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Buyers Slam German Auto Cos.' Bid To Dodge Antitrust MDL

By **Linda Chiem**

Law360 (July 17, 2018, 3:54 PM EDT) -- U.S. auto dealers and consumers told a California federal judge Monday that Audi, Volkswagen, Mercedes-Benz, BMW and Porsche cannot dodge multidistrict litigation alleging they engaged in an antitrust conspiracy on car technology, costs, suppliers and emissions equipment, saying there's substantial evidence of the decadeslong scheme.

Attorneys for the auto dealerships and the consumers, or the direct purchaser and indirect purchaser plaintiffs, filed a lengthy opposition brief firing back at the automakers' joint motion to duck out of the MDL accusing them of conspiring to constrain innovation on everything from brake controls and chassis to electronics and car assemblies for more than 20 years.

The buyers rebuked the automakers' arguments that the plaintiffs' ill-defined antitrust injuries and illogical claims don't hold up, maintaining that they've sufficiently established antitrust injuries as a result of the higher prices they paid for the German vehicles because of the scheme and that the Foreign Trade Antitrust Improvements Act of 1982 does not immunize the automakers from the MDL's Sherman Act claims.

"Defendants' joint [motion to dismiss] attempts to shift the court's focus away from acknowledged anticompetitive conduct to arguments that mischaracterize the law and facts, including many arguments that are premature at the pleading stage," the plaintiffs said in the 100-page filing. "First, ignoring the complaints' allegations about defendants' anticompetitive conduct, defendants move straight to antitrust injury and standing — never acknowledging that one unmistakable aspect of the conspiracy was to reduce product quality on products purchased by plaintiffs without any price concessions."

That alone is an antitrust injury, the plaintiffs said, easily meeting any standing requirements and especially for the purpose of defeating a motion to dismiss.

What's more, the existence of the cartel is bolstered by the fact that two of the three parent company defendants — Volkswagen AG and Mercedes-Benz parent Daimler AG — have already filed leniency applications with the European Commission that effectively admit participation in a "secret cartel," the plaintiffs said.

"The cartel was broad in scope. It was a de facto whole car conspiracy because defendants' collusion, which was carried out in at least 60 so-called 'working groups' that met thousands of times, encompassed everything from brake controls and chassis to electronics and drivetrains for German passenger vehicles," the plaintiffs asserted in their opposition brief.

"In fact, the defendants, who referred to themselves as the 'Circle of Five' and proclaimed that they did not want to engage in an 'arms race' on innovation, even had a 'total vehicle' working group," the plaintiffs added. "Such a conspiracy among horizontal competitors is precisely the type of misconduct that federal and state antitrust and consumer protection laws are meant to remedy."

And in the fall of 2017, the European Commission conducted **"dawn raids"** in Germany of BMW, Daimler and Volkswagen as part of its investigation that the companies colluded to restrict innovation in German passenger vehicles, according to the filing.

The automakers moved to dismiss the consolidated complaints from indirect purchaser and direct purchaser plaintiffs in May, saying they merely relied on sensationalized allegations in German magazine Der Spiegel's reports last year that certain German auto manufacturers engaged in numerous technical exchanges over the years that had the effect of limiting innovation competition.

Der Spiegel reported that Volkswagen, in particular, had admitted to participating in the alleged conspiracy, which then prompted the European Commission to announce it was **investigating a possible antitrust cartel** among German luxury vehicle manufacturers.

"Plaintiffs' obvious strategy is to use the Der Spiegel articles as the proverbial camel's nose under the tent — wedging their way into time-consuming and expensive discovery in hopes of finding actual anticompetitive conduct," the automakers said in their joint motion to dismiss in May.

The German automakers also argued that, in addition to failing to plead any actual or plausible antitrust injuries, the plaintiffs attacked foreign conduct — alleged agreements in Germany to limit innovation and coordinate purchasing — that's beyond the reach of U.S. federal and state antitrust law.

Under the Foreign Trade Antitrust Improvements Act, non-import foreign conduct is actionable under the Sherman Act only if, as is relevant here, it has "a direct, substantial, and reasonably foreseeable effect" on domestic or import commerce in the U.S. The same limitation applies to state antitrust laws, the companies argued.

"An agreement to limit innovation overseas is not a restriction of import commerce," they said. "And, in this circuit, the law is settled that overseas agreements that allegedly restrict innovation — even with respect to products destined for import — cause only an indirect effect and thus are not actionable under U.S. antitrust laws."

But the plaintiffs said Monday that's hogwash.

"Both pragmatically and with little imagination, defendants' collusion on German passenger vehicles is conduct that falls squarely within the FTAIA's import trade exclusion," the plaintiffs argued. "Defendants' assertion that the import trade exclusion 'applies only to claims based on conduct that itself directly acts upon and restrains import transactions' ignores the alleged facts and misstates the law."

The MDL started out with two lawsuits from California and two lawsuits from New Jersey that were centralized before U.S. District Judge Charles Breyer in the Northern District of California last October. The MDL then grew to include more than two dozen suits, according to court documents.

The centralized suits similarly accused BMW AG, Volkswagen AG, Audi AG, Porsche AG, Daimler AG and their U.S. affiliates of sharing commercially sensitive information and reaching illegal agreements about vehicle attributes including technology, costs, suppliers and emissions equipment.

The automakers have been secretly colluding since the 1990s, forming a price-fixing cartel that allowed them to significantly reduce and suppress research and development costs amongst themselves, while still allowing them to charge a premium price for their "reputed engineering quality and innovation," the suits alleged.

Meanwhile, consumers allegedly still had to pay premium prices, did not benefit from innovation driven by real competition and lost the alternatives provided by competitors other than the defendants.

Counsel for the parties could not be immediately reached for comment Tuesday.

The indirect purchaser plaintiffs are represented by co-lead counsel Bruce L. Simon and Neil Swartzberg, Daniel L. Warshaw and Michael H. Pearson of Pearson Simon & Warshaw LLP and Melissa R. Emert of Stull Stull & Brody.

The direct purchaser plaintiffs are represented by co-lead counsel Warren T. Burns of Burns Charest

LLP, Lesley E. Weaver of Bleichmar Fonti & Auld LLP, Steven A. Hart of Hart McLaughlin & Eldridge and Kimberly A. Justice of Kessler Topaz Meltzer & Check LLP, W. Joseph Bruckner of Lockridge Grindal Nauen PLLP, Elizabeth C. Pritzker of Pritzker Levine LLP, Christopher A. Seeger of Seeger Weiss LLP, Allan Steyer of Steyer Lowenthal Boodrookas Alvarez & Smith LLP and James Martin of Zelle LLP.

BMW is represented by Daniel M. Wall, Michael Lacovara, Belinda S. Lee and Elizabeth H. Yandell of Latham & Watkins LLP. Volkswagen and Audi are represented by Sharon L. Nelles, Steven L. Holley, Suhana S. Han, Amanda F. Davidoff and Samantha Hynes of Sullivan & Cromwell LLP. Porsche is represented by William F. Kiniry Jr., Matthew A. Goldberg and Justin Kerner of DLA Piper and Norman A. Armstrong Jr. of King & Spalding LLP. Daimler and Mercedes-Benz are represented by Shon Morgan, Adam Wolfson, Kevin Y. Teruya, Richard I. Werder Jr. and Josef Ansorge of Quinn Emanuel Urquhart & Sullivan LLP, and Eric J. Knapp and Troy Masami Yoshino of Squire Patton Boggs LLP. Robert Bosch is represented by Michael S. Feldberg, John Roberti, Daniel Alan Holman, Claire Naila Rajan and Jana Steenholdt of Allen & Overy LLP.

The MDL is In Re: German Automotive Manufacturers Antitrust Litigation, case number 3:17-md-02796, in the U.S. District Court for the Northern District of California.

--Additional reporting by John Kennedy. Editing by Jack Karp.