

COMMONALITY IS KEY: CLASS PROCEEDING CERTIFICATION DENIED

Posted on June 26, 2015

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The British Columbia Court of Appeal, in *Marshall v. United Furniture Warehouse Limited Partnerships*, upheld a chambers judge's decision denying certification to a proposed complex class action proceeding involving a consumer "cash-back" voucher program.^[1] The Court of Appeal dismissed the appeal solely on the basis that the claim lacked commonality of issues between its class members.

Background

The "cash-back" voucher program was offered to businesses by Consumers Trust. A business participating in this program gave its customers a voucher if they purchased specific products. The business would in turn pay a portion of the revenue to Consumers Trust. A voucher was eligible to be redeemed by a customer from Consumers Trust for up to three years, as long as the customer complied with all the conditions on the voucher. The program relied on the theory that most customers would forget to submit their vouchers for redemption or else not comply with the conditions and be ineligible to redeem the voucher, thereby allowing the program to be profitable.

The plaintiffs were customers who received vouchers for their furniture purchases from the defendants. However, before they could redeem the vouchers, Consumers Trust filed for bankruptcy. At this juncture, United Furniture sent a notice to its customers that United Furniture and Consumers Trust are separate entities and that the vouchers were contracts solely with Consumers Trust, not with United Furniture. To mitigate the situation, United Furniture instituted an in-store credit program for customers who had been issued vouchers.

In response to these events, the plaintiffs sought certification to proceed as a class action under the *Class Proceedings Act* against United Furniture and its related companies. The plaintiffs claimed (1) breach of warranty or collateral contract, (2) deceptive acts or practices or unconscionable acts or practices under the *Business Practices and Consumer Protection Act* (BPCPA), (3) negligent misrepresentation, and (4) negligence.

The Initial Decision

The chambers judge denied the application for certification because the pleadings did not disclose reasonable causes of action and there was not enough evidence to support many of the allegations. She also found that there were insufficient common issues between the purported class members. With respect to the claims under the BPCPA and in negligent misrepresentation, the court focussed on the significant variables in this case. A court would be required to consider various individual documents and especially individual oral representations made by different sales representatives to the plaintiffs in different stores, not just one representation, as was the case in a previous action involving the same voucher program.^[2] The plaintiffs appealed this decision on multiple grounds, including the judge's reliance on the necessity of the oral representations in making her decision that the case lacked the required commonality.

Commonality of Issues

Despite the plaintiffs advancing multiple grounds of appeal, a unanimous panel of the Court of Appeal, determined that the application for certification turned on a single issue: the lack of commonality.

Citing the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, the Court of Appeal emphasized that commonality is central to a class proceeding. A common issue is an issue that must be resolved in order to resolve each class member's claim, and success for one class member on a common issue means success for all class members. Essentially, a common issue is the ingredient that unites the class members in a class action.^[3]

Counsel for the plaintiffs argued that this particular class action could proceed by only considering the written brochures received by the plaintiffs. The Court of Appeal was not swayed by this argument and found that that the written material in combination with the oral representations received by the individual plaintiffs were "inextricably intertwined" with the question of the defendants' liability. Thus, the litigation could not proceed without considering the oral representations. The Court's key concern was that if the case proceeded as a class action and the oral representations were to be considered, a court would be forced to embark on an individual inquiry for each and every member of the purported class. This clearly would be unworkable, and demonstrated that a class proceeding was not the preferable procedure.

Since each customer had a different experience in a different store owned by the defendants and received, one assumes, different oral representations regarding the voucher program, this matter was ill-suited to be heard as a class action. The appeal was dismissed.

Commentary

While claims based on a specific representation made to an entire class have been certified in the past, this case illustrates the general rule that claims based on individualized representations made by different

individuals to different individual class members at different times in different places are, not surprisingly, unlikely to raise common issues and are thus unlikely to be certified as a class action. While there was commonality in some significant aspects the Plaintiffs' claims, there was not enough to overcome the hurdles that inevitably would be presented to the court in adjudication.

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[1][ps2id id='1' target=''] [Marshall v. United Furniture Warehouse Limited Partnership](#), 2015 BCCA 252.

[2][ps2id id='2' target=''] See [Payne v. Eagle Ridge Pontiac GMC Ltd.](#), 2009 BCSC 530.

[3][ps2id id='3' target=''] [Western Canadian Shopping Centres Inc. v. Dutton](#), 2001 SCC 46.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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