

Blakes Bulletin

Class Actions

Class Actions in Canada – Defeating Certification in Misleading Advertising Actions

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On January 7, 2010, the Ontario Superior Court of Justice released its decision in *Singer v. Schering-Plough Canada Inc.* This decision may prove useful for corporations opposing certification of class actions that seek damages for economic loss arising from alleged misrepresentations in advertising.

The *Singer* decision dismissed two motions that were heard together, seeking certification of virtually identical claims against Schering Plough and Playtex companies, alleging that they labelled and advertised their sunscreen products in a manner that misrepresented their level of sun protection. The plaintiff in both actions claimed that economic loss was suffered – the products' value was less than their purchase price – because they provided less sun protection than advertised.

Justice Strathy dismissed both certification motions based largely on his analysis of the causes of action pleaded.

First, the plaintiff pleaded negligence, arguing that the defendants owed and breached a duty of care to provide accurate information and not make misleading representations. Strathy J. held that this claim was clearly one in negligent misrepresentation, not negligence, but that it was not properly pleaded because there was no allegation that the class members *relied* on the representations and suffered damages *as a result*. Notably, Strathy J. opined that even if negligent misrepresentation was pleaded, it would be necessary to establish that *each* class member relied on the representations and suffered damages as a result and this would be fatal to certification. In this regard, Strathy J. noted that the effect of the alleged misrepresentations would vary depending on each individual consumer's knowledge and needs in relation to the characteristics of the relevant products. Indeed, Strathy J. opined that it might be considered a truism that, as the defendants' evidence established, people

respond in different ways to labelling and marketing messages of all products, including sunscreens.

Second, the plaintiff pleaded breach of warranty that the products conform to certain qualities, but Strathy J. held that this cause of action was unavailable. The defendants did not sell directly to consumers and therefore the requisite contractual relationships did not exist. Further, there was no allegation of collateral warranty inducing the contracts to purchase the products.

Third, the plaintiff pleaded breaches of the *Consumer Protection Act* (CPA), including that the representations constituted unfair practices, entitling the class members to either damages or rescission of their contracts. Strathy J. held that there was no cause of action under the CPA primarily on the basis that the defendant manufacturers were not 'suppliers' as defined in the CPA and did not enter into any agreement with any class members.

Fourth, the plaintiff pleaded that the defendants' allegedly misleading representations violated the *Food and Drugs Act* and that this constituted wrongful conduct sufficient to trigger a remedy in restitution. The plaintiff therefore sought a remedy for unjust enrichment, arguing that the defendants were enriched by increased profits, while the class members were deprived by making purchases under false pretences. However, Strathy J. also held that this claim disclosed no cause of action, because unjust enrichment requires a direct nexus between the enrichment and the deprivation. In this case, the purchase price was paid to retailers and not directly to the defendant manufacturers.

Fifth, the plaintiff pleaded that the defendants breached section 52 of the *Competition Act*, which prohibits using misleading representations to promote one's products. However, to establish the relevant cause of action under section 36 of the *Competition Act*, both the breach of section 52 and the damage suffered as a result must be demonstrated. Since the plaintiff failed to plead a causal link between the representations and the damages, this cause of action also foundered.

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Finally, although the plaintiff pleaded a remedy in waiver of tort, Strathy J. saw no need to consider its scope, because the plaintiff had not pleaded any tenable cause of action and had not established any wrongful conduct by the defendants.

Strathy J. also considered whether the elements of the test for certification, other than the cause of action requirement, had been met and concluded they were not. He noted that it was questionable whether there was a class interested in pursuing the claim at all, in the absence of any evidence that anyone other than the named plaintiff had made a complaint. He found that the proposed common issues were overly broad and had no basis in fact. In particular, he found that there was no evidence to establish misrepresentation of facts by the defendants. Further, there was no evidence to establish that the alleged misrepresentations affected the value of the products or that any product had a lower value than its sale price. He concluded that the class action procedure was not preferable, as it would be unmanageable and inefficient in the circumstances.

The *Singer* decision demonstrates many difficulties plaintiffs may have in seeking to certify claims for economic loss arising from misrepresentations in advertising. Ultimately, if *Singer* is followed, similar misrepresentation claims are unlikely to be certified as class actions, unless they involve very specific, clearly defined and limited representations made in circumstances in which it can be inferred that the consumers relied upon the representations.

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