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Class action nixed in alleged price-fixing case

Case involves brick colouring agents

It may only be \$112 each, but more than 1 million consumers have taken a much bigger hit in terms of loss of consumer protection from a recent decision of the Ontario Court of Appeal.

In a class-action case alleging price fixing against Bayer Inc. in Canada, Bayer Corp. of the United States, and Northern Pigment Company (Norpico), the province's highest court effectively killed the homeowner's right to recover any damages from the alleged price fixing.

The action claims that there was a conspiracy by the manufacturers and distributors of iron oxide pigments to fix and raise prices. These chemicals are colouring agents used in making bricks, paving stones and other building materials.

The allegation is that the price fixing scheme was contrary to the federal Competition Act. Since the case has not gone to trial, none of the allegations has been proved in court.

An investigation by the Competition Bureau was conducted and discontinued.

Between 1984 and 1992, the defendants in the case controlled between 90% and 100% of the Canadian market for iron oxide. The evidence indicated that assuming that the plaintiffs could establish their claim, the ultimate purchaser of concrete bricks in a \$150,000 home would have incurred an increased cost of between \$70 to \$112. Multiply that by 1.1 million homes and the potential damages could have been \$112 million.

Avininder Chadha and Renu Chadha of Heath Street, Richmond Hill, were the representative plaintiffs in a proposed class proceeding launched by class action lawyers Vincent Genova and Joel P. Rochon.

The Chadhas' new house was built in 1988 with bricks containing iron oxide pigment supplied by the defendants.

In July, 1999, Justice Robert Sharpe of the Superior Court of Justice allowed the Chadha action to be certified as a class proceeding. Under his ruling, the Chadhas were allowed to represent all Ontario residents with a similar claim.

The class action differs from a regular lawsuit because it involves many people, working together, to focus the power of the group against a single wrongdoer - often a large, multi-national corporation.

In many ways, a class action is preferable to one in which there might be more than a million plaintiffs. It allows access to justice for people who might not otherwise be able to afford a lawyer to have their day in court. It saves court costs and if it is successful, it punishes corporate wrongdoing.

The Chadhas did not actually buy the brick products from the defendants Bayer and Norpico. They did, however, buy a house which used brick products supplied by the defendants. The allegation was that as a result of the price-fixing conspiracy, the purchase price of products containing pigments was higher than what it would have been had there been an open competitive market.

The case claimed that the Chadhas suffered damages by overpaying for their home.

The decision of Justice Sharpe to permit the case to proceed as a class action was appealed twice - first to the Divisional Court, and then to the Ontario Court of Appeal. At the outset, Justice Sharpe had defined the class of plaintiffs who were permitted to sue as all homeowners or end users who suffered losses as a result of the defendants' agreement to increase or maintain the price of iron oxide or to restrict or lessen competition in that market.

The Divisional Court overturned the lower court decision and in January, the Court of Appeal agreed that the case could not proceed as a class action.

Paul J. Pape acted for the plaintiffs, John L. McDougall represented Bayer, and Kent E. Thomson was counsel for Norpico.

Bayer and Norpico successfully argued that any damages would not necessarily be suffered by all plaintiffs in the same way. If, for example, a price increase was not passed on but absorbed by the builder or other construction trade, the chain of damages to the end-user homeowner was broken. As well, not all homes built during the relevant time period contained the Bayer-Norpico pigments.

In other words, since each homeowner might have incurred different damages - or none at all - the case was not suitable for a class action.

Now, unless the case goes to the Supreme Court of Canada, each Ontario buyer of a new home built between 1984 and 1992 will be forced to prove that the bricks in the house contain Bayer-Norpico pigment, and that the price of the house was improperly increased as a result of the actions of the defendants. With maximum damages of only \$112 in each case, it seems unlikely that any of the 1.1 million cases will ever go to trial.

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