CITATION: Maginnis and Magnaye v. FCA Canada et al, 2020 ONSC 5462
COURT FILE NO.: CV-17-567691-CP
DATE: 20200918

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

ROBERT MAGINNIS and MICHAEL B. MAGNAYE

Plaintiffs

- and -

FCA CANADA INC., FCA US LLC, ROBERT BOSCH INC., ROBERT BOSCH GMBH, ROBERT BOSCH LLC, and SCARSVIEW MOTORS LTD.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

BEFORE: Justice Edward Belobaba

COUNSEL: *David Sterns, Daniel Bach, Jean-Marc Leclerc, Mohsen Seddigh, Stefani Cuberovic and Eva Markowski* for the Plaintiffs

Peter Pliszka, Antonio Di Domenico, Zohaib Maladwala and Caroline Youdan for the FCA Defendants

Robert Kwinter and Nicole Henderson for the Bosch Defendants

Robert Bell and Rebecca Shoom for Scarsview Motors Ltd.

HEARD: February 12 and 13 and September 10, 2020

MOTION FOR CERTIFICATION

[1] This is another emission "defeat device" case – but with one major difference.

[2] Unlike the motions for certification that were granted by this court in *Volkswagen*[1] and *Mercedes Benz*[2], here the alleged emissions defeat device[3] is being repaired by the defendant automobile manufacturer at no cost to the customer. The impugned vehicles are being recalled and the defeat device is being reprogrammed and rendered compliant with all applicable emission control regulations.

[3] More than two-thirds of the affected vehicles have been repaired to date.

[4] The defendants say there is no compensable harm and hence no basis for certification.

Background

[5] The plaintiff Robert Maginnis purchased a new Jeep Grand Cherokee with an "EcoDiesel" engine in 2014 from London City Chrysler in London. The co-plaintiff Michael Magnaye purchased his "EcoDiesel" Jeep Grand Cherokee in 2015 from Scarsview Motors in Toronto. The vehicles were built by Fiat Chrysler Automobile, or more formally, FCA.

[6] In January 2017, American environmental agencies charged FCA US with violations relating to the installation of a defeat device in certain diesel-engine vehicles. Within days, proposed class actions were launched in the U.S. and Canada.

[7] Messrs. Maginnis and Magnaye ask that their claims on behalf of all owners and lessees of the Dodge Ram 1500 and Grand Jeep Cherokee diesel-engine vehicles (model years 2014 to 2016) be certified as a class proceeding.

[8] The plaintiffs have added the Bosch defendants because Bosch designed and supplied the emissions control unit. They have added Scarsview Motors, a Toronto FCA dealership because it sold one of the impugned vehicles to one of the plaintiffs. The plaintiffs also bring a motion to certify a defendant class of FCA dealerships that sold or

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[1] *Quenneville v. Volkswagen,* 2016 ONSC 7959.

[2] *Kalra v. Mercedes Benz,* 2017 ONSC 3795.

[3] Some diesel-vehicle manufacturers and auto part suppliers have (allegedly) programmed the emissions control system to "defeat" or "cheat" government pollution testing and make it appear that the vehicle is fully compliant with applicable environmental regulations when in normal driving it is not.

leased vehicles with the alleged defeat device and ask that Scarsview Motors be named as the representative defendant for this defendant class of dealers.

[9] In January 2019, the American regulatory and civil actions were settled. FCA US without admitting liability agreed, among other things, to recall the impugned vehicles and repair the so-called defeat device. The recall and repair began in the U.S. on May 7, 2019 and continues to date. It appears that with the repair, the affected vehicles will be fully compliant with all relevant emission requirements.

[10] FCA Canada began a similar recall and repair program on May 8, 2019. The plaintiffs' engineering expert concedes that this repair program "eliminates [the] defeat devices" and "extends emission control to the expected range of real-world driving conditions."

The issue

[11] There is no dispute with the proposition that no action should be certified as a class proceeding without at least some evidence of compensable harm. That is, some evidence that at least one of the plaintiffs sustained an economic loss. After all, the goals of the class proceeding are access to justice, behaviour modification and judicial economy.[4] If the defect in the product has indeed been repaired and there is no evidence of compensable harm, then there are no access to justice concerns, behaviour modification has been achieved, and proceeding any further in court would be a waste of judicial resources.

[12] The parties generated a formidable amount of material and argument on each of the five requirements for certification as set out in s. 5(1) of the *Class Proceedings Act*.[5] In their lengthy written submissions, counsel dove into the detail of the causes of action, the class definition, the proposed common issues, preferability and the representative plaintiffs.

[13] I advised counsel several times as this matter proceeded that certification turned on a basic *threshold* question: have the plaintiffs provided any evidence of compensable harm? That is, absent compensable harm, the motion for certification remains a non-starter and there is no need to consider the five CPA requirements in detail.

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[4] See *Hollick v. Metropolitan Toronto (Municipality),* 2001 SCC 68, at paras. 27-28, and most recently *Atlantic Lottery Corp. Inc. v. Babstock,* 2020 SCC 19, at para. 68.

[5] *Class Proceedings Act* 1992, S.O. 1992, c. 6.

[14] Counsel for the defendants agreed with my observation and offered a number of submissions that reinforced this very point. Class counsel, however, demurred and insisted that there was more than enough evidence of compensable harm in the record before me and that the proposed class action should be certified.

Analysis

[15] It goes without saying that the repair of a defective product does not necessarily preclude a viable claim for compensable loss. One could be out of pocket, for example, in the context of this case, if they had to rent a replacement vehicle when their vehicle was recalled and the "defeat device" was being repaired. Or, if they incurred a loss on the sale or trade-in of their vehicle because of the negative news of the American developments in the time period before the defeat device was repaired. Or, if the additional pollution produced by the emissions defeat device actually caused some personal injury or property damage.

[16] Here, however, no such claims have been advanced.

[17] The plaintiffs' complaint as set out in their affidavits (in identical language) is as follows:

> When I purchased this vehicle, I understood it was a "clean" vehicle and that it had very good fuel economy. I had this understanding partially because of advertising by FCA Canada Inc. and FCA US LLC (the "FCA Defendants"), and the research I did on the internet, including reviewing representations on the FCA Defendants' websites.
>
> The FCA Defendants' advertising about my vehicle described to me that its engine was "clean" and ecologically friendly.
>
> I was unaware that my vehicle was equipped with a defeat device that shuts off its emissions systems, as alleged in this action. Had I been aware of this, I would not have purchased such a vehicle.

[18] There is no reason to doubt this evidence. Messrs. Maginnis and Magnaye thought they were buying a "clean" and "ecologically friendly" vehicle with "very good fuel economy". I accept that they were unaware of any defeat device when they purchased their "EcoDiesel" Grand Jeep Cherokee. I also accept that had they known about this defect, they would not have purchased this particular vehicle.

[19] But the core question still remains: what compensable losses have they sustained given the evidence that FCA Canada has now delivered an emissions-compliant vehicle as originally promised?

[20] The plaintiffs make two broad arguments. One is based on the promise of "clean diesel" and the other is based on the promise of fuel economy and performance. The plaintiffs say they sustained a compensable loss because they paid a "premium price" for "clean diesel" and instead, for lack of a better word, got "dirty diesel". They also say that after the defeat device was repaired, their vehicle's fuel economy and performance deteriorated.

[21] On their face, both the "premium price" and the deterioration in fuel economy and vehicular performance post-repair could provide a possible basis for plausible claims for compensable harm. On the evidence before me, however, neither of them succeeds.

[22] I will deal with each in turn.

(1) The "premium price" submission

[23] Class counsel begins this submission by noting (correctly) that s. 18(2) of the *Consumer Protection Act*[6] may apply on the facts herein. Where an "unfair practice" has occurred and rescission of the consumer agreement is not possible (here because the affected vehicles have been used and cannot be returned in their original condition) then the consumer "is entitled to recover the amount by which the consumer's payment under the agreement exceeds the value that the goods or services have to the consumer or to recover damages, or both."

[24] I am prepared to assume without deciding that over the several years before the defeat device was repaired FCA engaged in an unfair trade practice when they misled consumers with representations about "clean" diesel.

[25] The plaintiffs submit that they paid a "premium price" for their EcoDiesel vehicles and point to Mr. Maginnis' vehicle purchase invoice that shows $4995 beside the EcoDiesel Engine item. As I understand class counsel, this is enough to show that some or all of the class members also paid a premium price for a "clean diesel" which obviously exceeded the value of their "dirty diesel" - yielding a differential under s. 18(2) that constitutes significant and compensable loss.

[26] In my view, there are three problems with this submission:

(i) There is actually no evidence that anyone paid a "premium price" for the EcoDiesel feature. Although there is an EcoDiesel Engine line item on Mr.

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[6] *Consumer Protection Act, 2002,* S.O. 2002, c. 30, Schedule A.

Maginnis' invoice that shows $4995, there is also a Manufacturer Rebate line item on the same invoice that shows $4995 as a deduction. As for Mr. Magnaye, his purchase invoice shows nothing beside the line item EcoDiesel Engine but does show an unspecified "discount" of $9946.62. To repeat, there is no evidence before me that anyone paid a "premium price."

(ii) Even if a premium price was paid for diesel-engine vehicles (no such evidence) and even if one could isolate the amount that was paid for the "clean diesel" component as opposed to the amount paid for the other components of the diesel engine (again no such breakdown), one could still not satisfy the difference-in-value calculation set out in s. 18(2) of the *Consumer Protection Act.* This is a calculation that would have to be made today. But today, both Messrs. Maginnis and Magnaye have or shortly can have an EcoDiesel Grand Jeep Cherokee that is emissions-compliant and can be sold or traded at the prevailing fair market value, unaffected by the "defeat device" event. Again, where is the compensable loss?

(iii) If the plaintiffs' concern is not their vehicles' reduced trade-in value (no such evidence in any event) but the fact that their "dirty diesel" vehicles were polluting the environment for several years before FCA offered the repair, that is a commendable concern. But absent compensable harm, the policing and enforcement of environmental protection regulations are a matter for public regulatory authorities, not private action.[7] The plaintiffs can bring a private claim if they can show some evidence that their vehicle's additional pollution pre-repair caused personal injury or property damage – but no such claim has been advanced and no such evidence has been presented.

[27] I must pause here to make an obvious point. The "diesel-gate" scandal involving some of the world's largest automobile companies and auto parts suppliers was egregious and deserves strong condemnation. The resulting criminal prosecutions, fines and penalties in the hundreds of millions of dollars and nation-wide class actions to recover for widespread losses – are completely justified. But this doesn't mean that every proposed class action that relates to the "diesel-gate" scandal will be automatically

[7] As Justice Strathy, as he then was, noted in another consumer product misrepresentation case: "To the extent that the plaintiff believes that there have been transgressions that require sanctions, complaints can be directed to the appropriate regulators …": see *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at para. 206.

certified. The plaintiffs must still satisfy the requirements set out in the CPA and provide, at the very least, some evidence of compensable loss.

[28] To return then to the first submission. The "premium price" argument is not supported by any evidence. This first submission does not succeed.

(2) The fuel economy and vehicle performance submission

[29] The problem with this submission is that, here again, there is no evidence that the repair of the defeat device has resulted in reduced fuel economy or vehicle performance.

[30] The repair of the defeat device was completed in two steps, first the Approved Emission Modification or AEM, followed by the Updated AEM which was intended to deal with the "lag" or "loss of power" problem.

[31] After the AEM repair, the US Environmental Protection Agency and the California Air Resources Board tested affected vehicles. They approved FCA's Disclosure Statement, appended to the Consent Decree, which confirms that while fuel economy may decrease or increase during certain types of driving, "average fuel economy is not expected to change as a result of this AEM". This was corroborated by evidence that the vehicles' EPA-approved fuel economy ratings had in fact not changed as a result of the AEM.

[32] As for the Updated AEM, the Updated Disclosure Statement was also approved by EPA and CARB. The approved Updated Disclosure Statement confirms that the update is not expected to change *any* of the class vehicles' key attributes, "including reliability, durability, vehicle performance, drivability, engine noise or vibration, or other driving characteristics". The Updated Disclosure Statement also contains the same wording as appeared in the initial Disclosure Statement about the fact that the class vehicles' average fuel economy is not expected to change.

[33] The plaintiffs offer no evidence to the contrary – that is, no evidence that they actually sustained fuel economy or engine performance losses after the Updated AEM. The plaintiffs did not test their own vehicles. Their engineering expert did not test, inspect or drive the plaintiffs' vehicles – indeed he didn't test, inspect or drive any of the affected vehicles. All he did was propose a methodology that *could* be used to determine *whether* there was any evidence for any adverse impact on fuel economy or performance. A theory as to what "could" happen and a proposed methodology about how to test "whether" it happened is obviously not evidence that anything in fact did happen.

[34] I agree with FCA that the plaintiffs have presented no admissible evidence that their vehicles or indeed any class member vehicles post-repair have experienced any issues with decreased fuel economy or vehicle performance. The only piece of tangible (albeit inadmissible hearsay) "evidence" adduced by the plaintiffs in this regard is Mr.

Magnaye's testimony on cross-examination that he was told by a technician at a dealership that there were some "loss or power" issues with the original AEM that may continue to affect vehicle performance. But even if admissible, this comment is no longer relevant given that the "loss of power" problem was resolved with the subsequent approval and implementation of the Updated AEM.

[35] In short, there is no evidence of reduced fuel economy or vehicle performance post-repair. This second submission does not succeed.

[36] I am therefore driven to conclude that the plaintiffs have provided no evidence of compensable loss.

(3) The basis for the dismissal of this motion

[37] In that rare case where, as here, there is no evidence of compensable harm, a judge can dismiss the motion for certification in at least three ways. The judge can find that under s. 5(1)(b) of the CPA as this court did in *Singer,*[8] that that "there is no evidence of a class of two or more people seeking access to justice."[9] The judge can also find under s. 5(1)(e) that the two plaintiffs herein are not suitable representatives because they have sustained no loss and have "no stake in the potential outcome."[10]

[38] In my view, however, it is best to use s. 5(1)(d) and "preferability" because this cuts to the core of why we have class actions in the first place. The "preferability" analysis requires the judge to consider the over-arching goals of access to justice, behaviour modification and judicial economy.

[39] And here, as I have already noted, absent compensable harm, there are no access to justice concerns, the defeat device has been (or is being) repaired and thus behaviour has been modified; and certifying this action would not advance any viable lawsuit and would only result in a waste of judicial resources.

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[8] *Ibid.*

[9] *Ibid.,* at para. 136.

[10] *Stone v. Wellington (County) Board of Education,* [1999] O.J. No. 1298 (C.A.) at para. 10. I should add that the plaintiffs understood they could adjourn the motion under s. 5(4) of the CPA to find better or more suitable representatives but they declined to do.

[40] I note that Justice Strathy relied in part on s. 5(1)(d) and "preferability" to deny certification in *Singer* because there was no evidence that the plaintiff himself "ha[d] a real complaint or ha[d] suffered any damages."[11]

[41] The need to show some evidence of compensable loss is a fundamental prerequisite for the certification of a class proceeding.[12] Compensable loss claims are certainly possible even when a defective product has been repaired. But the loss claims must be presented with some thought, with the right plaintiffs and, of course, with at least some evidence. It is not enough to point to an American Consent Decree or Settlement Agreement and the payments or other benefits that are being provided in the U.S. and expect, without more, that the same result should automatically follow in Canada.

[42] This province has its own certification requirements and they must be satisfied.

Disposition

[43] The motion for certification is dismissed.

[44] The other motions - by the plaintiffs to certify a defendant class and by FCA to strike certain affidavit material - are rendered moot.

[45] The costs incurred by the FCA defendants, the Bosch defendants and Scarsview Motors may well be significant. I urge the parties to reflect on the general template that I have used for certification costs awards over the years and, ideally, to resolve the matter amongst themselves if at all possible. If costs cannot be resolved, I will be pleased to receive brief written submissions within 21 days from the defendants and within 21 days thereafter from the plaintiffs. If counsel require more time to resolve the question of costs, they should advise me accordingly.

[46] I am grateful to all counsel for their assistance.

Signed: *Justice Edward P. Belobaba*

Notwithstanding Rule 59.05, this Judgment [Order] is effective from the date it is made, and is enforceable without any need for entry and filing. In

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[11] *Singer, supra,* note 7, at para. 206.

[12] Nominal damages are not enough: *Atlantic Lottery, supra,* note 4 at para. 68.

accordance with Rules 77.07(6) and 1.04, no formal Judgment [Order] need be entered and filed unless an appeal or a motion for leave to appeal is brought to an appellate court. Any party to this Judgment [Order] may nonetheless submit a formal Judgment [Order] for original signing, entry and filing when the Court returns to regular operations.

Date: September 18, 2020