

MDL Judge Hears Takata Air Bag Dismissal Motions

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Car owners alleging Takata Corp. and several major automakers caused economic damages by concealing defective air bags should make use of the world's largest auto-safety recall, defense attorneys argued Friday in Miami federal court.

Plaintiffs in the multidistrict litigation claim they would not have bought their cars knowing the air bags might kill or injure them with flying shrapnel, and the stigma attached to the Takata air bags diminished resale values. Manufacturers named in the suit include Honda, BMW, Ford, Mazda, Toyota, Nissan and Subaru.

Japan-based Takata announced in May that more than 34 million U.S. vehicles would be recalled. Defective air bags have killed at least eight people and injured more than 139 others, according to court documents. Personal injury claims were brought separately from the economic loss claims.

U.S. District Judge Federico Moreno was concerned only with the economic loss claims Friday when he heard

several motions to dismiss the lawsuits. He agreed to take supplemental briefs of five pages or less before ruling.

Defense attorneys argued plaintiffs were seeking to reap rewards through litigation rather than simply taking their car to a dealer and having the air bag inflator replaced for free under the recall.

"There was an offer that we hope people will take advantage of to fix this problem," said Hondo attorney Eric Mattson of Sidley Austin in Chicago.

Fewer than five of more than 100 named plaintiffs have tried and failed to get their air bag inflator immediately replaced, added Takata attorney David Bernick with Dechert in New York.

Plaintiffs attorney Peter Prieto said inflator replacements didn't affect the argument that the plaintiffs overpaid for their cars. The Miami attorney with Podhurst Orseck also said people had "recall fatigue" that prevented them from going to the dealer.

"There have been so many recalls in the past two or three years that when people get these recall notices, what do

they do with them?" he asked. "They toss them."

Dealers were often replacing the inflators with new ones that use the same chemical plaintiffs claim caused the defect: ammonium nitrate, Prieto argued.

Bernick conceded that was true for some dealers but argued a new ammonium nitrate inflator would last at least seven years before rupturing. He reiterated Takata's stance that the defect was caused not just by ammonium nitrate but also by a press used in the manufacturing process and humidity.

Defense attorneys also argued the Racketeer Influenced and Corrupt Organizations Act claim should be dismissed for lack of specific facts.

'WAIT UNTIL IT EXPLODES'

Owners claim Honda was aware of the defect after Takata conducted secret testing in 2004. The two companies worked together to conduct additional testing in 2007, then falsely claimed only about 4,000 vehicles were affected and should be recalled, the plaintiffs allege.

Prieto said the companies colluded to conceal the defect from regulators as well as the public.

Mattson argued communication between Takata and vehicle suppliers was a positive thing.

"That's exactly what you would expect and exactly what you would want," he said.

Defense attorneys also argued each claim should be considered under the law of the state where they bought their cars.

Mazda's attorney noted most plaintiffs had not seen a defect show up. Specifically in Florida, Alabama and Pennsylvania, she said buyers could not recover damages under their contract and tort claims.

"For a product to manifest a defect, it has to malfunction," said Cari K. Dawson, an Atlanta attorney with Alston & Bird who represents Mazda.

Moreno pressed her. "Wait until it explodes, and then you can have cases?" he asked. "Is that the defense position?"

The vehicles might never manifest a defect, Dawson said.

"Does it make sense to compensate people who are driving their vehicles and recovering the benefit of the bargain?" she asked. "It does not."

Plaintiffs attorney David Boies argued the defense was making too much of the request to dismiss claims brought in jurisdictions where plaintiffs didn't buy their cars.

"Every state has an interest in not having dangerous vehicles on their highways," the Boies, Schiller & Flexner chairman said.

Boies said Moreno wouldn't have to apply dozens of state laws for unjust enrichment claims because they're similar across the U.S. Other counts might require state subclasses, he said.

Prieto told Moreno that if he allows the claims to go forward, vehicle owners are hoping for a jury trial in April 2017.

"That's when I'm eligible to go senior!" the 63-year-old judge said, drawing a laugh.

Other firms representing the plaintiffs are Colson Hicks Eidson, Power Rogers & Smith, Baron & Budd, Carella Byrne Cecchi Olstein Brody & Agnello and Lief Cabraser Heimann & Bernstein.

Defense firms are Bilzin Sumberg Baena Price & Axelrod, Hogan Lovells, Lewis Tein, Sedgwick, Herzfeld & Rubin, Kenny Nachwalter, Dykema Gossett, Seipp Flick & Hosley, DLA Piper, Buchanan Ingersoll & Rooney and Lewis Brisbois Bisgaard & Smith.

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