



# Considerations in Administering Class Action Settlements

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**September 25, 2013**

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- Settlements in class actions *versus* standalone actions (ss. 29 and 32, *CPA*)
- Keeping Your eye on the Approval Hearing
- General Factors considered by the Court
- Information to be provided to the Court
- Required Content in the Notice re the Approval Hearing

- Factors Assessing Counsel Fees
- “The Checklist”
- Issues of Distribution – Funds, Surpluses and Cyprès Awards
- Other Important Considerations
  - Documentation
  - Notices
  - Multi-jurisdictional Aspects
  - Explicit Support for Class Members



# Keeping Your Eye on The Approval Process

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## Approval Factors Considered by the Court

- Likelihood of recovery or likelihood of success
- Amount and nature of discovery, evidence or investigation
- Settlement terms and conditions
- Recommendation and experience of counsel

## Approval Factors Considered by the Court

- Future expenses and likely duration of litigation and risk
- Recommendation of neutral parties
- Number of objectors and nature of objections (if any)
- Presence of good faith, arms' length bargaining and the absences of collusion

## Approval Factors Considered by the Court

- Degree and nature of communications by counsel and the representative parties with class members during the litigation
- Information conveying to the court the dynamics of and the positions taken by the parties during the negotiation

## Information to be Provided to the Court

- History of the proceedings
- Facts of the case
- Relevant issues of law
- Strengths and weaknesses of the evidence



## Information to be Provided to the Court

- Estimate of damages
- Terms and the amount of the settlement
- Form of payment
- Method of quantifying individual claims and distributing the settlement funds to class members

## Information to be Provided to the Court

- Legal fees and disbursements, including:
  - (a) total amount of fees and disbursements;
  - (b) the impact on the settlement;
  - (c) notice that the amount of fees and disbursements are a first charge on the settlement; and
  - (d) notice that the legal fees and disbursements are confidential from the defendant

## Information to be Provided to the Court

- Notice of any fees or disbursements paid to the representative plaintiff or to other persons
- Plan of action for resolving individual claims
- Specifics of unresolved claims (how many and how they are being resolved)
- Instances of class members being treated differently than others and why

## Information to be Provided to the Court

- Procedure for disbursing unclaimed funds
- Details of actions in (any) other jurisdictions
- Form of notice to be sent to class members
- Time and place of approval hearing and how objections will be heard
- Procedure for making inquiries

## Required Content in the Notice

- Method of notice (in person, by mail, advertising, publishing, etc.)
- Description of the proceedings, names and addresses of representative parties and relief sought
- Procedures and deadlines for opting out of the proceeding
- Possible financial consequences of the proceeding

## Required Content in the Notice

- Summary of any agreement between the representative parties and their solicitors respecting fees and disbursements
- Description of any counterclaim being asserted by or against the class, including the relief sought in the counterclaim
- A statement that the judgment, whether favourable or not, will bind the class members who do not opt out of the proceeding

## Required Content in the Notice

- Description of the right of any class member to participate in the proceedings
- An address to which class members may direct inquiries about the proceeding

Note: The notice must **clearly** express the content above and must be communicated using a method that is likely to reach all of the intended recipients.

## Factors in Assessing Counsel Fees

- Factual and legal complexities of the matters dealt with
- The risk undertaken, including the risk that the matter might not be certified
- The degree of responsibility assumed by class counsel



## Factors in Assessing Counsel Fees

- The monetary value of the matters in issue
- The importance of the matter to the class
- The degree of skill and competence demonstrated by class counsel
- The results achieved
- The ability of the class to pay

## Factors in Assessing Counsel Fees

- The expectations of the class as to the amount of fees
- The opportunity cost to class counsel in the expenditures of time in pursuit of the litigation and settlement
- Fees in similar cases



# Issues in the Distribution of Funds and Surpluses

## Issues in the Distribution of Funds and Surpluses

- Whether assessing and distributing individual damages is economical, practical or possible
- Whether assessing and distributing aggregate damages is economical, practical or possible
- Whether a certain number of opt-outs should trigger a “tip-over” clause, terminating the settlement
- Take-up rates by category of claim

## Issues in the Distribution of Funds and Surpluses

- Whether the defendant should be allowed to retain a reversionary interest in unclaimed funds
- Whether defendant's conduct/ wrongful gains makes a *cy près* award appropriate
- Whether suggested recipient of a *cy près* award promotes the interests of the class directly or indirectly by improving access to justice
- Whether the suggested recipient of a *cy près* award is a credible/reliable organization

## Cy Près: Recent Criticisms

- Several leading class actions commentators have recently criticized the courts for approving *cy près* awards without sufficient scrutiny, consistency or transparency
- They are particularly critical of “fixed” *cy près* awards as opposed to “residual” *cy près* awards

## Concerns with *Cy Près* Awards

- There are two main concerns:
  1. Many *cy près* settlements lack a sufficient nexus between the class, the underlying litigation and the recipient of the *cy près* award
  2. There is risk that bias and conflicts of interest may affect the selection and approval of *cy près* award recipients

## Concerns with *Cy Près* Awards

- Critics fear that the goal of benefitting the actual class members is often neglected so long as the *cy près* award advances the broader social policy objectives of class actions (such as behaviour modification, disgorgement and access to justice)
  - In other words, *cy près* awards often seem overly disconnected from the class members and the underlying action



## Concerns with *Cy Près* Awards

- There is concern with the fact that *cy près* awards often benefit class counsel without providing the best available direct or indirect benefit to class members
  - Since a *cy près* award is considered part of the total settlement amount in calculating class counsel fees, class counsel may have incentive to agree to an easy *cy près* settlement instead of pushing for a more appropriate type of distribution

## The Call for a More Principled, Transparent Approach

- The general there should a more principled, transparent approach to process of selecting *cy prè*s award recipients
- The commentators agree that class counsel and the courts should be more diligent about ensuring there is a sufficient nexus between the class members, the underlying action and the *cy prè*s award recipients

## Increasing *Cy Près* Scrutiny in the US

- The Third Circuit recently vacated the district court's approval of a settlement that included a *cy près* award in *In re Baby Products Antitrust Litigation* (2013) due to insufficient evidence of an adequate direct benefit to class members
- Under the settlement, only \$3 million would go to the class, with *cy près* recipients receiving \$18.5 million.

- The Supreme Court will soon decide whether to hear the case, *Marek v. Lane*, No. 13-136
- The case involves the violation of Facebook users' privacy
- Under the settlement, the plaintiffs' lawyer would get \$2.3 million. Facebook would make a \$6.5 million dollar payment to a new foundation it would create

- The appeals court upheld the settlement, but the dissenting judge expressed strong disapproval:
  - “[The class members] do not get one cent,”
  - “They do not even get an injunction against Facebook doing exactly the same thing to them again.”
  - “This settlement perverts the class action into a device for depriving victims of remedies for wrongs,” Judge Kleinfeld wrote, “while enriching both the wrongdoers and the lawyers purporting to represent the class.”

## Increasing Scrutiny in Canada?

- In *Sorenson v. easyhome*, 2013 ONSC 4017, Perrell J rejected a *cy près* award that would go to a pro bono client of class counsel's law firm.
  - Perrell J was concerned about the “optics” of the proposed distribution and said it is “inappropriate” for Class Counsel to indirectly benefit from a *cy près* distribution or to have any direct connection with a recipient of a *cy près* distribution

## Defendants' Remainder Interests and Low Take-Up Rates

- In *Lavier v. MyTravel Canada Holidays Inc.*, [2013] O.J. No 674 (QL) (CA) the Ontario Court of Appeal set aside the award of an additional fee to class counsel
  - The total settlement was \$2.25 million, but only \$333, 306 was ever distributed to class members
  - Counsel was seeking an additional fee of \$395 000, bringing their total fee to \$995, 000

## Defendants' Remainder Interests and Low Take-Up Rates

- *Lavier v. MyTravel Canada Holidays Inc.*
  - The court held that the motion judge erred in considering the “crucial take-up factor as a distant second to the total fund”
  - The court also held that the record did not support valuating the settlement at the full amount of the negotiated fund given the low take-up rate
  - The court ordered the return of the \$395, 000 to MyTravel as residue of the settlement fund (the settlement provided that residue in the settlement would revert back to MyTravel)





# **Other Important Considerations When Drafting Class Action Settlements**

## Other Important Considerations

- The fairness and reasonableness of the size of the settlement in light of the size of the class, the valuation of the claims and the litigation risks (in a fund-based settlement)
- The fairness and reasonableness of the method for resolving claims and any applicable conditions (in a mechanism-based settlement)

## Other Important Considerations

- The scope of the definition of the class
- The potential need for “bar orders” in settlements (in multi-defendant class actions)
- The treatment of the settlement in other jurisdictions (in multinational class actions)

## Other Important Considerations

- The possibility the settlement agreement might be seen as a “strike suit”
- Explicit support for the settlement agreement voiced by class members
- The substantive, procedural, circumstantial and institutional fairness of the settlement

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