

Presenting a live 90-minute webinar with interactive Q&A

Auto Industry Class Actions: Pursuing, Defending or Settling Consumer Fraud and Warranty Breach Claims

Navigating Issues of Predominance, Standing and Causation;
Obtaining Court Approval of Settlements; Minimizing Litigation Exposure

THURSDAY, JULY 7, 2016

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

David Stein, Of Counsel, **Girard Gibbs**, Oakland, Calif.

Neal Walters, Partner, **Ballard Spahr**, Cherry Hill, N.J.

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Perspectives on Automotive Class Action Litigation

Strafford Publishers Webinar
July 7, 2016

Neal Walters
Ballard Spahr LLP
Cherry Hill, NJ

David Stein
Girard Gibbs LLP
San Francisco, CA

Overview

Background

Missteps
Leading to
Class Actions

Anatomy of
Auto Class
Actions

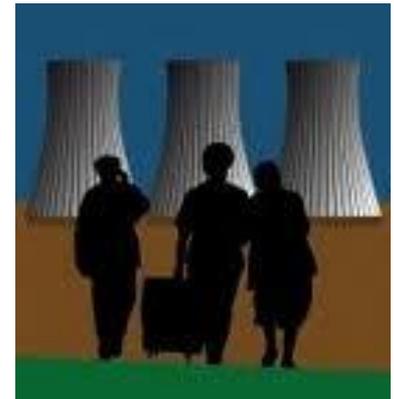
Pleadings,
Discovery,
Argument

Prevailing
Issues



Different Plaintiffs

- State Attorneys General – occasionally
- The FTC pursuant to the FTCA – on the uptick after years of inactivity
- Companies v. Companies – Competition and Disparagement Claims – Uncommon in Auto Industry
- Individuals v. Companies – Class actions – the most prevalent



Anatomy of an Auto Class Action

- Something is undesirable about the vehicle's performance, or official statements about the vehicle's capabilities are inaccurate.
- The buyer contends that – if properly informed – she would not have purchased the vehicle, or that she would have paid less for it; or that she has incurred consequential out of pocket repair costs for its non-performance.
- The consumer similarly contends that there was preexisting knowledge of the problem, thus characterizing the concern as a traditional fraud theory.

Why Auto Companies ?

- Plaintiffs make their case with company records. Large amounts of memorialized data on testing, surveys, warranty data, service reports from the field and customer service records reflecting consumer complaints.
- Mass distribution of the same literature.
- It is difficult to anticipate all of the ways in which literature may be misconstrued.
- Mass distribution of vehicles or parts with the same design makes plaintiffs ROI attractive.

Plaintiffs: What Makes for a Good Auto Case?

- Important Issue for Drivers
 - Safety Hazard
 - Expensive Repair/Fix
- Prevalence
 - Representation affecting all vehicles
 - Complaint volume
- Age of Vehicle
 - Prompt manifestation
 - Applicable warranties / claims

COMPLAINT

TO: _____

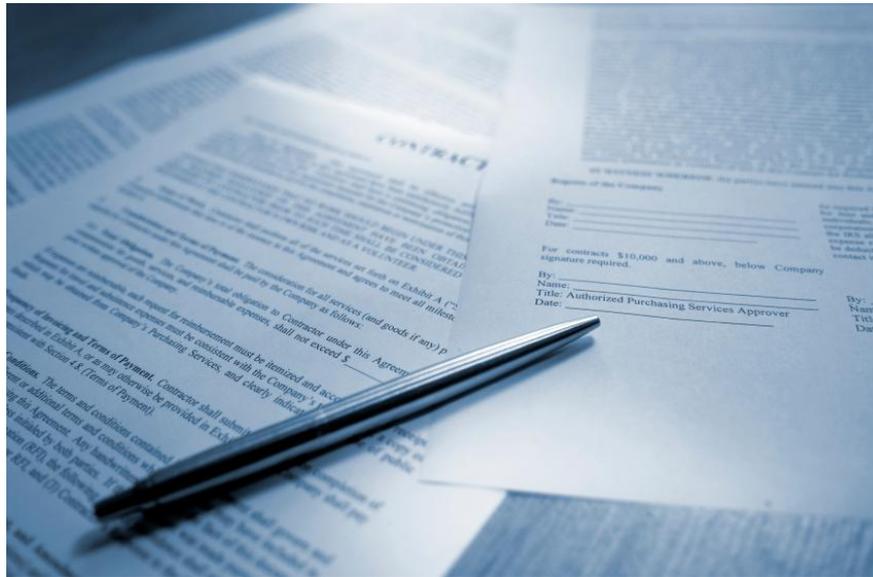
WHOSE FAULT: MINE YOURS OURS OTHER: _____

DESIRED OUTCOME: APOLOGY EXPLANATION LITIGATION PROMOTION RESTITUTION CHANGE

COMPLAINANT: _____ ANONYMOUS

Battle on the Pleadings

- 12(b)(6) Motions to Dismiss are Common – the Playbook
- Standing Motions
- Strategy with Motions to Dismiss



CAFA and the Removal Battle

- Class Action Removal Under CAFA
 - Greater than \$5 million in controversy
 - Greater than 100 putative class members
 - Minimal diversity



Prevailing Issue: Rule 9(b) In Fraud/UDAP Claims

- Misrepresentations

- Identifying Specific Advertisements / Documents

- *In re Ford Fusion & C-Max Fuel Econ. Litig.*, 2015 WL 7018369 (S.D.N.Y. Nov. 12, 2015) (“to the extent that Plaintiffs have referenced specific ads that made specific promises ... they have sufficiently alleged ... the fraud at issue under Rule 9(b)”).

- Omissions

- Was the Omission Within A Particular Advertisement? Identify the Ad.

- *Marolda v. Symantec Corp.*, 672 F. Supp. 2d 992 (N.D. Cal. 2009)

- Otherwise, just need “who” (e.g., manufacturer), “what” (e.g., knowingly concealing a defect), “when” (e.g., time of sale), and “where” (e.g., dealership).

- *Philips v. Ford Motor Co.*, 2015 WL 4111448 (N.D. Cal. July 7, 2015)

Prevailing Issues: Personal Jurisdiction / Multi-State

- *Demaria v. Nissan N. Am.*, 2016 WL 374145 (N.D. Ill. Feb. 1, 2016)
 - Illinois plaintiff sues Tennessee company in Illinois
 - Amended complaint adds plaintiffs from other states – “self-organized”
 - Defendant moves to dismiss non-Illinois plaintiffs on personal jurisdiction grounds
 - Court grants motion
 - No general jurisdiction
 - No specific jurisdiction
 - No pendent personal jurisdiction
 - Result: More MDLs?

Prevailing Issues: Suit Limited to Plaintiff's Model?

- *Bedi v. BMW of N. Am., LLC*, 2016 WL 324950 (D.N.J. Jan. 27, 2016)
 - Plaintiff does have standing to sue over vehicles beyond those he or she purchased.
 - Standard: a class complaint generally may survive a motion to dismiss on products a lead plaintiff did not purchase, so long as: (1) the basis for each of the claims is the same, (2) the products are closely related, and (3) the defendants are the same.
- *Glenn v. Hyundai Motor Am.*, No. 15-cv-2052 (C.D. Cal. June 24, 2016)
 - A named plaintiff may assert class claims regarding vehicle models she has not purchased if she adequately pleads “sufficient similarity” between the vehicle models purchased and those models not purchased.
- *Sanborn v. Nissan*, No. 14-cv-62567 (S.D.Fl. June 15, 2015)
 - “Plaintiffs cannot raise claims relating to those products which they did not purchase.”
 - “[T]he Court agrees with other courts in this district which have declined to apply the ‘sufficiently similar’ test.”

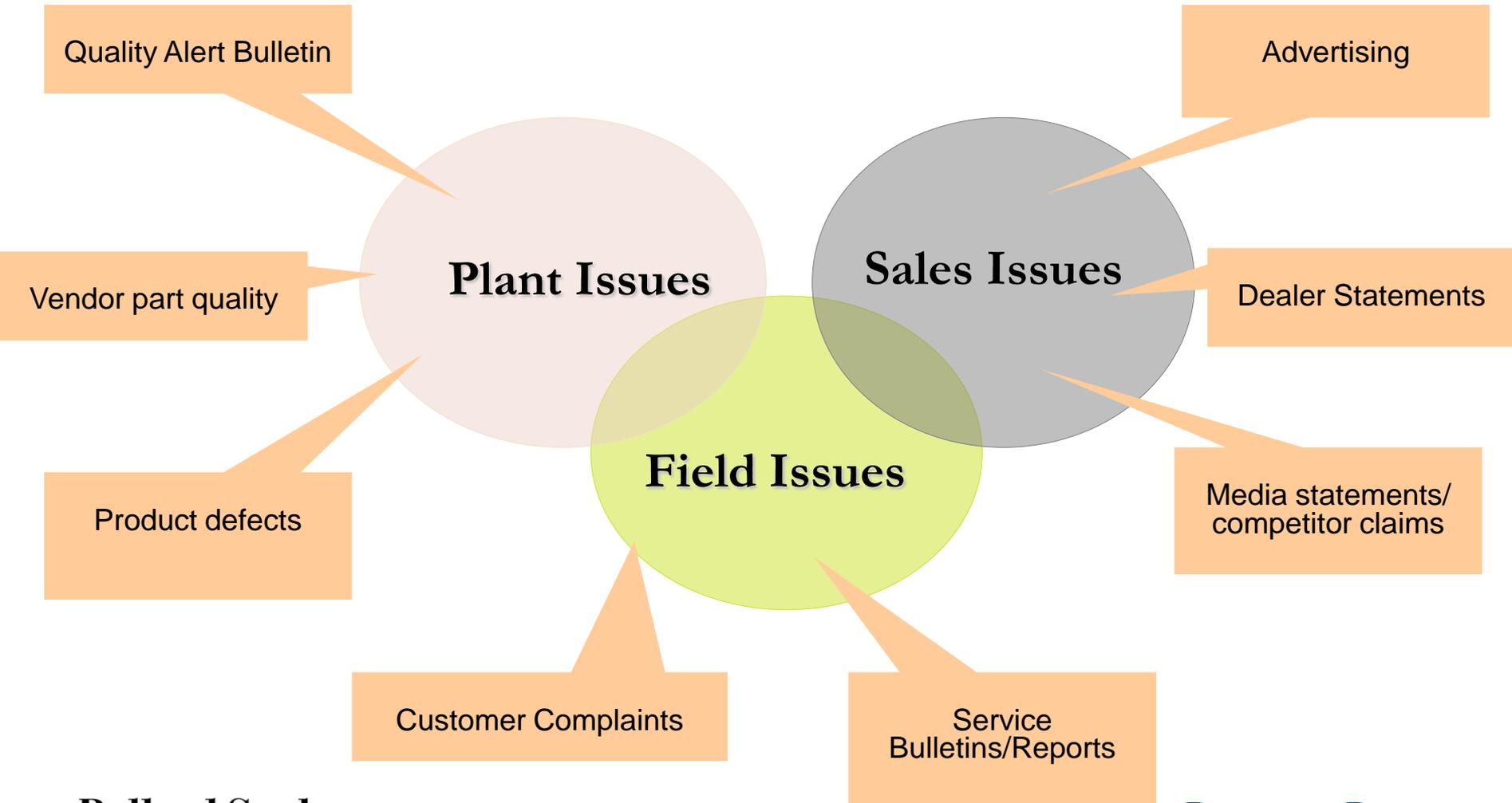
Prevailing Issues: Safety Requirement in California

- The Emergence of a Safety Requirement
 - *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824 (Nov. 8, 2006) (“Honda did nothing that was likely to deceive the general public by failing to disclose that its ... engine might, in the fullness of time, ... cause an oil leak.”)
 - *Wilson v. Hewlett-Packard*, 668 F.3d 1136 (9th Cir. 2012) (must “pose safety concerns”)
- The Disappearance of the Safety Requirement?
 - *Rutledge v. Hewlett-Packard*, 238 Cal. App. 4th 1164 (Aug. 2015) (*Daugherty* does not “preclude a duty to disclose material information ... concealed from a consumer”)
 - *Norcia v. Samsung*, 2015 WL 4967247 (N.D. Cal. Aug. 20, 2015) (“pursuant to *Rutledge*, the Court rejects defendants’ argument that Samsung’s duty to disclose here was limited to defects relating to safety concerns”)

Discovery in Automotive Class Actions

- ESI
- Rule 16 Conference Bifurcation Efforts
- Proportionality in Class Actions
- Statistical Evidence and Surveys
- Discovery from Absent Class Members
- The Role of Dealerships and other third parties
- Post Certification Discovery?

Where Good and Bad Vehicle Data Comes From



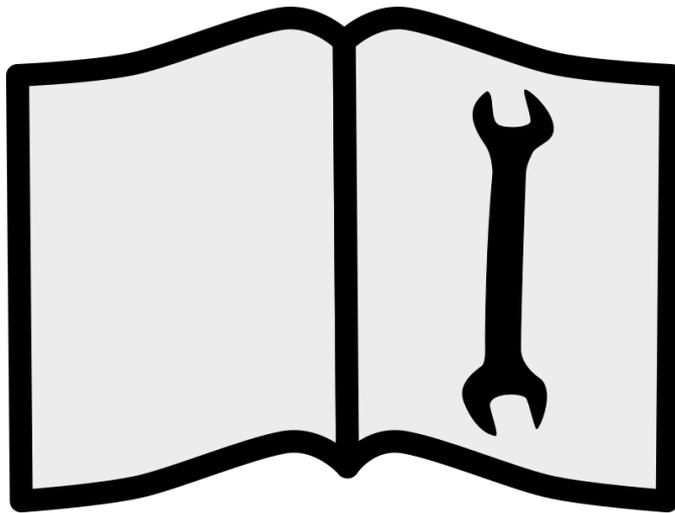
Missteps 1 – Prevailing Regulatory Issues

- Toyota Unintended Acceleration
- GM Ignition Switch
- Takata Airbags
- VW Emissions Scandal



Missteps 2 – Vehicle Owners’ Manuals

- Instruction and Owner’s Manuals can be a frequent source of consumer class actions.
- Auditing of the technical descriptions and images is important.
- “... the defendant advertised capabilities that the vehicle does not have ...”



Missteps 3 – Advertising

EVOLUTION

...to the blistering heat of the most barren deserts...

Needless to say, the requirements were met and the High Mobility Multi-purpose Wheeled Vehicle a.k.a. HMMWV, pronounced "HUMVEE®" by servicemen and women, began active service. Since its introduction, the HUMVEE has not only become an invaluable asset to the military, but an American icon as well.

It is from this proud heritage of surpassing the highest military standards in the world, that all civilian HUMMERS are born. The name may be different, but the DNA is the same.

Mitigate Advertising Impact: Provide Perspective

Independent Research

MOTOR TREND

PRINT THIS
Powered by Clickability

2002 AM General Hummer H1
Can the military-bred vehicle survive in the urban jungle?

By Jeff Bartlett
Photography by the author
Motor Trend, January 2002

Don't expect this truck to climb hills at high speeds

Through the years, we've evaluated the Hummer in the harshest conditions available, ranging from Death Valley Torture Tests to running the AM General's Indiana proving grounds. In these brutal environs, the Hummer's abilities never cease to amaze. At AM General, we've run the gamut, putting the Hummer through military-grade tests: scaling a 22-inch vertical wall, traversing a 40-degree side slope, climbing 60-degree grades, and fording 30 inches of water. Perhaps being built to have a 15-year service life in the hands of 18-year-old drivers is the most impressive spec of all.

*"Experience the product"
Test Drive...*

Critique

- Determine what is on the other side of the hill. Get out of your vehicle and walk up the hill, if necessary. Driving up a hill and not knowing what is on the other side could be extremely dangerous.

▲ WARNING ▲
NEVER drive fast over the top of a hill.

REASON: There may be a drop-off or obstacle over top of the hill. Failure to slow down when approaching the top of a hill may result in serious injury or death.

- If your wheels start to slip as you approach the top of the hill, "walk" the vehicle the last remaining feet of the hill by

Climb 60% grades

that the vehicle be stopped. Attempting this action while trying to simultaneously ascend a hill will result in damage to the drivetrain.

If your vehicle fails to climb the hill, there are a few steps to take depending on whether or not your vehicle engine stalls.

- The first step, no matter what the engine does, is to apply the service brakes and set the parking brake immediately. This will prevent your vehicle from rolling backwards and keep the tires from spinning.

120 Starting and Operating

Support

- Determine what is on the other side of the hill. Get out of your vehicle and walk up the hill, if necessary. Driving up a hill and not knowing what is on the other side could be extremely dangerous.

▲ WARNING ▲
NEVER drive fast over the top of a hill.

REASON: There may be a drop-off or obstacle over top of the hill. Failure to slow down when approaching the top of a hill may result in serious injury or death.

- If your wheels start to slip as you approach the top of the hill, "walk" the vehicle the last remaining feet of the hill by swinging the front wheels sharply left and right if the situation permits. This action will provide a fresh "bite" into the

• 195 horsepower

• 0-60 in 18 secs.

• 7,000 lbs.

will prevent your vehicle from rolling backwards and keep the tires from spinning.

120 Starting and Operating

Misstep 4 – E-mail

- Real-world examples – pick up the phone:

From:

Sent: Thursday, February 06, 2003 7:05 AM

To:

Subject: Overheating

One of our Field Engineers ran across two more vehicles in Nevada with the same overheating problem we've seen in Colorado and Utah (see attached). I also have one in Phoenix where the customer is getting very unhappy. Any progress?

Thanks,



Prevailing Issues: Choice of Law

- *In re: Onstar Contract Litigation*, 278 F.R.D. 352 (E.D. Mich. 2011)
 - Putative national plaintiff class alleges consumer fraud against OnStar and several auto manufacturers for allegedly failing to disclose impact of switch from analog to digital cellular service on telematics equipment.
 - The Court applied the Restatement of Conflicts to find definitively that the law of the plaintiffs' home state applies to allegations of consumer fraud and that one state's law cannot be applied to citizens of other states.
 - Eastern District of Michigan denied class certification. The 6th Circuit denied plaintiffs' Rule 23(f) Petition for interlocutory review.
- *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 585 (9th Cir. 2012)
 - Plaintiffs bought and leased Acuras with "collision mitigation" braking systems
 - Alleged ads misrepresented CMBS characteristics and omitted limitations of system
 - Complaint alleged four claims under California law. (Honda/Acura based in Cal.)
 - "We hold that the district court erred because it erroneously concluded that California law could be applied to the entire nationwide class...."

Prevailing Issues: Defect Manifestation

- The decision: *In Re Ford Motor Co. E-350 Van Products Liability Litigation (No. II)* (denying class certification to claims of diminution in value due to vehicle instability).
- Plaintiffs sought damages in the form of a retrofit repair the estimated cost of a retrofit.
- The Court denied class certification based on the finding that not all vehicles could have actually exhibited the alleged stability concern.
- In doing so, the Court squarely applied *Dukes* and discussed the “rigorous analysis”

Prevailing Issues: Defect Manifestation (Cont'd)

- *Collins v. DaimlerChrysler Corp.*, 894 So. 2d 988 (Fla. Dist. Ct. App. 2004) (“We see no requirement in FDUTPA that a defect *manifest* itself.... [Plaintiff] claims an actual injury in the form of insufficient product value. In other words, she contends that she did not get what she bargained for.”).
- *Wolin v. Jaguar Land Rover*, 617 F.3d 1168 (9th Cir. 2010) (“The district court erred when it concluded ... that certification is inappropriate because [plaintiffs] did not prove that the defect *manifested* in a majority of the class’s vehicles. ... [W]e have held that proof of the *manifestation* of a defect is not a prerequisite to class certification.”).

-

Prevailing Issues: Class Expert Scrutiny

- The decision: *American Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 814 (7th Cir. 2010) (reversing grant of certification in light of inadequate *Daubert* analysis and unreliable expert testimony).
- The trend toward a greater scrutiny of class certification proofs has made challenging experts at the certification stage a real consideration.
- *Peroxide* was a big step. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008). *Dukes* embraced this as part of the “rigorous analysis.”
- If an expert is engaged to speak to class certification issues, his methodology and conclusions are likely subject to at least a minimal *Daubert* scrutiny.
- Product design, consumer behavior, and economic experts are important in auto class actions.

Prevailing Issues: Economic Loss Damages Theories

- Increased Focus on Class-wide Damage Theories Post-*Comcast*
 - *Carriuolo v. Gen. Motors Co.*, 2016 WL 2870025 (11th Cir. May 17, 2016) (“as our sister circuits have held ... individual damages calculations do not preclude class certification”).
 - *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353 (3d Cir. 2015) (“[I]t is a misreading of *Comcast* to interpret it as precluding certification ... where damages are not susceptible to a formula for classwide measurement.”).
- *Sanchez-Knutson v. Ford Motor Co.*, 310 F.R.D. 529 (S.D. Fl.)
 - Approving conjoint analysis –survey method that measures customer preferences.
- *Falco v. Nissan N. Am.*, 2016 WL 1327474 (C.D. Cal. Apr. 5, 2016)
 - Approving restitution in amount of average repair (for those who had not yet paid for repairs) – “class would be getting the benefit of their bargain.”

Prevailing Issues: Consumer Behavior

- Many cases involve allegations that something was not disclosed.
- Would the alleged disclosure have made a difference?
- What exactly is it that should have been said?
- In what form? Writing; television or radio media; by direct telephone contact?
- During what time frame? Timing is critical in relation to the other information that may otherwise be available.

Prevailing Issue:

Did you rely ?

"Maybe a little"

"I don't Remember"

"I didn't"

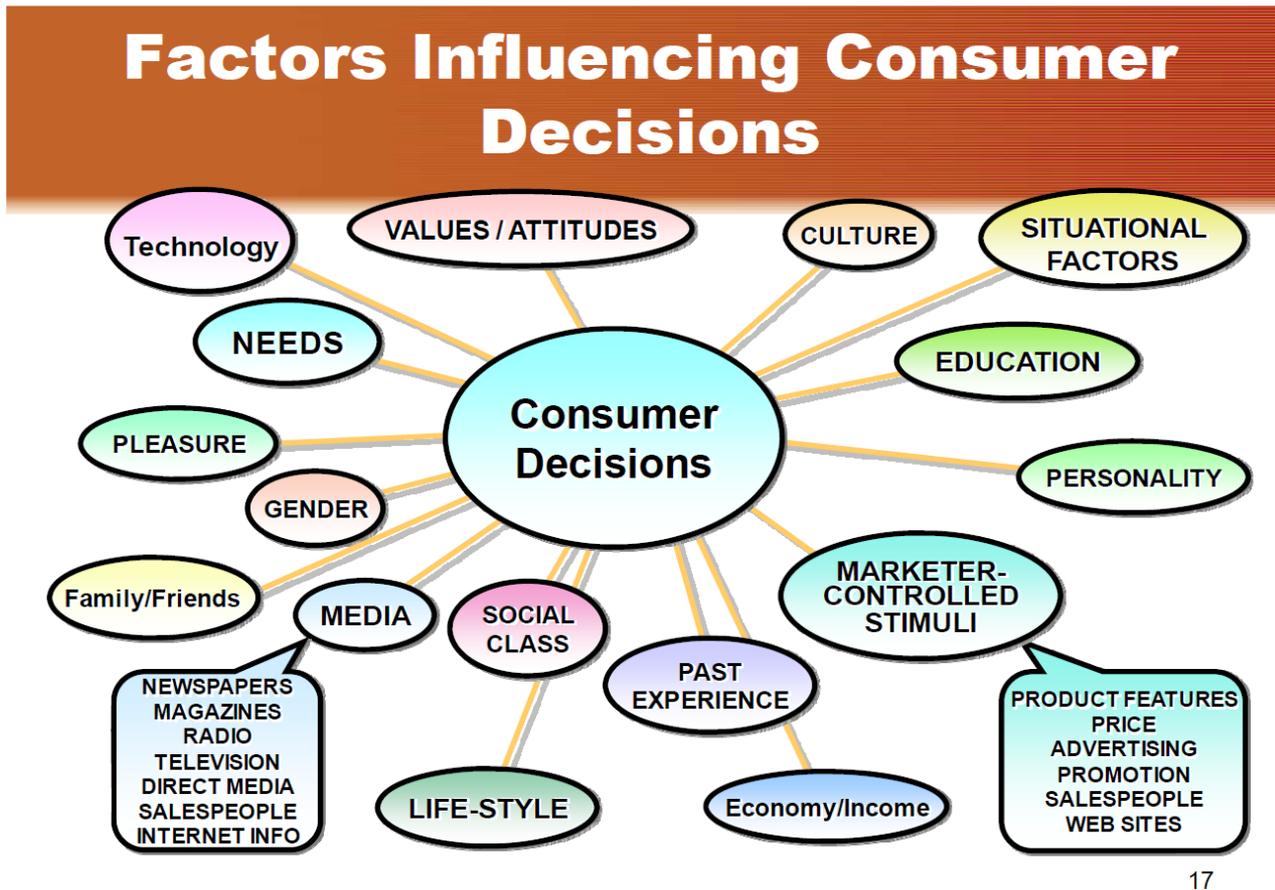
"I did"

Don't worry. I presume you all relied.

Prevailing Issues: Reliance and Causation

- The decision: *Mazza, et al. v. American Honda Motor Co., Inc.*, No. 09-55376 (9th Cir. Jan. 12, 2012)(denying class certification to national class pursuing California statutory fraud theories as to collision mitigating braking system limitations, based on individualized reliance inquiries).
- The 9th Circuit ruled that California law does not permit recovery by consumers who never were exposed to allegedly false advertising.
- The presumption of reliance—stemming from California Tobacco litigation—arises only in the presence of an “extensive and long-term [fraudulent] advertising campaign” and not where purchasers were exposed to disparate information or where the advertising was limited in scope.

Consumer Purchase Decision Model



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Figure 2: Factors Influencing Consumer Decisions

Prevailing Issues: Class Settlement Points

- Traditional Class Approval Settlements
- The Deal with Attorneys' Fees
- Objectors and Opt Outs
- Practical Considerations
- New Kid on the Block: Voluntary Market Actions



What is a Voluntary Market Action?

- Voluntary action that moots pending (or impending) class action or wraps into nationwide or statewide settlement
- Cover entire putative class (present & former owners)

	GROUP Body	MODEL All Models
	NUMBER 055	DATE March 2010
TECHNICAL SERVICE BULLETIN		
SUBJECT: HEADLAMP FOGGING/MOISTURE CONDITION		
<p>This bulletin provides information relating to some Kia models that may experience fogging or condensation <i>inside</i> of the headlamp assembly. Generally, this condition is considered normal and can be eliminated by turning on the headlamps with the engine running for several minutes or during normal driving conditions. In most cases, this will clear the headlamp fogging condition. Headlamp assembly replacement WILL NOT be necessary in most cases.</p>		
		
<p><i>Moisture accumulated within the headlamp assembly displays a fogging condition.</i></p>		

The Impact of a Recall or Voluntary Market Action

- Justiciability - Standing, Ripeness, or Mootness?
 - Standing - *In re Toyota Hybrid Brake Litig.* (C.D. Cal.)
 - Mootness - *Winzler v. Toyota* (10th Cir.)
 - Ripeness - *Strama v. Toyota* (N.D. Ill.)
- Damages Theory – Has Complete Relief Been Provided?
 - *Edwards v. Ford Motor Co.*, 603 F. App'x 538 (9th Cir. 2015)
 - *Sater v. Chrysler* (C.D. Cal.)
 - *Philips v. Ford Motor* (N.D. Cal.)

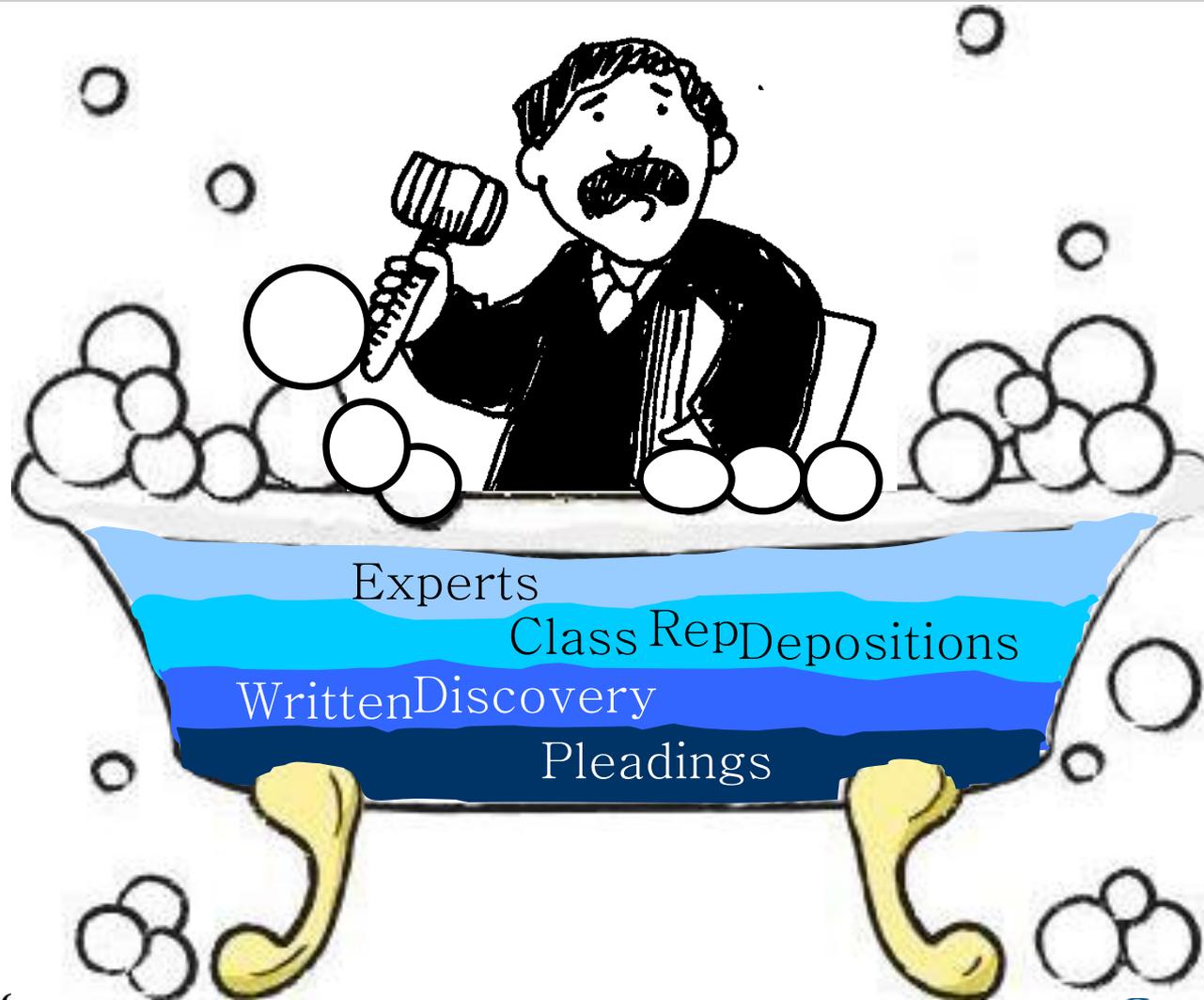
“Catalyst” Attorney Fee Motions

- Availability of Catalyst Award
 - *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553 (2005) (“an award of attorney fees may be appropriate where plaintiffs’ lawsuit was a *catalyst* motivating defendants to provide the primary relief sought....”)
- Recent Awards Under Catalyst Theory under State-Law Claims
 - *Chin v. DaimlerChrysler Corp.*, 461 F. Supp. 2d 279 (D.N.J. 2006) (Cal. law)
 - *MacDonald v. Ford Motor Co.*, 142 F. Supp. 3d 884 (N.D. Cal. 2015)
 - *Edwards v. Ford Motor Co.*, 2016 WL 1665793 (S.D. Cal. Jan. 22, 2016)

Looking Forward – Practice Changes

- With longer periods of discovery necessary for a “rigorous analysis”, courts are less willing to bifurcate class certification discovery. Auto makers will be required to produce more “merits” based vehicle testing, warranty and consumer affairs data during the initial phase, before class certification is decided.
- The Pleadings Become a Critical Battle Ground to pair down the claims.
- Trial courts will have fuller records to support their initial decisions. Decertification with the trial court, and appellate reversal, may be more difficult.

Appeal: Is the Bathtub Too Full?



Thank You

Neal Walters

Ballard Spahr LLP

Cherry Hill, NJ

waltersn@ballardspahr.com

David Stein

Girard Gibbs LLP

San Francisco, CA

ds@classlawgroup.com