

**COURT FILE NO.:** 06-CV-306061- CP  
**DATE:** August 10, 2009

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**JOSEPH FANTL**

Plaintiff

- and -

**TRANSAMERICA LIFE CANADA**

Defendant

*Proceedings under the Class Proceedings Act, 1992*

**COUNSEL:**

David F. O'Connor, Peter L. Roy and J. Adam Dewar for the Plaintiff  
Mary Jane Stitt and Allison Thornton for the Defendant

**HEARING DATE:** August 10, 2009

**REASONS FOR DECISION**

**PERELL, J.**

*Introduction*

[1] In this proposed class action under the *Class Proceedings Act, 1992*, S.O. 1992, c.6, the parties have reached a partial settlement, and the plaintiff, Joseph Fantl, moves for: (a) an order certifying, for settlement purposes, the action as a class proceeding; (b) an order approving the settlement. Without admission of wrongdoing, the defendant, Transamerica Life Canada, consents to these orders. A motion for approval of class counsel's fee has been adjourned.

*Factual Background*

[2] In setting out the factual background, I rely on the motion material and also my Reasons for Decision in an earlier motion, mentioned below, which provides a chronology of some of the events. See *Fantl v. Transamerica Life Canada*, [2008] O.J. No. 1536 (S.C.J.).

[3] Mr. Michael A. Millman, a chartered accountant in Vancouver, was the owner of an insurance policy from what is now Transamerica Life Canada. The policy contained an investment option known as the Can-Am Fund.

[4] In February 2002, Mr. Millman complained to Transamerica that; (1) he had been overcharged a management expense ("the management expense claim"); and (2) that the Can-Am Fund had not tracked or replicated the results of the S&P 500 total return index as had been represented to him ("the replication claim").

[5] The alleged management fee overcharges arose from a regulatory change that occurred in 2001 that allegedly increased the cost to insurers of operating segregated funds by increasing capital and related reserves to cover the cost of segregated fund guarantees. In March 2001, Transamerica had notified its policyholders and investment advisors that the management expense ratios ("MER"s) for its IMS Funds would increase in May 2001 due to the change in reserve requirements.

[6] When Mr. Millman was not satisfied by Transamerica's response, he retained Mr. Camp to sue Transamerica. Mr. Camp, in turn, referred the matter to Sutts, Strosberg LLP in Windsor, Ontario, to commence a class action in Ontario.

[7] On December 29, 2003, a statement of claim was issued. The proposed class action was brought on behalf of persons who invested in segregated funds that were offered as investment options under contracts of insurance. The statement of claim was framed in breach of contract. The statement of claim alleges, among other things, that Transamerica breached the terms of the insurance contract by deducting more management fees and expenses than were permitted by the terms of the contract.

[8] The action did not progress, and in the spring of 2005, Mr. Camp's law firm inquired whether the law firm of Roy Elliot Kim and O'Connor LLP ("REKO") would assume carriage of the action. REKO agreed to accept the retainer.

[9] The file was transferred, and one of the matters that had to be addressed was that Mr. Millman was no longer prepared to be plaintiff. But, as it happened, around this time, Mr. Fantl was seeking legal advice from REKO, and it was coincidentally discovered that he was an investor in the Can-Am Fund. Mr. Fantl, who is a retired litigation lawyer, accepted the invitation to be representative plaintiff with the attendant responsibilities and potential liabilities. A decision was made not to apply for funding from the Class Proceedings Fund.

[10] Mr Fantl and REKO signed a contingency fee agreement. Under the agreement, REKO was responsible for disbursements and if the litigation was successful its fee would be 30 % of money recovered, plus any costs recovered and disbursements.

[11] Between the autumn of 2005 and the end of March 2006, it was decided to amend the statement of claim to add negligent misrepresentation claims to the claims sounding in contract. A Fresh as Amended Statement of Claim, which introduced Mr. Fantl as the proposed representative plaintiff, was issued on April 5, 2006.

[12] On March 28, 2007, an Amended Fresh as Amended Claim Statement of Claim was delivered.

[13] With an amended pleading and a new plaintiff, the action began to make some progress. Cross-examinations on the certification materials were conducted on April 9, 10, and 26, 2007.

[14] The certification motion was scheduled for May 2007, but did not proceed. Instead, Mr. Kim and Ms. Stitt, counsel for Transamerica, began discussions about the possibility of a consent certification.

[15] During this period, there were also discussions about revising the scope of the claim. It became apparent that the complaints about the Can-Am Fund's management fee overcharge could be made against more of Transamerica's insurance offerings.

[16] On August 22, 2007, Ms. Stitt advised Mr. Kim that Transamerica intended to settle the portion of the claim dealing with the management fee overcharge and Transamerica was going to reimburse and compensate all similarly situated policyholders – not just the Can-Am Fund policyholders.

[17] Before August 22, 2007, Transamerica had informed its federal and provincial insurance regulators that it had identified an issue related to possible excess management fees that may have been charged to segregated funds and that it had commenced a review to determine how much was involved and which policyholders were affected. Transamerica's review included segregated fund offerings and insurance policies that are not part of the proposed settlement.

[18] On August 29, 2007, the Defendant wrote to policyholders about the management fee issue. The letters indicated that the issue arose because Transamerica or its predecessor companies may have increased management fees in excess of the percentages permitted under the relevant insurance contracts or without the proper advance notice of a fee increase otherwise permitted under the contracts.

[19] In September of 2007 Ms. Stitt sent an e-mail to Mr. Kim which stated, in part:

I have now received instructions from Transamerica to roll all 26 IMS funds into the settlement and to ensure that any secondary impact of any excess management fee charges in the IMS segregated funds on universal life policyholders is also included, as that forms part of the intended restitution plan.

[20] For purposes of settlement, Transamerica proposed, without admission of liability, to treat the costs associated with the change in capital and reserving requirements (the insurance fees) as amounts that are to be absorbed by Transamerica within its management fee and not by the segregated funds as an "other expense" within the MER. (Transamerica reset its management fees to the contractually permitted maximums in November 2008 and is no longer passing through any guarantee related costs (insurance fees) to class members.)

[21] The proposed settlement left outstanding the replication claim about whether the Can-Am fund tracked stock market performance as represented.

[22] On September 12, 2007, there was a case conference before Justice Hoy, and she was advised that the scope of the class proceeding was expanding beyond the Can-Am Fund claims. Transamerica's counsel told Justice Hoy that Transamerica's volunteered to include 25 additional funds in a settlement and that Transamerica was also instituting a voluntary restitution program in respect of a separate group of funds and policies that were outside of the proposed settlement but that would employ a similar restitution methodology.

[23] Justice Hoy was also advised that Transamerica had proposed that class counsel fees, and the reasonable costs of any expert retained by class counsel to advise with respect to the fairness of the settlement, would be paid separately by Transamerica in an amount to be determined by the court. Transamerica says that it adopted this approach because it had other policyholders who were not part of the proposed class and who would be receiving restitution without any legal cost and Transamerica says it wished to ensure that the Fantl action class members had no deduction from their restitution so that they would be treated equally.

[24] In November 2007, REKO retained PricewaterhouseCoopers LLP ("PwC") to assist it in the due diligence required to finalize a settlement of the management expense claim. Transamerica agreed to pay the reasonable fees and expenses of PwC to assist class counsel in examining and analyzing the historic accounting information being provided by Transamerica.

[25] In early November 2007, the REKO partnership began to come apart, and the partners decided to end the firm after December 31, 2007.

[26] In January 2008, Mr. Fantl retained the new firm of Roy Elliott O'Connor LLP ("REO") to continue the prosecution of the proposed class action. It was agreed that REO's retainer would be on the same terms as the retainer of REKO. Mr. Fantl's choice meant that Mr. Kim was no longer retained to prosecute the action.

[27] REO and the lawyers for Transamerica began negotiations to finalize the proposed settlement.

[28] In the meantime, Mr. Kim's new law firm challenged Mr. Fantl's status as proposed representative plaintiff. This resulted in the motion mentioned in the introduction above. Mr. Kim sought to set aside the notice of change of solicitors served by Mr. Fantl. I dismissed the motion. Leave to appeal was granted, [2008] O.J. No. 2593 (S.C.J.), but the Divisional Court, [2008] O.J. No. 4928 (Div. Ct.), and the Court of Appeal, [2009] O.J. No. 1826 (C.A.), ultimately upheld the decision.

[29] Notwithstanding the uncertainty caused by the pending appeals, REO and Transamerica worked towards implementing a settlement.

[30] While the various appeals were still pending, on September 2, 2008, REO and Transamerica issued a joint press release, which was also posted on their respective websites, announcing that the parties had reached an agreement in principle to settle the management expense claim and announcing the anticipated next steps, including the reset of the management fees around November 14, 2008 to contractually permitted amounts.

[31] On October 28, 2008, REO and counsel for Transamerica executed a "Memorandum of Understanding Concerning Proposed Settlement," confirming the parties' agreement in principle regarding the broad outlines of the proposed settlement.

[32] By order dated February 27, 2009, Deloitte & Touche LLP were appointed as Monitor/Administrator for the proposed settlement. (The parties now seek to continue this appointment as part of the settlement.)

[33] On July 16, 2008, Mr. Fantl's claim was further amended to include the additional funds. See Second Fresh as Amended Statement of Claim. Transamerica did not consent but it did not oppose the amendments.

[34] Pursuant to court order dated March 5, 2009, the proposed class was notified of the proposed settlement and settlement hearing. The notice program was as follows: (a) 307,446 direct mail notices were sent to the last known address of current and former policy holders; (b) a notice was published twice in 16 newspapers across the country; (c) internet notices were published on fundfees.ca and on transamerica.ca; and (d) on July 10, 2009, an e-mail was sent by Transamerica to each of its distributors and key advisors enclosing the notice of certification and settlement, short form of notice and the summary of the proposed settlement.

[35] Although notice of the proposed settlement had been given and while Transamerica had indicated that in principle it intended to fully compensate the class members for the overcharges, there were still differences between the parties about the calculation of the compensation and how the settlement should be implemented.

[36] On May 25 and 26, 2009, Justice Colin Campbell agreed to act as mediator to settle several matters about which the parties were at an impasse that REO says threatened the settlement. Transamerica disputes that a settlement was at risk but, in any event, both parties made concessions and the mediation was successful in achieving a settlement agreement.

[37] There is no doubt that an enormous amount of work has been done by many people to structure this settlement. Work has been on-going for approximately 22 months. The parties analyzed 140 differently worded contracts, 45 summary information folders, financial statements, auditor's working papers, available data from numerous policy administration and investment accounting systems in respect of a 21-year period (1987 to 2008). Both sides engaged considerable human and other resources. Transamerica committed a staff of 40 executives and employees with various specialties to design, program, and test complex restitution models for its insurance and investment products.

[38] Transamerica hired external actuarial consultants, Oliver Wyman, to verify and audit its restitution models. It has incurred other significant professional fees for accounting assistance, Cole & Partners and Deloitte & Touche LLP, in connection with the proposed settlement.

[39] Transamerica estimates that the number of policyholders who fall within the proposed class is at least 307,446 persons. It is estimated that approximately 200,000 persons will have entitlements under the settlement.

[40] The highlights of the Settlement Agreement may be summarized as follows:

- The settlement is without prejudice to Mr. Fantl's right to continue the action in respect of the replication claim.
- The settlement relates to 28 segregated funds originally offered by NN Life and its predecessors under the specified individual variable insurance contracts and universal life insurance contracts.
- The settlement class includes all persons, or beneficiaries, trustees or other legal or personal representatives of such persons, in Canada and elsewhere who at any time entered into insurance contracts with Transamerica, NN Life Insurance Company of Canada ("NN Life") or its predecessors pursuant to which the persons beneficially or notionally invested in units of, or which insurance contracts otherwise provided benefits based upon the value of, the following segregated funds (the "Transamerica Funds") which were offered as investment options:

1. American Asset Allocation Fund
2. American Equity Index Fund
3. Asset Allocation Fund (also known as the Balanced Fund)
4. Bond Fund
5. Canadian 35 Index Fund
6. Canadian Communications Fund
7. Canadian Financial Services Fund
8. Canadian Growth Fund
9. Canadian Resources Fund
10. Canadian Small Cap Fund
11. Can-Am Fund
12. Can-Asian Fund
13. Can-Daq 100 Fund (also known as the Can-Daq Fund)
14. Can-Emerge Fund
15. Can-Euro Fund
16. Can-Global Bond Fund
17. Dividend Fund
18. Equity Fund
19. European Equity Index Fund
20. Information Technology Fund

21. International Bond Index Fund
22. International Brands Fund
23. Mid-Term Bond Fund (also known as the Bond Fund, but distinct from #4 above)
24. Global Market Neutral Fund (also known as the Elite Fund)
25. T-Bill Fund
26. Money Market Fund
27. 5 Year Pooled Fund
28. Global Fund

- Transamerica pays, without admission of liability, compensation to any policyholders who purchased the insurance products if they were charged management fees, investment advice fees and/or operating expenses in excess of the amounts permitted in the applicable insurance contracts or represented in related summary information folders.
- The compensation is to be determined pursuant to a restitution methodology.
- The objective of the restitution calculation is to put each policyholder in the position he or she would have enjoyed under the insurance contract had the overcharges not occurred, subject to certain assumptions, adjustments and compromises. The name given this methodology is the "follow the money approach."
- The restitution calculation will be done on an individual policyholder basis and will use as its foundation the actual transactions that occurred in each policy and the historic returns of the segregated funds in which the policy was invested.
- Compensation will be paid to Class Members without regard to any potential limitation periods.
- The restitution payments shall be calculated using available transaction data as at September 30, 2009, with the objective of Transamerica calculating and being in a position to pay individual entitlements commencing in mid- October 2009 (the "Restitution Payment Date").
- Class Members with relevant lapsed policies shall receive a letter indicating the lapse date of record and the number of months by which the policy could have been extended by reason of the overcharges and return on overcharges to the relevant non-registered accounts calculated to the lapse date of record (the "New Eligibility Period"). The letter will invite the recipient to contact Class Counsel in the event there has been a death of the life insured in the New Eligibility Period.
- If documentation is provided supporting proof of death in the New Eligibility Period, Transamerica will apply the restitution owing for fee overcharges

towards past costs of insurance and will honour a claim by policy beneficiaries to the applicable death benefit payable in accordance with the terms of the policy.

- Where Class Members are existing policyholders and have in force policies with Transamerica, the settlement will provide that any payments of compensation to such policyholders shall be directed back to the relevant segregated funds in which the in force policies are invested at the time and that additional units will be acquired in those funds on behalf of the policyholder at current net asset values.
- For terminated policies, the amounts required to satisfy the settlement payments will be paid by Transamerica on the Payment Date into a trust account at The Canada Trust Company, and thereafter, payment will be made from the trust account to Class Members with terminated policies by cheque, net of withholding of tax where applicable.
- No compensation will be paid to terminated policyholders whose entitlement under the settlement is less than \$50, however, such amounts will remain in trust and will ultimately be disbursed *cy-prés*.
- Subject to compliance with unclaimed property legislation in various provinces, any compensation which remains unclaimed following 18 months after the date of judgment approving the settlement, including compensation payable to terminated policyholders which falls below the \$50 *de minimus* threshold described above, shall be distributed to the Heart and Stroke Foundation.
- Before any property may be considered unclaimed, Transamerica shall have first made reasonable efforts to locate the eligible recipient. In the case of class members with terminated policies who are entitled to \$50 or more but less than \$500 in compensation, if official notices to them (including the notice of the fairness hearing to approve the proposed settlement) are returned, Transamerica will engage the services of the National Search Unit of the federal government in an effort to obtain current addresses for these class members. If the compensation owing to such class members is \$500 or more, Transamerica will engage a search firm to attempt to locate them.
- Class Members may opt-out of the settlement within 90 days of receiving the notice of the settlement approval.
- No application forms or evidentiary proof of loss will be required from Class Members, except in the case of Class Members with prematurely lapsed policies.
- Deloitte & Touche LLP will act as the monitor and administrator for purposes of verifying and monitoring the payment of compensation to in force and terminated policyholders.

- Transamerica pays the costs of administration estimated to be in the magnitude of \$3.5 million.
- Transamerica pays class counsel fees and disbursements and the amounts received by class members will not be reduced by legal fees.
- The amount of Class Counsel's fees shall be either agreed upon by the parties prior to the settlement approval hearing and approved by the Court, or shall otherwise be fixed by the Court, at a hearing immediately following the settlement approval hearing. (That hearing is being adjourned.)

[41] In order to reach a settlement, the parties made concessions and compromises. Examples follow:

- Transamerica agreed to take into account the summary information folder as part of the insurance contract when determining the maximum allowable management fees or management expense ratios that could be charged for particular contracts.
- The restitution models take into account any potential negligent misrepresentation claims by using the management fees, "current" fee language and MER amounts stated in summary information folders when determining an allowable management fee, even though Transamerica disputes that the summary information folders have contractual effect or form any part of the contract of insurance.
- For purposes of determining whether Transamerica gave the required advance written notice of management fee increases otherwise permitted under certain contracts, Transamerica agreed not to rely on its notification to policyholders in March 2001 of an increase in management expense ratios as a result of regulatory changes.
- The parties agreed that, for the years 1998, 1999, and 2000 the percentage of operating expenses deducted before calculating whether any management fees were overcharged will be lowered to a level that increases the calculation by \$7.5 million (inclusive of interest) calculated as at June 19, 2009.
- The parties agreed that Transamerica will be permitted to charge any actual expenses incurred by it up to a maximum of 0.5%, which it did not previously charge because of its cap on recoverable expenses at 0.15% and 0.25%. The approximate total amount of this adjustment, which reduces the calculation, is estimated by Transamerica to be in the \$2.1 to \$2.7 million range.
- Mr. Fantl and REO abandoned their objections to the "follow the money" restitution methodology as the appropriate approach to determining compensation for class members.

[42] The "follow the money" restitution methodology has been reviewed and found reasonable by PwC. It is PwC's view that: the approach to the calculation of individual policyholder restitution appears to be a reasonable approach that takes into account the distinct nature of the contracts; and the calculation of overcharges are supported by a significant volume of documentation. PwC continues to review and test the implementation of the methodology to ensure that its results accord with the objectives set out in the Settlement Agreement.

[43] Transamerica provisionally estimates (as of July 23, 2009) that the value of the overall restitution, including interest, calculated using the restitution models involving transactions up to June 19, 2009 is \$13,013,580 for the Life Products block (102,563 policies) and \$27,533,331 for the Investment Products block (100,966 policies) for a total of \$40,546,911. The restitution referable to the Can-Am Fund is estimated to be approximately \$9 million as of July 23, 2009.

[44] The ultimate amount of restitution to be paid will depend on transactions which occurred between June 19, 2009 and the restitution calculation date, changes in market conditions and fluctuations in interest rates. Transamerica anticipates that there will be reductions to the overall restitution that will occur once the impact of any guarantee-related top-ups (not reflected in the \$40.5 million estimate) already paid by Transamerica are taken into account.

[45] Mr. Fantl deposes in paragraph 15 of his affidavit as follows:

I have been made aware of the strengths and weaknesses of the various claims and defences put forward in this litigation. I reviewed the terms of the Settlement Agreement with my counsel. After weighing the benefits that would be available to class members under the settlement against the likely outcome of continued litigation of these issues and the costs and delay inherent in continued litigation, I concluded that the settlement was fair, reasonable, and in the best interests of the class. Accordingly, I authorized my counsel to sign the Settlement Agreement on my behalf.

[46] It is the opinion of class counsel that the settlement is the best one that can be achieved for the class on the management expense claim and that it provides benefits that meet or exceed what could reasonably be expected through continued litigation, without the risks, costs and delays inherent in continued litigation. Class counsel is of the view that the settlement is fair, reasonable, adequate, and in the best interests of the class.

[47] Solely for purposes of this motion and only as it relates to the management expense claim, Transamerica submits that the criteria for certification set out in s. 5(1) of the Class Proceedings Act, 1992 are satisfied. Transamerica further submits that the proposed settlement is fair, reasonable, and in the best interests of those affected by it.

[48] Forty class members made written submissions in support of the settlement. Two class members objected to the settlement. The written objections were as follows:

1. Reason for opposing the proposed settlement: Since I no longer hold the Transamerica fund. I do not want to take legal action against Transamerica. After all, only lawyers will benefit at our expense.

2. J'accuse réception de votre avis d'audition concernant le recours collectif compagnie d'assurance-vie Transamerica du Canada. Veuillez prendre note que je refuse de faire partie du groupe qui fera des représentations au sujet de ce recours collectif. Je m'y oppose. Par conséquent, ne m'écrivez plus à ce sujet. Je ne suis pas intéressée.

### Certification

[49] The criteria for certification are set out in s. 5 (1) of the *Class Proceedings Act, 1992*, which states:

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,

(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.

[50] Where certification is sought for the purposes of settlement, all the criteria for certification still must be met: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 22.

[51] In this action, the Plaintiff advances claims in breach of contract, breach of collateral contract or collateral warranty, negligent misrepresentation, unjust enrichment, waiver of tort, an accounting of revenues or profits and disgorgement.

[52] The class definition is as follows:

All persons, or beneficiaries, trustees or other legal or personal representatives of such persons, in Canada and elsewhere who had at any time entered into contracts with the defendant, NN Life Insurance Company of Canada or its predecessors pursuant to which the persons beneficially or notionally invested in units of, or which contracts otherwise provided benefits based upon the value of the "Transamerica Funds" which were offered as investment options by the defendant, NN Life Insurance Company of Canada or its predecessors.

[53] The proposed common issue for the certification for settlement purposes is as follows: What damages, if any, are owing to the class members with respect to the Excess Management Fee Claim?

[54] It is preferable that the management fee overcharge claim be resolved by way of a class proceeding. It is highly unlikely the claims of individual class members could be advanced but for a class proceeding.

[55] Mr. Fantl is an appropriate representative plaintiff with no conflicts of interest with the Class.

[56] In the case at bar, I am satisfied that for settlement purposes, the criterion for certification have been satisfied. In particular: (a) the pleadings disclose a cause of action; (b) there is an identifiable class of two or more persons who will be represented by the representative plaintiffs; (c) the claims of the class raise common issues of fact or law; (d) a class proceeding is the preferable procedure; and (e) there is a suitable Representative Plaintiffs with adequate class counsel.

#### Settlement Approval

[57] I turn now to the matter of settlement approval. To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of those affected by it: *Dabbs v. Sun Life Assurance*, [1998] O.J. No. 1598 (Gen. Div.) at para. 9; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 68-73.

[58] In determining whether to approve a settlement, the court, without making findings of facts on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 10.

[59] When considering the approval of negotiated settlements, the court may consider, among other things: likelihood of recovery or likelihood of success; amount and nature of discovery, evidence or investigation; settlement terms and conditions; recommendation and experience of counsel; future expenses and likely duration of litigation and risk;

recommendation of neutral parties, if any; number of objectors and nature of objections; the presence of good faith, arm's length bargaining and the absence of collusion; the degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at 440-44, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused Oct.22, 1998; *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 71-72.; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (S.C.J.) at para. 8; *Kelman v. Goodyear Tire and Rubber Co.*, [2005] O.J. No. 175 (S.C.J.) at paras. 12-13; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 117; *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.) at para. 10.

[60] In my opinion, the settlement achieved in this case is a good one for the class and undoubtedly reasonable and fair. It appears that it is highly unlikely that class members would have achieved a better outcome had the claim about the management fee overcharge been pressed to a trial. Indeed, for some class members, a trial might not have been beneficial assuming that there was some bite to the limitation period defences that Transamerica has agreed to forgo as a part of the settlement. For all class members there appears to have been some risk about how a court might decide the issue of the significance, if any, of the summary information folder to Transamerica's contractual responsibilities.

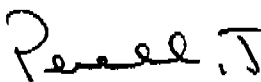
[61] More to the point, the design of the settlement is to put the class members in the position that they should have been under their investment contracts and that design is more than reasonable and fair.

[62] Transamerica is doing the proper thing in honouring its contractual obligations. The compromises in this case made by both sides were not about the aim of the settlement but about whether or not the details of the "follow the money approach" under-compensated or overcompensated the class members. There is no evidence that there was an arbitrary discount made to the compensation in order to achieve a settlement. A settlement that approaches full payment for the harm caused plus interest and without any deduction for the expense or risk of litigation is reasonable and fair.

[63] With all respect to the two objectors who took the time to notify the court of their objections, their objections do not address the merits of the settlement.

[64] In accordance with the *Class Proceedings Act, 1992*, I approve the settlement.

[65] Order accordingly

  
Perrell, J.

Released: August 10, 2009

**COURT FILE NO.: 06-CV-306061- CP**  
**DATE: August 10, 2009**

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**JOSEPH FANTL**

Plaintiff

- and -

**TRANSAMERICA LIFE CANADA**

Defendant

---

**REASONS FOR DECISION**

---

**Perell, J.**

**Released: August 10, 2009**