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Focus On

CLASS ACTIONS

Defendants increasingly pushing matters toward trial

Certification not the Holy Grail anymore

BY GRETCHEN DRUMMIE
Law Times

The certification stage in class action lawsuits has traditionally been considered the Holy Grail, signaling to successful plaintiffs that a settlement is probably just around the corner. But now, an increasing number of defendants aren't rolling over at that point — instead they're pushing cases towards trial, Toronto lawyer Darcy Merkur tells *Law Times*.

That means over the next two years, lawyers who have taken on these challenges under the impression that these cases often settle at the certification stage, "are going to realize that may no longer be the case, and they'll be put to the test in terms of working out these very expensive files and preparing them for trial," warns Merkur, a partner at Thomson Rogers, in the class action group.

Typically, getting a class action certified has been a signal to plaintiffs' counsel that you're almost all the way there. After all, suddenly, instead of representing one person who claims wrongdoing, the class plaintiffs' lawyer is representing hundreds or thousands of people who have the same generic claim, and in those cases the financial risk to defendants can be astronomical. So, usually you'd see defendants settling post certification saying the risk is in the multi-millions and they might as well try to resolve it, says Merkur.

But now, "Defendants are deciding right at the time of issuance whether this is a case that they want to resolve or whether this is a case they want to fight, and the cases they want to fight, they're not rolling over after the cases have been certified which usually crystallizes the risk as being an enormous number. Instead, they know that the plaintiffs' lawyers will be hanging themselves out to dry potentially if they push the case on to trial."

Of course that doesn't mean settlement post-certification isn't still happening. But lately law firms launching the class actions are taking on responsibility for pursuing them at enormous financial risk and the defendants know that, so occasionally they use it to their advantage. "If a common issues trial is required it will be three, four months and the plaintiffs could go down, in which case there could be a costs order against the plaintiffs and there would be no recovery so it would be time wasted," says Merkur.

"You saw what happened in the *Kerr v. Danier Leather Inc.* case which went to the Supreme Court of Canada. It was ultimately unsuccessful on the merits and the person who launched the claim, there was no recovery for the law firm, let's just say that," he says.

In the last three or four years a lot of law firms who had "no experience in class actions have considered dabbling in it, become involved in it and right now that doesn't seem like such a bad decision," says Merkur. "But in the next few years it might turn out to have been a bad decision because the wave may be turning and . . . the risks to the plaintiffs' lawyers could bury the firm in certain cases."

Darcy Merkur, left, and Alan Farrer, say an increasing number of defendants in class action lawsuits aren't rolling over at the certification stage and instead are opting to push cases toward trial.

Merkur notes that class action is all contingency work. Unlike personal injury lawyers who toil on hundreds of files at the same time on a contingency basis, in class actions, "between communicating with the large class, [and] dealing with the court issues, you could be spending years or months working exclusively on a class action and you might have multiple lawyers doing that, especially on the big ones. You go down in the sense that if you don't get a liability finding against the defendant that cost cannot be recovered, the firm will eat it."

So how often does a class get certified and then lose at trial? Do most settle assuming they're going to win?

Alan Farrer, Thomson Rogers managing partner and also in the firm's class action group, says that's the situation now; the bar isn't very high on the threshold to get certified. "The test is a procedural one and most cases that are started as class actions will meet that threshold and will be capable of being certified," he tells *Law Times*.

But he says it's only the first step because while securing a procedural determination that a class proceeding is a reasonable way in which to litigate a dispute, it is not a finding up to that point that there's a strong cause of action.

"The next stage is the common issues trial which follows after certification in which the merits of the case are examined," Farrer tells *Law Times*. "That's where the greater risk is and that's where some defendants are now setting up the barricades to fight at that level as opposed to the certification level."

"What we're saying is that the defendants are realizing that on the current status of the law they are likely not going to win the certification battle so they're redirecting their battle until after the certification stage when that's customarily been the opposite: fight you to death at the certification stage and if they lost that battle they would want to talk," says Merkur. "But now they're turning it around and saying they may challenge you at the certification stage but they don't like their chances and they'll throw up the barriers afterwards. At that point it becomes very expensive to plaintiffs' counsel who's knee-deep at this point; they've already been through the certification stage, they're in communication with hundreds of people, they've circulated a notice plan which involves publications in the newspaper sometimes at their expense or at joint expense and at that point the defendant can say, 'Well, I'm glad you're certified, there was nothing we could do to stop you from suing us, but we don't think we did anything wrong here so we're not settling with you. We're not paying, let's go to trial.'"

And this shifting of the landscape is going to bring fundamental changes to class action law, says Farrer.

"Reasonable lawyers and prudent lawyers always looked at the merits of a claim and they're not fast to just jump on a bandwagon when they see some small harm that's publicized in a newspaper and they've decided that's a class action," he says. "Reasonable lawyers look at the case, consider it on its merits and make a reasoned decision about whether this is a case worth pursuing.

"But what has happened is with the flurry of press and other things surrounding some of these class actions and the initial situation in the early days of the class action proceeding in Ontario, where certification seemed to determine whether a case would be settled or not, a lot of people have got into class actions and probably now are beginning to understand you do have to have a strong good case, a case that's worthy of pursuit and a case that you're prepared as litigation counsel to see through to the end and finance through to the end."

He says there's a possibility that some of these class actions that might have been settled in a "knee-jerk reaction by defendants simply out of the notion that the case may get certified and we may be liable, may be harder and harder to settle."

Farrer says he thinks what will happen is the groups of plaintiffs' lawyers doing class action work will shrink, there will be more consortiums of lawyers getting together to get some joint economic clout to take on some of the defendants and some of the less meritorious claims will fall by the wayside "because the economic weight of it will just rock the representative plaintiffs and rock the law firms that are pursuing it."

Farrer adds, "I think it's a recognition that some of these claims that have high publicity value and a little less value on the merits are more likely now to be defended. The ones that have merit to them and have real risk where the defendants know that the representative plaintiff and the law firm representing that plaintiff are prepared to see it through, I think defendants still have to make reasonable choices and have to act reasonably and if it is in the interests of the company and its shareholders that it be settled, they should still try and do that obviously."

Merkur notes that this development in the law is "a change . . . certification's becoming less significant for settlement purposes than it has in the past and it's just changing the dynamic. It's significantly increasing the risk for plaintiffs' lawyers is what it's really doing."

Says Merkur: "It may have raised the bar on plaintiffs' counsel to make sure your class action does have significant merit from a legal and public relations perspective before getting involved." LT

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