DENTONS

WEBINAR SERIES

KEEPING UP WITH

CROSS-BORDER CLASS ACTIONS

Part 2:
Product liability

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Grow | Protect | Operate | Finance

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Update on multidistrict litigation in the United States

Jack Vales

Personal injury claims in the US

- Unlike in Canada, US plaintiffs typically cannot assert personal injury product liability claims in class action proceedings.
- To obtain class certification under Rule 23(b)(3) of the Federal Rules of Civil Procedure, the proponent of a damages class must demonstrate common questions of law or fact ***that predominate over individual issues***, and a class action must be superior to other methods of adjudication.

Challenges due to personal injury claims in the US

In product liability cases, *individual issues* often predominate, such as:

1. Exposure – whether the plaintiff was exposed to the hazardous substance.
2. Injury – whether the particular plaintiff was injured.
3. Specific Causation – whether the product caused the plaintiff's injury.
4. Damages – the extent of any injury.

MDL Proceedings

- Due to the criteria applied by US courts to certify a class, class actions are generally not available for product liability claims in the US.
- The courts, however, have adopted a mechanism to consolidate product cases in a coordinated proceeding.
- In the federal system, this takes the form of Multidistrict Litigation (MDL).
- A similar model exists at the state court level – New Jersey Multi-County Litigation (MCL).

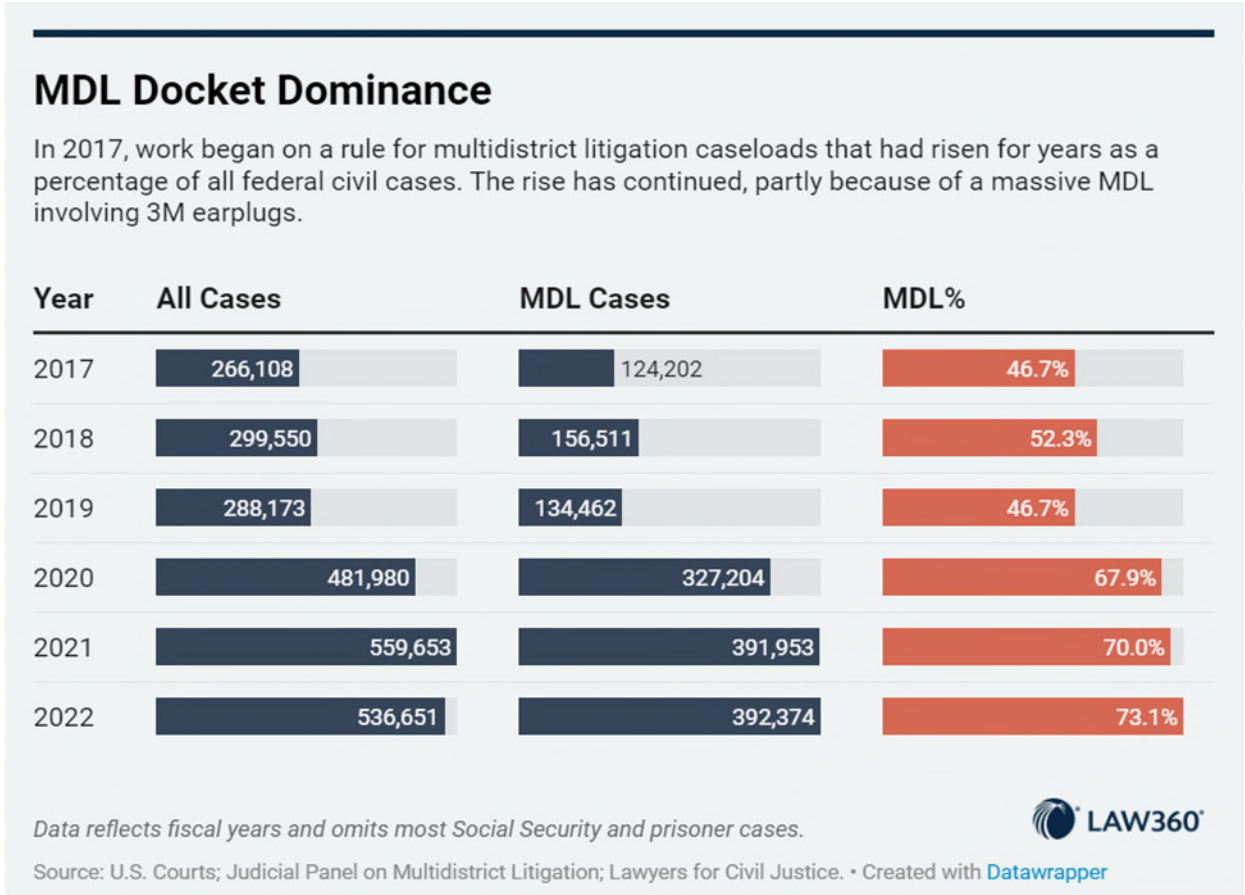
The Escalation of the MDL

What is Multidistrict Litigation? (28 U.S.C. § 1407)

- Civil proceedings employed for “coordinated or consolidated pretrial proceedings.”
- The underlying actions involve “one or more common questions of fact” and are pending in different districts.
- The Judicial Panel on Multidistrict Litigation makes decision to transfer cases to an MDL.
- A few recent examples: 3M earplugs, Allergan Biocell, Mirena, Proton-Pump, Taxotere, Valsartan.

The escalation of the MDL

MDL cases represent an increasingly prevalent percentage of overall federal civil dockets:



MDL Docket Dominance

In 2017, work began on a rule for multidistrict litigation caseloads that had risen for years as a percentage of all federal civil cases. The rise has continued, partly because of a massive MDL involving 3M earplugs.

Year	All Cases	MDL Cases	MDL%
2017	266,108	124,202	46.7%
2018	299,550	156,511	52.3%
2019	288,173	134,462	46.7%
2020	481,980	327,204	67.9%
2021	559,653	391,953	70.0%
2022	536,651	392,374	73.1%

Data reflects fiscal years and omits most Social Security and prisoner cases.

LAW360

Source: U.S. Courts; Judicial Panel on Multidistrict Litigation; Lawyers for Civil Justice. • Created with Datawrapper

The escalation of the MDL

Impact of MDL dominance on product litigation

1. Increases claims volume by:
   - Simplifying complaint process through use of short-form complaints;
   - Reducing focus and scrutiny on individual case proofs, with individual case disposition often turning on mass settlements driven by outcomes of Rule 702 motions, dispositive motions, and bellwether trials; and
   - Consolidating representation of claimants among groups of plaintiffs' lawyers.
2. These factors also significantly contribute to the increased prevalence of frivolous claims in MDL proceedings.
3. Plaintiffs' lawyers have an incentive to file as many claims as possible, in order to increase the volume of claimants participating in any settlement. Consequently, we see that plaintiffs' lawyers aggressively market MDL claims to the public. "If you build it, they will come."

The escalation of the MDL

New Rule 16.1 (expected to take effect December 1, 2025)

1. The first rule in the FRCP specifically addressed to MDLs.
2. Mostly permissive language and lack of mandatory requirements in the draft rule (“should” versus “shall”).
3. Does include a process for early exchange of information on factual bases for claims and defenses, which could help root out frivolous claims.

4. Overall, the proposed rule represents a moderate improvement on MDL case management.

New emerging theories of liability

Jack Vales

Emerging liability issues:

- Liability for failure to commercialize new product
- Innovator liability
- AI – Algorithm liability

Liability for failure to commercialize product

- This issue is at the heart of the Gilead Life Sciences cases that is currently being appealed to the California Supreme Court.
- At issue is whether drug companies could face liability in a product liability suit for failing to commercialize a new product, here, an HIV treatment deemed potentially safer than an existing HIV treatment on the market.
- Unless the California Supreme Court reverses the decision of the intermediate appellate court, this decision could have a chilling impact on product innovation, not only in the pharma industry, but beyond.

Innovator liability

- Since the US Supreme Court's decision in *PLIVA, Inc. v. Mensing*, federal law has insulated generic pharma companies from failure to warn claims on grounds that the federal requirement for the generic companies to follow the branded company label makes it impossible for the generic company to change its label in response to a state-law based requirements.
- This has caused the plaintiffs' bar to explore theories under which they could directly sue the branded company on a failure to warn theory with respect to a generic bioequivalent drug. Thus far, this theory has gained traction in California and Massachusetts but has otherwise been rejected.
- Nevertheless, the recent adoption of the Restatement of the Law Third Torts: Miscellaneous Provisions by the ALI at the 2024 Annual Meeting threatens to breathe new life into this theory, due to the provisions address Negligent Misrepresentation Causing Physical Harm.

AI – Algorithm liability – Bias in AI hiring tools

- AI algorithms used in the application screening process may lead to discrimination.
- ***Mobley v. Workday*** **- United States District Court for the Northern District of California (July 12, 2024):**
  - Workday, a Human Capital Management platform, faces claims of unlawful employment discrimination.
  - Court partially denied motion to dismiss of Workday.
  - Court found that Workday could face liability for acting as agent of employer.
  - Court additionally permitted claims for disparate impact to proceed.
  - Significant implications for AI vendors and employers using AI in hiring.

Class action waivers

Jack Vales

Class action waivers

- US Courts have approved use of Class Action Waivers as incorporated into arbitration agreements as long as arbitration agreement is enforceable (*AT&T Mobility L.L.C. v. Concepcion*).

- In response to presence of Class Action Waivers, plaintiff lawyers have sought to use this development for their advantage by commencing a large volume of individual arbitration claims for consolidation as a mass proceeding.

Class action waivers

- This strategy has caused some corporations to remove arbitration agreements from consumer contracts altogether due to consumer contract arbitration rules which shift arbitration costs to the company.
- Further, companies have now sought to include stand alone Class Action Waivers in consumer contracts without an arbitration provision.
- This past summer, the NJ Supreme Court approved the use of class action waivers in such contracts, provided the waivers are otherwise consistent with NJ contract law (*Pace v. Hamilton Cove*).

Product liability update:

Recent Canadian cases on the commonality test, claims for pure economic loss and the duty to warn

Matthew Fleming

Ham Sandwich

Evidentiary burden

Two-step standard must be met by plaintiff: *Lilleyman v. Bumble Bee Foods LLC,* and *Palmer v. Teva Canada Limited.*

- Proposed class action alleging price-fixing in the market for canned tuna in Canada by 3 US companies that engaged in price fixing in the US; claim named the US companies and Canadian affiliates.
- Certification motion dismissed on basis plaintiff failed: (i) to plead material facts ; (ii) to establish some basis in fact for common issues; and (iii) to meet preferable procedure test for certification.
- Plaintiff: motion judge erred in applying two-step analysis for common issues: (1) the proposed common issues actually exist; and (2) they can be answered in common across the entire class.
- ONCA rejected this argument; while plaintiff's burden is low, evidence is not required to meet balance of probabilities threshold, and courts not required to resolve conflicting evidence at certification, there must be some evidence that conspiracy occurred and that it caused harm to Canadian consumers.

Evidentiary burden

Lilleyman v. Bumble Bee Foods LLC and *Palmer v. Teva Canada Limited (cont'd).*

- Key takeaway: Two-step analysis confirmed by Court of Appeal.
- For Negligent Design Claim:
  i. must be some evidence of design defect (usually expert evidence); and
  ii. evidence the defect is common to class members.
- For Duty to Warn Claim:
  i. must be some evidence of a failure to warn of defect; and
  ii. evidence that the failure to warn is common to class members.
- Must also be evidence of compensable loss and that it is common to class members (e.g., *Larsen v ZF TRW Automotive Holdings Corp.*, 2023 BCSC 1471).

Pure economic loss claims

Kane v. FCA US LLC, 2024 SKCA 86

- Claim based on separate recalls or customer satisfaction notices for different FCA vehicles for ignition switches, potential fuel tank leaks, and possible fractures causing front end vehicle shakes.
- Plaintiff filed expert evidence in support of alleged financial losses but there was no evidence of personal injury; while certification judge identified valid causes of action in negligence for personal injury only and consumer protection legislation, the judge dismissed the certification motion finding: (i) no cause of action based on pure economic loss; and (ii) applying two part test, no evidence of any commonality between vehicles recalled and alleged defects.
- SKCA dismissed appeal: (i) no cause of action pleaded for an alleged diminution of value of the class vehicles or an alleged increased risk of harm or injury arising out of the defects that were the subject of the recalls; and (ii) no basis in fact that common issues existed or that they could be answered in common across entire class.

Pure economic loss claims

Kane v. FCA US LLC, 2024 SKCA 86 (Continued)

- Key Takeaway: Recalls/enhanced warranties and repairs (in the absence of personal injury or property damage) should immunize you from successful class action claims; issuing technical bulletins for defects causing imminent risk of a real and substantial danger will not.
- Pure economic loss claims must be specifically pleaded with material facts demonstrating imminent risk of a real and substantial danger.
- Voluntary remedies can eliminate liability (e.g., *Scott v Subaru Canada*, 2023 ONSC 6369).
- SKCA affirms two step test for common issues = growing consensus at appellate level in Canada.

No duty to warn of unlikely or remote risks

Pelton v. Maytag, 2024 ONSC 3016

- Merits decision in an individual action; valve in plaintiff's dishwasher failed due to freezing and house flooded; valve manufacturer and dishwasher manufacturer argued that a freezing event caused value to break but that while the risk of a freezing event was known, the risk was remote.
- Trial judge critical of the Plaintiff's experts' testing of the valve; it was ten years old at the time of the incident but was not tested for the first time until 5 years and 8 years after the event; the comparator valves used for testing purposes were models that were 18 years newer than the relevant valve = court not able to conclude the valve was defective.
- Plaintiff argued no warning about damage due to freezing event; defence evidence established that freezing could occur in certain circumstances.
- Court concluded that the Defendant could not be expected to know of the "confluence of events" leading to the freezing event that caused the valve to fail and did not breach a duty to warn.

The Wild Wild West:

Arbitration agreements, class action waivers, and the test for commonality

Emma Irving
Jaclyn Vanstone

Arbitration clauses in BC

Petty v. Niantic, 2023 BCCA 315 & Williams v. Amazon.com Inc., 2023 BCCA 314

- Arbitration agreements are enforceable in BC, with the exception of claims brought under certain legislation:
  - Distinct from other provinces which ban arbitration agreements in consumer contracts.
- Arbitration Act:
  - S. 15(1): If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before filing a response to civil claim or a response to family claim or taking any other step in the proceedings, to that court to stay the legal proceedings.
- Once an applicant has met the pre-requisites for a stay under s. 15(1), the court must grant a stay "unless it determines that the arbitration agreement is void, inoperative or incapable of being performed": s. 15(2).
- Legislative exceptions:
  - in BC claims under the BC Business Practices and Consumer Protection Act cannot be referred to arbitration and therefore get carved out of any stay of proceedings in favour of arbitration.
  - Expect plaintiff’s counsel to try to continue to expand the exceptions: travel agent legislation, privacy act legislation.

Void, inoperable, incapable of being performed

Uber Technologies Inc. v. Heller, 2020 SCC 16

- Courts retain some discretion to interpret an arbitration agreement to decide whether it is void, inoperable, or incapable of being performed rather than sending it to the arbitrator for determination.
  - Pure questions of law = court is free to resolve the issue of jurisdiction.
  - Pure questions of fact = courts should normally leave this to the arbitrator.
  - Questions of mixed fact and law = courts should refer to arbitrator unless the factual questions require only superficial consideration of the documentary evidence ion the record.
- *Uber* raised a question of pure law: was the arbitration agreement unconscionable? Yes.
  - Inequality of bargaining power between the individual driver and Uber, where the driver's employment with Uber is of necessary importance to his livelihood.
  - Driver's choice is to either accept or reject a standard form contract in order to gain that employment.
  - Imbalance of sophistication such that the driver could not be expected to appreciate that agreement to the arbitration clause meant that any dispute could only be brought in the Netherlands at an expense of US $14,500.
  - Fees to commence arbitration would be disproportionate to the value of any dispute.

Class action waivers

BC: form over function

- Unenforceable as stand-alone provisions: *Pearce v. 4 Pillars Consulting Group Inc.,* 2021 BCCA 198:
  - Unconscionable and contrary to public policy.
- But enforceable as part of arbitration agreements*: Williams v. Amazon*, 2023 BCCA 314:
  - *169 This result, it seems to me, is consistent with the intent and the policy rationale underlying s. 15 of the Arbitration Act. Unless an arbitration agreement is determined to be void, inoperative or incapable of being performed, the statutory objective of s. 15 must prevail and the arbitration clause, as a whole, is to be enforced: Peace River at para. 88. The "policy that parties to a valid arbitration agreement should abide by their agreement goes hand in hand with the principle of limited court intervention in arbitration matters": Wellman at para. 55, […].*
  - *171 Given this state of the law, I fail to see how, standing alone, an otherwise valid arbitration agreement is rendered unconscionable or contrary to public policy by mere virtue of the fact that it includes a class waiver.*

Commonality

Two step, or not two step? That is the question

- There must be some basis in fact for the proposition that the issue can be determined on a class-wide basis: *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2013 SCC 57 at para 99.
- Competing theories of the evidentiary burden:
  - “one step test”: in order to establish commonality, evidence that the acts alleged actually occurred is not required. The only evidence required at this stage goes only to establishing whether the common issues proposed are indeed common to all class members.
  - “two step test”: the plaintiff must adduce some basis in fact that 1) the common issue actually exists, and 2) the proposed issue can be answered in common across the class.

BCCA seems to endorse 1 step test

Nissan Canada Inc. v. Mueller, 2022 BCCA 338

- BCCA rejected the defendant's argument in favour of a two-step test requiring evidence that:
  - 1) There was some basis in fact that the product actually had a defect.
  - 2) There was some basis in fact that the alleged defect is dangerous.
- Product liability cases are unique in how they constrain the plaintiff's ability to prove a case involving an alleged product defect, where the product is a complicated machine and much of the key evidence supporting liability may lie exclusively in the defendant's possession and knowledge.
- **Key takeaway: in product liability cases, evidence that a defect is "dangerous" is not required.**

BCSC wants one step in two parts?

O'Connor v. Canadian Pacific Railway Limited, 2023 BCSC 1371

- Then Chief Justice Hinkson considered *Nissan* in a proposed class action against CN and other defendants alleging rail operations caused wildfires which resulted in massive loss in the town of Lytton, BC.
- Rejected the notion that Nissan endorsed a one step test and left the question of the appropriate test open:
  - *[261] In considering the authorities above, regardless of whether it is called a one- or two-step test, the plaintiff's burden is the same. He must show some basis in fact that the issues are common to the class. He need not prove on a balance of probabilities that the defendants actually caused or contributed to the Wildfire. However, as stated in Hollick at para. 25, he must show some basis in fact that the claims raise common issues, "other than the requirement that the pleadings disclose a cause of action."*
  - *[262] Put another way, "is there some evidence of class-wide commonality, that is some evidence that the proposed common issue can be answered on a class-wide basis": Trotman at para. 57, citing Grossman v. Nissan Canada, 2019 ONSC 6180.*
  - *[263] I struggle to see how the plaintiff can meet his burden of showing that an issue can be proven in common for the class without providing some basis in fact that there is a common issue in the first place. Thus, whether the one-step or two-step articulation of the test is used, the outcome is the same.*
- **Key takeaway: instead of focusing on a test, the framing of the proposed common issues may be crucial to defining what evidence is required.**

Novel claims in BC

- Litigation by the BC Provincial Government:
  - Opioids class action;
  - Forever chemicals.
- Enactment of Bill 12 – 2024, *Public Health Accoutability and Cost Recovery Act:*
  - Grants government a direct and distinct action against a person to recover the cost of health care benefits caused or contributed to by a health related wrong.
  - Covers virtually any product or service with health risks and allows government to prove its costs through “Ministers certificates” as opposed to evidence.
  - Presently on hold.

Thank you

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