CANADIAN LIFE AND HEALTH INSURANCE ASSOCIATION
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CLASS ACTIONS AND THE LIFE INSURANCE INDUSTRY

Background

Over the last decade, insureds have increasingly used class actions as the procedural vehicle to exercise their rights against insurers. A poignant illustration of this tendency can be seen in the series of class actions instituted by policyholders of participating life insurance policies which provide the benefit of premium offset, many of which have led to phenomenal settlements reaching several millions of dollars in Canada and hundreds of millions of dollars in the United States.

None justifies the use of class action as the procedural vehicle to favour access to justice or a greater protection of consumers for insurance products. However, the enticing perspective of a considerable monetary gain sometimes leads plaintiffs to bring such recourses without necessarily considering the difficulties or the inconvenience.

In fact, we can see that North American courts are not very inclined to authorize such class actions against insurers, primarily due to the difficulty of establishing questions of fact and law which would be common to the whole group, especially when they are founded on a situation of misrepresentation related to the sale of an insurance product where a large number of factors can vary from one policyholder to another, thereby causing class actions to be considered an inappropriate vehicle.

More particularly, in life insurance, the evidence and circumstances surrounding the conclusion of an insurance contract inevitably varies from one individual to another and focuses as much on objective elements as subjective ones but also on questions of credibility, the nature of verbal representations by the broker, the use of sale materials, the degree of sophistication of the individual and the personal considerations which may have led a member of the group to choose such a product.

However, courts seem to be more inclined to authorize a class action if the individual claim of the plaintiff is based on the interpretation or the extent of a provision of an insurance contract where such determination is susceptible to be applied to all members of the group without necessarily provoking a stream of mini trials on individual elements.

As we will see, the result of a class action is often risky. The uncertainty with respect to the outcome, the procedural complexity of the recourse and the material difficulty of establishing common evidence for all members of the group may not be obvious but we must not underestimate the importance for these insureds who wish to exercise their rights by this vehicle.

Notwithstanding the temptation to obtain damages which can satisfy the insureds, the reality of class actions against insurers is something different. More particularly, in the common law provinces, a large number of proceedings in class actions end up with unfavourable judgments against the insureds. We also note that several class action suits are abandoned, either because of new facts which surface during the course of the action or because of the necessary resources and time as well as costs which we must consecrate and which are inherent to every class action.[1]

[1] C. Wright, «Class Actions in Ontario and British Columbia 1993-2001: An Analysis of the First Eight Years of Class Actions in Canada's Common Law Provinces» in the context of the conference «Class Actions: Where Are We At and Where Are We Going?», Osgoode Hall Law School Professional Development Program, April 20 and 21, 2001.

The only unsettling note in the history of class actions against insurers in Québec is a tendency which is much too liberal at the stage of granting authorization than elsewhere in Canada, where plaintiffs can also obtain financial aid from the class action fund which also exists in Ontario, but which is much less used.[2]

We will examine in a much more specific fashion the application of class actions in the industry of life insurance in Québec as well as in the common law provinces, with an analysis of the current tendency in the caselaw and the means of defense which are generally invoked by insurers.

THE RISE OF CLASS ACTION SUITS AGAINST LIFE INSURANCE COMPANIES

The out of court settlements involving phenomenal amounts in the context of class actions instituted against insurers have had the perverse effect of encouraging such actions, many of which can be characterized as being "attorney driven".

In the United States, the case of Prudential Insurance Company, epitomizes the phenomenal amounts of out of court settlements made in the context of class actions against insurers. In Re Prudential Insurance Co. American Sales Litigation, 148 F.3d 283 (3d Dir. 1998), a settlement was reached for an amount of US $410,000,000 against the Prudential Insurance Company, which settlement was also confirmed by the Supreme Court of the United States.[3]

This case involved the situation of "churning" which was a general practice used by certain agents of the Prudential Insurance Company. In essence, this practice entailed agents persuading policyholders of certain life insurance policies to borrow from the cash surrender value of the policy in order to finance the payment of premiums on a new

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[2] In Québec, see article 20 and following *An Act Respecting the Class Action*, R.S.Q. c. R-2.1; in Ontario, see the provisions of regulation O.Reg. 771/92.

[3] *In re Prudential Ins. Co. America Sales Litig.*, 148 F.3d 283 (3d Cir. 1998), *certiorari* refused, 119 S.Ct. 890 (1999).

contract. In certain cases, agents represented to policyholders that the interest generated by the surrender value would finance the payment of the premium on the new contract which was often more costly and which stipulated a higher insurance amount, the whole to allow agents to receive new commissions.

However, with the economic situation having as a consequence a drop in the interest rate, the accumulated value was not sufficient to finance the new contract and the insureds were obligated to pay the premium in order to maintain their policies. This practice occurred between 1982 and 1995 and in fact affected approximately 10,000,000 policyholders, most often elderly individuals.

On January 19, 1999, the Supreme Court of the United States approved the settlement of the class action which was instituted in 1996 for a total of US $410,000,000. Initially, the number of members of the group of policyholders was evaluated at 220,000 and the settlement provided for a compensation of US $2,300 per policyholder, plus punitive damages.

However, the payments made by the Prudential have reached US $1,000,000,000 and it would appear that the Prudential recently established a reserve of US $2,400,000,000 in order to meet the settlement demands.

Another indication of the magnitude of the recourse, the attorney Melvyn I. Weiss of the New York firm Milberg Weiss Bershad Hynes & Lerach, was authorized in August 2000 to receive USD $90,000,000 in professional fees as the attorney for members of a group, which was awarded by judgment of the US District Court of Newark, New Jersey.

In Canada, the amounts provided by certain insurers in order to settle premium offset claims relating to participating life insurance policies have also reached impressive amounts:

- Settlement of $180,000,000 proposed by London Life to 500,000 policyholders (June 2001).
- Settlement of $72,000,000 proposed by ManuLife to 200,000 policyholders (fall 1998).
- Settlement of $65,000,000 proposed by Sun Life for 400,000 policyholders (summer 1997).
- Settlement for an undisclosed amount proposed by Canada Life for 135,000 policyholders (February 2001).

Settlements of such magnitude have inevitably provoked a proliferation of class actions against life insurers, which are in the context of national class action suits instituted in jurisdictions where such class action proceedings are allowed in Ontario, Québec and British Columbia.

To date, very few life insurers who offer amongst their products participating whole life policies and universal life policies, have escaped this wave which began around 1997 after the settlement of the class action suits in the Prudential matter; many of these class action suits are currently still pending and await their outcome.

CRITERIA FOR THE AUTHORIZATION OF A CLASS ACTION

In Canada, only the Provinces of Québec, Ontario and British Columbia currently have legislation regarding class actions.

These rules were largely inspired by American law and more particularly from Rule 23 of the Federal Rules of Civil Procedure (1966) as well as Sections 901 to 909 of the New York Civil Practice Law and Rules.

Our legislatures envisioned essentially the following objectives when class actions were introduced in Canada:

1. To permit, by aggregating similar individual actions, judicial economy by avoiding unnecessary duplication in fact finding and legal analysis.
2. As the fixed litigation costs will be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually.
3. To serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public.[4]

In all North American jurisdictions which possess legislation enabling the exercise of a class action, authorization from a competent court is required before such a recourse can be exercised and before an individual can be authorized to represent the members of a group.[5]

In Québec, Article 1003 of the *Civil Code of Procedure* imposes upon the plaintiff the obligation to demonstrate to the court that the following requirements have been met and coexist:

> "**1003.** The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:
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> (a) the recourses of the members raise identical, similar or related questions of law or fact;
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> (b) the facts alleged seem to justify the conclusions sought;

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4 *Western Canadian Shopping Centres Inc.* c. *Dutton*, [2001] SCC 46 (July 13, 2001) [hereinafter *Western Canadian Shopping Centres*]; *Hollick* v. *Ville de Toronto*, [2001] CSC 68; *Lavoie* v. *Corporation municipale de Saint-Mathieu-de-Beloeil et al*, C.S. 750-05-001833-001 (March 5, 2002).

5 In Québec, you can find this requirement at Article 1002 C.C.P.

(c) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and

(d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately."

In a general manner, the court has a limited discretion in the application of the criteria of Article 1003 C.C.P. In effect, if the conditions are met, the judge has no other alternative but to authorize the recourse.[6]

In terms of paragraph (a) of Article 1003 C.C.P., the litigation must present a certain number of questions of fact and law which are sufficiently similar or connected to justify the recourse, but it is not necessary that the whole of the questions of fact or law be identical for every member of the group.[7]

Furthermore, the application of paragraph (b) grants a certain discretion to the court which resembles that which is exercised in the context of a recourse in interlocutory injunction where the judge must determine if there is a serious colour of right without having to pronounce upon the merits of the case.[8]

With respect to the composition of the "group", for the purposes of paragraph (c) of Article 1003 C.C.P., the plaintiff must demonstrate that the composition of the group renders it difficult or impractical to apply Articles 59 and 67 C.C.P. relating to the exercise of a recourse by mandate or by joinder of actions. This requirement does not

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6 *Comité d'environnement de La Baie* v. *Société d'électrolyse et de chimie Alcan ltée.*, [1990] R.J.Q. 655 (C.A.) [hereinafter *Comité d'environnement de La Baie*]; *Guimond* v. *Québec (P.G.)*, [1996] 3 S.C.R. 347 [hereinafter *Guimond*].

7 *Association des consommateurs du Québec* v. *W.C.I. Canada inc.*, J.E. 97-2064 (C.A.) [hereinafter *W.C.I. Canada*]; *Lalumière* v. *Moquin*, [1995] R.D.J. 440 (C.A.).

8 *Guimond*, *supra* note 6; *Comité d'environnement de La Baie*, *supra* note 6. See also the recent decision of the Court of Appeal in *Vidal* v. *Harel, Drouin & Associés*, C.A. Montréal #500-09-000012-969, where the court held that the allegations of fault stipulated by the respondents against the chartered accountants in a civil litigation file was not "clearly frivolous", nor "manifestly unfounded" and thus the test in paragraph 1003 b) C.C.P. was met.

generally pose a difficulty where it concerns a class action against an insurer given that the plaintiff cannot realistically know the identity of thousands of other insureds who are members of the group for a joinder of actions or the exercise of a recourse by mandate to be possible. We should also add that the plaintiff must equally demonstrate that the conclusions sought are susceptible of constituting a proper remedy for each of the members of the group.[9]

Finally, on the question of the representative ability of the plaintiff as per paragraph (d), he or she must satisfy the judge that they are seriously involved in the file and they are capable of representing the members of the group.[10] We must not lose sight of the fact that a plaintiff who does not have the required qualities or who does not follow the recourse with seriousness, can irrevocably compromise the chances of success of the members of the group where the individual claims may have otherwise a certain merit.

The rules for authorization of class actions in the common law provinces are similar to those of Articles 1003 C.C.P. although they are articulated in a more precise manner.

As such, Articles 5 (1) and 6 of the *Class Proceedings Act*,1992[11], of Ontario provide:

> "5.(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
> (a) the pleadings or the notice of application discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defences of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
> (e) there is a representative plaintiff or defendant who,

9 *Nault* v. *Canadian Consumer Co. Ltd.*, [1981] 1 S.C.R. 553; *Archambault* v. *Construction Bérou inc.*, [1992] R.J.Q. 2516 (C.S.), discontinuance of appeal on January 26, 1993.

10 *Greene* v. *Vacances Air Transat inc.*, [1995] R.J.Q. 2335 (C.A.); *Guilbert* c. *Vacances sans frontière ltée.*, [1991] R.D.J. 513 (C.A.).

11 O.S. 1992, c. 6.

> (i) would fairly and adequately represent the interests of the class,
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.
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> ...
> 6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
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> 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
> 2. The relief claimed relates to separate contracts involving different class members.
> 3. Different remedies are sought for different class members.
> 4. The number of class members or the identity of each class member is not known.
> 5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members. 1992, c. 6, s. 6."

Also, Article 4 of the *Class Proceedings Act*[12] of British Columbia provides the following:

> "4. (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> a) the pleadings disclose a cause of action;
> b) there is an identifiable class of 2 or more persons;
> c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
> d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
> e) there is a representative plaintiff who
> (i) would fairly and adequately represent the interests of the class,
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[12] R.S.B.C. 1996, c. 50.

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
> a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
> b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
> c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
> d) whether other means of resolving the claims are less practical or less efficient;
> e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means."

However, apart from the precise text of the applicable law in each of these three provinces, the principles which govern the motion for authorization to institute a class action are relatively similar.

In fact, the Supreme Court has recently rendered a decision of principle on the criteria for authorization of a class action in the case of Western Canadian Shopping Centres Inc. v. Dutton[13]. In this case, the court had examined the application of the Rules of Court of Alberta in the context of a recourse in professional liability instituted by investor immigrants by means of a "representative action". Although this province does not possess specific legislation on class actions, the Supreme Court was of the opinion that the intention of the legislature was clear in order to permit such actions, even if no procedural mechanism for accreditation of the recourse was provided for.[14]

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[13] *Supra* note 4.

[14] Madame Justice McLachlin provides the following comments on the question:
"Absent comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them." (*ibid*. at para. 34)

In her analysis of the class action, Madame Justice McLachlin identifies the common elements of the existing legislation (in Québec, Ontario and British Columbia), which provide for the exercise of this recourse:

> "While there are differences between the tests, four conditions emerge as necessary to a class action. First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria: see Branch, *supra*, at paras. 4.190-4.207; Friedenthal, Kane and Miller, *Civil Procedure* (2nd ed. 1993), at pp. 726-27; *Bywater v. Toronto Transit Commission* (1998), 27 C.C.P. (4th) 172 (Ont. Ct. (Gen. Div.)), at paras. 10-11.
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> Second, there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.
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> Third, with regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.

> Fourth, the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class: see Branch, *supra*, at paras. 4.210-4.490; Friedenthal, Kane and Miller, *supra*, at pp. 729-32."[15]

Even if this decision does not apply *a priori* to the provinces having a specific regime for class actions, it is indicative of the attitude that the court can adopt regarding the conditions of exercising such a recourse.

We note that Canadian courts have generally shown a more liberal attitude than the American courts with respect to the authorization of a class action. The author Ward K. Branch writes the following of the subject:

> "The [American] class action [rule] requires that the class action be the superior method to resolve the "controversy". The B.C. and Ontario Acts require that the class proceedings be the preferable procedure for the resolution of the "common issue" (as opposed to the entire controversy). [This] distinction ... can be seen as creating a lower threshold for certification in Ontario and B.C. than in the U.S. However, it is still important in B.C. and Ontario to assess the litigation as a whole, including the individual hearing stage, in order to determine whether the class action is the preferable means of resolving the common issues."[16]

Despite this more open attitude, we will see that class actions against insurers present important difficulties to the plaintiff in grouping all the criteria for authorization which we have just examined.

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15 *Ibid.* at paras. 38-41.

16 W.K. Branch, *Class Actions in Canada,* Vancouver, Western Legal Publications, 1996 at para. 4.690.

CLASS ACTION SUITS RELATED TO PREMIUM OFFSET

We can certainly conclude that litigation arising from participating whole life insurance policies and universal life polices have generated the greatest number of class actions against insurers in North America. Several of these cases have led to some interesting judgments on the criteria for authorization of class actions which we will discuss further on.[17]

In the past year, the courts in both Ontario and Québec have rendered four important decisions, all dismissing applications to institute class actions against insurers having issued participating whole life or universal life policies.

Both the participating whole life policies and the universal life policies have the characteristic of the so called "premium offset" or "vanishing premium". This entails that the policies may, under certain circumstances, accumulate sufficient value at a certain future point in time such that either the annual dividend or the rate of return on an investment fund, coupled with the projected future annual dividend or rate of return, would be quantitatively sufficient to pay, or "offset" future premiums as they came due. Hence, the term "vanishing premium" policy.

ONTARIO CASES

Facts:

[17] *Dumas* v. *Mutuelle des fonctionnaires du Québec (MFQ-Vie)*, C.S. Montréal (class action), no 500-06-000041-976, December 5, 2001, the Hon. Justice Pierre Viau; appeal pending (C.A. Montréal, #500-09-011734-019) [hereinafter *Dumas*]. In the *common law* provinces, see *Kumar* v. *Mutual Life Assurance Co. of Canada* and *Williams* v. *Mutual Life Assurance Co.* (2000), 51 O.R. (3d) 54 (Ont. Sup. Ct.), conf. by 2001 CarswellOnt 4449 (Ont. Sup. Ct. (Div. Ct.)) [hereinafter *Kumar*]; and *Zicherman* v. *Equitable Life Insurance Company of Canada* (unreported, October 26, 2000, #98-CV-153282 CP, (Ont. Sup. Ct.), conf. by 2001 CarswellOnt 4449 (Ont. Sup. Ct. (Div. Ct.)) [hereinafter *Zicherman*].

1. Kumar v. Mutual Life Assurance Co. of Canada, [2000], 51 O.R. (3d) 54 (Ont. Sup. Ct.), conf. by 2001 Carswell Ont. 4449 (Ont. Sup. Ct. CDIV. Ct.)

This involved two actions which were commenced as class proceedings under the Ontario Class Proceeding Act, 1992. This was the first instance in Canada of a contested certification motion involving whole life insurance policies with vanishing premiums.

Members of the group had purchased participating whole life policies from the Mutual Life Assurance Company (today known as Clarica) between 1980 and 1995. The applicants alleged being victims of misrepresentations with respect to the illustrated value of the dividends as well as of the possibility of benefiting from the option of self-financing or "premium offset policy". The applicants claimed that this was a common issue for all policyholders of the contract.

Mutual Life argued that the participating whole life insurance policy issued for the period between 1980 and 1995 had been considerably modified over the years and that the disclaimer clauses found in the illustrations signalled that the dividends were not guaranteed and also went through important changes during this period, such that the questions of fact and law would vary from one member of the group to another. Mutual Life also held that the individual circumstances of each policyholder and the verbal representations which were made at the time of signing the application for insurance varied from one case to another such that in the absence of common issues, the class action could not be authorized.

Judgment:

The court found in favour of Mutual Life. Mr. Justice Cumming underlined that in an action founded on negligent misrepresentations, the evidence of such representations depended on a multitude of specific factors for each individual member of the group.[18]

After analyzing the application of the criteria for negligent misrepresentation in common law as stipulated by the Supreme Court of Canada in the case of Queen v. Cognose Inc., [1993] 1 R.C.S. 87, Justice Cumming concluded in the case at bar that there was no common issue amongst the members of the group. Justice Cumming further stated that the court must make a subtle distinction between the cause of action and common issues. In fact, he stated:

> "The *causes of action* are asserted by all class members. But the fact of a common cause of action does not in itself give rise to a *common issue*. A *common issue* cannot be dependent upon findings of fact which have to be made with respect to each individual claimant. While the theories of liability can be phrased commonly, the actual determination of liability for each class member can only be made upon an examination of the unique circumstances with respect to each class member's purchase of a policy." [19] [Our underlining]

Having decided that there was no common issue regarding misrepresentations, the court dismissed the class action. In doing so, Justice Cumming stated in *obiter* that had the action been authorized, it would have necessitated the examination of each individual file to determine if there was a causal relationship between the misrepresentations and the purchase of the insurance contract, as well as having to evaluate if there was actually contributory negligence on the part of the policyholder, the determination of the prescription of the recourse, etc., such that a class action would not have been the appropriate procedural vehicle in the instance.[20] Justice Cumming also underlined that American caselaw is almost unanimous in refusing class actions where the allegations of

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[18] *Supra*, note 17 (Ont. Sup. Ct.) at p. 62.

[19] *Ibid.* at p. 65.

[20] *Ibid.* at p. 66.

the applicants are founded on specific factual circumstances which are particular to each claimant.[21]

This judgment was appealed to the Ontario Divisional Court which heard both this appeal and the appeal in the case of Zicherman v. Equitable Life Insurance Company of Canada.[22] The Court confirmed the judgment of first instance in both cases and refused the motion for certification to institute class actions. The Divisional Court stated the following:

> "The issue is not with respect to the use of illustrations or the systematic marketing of "premium offset" policies by the insurance companies, but rather, some individual complaints by some clients about the sales approaches of some agents. Many tens of thousands of policies were sold by hundreds of agents, but a relatively small number of purchasers complained about representations allegedly made to them by agents at the time of sale. These transactions do not present common issues but, rather, individual representations."[23]

2. Zicherman v. The Equitable Life Insurance Company of Canada, un reported judgment rendered by the Honourable Justice Ferrier on October 26, 2000, # 98-CV-153282 C.P. (Ont. Sup. Ct.), conf. by 2001 Carswell Ont. 4449 (Ont. Sup. Ct. CDIV Ct.)

Facts:

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[21] *Ibid.* at p. 68. *Bergeron* v. *Pan American Assurance Co.*, 731 So 2d.1037; *Ligums* v. *General American Life Insurance Company* (March 31, 2000), (Massachusetts Superior Court, #97-01833) (unreported); *Kent* v. *SunAmerica Life Insurance Company*, 190 F.R.D. 271; *Rothwell* v. *Chubb Life Insurance Company of America*, 191 F.R.D. 25; *Keyes* v. *The Guardian Life Insurance Company of America*, 194 F.R.D. 253; *Velasquez* v. *Crown Life Insurance Company*, 1999 U.S. Dist. LEXIS 13186; *Banks* v. *New York Life Insurance Co.*, 737 So.2d 1275, petition for writ of certiorari denied 120 S. CT. 1168 (2000); *Adams* v. *Kansas City Life Insurance Company*, 192 F.R.D. 274; *Parkhill* v. *Minnesota Life Insurance Company*, 188 F.R.D. 332; *Russo* v. *Massachusetts Mutual Life Insurance Company*, 178 Misc 2d 772.

[22] In the same manner as *Kumar,* the Superior Court of Ontario refused to grant certification to institute a class action in the case of *Zicherman* due to the different factual circumstances of the members of the group.

[23] *Supra* note 17 (Ont. Div. Ct.) at para. 11. This matter has since been appealed before the Court of Appel of Ontario (Ont. C.A. M28O86); no date for hearing has yet been set.

This case entails substantially the same facts as those in Kumar v. Mutual Life Assurance Co. Whereas in the latter case, the defendant insurer denied having engaged in any organized and systemic marketing of premium offset insurance policies, in this case Equitable admitted that illustrations were frequently used by agents when explaining the premium offset feature. Nonetheless, the agents of Equitable were cautioned that the dividend rates were not guaranteed and as such, the premium payment period could be extended. Evidence was also adduced that Equitable cautioned their agents to ensure that the potential policyholders were all advised of this risk.

Judgment:

Although the factual evidence in the Equitable case were more helpful to members of the class, the court still dismissed the action citing Justice Cumming's decision in the Mutual Life case. Specifically, the court in Equitable maintained that the claims of the class members did not raise a common issue and therefore was not subject to a class action proceeding.

QUÉBEC CASES

3. Dumas v. Mutuelle des fonctionnaires du Québec, (MFQ-V), C.S.M. 500-06-000041-976, judgment rendered by the Honourable Pierre Viau on December 5, 2001.

Facts:

The applicant, Henri-Louis Dumas, contracted in 1988 a "premium offset" or "vanishing premium" whole life insurance policy from La Mutuelle des fonctionnaires du Québec ("MFQ"). At the time of signing of the insurance application, the insured chose to benefit from having accumulated dividends applied to the payment of the premium of the policy over a shorter period of time thus allowing for the self-financing of the premiums.

However, due to a drop of interest rates at the beginning of the 1990s, the accumulated dividends were no longer sufficient to finance the payment of the premium such that the insurer, MFQ, claimed from the policyholder payment of the premium beyond the period which had been indicated on the illustrations. Alleging that the insurance contract had been modified illegally, the policyholder demanded that the MFQ respect the initial modalities of the policy concerning the self-financing of the premium and that all premiums which had been paid beyond the illustration period be reimbursed.

During the course of his examination on Affidavit, the applicant had affirmed that he was conscious at the moment of signing the insurance application that the amount of the dividends and the period for the payment of premium was not guaranteed and that this could vary over the course of the years. Furthermore, the illustration which was remitted to the applicant specifically contained a disclaimer clause whereby it was stated that the self-financing of the premium by dividend was not guaranteed.

Judgment:

The court dismissed the arguments of the applicant and concluded that he had not been a victim of misrepresentations in the circumstances. In fact, according to the court, the applicant had taken into consideration both the text of the policy and the representations made at the time of the sale of the contract to the effect that premium offset was not guaranteed. As such, he had well understood the policy and the disclaimer but chose nonetheless to purchase the contract. Given that the facts alleged by the applicant did not appear to justify the conclusions sought, as required by Article 1003 of the *Civil Code of Procedure of Québec*, the court dismissed the application for authorization of a class action.[24]

In this case, the MFQ successfully argued that the provisions of the life insurance policy as well as the representations made by the agent were clear and well understood by the

[24] This judgment has been appealed (C.A. Montréal, #500-09-011734-019).

applicant with respect to the projections based on future dividends and the self-financing nature of the premium which was not in any way guaranteed. In fact, the court commented that the applicant was far from being an individual who was misinformed as he was an adviser in industrial development for the Ministry of Commerce and Industry of the Government of Québec, being university educated and understanding as such the nature of contracts.

4. Farber v. N.N Life Insurance Company of Canada, C.S.M. 500-06-000091-997, judgement rendered by the Honourable William Fraiberg on March 20, 2002.

Facts:

The applicant contracted in 1986 a universal life insurance policy having an insurance value of $250,000, providing an annual premium of $1,017 and providing a planned objective of payment of the premium over a period of ten (10) years.

Universal life policies are a commonly used financial product in the life insurance industry which combines protection for life insurance and is also used as a vehicle for investment with tax advantages. The premium which is payable on a monthly basis is deposited into one of the investment funds chosen by the policyholder and a portion of this amount is deducted monthly to cover the cost of insurance as well as administration costs.

After a certain period of time, which can vary according to the rate of effective return of the fund, the accumulated values can be used for payment of the premium without the necessity of the policyholder to pay additional amounts. In this case, in establishing the objective of the payment of the premium over a period of ten (10) years and after discussion with the broker, Farber opted for a rate of return projected at 17% of the amounts deposited in the mutual fund which he had chosen.

Over the course of the years, the rate of return of the funds was substantially inferior to 17% and in fact, was situated around 7.3% such that the objective of the plan, which

provided for the self-financing of the premium over a period of ten (10) years, could not be met.

Basing himself on his own interpretation of both the contract and the representations of the broker, Farber claimed that N.N. Life had in some way guaranteed the premium offset over a period of ten years and that many other policyholders of these universal life contracts entered into between 1986 and 1995, were in the same situation. As such, he claimed that he had the right to claim in the name of members of the group and request the performance of this undertaking by the insurer.

Judgment:

Justice Fraiberg dismissed the motion for authorization for a class action for many of the same reasons as those held in the Dumas[25] case. The court in fact held that Farber was clearly aware at the time of the signing of the application that the rate of return projected at 17% was not guaranteed and that he could not ignore the fact that the payment of the premium over a period of ten years was only an objective which was linked to the rate of return of the funds. This is, in fact, what the universal insurance policy itself stipulated and which was admitted by Farber himself during his examination on Affidavit.

The court held that the applicant did not prove to have a serious colour of a right and in consequence, the criteria found at article 1003 (b) of the *Civil Code of Procedure of Québec* had not been met.

With respect to Farber's allegations concerning misrepresentations on the part of the insurer and the broker which would necessarily entail the interpretation of the contract requiring extrinsic elements of evidence, the court held that the class action did not raise identical, similar or connected questions of fact or of law as per Article 1003 (a) of the *Civil Code of Procedure*. This finding was held given that individual and separate evidence would have been necessary to determine the liability of N.N. Life with respect

[25] *Supra* note 17.

to each member of the group or at least for a substantial number of the members such that a class action would not be the appropriate procedure in the present instance.

In matters of misrepresentation, a myriad of facts, subjective considerations or personal circumstances for each member of the group must be proven. The applicant Farber could not reasonably know the nature of representations which had been made to other members of the group concerning the projected rate of return of their universal life policy nor the premium offset.

CONCLUSIONS

This brief review of the tendency in the caselaw in matters of class actions enables us to note that the diversity of questions of fact and law constitutes a major difficulty where the litigation is based on an insurance contract. In effect, where the recourse is founded on misrepresentation on the part of the insurer, the content of the representation made to each insured is likely to vary from one member of the group to another and the drafting of a contract, at the level of the guaranties and exclusions contained therein, can also vary considerably over the course of years such that the members of the group are susceptible of having been affected differently. To date, this question has caught the attention of the courts in the common law jurisdictions, both in Canadian provinces as well as in the United States, who have treated the cases according to the criteria for negligent misrepresentation. However, this problem is also relevant for a civil law jurisdiction and should eventually be examined in the same manner by a Québec court. We see no reason as to why the criteria for the common questions of fact and law be analyzed differently in Québec despite the willingness of the Québec legislature to favour a more open and liberal regime for class actions.

In a general manner, Canadian courts have shown to be more open to class actions than American courts although insurers in Canada have been successful in defending class actions in cases of premium offset. Although we do not have a rule of "superiority"

of common questions, we find troubling this tendency of certain courts to authorize class actions in the absence of obvious common questions, which should be precise and well defined, especially in Québec since the judgment authorizing a class action is not appealable (Article 1010 C.C.P.). Furthermore, we believe that the courts should be more demanding in determining whether a person can act as representative of the group.

We therefore ask ourselves whether a class action is an appropriate procedural vehicle to ensure a just and efficient treatment of lawsuits in insurance matters, especially in cases regarding misrepresentation, given the large number of factors which can vary from one member of the group to another.

In this manner, it is illusory to think that common evidence can be administrated when the questions of fact and law will be, in all probability, different from one person to another. The courts of the common law jurisdictions have in fact rightly raised the question as to whether proceedings for negligent misrepresentation can be reconciled with the requirements of a class action. We must therefore hope that the Québec courts will adopt a similar approach to take into consideration the complexity of class actions in insurance matters, while at the same time recognizing that in certain cases, individual lawsuits and the joinder of actions can constitute appropriate procedural means which should be privileged.