CITATION: McBain v. Hyundai Auto Canada Corp., 2021 ONSC 1734
COURT FILE NO.: (McBain v. Hyundai Auto Canada Corp.) CV-19-627147-00CP
(Asselstine v. Kia Canada Inc.) CV-19-627149-00CP
DATE: 20210309

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: KEITH McBAIN, Plaintiff

AND:

HYUNDAI AUTO CANADA CORP, HYUNDAI MOTOR COMPANY, LTD, HYUNDAI MOTOR AMERICA, INC, and HYUNDAI MOTOR MANUFACTURING ALABAMA, LLC, Defendants

AND BETWEEN:

CHANTAL ASSELSTINE, Plaintiff

AND:

KIA CANADA INC., KIA MOTORS CORPORATION, KIA MOTORS AMERICA, INC, KIA MOTORS MANUFACTURING GEORGIA, INC, HYUNDAI MOTOR COMPANY, LTD, HYUNDAI MOTOR AMERICA, INC, and HYUNDAI MOTOR MANUFACTURING ALABAMA, LLC, Defendants

BEFORE: Justice Glustein

COUNSEL: *Matthew D. Baer and Chelsea Smith*, for the Plaintiffs in both actions

Cheryl M. Woodin and Ilan Ishai, for the Defendants in both actions

HEARD: February 23, 2021

REASONS FOR DECISION

Nature of motion and overview

[1] The plaintiffs in both Court File No. CV-19-627147-00CP (the McBain Action) and Court File No. CV-19-627149-00CP (the Asselstine Action) (collectively, the Ontario Actions) bring these motions pursuant to the *Class Proceedings Act 1992*, S.O. 1992, c. 6 [*CPA*], for an order (along with ancillary relief), on consent, to approve the settlement of the Ontario Actions in accordance with the terms of the Hyundai and Kia GDI Engine Canadian Class Actions Settlement Agreement executed as of October 22, 2020 (the Settlement Agreement).

[2] Similar actions were also brought in Québec, Saskatchewan, and British Columbia (collectively, the Other Canadian Actions). The Settlement Agreement governs the Ontario Actions as well as the Other Canadian Actions (collectively, the Canadian Actions).

[3] This settlement approval hearing was conducted by videoconference, jointly with the hearing conducted by Justice Pierre-C. Gagnon of the Superior Court of Québec in *Pelletant v Hyundai Auto Canada Corp., et al*, Court File No 500-06-0010103-198 (the Québec Action).

[4] At the hearing, the parties sought, from this court and the Superior Court of Québec, separate but consistent orders approving the Settlement Agreement (the Approval Orders). Counsel advised the court that if the Settlement Agreements were approved by the Ontario and Québec courts, the parties would discontinue, without costs, the Saskatchewan and British Columbia actions, upon the Approval Orders being issued and entered.

[5] For the reasons that follow, I approve the Settlement Agreement. Since the Settlement Agreement is common for all of the Canadian Actions, I release a single set of reasons for the settlement approval motions in both of the Ontario Actions.

[6] Further, I have reviewed and adopt the reasons of Justice Gagnon in the Québec Action, which are released concurrently with these reasons.

Background of the litigation

[7] These actions concern allegedly defective Theta II 2.0-litre and 2.4-litre gasoline direct injection engines in certain Kia and Hyundai vehicles, sold at varying dates between 2011 and 2019 (the Settlement Class Vehicles).

[8] The Settlement Class Vehicles sold by the Hyundai defendants are the Sonata (for model years 2011-19), Santa Fe Sport (for model years 2013-19), and Tucson (for model years 2014-15, and 2019).

[9] The Settlement Class Vehicles sold by the Kia defendants are the Optima (for model years 2011-19), Sorento (for model years 2012-19), and Sportage (for model years 2011-19).

[10] The plaintiffs allege that:

(i) The defendants were negligent in the design, research, development, testing, manufacturing, marketing, advertisement, promotion, distribution, warning, sale, leasing, warranting, servicing, and/or repair of the Settlement Class Vehicles;

(ii) The defendants' negligence resulted in vehicle stalling during operation, catastrophic engine failure, and/or non-collision engine fires in the Settlement Class Vehicles;

(iii) The defendants breached their warranties with the Settlement Class Members; and,

(iv) The defendants were unjustly enriched by the payments or overpayments they received from the Settlement Class Members.

[11] The McBain Action was commenced by statement of claim, issued June 10, 2019. The Asselstine Action was commenced by statement of claim, issued June 27, 2019. On August 8, 2019, both actions were transferred from London, Ontario to Toronto, Ontario and were subsequently assigned to me as case management judge.

[12] The defendants have not filed a statement of defence in either action.

[13] The following related actions were also commenced across Canada (previously defined as the Other Canadian Actions):

(i) *Papp v. Kia Motors America Inc., et al*, Court of Queen's Bench for Saskatchewan Court File No QBG 795/19 (the Saskatchewan Action),

(ii) *Killoran v. Hyundai Auto Canada Corp., et al*, Supreme Court of British Columbia Court File No S-194327 (the British Columbia Action), and,

(iii) the Québec Action.

Settlement negotiations

[14] In late 2019, the parties entered arm's-length negotiations to resolve the Canadian Actions. On or around April 17, 2020, after several meetings, conference calls, and email exchanges, the parties agreed to a term sheet providing for full settlement of the Canadian Actions.

[15] Between November 2019 and October 2020, the parties exchanged several drafts of the Settlement Agreement and continued to negotiate the final terms of the settlement. On October 22, 2020, the parties executed the Settlement Agreement.

[16] Counsel in the Canadian Actions (Class Counsel) worked cooperatively such that the Settlement Agreement resolves claims relating to Settlement Class Vehicles included in all of the Canadian Actions.

Settlement Agreement

[17] The Settlement Agreement resolves all past, present, and future claims for the alleged pecuniary losses of the Settlement Class Members arising from the allegations in the Canadian Actions related to the Theta II 2.0-litre and 2.4-litre gasoline direct injection engines in the Settlement Class Vehicles.

[18] Approximately 275,533 Hyundai-branded vehicles are Settlement Class Vehicles. Approximately 151,788 Kia-branded vehicles are Settlement Class Vehicles.

[19] The Settlement Agreement was reached after detailed documentary review by Class Counsel. While formal discovery did not take place, Class Counsel was provided with, and

reviewed, more than 40,000 files constituting the US confirmatory discovery database (*i.e.*, the documents provided for the purpose of confirmatory discovery in similar US litigation).

[20] I summarize below the principal terms of the Settlement Agreement.

Extension of the powertrain warranty to a lifetime warranty

[21] The Settlement Agreement incorporates the extension of the powertrain warranty into a lifetime warranty (the Lifetime Warranty) that was made available to Hyundai and Kia customers who had the Knock Sensor Detection Software update (KSDS) installed on their Settlement Class Vehicle.

[22] The KSDS is an engine-monitoring technology developed by the defendants that, with software innovations, leverages existing hardware on the Settlement Class Vehicles to continuously monitor engine performance for symptoms that may precede engine failure.

[23] The KSDS is offered as a software update to customers with Settlement Class Vehicles free of charge. It was introduced as part of the following product improvement campaigns (the Product Improvement Campaigns):

(i) four separate product improvement campaigns or recalls instituted through Transport Canada between April 17, 2017 and December 17, 2019 with respect to the allegedly defective engines in the Kia-branded Settlement Class Vehicles (Transport Canada Recall # 2017199, Transport Canada Recall # 2019143, Transport Canada Recall # 2019153, and Transport Canada Recall # 2019639), and

(ii) five separate product improvement campaigns or recalls instituted through Transport Canada between September 25, 2015 and December 17, 2019 with respect to the allegedly defective engines in the Hyundai-branded Settlement Class Vehicles (Transport Canada Recall # 2017199, Transport Canada Recall # 2019143, Transport Canada Recall # 2019153, and Transport Canada Recall # 2019639).

[24] The Lifetime Warranty was made available to Hyundai and Kia customers as a result of the Product Information Campaigns.

[25] Hyundai and Kia customers can receive the Lifetime Warranty whether or not they participate in the settlement, provided that they comply with the requirements to do so under the Product Information Campaigns or under the Settlement Agreement (if the customer is a Settlement Class Member).

[26] Under the Lifetime Warranty extension:

(i) The powertrain warranty is extended automatically (without a Claim Form) to a lifetime warranty for Settlement Class Members who are individual consumers

(*i.e.*, not used car dealers, franchisees, or automobile auction houses) and who have the KSDS installed on their Settlement Class Vehicle;

(ii) Except in cases of "Exceptional Neglect", the warranty will cover (upon production of records for vehicle maintenance performed before and after the installation of the KSDS update):

(a) any damage to the short-block assembly (consisting of the engine block, crankshaft and bearings, connecting rods and bearings, and pistons) and the rest of the long-block assembly caused by a connecting rod bearing failure in a Settlement Class Vehicle, and

(b) all costs associated with inspections and repairs, including the costs associated with replacement parts, labour, diagnoses, and mechanical or cosmetic damage to the Settlement Class Vehicle caused by an engine malfunction (*e.g.*, engine failure or fire).

Exceptional Neglect is a defined term in the Settlement Agreement and arises:

(a) "when the vehicle's engine evidences a lack of maintenance or care for a significant period of time of not less than one (1) year, based on the 'normal maintenance schedule' service intervals detailed in the vehicle's owner manual, unless such lack of maintenance or care was due to a Loss Event;[1] or"

(b) upon "failure of a Settlement Class Member to have the KSDS update completed pursuant to the KSDS Campaign by a Hyundai or Kia dealer within 60 days of the Approval Notice Date,[2] or within

[1] A Loss Event is also a defined term in the Settlement Agreement. It is "any incident involving a Settlement Class Vehicle that would have led to a Qualifying Repair (such as an engine seizure, engine stall, engine noise, engine compartment fire arising from a connecting rod bearing failure, or illumination of the oil lamp caused by a connecting rod bearing failure and diagnosed as requiring repair of the engine block) but as a result of which the Settlement Class Member disposed of the Settlement Class Vehicle at a Loss (an amount lower than the Settlement Class Vehicle's Fair Market Value), and for which the estimated repair cost, as documented at the time, exceeded 50% of the then-Fair Market Value of the vehicle."

A Loss Event includes "events for which there was insurance coverage, but only where the Settlement Class Member was still not made whole by such insurance payments, and only to the extent they were not made whole".

[2] A defined term which "means the date on which the Approval Notice is first published and disseminated, in accordance with the Approval Orders".

60 days of the mailing of the KSDS Campaign notice,[3] whichever is later";

(iii) Hyundai and Kia dealerships will provide a free loaner vehicle until the Lifetime Warranty repairs are completed. If no loaner vehicle is available, the dealership will provide reimbursement of reasonable rental car expenses up to $40 per day; and

(iv) Except for Exceptional Neglect and subject to the existing terms, limitations, and conditions of the Settlement Class Vehicle's original powertrain warranty, the Lifetime Warranty will otherwise endure for issues arising from connecting rod bearing wear or damage irrespective of the Settlement Class Vehicle's mileage, duration of ownership, or prior warranty engine repairs and/or warranty replacements, and is fully transferable to any subsequent owner or lessee.

Repurchase option for older and high mileage Settlement Class Vehicles

[27] If a Settlement Class Vehicle needs a new engine pursuant to the Lifetime Warranty but has mileage at or above 200,000 km and is more than eight years from the original in-service date, Hyundai or Kia has the option of buying back the vehicle at its Fair Market Value.

[28] Fair Market Value is a defined term:

> [A] Settlement Class vehicle's Canadian Black Book ("CBB") Wholesale Value (including any CBB-valued options), with no regional adjustment, as at the Relevant Loss Date[4] based on the vehicle's mileage at that time. In the event that an odometer reading is not available, as of the Relevant Loss Date, the default condition category for determining the CBB Wholesale Value will be the 'Average' condition.

Reimbursement for past Qualifying Repairs

[29] The relevant terms are:

(i) Settlement Class Members will be reimbursed for all repair expenses incurred to have a Hyundai or Kia authorized dealer or a qualified mechanic in Canada

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[3] The KSDS Campaign notice is defined as the notice "provided pursuant to product improvement campaigns".

[4] The Relevant Loss Date is a defined term that "means: (a) in the case of a Settlement Class Vehicle that is deemed a total loss as a result of an engine fire, the date of the engine fire; or, (b) in the case of a Settlement Class Vehicle that experienced a Loss Event and was sold or traded-in without obtaining a Qualifying Repair, the date of the sale or trade-in".

diagnose or address a Qualifying Repair before the Pre-Approval Notice[5] was issued, with the exception of expenses caused by Exceptional Neglect;

(ii) A Qualifying Repair is "any type of repair, replacement, diagnosis or inspection of the Settlement Class Vehicle's short-block assembly (consisting of the engine block, crankshaft and bearings, connecting rods and bearings, and pistons) due to a connecting rod bearing failure or symptoms associated with connecting rod bearing failure, except in the event of Exceptional Neglect";

(iii) For purposes of reimbursing repair expenses that occurred before the Pre-Approval Notice was issued, a Qualifying Repair also includes "repairs to any other Settlement Class Vehicle components (including, but not limited to, the long-block assembly and its components, the battery, and the starter), provided that there is corresponding documentation confirming that the work was conducted in an attempt to address engine seizure, engine stall, engine noise, engine compartment fire, illumination of the oil lamp, or other mechanical or cosmetic damage to the Settlement Class Vehicle that was caused by a connecting rod bearing failure or symptoms associated with connecting rod bearing failure, except in the event of Exceptional Neglect";

(iv) Qualifying Repairs do not include repairs caused by a collision involving a Settlement Class Vehicle unless the collision was directly caused by an engine failure in a Settlement Class Vehicle that would have otherwise led to a Qualifying Repair;

(v) Settlement Class Members are eligible for reimbursement for past Qualifying Repairs even if warranty coverage was previously denied on grounds of improper service or maintenance (except in cases of Exceptional Neglect), and even if the repairs were performed by an independent mechanic;

(vi) If, before the Pre-Approval Notice was issued, a Settlement Class Member was denied an in-warranty repair at a Hyundai or Kia authorized dealer and then obtained the Qualifying Repair elsewhere and can provide proof of payment for the Qualifying Repair, the Settlement Class Member is also entitled to a credit, valid for one year from the date it is issued, for a free oil and filter change and tire rotation at any Hyundai or Kia authorized dealer;

(vii) If a Settlement Class Member experienced more than 60 days of delay in obtaining a past Qualifying Repair from a Hyundai or Kia authorized dealer, the class member is eligible to receive a dealer credit based on the length of the delay, to be applied towards any service, parts, or merchandise at a Hyundai or Kia authorized dealer. If the delay was between 61 and 90 days, the Settlement Class Member is entitled

[5] (the notice which was disseminated to the class pursuant to my Pre-Approval Order dated November 5, 2020)

to a $65 dealer credit, plus an additional $35 dealer credit for each additional 30-day period of delay or fraction thereof (e.g., a Settlement Class Member may receive a $65 dealer credit for delays lasting 61 to 90 days, a $100 dealer credit for delays lasting 91 to 120 days, etc.); and

(viii) In order to make a claim for reimbursement for past Qualifying Repairs, Settlement Class Members must complete and submit a Claim Form by the Claims Deadline[6] with proof of payment for the repair expense incurred.

Reimbursement for expenses related to obtaining a past Qualifying Repair

[30] Settlement Class Members are also eligible for reimbursement of towing expenses and rental car or alternative transportation service expenses (if a loaner vehicle was not originally provided) up to a maximum of $40 per day, incurred by Settlement Class Members, provided that such expenses are reasonably related to obtaining a Qualifying Repair for a Settlement Class Vehicle.

[31] In order to make a claim for reimbursement for such incurred expenses related to a past Qualifying Repair, Settlement Class Members must complete and submit a Claim Form by the Claims Deadline with proof of the incurred expense and proof that a Qualifying Repair was performed, or that the Settlement Class Vehicle was at a Hyundai or Kia authorized dealer awaiting a Qualifying Repair, within 30 days of the incurred expense.

Compensation for Settlement Class Members who sold or traded-in a Settlement Class Vehicle at a loss

[32] For those Settlement Class Members who sold or traded in a Settlement Class Vehicle after a Loss Event without obtaining a Qualifying Repair, Hyundai and Kia will compensate them for any loss below Fair Market Value (based on the mileage on the Relevant Loss Date, and up to a maximum of the amount the Settlement Class Member paid to purchase the Settlement Class

[6] A defined term which requires Settlement Class members to submit a valid Claim Form within "ninety (90) days from the Effective Date".

The Effective Date is the "first business day after the Settlement Approval Date [the date on which the last Approval Order is issued and entered], unless any appeals are taken from an Approval Order, in which case it means the date upon which all appeals have been fully disposed of in a manner that affirms the subject Approval Order, or a date after the Settlement Approval Date that is agreed to in writing by the Parties".

Vehicle) plus $140, less any amount received by the Settlement Class Member from the sale or a trade-in (except for exceptional neglect).

[33] In order to claim this compensation, Settlement Class Members must submit a completed Claim Form by the Claims Deadline, with proof of (i) the Loss Event and (ii) the sale or trade-in and the value received under the sale or trade-in.

[34] Except in cases of Exceptional Neglect, a Settlement Class Member's maintenance history, or lack thereof, before the repair diagnosis will not be a basis for denying or limiting this compensation.

Compensation for loss of a Settlement Class Vehicle by engine fire

[35] If a Settlement Class Vehicle is deemed a total loss as a result of an engine fire arising from a vehicle condition that would have otherwise resulted in a Qualifying Repair, the Settlement Class Member will be entitled to payment of the Fair Market Value—based on the Settlement Class Vehicle's mileage on the Relevant Loss Date, and up to a maximum of the amount the Settlement Class Member paid to purchase the Settlement Class Vehicle—plus $140, less any amount received by the Settlement Class Member with respect to the loss of the vehicle (from an insurer or otherwise).

[36] To receive this payment, Settlement Class Members must submit a completed Claim Form by the Claims Deadline or, for losses incurred after the Effective Date, within 90 days of the date of the engine fire, with proof of the Loss Event and third party documentation establishing that (i) a fire occurred; (ii) the fire originated within the engine compartment; and (iii) the fire was unrelated to any collision.

Trade-in rebate program

[37] The Settlement Agreement also provides a rebate for Settlement Class Members who (i) have lost faith in their Settlement Class Vehicle as a result of an incident that led to a Qualifying Repair, and (ii) trade-in their Settlement Class Vehicle as part of a purchase of a new Hyundai or Kia vehicle at an authorized dealer.

[38] To be eligible for this rebate, Settlement Class Members must submit a completed Claim Form by the Claims Deadline or, if the engine failure or fire occurred after the Effective Date, within 90 days of the engine failure or fire, with proof of the completed trade-in of the Settlement Class Vehicle for a replacement Hyundai or Kia vehicle from an authorized dealer.

[39] The rebate will be calculated by determining the difference between the trade-in amount and the Fair Market Value of the Settlement Class Vehicle at the time of the trade-in, up to the

following maximum amounts: (i) for model years 2011 through 2014: $1,750, (ii) for model years 2015 and 2016: $1,000, and (iii) for model years 2017 through 2019: $500.

[40] The rebate will be paid in addition to the benefit of the lower sales tax on the replacement Hyundai or Kia vehicle, which the Class Member will receive in the ordinary course as a result of the trade-in value being deducted from the replacement vehicle sale price.

Informational pamphlet

[41] The Settlement Agreement also provides that the defendants will distribute an informational pamphlet to Settlement Class Members. This pamphlet will provide further guidance on the maintenance of the engines in the Settlement Class Vehicles and will remind Settlement Class Members of the available inspections and repairs.[7]

Settlement Agreement limited to pecuniary loss related to alleged engine defects

[42] The settlement benefits relate only to alleged pecuniary losses caused by the engine defects at issue in the Canadian Actions.

[43] Section 9.3 defines the "Released Claims" as all "claims … arising out of or related to the facts alleged in any claim … in the [Canadian] Actions … or which could have been brought based on, any of the facts, acts, events … or other matters asserted in the [Canadian] Actions".

[44] Under section 9.3, the Released Claims include "claims related to issues of oil consumption, oil maintenance, engine stalling, engine failure, and vehicle fires originating in the engine compartment that are covered and remedied under the Lifetime Warranty and other benefits [in the Settlement Agreement]".

[45] The claims covered by the Lifetime Warranty (and thus subject to the release) are set out at paragraph 26 in these reasons.

[46] By way of example, class counsel for the Ontario Actions advised the court that a claim for "oil consumption" or "oil maintenance" that was not related to the claim in the Canadian Actions (and, as such, not covered or remedied under the Lifetime Warranty and other benefits in the Settlement Agreement), would be excluded under the release.

[47] Under section 9.5, claims for "(i) wrongful death, (ii) personal injury, or (iii) damage to tangible property other than a Settlement Class Vehicle" are expressly excluded.

[48] Under section 9.2, the "Releasees" include "(a) any person involved in the design, manufacture, development, assembly, distribution, testing, sale, lease, repair, warranting or

[7] I adopt the cogent reasons of Justice Gagnon at paragraphs 46-51 of his judgment concerning the informational pamphlet. I also add a term to the draft order as set out at paragraph 93 of Justice Gagnon's judgment, to apply to Ontario class counsel.

marketing of the Settlement Class Vehicles, (b) any person involved in the design, development and/or dissemination of advertisements for the Settlement Class Vehicles", (c) the named defendants, and (d) their affiliates and all other related entities and individuals in any manner.

[49] Under s. 9.3, the Releasors include the Settlement Class Members and anyone who could claim through them including owners' associations.

Comparison of the Settlement Agreement with the settlement in similar US litigation

[50] Settlement was reached in similar US litigation by a settlement agreement executed on October 10, 2019 (the US Settlement). The benefits in the Canadian Settlement Agreement are comparable with the terms of the US Settlement.

[51] There are some differences in the terms of the two settlement agreements, arising generally because the Canadian Settlement Agreement was drafted to have more objective terms and benefits rationally connected to vehicle maintenance and safety, consistent with the Product Improvement Campaigns around which the Canadian settlement was built.

[52] For example, with respect to the repurchase option for older Settlement Class Vehicles described at paragraphs 27 and 28 above, the US settlement provides the defendants with the further option of paying the owner $2,000 in lieu of an engine replacement, provided that the owner has installed the KSDS and agrees in writing to assume all risk going forward and to void the vehicle's remaining lifetime warranty. The Canadian Settlement Agreement does not provide this additional option, as its terms were drafted to be better aligned with vehicle maintenance and safety, rather than encourage a cash payment for waiver of liability.

[53] In another example, as described at paragraphs 29(vi) and (vii) above, the Canadian Settlement Agreement provides for (i) a credit for a free oil and filter change and tire rotation for Settlement Class Members who, before the Pre-Approval Notice was issued, were denied an in-warranty repair at a Hyundai or Kia authorized dealer and then obtained the Qualifying Repair elsewhere and, (ii) a dealer credit for Settlement Class Members who experienced more than 60 days of delay in obtaining a past Qualifying Repair from a Hyundai or Kia authorized dealer.

[54] In contrast, under the US Settlement, the claimant in the first situation would be entitled to a $140 goodwill payment instead of a free oil and filter change and tire rotation, and the claimant in the second situation would be entitled to a goodwill payment in the form of a cash debit card. The Canadian Settlement Agreement terms on this issue again focus on promoting proper maintenance for safety purposes.

Approval of class counsel fees to be paid in addition to the settlement benefits

[55] The Settlement Agreement provides for Class Counsel's fees to be paid by the defendants in addition to the settlement benefits provided for in the Settlement Agreement. The settlement

benefits available to Settlement Class Members are not reduced by the fees payable to Class Counsel.

Costs and fees of the claims administrator to be paid by the defendants

[56] The costs and fees of the claims administrator,[8] including the cost of the dissemination of the Approval Notice and the cost of the Settlement's administration, are payable by the defendants pursuant to the Settlement Agreement.

Pre-approval notice and dissemination

[57] On November 5, 2020, the court certified the action for settlement purposes (the Pre-Approval Order). A Pre-Approval Notice was disseminated to Settlement Class members through print media advertising, Internet websites, email, and regular email. The deadline for objections to the Settlement Agreement and for opting out of the action and Settlement Agreement was February 12, 2021.

[58] Of the 291,372 bilingual Pre-Approval Notices sent by regular mail (127,464 to potential Hyundai Settlement Class Members and 163,908 to potential Kia Settlement Class Members), 24,464 bilingual Pre-Approval Notices were returned to Epiq as "undeliverable" as of February 12, 2021. Where a forwarding address was provided, Epiq re-mailed the bilingual Pre-Approval Notice and continued to make such attempts until the joint settlement approval hearings.

[59] Of the 254,774 bilingual Pre-Approval Notices sent by email (137,280 to potential Hyundai Settlement Class Members and 117,494 to potential Kia Settlement Class Members), 3,212 bilingual Pre-Approval Notices bounced back or otherwise could not be delivered. Epiq mailed bilingual Pre-Approval Notices by regular mail to the mailing addresses associated with the potential Settlement Class Members to whom these 3,212 emails were originally sent.

Support for the Settlement Agreement

[60] The representative plaintiffs Asselstine and McBain support the Settlement Agreement.

[61] Class counsel views the settlement as fair, reasonable, and in the best interests of the Settlement Class Members.

Notice and administration of the settlement

[62] The parties agree to the form and content of the Approval Notice that will (i) advise Settlement Class Members who have not opted out of their rights to participate in the settlement

[8] The parties agree that Epiq Class Action Services Canada, Inc. (Epiq), previously appointed as Notice Administrator by this court, continue as claims administrator. I approve the appointment of Epiq as claims administrator, given their experience in that role generally and in this particular action.

and (ii) provide them with information on how to submit a Claim Form and obtain the settlement benefits for which they are eligible.

[63] The Approval Notice will be disseminated in accordance with the Settlement Agreement and the Notice Program, by:

(i) print media advertising,

(ii) Internet websites, including the Canadian Bar Association National Class Action Registry,

(iii) email to all potential Settlement Class Members (a) for whom the defendants have a valid email address, (b) who have contacted Class Counsel and provided a valid email address, and/or (c) who have provided a valid email address through the settlement website, and

(iv) regular mail to all potential Settlement Class Members (a) for whom the defendants have a valid mailing address, (b) who have contacted Class Counsel and provided a valid mailing address, and/or (c) who have provided a valid mailing address through the settlement website.

[64] The parties agree that Epiq shall continue as Claims Administrator, subject to court approval.[9] Epiq has been extensively involved with the administration of this settlement, having administered the Pre-Approval Notice as well as the opt-out and objection processes.

Objections and opt-outs to the settlement

[65] As of February 18, 2021, Epiq, as the Notice Administrator, received a total of 15 objections to the Settlement Agreement: ten from Settlement Class Members with Hyundai-branded Settlement Class Vehicles and five from Settlement Class Members with Kia-branded Settlement Class Vehicles.

[66] Epiq also received a total of 170 completed opt-out forms: 84 in relation to Hyundai-branded Settlement Class Vehicles and 86 in relation to Kia-branded Settlement Class Vehicles.

[67] A large group of Settlement Class Members attended at the hearing, which was conducted by video conference. All Settlement Class Members who sought to object at the hearing[10] were

[9] See footnote 8 above.
[10] (and at least one Kia owner whose vehicle was not included as a Settlement Class Vehicle)

permitted to do so, regardless of whether they had provided a formal written objection. Approximately 50 Settlement Class Members raised objections at the hearing.

[68] Further, the Fonds d'aide aux actions collectives attended and raised concerns about the scope of the release terms of the Settlement Agreement, which Justice Gagnon addresses in his reasons.

[69] Consequently, approximately 0.05% of the Settlement Class Members either opted-out or objected to the Settlement Agreement (including those who objected at the hearing).

[70] I address the objections in my analysis below.

Analysis

The applicable law

[71] Pursuant to s. 27.1(3) of the *CPA*, a settlement of a class proceeding is not binding unless approved by the court.

[72] In *Robinson v. Medtronic, Inc.*, 2020 ONSC 1688, 150 O.R. (3d) 328, I reviewed the general principles governing approval of class action settlements. I set out and rely on those reasons, at paras. 63-68:

> In deciding whether to approve a proposed settlement, the court must determine whether the settlement is fair, reasonable, and in the best interests of the class. Consideration must be given to the totality of the circumstances, including the factual context and the prevailing legal issues (See *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Gen. Div.), at para. 9 (*"Dabbs II*"); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.), at paras. 68-73 ("*Parsons I*"); and *Waldman v. Thomson Reuters Canada Limited*, 2016 ONSC 2622, 131 O.R. (3d) 367 (Div. Ct.), at para. 21 ("*Waldman*")).
>
> In undertaking this analysis, the following principles are to be used as a guide *(*see *Nunes v. Air Transat A.T. Inc.*, 2005 CarswellOnt 2503, at para. 7; and *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643, 5 C.P.C. (7th) 341 ("*Osmun*"), at paras. 31 and 34):
>
> (i) The resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy;
>
> (ii) There is a strong initial presumption of fairness when a proposed settlement, which was negotiated at arm's-length by counsel for the class, is presented for court approval;
>
> (iii) To reject the terms of the settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness;

(iv) 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. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a zone or range of reasonableness. All settlements are the product of compromise and a process of give and take, and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs obligation;

(v) It is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the action or to simply rubber-stamp a proposal;

(vi) The burden of satisfying the court that a settlement should be approved is on the party seeking approval; and

(vii) The court cannot modify the terms of a proposed settlement. The court can approve or reject the settlement. In deciding whether to reject a settlement, the court should consider whether doing so would derail the settlement. The parties are not obligated to resume discussions and it is possible that the parties have reached their limits in negotiations and will backtrack from their positions or abandon the effort. This result would be contrary to the widely held view that the resolution of complex litigation through settlement is encouraged by the courts and favoured by public policy.

The court may also weigh the following factors, keeping in mind that they are not to be applied mechanically and that in any given case, some factors will have greater significance than others (*Dabbs* II, at para. 13; *Osmun*, at paras. 32-33; and *Waldman*, at para. 22):

(i) the presence of arm's-length bargaining and the absence of collusion,

(ii) the proposed settlement terms and conditions,

(iii) the number of objectors and nature of objections,

(iv) the amount and nature of discovery, evidence or investigation,

(v) the likelihood of recovery or likelihood of success,

(vi) the recommendations and experience of counsel,

(vii) the future expense and likely duration of litigation,

(viii) information conveying to the court the dynamics of and the positions taken by the parties during the negotiations,

(ix) the recommendation of neutral parties, if any, and,

(x) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation.

Of the guiding principles, one of the most significant is whether "the settlement falls within a zone of reasonableness" (*Dabbs II*, at para. 30).

The court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within the range of reasonableness.

The parties have an obligation to provide sufficient information to allow the court to exercise its function of independent approval, although it is not necessary that discovery be complete at the time of settlement (*Dabbs v. Sun Life Assurance Co. of Canada*, [1998] OJ No. 2811 (Gen. Div.), at para. 40 ("*Dabbs I*").

[73] I now review the above factors based on the evidence on this motion.

Application of the law to the evidence

(i) Presence of arm's length bargaining and absence of collusion

[74] The settlement negotiations were at arm's length, and required several meetings, conference calls, and email exchanges. Negotiations took place for approximately six months to agree to a terms sheet, with several drafts of a settlement agreement exchanged between November 2019 and October 2020.

(ii) Amount of evidence, discovery, and investigation

[75] Class Counsel engaged in significant investigation, reviewing more than 40,000 files constituting the US confirmatory discovery database (*i.e.*, the documents provided for the purpose of confirmatory discovery in similar US litigation). The defendants conducted significant investigation into the allegedly defective Theta II 2.0-litre and 2.4-litre gasoline direct injection engines.

(iii) Zone of reasonableness and likelihood of success

[76] The terms of the Settlement Agreement fall within the zone of reasonableness, having regard to all of the circumstances.

[77] The Settlement Agreement provides the Settlement Class Members with the recovery they could realistically and reasonably have expected to achieve through litigating this action. In particular, the settlement provides, among other benefits, reimbursement for all pecuniary losses incurred by Settlement Class Members as a result of the alleged engine defects.

[78] The zone of reasonableness must be assessed on the basis of what a class member could reasonably expect to obtain for the claims alleged in the class action.

[79] Settlement Class Members who incurred past Qualifying Repairs will receive reimbursement for those repairs, as well as for towing and car rental or alternative expenses related to obtaining those repairs.

[80] Settlement Class Members who sold or traded-in their vehicles at less than Fair Market Value after experiencing a Loss Event, will receive payment of Fair Market Value based on the mileage on the Relevant Loss Date and up to a maximum of the amount the Settlement Class Member paid to purchase the Settlement Class Vehicle plus $140, less any amount received by the Settlement Class Member from the sale or trade-in.

[81] There are Settlement Class Members who sold their vehicles without having incurred an engine incident, let alone one that would have qualified as a Loss Event. Some of those class members may have sold their vehicles due to safety concerns, while others may have sold their vehicles for factors completely unrelated to the alleged engine defects. However, there would be significant risks for such a class member to obtain damages for pecuniary loss on such a sale, given issues of causation (*i.e.* the reason why the vehicle was sold) and proof of damages (the extent to which any sale price was impacted by the alleged engine defect).

[82] Consequently, a settlement which limits sale or trade-in compensation to those class members who suffered significant damage through a Loss Event is within the zone of reasonableness.

[83] The settlement does not require Hyundai or Kia to replace the engines or buy back their vehicles. Given that the Lifetime Warranty is available to those Settlement Class Members who install the KSDS, and is fully transferable to subsequent purchasers, it is not reasonable that a court would order either buy-back or replacement engine relief as pecuniary damages.

[84] The KSDS update and a Lifetime Warranty were put into place as part of the Transport Canada Product Information Campaigns to ensure the safety of the affected vehicles. Consequently, Settlement Class Members would have not likely obtained an order from the court that a new engine or vehicle repurchase was the appropriate measure of damages.

[85] Therefore, the Settlement Agreement is within the zone of reasonableness by obtaining some trade-in rebate for those who own the Settlement Class Vehicles.

[86] Compensation for the loss of a Settlement Class Vehicle by engine fire provides that class member with the Fair Market Value of the vehicle plus $140, less any amount actually received with respect to the loss of the vehicle from an insurer or otherwise. Again, such relief is consistent with what a class member could reasonably obtain from the court in those circumstances, without

the Settlement Class Member having to incur the costs and delay of litigation, and without any legal fees being deducted from such a claim. Consequently, this relief under the Settlement Agreement is within the zone of reasonableness.

[87] Further, other claims for personal injury, damage to property other than a Settlement Class Vehicle, and wrongful death are excluded from the settlement.

[88] Finally, the differences with the US Settlement, as discussed above, reflect a decision by the representative plaintiffs, with the advice of Class Counsel, to draft the Canadian Settlement with more objective terms and benefits rationally connected to vehicle maintenance and safety, consistent with the Product Improvement Campaigns around which the Canadian settlement was built.

[89] The similarities of the Canadian settlement to the US settlement, along with the differences related to vehicle maintenance and safety, also demonstrate that the Settlement Agreement falls within a zone of reasonableness.

[90] For the above reasons, I find that the Settlement Agreement falls within the zone of reasonableness.

(iv) Recommendation of Class Counsel

[91] Class Counsel recommends the approval of the Settlement Agreement on the grounds that it is fair and reasonable and in the best interests of the class.

(v) Support of the representative plaintiffs

[92] The Settlement Agreement has the support of the representative plaintiffs.

(vi) The positions of the objectors

[93] Given that there were approximately 60 Settlement Class Members who objected in writing and/or in person at the hearing, I do not review each objection individually.

[94] Many of the objectors at the hearing set out their personal experiences as drivers of a Settlement Class Vehicle. They asserted that they experienced engine stalling in dangerous circumstances, such as driving in the passing or other lanes of a highway.

[95] Many of the objectors asserted that they had lost confidence in Kia and Hyundai-branded vehicles as a result of the alleged engine defects, regardless of whether they had suffered an incident with respect to their vehicles. Others asserted that even with the KSDS update, they continued to have engine defects.

[96] The experiences related by the objectors at the hearing were often traumatic. The court has sympathy for those drivers who were concerned about the safety of themselves and their passengers as a result of the alleged engine defects, and who asked the court to order Hyundai and Kia to either buy back their vehicles or replace the engines.

[97] However, sympathy for those Settlement Class Members is not a basis to set aside a class action settlement that falls within the zone of reasonableness. In particular, the relief sought by many of the objectors would not be a reasonable or likely result of litigation. By way of example:

(i) Objectors who wanted Hyundai and Kia to either (a) buy back all Settlement Class Vehicles, (b) replace them with a new vehicle of the same make, model, and trim package and other features, or (c) replace all engines regardless of whether they failed, were seeking relief that could not have been provided by the court if they had brought individual actions.

Objectors would not reasonably obtain such relief, given the Lifetime Warranty and Product Improvement Campaigns undertaken with Transport Canada, who applied their expertise to determine how to best address the alleged engine defects. If Transport Canada did not require an engine replacement or a vehicle repurchase, it is not the role of the court to do so;

(ii) Even if an objector continued to have some engine issues after the installation of the KSDS, the Lifetime Warranty introduced as part of the Product Improvement Campaigns would address those concerns and remove any basis for the court to order the defendants to buy back those vehicles or replace their engines;

(iii) Objectors who were concerned about the risk of engine fire causing damage to parking garages, condominiums, or homes have a right to Fair Market Value of their Settlement Class Vehicle if the vehicle is a total loss due to fire, or if it must be sold because of a Loss Event.

Further, property damage claims outside of the vehicle itself are not released by the Settlement Agreement;

(iv) Objectors who were concerned about the effect that the alleged defect would have on trade-in value would not likely obtain compensation for the speculative value of such a loss. Proof of damages (and causation) as to the basis for the sale price would be difficult, particularly as the KSDS was put into place to resolve engine defect issues along with the Lifetime Warranty transferable to any subsequent purchaser.

While the Settlement Agreement does not provide "perfect" compensation to such objectors since resale value could be affected despite the KSDS program and the Lifetime Warranty, the settlement is in the zone of reasonableness as a claim for such lost resale damages would face significant risk given the steps taken by Hyundai and Kia with Transport Canada to address the concerns;

(v) Objectors were concerned about the one-year expiration date on the dealer credit for inconvenience due to past repair delays (similar to the risk that a finding of Exceptional Neglect could be made if the vehicle is not serviced for a period of not less than one year). However, the Settlement Agreement is connected to vehicle maintenance and safety, and a one-year expiration date for the dealer credit or the risk of Exceptional

Neglect ensures that Settlement Class Members can conduct proper and regular maintenance;

(vi) Some objectors were concerned about the $40 per day reimbursement for the cost of a rental car for a past Qualifying Repair, on the basis that the cost was higher in a local area. However, there is no basis for the court to interfere with this negotiated rate on a Canada-wide basis; and

(vii) Some of the objectors believed that the release extinguished claims for personal injury, damage to property (other than to a Settlement Class Vehicle), or claims that relate to something other than a Settlement Class Vehicle and the alleged engine defects. This is not the case, as I have addressed in my reasons above.

[98] The court does not question the good faith of the objectors who advised the court of both their concerns arising from their experiences in the Settlement Class Vehicles and their requests for additional or modified compensation under the Settlement Agreement. However, based on the evidence before the court, it is not appropriate to rebut the strong presumption of fairness when a proposed settlement, negotiated at arm's length by counsel for the class, is presented for court approval.

(vii) Conclusion

[99] For the reasons I discuss above, the Settlement Agreement falls within the range of possible reasonable outcomes and is a product of compromise and a process of give and take. The Settlement Agreement provides the relief that would likely have been available to the class for the pecuniary damage claims arising out of the alleged engine defect, along with additional trade-in rebate and other benefits.

[100] Consequently, I find that the settlement is fair and reasonable and in the best interests of the Settlement Class Members.

Order

[101] For the above reasons, I approve the settlement of the Ontario Actions in accordance with the terms of the Settlement Agreement. Counsel may provide the court with a draft order for my review.

Glustein J.

Date: March 9, 2021

CITATION: McBain v. Hyundai Auto Canada Corp., 2021 ONSC 1734
COURT FILE NO.: (McBain v. Hyundai Auto Canada Corp.) CV-19-627147-00CP
(Asselstine v. Kia Canada Inc.) CV-19-627149-00CP
DATE: 20210309

ONTARIO

SUPERIOR COURT OF JUSTICE

KEITH McBAIN

Plaintiff

AND:

HYUNDAI AUTO CANADA CORP, HYUNDAI MOTOR COMPANY, LTD, HYUNDAI MOTOR AMERICA, INC, and HYUNDAI MOTOR MANUFACTURING ALABAMA, LLC

Defendants

AND BETWEEN:

CHANTAL ASSELSTINE

Plaintiff

AND:

KIA CANADA INC., KIA MOTORS CORPORATION, KIA MOTORS AMERICA, INC, KIA MOTORS MANUFACTURING GEORGIA, INC, HYUNDAI MOTOR COMPANY, LTD, HYUNDAI MOTOR AMERICA, INC, and HYUNDAI MOTOR MANUFACTURING ALABAMA, LLC

Defendants

REASONS FOR DECISION

Glustein J.

Released: March 9, 2021