

11th Circ. Backs Porsche In Engine Cooling Defect Suit

By **Mike Curley**

Law360 (November 6, 2023, 4:11 PM EST) -- The Eleventh Circuit on Monday sided with Porsche Cars North America Inc. in a suit alleging it sold vehicles with defective cooling systems, saying the two named plaintiffs failed to properly preserve the arguments they made on appeal.

In the **unpublished opinion**, the three-judge panel affirmed a summary judgment against Michael Xu and Daniel Vaz-Pocas, saying they missed their chances to argue that the delayed-discovery rule tolled their claims or that the trial judge used the wrong standard in deciding if Porsche's warranty was unconscionable.

The pair sued Porsche in **February 2020**, alleging that model year 2010 through 2016 Porsche Panamera vehicles and model year 2011 through 2019 Porsche Cayenne vehicles equipped with V8 gasoline engines have defective cooling systems that can result in immediate engine failure and complete loss of power without warning, including when traveling at highway speeds.

Though some of their claims survived a motion to dismiss in **December 2020**, U.S. District Judge Sarah E. Geraghty granted Porsche's motion for summary judgment in January 2023, leading to the appeal.

In the appeal, Xu had argued that Judge Geraghty should have applied the delayed-discovery rule to his California Unfair Competition Law and Consumer Legal Remedies Act claims when she found they were time-barred.

The panel, however, wrote that while Xu argued for the delayed-discovery rule in opposing Porsche's motion to dismiss, the judge at the time found that did not apply, and during the summary judgment proceedings, Xu's argument focused on a theory of fraudulent concealment, only raising the delayed-discovery rule "in passing."

"Although Xu had an opportunity to renew his delayed discovery argument at summary judgment — including an argument that the court had applied the incorrect standard at the motion-to-dismiss stage — he failed to raise it for either his UCL or CRLA claim," the panel wrote.

Similarly, the panel found that Vaz-Pocas didn't preserve his argument that the trial court failed to consider public policy implications and conducted the wrong analysis while considering whether Porsche's warranty was unconscionable.

According to the opinion, in his briefing at the trial court, Vaz-Pocas never mentioned public policy or the analysis he now says governs his claims, but only argued that the warranty was unconscionable because it was so one-sided as to shock the court's conscience.

And even if he had raised the public policy argument below, the panel added it was not convinced it would've changed the trial court's decision, as Judge Geraghty's order addressed the same factors that Vaz-Pocas focuses on in his appeal.

In Monday's opinion, the panel also denied Porsche's bid to file a surreply in the appeal as moot, and denied the company's bid for sanctions, saying the appeal was not clearly frivolous.

"While it is true that Xu failed to preserve his claims for appeal, not every losing argument — or

unpreserved claim — is so 'utterly devoid of merit' to warrant sanctions," the panel wrote.

Representatives for the parties could not immediately be reached for comment Monday.

Circuit Judges Adalberto Jordan, Kevin C. Newsom and Barbara Lagoa served on the panel.

Xu and Vaz-Pocas are represented by Timothy G. Blood and Paula R. Brown of Blood Hurst & O'Reardon LLP and James Evangelista and Kristi McGregor of Evangelista Worley LLC.

Porsche is represented by Brendan Krasinski, Matthew A. Goldberg and Timothy P. Pfenninger of DLA Piper LLP (US) and Anika P. Brunson of Lee Hong Degerman Kang & Waimey.

The case is Xu et al. v. Porsche Cars North America Inc., case number 23-10585, in the U.S. Court of Appeals for the Eleventh Circuit.

--Additional reporting by Emily Johnson and Emily Field. Editing by Patrick Reagan.