Ontario court dismisses automotive class action alleging false advertising on labels

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In *Rebuck v. Ford Motor Company*, Justice Edward Belobaba dismissed an automotive class action alleging Ford Motor Company (Ford) misrepresented vehicles' fuel consumption on EnerGuide labels. He found that since the content on the labels were approved by regulation; they could not be misrepresentations, per the *Competition Act* or the *Consumer Protection Act*.

What you need to know

- The Ontario Superior Court of Justice has dismissed a class-action lawsuit filed on behalf of purchasers and leasers of 2013 and 2014 model-year Ford vehicles (the Vehicles) in Canada.
- It was alleged that Ford intentionally understated the fuel consumption of the Vehicles in violation of the *Competition Act*, RSC 1985, c. C-34 and the *Consumer Protection Act*, R.S.O. 1990, c. C.31.
- Justice Belobaba found that federal regulations and guidelines prescribed the disputed content on the labels, and it would therefore be contrary to the principles of statutory interpretation to find that content prescribed by the federal government could violate a federal statute. It should be noted that the regulations and guidelines in question are highly prescriptive, and other courts may not make the same finding in other circumstances.

Background

The EnerGuide labels for vehicles rate and label the energy consumption or energy efficiency of new cars, vans, pickup trucks and SUVs. In this case, the plaintiff alleged that Ford intentionally advertised fuel consumption ratings on the Vehicle's EnerGuide labels that were understated.

The plaintiff claimed that the fuel consumption estimates on the Vehicles' EnerGuide labels were based on an older testing method that was being phased out and did not accurately reflect real world driving conditions. Ford had used a "2-Cycle Test" (a laboratory-controlled city test and a laboratory-controlled highway test) for its 2013 and 2014 Canadian vehicles while using a more accurate "5-Cycle Test" for its American

vehicles. The 5-Cycle Test would increase the fuel consumption data by between 10 and 20 per cent, but was not implemented in Canada until 2015. Consequently, the class sought damages of $1.5 billion as compensation for the alleged 15 per cent overpayment in fuel charges incurred over the course of the ownership or lease of their Vehicles as a result of the misleading information disseminated to consumers.

The action was certified as a class proceeding in 2018 by Justice Morgan. Both the plaintiff and defendant then brought motions for summary judgment. Although six common issues were certified initially, class counsel narrowed their focus to three issues at the merits stages:

- Did the defendants contravene section 52 of the *Competition Act* (which prohibits false or misleading advertising)?
- Did the defendants contravene sections 14 and 17 of the *Consumer Protection Act* and parallel provisions of provincial consumer protection legislation, by making false, misleading or deceptive representations?
- Are the class members entitled to damages under section 36(1) of the *Competition Act*, section 18(2) of the *Consumer Protection Act* and the parallel provisions of the consumer protection legislation in other provinces and, if so, can the damages payable by the defendants be determined on an aggregate basis and in what amount?

The plaintiff made two major arguments at the merits stage:

- the fuel ratings on the EnerGuide labels were expressly misleading, and that by stating that they were using "government-approved test methods", Ford conveyed the impression that the fuel consumption ratings were certified as being accurate by the Government of Canada; and
- that Ford misled the class members by failing to disclose certain information, including that the ratings did not to predict actual fuel consumption.

Claim under the *Competition Act*

Justice Belobaba found that the plaintiff had not established that Ford knowingly or recklessly made false or misleading representations by affixing the EnerGuide labels to the Vehicles, for two reasons.

First, Ford's compliance with federal guidelines that prescribed the design and content of the EnerGuide labels and the required fuel-consumption test method meant that the representations could not amount to a breach of federal competition law. Such an interpretation would be contrary to principles of statutory interpretation that presume consistency and harmony between federal statutes.

Second, class counsel’s argument that the general impression of the representations was false or misleading was lacking an evidentiary basis. Section 52(4) of the *Competition Act* provides that the Court must consider both the general impression conveyed by a representation as well as its literal meaning. Although there was no dispute that the statements on the EnerGuide labels were true, the plaintiff submitted that the representations provided a misleading general impression. However, there was an absence of evidence as to what the general impression conveyed by the

representations was. Justice Belobaba noted that in many misleading advertising cases, evidence of "general impression" is augmented with consumer focus group or survey evidence or by appropriate experts. No such evidence was adduced in this case – in fact, the only evidence on point was that of the plaintiff.

The court concluded that class counsel's only plausible submission was limited to non-disclosure, and that Ford knew and failed to disclose that the fuel consumption data on the EnerGuide did not reflect real-world driving and fuel consumption. However, as section 52(1) of the *Competition Act* only applies where a person actually makes a false or misleading representation, not in cases where there is a failure to disclose a material fact, the claim that Ford had breached section 52(1) could not succeed.

Claim under the *Consumer Protection Act*

As with the claim under the *Competition Act,* the argument that the general impression given by the EnerGuide labels violated the *Consumer Protection Act* could not succeed.

Provincial consumer protection legislation, however, goes further than the *Competition Act* and explicitly extends "false, misleading or deceptive" to include non-disclosure. Nonetheless, Justice Belobaba concluded that there was no material non-disclosure, since the material facts allegedly not conveyed were contained on the EnerGuide labels.

Takeaway

This decision is a reminder that the standard of proof on a summary judgment motion or at a common issues trial is higher than at certification, and it is part of a growing body of case law where defendants have succeeded on the merits with similar arguments to those the court rejected at certification.

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