



Class Actions: Getting Out Early

by Mirilyn Sharp

Originally published in *Blaneys on Class Actions* (November 2010) - [Read the entire newsletter](#)



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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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).

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. ■