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Breaking down the Economic Barrier: Negligent Misrepresentation and Class Actions

Over the 25 years that Ontario's *Class Proceedings Act* has been in force, there have been fewer than 20 common issue trials. While class actions have the potential to remove access to justice barriers and improve judicial economy and efficiency, in Ontario their scope has been limited.

Yet, the Ontario Court of Appeal recently addressed this limitation in *Fantl v. Transamerica Life Canada*, and the reach of class actions has seemingly expanded.

The proposed class consisted of a group of investors in Transamerica's Can-Am Fund. In five of the insurance contracts and all of the information folders, investors were told that the fund would "on a best efforts basis replicate the performance of the S&P 500 Total Return Index".

Alleging this statement to be untrue, the plaintiffs sued for breach of contract and negligent misrepresentation.

Although the certification judge certified the breach of contract action, he did not certify the negligent misrepresentation claim. He found the issues of reliance and damages would have to be decided at individual trials, thus overwhelming and subsuming the common issues. He held that a class action was not the preferable procedure for the negligent misrepresentation claims.

The investors successfully appealed this decision to the Divisional Court. While a certification judge's decision is generally entitled to deference, after the certification hearing, the Supreme Court of Canada released the decision in *AIC Limited v. Fischer.* In applying *Fischer,* the Divisional Court found a class proceeding in this case would be a fair, efficient and manageable method of adjudicating the plaintiffs' claims. The Divisional Court held that the individual issues could likely be resolved through "fairly straightforward mechanisms", and a class proceeding would be the only reasonable way to achieve access to justice.

Transamerica Life appealed to the Ontario Court of Appeal. At the Court of Appeal, Transamerica Life argued that the Court

had, in *Bayens v. Kinross Gold Corporation*, previously held a class proceeding based on common law misrepresentation to be unsuitable. In dismissing that argument, the Court of Appeal distinguished *Kinross* and instead relied on the preferability analysis from *Fischer*, which requires a court to consider:

(a) the barriers to access to justice;

(b) the potential of a class action to address those barriers; and

(c) the alternatives to a class action.

The most common barrier to access to justice - an economic barrier - was present here. Without class certification, the cost of individually acquired expert evidence would not be proportionate to the amount at issue. In a class proceeding, this cost could be distributed. Resolving the common issues of negligent misrepresentation would also considerably advance the claim of every class member. Relying on the possibility of improved access to justice and efficiency, the Court of Appeal affirmed the Divisional Court's ruling and allowed the certification.

In addition to providing an example of the preferability analysis from *Fischer,* the scope of this decision has the potential to be far-reaching. Both plaintiffs and defendants in a putative class proceeding should know that torts previously deemed unsuitable may now qualify for certification.

With notes from Kate Costin