TORT TRIAL & INSURANCE PRACTICE

Committee News

Defending Liberty Pursuing Justice

Winter 2014

Trial Techniques Committee

DEFENDING CLASS ACTIONS IN CANADA

By: Cheryl Woodin and Tim Buckley, *Borden Ladner Gervais LLP**

In-house counsel or external counsel are regularly required to direct or otherwise oversee the defence of class actions in Canada. Canadian class proceedings can take place as an extension of worldwide or United States litigation or as single disputes, made in Canada. This article highlights some of the major differences in Canadian procedural practice that can impact the overall defence strategy of United States counsel.

The test for certification of class actions in Canada is lower than in the United States.

The number of class actions started in Canada continues to grow each year. Class proceeding legislation in some provinces of Canada is relatively young and not yet deeply litigated. Significant substantive and procedural issues are before appellate courts in Canada in the areas of securities law, employment and overtime law, banking and anti-trust or competition law and consumer products.

Directing simultaneous defences in conventional litigation in different jurisdictions in the United States poses many challenges. Those challenges are magnified when actions are also brought in either the common law provinces of Canada or in the civil jurisdiction in the Province of Québec.

American counsel are initially surprised by the breadth of cases certified in Canada as compared to the United States. The test for certification of class actions in Canada is lower than in the United States. Canadian courts will often certify an action if there is one common material issue that will move the proceeding forward. Canadian law does not include some of the more important restrictions to certification found under United States Federal Rules of Civil Procedure. For example, in

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MESSAGE FROM THE CHAIR

This year (August 2013 - August 2014), the Trial Techniques Committee is sponsoring an Education Awareness Project for high school students. The goal of this program is to encourage high school students to consider law as a profession and to do "A Day in the Life as an Attorney" presentation in the four cities where TIPS plans to meet. The Trial Techniques Committee held its first presentation at the Cristo Rey Jesuit High School in Minneapolis, Minnesota. Six attorneys served on a panel to discuss a typical day in their practice. The students were engaged and asked several questions about the attorneys' practice, as well as, how to prepare for law school and the admission process. We scheduled our second panel presentation at the UIC College Prep Charter School in Chicago, Illinois. We had six attorneys with different backgrounds and practice areas from across the County serve on this panel, which again was well received by the students. We are now in the process of planning presentations for the TIPS meetings scheduled in Boca Raton, Florida and in Boston, Massachusetts.

The Trial Techniques Committee offers its members a variety of ways to improve trial advocacy skills, including Continuing Legal Education (CLE) programs, newsletters, professional networking and training materials. We are always looking to increase membership and are committed to increasing diversity among our members. If anyone is interested in getting involved, please do not hesitate to contact me.

Sincerely,
Erika E. Anderson
Chair, Trial Techniques Committee

LETTER FROM THE EDITOR

I am pleased to bring you the Trial Techniques Committee Winter 2014 Newsletter and would like to thank my predecessor, Amy Hurwitz of Carlton Fields Jordan Burt in Miami for her contributions to the 2012/2013 Newsletters and her guidance and assistance as I take over this role. I became a member of TIPS in August 2011. As a Canadian lawyer, I have thoroughly enjoyed meeting attorneys from across the United States, sharing practice experiences and comparing US and Canadian law. As a result, you will not be surprised to see that, along with our usual fare, we will offer articles addressing comparative law issues involving US and Canadian jurisdictions.

This issue includes an article by Cheryl Woodin and Timothy Buckley, partners at Borden Ladner Gervais LLP in Toronto, titled "Defending Class Actions in Canada" and offers insight into some of the key differences between litigating class actions in Canada versus the US. Jonathan Blum's article "Maximizing the Effectiveness of Offers of Judgment in Federal Court" gives guidance regarding the benefits, appropriate use and limitations of Offers of Judgment. Michael Lee's article "The Power of Persuasion" gives great practical tips and advice on the use of PowerPoint presentations at trial.

Thank you to all of our authors for their contributions. If you or anyone you know is interested in writing an article for the Newsletter, please do not hesitate to contact me. ⚖⚖

Rebecca Bush
Newsletter Editor

MAXIMIZING THE EFFECTIVENESS OF OFFERS OF JUDGMENT IN FEDERAL COURT

By: Jonathan D. Blum, Esq, *Kolesar & Leatham*, Las Vegas, Nevada

An offer of judgment can be a powerful settlement device. Under FRCP 68(d), "If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer," then, "the offeree must pay the costs incurred after the offer was made." This encourages a realistic evaluation of the strengths and weaknesses of each party's case as a rejecting party risks paying post-offer costs if they receive a judgment less "favorable" than the offer. This is significant—especially for defendants—because while a prevailing plaintiff is generally entitled to costs under FRCP 54(d), it may have to pay the defendant's post-offer costs even if the plaintiff obtains a judgment.

In some jurisdictions, there are important differences between offers of judgment under FRCP 68 and similar mechanisms under state statutes and rules of civil procedure. In most cases, FRCP 68 is weaker than the corresponding state rules for several reasons. First, FRCP 68 only operates in one direction: "[A] party defending against a claim may serve on an opposing party…." Thus, it does not contemplate an offer of judgment by a plaintiff to a defendant. Second, and perhaps more importantly, in most cases FRCP 68 only awards costs—not attorneys' fees. Under FRCP 68, "costs" include attorneys' fees only when authorized under the substantive statute upon which the claim or defense is based. Marek v. Chesny, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985). While costs can be significant, they generally pale in comparison to attorneys' fees. Therefore, the cost shifting threat to plaintiffs has less "teeth" under FRCP 68, and thus there is less incentive to settle.

In some jurisdictions, there are important differences between offers of judgment under FRCP 68 and similar mechanisms under state statutes and rules of civil procedure.

On the other hand, many states provide both a procedural rule and a statutory mechanism for recovering attorneys' fees and costs on rejected offers of judgment. See e.g. Nev. R. Civ. Proc. 68 and Nev. Rev. Stat. § 17.115(4)(d)(3). These mechanisms are not mutually exclusive. Therefore, if a party in federal court makes an offer of judgment pursuant to FRCP 68 *and* the relevant state statute, they may be able to recover an award of attorneys' fees as well as costs. (One court noted that separately invoking the state statute was not necessary; however, it is likely a good idea to reference it nonetheless. MRO Commc'ns, Inc. v. Am. Tel. & Tel. Co., 197 F.3d 1276, 1283 (9th Cir. 1999))

There is a no shortage of law addressing when a state rule of procedure or statute applies in federal court. Erie Railroad Co. v. Tompkins governs the conflict analysis in federal diversity actions. 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Erie states that federal law applies to "procedural" issues, while the forum state law applies to "substantive" issues. Using the Erie analysis, courts have found that statutes allowing attorneys' fees are "substantive"—and therefore, state law applies. McMahan v. Toto, 256 F.3d 1120, 1132 (11th Cir. 2001) amended on reh'g, 311 F.3d 1077 (11th Cir. 2002). Thus, state law applies unless it conflicts with a federal statute or procedural rule.

As a threshold determination, courts determine whether FRCP 68 conflicts with its state equivalent. For example, in Walsh v. Kelly, 203 F.R.D. 597, 599 (D. Nev. 2001), the plaintiff rejected an offer of judgment served by the defendant. The plaintiff failed to obtain a more "favorable" result at trial and the defendant sought attorneys' fees and costs. The court concluded that FRCP 68 applied, since both Nevada Rule of Civil Procedure 68 and Nevada Revised Statute § 17.115 (both of which allow attorneys' fees) directly conflicted with the federal rule.

However, a defendant may still be able to obtain an award of attorneys' fees in federal court based upon an offer of judgment to a plaintiff. Since FRCP 68(d) states, "If the judgment that the offeree [ie. Plaintiff] finally obtains is not more favorable than the unaccepted offer, the offeree must pay…." The US Supreme Court has held that FRCP 68 is inapplicable in a case in which the *defendant* obtains judgment. Delta Air Lines, Inc. v. August, 450 U.S. 346, 352, 101 S.Ct. 1146, 67 L.Ed.2d 287 (1981). In that case, plaintiff rejected an offer of judgment and failed to obtain *any* judgment at trial.

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THE POWER OF PERSUASION: CLARITY OF MESSAGE

By: Michael B. Lee, Esq., *Michael B. Lee, PC, Las Vegas, Nevada*

PowerPoint is an effective media to communicate information to your audience if used correctly. It can illustrate the parties and evidence to the trier-of-fact for your opening statement. It can highlight important text of a document or photograph during an examination of a witness, or offer a video or sound clip to immediately impeach a witness. It can also assist in walking a jury through the jury instruction form and how the jury needs to complete it. In short, PowerPoint can mean the difference between a successful or unsuccessful trial. Every litigator needs to understand how to craft their storyboard and present information in a way that facilitates processing, understanding, and retention.

Every litigator needs to understand how to craft their storyboard and present information in a way that facilitates processing, understanding, and retention.

Tip #1 – Understand the Cognitive Science Behind Information Processing

Most humans process information in a cognitive manner. Think Fast and Slow by Daniel Kahneman describes the cognitive process as involving two immediate types of brain function: (1) fast – System #1 (automatic, intuitive, unconscious); and (2) slow – System #2 (deliberate, analytical, conscious effort). The key to persuasion is in understanding how to access each system when making your presentation. If System #1 accepts your premise, then System #2 will accept the information without question, even though it may be unreliable. For example, Dr. Kahneman provides this example to show how System #1 can trick System #2 into accepting a wrong answer: If a baseball and a bat cost $1.10 together, and the bat costs $1.00 more than the ball, how much does the ball cost? Most people answer $0.10, but the correct answer is $0.05 ($1.05 (bat) + $0.05 (ball) = $1.10). "The distinctive mark of this easy puzzle is that it evokes an answer that is intuitive, appealing, and wrong." Daniel Kahneman, Ph.D., *Think Fast and Slow*, (1st Ed., Farrar, Straus and Giroux 2011). Although System #2 is supposed to monitor the suggestions of System #1, it does not want to invest the effort. "[M]any people are overconfident, prone to place too much faith in their intuition. They apparently find cognitive effort at least mildly unpleasant and avoid it as much as possible." *Id.* Hence, the key is to anchor your presentation to things that your audience are already familiar with.

Initial observations are key to shaping perception. Blink by Malcolm Gladwell explains that we are constantly "thin slicing" our expectations based on small observations. In turn, these snap decisions can be corrupted by information overload. The key is to present information to the decision maker without distorting it with too much information. Additionally, another key is understanding the limits of attention span. We have all sat through PowerPoint presentations where the presenter just reads words off a slide. Unquestionably, we have all mentally zoned out during these presentations and stopped paying attention. During your presentation, you need to present a clear idea in a short time frame using various techniques to recapture attention. Framing your PowerPoint presentation is crucial to keeping your audience's attention and focus.

Multitasking is a myth. The human brain can only focus on one thing at a time. Too much cognitive effort causes people to tune out because of the fairly narrow bandwidth for accepting new information. In fact, magicians thrive on drawing your attention to one place to divert you away from the slide of hand setting up the "illusion." This is called inattention blindness. For example, in Think Fast and Slow, Dr. Kahneman references a study which asked a group to watch a short video of two groups of people passing a basketball around and counting the number of passes. During the video, a person in a gorilla suit walks through the scene. After watching the video, the researchers ask the subjects if they saw anything out of the ordinary take place. In most groups, 50% of the subjects did not report seeing the gorilla. Just like a computer, asking the brain to do too many things at once causes it to slow down. The solution is to "chunk" information in small increments so your audience can understand it, retain it, and then apply it.

Tip #2 – Use Images Instead of Words

Surprising and differing things grab our attention. Images and pictures are better attention grabbers than words. Images that evoke some type of emotional

response will generate a brain process that is powerful, potent, and long lasting. High levels of attention equal a high level of retention. Litigation is always about people. Starting with flattering pictures of your client(s) evokes the initial "thin slicing" for your trier-of-fact. The audience's subjective likes and dislikes, prejudices and stereotypes (even unconscious ones), will all start to shape their perception of your client(s), which, if used correctly, can invoke attraction through commonalities. From there, you can present your story board through images depending on the story you want to tell (and what evidence the parties have agreed to admit into evidence or had admitted by way of a pre-trial motion). When you capture your audience's attention throughout the presentation of your opening statement, they retain the information throughout the trial. When you state in your closing that you delivered on your promises from your opening statement, you maintain important credibility that should persuade the trier-of-fact to decide in your favor.

Multitasking is a myth. The human brain can only focus on one thing at a time.

Tip #3 – Story Boarding

Trial is a theatre. It has characters (parties, witnesses), a plot, costumes, and props (evidence). Your story board should present your theme and set up your call to action. Understand how you want to create your PowerPoint in three Acts. Act 1 introduces your theme and the characters. Act 2 explains the story of the case. Act 3 restates your call to action, reinforcing your theme. Once you understand your theme and the direction, start gathering images you will need for your presentation. Remember that you have an unlimited number of slides. In that, you can start with a simple blown up image for your first slide. Have your next slide consist of the image moving to the left side of the screen so you can use "chunks" to present the information you want about the slide. The chunk will usually be a sentence, which should be written out as a full simple sentence of seven words or less. Remember, trying to speak over large portions of text is distracting. Your audience will tune you out and just read the text on the screen. Starting with a visual image will help your audience connect to the presentation. Once this connection is in place, the chunks will connect your audience to the image and help them retain information. Retention creates persuasion.

Tip #4 – Simple Graphics

Understand your audience. Your average juror has a sixth grade reading level. As such, keeping your graphics simple will add attention and retention. Annoying fonts and animations are distracting. We read left to right. Thus, you should animate your slide to "wipe" from the left unless the flow of the presentation dictates a different direction. As to the font, be aware that your audience may have poor eyesight and/or be color blind. Use a large font of at least 40 point for your headings and at least 36 points for your chunks. Do not use different colors within the text itself for emphasis, as your audience may not see the difference. Bold or underline for emphasis. Finally, be aware of your use of white space to avoid clutter, and use a dark background with a yellow font to make it less harsh on your audience's eyes.

Summary

PowerPoint is an effective tool when you use it properly. Depending on your local rules, you can present the likely evidence by way video deposition clips, "call out" specific portions of a contract, emphasize your points with animations, etc. However, it becomes an ineffective tool if you simply present your speech and just read it from the screen. Understanding how the brain processes information is crucial to understanding how to create your slides. Obviously, knowing how to make a slide, insert images, use "call outs," and animate are critical to making a persuasive PowerPoint presentation. In that light, you should take a class on an introduction to PowerPoint for lawyers and follow up with an advanced class. As to understanding the brain, I would recommend reading Think Fast and Slow, Blink, Predictably Irrational: The Hidden Forces That Shape Our Decisions, and Win Your Case: How to Present, Persuade, and Prevail--Every Place, Every Time. ⚖

DEFENDING CLASS ACTIONS...

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Ontario there is no requirement that common issues of fact or law predominate over individual issues nor does Canadian law rigorously apply the concept of typicality.

Canada as a Federal Jurisdiction – Non Uniformity

Class action law in Canada is largely, but not exclusively, provincial. There is however great similarity between the substantive and procedural law among the nine common law provinces and three common law territories.

For example, the criteria in Ontario are: (a) the pleadings must disclose a cause of action; (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant; (c) the claims or defences of the class members raise common issues; (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and (e) there is a representative plaintiff or defendant (*Class Proceedings Act, S.O. 1992,* c.6, s.5*)*.

Protective orders issued in the courts of the United States do not necessarily bar Canadian plaintiff access to documents and discovery evidence in parallel actions in Canada.

The substantive and procedural law is distinctly different in the civil law jurisdiction of the Province of Québec. The certification criteria under the *Québec Code of Civil Procedure* are: (a) the members of the group must present similar, identical or related questions of fact and law – i.e. there must be one or more common issue(s) to be tried; (b) the plaintiff must have asserted a prima facie case that is not frivolous; (c) the number of class members must be sufficient so that it would be impractical or impossible for each of them to join in the same action or to allow one of them to represent the others by proxy; and (d) the proposed representative plaintiff must be an adequate representative for the members of the group. Québec law does not include the "preferable procedure" criterion applicable in common law Canada.

National Classes – Work in Progress

The viability of national classes in Canadian law is still unsettled.

Canadian provinces have not enacted protocols permitting the certification of national class actions in Canada, the enforcement of class action judgments or the preclusion of claims of individual plaintiffs after a class action settlement or judgment in a different province.

This uncertainty promotes the proliferation of parallel class proceedings against the same defendant in Canada. Fortunately, for the sake of efficiency, one action in one jurisdiction often becomes the lead action.

Procedural Implications of Cross Border Litigation

Broadly speaking, most Canadian class action proceedings will be decided by a judge alone, and not by a jury. Trials are typically lengthier than in the United States. This is in part because in most provinces witnesses other than the plaintiff and one representative of the corporate defendant are not deposed prior to trial in Canada. A recent Canadian product liability class action established a high watermark of 138 days for trial.

The differences between production and disclosure obligations in the common law provinces, Québec, and the United States create significant tactical issues for defendants.

In the case of parallel actions brought in Canadian and American jurisdictions, the use of documentary production in one action for the benefit of the other is a developing trend. Protective orders issued in the courts of the United States do not necessarily bar Canadian plaintiff access to documents and discovery evidence in parallel actions in Canada. Plaintiffs in Canadian proceedings have sometimes obtained access to discovery in United States actions.

In a recent decision of the Ontario Court, the bid of a Canadian resident to oppose enforcement of a letter of request for deposition by United States class plaintiffs on the basis that the deposition would violate narrower Canadian discovery rules was rejected in the spirit of comity.

Further tactical implications are created by differences in litigation privilege and work product privilege between jurisdictions in the United States and Canada. For example, litigation privilege may cease to apply upon termination of litigation in Canada and not have perpetual protection. Differences in Canadian law mean that the creation of solicitor work product must be carefully considered.

Exposure to Significant Awards of Legal Fees

There are enormous differences in the rules of the provinces concering the payment of legal costs by unsuccessful class action litigants. In some jurisdictions, such as Québec, unsuccessful defendants on certification

hearings will be required to pay nominal awards towards plaintiff legal costs. In other provinces, unsuccessful defendants will face awards of legal costs of several hundred thousand dollars on certification.

American counsel are also often surprised by the existence of third party funds that can be available to pay for the costs of plaintiff experts and to idenmnify unsuccessful plaintiffs against significant costs awards which can be made against them.

Few claims of Canadian claimants are tried or settled in class action proceedings in the United States or other jurisdictions outside of Canada.

Impact of Trans-Border Class Actions in Canada

Few claims of Canadian claimants are tried or settled in class action proceedings in the United States or other jurisdictions outside of Canada. A more common practice is for internationally negotiated settlements affecting Canadian claimants to be approved in a Canadian class action proceeding.

Settlement approval may be sought in several provincial jurisdictions in Canada, particularly in jurisdictions where large numbers of claimants reside in a foreign country. Defendants may be interested in seeking settlement approval in multiple provinces, and particularly Québec, for the purpose of precluding claims.

Canadian courts show a willingness to work collaboratively in defining classes to avoid the troublesome problem of overlapping cross-border classes.

Conclusion

The defence of Canadian class actions as part of global or North American litigation strategy is common in Canada. Recognition and appreciation of the significant differences in law and practice will greatly improve the result achieved and permit clients and counsel to manage the proceedings effectively. ⚖

MAXIMIZING THE…

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Since plaintiff did not obtain a judgment, the Court held that the federal rule was inapplicable. Citing Delta Air Lines, the 9th Circuit upheld an award of attorneys' fees based on NRCP 68 after the plaintiff rejected an offer of judgment, and the defendant obtained a directed verdict. MRO Commc'ns, Inc. v. Am. Tel. & Tel. Co., 197 F.3d 1276, 1283 (9th Cir. 1999). Since the plaintiff did not obtain a judgment, the federal rule was inapplicable and thus not in conflict with the state rule and statute.

The US Supreme Court has held that FRCP 68 is inapplicable in a case in which the defendant obtains judgment.

When a plaintiff serves a defendant with an offer of judgment, FRCP 68 also does not apply. Consequently, there is no conflict with state law allowing such offers, and courts apply the state law. These state laws impose various penalties on parties who fail to obtain more favorable results. For example, some award attorneys' fees. See e.g. Nevada Revised Statute § 17.115; Scottsdale Ins. Co. v. Tolliver, 262 F.R.D. 606, (N.D. Okla. 2009) aff'd on other grounds, 636 F.3d 1273 (10th Cir. 2011). Others permit post-offer interest awards. See e.g. Dillingham-Healy-Grow-Dew v. Milwaukee Metro. Sewerage Dist., 796 F. Supp. 1191 (E.D. Wis. 1992). In any case, the state laws usually give more "teeth" to the offer of judgment rule.

As outlined above, under different circumstances, plaintiffs and defendants can both take advantage of the federal and state offer of judgment rules. When deciding to make or respond to an offer of judgment in federal court, it is essential to evaluate whether attorneys' fees and costs, or only costs, are on the line. The difference can be game-changing. ⚖

2014 TIPS CALENDAR

April 2014

3-4 **Emerging Issues in Motor Vehicle Product Liability Litigation National Program** — **Arizona Biltmore Resort & Spa, Phoenix, AZ**
Contact: Donald Quarles- 312/988-5708

4-5 **Toxic Torts & Environmental Law Committee Midyear Meeting** — **Arizona Biltmore Resort & Spa, Phoenix, AZ**
Contact: Felisha A. Stewart – 312/988-5672

12-16 **TIPS/ABOTA National Trial Academy** — **National Judicial College, Reno, NV**
Contact: Donald Quarles – 312/988-5708

Property Insurance Law Spring CLE Meeting — **TBD**
Contact: Ninah F. Moore – 312/988-5498

May 2014

7-9 **Fidelity & Surety Committee Spring Meeting** — **The Brown Hotel, Louisville, KY**
Contact: Donald Quarles – 312/988-5708

14-18 **TIPS Section Spring Leadership Meeting** — **Boca Raton Resort & Club, Boca Raton, FL**
Contact: Felisha A. Stewart – 312/988-5672
Speaker Contact: Donald Quarles – 312/988-5708

August 2014

7-12 **ABA Annual Meeting** — **Sheraton Hotel, Boston, MA**
Contact: Felisha A. Stewart – 312/988-5672
Speaker Contact: Donald Quarles – 312/988-5708

October 2014

15-19 **TIPS Section Fall Leadership Meeting** — **The Meritage Resort and Spa in Napa Valley, Napa, CA**
Contact: Felisha A. Stewart – 312/988-5672
Speaker Contact: Donald Quarles – 312/988-5708

23-24 **2014 Aviation Litigation Program** — **Ritz Carlton Hotel, Washington, DC**
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