CERTIFIED TODAY, DISMISSED TOMORROW: ONTARIO COURT DISMISSES AUTOMOTIVE CLASS ACTION AFTER SUCCESSFUL CERTIFICATION

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The Ontario Superior Court of Justice in *Rebuck v. Ford Motor Company*[1] recently dismissed a national class action against an automobile manufacturer for alleged misrepresentations to consumers. Notably, the Court dismissed the class action on the merits by way of summary judgment *after* it had been certified. This case demonstrates that even after plaintiffs meet the class certification test under the *Class Proceedings Act*,[2] courts can be convinced to scrutinize the merits of the alleged causes of action. Moreover, the decision also reflects a change in how courts approach the question of "general impressions" in false and misleading advertising claims.

Background

The case considered whether the Ford Defendants'[3] display of the federal government's EnerGuide label violated the *Competition Act*[4] and various provincial consumer protection legislation for being false or misleading. The representative plaintiff had leased a Ford vehicle containing an EnerGuide label providing his vehicle an estimated fuel consumption and cost. He alleged that his on-board fuel consumption was 23 miles per gallon while highway driving, which was significantly less than the 36 miles per gallon set out on the EnerGuide label for highway driving.

After the action was certified, the representative plaintiff and defendants both sought summary judgment on the three following issues:

1. Did the Ford Defendants contravene section 52 of the *Competition Act* prohibiting false or misleading advertising?
2. Did the Ford Defendants contravene sections 14 and 17 of the *Ontario Consumer Protection Act*[5] and parallel provisions of provincial consumer protection legislation by making false, misleading or deceptive representations?
3. Are the class members entitled to damages under the *Competition Act* or provincial consumer protection legislation and if so, can damages be calculated on an aggregate basis?

The Regulatory Scheme

The requirement to affix EnerGuide labels on motor vehicles is rooted in memoranda of understanding between Natural Resources Canada ("**NRCan**") and automobile manufacturer industry associations.[6] Federal regulations prescribe what needs to appear on EnerGuide labels, including the fuel consumption rates in highway and city driving and a mechanism to allow consumers to acquire a Fuel Consumption Guide. The Fuel Consumption Guide further indicated that the ratings on the EnerGuide label were estimates and intended to be generally comparative to other vehicles, rather than a perfectly accurate prediction of each vehicle's fuel consumption.

As noted above, the fuel consumption estimates on the EnerGuide labels for the subject vehicles were based on 2Cycle testing even though more robust 5-Cycle testing had been developed and adopted in the United States. Canada eventually adopted the 5-Cycle test in 2015, more than seven years after the United States endorsed the 5-Cycle test as being more accurate and reflective of "typical driving conditions and styles".

No False or Misleading Advertising under the *Competition Act*

The Court found that the Ford Defendants did not knowingly or recklessly make false or misleading representations by affixing the required EnerGuide label to their vehicles for several reasons.

First, the Court found that federal regulatory compliance cannot fairly or reasonably constitute a breach of federal competition law. This result would not only be contrary to common sense but would also violate the principle of statutory interpretation that there is a "presumption of consistency" within federal statutes. Simply put, the federal government did not intend to require automobile manufacturers to violate the *Competition Act* in encouraging them to display the federally endorsed EnerGuide label.

Second, the *Competition Act* requires courts to consider the "general impression" of a representation beyond its literal meaning in determining whether there was a misrepresentation. The Court found that there was a lack of evidence showing that the Ford Defendants' display of the EnerGuide label conveyed a "general impression" that was materially false or misleading. The Court disagreed with the representative plaintiff's argument that the EnerGuide label gave the impression that the fuel consumption levels indicated a median fuel consumption, rather than driving under ideal conditions. Moreover, the Court emphasized that in cases such as this one, where the alleged misrepresentation is not "inherently obvious", it would be helpful, or perhaps even necessary, for the court to receive consumer focus group evidence, survey evidence or expert evidence to help it determine the general impression of the representation. This request is in contrast with historical case law that held that the general impression of a representation is a question of law, meaning that extrinsic evidence, such as survey or focus group evidence, is generally not admissible.

Third, non-disclosure (such as failing to explain the limitations of the 2-Cycle testing process) is not actionable under section 52 of the *Competition Act*.

The Provincial Consumer Protection Acts

The representative plaintiff argued that the *Consumer Protection Act* gave the Ford Defendants a positive obligation to clarify the "false impression" the EnerGuide label offered. Unlike the *Competition Act*, the *Consumer Protection Act* prohibits "misleading or deceptive" representations, including "failing to state a material fact" that would deceive.[7]

The Court disagreed with the representative plaintiff's contention and found that the Ford Defendants' EnerGuide label had sufficiently referenced the Fuel Consumption Guide, which explained that the EnerGuide label was an estimate and varied vehicle-to-vehicle under the 2-Cycle testing process. The Court also explained that the representative plaintiff had not produced evidence showing that the Ford Defendants knew that its customers would not consult the Fuel Consumption Guide prior to obtaining the vehicles. Finally, the Court declined to consider the third issue of damages given that the Ford Defendants had not violated the legislation in question.

Key Takeaways

Rebuck serves as a rare example of courts dismissing class actions on the merits after granting certification. Remarkably, the claim was also dismissed by way of summary judgment.

- Courts will avoid interpretations of statutes (such as the *Competition Act*) that could render regulatory compliance unlawful.
- There may be new opportunities to put forward focus group, survey and expert evidence in *Competition Act* cases when trying to demonstrate the general impression of a representation.
- For claims of non-disclosure being misleading, Courts will generally require evidence that defendants knew or ought to have known that their customers would rely on misleading or deceptive omissions to prove that a representation violates provincial consumer protection legislation.
- The Court noted without further comment that the Ford Defendants had submitted a "record-setting" 340-page factum in the related certification motion.

[1] 2022 ONSC 2396 ("***Rebuck***").
[2] *Class Proceedings Act*, 1992, SO 1992, c 6 (the "***Class Proceedings Act***").
[3] The Ford Motor Company and Ford Motor Company of Canada, Limited.
[4] *Competition Act*, RSC 1985, c C-34 (the "***Competition Act***").
[5] *Consumer Protection Act*, 2002, SO 2002, c 30, Sched A. (the "***Consumer Protection Act***").

[6] While the automobile manufacturer associations' decisions to enter into the memoranda were voluntary, the Court found that individual signatories, such as the Ford Defendants, viewed the NRCan recommendations as being mandatory. See paragraph 22 of *Rebuck*.
[7] *Consumer Protection Act* at s. 14(2)14.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.