Court of Appeal Clarifies “Some Basis in Fact” Requirement for Common Issues in Class Actions

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In its recent decision in *Fehr v Sun Life Assurance Co. of Canada*, the Ontario Court of Appeal, overturning in part certain holdings of the lower court, certified a class-action lawsuit brought on behalf of former policyholders respecting the sale of universal life policies issued by predecessors of the defendant.

The ruling represents the most recent appellate statement with respect to the extent to which courts should delve into the merits of a proposed class action at the certification stage. In particular, the Court has clarified that, in considering the "common issues" criterion for certification, the certification judge should determine whether the plaintiff has established some basis in fact for the *existence* of an issue that can be decided on behalf of all class members. The certification judge should *not* determine whether there is a basis to conclude that the proposed common issue should be decided in the plaintiff's favour. The Court accordingly effectively reaffirmed the purpose of a certification motion as a "meaningful screening device" as opposed to a test on the merits. The ruling also illustrates the strict approach taken to interpretation, construction, and effect of insurance policies with respect to terms relying on industry custom for meaning (as evidence to prove such custom may have limited admissibility on such motions).

The decision relates to a class action proceeding against Sun Life commenced in the Ontario Superior Court in 2010, on behalf of holders of certain universal life policies (which were acquired decades earlier as investments with returns tied to the vagaries of interest rate fluctuations). The class proceeding alleged, among other things, misrepresentation (chiefly regarding investment return), breach of contract, and fraudulent concealment (regarding ability of policy-holders/ investors to timely discover the alleged breach(es) in question). The class proceeding spawned a series of decisions in which the lower court ruled in favor of the defendant, declining to certify the class action on the basis that the claims were not properly constituted as a class action, *e.g*. not raising "common issues" (in respect of the misrepresentation claims), invalid, "inchoate" (*i.e.* premature), and, in respect of some of the claims (the misrepresentation and some of the breach of contract claims), time-barred.

On appeal, the court upheld some of these findings by the lower court (e.g. the misrepresentation claims) and overruled others (e.g. the breach of contract and fraudulent concealment claims) and, incidentally, found that some of the claims were not time- barred. The class action proceeded on the "breach of contract" and "fraudulent concealment" claims.

On the breach of contract (of insurance) claims, the court provided a reminder of the procedural nature of a certification motion: namely, that this is not a step inviting analysis and determination of the merits of the dispute. The Court of Appeal further concluded that the lower court's approach to the "common issue" criterion (that there be common – but not necessarily identical - issues of fact or of law arising therefrom) did not withstand appellate scrutiny. The lower court had "decided the proposed common issue by interpreting the contract and making a finding that there was no breach" as opposed to deciding whether there was some basis in fact to conclude that the question of whether a breach had occurred could be decided on a class-wide basis. By deciding the issue of whether a breach had occurred, the certification judge usurped "a task for the judge at the common issues trial, not the judge dealing with certification," as the appellate court put it. This is consistent with the limitation on admissibility of evidence proffered for merits of the claim as opposed to for pure certification criteria (in this case, the lower court had considered evidence of industry practice tendered by Sun Life in support of a specific interpretation of the insurance contract).

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