CLASS ACTIONS KEEP ON ROLLIN'

Posted on January 19, 2017

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The BC Supreme Court recently certified a class action involving allegations that the defendant's emission control technology designed for diesel engines in heavy-duty trucks was defective.

The plaintiff, N&C Transport Ltd. ("**N&C Transport**") and its subsidiaries, brought this action against Navistar Inc. ("**Navistar**") and Harbour International Trucks Ltd. ("**Harbour**"). Navistar is in the business of designing, manufacturing, testing and marketing heavy-duty trucks. Harbour is a BC based dealer of Navistar heavy-duty trucks.

Background

In 2001, the United States Environmental Protection Agency ("**EPA**") put in place new emissions standards for heavy-duty engines and vehicles in the United States. Since 2004, the Canadian approach has been in harmony with the standards set forth by the EPA. This is evinced by standards established by the *On-Road Vehicle and Engine Emissions Regulations*[1].

Navistar implemented certain technology to develop trucks that would comply with the new emission standards set by the EPA. N&C Transport bought 14 of these trucks. N&C Transport claimed that these 14 trucks all repeatedly suffered from similar mechanical failures.

The Decision

N&C Transport advanced the several causes of action against Navistar and Harbour including:

1. Negligence and failure to warn;
2. Negligent misrepresentation;
3. Waiver of tort;
4. Breach of section 52 of the *Competition Act*[2]; and
5. Breach of express warranties and implied warranties pursuant to the *Sale of Goods Act*[3].

The court considered the requirements of the British Columbia *Class Proceedings Act* (the "**CPA**")[4]. Section 4 of the CPA requires the court to, among other things, determine if:

1. the pleadings disclose a cause of action;
2. there is an identifiable class of two or more persons;
3. there are common issues for the class;
4. a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and
5. there is an appropriate representative plaintiff.

The threshold to be applied by the court is not a balance of probabilities, but instead the less stringent "some basis in fact". In doing so, Canadian courts resist the U.S. approach of engaging in a robust analysis of the merits at the certification stage[5] and instead only consider whether the suit is appropriately pursued as a class action. There is no effective analysis of the merits of the claim at the certification stage in BC.

The court easily found that the requirement to plead a cause of action had been met in the case; however, it did recognize that the cause of action for negligence/failure to warn required more particulars to be pleaded.

In addressing whether there was an identifiable class, the court took issue with the definition of class advanced by N&C Transport which stated, among other things, that the class includes "all persons resident in Canada that purchased and/or operated heavy duty Class B tractor trailer trucks...". The court held that the inclusion of "operators" in the definition was problematic because it is not clear whether it would include drivers that have no ownership interest in one of the subject trucks.

Further, the court debated whether including both purchasers of new and purchasers of used trucks in the definition of class was problematic, as Navistar argued that these two groups are distinct as their reasonable expectations would be different. However, the court held that this was irrelevant by applying the case of *Hollick v Toronto (City)*[6], which stated that a representative need not show that everyone in the class share the same interest in the resolution of the asserted common issue.

With regard to the other requirements in section 4 of the CPA, the court was satisfied that they had all been adequately addressed.

Takeaway

This case once again demonstrates that Canadian courts in class action certification proceedings will do two things: employ an extremely low threshold in applying the tests set forth in section 4 of the *CPA*, and will not evaluate the merits of the claims at the certification stage. As such, U.S. corporations facing class action claims in Canada should be aware that Canadian courts will more easily find a basis for certifying actions as class proceedings than is common in the US and that even a claim with little merit can be easily certified. This has the effect of exposing the company to the costs of defending a significant claim despite a low likelihood of

success for the plaintiff class members. In BC's "no costs" class action regime this can prove expensive and frustrating for innocent defendants.

by Joan M. Young and Dharampreet Dhillon, Articled Student

[1] *On-Road Vehicle and Engine Emission Regulations*, SOR/2003-2
[2] *Competition Act*, R.S.C. 1985 c. C-34
[3] *Sale of Goods*, R.S.B.C. 1996, c. 410
[4] *Class Proceedings Act*, R.S.B.C., 1996, c. 50
[5] *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57 at para 105
[6] *Hollick v Toronto (City)*, 2001 SCC 68 at para 21

A Cautionary Note