CLASS ACTIONS AND JUDICIAL CONFLICT

Merck Frosst's withdrawal of the anti-inflammatory drug, Vioxx, from the market on September 30, 2004, not only led to a huge amount of litigation in the U.S. and Canada (thousands of individual actions in the U.S. and more than 160 class actions), a huge corporate cost in the U.S. (a settlement fund of approximately $4,850,000 that will start being paid out in the near future), but now also to a huge judicial conflict in Canada. This note will summarize that conflict and look ahead to the much anticipated argument currently scheduled for the Saskatchewan Court of Appeal on September 16-18, 2008.

The basis of the underlying claim against Merck is essentially twofold. Merck is alleged to have negligently designed, manufactured and distributed a drug which was defective because it imposed an undisclosed and excessive risk of adverse cardiovascular events in patients. The other principal claim is based on waiver of tort. If the latter claim is successful the defendants will have to disgorge their gross revenues or net sales rather than pay the class' damages. This subject is, however, for another day.

The topic here is the conflict arising from the commencement in Canada of multiple class actions in every province shortly after Vioxx was withdrawn from the Canadian market on September 30, 2004. The vast majority of the counsel across the country who commenced Vioxx claims immediately agreed to work together in a group known as the National Consortium. One group led by Anthony Merchant, Q.C. (the Merchant Group), based in Saskatchewan, however, insisted on proceeding independently.

Carriage motions were scheduled in various provinces including Ontario and B.C. Only one of these motions has been argued. By reasons released February 2, 2006, Justice Winkler in *Setterington v. Merck Frosst* (2006), O.J. 376, now known as *Tiboni v. Merck Frosst*, ordered that the Ontario action in which a national class was sought, other than for Québec, should continue under the control of the National Consortium. The court stayed the Merchant Group's Ontario action (in which the plaintiff was a Mr. Wuttunee).

Unusually, Mr. Wuttunee was also the plaintiff in a similar class action commenced in Saskatchewan. Mr. Wuttunee was also represented in Saskatchewan by the Merchant Group. Notwithstanding the Ontario order, the Merchant Group went ahead with a certification motion in Saskatchewan, initially unbeknownst to the National Consortium. The Saskatchewan court certified Wuttunee's claim against Merck Frost on February 15, 2008, for Saskatchewan residents who had consumed Vioxx *and* for non-residents on an "opt in" basis. The Ontario action, seeking to certify a national class (other than for Québec, where separate proceedings were being pursued) was still pending.

Thus, confusion arose among class members, because an Ontario resident now could opt into the Saskatchewan proceeding, although there was a motion pending in Ontario in which, if certified, the same person would likely become a class member unless they expressly opted out.

Matters would become even more confused. The Saskatchewan *Class Actions Act*, S.S. 2001, c. C.12.01, was amended as of April 12, 2008, converting Saskatchewan from an "opt in" jurisdiction to an "opt out" jurisdiction.

On May 2, 2008, Wuttunee (still represented by the Merchant Group) applied to amend the Saskatchewan certification order to change it from an "opt in" class for non-residents to an "opt out" class for non-residents. If granted, Ontario residents would automatically be class members in the Saskatchewan proceeding, unless they expressly opted out.

Notwithstanding opposition from the National Consortium, Chief Justice Klebuc on May 29, 2008 approved the change, thereby including all residents of Canada outside Québec (2008 S.J. No. 234 Q.B.) unless they opt out. This order creating a Saskatchewan based national "opt out" class appears to be inconsistent with Justice Winkler's February 2, 2006 Ontario order denying the Merchant Group carriage of their Ontario action in which they had proposed a national class based on the Ontario issued Wuttunee claim (which Justice Winkler stayed).

Chief Justice Klebuc's decision has been appealed by Merck Frosst and that appeal is to be argued on September 16-18, 2008.

In the meantime, the Ontario certification motion, being pursued by the National Consortium (formerly *Setterington*, now *Tiboni v. Merck Frosst*) was argued in Ontario in June 2008, together with Merck Frosst's motion to stay the Ontario proceeding pending the Saskatchewan appeal.

In reasons released July 28, 2008, Justice Cullity not only declined Merck Frosst's request for a stay of the Ontario action, but also certified *Tiboni* as a national "opt out" class (other than Québec *and Saskatchewan*). Justice Cullity was careful to say he was not critiquing the decision of Chief Justice Klebuc (para. 21) although he emphasized that comity was a "two way street".

Merck argued for a stay of the Ontario proceeding on a number of grounds. Justice Cullity (para. 30) rejected the proposition that Saskatchewan should be favoured because it is a no cost regime (whereas Ontario courts may award costs against unsuccessful plaintiffs) (paras. 31-33). Justice Cullity also rejected the argument that Saskatchewan's justice system is more efficient and expeditious than that in Ontario. While the court agreed (para. 36) that a multiplicity of proceedings is to be avoided, the main question for Justice Cullity was whether the Saskatchewan decision to expand the Saskatchewan class to a national "opt out" class should be allowed to undermine Justice Winkler's 2006 Ontario decision that Wuttunee and the Merchant Group should not have carriage of the national class action which was then being pursued in Ontario by both sets of counsel. Justice Cullity particularly emphasized that priority should not be granted to a jurisdiction in which claims are first made (a view which also finally appears to be gaining some ground in Québec).

In the final analysis, Merck's request for a stay of the Ontario action was denied because the Ontario court was not prepared to let a subsequent Saskatchewan decision (that of Chief Justice Klebuc) effectively undermine the previous Ontario court order (that of Justice Winkler) staying Wuttunee's proposed national class action. As Justice Cullity noted (para. 41) the result is "unfortunate". Justice Cullity then stated:

> "If decisions of provincial courts on carriage motions are not to be respected throughout Canada, this merely underlines—and makes even more urgent—the need for an agreement or protocol among the Superior Courts that will provide for nationally-accepted carriage motions and determine the jurisdiction in which such motions will be heard. The recommendations of a committee on the Uniform Law Conference address the question of multi-jurisdictional class actions in different courts but, arguably, would give undue deference to the proceeding that is the first to be certified. To this extent they endorse what appears to be the prevailing view among counsel that the race is to the swift. I hope that we are able to do better than that."

It now remains to be seen how the Saskatchewan Court of Appeal will deal with this matter. Of course, it is unlikely they will have the last word. The issue seems destined for the Supreme Court of Canada, whether in this case or another.

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