

FINDINGS OF FACT

1. The class Plaintiff is seeking to certify is “All persons/entities who purchased or leased a vehicle equipped with an LA Engine (3.9L, 5.2L and 5.9L engines installed on Daimler Chrysler Corp. vehicles between 1992 and 2002) in Pennsylvania; and all persons/entities who purchased or leased a vehicle equipped with an LA engine in another Jurisdiction but attempted to have the plenum assembly remedied in Pennsylvania.”
2. From 1994 through 1999, 146,780 individuals either purchased or leased a new Chrysler automobile containing an LA engine.
3. During the 1990’s Chrysler began using “LA engines” in many of their vehicles.
4. There are three types of LA engines, the 3.9, the 5.2 and the 5.9 Liter engine.
5. These LA engines contain a Plenum Pan Gasket. The Plenum Pan Gasket “PPG” is designed to stop oil from entering the intake manifold.
6. The PPG was made from three different materials from 1992 through 2002, paper, enhanced paper and embossed steel.
7. If the PPG fails, a vacuum is created sucking oil into the intake manifold causing a buildup in the combustion chamber. This buildup mixes with fuel lowering the fuel’s octane.
8. The lowering of the octane in the fuel results in increased combustion otherwise known as engine knock which manifests itself as an audible rattling noise in the engine.
9. Increased combustion or engine knock can lead to increased “blowby”. Blowby are the gasses that are emitted from the combustion chamber. When the blowby enters the crankcase it mixes with the oil and creates contaminants. As the contaminants build up in the oil, “engine sludge” is formed. Engine sludge can build up on the intake screens

which prevent the engine from receiving proper lubrication. This lack of lubrication can ultimately lead to engine failure.

10. In addition to the failure of the PPG, low quality fuel can cause engine sludge.
11. In addition to the failure of the PPG, faulty ignition timing can cause engine sludge.
12. In addition to the failure of the PPG, bad air filters can cause engine sludge.
13. In addition to the failure of the PPG, bad oil filters can cause engine sludge.
14. In addition to the failure of the PPG, towing heavy loads can cause engine sludge.
15. In addition to the failure of the PPG, certain climates can cause engine sludge.
16. In addition to the failure of the PPG, high temperatures can cause engine sludge.
17. In addition to the failure of the PPG, infrequent oil changes can cause engine sludge.
18. In addition to the failure of the PPG long idle times can cause engine sludge.
19. In addition to the failure of the PPG, traveling at high speeds can cause engine sludge.
20. Mr. Scully, the named Plaintiff, resides in West Chester Pennsylvania.
21. In 1998 Mr. Scully leased a new Dodge Durango.
22. Mr. Scully did not follow the recommended procedures for changing his oil.
23. At or around January of 2002, an employee of the named Plaintiff, while driving the Durango, was involved in a serious front end collision.
24. The day after Mr. Scully's Durango was repaired, the engine failed.
25. Mr. Scully purchased a used engine and had it put in the Durango.
26. Mr. Scully used the same PPG from the failed engine in the replacement engine. The PPG on Mr. Scully's vehicle was never replaced.
27. Mr. Scully has since sold the vehicle.

28. Between five and ten percent of LA engines found in Chrysler automobiles will have a PPG leak over the life of the vehicle.
29. Plaintiff's expert witnesses have seen a total of 16 LA engines with a PPG leak.
30. None of the Plaintiff's expert witnesses have ever seen a PPG leak in a 3.9 Liter LA engine.
31. Plaintiff's experts have not seen a leak in LA engines utilizing the steel PPG.
32. None of Plaintiff's witnesses have had or ever will have an opportunity to examine the PPG in Mr. Scully's Durango.
33. None of Plaintiff's experts identified what defect existed in Mr. Scully's PPG.

DISCUSSION

The sole issue before this court is whether the prerequisites for certification as stated in Pa. R. C. P. 1702 are satisfied. The purpose behind a class action law suit is "to provide a means by which the claims of many individuals could be resolved at one time, thereby eliminating the possibility of repetitious litigation and providing small claimants with a method to seek compensation for claims that would otherwise be too small to litigate". DiLucido v. Terminix Intern, Inc., 450 Pa. Super. 393, 397, 676 A.2d 1237, 1239 (Pa. Super. 1996). For a suit to proceed as a class action, Rule 1702 of the Pennsylvania Rules of Civil Procedure requires that five criteria be met:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
- (4) the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709;
- (5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

Rule 1708 of the Pennsylvania Rules of Civil Procedure requires:

In determining whether a class action is a fair and efficient method of adjudicating the controversy, the court shall consider among other matters the criteria set forth [below]

a) Where monetary recovery alone is sought, the court shall consider

- (1) whether common questions of law or fact predominate over any question affecting only individual members;
- (2) the size of the class and the difficulties likely to be encountered in the management of the action as a class action;
- (3) whether the prosecution of separate actions by or against individual members of the class would create a risk of
 - (i) inconsistent or varying adjudications with respect to individual members of the class which would confront the party opposing the class with incompatible standards of conduct;
 - (ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
- (4) the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues;
- (5) whether the particular forum is appropriate for the litigation of the claims of the entire class;
- (6) whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
- (7) whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.

The burden of showing each of the elements in Rule 1702 is initially on the moving party. This burden “is not heavy and is thus consistent with the policy that decisions in favor of maintaining a class action should be liberally made.” Cambanis v. Nationwide Ins. Co., 348 Pa. Super. 41, 45, 501 A.2d 635, 637 (Pa. Super. 1985). The moving party need only present evidence sufficient to make out a *prima facie* case “from which the court can conclude that the five class certification requirements are met.” Debbs v. Chrysler Corp., 2002 Pa. Super. 326, 810 A.2d 137,153-154 (2002)(quoting Janicik v. Prudential Ins. Co., 305 Pa. Super. 120, 451 A.2d 451, 455 (Pa. Super. 1982)

In other contexts, the *prima facie* burden has been construed to mean “some evidence,”

“a colorable claim,” “substantial evidence,” or evidence that creates a rebuttable presumption that requires the opponent to rebut demonstrated elements. In the criminal law context, “the *prima facie* standard requires evidence of the existence of each and every element.”

Commonwealth v. Martin, 727 A.2d 1136, 1142 (Pa. Super. 1999), *alloc. denied*, 560 Pa. 722, 745 A.2d 1220 (1999). However, “The weight and credibility of the evidence are not factors at this stage.” Commonwealth v. Marti, 779 A.2d 1177, 1180 (Pa. Super. 2001).

In the family law context, the term “‘*prima facie* right to custody’ means only that the party has a colorable claim to custody of the child.” McDonel v. Sohn, 762 A.2d 1101, 1107 (Pa. Super. 2000). Similarly, in the context of employment law, the Commonwealth Court has opined that a *prima facie* case can be established by “substantial evidence” requiring the opposing party to affirmatively rebut that evidence. *See, e.g., Williamsburg Community School District v. Com., Pennsylvania Human Rights Comm.*, 512 A.2d 1339 (Pa. Commw. 1986).

Courts have consistently interpreted the phrase “substantial evidence” to mean “more than a mere scintilla,” but evidence “which a reasonable mind might accept as adequate to support a conclusion.” SSEN, Inc., v. Borough Council of Eddystone, 810 A.2d 200, 207 (Pa. Commw. 2002). In Grakelow v. Nash, 98 Pa. Super. 316 (Pa. Super. 1929), a tax case, the Superior Court said: “To ordain that a certain act or acts shall be *prima facie* evidence of a fact means merely that from proof of the act or acts, a rebuttable presumption of the fact shall be made;...it attributes a specified value to certain evidence but does not make it conclusive proof of the fact in question.”

Class certification is a mixed question of fact and law. Debbs v. Chrysler Corp., 2002 Pa. Super. 326, 810 A.2d,154 (Pa. Super. 2002). The court must consider all the relevant testimony, depositions and other evidence pursuant to Rule 1707 (c). In determining whether the

prerequisites of Rule 1702 have been met, the court is only to decide who shall be the parties to the action and nothing more. The merits of the action and the plaintiffs' right to recover are excluded from consideration. 1977 Explanatory Comment to Pa. R. Civ. P. 1707. Where evidence conflicts, doubt should be resolved in favor of class certification. In making a certification decision, "courts in class certification proceedings regularly and properly employ reasonable inferences, presumptions, and judicial notice." Janicik, 451 A.2d at 454,455. Accordingly, this court must refrain from ruling on plaintiff's ultimate right to achieve any recovery, the credibility of the witnesses and the substantive merits of defenses raised.

"The burden of proof to establish the five prerequisites to class certification lies with the class proponent; however, since the hearing on class certification is akin to a preliminary hearing, it is not a heavy burden." Professional Flooring Co. v. Bushar Corp., 61 Pa. D&C 4th 147, 153, 2003 WL 21802073 (Pa. Com. Pl. Montgo. Cty. Apr. 14, 2003), citing Debbs v. Chrysler Corp., 810 A.2d 137, 153-54 (Pa. Super. 2002); Janicik v. Prudential Inc. Co. of America, 451 A.2d 451, 455 (Pa. Super. 1982). *See also* Baldassari v. Suburban Cable TV Co., 808 A.2d 184, 189 (Pa. Super. 2002); Cambanis v. Nationwide Insurance Co., 501 A.2d 635 (Pa. Super. 1985). The *prima facie* burden of proof standard at the class certification stage is met by a qualitative "substantial evidence" test.

Our Superior Court has instructed that it is a strong and oft-repeated policy of this Commonwealth that, decisions applying the rules for class certification should be made liberally and in favor of maintaining a class action. Weismer by Weismer v. Beech-Nut Nutrition Corp., 615 A.2d 428, 431 (Pa. Super. 1992). *See also* Janicik, 451 A.2d at 454, *citing and quoting* Esplin v. Hirschi, 402 F.2d 94, 101 (10th Cir. 1968) ("in a doubtful case . . . any error should be committed in favor of allowing the class action").

Likewise, the Commonwealth Court has held that “in doubtful cases any error should be committed in favor of allowing class certification.” [Foust v. Septa](#), 756 A.2d 112, 118 (Pa. Commw. 2000). This philosophy is further supported by the consideration that “[t]he court may alter, modify, or revoke the certification if later developments in the litigation reveal that some prerequisite to certification is not satisfied.” [Janicik](#), 451 A.2d at 454

Within this context, the court will examine the requisite factors for class certification.

I. Numerosity

To be eligible for certification, Appellant must demonstrate that the class is "so numerous that joinder of all members is impracticable." [Pa.R.C.P. 1702\(1\)](#). A class is sufficiently numerous when "the number of potential individual plaintiffs would pose a grave imposition on the resources of the court and an unnecessary drain on the energies and resources of the litigants should plaintiffs sue individually." [Temple University v. Pa. Dept. of Public Welfare](#), 30 Pa.Cmwlth. 595, 374 A.2d 991, 996 (1977) (123 members sufficient); [ABC Sewer Cleaning Co. v. Bell of Pa.](#), 293 Pa.Super. 219, 438 A.2d 616 (1981) (250 members sufficient); [Ablin, Inc. v. Bell Tel. Co. of Pa.](#), 291 Pa.Super. 40, 435 A.2d 208 (1981) (204 plaintiffs sufficiently numerous). Appellant need not plead or prove the actual number of class members, so long as he is able to "define the class with some precision" and provide "sufficient indicia to the court that more members exist than it would be practicable to join." [Janicik](#), 451 A.2d at 456.

From the year 1994 through 1999, 116,089 individuals purchased and 30,691 leased a Chrysler automobile containing an LA engine. 146,780 potential class members is sufficient to satisfy the numerosity requirement. This number does not include those individuals who had their PPG gasket repaired in Pennsylvania or those who purchased or leased a Chrysler automobile in the years 2000 through 2002.

The Plaintiffs have satisfied the numerosity requirement for class certification of the proposed class.

II. Commonality

The second prerequisite for class certification is that “there are questions of law or fact common to the class.” Pa. R. Civ. P. 1702(2). Common questions exist “if the class members’ legal grievances arise out of the ‘same practice or course of conduct on the part of the class opponent.” Janicik, supra. 133, 451 A.2d at 457. Thus, it is necessary to establish that “the facts surrounding each plaintiff’s claim must be substantially the same so that proof as to one claimant would be proof as to all.” Weismer by Weismer v. Beechnut Nutrition Corp., 419 Pa. Super. 403, 615 A.2d 428 (Pa. Super. 1992)). However, where the challenged conduct affects the potential class members in divergent ways, commonality may not exist. Janicik, supra. 457 fn. 5

“While the existence of individual questions is not necessarily fatal, it is essential that there be a predominance of common issues shared by all class members which can be justly resolved in a single proceeding.” D’Amelio v. Blue Cross of Lehigh Valley, 347 Pa. Super. 338, 487 A.2d 995, 997 (Pa. Super. 1985). In examining the commonality of the class’ claims, a court should focus on the cause of injury and not the amount of alleged damages. “Once a common source of liability has been clearly identified, varying amounts of damages among the plaintiffs will not preclude class certification.” See Weismer by Weismer v. Beech-Nut Nutrition Corp., 419 Pa. Super. 403, 409, 615 A.2d 428, 431 (Pa. Super.). Where there exists intervening and possibly superseding causes of damage however, liability cannot be determined on a class-wide basis. Cook v. Highland Water and Sewer Authority, 108 Pa. Cmwlt. 222, 231, 530 A.2d 499, 504 (Pa. Cmwlt. 1987).

Individual questions of fact predominate. Plaintiffs claim that a common defect in the Plenum Pan Assembly causes the Chrysler LA engines to develop engine sludge which ultimately leads to engine failure. Plaintiffs have failed to prove even *prima facie* that there exists a class wide PPG problem. Plaintiff claims that all LA engines are in fact the same. However, during the course of the Class Certification Hearing it became evident, even from plaintiff's experts themselves, that there is no common defect among LA engines and that there is variation within the LA engine which makes identifying a common defect impossible. In addition to the variation among the LA engines, there are so many potential causes for engine sludge that causation can only be proved on an individual basis.

Plaintiff is seeking to certify a class of, "All persons/entities who purchased or leased a vehicle equipped with an LA Engine (3.9L, 5.2L and 5.9 L engines installed on Daimler Chrysler Corp. vehicles between 1992 and 2002) in Pennsylvania; and all persons/entities who purchased or leased a vehicle equipped with an LA engine in another Jurisdiction but attempted to have the plenum assembly remedied in Pennsylvania."¹ This class consists of at least 146,780 people.² Plaintiff's four experts have collectively seen only sixteen LA engines with a PPG leak³, .01% of the class that Plaintiff is seeking to certify. Plaintiff offered the deposition of Albert Motta , a Chrysler employee in the corporate quality division. Mr. Motta testified that according to his records, five to ten percent of the LA engines sold by Chrysler would have a PPG leak over the lifetime of the vehicle.⁴ Even if a full ten percent of the PPGs in the LA engines will fail at some point in the life of a vehicle, ninety percent of the class will have no problem whatsoever. Plaintiff's own expert, Terry Shaw, testified that even a PPG failure does not mean that the

1 Pl.'s Mot. for Class Certification, ¶ 18

2 Pl.'s Mot. for Class Certification, ¶ 25

3 N.T., Nov. 15, 2004, Vol. 1, Pg. 56; N.T., Nov. 16, 2004, Vol. , Pg. 14, 57, 68

4 See, Dep. Of Albert Motta , August 15, 2004, pg. 13

vehicle's engine will develop engine sludge.

Q: So it's true is it not, Mr. Shaw, that depending on the severity of the plenum pan gasket leak, the vehicle may or may not develop engine sludge?

A: Yes.⁵

There is no commonality between the ninety percent of class members who have no cause of action and the ten percent of class members who will have their PPG fail over the life of the vehicle. The ten percent failure rate of the LA engine PPG is the absolute maximum percentage of class member who may have an injury. The actual percentage is more than likely lower. Of those 10 percent of class members who do experience a PPG failure there can be no commonality between those who do experience engine sludge and those who don't. There was no evidence presented that everyone who develops engine will per se experience engine failure. Thus there is also no commonality between those engines with engine sludge which experience engine failure and those that do not.

There are other, more serious, commonality problems. All Plaintiff's experts agree that there are three types of LA engine, the 3.9 the 5.2 and the 5.9 Liter engine. All three of these engines are included in Plaintiff's proposed class. At the class certification hearing, Plaintiff presented the testimony of four expert witnesses; Dr. Checkel an engineering professor with his PHD in Engineering from Cambridge University, Terry Shaw, a graduate of Blaire Automotive Technical Institute, who has a Pennsylvania damage Vehicle Appraiser's license, Harlan Gustafsan, who builds racing engines and Dale Cherry an auto mechanic who has been working on engines for fifteen years.

At the Class Certification hearing, Dr. Checkel testified:

⁵ N.T., Nov. 16, 2004, Vol. II , Pg. 23

Q: Have you ever seen a plenum pan gasket leak in a 3.9 Liter engine?

A: No.⁶

Terry Shaw testified:

Q: Now, are you aware, Mr. Shaw, of ever seeing or hearing or reading of a plenum pan gasket failure in the 3.9 Liter engine.

A: No⁷

In addition to Dr. Checkel and Mr. Shaw's testimony that they know of no PPG problems in the 3.9 Liter engine, Plaintiff's expert, Dale Cherry testified that not only had he never seen a PPG leak in a 3.9 Liter engine but that the 3.9 Liter LA engine has a completely different Plenum Pan design than the other two types of engine:

Q: I think you testified at your deposition, didn't you, sir, that you had never seen is a plenum pan gasket failure in a 3.9 engine?

A: That's correct...

Q: But in your opinion the 3.9 is to whatever extent, to some extent a different design?

A: Yes.⁸

Obviously, none of Plaintiff's experts believe the 3.9 Liter engine is defective.

Likewise, Plaintiff cannot claim a common design defect among the LA engines when the 3.9 Liter engine has a completely different design from the other engines. Owners of 3.9 Liter engines have no defect, no problem and therefore no commonality and cannot be part of the class.

Not only are there three types of LA engine, there are also three types of PPGs found in these engines. Plaintiff's expert Terry Shaw testified at the Certification Hearing that there were three different materials used to make the PPG in the LA engine, paper, enhanced paper and

6 N.T., Nov. 15, 2004, Vol. I , Pg. 56

7 N.T., Nov. 16, 2004, Vol. II , Pg. 31

8 N.T., Nov. 16, 2004, Vol.II , Pg. 72, 82

embossed steel.⁹ Mr. Shaw testified that the steel gasket has never failed:

Q: Have you ever seen a failure involving the steel gasket?

A: No¹⁰

Nevertheless, LA engines equipped with a steel PPG, which Plaintiff's own expert admitted never fail, are included in the proposed class. Class members driving a vehicle with a steel PPG that will not fail cannot possibly have common issues with those class members driving vehicles equipped with a PPG made from another material and cannot be part of the class.¹¹

Dr. Checkel, Plaintiff's only engineering expert, who has never examined a PPG in an LA engine, testified that the development of engine sludge can be from any one of ten causes. Dr. Checkel testified that in addition to a PPG failure, low octane fuel, faulty ignition timing, bad air filters, high temperatures, low humidity, carrying heavy loads, high engine temperature, infrequent oil changes, long idle times and driving at high speeds can cause engine sludge.¹² Accordingly, each individual class member who does prove that their engine failed due to engine sludge would still need to prove that the engine sludge was caused by a defective PPG rather than one of the other ten causes. Plaintiff's experts admit that the only way to determine whether engine sludge was caused by the PPG is to take the engine apart. Dr. Checkel testified that:

Q: Now, is there any way to determine, without inspecting the vehicle and taking the engine apart, what caused the formation of engine sludge?

A: There are tests to find out some of the problems you would have. So for example, there is a diagnostic test if the engine is still running to see if you have a plenum pan gasket leak for example.

Q: Right, but we have other causes for engine sludge right?

A: There are other things that lead to contaminated oil and buildup of

9 N.T., Nov. 16, 2004, Vol. 2 , Pg. 28-30

10 N.T., Nov. 16, 2004, Vol. 2 , Pg. 30

11 No expert testified that the steel PPG was defective.

12 See, N.T., Nov. 15, 2004, Vol. 1 , Pg. 47-49

sludge, that's right.

Q: And you can't tell without examining the vehicle and examining the engine what exactly it was that caused the formation of sludge; isn't that true?

A: That's correct.¹³

Plaintiff's expert, Mr. Shaw agreed with Dr. Checkel:

Q: And in order to determine whether the sludge in an engine is caused by a leaking plenum gasket, or by improper maintenance, or by some other cause, you got to take the engine apart and examine the sludge, don't you?

A: Yes.¹⁴

Plaintiff has failed to demonstrate that causation can be proven on a class wide basis as to any subclass of the severely broad class requested.¹⁵ Because of the multiple causes of engine sludge, causation must be proven on a case by case basis by disassembling each individual engine, there can be no commonality.

Plaintiff claims that there is a common "defect" in the LA engine which causes the PPG to leak thereby allowing oil into the intake manifold. Plaintiff's experts however cannot identify what is defective in the LA engine.

Dr. Checkel, Plaintiff's engineer, believes the PPG problem to be one of economics:

Q: Is a car that has an LA engine, such as we've been discussing here, in your opinion, based on your training and experience, substantially free of defects? . . .

A: The answer is no, and I can tell you why.

Q: Please tell me why.

A: Any repair that costs \$4,000 [to] \$5,000 to repair, you're going to lose profits on dozens of cars for everyone you have to repair. So if you are sustaining something like five to ten percent failure rate in warranty that was not a very good product for the manufacturer, never mind the person who owns it.

13 N.T., Nov. 15, 2004, Vol. I , Pg. 71-72.

14 N.T., Nov. 16, 2004, Vol. II , Pg. 41.

15 No testimony whatsoever supports a claim that the 3.9 Liter engine or the steel PPG are in any way defective.

Q: So it's defective because the company is going to lose money. Is that the testimony?

A: It's defective because the company is going to lose money while it's in warranty and the customers are going to lose money after they failed to provide the warranty. That's a defect...

Q: What do you base your opinions on?

A: That's simple economics. I guess that's maybe outside engineering but....¹⁶

Mr. Shaw, who is not an engineer, feels that the defect has to do with the PPG material as well as the design of the plate and the fasteners.

Q: You've talked about a defect several times. What is the defect that you're talking about?

A: The plenum pan gasket.

Q: That's a part. What is the defect?

A: Defect is that it doesn't seal.

Q: That's a description of what is going wrong. What is the defect?

A: The defect is that it causes the engine to self destruct.

Q: That is the result of the description of what goes wrong. What is the defect?

A: The design of the gasket.

Q: What's wrong with the design?

A: Improper selection of material.

Q: Is that the defect or is it just the wrong thing?

A: And the design of the plate and fasteners, the choice of materials they used.

Q: Do you recall whether you said any of that in your three-page report?

A: Not that specifically no, sir.

Q: But the defect is what, that it's the wrong material and what, that it's the wrong material for the fasteners?

A: The gasket was insufficient for the job they had assigned to it. The fasteners, the location of the fasteners, the design of the plate

16 N.T., Nov. 15, 2004, Vol. I, Pg. 64-65.

which was to fasten the gasket so that it would seal the plenum was all miss-engineered and caused problems for years with that engine.¹⁷

Finally, Mr. Gustafsan who is also not an engineer, feels that the defect is in the “plenum pan cover.”

Q: Do you say in your report that the plenum pan assembly design on the LA engines was defective?

A: Yes.

Q: Why do you say there?

A: I feel the cover itself was the main problem. I feel that.

Q: What cover?

A: The plenum pan cover. The plenum pan itself.

Q: Would you describe for the court what the function of these different parts you're talking about?

A: As far I'm concerned, there's three – there's four pieces to it. There is a gasket, there is a base and there is 15 bolts. I feel that the cover is not stiff enough, not rigid enough. And this spans between all the bolts, to hold constant pressure on all the areas of gasket around this periphery, around where the gasket lies.

Q: How does the cover not being stiff enough promote failure of the gasket?

A: Its design is -- that is a flat plate. I feel it should either be a thicker plate or rolled up edges that's similar to the oil pan on the same engine has rolled edges to make the edge of the pan stiffer. Any way at all to make it stiffer. It really doesn't matter what you do, but it has to be stiffer so that it doesn't have unequal pressures and rises and falls around this periphery.

Q: Well, that's my question. What does the unequal pressure do to allow the failure of the gasket?

A: The unequal pressure allows the fluids or air, oil to leak one way or the other. It doesn't have pressure on it, it allows leakage.¹⁸

Plaintiff's experts do not agree on any common defect in the Chrysler LA engine. Dr.

Checkel suggests the common defect is merely economical. Mr. Shaw hypothesizes that the

17 N.T., Nov. 15, 2004, Vol. I , Pg. 145-146

18 N.T., Nov. 16, 2004, Vol. II , Pg. 53-54

common defect is somewhere in the gasket material and the plate and fasteners. Finally, Mr. Gustafsan says that the plenum cover is defective. One cannot prove a common defect within the Chrysler LA engine by presenting three contradicting theories.

Plaintiff's over inclusive class, as currently defined, can never satisfy the commonality requirement. In addition to Plaintiff failing to identify a common defect, ninety percent of Plaintiff's class will never have a problem with their PPG. Included in this ninety percent are all owners of Chrysler automobiles with 3.9 Liter engines and vehicles whose LA engines contain a steel PPG. By the admission of all Plaintiff's experts these class members will never experience any problems with their engine due to a defective PPG.

Those few owners of Chrysler LA engines who do experience engine sludge must show (by having their engine taken apart) that the sludge was caused by the PPG and not by low octane fuel, faulty ignition timing, bad air filters, high temperatures, low humidity, carrying heavy loads, high engine temperature, infrequent oil changes, long idle times or driving at high speeds. This Court may not certify a class of plaintiffs, alleging a class wide defect, where at the very least, ninety percent of those individuals will never experience a problem with the "defective" part.

Accordingly, this court finds that individual questions of law and fact exist and commonality has not been proven.

III. Typicality

The third step in the certification test requires the plaintiff to show that the class action parties' claims and defenses are typical of the entire class. The purpose behind this requirement is to determine whether the class representatives' overall position on the common issues is sufficiently aligned with that of the absent class members, to ensure that pursuit of their interests

will advance those of the proposed class members. DiLucido v. Terminix Intern, Inc., 450 Pa. Super. 393, 404, 676 A.2d 1237, 1242 (Pa. Super. 1996).

Plaintiff is typical only in that he leased a Chrysler vehicle that contained an LA engine.¹⁹ The fact that Mr. Scully meets the class definition demonstrates the over-inclusiveness of the proposed class. Mr. Scully leased a new 1998 Dodge Durango in July of 1998.²⁰ The engine of the Durango failed after 52,000 miles, which is beyond the warranty period.²¹ The engine failure occurred shortly after the Durango had been involved a serious front end collision.²² After Mr. Scully's engine failed he had a new engine was put into the Durango.²³ Mr. Scully never experienced any engine knock.²⁴ The PPG from the old engine put into the replacement engine. The PPG in Mr. Scully's engine was never replaced.²⁵ After replacing the engine, Mr. Scully purchased the car and subsequently traded it in.²⁶ No one has ever seen the original engine's PPG.²⁷ Mr. Scully did not follow the recommended procedures for changing his oil.²⁸

Mr. Scully is not a typical Plaintiff. Mr. Scully alleges in count four of his complaint that Defendant breached his express warranty. Mr. Scully's engine did not fail during the warranty period. Mr. Scully is not a typical plaintiff for any express warranty claim. Mr. Scully admittedly failed to follow the recommended procedures for oil changes. Dr. Checkel specifically testified that infrequent oil changes are a cause of engine sludge. Plaintiff's expert Mr. Cherry testified that LA engines with a PPG failure will initially experience engine knock before developing

19 The record does not demonstrate whether plaintiff's vehicle had a steel PPG or a 3.9 Liter engine which Plaintiff's experts testified were not defective.

20 N.T., Nov. 15, 2004, Vol. 1 , Pg. 96

21 N.T., Nov. 15, 2004, Vol. 1 , Pg. 98

22 N.T., Nov. 15, 2004, Vol. 1 , Pg. 107,108

23 N.T., Nov. 15, 2004, Vol. 1 , Pg. 101

24 N.T., Nov. 15, 2004, Vol. 1 , Pg. 110

25 N.T., Nov. 16, 2004, Vol. 2 , Pg. 20,21

26 N.T., Nov. 15, 2004, Vol. 1 , Pg. 114

27 N.T., Nov. 15, 2004, Vol. 1 , Pg. 113

28 N.T., Nov. 15, 2004, Vol. 1 , Pg. 109

engine sludge. Mr. Scully testified that his vehicle did not experience engine knock. Because Mr. Scully no longer owns the vehicle, no one has ever examined his PPG to determine if it was defective.

If Mr. Scully were to bring an individual action claiming injury due to a defective PPG his own claim must fail since he will never be able to prove that his PPG was defective. No one has ever seen his PPG or will ever see the PPG that was originally installed in Mr. Scully's vehicle. The characteristic symptom of PPG failure, engine knock, did not occur before his engine failure. A class representative cannot be typical if he can surely not prove his individual case. He is certainly not typical of those class members who may in fact have a claim. His very membership in this class demonstrates the over-inclusiveness of definition. For the reasons stated above, the criteria of typicality contained in Rule 1702 (3) has not been met by the proofs presented at the class certification hearing or the record presented therein.

IV. Adequacy of Representation

For the class to be certified, this court must also conclude that the plaintiffs "will fairly and adequately assert and protect the interests of the class." Pa. R. Civ. P. 1702 (4). In determining whether the representative parties will fairly and adequately represent the interests of the class, the court shall consider the following:

- “(1) whether the attorney for the representative parties will adequately represent the interests of the class,
- (2) Whether the representative parties have a conflict of interest in the maintenance of the class action, and
- (3) Whether the representative parties have or can acquire financial resources to assure that the interests of the class will not be harmed.” Rule 1709.

“Until the contrary is demonstrated, courts will assume that members of the bar are skilled in their profession.” Janicik, 305 Pa. Super. at 136, 451 A.2d at 458. Here, defendants do not challenge plaintiffs' counsels' skill and therefore, the court presumes that counsel is skilled

in their profession.

“Courts have generally presumed that no conflict of interest exists unless otherwise demonstrated, and have relied upon the adversary system and the court’s supervisory powers to expose and mitigate any conflict.” Janicik, 305 Pa. Super. at 136, 451 A.2d at 458. Here,

Defendants do not challenge Plaintiffs’ counsels’ skill and the court knows that counsel is skilled in their profession.

V. Fair and Efficient Method of Adjudication

The final criteria under Pa. R. Civ. P. 1702 is a determination of whether a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

It is not necessary for this court to consider these remaining requirements for certification since plaintiff has failed to establish commonality and typicality. However, the same considerations that cause commonality and typicality to fail make the matter unmanageable as a class trial. Having weighed all class certification requirements, this court finds that a class action is not the appropriate method for adjudicating Plaintiff’s claims.

CONCLUSIONS OF LAW

1. The class is sufficiently numerous that joinder of all its members would be impracticable.
2. Individual questions of fact exist with respect to the class.
3. Plaintiff's claims are not typical of the class claims.
4. The representatives can fairly and adequately represent the class.
5. The case cannot be suitably managed and tried as a class action.

BY THE COURT:

Mark I. Bernstein,

