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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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"...the Court of Appeal appears to have accepted the notion that there may be claims where an Insurer's financial interest in the litigation is so much greater than the Insured's that allowing the Insurer to be in control of the litigation is warranted."

IN A CLASS ACTION, CAN THE INSURER CHOOSE TO OPT OUT? OR DOES THAT DECISION BELONG TO THE INSURED?

Catherine MacInnis

In the just released decision of the Ontario Court of Appeal in *Zurich Insurance Co. v. Ison T.H. Auto Sales Inc.*, the Court reaffirmed the long established principle that the Insured is in control of the litigation until he or she has been fully indemnified for both the insured and uninsured losses.

While the *Zurich* case did not directly involve a class action, it can be expected that the reaffirmation of this principal will give Plaintiffs' Class Counsel comfort in any class action where there are both insured and uninsured losses. While an Insurer may prefer to have the subrogated claims dealt with by way of individual actions rather than by way of a class action, the Insurer may have no choice in the matter unless the Insured chooses to opt out of the class action or the Insurer fully indemnifies the Insured and then opts out of the class action.

In the *Zurich* case, the Insured brought an action seeking damages resulting from a fire and explosion that occurred in an apartment building. The Insurers sought an order giving them control of the litigation pursuant to the terms of a subrogation clause in the policy, and argued that this would be a "*fair and sensible result*" given the relative strength of the parties' claims. The Insurers pointed out that they had covered the insured losses of approximately $1.9 million and that these 'hard' losses were worth more than the 'soft' uninsured losses of approximately $700,000 claimed by the Insured for loss of goodwill.

It was the Insurers' position that they ought to have control of the litigation in these circumstances. The lower Court judge rejected the arguments put forth by the Insurers but did note that there may be circumstances where: "*…the insurer's interest is so vastly disproportionate to the insured's interest that it would be unreasonable to allow the latter to have control of the litigation…*", thus leaving the door open for Insurers with claims that are vastly in excess of the uninsured claims with an argument that the Insurers ought to have control of the litigation.

In its decision released on October 11, 2011, the Ontario Court of Appeal affirmed both the decision and the "*masterful*" analysis of the lower Court judge. In so doing, the Court of Appeal appears to have accepted the notion that there may be claims where an Insurer's financial interest in the litigation is so much greater than the Insured's that allowing the Insurer to be in control of the litigation is warranted.

It is expected that this will not necessarily be the last word on who has control of the litigation, particularly in class actions, where subrogated

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"...in a class action context... did the limitation period start to run when 'all' of the class members knew or should have known all of the material facts?... Or when 'a majority' of class members knew or ought to have known?"

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claims often form a vast proportion of the potential claims, and Insurers may prefer to opt out and settle these claims rather than await a determination of a class proceeding with its attendant costs and delays. ■

SMITH V INCO LIMITED - LIMITATION PERIODS IN CLASS ACTIONS AN INDIVIDUAL AND NOT A COMMON ISSUE

Ralph Cuervo-Lorens

The *Inco* case is an environmental class action by 7,000 surrounding property owners against Inco that went to trial in 2010. The main claim in the lawsuit was that property values in the Port Colborne area had been adversely affected over many years as a result of particle emissions from the operation of *Inco*'s nickel refinery. *Inco* lost at trial and had a $36 million judgment awarded against it. *Inco* appealed.

The appeal decision was released on October 7, 2011. In it the Court of Appeal reversed the trial judgment. While the case is of interest for several reasons, we focus here on the impact of the decision on class actions.

It was not in dispute that the refinery emitted nickel oxide into the air and that as a result nickel made its way into the soil on many nearby properties. The main claim was that emissions in the area were responsible for property values in the early 2000's not appreciating at the same rate as comparable property values in nearby towns and cities.

The trial judge found that *Inco* was liable for the loss of property value attributed to the perception created in the market arising from the exposure to these contaminants (and not to any actual damage). The Court of Appeal disagreed. Having disposed of the basis for liability, the Court of Appeal could have stopped there. However, it went on to address the issue that is the focus of this article which is the Court's treatment of the applicability of the statutory limitation period in the Ontario *Limitations Act* in the context of class actions.

The emissions ceased in 1984. The lawsuit was commenced in March 2001, some 17 years later. Under the *Limitations Act* applicable when this action was commenced, an action of this type had to be brought within six (6) years. *Inco* argued that the limitation period had expired in 1990, six (6) years from when the last emission had occurred. Relying on the discoverability principle, the plaintiffs argued that the limitation period clock should not start ticking until some time in 2000 because that is when class members first acquired the knowledge that *Inco*'s conduct had caused damage to the values of their properties. Therefore, according to the plaintiffs, the lawsuit had been commenced in time.

The discoverability principle is well established. Where a limitation period is said to run from the time that "the cause of action arose", the limitation period will not begin to run until the material facts upon which the action is based have been discovered or should have been discovered by the exercise of reasonable diligence. *Inco* argued that by 1990 the limitation period had expired as most of the class members would have been aware that the refinery had been operating and that *Inco* had been in the business of refining nickel. Class members would also have been aware or should have been aware, according to *Inco*, that there may be nickel particles in the soil on their properties which had come from *Inco*'s facility.

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"If the entire class cannot be grouped for the purposes of the issue, it is clearly not a common issue..."

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But the trial judge found that since damage is an essential element of the tort "on which the lawsuit was based", the cause of action did not arise until the class members knew or should have known that *Inco*'s conduct caused damage in the form of the loss of property values.

The question for the trial judge was just how this discoverability principle should apply in a class action context. Did the limitation period start to run when 'all' of the class members knew or should have known all of the material facts? Or when only 'one' of the class members knew or ought to have known? Or when 'a majority' of class members knew or ought to have known?

The trial judge's analysis of the issue went as follows:

> In the present case, there were probably 10 or 12 property owners, out of approximately 7,000 property owners in the class, who had their own properties tested for nickel prior to the 1998 phytotoxicological study, and who therefore had some special knowledge of the general extent of nickel contamination of the soil in Port Colborne. However, I cannot assume that any of those property owners knew or ought to have known that their property values could be affected. Even if there were a few class members who knew or ought to have known the material facts upon which this case is based prior to February15, 2000, those class members would constitute only an insignificant minority of all of the members of the class. I find that the overwhelming majority of the class members did not know and ought not to have known the material facts until approximately February 15, 2000.

The trial judge therefore found that in the context of this class proceeding the cause of action had arisen as of February 15, 2000 because that was when "the overwhelming majority" of the class members knew or should have known of the necessary facts.

The Court of Appeal disagreed with this analysis. It was implicit in the trial judge's finding (above), it said, that some class members would have been aware of the potential effect of the nickel on the value of their properties. To that extent, it was an error to have found in their favour on this issue. The problem, in other words, was in having allowed a procedural vehicle, the class action, to change the substantive law applicable to individual lawsuits, a point that has ample support in the class action case law.

If the entire class cannot be grouped for the purposes of the issue, it is clearly not a common issue and it should not have been treated as such by the trial judge. Discoverability in class actions, then, is likely to always be an individual and not a common issue.

While other certification decisions have recognized that discoverability will often require individual adjudication (after the common issues have been determined) *Inco* is a welcome and clear statement of the underlying rationale for this rule from Ontario's highest court. ■

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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