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A risky rule of thumb for estimating damages in competition class actions

Using rules of thumb to generate estimates can be very useful in a variety of circumstances: for example, when the detailed information necessary to generate a precise answer is unavailable, or when it's too difficult to analyze that detailed information. Lawyers use such rules of thumb in a number of circumstances, sometimes as an initial rough estimate, and sometimes to confirm the results of more detailed analysis.

While those rules of thumb can be useful, care has to be taken when applying them. Taken beyond their natural limits, rules of thumb can generate results that mislead more than elucidate. The potential risk of over-reliance on one particular rule of thumb routinely used in class actions can be seen in the December 2016 decision of the Ontario Superior Court of Justice in *Urlin Rent a Car v Furukawa Electric.*

That decision arose in the context of a number of different class actions alleging price-fixing conspiracies in the auto parts industry. The precise issue before the Court in this decision was whether to approve settlements that had been entered into between the plaintiffs and two defendants, Sumitomo and GS Electech. Under the *Class Proceedings Act*, in order to approve the settlements, the Court had to conclude that the proposed settlements were fair, just and reasonable and in the best interests of the class.

In this case, after considering the evidence, the Court concluded that the proposed settlements were fair, just and reasonable and in the best interests of the class, and the Court approved the settlements. Those results are not themselves particularly interesting or controversial. However, what is interesting is the Court's discussion of a commonly used rule of thumb.

Canadian class actions—particularly in domains like price-fixing or product liability—routinely follow similar class actions that were started in the United States. By the time Canadian class actions are settled, a settlement has often already been reached and approved by the Courts of the United States. This has led some lawyers and judges to estimate the magnitude of potential settlements in Canada by reference to the settlements

reached in the corresponding American class actions.

The rough rule of thumb that is sometimes applied is that settlements in Canadian class actions will be in the range of one-tenth of the value of the American settlement. The basis for this is that because Canada has approximately one-tenth the population and one-tenth the GDP of the United States, it stands to reason that, in the absence of any other information, such a ratio similarly applies to both the volume of commerce of the particular product and, in turn, the damages.

The Court in *Urlin Rent a Car* applied precisely this reasoning at various points in its decision. For example, at paragraph 9 of its reasons, the Court wrote as follows:

> Sumitomo settled with the indirect purchaser class in the U.S. (i.e. the equivalent of the Canadian class) for US$47,127,920. This sum includes amounts paid for ECU claims since there is no separate ECU case in the U.S. Given that the U.S. comparator is often used as one measure of the zone of reasonableness, it would follow that any Canadian settlement over and above $4.7 million would fall within said zone. The $10.7 million settlement herein is more than two times larger. This is certainly evidence that the settlement is fair and reasonable.

While the use of this one-tenth rule of thumb may often be reasonable, it must be applied with particular caution in the context of competition law matters. Indeed, in that domain, special considerations apply that might make a one-tenth rule too strict.

To see why, one has to break down each of the implicit assumptions that underpin the application of the one-tenth rule of thumb. First, as noted above, one assumes that Canada's population and gross domestic product are approximately one-tenth those of the United States; this is approximately true. Second, one has to assume that the product at issue in the class action is a typical product that is used roughly equally on a per capita basis by individuals in the United States and Canada. Although this will not be true for each any every product, given the cultural similarities and deep economic integration between Canada and the United States, this may be a reasonable assumption in many cases, particularly in the absence of any additional information.

The third implicit assumption is that the harm to each consumer, and in turn the damages owing to each consumer, resulting from the alleged misconduct is roughly the same in the United States and Canada. This implicit assumption is

where the rule of thumb starts breaking down in the antitrust law context.

Even assuming that the amount of the overcharge resulting from the conspiracy is identical in the United States and Canada (which may or may not be the case), that same overcharge can lead to very different damages in the United States and Canada. The reason for this is that under federal antitrust law in the United States, as well as antitrust statutes of some states, damages for breaches of those statutes are automatically trebled. By contrast, Canada has no such treble damages provisions; companies' liability for a price-fixing conspiracy is limited to the total loss to purchasers results from the overcharge. What this means is that, in theory, for the same overcharge on the same product, an American consumer may be entitled to three times the damages to which the Canadian consumer is entitled.

Taking that into account, the rule of thumb that damages or a settlement in a Canadian class action would be one-tenth of what they are in the comparable American proceeding may be excessive in the competition law context. In that domain, the comparable number may in fact be closer to one-thirtieth the value of the settlement in the United States, depending on the circumstances.

This highlights the dangers that can arise from using what is merely a rough rule of thumb as a definitive guide. While rough rules can be useful tools, they have to be used with appropriate care and in conjunction with more reasoned analysis. Whether a rule of thumb of one-tenth, or even one-thirtieth, will be a good or accurate rule of thumb will depend very much on the circumstances of each case. Indeed, it would dangerous for Courts to establish a blanket principle that settlements will presumptively not be fair, just and reasonable unless they total at least one-tenth of the analogous U.S. settlement.