



Trends in auto-class action suits

From charges of deceptive consumer practices to false advertising, safety issues to unfair competition, high-profile automotive class-actions are making global headlines. When it comes to potential defenses and approaches to economic product defect litigation, most cases do not center around personal injury; rather they allege diminution in value or fraudulent concealment.

In addition to federal laws, states have their own unfair competition laws to prohibit false and misleading advertising. In California, for example, the Consumer Legal Remedies Act (CLRA) contains provisions to outlaw unethical business practices and make it economical for consumers to pursue legal redress for violations of the Act. Additionally, the Unfair Competition Law (UCL) protects consumers from unlawful, fraudulent or unfair business practices.

These are some of the big trends in the auto class-action landscape:

Trend: challenging countermeasures

There is a new trend of challenging the efficacy of countermeasures—plaintiffs are seeking discovery from suppliers to gather information about the relevant vehicle components. Even when a company has proactively found an issue and addressed it through a warranty, plaintiffs may challenge those actions. Plaintiffs may work around a statute of limitations by pleading the problem is a safety issue—in which case it is difficult to get a judge to dismiss a case when a credible safety issue has been alleged.

Takata MDL and VW defeat device cases have resulted in plaintiffs aggressively looking for the “next big thing,” seeking discovery from suppliers especially

if they are seeing personal injury claims arising from a specific component or part. They are looking for bad conduct. If they have that, they can bring a whole host of other claims.

In addition to sharing information regarding safety issues on their website, The National Highway Traffic Safety Administration (NHTSA) allows consumers to register complaints about vehicles. Plaintiffs may allege that if there are a lot of NHTSA complaints about a vehicle, it is a widespread problem. They may view it that although a company thinks they have addressed an issue, people are still complaining on NHTSA website.

Keep in mind, most OEMs consider their suppliers to be partners. Unless the lawsuit alleges a serious product liability issue (causing death or injury), they typically work in concert with the supplier and don't make a demand for indemnity if it's an alleged false advertising claim or economic product defect claim.

Trend: a metamorphosis of RICO

As plaintiffs allege, since the automotive industry is so intertwined between suppliers and OEMs, there are inherent possibilities for distinctness under the Racketeer Influenced and Corrupt Organization (RICO) act.

***Section 1962(c)** makes it “unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity.” 18 U.S.C. § 1962(c).*

Trend: international reach

Litigation is morphing from a self-contained one nation dispute into a more global setting due to how products are distributed around the world. For example, in the Volkswagen “Deiselgate” case, affected Volkswagens were globally distributed, sparking interest in international class actions in several countries. Germany recently passed a law allowing consumer organizations to sue on behalf of consumers. There is also a consumer protection organization undertaking pioneering work to provide German consumers with the same kind of results that U.S. consumers have been able to achieve in the court systems.

This expansion into international markets means that companies need to train colleagues overseas in how to deal with these issues. Many international court systems are not governed by common law principles,

they are governed by civil law, so class actions are uncharted territory.

Trend: regulatory action or scrutiny drives lawsuits

When an OEM or distributor faces regulatory action or scrutiny, such as when a NHTSA investigation becomes public or when they are doing a big recall because of an issue that implicates safety, it will draw scrutiny of plaintiffs' lawyers. Some plaintiff lawyers are now more proactively investigating.

Trend: AGs are becoming more proactive

Apart from a federal investigation, more and more state's Attorneys General are investigating on behalf of their citizens, and increasingly focused on recovering Medicaid costs from perceived wrong doers, including automotive suppliers and distributors. It is very important for defense counsel to be aware of these issues and know how to deal with them.

Trend: class members + governments = results

With the interplay of private litigation and government redress, there are lots of competing interests and complexities at play. It is very important to have a mediator or a neutral appointed to the case who can peel back the layers to understand who has jurisdiction to assert what claims on the plaintiffs' side, what are the interests on the defense side, and what kind of indemnification agreements lie beneath the surface. In the case against Volkswagen over its excess diesel emissions, Robert Mueller was named “settlement master” to facilitate settlement discussions about complex matters among the involved parties.

Different kinds of plaintiffs can assert different causes of action. In the VW case for example, the EPA first issued a Notice of Violation. Under the settlements, the EPA and CARB (California Air Resources

Class Action & Mass Tort

Board) required VW to pay 225 million to support environmental programs throughout the country. This case likely would not have resolved without environmental remediation.

Plaintiffs are often motivated, in part, by making sure their vehicle choice is helping to create a cleaner environment. More and more consumers are taking action on their own when they suspect something is wrong with their vehicle—using labs or resources of their own to determine what's going on under the hood. Plaintiff's lawyers may also fund these tests.

Trend: meet people where they are—online

Lawyers must draft notices in a way that people will read them, understand the information, know their options, and advance through the process. You must capture people's attention and make sure they will participate. It is important to use modern tools to reach people where they are—online. Social media

outreach and ads are often used, as well as websites for consumers to learn in real-time if their car was affected and start the registration process. If you don't have a robust notice process, it can undermine your settlement in getting the relief bargained for, and draw the attention of objectors.

Trend: cooperation between plaintiffs' bar and defense

If the dollars are extremely high and the OEM believes it has valid defenses—you may have to litigate before settling. There are lots of issues to keep in mind while structuring a settlement and you want to make sure it can withstand scrutiny. When the defense and plaintiff's bar work cooperatively, they can hone in on the issues and try to address them quickly. It's better to try to come up with a settlement that's focused on consumers and helps companies restore good faith with customers, rather than having long, costly legal battles.