



To Plead or to Concede?... That Should be the Question

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In *Bernstein v. Peoples Trust Company*, the Court transmitted “a salutary message... to Class Counsel that they should not over-plead their case and that they should make appropriate admissions or concessions.”

Background

The representative plaintiff successfully certified a class action on behalf of all consumers in Ontario who purchased or acquired a prepaid payment card sold or issued by Peoples Trust Company between October 1, 2007 and April 30, 2014. The parties were unable to agree on costs. The defendants contested the quantum of costs sought by the plaintiff for the certification motion on the grounds that it was not fair and reasonable based on the outcome, as the class definition was found to be overbroad (by including members whose claims were presumptively statute-barred).

Discussion

The Court regarded certification as a “total success” for the representative plaintiff even though the class definition was revised to accommodate the limitation period because “that is not an uncommon successful outcome.” At the same time, the Court found that plaintiff had had not made reasonable concessions on the limitations issue. The Court cautioned counsel to avoid over-pleading a case or taking too uncompromising a stance:

In the class action context, over-pleading the class size, class period, and adding redundant causes of action and claims and not making concessions is a frequent phenomenon. And it is a problematic phenomenon because over-pleading and not making concessions virtually ensures that there will be a contested certification motion - and an expensive one - that simply aggravates the access to justice problems that class action procedure was designed to ameliorate.

And, over-pleading ignores the changing landscape of the developments of class action jurisprudence where the risks of not achieving certification have at least diminished, making it unnecessary to plead everything in hope that something will be certifiable. Certainly, class counsel should not over-plead to provoke a contested certification motion in order to finance the class action.

In the result, the Court found that “the refusal to admit or lengthening of the hearing was quite modest” but still considered the outcome “enough here to warrant that a very small portion of the costs be payable to the plaintiff in the cause.” The Court awarded the plaintiff the costs that it had sought, with a modest portion payable in the cause rather than within 30 days in order to reflect its dissatisfaction.

Take-Away:

- In determining an appropriate award of costs and whether costs should be awarded in the cause, the courts will take into account the extent to which over-pleading or unnecessarily lengthened the certification motion.

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