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Cross-border class action update

JANUARY 22, 2021 | 1:30 PM TO 2:30 PM EST

#1 in multijurisdictional litigation – Acritas

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Canada update: Ontario amendments, Supreme Court decisions and trends

Amendments in Ontario

- Proclaimed into force on October 1, 2020
- Amendments based largely on Law Commission of Ontario report: *Class Actions: Objectives, Experiences and Reforms: Final Report* published July 2019
- Amendments generally viewed as favourable to defendants, although certain amendments reduce delay which may favour plaintiffs
- The amendments apply to any new claims commenced after October 1, 2020
- **Exception – Dismissal for Delay** – new section 29.1 provides that Court, on motion, shall dismiss the claim one year from the date it was commenced unless:
 - the plaintiff has filed a final and complete motion record for certification;
 - the parties have filed an agreed upon timetable with the Court;
 - the Court has ordered that the proceeding not be dismissed and has established a timetable for certification; or
 - or any other steps specified by the Regulations have taken place
- This also applies to current actions – 1 year deadline from October 1, 2020

Amendments in Ontario

- **Jurisdiction** – Plaintiffs must register claim and give notice of certification motion to representative plaintiff of any other class action with overlapping issues
- Court will determine if Ontario is the preferable forum to resolve all or some of the class members on motion prior to certification
- **Carriage motions** – shall not be made 60 days after date on which first claim was commenced
- If there is an existing claim, no second claim may be issued without leave of the Court if more than 60 days have passed since issuance of first claim
- Court's decision on carriage is final and may not be appealed
- **Third party funding agreements** – must be approved by court on notice to defendants
- If a cost award is made against representative plaintiff, defendant has right to recover costs directly against funder
- Defendant may obtain security for costs from funder where not ordinarily resident, or insufficient assets, in Ontario
- **Eliminated asymmetrical appeal rights** – both parties may appeal directly to Court of Appeal (no appeal or Divisional Court for Plaintiff and no leave to appeal to Divisional Court for Defendants)

Amendments in Ontario

- Adopts test under Rule 23 of US *Federal Rules of Civil Procedure*: (i) superiority; and (ii) predominance tests
- With respect to preferable procedure element of certification test, plaintiff must show:
that a class action is superior to all reasonably available means of determining the entitlement of class members (quasi-judicial, administrative, remedial, case management of individual claims); and
questions of fact or law common to class members predominate over any questions affecting only individual class members
- Will Ontario courts adopt US case law or forge own approach?

Amendments in Ontario

- Default for many preliminary motions had been that they would be “sequenced” to be heard together with or after certification
- Now, new section 4.1 provides as follows:

Early resolution of issues

4.1 If, before the hearing of the motion for certification, a motion is made under the rules of court that may dispose of the proceeding in whole or in part, or narrow the issues to be determined or the evidence to be adduced in the proceeding, that motion shall be heard and disposed of before the motion for certification, unless the court orders that the two motions be heard together.

- The only decision to date citing section 4.1 makes clear that the section does not apply because the action was commenced prior to section 4.1 coming into force
- Sequencing motions will not disappear but they should become less common

2020 SCC cases on class actions

Atlantic Lottery Corp Inc v. Babstock, 2020, SCC19:

- Where possible, therefore, courts should resolve legal disputes promptly, rather than referring them to a full trial (...). This includes resolving questions of law by striking claims that have no reasonable chance of success (...)

11688782 Ontario Inc. v. Maple Leaf Foods, 2020 SCC 35

- Consistent with SCC's decision in *Babstock* that courts should determine preliminary issues of law at an early stage where possible, the SCC affirmed Court of Appeal's decision that no duty of care owed by defendant to plaintiff.
- Class action dismissed on motion for summary judgment

2020 SCC cases on class actions

Uber v. Heller, 2020 SCC 16: the ongoing question of arbitration vs. class action before the SCC

Big take away:

- In *Uber*, the SCC set out a two step approach to guide future cases:
 1. The judge should consider whether there was an inequality of bargaining power between the parties
 2. If yes, the judge will consider whether that inequality resulted in an improvident bargain

An improvident contract entered into between parties of unequal bargaining power will be found to be unconscionable and will not be enforced

- The battleground on an application to stay the class action in favour of arbitration: is the arbitration clause unconscionable?
- The good news: Not every standard form arbitration clause will be unconscionable
- See, for example, the recent decision of Justice Myers: *Forest Hill Homes (Cornell Rouge) Limited v. Wei*, 2020 ONSC 5060. [note: this case concerned an irrevocability clause, not an arbitration clause]



2020 SCC cases on class actions

Desjardins Financial Services Firm Inc. v. Asselin, 2020 SCC 30

- Despite SCC's approach in *Babstock*, is Quebec an outlier in Canada?
- Low authorization threshold confirmed once more by the SCC.
- The judge's role is to filter out frivolous claims, and nothing more.
- Plaintiffs only need to demonstrate an arguable case and must read the wording of the motion to "discover the full message it conveys, including the necessarily implied message."

Trends arising from Ontario amendments, COVID and beyond

Jurisdiction

- Ontario – impact of a more “defendant friendly” regime?
- British Columbia – impact of the no cost regime and a lower hurdle?
- Quebec – low threshold – no evidentiary assessment

Cannabis

Privacy/Data Security

Covid-19:

- Insurance class actions – most cases focusing on business interruption insurance
- Educational institutions – number of cases in this category remains curiously low
- Long Term Care Homes – cases continue to rise
- Airline/Travel Cancellation – number of class actions seeking passenger refunds
- An interesting class action to watch: *Koehler v. Newfoundland*

US update: Predominance test, COVID class actions, recent notable developments and other class action trends

U.S. Federal Rule of Civil Procedure 23(b)(3)

Requires the court to find that “questions of law or fact common to class members predominate over any questions affecting only individual members,” and that a class action is “superior to other available methods for fairly and efficiently adjudicating the controversy.”

- Applicable to class actions seeking damages
- “Rigorous standard”
- Analysis frequently overlaps with the merits of the plaintiffs’ underlying claim
- Becomes the crux of the class defense
- Court must look at each element of the cause of action -- can it be shown with common proof, or does it necessarily involve highly individual elements for each plaintiff, such that a “mini-trial” would be required

COVID-19 class actions

Price Gouging

Airlines, event
cancelation

Educational
institutions

Employment

Insurance business
interruption claims

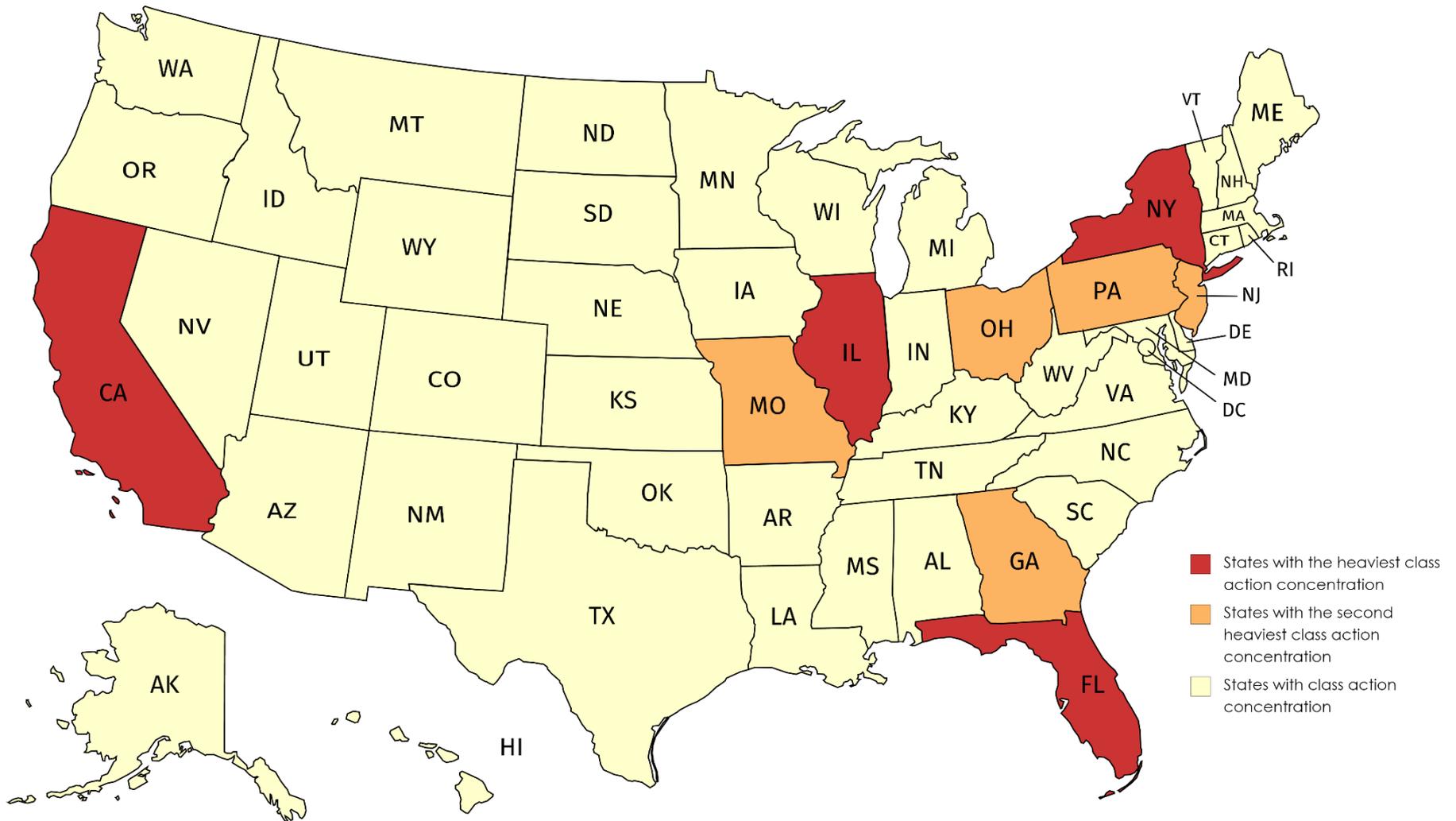
Negligence --
Cruise Lines, Nursing
Homes/Health Care
Institutions

Securities
Class Actions

Product
Misrepresentation/
Consumer Fraud

Financial
Institutions

Class action concentration by state



The US litigation climate summarized



Arbitration provisions and class action waivers



MANDATE

1:18-cv-04027-LGS

19-527 (L)
Horton v. Dow Jones & Company, Inc.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of April, two thousand twenty.

Present:

ROBERT A. KATZMANN,
Chief Judge,
AMALYA L. KEARSE,
JOSEPH F. BIANCO,
Circuit Judges.

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: May 13 2020

ROBERT JEREMY HORTON, individually and on behalf of all others similarly situated,

Plaintiff-Appellant-Cross-Appellee,

v.

Nos. 19-527 (L)
19-832 (XAP)

DOW JONES & COMPANY, INC., DBA The Wall Street Journal,

Defendant-Appellee-Cross-Appellant.

For Plaintiff-Appellant-Cross-Appellee:

FRANK S. HEDIN, Hedin Hall LLP, Miami, FL; Thomas L. Laughlin, IV (*on the brief*), Scott & Scott Attorneys at Law, LLP, New York, NY.

For Defendant-Appellee-Cross-Appellant:

NATALIE J. SPEARS (*Sandra D. Hauser*, Kristen C. Rodriguez, *on the brief*), Dentons US LLP, Chicago, IL and New York, NY.

MANDATE ISSUED ON 05/13/2020

Intuit v. 9,933 Individuals
(Los Angeles Superior Court)

New Year's resolution #1:

Review and update your arbitration provisions and programs

Article III standing and absent class members

IN THE
Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION,
SUCCESSOR IN INTEREST TO
THE FIRST AMERICAN CORPORATION, AND
FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

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November 10, 2011

**Privacy class actions:
data incidents and breaches,
biometrics, website recording,
and more**

New Year's resolution #2:

Review and update your organization's privacy policies' and programs' compliance

Labeling and false advertising
class actions:

Food

Beverage

Nutrition supplement

Personal care products

Beauty products

Cosmetics

Thank you



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