Certification denied for Takata air bag recall on basis that existing recalls preferable to proposed class action

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What is the preferable procedure for addressing a dangerous product – a recall or a class action?

In *Coles v FCA Canada*[1], the Court denied certification of a proposed class action against an auto manufacturer that had already initiated recalls to replace defective air bag components at no cost to consumers. The air bags were designed, manufactured and tested by Takata, and installed by most auto manufacturers. Takata went bankrupt following the discovery of the defects and pleaded guilty to having devised a scheme to defraud the auto manufacturing industry through materially false, fraudulent and misleading reports and other information that concealed the truth about the air bags. Recall campaigns were initiated in the U.S. and Canada, and proposed class actions focusing on the same defective components were commenced.

In the Court's view, the recall was "the crux, hub and nub, nuts and bolts, and pith and substance" of the proposed class action. Although the defects were a result of the design and manufacturing negligence of Takata, the Plaintiff in *Coles* argued the defendant car manufacturer's recalls were inadequate and should be supplemented by additional notice and compensation. The Court disagreed and found that a class action was not preferable to the defendant's recall campaign when judged with reference to the purposes of a class action. The Plaintiff's argument that their class action was preferable was, in part, undermined by the timing of the motion for certification (and potential common issues trial) in relation to the ongoing recall campaign.

In reaching its decision, the Court commented on the state of the law relating to pure economic loss following *Atlantic Lottery Corp. Inc. v Babstock*[2] and *1688782 Ontario Inc. v Maple Leaf Foods Inc.*[3], which limit the scope of recovery for a dangerous product to mitigating or averting the danger (including simply discarding the defective product). Although noting that other auto manufacturers had consented to class action settlements arising from Takata air bag recalls, the Court commented that the defendant:

> *"…has proceeded to provide a free of charge replacement of the beta-airbags, which would appear to cover off its responsibility to pay compensatory damages*

for its liability for manufacturing and distributing vehicles with a dangerous automotive part."

Although not relevant to the result, the Court commented on the prospective application of section 5(1.1) of the amended *Class Proceedings Act, 1992.* This section requires that a class proceeding be "superior" to reasonably available means of determining the entitlement of class members to relief or addressing the impugned conduct of a defendant, and that questions of fact or law common to the class "predominate" over questions affecting individual class members. Although section 5(1.1) did not apply to this case, the Court noted that if it had, the preferable procedure criterion would not be satisfied in the context of an existing recall.

This case stands for the proposition that an existing recall may be preferable to a class action, even where additional pure economic losses are alleged. In such circumstances, the purposes of class proceedings – access to justice, behaviour modification, and judicial economy – may no longer be served by a class action. The Court's reference to the new amendments to the *Class Proceedings Act* suggests that this argument will continue to be available to defendant manufacturers, assemblers and importers.

For more information on this decision, please reach out to any of the key contacts listed below.

[1] 2022 ONSC 5575.

[2] 2020 SCC 19.

[3] 2020 SCC 35.

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