

Takata, Automakers Argue For Dismissal Of Air Bag MDL

By *Nathan Hale*

Law360, Miami (October 23, 2015, 7:20 PM ET) -- Takata and Honda attacked racketeering claims as part of their arguments Friday in Florida federal court urging dismissal of multidistrict litigation over defective air bags, and pointed along with other automakers to massive recall efforts to repair the millions of faulty components.

U.S. District Court Judge Federico Moreno heard **arguments to toss** the economic-loss claims of 115 plaintiffs seeking to represent more than 34 million car buyers who purchased or leased vehicles in the United States containing the defective air bags manufactured by Japan-based Takata Corp. that have been subject to warnings or recalls.

The air bags supplied by Takata have been recalled worldwide because of a defect the car buyers claim is linked to use of inexpensive-but-volatile ammonium nitrate that causes the air bags to explode, particularly in humid conditions, sometimes spewing chemicals or shrapnel at passengers. At least eight deaths and more than 139 injuries have been attributed to the company's air bags, they claim.

With more than 50 lawyers packed into the courtroom, a scene he likened to an American Bar Association regional meeting, Judge Moreno afforded each side 45 minutes during a morning hearing Friday. The judge also left open an afternoon session for other parties wishing to voice arguments and granted permission for brief comments to be filed within the next week before he rules.

Counsel for Takata and Honda dominated the allotted time with their arguments that the pleadings levied under the Racketeering and Organized Crime Act, which carry potential treble damages, do not suit the case and fail to provide required specific facts or proof of direct harm. The car buyers' counsel, Peter Prieto of Miami law firm Podhurst Orseck PA, was quick to refute that argument.

"I don't want the court to think this is an exotic RICO claim," he said. "This is a long-term concealed defect."

American Honda Motor Co. Inc. counsel Eric S. Mattson of Sidley Austin LLP said the conspiracy claims pointed only to conversations that took place between Honda and Takata that he held were part of the automaker "pushing to get to the bottom of this problem."

"We're entitled to know the details of what we allegedly did wrong," Mattson said, adding later, "It's really easy to fling this charge of fraud at people and hurt their reputations."

In response, Prieto argued that the pleading standards do not match those for common law fraud, as Mattson had suggested they should, and pointed to numerous specific allegations of conspiracy in the complaint, including that Honda knew of secret testing conducted by Takata after malfunctions and that the two companies agreed to keep test results from the National Highway Traffic Safety Administration.

The complaint alleges that the conversations between the companies were about concealing the defect from regulators and from the public, Prieto said.

“That’s the whole scheme to defraud here,” he said.

Takata counsel David Bernick of Dechert LLP said RICO claims are rare for product liability claims and said he believes they have been completely unsuccessful in automotive cases at the appellate level.

Focusing on a requirement to demonstrate causation, Bernick argued that the consumers did not buy or lease the cars based on the inflators in the air bags, so their injury is based on the theory that they overpaid for the vehicles or they lost resale value because of the defective parts.

“This is a stigma case ... and stigma is notoriously not connected to an actual fact,” he said.

He also said that with no plaintiffs in the case who claim they sold cars at lesser values, it’s impossible to make a real determination of injury or damages.

Focusing on the recalls, Mattson said the fact that all consumers have a right to have the defective air bags replaced free of charge means there is no clear injury, and Bernick questioned how plausible the car buyers’ claims are when that fewer than five of the 115 got the available repairs done.

The existence of recalls does not change the allegation that consumers made initial overpays for defective vehicles, Prieto said, arguing many of the plaintiffs would not have bought the cars if they knew of the defects or would not have paid as much for them.

He said many car owners had not followed through on recall repairs because of “recall fatigue” brought on by so many recent recalls from automakers, and in some cases, the defective air bags are being replaced by newer Takata air bags that he said feature the same ammonium nitrate defect and will have to be replaced again in the future.

Mazda Motor of America Inc. counsel Cari K. Dawson of Alston & Bird LLP also argued that under Florida, Alabama and Pennsylvania state laws, the defects are not recognized until they have manifested themselves by malfunctioning.

“So the court is supposed to wait until it explodes, then you can have cases?” Judge Moreno asked.

Dawson questioned if, with the recourse of the recalls, should consumers be allowed to drive around enjoying the “benefit of the bargain” from their car purchase when the defect may never manifest and then come to court and get paid for that.

“I don’t think so,” she said.

The buyers first sued in November 2014 and filed a second-amended complaint on June 15 with 106 counts against the companies, including fraud, warranty, unjust enrichment and consumer protection claims, along with negligence and RICO claims against Takata and Honda. The complaint also included subclasses for consumers in 30 states as well as claims by scrap yards that had bought and sold the deadly Takata inflators.

In addition to Takata, the seven automaker defendants, including American Honda Motor Co., Nissan Motor Co., Ford Motor Co., Subaru America Inc., BMW of North America LLC and Mazda Motor of America Inc., also attacked the buyers’ 422-page amended complaint.

Prieto told the court he anticipated that if the case is allowed to proceed, the consumers would be prepared to go to trial in early 2017.

The buyers are represented by Baron & Budd PC, Labaton Sucharow LLP and Podhurst Orseck PA.

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 Corporation et al., case number 1:14-cv-24009-FAM, in the U.S. District Court for the Southern District of Florida.

--Additional reporting by Bonnie Eslinger, Aebra Coe and Jody Godoy. Editing by Ben Guilfooy.