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The Products Liability and Warranty Practice Group at Wilson Turner Kosmo LLP consists of trial lawyers with extensive experience representing manufacturers and sellers in products liability and warranty matters. The firm's experience includes representing manufacturers and retail sellers of automobiles, industrial equipment, hand tools, lawn and garden equipment, pharmaceutical products, medical devices, and consumer goods in all aspects of complex litigation, including trial, arbitration, and mediation.

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MPG Claims Becoming Hot Issue

Automakers' stated miles per gallon (MPG) estimates are drawing criticism from consumer groups and the plaintiffs' bar, as well as increased attention from the federal regulatory agencies overseeing such estimates. The MPG ratings, which are based on guidelines and testing established by the Environmental Protection Agency (EPA), are widely used in car advertisements, and are included in the window stickers for new vehicles. Dealership salespeople typically tout the estimated MPG to potential consumers as well. Two recent lawsuits highlight the contentious issues involved in MPG claims. It is also clear that the two governmental regulatory agencies tasked with overseeing this area, the EPA and the Federal Trade Commission (FTC), seem to be ratcheting up their standards and requirements.

On the litigation front, recently, the Colorado district court largely dismissed a proposed class action accusing Ford Motor Company of misleading consumers about the fuel efficiency of some of its hybrid vehicles, finding that many of Ford's allegedly false advertisements and claims amounted to no more than "non-actionable puffery." (*Sanchez v. Ford Motor Co.*, 2014 U.S. Dist. LEXIS 73195, at *15 (D. Colo. May 29, 2014).) The court also largely adopted Ford's argument that MPG claims are preempted by federal law, stating, "FTC guidelines explain that the use of 'EPA estimate' is sufficient disclosure." (*Id.* at *12 (citing 16 C.F.R. § 259.2(a)(2), n.5).)

In addition, Hyundai and Kia recently settled an MDL action involving MPG issues, for potentially more than $255 million. Plaintiffs in the MDL matter alleged the automakers overstated the fuel efficiency of more than 900,000 vehicles. (*In re Hyundai & Kia Fuel Econ. Litig.*, MDL No. 2424, 2:13-ml-02424-GW-FFM (C.D. Cal.).)

On the regulatory front, in July, the EPA said it is considering a new regulatory program to require in-use gas mileage auditing for all automakers, following complaints about misleading fuel economy estimates. Most recently, on November 3, 2014, the EPA issued a $350 million penalty under the U.S. Clean-Air Act against Hyundai and Kia based upon its conclusion that the automakers falsely inflated the fuel economy ratings on 1.2 million vehicles.

For its part, the FTC announced in May that it is inviting comments on whether to change its fuel economy advertising rules to advise that automakers state the mileage their vehicles get both in the city and on the highway (rather than just the highway), in an effort to better inform consumers.

Given the ever-rising price of gasoline, as well as the increasing popularity of hybrid vehicles, MPG litigation is likely to increase in the foreseeable future.

Texts, Tacos, and the TCPA on Vicarious Liability

In *Thomas v. Taco Bell, Inc.*, the Ninth Circuit affirmed a district court's ruling in a Telephone Consumer Protection Act ("TCPA") case, which held that Taco Bell was not vicariously liable for text messages sent by a third party advertising a Taco Bell product. (*See Thomas v. Taco Bell Corp.*, No. 12-56458, 2014 U.S. App. LEXIS 12547 (9th Cir. July 2, 2014).) The ruling is one of the first Circuit Court decisions to consider the issue of vicarious liability since the FCC's declaratory ruling, which held that companies can be "vicariously liable under federal common law agency principles [i.e. Formal Agency, Apparent Authority, and Ratification] for a TCPA violation by a third-party telemarketer." (*In re Joint Petition filed by Dish Network* LLC, CG Docket No. 11-50, ¶24 (2013) ("Dish Network").)

(cont.)

In *Thomas*, plaintiff attempted to hold Taco Bell vicariously liable for a text message marketing campaign, which was conducted by the Chicago Area Taco Bell Local Owners Advertising Association (the "Association"). A four-member board of directors headed the Association; three directors were elected by the Association's membership and Taco Bell selected the fourth. Susan Viti served as Taco Bell's appointed director during the relevant time period. After the Association approved the marketing campaign, Ms. Viti sent the promotional materials to Taco Bell and informed it that the promotion also included a text-messaging component. After plaintiff allegedly received an unsolicited text message regarding the promotion, she filed suit.

The district court, however, found that there was insufficient evidence to support the conclusion that Taco Bell was vicariously liable. In particular, the court found that plaintiff did not present evidence that Taco Bell:

1) directed or supervised the manner and means of the text messaging campaign, which was conducted by the Association;
2) created or developed the text message; or
3) played any role in the decision to distribute the message by way of a blast text.

Plaintiff appealed and the Ninth Circuit affirmed the lower court's ruling. Specifically, the Ninth Circuit found that a formal agency relationship did not exist because Taco Bell did not control the actions of the Association or the other entities that assisted with the text marketing campaign. (*Thomas*, No. 12-56458, 2014 U.S. App. LEXIS, *4.)

The Ninth Circuit also held that "ratification" was inapplicable. "'Although a principal is liable when it ratifies an originally unauthorized tort, the principal-agent relationship is still a requisite, and ratification can have no meaning without it.'" (*Id*. [initial citations omitted].) But plaintiff failed to show that the Association or the other entities that assisted it with the text marketing campaign were agents of Taco Bell. (*Id.* at *6.) Although the Ninth Circuit's decision is currently unpublished, it is a straightforward application of the vicarious liability principles that the FCC articulated in *Dish Network* and, therefore, courts are likely to find the analysis set forth in *Thomas* helpful as they address future TCPA cases involving the issue of vicarious liability.

For additional Products Liability articles, please visit our new blog (WTK CONNECT) located on our firm's website.

Application of the Components Parts Doctrine in the Hands of California Supreme Court

The California Supreme Court recently granted review of *Ramos v. Brenntag Specialties, Inc.* (2014) 224 Cal.App. 4th 1239, a case involving California's Components Parts Doctrine. The significance of California's high court considering *Ramos* is that its decision will resolve a split of opinion on the doctrine's application that exists in the Second Appellate District. The facts of *Ramos* are substantially similar to another Second Appellate District case, *Maxton v. Western States Metals* (2012) 203 Cal.App.4th 81, yet the Court's decisions in the two cases are polar opposites. The *Ramos* court drew a distinction between products used in the manufacturing process versus end-products sold to consumers.

By way of background, the Component Parts Doctrine is a compilation of several lines of cases that discuss the liability of component part manufacturers in various scenarios. The cases, when taken together, establish that component and raw material suppliers are not liable to ultimate consumers when the goods or material they supply are "not inherently dangerous, they sell goods or material in bulk to a sophisticated buyer, the material is substantially changed during the manufacturing process and the supplier has a limited role in developing and designing the end product." (*Artiglio v. General Electric* (1998) 61 Cal.App. 4th 830, 839.)

Maxton and Ramos were both workers in manufacturing plants. Both sustained injuries allegedly as a result of being exposed to raw materials used at the plant to manufacture end-products. Both sued the raw material suppliers claiming their products caused their injuries. Trial Courts in both cases entered judgment in favor of the raw material suppliers, relying upon the Components Parts Doctrine. Both plaintiffs appealed.

The Second Appellate District, applying the *Artiglio* factors, affirmed judgment for the raw material suppliers in *Maxton*. However, just two years later, the Second Appellate District reversed judgment in *Ramos*, holding that the Components Parts Doctrine applies to ultimate end-users, but it does not shield a component parts manufacturer from liability when the plaintiff alleges direct injury from their products during the manufacturing process. (*Ramos, supra,* 224 Cal.App. 4th at 1243.)

Those that practice in the products liability arena in California are wondering whether the Components Parts Doctrine survives or perishes, or whether its existence will be somewhere in between. Stay tuned.