
Jonathan Chen
416-865-3553
jchen@litigate.com


Angela Hou
416-238-7457
ahou@litigate.com

October 12, 2022

Recall Remedy Once Again Preferable to Class Action

History has shown that recalls for product defects are often followed by a proposed class action lawsuit. While many products cases in that context have been certified, we have now seen certification of proposed class actions being denied on the basis that there is already an effective recall campaign in place. We have seen this in *Maginnis and Magnaye v FCA Canada et al* and *Richardson v Samsung*.

A recent decision by Justice Perell of the Ontario Superior Court of Justice in *Coles v FCA Canada* is the latest example of an effective recall campaign overcoming a proposed class action.

Factual and Procedural Background

Coles was a proposed class action against car manufacturer FCA Canada, and one of six national class actions against various other car manufacturers.

The proposed class actions were brought by a consortium of class counsel following a recall of airbags designed and manufactured by Takata. The airbags at issue were alleged to be defective and posed a safety risk that could cause personal injury. It was alleged that FCA Canada concealed their knowledge of the defect and are liable for negligence. Takata declared bankruptcy prior to the certification motion and was no longer party to any of the actions. The proposed class limited their claims to pure economic losses.

Importantly, as Justice Perell noted, the consortium that brought these actions did so strategically, and their strategy did not involve prosecuting all six proceedings at the same time. Prior to the certification hearing in *Coles*, many of the companion actions against other car manufacturers had already settled. Those settlements provided for, amongst other things, a replacement of the defective components and reimbursement for certain out-of-pocket expenses.

FCA Canada had undertaken a recall that consisted only of a free of charge replacement for certain vehicles equipped with Takata airbags.

The Decision: A Recall Remedy is the Preferable Procedure

FCA Canada argued that the recall remedy is a bar to

certification under s. 5(1)(a) of the *Class Proceedings Act*, *1992,* ("*CPA*"). Justice Perell rejected that argument, holding that the fact of a recall remedy may establish a defence (and indeed, FCA Canada had already filed a defence), but it does not follow that no reasonable cause of action was pled.

Instead, Justice Perell dismissed the certification motion because a class proceeding was not the preferable procedure under s. 5(1)(d) of the *CPA.* The existence of a recall remedy that is in line with what the class members could likely achieve via litigation, and had been in place and running years before the certification hearing, foreclosed any possibility that a class proceeding could satisfy the preferable procedure criterion.

First, Justice Perell pointed to the delay in moving the *Coles* action forward, calling it "dawdling, plain and simple". The action was commenced in May 2015 and certification was argued in August 2022. The delay meant that the *Coles* action had made no meaningful progress for its intended purpose of removing the alleged defect. Justice Perell also noted that while settlement would be preferable for the class members, settlement was not a preferable alternative because a settlement cannot be forced.

Second, Justice Perell reviewed the Supreme Court of Canada's decisions in *Atlantic Lottery Corp. Inc. v Babstock*, and *1688782 Ontario Inc. v Maple Leaf Foods In*c, which narrowed the scope of recovery for pure economic loss in Canada as follows:

> [T]he right to compensation for a threat of injury was delimited in availability and in the scope of recovery. There is no compensation if the product defect presents no imminent threat. The scope of recovery is limited to mitigating or averting the danger, and where it is feasible for the plaintiff to simply discard the defective product, the danger to the plaintiff's economic rights along with the basis for recovery falls away. The law views the plaintiff as having sustained actual injury to its right in person or property because of the necessity of taking measures to put itself or its other property outside the ambit of perceived danger.

Justice Perell concluded that the settlements in the other Takata airbag class actions, which as noted above included more than mere replacement of the defect, now represent overachievements from what is likely recoverable in the present case. The replacement remedy that FCA Canada had in place represents the likely extent of what the class members could recover if they succeed at trial. In sum,

> [b]ecause of delay and because of a clarification of the law delimiting the recoveries for pure economic losses for dangerous products the purposes of a class action are no longer served by this class action, which is not the preferable procedure to obtain access to justice, behaviour modification, or judicial economy. I conclude that the preferable procedure criterion is not satisfied in the immediate case. It follows that the class action is not certifiable.

Interestingly, although *Coles* was not decided under the amended provisions of the *CPA*, Justice Perell commented that the amendment is “prescient” of circumstances like *Coles* where a class action is not superior to a recall and replacement program. Indeed, Justice Perell’s commentary in this case may itself be prescient of how the predominance provision in s. 5(1.1) will be applied in similar product liability cases where a replacement remedy is available.

This decision is a good reminder that product recalls and class actions do not all end the same way. A manufacturer that takes early steps to implement a proper recall program and repairs the defective product can limit or even avoid product liability risk. In this case, with the assistance of clarified case law on appropriate compensation for pure economic losses, the Court observed that any compensatory damages appeared to be addressed by the recall program. Certainly, what will amount to sufficient compensation will be different in each case, and as seen in *Coles*, there may be some flexibility in that analysis.