For Proper Risk Management

Doing Business in the U.S. and Canada

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Counsel needs to understand the potential exposure on both sides of the border and ensure that they have a plan in place to defend companies from these claims effectively in both countries.

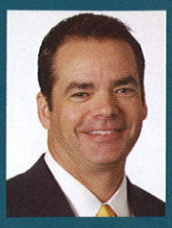
Companies doing business in the United States and Canada have historically considered the United States to present the only real financial and public relations risk from class action lawsuits. Not anymore. Class action filings in Canada are increasing annually, and Canadian class actions can present companies with exposure equal to or greater than those in the United States. Obtaining class certification is generally less difficult in Canada, for example, and the "loser pays" system can make risk assessment much more difficult. U.S. class actions, meanwhile, continue to consume corporate resources with their expansive discovery demands and risk of crippling verdicts. Companies doing business north and south of the border need to understand the risks and the benefits of class action law in each country so that they can properly manage their risk. This paper provides an overview of U.S. and Canadian class action law and highlights some of the significant differences.

Jurisdiction

Most often the Canadian provincial courts adjudicate Canadian class actions; the Canadian federal courts have very limited subject matter jurisdiction. Conversely, the Class Action Fairness Act of 2005 greatly expanded federal court jurisdiction over U.S. class actions.

United States

Federal court jurisdiction over class actions was significantly expanded by the Class Action Fairness Act of 2005, commonly known as "CAFA." CAFA is a federal statute that confers subject matter jurisdiction upon federal courts over most class actions that include at least 100 purported class members; have at least $5 million in controversy, permitting aggregating individ-



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ual claims to reach this threshold; and have minimal diversity, meaning that at least one plaintiff is from a different state than a defendant. The statute confers original jurisdiction upon the federal courts over any such action and also allows a defendant to remove any such action to federal court if it is originally filed in state court.

The Federal Rules of Civil Procedure govern class actions in the federal courts in the United States, although those rules are supplemented by each federal district's own set of local rules. Local rules govern various aspects of case procedure, typically including pretrial conference requirements, discovery dispute procedures, briefing schedules, and sometimes timing requirements for class certification motions. Federal court class actions may include plaintiffs from a single state or numerous states, or they may allege a nationwide class.

When unresolved class actions in different federal district courts involve one or more common questions of fact, a federal statute provides a way to transfer and coordinate or consolidate such cases in a single federal district court. Multidistrict litigation, or "MDL" practice, is overseen by the Judicial Panel on Multidistrict Litigation (the JPML). The JPML has its own set of procedural rules that govern the transfer and the coordination of related lawsuits.

Class actions that do not satisfy the CAFA jurisdictional requirements can be brought in state court and generally can only be removed by the defendant to federal court if the parties to the action are completely diverse, meaning that no defendant is incorporated in or has its principal place of business in the same state in which any plaintiff resides, and if at least one named plaintiff seeks damages in excess of $75,000.

Each state has its own set of rules that govern procedure in civil cases, including class actions. The procedural rules applicable to class actions in state court vary widely.

Canada

Federal courts in Canada have very limited subject matter jurisdiction. The federal courts are generally limited to reviewing federal matters, such as federal taxation issues, decisions by federal administrative agencies, intellectual property and maritime legal issues, and national security. While the federal courts can and do hear some class actions, plaintiffs file almost all class actions in the provincial courts. Nine of Canada's 10 provinces have now enacted some form of class action enabling legislation, referred to in most provinces as its Class Proceedings Act, or CPA. The CPA in each province establishes the procedural requirements, such as requirements for class member notification, opting out, and court approval of settlement agreements.

While each province has its own class action statute and its own procedure, a provincial court can certify a class that includes class members from other provinces. Accordingly, national class actions may be commenced simultaneously in several provinces, requiring a company to defend the same case in multiple jurisdictions. Canada does not have an equivalent of the U.S. MDL statute so the cases cannot be consolidated.

In an effort to address the issue of duplicative class action filings in different provinces, the Canadian Bar Association (CBA) maintains a database that tracks class actions across Canada. The CBA database is voluntary, though, and therefore not an accurate accounting of all of the class actions filed in Canada. Ontario has implemented procedures for mandatory recording of class action claims. Alberta and Saskatchewan have recently passed legislation to address the issues that filing similar class actions in multiple provinces raises. The CBA also recently published a Judicial Protocol to further address the issue.

Pleadings

Pleadings and answers differ in content and filing timing in Canada and the United States, and some terminology differs as well.

United States

In the United States, a plaintiff initiates a lawsuit in either federal or state court by filing a complaint and requesting that the court clerk issue a summons. Under the Federal Rules of Civil Procedure, the defendant has 21 days after proper service of the complaint and summons receipt to answer or otherwise respond. Stipulations extending this deadline are commonplace, but in some jurisdictions court approval is required.

Most federal judicial districts randomly assign cases to judges within the district, although each federal district court with more than one judge has its own procedure for case assignment. State courts work this way as well. Also, plaintiffs are typically required to identify any related cases existing at the time of filing, and related cases are typically assigned to the same judge.

Under the Federal Rules of Civil Procedure, a pleading need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief," as well as "a short and plain statement of the grounds for the court's jurisdiction." Allegations of fraud or mistake must, however, "state with particularity the circumstances constituting fraud or mistake."

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An answer must include an admission or a denial of each allegation, or it must state that the defendant lacks knowledge or information sufficient to form a belief about the truth of an allegation. The answer must also include any affirmative defenses that the defendant intends to raise.

Canada

Plaintiffs initiate a class action lawsuit in Canada by filing a statement of claim rather than a complaint. The statement of claim states that the action is being commenced under the CPA. The rules of civil procedure for the province in which the action is filed apply to class actions. Under the Ontario Rules of Civil Procedure, the statement of claim must contain a concise statement of the material facts on which the party relies for the claim, but not the evidence by which the plaintiff will prove those facts. The allegations should be made in clear, unambiguous language.

The statement of defense is usually not delivered until later in a proceeding. Historically, defendants in class proceedings have not been required to file their statement of defense until after certification. Recent case law suggests, however, that defendants may have to deliver their statement of defense at an earlier stage in a proceeding.

After a claim has been issued, a court will appoint a case management judge who will hear the preliminary motions, set timelines, and rule on procedural issues.

In Canada, the courts circumscribe tolling more than in the United States.

Preliminary Motions

Preliminary motion practice differs significantly in the two countries, discussed more in the following sections.

United States

In the United States, class action defendants have the option of responding to a complaint by filing an answer or a motion to dismiss. Under the Federal Rules of Civil Procedure, a defendant has seven enumerated bases for such a motion. They are (1) lack of subject matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted; and (7) failure to join an indispensable party. A defendant must make such a motion before the defendant files an answer. If a motion to dismiss is filed that covers all the claims in a complaint, an answer need not be filed unless and until the motion is denied. A party may also move for a more definite statement if the pleading "is so vague or ambiguous that the party cannot reasonably prepare a response." A party may also file a motion to strike "any redundant, immaterial, impertinent, or scandalous matter" from a complaint. The procedural rules of most state courts make initiating similar preliminary motions possible as well.

Class action defendants commonly file motions to dismiss for failure to state a claim at the beginning of a case. The motion must be based solely on the pleadings, although if the litigating parties present materials outside the pleadings that a court does not exclude, the court can treat the motion as a summary judgment motion if the parties receive a reasonable opportunity to present all the pertinent material.

In 2007 and 2009, the United States Supreme Court handed down two decisions clarifying the standards that a complaint must satisfy to survive a motion to dismiss for failure to state a claim under the federal rules. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), the Court held that complaints must contain sufficient factual allegations to "state a claim to relief that is plausible on its face." To satisfy this standard, a complaint need not contain "detailed factual allegations," but it must contain "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Id.* at 555.Further, "[t]he plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Twombly*, 550 U.S. at 556.). The Court also stated that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* It is unclear whether the *Twombly* and *Iqbal* plausibility standard applies to affirmative defenses.

After an answer is filed, a defendant may file a motion for judgment as a matter of law, which, similar to a motion to dismiss, is based solely upon the pleadings. The standards for prevailing on a motion for judgment as a matter of law are the same as for a motion to dismiss.

State court rules governing preliminary motions vary widely, but most state procedures permit some type of preliminary motion practice similar to the procedures of the federal rules.

Canada

In securities class actions, before a class action plaintiff can proceed, the party needs the leave of a court. The threshold for obtaining leave is quite low. A plaintiff only needs to establish more than a "mere" possibility of success at trial. Leave is not required to proceed in other class actions.

In actions with numerous class members and multiple plaintiffs' lawyers, a motion for carriage is typically filed to determine which plaintiffs' counsel will represent the class. A court will consider several factors in determining which firm will represent the class:

- The nature and scope of the causes of action advanced;
- The presence of any conflicts of interest;
- Counsel factors including (1) the theories advanced by counsel; (2) the status of each class action, including preparation; (3) the resources, experience and competence of the counsel; and (4) the prior success of counsel in class actions, particularly, similar class actions;
- The number, size, and extent of involvement of the proposed representative plaintiffs; and
- The relative priority of commencing the class actions.

Defendants almost always file a motion to dismiss under Ontario Rule of Civil Procedure 21 at their first opportunity. The motion is not surprisingly called a Rule 21 motion and is based solely on the pleadings. Rule 21 motions are usually based on failure to state a cause of action, statute of limitations, and the like. A Rule 21 motion involves a question of law for a court to decide. A court can decide to defer hearing a Rule 21 motion until the hearing on plaintiffs' motion for certification.

Limitations Periods

Class actions adjudicated in the United States federal courts enjoy generous tolling rules, but the rules for state-based class actions vary. In Canada, the courts circumscribe tolling more than in the United States.

United States

In a federal court case in the United States, during the pendency of a class action the statute of limitations period for the putative class members will toll until a court denies class certification or dismisses the matter. The law varies from state to state, however, regarding whether class actions toll limitation periods for plaintiffs who bring actions in state courts.

When it applies, expiration of the statute of limitations is an affirmative defense that a defendant's answer must argue.

Canada

When plaintiffs file a class action, generally the filing tolls the limitations period for the putative class members. Either certifying a class or dismissing a case will lift the suspension, and the limitations period will resume expiring again.

As stated above, in securities class action cases, plaintiffs must receive the leave of the court to proceed. Recent case law indicates that in such cases, merely filing an application for leave does not toll the limitations period. A court actually must grant the leave to proceed to toll the limitations period.

Discovery

Procedural rules circumscribe discovery much more in Canada than in the United States.

United States

Discovery in federal court cases in the United States begins *as* soon as the parties engage in a "Rule 26(f) conference," which typically takes place shortly after a defendant's answer is filed. At that conference, the parties must develop a discovery plan to submit to the court that covers subjects such as the parties' positions regarding proposed deadlines, topics and potential phasing of discovery, and the form or forms in which they will produce electronically stored information.

Shortly after the Rule 26(f) conference, parties in federal court proceeding must provide initial disclosures that include the name and the contact information of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or its defenses. The parties must also identify or produce categories of documents in their possession that they may use to support their claims or defenses. A computation of each category of damages claimed is also required, and copies must be produced of any insurance agreement that exists that could cover a judgment.

The Federal Rules of Civil Procedure permit broad discovery into any nonprivileged matter that "appears reasonably calculated to lead to the discovery of admissible evidence." Each side may take 10 depositions and proffer 25 interrogatories. A court can alter these limitations, or the parties can stipulate to do so. The federal rules do not limit document requests or requests for admission.

The named plaintiffs are typically deposed in a class action. So are other fact witnesses, such as individuals involved in development of a product at issue in a product liability case. In addition to deposing named individuals, the federal rules allow a party to "depose" an organization. A party would send a deposition notice directed to an organization that describes the topics for examination. The organization must then designate and produce one or more persons to testify on its behalf about the topics for examination identified in the notice.

Document production in class action cases is often a massive, time-consuming, and expensive undertaking. It is not unusual for a class action defendant's document production to consist of tens of thousands or even hundreds of thousands of pages of documents, all of which need reviewing to determine which documents respond to the plaintiffs' discovery requests and to remove any privileged documents before making anything available.

Canada

Once a court certifies a proceeding, the provincial rules of civil procedure govern discovery. Discovery in Canada is far less burdensome than discovery in the United States. Generally, the provincial rules require parties voluntarily to produce all relevant, unprivileged documents in their possession, control, or power. Depositions are very limited. Only the representative plaintiff and a single witness for each defendant may be deposed unless a court grants leave to depose more witnesses.

Dispositive Motions

Due to changes to the federal rules in 2003 in the United States, the courts have increasingly considered summary judgment motions before or concurrently with certification motions, which Canadian courts have always done.

United States

In the United States a summary judgment motion may be filed at any time after discovery begins in a federal court proceeding, subject to a provision in the rules that allows the opposing party to submit a declaration asserting that it needs additional discovery to oppose the motion and requesting that the court accordingly defer or deny the motion. Similar procedures exist in most state courts.

Courts in the United States traditionally considered class certification before ruling on summary judgment motions as a result of a provision in the federal rules that required the courts to consider class certification "as soon as practicable." In 2003, that provision was changed to require consideration of class certification "[a]t an early practicable time." Since this change, federal courts increasingly have considered a defendant's summary judgment motion before or concurrently with class certification.

Canada

Defendants typically file a *summary* judgment motion either before or at the same time that plaintiffs file their class certification motions.

Class Certification

The class certification standards differ in some respects in both countries, discussed more below. Among them, although Canadian courts consider "predominance," the law does not require it, and generally Canada has a lower certification threshold than the United States.

United States

Federal Rule of Civil Procedure 23 governs certification of class actions in federal courts in the United States. All class actions filed in federal court must satisfy four prerequisites:

- The class is so numerous that joinder of all members is impracticable (the "numerosity" requirement);
- There are questions of law or fact common to the class (the "commonality" requirement);
- The claims or defenses of the representative parties are typical of the claims or defenses of the class (the "typicality" requirement); and
- The representative parties will fairly and adequately protect the interests of the class (the "adequacy" requirement).

The court must also find that one of the following requirements is met:

- Prosecution of separate actions poses a risk of either inconsistent adjudications that would establish incompatible standards of conduct for the party opposing the class (for example, separate actions by individuals seeking to declare a bond issue invalid, or separate actions respecting a claimed nuisance);
- Individual adjudications would essentially be dispositive of the interests of absent class members (for example, where there are limited funds available to satisfy all potential claimants);
- The defendant has acted or refused to act on grounds that apply generally to the class, such that injunctive or declaratory relief is appropriate respecting the class as a whole; or
- Questions of law or fact common to class members predominate over any questions affecting only individual members (the "predominance" requirement), and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy (the "superiority" requirement).

Procedural rules circumscribe discovery much more in Canada than in the United States.

Plaintiffs bear the burden of proving that their cases satisfy these prerequisites for class certification. Class certification motions typically involve extensive briefing by each side, and voluminous deposition transcripts, documents produced by the parties, and expert reports usually support the briefs. Courts typically hold a hearing on a motion for class certification, but they usually only hear arguments from the counsel and not witness testimony, but not always.

If a court certifies a class, the class members must then receive notice. For most class actions seeking damages, class members must receive "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The Federal Rules of Civil Procedures prescribe the contents of the notice, and the notice must include information regarding the action, class, and claims. The notice must also provide class members with the opportunity to opt out of the class, and it must explain the binding effect of a class judgment. In other class actions, the rules simply require "appropriate notice" to class members.

State court standards and procedures for class certification vary, but they are generally similar to federal rules.

Canada

A class must be certified before a case can proceed as a class action in Canada. Plaintiffs must establish five criteria. First, the pleadings must disclose a cause of action. Second, there must be an identifiable class of at least two people that would be represented by the representative plaintiff. Third, the claims of the class members must raise common issues. Fourth, a class proceeding must be the preferable method for resolving the common issues. Fifth, there is a representative plaintiff or defendant who would fairly and adequately represent the interests of the class,

> has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

In Canada, class actions do not require "predominance." While the courts consider predominance, the central consideration is whether a class action is the "preferable" method for resolving the common issues. Accordingly, achieving class certification in Canada is generally considered easier than in the United States under Federal Rule of Civil Procedure 23.

While opposing certification is a bigger challenge for defendants in Canadian courts than in the United States, it is not impossible. Canadian courts have rejected certification in many cases based on a lack of common liability or damages issues.

During the certification stage, plaintiffs are required to proffer sufficient evidence to allow a court to conclude that they meet the test for certification. This burden typically results in the parties introducing large amounts of evidence in very lengthy, extensive proceedings. The evidence is usually offered by affidavit rather than testimony. An affiant may be cross-examined before a trial, but he or she does not appear live in court.

Once a court grants certification, putative class members must be notified of the action. The form, timing and means of the notice must be *approved* by the court. Canada is an "opt out" system in most provinces. However, nonresident class members in some provinces have to "opt-in."

Trial

In both the United States and Canada, once a proceeding is "certified" as a class proceeding, it will proceed to a common issues trial, which will determine the common issues based on the evidence. In both countries, if a case survives after the common issues trial, the individual issues are tried or resolved through alternative dispute resolution. In the United States, the common issues are usually tried before a jury. In Canada, common issues trials are bench trials, and a judge sits as finder of fact.

Recoverable Damages

One big difference between the United States and Canada is that some Canadian provinces still have the "loser pays" rule.

United States

Generally, a wide range of remedies is available through class actions in the United States, although the statutes or the case law governing the claims brought in the action dictate the specific relief available. Injunctive and declaratory relief typically are available, as are actual damages and damages for restitution, usually defined as money unfairly or fraudulently obtained by the defendant. Punitive damages also can be awarded if the statute or other law governing the claims permits it.

In 2013, the United States Supreme Court issued an opinion reversing the certification of a class in part because the plaintiff had failed to establish that damages were capable of measurement on a classwide basis, and therefore, "[q]uestions

of individual damage calculations [would] inevitably overwhelm questions common to the class." While the lower courts still continue to debate the importance of this Supreme Court decision, the opinion has provided some support for the argument that class certification is inappropriate unless the plaintiffs establish a method of measuring damages on a classwide basis.

Neither federal nor state courts award fees to the prevailing party as a matter of course. There are, however, numerous state and federal statutes under which plaintiffs can bring claims that allow courts to award attorneys' fees to a prevailing plaintiff. For example, most state consumer fraud statutes allow a successful plaintiff to recover attorneys' fees, and the federal Magnuson-Moss Warranty Act allows plaintiffs to recover fees as well. Some state consumer fraud statutes allow a prevailing defendant to recover its fees. A defendant can receive attorneys' fees for having had to defend against frivolous claims or sanctionable conduct, although courts relatively rarely make such awards.

Canada

Canada has no limitations on the types of remedies that a class can pursue. Relief can be declaratory, injunctive, monetary, or in virtually any other form recognized under the law. Plaintiffs can seek aggregate monetary damages or individual damages. One particularly worrisome theory of damages for defendants is "waiver in tort." Under this damages theory, a defendant must disgorge revenue or profit made from the alleged misconduct. Punitive damages are recoverable in class actions, but only when a defendant's conduct is so malicious and oppressive that it offends the court's sense of decency.

Ontario, Alberta, and New Brunswick still have the "loser pays" rule. Typically, only the representative plaintiff is responsible for any adverse cost award. In practice, class representative plaintiffs realistically have no exposure for costs because they are indemnified by counsel. Class action defendants, on the other hand, have significant exposure.

The remaining provinces and the federal courts do not award costs to the prevailing party as a matter of course. In these jurisdictions, parties are generally not liable for costs unless they engage in vexatious, frivolous or abusive conduct, or unless they engage in some other type of improper conduct.

A court determines whether to award aggregate or individual damages. When a class wins an aggregate damages award, the court must approve the agreement for class counsel's fees and disbursements, and if it does, the court then determines the amount that the lawyer will receive. The lawyer is paid first out of the settlement fund. If damages are awarded on an individual bases, fees and disbursements are paid out of each individual class member's award.

Settlement

In both the United States and Canada courts must approve class action settlements and attorneys' fees. In other respects, settlements differ.

United States

Class action settlements and attorneys' fees must be approved by a court. A court will approve a settlement if the requirements for certifying a class are met and if it finds that the settlement is fair, reasonable and in the best interests of all parties affected by the settlement. A court-approved notice of settlement is issued to all potential class members, either by mail or publication. Upon receipt of the notice, class members may opt out of the settlement or remain and collect the agreed upon remuneration. Alternatively, class members may appear in the action for the purpose of objecting to the settlement.

At one time, coupon settlements, meaning settlements that provided coupons to class members that they could redeem for products or services at a discount, were popular because they could be issued at a nominal cost to defendants while counsel for the class recovered substantial fees. Because these settlements led to abuse, the Class Action Fairness Act (CAFA) has now placed significant restrictions on the amount of fees that may be awarded to class counsel when the relief offered takes the form of coupons.

Canada

A court must also approve class action settlements and attorneys' fees in Canada. A court will approve a settlement if it finds that the settlement is fair, reasonable, and in the best interests of all parties affected by the settlement. The court will typically look at how plaintiffs' counsel's requested fees compare to the benefit actually achieved for the class members.

A settlement fund is usually created for tracking and dispensing settlement proceeds to class members. A court-approved notice of settlement is issued to all potential class members, either by mail or publication. Upon receipt of the notice, class members may opt out of the settlement or remain and collect their remuneration.

In the United States, the common issues are usually tried before a jury. In Canada, common issues trials are bench trials, and a judge sits as finder of fact.

Conclusion

The risk to companies of significant financial and reputational damage from class action litigation continues to grow in the United States and in Canada. Despite U.S. class action legal reform, companies can still incur enormous costs from defending cases brought on a classwide basis. The discovery requirements alone require tremendous resources, and the sheer size of the classes can result in devastating verdicts. As companies try to manage their risk in the United States, new threats loom from north of the border. With the lower class certification threshold, potential disgorgement of profits damages and the "loser pays" system, Canadian class actions present their own set of significant risks to corporate defendants. Corporate counsel need to understand the potential exposure in both countries and ensure that they have a plan in place to defend companies from these claims effectively in both the United States and Canada. FD