

FOR PUBLICATION

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

IN RE: MERCEDES-BENZ TELE AID
CONTRACT LITIGATION

Civ. No. 07-2720 (DRD)

MDL No. 1914

OPINION

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DEBEVOISE, Senior District Judge

This matter comes before the Court on two motions submitted by Defendant, Mercedes-Benz U.S.A., LLC (“Mercedes”). In the first, Mercedes argues that a recent decision by the Court of Appeals for the Third Circuit requires decertification of the class of plaintiffs¹ created by the Court’s April 24, 2009 Opinion and Order. In the event the Court refuses to decertify the class, Mercedes contends in its second motion that the class definition should be narrowed to exclude any individual whose “Tele Aid” service – an emergency response system which links subscribers to road-side assistance operators by using a combination of global positioning and cellular technology – was terminated prior to December 31, 2007.

For the reasons set forth below, the Court will deny Mercedes’s Motion for Decertification. The class definition will be clarified in two ways: (1) the date after which a plaintiff must have purchased or leased the vehicle in question will be changed from August 8, 2002 to August 22, 2002, and (2) persons or entities that purchased or leased a pre-owned vehicle after Decemeber 2006 will be excluded from the class. Moreover, the Court will certify an interlocutory appeal of two issues: (1) whether a district court may entertain a motion for

¹ The class is represented by 15 named Plaintiffs: Leroy Browning, James Giotis, Richard Hankins, Jack D. Kelley, Karen Marcus, Nicholas Lonziser, Christian Andrew Pellegrini, Mark Russell, Ashish Sen, Colleen Sen, Cord Shiflet, Michael Leslie Shim, Lois A. Stowers, Robert E. Stowers, and Susan Tuteur. On June 2, 2008, former Plaintiff S.B. Atlss voluntarily dismissed his claim without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1). Similarly, former Plaintiff Sandra Levin voluntarily dismissed her claim without prejudice on March 12, 2009.

reconsideration of an order certifying a class after a request for interlocutory appeal of that order pursuant to Federal Rule of Civil Procedure 23(f) has been denied, and (2) whether the Court was correct in its April 24, 2009 ruling that Restatement 148(2) governs the choice of law analysis under the “most significant relationship” test in consumer fraud actions in which the misrepresentations or omissions at issue were made and received in different states.

I. BACKGROUND

The circumstances underlying this litigation are laid out in detail in the Court’s April 24, 2009 Opinion. See In re Mercedes-Benz Tele Aid Contract Litig., 257 F.R.D. 46 (D.N.J. 2009). For the sake of brevity, the Court incorporates by reference the “background” section of that decision, and will refrain from revisiting the majority of the facts contained therein.

A. FCC Rule Change and Discontinuation of Analog Service

Plaintiffs purchased Mercedes model year 2002-2006 vehicles equipped with analog-only Tele Aid Systems and subscribed to that service until being informed that it would be discontinued at the end of 2007.² In order to receive Tele Aid service, Plaintiffs were required to sign a Subscriber Agreement that was separate from their purchase or lease contracts. Mercedes offered free Tele Aid service for one year, after which Plaintiffs were required to periodically renew their subscriptions by pre-paying fees corresponding to a given number of years of Tele Aid service. See (Pls.’ Br. Supp. Mot. Class Certification, Decl. of Geoffrey Munroe (“Munroe Decl.”), Exs. 19-22).

The Tele Aid systems installed in Plaintiffs’ vehicles used an analog signal provided by AT&T Wireless Services, Inc. (“AT&T”), as part of a contract between that company and

² Wireless telephone networks operate using either an analog or digital signal. Although the technology to produce so-called “dual mode” devices capable of using both analog and digital phone signals existed at the time they were manufactured, the Tele Aid systems installed in Mercedes’s model year 2000-2004 and some 2005 and 2006 automobiles depended exclusively on analog signals.

Mercedes. Prior to August 8, 2002, federal regulations required wireless carriers to provide both analog and digital signals over their networks. However, on August 8, 2002, the Federal Communications Commission (“FCC”) adopted a rule that abandoned that requirement by stating that carriers would no longer be required to provide analog service after a five-year “sunset period” ending on February 18, 2008.³ That rule change was vigorously opposed by Mercedes, which filed several objections during the rulemaking process and whose representatives met with FCC officials on at least two occasions prior to the agency’s final adoption of the new regulation.

Mercedes continued to manufacture and sell vehicles equipped with analog-only Tele Aid systems after the FCC’s August 8, 2002 ruling, but did not inform its customers that wireless carriers would no longer be required to provide the analog service on which their Tele Aid systems depended after February 18, 2008. In fact, Mercedes admits that it did not publicly acknowledge the FCC rule change and the impending obsolescence of analog-only Tele Aid systems until 2006, when it posted information regarding those developments on its website. Compare (Def.’s Br. Supp. Mot. Decertify 22) (setting the date of that disclosure as “June 2006”) with (Def.’s Br. Opp’n Class Certification 9) (stating that the information was posted in “November 2006.”) Owners of vehicles equipped with analog-only Tele Aid systems were not personally informed until their Tele Aid subscriptions needed to be renewed, meaning that in some cases individual subscribers did not receive notice of the FCC rule change and the imminent cessation of their Tele Aid service until late 2007. See (Munroe Decl., Ex. 26 at 1) (letter from Mercedes to a Tele Aid subscriber dated September 7, 2007 stating that “in

³ Although the FCC finalized its rule change on August 8, 2002, the amendments to the agency’s regulations that resulted from that change did not take effect until six months later, on February 18, 2003. Therefore, the date on which the five-year ended was set as February 18, 2008. For the sake of convenience, the Court will refer throughout its ruling to February 18, 2008 as the date after which communications companies were no longer required to provide analog service.

accordance with a recent Federal Communications Commission (FCC) ruling, traditional analog wireless networks that support some Tele Aid systems, including the one used in your vehicle ... will no longer be required to be maintained by wireless carriers.”)

The disclosures Mercedes sent to Tele Aid subscribers in 2006 and 2007 were part of a “customer ramp-down” plan initiated in cooperation with AT&T. In meetings between the two companies as early as August 22, 2002 – a mere 14 days after the FCC’s ruling – AT&T made it clear that it would “shut down” its analog network as soon as the requirement that it provide such service expired. (Id., Ex. 12 at 3.) It was not until November 28, 2006, however, that Mercedes stopped selling new vehicles equipped with analog-only Tele Aid systems. On that date, the companies entered into a contract whereby Mercedes, in addition to halting new vehicle sales, also agreed to stop renewing analog-only Tele Aid Subscriber Agreements after June 30, 2007 and terminate service to all remaining subscribers on December 31, 2007. (Id., Ex. 11 at 2); see also (Id., Ex. 14 at 3) (describing Mercedes’s plans for a “hard shutdown” of all analog Tele Aid service on December 31, 2007.) In exchange, AT&T reduced the fees charged for its services by \$4.8 million. (Id., Ex. 14 at 2.)

In order to mitigate its impending loss of the revenue from analog Tele Aid subscriber fees, Mercedes on November 14, 2006 informed its parts managers that it would offer a “Digital Tele Aid Upgrade program” whereby customers whose vehicles contained an analog-only system could choose to purchase new hardware that would be unaffected by the discontinuation of analog service at a price of approximately \$1,000 per vehicle. The company characterized the program as “a significant customer pay revenue opportunity,” and stated that over 720,000 automobiles containing analog-only Tele Aid systems – including all 2002-2004 and some model year 2005 and 2006 Mercedes vehicles – were eligible for the digital upgrade. (Id., Ex. 18.)

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