

Goodmans^{LLP} Update

Supreme Court Allows Price-fixing Class Action On Behalf Of “Umbrella Purchasers” To Proceed

In an expansion of section 36 of the *Competition Act*, an eight member majority of the Supreme Court has ruled that “umbrella purchasers” can be class members in price-fixing class actions. Umbrella purchasers are consumers who purchased products neither manufactured nor supplied by any conspirator in the price fixing, but who were nonetheless subjected to higher prices due to the price “umbrella” created by that price-fixing. This decision could have a significant impact on the potential damages payable by price-fixing conspirators.

Background

Pioneer Corp v. Godfrey dealt with a class action brought on behalf of all persons in British Columbia who purchased “optical disc drives” or products containing such drives (such as video game consoles). The defendants comprise a relatively large group, four of whom are alleged to account for approximately 94% of the optical disc drives sold in British Columbia during the relevant time. At the heart of the claim is an allegation that the defendants conspired to fix the prices they charged for the disc drives. The plaintiff claims damages under the *Competition Act* (the “**Act**”) as well as for common law conspiracy.

The claim was certified as a class action by the British Columbia Supreme Court, and that order was upheld by the British Columbia Court of Appeal. The claim was brought not only on behalf of persons who purchased products manufactured by the defendants, but also on behalf of persons who purchased disc drives (or products containing disc drives) that were manufactured by companies other than the defendants (referred to as “umbrella purchasers”). The plaintiff seeks damages in respect of those allegedly excessive prices as well as in respect of the prices charged on goods manufactured by the defendants. The Supreme Court had confirmed in *Pro-Sys Consultants v. Microsoft Corporation* (“**Pro-Sys**”) that “indirect purchasers” of products manufactured by the defendants could claim under section 36 for allegedly inflated prices, but had never before ruled on whether such prices paid by umbrella purchasers could also be the subject of a claim under the *Act*.

Umbrella Purchasers

The Supreme Court determined that umbrella purchasers could indeed advance claims under section 36 of the *Act*. The theory behind holding price-fixers liable to these purchasers is that a competitor, outside the cartel, might raise the price for their products in order to meet the market – as the Court described it, “[I]n short, a rising tide lifts all boats.” The Court found that the words of the *Act*, which provide a cause of action to any person who has “suffered loss or damage as a result of” the defendant’s illegal conduct, did not narrow the class of claimants to those who purchased products directly from the defendants or who were indirectly supplied by the defendants. Moreover, the Court focused on the purpose of the *Act* – to provide consumers with “competitive prices and product choices” – as supporting claims by umbrella purchasers. The Court also focused on the ability of these claims to promote deterrence, an aspect of private enforcement under Canadian law that has lagged the law in the US, where treble damages are recoverable by plaintiffs in civil suits to deter criminal conduct.

Finally, the Court determined that barring a class of purchasers who were intended by the defendants to pay higher prices as a result of their price-fixing is inconsistent with the compensatory goal of the *Act*. This same focus on the umbrella effects as the “intended consequence” of the defendants’ anti-competitive behaviour influenced the Court’s ruling that permitting umbrella claims would not lead to “indeterminate liability”.

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It is premature to predict the impact of this ruling on the case before the Court or in any other civil action for price-fixing, and the Court acknowledged that “this is not to say that umbrella purchasers’ actions will not be complex or otherwise difficult to pursue” from the perspective of leading evidence that shows a causal link between loss suffered and the defendant’s conduct.

Additional Findings

In addition to its ruling extending section 36 claims to umbrella purchasers, the Court’s decision also touched upon two important matters in class action law. First, the Court held that aggregate damage provisions in class action regimes are purely remedial and cannot be used to establish liability. Regardless of whether aggregate damages are certified as a common issue, the trial judge must be satisfied that any individuals who participate in a damage award actually suffered a loss. Second, the Court reiterated its decision in *Pro-Sys*, finding that for loss-related questions to be certified as common issues, plaintiffs need only demonstrate an expert methodology sufficiently credible or plausible to show that the loss reached the requisite purchaser level. It is not necessary that the methodology be able to show that each and every class member at that level suffered damage or identify those who did or did not.

To discuss the Court’s decision or competition or class action matters more generally, please contact the authors or any member of our [Class Action](#) or [Competition Law](#) Groups.