

Goodmans^{LLP} Update

Extra-Jurisdictional Evidence Gathering in Class Certification Motions

With no right of discovery in advance of certification, class counsel have been increasingly looking for other avenues to obtain information to assist with their certification motions. One recent trend amongst the plaintiffs' bar has been to attempt to gather information from the United States (where there are often parallel proceedings or parties), by availing themselves of 1782 of Title 28 of the U.S. Code entitled *Assistance To Foreign And International Tribunals And To Litigants Before Such Tribunals*. Pursuant to 28 U.S.C. §1782, an "interested person" (which includes parties involved in disputes in another country) can seek and obtain, on an *ex parte* basis, subpoenas compelling oral testimony and documentary discovery without first obtaining Letters Rogatory (a request from their local court) in their home jurisdiction. But what happens when obtaining such relief intersects with the *Rules of Civil Procedure* and case management regime in the Canadian court where the class action was commenced?

In a recently affirmed 2017 decision of Justice Perell of the Ontario Superior Court of Justice (*Mancinelli v. Royal Bank of Canada*, 2017 ONSC 87, affirmed by the Divisional Court 2018 ONSC 1844), the Court took a dim view of the plaintiffs' use of 28 U.S.C. §1782 to obtain a subpoena to examine a third party in the United States, calling it a circumvention of the Ontario *Rules* surrounding the examination of non-parties. The Court ultimately ordered no steps be taken in furtherance of the subpoena and no other attempts be made to obtain evidence from non-parties through extra-jurisdictional procedures without further Order.

While a motion for leave to appeal has been filed, for the time being, class counsel can expect to have to satisfy the Ontario Court of the necessity and advisability of third party discovery before having recourse to 28 U.S.C. §1782.

For further information concerning this development, please contact any member of our Litigation Group.

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