

**CLASS ACTION - Hepatitis C 1986-1990**  
**Request for Review # 14655**

**DECISION**

On May 3<sup>rd</sup>, 2004, this Claimant completed a claim's form for the Estate of the deceased mother of the HCV Primarily-Infected Person.

The Administrator of the 1986-1990 Hepatitis C Claims Center informed the Claimant by letter dated June 4, 2004, that her claim was rejected on the basis that as the Representative for the Estate of the mother of the HCV Infected Person, she did not meet the definition of "Family Member" as provided in Section 1.01 a) of the HCV Transfused Plan [hereinafter referred to as "the Plan"].

It is about this decision by the Administrator that the Claimant is submitting a Request for Review and I must now render this decision as a referee.

I sent a letter to the Claimant in order notably to ask her to confirm her intention to testify or to have other witnesses testify before me. The Claimant forwarded to me, by letter dated August 4, 2004, some information and confirmed that she would not testify before me, having "nothing more to add" to the case. On September 3, 2004, I therefore confirmed to the Claimant that, for her part, the file was complete and that the decision to be rendered on her Request for Review would be based on documents and information provided up to that time. Finally, I confirmed to the Claimant that there would be no hearing in this case unless she advised me in writing to hold one within a period of 30 days following September 13, 2004. On the expiry date, I had received no such request from the Claimant.

On March 3, 2005, further to the 1986-1990 Hepatitis C Settlement Agreement, the Compensation Fund Counsel forwarded to me his written submission, of which a copy was sent to the Claimant in order to allow her to react to it, if appropriate. The Claimant did not react to the Fund Counsel's submission. Thus, I render this decision on the basis of the documents and information forwarded to me by the Claimant and the written submission provided by the Fund Counsel.

The HCV Primarily-Infected Person died on July 29, 2003 and her mother, for whom this claim is submitted, also died on September 14, 2003. No steps or action regarding this Agreement were undertaken during the period of 6 weeks between the death of the Primarily-Infected Person and that of her mother.

The file as submitted to me contains little information as to why no action has been taken during those 6 weeks, but the woman's age, the pain resulting from the death of her daughter, then her own illness appear to me as a reasonable explanation for the fact that no claim was initiated by or in the name of the mother before her death. She was then 87 years old.

As Estate Administrator for the mother of the Primarily-Infected Person, the Claimant submits this claim for the benefit of the Estate of her mother and describes the latter as a "Family Member" of the HCV Infected Person.

Section 3.07 of the Plan stipulates the following:

**" 3.07 Claim by Family Member**

A person claiming to be a Family Member referred to in clause (a) of the definition of Family Member in Section 1.01 of a HCV Infected Person who has died must deliver to the Administrator, within two years after the death of such HCV Infected Person or within two years after the Approval Date ... an application form prescribed by the Administrator together with:

[...]

b) proof that the claimant was a Family Member referred to in clause (a) of the definition of Family Member in Section 1.01 of the HCV Infected Person."

According to Section 1.01 of the same Plan, " Family Member" of a HCV Infected Person means:

**"1.01 Definitions**

[...]

a) the Spouse, Child, Grandchild, Parent, Grandparent or Sibling of a HCV Infected Person;

[...]

unless any person described above opts out of the Class Action in which he or she would otherwise be a Class Member."

This claim in favor of the Estate of the mother of the Infected Person was rejected by the Fund Administrator on the basis that a "Family Member of the Estate" of the deceased mother of the HCV Infected Person does not meet the definition of "Family Member of the HCV Infected Person " as provided in Section 1.01 a) of the Plan. Such being the case, it appears, in my view, that the more relevant question that must be raised in this case is whether the remedy that the mother of the HCV Infected Person chose not to seek while she was alive or that she simply did not seek while she was alive (because of her health condition or for some other reason) can now be validly exercised by and on behalf of her Estate?

At first, I note that the Plan does not clearly deal with this question and the decisions to which the Fund Counsel is referring in his submission seem, in my view, to be a relatively weak argument to support his case. My role as referee is to ascertain that the decision of the Fund Administrator is the result of an adequate application of the Plan as well as its stated eligibility criteria. In order to do so, while knowing that the Plan is not a testamentary instrument, I consider it appropriate to be guided by certain legal considerations raised by the courts on estate matters.

Having reviewed the documents forwarded to me by the Parties and having examined the relevant sections of the Plan, it is acknowledged that the mother of the Primarily-Infected Person, following her death on July 29, 2003, was eligible as a "Family Member" according to Section 1.01 a) of the Plan. However, this woman, a "Family Member" as defined in the Plan, died some 6 weeks later without submitting a claim under Section 3.07 of the Plan. However, her eligibility to submit such a claim arose at the time of the death, on July 29, 2003, of her infected daughter. Such being the case, can her Estate seek such remedy?

The Administrator and the Fund Counsel argue that the Estate cannot be considered as a "Family Member" of an HCV Infected Person as defined in Section 1.01 of the Plan. On a strictly literal basis, this proposal seems to be reasonable, but one needs to replace in its context

the proper role of an Estate, which is to continue the juridical legal personality of the deceased <sup>1</sup>. Thus, an Estate is "a vehicle, a medium or an instrument" allowing the exercise of the only rights enjoyed and held by the deceased while alive. Such being the case, rejecting this claim on the basis that the "Estate" and not the "person" for whom such an Estate is available does not qualify as "Family Member", evades the real question in this case and does not, in my view, comply with the intention of the Plan generally and with Section 1.01 a) in particular.

I understand from this file that this Claimant, who is the sister of the HCV Infected Person, has already submitted a personal claim as "Family Member" of the Infected Person and that she was effectively compensated according to Section 1.01 a), 3.07 and 6.02 e) of the Plan. The Administrator and the Fund Counsel seem to give a certain weight to the fact that this Claimant has already received a monetary compensation as Family Member. As far as I am concerned, this situation does not appear to be relevant in my ruling on this Request for Review.

It then involved seeking personal remedy, while in this case, the action for which the Estate of the mother of the Infected Person is seeking remedy relates only to this Estate and its heirs. In this context and in view of the fact that this claim has been submitted by and for the benefit of the Estate of the mother of the HCV Infected Person, that the claim was submitted within the 2 year period stipulated in Section 3.07 of the Plan and that such a claim deals exclusively with the exercise of a right included in the estate of a person who is a « Family Member of the Infected Person" at the time of her death on September 14, 2003, I allow this Request for Review and this, for the compensation stipulated in Section 6.02 d) of the Plan.

As for the expenses, no proof or documents having been forwarded to me and no representation having been made to me, this Request for Review is allowed without costs.

The amount in dispute, according to Section 6.02 d) of the Plan, being less than \$10 000, this decision will have to be considered in accordance with Appendix C, Section 3, as being an arbitration case and thus, final and not subject to appeal.

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<sup>1</sup> For example, *Sauvageau et al. c. Dr Leroux et al*, C.S., Joliette District, 705-05-001048-969, August 14, 1996, pages 7,10 and 11; *Driver c. Coca-Cola Ltd.*, [1961] R.C.S. 201, pages 204 to 208; *Pantel c. Air Canada* [1975] 1 R.C.S. 472, pages 478 and 479; Baudouin J.-L. et Deslauriers P, *La responsabilité civile*, 6<sup>e</sup> éd., Les Éditions Yvon Blais inc., 2003, page 363; art. 625 al.1, *Code civil du Québec*.

Montreal, July 13, 2006

Original signed by

Jacques Nols Referee