

RECENT TRENDS IN ENVIRONMENTAL TORT LITIGATION

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INTRODUCTION

As one reflects on the decade of the 1990s, it is clear that the plaintiffs' tort bar sought new and inventive ways to assert causes of action based on the presence of hazardous materials in the environment, making defense of toxic tort suits more complicated than ever before. Although "A Civil Action," the 1999 movie starring John Travolta, may have raised public consciousness of the ongoing battle over such issues, defense counsel, including the toxic tort defense team of Morgan, Lewis & Bockius LLP, have been actively engaged for some time defending against the efforts of plaintiffs' lawyers to lower thresholds of factual proof and to liberalize liability standards in such actions.

In this article, we summarize developments during the past decade to illustrate areas where defendants have an opportunity to attack, defeat and/or circumscribe plaintiffs' toxic tort claims. First, we discuss defendants' strategic use of the fact that plaintiffs bear the burden of causation, particularly focusing on areas requiring expert testimony. Second, we address how different jurisdictions have handled claims for medical monitoring costs and effective strategies to defeat those claims. Third, we turn to the relatively recent claim for property damage based on stigma. Fourth, because plaintiffs' counsel often bring class actions to pursue toxic tort claims, we review the pros and cons of defending against a class action and strategies to avoid class certification. Finally, we emphasize the potential availability of case management vehicles, so-called Lone Pine

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orders, to avoid protracted litigation based on broad-based, yet thinly-pled complaints.

More than ever before, the issue of causation can be a toxic tort defense attorney's most effective tool. It is by now well established that plaintiffs are required to demonstrate both general and specific causation to a reasonable degree of medical or scientific certainty to prove their claims. The linchpin to such proof inevitably entails the use of expert testimony in many different areas of science and/or medicine. The U.S. Supreme Court has given significant attention to the issue of the admissibility of expert testimony in the 1990s, with a trilogy of cases that provide defense counsel with new means to challenge such testimony and thereby defeat plaintiffs' causation burden.

In 1993, the Supreme Court issued an opinion in the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), in which the Court considered the admissibility of expert testimony based on test tube and animal studies showing a link between Bendectin and certain birth defects. The Court in *Daubert* rejected the long-standing "general acceptance" test, established in 1923 in the case of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)⁴, holding that the Frye test was superseded by Rule 702 of the Federal Rules of Evidence.⁵ *Daubert*, 509 U.S. at 589. Instead of the seemingly rigid "general acceptance" test, the Court interpreted Rule 702 to require "a standard of evidentiary reliability." *Id.* at 590. To evaluate the reliability of proffered

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scientific expert testimony under Rule 702, the Court identified the following relevant factors: (1) the testability of the proffered scientific theory; (2) whether the scientific opinion has been published or subjected to peer review; (3) the error rate of the technique; and (4) whether the opinion is generally accepted in the relevant scientific community. *Id.* at 593-94. While *Daubert* was initially viewed as a plaintiffs' victory, it has since proved very favorable to defendants seeking to exclude novel or unreliable testimony. Most important, the *Daubert* opinion placed great emphasis on the role of the trial judge as a "gatekeeper," affording sophisticated and creative defense counsel an expanded basis upon which to challenge expert testimony.⁶

In 1997, the Supreme Court issued the second opinion in the trilogy, clarifying that *Daubert* did not alter a reviewing court's standard of review with regard to a district court's decision to admit or exclude scientific evidence. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). The Court reversed the court of appeals, which had applied "'a particularly stringent standard of review to the trial judge's exclusion of expert testimony.'" *Id.* at 140 (citing *General Electric Co. v. Joiner*, 78 F.3d 524, 529 (11th Cir. 1996)). The Court held that the abuse of discretion standard, not a heightened standard, would apply. *Id.* at 141-42. The Court then held that the district court did not abuse its discretion in excluding the testimony of plaintiff's expert witnesses. *Id.* at 143. The Court also clarified that, despite *Daubert*'s focus on an expert's methodology, as opposed to an expert's conclusions, "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered," and thus exclude the evidence. *Id.* at 146.

Most recently, in 1999, the Supreme Court issued the third opinion in the trilogy, expressly holding that all technical or specialized expert testimony, whether or not it is "scientific," is

subject to the *Daubert* standard. *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999). In *Kumho*, the Supreme Court evaluated whether *Daubert*'s general holding, establishing a trial judge's gatekeeping obligation with regard to novel scientific evidence, applies not only to scientific evidence, but to all expert testimony. At issue was an Eleventh Circuit decision holding that *Daubert* was strictly limited to scientific evidence and thus did not apply to an engineer's expert testimony regarding the manufacture, design and performance of a failed tire. The expert testimony was not scientific per se, but was based on the engineer's skill and experience-based opinions. The Supreme Court reversed the decision below, holding that *Daubert*'s general principles apply to all expert matters described in Federal Rule of Evidence 702.⁷ *Id.* at 1175. Thus, a court is obligated to fulfill its role as gatekeeper, establishing a standard of reliability with regard to all specialized or technical evidence. The Court acknowledged, however, that the four-factor test in *Daubert* may not be amenable to all types of technical or specialized testimony. *Id.* In these cases, the Supreme Court emphasized that the *Daubert* inquiry should be flexible, with the main purpose of ensuring the reliability of the evidence presented. *Id.* at 1176. Courts are instructed to focus not so much on the expert's conclusion, but on whether his or her methodology is logical, and thus reliable. *Id.*⁸ In the wake of the Supreme Court trilogy, courts are also giving more attention to the process of determining whether scientific, technical or specialized evidence is admissible. In a recent Third Circuit case, *Padillas v. Stork-Gamco*, 186 F.3d 412 (3d Cir. 1999), the court of appeals vacated a district court ruling excluding certain technical evidence for its failure to meet the test enunciated in *Daubert*. The appellate court did not reach the issue of the admissibility of the evidence, but held that the district court erred in excluding the evidence on summary judgment without holding a Rule 104 or

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Daubert hearing. *Id.* at 417-18. While the court made clear that a Rule 104 hearing is not required every time the admissibility of evidence is challenged, it held that failure to hold such a hearing may be an abuse of discretion when admissibility turns on factual issues. *Id.* at 418. The court found immaterial whether the party actually requested a Rule 104 hearing. *Id.* at 417.

In light of *General Electric* and *Kumho*, defense counsel should prepare to subject all types of specialized expert testimony to challenges under *Daubert*, as the trial judge has significant discretion whether to admit or exclude such evidence. Defense counsel also should be prepared to present challenges to such evidence early in the proceedings and to press their positions to full advantage in Rule 104 hearings, seeking to have the court exclude the evidence before there is any risk that a jury may hear it.

In addition to challenges to the admissibility of expert testimony, defendants also should press courts to question the utility of such testimony and to reject it where the testimony is non-conclusive or insufficient to demonstrate specific causation. For example, in *Rutigliano v. Valley Business Forms*, 929 F. Supp. 779 (D.N.J. 1996), a former office worker sued the manufacturer of carbon paper, alleging that she had developed "formaldehyde sensitization" from exposure to formaldehyde in the paper. Defendants challenged plaintiff's proof of causation, arguing that plaintiff's expert did not prove general or specific causation. The court first rejected plaintiff's proof of general causation, holding that plaintiff's expert did not meet the Daubert standard for admission, as his conclusions were based primarily upon subjective experience. *Id.* at 786. In addition, the court found that plaintiff failed to prove specific causation because she did not prove that some other substance did not cause her injury. *Id.* at 790. Because plaintiff failed to disprove other potential causes for her injury, the court dismissed the defendant

manufacturers on summary judgment. *Id.* at 791-92. Thus, plaintiffs must not only prove general causation (i.e., that the substance can cause the alleged injury), but must prove specific causation (i.e., that the substance did cause the alleged injury) by, among other things, eliminating other possible causes for the injury.

Defendants also have argued successfully that proof of exposure to a toxic substance is not sufficient to prove causation; plaintiffs must prove exposure to a dosage sufficient to cause the alleged injury. In *Wright v. Willamette Industries, Inc.*, 91 F.3d 1105 (8th Cir. 1996), for example, residents near a manufacturing plant brought a negligence action against the plant owner, claiming damage from exposure to plant emissions. The court required plaintiffs to prove the dose of their alleged exposure, as well as the dose considered hazardous to humans. *Id.* at 1107. Despite evidence of exposure, the court excluded plaintiffs' evidence of causation because they only produced speculative evidence regarding the level of exposure actually hazardous to humans. *Id.* On that basis, the court reversed a lower court judgment for plaintiffs.⁹

Defendants and courts also are becoming more adept at analyzing and assessing plaintiffs' attempts to prove causation through epidemiological studies. Epidemiological studies are used to show a statistical relationship between exposures to certain substances and the occurrence of certain health conditions. The most important thing a defense attorney must understand about evidence based on epidemiology is that even a strong statistical association between an exposure and a disease does not prove that the exposure is capable of causing, or did indeed cause, the disease. Further, even epidemiological studies showing strong associations between an exposure and a disease should be critically evaluated for characteristics that can create unreliable results.

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Recent case law provides evidence of the courts' increased awareness of the problems inherent in epidemiological studies and their increased willingness to exclude misleading or unreliable testimony based on such studies. Courts are beginning to understand that an expert's testimony that an association proves causation is not determinative. Instead, urged on by developments in the law, trial courts are critically evaluating epidemiological evidence according to criteria widely used by epidemiologists. For example, the Hill criteria, an oft-cited set of guidelines to evaluate epidemiological evidence, assess the following: the strength of the association; whether the association has been consistently observed; whether the association is specific (i.e., limited to a particular subset of the population in a particular location); whether the exposure precedes the disease; whether the association reveals a biological gradient (i.e., an increased risk of disease with an increased dose); whether there is a plausible biological mechanism for the relationship; whether the association makes sense given what we know about the disease; and finally, whether there is laboratory evidence consistent with the association.

Defendants have focused the courts on the Hill criteria as a tool to assess the reliability of epidemiological evidence. In *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997), for example, plaintiffs presented epidemiological evidence to prove that Bendectin caused their child's injuries. The court recognized, however, that the evidence only proved an association, not causation, and proceeded to evaluate the evidence according to the Hill criteria. The court ultimately found for the defendant, holding that the evidence presented was insufficient to prove causation. Specifically, the court stated:

To raise a fact issue on causation and thus to survive legal sufficiency review, a claimant must do more than simply introduce into evidence epidemiological studies that show a substantially elevated risk. A claimant must show that he or she is similar to those in the studies. This would include proof that the injured person was exposed to the same substance, that the exposure or dose levels were comparable to or greater than those in the studies, that the exposure occurred before the onset of injury, and that the timing of the onset of injury was consistent with that experienced by those in the study.

Id. at 720.¹⁰

As reflected in the preceding discussion, the Supreme Court's decisions in *Daubert*, *Joiner* and *Kumho* have increased recognition of the trial judge's critical role in assessing the admissibility and reliability of expert testimony on general principles of causation. With the attention given to the judge's gatekeeping function, defendants increasingly can, and have, used summary judgment motions and Rule 104 hearings to demonstrate the flaws in the opinions of plaintiffs' proffered expert witnesses and to demonstrate plaintiffs' fatal failure to prove the specific causation necessary to establish their claims.

MEDICAL MONITORING

During the past decade, plaintiffs increasingly have pressed claims for the cost of medical monitoring, a claim first recognized in the 1980s. A medical monitoring claim seeks to recover the anticipated costs of long-term diagnostic testing necessary to detect latent diseases that could develop as a result of exposure

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to toxic substances in the environment. Faced with the significant burden of proving causation, the plaintiffs' bar has devised a cause of action which turns on exposure, rather than the manifestation of disease, to trigger liability. While traditionally the reasonable costs of anticipated future medical expenses have been a recoverable element of damages when there is an underlying physical injury, claims for medical monitoring encompass asymptomatic plaintiffs seeking costs for future medical monitoring based on the mere exposure to hazardous substances. Such a claim would appear to violate the traditional rule in tort law – "no-harm, no-foul." However, plaintiffs have argued, and some courts have accepted, the proposition that the mere exposure to a hazardous substance constitutes the necessary harm. As a result, during the 1990s, an increasing number of state and federal courts recognized a tort claim for medical monitoring absent any past or present physical injury.

A few courts first recognized medical monitoring claims in the 1980s. *In Askey v. Occidental Chemical Corp.*, 102 A.D.2d 130 (N.Y. 1984), one of the foundational cases recognizing such a claim, persons who claimed to have been injured through exposure to waste from a landfill brought a class action seeking the right to recover the costs of future medical monitoring services. New York's highest court held that "the future expense of medical monitoring[] could be a recoverable consequential damage provided that plaintiffs can establish with a reasonable degree of medical certainty that such expenditures are 'reasonably anticipated' to be incurred by reason of their exposure." *Id.* at 137. Similarly, in *Ayers v. Township of Jackson*, 525 A.2d 287 (N.J. 1987), the New Jersey Supreme Court recognized such a cause of action. It held that medical monitoring "is a compensable item of damages where the proofs demonstrate, through reliable expert testimony predicated upon the significance and extent of exposure to chemicals, the toxicity of the

chemicals, the seriousness of the diseases for which individuals are at risk, the relative increase in the chance of onset of disease in those exposed, and the value of early diagnosis, that such surveillance to monitor the effect of exposure to toxic chemicals is reasonable and necessary." *Id.* at 312.

During the 1990s, courts cited the *Askey* and *Ayers* decisions as foundational support for medical monitoring claims. The Pennsylvania Supreme Court decision in *Redland Soccer Club, Inc. v. Department of the Army*, 696 A.2d 137 (Pa. 1997), is representative of how courts handled medical monitoring claims in the 1990s. In *Redland*, the court held that plaintiffs could maintain a claim to recover the cost of medical monitoring if they proved the following elements: (1) exposure beyond normal background levels; (2) to a proven hazardous substance; (3) caused by defendant's negligence; (4) as a proximate result, plaintiff has a significantly increased risk of contracting a serious latent disease; (5) a monitoring procedure exists making early detection of the disease possible; (6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles. *Id.* at 145-46. Likewise, many federal courts sitting in diversity have interpreted state law to permit such claims. *See, e.g., In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829 (3d Cir. 1990) (applying Pennsylvania law); *Carey v. Kerr-McGee Chem. Corp.*, 999 F. Supp. 1109 (N.D. Ill. 1998) (applying Illinois law).

The U.S. Supreme Court recently addressed one aspect of medical monitoring claims in *Metro-North Commuter Railroad v. Buckley*, 117 S. Ct. 2113 (1997). Buckley, a pipefitter exposed to asbestos in the 1980s, sued Metro-North for negligent infliction of emotional distress and the cost of future medical monitoring. Buckley had no injury or symptoms of a disease at the time.

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Metro-North conceded negligence, but denied liability because there was no injury to plaintiff. Justice Breyer, writing for the majority of the Court, first assumed that an exposed plaintiff can recover medical costs if and when she or he develops symptoms relating to an exposure. After a lengthy review of state case law discussing medical monitoring claims, he concluded that the courts that have authorized recovery for medical monitoring absent a physical injury have not endorsed a "full-blown, traditional tort law cause of action for lump-sum damages." *Id.* at 2122. The Court ultimately rejected a lump-sum award for the asymptomatic plaintiff, citing several policy reasons for such a decision. These policies included the speculative and costly nature of such lump-sum claims, the threat of a flood of litigation asserting speculative claims, the difficulty in distinguishing the extra monitoring necessitated by the exposure from the routine monitoring that people otherwise would obtain, and that recognizing such a claim would often ignore other sources of recovery available to the plaintiff, contravening the traditional rule that a plaintiff must mitigate her damages. *Id.* at 2123.

Despite the Supreme Court's holding in *Buckley*, medical monitoring continues to gain acceptance as an independent cause of action. In *Barnes v. American Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998), the Court of Appeals for the Third Circuit discussed Pennsylvania's continued acceptance of such claims. In *Dangler v. Town of Whitestown*, 241 A.D.2d 290 (N.Y. 1998), a "cancerphobia" case brought by residents exposed to landfill contamination, New York's highest court reaffirmed its recognition of these claims. In *Bower v. Westinghouse Electric Corp.*, No. 25338, 1999 WL 518926 (W. Va. July 19, 1999), the West Virginia Supreme Court established a cause of action for medical monitoring, disagreeing with a federal court's prediction of West Virginia law in *Ball v. Joy Tech., Inc.*, 958 F.2d 36 (4th Cir. 1991).¹¹

Thus, despite *Metro-North's* restriction of claims for medical monitoring under federal common law, defendants still need viable ways to challenge such claims. The most logical place to start such an attack is at the very root of the claim – the alleged exposure. Where possible, defendants should press the fact that there is no present physical injury if there is no evidence of exposure, or, in some cases, depending on the jurisdiction, no evidence of "significant exposure." See *In re Paoli Yard R.R. PCB Litig.*, 113 F.3d 444, 459 (3d Cir. 1997) (affirming jury's rejection of medical monitoring claim where plaintiff failed to prove significant exposure). Defendants also have significant opportunities to challenge medical monitoring claims by requiring documentation of the nature of the requested monitoring program, proof of its scientific reliability, documentation of the disease the program is designed to detect, proof that the disease can be detected by the testing protocol and proof that the disease is caused by the alleged exposure.¹² In some cases, plaintiffs also must prove that there is an actual benefit from early detection of the disease.¹³ Finally, defendants should investigate whether the requested monitoring program would be part of a person's routine medical maintenance. If so, such monitoring should not be compensable because a person would have engaged in the monitoring and incurred those costs absent the alleged exposure, as part of a regular medical regimen.¹⁴

STIGMA CLAIMS

The 1990s also gave rise to a new type of claim in toxic tort litigation – a claim for property damage based on so-called stigma. Such claims generally consist of allegations that a person should be able to recover based on an alleged decrease in property value caused by past or

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present environmental contamination on or even simply near a given property. Such stigma claims may arise from actual contamination of a property, the potential for or perception of contamination or the mere fear of contamination. Plaintiffs attempt to base stigma claims on the public's perception of uncertainty and risk resulting from environmental contamination. What is unique about these claims is that they are often brought despite the absence of any actual contamination of plaintiffs' property, or any proof, in the form of an actual sale, of diminution in value. Stigma claims are attractive to plaintiffs because they have the potential to avoid the complicated issues of causation involved in personal injury claims and to expand significantly the universe of plaintiffs able to bring a claim. Stigma claims are usually brought as torts of nuisance or trespass.

Defendants facing stigma claims have many avenues of defense. First and foremost, many courts have rejected stigma claims, calling such a cause of action vague and speculative absent proof of actual damage. See *Hammond v. City of Warner Robins*, 482 S.E.2d 422, 428 (Ga. Ct. App. 1997). Even if a court does not reject such claims outright, the vast majority of courts reject such claims absent proof of physical damage to the property. Thus, mere proximity to a contaminated site or inability to sell one's house due to proximity to such a site should not be actionable. For example, in *Golen v. Union Corp.*, 718 A.2d 298 (Pa. Super. Ct. 1998), property owners sued their neighbors, claiming inability to sell their property due to the neighboring property's status as a National Priorities List site. Plaintiffs' land was not contaminated. Although the court conceded that a broad reading of the Restatement (Second) of Torts could include such a cause of action, the court held that "private nuisance only recognizes injuries that require physical presence on the property in order to be perceived." *Id.* at 300. Thus, the court would not recognize a claim of stigma absent proof that the property was

contaminated. Similarly, in *Berry v. Armstrong Rubber Co.*, 989 F.2d 822, 829 (5th Cir. 1993), the court rejected a claim of property damage based on stigma "absent some physical damage to plaintiffs' land caused by defendant." The court stated that the "public perception" of harm to the property from contamination is insufficient to support a claim. *Id.*¹⁵

Some courts, while recognizing a claim of stigma, have placed significant limitations on the availability of such a claim. For example, although the court in *In re Paoli Railroad Yard PCB Litigation*, 113 F.3d at 463, entertained a stigma claim, it required that the stigma be permanent, remaining after the property is completely remediated.¹⁶ Thus, even where there is physical impact to a property, a defendant may often defeat a claim of stigma by arguing that any stigma is only temporary.

Finally, even where plaintiffs are successful in proving stigma claims, they still must prove that defendants caused the stigma. In *Anglado v. Leaf River Forest Products, Inc.*, 716 So.2d 543 (Miss. 1998), the court dismissed plaintiffs' stigma claim because they did not affirmatively prove that defendant was the source of the chemical found on their property. As discussed above, proof of causation will often involve expert testimony, all of which may be subject to challenge under *Daubert* depending on the jurisdiction. Thus, even where a court is receptive to a claim of stigma, defendants must assert the traditional defenses to tort claims based in nuisance or trespass.¹⁷

CLASS CERTIFICATION

Plaintiffs frequently seek to use the Rule 23(b)(3) class action, or a state court analogue, as a means to bring toxic tort claims.¹⁸ From the defendant's perspective, class actions require

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careful consideration of settlement options and litigation strategy because of the public attention and enormous economic threat posed by the aggregation of what may otherwise be marginal claims. It is often wise to challenge the certification of a class to avoid this extremely time-consuming and expensive breed of litigation. On the other hand, there are certain situations where defendants may view class treatment as beneficial. In this section, we will provide an overview of the requirements for maintaining a class action, and then will review the pros and cons to class certification. A review of case law discussing class certification will illuminate successful strategies for opposing class certification.

Rule 23(a) of the Federal Rules of Civil Procedure lists four threshold requirements applicable to all class actions: numerosity (“the class is so numerous that joinder of all members is impracticable”); commonality (“there are questions of law or fact common to the class”); typicality (“the claims or defenses of the representative parties are typical of the claims or defenses of the class”); and adequacy of representation (“the representative parties will fairly and adequately protect the interests of the class”). Fed. R. Civ. Proc. 23(a). The class must also be maintainable under either Rule 23(b)(1), (b)(2), or (b)(3). Rule 23(b)(3) is the section most often applied in toxic tort actions, and requires that the class show that common questions of law or fact predominate over individual issues and that a class action is superior to other available methods of adjudication. Fed. R. Civ. Proc. 23(b)(3). The Rule 23(b)(3) “predominance” analysis is often very similar to the Rule 23(a)(3) “typicality” requirement. The question of superiority is often determined by predicting the manageability of the resulting class and case. All Rule 23(b)(3) class members have the right to “opt out” of the class, preserving the ability to bring a claim in an individual suit.¹⁹

Defending class actions can be extremely time-consuming and expensive. Due to the many procedural steps involved, a class action suit may last upwards of 10 to 15 years. Even where defendants ultimately succeed, defendants may suffer from the flurry of adverse publicity often surrounding class actions. Further, defendants’ task is all the greater because of the great procedural advantages plaintiffs obtain from invoking Rule 23. Most notably, the class obtains broad discovery rights, permitting a limited group of class representatives to obtain discovery that may be used for hundreds of claims. In addition, the statute of limitations as to the claims of absent class members may be tolled, preserving the possibility of numerous individual claims if the class is not certified.

On the other hand, there are potential advantages to class treatment that defendants should consider before embarking on a battle to defeat class certification. When serial litigation is the alternative to defending a class action, it may be less costly and time-consuming to defend a single class action. A class action also affords the possibility of obtaining broad *res judicata* protection against future claims²⁰ and avoiding a repeated threat of punitive damages.²¹ Finally, there is sometimes a benefit from the certainty – good or bad – afforded with the resolution of a class action. In determining whether to attack class certification, defendants should weigh these pros and cons, carefully considering the number of individual cases likely to arise in the absence of a class action. Of course, defendants should recognize that class certification is often pursued where there are many small or weak claims, and that opt-out rights under Rule 23(b)(3) still allow plaintiffs with strong claims to sue independent of the class.

Despite a trend in the 1980s and early 1990s of increased use of the class action as a vehicle to adjudicate toxic tort claims, the trend is now starting to swing away from the use of this

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device. The U. S. Supreme Court's decision in *Amchem Products v. Windsor*, 117 S. Ct. 2231 (1997), epitomizes this trend. The Supreme Court engaged in a very thorough analysis of the class certification issue and then declined to certify a settlement class of persons who were either suffering from asbestos-related injuries, or who had been exposed to asbestos and were at risk of suffering future injuries. Under the terms of the settlement under review, persons currently suffering from asbestos-related injuries would be compensated for their injuries, and persons exposed to asbestos and at risk of future injury could qualify for certain future benefits. The Court was troubled by the fact that class members were exposed to different products, in different doses, over different lengths of time. Some class members had no current injury, some suffered from asbestosis, and some suffered from lung cancer. Some members had a history of smoking, while some had never smoked. Due in part to the widely varying circumstances of the class members, the Court rejected the class, holding that common questions did not predominate. *Id.* at 2250. In addition, the Court held that the class did not meet the Rule 23(a)(4) requirement of adequate representation, as the interests of the class were not aligned. *Id.* at 2251. For example, while the interest of those with current injuries is to get a large lump sum payment, the interest of those without current injuries is to obtain relief in the form of future medical monitoring, ideally in a way that accounts for inflation and future medical technology. Thus, the court affirmed the Third Circuit decision rejecting the Rule 23(b)(3) class.

Because of the numerous individual fact issues always involved in toxic tort cases, defendants wanting to challenge class certification have a very strong argument. As discussed in *Amchem*, defendants opposing class certification may almost always attack certification on the basis that the class does not meet the typicality and adequacy of representation requirements of Rule

23(a). Given the huge spectrum of exposures, dosages and injuries at issue in most toxic tort suits, it is possible that no set of representatives could be "typical" of the proposed class. *See, e.g., Id.* at 2250-51. In addition, potential conflicts of interest abound in toxic tort cases, making the adequacy of representation vulnerable to challenge. *Id.* For example, the differing strengths of plaintiffs' claims create tension within the class, as weaker claims may risk the success of stronger claims.²² In addition, plaintiffs with differences in the severity and types of injuries may have different priorities with regard to settlement and their requested damages.²³ Finally, the adequacy of representation is also subject to challenge where there are subsets of plaintiffs that are vulnerable to affirmative defenses.²⁴

In addition to challenging the typicality and the adequacy of representation, courts are increasingly holding that a class in toxic tort actions fails to meet the predominance requirement in Rule 23(b). Causation is an issue that is almost impossible to generalize across a class of plaintiffs. There is rarely a single event causing the damage claimed, and almost never a proximate cause that pertains to all class members or injuries. Thus, defendants can almost always challenge class certification on the basis that causation in a toxic tort case is an individualized inquiry, not suited to class treatment.²⁵

Finally, defendants may also challenge class certification under the Rule 23(b)(3) superiority requirement. Often, the sheer size of the class and the complexity of the issues involved makes class treatment unmanageable. Class certification could result in an unwieldy discovery process and could create considerable inefficiencies as the court must separate the common issues from the individual issues. Further, despite certification, the courts will still have to devote resources to the opt-out cases, which could be significant in number.²⁶ Thus,

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defendants also should analyze critically the manageability of certifying a given class.

Often, all of the problems associated with certifying a given class will not be apparent at the outset of a litigation. In the case that the court initially certifies a class, a defendant may always file a motion to decertify. In addition, Rule 23(f) now provides the opportunity, albeit discretionary, for immediate appeal of certification issues.²⁷

CASE MANAGEMENT VEHICLES

In addition to making substantive challenges to plaintiffs' claims, defendants also must take advantage of helpful case management vehicles, designed to focus the court's attention on the substantive deficiencies in plaintiffs' claims. During the past decade, courts more frequently issued so-called *Lone Pine* orders, a powerful tool available to defendants in toxic tort suits. The *Lone Pine* order is a case management vehicle that acts as a pretrial screening device, forcing plaintiffs to substantiate the allegations in their complaint with bona fide evidence of causation early in the litigation. It is especially useful in response to complaints making far-reaching allegations of fraud and conspiracy, which typically name all members of a particular industry as defendants without making any specific allegations against any particular defendant.

The *Lone Pine* order originated in the case of *Lore v. Lone Pine Corp.*, No. L-03306-85, 1986 N.J. Super. LEXIS 1626 (N.J. Sup. Ct. Nov. 18, 1986). In *Lone Pine*, over 400 plaintiffs sued the Lone Pine landfill for loss of property value and personal injury caused by pollution from the landfill. In light of the number of parties involved and the complexity of the issues raised, following a case management conference, the court ordered

the plaintiffs, within the next five months, to submit the following information: (1) each plaintiff's exposure to alleged toxic substances from the landfill; (2) expert reports from doctors supporting each claim of injury and causation by exposure to the substances at the landfill; and (3) expert reports supporting each claim of diminution of property value, including the timing, degree and cause of such diminution. In plaintiffs' attempted response to the order, real estate experts claimed they were unable to render an opinion regarding plaintiffs' claims considering the time constraints of the order, and medical experts were unwilling to commit to the cause of plaintiffs' injuries. In light of plaintiffs' inability to substantiate their claims, the court dismissed the action with prejudice, finding that plaintiffs' evidence of personal injury and property damage did not support a valid cause of action. The court stated that, before the institution of a case, "attorneys for plaintiffs must be prepared to substantiate, to a reasonable degree, the allegations of personal injury, property damage and proximate cause." *Id.* at *9.

Since the *Lone Pine* decision, defendants faced with similarly broad and unsubstantiated complaints have frequently requested courts to issue orders similar to the *Lone Pine* order. For example, in *Gallagher v. Fibreboard Corp.*, 642 So.2d 953 (Fla. Dist. Ct. App. 1994), the court affirmed the lower court's use of an Omnibus Order, an order established in response to the substantial number of asbestos cases in Dade County, Florida. The order required asbestos plaintiffs to "file and serve 'exposure sheets' for each defendant, identifying (1) the asbestos products(s) to which they were allegedly exposed, (2) the dates of exposure, (3) the witnesses who will testify to such exposure, and (4) the addresses of the witnesses and the name and address of witness's counsel." *Id.* at 954. Failure to comply with the order as to a particular defendant resulted in that defendant's being dismissed from the case

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with prejudice. Similarly, in *Cottle v. Superior Court*, 3 Cal. App.4th 1367 (Cal. Ct. App. 1992), the court affirmed a lower court decision precluding plaintiffs from presenting any evidence relating to a claim that they could not substantiate before the start of the trial. In *Cottle*, approximately 175 property owners and renters brought an action against the developers of their subdivision, alleging personal injury, emotional distress and property damage as a result of defendants' concealment of the prior use of the land on which their houses were built. The trial court classified the case as complex litigation, enabling it under the local rules and the California rules of civil procedure to fashion a new procedure to manage the case before it. *Id.* at 1380. The court issued an order requiring each plaintiff, within three months, to state the substances to which they were exposed, the method of exposure, the date and place of exposure, the nature of their injury, and the identity of each expert who will support the personal injury claim. Plaintiffs were unable to meet the requirements of the order. Finding that there was no evidence that any hazardous substance had caused, to a reasonable degree of certainty, any injury to plaintiffs, the court excluded evidence regarding plaintiffs' personal injury from the case. *Id.* at 1385.

Members of this firm recently pressed an Ohio state court to impose a similar requirement on plaintiffs in a toxic tort case involving alleged vinyl chloride exposure. Plaintiffs' complaint alleged a vague, yet wide-ranging toxic tort and conspiracy theory against virtually all, if not all, manufacturers of vinyl chloride, spanning in excess of thirty years. Faced with the prospect of endless years of discovery, defense counsel used the analogous standing orders in civil RICO cases as precedent for the wisdom and utility of requiring the plaintiffs to specify the nature of their claims against each defendant at a preliminary stage of the litigation, or risk dismissal

of their claims. The court was receptive to this approach and instructed the parties to prepare a case management order to that effect. Similarly, the firm convinced a state court judge in Texas to impose a *Lone Pine* order in a mass tort case in which the plaintiffs claimed exposure to airborne pollutants. The threat of a *Lone Pine* order in a 6,000-plaintiff companion case led plaintiffs to abandon their personal injury case.

As evidenced by the growth in the use of such early case management vehicles during the past decade, courts are receptive to such efforts to assist them in managing their dockets and to focus the efforts of the parties. Faced with the insufficiency of plaintiffs' pleadings in complex, far-ranging toxic tort matters, and concerned about the expense and duration of such cases, defendants should seriously consider requesting the court to embrace such case management vehicles at the earliest stages of toxic tort litigation matters.

CONCLUSION

As reflected in the foregoing discussion of significant developments during the past decade in the field of toxic tort litigation, there is an active battle raging as plaintiffs' counsel seek to press wide-ranging complaints against large numbers of defendants based on thinly-pled complaints "supported" by questionable expert testimony. In that battle, defendants must use every weapon available to maintain traditional liability standards, to insist upon standard factual proofs and valid, reliable scientific underpinnings to the claims, and to propose flexible case management vehicles designed to focus the court's attention and the parties' efforts.

ENDNOTES

1. Mr. Pagliaro is a partner in the Philadelphia office of Morgan, Lewis & Bockius LLP and is the firmwide Manager of the Litigation section. His biography appears elsewhere in this Deskbook.
2. Mr. Stuart is a partner in the Philadelphia office of Morgan, Lewis & Bockius LLP and a member of the Tort, Environmental and Construction Practice Group. His biography appears elsewhere in this Deskbook.
3. Ms. Gilgore is an associate in the Philadelphia office of Morgan, Lewis & Bockius LLP. Her biography appears elsewhere in this Deskbook.
4. In *Frye*, the Court of Appeals for the District of Columbia ruled certain scientific evidence inadmissible because it had "not yet gained such standing and scientific recognition . . . as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made." *Frye*, 293 F. at 1014.
5. Some states, such as Alabama, Arizona, Florida, Illinois, Minnesota, Pennsylvania and Washington, still follow the *Frye* test. Practitioners should be aware, however, that many states are moving towards the *Daubert* standard, or considering doing so. See, e.g., *State v. Coon*, 974 P.2d 386 (Alaska 1999) (adopting *Daubert* over *Frye*). In Pennsylvania, for example, the Supreme Court recently heard oral argument regarding the proper standard to apply in determining the admissibility of expert testimony. *Blum v. Merrell Dow*, No. 97-2755 (Pa. 1999) (considering adopting *Daubert* over *Frye*).
6. See, e.g., *Nemir v. Mitsubishi Motor Sales*, No. 96-75380, 1999 WL 570980, at *8 (E.D. Mich. July 30, 1999) (holding evidence inadmissible under *Daubert*); *Koch v. Shell Oil Co.*, 49 F. Supp.2d 1262, 1268 (D. Kan. 1999) (same); *Belofsky v. General Elec. Co.*, 1 F. Supp.2d 504, 507 (D.V.I. 1998) (same); *Reiff v. Convergent Tech.*, 957 F. Supp. 573, 582 (D.N.J. 1997) (same); *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1407 (D. Or. 1996) (same); *National Bank of Commerce v. Dow Chem. Co.*, 965 F. Supp. 1490, 1509 (E.D. Ark. 1996) (same).
7. Federal Rule of Evidence 702 provides, in pertinent part:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion or otherwise.
8. See also *Oglesby v. General Motors Corp.*, 190 F.3d 244, 251 (4th Cir. 1999) (affirming district court decision excluding non-scientific testimony of an engineer following a *Daubert* analysis).
9. See also *In re TMI Litig.*, 927 F. Supp. 834, 864 (M.D. Pa. 1996) (dismissing all 2000 plaintiffs' cases after the ten "test" plaintiffs failed to present evidence of exposure to at least 10 rem of ionizing radiation, because the district court held that a review of the scientific literature showed a consensus that the causal link between exposure and cancer below 10 rem was merely speculative), *rev'd in part*, Nos. 96-7623, 96-7624, 96-7625, 1999 WL 997702 (3d Cir. Nov. 2, 1999) (reversing the decision as to the non-"test" plaintiffs because the scientific literature did not support the decision and the remaining plaintiffs should have the opportunity to prove that exposure to doses below 10 rem could have caused their current conditions; affirming the decision as to the "test" plaintiffs because they had proceeded on the theory that they were exposed to at least 10 rem of ionizing radiation, and thus their failure to prove this exposure was fatal).

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10. *See also Lofgren v. Motorola*, No. CV 93-05521, 1998 WL 299925, at *17 (Ariz. June 1, 1998) (court used the Hill criteria to evaluate and exclude all of plaintiff's epidemiological evidence).
11. Of course, some states have rejected medical monitoring claims. For example, in July, 1999, the Louisiana legislature enacted legislation essentially overruling a decision allowing recovery for medical monitoring. *See, e.g.*, 1999 La. Sess. Law Serv. 989 (West) (modifying civil code article 2315 to exclude costs for future medical treatment from tort damages); *Witherspoon v. Philip Morris Inc.*, 964 F. Supp. 455 (D.D.C. 1997) (stating that a plaintiff must prove a present physical injury to maintain a medical monitoring claim); and *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515, 1523 (D. Kan. 1995) (rejecting medical monitoring costs as separate cause of action).
12. *See, e.g.*, *Redland Soccer Club*, 55 F.3d at 845 (stating what plaintiff must prove to recover medical monitoring costs); *Dombrowski v. Gould Elecs.*, 31 F. Supp.2d 436 (M.D. Pa. 1998) (rejecting bone lead testing technology in connection with proposed monitoring program because the technology had not gained acceptance in the scientific or medical community); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 979 (Utah 1993) (requiring proof that the monitoring program is prescribed by a qualified physician and that the exposure increased the risk of the disease).
13. *See, e.g.*, *Redland Soccer Club*, 55 F.3d at 845; *Hansen*, 858 P.2d at 979.
14. *See, e.g.*, *Redland Soccer Club*, 55 F.3d at 846.
15. *See also Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715 (Mich. 1992) (rejecting stigma claim where property at issue was not contaminated); but see *In re Paoli R.R. Yard PCB Litig.*, 113 F.3d at 463 (recognizing a claim for stigma); *Terra-Products, Inc. v. Kraft Gen. Foods, Inc.*, 653 N.E.2d 89 (Ind. Ct. App. 1995) (allowing recovery for decreased value of land after contamination had been remediated); and *Bisson v. Eck*, 667 N.E.2d 276 (Mass. App. Ct. 1996) (allowing recovery based on stigma where defendant failed to object to the evidence).
16. The court in this case distinguished a claim for a temporary stigma, which is not recoverable, with a claim for the temporary loss of use of property, which may be recoverable. *Id.* While a temporary stigma is a speculative, unrecognized loss, a temporary loss of use of a property is, in fact, a quantifiable damage.
17. For a more extensive analysis of claims based on stigma, see William J. Stack & Terri Jacobsen, *Diminution in Property Value Arising from the Stigma of Environmental Contamination: A Phantom Injury in Search of Actual Damages*, *Envtl. Claims J.*, vol. 11, no. 2 (1999). The authors of that article assert that recognizing such claims starts the courts down a dangerous slippery slope, as stigma claims "inevitably degenerate to conjecture and speculation by both sides." *Id.* at 42. (Mr. Stack is counsel for Exxon Company, U.S.A., and Ms. Jacobsen is an associate in the firm's Environmental Practice Group, resident in the Washington D.C. office.)
18. A more detailed discussion of the subject addressed in this section can be found in Chapter 15 of *Business and Commercial Litigation in Federal Courts*, an American Bar Association publication. *Business and Commercial Litigation in Federal Courts*, vol. 1, ch. 15 (Robert L. Haig ed.) (West Group & ABA 1998). Chapter 15, entitled "Class Actions," was written by John F.X. Peloso, Peter Buscemi, and James D. Pagliaro, partners at Morgan, Lewis & Bockius LLP.
19. A full discussion of the basic Rule 23 requirements for maintaining a class action is beyond the scope of this article. For a thorough review of those requirements, refer to *Business and Commercial Litigation in Federal Courts* § 15.3 (Robert L. Haig ed.) (West Group & ABA 1998).
20. The fact that class treatment affords res judicata protection does not mean that a defendant does not have to address the merits of each plaintiff's case. For example, in *In re TMI Litigation*, 927 F. Supp. at 864, the district court

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dismissed the cases of the 2000 plaintiff class after ten "test" plaintiffs failed to prove exposure to at least 10 rem of ionizing radiation based on its conclusion that the scientific literature showed a consensus that the causal link between exposure and cancer below 10 rem was speculative. The court of appeals reversed, disagreeing that the scientific literature showed such a consensus and holding that the remaining plaintiffs should have the opportunity to prove that exposure to doses below 10 rem could have caused their current conditions. *In re TMI Litig.*, 1999 WL 997702, at *106.

21. On the other hand, potential exposure for punitive damages to an entire class of plaintiffs could lead to enormous damages. In one of the most widely publicized tobacco class actions, a Florida appeals court recently reversed its original decision and held that the jury could proceed to decide the punitive damages phase on a class-wide basis. *R.J. Reynolds Tobacco Co. v. Engle*, No. 94-2797 (Fla. Ct. App., 3d Dist. 1999).
22. *See, e.g., Amchem*, 117 S. Ct. at 2243 n.14 (noting argument that California victims have substantially greater historical recoveries than that provided by proposed settlement of national asbestos personal injury class); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (vacating certification of class of users of epilepsy drug, due in part to concern that named plaintiffs did not exhibit the more severe conditions for which recovery was sought).
23. *See, e.g., Amchem*, 117 S. Ct. at 2251 (stating that named plaintiffs, despite diverse medical conditions, all sought to represent the entire personal injury class).
24. *See, e.g., McGuire v. International Paper Co.*, Civ. A. No. 1:92-CV-593BRR, 1994 WL 261360, at *7 (S.D. Miss. Feb. 18, 1994) (declining to certify class of residents near a paper mill due in part to the predominance of individual issues relating to affirmative defenses).
25. *See, e.g., Reilly v. Gould, Inc.*, 965 F. Supp. 588, 606 (M.D. Pa. 1997) (declining to certify class of individuals living near a battery crushing facility and noting that causation must be assessed "property by property and individual by individual"); *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400, 1404 (W.D. Mo. 1994) (declining to certify class allegedly exposed to contaminated groundwater due to predominance of individual causation issues).
26. *See, e.g., Georgine v. Amchem Prods. Inc.*, 83 F.3d 610, 634 (3d Cir. 1996) (reversing certification of national asbestos personal injury class and holding that "a series of statewide or more narrowly defined adjudications, either through consolidation under Rule 42(a) or as class actions under Rule 23, would seem preferable"), *aff'd sub nom. Amchem*, 117 S. Ct. 2231; *Reilly*, 965 F. Supp. at 605-06 (noting manageability problems associated with class of individuals living near a battery crushing facility).
27. Rule 23(f) of the Federal Rules of Civil Procedure provides:

A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.