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The Continuing Scrutiny of Automotive Class Actions

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Class action jurisprudence has continued to evolve following the game-changing U.S. Supreme Court decisions in *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011), and *Comcast v. Behrend*, 133 S. Ct. 1426 (2013). Automotive class actions are no exception, as major players in the automotive industry frequently are subject to class action litigation.

The ubiquity of automobiles, coupled with the complexity of product design, testing, warnings and the manufacturing process, set the stage for frequent and complex lawsuits. Even defendants with the best of intentions are exposed to litigation about everything from marketing, sales and service programs to minor performance defects and warranty performance issues. Small-dollar, economic loss claims—so-called no-injury class actions—can have a large impact given the broad customer base.

In recent decisions, car and truck buyers and lessees seeking class treatment have complained about everything from car window regulators, to anti-lock brake components, to axles and suspensions. In a number of significant automotive class action decisions over the past year, courts have followed the direction of class action cases generally, which have tended to place new roadblocks to class certification. Choice-of-law issues and a renewed focus on damages have played major roles of late. Clients and practitioners alike should be familiar with the important developments in this area, including some notable exceptions to the general trends.

A 'Rigorous' Adherence to *Dukes* and *Comcast*

In *Dukes*, the Supreme Court reaffirmed the obligation of trial courts to conduct a rigorous analysis of class claims, including an inquiry into the merits when necessary. Two years later, *Comcast* doubled down on *Dukes* and, importantly, it did so on the issue of classwide damages. Specifically, the court reversed the certification of a class of consumers because the plaintiffs' damages model could not be calculated on a classwide basis. Individualized damages, the court said, necessarily would "overwhelm" common questions. The court further implied, in dicta, that a full *Daubert* analysis may be required at the class certification stage. In automotive cases, this renewed focus on individualized causation and damages issues has provided ammunition for longstanding defenses to class certification, but results have been far from uniform. In *Martin*

v. Ford Motor, 292 F.R.D. 252 (E.D. Pa. July 2, 2013), the court noted factual scenarios would have to be considered to decide whether vehicles of different ages, with different mileage and in different conditions were "free from defects." In *Auto Leasing v. Mahindra & Mahindra*, No. 12-2048 (N.D. Ga. Mar. 14, 2014), the court noted it would need to conduct individualized determinations of the plaintiffs' claims. But in *Banks v. Nissan North America*, No. 11-2022 (N.D. Cal. Dec. 19, 2013), the court granted the plaintiffs' motion to certify despite the fact that an alleged defect in the anti-lock brake system manifested itself in different ways.
Following *Comcast*, the role of expert evidence in proving classwide damages is critical, particularly the fit between the expert's theory and the alleged damages. For example, in *Martin*, the plaintiffs alleged damages based on diminished vehicle value caused by an allegedly defective axle design. The court considered and rejected the report of the plaintiffs expert, an economist, who opined that the plaintiffs' damages would be reflected in reduced resale values of the subject minivans, as compared to the resale values of similar vans without defective axles. The court was "not persuaded that this damages model is sufficient for class certification purposes ... [because] the resale price ... is based on a multitude of factors, of which the allegedly defective rear axle is but one." The plaintiffs could not convince the court that there was an acceptable method of calculating damages for the entire class.
By contrast, a judge in the U.S. District Court for the District of New Jersey, in *Neale v. Volvo Cars of North America*, No. 10-04407 (D.N.J. Oct. 16, 2013), rejected the defendant's position that individualized damages calculations would be an impediment to class treatment. There, the plaintiffs alleged that a sunroof drainage system allowed water to become trapped inside vehicles and caused interior damage. In a motion for reconsideration, the defendant argued that the court's certification of six statewide subclasses was improper because the court did not adequately consider damages issues in light of *Comcast*. The court denied reconsideration, noting that the damages were relatively straightforward, unlike the complex antitrust theories in *Comcast*, and, moreover, the plaintiffs did not rely exclusively on their expert report in support of damages.

Choice-of-Law Problems

Differences in state consumer protection laws inherently are in tension with the original policy behind Rule 23, namely, allowing more streamlined treatment of claims by large groups of consumers. Numerous courts over the past year have rejected plaintiffs' requests to certify nationwide automotive class actions. Plaintiffs consistently argue that the law of one state—usually where the defendant has made key decisions about design, warranty service or marketing—can apply to the entire class. Courts commonly reject these arguments because choice-of-law principles commonly prefer the state in which plaintiffs purchased their vehicles, relied on alleged misrepresentations and allegedly suffered damages or where title passed. Moreover, because state consumer protection laws differ meaningfully, attempting to adjudicate a class action applying the laws of each of the 50 states simply is unmanageable.

In *Auto Leasing*, the court held that the plaintiffs could not show that Georgia law would apply to all 340 potential class members. In *Grodzitsky v. American Honda Motor*, No. 12-01142 (C.D. Cal. Feb. 19, 2014), the court held that although the defendant is a California corporation, "each proposed class member's claims should be governed by the consumer protection laws of the jurisdiction in which the transaction took place." In *Neale*, the court rejected a nationwide class but certified six subclasses based on the named representatives' home states. In *Martin*, the court held that the laws of various states were not sufficiently similar for class treatment. In *Cochran v. Volvo Group North America*, No. 11-927 (M.D.N.C. Apr. 22, 2013), the court denied class certification when plaintiffs could not show breach of warranty law was the same throughout the country.

Motions to Dismiss

The class vehicle does not relieve plaintiffs of their basic obligation to adequately plead the facts of their claims. As a result, courts around the country appear to be increasingly receptive to motions to dismiss, before any consideration of certification, based on plaintiffs' failure to adequately plead presale knowledge, defect manifestation and causation. Timeliness also was a problem in some recent cases.

In *Speier-Roche v. Volkswagen Group of America*, No. 14-20107 (S.D. Fla. Apr. 30, 2014), the court granted a motion to dismiss when the plaintiff was charged for brake repair only after expiration of the warranty.

In *Callaghan v. BMW of North America*, No. 13- 4794 (N.D. Cal. Apr. 2, 2014), the court dismissed a complaint when the alleged injury was not "traceable to any actual misstatement or omission by defendants."

In *Mitchell v. General Motors*, No. 13-498 (W.D. Ky. Mar. 31, 2014), the court held that the plaintiff failed to "plead the essential elements of each state consumer fraud statute on which he intends to rely." In *Morris v. BMW of North America*, No. 13-4980 (D.N.J. Feb. 26, 2014), the court granted a motion to dismiss in part when the plaintiff "failed to allege the type of aggravating circumstances required to state a claim under" New Jersey's consumer fraud statute.

But in *Jekowsky v. BMW of North America*, No. 13-02158 (N.D. Cal. Dec. 13, 2013), the court denied a motion to dismiss even though the plaintiff did not discover the alleged defect of cracking in his tires until after the applicable warranty period was over. This did "not necessarily mean that plaintiff cannot prove the existence of a defect within the one-year duration period," the court held. In *Morano v. BMW of North America*, 928 F. Supp. 2d 826 (D.N.J. 2013), the court denied a motion to dismiss when the plaintiff met a heightened pleading standard for fraud allegations.

Increased Scrutiny

From *Twombly* to *Comcast*, the past several years have seen an increased scrutiny of class actions, and automotive class actions are no exception. While the complexity of design, marketing and service

responsibilities associated with bringing a fleet of motor vehicles to market remains an attractive target for class action plaintiffs, automotive defendants have benefited from this increased scrutiny. As recent decisions reflect, opportunities exist at all stages of automotive class action cases to examine the suitability of class treatment. The inquiry starts at the pleading stage, and could proceed through conventional class certification proceedings including expert challenges, and even through trial. It is apparent from this active area of litigation that automotive cases will continue to contribute substantially to class action jurisprudence.

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