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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Blaneys on Class Actions

This newsletter is designed to bring news of changes to the law, new law, interesting decisions and other matters of interest to our clients and friends. We hope you will find it interesting, and welcome your comments.

Feel free to contact any of the lawyers who wrote or are quoted in these articles for more information, or call the head of our Class Actions Group, Mirilyn Sharp at 416.593.3957 or msharp@blaney.com.

Court in payday loans class action refuses to approve Class Counsel fees of $27.5 million... settlement contemplated "coupons" for class members but "cash" payment for Plaintiff's Class Counsel.

COURT OF APPEAL AGREES THAT PLAINTIFFS' CLASS COUNSEL FEES WERE PROPERLY REDUCED FROM $27.5 MILLION TO $14.5 MILLION

Mirilyn R. Sharp

After a hard fought battle in the "payday" loans class action (*Smith v Money Mart*), an action in which it was alleged, among other things, that Money Mart was charging criminal rates of interest to class members who utilized the defendant's services to obtain cash advances, the parties finally reached a class action settlement some seven years after the action was commenced.

The settlement provided that one group of class members would receive a series of $5 'coupons' or transaction credits to be used for future payday loans with Money Mart, and that the other group of class members (those who were in debt to Money Mart for failing to pay off their loans) would receive forgiveness of their prior indebtedness. The settlement did not contemplate any cash payments being made to the class members, but it did contemplate a cash payment of $27.5 million being made to Plaintiffs' Class Counsel.

As with all class action settlements, court approval of both the settlement and the Plaintiffs' Class Counsel fees was required. To approve a settlement of a class proceeding, the court must find that it is fair, reasonable, and in the best interests of those affected by it. To approve Class Counsel Fees, the court is to determine, among other things, whether the fee is fair and reasonable, and is entitled to consider a number of factors including whether the compensation would be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and do it well.

While Plaintiffs' Class Counsel asserted that the 'value' of the settlement was $120 million (including $30 million in transaction credits and $56 million in debt forgiveness), thus justifying the class counsel fee of $27.5 million, both the lower Court and the Court of Appeal disagreed.

In *Smith v Sutts Strosberg LLP*, 2011 ONCA 233, released on March 28, 2011, the Ontario Court of Appeal upheld significant portions of the somewhat stinging decision of Justice Perell, in which Justice Perell refused to approve the requested $27.5 million in class counsel fees for a settlement he said was "a disappointment to the class". While Justice Perell acknowledged that the settlement was "satisfactory", he also noted a number of times that it was "not, as submitted, an excellent result…". In fact, Justice Perell went so far as to say that it was "to spin a silk purse from a sow's ear to suggest that the result was excellent".

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"It was clear from the decision of Justice Perell that he did not view the settlement as being worth $120 million to the class members, particularly as most of the 'value' came in the form of coupons and credits rather than in the form of cash payments to class members."

Mirilyn Sharp has an active class action practice and has defended large multi national health care providers and pharmaceutical companies, as well as insurers in a wide variety of class actions including class actions claiming damages arising from silicone gel breast implants, the Hepatitis B vaccine, Temporomandibular joint (TMJ) implants, auto insurance deductibles, the August 2003 regional black-out, the Sunrise Propane explosion, collagen based wrinkle creams, and ruined vacations. She has litigated and continues to litigate numerous class actions in Ontario and Saskatchewan, and has provided assistance to our clients in class actions commenced in British Columbia, Quebec, and Alberta.

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Justice Perell quoted at length from an email sent by one of the objectors to the settlement who said "…the credit that they want to offer, that's a joke. They want us to go and use their services again by giving us credits... this does not make sense. I do not want to use Money Mart services ever again… I want a refund of some of the money that they stole from us by overcharging us interest…"

It was clear from the decision of Justice Perell that he did not view the settlement as being worth $120 million to the class members, particularly as most of the 'value' came in the form of coupons and credits rather than in the form of cash payments to class members. Justice Perell seemed particularly unhappy with the fact that Plaintiffs' Class Counsel would be receiving their fees in cash, and not by way of 'coupons' or credits.

Plaintiffs' Class Counsel argued that the settlement was structured without cash payments to class members because a cash settlement would have bankrupted Money Mart. It was also significant, according to Plaintiffs' Class Counsel, that part way through the litigation, the law concerning payday loans changed, such that the rates being charged by Money Mart became 'legal'.

While Justice Perell agreed that the settlement was reached after a particularly litigious history, noting that "it is to do injustice to the notion of understatement to say that [the] class proceeding has been hard fought", he nevertheless was of the view that the $27.5 million fee (to be shared amongst 4 law firms) was too high. Justice Perell reduced the fees to $14.5 million (inclusive of GST and disbursements) and held that the remaining $13 million should be shared amongst the first group of class members, with a portion going to the Class Proceedings Fund.

It is to be noted that over the seven years that this action was litigated prior to the settlement, there had been numerous interlocutory motions and numerous appeals, including four appeals to the Ontario Court of Appeal and three applications for Leave to Appeal to the Supreme Court of Canada. The settlement itself was reached after 17 days of trial. And while Justice Perell noted that the settlement had been reached by Plaintiffs' Class Counsel who are "among the most experienced and respected members of the class action bar", he remained of the view that a "better version of the settlement" was one where "Class Counsel's fee does not take up all of the cash portion of the settlement…"

While the Court of Appeal decision was somewhat more tempered than that of Justice Perell, what did become obvious from both decisions was that in these types of proceedings, where the parties have settled the case and are seeking court approval on behalf of an 'absent' group of class members, and where the motion for approval is usually heard on an unopposed basis, there may need to be some sort of independent person who can speak up for the absent class members regarding the reasonableness of the settlement and the reasonableness of the Plaintiffs' Class Counsel fees.

The Court of Appeal agreed with Justice Perell that it is well known that the court is placed in a difficult position in determining whether a settlement and class counsel fees should be approved without the dynamics of

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the adversary system where opposing views are heard. Justice Juriansz, speaking for the panel took the opportunity to put forward a number of suggestions as to how to deal with this situation in future, including the suggestion that an *amicus*, monitor, or *guardian ad litem* be appointed to present the opposing view or to assist the court in analyzing volumes of information that may be filed on settlement and fee approval motions.

Justice Juriansz went on to say that in this case, where counsel proceeded with the settlement and fee approval motion without ensuring that an independent perspective was put forward, Plaintiffs' Class Counsel had little cause for complaint if the court departed from its traditional passive role and challenged the uncontradicted evidence and the arguments being put forward by Plaintiffs' Class Counsel (as was done by Justice Perell).

Oddly the Court of Appeal makes no mention of the fact that Justice Perell relied in part on the recommendation of the mediator – a former Judge of the Supreme Court of Canada – the Honourable Frank Iacobucci. Justice Perell noted that Mr. Iacobucci was of the opinion that the settlement was fair and reasonable and in the best interests of all concerned, and that "given Mr. Iacobucci's credentials as a scholar, law professor, law dean, judge, mediator, and business executive, this is a substantial factor in favour of approving the settlement."

After dealing with a number of procedural issues pertaining to fee approval hearings, and the relevant statutory provisions that govern such hearings, the Court of Appeal dealt with the reasonableness of the Class Counsel fees being sought in the present case.

The Court of Appeal noted that it had been established that class members had paid to Money Mart cheque cashing fees and interest totalling over $224 million over the class period, and that Money Mart was owed over $56 million in respect of payday loans that were in default. The settlement, which contemplated coupons or credits of $30 million, forgiveness of the $56 million in payday loans, administration costs, repayment to the Class Proceedings Fund, and payment of $27.5 million in fees, was said by Plaintiffs' Class Counsel to have a value of $120 million.

The Court of Appeal concluded that Justice Perell had a solid foundation for concluding that the settlement did not have a value of $120 million to the class members. In particular, the Court agreed with Justice Perell that the transaction credits did not have a benefit to the class members equal to their face value, and that in any event, the transaction credits could be seen as a "business promotion scheme" under which Money Mart discounts its price and makes less profit from a profitable transaction but "obtains business it would otherwise not have obtained".

In making the point that the transaction credits were not equivalent to cash, Justice Perell surmised (and the Court of Appeal agreed that this was a fair inference) that class counsel would likely not accept an assignment of $27.5 million worth of transaction credits as payment of their fees.

With respect to the debt forgiveness, both Justice Perell and the Court of Appeal agreed that much of the debt forgiveness component of the settlement released debts that had already been written off or reserved in Money Mart's records, thus making the debt forgiveness component of the settlement worth far less than the dollar amount attributed to it by Class Counsel.

In the end, the Court of Appeal held that the motion judge's determination on the appropriate Class Counsel Fee was discretionary and there was no basis upon which to interfere with his determination that $14.5 million was a fair and reasonable fee for Class Counsel in this case.

The concern expressed by Plaintiffs' Class Counsel, both before the motions Judge and before the Court of Appeal, was that unless proper fees were awarded to Plaintiffs' Class Counsel, there would be no incentive for law firms to take on high risk class actions on a contingency basis.

In this case, the fees incurred by Plaintiffs' Class Counsel, inclusive of GST, amounted to just over $10 million. Justice Perell noted, in response to the concern put forward by Plaintiffs' Class Counsel, that "the award for Class Counsel for the risk they took is that they will receive $10 million at their not bargain basement hourly rates plus a premium of $3.5 million… I see no necessity to award more having regard to the success achieved and the risk taken and having regard to the other factors that the court should consider when setting a reasonable counsel fee in the context of class proceedings."

No decision has yet been made as to whether Leave to Appeal the decision to the Supreme Court of Canada will be sought. Either way, this latest decision from the Court of Appeal and the significant reduction in the fees approved in this particular case, signal that Plaintiffs' Class Counsel should give serious consideration to the appointment of an *amicus*, monitor, or *guardian ad litem* to participate in the settlement and fee approval process in order to assist the court in assessing the reasonableness of both the settlement and the fees. ■

Blaneys on Class Actions is a publication of the Class Actions Group of Blaney McMurtry LLP. The information contained in this newsletter is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.
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We welcome your comments. Address changes, mailing instructions or requests for additional copies should be directed to Chris Jones at 416.593.7221 ext. 3030 or by email to cjones@blaney.com. Legal questions should be addressed to the specified author.

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