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Access to Justice a Key Concern in Certification Decisions

The Ontario Divisional Court has recently affirmed the importance of access to justice as a factor in determining whether to certify a proposed class action.

The court's recent decision in *Fantl v. Transamerica Life Canada*, 2015 ONSC 1367 is a further step in the trend towards granting certifications to facilitate access to justice, following the Supreme Court of Canada's decision in *AIC Limited v. Fischer*, 2013 SCC 69.

In *Fantl*, a class of investors purchased investments in Transamerica's Can-Am fund. Transamerica had represented it would make best efforts to have the Can-Am fund duplicate the performance of a well-known stock index, the S&P 500. The class claimants say that Transamerica made no efforts to have the fund emulate the S&P 500, and that they fell victim to Transamerica's negligent misrepresentations contained in the investment information documents.

Justice Paul Perell of the Ontario Superior Court declined to certify common issues on the class' negligent representation claim. His decision focused on the fact that the negligent misrepresentation claim would require individual hearings to deal with the questions of reliance and damages. He also noted that because the representative plaintiff had a $100,000 investment portfolio, the amount in issue wouldn't be so small as to make access to justice unavailable absent a class action.

On appeal, the Divisional Court disagreed with Perell J's assessment of the access to justice considerations at play. Justice Harriet Sachs, writing for a panel of three judges, was quick to note that Perell J. did not have the benefit of the Supreme Court of Canada's decision in *AIC Limited v. Fischer*, 2013 SCC 69 when he wrote his reasons, in which the Supreme Court set out the proper analytical approach to the access to justice component of the preferable procedure analysis.

In *AIC*, the Supreme Court clarified that when determining whether a class proceeding is the preferable procedure for a claim, the court should focus on the goals of judicial economy, behavioural modification and access to justice. Even where a class action may not succeed at meeting all of these goals, the question is whether certification as a class proceeding is

preferable to the other available options. With respect to access to justice, the court must determine which barriers exist to access to justice, and compare the proposed class proceeding to other available forms of proceeding to determine which procedure best overcomes the existing barriers.

The *Fantl* case shows an application of the *AIC* principles. The main barrier to access to justice in this case, as in most cases, is the cost of litigation compared to the potential benefit. Sachs J. noted that while the representative plaintiff had $100,000 in investments, he invested only $27,000 in the Can-Am fund, and his ultimate damages award if successful would be only a fraction of that amount. The cost of litigation compared to the potential benefit made the other option, an action in the Superior Court, unfeasible.

Given this analysis, a class proceeding is the preferable procedure to resolve the class' negligent misrepresentation claim. Even though individual hearings might be required to address some issues, there are judicial economy and access to justice benefits in determining the common issues on a class-wide basis.

Sachs J. also held that Perell J. erred in refusing certification due to the individual reliance element of the common law by virtue of the claim being a negligent misrepresentation claim. She noted that other negligent misrepresentation claims have been certified in the past. Generally, the claims that have been certified are ones where the defendant had made one single or common misrepresentation to the class, as opposed to multiple individual representations. Sachs J. held that cases which involve one or a few common misrepresentations are generally appropriate for certification.

This categorization of negligent misrepresentation claims may lead to class plaintiffs re-framing pleading negligent misrepresentation class actions to focus on a common message or theme among multiple representations. This could have significant implications for cases involving alleged false, inadequate or otherwise misleading public disclosure of material developments by reporting issuers.

Perhaps most importantly though, following the *Fantl* decision, the court has given every indication that access to justice considerations will play a large role in future certification decisions.

- Research contributed by David Shore, 2014/2015 articling student.