SUPERIOR COURT OF JUSTICE
COUR SUPÉRIEURE DE JUSTICE

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Date: November 30, 2011

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FROM: Laurie Pietras, Acting Secretary to The Honourable Mr. Justice Perell

TOTAL PAGES (INCLUDING COVER PAGE): 16

MESSAGE:

RE: Voutour et al v. Pfizer Canada Inc. et al
Court file no. 05-CV-287488CP

Please see attached Reasons for Decision released by Mr. Justice Perell today.

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CITATION: Voutour v. Pfizer Canada Inc., 2011 ONSC 7118
COURT FILE NO.: 05-CV-287488CP

DATE: November 30, 2011

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Jesse Voutour, Eiko Voutour, Portia Waheed and Pardo Antonio Perotta

Plaintiffs

- and -

Pfizer Canada Inc. and Pfizer Inc.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

- B.C. McPhadden, J. Rochon, I. Erez, and A. Thorsen for the Plaintiffs
- G. Zakaib and E. Larose for the Defendants

HEARING DATE: November 29, 2011

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] In a consolidated class action against Pfizer Canada Inc. and Pfizer Inc., the Plaintiffs, Jesse Voutour, Eiko Voutour, Portia Waheed, and Pardo Antonio Perrotta, bring a motion for: settlement approval, counsel fee approval, and incidental relief under the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6.

[2] The parties' Settlement Agreement seeks to resolve all Canadian litigation related to Bextra and Celebrex, which are drugs manufactured and distributed by the Defendants.

[3] For the Reasons for Decision that follow and notwithstanding the objections of a few Class Members, including Timothy Moorley and Mrs. Rodriques-Trasvina, I approve the Settlement Agreement, approve the counsel fee, and grant the ancillary relief.

B. FACTUAL BACKGROUND

1. The Prologue to Claims against Pfizer Inc. and Pfizer Canada

[4] Pfizer Inc. and Pfizer Canada Inc. manufactured and marketed the drugs Bextra and Celebrex, which are prescription, non-steroidal, anti-inflammatory drugs ("NSAIDs"), a class of drugs used for the treatment of inflammation and associated pain. They are known as selective COX-2 inhibitors.

[5] On April 14, 1999, Celebrex was approved for the treatment of rheumatoid arthritis and osteoarthritis, and on May 28, 2002, it was approved for use in the treatment of familial adenomatous polyposis, a disease of the large intestine. On September 8, 2004, Celebrex was approved for the short term management of moderate to severe acute pain in adults.

[6] On December 11, 2002, Bextra was approved for the treatment of acute and chronic adult rheumatoid arthritis and osteoarthritis and for pain relief related to primary dysmenorrhea.

[7] On September 30, 2004, another pharmaceutical company's Cox-2 drug, Vioxx, was withdrawn from the worldwide market because of evidence of its cardiovascular risk, and on December 17, 2004, the U.S. National Cancer Institute announced the premature cessation of a trial of Celebrex due to an increased risk of cardiovascular events.

[8] After the withdrawal of Vioxx and the cessation of the Celebrex studies, expert advisory panels were struck in both the U.S. and in Canada. On April 7, 2005, Health Canada asked Pfizer Canada to suspend sales of Bextra and to impose new restrictions on the use of Celebrex.

[9] Health Canada's request was stated to be in response to "potentially life-threatening skin reactions" in the case of Bextra and an "increased risk of heart attack and stroke" in the case of Celebrex. It is to be noted that the reasons for the suspension of Bextra was not the same as the reason for imposing restrictions on the uses for Celebrex.

[10] In April 2005, Health Canada also alerted the public and prescribing physicians to concerns about the cardiovascular safety of Celebrex and recommended its limited prescription. These concerns were incorporated into significant labelling changes for Celebrex and the concerns were also disclosed in a "Dear Doctor" letter in September, 2005 providing information about the drug's use.

[11] In Canada, on December 16, 2005, Health Canada advised the public that Bextra would not return to the market.

[12] Celebrex continues to be sold in the U.S., Canada, and elsewhere, although with the strongest form of black box warnings regarding its use.

[13] Neither Health Canada nor the United States Food and Drug Administration have requested the withdrawal of Celebrex.

[14] It is alleged that many users of Bextra and Celebrex suffered serious, medical problems as a consequence of their use of these drugs.

[15] It is to be noted that given the state of scientific and medical knowledge, the Representative Plaintiffs confronted substantial problems proving the connection, if any, with the use of Bextra and Celebrex with any particular adverse medical condition, many of which could be explained be pre-existing conditions or other factors. Proof of causation would also be problematic because there was some evidence known to Class Counsel that suggested that any harmful effects from the drug would not occur if use of the drug stopped. These difficulties of connecting the drug use to various medical conditions are reflected in the Settlement Agreement and in the objections to it.

2. The United States Multi-District Litigation against Pfizer Inc.

[16] In the United States, in multi-district litigation, Pfizer Inc. was sued for damages with respect to injuries allegedly suffered as a consequence of the use of Bextra and Celebrex.

[17] In the United States litigation, the U.S. court made a finding that available scientific evidence did not support the conclusion that daily doses of 200 mg of Celebrex caused harm to patients. The court, however, was not prepared to make a similar finding with respect to daily doses of 400 mg of Celebrex. In any event, Pfizer Inc. and Pfizer Canada deny that Celebrex causes the harm as alleged by the Plaintiffs.

[18] In the fall of 2008, Pfizer Inc. began settlement negotiations to settle the Bextra and Celebrex litigation in the United States.

[19] A settlement was reached in the United States. Under that settlement, Pfizer Inc. reserved $745 million to settle all known personal injury cases, which were settled on an individual basis.

[20] In the United States in excess of 7,000 individually filed claims were resolved. The average value of the settlements was $106,428 per claimant or $69,178 per claimant after the deduction of attorney's contingency fees.

3. The Canadian Class Actions against Pfizer Inc. and Pfizer Canada

[21] Between 2004 and 2008, class actions with respect to Bextra and Celebrex were initiated across Canada; more particularly:

- In Québec, Ontario, Manitoba, Saskatchewan, Alberta, and British Columbia, between October 12, 2004 and December 19, 2005, various plaintiffs commenced class actions against Pfizer Inc. and Pfizer Canada and others with respect to Bextra or Celebrex. The Merchant Law Group was the lawyer of record in these various proposed class actions.

- In Ontario, on December 21, 2004, Portia Waheed commenced an action against Pfizer Inc. and Pfizer Canada Inc. with respect to Celebrex. The firm now known as McFadden, Samac, Touvi was the lawyer of record.
- In Ontario, on January 14, 2005, Pardo Antonio Perrotta commenced an action against Pfizer Inc. and Pfizer Canada with respect to Celebrex. The firm Rochon Genova LLP was the lawyer of record.
- In British Columbia, on January 24, 2005, Timothy Moorley commenced an action against Pfizer Inc. and Pfizer Canada. The firm of Poyner Baxter was the lawyer of record. That firm subsequently removed itself as lawyer of record, and Mr. Moorley is now a self-represented plaintiff and the proposed representative plaintiff in the British Columbia action. He has not taken steps to have his action certified, and in the case at bar, he is a Class Member and an objector to the settlement approval.
- In Alberta, on April 8, 2005, Eugene Laverty commenced an action against Pfizer Inc. and Pfizer Canada with respect to Bextra. The firm of McNally, Cuming Raymaker was the lawyer of record. There is agreement that this action will be discontinued on consent.
- In Ontario, on April 11, 2005, Jesse and Eiko Voutour commenced an action against Pfizer Inc. and Pfizer Canada with respect to Bextra. The firm now known as McFadden, Samac, Touvi was the lawyer of record.
- In Québec, on October 27, 2008, Union des Consommateurs, Diane Guay, and Micheline Labrie commenced an action against Pfizer Canada with respect to Celebrex. The law firm of Lauzon Bélanger Inc. was the lawyer of record.

[22] McFadden, Samac, Touvi, Rochon Genova LLP, and the Merchant Law Firm agreed to co-operate and formed a consortium to prosecute various class actions, principally by advancing claims in Ontario and Québec. In October 2009, Lauzon Bélanger Inc. joined the consortium.

[23] In the class actions of the consortium of law firms, the Plaintiffs allege that the Defendants were negligent in the manufacture and distribution of Bextra and Celebrex and that the proposed class members suffered damages. The Plaintiffs also advance a claim for waiver of tort and for punitive damages.

[24] In the case at bar, the Plaintiffs allege that the drugs caused serious and life-threatening adverse reactions and that the Defendants knew or ought to have known of these risks and failed to warn Canadian consumers sufficiently or at all and failed to take appropriate steps related to the risks.

[25] The Defendants vigorously deny that they committed any wrongdoing. They have not delivered statements of defence in the Ontario actions, and there have not been any examinations for discovery in the Ontario actions.

[26] On August 25, 2011, the Ontario actions were consolidated and certified as a class action for settlement purposes.

[27] It was a term of the Court's certification order that Collectiva Class Action Services Inc. ("Collectiva") be provisionally appointed Claims Administrator for opt-outs, coordination of the notice plan, and administration of objections. This appointment would continue as a matter of the incidental relief being requested on this settlement approval motion.

[28] On August 30, 2011, the Québec action was authorized as a class proceeding for settlement purposes.

[29] Pursuant to the Ontario Court's certification order of August 25, 2011, Deloitte and Touche LLP gave notice of the certification. As part of the notice program, it distributed 2,000 notices of certification for settlement approval. The notice program cost $394,906.75. Class Members were provided with the opportunity to complete claim forms.

[30] The deadline for opting out was November 1, 2011. Fifteen persons opted out, but the Defendants elected not to exercise their tip-over rights under the Settlement Agreement. Subject to court approval, there is a binding settlement agreement. Should approval not be granted, the certification will be set aside and the proposed class action would resume with certification to be determined on a contested basis.

[31] As at November 11, 2011, Collectiva had sent out 44 Claim Packages, received 32 Claim Packages, received 145 telephone inquiries, received 9 email inquiries, and noted that 369 people had signed up for updates regarding the Settlement Agreement via the settlement website.

[32] As noted above, Deloitte delivered direct notices to 2,000 potential Class Members. For the purposes of this settlement approval motion, it should be noted that this group included anyone who had contacted Class Counsel relative to the two drugs in question for any reason, with the result that some of those notified were not Class Members.

[33] It should also be noted that some of those notified did not suffer injuries during the class period. Others did not suffer Compensable Injuries as defined by the Settlement Agreement. Still others possibly had injuries caused by factors other than the two drugs that are the subject of the class action. Taking these factors into consideration, Class Counsel anticipates that there will be in the range of 90 compensable claims with an aggregate value of between $3.0 million and $4.0 million under the terms of the Settlement Agreement, which are discussed below.

4. The Settlement Negotiations

[34] In November of 2008, settlement negotiations began in Canada. The negotiations included two sessions of a Court-supervised mediation in the summer and early fall of 2010. Justice Lacoursiere of the Québec Superior Court acted as judicial mediator. I know Justice Lacoursiere to be a talented and highly regarded jurist, and an experienced class action judge.

[35] After prolonged negotiations, the parties reached an agreement in principle. It took another year for a formal agreement to be reached. The Canadian Bextra/Celebrex Settlement Agreement is dated August 23, 2011.

[36] The Plaintiffs submit that a variety of factors associated with litigation risk were influential in the settlement negotiations and in structuring the scheme of the settlement. Class Counsel submits that while they were confident in the strength of the case against Pfizer Inc. and Pfizer Canada, significant liability risks were incorporated into the eligibility criteria and the compensation values under the Settlement Agreement. The litigation risk factors included:

- The evidence and the finding in the United States litigation indicated that causation of harm would be particularly difficult to prove for daily dosages of under 400mg.
- Bextra was withdrawn from the market on the basis of its association with adverse skin reactions, not cardiovascular risks.
- The withdrawal of Bextra from the market in April of 2005 and the announcements by Health Canada about cardiovascular risks associated with Celebrex reduced the Defendants' exposure to liability for a failure to warn and for injuries suffered after April 2005. The effective date for claims, however, was stretched to the end of 2005.
- The Defendants have vigorously contested liability, and among other things, they would rely on limitation period defences and the difficulties of proving causation. With respect to causation, there is the complication of commonly experienced co-morbidities that could be the explanation for the Class Members' injuries.
- Absent a settlement, the litigation would be protracted and difficult. There would be a contested certification hearing, an extensive discovery phase, and a lengthy common issues trial that would not be determinative in the sense that individual issue trials would still follow.
- Assuming success at a common issues trial, each Class Member would still need to prove that he or she consumed Bextra or Celebrex and consequentially suffered an injury and that that injury occurred before he or she ought to have been aware of the likelihood of risk.
- Each class member would also have to individually prove the quantum of damages.

5. The Settlement Agreement

[37] The essential terms of the settlement agreement are as follows:

- Pfizer Inc. and Pfizer Canada pay $12 million to create a $12 million settlement fund. The settlement fund is to be used to pay:

- Compensation for Compensable Injuries and losses. (Compensable Injuries are defined, as described below, to particular types of injuries.)
- The claims of public health insurers.
- Class Counsels' fees, disbursements, and taxes, for which (as described below) $4 million is being sought plus disbursements of $212,068.87 plus applicable taxes.
- Costs for the notice plan, not to exceed $400,000. (As noted above, the actual cost was $394,906.75.)
- Costs for administering the settlement, not to exceed $250,000.
- Costs of the claims adjudicators.

- The distribution of payments to Class Members will not commence until after all claims have been determined or adjudicated.
- Class Members will submit claims packages to Collectiva within 180 days of the effective date of the settlement approval to be processed as follows:
  - The Class Members will provide documentation to show use of the drug and a contemporaneous compensable injury. Notably, there is no causation analysis linking the use of the drug to the contemporaneous injury.
  - Collectiva will contact Class Members about incomplete claims and then submit the complete claims to one of two Canadian physicians appointed by the Court (one of whom will be French-speaking), who will make a determination of eligibility within 30 days.
  - Collectiva will advise the Class Member of the adjudicator's decision.
  - Class Members will have 30 days to challenge and engage a process of documentary review by the Court, which review will be binding.
- Eligible class members receive compensation for Compensable Injuries, Income Loss Claims, Consumer Claims, and Derivative Claims, as follows:
  - The payments for Compensable Injuries range from $5,000 to $100,000 depending on the Class Member providing documentary proof that he or she was prescribed Bextra and/or Celebrex and contemporaneously with the use of the drug, he or she suffered from one of a list of Compensable Injuries.
  - To become entitled to recovery from the settlement funds, Class Members will, in most cases, need to present only documentary evidence in the form of pharmacy records evidencing the dispensing, purchase, or prescription of Bextra and or Celebrex and medical records contemporaneous with the Class Member's use of Bextra and/or

Celebrex that reflect the injury allegedly suffered from the use of the drug.

- Claims for fatal or non-fatal myocardial infractions or ischemic strokes are valued at $100,000 for use before January 1, 2006 of Bextra or for use before January 1, 2006 of 400 mg or greater daily doses of Celebrex.
- Claims for fatal or non-fatal myocardial infractions or for ischemic strokes are initially valued at $25,000 for use before January 1, 2006 of daily doses of Celebrex of less than 400 gm.
- Claims for severe cutaneous adverse reactions are valued at $50,000 for use of Bextra.
- Claims for other cardiac, renal, or vascular events are valued at $10,000 where there was drug use before January 1, 2006 of Bextra or use of 400 mg per day or more of Celebrex.
- As Derivative Claims, Family Class Members receive 10% of the value of the associated Class Member's Compensable Injury to a maximum of $10,000 for a single Class Member.
- The payments for loss of income are determined based on the difference between the Class Member's average net income in the three years before the Compensable Injury and the Class Member's average net income following the injury.
- The payment for the Consumer Claim of up to $300 as partial reimbursement for the cost of Bextra and/or Celebrex purchases is based upon submission of a Claim Package and the applicable product identification documentation.

- The net funds available to Class Members are notionally allocated: 70% for Compensable Injuries; 18% for Income Loss Claims; 7% for any additional notice costs and adjudication expenses; and 5% for Consumer Claims.
- If there are insufficient net funds for distribution to Class Members, then the amounts will be distributed *pro rata* within each notional allocation.
- If there is a surplus funds for distribution to Class Members, claims related to Celebrex at a daily dosage of less than 400 mg. will be increased *pro rata* up to their maximum value.
- Payment of $5,000 as an honorarium to the proposed representative plaintiffs in the Ontario and Québec actions.
- The costs associated with the Notice, all administration and adjudication costs, payments to public health insurers, as well as lawyers' fees and expenses are to be paid out of the fund.

- Any undistributed balance of the settlement fund is to be distributed *cy-près*. The funds will be divided between the Ontario and Québec actions based on the final compensation values for each jurisdiction. In Ontario, a cy-press will be made 45% to The Arthritis Society, 45% to Women's College Hospital Foundation and 5% to the Walrus Foundation.

6. Endorsement of the Settlement Agreement

[38] All the Class Counsel involved in the class action endorse the Settlement Agreement, and they recommend that it be approved by the Court as fair, reasonable and in the best interests of the Class Members.

[39] The Representative Plaintiffs believe that the Settlement Agreement is fair, reasonable and in the best interests of Class Members.

7. Opposition to the Settlement

[40] Four Class Members filed written objections to the Settlement Agreement with Collectiva before the November 1, 2011 deadline to do so including an objection from Mr. Moorley. Two additional objections were filed after the deadline on November 16 and 17, 2011 that replicate Mr. Moorley's objection. The other objectors with timely objections were Serge Brochu, Gérard St-Germain, and Yanick Lavallée.

[41] Mr. Jamie Trasvina attended the settlement approval hearing to make an objection on behalf of his mother who had used Bextra in 2004 and 2005 and suffered a heart attack and stroke in March 2006. It would seem that she will not be eligible for compensation under the proposed settlement.

[42] With the exception of Mr. Brouchu, the objectors who objected before November 1, 2011 have chosen to remain as Class Members rather than opt out of the class action.

[43] Serge Brochu and Gérard St-Germain object to the January 1, 2006 endpoint for the class period, which they suggest should be extended.

[44] Mr. Lavallée's objects to the list of Compensable Injuries as being too narrow and as excluding his injuries.

[45] The Trasvina objection was that the amount of compensation was insufficient and the exclusion of certain types of injuries; i.e. the restrictions on what was a Compensable Injury was unfair and unreasonable.

8. Mr. Moorelev's Objection

[46] Mr. Mooreley's objection is the most detailed and extensive and includes an account of his life experience after using Celebrex. His story is distressing and sad. In 2003, Mr. Moorely was a semi-professional boxer and in excellent health. He was prescribed Celebrex to alleviate minor cramping in his feet. What followed after 2003

was the amputation of a part of his right foot, the discovery of a complete occlusion of his femoral artery, and the discovery of a hole in his heart, which Class Counsel suggested may be a pre-existing congenital condition.

[47] Mr. Moorely says that he was negligently served by various doctors and hospitals and the misadventures included the alleged loss of his medical test records. He retained a British Columbia law firm to prosecute a class action, but his experience with the legal establishment appears to have been equally unfortunate, and he and his lawyers have parted company. They removed themselves from the record, and in his written objection, he is frank to say that he does not know the status of his action in British Columbia.

[48] Mr. Moorely, who did not attend the settlement approval hearing, objects to the proposed settlement. He submits that the Defendants would not be successful at a trial. He characterizes the Defendants as notoriously negligent, as shown by Pfizer Inc. having been criminally prosecuted in the United States and having settled similar claims about dangerous drugs. He says that the Defendants have shown no remorse, and he submits that they should pay punitive damages for the harm they allegedly have caused.

[49] Mr. Moorely submits that the settlement is deficient and will not achieve the aims of the tort system. He says that the amount of the settlement fund will be inadequate to pay the claims of Class Members. He notes that the claim as pleaded was for $1 billion plus punitive damages of $500 million.

9. Factual Background to Counsel Fee Application

[50] The Representative Plaintiffs signed retainer agreements. The agreements all involve contingency fees, but the agreements differ.

[51] The retainer with Portia Waheed provides for compensation on the basis of a percentage of 30% of the amounts recovered or on the basis of a 3 times multiplier, whichever is higher. The retainer with Pardo Antonio Perrotta provides for compensation on the basis of a percentage of 25% of the amounts recovered or on the basis of a 3 times multiplier, whichever is higher. The retainers with Jesse and Eiko Voutour each provide for compensation on the basis of a percentage of the amounts recovered, namely, 25%.

[52] To date, the consortium of Class Counsel have expended approximately 7,700 hours in prosecuting the class actions. A considerable amount of time was expended with respect to the variety of factors associated with litigation risks that are noted above.

[53] In this last regard, I am satisfied that the decisions about litigation risk are informed and well-researched decisions notwithstanding that there has not been examinations for discovery in the class action.

[54] The combined value of this unbilled time is $3,458,020.81 plus $307,221.92 in applicable taxes.

C. SETTLEMENT APPROVAL

[55] Under s. 29 (2) of the *Class Proceedings Act, 1992*, a settlement of a class proceeding must be approved by the court to be binding on the parties.

[56] To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of those affected by it: *Dabbs v. Sun Life Assurance*, [1998] O.J. No. 1598 (Gen. Div.) at para. 9; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 68-73.

[57] In determining whether to approve a settlement, the court, without making findings of facts on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10.

[58] When considering the approval of negotiated settlements, the court may consider, among other things: (a) likelihood of recovery or likelihood of success; (b) amount and nature of discovery, evidence or investigation; (c) settlement terms and conditions; (d) recommendation and experience of counsel; (e) future expenses and likely duration of litigation and risk; (f) recommendation of neutral parties, (g) if any; number of objectors and nature of objections; (h) the presence of good faith, arms-length bargaining and the absence of collusion; (i) the degree and nature of communications by counsel and the representative parties with class members during the litigation; and (j) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at pp. 440-44, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C., [1998] S.C.C.A. No. 372; *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 71-72; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (S.C.J.) at para. 8; *Kelman v. Goodyear Tire and Rubber Co.*, [2005] O.J. No. 175 (S.C.J.) at paras. 12-13; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 117; *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.) at para. 10.

[59] A reasonable and fair settlement is inherently a compromise and a reasonable and fair settlement will not be and need not be perfect from the perspective of the aspirations of the parties. That some class members are disappointed or unsatisfied will not disqualify a settlement because the measure of a reasonable and fair settlement is not unanimity or perfection. See: *Baxter v. Canada (Attorney General)*, [2006] O.J. No. 4968 (S.C.J.) at para. 21; *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at p. 440, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C., [1998] S.C.C.A. No. 372.

[60] In my opinion, having regard to the claims and defences in the litigation and the objections raised to the Settlement Agreement in the case at bar, the settlement proposed is fair and reasonable and should be approved.

[61] The proposed settlement is within the range of reasonableness. Class Counsel, with their medical and science experts, have done considerable work and appear to have come to a fully-informed assessment of the likelihood of success and of the risks of failure in the litigation.

[62] The Representative Plaintiffs confront Defendants that are a formidable foe and the litigation and the settlement negotiations, which had the benefit of an experienced class action judge, have been contentious and hard fought and the settlement agreement appears to reflect these difficult negotiations. There is nothing to suggest any collusion or that Class Counsel were less than resolute in seeking a settlement that they perceived as rational and fair and in the best interests of the Class Members.

[63] The settlement has the benefits of settlements generally. It provides certainty of some recovery and it avoids the delays and uncertainties of pursuing a common issues trial to be followed by individual issues trials. For some Class Members, the settlement will achieve an immediate success that would have been at least delayed and might never have come, unless they had the resoluteness to prove causation at individual issues trials that would be several years away.

[64] The allocation of damage awards for the Compensable Injuries, the definition of what are Compensable Injuries, and the temporal requirement connecting the drug to the injury are within the range of reasonableness and reflects the genuine difficulties the Class Members would confront if they were pressed by contested proceedings to prove a connection between particular ailments or conditions and the usage of the drugs.

[65] Although as Mr. Moorely notes, it is a $12 million settlement of a $1.5 billion dollar claim as pleaded. The pleaded claim - as all too typically is the case - bears no rational relationship to the Defendants' genuine exposure to liability, and the pleaded claim does not account for the genuine risks of proving liability, including the difficulties of proving a breach of a duty of care and of proving causation of harm.

[66] In the United States litigation, Pfizer Inc. settled claims on an individual basis, and the net return to an individual claimant was $69,178. In contrast, in the case at bar, eligible claimants will receive $5,000, $25,000, or $100,000 depending on the class member providing documentary proof that he or she was prescribed Bextra and/or Celebrex and contemporaneously with the prescription of the drug he or she suffered from one of a list of Compensable Injuries. Thus, under the Canadian settlement, it appears that the most serious claims would receive compensation comparable to that achieved in the United States. Using the United States litigation as some measure of what is fair and reasonable, the contrast suggests that the Canadian settlement is reasonable and fair. The proposed settlement has the advantage that for the Compensable Injuries, causation of harm is not a factor.

[67] Based on Class Counsel's estimates, the settlement fund should be adequate to pay the eligible claimants without any reduction.

[68] I appreciate that the proposed settlement does not provide compensation for all injuries that occurred to users of Bextra and Celebrex. However, the identification of

compensable injuries is rational and reflects the considerable litigation risks that other types of injury could not be proven to have a link to Bextra or Celebrex usage. Similarly, the effective date of injuries occurring before the end of 2005 is rational and reflective of a genuine and serious litigation risk.

[69] For the above reasons, I approve the settlement in accordance with the *Class Proceedings Act, 1992* and I grant the ancillary relief requested in the notice of motion.

D. FEE APPROVAL

[70] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved: *Maxwell v. MLG Ventures Ltd.* (1996), 30 O.R. (3d) 304 (Gen. Div.); *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen. Div.); *Serwaczek v. Medical Engineering Corp.*, [1996] O.J. No. 3038 (Gen. Div.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.).

[71] Where the fee arrangements are a part of the settlement, the court must decide whether the fee arrangements are fair and reasonable, and this means that counsel are entitled to a fair fee which may include a premium for the risk undertaken and the result achieved, but the fees must not bring about a settlement that is in the interests of the lawyers, but not in the best interests of the class members as a whole: *Sparvier v. Canada (Attorney General)*, [2006] S.J. No. 752 (Q.B.) at para. 43, aff'd [2007] S.J. No. 145 (C.A.).

[72] Fair and reasonable compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well: *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 (C.A.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.); *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.) at paras. 59-61.

[73] Factors relevant in assessing the reasonableness of the fees of Class Counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by Class Counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by Class Counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; (j) the opportunity cost to Class Counsel in the expenditure of time in pursuit of the litigation and settlement: *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.) at para. 67; *Endean v. Canadian Red Cross Society*, [2000] B.C.J. No. 1254 (S.C.); *Wamboldt v. Northstar Aerospace (Canada)* [2009] O.J. No. 2583 (S.C.J.) at para. 33.

[74] In my opinion, in the case at bar, the fees requested by the consortium of law firms are fair and reasonable. Put shortly, Class Counsel have earned their fees including what amounts to a quite modest premium above their hours and hourly rates

for what was difficult and high-risk products liability litigation against a formidable foe that has not admitted liability.

E. CONCLUSION

[75] For the above Reasons, I approve the Settlement Agreement, approve the counsel fee, and grant the ancillary relief. The formal order may be settled at a case conference.

Perell, J.

Released: November 30, 2011

CITATION: Voutour v. Pfizer Canada Inc., 2011 ONSC 7118
COURT FILE NO.: 05-CV-287488CP

DATE: November 30, 2011

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Jesse Voutour, Eiko Voutour, Portia Waheed and Pardo Antonio Perotta

Plaintiffs

- and -

Pfizer Canada Inc. and Pfizer Inc.

Defendants

REASONS FOR DECISION

Perell, J.

Released: November 30, 2011