THE GLOBALIZATION OF CLASS ACTIONS

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Representation & Conflicts of Interests in Class Actions and Other Group Actions

REMARKS BY
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In the past decade, Canada has witnessed a dramatic increase in the number of class actions. High profile class actions have been commenced for damages attributable to tainted blood, faulty pacemakers, defective breast implants, aboriginal residential schools, price-fixing, prospectus misrepresentation, e-coli in the water, criminal rates of interest charged by utilities companies and banks, improper bank charges and the list goes on.

The number of Canadian jurisdictions that have class proceedings legislation has also greatly expanded in the last ten years. As it now stands, eight of the ten Canadian provinces have

enacted comprehensive class proceedings legislation. Of the two remaining provinces, Nova Scotia has an act that will be proclaimed imminently, while P.E.I. is in the process of considering draft legislation.[1]

Even in the provinces and territories that do not have specific class action legislation, the Supreme Court of Canada ruled in 2001 that courts have a duty to structure class proceedings using the applicable civil rules of practice.[2] Within this legislative and common law framework, a class proceeding may be commenced in any of the ten provinces and three territories in Canada.

The prospect for inter-jurisdictional conflict in class actions involving claims that spread across provincial or territorial borders is therefore a significant one in Canada.

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[1] Quebec was the first province to enact class action legislation in 1978, followed by Ontario (1992); B.C. (1995); Newfoundland and Labrador (2001); Saskatchewan (2001); Manitoba (2002); Alberta (2003); New Brunswick (June 30, 2007). The three territories, Nunavut, the Yukon and the Northwest Territories, currently do not have class action legislation.

[2] *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 34.

Context for considering multi-jurisdictional class actions in Canada: the Canadian judicial system

A brief primer on the constitutional framework for the Canadian judicial system helps to appreciate the types of jurisdictional issues affecting class actions in our federal state. The Canadian constitution assigns jurisdiction over property and civil rights to the provinces. Class actions thus proceed through the superior courts of each province.

Judges of the provincial superior court at both the trial and appellate levels are appointed for life by the federal government of Canada (there is a compulsory retirement age of 75). The provincial superior courts have an extremely broad jurisdiction that covers virtually all areas of civil, criminal and constitutional law. The jurisdiction of the provincial superior courts is thus comparable to the U.S. Federal District Courts rather than to U.S. state courts.

The superior courts apply common law principles, which are in many respects quite uniform across Canada. These courts also

apply the statutory law of the particular province, as well as federal statutes and the federal Constitution, including the *Charter of Rights and Freedoms*.[3]

Unlike the U.S. system, Canada does not have any multi-district litigation mechanism (MDL) for dealing with cases that involve inter-provincial claims. Judges from one province do not have authority to require judges of another province to transfer a case or to determine who shall have carriage of an action in another province. It is left to the courts of each province to deal with any inter-jurisdictional issues that arise in class actions.[4]

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[3] In *Buffet v. Ontario (Attorney General)* (1998), 42 O.R. (3d) 53 (Ont. Ct. (Gen. Div.)) per Crane J., the court held that a class proceeding will not be certified where the proposed class action is for a declaration of a breach of the *Charter of Rights and Freedoms*.

[4] The Uniform Law Conference of Canada considered using the MDL model. In the end, the committee concluded that the most practical solution was to leave it to the courts to resolve conflicts themselves building on a spirit of comity, by allowing any province to certify a national or multi-jurisdictional class action in appropriate circumstances: *Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis, and Recommendations*, Vancouver, B.C. (March 9, 2005). The model class proceedings legislation proposed by the ULCC in 2006 provides that a court may certify a multi-jurisdictional class proceeding on an opt-out basis. (Model legislation proposed by the ULCC in 1995 provided that non-residents must opt in to the proceedings.)

The approach in Canada to multi-jurisdictional class actions: four issues

1) The National Plaintiff Class

One question that has arisen in the context of multi-jurisdictional class actions is whether non-residents of a province can be included in the plaintiff class. The superior courts in various Canadian provinces have had occasion to consider whether to certify a class action where the proposed plaintiff class includes residents from other provinces, or from all of Canada.

My comments will be focused primarily on Ontario, which is in part because of my judicial connection with that province, but also because Ontario, as the most populous province and as the second province to enact class proceedings legislation, has generated a significant amount of the relevant case law.

To provide some perspective on the size of Ontario, if Ontario were a U.S. state, it would rank second in size after Alaska and, as of 2006, it would rank sixth in population after California, Texas, New York, Florida and Illinois.

The *Class Proceedings Act* of Ontario does not speak to the issue of whether a plaintiff class can include non-residents of Ontario. The Quebec Act is also silent on the issue of including non-residents as class members. In contrast, the class proceedings legislation of the six other provinces specifically contemplates the inclusion of non-resident class members. Five of these provinces allow for non-resident class members to opt in to a class proceeding commenced in another province. Only Manitoba allows for certification of non-resident class members on an opt-out basis.

The approach taken by certification judges at the trial level in Ontario is that a national class action may be certified on an opt-out basis, subject to requirements of the Constitution being met.[5] The relevant constitutional requirement is that there must be a real and substantial connection between the subject matter of the action and Ontario. If such a connection is found, then the Ontario court

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[5] *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (Gen. Div.), leave to appeal to Divisional Court refused; *Carom v. Bre-X Minerals Ltd.* (1999), 43 O.R. (3d) 441 (Ont. Ct. (Gen. Div.)); *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389 (S.C.J.) per Brockenshire J.; *Wilson v. Servier* (2002), 59 O.R. (3d) 656 (S.C.J.) per Cumming J.; *McCutcheon v. The Cash Store Inc.*, [2006] O.J. No. 1860 (S.C.J.) per Cullity J.; see also *Harrington v. Dow Corning Corp*. (1997), 29 B.C.L.R. (3d) 88 (S.C.).

will apply the procedural law found in the province's *Class Proceedings Act*.[6] The requisite connection has been found to exist in cases where the claims of non-resident class members are based entirely on material facts that occurred outside of Ontario and where the only connecting factor between Ontario and the non-resident members is that their claims against the defendant raise the same common issues as the claims of Ontario residents.[7]

In determining whether non-residents may be included in the proposed class, the court is guided by the requirements of orderly decision-making and fairness to the parties. If the factual issues can be litigated in one province even though the issues relate to non-residents, then the court will conclude that orderly decision-making and fairness to the parties favours a national class.[8]

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[6] In certification hearings where a national class is proposed, the real and substantial connection has been found to exist in mass tort cases where the locus of the tort was in Ontario, or where aspects of the defendant's alleged tortious conduct against each class member occurred in Ontario: see *Nantais* and *Carom*, *supra*.

[7] See *Wilson v. Servier*, *supra*, at paras. 65-66 and *McCutcheon*, *supra*, at paras. 49-50.

[8] In contrast, a certification judge declined to exercise jurisdiction over non-resident members of the proposed class in a case where the proposed class action raised issues that would require the interpretation of specific provincial statutes that were quite different from the Ontario legislation: *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.* (2003), 66 O.R. (3d) 112 (S.C.J.).

Ontario courts have not shied away from accepting a plaintiff class that includes foreign residents, or from certifying a class action against a foreign defendant. In a class action against a publishing company, the defendant objected that the proceedings

class action cases involving claims that spread across international borders. The jurisprudence from Ontario may be of some assistance in formulating an approach to deciding jurisdictional issues in such cases.

2) When will the court "stand down" a class action?

A second issue that has received limited consideration by Canadian courts is when it is appropriate to stay a class action where a similar proceeding has been initiated in another province and one or both actions are brought on behalf of a national or inter-provincial class.

The Saskatchewan Court of Appeal recently stayed a class proceeding against a drug manufacturer that was commenced by the same representative plaintiffs in both Saskatchewan and Ontario. The court held that the plaintiffs were using the courts in a vexatious manner by bringing multiple claims in multiple

jurisdictions where there was no indication that multiple claims served any legitimate interest of the plaintiffs.[10]

In contrast, the Newfoundland and Labrador Court of Appeal refused to interfere with the trial division's decision dismissing the defendant drug company's application to permanently stay the plaintiff's class action as an abuse of process.[11] Class actions relating to the same matter – the allegedly defective anti-cholesterol drug, Baycol – were initiated in five other provinces. The defendant complained that the Manitoba action, which had yet to be certified, included Newfoundland plaintiffs as a proposed sub-class. In commenting on the correctness of the lower court order refusing to stay the Newfoundland action, the Court of Appeal noted that the revised definition of the class in the Manitoba action excluded non-residents who are members of an already certified class action in another province.

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[10] *Englund v. Pfizer Inc.*, 2007 SKCA 62. The court stayed the Saskatchewan action on the condition that it could be re-activated if the Ontario action was discontinued, or if the Ontario action was certified without the Saskatchewan plaintiffs.

[11] *Pardy v. Bayer*, [2003] N.J. No. 1982 (T.D.); 2003 NLCA 45 (C.A.).

3) Handling issues of representation: carriage motions

A third issue is whether conflicts in representation frustrate the objectives of class actions in Canada. Generally speaking, there seems to be a cooperative approach amongst the class action plaintiffs' bar in Canada. This cooperative behaviour may explain the limited number of motions over what law firm should have carriage of a class action. Of course, it is not uncommon to have two or more class proceedings commenced in different provinces seeking certification for similar classes. However, in these situations, counsel from across Canada often work together to pursue the class action.[12]

To give an example, eight class actions were commenced in Ontario against the pharmaceutical company Merck Frosst

[12] In *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.* (2000), 4 C.P.C. (5th) 169 (Ont. S.C.J.) per Cumming J., the court held that the criteria that Ontario courts consider on a carriage motion in determining who should be appointed as counsel of record in a class action include: the nature and scope of the causes of action advanced, the theories advanced by counsel as being supportive of the claims advanced, the state of each class action, including preparation; the number, size and extent of involvement of the proposed representative plaintiffs; the relative priority of commencing the class actions; and the resources and experience of counsel.

involving problems allegedly associated with the painkiller Vioxx. Similar class actions were commenced in other Canadian provinces. Six of the Ontario actions were consolidated and went forward as a single action with an amalgamated counsel team. The team was made up of counsel drawn from some nineteen law firms based in nine provinces across Canada. Members of the firms appointed a Steering Committee of seven counsel to direct the conduct of the lawsuit.

Counsel from the Steering Committee appeared on a carriage motion seeking an order staying a rival Vioxx-related class action, which was started in Ontario by a law firm based in Saskatchewan.[13] The case management judge granted the relief requested by the amalgamated counsel team and stayed the competing class action, explaining that the way the causes of action had been framed by the amalgamated counsel brought more efficiency to the proceeding and that the resources and experience

[13] See *Setterington v. Merck Frosst*, [2006] O.J. No. 376 (S.C.J.) per Winkler J.

of the amalgamated counsel team were superior to that of the Saskatchewan firm.[14]

4) Recognition and enforcement of class action judgments from other jurisdictions

Another issue that recently confronted the Court of Appeal for Ontario is whether to recognize and enforce a class action judgment from the United States. The court considered whether the order of an Illinois court approving a settlement of a class action that was brought on behalf of American and international customers of McDonald's Restaurant should be given binding effect so as to preclude a proposed class action in Ontario in respect of the same cause of action.[15]

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[14] It came to light that the latter firm had brought another class proceeding against Merck raising a different cause of action, which if successful, could seriously jeopradize the ability of the proposed class to recover damages. The same firm lost out in recent carriage motions in Ontario and B.C. related to class actions involving the recall of cat and dog food manufactured by Menu Foods: *Whiting v. Menu Foods Operating Limited Partnership*, [2007] O.J. No. 3996 (S.C.J) per Lax J.; *Joel v Menu Foods GenPar Ltd.*, 2007 BCSC 1482 (B.C.S.J.) per Hinkson J. There are 17 proposed class actions related to the pet food recall that have been commenced in various parts of Canada, 11 of which were commenced by members of law firms from various cities and provinces on a consortium basis, and the remaining six of which were commenced by the Saskatchewan firm. The plan for the consortium group is to seek certification of a national class proceeding in Ontario. If certification is obtained, they plan to pursue a national remedy for all those whose pets were adversely affected.

[15] *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321.

Our court signalled that it will enforce foreign class action judgments provided that the following three criteria are met: (i) there is a real and substantial connection linking the cause of action to the foreign jurisdiction; (ii) the rights of non-resident class members are adequately represented; and (iii) non-resident class members are accorded procedural fairness, including adequate notice. In such circumstances, failure of the non-resident class member to opt out of the action may, in the words of the court, "be regarded as a form of passive attornment sufficient to support the jurisdiction of the foreign court."[16]

The court found that the Illinois judgment failed the test because of inadequacies in the notice of the action that had been provided to Canadian residents. This notice consisted of an advertisement in Quebec newspapers and in a national subscription-based magazine of quite limited readership.[17] Accordingly, the judgment was not enforced.

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[16] *Ibid.* at para. 30.
[17] In a ruling that is currently on appeal to the Ontario Court of Appeal, a judge of the trial division ruled that a New York class action judgment for over $36 million is

Interestingly, the related question of whether the courts of one province will enforce a class action judgment rendered in another province involving a national plaintiff class has received limited consideration in Canada. There is, however, a trial-level decision from the Superior Court of Quebec that refuses to recognize and give effect to an order of the Ontario Superior Court, which had approved a settlement of a class action brought on behalf of a national class against a bank for allegedly overcharging mortgage penalties.[18]

What are the goals of class actions legislation in Canada?

What informs the approach taken by Ontario courts to certification generally and, in particular, to resolving multi-jurisdictional issues in a way that favours recognizing a national class? The Supreme Court of Canada in a trilogy of cases that

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enforceable in Ontario against the defendants, Garth Drabinsky and Myron Gottleib, as senior officers and directors of Livent. The court held that as long as there is a real and substantial connection between the action and the forum in which it is heard, and provided there is an absence of fraud or a denial of natural justice in obtaining the judgment, then judgments rendered outside of the country should be enforced as a matter of international comity: *King v. Drabinsky*, [2007] O.J. No. 2901 (S.C.J.) per Wilton-Siegel J.

[18] *HSBC Bank Canada Ltd. v. Hocking*, 2006 QCCS 330 (Q.S.C.).

were decided in 2001 -- *Western Canadian Shopping Centres v. Dutton*; *Hollick v. City of Toronto*; and *Rumley v. British Columbia* -- affirmed the three main goals of class actions in Canada.

The first goal, as identified by Chief Justice Beverley McLachlin, is judicial economy: by aggregating similar individual actions, class actions avoid unnecessary duplication in fact-finding and legal analysis.

The second goal is access to justice: by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making it economical to prosecute claims that otherwise would be too costly to prosecute individually. Sharing costs ensures that injuries are not left unremedied by the judicial system.

The third goal is behavioural modification or deterrence of wrongdoers and accountability to those who are wronged. Class actions serve efficiency and justice by providing a mechanism for ensuring that actual and potential wrongdoers do not ignore their obligations to the public and for ensuring that defendants take full

account of the cost of their conduct. The cost-sharing inherent in class actions decreases the expense of pursuing legal recourse and thereby deters potential defendants who might otherwise assume that minor wrongs would not result in expensive litigation against them.[19]

It is not difficult to see how permitting a representative plaintiff to bring an action on behalf of a national class promotes each of these three goals when it comes to litigating causes of action with multi-jurisdictional dimensions. By permitting the certification of a national plaintiff class, duplication of judicial resources is avoided, the cost-sharing feature of class actions is greatly enhanced and the goal of deterrence is served by increasing the extent of the defendant's potential exposure to liability.

The three goals identified by the Supreme Court, and particularly that of access to justice, have animated decisions of the Court of Appeal for Ontario in a recent series of cases that are

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[19] These three goals were first identified in two studies that led to the enactment of the Ontario *Class Proceedings Act*: the 1982 Report of the Ontario Law Reform Commission and the Report prepared by the Ontario Attorney General's Advisory Committee on Class Action Reform in 1990.

generally seen by observers as having liberalized the approach to certification of class actions in Ontario: *Cloud v. Attorney General*[20]; *Pearson v. Inco*[21]; and *Cassano v. Toronto-Dominion Bank.*[22]

The *Cloud* case arose in the context of a motion to certify a class action against the federal government and others for damages for physical and sexual abuse suffered by former students of a native residential school. The Court of Appeal in *Cloud* held that the screening requirement in the *Class Proceedings Act*[23] that the proposed cause of action must raise common issues is a "low bar."[24] The court also asserted that the relative proportion of individual to common issues is a factor that goes into determining

[20] (2004), 73 O.R. (3d) 401, (2004), 247 D.L.R. (4th) 667.
[21] (2006), 78 O.R. (3d) 641.
[22] 2007 ONCA 781.
[23] The screening tests for certification set out in Ontario's *Class Proceedings Act* are: there must be a cause of action that is shared by an identifiable class, that raises common issues for which a class proceeding is the preferable procedure for resolution and in which the class may be fairly and adequately represented by a plaintiff or plaintiffs who have produced a workable plan for advancing the litigation.
[24] See also *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A) at para. 42, cited by the court in *Cloud* at para. 52.

whether the class action will be the preferable procedure, rather than determining the existence of common issues.[25]

The *Inco* decision furthered the more liberalized approach to certification by lowering the bar posed by the legislated screening requirement that a class action be the preferable procedure for pursuing the cause of action. *Inco* stands as the first successful certification outside of Quebec of a class action involving alleged environmental damages caused by long-term emissions. The court made it clear that the existence of substantial individual assessment issues related to the damages assessment does not stand as a bar to finding that the preferable procedure requirement is satisfied.

The very recent *Cassano* decision overturned a decision of the Superior Court refusing to certify a class action involving an allegation of improper credit card charges by the defendant bank. The court in *Cassano* reaffirms that a class action may still be the preferable procedure even where the resolution of the common issues leaves the court with outstanding individual issues related to

[25] *Cloud* at para. 65.

calculating damages. The judgment also makes it clear that the fact that damages cannot be assessed on an aggregate basis does not mean that a class action is not the preferable procedure, even in cases where individual assessments of damages in small amounts may be necessary.

With this line of case law, the Court of Appeal for Ontario has embraced the view that class actions have an important role to play in enhancing access to justice and that this role is a factor favouring certification.

This evolution in the case law harmonizes with recent recommendations made by the former Associate Chief Justice of Ontario, Coulter Osborne, to the Attorney General for achieving civil justice reform in Ontario. In a report delivered in November 2007, the Honourable Mr. Coulter Osborne made some eighty recommendations, which in his words are geared towards making

"the civil justice system more accessible and affordable" for Ontarians.[26]

The approach to costs in Ontario: the elephant in the room

Having discussed the more liberalized approach to certification of class actions in Ontario, there is also somewhat of an elephant in the room when it comes to selecting Ontario as the forum for commencing multi-jurisdictional class actions. The Ontario *Class Proceedings Act* permits the judiciary to apply existing cost rules for civil litigation in class actions: that is, the successful party is to be awarded its costs unless the court orders otherwise.

In contrast with the Ontario approach, legislation in several other provinces, including that of British Columbia and Manitoba, prohibits the court from awarding costs associated with a class

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[26] See the Honourable Mr. Justice Osborne's Summary of Findings and Recommendations of the Civil Justice Reform Project, November 20, 2007. This report does not specifically discuss class actions.

action to any party, subject to certain exceptions such as for vexatious, frivolous or abusive conduct.[27]

The Ontario statute directs the court to have regard to three factors when exercising the discretion to award costs of a class proceeding (or of a step in the proceeding): (i) whether the issue in dispute was in the nature of a test case; (ii) whether the action raised a novel point of law; and (iii) whether the case concerned a matter of public interest.[28]

Early costs decisions of the Superior Court in Ontario were seen as possibly having a chilling effect on bringing class actions in that province. In one case, a judge awarded significant costs to defendants who successfully resisted a certification application in a case involving the manufacture and sale of an allegedly defective plumbing system. The judge stated that class proceedings should

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[27]The legislation of Quebec, Alberta and New Brunswick permit the court to order costs, whereas the legislation of Newfoundland and Labrador, Saskatchewan and Manitoba mirrors that of B.C.

[28] The Report prepared by the Ontario Attorney General's Advisory Committee on Class Action Reform in 1990 gave the following rationale for empowering the courts to award costs in class actions: "This leaves the risk of being held accountable for costs in the mind of the plaintiff, thereby deterring weak claims and wasteful steps and moderating the approach to the litigation."

not be accorded any special treatment in the disposition of costs, and went on to reject the view of class actions as necessarily pitting David against Goliath.[29]

However, several years later, the Court of Appeal released a costs decision in *Pearson v. Inco* (referred to above)[30] in which it disapproved of any such suggestion that class actions do not raise different concerns when it comes to awarding costs. The court observed that when the three factors referred to in the Act apply, they should be given significance. The court also held that in fixing costs of a certification motion, the court should consider that a fundamental object of the Act is to provide enhanced access to justice.[31]

The threat that a representative plaintiff in a class action commenced in Ontario will be exposed to a significant cost award has potentially been increased by a very recent decision of the

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[29] *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 3495 at para. 4.
[30] *Pearson v. Inco Ltd.* (2006), 79 O.R. (3d) 427 at para. 11, footnote 1.
[31] *Ibid.* at para. 13.

Supreme Court of Canada: *Kerr v. Danier Leather.*[32] The court in that case unanimously upheld the decision of the Court of Appeal for Ontario that the plaintiff's class action for prospectus misrepresentation should be dismissed.

The author of the opinion, Justice Binnie, rejected the plaintiff's argument that costs should not be awarded against him because novel issues were raised or because the action constituted a test case. Justice Binnie observed that the representative plaintiff, who had a multi-million dollar investment portfolio, stood to personally recover half a million dollars if the action succeeded.

Justice Binnie said the following about the position of the representative plaintiff: "[t]here is nothing to be criticized in any of this… However, protracted litigation has become the sport of kings in the sense that only kings or equivalent can afford it. Those who inflict it on others in the hope of significant personal gain and fail can generally expect adverse cost consequences."

[32] 2007 SCC 44.

Justice Binnie went on to emphasize that it will not simply be assumed that class proceedings engage sufficiently weighty access to justice concerns to justify withholding costs from the successful party.

It remains to be seen whether the approach to costs in *Kerr v. Danier Leather* will be confined to situations where the representative plaintiff has substantial means and stands to make significant financial gain from prosecuting a class action. In the meantime, this decision could have a deterrent effect on the plaintiff class action bar in Ontario, particularly when it comes to pursuing shareholder class actions in this jurisdiction.

It also remains to be seen whether *Danier* will prompt the plaintiff's bar to forum shop in favour of selecting cost neutral regimes when commencing class actions of inter-jurisdictional scope. A possible solution to this dilemma may be to insert a merits based test at the beginning of a class action and eliminate what may be seen as a harsh cost consequence at the back end.