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In Advertising, Silence Can be Golden – or at least not Actionable

The Court of Appeal for Ontario, in a case involving an application to certify a proposed misleading advertising class action with respect to front loading washing machines[1], determined that the matter should not be certified as a class action. The case provides comfort for advertisers that they need not publicize all problems associated with their products.

It was alleged that Whirlpool negligently designed its early front loading machines, such that they were prone to developing an unpleasant smell as a result of mold and fungus ("bio-film") build up. Various causes of action were alleged, including breach of the express warranty provided by the manufacturer; breach of the implied warranty of fitness for purpose under the *Sale of Goods Act*; breach of the misleading advertising provision of the *Competition Act;* economic loss for negligent design of a non-dangerous consumer product; and waiver of tort.

The Court of Appeal (Hoy, ACJO) rejected each of these possible causes of action. Associate Chief Justice Hoy noted that the express warranty was silent with respect to negligent design – it only spoke to negligence related to materials or manufacturing. The implied warranty in the *Sale of Goods Act* did not apply because there was no direct contract of sale between Whirlpool and consumers. The claim for economic loss for negligent design of a non-dangerous consumer product failed because the Court of Appeal found, as a matter of law, that there could be no claim

[1] *Aurora et al v. Whirlpool Canada Ltd.,* 2013 O.N.C.A. 657, October 31, 2013

law for economic loss resulting in diminution of value due to negligent design of a consumer product. With respect to waiver of tort, because there was no predicate wrongdoing upon which to base waiver of tort the Court concluded that there was no basis for a cause of action in waiver of tort.

Finally, and of direct relevance with respect to the misleading advertising claim, the plaintiffs alleged that Whirlpool's actions were in breach of Section 52 of the *Competition Act*, and therefore gave rise to a claim under Section 36 of the *Act,* based on representation by omission. The allegation was that Whirlpool did not tell the public its front loading washing machines did not self clean in the same way as its top loading washing machines did, and did not advise that they were susceptible to the build up of bio-film, resulting in unpleasant odors.

Whirlpool argued that while, in some circumstances, misrepresentation by omission may be actionable – although not necessarily a breach of the *Competition Act* – an allegation that there is misrepresentation by omission when there was no positive misrepresentation with respect to the matter cannot support a claim. The Court stated that while Section 52 of the *Competition Act* prohibits material, false or misleading representations, unlike statutes such as provincial securities legislation, which require the provision of "full, true and plain disclosure of all material facts", the *Competition Act* does not impose a general duty to disclose. The Court of Appeal stated "I would note and adopt the holding in *Williams v. Canon*[2]... that 'the failure to disclose the alleged defect cannot be representation for the purposes of Section 52'."

This case, at the level of the Ontario Court of Appeal, represents strong authority that failure to disclose something negative will not constitute breach of Section 52 of the *Competition Act*. The decision will be authority in both the civil as well as the criminal

[2] *Williams v. Canon Canada Inc.*, [2011] O.J. No. 5049, 2011 ON SC 6571

context. Silence, really may be golden. As noted in the now vaguely superannuated but still much loved *Purolator*[3] case:

> "Advertising…by its nature, it is one-sided and usually does not convey a full and balanced analysis….competitors may complain that it does not depict a full and balanced picture…Courts should be reluctant to intervene in the competitive marketplace unless the advertisements are clearly unfair".

Confirmation by the Court of Appeal, almost 20 years after *Purolator*, that advertisers do not have to tell both sides of the story – that omissions, absent misleading positive assertions, do not constitute misleading advertising – provides useful certainty. Advertisers may tell their story, honestly, but need not share all the possible negatives surrounding their products.

by James Musgrove and Dan Edmondstone

[3] *Purolator Courier Ltd. v. United Parcel Services Canada Ltd.*, (1995), 60 C.P.R. (3d) 473.

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a cautionary note