

## FINANCIAL SERVICES LITIGATION BULLETIN

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### **VOLUNTARINESS OF PAYMENTS MAY BE WEAK LINK IN CERTIFYING USURY CLASS ACTIONS**

A recent decision of the Ontario Divisional Court may make it more difficult to certify class actions against financial institutions for usury. The Court held that, as the voluntariness of each individual payment was relevant to the issue of whether interest charges constituted usury, a class action may not be the preferable procedure for the determination of such claims.

In *Markson v. MBNA Canada Bank*,<sup>1</sup> one of MBNA's cardholders attempted to certify a class action proceeding based on the allegation that MBNA received interest on credit card cash advances in violation of the usury provisions of the Criminal Code.<sup>2</sup> Markson brought this certification motion after he withdrew a cash advance on his credit card which he paid back one week later. Markson claimed that since the amount of the interest charged on his cash advance, along with the transaction and service fees, was greater than 60% per annum, MBNA had violated the usury provisions of the Criminal Code.

Under the Criminal Code it is an offence to charge more than 60% interest per annum, but there is no violation "where a payment of interest at a criminal rate arises from a voluntary act of the debtor".<sup>3</sup> Therefore, in order to establish its claim, the representative plaintiff had to prove that the payment did not arise from a voluntary act of the individual cardholder.

In order to obtain certification, among other things, a representative plaintiff must establish that a class action is the "preferable procedure" for the resolution of the common issues.<sup>4</sup> The factors to consider when considering this issue are access to justice, behaviour modification and judicial economy. The Divisional Court held that the motion Judge was correct in finding that, because the trial Judge would be required to assess each potential class member's individual circumstances during each payment, the class action would not achieve judicial economy.

Although this was not the only grounds on which the Divisional Court upheld the motion Court's decision, it is significant as it is an element which will be common to most usury claims. To the extent that the defending financial institution can raise the issue of voluntariness of a payment, it may be able to block the certification of a class proceeding based on usury.

It should be noted that in early April the Court of Appeal granted leave to appeal from this Divisional Court decision. The appeal is expected to be heard in fall of 2006.

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<sup>1</sup> (2005), 78 O.R. (3d) 39

<sup>2</sup> Section 347(1)(b), Criminal Code, R.S.C. 1985, c. C-46

<sup>3</sup> *Degelder Construction Co. v. Dancorp Developments Ltd.*, [1998] 3 S.C.R. 90 [S.C.J.]

<sup>4</sup> Section 5(1)(d), *Class Proceedings Act, 1992*, S.O. 1992, c. 6

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*The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.*

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