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Eighth Circuit reverses dismissal of putative class claims on ground that puffery does not apply to allegations of concealment

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Takeaway: The Eastern District of Missouri granted General Motors' motion to dismiss a putative class action alleging deceptive omission of oil consumption problems with certain GMC and Chevy trucks, agreeing that the positive statements in GM's ads were non-actionable puffery. But the Eighth Circuit reversed, holding that puffery is not a valid defense to a claim based on the omission of a material fact. *Tucker v. General Motors LLC*, --- F.4th ---, 2023 WL 310225 (8th Cir. Jan. 19, 2023). While the appellate court recognized it is not practical to require vendors to disclose every prior consumer complaint, it held that the two plaintiffs had sufficiently pled a history of oil problems such that it was a legally cognizable omission claim. The court, however, did not articulate a standard for companies to determine when a handful of customer gripes crosses the line into a potential problem that must be disclosed to new buyers. Nor did the court address the manner in which such disclosures must be made to avoid liability.

In *Tucker*, two individuals purchased GM vehicles with Gen IV V8 engines—one bought a 2013 GMC Sierra and the other a 2012 Chevrolet Silverado. The trucks began consuming excess oil at 75,000 miles and 25,000 miles, respectively. The plaintiffs alleged that GM was aware of the oil consumption defect in the Gen IV engines as early as 2008, based on prior customer complaints, but that GM never disclosed this problem to purchasers. Instead, its advertisements and public statements made positive comments about the performance, power, and fuel economy of the engine.

The plaintiffs filed a putative class action in federal court in Missouri, alleging a number of legal claims, including a violation of the state's consumer protection law, the Missouri Merchandising Practices Act (MMPA), which is similar to many states' consumer protection laws. The lawsuit claimed that plaintiffs either (a) would not have purchased or (b) paid too much for their vehicles, due to the undisclosed oil problem. They sought unspecified damages. The case was brought on behalf of a class of those who purchased any of the seven different GMC and Chevrolet trucks and SUVs using the Gen IV V8 engine in model years 2010-2014.

The MMPA provides a right to legal relief to a person who sustains ascertainable loss in connection with the purchase of certain personal merchandise as a result of "any deception, fraud, ... misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or

advertisement of” the merchandise. *Tucker*, 2023 WL 310225, at *2. Plaintiffs alleged that GM violated the MMPA by suppressing or concealing a material fact in connection with the sale of their vehicles.

The district court dismissed the complaint. It ruled that GM’s advertising constituted “mere puffery”—vague positive statements of product superiority typically found in ads—rather than a false statement of fact under the MMPA. Because puffery applies to affirmative marketing statements, and not to the nondisclosure of material information, the court of appeals reversed. It rejected GM’s contention that Plaintiffs’ MMPA claim must be tied to an affirmative statement by GM and noted that the law’s language also allows a claim based on alleged concealment, suppression, or omission.

The appeals court held that “Plaintiffs’ allegations that they would not have bought the affected vehicles, or would only have bought them at a lower price, plausibly alleges that GM omitted a ‘material fact’ that resulted in Plaintiffs suffering an ascertainable loss” and thus “Plaintiffs plausibly stated claims that GM violated the MMPA” *Id.* at *3. Significantly, the court recognized that “Plaintiffs are not simply alleging that GM should have told them that the vehicles they were purchasing had been the subject of consumer complaints, which would ‘impose an impossible duty on vendors of commercial products.’” *Id.* (citation omitted).

Notably, however, the court did not identify what a plaintiff must allege beyond consumer complaints to shift from imposing “an impossible duty on vendors” to stating a viable legal claim. Evidently, something in the 30 pages of allegations in the complaint about GM’s knowledge of the oil defect cleared this threshold, but the court does not attempt to state a standard for what additional facts beyond a bare consumer complaint qualify an omission as material and satisfy the “scienter” requirement.

In the real world, how is a manufacturer like GM to comply with such a legal rule? Even if the court had established a clear line after which disclosure were legally required, would GM’s television ads have to balance their rosy statements with a disclaimer that “we have some evidence of high oil consumption but don’t think you should worry about it”? Or require dealers to force purchasers to sign an acknowledgement that they received and reviewed information about the oil problem? Would any of these steps impose a more reasonable burden on vendors?

The court’s analysis also does not explain how the putative class met the MMPA element requiring plaintiffs to suffer an “ascertainable loss of money or property.” The opinion recounts the complaint’s allegations that the oil defect can damage the engine through accelerated wear and tear and create safety risks (such as overheating and sudden engine seizure). But there is nothing indicating how the two class representatives—much less all class members uniformly—had actually suffered “ascertainable” damages, such as the incremental cost of the additional oil changes or the faster depreciation in value due to perception in the market of engine degradation. Instead, the damages were unspecified in the complaint.

Had the plaintiffs included such specific damages allegations in their complaint, they potentially would create serious challenges for class certification because undoubtedly each truck owner would have different experiences with their vehicle and its maintenance. Based on what is alleged by just two plaintiffs, one did not have oil problems until driving triple the miles of the other. Limitless individual variations inevitably would emerge once starting down the path of showing ascertainable damages for each class member.

While the plaintiffs in *Tucker* received a second chance to plead their MMPA claim, it will be a challenge to do so in a way that does not jeopardize class certification later in the case. More importantly, the appeals court decision leaves significant open questions for companies attempting to prevent class action lawsuits.