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Representation of Plaintiff by Professional Representative in Group Proceedings – Selected Aspects

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The law of Dec. 17, 2009 on enforcement of claims in group proceedings (OJ 2010 No. 7, pos. 44) in force since July 19, 2010 regulates proceedings in cases in which claims are enforced by at least 10 people; claims are of one type and based on the same factual basis (group proceedings).

A class action is an individual claim brought by a specified person (group representative) in the common interest of a group injured by an action of an individual subject.

In group proceedings, the plaintiff should be represented by an advocate or solicitor, unless he is himself an advocate or solicitor. The introduction of coercive representation by an advocate or solicitor shows the importance which the legislator granted to these proceedings. In addition, representation of the group before the court in group proceedings by a professional representative is intended to protect the interests of the group against the improper conduct of proceedings by people who do not have experience in conducting such kind of litigation.

Advocate and solicitor coercion shall apply only to situations where a group representative, who is one of its members or the municipal commissioner of consumers, is not a solicitor or an advocate. If however the group representative is solicitor or advocate, he has the right to represent the group before court independently as legal representative.

If it is found that the person named in the power of attorney does not fulfill the requirements of art. 4 par. 4 of the law, subject to the exception contained in art. 5 par. 4 of the law, the court calls the party to present power of attorney (art. 97 § 2 Code of Civil Procedure – hereinafter called "CCP").

The principles which regulate representative's fees introduced in the law are a complete innovation in Polish law.

The law completely departs from the rules on which parties incur fees for legal representation in favor of advocates and solicitors. Art. 5 of the law allows the parties to define in an agreement remuneration of a representative in relation to the amount awarded to the plaintiff. The maximum remuneration of a representative may amount to no more than 20 percent of this amount. Such an agreement is obligatory. It is concluded by a group representative with an advocate or solicitor and should be attached to the claim in a group proceeding. If the contract is not attached to the claim, the court calls for its delivery within a week on pain of return of the claim.

The intention of the legislator who introduced these new rules of a representative's remuneration was to create a mechanism for encouraging lawyers to engage in complicated litigation.

The current provisions of advocate's and solicitor's autonomy clearly show that it is not permitted to conclude an agreement with a client under which the amount of remuneration payable for exercise thereof is determined in proportion to achieved result (*pactum de quota litis*).

The legislator has expressly stated in art. 5 of the law that it is only an option to determinate the percentage of remuneration in relation to the amount awarded to the plaintiff – "an agreement governing the remuneration of the representative may define the remuneration in respect of the amount awarded to the plaintiff." Thus, it is also possible to determine the remuneration of the representative as a fixed rate, independent of the amount that the court will finally award to the plaintiff.

In case where remuneration of representative is determined as certain amount defined by members of the group in advance, a representative at the end of the procedure should only obtain the monetary amount indicated in the contract, regardless of the outcome of the case. In such situation the provisions of the CCP regarding remuneration of advocates and solicitors should be applied (art. 98 and 99 CCP). Thus, the court, when ruling on the reimbursement of the costs of the proceedings to the party represented by a solicitor or an advocate, takes an amount stipulated with client as the basis for determination of the representative's pay, as long as it stays within the limits of rates set out in Regulation (Supreme Court resolution of Nov. 23, 2000, III CZP 40 / 00, OSNC 2001, No. 5, pos. 66).

The second case is the resulting fee (so-called contingency fee). A representative's fees in relation to the amount awarded to the plaintiff could not be more than 20 percent of this amount. It seems, therefore, that the contingency fee shall be a motivating factor for representatives engaged in the group cases. This regulation is very similar to the solutions found in common law.

The regulation of art. 5 of the law has been severely criticized. Among other things, it has been accused of the "americanization" of justice, which may give rise to practices such as searching for injured people by potential representatives in order to maximize profits from the case.

However, the undoubted advantage of such a determination of the remuneration of the representative is the greater motivation to fight before the court for the highest compensation for members of the group. The possibility of determining the percentage of pay in the agreement attributable to the representative shall encourage professional representatives to participate in the proceedings.

The law does not say this explicitly, but it seems clear that it is also possible to also the "mixed" representative's pay, that is, to establish a fixed amount of his fee plus a potential bonus for winning, which will probably be the most advantageous for lawyers.

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