BC Court of Appeal Declines to Include Ontario Residents in Settlement Class

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The British Columbia Court of Appeal recently dealt with the issue of overlapping classes arising from a multi-jurisdictional class action commenced in British Columbia, Ontario, and Québec.

In *Wilson v DePuy International Ltd*, the plaintiff applied before the Supreme Court of British Columbia to have the action certified as a class action and for the approval of a settlement. The chambers judge concluded that the action should be certified, and that the settlement agreement was fair, reasonable, and in the best interests of the British Columbia resident class, but he was not prepared to certify a class that included individuals who were already members of a class certified in Ontario.

The Court of Appeal dismissed an appeal of the chambers judge's decision on the basis that it was proper for the chambers judge to take into account the effect of a multi-jurisdictional class on the question of whether another more suitable procedure was available.

In 2010 and 2011, class actions involving a recalled hip replacement product began in Ontario, Québec, and British Columbia. Class counsel in all three actions action agreed that the Ontario action would exclude residents of Québec and British Columbia from the proposed class.

The Ontario litigation, as a "near-national class," proceeded and was certified in August 2013.

In 2017, the plaintiff in the British Columbia action reached a settlement agreement with the defendant that included non-British Columbia residents on an opt-in basis. This proposed "opt-in class" was apparently contrary to the agreement between counsel.

The chambers judge considered whether the "opt-in class" should be included based on a preferability analysis, rather than the suitability of the class. In his analysis, the chambers judge identified a number of concerns, including the creation of overlapping classes, disruption of counsel agreements and the negative effect on judicial comity. Ultimately, the chambers judge determined that the existing Ontario action was the

preferable procedure to resolve the claims for class members outside of British Columbia and Québec.

The Court of Appeal upheld the chambers judge's decision. The Court referred to recently added subsections 4(3) and 4(4) of the amended *Class Proceedings Act*, which state that the court must determine whether it would be preferable for some or all of the claims of the proposed class members to be resolved in a proceeding commenced elsewhere.

The Court held that the question of whether the chambers judge erred by considering the Ontario proceedings as the preferable procedure was now answered clearly in the legislation. Further, even prior to the enactment of subsections 4(3) and 4(4), it was proper for a certification judge's discretionary decision on preferability to take into account the effect of a multi-jurisdictional class on the question of whether another more suitable procedure was available.

In determining whether the chambers judge erred in rejecting the settlement, the Court of Appeal noted the potential for chaos and confusion when there are overlapping classes. Although there is no general principle that overlapping classes must be avoided, in cases such as this one, they can create chaos and confusion and undermine judicial economy. The overlap in this case would disrupt counsel agreements and the process and approach taken in Ontario. Additionally, judicial economy could not be achieved by having overlapping claims relating to the same subject matter.

By

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