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Motor Vehicles

Volvo Can't Avoid Class Action Over Hybrid With Offer to Settle

Volvo's attempt to give an unhappy hybrid car owner a full refund before she filed suit didn't strip her of her right to bring the case, the Seventh Circuit held Aug. 22 (*Laurens v. Volvo Cars of N. Am., LLC*, 2017 BL 293428, 7th Cir., No. 16-3829, 8/22/17).

''While the legal effect of every variation on the strategic mooting theme has not yet been ex-plored, we are satisfied that an unaccepted pre-litigation offer does not deprive a plaintiff of her day in court,'' Judge Diane P. Wood wrote for the U.S. Court of Appeals for the Seventh Circuit.

The ruling allows a would-be class action over the battery range of the XC90 T8 plug-in hybrid to proceed against Volvo Cars of North America LLC and Volvo Car USA LLC.

It also cuts off yet another defense attempt to get around the U.S. Supreme Court's *Campbell-Ewald Co. v. Gomez* ruling. There the court held that rejecting a defendant's offer of full relief to a lead plaintiff doesn't moot a plaintiff's individual or class claims.

A defense attorney not involved in the litigation told Bloomberg BNA that courts focus solely on mootness in such ''pick off'' cases. But other important defenses will emerge as these cases develop.

''For example, unaccepted offers of complete relief can be important components of waiver, estoppel, and failure to mitigate arguments,'' Laura McNally said in an email.

''And the existence of these defenses can create a situation where a hopeful class representative's claims are not typical, and the individual is not an adequate class representative.'' McNally is a partner at Loeb & Loeb LLP in Chicago.

Counsel for plaintiffs disagreed. ''Unaccepted settlement offers are nullities, which by definition means such offers have no effect on whatever other defenses Volvo may wish to raise, nor does it have any impact on typicality,'' Todd L. McLawhorn, partner at Siprut PC in Chicago, told Bloomberg BNA.

The plaintiffs are pleased this court, and others, have recognized pick off attempts for what they are—''procedural mechanisms to avoid addressing the merits of plaintiffs' cases,'' McLawhorn said in an email.

''Volvo promised one thing and delivered another; it would be perverse that having been called out on its misrepresentations, Volvo would then get to decide the appropriate remedy,'' he said.

'Puny Eight to Ten Miles' Xavier and Khadija Laurens bought a new Volvo XC90 T8 plug-in hybrid. They paid an extra $20,000 for the hybrid over the gas-only version, relying on Volvo's advertising that the car's battery range was 25 miles, they said in their suit.

But when they actually took their car out on the road, their X8 averaged ''a puny eight to ten miles of battery-only distance,'' they alleged.

Xavier Laurens filed a class action against Volvo Cars of America LLC seeking damages equal to the premium he paid for the hybrid model, the cost of a charging station ($2,700), injunctive relief, punitive damages, and attorneys' fees.

Volvo moved to dismiss Xavier's suit for lack of standing because only Khadija's name was on the purchase agreement and title. Volvo also offered ''immediately'' to give Khadija a full refund if she turned in the car.

The couple added Khadija to the complaint, but Volvo argued she lacked standing because it offered her complete relief before she filed suit.

The district judge agreed and dismissed the suit. But the Seventh Circuit revived it, saying ''we see no reason why an impersonal note offering a refund should have such a powerful effect.''

''*Campbell-Ewald*'s core lesson is that unac-cepted contract offers are nullities; settlement propos-als are contract offers; and therefore unaccepted settle-ment proposals are nullities,'' the court said. ''Nothing about that logic turns on whether a suit has been filed.''

Standing for Injunction The court declined to rule on whether the plaintiffs have standing to seek injunctive relief because they can't be fooled again by Volvo's advertising.

Judge Michael S. Kanne wrote separately to ''emphasize that on remand the district court is free to draw, or not to draw, the conclusion that Khadija has not met her burden to show standing for injunctive relief.''

''Judge Kanne's two-sentence concurrence underlines that mootness is only one aspect of the analysis,'' defense attorney McNally said. ''We expect these approaches to continue to evolve, as defendants look for efficient ways to address plaintiff claims without being forced through potentially ruinous class action defenses.''

Professor and consumer advocate Brian Wolfman said the discussion of standing for injunctive relief is the only place the majority opinion mentions the class.

The class may still have a claim for injunctive relief even if the lead plaintiffs don't, and the plaintiffs may

have standing to represent the class even if they have lost their personal stake in the outcome, he told Bloomberg BNA.

Wolfman runs the Georgetown University Law Center appellate courts immersion clinic in Washington.

Judge Ilana Diamond Rovner joined the opinion.

Siprut PC represented the car owners.

Reed Smith LLP represented Volvo.

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