

Ruling on ABCP plan may not end court battles

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TORONTO - The Ontario Court of Appeal says the restructuring plan intended in part to unfreeze \$32 billion of asset-backed commercial paper investments should proceed as planned -- marking a major victory for individual investors.

In the decision released late Monday, the three judges unanimously found that an earlier decision made by an Ontario Superior Court judge two months ago should be upheld.

The decision by the Superior Court had prevented ordinary corporate and individual investors from suing brokerages, financial services companies, the banks and bond rating agencies for millions of dollars in losses they suffered from the collapse of the short-term investments last year.

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The restriction on lawsuits was one of the main reasons the players in the financial community, particularly the banks, and many investors, were able to agree on a broad restructuring plan to reimburse investors who lost money on the so-called ABCP investments.

"We ought not to interfere with his decision that the plan is fair and reasonable in all the circumstances," Justice Robert Blair wrote in the decision.

"Implementation of the plan, in his view, would work to the overall greater benefit of noteholders as a whole. I can find no error in principle... It was his call to make."

The appeal court decision marks a significant step for small investors who have been trying to get their money back from the failed investments since the market froze last year.

Canadian ABCP was a victim of last summer's crisis in U.S. subprime mortgages, amid worries that some of the paper was tied to dodgy U.S. home loans, in addition to bundles of higher-quality mortgages, car loans, credit card receivables and other assets.

Many corporate investors relied on bond rating agencies, who rated the debt as an acceptable risk, and poured millions of dollars into the short-term investments, hoping to get their money back quickly when they needed it.

However, the investments were frozen last summer because the financial community could not value the ABCP investments.

A rescue plan was hatched by the Pan-Canadian investors committee -- representing very large investment groups, including pension plans -- late last summer to clean up the problems, and was headed by Bay Street lawyer Purdy Crawford.

If the court had decided against the restructuring plan it would have wiped out months of preparations intended to move past the process.

However, the decision doesn't necessarily mean that all of the legal wrangling has been resolved because some investors who were unhappy with the plan have suggested they'll take their case to the Supreme Court of Canada.

Further appeals could potentially drag the process into the fall, which means that investors might not see their money until next year.

"We're very much in favour of our clients getting paid, and we hope that this process is moved along expeditiously to a planned implementation date, and after that date our clients are forthwith paid," said Henry Juroviesky, a lawyer representing some small investors.

He said that if more appeals are filed they could slow down the process by 60 to 70 days assuming that the courts expedited the case.

"This is an extremely important issue for the country and we think that if the Supreme Court of Canada does allow an appeal, the schedule of it will be fine tuned and customized to reflect the importance and urgency of this matter," he said.


Disappointed investors, which include companies like Air Transat (TSX:TRZ.B) and the Jean Coutu Group (TSX:PJC.A), will only be able to sue in certain circumstances of fraud.

It's unclear how many -- if any -- of the mid-sized investors plan to take their concerns to a higher court. Calls to Jean Coutu and Transat were not immediately returned.

"The trouble with this case is that there's extra judicial considerations with the small retail market... the people who need the money to continue on with their life," said lawyer Allan Sternberg of Ricketts Harris LLP, who appealed on behalf of Montreal businessman Hy Bloom.

Individual investors who had chunks of their life savings in ABCP have seen that investment teeter on the brink of either being tied up for several years or wiped out if the rescue plan failed and the notes were dumped at a discount by the major players.

Sternberg said he would consult with all of his clients before deciding whether to go to the Supreme Court.

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"Our committee is now in a position to put the final steps in place to complete the restructuring plan and noteholders can look forward to the issuance of new notes and the establishment of a liquid market for them," Crawford said in a release.

"Absent any further appeals, we expect the restructuring to close by Sept. 30."

Some mid-sized investors, a number of corporations and large individual investors with ABCP holdings of more than \$1 million, but less than hundreds of millions, launched the appeal. Many regard themselves as disadvantaged by the plan.

"Each of the appellants has large sums invested in ABCP - in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants -- slightly over \$1 billion -- represent only a small fraction" of the ABCP, the judges wrote.

A number of individuals and families have investments of more than \$1 million tied into the troubled assets, and aren't protected by the current restructuring plan.

Together they make up about \$65 million of the frozen ABCP, according to an estimate by said Diane Urquhart, a Toronto-area independent financial analyst.


"This decision denies their right to seek legal remedy," she said.

"So we have about 1,800 families extremely happy and some others that are very sad. But it's not over for them -- they're going to have to seek cash settlement on the basis of the banks having sold them a product that has damaged their life savings."

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