

Get out while you can – franchisors navigating the consumer class actions maze

April 04 2017 | Contributed by [Lapointe Rosenstein Marchand Melançon LLP](#)

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Introduction

A recent decision of the Quebec Court of Appeal reversed a Quebec Superior Court ruling which had granted authorisation of a proposed class action by consumers against a franchisor for alleged misrepresentations made by its franchisee with respect to the purchase of an extended warranty for consumer goods.⁽¹⁾

In Quebec, and similarly in the rest of Canada, a court will authorise a class action if:

- the claims of the members of the class raise identical, similar or related issues of law or fact;
- the facts alleged appear to justify the conclusions sought;
- the composition of the class makes it difficult or impractical to take part in judicial proceedings on behalf of others or for the consolidation of proceedings; and
- the class member appointed as the representative plaintiff is in a position to represent all class members properly.⁽²⁾

Further, when assessing whether a class action meets the foregoing criteria at the authorisation stage, courts will assume the allegations of the petitioner to be true in order to focus on the procedural principles, reserving the analysis of substantial issues for trial.

On September 9 2016 the Quebec Superior Court granted authorisation of a proposed class action and found that a representative plaintiff had standing to bring a class action against a franchisor, Corbeil Électrique Inc, despite having purchased an extended warranty from Corbeil's franchisee, Gestion Éric Dubreuil Inc, and having no contractual relationship with Corbeil.

Fortunately for franchisors, this decision was later reversed on appeal. Nevertheless, it highlights the difficulty for franchisors to extricate themselves from class action claims by consumers that are customers of the franchisees, given the court's reluctance to rule on any substantive issues at the authorisation stage of these class action proceedings, preferring to leave to the trial judge the determination of issues such as the legal relationship between the parties.

Facts

In January 2012 the plaintiff purchased a General Electric-branded refrigerator, together with an extended warranty that added 50 months to the manufacturer's one-year warranty, at one of Corbeil's franchised retail locations. The plaintiff alleged that, at the time of sale, the salesperson at the Corbeil franchised location made certain misrepresentations to coerce the plaintiff into purchasing the extended warranty, including that the plaintiff would have to assume all costs for any defect with the refrigerator if such problems were to arise after the expiry of the manufacturer's

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warranty and that the only way for him to benefit from a warranty beyond that of the manufacturer was to purchase the extended warranty from the franchisee. Consequently, the plaintiff sought authorisation to institute a class action against Corbeil for damages suffered due to the misrepresentations made by the franchisee's employee, based on which the plaintiff purchased an extended warranty.

While Corbeil submitted that the plaintiff did not have standing to bring a class action given the lack of a legal relationship between the plaintiff and Corbeil, the plaintiff's claim stated that he believed that he was in fact dealing with Corbeil at the time of purchase and not with an independent franchisee. The plaintiff further claimed that he chose to purchase the refrigerator from that location because it was part of the Corbeil chain of stores and was listed on Corbeil's website as one of its locations. Further, the information available on Corbeil's website concerning post-sale support was consistent with the general representations made by the franchisee's employee with respect to the coverage of the extended warranty, leading to further confusion. The court acknowledged the fact that Corbeil's trade name, trademarks and logos appeared on the franchisee's warranty, on the sales receipt issued by the franchisee, on the Corbeil website and in its retail establishments.

Decision

In an attempt to determine whether a relationship existed between Corbeil and the plaintiffs, the trial court considered a similar case wherein Corbeil was faced with a proposed class action claim from a consumer who had purchased a product from one of Corbeil's franchisees.⁽³⁾ In this earlier case, the court noted that the indication "represented by the franchisee", which appeared on the consumer's sales receipt under the Corbeil logo, gave rise to doubts as to whether an agency relationship existed between Corbeil and its franchisee. Given the uncertainty, the judge in that case determined that it was better to leave the question of the nature of the relationship between Corbeil and its franchisee to the judge on the merits, as it was premature to make such determinations at the authorisation stage of class action proceedings.

Conversely, in the case at hand, the plaintiff's sales receipt did not suggest in any manner that the franchisee may have been acting as a representative of its franchisor. The court also considered other elements which could possibly lead to confusion as to whether the consumer was dealing with Corbeil or its franchisee. Among these were the fact that the franchisee's store was listed on the Corbeil website as one of the Corbeil retail locations and that the court was unable to distinguish the extended warranties which Corbeil offered directly to consumers from those offered by its franchisees.

In addition, the court considered the *Blondin* case⁽⁴⁾ in which, in nearly identical circumstances, the court had refused to grant consumers authorisation to bring a class action against a franchisor on account of the fact that they had purchased extended warranties from the third-party franchisee that were not required to be offered by the franchisor and were presented clearly as being the franchisee's own warranties. However, the case was distinguished based on this plaintiff's allegation that, although the warranty was in fact purchased from the franchisee, the plaintiff's intention was to purchase the appliance and associated warranty specifically from Corbeil for the sole reason that it was part of the trusted Corbeil chain.

In the end, the court ruled that the foregoing facts were sufficient at the authorisation stage to establish that the plaintiff had interest to bring a class action against Corbeil.

Appeal

This ruling was overturned on appeal, based on the fact that the lower court had made a determinative error in its analysis of *Blondin* by failing to recognise that the petitioner in *Blondin* had also made an allegation which was identical to that made by the plaintiff – that is, its intention to purchase the extended warranty directly from the franchisor. *Blondin* could therefore not be distinguished from the case at hand and, as a result, the Quebec Court of Appeal concluded that the lower court judgment was mistaken in authorising a class action against Corbeil, given the lack of elements supporting a legal relationship between the petitioner and Corbeil.

Comment

The facts of this case illustrate the difficulties often faced by franchisors in being targeted in and extricating themselves from class action proceedings brought by consumers at the authorisation stage. It is important that franchisors implement mechanisms which can act as barriers to the possibility of establishing a legal relationship with consumers purchasing consumer goods from their franchisees, in order to insulate themselves from potential misrepresentation and other claims based on the conduct of their franchisees at the time of sale.

In general, franchisors should ensure that they have no form of relationship with consumers, including as a distributor, importer, manufacturer or wholesaler of any products sold to consumers by franchisees. To the extent possible, franchisors should also refrain from restricting their franchisees to one source of supply for products or services sold to consumers and should ensure that consumers are fully informed that they are contracting with an independent and autonomous franchisee, rather than the franchisor or its affiliates.

Franchisors can also protect themselves by including indemnification provisions in their franchise agreements requiring franchisees to provide an indemnity with respect to any claims arising from their acts or omissions. As a practical matter, given the risks, and the possibility that such an indemnity may not be enforced in circumstances where the franchisee's actions were dictated by the franchisor or the franchise agreement, franchisors should consider subscribing to insurance policies covering claims by third parties, including those of consumers.

As was seen in this case, simply including franchisors as defendants at the authorisation stage of a class action does not preclude them from demonstrating that there is an insufficient legal relationship between them and the plaintiff/consumers when the case is ultimately tried on the merits. Nevertheless, franchisors should exercise caution in order to avoid the effort and expense of having to extricate themselves from having to defend a trial on the merits.

Franchisors should therefore always be mindful of the dangers of exercising an excessive degree of control over their franchisees, in particular as concerns the services and products sold by their franchisees to consumers. Not only may evidence of control encourage class actions by consumers against franchisors, it may also be conducive to vicarious liability and product liability claims. Franchisors must therefore be mindful of the manner in which they conduct their continuing relationship with franchisees and that excessive control could lead to increased exposure to liability.

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Endnotes

(1) *Ameublements Tanguay inc v Cantin*, 2017 QCCA 135; *Cantin v Ameublements Tanguay inc*, 2016 QCCS 4546.

(2) Article 575 of the Code of Civil Procedure, CQLR c C-25.01.

(3) *Fortier v Meubles Léon ltée*, 2014 QCCA 195.

(4) *Blondin v Distribution Stéréo Plus inc*, 2012 QCCS 105.

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