Much Ado About Very Little? When A Court Questions The Adequacy Of Compensation On Settlement Approval

March 15, 2019

On January 28, 2019, the Ontario Superior Court of Justice released its decision in Micevic v. Johnson & Johnson. This decision addresses several issues relating to settlement approvals in the context of the Class Proceedings Act, including:

- What makes a fair and reasonable settlement, and to what extent a court may adjust a proposed settlement;
- Ordering a permanent stay of proceedings in the face of duplicative proceedings in two jurisdictions; and
- How a non-settling defendant's procedural rights can be protected if settlement is approved.

Parallel actions were brought by Plaintiffs in Ontario and British Columbia. Both actions allege that a cosmetic injectable filler, Evolence, caused bumps or nodules when improperly injected into the lips of persons who used the product. Although this reaction may be permanent and severe, the adverse effects are believed to occur only in a limited number of people. This meant that the class size was small. Consequently, the proposed overall settlement was also small ($110,000 to be distributed to class members). The proposed settlement was agreed to by five of the six defendants, and class counsel. One class member objected to the proposal on the basis that it was not fair and reasonable given the injuries she had suffered, and the losses incurred by her and others in a similar position as her.

In considering settlement approval, the court must determine whether it is fair and reasonable, and in the best interests of the class. The Court in this case noted that while the settlement was negotiated by experienced counsel, there was concern that the small class size (i.e. 12 or 13 class members) meant that "the economies of scale that often provide a motivational factor for a large class action were missing (para. 15)." The Court went on to say that while a settlement is inevitably a compromise, "that does not mean that it should simply strike a median level of payment for every class member such that it seriously undercompensates those whose damages are greatest. Moreover, even if the representative plaintiffs have "learned to accept and live with" their losses and have lost their desire to pursue the case, the interests of all class members must be taken into account. Any settlement must be fair to the entire class, including those who

suffered the most (par. 21)."

The settling parties had agreed to a "distribution protocol" which set out three levels of compensation based on three levels of physical injury. The protocol also called for income loss compensation, but only up to a maximum of $5,000 per claimant. The Court considered the case of the objecting class member, as an example of a sub-class of claimants, and found that given her level of loss, the "distribution protocol" would not sufficiently compensate her. She was a professional model and had suffered income loss due to her injuries. While recognizing that the court's role is to approve or refuse to approve a proposed settlement, and not to transform an agreed-upon settlement, the Court said it is possible for a court to "adjust some of the details of a proposed settlement in a way that does not undermine the settlement overall (para. 25)." All counsel agreed that "that the Distribution Protocol [was] open to the court's readjustment so long as the settlement amount and the general structure of the proposed settlement remain[ed] intact" (para. 25). The parties also agreed that there was flexibility in the cap set on income loss compensation.

The Court ultimately found that to make the proposed settlement fair and reasonable, while also preserving the overall settlement distribution for the rest of the class, the maximum amount for income loss that could be awarded per claimant should be raised to $20,000.

Further, given that the class action was to continue against the non-settling defendant, and there were identical proceedings in British Columbia and Ontario, the Court ordered a permanent stay of proceedings with respect to the Ontario action. The Court found that there was no injustice to the plaintiff in ordering a stay of the Ontario action given that the identical claim would proceed in British Columbia. The Court also noted that a permanent stay of proceedings was warranted in the circumstances because it puts the onus on the plaintiff to restart the Ontario action if the circumstances necessitate it. In the ordinary course, a stay of proceedings would mean that the non-settling defendant would have to bring a motion to dismiss the Ontario claim, once the British Columbia claim had been finally resolved. The Court stated that since "the settlement has left open the B.C. proceedings against Canderm [the non-settling defendant], it is appropriate for the Plaintiff to bear the onus of re-starting any future proceedings in Ontario and not for Canderm to bear the onus of finally ending them (para. 40)."

Finally, the non-settling defendant sought a "bar order" which would preserve its procedural rights that might otherwise be lost once the settling defendants were out of the action. Specifically, the non-settling defendant and the plaintiff would not be entitled to full documentary and oral discovery as they would be if the settling defendants remained in the action. While the plaintiff was a party to the settlement and chose to forgo these rights as a feature of the settlement, the non-settling defendant was not a party to the settlement and would suffer an injustice as a result of it. The court applied the test articulated by the Ontario Superior Court of Justice in Ontario New Home Warranty Program v Chevron, and made a bar order which carved out the non-settling defendant's procedural rights in the remaining action.

Overall, this decision is helpful in understanding the court's role in approving settlements under the Class Proceedings Act and its limited ability to adjust settlement proposals. It further highlights the commitment to achieving judicial efficiency and procedural fairness vis à vis non-settling defendants.

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