EXPECT THE BEST

Blaney McMurtry
BARRISTERS & SOLICITORS LLP

CLASS ACTIONS: HOW TO OPPOSE CERTIFICATION

Roderick S.W. Winsor

Blaney McMurtry LLP
416.593.3971
rwinsor@blaney.com

CLASS ACTIONS AGAINST GOVERNMENT

1. INTRODUCTION

Class actions have rapidly become common and important. In order to understand the reasons for this, one must consider the characteristics of class actions. This will show why such actions have become so attractive to plaintiffs and why they present extraordinary challenges for defendants.

This paper attempts to provide an overview with some illustrations from recent cases in Canada and then focus on how to respond to motions for certification.

2. Class Actions

The essence of a class action is that it permits a representative plaintiff to bring a claim on behalf of all members of the class without the direct involvement of such members.[1]

This peculiar structure potentially makes a class action a tremendously powerful mechanism for suing defendants. It also creates a whole series of procedural issues which would not otherwise exist, and this requires an innovative and flexible approach by the Courts to the management of these actions.

One of the more significant aspects of a class action is the extraordinary role played by the class counsel. In many class actions, members of the class, including the representative plaintiff, have little stake in the outcome. However, class counsel always have a substantial stake. This will be particularly true in the usual case where the counsel is acting pursuant to a contingent fee retainer agreement. While lawyers usually have considerable influence on their clients, in the case of a class action, the class counsel is in a very real sense one of the "clients". While it is possible for a class action to be funded by members of the class, for the balance of this paper we will assume that we

---

[1] Defendants may also seek certification, but for the purposes of this paper, the assumption will be that the action is initiated by a representative plaintiff.

are dealing with a more typical situation where the class counsel is acting under such a contingent fee agreement.

While there is no reason why a class action cannot be brought on behalf of claimants, each of whom has a substantial claim[2], there are compelling practical reasons why a typical class action involves claims by a substantial number of claimants with small claims, at least in relation to the costs involved in litigation.

If there is going to be enough money at the end of the day to justify the cost of the proceeding, certain conditions probably must be satisfied:

1. while the amount of any individual claim can be very small, the total amount of the claims by their class must be for a substantial amount. The minimum amount required will vary with the probability of success and the cost of the litigation. However, the minimum amount is usually in the millions of dollars.

2. there must be a representative plaintiff willing to assume the responsibility and potential exposure to costs.

3. there must be class counsel that believes the prospects of success are sufficient to justify the substantial investments such claims involve.

4. the proposed defendants must have sufficient ability to pay the anticipated substantial judgment.

While a few large claims may create a very substantial claim, typically the more significant factor is the size of the class. Current claims against the government involve classes in the tens of thousands. Even an average claim of $5,000.00 can generate a $250,000.000.00 claim for a 50,000 member class.

2.1 Criteria for Certification:

[2] In *Larcade* which is discussed below the total claims for the 30,000 members adds up to close to twenty billion dollars.

Class proceedings provide several benefits. Some of these are for the defendant but most are for the plaintiffs. At their best, they provide an effective disincentive for those who would abuse power to gain large advantage, knowing that it is unlikely that the victims will sue due to the small individual loss or vulnerability of the individual victim. In these circumstances class actions provide an effective disincentive by providing an effective remedy where the defendant breaches its obligations.

At their worst, class actions present an unfair burden on defendants who must face the large defense costs with no effective means of indemnity should the claim have no merit.

The Ontario *Class Proceedings Act, 1992*, is a procedural statute that requires the satisfaction of certain conditions before an action can be certified as a class proceeding. The conditions are as follows[3]:

> 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 disclose 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) the 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 the other class members.

---

[3] *Class Proceedings Act, 1992,* S.O. 1992, c.6, s.5.

There is extensive case law on what each of these five criteria mean.

(a) DO THE PLEADINGS DISCLOSE A CAUSE OF ACTION?

The test for establishing a cause of action on a certification motion is the same as that which must be met on a motion pursuant to Rule 21 of the ***Rules of Civil Procedure*** for the striking out of all or a portion of a pleading: the pleading will be permitted to stand so long as it is not "plain and obvious" that it discloses no reasonable cause of action[4].

The plaintiffs must demonstrate not only that the representative plaintiff has a cause of action against each named defendant but it is also necessary that every cause of action alleged against a particular defendant be demonstrated:

> "in my view it is also necessary that every cause of action alleged against a particular defendant be demonstrated. This is necessary for a number of reasons. First, a defendant should not be subject to any claim, particularly one asserted on behalf of a whole class of plaintiffs, which does not disclose a proper cause of action. Secondly, all of the claims asserted in the statement of claim impact on the question of whether there are common issues. I do not believe that a plaintiff can purport to set up common issues based on causes of action that are not properly pleaded. Thirdly, the nature of the claims advanced very much determines the proper members of the class. In other words, if certain claims are eliminated because they are based on non-existent causes of action, various individuals who might otherwise be members of the proposed class are also removed as prospective class members."[5]

(B) IS THERE AN IDENTIFIABLE CLASS?

---

[4] *Cloud et al v. Attorney General Of Canada et al.,* 2001 Carswell Ont. 3739, O.J. No. 4163 [2001] at paragraph 10.

[5] *Pearson v. Inco. Ltd. et al* [2002] O.J. No. 2764 (Ont. S.C.J.) at paragraph 84.

A clear definition of the class is critical because individuals entitled to notice, entitled to relief, and bound by the Judgment must be identified at the outset of litigation[6].

The class must be defined in objective terms which are clear and specific. Definitions should avoid criteria that are subjective (e.g. a plaintiff's state of mind) or that depend upon the merits (e.g. persons who are discriminated against). Such definitions frustrate efforts to identify class members, contravene the policy against considering the merits of a claim in deciding whether to certify a class, and create potential problems of manageability[7].

The *Act* requires that there be a minimum of two members in the class. However, the issues of class definition and class size have pertinence to other issues on certification, including whether a class proceeding will be the preferable procedure. Accordingly, a defendant is within his or her rights to insist upon an appropriate class definition that is supported by an evidentiary basis.[8]

In addition, the objective criteria by which members of the class can be identified should bear a rational relationship to the common issues asserted by all class members. The criteria should not depend on the outcome of the litigation.[9]

It is important that the definition of any class not be overly inclusive, that is, the class should not include persons who do not have a claim. It falls to the putative representative to show the class is defined sufficiently narrowly[10].

(C) DO THE CLAIMS OF THE CLASS MEMBERS RAISE COMMON ISSUES

---

[6] *Western Canadian Shopping Centres Inc. v. Dutton,* [2001] 2 S.C.R. 534 at paragraph 38; *Bywater v. Toronto Transit Commission*(1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.) at paragraph 10; *Pearson v. Inco Ltd. et al, supra,* at paragraph 98

[7] *Bywater v. Toronto Transit Commission,* supra; *Cloud et al v. Attorney General Of Canada et al.,* supra, at paragraph 59

[8] *Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301, at paragraph 26; *Hollick v. Toronto (City),* [2001] S.C.J. No. 67 at paragraph 25

9 Western Canadian Shopping Centres Inc. v. Dutton, supra, at paragraph 38,

[10] *Hollick v. Toronto (City), supra* at paragraphs 20 and 21; P*earson v. Inco Ltd. et al, supra* at paragraph 99,

The *Class Proceedings Act* defines "common issues" as:

(a) common, but not necessarily identical issues of fact, or

(b) common, but not necessarily identical issues of law that arise from common, but not necessarily identical facts.[11]

The plaintiff must satisfy the Court that there is a common issue or there are common issues of law or fact, the adjudication of which would move the litigation forward in a meaningful way. Without a common issue or common issues, there can be no certification.[12]

The Supreme Court of Canada has addressed the proper approach to commonality[13]:

> "...The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis a vis the opposing party. Nor is it necessary that common issues predominate over non common issues or that the resolution of the common issues would be determinative of each class member's claim, however, the class members' claims must share a **substantial common ingredient** to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance in relation to the individual issues". [*emphasis added*]

It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceedings less fair and less efficient.[14]

---

[11] *Class Proceedings Act, 1992,* S.O. 1992, c.6, s.1

[12] *Rosedale Motors Inc. v. Petro Canada Inc.* (1998), 42 O.R. (3d) 776 (Gen. Div.)) at page 785, *Sutherland v. Canadian Red Cross Society* (1994), 21 C.P.C. (3d) 137 (Gen. Div.) at paragraph 22

[13] *Western Canadian Shopping Centres Inc. v. Dutton, supra*, at paragraph 39

[14] *Rumley v. British Columbia,* [2001] 9 C.P.C. (5th) 1, at paragraph 29

It is also necessary that there exist a rational connection between the class as defined and the asserted common issues.[15]

In order to be considered a "common issue" for the purposes of the *Act*, the issue must settle an important element or dispose of a significant feature of the litigation.[16] A common factual core does not necessarily amount to a common issue. Courts may dismiss motions for certification in these circumstances.[17]

The question on a motion for certification is not simply whether there are common issues raised by the claims advanced. There will always be common issues raised by any common event. The issue is whether the resolution of the proposed common issues sufficiently advances the overall determination of liability so as to justify the certification of the action as a class proceeding. An important consideration is whether any individual issues that will remain for determination after the common issues are resolved are limited or whether what remains to be determined is sufficiently extensive that the determination of the common issues essentially marks the commencement as opposed to the completion of the inquiry.[18]

One common approach by defendants is to demonstrate the differences between class members and thus the absence of common issues. Plaintiffs try to respond by creating sub-classes which is recognized both in the Act and the cases. The Court of Appeal has recently dealt with a case where the members of the class had the potential of suffering a common loss, but not all members of the class would suffer a loss. Notwithstanding this the Court of Appeal reversed the decision of the lower courts and certified the claim[19]

---

[15] *Hollick v. Toronto (City), supra* at *paragraphs* 20 and 21, *Western Canadian Shopping Centres Inc .v. Dutton, supra*, at paragraph 28,

[16] *Rosedale Motors Inc. v. Petro Canada Inc., supra,* at page 785

[17] *Controltech Engineering Inc. v. Ontario Power Generation Inc. et al, [2000] 130 O.A.C. 367,* at paragraph 16

[18] *Abdool et al v. Anaheim Management Ltd. et al* (1995), 21 O.R. (3d) 453 (Div. Ct.), at page 475

[19] *Markson v. MBNA Canada Bank* (2007), Reversed 204 O.A.C. 94, [2005] O.J. No. 4625, 78 O.R. (3d) 38, 22 C.P.C. (6th) 221 (Ont. Div. Ct.); Affirmed 48 B.L.R. (3d) 129, 71 O.R. (3d) 741 (Ont. S.C.J.)

(D) IS THE CLASS PROCEEDING THE PREFERABLE PROCEDURE

In many cases this is the critical criterion. As a practical matter this allows for the fullest argument and gives defendants the best opportunity to make a compelling argument that a claim should not be certified. The nature of the test not only allows for more flexibility on the part of the Court, but allows the defendant to bring together all the other arguments and to refer to an evidentiary record.

It may be the most difficult argument to make and requires great care to ensure that the right evidence is before the court and that it is presented in the best way.

The Court must be satisfied that a class proceeding is the preferable procedure for the resolution of the common issues. The term "preferable" was meant to capture two ideas: first, that the class proceeding would be a fair, efficient and manageable method of advancing the claim, and second, that a class proceeding would be preferable in the sense of being preferable to other procedures.[20] Thus the defendant must not simply criticize the plaintiff's argument but present positive reasons why another procedure is preferable.

Particularly in the case of government defendants, a wide variety of alternative procedures may exist. Trial of an issue or judicial review in an individual case may well be preferable.

While Section 5(1)(d) of the *Act* makes it clear that preferability is to be determined only with respect to the resolution of the common issues and not the claim as a whole, it is nonetheless true that the issue of preferability must be considered in the context of the case as a whole. Looking at the common issues in their context involves a consideration of the degree to which the resolution of those common issues will advance the overall action compared to the individual issues that remain to be determined thereafter.[21]

In considering whether the determination of a common issue will sufficiently move the case forward, it is necessary to consider the nature and extent of the litigation that will remain to be dealt

---

[20] *Hollick v. Toronto (City), supra,* at paragraph 28,

[21] *Hollick v. Toronto (City),* supra, at paragraphs 28-30, *Pearson v. Inco et al,* supra, at paragraphs 115 and 116, *Controltech Engineering Inc. v. Ontario Hydro,* supra, at paragraph 26, *Rosedale Motors Inc. v. Petro Canada Inc,* supra, at page 789; *Bywater v. Toronto Transit Commission, supra,* at paragraphs 181 - 182,

with at the "individual issues" stage of the proceeding. If the resolution of the common issue does not significantly advance the litigation, a class proceeding will not be the preferable procedure.[22] A Court should be cautious when certifying actions which will inevitably break down into a series of individual trials.[23] Where the common issues are subsumed by the individual differences, certification is not appropriate.[24]

A defendant may be able to demonstrate that certification will result in an unduly complex and expensive proceeding. This will not help if there is no preferable procedure but may make an alternative relatively more attractive.

However, where the problems resulting from certification result from a failure of the defendant to maintain records which would have facilitated a class proceeding, this may not assist a defendant. In *Markson* the Ontario Court of Appeal reversed the lower courts and certified an action involving flat fees charged by banks on top of interest on cash advances which were argued to be illegal. The motions judge noted the difficulty that would be faced in assessing the loss given the absence of sufficient electronic records. The Court of Appeal noted the alternative approaches under the Act to the determination of the remedy[25].

JUDICIAL ECONOMY, ACCESS TO JUSTICE AND BEHAVIOUR MODIFICATION

The preferability inquiry is conducted by looking at the three principal advantages of class actions: judicial economy, access to justice and behaviour modification.[26] These considerations are very

---

[22] *Tiemstra v. Insurance Corp. of British Columbia* (1997), 12 C.P.C. (4th) 197 (B.C.C.A.) at paragraphs 15-17.

Carom v. Bre-X Minerals Ltd. [1999] 30 C.P.C. (4th), at paragraphs 259, 272 and 275 (S.C.J.)

[23] *Abdool v. Anaheim Management Ltd., supra* , at pages 474 - 475,

[24] *Moutheros v. DeVry Canada Inc.* (1998), 22 C.P.C. (4th) 198 at paragraph 31

[25] *Markson v. MBNA Canada Bank* (2007), Reversed 204 O.A.C. 94, [2005] O.J. No. 4625, 78 O.R. (3d) 38, 22 C.P.C. (6th) 221 (Ont. Div. Ct.); Affirmed 48 B.L.R. (3d) 129, 71 O.R. (3d) 741 (Ont. S.C.J.). Also see *Smith v. National Money Mart Co.*, [2007] O.J. No. 46 (S.C.J.).[

[26] *Hollick v. Toronto (City), supra*, at paragraph 27, Tab 5 of the Book of Authorities
Tab 16 of the Book of Authorities

Abdool v. Anaheim Management Ltd., supra, at page 472, Tab 24 of the Book of Authorities

important and have to be addressed with care. Different factors may arise depending on the type of claim and the nature of the parties. In the case of government it should be possible to argue in most cases that to the extent there are any common issues there is no basis to conclude that the Crown will not honour the finding of the Court for the benefit of all, whether or not they are part of the proposed classes and whether the action proceeds as a class proceeding or not.

It may be possible to argue that certification of the action as a class proceeding is not the preferable procedure for reasons such as:

(c) Any common issues which survive consideration of whether the claim discloses a cause of action, will be subsumed by the multiplicity of individual issues both with respect to liability and damages, which will require a determination on a claim by claim basis;

(d) Determination of issues raised by the other criteria raise individual issues which overwhelm the common issue. For example, whether a person is a member of the class may require extensive individual assessment;

(e) The relationship between each member of the class and defendant may be quite different;

(f) Limitation periods may be different for different class members.

(g) Where there are vague and wide ranging allegations, a class proceeding puts the defendant in an unfair position in trying to defend the action as a class proceeding and makes management of a class proceeding very difficult for the Court and the parties.

Government is the prime target for class proceedings and its presence raised particular problems.

(h) The consequences of the common government activity may have very different individual consequences, not just different damages;

(i) As government often acts through unrelated agencies, the plaintiffs may have dealt with different agencies and on a different basis.

(j) In contrast, defending a claim with specific allegations relating to specific people will enable the defendant to respond in a specific way and at reasonable cost both in terms of legal expenses but more importantly in terms of the limited resources of the

government. This is in the best interests of society in general. This will also assist the Court in determining any issues in a focused, fair and expeditious manner.

(k) Defending a class action of the type proposed by the plaintiffs will force the government to dedicate a large portion of its resources to defend claims which arise out of a very large number of differing circumstances. It may well turn out that many of these differing circumstances are hypothetical.

(l) If such a class action proceeds the scope of production by the defendant and examination for discovery of the defendant will be oppressive, yet

(m) The ability of the Crown to obtain examination for discovery of the plaintiffs will be limited and ineffective to demonstrate that many of the included claimants have no claim even if the bare pleading has merit.

The preferability analysis is in large measure a practical exercise: does it make sense that the action be certified. In some cases defendants try to emphasize the practical problems that will result from certification. In *Markson v. MBNA Canada* Bank (May 2,2007) the defendant raised the extraordinary costs that certification would involve, both in absolute numbers and in relation to the amount of the claims. While successful at the lower levels, the defendant failed to resist certification in the Court of Appeal which noted the flexible alternative approaches to class proceedings under the Act which allow the Court to cut through the kinds of practical problems which would result from regular procedural and evidentiary requirements.

(E) SUITABILITY OF THE REPRESENTATIVE PLAINTIFF

There are three separate considerations in Section 5(1)(e) of the *Act* under this final requirement for certification. It must be demonstrated that the representative plaintiff:[27]

1. would fairly and adequately represent the interests of the class

2. 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

---

[27] Section 5(1)(e) of the *Class Proceedings Act*

3. does not have, on the common issues for the class, an interest in conflict with the Interests of the other class members.

Would the Representative Plaintiffs Fairly and Adequately Represent the Interests of the Class?

It is unlikely that one can show this and little advantage in doing so assuming the class can find a new representative plaintiff. However, in a given case it may be worth pursuing, particularly if there is some conflict as is discussed below.

Have the Plaintiffs 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?

A detailed plan is of critical importance in complex litigation. A litigation plan which is long on generalities and short on specifics is inadequate. A workable plan must address issues such as the experts that will be used, what investigations have been or are to be undertaken, interviews to be conducted, how documents are to be managed, and, most importantly, how the myriad of individual issues that will remain, after the common issues are resolved, are going to be addressed.[28]

The litigation plan should make provision for the following:

(n) the method by which individuals would submit claims;
(o) the manner in which such claims would be processed;
(p) how documents are to be managed;
(q) the use of experts;
(r) describe the individual issues and provide a workable and manageable plan for addressing the numerous individual issues;
(s) how to deal with limitation period issues which may arise;

---

[28] *Pearson v. Inco et al., supra,* at paragraph 144

(t) the just or appropriate treatment of any unclaimed amounts in relation to that process.

The practice is both flexible and forgiving and plans can be modified as the action progresses. This can be very frustrating for defendants who are forced to respond to a moving target. However there is authority that it is not an answer to concerns raised in respect of a deficient litigation plan and/or the potential for conflict within the class that such matters can be dealt with after certification. The plaintiff bears the obligation of satisfying the court that the requirements for certification are met. It is not satisfactory for the plaintiff to assert that any failings that may be identified in the case for certification can be dealt with at some later point.[29]

Do the Plaintiffs have, on the Common Issues for the Class, an Interest in Conflict with the Interests of Any Other Class Members?

Conflicts can arise in a variety of circumstances. It may be that a representative plaintiff is in a sufficiently different position from some other members of the class that allocating funds to one will take money from the other.

Section 6 of the *Class Proceedings Act*:

Section 6 of the *Class Proceedings Act*[30] specifically limits the Court from refusing to certify solely on any of the following grounds:

(u) The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.

(v) The relief claimed relates to separate contracts involving different class members.

(w) Different remedies are sought for different class members.

(x) The number of class members or the identity of each class member is not known.

---

[29] *Pearson v. Inco et al, supra,* at paragraph 148,

[30] *Class Proceedings Act, 1992,* s.6,

(y) The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

While the Court shall not refuse certification solely if any one of the five delineated grounds in Section 6, this does not mean that they are not valid considerations. Thus it may be important to consider these grounds particularly if several of them exist in a given case.[31]

4.1 Suggested Approach to Oppose Certification

The first decision is whether to attack the claim. The options are:

1. seek particulars;
2. moving to strike portions of the claim;
3. moving to dismiss the action on the ground that the Claim fails to disclose a cause of action;
4. moving for judgment;
5. Waiting for the certification motion and raise the same or similar arguments within the context of the certification motion.

There is no simple answer to these questions and the answer will vary from case to case. However, while there are advantages in moving early, such as saving costs and having a more focused motion limited to fewer issues, in many cases a defendant may be better off fighting the claim on legal grounds in the context of the certification motion. The reasons for are complex but in particular one must remember that a Rule 21 motion is generally decided on the basis of the Claim alone. By forcing the defendant to accept the truth of the plaintiff's allegation for this motion, and that the onus faced by defendants on such motions is so high, defendants are often at a serious disadvantage.

In contrast on the certification motion the same approach is taken on the argument on the first criterion, but the defendant may be assisted by the evidence which is available on a certification motion, including the benefit of a cross-examination of the plaintiff's deponent. Such deponents often address the merits which may make substantial helpful evidence available.

Attacking the claim in stages also tends to increase costs and result in delay.

---

[31] *Abdool v. Anaheim Management, supra,* at page 473

If the defense is *very* strong, then a Rule 20 motion for judgement may be attractive. If successful it is probably the fastest and cheapest way of disposing of a claim.

Seeking particulars usually serves to give the plaintiff an opportunity to improve the Claim. However, in some cases the pleading is so bad that you may have to move so as to have sufficient clarity to make a compelling argument on certification or a motion to dismiss.

Even if one cannot get an action dismissed, it may be wise to attack the claim to try and narrow the claim. This will not only assist the defense but may have substantial benefits in the certification motion. A narrower claim may reduce the issues, the remedies and perhaps most important the size of the class. The last is not necessarily in the best interests of the defendant but usually will reduce the costs and the exposure.

5.1 Are there Particular Problems for Government in Class Actions

While class actions are a serious challenge for any defendant, they present particular problems for governments.

First, the large size and complexity of government means that in any one potential claim, a large number of ministries, departments and individuals may be involved. This wide-ranging involvement creates particular challenges at each stage of the litigation. Production can be very difficult and extremely expensive. Marshalling the evidence is difficult. Examinations for discovery tend to be very long because of the wide-ranging involvement of different parts of government.

One of the unfortunate consequences of class proceedings for government is that it results in a large diversion of government resources to the defence of the action. Thus, we see the irony of a claim by the beneficiaries of government programs requiring extensive responses by the very persons who would otherwise be providing services to members of the class.

Second, in many of the class actions, the government will have available to it information necessary to identify and contact members of the proposed class. Thus, it is likely that in effect the government will be funding a major component of the plaintiff's costs of proceeding with the action by bearing the costs of identifying and giving notice to members of the class.

Governments also face a challenge resulting from the tendency of individuals to be able to absorb the particular but ignore the general. Thus, when faced with a particular plaintiff, it is very easy to argue persuasively that that individual should obtain relief. While the effect of this may be diluted in class proceedings, because of the large number of claimants, the effect remains strong in those cases where the plaintiffs form a sympathetic group.

On the other hand, government faces the reality that in any given case members of the public tend to see the government as a deep pocket and responsible. People fail to make the connection between the effect of a decision in favour of a given group of claimants and the resulting consequences on the government which must deal with all potential claimants competing for limited resources.

4.2 Case Study: How can Governments Respond to the Threat/Reality of Class Actions

The Courts have recognized the unique position of government and have struggled to find a workable approach to balancing the competing interests. While on the surface several of the major decisions appear to be straight-forward, they in fact represent an ongoing dialogue between the competing concerns. While it oversimplifies the issue, the courts recognize:

1. government is unique;

2. the fact that it has a power to act does not mean that it has a duty to act;

3. that the judiciary does not have the right to overrule or judge the legislature[32];

Balanced against this are considerations such as:

1. there is now a broad consensus that when government acts in the same way as other persons, it should be held accountable in the same manner;

---

[32] The Charter aside.

2. the legitimate reasons to defer to government decisions should not be seen to justify actions undertaken for improper motive.

We have seen in a series of cases, largely from the Supreme Court of Canada, an attempt to articulate a test for determining the liability of government which balances these and other competing concerns. Such statements have been ambitious in their effort to synthesize a complex analysis into a simple test. There have been significant difficulties in the application of these cases.

However, more recently we have a consensus test which is workable in most situations. It does not fully reflect the development of the law in this area, and does not answer all questions which arise. However, it is far more sophisticated and rational than the analyses which simply look to what was described as the "policy/operational" test.

The essence of this test is to answer the first question in the negligence analysis, which is so often ignored in practice: Does the defendant owe a private law duty of care in law to the plaintiff answerable in damages?

The policy/operational test attempted to synthesize the competing concerns by assuming that there are certain decisions in government which are within the exclusive jurisdiction of the government, and therefore cannot give rise to a claim for damages in tort. These were described as policy decisions.

The analysis then went on to suggest that in implementing the policy decisions government made operational decisions and these were subject to court review and could support a claim for damages in negligence.

There were several serious problems with this approach. First, as a practical matter, the dividing line between policy and operational decisions is often unclear. It was not uncommon for judges to look at exactly the same decisions and come to diametrically opposed conclusions as to the proper characterization.

Second, the analysis presupposes that there are decisions which are in the exclusive jurisdiction of government and those which are not, based upon the characterization of the decision. Thus, a decision to shut down lighthouses could be seen as a policy decision because it was the type of

decision that would be made on the basis of political, economic or social considerations. Once the decision was characterized in this way, the courts concluded that no one could sue for damages suffered as a result.

One of the problems with this approach is that the same decision can be made for different reasons. While it may be perfectly rational to conclude that a government was immune from a claim for damages if it decided to spend the money on health care rather than lighthouses, it might not be rational to conclude that it should be immune if the lighthouse was closed on the basis that the decision-maker concluded that lighthouses did not save lives based upon a misunderstanding of the evidence.

This approach also failed to fully address the analysis which was undertaken in trying to answer these questions, at least historically. The starting point should be legislation. Crown liability arises out of legislation and as a simple proposition governments cannot be liable for a loss caused by valid legislation.

Returning to the environmental example, the *Environmental Protection Act* gives the government the power to regulate polluters, but if it chooses not to do so such failure should not give rise to a claim for damages in negligence if such decision was made in accordance with the legislation.

Given the complexity of the issues, the wide powers of government, the large number of persons affected by government actions and the deep pockets of government, it is easy to see why governments are such an attractive target for class actions,

In the more recent cases the Courts have applied what is referred to as the *Cooper/ Anns Test*[33]. This can be summarized as follows:

To determine whether a duty of care exists, the Court is to proceed as follows:

> In the first stage two questions arise:

---

[33] *Cooper v. Hobart,* [2001] S.C.J. No. 76 (S.C.C.) at paragraph 30.

(i) Was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and

(ii) If so are there reasons notwithstanding this that tort liability should not be recognized here? The proximity analysis involved in the first stage focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word.

If foreseeability and proximity are established then a prima facie duty of care arises.

At the second stage, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care.

In the first stage sufficiently proximate relationships are identified through the use of categories. This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances. The starting point for the proximity analysis is to determine whether a duty has been determined to exist in the category of claim being asserted. If not, the Court may look to analogous categories of cases in which a duty of care has been recognized.

If no such categories exist, the question then becomes whether a new duty of care should be recognized in the circumstances. Foreseeability is not enough. The plaintiff must show that the defendant was in a close and direct relationship to him or her such that it is just to impose a duty of care in the circumstances. The plaintiff must point to factors arising from the circumstances of the relationship that impose a duty. In addition to showing foreseeability, the plaintiffs must also show proximity--that the Ministry was in a close and direct relationship to them, making it just to impose a duty of care upon the Ministry toward the plaintiffs.

Subject to the specific exceptions found in the previously recognized categories, the relationship between the government and the governed is not one of individual proximity. It has been recognized that Government actions are likely to cause harm to some members of the public. That is why government is not an easy matter. The government owes a duty to the public but it is a duty

owed to the public collectively and not individually. In general, government is accountable through the political process, not the Courts[34].

4.3 How have Courts Responded to Class Proceedings against Government

There is a substantial variety in the claims against government. For example, a claim may be brought by a number of investors who have lost money. Claims may result from bodily injury or property damage suffered by a number of people as a result of government operations. Claims may be brought as a result of illness suffered by members of the public where the government did not cause the illness but is argued to have failed to respond properly to the threat. Claims can be brought for the management of social welfare programs which are argued to have failed to provide relief to members of the class because of the manner in which the government dealt with such programs.

In general, claimants in these proceedings have been more successful at the trial level than at the appellate level. Several key actions are still pending and any comments should be qualified. However, review of some of these cases serve to illustrate many of the points set out above.

Early attempts included a claim brought by Plaintiffs seeking the extension of government funding for government benefits. Such claims can be advanced on a number of different bases. The easiest is if the underlying legislation requires the government to fund, in which case the government should be required to provide the funding. Examples include efforts to get funding under the Ontario Education Act[35] and on the basis of the Charter. However, this does not, at least in itself, give rise to a right to damages [36].

---

[34] *A.O. Farms Inc. v. Canada,* [2000] F.C.J. No. 1771 at paragraph 11; *Just v. British Columbia,* [1989] 2 S.C.R. 1228 at paragraph 45

[35] *Wynberg v. Ontario* [2006] O.J. No. 2732 (C.A.).

[36] *Auton (Guardian ad litem of) v. British Columbia (Attorney General)* : [2004] 3 S.C.R. 657.

Another approach is to attack legislation which limits benefits. The most notable example is *Hislop v. Canada*,[37] the same sex spouse Canada Pension Plan class action, the class sought payment of survivor's pensions to same sex partners from the Canada Pension Plan. The effect of the class action is to attack federal legislation which sought to limit such benefits.

Occurrences of illness caused by West Nile Virus and SARS gave rise to proceedings in Ontario.

In the SARS case, *Williams v. Canada*[38], the plaintiff sued the federal Crown, the Ontario Crown and the City of Toronto. The defendants sought to have the action dismissed on a Rule 21 motion at the outset. The judge dismissed the action against the federal Crown concluding that the statute duties relied upon by the plaintiff did not give rise to a private law duty of care. The action against the City of Toronto was dismissed on the grounds that there was no statutory basis for the duties alleged as against the City and the claim did not plead sufficient facts to support a cause of action.

A distinction was drawn between different allegations made against the province. The allegations were struck to the extent that the allegations of "operational" and "systemic" negligence assumed the existence of a private law duty to make policy decisions. However, allegations relating to specific decisions made by the Crown dealing with health care precautions to be taken at public hospitals in Toronto were not struck and the action is pending. It should be noted that the claim is expressly limited to the second round of SARS infections, in essence arguing that it resulted from a negligent response to the known threat resulting from the first series of SARS cases. In other words, by deliberately making a decision to let their guard down prematurely, the government caused a further spread of the disease.

This case may raise the difficult issue of whether government is liable in circumstances where it has no duty to act, decides to do so, but without complete success. Typically plaintiffs argue this amounts to operational negligence and therefore they are entitled to damages that result, which they interpret to mean the damages that would have been avoided had the government carried out its

---

[37] *Hislop v. Canada (Attorney General)* [2005] O.J. No. 2575 (C.A.), Supreme Court has reserved decision on appeal.

[38] *Williams v. Canada* (2005), 76 O.R. (3d) 763

discretionary intervention without negligence and without failing to complete. However this characterization obscures the full analysis and ignores some difficult issues.

It is one thing the say that a government should be liable if it intervenes when it has no duty to do so, and makes any person's position worse than if it had not intervened. But if the government has no duty to intervene at all, does so and helps to some extent, why should it be liable for not having done better?

Following the spread of the West Nile virus in Ontario in summer 2002, a group of actions were issued. Interestingly, the plaintiffs' counsel, the same counsel involved in the SARS and spousal survivor benefits cases, have not pursued certification. However, the claims have proceeded in a similar manner and the question whether the claim disclosed a cause of action was argued in the Court of Appeal together with the Special Needs class action, which is discussed below.

However, the government's response was similar and they moved to have the actions dismissed on the ground that the Claims did not disclose a cause of action. This motion was dismissed both by the motions judge and the Divisional Court. However, the Court of Appeal allowed the appeal and dismissed the actions concluding that they did not disclose a cause of action. The Court of Appeal stated:

> "The central issue is whether, on the facts that have been pleaded, Ontario owed Eliopoulous a private law duty of care to provide the necessary legal basis for negligence action for damages."

The court reviewed the various provisions of the statute and concluded:

> "In my view, these important and extensive statutory provisions create discretionary powers that are not capable of creating a private law duty. The discretionary powers created by the HPPA are to be exercised, if the Minister chooses to exercise them, in the general public interest. They are not aimed at or geared to the protection of the private interest of specific individuals. From the statement of purpose in Section 2 and by implication from the overall scheme of the HPPA, no doubt there is a general public law of duty that requires the Minister to endeavour to promote, safeguard and protect the health of Ontario residents and prevent the spread of infectious diseases. **However, a general public law of duty of that nature does not give rise to a private law of duty sufficient to ground an action in negligence**." (emphasis added)

The court referred to a hospital funding case, *Mitchell v. Ontario* (2004), 71, O.R. (3d) 571 (Div. Ct.) in which Swinton, J. stated:

> "The legislated framework gives the Minister the power to act in the public interest, and in exercising her powers, she must balance a myriad of competing interests. The terms of the legislation make it clear that her duty is to the public as a whole, not to a particular individual."

As noted above, one of the problems with the earlier cases which focused so heavily on a policy/operational analysis, was that it led to plaintiffs arguing that an initial decision was policy and everything else was implementation of that policy, and therefore operational. This often led to an unsatisfactory process of categorization which did little to further a meaningful analysis. In the *West Nile* case, the Court of Appeal noted:

> "The respondents submitted that even if the HPPA by itself imposed no private law duty, by issuing the Plan, Ontario made a policy decision to act and therefore triggered a private law duty to use case to implement the Plan at the operational level (para. 21). Quoting from one of the earlier cases, *Swinamer v. Nova Scotia*, [1994] 1 S.C.R. 445 at 450, which stated:
>
> > "There is no private law duty on the public authority until it makes a policy decision to do something. Then, and only then, does a duty arise at the operational level to use due care and carry out the policy. On this view, policy decision is not an exception to a general duty, but a pre-condition to the finding of a duty at the operational level."

The Court of Appeal rejected the plaintiff's submission along these lines for three reasons:

1. the judge did not read the Plan as a policy decision of a kind that would engage Ontario at the operational level;

2. to the extent that the Plan was a policy decision, it gave the operational duties to local authorities;

3. while the claim tried to described the complaints as being a fair to execute operational duties in a non-negligent manner, the substance of the claim was that Ontario failed to adopted adequate policies to prevent West Nile virus, not as unfair to implement the Plan.

It is interesting to note that Justice Sharp distinguished the case from the earlier well-known case of *Doe v. Metropolitan Toronto* (1998), 39 O.R. (3d) 487, in which the police were found liable for using the plaintiff as bait to try and catch a serial rapist. *Doe* was decided by Justice McFarland when she was in the Trial Division. She was a member of a Court of Appeal panel in both El*iopoulos* and *Larcade*.

While he rejected the assertion that the plaintiffs had demonstrated a duty of care under the first stage of the Cooper/Annes test, he then went on to conduct a second stage analysis and concluded there were residual policy concerns which should negate the imposition of a duty. In addressing this second stage, Justice Sharp stated:

> "The risk of contracting disease spread by mosquitoes is one to which all who live in Ontario are exposed. It is not a risk that is created by the provincial government or that arises from the use of a public facility, such as a highway, provided by Ontario. In deciding how to protect its citizens from risks of this kind that do not arise from Ontario's actions and that pose an undifferentiated threat to the entire public, **Ontario must weigh and balance the many competing claims for the scarce resources** available to promote and protect the health of its citizens." (emphasis added)

The final decision in this series is that in *Larcade v. Ontario*[39], also known as the Special Needs class action.

Ontario provides a variety of programs for the benefit of special needs children and their families. These programs provide a variety of relief including funding under different programs. The Act also provides that the Minister may enter into a "special needs agreement". The Act provides:

> 30. (1) A person who is unable to provide the services required by a child in his or her custody because the child has a special need, and a society having jurisdiction where the person resides, may with a Director's written approval make a written agreement for,
>
> (a) the society's provision of services to meet the child's special need; and
>
> (b) the society's supervision or care and custody of the child.
>
> *Special needs agreement with Minister*

---

[39] *A.L. v. Ontario (Minister of Community and Social Services)* [2006] O.J. No. 4673

> (2) A person who is unable to provide the services required by a child in his or her custody because the child has a special need, and the Minister, may make a written agreement for,
>
> (a) the Minister's provision of services to meet the child's special need; and
>
> (b) the Minister's supervision or care and custody of the child.
>
> *Term to be specified*
>
> (3) A special needs agreement shall only be made for a specific period, but may be extended, with a Director's written approval in the case of an agreement with a society, for a further period or periods.
>
> s. 29 (7-10) apply
>
> (4) Where a special needs agreement provides for a child's residential placement, subsections 29 (7), (8), (9) and (10) (authority to consent to medical treatment, contents of agreement, variation) apply with necessary modifications, and subsection 29 (4) (duty of society) applies to the society or the Minister, as the case may be, with necessary modifications. R.S.O. 1990, c. C.11, s. 30.

The facts are quite complicated. However, the plaintiffs allege that as a result of a decision made by the government not to enter into any further special needs agreements, families with special needs children were denied access to the one program which provided needed care if other funding was insufficient. The plaintiffs allege that the net effect of this is twofold: First the families did not have sufficient funding to care for their children. Second, because the government provided priority to children in need of protection who were cared for by Children's Aid Societies, this created a situation where parents were forced to give up custody of their children to the CAS if they wanted the necessary funding would be made available for the child's care.

In the certification motion before Mr. Justice Cullity, the Crown argued that these allegations did not disclose a cause of action and that the proceeding should therefore not be certified. In any event certification was not the preferable procedure as the foundation issue could easily be determined by the trial of this issue in a single case.

On the cause of action issue, it was argued that in essence the claim boiled down to one of the following complaints:

1. there was inadequate funding;

2. as between different members of the public, the funds were allocated on the basis that left families underfunded;

3. to the extent that parents were giving up custody, they were doing so in order to obtain the benefit of funding which would otherwise not be available to them. This resulted from the decision the government made to give priority to children in need of protection.

In short, the plaintiffs' complaints were with respect to inadequate funding and the decision made to give priority to children in need of protection. Thus, under the *Cooper/Annes* test, there was clearly no duty of care under either branch of the test.

The decision of Justice Cullity was appealed to the Divisional Court which unanimously rejected the Crown's submissions and certified the action. The reasons are lengthy, but the Court stated that the decisions in question were not ones of funding but with respect to how these decisions were implemented. The court also referred to the Crown's *parens patriae* jurisdiction which was seen to be an obligation to provide for the class members. Last, the court concluded that the action disclosed the tort of abuse of office.

The decision of the Court of Appeal allowing the appeal was written by Mr. Justice Sharpe. The Court concluded that there was no authority to support the *parens patriae* related claim, the elements of the tort of misfeasance in public office were not made out, and the *Cooper/Annes* test was not satisfied. More specifically, he stated:

> In this case, the only possible source of a duty of care is the statute. The *CFSA* confers upon the Minister certain powers to be exercised in the general public interest. Section 30 allows but does not require the Minister to enter special needs agreements.
>
> The determination of what services to fund and how to fund them is left to the Minister. When deciding whether or not to enter a s. 30 agreement, the Minister is required to act in the public interest and balance competing demands for scarce public resources: see *Wynberg v. Ontario* (2006) …
>
> The statute presents the respondents with hope that the Minister might enter into a special needs agreement but, in the face of the Minister's public duty to weigh other competing demands when deciding how to exercise his or her discretion, that hope does not amount to a legal duty of care that would ground an action for damages in negligence. Decisions by the Minister "require the exercise of legislatively delegated

> discretion and involve pursuing a myriad of objectives consistent with public rather than private law duties": *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562 at para. 14. The imposition of a duty of care would contradict and undercut the nature of the legal relationship contemplated by the statute and would be contrary to the public nature of any duty that is created by s. 30.
>
> I wish to be clear that my decision does not rest on the assumption that the courts are entirely powerless to review or control the Minister's exercise of the discretion conferred by s. 30. I agree with the motions judge that it is not plain and obvious on the pleading that the respondents would necessarily fail on their claim that the Minister was in breach of certain statutory duties, namely, failing to provide clear and consistent criteria for special needs agreements and deciding to terminate their availability. However, since any duties or obligations contemplated by the statute are public in nature, they are not capable of giving rise to a private tort law duty of care or an action in negligence for damages.

The Court then turned to the second stage of the *Cooper/Anns* test, relying in part on the large claim advanced by the Class:

> This brings me to the second stage of the *Cooper/Anns* test. Even if, on the facts pleaded, there was sufficient proximity to give rise to a *prima facie* duty of care under the first stage of the *Cooper/Anns* test, I would find under the second stage of the *Cooper/Anns* test that there are residual policy considerations outside the relationship of the parties that negative the imposition of a duty. These residual policy concerns are explained in *Cooper, supra* at para. 37:
>
> > These [residual policy concerns] are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?
>
> ¶ 32 Here, the law already provides a remedy that responds directly to the respondents' complaint. The allegation that the Minister acted improperly by terminating s. 30 agreements or by failing to provide adequate criteria or guidelines for their use can be addressed by way of declaratory action or an application for judicial review. This is the proper remedy given the nature of the complaint: it relates to a statutory discretion and to duties owed to the public at large.
>
> ¶ 33 To recognize a private law duty of care would expose Ontario to claims for substantial damages by many families and individuals who believe that they have not received adequate services. The respondents claim on behalf of the proposed class of some 30,000 individuals general damages of $500,000,000, special damages of $100,000,000, aggravated, exemplary and punitive damages of $50,000,000, and

> damages of $50,000,000 under the *Family Law Act*, R.S.O. 1990, c. F.3, s. 61. In my view, to recognize a novel duty of care that would allow claims of this nature to proceed would be contrary to sound policy in this area of the law. A private law duty of care would represent an unwarranted and undesirable intrusion that could interfere with the sound administration of the *CSFA*. The Minister and the child welfare authorities have a difficult task to perform and limited resources at their disposal. Their priorities should be based on the general public interest, not on the interests of particular individuals, however difficult and sympathetic their circumstances may be. As in the case argued immediately before this one, *Eliopoulos v. Ontario (Minister of Health and Long-Term Care)*, [2006] O.J. No. 4400 at para. 33 (C.A.), the "authorities should be left to decide where to focus their attention and resources without the fear or threat of lawsuits."

Then turning to the tort of misfeasance in public office he stated:

> *(2) Does the amended statement of claim disclose a cause of action for misfeasance in public office?*
>
> ¶ 34 The original statement of claim did not plead the tort of misfeasance in public office. The Divisional Court, on its own initiative, found that the respondents had pleaded the factual elements of the tort. The respondents then amended the statement of claim to assert a claim for misfeasance in public office on the basis of the allegation that the appellant issued the directive not to enter s. 30 agreements and failed to exercise its discretion to enter s. 30 agreements when it knew or ought to have known that this was unlawful and likely to cause harm to the respondents and proposed class members.
>
> ¶ 35 The tort of misfeasance in public office is founded on the principle that those who hold public office and exercise public functions are subject to the law and must not abuse their powers to the detriment of ordinary citizens. As Lord Steyn put it in *Three Rivers District Council v. Bank of England (No. 3)*, [2000] 2 W.L.R. 1220 at 1230: "The rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes." In *Odhavji Estate, supra* at para. 30, Iacobucci J. described the "underlying purpose" of the tort of misfeasance in public office as being "to protect each citizen's reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions."
>
> ¶ 36 In *Odhavji Estate, supra* at para. 23, Iacobucci J. described the elements of the tort: "First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff." The ingredient of a deliberate unlawful act intended to inflict harm on the plaintiff is central to the tort: *Odhavji Estate* at para. 25. Failure to discharge the functions of office because of budgetary constraints does not amount to a deliberate disregard of a public officer's duties. Rather, the tort is directed "at a public officer who *could* have discharged his or her public obligations, yet wilfully chose to do

> otherwise" [Emphasis in original.]: *Odhavji Estate* at para. 26. Likewise, *Odhavji Estate* makes it clear, at para. 28, that public officials must retain the authority to make decisions adverse to the interests of particular individuals even with the knowledge that a course of action will cause harm:
>
> > A public officer may in good faith make a decision that she or he knows to be adverse to interests of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.
>
> ¶ 37 In my view, the amended statement of claim fails to plead facts sufficient to satisfy the requirements of the tort of misfeasance in public office. The pleading makes bald allegations that recite the basic elements of the tort in very general terms but fails to provide material facts sufficient to demonstrate an intentional wrongdoing by a specific public officer aimed at the respondents. The pleading does not allege that a specific public officer knowingly abused his or her statutory duties for the unlawful purpose of harming these respondents. The pleading alleges only that Ontario adopted a general policy not to enter new s. 30 agreements that applied to all members of the public. This lack of specificity is not merely a technical defect - it goes to the core of the respondents' claim. Stripped to its essentials, the misfeasance in public office claim consists of a general allegation that terminating s. 30 agreements was unlawful. Although this allegation gives rise to a public law claim which may form the basis for an application for judicial review or an action for declaratory relief, it does not provide a foundation for a tort action for misfeasance in public office. This case is readily distinguishable from *Roncarelli v. Duplessis*, [1959] S.C.R. 121. Here, the respondents complain of a general policy decision not to fund special care needs by way of s. 30 agreements that applied to all Ontario residents. In *Roncarelli*, a provincial premier abused his statutory discretion to punish a specific individual for conduct unrelated to the statutory scheme.

The plaintiffs sought leave to appeal to the Supreme Court which recently denied the request.

What these decisions collectively illustrate is that class actions are a real challenge for governments. They are very large claims which tend to cast a wide net. The consequences of the mere act of certification may cause government serious problems and costs even if the claim fails in the end. The costs of defending are high and cannot realistically be recovered. The defense consumes the time of a large number of public servants to deal with notice issues, production, examination for discovery and trial.

However, governments are in a far from hopeless situation. A careful initial response may be able to eliminate claims without merit or avoid certification. At a minimum, this can narrow the issues and reduce the adverse consequences of these claims.