

**FINANCIAL SERVICES LITIGATION BULLETIN**

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**CLASS ACTIONS TARGET FINANCIAL INSTITUTIONS****UNDISCLOSED OR EXCESSIVE FINANCING CHARGES COULD GET PLAINTIFFS MONEY FOR NOTHING, AND THEIR CHEQUES FOR FREE**

A significant number of class actions certified by Canadian courts in the last few years have targeted financial institutions. Many of these class actions attack fees and other charges, which the plaintiffs allege are hidden from customers, or constitute usury.

*Recent Class Actions Against Financial Institutions*

To date, financial institutions have had some success in defending such proceedings. For example, in *Cassano v. Toronto-Dominion Bank*, a VISA cardholder was unsuccessful in certifying a class action in which it was alleged that the defendant bank had charged unauthorized and undisclosed fees to VISA cardholders in respect of foreign currency transactions. The plaintiff objected to the fact that when the bank processed a foreign exchange transaction on a VISA card it used an exchange rate that reflected the cost of buying US dollars when determining the amount to be debited and a rate which reflected the cost of selling such currency for the purpose of the credit.

In this case, the Court refused to certify the class action holding that a class action was not appropriate given that the loss suffered by each member of the class would have to be determined individually. Under the VISA agreement, the bank was entitled to determine what VISA charges would be levied without the customer's agreement. The customer's remedy, if he was not prepared to accept such charges, was to cease using the VISA card. The loss suffered would therefore depend on whether an individual customer would have chosen not to use the VISA card had the charge in issue been disclosed. Because this issue would have to be decided on an individual rather than a class basis, the court refused to certify the class action.

In *Markson v. MBNA Canada Bank*, a holder of a credit card issued by the defendant bank sought to certify a class action in which it was alleged that the transaction fee, interest and service fee charged in relation to a cash advance on the credit card gave rise to interest charges above the 60% threshold set out in the *Criminal Code*. In that case, the judge refused to certify the class action on the ground that a class action was not the preferable procedure. The Court held that a class action was not preferable because the evidence was that, if the relief sought by the plaintiff was granted, the defendant bank would be forced to make changes to its credit practices to establish a minimum amount for advances and to restrict options previously available to cardholders with respect to the amounts and timing of repayments. This would not only be less convenient for cardholders in general, but would likely increase the amount of interest they would have to pay. Because it could not be assumed that class members would support the action, the result of which might make credit more difficult to obtain, the Court refused to certify the class action.

Last, in *Dabl v. Royal Bank of Canada*, the plaintiff commenced a class action which took issue with the defendant banks' practice of charging cardholders interest from the transaction date rather than the date on which the banks were required to pay for the purchase. The plaintiff contended that the banks were only entitled to charge interest from the date that they paid the merchants in relation to the transactions, as it was only on this date that the banks advanced funds on behalf of the cardholders. The Court held that the amount charged from the transaction date was indeed interest and that it had properly been disclosed by the defendant banks in accordance with the *Consumer Protection Act* and the *Bank Act*.

While financial institutions have recently been successful in resisting class actions arising out of alleged unauthorized or undisclosed fees, the Courts have made it very clear that they will certify such actions in appropriate cases. For this reason, it is important for financial institutions to closely monitor the net effect of the interest, fees and penalties they charge and to ensure that all potential charges or fees are clearly communicated to clients.

Class actions, like the ones described above, pose a significant challenge to financial institutions, owing to both the wide range of charges and fees challenged in the claims and the fact that such actions often take aim at long-standing and commonly accepted industry practices. In defending such actions, financial institutions have to decide whether they are prepared to litigate and face the risk that their established procedures will be found wanting or settle the claims and undertake to revamp their practices. Whatever strategy is adopted, the repercussions for the financial institution are significant.

### *The Future*

There is significant concern among many financial institutions regarding two up coming changes in legislation which are likely to foster class actions. The first relates to the implementation of changes to the *Ontario Securities Act*, which provide a statutory cause of action for investors who purchase their securities on the secondary market. These changes, which come into force December 31, 2005, grant an investor a cause of action for any misrepresentation made by the issuer without the need to establish reliance. For any widely held financial institutions, this will significantly increase exposure to shareholder class actions.

The second relates to amendments to the criminal interest rate. Bill S-19, An Act to Amend the Criminal Code (criminal interest rate), which would reduce the designated rate of criminal interest from 60 per cent per annum to the inter-bank rate plus 35 per cent, received its first reading in the House of Commons on September 28, 2005. Although it is intended to deal with payday loan operations, this legislation could have the unintended consequence of making many standard short-term loans unlawful and opening financial service providers up to increased exposure to usury related class actions.

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## ADDITIONAL INFORMATION

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