

## **CLASS ACTION SETTLEMENTS AND ADMINISTRATION**

### **SOME COMMENTS ON COMMON QUESTIONS**

**By: Margaret L. Waddell, Partner,  
and Danny Kastner, Student-at-Law  
Paliare Roland Rosenberg Rothstein LLP**

#### **1. What is a Matrix Distribution?**

A Matrix Distribution is a helpful tool for providing different levels of compensation to class members who have experienced varying degrees of damage or loss. It can provide an efficient compensation protocol without the necessity of an individual assessment of damages. It is typically employed in the context of mass torts causing personal injury, where class members experience differing injuries or diseases of varying severity. It works both in the context of an aggregate damages award, or where the defendant has agreed to provide compensation to all affected class members.

The matrix is, in effect, an input-output calculator of damages. The claims administrator will input certain specified particulars of the injuries suffered by each claimant, and by the application of the matrix, will determine as an output the level of compensation to which they are entitled under the settlement scheme.

For example, in *In Re Congoleum Corp*<sup>1</sup>, a US asbestos-exposure class action, a matrix was established which contained five levels of compensation for five different diseases. According to the agreement between the parties, compensation was assigned as follows:

1. Mesothelioma - \$100,000
2. Lung Cancer - \$30,000

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<sup>1</sup> 426 F.3d 675 (3<sup>rd</sup> Cir., 2005)

3. Other cancers - \$10,000
4. Level II non-malignant disease - \$3,000
5. Level I non-malignant disease - \$1,000

Individual claimants were required to provide evidence of exposure to the defendant's asbestos products as well as evidence that they had contracted a disease that fit within one of the five categories.

A slightly more complicated matrix was employed in *Wilson v. Servier Canada Inc.*<sup>2</sup>, an action against a drug manufacturer whose diet pills had been shown to cause forms of heart disease. The parties agreed to a "Matrix Grid" which cross-referenced the level of disease severity with the age range of the claimants. Similarly, the Hepatitis C class proceeding<sup>3</sup> a two-pronged multi-level matrix has been employed to provide a sliding scale of compensation to either transfused or hemophiliac class members depending upon the complications that they have suffered as a result of the infection.

Building the intended use of a matrix for damage assessment into the plaintiff's litigation plan may assist in overcoming defendants' arguments regarding both individual issues and preferable procedure. A matrix can be used to minimize the appearance of variation between class members. An otherwise chaotic assembly of proposed class members can be given structure and order through the application of a matrix. An effective matrix may demonstrate that, despite a significant number of minor variations among class members' claims, the damages can be categorized into specific general categories, and therefore the class action is the preferable procedure.

The most obvious benefit of a matrix is that it is an efficient and attractive mechanism for dealing with damage variations across the class. The mathematical simplifications of a well-designed matrix significantly reduce the

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<sup>2</sup> [2005] O.J. No. 1039

<sup>3</sup> *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.)

time spent by the claims administrator, and therefore reduce the costs and time involved in administration and completion of the settlement – an important consideration for both the class and defendant in structuring the settlement. Similarly, a well-defined matrix should reduce the likelihood of dissatisfaction or appeals by class members who disagree with the decisions of the administrator, and can result in better overall satisfaction with the settlement.

## **2. Compensation for Representative Plaintiffs**

Unlike standard litigation, in the class action context it is possible for the representative plaintiff(s) to receive compensation for their time spent in prosecuting the case on behalf of the class. While compensation to the representative is by no means an automatic outcome, it may be appropriate in some circumstances, and serves as a valuable incentive for individuals to assume the significant and often time-consuming burden of fulfilling the role of representative plaintiff in cases that might not otherwise be prosecuted because of the small amounts of individual damages at stake.

In *Windisman v. Toronto College Park Ltd.*<sup>4</sup>, Justice Sharpe noted that the Ontario *Class Proceedings Act, 1992* makes no reference to compensation for the representative plaintiff, and the OLRC Report also did not mention this possibility (para. 27). Accordingly, he drew on American jurisprudence regarding “incentive awards” for class representatives to assess the propriety of extra compensation for the representative plaintiff where it was proposed that the amount be paid out of the total settlement fund, i.e. by the plaintiff class. He noted that such an award achieves the dual objective of encouraging class actions and compensating representatives for their efforts, and for having assumed the risks inherent in prosecuting the action.

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<sup>4</sup> [1996] O.J. No. 2897

Justice Sharpe concluded that compensation for a representative class member may be appropriate in some cases; but that such awards should not be made as a matter of course:

Ordinarily, an individual litigant is not entitled to be compensated for the time and effort expended in relation to prosecuting an action. In my view, there is an important distinction to be drawn with reference to class proceedings. The representative plaintiff undertakes the proceeding on behalf of a wider group and that wider group will, if the action is successful, benefit by virtue of the representative plaintiff's effort. If the representative plaintiff is not compensated in some way for time and effort, the plaintiff class would be enriched at the expense of the representative plaintiff to the extent of that time and effort. In my view, where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, the representative plaintiff may be compensated on a quantum meruit basis for the time spent. I agree with the American commentators that such awards should not be seen as routine. (para 28)

After scrutinizing the total hours of work and the hourly rate suggested by the representative plaintiff as the basis for compensation, Justice Sharpe discounted the hours worked which were "not strictly necessary to the prosecution of the action" and reduced the hourly rate claimed from \$125 to \$40. Ultimately, the representative plaintiff received compensation for time spent in the amount of \$4000.

In *Sutherland v. Boots Pharmaceutical PLC*<sup>5</sup>, Justice Winkler refused to approve the payment of additional compensation to the representative plaintiffs, which was primarily for work done by them in determining the research projects to benefit from the cy-pres payments call for in the settlement. Distinguishing

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<sup>5</sup> [2002] O.J. No. 1361

*Windisman*, Justice Winkler focused on the fact that the work of the representative plaintiffs was “unnecessary to the preparation of the case” and the representative plaintiffs had only become seriously involved in the case once the settlement had already been structured. An important factor in the analysis was that the entire settlement was in the form of a cy-pres distribution, with no direct “monetary success” for the plaintiff class. On this issue, Justice Winkler stated:

While the work of the representative plaintiffs is commendable, to compensate them for their work when the settlement funds for the entire class are being donated to research without a single penny finding its way into the hands of a class member would be contrary to the precept of a Cy-pres distribution in particular and to a class proceeding generally. Compensation for representative plaintiffs must be awarded sparingly. The operative word is that the functions undertaken by the Representative Plaintiffs must be “necessary”, such assistance must result in monetary success for the class and in any event, if granted, should not be in excess of an amount that would be purely compensatory on a quantum meruit basis. Otherwise, where a representative plaintiff benefits from the class proceeding to a greater extent than the class members, and such benefit is as a result of the extraneous compensation paid to the representative plaintiff rather than the damages suffered by him or her, there is an appearance of conflict of interest between the representative plaintiff and the class members. A class proceeding cannot be seen to be a method by which persons can seek to receive personal gain over and above any damages or other remedy to which they would otherwise be entitled on the merits of their claims. (para 22)

With all due respect to Justice Winkler, it is my view that his analysis was flawed. While it was fair to deny compensation on the basis of the fact that the representatives did not assist meaningfully in the prosecution of the case, but

only inserted themselves into the process at the stage where the charitable distributions were being determined, the balance of his reasoning is not in keeping with the analysis and policy objectives underlying the ratio in *Windisman*. One of the paradigm types of class proceedings is one where a small (or even miniscule) harm has been suffered by each class member, but the defendant has made a substantial gain – for example in the price fixing cases. One of the primary policy objectives of the *Class Proceedings Act, 1992* is behaviour modification. The class proceeding acts as a form of private prosecution aimed at preventing or deterring corporate malfeasance. In these types of cases, the individual representative, along with all the class members stands to receive very little, if anything by way of damages, personally. Indeed, in many cases it is neither reasonable nor economically feasible to distribute the damages to the class, even though the aggregate loss to the class and concomitant unjustified gain to the defendant is substantial. In these circumstances a cy-pres distribution is not only likely; it is entirely foreseeable from the outset. It is exactly in these types of consumer advocacy cases that the individual who is prepared to take on the burden and personal expense of prosecuting the claim should be entitled to receive compensation for the efforts they expend. Providing compensation to the representative does not create a conflict of interest at all. Rather, it recognizes the effort that has been made by the representative plaintiff in taking up a valid cause that otherwise may not have been remedied, resulting in an overall benefit for the class. The representative plaintiff is not obtaining a “personal gain” – they are being reasonably compensated for their efforts spent in prosecuting the claim.

*Kerr v Danier Leather Inc.*<sup>6</sup> is another case in which compensation for the representative plaintiff was denied. The key factor motivating the decision was the fact that the representative plaintiff stood to recover over half a million dollars as a class member. His position was, therefore, analogous to that of a plaintiff in a non-class action context. Costs of the action would have been payable by the

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<sup>6</sup> [2005] O.J. No. 1972 (S.C.J.), overturned on other grounds on appeal

unsuccessful defendant for the benefit of the class; but the representative plaintiff, on the facts of that case, was not entitled to additional compensation from the defendants.

It is possible that the courts will be more sympathetic to the payment of compensation to the representative plaintiff if it is negotiated as a separate payment to be made to them by the defendant over and above the amount being paid to the class for damages and for costs of the proceeding, and the amounts being paid to the class members are not large. If it is established that the total amount being paid to the class is not reduced as a result of this payment, and there is no other adverse consequence to the class members, then it is reasonable to compensate the representative plaintiff who takes an active role in bringing the case to justice. In these circumstances, it can fairly be said that the payment meets the policy objectives of the Act, and does, indeed assist in achieving access to justice for the class.

### **3. Should the Defendant Administer the Settlement?**

In the United States, a history developed that saw serious mishandling by defendants who were allowed to administer their own settlements. No such proven history has developed in Canada, although there have been few experiences from which to draw as of yet. Certainly, the possibility is provided for under the *Class Proceedings Act, 1992*, s. 26(2).

Certainly, in some circumstances it may make logical sense both in terms of efficiency and speed to permit the defendant to administer a settlement. It is an appropriate consideration in determining the best means of reducing the costs of administration that might otherwise be borne by the class. An obvious case where defence administration makes sense is where the payments are to be made on a cy-pres basis to specified not for profit agencies. Also, when payments are to be made to customers of the defendant whose information, both with respect to entitlement and identification, is all available from the defendant's

records, or where there is to be a credit into the plaintiff customers' accounts. In these circumstances, it is important that the administration of the settlement remain a transparent process, either through monitoring or auditing by class counsel or an independent third party, or at a minimum, through a requirement of full and detailed reporting to the court. These fail-safes will no doubt be required by the courts, as they will want to be assured that the class is being properly compensated in accordance with the terms of the settlement, as approved.

Administration by the defendant should not be permitted in cases where the entitlement of each class member to compensation cannot be definitively measured by objective and concrete criteria, or where there is any concern about the ongoing viability of the defendant's business. The potential for abuse in this situation is manifold, and can result in multiple re-attendances before the court for further directions, complaints to both defence and class counsel by class members who are dissatisfied with the manner in which their claims have been handled, and the potential that class members claims may not be properly, or fairly administered. Certainly, if the defendant has any reversionary interest in the settlement fund, they should absolutely not be permitted to administer the settlement, as they stand in a position of a clear conflict of interest.