

## CLASS ACTION RESPONSE STRATEGIES

### Successful Response Strategies

a) Coordination of multi-jurisdictional class actions

1. The geographic realities

The geographic realities can increase costs and have an important impact on the CLO budget. It can also influence the steps to be taken before a litigation even starts and the choice of counsel. What every CLO must know and take into consideration in the overall strategy:

- Differences in the substantive law can make a defence strategy that is good for one jurisdiction, a source of problems in another.
- Costs regimes differ between provinces, while some provinces are said to be “no costs” this may only be the case after certification and thus pre-certification applications may attract costs.
- Pre-certification strategies may vary between provinces, whether that be motions to strike, documentary production or requirements to file Statements of Defence.
- Differences in the legislated test for certification, and the provincial court’s application of the test, can impact on the choice of defence strategy and even be a source of confusion in discussions between co-counsel.
- Uncertainties over the constitutionality of national classes will continue to impact on the multiplication of class proceedings in separate provinces, particularly in Quebec and create problems for settlements.
- Aside from national class problems, class definitions can overlap as the Ontario class might be based solely on residence, some provinces allow for opt-in national classes, some allow for opt-out national classes, the Quebec class might be inched on use or consumption with the result that one class may include the residence of the other class.

- The likelihood of parallel proceedings in Quebec and other common law provinces and concerns for bilingualism in at least two other provinces require a capability for the preparation and vetting of notices and settlement agreements in both official languages.
- While expertise in area of scientific inquiry such as generic causation is without borders, it is often wise to have a local expert in dealing with the clinical side to personal injury claims.
- The fact that journalists like to cover their own turf makes it hard to respond to media and public relations needs to a single voice.
- Different rules on what is relevant for discovery purposes will impact on arrangements for document review and disclosure.
- Different discovery principles may impact on whether you can communicate with your own witness before the examination has been completed.
- A discovery transcript or an affidavit originating in one province may not be accepted as valid in another one.
- Different rules and solicitors/client privilege will impact on document disclosure.
- Differing substantive law in provinces and in foreign jurisdictions may be relevant.
- Different rules and procedures for third party claims or claiming over may impact on the ability to get rulings on the apportionment of liability with physicians and pharmacists.
- Different rules and concepts on jurisdiction and attornment have to be taken into account, particularly the danger of implicitly accepting jurisdiction by doing something in another locality.
- Different rules of private international law will impact on decisions relating to jurisdictional challenge and bi-lateral international agreements can change the rules relating to service and the taking of evidence.
- Separate judicial systems travel at different speeds with the result that the preparation of work may switch from one province to another in a way the CLO can not control.

- With claims arriving in different jurisdictions, there may be different insurance coverage and reporting requirements to deal with, does the insurer understand the multi-jurisdictional issues and have they assigned a claims examiner with this expertise?
  - The Court in one province may not consider itself bound by the approach followed by its sister Court in another province.
2. Role of the CLO in taking steps before the litigation starts (document retention, communications with clients or consumers etc.)

Corporations should have centralized reporting requirements for every law suit or class action proceeding that is not purely local in nature. An in-house general counsel office needs to be made aware immediately of an action or even just the threat of an action which could be the precursor to similar proceedings in other jurisdictions. An assessment then has to be made to determine if the file has something that can be handed off to local counsel as a single jurisdiction problem or whether it is likely to become a multiple jurisdictions problem that needs to be managed as such from the beginning. In-house counsel and other senior management should work together to identify the jurisdictions whether the exposure may lie and define reporting and responsibilities early on.

Once that is done, in-house counsel can identify the team of local counsel that should be retained on a stand-by basis and who can be consulted in preliminary fashion so what is done in response to the first action does not compromise the corporation defence in the other jurisdictions. Inadvertently waiving local jurisdictional challenge and an appropriate media response should be controlled out of the CLO office. Steps must be taken for document and evidence retention. It might also be possible to avoid class action at all if certain steps can be taken towards clients or consumers in order to solve the problems before it gets into the hands of Plaintiff's counsel.

3. Building a team, insuring coordination and budgeting

In-house and outside counsel must know from the start that there is a team, who the captain is and who the team mates are. Is it necessary to retain one firm as co-ordinating counsel for all litigation to provide act as a central repository of evidence, experts and other litigation related matters. The CLO has a role to play in regularly schedule reporting and brainstorming sessions as does co-ordinating and local counsel. How important are models and standardized repetitive tasks for local counsel (for example, guidelines for examinations on discovery of Plaintiffs in each of the provinces). Develop litigation tracking systems early on and

assign responsibility to either internal or external counsel to keep these updated. Develop a plan to manage the evidence database? Consequences of giving access to the document database to each local counsel including obligation in certain jurisdictions to disclose it. Does the file require collaboration and knowledge management software which enable secure access to a central defence team file via the internet? Plaintiffs lawyers are communicating, so should the defence. The importance of making sure that all of those who have access to such a software are bound by privilege.

The importance of having a single public relation consultant answering inquiries.

Should a global budget predicated on everything moving forward in all jurisdictions be prepared or rather a one jurisdiction budget based on the premises that one jurisdiction will tend to become the lead while the others stand by and watch. Leveraging the multi-jurisdictional legal resource in order to eliminate duplication budget items.

4. Cross-border considerations

Certainty of settlements reached abroad or in another province. Coordinating the Canadian litigation with the U.S. litigation. Differences will exist due to the influence of jury trial thinking in the U.S., the use of preliminary Daubert motions and differing substantive and procedural both in federal and state courts. U.S. settlement attitudes are not necessarily the right ones for Canada. The importance of appointing a Canadian co-ordinating counsel to deal with the Canadian local counsel rather than placing the Canadian cases directly under the U.S. umbrella.

b) Opposing certification/authorization

1. In Quebec

Type of preliminary motions that can be brought, cross-examination of Plaintiff, evidence that can now be presented, impact of the Court of Appeal trilogy on future strategy.

2. The rest of Canada

The ongoing debate as to the appropriateness of preliminary motions to strike out claims before certification. Lack of experienced judges and counsel in class actions, is this an advantage or a disadvantage.

c) Defending the merit of the case or negotiating a settlement

The pros and cons of negotiating a settlement after certification.