

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding under the *Class Proceedings Act, 1992*

BETWEEN:

RICHARD MANDEVILLE, WISMAR  
GREAVES, MARCUS JORDAN and  
ANTHONY BOWEN

Plaintiffs

- and -

THE MANUFACTURERS LIFE  
INSURANCE COMPANY

Defendant

)  
)  
) *Harvey T. Strosberg, Q.C. and David*  
) *Stratas, for the plaintiffs*  
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) *Sheila Block, Wendy Matheson and David*  
) *Outerbridge, for the defendant*  
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) HEARD: September 10, 11, & 12, 2002

REASONS FOR DECISION

NORDHEIMER J.:

[1] I have before me a motion by the defendant pursuant to rules 21.01(3)(a) and (d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 and section 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 to dismiss or stay this action on the basis that this court does not have jurisdiction to adjudicate the claims raised or that the action is an abuse of the court's process. Concurrently, the plaintiffs move to certify this action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c.6.

[2] The claims in this action arise out of the transfer in late 1996 by the defendant of its Barbados policies to a third party corporation. This transfer was part of an ongoing effort by the defendant to sell all of its Caribbean business. The plaintiffs, who propose to act on behalf of a

class comprised of the 8,048 Barbados policyholders of the defendant, complain that this transfer was undertaken without ensuring that their interests in receiving benefits if the defendant demutualized were protected or safeguarded. Slightly over a year after the transaction closed, the defendant's board of directors announced that the defendant would demutualize as soon as the law permitting it came into force. The result was that the Barbados policyholders did not receive the substantial benefits of demutualization that other policyholders of the defendant received when demutualization occurred. The plaintiffs plead that the failure of the defendant to protect the Barbados policyholders was negligent and/or was a breach of fiduciary duties owed by the defendant to these policyholders. The plaintiffs seek various declarations to that effect as well as general damages and punitive damages of \$150 million.

[3] The defendant asserts that the rights of the proposed class were extinguished by the transfer of their insurance policies in 1996, in accordance with the Barbados *Insurance Act*. That Act required that the transfer of the defendant's Barbados insurance business be sanctioned by the Barbados Supervisor of Insurance through a process that included notice, the right to object, and a hearing, with a right of appeal to the Barbados court. The transfer was ultimately sanctioned by the Supervisor of Insurance which the defendant says thereby brought to an end the relationship between the defendant and the Barbados policyholders. The defendant also says that, pursuant to the Barbados *Insurance Act*, the transfer, once sanctioned, is binding on all policyholders, i.e., it is binding on all members of the proposed class.

### **Background**

[4] The defendant, Manulife, is a life insurance company. Its registered office is in Toronto. It was incorporated as a stock company on June 23, 1887 by a Special Act of Parliament. In 1957, legislation was enacted that established a procedure under which a life insurance company with share capital such as Manulife could convert itself into a mutual insurance company through the purchase of its own shares. In early 1958, Manulife decided to use that section and become a mutual insurance company.

[5] Manulife prospered as a mutual insurance company, conducting business around the world. In 1984, the company's total assets reached \$10 billion and by 1986, total Manulife insurance in force reached \$100 billion. In 1994, Manulife purchased Confederation Life's

group life and health insurance business. In 1996, it amalgamated with the North American Life Assurance Company and reported net operating income of \$503 million, making it the first Canadian life insurer to pass the half-billion mark in earnings.

[6] In 1990, Manulife decided to sell its Barbados life insurance business as part of its decision to sell all of its Caribbean operations. Manulife's Board of Directors authorized negotiations for the transfer of its business in the Caribbean-Atlantic region *en bloc*. The size of the Caribbean block relative to Manulife's other business made it inefficient from a cost perspective as well as in terms of management attention. Manulife concluded that it could not continue to operate effectively in the region. It was originally contemplated that the Caribbean block would be transferred to a single purchaser but Manulife had difficulty doing so in Barbados. At least some of those difficulties arose from the fact that Wismar Greaves, one of the proposed representative plaintiffs, was the Barbados Supervisor of Insurance in the early 1990's and he refused to approve the transfer unless the surplus relating to the Barbados policies was distributed to the participating policyholders. Ultimately, the defendant's Caribbean business was not sold as a single block but it did proceed in several separate transactions.

[7] In 1995, Manulife and LOB, a local Barbados insurance company, signed a letter of intent to transfer Manulife's Barbados business to LOB. The formal agreement was reached between Manulife and LOB in May of 1996. The transfer was the subject of a favourable actuarial opinion both from Manulife's Chief Actuary and from an independent actuary reviewing the transfer, namely, Eckler Partners. Manulife considered that the Transfer was beneficial to the Barbados policyholders in three major areas: service; dividend expectations; and security. Manulife's view in this regard was based on the fact that, if Manulife simply ceased to do further business in Barbados, the result would be that the Barbados policies would become a "closed block" of business without the prospect of growth. Dividends paid on those policies would steadily decrease until they reached zero. In contrast, a transfer of the policies to a local company would provide local attention and positive dividend expectations resulting in local expertise and increased management attention which would, in turn, generate service and return levels as high as those the policyholders could have reasonably expected from Manulife. Included in the benefits of the transfer were dividend guarantees, together with a generally better outlook for dividends and guarantees built into the Transfer Agreement with respect to

capitalization levels which also provided a level of comfort with regard to the future prospects for the policyholders.

[8] Eckler Partners, the independent actuary, opined that the Transfer allowed for satisfactory security for the transferred policyholders and was advantageous with respect to dividend expectations. Eckler noted that, if the proposed transfer had not been planned, it was almost certain that there would have been a reduction in dividends for this business in 1991, in step with Manulife's reduction at that time in its dividends for individual policies in almost every other geographic region. Further, the closed block of business would run off over time. This meant that subsequent decreases in dividends would most likely follow. In contrast, the Transfer Agreement provided that, after the proposed Transfer, there could be no reduction in dividends unless there was a commensurate reduction in the dividend scales for the existing LOB business in force at that date.

[9] Of particular importance for the purposes of the motions before me, is the fact that, with regard to policyholder rights and demutualization, Eckler opined as follows:

“The transferred policyholders lose their right to participate in Manulife's government and acquire no comparable right in LOB because its policyholders do not participate in its government. That loss is acceptable in view of the other advantages of the transfer. The transferred policyholders also lose their rights under the special circumstances of Manulife undergoing a demutualization. It is doubtful what, if any, portion of surplus the participating policyholders would be entitled to in the event of a demutualization. Furthermore, the management of Manulife have stated that the company has no intention of demutualizing at present and that demutualization is not contemplated in any of its business plans. Under these circumstances, the likelihood of demutualization is remote and these rights have no material value.”

It is also important to know that this wording, especially the last two sentences, was written by Manulife and was provided to Eckler by Manulife. Eckler adopted this language verbatim into its report.

[10] After the Transfer Agreement was reached, Manulife and LOB pursued the required regulatory approval in Barbados. The Barbados *Insurance Act* included a mandatory process for the transfer of any Barbados insurance business. This mandatory process involved the need to

obtain the sanction of the Supervisor of Insurance. It was this process, ultimately leading to the Sanction, that was followed in regard to the Transfer.

[11] The mandatory process under the Barbados *Insurance Act* required that certain steps be taken before the Supervisor could issue a sanction for a transfer (called a "scheme" in the Act). The steps that are required are not in issue. Only the effect of the Sanction which resulted from the process is in issue. The steps are:

- (a) Notice of intention to apply for a sanction must be given to policyholders and certain information about the transfer must be made available.
- (b) The companies desiring a transfer then make an application to the Supervisor in the form of a petition, providing information regarding the transfer and the companies involved in the transfer.
- (c) After notice is given, any person who is likely to be affected by the proposed transfer may make an application to the Supervisor in respect of any matter relating to the transfer.
- (d) Upon receiving an application from a party who is likely to be affected, the Supervisor must fix a date for a hearing of the application, and provide notice of the hearing.
- (e) At the hearing the person making the application, either in person or by his or her legal representatives, is entitled to be heard. The companies interested in the application, and any person who, in the opinion of the Supervisor, is likely to be affected, may also present evidence.
- (f) After the hearing has taken place, the Supervisor shall decide whether or not to sanction the transfer.
- (g) The Supervisor must refuse to approve a transfer where the procedural requirements of the Barbados *Insurance Act* have not been complied with. The Act also requires the Supervisor to refuse a sanction:
  - a) where there are more than a certain number of policyholders who dissent; or
  - b) where the Supervisor is not satisfied that --
    - (i) the continuing insurer is incorporated in Barbados; or
    - (ii) the transfer is in the public interest.

[12] Finally, the Act provides for a right of appeal from the decision of the Supervisor to a judge of the Barbados High Court in chambers.

[13] Under the Barbados *Insurance Act*, every policy issued in Barbados or to a person resident in Barbados through a person or office in Barbados is governed by the law of Barbados and is subject to the jurisdiction of the courts of Barbados. In addition, the plaintiffs' policies themselves expressly provided that they were governed by the law of Barbados.

[14] Manulife and LOB went through the above steps to obtain the sanction of the transfer. Notices were given and a total of eight objections were received. All of those objections raised the issue of the resulting loss of rights due to the transfer of the policies from a mutual company to a stock company.

[15] In addition to receiving actuarial reports from Manulife, from LOB and from Eckler, the Supervisor of Insurance retained his own independent actuary, the Hymans Robertson firm from the United Kingdom, to assess the likely impact of the transfer on the policyholders of LOB and Manulife. In its draft report, Hymans Robertson recommended that a special bonus ought to be paid to the Barbados policyholders. It felt that a special bonus would be "helpful and possibly necessary in convincing the transferring policyholders that their interests were fully protected in the transfer". Hymans Robertson thought a special dividend equal to one year's normal dividend would be appropriate and identified the cost thereof at approximately BD\$2.2 million. When Manulife saw the draft Hymans Robertson report, it objected to this part of the report. Manulife and Eckler then discussed the best strategy to get Hymans Robertson to change its report with the result that both it and Eckler made representations to Hymans Robertson regarding this portion of the draft report. In its final report, Hymans Robertson deleted the reference to the BD\$2.2 million but retained the point that a bonus of some sort ought to be paid. However, Hymans Robertson delivered a letter with its final report which said the following regarding the deleted reference:

"I would like to emphasise that the reasons for removing specific reference to the form of benefit and its cost from our report was to permit sufficient room for manoeuvre to the parties, and to Manufacturers Life in particular. We have definitely not changed our view that some compensation, preferably in excess of BD\$2 million, is required in order for us to be able to recommend the transfer to you."

For reasons that are not explained, it appears that neither the Hymans Robertson report, nor the letter that accompanied it, were provided to the objectors.

[16] A hearing was held by the Supervisor on November 14, 1996. Two of the proposed representative plaintiffs, namely Greaves and Jordan, spoke at the hearing and reiterated their objections to the transfer. Manulife responded to those objections. At the conclusion of the brief and informal hearing, which lasted approximately two hours, the Supervisor said:

"I have listened to the arguments of both objectors and representatives of the companies. The significant issue is the issue of whether or not policyholders in Manulife should be paid some sort of compensation for their membership rights in the circumstance of the demutualization in Barbados. I will take all of the arguments of the objectors. I will take all the arguments of the two companies into consideration, and I will make a determination that I consider to be fair, equitable and in the best interest of all the persons involved. Now let me make one observation. That determination most likely is not going to please everybody, but in attempting to make that determination I am going to consider every person."

[17] By letter to LOB dated November 25, 1996, the Supervisor of Insurance advised that approval had been granted for the Transfer, subject to certain conditions, including a requirement for a special dividend in recognition of the concerns of the participating policyholders. The Certificate of Sanction refers to this Special Dividend as equal to "\$20 for each \$1,000 of basic sum assured to the beneficiary of such participating policy of the death of the life insured". The Certificate of Sanction then gives the following explanation as to the reason for the requirement of a Special Dividend:

"... as an incentive to the transferring policyholders to support the transfer, estimated to cost BDS\$7.2 million ..."

[18] This reference in the Sanction appears to have caused some concern to Eckler because it could not understand where the figure of BDS\$7.2 million had come from. In notes which the representative of Eckler made of a telephone conversation he had with Steve Alleyne, the Chief Actuary of LOB, on November 27, 1996, Eckler's representative records the following:

"SA said the number was 'optics' (an MLI word). ... It had been described in more detail in a tightly-worded memo from LOB & MLI to the Sup."

Manulife has been unable to produce the memorandum referred to in this note and, despite numerous requests from Manulife, it has not been forthcoming from LOB.

[19] Also among the documents that have been produced to date in this proceeding are other notes of the Eckler representative detailing a conversation he had with a representative of Manulife in which the Eckler representative was advised that a private meeting had taken place between representatives of Manulife and LOB, and the Supervisor personally, that appears to have occurred the day before the hearing. The notes recount that the Supervisor advised

Manulife and LOB that he would not sanction the Transfer unless the deal was "sweetened". The notes further recount that Manulife refused to pay anything more but that LOB indicated that it was prepared to add a special dividend that had a value of between \$500,000 and \$1.4 million depending on how it was calculated. There is some dispute as to whether this meeting actually took place before or after the hearing. Manulife contends that the meeting occurred after the hearing. In either case, there appears to be no dispute that the meeting took place and that it was held without the knowledge or participation of the objectors. It is, of course, this same special dividend that ultimately appeared as a condition in the Certificate of Sanction.

[20] No appeal was taken to the Barbados court from the decision of the Barbados Supervisor of Insurance to sanction the Transfer. Manulife subsequently wrote to Office of the Supervisor of Financial Institutions in Canada, attaching documentation, including the Barbados Sanction, and requested that OSFI proceed to recommend that the Canadian Minister of Finance approve the Transfer. The internal government briefing memorandum from OFSI provided background regarding the sale of the Caribbean operations, the process in Barbados including the fact that there were objections, and the special dividend to be paid a result. The briefing memorandum did not provide any details regarding the nature of the objections. It simply recites that:

"As part of the approval process in Barbados, policyholders who raised objections to the transfer had an opportunity to present their objections to the Barbados Supervisor of Insurance at a public hearing which took place on November 14, 1996."

OFSI did not invite submissions on the request nor did it hold any hearing. The Secretary of State (International Financial Institutions) Finance authorized the Transfer of Manulife's Barbados business to LOB on December 20, 1996.

[21] Also of relevance to the matters raised before me is the history of the demutualization process in Canada. Manulife had been exploring the demutualization issue since at least 1990. In 1990-1991, internal committees were established at Manulife to explore the issues involved in demutualization. In the early 1990's, presentations and reports were made to Manulife's board of directors about demutualization. A committee of the board on mutuality was established and legal and actuarial committees looked at the issue as well. In late 1992 or early 1993, Mr. Di Giacomo, who was then the Chief Executive Officer of Manulife and who gave evidence on this

motion, said that he had reached the conclusion that the strategic direction of Manulife was toward demutualization. In that regard, Manulife wished to have the federal government change the legislation to permit demutualization.

[22] It seems that the federal government was already embarked on this route. In June 1992, the federal government had reformed the financial services sector by amending the *Bank Act*, the *Trust and Loan Companies Act*, the *Cooperative Credit Associations Act* and the *Insurance Companies Act*. It introduced "sunset clauses" into the Acts – these required Parliament to enact new legislation by March 31, 1997. Also in 1992, the federal government began a legislative review process in order to prepare for the legislative reform that the sunset clauses required by 1997. There was a consultative process including hearings being held by the Senate Committee on Banking, Trade and Commerce. The Department of Finance issued a Discussion Paper on the Conversion of Mutual Life Insurance Companies on May 21, 1992.

[23] Throughout the period from 1992 to June 1996, Manulife, either directly, or indirectly through lobbyists and industry organizations, urged the federal government, OSFI, federal politicians and federal bureaucrats to persuade the Privy Council to pass a regulation permitting Manulife and other mutual insurance companies with capitalization in excess of \$7.5 billion to demutualize. Among other things, in June 1995, as part of the 1997 Federal Financial Services Review, Manulife delivered a submission to the Department of Finance on "issues of particular significance to Manulife." Manulife urged that demutualization be permitted and sought a simplified demutualization process.

[24] The result of all of the government's consultation between 1992-1996 was a government White Paper entitled, "1997 Review of Financial Sector Legislation: Proposals for Changes." It was tabled in the House of Commons in June, 1996. A White Paper is a document presenting government policy in a given area which may contain legislative or administrative proposals on which the Government intends to act. The White Paper recommended that companies such as Manulife be permitted to demutualize. By this point in time, the sunset clauses in the legislation were fast approaching and so legislative change was required. Manulife immediately brought the White Paper to the attention of its management committee.

[25] After the release of the White Paper, Manulife continued its work on demutualization. By way of example, Manulife's Chief Actuary, who had been integrally involved in the Transfer including speaking for Manulife at the hearing before the Barbados Supervisor of Insurance which lead to the granting of the Sanction, outlined his objectives for the year 1997 in a memorandum dated January 17, 1997 to Manulife's Chief Executive Officer. He wrote:

"I believe that Manulife needs to prepare for demutualization. I would like to begin a study of demutualization (including other business, legal and financial management as necessary) with the objective of creating a workable demutualization plan which would see the company demutualized within 2-5 years."

[26] In a further memorandum dated March 3, 1997, the Chief Actuary said:

"I feel it is important for Manulife to determine the manner in which we would demutualize in the event that we take a decision to do so in the next few years."

[27] Manulife continued its work on demutualization throughout 1997. On January 20, 1998, the board of directors of Manulife formally announced its intention to demutualize, i.e., to convert Manulife from a mutual insurance company into a public company with common shares. This was done as part of Manulife's effort "to seek new ways to grow and expand its business." The announcement was made before demutualization was possible under Canadian law but in anticipation that the law would be changed. On September 23, 1999, Manulife legally converted from a mutual insurance company to a wholly owned subsidiary of Manulife Financial Corporation, a company with common shares that are publicly traded.

[28] Returning to the Transfer itself, it should be noted that Manulife had transferred other blocks of policies in this same time frame. Both in Hong Kong and in the United States, Manulife had transferred its existing business to subsidiary corporations. In each instance, however, the transfers contained express provisions that the policies would continue to be treated as participating policies of Manulife and would be entitled to vote and to participate in any future demutualization of Manulife. For example, the U.S. agreement contained a provision which stated:

"If Manulife ever applies to become a stock company in accordance with the Insurance Companies Act that Transferred Policies which are participating

policies will be treated for purposes of the application and for purposes of determining benefits received on any subsequent demutualization as if they had remained a policy of Manulife.”

[29] It is important to realize that the transfers of the Hong Kong and U.S. policies were made to subsidiaries of Manulife and not to an arm's length third party purchaser. It is this fact which Manulife says explains the reason for the differing treatment between the Hong Kong and U.S. policyholders on the one hand and the Barbados policyholders on the other. Whether that fact is sufficient to account for the differing treatments is not, however, clear. The lack of clarity on this point is due, at least in part, to the fact that Manulife itself does not appear to have always treated this distinction as warranting different treatment. For example, in submissions made to Revenue Canada by Manulife's tax lawyers at the time of the Hong Kong transfer, various statements were made that suggest that, in either case, the rights of the policyholders ought to be protected. For example, in a November 1, 1994 letter, Manulife's tax lawyers advised Revenue Canada that “a mutual insurance company has no power to terminate the proprietary rights of participating policyholders without compensation”. The tax lawyers also told Revenue Canada that:

“[a] transaction which terminated the proprietary rights and entitlement of a class of participating policyholders without appropriate compensation would not receive the required regulatory approval.”

[30] Further, in an internal document entitled “Possible Courses of Action and their Implications” dated February 28, 1994, and which dealt with the options available to Manulife in dealing with its U.S. policyholders, the possible sale of the policies to a third party stock company (as happened in the Barbados) was observed as being problematic for the following reasons:

“Furthermore, we would likely need to compensate U.S. policyholders (e.g. treat it in some ways as a partial demutualization). It would be very difficult to arrive at a ‘fair’ compensation amount and we would be faced with legal challenges from policyholders drawn out over many years.”

[31] With that background, I turn to my analysis of the two motions.

**The Rule 21 motion**

[32] Fundamentally, the defendant submits that the issue of whether the members of the proposed class, i.e., the Barbados policyholders, were entitled to any compensation arising from the Transfer of the defendant's business, was determined by the Supervisor as part of the process leading up to the Sanction. The defendant also submits that if there is any complaint which the plaintiffs have regarding that process, it is a matter that ought to have been raised by way of appeal from the Supervisor's decision, or through a judicial review of that decision in the Barbados. The defendant therefore submits that this court has no jurisdiction to entertain the plaintiffs' complaints, in reliance on rule 21.01(3)(a), or that the proceeding is an abuse of process, in reliance on rule 21.01(3)(d).

[33] Unlike a motion under rule 21.01(1), it is permissible to file evidence in support of a motion under rule 21.01(3). The parties here acknowledge that to be the case. The ability to place evidence before the court on the motion, though, raises the issue as to the test which the court should apply when considering whether the evidence justifies the granting of the relief sought. Put another way, what burden of proof should be applied in the determination of such a motion?

[34] Rule 21 is part of a group of rules which provide parties with a method for the summary determination of a matter before trial. Rules 20 and 22 provide other methods of reaching such determinations. It seems to me that the test, or burden of proof, that ought to be applied to these various avenues for summary determinations, where evidence is involved, should be the same. By way of example, I can see no logical reason for imposing a higher hurdle in order to obtain a summary judgment dismissing an action than would be applicable to obtaining a dismissal of an action under rule 21.01(3). At the same time, under all of these rules not only should the burden on the moving party be the same, that burden should be a high one. The rationale for setting a high bar for such relief is expressed by Doherty J. A. in *Schreiber v. Canada (Attorney General)* (2001) 52 O.R. (3d) 577 at para. 15:

“There are strong, well-recognized policy reasons which preclude the pre-emptive striking of claims or dismissal of lawsuits on the basis that they do not disclose a cause of action. The exact nature of a claim is often an amalgam of fact and law which is melded through the trial process and only properly tested at the end of

the trial. Plaintiffs should only be denied the opportunity to prove their claims at trial where the futility of those claims is obvious. In addition, a willingness to strike claims or dismiss actions prior to trial in situations where those claims or actions operate on the borderlines of the present jurisprudence will stultify the development of the law.”

[35] If the same general test or burden is to be applied then the onus on the defendant in this proceeding is to establish that it is clear, or that it is plain and obvious, that a trial is unnecessary. As was said by Borins J.A. in *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4<sup>th</sup>) 257 (Ont. C.A.) at p. 272:

“In a sense, the courts have come to equate ‘genuine issue for trial’ with ‘genuine need for trial’. However, at the end of the day, it is clear that the courts accord significant deference to the trial process as the final arbiter of the dispute which has brought the parties to litigation.”

[36] This point is also made by Morden, A.C.J.O. in *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 546 (C.A.) where he said, at p. 551:

“It is safe to say that ‘genuine’ means not spurious and, more specifically, that the words ‘for trial’ assist in showing the meaning of the term. If the evidence on a motion for summary judgment satisfies the court that there is no issue of fact which requires a trial for its resolution, the requirements of the rule have been met. It must be clear that a trial is unnecessary.”

[37] Indeed, the defendant accepts that it must be “clear” on the evidence that it is entitled to the dismissal of the claim at this preliminary stage. While the plaintiffs suggest that there is a higher hurdle for the defendant to overcome under rule 21.01(3) than there would be under Rule 20, I do not accept that there is, or should be, a different approach under the two rules. In the end result, as the above quotations make clear, dismissing a claim on a summary basis is a form of relief which should be granted cautiously and only where it is obvious that there is no need for a trial to properly determine the issues raised in the proceeding.

[38] The issue then becomes whether the defendant has satisfied the requirement of showing that a trial is unnecessary. The defendant says that the issue of what compensation, if any, should be given to the policyholders is a matter covered by the laws of Barbados and that this court is consequently without jurisdiction to determine the issue. Alternatively, the defendant asserts that the issue of compensation for the policyholders was squarely before the Supervisor,

that he determined that issue, that it cannot now be re-litigated in this court and that this action therefore constitutes an abuse of process. The plaintiffs, on the other hand, assert that the Supervisor was not mandated to address the issue of compensation, or the rights which the policyholders may have against the defendant, nor did the Supervisor purport to deal with those issues and they are therefore open for determination in this proceeding. Alternatively, the plaintiffs say that, if the Sanction granted by the Supervisor purports to determine those issues, the Sanction was obtained through a fraud committed on the Supervisor by the defendant and, consequently, the Sanction cannot be relied upon by the defendant in this proceeding nor should this court recognize the Sanction.

[39] The first issue is whether the Supervisor was called upon to determine the compensation due to the policyholders. This issue requires a review of the statutory authority under which the Supervisor operated. I have referred to the general requirements of the Barbados *Insurance Act* above. There is nothing in the Act which expressly requires the Supervisor to determine the amount of compensation, if any, that policyholders ought to receive as a condition of sanctioning a transfer. In fact, there is nothing in the Act which expressly requires the Supervisor to consider the interests of the policyholders at all. Admittedly, the Act does preclude any sanction being granted if enough policyholders object. Absent that situation, however, the Supervisor is not expressly directed to consider the interests of the policyholders. What the Supervisor is directed to consider is the "public interest" and the "national interest". Section 35A(5) of the Act states:

"Notwithstanding subsection (4), the Supervisor may refuse to sanction a Scheme where a number less than that indicated in subsection (4) dissents therefrom, if –  
(a) in his opinion the circumstances of the case so require; or  
(b) he is satisfied that a proposed amalgamation is not in the public or national interest."

It is perhaps axiomatic to point out that the public interest and the national interest may be very much different than the interests of the policyholders.

[40] There is also no requirement in the Act which requires the holding of a meeting so that the policyholders may vote on the proposed transfer. Further, there is no provision in the Act which permits a policyholder, who objects to the transfer, to dissent and to then participate in a process by which his or her interests are valued and payment made for the fair value of the loss

of those interests – in contrast, for example, to the procedure under section 190 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 and section 185 of the *Business Corporations Act*, R.S.O. 1990, c. B.16.

[41] I am not unmindful on this point that the Sanction contained, as a term, the payment of the Special Dividend. Whatever other problems there may be surrounding the Special Dividend to which I have made reference above, it is clear that the Special Dividend was agreed to be paid by LOB and not by Manulife. This fact raises a question as to how the Special Dividend could be considered a payment on account of Manulife's obligation to its policyholders to compensate them for the loss of their "proprietary rights and entitlement" when the payment did not emanate from Manulife. There is also no evidence that LOB, in arriving at the quantum of this Special Dividend, had any information about, or paid any attention to, the value that would be attributable to the loss of those rights.

[42] It is, of course, up to each jurisdiction to determine the process that it will follow for the determination of such matters. Each jurisdiction may choose to employ different methods to achieve the same result. However, when a court is called upon to determine whether the statutory scheme in question purports to deal with the issue of compensation for dissenting individuals, the absence of such provisions tends to suggest that such matters were not intended to be part of the process. Further, insofar as the policyholders may have common law rights which are being affected by such a transfer, the law is well settled that a statute will not be seen as altering those rights unless it clearly so states. As Associate Chief Justice O'Connor said in the recent decision of *McIntyre Estate v. Ontario (Attorney General)*, [2002] O.J. No. 3417 (C.A.) at para. 45:

"It is a settled principle of statutory interpretation that where the legislature intends to change the common law, it must do so expressly and in clear and unequivocal terms."

[43] There have been a number of affidavits filed by the parties from distinguished Barbados lawyers regarding the process followed by the Supervisor. The three affidavits filed on behalf of Manulife all are of the opinion that the effect of the Barbados *Insurance Act* was to extinguish all rights of policyholders against the transferring corporation once the transfer has been sanctioned by the Supervisor. The two affidavits filed on behalf of the plaintiffs reached the opposite

conclusion, that is, that the Act and the Sanction do not have that effect. I do not consider it to be my role on this type of motion to resolve such a conflict on the evidence. Rather, I view the fact that there is such a conflict as a strong indication that there needs to be a trial to resolve this and other issues.

[44] I recognize that in the absence of direct and accepted evidence which proves foreign law, a Court is entitled to review the foreign statute and reach its own determination – see *Allen v. Hay* (1922), 64 S.C.R. 76 per Duff J. at p. 81. It is unclear, however, whether that right rests solely with a trial court or whether a motions court judge may make such a determination. Given the circumstances of the case before me, I do not consider it necessary to reach a conclusion on that issue. In my view, it is enough for me to conclude that there is an issue regarding the proper interpretation of the statutory scheme and that, in turn, is all that is necessary to conclude that the matter should not be resolved on a summary basis.

[45] The defendant relies on the decisions in *Altberg v. Oosterhuis*, [1999] O.J. No. 160 (Gen. Div.); aff'd. [1999] O.J. No. 5009 (C.A.), *Vaughan v. Ontario (Minister of Health)*, [1996] O.J. No. 1647 (Gen. Div.), *Ziegler v. Sherkston Resorts Inc.* (1996), 30 O.R. (3d) 375 (Gen. Div.), *Giorno v. Pappas* (1999), 170 D.L.R. (4<sup>th</sup>) 160 (Ont. C.A.) and *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 as examples where the court has struck out a claim on the basis that there was an alternative procedure available to the complainant. However, in each of those cases, there was a determination made that the alternative procedure was expressly created for the purpose of determining the issue which formed the subject matter of the action. For example, in *Altberg*, Madam Justice MacFarland, at para. 4, ruled that the professional disciplinary body had a statutory mandate to determine the very issue on which the plaintiff intended to base his claim. Again, in *Ziegler*, Mr. Justice Crane found, at p. 379, that the *Rent Control Act, 1992* provided a “complete code of procedure” for dealing with tenants’ complaints respecting their landlord. Once again, in *Giorno* and *Weber*, the courts held that the arbitration requirements under the labour relations regime were part of a “comprehensive statutory scheme” designed to deal with the plaintiffs’ complaints in those cases. Unlike those cases, however, I do not find that it is clear, or that it is plain and obvious, that the process under the Barbados *Insurance Act* either does, or was intended to, address the causes of action which the plaintiffs allege here.

[46] The defendant also asserts, as stated in its factum, that the policy goal behind the Barbados *Insurance Act* was to ensure “that the regulation of the insurance industry in Barbados and any disputes that arose from that industry, remained within the control of domestic courts and regulators”. The difficulty with that submission in the context of the claims here is that the rights of the plaintiffs, if any, arise from Canadian legislation. It is the *Insurance Companies Act*, S.C. 1991, c. 47 which provides policyholders with certain rights. It is the *Mutual Company (Life Insurance) Conversion Regulations*, SOR/99-128 which provided for the demutualization process which in turn lead to the conferring of certain benefits on policyholders. It is the loss of those rights and the loss of those benefits which are at issue in this action. The consideration and determination of those issues by a Canadian court would not, therefore, appear to involve any infringement on the stated policy goal of the Barbados legislation nor any intervention in the domestic affairs of that country.

[47] Consequently, I find that it is not clear that the claims raised by the plaintiffs were determined in the Barbados proceeding and therefore it is not clear that this court is without jurisdiction to hear and determine those matters. In this regard, I reject the alternative contention of the defendant that in some fashion the courts of Barbados are the only courts to which the plaintiffs may have recourse in the instance where it is determined that the issues are still live for adjudication. I do not dispute that the courts of Barbados may have jurisdiction to address these issues. But given that Manulife is a Canadian corporation, with its head office in the City of Toronto in the Province of Ontario, and which is governed by Canadian statutes, it appears to me that this court clearly has jurisdiction to hear a claim against that corporation regardless of where the plaintiffs may be located. If the plaintiffs have multiple jurisdictions in which they may advance their claims, then they are generally entitled to choose the jurisdiction in which to institute their proceeding. As Madam Justice Gillese said in *Lemmex v. Bernard* (2001), 55 O.R. (3d) 657 (Div. Ct.) at p. 664:

“This results from the fact that it is quite likely the courts of both Ontario and Grenada have jurisdiction *simpliciter* in the case at bar. The plaintiffs had the right to choose between those two forums.”

Indeed there may be very important practical reasons for suing a corporate defendant in the jurisdiction where it is headquartered.

[48] If I am incorrect in my assessment of the effect of the proceeding before the Supervisor, I turn to the question of whether this action would then amount to an abuse of process in light of the Supervisor's decision to grant the Sanction. The principle of abuse of process was applied recently in *Canam Enterprises v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.); leave to appeal granted [2001] S.C.C.A. No. 50. The principle was described by Mr. Justice Finlayson, speaking for the majority, in the following terms, at p. 490:

“Abuse of process is a discretionary principle that is not limited by any set number of categories. It is an intangible principle that is used to bar proceedings that are inconsistent with the objectives of public policy.”

[49] It is clear that principles such as *res judicata* and abuse of process are subject to a discretion in the court not to apply them where their application would give rise to an injustice. Indeed, Mr. Justice Finlayson refers to abuse of process as being a discretionary principle in the above quotation. The same point has been made regarding the principle of *res judicata* – see *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460.

[50] Manulife says that this action is a collateral attack on the decision of the Supervisor. It contends that if the plaintiffs wish to attack the Sanction then they are obliged to do so in Barbados through a judicial review application or by way of an application to extend the time for an appeal from the Supervisor's decision. The plaintiffs respond that they are not interested in setting aside the Sanction or in any other way undoing the transfer that has occurred. The plaintiffs say that they are merely seeking relief for the injury caused to them by Manulife's action is dispossessing them of their legitimate interests without compensation.

[51] I do not view this case as involving a collateral attack on the decision of the Supervisor. To the contrary, on this branch of the argument it seems to me that the plaintiffs attack on the Sanction is not collateral, it is direct. The plaintiffs say that this court should not recognize the Sanction because of the manner in which it was obtained. The plaintiffs say that the Sanction was obtained through fraud or active misrepresentations and that a court will not recognize orders that are obtained through such conduct – see, for example, *Beals v. Saldanha* (2001), 54 O.R. (3d) 641 (C.A.) at para. 37.

[52] The argument on this aspect of the motion reinforces my conclusion that this is not a matter which ought to be determined summarily. There is some evidence upon which a court could conclude that the Sanction was obtained improperly. That evidence consists in part of the statements made regarding Manulife's plans for demutualization. On the one hand there are the statements in the Eckler report that Manulife "has no intention" of demutualizing at present, that demutualization "is not contemplated" and that the "likelihood of demutualization is remote". On the other hand, the evidence establishes that Manulife had been actively considering demutualization since at least 1990. Further, the federal government had released in June 1996 a White Paper recommending that companies such as Manulife be permitted to demutualize. The evidence also shows that Manulife's Chief Actuary had, within a month and a half of the hearing before the Supervisor, written to the Chief Executive Officer of Manulife stating that one of his objectives for 1997 was to create a workable demutualization plan. This is the same individual who, in making Manulife's case at the hearing before the Supervisor, said:

"In case of Manulife, first of all we do not have any plans to demutualize and I would feel very uncomfortable talking to you today about the fact that sometimes in some countries policyholders get to share a surplus under demutualization if I felt that in the not too distant future Manulife, if they were to demutualize .... that's not going to happen - we have no plans to do that."

In these circumstances, a court might conclude that the statements made in the proceedings before the Supervisor did not constitute full, fair and frank disclosure by Manulife of its plans.

[53] There is also the evidence regarding the meeting between the Supervisor, LOB and Manulife, whether it occurred before or after the hearing, in which the special dividend was discussed without the knowledge or participation of the objectors. Further, the objectors were not made aware of the views of Hymans Robertson, the Supervisor's independent actuary, regarding the need for some additional compensation for the policyholders. Finally, there is the issue of the value of BDS\$7.2 million placed on the special dividend, why some referred to this information as "optics" and why it was that those individuals would have considered that some form of optics was necessary in order to obtain approval of the Transfer.

[54] I reach no conclusions regarding these matters. As I have said, I do not consider it my role on this type of a motion to reach such conclusions. I do consider that these matters require a

trial for their determination so that the court can decide after a review of the full facts whether or not the plaintiffs' claim ought to be precluded or whether the court ought to exercise its discretion to relieve from that result. As was said in *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173 (C.A.), a case which involved somewhat similar issues, by Mr. Justice Cromwell, at p. 190:

“ . . . I do not think it obvious that this discretion should be exercised at this preliminary stage to preclude Mr. Braithwaite's action from proceeding. The exercise of this discretion should, in my opinion, be left to the trial judge or at least to a judge with a full view of the relevant facts and circumstances.”

It is worth noting that, in this case, the parties have not as yet had production or discovery. It is not possible for me to conclude, therefore, that I have a “full view” of the relevant facts and circumstances in this case.

[55] I also do not accept Manulife's contention that if such matters are to be determined they must be determined through a judicial review procedure in Barbados. I do not know of any authority, and none was provided to me, which requires a party who is harmed by a regulatory order, that may have been improperly obtained, to proceed by way of judicial review as a prerequisite to instituting a damage claim against the party, who it is contended, improperly obtained that regulatory order. I see no reason why the issue of whether the regulatory order was or was not improperly obtained, or otherwise obtained in circumstances where the court will not allow it to be used to defeat a legitimate claim, cannot be determined in the action for damages. Indeed, in other circumstances, it appears that just such proceedings have been allowed. For example, in *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund*, *supra*, the Nova Scotia Court of Appeal permitted a claim to proceed even though it challenged the decision of a tribunal which could have been the subject of a judicial review application. On my reading of that decision, the Nova Scotia Court of Appeal appears to have implicitly rejected the notion that a judicial review application had to be pursued. Cromwell J.A. said, at p. 190:

“In this case, the only other avenue of challenge to Dr. Reid's decision is by way of judicial review. . . . Given that no application for judicial review was taken, the present action does not create any duplication of reviews.”

[56] The issue is directly addressed in *Roy v. Kensington and Chelsea FPC*, [1992] 1 All E.R. 705 (H.L.). In that case, a physician brought a claim against an administrative committee that had reduced the physician's basic practice allowance. The committee sought to strike out the claim on the basis that the appropriate procedure for challenging its decision was by way of judicial review and not by way of an action. The claim was struck out at first instance but on appeal the Court of Appeal allowed the claim to stand. A further appeal to the House of Lords was dismissed. In his speech, Lord Bridge said, at p. 708:

"But where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him. I think this proposition necessarily follows from the decisions of this House in *Davy v. Spelthorne Borough Council* [1984] A.C. 262 and *Wandsworth London Borough Council v. Winder* [1985] A.C. 461. In the latter case Robert Goff L.J. in the Court of Appeal, commenting on a passage from the speech of Lord Fraser of Tullybelton in the former case, said at p. 480:

'I read this passage in Lord Fraser of Tullybelton's speech as expressing the opinion that the principle in *O'Reilly v. Mackman* should not be extended to require a litigant to proceed by way of judicial review in circumstances where his claim for damages for negligence might in consequence be adversely affected. I can for my part see no reason why the same consideration should not apply in respect of any private law right which a litigant seeks to invoke, whether by way of action or by way of defence. For my part, I find it difficult to conceive of a case where a citizen's invocation of the ordinary procedure of the courts in order to enforce his private law rights, or his reliance on his private law rights by way of defence in an action brought against him, could, as such, amount to an abuse of the process of the court'."

[57] With respect, this approach makes practical sense. If the plaintiffs were to seek judicial review of the regulatory approval for a transaction that occurred six years ago, and which could not possibly be undone at this time, the application for judicial review would necessarily have to fail on that basis alone. It would be said that the only practical remedy available in such circumstances is a claim for damages. That, of course, is precisely what the plaintiffs seek to pursue here.

[58] In the end result, therefore, I am unable to find that a trial is unnecessary to deal with these very serious and complex issues. The motion under rule 21.01(3) to dismiss or stay the action must therefore be dismissed.

**The certification motion**

[59] In order to have an action certified as a class proceeding, the plaintiff must satisfy the requirements of section 5(1) of the *Class Proceedings Act, 1992* which requires that (a) the pleadings disclose a cause of action; (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiffs; (c) the claims of the class members raise common issues; (d) the class proceeding would be the preferable procedure for the resolution of the common issues; and (e) the representative plaintiffs (i) would fairly and adequately represent the interests of the class, (ii) have 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) do not have, on the common issues for the class, an interest in conflict with the interests of the other class members. While the defendant only disputes the preferable procedure requirement (as well as raising an issue about one of the proposed representative plaintiffs), for the sake of completeness I will deal with each of the requirements.

[60] The statement of claim clearly sets out properly pleaded causes of action in negligence and in breach of fiduciary duty. There is a clearly identifiable class, namely:

“The 8,048 persons resident in Ontario, Barbados and elsewhere who owned one of the participating life insurance policies and annuity contracts issued or assumed by Manulife in respect of policyholders in Barbados which were in force on December 31, 1994, which Manulife transferred to LOB by the May 30, 1996 Agreement.”

Indeed, in this case, not only is the exact number of the members of the class known but so are the identities of each and every class member. The parties have agreed on the common issues. They are attached as Appendix “A” to these reasons.

[61] In terms of preferable procedure, the main issue raised by the defendant under this requirement is the same as it raises on the Rule 21 motion. Given my disposition of that motion, the bulk of the defendant’s challenge on this requirement falls with it. In any event, it is clear to

me that a class proceeding is the preferable procedure for determining the common issues in this case. This action satisfies all three of the recognized advantages of class actions. First, judicial economy will be achieved through a determination of the common issues. In fact, the determination of the common issues may well involve a determination of the action as a whole. Negative answers to the common issues would result in the dismissal of the plaintiffs' claims. At the same time, positive answers to the common issues would leave nothing to be determined other than the exact damages to which each class member was entitled. Even the question of damages may allow of a simple answer through the application of a formula. But if it does not, that fact is not, in and of itself, a reason to deny certification – see section 6.1 of the Act.

[62] Second, I am satisfied that the denial of certification would carry with it a denial of access to justice. It is estimated by the plaintiff that the prosecution of these claims through a class trial will cost in the order of \$2 million. This estimate is not challenged by the defendant. It is apparent from the litigation plan that most, if not all, of these costs would have to be incurred regardless of whether the issues were being determined on a class wide basis or on an individual basis. At the same time, each member of the class stands to recover damages in the order of \$15,000. No sensible plaintiff, irrespective of the validity of his or her claim, would choose to invest \$2 million in order to recover \$15,000. Further, there is no other concurrent avenue for the members of the proposed class to avail themselves in order to obtain relief. To deny certification, therefore, is tantamount to denying relief – assuming relief is due to these individuals.

[63] Third, there is an element of behaviour modification which may be achieved through a class action. This proceeding raises issues of corporate conduct and the obligations that a corporation owes to its owners or shareholders to which, for the purposes of this factor, I am prepared to equate policyholders. The action raises an issue as to whether the defendant actively misled a regulator. Regardless of that determination, the action also raises issues as to the degree, if any, to which a corporation has a duty to protect individuals who have a financial interest in the corporation regarding future plans of the corporation. As part of this overall consideration, issues are raised as to whether a duty of care and/or a fiduciary duty is owed by the corporation and, if so, to what extent.

[64] I am satisfied, therefore, that a class proceeding is the preferable procedure for the resolution of the common issues.

[65] Finally, the defendant challenges the appropriateness of Wismar Greaves being a representative plaintiff. In particular, the defendant asserts that Mr. Greaves is not an appropriate representative plaintiff because, as stated at para. 81 of the defendant's factum, "he has shown himself to be less than candid in his dealings with this Court". In support of this contention, the defendant asserts that Mr. Greaves failed to disclose to the Court a number of key material facts including his direct involvement, while the Barbados Supervisor of Insurance, in Manulife's attempts to sell the Barbados block in the early 1990s; his actions first as Supervisor, and later as the owner of three Manulife policies, in specifically raising the issue of compensation for loss of rights as a policyholder in a mutual company; his view that the Transfer of the policies to LOB would result in the Manulife policyholders losing their rights as mutual policyholders; his failure to answer questions regarding the conflict of interest he had as Supervisor of Insurance in taking a position which would have directly benefited him financially, as well as other matters.

[66] I am not satisfied that the issues raised by the defendant are sufficient to disqualify Mr. Greaves as a representative plaintiff. In terms of facts not disclosed, I am cognizant of the reality that the contents of affidavits are principally the work product of the lawyers. While that cannot, of course, obviate the need for the deponent to ensure that the contents of the affidavit are true and accurate, it does make it difficult to blame the deponent for failing to include some fact of which the lawyers are aware but which they may not view as relevant at the time that the affidavit is prepared. Indeed, the relevance of the fact may only become apparent after the opposing party's affidavits are filed. Another reality is that the lawyers may disagree on the relevance of the fact. There is no evidence that Mr. Greaves tried to suppress any of these facts. To have done so would have been foolhardy since the majority of the omitted facts were matters of public record or were otherwise well known to the defendant. Lastly, insofar as Mr. Greaves was advised by his counsel not to answer a question on his cross-examination regarding any alleged conflict of interest, the defendant's remedy was to move to compel an answer to the question. I do not believe that a party, faced with an objection to a question, can choose not to dispute the objection but then attempt to use the failure to answer the question as a basis to


challenge the witness' veracity. This is not a situation where the witness constantly avoided answering questions, or where counsel continually objected to questions, such that the court could be asked to draw an adverse inference resulting from such conduct. I can see no legitimate basis, therefore, to disqualify Mr. Greaves from acting as a representative plaintiff.

[67] On the final requirement, there is a comprehensive litigation plan filed that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding. All of the requirements for certification under section 5(1)(a) of the Act are therefore met.

### Conclusion

[68] The defendant's motion is dismissed. An order is granted certifying this action as a class proceeding for the purpose of determining the common issues which are attached as Appendix "A". Issues arising from the granting of certification, such as the proper notice to be given, can be addressed before me on a date to be arranged.

[69] The plaintiffs are entitled to their costs of the motions. I am prepared to fix the costs upon receipt of the appropriate material that will permit me to do so. The appropriate material will include, among other things, a bill of costs or equivalent, time summaries or actual time entries, receipts for all disbursements claimed and, in the case of expert witnesses, their time spent, rates charged, etc. The plaintiffs' submissions are to be filed within 15 days of the release of these reasons and the defendant's response is to be delivered within 10 days thereafter. No reply submissions are to be filed without leave.



NORDHEIMER J.

Released: September 30, 2002

## **APPENDIX "A"**

### **COMMON ISSUES**

1. Did Manulife have the power to extinguish the Ownership Rights held by the members of the Class? Did it do so?
2. Does either the Certificate of Sanction dated November 26, 1996 issued by the Supervisor of Insurance in Barbados and/or the approval of the Minister of Finance, Canada dated December 20, 1996 extinguish the rights of the members of the Class to make any claim against Manulife, including the causes of action asserted in this action?
3. Were the members of the Class Eligible Policyholders and entitled to participate in Manulife's Plan of Demutualization?
4. Was Manulife negligent? If so, when, how and why?
5. Did Manulife owe a fiduciary duty to the members of the Class? If so, did it breach this fiduciary duty? If yes, when and how?
6. Is each member of the Class entitled to be paid damages? If so, should damages be in an amount equal to the amount that he, she or it would have been paid if he, she or it was considered by Manulife to be an Eligible Policyholder and participated in the Plan of Demutualization? If no, what is the measure of damages?
7. Is an award of punitive damages appropriate? If so, in what amount and why?
8. Is Manulife obligated to pay prejudgment interest? If so, at what annual rate? Is the rate to be compounded?
9. Should Manulife pay the costs of administering and distributing any monetary judgment? If so, what amount should Manulife pay?

Court File No. 01-CV-221418CP

SUPERIOR COURT OF JUSTICE

B E T W E E N:

RICHARD MANDEVILLE  
and others

Plaintiffs

- and -

THE MANUFACTURERS LIFE  
INSURANCE COMPANY

Defendant

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REASONS FOR DECISION

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NORDHEIMER J.

RELEASED: SEP 30 2002