

## Automotive Cases To Watch In 2016

By **Alex Wolf**

*Law360, New York (December 24, 2015, 8:37 PM ET)* -- Buckle up. 2016 is shaping up to be a big year for litigants with product defect claims against major manufacturers of automobiles and automobile parts, with the onset of bet-the-company litigation against Volkswagen and suits that examine the reliability of new automotive technologies.

Here are the automotive cases attorneys will be watching in the coming year:

### **Volkswagen Emission Litigation**

Above all other automotive cases, industry attorneys and legal experts are all eagerly watching to see how litigation and potential criminal prosecution against Volkswagen AG manifests in 2016, after it admitted in September to designing “clean diesel” cars that cheat emissions standards.

Volkswagen has been targeted by plaintiffs for admittedly using defeat devices in some of its “clean” diesel vehicles in order to appear to comply with emissions standards while exceeding allowable levels of chemicals emitted into the air. The company has gone on to estimate about 11 million vehicles were affected by the scheme worldwide.

In December, the Judicial Panel on Multidistrict Litigation consolidated more than 500 suits, saying California federal court in San Francisco is the best venue given that nearly one-fifth of the suits were filed in the Golden State.

After absorbing a massive public relations hit, the German carmaker’s livelihood hangs in the balance as car owners, sellers, state and federal regulatory agencies and federal prosecutors posture themselves to take a bite out of the company for flouting environmental rules and the public’s trust, experts say.

Some economists have predicted that the manufacturer stands to lose roughly \$80 billion as the result of international litigation and fines, plaintiffs’ attorney Elizabeth Cabraser of Lief Cabraser Heimann & Bernstein LLP said.

Settling these claims quickly should be a priority for Volkswagen in the coming year, experts say, as the company scrambles to find ways to fix the problem in order to avoid recalling every affected vehicle and refunding consumers.

“They have no defense,” plaintiffs’ attorney Steve W. Berman of Hagens Berman Sobel & Shapiro said.

“They have admitted that they cheated and so the issue is 'what is the appropriate remedy?’”

Experts say the company will be facing claims not only from car purchasers but also independent dealers with clean diesel models on their lots.

The plaintiffs in the various suits are represented by Hagens Berman Sobel & Shapiro LLP, Quinn Emanuel Urquhart & Sullivan LLP, Heninger Garrison Davis LLC, Girard Gibbs LLP, Hellmuth & Johnson PLLC, The Schmidt Firm PLLC, Morris Polich & Purdy LLP, among many others.

Volkswagen is represented by Mayer Brown LLP.

The case is In re: Volkswagen Clean Diesel Marketing, Sales Practices, and Products Liability Litigation, case number 2672, before the Judicial Panel on Multidistrict Litigation.

### **GM Ignition Switch Cases**

General Motors LLC grinded its way through a tough year in 2015 with litigation stemming from a deadly ignition switch defect in its automobiles, which can cause cars to lose power abruptly and prevent airbags from deploying. The defect has been blamed for causing hundreds of deaths and injuries and led to subsequent recalls that ultimately affected millions of GM vehicles.

In September, the company agreed to pay the U.S. Department of Justice a \$900 million criminal settlement to resolve claims that it knowingly concealed the defect, and also settled about half of the wrongful death and personal injury claims in the MDL.

The government's involvement in the case is a good sign, Cabraser said. Increased vigilance on the part of federal regulators and prosecutors to correct automobile defects is a relatively recent phenomenon that could make litigation over deadly mechanical defects a relic of the past and the current suits against GM the last of their kind, she said.

“If the laws work correctly, if accidents involving safety defects are reported promptly ... then much of this can be avoided,” she said. “What we’re always hoping for is this is going to be our last car case.”

Six bellwether trials have been scheduled for 2016 in the MDL, targeting GM in Manhattan federal court all for personal injury claims. The first trial, involving accident victim Robert Scheuer, is scheduled to take place beginning Jan. 11. The two sides have argued over the last few months over what evidence should be permissible at trial.

Scheuer seeks “punitive damages based solely on New GM’s knowledge and conduct, including information inherited from Old GM’s employees and documents and obtained by New GM.”

Old- and New GM are shorthand terms for the company before and after its July 2009 transformation in bankruptcy court.

In addition to the personal injury claims moving forward in the coming year, the court will also grapple with consumers’ economic loss claims, Berman said. And the Second Circuit will rule on an appeal filed by certain groups of consumers seeking to reverse a bankruptcy court’s finding from April that bankruptcy protections block most car owners seeking to sue New GM for billions of dollars over the defect.

The MDL plaintiffs are represented by Robert C. Hilliard of Hilliard Munoz Gonzales LLP, Steve W. Berman, Sean R. Matt and Andrew M. Volk of Hagens Berman Sobol Shapiro LLP, and Elizabeth J. Cabraser, Steven E. Fineman, Rachel Geman and Annika K. Martin of Lieff Cabraser Heimann & Bernstein LLP.

GM is represented by Richard C. Godfrey and Andrew B. Bloomer of Kirkland & Ellis LLP.

The case is General Motors LLC Ignition Switch Litigation, case number 1:14-md-02543, in the U.S. District Court for the Southern District of New York.

### **Takata Airbag Litigation**

The last of the “big three” automotive legal cases, as dubbed by Cabraser, that will continue to play out in 2016 is the MDL against Takata Corp. and 10 automakers over defective driver’s side air bags that allegedly explode in humid conditions and subsequently pummel passengers with shrapnel. In the past year, consumer cases were consolidated in Florida federal court.

The Japanese air bag manufacturer heads into 2016 with a spate of losses under its belt. It was hit in November with \$200 million in civil penalties — the largest fine ever imposed by the National Highway Traffic Safety Administration, of which \$70 million is payable in cash — and it lost a joint bid with Honda Motor Co. in early December to toss racketeering claims from an amended MDL complaint.

Consumers suing Takata Corp. and a number of top automakers, including Chrysler Group LLC, Ford Motor Co. and BMW of North America, over the recall allege that at least eight deaths and more than 139 injuries can be attributed to the company’s air bags.

“Takata is a mess,” professor Mark Dotson of Western Michigan University’s Cooley Law School said, pointing to the record-setting fine and NHTSA’s acceleration of a massive recall of approximately 19 million vehicles in the U.S. with the defective inflators.

“I see a great potential for considerable punitive damage recovery, especially against a foreign company, in these lawsuits,” Dotson said. “I can’t think of many corporations that would be able to absorb what I anticipate happening to them and remain in the same form that they were in originally.”

A recent loss of business may also make matters worse for Takata. In November, Ford took the same steps as Honda, Toyota and Nissan in announcing that it won’t use certain Takata air bag inflators in its new vehicles after the parts manufacturer admitted through its agreement with the NHTSA that it failed to alert the agency of the defect.

As for the recall, it will likely take awhile because there aren’t airbags readily available to quickly fix all of the affected vehicles, said Aaron H. Jacoby, partner and chairman of Arent Fox LLP’s automotive industry practice group.

“The whole recall crisis is going to continue to be an ongoing crisis,” he said.

The plaintiffs’ steering committee is represented by James Cecchi of Carella Byrne Cecchi Olstein Brody & Agnello; Elizabeth Cabraser of Lieff Cabraser Heimann & Bernstein, and Roland Tellis of Baron & Budd.

Takata is represented by Stephen J. Krigbaum of Carlton Fields Jordan Burt PA and David Bernick, Hope S. Freiwald and Benjamin R. Barnett of Dechert LLP.

American Honda Motor Co. Inc. is represented by Michael L. Mallow, Eric S. Mattson and Michael C. Andolina of Sidley Austin LLP and Mitchell Widom of Bilzin Sumberg Baena Price & Axelrod LLP.

BMW of North America LLC is represented by Carey S. Villeneuve, Rosemary J. Bruno and Christopher J. Dalton of Buchanan Ingersoll & Rooney PC and Eric Y. Kizirian of Lewis Brisbois Bisgaard & Smith LLP.

Ford Motor Co. is represented by E. Colin Thompson, Joel A. Dewey, Jeffrey M. Yeatman and J. Trumon Phillips of DLA Piper LLP.

Mazda Motor of America Inc. is represented by Cari K. Dawson, Scott A. Elder and Daniel C. Norris of Alston & Bird LLP and Michael R. Tein and Guy A. Lewis of Lewis Tein PL.

Nissan North America Inc. is represented by Kimberly A. Cook, E. Paul Cauley Jr., S. Vance Wittie and Ramon A. Abadin of Sedgwick LLP.

Subaru of America Inc. is represented by Stanley H. Wakshlag and Robert D.W. Landon III of Kenny Nachwalter PA and Jeffrey L. Chase and Michael Gallub of Herzfeld & Rubin PC.

Toyota Motor Sales USA Inc. is represented by John C. Seipp Jr. and Donald A. Blackwell of Seipp Flick & Hosley, Terri S. Reiskin of Dykema Gossett PLLC, and Robert M. Brochin of Morgan Lewis & Bockius LLP.

The case is Dunn et al. v. Takata Corp. et al., case number 1:14-cv-24009, in the U.S. District Court for the Southern District of Florida.

### **Keyless Fob Carbon Monoxide Suits**

Fiat-Chrysler, Ford, Honda and several other car manufacturers were targeted by a first-of-its-kind proposed class action in California federal court in August by drivers alleging that a flaw in the design of keyless fob systems has led to 13 documented deaths from carbon monoxide poisoning.

The plaintiffs claim that reasonable drivers misunderstand that although keyless-ignition fobs can remotely start their vehicle's engine, they do not turn them off, which can lead to drivers leaving their cars running in their garages and filling their homes with the deadly odorless compound.

The automakers facing the claims offered various reasons to toss the suit in November, with some arguing that they shouldn't be liable for drivers' forgetfulness and that the drivers haven't suffered any physical or economic injuries and therefore don't have standing to sue. Others pointed to specific vehicle features and warnings in car owners' manuals they say thwart the claims.

The litigation has since been split into separate suits against each manufacturer.

Although the companies have yet to mount each of their defenses, Dotson anticipates they will allege contributory negligence, and could ultimately be put on the hook for some percentage of damages.

"In all of the cases, the jury is going to be asked 'how do you assign fault?'" he said. "The only consequence is going to be a reduction in damages."

If the cases aren't settled, Dotson said juries will be swayed if the plaintiffs are able to show that the manufacturers could have easily fixed the alleged problems. In which case, he noted, "the politics are not in favor of the defendants."

The plaintiffs are represented by Elaine T. Byszewski and Steve W. Berman of Hagens Berman Sobol Shapiro LLP and Martis Alex, Daniel R. Leathers and Brian R. Morrison of Labaton Sucharow LLP.

Ford is represented by Randall W. Edwards, Carlos M. Lazatin and Michael Reynolds Of O'Melveny & Myers LLP.

Honda is represented by Katherine A. Rykken, Mark S. Mester and Kathleen P. Lally of Latham & Watkins LLP.

Mercedes-Benz is represented by Troy M. Yoshino and Eric J. Knapp of Carroll Burdick & McDonough LLP.

Nissan is represented by M. Kevin Underhill, Amir Nassihi and William R. Sampson of Shook Hardy & Bacon LLP.

Toyota is represented by David L. Schrader and Esther K. Ro of Morgan Lewis & Bockius LLP.

Volkswagen and Bentley are represented by Jeffrey L. Chase and Michael B. Gallub of Herzfeld & Rubin PC and Craig L. Winterman, Gary S. Yates and L. Dean Smith Jr. of Herzfeld & Rubin LLP.

Kia and Hyundai are represented by Ekwan E. Rhow, Thomas V. Reichert and Douglas A. Fretty of Bird Marella Boxer Wolpert Nessim Dooks Lincenberg & Rhow PC.

BMW is represented by Eric Y. Kizirian and Michael K. Grimaldi of Lewis Brisbois Bisgaard & Smith LLP.

FCA is represented by John W. Rogers, Kathy A. Wisniewski, Stephen A. D'Aunoy and Rowena G. Santos of Thompson Coburn LLP.

The case is Draeger et al. v. Toyota Motor Sales USA Inc. et al., case number 2:15-cv-06491, in the U.S. District Court for the Central District of California.

### **Car-Hacking Suits**

New automobile technology has also taken center stage in litigation against Toyota, Ford, GM, Fiat Chrysler and others accused in federal suits filed in 2015 in California and Illinois of selling computer software-equipped vehicles that are vulnerable to hackers who could hypothetically wrest control of essential functions such as brakes and steering or even shut down the car.

The suits — Flynn et al. v. FCA US LLC et al. and Cahen et al. v. Toyota Motor Corp. et al. — aren't premised on actual injuries that have occurred, but instead on claims that the company sold the cars with knowledge that their software could be hacked.

"They're saying that susceptibility amounts to a breach of warranty and violates various consumer protection laws," Frost Brown Todd LLC member Robert L. Hust said. "These are people who have

bought these cars, not people who have had their cars hacked.”

Hust, who served as assistant vice president and general counsel at Honda of America Mfg. Inc., said the claims in these cases hinge on a question of standing, and could rest on the way the U.S. Supreme Court rules in *Spokeo v. Robins*, a case examining whether a plaintiff can bring a suit under violation of a federal statute, even if he or she had suffered no other injury.

“They've characterized this as sort of a floodgate kind of case,” Hust said “If the [Supreme Court] takes the most liberal reading, then you could have lawsuits arise over consumer safety across the industry even where plaintiffs have not been harmed.”

In November, a California federal judge granted individual motions to dismiss claims against several car manufacturers, ruling that the speculative risk of being hacked in the future couldn't be considered an “injury in fact.” The drivers have until Jan. 8 to file an amended complaint, according to the order.

A September motion to dismiss is pending in the Fiat case.

The California plaintiffs are represented by Matthew J. Zevin, Marc R. Stanley and Martin Woodward of Stanley Law Group and Donald H. Slavik of the Slavik Law Firm LLC.

Toyota is represented by Christopher Chorba, Timothy W. Loose, Tiaunia Bedell and Christina Yang of Gibson Dunn.

The case is *Cahen et al. v. Toyota Motor Corp. et al.*, case number 3:15-cv-01104, in the U.S. District Court for the Northern District of California.

The Illinois plaintiffs are represented by Michael Gras and Christopher Cueto of the Law Office of Christopher Cueto Ltd.

Fiat Chrysler is represented by John W. Rogers, Kathy A. Wisniewski and Stephen A. D'Aunoy of Thompson Coburn LLP.

The case is *Flynn et al v. FCA US LLC et al*, case number 3:15-cv-00855, in the U.S. District Court for the Southern District of Illinois.

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