

CITATION: Shippelt v. General Motors of Canada Company, 2019 ONSC 4764
COURT FILE NO.: 1872/16 CP (London)
DATE: 20190814

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Dale Shippelt and Paul Ungoad, Plaintiffs

AND:

General Motors of Canada Company and General Motors, LLC, Defendants

BEFORE: Justice R. Raikes

COUNSEL: Matthew Baer and Emily Assini, Counsel for the Plaintiffs

Robert B. Bell, Counsel for the Defendants

HEARD: August 7, 2019

ENDORSEMENT

[1] The representative plaintiffs seek an order approving the settlement of this action, the Notice of Approval, the Claim Form, the plan for dissemination of the Notice, the appointment of the Administrator to implement the settlement and various ancillary relief.

Nature of the Action

[2] The plaintiffs claim damages arising from incorrect fuel economy stickers placed on the 2016 model year Chevrolet Traverse, Buick Enclave and GMC Acadia vehicles (hereafter “the Vehicles”) manufactured by the defendants.

[3] In the Spring of 2016, the defendants became aware of incorrect fuel efficiency listings for the Vehicles when testing was being completed on 2017 model year vehicles. The defendants discovered that due to a computer error, a prior test result for the 2016 model year was omitted from the data pool used to calculate the fuel economy results for the Vehicles. Once included, the estimated fuel economy results for the Vehicles changed. To be clear, the erroneous test results were specific only to the models that are the subject of this action.

[4] To correct the error, the defendants included the test results in the data pool and appropriate standard fuel economy calculations were performed pursuant to the applicable regulations to determine the correct fuel economy ratings. On May 18, 2016, the defendants instructed dealers to stop selling the vehicles until corrected window labels were issued.

[5] The defendants determined the total population of Vehicles sold up to May 18, 2016 and initiated a voluntary compensation program in Canada. That program was similar to a

program in the United States where the same problem occurred. As of September 27, 2018, 4132 retail customers and 199 fleet customers in Canada had accepted the reimbursement provided in the voluntary compensation plan and had executed a release.

- [6] Class action litigation was commenced in the United States. That litigation settled in or about July 2017.
- [7] This action was commenced on July 27, 2016. The plaintiffs advance statutory causes of action under provisions of provincial consumer protection legislation, including the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A, and the provisions of the *Competition Act*, R.S.C. 1985, c. C-34. As is customary in class proceedings in Ontario, the defendants have not filed a statement of defence and will do so only if necessary after a contested certification motion on the merits.
- [8] This action was certified for settlement purposes only on April 30, 2019. The certification order certified the following class:

All persons within Canada who are the original new purchaser or lessee either at retail or as a fleet, of a new model year 2016 Chevrolet Traverse, Buick Enclave, or GMC Acadia with a “window sticker” displaying the incorrect fuel economy in annual fuel cost from an authorized GM dealer (vehicles purchased by companies for daily rental service are excluded) and who did not participate in the voluntary compensation plans previously offered by the defendants and thereby agreed to a release of the claims made in this case.

- [9] The certification order certified the following common issue:

Did the defendants display estimated city, highway and combined fuel economy Ratings on Class Vehicle “window stickers” with incorrect fuel economy ratings? If yes, what are the remedies of Class Members?

- [10] As mentioned, certification is conditional upon approval of the settlement. If the settlement is not approved, the litigation will revert to its pre-certification status as if no settlement was ever negotiated and no order was ever made with respect to certification.

Settlement

- [11] In late 2018, the parties entered into arm’s length negotiations to resolve this action. The negotiations were conducted between counsel who are experienced in class proceedings. No mediator was used.
- [12] On November 5, 2018, the parties agreed to a Term Sheet that provided for full settlement of the action and which mirrored the settlement benefits in the US settlement. Between November 2018 and April 2019, several drafts of a settlement agreement were exchanged. On April 9, 2019, the parties executed the Settlement Agreement. Soon after, they obtained the order conditionally certifying the action for settlement purposes. That order approved notices to the class dealing with the terms of the settlement, the right to opt out of the settlement and how to do so, and the date, time and location for the settlement approval

hearing. Analytics Consulting LLC was appointed Claims Administrator to disseminate the notices to Class Members by direct mail, and to receive opt outs and objections to the settlement.

- [13] There are 405 Class Members. Some Class Members may own more than one of the Vehicles. The exact number of Vehicles is not known but is estimated by counsel to be slightly more than 405. For example, there may be a small fleet owner among the 405 Class Members who purchased more than one of the Vehicles. Most fleet owners took up the compensation offered by the defendants through the voluntary compensation program.
- [14] I note that the US litigation and settlement did not include fleet purchasers.
- [15] The settlement agreement provides two options to class members:
1. a cheque payable in cash in the same amount previously available to the Class Member in the voluntary compensation program, which is an amount calculated as five times the annual difference in the estimated/expected fuel cost shown on the original incorrect window stickers and on the corrected window stickers. Lessees under this option receive a cheque in the same *pro rata* amounts based on the length of their leases as was calculated in the voluntary compensation program; or
 2. a voucher for \$2,000 as a credit on the purchase of any new GM vehicle from an Authorized GM Dealer in Canada within three years of the date the voucher is issued. The voucher is transferable to the Class Member's Immediate Family and can be used in addition to any rebates or other incentives.
- [16] The monetary payments under option one are the same as were available under the voluntary compensation program. They range from \$983 to \$1201. The voluntary compensation program did not fully compensate Class Members in all circumstances; for example, a consumer who drives their vehicle for longer than five years. If a class member falls into that category – someone who is likely to drive their vehicle for more than five years – he or she has the option to take the \$2,000 voucher if he or she concludes that option one is not enough.
- [17] The settlement agreement contemplates that notice will be given by direct mail to Class Members so that they can select option one or two – a cheque or voucher. If a Class Member fails to make a choice, he or she will automatically be sent a cheque under option one. Thus, every Class Member will get either a cheque or a voucher.
- [18] The notice approved earlier was sent by direct mail to the 405 affected Class Members. Only 17 were returned. The Administrator is undertaking skip traces to find those whose addresses have changed and are not known. In short, everything reasonable that can be done to find those entitled to the benefits of this settlement is being done.
- [19] In addition to the compensation paid to Class Members, the defendants have agreed to pay 100% of class counsel's fees and disbursements which they have agreed will be \$175,000. That figure includes HST. Counsel are, as mentioned, experienced class-action counsel.

They were aware that negotiation of class counsel fees could not be discussed until after the terms of the settlement were agreed upon. They confirm that no such discussions took place. This additional term, when added to the settlement reached, benefits the class because their compensation under the settlement is not diminished by legal expenses incurred to achieve the settlement. They get 100% of what they are entitled to under the settlement at no cost to them.

- [20] In return, the defendants get a dismissal of the action with prejudice and the usual releases and protections against future litigation involving the same claims raised by this action.

Law – Settlement Approval

- [21] Settlement of a class proceeding requires court approval: s. 29 *CPA*. Once approved, the settlement binds all class members: s. 29(3) *CPA*.

- [22] On a motion for court approval of a settlement of a class proceeding, the applicable test is whether, in all the circumstances, the settlement is fair, reasonable and in the best interests of those affected by it. The following principles apply to the consideration of a proposed settlement:

- the resolution of complex litigation through compromise of claims is encouraged by the courts and is consistent with public policy
- a settlement negotiated at arms' length by experienced counsel is presumptively fair
- to reject the terms of the settlement and require that litigation continue, a court must conclude that the settlement does not fall within a range of reasonable outcomes
- a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. The court must recognize that there are a number of possible outcomes within a range of reasonableness
- it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement
- it is also not the court's function to litigate the merits of the action or simply rubber stamp a settlement.

(See *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. C.J. (Gen. Div.)) at para.9; *Nunes v. Air Transat AT Inc.* (2005), 20 C.P.C. (6th) 93 (Ont. S.C.) at para. 7; *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643 at para. 31.)

- [23] There are several factors which the courts have considered to assess the reasonableness of a proposed settlement. These factors include:

- the likelihood of recovery or likelihood of success, sometimes referred to as litigation risk
- the amount and nature of discovery, evidence or investigation
- the proposed settlement terms and conditions
- the recommendation and experience of counsel
- the likely duration of the litigation
- the number of objectors and the nature of the objections
- the presence of arms' length bargaining and the absence of collusion
- the positions taken by the parties in the litigation and during negotiations.

(See *Marcantonio v. TVI Pacific Inc.* (2009), 82 C.P.C. (6th) 305 at para. 12; *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 at paras. 71 – 73.

- [24] The court must be satisfied that there is both substantive and procedural fairness. Procedural fairness deals with the manner in which the settlement has been reached. It requires a consideration of the process followed. Hard-fought arms' length negotiations go a long way to satisfy the requirement of procedural fairness.
- [25] The burden of satisfying the court that a settlement should be approved is on the party seeking approval: *Nunes*, para. 7 citing *Ford v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1118 (S.C.J.).

Analysis

- [26] I am satisfied that the settlement in this action was negotiated at arms' length and in good faith between counsel knowledgeable and experienced in class-action litigation each of whom had done their due diligence. I am satisfied that there is a procedural fairness in the negotiation of the settlement agreement.
- [27] No litigation is risk-free. In this case, there was the risk of that one or more of the statutory causes of action would not survive the certification hearing. The action might not be certified on a contested basis. The litigation could be vigorously defended and the final outcome of a trial on the merits years in the future is, at best, speculative. Those risks were known to counsel and taken into account in the negotiation of the terms of the settlement.
- [28] The settlement in this case provides real, tangible benefits to class members. The compensation offered through the settlement falls within the range of reasonable outcomes. I am satisfied that the settlement is fair, reasonable, and in the best interests of the class. The settlement is comparable to that obtained in the US litigation although more expansive to include fleet purchasers.

- [29] No objections to the settlement were filed nor did anyone attend the settlement approval hearing to voice an objection. In addition, no one opted out of the class. The representative plaintiffs and class counsel are satisfied that this is a fair and reasonable compromise. The recommendation of experienced counsel is to be given great weight absent any evidence suggesting otherwise.
- [30] I have reviewed the notice to the class and directed a very minor change to it. I have also reviewed the proposed plan of dissemination of the notice and am satisfied that it is likely to be effective.
- [31] Analytic Consulting LLC has considerable experience as a claims administrator in similar litigation. They were previously approved by me to act as Claims Administrator to this point and I am satisfied that they should continue in that capacity until the settlement has been administered to its conclusion. I have directed that the draft order provide that the Claims Administrator will provide a report to me and counsel so that the outcome of the settlement administration is known. Obviously, the Administrator is at liberty to bring issues to my attention for direction in the event of any concerns as the settlement is administered.
- [32] I have asked the council to provide a revised draft order for my signature which contains the amendments that I requested. The order contains a number of provisions common to settlement approval orders that I need not set forth in detail in this decision.
- [33] In conclusion, the settlement herein is approved.



Justice R. Raikes

Date: August 14, 2019