Section of Litigation Consumer Litigation

Low-Hanging Fruit: Cross-Border Consumer Copycat Class Actions

By Thomas Arndt and Wendy Hulton – June 13, 2013

The occurrence of copycat class proceedings is on the rise. Class counsel and representative plaintiffs look to the success of class proceedings in other jurisdictions to pave the way to bring similar class proceedings in their jurisdiction armed with the factual and expert evidence of the foreign class proceeding. Given the extensive overlap, counsel on both sides of the Canada-U.S. border are increasingly looking to each other's activities as their springboard for class proceedings.

Regulatory compliance has become a fertile source of inspiration for consumer-rights class proceedings on both sides of the border. The prevalence of copycat and multi-jurisdictional class proceedings and the objectives of promoting the effective and efficient administration of justice have triggered the development of protocols and procedures in Canada and the United States.

The following are a few examples of recent and ongoing consumer copycat class proceedings.

Reebok
The Canadian Reebok class proceedings were filed in both Ontario and Quebec, alleging that Reebok Canada Inc., Reebok International Ltd., and Adidas Canada Limited (collectively "Reebok") had made false or misleading claims in connection with the health benefits of certain Reebok toning shoes. Reebok denied the allegations and liability but subsequently entered into a settlement agreement for $2.2 million to reimburse Canadians who purchased the products from December 5, 2008, to July 10, 2012. The

Canadian settlement was a small fraction of the earlier $25 million settlement Reebok made with the U.S. Federal Trade Commission (FTC).

Gaiam
In 2009, Gaiam, Inc. advertised a reusable aluminum water bottle as BPA-free. Reports indicated that the bottles' liners contained an epoxy resin that contained BPA that could leach into the water. Gaiam removed the BPA claim from its materials, but according to documents filed in the Quebec court, it failed to inform consumers about the presence of BPA. In April 2012, the U.S. class proceedings were settled out of court. Later, in June 2012, the Superior Court of Quebec approved the Canadian out-of-court settlement that required Gaiam to undertake an exchange program to allow consumers to obtain a new water bottle.

Google Street View
Regulatory compliance copycat class actions have expanded beyond misleading advertising. For example, in 2010, a number of U.S. class proceedings were filed against Google Inc. following investigations by several states into alleged privacy invasions during Google's collection of information for its "Street View" project. In October 2010, Canada's Federal Privacy Commissioner concluded an investigation and found that Google had contravened Canadian privacy law when it collected personal information from unsecured wireless networks in neighborhoods. A few months later, in April 2011, a national class-action lawsuit was launched in Canada against Google, Inc. and Google Canada Corp. on behalf of individuals who used unsecured wireless networks and who had sent or received on their wireless Internet connections any electronic data and communications from March 30, 2009, to May 7, 2010.

Beiersdorf—Nivea
In the spring of 2008, Health Canada's product-safety inspectors, acting on a complaint, conducted a retail blitz that led to a removal of a Nivea product from store shelves for labeling issues. Fast-forward to 2011 and Canada's Federal Competition Bureau announced a settlement with Beiersdorf Canada Inc., Nivea's Canadian distributor, to stop making what the bureau concluded were false and misleading claims that use of one its products could lead to a "reduction of up to 3 centimeters on targeted body parts, such as thighs, hips, waist and stomach." Early in 2011, Beiersdorf, Inc. announced a class-action settlement in the United States. This was followed by Canadian copycat class proceedings in mid-July 2011 and early 2012. By November 2012, an announcement was made regarding the settlement in the Canadian Nivea/Beiersdorf class-action proceedings.

Skechers
In April 2012, just a month before the U.S. FTC entered into a $40 million settlement with Skechers USA Inc., a motion was launched to commence a Canadian national class action against the company. The allegations in the Canadian proceedings are similar to those in the U.S. action, namely that the company had deceived consumers by making unfounded claims that one of its product would help strengthen and tone consumers' lower body. The Canadian proceedings are still pending.

Inclusion of Canadians in U.S. Settlements
Including Canadian consumers in U.S. actions presents some challenges. Ontario's Court of Appeal in *Currie v. McDonald's Restaurants of Canada Ltd*. (2005) 74 O.R. (3d) 321 (C.A.), has recognized that Canadian plaintiffs may be bound by U.S. class-action judgments subject to meeting the real-and-substantial-connection test, the adequacy and clarity of notice from an opt-out perspective, and the adequacy of representation in the class proceeding.

The McDonald's decision arises from the company's "Monopoly" promotional contest. A class action filed in an Illinois court on behalf of an American and international class of McDonald's customers, including the customers of McDonald's Canada, was settled. The Illinois court directed that notice of the class action be given to Canadian class members by means of an advertisement in Maclean's magazine. The settlement agreement provided that the settlement was binding on all class members who did not opt out of the class by the specified date. The Canadian plaintiff in a copycat class proceeding did not participate in the U.S. action. He brought a proposed class action in Ontario against McDonald's,

McDonald's Canada, and the contest coordinator, alleging wrongdoing in relation to the McDonald's promotional contests. Another proposed class action was commenced by another Canadian, who had intervened in the U.S. proceedings to object to the settlement of that action. The U.S. defendants moved to dismiss or stay the Canadian actions on the ground that the claims had been finally disposed of in the U.S. action. The motion judge dismissed the second Canadian action on the basis that, by appearing in the Illinois court to object to the settlement, the plaintiff had attorned to the jurisdiction of the Illinois court and that the U.S. judgment should be recognized and enforced against him. The motion judge refused to stay or dismiss the first Canadian's action, holding that that plaintiff was not bound by the U.S. judgment or by the other Canadian's attornment despite the fact that the claims were identical and they were both represented by the same law firm.

According to the Ontario Court of Appeal:

> Before enforcing a foreign class action judgment against Ontario residents, the court should ensure that the foreign court had a proper basis for the assertion of jurisdiction and that the interests of Ontario residents were adequately protected. The principal connecting factors linking the cause of action asserted in the plaintiff's proposed class action to Illinois were that the alleged wrong occurred in the United States and Illinois is the site of McDonald's head office. That factor was a real and substantial connection in favour of Illinois jurisdiction. On the other hand, the principles of order and fairness required that careful attention be paid to the situation of ordinary McDonald's customers whose rights were at stake. These non-resident class members would have no reason to expect that any legal claim they might wish to assert against McDonald's Canada as a result of visiting the restaurant in Ontario would be adjudicated in the United States. The consumer transactions giving rise to the claims took place entirely within Ontario. The consumers were residents of Canada and McDonald's Canada is a corporation that conducts its business in Canada. Damages from the alleged wrong were suffered in Ontario. The plaintiff class members did nothing that could provide a basis for the assertion of Illinois jurisdiction, while McDonald's Canada invited the jurisdiction of the courts of Ontario by carrying on business here. Given the substantial connection between the alleged wrong and Illinois, and given the small stake of each individual class member, the principles of order and fairness could be satisfied if the interests of the non-resident class members were adequately represented and if it were clearly brought home to them that their rights could be affected in the foreign proceedings if they failed to take appropriate steps to be removed from those proceedings. The right to opt out is of vital importance to the jurisdiction of the foreign court in international class action litigation. There was no basis for interfering with the motion judge's finding that the notice given to the nonresident class members was inadequate. As the unnamed plaintiffs were not afforded adequate notice of the Illinois proceedings, the Ontario courts should not recognize and enforce the Illinois judgment against the plaintiff and the non-attorning Canadian class members he sought to represent. Accordingly, the plaintiff and the unnamed members of the class he sought to represent were not bound by the U.S. judgment. Moreover, the mode of notice was inadequate, as the notice was published in a publication that is not ordinarily used in English Canada for these purposes and there was evidence that the notice reached only a small proportion of the members of the plaintiff class. While the motion judge apparently did not assess the adequacy of the Canadian notice against the standard mandated by Ontario law for Ontario class actions, this did not amount to an error. The adequacy of the notice had to be assessed in terms of what is required in an international class action involving the assertion of jurisdiction against non-residents. While Ontario's domestic standard may have some bearing upon that issue, it is not conclusive, particularly in light of the importance of notice to jurisdiction. The motion judge was entitled to look, as he did, to the standard the American court applied to its own residents. The motion judge did not err

in holding that the notice to the Canadian class members did not satisfy the requirements of natural justice.

Noteworthy Advantages and Disadvantages to Copycat Class Actions

Discovery. The rules of discovery in the Canadian legal system are much more restrictive than in the United States. For evidence to be discoverable in Canada, evidence must be directly relevant to material facts in issue in the dispute. In contrast to the United States, discovery in Canada is generally not permitted until after there has been a ruling on class certification and the pleadings have closed. This can result in much less information being exchanged between the parties in Canadian litigation and explains the desire of Canadian plaintiffs to obtain access to the results of U.S. discovery efforts. There has been a somewhat mixed reaction by the U.S. courts to this tactic. In some cases, there has been a willingness on the part of U.S. courts to permit Canadian plaintiffs access to discovery from U.S. cases. *See e.g.*, *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

Jurisdictional issues within Canada. The administration of Canada's civil justice system is a matter of almost exclusive provincial jurisdiction. While Canada has a federal court system, its jurisdiction is limited to matters involving the Canadian federal government and certain federal statutory matters such as immigration, federal taxes, transportation, and intellectual-property rights. This has resulted in some provincial jockeying for position for a larger piece of the class-action pie. Quebec, for example, has become known for its liberal approach to class certification, while Manitoba's class-action regime has no costs and opt-out provisions for national classes. This means that Canada is unlikely to follow the United States' example with its Class Action Fairness Act, and the defense bar is looking forward to guidance from the Supreme Court of Canada for a road map to resolve the provincial conflicts.

Unlike in the United States, Canada does not have a mandatory multi-district litigation mechanism for dealing with cases that involve inter-provincial claims. Practically speaking, this means that it is left to the courts of each province to deal with any inter-provincial issues that arise. However, Canadian courts, with the consent of counsel to the parties, have a proven track record of informal coordination to achieve judicial economy. That said, it is not a comprehensive system and as a result, class actions have been re-litigated in another province.

To coordinate competing class actions, the Canadian Judicial Council has endorsed the recommendation of the Uniform Law Conference of Canada for the creation of a Canadian Class Proceedings Database administered by the Canadian Bar Association. The database facilitates the exchange of information about multi-jurisdictional class proceedings. Canada's courts, with a few exceptions, have issued practice directions requiring plaintiffs to register their multi-jurisdictional class proceedings in the database.

Cross-border class action judicial protocols. The Canadian Bar Association launched a task force to address the challenges of overlapping class proceedings across international borders. The first phase of the task force's work produced Class Action Judicial Protocols that include cross-border protocols developed by the American Bar Association and endorsed by the Canada Bar Association Council. These protocols address the management of multi-jurisdictional class actions, court-to-court communications in Canada-U.S. cross-border class actions, and coordinating notice to the class(es) in multi-jurisdictional class actions.

Conclusion

The incidence of copycat class actions is increasing in our global economy, including on both sides of the Canada-U.S. border. Indications are that this trend will continue as class counsel benefit from the bounty generated by their colleagues in other jurisdictions. Class actions often follow regulatory investigations and are becoming part of modern corporate operations. The courts, counsel, and legislators have and continue to take steps to coordinate these class proceedings as the class-action road map continues to be developed. Corporations are also wise to develop a company-wide response to avoid taking a position in one jurisdiction that may adversely affect litigation in another jurisdiction.

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