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SETTLEMENT OF AUSTRALIAN CLASS ACTIONS WHEN NOT ALL GROUP MEMBERS ARE EQUAL

In *Peterson v Merck Sharp and Dohme (Aust) Pty Ltd (No 6)* [2013] FCA 447, approval of a class action settlement was sought in the context of the representative party's claim, and a number of common questions, having been determined at trial and after an appeal. The representative party had been unsuccessful due to risk factors specific to the representative party, but other group members without those risk factors may be successful. The proposed settlement was designed to make payments to group members regardless of whether they were subject to the risk factors and treated all group members alike. Jessup J refused approval on the basis that the settlement was unfair and unreasonable.

A class action may not be settled or discontinued without the approval of the court.[1] Further, unless the court is satisfied that it is just to do so, an application for approval of a settlement must not be determined unless notice has been given to group members. Unlike regular litigation, class actions cannot be resolved in private.

The criteria for approving settlements in the Federal Court has been discussed on a number of occasions[2] and are now consolidated in Federal Court of Australia, Practice Note CM17, *Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976*, 1 August 2011.

When applying for court approval of a settlement, the parties will usually need to persuade the court that: (i) the proposed settlement is fair and reasonable, having regard to the claims made on behalf of the group members who will be bound by the settlement; and (ii) the proposed settlement has been undertaken in the interests of group members as well as

1 *Federal Court of Australia Act 1976* (Cth) s 33V. *See also Supreme Court Act 1986* (Vic) s 33V and *Civil Procedure Act 2005* (NSW) s 173.

2 *See Taylor v Telstra Corporation Ltd* [2007] FCA 2008 and *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 6)* [2011] FCA 277.

those of the plaintiff, and not just in the interests of the plaintiff and the defendants.

VIOXX PRODUCT LIABILITY CLASS ACTION SETTLEMENT REJECTED

The Vioxx product liability class action was brought by Graeme Peterson in 2006. Mr Peterson was successful at first instance in relation to his personal claim and achieved favourable answers to a number of common questions.[3] On appeal, the Full Federal Court found against Mr Peterson but did not disturb the answers to the common questions.[4] However, those answers were said to illustrate an "absence of commonality in relation to many of [the common] questions".[5]

The proceedings brought by Mr Peterson and the related proceedings by Joan Reeves were subsequently settled and approval was sought from the Federal Court. The terms of the settlement[6] were, in summary, if a group member had (i) suffered a myocardial infarction (heart attack) or sudden cardiac death and (ii) Vioxx was a current medication when they were injured and they had documentary evidence of having received a specified number of Vioxx tablets within specified timeframes, they would receive the following compensation:

- For living group members, AUD2,000, provided the total of all payments to living group members does not exceed AUD497,500. In the event that the total of all payments to living group members does exceed this amount, each approved eligible living group member will receive one equal share of AUD497,500;

- For deceased group members (and approved eligible group members in the *Reeves* proceeding), AUD1,500, provided the total of all payments to deceased group members in both the *Peterson* and *Reeves* proceedings does not exceed AUD45,000. In the event that the total of all payments to deceased group members in both proceedings does exceed this amount, each approved eligible living group member will receive one equal share of AUD45,000.

The reasons for the Full Federal Court finding against Mr Peterson became of central relevance to the decision whether to approve the settlement. The Full Federal Court found that Mr Peterson's personal circumstances—his age, gender, hypertension, hyperlipidemia, obesity, left ventricular hypertrophy and history of smoking—afforded a ready explanation for the occurrence of his injury independent of the possible effects of Vioxx. Further, because of the causative potential of these circumstances for a heart attack, the court held that it was a matter of conjecture rather than reasonable inference on the balance of probabilities that Vioxx was a cause of Mr Peterson's heart attack.[7] The Full Federal Court also dismissed Mr Peterson's claims that Vioxx was unfit for purpose or was not of merchantable quality.[8]

However, Jessup J observed that the reasons of the Full Federal Court did not find that other group members could never recover. Rather Mr Peterson's case was not representative. Other group members who were prescribed Vioxx may have been able to prove that Vioxx contributed to the occurrence of a heart attack.[9] Further, the trial and appeal had determined "a number of criteria by reference to which the relative strengths and weaknesses of the cases of the various group members would stand to be assessed".[10]

The difficulty faced by Jessup J was that the settlement agreement did not take account of the learning produce by the trial and appeal. Consequently, Jessup J observed:[11]

3 *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd* (2010) 184 FCR 1.
4 *Merck Sharp & Dohme (Aust) Pty Ltd v Peterson* (2011) 196 FCR 145.
5 *Merck Sharp & Dohme (Aust) Pty Ltd v Peterson* (No 2) [2011] FCAFC 146 at [9].
6 *Peterson v Merck Sharp and Dohme (Aust) Pty Ltd* (No 6) [2013] FCA 447 at [13]-[15].
7 *Merck Sharp & Dohme (Aust) Pty Ltd v Peterson* (2011) 196 FCR 145 at [120], [124].
8 *Merck Sharp & Dohme (Aust) Pty Ltd v Peterson* (2011) 196 FCR 145 at [173]-[175], [179]-[182].
9 *Peterson v Merck Sharp and Dohme (Aust) Pty Ltd (No 6)* [2013] FCA 447 at [9]-[10], [12].
10 *Peterson v Merck Sharp and Dohme (Aust) Pty Ltd (No 6)* [2013] FCA 447 at [16].
11 *Peterson v Merck Sharp and Dohme (Aust) Pty Ltd (No 6)* [2013] FCA 447 at [17].

> [the settlement] makes no discrimination between group members who have other risk factors which were decisive in the rejection of the applicant's case by the Full Court and group members who have no other risk factors.

The settlement agreement creates two prerequisites to recovery—namely the group member had (i) heart attack or sudden cardiac death and (ii) been prescribed Vioxx—and then group members are treated the same. The settlement ignores the strength of group members' claims and treats strong and weak claims alike. As a result:[12]

> Under the proposed settlement, for group members whose circumstances are similar to those of the applicant, the payment of the monetary sum proposed would constitute a windfall.... On the other hand, for a group member who might, consistently with the reasons of the Full Court, anticipate a favourable judgment, the settlement would represent an obvious injustice.

Jessup J refused to grant approval of the settlement on the basis that it was unfair and unreasonable for the representative party, Mr Peterson, to compromise the claims of those group members who have no other risk factors on the basis that it enabled the claims of the "less-deserving group members" to be settled.[13]

12 *Peterson v Merck Sharp and Dohme (Aust) Pty Ltd (No 6)* [2013] FCA 447 at [20].
13 *Peterson v Merck Sharp and Dohme (Aust) Pty Ltd (No 6)* [2013] FCA 447 at [20].

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

John Emmerig
Sydney
+61.2.8272.0506
jemmerig@jonesday.com

Michael Legg
Sydney
+61.2.8272.0720
mlegg@jonesday.com