

## Legal update

### Quebec Court of Appeal confirms CPA does not apply to the sale of prescription drugs

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**May 2019**

**Dispute resolution and litigation**

**Class actions**

**Pharmaceuticals**

**Product liability**

In a May 8 decision, the Quebec Court of Appeal confirmed that the Quebec *Consumer Protection Act* (CPA) does not apply to the sale of prescription drugs. The decision, *Brousseau v Laboratoires Abbott limitée*, 2019 QCCA 801 provides critical guidance on the liability regime in Quebec for manufacturers of pharmaceutical products facing product liability claims.

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#### Relevant facts

Abbott Laboratories manufactured a drug commercialized under the name Biaxin®. Abbott was named as a defendant in a class action where the plaintiff alleged the use of the drug causes side effects that had not been disclosed to users. The class action was based on *Civil Code of Quebec* (CCQ) provisions outlining the manufacturer's liability regime relating to security defects, but also on section 53 of the CPA, which allows a consumer to commence an action in damages directly against the manufacturer of a good affected with a security defect. It is important to note that the means of defense that can be raised to oppose an action based on section 53 CPA are more limited than under the CCQ since the manufacturer is not allowed to claim that the state of scientific knowledge made it impossible to know of the defect.

#### The decision of the Court of Appeal

The Court of Appeal decision analyzes a number of important issues that are relevant in the context of a class action based on an alleged breach of the duty to warn imposed on drug manufacturers. As a result of that analysis, the court dismissed the action and held that Abbott had adequately disclosed the risks associated with the use of the product.

As it relates to the CPA claim, the court dismissed the action on the grounds that the CPA provisions were simply not applicable to the sale of prescription drugs. According to the court, a pharmacist who sells prescription drugs does not act as a merchant within the meaning of the CPA, but rather acts as a health professional. As a result, the sale by a pharmacist of prescription drugs does not lead to a contract between a consumer and a merchant and therefore the CPA does not apply.

In support of its conclusion, the court also noted that the CPA's bar on a manufacturer raising a defense based on the state of science (as is available under the second paragraph of section 1473 CCQ) is difficult to reconcile with the

specificities of drug development. The court held the Quebec legislature could not have intended to impose an absolute presumption of knowledge on drug manufacturers of all risks and dangers that could materialize after the drug enters the market.

It is also to be noted the Court of Appeal confirms the applicability of the learned intermediary doctrine in the context of Quebec civil law. Although many decisions from lower courts had applied this theory in the past, this is the first decision from the Court of Appeal confirming the applicability of the learned intermediary doctrine in Quebec. This doctrine is an important defense available to prescription drug manufacturers to establish they have met their duty to warn.

## Key takeaway

As a general statement, the provisions of the CPA impose on manufacturers a liability regime that is more stringent than that provided under the general principles of the CCQ. In addition, the CPA also provides for a potential award of punitive damages in certain circumstances. The Court of Appeal decision confirming that the CPA does not apply to the sale of prescription drugs thus represents an important legal development in the field of manufacturers' liability for pharmaceutical companies.

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