IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

CIVIL TRIAL DIVISION

PARKER, ET AL.	:	SEPTEMBER TERM, 2003
	:	
vs.	:	
	:	
AMERICAN ISUZU MOTORS INC.	:	
ISUZU MOTORS, LIMITED	:	NO. 3476

ORDER

AND NOW, this 2nd day of September, 2005, the parties' Joint Motion for Conditional Certification and Settlement of Class is hereby denied.

Plaintiffs filed this Class Action lawsuit in September, 2003, seeking certification of a national class on behalf of all persons who purchased or leased a 1998 or 1999 Isuzu Amigo or Rodeo automobile and suffered economic damages in connection with car accidents caused by the vehicle's defective brake system. Five years after the vehicles were first marketed the Defendant issued a recall notice stating that as a result of the brake system, drivers "may encounter extended stopping distances." The notice further advised: "This could lead to a crash." In excess of 161,927 Amigos and Rodeos were recalled. Plaintiffs claim that Defendants violated the Pennsylvania Unfair Trade Practices Consumer Protection law, the consumer protection statutes of other states and breached the implied warranties of merchantability and fitness for a particular purpose as to those recalled vehicles. Plaintiff class claims damages for "(1) insurance deductibles in connection with repair work caused by car crashes; (2) increased insurance premiums caused by car crashes; (3) cost of repairs to vehicles caused by car crashes not covered by

insurance; (4) damages to other property caused by car crashes, not covered by insurance; and (5) cost of rental cars needed as a result of car crashes. Plaintiffs also claim damages under the Consumer Protection Law of Pennsylvania for the statutory minimum of $100.00 per claim together with trebling of actual damages pursuant to statute. Finally, for violation of the implied warranty of merchantability, Plaintiffs claim damages for the difference in value between the car as warranted and the car as purchased.

Plaintiffs filed their motion for class certification on January 27, 2005. Class certification has yet to be determined. Prior to the certification hearing, the parties jointly submitted this motion for court approval of a settlement agreement on February 18, 2005. The proposed settlement requires class members to submit multiple sworn statements and documentation in order to receive compensation. After the significant required documentation is received and deemed adequate, class members would receive a cash payment in the range of $75 to $1,750. Defendants guarantee only a total payment of $300,000. As part of the settlement, class counsel is to be reimbursed for reasonable fees and expenses up to $150,000. The Named Plaintiffs are to receive a payment of $3,000 each.

"Once a settlement ha[s] been proposed affecting the interests of the class the court had an affirmative duty to ensure that the settlement was in the best interests of the parties involved."[1] The Pennsylvania Supreme Court has adopted the following factors for trial courts to use when evaluating class settlements:

> (1) the risks of establishing liability and damages, (2) the range of reasonableness of the settlement in light of the best possible recovery, (3) the range of reasonableness of the settlement in light of all the attendant risks of litigation, (4) the complexity, expense and likely duration of the litigation, (5) the stage of the

[1] Wilson v. State Farm Mut. Auto. Ins. Co., 512 Pa. 486, 494, 517 A.2d 944, 948 (1986)

> proceedings and the amount of discovery completed, (6) the recommendations of competent counsel, and (7) the reaction of the class to the settlement. In effect the court should conclude that the settlement secures an adequate advantage for the class in return for the surrender of litigation rights. As with valuation problems in general, there will usually be a difference of opinion as to the appropriate value of a settlement. For this reason, judges should analyze a settlement in terms of a "range of reasonableness" and should generally refuse to substitute their business judgment for that of the proponents.[2]

This is the parties' second settlement proposal. The first settlement proposal was withdrawn after the Court expressed serious reservations. In the original settlement Defendants guaranteed no minimum payment. No notice was to be distributed, except for a post card informing class members that they, by letter, may request notice. The current proposed settlement, otherwise substantially the same, is deficient in that it abandons most of the claims presented and imposes onerous proof requirements for recovery by class members.

The settlement abandons all claims of damages for increased insurance premiums, insurance deductibles and damage caused to other property. Likewise abandoned is any claim of decrease in value of the vehicle in question. This settlement also abandons multiple claims arising from a single vehicle.

A defective braking system could easily cause the owner of a vehicle to be involved in more than one accident. Likewise, if the vehicle had been sold one or more times prior to the recall, damages could have been sustained by multiple owners of the same vehicle.[3] Nonetheless, the proposed settlement provides for a single payment per

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[2] Dauphin Deposit Bank & Trust Co. v. Hess, 556 Pa. 190, 194-195, 727 A.2d 1076, 1078 (1999)

[3] In fact, the Named Plaintiff's vehicle was involved in two accidents, which Plaintiffs claim was a result of the vehicle's defective brake system. Under the settlement the Named Plaintiff would only recover for one of those accidents. However, the Court notes that under the terms of this settlement Named Plaintiffs will receive an additional incentive payment of $3,000.

vehicle and a single payment per owner. No system is provided for resolving conflicts among multiple claimants for the same vehicle.[4]

Finally, if a violation of the UTCPL is proven, minimum statutory damages are required in the amount of $100.00 and actual damages are subject to trebling.[5] Plaintiff's complaint reads:

> While having knowledge of the defective brake system in these vehicles, Defendants failed to disclose such defect to Plaintiffs and the Class at the time that they purchased their vehicles. Defendants' omissions were unfair and deceptive trade practices within the meaning of the Pennsylvania Unfair Trade Practices Consumer Protection Law, 73 P.S. §§201, et seq. [6]

This mandatory minimum damage for every class member has been entirely abandoned.

Even more egregious than the abandoned claims is the proposed settlement's arduous claims procedure. For any class member to receive any money, a claimant must provide a sworn statement that they are a class member. The statement must include the date of the accident, the location of the accident, a statement of weather and road conditions at the time of the accident, a description of physical damage to the qualifying vehicle and a description of how the accident happened. The claimant must also quantify the amount of unreimbursed out-of-pocket losses suffered. The claimant must also present a sworn statement of a passenger in the vehicle at the time of the accident, stating that the accident was caused by brake failure. Alternatively, the claimant must present a sworn statement of a person who learned of the accident within one month stating that the

[4] Plaintiff claims that Defendant's brake system was defective. When the Named Plaintiffs took their automobile to the Dealership, they were informed that there was no problem with the brake system. It is entirely likely that defective Isuzu vehicles were involved in multiple accidents since they were being told by Isuzu Dealerships that there was no problem with the brake system.

[5] With over 161,000 class members the statutory minimum damages to the national class is 161 million dollars.

[6] Pl.'s First Am Class Action. Comp., page 13

accident was due to brake failure. Finally, the claimant must also provide documentation establishing a compensable unreimbursed out-of-pocket loss. The documentation may require an invoice for unreimbursed repair work, a canceled check, evidence of payment of an insurance deductible or an invoice for an unreimbursed car rental payment together with proof of the payment. If the accident occurred at the beginning of the class period, 1998, the documentation required is from seven years ago. Upon receipt of all these proofs and sworn statements, the claimant will receive a grand total of $75.00.

While it is extremely unlikely that any significant number of class members will undergo the difficulties and aggravation to obtain the documentation needed to receive $75, it is a virtual certainty that only a tiny fraction, if any, of the 161,000 potential class members will comply with the additional burdensome requirement to obtain any greater recovery.

To obtain any payment greater than $75.00 the class member must provide a sworn statement that they are a class member. The statement must include the date of the accident, the location of the accident, a statement of weather and road conditions at the time of the accident, a description of physical damage to the qualifying vehicle and a description of how the accident happened. The claimant must quantify the amount of unreimbursed out-of-pocket losses suffered. Additionally, the claimant must produce a police report stating that the accident was caused by a brake failure. Finally, the claimant must provide documentation establishing unreimbursed out-of-pocket loss. The documentation may require an invoice for unreimbursed repair work, a canceled check, evidence of payment of an insurance deductible or an invoice for an unreimbursed car rental payment and proof of payment. The settlement further requires that the claimant

meet this documentary burden within 90 days from the date the settlement notice is mailed.

In their motion for class certification, Plaintiffs claim that causation is a class wide issue. "Moreover many of the individual issues here may no longer exist once liability is proven. For example, with regard to causation, Plaintiff's allege and will prove that the defective brakes caused their car crashes."[7] "Accordingly, Plaintiffs believe that it will not be unduly difficult to prove that these faulty brakes, which did not stop the vehicles within safe distances, were a factual and proximate legal cause of their accidents."[8] However, despite claiming that causation is a general class issue which can be universally resolved at one trial, the settlement requires each individual claimant to prove individualized causation. For example, class members are asked to describe the weather and road conditions at the time of the accident. This Court can only assume that this is information which will be used to discourage claims or to deny a claim for compensation. Weather conditions at the time of the accident are irrelevant. In fact, defective faulty brakes are more dangerous and more likely to lead to accidents under adverse conditions than those same brakes applied in ideal conditions.[9]

No recovery above $75 is possible unless a class member can produce "a police report specifically stating that the accident was attributable to an alleged brake failure."[10] This makes recovery entirely dependent upon the composure of the driver at the scene of the accident and the competence and thoroughness of the investigating police officer. The settlement papers clearly state that any class member who is involved in "accidents

[7] Pl.'s Mot. for Class Certification, page 31.
[8] Pl.'s Mot. for Class Certification, page 32.
[9] The Named Plaintiff was involved in an accident when it was raining.
[10] Joint Mot. For Prelim. Approval, page 9

that are attributed in a police report to speeding, driver distraction, following too closely, or some other fault designation other than brake failure; and (2) accidents where the driver claims that the brakes "Locked" or "locked up"", are automatically excluded from the settlement.[11]

However, this class action is about an undisclosed defective brake system. According to the class action complaint even Isuzu's representative could not identify a problem with the brake system and told the Named Plaintiff that, "there was no problem with their Amigo or with the brakes."[12] If an Isuzu dealership could not identify any problem with Isuzu brakes it is unlikely that either the driver or a police officer taking a report at the scene of an accident could identify a problem with Isuzu brakes. Both driver and officer would likely attribute the accident to speeding, driver distraction or following too closely. Investigating police officers are neither auto mechanics nor accident reconstruction experts. It is unreasonable to bar a class member from reasonable compensation based on the opinion of a police officer, rendered at a time when Isuzu's own representatives and mechanics were unable or unwilling to identify anything wrong with the Isuzu brake system. This Court is also very concerned about the difficulty, aggravation, and expense in obtaining a police report for an accident which occurred five years earlier in a jurisdiction far from home. [13] This difficulty is itself significant further discouragement to presenting a claim.

The requirement that a police report contain the words brake failure or the requirement that a passenger or third party make a statement that there was brake failure will further limit the number of claimants. Individuals involved in a minor accident where

[11] Joint Mot. For Prelim. Approval, page 11
[12] Pl.'s First Am Class Action. Comp., page 11
[13] The Court notes that accidents may have occurred beyond the residence of the owner.

no police report was taken are excluded from collecting more than $75. Owners of Isuzu vehicles where someone other than the owner was driving the car when the accident occurred must track down not only the driver but also a passenger whom the driver told that the accident was caused by brake failure in order to even present a claim.

The period to be able to recover for an accident spans five years, from 1998, the release of the vehicles in question, through 2003, the year of the recall. Class members are being asked, within 90 days, to locate documentation and obtain police reports that could be seven years old.

Class members who might otherwise be willing to go through the ordeal of collecting all of the required documentation within the restrictive time limitations, are cautioned in the notice in all capital letters and in bold font: "**FALSE OR FRAUDULENT CLAIMS WILL BE PROSECUTED TO THE FULLEST EXTENT OF THE LAW. ISUZU RESERVES THE RIGHT TO INVESTIGATE QUESTIONABLE CLAIMS INCLUDING SEEKING ADDITIONAL SWORN TESTIMONY**."

If no one is willing to put forth the time or the effort to produce the documentation necessary to make a claim, Defendants guarantee a payment of only $300,000. They are also required to pay $150,000, an amount equal to half the guarantee, as legal fees. Additionally, Defendants reserve the right to withdraw from the settlement if more than seventy five class members object by opting out of the settlement. Seventy five people is only .04% of the class.

Accordingly, since the proposed settlement abandons most claims and clearly minimizes recovery to class members and maximizes the difficulty of even submitting a

claim, the proposed settlement fails to be within the parameters of a reasonable settlement.

BY THE COURT

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MARK I. BERNSTEIN, J.