Proposed class actions against insurers fails

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Court of Appeal confirms LAT to decide SABs Disputes

In a previous article, BLG wrote about proposed class actions brought against 15 auto insurers and the insurers' government regulator, the Financial Services Commission of Ontario (FSCO, now the Financial Services Regulatory Agency of Ontario), alleging the insurers were improperly deducting HST from the plaintiff's statutory accident benefits (SABs). The defendants subsequently brought a Rule 21 motion, which resulted in the Superior Court of Justice dismissing the claims against the insurers, holding that it lacked jurisdiction over the claims, which belonged to the License Appeal Tribunal (LAT). However, the claim against FSCO was allowed to proceed as the nature of the allegations fell outside the jurisdiction of the LAT.

Two of the insurers had also entered into qualified settlement agreements with the plaintiffs, but those settlements were conditional on the proposed class actions being certified, and on the Court's approval of the settlements. With the Court's ruling that it lacked the appropriate jurisdiction, the conditional settlements were rejected.

Ontario Court of Appeal

In *Dorman v. Economical Mutual Insurance Company*, the plaintiffs appealed, seeking to restore the claims against the insurers, and approve the two conditional settlements. Conversely, the Crown appealed the decision not to dismiss the claims against FSCO, which were grounded in allegations of regulatory negligence, bad faith and misfeasance of public office. The respondent insurers also sought leave to appeal the costs order of the underlying motion, which had been set at $15,000 collectively to be shared amongst the insurers and a further $1,000 to each insurer as costs of the action. On the motion, the defendants had sought over $600,000 in costs.

On appeal, the panel affirmed the motion Judge's decision with respect to jurisdiction, stating that section 280 of the *Insurance Act* "provides a clear answer to the plaintiff appellants' claim". Pursuant to that provision, any dispute surrounding an insured person's entitlement to SABs and/or the quantum of that benefit, falls under the purview of the LAT. Specifically, that provision also clearly states that "[n]o person may bring a proceeding in any court with respect to a [SABs] dispute…"

The Court of Appeal also stated that s. 280 of the *Insurance Act* cannot be read as dealing only with individual claims, and not proposed class actions. In doing so, the Court reminded the parties that the *Class Proceeding Act*, 1992 "is procedural in nature and does not confer jurisdiction on the court that does not otherwise exist". In upholding the motion Judge's decision with respect to jurisdiction, the Court necessarily concluded that the conditional settlements could not be approved, as they were incapable of being certified.

With respect to the Crown's appeal, the Court reaffirmed that the allegations against FSCO relate to alleged failures in performing its duties. As such, the torts alleged against FSCO fall outside of the scope of s. 280 in the *Insurance Act*, and thus the Court could assume jurisdiction over the LAT. In the result, the proposed class action against FSCO was allowed to proceed.

Finally, as to leave to appeal the costs award, the Court of Appeal reiterated that it is well-established that costs are within the discretion of the motion Judge and deference ought to be shown. Therefore, it was open to the motion Judge to conclude "this was a straightforward motion on a jurisdictional question and that the costs incurred were excessive in the circumstances." The Court of Appeal ultimately denied leave.

Takeaways

This case reiterates the importance of understanding the underlying legislation that may govern a proposed class action. The Court of Appeal confirmed that where such legislation creates another avenue for disputes, as the Insurance Act did in this case, the Courts might defer its jurisdiction in such matters.

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