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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Blaneys on Class Actions

This newsletter is designed to bring news of changes to the law, new law, interesting decisions and other matters of interest to our clients and friends. We hope you will find it interesting, and welcome your comments.

Feel free to contact any of the lawyers who wrote or are quoted in these articles for more information, or call the head of our Class Actions Group, Mirilyn Sharp at 416.593.3957 or msharp@blaney.com.

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CLASS ACTIONS: GETTING OUT EARLY

Mirilyn R. Sharp

If you've been sued in a class action in Ontario, you can potentially get out before incurring enormous costs if you can show that the statement of claim fails to name a plaintiff who has a reasonable cause of action against you. That's because in Ontario, for each defendant sued in a class action there must be, as a preliminary matter, a plaintiff with a cause of action against that defendant.

But if you're sued in British Columbia, you probably don't have the option of getting out early on this basis because the British Columbia courts do not require, for each defendant named in a class action, a separate plaintiff with a cause of action against that defendant. In British Columbia it is sufficient if the plaintiff has a cause of action against only one of the defendants, on the theory that there are probably "class members" who have a cause of action against the remaining defendants.

What happens if you're sued in Saskatchewan?

Saskatchewan has become a very popular province in which to commence class actions, not only because it has a 'no costs' regime (meaning that in most cases, the defendant can't collect costs of the expensive certification process, even if completely successful), but also because one of Canada's most prolific and well known plaintiffs' class action lawyers, Tony Merchant, lives and carries on his practice there.

So, what happens if you find yourself sued in a Saskatchewan class action by a plaintiff who has no cause of action against you, but *does* have a cause of action against one or more of your co-defendants?

The Saskatchewan lower courts have made two decisions which follow the British Columbia approach over the Ontario approach, meaning that in Saskatchewan, like in British Columbia, it is sufficient if the plaintiff has a cause of action against only one of the defendants.

But on November 8, 2010, the Saskatchewan Court of Appeal will deal with this issue for the first time and will be asked to decide whether Saskatchewan should continue to follow the British Columbia approach (which *doesn't* require that for each defendant named in a class action there must be a plaintiff with a cause of action against that defendant) or the Ontario approach (which *does* require that for each defendant named in a class action there must be a plaintiff with a cause of action against that defendant).

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"If you've been involved in a class action, you'll know that it can be very expensive, not only in terms of time and effort but also in terms of legal costs... can you recover those costs if you are successful?"

Mirilyn Sharp has an active class action practice and has defended large multi national health care providers and pharmaceutical companies, as well as insurers in a wide variety of class actions including class actions claiming damages arising from silicone gel breast implants, the Hepatitis B vaccine, Temporomandibular joint (TMJ) implants, auto insurance deductibles, the August 2003 regional black-out, the Sunrise Propane explosion, collagen based wrinkle creams, and ruined vacations. She has litigated and continues to litigate numerous class actions in Ontario and Saskatchewan, and has provided assistance to our clients in class actions commenced in British Columbia, Quebec, and Alberta.

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Blaney McMurtry will be arguing the Appeal in Saskatchewan and we hope to persuade the court that Saskatchewan ought to follow the Ontario approach, thereby forcing plaintiffs' counsel to find, for every defendant sued in a class action, a viable plaintiff with a cause of action against that defendant. Tony Merchant will be arguing the Appeal on behalf of the plaintiffs, and will attempt to persuade the Saskatchewan Court of Appeal that it ought to follow the British Columbia approach.

We will report again once the case has been argued and the decision has been rendered. Meanwhile, keep this argument in mind for class actions commenced against you in Ontario, as you may be successful in having the action against you dismissed on a preliminary basis if you can demonstrate that there is no named plaintiff who has a viable cause of action against you.

Of course, if a person who does have a cause of action against you is found prior to the expiry of any limitation period, you may be sued again. But in Ontario, you will be entitled to claim your costs of the first action and your costs of the preliminary motion to dismiss.

If you find yourself sued in a class action in Saskatchewan, let us know. Blaney McMurtry has been litigating class actions in Saskatchewan for many years and, chances are, we know your worthy opponent. ■

CAN YOU RECOVER YOUR COSTS?

Ralph Cuervo-Lorens

If you've been involved in a class action, you'll know that it can be very expensive, not only in terms of time and effort but also in terms of legal costs.

Can you recover those costs if you are successful? The answer depends, in part, on where you were sued.

In a number of provinces (British Columbia, Saskatchewan, and Manitoba), costs are *not* recoverable unless you can demonstrate that there was vexatious, frivolous, or abusive conduct, or that an improper or unnecessary application or step was taken for the purpose of delay or increasing costs or other improper purpose, or if you can demonstrate that there are "exceptional circumstances" making it unjust to deprive you of costs. A very difficult test to meet.

In Ontario, however, costs can be recovered in the normal course (just as in any other action) unless the court considers that the class proceeding was a test case, raised a novel point of law, or involved a matter of public interest.

In Alberta, costs can be recovered just as in any other action commenced there.

As a result of a number of recent decisions released in Ontario, the different costs regimes can have a major influence on where a plaintiff and his or her counsel will choose to commence their class action. Specifically, a number of recent decisions from the Ontario courts have

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"As a result of a number of recent decisions released in Ontario, the different costs regimes can have a major influence on where a plaintiff and his or her counsel will choose to commence their class action."

Ralph Cuervo-Lorens is a partner in Blaney McMurtry's Commercial Litigation and Alternative Dispute Resolution groups and a qualified arbitrator. He has represented both plaintiffs and defendants in class action litigation. He has acted in several leading cases involving criminal interest rates charged by utilities as late payment penalties and in product liability litigation arising from a variety of defective products (medical, automotive, nutrition). He has also acted in a variety of representative and mass tort cases in areas such as pensions and environmental and aboriginal arising from the impacts of resource exploitation and forestry and mining activities.

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made it clear that an unsuccessful proposed representative plaintiff can be hit with with an adverse costs award, even if the potential upside for that plaintiff was minimal.

As an example, in a proposed class action commenced against the Federal Government by two women who received silicone gel breast implants, the Ontario Court awarded costs of $125,000 against these two unsuccessful plaintiffs. These two women had sought certification of the action against the Federal Government on behalf of all women in Canada who had received silicone gel breast implants, arguing that the products were dangerous and ought not to have been approved by the Federal Government for sale in Canada. Blaney McMurtry represented one of the third party manufacturers of breast implants in this action and we succeeded in having our client removed from the action on a preliminary motion to dismiss.

At the Court of Appeal, a further costs award in the amount of $40,000 was made against the two unsuccessful plaintiffs and on an unsuccessful application for Leave to Appeal to the Supreme Court of Canada, a further adverse costs award of $1,086 was made against these two plaintiffs.

In a surprising turn of events, the Ontario Court of Justice ruled a few weeks ago that because these two plaintiffs had little or no money, and because their lawyer had allegedly failed to properly advise them that they could face an adverse costs award, the costs had to be paid by their lawyer. The lawyer is appealing this extraordinary ruling and we will report again once a decision has been rendered.

While it is highly unusual for a plaintiffs' class action lawyer to be held liable for an adverse costs award, it is now not unusual in Ontario for a proposed representative plaintiff to be held liable for costs following an adverse ruling at the certification hearing or following an adverse ruling on a preliminary motion. In one recent case, the plaintiff was ordered to pay $525,000 in costs, a decision that was upheld at the appeal level.

This is good news for defendants (assuming the plaintiff has the financial wherewithal to pay the costs) but it is not good news for plaintiffs or their lawyers (if the breast implant decision is upheld on appeal).

How this issue plays out in the future remains to be seen. One possible result is that plaintiffs' class action lawyers will choose in future to commence their class actions in provinces other than Ontario, such as British Columbia or Saskatchewan, in order to avoid the harsh costs consequences of litigating in Ontario. (This assumes the issue is one that is capable of being brought in another province and that there are not other factors militating against bringing the action outside Ontario).

Defendants will be well served to ensure that they have lawyers who can litigate in these other provinces if and when such out-of-province class actions are commenced. ■

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Class actions present unique challenges to parties and their lawyers. Litigation of a class action often takes years, and is extremely costly both in terms of time and money.

We have represented clients in class actions involving product liability, governmental liability, environmental contamination, travel claims, professional liability, financial services and products claims, medical treatment, aviation and other transportation disasters, as well as property and auto insurance claims.

We have also acted as insurance coverage counsel in connection with class actions brought both in Canada and the United States and as instructing counsel managing defenses of Canadian businesses involved in class actions in foreign jurisdictions.

We have successfully handled class action claims brought by national classes of plaintiffs and by small classes resident in Ontario. Whether the claims arise out of allegedly defective medical devices, or disasters such as aviation crashes, the sinking of an oil rig, the regional blackout, propane explosions or water shortages on vacations, we have experienced counsel who can handle the matter from its inception to its ultimate conclusion, whether that be a successful result on a preliminary motion or a successful class wide settlement of the action on terms favourable to our clients. We have extensive experience in a wide variety of class action claims such as the Canada wide litigation involving silicone gel breast implants, temporomandibular joint implants, the Hepatitis B vaccine, and some of the largest class actions in Canadian history against governments and related parties arising out of their regulatory, policing and operational functions.

Our firm is knowledgeable, experienced and highly respected in the class action field, having represented clients in trial and appeal courts in Ontario, Quebec, Saskatchewan, British Columbia and the Federal Court of Canada, and having been involved in Leave applications to the Supreme Court of Canada. We have gained significant expertise not only in Ontario class actions, but also in Saskatchewan class actions, having litigated against some of Canada's best known plaintiffs counsel. ■

EXPECT THE BEST

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Blaneys on Class Actions is a publication of the Class Actions Group of Blaney McMurtry LLP. The information contained in this newsletter is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.
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