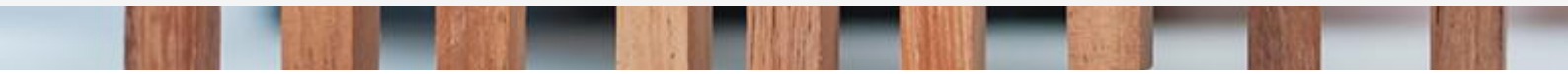
OSLER

PERSPECTIVES JURIDIQUES OSLER 2023

What if you face a class action even though no one was harmed?

DECEMBER 11, 2023 6 MIN READ



Related Expertise

- Class Action Defence

Authors: Laura Fric, Robert Carson

In a new trend, plaintiffs are launching proposed class actions even though no person has suffered any meaningful harm from the alleged wrongdoing. Many industries have been targets of these kinds of actions. Notable examples include proposed class actions filed after a business notified its customers that a hacker had breached its IT systems, an auto manufacturer notified its customers that it was recalling airbags or Health Canada announced the recall of a medication. In these cases and others like them, the proposed class actions have been filed immediately after the announcement, regardless of whether the event caused any harm to customers. These actions present real risk to businesses operating in Canada who may be forced to deal with time consuming claims that have no merit.

There is, however, some positive news for the business community. Even before a class action is filed, businesses can take steps to strengthen their position in the face of an incident that could result in litigation. And there is more good news. In many recent cases, defendants have been able to persuade courts to end these cases at an early stage precisely because the plaintiff has not suffered compensable harm.

Although these cases continue to make their way through the appellate courts, there are already many helpful findings. In 2020, the Supreme Court of Canada confirmed that "negligence 'in the air' — the mere creation of risk — is not wrongful conduct." Over the past year, the Supreme Court of Canada has consistently declined to hear plaintiffs' appeals in such cases.

Proactive steps for businesses to take

When a company becomes aware of an incident that poses class action risk, there are a number of steps it can take proactively to improve the chances that the proposed class action will not be viable because there is no or negligible harm to proposed class members.

In many cases, a business may be able to eliminate or mitigate any risk of harm to customers through recall programs, remediation, credit monitoring or other services. For example, the

Ontario Superior Court recently refused to certify an airbag recall class action after finding that the existing recall program to mitigate any danger was preferable to a class action. The Court found that the recall program was in line with what class members could achieve in a class action and was more expeditious.

Obtaining early dismissal of the action

There are numerous examples of actions of this type where businesses have persuaded courts that a case should not go ahead in the absence of actual, compensable harm. Even where there could be a minor injury to some class members, there are good arguments that the enormous machinery of a class action — with its attendant costs to parties and the court system — is not warranted to resolve an insignificant injury or inconvenience, particularly where the business has taken appropriate remedial steps.

In Alberta, for example, the courts refused to certify a data breach class action against Uber. The Court of Appeal subsequently confirmed that the plaintiff "has no hope of establishing that the simple loss of publicly available information like names, phone numbers and email addresses amounts, without more, to compensable injury or loss." In July, the Supreme Court of Canada denied leave to appeal.

Similarly, in Québec, the court rejected a class action on the merits because the plaintiff failed to prove compensable harm where a regulator had lost a laptop containing the class members' personal information. The Court of Appeal affirmed this decision, confirming the requirement for plaintiffs to show compensable damage beyond mere inconvenience in privacy breach cases. In March, the Supreme Court of Canada denied leave to appeal.

Ontario courts refused to certify a case against Fiat Chrysler that alleged that emissions "defeat devices" were installed in diesel engine vehicles. The Divisional Court confirmed the case should not go ahead because there was no evidence that any individual suffered a compensable loss following recall of the vehicles. Both the Court of Appeal and the Supreme Court of Canada denied leave to appeal.

Ontario and British Columbia courts are handling several cases arising from industry-wide recalls of drugs. In most cases, the plaintiffs allege that impurities in the drugs modestly increase the risk of being diagnosed with cancer. But instead of seeking damages for alleged cancer injuries, the plaintiffs claim small economic loss (e.g., for pills thrown away) or for mental distress after learning of the recall. So far, the first level courts have rejected these cases at the certification or summary judgment stage: the first in Ontario involved a blood pressure medication (valsartan); the first in B.C. involved a heartburn medication (ranitidine). The plaintiffs appealed the Ontario decision. We expect that the Court of Appeal's decision may be released this fall.

In a similar vein, the Ontario Divisional Court overturned certification of a class action where 6,800 patients received a letter advising that there was a low risk that they had been exposed to hepatitis or HIV. Ottawa Public Health ultimately confirmed there was "no transmission of Hepatitis B or C or HIV … within the Clinic where the lapse occurred." In the meantime, patients were informed that blood testing was available. The Court held that an "increased risk of harm" could not form the basis for certifiable cause of action. The plaintiff has filed a motion seeking leave to appeal to the Court of Appeal.

We continue to track these cases as they work their way through Canada's appellate courts. Despite recent successes by businesses, many plaintiffs and plaintiffs' counsel continue to see an incentive to file and pursue these types of actions. We are also seeing some class counsel pivot in their approaches. In some cases, plaintiff's counsel have essentially "shrunk"

the scope of the class action to pursue only limited claims (e.g., mental distress associated with potential future risks) or only punitive damages or nominal damages. These limited claims still offer the potential to generate large returns for plaintiff's counsel, even if any recovery by individual class members would be minimal or non-existent. As such, there is incentive for plaintiff's counsel to make increasingly creative arguments and continue to pursue "no harm" cases.

What happens next?

For the foreseeable future, Canadian businesses should continue to expect that they will face potential class actions where a negative event occurs that is outside the control of the business — even if the event does not cause any real damage to their customers. However, the good news is that the existing law can be helpful in seeking to terminate the action at an early stage. Further, where businesses take appropriate proactive steps to mitigate the risks to their customers, there will often be strong additional arguments that a class action is neither necessary nor desirable.

It remains critical for businesses to respond quickly and effectively when incidents occur. Defendants have a variety of tools to defend these types of cases or to resolve them early on. It is valuable to seek early advice on how best to implement such tools where an incident occurs that creates a risk of a class action or where a claim is commenced.