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Class Actions: Settling at the court's discretion

Parties to class action settlements often settle, at least in part, to avoid the ordinary uncertainty of litigation. Courts have long emphasized that while they retain discretion to supervise payments of lawyers' fees as part of a settlement, the settlement approval process will not entail the Court re-writing a settlement that it is not prepared to approve.

The Court of Appeal for Ontario's decision in *Welsh v Ontario* exemplifies this tradition. The Court overturned a motion judge's settlement approval order which imposed a settlement term to which neither party had agreed and which, the Court said, significantly altered the terms of the bargain between the parties. Perell J. had been critical of the merits of the settlement, which would effectively leave 90% of class members without compensation. Although he ultimately approved the settlement, Perell J. purported to use his supervisory authority under the *Class Proceedings Act* to approve the settlement but direct that (1) class counsel donate \$1.5 million of its fees to charity; (2) class counsel fees would be reduced by an amount proportionate to the amount of the settlement which was not taken up by the class and which reverted to the Defendant. The Court of Appeal set aside the order as an unwarranted alteration of the parties' agreement that fell well beyond the scope of the court's discretion.

Only four days later, Justice Morgan released a settlement approval order in *Micevic v Johnson & Johnson*. Although the motions judge noted the Court of Appeal's direction as to the limited scope to alter settlements, he did impose a meaningful change in the manner in which the settlement fund established in that case would be disbursed. Morgan J. acknowledged that the role of the court is "not to transform an agreed-upon settlement into a court-imposed resolution," but he nevertheless attempted to distinguish the case from the Court of Appeal's recent decision in stating that "it is possible for the court to adjust some of the details of a proposed settlement in a way that does not undermine the settlement overall." In the result, he changed the maximum amount that class members could be awarded for an income loss claim from a settlement fund from \$5,000 to \$20,000.

The potential for awarding of a larger amount to compensate income loss claims from a fixed settlement fund for some class

members risks reducing the total amount available to other class members. It may be difficult for some to square this result with the Court of Appeal's direction in *Welsh* that courts can approve or not approve a settlement but must not rewrite the terms of the bargain.

It is not clear that any party has an interest in appealing the order in *Micevic* so it is likely that further cases will explore the scope of the court's discretion to "adjust some of the details of a proposed settlement in a way that does not undermine the settlement overall".

With notes from Julia Flood.