Class action lawsuits: Looking south at pharmaceutical settlements

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On April 16, 2021, the Ontario Superior Court of Justice released its decision in *Casseres v. Takeda Pharmaceutical Company*, 2021 ONSC 2846, regarding the approval of a settlement of two pharmaceutical class action lawsuits. The class actions alleged that three diabetes medications caused bladder cancer and that class members were not warned of this risk.

The proposed settlement amount, achieved through mediation, was $25 million. The Court adjourned the initial settlement approval hearing after learning that actions in the United States in respect of the same medications were settled for a total of $2.4 billion. The Court noted that "using a per capita comparison, this would mean that a Canadian settlement in the range of $240 million would be more appropriate." The Court questioned how, in light of the U.S. settlements, the proposed settlement amount could be fair and reasonable. It adjourned the settlement approval hearing to allow class counsel to file additional information to address this concern.

Class counsel submitted a supplementary affidavit explaining why the U.S. comparison was inappropriate and satisfying the Court that $25 million was a fair and reasonable amount. Notably, class counsel explained to the Court that:

1. Four significant scientific studies published after the U.S. settlements raised significant questions as to any causal link between the medications and bladder cancer;
2. Although Canada's population is approximately 10 per cent of the U.S., its usage of the medication was significantly less (3 to 3.8 per cent of U.S. usage); and
3. Significant differences in access to and pricing of the medications make the U.S. an inappropriate comparison.

Upon receiving this information, the Court approved the settlement. The Court did deny class counsel's request that the representative plaintiffs each receive a $5,000 honorarium as part of the settlement. The Court reiterated that it is only where a representative plaintiff can demonstrate that their effort and involvement went "beyond what is normally expected and is truly extraordinary, or where there is evidence that they were financially harmed" that an honorarium will be justified. No such evidence was

presented. It should also be noted that honoraria for representative plaintiffs are not available in Québec.

Takeaways

The Court's consideration of the U.S. settlements in assessing the fairness of the proposed Canadian settlement is significant given the number of Canadian class actions that mirror actions in the U.S. Where similar U.S. cases have settled, Canadian counsel will want to be in a position to explain why the Canadian experience is different. Such considerations may arise from differences in the legal/statutory regimes, relevant factual context or timing of the settlements.

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