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Rebuck v Ford Provides More Fuel for Defending False Advertising Class Actions

Historically, many class actions practitioners considered certification the primary fight in a case. It was common that cases would settle not long after certification, so the whole ballgame was perceived to be in the certification motion. Yet with the courts consistently reaffirming the low bar for certification, we are seeing a greater number of class actions determined on their merits *after* certification. And as the recent case of *Rebuck v Ford Motor Company* shows, success on certification is by no means a guarantee of success on the merits.

In that case, the plaintiff had brought a class action against Ford in respect of allegedly false or misleading fuel consumption representations. The case was focused on the EnerGuide labels that were attached to Ford cars sold in Canada in 2013 and 2014. Those EnerGuide labels specified the fuel consumption that the cars could be expected to achieve. However, the labels also contained various disclaimers, including that:

- The estimates are based on the Government of Canada's approved criteria and testing methods;
- The actual fuel consumption of this vehicle may vary;
- One should "Refer to the Fuel Consumption Guide";
- One can obtain a copy of the FUEL CONSUMPTION GUIDE from the dealer or by calling 1-800-387-2000.

The plaintiff alleged that the fuel consumption estimates on the EnerGuide labels were false or misleading. In particular, they argued that the "two-cycle test" that Ford had used to estimate fuel economy provided inaccurate results and typically understated actual fuel consumption in real world environments. By contrast, for its US vehicles, Ford had switched to a "five-cycle test" process for measuring fuel economy, which is alleged to be much more accurate. (Canada only adopted the five-cycle test in 2015). The evidence suggested that there was anywhere from a 10-20% increase in fuel consumption when fuel consumption was measured using a five-cycle test instead of a two-cycle test.

The Plaintiff thus alleged that Ford's use of the two-cycle test resulted in representations as to fuel economy that were false or misleading. The Plaintiff advanced claims under the *Competition Act* and provincial consumer protection legislation.

The case was certified in 2018. Both the plaintiff and defendant then brought motions for summary judgment. Justice Belobaba ultimately decided that the representations were not misleading and granted summary judgment in favour of the defendant, dismissing the action.

As Justice Belobaba described in his reasons, there were two related theories advanced by the plaintiff.

- The first argument was based on an alleged express misrepresentation. The plaintiff alleged that the representations could be understood as having a government backing as to their accuracy.
- The second argument was that there had been misrepresentation by omission, on the basis that Ford had failed to attach qualifiers to the standard fuel consumption information displayed on their cars.

With respect to the allegations under s 52 of the *Competition Act*, Justice Belobaba found that there was no false or misleading representation, for two reasons.

First, Justice Belobaba found that Ford's compliance with federal guidelines meant that the representations could not amount to a breach of the *Competition Act*. Because the relevant federal regulator had approved of a two-cycle test for making EnerGuide label representations at the relevant time, Ford could not be faulted for using them.

Second, Justice Belobaba held that there was a lack of evidentiary foundation for the plaintiff's argument that the general impression of the representations was false or misleading. Under s 52(4) of the *Competition Act*, the Court must consider both the literal meaning and the general impression conveyed by the representations. While there was no doubt that the representations made on the EnerGuide label were literally true, the plaintiff had effectively argued that the general impression conveyed by the representations rendered them false or misleading.

Justice Belobaba rejected this argument. He held that there was an absence of evidence as to what the general impression conveyed by the representations was. He noted that the plaintiff could have led evidence of how consumers would have understood the general impression, such as through a survey, focus group, or other expert opinion evidence. Here, the plaintiff

did not do so, which meant they were unable to establish a particular general impression that the representations conveyed.

Concluding that the plaintiff could not prove his case in absence of such evidence is arguably a change in the law. Historically, cases involving misleading advertising have often been resolved without such evidence, generally on the theory that the general question conveyed by an advertisement is a question of law to be determined by the Court, rather than extrinsic evidence. However, there can be no doubt that the general impression conveyed by a representation could in fact be informed by consumer behaviour evidence, including surveys on focus groups. In the United States, it is common to use such surveys in these types of cases. Surveys are also used to assess the likelihood of consumer confusion in trademark infringement cases. Consequently, to the extent this is a change in practice to demand more evidence as to what general impression a representation conveys, it is a reasonable one.

The Court also concluded that Ford had not breached provincial consumer protection legislation. Here, the focus of the plaintiff's claim was the material non-disclosure allegation. Justice Belobaba ultimately concluded that there was no material non-disclosure, since the substance of information allegedly not conveyed was already contained on the EnerGuide label.

This decision will be significant for practitioners of advertising law and class actions alike. The decision provides helpful guidance as to how to interpret representations, as well instruction as to the types of evidence that will be relevant for interpreting representations. It also provides comfort that representations made in conformity with federal guidelines will not be found to be unlawful. And for class actions practitioners, this decision is another reminder that the defence of a case continues well past certification. Given the low bar for certification, unmeritorious claims can still be certified, and summary judgment motions are a viable process to dispose of many such actions.