

1B. BOXES 3, 4 & 5: Different models of class actions (resolving causation for individual claimants)

One of the critical questions for any type of collective redress system, including tobacco claims, is how to resolve the claims of individual class members, including whether the defendant's civil wrong was a cause of their loss. Principally, there are two different models for resolving individual claims in a class action. These are aptly illustrated by the approaches available under Québec's tobacco-related damages and health-care cost recovery legislation and the two step model employed in the *Engle* model in Florida, known as a "follow-on" action, which is widely employed in other jurisdictions including civil law countries.¹

Firstly, the Québec model represents legislation that provides for determining liability, causation and damages issues all on an aggregate/statistical basis, without reference to circumstances of each individual claimant. This approach attempts to resolve all issues in dispute between the defendant and class members by dealing with all issues of liability on a class-wide basis, including by use of statistical evidence to prove causation, and calculating damages on an aggregate basis. This is evident in both class actions that have been certified in Québec, the trials of which are ongoing.

The first class action case, *Létourneau v. JTI-MacDonald Corp. et al.*, was filed on September 10, 1998. It included the over 800 000 Québécois who are addicted to smoking. Plaintiffs' counsel notably based the class action on misrepresentations and the omission to warn of the risks and dangers including the addictiveness of tobacco products under the Québec Consumer Protection Act, which does not require evidence of reliance to establish liability. The Québec Superior Court certified the class action on February 21, 2005. Following subsequent amendments the group is composed of all persons residing in Québec who, as of September 30, 1998, were addicted to the nicotine contained in the cigarettes made by the defendants and who otherwise satisfy the following criteria:

- 1) They started to smoke before September 30, 1994 by smoking the defendants' cigarettes;
- 2) They smoked the cigarettes made by the defendants on a daily basis by September 30, 1998, that is at least one cigarette per day during the 30 days preceding that date; and
- 3) They still smoked the defendants' cigarettes on February 21, 2005, or until their death if it occurred before this date.²

The second lawsuit, *Conseil québécois sur le tabac et la santé and Blais v. JTI-MacDonald Corp. et al.*, was filed independently and seeks compensation for Québec cancer and emphysema victims. Plaintiffs' counsel based the claim on both Québec civil law and consumer protection legislation. The group is composed of all persons residing in Québec who satisfy the following criteria:

- 1) To have smoked, before November 20, 1998, a minimum of 5 pack/years of cigarettes made by the defendants; and³
- 2) To have been diagnosed before March 12, 2012 with:
 - a) Lung cancer or
 - b) Cancer (squamous cell carcinoma) of the throat, that is to say of the larynx, the oropharynx or the hypopharynx or
 - c) Emphysema.⁴

The group also includes the heirs of the persons deceased after November 20, 1998 who satisfied the criteria mentioned above. Over 200,000 persons are estimated to be included in this action.

The class actions permitted in Québec are undoubtedly the most efficient way of disposing of tobacco-related claims because the need for individual proof is limited. Causation will be determined on a class-wide basis (and proof that the individual falls within the class), and the same amount of compensation is claimed in respect of each class member. This avoids potentially lengthy and costly individual follow-on trials to determine whether

¹ See, for example, Article 3:305a of the Dutch Civil Code.

² *Létourneau v. JTI-MacDonald Corp. et al.*, District of Montreal, PQ No. 500-06-000070-983. The group also includes the heirs of the members who satisfy the criteria described herein.

³ This is the equivalent of a minimum of 36 500 cigarettes.

⁴ *Conseil québécois sur le tabac et la santé v. JTI-MacDonald Corp.*, 2013 QCCS 4904 (CanLII).

the liability findings made by the court in relation to the common issues apply to each individual. The individuals need to prove only that their circumstances, including their smoking history, mean that the statistical evidence, upon which a finding of causation is made, is relevant to their claim.

Secondly, the two step model consists of class-wide determinations of questions that common to the class (usually questions of breach and fault and causation at the population level) and individual follow-on trials (to establish causation for each individual claimant). This best suits a legal system that does not permit proof of causation through statistical evidence alone, but there is still value in holding separate individual trials following a court's determination of liability issues on a class-wide basis. In the *Engle* trial, the Florida Supreme Court decided to limit the class action part of the litigation strictly to the common issues. Individual class members could then use the findings made against the industry as a first and critical step in making their own damages claim in individual "follow-on" trials, which are commonly referred to as *Engle* progeny trials.

The *Engle* action was originally filed in Miami, Florida in May 1994 against the major American cigarette manufacturers, on behalf of thousands of Florida residents who had contracted tobacco-related diseases between 1991 and 1996 as a result of being addicted to the nicotine in cigarettes. The trial, which proceeded in phases, began in 1998. The Phase I jury decided common issues about the tobacco companies' conduct in favour of the plaintiffs. In Phase II-A, the jury returned a verdict for three individual plaintiffs in general liability in the amount of US\$ 12.7 million. In Phase II-B, the jury, clearly outraged by what they had learnt during the trial about the tobacco industry's long history of corporate wrongdoing, returned a US\$ 145 billion punitive damages award in July 2000.

On appeal, the Supreme Court of Florida upheld most of the jury's findings, including that the tobacco companies:

- a) acted negligently;
- b) sold defective and unreasonably dangerous products;
- c) sold addictive products;
- d) were subject to strict liability;
- e) committed fraud by concealment;
- f) committed civil conspiracy through misrepresentation;
- g) committed civil conspiracy through concealing material fact; and
- h) breached express warranties.⁵

The Supreme Court ruled that while the class action procedure had been proper, the most efficient way to proceed was to disband the class but to permit the individual class members to file their own individual product liability lawsuits within a year of the court's decision. These plaintiffs would not need to prove again the findings of liability from the original trial. They would also benefit from the jury's finding that cigarette smoking causes the following diseases: aortic aneurysm, bladder cancer, cerebrovascular disease, cervical cancer, chronic obstructive pulmonary disease, coronary heart disease, oesophageal cancer, kidney cancer, laryngeal cancer, lung cancer, (specifically adenocarcinoma, large cell carcinoma, small cell carcinoma and squamous cell carcinoma), complications of pregnancy, oral cavity/tongue cancer, pancreatic cancer, peripheral vascular disease, pharyngeal cancer and stomach cancer. The Supreme Court reversed the US\$ 145 billion class-wide punitive damage award as premature, but allowed the individual class members to request punitive damages in their own cases.

Over 7,000 individual cases were filed within the deadline set by the Supreme Court. These individual smokers and former smokers would need to prove at trial that they had smoked a defendant company's product, that the smoking caused their specific case of whichever disease is at issue in the case, and – if fraud is alleged in their complaint—that they relied on a defendant's fraudulent claims. Trials of these individual lawsuits began in February 2009. Since then, 104 such *Engle* progeny trials have reached a verdict, with 71 of those verdicts for plaintiffs and 33 for the defendants.

The tobacco defendants appealed several of these plaintiff verdicts, arguing that the *Engle* progeny process approved by the Supreme Court of Florida in 2006 had deprived them of their constitutional due process rights. For example, in 2009 a Florida jury awarded US\$ 3.3 million in compensatory damages and US\$ 25 million in punitive damages against Reynolds American, Inc. (RAI) in a case involving the death of Benny Ray Martin, the husband of Mathilde Martin. After losing on appeal at every stage in Florida's state court system, RAI filed

⁵ *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). The court also held that smoking caused numerous diseases.

a petition for certiorari (which in substance is a petition to appeal the decision) with the Supreme Court of the United States. In arguing that its petition should be granted, RAI's attorneys claimed that in "their conduct of Engle progeny litigation, the Florida state courts are engaged in serial due process violations that threaten the defendants with literally billions of dollars of liability."

On March 26, 2012, the Supreme Court of the United States declined to consider RAI's appeal. A similar appeal claiming due process violations was rejected by the Supreme Court of Florida in *Philip Morris USA, Inc., et al v Douglas* and a writ of certiorari to the Supreme Court of the United States was also denied.⁶ The approach in *Engle* also has some statutory support in the United States. Rule 23(c)(4) of the Federal Rules of Civil Procedure allows an action to be "brought or maintained as a class action with respect to particular issues." Two step collective redress models are typical in other jurisdictions such as the Netherlands.

While the approaches in *Engle* and Quebec are different, both can reasonably be described as best practice. The Quebec approach goes further than the mechanisms for collective redress in most jurisdictions. However, strong arguments can be made in its favour in light of the sheer scale of the harm caused by tobacco use, the limited public resources available for deciding such disputes, and the robust nature of the statistical evidence and models developed to measure the total numbers of people affected by the tobacco industry's conduct.

The *Engle* model also has much to commend it. The model is fully consistent with established models of collective redress in both common law and civil law systems which employ a two-step process: first, a trial in which the court makes declaratory findings on the common issues of law and fact affecting the whole class, or specific sub classes; and secondly, individual follow-on trials in which class members seek to prove their entitlement to damages. Indeed, the European Commission has adapted this system of collective redress for different liability regimes, including areas of competency where public regulators have the power to make findings on liability, which can then be used by consumers seeking compensation for the losses they have allegedly suffered as a consequence of the declared breach.⁷ This two-step process ensures common issues are decided efficiently, ideally only once, in a process where all interests are adequately represented and protected. On the other hand, the more confined the class the more likely it will be suitable for determination on an aggregate basis, using a less stringent form of proof of causation in individual cases⁸, as per the Quebec model.

⁶ *Philip Morris USA, Inc., et al. v. Douglas*, 110 So. 3d 419 (Fla. 2013); *Philip Morris USA, Inc., et al. v. Douglas*, 187 L.Ed. 2d 158.

⁷ For example, European Competition Law.

⁸ It should be stressed that in *Conseil québécois sur le tabac et la santé and Blais v. JTI-MacDonald Corp. et al.*, individual claimants still need to prove they are suffering the relevant disease and sufficient exposure to tobacco to cause the disease.