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Canadian Appellate Court Issues Landmark Ruling Reversing Class Certification in Vioxx Litigation

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On March 30, 2009, the Saskatchewan Court of Appeals (the province's highest appellate court) issued a unanimous decision reversing a trial court's certification of a class action on behalf of persons in Canada (other than Quebec) who purchased or ingested Vioxx — a pain reliever manufactured by Merck. In *Merck Frosst Canada Ltd. v. Wuttunee*, the appellate court reversed the lower court's class certification order on the grounds that the class was not identifiable, that the so-called "common" issues were not sufficiently similar to allow for a class action to proceed, and that a class action would not be the "preferable procedure" for addressing damage claims by Vioxx purchasers and users. This is a major development in Canadian class action litigation. It suggests that, after many years of tolerating a more lenient approach to the consideration and review of class certification motions than presently exists in most U.S. courts, the Canadian appellate courts are now starting to insist on a deeper and more rigorous evaluation of the propriety of class treatment.

Before *Merck Frosst*, Canadian class action procedures had been regarded as permissive in part because the statutory class certification prerequisites in the provinces did not include the formal "predominance" requirement found in the U.S. federal court, and most state court, class action rules. The U.S. "predominance" requirement limits certification to those actions in which issues of fact or law that are "common" to the class (meaning they logically must be answered the same way as to all class members) "predominate" over any individualized claimant-specific issues, such that deciding the "common" issues resolves all, or virtually all, important issues in the case. The absence of a predominance requirement has led Canadian trial courts to grant class certification in many lawsuits that would not qualify for class treatment under U.S. law. Formally, Canadian courts do balance the common and individual issues to be litigated, but this factor is relegated to the provision requiring class action litigation to be the "preferable procedure" for resolving the proposed class members' claims. But such an analysis leaves much discretion with the trial judge and often has not been a sufficient bar to the certification of classes whose members' claims are more individualized than they are uniform.

The careful analysis of class certification in the *Merck Frosst* appellate ruling is a significant step towards a more intellectually rigorous and less conclusory class certification process in Canada. The court held that the classes and subclasses defined by the trial court were not sufficiently "ascertainable" because their membership either could not easily be determined by ordinary consumers, or because membership in the classes could not be determined until after the conclusion of trials on the merits of the so-called "common" issues presented by the proposed class claims, meaning the creation of unfair "fail-safe" classes. Describing the class member confusion

and unfairness-to-defendant consequences of such ill-defined classes, the court held that “class definitions that set criteria for membership dependant on the outcome of litigation of the common issues certified are prohibited.”

The court next held that various issues that the trial court had determined to be “common” to the proposed classes (such as whether Vioxx posed excessive risks that users of the drug would experience adverse cardiovascular side effects, and whether Merck failed sufficiently to disclose known information about those risks) were, upon closer examination, not really common to all proposed class members. This was due to the wide range of adverse side effects plaintiffs sought to place at issue, the different susceptibility to such risks among different Vioxx users based on their preexisting cardiovascular risk factors, and because knowledge about the drug's potential side-effects evolved over the five years it was on the market. As the appellate court found, the sheer diversity of claims asserted by the members of the class “posed an insurmountable challenge to the quest for commonality in relation to the proposed common issues.”

Finally, the Saskatchewan appellate court held that the trial court erred in its conclusion that a class action trial would be the "preferable procedure" for litigating claims by Vioxx users for the recovery of the purchase price of the drug and/or the cost of treating alleged side-effects of the drug. This conclusion followed from the court’s “tak[ing] into account the importance of the common issues in relation to the claim as whole.” The appellate court instead concluded that “this action vastly over-reaches what is reasonably manageable in a class action in a fair and efficient way.” This decision gives teeth to the “preferable procedure” review and casts serious doubt on the future viability of proposed class actions that attempt to assert a “myriad of claims” as in this case.

The Saskatchewan Court of Appeal's decision in *Merck Frosst* will likely be viewed as a watershed event in the development of class action law in Canada — akin to the U.S. federal appellate court rulings reversing class certification rulings in *Castano v. American Tobacco* (5th Cir.) and *In re Rhone Poulenc Rorer Inc.* (7th Cir.) in the mid-1990s. Just as trial courts in the United States routinely certified class actions pursuant to lenient applications of the class certification requirements until a series of federal appellate court decisions imposed more rigorous standards for evaluating class certification motions, Canadian trial and appellate courts to this point have employed relaxed criteria for certifying class actions, and for affirming such orders on appeal. The decision in Merck Frost reversing a trial court’s certification order on multiple grounds parallels the U.S. crackdown on “easy class certification” orders that began about a decade ago, and suggests that the Canadian courts may be about to initiate a similarly more rigorous approach to class certification motions north of the border.

Shortly after the *Merck Frosst* ruling came out, plaintiffs’ counsel stated his intention to appeal to the decision to the Canadian Supreme Court. Hence, the coming months may bring an historic debate in Canada’s highest court over the level of rigor with which trial courts must examine class certification motions, and the circumstances under which class treatment will, and will not, be permitted in Canada.

View a copy of the Merck Frosst decision.