Are class actions trying to do too much?

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▶ SPEAKER'S CORNER

In his opening address at a conference on class actions last March at the University of Windsor, former Supreme Court of Canada justice Frank Iacobucci asked two fundamental questions: What is access to justice in the context of class actions? Are class actions trying to do too much?

On Jan. 27, the Ontario Court of Appeal offered a response to those two questions: access to justice is access to substantive and procedural justice and, by securing both, class action litigation legitimately plays a regulatory enforcement function.

In *Fischer v. IG Investment Management Ltd.*, the Court of Appeal held that the certification motion judge erred when he refused to certify the action on the basis that it did not offer access to substantive justice to the class members. The proposed class action against CI Mutual Funds Inc. and AIC Ltd. claims that investors lost hundreds of millions of dollars when the defendants allegedly engaged in market-timing practices.

After a year-long investigative and enforcement proceeding, the Ontario Securities Commission found the practice to be in contravention of the Securities Act and entered into settlement agreements with the defendant fund managers. The settlement was approved *in camera* before a panel of the OSC. Although the defendants paid more than $200 million to investors in five mutual funds, there was some basis in fact for concluding that the amount of compensation paid under the OSC procedure was between one-seventh and one-third of the actual losses sustained by the class members.

At the certification hearing, the motion judge found that the OSC settlement had provided a measure of compensation and performed a deterrence function and therefore was the preferable procedure. Court of Appeal Chief Justice Warren Winkler disagreed and found that the OSC process was not preferable to the class proceeding for two reasons: first, the aim of the OSC settlement was principally protective and preventative rather than compensatory and second, those proceedings lacked participatory rights for affected investors.

Importantly, Winkler found that regulatory bodies like the OSC are designed to work in conjunction with civil litigation to ensure public companies and mutual fund managers act in the investing public's interest. In his view, private and public enforcement mechanisms are not mutually exclusive. "Unlike enforcement proceedings under s. 127 of the Securities Act, the purpose of the proposed class proceeding is to obtain relief for investors — monetary or otherwise — who claim to have suffered losses from the defendants' impugned conduct." Put differently, public enforcement via regulatory agencies focuses on deterrence of wrongful behaviour while private enforcement via class actions has a principally compensatory function.

Winkler also pointed to the transparency of class actions as a distinct advantage over the lack of investor participation in regulatory proceedings. Here, Winkler equated the appointment of a representative plaintiff with participation by investors and class members.

So what do these important statements mean for Iacobucci's questions about the meaning of access to justice and the possibility that class actions are trying to do too much?

Fischer offers a clear vision of access to justice as having both substantive and procedural components with the latter being the main concern at the certification stage. Indeed, the Court of Appeal rejected as inappropriate any consideration of the adequacy of the OSC settlement award in its analysis of preferable procedure. Rather, a preferable procedure will be one that gives notice to affected investors, permits them to participate in hearings that operate on the open-court principle, and provides information about the proposed settlement.

Further, class actions exercise a compensatory function that is complementary to that of regulatory agencies. As such, by carving out a role for civil litigation even where regulatory enforcement has already taken place, *Fischer* proclaims that it is the class action, not the OSC, that is best suited to providing substantive justice to investors. In doing so, private civil actions buttress the regulator's deterrence function. Class actions, according to the court, are not trying to do too much.

The Court of Appeal's decision is bound to attract criticism and warrants further discussion. It comes at a particularly important time for the development of collective redress mechanisms internationally, particularly in Europe. There, the normative question legislators are grappling with revolves around the issue of privatizing, wholly or in part, the enforcement of antitrust, environmental, consumer, and other laws with class action lawyers acting as private attorneys general.

Winkler's reasons highlight the fact that, at least in Ontario, private enforcement mechanisms are equally important to those of public entities in regulating the behaviour of capital market participants. Yet if through class actions the government has a cost-effective way to promote enforcement of securities legislation, is there a risk that the *Fischer* approach, with its rejection of any consideration of the substantive outcome of the regulatory proceeding, will lead to duplicative effort, if not excessive compensation?

Moreover, critics may point to the less-than-robust participation by class members as casting into doubt Winkler's emphasis on the procedural justice elements of class proceedings. Whether measured by the number of people who opt out, objector participation or take-up rates, there is at least some empirical basis for the more cynical view of the motion judge who found that the "subjective and emotive plea that the investors have not had their day in court" was not persuasive. If the negligible role played by class members in most class actions satisfies the procedural justice imperative, is the Court of Appeal's vision of that notion inadequate?

Notwithstanding the questions raised by *Fischer*, the decision contributes to an ongoing, principled discussion about the aims of class actions. It is a discussion that is long overdue. **LT**

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