NO COMPENSABLE LOSS? NO CLASS ACTION – *MAGINNIS V FCA CANADA*

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In a recent decision that will be of critical importance to the class action defence bar, Justice Belobaba refused to certify a proposed automotive class action because the plaintiffs failed to demonstrate a compensable loss.

Factual Background

The proposed class action in *Maginnis and Magnaye v FCA Canada et al*[1] involved certain Dodge Ram 1500 and Grand Jeep Cherokee vehicles manufactured by Fiat Chrysler Automobiles ("**FCA**"). In January 2017, American environmental agencies charged FCA with violations relating to the installation of a defeat device in certain diesel-engine vehicles. Not surprisingly, litigation in both Canada and the US followed shortly thereafter.

The plaintiffs in *Maginnis* sought certification of a class consisting of all owners and lessors of model year 2014-2016 Dodge Ram 1500 and Grand Jeep Cherokee diesel-engine vehicles (the "**Subject Vehicles**"). However, prior to the hearing of the certification motion in *Maginnis*, the US litigation settled, and FCA recalled the Subject Vehicles in both Canada and the US. FCA's recall and repair program offered a vehicle fix that would render the Subject Vehicles fully compliant with all relevant emission requirements.

Leading into the certification motion, the plaintiffs alleged FCA misled consumers and committed unfair practices under the *Consumer Protection Act*[2] (the "**CPA**") by making misleading representations about the Subject Vehicles. The plaintiffs submitted affidavit evidence stating they purchased their vehicles on the understanding the vehicles were "clean", ecologically friendly, and had good fuel economy, when in fact the Subject Vehicles contained a defeat device. The plaintiffs' damages theories centered on: (a) the proposed class having allegedly paid a premium price for a "clean" diesel vehicle but having instead received a "dirty" diesel vehicle, and (b) allegations that the Subject Vehicles' fuel economy and performance deteriorated post-repair.

The Decision

Justice Belobaba rejected the plaintiffs' submissions, and refused to certify the case.

His Honour found that there was no evidence anyone paid a "premium price" for a Subject Vehicle, and even if they did, the vehicles would be emissions-compliant post-repair, and could be bought, sold, or traded at a

value unaffected by the defeat device.[3] Since a calculation of damages under the CPA would have to be made post-repair, and the repair was found to have "*eliminate[d] [the] defeat device*" and "*extend emission control to the expected range of real-world driving conditions*",[4] the plaintiffs were left without evidence of compensable loss on this point.

Further, there was also no evidence that the repair of the defeat device resulted in reduced fuel economy or vehicle performance. FCA introduced evidence surrounding the testing and approval of the vehicle update confirming its adequacy. The plaintiffs offered no evidence to the contrary. His Honour noted that the plaintiffs' expert did not inspect, test, or drive any of the Subject Vehicles, and had simply proposed a "*methodology that could be used to determine whether there was any evidence for any adverse impact on fuel economy or performance*."[5] This was insufficient: "*[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*."[6]

His Honour further rejected the plaintiffs' attempt to characterize potential environmental pollution as damages:

> *Absent compensable harm, the policing and enforcement of environmental protection regulations are a matter for public regulatory authorities, not private action. 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.*[7]

Having rejected these submissions, the Court found that the plaintiffs provided no basis in fact for any compensable loss,[8] which was fatal to the plaintiffs' attempt to certify a class action. Indeed, Justice Belobaba noted that the motion could be dismissed for this reason alone under several different factors of the certification test of the CPA. His Honour ultimately relied on the preferability component of s. 5(1)(d) of the CPA to do so: preferability "*cuts to the core of why we have class actions in the first place*" and "*requires the judge to consider the over-arching goals of access to justice, behaviour modification and judicial economy*."[9]

In a key paragraph that will no doubt be relied upon by defendants in many cases to come, His Honour concluded as follows:

> *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. 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.[10]

His Honour also applied the Supreme Court of Canada's recent decision in *Atlantic Lottery Corp Inc. v Babstock*[11] to determine that even if plaintiffs produced some evidence of nominal damages, such nominal damages on their own are not enough to support certification.[12]

His Honour concluded by noting that "*[c]ompensable 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*."[13] While a different set of plaintiffs with evidence of different types of loss (such as diminution in value or out-of-pocket expenses) may have been able to advance their claims further, the *Maginnis* decision - like several decisions coming before it - has confirmed that those damages must rise above the *de minimis* level for a class action to be a preferable procedure.[14]

Commentary

This case will be of keen interest to manufacturers across multiple industries, particularly those who may be confronted with a recall scenario. In this particular case, the nature of the recall and repair remedy offered by FCA was instrumental to the outcome:

- it came at no cost to the consumer;
- it was found to completely address the issue with the vehicle (even as acknowledged by the plaintiffs' expert);
- it did not have a detrimental impact on the vehicle post-repair; and
- it had high completion rates (more than two-thirds of the affected vehicles had been repaired prior to the certification motion).

Under these circumstances, the recall and repair vehicle update program was found to have given vehicle owners or lessors the benefit of their bargain, and there was no evidence of any residual compensable harm to the plaintiffs or the proposed class. Manufacturers should take note that a robust and consumer-friendly recall may offer the prospect of materially reducing or even eliminating compensable harm to consumers – and thus, eliminating a potential class action.

The *Maginnis* case will also be of interest to class action defendants more broadly, as it states in no uncertain terms that absent evidence of loss, a class action will not get off the ground.

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[1][ps2id id='1' target=''/] *Maginnis and Magnaye v FCA Canada et al*, 2020 ONSC 5462 [*Maginnis*].
[2][ps2id id='2' target=''/] *Consumer Protection Act*, SO 2002, c 30, Schedule A.

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[3][ps2id id='3' target=''/] *Maginnis, supra* note 1 at para 26.
[4][ps2id id='4' target=''/] *Ibid* at para 10.
[5][ps2id id='5' target=''/] *Ibid* at para 33.
[6][ps2id id='6' target=''/] *Ibid*.
[7][ps2id id='7' target=''/] *Ibid* at para 26.
[8][ps2id id='8' target=''/]*Ibid* at para 36.
[9][ps2id id='9' target=''/]*Ibid* at para 38.
[10][ps2id id='10' target=''/] *Ibid* at para 11.
[11][ps2id id='11' target=''/] *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 68.
[12][ps2id id='12' target=''/] *Maginnis, supra* note 1 para 41, note 12.
[13][ps2id id='13' target=''/] *Ibid* at para 41.
[14][ps2id id='14' target=''/] See *James Richardson v Samsung Electronics Canada Inc*, 2018 ONSC 6130 at para 80, aff'd 2019 ONSC 6845 (Div Ct).

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.

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