

A Prime Target

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Understanding the test for certification, elements of available causes of action and the existing case record can help fashion more effective risk management strategies.

Automobile Quality Defect Class Actions in Canada

Consumer product quality defect class actions are on the rise in Canada, and one of the products targeted by plaintiffs' class action lawyers is the motor vehicle. The sheer number of cars and trucks in the marketplace coupled

with the current regulatory environment makes vehicles appear easy and remuneratively rewarding targets. Remunerative, because the number of vehicles in use multiplied by the cost of remedying "defects" generates dollar figures that are attractive to class counsel. Easy, because in the current regulatory environment, original equipment manufacturers may err more than in the past in favor of hitting the recall or product update button thus rendering themselves class action targets.

In an effort to assist motor vehicle companies to understand which factors are most likely to make them targets of these class actions, we discuss the class action regime and certification requirements in Canada. We analyze the key causes of action pleaded in motor vehicle defect class actions and their elements under Canadian law. And we examine the existing certification decisions. At a minimum, this will assist companies in predicting class action exposure and suggest prophylactic mea-

sures that motor vehicle companies can implement at certain critical junctures to minimize their exposure in Canada.

Class Actions in Canada

Despite many calls for one, Canada does not have a national class action regime. Each province has its own legislation governing the certification and conduct of class actions before its courts. As such, a proposed class's scope, in part, will depend on the province in which the action is commenced.

Some provinces have express "opt in" regimes under which nonresidents will not become part of a certified class unless they specifically opt in to it. British Columbia, Alberta, New Brunswick and Newfoundland/Labrador are opt in provinces. Some provinces have "opt out" regimes under which those nonresidents who fall within a class and do not wish to be part of it must take active steps to opt out. Ontario, Quebec, Manitoba, Nova Scotia, and Saskatchewan are opt out provinces. Some provinces



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with opt out regimes expressly permit the naming of national classes. In others, while this is not expressly addressed in the legislation, the superior courts of the provinces have held that national classes can be named.

This has led to an unresolved debate about the constitutionality of a provincial superior court purporting to certify national classes comprised of residents of other provinces. The practical effect for defendants is that they can find themselves facing purported *national* class actions brought in different provinces, or even in the same province, by different class counsel. Sometimes, to avoid duplication, class counsel will cooperate and agree on a lead action and firm. But sometimes class counsel do not cooperate, and in those circumstances, the provincial superior courts themselves have not always been prepared to dismiss a national class action in their jurisdiction in favor of one brought in another province. So far, this difficult jurisdictional problem continues to confound class action defendants sued concurrently in more than one province for the same alleged defects.

The Requirements for Certification

The criteria for certification in the common law provinces, which excludes Quebec, are essentially the same. The class counsel needs to (1) disclose a cause of action in the pleadings; (2) identify a class consisting of two or more persons; (3) demonstrate that the claims of the class members raise common issues of law or fact; (4) establish that a class action is the preferable procedure for resolving the common issues, although not necessarily for resolving the claims; and (5) show that the representative plaintiff would adequately represent the interests of the class members during the litigation. Class counsel must also propose a viable plan for the litigation, including a plan for resolving all of the individual issues once the common issues have been determined.

Perhaps the most significant differences between the Canadian and American requirements for certification are that the American requirements of typicality, numerosity, and predominance are not prerequisites for certification in Canada. Canadian class action regimes do not require the representative plaintiff's claim to typify the claims of the mem-

bers of the class. All that is required is that the claims of the representative plaintiff and the claims of the class members raise common issues of fact or law. A Canadian court may certify a class with as few as two members. And, the common issues do not need to predominate over individual issues. Resolving the common issues need only substantially advance the litigation.

Certification battles in Canada primarily focus on two areas. The main battle is generally over whether the claims of the proposed class members raise common issues, and even if so, whether their materiality to the litigation makes a class action the "preferable procedure" for resolving them. The other area of contention, albeit less frequently, is whether some other forum or process is better suited than a class action to resolve the issues. That might encompass anything from a regulatory process to a non-adversarial claims resolution process that is already in place to deal with individual claims.

The Supreme Court of Canada has held that the overriding policy considerations in class actions are promoting access to justice, promoting judicial economy, and achieving behavior modification of defendants if appropriate. Virtually all aspects of class action litigation in Canada are viewed through these three lenses. The rejection in Canada of a predominance requirement for common issues in favor of a more lenient materiality test reflects this policy. This more liberal approach to the certification of class proceedings in Canada coupled with many courts' preparedness to certify national classes has made Canada an attractive forum for counsel wishing to litigate automotive defect class actions.

The Evidence for Certification

In most provinces, the evidence addressing certification criteria is filed in affidavit form. Evidence solely concerning the merits of an action is not admissible, as the focus of the certification stage is on the *form* of the action and whether it should proceed as a class action. Affidavit evidence from properly qualified experts is admissible if it is relevant to one of the certification criteria rather than only to the merits. Parties have a limited right of cross-examination. In some provinces, cross-examination requires leave of the

court, and a court may not grant it if the court believes that the cross-examination will focus on the merits rather than the certification criteria. That said, cross-examination of experts is common.

Although parties do not have a pre-certification right to documentary discovery, most provinces permit oral discovery of representative parties and limited dis-

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covery of proposed class members, which is often contingent upon leave of the court. Evidence obtained through oral discovery is admissible during the certification stage.

Post-Certification Procedure

Once a class action is certified, a court will order a common issues trial to determine the common issues. Courts subsequently resolve individual issues in separate proceedings. There is a high level of judicial supervision throughout.

Since most class actions involve the advancement of small dollar-value claims by large numbers of people, provincial legislation specifically permits the aggregate assessment of damages in appropriate cases. This can be particularly significant to defendants as these provisions permit the amount of a defendant's liability to be determined in the aggregate, without individual participation by class members, often based on statistical evidence or sampling data that would otherwise be inadmissible.

Settlement or discontinuance of a class action generally requires court approval, and a court will only approve a settlement if it is fair and reasonable. Class members who object to a proposed settlement can file their objections, which the court may or may not hear, in its discretion. Most settlements will also address the amount and mechanism for payment of legal fees to the plaintiffs' counsel, which also requires court approval.

Typical Causes of Action in Product Defect Class Actions

The typical causes of action advanced in motor vehicle defect class actions are (1) negligence; (2) misrepresentation; (3) breach of a statutory implied warranties of fitness of purpose and the like under provincial sale of goods or consumer protection legislation; (4) committing an unfair business practice

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under provincial consumer protection legislation, generally by “misleading” consumers; and (5) misleading advertising under the federal Competition Act.

Negligence

Typically, a negligence claim against an automotive manufacturer in a class action will allege that negligent design or manufacture of a vehicle component is causally connected to a loss. Often, class counsel also will allege that a manufacturer failed to warn of a defect. The loss is typically economic, and plaintiffs will seek damages for such things as repair costs. Sometimes, class actions also involve non-pecuniary losses for personal injuries.

Under Canadian law, damages for personal injury and property damage caused by a defective product are recoverable from a nonprivity manufacturer in tort. However, once damages enter the realm of the purely economic, which is typically the case in product defect class actions, the ability of a damaged party to recover from a nonprivity manufacturer in tort is significantly circumscribed. The policy rationale is that while negligence law imposes a duty on a product manufacturer to prevent dangerous products from circulating, that duty does not extend to a product that is merely

shoddy or of poor quality. It is the law of contract and the sale of goods that allocates risk for goods of poor quality. There are some limited exceptions to the general rule of no recovery. The most relevant here is the exception that permits recovery for economic loss in tort if there is a significant and unreasonable risk of personal injury or property damage associated with a defect. In those cases, courts will permit recovery for the cost of remedying defects to eliminate the risks. Consequently, to survive the “is a cause of action disclosed” test in a class action claiming economic loss only, class counsel must allege that a defect creates a significant risk of personal injury or property damage.

Finally, recovery for economic loss in tort is still considered “unsettled” by some commentators and courts. Some believe that while Canadian law now clearly permits recovery in the circumstances outlined above, it does not as clearly exclude a right of recovery for a merely shoddy product. Notably, this alleged ambiguity has been used from time to time to defeat motions that have attacked claims on the grounds that they failed to disclose a cause of action, but no appeals court has held that economic recovery *is* available in tort for safe but shoddy products.

Negligent Misrepresentation

A second tort-based cause of action that is sometimes advanced in automotive defect class actions is negligent misrepresentation. This cause of action is attractive to class counsel because it is another of the exceptions to the “no recovery for economic loss in tort” rule. Under Canadian law, economic loss caused by a negligent misrepresentation is recoverable from a nonprivity party in tort.

This cause of action is premised on a duty of care that is founded on a “special relationship” between a representor and a recipient. To be actionable, a representation must be untrue, inaccurate, or misleading, and it must have been made in breach of the standard of care applicable in the circumstances. Significantly, the recipient must also have relied on the representation, have done so reasonably, and have suffered damages as a result.

The typical negligent misrepresentation claim is that a vehicle manufacturer neg-

ligently misrepresented that the defective vehicle would perform as expected under normal conditions for a reasonable period of time, and the plaintiff relied on the representation in making his or her purchase decision. Class counsel might also frame negligent misrepresentation as a representation by omission, alleging that a manufacturer failed to disclose a defect that the manufacturer knew about at the time the vehicle was sold.

Negligent misrepresentation claims in automotive defect class actions have not been particularly successful. This is in large part because, while determining whether a manufacturer committed a misrepresentation may be a common issue, the need to prove individual reliance means that resolution of the common issue will not significantly advance the litigation. That makes this cause of action a risky proposition for class counsel.

Breach of Statutory Warranties

The most common statute-based cause of action pleaded in product defect class actions is breach of statutory implied warranties, essentially quality-focused performance standards, such as fitness for purpose, merchantability, or reasonable durability. A combination of sale of goods and consumer protection legislation in each province gives consumers the automatic benefit of such warranties and a cause of action when they are breached.

But this cause of action too has challenges for class counsel in motor vehicle defect class actions. Except in Saskatchewan, provincial legislation limits claims based on these statutory warranties to claims against the sellers. In the typical automotive defect class action, the seller is the dealer, and it is impractical to name all of a vehicle manufacturer’s Canadian dealers in a class action.

In a case purporting to seek certification of a national class, the differences from province to province in the availability of these causes of action against a manufacturer create an individual issue problem for class counsel. Due to statutory differences among provinces, only a small fraction of class members of a proposed national class will have this cause of action available to them. Thus, its resolution may not meet the test of a “common” issue.

In addition, although statutory warranties eliminate the need for a plaintiff to prove negligence against a manufacturer, a plaintiff must still prove during a common issues trial that the defect existed and fell below the statutory performance standard. This is a very contextual analysis that is not well suited to resolution on a class-wide basis, particularly if factors unique to each class member are relevant to the question of breach. For example, a court would have to consider vehicle use and whether the vehicle was properly maintained to determine whether it was fit for its purpose or durable for a reasonable period.

These challenges have not, however, always prevented courts from certifying as a common issue whether a statutory warranty has been breached. Since the focus during the certification stage is the form of an action only, and not its merits, the fact that claimants ultimately may have difficulty proving that a manufacturer breached warranties in *their* case has not been a barrier to certification of the breach question as a common issue.

Unfair Business Practice

Another statute-based cause of action is the unfair business practice claim. Most provincial consumer protection legislation provides for a civil right of action against a manufacturer or retailer who commits an unfair business practice. In most provinces, that includes doing or saying anything, or failing to do or say anything, in connection with a consumer transaction that might reasonably deceive or mislead. Claimants usually cannot point to an express, misleading representation as a ground for liability. As with negligent misrepresentation, these claims typically allege a misrepresentation by omission—an allegation that a manufacturer or dealer had knowledge of a defect and failed to disclose it with the result that consumers were misled. The test is an objective one and does not require proof of reliance by each claimant. Nor does the mistaken belief induced by the unfair business practice necessarily have to have influenced the ultimate purchase decision. Class counsel, however, must still demonstrate that damage was causally connected to the omission.

The very breadth of this cause of action together with the relief that it offers from

the individual proof challenges associated with negligent misrepresentation make this a popular cause of action in some jurisdictions. The exceptions are Alberta, Manitoba and Saskatchewan where the legislation requires a court to consider efforts made by a consumer to mitigate the loss and to resolve the dispute before suing. Because consumers need to attempt to resolve individual issues before a court could order a remedy, unfair business practice claims are not commonly certified in those three provinces.

Misleading Advertising

Another statute-based cause of action that is commonly advanced in automotive defect cases is a consumer deception claim brought under the federal *Competition Act*. In addition to addressing anticompetitive practices, the *Act* contains prohibitions on misleading marketing activities and establishes a civil right of action if a company is shown to have made a representation to the public that is false or misleading in a material respect for the purpose of promoting the supply or use of a product. In automotive defect cases, the common allegation is akin to that made in negligent misrepresentation and unfair business practice claims: the manufacturer misled the public by knowingly advertising the sale of defective vehicles without disclosing the defect.

For plaintiffs, the primary advantage of this cause of action is that it eliminates the need to prove that a false or misleading representation was made to a specific individual.

What Do the Existing Cases Tell Us?

Most automotive defect class actions in Canada have not yet reached the certification stage or they have been certified on consent and settled. So there are few decisions in contested certification motions that fully air the issues and no cases that have actually gone to trial. Even so, there are several useful points that emerge from a review of the cases:

- Negligent design or manufacture is the most common cause of action advanced and certified successfully. Causes of action for breach of statutory warranties are next, followed by unfair business practice claims.

- The one issue that courts routinely appear prepared to certify as a common issue is whether a product was defective.
- Advertising may be used successfully to meet the minimum evidentiary standard necessary to “disclose” a cause of action for an unfair business practice.
- Expert evidence matters. Even though it can add expense to a certification fight, expert evidence is critical for a defendant, especially if the plaintiff has not filed any expert evidence or is relying exclusively on a pro forma affidavit that simply attaches an allegedly relevant finding by a regulatory authority.
- A court will likely regard countermeasures implemented before certification as admissions absent a cogent, alternative explanation by a defendant.
- If a court perceives an existing alternate procedure as sufficiently robust to fairly address the claims of a class, that procedure may trump a class action as the preferable procedure for resolving claims. However *when* these programs are announced is just as important as the remedy that they offer.

Practical Points for Motor Vehicle Manufacturers

Taking into account the test for class action certification in Canada, the available causes of action in product defect cases, and the existing judicial record in Canadian motor vehicle class actions, we discuss below several class action risk management considerations for automotive manufacturers and distributors. These should be considered (1) when product action is being considered, (2) when a class action in the United States involving the same product is about to be or has been certified and settled, and (3) when a company is deciding how to respond to a class action already commenced in Canada.

Plaintiffs’ class action lawyers are entrepreneurs looking for product issues that have class action potential. Sometimes genuine representative plaintiffs have identified these issues. But more commonly by far, an issue comes to class counsel’s attention through a company’s own communications to regulatory authorities, dealers, and customers. And much of the information, as it applies to the U.S. market at least, class counsel can find on the Inter-

net. And given the similarities in vehicles and standards, Canadian plaintiffs' class action lawyers will assume that the same market action should be or has been taken in Canada.

After identifying a potential opportunity, class counsel then will assess profit potential, evaluating the perceived difference between the losses that a class has

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potentially suffered as a result of an issue and what the company has offered as a countermeasure or compensation. Class counsel may assess that a countermeasure or compensation falls short in one or more of the following ways: (1) failure to notify potential claimants; (2) establishing an unreasonably high or exclusive remedy qualifying threshold; or (3) failing to cover all potential losses caused by the defect.

What to Do When Product Action Is Necessary

Generally speaking, vehicle manufacturers deal with product issues through, in descending order of seriousness, recall notices, product update notices and dealer only bulletins.

Ironically, while recall announcements are the most public of "admissions," they probably have the lowest risk of attracting class actions as long as the defects associated with them aren't also associated with uncompensated personal injury or property damage. The implied admission that the issue meets the "safety problem" threshold for filing a "Notice of Defect" under the federal *Motor Vehicle Safety Act* does create risk that claimants will

allege that they experienced the very sort of personal injury or property damage that the recall was designed to avoid. But in many cases, if a defect has been identified by the manufacturer's own quality control processes rather than by catastrophic events, that risk is relatively low. And experience shows that two things about recalls militate against the commencement of a class action. First, potential claimants receive notice and penetration is, relatively speaking, high. Second, the "fix" is generally comprehensive, leaving little, if any, uncompensated economic loss.

A "product update" typically takes the form of a letter to owners of all affected vehicles about a non-safety related vehicle issue that a company has identified and proposes to address by combining technical countermeasures with compensation for past losses (typically past consumer paid repairs). Assuming that a company's product update notification process will be similar to the one it uses for a recall, the issues that will attract the attention of class counsel are such things as (1) whether the notification method will overlook some consumers, for example, past owners; (2) how long the program will remain open and whether there is a risk of excluding people who may have experienced the problem late; and (3) whether the eligibility qualifications will exclude some people such as owners of vehicles no longer under warranty.

Programs that address durability issues are particularly amenable to attack if the line between non-compensable and compensable durability has been drawn with reference to a hard measure such as mileage that class counsel can argue was arbitrary.

The third type of communication that can bring an issue to the attention of class counsel is a dealer bulletin that only dealers receive and has dealers implementing a remedy in response to customer complaints. This type of communication is the least visible, but it is also the one most likely to attract the attention of class counsel. Class counsel will seize upon a bulletin containing information about a problem as an admission of the defect and will try to capitalize on the lack of notice to consumers, the fact that only those who complain will receive the remedy, and that eligibility and the scope of the remedy are left to the

dealer to determine, inevitably resulting in uneven treatment for consumers.

What to Do When a Company Settles the Same Issue in the United States

When a U.S. settlement is in the offing or does conclude, a critical window of time exists during which the action taken by a company's Canadian operation can significantly impact the likelihood of a class action or certification in Canada. The window can be very small; time-wise it falls between the time that settlement terms are finalized in the United States and the time that Canadian class counsel, often in cooperation with U.S. class counsel, seize upon news of the settlement and issue a copycat claim. To reduce its class action exposure, experience suggests the Canadian distributor should, before that copycat claim is issued, communicate an unequivocal commitment to the same settlement for Canadian customers. An unequivocal commitment means more than a demonstrable internal decision that the company intends in the future to go the same route in Canada. There must be public commitment to that course of action, ideally in the form of a communication of the company's intentions to its customers. This will almost certainly cause class counsel to reassess the profit potential of the case. If a statement of claim is issued notwithstanding, the prior customer communication should have a significant impact on the fees that a court will be prepared to award class counsel given the total absence of any effort or risk.

What to Do When a Canadian Class Action Is Commenced

While risk management efforts often will dampen class counsel's enthusiasm for initiating actions, sometimes class counsel will proceed despite a company's best efforts to satisfy the claims of its customers. In that scenario, a company will have to make a fundamental decision: will the company fight certification or settle? The certification motion timetable will influence when a company will have to make the decision.

If a class action settlement exists in the United States and the plan is to implement the same remedy in Canada, then settlement may be attractive to a company because it will generate a release, and

the only incremental costs will be notice and class counsel's fees. With respect to notice costs, there is precedent in automotive class action settlements in Canada for mail notice only (no newspaper) and for one notice only (with the courts finding the Internet acceptable for subsequent notice). A decision to settle will come down to how much a release is worth and whether any "preferable procedure" in place is likely to defeat certification thus warranting resistance. Note that Canadian courts have been more likely to certify notwithstanding the remedy offered by the company if the company did not announce the availability of the remedy until *after* the Canadian class action was commenced. They are also more likely to apply a multiplier to class counsel's fees since they are likely to ascribe the impetus to settle to the commencement of the suit when a company does not announce its remedy until after the suit begins. A company might counter this by arguing that the company treats the entire North American market as one market for the purposes of customer satisfaction and showing that implementing the same remedy in Canada as has been implemented in the United States was a sure thing, even without a public announcement; that is, that Canadian customers always receive what U.S. customers receive. That said, many companies may not be able to make that statement and courts are not likely to find it persuasive.

In some circumstances, a company may find settlement unpalatable. That will certainly be the case if a company does not agree that there is a problem and does not intend to implement a remedy (the "no merits" scenario). It may also be the case if a company concedes the product issue and a remedy is already in place or a company has planned to implement one but the cost of settlement is just too high because plaintiffs' counsel wants a broader remedy or exorbitant fees (the "preferable procedure" scenario). In either case, when class counsel files a certification motion, it must be defended on the basis that the *form* of action proposed is inappropriate, not that the action is unmeritorious. The merits is an issue for a different day; namely, the trial of the action after the case is certified.

Fighting a certification battle means looking very hard at whether (1) any legiti-

mate issues are common to all class claims; and (2) these issues are significant enough to materially advance the litigation. If a case is likely to be overwhelmed by a host of "individual" issues, then a class action is not the preferable procedure. Negligent misrepresentation claims, breach of implied warranty claims, and unfair business practice claims are all amenable to this attack. So are negligent design or manufacturing claims if the losses alleged are just as likely to have been caused by other factors as by the defects. Some potential factors other than defects that could cause losses include unusual uses, modifications, poor maintenance, or environmental conditions.

Defense counsel ought to consider two other lines of attack. One is where class counsel allege negligence and claim plaintiffs suffered economic loss but have no hard evidence of a risk of personal injury or property damage that is causally connected to the defect. Defense counsel cannot mount this as a merits attack because courts do not want to hear merits attacks during the certification stage. Plus a merits attack can assist the representative plaintiff in arguing that the defect question is a common issue. Rather, argue that there is no cogent (read "expert") evidence before the court of any link to personal injury or property damage risk and thus no cause of action in negligence has been disclosed. That is a permissible argument on a certification motion.

The second line of attack focuses on the very notion of "defect" as a common issue. Plaintiffs use the concept as though it is homogenous across all causes of action, but it is not. "Defect" in a negligence context has a meaning that is quite different from defect in a breach of statutory warranty context. In the former, it is defined by the risk of unreasonable physical harm. In the latter, it is defined by the failure to meet a statutory performance standard that is quality focused. The elements of the two causes of action are quite different as are the defenses. Defect in the negligence context may not meet the threshold "is a cause of action disclosed" test, and defect in the statutory warranty or unfair business practice context may have too many individual issues associated with it to qualify for class treatment.

Fighting a certification battle on the grounds that a company-implemented program for an admitted defect is preferable to a class action is more difficult. The fairer and more robust the competing program looks, the better the odds. That means being prepared to defend the reach of the notice program, any qualifications that claimants must meet to qualify for the

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remedy, the ambit of the remedy, and the process for the resolution of disputes. That last point is probably both the most important and the most difficult to implement since it extends beyond the bounds of normal motor vehicle manufacturer product update programs. Even so, courts like to see an objective third-party dispute-resolution process. They do not like to see any sort of cap on recovery or a unilateral right to end a program. Finally, they want to see a program that a company has already implemented or committed to implement. If the program is conditional on certification denial, it will offer little benefit to the defendant in defeating certification.

Conclusion

To conclude, class actions and class action settlements are a global business and motor vehicles are a prime target because they are everywhere and repairs can run into the hundreds of dollars per claimant. Undoubtedly the class action environment in Canada is more liberal than in the United States. But armed with understanding of the test for certification in Canada, the key elements of the available causes of action, and the existing case record in automotive quality defect class actions, automotive companies can fashion risk management strategies that will lower their risk of class actions in Canada. 