiries and yield more predictable certification outcomes in consumer cases centered on common misrepresentations or latent defects. A

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57 *See Davis*, 145 S. Ct. at 1609 (Kavanaugh, J., dissenting).

58 *See, e.g.*, *id.*; *Speerly*, 143 F.4th at 340–45 (Thapar, J., concurring).

59 *See infra* Part I.B.1.

contrary rule would functionally collapse many such cases into individualized actions, raising litigation costs, reducing deterrence for market-wide misinformation or defects, and shifting the settlement leverage that certification currently places on defendants and plaintiffs alike.[60]

B. Benefit-of-the-Bargain Circuit Split

Courts have disagreed about whether plaintiffs can establish Article III standing based on a benefit-of-the-bargain theory of injury. Broadly speaking, the Fourth, Sixth, and Eighth Circuits reject overpayment as injury absent manifestation of the defect,[61] while the First, Second, Third, Fifth, Ninth, and Eleventh Circuits accept overpayment as a concrete economic injury at the point of sale.[62] The Seventh Circuit, once firmly in the permissive camp, has recently narrowed its approach.[63] While the majority of circuits currently approve of the theory, shifts in class action doctrine at the Supreme Court and in the circuit courts suggest that these approaches are not immune to change.

1. Manifest defect circuits: Fourth, Sixth, and Eighth Circuits.

The Fourth, Sixth, and Eighth Circuits hold that consumers lack standing unless they can show the defect actually manifested in the product they purchased. Absent manifestation, plaintiffs "received the benefit of [the] bargain"[64] and suffered no Article III injury. Successfully defending against a class action on lack of standing grounds effectively ends the case before certification, thus preventing forced settlements. In this way, stripping class action plaintiffs of the ability to achieve standing through a benefit-of-the-bargain theory of injury can be powerful. For this very reason, "[l]ack of standing [ ] is the defense most frequently raised when there is an assertion of 'no injury.'"[65]

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60 *See* Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 691 (9th Cir. 2022) (Lee, J., dissenting) ("The district court will need to conduct individualized mini-trials to determine whether each class member suffered an injury, and if so, what the damages are for each member. That would upend Rule 23's commonality requirement.").

61 *See infra* Part I.B.1.

62 *See infra* Part I.B.2.

63 *See infra* Part I.B.3.

64 Johannessohn v. Polaris Indus. Inc., 9 F.4th 981, 988 (8th Cir. 2021) (quotation marks omitted) (quoting O'Neil v. Simplicity, Inc., 574 F.3d 501, 504 (8th Cir. 2009)).

65 Edward Sherman, *"No Injury" Plaintiffs and Standing*, 82 GEO. WASH. L. REV. 834, 836 (2014).

The paradigmatic manifest defect case comes from the Eighth Circuit. In *Johannessohn v. Polaris Industries Inc.*,[66] the Eighth Circuit held that plaintiffs alleging economic loss from an all-terrain vehicle (ATV) overheating defect lacked Article III standing because they did not allege that their own ATVs exhibited the defect.[67] In that case, plaintiffs alleged that Polaris Industries failed to disclose heat defects in its ATVs, and therefore, plaintiffs overpaid for the product and did not receive the benefit of the bargain.[68] The court affirmed the district court's dismissal of the action for lack of standing and because individualized questions predominated.[69] The panel reasoned that "plaintiffs claiming economic injury do not have Article III standing in product defect cases unless they show a manifest defect," warning that otherwise uninjured purchasers could "piggyback" on the injuries of others.[70] Moreover, the court rejected the theory that "because some buyers did not receive the benefit of the bargain, all buyers should have paid less for their ATVs."[71] The court concluded that "[i]n this circuit, plaintiffs claiming economic injury do not have Article III standing in product defect cases unless they show a manifest defect."[72]

The manifest defect rule in the Eighth Circuit seems to originate[73] from *Briehl v. General Motors Corp.*[74] In that case, a class of car buyers alleged that a certain antilock braking system (ABS) was defective because it performed in a counterintuitive manner "to how an average driver is conditioned to respond when a hard braking maneuver is attempted."[75] The plaintiffs claimed they suffered damage because these braking systems diminished the vehicles' resale value.[76] However, the court rejected the plaintiffs' claims because they "[had] not alleged that their ABS brakes have

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66 9 F.4th 981 (8th Cir. 2021).

67 *Id.* at 988.

68 *Id.* at 984.

69 *Id.* at 985, 988.

70 *Id.* at 988. ("At its core, Appellants' argument is that purchasers without manifest defects should be able to piggyback on the injury caused to those with manifest defects. That theory is in direct conflict with the manifest defect rule and does not create an Article III injury-in-fact.").

71 *Johannessohn*, 9 F.4th at 988.

72 *Id.*

73 *See id.* at 987–88 (citing Briehl v. Gen. Motors Corp., 172 F.3d 623, 628 (8th Cir. 1999)); *O'Neil*, 574 F.3d at 503–04 (citing *Briehl*, 172 F.3d at 628); Jarman v. United Indus. Corp., 98 F. Supp. 2d 757, 767–69 (S.D. Miss. 2000) (citing *Briehl*, 172 F.3d at 626).

74 172 F.3d 623 (8th Cir. 1999).

75 *Id.* at 626.

76 *Id.*

malfunctioned or failed,"[77] and the "ABS brakes [ ] functioned satisfactorily and at no time [had] the brakes exhibited a defect."[78] In short, because there was no manifest defect, the plaintiffs had not suffered an injury.[79]

Despite its important role in the doctrine, *Briehl* is a strange case to fashion as the primary authority for the manifest defect rule. Crucially, the ABS system was not actually defective, so the value of the cars could not have fallen. The plaintiffs therefore received exactly what they bargained for—a car with a functioning ABS system. At least one later court has pushed back on this critique by arguing that the fact that the brakes were not actually defective was immaterial since the allegation that they were defective was taken as true.[80] But that argument misses the mark. While manifestation of a defect might aid a court in proving the existence of a defect, it does not follow that recovery for financial injury should turn on whether a defect also caused a physical injury.[81] In a sense, the court is asking plaintiffs to allege two separate injuries (deprivation of one's bargain and a physical injury) when Article III requires only one.

The Fourth Circuit has not directly weighed in on the manifest defect debate, but several of its district courts impose a manifest defect requirement in the products liability context.[82] The closest applicable circuit authority, *Alig v. Rocket Mortgage, LLC*,[83] suggests that the Fourth Circuit would adopt a manifest defect requirement. In that case, the court rejected standing where homeowners alleged that appraisal practices inflated home values but lacked evidence that the appraisals "were actually

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77 *Id.* at 628.

78 *Id.*

79 This is a classic no-injury case. *See* Moin A. Yahya, *Can I Sue Without Being Injured?: Why the Benefit of the Bargain Theory for Product Liability Is Bad Law and Bad Economics*, 3 GEO. J.L. & PUB. POL'Y 83, 86–89 (2005).

80 *See O'Neil*, 574 F.3d at 504.

81 Other courts distinguish *Briehl* this way. *See, e.g.*, *In re Gen. Motors*, 339 F. Supp. 3d at 276 (explaining that "while manifestation may be helpful in proving the presence of a defect, it does not follow that recovery for economic loss should turn on whether the defect also caused property or personal damage"); Dakota Style Foods, Inc. v. SunOpta Grains & Foods, Inc., 329 F. Supp. 3d 794, 804 (D.S.D. 2018) (explaining that "[t]he Eighth Circuit [in *Briehl*] may have just as easily written that plaintiffs' ABS brakes functioned satisfactorily in spite of the tendencies of ABS braking, and that no harm occurred as a result of those tendencies causing an accident").

82 *See, e.g.*, Sproles v. Gen. Motors LLC, 2021 WL 4164683, at *4 (W.D. Va. Sept. 13, 2021); Belville v. Ford Motor Co., 13 F. Supp. 3d 528, 535 (S.D. W. Va. 2014); Bussian v. DaimlerChrysler Corp., 411 F. Supp. 2d 614, 630 (M.D.N.C. 2006).

83 126 F.4th 965 (4th Cir. 2025).

inflated"[84] or that the alleged inflation caused "concrete harm."[85] The court refused to recognize standing where the plaintiffs could prove only "a risk of future harm."[86] Although the benefit-of-the-bargain theory was not pleaded by name, the nature of the alleged injury followed the same principle. Without concrete proof that the defect affected the plaintiffs' actual transactions, the court held the injury too speculative.[87] In the benefit-of-the-bargain context, the Fourth Circuit might then say without proof of defect manifestation, an overpayment theory of injury is too speculative because possible physical harm lives in the future. This case stands for the principle that a mere risk of future harm might not be sufficient to confer standing.[88]

The Sixth Circuit's most recent articulation of this view came in *Speerly v. General Motors LLC*,[89] a case highlighting sharp divisions on the overpayment theory. In that case, buyers of certain General Motors vehicles alleged that a defective transmission led some cars to occasionally shudder or lurch.[90] While the majority put aside the standing issue and resolved the case against the plaintiffs on Rule 23 certification grounds,[91] concurring judges expressed sharp skepticism toward overpayment injury. Judge Nalbandian argued that allowing benefit-of-the-bargain standing without manifestation "open[s] the door to no-injury classes" and "trivialize[s] Article III's requirements."[92] He further reasoned that "[u]nder the plaintiffs' benefit-of-the-bargain theory, a person who experienced no issues with their car is 'injured' to the same degree and dollar amount as a person whose vehicle

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84 *Id.* at 974.

85 *Id.*

86 *Id.* at 973 (quotation marks omitted) (quoting *TransUnion*, 141 S. Ct. at 2210).

87 *Id.* at 976.

88 At least one judge has rejected the application of *Alig* to overpayment claims. *See Speerly*, 143 F.4th at 358 (Moore, J., dissenting) (emphasis in original):

> Plaintiffs have not demonstrated a mere risk of future harm. Rather, Plaintiffs have alleged and provided proof that each and every plaintiff—named and unnamed—overpaid for their class vehicle because each vehicle suffered a universal defect, regardless of whether that defect ever "manifested." It is Plaintiffs' theory that even if a non-named plaintiff's car never manifested the defect, the car nevertheless still suffers from the defect, and therefore that the plaintiff overpaid for their car. This a present and concrete harm, not a "mere risk of future harm."

89 143 F.4th 306 (6th Cir. 2025).

90 *Id.* at 312.

91 *Id.* at 315 ("The standing of absent class members becomes immaterial once a court, as here, vacates a certification order.").

92 *Id.* at 354 (Nalbandian, J., concurring).

exhibited both defects in a way that inhibited its everyday use."[93] Judge Amul Thapar explored standing in class actions more generally, describing the apparent "disparity between the named plaintiffs' injuries and those of some prospective class members" as a "disjuncture problem."[94] Finally, Judge Karen Nelson Moore wrote a lengthy dissent rejecting the manifest defect rule. She would have held that the plaintiffs could proceed on the benefit-of-the-bargain theory of injury.[95] Although *Speerly* did not produce a binding majority on the question whether a benefit-of-the-bargain theory confers standing, the concurrences—and the absence of a contrary majority—signal a circuit increasingly hostile to overpayment theories.

The opinions in *Speerly* draw out several recurring critiques of the benefit-of-the-bargain theory of injury. Highlighting each of these critiques now is instructive as context for Part II. First, some courts find benefit of the bargain "inherently speculative and insufficient to permit Article III standing for class members who never experienced [the] alleged defect."[96] Second, because of concerns over the speculative nature of benefit of the bargain, some courts turn to a narrow conception of injury, often grounded in a strict understanding of tangible injury, for instance the manifest defect requirement.[97] Third, harms alleged between the named plaintiffs must be similar, or identical, to the harms of the class members for commonality and predominance class certification purposes.[98] For another example, consider that the value of a car with a transmission that has manifested a defect (and is now broken) might be less than the value of another car of the same make and model whose transmission might manifest, but has not yet manifested, a defect. Yet, the presence of that latent defect in

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93 *Id.*

94 *Speerly*, 143 F.4th at 336 (Thapar, J., concurring) (quotation marks omitted).

95 *See id.* at 358–59 (Moore, J., dissenting).

96 *Id.* at 346 (Nalbandian, J., concurring).

97 For a critique of this approach, see *id.* at 358 (Moore, J., dissenting) (explaining that the injury is overpayment stemming from a universal defect, not individualized manifestation of that defect).

98 *Id.*:

> Plaintiffs assert that every unnamed plaintiff has standing because each overpaid for their class vehicle. We would hold that Plaintiffs have standing based on their overpayment theory. As we have already explained, the alleged defects in the class vehicles are universal, and all plaintiffs—both named and unnamed—have suffered an economic injury because of them. At this stage in the litigation, Plaintiffs have provided sufficient proof in support of their economic theory of standing.

the transmission that might one day manifest has likely diminished the value of the latter car. Overpayment cases should therefore focus on the common economic injury stemming from a common defect, not variations in manifestation.

Taken together, these circuits demand individualized proof of physical harm and reject overpayment alone as constitutionally sufficient to support standing. They converge on several rationales: equating concreteness with defect manifestation or performance failure, characterizing price-premium or diminution-in-value claims as speculative, and treating common-economic-loss theories as impermissibly collapsing injury into damages. Critically, these opinions largely forgo a history-and-tradition inquiry that asks whether benefit-of-the-bargain injury has a close historical analogue, or whether the suit would have been entertained by an equity court. Before we explore that argument in the next Part, we turn to a review of the permissive circuits.

2. Benefit-of-the-bargain circuits: First, Second, Third, Fifth, Ninth, and Eleventh Circuits.

Presently, the majority of circuits allow plaintiffs to achieve standing through a benefit-of-the-bargain theory of injury, recognizing a concrete economic injury at the point of sale without requiring a manifest defect showing.[99] These courts adopt the view that "a financial injury creates standing"[100] and that a defect in a product inherently diminishes its value. Generally, because these courts do not theorize the doctrine beyond declaring it a financial injury, this Comment's historical grounding is especially helpful.

The approving circuits understand the benefit-of-the-bargain injury as classic monetary harm sufficient to confer standing. The First Circuit has "repeatedly recognized overpayment as a cognizable form of Article III injury."[101] Several cases are illustrative. First, in *Gustavsen v. Alcon Laboratories, Inc.*,[102] the court found standing for a class of consumers alleging that they had overpaid for eye drop bottles that dispensed unnecessarily large drops.[103]

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[99] *See Speerly*, 143 F.4th at 354 (Nalbandian, J., concurring) (explaining that the majority of circuits "have ratified overpayment as injury in fact for products liability claims alleging that the plaintiffs were denied the benefit of their bargain").

[100] *In re* Aqua Dots Prods. Liab. Litig., 654 F.3d 748, 751 (7th Cir. 2011).

[101] *In re* Evenflo Co., Mktg., Sales Pracs. & Prods. Liab. Litig., 54 F.4th 28, 35 (1st Cir. 2022).

[102] 903 F.3d 1 (1st Cir. 2018).

[103] *Id.* at 7–9.

The plaintiffs did not claim, for standing purposes, that the eyedrops had a manifest defect or caused physical harm. Similarly, in *In re Evenflo Co., Marketing, Sales Practices & Products Liability Litigation*,[104] the court found standing based on allegations that consumers overpaid for car seats marketed as safe when internal testing suggested otherwise.[105] The injury was economic and common across the class—regardless of whether individual class members' seats failed.

Understanding the theory as monetary harm rejects a per se no-injury defense because the fact that a product did not manifest a *physical* injury does not somehow diminish the *financial* injury. That is because, for standing purposes, the two injuries would both generally confer standing, but only one need be present to get into court. Monetary loss, as the court explained in *Gustavsen*, is particularized "because it constitutes undisputed harm to the plaintiff specifically";[106] concrete because "actual economic loss [ ] is the prototypical concrete harm";[107] and "actual or imminent" since the financial harm "has already occurred."[108] The Second Circuit has reached similar conclusions.[109]

Thus, the relevant timeframe of the injury is the point of sale, not some time in the future. For example, the Fifth Circuit in *Cole v. General Motors Corp.*[110] found standing where plaintiffs purchased automobiles with defective airbag systems that could inadvertently deploy.[111] The court held that even absent physical failure, plaintiffs alleged injury "at the moment of purchase" because the vehicles were worth less than represented.[112] Each plaintiff suffered an economic injury based on the "difference between what they contracted for and what they actually received," and that injury manifested "at the moment [each plaintiff]

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104 54 F.4th 28 (1st Cir. 2022).

105 *Id.* at 35–38.

106 *Gustavsen*, 903 F.3d at 7.

107 *Id.* at 8.

108 *Id.* (quotation marks omitted) (quoting Katz v. Pershing, LLC, 672 F.3d 64, 71 (1st Cir. 2012)); *see also Debernardis*, 942 F.3d at 1087–88 (distinguishing a manifest defect case as unpersuasive because the court failed to grapple with the plaintiffs' argument that the products were worthless because they could not lawfully be sold).

109 *See, e.g.*, *In re Gen. Motors*, 339 F. Supp. 3d at 276 ("[W]hile manifestation may be helpful in proving the presence of a defect, it does not follow that recovery for economic loss should turn on whether the defect also caused property or personal damage."); Axon v. Fla.'s Nat. Growers, Inc., 813 F. App'x 701, 703–04 (2d Cir. 2020) (ruling by summary order).

110 484 F.3d 717 (5th Cir. 2007).

111 *Id.* at 721–23.

112 *Id.* at 722.

purchased a [vehicle] because each [vehicle] was defective."[113] Thus, the court found it sufficient for standing purposes that the plaintiffs sought recovery for actual economic harm "emanating from the loss of their benefit of the bargain."[114]

Because monetary harm narrows the relevant timeframe and makes a manifest defect analysis unnecessary, courts have no problem finding not only standing, but also a class for which common questions predominate. Plaintiffs who also suffered physical harm—a child poisoned by a defective product, for instance—could pursue those claims through separate tort actions; the benefit-of-the-bargain class addresses only the common economic injury shared by all purchasers, which is precisely why common questions predominate. For example, the Ninth Circuit in *Nguyen v. Nissan North America, Inc.*[115] held that plaintiffs who purchased vehicles with allegedly defective clutch systems pleaded a concrete economic injury because "the defect itself *is* the injury."[116] The court rejected the manifest defect rule as improperly conflating injury with damages.[117] Critically, the court concluded that the plaintiffs were not seeking damages for faulty performance of the clutch system, since the individualized analysis might harm standing or class certification.[118] Rather, the "[p]laintiff's theory [was] that the allegedly defective clutch [was] itself the injury, regardless of whether the faulty clutch caused performance issues."[119] The Ninth Circuit has repeatedly endorsed similar reasoning.[120]

Moreover, that broad view of injury makes the magnitude of financial harm irrelevant: Regardless of whether a product's value decreases only slightly or drops all the way to zero, standing will still be conferred, since a monetary harm occurred. For instance, in *Huertas v. Bayer US LLC*,[121] the plaintiffs purchased healthcare products that were recalled due to benzene

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113 *Id.* at 722–23.

114 *Id.* at 723.

115 932 F.3d 811 (9th Cir. 2019).

116 *Id.* at 822 (emphasis in original).

117 *Id.*

118 *Id.*

119 *Id.*

120 *See, e.g.*, Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168, 1173 (9th Cir. 2010) ("[W]e have held that proof of the manifestation of a defect is not a prerequisite to class certification."); Pulaski & Middleman, LLC v. Google, Inc., 802 F.3d 979, 989 (9th Cir. 2015) ("[T]he focus is on the difference between what was paid and what a reasonable consumer would have paid at the time of purchase without the fraudulent or omitted information.").

121 120 F.4th 1169 (3d Cir. 2024).

contamination.[122] Although the plaintiffs in the suit themselves suffered no physical injury from the products, they sought "compensation for economic losses they allegedly suffered from purchasing products that they claim[ed were] worth less than the uncontaminated products for which they bargained."[123] Thus, the court concluded that the plaintiffs had economic standing since contaminated products were worth less than properly manufactured products, "thereby depriving [p]laintiffs of the benefit of their bargain."[124] Similarly, in *Debernardis v. IQ Formulations, LLC*,[125] the court found plaintiffs had standing where consumers purchased adulterated dietary supplements whose value dropped to zero, explaining that its "conclusion [was] consistent with the well-established benefit-of-the-bargain theory of contract damages, which recognizes that some defects so fundamentally affect the intended use of a product as to render it valueless."[126] The Eleventh Circuit also recognizes diminutions, not merely entire loss, as sufficient to confer standing.[127] In short, whether there is a drop in value or total loss, plaintiffs have been deprived of the benefit of the bargain.

Overall, the majority of circuits treat overpayment as a paradigmatic monetary harm and recognize that a price-premium or diminution-in-value loss is complete at the point of sale. The Article III injury is understood as the pocketbook shortfall itself rather than downstream malfunction. What these courts are largely missing, however, is an inquiry situating the overpayment theory in history or the common law. Instead, they treat monetary harm as self-evidently concrete, which gets the theory across the finish line in the approving circuits but falls short of grounding the theory in history and tradition. Grounding the benefit-of-the-bargain theory in history offers class action plaintiffs another tool to affirm standing and comports with the judicial inclination to analogize modern or novel theories to practice grounded in historical pedigree. Part II takes up that task.

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[122] *Id.* at 1172.

[123] *Id.*

[124] *Id.* at 1175.

[125] 942 F.3d 1076 (11th Cir. 2019).

[126] *Id.* at 1085.

[127] *See* Carriuolo v. Gen. Motors Co., 823 F.3d 977, 986–87 (11th Cir. 2016) (holding that class members bringing Florida Deceptive and Unfair Trade Practices Act claims were denied the benefit of their bargain and thus injured when they purchased vehicles that were represented as having three perfect safety ratings but actually had no safety ratings).

3. The Seventh Circuit's recent contraction.

The Seventh Circuit historically aligned with the majority view permitting the overpayment theory, but a 2024 case may signal a shift toward the manifest defect circuits. Previously, in *In re Aqua Dots Products Liability Litigation*,[128] the court held that Aqua Dots purchasers had standing because they "paid more for the toys than they would have"[129] had they known the risks posed by the toxic chemicals in the toys. In that case, the plaintiffs had purchased the toy, but their children were not physically harmed.[130] Still, the court found that "[a] financial injury creates standing," and that the plaintiffs experienced a concrete and particularized economic injury at the point of sale for an unsafe and worthless product.[131]

Yet a 2024 case suggests that the Seventh Circuit is narrowing the doctrine and potentially aligning itself with the manifest defect circuits. In *In re Recalled Abbott Infant Formula Products Liability Litigation*,[132] the court reaffirmed that economic injury can support standing, but stressed that plaintiffs must plausibly allege that all products in the class contained a defect that "renders each product *valueless* to each plaintiff."[133] In that case, the plaintiffs claimed economic harm based on a potential risk of injury from contaminated formula production facilities.[134] On the one hand, the claim resembled past benefit-of-the-bargain cases, in which the theory of injury was the risk of defective formula diminishing the formula's value, not the defective formula itself. It is likely that all plaintiffs would have paid less, or not bought the formula at all, had they known of contamination problems at the production facilities. On the other hand, the court imposed an additional timing requirement, reasoning that plaintiffs "received what they asked for"—safe infant formula—because "there was no *known* risk of contamination" at the time of sale.[135]

But of course they did not receive what they asked for! Generally, in benefit-of-the-bargain cases, there is simply no way for a plaintiff to have known that they might have overpaid for a

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128 654 F.3d 748 (7th Cir. 2011).

129 *Id.* at 751.

130 *Id.* at 750.

131 *Id.*

132 97 F.4th 525 (7th Cir. 2024).

133 *Id.* at 530 (emphasis added). This extreme conception cabins the theory to complete loss of value, the most restrictive view taken among the approving circuits.

134 *Id.* at 527.

135 *Id.* at 529 (emphasis added).

product ex ante at the point of sale without ex post evidence showing that some of the products turned out to have a defect. Under the court's logic, only plaintiffs that bought a product knowing it had a defect at the point of sale could recover—an unrealistic scenario.[136] To be sure, the court's reasoning also relied on the fact that plaintiffs were offered a refund once the contamination risk became known, suggesting that the absence of a refund might have changed the outcome.[137] But even so, the decision's emphasis on the plaintiffs' knowledge at the time of sale threatens to collapse the benefit-of-the-bargain theory whenever a latent defect is, by definition, unknown to the buyers. The court also approvingly cited a line of Eighth Circuit manifest defect decisions, suggesting that the Seventh Circuit may be narrowing its approach.[138] Overall, by enhancing the necessary degree of harm and adding a timing requirement for knowledge of the defect, the Seventh Circuit put itself in tension with its sister circuits permitting the benefit-of-the-bargain theory.

II. HISTORICAL ROOTS OF THE BENEFIT-OF-THE-BARGAIN THEORY

Modern standing doctrine has increasingly turned toward history and tradition to inform the Article III standing analysis.[139] Once a plaintiff establishes an injury in fact, causation, and redressability, the lawsuit may proceed.[140] But where an alleged injury in fact is not one traditionally recognized by courts to provide the basis for a lawsuit, or a court suspects that the plaintiff's

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[136] For an analogy, see *Gustavsen*, 903 F.3d at 8 (alteration in original):

> Suppose, for example, that defendants successfully conspired directly to fix prices on any competing products, or entered into a similar collusive agreement to, perhaps, sell products with unnecessarily large drops while holding price constant. It would still be true that consumers bought an "effective product, consume[d] it fully" and now "seek a partial refund" solely based on their belief that the price should have been lower. Yet certainly in such a case the aggrieved consumer who directly purchased the product would have standing to sue for the anticompetitive surcharge.

[137] *See In re Recalled Abbott*, 97 F.4th at 529.

[138] *See id.* at 530 (first citing Wallace v. ConAgra Foods, Inc., 747 F.3d 1025, 1030 (8th Cir. 2014); then citing *In re* Polaris Mktg., Sales Pracs. & Prods. Liab. Litig., 9 F.4th 793, 797 (8th Cir. 2021)).

[139] *See, e.g.*, Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 274 (2008) (explaining that "history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider"); *Spokeo*, 578 U.S. at 340–41.

[140] *See supra* Part I.A.1.

standing theory is intangible or abstract, the Supreme Court instructs judges to turn to history and tradition.[141]

That mandate is especially significant for economic injury claims in class actions, in which the asserted harm—an overpayment—does not always manifest in physical or tangible damage. While some circuits understand a benefit-of-the-bargain theory of injury to be a financial injury readily qualifying as concrete economic harm, others are skeptical, believing that a consumer who purchases a functioning product cannot show "real" harm absent a malfunction.[142] A historical investigation can reveal whether a benefit-of-the-bargain theory of injury qualifies as a type of historically analogous concrete injury. If so, the manifest defect step is superfluous. Moreover, because "our procedural rules are mostly derived from equity," an inquiry into how equity understood representative actions of claims analogous to benefit of the bargain can help us understand class actions today.[143] Together, finding historical roots in equity and the common law may aid plaintiffs pleading novel class action standing theories not limited to overpayment.

With that framework in mind, this Part traces the historical pedigree of the benefit-of-the-bargain theory along two lines of inquiry. The first builds on scholarship connecting traditional equity practice to Article III standing[144] and extends the judicial practice of analogizing the bill of peace tradition to modern class action practices.[145] Equity's pedigree is conventionally understood to define the limits of equitable relief in federal courts,[146] but it can also teach us much more. Courts and scholarship, for example, "overlook[ ] the implications of equity's unique history for the

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141 *See infra* Part II.B.1.

142 *See supra* Part I.B.

143 Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 64 (1993); *see also id.* at 65 ("Specialized joinder devices for larger groups all arose in equity: class actions, consolidation of actions, interpleader, and shareholder's derivative suits.").

144 Scholarship linking equity and Article III standing is novel and underdeveloped. *See* Young, *supra* note 29, at 1896 ("One would think, however, that traditional practice in *equity* would be relevant to defining the contours of an Article III case alongside traditional practice with respect to legal claims. Any appreciation of equity practice as meaningfully distinctive is, however, largely missing from contemporary debates about standing." (emphasis in original)).

145 *See infra* note 164 and accompanying text.

146 The Supreme Court's rejection of universal injunctions provides a recent example. *See* Trump v. CASA, Inc., 145 S. Ct. 2540, 2554 (2025) (holding that "[b]ecause the universal injunction lacks a historical pedigree, it falls outside the bounds of a federal court's equitable authority under the Judiciary Act"); *see also* Bray, *supra* note 30, at 425 (arguing that the national injunction was absent from traditional equity).

more foundational issue of injury in fact."[147] Equity's tradition, however, need not be confined to standing; it can teach us more generally about the types of suits chancellors deemed appropriate for representative action. Put differently, because "the English bill of peace [ ] developed into what is now known as the class action,"[148] it follows that the "distinctive traditions and practices of equity['s]"[149] bill of peace should likewise inform how modern courts approach class action theory and practice. And to some extent they already do—at least in the remedial context.[150] This Comment pushes further.[151]

Under equity's bill of peace tradition, courts historically entertained representative suits to remedy common economic injuries even when individual losses or circumstances varied.[152] That history cuts against the intuition that benefit-of-the-bargain harms are too heterogeneous or speculative to ground judicial power. Permitting plaintiffs to proceed in modern class actions on a benefit-of-the-bargain standing theory aligns with that historical understanding. If equity courts allowed representative suits notwithstanding variation in individual losses, then whether a certain class member's product manifested a defect or declined in value at a different rate should not prevent plaintiffs from proceeding in a lawsuit.

Second, this Part turns to the common law to demonstrate that benefit-of-the-bargain claims closely resemble long-recognized private rights claims in contract and warranty, in which the injury is complete at acceptance and measured by the difference between the value promised and the value delivered.[153] The theory is essentially a reformulation of breach of contract and the implied warranty of merchantability, causes of action with deep

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147 Young, *supra* note 29, at 1896–97. Professor Ernest Young argued that "equitable grievances," a way to access equity's jurisdiction, look a lot like the injury-in-fact requirement for Article III standing. *Id.* at 1888. He explained: "[I]f equitable grievances have more to do with factual injury than with the existence of a legal cause of action, then the injury-in-fact requirement may make particular sense in equity." *Id.* at 1904. Moreover, "[i]f Article III standing seeks to track traditional practice, then equity's expectation of a factual injury—a grievance—is part of the tradition shaping the contours of an Article III case." *Id.* at 1905.

148 *CASA*, 145 S. Ct. at 2555.

149 Young, *supra* note 29, at 1908.

150 *See, e.g.*, *CASA*, 145 S. Ct. at 2554–55.

151 So might some judges. *See infra* note 164 and accompanying text.

152 *See infra* Part II.A.2.

153 *See infra* Part II.B.

roots in English common law.[154] Thus, the theory may properly be understood as breach, not just mere financial injury. And breach has always conferred standing. This Part traces benefit-of-the-bargain injury to first principles and theorizes an "undertheorized area"[155] of class action law. Moreover, benefit-of-the-bargain damages were commonly the rule applied in contract actions for breach of warranty.[156] Together, this history supports the conclusion that overpayment is a concrete injury for Article III purposes without a manifestation requirement.

A. Bills of Peace and Flexible Claim Aggregation

Long before the modern class action, English courts of equity would grant a bill of peace, a procedural device that allowed a chancellor to combine several suits to resolve common disputes in a single representative action.[157] The purpose of the bill of peace was pragmatic: It was designed to avoid "a multiplicity of suits" that might otherwise be brought over a shared right or controversy.[158] When numerous parties faced or brought repeated litigation over a "general right," equity would entertain one bill to settle the issue for all, thus avoiding multiplicity of suits and inconsistent judgments.[159] The bill of peace was thus "a kind of proto–class action,"[160] and it was from the bill of peace that the modern class action evolved.[161]

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[154] *See* Michael Lobban, *Mapping the Common Law: Some Lessons from History*, 2014 N.Z. L. REV. 21, 26–27 (breach of contract); John W. Salmond, *The History of Contract*, 3 LAW Q. REV. 166, 166 (1887) (breach of contract); Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1156–68 (1931) (implied warranty); K.N. Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699, 718–27, 731–45 (1936) (implied warranty).

[155] *Speerly*, 143 F.4th at 336 (Thapar, J., concurring).

[156] WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 91 (2d ed. 1955):

> [T]he "loss-of-bargain" rule[ ] gives the plaintiff the benefit of what he was promised, and allows recovery of the difference between the actual value of what he has received and the value that it would have had if it had been as represented. This, of course, is the rule applied in contract actions for breach of warranty.

[157] Bray, *supra* note 30, at 426.

[158] *See* 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 245–246 (5th ed. 1941).

[159] Mayor of York v. Pilkington (1737) 25 Eng. Rep. 946, 947; West T. Hard. 293, 295–96.

[160] *See* Bray, *supra* note 30, at 426.

[161] *See CASA*, 145 S. Ct. at 2555 ("It was the English bill of peace that developed into what is now known as the class action." (quotation marks omitted) (quoting 7A WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 1751)).

Today, courts have grown increasingly interested in the connection between the bill of peace and the modern class action. The most prominent example is *Trump v. CASA, Inc.*,[162] in which the Supreme Court aligned modern injunctive remedies with the scope of power exercised by English chancellors in bills of peace.[163] More recently, judges have explicitly connected standing in class actions with bill of peace practice, suggesting that the analogy between the two is expanding.[164] Therefore, connecting that equitable device with the Rule 23 class action and standing is instructive. This connection is also apt because "[t]he class suit was an invention of equity,"[165] so equity's understanding of bills of peace should inform modern class certification.[166] Moreover, equity can aid the Article III standing analysis because a "longstanding practice in equity may provide a firm[ ] ground for injury in fact."[167] Historical practice therefore shows what types of group claims a court should entertain.[168] And the judicial trends that suggest linking bill of peace practice with modern class action doctrine will only become more important.

Following in that tradition, this Section analyzes the bill of peace to demonstrate that strict requirements like manifest defect run counter to the flexible nature of the equity claim

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[162] 145 S. Ct. 2540 (2025).

[163] *See id.* at 2555 ("The bill of peace lives in modern form . . . [as] the modern class action . . . . [W]hile Rule 23 is in some ways 'more restrictive of representative suits than [ ] original bills of peace,' it would still be recognizable to an English Chancellor . . . . The requirements for a bill of peace were virtually identical." (citation omitted) (quoting Rodgers v. Bryant, 942 F.3d 451, 464 (8th Cir. 2019) (Stras, J., concurring))).

[164] *See, e.g.*, *Speerly*, 143 F.4th at 349, 354 (Nalbandian, J., concurring) ("This standing requirement for unnamed plaintiffs is also consistent with the historical practice that gave rise to the modern class action form. Though the history of Anglo-American representative litigation is complex, the bill of peace provides the clearest analogue to the modern class action."); *id.* at 337 (Thapar, J., concurring) ("In early analogues to class actions called bills of peace, the original plaintiff (the representative party) had to establish his personal stake at the outset of the proceeding.").

[165] Hansberry v. Lee, 311 U.S. 32, 41 (1940).

[166] *See* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999) ("[T]he equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789." (quotation marks omitted) (quoting ARMISTEAD M. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE 660 (1928))).

[167] Young, *supra* note 29, at 1888; *see also* Curtis A. Bradley & Ernest A. Young, *Standing and Probabilistic Injury*, 122 MICH. L. REV. 1557, 1571 (2024) ("[T]he Court's historical analysis has tended to require that modern litigation simply retain certain basic elements that have characterized the core of Anglo-American justice.").

[168] Because of the confusion in the circuits between Article III standing and Rule 23 certification, this Section focuses on standing, but the same arguments could be used in courts that analyze benefit of the bargain at the certification stage.

aggregation device. In fact, courts of equity granted bills of peace even when individual claims, losses, or defenses to those claims differed, as long as a general right or common question existed.[169] This focused historical survey suggests that rejection of benefit-of-the-bargain harms as too speculative may not be warranted in all cases. Specifically, the historical evidence suggests that not all class members must experience identical injury and that a shared economic loss would not be considered "no injury," precluding common objections to that theory.[170] The point is that an equity chancellor would likely entertain a suit proceeding on an overpayment theory. So too should modern courts.

1. Equity did not require strict homogeneity of claims or defenses to retain jurisdiction in a bill of peace.

The manifest defect circuits hold that the fact that not all plaintiffs have suffered identical physical injury or harm precludes standing.[171] But that would not have been the case under the bill of peace, which was a flexible instrument.[172] When a controversy turned on a shared general right, equity kept the case even if the parties' precise claims and defenses diverged; a "general right" anchored jurisdiction.[173] What mattered was the common question that a single decree could resolve. Chancery thus maintained jurisdiction even when plaintiffs suffered similar, but not identical, injuries, and even when defendants asserted distinct defenses. That is the same posture as modern overpayment cases, in which the shared issue is whether a latent defect or misrepresentation reduced value at the point of sale. If independent differences among claimants—such as the degree of loss or the precise value of a right—did not deprive equity of jurisdiction, so long as there were substantial common questions, the same should be true of plaintiffs proceeding on an overpayment theory of injury.

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169 *See infra* Part II.A.1.

170 *See, e.g.*, *Johannessohn*, 9 F.4th at 988; *Speerly*, 143 F.4th at 354 (Nalbandian, J., concurring).

171 *See supra* Part I.B.1.

172 *See* ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 155–56 (1950) ("[T]he greater flexibility of equity procedure ma[de] it possible to segregate the common questions from the independent questions, and to consider the latter in separate hearings.").

173 *See id.* at 161 ("[T]he presence of independent questions does not deprive equity of jurisdiction over the bill of peace so long as there are substantial common questions, but goes only to the exercise of jurisdiction.").

What is meant by a "general right"? The classic statement of the doctrine comes from Lord Hardwicke in *Mayor of York v. Pilkington*.[174] In that case, the mayor, on behalf of the city's inhabitants, claimed an exclusive right to fish the River Ouse and sought a bill of peace against several riparian lords who claimed rights to fish the river and had already taken fish from its waters.[175] The defendants demurred, arguing that "although bills of peace had been allowed where 'general rights' were asserted, the rights of each defendant in this case were claimed on 'distinct' grounds; hence, no issue could be framed that would settle the rights of all parties."[176] Lord Hardwicke rejected that logic, writing that "[b]ecause a great number of actions may be brought, the Court suffers such bills, though the defendants might make distinct defences."[177] In other words, to Lord Hardwicke, the "several nature of the rights claimed by defendants was irrelevant."[178] English courts also treated purely financial entitlements—like a municipal duty payable by traders—as a general right cognizable in a single proceeding, underscoring that economic injuries could support representative adjudication.[179]

Lord Hardwicke's opinion identifies two crucial features of equity's bill of peace jurisdiction. First, the nature of the injury was a threatened loss of a common benefit or privilege—fishing.[180] Second, although the defendants may have had individual defenses to the plaintiff's claim, those individual defenses did not deprive the court of jurisdiction because the purpose of the bill of peace was to secure the benefit of a common right.[181] The injury, in modern terms, was the deprivation of a common economic benefit—the profits of the fishery—and equity's remedy was to restore that benefit for the collective good.

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[174] (1737) 25 Eng. Rep. 946; West T. Hard. 293.

[175] *Id.* at 946; West T. Hard. at 293.

[176] Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1864 (1998).

[177] *Mayor of York*, 25 Eng. Rep. at 947; West T. Hard. at 296.

[178] Hazard et al., *supra* note 176, at 1864. *See also generally* How v. Tenants of Bromsgrove (1681) 23 Eng. Rep. 277; 1 Vern. 22 (demonstrating early acceptance of multiplicity as a sufficient equity ground to settle a lord-tenants general right controversy otherwise tried repeatedly at law).

[179] *See generally* City of London v. Perkins (1734) 1 Eng. Rep. 1524; 3 Bro. P.C. 602.

[180] *Mayor of York*, 25 Eng. Rep. at 946; West T. Hard. at 294.

[181] 1 JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS AND THE INCIDENTS THEREOF § 125 (Isaac F. Redfield ed., Boston, Little, Brown & Co. 8th ed. 1870) (explaining that a single decree could "quiet the general right, not only as to the persons before the court, but as to all others in the same predicament").

Nineteenth-century commentators showed that the equitable tradition extended even further than Lord Hardwicke's case—beyond suits involving a shared property right and into any controversy presenting common questions of law or fact. Professor John Norton Pomeroy, a leading equity scholar, described the "weight of authority" as "simply overwhelming" that courts should entertain representative suits "either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body," even where there was "no 'common title'. . . among these individuals, but where there is and because there is merely a community of interest among them in the questions of law and fact involved."[182] Indeed, Pomeroy emphasized that equity's reach extended even to cases in which "the individual claims were not only legally separate, but were separate in time, and each arose from an entirely separate and distinct transaction, simply because there was a community of interest among all the claimants in the question at issue and in the remedy."[183] In other words, the plaintiffs in a representative suit need not share a common property right—like the fishing right at issue in *Mayor of York*—nor must their claims arise from the same event or transaction, so long as their claims raise shared legal or factual questions. Professor Zechariah Chafee, another leading equity authority, agreed, observing that "bills of peace have been granted against or to a multitude in . . . cases in which there was no community of property interest"[184] among the parties because equity's focus was on the shared questions, not identical property rights. The implications for standing are significant: If equity did not even require that plaintiffs hold a common property interest or that their claims arise from the same transaction, and instead demanded only common questions, then a fortiori it would not have required that each plaintiff suffer an identical injury. Courts focused on commonality and used equity's flexibility to separate common issues from independent ones.

2. Widespread economic harms and heterogeneous losses did not defeat equity jurisdiction in bill of peace actions.

The fact that some plaintiffs' products manifested a defect while others did not, or that the value of those products declined

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[182] POMEROY, *supra* note 158, § 269.

[183] *Id.*

[184] CHAFEE, *supra* note 172, at 177.

at varying magnitudes, did not make a representative suit improper in a bill of peace action. Nor should it in modern class actions. This Section demonstrates that, in various actions, equity courts grouped plaintiffs' shared economic harms into one bill of peace, even when some of those plaintiffs' losses differed. That is because the equity chancellor's focus was on preventing multiple suits arising out of the shared controversy.[185] Thus, modern courts should not reject an overpayment theory of injury on grounds that not all class members' products manifested a defect or that the loss in value among plaintiffs varied.

Identical damages among plaintiffs were not required in a bill of peace, and such a microlevel view of the suit could doom the bill, a path often rejected by judges.[186] To avoid a multiplicity of suits and ensure justice was done, equity viewed the common harm at a more abstract level than the question of individual injury.[187] That principle extended to bills concerning shared general economic harms without identical individual losses.

Equity courts retained jurisdiction over heterogeneous economic injuries in creditor and legatee bills, in which the shared interest consisted of common victimization by a debtor even though amounts due differed.[188] That was also true in nuisance suits in which each claimant's loss differed in magnitude because a single decree could resolve the shared entitlement.[189] In other words, equity grouped claims by the shared wrong and remedy, not by identical dollar figures or manifest defects—an approach that mirrors class-wide overpayment theories.

Equity exhibited this more general grouping in two ways. First, creditor and legatee bills, early precursors to the class action, permitted one creditor to sue on behalf of all to marshal a debtor's assets.[190] The "only tie among creditors would be their unpaid claims . . . that is, their common victimization," yet this was enough to create the common interest necessary for representative relief.[191] The principle was that all plaintiffs stood in the same situation, and had "one common right or one common interest, the operation and protection of which [would] be for the

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185 *See* POMEROY, *supra* note 158, §§ 245–246.

186 *See supra* Part II.A.1.

187 *See infra* note 199 and accompanying text.

188 *See infra* notes 194–95 and accompanying text.

189 *See infra* text accompanying notes 200–03

190 For examples of creditor and legatee bills, see Hazard et al., *supra* note 176, at 1866 n.75.

191 *Id.* at 1868.

common benefit of all."[192] In other words, all plaintiffs in the action had the same general interest in recovering debts owed. Even though the individual amounts were sure to differ, the common interest was sufficient to retain jurisdiction.[193] The same was true in taxpayer illegality cases, in which early American equity grouped creditors and taxpayers based on the shared wrong and shared entitlement to relief, not identical sums.[194] Representative suits were used to prevent a multiplicity of individual suits since a single decree could settle the common question.[195]

Second, equity courts exercised jurisdiction over bills of peace even where individual plaintiffs' losses varied in amount or degree.[196] These suits typically involved numerous property owners who, though asserting separate rights, faced a single wrongful act that gave rise to a common legal question or general right. In *Murray v. Hay*,[197] for example, several homeowners brought a bill in chancery to enjoin the defendant's nuisance.[198] Each plaintiff owned a distinct parcel and suffered a different degree of injury, yet chancery sustained the suit as a proper exercise of equity's jurisdiction.[199] Likewise, in *Reid v. Gifford*,[200] several mill owners, each entitled to draw water from a common stream, jointly sought to enjoin an upstream diversion that reduced their flow, "thereby injur[ing] all the plaintiffs in the same manner, but in varying amounts."[201] Although the diversion affected each mill differently,

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192 City of Detroit v. Detroit United Ry., 197 N.W. 697, 703 (Mich. 1924).

193 *See* Hazard et al., *supra* note 176, at 1891 ("Despite differences regarding the ultimate division of the assets, the creditors have a common interest in ferreting out the debtor's assets.").

194 *See id.* at 1894 (explaining that taxpayer suits seek an "injunction against expenditure" and these suits could be conceptualized as seeking a rebate equivalent to a creditor's bill against a debtor).

195 *See, e.g.*, Brinkerhoff v. Brown, 6 Johns. Ch. 139, 151 (N.Y. Ch. 1822) (permitting creditors with separate judgments to unite to defeat a debtor's fraud); Smith v. Bank of New Eng., 45 A. 1082, 1083 (N.H. 1898) (noting that "[t]he plaintiff's bill is in the nature of a bill of peace" and emphasizing the public and party convenience of resolving a common legal question once, rather than in seventy-nine separate trials).

196 *See* POMEROY, *supra* note 158, § 257.

197 1 Barb. Ch. 59 (N.Y. Ch. 1845).

198 *Id.* at 64–65 ("[T]he bill shows that the erection and continuance of the alleged nuisance, and of every part of it, is a common injury to the separate property and rights of each of the complainants.").

199 *Id.* at 65. The court noted that "[t]he insertion of such a prayer [for compensation for the damage which they have each sustained from the alleged nuisance] might perhaps render the bill multifarious," but that by examining the issue at a higher level of abstraction (e.g., the common nuisance), jurisdiction was proper. *Id.*

200 1 Hopk. Ch. 416 (N.Y. Ch. 1825).

201 POMEROY, *supra* note 158, § 257 nn.6–7.

the court held that they all had such a community of interest in the subject matter of the suit that they could join in the bill.[202] As Pomeroy observed, these cases exemplify equity's capacity to "settle[ ] the entire controversy and determine[ ] the separate rights and obligations of each individual claimant" in a single decree whenever the plaintiffs' interests turned on the same controlling question.[203]

One might argue that equity courts' retention of jurisdiction in these cases had less to do with permitting an abstract view of individualized loss and more to do with recognizing a distinct claim separate from financial injury. After all, Pomeroy suggested that cases like *Murray* and *Reid* are nuisance cases first, and that "[i]n the case of a nuisance it is not the injured property of the plaintiffs that is the subject, but the right to be protected from the alleged nuisance."[204]

This argument is overly formalistic and struggles for two reasons. First, even accepting Pomeroy's characterization, the nuisance cases actually prove the broader point: Equity courts framed the basis of jurisdiction around the common question—the shared right to be free from the nuisance—rather than allowing individualized damages to defeat it. As one equity judge put it, "The common injury, although differing in degree as to each owner, makes a common interest, and warrants a common remedy."[205] Thus, when confronted with a mix of common and individual questions, equity anchored jurisdiction in the former rather than surrendering it because of the latter. Second, equity evolved to permit jurisdiction over damages claims in the unified proceeding, tracking the flexible nature of the device.[206] In other words, an equity judge evaluating overpayment standing today would resist dismissing an action for lack of standing on manifest defect or heterogeneous loss grounds, since framing the common

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[202] *Reid*, 1 Hopk. Ch. at 419.

[203] POMEROY, *supra* note 158, § 269.

[204] *Id.* § 257 nn.6–7; *accord* State v. Sunapee Dam Co., 55 A. 899, 900 (N.H. 1903) (dividing evenly on the question of jurisdiction to award damages in lieu of an injunction).

[205] Strobel v. Kerr Salt Co., 58 N.E. 142, 148 (N.Y. 1900) ("While each [plaintiff] owns a distinct piece of land . . . they all have a common grievance against the defendant for an injury of the same kind, inflicted at the same time and by the same acts.").

[206] CHAFEE, *supra* note 172, at 194 (explaining that equity decisions showed "an inclination to assess compensation in the unified proceeding, applying the principle that equity once having taken jurisdiction will wind up the whole controversy").

question as an overpayment theory preserves the claim by equalizing the loss.[207] Thus, formalism falls.

3. Mapping bill of peace principles to benefit-of-the-bargain standing.

The bill of peace was a pragmatic instrument: It empowered equity to resolve a shared controversy once and for all when many persons asserted or resisted a general right, thereby preventing a multiplicity of suits and inconsistent judgments. That animating purpose—to make "one lawsuit grow where two grew before"[208]—did not require homogeneity of loss or defenses so long as a common question anchored the controversy. Indeed, as Pomeroy emphasized, equity entertained representative suits even when claims were "separate in time" and arose from "entirely separate and distinct transaction[s]," so long as there was a community of interest in the questions at issue.[209] Most salient here, the presence of individualized damages or circumstances did not strip equity of jurisdiction when claimants were deprived of a general right or common benefit. That principle migrated into American equity and received recognition in both state courts and the Supreme Court.[210] Moreover, Pomeroy captured the point in terms relevant today: Many disputes not technically within the historical form were nonetheless "analogous to" bills of peace because they involved a numerous set of claimants bound together by a "community of interest . . . in the questions of law and fact,"[211] even though their particular losses varied.

Two features of the bill of peace tradition map cleanly onto benefit-of-the-bargain standing. First, equity's threshold was a shared question tied to a general right, not identical proof among plaintiffs. In modern overpayment cases, the shared question is whether a uniform misrepresentation or latent defect diminished value at the point of sale; differences in the quantum of overpayment or the incidental circumstances (e.g., manifest defect) are,

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[207] Some courts went even further, taking the view that once equity had properly taken jurisdiction to prevent multiplicity or abate a nuisance, it would retain that jurisdiction to award damages as well. *See, e.g.*, Knox v. Reese, 100 S.E. 371, 372–73 (Ga. 1919) (keeping the bill despite the fact that "the damages sought by each plaintiff are for different sums alleged to have been done the several plaintiffs by the defendant").

[208] CHAFEE, *supra* note 172, at 149.

[209] POMEROY, *supra* note 158, § 269.

[210] *See* Bray, *supra* note 30, at 427; Smith v. Swormstedt, 57 U.S. (16 How.) 288, 302–03 (1854).

[211] POMEROY, *supra* note 158, § 269.

in Chafee's terms, merely "independent questions"[212] that should not defeat jurisdiction. Relatedly, if the injury is common, that may also satisfy Rule 23's commonality and predominance inquiries.[213]

Second, equity routinely entertained suits in which each plaintiff's loss differed in magnitude because a common wrong generated a common entitlement to relief. In nuisance and water-diversion cases, distinct landowners with heterogeneous injuries proceeded together because they shared a "community of interests" in the subject of the suit,[214] and equity would settle the "entire controversy"[215] in one decree. Creditor and legatee bills did the same, allowing one creditor to sue on behalf of all even though the amounts due varied, because the same interest consisted in the parties' common victimization and shared right to a single, uniform resolution.[216] Overall, equity separated common from independent issues and retained jurisdiction.

These principles render the benefit-of-the-bargain injury an easy fit to support Article III standing. When consumers allege that they paid more than a product was worth due to a uniform misrepresentation or latent defect, they assert a shared general right to receive the value promised at the price paid. The injury—a diminution in value at the point of sale—is common in nature even if dollar amounts or defect manifestation differ because the common wrong and common entitlement ground collective adjudication.

Equity's history answers several recurring objections. Concern that overpayment injuries are "speculative"[217] misconceives the level of generality at which equity located the common right. Moreover, the controlling question is whether a misrepresentation or latent defect uniformly depressed value, not whether each unit failed in the same way. That is why chancery tolerated "distinct defences"[218] and varying magnitudes of harm so long as the general right could be adjudicated once, and why modern courts properly allow class-wide proof of price effects or diminished value.[219] The insistence on defect manifestation likewise collapses

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212 CHAFEE, *supra* note 172, at 161.

213 *See supra* note 88 and accompanying text.

214 *Reid*, 1 Hopk. Ch. at 419.

215 POMEROY, *supra* note 158, § 269.

216 *See supra* Part II.A.2.

217 *See, e.g.*, *Speerly*, 143 F.4th at 346 (Nalbandian, J., concurring).

218 *Mayor of York*, 25 Eng. Rep. at 947; West T. Hard. at 296.

219 *See* RUBENSTEIN, *supra* note 51, § 4:50 ("If 'the same evidence will suffice for each member to make a *prima facie* showing [or] the issue is susceptible to generalized, class-wide proof,' then it is a common issue." (alteration in original)).

injury into proof of damages. As one court has observed, manifestation may sometimes be evidence of defect, but it is not a necessary condition of economic loss when plaintiffs can show they received less value than promised at the point of sale.[220]

In short, the bill of peace tradition supplies a historical foundation for recognizing benefit-of-the-bargain injury as a cognizable, common economic harm. The analysis may also be extended to the commonality and predominance inquiries of class certification.[221] Equity aggregated claims anchored in a shared deprivation of a general right and retained jurisdiction notwithstanding heterogeneity in damages. Modern overpayment claims are "analogous to"[222] that tradition: They present a single, dispositive question—whether a uniform misrepresentation or defect reduced value at purchase—and equity would have resolved them together to avoid multiplicity. Recognizing benefit-of-the-bargain standing thus accords with equity's functional, rights-based approach to common economic injuries.

B. Benefit of the Bargain Resembles Common Law Claims

This Section turns from equity to the common law and undertakes the standing analysis *Spokeo* and *TransUnion* demand. It argues that benefit-of-the-bargain injuries map closely onto long-recognized private rights injuries—especially contract and warranty—and that this historical fit supports concreteness without requiring defect manifestation. A threshold question is why, if breach of contract and warranty are independently available, the benefit-of-the-bargain theory is necessary in the products liability context at all. The answer lies in a gap that traditional causes of action leave: A consumer whose product has not yet manifested a defect generally cannot state a claim for breach of warranty or breach of contract, because on the traditional understanding, no breach has occurred until the product fails.[223] The benefit-of-the-bargain theory fills that gap by locating the injury at the point of sale—the consumer overpaid for a product worth less than represented, regardless of whether it has yet

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[220] *See In re* Gen. Motors LLC Ignition Switch Litig., 339 F. Supp. 3d 262, 276–77 (S.D.N.Y. 2018).

[221] *See* FED. R. CIV. P. 23(a), (b)(3).

[222] POMEROY, *supra* note 158, § 269.

[223] *See* Rule v. Fort Dodge Animal Health, Inc., 607 F.3d 250, 252 (1st Cir. 2010) ("Recovery generally is not available under the warranty of merchantability where the defect that made the product unfit caused no injury to the claimant.").

malfunctioned. Grounding that theory in the common law of contract and warranty shows that its underlying measure of harm—the difference between value promised and value delivered—has historical roots, even when deployed in a products liability context in which the traditional causes of action may be unavailable to all class members. This Section proceeds in three steps. First, it explores the Court's "close relationship" inquiry and explains how the common law–analogue test operates in practice. Second, it develops the doctrinal account: Expectation-loss principles and warranty remedies—now codified in the Uniform Commercial Code (U.C.C.)—treat the injury as complete at acceptance and measure it as the difference between value promised and value delivered. Third, it explores the implications for standing in class litigation: When the injury is a purchase-time pocketbook shortfall with historical roots, standing is satisfied and common proof may even be aligned with Rule 23 without resort to a manifestation requirement. This approach also addresses a recurring gap in the lower courts' decisions, many of which either assume monetary harm is self-evidently concrete or reject overpayment as "no injury" without conducting the history-and-tradition analysis *Spokeo* and *TransUnion* prescribe.

1. *Spokeo*, *TransUnion*, and the common law–analogue inquiry.

The modern Article III standing inquiry turns in part on whether an asserted harm bears a "close relationship" to an injury traditionally recognized at common law.[224] *Spokeo*, recognizing that "the doctrine of standing derives from the case-or-controversy requirement . . . [which] is grounded in historical practice,"[225] framed the standing inquiry by asking whether an alleged harm "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[226] *TransUnion* crystallized that standard, finding that the "inquiry asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury"[227] and made clear that that analogue need not be "an exact duplicate."[228] In

[224] *Spokeo*, 578 U.S. at 340–41.

[225] *Id.*

[226] *Id.* at 340.

[227] *TransUnion*, 141 S. Ct. at 2198.

[228] *Id.* at 2204. The Supreme Court requires only a close, not an identical, analogue. The circuits differ slightly on what exactly this common law analogue must look like, but

previous cases, the Supreme Court has also suggested that the historical analysis is not a snapshot in time, but an evolving story that looks for trends and links between English common law through the development of law and equity in the United States.[229] The Court's test thus makes the historical record illustrative and potentially dispositive. To decide whether a modern harm counts as real enough for federal justiciability, courts must ask whether similar, not identical, harms were cognizable when the judicial power was first understood.

Despite this standard, the benefit-of-the-bargain theory remains incredibly undertheorized in the lower courts.[230] One reason is that courts are thinking too narrowly about the theory—for instance, by not considering common law analogues. In the lower courts, the history-and-tradition inquiry is typically triggered when courts do not consider the asserted harm to be paradigmatically concrete,[231] for example, "traditional tangible harms, such as physical harms and monetary harms."[232] In most benefit-of-the-bargain cases, however, plaintiffs plead and courts assume that the injury is grounded in economic loss because an "economic injury qualifies as a concrete injury."[233] The result is that the benefit-of-the-bargain theory is, in a sense, a victim of its own characterization: Courts that accept overpayment as a straightforward economic harm never reach the history-and-tradition inquiry, while courts that are skeptical of the theory reject it on manifest

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most take a flexible view. *See, e.g.*, Bohnak v. Marsh & McLennan Cos., 79 F.4th 276, 286 (2d Cir. 2023) ("For the purposes of the 'concreteness' analysis under *TransUnion* . . . that analog need not be 'an exact duplicate.'" (quoting *TransUnion*, 141 S. Ct. at 2204)); Salazar v. Nat'l Basketball Ass'n, 118 F.4th 533, 542 n.6 (2d Cir. 2024) ("We did not . . . hold that *TransUnion* demands that a plaintiff adequately plead *every* element of a common-law analog to satisfy the concreteness requirement." (emphasis in original)); Shields v. Pro. Bureau of Collections of Md., Inc., 55 F.4th 823, 829 (10th Cir. 2022) ("Shields did not have to plead and prove the tort's elements to prevail. But to proceed, she had to at least allege a similar harm."); *see also* Barclift v. Keystone Credit Servs., LLC, 93 F.4th 136, 145 (3d Cir. 2024) ("We believe that if the Court wanted us to compare elements, it would have simply said so. So when asking whether a plaintiff's intangible injury is 'concrete,' we will examine the kind of harm at issue.").

[229] *See, e.g.*, *Sprint Commc'ns Co.* 554 U.S. at 274–86 (reviewing English and early American decisions to conclude that "[t]he history and precedents that we have summarized make clear that courts have long found ways to allow assignees to bring suit").

[230] For example, the circuits that accept the theory conceptualize it solely as economic injury. *See supra* Part I.B.2.

[231] Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917, 926 (11th Cir. 2020) (explaining that establishing standing for claims of intangible harm "can be tricky" and relying on history and tradition to "draw that difficult line").

[232] *TransUnion*, 141 S. Ct. at 2204.

[233] *Debernardis*, 942 F.3d at 1084.

defect grounds without exploring whether a close common law analogue might independently establish concreteness.[234] Either way, the historical record goes unexamined.

While it is certainly true that the benefit-of-the-bargain measure of damages seeks to remedy the loss by making the plaintiff whole, it is interesting that the purported injury is cast in the same language as the remedy.[235] That parallelism may allow a shortcut to traditionally concrete economic damages. After all, a remedy historically recognized as a proper response to a wrong can itself evidence a concrete and cognizable injury, even when that injury is economic or perceived to be intangible. The Supreme Court has recognized that the standing inquiry is inextricably related to "the nature and source" of the claim.[236]

But casting the injury as an economic one to access the concreteness requirement is not the only way to achieve standing. As explored above, the Supreme Court's common law–analogue approach also allows plaintiffs to establish concrete harm through a historical inquiry. First, courts look for a close historical or common law analogue; second, they consider whether the legislature elevated the injury; and third, they treat monetary harms as paradigmatically concrete.[237]

With the historical framework established, this Section proceeds by considering whether there are common law analogues to benefit-of-the-bargain theory. There are: breach of contract and warranty. Essentially, the plaintiff received a product or service diminished in value from what was promised. That may be because of a defect in their own product or a deprivation of the bargain in a class of products, one of which is owned by the plaintiff. Putting aside the damages component, that injury looks

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[234] *See, e.g.*, *In re Evenflo Co.*, 54 F.4th at 38–39 (recognizing overpayment injuries as monetary harms sufficient to confer standing); Cox v. Valley Hope Ass'n, 2016 WL 4680165, at *3 n.4 (W.D. Mo. Sept. 6, 2016) ("Nevertheless, some courts appear to categorically reject the theory that standing can be premised on an overpayment.").

[235] The benefit-of-the-bargain measure of damages is ordinarily either the value of the product minus the impact of the defect or, when a product is rendered valueless as a result of a defect, the entire purchase price of the product. *See* PROSSER, *supra* note 156, at § 91; Yahya, *supra* note 79, at 100. For a case making this move, see, for example, *Nguyen*, 932 F.3d at 815, 818.

[236] Warth v. Seldin, 422 U.S. 490, 500 (1975); *see also* Ashley C. Robson, Note, *Measuring a "Spiritual Stake": How to Determine Injury-in-Fact in Challenges to Public Displays of Religion*, 81 FORDHAM L. REV. 2901, 2909 (2013) ("[I]mprecision can lead to impermissibly conflating an evaluation of the alleged injury with a determination of whether or not to recognize the alleged interest injured. This conflation allows for the incorporation of normative judgments into a purportedly objective analysis.").

[237] *See, e.g.*, *Muransky*, 979 F.3d at 926–29.

substantially like harms traditionally remediable in contract and warranty law: breach of an agreement, misrepresentation about value, and the corresponding entitlement to the difference between the value as represented and the value actually delivered.[238] The loss, moreover, is quintessentially monetary, linking back to economic harm.[239] Crucially, that means the cause of action accrues when breach occurs and the breach of warranty occurs when delivery is made, regardless of any subsequent physical defect.

That observation reflects the view[240] that economic diminution at the moment of purchase constitutes a cognizable injury irrespective of downstream physical consequences.[241] Benefit-of-the-bargain harms thus map onto the types of injuries that common law courts have long treated as actionable without additional manifestation. We now turn to that common law exploration.

2. Theorizing the doctrine: Benefit-of-the-bargain injury and the common law roots of contract and warranty.

The Supreme Court's decisions in *Spokeo* and *TransUnion* provide a coherent framework for recognizing benefit-of-the-bargain injuries as concrete Article III harms.[242] Framed through this lens, benefit-of-the-bargain injuries are a modern cousin of the expectation-loss harms vindicated for centuries in breach of contract and breach of warranty actions.[243] When a consumer pays for a product as represented but receives something worth less at the time of sale, the monetary shortfall is the very injury the common law has long recognized and remedied. The manifest defect rule, which would require plaintiffs to show that their particular product failed, imposes an additional element that neither

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[238] *See supra* Part II.B.2.

[239] An example from one court: When a plaintiff alleges that she "paid x for [her car] and can prove that [it is] now worth x minus y as the result of the alleged defects," preventing her recovery "because the defect did not manifest itself" would be "arbitrary." *In re Gen. Motors*, 339 F. Supp. 3d at 276.

[240] *See supra* Part I.B.2.

[241] This is not to say that benefit-of-the-bargain theories of injury must be accepted per se. After all, plaintiffs must still allege sufficient facts to establish that a claim for relief is plausible. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–56 (2007).

[242] *See supra* Part II.B.1.

[243] *See* Mayhall v. A.H. Pond Co., 341 N.W.2d 268, 270–71 (Mich. Ct. App. 1983) (finding that common law fraud "injury may consist in the plaintiff's unfulfilled expectations" and that when "the victim does not receive what he expected to receive," he may "recover the difference between the actual value of the property when the contract was made and the value that it would have possessed if the representation had been true").

contract nor warranty law demands and that finds no support in the Supreme Court's history-and-tradition inquiry.

To appreciate the connection between the benefit-of-the-bargain theory and the common law, it helps to understand breach of contract and warranty at a basic level. A breach of contract occurs when one party fails to perform a promise that forms part of a binding agreement[244]—for example, a seller who promises to deliver a functioning automobile but instead delivers one with a defective transmission. The remedy for breach is to place the injured party in the position she would have occupied had the contract been performed as promised.[245] Of course, in products liability cases, a written contract may not always be present, like in the case of purchasing a toy at the store, so breach of warranty is a better fit in the usual cases invoking the overpayment theory.

Breach of warranty can be express or implied. An express warranty arises when a seller makes a specific affirmation about a product—such as representing that a car seat meets certain safety standards—that becomes part of the bargain. If the product fails to conform to that representation, the warranty is breached.[246] Implied warranties, by contrast, arise automatically by operation of law.[247] The implied warranty of merchantability guarantees that goods are fit for their ordinary purpose.[248] The implied warranty of fitness for a particular purpose applies when a seller knows the buyer's specific needs and the buyer relies on the seller's expertise.[249] Under both express and implied warranty theories, the buyer need not show that the product caused physical harm or malfunctioned—only that the product, as delivered, failed to conform to what was promised or implied. The injury is complete at the moment of acceptance when the buyer receives goods worth less than warranted.[250]

The U.C.C. has broadened the application of and remedies available from breaches of implied warranties, clarifying that

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244 *See* RESTATEMENT (SECOND) OF CONTS. § 235 (AM. L. INST. 1981); *see also, e.g.*, Sullivan v. O'Connor, 296 N.E.2d 183, 184 (Mass. 1973).

245 *See Sullivan,* 296 N.E.2d at 186–87.

246 *See* Richard A. Lord, *Some Thoughts About Warranty Law: Express and Implied Warranties*, 56 N.D. L. REV. 509, 513 (1980).

247 *See id.* at 626 (explaining that the implied warranty of merchantability "arises by implication in any sale of goods by a merchant unless it is disclaimed by appropriate words or conduct").

248 *Id.* at 627.

249 *See id.* at 597.

250 *See* Lloyd v. Gen. Motors Corp., 916 A.2d 257, 287 (Md. 2007).

breach need not be accompanied by defect manifestation.[251] For adopting states, the U.C.C. expressly provides "that a claim for the breach of an implied warranty 'accrues when the breach occurs' and that 'there is no requirement that [p]laintiffs demonstrate any injury to their person or property as a result of the breach, but only that they purchased an unmerchantable product.'"[252] For accepted but nonconforming goods,[253] the buyer's damages are "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted,"[254] plus incidental and consequential damages.[255] The U.C.C. also allows express warranties to arise from affirmations, descriptions, or samples that form the basis of the bargain, not just explicit warranties.[256] Similarly, the implied warranties of merchantability and fitness guarantee baseline quality and suitability.[257]

Other features of the U.C.C. reinforce the benefit-of-the-bargain injury's concreteness at the point of sale. First, the injury occurs at acceptance: Warranty law recognizes that the buyer's pecuniary loss is complete when goods worth less than warranted are accepted, even if defects are latent or the product is later used.[258] Second, while the U.C.C. imposes notice, limitation, and disclaimer rules,[259] courts police those limits and continue to award the difference in value and appropriate incidental or consequential damages when warranted.[260] This injury is neither

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[251] *See, e.g.*, Johansen v. E.I. Du Pont de Nemours & Co., 810 F.2d 1377, 1381 (5th Cir. 1987):

> The UCC provisions pertaining to implied and express warranties do not create new rights not existing at common law. A cause of action predicated on the implied warranty of merchantable quality was developed at English common law. . . .
>
> [ ] [T]he action for breach of an express warranty relating to the quality of goods was also present at common law and in pre-UCC Texas decisions.

See also, e.g., Smith v. Old Warson Dev. Co., 479 S.W.2d 795, 798 (Mo. 1972) ("Our Supreme Court has further recognized that implied warranties of merchantable quality and reasonable fitness for use are derived from the common law.").

[252] *In re Gen. Motors*, 339 F. Supp. 3d at 301–02 (quoting *In re* Gen. Motors LLC Ignition Switch Litig., 257 F. Supp. 3d 372, 426 (S.D.N.Y. 2017)).

[253] U.C.C. § 2-714(1) (AM. L. INST. & UNIF. L. COMM'N 2022).

[254] *Id.* § 2-714(2).

[255] *Id.* §§ 2-714(3), -715.

[256] *See id.* § 2-313.

[257] *See id.* §§ 2-314 to -315.

[258] *See* U.C.C. § 2-714(2) (AM. L. INST. & UNIF. L. COMM'N 2022).

[259] *See, e.g.*, *id.* §§ 2-607(3), -316, -719.

[260] *See, e.g.*, *In re* Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 155 F. Supp. 2d 1069, 1110–13 (S.D. Ind. 2001), *rev'd on other grounds*, 288 F.3d 1012 (7th Cir. 2002);

abstract nor contingent. It materializes at the moment of purchase, when the consumer parts with money in exchange for less value than was promised or reasonably implied.

Moreover, the damages that flow from an overpayment injury match remedies long available at common law. Damages under a benefit-of-the-bargain theory align with the classic common law and U.C.C. measures of expectation loss. At common law, expectation damages put the nonbreaching party in the position she would have occupied had the promise been performed, typically by awarding the difference in value between what was promised and what was delivered.[261] Consequential damages are available where foreseeable, a principle traceable to the foundational *Hadley v. Baxendale*[262] line of cases and reflected in modern commercial doctrine.[263] Overall, breach of warranty and its remedies provide a common law analogue to the benefit-of-the-bargain theory of harm.

Two further aspects of overpayment harm make it compatible with the Supreme Court's framework: the tangible nature and the private rights character of the harm. First, *Spokeo*'s admonition against "bare procedural violation[s]"[264] reinforces this conclusion that overpayment can satisfy the injury-in-fact requirement. A benefit-of-the-bargain claim is not a request to enforce regulatory procedure detached from real-world impact; it asserts a direct pocketbook loss caused by misrepresentation, concealment, or nonconformity. That concrete economic injury is distinct from the speculative harms *Spokeo* and *TransUnion* reject.[265] Moreover, *TransUnion*'s clarification that risk of future harm cannot alone support damages[266] poses no obstacle because benefit-of-the-bargain theory does not rest on a speculative future event. The

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Murray v. Holiday Rambler, Inc., 265 N.W.2d 513, 519–20 (Wis. 1978); A & M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 120 (Cal. Ct. App. 1982).

261 *See* RESTATEMENT (SECOND) OF CONTS. § 347.

262 (1854) 156 Eng. Rep. 145; 9 Exch. 341.

263 *See* GeoMetWatch Corp. v. Behunin, 38 F.4th 1183, 1232 (10th Cir. 2022) ("Damages for breach of contract generally include 'general damages, *i.e.*, those flowing naturally from the breach, and consequential damages, *i.e.*, those reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made.'" (quoting Beck v. Farmers Ins. Exch., 701 P.2d 795, 801 (Utah 1985))); *see also* Lucian Arye Bebchuk & Steven Shavell, *Information and the Scope of Liability for Breach of Contract: The Rule of* Hadley v. Baxendale, 7 J.L. ECON. & ORG. 284, 285 (1991).

264 *Spokeo*, 578 U.S. at 341–42.

265 *See id.* at 341–43; *TransUnion*, 141 S. Ct. at 2212.

266 *See TransUnion*, 141 S. Ct. at 2210–11.

alleged loss has already occurred: The plaintiff overpaid or received a product worth less than represented at the time of sale.

Lastly, the private rights character of benefit-of-the-bargain theory further situates it within the Court's history-and-tradition guidance.[267] Benefit-of-the-bargain theory vindicates a private transactional right: receiving the value that was bargained for. That is why the theory maps onto long-recognized claims for breach of contract, express warranty based on affirmations of fact forming the basis of the bargain, and implied warranties of merchantability and fitness. Each of these causes of action was designed to redress the very injury that benefit-of-the-bargain plaintiffs plead: a purchase-time loss in value.

Overall, analogizing benefit-of-the-bargain injuries through the doctrinal syllogism *Spokeo* and *TransUnion* prescribe provides courts with an additional way to evaluate benefit-of-the-bargain standing claims. First, identify the asserted harm: paying more than the product was worth as represented or receiving nonconforming goods that were worth less at acceptance. Second, locate the historical analogue that most closely matches the claim: expectation-loss damages for breach of contract or breach of warranty depending on the nature of the pleading, as remedied by, for example, a difference-in-value calculation. Third, confirm concreteness: A completed monetary injury at the time of purchase is paradigmatically real and requires no additional malfunction or physical injury to satisfy Article III, assuming some latent defect or misrepresentation is allegedly giving rise to the economic injury. This analysis also addresses common defenses. The contention that a product did not fail or cause physical harm is beside the point because the contract and warranty injury is the diminished value itself. The claim that use or enjoyment negates injury misunderstands the measure of damages, which turns on value at acceptance, not ex post satisfaction. And arguments about privity, the economic loss rule, or damages quantification go to the merits or remedies under state law, not to the existence of a concrete injury for standing.

Because the benefit-of-the-bargain theory satisfies each step of this framework, it provides courts with a historically grounded mechanism—independent of any characterization as simple

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[267] Private rights traditionally include contract rights. *See Spokeo*, 578 U.S. at 343–44 (Thomas, J., concurring) ("Historically, common-law courts possessed broad power to adjudicate suits involving the alleged violation of private rights, even when plaintiffs alleged only the violation of those rights and nothing more.").

economic injury—for finding that class members have suffered a concrete Article III injury even when their products have not manifested a defect. The practical significance is considerable. For courts in circuits that currently reject overpayment standing,[268] the common law analogy supplies what those courts have found missing: a basis for concreteness rooted in history and tradition rather than an assertion that monetary loss is self-evidently concrete.[269] For courts in circuits that already permit the theory, grounding it in contract and warranty reinforces existing doctrine and insulates it against the skepticism expressed in cases like *Speerly*.[270] Overall, theorizing benefit of the bargain through its common law analogues rests the standing theory on solid ground.

CONCLUSION

The benefit-of-the-bargain theory of injury rests on solid doctrinal and historical foundations. The circuits demanding defect manifestation conflate injury with evidentiary mechanics and depart from the Supreme Court's instruction to anchor concreteness in history. Turning to that history, this Comment demonstrates that equity's bill of peace authorized representative resolution of common economic injuries without requiring identical losses or defenses so long as a shared general right framed a single dispositive question. It shows that expectation-loss and warranty principles at common law treat the injury as complete at acceptance, measured by the difference between value promised and value delivered. Together, these independent historical inquiries support the conclusion that overpayment is a concrete injury for Article III purposes—without any requirement that a defect first manifest in the plaintiff's particular product.

The implications for modern class action standing doctrine are significant. First, recognizing benefit-of-the-bargain injury harmonizes Article III with Rule 23. When the injury is the pocketbook shortfall at purchase, plaintiffs can offer common proof—such as price-premium or diminution-in-value models—to establish injury and impact class-wide, aligning standing with predominance and avoiding member-by-member manifestation showings. This alignment is especially important in the wake of the

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[268] *See supra* Part I.B.1.

[269] *See supra* text accompanying note 234.

[270] *Speerly*, 143 F.4th at 346 (Nalbandian, J., concurring).

Supreme Court's decisions in *Spokeo* and *TransUnion*, which instruct courts to tether standing to harms traditionally recognized in English or American courts, and *Davis*, which leaves unresolved whether Rule 23 permits certification of a class that includes members without injury. Second, embracing the historical pedigree of overpayment supplies a principled answer to no-injury objections. Equity's separation of common from independent questions—and its tolerance of heterogeneous damages when a general right is at stake—confirms that the absence of identical losses does not defeat standing. Third, the history-and-tradition analysis that *Spokeo* and *TransUnion* require is a roadmap, not a barrier: Benefit-of-the-bargain claims closely track private rights injuries long actionable in contract and warranty and therefore satisfy concreteness. A manifest defect requirement, by contrast, asks plaintiffs to allege two separate injuries to gain standing—deprivation of one's bargain and a physical injury—when Article III requires only one.

Policy considerations reinforce this conclusion. A manifestation rule distorts incentives by underdeterring uniform misrepresentation and latent-defect conduct that might impose market-wide price effects yet rarely produces identical performance failures. It could also multiply litigation and fragmented proceedings—the very multiplicity equity sought to avoid. Recognizing overpayment as injury, by contrast, supports administrable class definitions tied to periods of common misrepresentation or defect, yields more predictable certification outcomes, and calibrates remedies to the actual harm consumers suffered at the point of sale.

Ultimately, the benefit-of-the-bargain theory is neither novel nor suspect. It is the contemporary application of equity's bill of peace jurisdiction and the common law's breach of contract and warranty tradition to the modern consumer marketplace. By recognizing that the economic injury occurs at the point of sale when the promised value is not delivered, courts can ground the injury in the very history the Supreme Court instructs them to consult. Doing so vindicates the rights of consumers who overpaid for defective products and retains a meaningful path to relief.