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Umbrella purchasers: Who are they, what do they want, and why are Courts (sometimes) certifying their claims?

While competition law specialists are familiar with the ongoing debate about umbrella purchaser claims, most Canadian lawyers could be forgiven for wondering what all the fuss is about umbrellas. Far from being individuals who rejected raincoats or ponchos in favour of a more traditional option, umbrella purchasers are now at the center of a heated debate in Canadian competition law.

By way of background, the *Competition Act* prohibits any agreements or conspiracies between competitors with respect to, among other things, the price or supply of their products. Such agreements can attract not only criminal consequences, but also civil claims under s. 36 of the *Competition Act* by individuals who paid increased prices for products as a result of the conspiracy. Class actions brought on behalf of purchasers who paid inflated prices for conspirators' products are now commonplace in the Canadian legal landscape.

It is in this context the problem of umbrella purchasers arises. Umbrella purchasers are individuals who purchased a product from a non-conspirator who was able to and did raise the price of its products as a result of the conspiracy. Umbrella purchasers have no direct or indirect commercial relationship with conspirators, yet they arguably suffered some harm as a result of actions taken by the conspirators. As articulated by Justice Perell in *Shah v LG Chem, Ltd*., "[t]he theory of umbrella liability is that cartel activity could create an 'umbrella' of supra-competitive prices that enable non-cartel members to set their prices higher than they otherwise would have under normal conditions of competition, thus affecting Umbrella Purchasers."

To date, Canadian courts have been profoundly divided on the question as to whether umbrella purchasers have a cause of action.

Several judges in both Ontario and British Columbia have held that umbrella purchasers do have a cause of action. Most recently, on August 18, 2017, the British Columbia Court of Appeal affirmed the viability of claims by umbrella purchasers in

Godfrey v Sony Corporation.

The decisions holding in favour of a cause of action are typically based on a strict textual interpretation of s. 36 of the *Competition Act*. The basic reasoning is simple: s. 36 provides a remedy for anyone who suffered loss or damage as a result of an anticompetitive conspiracy. Umbrella purchasers suffered such losses; *ipso facto* they must have a claim under s. 36.

Other courts have been more skeptical of such arguments. The strongest decision holding against such claims is the decision of Justice Perell in *Shah v LG Chem, Ltd*. In a lengthy analysis of the viability of such claims, Justice Perell identified four reasons that umbrella purchasers do not have a cause of action:

- Interpreting s. 36 as allowing a claim by umbrella purchasers would be inconsistent with restitutionary law;
- Allowing claims by umbrella purchasers liability would giving rise to indeterminate and uncircumscribed claims, contrary to legal policy about economic loss torts;
- The proposed new cause of action is unjust because defendants would be liable for the intervening independent pricing decisions of non-defendants, which break any causative link between umbrella purchasers and defendants; and
- To the extent that tort law has a role to play in behaviour modification and deterrence of wrongdoing, there is no need to extend liability to include compensation for umbrella purchasers.

On appeal to the Divisional Court, Justice Nordheimer upheld Justice Perell's decision and refused to certify the claims against umbrella purchasers. However, he disagreed with three of the four reasons identified by Justice Perell for not certifying umbrella purchaser claims, and instead held that only concerns about indeterminate and uncircumscribed liability justified not certifying such claims. While undoubtedly not the last word on the issue, this case is, to date, the only appellate authority on the matter.

Although not endorsed by the Divisional Court, there is significant merit in the third and fourth problems identified above. In my view, these problems give rise to both conceptual and practice problems with claims by umbrella purchasers.

The conceptual difficulty with claims by umbrella purchasers is that they create a cause of action in favour of individuals who purchased a product from a manufacturer who was acting independently of other parties. Competition law has never given

individuals a cause of action simply because a manufacturer chooses to raise its prices. Conscious parallelism, where different manufacturers consciously follow each other's prices without any actual agreement, is not actionable, even if it results in prices increasing to the detriment of consumers.

The practical difficulty is that allowing such claims will create significant costs and uncertainty in litigation, while not actually playing much of a role in deterring firms from engaging in conspiracies or compensating affected consumers.

On the one hand, the objectives of deterrence and compensation created by private rights of action for competition claims are not furthered to any significant degree by umbrella claims. Typically, in order for a conspiracy to be effective, it has to involve market participants with the lion's share of the market for a product. Otherwise, a conspiracy to raise prices would typically be ineffective, as the conspirators' coordinated increase in prices would be undercut by the remaining non-conspirator market participants. As a result, one would expect that non-conspirator participants in the market would constitute a relatively small share of the market, which in turn means that claims by umbrella purchasers should be relatively small. In turn, that means that the marginal deterrent effect of umbrella purchaser claims—when measured in the context of other civil, criminal, and regulatory penalties—is likely to be extremely modest.

Yet the cost of such marginal deterrence and compensation is high. In principle, in order for umbrella purchasers to establish their claims, they would need to show not simply that prices by the non-conspirators rose in respect of the conspiracy. Rather, they would need to establish that prices by the non-conspirators rose as a result of the increased prices by conspirators. Showing that necessarily brings non-parties into the litigation, as it requires access to highly confidential business decisions of non-conspirators. This is beneficial for lawyers, as both parties and non-parties' lawyers contest production motions, negotiate confidentiality orders, and review and produce reams of documents. However, except in perhaps the most unusual circumstances, it seems unlikely that benefits of umbrella purchaser claims will outweigh the collective transaction costs of plaintiffs, defendants, and non-parties associated with these endeavours.

Whether these considerations will prevail remains to be seen. Given the split between courts on the viability of such claims, further litigation is undoubtedly on the horizon.