A DEFENCE OF DETRIMENTAL RELIANCE IN *COMPETITION ACT* MISREPRESENTATION CLASS ACTIONS

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This paper examines the recent jurisprudence which, some suggest, holds that detrimental reliance is unnecessary to certify a class in product misrepresentation cases under the Competition Act. Contrary to that conclusion, the author reviews the applicable jurisprudence and demonstrates that detrimental reliance is always required in misrepresentation cases. Cases that claim not to require detrimental reliance do in fact require it—just from third parties, not necessarily from the plaintiff class. Thus, detrimental reliance remains a critical link in the chain of causation in all misrepresentation cases. Where representations are made to the plaintiff class as opposed to third parties, experience demonstrates that such cases continue to raise individual issues and are not likely suitable for class treatment. It remains to be seen whether the recent amendments to the Competition Act will prove an effective option for consumers seeking compensation for misrepresentations.

L'auteur recense la jurisprudence récente qui, selon certains, soutient que l'acte de confiance préjudiciable n'est pas nécessaire pour autoriser un recours dans les cas de fausse déclaration de produit en vertu de la Loi sur la concurrence. Contrairement à cette conclusion, l'examen de la jurisprudence applicable démontre que l'acte de confiance préjudiciable est toujours requis dans les cas de fausses déclarations. Les affaires qui prétendent ne pas nécessiter de confiance préjudiciable l'exigent en fait—simplement de la part de tiers, pas nécessairement de la part du groupe de demanderesses. Ainsi, l'acte de confiance préjudiciable demeure un maillon essentiel de la chaîne de causalité dans tous les cas de fausse déclaration. Lorsque des observations sont faites au groupe des plaignantes plutôt qu'à des tiers, l'expérience démontre que de tels cas continuent de soulever des questions individuelles et ne sont probablement pas propices à un traitement en recours collectif. Il reste à voir si les récentes modifications apportées à la Loi sur la concurrence constitueront une option efficace pour les consommateurs qui cherchent à obtenir une indemnisation pour de fausses déclarations.

My car's seats are said to be covered in "vegan leather"—a fact which had no influence on my decision to buy it. In fact, I do not know what vegan leather is. But had I been vegan, I suspect that I would care rather more about what material I was sitting on.

That reality—that different customers value product attributes differently—has long influenced class actions about product misrepresentations.

Take my vegan leather example. Were I to find out that the manufacturer's representation about the material used in the seats was false and that my seats were actually covered in leather derived from animals, I would shrug and continue driving my car. Were I vegan, I would feel cheated; I would not have bought that car had I known that the seats were made of animal skin. If compensation were available *via* a lawsuit, many would agree that, as between the two of us, only vegan-me should receive that compensation. Why should non-vegan me be compensated for something I never cared about in the first place and which did not influence my decision to buy the car or the amount I was willing to pay for it?

The point of the hypothetical is this: whether I was harmed by the lie that the seats were covered with vegan leather depends on who I am, what I care about, and what I knew, including whether I even knew of the claim that the seats were covered with vegan leather when I chose to buy the car.

Because customers value product attributes differently, courts have been skeptical of class actions on behalf of large groups who seek compensation for product misrepresentations using the statutory cause of action in the *Competition Act*. Because proof of damages in such cases depends on evidence from each of the individual class members (who they are, what they knew, why they bought, *etc.*), a class action is no more efficient than thousands or even millions of individual actions.[2]

Recently, however, judicial consensus around the inherently individual nature of these cases has fractured. Some decisions adhere to the historical orthodoxy: misrepresentations harm different people differently—or not at all. Because of this, trials require individual evidence, and a class action is no more efficient than many individual trials. Other decisions, however, state that the historical orthodoxy is wrong, that detrimental reliance and individual evidence are not required. Thus, those decisions have held that *Competition Act* misrepresentation cases can be certified as class actions.[3]

Who is right? In my view, defenders of the historical orthodoxy have the better side of the argument. In fact, upon close inspection, the decisions that purport to veer from that orthodoxy do not actually do so. Despite saying that the law does not require detrimental reliance, these decisions actually bake such reliance into their analysis.

If that is true, why the fuss (and this paper)? Two reasons:

First, as happened with waiver of tort,[4] one or two decisions can send the law into a decade-long holding pattern in which statements taken out of context lead subsequent decision-makers to see conflict in the law when there is none. This is particularly problematic when such conflict saves ill-conceived case theories from being struck because it is no longer "plain and obvious" that they will fail. Our justice system is too overburdened to permit ill-conceived cases to linger.

Second, amendments to the *Competition Act*[5] have opened a new door for consumers who seek compensation for product misrepresentations. Beginning in June 2025, private parties will be able to seek leave to bring product misrepresentation cases to the Competition Tribunal. If successful, those parties may access the existing disgorgement remedy to receive an amount up to the total amount paid for the product.[6] That compensation may not require proof of loss and, hence, may not raise individual issues. However, such cases may only be brought before the Tribunal, only with leave and do not currently have procedural structures in place like the existing class proceedings regimes that would encourage plaintiffs' counsel to fund the cases to the same extent as they do class actions (certification, class-wide releases, court-approved settlements, court-approved contingency fees, etc.).[7] Whether plaintiffs (and their counsel) choose this new door despite the procedural uncertainty will depend in large measure on the substantive law that applies to claims under the Tribunal regime and under the existing class actions regime. If neither regime requires detrimental reliance, plaintiffs may prefer the process they know to the process they do not. On the other hand, if detrimental reliance and the individual issues it raises persists in the class actions realm, plaintiffs may prefer to take their chances in the Tribunal's new regime, despite the procedural uncertainty.

In this paper, I argue that detrimental reliance remains a key link in the chain of causation for *Competition Act* misrepresentation class actions. Although some cases have been characterized as suggesting otherwise, they do not. Detrimental reliance has not disappeared; it has just moved up the chain of causation such that—in appropriate cases—class members may have been harmed because ***someone else*** relied on the misrepresentation. Specifically, the entities who relied on the misrepresentation were not the plaintiffs themselves, but rather a third party with whom the plaintiffs may have transacted. And it was these third parties' reliance on the misrepresentations—upward in the chain of causation—that led to the plaintiffs' loss.

Conversely, in the classic case in which class members claim harm because of a misrepresentation made to ***them***, experience confirms the

common law's long-standing intuition: misrepresentation cases raise individual issues that are not suitable for class treatment.

To the extent that outcome seems unfair, the remedy has been and should remain legislative intervention to create avenues for compensation that do not require reliance. Indeed, that is what Parliament appears to have done through the recent amendments to the *Competition Act* which give private plaintiffs access to the existing disgorgement remedy, and provincial legislatures have done in the past in the securities[8] and consumer protection spheres.[9]

To situate the argument, I first describe the relevant statutory framework and how courts historically applied that framework—what I am calling the "historical orthodoxy." I then analyze some decisions that appear to challenge that orthodoxy, but on closer inspection I find to fit within it. While these decisions do not acknowledge it, they typically rest on an assumption that someone up the chain of causation from the plaintiffs relied on the misrepresentation. I conclude by discussing the evidentiary challenges plaintiffs face when they try to prove loss from misrepresentations. This analysis suggests that plaintiffs will welcome the changes to the *Competition Act* and will likely take advantage of the new Tribunal regime that may compensate consumers without proof of loss.[10]

The Historical Orthodoxy

Section 52 of the *Competition Act* concerns false and misleading representations. Statements made to promote a product, service or business interest must be true. Businesses violate s. 52 when, to promote a business interest, they knowingly or recklessly make a representation to the public that is false or misleading in a material respect. To establish a contravention, of s. 52(1), it is not necessary to prove that any person was deceived or misled.[11]

Criminal consequences for violating s. 52 are severe: up to 14 years in prison and a fine in the discretion of the court.[12] So too are the civil consequences. Section 36 of the *Competition Act* permits plaintiffs (usually consumers who purchased the product) to sue and recover an amount equal to the loss or damage suffered. But s. 36 has an important safeguard. Claimants must prove that the loss or damage resulted from the false or misleading representation. Courts have described this as the "causal connection" between the unlawful conduct and the plaintiff's loss.

Very early, courts equated this causal connection with detrimental reliance—the idea that a purchaser could only have been harmed by the

misrepresentation if the misrepresentation had caused the purchaser to do something differently than if the misrepresentation had not been made.

Justice Strathy (as he then was), in an oft-quoted passage from the 2010 case *Singer v. Schering-Plough Canada Inc.,* stated the prevailing view as follows:

As I have noted, s. 52(1) does not create a cause of action. The cause of action, or right of action, is created by s. 36. The plain language of that section makes it clear, as the defendants assert, that the plaintiff must show both a breach of s. 52 and loss or damage suffered by him or her as a result of that breach. That can only be done if there is a causal connection between the breach (the materially false or misleading representation to the public) and the damages suffered by the plaintiff. A consumer of sunscreen products cannot recover damages, in the abstract, simply by proving that the manufacturer made a false and misleading representation to the public. The failure of the plaintiff to plead a causal link is fatal to this claim.

Section 52(1.1) only removes the requirement of proving reliance for the purpose of establishing the contravention of s. 52(1). The separate cause of action, created by s. 36 in Part IV of the *Competition Act*, contains its own requirement that the plaintiff must have suffered loss or damage "as a result" of the defendant's conduct contrary to Part VI. It is not enough to plead the conclusory statement that the plaintiff suffered damages as a result of the defendant's conduct. The plaintiff must plead a causal connection between the breach of the statute and his damages. **In my view, this can only be done by pleading that the misrepresentation caused him to do something—i.e., that he relied on it to his detriment**.[13] (emphasis supplied)

As Justice Strathy said in the same decision, the plaintiff had not pleaded detrimental reliance, "for the obvious reason that proof of reliance and causation could only be done on an individual basis and this would be fatal to certification: the proceeding would break down into individual proceedings to prove reliance."[14] To certify a case as a class proceeding, the plaintiff had to plead a reasonable cause of action and provide "some basis in fact" that there were common issues and that the class action was the preferable procedure. The problem was that detrimental reliance could not be proved in common and a class action was not likely preferable to a myriad of individual actions. To avoid that outcome, the plaintiff had avoided pleading detrimental reliance. But as Justice Strathy held, by failing to plead reliance,

the plaintiff had failed to plead a reasonable cause of action, and so the class action failed anyway.

Returning to my earlier hypothetical, vegan-me choosing to buy the car or agreeing to pay a higher price for the car because it was represented to have "vegan leather" seats is detrimental reliance. Actual-me buying the car without caring about the seat material is not, since I did not rely on the veracity of the representation in making my purchase decision. Determining which class members relied on the misrepresentation to their detriment, and which did not, requires individual evidence from each of them. As Justice Strathy said, this reality means that a class action should not be certified because it will invariably break down into a series of individual cases.

Many cases before and after Justice Strathy's decision adhered to his conclusion: for a misrepresentation to have harmed consumers, plaintiffs must have each and individually relied on the misrepresentation to their detriment. Because such reliance could only be proven through individual evidence, the case was not appropriately tried as a class action.

Heresy or Orthodoxy in Disguise?

If judicial consensus was so firm, what happened to fracture it? Clever arguments. Plaintiffs noted that s. 36 does not explicitly require detrimental reliance; it requires a causal connection. Building on that idea, they identified some earlier cases in which courts had held, either expressly or implicitly, that detrimental reliance was not required on the facts of the particular case. These arguments culminated in the British Columbia Court of Appeal's conclusion in *Live Nation*[15] that, "if there is an alternative means of establishing the causal link required to make out a claim under s. 36 of the *Competition Act*, a plaintiff need not plead and prove detrimental reliance. The outcome will depend on the circumstances and the nature of the claim."[16]

At first blush, the logic appears sound. If there is an alternative means of establishing a causal connection, why the need for detrimental reliance? The problem is that this conclusion ignores the crucial question: what could the alternative means be? How do misrepresentations cause harm if ***no one*** relied on them (or even heard or read them)?

When we examine the decisions that *Live Nation* cited as well as *Live Nation* itself, we see that detrimental reliance remains a crucial aspect of the analysis. In ***all*** cases, someone heard or read the misrepresentations and relied on them. The critical distinction between these cases and the

historical orthodoxy cases is not that there was no reliance. Rather, it is that the "someone" who relied on the representations was ***not*** the plaintiff.

Take three cases considered in *Live Nation*: *Go Travel*,[17] *Pro-Sys*[18] and *Valeant*.[19] *Go Travel* arose after the defendant, Go Travel, made misleading representations in newspaper ads comparing its Southern vacation packages to those available through its competitor, Maritime Travel. Maritime's market share fell after the ads ran, and it sued Go Travel for damages. The trial judge found for Maritime in respect of ads placed in 2004, but not those placed in 2003 or 2005. On appeal, Go Travel argued that the judge had erred by finding for Maritime without finding that any consumer had been deceived by Go Travel's ads. The Court of Appeal recognized that cases brought by consumers under s. 36 alleging a violation of s. 52 require evidence of detrimental reliance. In fact, it held that, "[i]n such a situation [*i.e.*, a consumer case], it is difficult to conceive how the plaintiffs might establish loss without demonstrating they had been deceived by the false statements."[20] But it distinguished those cases because Maritime was not Go Travel's customer; it was its competitor. The Court of Appeal held that, "[p]rovided Maritime can prove it suffered a loss caused by the misrepresentation, it is not additionally required to prove a consumer relied on and was misled by the 2004 ad."[21]

Like *Live Nation*, here the Court of Appeal appeared to leave unexplained how Maritime could prove it had suffered a loss without showing that customers had been misled. Or did it? While the Court of Appeal noted that the trial judge had not specifically referred to the evidence she relied on to reach her conclusion on causation, it listed several pieces of evidence and factual findings that supported the trial judge's conclusion that the 2004 ad had caused loss to Maritime.[22] These factors told the following story: just before the peak sales season, Go Travel ran a misleading ad that wrongly implied its prices were lower than Maritime's. Maritime's sales during the peak travel period fell relative to other years and in a larger amount than could be explained by other factors. With no other explanation for the fall in sales, the trial judge did not err by finding that the 2004 ad caused the part of the sales drop that could not otherwise be explained.

What does that story imply about the 2004 ad's effect on customers? It implies that (i) customers saw the ad, and (ii) they relied on it to book travel with Go Travel and not Maritime (hence the drop in Maritime's sales and market share). Viewed in this way, the Court of Appeal was not saying that reliance is not required. Rather, on the facts of that case, reliance had been

proven on a balance of probabilities without evidence from any of Go Travel's customers.

The situation was similar in *Pro-Sys*, although the facts were different. There, purchasers of Microsoft products alleged that Microsoft had "made false claims about the nature and timing of the release of one of its products in order to deprive a competitor of the advantage of being the first in the market, thereby allegedly allowing Microsoft to sell its products at a higher price to intermediate corporate resellers."[23] There was no suggestion that the plaintiff class of consumers had relied on Microsoft's misrepresentations. But, like *Go Travel*, that did not mean that ***no one*** relied on the misrepresentation. Implicit in the description of the case is that, at a minimum, intermediate corporate resellers had relied on Microsoft's misrepresentations and had done so to their detriment. Why else would they have agreed to pay a higher price for Microsoft's products and not bought from Microsoft's competitor at a lower price? As in *Go Travel*, the entities who relied on the misrepresentations were not the plaintiff, but it was these entities' reliance on the misrepresentations that led to the plaintiff's loss. In *Go Travel*, customers produced the loss by purchasing vacation packages from Go Travel instead of Maritime, and the court found indirect evidence of reliance (*i.e.*, the otherwise unexplained drop in sales) to be persuasive. In *Pro-Sys*, resellers produced the loss by not buying from Microsoft's competitor, paying more for Microsoft's products based on Microsoft's representations that it would be first-to-market, and then passing on some portion of that higher cost to class members.

The British Columbia Court of Appeal's decision in *Valeant* fits into this same mold. There, among other causes of action, the province alleged that the defendants had misrepresented certain opioid-based painkillers as safe, effective, non-addictive, *etc*. The Court of Appeal permitted the claim to proceed without the province having to plead that it had relied on the alleged misrepresentations. But like *Go Travel* and *Pro-Sys*, that did not mean that ***no one*** had relied on the misrepresentations. The province pleaded that doctors and patients had relied on the misrepresentations, and that their reliance had caused the province's loss.[24] Reliance remained an integral link in the chain of causation of harm to the plaintiffs; it just did not have to be the final link.

What about the Court of Appeal's decision in *Live Nation*? It upheld what was described as a "general inflationary effect" theory that the Court said, "does not depend on detrimental reliance."[25] Arguably, the Court could be interpreted to have said that detrimental reliance is not required in a

Competition Act misrepresentation case. Certainly, that is how its decision was interpreted in a subsequent Ontario decision.[26] But as with *Go Travel*, *Pro-Sys*, and *Valeant*, looking at *Live Nation* more closely reveals that reliance—by someone, perhaps just not by the plaintiffs—remains an integral link in the chain of causation.

To see this, one needs to unpack the "general inflationary effect" theory that the Court of Appeal referred to in *Live Nation*. The Court of Appeal summarized it as follows:

- Through its Terms of Use and Purchase Policy, Ticketmaster represented that it provided consumers with a fair opportunity to purchase event tickets in the primary market by prohibiting ticket bots and enforcing ticket limits.
- As a result, consumers trusted Ticketmaster, had confidence in the secondary market and purchased tickets on the secondary market. The demand for tickets on the secondary market drove prices up.
- Contrary to its representations, in order to earn substantial additional fees, Ticketmaster fostered an artificial secondary market by facilitating or turning a blind eye to professional ticket resellers using ticket bots in the primary market to exceed ticket limits.
- If consumers were aware of the true state of affairs, they would have lost trust in Ticketmaster, concluded that the secondary market was unfair and declined to participate in the secondary market.
- Further or alternatively, in the absence of the representations, consumers may have been wary of the activity of professional ticket resellers on the Ticketmaster website, concluded that the secondary market was unfair and declined to participate in the secondary market.
- As a result, demand on the secondary market would have decreased, resulting in lower prices.[27]

Respectfully, it is hard to square the above summary with the Court of Appeal's statement that the "general inflationary effect" theory does not require detrimental reliance. It clearly does; consumers relied on Ticketmaster's representations and participated in the secondary market to their detriment. Had Ticketmaster told them the truth, the above summary says that some consumers would not have participated in the secondary market.

This suggests that the Court of Appeal was making a slightly different point in saying that detrimental reliance is not required—a point that is in line with *Go Travel*, *Pro-Sys* and *Valeant*: detrimental reliance is still part of the chain of causation, it just does not have to be the last link in that chain, and proven on behalf of each and every plaintiff in the class. In other words, a plaintiff need not plead that she relied on the misrepresentation to her detriment. It will be sufficient if she pleads that ***someone else*** relied on the misrepresentation and that person's reliance led to her loss. In *Live Nation*, the "someone else" were those consumers who would not have participated in the secondary market.[28] In *Valeant*, the "someone else" was the doctors and patients. In *Pro-Sys*, it was the resellers. In *Go Travel*, it was Go Travel's customers.

This analysis suggests that courts are too categorical in saying that plaintiffs do not need to plead detrimental reliance. The "other causal connection" that the Court of Appeal described in *Live Nation* still requires detrimental reliance up the chain of causation. If that element has not been pleaded, it is hard to see how the claim could survive. Put another way, I suggest that it is "plain and obvious" that if plaintiffs do not plead detrimental reliance somewhere in the chain of causation (even implicitly as in *Live Nation*), their claim is doomed to fail and should be struck. This makes sense. As noted earlier, in the most extreme example, it is difficult to understand how misrepresentations caused harm if no one heard or read them.

To be sure, through *Go Travel*, *Pro-Sys*, *Valeant*, and *Live Nation* plaintiffs appear to have identified a way to avoid individual issues trials on behalf of class members. If the loss did not depend on class members' reliance, then the court does not require evidence from class members through individual trials. But this approach seems to be an exception that would apply to a very narrow set of cases where the misrepresentation has not been made to class members. The Nova Scotia Court of Appeal's words in *Go Travel* still ring true: it is difficult to conceive how plaintiffs might establish loss to consumers without demonstrating they had been deceived by the false statements.[29] As discussed in a later section, the *Rebuck*[30] summary judgment following class certification only confirms the truth of this intuition.

But even in this narrow set of cases in which someone else's reliance caused the plaintiffs' losses, big questions remain about how plaintiffs can prove such reliance to establish the necessary link in the chain of causation leading to damages. Such proof might be possible in a case like *Pro-Sys* in which a defined set of third-party corporate resellers might be called to testify or where contemporaneous documents (emails, recitals in contracts,

etc.) might confirm the necessary reliance. It is hard to conceive of that in a case like *Live Nation* in which the theory depends on some unknown (but potentially large) number of customers choosing not to participate in the market.

In *Live Nation*, the Court of Appeal has sent the parties back to the lower court on several issues. One is whether the plaintiffs have a credible and plausible methodology to show harm arising from their "general inflationary effect" theory. It remains to be seen how the plaintiffs will propose to identify that portion of customers who relied on the misrepresentations and would not have participated in the market. How this can be done on the facts of that case is incredibly unclear, including because "but for" participation rates would vary by ticketed event. For example, it is hard to imagine demand for Taylor Swift tickets falling significantly in the secondary market no matter what Live Nation or Ticketmaster had said about the primary ticket market. But the same may not be true for all events. Then, there is the further question of how one can reasonably disentangle the demand effects in the secondary ticket market caused by the alleged misrepresentations from those caused by the presence of bots in the primary market (which independently allegedly restricted the availability of tickets in the primary market thereby increasing demand in the secondary market). Frankly, if this matter survives certification, it will not surprise me to see it flounder at the merits stage owing to inherently individual issues, as was the case in *Rebuck*, discussed later in this paper.

The Fraud-on-the-Market Theory in Consumer Products Cases

Admittedly, *Live Nation* doesn't fit as neatly into the framework of representations made to "someone else" as do *Go Travel*, *Pro-Sys* and *Valeant* because the plaintiff's "general inflationary effect" theory may depend on an assumption that some class members (as opposed to a separate category of non-class members) would not have participated in the secondary ticket market.

Not only will this be difficult to prove for the reasons I have outlined above, but, in my view, it risks importing the fraud-on-the-market theory into consumer products markets despite Canadian courts having rejected that theory for less complicated and more transparent financial markets.[31] To the extent that is what the Court of Appeal did (and it is by no means clear), in my view, that approach is not supportable given that (i) Canadian courts have rejected the fraud-on-the-market theory for cases involving

financial markets, and (ii) consumer product markets do not exhibit the essential characteristics necessary for the assumptions that underly the fraud-on-the-market theory as applied to financial markets.

A full analysis of the fraud-on-the-market theory is beyond the scope of this paper. To summarize, however, the theory assumes that the price of the financial instrument in question reflects all the material information available to the market. It has been applied in the United States to dispense with proof of individual reliance in securities misrepresentation cases. The U.S. Supreme Court held that, "because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations may be presumed for purposes of a [securities misrepresentation] action."[32]

The "general inflationary effect" theory as expressed in Live Nation does not explicitly assume that ***all*** class members relied on the misrepresentation as does the fraud-on-the-market theory. Instead, it assumes (or perhaps proposes to prove) that ***some*** ticket buyers did and that because those ***some*** would not have bought the product in the "but for" world, the price of ***all*** other tickets sold in the secondary market would have been lower than they were in the actual world.

Very different from the fraud-on-the-market theory, right? Wrong. In my view, the "general inflationary effect" theory is just a different way of expressing the same foundational principle that underlies the fraud-on-the-market theory. The fraud-on-the-market theory assumes that publicly available information is reflected in the market price of a financial instrument. How does this occur? Because in a "thick" market, arbitrage opportunities for any given financial instrument based on available information will be quickly identified and eliminated by market participants. Accordingly, positive information for a particular financial instrument increases market participants' willingness to pay—and thus the price—for that financial instrument, while negative information depresses it. The changing demand for the specific financial instrument changes its price.

When you unpack it, the "general inflationary effect" theory is an extension of the fraud-on-the-market theory. The positive information (in the form of the alleged misrepresentation) allegedly increased peoples' willingness to participate in the market (i.e. created a "thick market") relative to what it should have been, with the resulting increased overall demand across all products thereby increasing the market price of every product sold.

Should we accept an extension of fraud-on-the-market theory for consumer products when we have rejected the theory itself in Canada for financial instruments?[33] It is hard to see why we would. If anything, the assumptions that underly the fraud-on-the-market theory are much more compelling for financial markets than for consumer products. In financial markets, information is widely published, participants are usually highly sophisticated, and there is often a single market on which the instrument trades. In many instances, corrective disclosures have triggered immediate and observable share price changes, providing intuitive support for the assumptions underlying a theory based on deemed reliance, as well as providing relatively straightforward ways to estimate investor losses. Perhaps most importantly, there is a single market price at any given point in time for the instrument.

None of this is true for most consumer products. Different stores sell the same consumer product at different prices. Prices at different stores, as well as consumer decisions about which product to buy, will be influenced by different alternatives: some stores will offer substitute products thereby influencing consumer demand at the specific store while others may not (or may offer different substitutes). Some products (like cars) are the subject of individual price negotiations between car buyers and dealers. Other products (like cough syrup) are not.

Put simply: unless all these variations are assumed away, which they should not be, there is no prevailing "market price" in a single "market" for a consumer product in the same way that there is for financial instruments. The assumption underlying the fraud-on-the-market theory for financial instruments—that the "market price" includes all publicly available material information—does not hold for most consumer products. Instead, we see a multitude of different prices offered by different stores at different times, and prices are sometimes subject to individual negotiation (presumably based on the information known to the specific parties at that time). Some may argue that markets for event tickets are as "thick" as those for financial instruments. That is debatable, and even if true would hold only for the specific event in question, not all tickets for different events, in different geographies.

A more complete discussion of the fraud-on-the-market theory is beyond the scope of this paper. For the moment, it will be obvious that I do not support the application of the theory to consumer products markets, and I see the Court of Appeal's decision in *Live Nation* as a ***potential*** attempt to do so. Ultimately, Canadian courts will determine whether Canadian common

law should accept such an approach. The redetermination hearing in *Live Nation* may present the lower court, and perhaps eventually the Court of Appeal, an opportunity to engage with the methodology that the plaintiff proposes in that case and to determine whether that methodology attempts to import the fraud-on-the-market theory into consumer products cases.

Alleged Illegality

Another theory of causation that some plaintiffs have advanced as not requiring detrimental reliance involves claims that the product sales could not have taken place at all "but for" the misrepresentations. Accordingly, the misrepresentations "caused" harm because if the misrepresentations had not been made, the product would not have been approved for sale to consumers in the first place, and so consumers could never have purchased it.

Even here, we see reliance. And again, we see it is ***someone else's*** reliance on the alleged misrepresentation that allegedly caused the plaintiff's loss. For this theory to apply, the product must be subject to a regulatory regime that permits the product's sale only on certain conditions or following certain regulatory approvals. The alleged misrepresentations relate to these conditions or approvals and enable the product to be sold. For that to be so, the misrepresentations must have been made to a regulator who then relies on those representations to permit the product's sale. The regulator's reliance forms the link in the chain of causation between the original misrepresentation and the alleged harm to consumers. As in the other examples I've reviewed, ***someone else's*** reliance has led to the plaintiffs' alleged harm. The challenge for plaintiffs under this theory is that s. 52 applies only to representations "made to the public," not to representations made to a regulator.[34]

This argument appeared in *Krishnan*.[35] There, the plaintiffs alleged that the product could not have been sold because its labeling violated the applicable regulations. Accordingly, the misrepresentations had "caused" the plaintiffs' losses because the plaintiffs should never have been able to buy the mislabeled product in the first place. The court accepted that the argument was not doomed to fail, but in my view, the court misunderstood the applicable "but for" world when considering how the alleged mislabeling could have caused the plaintiffs' alleged losses. There is a difference between (i) a product that could not have been sold "but for" the alleged misrepresentation, and (ii) a product that could still have been sold had the labelling been correct (*i.e.*, had the misrepresentation not been made). Only in the former situation has the alleged misrepresentation arguably caused loss to

consumers on the basis that they could ***never*** have bought the product "but for" the alleged misrepresentation.

Take the example of glucosamine sulphate supplements from *Krishnan*. The regulations in question did not prohibit the sale of the underlying supplements; they prohibited the sale of the supplements only if they were improperly labeled. Had the supplements been properly labeled, the supplements could have been sold as glucosamine chondroitin, not as glucosamine sulphate. In that case, "but for" the alleged misrepresentation of the products as glucosamine sulphate, the plaintiffs would still have had an opportunity to buy the supplements. The only difference between the "but for" world and the actual world is that the labels in the "but for" world would have contained no reference to glucosamine sulphate. The question is whether the plaintiffs would have bought the product had they been labeled as glucosamine chondroitin.

That situation is different than if, for example, the law had required supplement manufacturers to provide test results showing a sufficient concentration of glucosamine sulphate to obtain a license to sell the supplement at all. Imagine if, to obtain that license, a manufacturer had misrepresented its test results to the applicable regulator. "But for" the misrepresentation, the license would not have been obtained, the supplement could not have been sold, and the plaintiffs would have had no opportunity to buy the supplement.[36]

Rebuck **and** ***Drynan***

That brings me to two Ontario decisions that do not necessarily fit into the above framework in which "someone else's" reliance caused the plaintiff's loss: *Rebuck* and *Drynan*.[37] As *Drynan* followed the result in *Rebuck* with little additional analysis, there is little to say about it. In contrast, there is much to say about *Rebuck*.

In *Rebuck*, the plaintiff alleged that Ford had understated the fuel consumption of its 2013 and 2014 model year vehicles. He sought compensation for the value of the extra fuel he and his fellow class members would have to buy relative to what they had expected based on Ford's representations.

Ford argued at the certification motion that the plaintiff had not pleaded detrimental reliance. That is, he had not pleaded that he would not have bought the car had he known the truth about its fuel consumption. The court rejected Ford's argument and held (ostensibly) that the plaintiff did not have to plead detrimental reliance. It wrote that:

Although causation has not been dispensed with, reliance in the usual sense of a common law negligent misrepresentation claim is not a necessary ingredient to establish a civil cause of action under s. 36 of the Competition Act for breach of s. 52: Magill v Expedia Canada Corp, 2010 ONSC 5247, at para 107. For example, in Pro-Sys, at paras 71, 113, a claim under s. 36 was permitted to proceed and for damages to be calculated on an aggregate rather than an individualized basis. This could not happen under a common law tort claim of negligent misrepresentation with its strict reliance-as-inducement rule: Hedley Byrne & Co Ltd v Heller & Partners Ltd. [1964] AC 465, 502-4.

This approach suggests that the causal connection between the Defendants' alleged misrepresentations and the Plaintiff's alleged loss is sufficiently pleaded here. That is, the Plaintiff claims that misrepresenting the fuel consumption of the Vehicles has caused buyers and lessees of the Vehicles to spend more on fuel consumption than they were expecting.

The Plaintiff need not plead that the misrepresentations induced him to buy his car; that type of detrimental reliance would be a necessary ingredient for a claim based on the common law of negligent misrepresentation. Rather, under s. 36 of the Competition Act what the Plaintiff must plead is that the misrepresentations caused him to acquire less value than he expected to acquire—i.e. to spend more on gas than he thought he would spend when he purchased the Vehicle.

Framed in this way, causation is an issue that is common to all purchasers and lessees of the Vehicles. The facts as pleaded match the requirements of the statutory causes of action that are pleaded.

These paragraphs are striking in several respects. For one, they misunderstand the result in Pro-Sys, which as I have noted above, did require detrimental reliance, just not as the final link in the chain of causation. Second, it is arguable that they do not actually do away with detrimental reliance as they appear to suggest; they simply use different words to mean the same thing. The court in Rebuck wrote that the misrepresentations must have ***caused*** the plaintiff to acquire less ***value*** than he ***expected*** to acquire. This standard is arguably detrimental reliance in the sense that Justice Strathy described it in Singer. In any event, and contrary to the conclusion in Rebuck, it certainly raises individual issues. A plaintiff can only have ***expectations*** if she heard the misrepresentations and believed them (which would usually require individual evidence from the plaintiff). She could only have acquired ***less value*** than ***expected*** if she valued the attribute differently based

on the misrepresentation (which, again, would usually require individual evidence from the plaintiff).

Once those elements are established, it is not a giant leap to infer that, if a consumer had agreed to pay a certain price for a product based on certain, subjective expectations of value that were influenced by the misrepresentation, then the consumer would not likely have bought the product at the agreed upon price had she known the true value. That is detrimental reliance.

By using the language of "expectations" and "value", the court in Rebuck said that it was avoiding detrimental reliance, but hardly seems to have done so. That reality is likely why one subsequent decision has suggested that Rebuck is not at odds with prior authorities[38] and another has held that prior authorities remain good law.[39]

Let's return to my example of my vegan leather seats. There are at least three possibilities that could have applied when I bought my car: (i) I never heard or read the representation, in which case I could have had no expectations about the value I expected to receive from the vegan leather seats; (ii) I heard or read the representation but attributed no value to the vegan leather seats; or (iii) I heard or read the representation and attributed value to the vegan leather seats.

Rebuck jumps right to the third possibility and identifies it as the ***only*** possibility. Why?

In my view, although the court did not put it this way, the result in Rebuck indicates that the court believed that reliance could be proven on a common basis because of the formulaic and common representations in that case.[40] The court appears to have assumed that class members all had the same expectations about fuel economy because of the uniform representations made by Ford. That is, they all expected to receive the same "value" (i.e., how much they would have to spend on gas given the represented fuel economy). As well, because fuel economy is often relevant to car purchasing decisions, it must have seemed likely that all class members would have relied on the fuel economy representations when purchasing their cars at the price that they did. Otherwise, as I have demonstrated above, it is not clear how the court could have talked about class members' expectations about value without immediately triggering the need for individualized evidence.

Alternatively—and although it does not fit with the court's comments about class members' "expectations"—the court in *Rebuck* (and in *Drynan*) may have been saying what the Court of Appeal said in *Live Nation*: because some purchasers relied on the representations, demand was higher than it would otherwise have been and higher demand increased prices for all car purchasers, whether or not they relied on the misrepresentations.

I will not repeat the criticisms I expressed earlier about this apparent fraud-on-the-market theory in consumer product cases. But I will note that the common issues decision in *Rebuck* demonstrated that any assumptions about proving reliance on a common basis because of formulaic misrepresentations proved to be incredibly unrealistic on the facts of that case.

The eventual common issues decision in Rebuck revealed the utter lack of commonality in class members' expectations arising from Ford's representations. The court granted summary judgment for Ford, primarily on the basis that its representations could not have contravened s. 52 because they complied with another government regulation concerning fuel economy testing and labeling. But the court also held that the plaintiff had not demonstrated that the representations created any particular "general impression" as required under the applicable legal test. This was so for several reasons, including because the plaintiff's evidence confirmed that ***different class members would have had different expectations about the expected fuel economy when buying their cars***. This lack of common expectations proved fatal to establishing any "general impression" and, hence, proving a violation of s. 52.

In my view, the lack of common expectations would have proven equally fatal if the court had continued its analysis to consider whether the representations had caused loss to class members. The plaintiff testified that he had never expected to obtain the fuel economy represented by Ford because he knew that fuel economy is affected by several factors, such as weather, driving conditions, driving habits, etc. One of the plaintiff's experts confirmed that these realities are "well known… to most vehicle owners."[41] The plaintiff even testified he would have been content with fuel consumption that was 25% higher than the represented consumption.[42] That evidence raised the obvious implication that other class members would have had their own expectations based on their own knowledge, and that across so many thousands of class members, those expectations would vary.

In other words, the merits evidence in Rebuck confirmed the logic behind the historical orthodoxy expressed by Justice Strathy over a decade ago in Singer: misrepresentation cases require individual evidence because customers have individual interactions with the representations in question (assuming they have even heard them). They understand them differently, have different expectations about them, and differently value what they are told about the product in question. As the Ontario Court of Appeal held, "[a] court cannot extrapolate from the motivation of one person to a conclusion respecting others. As discussed above, proof of reliance must be based on evidence of the experience of each individual class member."[43] Given its outcome in which a purportedly common issue foundered at the merits stage,[44] Rebuck is a cautionary tale about the dangers of assuming commonality in misrepresentation cases at the class certification stage.

Conclusion

So where does this leave misrepresentation class actions under the *Competition Act*? I offer three thoughts. First, detrimental reliance remains a critical link in the chain of causation. Decisions that suggest otherwise misread the law. That outcome aligns with a commonsense principle: an unheard or unread misrepresentation cannot cause harm. ***Someone*** must have heard or read the misrepresentation and acted differently because they heard it or read it. Otherwise, the misrepresentation did not ***cause*** anything to happen at all.

Second, in the few cases where the misrepresentation has not been made to class members, the necessary detrimental reliance can occur up the chain of causation from the plaintiffs—but must still exist. To the extent that these cases are a narrow exception to the ordinary rule that misrepresentation cases cannot be certified because they depend on individualized evidence, courts must nevertheless be vigilant to ensure that the plaintiffs can demonstrate, among other things, (i) that the representation was made "to the public," and (ii) how the plaintiffs will prove reliance by these third parties in a common issues trial. As the lower court's reconsideration of *Live Nation* may reveal, this could prove much more complicated than the plaintiffs expect. As well, to the extent that *Live Nation* implies a fraud-on-the-market theory for consumer products cases, that outcome should be rejected.

Third, where as in *Rebuck*, the claim rests on misrepresentations made to the plaintiff class, the logic of the historical orthodoxy remains true: misrepresentation cases raise inherently individual issues that are not suitable

for class treatment. Different consumers really are different. They have different expectations arising from the misrepresentations; they value different product attributes differently. Consequently, any harm they experience is inherently individualized.

This outcome aligns with the commonsense proposition with which this paper began: why should non-vegan me receive a windfall if I never attributed value to my vegan leather seats (or never even heard the representation) in the first place?

To the extent that plaintiffs reject that outcome as presenting an unfair barrier to justice for vegan-me, the appropriate solution is legislative change. Where Parliament or other legislatures have considered the common law rule of detrimental reliance too severe, they have legislated it away (albeit, often with other safeguards). That is their prerogative. Indeed, the recent amendments to the Competition Act may be another example of such legislative action.[45]

Admittedly, the Competition Act changes come with significant procedural uncertainty relative to the known procedures that have developed over the last 30 years since Ontario passed its Class Proceedings Act. As well, the Tribunal will have broad discretion to fashion appropriate remedies on the facts of each case. It may apply that discretion to prevent unharmed consumers from receiving significant windfalls. Such an approach might end up producing an outcome very similar to what a detrimental reliance standard would produce. These and other questions remain to be answered by the Tribunal in the coming years.

Regardless of the preferred procedural vehicle, I think that we can all rely on two things: businesses will keep making representations about their products and groups of consumers will continue to seek damages when those representations are wrong.

ENDNOTES

[1] Partner at Bennett Jones LLP. The author thanks Mike Eizenga, Cheryl Woodin and Ilan Ishai for their helpful comments on drafts of this paper.

[2] See the cases cited at note 13.

[3] See the cases cited at notes 15, 19, 26, 30, 35, and 37.

[4] As the Supreme Court of Canada noted in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para 15, plaintiffs maintained that it was not "plain and obvious" that waiver of tort was not an independent cause of action because "courts have *refrained* from finding that it is plain and obvious that such an action *does not* exist." (emphasis in original) The law remained in that state of uncertainty for 16 years, a period in which the Supreme Court stated: "Nothing is gained, and much court time and considerable litigant resources are lost, by leaving this issue unresolved." (at para 21).

[5] R.S.C., 1985, c. C-34.

[6] Bill C-59: *An Act to implement certain provisions of the fall economic statement tabled in Parliament on November 21, 2023 and certain provisions of the budget tabled in Parliament on March 28, 2023*. The Bill received Royal Assent on June 20, 2024 and the amendments providing for private access will come into force on June 20, 2025. The amendments enable private litigants to bring misleading representation cases before the Competition Tribunal with leave. Disgorgement is an available remedy: the Tribunal may order the respondent to pay an amount, not exceeding the total of the amounts paid to the person for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold — except wholesalers, retailers or other distributors, to the extent that they have resold or distributed the products — in any manner that the court considers appropriate (s. 74.1(1)(d)).

[7] Although s. 74.1(8) of the *Competition Act* gives the Tribunal broad powers concerning the terms necessary to implement any disgorgement remedy it orders, many of the enumerated examples appear in orders made in class proceedings: "The court may specify in an order made under paragraph (1)(d) any terms that it considers necessary for the order's implementation, including terms (a) specifying how the payment is to be administered; (b) respecting the appointment of an administrator to administer the payment and specifying the terms of administration; (c) requiring the person against whom the order is made to pay the administrative costs related to the payment as well as the fees to be paid to an administrator; (d) requiring that potential claimants be notified in the time and manner specified by the court; (e) specifying the time and manner for making claims; (f) specifying the conditions for the eligibility of claimants, including conditions relating to the return of the products to the person against whom the order is made; and (g) providing for the manner in which, and the terms on which, any amount of the payment that remains unclaimed or undistributed is to be dealt with."

[8] For example, the statutory causes of action in the Ontario *Securities Act* R.S.O. 1990, c. S.5 permit recovery "without regard to whether the person or company

relied on the misrepresentation": s. 130 (prospectus misrepresentations); s. 130.1 (offering memorandum misrepresentations); s. 131 (circular misrepresentations); s. 138.3 (secondary market misrepresentations).

[9] For example, the Ontario *Consumer Protection Act*, RSO 1990, c C.31 does not require reliance for consumers to obtain compensation. See *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921 at para 86-87 ("*Ramdath*").

[10] Subject to the Tribunal's broad discretion on who will be entitled to a remedy and in what amount. As noted later in this paper, it remains open to the Tribunal include some element of reliance in its assessment to avoid windfall gains to unharmed consumers.

[11] Section 52(1.1)(a).

[12] Section 52(5).

[13] *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at paras 107-108 ("*Singer*"). Other cases include: *Magill v. Expedia Canada Corporation*, 2010 ONSC 5247 at paras. 105-106; *LBI Brands Inc. v. Aquaterra Corporation*, 2016 ONSC 3572 at paras. 20-21; *Murphy v. Compagnie Amway Canada*, 2015 FC 958 at paras. 82-89; *Lin v. Airbnb, Inc.*, 2019 FC 1563 at para. 71; *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361at para. 82; and *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36.

[14] *Singer* at para 70.

[15] *Live Nation Entertainment, Inc. v. Gomel*, 2023 BCCA 274 ("*Live Nation*").

[16] *Live Nation* at para 125.

[17] *Go Travel Direct Inc. v. Maritime Travel Inc.*, 2009 NSCA 42 ("*Go Travel*").

[18] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 ("*Pro-Sys*").

[19] *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366 ("*Valeant*").

[20] *Go Travel* at para 62.

[21] *Go Travel* at para 64.

[22] *Go Travel* at paras 8 and 42.

[23] *Valeant* at para 235.

[24] *Valeant* at paras 224 and 228.

[25] *Live Nation* at para 126.

[26] *Thompson-Marcial v. Ticketmaster Canada LP*, 2024 ONSC 2305 at paras 198 and 203.

[27] *Live Nation* at para 85 (emphasis added).

[28] Admittedly, it is conceivable that at least some consumers who would not have participated in the secondary market are also class members, which somewhat strains the idea that "someone else" relied on the misrepresentations. Regardless, this simply leads to additional problems of proof as discussed later in this paper. Alternatively, the Court of Appeal may have meant that, given the nature of the representations, reliance could be inferred on a class-wide basis, although this is even less consistent with its statement that the "general inflationary effect" theory did not require reliance.

[29] *Go Travel* at para 62.

[30] *Rebuck v. Ford Motor Company*, 2018 ONSC 7405 ("*Rebuck*").

[31] *Carom v. Bre-X Minerals Ltd.*, 1998 CanLII 14705 (ON SC), 41 OR (3d) 780, 83 ACWS (3d) 363, 78 OTC 356, 41 BLR (2d) 246, 27 CPC (4th) 73, 43 CCLT (2d) 310 & *Markowich v. Lundin Mining Corporation*, 2022 ONSC 81 at para. 231: "It is settled law that reliance issues in a common law securities misrepresentation claim cannot be certified on the basis of deemed reliance arising from a "fraud on the market" or "efficient market" theory." See also: *Peters v. SNC-Lavalin Group Inc.*, 2021 ONSC 5021 at para. 236; *Coffin v. Atlantic Power Corp.*, 2015 ONSC 3686 at para. 135-139; *Lawrence v. Atlas Cold Storage Holdings Inc.*, [2006] O.J. No. 3748 (S.C.J.); *Menegon v. Philip Services Corp.*, 2003 CanLII 36468 (ON CA), leave to appeal refused [2003] S.C.C.A. No. 95; & *Mondor v. Fisherman*, 2001 CanLII 28388 (ON SC).

[32] *Basic v. Levinson*, 485 U.S. 224 (1988) at 485.

[33] See the cases cited at note 31.

[34] *Canada (Commissioner of Competition) v. Premier Career Management Group Corp.*, 2009 FCA 295 & *R v Stucky*, 2009 ONCA 151.

[35] *Krishnan v Jamieson Laboratories Inc.*, 2021 BCSC 1396.

[36] But as noted earlier, such a misrepresentation has arguably not been made "to the public" and so would not be captured under s. 52.

[37] *Drynan v. Bausch Health Companies Inc.*, 2021 ONSC 7423 ("*Drynan*").

[38] *Hoy v. Expedia Group Inc.*, 2022 ONSC 6650 at para 116.

[39] *Lewis v. Uber Canada Inc. et al.*, 2023 ONSC 6190 at para 74.

[40] As the Ontario Court of Appeal noted in a footnote in *Ramdath*, reliance as a common issue may not be impossible. It gave the example of recitals in a consumer contract that state that the consumer has read and relied on a previous document. It also cited *Cannon v. Funds for Canada*, 2012 ONSC 399 at para. 351 where the court held that it may be possible to infer that donors relied on the representations regarding the enhanced tax deduction since that was the entire reason donors would have participated in the tax shelter in question. As demonstrated below, *Rebuck* did not fit that mold.

[41] *Rebuck* at para 62.

[42] *Rebuck* at para 65.

[43] *Ramdath* at para 91.

[44] This is the very result that the Supreme Court of Canada warned against in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para 104.

[45] Although, admittedly, these remedies will not be available if the Competition Bureau obtains a remedy against a respondent meaning that class actions under s. 36 will remain the only means of recovery where the class action "follows on" from a regulatory outcome.