

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

IN RE NEW MOTOR VEHICLES		
CANADIAN EXPORT ANTITRUST		MDL DOCKET No. 1532
LITIGATION		

**ORDER ON EMERGENCY MOTION TO TEMPORARILY VACATE ORDER
CERTIFYING AN INJUNCTIVE CLASS PENDING THE COURT'S
CERTIFICATION DECISION UNDER RULE 23(B)(3)**

The defendants' Emergency Motion to Temporarily Vacate Order Certifying an Injunctive Class Pending the Court's Certification Decision Under Rule 23(b)(3) is **DENIED**.

After I dismissed the plaintiffs' federal antitrust damages claim, they continued to seek federal antitrust injunctive relief, and they added state law damages claims. I dismissed a number of state damages claims, but left them with state damages claims in 23 states and the District of Columbia.

After case management conferences, the parties agreed upon, and I approved, a procedure by which the plaintiffs would move to certify a federal injunctive class under Fed. R. Civ. P. 23(b)(2) for the entire country, and particular state damages classes in six states (chosen as exemplars, recognizing the practical impact of any decision to certify or to refuse certification; as a result, three were chosen by the plaintiffs and three by the defendants). The class certification motion was filed, briefed and argued. Finding the 23(b)(2) analysis more straightforward than the 23(b)(3) analysis and seeing no reason to delay, I certified the federal injunctive class. I

announced that I would require a bit longer to rule on the six exemplar state damages classes under 23(b)(3). In re New Motor Vehicle Canadian Export Antitrust Litig., No. 2:03-MD-1532-DBH, 2006 WL 623591, at *1 n.1 (D. Me. Mar. 10, 2006).

Now the defendants ask me to vacate my order. They argue that separating the class certification issues prejudices their Rule 23(f) appeal rights. They say that the First Circuit will have to decide whether to accept the appeal without knowing what I will do on the 23(b)(3) certification issue. See Defs.' Emergency Mot. to Temporarily Vacate Order at 2 (Docket Item 344). The defendants maintain that what I have done creates "procedural and substantive complexities associated with multiple, piecemeal Rule 23(f) appeals that may result from two separate class certification orders". Id. at 1.

I disagree.

The First Circuit is perfectly able to sit on the request to permit a 23(f) appeal while waiting for my decision on the 23(b)(3) certification. Whether it *wishes* to do so is a separate question. Clearly my decision to certify the 23(b)(2) class separately reflects my judgment that the two certification issues are entirely distinct.

The defendants also argue that "one of the fundamental issues underlying any class certification decision: the manageability of any trial of the action in which one or more classes has been certified" is central to both a 23(b)(2) class and a 23(b)(3) class. Id. at 2. They made no such argument as to the (b)(2) class in their original opposition to class certification, then arguing

trial manageability only as to the (b)(3) classes. Compare Defs.’ Opp’n to Exemplar State Pls.’ Mot. for Class Certification at 42-44 (Docket Item 305) (addressing problems with trial manageability for the proposed 23(b)(3) exemplar state damage classes) with id. at 44-47 (making no mention of trial manageability in arguing against certification of the 23(b)(2) injunctive class). That is understandable, since Rule 23(b)(2), unlike 23(b)(3), makes no reference to manageability; the First Circuit has not addressed it; and most of the Circuits that have addressed the issue have said only that manageability is an issue that a trial court *may*, in the exercise of its discretion, consider in certifying a (b)(2) class. See, e.g., Shook v. El Paso County, 386 F.3d 963, 973 (10th Cir. 2004) (“Elements of manageability and efficiency are not categorically precluded in determining whether to certify a 23(b)(2) class.”); Lowery v. Circuit City Stores, Inc., 158 F.3d 742, 759 n.5 (4th Cir. 1998) (“[W]e hold that in appropriate circumstances a district court may exercise its discretion to deny certification [of a 23(b)(2) class] if the resulting class action would be unmanageable or cumbersome.”), vacated on other grounds, 527 U.S. 1031 (1999).

Furthermore, even if I decide that the 23(b)(3) classes cannot be certified because of trial manageability issues, the 23(b)(2) class will nevertheless proceed. In fact, the class certification issues are independent.

I fully understand that the defendants may want to file a protective notice of appeal under Rule 23(f) and may later choose to withdraw it,

depending on what I decide vis-à-vis the 23(b)(3) classes. But I see no reason to vacate the Order.

SO ORDERED.

DATED THIS 21ST DAY OF MARCH, 2006

/s/D. BROCK HORNBY
D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

**U.S. DISTRICT COURT
DISTRICT OF MAINE (PORTLAND)
CIVIL DOCKET FOR CASE #: 2:03-MD-1532-DBH**

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