Yale Law Journal

Volume 116
Issue 1 *Yale Law Journal*

Article 6

2006

# BlackBerry Users Unite! Expanding the Consumer Class Action To Include a Class Defense

Nicole L. Johnson

THE YALE LAW JOURNAL

COMMENT

# BlackBerry Users Unite! Expanding the Consumer Class Action To Include a Class Defense

On March 3, 2006, Research in Motion, Ltd. ("RIM") and NTP, Inc. announced a $613 million settlement, avoiding a permanent injunction that would have prevented RIM from providing service to more than three million BlackBerry users nationwide.[1] The anxiety of consumers was substantial. Individual users often have a strong emotional attachment to their handheld e-mail devices. Businesses whose employees rely on BlackBerry devices for communication potentially faced substantial economic disruption.[2] Experts have estimated that enterprise BlackBerry users faced costs of approximately $845 per BlackBerry to switch to an alternate device that offered similar services, totaling an estimated $1.5 billion nationwide.[3]

Though the March settlement allayed consumer fears, the respite was short-lived, as rival Visto Corp. filed suit against RIM on April 28, seeking a

1. *See* NTP, Inc. v. Research in Motion, Ltd., 418 F.3d 1282 (Fed. Cir. 2005).

2. *See* Ian Austen, *A Nightmare for Corporate America: Life Without the BlackBerry*, INT'L HERALD TRIB., Dec. 6, 2005, at 16, *available at* http://www.iht.com/articles/2005/12/06/business/berry.php (asking readers, "What if your BlackBerry screen went dark?" and describing the anxiety of corporate America over the potential service shutdown); Grant Gross, *RIM to Patent Case Judge: BlackBerry Too Important To Shut Down*, IDG NEWS SERVICE, Feb. 24, 2006, http://www.pcworld.com/article/id,124868-page,1/article.html (noting that BlackBerry devices play a crucial role in important industries such as hospitals, utilities, and banks); Carmen Nobel, *Hope, Fear Surround BlackBerry Blackout Scare*, EWEEK.COM, Dec. 5, 2005, http://www.foxnews.com/story/0,2933,177542,00.html ("BlackBerry customers and industry observers remained hopeful, concerned and in the dark . . . .").

3. Andrew R. Hickey, *Scared of a BlackBerry Shutdown? The Cost To Switch Could Be Equally Terrifying*, SEARCHMOBILECOMPUTING.COM, Feb. 8, 2006, http://searchsecurity.techtarget.com/originalContent/0,289142,sid14_gci1165258,00.html.

permanent injunction and monetary damages.[4] While a new round of litigation over the BlackBerry has once again threatened consumer interests, consumers cannot act in their own defense. There is currently no procedural mechanism for consumers, typically decentralized and not named as defendants, to intervene as a class in a suit in which a patent holder sues a product manufacturer or service provider for infringement.[5]

This Comment proposes a procedural solution to the obstacles faced by decentralized consumers. The "consumer class defense" would allow consumers to protect those interests that are inadequately represented by the producer defendant. Assaf Hamdani and Alon Klement have recently proposed the class defense to allow certification of defense classes at the instigation of defendants rather than plaintiffs.[6] They recommend this procedural device in the limited circumstances of dispersed individual defendants faced with identical suits. This Comment takes the Hamdani and Klement proposal a step further and suggests that the class defense has a more expansive applicability, not only for achieving economies of scale and overcoming collective action problems in litigation, but perhaps more importantly in obtaining settlements. This defense is particularly appropriate in patent litigation that threatens to bar the consumer from the full use and enjoyment of an infringing product. In such situations it is often in the consumers' interest to obtain a settlement that resolves the uncertainty of a possible future injunction and avoids the costs of developing and switching to an alternative product.

## I. WHY CREATE A CONSUMER CLASS DEFENSE?

The consumer class defense provides a mechanism for consumers to act collectively to pursue litigation or settlement when their interests diverge from

4. Complaint, Visto Corp. v. Research in Motion, Ltd., No. 2:06-cv-00181-TJW (E.D. Tex. Apr. 28, 2006).

5. The Supreme Court's recent decision in *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006), may decrease the frequency of preliminary injunctions in patent controversies. However, Visto—the plaintiff in the most recent RIM suit—is a direct competitor and therefore has a legitimate claim to an injunction even after *eBay*. James Alan Miller, *Up-and-Comer Visto Challenges RIM with Mobile E-Mail*, PDASTREET.COM, Aug. 4, 2004, http://www.pdastreet.com/articles/2004/8/2004-8-4-Up-And-Comer.html (describing Visto as an up-and-coming competitor of RIM).

6. Assaf Hamdani & Alon Klement, *The Class Defense*, 93 CAL. L. REV. 685, 685 (2005) (addressing the failure of the current system to provide "adequate procedural protection to defendants who are individually sued by a single plaintiff over similar questions of fact or law").

those of the producer defendant.[7] Consumers as a class can opt to intervene in pending patent suits and either consolidate resources with the producer defendant or reach a settlement independently. Though a defendant class poses unique due process concerns, the use of settlement-only or opt-in classes can ensure that due process is satisfied.[8] The primary advantage of the consumer class defense is internalization by the litigants of consumer interests that will encourage efficient outcomes to patent disputes.

Under the current system, when an alleged patent holder decides to sue and the producer defendant determines its litigation strategy, the impact of the patent litigation on consumers, whether positive or negative, is an externality.[9] This failure of the plaintiff and the named defendant to take all interests into account in the cost-benefit calculation leaves open the possibility of inefficient litigation decisions. At the margins, the addition of consumer interests to the decision-making process and the settlement pool is likely to have an impact on the original parties' choice of litigation tactics and on whether a settlement can be reached.[10]

The class defense advances the interests of the producer defendant, consumer defendants, and the plaintiff, with little possibility that any party will find itself in a less desirable position. In litigation, the class defense will generally be a Kaldor-Hicks improvement[11] because any value the plaintiff loses from patent invalidation will be gained by the consumers. In reaching settlements, the class defense is a Pareto improvement[12]: the plaintiff receives a higher settlement, consumers may continue to use the product, and the producer is no worse off.

For the producer defendant, the class defense can provide the benefit of additional funds from consumers, which expands both settlement and litigation opportunities. At the same time, the class defense does not limit the litigation choices that are otherwise available to the producer. Though

---

7. For a discussion of circumstances in which the producer might find it impossible to optimize consumer welfare while preserving its own, see *infra* Part III.

8. *See infra* Part III.

9. Harold Demsetz has defined externalities as costs or benefits imposed on third parties by another individual's voluntary action. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348 (1967). A legal regime can facilitate internalization of externalities through allocation of rights, including procedural rights.

10. The class defense can also influence the plaintiff's willingness to settle. *See infra* Part III.

11. Kaldor-Hicks efficiency occurs when net gains exceed net losses. *See, e.g.*, ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 43-44 (3d ed. 2000).

12. A Pareto improvement increases overall welfare without decreasing the welfare of any particular individual, so that every party is at least as well off as before the change. *See, e.g.*, *id.* at 12.

consumers can intervene in a suit, they can neither force nor block a settlement.[13] Therefore, the producer defendant may continue to litigate or settle independently from consumers.

Consumers also risk little and have much to gain by opting into a class defense. Consumers can utilize the class defense with no risk of liability by creating the class for settlement only.[14] The law also weighs heavily against extraction of damages from end-user consumers for patent infringement.[15] Under current doctrine, a patent holder cannot obtain multiple recoveries for a single injury – for example, by obtaining damages from both an infringer and a customer of the infringer.[16] Furthermore, the patent holder bears the burden of proving the amount of damages, i.e., a "reasonable royalty," for end consumers.[17] Calculation of a reasonable royalty can be complex and difficult to prove, and it is unique for each individual consumer defendant depending on the infringing product's value of use. Because of the difficulty and corresponding cost, a rational patent holder will typically opt to obtain damages from the producer defendant rather than from consumers except in cases of producer insolubility. Furthermore, if the patent holder is a rival producer, the plaintiff company will not wish to alienate consumers as potential customers by seeking damages from them. All of these reasons

13. Parties may dismiss a civil suit without court approval. *See, e.g.*, Gardiner v. A.H. Robins Co., 747 F.2d 1180, 1189 (8th Cir. 1984). The plaintiff may dismiss fewer than all the defendants. *See, e.g.*, Pedrina v. Chun, 987 F.2d 608, 609-10 (9th Cir. 1993).

14. The Supreme Court recognized nearly ten years ago that "the 'settlement only' class has become a stock device." AmChem Prods., Inc. v. Windsor, 521 U.S. 591, 618 (1997).

15. It is difficult to obtain damages from end users who cause no direct lost-profit harm to the patent holder. *See* Paul M. Janicke, *Contemporary Issues in Patent Damages*, 42 AM. U. L. REV. 691, 696 (1993) (stating that the focus of the courts is on harm done to the plaintiff); *see also* Roger D. Blair & Thomas F. Cotter, *An Economic Analysis of Seller and User Liability in Intellectual Property Law*, 68 U. CIN. L. REV. 1, 3 (1999) (noting that consumers not in the chain of production are almost never sued for patent infringement). It is more common for plaintiffs to obtain damages from the customer of an infringer when the customer resells the product. *See, e.g.*, Kahn v. Gen. Motors Corp., 889 F.2d 1078 (Fed. Cir. 1989) (concerning a suit against General Motors for the use of an infringing stereo receiver in its cars); William Gluckin & Co. v. Int'l Playtex Corp., 407 F.2d 177 (2d Cir. 1969) (concerning a suit against Woolworth for the sale of an infringing brassiere).

16. *See* Jerry R. Selinger & Jessica W. Young, *Suing an Infringing Competitor's Customers: Or, Life Under the Single Recovery Rule*, 31 J. MARSHALL L. REV. 19, 28-29 (1997) (discussing applications of the single recovery rule).

17. Transclean Corp. v. Bridgewood Servs., Inc., 290 F.3d 1364, 1370 (Fed. Cir. 2002). Because an end user does not generate lost profits for the patent holder, damages are the amount of a "reasonable royalty," which requires a showing of the value derived from the use of the patented item. Norian Corp. v. Stryker Corp., 363 F.3d 1321, 1333 (Fed. Cir. 2004).

support the conclusion that patent litigation poses little risk to consumers and is not an obstacle to the success of the class defense.

## II. SOLUTIONS PROVIDED BY THE CONSUMER CLASS DEFENSE

There are several scenarios in which a producer defendant is likely to have interests sufficiently divergent from those of consumers to justify independent consumer representation. Such circumstances include when settlement is not a viable option for the producer defendant, when the producer defendant is unable to evaluate consumers' willingness to pay for continued use of the product, or when consumers can benefit from their position as potential customers in a competitive market.

First, the producer defendant may face a "do or die" situation, in which settlement is not a viable option – for example, if manufacture of the patented item is the company's primary business, or if the patentee is a competitor. With the consumer class defense, consumers may obtain their own settlement with terms by which they may continue to use and obtain service for the purchased product, perhaps even from an alternate source if necessary. In the RIM suit, BlackBerry users might have negotiated a settlement with NTP under which they could obtain service from another provider if NTP was unwilling to settle with RIM.

Second, a producer defendant may face an informational problem in determining the appropriate settlement amount or the point at which to discontinue litigation. In theory, producer defendants can extract the cost of settlement by charging higher prices for their products. However, it is more difficult for a producer to determine each individual consumer's willingness to pay for use of the product and to implement a price discrimination policy at the time of sale than for consumers to provide information about their own preferences directly. The consumer class defense allows consumers to provide information as to the amount they are willing to pay through the settlement process, and it thereby reduces the information costs faced by producers.

Finally, consumer and producer interests may diverge when the producer and the plaintiff are competitors. If the consumer defendants are potential customers of the plaintiff, the plaintiff may be more willing to negotiate a favorable settlement with consumers than with its rival producer. The consumer class has a privileged position and may use consumer goodwill to extract a favorable settlement. In sum, the class defense not only incorporates consumer interests into the litigation decisions of the defendants, but also inserts consumer preferences into the plaintiff's cost-benefit analysis.

## III. THE PROCEDURAL MECHANICS OF A CONSUMER CLASS DEFENSE

In most circumstances the consumer class defense satisfies the requirements for standing, intervention, and certification of a class.[18] The only additional procedural device necessary to render the consumer class defense viable is a mechanism for certification of a class of defendants at their own initiation.

Consumers have standing in any suit addressing the validity of a patent upon which their use may have infringed.[19] Though consumers may be unaware that a device is patented, knowledge is irrelevant to determining infringement. All consumers who "use" a patented technology without the permission of the patent holder are potential infringers.[20]

Consumers also satisfy the requirements for intervention under Rule 24 of the Federal Rules of Civil Procedure, which allows consumers to enter a suit even without the cooperation of the producer defendant.[21] Rule 24 further states that intervention may be denied when "the applicant's interest is adequately represented by existing parties."[22] The adequate representation exception tailors intervention to fit precisely those cases in which consumers ought to be allowed to intervene. If consumer interests are already adequately represented, then inclusion of a consumer class in the suit only adds

18. The five elements certified under Rule 23(b)(3) are: (1) the class is sufficiently numerous; (2) there are questions of law or fact in common; (3) the claims or defenses of the representative are typical of the class; (4) the representative parties fairly and adequately protect the interests of the class; and (5) common questions of law or fact predominate, such that a class action is superior to other methods for fair and efficient adjudication. FED. R. CIV. P. 23(a)-(b). A class of consumers is often numerous and the independent coordination of litigation tactics extremely difficult, making joinder impracticable. The question of the validity of the patent and the corresponding claims or defenses are not only common to the class but identical for all class members. A consumer class defense might also satisfy FED. R. CIV. P. 23(b)(1)(B), which states that a class action can be maintained if "adjudications with respect to individual members of the class . . . would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests."

19. DONALD S. CHISUM, CHISUM ON PATENTS § 21.03[6][b] (2005).

20. Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476, 484 (1964).

21. FED R. CIV. P. 24(a). ("[A]nyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest . . . ."). The requirements of Rule 24 are met because the outcome affects the consumers' legal status as potential patent infringers. Alternatively, the producer defendant could instigate permissive joinder of the consumer class under FED. R. CIV. P. 20(a).

22. *Id.* 24(a)(2).

complexity without corresponding gains. Rule 24 provides judges with a discretionary tool to limit intervention by consumers to situations in which their interests are likely to have a marginal impact on litigation choices, that is, when exclusion of consumer interests is likely to result in inefficiencies.[23]

Due process concerns are the primary objection to class actions as a procedural device. Due process requires that individuals not be deprived of legal rights without "notice plus an opportunity to be heard and participate in the litigation."[24] With a defendant class, the concern is that individual members may become liable without knowledge or opportunity to partake in their own defense. However, classes certified for settlement only do not risk involuntary liability as long as the settlement pool comprises only voluntary payments contingent upon settlement.[25]

An opt-in rather than an opt-out class also ensures that only individuals who knowingly and voluntarily accept the risk of liability can become subject to it.[26] The disadvantage of an opt-in class is the incentive to free-ride, i.e., consumers might refuse to opt in or might contribute less than other members of the class. However, the more likely it is that an individual's participation is essential to the success of the venture, the less likely she is to free-ride.[27] Therefore, a rational course of action for large-scale consumers is to negotiate contingent contribution agreements, so that the participation of each entity is contingent upon participation by others.[28] Settlements can also be structured to exclude from the benefits of the agreement individuals or entities who opt out of the class or who fail to contribute a minimum per-product amount.[29] Insofar

---

23. Though this determination may be difficult for judges to make, a presumption against intervention would maintain the current baseline and allow intervention only when consumer interests are substantial.

24. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).

25. Though one can imagine settlement terms that might extinguish future rights of consumer class members, the judge must still approve the agreement as fair to all parties. FED. R. CIV. P. 23(e).

26. *See* Hamdani & Klement, *supra* note 6, at 721-22.

27. *See* Ian Ayres & Peter Cramton, *Relational Investing and Agency Theory*, 15 CARDOZO L. REV. 1033, 1048 (1994) (analyzing free-riding of shareholders in corporate takeovers).

28. *See* MICHAEL TAYLOR, THE POSSIBILITY OF COOPERATION 104 (1987) (asserting that even if some entities free-ride, other actors may find it rational to agree to cooperate conditionally); *see also* Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2323-24 (2000) (stating that free-rider problems are reduced when contracts are contingent upon a sufficient number of others signing to ensure the viability of the venture).

29. Hamdani and Klement suggest that the free-rider problem for contributions to attorney's fees could be overcome by shifting the class defendant's attorney's fees onto the plaintiff when the plaintiff's suit is unsuccessful. Hamdani & Klement, *supra* note 6, at 691.

as judges must take an active role in any class action suit to ensure fairness to all parties, little procedural change need be made to overcome the due process objections to the consumer class defense.[30]

## IV. THE CLASS DEFENSE AND THE BLACKBERRY LITIGATION

In the recently settled suit between NTP and RIM, a consumer class defense would have allowed consumers, including large corporate firms that rely on BlackBerry devices for critical communication, to protect their interests and take action in their own defense. BlackBerry users might have obtained an earlier settlement or might have been assured that they could reach a settlement regardless of a standoff between the parties.

The issue is again raised by the Visto suit. Though Visto claims that it will pursue an injunction at all costs, it may take a different position with respect to BlackBerry users who are potential Visto customers. RIM, as the representative of consumer interests, may be unable to maximize consumer welfare because it lacks the leverage afforded by consumer goodwill.[31] To avoid alienating current BlackBerry users, instead of seeking an injunction at all costs, Visto might settle with them or allow a limited-time license during which they may change services without interruption. However, under the current procedural system, consumers may well face an injunction if the cost of consumer alienation to Visto is outweighed by the benefits of preventing RIM from providing BlackBerry service.

In short, with the consumer class defense, consumers would no longer have to rely on producers to defend their interests. This procedural device is a creative and potentially powerful mechanism to pool interests and resources, maximize efficient litigation decisions, and grant consumers a voice. The consumer class defense empowers consumers who are otherwise rendered helpless in protecting their own interests. With this defense, suits over the latest technologies will not disrupt the business world, but can be resolved in advance of an injunction by both patent holders and consumers.

NICOLE L. JOHNSON

30. *See* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 940 (1998) ("The need for the judge to play a more active part . . . at the critical stages of a class action, and especially in passing on the fairness of a settlement, is reflected in Rule 23 itself, in the cases, and in the literature." (footnotes omitted)).

31. *See supra* Part III.

# THE YALE LAW JOURNAL

NOVEMBER 2006 VOLUME 116, NUMBER 2