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CLASS ACTIONS

No crash, but plenty of impact

Top court's holding in seatback case could have far-reaching ramifications

BY CARYN TAMBER

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Depending on which side you ask, a recent **Court of Appeals** opinion either ushered in a new era of consumer protection, or plumbed a new low in frivolous litigation.

The opinion in *Lloyd v. GM et al.* reinstated a suit against automakers over allegedly defective seatbacks, even though the plaintiffs sustained no physical injuries. The top court held that the potential injury — death or paralysis — was so great and the probability of injury so high that the owners could sue under a purely economic loss theory.

"You have to start somewhere," said Jack M. Mason, one of the lawyers for the putative class-action plaintiffs. Allowing consumers to sue for economic loss from an "uncrashworthy" defect, he said, "represents the same kind of breakthrough the lawyers had in the '60s, where they persuaded the courts that the manufacturer had a duty to make the automobile crashworthy in the first place."

DaimlerChrysler Corp., one of the defendants in *Lloyd*, sees it as a breakthrough of a different sort.

"We think it's important because it's probably the most frivolous theory for a class-action suit that is making its way through the American court system today," spokesman Michael Palese said.

Both sides agree that the case could have far-reaching ramifications.

"There's no other state that goes this far in allowing the groundwork now for an action for owners that have not actually yet been physically injured but [who] have been injured under the economic loss rule," said Bill Askinazi of the Rockville firm **Shulman, Rogers, Gan-**



MAXIMILIAN FRANZ

Bill Askinazi is one of the lawyers who helped convince Maryland's highest court to allow a suit over automobile seatbacks by plaintiffs who have not sustained physical injuries. There's no other state that goes this far, he said.

dal, Pordy & Ecker P.A.

Mason said *Lloyd* could open the door for more suits against automakers by uninjured car owners. For example, he said, owners of vehicles that tend to roll over in accidents could sue, as could owners of cars where the placement of the gas tank increases the risk of fire in a collision.

"That's the kind of case that could possibly be a clone of the seat-failure case," said Mason, who is of counsel in the Philadelphia firm **Marks & Sokolov**.

While Mason sees that as an opportunity, **DaimlerChrysler Corp.** sees it as a disaster in the making.

If *Lloyd* is applied broadly in Maryland, spokesman Palese warned, "Think about how unpredictable and how unfair the civil justice system would be in

Maryland and what impact that would have on Maryland's ability to attract businesses."

The *Lloyd* decision "basically did a very bad service to the residents of Maryland who pay taxes and rely on their jobs and on business growing and prospering in that state," he said.

Jeffrey A. Curran, head of the **American Bar Association** Tort Trial and Insurance Practice section's Automobile Law Committee, said the case could impact other types of product liability cases.

"It seems like it's really potentially opening up a lot of things to more litigation," said Curran, an Oklahoma attorney who does product liability defense, including for automakers. "The plaintiffs'

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Long wait for landmark ruling

Lloyd v. GM plaintiffs' lawyer Bill Askinazi said he believes the court took longer to decide *Lloyd v. GM* than any other case in its history.

Lloyd said someone in the **Court of Appeals** clerk's office told him the case had been out longer than any other. The Court Information Office could not confirm that because it does not keep those statistics.

Whether or not the case was record setting, Askinazi called the more than four years that elapsed between the fall 2002 argument date and the Feb. 13, 2007, decision "puzzling."

"The only rationalization I can provide is that it was such a landmark ruling that deviated from accepted law that there was some serious debate within

the court," he said.

He speculated that there may have been a dissenter who put off writing the dissent and was ultimately swayed to the opinion of the rest of the judges.

Askinazi said that before the decision was issued, he wrote several letters to the court, urging it to act. He said he was concerned that the passage of time would decrease the size of the putative class, or that some of the plaintiffs might actually be injured in the meantime.

"Justice delayed was justice denied, and I made that clear in many of the letters I wrote to the court over the past year," he said.

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Seatbacks

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lawyers I assume are extremely happy."

He said Maryland defense attorneys he has spoken to are "somewhat taken aback."

Collapsing backward

Seatbacks that collapse backward in rear-impact collisions have killed or seriously injured thousands of people across the country, the plaintiffs allege. In the Maryland case, nine consumers who owned cars made between 1990 and 1999 by **General Motors Corp.**, **DaimlerChrysler**, **Ford Corp.** or **Saturn Corp.** filed suit against the companies.

Cases against the automakers brought by people allegedly injured by the defective seatbacks have not been uncommon. Notably, a Tennessee couple won a \$105.5 million verdict — against DaimlerChrysler after a minivan in which their baby was riding was struck from behind. The front passenger seatback collapsed in the accident, causing the passenger to fall backward and strike the baby's head with his own, killing the child.

Palese said such suits are premised on the idea that judges and juries should second-guess auto safety engineers. He said the seatbacks may not be ideal in every kind of collision, but that they are designed to best protect in "the preponderance of accidents."

Askinazi said he believes the *Lloyd* plaintiffs and similar groups in New York, New Jersey, New Hampshire and Pennsylvania were the first uninjured car owners to file suit.

The *Lloyd* plaintiffs made claims for negligence, strict liability, breach of implied warranty, negligent failure to disclose, failure to warn, concealment, misrepresentation, fraudulent concealment and unfair or deceptive trade practices.

The cases in other states were all dismissed. In Maryland, the Montgomery County Circuit Court also dismissed the cases, holding that the plaintiffs could not sustain their claims under a pure economic loss theory. The Court of Special Appeals affirmed.

But the Court of Appeals disagreed, unanimously deciding that the case could proceed.

The top court "agree[d] with us that you don't have to wait until you're injured or dead to bring an action against a manufacturer of a defective product," Askinazi said. "It's not that anybody could run into court. This ruling specifi-

cally looked at the mountain of evidence that these seats are defective, both in the single case, personal injury context and all of the investigatory reports."

A spokeswoman for General Motors said the company will ask the Court of Appeals to reconsider its decision.

Askinazi said he hopes to get class certification within a year. Mason said the legal team plans to add as plaintiffs owners of GM, Ford and DaimlerChrysler cars manufactured up to the present day; all of those cars have the same defect, he said.

Will other states follow?

Askinazi and Mason said that, armed with the Maryland decision, they may file additional class actions in other states.

There are a "dozen states out there that have gone close but not as broad as

Maryland in that they created some exceptions" to requiring an actual injury, Askinazi said. "Those exceptions have not gone as far as what *Lloyd* does. Those are the states that we're looking at."

Mason said he hopes other states follow Maryland's lead.

"In the main, most of the state courts

are hostile to the notion that the Maryland Court of Appeals adopted, that consumers at risk of serious injury or death ought to be able to go to court and have their cars fixed," Mason said. "I expect that now that the Maryland Court of Appeals has sort of broken down the mystique behind the economic loss rule that other ... consumer-oriented state supreme courts will begin to pay attention to this issue."

Palese, though, does not believe the *Lloyd* attorneys will gain traction in other states. He pointed out that four states have already dismissed the case. In Pennsylvania, he said, DaimlerChrysler even brought — and settled — a malicious prosecution suit against the plaintiffs' lawyers.

(Askinazi said the suit was part of a DaimlerChrysler strategy of harassment and was dismissed for payment of a token \$1. Palese said he could not confirm that because the settlement was confidential.)

The ABA's Curran, too, said he is unsure how much success the plaintiffs' lawyers will have elsewhere.

He said other top courts may be reluctant to sign on to the Court of Appeals' new rule for economic loss claims, especially since it is based heavily on prior Maryland cases.

"Generally speaking, states are a little more provincial than that," he said.

"You don't have to wait until you're injured or dead to bring an action."

Bill Askinazi