The Legal Intelligencer

Prevailing Trends in Automotive Class Action Litigation

By Neal Walters and Michael R. Carroll

The Legal Intelligencer
June 5, 2012

The automotive industry frequently confronts class action litigation. The complexity of product design, manufacturing and warnings issues, coupled with broad marketing and sales programs, provides fertile ground for potentially millions of consumers to seek class relief for alleged vehicle defects and deceptive trade practices.

Class certification jurisprudence is evolving quickly, and with it courts have grappled with important issues in several recent motor vehicle decisions. The rigorous analysis advanced by the U.S. Court of Appeals for the Third Circuit in *In re Hydrogen Peroxide* , 552 F.3d 305 (3d Cir. 2008), and endorsed by the U.S. Supreme Court in *Wal-Mart Stores Inc. v. Dukes* , 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011), and the increased focus by federal courts on the sufficiency of pleadings, continues to drive those developments in automotive class actions. As part of that increased scrutiny, courts also are conducting more rigorous reviews of expert opinions in automobile cases, which necessarily involve the litigation of complex technical, advertising and financial damages issues.

This article briefly summarizes several important substantive trends and practice developments addressed by the most recent automotive class action decisions.

Early Motion Practice

• Motions to Dismiss/Strike

The *Wal-Mart* and *Hydrogen Peroxide* decisions have combined naturally with *Twombly* and *Iqbal* to result in more frequent challenges to the pleadings in automotive class actions. See, e.g., *Suddreth et al. v. Mercedes-Benz LLC* , No. 2:10-cv-05130, 2011 WL 5240965 (D.N.J. Oct. 31, 2011); *Weisberg v. Toyota Motor Corp. et al.,* No. 2:11-cv-03776, 2011 WL 1108542 (D.N.J. March 30, 2012). Discovery burdens are amplified by class actions and, therefore, a court's faithful adherence to its gatekeeping function is critical. In addition to narrowing the theories of liability and class certification, pleadings motions can serve the added benefit of providing the court valuable context within which to make more responsible certification decisions thereafter.

In certain cases, where the complaint itself is inconsistent with the requirements of Rule 23, courts have entertained motions to strike the class claims, or a "pre-emptive" motion to deny class certification. Rule 23 provides neither party

an exclusive right to move on the issue of certification. See, e.g., *Vinole v. Countrywide Home Loans Inc.,* 571 F.3d 935 (9th Cir. 2009); but see *Martin v. Ford Motor Co* ., 765 F.Supp.2d 673 (E.D.Pa. 2011) (denying motion to strike as premature until plaintiff moves for certification).

• Choice of Law

Complaints seeking to certify a national class in automotive class actions are susceptible to early motions based on conflicts of law. Complaints often include a nationwide class seeking certification under a single state's consumer protection statute. See, e.g., *In re Mercedes Tele-Aid Litigation* , 257 F.R.D. 46 (D.N.J. 2009) (certifying automotive class action under New Jersey Consumer Fraud Act). The recent trend is against this approach, and counsel and courts alike must be prepared to engage in a thorough choice-of-law analysis early in the litigation. See *Mazza v. Am. Honda Motor Co.* , 666 F.3d 581 (9th Cir. 2012) (reversing certification of nationwide automotive class); *In re OnStar Contract Litigation* , 278 F.R.D. 352 (D.Mich. 2011) (denying certification of nationwide automotive class action). This trend is particularly pronounced for claims of allegedly deceptive trade practices, where choice-of-law principals often require application of a purchaser's home-state law, resulting in a lack of legal predominance.

• Standing

Broad class definitions — encompassing every purchaser of a certain vehicle or model year — inevitably capture class members who have experienced no problems with their vehicles or who were not exposed to the allegedly fraudulent advertising. In other words, the definition captures class members with no injury.

Where the named plaintiff lacks such an injury, courts have become more receptive to dismissing such actions on the pleadings. See, e.g., *Nirmul et al. v. BMW of North Am.* , No. 2:10-cv-05586, 2011 WL 5195801 (D.N.J. Oct. 31, 2011) (dismissing class action where named plaintiff's vehicle had not manifested alleged defect). Courts continue to struggle, however, with the issue of absent class member standing. Compare *Avritt v. Reliastar Life Ins. Co* ., 615 F.3d 1023 (8th Cir. 2010) (holding that class definition may not include absent class members who lack standing), with *Stearns v. Ticketmaster Corp* ., 655 F.3d 1013 (9th Cir. 2011) (affirming that standing in a class action is satisfied if at least one named plaintiff satisfies the requirements); see also *In re Toyota Motor Corp. Unintended Acceleration Litigation* , No. 8:10ML02151, 2011 WL 2881378 (C.D.Ca. July 19, 2011) (certifying for immediate review by Ninth Circuit the question of whether plaintiffs whose vehicles did not manifest alleged defect have Article III standing).

Regardless of the conflicting authority, federal courts in automotive class actions at least will consider the extent to which Article III requires a narrower class definition early in the litigation.

Automotive class actions often involve multiple model years and multiple models, and it is often unlikely that all purchasers actually saw the advertisements, that everyone found the information material or that the advertisements and disclosures were even uniform during the entire relevant time. Given that the most significant claim — consumer fraud — often involves elements of materiality, reliance and causation, variations in consumer receptivity (and in the media message itself) can be formidable obstacles to certifying automotive classes, as in *Mazza* and *OnStar* .

In one notable example, the Ninth Circuit — yes, that Ninth Circuit — reversed a district court's certification of a nationwide class of Acura RL purchasers, in part based on a lack of factual predominance. Specifically, the court held that even if the class were limited to a single state (thus overcoming the choice-of-law problem), a class definition that included all purchasers necessarily would include purchasers not exposed to the allegedly false advertising. Although it declined to treat the issue as one of standing, the court nevertheless found that the inclusion of such purchasers prevented certification.

Experts and 'Daubert Light'

Following *Hydrogen Peroxide* , a decision bolstered by *Wal-Mart* , courts increasingly are scrutinizing expert proofs relevant to class certification. In automotive class actions, plaintiffs often proffer engineering experts to establish a "common defect" negatively impacting all class vehicles, consumer behavior experts to overcome the inherent obstacle of individualized reliance and economic experts to provide uniform, aggregate damage theories.

A proper Rule 23 analysis requires the court to exercise its gatekeeping authority to ensure that relevant expert testimony reliably supports class certification and to prevent bad science from serving as a surrogate for an insufficient factual record. A trial court's failure to conduct an appropriate *Daubert* review at the class certification stage can constitute reversible error. See, e.g., *American Honda Motor Co. v. Allen* , 600 F.3d 813, 814 (7th Cir. 2010) (reversing grant of certification in light of inadequate *Daubert* analysis and unreliable expert testimony). A *Daubert* inquiry during the preliminary stages of a class action may further serve to isolate whether the facts on which the expert relies truly are subject to common proofs.

Aggregate Damages

Automobiles are highly complex products. Consumers purchase them for different reasons and each operates them in the particular manner that suits the consumer. As a result, it often is difficult to demonstrate that all class members were impacted similarly by one allegedly unfair trade practice or a single alleged defect. This problem is prevalent in damages analyses and, to overcome it, plaintiffs frequently engage experts to opine that the class has suffered some uniform, aggregate damage. Aggregate damages are often urged as a "shortcut" to the actual adjudication of each consumer's particularized experience.

It is important in such cases to distinguish between two entirely separate concepts: (1) the method for calculating an average amount of damages, and (2) the existence of damage to any given class member in the first place. In other words, the method of calculating an average loss is not the same as establishing that every member of the class actually suffered harm. See, e.g., *Muise v. GPU Inc* ., 851 A.2d 799 (N.J.Super. App. Div. 2004).

In automotive class actions, there is a tendency for plaintiffs to argue that a defect, which may manifest in a relatively small population of vehicles, has impacted all class members. Discovery of absent class members is critical in such cases to determine whether the named class representatives and their expert proofs actually are consistent with the experiences of the class. In an industry where effective warranty administration satisfies the manufacturer's obligations, the mere existence of a defect tells the court nothing about whether any given class member actually suffered any harm. See, e.g., *Thiedemann v. Mercedes-Benz* , 183 N.J. 234, 251 (2005).

The District of New Jersey's denial of class certification in the long-running Ford E-350 class action demonstrates the aggregate damages obstacle. See *In re Ford E-350 Van Products Litig* ., No. 03-4558, 2012 WL 379944 (D.N.J. February 06, 2012). The court denied certification in part because the plaintiffs were unable to proffer common proof of causation or injury. As part of that analysis, the court rejected the plaintiffs' proposal to use the uniform cost of a retrofit to estimate class members' damages because the record demonstrated that the alleged defect did not manifest in every vehicle. In the absence of a common injury susceptible to common proof, the court noted, class treatment is inappropriate.

Conclusion

A motor vehicle is a complex bundle of features. As a matter of common sense, people buy them for many different reasons and use them in markedly different ways. Those unavoidable facts, combined with increased and early scrutiny by courts, can serve to weed out insufficient actions that otherwise would occupy valuable and increasingly scarce judicial resources. Practitioners on both sides must adjust their approach to account for the rapidly changing class action landscape, and in the end, an honest application of Rule 23 will yield the right • result.

Neal Walters *is a partner at Ballard Spahr and practice leader of the firm's products liability and mass torts group. He has successfully defended numerous automotive and other consumer product class actions, including the trial of two such matters, with one resulting in a full defense verdict and the other in decertification. He also regularly counsels clients regarding product literature and other prelitigation concerns.*

Michael Carroll *is an associate and a member of the firm's products liability and consumer class action groups. He has substantial experience in the defense of consumer product class actions, including automotive matters, as well as mass torts involving pharmaceuticals and medical devices.*