Goodmans LLP Update

Novel Claim of Negligent Commercialization Permitted to Proceed

In *Darmar Farms Inc. v. Syngenta Canada Inc.*, the Ontario Court of Appeal held that a claim asserted in a proposed class action for "negligent commercialization" disclosed a reasonable cause of action, thus allowing the action to proceed to the next stage of determining whether it is suitable for certification as a class action.

The defendant had put its genetically modified corn seed on the market before receiving regulatory approval from Chinese authorities, which then banned all North American corn because it had intermingled with the defendant's corn seed. The resulting glut in the North American market caused prices to fall. The plaintiff corn grower, who had not purchased the defendant's product but suffered economic loss as a result of the drop in prices, sued on behalf of itself and "others similarly situated in Canada" in a proposed class action.

Applying the test recently set out by the Supreme Court of Canada in *Deloitte & Touche v. Livent Inc. (Receiver of)* to determine whether a duty of care could arise under the circumstances, the Court of Appeal found that sufficient facts had been pleaded so that the plaintiff had a reasonable prospect of establishing the relationship of proximity and foreseeability of harm necessary to support a finding that the defendant owed the plaintiff a duty to take care with respect to the timing, manner and scope of the commercialization of its genetically modified corn seed.

The allegations supporting a relationship of proximity were twofold:

- The defendant belonged to industry associations formed for the purpose of protecting the public and participants in the corn market, which associations had warned the defendant of possible trade disruptions if its product were commercialized without appropriate steps being taken to obtain global approvals. In response to these concerns, the defendant had undertaken not to cause harm by commercializing its product without the required global approvals, and the plaintiff had relied on that undertaking.
- The defendant's genetically modified corn seed would inevitably commingle with all growers' corn, including the plaintiff's, so as to impart traits that would affect the growers' access to certain markets, and the defendant knew this. That was arguably sufficient to create a relationship between them even though the plaintiff did not purchase the defendant's product.

In the Court's view, the proximity inquiry largely answered any indeterminacy concerns, and in any event courts should be reluctant to find at the pleadings stage that such concerns negate a duty of care.

The Court of Appeal relied on the 2007 case of *Sauer v. Canada (Attorney General)*, in which an Ontario cattle farmer brought a proposed class action against the manufacturer of cattle feed alleged to have infected a cow in Alberta with "mad cow disease". The infection of the single cow was sufficient to provoke an international ban on exports of Canadian cattle and beef products, and the plaintiff claimed to have suffered economic loss as a result of the ban even though none of his cattle was affected. In *Sauer*, allegations as to the integrated nature of the industry and the foreseeable industry-wide consequences of contamination were found to be sufficient indicia of proximity to move the claim for economic loss past the pleadings stage. There was no mention of any undertaking on the defendant's part or reliance on the plaintiff's.

The Supreme Court of Canada stressed in *Deloitte* that an undertaking by the defendant and reliance on that undertaking by the plaintiff are necessary elements of a claim in negligent misrepresentation or negligent performance of services; but it is not clear whether the same is true of claims for pure economic loss which do

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not fit into those categories.

This is an important point, which will have a considerable impact on the scope of liability. It was not necessary for the Court of Appeal to resolve the question at this stage of the action, but it will likely arise again at the certification stage, where a requirement to prove reliance could raise individual issues that make the claim unsuitable as a class action.

For further information on the *Darmar Farms* case, contact any member of our Litigation Group.