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Canadian Antitrust Class Actions — A Business Opportunity


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Law360, New York (April 07, 2014, 1:34 PM ET) -- Canadian antitrust class actions serve as a potentially substantial new source of revenue and prospective business opportunities for companies in the United States that have business in Canada. While many of these companies have already realized the advantages of U.S. antitrust actions, many have not recognized the similar opportunities offered by participation in Canadian antitrust actions. But, in order to weigh their options properly, U.S. companies must first understand the differences that exist between antitrust law and procedural regimes in Canada and the United States.

Differences in the Regimes

There are several variances between U.S. and Canadian competition law and class action procedures. For example, Canada's Competition Act, R.S.C. 1985 c. C-34, legislates per se illegality for horizontal conspiracy, but does not provide for treble damages. Additionally, as the Supreme Court of Canada recently confirmed, Canadian law is friendlier to plaintiffs than U.S. law in important respects.[1]

For example, Canadian class action laws generally do not require numerosity, typicality or predominance. On matters of substantive law, indirect purchasers are not prohibited from collecting damages under Canadian law as they have been under Illinois Brick v. Illinois.[2] While the differences cover both substantive and procedural matters, they have not hindered cross-border cooperation in antitrust damages actions. Successful collaboration has occurred in notable cases such as Vitamins, DRAM, Air Cargo, Microsoft, Biovale and NovaGold.

Significant Considerations in Cross-Border Litigation

Protective Orders

In the U.S., courts allow for a greater range of inquiry in precertification procedure. In contrast, Canadian courts limit precertification inquiries to whether the class should be certified. This may represent an opportunity for Canadian litigants if the U.S. litigation proceeds to discovery before the Canadian litigation. Canadian counsel may gain access to greater information by seeking documents exchanged during discovery in the U.S. case.

Canadian plaintiffs have had varying levels of success in obtaining U.S. discovery, depending on the existence of protective orders and the nature of the information they were seeking. It may be necessary for a Canadian plaintiff to apply to the U.S. court for a modification of the protective order in order to obtain discovery produced in the U.S. case.

One of the first cases to consider this issue was Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.,[3] a

class action alleging price fixing of vitamins and vitamin products. The plaintiffs in this case sought access to certain materials in the U.S. litigation by bringing a motion before a U.S. court. The defendants attempted to enjoin the request, but the Ontario Court of Appeals decided to allow it, stating the U.S. court was in a better position to handle the issue of confidentiality.[4]

In Bryar Law Corporation v. Samsung Electronics Ltd.,[5] the British Columbia Supreme Court held that a plaintiff was entitled to information that was relevant to certification, but was not entitled to unredacted expert reports because they were subject to protective orders in the U.S.[6] The court held that the Canadian plaintiff ought to motion the U.S. court for disclosure for the protected documents.[7] In the end, the Canadian plaintiff was unsuccessful in obtaining the documents, as the U.S. court concluded the motion was untimely due to the fact that the multidistrict litigation had already ended.[8]

Since Vitapharm and Bryar, several cases have achieved more favorable results for Canadian plaintiffs. In Pro-Sys Consultants v. Microsoft Corp,[9] the Canadian plaintiff successfully intervened in the U.S. proceedings, and was able to modify the protective order and gain access to U.S. discovery.[10] Other motions to intervene on behalf of Canadian plaintiffs in the U.S. court to modify protective orders have succeeded in cases such as Linerboard (Eastern District of Pennsylvania),[11] Aftermarket Automotive Lighting Products (Central District of California)[12] and Vitamins[13] (District of D.C.) and have failed in cases such as Payment Card Interchange Fees.[14]

Preclusive Effect of Findings

U.S. courts recognize foreign judgments, so long as the United States has determined that they are entitled to recognition.[15] Indeed, the United States has decreed that it will recognize orders of Canadian federal and provincial courts and judgments of the Competition Tribunal.[16] Canadian courts provide similar recognition to U.S. judgments.[17] As U.S. and Canadian antitrust laws are quite similar, there is a high likelihood that a finding in a U.S. court may have preclusive effect in Canada, and vice versa. This offers the potential for plaintiffs to streamline the proceedings in multi-jurisdictional litigation.

U.S. companies that are considering parallel claims in Canada should examine whether they are entitled to collateral estoppel based on the procedural posture of parallel U.S. litigation. The results of criminal proceedings can have preclusive effect in private damages actions in Canada or the U.S. Likewise, class certification in the U.S. may benefit Canadian plaintiffs in establishing “common issues” under the more lenient standards for class certification in Canada.

Use of Experts

U.S. and Canadian courts alike are careful about allowing plaintiffs to use their expert’s testimony in parallel actions in the two countries. While the courts respect the need to present the best evidence from the most qualified experts, they also understand the need to protect confidential information. U.S. companies should understand the potential obstacles involved in using their expert’s testimony in Canadian litigation.

In Irving Paper Ltd. v. Atofina Chemicals Inc.,[18] the Canadian court ruled that an affidavit from an expert used in parallel litigation in U.S. courts was admissible, due in part to the facts that the expert based his conclusions on admissible evidence, and that the defense had access to the information and were also able to cross-examine the expert.[19] Likewise, in Sullivan v. De Beers, the U.S. court denied the defendants’ motion to enforce a protective order entered into by an expert who was subsequently retained by the plaintiffs in the parallel Canadian action, as the court determined there was no proof that the expert used confidential information from the U.S. case in the Canadian report.[20]

Effect of Releases

Once litigation has settled in one jurisdiction, the class and opt-out plaintiffs may yet have the ability to seek compensation for purchases made in foreign jurisdictions. Defendants in these cases generally seek the broadest possible release. It is important for companies or counsel settling U.S. litigation to be mindful of the effect of a U.S. release on ongoing Canadian litigation and vice versa.

Use of Opt-Outs

It has become common practice for larger U.S. companies to opt out of the class in antitrust damages actions in the U.S. and instead pursue individual claims. Depending on the case, opting out of U.S. litigation may help secure larger recoveries, reduced attorney fees or favorable supplier relations. Canadian class actions are more favorable to the interests of class members with larger claims, so the practice is less common. There is no established opt-out bar in Canada and individual claims are typically much smaller than in the United States.

Therefore, for U.S. companies to make the most of potential class action claims, they must stay abreast of litigation in their industries, including those arising out of Canada. This is especially true for U.S. companies that have significant cross-border operations. For antitrust claims that have settled in the U.S., companies ought to determine if similar damages litigation is pending in Canada. If there is, companies litigating in the United States should speak to Canadian class counsel to determine the status of the Canadian litigation. Canadian counsel can inform the companies of the steps necessary to preserve claims and advise them of the considerations that go into joining the litigation as a class representative.

Conclusion

U.S. companies with operations north of the border have a unique opportunity to participate in parallel antitrust class actions in Canada and the United States. With the right investment and awareness of the distinctions between litigation in the two countries, this opportunity may give rise to substantial revenues and improve a company's bottom line.

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[1] On October 31, 2013, the Supreme Court of Canada decided three antitrust cases, commonly known as "The Trilogy." The first, Pro-Sys Consultants v. Microsoft Corp., 2013 SCC 57 (CanLII), established that indirect purchasers have a cause of action against parties responsible for anticompetitive overcharges. The second, Sun-Rype Prods. Ltd. v. Archer Daniels Midland Co. et al, 2013 SCC 58 (CanLII), established that indirect purchasers and direct purchasers could participate in the same class action, provided that there are at least two identifiable members of each class. Finally, Infineon Technologies AG v. Option Consommateurs, 2013 SCC 59 (CanLII), established that a single representative can represent both direct and indirect purchasers, at least for purposes of establishing liability.

[2] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (holding indirect purchasers could not recover treble damages on the theory that the overcharges paid by a direct purchaser to an alleged antitrust violator were passed on to the indirect purchaser).

[3] Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd., [2001] 6 C.P.C. (5th) 245 (Sup. Ct.), affirmed (2003), 23 C.P.R. (4th) 454 (Ont. C.A.).

[4] Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd., [2001] 6 C.P.C. (5th) 245 (Sup. Ct.), affirmed (2003), 23 C.P.R. (4th) 454 (Ont. C.A.), para. 4.

[5] Bryar Law Corp. v. Samsung Electronics Co. Ltd., 2010 BCSC 1661.

[6] Bryar Law Corp., ¶¶ 17-18; See also Pro-Sys Consultants v. Microsoft Corp., 2007 BCSC 1663, ¶ 25; Kimpton v. Canada (Attorney General), 2002 BCSC 67. para. 16.

[7] Justice Masuhara noted that his decision was consistent with the decision of the Ontario Court of Appeal in Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd., [2001] 6 C.P.C. (5th) 245 (Sup. Ct), where the court stated that the US court was better situated to determine issues of confidentiality.

[8] Order Denying Motion for Leave to Intervene and Modify Protective Order, In re Static Random Access Memory (SRAM) Antitrust Litigation, No. 07-MD-01819. (N.D. Cal. Nov. 1, 2011), ECF No. 1415.

[9] Pro-Sys Consultants Ltd. v. Microsoft Corp., 2007 BCSC 1663.

[10] Comes v. Microsoft Corp. 646 N.W.2d 440 (Iowa 2002), affirmed 775 N.W.2d 302 (Iowa 2009).

[11] In re Linerboard Antitrust Litig., 333 F. Supp. 2d 333, 229 (E.D. Pa. 2004).

[12] Civil Minutes, In re Aftermarket Automotive Lighting Prods. Antitrust Litig., 09 MDL 2007 (C.D. Cal. Aug. 30, 2010), ECF No. 207.

[13] In re Vitamins Antitrust Litig., No. 99-197, 2001 U.S. Dist. LEXIS 25068 (D.D.C. Mar. 19, 2001).

[14] Civ. Conf. Minute Or., In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig., 05-MD-1720 (JG)(JO) (E.D.N.Y. Jan. 17, 2013), ECF No. 1785.

[15] Alfadda v. Fenn, 966 F. Supp. 1317, 1326 (S.D.N.Y. 1997).

[16] Info. Resources Inc. v. Dun & Bradstreet Corp., No. 96 CIV 5716, 1998 WL 851607, at *1 (S.D.N.Y. Dec. 8, 1998).

[17] See Currie v. McDonald's Restaurants of Canada Ltd., 74 O.R.3d 321 ¶ 16 (Ct. App. Ont. 2004) (noting that Ontario courts will recognize foreign class-action judgments when appropriate).

[18] 89 OR (3d) 578 (2008).

[19] Irving Paper Ltd.v. Atofina Chemicals Inc., 89 OR (3d) 578, ¶¶ 30 – 33 (2008).

[20] Order, Sullivan v. De Beers, No. 04-2819 (SRC) (D.N.J. Aug. 27, 2010), ECF No. 420.