A Tale of Two (Mer)cedes

Cheryl Woodin & Hartlee Zucker – January 23, 2018

Although multinational companies and their counsel may expect to see litigation on either side of the U.S.-Canadian border proceed in a coordinated manner, the Mercedes-Benz emissions litigation is an illustrative example of how it can also easily proceed at different speeds and on procedurally different routes.

The actions in both countries relate to Mercedes BlueTEC vehicles. Plaintiffs have alleged that a component of the car, the so-called defeat device, is defective. The device purportedly switches off the car's emission control system once it reaches a certain temperature, causing the vehicle to emit illegal levels of nitrogen oxide into the atmosphere.

The Canadian litigation was commenced in April 2016. In June 2017, the Ontario Superior Court issued its decision in *Kalra v Mercedes Benz Canada*, 2017 ONSC 3795, certifying the proposed emissions standards class action against Mercedes-Benz Canada and three other Daimler AG entities on behalf of a national class.

Although the proceeding was certified, the decision substantially narrowed the common issues originally proposed by the plaintiff. The Canadian court amended several of those common issues and declined to certify three others, including those related to the determination of aggregate damages. The relatively early certification result in Canada reflects the fact that the certification threshold is different in Canada and marks only a court's assessment of the procedural utility of a class proceeding for at least some common issues.

In contrast, the U.S. litigation, which was commenced a couple of months *prior* to the Canadian action, has not yet proceeded to certification. As is more typical of the course of U.S. litigation, the proceedings have been defined to date by pre-certification motions, including a dismissal of the proposed class action in 2016. In its 2016 dismissal decision, the U.S. court determined that the

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plaintiffs did not have adequate standing to bring the claim on the basis that the plaintiffs had not actually seen and relied on purportedly misleading ads by Mercedes that would have induced them to purchase the impugned vehicles. However, the court permitted the plaintiffs to file an amended complaint.

Over two years have passed since that dismissal, and the plaintiffs are now on their fourth amended and consolidated complaint and are facing yet another motion to dismiss. The current motion by Mercedes is proceeding on various grounds, including arguments respecting standing, preemption, and inadequate pleadings, among others. It remains to be seen whether Mercedes will succeed in having the proceedings against it dismissed in the United States for good, or whether it will also proceed to certification in the United States.

Although the plaintiffs in Canada are ostensibly further ahead, certification of the ability to try certain liability issues in common is only the beginning of the Canadian litigation path. It is reasonable to expect that many of the substantive issues playing out in the U.S.-context pre-certification will also require adjudication in Canada, leaving the viability of the action in Canada as much an uncertainty as it is in the United States.

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