

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

LUIGI DEL GUERCIO o/a WESTOWN SHOE CLINIC

Plaintiff

- and -

BAYER INC., BAYER A.G., BAYER MATERIAL SCIENCE A.G., BAYER MATERIAL SCIENCE
LLC (formerly BAYER POLYMERS LLC), BAYER CORPORATION
CROMPTON CORPORATION, CROMPTON CANADA CORPORATION, CROMPTON
CO./CIE. (formerly UNIROYAL CHEMICAL CO./CIE.), UNIROYAL CHEMICAL COMPANY
INC., FLEXSYS NV, FLEXSYS AMERICA LP,
FLEXSYS RUBBER CHEMICALS LTD., and DUSLO AS

Defendants

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff.
The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU

WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$1000.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400.00 for costs and have the costs assessed by the court.

Date February , 2005

Issued by _____
Local Registrar

Address of court office London Court House
Civil, Landlord/Tenant Section
Group Floor, Unit "A"
80 Dundas Street
London, ON N6A 6A3

TO: Bayer Inc.
77 Belfield Road
Etobicoke, ON
M9W 1G6

AND TO: Bayer A.G.
Postfach D-51368
Leverkusen, Germany

AND TO: Bayer Material Science A.G.
Postfach D-51368
Leverkusen, Germany

AND TO: Bayer Material Science LLC
100 Bayer Road, Building 4
Pittsburgh, PA
15205-9741 USA

AND TO: Bayer Corporation
100 Bayer Road, Building 4
Pittsburgh, PA
15205-9741 USA

AND TO: Crompton Corporation
199 Benson Road
Middlebury, Connecticut
06749 USA

AND TO: Crompton Canada Corporation
3 Glencrest Blvd.
Toronto, Ontario
M4B 1L2

AND TO: Crompton Co./Cie.
25 Erb St.
Elmira, Ontario
N3B 3A3

AND TO: Uniroyal Chemical Company Inc.
199 Benson Road
Middlebury, Connecticut
06749

AND TO: Flexsys NV
Woluwe Garden
Woluwedael 24/3
St. Stevens Woluwe, 1932
BELGIUM

AND TO: Flexsys America LP
260 Springside Drive
P.O. Box 5444
Akron, OH
44334-0444
USA

AND TO: Flexsys Rubber Chemicals Ltd.
Ruabon Works, Cefn Mawr
Wrexham, LL14 3SL
United Kingdom

AND TO: Duslo AS
P.O.Box 33
927 03 Šafa 3
Slovak Republic

CLAIM

1. The plaintiff claims on behalf of itself and other persons in Canada who are similarly situated:
 - (a) general damages for conspiracy in the amount of \$30,000,000.00;
 - (b) general damages for intentional interference with economic relations in the amount of \$30,000,000.00;
 - (c) general damages for conduct that is contrary to Part VI of the *Competition Act*, R.S.C. 1985, Chap. C-34 in the amount of \$30,000,000.00;
 - (d) punitive and exemplary damages in the amount of \$5,000,000.00;
 - (e) costs of investigation pursuant to Part VI of the *Competition Act*, R.S.C. 1985, Chap. C-34 s. 36;
 - (f) pre-judgment interest at the rate of 10% compounded annually or as otherwise ordered by the Honourable Court;
 - (g) costs of this action on a solicitor and client basis; and
 - (h) such further and other relief as this Honourable Court awards.

The Plaintiff

2. The plaintiff operates a shoe repair business in London, Ontario. At all relevant times, the plaintiff purchased products made with or containing rubber chemicals including accelerants and antidegradants in the course of his business.

The Defendants

3. The acts alleged in this complaint to have been done by each defendant were authorized, ordered and done by its officers, directors, agents, employees or

representatives while engaged in the management, direction, control or transaction of its business affairs.

4. Various persons and/or firms, not named as defendants herein, may have participated as co-conspirators in the violation alleged herein and may have performed acts and made statements in furtherance thereof.

The Bayer Companies

5. Bayer Inc. is a Federal corporation with its head office in Etobicoke, Ontario ("Bayer Canada"). Bayer Canada is a subsidiary of Bayer A.G. At all relevant times, Bayer Canada manufactured, marketed, sold and/or distributed rubber chemicals in Canada.
6. Bayer Material Science LLC, formerly known as Bayer Polymers L.L.C. ("Bayer Polymers") is a U.S. corporation registered in Delaware, and is a subsidiary of Bayer A.G. Its principal place of business is in Pittsburgh, Pennsylvania. At all relevant times, Bayer Polymers manufactured, marketed, sold and/or distributed rubber chemicals in Canada directly or indirectly through an agent, affiliate or subsidiary.
7. Bayer Corporation ("Bayer America") is a U.S. corporation with its principal place of business in Pittsburgh, Pennsylvania. It is a subsidiary of Bayer A.G. At all relevant times, Bayer America manufactured, marketed, sold and/or distributed rubber chemicals in Canada directly or indirectly through an agent, affiliate or subsidiary.
8. Bayer Material Science A.G. is a German corporation with its principal place of business in Germany ("Bayer Material Science"). At all relevant times, Bayer Material Science manufactured, marketed, sold and/or distributed rubber chemicals in Canada directly or indirectly through an agent, affiliate or subsidiary.
9. Bayer A.G. is a German corporation with its principal place of business in Germany ("Bayer Germany"). It is the parent company of Bayer Material Science, Bayer Canada,

Bayer Polymers, and Bayer America. At all relevant times, Bayer Germany manufactured, marketed, sold and/or distributed rubber chemicals in Canada directly or indirectly through an agent, affiliate or subsidiary.

10. The business of each of Bayer Canada, Bayer Germany, Bayer America, Bayer Material Science and Bayer Polymers (collectively "Bayer") is inextricably interwoven with that of the other and each is the agent of the other for the purposes of the manufacture, marketing, sale and/or distribution of rubber chemicals in Canada and for the purposes of the conspiracy described hereinafter.

The Crompton Companies

11. Crompton Corporation is a corporation duly registered in Delaware. Its headquarters and principal place of business are in Middlebury, Connecticut. Crompton Corporation has offices in Canada at Elmira, Ontario and Guelph, Ontario. It acquired Uniroyal Chemical Company Inc. ("Uniroyal") in 1996. At all relevant times, Crompton Corporation manufactured, marketed, sold and/or distributed rubber chemicals in Canada directly or indirectly through an agent, affiliate or subsidiary.
12. Crompton Co./Cie. is an extra-provincial corporation. Its principal place of business in Ontario is in Elmira. Crompton Co./Cie. is an agent, affiliate and/or subsidiary of Crompton Corporation. At all relevant times, Crompton Co./Cie. manufactured, marketed, sold and/or distributed rubber chemicals in Canada directly or indirectly through an agent, affiliate or subsidiary.
13. Crompton Canada Corporation is a Federal corporation, with its principal place of business in Toronto, Ontario. Crompton Canada Corporation is an agent, affiliate and/or subsidiary of Crompton Corporation. At all relevant times, Crompton Canada Corporation manufactured, marketed, sold and/or distributed rubber chemicals in Canada directly or indirectly through an agent, affiliate or subsidiary.

14. Uniroyal is a U.S. corporation, duly registered in New Jersey. Its principal place of business is in Middlebury, Connecticut. Since it was acquired by Crompton Corporation in 1996, Uniroyal has been a wholly owned subsidiary of Crompton Corporation. At all relevant times, Uniroyal manufactured, marketed, sold and/or distributed rubber chemicals in Canada directly or indirectly through an agent, affiliate or subsidiary.
15. The business of each of Crompton Corporation, Crompton Co./Cie., Crompton Canada Corporation and Uniroyal (collectively, "Crompton") is inextricably interwoven with that of the other and each is the agent of the other for the purposes of the manufacture, marketing, sale and/or distribution of rubber chemicals in Canada and for the purposes of the conspiracy described hereinafter.

The Flexsys Entities

16. Flexsys NV is a joint venture between Akzo Nobel NV and Monsanto Inc. formed in 1995. Its principal place of business is in Woluwe, Belgium. Flexsys NV identifies itself as one of the world's leading producers of rubber chemicals. At all relevant times, Flexsys NV manufactured, marketed, sold and/or distributed rubber chemicals in Canada directly or indirectly through an agent, affiliate or subsidiary.
17. Flexsys America LP is an agent, affiliate and/or subsidiary of Flexsys NV operating principally from facilities in Akron, Ohio. At all relevant times, Flexsys America LP manufactured, marketed, sold and/or distributed rubber chemicals in Canada directly or indirectly through an agent, affiliate or subsidiary.
18. Flexsys Rubber Chemicals Ltd. is also a wholly owned subsidiary of Flexsys NV operating from facilities in the United Kingdom. Flexsys Rubber Chemicals Ltd. is an agent, affiliate and/or subsidiary of Flexsys NV. At all relevant times, Flexsys Rubber Chemicals Ltd. manufactured, marketed, sold and/or distributed rubber chemicals in Canada directly or indirectly through an agent, affiliate or subsidiary.

19. The business of each of Flexsys NV, Flexsys America LP, and Flexsys Rubber Chemicals Ltd. (collectively, "Flexsys") is inextricably interwoven with that of the other and each is the agent of the other for the purposes of the manufacture, marketing, sale and/or distribution of rubber chemicals in Canada and for the purposes of the conspiracy described hereinafter.

Duslo AS

20. Duslo AS is a corporate entity organized and existing under the laws of the Slovak Republic, with its primary place of business at or near Bratislava. It is a significant producer of rubber chemicals. At all relevant times, Duslo AS marketed, sold and/or distributed rubber chemicals in Canada directly or indirectly through an agent, affiliate or subsidiary.

Factual Background

21. Rubber chemicals are commodity products used in the production of various rubber products, including tires, automobile parts, surgical gloves and in other commercial, industrial and health applications. Accelerants and antidegradants are added to polymers in the curing process to manipulate the qualities of the finished product, including its strength, durability, hardness, flexibility and resistance to wear.
22. During the period material to this lawsuit, there were no practical or reasonable substitutes to these chemicals. To the extent that innovations were possible, the defendants were, as a result of their market position and resources, best suited to participate in such developments.
23. Rubber chemicals constitute approximately 1% of the value of finished tires. In Canada, tire manufacturing is a \$2 billion annual business. An additional 30% of the rubber chemicals used in Canada are used in non-tire uses, including automobile parts, surgical gloves, and other commercial, industrial and health applications.

24. The defendants in this action manufactured and/or sold the vast majority of rubber chemicals that were sold or distributed in Canada during the relevant period. In addition, approximately 50% of the rubber chemicals manufactured in Canada were exported during the relevant period.
25. During the relevant period, Flexsys, Crompton and Bayer share approximately 90% of the annual Canadian volume of commerce in rubber chemicals of approximately \$45 million per year over the period of the conspiracy.

The Conspiracy

26. The defendants were involved in an unlawful conspiracy as detailed herein.
27. At various times from at least July, 1995 to 2001, senior executives and employees of each of the defendants engaged in meetings and other communications with each other at various times.
28. As a result of these communications and meetings, the defendants entered into a conspiracy in which they unlawfully agreed to coordinate the timing and amounts of price increases for certain rubber chemicals known as accelerators and antidegradants, and to allocate customers and sales volumes amongst the defendants.
29. In furtherance of the conspiracy, during the relevant time, the following acts were done by the defendants, and their senior executives, employees and agents:
 - (a) They communicated secretly by telephone and in person to discuss prices and volumes of sales of rubber chemicals;
 - (b) They agreed to, and did, fix and maintain prices and coordinate price increases for the sale of rubber chemicals;

- (c) They agreed to, and did, allocate the volumes of sales, customers, and markets for rubber chemicals among themselves;
 - (d) They agreed to refrain from bidding or to submit intentionally high, complementary and non-competitive bids for particular rubber chemicals supply contracts;
 - (e) They exchanged information regarding the prices and volumes of sales of rubber chemicals for the purpose of monitoring and enforcing adherence to the agreed-upon prices, volumes of sales and markets;
 - (f) They instructed members of the conspiracy not to divulge the existence of the conspiracy;
 - (g) They took active steps to conceal the unlawful conspiracy from their customers, the authorities, and the public; and
 - (h) They disciplined any corporation that failed to comply with the conspiracy.
30. The defendants were motivated to conspire and their predominant purpose and intention was:
- (a) To harm the plaintiff and members of the public by requiring them to pay artificially high prices for rubber chemicals and/or products containing or derived from rubber chemicals; and
 - (b) To unlawfully increase their profits on the sale of rubber chemicals.
31. The acts particularized in paragraphs 27 to 29 were unlawful acts directed towards purchasers of rubber chemicals or products containing rubber chemicals, including the plaintiff, which unlawful acts the defendants knew in the circumstances would likely

cause injury to those purchasers and the plaintiff and the defendants are liable for the tort of civil conspiracy.

32. Alternatively, the acts particularized in paragraphs 27 to 29 were unlawful acts undertaken by the defendants with the intent to injure purchasers of rubber chemicals or purchasers of products containing rubber chemicals, including the plaintiff, and the defendants are liable for the tort of intentional interference with economic interests.
33. The acts particularized in paragraphs 27 to 29 were also in breach of Part VI of the *Competition Act* and render the defendants liable to pay damages pursuant to s. 36 of the *Competition Act*.

Investigations and Charges

34. In July of 2004, Bayer agreed with the U.S. Department of Justice to settle charges that its rubber chemicals business unit engaged in anti-competitive activities including conspiring to fix prices between 1995 and 2001. Under the terms of the agreement, Bayer agreed to plead guilty to charges that it conspired with other rubber chemical producers to suppress and eliminate competition for certain rubber chemicals from 1995 to 2001. It also agreed to pay a fine of US\$66 million.
35. In November of 2004, a former executive of Bayer pled guilty to U.S. Department of Justice charges that he participated in an international conspiracy to fix prices in the rubber chemicals market in 2000 and 2001.
36. On October 8, 2002, Crompton, announced that it was cooperating with competition authorities in the United States and the European Union in relation to possible collusive behaviour by manufacturers of rubber chemicals.
37. In March of 2004, Crompton pled guilty to a U.S. Department of Justice charge that it conspired with unnamed rubber chemical producers to suppress and eliminate

competition for certain rubber chemicals sold in the United States and elsewhere from 1995 to 2001. It also agreed to pay a fine of US\$50 million.

38. On May 28, 2004, Crompton pled guilty to a charge that between May of 1995 and September of 2001, in Canada and in parts thereof and elsewhere, conspired, combined, agreed and arranged with Bayer AG, Flexsys NV and Duslo AS and with other persons known and unknown to prevent or lessen competition unduly in the production, manufacture and supply of certain rubber chemicals contrary to section 45(1)(c) of the *Competition Act*. It also agreed to pay a fine of \$9 million.

Damages

39. The plaintiff suffered the following damages:
- (a) The price of rubber chemicals purchased by the plaintiff has been fixed, raised, maintained and stabilized at artificially high and non-competitive levels;
 - (b) Competition in the sale of rubber chemicals has been restrained.
40. During the period covered by this claim, the plaintiff purchased products containing rubber chemicals manufactured by the defendants. By reason of the alleged violations of the *Competition Act* and the common law, the plaintiff paid more for those products and/or rubber chemicals than it would have paid in the absence of the illegal conspiracy and, as a result, it has been injured in its business and property and has suffered damages in an amount presently undetermined.
41. The plaintiff's damages and those of other persons who are similarly situated are capable of being quantified on an aggregate basis as the difference between the prices actually obtained by the defendants and the prices which would have been obtained in the absence of the unlawful agreements.

42. The defendants' conduct was high-handed, outrageous, reckless, wanton, entirely without care, deliberate, callous, disgraceful, wilful, in contumelious disregard of the plaintiffs' rights and the rights of others who are similarly situated, and as such renders the defendants liable to pay aggravated, exemplary and punitive damages.
43. The plaintiff's damages have been suffered in the Province of Ontario.
44. The plaintiff pleads and relies on the *Competition Act*, R.S. 1985, c. 19 (2nd Supp), s.36 & Part VI.
45. The plaintiff pleads and relies on clauses 17 (g), (h), (o) and (p) of the *Rules of Civil Procedure*, allowing for service ex juris of the foreign defendants. Specifically, this originating process may be served without court order outside Ontario in that the claim is:
- (a) in respect of a tort committed in Ontario (rule 17.02(g));
 - (b) in respect of damages sustained in Ontario arising from a tort or breach of contract wherever committed (rule 17.02(h));
 - (c) against a person outside Ontario who is a necessary and proper party to this proceeding properly brought against another person served in Ontario (rule 17.02(o)); and
 - (d) against a person carrying on business in Ontario (rule 17.02(p)).
46. The plaintiff pleads and relies on the *Class Proceedings Act, 1992*.
47. The plaintiff states that it is representative of persons in Canada who purchased rubber chemicals or products containing rubber chemicals during the relevant time period.

48. The plaintiff proposes that this action be tried at London, Ontario.

DATE:

Siskind, Cromarty, Ivey & Dowler LLP
680 Waterloo Street
London, Ontario N6A 3V8

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Michael G. Robb LSUC #45787G
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Luigi Del Guercio o/a Westown Shoe Clinic
Plaintiff

and

Bayer Inc. et al.
Defendants

Court File No:

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at [London](#)

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

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P.O. Box 2520
London, ON N6A 3V8**

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Solicitors for the [Plaintiff](#)