

Pharma in brief - Canada

Federal Court of Appeal clarifies requirement for a binding settlement agreement

Case: *Apotex Inc v Allergan Inc*, 2016 FCA 155
Nature of case: Motion for an Order enforcing settlement
Successful parties: Apotex Inc and Apotex Pharmachem Inc
Date of decision: May 18, 2016

Summary

The Federal Court of Appeal (**FCA**) has clarified the requirements for a binding settlement agreement, and has stated that determination of whether settlement had been reached is to be assessed from an objective standpoint. The FCA warned that “[i]f a party does not want to be bound until it has agreed to all terms it subjectively considers essential to the deal, in every offer it communicates it must make that wish objectively clear.” In this case, the FCA found that no settlement agreement had been reached by the parties.

Background

In August 2010, Allergan brought an infringement action against Apotex relating to gatifloxacin.

In April 2012, Apotex’s counsel made an offer to settle to Allergan’s counsel (**Initial Offer**). Allergan sought clarification on the scope of the limitations imposed on Apotex. Allergan never accepted the Initial Offer nor indicated that the clarifications received from Apotex were satisfactory. The parties re-engaged in debate regarding the scope of limitations imposed on Apotex.

Further communications regarding settlement took place in late 2013 and early 2014. In January 2014, Allergan’s counsel advised that it had recommended that Allergan accept Apotex’s December 2013 revisions to the minutes of settlement, and circulated a draft. Two weeks later, Allergan’s counsel proposed certain amendments to the draft. Apotex’s counsel rejected these amendments, but indicated a willingness to recommend that Apotex accept the January 2014 draft. In February, Allergan’s counsel advised that Allergan accepted the terms of the January 2014 draft. Allergan subsequently advised the Court that in its view a settlement had been reached; however, Apotex did not agree.

Allergan brought a motion before the Court for an order enforcing the settlement agreement, and the Federal Court granted Allergan’s motion ([2015 FC 367](#)). Applying a subjective standard, Hughes J. found that the parties agreed to the essential terms of the agreement and that any differences could be attributed to “fussing and wordsmithing”. Apotex appealed the order.

The Federal Court has jurisdiction

The FCA held that the Federal Court has jurisdiction to determine whether a patent infringement action had been settled and, if so, to enforce the settlement agreement. While contract law is normally a matter of provincial jurisdiction, the Federal Court has jurisdiction when the contract at issue is tied to a matter over which the Court has statutory jurisdiction or where the existence of a settlement agreement affects the status of proceedings before the Court. Where there is concurrent jurisdiction with a provincial court, the Federal Court may decline jurisdiction if it considers the provincial court to be a more appropriate forum.

Requirements for a settlement agreement in a common law jurisdiction

The FCA clarified the requirements to determine whether a settlement agreement has been reached.

- **There must be an objective, mutual intention to create legal relations:** Would a reasonable businessperson viewing the parties objectively conclude that both parties intended to enter into legal relations?
- **There must be consideration flowing in return for a promise:** The Court stated that this requirement will “almost certainly never [be] a problem” as settlements are by definition compromises with consideration flowing both ways.
- **Objectively, the terms of the settlement must be sufficiently certain:** A court cannot make “a new agreement for the parties” where they “were never *ad idem*”.
- **There must be an objective agreement on all essential terms:** Viewed through the eyes of a reasonable businessperson, did the parties agree on all the essential elements?
- **Proper authority must be established:** In the case of parties represented by counsel, if counsel has qualified its authority with “subject to instructions” or “subject to my client’s approval”, there can be no agreement until the client is heard from.

The FCA overruled Hughes J.’s subjective approach, holding that evidence of the parties’ subjective intentions is irrelevant in determining whether a settlement agreement has been reached.

The FCA held that the scope of limitations on Apotex were essential terms to the Initial Offer, and on an objective review of the evidence, there could be no agreement. With respect to the settlement exchanges in early 2014, the FCA found that counsel for Apotex had only agreed to recommend the settlement to Apotex and did not have the apparent authority to bind Apotex. The FCA found that no settlement agreement had been reached.

Links to decisions :

Federal Court of Appeal Decision: [Apotex Inc v Allergan, Inc, 2016 FCA 155](#)

Federal Court Decision: [Allergan, Inc v Apotex Inc, 2015 FC 367](#)

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