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Voluntary Gift Cards: An Effective Strategy for Reducing Liability?

The recent admissions by supermarket chain Loblaws and a related group of companies that they engaged in conduct to fix the retail price of bread products have drawn significant public attention to price-fixing. And Loblaws' response to those revelations of price-fixing—including giving consumers gift cards to be used at Loblaws—has also attracted significant interest, not just from the public, but also from businesses and the antitrust and class actions bar. For organizations that have engaged in misconduct looking to make a public response, Loblaws' actions highlight both the potential benefits and risks of such voluntary remediation.

While public details remain limited, it appears that Loblaws discovered that it and related companies had been engaging in some form of retail price-fixing of bread products since as early as 2002. It also appears that Loblaws reported this conduct to the Competition Bureau, and it is publicly reported that Loblaws has obtained immunity from criminal prosecution as a result of such disclosure. While such immunity shields Loblaws from criminal prosecution, the ancillary consequences of its price-fixing remain: numerous class actions have been launched against Loblaws, and it has also faced public criticism and undoubtedly at least some damage to its brand.

To try to address these consequences, Loblaws announced in December 2017 that it would make available a $25 gift card to all consumers. The details of this program were made public in early January 2018. In brief, consumers were permitted to register on a special website. Customers that did so would have to declare that they had bought, but not provide proof or purchase of, bread products at one of several grocery stores. In exchange, consumers would receive a $25 gift card that could be used at Loblaws and certain other grocery stores. Loblaws has publicly estimated the cost of the program at between $75 million and $150 million, depending on consumer update.

The website announcing the terms of the gift card contained a limited release to which consumers would have to agree:

> In exchange for this twenty-five (25) Canadian Dollar Loblaw Card you hereby release and forever discharge Loblaw ("Loblaw" includes Loblaw Companies Limited, its

> parent corporation George Weston Limited and their affiliates as well as all of their current and former officers, directors, and employees) from any and all claims or causes of action (of whatever nature or kind) for damages, costs or other relief that you may have relating to or otherwise in connection with any overcharge on the price of packaged bread in the period between January 1, 2002 and March 1, 2015 to the extent of twenty-five dollars.

On its face, the effect of this release would be that consumers who obtained a $25 gift card would release Loblaws from the first $25 of liability in any settlement or damages award. The release would not, however, bar consumers from participating in a class action against Loblaws, nor would it extinguish or discount claims for any amounts to which consumers would become entitled in excess of $25.

Counsel to the representative plaintiffs in two proposed class actions immediately brought a challenge to Loblaws' purported release. Plaintiffs' counsel sought orders restricting Loblaws from continuing to communicate with the class in this manner

In his January 9, 2018 decision in *David v Loblaw*, Justice Morgan of the Superior Court of Justice held that there was nothing inappropriate with Loblaws' conduct, holding as follows:

> Loblaw has a right to engage in a marketing campaign, and it equally has a right to reach out to consumers to settle part of its exposure in class action litigation. As long as they have not misled anyone – and the explicit language of the application form and accompanying Release is appropriate and serves to counter any misinformation that the consumer may have gleaned from press coverage of the card program – both of these aims are acceptable and can be combined into one package.

Consequently, Justice Morgan held that Loblaws was free to continue to provide the gift cards and to seek to obtain releases in this form from recipients.

Crucially for Loblaws, however, Justice Morgan declined to decide what the effect of the provision of gift cards or the release would be. Justice Morgan noted that there has been some academic and judicial criticism of "coupon settlements" of class actions—namely, settlements where consumers are provided with payments that can only be used to purchase products or services from the settling party. While Justice Morgan noted that coupon settlements could be appropriate, the appropriateness of a settlement including coupon payments would have to be scrutinized by the judge deciding whether to

approve any settlement ultimately reached.

Noting that he was not in a position to know the terms of any settlement that might ultimately be reached, Justice Morgan declined to hold that either that the releases were enforceable or that the gift cards constituted a set-off against any ultimate damages award. The implication of this decision is that Loblaws will not have certainty from the Courts at this stage as to whether the gift cards it will provide to consumers will actually provide it with any relief from liability for its role in the price-fixing conspiracy. While Loblaws undoubtedly has a good argument that such gift cards should be taken into account in a subsequent settlement, that residual uncertainty places Loblaws, and other such companies, in a difficult position.

For companies faced with these circumstances, the *Loblaws* decision provides a roadmap of the difficult cost/benefit calculus. On one hand, voluntary restitution to consumers can have a number of salutary effects, including repairing the company's image in the public eye and potentially controlling the company's exposure in subsequent litigation. On the other hand, the fact that Courts appear unwilling to provide pre-authorization to the enforceability of such releases and set-offs means that companies engaging in such voluntary restitution face the risk that amounts voluntarily paid will not in fact constitute a set-off. In effect, the company faces the risk, albeit potentially a low one, of having to pay for such damages twice. Moreover, by asking consumers to sign a release in exchange for receiving such a gift card, the company potentially risks losing the goodwill and positive media exposure that the provision of such a gift card would otherwise generate.

Going forward, the best strategy for many firms will be to continue to make some form of voluntary restitution to consumers, just as Loblaws has done. However, if Courts continue to remain unwilling to pre-approve the effectiveness of such releases, firms will have to structure such voluntary restitution in such a way as to maximize the likelihood that a Court will subsequently agree that the releases are effective and that the payments are a set-off against any settlement or damages.

A good starting point for doing so is to use clear releases, accompanied by plain language explanations, as Loblaws did and Justice Morgan approved. However, companies looking to maximize the likelihood of setting off such payments against any subsequent settlement or damages award can also consider alternative forms of restitution to consumers. For example, instead of simply giving gift cards, companies can consider giving consumers the option to elect between receiving gift

cards or funds useable elsewhere, such as a prepaid credit card. Alternatively, if a company wanted to provide gift cards, it could discount the scope of the release: for example, it could provide a $25 gift card that could only be used at the company's stores, in exchange for which a consumer would agree to release its claim to only the first $10 of any settlement or damages. Each of those options would entail higher costs of the program for the firm, but would increase the likelihood that such voluntary restitution would be an effective release and set-off.

Businesses will ultimately receive guidance on these issues once this issue is adjudicated in the Loblaws litigation at the time of settlement approval or when a damages award is made. However, given that such time may be many years away, the complicated cost/benefit analysis remains.