Morgan Lewis

CLASS ACTION LITIGATION

FROM THE AUTOMOTIVE PERSPECTIVE

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SECTION 01

INTRODUCTIONS

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SECTION 02

RECENT DEVELOPMENTS IN PRODUCT DEFECT LITIGATION

Article III Standing in Vehicle-Hacking Class Actions

- Federal courts have long reached inconsistent results in deciding whether a plaintiff who has not been injured has Article III standing to sue over an alleged product defect.
- Recent class-action decisions are split on whether plaintiff can sue over vehicle's alleged vulnerability to hacking where no damage has been suffered.
  - *Cahen v. Toyota Motor Corp.,* 717 F. Appx. 720 (9th Cir. 2017). Affirmed dismissal of class action alleging vulnerability to hacking, based on lack of Article III standing. Plaintiffs had not demonstrated that their vehicles or anyone else's had actually been hacked.
  - *Flynn v. FCA US LLC.*, No. 3:15-cv-00855 (S.D. Ill. 2018). Denied motion to dismiss for lack of standing. "Despite defendants' characterization that the defect alleged by plaintiffs requires that they be hacked before bringing suit, plaintiffs provide evidence that suggests that the Uconnect integration in their vehicles is flawed such that the defect exists regardless of whether they, personally, have had their vehicles hacked." Seventh Circuit denied immediate appeal; petition for certiorari in U.S. Supreme Court is pending.

Personal jurisdiction

- In several cases, plaintiffs' counsel have argued that defendant submitted to general personal jurisdiction by complying with statutes requiring it to register to do business in the state or appoint an agent for service of process.
- General jurisdiction would authorize court to hear claims unrelated to in-state conduct, paving way for multistate class actions.
- Though some courts previously accepted this argument, trend for courts to rethink it in light of *Daimler's* limits on general jurisdiction. Courts interpret the statute not to authorize personal jurisdiction, avoiding question whether such statute would be constitutional.
  - *Wait v. All Acquisition Corp.,* 901 F.3d 1307 (11th Cir. 2018) (appointing agent for service of process did not consent to general personal jurisdiction under Florida law)
  - *State ex rel. Norfolk Southern Ry. Co.*, 512 S.W.3d 41 (Mo. 2017) (registering and appointing agent as required by statute did not consent to general jurisdiction) (overruling contrary precedent).
  - *Segregated Account of Ambac Assurance Corporation v. Countrywide Home Loans, Inc.,* 898 N.W.2d 70 Wis. 2017) (appointing agent for service of process did not consent to jurisdiction)
  - *Aspen American Insurance Company v. Interstate Warehousing, Inc.,* 90 N.E.3d 440 (Ill. 2017) (similar)
  - *Genuine Parts Co. v. Cepec,* 137 A.3d 123 (Del. 2016) (similar) (overruling contrary precedent).

CAFA removal of product defect class actions

- With some exceptions, Class Action Fairness Act authorizes federal district court jurisdiction – and thus removal to federal court – over a class action with over $5 million in controversy, exclusive of interest and costs. 28 U.S.C. § 1332(d).
- *Faltermeier v. FCA US LLC,* 899 F.3d 617 (8th Cir. 2018).
  - Class action alleging product defect
  - Repair cost of $320 per vehicle; 8,127 vehicles in class. Total repair cost of $3,605,010. Not enough under CAFA by itself.
  - Also attorney fees likely to exceed $1.4 million.
  - Total exceeded $5 million
  - Affirms denial of motion to remand to state court.

Use of TSBs to Show Defendant Knew of "Defect"

- Plaintiffs in "economic loss" class actions often allege that defendant knew about the alleged defect but did not disclose it, and that buyers would have paid less had it been disclosed.
- Plaintiffs are using technical service bulletins ("TSBs") to show defendant knew the vehicle had a problem but did not disclose it before purchase.
  - TSBs describe recommended procedures for repairing vehicles. *E.g.,* how to repair new issue discovered after model enters service, or new specification for repair.
  - Nearly every manufacturer issues them and they're common. Single vehicle may be covered by numerous TSBs. Not a recall.
  - Trend of plaintiffs using TSBs to show model was defective, or that defendant knew of an alleged defect, but did not disclose it to plaintiff before purchase.
- E.g. *Kommer v. Ford Motor Co.*, No. 2018 WL 3727353 (N.D.N.Y. 2018): "The existence of the 2015 TSB creates a plausible inference that Ford, the TSB's author, knew of the defects in Kommer's F-150 when Kommer purchased the truck. This is all that [FRCP] 8 requires."
- Concerning trend. TSBs are publicly available from NHTSA's website. California, and possibly other states, require dealers to notify potential buyers that TSBs exist and how to obtain them. Are also published by third parties. Issuance of TSBs does not indicate a defect.

Admissibility of Competitors' Designs

- Can a defendant in a strict-liability design-defect action prove peer vehicles' designs to help show the vehicle is not defective?
  - Most states and Restatement say yes
  - Some states suggest no or place limits
- *Kim v. Toyota Motor Corporation,* 6 Cal.5th 21 (2018) holds that other manufacturers' design choices can be admissible when relevant to (i) whether design caused plaintiff's injury or (ii) any of the factors that jury is to consider in deciding whether defective. Overrules contrary California cases.
- *Kim* was individual product liability action for personal injuries. But would logically extend to product-defect class actions.

Settlement

- A large class-action settlement will often set aside a pool of money to fund class members' remedies or attorneys' fees. What happens if the claims or fees don't use up all the money?
- Reversion clause allows the unused money to revert to the defendant after the claims period runs.
- Court of Appeals approved a reversion clause in *In Re Volkswagen "Clean Diesel" Marketing, Sales Practices and Products Liability Litigation,* 895 F.3d 597 (9th Cir. 2018).
  - Reversion clause can signal collusion. Benefits defendant by reducing amount defendant is on the hook for if not all members make claims while creating inflated basis for plaintiffs' counsel's fees.
  - But can be innocuous. "[A] district court must explain why the reversionary component of a settlement negotiated before certification is consistent with proper dealing by class counsel and defendants."
  - *Clean Diesel* reversionary clause was justified. VW had incentive to buy back or fix as many vehicles as possible because of consent decree, large benefits to class members were sufficient incentive to make claims, and over 60% of class members had already made claims.

SECTION 03

RECENT TRENDS IN CLASS ACTION LITIGATION

Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773 (2017)
Challenges To Personal Jurisdiction Over Claims By Absent Class Members

- Multiple Plaintiffs
- Class Certification
- Absent Class Members

1. Move to strike multi-state class allegations at the outset
2. Affirmative Defense for preservation / non-waiver
3. Challenge to motions to certify classes of non-forum residents

ISSUE CERTIFICATION: Rule 23(c)(4)

- Increased use of issue certification by plaintiffs under Rule 23(c)(4).
  - Example: Certification of a liability class only, with the issue of damages left for individual trials.
- There is a circuit split as to whether a "limited issue" class can be certified when the entire claim does not satisfy Rule 23(b)(3)'s predominance requirement.
- Courts have recognized that even when a more relaxed predominance standard is permitted, a Rule 23(c)(4) class must satisfy the requirements of Rule 23(a).
- There is great debate over the efficiency of "limited issue" certification. With a limited issue class, any class trial would not resolve the whole action. Separate individualized trials on all remaining issues still would need to be conducted.

Damages Problems: *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013)

- Over time, courts have narrowly interpreted *Comcast*.
- Most, if not all, Circuits have expressly held that *Comcast* did not alter the long-standing principle that individualized determinations of damages do not automatically defeat class certification.
- Courts have held that a *Comcast* problem is limited to the situation where there is a mismatch between the damages model and the theory of liability.
- Nonetheless, *Comcast* still highlights the importance of expert testimony at class certification and the need to make sure that there is a damages model that will measure actual harm on a class-wide basis.

SATISFYING COMCAST: DAMAGES MODELS

- Average Repair Cost Model
- Hedonic Regression Model
- Conjoint Analysis Model
- Combinations

Scrutinizing Multi-State Class Settlements

- *In re Hyundai & Kia Fuel Econ. Litig.*, 881 F.3d 679, 703 (9th Cir. 2018): Ninth Circuit applies heightened scrutiny to vacate approval of nationwide settlement class.
  - District Court failed "to make a final ruling as to whether the material variations in state law defeated predominance under Rule 23(b)(3)"
  - District Court failed to define the class to account for "individualized questions regarding exposure to the nationwide advertising"
  - Creates a very difficult standard for approving multi-state class settlements of state-law claims in Ninth Circuit
- Rehearing en banc granted on July 27, 2018
- Argued en banc on September 27, 2018

SECTION 04

EXPLORING THE RELATIONSHIP BETWEEN CLASS ACTION LITIGATION AND INDIVIDUAL WARRANTY CASES

Warranty Litigation

- "Lemon Law" cases
- Filed by individual plaintiffs involving individual vehicles
- Claims Asserted
  - Breach of express warranty
  - Breach of implied warranty
  - State-specific consumer protection statutes, e.g., California Song Beverly Consumer Warranty Act
  - Magnuson Moss Warranty Act
- Relief sought: damages, replacement, refund, civil penalties, attorneys fees

Holding Class Action Plaintiffs To The Same Standard As Individual Plaintiffs

- "Lemon Law" cases are inherently individualized from a factual perspective
  - "Reasonable steps to notify defendant within a reasonable time"
  - "Fit for the ordinary purposes"
  - "Substantially impaired the vehicle's use, value, or safety"
  - "Reasonable number of opportunities to fix"
  - Application of rebuttal presumption
- In class action litigation, highlight the individualized questions required to demonstrate a valid breach of warranty claim

Using Individual Warranty Cases To Demonstrate A Class Action Is Not A "Superior" Method Of Adjudication

- Rule 23(b)(3)

  (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that **a class action is superior to other available methods for fairly and efficiently adjudicating the controversy**. The matters pertinent to these findings include:

  (A) **the class members' interests in individually controlling the prosecution or defense of separate actions**;

  (B) **the extent and nature of any litigation concerning the controversy already begun by or against class members**;

  (C) **the desirability or undesirability of concentrating the litigation of the claims in the particular forum**; and

  (D) the likely difficulties in managing a class action

"Superior" Method Cont.

(A) **the class members' interests in individually controlling the prosecution or defense of separate actions**;

- Relief sought

(B) **the extent and nature of any litigation concerning the controversy already begun by or against class members**;

- Individual cases filed; because of fee shifting statute, cost of bringing suit not prohibitive

(C) **the desirability or undesirability of concentrating the litigation of the claims in the particular forum**; and

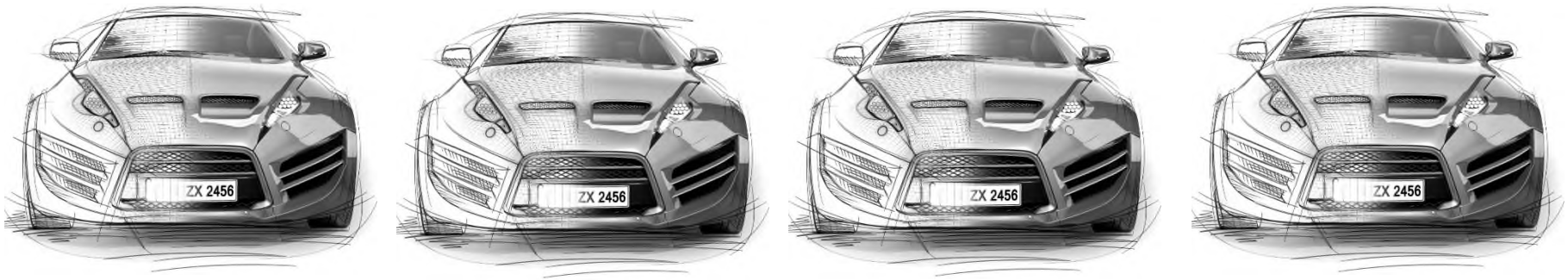
- Purchases made all over the country; evidence located all over the country

Reaping The Benefits Of A Class Action Settlement

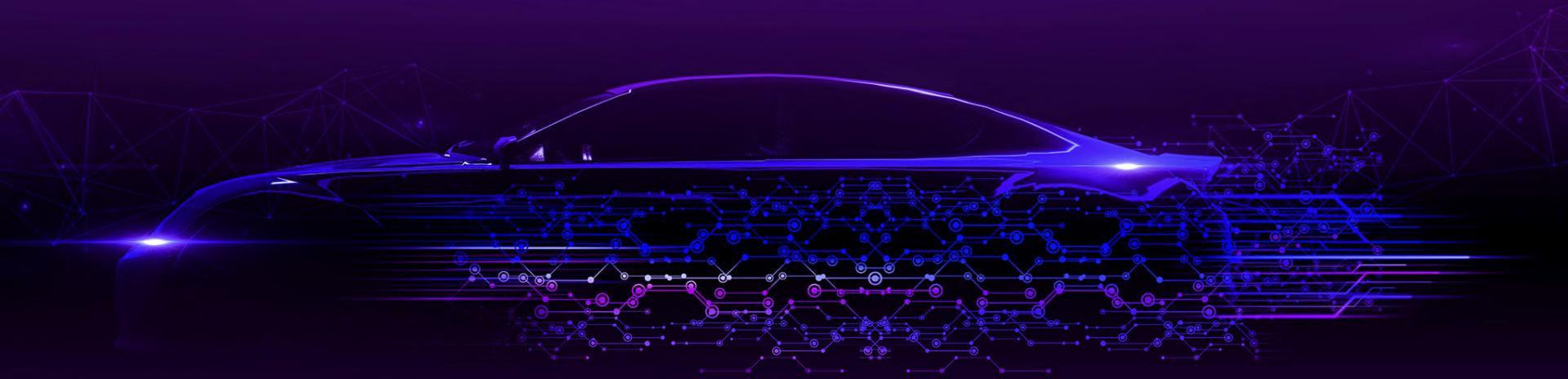
- Class members who did not opt out are bound by a class action settlement
- Claim preclusion (res judicata) arises if a second suit involves (1) the same cause of action (2) between the same parties and (3) after a final judgment on the merits in the first suit.
- Assert claim preclusion as an affirmative defense in individual warranty cases

Canary In The Class Action Mine?

- Warranty cases might signal the next class action
- Communication between in-house attorneys managing warranty cases and class action cases
  - Coordinating discovery responses; substantive arguments; fact and expert witnesses



QUESTIONS?



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