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Ford Throttle Defect Class Action Revived By 9th Circ.

By **Michael Mello**

Law360, Los Angeles (February 27, 2015, 11:04 PM ET) -- The Ninth Circuit ruled Friday that a lower court erred in denying class certification to Ford Freestyle owners who claim the automaker failed to disclose an acceleration defect in 150,000 vehicles, but rejected a request to order that the class be certified.

The decision breathed new life into Gene Edward's proposed class action alleging Ford violated California consumer protection laws by failing to inform Golden State buyers that its Freestyle sport utility vehicles had throttle problems and continuing to sell the vehicles despite its knowledge of those alleged issues. Ford has denied there were defects.

David Stein of Girard Gibbs LLP, who represents Edwards and **argued before the panel** earlier this month, praised the panel's decision.

"We're back on track," Stein told Law360 on Friday. "We're looking forward to proceeding with this case getting a positive result for the drivers who bought these vehicles."

Friday's opinion orders U.S. District Judge Michael M. Anello to reconsider whether the case against Ford should be certified as a class action. Anello denied class certification in 2012, saying that whether a defect exists in the Freestyle vehicles and how to define that defect could be done only through individual factual determinations.

The panel said Friday that Anello correctly concluded that whether there was a defect and whether Ford failed to disclose the defect are questions common to the proposed class, satisfying the commonality requirement for class certification. However, the appellate judges said the lower court later referred to those questions as "individual" in considering the class action predominance requirement, creating an incongruity.

The Ninth Circuit panel rejected Ford's argument that the error was harmless and reversed the lower court's denial of class certification, but declined Edward's request to order Anello to certify the class.

Edwards filed suit against Ford in 2011, complaining Ford violated California's Consumers Legal Remedies Act and Unfair Competition Law because the company knew about alleged Freestyle problems as early as 2005 but did not notify Freestyle owners and continued to sell the vehicles.

She said her 2006 Freestyle had problems with stalling or suddenly surged forward while she was driving at low speeds or stopped. Ford repaired her sport utility vehicle once under warranty, but she said she had to pay \$900 for further repairs when the problem returned after a couple of years.

Ford has said there is no defect, and the district court sided with its argument that determining there is a defect cannot be done through common proof among all the proposed class members, because several other systems in the Freestyle's engine independently influence the electronic throttle control system's performance, and because Freestyle owners have reported the alleged surging under various driving conditions.

On appeal, Ford argued that any class action was moot because of its program to repair 150,000 vehicles or reimburse owners for repairs. Ford's repair program started after the denial of class certification. But the panel struck down this reasoning Friday.

"The appeal is not moot, though, because Edwards seeks relief beyond that provided by the program, including reimbursement of the money consumers spent on the Freestyles or on extended warranties," the panel opined.

Representatives of Ford Motor Co. did not immediately respond to requests for comment Friday.

U.S. Circuit Judges Susan P. Graber and Kim McLane Wardlaw and U.S. District Court Judge James C. Mahan sat on the panel that reached Friday's decision.

Edwards is represented by Eric H. Gibbs, Geoffrey A. Munroe and David Stein of Girard Gibbs LLP; and Michael F. Ram of Ram Olson Cereghino & Kopczynski LLP.

Ford is represented by Amir M. Nassihi of Shook Hardy & Bacon LLP; Daniel S. Rodman of Snell & Wilmer LLP; and John M. Thomas, Krista L. Lenart and Janet L. Conigliaro of Dykema Gossett PLLC.

The case is Edwards v. Ford Motor Co., case number 12-80199, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Daniel Siegal. Editing by Kelly Duncan.

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