

[Products Liability Law Daily Wrap Up, TOP STORY—MOTOR VEHICLES—E.D. Mich.: Court won't hit the brakes on Cruze owners' emissions defeat device claims against GM, \(Feb. 15, 2017\)](#)

Products Liability Law Daily Wrap Up

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By John W. Scanlan, J.D.

Nine 2014 Chevrolet Cruze owners may bring a putative class action alleging deceptive advertising, breach of contract, and fraudulent concealment claims under the laws of 30 states against General Motors for installing a "defeat device" to enable the diesel-fueled cars to pass emissions tests even though they produce significantly higher emissions in real-world driving, a federal district court in Michigan ruled in granting in part GM's motion to dismiss. The owners had standing to bring the claims, the claims were not preempted, and the allegations in their complaint were sufficient to survive at this stage of the litigation (*Counts v. General Motors, LLC*, February 14, 2017, Ludington, T.).

The owners alleged that they bought their vehicles with the belief that the cars emitted fewer pollutants than gasoline-powered cars and were in compliance with U.S. emissions standards, that they had selected their cars in part because they were clean diesel vehicles, and that if they had known the cars actually had higher pollutant emissions than gasoline cars they would have paid less for them or not bought them at all. According to the owners, multiple reports and tests showed that clean diesel GM vehicles emitted far more pollution on the road than in the lab, including the owners' own test. GM moved to dismiss, arguing that the owners lacked standing to bring the suit and had failed to state a claim for relief, their claims were preempted by the Clean Air Act, and the court was required to defer to the U.S. Environmental Protection Agency (EPA) pursuant to the primary jurisdiction doctrine.

Standing. The nine plaintiffs have standing to bring claims on their own behalf, but the court deferred deciding whether they would have standing to bring claims on behalf of the unnamed putative class members until a motion for class certification is filed. Although GM argued that the owners were alleging speculative future injuries based on the possibility that GM might have to recall their cars in the future and modify them to reduce performance and fuel efficiency, the owners' allegations that they had overpaid for their vehicles based on GM's representations that the 2014 Cruze was a clean diesel vehicle constituted sufficient economic injury to confer Article III standing.

GM also argued that the owners had not specifically alleged that they had emissions-tested a 2014 Cruze, but the owners' references to multiple studies showing that GM vehicles with the same engine technology as the Cruze produce significantly higher emissions than represented was enough to raise a plausible allegation that GM's representations of "Clean Diesel" and 90 percent lower emissions were deceptive, and the alleged disparities shown in the lab testing made their allegations of a defeat device plausible. The owners were not required to allege at this stage that they had seen and relied upon specific advertisements because they did not need to plead reliance to establish standing; instead, they needed to allege economic injury, which they did by alleging overpayment.

GM also cited a decision by a U.S. District Court in New Jersey dismissing a similar suit brought against Mercedes-Benz on the ground that the plaintiffs had not alleged that their injuries were "fairly traceable" to the defendants' conduct because they did not allege the general type or medium of advertising to which they personally had been exposed. However, the Mercedes-Benz decision blurred the distinction between proximate causation and traceability, and was incompatible with existing precedent from the U.S. Court of Appeals for the Sixth Circuit and the U.S. Supreme Court.

Preemption. The owners' claims were not preempted by the Clean Air Act (CAA) except to the extent they sought damages based solely on GM's alleged violation of that statute. The owners' claims did not directly depend on proof of noncompliance with CAA standards because they addressed the "deceit about compliance, rather than the need to enforce compliance." They were not attempting to bring about tighter emissions standards or introduce separate state standards. The court noted that proof of noncompliance might strengthen their case, but they did not need to show this in order to succeed in their claims.

Primary jurisdiction doctrine. The owners' claims did not have to be stayed and referred to the EPA under the primary jurisdiction doctrine. The owners were not required to establish proof of noncompliance with EPA regulations and the agency did not have the authority to address their claims or remedy their alleged damages.

Fraudulent concealment. The owners' fraudulent concealment claims were not dismissed to the extent they alleged that GM violated its duty to disclose the existence of the defeat device. However, the owners could not base their claims on their reliance upon affirmative statements made by GM in its advertising for the Cruze.

The court first determined that the owners alleged sufficient facts to meet the heightened federal pleading standards for claims of fraud. Although they did not allege who had tested a Cruze or when it was tested, or whether the tested vehicle was a 2014 Cruze, they included details about their test and also alleged six different tests by various European authorities of other models of GM vehicles alleged to use similar clean diesel technology as the 2014 Cruze that produced similar results.

GM argued that they had not pleaded with particularity that they had relied upon GM's own omissions regarding the Cruze emissions to their detriment. The owners cited cases from four of the 30 states holding that demonstration of individual reliance was not required, and because GM had not addressed this argument, the court said that it would not on its own analyze the elements of each state's fraudulent concealment law. The owners still were required to allege that the alleged misrepresentations could have been relied upon by a reasonable consumer, and in examining GM's advertisements the court concluded that they were not actionable because they constituted "puffery."

However, under the laws of at least some states, exclusive knowledge of a defect or active concealment of a defect triggers a duty to disclose. The owners alleged both that GM had exclusive knowledge of the existence of the defeat device and had actively concealed it. As GM had not addressed specific state standards regarding the duty to disclose, the court said that it would not raise defenses on GM's behalf.

Other claims. Similarly, while the owners had not stated claims for violation of various state consumer protection laws to the extent that they relied upon GM's affirmative representations, GM had not shown that they failed to state such claims to the extent that they were based on GM's failure to disclose the existence of the defeat device. Finally, the court dismissed without prejudice the owners' breach of contract claims after the owners conceded that these claims were deficient.

The case is No. [16-cv-12541](#).

Attorneys: Scott A. George (Seeger Weiss LLP) for Jason Counts. April N. Ross (Corwell & Moring LLP) and Christopher V. Burtley (Dykema Gossett PLLC) for General Motors, LLC.

Companies: General Motors, LLC

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