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Class Actions and Vioxx: Perfect Together?

Recent decisions reflect evolving approaches to class actions in mass tort litigation

By Beth S. Rose

The legal community has been riveted by details of Merck & Co., Inc.'s withdrawal of its blockbuster drug, Vioxx, and ensuing litigation. Media coverage of Merck's loss in Texas and the recent defense verdict in Atlantic City has been intense. Despite this scrutiny, surprisingly little attention has been paid to Judge Carol E. Higbee's rulings in two class actions arising out of Merck's sale of Vioxx; *Sinclair, et al. v. Merck & Co., Inc.*, ATL-L-3771-04-MT (May 6, 2005); and *International Union of Operating Engineers Local #68 Welfare Fund v. Merck & Co., Inc.*, ATL-L-3015-03-MT (June 30, 2005). In *Sinclair*, Judge Higbee dismissed with prejudice plaintiffs' complaint seeking a nationwide medical monitoring class under New Jersey law. Less than two months later, she granted Local 68's motion to certify a nationwide consumer fraud class of third-party nongovernment payors who paid healthcare plans or their participants for Vioxx purchases. The *Local 68* case is on appeal.

Both *Sinclair* and *Local 68* are currently unpublished, are not binding precedent and can only be cited in accordance with R. 1:36-3. Yet, these rulings are important inasmuch as they reflect evolving approaches to class actions in mass tort litigation. The *Sinclair* holding suggests that opportunities to pursue a medical monitoring class in a New Jersey pharmaceutical case are quite limited (if they exist at all). By contrast, the *Local 68* ruling evidences a willingness to extend the rights and remedies of New Jersey's Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. beyond this state's borders in a fairly novel way.

Medical Monitoring

Plaintiffs in *Sinclair* alleged that their ingestion of Vioxx put them at an increased risk of having suffered silent but unrecognized heart attacks. Their complaint sought certification of a nationwide class of persons under New Jersey law who took Vioxx, did not file personal injury actions, but were nevertheless at "an increased risk for serious unrecognized or latent injury" and therefore required "non-routine medical and diagnostic testing." *Sinclair*, slip op. at 2. Plaintiffs' requested relief included a Medical Screening Program, funded by Merck, as well as a follow up epidemiology study to monitor post-use risk.

Sinclair is important because it tested the applicability of medical monitoring to pure product liability cases. The New Jersey Supreme Court first recognized a cause of action for medical monitoring in *Ayers v. Township of Jackson*, 106 N.J. 557 (1987), a toxic tort case in which the latency period between exposure to contaminated well water and manifestation of disease presented complex causation issues. Although the Supreme Court applied *Ayers* to an asbestos case (see *Mauro v. Raymark Industries, Inc.*, 116 N.J. 126 (1989)), it later made clear that the *Ayers* decision "was tailored for the unique damages that result from 'exposure to toxic chemicals' and that such a remedy was 'not easily invoked.'" *Sinclair*, slip op. at 8. See also *Theer v. Phillip Carey Co.*, 133 N.J. 610 (1993).

Against this backdrop, the Court analyzed whether the Vioxx plaintiffs stated a cause of action for medical monitoring under New Jersey law. The Court first distinguished between asbestos (environmental tort actions) and Vioxx (pure product liability actions subject to New Jersey's Product Liability Act

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(N.J.S.A. 2A:58C-1 et seq.). The court correctly observed that "while the New Jersey Supreme Court has indicated that medical monitoring may be necessary in asbestos products liability actions, it has yet to apply a medical monitoring remedy to a pure products liability action where the PLA applies." *Sinclair*, slip op. at 10. The court intimated that medical monitoring could never be an appropriate remedy under the PLA because medical surveillance is not listed among the types of harm for which a product liability plaintiff may seek relief.

The court was similarly tepid about invoking New Jersey's CFA as the basis for medical monitoring. Since the CFA allows for recovery of economic damages only, and medical monitoring is essentially a money claim — plaintiffs are asking for money to do medical surveillance — the court found that medical monitoring was technically an "available" remedy under the statute. The court nevertheless acknowledged that "the difficulties in obtaining relief especially for class actions may preclude the courts ability to grant such relief." Id. at 11.

These legal hurdles, coupled with the nature of plaintiffs' claims and alleged injuries, convinced the court to dismiss plaintiffs' complaint in its entirety. Unlike the plaintiffs in *Ayers*, Vioxx plaintiffs had information about the length of exposure and dose. The alleged risks of Vioxx were well publicized following withdrawal of the drug, leading the court to conclude that the causation issues presented in *Ayers* were not present here. *Sinclair* teaches that certification of a New Jersey medical monitoring class in a pure product liability case is unlikely.

Nationwide Consumer Fraud Class Action

Local 68 is a union that provides healthcare benefits (including a prescription drug plan) to its members. Horizon Blue Cross/Blue Shield of New Jersey administered the healthcare benefits plan for Local 68 with the assistance of a Pharmacy and Therapeutics Committee (P&T Committee). Its P&T Committee reviewed available information about Vioxx, and recommended that the drug be included on the plan formulary. Plaintiff claimed that Merck's dissemination of false and misleading information regarding the risks and benefits of Vioxx to the P&T Committee caused Local 68 to include Vioxx on its formulary. Local 68 maintained that if Merck had disclosed the true profile of Vioxx, the drug either would not have been included on the formulary or would have been included on less favorable terms.

Plaintiff alleged that Merck's conduct violated the CFA and proposed certification of a nationwide class consisting of third-party payors, similar to Local 68. *Local 68*, slip op. at 8.

This case is worthy of attention because of the court's approach to the predominance requirements of R. 4:32-1(b)(3), i.e., whether common questions of law and fact predominate over individual claims. In a putative nationwide class action, courts often find that individual questions of law predominate over common ones as conflicts in the laws of the 50 states are inevitable and make such classes unmanageable. Indeed, in its choice of law analysis, the court quickly acknowledged "sufficient variations between the laws of the varying states and the CFA to constitute an actual conflict." Id. at 28-29. The court nevertheless focused its analysis on which state had the greatest interest in having its law apply. That the court selected New Jersey may not be much of a surprise given Merck's location as well as the development and marketing of Vioxx in New Jersey.

What is noteworthy is that if the *Local 68* ruling stands, it may well be the first and only time the CFA will have been applied in a class action context to non-New Jersey plaintiffs whose states provide different, and in some instances less protection, against consumer fraud than does New Jersey. Although there is nothing in the CFA which specifically precludes application of the law to an out-of-state resident, the court understood that its ruling was unprecedented. See id. at 12 ("There is no controlling Supreme Court or Appellate level decision as to whether [the] New Jersey Consumer Fraud Act can be applied to a class action involving out of state plaintiffs and a New Jersey defendant.") Following a review of each state's form of consumer fraud law, the court concluded that "applying the CFA to the instant matter would not frustrate the policies of intentions" of another state's law. Id. at 38-63.

Whether the *Local 68* class certification holds up on appeal remains to be seen. See *In re St. Jude Medical, Inc., Silzone Heart Valve Products Liability Litigation*, No. 04-3117 (October 12, 2005) (Eighth Circuit reversed certification of a nationwide consumer fraud class based on Minnesota's consumer fraud statute, finding that "the district court did not conduct a thorough conflicts of law analysis with respect to each plaintiff class member before applying Minnesota law."). What is certain is that the recent *St. Jude* decision provides a roadmap for Merck to vigorously challenge the court's choice of law analysis.

In the wake of the Class Action Fairness Act, state court judges are likely to have fewer opportunities to make class action law. Nevertheless, for those parties and practitioners with class actions pending in New Jersey, the *Sinclair* and *Local 68* decisions provide important insight into one judge's thinking about the applicability (or lack thereof) of class actions in mass tort litigation. ■