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LES LABORATOIRES SERVIER et al. v. APOTEX: THE PATENT – ANTITRUST TURF WAR CONTINUES

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The recently decided case of *Les Laboratoires Servier et al. v. Apotex et al.*[1] is a further example of the ongoing high stakes litigation between generic and name brand pharmaceutical companies, which has involved both patent and, increasingly, also competition law principles. The leading cases to date have included *Molnlycke AB v. Kimberly-Clark of Canada Ltd.*[2] (although this was not a pharmaceuticals case) and *Eli Lilly and Co. v. Apotex.*[3] The *Laboratoires Servier* case continues the trend of significant disputes involving both patent and competition law issues which we have written about previously.

The *Laboratoires Servier* case involved a dispute over perindopril, used to treat hypertension. Servier and its corporate affiliates owned the patent for perindopril, and sued the Apotex defendants for infringing the patent. Apotex denied the validity of the patent on various patent law grounds. It also alleged that the patent was obtained in a way which contravened the *Competition Act*.

Prior to the time the patent was issued, there were conflict proceedings between the plaintiff and other name brand drug manufacturers (Hoechst and Schering) to determine who was entitled to the relevant patent, which were resolved by way of court endorsed agreement prior to the issuance of the patent.[5] Apotex alleged that the settlement of these conflict proceedings was contrary to section 45 of the *Competition Act*, and gave rise to the right to damages under section 36 of the Act. Alternately, Apotex claimed that equitable relief should not be available to Servier, given the basis on which the patent was obtained.

In considering Apotex's *Competition Act* claims the Court noted:

> Thus, the very existence of a patent lessens competition. On its face, this is in direct conflict with provisions of the *Competition Act*, which legislation has as its stated purpose:
>
> > The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy

> and in order to provide consumers with competitive prices and product choices. [para. 464]

The Court went on to note, however, that courts have consistently held, despite the apparent conflict, that the existence of a patent is not an offence under the *Competition Act*. The Court noted that in this particular case Apotex did not allege that the patent itself was contrary to the *Competition Act*, but rather that Servier, Hoechst and Schering, by entry into the settlement agreement in the conflict proceedings, lessened competition unduly.

The Court examined the prior case law, and in particular the *Molnlycke* case and *Eli Lilly* cases. It noted that in the *Molnlycke* case the only impairment of competition was caused by the existence of a patent – regardless of who actually held the patent or to whom it was assigned. This, in the Court's view, was distinguishable from the *Eli Lilly* case, in which the conduct challenged was not merely the existence of a patent or patents, but the transfer of patents to the holder of other patents in the same field, so as to combine the market power created by both patents in the hands of one person. The court had determined in the case of *Molnlycke*, where the impact on competition was created by the issuance of the patent, that there could be no *Competition Act* challenge, whereas in the *Eli Lilly* case, where the impact on competition was as a result of the combination of two potentially competing patents, there was a possibility of *Competition Act* challenge.

The situation before the Court in the present case was different still. Here, parties competing with respect to the potential issuance of a patent or patents had resolved their conflict proceedings by way of a settlement before the court, in accordance with the *Patent Act*, as it then was, and the Federal Court Rules. The Court noted that regardless of whether the perindopril was in the same market as other ACE inhibitors, Laboratoires Servier could only gain as much market power as that inherent in the patent which was issued. Since there was no evidence that the market power was obtained by methods other than that authorized by the *Patent Act*, the Court concluded that there was nothing more to the creation of market power than the patent itself and that the principles in the *Molnlycke* case applied. It stated:

> In summary, because [Servier] was merely exercising its right under the *Patent Act* to obtain patents and nothing more, I am satisfied that Apotex's claim for damages under the *Competition Act* must fail.[6]

The Court also noted that even if it were wrong on the substance of the *Competition Act* allegation, the *Competition Act* claim was barred by a limitation period. Section 36 of the *Competition Act* provides for a two year limitation period, and the settlement agreement challenge occurred more than six years prior to the commencement of the counterclaim.

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While the Court in the *Laboratoires Servier* case dismissed the *Competition Act* challenges, this will not be the last of the drug patent cases to allege conduct contrary to the *Competition Act*. This is both because the stakes are so high in these matters and also because, if American antitrust law is an inspiration (as it typically is in this field), these matters are unsettled. Indeed, while the propositions articulated in the *Molnlycke* and *Eli Lilly* cases, as summarized in the *Laboratoires Servier* case – that a patent alone cannot give rise to a *Competition Act* claim, but conduct by patent holders (for instance, combining two sets of patents) could give rise to *Competition Act* challenges – we think are fairly settled, the *Laboratoires Servier* case itself we think is somewhat more complex. Once the patent was issued to Laboratoires Servier, the market power, if any, that existed was created by the patent, but the question is whether it is possible that conduct – such as agreement amongst competing patent claimants – giving rise to the issuance of a patent, as was apparently the case in *Laboratoires Servier*, can never give rise to a *Competition Act* claim?

It seems to us that a conclusion that any conduct which occurred before the issuance of a patent or patents is immune from *Competition Act* challenge will not necessarily prove out in the long run. One can imagine a case, for instance, where two patent claimants might be in a position either to each obtain a patent to achieve the same economic outcome – in which case both would have a patent monopoly but neither would have any sort of economic monopoly – or would be in a position to defeat the other's claim for a patent, so no patent would issue and there would be no patent or economic monopoly. In both such cases the parties, if acting rationally, would realize that, collectively, they would be better off if a patent was issued – but only one – and therefore monopoly rents could be achieved. Of course, the question would then be who gets the patent, but that issue may be satisfied by way of some sort of payment for the settlement – whether an up front payment or some sort of stream of royalties or the like. In those circumstances, the two parties could share the monopoly rents which would not have been available if they had not cooperated in settling their patent dispute before the issuance of a patent. Since the *Patent Act* has now been changed to a "first to file" system, the particular issue may not arise in the future, but one might obtain a similar result by a settlement of the issue of the scope of claims covered by potentially competing patents.

We are not suggesting that the situation posited above was necessarily the one faced in the *Laboratoires Servier* case, but one could imagine such a case, and the reasoning in *Laboratoires Servier*, although quite minimalist on this issue, would seem to say that in such a case, once the patent is issued there is no possibility of a *Competition Act* claim. It is not obvious to us that that would or should necessarily be the result in all cases. Indeed, in the United States there is considerable debate and dispute as to antitrust challenges to patent litigation and settlements, and it seems to us naïve to expect that this may not spill over into Canada, in an appropriate case.

Notes

* With the kind assistance of Donald MacOdrum and Esther Rossman.

1 2008 FC 825, 67 C.P.R. (4th) 241 [*Laboratoires Servier*].

[2] (1991), 36 C.P.R. (3d) 493 (F.C.A.) [*Molnlycke*].

[3] See *Eli Lilly and Co. v. Apotex*, 2004 FC 1445, (2004), 35 C.P.R. (4th) 155; *Apotex Inc. v. Eli Lilly and Company*, 2005 FCA 361, (2005), 44 C.P.R. (4th) 1.

[4] J. Musgrove & D. Edmondstone, "*Lilly* v. *Apotex* – Skirmishes Along the IP/Competition Law Frontier" (2004) 22:1 Can. Comp. Rec. 60; J. Musgrove & D. Edmondstone, "*Apotex* v. *Lilly*: Subsidiary Issues" (2006) 22:3 Can. Comp. Rec. 14.

[5] It should be noted that the case involved a patent granted under the previous "first to invent" system, rather than the current first to file legislation.

[6] *Laboratoires Servier*, at para. 478.

[7] See *In re Cardizem CD Antitrust Litigation*, 332 F.3d 896 (6th Cir. 2003); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005); *In Re: Tamoxifen Citrate Antitrust Litigation*, 429 F.3d 370 (2d Cir. 2005); *In re Ciprofloxacin Hydrochloride Antitrust Litigation*, 363 F. Supp. 2d 514 (E.D.N.Y. 2005), affd. No. 08-1097, 2008 WL 4570669 (Fed. Cir. October 15, 2008).

See also: "Pharmaceutical Patent Litigation Settlements: Implications for Competition and Innovation" report by John R. Thomas, Visiting Scholar at the Congressional Research Service of The Library of Congress, November 3, 2006, available at: <http://ipmall.info/hosted_resources/crs/RL33717-061103.pdf>; Prepared Statement of the Federal Trade Commission Before the Committee on the Judiciary of the United States Senate on Anticompetitive Patent Settlements in the Pharmaceutical Industry: "The Benefits of a Legislative Solution", January 17, 2007, available at: <http://www.ftc.gov/speeches/leibowitz/070117anticompetitive patentsettlements_senate.pdf>; and "FTC Litigation at the Antitrust/Intellectual Property Interface" Remarks of J. Thomas Rosch, Federal Trade Commission Commissioner at the Law Seminars International, Pharmaceutical Antitrust, April 26, 2007, available at: http://www.ftc.gov/speeches/rosch/070426si_ pharma.pdf.

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COMPLEX DISTRIBUTION CHAIN KILLS DRAM CLASS ACTION – *PRO-SYS CONSULTANTS LTD. v. INFINEON TECHNOLOGIES AG*

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A proposed class action by purchasers of electronic goods containing DRAM memory chips would degenerate into a series of individual trials, the British Columbia Supreme Court has held in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*.[2] Key issues, including whether the plaintiffs paid more because of price-fixing by manufacturers of the chips, could not be determined on a class-wide basis. The court thus refused to certify the action as a class proceeding.

This decision confirms that class actions for price fixing by indirect purchasers[3] that are at the end of a long distribution chain are virtually impossible in Canada. This principle was first established by Ontario courts in *Chadha v. Bayer*,[4] but has since been challenged by two recent cases that accepted the use of aggregate measures of damages,[5] and undermined by courts' acceptance of attempts to get around *Chadha*.[6] The BC court reaffirmed *Chadha*'s holding that aggregate assessment of damages cannot be used to establish liability.

The BC court's decision also establishes the following important principles:

- The goal of behaviour modification, which underlies class action legislation, can be satisfied through enforcement action and settlements with direct purchasers in the United States.
- A proposal for *cy-près* distribution of damages (that is, payments to charities rather than to the consumers who lost money) suggests that the goal of access to justice is not served by the class action.
- There are irreconcilable conflicts between class members in a class that includes direct and indirect purchasers at different distribution levels.
- Waiver of tort still requires a causal link between the unlawful conduct and harm to the plaintiff. Thus it does not avoid the central problem that harm to indirect purchasers cannot be demonstrated on a class-wide basis.

The DRAM Class Action

DRAM chips are a kind of memory chip used in computers, automobiles, mobile phones, GPS units, cameras, and other consumer electronic products.

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Between September 2004 and January 2007, several manufactures of DRAM chips pled guilty in the United States to fixing prices for DRAM chips from 1999-2002. The U.S. Department of Justice has collected $731 million in fines to date. Some manufacturers have also settled direct purchaser class actions in the U.S., paying about $160 million. To date there have been no convictions or settlements in Canada against manufacturers of DRAM chips.

The *Pro-Sys* class action alleged a price-fixing conspiracy contrary to the *Competition Act*, as well as common law conspiracy, interference with economic interests, unjust enrichment, waiver of tort, and constructive trust. It proposed a class consisting of all purchasers of DRAM chips or products containing DRAM chips from 1999-2002. The proposed class thus included both direct and indirect purchasers, but the plaintiffs admitted that indirect purchasers predominated. The representative plaintiff, Pro-Sys Consultants Ltd., was an indirect purchaser: it bought a Toshiba laptop in 2002.

The Test for Certification

The BC *Class Proceedings Act* establishes a test for certification that is similar to that found in Ontario's equivalent, as well as the test in U.S. Federal Rule 23. The test may be summarized as follows:

1. the pleadings must disclose a cause of action;

2. there must be an identifiable class;

3. the claims of class members must raise common issues;

4. a class proceeding must be the preferable procedure;

5. the proposed representative plaintiff must be able to represent the class fairly, have a workable litigation plan, and not have a conflict of interest with other class members.[7]

All but two of the plaintiff's claims easily passed the first requirement, that of disclosing a cause of action. Waiver of tort was allowed to stand because of the current uncertainty as to whether it is a separate cause of action or not. However, one of the constructive trust claims was not properly pleaded and was struck.

The case also passed the second requirement, identifiable class, although the court noted that there were problems with the proposed class definition.

Where the case ran into trouble was with the common issues and preferable procedure requirements. It was common ground that the existence of a conspiracy was a common issue. However, proof of damages is an essential component of proof of liability under the private action provisions of the *Competition Act* as well as under common law economic torts.

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The Pass-Through Problem

In an indirect purchaser case such as *Pro-Sys*, proving damages on a class-wide basis involves proving pass-through on a class-wide basis.

If manufacturers fix prices for a product, they raise the price to their customers. Those customers might, or might not, pass all or part of the increase on to their customers. In a typical distribution chain there might be several levels of intermediate purchasers in between the manufacturer and customer. To succeed in a claim against a price fixing manufacturer, an indirect purchaser must prove that all of these intermediate purchasers passed the increased price on to the next level, all the way to the indirect purchaser making the claim. Proving pass-on is difficult even for individual indirect purchasers; it is extremely difficult, if not impossible, to prove for a class of indirect purchasers, who may have purchased from different retailers, at different times, at different prices, and in different market conditions.

American federal courts have adopted a bright line rule to deal with this problem by restricting price fixing claims to direct purchasers. Two cases establish this rule. In the first, the U.S. Supreme Court held that a defendant could not use pass-on as a defence, that is, a defendant cannot say that a direct purchaser passed on the increase and thus suffered no loss.[8] In the second, the U.S. Supreme Court established the corollary principle: indirect purchasers cannot bring price fixing claims.[9] In U.S. state courts, the approach taken to this problem varies from state to state.

Canada has been moving slowly toward the U.S. position. The Supreme Court of Canada has rejected the pass-on defence in a case involving unlawful taxes.[10] The court held that although most businesses will seek to pass on losses, "it is generally not open to a wrongdoer to dispute the existence of a loss on the basis [that] it has been 'passed on'" to others. This reasoning would apply with equal force to a price-fixing case.

The corollary, whether those to whom a loss can be passed on can sue, was addressed in *Chadha v. Bayer*. In that case, the Ontario Court of Appeal discussed the difficulties in proving pass-through, and refused to certify an indirect purchaser class action, but stopped short of establishing a rule barring indirect purchaser class actions. The court left the door open for plaintiffs to lead evidence showing how pass-through to indirect purchasers could be proven as a common issue. The *Pro-Sys* plaintiffs attempted to do just that. They filed evidence from a respected economist attempting to demonstrate that the impact of the alleged conspiracy on indirect purchases could be shown on a class-wide basis, notwithstanding the complicated distribution chain for DRAM chips.

Complicated Distribution Chain

The complicated distribution and value-added chain for DRAM chips was at the heart of the defendants' attack on the plaintiff's evidence in this case, just as a similarly complicated distribution chain was in *Chadha*.

There is a wide variety of DRAM chips having different characteristics such as speed and capacity. They are also sold in different forms, from "bare die" chips that are not packaged, to "modules" that incorporate other components. Finally, DRAM chips are incorporated into a bewildering variety of products, including all kinds of computers, PDAs, GPS units, mobile phones, digital cameras, televisions, game consoles, and MP3 players.

How DRAM chips get from the foundry into the hands of consumers is complicated. The defendants identified ten groups of market participants through whose hands a DRAM chip may pass after its manufacture, before reaching the consumer. These include, broadly speaking, distributors of DRAM chips, manufacturers that incorporate DRAM chips into other products, and distributors and resellers of products that contain DRAM chips. To make matters even more complicated, a DRAM chip can end up in the same end product, for example a PC, by different routes through the distribution chain.

Perhaps not surprisingly, the cost of DRAM as a percentage of the retail price of products in which DRAM chips are incorporated is both small and variable. For example, during the alleged conspiracy period, the cost of DRAM represented between 1.1% and 8.6% of the average sale price of a desktop computer, and 1% to 3.5% of the average sale price of a notebook computer.

Dr. Ross' Simplifications

The plaintiff's economist, Tom Ross, posited a series of "simplifications" designed to get around the problems created by the complicated supply chain and prove damages on a class-wide basis. The most important of these consisted of narrowing the analysis to one product channel, namely, DRAM chips used in personal computers. The defendants' economist, Margaret Sanderson, countered that Dr. Ross had failed to provide a class-wide basis for determining whether any class members sustained any harm, nor the extent of that harm.

Masuhara J. held that the plaintiff's economic evidence should be subjected to scrutiny and rejected the plaintiff's suggestion that the difficulties raised by the complicated distribution chain could simply be worked out in the laboratory of the trial court. However, Dr. Ross' simplifications did not meet the onus of showing that damages could be shown on a class-wide basis, Masuhara J. held. Among other deficiencies, the analysis was general and preliminary; it inappropriately depended on the use of the PC channel as a proxy for the whole distribution chain; and it was not based on industry knowledge or analysis. Ultimately, "the methods proposed by the plaintiff do not avoid the need for a vast number of individual inquiries regarding the participants and conditions in the market place for DRAM"

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No Aggregate Assessment of Damages before Liability Established

The plaintiff then argued that provisions in BC's class proceedings legislation allowing for aggregate assessment of damages, and two cases that approved of using aggregate assessment of damages, relieved it of the burden of showing that all members of the class suffered harm. The plaintiff argued that once it demonstrated a common model to prove that some class members had suffered harm, the aggregate assessment provisions would kick in.

The two cases were *Markson v. MBNA Canada Bank* and *Cassano v. Toronto Dominion Bank*. Both of these cases involved claims for repayment of allegedly unlawful charges to credit card holders. *Markson* involved a flat fee charged by the bank for cash advances on credit cards. The flat fee allegedly pushed the effective interest rate over the 60% maximum established by the *Criminal Code* in certain cases. The bank resisted certification on the basis that an individual examination of millions of transactions would be required, and it did not have the electronic data necessary to do this.

The Ontario Court of Appeal noted the requirement in the *Class Proceedings Act*[11] that all questions of fact and law necessary to determining the defendant's liability must have been resolved before aggregate assessment can be resorted to. The court held that once it is determined that the bank charged for cash advances in a way that resulted in interest above 60%, violating the *Criminal Code* and breaching cardholder contracts, each member of the class would be entitled to declaratory and injunctive relief, and some class members would be entitled to damages.[12]

Cassano involved a claim that TD Bank breached cardholder agreements with its Visa customers by charging fees on foreign currency transactions that were undisclosed and unauthorized. The Ontario Court of Appeal held that the determination of the common issue of whether these fees breached the contract would determine the bank's liability to all members of the class. Thus no issues of fact or law would remain to be determined, and damages could be assessed on an aggregate basis.[13]

In *Pro-Sys*, Masuhara J. distinguished *Markson* and *Cassano*, noting that these cases involved credit card contracts and a direct relationship between plaintiff and defendant, with no intermediaries. By contrast, *Pro-Sys*, like *Chada*, involved indirect purchasers. The aggregate assessment provisions would only be available after pass-through is shown on a class-wide basis. Aggregate assessment cannot be used to establish liability.

Class Action Not the Preferable Procedure Where Liability is Not a Common Issue

In determining whether a class action would be the "preferable procedure", Masuhara J. assessed the proposed class action against the three goals of class actions: judicial economy, access to justice, and behaviour modification.[14]

The proposed DRAM class action failed when measured against all three. It would not advance judicial economy, the court held, because liability would have to be established on an individual basis; thus the individual issues would overwhelm the common ones.

Masuhara J. dismissed the plaintiff's argument that the class action would promote access to justice by noting that "the plaintiff's reference to cy-pres distribution of any recovery serves as an indicator that the engagement of access to justice for a Class Member may not weigh so heavily in the assessment".[15]

Nor would the proposed class action advance the goal of behaviour modification. Masuhara J. noted that all of the defendants except one had been subject to heavy penalties in the U.S., including imprisonment of executives, and that there had been large settlements of class actions brought by direct purchasers in the U.S.

Direct and Indirect Purchasers in Conflict

One of the requirements of certification is that the proposed representative plaintiff must be able fairly and adequately to represent the interests of the class. The defendants argued that the representative plaintiff, an indirect purchaser, was in a financial conflict of interest with class members at different stages of the distribution chain. This conflict of interest arises from the fact that there is in principle a certain amount of overcharge caused by the conspiracy. In any class action involving direct and indirect purchasers, this overcharge must be allocated between the different levels in the distribution chain. In other words, class members at different levels must fight over the spoils.

The plaintiff relied on decisions in the *Vitamins* class action in Ontario that address this point. The issue was first raised in the context of a carriage battle in that case. One group of firms proposed to represent the entire class, including direct and indirect purchasers. A rival group proposed representing retail purchasers only. This group argued that the loss suffered by direct purchasers is only what the direct purchasers were unable to pass on to indirect purchasers, who suffered the greatest loss. Thus, they argued, there was a conflict between direct and indirect purchasers within the putative class.

In dismissing this concern, the Ontario court held that a global assessment of damages, on a product by product basis, was necessary. This assessment would involve calculating the difference between economic rents with the conspiracy, and the likely economic rents had the conspiracy not occurred. The question of distribution among class members would only arise after the global assessment, the court held. At that point, purchasers at different levels in the distribution chain may have different interests, and require division into subclasses and separate representation. Consequently, there was no conflict among class members with respect to the common issues (which included global assessment of damages, but not apportionment). Indeed, Cumming J. added, class members were likely to maximize their recovery through joint pursuit.[16]

In approving the *Vitamins* settlement, Cumming J. returned to this theme, commenting that "All groups of class members must be present...to protect the rights of the class members to make a claim against a common fund to address their losses".[17]

It should be noted that the decision in *Vitamins* depends upon the assumption that liability and damages could be assessed on a class-wide basis. As this case settled before certification, this assumption was never tested.

In the DRAM case, Masuhara J. rejected Cumming J.'s approach in *Vitamins*, holding that the representative plaintiff had irreconcilable conflicts with other members of the proposed class. He noted the fact that the proposed class contained both direct and indirect purchasers, the complexity of the market and distribution channels, the time period over which the conspiracy occurred, and the numerous individual inquiries that would be required, in support of this finding.

Harm Element for Waiver of Tort

The plaintiffs attempted to use waiver of tort to get around the requirement of showing that harm to each class member could be proven on a class wide basis. Waiver of tort is a restitutionary doctrine that allows a plaintiff to waive its claim for tort damages and obtain instead a restitutionary remedy such as disgorgement of profits.

There is an ongoing debate in Canadian jurisprudence about whether waiver of tort is an election of remedy or a separate cause of action. If waiver of tort is an election of remedy, then there must be an underlying tort that is waived. The plaintiff must prove all the elements of the tort, including damages, to obtain this remedy. Some argue, however, that waiver of tort is a separate cause of action that does not require proof of an underlying tort, including damages. In a recent case, *Serhan Estate v. Johnson & Johnson*, the Ontario Divisional Court certified a class action against Johnson & Johnson seeking disgorgement of the profits Johnson & Johnson made from selling a defective blood monitoring device even though the plaintiffs had suffered no loss at all.[18]

As noted above, Masuhara J. allowed the plaintiffs waiver of tort cause of action to stand because courts do not dismiss claims based on the pleadings unless it is "plain and obvious" that the pleadings do not disclose a cause of action.

However, Masuhara J. held that the gain that the plaintiffs sought to recover from the defendants must be referable to the class members: "there must be a causal connection on a class-wide basis between the gain subject to disgorgement or constructive trust and the wrongful conduct".[19] Indeed, even the plaintiff's pleading stated that the class members had suffered deprivation equal to overcharge attributable to the sale of DRAM, he noted. Masuhara J. concluded:

> The benefit the defendants are alleged to have gained must be referable to the Class Members. Liability to a class cannot be

> established based on wrongful conduct alone, but requires that the wrongful conduct actually impacted the class. The wrongful gain must arise from the class before the wrongdoer can be required to disgorge to the class. There is no principled basis to relieve the plaintiff from this requirement.[20]

Implications

Assuming it survives appeal, *Pro-Sys* will likely have a number of implications for class actions in Canada.

First, *Pro-Sys* confirms that indirect purchasers that are at the end of a complicated distribution chain are unlikely to be able to demonstrate a method for proving damages on a class-wide basis and will thus fail the test for certification. It is true that neither *Pro-Sys* nor *Chadha* establish a formal bar to certification of indirect purchaser class actions. However, *Chadha* established that a class action claiming damages for conspiracy cannot be certified absent a reliable method for establishing harm to class members on a class-wide basis. *Pro-Sys* shows just how difficult it is to discharge the burden set by *Chadha*.

That being said, similar predictions that were made after *Chadha* did not come to pass. What happened instead is that plaintiffs rolled direct and indirect purchasers into one class, in an attempt to capture the entire overcharge, making pass-through a matter of allocation between subclasses. Until *Pro-Sys*, courts appeared willing to paper over the obvious and irreconcilable conflicts between direct and indirect purchasers in a class.[21]

The second key implication of *Pro-Sys* is that this mechanism for avoiding the problems raised by *Chadha* has been rejected as giving rise to irreconcilable conflicts of interest.

Third, the BC court has injected a welcome dose of realism into the certification process. Class actions claiming damages on behalf of consumers in fact do nothing for consumers, at least not directly. Consumers never see any money. Instead, the damages are paid out *cy-près* to various universities and non-profit organizations.[22] And of course plaintiffs' counsel receive healthy multipliers. Masuhara J. effectively exposed this unsavoury aspect of class actions by pointing out that the plaintiff's proposal for *cy-près* distribution meant that access to justice was not a factor in this proposed class action.

Fourth, Masuhara J.'s recognition of the deterrent effects of enforcement action, both state and private, in other jurisdictions – in this case, the U.S. – expands on a similar recognition in *Chadha*. In *Chadha*, the Ontario Court of Appeal referred to enforcement action by the Competition Bureau as better supporting the *Class Proceedings Act*'s goal of behaviour modification – even though, in that case, the Bureau had investigated but taken no enforcement action.[23]

Fifth, Masuhara J.'s finding that there are irreconcilable conflicts of interest between indirect and direct purchasers if they are included in the same class will change how class actions are configured. Plaintiffs will be caught on the horns of a dichotomy: on the one hand, attempting to meld direct and indirect purchasers into one class with one representative plaintiff creates the irrenconcilable conflicts identified by Masuhara J. On the other, splitting them into completely separate class actions makes it difficult to manage the allocation of any recovery among classes, leading to the possibility of under, or over-recovery when the actions are considered as a whole.

Sixth, *Pro-Sys* puts important limits on waiver of tort. As an independent cause of action, waiver of tort is used to circumvent damages as an essential element of many torts and potentially allow people who have not suffered any harm whatsoever to claim "restitution" for allegedly wrongful acts. But harm is an important element of most (not all)[24] torts for good reason. First, in some cases, harm is the distinguishing element between conduct that is wrongful and conduct that is not. It is, for instance, trite law that there is no "negligence in the air";[25] without damages, there is no cause of action. Second, the harm requirement is an important limitation on the scope of liability for wrongful conduct. Without it, people who commit civil wrongs could theoretically be liable to anyone and everyone.

That being said, Masuhara J.'s approach to waiver of tort has already been distinguished, by the Ontario Divisional Court, in *Heward v. Eli Lilly & Co.*[26] In that case, the court certified a class action against manufacturers of the antipsychotic drug Zyprexa that alleges that the drug causes increased risk of diabetes and related disorders, and that the manufacturers failed to warn patients adequately of these risks. The action includes a claim for disgorgement of profits and constructive trust based on waiver of tort. The court contrasted Masuhara J.'s approach with the approach it took in the *Johnson & Johnson* case. However, the Divisional Court's reasoning in *Heward* arguably supports the proposition that damages are necessary to found an entitlement to restitutionary relief under the waiver of tort doctrine. The court stated:

> 20 The nomenclature "waiver of tort" is somewhat confusing. A plaintiff is not waiving the right to sue in tort but rather, electing to base his/her claim in restitution. The plaintiff thereby seeks to recoup the benefits that the defendant has derived from the tortious conduct. For example, if the tortfeasor's gain exceeds the quantum of damages that the plaintiff might recover in an action in tort, the plaintiff might well choose to concurrently pursue the alternative (so-called 'waiver of tort') remedy founded in restitution.
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> 21 Professor John D. McCamus and Peter D. Maddaugh in their chapter on "Waiver of Tort" in *The Law of Restitution*, looseleaf (Aurora: Canada Law Book Inc., August 2007) at 24-

> 19 assert that the doctrine constitutes an independent cause of action and is not simply parasitic to the tort claim. The modern theory of restitution is based squarely upon the principle of preventing unjust enrichment. It is not necessary to prove a loss, but rather, simply that there has been unjust enrichment. [emphasis added]

The reference to unjust enrichment is key: an essential component of a cause of action in unjust enrichment is a showing that the plaintiff suffered a corresponding deprivation – that is, a loss caused by the defendant's conduct.[27]

Notes

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[2] *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575.

[3] "Direct purchasers" are persons who buy the product directly from the manufacturer, in this case, persons who buy DRAM chips. "Indirect purchasers" are persons who buy the product from another participant in the distribution chain (such as a distributor), or who buy a product that contains the product in question (such as, in this case, a computer).

[4] (2003), 63 O.R. (3d) 22 (C.A.), affirming (2001), 54 O.R. (3d) 520 (Div. Ct.), reversing (1999), 45 O.R. (3d) 29 (Gen. Div.), leave to appeal to Supreme Court of Canada denied, [2003] S.C.C.A. No. 106.

[5] *Markson v. MBNA Canada Bank*, 2007 ONCA 334; *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781, [2007] O.J. No. 4406.

[6] *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2000] O.J. No. 4594 (S.C.J.) at ¶36-46; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1118 at ¶23 (S.C.J.). See also M. Osborne, "And the Money Keeps Rolling (In and Out) – Conspiracy Class Action Settlements After Chadha v. Bayer", (2006) 22:3 Can. Comp. Rec. 115.

[7] *Class Proceedings Act*, RSBC 1996, c. 50, s. 4; see also *Class Proceedings Act* 1992, SO 1992, c. 6, s. 5. The principal difference is that where rule 23 requires that the common issues predominate over individual issues, Canadian class proceeding legislation generally sets a lower threshold, requiring that a class proceeding be the "preferable procedure" for the resolution of the common issues.

[8] *Hanover Shoe Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968)

[9] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)

[10] *Kingstreet Investments v. New Brunswick (Department of Finance)*, 2007 SCC 1; see also *British Columbia v. Canadian Forest Products Ltd.* [2004] 2 S.C.R. 74.

[11] Ontario *Class Proceedings Act*, s. 23; BC *Class Proceedings Act*, s. 30.

[12] *Markson v. MBNA Canada Bank*, 2007 ONCA 334, ¶40-41.

[13] *Cassano v. Toronto-Dominion Bank*, 87 O.R. (3d) 401 (C.A.), ¶42, 47.

[14] As mandated by the Supreme Court's decision in *Hollick v. Toronto (City)*, 2001 SCC 68.

[15] At ¶193.

[16] *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2000] O.J. No. 4594 (S.C.J.) at ¶36-46.

[17] *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1118 at ¶23 (S.C.J.).

[18] *Serhan Estate v. Johnson & Johnson*, [2006] O.J. No. 2421.

[19] Citing Lederman J. in *Heward v. Eli Lilly Co.*, (2007), 47 C.C.L.T. (3d) 114 (S.C.J.) at ¶28

[20] At ¶149.

[21] See M. Osborne, *supra* note 6.

[22] Arguably, these payments have been approved in breach of the *Class Proceedings Act*, which provides that *cy-près* distribution will be made only after class members have been given time to claim their share of the award. See Ontario *Class Proceedings Act*, s. 26(4); M. Osborne, *supra* note 6.

[23] *Chadha*, at ¶18, 63-64.

[24] Intentional torts such as trespass typically do not require damages; however, the plaintiff's recovery will be nominal if there are no damages.

[25] See for example *Grand Trunk Railway Co. of Canada v. Murphy*, [1924] S.C.R. 101.

[26] [2008] O.J. No. 2610; 295 D.L.R. (4th) 175 (Div. Ct.).

[27] See for example *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 848; *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25 at ¶30; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 at ¶32-40.

Canadian Developments

ANNOUNCEMENTS ISSUED BY THE COMPETITION BUREAU DURING THE PERIOD MARCH 1, 2008 TO FEBRUARY 28, 2009

The following Announcements are available on the Bureau's website at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_02705.html

March 3, 2008: Expert Appointed to Advise on Section 11 Process

March 3, 2008: Competition Bureau Announces Launch of Fifth Annual Fraud Prevention Month

March 6, 2008: Atlantic Canadians Tell Scammers to Fraud Off!

March 7, 2008: Competition Bureau Launches Study Into Dentistry Profession

March 12, 2008: Project False Hope Unveiled

March 17, 2008: Competition Bureau Investigation Leads to Criminal Charges Related to Deceptive Telemarketing Operations

March 19, 2008: Competition Bureau Provides the "FACTs" on Fraud Targeting SMEs and NPOs

March 19, 2008: Competition Bureau Applauds New Report on Counterfeit Checks and Money Orders

March 31, 2008: Consumers and Businesses Should be Vigilant Year-Round in the Fight Against Fraud

March 31, 2008: NHL Ownership Transfer and Relocation Policies Reviewed by Competition Bureau

April 1, 2008: Competition Bureau Seeks Comments on the Draft Multi-Level Marketing and Scheme of Pyramid Selling Information Bulletin

April 2, 2008: Cracking Down on Cross-Border Scams

April 4, 2008: Competition Bureau Obtains Prohibition Order Against Two Bio-Insecticide and Insect Control Service Companies

Canadian Developments

April 8, 2008: Competition Bureau Launches New Online Bid-rigging Prevention Tool

April 9, 2008: Competition Bureau Invites Feedback on its Updated Draft Bulletin on Corporate Compliance Programs

April 9, 2008: Correction: Competition Bureau Investigation Leads To Criminal Charges Related To Deceptive Telemarketing Operations

April 11, 2008: Global Competition Experts Meet To Discuss Further Co-Operation

April 16, 2008: Competition Authorities from Around the World Send Clear Message On Convergence

April 24, 2008: Competition Bureau Publishes Bulletin on Sections 15 and 16 of the *Competition Act*

April 28, 2008: Competition Bureau Seeks Comments on Draft Sentencing and Leniency Bulletin

April 29, 2008: Jail Sentence for Deceptive Telemarketer

May 5, 2008: Fraudulent Cheque Scammer Receives Jail Time Following Competition Bureau and Toronto Strategic Partnership Action

May 12, 2008: Competition Bureau Reaches Consent Agreement with Superior Plus to Divest Propane Assets in Newfoundland

May 13, 2008: "Closing the Net on Cross-Border Anticompetitive Activity" - Competition Bureau Signs Cooperation Arrangement with Competition Agencies in Brazil

May 16, 2008: Competition Tribunal Imposes Terms of Order Against Imperial Manufacturing Group

May 20, 2008: Competition Bureau Partners with U.S. Law Enforcement in Operation Tele-PHONEY

June 6, 2008: Competition Bureau Publishes Bulletin on Abuse of Dominance in the Telecommunications Industry

June 12, 2008: Competition Bureau Uncovers Gasoline Cartel in Quebec

June 19, 2008: Rising Pump Prices May Fuel Gas Saving Device Claims

Canadian Developments

June 25, 2008: What Does Green Really Mean?

June 25, 2008: Notice to the Media

July 16, 2008: Air Canada Responds to Competition Bureau Concerns by Clarifying Baggage Fees

July 21, 2008: Competition Bureau Publishes Enforcement Guidelines on Predatory Pricing

July 30, 2008: Canadian Scammers Extradited to the U.S. Receive Lengthy Prison Sentences

August 7, 2008: Competition Bureau Seeks Public Comments on Draft Bulletin on Efficiencies in Merger Review

August 8, 2008: Competition Bureau Seeks Comments on Draft Trade Associations Bulletin

August 10, 2008: Competition Bureau Publishes Updated Bulletin on Corporate Compliance Programs

August 12, 2008: Report on Section 11 Orders Under *Competition Act* Released

August 19, 2008: ICBC Policies Reviewed by Competition Bureau

October 21, 2008: Competition Bureau Stops Unproven Claims in Weight Loss Infomercials

October 31, 2008: Third Individual Pleads Guilty in Quebec Gasoline Cartel Case

November 5, 2008: Google Inc. Terminates Advertising Agreement with Yahoo! Inc. in Canada

November 10, 2008: Quebec Construction Companies Charged with Bid-Rigging Following Competition Bureau Investigation

November 21, 2008: Akzo Nobel Chemicals International BV Fined $3.15 Million for its Role in an International Cartel

November 24, 2008: Notice to the Media

Canadian Developments

November 25, 2008: Major Savings Available on Generic Drug Spending Through More Competition, Competition Bureau Study Finds

December 1, 2008: Competition Bureau Wins Award for Collaboration in Combatting Online Health Fraud

December 18, 2008: 15 Years in Jail for Canadian Extradited to U.S. in Deceptive Telemarketing Case

December 22, 2008: Competition Bureau Launches Revamped Web Site

January 12, 2009: Melanie Aitken Becomes Interim Commissioner of Competition

January 15, 2009: Adam Fanaki Becomes Acting Senior Deputy Commissioner of Competition, Mergers Branch

January 16, 2009: Competition Bureau Seeks Comments on Abuse of Dominance Guidelines

January 16, 2009: Competition Bureau Completes Review of Labatt's Acquisition of Lakeport

January 23, 2009: Competition Bureau Clears Dow Chemical's Acquisition of Rohm and Haas

February 17, 2009: Competition Bureau Announces Charges Against Companies Accused of Rigging Bids for Government of Canada Contracts

February 18, 2009: Applying a Quality Mark to Precious Metal Jewellery? Don't Forget to Include the Necessary Registered Trade-Mark

February 19, 2009: Competition Bureau Takes Action Against Unproven Cancer Treatment Sold Online

February 19, 2009: Competition Bureau Obtains Prohibition Orders Against School Bus Operators

Canadian Developments

February 19, 2009: Court Sends Warning to Fraudulent Marketers Targeting Foreign Residents

February 27, 2009: Hard Economic Times Can Be Boom Times for Scammers

February 27, 2009: Competition Bureau Announces Results of XL-Lakeside Merger Review