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Proactively managing class action risk: the virtue of voluntary compensation

Product liability cases are routinely certified as class proceedings. Indeed, allegations that a product was negligently manufactured, or that a manufacturer failed to warn consumers of a particular risk, seem particularly amenable to resolution on a class-wide basis. However, not every such case is certified as a class proceeding. The recent decision of the Ontario Superior Court of Justice in *Richardson v Samsung Electronics Canada Inc* is one example of a case that was not certified. More importantly, it shows what steps defendants can proactively take to avoid certification of class actions against them.

By way of background, *Richardson* was a proposed class action against Samsung relating to the Galaxy Note7. The Galaxy Note7 was a smartphone released by Samsung in Canada in August 2016. Unfortunately, as was widely reported at the time, there was a defect in one of the batteries used in the Note7 that caused the device to overheat, creating the risk of fire or explosion.

Within a few weeks of the Note7 being released to the Canadian market, Samsung halted sales. Shortly thereafter, it announced the availability of replacement phones, and it exhorted customers to power down and replace their Note7 smart phones as soon as possible. Approximately a month later, Samsung began offering various credits to persons who had purchased the Note7.

Unsurprisingly, class proceedings was brought against Samsung, pleading a number of claims, including negligent design, failure to warn, negligence, and unjust enrichment, and various misrepresentation claims. When the matter came before the courts for a certification motion, the Ontario Superior Court declined to certify the claim.

Perhaps most notable in the court's decision is the court's preferable procedure analysis. It is a requirement for certification of a class action that a class action be the preferable procedure for resolving common issues. In conducting the preferable procedure analysis, one set of facts the courts will look to in conducting the preferable procedure analysis is whether another means of compensation to class

members is provided.

In this case, the court found that there was an alternative mechanism for resolving the harm that consumers had suffered. After the defects with the Note7 came to light, Samsung engaged in a recall of the defective products and offered customers new phones as well as credits. The court held that this compensation scheme was an appropriate alternative compensation scheme for dealing with class members of the claims. The Court held as follows:

First, the defendant's compensation program is the preferable procedure. The existence of this voluntary compensation scheme squarely addresses access to justice and behaviour modification concerns.

In my view, the defendant's prompt response in concert with Health Canada to safety issues, the recall, the termination of sales, and the compensation package, demonstrates the response of a responsible corporate citizen. It is behaviour that should be encouraged rather than discouraged.

The court acknowledged that the common nature of the compensation scheme across all class members meant that there might be some class members who had suffered greater losses as a result of the defects in the Note7. However, the court held that this was sufficient:

As to the adequacy of the plan, it is quite possible that some people are out of pocket to some extent. It is also the case that some people sustained no loss at all as the plaintiff's expert acknowledges. In any event, no recall program is likely to satisfy every purchaser. However, the law does not demand perfect compensation. Indeed, perfect compensation is unlikely even if pursued by way of class action.

There were features of the defendant's package that were advantageous to consumers. Those advancing claims under it were not required to prove liability, causation or damages in order to receive a full refund for the phone plus a \$25 credit; or a replacement phone and a \$100 credit. Refunds for Note7 accessories were also offered.

Furthermore, surely there is a certain amount of stress, upset, anxiety, inconvenience and irritation associated with daily living. However, they must rise to a sufficient

level beyond *de minimus* in order to attract compensation in excess of what was offered by the defendant.

Richardson v Samsung is not an example of clever lawyering defeating class action certification; rather, it is an example of what companies can do to try to protect themselves against class action risk. As this case demonstrates, proactive steps by a company to address defective products and compensate customers can have the effect of stopping a potential class action in its tracks. This can bring significant benefits to the company, including lower costs, fewer business resources diverted to addressing the proposed class action, and diminished reputational risk.

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