Class Action Settlement Administrators Need Not Go “Above And Beyond” Terms Of Settlement Agreement: Court Of Appeal Of Alberta

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The Court of Appeal of Alberta has recently rendered an important decision about the extent of a Settlement Administrator's duties to those submitting claims under the terms of a class action settlement

The decision in *DePagie v Crawford & Company Inc.* represents the latest development in the decades-long multi-jurisdictional class action litigation over Hepatitis C, blood-tainted transfusions. Claims were litigated against numerous defendants in several provinces, and resulted in various settlements. One such settlement related to claimants who had been infected prior to January 1, 1986 or between July 2, 1990 and September 28, 1998. That settlement was embodied in an agreement that received court approval in 2007. The settlement agreement established six agreed-upon disease levels, ranging from lowest in severity (Level 1) to highest (Level 6). Claimants were required to attach a treating physician form to their applications and different compensation was provided, depending on the disease level that the claimant was able to establish.

The appellant was the personal representative of the estate of one of the class members who had submitted a claim pursuant to the settlement agreement.

The claimant submitted his treating physician form and was approved for Level 1 and Level 2 and received compensation in May 2010. The claimant died in March 2012. The claimant's son and personal representative of his estate commenced an action against the Settlement Administrator, alleging that the Settlement Administrator did not properly "evaluate" the claimant and that, consequently, the claimant had received less than what was properly due. In the appellant's view, his father ought to have been compensated based on a Level 3 disease level.

Pursuant to the settlement agreement, the appellant required leave to proceed with an action against the Settlement Administrator. The appellant applied for leave and the lower court dismissed the application because the appellant failed to establish that there was a reasonable possibility of success in the proposed action against the Settlement Administrator. The appellant appealed and argued, among other grounds, that the lower

court erred in applying a higher threshold test of "reasonable possibility of success" when it ought to have applied a less stringent "actionable wrong" test when considering whether or not the action could proceed. In the appellant's view, this was a novel claim because the duties of a Settlement Administrator under a settlement agreement had never been considered by a Canadian Court previously.

The Court of Appeal of Alberta dismissed the appeal.

The Court found that the lower court applied the correct test. The "reasonable possibility of success" test was consistent with the purposes that are served by class action settlement agreements: certainty and finality. In the Court's view, to apply a lower threshold and grant leave simply on the basis that the claimant pled sufficient facts in law to found a cause of action, without any assessment of the strength of the claim, would be inimical to the Court's gate-keeping function.

The Court went on to say that the lower court judge made no over-riding or palpable error in concluding that the applicant's action had no reasonable possibility of success. The Court was satisfied that the lower court judge reasonably evaluated the Settlement Administrator's duties and responsibilities and rejected the argument that the Settlement Administrator was required to go above and beyond the treating physician's certification concerning the compensable disease level. The Court noted that it was the claimant's physicians and specialists, *not* the Settlement Administrator, who could assess and certify whether the claimant met certain medical requirements to fall within a higher disease level. In that regard, the Court clarified that the "duty to evaluate" the validity of the claim does *not* extend to independently considering, and eliminating, the possibility that a higher level of compensation than that certified might be available. This, in the Court's view, would have been inconsistent with the settlement agreement.

The decision of the Court of Appeal of Alberta is helpful, as it sheds light on the duties of Settlement Administrators. The Court clarified that that the role of a Settlement Administrator will be defined by the terms of the applicable settlement agreement and will not include independent assessments or the obligation to independently certify whether certain medical guidelines or thresholds are met in order for a claimant to receive a greater amount of compensation, if the settlement agreement does not expressly impose such an obligation.

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