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ARTICLE

Offers to settle certification motion may have limited cost consequences

In *Harris v. Bayerische Motoren Werke Aktiengesellschaft*, Justice Perell, of the Ontario Superior Court of Justice, determined whether the discretionary costs Rule 49 of the Rules of Civil Procedure applies when a judge is awarding costs of a certification motion. Perell J. concluded the Rule was an "ill fit" in these circumstances.

Background and decision

The Plaintiff – having been successful on certification after offering to settle the certification motion nearly a year earlier – sought substantial indemnity costs from the date of the offer to settle for a total of \$367,210.28, in line with Rule 49 (which applies if a party "meets or beats" a settlement offer at trial). The Defendants submitted that a costs award within the range of \$225,000 to \$285,000 would be fair and reasonable.

Justice Perell awarded partial indemnity costs for the amount of \$300,000, choosing to assess costs in the "normal fashion for a contested certification motion". Justice Perell reasoned that substantial indemnity costs should rarely be awarded on a certification motion. In his view, the policy rationale and technical requirements of Rule 49 were an "ill fit" for a certification motion. Justice Perell noted that certification motions, unlike most other interlocutory motions, *must* be brought and, even if on consent, still require the preparation of a certification record and factum to satisfy the court that the claim ought to be certified, resulting in unavoidable legal expenses.

Justice Perell also viewed that the technical requirements of Rule 49 would be difficult to apply in many, if not most cases. This challenge would also apply to defendants, as it will not be obvious that a defendant should accept an offer to settle a certification motion.

In any event, Justice Perell noted that a defendant's opposition to a certification motion is often "productive" in that "the outcome of the motion is a manageable class action that optimizes access to justice and judicial economy." Finally, Justice Perell found there would be an "unfair asymmetry" to applying Rule 49 cost consequences to certification motions, which do not decide the merits of the case and do not lend themselves easily to an offer to settle by a defendant.

Despite the result, Justice Perell endorsed attempts by parties to resolve certification or narrow the issues, while declining to impose adverse costs consequences if settlement offers are refused.

Takeaways

This decision is significant as it limits the cost impact of offers to settle certification. If followed, offers to settle certification will not result in substantial indemnity costs for the following reasons:

- Certification motions are mandatory with unavoidable legal expenses;
- Partial indemnity costs are a significant consequence for unsuccessfully opposing certification;
- A defendant's opposition to a certification motion often has the desired outcome of narrowing the issues and making the action more manageable; and
- It would be unfair to apply Rule 49 to certification motions when they do not easily lend themselves to an offer to settle by a defendant.

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