

# Putting The Brakes On Class Certification Under Dukes

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Law360, New York (January 20, 2012, 1:03 PM ET) -- The rigorous class action standards announced last term by the U.S. Supreme Court have now been applied in the context of a massive federal multidistrict litigation (MDL) of consumer product claims.

In a Dec. 19, 2011, decision, a federal judge in Michigan refused to certify a class of consumers who purchased cars equipped with OnStar, an in-vehicle telematic communications system designed to support drivers with roadside assistance information.

In his opinion in *In Re: OnStar Contract Litigation*, Judge Sean F. Cox of the Eastern District of Michigan denied plaintiffs' requests for class certification of consumer fraud and warranty theories in numerous class actions consolidated by the Joint Panel on Multidistrict Litigation.

The cases arose out of the cessation of OnStar telematics services in millions of motor vehicles sold by several prominent automotive companies.

The successful defendants included the service provider, OnStar Inc., and automotive companies Honda, Volkswagen and Subaru. The decision is the first MDL ruling to apply the more stringent "rigorous analysis" class certification scrutiny articulated by the U.S. Supreme Court in [Wal-Mart Stores Inc. v. Dukes](#) to consumer fraud theories arising from the sale of products.

The decision should be very helpful to product companies defending class actions asserting claims based on product advertising and marketing disclosures.

The consumers asserted both statutory and contract claims, alleging violations of each state's consumer protection statutes and violations of the terms of their vehicle warranties. They alleged that the defendants' failure to inform them of the Federal Communication Commission's rule change regarding the future cessation of analog communications, and its effect of rendering analog OnStar equipment inoperable, caused them damages.

The court focused on the inherently individualized differences in consumer behavior that precluded class treatment of time-of-sale consumer protection claims. In doing so, it examined the limited role that advertising may play in relation to other sources of information influencing buying decisions.

Citing extensive defense expert testimony, the court found that individual issues predominated over common ones and defeated at least two critical elements of the plaintiffs' claims that

1. Their purchase decisions were necessarily affected by OnStar and its availability after the sunset (they were not); and

2. Damages could be proven on a class-wide basis (they could not, because the value consumers placed on the product, if any, was not uniform).

The ruling is a forceful reminder that there may well be no causal link between allegedly unlawful disclosures and product-buying decisions, and that, under *Dukes*, the courts must undertake a rigorous examination to determine whether, at trial, such a link can be proven on a class-wide basis.

Again relying on *Dukes*, the court also held that the individual statutory defenses available to the defendants precluded class-wide treatment. Numerous discrete defenses available against the members of the putative class precluded class treatment.

Finally, with respect to the plaintiffs' warranty claims, the court held that the plaintiffs could not save the expiration of those claims with an unconscionability argument, finding that this was also a highly individualized determination.

In the post-*Dukes* era, in which courts are to rigorously examine the evidence necessary to determine whether Rule 23 requirements are met, this case highlights the critical importance of defendants' attention to the discovery of plaintiffs and to expert discovery, if appropriate, in preparing to challenge class certification.

This case involved more than 30 depositions of named plaintiffs and seven expert depositions. As the Supreme Court admonished in *Dukes*, the issue is not whether common questions can be formulated, but whether the claims of every putative class member can be proven with common answers, and the evidence here showed that they could not.

*Subaru* was represented by [Ballard Spahr](#).

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