

## EXAMINERS' ANALYSIS OF QUESTION NO. 2

In Michigan, plaintiffs must satisfy all of the prerequisites set forth in MCR 3.501(A)(1)(a)-(e) in order for their suit to proceed as a class action. "These prerequisites are often referred to as numerosity, commonality, typicality, adequacy, and superiority." *Duskin v Department of Human Services*, 304 Mich App 645, 652 (2014) quoting *Henry v Dow Chemical Co*, 484 Mich 483, 488 (2009). "The party's pleadings will only be sufficient to support certification if the facts are uncontested or admitted by the opposing party." *Id.* (citation and quotation marks omitted). However, the court "may not simply accept as true a party's bare statement that a prerequisite is met" without making an independent determination that the facts are adequate. *Michigan Association of Chiropractors v Blue Care Network of Michigan, Inc*, 300 Mich App 577, 587 (2014), citing *Henry*, *supra*. "If the pleadings are not sufficient, the court must look to additional information beyond the pleadings to determine whether class certification is proper." *Henry*, at 503. The question as presented permits argument both for and against certification.

The following prerequisites for certification should be analyzed by the examinee:

(a) **Numerosity:** The analysis should recognize that there is no particular number of class members necessary to meet the numerosity requirement, *Duskin*, 304 Mich App at 653, but that the class should be adequately defined "so potential members can be identified" and a plaintiff must offer a reasonable estimate of the number of class members. *Id.* This showing permits the trial court to determine whether joinder would be impracticable. *Zine v Chrysler Corp*, 236 Mich App 261, 288 (1999). Finally, "the proponent must establish that a sizable number of class members have suffered an actual injury." *Duskin*, 304 Mich App at 653.

Here, the analysis could identify that 1,000 residents of the Mills' subdivision have suffered an actual injury, making a sufficiently large class to make joinder impracticable.

(b) **Commonality:** The analysis should note that commonality establishes "that issues of fact and law common to the class predominate over those issues subject only to individualized proof." *Duskin*, 304 Mich App at 654 (citation and quotations marks omitted). The raising of common questions is not enough. *Id.* Rather, the common contention must be such that a

"determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* In other words, "commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Duskin*, 304 Mich App at 654-655 (citation and quotations marks omitted).

Here, the analysis could identify that the silver maple trees were planted during a discreet window in time, and that Muni City identified a problem being caused by the trees at a discreet period of time. All of the class members share in common sidewalk and landscaping damage, and a significant number of the class members share sewage and water damage. However, because it is less clear when each of the proposed class members suffered property damage, whether the value of the property damage claims is sufficiently common, how many of the residents suffered personal injuries, and whether the extent of the personal injuries suffered by each resident is common, the issues may be too unique to satisfy the commonality prerequisite. The purported class members all have a common legal theory, i.e. whether there was a governmental taking.

(c) **Typicality:** The question to be identified here is "whether the claims of the named representatives have the same essential characteristics of the claims of the class at large." *Duskin*, 304 Mich App at 656 (citation and quotation marks omitted). In other words, "the class representatives share a common core of allegations with the class as a whole." *Id.* at 656-657.

Here, the class members share the same legal theory of a governmental taking because of the intrusion of the tree roots into the residents' private property.

(d) **Adequacy:** This prerequisite tests whether the "class representatives can fairly and adequately represent the interests of the class as a whole . . . [by showing] that (1) counsel is qualified to pursue the proposed class action, and (2) the members of the class do not have antagonistic or conflicting interests." *Duskin*, 304 Mich App at 657 (citations omitted).

Here, the plaintiff's attorney is inexperienced, having just become licensed, and he is a family friend who only consulted with the Mills about the possibility of filing a class action lawsuit, potentially calling into question whether he would advocate zealously for all class members and not just the Mills. However, the analysis can also properly assert that the attorney, while inexperienced, took the proper steps to

investigate the number of residents impacted by the tree planting as well as the nature of the damages they incurred, and that he also identified an apparently viable legal theory to pursue. As to the second prong, applicants should discuss whether the Mills claims and damages, being different in some form than those of some of the other proposed members, have sufficiently conflicting interests to be the class representatives. For example, there is a range in amount of damages for repair, and some only had lawn repairs, others also had flood damage.

(e) **Superiority:** This factor examines "whether a class action, rather than individual suits, will be the most convenient way to decide the legal questions presented, making a class action a superior form of action." *A & M Supply Co v Microsoft Corp*, 252 Mich App 580, 601 (2002). In making this determination, "the court may consider the practical problems that can arise if the class action is allowed to proceed [, the] relevant concern . . . [being] whether the issues are so disparate that a class action would be unmanageable." *Id.* pp. 601-602 (citations and quotation marks omitted).

Other factors noted in MCR 3.501(A)(2) include whether there might be inconsistent adjudications, whether the resolution as to an individual member of the class would as a practical matter be dispositive of the interests of other class members, whether final equitable or declaratory relief might be appropriate for the class, whether there is any incentive for any individual to bring a separate action, and whether the amount recoverable is sufficient in relation to the expense and effort required to undertake the administration of a class action.

Here, the analysis might offer that there is the potential to increase the efficiency of the legal process—reduce repetition of witnesses, exhibits, and courtroom time, for example, lower the costs of litigation, overcome the problem that some of the recoveries would be so small as to not warrant bringing an action against Muni City. It is unlikely that there would be inconsistent judgments on Muni City's liability for a governmental taking given Muni City's abrupt discontinuance of the tree planting program, and its creation of a cost-sharing plan for sidewalk replacement.