

# Morgan Lewis Automotive Hour Webinar Series

Series of automotive industry focused webinars led by members of the Morgan Lewis global automotive team. The 8-part 2023 program is designed to provide a comprehensive overview on a variety of topics related to clients in the automotive industry.

- **JANUARY 18** | Warranty Claims and Trends in the Automotive Industry
- **FEBRUARY 22** | Key Issues Facing the EV Industry in 2023
- **MARCH 29** | Recent Trends and Developments in Automotive Class Actions
- **APRIL 19** | 2023 Congress: Potential Impact on EVs
- **JUNE 21** | Advancements in Autonomous Vehicles
- **JULY 19** | Latest Developments in Automotive Finance and Consumer Protection
- **SEPTEMBER 20** | Human Rights and Supply Chain Issues: Impacts on the Automotive Industry
- **NOVEMBER 15** | IP Considerations for EVs and Beyond

[REGISTER NOW](#) for upcoming webinars!





Morgan Lewis

# WARRANTY CLAIMS AND TRENDS IN THE AUTOMOTIVE INDUSTRY

January 18, 2023

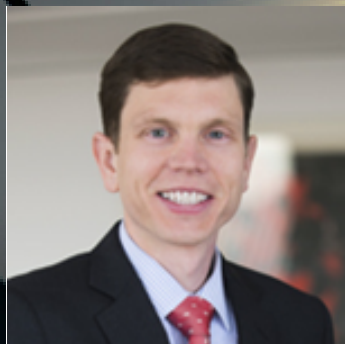
Franco A. Corrado

Nathaniel P. Bruhn

# Presenters



**Franco A. Corrado**  
Partner, Philadelphia



**Nathaniel P. Bruhn**  
Partner, Boston

**Morgan Lewis**

# Agenda

Warranty  
basics

Defending  
warranty claims  
in class actions

Right to  
Repair/FTC  
considerations



# Types of Warranties

# Types of Warranties

**EXPRESS WARRANTY**  
(created by sellers' words/conduct)

- **Three types**
    - **Affirmation or promise**
    - **Description of goods**
    - **Sample or model**
- Must form basis of bargain*

**IMPLIED WARRANTY**  
(arise by operation of law)

**Merchantability: Fit for ordinary use**

**Fitness for Particular Purpose: Fit for particularized use**

# Sources of Law

# Sources of Law

## Uniform Commercial Code

- Each state has its own version and interpretation
  - Express Warranty § 2-313
  - IW Merchantability § 2-314
  - IW Fitness for Particular Purpose § 2-314

## Magnuson Moss Warranty Act

- Federal cause of action
- Requires underlying breach of express or implied warranty

## Case law

- State and federal law



# Express Warranty Claims in Class Actions Against Automakers

Auto defect class actions (in federal and state court) often include express warranty claims



May be filed against manufacturer – and others in distribution chain – including dealerships, distributors, etc.



Trends in express warranty law and attacks at each stage of a matter

# Must Identify Warranty Terms and Breach

- **Plaintiff must plead specifics about what was warranted and/or attach a copy of the warranty to complaint**
  - Courts have found conclusory allegations insufficient
    - *Kochlani v. General Motors* (C.D. Cal. 2021) – allegations that “plead the legal effect of the contract rather than its precise language” was insufficient to assert a breach of warranty claim
    - *Cadena v. Am. Honda Motor Co.* (C.D. Cal. 2018) – The plaintiff must allege the “exact terms of the warranty.”
    - *Brown v. Takeuchi Mfg. Co.* (E.D. Cal. 2021) (non-vehicle case) – allegations that defendants warranted in marketing materials that “TB230 was safe, efficacious, and fit for its intended purpose and was of marketable quality, that it did not pose any unwarned-of dangerous risks, and that it was adequately tested” did not sufficiently plead warranty terms

**Practice pointer – even if plaintiff does not attach the warranty, the Court may consider it under incorporation by reference doctrine, allowing defendants to rely on warranty’s precise language at the motion to dismiss phase**

# Scope of Warranty

Morgan Lewis

# Scope of Warranty – Warranty Limitations

- Defects Manifested outside time/performance limits
  - *Clemens v. DaimlerChrysler Corp.* (9th Cir. 2008)
    - The general rule is that an express warranty does not cover repairs/attempted repairs made after the applicable time or mileage periods have elapsed.
    - Claim for breach of express warranty generally fails if the defect in question manifested after the expiration of the express warranty.”
    - But plaintiffs often allege “unconscionability” and known “latent defect” to plead around limitations

# Scope of Warranty – Warranty Limitations

Unconscionability  
(gross disparity  
in bargaining  
power + unfair  
terms)

- *Williams v. Tesla, Inc.* (N.D. Cal. 2021) (CA law) - even assuming bargaining power disparity, routine time-and-miles limit not overly one-sided
- *Ambrose v. Gen. Motors LLC* (E.D. Mich. 2022) (MI law) - bargaining power disparity analysis is focused on plaintiffs' options – not mere knowledge of defect; automotive industry is competitive
- *Rothschild v. Gen. Motors LLC* (E.D.N.Y. 2020) (NY law) – “knowledge of a latent defect does not render unconscionable a limitation contained in an express warranty”
- *Smith v. Ford Motor Co.* (9th Cir. 2011) - bargaining power disparity analysis is focused on plaintiffs' options – not mere knowledge of defect; automotive industry is competitive
- *Chiarelli v. Nissan N. Am., Inc.* (E.D.N.Y. 2015) (NY law) – “knowledge of a latent defect does not render unconscionable a limitation contained in an express warranty”

# Scope of Warranty – Design Defects Not Covered

- **Warranties extending to defects “in materials or workmanship” generally found to cover only manufacturing defect, not defective design**
- “A design defect is one that will be reflected across all products in the same line. . . a manufacturing defect is one where the process of manufacturing created a flaw inconsistent with the original design.”
- *Express warranty did not cover claimed defect*
  - *Diaz v. FCA US LLC (D. Del. 2022)* – claims that rear differential defect which could cause, noise/vibration, total power loss, and explosion was common to all vehicles
  - *Coba v. Ford Motor Co. (3d Cir. 2019)* – fuel tank defect causing delamination and requiring frequent replacements was a design defect claim because “common problem” across all vehicles and based on flawed design – not problems during manufacturing process
  - *Fitzpatrick v. Ford Motor Co. (C.D. Cal. 2022)* – allegations of defective electric equipment, brakes, cooling system, engine, and transmission parts did not state claim for breach materials and workmanship warranty

# Scope of Warranty – Design Defects Not Covered

***BUT ...*** courts may find the question requires discovery:

- *Hickman v. Subaru* (D.N.J. 2022) – claim that transmission defect caused acceleration issues, stalling, power loss and noises – court declined to decide that it was solely design defect
- *Hadjian v. Mercedes-Benz, USA, LLC* (N.D. Ga. 2022) – claim defect in front bumper and air inlet that permitted rocks/debris to enter and interfere with AC system
- *Browning v. Am. Honda Co.* (N.D. Cal. 2022) – finding that for pleadings purposes, software defect was a manufacturing defect because defect could have arisen due to calibration process
- *Milisits v. FCA US LLC* (E.D. Mich. 2021) – plaintiff pled facts consistent with theory that transmission defect (which caused stalling and acceleration issues) could be due to either poor design **or** to poor materials and workmanship

# Presentment

- Contractual warranty obligation to bring the vehicle to manufacturer for repair.
- **Defendants have defeated claims where plaintiffs failed to comply with warranty terms and present vehicle for repair**
  - *Cunningham v. Ford Motor Co.* (E.D. Mich. 2022) – express warranty claims dismissed because no allegations that plaintiff complied with the express warranty's requirement to take their vehicle to dealership for repair within the warranty period
  - *In re ZF-TRW Airbag Control Units Prod. Liab. Litig.* (MDL) (C.D. Cal. 2022) – express warranty claim alleging defective airbags that failed to deploy due to electrical defect was dismissed as to plaintiffs who failed to present their vehicle for repair and lacked specific allegations of futility
  - *Moyer v. Forest River, Inc* (N.D. Ga. 2021) – summary judgment in favor of defendant where RV owner refused to return motorhome to manufacturer for repair attempt as required by warranty
  - *Tershakovec v. Ford Motor Co* (S.D. Fla. 2021) – summary judgment on express warranty who did not present their vehicles for repair as required by warranty



# Other Issues: Failure of Essential Purpose or Futility

- **If seller is either unwilling or unable to repair the vehicle, a court may find that the limited vehicle warranty failed its essential purpose and a breach.**
  - Must have fact-specific allegations that any repair attempts would have been futile
  - Courts in many states – including California – require specific allegations of multiple failed attempts to repair vehicles
  - Cannot rely on the purported experiences of other vehicle owners
- Examples
  - *In re Chevy Bolt EV Battery Litig.* (E.D. Mich 2022) (MI law) – manufacturer acknowledged that it is unable to fix the vehicles, software updates were temporary remedies, and issued notices to customers stating that parts to repair vehicle were unavailable
  - *Chijioke-Uche v. Gen. Motors* (E.D. Pa. 2022) – multiple months-long delay in supplying the remedy may be sufficient to show that the remedy failed its essential purpose
  - *In re Subaru Battery Drain Prod. Liab. Litig.* (D.N.J. 2021) – dealer refused to repair/replace allegedly defective part
  - *White v. Gen. Motors* (CO Law) – when goods have latent defects which are not discoverable upon receipt and reasonable inspection
  - *Benkle v. Ford Motor Co.* (C.D. Cal. 2017) (FL, CA, GA law) – plausible allegation that a design defect common to all vehicles and that a repair would have been temporary and inadequate were sufficient
  - *Al's Auto Inc. v. Hollander, Inc.* (E.D. Pa. 2020) – delay in supplying the remedy can just as effectively deny the purchaser the product he expected as can the total inability to repair
  - *Fiberglass Component Prod., Inc. v. Reichhold Chemicals, Inc.* (D. Colo. 1997) (CO Law) – when goods have latent defects which are not discoverable upon receipt and reasonable inspection

# Notice of Breach as Condition Precedent to Suit

- **Notice of Breach** = Section 2-607(3) of the Uniform Commercial Code requires that a plaintiff, “within a reasonable time after he discovers or should have discovered any breach[,] **notify the seller of breach or be barred from any remedy.**”
- State specific question:
  - Failure to do so may be grounds for dismissal in certain states:
    - *Perez v. Toyota Motor Sales, U.S.A., Inc.* (C.D. Cal. 2022) (FL law) – dismissing express warranty claim because plaintiff failed to provide pre-suit notice of alleged HVAC defect issue which was required under warranty terms
    - *Powell v. Subaru of Am., Inc.*, (D.N.J. 2020) (applying MI, IN, and IL law) – dismissing express and implied warranty claims relating to dangerous windshield defect for failure to provide sufficient notice to manufacturers
- Other courts find lawsuit is sufficient notice
  - *Stockinger v. Toyota Motor Sales USA Inc.* (C.D. Cal. 2017) (WA law) – denying motion to dismiss express warranty claim alleging HVAC defect because lawsuit was sufficient notice under WA law
  - *In re FCA US LLC Monostable Elec. Gearshift Litig.* (E.D. Mich 2020) – courts have construed section 2–607 to permit the required “notice” to be given by the filing of a civil complaint

# Statute of Limitations

- **Failure to file suit within period prescribed by law may bar express warranty**
  - The statute of limitations is governed by state-specific UCC codes and common law
  - Accrual – generally accrues at date of sale, but may be tolled by:
    - Discovery rule (latent defect which plaintiff could not have reasonably discovered):
      - *Bettles v. Toyota Motor Sales* (C.D. Cal. 2022) – dismissing warranty claim which accrued on date of sale and was not entitled to discovery rule because should have known injury when alleged HVAC defect began manifesting and causing foul odors in 2017
    - Fraudulent concealment doctrine (misrepresentations from dealer/repairperson)

# Other Issues: Technical Service Bulletins (TSBs)

TSBs can invite additional actions by consumers:

- Can be argued to constitute proof of pre-sale knowledge of defect
- If improperly worded, can arguable extend a warranty

*Wiseberg v. Toyota Motor Corp.*, (D.N.J. 2012)

- Plaintiff failed to adequately allege that defendant knew with certainty that sliding door would fail based on TSB

*Mercado v. Audi of Am., LLC*, (C.D. Cal. 2019)

- Court held that TSB did not extend express limited warranty, among other reasons, because language in TSB stating that “[i]f vehicle is outside any warranty, this Technical Service Bulletin is informational only” or that “this TSB is informational only”

*Kuns v. Ford Motor Co.*, (N.D. Ohio 2013)

- Court held that even if the TSB acted as “silent recall” that expanded new vehicle warranty’s coverage or created new warranty, buyer was not relieved of her obligation to present car to dealer before claiming breach of warranty

# Key Factual Discovery and Expert Discovery

# Factual and Expert Witness Strategy For MSJ

- Propound discovery directed to each named plaintiff to inform potential factual attack
- Investigate plaintiffs' driving habits and whether maintenance schedule was observed
- Engage in third-party discovery of others who had driven the vehicle
- Develop factual story regarding alleged issue, including, without limitation, data demonstrating that reported cases are rare and that consumers who presented with issue provided remedy/repair
- Utilize automotive engineering expert(s) with component specific experience
- Identify pre-production testing expert or manufacturing expert with industry experience
- Organize detailed vehicle inspection with expert team prior to deposing plaintiff
- Have expert run tests of exemplar vehicles of same make and model
- Consider motion for summary judgment directed to named plaintiff's claims to achieve dismissal and/or contextualize class certification opposition

# **Class Certification Considerations**

**Morgan Lewis**

# Class Certification Considerations

- Use internal and third-party vehicle quality data/surveys (e.g. Maritz, JD Power) to demonstrate diversity of product performance and/or low failure rates
- Some jurisdictions require plaintiffs submit proof that the alleged defect was substantially certain to manifest within the warranty period to certify a class
  - *Torres v. Nissan N. Am. Inc.*, (C.D. Cal. 2015) (declining to certify a class of Nissan owners who complained of transmission defect because there were only 200 out of thousands of consumers who have complained about the vehicle's performance and thus the issue of whether a defect is substantially certain to occur predominate over common questions)
- Identify unique defenses to particular plaintiffs
  - Basis of the bargain; warranty limitations; consumer compliance; sophistication and lack of reliance; enforceable arbitration agreement
- Conduct consumer survey to quantify whether warranty affects consumer decision (i.e. did warranty form the basis of the bargain)
- Focus on damages, conjoint damages model expert, cost of repair experts



# Class Certification Considerations

- Establish lack of commonality/predominance for proposed class and individualized issues
  - Design differences – relevant changes between Model years and Makes
    - *Stockinger v. Toyota Motor Sales* (C.D. Cal. 2019)– refusing to certify a class of 80+ make/model years involving HVAC defect because expert testimony identified meaningful differences amongst vehicles’ design that could affect manifestation of alleged defect and driver experience
  - Changes to warranty language (scope or arbitration provisions) across time or states
    - *Neale v. Volvo Cars of N. Am., LLC*, (D.N.J. 2021) – denying certification of express warranty claims relating to sunroof drainage system due to lack of common warranty language across class
  - Differences in consumers notice and presentment
    - *Sanchez-Knutson v. Ford Motor Co.*, (S.D. Fla. 2016) (decertifying express warranty class of Ford Explorer purchasers who complained of exhaust defect because “issues of whether each individual class member gave Ford proper notice and the opportunity to cure necessitate the type of individualized proof that defeats the predominance requirement for class certification”)
  - Different advertisements or representations across different dealers
  - Performance differences; differences in consumer experiences

# Class Certification Considerations

Point to differences in state law to negate nationwide class and underscore predominance of individualized issues

*Mazza v. Am. Honda Motor Co.*, (9th Cir. 2012) - Under CA choice of law principles, law of the state where vehicle was purchased governs.

*Tsonev v. Kia Motors Am., Inc.*, (C.D. Cal. 2016) - "several material differences between states with regard to express warranty causes of action, specifically with regard to how states analyze privity, reliance, and notice"

# Right to Repair

Morgan Lewis

# Right to Repair

- Ability to have repairs performed, without penalty, by yourself or at independent service centers.
- Increased focus in recent years:



FTC's  
efforts



"Right to  
Repair"  
laws



Antitrust  
actions

# Right to Repair – FTC’s Increased Focus

## “Nixing the Fix”

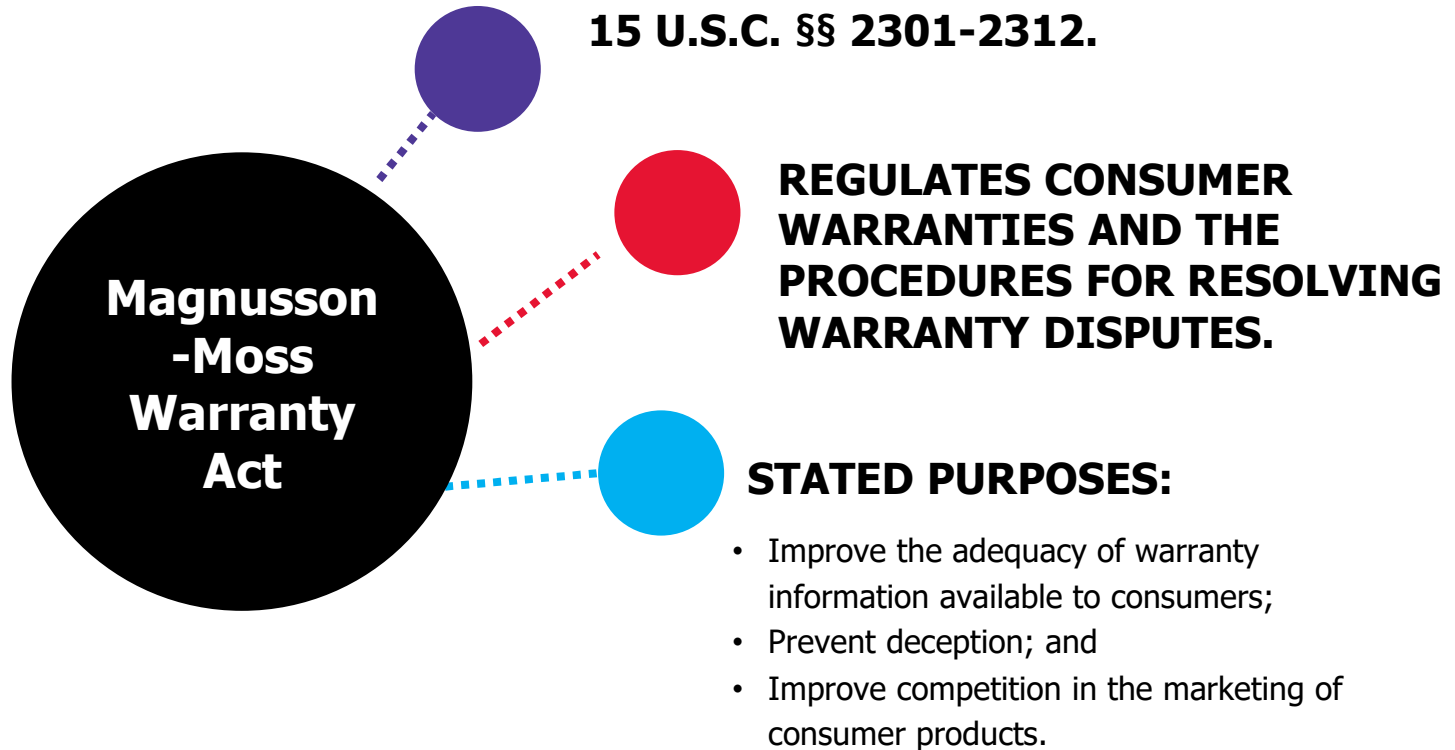
- May 2021 FTC Report to Congress on Repair Restrictions.
- Response to Congressional directive to report on “anticompetitive practices related to repair markets.”
- “Congressional interest in the competition and consumer protection aspects of repair restrictions is timely. Many consumer products have become harder to fix and maintain. Repairs today often require specialized tools, difficult-to-obtain parts, and access to proprietary diagnostic software. Consumers whose products break then have limited choices”

# Right to Repair – FTC’s Increased Focus

## FTC Policy Statement

- “While unlawful repair restrictions have generally not been an enforcement priority for the Commission for a number of years, **the Commission has determined that it will devote more enforcement resources to combat these practices.**”
- “Accordingly, **the Commission will now prioritize investigations into unlawful repair restrictions under relevant statutes** such as the Magnuson-Moss Warranty Act and Section 5 of the Federal Trade Commission Act.”

# Right to Repair - FTC's Increased Focus



# Right to Repair - FTC's Increased Focus

## Magnusson-Moss Anti-Tying Provision

- Warrantor cannot condition a warranty on a consumer's using any article or service which is identified by brand, trade, or corporate name *unless*:
  - the part or service is provided free of charge; or
  - the warrantor has received a waiver from the FTC.
- FTC can seek an injunction for violations of the anti-tying provision, but not civil penalties.
- Once a violation has been found, the warrantor can be liable for upwards of \$50,000 per further violation.



# Right to Repair - FTC Enforcement Actions

## FTC Enforcement Actions

- Only one case alleging Magnuson-Moss violation prior to 2019.
- Multiple warning letters issued and actions commenced since.
- “The FTC’s concern is that violations of the tying prohibition inflict an injurious double whammy. Companies that illegally restrict consumers’ right to choose how and where to get items repaired may force people to use potentially pricier options. And by conditioning consumers’ warranties on the use of authorized service providers and branded parts, companies infringe on the right of independent repairers and manufacturers to compete on a level playing field.” – July 7, 2022 FTC Statement

# Right to Repair - FTC Enforcement Actions

## FTC Enforcement Actions

- Claims asserted for violations of Magnuson-Moss and Section 5 of FTC Act.
- 2022 – FTC approved final consent orders in three right to repair cases.
  - “Orders require companies to fix warranties and come clean with consumers about their right to use third-party repair services and aftermarket parts.”
  - Harley-Davidson Motor Company Group
  - Weber-Stephen Products
  - MWE Investments (manufacturer of Westinghouse outdoor power equipment)

# Right to Repair - FTC Enforcement Actions

## FTC Enforcement Actions – Harley-Davidson

- “Insist that your authorized Harley-Davidson dealer uses only genuine Harley-Davidson replacement parts and accessories to keep your Harley-Davidson motorcycle and its limited warranty intact.”
- “Use of aftermarket performance parts may void all or parts of your limited warranty. See an authorized Harley-Davidson dealer for details”
- “[T]he use of parts and service procedures other than Harley-Davidson approved parts and service procedures may void the limited warranty.”

# Right to Repair - FTC Enforcement Actions

## FTC Enforcement Actions – Harley- Davidson



```
graph TD; A[FTC Enforcement Actions – Harley-Davidson] --- B[Count I – violation of Magnuson-Moss anti-tying provision.]; A --- C[Count II – deceptive conduct in violation of FTC Act.]; A --- D[Count III – failure to describe all warranty terms in a single document in violation of the disclosure rule.]
```

Count I – violation of Magnuson-Moss anti-tying provision.

Count II – deceptive conduct in violation of FTC Act.

Count III – failure to describe all warranty terms in a single document in violation of the disclosure rule.

# Right to Repair - FTC Enforcement Actions

## FTC Enforcement Actions – Harley-Davidson

- Consent Order:
  - Prohibits conditioning warranty to use of brand name parts or service;
  - Prohibits violations of Magnuson-Moss;
  - Include in warranty statements: “Except as described in \_\_\_\_\_, taking your product to be serviced by a repair shop that is not an authorized Harley-Davidson dealer will not void this warranty, and using third-party parts alone will not void this warranty.”
  - Notice to consumers.
- Consent Order lasts for 20 years.
- Violations of Consent Order can result in penalties of up to \$50,000 per violation.

# Right to Repair – State Laws

**Create private  
rights of action.**

**Over half of  
states have  
introduced  
“right to repair”  
legislation.**


**Laws vary  
across states.**

# Right to Repair – State Laws

## Massachusetts Right to Repair Law

- First passed by referendum in 2012.
  - Required automakers to share diagnostic and repair information.
  - Compromise reached before law took effect.
- Expanded law passed by referendum in 2020.
  - Requires automakers to share telematics data with independent repair shops.
- Law held up by lawsuit by Alliance for Legal Innovation.
  - Cybersecurity risks.
  - Inability to keep vehicle data and systems safe.
- Requirements met by turning off telematics?

# Right to Repair – Antitrust Actions



Private lawsuits alleging violations of antitrust laws.

Claims rooted in inability of individuals or independent repair shops to repair vehicles.



# Key Takeaways

- Understand the applicable law – state law governs express warranty claims and they differ from state to state.

- Make clear in warranties that design defects are not covered.
- Carefully craft TSB language to avoid expanding warranty.

- Review new vehicle warranty language. Ensure that it includes clear notice and presentment requirements.

- Review your warranties for compliance with Magnuson-Moss.
- Avoid explicit or implicit tie-ins.

- Stay up to date on state “right to repair” laws.

# Biography



**Franco A. Corrado**

Philadelphia

+1.215.963.5843

franco.corrado@morganlewis.com

Franco A. Corrado represents clients facing a broad range of lawsuits, with a particular focus on complex business disputes and class action defense. His clients span across multiple industries, including the technology, retail, food and beverage, manufacturing, pharmaceutical, and insurance sectors. Franco defends clients against consumer class actions related to deceptive trade practices, false advertising, product liability, and warranty claims in state and federal courts across the United States.

# Biography



## **Nathaniel P. Bruhn**

Boston

+1.617.951.8651

nathaniel.bruhn@morganlewis.com

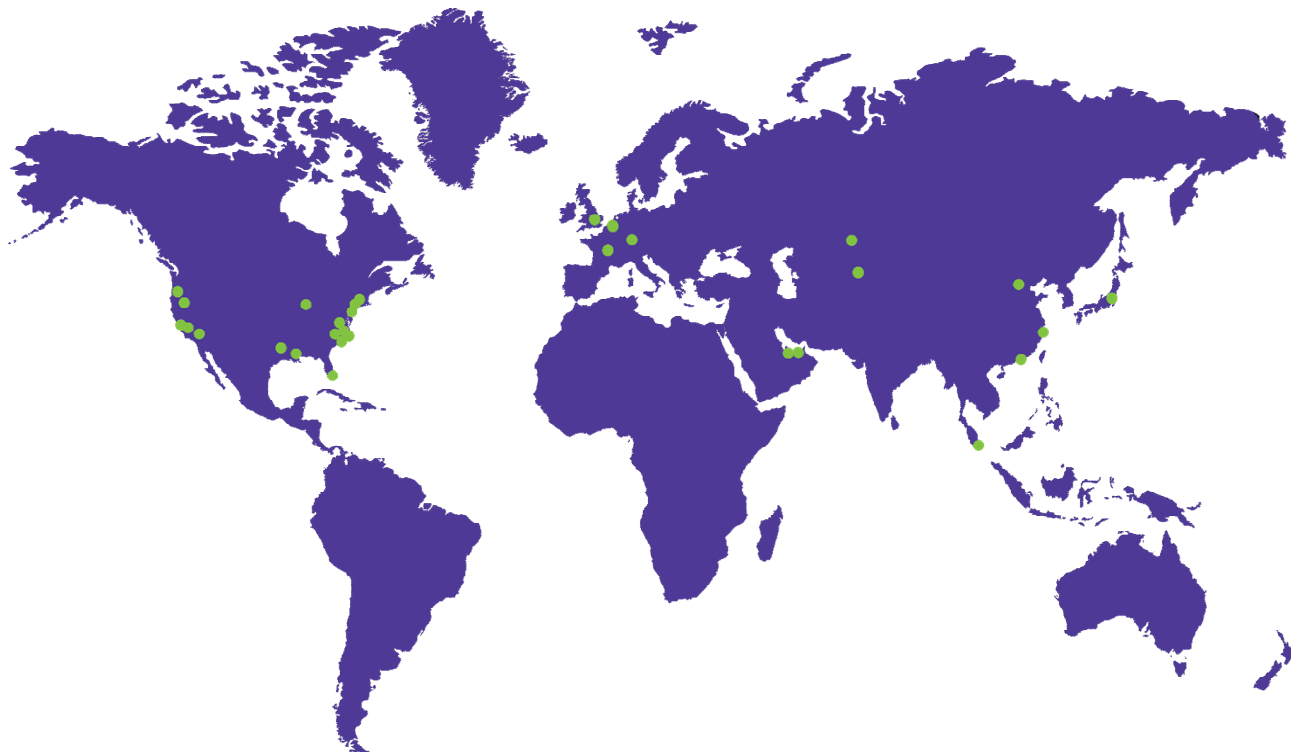
An accomplished litigator, Nathaniel P. Bruhn handles complex commercial litigation and bankruptcy, with a specific focus on fraudulent transfer cases. Nathaniel counsels clients in all phases of litigation, and has successfully litigated high-stakes matters in jurisdictions across the United States. He also counsels auto industry clients on compliance and regulatory matters.

## Our Global Reach

Africa  
Asia Pacific  
Europe  
Latin America  
Middle East  
North America

## Our Locations

Abu Dhabi  
Almaty  
Beijing\*  
Boston  
Brussels  
Century City  
Chicago  
Dallas  
Dubai  
Frankfurt  
Hartford  
Hong Kong\*  
Houston  
London  
Los Angeles  
Miami  
New York  
Nur-Sultan  
Orange County  
Paris  
Philadelphia  
Pittsburgh  
Princeton  
San Francisco  
Shanghai\*  
Silicon Valley  
Singapore\*  
Tokyo  
Washington, DC  
Wilmington



# THANK YOU

© 2022 Morgan, Lewis & Bockius LLP  
© 2022 Morgan Lewis Stamford LLC  
© 2022 Morgan, Lewis & Bockius UK LLP

Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship. Prior results do not guarantee similar outcomes. Attorney Advertising.