



## **EIGHTH CIRCUIT UPHOLDS DISMISSAL OF PUTATIVE CLASS ACTION AGAINST GENERAL MOTORS: CAUSATION MISSING FOR CONSUMER FRAUD CLAIM, SUPERIOR KNOWLEDGE MISSING FOR FRAUDULENT CONCEALMENT CLAIM**

The Eighth Circuit has confirmed the necessity of proving causation in a consumer protection case. The court also rejected an attempt to water down the superior knowledge required to state a claim of fraudulent concealment and to toll the statute of limitations by fraudulent concealment. [Owen v. General Motors Corporation, No. 07-2621 \(8th Cir., decided July 17, 2008\).](#)

After the wipers on their 6.5-year-old SUV failed at 98,000 miles, the Owens sued on a variety of claims, including breach of the Missouri Merchandising Practices Act (MMPA), fraudulent concealment and breach of warranty. They sought to represent a nationwide class of several million owners of GM vehicles built between 1994 and 1998, which they later redefined as a class of Missouri residents. The district court granted two GM motions to dismiss on several claims and entered summary judgment on the consumer protection claim under the MMPA.

The Eighth Circuit's robust analysis of the MMPA is a model for other courts examining consumer protection claims. Focusing on the language of the MMPA, the Eighth Circuit rejected the Owens' argument that the district court had applied an erroneous causation standard. The statute specifically requires a claimant to show that she suffered an ascertainable loss "as a result of" the defendant's act. The court emphasized "there is no denying that causation is a necessary element of an MMPA claim...[T]he plain language of the MMPA demands a causal connection between the ascertainable loss and the unfair or deceptive merchandising practice." The court went on to point out that "[w]here, as here, the alleged unfair practice is the failure to disclose a product defect, there must be a showing that the Owens' vehicle in fact suffered that defect, or evidence from which the defect reasonably could be inferred, in order to demonstrate an ascertainable loss as a result of GM's failure to disclose the defect." The court agreed with the district court that "evidence of the precise nature of the defect was paramount because only the defect GM failed to disclose can give rise to an MMPA claim."

Turning to the undisputed facts, the appellate court concluded, like the district court, that there were "any number of plausible causes for the failure" of the Owens' wipers. The Owens had presented no direct evidence of a defect. While the single-sided assembly had failed in other vehicles, there was also evidence that some wipers failed for no ascertainable cause and that many

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vehicles with the wiper assembly did not fail. Furthermore, the GM investigative team had identified multiple possible causes for the failures. Many different variables, such as different engine and model combinations, affected the rate of failure. The Owens' expert opined that the single-sided circuit board in the wiper assembly was increasingly likely to fail outside the warranty period, but he did not offer an opinion that the Owens' circuit board failed because it was defective. Indeed, the Owens' wipers had functioned normally for more than six years and 98,000 miles. Given the factual record, the jury could not conclude that the Owens' damages resulted from a defect of which GM was aware and failed to warn or that single-sided board was the more reasonable cause of their loss.

The Eighth Circuit's insistence that a claimant establish a causal connection makes consumer protection claims less attractive to would-be class representatives. If, like the Owens, the class representative submits a generic expert report which does not offer an opinion establishing individual causation, the representative's individual case fails for lack of causation. On the other hand, if the class representative asks the expert to express both a generic opinion and a opinion regarding causation in the representative's case, it is obvious that causation is an individual issue, which undermines the representative's request for a class action. While some claimants may try to avoid this dilemma by asking their expert to opine that every single product will fail, this position may often be belied by the facts.

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## **Fraudulent Concealment**

The Eighth Circuit brought an equally rigorous analysis to the Owens' fraudulent concealment claims. The Owens argued that the limitations period should be tolled by GM's fraudulent concealment of the nature of the alleged defect in their wiper module. GM's silence was concealment, their argument went, because GM had "superior knowledge" of the allegedly dangerous and defective nature of the wiper module by 1997 but concealed this from the Owens. As a result, they did not discover their cause of action until their wipers failed three years after the expiration of the express warranty. The alleged "superior knowledge" consisted of GM's use of a single-sided circuit board in the wiper control module in many different types of vehicles for several model years and information that the module could suffer solder joint failures after 12 months due to fatigue.

The Eighth Circuit found that these allegations did not demonstrate superior knowledge of a defect in the Owens' wiper module which GM should have disclosed. In so holding, the court pointed out that the Owens had also alleged that their wipers worked without incident for more six years and 98,000 miles, that the prior wiper recalls were public and that GM cooperated with the National Highway Traffic Safety Administration's (NHTSA's) investigation, which did not include the Owens' SUV. The court also noted that GM had implemented several design and manufacturing changes by 1998, which reduced the rate of failure due to fatigue such that NHTSA did not require further recalls. The court concluded: "GM's knowledge of prior solder joint failure due to fatigue and its failure to notify the Owens that the wiper control module could fail due to fatigue after the expiration of the three-year warranty are not so remarkable as to amount to fraudulent concealment of the Owens' breach of warranty claim that would justify equitable tolling of the statute of limitations."

The Eighth Circuit rejected the Owens' substantive claim of fraudulent concealment for the same reason. As in many states, the crux of a fraudulent concealment claim in Missouri is that the defendant "affirmatively intend[ed] to conceal from plaintiff the fact that the plaintiff ha[d] a claim against the defendant." The court agreed with the district court that "the unremarkable knowledge that a windshield wiper motor guaranteed for three years might be prone to failure due to fatigue sometime after the warranty

expires is too broad an assertion to establish the type of superior knowledge that can substitute for the false representation element of fraudulent concealment.”

The Eighth Circuit’s common sense analysis of superior knowledge will be particularly helpful to companies that have occasion to recall some portion of their product population, such as a rate-based recall of some products. If the fact that a company recalled some but not all products could be used as “superior knowledge,” claimants would always have a fraudulent concealment claim and would always be able to toll the statute of limitations based on fraudulent concealment. The Eighth Circuit rightly read such “unremarkable” knowledge as an inadequate substitute for the false representation element of fraudulent concealment.

Shook, Hardy & Bacon Partners [John K. Sherk](#) and [Laurel J. Harbour](#), along with Of Counsel [Matthew C. Miller](#) and Associate [Gregory K. Wu](#), formed the team that successfully represented GM both before the trial court and at the Eighth Circuit Court of Appeals.

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