



Andrew Parley
416-865-3093
aparley@litigate.com

May 30, 2018

The Terms of Fair Settlement: Pierringer Agreements and the Benefits of Settlement in Multi- Party litigation

Settlement in multi-party litigation is to be encouraged, as confirmed by the Supreme Court of Canada in *Sable Offshore Energy Inc v Ameron International Corp*. One common mechanism for achieving settlements in multi-party litigation is through what is commonly known as a *Pierringer* agreement. A *Pierringer* agreement allows the settling defendants to be released from the lawsuit with the non-settling defendants left exposed to their proportionate share of liability. Despite their popularity, the impact of a *Pierringer* Agreement on the remaining defendants and the continuing litigation is not always clear.

The Superior Court of Ontario recently provided further guidance in this in area through its decision in *Allianz Global Risks US Insurance Company v The Attorney General of Canada* (“*Allianz*”).

In *Allianz*, there were several incidents causing damage to an aircraft owned by the Plaintiffs while flying into Ottawa International Airport for United Express/United Airlines. The Plaintiffs entered into a *Pierringer* agreement with two of the Defendants, Transport Canada and the airport authority. NAV Canada, the remaining Defendant, was to remain in the litigation as the only non-settling defendant.

There are two issues arising out of *Allianz*, which parties dealing with *Pierringer* agreements should be aware of:

1. The court has jurisdiction to compel the non-settling defendant to abandon its contribution and indemnity claims against the settling defendants.

One of the main issues in *Allianz* was the request for a bar order, which would prevent the non-settling Defendant from making any claim against any other defendant if it is ultimately found liable. The Court found it had jurisdiction to force a non-settling defendant to abandon claims against the settling defendants, including cross-claims and third party claims in an effort to implement the *Pierringer* agreement. The Court concluded that there would be no reason to continue claims for

contribution indemnity from the settling defendants if the non-settling defendant is only liable for its proportionate share of liability under a *Pierringer* arrangement.

2. Discovery rights are not part of the terms the non-settling defendant is entitled to when approving a *Pierringer* agreement.

While NAV Canada did not oppose the dismissal of the cross-claims, its position was contingent on the Court approving the *Pierringer* agreement on terms that were fair to NAV Canada, including preserving their discovery rights against the settling defendants. NAV Canada's position is common to most non-settling defendants, who face a perceived procedural prejudice when they are left as the sole remaining defendant in the litigation. As the Court in *Allianz* points out, the reality is that after the approval of the *Pierringer* agreement, the non-settling defendant will now be faced with defending the allegations for which it is 100% at fault, albeit on a several liability basis, and it may be required to prove the fault of the settling defendants even though they are non-parties. The Court must aim to prevent prejudice to the non-settling defendant in such circumstances.

This does not mean that the Court should grant all of the discovery rights being sought by the non-settling Defendant in the process. Indeed, the Court in *Allianz* was alive to the possibility of overreaching by the non-settling Defendant to such an extent that the terms sought could undermine the settlement. To this end, the Court concluded that the non-settling defendant would be required to establish the need for discovery of the non-settling Defendant through a motion to examine or seek production under the *Rules*.

Allianz reaffirms the Court's commitment to encouraging settlements in multi-party litigation and helpfully provides parties with further guidance on the jurisdiction of the Court to bar further litigation against settling Defendants as part of a *Pierringer* agreement. Perhaps most importantly, however, is that *Allianz* seems to favour an approach that preserves settling defendants' rights by limiting a non-settling defendant's right to automatic discovery post-settlement. As a result, the court has made it easier for settling defendants in *Pierringer*-type arrangements to extricate themselves from the cost and expense of litigation.